



October 10, 2011

Superior Court of New Jersey, Appellate Division
Hughes Justice Complex
25 W. Market St.
P.O. Box 006
Trenton, New Jersey 08625

Re: Rosalie Bacon, et al. v. New Jersey Department of Education
Docket No.: A-2460-05T1

Honorable Judges of the Appellate Division:

Please accept this Letter Brief, on behalf of the amicus curiae Education Law Center ("ELC")¹, in lieu of a more formal Brief in support of Petitioner-Appellants' Notice of Motion in Aid of Litigants' Rights in this matter. The State's clear disregard of the funding mandates of the School Funding Reform Act of 2008 ("SFRA"), N.J.S.A. 18A:7F-43 - 63, as that act applies to the poor rural school districts that are the subject to this appeal ("Bacon districts"), has left unremedied proven

¹ ELC was granted leave to appear as amicus curiae in this case before the New Jersey State Board of Education below and subsequently appeared before this Court in this case. Since its founding in 1973, ELC has advocated on behalf of disadvantaged students for access to an equal and adequate education under state and federal laws through research, public education, technical assistance, advocacy and litigation. Further, since 1981, ELC has served as attorneys in the Abbott v. Burke case for the plaintiff class of over 325,000 children who attend public schools and preschools in the 31 poor urban communities, commonly referred to as "Abbott districts."

constitutional deficiencies in those districts, thereby necessitating a prompt judicial response.

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STATEMENT OF FACTS

Amicus incorporates herein the facts set forth on pages 2-8 of Petitioner-Appellants' Brief, supplemented as follows: 1) with data demonstrating that full funding under the SFRA would increase K-12 funding to the Bacon districts by \$19.5 million in Fiscal Year 2012; and 2) with data demonstrating that, among other impacts, the provision of such funding would increase by two-thirds the number of preschool students currently served in full day preschool in the Bacon districts, by adding over 2,000

full day preschool seats. See Certification of Danielle Farrie, Exhibits A and B.

PROCEDURAL HISTORY

Amicus incorporates herein the Procedural History set forth on pages 2-8 of Petitioner-Appellants' Brief.

LEGAL ARGUMENT

Point I

THIS COURT MUST ENJOIN THE STATE'S FAILURE TO FULLY FUND THE SFRA AS TO THE BACON DISTRICTS IN ORDER TO REMEDY THE PROVEN CONSTITUTIONAL DEPRIVATION IN THOSE DISTRICTS

Once again, the Bacon districts are seeking relief for the State's failure to remedy the violation of their students' -- who are predominately low income ("at-risk") -- constitutional right to a thorough and efficient education. Although this Court previously stayed its hand and tempered its relief granted in this case, the State's continuing refusal to provide the judicially sanctioned remedy that it promised now warrants a prompt judicial response.

On March 14, 2008, this Court upheld the finding of the New Jersey State Board of Education that the sixteen Bacon districts had "demonstrated a constitutional deprivation unchallenged by the Department as well as an inability through local taxation to fill in the gaps created by [the] inadequate funding [of the prior school funding formula]. Bacon v. N.J. State Dept. of

Educ., 398 N.J. Super. 600, 615 (App. Div. 2008). In this same decision, while recognizing that "constitutional violations must be remedied in a timely manner," this Court deferred to its fellow branches of government and allowed the State to proceed with the "legislative solution" it had enacted, namely reliance on the SFRA to remedy the constitutional deprivations in the Bacon districts.² Id. at 615, 618. However, to ensure that the SFRA in fact would be responsive "to the individualized, unique circumstances of the Bacon districts," this Court also ordered that the Commissioner of the New Jersey Department of Education ("DOE") comply with the State Board's 2006 mandate for a needs assessment of each of the Bacon districts. Id. at 617, 618. Specifically, the Commissioner was required to determine, "in light of the proven educational deficits already found by the

² SFRA is the State's effort to establish a unitary, equitable, predictable, and transparent school funding formula "designed to fund the costs of a thorough and efficient education, measured against delivery of the [Core Curriculum Content Standards]." Abbott v. Burke, 199 N.J. 140, 172, 173 (2009) ("Abbott XX"). The SFRA was developed both as a response to the State Board's 2006 order that the Commissioner begin the process to establish "a unified system that ensures the provision of a constitutionally adequate education and equal educational opportunity for all students in New Jersey regardless of the district in which they live or the economic circumstances under which they were born," Pa 230, and as a means to release the State from "prior remedial orders concerning educational funding for students in Abbott districts." Id. at 145. The SFRA has been held to meet the constitutional mandate, but "will remain constitutional only if the State is firmly committed to ensuring that the formula provides those resources necessary for the delivery of State education standards across the State." Id. at 170.

Board," whether the SFRA would "afford students in the Bacon districts the thorough and efficient education to which they are constitutionally entitled." Id. at 618. With this "seemingly effective first start for remedying the educational deficits shown by this record," this Court stayed its hand and decided that no further relief was "constitutionally compelled **at this time.**" Id. at 615, 617 (emphasis added).

Three and one-half years later, it is indisputable that the State has failed to fully fund the SFRA in the Fiscal Year ("FY") 2010 and FY 2011 budgets. As found by the Supreme Court in funding litigation concerning the poor urban, or Abbott, districts, "[t]he State made a conscious and calculated decision to underfund the SFRA formula." Abbott v. Burke, 206 N.J. 322, 359 (2011) ("Abbott XXI"). This underfunding totaled \$1.6 billion statewide for FY 2011, with the greatest impact of the reductions falling upon the State's at-risk students. Id. at 358.

For the Bacon districts, the State's failure to fully fund the SFRA is of critical import, as the State has promised since the Commissioner's Report of May 2006 to the State Board that "creation and **implementation** of a new school funding formula" would provide the best means of addressing the needs of the Bacon students. Pa3 (emphasis added). The State's failure is compounded by its needs assessments results for the Bacon

districts, finally completed in September 2009, in which DOE found for virtually every Bacon district that the SFRA provided the "necessary resources," see, e.g. Pa 38, or supplied "necessary tools," see, e.g. Pa 158, for those districts to improve educational opportunities for their students. These needs assessments did not, of course, take into account the dramatic \$1.6 billion funding cut to the SFRA that occurred in FY 2011. Thus, after purporting to establish that the constitutional deprivation in the Bacon districts can be remedied if those districts receive funding in accordance with the SFRA, the State has pulled that remedy out from under the districts' feet, leaving the deprivation suffered by the Bacon districts and their students still in place fourteen years after this case began.

Without prompt judicial intervention and appropriate relief, this Court's finding of constitutional deprivation in the Bacon districts will be rendered completely hollow. Simply put, the funding necessary to provide a constitutional education to students in the Bacon districts has not been made available as mandated by the SFRA and as promised to this Court. As the Supreme Court held in Robinson IV, over thirty-five years ago:

If then, the right of children to a thorough and efficient system of education is a fundamental right guaranteed by the Constitution, as we have already determined, it follows that the court must 'afford an appropriate remedy to redress a violation of those

rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper.'"

[Robinson IV, supra, at 147, quoting Cooper v. Nutley Sun Printing Co., Inc., 36 N.J. 189, 197 (1961)]

The fact that the Supreme Court in Abbott XXI declined to order that the SFRA be fully funded for school districts throughout the State has no effect on this Court's authority to provide relief to the Bacon districts. Abbott XXI, supra, 206 N.J. at 370-372. As is true for this Court, the Abbott Court's jurisdiction was "limited to the rectification of the constitutional violation suffered" by the litigants in the case before the Court. Id. at 371. That Court's holding that the Abbott plaintiffs "do not have standing in this litigation to seek vindication of the rights of children outside of the plaintiff class," id., has no bearing on the merits of the Bacon plaintiffs' claim for full funding under the SFRA. Just as the Abbott Court was obligated to afford an effective remedy to the constitutionally deprived students in the case before it, so too must this Court ensure that the students in the Bacon districts are not left without a remedy.

Point II

THE STATE'S FAILURE TO FULLY FUND THE SFRA FOR THE BACON DISTRICTS DENIES PRESCHOOL AND OTHER NECESSARY STAFF, PROGRAMS, AND SERVICES TO AT-RISK STUDENTS IN VIOLATION OF THE THOROUGH AND EFFICIENT EDUCATION CLAUSE OF THE NEW JERSEY CONSTITUTION

As recognized by this Court, the Bacon districts have long suffered from a dearth of adequate programming that has deprived their students of a thorough and efficient education under the New Jersey Constitution; these deficiencies can be found in the areas of art, music, media, library, world language, and science labs, as well as in the lack of "other important resources such as child study teams, drug counseling, and alternate education programs." Bacon, supra, 398 N.J. Super. at 609. Currently, with substantial cuts to SFRA funding having been imposed by the State in FY 2011, eleven of the sixteen Bacon districts are projected to be below the constitutional "adequacy" level for FY 2012, with underfunding totaling \$19.5 million for all sixteen districts. See Certification of Danielle Farrie, Exhibit A.

The SFRA was designed to take into account "the additional costs associated with educating 'at-risk students,' i.e. those living in poverty," by making the number of a district's low income students "a major factor" in allocating state funding. Bacon, supra, 398 N.J. Super. at 614, 615. In addition, because of the "demonstrable, beneficial results and success of the

current Abbott preschool program," the Legislature ensured that the SFRA's funding provisions included "an expanded high-quality preschool program for all children who qualify for free and reduced price meals in all districts." N.J.S.A. 18A:7F-44(k).

There can be no dispute about the impoverished socioeconomic conditions of the children residing in the Bacon districts. See, e.g. Bacon, supra, 398 N.J. Super. at 609 (recounting the State Board's findings regarding the "special needs" arising from the socioeconomic conditions of the Bacon students and living conditions that "mirror" those of the Abbott students). It is also undeniable that the cuts in SFRA funding have fallen most harshly on those districts with the greatest number of at-risk students, Abbott XXI, supra, 206 N.J. at 358.

Without full funding of the SFRA, then, the Bacon districts are left without sufficient resources to ensure that their large numbers of at-risk students receive the programs and supports needed to provide them with a constitutionally adequate education. Moreover, the failure of the State to have contributed any funding to the preschool expansion provisions of the SFRA - which must be fully implemented by the 2013-14 school year, N.J.S.A. 18A:7F-54(b) - means that there are 2,167 preschoolers in the Bacon districts who are eligible for full day preschool, but do not receive it. See Certification of Danielle Farrie, Exhibit B. Supplemental programs, such as

preschool, are an essential component of a constitutional education for students who are disadvantaged, as most of the Bacon students are. See Abbott v. Burke, 153 N.J. 480, 493, 503-503, 527 (1998) ("Abbott V"); Abbott v. Burke, 149 N.J. 145, 179-180 (1997) ("Abbott IV"); Abbott v. Burke, 136 N.J. 444, 453-454 (1994) ("Abbott III"); Abbott v. Burke, 119 N.J. 287, 402-403 (1990) ("Abbott II").


In short, by failing to honor its commitment to the Bacon students by providing their districts with the funding mandated by the SFRA, the State is denying constitutionally necessary programs and services to those students, and compounding the constitutional deprivation already established before this Court. Only with full funding of the SFRA for the Bacon districts, can those students hope to obtain the education to which they are entitled.

CONCLUSION

For the reasons set forth above, Amicus ELC respectfully requests that this Court grant the relief sought in Petitioner-Appellants' Motion in Aid of Litigants' Rights.

Respectfully submitted,

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