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RAYMOND ARTHUR ABBOTT, *et al.* Plaintiffs, v. FRED G. BURKE, *et al.* Defendants.	SUPREME COURT OF NEW JERSEY DOCKET NO. 42170 CIVIL ACTION

BRIEF IN OPPOSITION TO STATE'S MOTION ON BEHALF OF *AMICI CURIAE* ALLIANCE FOR THE BETTERMENT OF CITIZENS WITH DISABILITIES, BRAIN INJURY ASSOCIATION OF NEW JERSEY, NEW JERSEY PROTECTION & ADVOCACY, INC., NEW JERSEY SPECIAL EDUCATION PRACTITIONERS, SPECIAL EDUCATION CLINIC AT RUTGERS UNIVERSITY SCHOOL OF LAW-NEWARK, SPECIAL EDUCATION LEADERSHIP COUNCIL OF NEW JERSEY

Mary A. Ciccone
On the Brief

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PRELIMINARY STATEMENT

The School Funding Reform Act of 2008, N.J.S.A. 18A:7F-43 ("SFRA"), with its arbitrary special education formula that ignores the actual number of special education students, that ignores the actual needs of these students, and that allows wholesale commingling of special education and regular education dollars, ensures that this State's approximately one quarter of a million students receiving special education services statewide, and especially the approximately 50,000 special education students in the Abbott special needs districts, will be deprived of a "thorough and efficient education" and a "free and appropriate public education." This Court must aid our most vulnerable students and find the special education provisions of the School Funding Reform Act to violate New Jersey's Constitution and state and federal special education laws.

PROCEDURAL HISTORY

Proposed Amici rely on the Procedural History set forth in Plaintiffs' Brief.

STATEMENT OF FACTS

In January 2008, the New Jersey Legislature enacted SFRA, the new state funding formula for education that is the subject of this action. N.J.S.A. 18A:7F-43. SFRA fundamentally changed state special education funding to the detriment of children with disabilities.

First, SFRA, allocates special education funding pursuant to a census-based model which provides funding to school districts based upon the statewide average special education classification rate -- 14.69% -- regardless of the number of students actually classified in each district. N.J.S.A. 18A:7F-55(a). Districts with more than 14.69% of its students classified for special education services will receive funding for only 14.69% of their students, while districts with classification rates lower than 14.69% will also receive special education funding for 14.69% of their students. *Id.* The Abbott districts' average special education classification rate is 15.48%, and twenty-two of the thirty-one Abbott districts have classification rates higher than the statewide average. *See* Certification of Melvin L. Wyns dated April 24, 2008 ("Wyns Cert."), ¶ 30. More than two-thirds of the Abbott districts will receive less funding for each special education student than districts with a classification rate of 14.69%, and significantly less than districts with a classification rate below 14.69%. In addition, the average classification rates for districts in the lower economic district factor groups, A, B, CD, and DE, are all higher than the statewide average and the majority of these districts will also receive less special education funding per capita than districts with fewer classified students. Office of Legislative Services, *Analysis of New Jersey Budget, Fiscal Year 2008-2009, Department*

of Education (hereinafter "the OLS Report"), p. 67 annexed to Certification of Mary A. Ciccone (hereinafter "Ciccone Cert.") as Exhibit A.

Second, SFRA bases funding for special education "excess" costs (costs above baseline regular education costs) upon a purported "average" excess cost of services for all students with disabilities in the State. N.J.S.A. 18A:7F-55. The State provided little information about the basis for computing the "average" excess cost beyond stating that all higher cost services (costs above $40,000 which are known as "extraordinary costs") were specifically excluded from determining the "average" costs. *See* New Jersey Department of Education, "A Formula for Success: All Children, All Communities" (December 18, 2007), annexed as Exhibit G to the Certification of DOE Commissioner Lucille E. Davy dated March 12, 2008 (hereinafter "DOE SFRA Report"), p. 16. The "average" excess cost is thus not remotely average, and it is not based on actual special education costs or the needs of students with disabilities.

Finally, SFRA includes two-thirds of the total excess special education costs in the general "adequacy" budget, which is the total amount of state aid purportedly needed to assist school districts to educate their students in the core curriculum content standards. N.J.S.A. 18A:7F-51. The aid in the adequacy budget is undifferentiated and includes special education aid, as

well as aid for all regular education, at-risk services and Limited English Proficient ("LEP") services. *Id.* There is no mandate that monies calculated to meet the costs of special education actually be spent for special education services.

LEGAL ARGUMENT

I. SFRA'S Census-Based Funding Formula for Special Education Violates the Thorough and Efficient Clause of the New Jersey Constitution, as well as State and Federal Special Education Laws

SFRA fundamentally changed the formula for state funding for special education to the disadvantage of students in need of special education services in most Abbott districts and to the disadvantage of students in all other districts with a large concentration of students in need of special education services. SFRA will no longer provide aid based upon the actual number of students requiring special education services and the actual needs of these students, *see* Comprehensive Educational Improvement and Financing Act, N.J.S.A. 18A:7F-1, 19 (repealed 2008) ("CEIFA"), but instead imposes a census-based funding formula, providing aid to districts based upon the average statewide special education classification rate of students with disabilities. N.J.S.A. 18A:7F-55. Using the census method, the State will provide special education aid for 14.69% of the total students enrolled in each district, regardless of whether greater or fewer than 14.69% of the district's students are classified as

requiring special education services. *Id.* Because there are many districts that have a higher classification rate than the statewide average, including 22 of the 31 Abbott districts, *see* Wyns Cert., ¶ 30, and because this funding formula will result in countless students being denied an appropriate education, the census-based funding formula for special education violates the New Jersey Constitution's requirement that the State provide all students with a "thorough and efficient" education, as well as the state and federal special education mandate for a "free and appropriate public education."

New Jersey's Constitution guarantees all students the right to a "thorough and efficient" education. N.J. Const. Art. VIII, § 4, ¶ 3. This Court has long interpreted the "thorough and efficient" ("T&E") clause of the Constitution in the educational funding context to mandate that the level of funding "'be adequate to provide for the special education needs of these poorer urban districts'" and "'address their extreme disadvantages.'" *Abbott v. Burke*, 153 N.J. 480, 491 (1998) ("*Abbott V*") *quoting Abbott v. Burke*, 119 N.J. 287, 385 (1990) ("*Abbott II*"). Similarly, state and federal special education laws mandate that New Jersey provide a "free and appropriate public education" ("FAPE") to all children with disabilities residing in the State. 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a); N.J.A.C. 6A:14-1.1(b), 1.2(b)(1). *See e.g. Bd. of*

Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 *U.S.* 176 (1982) (establishing requirements for delivery of FAPE); *M.A. v. State-Operated Sch. Dist. of the City of Newark*, 344 F.3d 335, 351 (3d Cir. 2002) (recognizing the State's obligation to deliver FAPE). As set forth below, the census model funding cap violates these obligations to provide T&E and FAPE to students with disabilities.

First, and most critically, the census-based funding formula violates T&E and FAPE as it caps special education aid at 14.69% of students, and provides no "safety net" to seek redress from the cap for districts that have a larger special education population.[1] N.J.S.A. 18A:7F-55. This means that 22 of 31

1 SFRA has two provisions that suggest an ability to change the cap in the future, but neither provision can remotely be considered to be a "safety net." SFRA provides that a school district "may apply to the commissioner to receive additional special education categorical aid if the district has an unusually high rate of low-incidence disabilities," N.J.S.A. 18A:7F-55(d), and SFRA calls for the commissioner to "commission an independent study of the special education census funding methodology to determine if adjustments in the special education funding formulas are needed in future years to address the variation in incidence of students with severe disabilities requiring high costs programs and to make recommendations for any such adjustments." *Id.* at 55(f). The first provision is only concerned with a high rate of low-incidence disabilities and does not take into account a high rate of classification of disabilities other than "low-incidence" disabilities. The second provision is merely a study, not an additional funding mechanism. Moreover, both provisions contain few details or parameters, and neither guarantees additional funding or guarantees changes in the funding formula based on need. They are at the discretion of the education commissioner and unlike Abbott's "supplemental funding" provision, which mandates that the commissioner approve

Abbott districts, the county vocational school districts, and many other districts in the lower District Factor Group designations will receive less funding for their special education students solely because they have more students classified than the statewide average, without any finding that these districts are improperly over-classifying these students. OLS Report, p.66. The consequence of the census-based funding formula is that funding will be based on student numbers rather than student needs, and indeed will be inversely proportional to student numbers. Students in school districts with higher concentrations of students in need of special education services will receive proportionately less funding for special education services than districts with lower concentrations of students in need of special education services.[2] Moreover, the census model

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requests for additional funding and fund such requests, *see infra.* 10-11, the SFRA provisions do not involve the allocation of additional funds.

2 For example, in 2006, the Montclair School District had 1,126 students classified for special education services, which constituted 16.8% of the district's enrollment. *See* New Jersey Department of Education, Office of Special Education Programs, *2006 Classification Rates by District, Ages 3-21* (2006), *available at* http://www.nj.gov/education/specialed/data/2006.htm. The West Windsor-Plainsboro Regional School District had 1,116 students classified which constituted 11.6% of the district's enrollment. *Id.* Even though these two districts had approximately the same number of classified students, under the census-based funding formula, they would receive widely disparate per capita funding. West Windsor-Plainsboro would receive funding for 1,418 classified students -- a windfall of funding for 302 more students than are enrolled -- while Montclair would receive funding for only 985 classified students -- a shortfall of

is entirely contraindicated by the demographics of disability which do not evenly distribute students with disabilities across a state, but rather concentrate them in poorer districts. *See, e.g.*, Newacheck, Paul W. and McManus, Margaret, A., "Financing Health Care for Disabled Children," 81 *Pediatrics* 385 (1988); Macomber, Jennifer, "An Overview of Selected Data on Children in Vulnerable Families," The Urban Institute (January 12, 2006).

Courts in other states have held that comparable census-based funding formulas violate the rights of students with disabilities. Alabama had used a census-based funding formula for special education since the early 1970's which resulted in a large disparity of funding between districts that had fewer classified students and districts that had a greater number of classified students. *See Alabama Coalition for Equity, Inc. v. Hunt et al.,* No. CV-90-883-R, (Cir. Ct. Montgomery Cty., April 1, 1993)*, reprinted in Appendix in Opinion of the Justices No. 338,* 624 So. 2d 107, 125 (Ala. Sup. Ct. 1993). In the early 1990's, a lower court found that this funding formula was inequitable and inadequate and, therefore, unconstitutional. *Id.* at 164. The lower court ordered an entire overhaul of the state educational system, including special education, *id.,* and the Alabama Supreme Court held that the legislature was required to follow the order unless such order was modified or reversed on appeal. *Opinion of*

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funding for 141 enrolled students.

the Justices 338, 624 So. 2d at 110.

In Pennsylvania, in *C.G. v. Commonwealth of Penn. Dep't. of Educ.*, 49 *I.D.E.L.R.* 223 (M.D. Pa. Feb. 25, 2008), the court denied the state defendants' motion to dismiss challenges to the census-based special education funding statute based upon constitutional and special education grounds.

In Washington, in *School Districts' Alliance for Adequate Funding of Special Education v. State of Washington,* No. 04-2-02000-7 (Thurston Cnty. Sup. Ct. Mar. 1, 2007), attached to Ciccone Cert. as Exhibit B, the court determined that the census-based model violated the state Constitution which, much like New Jersey's, requires that Washington "make ample provision for the education of all children," Wash. Const. Art. IV, § 1. Washington developed a funding formula for special education similar to that in SFRA which limited funding to 12.7% of the district's student population. *See School Districts' Alliance, supra.* Specifically, the lower court found that because this census-based funding scheme had no "safety net" or other alternative to ensure that districts which have special education populations greater than the cap have an opportunity to seek additional funding for those students, it violated the education provision of the Washington Constitution. *Id.* In districts where special education classification exceeded the 12.7% cap,

the court held that excess students are excluded from the State funding formula, in violation of the State's Constitution. *Id.* In order to pass constitutional muster, the court held that Washington needed to develop a "safety net" that permitted districts to seek the excess cost allocation for its students over the cap, but the State was permitted to analyze the special education population in such districts to ensure that the districts' students were eligible for special education services and that the districts were operating efficiently. *Id.* The court held that the "safety net" would address the State's interest in ensuring that districts are not over-classifying students, while ensuring that all special education students had access to State funding. *Id.*

New Jersey's 14.69% cap will similarly deny funding for students in excess of the cap if there is no "safety net" or other alternative for districts to seek redress from the cap if they have a special education population larger than the cap. In *Abbott V.*, the Supreme Court mandated precisely such a "safety net" when it held that the State may need to provide additional funding when it is required to implement traditional special education services. *Abbott V*, 153 N.J. at 496. The Supreme Court specifically noted that "[i]f a school demonstrates the need for programs beyond those recommended by the Commissioner, including programs in, or facilities for, . . . special

education, then the Commissioner shall approve such requests and, when necessary, shall seek appropriations to ensure the funding and resources necessary for their implementation." *Id.* at 518. SFRA does away with this Court's supplemental funding mandate, and provides no opportunity for districts to seek additional funding when the needs for special education students require it.

Second, SFRA's census-based funding formula violates T&E and FAPE as it creates pressures for districts to under-serve students with disabilities. Capping district funding at 14.69% will provide districts with an incentive not to classify additional students and to declassify already eligible students in order to get below the cap. The fewer students determined in need of special education services in the district, the more "free" money the district will have for other purposes. As a result, there is a significantly increased risk that students in need of special education services will not receive these services.[3]

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3 Proponents of the census-based funding formula allege that the new formula will serve the needs of classified students because it eliminates the incentive for districts to over-classify students. *See* OLS Report, p.63. Notably, however, the prior needs-based formula contained no incentive to over-classify students. While the prior formula recognized the actual number of students determined in need of special education services and the relative needs of each student, the formula did not cover the total costs of providing special education services to the student. N.J.S.A. 18A:7F-19. For every student determined in need of special education services, there was an incremental cost to the district. *Id.* Further, other costs associated with an increase in the number of students determined in need of special

Finally, as OLS recognized, the census model will result in denial of rights to regular education students. The costs of providing special education services in excess of the census allotment will be primarily supported through local property taxes, which could lead to a "crowding out" effect of regular education programs, meaning that if districts have to spend more of their own tax levies on required special education programs because they receive proportionally less state aid, there will be less money for general education programs. OLS Report at 66. Furthermore, because the census-based funding formula is incorporated into the school district's general adequacy calculation, which is the total amount the State expects a district to spend per pupil to appropriately educate its students to meet the core curriculum content standards, districts with a higher classification rate than the statewide average may be subject to SFRA's limits in State aid and tax levy growth which again may lead to crowding out of regular education programs. *Id*. For all of these reasons, SFRA's census method of funding special education, without provision of a safety net, violates the T&E clause of the New Jersey Constitution, as well as the

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education services, such as additional staff, classrooms, paperwork and monitoring all militated against the proposition that there was an incentive to over-classify students under the prior formula. In addition, it begs all logic to address an issue of over-classification by simply cutting off funding, rather than monitoring for inappropriate classification and then declassifying, as needed.

FAPE provisions of state and federal special education laws.

II. SFRA's Basis for Establishing the "Excess Cost" of Special Education Services Violates the Thorough and Efficient Clause of the New Jersey Constitution, as well as State and Federal Special Education Laws

SFRA funds special education based on a figure that it purports is the statewide "average" excess cost of special education services (beyond the base cost for providing general education services). Not only does the use of average costs ignore the actual special education costs of each student, but the "average" excess cost of $10,898 is greatly skewed downward and in fact is not the average. Use of SFRA's excess cost figure violates the New Jersey Constitution, as well as state and federal special education laws, as it does not permit the appropriate allocation of special education dollars in order to provide the mandated "thorough and efficient" and "free and appropriate" education.

As set forth in Point I, *supra*, this Court in prior *Abbott* rulings has interpreted the T&E Clause to mandate that education funding be "adequate" to address special education needs. *Abbott V*, 153 N.J. at 491. The SFRA funding formula that provides for special education funding that is not based on actual special education costs, but rather on a purported "average" statewide cost – let alone an "average" cost which is anything but average, *see infra* at 16-17, fails to provide adequate funding and thus

fails to provide children with a thorough and efficient education in violation of the New Jersey Constitution. Similarly, as SFRA's excess cost calculation fails to take into account actual costs and actual need and will result in students being denied special education services, it also violates state and federal special education laws which mandate that New Jersey provide FAPE to all children with disabilities residing in the State.

A Washington court found a similar excess cost methodology which relied on statewide averages, rather than actual individually determined needs, to violate a similar education provision of its state constitution[4] in *Washington State Special Education Coalition v. State of Washington*, No. 85-2-00543-8 (Findings of Fact and Conclusions of Law, Thurston Cnty. Sup. Ct. Nov. 22, 1988), attached to Ciccone Cert. as Exhibit C. The Court found the excess cost methodology "fail[ed] to reflect the actual distribution by level of [disability] severity," ¶ 1.33, and that this resulted in "under-hiring psychologists to slow down the assessment process," ¶1.5, and "increasing reluctance to refer students for special education," ¶ 1.26. The Court therefore held that the excess funding methodology violated the Constitution as it "[f]ail[ed] to distribute funds to school districts in a manner which reflects the actual distribution by

4 The education clause of Washington's constitution is set forth *supra* at p. 7.

level of severity .... of ... handicap[]...," *Washington State Special Education Coalition v. State of Washington*, No. 85-2-00543-8 (Declaratory Judgment, Thurston Cnty. Sup. Ct. Nov. 22, 1988), attached to Ciccone Cert. as Exhibit D, ¶ 1(A), and [f]ail[ed] to ... be provided and distributed in a manner that is based as closely as reasonably practicable on the actual cost of the special educational needs identified...," *Id.* at ¶1(C).[5]

Numerous other courts have found educational funding schemes that are not based on actual need, like New Jersey's special education funding scheme, to be unconstitutional. *See, e.g., Columbia Falls Elem. Sch. Dist. No. 6 v. State of Montana*, 109 P.3d 257 (Mont. Sup. Ct. 2005) (funding was unconstitutionally deficient as it provided no mechanism for dealing with inflation; did not base its numbers on costs such as teacher pay, meeting accreditation standards, fixed costs or special education costs; districts budgeted at or near maximum budget authority; qualified educators were leaving the state; programs were being cut; and facilities were deteriorating); *Campaign for Fiscal Equity v.*

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5 Although the court in *School Districts' Alliance*, *supra*, found the average excess cost methodology to be rational and constitutional, it did so because, unlike Washington's prior excess cost methodology, and unlike the excess cost methodology in New Jersey, "while it is based on average services and costs, those averages are computed on a *whole spectrum of disabilities and needs*." (Emphasis added). As New Jersey's excess cost formula omits a whole spectrum of needs -- the needs of children with the most severe disabilities who incur costs above $40,000, *see infra* at 12-13, -- it is anything but rational, and hence

State of New York, 100 N.Y.2d 893, 930 (N.Y. Ct. of App. 2003) (holding part of education finance system unconstitutional for not providing funding based on the actual cost of addressing student needs); *State v. Campbell County Sch. Dist.,* 19 P.3d 518, 547 (Wyo. 2001) (holding funding for at-risk students was unconstitutional because it "d[id] not reflect the cost of adequately educating those students").

In addition to not taking into account the actual needs of students with disabilities, the use of the "average" excess cost methodology is not average. The Department of Education provided virtually no data regarding the basis of the "average" excess cost figure. *See* Wyns Cert., ¶ 29. Are costs for transportation included? What about costs for related services, teacher training or assessments? It is impossible to tell whether the purported "average" cost takes into account critical special education programs and services. What is known is that the "average" excess cost does not take into account costs above $40,000[6], and in this way alone is not a true "average." The fact that *some* costs above $40,000 *may* ultimately be considered for reimbursement under SFRA as "extraordinary aid," N.J.S.A.

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unconstitutional.

6 *See* DOE SFRA Report, p. 16 which states that "[t]he excess cost for general special education ... was based on a ... total ... spent in fiscal year 2006 for special education services, excluding the costs for ... extraordinary aid...." In 2006, "extraordinary aid" costs included all costs above $40,000. N.J.S.A. 18A:7F-19(b)(repealed 2008).

18A:7F-55(b), does not ameliorate the arbitrariness of the excess cost calculation. Extraordinary aid must be applied for and is not guaranteed. *Id.* at 55(c). Moreover, extraordinary aid is "conditioned upon" a "demonstration by the district" that the pupil's Individualized Education Plan requires the provision of "*intensive* services, *pursuant to factors determined by the commissioner," Id.* at 55(b)(5) (emphasis added), where the term "intensive services" is not defined, and the "factors determined by the commissioner" are not set forth. It is questionable how many extraordinary aid applications will successfully document some undefined "intensive services pursuant to factors determined by the commissioner." In addition, should a district succeed in obtaining reimbursement, such reimbursement will only be paid "in the subsequent school year," *Id.* at 55(c), thereby lessening the amount of money available to districts awaiting reimbursement, as well as ensuring a smaller return to the district due to inflation should they eventually obtain reimbursement. Most critically, SFRA only allows for reimbursement of 75%[7] of all extraordinary aid applications, *Id.* at 55(b)(2) and (3), and thus, at least 25% of all costs above $40,000 are neither

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7 The only exception appears to be "direct instructional and support services" for children educated in in-district public school programs with non-disabled peers, where SFRA allows for reimbursement of 90% of extraordinary aid costs. N.J.S.A. 18A:7F-55(b)(1).

reimbursed as extraordinary aid nor considered in calculating the "average" excess cost.

Most critically, **no** funding for extraordinary aid is guaranteed as it is not linked to a mandatory appropriation. Thus, all extraordinary aid costs above $40,000 could remain the districts' burden, yet, these costs would never have been factored into the "average" excess costs determined for state aid. Notably, in prior years where CEIFA set forth a 100% reimbursement of extraordinary aid applications without a mandatory appropriation, N.J.S.A. 18A:7F-19(b)(2)(repealed 2008), only a meager approximately 23% of the applications were actually reimbursed, DOE SFRA Report, p. 15. OLS noted that "the State has never appropriated sufficient funding to support the reimbursement...." OLS Report, p. 57.

For all of these reasons, SFRA's average excess cost methodology violates the T&E clause of the New Jersey Constitution, as well as the FAPE provision of state and federal special education laws.

III. SFRA's Commingling of Special Education Funds with Regular Education Funds and Funds for "At-Risk" and Limited English Proficient Programs Violates the Thorough and Efficient Clause of the New Jersey Constitution, as well as State and Federal Special Education Laws

SFRA contains no requirement that any state aid, nominally delineated for special education purposes, actually be spent for special education. *See* Wyns Cert., ¶ 29. Two thirds of the special education budget is part of SFRA's "adequacy" budget which also includes all regular education funds, as well as funds for student poverty ("at risk") and LEP students. *Id.* at ¶ 19. The adequacy aid is distributed as a single, lump sum amount, with no differentiation between the amount generated for special education and the amounts generated for regular education, at risk and LEP. *Id.* The only requirement for SFRA adequacy aid is that it be expended for a Thorough & Efficient "system" of education "consistent with" New Jersey's core curriculum content standards. *Id.* There is no requirement that the aid be expended for any particular programs or to address any specific student needs. *Id.* Money that was calculated to be used for special education may be used for general education, to the detriment of students with disabilities, and similarly, money that was calculated to be used for general education may be used for special education.

Not only does this commingling of funds violate IDEA's explicit "prohibition against commingling," 20 U.S.C. §

1413(a)(17), 34 C.F.R. § 300.162(B), but it violates the New Jersey Constitution and federal and state special education laws because children with disabilities, our most vulnerable students, could be left with no funds to provide the "thorough and efficient" and "free and appropriate" education to which they are entitled.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court find the afore-mentioned special education provisions of SFRA to violate the Thorough and Efficient Clause of the New Jersey Constitution, as well as the "free and appropriate public education" requirement of federal and state special education laws.

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