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*Advocating and advancing the human, civil and legal rights of persons with disabilities*

*New name as of 10/1/08:*

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March 9, 2009

Honorable Peter E. Doyne  
Assignment Judge  
Bergen County Superior Court  
Justice Center  
10 Main Street  
Hackensack, New Jersey 07601-7699

Re: Abbott v. Burke  
Supreme Court Docket No. M-969/1372-07

Dear Judge Doyne:

Please accept this letter brief in lieu of a more formal post-trial brief, on behalf of *Amici Curiae* Disability Rights New Jersey (formerly New Jersey Protection and Advocacy, Inc.), Alliance for the Betterment of Citizens with Disabilities, Brain Injury Association of New Jersey, New Jersey Special Education Practitioners, Special Education Clinic at Rutgers University School of Law - Newark, and Special Education Leadership Council of New Jersey.

### **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 and needs of special education students, ensures that New Jersey'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 SFRA's special education provisions to violate New Jersey's Constitution and state and federal special education laws.

### **PROCEDURAL HISTORY**

Amici rely on the Procedural History set forth in Plaintiffs' Pre-trial 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. SFRA fundamentally changed state special

education funding to the detriment of children with disabilities.

Prior to 2008, state special education funding was based upon the actual number of students classified for special education, and the type of disability that each child exhibited, whether mild, moderate or severe. Comprehensive Educational Improvement and Financing Act, N.J.S.A. 18A:7F-1, 19 (repealed 2008) ("CEIFA"). CEIFA set forth a tiered funding formula based primarily on categories of disabilities. Under CEIFA, districts would assign each classified child to a tier based upon their disability, with the lower tiers being designated for those with less severe disabilities. Under CEIFA, each district would receive special education funds for each and every classified student, and the funds would be based upon the actual needs of each individual student.

Under SFRA, special education funds are no longer distributed on a per-child basis. The majority of special education funding is allocated pursuant to a census-based formula by which a school district's allocation of funding is derived by multiplying what the State has deemed as the "average excess costs"<sup>1</sup> of educating children with disabilities (\$10,898),

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<sup>1</sup> 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

by the district's total pupil enrollment and the State's average rate of special education classification (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 their 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.*

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not the average. The Department of Education provided virtually no data regarding the basis of the "average" excess cost figure. See Exhibit P-27, Report of Melvin L. Wyns dated January 29, 2009 ("Wyns Report"), ¶ 29. It is impossible to tell whether the purported "average" cost takes into account critical special education programs and services, but it is known that the "average" excess cost does not take into account costs above \$40,000. See Exhibit D-12, New Jersey Department of Education, "A Formula for Success: All Children, All Communities" (December 18, 2007) (hereinafter "DOE SFRA Report"), p. 16. In this way alone, the \$10,898 "average" excess cost 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. 18A:7F-55(b), does not ameliorate the arbitrariness of the excess cost calculation. See *infra* at 19-20. As more fully set forth in Point II of Amici's Pre-Trial Brief to the Supreme Court, 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.

## LEGAL ARGUMENT

### 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

The record demonstrates that SFRA's census-based funding formula for special education is unconstitutional and violates state and federal special education laws because it fails to adequately fund special education programs for those children in districts with special education classification rates above the state average, and allocates disproportionately low levels of funding to the State's poorer school districts. The consequences of SFRA's census-based funding formula are devastating for the State's poor children with disabilities. Classification rates for school district's in the State's lowest socioeconomic status groups -- District Factor Groups A, B, CD and DE -- are well above the State average, as high as 17%. See Office of Legislative Services, *Analysis of New Jersey Budget, Fiscal Year 2008-2009*, Department of Education (hereinafter "the OLS Report"), p. 67. In the Abbott districts, twenty-two of the thirty-one Abbott districts have higher classification rates. Wyns Report, ¶ 30. In contrast, the classification rates of the State's highest socioeconomic status groups - District Factor Groups I and J -- are substantially lower than the State average, as low as 12.1%. *Id.*

Consequently, the State provides on average \$164 less per classified student enrolled in an Abbott district, and a comparable amount less per classified student enrolled in the other District Factor Group A or B districts, than it would if it funded districts based on their actual classification rates, rather than on the statewide average classification rate. Trial Testimony of Bruce Baker, Ph.D., Transcript II (hereinafter "Baker Transcript II"), 8:21-9:5. In contrast, the State provides on average \$162 more per classified student enrolled in a District Factor Group I or J district than it would if it funded districts based on their actual classification rates, rather than on the State average. Baker Transcript II, 9:5-9. As a result, the State is providing poorer districts substantially less, and wealthier districts substantially more, than it has determined school districts need to adequately fund special education programs for children with disabilities in New Jersey.

Looking at it another way, under SFRA's census-based funding formula, using the State's average classification rate rather than actual district classification rates, the average Abbott district will not receive funding for 264 classified students, with under-funding of \$2,877,072, while the average District Factor Group I and J district will receive funding for

81 students who are not classified, with over-funding of \$882,738. Baker Transcript II, 9:20-10:5; Exhibit P-54, Report of Bruce Baker (hereinafter "Baker Report"), pp. 24-25; Exhibit P-59, Baker Report Figure 14. As one of the State's experts himself blithely noted, this underfunding of districts in which the classification rate exceeds the state average is a "potential disadvantage" of the census-based special education funding model. Trial Testimony of Lawrence O. Picus (hereinafter "Picus Transcript"), 98:24, 99:6-17 and 105:1-6. Picus added that the district likely will have to use general resources to meet the needs of its children with disabilities, *id.*, posing a severe hardship for New Jersey's already struggling Abbott and other poor districts. As Dr. Baker most aptly summarized, "moving to a Census-based formula means choosing to knowingly fund at less than currently identified need, some school districts, and also to knowingly fund at greater than currently identified need, a roughly equal number of school districts." Baker Report, p. 24.

Notably, Plaintiffs' experts do not suggest that the census-based funding system is untenable under any circumstances,<sup>2</sup> but rather, that it is inappropriate if a state

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<sup>2</sup> For example, as discussed during the trial, Baker Transcript II, 63:1-18, California has a census-based funding formula; however, California's plan varies significantly from New

has failed to undertake two prerequisite analyses: 1) an analysis of the distribution of children with disabilities across the state to determine if there are large numbers of disproportionate clusters, and 2) a review of the identification practices and procedures of those districts with very high and very low identification rates. Baker Transcript II, 11:3-12:8, 99:8-100:15. This is necessary because, as the State's own experts acknowledge, the census method only works where the distribution of special education students across the state is equal. Picus Transcript, 98:21-24. See also Baker Transcript II, 95:24-96:6. Yet, the State has never performed an analysis of the actual distribution of children with disabilities across the State, nor has it analyzed the districts' identification practices and procedures. Baker Transcript II, 10:10-15; Gantwerk 72:9-17, 73:20, 74:3 and 74:10.<sup>3</sup> Moreover, Dr. Baker's extensive research concluded that there are indeed "real variations" in the distribution of children with disabilities across New Jersey. Baker Transcript II, 95:11-96:9. The

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Jersey's. Unlike New Jersey's plan, which is statewide and does not take into account huge classification rate variations across the state, California's funding is calculated at the regional level, and thus adjusts for the variation in classification rates.

<sup>3</sup> Dr. Baker also points out that the SEEP Report provides no such analyses. Baker Report, p. 15.



State's contention that SFRA's census-based funding formula is equitable thus wrongly assumes that the incidence of disability and costs are uniformly distributed across the State, at least with respect to children with mild to moderate disabilities. Trial Testimony of David H. Monk, Ph.D. (hereinafter "Monk Transcript"), 54:16-55:12; Trial Testimony of Susanna Loeb, Ph.D. (hereinafter "Loeb Transcript"), 35:6-37:6. However, as Dr. Baker testified, "there are real variations in the distribution of kids with disabilities across the State of New Jersey." Baker Transcript II, 96:6-9. Moreover, students with disabilities are "clustered" and "[t]here is a poverty association which then tends to lead to correlation with higher rate [of classification] in Abbott Districts. And the poverty correlation exists not only using school district data ... but also looking at individual families and their income and where they're clustered...." Baker Transcript II, 96:14-20. Furthermore, there is a "strong [poverty] correlation ... even across the metropolitan areas of the state, between higher poverty metropolitan areas having more families of children with mild to moderate disabilities ... and higher poverty school districts in those areas having higher concentrations [of classified children]." <sup>4</sup> Baker Transcript II, 97:7-12.

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<sup>4</sup> Even a cursory look at Figure 2 in the OLS Report, p. 67,

Congress too recognized the correlation between poverty and disability when it incorporated into its special education funding formula a provision that distributes federal special education funds to states, in part, based on their relative populations of children living in poverty. See Trial Testimony of Barbara Gantwerk (hereinafter "Gantwerk Transcript"), 30:5-14; 20 U.S.C. § 1411(d)(3)(A)(III). Although Ms. Gantwerk speculated that the federal government's reliance on poverty rates was based on "a recognition that poor districts would have more trouble paying for all of the services," Gantwerk 31:1-3, Congress' use of poverty as a basis for the distribution of special education funds in fact was based on the correlation between disability rates and poverty. H.R. 105-95 (page 125) ("The Committee added a poverty factor to the formula because there is a link between poverty and certain forms of disability.")

Thus, census-based funding, which requires even distribution of students with disabilities across the state, is

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supports the correlation between the socioeconomic status of New Jersey school districts and the classification rates of students with disabilities. Classification rates rise smoothly as you move from the far right side of the chart, representing the wealthier District Factor Group J districts with the lowest classification rates, to the far left side of the chart, representing the poorest District Factor Group A districts with the highest classification rates.

doomed to fail children with disabilities in New Jersey as they are not evenly distributed, and, as Dr. Baker pointed out, *supra* at 7, in fact is failing children with disabilities by providing those districts with higher concentrations of students with disabilities - primarily the poorer districts - insufficient funds to serve their children.

In sum, the State assumed an even distribution of children with disabilities across the state, and then put in place a funding system that can only work where the distribution is even. As more fully set forth in Point I of Amici's Pre-Trial Brief to the Supreme Court, a school funding formula which deliberately and indisputably results in the inadequate funding of special education programs for children who live in school districts where the classification rate exceeds the state's average, and deliberately and indisputably results in gross disparities between the funding of special education programs in relatively poor and relatively wealthy school districts, cannot withstand constitutional scrutiny, nor can it purport to ensure a free appropriate public education to all children with disabilities in the state, as mandated by state and federal special education laws.<sup>5</sup>

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<sup>5</sup> As more fully set forth in Point I of Amici's Pre-Trial Brief to the Supreme Court, courts in other states have held that comparable census-based funding formulas violate the rights

A. The State Improperly Assumes that School Districts Intentionally Over-classify Students, and that SFRA's Census-based Formula was Needed to Eliminate any Incentive to Classify

The State's primary argument in favor of SFRA's census-based funding formula is that it will remove an incentive to over-classify students as eligible for special education. However, the State failed to produce any evidence that children in New Jersey are in fact over-classified,<sup>6</sup> that the State's previous funding formula provided an incentive to over-classify or that adoption of a census-based formula was needed to eliminate any incentive to over-classify.

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of students with disabilities. See, e.g., *Alabama Coalition for Equity, Inc. v. Hunt et al.*, No. CV-90-883-R, (Cir. Ct. Montgomery C'ty, April 1, 1993), reprinted in *Opinion of the Justices No. 338*, 624 So. 2d 107, 125 (Ala. Sup. Ct. 1993); *School Districts' Alliance for Adequate Funding of Special Education v. State of Washington*, No. 04-2-02000-7 (Thurston C'ty Sup. Ct. Mar. 1, 2007), attached as Exhibit B to the Certification of Mary Ciccone dated April 30, 2008. See also *C.G. v. Commonwealth of Penn. Dep't. of Educ.*, 49 I.D.E.L.R. 223 (M.D. Pa. Feb. 25, 2008) (denying the state defendants' motion to dismiss challenges to the census-based special education funding statute based upon constitutional and special education grounds).

<sup>6</sup> As this Court recognized in its questioning of Defendants' expert Susanna Loeb, there can be many different explanations for a increasing rate of classification. See Loeb Transcript, 64:9-66:16. Dr. Loeb admitted that one cause for the an increase in the rate could be the increase in the level of sophistication about special education. Loeb Transcript, 66:8-16. Also, Dr. Loeb admits that it is possible that there was under-classification in the past, especially concerning minority groups. *Id.*, 64:9-22.

The State's experts believe that the prior tier funding system created an incentive to over-classify and misclassify students. Exhibit D-122, Written Testimony of Susanna Loeb, Ph.D. (hereinafter "Loeb Written Testimony"), ¶ 64; Exhibit D-123, Written Testimony of David H. Monk, Ph.D. (hereinafter "Monk Written Testimony"), ¶ 41. Dean Monk stated that districts that classify at greater than the average classification rate "may" be misclassifying students. Monk Transcript, 53:11-15. Dr. Loeb, who admits that she is "not a specialist in special education," Loeb Transcript, 63:25-64:1, testified that the 2003 New Jersey Special Education Expenditure Project Report ("SEEP Report") Report, Exhibit D-78, suggested that misclassifications occurred at a high rate. Loeb Written Testimony, ¶ 69. Dr. Loeb also opined that there has been an increase in the number of classifications over the years,<sup>7</sup> and that the increase is related to the incentives to classify present under the prior funding system. Loeb Transcript, 37:7-19, 38:2-10, 63:2-3, 64:19-22. Dr. Loeb believes that the census-based funding formula will eliminate the prior funding

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<sup>7</sup> In fact, according to the most recent data reported by the State, the overall number of students classified in the State in 2005, 2006 and 2007 remained essentially the same. Statewide Trends of Classified Students by Eligibility Category, Ages 6-21, New Jersey Department of Education, Office of Special Education Programs, <http://www.nj.gov/education/specialed/data/trends.htm>.

formula's incentive to classify which resulted in such high misclassifications. See Loeb Written Testimony, ¶ 67; Loeb Transcript, 32:13-24.

In fact, Dr. Loeb herself, acknowledged that it was possible that children were indeed being classified appropriately and not being over-classified. Loeb Transcript, 63:17-21. Moreover, neither Monk nor Loeb was able to cite even one report that showed that New Jersey school districts were inappropriately classifying students, or that any increase in New Jersey's classification rate over time was due to an incentive to classify created by the previous funding formula. While Dr. Loeb cited the SEEP report for the proposition that the students were "misclassified" at a high rate, Loeb Written Testimony, ¶ 69, the SEEP report in fact does not identify any misclassification of students. Rather, what the SEEP report stated was that, 30% of the time, school districts mis-assigned students to the various tiers in the previous funding formula, and, significantly, that they usually mis-assigned students to a lower-funded category.<sup>8</sup> SEEP Report, p. ii. The SEEP authors

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<sup>8</sup> Misclassification or over-classification relates to the question of whether children are improperly identified as eligible for special education and related services as a result of having one of the disabilities enumerated in IDEA and state special education regulations, and requiring special education services. The problem identified in the SEEP report, on the

specifically noted that this "seems surprising as districts benefit financially when students are classified in a higher tier." *Id.* Baker stated that the SEEP finding thus "thwart[s] the usual logic that a census based funding system should be adopted to contain costs by limiting fiscally incentivized misclassification." Baker Report, p. 15. See also Baker Transcript II, 10:19-11:2. Thus, whatever relevance, if any, the mis-assignment to funding tiers might have to district classification rates, it does not suggest that districts were classifying children in order to obtain additional funding. To the contrary, districts were incorrectly assigning children already classified to lower funded tiers, resulting in a failure to maximize funding already available to them under the State's then-existing funding formula.

Moreover, once a student is classified, the district is responsible for all of the costs to provide the student with all the supports and services required by each student's Individualized Education Program ("IEP"), 20 U.S.C. § 1401(8); 34 C.F.R. § 300.13, including such costs as additional staff, classrooms, paperwork and monitoring. Notably, such costs

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other hand, related to the mis-assignment of classified students to one of the funding level tiers in the previous special education funding law. The latter has nothing to do with the misclassification or over-classification of children.

regularly exceed the actual amount of extra funds generated by classifying a student. SEEP Report, p. 51. It is thus hard to conceive how the State's previous funding formula might have created any incentive to classify a student.<sup>9</sup>

Although one of the State's witnesses pointed out in her testimony that the State's classification rate is the highest in the country, Gantwerk Transcript, 20:20,<sup>10</sup> Ms. Gantwerk testified that the State has never conducted a study of whether the students in the State are actually properly classified, why some districts have higher classification rates than others or why the State's classification rate might be higher than that of other states. Gantwerk Transcript, 22:7-9, 72:9-17. Furthermore, although the State regularly monitors districts with high classification rates, Ms. Gantwerk could identify no data or studies which show that any students in New Jersey are

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<sup>9</sup> In its report, "A Formula for Success: All Children, All Communities," Exhibit D-12, the State relies on findings in the SEEP Report as the basis for adopting the census-based funding system. See Baker Report, p. 15. However, as Dr. Baker noted, in fact, the SEEP Report itself did not recommend that New Jersey adopt a census-based funding system. *Id.*

<sup>10</sup> Ms. Gantwerk also testified that the State's average classification rate used for purpose of SFRA, 14.69%, was higher than the State's average classification rate as reported by the federal government, 12.54%, Gantwerk Transcript, 21:6, but, as she subsequently testified, the rate reported by the federal government is not comparable to the rate used by the State since the rates are calculated differently. *Id.* at 22:10-19.



misclassified, let alone misclassified for reasons related to funding. Gantwerk Transcript, 71:24-72:17, 73:20 and 74:3.

Critically, while census-based funding might act as a disincentive to over-classify children with disabilities,<sup>11</sup> it is equally clear that census-based funding leads to the incentive to under-identify and under-serve special education students. See, e.g., Parrish, Tom and Harr, Jenifer, "Reconsidering Special Education Funding in Georgia," American Institutes for Research (June 2005), <http://csef.air.org/publications/related/AIR%20Georgia%20Report.pdf>.

B. The State Improperly Justifies the Census-based Funding Formula as Allegedly Being "Simple, Transparent and Predictable"

The State's experts testified that New Jersey's census-based funding formula for special education is appropriate because it is "simple, transparent and predictable." Loeb

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<sup>11</sup> Although the experts agree that census-based funding can result in decreased classification, districts in Pennsylvania continued to have high classification rates six years after the State implemented a census-based funding formula, despite the fact that they adhered to virtually the same procedures and processes as districts with low classification rates. Pennsylvania Department of Education, "A Report on Special Education Incidence Rates," Harrisburg, PA (2000), pp. 5-6. The report also concluded, "it would appear that high incidence rates in special education are a reflection of local economic and demographic conditions ... and do not reflect school

Written Testimony, ¶ 71. See also Monk Written Testimony, ¶ 40; Monk Transcript, 57:6-13, 59:17-20. However, whatever truth there might be to this point, such benefits simply cannot justify imposition of a funding formula with the constitutional deficiencies identified above. Moreover, it is wholly unclear how reliance on an average classification rate is any simpler, more transparent or more predictable than actual classification rates, particularly since the State relies upon actual identification rates of children at-risk and children designated Limited English Proficient ("LEP"), N.J.S.A. 18A:7F-51, and already collects information about the classification of each student with a disability in the state. Indeed, utilization of readily available actual classification rates would not only bear the virtues professed above, but would also carry with it the added virtues of equity, fairness and logic.

C. The State Improperly Justifies the Census-based Funding Formula by Emphasizing the Limited Funding Stream of "Extraordinary Aid"

The State's experts point to the ability of districts to obtain additional monies for "extraordinary costs" of special education services in response to the critique that SFRA's census-based funding formula applies a single, uniform statewide

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districts' failures to use good education practices." *Id.*

average classification rate when district classification rates vary greatly across the state. Loeb Written Testimony ¶ 70; Monk Written Testimony, ¶ 39; Monk Transcript, 56:4-11; Picus Transcript, 107:4-14. In fact, as Dr. Baker points out, extraordinary aid under SFRA, which at most amounts to 11.8% of the special education revenues funded by the State, OLS Report, p. 2,<sup>12</sup> and is intended solely for the small percentage of students who have severe disabilities, is irrelevant. The excess costs, which are at the heart of census-based funding, deal with the students who have mild to moderate disabilities. Baker Transcript II, 93:16-23.<sup>13</sup> The extraordinary aid available

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<sup>12</sup> The percentage is determined by dividing the State's calculated figure of \$91.2 million to fully fund extraordinary aid by the State's total special education allocation of \$770.1 million.

<sup>13</sup> To the extent the State argues that the only variation in classification rates is for those with the most severe disabilities, who are in turn aided by the extraordinary aid, it should be noted that Dean Monk, when asked if he was aware of the distribution of classifications across school districts between mild and severe disabilities, stated that he had "seen some of the statistics," but that he would be "hard-pressed to recall the specifics off the top of my head." Monk Transcript, 55:21-25. Dr. Loeb merely contended that, "the research that's out there, to the best of my knowledge, suggests that" classification rates for those with mild and moderate disabilities are "more evenly distributed" than the rates of those with severe disabilities. Loeb Transcript, 37:1-4. In fact, as Dr. Baker points out from his extensive research in New Jersey, the variations in disability classification rates across the State indeed affect those with mild and moderate disabilities, as well as those with severe disabilities. Baker Transcript II, 97:9-10. See also Pennsylvania Department of

under SFRA, therefore, simply does not address the inequities involved in the distribution of funding based on an average classification rate for the vast majority of children with disabilities in the state.

Moreover, even if the extraordinary aid, in theory, offset the disparities engendered in the State's application of a single classification rate across the state, extraordinary aid is not a guaranteed funding stream. Extraordinary aid must be applied for, and there is no guarantee that a district will receive the extraordinary aid when it requests it. N.J.S.A. 18A:7F-55(c). 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

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Education, "A Report on Special Education Incidence Rates," Harrisburg, PA (2000), p. 5 (classification rate varies, irrespective of severity of disability); Parrish, Thomas, et al., "Special Education: Study of Incidence of Disability" (September 30, 1998), <http://csef.air.org/publications/related/incidence.pdf>, p. vii (same).

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.

Furthermore, there is no guarantee that the State Legislature will continue to appropriate the full amount of funds to ensure that the extraordinary aid will be fully funded. Notably, where the prior funding system set forth a 100% reimbursement of extraordinary aid applications without a mandatory appropriation, N.J.S.A. 18A:7-19(b)(2) (repealed 2008), only a meager approximately 23% of the applications were actually reimbursed, DOE SFRA Report, p. 15. The Office of Legislative Services noted that "the State has never appropriated sufficient funding to support the reimbursement...." OLS Report, p. 57.

Since extraordinary aid, which the State's own experts state is a necessary component of an equitable funding system, Loeb Written Testimony, ¶ 70, is not guaranteed, the census-based funding system cannot be considered equitable and cannot

adequately fund the needs of special education students in New Jersey.

D. The State Improperly Justifies the Census-based Funding Formula by Pointing to the Large Sum of Special Education Dollars Spent in New Jersey

The State also erroneously attempts to justify SFRA's limited funding of special education excess costs by pointing out that the average public education spending per student with a disability is estimated to be about 40 percent higher in New Jersey than the national average. Loeb Written Testimony, ¶ 66. However, as the SEEP Report points out, while New Jersey spends an average of \$17,500 on each special education student compared to the national average of \$12,474, the average expenditure for general education students in New Jersey of \$9,229 is also considerably higher than the national average of approximately \$6,565, for an average ratio of total spending in New Jersey of 1.90 which is the same as the national ratio of 1.90. SEEP Report, pp. 15-17. Thus, the reason New Jersey appears to spend more than the national average in special education is because the base general education costs are higher than the national average. The State spends no more for special education than the national average, relative to what it spends on education generally.

**CONCLUSION**

For the foregoing reasons, and for the reasons set forth in Amici's Brief to the Supreme Court, Amici respectfully request that this Court find the special education census-based provisions of SFRA, as well as SFRA's extraordinary aid provision, "average" excess cost calculation and allowance for co-mingling of funds, to violate the Thorough and Efficient Clause of the New Jersey Constitution and the "free and appropriate public education" requirement of federal and state special education laws.

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Dated: March 9, 2009