SUPREME COURT OF NEW JERSEY
DOCKET NO. 42,170

RAYMOND ARTHUR ABBOTT, et al Plaintiffs, v. FRED G. BURKE, et al., Defendants.	:	CIVIL ACTION

BRIEF IN SUPPORT OF MOVANTS-INTERVENORS BOARDS OF EDUCATION OF CITYCITY OF BRIDGETON, CITY OF BURLINGTON, CITY OF EAST ORANGE, CITY OFOF ELIZABETH, GLOUCESTER CITY, KEANSBURGOF ELIZABETH, GLOUCESTER CITY, KEA STATE-OPERATEDSTATE-OPERATED SCHOOL DISTRICT OF PATERSON, PEMBERTON TOWNS CITY OF PERTH AMBOY, TOWN OF PHILLIPSBURG, AND CITY OF TRENTON

Richard E. Shapiro, L.L.C.
5 Mapleton Road
Princeton, New Jersey
(609) 919-1888

Attorneys for Movants-Intervenors Boards of Education

On the Brief:
Richard E. Shapiro, Esquire

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTESSTATUTES STATUTES ANDSTATUTES AND STATUTES AND REGULATIONS

COURTCOURT COURT RULES

PRELIMINARY STATEMENT

After twenty-five years of "profound constitutional deprivation that has penalized generations of children," Abbott v. Burke, 149 N.J. 145, 201-02 (1997)("Abbott IV"), and after the Court's rejection of several fundamentally flawed statutory schemes, this Court established in Abbott IV and Abbott v. Burke, 153 N.J. 480 (1998)("Abbott V"), a remedial framework to ensure that the educational needs of students in the State's poorest urban districts would be properly addressed. The "Abbott remedies" were predicated on a solid evidentiary record demonstrating educational inadequacy, an inability to address those educational deficiencies through reliance on property taxes, the extreme disadvantages of students in those districts, and the supplemental programs, services and positions required and demonstrably needed to overcome those disadvantages.

Throughout the past decade of Abbott implementation, the Court has consistently reaffirmed the administrative and judicial appeals process established in Abbott V, which enables the Abbott districts to seek additional funding for demonstrable needs. Indeed, on the three prior occasions the State sought Court approval to shut down the appeals process, the Court rebuffed those efforts.

The State now comes before the Court with another statutory proposal – the School Funding Reform Act of 2008 ("SFRA") - and requests that the Abbott remedies, including the Districts' appeal rights, be peremptorily abolished based on SFRA's formulaic approach to educational funding. While SFRA is touted in the State's motion as addressing the Court's constitutional mandates, the evidence on this record demonstrates otherwise - SFRA suffers from the same basic flaws that rendered unconstitutional the funding provisions in the Public School Education Act of 1975, the Quality Education Act of 1990 ("QEA"), and the Comprehensive Educational Improvement and Financing Act of 1996 ("CEIFA").

In the course of prior Abbott rulings, the Court set forth the evidentiary showings required to overcome the constitutional defects in prior Acts. The movants-intervenors (Boards of Education of Bridgeton, Burlington City, East Orange, Elizabeth, Gloucester City, Keansburg, Passaic, Paterson, Pemberton, Perth Amboy, Phillipsburg, and Trenton)("Boards") oppose the State's motion and explain in this brief how the State has fallen far short of the legal and evidentiary showings required by this Court to displace the Abbott remedies. The Boards also seek an immediate, interim order preserving the status quo and

declaring that the procedural protections established by Abbott V, 153 N.J. at 526-27 - including the right of Abbott districts to seek additional funding in expedited appeals based on a showing of demonstrated or particularized need - shall remain in effect pending a final decision on the State's Motion.

Given this Court's unequivocal prior mandates, the Boards would have expected the State on this motion to provide the Court with the requisite facts, evidence, analyses, and assessments to support the State's claims about SFRA and to justify scuttling the Abbott designation and this Court's Abbott remedies. Instead, the State has simply invited the Court to ignore its prior decrees, and to accord "significant deference" to unsupported assumptions, assertions, and speculation about SFRA. Put bluntly, the State's motion asks this Court to abandon its constitutional responsibilities in our scheme of government and its historic role in protecting the rights of disadvantaged children in the Abbott districts.

The briefs filed in opposition to the State's motion convincingly demonstrate that the SFRA fails to meet the standards established by this Court. The SFRA is a constitutionally flawed statutory scheme -– a scheme, like its flawed predecessors, that will immediately and

inevitably restore the inequities previously condemned by this Court and that will restore the two-tiered school system in New Jersey that this Court has sought to eliminate through the Abbott remedial mandates. The SFRA certainly provides no legal or factual basis for the Court to shut the door on the administrative and judicial appeal remedies afforded the Abbott districts.

The Court's remedial decrees have brought concrete results and progress for the children the Boards serve; the appeal rights for supplemental funding have ensured that districts and schools are accorded full administrative and judicial protection from State decisions that do not adequately fund demonstrable needs. Equally important, but not as tangible, the Court's continuing protection of these children's interests, through a structured remedial framework of funding, programs, positions, and services, and appeal rights, has brought hope to hundreds of thousands of disadvantaged, largely minority, students where there was none before. The clear lesson of this Court's past Abbott decisions is that bald claims by the State – unsubstantiated by facts, evidence, analyses, and assessments - do not justify deviation from the sound constitutional course established by the Court.

On this record, the State has provided nothing more than the same hollow assurances and unsupported claims repeatedly rejected by the Court in the past. Other than this Court's steadfast adherence to its prior mandates, there is nothing standing between the continued implementation of the Abbott remedies - and continuing progress in the Boards' districts - and a return to the profound educational deprivation of the decades prior to the Abbott decisions. Therefore, the State's motion should be denied, and the Boards' motion should be granted to preserve the status quo and to maintain the districts' appeal rights pending a final disposition of the State's motion.

STATEMENT OF FACTS[1]

Plaintiffs' Statement of Facts provides detailed data, analyses, and evidence relating to the numerous flaws in the SFRA. The Boards supplement those facts with district-specific information about their Abbott designation, the educational progress in their districts, the failure of the model district to reflect the characteristics of their districts, their experience with the appeals process, and

[1] The Boards rely on the Procedural History set forth in the Plaintiffs' Brief In Opposition to Defendants' Motion For Review of the Constitutionality of the School Funding Reform Act of 2008. ("Pb.")

the devastating impact that SFRA would have if implemented in these districts.[2]

The Abbott Designation

The State has failed to provide any data, assessment or analysis of the relevant criteria that would justify the elimination of all the Boards' districts from the list of poorer urban districts designated by the Court and the Legislature as Abbott districts.[3] Nor has the State provided any information to the Court to support the assertion that the local tax base in these Districts has the capacity to support the substantial increases in local fair share under the SFRA and that the factual condition of

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[2] The following Superintendents have submitted certifications: Dr. H. Victor Gilson (Bridgeton)("Gilson Certification"); Dr. Edward F. Gola (Burlington City)("Gola Certification"); Dr. Clarence Hoover (East Orange) ("Hoover Certification"); Pablo Muñoz (Elizabeth) ("Muñoz Certification"); Paul Spaventa (Gloucester City) ("Spaventa Certification"); Barbara A. Trzeszkowski (Keansburg) ("Trzeszkowski Certification"); Dr. Robert Holster (Passaic)("Holster Certification"); Dr. Michael E. Glascoe(State-Operated District of Paterson)("Glascoe Certification"); Dr. Michael Gorman (Pemberton Township)("Gorman Certification"); John M. Rodecker (Perth Amboy)("Rodecker Certification"); George Chando (Phillipsburg)("Chando Certification"); and Rodney Lofton (Trenton)("Lofton Certification").

[3] This Court identified twenty-eight Abbott districts in Abbott II. Abbott v. Burke, 119 N.J. 297, 385 (1990)("Abbott II"). Neptune and Plainfield were subsequently added as Abbott districts by L. 1999, c. 110, and Salem was added following issuance of the Commissioner's decision in the Bacon case by L. 2004, c.61,¶1. Bacon v. New Jersey State Department of Education, 398 N.J. Super. 600, 603 n. 1 (App. Div. 2008). .

"municipal overburden" is no longer a bar to Abbott districts raising significantly more money for education. Cf. Abbott v. Burke, 119 N.J. at 357.

Although the State claims that changes in the Abbott districts justify elimination of the Abbott remedies, (Db at 75-78), the Boards' districts still remain in District Factor Groups ("DFG") A and B, based on 2000 data, which is the same DFGs these districts were in at the time of their original Abbott designation. (Gilson Certification, ¶¶10-11; Gola Certification, ¶¶10-11; Hoover Certification, ¶¶10-11; Muñoz Certification, ¶¶10-11; Spaventa Certification, ¶¶10-11; Trzeszkowski Certification, ¶¶10-11; Holster Certification, ¶¶10-11; Glascoe Certification, ¶¶10-11; Gorman Certification, ¶¶10-11; Rodecker Certification, ¶¶10-11; Chando Certification, ¶¶10-11; Lofton Certification, ¶¶10-11).

The Districts' poverty concentrations continue to exceed the percentages at the time of the original designations, and as Professor Dr. Margaret E. Goertz explains in the Certification submitted by Plaintiffs, the districts still possess the requisite demographic, economic, and educational characteristics for Abbott designation. (Certification of Dr. Margaret E. Goertz ("Goertz Certification"), ¶¶14-21).

Educational Progress in the Boards' Districts

The Certifications also detail the progress in these districts as a result of the Abbott remedies. The concrete progress in the past decade includes higher achievement scores in mathematics and language arts/literacy in standardized tests, most prominently in the early grades (Goertz Certification, ¶¶20(a)-(b)), but in other grades as well; higher graduation rates; increased numbers of schools making adequate yearly progress under the federal No Child Left Behind Act; a narrowing of the achievement gap between these districts and non-Abbott districts; increased graduation and attendance rates; and reductions in the drop-out rate. (Gilson Certification, ¶18; Gola Certification, ¶18; Hoover Certification, ¶20; Muñoz Certification, ¶19; Spaventa Certification, ¶19; Trzeszkowski Certification, ¶20; Holster Certification, ¶20; Glascoe Certification, ¶20; Gorman Certification, ¶19; Rodecker Certification, ¶20; Chando Certification, ¶18; Lofton Certification ¶20).

The DOE's Hypothetical Model District

The State relies almost exclusively on the Professional Judgment Panel ("PJP") process to justify the claim that the SFRA's formulaic amounts are sufficient to provide a thorough and efficient education for students in

the Boards' districts and to provide the supplemental funding necessary to overcome their disadvantages. (Db8-15). Dr. Goertz identifies several basic flaws in the PJP process conducted by the DOE, as well as serious deficiencies in the other stages of the DOE's "costing out" process (Goertz Certification, ¶¶51-61) prior to the development of the final DOE report. (A Formula For Success: All Children All Communities (December 2007)(Exhibit G to Certification of Commissioner Lucille E. Davy)("December 2007 Report")). The Boards join in those claims and will not repeat them here.

Instead, the Boards underscore the fact that several "costing out" changes in the December 2007 Report are based on undisclosed expert opinions provided by a three-person advisory panel that was convened after the PJP process had been completed. (Db24-25:providing the credentials and expertise of the advisory panel, but failing to disclose their opinions, contributions, or reasoning for changes in SFRA). First, instead of the six model districts developed through the PJP process, the DOE decided, in consultation with the advisory panel, "to use only one representative model for determining adequacy budgets for all districts." (Exhibit G to Davy Certification at 9). Yet, there is no explanation of whether there was any consideration of the

"fit" between the single hypothetical model district and the Abbott districts.

In fact, the Certifications demonstrate that the hypothetical model district was not based on the reality of any of the Boards' districts – or any other Abbott district - with respect to enrollment, nature of student population, size of schools, and grade configuration. (Gilson Certification, ¶12; Gola Certification, ¶¶12-13; Hoover Certification, ¶¶12-13; Muñoz Certification, ¶¶12-13; Spaventa Certification, ¶¶12-13; Trzeszkowski Certification, ¶¶12-13; Holster Certification, ¶¶12-13; Glascoe Certification, ¶¶12-13; Gorman Certification, ¶¶12-13; Rodecker Certification, ¶¶12-13; Chando Certification, ¶¶12-13; Lofton Certification, ¶¶12-13). In short, the single model district, which is the foundation for the State's assertion that the adequacy budget is sufficient to provide a thorough and efficient education for all students in the Abbott districts, is not representative of the characteristics of actual Abbott districts.

Second, the DOE's final proposal, for undisclosed reasons, "accounts for the 'concentration effect' by applying a sliding scale at-risk weight with finite values, ranging from 0.47 for districts with an at-risk population of less than 20% to a maximum of 0.57 for districts with an

at-risk population equal to or greater than 60%." (Exhibit G to Davy Certification at 11). There is no explanation of how the percentages were selected for this sliding scale, how they correlate with actual needs in the Boards' districts, or why the at-risk weight is capped at 60% for those districts with at-risk populations substantially in excess of 60%. (Gilson Certification, ¶10(73.1%); Hoover Certification, ¶10(76.8%); Munoz Certification, ¶10(73.1%); Trzeszkowski Certification, ¶10(65.4%); Holster Certification, ¶10(84.3%); Glascoe Certification, ¶10(86.3%); Rodecker Certification, ¶10(80.4%);Lofton Certification, ¶10(62.1%).

Third, there is no explanation or support for many of the determinations in the at-risk model. Since the implementation of the Abbott mandates, the DOE has never analyzed or assessed the implementation, effectiveness or costs of foundational and supplemental programs, services, and positions required and demonstrably needed for our students. Neither the DOE nor the PJPs nor the advisory panel conducted any study or evaluation of the implementation, effectiveness, and costs of the required and demonstrably-needed Abbott remedies in developing the at-risk weights. It is unfathomable how the PJPs, the advisory panel, or the DOE itself - without actual data on

the current needs, costs and realities in the Abbott districts - could have "costed out," with sufficient accuracy, what constitutes an adequate at-risk weight for supplemental programs, services and positions. Moreover, the State not only claims without evidence that these at-risk weights are adequate, but also seeks to eliminate any appeal by districts to show that demonstrable supplemental needs have not been met by the formulaic weights.

Although the State baldly claims that the resources in its SFRA formulaic model exceed the resources necessary for the districts to implement the Abbott X Chart of Supplemental Programs and Services, there are numerous programs and services that are not accounted for in the SFRA model, but that are currently in place in districts to address demonstrable needs of students. For example, the DOE failed to account for early literacy reading blocks and assessments in determining the cost of providing a thorough and efficient education for at-risk students in the early elementary grades. These early literacy reading programs have been instrumental in boosting achievement scores in the elementary grades in the Boards' districts. (Gilson Certification, ¶13; Gola Certification, ¶14; Hoover Certification, ¶14; Muñoz Certification, ¶14; Spaventa Certification, ¶14; Trzeszkowski Certification, ¶14;

Holster Certification, ¶14; Glascoe Certification, ¶14; Gorman Certification, ¶14; Rodecker Certification, ¶14; Chando Certification, ¶14).

With regard to secondary education, the at-risk weights fail to address the additional needs arising from the DOE-mandated Secondary Education Initiative ("SEI") in middle and high schools. SEI consists of establishing smaller learning communities within schools; providing ongoing support to students and their families; and increasing the academic rigor of curriculum and instruction. Although the SEI is implemented in both the middle and high schools in the Boards' districts, there is no fiscal or educational input in the SFRA for the additional costs relating to those educational programs. (Gilson Certification, ¶17; Gola Certification, ¶17; Hoover Certification, ¶19; Muñoz Certification, ¶18; Spaventa Certification, ¶18; Trzeszkowski Certification, ¶19; Holster Certification, ¶19; Glascoe Certification, ¶19; Gorman Certification, ¶18; Rodecker Certification, ¶19; Chando Certification, ¶17; Lofton Certification, ¶19)

The SFRA "at risk" inputs also fail to include numerous programs, services, and positions that the various districts have had and continue to need to serve at-risk children. These include: community services coordinators in

middle and high school; a school-to-work and college transition counselor(s)/program in the high school; adequate numbers of social workers; a sufficient allocation of parent liaisons to provide critical outreach to the community and parents; teacher tutors at elementary and middle schools; drop-out prevention and health and social service coordinators at the middle and high school level; alternative educations programs at middle and high school; vocational programs; substance awareness coordinators; elementary and secondary school facilitators; media specialists; family support teams; student assistance counselors; adequate literacy and math coaches; an enriched nutrition program for breakfast and lunch to enable our students to be ready to learn; district attendance officers; school-based health and social services positions; K-8 gifted and talented programs; technology positions and technology needs; increased instructional time in after school programs; special area supervisors for alternative education, nursing, staff development, home instruction, guidance, social studies, and fine and performing arts (Gilson Certification, ¶¶14-15; Gola Certification, ¶¶15-16; Hoover Certification, ¶¶15-16; Muñoz Certification, ¶¶15-16; Spaventa Certification, ¶¶15-16; Trzeszkowski Certification, ¶¶15-16; Holster

Certification, ¶¶15-16; Glascoe Certification, ¶¶15-16; Gorman Certification, ¶¶15-16; Rodecker Certification, ¶¶15-16; Chando Certification, ¶¶15-16; Lofton Certification, ¶¶15).

The SFRA formulaic inputs also fail to include adequate funding for the "exemplary programs" for art, music and special education in the Districts, which were identified by the Court in Abbott V as requiring special protection. 153 N.J. at 518-19. Nor do the SFRA inputs provide funding for the technology positions and other technology needs and enhancements to help students in the Boards' districts master the Core Curriculum Content Standards ("CCCS") and compete with their peers in the wealthier districts. (Gilson Certification, ¶15; Gola Certification, ¶16; Hoover Certification, ¶16; Muñoz Certification, ¶16; Spaventa Certification, ¶16; Trzeszkowski Certification, ¶16; Holster Certification, ¶16; Glascoe Certification, ¶16; Gorman Certification, ¶16; Rodecker Certification, ¶16; Chando Certification, ¶16; Lofton Certification, ¶16). The at-risk inputs also do not accurately reflect the reality of costs associated with teachers' contractual salaries, alternative education programs, and after school and summer school programs for disadvantaged students in various districts. (See, e.g.,

Muñoz Certification, ¶15; Holster Certification, ¶12).

Finally, as stated above, the at-risk populations in numerous districts exceed those contemplated by the SFRA, and the Limited English Proficient ("LEP") rates used by DOE are vastly different from those in several Abbott districts. For example, the model has a 6.2% LEP student population, while Elizabeth, Passaic and Perth Amboy have LEP rates of 14%, 32%, 14.7%, respectively. (Muñoz Certification, ¶12; Holster Certification, ¶12; Rodecker Certification, ¶14).

The Supplemental Funding Appeals Process

In past years, the Boards' districts and the DOE worked collaboratively to reach agreement on a supplemental funding amount that would support the districts' DOE-approved budgets. The administrative and judicial process established by the Court in Abbott V, 153 N.J. at 526-27 (1988) – and reaffirmed in Abbott v. Burke, 177 N.J. 578, 587 (2003)("Abbott XI") - enabled the Abbott districts and the DOE to engage in a constructive dialogue about the educational needs of students and to discuss specific programs, positions, and services that would be needed to help students overcome their socio-economic disadvantages and achieve the CCCS. (Gilson Certification, ¶4, Gola Certification, ¶4; Hoover Certification, ¶4; Muñoz

Certification, ¶4; Spaventa Certification, ¶4; Trzeszkowski Certification, ¶4; Holster Certification, ¶4; Glascoe Certification, ¶4; Gorman Certification, ¶4; Rodecker Certification, ¶4; Chando Certification, ¶4; Lofton Certification, ¶4).

In the few instances when a district and the DOE could not reach agreement on the appropriate amount of supplemental funding, the district had the opportunity to seek review of the DOE's decision through the expedited appeals process established by the Court and by the DOE regulations. The ability to have full administrative and judicial due process has been integral to these districts' efforts to provide their students with a thorough and efficient education and to help them overcome significant impediments to education as a result of their socio-economic disadvantages. (Gilson Certification, ¶¶5-6; Gola Certification, ¶¶5-6; Hoover Certification, ¶¶5-6; Muñoz Certification, ¶¶5-6; Spaventa Certification, ¶¶5-6; Trzeszkowski Certification, ¶¶5-6; Holster Certification, ¶5-6; Glascoe Certification, ¶¶5-6; Gorman Certification, ¶¶5-6; Rodecker Certification, ¶¶5-6; Chando Certification, ¶¶5-6; Lofton Certification, ¶¶5-6).

The State has not provided any evidence of an educational justification to support the curtailment in the

SFRA of the due process right to seek demonstrably needed funding for special needs students. Nor has the State produced any evidence on this motion – other than conclusory and factually unsubstantiated statements by the Commissioner (Db 72) - that the appeals process has resulted in an "adversarial relationship" or has "negatively effected the ability of the DOE to assist the districts in using funds in an effective and efficient manner to improve student achievement." (Id.). To the contrary, the districts state that the process has actually worked to facilitate a productive dialogue between the DOE and the districts in addressing supplemental funding needs. They are unaware of anything during this process that has impeded the ability of the DOE to work with the districts on a variety of fiscal and educational issues. (Gilson Certification, ¶9; Gola Certification, ¶9 Hoover Certification, ¶9; Muñoz Certification, ¶9; Spaventa Certification, ¶9; Trzeszkowski Certification, ¶9; Holster Certification, ¶9; Glascoe Certification, ¶9; Gorman Certification, ¶9; Rodecker Certification, ¶9; Chando Certification, ¶9; Lofton Certification, ¶9).

In contrast to the process required by Abbott V, the SFRA dispenses entirely with the opportunity for the districts to seek additional funding based on the

demonstrable needs of their students, no matter how substantial or compelling the needs of the students are and no matter how great the obstacles that they must still overcome to benefit from the districts' educational program. The State does not explain why the right to appeal needs to be entirely eliminated under SFRA, for "if the SFRA will provide the needed funding, as the State claims, to continue all of the programs, services and positions to address the special disadvantages of [Abbott] students, then there would be few, if any appeals." On the other hand, "if the SFRA fails to provide that funding, then the effect of the statute is to deprive the District[s] and [their] students of the fundamental right to seek additional funding to meet those needs." (Gilson Certification, ¶8; Gola Certification, ¶8 Hoover Certification, ¶8; Muñoz Certification, ¶8; Spaventa Certification, ¶8; Trzeszkowski Certification, ¶8; Holster Certification, ¶8; Glascoe Certification, ¶8; Gorman Certification, ¶8; Rodecker Certification, ¶8; Chando Certification, ¶8; Lofton Certification, ¶8).

The Impact of the SFRA Upon These Districts

As a direct result of the potential implementation of SFRA and documented increases in non-discretionary expenditures in the 2008-09 school year in excess of the 2%

increase in State funding for most districts, the Boards will have to cut a wide range of current, approved expenditures for programs, services, and positions in 2008-09, including the following: numerous teachers in a variety of subject matter areas (which will increase class sizes beyond DOE regulations), teacher tutors, Basic Skills and remedial instructors, school-based social services, assistant principals and supervisors, coordinators of health and social services, drop out prevention officers, language arts/literacy and math coaches, home instruction teachers, school nurses, parent liaisons, instructional materials in the various languages needed to serve the districts' populations, before and after school tutoring services, curriculum supervisors, textbooks and other instructional materials and supplies, field trips, technology coordinators, facilitators, attendance officers, custodial and maintenance positions, school disciplinarians, remedial summer schools, middle school enrichment programs, counselors and social workers, media specialists, ELL instructors, professional development, guidance and social worker positions, substitute teachers, alternative schools for the middle grades; after school programs, and bilingual classroom aides, (Gilson Certification, ¶21; Gola Certification, ¶21 Hoover

Certification, ¶23; Muñoz Certification, ¶22; Trzeszkowski Certification, ¶23; Holster Certification, ¶23; Glascoe Certification, ¶23; Gorman Certification, ¶22; Chando Certification, ¶21).

Furthermore, there are other programs, services, and positions in the Chart of Supplemental Programs that are demonstrably needed by students in those districts, which individual districts will have to eliminate or reduce in the 2008-09 school year and in future school years under the SFRA's formulaic approach. These include the following: classroom teachers, literacy teachers at the elementary level, early literacy intervention coaches, academic support teachers to assure appropriate student-teacher ratios and to provide instructional support, drop-out prevention specialists and programs, school to work and college transition coordinators, lack for funding to implement necessary improvements to address "District In Need of Improvement" status under the No Child Left Behind Act, Basic Skills teachers, art and music teachers, literacy specialists and math coaches, bi-lingual teachers, teacher tutors, instructional facilitators, social and school referral personnel, school nurses, school-based social workers and counselors, substance abuse coordinators, alternative education programs,

instructionally-based after school academic support and supplemental programs, instructionally-based summer programs, violence prevention programs, technology teachers, small reading groups for early literacy, removal of elements of small learning communities at the secondary level, anger management staff and programs, and professional development. (Gilson Certification, ¶22; Gola Certification, ¶22; Muñoz Certification, ¶23; Spaventa Certification, ¶22; Trzeszkowski Certification, ¶24; Holster Certification, ¶24; Glascoe Certification, ¶24; Gorman Certification, ¶23; Rodecker Certification, ¶6; Chando Certification, ¶22).

Under SFRA, the cuts in the Districts' overall budgets would be even more drastic in the 2009-2010 and 2010-2011 school years. Transitional "adjustment aid" will decrease or will not even be appropriated (since there is no assurance of such aid) and, even if appropriated, non-discretionary increases in expenditures will exceed the modest "transitional aid" funding in most districts. As a result, reliance on local fair share will increase, but, because of limitations on the local tax raising capacity arising from municipal overburden, budget shortfalls will grow. The districts face the realistic prospect of eliminating all the Abbott remedial positions, programs,

and services and losing all the educational gains obtained under the Abbott remedial mandates. (Gilson Certification, ¶¶23,25; Gola Certification, ¶¶22,24; Hoover Certification, ¶25,27; Muñoz Certification, ¶24,27; Spaventa Certification, ¶23,25; Trzeszkowski Certification, ¶25,27; Holster Certification, ¶25,28; Glascoe Certification, ¶25,27; Gorman Certification, ¶24,27; Rodecker Certification, ¶23,25; Chando Certification, ¶23,25; Lofton Certification, ¶¶24,26).

Consequently, the SFRA will immediately result in the elimination of various Abbott remedies and will inevitably return the Abbott districts to the pre-Abbott two-tiered school system of significant disparities between these districts and their wealthier counterparts and the absence of supplemental programs, services, and positions needed for Abbott students to overcome their disadvantages.

Finally, under the SFRA, two other factors will increase the drain on adequacy budgets in 2008-09. Most of the districts have special education classification and tuition costs that will exceed the new DOE "census-based" method of funding special education. (Gilson Certification, ¶24; Gola Certification, ¶23; Hoover Certification, ¶26; Spaventa Certification, ¶24; Trzeszkowski Certification, ¶26; Holster Certification, ¶26; Glascoe Certification,

¶26; Gorman Certification, ¶25; Chando Certification, ¶24; Lofton Certification, ¶25). Those districts will be forced to rely on additional revenues from their already strapped adequacy budgets to satisfy the federal and state mandates for special education since their over-burdened local tax bases will not be able to provide that funding. Under SFRA, the districts will lack the opportunity to seek supplemental funding from the State to meet those needs. (Id.)

Additionally, those districts that have new schools coming on line in the 2008—09 school year will have to rely heavily on funds reallocated from their adequacy budgets to meet anticipated start-up costs. For example, Elizabeth has anticipated start-up costs of $16.4 million for three new facilities (Munoz Certification, ¶26), but the State has recommended a total of only $15 million in the FY 2009 budget for all new facilities in all Abbott districts coming on line in the 2008-09 school year. (Db44, n.20). Without taking into account other districts that will have new facilities coming on-line, the appropriated amount is not even enough to cover Elizabeth's start-up costs even if every single dollar was allocated to the District. This will cause an even greater drain on Elizabeth's adequacy budget and will further reduce the amounts available for

current foundational and supplemental educational programs. (Munoz Certification, ¶26).

LEGAL ARGUMENT

POINT ONE

THE MOVANTS-INTERVENORS SHOULD BE GRANTED LEAVE TO INTERVENE

The Boards seek leave to intervene in these proceedings under R. 4:33-1 (Intervention as of right) or R. 4:33-2 (Permissive Intervention). The Boards have been granted leave to intervene and to participate in oral argument in prior Abbott cases. In this case, the Boards meet the criteria for intervention, and the Court should grant the Boards' motion to intervene and to participate in oral argument.

Under R. 4:33-1, there are four criteria for determining intervention as of right. The applicant must: (1) claim "an interest relating to the property or transaction which is the subject of the transaction," (2) show it is "so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest," (3) demonstrate that the "applicant's interest" is not "adequately represented by existing parties," and (4) make a "timely" application to intervene. Meehan v. K.D. Partners, L.P. and Planning Board of the

Borough of Longport, 317 N.J. Super. 563, 568 (App. Div. 1998)(citation omitted). This rule has been construed liberally and "the test is whether the granting of the motion will unduly delay or prejudice the right of the original parties." Id. (citation omitted). The Boards' motion meets all four criteria.

The Boards have critical programmatic and fiscal interests in the continued implementation of the Abbott V remedial measures and of the administrative and judicial appeals process to address the needs of their disadvantaged students. 153 N.J. at 525-27. The State's application, if granted, would have a direct adverse impact on the Boards' ability to provide the programs, services, and positions needed by their disadvantaged students and would preclude any opportunity to appeal for supplemental funding. As set forth in the Certifications, the adverse impacts on the respective districts will be severe, immediate, and irreparable and will turn back the clock on reform and progress in these districts. The Boards will be hamstrung in their efforts to address the educational needs and other disadvantages of their students in the 2008-09 school year and beyond.

Furthermore, each of the Boards has distinct and separate interests apart from the Plaintiffs. The Boards

have significant responsibilities and obligations to address the needs of their disadvantaged students under the Abbott decisions, including the Boards' exclusive right to appeal for demonstrably needed funding. Abbott V, 153 N.J. at T525. The Boards also need to actively participate in these proceedings so that the Court has a fully informed view of district-specific facts that are critical for a proper assessment of whether the SFRA is constitutional and whether the Abbott remedies should be eliminated. The Boards have also sought immediate, interim relief – an issue that has not been addressed by the Plaintiffs. This motion should not delay these proceedings because the Boards are filing this motion in advance of the State's reply to Plaintiffs' opposition. Therefore, the Court should approve the Boards' motion under R. 4:33-1 and allow the Boards, who have vital and unique interests in these proceedings, to intervene and participate in oral argument. Chesterbrooke Ltd Partnership v. Planning Bd., 237 N.J. Super. 118, 124 (App. Div. 1989).

The Boards also meet the standards for permissive intervention under R. 4:33-2. The Boards' submission should not delay or prejudice the Court's decision on the State's application, and the public importance of the issues raised by the State's motion supports the need for

the Boards' active participation in these proceedings. Evesham Tp. Board of Adj. V. Evesham Tp., 85 N.J. 295 (1981). Therefore, intervention is also justified under R. 4:33-2.

POINT TWO

THE COURT SHOULD PRESERVE THE STATUS QUO BY ENTERING AN IMMEDIATE, INTERIM ORDER CLARIFYING THAT THE ABBOTT V ADMINISTRATIVE AND JUDICIAL PROTECTIONS SHALL REMAIN IN EFFECT PENDING A FINAL DECISION ON THE STATE'S MOTION

The State claims it is time to "abandon" the supplemental funding process (Sb73), including the expedited appeals process established by the Court and by DOE regulations[4] to enable the Boards' districts to obtain demonstrably-needed supplemental programs, services and positions for their students. (Sb 71-75) The State baldly asserts that the process has created "an adversarial relationship between the DOE and the Abbott districts" and has "negatively effected the ability of the DOE to assist the districts." (Sb 72). The State further claims that since "the SFRA provides all the resources needed to address the special disadvantages of children in the Abbott

[4] See N.J.A.C. 6A:10-3.8(establishing procedures for administrative and judicial review of budget appeals)

districts," the supplemental process is no longer warranted. (Sb 75).

Even before this Court resolves the State's claims about the SFRA on the merits, the State by fiat has unilaterally jettisoned the expedited administrative and judicial appeals process for the 2008-09 school year. Instead of preserving the status quo pending this Court's constitutional determination on the merits - or properly seeking relief in the Court to eliminate the appeals process (as the State did in prior years) – or even seeking interim relief under Crowe v. DeGioia, 90 N.J. 126, 133-34 (1982) to change the status quo pending a final decision on the merits, the State has taken the extraordinary step of granting itself interim relief by nullifying the existing appeal process prior to any Court review. Under these circumstances, the Court should enter an immediate, interim order preserving the status quo and clarifying that the expedited administrative and judicial protections mandated by this Court in Abbott V and in the current DOE regulations shall remain in full force and effect pending the Court's final determination of SFRA's constitutionality.

The State's precipitous curtailment of appeal rights is based on a perverse and unprecedented legal position –

contrary to our constitutional scheme of government - that a statute like the SFRA immediately trumps and displaces the Court's existing constitutional mandates with respect to the appeals process. As we now explain, elimination of the districts' appeal rights is wholly at odds with prior decisions of this Court, and there is no legal or factual basis to remove those rights while this case is pending before the Court.

In Abbott V, the Court recognized that disputes will occur in the implementation of the Abbott remedies. The Court developed mechanisms to ensure that "districts and individual schools will be accorded full administrative and judicial protection in seeking the demonstrably-needed programs, facilities, and funding necessary to provide the level of education required by CEIFA and the Constitution." 153 N.J. at 527. Subsequently, the State sought on three separate occasions sought the Court's approval to restrict funding for the Abbott districts and to eliminate the Abbott V appeal rights. While the Court granted the State's requested restrictions on funding, the Court repeatedly refused to eliminate the right to appeal to seek adequate funding for demonstrably needed Abbott programs, services, and positions. Abbott v. Burke, 187 N.J. 191,

195 (2006); Abbott v. Burke, 177 N.J. 596, 599 (2003); Abbott v. Burke, 172 N.J. 294, 297 (2002).

The Court recognized that DOE funding might not result in adequate needs-based funding and, therefore, refused to prejudge those issues by peremptorily eliminating the districts' right to appeal those funding determinations. The same reasoning applies with greater force here because the State has failed to provide any reason why existing expedited appeal rights should be eliminated without first obtaining the Court's imprimatur. And, in this case, such a determination cannot be made until the Court has the opportunity to fully address whether the SFRA satisfies this Court's mandates and eliminates any need for funding appeals. It bears repeating that, unlike the prior instances mentioned above where the State sought approval prior to the elimination of appeal rights, the State now has discarded those rights without even seeking leave of the Court pendente lite.

Furthermore, there is no conceivable educational justification for interim or permanent elimination of the Court-mandated appeals process for seeking demonstrably needed funding for their students. Certainly, the DOE has not provided any data or evidence to justify the immediate elimination of these appeal rights prior to any review of

the SFRA. Nor is there any legitimate basis at this stage of the litigation to bar the districts from seeking needed funding for the 2008-09 school year through the existing appeals process, particularly if non-discretionary increases in expenditures jeopardize the continuation of existing programs, service and positions under the SFRA formulas.

In the absence of any educational rationale, the State proffers conclusory assertions, without a shred of evidence, about the "adversarial relationship" created by the process and the negative affect on the DOE's ability to ensure the effective and efficient use of Abbott funding. (Sb72). However, the Court recognized in Abbott V that disputes will inevitably occur in the implementation of the Abbott remedies and that the appeal process was necessary to ensure that demonstrable needs would be met. The State provides no evidence that this appeal process creates any friction between the DOE and the districts, and the State's proffered solution – the abolition of administrative and judicial protections -- would eviscerate the districts' ability to protect their students' constitutional right to demonstrably needed programs, services, and positions.

Moreover, the State's assertion that the SFRA renders those appeal rights unnecessary is flawed for two reasons.

First, it flies in the face of this Court's pronouncements that funding decisions should not be based on "arbitrary, predetermined per-student amounts, but, rather on a record containing funding allocations developed after a thorough assessment of actual needs." Abbott v. Burke, 170 N.J. 537, 559 (2002). The appeals process provides a continuing safeguard for the districts to ensure that funding allocations will be based on need, not on pre-determined SFRA formulas. Until the Court assesses on the merits the adequacy of the SFRA's formulas, it is premature to eliminate those expedited appeal rights.

Second, the practical impact of preserving the districts' appeal rights pending a final determination on the merits would be negligible if the State is correct about the adequacy of SFRA's formulas, but the failure to preserve those existing rights would be disastrous for the districts if their position is ultimately vindicated by the Court. Specifically, if the State is correct that the SFRA has now identified all the additional educational resources needed for at-risk and LEP students and provides the necessary funding to support those educational resources, then there should be no subsequent appeals and the State's effort to eliminate appeal rights is of no practical significance.

However, if the SFRA fails to provide that needed funding, as the Plaintiffs and the districts contend, - and if the Court does not clarify that existing appeal rights shall remain in full force and effect pendente lite- then the State would have, through unilateral action, achieved the same result that it failed to obtain on the merits. Before the Court's ultimate determination on the merits, the Court should not permit the State to eliminate on its own the districts' appeal rights. Instead, the Court should preserve the status quo by clarifying that the expedited appeals process must continue pending the Court's final decision on SFRA's constitutionality.

POINT THREE

THE STATE BEARS THE BURDEN OF PROOF THAT THE COURT'S CONSTITUTIONAL MANDATES ARE SATISFIED BY SFRA AND THAT THE ABBOTT REMEDIES ARE NO LONGER REQUIRED

In the course of the Abbott decisions, this Court has established strict constitutional standards that must be satisfied before actions by the other branches of government can displace the Court's constitutional mandates. As we explain in this brief, those standards relate to any proposal to replace parity funding or to eliminate supplemental funding for needed programs, services, and positions. The Court constructed the

constitutionally-mandated Abbott remedies on a solid evidentiary foundation and should require an equally solid evidentiary showing by the State for any proposed displacement of those remedies.

Notwithstanding the procedural posture of the State's motion, which seeks elimination of constitutional mandates based on assertions that SFRA satisfies the Court's constitutional standards, the State claims that the Court should accord "significant deference,"(Db3), or "substantial deference," Db 54, to the legislative response. The State's position directly conflicts with the Court's prior decisions.

The burden of proof issue was first directly addressed by Judge Levy in his decision on the constitutionality of the QEA after remand by this Court. Abbott v. Burke, 1993 WL 379818 (Ch. Div. 1993), aff'd, 136 N.J. 444 (1994). As Judge Levy persuasively explained in language equally applicable to the State's present motion:

> Here, the overriding question is whether the QEA conforms to the specifics of the Supreme Court's decrees. Therefore the defendants must persuade the Court that the Legislature has provided certain funding for the poor urban districts, not dependent on local budget and tax determinations, that there is adequate funding to provide for special education needs in each

> poorer urban district, that it has considered the problem of municipal overburden in these districts and that a complete new funding mechanism is in place, although its implementation may be phased in. The defendants must prove that the Commissioner, under QEA, has clearly defined the special education needs of those districts and assessed the cost of specific programs to meet those needs.

Id. at *3-4. Judge Levy's decision was affirmed by the Court without any comment on, or modification of, the lower court's burden analysis. Abbott III, 136 N.J. at 446-47. The Court in Abbott IV similarly conducted a detailed examination of the State's proofs in determining whether CEIFA's funding provisions met constitutional requirements. 149 N.J. at 171 (concluding that there is "no evidence to support State's assertion" that all amounts spent in non-Abbott districts in excess of the T&E amount "constitute educational inefficiency"); id. at 185 (stating that the "State failed to demonstrate a basis for the per-pupil amounts for supplemental programs. . . .").

If anything, the reasons for placing the burden on the State are now even more compelling since the Court has established clear standards for the showings necessary to displace the Abbott remedies. With respect to parity, the

Court articulated in Abbott IV the "convincing demonstration" standard that must be met for replacement of the parity remedy, Abbott IV, 149 N.J. at 196. As for supplemental programs, the Court has made it clear that any determination of the specific supplemental programs, services, and costs for at-risk students must be based on a study of the appropriate programs and additional costs associated with addressing those needs. Abbott III, 136 N.J. at 453-54; Abbott IV, 149 N.J. at 198-200.

Moreover, the Court repeatedly refused to rely on the State's bare assertions about the needs of those students and claims that pre-determined funding amounts would be sufficient to meet those needs. Instead, in the absence of any State study, the Court eventually ordered the development of an extensive factual record to determine the required and demonstrably needed supplemental programs and services to overcome students' disadvantages in the Abbott districts. Abbott V, 153 N.J. at 496-519; See also, Abbott XI, 177 N.J. at 587.

In light of this background, the burden of proof on this motion must be squarely placed on the State to make the "convincing demonstration" required to eliminate parity and to provide the Court with the study, data and assessments required to demonstrate to the Court that the

SFRA's formulaic at-risk weights reflect actual needs and costs in the Abbott districts, and are adequate to fund the continuation of required and demonstrably needed supplemental programs in those districts. In light of the decade of experience with supplemental programs in the Abbott districts, it is mystifying how the DOE could have reached such a determination without such a study of effective and needed programs, services and positions that have been implemented in those districts. It is also imperative that the State bear the burden of showing that the Abbott administrative and judicial protections are no longer needed under the SFRA.

Placing the burden of proof on the State to show constitutional compliance in these circumstances is not only consistent with prior decisions in the Abbott cases, but also reflects the holdings of other jurisdictions facing the identical issue. Campbell County School District v. State, 181 P.3d 43, 50 (Wyo. 2008) (placing burden on State to show constitutional compliance); Montoy v. State, 112 P.3d 923, 929(Kan. 2005) (stating that "[t]ypically a party asserting compliance with a court decision ordering remedial action bears the burden of establishing that compliance...."); DeRolph v. State, 699 N.E. 2d 518 (Oh. 1998) (holding that the state "has the

burden of production and proof and must show by a preponderance of the evidence that the constitutional mandates have been satisfied.").

Therefore, the Court should carefully scrutinize the State's claims on this motion to ensure that the State has met its burden of showing that SFRA complies with this Court's constitutional standards and that the Abbott remedies are no longer required.

POINT FOUR

THE STATE'S MOTION ARBITRARILY SEEKS TO ELIMINATE THE ABBOTT DESIGNATION WITHOUT SHOWING THAT THE BOARDS' DISTRICTS NO LONGER POSSESS THE REQUISITE CHARACTERISTICS OF ABBOTT DISTRICTS

This Court originally designated twenty-eight school districts as "poorer urban districts" or Abbott districts, but left it to the Legislature, the State Board of Education, and the Commissioner to make the determination to include others. Abbott v. Burke, 119 N.J. 297, 385 (1990)("Abbott II"). Subsequently, the Court stated, in addressing the de-classification of Abbott districts for the first time, that "[w]hen a district no longer possesses the requisite characteristics for Abbott district status, [Abbott II, 119 N.J. at 338-45, the Legislature, the State Board and the Commissioner may take appropriate action in

respect of that district." Abbott v. Burke, 164 N.J. 84, 90 (2000)("Abbott VII").

To guide this decision, in the subsequently-enacted Education Facilities Construction and Financing Act of 2000, the Legislature required the Commissioner to recommend "criteria to be used in the designation of districts as Abbott districts," including "the municipal overburden of the municipality or municipalities in which the district is situate as that term is defined by the New Jersey Supreme Court in Abbott v. Burke." N.J.S.A. 18A:7G-4(k).[5]

Pursuant to that provision, on June 15, 2005, then-Commissioner Librera submitted a report to the Legislature entitled, Designation of Abbott Districts Criteria and Process (Exhibit to Certification of Richard E. Shapiro, Esq.("Shapiro Certification"). That report, which is the most recent (and only) DOE guidance on the de-designation issue, details the specific factors relating to both educational adequacy and concentrated poverty for Abbott classification or declassification, including consideration of municipal overburden based on the total equalized tax rate and equalized value per capita. (Exhibit to Shapiro

[5] That provision was reenacted in the 2007 amendments to the Act. P.L. 2007, c. 137, ¶19(k).

Certification, 2-3). The report recommends a "systematic and timely review of current Abbott districts and of prospective Abbott districts so that a determination consistent with the intent and spirit of Abbott can be made. Such a review will occur after the decennial census..." (Id. at 4).

With respect to Abbott de-designation, the report states:

> [t]he decennial census may validate that some Abbott districts no longer satisfy Abbott's economic requirements. After each census, the Commissioner shall document those Abbott districts, if any, that no longer satisfy the criteria for concentrated poverty. Should these districts also demonstrate satisfactory student achievement, an exit plan will be devised for each no longer qualifying district to permit an orderly financial and educational transition.

(Id. at 4-5). The report further qualifies de-designation decisions by stating that Abbott districts in District Factor Group ("DFG") A should not be removed if they "continue to qualify as high-poverty even if their students consistently achieve at acceptable levels.... It is reasonable that these DFG A districts with high concentrations of poor children require more time and

analysis to determine if their success will continue without the Abbott remedies." (Id. at 5).

Two conclusions can be readily drawn from this Court's decisions and the Commissioner's report: (1) the determination to de-designate any Abbott district requires after a decennial census a fact-sensitive inquiry into, and thorough assessment of, the specified factors and characteristics of an individual district; (2) districts in DFG A should not be de-designated if they continue to have the same high-poverty characteristics. However, despite these clear guidelines, the State's submission does not provide any of the requisite discussion or analysis by the Legislature, the SBOE, or the Commissioner of the relevant panoply of educational and fiscal criteria to support the sweeping de-designation of all thirty-one Abbott districts. For example, there is no indication that the Commissioner in her reports preceding SFRA – or the Legislature in its hasty passage of the bill – ever considered, much less addressed, the data on poverty concentrations, educational adequacy, and equalized tax rates that are indispensable to a reasoned decision on Abbott de-designation. Put simply, there is no support on this record for the claim that any Abbott district "no longer possesses the requisite characteristics for Abbott district status." Abbott VII,

164 N.J. at 90. To the contrary, the Certification of Dr. Goertz, ¶¶18-28 and the Certifications referenced above demonstrate that conditions in those districts remain largely unchanged from the time of their designation and that ten districts in DFG A retain the high-poverty concentration that led to their original designation. (see pages 6-7).

Moreover, it is striking that the Legislature required the Commissioner to illuminate the appropriate criteria to guide decisions on Abbott de-designation – presumably to comply with this Court's decrees -- and then totally ignored those statutorily-directed criteria. For example, beyond failing to assess data on the relevant specific criteria reflected in Court decisions and the Commissioner's report, the State disregarded the Commissioner's opinion that: (1) these decisions should be made based on the decennial census; and (2) DFG A districts that continue to qualify with high-poverty concentrations should not be immediately de-designated.

In short, the record demonstrates that the State's decision to de-designate all thirty-one Abbott districts was not based on reasoned choices or decisions, but was arbitrarily reached, without any rational basis, in disregard of this Court's decisions and of the very report

required by the Legislature to guide the State in making such decisions. That decision cannot be squared with this Court's constitutional mandates, and the State's motion seeking Abbott de-designation should be denied.

POINT FIVE

THE STATE'S MOTION TO DISPLACE THE ABBOTT REMEDIES SHOULD BE DENIED BECAUSE THE STATE HAS FAILED TO DEMONSTRATE THAT THE SFRA SATISFIES THIS COURT'S CONSTITTUIONAL MANDATES

The State claims that the SFRA is constitutional and that, therefore, the Abbott remedies are no longer required or necessary. Plaintiffs' brief persuasively explains the fundamental constitutional flaws in the SFRA, and the districts join in those arguments. As Plaintiffs demonstrate, the State has simply failed to sustain its burden of proof that this Court's Abbott remedies should be eliminated.

The Boards supplement those reasons to deny the State's motion. First, as discussed in Point II, the SFRA seeks to deprive the Abbott districts of their right to seek additional funding to address demonstrable needs beyond the formulaic statutory amounts. That claim seeks to return educational funding to the era of prior unconstitutional statutes grounded on rigid, unappealable,

pre-determined formulaic funding amounts, rather than on needs-based funding, in contravention of the basic principle of the Abbott decisions. Abbott V, 153 N.J. at 519 (stating that "[r]equests by the Commissioner that funds be appropriated to implement educational programs deemed essential on the basis of demonstrated need will be the measure of the State's constitutional obligation to provide a thorough and efficient education."); Abbott III, 170 N.J. at 559(budget decisions "must yield funding decisions based not on arbitrary, predetermined per-student amounts, but, rather, on a record containing funding allocations developed after a thorough assessment of actual needs.").

To eliminate the right to appeal formulaic funding determinations would require the Court to find that the State has conclusively demonstrated on this record that adequacy budgets and at-risk weights for Abbott children now and in the future would always be sufficient to meet demonstrable student needs. That is a hopelessly speculative process, and the districts' right to appeal is the very type of fail-safe mechanism required by the Court to guard against inadequate formulaic funding determinations.

Second, the at-risk weight determinations in the SFRA are still not based on a study or assessment of student needs or a review of effective supplemental programs, services and positions (and their costs) that have been implemented in the Abbott districts over the past decade. The Court's pronouncements on supplemental funding have repeatedly stressed the critical importance of informed decision-making on needed supplemental programs through such a study. The Court's Abbott V ruling was predicated on an extensive evidentiary record describing such programs, services, and positions. Abbott V, 153 N.J. at 489-90. Yet, the State now asks the Court to accept at face value an at-risk weight that was not based on an analysis of the Abbott remedies or even a study of the experience of in Abbott districts since the implementation of those remedies ordered in Abbott V. It is beyond belief that - after repeated demands by the Court that the State base any funding determinations for at-risk students on a study of actual needs – that the State would now seek the Court's approval of an at-risk formula that is not based on an assessment of actual needs and costs.

Furthermore, the SFRA's sliding scale is capped at 60% poverty concentration and fails to provide any remedy for needed funding to those districts whose at-risk population

exceeds 60%. The SFRA's at-risk weight is dressed up as something new, but it is, in actuality, the same flawed methodology leading to the same flawed result that rendered similar approaches to supplemental needs unconstitutional in QEA and CEIFA. SFRA fails to assure - and will, in actuality, require the reduction or elimination of - supplemental programs for Abbott children that "are the indispensable foundation of a thorough and efficient education and a fundamental prerequisite to the fulfillment of the State's constitutional obligation." Abbott IV, 149 N.J.at 199.

Third, as with CEIFA, the State has based the funding scheme in SFRA on a hypothetical model district that does not reflect the characteristics and realities of the Abbott districts. Abbott IV, 149 N.J. at 172. (see pages 8-16,infra). As with CEIFA, the model "rests on the unrealistic assumption that, in effectuating the imperative of a thorough and efficient education, all school districts can be treated alike and in isolation from the realities of their surrounding communities." Id. This fallacy doomed CEIFA's funding provisions and the same fatal flaw is repeated in SFRA.

Fourth, the Court found the QEA unconstitutional because of the Act's reliance on discretionary actions of

the executive and legislative branches to achieve an adequate funding level. Abbott v. Burke, 136 N.J. at 451. The SFRA contains the same defect since decisions on "adjustment aid," a non-formulaic funding stream required to prevent the immediate catastrophic impact of the funding formula on Abbott special needs districts, is totally dependent on annual discretionary decisions of the Governor and the Legislature. There is no guarantee that this adjustment aid will be appropriated in adequate amounts this year or in future years. Moreover, in every budget year the Governor and the Legislature will have discretion to determine whether to provide adjustment aid and in what amount. SFRA simply does not provide the assured and guaranteed funding level mandated by the Court for the Abbott districts. Abbott II, 119 N.J. at 385; Abbott III, 136 N.J. at 451.

Finally, in Abbott II, 119 N.J. at 355-57, this Court identified the factual conclusion of municipal overburden in the Abbott municipalities as a serious constitutional concern with the Public School Education Act of 1975 and stated that "the funding mechanism of the Act will never achieve a thorough and efficient education because it relies so heavily on a local property base already over-taxed to exhaustion," Id. at 357. It is factually

undisputed that SFRA similarly relies heavily on local taxpayers to assume a substantially greater financial burden to support their districts' adequacy budgets.

However, the State has not presented any evidence that the Commissioner or the Legislature has conducted any study or assessment of relevant fiscal data to determine whether municipal overburden in the Abbott districts continues to be a factual impediment to adequate funding under SFRA. The State baldly claims, without any assessment of municipal overburden, that these municipalities can now absorb significantly increased local tax burdens (Db 76-77), but the Plaintiffs demonstrate that the State's assumptions are based on a flawed understanding of data and of present conditions in the Abbott districts. (Pb 54-58). Without any proper factual showing that municipal overburden is no longer a problem, SFRA violates the Court's Abbott mandate that "the required level of funding for the special needs districts 'cannot be allowed to depend on the ability of local school districts to tax. . .[and] must be guaranteed and mandated by the State.'" Abbott III, 136 N.J. at 451; Abbott II, 119 N.J. at 295, 386.

The failure of the State to address municipal overburden would be reason enough to find SFRA

unconstitutional. Equally troubling is the lack of any provision in the SFRA requiring Abbott municipalities to raise taxes to support the SFRA's adequacy budget. Since many wealthier districts will be able to raise local taxes to support their school budgets, while the Abbott districts will not be in a position to do so because of municipal overburden, the SFRA will restore the very spending disparities between districts and two-tiered school system that triggered this Court's original decisions in Robinson and Abbott. The SFRA brings the Court full circle to the type of flawed and unconstitutional funding scheme that in the past has relied so heavily on local taxpayers, and the Court should similarly conclude that "we are no more likely 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.

On this record, the State has not only failed to demonstrate that SFRA satisfies this Court's constitutional mandates, but also it is evident that SFRA contains virtually all the constitutional defects in prior State funding statutes rejected by the Court. The State provides no legal or factual basis for Court to find after the enactment of SFRA that the Abbott remedies are no longer required or necessary.

CONCLUSION

For the reasons set forth above, the Boards respectfully request that the Court enter an immediate, interim order clarifying that the Abbott V procedural protections shall remain in effect pending a final decision on the merits of SFRA's constitutionality.

When the Court turns to the merits of the State's motion, the Boards respectfully request that the State's motion should be denied.

Respectfully submitted,
RICHARD E. SHAPIRO, LLC

By: _____
Richard E. Shapiro

Date: May 13, 2008