
RAYMOND ARTHUR ABBOTT, et al.,	:	SUPREME COURT OF NEW JERSEY
	:	
Plaintiffs,	:	DOCKET NO.: M-1293-09
	:	
v.	:	CIVIL ACTION
	:	
FRED G. BURKE, et al.,	:	ON REMAND BEFORE THE
	:	HON. PETER E. DOYNE, A.J.S.C.
Defendants.	:	
	:	

POST-HEARING BRIEF OF AMICUS CURIAE
MONTGOMERY TOWNSHIP BOARD OF EDUCATION
ON REMAND TO THE SPECIAL MASTER

Fogarty & Hara, Esqs.
16-00 Route 208 South
Fair Lawn, NJ 07410
(201) 791-3340
(201) 791-3432 Telecopier
sfogarty@fogartyandhara.com
Attorneys for Montgomery
Township Board of Education

Stephen R. Fogarty, Esq. and
Jane Gallina Mecca, Esq.
Of Counsel and On the Brief

Cameron R. Morgan, Esq.
On the Brief

TABLE OF CONTENTS¹

TABLE OF AUTHORITIES..... ii

PROCEDURAL HISTORY..... 1

STATEMENT OF FACTS..... 2

LEGAL ARGUMENT..... 16

 I. THE STATE HAS FAILED TO SUSTAIN ITS BURDEN OF
 DEMONSTRATING THAT THE CURRENT LEVELS OF STATE
 SCHOOL FUNDING ARE SUFFICIENT TO ENABLE
 MONTGOMERY TO PROVIDE A THOROUGH AND EFFICIENT
 EDUCATION FOR THE 2010-2011 SCHOOL YEAR, AS
 MEASURED BY THE CORE CURRICULUM CONTENT
 STANDARDS..... 16

 II. THE STATE'S FAILURE TO PROVIDE THE REQUIRED LEVELS OF
 AID FOR THE 2010-2011 SCHOOL YEAR PREVENTED MONTGOMERY
 FROM BRINGING ITS INSTRUCTIONAL CURRICULUM INTO
 ALIGNMENT WITH THE CORE CURRICULUM CONTENT STANDARDS
 TO BE IMPLEMENTED EFFECTIVE SEPTEMBER 1, 2011. 20

CONCLUSION..... 25

¹ In the interest of conciseness and to avoid unnecessary repetition of information and arguments previously submitted to the court, separate sections for the preliminary statement and standard of review have been omitted.

TABLE OF AUTHORITIES

Cases

Abbott v. Burke, 149 N.J. 145, 168 (1997) ("Abbott IV")..... 17
Abbott v. Burke, 199 N.J. 140 (2009) ("Abbott XX"). 1, 17, 18, 25

Statutes

N.J.S.A. 10A:76-15..... 14
N.J.S.A. 18A:7F-1 to -34..... 16
N.J.S.A. 18A:7F-43 to -63..... 1
N.J.S.A. 18A:7F-46(a)..... 1
N.J.S.A. 18A:7F-46(b)..... 1
N.J.S.A. 7F-4.1d..... 18

Other Authorities

N.J. Const. art. VIII, §4, ¶1..... 1

Rules

Rule 1:10-3..... 1
Rule 1:13-9..... 1

Regulations

N.J.A.C. 6A:8-1.1..... 18

PROCEDURAL HISTORY

On May 28, 2009, the Supreme Court upheld the constitutionality of the School Funding Reform Act of 2008 ("SFRA"), N.J.S.A. 18A:7F-43 to -63, finding it facially adequate to satisfy the Thorough and Efficient Education Clause of the New Jersey Constitution, N.J. Const. art. VIII, §4, ¶1. Abbott v. Burke, 199 N.J. 140 (2009) ("Abbott XX"). In doing so, the Court expressly premised its holding on the directives that the State (1) continue to provide funding through 2010-2011 "at the levels required by SFRA's formula each year," and (2) conduct a mandated review of the formula's components after three years of implementation. Id. at 146.

On March 16, 2010, Governor Christie presented the FY11 State Budget, in which he proposed a decrease of \$1.081 billion in state aid for K-12 education, thereby reducing state aid 13.6% below the amount provided under the SFRA formula in 2009-2010. On or about June 8, 2010, the Education Law Center, acting on behalf of the Abbott Plaintiffs, filed a Motion in Aid of Litigants' Rights, under Rule 1:10-3, seeking an order enjoining the State Defendants from (1) providing state aid for 2010-2011 in amounts less than the levels required by SFRA's funding formula, and (2) conducting the three-year review or making recommendations to the Legislature pursuant to N.J.S.A. 18A:7F-46(a) and (b), since the State proposed not to fully implement the formula as it was designed and enacted. On or about July 6, 2010, the Montgomery Township Board of Education ("Montgomery" or "the Board") filed a motion, pursuant to Rule 1:13-9, for leave to participate as amicus curiae in support of Plaintiffs' position.

Thereafter, the Court granted Montgomery's motion to participate, as well as those of various other amici.

By order of January 13, 2011, the Court remanded the case to Your Honor as Special Master. The Court directed that the State "bear the burden of demonstrating that the present level of school funding distributed through the SFRA formula can provide for a thorough and efficient education ["T&E"] as measured by the comprehensive core curriculum content standards ["CCCS"] in districts with high, medium, and low concentrations of disadvantaged pupils." On January 25, 2011, the State moved for an extension of time and for clarification of the Court's remand order to the effect that it be permitted to submit evidence of the State's fiscal condition. On February 1, 2011, the Court issued an order denying the motion.

STATEMENT OF FACTS

The State's provision of school funding aid at levels far below those required by SFRA rendered the Board unable to fulfill the constitutional mandate to provide its students with T&E for the 2010-2011 school year. Furthermore, the massive reductions in aid for this fiscal year will prevent the Board from providing T&E for the 2011-2012 school year. This court heard testimony from Montgomery's superintendent, Earl T. Kim², who was called as a witness by the State and qualified as an expert in the field of education and performance(1T111).

² As cited herein, "1T" refers to the transcript of Kim's testimony on February 16, 2011 (afternoon session), while "2T" refers to the transcript of Kim's testimony on February 21, 2011 (morning session).

The Montgomery Township School District ("the District") is among the wealthier K-12 districts in the state in terms of socio-economic status, being classified under District Factor Group ("DFG") J (1T9; D-25, ¶4). The District serves students from both Montgomery Township and the Borough of Rocky Hill, pursuant to a merger beginning in the 2009-2010 school year (D-25 ¶7). Montgomery is among those local districts identified as having "low" concentrations of disadvantaged pupils (1T10;D-25, ¶7).³ Montgomery maintains one of the lowest costs per pupil in its peer group, ranking ninth lowest in actual costs for 2008-2009, out of 105 K-12 districts in the state with enrollments of over 3,500 students (D-25 ¶5). For 2009-2010, at \$11,627, Montgomery had the lowest budgeted cost per pupil of any similarly sized K-12 district in DFG I or J statewide (1T16;D-27).

Through his testimony, Kim provided a brief overview of the District's recent budgetary history. For the 2009-2010 school year, Montgomery was originally scheduled to receive \$5,320,850 in state aid (1T35;D-25, ¶10). The local tax levy was \$60,629,655, which left the District \$5,687,111 under its adequacy budget and \$3,645,409 over its local fair share under SFRA (D-25, ¶9). On February 11, 2010, the Governor directed the withholding of state aid to school districts for the remainder of the 2009-2010 school year (D-25, ¶12). In doing so, the State "reserved" or impounded \$1,888,238 in budgeted state aid to the District, leaving it with only \$3,432,612 in aid for the 2009-2010

³ Of approximately 3,500 students served by Montgomery, 1-2% qualify for free or reduced price lunches (1T10).

school year, a reduction of over 35% (1T35-1T37;D-25, ¶12).⁴ The District could not use excess surplus revenues generated in 2008-2009 to plug this loss of state aid in 2009-2010 without creating a revenue shortfall in future budget years, because those funds were already planned as a revenue source for the 2010-2011 budget (D-25, ¶13). Moreover, the amount of impounded state aid was artificially inflated, as Montgomery had knowingly built up excess surplus funds through a purchasing freeze in 2008-2009 in anticipation of a difficult budget cycle in 2010-2011 (D-25, ¶14).⁵

On March 19, 2010, the Commissioner of Education notified Montgomery that its formula aid allotment for 2010-2011 would be \$1,871,805, a reduction of \$3,543,398 or 65.4% of the prior year's \$5,415,203 in combined formula aid to Montgomery and Rocky Hill (1T35-1T37;D-25, ¶¶17-19). This represented a reduction of \$650 per pupil (D-25, ¶¶17-19). The District had anticipated a reduction of approximately 10% (1T64). When administrators and Board members learned of the 65% reduction just three days before the budget was due to be submitted to the Somerset County Executive County Superintendent

⁴ Of more than 600 districts across the state, Montgomery was one of only 14 that were 1) under adequacy by more than 10%, 2) over local fair share, and 3) had 10% or more of their 2009-2010 state aid impounded (D-25, ¶16).

⁵ The net result was the creation of a significant revenue shortfall or "budget gap," anticipated for 2011-2012 in the amount of approximately \$2.3 million (D-25, ¶15). School districts try to avoid significant budget gaps, since they create large variations in the amount of revenue required from year to year in order to maintain operations at the status quo, thereby undermining the fiscal stability of a district (D-25, ¶15). The Commissioner later forced the District to appropriate \$898,798 in projected excess surplus generated in the 2009-2010 school year into the 2010-2011 budget (1T41;D-25 ¶¶35, 40-41). Since those funds had already been earmarked by the District as a revenue source for 2011-2012, the budget gap for 2011-2012 was now been widened from \$2.3 million to \$3.2 million (1T43;D-25, ¶¶40-41).

("ECS"), they did their best to cope with the traumatic budgetary effect in a way that preserved core instructional programs (1T132).

Kim testified that the Board submitted an extremely lean budget to the voters in recognition of the funding deficiencies stemming from the 65% reduction in aid (1T38; D-25, ¶27). The Board proposed a 2010-2011 general fund tax levy of \$65,439,585, which was \$139,377 under the District's adequacy budget but \$3,335,212 over its local fair share pursuant to SFRA (D-25, ¶24). The proposed budget contained only a 0.66% increase in spending from the prior year, but reflected a 5.63% increase in the general fund tax levy (1T38-1T39; D-25, ¶25). This significant tax levy increase, despite virtually no increase in spending, was driven solely by the 65% reduction in state aid (D-25, ¶25; D-32). The Board's budget proposal was defeated, however, leading to a separate round of reductions.⁶

Kim testified in detail concerning the cuts made to the 2010-2011 budget as a result of the 65% reduction in formula aid in the current year and the effect on the District's ability to provide T&E in both the 2010-2011 and 2011-2012 school years. At the hearing, Kim testified that the reductions made to the 2010-2011 budget as a result of the 65% decrease in state aid for this year impacted Montgomery's ability to provide educational programs required by the CCCS to such a degree that the District cannot provide T&E for the 2010-2011 school year (1T96-1T97).

⁶ The budget was defeated by Montgomery and passed by Rocky Hill. The budget reductions imposed by the Commissioner are currently on appeal before the Appellate Division (1T94-95).

Academic Support Programs at Early Elementary Level:

As a result of the funding reductions, the District was forced to eliminate its academic support program for early elementary students (1T99; D-25, ¶26b). The District had to lay off the academic support staff that provided the program, who were trained as reading recovery teachers and held reading specialist certifications (1T99). The program was specifically designed to assist at-risk pupils who otherwise would not make sufficient progress toward the CCCS (1T100). These teachers provided supplemental instruction through classroom pull-out services to students, as well as consultative services to classroom teachers (1T100, 2T50-51).

In describing the effect of the elimination of academic support, Kim drew a distinction between pupils who are economically disadvantaged and those who are academically disadvantaged (1T101). Although the term "at-risk" has traditionally been thought of as pupils who are eligible for free or reduced price lunches, Montgomery uses a standards-driven system to identify and provide early support to students who are either not achieving or are in danger of not achieving adequate yearly progress toward the CCCS (1T101).

Kim testified that the District would utilize state standardized testing in the area of reading, beginning in kindergarten, to accurately predict which students would be at risk of not making adequate yearly progress at the end of the third grade year (1T102). Those students would then be provided with academic support under the program (1T102). In 2009-2010, the District identified 45 students as academically at-risk, provided each of those students with academic

support, and was able to verify through standardized testing results that such services moved those students closer to attaining proficiency under the CCCS (1T105).

For the 2010-2011 school year, the State increased the scaled score required for proficiency in the state testing such that a larger portion of elementary students are at risk of not achieving proficiency (1T102). For 2010-2011, 100 to 120 students in every grade level are at risk of not making sufficient yearly progress toward the CCCS, meaning they are projected not to pass the state testing, including 20% to 30% of third grade students as measured in the District's annual report card (1T103-1T104). As a result of the state aid reduction, the District is unable to provide any of those students with academic support and/or supplemental instruction for the 2010-2011 school year (1T104; 2T51).

Increased Class Sizes:

As a result of having to eliminate 11.2 full-time equivalent ("FTE") teaching staff positions, Montgomery saw an increase in elementary class sizes of approximately 10% for every grade except first and sixth grades (1T106; D-30). As an educational expert, Kim opined that students in large class sizes of 18 or more have been found, on average, to lose the equivalent of one-tenth of the school year in educational benefit for reading and math, as compared to students with smaller class sizes of 17 or less (1T115). Studies show an even greater impact on economically disadvantaged pupils (1T110).

In Montgomery, every class size is above 18 students with the exception of kindergarten, and most range from 20 to 25 students

(1T117; D-30). In 2010-2011, in addition to a 10% increase in class sizes from the prior year, the District no longer has an academic support program in place to enable it to compensate for larger class sizes (1T118). Kim testified that increased class size has a significant effect on the ability of students to achieve the CCCS (1T114-1T115). For example, the elimination of physical education teaching positions in the middle school for 2010-2011 resulted in class sizes of up to 60 students (1T130-1T131). With such a large class size, it is no longer possible for students to cycle through the various cardiovascular and fitness stations set forth in the physical education curriculum. Therefore, teachers have had to change the students' activities, which are not in keeping with the CCCS (1T131).

Cuts to the World Language Program:

Montgomery was forced to lay off two first and second grade Spanish teachers, resulting in the elimination of its elementary level world languages program (1T118). In addition, the District was forced to "roll up" its Italian program at the high school, eliminating Italian 1 this year, Italian 2 next year, and so on until the program is dismantled (1T119). Kim emphasized the importance of the world language curriculum, as it is one of the CCCS (1T120-1T121). Approximately 700 students in grades one and two will receive no instruction in world language (Spanish) (1T121), resulting in the denial of T&E to those children. Consequently, their third and fourth grade teachers will now be starting from "ground zero" (1T122). Kim testified that this is significant due to what experts have termed "the window of the mind" for acquisition of language, meaning that

younger children are able to internalize language as a part of their thinking in a way that older children cannot, thereby leading to greater fluency and proficiency in the area of language (1T123). Thus, Kim testified that the inability to fund these programs in grades one and two will hinder the District's ability to have students meet the CCCS in world languages (1T125-1T126).

Moreover, the District is now unable to service any of its 60 students who are English language learners, 26 of whom are in the elementary school (2T48). Those students should have had a language-intensive preschool experience to bring them onto even footing with their peers (2T48). Since the teachers who were eliminated serviced students with limited English proficiency in addition to teaching world language classes, many of these English language learners lost their world language program in addition to their academic support, due to the reduction in state aid (2T50; 1T120).

Cuts in Technology:

Montgomery was also forced to make significant reductions which will prevent the District from providing students with the instruction they need to meet the CCCS related to technology (1T127). Not only did the District eliminate technology support staff and the director of technology position, but it sustained a 30% reduction to its district technology plan (1T127; D-25, ¶26f). The District's computer to student ratio is three times below the state average in K-4, and entire carts of computers were eliminated from the budget, while funding for servers and switches were cut, increasing the likelihood of a breakdown in the infrastructure of the District's network

(1T127). The District's computer labs now service approximately 700 students with only 27 to 30 work stations and are unavailable due to testing twice a year for two weeks at a time (1T128). Student access to the labs is so diminished that instruction which affords access to the CCCS in technology does not exist (1T129). Therefore, Kim opined that the reductions in state aid negatively affect the ability of the District to render T&E as measured by the CCCS (1T129-1T130).

Cuts to Administrative Staff and Curriculum Development:

Montgomery attempted to minimize the impact of the 65% reduction in state aid on instructional staff by making significant administrative reductions (1T132; D-25 ¶26c). The District reduced senior administrative staff by 12.6% or 4.4 FTE positions (1T132;D-28), and also cut administrative secretaries and support staff by 20.6% or 6.4 FTE positions (1T45; D-28). Reductions to the central office totaled approximately \$500,000 (1T45). In terms of total cuts to administrative and central office staff, Montgomery had a reduction of 16.4%, as compared to only a 3.1% reduction of teaching staff, which is illustrative of the District's priorities in "trying to avoid impacting the instructional core" (1T132). Among comparable districts, Montgomery had already budgeted 12.2% below the average for administrative salaries and benefits (1T44-1T45; D-27). Kim was careful to point out that, rather than indicating greater efficiency, the reductions in the administrative line items resulted in reduced output as well as reduced input (1T46).

The effect of these administrative reductions is significant in terms of the District's inability to provide T&E for the 2010-2011 and

2011-2012 years (1T133). In 2009-2010, the DOE made significant changes to the CCCS and high school graduation requirements (2T13; P-64). The Commissioner gave districts three years to align their curricula, develop common assessments, and instruct students in keeping with those new standards, so that students will be prepared when the new state tests are field tested in 2013 (1T133). The District was on track with its curriculum development activities until February 2010, when the State impounded \$1.88 million in state aid to Montgomery (2T34). In response, the District was forced to halt its curriculum development in the 2009-2010 school year in order to generate surplus to be appropriated into 2011-2012 to make up for the loss of the impounded aid (2T35). As a result, Montgomery fell behind in curriculum development (2T35).

By September 1, 2011, all districts are required to instruct students based on the revised curricula and must develop common assessments embedded in the curriculum documents as valid measures of student performance around the CCCS (2T14). The 2010-2011 budget saw the loss of area supervisors for language arts, math, science, humanities, health/physical education, and technology (2T10). Due to the elimination of those responsible for overseeing the development of the revised curriculum and revised common assessments, Montgomery was unable to revise the curriculum over the summer prior to the 2010-2011 school year (2T14-2T17). As a result, students are receiving the same curriculum as last year and are not being prepared for the state testing they will face next year under the CCCS effective September 1, 2011 (1T133; 2T17). Kim testified that this will have a demonstrable

effect on the students' ability to meet their CCCS requirements. For example, the District conducted a field test of the algebra 1 and biology exams, and the students did not perform as well as expected (2T40). Kim attributed this poor performance to the fact that critical curriculum development work was not completed this summer due to the reductions in state aid (2T41).

Beyond not being able to align the curriculum to the CCCS, the DOE increased the high school credit requirements for graduation from 110 to 120, implementing two full-year course requirements in the areas of personal finance and practical arts (home economics, wood shop, etc.) (2T120-2T124). Given these additional requirements and the revisions to the CCCS, Kim testified that the existing levels of state funding are insufficient to allow the District to provide T&E (2T23). In fact, Montgomery was visited by a QSAC monitor⁷ and cited for noncompliance in its instructional programs due to the inability to integrate the revised curriculum (1T134; 2T19). Kim testified that the District was unable to meet QSAC milestones due to the reduction in state aid (2T19-2T20).

In addition, as a result of the loss of state funding in 2010-2011, the Board cut 22.0 FTE support staff positions, including technology specialists, a child study team social worker, educational support assistants, building clerks, groundskeepers, custodians, and nurses (D-25 ¶26b). The cuts to nursing staff affected every school

⁷ QSAC is an acronym for the "New Jersey Quality Single Accountability Continuum," a statutorily created periodic monitoring system to ensure local districts are providing the minimum requirements for T&E (1T134; 2T19).

in the District such that each building is now operating below the adequacy model in this area (2T43; P-3), which could potentially result in a lapse in nursing coverage (2T45).⁸

The support staff reductions also impeded the use of school facilities. The reductions to custodial and grounds staff were made on the understanding that the township would provide for upkeep of the school fields (1T136). A week before summer practices were to begin, however, the fields were declared unsafe due to lack of watering and maintenance and all activities were confined to the turf field for safety reasons (1T136). Among the other resources the District is unable to utilize for the benefit of the students is Project Adventure, which is a team building program that utilizes a ropes course (1T137). Due to the reduction in state aid, Montgomery did not have the funds to bring out an inspector or recertify the program instructors, so this resource now goes unused by the children of the District (1T137).

The Board's proposed 2010-2011 budget eliminated middle school extracurricular activities, including approximately 23 different sports, thereby affecting over 600 students (2T45; D-25 ¶26h-i). Kim testified that the elimination of extracurricular activities adversely affects the District's ability to deliver the core standards regarding

⁸ Kim illustrated the seriousness of this concern through an example from this past fall when a Montgomery student suffered an aneurysm and was only recognized as being in need of a Medevac rather than an ambulance because of the presence of a school nurse (2T45).

social emotional learning.⁹ Interaction with the coaching and co-curricular staff that were lost would have afforded students the best opportunity to build relationships with adult role models in a less artificial setting than a classroom environment (2T46). In his expert opinion, Kim testified that the loss of middle school sports programs will have the greatest impact on students who are economically disadvantaged and in need of positive after-school activities (2T47). The District also eliminated funding for field trips due to the reduction in state aid (2T52). Only those whose parents can afford to pay the full cost of the trip are now able to participate (2T52).

Finally, the State saddled Montgomery with substantial burdens for transportation and debt service costs (2T52-2T55). For the 2010-2011 school year, the State provided zero categorical aid to Montgomery for the transportation of private school students (2T53). Yet, the District was still required to reimburse the parents of private school students for transportation costs, which resulted in the loss of \$400,000 from the general fund levy (2T54). In addition, the State was obligated to pay a portion of the debt service on capital projects in the District (2T55).¹⁰ In the 2010-2011 budget, the State applied \$170,000 of debt service aid to the general fund tax levy, thereby foisting its own financial obligation onto the local

⁹ The CCCS require school districts to address social emotional learning in the 21st Century Life and Careers Standard (P64).

¹⁰ Pursuant to N.J.S.A. 10A:76-15, Montgomery could elect to receive a grant or debt service aid up to 40% of the final eligible cost of each project.

taxpayers (2T55). The result was that the District was forced to reduce \$170,000 worth of programs from the rest of the budget (2T55).

Summary of the Impact of the 65% Reduction in 2010-2011 State Aid:

The net result of all the budgetary cuts resulting from the 65% reduction in state aid, was that Montgomery could not and did not offer an educational program commensurate with the requirements of the CCCS for the 2010-2011 school year (1T96-1T97). On March 18, 2010, when the District was advised that its state aid allotment would be reduced by \$3.5 million, it was suddenly forced to make massive reductions by cutting \$2 million from its budget in the three working days prior to the deadline for submission of the budget to the ECS for approval (1T97; D-32). On March 24, 2010, by directive of the ECS, Kim submitted the proposed budget and authorized his signature to be stamped on the letter of transmittal, a form document which includes a statement that the proposed budget contains sufficient funds to enable all students to meet the CCCS (1T59).¹¹

On the same day, however, Kim emailed the ECS and specifically informed her that the transmittal letter was stamped to enable the budget's transmission, but he "stop[ped] short of certifying its support of a T&E education" (1T58-59;D-32). Kim's email informed the ECS, the District business administrator, and the Board President that "our budget does not fund what I consider a T&E education" because the

¹¹ Following the submission of a memorandum of law concerning the "issue of certification," the parties and the court concurred that the letter of transmittal was not a "certification" in the usual legal sense, and there is not statute or regulation indicating that the letter is anything but a budget statement (2T4-2T7).

District was "losing valued people, valued programs and valued co-curriculars" which are part of T&E (D-32). Kim noted in his email that the District was cutting programs and personnel, spending at nearly the same level from the previous year, and still imposing a nearly 6% property tax increase on Montgomery residents, all of which he attributed to be "a direct result of the draconian reduction in State aid" (D-32). The email concluded: "legally I feel bound to note that we have fallen short in Montgomery" (D-32). Kim printed a copy of the email, which was stamped and affixed to the budget submission (1T71-1T77;D-32). On March 31, 2010, the ECS signed off on the proposed budget despite Kim's statements (1T96).

Kim's opinion as an educational expert and a career educator has not changed since that time (1T96). He testified that the budget he transmitted to the ECS on March 24, 2010 was incapable of delivering T&E (1T96). He further testified that the level of state funding for the 2010-2011 school year was insufficient to enable Montgomery to provide its students with a T&E education as measured by the CCCS.

LEGAL ARGUMENT

I. THE STATE HAS FAILED TO SUSTAIN ITS BURDEN OF DEMONSTRATING THAT THE CURRENT LEVELS OF STATE SCHOOL FUNDING ARE SUFFICIENT TO ENABLE MONTGOMERY TO PROVIDE A THOROUGH AND EFFICIENT EDUCATION FOR THE 2010-2011 SCHOOL YEAR, AS MEASURED BY THE CORE CURRICULUM CONTENT STANDARDS.

In assessing the constitutionality of the Comprehensive Educational Improvement and Financing Act ("CEIFA"), N.J.S.A. 18A:7F-1 to -34 (repealed), the Court upheld the CCCS as "facially adequate as a reasonable legislative definition of a constitutional thorough and efficient education." Abbott v. Burke, 149 N.J. 145, 168 (1997)

("Abbott IV"). The Court struck down as unconstitutional the funding mechanism contained in CEIFA, in large part because CEIFA did not "in any concrete way" link the CCCS to the funding actually needed to implement the content required. Id. at 169. In upholding SFRA, this Court found a formula capable of providing the critical link between actual funding and the objective CCCS that was lacking in CEIFA. Abbott XX, supra, 199 N.J. at 172. The Court emphasized that the delivery of a constitutionally adequate education depended upon the link remaining viable through the State's continued commitment to fund the formula at the required levels. Id. at 170. As with the CCCS's definition of constitutionally adequate educational content, the Court recognized that SFRA's formula for constitutionally adequate funding levels should be implemented, as it was designed, to achieve T&E "for every child, regardless of where he or she lives." Id. at 175.

The expenditure disparity the Court identified in 1990 has changed, with Abbott districts now spending on average more per pupil than I and J districts. The facts simply do not support the blind assumption that Montgomery's state aid can be more heavily reduced because, as a wealthier district, it does not have to rely on those funds. Montgomery had \$1.88 million or about 35% of its state aid impounded in 2009-2010 to meet the State's "fiscal emergency," without regard to whether its budget could absorb the impact in future years. Ever since the enactment of SFRA, Montgomery's budget has been well above its local fair share, but well below SFRA's adequacy level, the objective measure of the amount of funding required to meet the CCCS

and provide T&E.¹² Consequently, the improvident reduction in state aid has had a cataclysmic effect on Montgomery.

The 65% reduction in aid stifled the District's ability to comply with the CCCS for 2010-2011 to such a degree that Kim specifically advised the ECS that the 2010-2011 budget proposal would be insufficient to meet T&E. Without even confronting the cuts that resulted from the budget defeat, the 65% reduction in aid resulted in the dismantling of programs and the abolishment of staff. Layoffs to teaching staff resulted in the elimination of world language classes, which are core fields of study required by the CCCS. N.J.S.A. 7F-4.1d; see N.J.A.C. 6A:8-1.1. Basing his expert opinion on studies done in the field, Kim opined that class sizes have increased to levels where students are likely to be deprived of up to one-tenth of the educational benefit they are receiving, and that the ratio will be even higher for economically disadvantaged pupils. Important co-curricular programs have been eliminated, from sports to field trips, with a disproportionate effect on disadvantaged students. As for pupils who are academically at-risk of not making adequate yearly progress toward the CCCS, the District is now unable to provide any academic support at all, as it had in the past through academic support and supplemental instruction programs designed to identify at-risk pupils at an early age and bring them up to grade level.

¹² As the "core of the formula," the adequacy budget is a calculation based on weighted per-pupil costs, done on a sliding scale such that it is, to use the Court's words, already "wealth equalized." Abbott XX, supra, 199 N.J. at 153-54.

Perhaps the most damaging aspect of the reductions is the District's inability to align its curriculum to bring it into compliance with the State's revisions to the CCCS. Between layoffs of the administrators responsible for curriculum writing, cuts to the curriculum development budget, and the pressing need for Montgomery to freeze as much spending as possible to generate excess surplus in the current year to fill a calamitous \$3.2 budget gap for 2011-2012, the District has fallen far behind in meeting its curriculum development milestones. Notably, Montgomery's inability to revise its curriculum led to the District being cited by QSAC, a statutory entity of the same state government that gutted the very funding intended to support curriculum development. Aside from the teachers, administrators, and support staff who lost their jobs, the most severe impact will be felt by the children of the District who have been deprived of significant elements of their constitutionally guaranteed right to T&E. Despite all Montgomery has done to minimize the impact on core instructional programs, students are performing lower than expected on field tests based on the new CCCS. They will continue to underperform in the upcoming year, because they will not have a curriculum on September 1, 2011 calibrated to prepare them for the proficiencies they must achieve during the 2011-2012 school year.

The State called Kim as its own witness. Kim testified substantially concerning the detrimental impact to T&E for each of the cuts sustained in Montgomery as a result of the reduction in state aid for 2010-2011, rendering his expert opinion with regard to each item within a reasonable degree of educational certainty. In the face of

this evidence, the only testimony the State was able to elicit from Kim regarding Montgomery's ability to meet T&E concerned the District's status as having the lowest or among the lowest costs per pupil across various categories of spending within its peer group (1T14-1T25). The Supreme Court's January 13, 2011 remand order stipulated, however, that "relative comparison of funding among districts alone shall not be sufficient to carry the State's burden." Thus, the State was unable to offer anything to refute Kim's testimony that, in his expert opinion, the state aid reductions have rendered Montgomery unable to provide T&E in the 2010-2011 school year.

The District respectfully submits that the State has failed to meet its burden on remand to show that the current level of state funding in 2010-2011 was sufficient to permit T&E as measured by the CCCS in districts with high, medium, and low concentrations of disadvantaged students. The Board further asserts that Kim's testimony presented this court with sufficient credible evidence to support the opposite finding, that the 2010-2011 state aid levels are woefully inadequate to support the provision of a T&E education commensurate with the CCCS.

II. THE STATE'S FAILURE TO PROVIDE THE REQUIRED LEVELS OF AID FOR THE 2010-2011 SCHOOL YEAR PREVENTED MONTGOMERY FROM BRINGING ITS INSTRUCTIONAL CURRICULUM INTO ALIGNMENT WITH THE CORE CURRICULUM CONTENT STANDARDS TO BE IMPLEMENTED EFFECTIVE SEPTEMBER 1, 2011.

At the hearing, a colloquy ensued concerning the scope of the Court's January 13, 2011 remand order and whether or not the State's

funding reductions in this budget year should also be considered to the extent that they directly affect the ability of the District to develop its curriculum to implement the CCCS that become effective on September 1, 2011 (2T28-2T30). To be more specific, Your Honor acknowledged the relevance of Kim's testimony as to the District's inability to meet its curriculum writing goals during 2010-2011, but Your Honor reserved decision on the issue of whether the concomitant impact on student achievement under the new CCCS standards in effect for the 2011-2012 school year fell within the scope of the remand under the Court's January 13, 2011 order (2T28-2T29). Kim testified that the District's inability to meet curriculum writing goals for this year will negatively impact student preparedness for testing under the enhanced CCCS to be implemented on September 1, 2011 (2T30). Notably, the revised standards were in place since 2009, and only their implementation was deferred until September 2011. Hence, the reductions in state aid prevented the District from meeting the state mandate to align its curriculum with the CCCS, and the resulting effect on T&E will carry over into the 2011-2012 school year.

The Supreme Court's January 13, 2011 remand order contained nothing that can fairly be read as limiting the scope of the remand to the ability to provide T&E for only the 2010-2011 school year. The order states that the "hearing shall consider whether school funding through SFRA, at current levels, can provide for the constitutionally mandated [T&E] for New Jersey school children." It further directs that "the State must bear the burden of demonstrating that the present level of school funding

distributed through the SFRA formula can provide for [T&E] as measured by the [CCCS] in districts with high, medium, and low concentrations of disadvantaged pupils." Finally, the order states that "[t]he basis for the record shall be the level of funding provided in the current school year. . . ."

Though the order clearly states that the purpose of the remand is to determine whether current funding levels can support the provision of T&E, and that the record is to be based on the level of funding provided this year, there is nothing in the order to limit a potential finding that a deprivation of T&E has occurred to only this year. The Supreme Court chose its words carefully and has granted Your Honor the ability to consider whether the State's current funding levels for this year deprived New Jersey school children of their right to T&E during any year, including either the current 2010-2011 school year or the upcoming 2011-2012 school year. Moreover, the impact of this year's funding reductions on subsequent school years is critically important to considering the delivery of T&E. The court cannot disregard the fact that the CCCS are dynamic standards or that the State mandated significant curriculum development work this year to prepare students for the upcoming year.

Thus, it would appear that the scope of the remand proceeding must take into consideration the CCCS as they are currently being implemented. Where it can be shown that massive reductions to school funding which deviated from the SFRA formula for this year have effectuated a deprivation of constitutional rights for the following year, as it can in Montgomery's case, this court is obligated to make

findings of fact and conclusions of law to that effect. Moreover, since the District has done everything it can to preserve the instructional core of educational programming that stands to be decimated by a \$3.2 million budget gap, which efforts have caused it to fall significantly behind on its curriculum development activities, this court should view the affect on T&E for next year as an important concern. To do otherwise would be to ignore the realities of the dynamic and changing standards that shape the educational content of T&E as students pass from one year to the next, and the realities of our budgetary system whereby changing surplus revenues carry over to shape the funding component of T&E as district budgets are prepared from one year to the next.

In short, the determination of constitutionally adequate school funding should not be viewed as a snapshot in a moment in time, wholly removed from the surrounding context of the effect on prior and subsequent budget years. Rather, it is an ongoing and complex interplay between fiscal management and the development of educational content commensurate with the CCCS which serve as the mechanism for the delivery of T&E to individual students. The Supreme Court was fully cognizant of the fact that the CCCS are a dynamic set of standards that may change from year to year in terms of the "content component" for T&E. Students who are instructed in the current year, based on outdated curricula that have not been aligned with next year's enhanced standards, will necessarily be less prepared for the challenges they will face in the following year when the new standards go into effect.

By the same token, the structure of our school budgeting process dictates that surplus balances may carry over from one year to the next up to the statutory maximum, and, as a consequence, those funding streams significantly affect a district's ability to meet or not meet future budgetary challenges (2T36-38). When a substantial sum of state funding is never received, or when surplus revenues from one year are overestimated and forced to be appropriated as revenue into a budget cycle other than that for which they were intended, then months or even years of careful, responsible local budget planning is thwarted. The same holds true of the 65% reduction in state aid, which eliminated the District's ability to cope with these fiscal blows while at the same time fulfilling its core educational mission. Thus, a "snapshot" of instructional programming in 2010-2011, in the context of standards that are soon to be obsolete, would ultimately not be reflective of the larger budgetary predicament for the 2011-2012 school year caused by the State's failure to provide the statutorily required levels of funding under SFRA.

Therefore, the Board respectfully submits that in assessing the impact of the State's deviation from its own statutes, this court should not judge the adequacy of Montgomery's ability to meet T&E through a quick glance at the "waterline" without regard to the cracks beneath the surface created by the State which will soon cause the water level to fall drastically in 2011-2012. Instead, this court should consider all of the potential repercussions for the delivery of T&E that have resulted from the State's provision of lower funding levels for the current 2010-2011 school year.

CONCLUSION

For the above reasons, amicus curiae, the Montgomery Township Board of Education, respectfully requests that the Special Master recommend that the Supreme Court grant Plaintiffs' Motion in Aid of Litigants' Rights and enjoin the State Defendants from providing state aid to any New Jersey school districts for 2010-2011, on a statewide basis, in amounts less than the aid levels required by the provisions of SFRA, as mandated by this Court's ruling in Abbott XX.

Respectfully submitted,

FOGARTY & HARA, ESQS.

By: _____
Stephen R. Fogarty

Dated: March 14, 2011