

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

EDUCATION LAW CENTER  
DAVID G. SCIARRA, Esquire  
60 Park Place  
Suite 300  
Newark, N.J. 07102  
(973) 624-1815 x16  
dsciarra@edlawcenter.org

Attorneys for Plaintiffs-Movants

On the Brief:

David G. Sciarra, Esquire  
Theresa Luhm, Esquire  
Elizabeth Athos, Esquire

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**PRELIMINARY STATEMENT**

Plaintiffs seek this Court's intervention to ensure State Defendants' ("State") compliance with the explicit directives for remediating unsafe, overcrowded and inadequate school facilities in poorer urban or "SDA districts" in Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V") and Abbott v. Burke, 164 N.J. 84 (2000) ("Abbott VII"), and as required by the Education Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1 to 48 ("EFCFA"). As the record on this Motion demonstrates, the State has failed to take the requisite steps to secure funding for urgently needed school facilities projects in SDA districts and, absent judicial relief, will default on its constitutional and statutory obligation to provide the safe and adequate physical environments that are essential for Plaintiffs' learning and academic success.

Given the State's failures, Plaintiffs respectfully request an appropriate remedial order directing the State to promptly complete a revised "statewide strategic plan" for priority school construction projects, as required by EFCFA and, upon completion, to seek and secure such funding as is required to undertake and complete the facilities projects contained in the revised statewide plan.

## 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 overwhelming evidence of "dilapidated, unsafe, and overcrowded facilities," the Court concluded that capital deficiencies were among "the most significant problems" facing the poorer urban or "SDA districts."<sup>1</sup> Id. The Court also reaffirmed its holding in Abbott v. Burke, 119 N.J. 287 (1990) ("Abbott II") that "adequate physical facilities are an essential component of [the] constitutional mandate [for a thorough and efficient education]." Id. at 390. Further, the Court concluded that facilities improvements are fundamental to the efficacy of the Abbott remedies for adequate K-12 funding, supplemental K-12 programs, and high-quality preschool -- all of which implicate facilities. Abbott IV, 149 N.J. at 187-88 ("[w]e 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 school buildings in SDA districts, underscoring that the deplorable facilities "have a direct and deleterious impact on the education available to the at-risk children." 153 N.J. at 519. The Court also reaffirmed that "[t]he State's constitutional

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<sup>1</sup> In EFCFA, the poorer urban districts are denominated SDA districts. N.J.S.A. 18A:7G-3.

obligation under the thorough and efficient clause, N.J. Const. Art. VIII, §4, includes the provision of adequate school facilities." Id. at 519-20.

To address these "deplorable conditions," the Court in Abbott V directed the State to fund "the complete cost" of "remediating the infrastructure and life cycle deficiencies that have been identified in the [SDA] districts," as well as "the construction of any new classrooms needed to correct capacity deficiencies." Id. at 524. The Court also directed the districts to complete five-year facilities management plans, enrollment projections, and architectural blueprints by fall of 1999 and set "spring of 2000" for the State to commence construction. Id. at 521. Because "projected cost estimates" were speculative, the Court declined to "impose dollar restrictions" on funding. Id. at 521, n.8.

Subsequently, in Abbott VII, the Court reaffirmed the State's obligation to fully fund facilities improvements in the SDA districts. 164 N.J. at 88 (holding the State must "fund all of the costs of necessary facilities remediation and construction").

**B. EDUCATION FACILITIES CONSTRUCTION AND FINANCING ACT**

**1. Facilities Project Planning Under EFCFA**

In July 2000, the Legislature enacted EFCFA, N.J.S.A. 18A:7G-1 to 48, to comply with the Abbott facilities mandates. In 2007, the Legislature amended EFCFA to establish the New Jersey Schools Development Authority -- or "SDA" -- as the agency responsible for funding facilities projects in SDA districts. N.J.S.A. 18A:7G-3;

see also N.J.S.A. 52:18A-237 to 247 (replacing Schools Construction Corporation with SDA).

EFCFA requires the SDA to fund, plan, design and construct facilities projects determined to be needed in LRFPs prepared by the SDA districts and approved by the Commissioner of Education ("Commissioner"). N.J.S.A. 18A:7G-5k (providing that the "State share" of SDA district projects "shall be 100% of the final eligible costs"). The LRF process requires each district to submit extensive data and other information on the district's facilities' needs and a plan for future construction for the ensuing five years. N.J.S.A. 18A:7G-4(a) to (g) (prescribing elements and submission of LRFPs to Commissioner). EFCFA also requires the districts to amend their LRFPs once every five years to update enrollment projections, building capacities, and health and safety conditions. N.J.S.A. 18A:7G-4(a).

The districts' LRFPs must identify all deficiencies in the current facilities inventory, including capacity issues, emergent health and safety concerns, and the educational adequacy of existing buildings in accordance with "facilities efficiency standards" (FES) established by the Commissioner. N.J.S.A. 18A:7G-4(a). The FES represent the instructional and administrative spaces educationally necessary to support student achievement of New Jersey's Core Curriculum Content Standards (CCCS). N.J.S.A. 18A:7G-4h.

Following the approval of the LRFPs, EFCFA requires the Commissioner to develop an "educational facilities needs assessment" ("EFNA") that identifies the most critical needs for each SDA district. The EFNA must be revised every five years. N.J.S.A. 18A:7G-5m(1).

Based on the approved LRFPs and the EFNA, the Commissioner must also establish, in consultation with each SDA district, "an educational priority ranking of all school facilities projects in the SDA districts based upon the Commissioner's determination of critical need" in accordance with "priority project categories" that include health and safety, overcrowding, in-district programs for students with disabilities, and educational adequacy. N.J.S.A. 18A:7G-5m(2).

After the Commissioner transmits the EFNA and educational priority rankings to the SDA, the agency -- in consultation with the Commissioner, the SDA districts, and the governing bodies of the districts' municipalities -- must establish a "statewide strategic plan" for use in sequencing the construction of facilities projects based upon the Commissioner's project priority rankings and issues which may impact the SDA's ability to complete the projects, including, but not limited to, the construction schedule and other appropriate factors. The SDA must revise the statewide strategic plan "no less than once every five years." N.J.S.A. 18A:7G-5m(3).

Finally, the Commissioner adopted EFCFA-implementing regulations codifying an expedited process to review and fund “emergent” projects in SDA district buildings. Emergent projects are defined as a “capital project necessitating expedited review” to remediate a condition that “would render a building so potentially injurious or hazardous” as to cause “an imminent peril to the health and safety of students or staff.” N.J.A.C. 6A:26-1.2.

## **2. Facilities Project Funding Under EFCFA**

To fulfill the Abbott mandate for full funding of facilities projects in SDA districts, the Legislature determined in EFCFA to utilize bonding as the mechanism to fund project costs, including land acquisition, planning, design and construction. In enacting EFCFA in 2002, the Legislature set the aggregate principal amount of bonds authorized for school construction funding in the SDA districts at \$6 billion. N.J.S.A. 18A:7G-14a.

In the wake of this Court’s orders in Abbott v. Burke, 185 N.J. 612, 615 (2005) (“Abbott XIV”) and Abbott v. Burke, 193 N.J. 34 (2007) (“Abbott XVII”), the Legislature, in June 2008, enacted amendatory legislation raising the aggregate principal amount of bonds authorized to be issued by an additional \$2.9 billion. P.L. 2008, c. 30, codified in N.J.S.A. 18A:7G-14(a).

To keep the Legislature apprised of the progress of school construction and the need for additional funding, EFCFA directs

the SDA, no later than June 1 and December 1 of each year -- and in consultation with the State Treasurer and the Commissioner -- to submit to the Senate President and Assembly Speaker a "report on the school facilities construction program" that includes the following information: a) the number of projects approved by the Commissioner; b) the number of projects undertaken and financed by the SDA; and c) the "aggregate principal amount of bonds . . . issued by the [SDA]" and "whether there is a need to adjust the aggregate principal amount of bonds" to finance school facilities projects, as needed in SDA districts. N.J.S.A. 18A:7G-24. The twice-a-year report is referred as the "Biannual Report." Certification of Theresa Luhm, ("Luhm Cert.") ¶39.

**C. CURRENT NEED FOR SCHOOL FACILITIES PROJECTS**

**1) Major Capital Projects**

From EFCFA's enactment to December 31, 2017, the SDA completed 331 major projects in SDA districts, consisting of 80 new schools, 46 extensive renovations or additions, 31 rehabilitations, and 174 capital maintenance projects. Luhm Cert., ¶35.

In 2008, the SDA prepared a revised statewide plan of priority projects in SDA districts titled "Funding Allocation and Capital Plan in the SDA Districts." ("2008 Plan"). The 2008 Plan prioritized 53 major capital projects for construction. Luhm Cert., ¶12.

In 2010, the SDA and DOE created a joint team to conduct a review of the 2008 Plan and make recommendations for a "reformulated program." Luhm Cert., ¶¶13-14, Ex. B. In 2011, the SDA released a revised statewide plan, titled "Capital Program Report." ("2011 Statewide Strategic Plan" or "2011 Plan"). The 2011 Plan identified 110 major capital projects as the highest priority needs in 30 of the 31 SDA districts. These priority projects cover preschool, elementary, middle and high school grade configurations, and include new school projects and additions/renovations of existing buildings. Luhm Cert., Ex. B at TL Ex 014-016.

From 2011 to 2014, the SDA issued an annual "portfolio" of major capital projects advanced from the 2011 Statewide Strategic Plan to active construction. During that timeframe, the SDA moved a total of 39 major capital projects from the 2011 Plan to active status: 11 projects in 2011; 23 projects in 2012; and 5 in 2014. Since 2014, the SDA has not advanced any additional priority projects on the 2011 Plan to active construction. Luhm Cert., ¶16-18; see also Certification of David Sciarra ("Sciarra Cert."), ¶11, Ex. F.

In early 2016, the Commissioner approved revised amendments to the SDA districts' LRFPs as required by EFCFA. ("2016 LRFPA Amendments"). Luhm Cert., ¶19. An analysis of the 2016 LRFPA Amendments shows approximately 381 major capital projects are

needed across all 31 SDA districts, impacting over 300,000 children. These projects include 200 renovations/additions of existing school buildings, 102 new school buildings, 72 upgrades of major building systems (such as new windows or mechanical systems), 3 capital maintenance projects, and 4 site upgrades. Luhm Cert., ¶20, Ex. C.

In 2016, following approval of the 2016 LRFPA Amendments, the Commissioner transmitted to the SDA an EFNA prioritizing major capital projects in each district. ("2016 EFNA"). In January 2019, the Commissioner revised the 2016 EFNA with updated enrollment projections and building capacity assessments. ("2019 EFNA"). Luhm Cert., ¶21 and 22, Ex. D.

The 2019 EFNA analyzed enrollment trends, building capacity and square feet per student by four FES grade groups for each SDA district: Pre-K, K-5, 6-8, 9-12. The key findings include:

a) Fifteen of the thirty-one SDA districts have deficient capacity and/or provide fewer square feet per student than prescribed in the FES for one or more grade groups;

b) Five districts have capacity and square footage deficiencies in two or more grade groups. These deficiencies cannot be addressed through increased building utilization, the reassignment of buildings, and/or the reconfiguration of school sending areas; and

c) Five districts have capacity or square footage deficiencies in two or more grade groups necessitating additional square footage. Luhm Cert., ¶24, Ex. D at TL Ex 083-084.

The 2019 EFNA includes for each SDA district, except for Neptune and Gloucester City where no major projects are needed, a "District Level Prioritization" that lists 2 to 3 major capital projects as "the most critical" based on "capacity and FES square footage deficiencies determined in the EFNA." The 2019 EFNA does not provide a priority ranking of these projects statewide or across all SDA districts. Luhm Cert., ¶25, Ex. D at 081-083.

The 2019 EFNA prioritizes major capital projects that address capacity and non-FES compliant buildings due to the "magnitude of the need." Although 16 districts do not have space deficiencies, the 2019 EFNA notes that projects in those districts, "particularly those replacing buildings beyond their useful life for education, are also worthy of consideration." Luhm Cert., ¶26, Ex. D at TL Ex 084.

To date, the Commissioner and SDA have not issued the EFCFA-required five-year revision of the 2011 Plan, despite having completed the approved 2016 LRFP Amendments and the 2019 EFNA. A comparison of the priority projects identified in the 2019 EFNA and the projects listed in the 2011 Plan shows that at least 23 projects in the 2019 EFNA were also in the 2011 Plan, meaning they

have been considered "priority" projects for nearly a decade but have yet to advance to active construction status.

## **2. Emergent Projects**

On three occasions -- 2007, 2011 and 2016 -- the SDA and DOE have jointly undertaken a "Potential Emergent Projects Program" ("PEPP") to identify and evaluate for remediation potential projects impacting the health and safety of students and staff. In the last PEPP announced on July 26, 2016, the SDA districts identified 429 building conditions in need of emergent action, including leaky roofs, crumbling facades, and inadequate heating, fire safety and other basic systems. Of the 429 district submissions, the DOE and SDA approved only 15 as emergent. Luhm Cert., ¶31 and ¶32.

The SDA reports that it is currently managing 23 emergent projects in the SDA districts. There is no further information, data or reports from the DOE or SDA on the existing need for emergent projects. There is also no information available on the status of the 414 projects submitted in 2016 that were rejected by the DOE and SDA as emergent. Luhm Cert. ¶33 and ¶34.

## **D. CURRENT NEED FOR SCHOOL CONSTRUCTION FUNDING**

The 2016 LRFPA Amendments and the 2019 EFNA show that, despite much progress, there remains a significant unmet need for school facilities projects in SDA districts to remediate serious and

severe building deficiencies and ensure facilities are safe, not overcrowded, and adequate to deliver the CCCS.

Since 2014, the SDA has alerted the Legislature in at least four Biannual Reports – December 2014, June 2018, December 2018 and June 2019 – of the unmet facilities needs in SDA districts and that available funding has already been committed to projects moved to active construction status from the 2011 Plan. Luhm Cert., ¶¶40-50.

In the June 2019 Biannual Report, the SDA specifically informed the Legislature that:

additional funding is needed to fulfill our constitutionally mandated mission of building new schools and improving existing ones in our 31 SDA Districts.

Luhm Cert., Ex. E at TL Ex 106 (emphasis added).

In that report, the SDA indicates it is currently managing only 18 major capital projects: 9 projects under construction; 2 in initial design; 2 approved for construction; 1 in ongoing design; 1 in design-build procurement; 1 in design procurement; and 2 in design by the SDA in-house. Luhm Cert., ¶44, Ex. E at TL Ex 108. The SDA estimates that all 18 capital projects will be completed by 2024. Luhm Cert., ¶45.

In addition to the Biannual Reports, the SDA has testified before the Senate and Assembly Budget Committees on the need for construction funding in 2018 and 2019. In an April 17, 2018 Senate Budget Committee hearing, former SDA Chief Executive Officer

Charles McKenna testified that, although the SDA had \$1.7 billion in remaining bond authorization, all but \$70 million was allocated to specific projects in its capital portfolio. At that time, Mr. McKenna testified that the SDA would exhaust all available funding within four to five years, or by 2022-23. Luhm Cert., ¶46.

In testimony delivered April 10, 2019, former SDA Chief Executive Officer Lizette Delgado Polanco advised the Assembly Budget Committee that SDA officials had visited more than 125 schools in need of improvement, which included schools between 125 and 150 years-old and Newark's 170 years-old Lafayette Elementary School. The SDA CEO explained that the tours "have shown us that the SDA and the State of New Jersey MUST do more to help improve conditions and overcrowding in these Districts." Luhm Cert., Ex. F at TL Ex 118 (emphasis in original).

The SDA CEO further advised legislators that:

These schools should not be schools...they should be museums. We've visited schools where we found windows that didn't open and classrooms that are 80+ degrees. We've visited schools where subjects like art and music are taught beneath stairwells and bleachers due to lack of classroom space. We've visited schools that aren't meeting STEM/Science requirements because they don't have the necessary equipment or space. We've visited schools that aren't meeting PE requirements because they don't have gyms or the gym floors are bowed, bent and broken. New Jersey students can't receive a 21st Century education in 19th Century facilities.

Luhm Cert., Ex. F at TL Ex 119-120; see also, ¶49 (providing URL for pictures of deplorable conditions taken by SDA officials).

In her testimony, the SDA CEO advised legislators that, beyond the 18 major capital projects under active construction, there is "NO additional funding available to commit to new construction" and only \$60 million remaining "for emergent projects that are approved" by the DOE. Luhm Cert., ¶50, Ex. F at TL Ex 122 (emphasis in original).

The 2016 LRFP Amendments and 2019 EFNA document a significant unmet need for major capital projects in SDA districts. Yet, even with the approved 2016 LRFP Amendments and 2019 EFNA, the Commissioner and SDA have not revised the 2011 Plan, as required by EFCFA. As recently as June 2019, the Commissioner has advised legislators, through the EFNA, of the need for funding to construct priority projects. Finally, there is virtually no funding available for emergent projects to address health and safety conditions in district buildings.

#### **E. PLAINTIFFS' DEMANDS**

In 2015, based on information from the DOE and SDA, Plaintiffs became concerned that the available funding would be insufficient to complete the priority projects in the 2011 Plan, the most recent statewide strategic plan prepared by SDA and DOE. Sciarra Cert., ¶4. Since 2015, Plaintiffs' counsel has sent seven letters to the State, through the Office of Attorney General, underscoring 1) the need for SDA to revise the 2011 Plan and, 2) for the Commissioner

and SDA to secure additional funding for priority projects remaining on the 2011 Plan and new projects in a revised plan. Sciarra Cert., Ex. A, D, E, G, H, J, & K. While the Attorney General responded on five separate occasions, Sciarra Cert., Ex. B, C, F, I, & L, the Commissioner and SDA have neither revised the 2011 Plan nor made any effort to seek and secure funding for facilities projects in a revised statewide plan.

In October 2017, the Attorney General informed Plaintiffs that the Commissioner's 2019 EFNA would "serve as a starting point for the next update to the NJSDA capital plan." Sciarra Cert., Ex. F at SC Ex 013. Despite this representation, no update to the 2011 Plan has been made public to date.

Plaintiffs have made extensive efforts since 2015 to obtain the State's voluntary cooperation in revising the 2011 Plan and securing additional construction funding. Those efforts have now proven unsuccessful. Only this Court's intervention can provide relief for Plaintiffs consigned to unsafe and inadequate facilities, in violation of their right to a constitutional education.

## ARGUMENT

### **I. PLAINTIFFS' MOTION FOR RELIEF IN AID OF LITIGANTS' RIGHTS TO COMPEL STATE COMPLIANCE WITH THE ABBOTT SCHOOL FACILITIES MANDATES SHOULD BE GRANTED**

Plaintiffs bring the within Motion for Relief in Aid of Litigants' Rights to compel State compliance with the Court's mandate in Abbott V, 153 N.J. at 524 and Abbott VII, 164 N.J. at 90, to fully fund needed school facilities projects in SDA districts. The record on this Motion mirrors that before this Court in 2005 when Plaintiffs sought relief on a remarkably similar application to enforce the Abbott facilities mandate. Abbott XIV, 185 N.J. at 612-14. Accordingly, Plaintiffs' Motion should be granted.

First, following EFCFA's enactment in 2002 through 2019, the State has funded and remediated a meaningful 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; and see Abbott XIV, 185 N.J. at 613 (recognizing the State "has completed numerous health and safety projects, has constructed several new facilities, and has rehabilitated or added to existing facilities").

Second, despite that progress, the record on the Motion also demonstrates an unmet need for 381 major capital projects in SDA districts, encompassing 200 renovations and additions to existing

buildings, over 100 new schools and over 70 major system upgrades. Further, the Commissioner, in the 2019 EFNA, designated two to three projects in 29 of the SDA districts as priority projects. At least 23 of the projects in the 2019 EFNA were also listed as priority projects in the 2011 Plan but have not advanced to construction due to a lack of funding. See supra at 8-10. Thus, the continuing need for facilities improvements in SDA districts is the exact same condition that warranted the Court's intervention in 2005. Abbott XIV, 185 N.J. at 614 (finding nearly 350 DOE approved projects in SDA districts were awaiting financing and construction management).

Third, beginning in 2014, the SDA has repeatedly alerted the Legislature of the need for additional funding to advance priority projects to construction and completion. The most recent calls were made in the SDA's April 2019 testimony before the Assembly Budget Committee, and in its EFCFA-required June 2019 Biannual Report to legislators. In stark terms, the SDA made clear that "NO additional funding is available to commit to new construction," and that "additional funding is needed to fulfill our constitutionally mandated mission of building schools and improving existing ones in our 31 SDA districts." See supra at 12-14. Thus, the State has taken an important first step of alerting the Legislature of the need for additional funding to construct priority projects in SDA districts. N.J.S.A. 18A:7G-24 (requiring

SDA, in its biannual reports, to inform the Legislature of the "need" to "adjust" bonding authority).

Fourth, the lack of funding will shortly bring implementation of the Abbott facilities mandates and EFCFA's school construction program to a standstill. While the SDA continues to manage 18 projects with available funds, numerous priority projects identified in the 2011 Plan continue to languish and none of the other priority projects identified in the 2019 ENFA can advance to construction status. See supra at 8, 10, 12. And the SDA and DOE are unable to initiate and fund a new round of emergent projects in SDA districts, nearly four years after the last initiative. See supra at 11.

Simply put, without additional funding, the construction of needed priority projects in the SDA districts will grind to a complete halt. This is the very same condition found by this Court in 2005:

And the [State] having announced in July 2005 that only \$1.4 billion of the original \$6 billion appropriation for school facilities projects in [SDA] districts remained and that work on all but fifty-nine school facilities projects had been indefinitely postponed due to insufficient funds, resulting in hundreds of approved projects being placed on hold...."

Abbott XIV, 185 N.J. at 614 (emphasis added).

Finally, while informing the Legislature of the need for additional funding, the SDA has yet to take the pivotal next step of revising the 2011 Plan based on the districts' approved 2016

LRFP Amendments and the 2019 ENFA, as required by EFCFA. N.J.S.A. 18A:7G-5m(3). A revised statewide strategic plan sequencing facilities projects based on their priority ranking and addressing “issues which impact the [SDA’s] ability to complete the projects” and “other appropriate factors,” id., is an essential prerequisite to securing the funding needed to ensure continued implementation of the Abbott mandate for facilities remediation. Abbott V, 153 N.J. at 518 (recognizing the Commissioner must “provid[e] or secur[e]” adequate funding for the Abbott remedial measures).

In sum, the State has reached the very same juncture on compliance with the Abbott facilities mandate as was found by the Court in 2005:

And the Court having acknowledged that the State has made a substantial effort to improve school facilities conditions in [SDA] districts, but 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 [SDA] districts....

Abbott XIV, 185 N.J. at 614 (emphasis added).

In equally stark terms, the record on the within Motion demonstrates that without additional funding for needed projects, State implementation of the Abbott directive for facilities improvement does “not comport” with the “constitutional mandate to provide facilities adequate to ensure a thorough and efficient education.” Abbott V, 153 N.J. at 524. Thus, this Motion must be

granted to remedy the State's default on its obligation to "secure funds to cover the complete cost of remediating identified life-cycle and infrastructure deficiencies in Abbott school buildings as well as the cost of providing the space necessary to house Abbott students adequately..." Id. at 527.

**II. APPROPRIATE RELIEF IS REQUIRED TO ENSURE STATE COMPLIANCE WITH ITS CONSTITUTIONAL AND STATUTORY OBLIGATION TO PROVIDE SAFE AND ADEQUATE FACILITIES IN SDA DISTRICTS**

The record before this Court not only supports granting Plaintiffs' Motion. It also compels this Court's immediate intervention. Given the "constitutional rights at stake," and the prior history of this litigation, there can be no doubt of the Court's authority to provide relief. See Abbott IV, 149 N.J. 145 (ordering parity funding); Abbott v. Burke, 163 N.J. 95 (2000) ("Abbott VI") (compelling compliance with the Abbott V preschool mandates); Abbott v. Burke, 170 N.J. 537 (2002) ("Abbott VIII") (same); Abbott XIV, 185 N.J. 612 and Abbott XVII, 193 N.J. 34 (enforcing Abbott facilities mandates); Abbott v. Burke, 199 N.J. 140 (2009) ("Abbott XX") (upholding the School Funding Reform Act of 2008 and ordering formula funding); Abbott v. Burke, 206 N.J. 332 (2011) ("Abbott XXI") (granting relief for full SFRA funding).

On this Motion, Plaintiffs request an order for appropriate relief to ensure State compliance with the Abbott facilities mandate as follows.

First, within 30 days, and based on the 2019 EFNA, the Commissioner and SDA shall finalize and submit to the Legislature a revised statewide strategic plan, as required by N.J.S.A. 18A:7G-5m(3), sequencing the construction of projects in SDA districts based on their priority rankings and addressing issues impacting on the SDA's ability to complete the projects and other appropriate factors.

As the record demonstrates, the Commissioner has approved the SDA districts' 2016 LRFPA Amendments and the 2019 EFNA, including a determination of two or three priority projects for 29 SDA districts. Compare Abbott XIV, 185 N.J. at 615 (directing prompt submission of overdue LRFPA). Further, the SDA, in its EFCFA-mandated Biannual Reports, has informed legislators of "the progress of the school facilities construction and the need for further appropriations." Id. (directing submission of EFCFA's annual report to the Legislature). Yet, despite these steps, the SDA has failed to revise the 2011 Plan to identify currently needed priority projects and sequence their construction as a basis for securing additional funding from the Legislature to undertake and complete these projects. See supra at 10.

Thus, the relief sought on this Motion is the next pivotal step to that provided Plaintiffs in 2005: having approved amended LRFPA in 2016 and revised and updated the EFNA in 2019, the State must now revise the EFCFA-required statewide strategic plan to

ensure construction of urgently projects will not be halted. See Abbott XIV, 185 N.J. at 615 (ordering submission of annual report and overdue LRFPs).

Second, upon completion of the revised statewide strategic plan, Plaintiffs specifically request an order directing the Commissioner and SDA to promptly seek and secure the school construction funding necessary to undertake and complete the projects in the revised plan. As the Court has made clear in this litigation, adequate funding for the Abbott remedies, including remediation of school facilities deficiencies, is "the measure of the State's constitutional obligation to provide a thorough and efficient education[.]" Abbott V, 153 N.J. at 519 (anticipating Legislature's responsiveness to "constitutional call" once call is made by Commissioner).

Plaintiffs are confident that, if provided with a revised statewide strategic plan and a request for funding, the legislative branch will promptly answer the Commissioner's "constitutional call" by providing the requisite construction funding for that plan, as it did following the Court's intervention in 2005 and 2007. More importantly, the specific relief, as set forth in Plaintiffs' proposed order, is necessary to prevent a grave constitutional default; maintain the momentum of improving unsafe, overcrowded and inadequate facilities in SDA districts; and ensure the State's continuing compliance with the Abbott facilities

mandate. Just as this Court has rejected a “wait and see” approach in the past when confronted with “continuing profound constitutional deprivation that has penalized generations of children,” Abbott IV, 149 N.J. at 201-202, it must do so again.

**CONCLUSION**

For the reasons stated above, Plaintiffs respectfully request that the Court grant the Motion in Aid of Litigants’ Rights and enter the requested remedial relief, as set forth in Plaintiffs’ proposed order, and provide such other relief as may be appropriate.

Respectfully submitted,

Education Law Center

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By: David G. Sciarra, Esquire

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