RAYMOND ARTHUR ABBOTT, et al., Plaintiffs, v. FRED G. BURKE, et al., Defendants.	SUPREME COURT OF NEW JERSEY DOCKET NO. 42,170 CIVIL ACTION

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR REVIEW OF THE CONSTITUTIONALITY OF THE SCHOOL FUNDING REFORM ACT OF 2008

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATE STATUTES

STATE REGULATIONS

PRELIMINARY STATEMENT

Over the past thirty years, this Court has established requirements to ensure that children in poorer urban districts receive the thorough and efficient education to which they are entitled under the New Jersey Constitution. More recently, the Court has directed implementation of specific remedies – the Abbott remedies – to guarantee that they receive adequate funding for regular education, as well as supplemental programs to overcome their extreme disadvantages. Equally important, the Court has established substantive standards and a remedial framework to guide legislative and executive response to the decrees.

The Court has repeatedly called on the other branches to properly address these constitutional requirements. The Court also has not hesitated, as the last resort guarantor of constitutional rights, to reject approaches that do not fully comport with these mandates.

On this motion, the State, for the fourth time in the Abbott case, has claimed that the current response in the School Funding Reform Act of 2008 ("SFRA" or "Act") satisfies the Court's mandates and should completely displace the carefully and painstakingly crafted Abbott remedies: parity funding for regular education, a regimen of mandated and demonstrably needed supplemental programs, and other required substantive

educational standards and procedural rights. Yet, as the record reflects, the State bases its claims for SFRA on sweeping, unsupported assertions lacking any solid evidentiary foundation, and on formulaic approaches predicated on assumptions that are at odds with the realities faced by the Abbott children.

When viewed in proper factual and legal context, SFRA suffers from the same, if not greater, constitutional flaws as the other funding regimens previously rejected by the Court in Abbott v. Burke, 119 N.J. 287 (1990)("Abbott II"); Abbott v. Burke, 136 N.J. 444 (1993)("Abbott III"); and Abbott v. Burke, 149 N.J. 145 (1997)("Abbott IV"). For the State to now propose, on the basis of this fundamentally flawed Act, dismantling in one fell swoop research-proven remedies under implementation for the past ten years – just when at long last real benefits are accruing to the Abbott children – represents a striking repudiation of this Court's decrees. For the State to do so without making any evidentiary showing, let alone a convincing one, that the Court's prior mandates for remedial relief will be met under SFRA, is an invitation to accord the State blind deference and ignore the Court's historic role in protecting the constitutional rights of our poorest and most vulnerable public school children.

The Abbott children would be the first to welcome an appropriate, constitutional response from the State, rather than

again seeking judicial intervention to protect their fundamental rights. Sadly, SFRA is not that response. Stripped of its veneer – and examined through the lens of this Court's prior decisions – SFRA will: (1) eliminate the Abbott designation in the face of persistent educational inadequacy and poverty identified in Abbott II; (2) reinstate the funding disparity between Abbott and the most successful school districts eradicated in Abbott IV; (3) wipe out the supplemental programs found essential based on the "solid evidentiary record" established in Abbott v. Burke, 153 N.J. 480, 489 (1998)("Abbott V"); (4) dramatically raise the districts' local fair share without any study or assessment demonstrating that municipal overburden is no longer a problem, as found in Abbott II; and (5) cut-off the substantive and procedural rights of districts to obtain supplemental funding by demonstrating particularized needs under Abbott V. Even the nationally-recognized Abbott preschool program, which the State concedes is working, would be untethered from the essential Court-mandates in Abbott V, Abbott v. Burke, 163 N.J. 95 (2000)("Abbott VI") and Abbott v. Burke, 170 N.J. 537 (2002)("Abbott VIII"), that have powered its success.

To mask these glaring constitutional defects, the State has introduced a novel form of funding – "adjustment aid" – outside of the SFRA formula. Without this aid, the stark funding cuts

under the Act would be transparent and the disparity with the most successful districts self-evident. Yet this aid, which attempts to shore up SFRA, is not assured and is utterly at the discretion of the Executive and Legislature. It also quickly fades away, ensuring budgetary cutbacks in 2009-10 and beyond that will devastate educational programs and services made available under the Abbott remedies.

On this record, this Court should stand firm. The State cannot be allowed to simply disavow its solemn and positive commitment to this Court and Plaintiffs to "see the [Abbott] reforms through." Abbott V, 153 N.J. at 528. While no doubt "the task" of Abbott implementation "has been rough," and "progress has been slower than. . .hoped," the indisputable "momentum for reform must not [now be allowed to] slow," Abbott VI, 163 N.J. at 101-02, especially where the State only offers old, formulaic and constitutionally-defective approaches in a new guise.

The "lessons of the history" of the generations-long effort to ensure a thorough and efficient education to the Abbott children are now well known. Abbott V, 153 N.J. at 527. Once again, Plaintiffs have no alternative but to call upon the Court to stay the course so that they are not "left out or left behind" in the fulfillment of the Constitution's command, and

their entitlements and fundamental interests “remain prominent, paramount, and fully protected.” Id. at 528.

PROCEDURAL HISTORY

The State's motion cannot be properly assessed in a procedural vacuum, but must be viewed against the backdrop of the Abbott remedies, which the State claims should now be displaced by SFRA. Beyond the Abbott designation, which demarcates the poorer urban districts entitled to constitutional relief, the "Abbott remedies" also include standards-based regular education with funding at parity with the State's most successful districts; and required, and necessary supplemental programs, including preschool and whole school reform ("WSR"), with procedural and substantive rights to ensure that Abbott districts can demonstrate the need for additional supplemental funding for programs, services and positions for the Abbott children. Abbott IV, 149 N.J. at 189-90; Abbott V, 153 N.J. at 527.

Since 1998-99, implementation of the Abbott remedies has been underway in twenty-eight poorer urban districts, as identified by the Court and designated by the Commissioner of Education ("Commissioner"), State Board of Education ("SBOE") and Legislature. Abbott v. Burke, 119 N.J. 287, 386 (1990)("Abbott II"); N.J.A.C. 6A:10A-1.2(designation of "Abbott School Districts" by Commissioner in Abbott implementing regulations); N.J.S.A. 18A:7D-1(designation of "special needs districts" in Quality Education Act ("QEA")(repealed 1996));

N.J.S.A. 18A:7F-3(designation of "Abbott districts" in Comprehensive Educational Improvement and Financing Act of 1996 ("CEIFA")(repealed 2008)). In 1999, the Legislature added Plainfield and Neptune, L. 1999, c. 110, and in 2003, the Commissioner and SBOE determined Salem City met the Abbott criteria. See Bacon v. NJDOE, 398 N.J. Super. 600, 608 (App. Div. 2008)(describing Salem City determination); L. 2004, c. 61.

Abbott implementation in the thirty-one Abbott districts has proceeded under Court-mandated procedural and substantive regulations adopted by the Commissioner. Abbott V, 153 N.J. at 526(directing Commissioner to "codify" the Abbott remedies); see N.J.A.C. 6A:10A-1.1 to –8.8(designating Abbott districts and directing implementation of the Abbott preschool, parity and supplemental program remedies); N.J.A.C. 6A:10:1-1 to –3.8(establishing budgetary procedures for districts to seek supplemental funding).

In 2000 and 2002, the Court clarified the mandate for well-planned, high quality preschool in Abbott districts. Abbott VI, 163 N.J. at 95; Abbott VIII, 170 N.J. at 537. In 2000, the Court also reaffirmed the authority of the Legislature, SBOE and Commissioner to classify additional Abbott districts, and to de-classify any district that "no longer possesses the requisite characteristics for Abbott district status" identified in Abbott II, 119 N.J. at 338-45. Abbott v. Burke, 164 N.J. 84, 90

(2000)("Abbott VII"); see also N.J.S.A. 18A:7G-4; L. 2000, c. 72(directing Commissioner to report on Abbott designation).

In 2003, the Court modified and reaffirmed the Abbott V remedy for K-12 supplemental programs and reforms, directing implementation of the parties' agreements reached in mediation. Abbott v. Burke, 177 N.J. 578, 586-87 (2003)("Abbott X").

In 2002, 2003, and 2006, the Court granted the State's one-year requests to restrict districts' budgets and access to supplemental funding, while maintaining parity. Abbott v. Burke, 172 N.J. 294 (2002)("Abbott IX"); Abbott v. Burke, 177 N.J. 596 (2003)("Abbott XI"); Abbott v. Burke, 187 N.J. 191 (2006)("Abbott XV"). In each case, the Court conditioned relief on the requirement that Abbott districts be afforded the opportunity to seek additional funding to maintain prior approved budgetary expenditures, and the right to appeal the State's funding decisions. Abbott IX, 172 N.J. at 297; Abbott XI, 177 N.J. at 598-99; Abbott XV, 187 N.J. at 195-96.

On January 7, 2008, the Legislature, by the narrowest of margins, passed the School Funding Reform Act of 2008 ("SFRA" or "Act") and on January 13th, Governor Jon Corzine signed the measure. L. 2007, c. 260. On March 17, 2007, the State filed a "Motion for Review of the Constitutionality of the SFRA," seeking a determination that (1) the Act is constitutional for "all" New Jersey public school children; and (2) the Abbott

remedies are "no longer necessary." Db54-81.[1] Prior to the disposition of this motion, the State has notified Abbott districts that they will receive funding in 2008-09 under SFRA, even though the Court has not vacated the Abbott remedies. Thus, the State has taken the unusual procedural position that the State's statutory response supersedes constitutional directives that remain in full force and effect.

The Abbott Plaintiffs – the certified class of children attending preschools and schools in Abbott districts – file this brief in opposition to the State's Motion.

[1] The State does not seek relief with respect to the Abbott school facilities remedy. Db6, n. 2.

STATEMENT OF FACTS

In the following section, Plaintiffs first discuss the Abbott remedies and their implementation since 1998, including the progress made toward ensuring Plaintiffs a constitutional education. Plaintiffs then discuss the State's request to discontinue further implementation of the Abbott remedies, and the impact on Plaintiffs' education if the Court were to grant such relief.

A. The Abbott Remedies

1. The Criteria for Abbott Designation

The criteria for Abbott district designation were identified in Abbott II, 119 N.J. at 338-43, 346-47, and govern determinations by the Legislature, SBOE and Commissioner regarding the inclusion or removal of specific districts from the Abbott class. Id. at 385-86; Abbott VII, 164 N.J. at 88-90; Bacon v. NJDOE, 398 N.J. Super. at 608-11(reviewing application of Abbott criteria by Commissioner and SBOE to poor rural districts); see also Certification of Dr. Margaret E. Goertz ("Goertz Cert."), ¶¶13-15 (citing Commissioner William L. Librera, "Designation of Abbott Districts: Criteria and Process" (June 15, 2005)("Librera Report"), which can be available at <<http://www.state.nj.us/education/abbotts/regs/criteria2.pdf (last visited April 28, 2008)>>(reporting to Legislature on the

Abbott criteria, and making recommendations for adding and removing districts)).

Poorer urban districts are expressly defined as "urban areas with the highest poverty indicators and the lowest socio-economic status," coupled with a "significantly inferior" and "inadequate" level of education. Abbott II, 119 N.J. at 333, 357-75. The specific criteria include: (1) classification as "urban" by the Department of Community Affairs; (2) placement in the Department of Education's ("DOE") lowest socio-economic ranking – district factor groups ("DFG") A and B – based on student demographics, community wealth, and other factors; and (3) severe educational deficits as measured by performance on state and other assessments, drop out rates, and indicators. Librera Report, at 2-5; Abbott II, 119 N.J. at 341-43, 357-68.

The current evidence related to these socio-economic and educational adequacy indicators demonstrates that "almost all Abbott districts continue to possess the unique characteristics of 'poorer urban' districts established in Abbott II and reiterated in the Librera Report." Goertz Cert., ¶28.

First, all Abbott districts are designated urban by the State, and twenty-nine continue to be ranked in DFG A&B, DOE's lowest socioeconomic grouping. Goertz Cert., ¶18(a)-(b). All districts have concentrations of student poverty over 40%, with twenty-four districts over 60%, and seven districts between 40%

and 60%. The districts also have extremely high rates of student mobility, an important indicator of student disadvantage. Goertz Cert., ¶18(c)-(d).

Second, virtually all Abbott districts remain among the State's poorest, with low fiscal and taxing capacity, as evidenced by the DFG A&B rankings and below average equalized property value per capita. Goertz Cert., ¶18(e). Twenty-nine Abbott districts have total tax rates above the state average, with eighteen of those above 110%, fifteen above 120%, and nine above 130%. Goertz Cert., ¶18(e)-(f), Ex. C, Table 1 and Ex. G; Certification of Melvin L. Wyns ("Wyns Cert."), ¶¶17, 40.

Third, the level of education in Abbott districts, despite gains in recent years, remains seriously inadequate based on state assessments and other measures. Goertz Cert., ¶22. The data show Abbott students on average performing well below the state average and even further below the I&J average on nearly every State proficiency assessment and the SAT exam. The data further show Abbott high school graduation rates well below the state and I&J averages, and over half of all Abbott schools have been labeled "schools in need of improvement" under the federal No Child Left Behind Act as not making adequate yearly progress. Goertz Cert., ¶¶19-27(detailing Abbott educational deficits and

noting that the graduation rate does not capture the drop-off rate, which is no doubt much higher).[2]

As the current data show, the "extreme disadvantages and special needs that gave rise to the Abbott class in 1990 continue to persist." Goertz Cert., ¶28.

2. The Abbott Parity Remedy

In Abbott IV, the Court ordered parity to provide sufficient funding to enable Plaintiffs to achieve the Core Curriculum Content Standards ("CCCS"), as measured by State assessments. Abbott IV, 149 N.J. at 189-92. The parity remedy, established in Abbott II, directs the State to assure funding for regular education equivalent to the average per pupil expenditure in the DFG I&J districts. Id. at 191-92(resorting to the I&J average as "an objective and reasonable indicator" of the resources needed to achieve the CCCS).

Since 1997-98, parity has been maintained in Abbott districts. Goertz Cert., ¶41; Wyns Cert., ¶12; see also Abbott V, 153 N.J at 498(directing that parity be continued in school-

[2] Despite these deficiencies, the districts have made solid gains on the State's fourth grade assessment, which "may reflect" the initial Abbott focus on early grade literacy and elementary reform. Goertz Cert., ¶¶20(a)-(b), 21; Certification of Dr. Clive Belfield ("Belfield Cert."), ¶¶9, 33(noting the State's failure to evaluate the K-12 remedial reforms). Districts will also launch the Abbott Secondary Education Initiative ("SEI") in 2008-09, which Plaintiffs' "anticipate" will have "a positive impact" on secondary student performance. Goertz Cert., ¶21.

level budgets); Abbott IX, 172 N.J. at 295; Abbott XI, 177 N.J. at 596-99; and Abbott XV, 187 N.J. at 193(maintaining parity while imposing annual budgetary limits). Each year, the State projects the I&J average expenditure, or parity amount, and then provides additional state aid above the CEIFA formula to ensure parity.[3] Goertz Cert., ¶41; Wyns Cert., ¶12.

In the current (2007-08) school year, the I&J average is $12,872 per pupil, and Abbott districts have a budget, approved by DOE, of $3.45 billion to ensure parity. Goertz Cert., ¶44; Wyns Cert., ¶13. Current Abbott regulations direct Abbott districts to utilize parity funding for a data-driven, CCCS-based instructional program in every school, including "intensive" literacy in preschool to grade three and in grades four to twelve; two-year plans for instructional priorities; implementation of DOE-approved WSR models in elementary schools and SEI in secondary schools; and support for schools making "insufficient academic progress." N.J.A.C. 6A:10A-3.1 to –4.4; N.J.A.C. 6A:10-2.6(b)(giving "highest" priority to CCCS-based instructional programs in district budgets).

[3] In Abbott IV, the Court rejected the State's attempt to replace parity with the regular education cost in CEIFA for two reasons: the cost was derived from a DOE model district unlike actual Abbott districts, and the lack of evidence that I&J district spending over the CEIFA cost was inefficient or unnecessary. Abbott IV, 149 N.J. at 191-92.

3. Abbott K-12 Supplemental Programs Remedy

In Abbott V, the Court directed implementation of elementary whole school reform (WSR) and other supplemental programs to address Plaintiffs' extra educational and educationally related needs. Abbott V, 153 N.J. at 489, 527-528; Certification of Dr. Clive Belfield ("Belfield Cert."), ¶14.

The required K-12 supplemental programs include: intensive early literacy, class size limits, technology, social and health services, security and violence prevention, parent involvement, drop-out prevention, school to work and college transition, enriched nutrition, school based management, and accountability measures. Abbott V, 153 N.J. at 508-19, 527. In 2003, the parties agreed to modify elementary WSR to allow for more options, and to continue implementation of the K-12 supplemental programs, as set forth in a chart of supplemental programs ("CSP"). Abbott X, 177 N.J. at 587(requiring the Abbott regulations "guide school and district assessment, planning and implementation of needs-driven supplemental programs" on the CSP). The Commissioner also agreed to develop a reform program for Abbott secondary schools, which is now codified in the Abbott regulations. Id. at 586-87; N.J.A.C. 6A:10A-3.2; Belfield Cert., ¶17.

Since 1999, Abbott districts have been implementing the K-12 supplemental programs under Court directives and the Abbott

regulations. The current rules require schools and districts to prepare two-year plans and annual budgets for needs-based program implementation, N.J.A.C. 6A:10-2.5(f)-(g), App. A; implement elementary WSR, N.J.A.C. 6A:10-2.5(e)11, 10A-4.3(d); and implement SEI, N.J.A.C. 6A:10A-3.2. Belfield Cert., ¶¶17-18.

In 2007-08, the DOE approved $861 million in budgetary expenditures to support the K-12 supplemental programs, of which $691 million is needs-based supplemental funding.[4] Belfield Cert., ¶21, Ex. B, 2007-08 K-12 Supplemental Funding. Consistent with Abbott V and current regulations, supplemental funding is also available to support regular and special education programs, and to maintain prior approved expenditures in Abbott budgets. Abbott V, 153 N.J. at 518, 526; N.J.A.C. 6A:10-2.8.

4. The Abbott Preschool Remedy

Abbott V also directed implementation of "well-planned, high quality preschool" for all three- and four-year olds residing in Abbott districts. Abbott V, 153 N.J. at 503-08. The preschool remedy was based on strong "empirical evidence" that

[4] This Court, in Abbott IV found the CEIFA categorical aid for supplemental programs – Demonstrably Effective Program Aid ("DEPA") - deficient because it was not based on any study of the actual needs of Abbott children. Abbott IV, 145 N.J. at 185. In Abbott V, this Court directed the continuation of DEPA, augmented by needs-based supplemental funding to ensure program implementation. Abbott V, 153 N.J. at 498; Wyns Cert., ¶22.

high quality preschool can close early learning gaps and enable the Abbott children to succeed in school. Id. at 504-07.

In Abbott VI and Abbott VIII, the Court reaffirmed that only high quality preschool would prepare Plaintiffs for academic success. These decisions clarified quality standards and funding procedures, and spelled out the following required program components: certified teachers and teaching assistants; a maximum class size of fifteen; developmentally appropriate curriculum; adequate facilities; and transportation, and other related services and supports, as needed. Abbott VI, 163 N.J. at 105-18; Abbott VIII, 170 N.J. at 547-61.

These decisions amplified the State's duty to provide adequate preschool funding, making clear that funding must be based on "a thorough assessment of actual needs" and not on "arbitrary, predetermined per student amounts." Abbott VIII, 170 N.J. at 558-59; Abbott VI, 163 N.J. at 119(noting need for assessment and evaluation of preschool programs).[5]

The decisions also clarified the eligibility of all three- and four-year olds for preschool, requiring districts to do concerted outreach and recruitment, with DOE support, including

[5] This Court, in Abbott IV, found the CEIFA preschool categorical aid – Early Childhood Program Aid ("ECPA") – defective because it too was not based on any study of the actual needs of Abbott children. Abbott IV, 149 N.J. at 185. This Court directed ECPA continue in district budgets, augmented by needs-based supplemental funding. Abbott V, 153 N.J. at 498, 507-08; Wyns Cert., ¶¶22-23.

contingency facilities. Abbott VI, 163 N.J. at 118-19; Abbott VIII, 170 N.J. at 549-52, 562.

The Commissioner has codified these directives in the Abbott regulations, including the quality standards and eligibility mandates. N.J.A.C. 6A:10A-2.1 to –2.4. The regulations also establish procedures for needs-based funding, requiring districts to annually assess program implementation, develop a two-year plan, and prepare an annual budget. N.J.A.C. 6A:10A-2.2(a). The DOE-approved preschool budgets vary by district based on particularized needs. In 2006-07, the range of expenditures across private community providers – $10,149 to $15,341 per pupil – and across public school programs – from $7,532 to $13,363 – was significant. Belfield Cert., ¶28.

In 2008-09, DOE afforded districts the option of submitting a presumptive preschool budget based on a fixed 2.89% increase over the 2007-08 budget. Id. at ¶30. One-third of districts elected to submit the traditional line item, needs-based budget, as did 12% of community preschool providers. The DOE approved $530 million in Abbott preschool expenditures for 2008-09. Id. at ¶31. The 2008-09 process demonstrated that many districts and providers needed supplemental funding beyond the presumptive formula. Again, the budgets show a significant range of per-pupil costs across districts and providers. Id. at ¶¶30, 32.

The Abbott preschool remedy is nationally recognized, and highly-regarded. Id. at ¶8. DOE evaluations show that the Court quality standards, coupled with needs-based funding, have yielded significant positive gains for Abbott children, particularly in early language, literacy, and math. Id. at ¶8, 28-29, 31. Data show that since 2004-05, enrollment has leveled off at approximately 73% of the eligible children, with nine districts below this level. Id. at ¶56.

5. Abbott Municipal Overburden

The Abbott "municipal overburden" ruling has been in place since 1990 to assure adequate funding for regular education and other necessary budgetary expenditures. Goertz Cert., ¶62; Wyns Cert., ¶17. In Abbott II, the Court found that the combination of low property wealth and low income, high demands on municipal services, and overall tax rates "well above average," limits the ability of Abbott districts to increase property tax revenue in the education budget. Abbott II, 119 N.J. at 355.

Under the municipal overburden ruling, Abbott districts have been mandated by DOE, at a minimum, to raise the prior year local revenue. Wyns Cert., ¶17. For the last two years, the districts also have been mandated to increase their local revenue or "levy" if the total equalized tax rate was 110% (2006-07) or 120% (2007-08) of the state average. L. 2006, c. 45; L. 2007, c. 111; Certification of Katherine Attwood

("Attwood Cert."), ¶¶16-17. If below these levels, districts were directed to raise the local levy, subject to a $125 per household cap. Wyns Cert., ¶17. In 2007-08, fifteen districts under the 120% threshold increased their levy, collectively adding $15.5 million to their budgets. Wyns Cert., ¶17; Attwood Cert., ¶17.

Based on the limits established under Abbott municipal overburden, districts were mandated to raise $635.2 million in local revenue in 2007-08 for their education budget. Wyns Cert., Ex. E, Comparison of Abbott Tax Levy to LFS; Goertz Cert., ¶65(a).

B. The State's Motion to Declare the Abbott Remedies Unnecessary

The State asserts that the Abbott remedies are "no longer necessary." Db66. In support, the Commissioner presents provisions of SFRA related to the "base cost" of regular education, N.J.S.A. 18A:7F-49-50; the "at-risk" cost for concentrated student poverty, N.J.S.A. 18A:7F-51(b); and preschool education aid, N.J.S.A. 18A:7F-54. In addition, the Commissioner presents some alleged "changes" in Abbott districts that justify discontinuing the Abbott remedies. Db75-78. The Commissioner's evidence and the record on the State's requested relief is set forth below.

1. Ending the Abbott Designation

SFRA repeals the Abbott designation in CEIFA and makes no provision for continuing the Abbott remedies in the districts currently classified as poorer urban. See N.J.S.A. 18A:7F-44(p). The Commissioner offers no evidence that the Court-prescribed criteria for Abbott designation were considered in SFRA or at any time in the Act's development. The entire available record of the Act contains no study, data, or analysis of the socio-economic conditions and educational factors that would support a Legislative determination to de-designate or remove current districts from the Abbott class. Goertz Cert., ¶17.

There also is no evidence that the Commissioner or SBOE performed an analysis of the Abbott criteria, including an educational adequacy study, or that the Commissioner or SBOE made a determination that one or more of the current districts no longer possess the characteristics for Abbott status and, therefore, no longer necessitate the Abbott remedies. Goertz Cert., ¶17; Cf. N.J.A.C. 6A:10A-1.1-2(designating Abbott districts in current Abbott regulation); Bacon v. NJDOE, 398 N.J. Super. at 618(directing needs assessment of poor rural districts found to have conditions similar to Abbott districts, despite enactment of SFRA).

The Commissioner presents facts related to low school tax rates, "high" spending levels, and a rise in poor and minority

students in non-Abbott districts to show changes in the Abbott districts. Db75-78; Attwood Cert., ¶¶12-15, Ex. F, G and H; Certification of Lucille Davy ("Davy Cert."), ¶¶49-50. These facts are, however, unrelated to the criteria for Abbott designation. Wyns Cert., ¶¶40, 55-56; see also Goertz Cert., ¶¶14-15(setting forth criteria). Total municipal tax rates, not school tax rates, are the "appropriate indicator" of the districts' ability to provide more revenue for the education budget. Wyns Cert., at ¶40. The State's method of comparing Abbott spending with I&J and other districts does not account for revenue differences generated by "stark variations" of concentrated student poverty and other student needs among school districts. Wyns Cert., ¶55(describing the State's method as "highly inappropriate and misleading").[6] Finally, the Abbott districts remain intensely poor, even if rates of poverty and racial diversity have increased elsewhere. Goertz Cert., ¶18(c), Ex. C, Table 1.

2. Replacing Parity

The Commissioner proposes replacing the parity remedy with the "base" per pupil amount and "base cost" in SFRA. N.J.S.A. 18A:17F-49-50; Davy Cert., ¶¶3, 24. The base amount is derived

[6] Plaintiffs' evidence shows that, when adjusted for student need, Abbott districts are not the highest spending in the state, but rather are spending $901 per pupil less than I&J districts. Wyns Cert., ¶56.

from a hypothetical school district model developed by DOE ("SFRA model"), the same method DOE used to develop the CEIFA T&E amount. Wyns Cert., ¶10, Goertz Cert., ¶¶30-32, 36(discussing district, school, and student characteristics of SFRA model); Davy Cert., ¶24, Ex. G, "A Formula for Success: All Children, All Communities" ("2007 Cost Report"), at 10 and App. E, Tables 1 and 2. The model contains varying levels of inputs – teachers, staff, and other resources – with assigned costs. Davy Cert. Ex. G, App. E, Tables 1 and 2.

From the SFRA model, the DOE determined a cost for regular education - the base amount – of $9,649 per elementary student. N.J.S.A. 18A:17F-49; Goertz Cert., ¶33; Wyns Cert., ¶14. Using weights, i.e. a percent of the base amount, for middle and high students, the average cost for regular education is $10,281 per pupil. Goertz Cert., ¶33; Wyns Cert., ¶14.

There is no evidence that the SFRA model and base amount were informed by any study or analysis of Abbott districts, of the parity remedy, or of the actual needs of Abbott children to achieve the CCCS. Goertz Cert., ¶¶56(b)-(c), 61. In addition, Abbott districts have enrollment levels, grade configurations, school types, and numbers and sizes of schools significantly different from the SFRA model. Goertz Cert. at ¶¶31-32, Ex. E, Tables 1-2(providing details of how the districts compare to the SFRA model, and the likely impact on resources and costs).

The SFRA base amount of $10,281 per pupil is 20% below the parity amount of $12,872 per pupil. Wyns Cert., ¶13; Goertz Cert., ¶43. The lower SFRA base amount results in "a significant reduction in resources to provide the CCCS to Abbott students," approximately $1 billion in current 2007-08 expenditures. Goertz Cert., ¶43, Ex. F, Table 3. SFRA also immediately causes a parity gap of $1.25 billion in 2008-09. Goertz Cert., ¶50, Ex. F, Table 5. Under the Act, Plaintiffs will have 34% or $4,311 per pupil less in resources than students in I&J districts to achieve CCCS in 2008-09, and this gap will "unquestionably widen" in future years. Goertz Cert., at ¶¶49-50, Ex. F, Table 5.

Moreover, the Commissioner presents no evidence that the significant amount of current expenditures for regular education above the SFRA base cost are excessive, represent inefficiencies or waste, or are otherwise not needed for Plaintiffs to achieve the CCCS. Wyns Cert., ¶¶37, 39.

The Commissioner provides information on a DOE process in early 2003 in which outside stakeholders provided input on earlier versions of the model district, a process the State characterizes as "Professional Judgment Panel" or "PJP." Davy Cert., ¶¶8-10. The available documentation, along with expert reviews after the release of the DOE 2006 Cost Report, reveal serious limitations and flaws with the 2003 process, including:

the degree of control exercised by DOE and the limited opportunity for outside input; the paucity of school level and Abbott district participation; the absence of guidance on the Abbott remedies; and the age of the work, given changes in education standards and requirements since 2003. Goertz Cert., ¶¶56, 61(finding that the "limited" stakeholder input in 2003, and the expert reviews almost four years later, do not create "any discernible connection" between the SFRA model and the resources needed by Abbott students to achieve the CCCS).[7]

3. Discontinuing K-12 Supplemental Programs

The Commissioner proposes ending implementation of the Abbott K-12 supplemental programs and reforms, to be replaced by the "at-risk" cost in SFRA. Davy Cert., ¶¶24, 29(suggesting Abbott districts could still "choose to continue" "previously mandated" programs under SFRA); Attwood Cert, ¶25; N.J.S.A. 18A:7F-51(b). The SFRA at-risk cost is derived from the same model district used to generate the base amount. The DOE added resources to the model consisting of staff, services and other

[7] The Commissioner also asserts that the DOE's 2003 models were later "validated" by two of the experts using the "Evidence Based" method. Davy Cert., ¶20. Yet these experts, in separate reports excluded from the State's moving papers, make clear they only compared the models with EB studies from other states, and did not perform an EB study in New Jersey. Goertz Cert., ¶¶57-58; Report of Lawrence Picus, at 12, available at <<http://www.nj.gov/education/sff/reports/picus.pdf (last visited April 28, 2008)>> (stating that without conducting an EB study, "it is impossible to know" what the results would be "and how they would compare" to the DOE models).

programs in addition to those in the "base" for regular education, and assigned unit costs. Davy Cert., ¶26, 30. The DOE then calculated a student weight to represent the cost of the at-risk resources. Davy Cert., ¶32, Ex. G, at 12-13, App. E, Table 4 and 4(a).

The SFRA at-risk weights are on a sliding scale, with a low of 0.47 for districts with 20% or less concentrated student poverty, to 0.57 for districts with poverty rates at 60% or greater. N.J.S.A. 18A:17F-51(b); Davy Cert., Ex. G, at 12-13; Belfield Cert., ¶39(b)(explaining that twenty-four Abbott districts have poverty concentrations over 60%). Using these weights, SFRA calculates an at-risk cost for each district. Attwood Cert., ¶25, Ex. M(giving at-risk cost for Abbott districts).

SFRA does not provide categorical aid to support these at-risk costs. Instead, the at-risk costs are combined with other costs in a district "adequacy budget" – which is then "wealth equalized" to generate a single amount of state "equalization" aid. N.J.S.A. 18A:17F-53; Wyns Cert., ¶19. Equalization aid is not differentiated by program type, and there is no requirement that it be used to address the needs of at-risk students. Wyns Cert., ¶19; Belfield Cert., ¶¶34-36(concluding it is "not possible to determine the level of funding Abbott districts will receive for concentrated student poverty"). In addition, SFRA

does not require that equalization aid be used to support the supplemental programs established in Abbott V, or any specific programs at all. Belfield Cert., ¶36; Davy Cert.,¶29(conceding "resources are flexible" and acknowledging districts can "choose" whether or not to continue "previously mandated" supplemental programs).

The Commissioner presents no evidence that SFRA's at-risk cost or weights are based upon study or research of the actual needs of the Abbott children for educational or educationally related programs, and no data, research or other evidence derived from ongoing or current implementation of K-12 supplemental programs and reforms since 1999. Belfield Cert. at ¶45. There is also no study, research or other evidence that the specific supplemental programs and reforms currently in use and required by Abbott V are no longer needed to address concentrated student poverty in Abbott schools.[8] Belfield Cert., at ¶46.

In addition, the SFRA at-risk model does not account for several required Abbott supplemental programs, and does not

[8] The Abbott V supplemental programs, reaffirmed in Abbott X, 177 N.J. at 587, 590-95, arose from research-based proposals, and were subjected to expert review and cross-examination in an evidentiary hearing. Abbott V, 153 N.J. at 494-497(setting forth components of the "most solid, research-proven effective" WSR model); id. at 515-516(citing "research" supporting alternative education, school-to-work, and college transition programs); cf. id. at 513-14(rejecting Commissioner's proposal for a fixed ratio of security guards as lacking any link to "actual needs").

consider costs related to elementary WSR or SEI. Belfield Cert, ¶¶41-42. For those programs that were considered in the SFRA at-risk model – such as health and social services and after school and alternative education – the DOE specified fixed staff, inputs, and other costs at assumed ratios, levels and amounts, without any data, study or other research of Abbott districts to validate those assumptions. Belfield Cert., ¶¶43-44; Davy Cert., Ex. G, App. E, Table 4 and 4(a); Abbott X, 177 N.J. at 590(adopting the Chart of Supplemental Programs and directing implementation based on particularized needs, even where a "baseline" resource level is specified).[9]

4. Vacating the Abbott Preschool Mandates

The Commissioner acknowledges the success of the Abbott preschool remedy, Davy Cert., ¶55, but presents no evidence that quality, enrollment and other standards, and need-based funding, established in this Court's preschool rulings, will continue under SFRA. Belfield Cert., ¶59(e).

SFRA provides Abbott districts with categorical preschool aid. N.J.S.A. 18A:7F-54(c)(4). For 2008-09, districts will

[9] The State asserts that the model used to develop the SFRA at-risk cost is comparable to the illustrative budget presented by the Commissioner on remand in Abbott V. Davy Cert., ¶29, Ex. H. However, Judge King underscored the Commissioner's representation that the State would not impose the illustrative budget on any Abbott school, and that supplemental funding would be sought if additional resources were needed. Abbott V, 153 N.J. at 565-66.

receive the aid based on already approved needs-based budgets. Belfield Cert., ¶51. Beginning in 2009-10, SFRA eliminates needs-based budgeting, and provides preschool aid based on fixed per pupil amounts. N.J.S.A. 18A:7F-54(c)(4). The formula amounts are derived from average preschool expenditures, by program setting: $11,506 for district pupils; $12,934 for pupils in community providers; and $7,146 for Head Start pupils. N.J.S.A. 18A:7F-54(c)(4), -(d). SFRA does not account for the range of DOE-approved, needs-based expenditures, nor provides a procedure for districts to seek supplemental funding above the formulaic amounts. Belfield Cert., ¶54.

SFRA anticipates that the Commissioner will adopt "preschool quality standards," N.J.S.A. 18A:7F-54(b), (f), (g); but contains no reference to the detailed Court-mandated program standards. Belfield Cert., ¶55. The Act requires districts to prepare five year plans – instead of the current two-year plan – and allows districts to adjust the enrollment of "eligible pupils" based on "actual implementation experience," N.J.S.A. 18A:7F-54(b), not the "universe" of eligible children. Belfield Cert., ¶57. SFRA also permits districts to reallocate preschool aid to K-12 programs. N.J.S.A. 18A:7F-54(f); Belfield Cert., ¶58.

5. Vacating Municipal Overburden

The Commissioner proposes vacating the Abbott municipal overburden ruling and, instead, seeks to impose the SFRA local fair share on Abbott districts. N.J.S.A. 18:7F-52; Attwood Cert., ¶¶16-19, 24. The local fair share is based on total equalized property valuation and aggregate community income, the same as CEIFA, and represents the local revenue the State requires – but does not mandate – districts to provide for the SFRA-defined adequacy budget. Wyns Cert., ¶¶15-16; Goertz Cert., ¶64. It also determines districts' state equalization aid. N.J.S.A. 18A:7F-53; Wyns Cert., ¶20.

The SFRA local fair share for Abbott districts is $1.14 billion, $507 million more than the $635 million actually levied or raised in 2007-08. Goertz Cert., ¶¶46, 65; Wyns Cert., ¶40. The local fair share also reduces overall K-12 state aid to the districts by $472.5 million, leaving districts with insufficient revenue to sustain the Abbott remedies and maintain current budgets, or to fully support the reduced SFRA adequacy budget. Wyns Cert., ¶¶40-42.

Although most Abbott districts are presently taxing well below the SFRA local fair share, by law, no district can increase the local levy more than 4% annually. Goertz Cert., ¶66; Wyns Cert., ¶52; L. 2007, c. 62. Thus, it will take many years before most Abbott districts can raise the SFRA local fair

share, even assuming they are able to secure the 4% annual increase. Goertz Cert., ¶66. Raising taxes to reach the local fair share would also increase already high Abbott tax rates by 22.9%, worsening municipal overburden. Id. at ¶67. There is no study, data, or other information in SFRA or in developing the Act, demonstrating that the Abbott districts have the realistic ability to raise the local share under SFRA. Wyns Cert., ¶40.

6. Ending Supplemental Funding

The Commissioner seeks to end needs-based supplemental funding, Davy Cert., ¶53, and SFRA provides no mechanism for Abbott districts to demonstrate the need for supplemental funding beyond the level under the SFRA formula. Belfield Cert., ¶¶48-49.

The Commissioner presents generalized assertions that the supplemental funding process is "inherently problematic," "did not work," "created uncertainty," and "resulted in an adversarial relationship" between DOE and the Abbott districts that "negatively affected the ability of the DOE to assist districts." Davy Cert., ¶53. However, no specific evidence is proffered to support these assertions.

Districts have used the supplemental funding process since 1999 to secure funding to implement preschool and K-12 supplemental programs, to maintain regular education and special education, and to maintain expenditures previously approved by

DOE as necessary for Plaintiffs' education. N.J.A.C. 6A:10-2.8(establishing procedures to demonstrate need for supplemental funding); Belfield Cert., ¶21, Ex. B(analyzing level of expenditures for supplemental programs); Wyns Cert., ¶22.

There are several ways in which SFRA will have an adverse impact on the ability of Abbott districts to continue Abbott implementation and maintain approved budgetary expenditures. First, considering both state and local revenue sources – with an assumed 4% increase – the districts will have $447 million, or 9.7%, less in budgetary revenue under SFRA than is currently available. Wyns Cert., ¶37. Second, eighteen districts are currently spending $217.6 million over the SFRA adequacy budget. Id. at ¶¶38-39, Ex. D(also showing I&J district over-spending at $345.9 million). Third, SFRA more than doubles the required local fair share in Abbott districts, and significantly reduces overall K-12 state aid. Id. at ¶41.

Fourth, the Act relies on adjustment aid to provide most Abbott districts with a 2% state aid increase in 2008-09, but this aid has no educational purpose under SFRA and its appropriation is subject to executive and legislative discretion. N.J.S.A. 18A:7F-58(a); Wyns Cert., ¶42. This aid will be "adjusted" downward in future years as the SFRA formula increases by the annual inflation factor. Beginning in 2009-10 most Abbott districts will have no increase in state aid until

such time as their budgets are reduced to the SFRA adequacy budget level. N.J.S.A. 18A:7F-58(a)(2); Wyns Cert., ¶¶43-44.

Finally, Abbott districts typically face a 4% annual cost of living adjustment due to increases in non-discretionary expenditures such as contracted teacher salaries, health benefits, special education tuition and charter school payments. Wyns Cert., ¶¶48-49(citing DOE data on school budget growth). As a result, districts can expect budgetary shortfalls under SFRA of up to $78.2 million in 2008-09; as high as $212.6 million in 2009-10; and reaching $354.7 in 2010-11. Id. at ¶51(a)-(c). These shortfalls will be even more severe if discretionary adjustment aid is not appropriated and Abbott districts are unable to raise more local tax revenue.

Without access to the supplemental funding process, Abbott districts will have no alternative but to eliminate programs, staff, and other expenditures under SFRA, even though the Commissioner presents no evidence that these current budgetary expenditures are not necessary to ensure the Abbott children have the resources necessary to achieve the CCCS. Id. at ¶¶53-54; Belfield Cert., ¶48.

LEGAL ARGUMENT

I. THERE IS NO BASIS TO DETERMINE THE CONSTITUTIONALITY OF SFRA ON A STATEWIDE BASIS IN THIS LITIGATION

The State seeks a declaration that SFRA will provide a thorough and efficient education to all New Jersey children. Db64. Because there is no basis for adjudicating the statewide constitutionality of SFRA in this litigation, the State's motion should be denied.

In attempting to obtain this Court's imprimatur on SFRA for students in all districts, Db64, the State ignores the core holding in Abbott: the 1975 school funding formula, and subsequent formulas, were determined unconstitutional only as applied to poorer urban districts. Abbott II, 119 N.J. at 385-87; see also Abbott III, 137 N.J. at 451(declaring QEA unconstitutional as to "special needs districts"); Abbott IV, 145 N.J. at 153(holding CEIFA unconstitutional as to "Abbott" districts). As the Court emphasized in Abbott II, because the evidentiary record in this litigation pertained only to children in poorer urban districts, the Court had "no right" to extend its rulings "any further." Abbott II, 119 N.J. at 296, 357, 386-87.

Moreover, the Court's directives to remedy the constitutional deficits found in poorer urban districts – at issue on this motion – have been similarly circumscribed. Abbott

IV, 149 N.J. at 199-201(ordering parity and remanding for determination of Plaintiffs' need for supplemental programs); Abbott V, 153 N.J. at 527(directing implementation of preschool and K-12 supplemental programs in Abbott districts). Indeed, this Court acknowledged that it was imposing a judicial "sharp line" that would leave "districts of some similarity" on "different sides of that line." Abbott V, 153 N.J. at 386; see also Bacon v. NJDOE, 398 N.J. Super. at 618(ordering a remedial needs assessment in poor rural districts).[10]

In sum, the sole issue capable of adjudication on this motion is whether the State has met its burden of demonstrating that the Abbott remedies ordered to ensure Plaintiffs a constitutional education are no longer necessary, and whether current implementation of those remedies in Abbott districts should now be discontinued. Accordingly, the relief sought by the State related to the statewide constitutionality of SFRA should be denied.

[10] SFRA purports to address the unmet needs of disadvantaged students outside Abbott districts, a problem the State attributes to the Abbott decisions. Db65, Davy Cert., ¶54. There is compelling evidence, however, that funding shortfalls in other poor and middle-income districts, and higher levels of parity aid for Abbott districts, are the direct result of the CEIFA funding freeze since 2001-02, and not Abbott implementation. See Certification of Dr. Ernest C. Reock, Jr. ("Reock Cert."), ¶¶6-8, 9.

II. THERE IS NO EVIDENTIARY OR LEGAL BASIS FOR ENDING ABBOTT IMPLEMENTATION AND, THEREFORE, THE STATE'S MOTION SHOULD BE DENIED

On this motion, the State asserts that, while the Abbott remedies "may" have been appropriate "when issued," certain provisions of the SFRA formula and "changed circumstances" in Abbott districts render the remedies "no longer necessary." Db66. Given the State's clear failure to make the evidentiary and legal showing required to halt implementation of this Court's remedial decrees, and the compelling need for continuing Abbott implementation to ensure Plaintiffs a constitutional education, the State's motion should be denied.

At the outset, the State unquestionably bears the burden of proving that further implementation of the Abbott remedies should cease, and can be replaced by certain provisions of the SFRA formula. This identical issue was addressed and resolved in a prior round of Abbott when, faced with determining whether QEA satisfied the remedial directives in Abbott II, Judge Levy held that the "burden falls on the legislative body to show that the new legislation meets the requirements of the decree." Abbott v. Burke, No. 91-C-00150, 1993 WL 379818, at *3-4 (Ch. Div. Aug. 31, 1993), citing So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 N.J. 158 (1983)(placing burden on defendants to prove "every element of compliance" with Court's remedial low-income housing decrees).

Moreover, this Court affirmed Judge Levy's decision on the merits in Abbott III, and the ruling does not disturb the determination on remand to place the burden on the State to demonstrate compliance with prior Abbott remedial orders. Abbott III, 136 N.J. 444; see also Abbott IV, 149 N.J. at 169-74(finding State failed to prove the CEIFA formula comported with the Abbott II and III orders). Assigning the burden to the State on this motion is also consistent with decisions in other jurisdictions on this same issue. See, e.g., Montoy v. State, 112 P.3d 923, 929 (Kan. 2005)(placing the burden on the state to show a new formula complied with court mandates); Campbell County Sch. Dist. v. State, Nos. 06-74, 06-75, 2008 WL 67536, at *3 (Wyo. Jan. 8, 2008)(holding the State bears the burden by a preponderance of the evidence).[11]

As Plaintiffs explain below, the State has utterly failed on this motion to meet its burden of proving that the specific Abbott remedies, which are carefully designed to ensure that the Abbott children "receive the educational entitlements that the Constitution guarantees them," Abbott V, 153 N.J. at 489, are

[11] Although deference is generally accorded to legislative enactments, this Court has not hesitated to pierce the shield of deference and examine whether legislative responses to the Abbott rulings satisfied this Court's remedial mandates. See Abbott III, 136 N.J. at 448-54(examining sufficiency of QEA); Abbott IV, 145 N.J. at 174-75, 185(examining sufficiency of CEIFA, and rejecting "putative expert opinion that does not disclose the reason or bases for its conclusions").

now constitutionally unnecessary, and should be replaced by provisions in the SFRA formula. Db66.

A. The State Provides No Basis for Eliminating the Abbott District Designation

The State asserts that the "factors" underlying the Court's remedial directives for Abbott districts "have changed," rendering those directives unnecessary. Db75-78. To the extent that the State on this motion implicitly seeks elimination of the Abbott designation, and the consequent end to Plaintiffs' entitlement to continuing implementation of the Abbott remedies, the motion should be denied for several reasons.[12]

First, there is no evidence in SFRA or its legislative history – or presented to the Court on this motion – that the Legislature, SBOE or Commissioner analyzed, or ever considered, the constitutionally required socio-economic and educational adequacy criteria established by the Court as the basis for the Abbott designation. See supra Statement of Facts B.1; see also Abbott II, 119 N.J. at 385-86(entrusting Legislature, SBOE and Commissioner to make determination of districts entitled to Abbott remedies). There is also no evidence or other analysis demonstrating that any of the currently designated districts "no longer possess the requisite characteristics for Abbott district

[12] The State's motion does not explicitly request elimination of the Abbott designation, but it is clear the designation has been legislatively abandoned. N.J.S.A. 18A:7F-44(p); but see N.J.A.C. 6A:10A-2.1(designation in current Abbott regulations).

status." Abbott VII, 164 N.J. at 89-90; See supra Statement of Facts B.1. Such evidence is a fundamental constitutional prerequisite for the Legislature and state education officials to "take appropriate action" to remove any specific districts from the Abbott class or to eliminate the classification altogether. Abbott VII, 164 N.J. at 90.

Second, the few, selective facts presented by the State to support its conclusion of "changed circumstances" in Abbott districts, Db66, 75-78, are wholly unrelated to the criteria for Abbott designation and otherwise inappropriate and misleading. See supra Statement of Facts B.1. The school tax rates, total spending comparisons and statewide student enrollment data offered by the Commissioner are irrelevant to the specific and detailed factors of student poverty and need, community wealth and taxing capacity, and educational adequacy that form the basis for Abbott designation. Abbott II, 119 N.J. at 338-75; see also supra Statement of Facts A.1(discussing Librera Report). Simply put, the data proffered by the State bear no relationship to the requisite criteria for Abbott designation and are otherwise insufficient to support any administrative or legislative determination, let alone a reasoned determination, that any current Abbott district – or all of them – "no longer possess" the criteria for Abbott status.

Finally, the evidence of record is directly to the contrary: namely there is compelling current data demonstrating the continued presence in Abbott districts of concentrated poverty and other critical student needs; low wealth, high overall taxes and municipal overburden; and inadequate education. See supra Statement of Facts A.1. These data directly refute the State's meager assertions, and unequivocally show that the "extreme disadvantages and special needs that gave rise to the Abbott class in 1990 continue to persist," Goertz Cert., ¶28, requiring continued implementation of the Abbott remedies. Abbott II, 119 N.J. at 346-47(summarizing factors for Abbott designation).

B. The State Has Failed to Convincingly Demonstrate That SFRA Can Replace Parity

The State argues that the parity remedy for regular education is "obsolete" and can be replaced by SFRA, citing the overall level of "educational resources" provided by the formula and "high" spending in the Abbott districts. Db67-71. The State, however, completely ignores the Court's clear and unambiguous standards for replacing parity as the constitutional benchmark for Plaintiffs' regular education. Ibid. Even worse, because the SFRA "base" cost is substantially below parity, the Act will immediately result in a significant reduction in regular education expenditures in Abbott budgets and will

inevitably reinstate the wide disparity between Abbott and I&J districts – condemned in this Court's prior decisions – that the parity remedy was designed to end. See supra Statement of Facts B.2.

In Abbott IV, this Court established clear evidentiary and substantive legal standards that must be met in order to replace parity:

> If it can be convincingly demonstrated...that a substantive [T&E] can be achieved in the [Abbott districts] by expenditures that are lower than parity with the most successful districts, that would effectively moot parity as a remedy. Moreover, if the State could...specifically identify those elements of DFG I&G budgets that represent genuine inefficiencies or excesses and demonstrate that they are truly unnecessary to the achievement of [T&E], as evidenced by student performance and achievement of the [CCCS], it then may consider those expenditures in the funding calculation. Further, when supplemental programs are established [citation omitted] and expenditures for implementation of those programs are undertaken, those will in large measure become more instrumental in the achievement of [T&E]; such expenditures...will lessen the significance of the level of funding now directed to regular education.
>
> [Abbott IV, 149 N.J. at 196-7(emphasis added).][13]

[13] This Court's precedents make clear that the "convincing" standard is a heavy burden and requires the State's evidence to produce "a firm belief or conviction as to the truth of the allegations sought to be established." Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169-70 (2006)(explaining "clear and convincing" standard). This standard is compelled where, as here, the issues at stake are critical to the effectuation of Plaintiffs' constitutional entitlements, and "proof by a lower standard will not serve to generate confidence in the ultimate factual determination." Id. at 170(quoting In re Polk License Revocation, 90 N.J. 550, 563 (1982).

As explained below, the State utterly fails to "convincingly demonstrate" that Plaintiffs can achieve the requisite substantive standards with expenditures significantly below parity, as provided by SFRA.

First, the record demonstrates that SFRA imposes on Abbott districts a level of expenditures for regular education far below parity. Indeed, the reduction is substantial, amounting to 20% or $2,591 per pupil lower than the current parity amount. See supra Statement of Facts B.2. This, in turn, causes a $1 billion reduction in regular education expenditures from the current 2007-08 budgetary level, and will cause a $1.25 billion, or $4,311 per pupil, parity gap with the I&J districts in 2008-09. Ibid. The record further shows this gap will widen in future years. See supra Statement of Facts B.2; Goertz Cert., ¶50.

Thus, on its face, SFRA undermines the bedrock, dynamic principle under-girding all of this Court's remedial measures, namely that "poorer disadvantaged students must be given a chance to be able to compete with relatively advantaged students." Abbott II, 119 N.J. at 313; Abbott III, 136 N.J. at 454(reiterating that a constitutional education for Plaintiffs is one "that is the substantial equivalent of that afforded in the richer districts"); Abbott IV, 149 N.J. at 76(refusing to

"turn a blind-eye" to the most successful districts, and continuing to focus on their "recipe for success").

Second, the SFRA base cost is derived from a hypothetical district model that is clearly "not based on the characteristics" of the Abbott districts, which was the identical fatal flaw in CEIFA's unconstitutional funding formula. Abbott IV, 149 N.J. at 172; see supra Statement of Facts B.2. As with the CEIFA model, not one of the Abbott districts "conforms" to the SFRA model, and the model "assumes, as the basis for its resource allocations and cost projections, conditions that do not, and simply cannot, exist" in those districts. Id.; see supra Statement of Facts B.2. Thus, SFRA rests upon the very same "fallacy" as CEIFA, namely, the "unrealistic assumption" that "all districts can be treated alike and in isolation from the realities of the surrounding environment." Abbott IV, 149 N.J. at 172.

Moreover, like the 1975 Act, QEA and CEIFA, its unconstitutional predecessors, SFRA is clearly "incapable of assuring" the Abbott children a constitutional education under the CCCS. Id. at 175. The SFRA base amount is not only well below parity, it is also $135 per pupil lower than the CEIFA T&E amount. Wyns Cert., ¶ 14; Goertz Cert., ¶38. In Abbott IV, this Court found an $80 per pupil increase over QEA as evidence of CEIFA's constitutional inadequacy; here, the deficiency is even

more pronounced – there is a reduction in resources below the level already found deficient for Abbott children over ten years ago. It is "difficult to fathom" how the State can claim that a reduction in resources can "solve the constitutional problem" today when a modest increase failed to do so a decade ago. Abbott IV, 149 N.J. at 174.

Third, the SFRA base cost is not supported by any study or other evidence that current regular education spending in I&J districts, or the Abbott districts for that matter, is excessive or otherwise not necessary for the Abbott children to achieve the CCCS. See supra Statement of Facts B.2. This lack of evidence eviscerates the State's proposal to replace parity with a newly-minted "base cost," since SFRA has the immediate effect of declaring over $1 billion in current, DOE-approved spending statewide, with nearly $564 million in Abbott and I&J districts alone, unnecessary for a constitutional education. See supra Statement of Facts B.2.; Wyns Cert., ¶39, Ex. D. The State's evidentiary failure is even more pronounced in light of the significantly reduced SFRA base cost and adequacy budget. Given the dramatic impacts of SFRA on the resources currently available and approved by DOE in Abbott district budgets, there is simply no justification for the State's failure to make any attempt to show that these approved expenditures "represent genuine inefficiencies or excesses" and "are truly unnecessary"

for the achievement of the CCCS in Abbott districts, a critical constitutional touchstone for displacing parity. Abbott IV, 149 N.J. at 196.[14]

Finally, the Court clearly anticipated that any future effort to replace parity with a lower expenditure for regular education might occur when the Abbott V supplemental programs were well established and under intensive and sustained implementation in Abbott schools and districts. Abbott IV, 149 N.J. at 197. As discussed infra II.C, the State is not only seeking to significantly reduce funding for regular education; it also proposes to discontinue implementation of the K-12 supplemental programs and reforms mandated by Abbott V. Thus, to the extent that the supplemental programs may have become "more instrumental" than parity in providing Abbott children a constitutional education, the State's proposal to end implementation of those mandated programs will not "lessen," but rather heighten "the significance of the level of funding now directed to regular education." Abbott IV, 149 N.J. at 197.

[14] The State contends that the SFRA model and base amount were "validated" by outside stakeholders who reviewed prior versions of the model in early 2003, and by the State's experts three years later. Db61. Yet the 2003 process was deeply flawed and out of date, a view shared by the State's own experts. Goertz Cert., ¶¶54-56. Whatever input the DOE may have gathered in 2003, it is wholly insufficient to "convincingly demonstrate" the requisite link between the CCCS and the funding necessary for Plaintiffs to achieve those standards. Abbott IV, 149 N.J. at 169, 196; Goertz Cert., ¶¶56, 58, 61.

In sum, ten years ago, citing prior failed efforts by the State to comply with the call for remedial relief, this Court ordered parity to address "a profound deprivation that has continued for at least twenty-five years." Abbott IV, 149 N.J. at 198. On this motion, the State has not only failed to "convincingly" demonstrate the requisite substantive and legal standards for ending parity, it is also proposing a new formula that will bring back the very deprivation the Abbott children endured for so long and that parity was designed to eradicate. Accordingly, the State's requested relief should be denied.

C. There Is No Basis for Discontinuing the Abbott K-12 Supplemental Programs

As indicated, the State seeks to stop further implementation of the Abbott K-12 supplemental programs remedy, in favor of "additional education resources identified for disadvantaged students" in the SFRA formula. Db62. The SFRA at-risk formula, however, has no basis in the actual supplemental program needs of Abbott school children and, in any event, fails to deliver any defined at-risk funding or even require implementation of any K-12 supplemental programs in Abbott schools and districts. For these reasons, the State's motion should be denied.

First, the record on this motion makes clear that the SFRA at-risk cost is derived from the same hypothetical model

district as the base cost for regular education, and not on any study or other evidence of the actual needs of Abbott children for supplemental programs, and the actual cost of implementing such programs. See supra Statement of Facts B.3; Davy Cert., ¶¶26, 30. This glaring deficit flies in the face of this Court's repeated mandates that the provision of supplemental programs for Abbott school children cannot be detached from the actual educational and educationally-related needs of those children, and the costs of addressing those needs. Abbott II, 119 N.J. at 385-88(requiring programs and services targeted to address the extreme needs of Abbott children); Abbott III, 136 N.J. at 453-54(invalidating QEA because at-risk aid was not based on a study of actual program needs and cost); Abbott IV, 149 N.J. at 181(holding unconstitutional CEIFA aids for supplemental programs, in part, because they were not based on any study of actual student needs).

Second, the record is also clear that the State did not undertake any study of the level, effectiveness and cost of the Abbott K-12 supplemental programs and reforms that this Court determined necessary and required be implemented in Abbott V, 153 N.J. at 489, 527(underscoring "solid evidentiary record" for supplemental programs, and specifying programs that must be implemented); Abbott X, 177 N.J. at 584-87(modifying and reaffirming supplemental programs). See supra Statement of Facts

B.3. For almost a decade, Abbott districts have been vigorously implementing these programs, and are currently doing so, yet there is no evidence that this "herculean" effort informed in any way the development of the SFRA at-risk formula. See supra Statement of Facts B.3; Abbott IV, 145 N.J. at 199. Nor does the State proffer any study or other evidence to show that the Abbott children no longer need the programs identified in Abbott V to ensure them a constitutional education. See supra Statement of Facts B.3; Abbott IV, 149 N.J. at 197-99(stressing that supplemental programs are "crucial," "indispensable," and "instrumental" for educational achievement in Abbott districts); but see infra II.D(discussing the State's use of data from implementation of the Abbott preschool program to set initial costs of SFRA preschool aid).

Third, the DOE, in developing the SFRA at-risk cost model, failed to include any resources for many of the K-12 supplemental programs determined necessary in Abbott V. See supra Statement of Facts B.3. Moreover, for those Abbott programs included in the model, the DOE assigned staff, inputs, and other resources at assumed levels, ratios, and amounts, a costing technique explicitly rejected in Abbott V. Abbott V, 153 N.J. at 511-12(concluding that "one uniform approach" for every school was not educationally "sound," and holding that the "particularized needs" of the Abbott children must "drive the

determination of what programs should be developed"). See id. at 513-14(rejecting proposal for an assumed security guard to student ratio for school safety); id. at 512-18(directing implementation of social and health services, after school and other necessary programs based on the "varying needs" of Abbott schools, even where Commissioner proposed a minimum "baseline" resource level).

Fourth, while claiming that the SFRA at-risk formula should displace Abbott supplemental programs, the State concedes that SFRA does nothing to require the continuation of those programs established to overcome the deep disadvantages faced by the Abbott children and schools. See supra Statement of Facts B.3. It is undisputed that SFRA provides Abbott districts with no designated at-risk funding, and does not require implementation of the required Abbott K-12 supplemental programs, or any other supplemental programs to address the needs of Abbott children. Ibid.

Indeed, the State admits that the provision of supplemental programs in Abbott districts – with whatever funding may be available under SFRA - is left entirely to the discretion of local education officials. Db62. This is the very type of "flexibility" condemned in Abbott IV as lacking any assurance that "the most needed programs" will be provided and that the funding "will be sufficient to implement the needed programs."

Abbott IV, 149 N.J. at 182(rejecting the discretionary "menu approach" in CEIFA, and emphasizing that the State "cannot shirk its constitutional obligation under the guise of local autonomy"); id. at 193, 197(requiring Abbott funding "be accompanied by firm controls"); see also Abbott III, 136 N.J. at 451-2(finding no evidence of "any correlation" between QEA funding and Abbott district educational improvement plans).

Finally, the State fails to offer a scintilla of evidence that the supplemental programs and reforms, under implementation since 1999, have proven ineffective or inefficient in improving the education of the Abbott children under the CCCS. See supra Statement of Facts B.3. In contrast to the State's silence, data on this record show solid gains on State assessments in the early grades, the level where Abbott V placed initial intense focus through WSR and other programs. See supra Statement of Facts A.1; Goertz Cert., ¶21. Moreover, after years of planning, Abbott middle and high schools are ready to launch SEI, an ambitious reform to improve achievement at these levels. Abbott X, 170 N.J. at 586-87; Belfield Cert., ¶17.[15]

In sum, absent evidence that the required Abbott supplemental programs are superfluous at this point, the State's

[15] Governor Corzine recently announced the State will impose more rigorous academic standards and course requirements on high schools, which the Governor acknowledged will require additional resources. See "Corzine: Make High School Tougher," The Record, April 25, 2008, A1.

request to halt further implementation of those programs must be denied. At bottom, the State's proposal is nothing more than a callous, budget-driven effort to turn its back on the severe and extreme disadvantages of Abbott school children repeatedly identified, and directly addressed, by the Court's remedial supplemental program directives. There is simply no basis on this motion for the State's wholesale retreat from those directives and to, once again, consign untold future "generation[s] of Abbott children to pay the price" so dearly exacted upon prior generations of those children. Abbott VI, 163 N.J. at 102.

D. The State Provides No Basis for Vacating the Abbott Preschool Rulings

The State acknowledges the "unquestioned success" of the Abbott preschool program, Db32-35, and does not explicitly seek to vacate the Court's preschool mandates, nor presents evidence to support such relief. Nonetheless, because SFRA is devoid of any assurance that the Court-mandated program standards and needs-based funding procedures so crucial to its success will remain in effect, the SFRA will have serious, adverse impacts on the continuing provision of high quality preschool to the Abbott children. See supra Statement of Facts B.4.

Most critically, SFRA eliminates the needs-based preschool budgeting and funding process in favor of a formula based on

fixed, uniform per pupil amounts – an approach that has been explicitly rejected by the Court in the past. See supra Statement of Facts B.4; N.J.S.A. 18A:7F-54(c)(4). This Court has repeatedly mandated that preschool funding be driven by the unique and particularized needs of Abbott preschool programs, including those operated by community providers and Head Start. Abbott V, 153 N.J. at 508, 517-18; Abbott VI, 163 N.J. at 117-18(directing timely DOE review of individual district funding applications); Millville BOE v. NJDOE, 183 N.J. 264, 276 (2005)(underscoring requirement for needs-based funding for preschool). This Court has strongly condemned "formulaic decision-making" and the imposition of "arbitrary, predetermined per student amounts" on Abbott districts and preschools, and required that funding determinations be driven by "thorough assessment of actual needs." Abbott VIII, 170 N.J. at 558-59; see supra Statement of Facts A.4(showing record of significant variation in preschool costs among provider type and district).[16]

Moreover, SFRA is devoid of any assurance regarding other key Court preschool mandates, including teacher and classroom quality; substantive education standards; full enrollment and

[16] SFRA also authorizes transfers of preschool aid to K-12 programs, without reference to the Court's stringent standards for Abbott budgetary reallocations. See, e.g., Millville BOE v. NJDOE, 183 N.J. at 278-79(emphasizing Commissioner's burden to show reallocations will not "undermine or weaken" foundational education or existing supplemental programs).

recruitment; temporary facilities; provider contracts; and needs-based assessment and program planning. Abbott VI, 163 N.J. at 105-19; Abbott VIII, 170 N.J. at 546-62; see supra Statement of Facts B.4. Indeed, the Act relegates future implementation of critical mandates for quality preschool education to agency discretion even though, on two prior occasions, this Court has had to step in and correct State implementation of preschool when it did "not conform" to quality and funding standards accepted and carefully articulated by the Court. Abbott VI, 163 N.J. at 105; Abbott VIII, 170 N.J. at 541(providing further course corrections in the wake of Abbott VI); see supra Statement of Facts B.4.

There can be no dispute that "early childhood education is essential for children in the [Abbott districts]." Abbott V, 153 N.J. at 502, citing Abbott IV, 149 N.J. at 183. It is also beyond dispute that the success of the preschool program is directly attributable to needs-based – and not formulaic – funding, and to the Court's high quality standards governing ongoing program implementation. See supra Statement of Facts B.4. SFRA retreats from these critical requirements, and the State presents no evidence or other assurance that they will remain firmly in place to ensure "the high quality [preschool] educational experience promised for the Abbott districts." Abbott VIII, 170 N.J. at 543. Thus, there is no basis on this

record for relieving the State of full and continuing compliance with the Court's preschool decrees mandating needs-based funding; detailed quality, enrollment, facilities and other program standards; and the opportunity seek demonstrably needed supplemental funding.

E. There is No Basis for Vacating the Abbott Municipal Overburden Ruling

It is undisputed that SFRA relies heavily on a substantial increase in local taxes ("local fair share") to provide a constitutional education to the Abbott children. Db36-37; N.J.S.A. 18A:7F-52. Indeed, SFRA requires a local fair share that is double the local revenue the districts currently raise under Abbott. See supra Statement of Facts B.5. The State, however, fails to provide any assurances that the districts have the capacity to raise the SFRA local fair share. Ibid. Accordingly, there is no basis on this motion to vacate the Abbott municipal overburden ruling.

First, contrary to the State's assertions, municipal overburden is not limited to the school tax rate, but is "usually thought of as a [local] tax rate well above the average." Abbott II, 119 N.J. at 355(defining municipal overburden as "the excessive tax levy" caused by "low property values" and "high governmental need"). In Abbott II, the Court sharply disagreed with the State's position virtually identical

to that proffered on the current motion: that the Act's "funding provisions...make it certain that enough money for a thorough and efficient education will be raised...given the districts' unlimited power to tax, their duty to do so, and the power of the Board and the Commissioner to force them to if needed." Abbott II, 119 N.J. at 356. Instead, the Court found, as a matter of fact, that municipal overburden "effectively prevents districts from raising substantially more money for education." Id. at 357. Equally significant, the Court recognized that, because of municipal overburden, the Act "will never achieve a thorough and efficient education because it relies so heavily on a local property tax base already overtaxed to exhaustion." Ibid.

Second, the State presents no evidence to show that the "municipal overburden" problem in Abbott districts identified in Abbott II, 119 N.J. at 355-357, has been resolved favorably in the intervening years since Abbott II. It is striking that nowhere in the record on this motion or in the legislative history of SFRA is there reference to a study or analysis demonstrating that Abbott districts now possess the capacity to raise the local fair share required by the Act. See supra Statement of Facts B.5. Indeed, the evidence on the record indisputably demonstrates the contrary, namely that municipal

overburden continues to persist in these districts. See supra Statement of Facts A.1, 5.

Third, the local fair share under SFRA will clearly leave Abbott districts without the resources necessary to ensure adequate funding to provide the Abbott children with a constitutional education. The immediate and dramatic rise in the districts' local fair share – from $635 million in current local revenue to a local share of $1.4 billion – is wholly ignored by the State, with no evidentiary assurances that the districts have any realistic capacity to meet this extraordinary requirement. See supra Statement of Facts B.5.

Moreover, this constitutional flaw in SFRA is even more apparent than the problem identified in Abbott II. As noted above, in defending the 1975 Act, the State relied on provisions that mandated raising local taxes to provide adequate educational funding. Abbott II, 119 N.J. at 356. SFRA, however, does not mandate the local fair share; the provision of necessary funding rests entirely on "the ability" of the taxing decisions of local officials. Id. at 295; Abbott III, 136 N.J. at 451; see supra Statement of Facts B.5. Even if the Abbott districts could raise local taxes, which the State has failed to show on this record, it would take years for the districts to reach the local fair share under SFRA, given the 4% annual tax limit and the already significant fiscal burdens needed for "the

entire range of goods and services made available to citizens." Abbott II, 119 N.J. at 355; see supra Statement of Facts B.5. Therefore, under SFRA, "we are no more likely ever to achieve thorough and efficient than we believed we could by relying on local taxation in Robinson I." Abbott II, 119 N.J. at 338.

Lastly, by substantially relying on the local fair share to provide a constitutional education, SFRA creates a "Catch 22" for the already-strapped Abbott districts: they receive less aid from the State and require greater reliance on local taxes, but much of the required local share is simply unavailable and unattainable. See supra Statement of Facts B.5. These are not abstract tax or fiscal concerns, but shortcomings that, under SFRA, will have a devastating impact on the education of Abbott children. Under SFRA, Abbott districts will not only lack adequate funding to continue the mandated and demonstrably-needed Abbott remedies and maintain current approved budgetary expenditures, but many Abbott districts also will lack the revenue even to fund the constitutionally-flawed SFRA adequacy budget. Ibid.

In sum, the State seeks to shift the burden of education funding onto local taxpayers without any analysis to refute the Court's prior finding of "municipal overburden" in the Abbott districts. On this record, the SFRA, like its unconstitutional predecessors, improperly relies on "how much a poorer urban

district is willing to tax," Abbott II, 119 N.J. at 385-86, and "will never achieve a thorough and efficient education." Id. at 357.

F. The State Has Failed to Demonstrate That the Abbott V Supplemental Funding Process Should Be Ended

The State asserts that, because the Abbott supplemental funding process "does not work," it is "no longer appropriate or constitutionally warranted." Db73, 75. This argument lacks merit and should be rejected outright. As explained below, the Abbott supplemental funding process, established under Abbott V, 153 N.J. at 518, 526-27, has provided Abbott districts with the essential opportunity to ensure adequate funding for required and demonstrably needed programs necessary to provide a constitutional education for Abbott children.

At the outset, the State presents no evidence to support its bald contention that the Abbott supplemental funding process is "exceedingly difficult." Db72. The State disregards the indisputable evidence on this motion, and the record of Abbott implementation since 1999, that the supplemental funding process has been instrumental in securing the funding necessary for implementation of critically needed and required remedial programs, including preschool and K-12 supplemental reforms. See supra Statement of Facts B.6. In addition, the districts' right of administrative and judicial appeal of State funding

decisions, an essential component of the supplemental process, Abbott V, 153 N.J. at 526-27, has been vital to obtaining additional funds to maintain prior approved – and constitutionally necessary – programs, services, and positions in Abbott budgets each year, in the face of cost increases in non-discretionary expenditures.

This Court has recognized as much in prior rulings, rejecting on several occasions the State's invitation to jettison the Abbott V appeal process and leave the Abbott districts, regardless of need, to cope with whatever funding the State provides. See, e.g., Abbott IX, 172 N.J. at 297-98; Abbott XI, 177 N.J. at 598-99; and Abbott XV, 187 N.J. at 195(directing appeal procedures remain available to maintain prior approved expenditures in the face of non-discretionary cost increases and State budgetary constraints).[17] In keeping with its entire approach on this motion, the State ignores these prior rulings, pretending they did not occur, or simply wishing them away, in

[17] The State also contends that the supplemental funding process fosters an "adversarial relationship" that "negatively" affects DOE supervisory functions. Db72. The State offers no evidence that it has been constrained in taking necessary actions because of adversarial proceedings over DOE funding decisions. See Abbott V, 153 N.J. at 526(expecting "disputes will occur" in Abbott implementation). There is no basis to dismantle the supplemental funding process simply because it requires the State to make, explain and defend, if necessary, needs-based funding decisions, rather than unilaterally impose "arbitrary, pre-determined" funding amounts. See, e.g., Abbott VIII, 170 N.J. at 559.

order to abandon Abbott needs-based funding in favor of predetermined and budget-driven aid amounts. This is not permissible in the face of longstanding judicial precedents and should not be countenanced here.

Finally, there is clearly a continuing need for the Abbott supplemental funding process, given the obvious constitutional defects and budgetary impacts of SFRA. As the record demonstrates, SFRA will reduce Abbott districts' regular education and overall budgetary expenditures, lower state aid, increase reliance on unavailable local revenue, and declare hundreds of millions in current, approved expenditures unnecessary for a constitutional education. See supra Statement of Facts B.2, 3, 5, 6. These budgetary cutbacks will have devastating consequences on educational programs for Abbott children and their ability to achieve the CCCS. See supra Statement of Facts B.2, 3. Without access to the Abbott V supplemental funding process, Abbott districts, on behalf of their students, will have no avenue to seek relief to ameliorate these adverse educational impacts. Abbott V, 153 N.J. at 525(underscoring that adequate funding "remains a critical element" in the provision of a constitutional education).

Moreover, the State's proposed "adjustment aid" provides even further support for retaining the supplemental funding process. As discussed supra Statement of Facts B.6, this aid is

not part of the SFRA adequacy budget; diminishes in 2009-10 and future years; "depends fundamentally on the discretionary action of the executive and legislative branches;" and, therefore, "fails to guarantee adequate funding" for Abbott districts. Abbott III, 136 N.J. at 451. Even if adjustment aid is appropriated, many Abbott districts face flat state aid beginning in 2009-10 which, coupled with non-discretionary cost increases, will unquestionably cause widening budget shortfalls that can only be addressed either with additional state funding or the elimination of essential programs, services, and positions. Wyns Cert., ¶¶51, 54, Ex. G Table 3. Thus, although adjustment aid may mitigate the devastating effects of downsizing to the SFRA formula, it offers no assurance that the districts will not be compelled to seek supplemental funding through the Abbott V process.

Accordingly, the record on this motion provides no evidentiary or legal basis for diluting or ending the State's commitment, and this Court's directive, that "if there is a need for additional funds, the needed funds will be provided or secured." Abbott V, 153 N.J. at 518.[18]

[18] If this Court determines that the development of a full evidentiary record is necessary to resolve the State's motion, it should remand this case for a plenary hearing, as in Abbott III and Abbott IV. See Abbott v. Burke, No. 30,433 (N.J. Sept. 23, 1991)(Order at 2-3)(ordering a remand to the Chancery Court for the development of a full evidentiary record on QEA); Abbott

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the State's motion be denied.

Respectfully submitted,

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IV, 149 N.J. at 199-201 (remanding for a record to fashion relief on Abbott supplemental programs and facilities); see also, DEG, LLC v. Twp of Fairfield, 398 N.J Super. 59, 68 (App. Div. 2008) (remanding for the development of a full evidentiary record when governmental entity sought relief from judgment based on changed circumstances).