

RAYMOND ARTHUR ABBOTT, ET AL.,

Plaintiffs-Movants,

vs.

FRED G. BURKE, ET AL.,

Defendants-Respondents

SUPREME COURT OF NEW JERSEY
DOCKET NO. 42,170

CIVIL ACTION

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION IN AID OF LITIGANTS' RIGHTS

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PRELIMINARY STATEMENT

Plaintiffs come before this Court again seeking immediate intervention to ensure that the State Defendants ("State") comply with the explicit directives to remediate deplorable and outmoded school facilities in the Abbott districts set forth in Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V"), Abbott v. Burke, 164 N.J. 84 (2000) ("Abbott VII"), and the Education Facilities Construction And Financing Act ("EFCFA"), N.J.S.A. 18A:7G-1 et seq. As the record on this motion demonstrates, the State is now in default of its constitutional obligation to fund facilities projects in the poorer urban or "Abbott" districts, requiring an appropriate remedial order directing the State and the Legislature to provide the constitutionally-mandated funds by a date certain.

When the New Jersey Schools Construction Corporation ("SCC") announced in the summer of 2005 that it would soon run out of the initial \$6 billion funding established by the Legislature under the EFCFA in 2000 - stranding numerous approved school facilities projects, many under development -- Plaintiffs came before this Court seeking to compel the Commissioner to report to the Legislature on the status of the construction projects and funding needs. This Court granted Plaintiffs' requested relief in December 2005, finding that "significant deficiencies in this area persist and are likely to worsen at a severe cost to the state's most disadvantaged school children if there is further delay in addressing the

dilapidated, overcrowded, and dangerous schools in the Abbott districts." Abbott v. Burke, 185 N.J. 612, 614 (2005) ("Abbott XIV"). But relief from deplorable, antiquated, overcrowded and unsafe facilities for this State's poorest school children has only slipped further away since that December 2005 Order.

As the record demonstrates, the problem is only getting worse, both in the conditions of the Abbott schools and the escalating costs to remedy the deficiencies. In the sixteen months since this Court expressed its concern about the condition of those schools, no funding has been authorized to remedy this patent constitutional deficiency. Indeed, in his most recent budget address to the Legislature, Governor Jon Corzine recognized that because of the State's neglected responsibilities "[n]ot only have children suffered unnecessarily, our failure to invest appropriately has cost more in the long run than to have done it right in the first place," and that the Legislature's continuing inaction on this issue would lead to "additional court-ordered mandates."

Plaintiffs appear before this Court as a last resort after having exhausted all other avenues of relief from the Executive and Legislative branches. As detailed herein, it has been well over a year since this Court issued its Order, and over a year since the Commissioner issued her report on necessary funding and current Abbott construction projects. Furthermore, both the Governor's Interagency Working Group and the SCC have requested \$2.5 billion in additional school facilities funding immediately for projects for the next three years.

Despite these repeated requests and detailed reports, the Legislature has failed to take action to appropriate or authorize the necessary funding. While the funding issue remains unresolved, Plaintiffs are forced to remain in dilapidated, overcrowded, and constitutionally inadequate schools, where their health, safety, and welfare are compromised daily. An Abbott student starting school in 2000 in a building slated for major repairs will spend her school years in an unsafe or unhealthy building if those repairs are not made before next year. This is unlikely to happen without this Court's immediate intervention.

In 1998 and 2000, this Court took the first steps in remedying the State's constitutional violation by requiring the Commissioner to provide and secure from the Legislature funds to undertake necessary school construction projects in the Abbott districts, including health and safety repairs. As this Court recognized in its December 2005 Order, Abbott XIV, 185 N.J. at 613, much work has been accomplished, but many more projects remain to be completed in order to ensure full constitutional compliance. Now there is no alternative for the Plaintiffs other than to request that the Court take the next step and compel the State and Legislature to provide additional funding before another generation of Abbott children is forced to endure their school years in facilities that fail to meet this Court's constitutional mandates for a thorough and efficient education.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

A. The Abbott Facilities Mandates

In Abbott v. Burke, 149 N.J. 145 (1997) ("Abbott IV"), this Court was faced with "accounts of crumbling and obsolescent schools" that "inundate[d] the record." Id. at 186. Based on voluminous evidence of "dilapidated, unsafe, and overcrowded facilities," this Court concluded that capital deficiencies were among "the most significant problems" facing the Abbott districts. Id. In so finding, the Court reaffirmed its prior holding, in Abbott v. Burke, 119 N.J. 287, 390 (1990) ("Abbott II"), that "adequate physical facilities are an essential component of [the] constitutional mandate [for a thorough and efficient education]." Id. Further, the Court ruled, capital improvements are fundamental to the efficacy of the entire framework of Abbott remedial measures, all of which have necessary space requirements. Abbott IV, 149 N.J. at 187-88 ("We cannot expect disadvantaged children to achieve when they are relegated to buildings that are unsafe and often incapable of housing the very programs needed to educate them").

In Abbott V, the Court again recognized the "grave state of disrepair" of Abbott school buildings, and underscored the fact that the deplorable physical facilities "have a direct and deleterious impact on the education available to the at-risk children." Id. at 519. The Court also reaffirmed that "[t]he State's constitutional educational obligation [under the thorough and efficient clause, N.J. Const. Art. VIII, §4, ¶ 1]

includes the provision of adequate school facilities." Id. at 519-20.

To address these "deplorable conditions," the Court explicitly directed the State to fund "the complete cost" of "remediating the infrastructure and life cycle deficiencies that have been identified in the Abbott districts," as well as "the construction of any new classrooms needed to correct capacity deficiencies." Id. at 524(emphasis added). Any funding formula that fails to cover the complete facilities' cost "will not comport with the State's constitutional mandate to provide facilities adequate to ensure a thorough and efficient education." Id. (emphasis added). The Court also noted that the State's facilities proposal was "based on the premise that the State would fund 100% of 'approved costs.'" Id.

Subsequently, in Abbott VII, the Court reaffirmed that the State is obligated to fully fund all of the facilities improvements needed in the Abbott districts. Id. at 88 (holding that the State must "fund all of the costs of necessary facilities remediation and construction in the Abbott districts").

In response to this Court's mandates, the Legislature enacted the EFCFA in July 2000. EFCFA authorized an initial \$6 billion in bond financing for Abbott school facilities and \$2.5 billion in funding for non-Abbott districts. N.J.S.A. 18A:7G-14(a). As required by Abbott V and Abbott VII, EFCFA provides that the State's share "shall be 100% of final eligible costs" for Abbott districts. N.J.S.A. 18A:7G-5(k).

B. Plaintiffs' 2005 Motion In Aid Of Litigants Rights

In August 2005, the Abbott Plaintiffs filed a Motion in Aid of Litigants' Rights which, among other things, sought an order compelling the Commissioner to fulfill her statutory duty under the EFCFA to submit an annual report to the Governor and Legislature, which included a required recommendation on "whether there is a need to adjust the aggregate principal amount" to complete the approved projects. N.J.S.A. 18A:7G-24. Plaintiffs' motion was prompted by the SCC's July 2005 announcement that only \$1.4 billion of the initial \$6 billion dollars allotted by the EFCFA was left to fund the remainder of the 532 facilities projects identified in the districts' 2000 Long Range Facilities Plans ("LRFPs"), of which twenty-five projects were complete, fifty-one projects were "under construction," and 162 projects had been approved for pre-development. See Certification of Joan Ponessa ("Ponessa Cert.") Ex. A, Ponessa 2005 Cert. ¶¶8-27. The SCC also announced in July 2005 that it had selected only fifty-nine projects that could be completed with the remaining funds, and explained the effect of delays on the remaining hundreds of projects. Id.

In response, the Court issued an Order requiring, among other things, that the Department of Education ("DOE") "provide its annual report for fiscal year 2005 to the Governor, the Joint Budget Committee, the President of the Senate, and the Speaker of the General Assembly as provided in the statute no later than February 15, 2006," including in the report estimates for the projects approved by the DOE and under design by the

SCC; the projects approved by the DOE on which some preliminary pre-development has been completed; and the projects approved by the DOE that were awaiting predevelopment work by the SCC. Abbott XIV, 185 N.J. at 615. The Court further ordered that the DOE submit such annual report each year by August 1, "to ensure a predictable and uniform manner by which all parties are provided the requisite information needed to assess the progress of the school facilities construction and the need for further appropriations." Id.

In so ordering, this Court found that "the State has made substantial effort to improve school facilities conditions in the Abbott districts, but that significant deficiencies in this area persist and are likely to worsen as a severe cost to the state's most disadvantaged school children if there is further delay in addressing the dilapidated, overcrowded, and dangerous schools in the Abbott districts." Id. at 613-14 (emphasis added).

C. Developments Since This Court's December 2005 Order

On February 7, 2006, in response to this Court's order in Abbott XIV, 185 N.J. at 612, Governor Corzine issued an executive order that, among other things, revamped the SCC and established the Interagency Working Group on School Construction (the "Working Group") "to review the entire School Construction Program and the laws, regulations, and policies governing educational facilities and to develop recommendations . . . to the Governor." Ponessa Cert. Ex. B, Executive Order #3.

Shortly thereafter, pursuant to Executive Order #3, Governor Corzine charged the Working Group with responsibility to develop proposals for improving the operation of the school construction program in the Abbott districts, and to recommend additional funds to restart stalled projects in those districts. Certification of David G. Sciarra ("Sciarra Cert.") ¶3. The Working Group in turn formed a Prioritization Sub-Committee, which was charged with developing a mechanism for prioritizing school facilities projects based on overcrowding, preschool needs, and health and safety issues. Ponessa Cert. ¶8.

In addition, the DOE submitted its annual report for fiscal year 2005 on February 15, 2006, as ordered by this Court. Abbott XIV, 185 N.J. at 615. The report showed that 96¹ project designs had been suspended, with an estimated five-year cost of \$7.9 billion; 84 projects had preliminary pre-development approval by the DOE, with an estimated five-year cost of \$6.6 billion; and 133 projects, at a five-year total estimated cost of \$4.7 billion, were awaiting pre-development approval by the DOE. See Ponessa Cert. Ex. C, New Jersey Department of Education Annual Report, School Facilities Construction Program FY 2005, at 77, 87, 91, 93; also available at <http://www.state.nj.us/njded/facilities/ar/2005.pdf>.

Upon the issuance of this report, Plaintiffs' Counsel Education Law Center ("ELC") immediately urged the Legislature

¹ The number of suspended project designs was later acknowledged by the DOE to be 97, not 96, due to the inadvertent omission of one project from the report. Ponessa Cert. ¶7.

and Governor Corzine "to act quickly to approve funding to restart work" on stalled projects, emphasizing the urgent nature of the needs presented in the report and the fact that "[t]he Legislature and Governor now have all the information they need to act." Sciarra Cert. ¶4, Ex. A, ELC Feb. 16, 2006 Press Release.

The Working Group released its initial report in March 2006, proposing significant structural changes in the school construction program. Sciarra Cert. ¶5. In response, Plaintiffs' Counsel endorsed the key reforms proposed for the SCC, but urged the Governor to establish an emergency plan to fund the stalled projects. Sciarra Cert. ¶6, Ex. B. Counsel, by letter, also requested Governor Corzine to take "prompt, decisive" steps to secure the funding necessary to fulfill this Court's facilities mandate and pledged to work with his Administration to secure additional funds to restart hundreds of previously-approved school construction projects in the Abbott districts. Sciarra Cert. ¶6, Ex. C, Letter of Mar. 10, 2006.

In May 2006, the Working Group released its second report, announcing it would finalize recommended reforms to the school construction program by August, including a recommendation for additional funds to restart the program. Sciarra Cert. ¶7. Plaintiffs' Counsel again urged the Governor "to follow through for our school children by making an immediate funding request to the Legislature in August," when the final report was due, in order to "restart stalled projects when children return to

school in September." Sciarra Cert. ¶7, Ex. D, ELC May 17, 2006 Press Release.

The Working Group released its third and final report in September 2006, recommending additional funding for school construction for the SCC and reforms to the EFCFA. Specifically, the Working Group recommended \$3.25 billion in additional funds for the next two to three years, to be allocated as follows: \$2.5 billion to Abbott districts for the most pressing problems and \$750 million to non-Abbott districts. Ponessa Cert. ¶9, Ex. D, Working Group's Final Report, Sept. 14, 2006. Of the \$2.5 billion recommended for Abbott districts, \$60 million to \$80 million is recommended as a reserve for unanticipated emergent projects. Id. Ex. D, Report at 11. In addition, the Working Group applied the criteria developed by the Prioritization Sub-Committee to the 59 projects in the current capital plan and 97 suspended projects and determined that 58 of the 156 projects met the proposed education criteria. Of the 58, 27 identified as high priority are not funded in the current capital plan. Id.² The Working Group found that if these 27 projects were funded through the strategic planning process, they would require \$1.3 billion without adjustments for final site acquisition costs, future inflation, and other forecasting

² SCC CEO Scott Weiner, in his February 6, 2007 testimony to the Joint Legislative Committee on the Public Schools, indicates that there is now a "structural deficit" in the July 2005 capital plan, with an estimated shortfall of \$500 million. Thus, it does not appear that the 59 projects identified by SCC in that plan can now be completed. See Ponessa Cert., Ex. F at 15; Abbott XIV, 185 N.J. at 615.

impacts. Id. In addition, once the 2005 LRFPS are reviewed and approved, other schools facilities projects might be identified for immediate remediation. Id.

Since September 2006, Plaintiffs' Counsel and other stakeholders have made additional efforts to urge the Governor and the Legislature to secure at least some of the emergency funding necessary to restart the stalled Abbott projects. A statewide coalition of construction, education, labor and advocacy groups -- Building Our Children's Future ("BOCF") -- was formed to press for additional school construction funds and has done so on several occasions. Sciarra Cert. ¶9. For example, in a letter to the Governor's Education Policy Analyst, the BOCF expressed its concern about the Governor's failure to mention this issue in his State of the State address. Sciarra Cert. ¶10, Ex. E, Letter of Jan. 25, 2007.

The SCC, as well, has urged the Legislature to provide necessary funds to promptly resume development of numerous stalled Abbott school construction projects. At a hearing before the Legislature's Joint Committee on the Public Schools on February 6, 2007, the SCC and members of the BOCF testified about the details and the urgency of these critical needs. See Ponessa Cert. ¶16, Ex. F, SCC PowerPoint Presentation; Sciarra Cert. ¶11, Ex. F, Feb. 6, 2007 Testimony. The SCC presented data to the Joint Committee showing that, ultimately, delays in completing projects currently under design will make these projects more expensive, not only because work completed up until now may have to be redone by new architects and engineers,

but also because of the effect of inflation on materials, building, and construction costs. SCC CEO Scott A. Weiner advised the Joint Committee that these costs are increasing by 7½% to 10% per year. Ponessa Cert. ¶16. The data show 315 unfunded school construction projects that were approved by NJDOE based on the 2000-2005 LRFPs, and indicate that if construction on these 315 projects had begun in January 2006, the total cost to complete those projects would exceed \$12 billion. Ponessa Cert. Ex. F at 11.

Because of the lack of legislative action on facilities funding, and in anticipation of the Governor's FY 2008 Budget Message, Plaintiffs' Counsel sent another letter to Governor Corzine, the Commissioner of Education, the Attorney General, and others urging a prompt response to the request for additional funds made by the Working Group and SCC officials. See Sciarra Cert. Ex. G, Letter of Feb. 20, 2007. The ELC urged the Governor to include a proposal to address the funding needs in his Budget Message for the FY08 State Budget. Id.

In his Budget Message to the Legislature on February 22, 2007, Governor Corzine acknowledged that the State's "responsibilities to the most vulnerable [the State's school children] were long neglected," but he did not request or recommend any school facilities funding. <http://www.state.nj.us/governor/news/news/approved/20070222.html> at 5. While acknowledging that because of those neglected responsibilities "[n]ot only have children suffered unnecessarily, our failure to invest appropriately has cost more

in the long run than to have done it right in the first place," Governor Corzine also recognized that the Legislature's continuing inaction on this issue would lead to "additional court-ordered mandates." Id.

Prior to filing this motion, Plaintiffs and other concerned stakeholders have exhausted all available efforts to secure from the Legislature and the Executive the additional funding for school construction projects that this Court has constitutionally required and that the disadvantaged students in the Abbott districts are entitled to receive. Sciarra Cert. ¶15. However, it now appears clear that the State is unwilling to comply voluntarily with this Court's decrees and to provide additional school construction funds so that urgently needed projects can move forward expeditiously. Id.; see also Ponessa Cert. ¶20. Without this Court's immediate intervention, thousands of disadvantaged school children will not be educated in the foreseeable future in facilities that are safe and educationally adequate, as constitutionally required by this Court's prior Abbott rulings.

D. The Current State Of The Abbott Schools

In addition to 97 stalled projects presently under design,³ which cannot move forward without additional funding, there are approximately 275 additional projects in the Abbott districts that still need to be renovated or built based on the 2000

³ These projects are classified as "under design" because they have been determined by the districts and the NJDOE to be construction priorities. Ponessa Cert. ¶12.

LRFPs. This number may change when the DOE completes its review of the Abbott districts' LRFPs for 2005-2010. Ponessa Cert. ¶11.

The lack of funding for the 97 projects currently under design is causing major problems for the Abbott districts and surrounding communities. Like the 59 projects selected by SCC to proceed back in 2005, these 97 projects are urgently required to address health and safety needs, overcrowding, or the educational inadequacy of facilities in the Abbott districts. Ponessa Cert. ¶13.

Some of the reported problems include a "domino effect" whereby a delay in one project disrupts the district's educational program because completion of the delayed project is necessary to accommodate students from a school where construction is next in line to begin. Ponessa Cert. ¶14(a). Another problem occurs when land that has been acquired from private owners for school construction -- up to 80% of the necessary property in some cases -- is left vacant because a project has been stopped, and the remaining residents in the blighted area are surrounded by boarded-up houses that become unsafe and require increased police patrols to control drug-dealing, arson, and squatters. Id. ¶14(b). Additional problems include the decreasing availability of clean and vacant land in the Abbott districts, id. ¶14(c); lack of funding to acquire temporary classroom units to alleviate overcrowding and the use of sub-standard facilities, id. ¶14(d); the inability to provide pre-school programs to all eligible Abbott youngsters, id.

¶14(e); and health and safety needs that are not currently being addressed, id. ¶14(f).

These and other problems have significantly increased the cost of the stalled facilities projects because of the need to "reinvent the wheel for development work on facilities projects," such as for example, design and engineering studies left partially complete now that contracts have been cancelled, or purchased land that may be sold to redevelopers in the interim. Ponessa Cert. ¶14(h).⁴

In addition, Abbott districts currently face a "Catch-22" situation with emergency health and safety repairs to their existing facilities: the DOE has required them to eliminate their capital budgets and seek funding for all capital projects from the SCC, but the SCC has no funds available. Ponessa Cert. ¶14(g). Consequently, the districts have been forced to utilize general operating accounts to pay for major emergency repairs like gas main leaks, ceiling collapses, serious roof leaks, etc., to insure the security of school children. Id.

Some of the representative significant problems facing the Abbott districts can best be illustrated by a few specific examples. The Newark schools need at least \$25-30 million to address a backlog of emergent problems, plus an additional \$200 million in other health and safety projects over the next five years to address the critical problems that enable the schools

⁴ The severe global problems facing the Abbott districts are detailed in the Certification of Joan Ponessa. See Ponessa Cert. ¶14(a)-(h).

to operate at a satisfactory level of safety. Ponessa Cert. ¶15(a). Currently, at least twenty-two emergent health and safety projects are stalled and unfunded; these projects are meant to address such problems as: falling façades, non-functioning fire alarms, broken boilers, falling out windows, and badly leaking roofs that prevent use of the upper floors of some schools. Id. Significant overcrowding in nine schools has created the need for fifteen temporary classroom units ("TCUs") (total cost \$2-\$3 million) in addition to costs for existing TCUs and leased facilities to replace the Elliot Street School, which was destroyed by fire last summer. Id. Finally, work on at least fifteen replacement schools has come to a complete halt, leaving students and staff in seriously overcrowded and dilapidated schools, many of which require a constant infusion of health and safety expenditures. Id.

Millville also typifies the global problems facing Abbott districts. In 2002, Millville received approval from the DOE for an addition and major renovation of the existing high school building, which was severely overcrowded. Ponessa Cert. ¶15(b). Due to a subsequent housing boom in Millville, the SCC determined that a new high school was necessary and feasible, and that the present high school could be renovated to alleviate overcrowding at the middle school level. Id. However, neither project has been started because of the unavailability of funds. Id. In the four years since the DOE approved the original project, 2000 new units of housing have been approved by the municipal planning board, resulting in a continuous increase in

the district's student population. Id. Since the SCC's funding ran out in 2005, Millville had to find money to pay for eleven additional TCUs this school year to accommodate the 500 additional students who attend the high school. Id. The cafeteria is severely crowded, lunch periods are only 20 minutes, and overcrowding in the hallways creates safety hazards. Id.

East Orange offers further examples of global issues. The SCC has not reimbursed the district for over \$1 million in emergency repairs, which were necessary to keep one of the district's elementary schools open since 2005, when its ceiling caved in. Ponessa Cert. ¶15(c). In another one of the district's elementary schools, thirty feet of the ceiling on the top floor is hanging, with no money available to repair this imminent health and safety hazard. Id.

To date, despite this Court's mandates and orders, repeated requests to the Governor and the Legislature, and detailed reports setting out the critical need for additional funding, the State and Legislature have failed to take appropriate action to ensure resumption of urgently needed school facilities remediation. Ponessa Cert. ¶¶18, 20; Sciarra Cert. ¶16.

LEGAL ARGUMENT

I. BY FAILING TO SECURE NEEDED CONSTRUCTION FUNDING, THE STATE IS IN DEFAULT ON ITS CONSTITUTIONAL OBLIGATION TO PROVIDE SAFE AND ADEQUATE SCHOOL FACILITIES IN ABBOTT DISTRICTS

In successive Abbott decisions, this Court has held -- unequivocally -- that the State has a constitutional obligation to ensure that New Jersey's poorest and most vulnerable school children are provided with adequate school facilities in which to learn. Abbott II, 119 N.J. at 390; Abbott IV, 149 N.J. at 186; Abbott V, 153 N.J. at 519-20. The Court has been equally forceful in its directives requiring that the State fund the complete cost of necessary facilities remediation and construction in the Abbott districts. Abbott V, 153 N.J. at 524; Abbott VII, 164 N.J. at 88; see also N.J.S.A. 18A:7G-5(k); N.J.A.C. 6A:26-3.9(c)(1);(c)(2)(codifying "100% cost" requirement); Abbott XIV, 185 N.J. at 615 (directing Commissioner to provide "requisite" information "to assess the progress of school facilities construction and the need for further appropriations").

Indeed, the Legislature, in enacting the EFCFA, recognized its constitutional obligation to "ensur[e] that students are educated in physical facilities that are safe, healthy, and conducive to learning." N.J.S.A. 18A:7G-2(a). The Legislature also acknowledged that "[e]ducational infrastructure inadequacies are greatest in the Abbott districts where maintenance has been deferred and new construction has not been initiated due to concerns about cost." N.J.S.A. 18A:7G-2(c).

The Legislature recognized further that in order to "remedy the facilities inadequacies" the State must "fund the entire cost of repairing, renovating, and constructing the new school facilities determined by the Commissioner of Education...." Id.

In accordance with the EFCFA, the Commissioner has approved hundreds of facilities construction projects; yet the record on this motion makes clear that the State has thus far funded only a portion of the "infrastructure and life cycle deficiencies that have been identified in the Abbott districts" and of "the construction of any new classrooms needed to correct capacity deficiencies." Abbott V, 153 N.J. at 524. Moreover, the action taken by the SCC in July 2005, after a review of all facilities projects, demonstrates that the remaining \$1.4 billion will allow only a limited number of school facilities projects approved by the DOE to be completed, representing only a fraction of the overall facility needs in Abbott districts.

Since this Court issued the December 2005 Order, Abbott XIV, 185 N.J. at 615, reports by the Working Group, the DOE, and the SCC have set out in detail the current status of necessary school facilities construction projects, as well as funding needs based on current cost estimates -- a number that grows exponentially by the day with every delay. Furthermore, as the record demonstrates, with the exception of the projects on the July 2005 list,⁵ implementation of the Abbott facilities mandates

⁵ As discussed in footnote 2, supra, the SCC recently revealed an estimated \$500 million "structural deficit" that may not allow it to even complete the 59 projects identified in July 2005.

is presently at a complete standstill. There can be no dispute, therefore, that the State is in default of its constitutional obligation -- repeatedly reaffirmed in the Abbott decisions -- to remediate all the facilities needs in Abbott districts. There can also be no dispute that, despite the Commissioner's compliance with the statutory reporting obligation enforced by this Court, Abbott XIV, 185 N.J. at 615, the State and Legislature have failed to address this serious constitutional default.

In sum, the State's default in the implementation of the school construction program clearly "does not comport" with the "constitutional obligation to provide facilities adequate to ensure a thorough and efficient education." Abbott V, 153 N.J. at 524. There is no justification for the State's failure to remedy properly these severe constitutional deficiencies, and the continuing relegation of thousands of children on a daily basis to the same physical conditions condemned by the Court for over a decade. Nor is there any reason for further delay in compelling the State defendants to take prompt action to secure necessary construction funds so that this Court's constitutional mandates will be met.

II. THIS COURT SHOULD ENTER AN APPROPRIATE ORDER TO ENSURE STATE COMPLIANCE WITH ITS CONSTITUTIONAL OBLIGATION TO PROVIDE SAFE AND ADEQUATE FACILITIES IN ABBOTT DISTRICTS

Plaintiffs have been compelled to file this motion because the State -- despite Plaintiffs' repeated requests and entreaties -- has failed to provide critically needed school

facilities funding. As discussed in Point I, supra, while the DOE and the SCC, through reports to and testimony before the Legislature, have all provided the "requisite information needed to assess the progress of school facilities construction and the need for further appropriations," Abbott XIV, 185 N.J. at 615, the State and Legislature have failed to secure and provide additional construction funds. In fact, no legislative action has even been proposed to address the State's continuing constitutional obligation, and while the delay continues and construction costs mount, thousands of Plaintiff children go to school every day in crumbling, unsafe, overcrowded, and unhealthy facilities.

This Court unquestionably has the authority to provide such a remedy here. As the Court noted in Robinson v. Cahill, 69 N.J. 133 (1975) ("Robinson IV"):

If there remains a theoretical conflict between the strictures of the Appropriations Clause and the mandate of the Education Clause, we hold the latter to be controlling in these circumstances.

...

The interest here at stake transcends that of an ordinary individual claimant against the State. It is that of all the school children of the State, guaranteed by the constitutional voice of the sovereign people: equality of educational opportunity.

Robinson IV, 69 N.J. at 154; see also New Jersey Div. of Youth and Family Services v. D.C., 118 N.J. 388, 400 (1990)(finding the principle that the judiciary will not interfere with the

discretion of the Legislature or Governor on whether to appropriate funds is not applicable "when funds are constitutionally mandated")(citing Robinson v. Cahill, 67 N.J. 333, 354-55 (1975)).

Indeed, this Court has not hesitated to compel legislative action to appropriate the necessary funding when, as here, there has been a clear failure to provide education funding necessary to carry out constitutional responsibilities. In Robinson v. Cahill, 69 N.J. 449 (1976) ("Robinson V"), for example, the Court found the Public School Education Act of 1975 facially unconstitutional and ordered the Legislature to enact a provision for the full funding of the State Aid provisions of the Act. Id. at 467-68.⁶

More recently, in Abbott IV, the Court ordered the Legislature to fund an increase in per-pupil spending in Abbott districts for the 1997-98 school year. Abbott IV at 197-98. While recognizing the time constraints imposed on the Legislature, the Court noted that the Legislature had "seven years to comply with a remedy intended to address, albeit

⁶ The Court retained jurisdiction in Robinson V and established a date certain for the Legislature to enact a constitutional school funding formula. Id. at 468. When the Legislature failed to act by the mandated deadline, the Court enjoined the existing method of public school financing, pointing out that "[i]t is the Legislature's responsibility to create a constitutional [school] system." Robinson v. Cahill, 70 N.J. 155, 159-60 (1976) ("Robinson VI"). The Court noted further that it is up to the State to determine how to meet its funding obligations "so long as the constitutional objective was achieved." Id. 161, n.2 (citing Archibald Cox, The Role of the Supreme Court in American Government (1976) at 94-95 n.1).

partially, a profound deprivation that has continued for at least twenty-five years. Thus, the remedy of increased funding for educational improvement in the poor urban districts should not be delayed any further." Id. at 198.

Further, this Court in Abbott V underscored the bedrock Abbott principle that the provision of adequate funding, based on demonstrated need, "will be the measure of the State's constitutional obligation to provide a thorough and efficient education," and that the Court "anticipate[s] that the Legislature will be fully responsive to that constitutional call." Id., 153 N.J. at 518-19. See also Pasqua v. Council, 186 N.J. 127, 153-54 (2006)(expecting the Legislature to respond by providing the necessary funds to support constitutionally-mandated counsel for the representation of indigent parents). The need for immediate judicial action to remedy the violation of this Court's mandates and to require adequate funding in accordance with this Court's decrees is clear and compelling.

The Court also needs to establish an immediate, firm deadline to prevent further delays in remediation of the patent constitutional violations established in this case. This Court has recently compelled prompt legislative action when faced with the need to address a new constitutional mandate. See Lewis v. Harris, 188 N.J. 415, 463 (2006)(finding that in order to "bring the State into compliance with Article I, Paragraph 1 [of the New Jersey Constitution] . . . the Legislature must either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision").

Likewise, in Robinson V, this Court did not hesitate to compel prompt legislative action, setting a deadline for the enactment of an appropriate school funding bill within nine and one-half weeks of its decree. 69 N.J. at 468.

In light of the demonstrated need for additional construction funds, the current constitutional needs of the Abbott school children, and the State's failure to respond to its longstanding constitutional obligation to provide adequate facilities funding, the need for a firm deadline is even more compelling here. Accordingly, the Court should order the State by a date certain -- June 30, 2007 - to secure and provide funding to resume work on approved school construction projects in the Abbott districts, including health and safety repairs. The longer the delay, the greater the financial and educational cost to children housed in constitutionally inadequate facilities. Prompt action will, at the very least, ensure continuation of the school construction program until the Legislature has the opportunity to consider more permanent funding solutions and mechanisms to implement the Court's constitutional mandates, including possible revisions to EFCFA.

Without such a remedial order, the State's default will continue unabated, as will the harm to present and future generations of disadvantaged school children.⁷

⁷ If Plaintiffs prevail on their motion, they will make application for attorneys' fees under R. 1:10-3.

CONCLUSION

For the reasons stated above, the State Defendants are now in clear violation of this Court's prior Abbott school facilities mandates, and its constitutional obligation to ensure children in the Abbott districts attend school in facilities that are safe, not overcrowded and educationally adequate. Plaintiffs respectfully request the Court grant their Motion to compel the State and Legislature's compliance with these facilities mandates and constitutional requirements by entering an appropriate order, as requested by Plaintiffs, and provide such other relief as may be appropriate.

Respectfully submitted,

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