



# Education Law Center

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June 14, 2004

Honorable Chief Justice Poritz and  
Associate Justices of the Supreme Court  
Supreme Court of New Jersey  
Hughes Justice Complex  
25 Market Street  
Trenton, New Jersey 08625-0970

Re: Abbott, et al. v. Burke, et al.  
Docket No. 42,170

Dear Chief Justice Poritz and Associate Justices of the Supreme Court:

Please accept this response by Education Law Center ("ELC") on behalf of the Abbott Plaintiffs -- all pre-K to 12 children in the Abbott districts -- to the motions by the Board of Education of the City of Asbury Park and the nine other named Abbott district Boards, ("Abbott Boards") to intervene in the above captioned matter, and for emergent relief and relief in aid of litigants' rights. ("Abbott Boards' motions"). The Boards filed these motions on June 11, 2004.

ELC fully supports the Abbott Boards' motion to intervene under R. 4:33-1 and 2 based upon the arguments set forth in their Letter Brief. See Letter Brief of Abbott Boards, at 21-25.

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ELC also supports the Abbott Boards' application for an emergent stay of the individual budget appeals pending in the Office of Administrative Law ("OAL"). See Letter Brief, at 41-2.

The Abbott Boards' motion for relief in aid of litigants' rights raises significant legal issues that directly impact upon the basic procedural and substantive protections afforded the Abbott districts through the administrative process, and the mechanism established for resolving disputes over Abbott programs, budgets and funding in Abbott v. Burke, 153 N.J. 480 (1998)("Abbott V"); see also Abbott v. Burke, 163 N.J. 95, 120 ("Abbott VI"); Abbott v. Burke, 170 N.J. 537, 543-44 ("Abbott VIII")(reaffirming Court's preference for resolving Abbott disputes through the administrative process). It is essential that this Court promptly decide the issues raised by the Boards on these motions to ensure both "meaningful" and "timely" decision-making by DOE on all demonstrably needed Abbott programs, services and positions in the Boards' 2004-05 budgets. Abbott VIII, 170 N.J. at 543.

Furthermore, ELC supports, and joins, the Abbott Boards' motion for relief to aid of litigants' rights. See Letter Brief, at 25-41. As the Boards demonstrate in their brief and supporting certifications, the regulations adopted by the Commissioner of Education ("Commissioner") on May 25, 2004 ("May 2004 regulations"), and the May 28, 2004 decisions by the Department of

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Education ("DOE")("May 28 decisions"), clearly violate well-established principles narrowly circumscribing the retroactive application of changes in law, and the basic legal framework for the provision of demonstrably needed supplemental programs and funding established by this Court in Abbott v. Burke, 149 N.J. 145 (1997), and Abbott V, 153 N.J. at 494-502 and 508-519.

ELC also underscores the patent conflicts raised in the Boards' motion between the May 2004 regulations and May 28 decisions and the agreements reached just a year ago by ELC and the Commissioner and DOE in mediation before the Honorable Philip S. Carchman, and ordered by this Court in Abbott v. Burke, 177 N.J. 578 (2004)("Abbott X Mediation Order"). Those agreements -- expressly intended to improve implementation of Abbott whole school reform and supplemental programs -- included express commitments by the Commissioner and DOE to: (a) require the Boards to "continue to implement supplemental programs," as required by Abbott V and as set forth in the Chart of Supplemental Programs developed by the parties in mediation; (b) adopt regulations "to guide school and district assessment, planning and implementation of needs-driven supplemental programs," as set forth in the Chart; and (3) reinstate "the right of Abbott districts to request supplemental funding for all demonstrably needed programs, services and positions and to appeal the denial of such requests" through the

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administrative process established in Abbott V. See Abbott X Mediation Order, 177 N.J. at 584 (reciting parties' request to the Court to "direct the improvements to implementation of WSR and supplemental programs as agreed to in mediation"); id. at 587 (providing specific agreements on improving implementation of supplemental programs and funding in 2004-05 and beyond).

As the Boards demonstrate, and based on the first-hand experience of ELC in mediation with Judge Carchman, each one of the specific agreements related to implementation of supplemental programs and funding has now been disavowed by the Commissioner and DOE through the May 2004 regulations and May 28 decisions on the Boards' 2004-05 budgets. Letter Brief, at 33-41; and see Exhibit G of Certification of Richard Shapiro (comparing Commissioner's September 2003 and May 2004 regulations, and identifying conflicts of latter regulations with the Abbott decisions and the Abbott X Mediation Order).

In addition to joining in the specific relief sought by the Abbott Boards -- including invalidation of the May 2004 regulations and the May 28 decisions -- ELC renews its request that this Court appoint a special or standing master to oversee and ensure the prompt adoption of regulations to govern future implementation of the Abbott programs and reforms that fully comport with Abbott V and the Abbott X Mediation Order.

The record on this motion starkly illustrates the urgent need for increased supervision by a standing or special master to facilitate proper implementation of the Abbott programs and reforms. The Commissioner's unilateral action in adopting the May 2004 regulations, which directly conflict with numerous Abbott mandates, demonstrates that these intentional and systemic failures in implementation are neither insignificant nor the result of misunderstandings on the Commissioner's part. See Abbott VI, 163 N.J. at 100-01 (finding a special master unwarranted since the deficiencies in implementation of the Abbott preschool program resulted from "misunderstandings"); Abbott VIII, 170 N.J. at 544-45 (declining to appoint a special master because the demonstrated implementation defects were not "sufficient" to justify that relief). Rather, the Commissioner's action and the DOE decisions challenged on these motions reflect a direct challenge to the Court's mandates and the rule of law.

Indeed, the Commissioner and DOE not only seek to dismantle the substantive and procedural framework carefully developed in the Abbott rulings and orders, but they also directly repudiate their own agreements and representations made last year during the mediation process. The rejection of those agreements at the first opportunity -- the decisions on the Abbott districts' 2004-05 budgets -- strongly suggests that the Commissioner and DOE entered

into the mediation agreements with no intent of honoring them, and that they have now disregarded their unequivocal commitments to the Court and the ELC.

Most importantly, the Commissioner and DOE have failed to demonstrate good faith in taking these actions. In contrast to prior years, the Commissioner and DOE did not make any effort to seek the Court's prior approval of the substantial changes in the Abbott framework before applying those changes to the Abbott districts' budgets. Moreover, the Commissioner made no effort to consult with the Abbott Rulemaking Committee before radically altering the September 2003 regulations, despite his promise to do so. Certification of Marion Bolden, ¶6. Instead, with evident awareness that the Court would not approve the direct conflicts between his regulations and the Abbott decisions and Abbott X Mediation Order, and that the Rulemaking Committee would not endorse the May 2004 regulations, the Commissioner and DOE unilaterally imposed their will on the Abbott districts and children.

This Court was confronted once before with the refusal of the Commissioner and DOE to ensure the provision of supplemental programs and funding to remedy the extreme disadvantages of the Abbott Plaintiffs. Abbott IV, 149 N.J. at 199. At that juncture, this Court turned to a Special Master, Judge Michael Patrick King,

to ensure "appropriate remedial relief in the critical area of the special needs of at-risk children and the programs to meet those needs." Id. ELC and the Abbott districts fully expected that the agreements on supplemental programs and funding reached through extended litigation and the deliberative mediation process last year would usher in cooperative efforts to continue and improve implementation of those programs. That has clearly not occurred, and there is now a compelling need for the Court to place implementation of the Abbott programs and reforms under the regular supervision of a Special or Standing Master so that the Abbott Plaintiffs "receive the educational entitlements that the Constitution guarantees them." Abbott V, 153 N.J. at 489.

The continuing supervision of a Special or Standing Master would also, hopefully, eliminate the need for an annual return to the Court when, as in the case of the May 2004 regulations, the Commissioner seeks to undermine or weaken the procedural and substantive requirements in the Abbott decisions and orders. Accordingly, this Court should appoint a Special Master to oversee proper implementation by the Commissioner and the DOE of the Abbott V programs and reforms approved in the Abbott X Mediation Order.

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CONCLUSION

For the reasons stated above, ELC, on behalf of the Abbott Plaintiffs, respectfully requests that the Court grant the Board's Motions, enter the relief set forth in the Boards' proposed order on the Motion, and appoint a special or standing master.

Respectfully submitted,

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cc: Michelle Lyn Miller, Esq.  
Richard E. Shapiro, Esq.