

RAYMOND ARTHUR ABBOTT, ET AL.,

Plaintiffs-Cross Movants,

vs.

FRED G. BURKE, ET AL.,

Defendants-Respondents

SUPREME COURT OF NEW JERSEY
DOCKET NO. 42,170

CIVIL ACTION

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION AND IN SUPPORT OF
PLAINTIFFS' CROSS-MOTION IN AID OF LITIGANTS' RIGHTS

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INTRODUCTION

Plaintiffs seek this Court's immediate intervention to uphold the bedrock Abbott principle of assuring adequate State funding to meet the demonstrated needs of school children in the Abbott districts. As the record on this motion plainly demonstrates, the State's "flat" FY2007 budget proposal, which the Acting Commissioner of Education ("Acting Commissioner") seeks to impose upon the Abbott districts and schools, is unprecedented; is wholly lacking in evidentiary support or legal justification; and will force districts to make significant cuts in existing programs, staff and services to the Abbott school children.

Without this Court's prompt intervention to invalidate the State's budget proposal and require timely review of district FY2007 budgets consistent with the funding protocols established in Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V"), the State's proposal will negatively impact New Jersey's most disadvantaged students, and roll back the strong, historic educational progress being made in our high poverty urban districts and schools since 1999, when initial implementation of the Abbott programs and reforms began in earnest.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

On April 7, 2006, the Acting Commissioner of Education filed this motion seeking the Court's approval of the Governor's FY2007 proposed budget. The Governor's proposed budget would, if enacted, provide no increase in state aid in Abbott districts. Thus, by this motion, the Commissioner is seeking to preclude the districts from requesting any needs-based supplemental funds to support their FY2007 programs and budgets, and to be absolved of the obligation to determine the need for such funds, as required under Abbott V.

The Abbott plaintiffs oppose the motion, and seek an order denying the Acting Commissioner's request for approval of the State's proposed budget. Plaintiffs also file a cross motion, seeking an order to: (1) declare invalid the March 24, 2006 amendment to the 2005-06 Abbott regulations, N.J.A.C. 6A:10A-7.3, which imposes the Governor's proposed budget on the Abbott districts; (2) direct the Acting Commissioner to adopt an emergency regulation to guide the FY2007 district budget process, consistent with Abbott V; (3) commence promptly the evaluation of the Abbott reforms, as required by Abbott V and Abbott v. Burke, 177 N.J. 578 (2003) ("Abbott X"); (4) finalize promptly the Department of Education's ("DOE") plan to manage Abbott implementation; and (5) direct the Commissioner to promulgate the 2006-07 Abbott

regulations under the Administrative Procedure Act, N.J.S.A. 52:31-1 et seq., or other comparable procedures.

In the following parts of this section, plaintiffs discuss the record concerning the Abbott district budgets from 2002-03 through 2005-06, and the budgeting process for FY2007 until the filing of this motion. We then discuss the record concerning educational progress in the Abbott districts since 1999-2000, and critical flaws in Abbott implementation impeding that progress.

A. Abbott District Budgets From 2002-03 to 2005-06

As required by Abbott V, Commissioners have, since 1999-2000, promulgated regulations governing the Abbott district budgets, including standards and procedures for districts to request supplemental funding based on demonstrated need.¹

Under these regulations, the Abbott districts follow the same general process in developing their annual budgets. First, the district prepares a separate budget for the preschool program, with a request for additional supplemental funding, if needed. Next, each school prepares a budget for foundational education and supplemental programs, which is submitted to the district.

¹ As discussed infra, since 2002-03, the Commissioner has adopted new Abbott regulations every year, without any public notice or comment.

Finally, the district prepares a budget for central office functions. All of these budgets are combined to create the overall district budget, including requests for funding for preschool and for K-12 supplemental programs based on the district's particularized needs. See Certification of Melvin Wyns, ¶5 ("Wyns Cert.").

Thus, the annual Abbott district budgets have three main program elements: (a) K-12 foundational education supported by per-pupil funding at parity with the average per-pupil expenditure in the successful suburban, or DFG I&J districts; (b) universal, high quality preschool for three- and four-year olds, and the second half of kindergarten for five-year olds, supported by funding based on need; and (c) K-12 mandated and other identified supplemental programs, also supported by needs-based funding. Wyns Cert. ¶4.

The record on this motion, and the record of the proceedings before this Court in Abbott v. Burke, 172 N.J. 294 (2002) ("Abbott IX") and Abbott v. Burke, 177 N.J. 596 (2003) ("Abbott XI"), clearly demonstrate that State's process for reviewing Abbott district budgets, and deciding requests for supplemental program funding has not been "open-ended" or "unlimited," as the State asserts. See Brief in Support of State's Application for Approval of

Governor's FY2007 Proposed Budget, at 2, 27 ("State's Br."). Rather, since 2002-03, the districts' budgets, and supplemental funding, have been limited under authority granted by this Court, or by extensive and stringent efficiency and presumptive budgeting standards established by the annual Abbott regulations.

1. The Maintenance Budgets

In 2002-03 and 2003-04, the Abbott district budgets, and supplemental program funds, were placed under strict limits, based on applications by the State to this Court.

In 2002-03, the Commissioner, with plaintiffs' consent, sought relief from this Court to "relax," for one year, the Abbott IV and Abbott V remedies by authorizing districts to "reduce, eliminate or limit growth of whole school reform enhancements," and to scale back other supplemental programs. Abbott IX, 172 N.J. at 297. The Commissioner made this request to have "time to make revisions to the regulatory framework to ensure full, effective, and timely implementation of the Abbott remedial measures" and to accommodate a State budget deficit. Id. at 295-96.

Under this Court's "time out" budget order, the DOE was authorized to establish a "presumptive budget" for each district, along with the supplemental funding amount to

support the "level of expenditures contained in the 2001-02 K-12 approved district budget," as increased by the cost of the second half of kindergarten. 172 N.J. at 297. The districts supported this budget through a parity increase, but experienced a reduction in K-12 supplemental funds. Wyns Cert. ¶13.

In 2003-04, the Commissioner sought judicial authority to extend the "time-out" budget and set limits on supplemental funding for a second year. Abbott X, 177 N.J. at 589(citing the parties' disagreement in mediation). The State expressly represented to the Court that its request "relates only to the 2003-04 school year," and that it does "not otherwise" seek to "modify or limit" the districts' right to request needs-based supplemental funding. Abbott X, 177 N.J. at 587.

The Court granted the State's application, authorizing the Commissioner to establish a "maintenance" budget for each district and to determine the amount of supplemental funding needed to support the budget. Abbott XI, 177 N.J. at 596. Maintenance was defined as the funding level "necessary to implement current approved programs, services, and positions," and to cover "documented increases in non-discretionary expenditures," such as contracted salaries, health benefits, and special education

tuition. Id. at 598.

In addition, the DOE was authorized to establish, by emergency regulation, standards for "the effectiveness and efficiency of the districts' non-instructional programs," and to evaluate the maintenance budgets based on those standards. Id. The Commissioner then promulgated an amendment containing new, and more stringent, budgetary review standards that required extensive documentation to support all spending; imposed strict limits on fund balances; and authorized reallocations of non-instructional expenditures based on comparisons with other districts. Wyns Cert. ¶ 14.

Following exhaustive review of the district budgets under these standards, and further clarification from this Court, Asbury Park BOE v. DOE, 180 N.J. 109 (2004), the 2003-04 maintenance budgets were approved, supported by the mandated parity increase. K-12 supplemental funding was reduced for a second straight year. Wyns Cert. ¶14.

2. The Efficiency and Presumptive Budgets

In 2004-05, the Commissioner did not seek Court approval for another maintenance budget, but carried over the 2003-04 effectiveness and efficiency standards for review of district budgets and requests for supplemental funds. In May 2004, after the budgets were submitted, the

DOE adopted regulatory amendments establishing additional efficiency standards. However, after the districts challenged these amendments in this Court, they reached agreement with DOE on their budgets and supplemental funding levels. Wyns Cert. ¶15.

For 2005-06, the Commissioner did not adopt the Abbott regulations until November 30, 2004. In these regulations, the Commissioner established, for the first time, a "presumptive budget" formula. The presumptive budget was calculated "as the 2004-2005 base budget," adjusted by a 3.01% cost of living increase, plus approved new school facility costs. N.J.A.C. 6A:10A-7.2(e)(expired June 30, 2005). Districts were given discretion to support the presumptive budget by accepting a 3.01% aid increase, or the parity increase if greater, or by pursuing supplemental funding beyond that budget level based on particularized need. Wyns Cert. ¶16.

The 2005-06 presumptive budget protocol was significant in several ways: (a) a district's acceptance of the presumptive budget included the DOE's determination that the district was operating efficiently, N.J.A.C. 6A:10A-7.2(i)(expired June 30, 2005); (b) the DOE established a process to fund the cost of opening new school facilities, N.J.A.C. 6A:10A-7.2(e); and (c) the DOE

placed even more stringent requirements for approving supplemental funding beyond the presumptive budget level. N.J.A.C. 6A:10A-7.3; Wyns Cert. ¶17.

Under these regulations, the districts and DOE cooperatively agreed on their budgets and aid levels. Twenty-five (25) districts accepted the presumptive budget increase, or parity if greater. The DOE approved supplemental program funding in several districts, including funds to cover new school costs. In approving the budgets, the DOE determined that the districts were operating efficiently. Wyns Cert. ¶18, Exhibit B (showing FY2006 presumptive budgets and state aid increase).

The State asserts on this motion that "it lacks the types of accountability measures" to "fairly" review districts' requests for supplemental program funds. State's Br. at 28. However, in September 2005, the Assistant Commissioner for Abbott Implementation made special note of DOE success in reviewing the 2004-05 and 2005-06 budgets, achieving efficiencies and cost savings, and collaboratively resolving districts' funding requests:

The [Abbott] Division has worked with McKinsey & Co., a leading management consulting firm to develop a reliable comparative spending analysis to identify areas of potential savings...The comparative analyses of district expenditures help the division and districts focus their attention on substantial saving opportunities and

a closer examination of certain administrative practices that could be improved...In the two budget reviews for FY2005 and FY2006, we relied on the experience and skill of Peter Genovese, the School Business Administrator for Long Branch. With his return to the district, we recruited Mark Kramer, the assistant superintendent for facilities and former SBA of East Orange...The full implementation of the comparative spending model requires the recruitment and training of persons with expertise in major expenditure areas like facilities, maintenance, instructional support, and benefits to use comparative spending results with districts to improve efficiencies and effectiveness of business and financial operations.

It is worth noting that after many years when as many as 23 districts appealed the DOE budget determination, in the last two years, there has been a single appeal that was settled quickly. This is a testimony to the effectiveness of Mr. Genovese and to the adoption of the presumptive budget opportunity for FY2006.

See Certification of Koren Bell, ¶10, Exhibit B, page 14(emphasis added)("Bell Cert.").

B. Current Abbott District Budgets

The record on this motion does not support the State's assertions that current budget levels in the Abbott districts are "extraordinary," "astonishing" or somehow improperly "high." State's Br. at 27.

FY2006 data on the Abbott budgets shows that the districts were operating at an overall budget level of \$4.77 billion. Of this total budget, \$3.23 billion, or 68 percent, is allocated to support the foundational education

program for all students, at the spending level in the suburban I&J districts of \$11,706 per pupil. Another \$568 million, or 12 percent, is allocated to providing preschool and full day kindergarten to three- four- and five-year olds. Seven percent, or \$330.5 million is categorical funding to support programs for English language learners, students with disabilities, and students with other special needs. Lastly, \$639.5 million, or 13 percent, are funds to provide K-12 supplemental programs, services and positions under Abbott. WYNS Cert. ¶43, Exhibit F.

The State also does not produce any evidence on this motion to support its contention that current funding for K-12 supplemental programs in districts' budgets, as approved by DOE, is nothing more than a budget "hole-filler" that does not support any specific supplemental programs, services and positions. See Certification of Lucille Davy, ¶17 ("Davy Cert.").

The available data on K-12 supplemental programs - the sole area of concern raised by the State - shows that both Demonstrably Effective Program Aid ("DEPA") and DOE-approved awards of Abbott needs-based funds support significant levels of those mandated and needed programs. K-12 supplemental funds are providing the additional teachers and other expenditures required to bring down

class size to Court-mandated levels; instructional facilitators, tutors and library media specialists; security officers and drop-out prevention specialists; parent liaisons, nurses, technology coordinators and other mandated and needed staff and services. Certification of Lesley Hirsch, ¶24, ¶25, Exhibit B (updating staffing data from Abbott Indicators Project)("Hirsch Cert.").

The record on this motion clearly demonstrates that the current budget levels in the Abbott districts are fully in line with the program requirements and funding benchmarks established in the Abbott rulings, and are entirely consistent with what is needed to deliver rigorous foundational education, provide high quality early education, and meet the extra educational needs of disadvantaged students, students with disabilities, and students with other special needs in the Abbott districts. Wyns Cert. ¶42, ¶43, ¶44.

C. The FY2007 Budget Process

The 2006-07 Abbott regulations provide extensive guidance and direction to the schools and districts on implementing foundational education and supplemental programs, and require each school and district to prepare a new program plan, named the "Two-Year Reports on Instructional Priorities." N.J.A.C. 6A:10A-1 et seq.

(expires June 30, 2006); Wyns Cert. ¶26 (discussing programmatic requirements for the Two-Year Reports). The regulations also require school-based budgets to implement the Abbott reforms, as reflected in the Two-Year Reports. The regulations, however, contained no guidance on preparing the district FY2007 budget, nor provided standards and procedures for requesting supplemental funding. Wyns Cert. ¶24.

In October, the DOE issued further guidance on the school and district Two-Year Reports. Wyns Cert. ¶25. The guidance emphasized the importance of addressing the needs of English language learners and students with disabilities; of integrating Abbott and the federal No Child Left Behind ("NCLB") requirements, particularly for schools designated "in need of improvement" under NCLB and required to implement a corrective action plan known as the Collaborative Assessment and Planning for Achievement ("CAPA") plan; and of implementing the new Abbott Secondary Education Initiative ("Secondary Initiative"), an ambitious effort to improve student achievement and graduation rates. Wyns Cert. ¶26.

The DOE guidance also directed each school to develop a FY2007 budget to meet regulatory requirements and carry out its Two-Year Report. The document also notifies

districts that, although the Commissioner had not yet adopted budget rules, they can "assume" that "only minor changes" will be made from the prior year's [2005-06] presumptive budget protocols. Further, the DOE stated that it will apply the same "standards for judging efficiency and effectiveness" of district budgets that were in effect in the prior year. Wyns Cert. ¶27.

During the entire period when the schools and districts were preparing their Two-Year Reports and budgets, and submitting those Reports and budgets to the DOE for review - from November 2005 through early March 2006 - neither the Commissioner nor DOE issued any further budget regulations or guidance. Further, the schools and districts received no feedback or response from DOE on the Two-Year Reports. Wyns Cert. ¶ 29.

Finally, on March 6, 2006, the DOE advised the Abbott superintendents that, because of a "significant anticipated budget shortfall, it now appears unlikely that there will be a presumptive budget award process of a 4.04% cost-of-living increase." The DOE also requested extensive documentation of budget expenditures - salaries, health benefits, special education, textbooks, etc. - and asked districts "to identify expenditures that can be reallocated to support essential instruction and mandated expenses" and

"will make it less likely that students will be harmed by arbitrary and unsupportable reductions." Wyns Cert. ¶29.

Without budget regulations, or standards and procedures for requesting supplemental funding, and without feedback on their Two-Year Reports, the districts prepared and submitted their budgets to DOE on March 14th. The districts made efforts to ensure that the budgets and requests for supplemental funds were based upon the Two-Year Reports, and other identified needs such as new school openings, NCLB corrective action, and the Secondary Initiative. Wyns Cert. ¶30.

On March 23rd, after districts submitted their budgets, the Commissioner notified the districts that FY2007 funding would be "flat;" that they "will not be able" to seek needs-based supplemental funding; and that state funding would be "limited to parity, or last year's amount, whichever is greater." The Commissioner also stated that some Abbott districts would have to increase their local tax levy, which would be deducted from state aid. The Commissioner directed the districts to resubmit their budgets consistent with the "flat" revenues in the Governor's proposed State budget, and consistent with new regulations to be filed shortly. Wyns Cert. ¶31.

The Commissioner also notified eight Abbott districts

with equalized property tax rates of less than 110 percent of the 2005 state average to increase their local tax levies to support their budget. The notice further advises that the amount of state aid to these districts will be reduced "to account for the additional revenue generated by the tax levy." Wyns Cert. ¶32.

On March 24th, the Commissioner amended the Abbott regulations to implement the State's proposed "flat" budget. N.J.A.C. 6A:10A-1.2, 7.2 and 7.3. The amendments require districts to submit balanced budgets and prohibit requests for supplemental funding. N.J.A.C. 6A:10A-7.3(b). The regulations also direct the districts to submit the budget expenditure documentation previously requested by DOE on March 6th, N.J.A.C. 6A:10A-7.3(c), and to ensure budgets are "consistent with" the Two-Year Reports and provide "essential instruction and mandated expenses." N.J.A.C. 6A:10A-7.3(a); Wyns Cert. ¶33.

On March 31st, the districts resubmitted their budgets to DOE. Although a few districts complied with the amended regulations and abandoned their requests for supplemental funding, most districts resubmitted budgets seeking supplemental funding. Wyns Cert. ¶34. These "non-compliant" districts received a second notice from DOE to resubmit a balanced, but "flat" budget, along with an offer

of DOE assistance to make necessary reductions and reallocations. Wyns Cert. ¶35.

The State concedes on this motion that its budget proposal, by eliminating the opportunity to request supplemental funding, will result in across the board cuts in programs and services, given the 4.04% rise in fixed costs as calculated by the DOE. See Davy Cert. ¶5, Exhibit C (directing districts to use care in making "reallocations" so as to lessen the harm to Abbott students from "arbitrary and unsupportable reductions"). There are fixed, non-discretionary costs of operating a school district that increase every year. These costs include items such as teachers' salaries, insurance premiums, utilities bills, out-of-district tuition payments for students with disabilities, and the costs generated by opening new schools. Because of those non-discretionary expenditures, Abbott districts cannot operate on the same state funding level from year to year without an increase in funds from another source or a decrease in the programs and services offered to its students. Wyns Cert. ¶37.

One of the most serious effects of the State's proposal will be its failure to fund new schools that are opening in FY2007. There are an estimated 20 new or renovated schools, built by the State school construction

program that will open in 14 Abbott districts. Certification of Joan Ponessa, ¶5. ("Ponessa Cert."). These schools are essential to meet the needs of Abbott school children, but will now be denied necessary operating and staffing funds. These schools may be forced to remain empty, or other programs must be cut to account for these costs. Ponessa Cert. ¶9.

To implement "flat" Abbott district budgets, the State's proposal reduces current (FY2006) funding for K-12 supplemental programs by approximately \$146 million, and then reallocates \$130 million of that funding to maintain parity in foundation funding at the projected FY2007 suburban district spending level of \$12,174 per pupil. Wyns Cert. ¶36.

It is also clear that Abbott districts have no other source of funding to mitigate or avoid program and staffing cuts. The Acting Commissioner has now defined municipal overburden under Abbott as an equalized property tax rate of 110 percent of the state average. Thus, the State has determined that twenty-three districts, with equalized property tax rates in excess of that level, cannot increase their local tax levy. Even the eight districts mandated to increase local taxes receive no benefit because their state aid will be reduced by the amount of additional local

revenue. Wyns Cert. ¶38; Davy Cert., Exhibit L.

The State, in its filing with this Court, makes no showing that it cannot make timely determinations of the districts' FY2007 budgets based on standards consistent with Abbott V. The Acting Commissioner can issue an emergency regulation establishing protocols similar to the 2005-06 presumptive budget; seek quick budget revisions to conform with those standards; review for reallocations and inefficiencies; and make prompt determinations on budget levels and supplemental program funding. Wyns Cert. ¶41; see also Davy Cert. ¶22 (describing how the State has already retained outside auditors to assist DOE personnel in district budget reviews).

D. Educational Progress in Abbott Districts

The record on this motion demonstrates the growing body of evidence and data showing that the Abbott districts have been making strong educational improvements since 1999-2000, the year in which implementation of the Abbott reforms got underway. Hirsch Cert. ¶18 - ¶23 (discussing data and findings presented in local and statewide reports of the Abbott Indicators Project); State's Br. at 11 (stating that the achievement gains in Abbott districts are "evident," and that the "achievement gap is decreasing"). The greatest progress has been made in early and elementary

education, the specific target of the Abbott V reforms. Hirsch Cert. ¶18.

In early education, substantial progress has been made since 1999. Hirsch Cert. ¶19. Program reviews and analyses, funded by the DOE, show steady improvements in classroom quality, and recent research found "significant improvement in the language, literacy and math skills" of Abbott preschoolers, effects correlated with increased success in later grades in reading and math skills. In a few short years, the Abbott preschool program has become one of the nation's best. Hirsch Cert. ¶20, ¶21.

In elementary education, significant progress has also been made in improving outcomes of Abbott children. The achievement gap between Abbott and non-Abbott fourth graders has been cut in half since 1999. Since 2001, the passing rate of fourth graders has risen 14 points, to 77 percent, in language arts literacy and 36 points, to 72 percent, in math. Hirsch Cert. ¶22; see also State's Br. at 11 (citing the "marked increase" on the fourth grade assessment since 1999).

There is also evidence that Abbott middle and high schools need to improve, the area specifically not addressed in Abbott V. 153 N.J. at 508, n.5 (noting that Commissioner did not propose secondary reforms, but would

do so at a later date); Hirsch Cert. ¶26. Student performance of Abbott secondary students is lower on average than of non-Abbott students and, although graduation rates are rising, more Abbott students, along with their peers elsewhere, are earning a diploma through the State's alternative assessment. Hirsch Cert. ¶26.

To address this need, the Secondary Initiative has been developed, an "ambitious" set of reforms responding to Abbott X. Certification of Stan Karp ("Karp Cert.") ¶5. The Secondary Initiative has just been launched, with curriculum improvements and school restructuring underway in many, but not all, of the districts. The Secondary Initiative, however, is tackling a complex and difficult problem - improving middle and high schools is a national challenge - and will require a substantial, focused and sustained commitment, over a multi-year timeframe, to succeed. Karp Cert. ¶14 (explaining reform requirements in the 2005-06 regulations; implementation progress to date; and the need for a multi-year, intensive effort by DOE and the districts in order for the reforms to bear fruit).

E. Flaws in Abbott Implementation

The State admits its efforts to effectively manage Abbott implementation are flawed, requiring prompt corrective action. See State's Br. at 24 (recognizing that

"the State must improve its accountability measures" and must "analyze how it might improve directing, regulating, and monitoring" Abbott funding). Further, the record demonstrates several specific and longstanding deficits that, if not corrected, will continue to impede further educational progress in Abbott districts and schools.

1. Evaluating Abbott

The record makes clear that the State has not conducted any evaluation of Abbott, eight years after this Court's order to do so in Abbott V, and three years after the Commissioner agreed to move forward in Abbott X. Abbott V, 153 N.J. at 501-02 (directing, "as soon as feasible," a "comprehensive formal evaluation program"); Abbott X, 177 N.J. at 589 (directing the formation of a work group to design the evaluation).

After Abbott X, a work group was convened, labored diligently, and completed the evaluation design specifications in Fall 2004. Hirsch Cert. ¶29. The DOE issued a request for bids for the evaluation last spring, but, suddenly and unexpectedly, withdrew it. Hirsch Cert. ¶31. Despite the work group's efforts, and plaintiffs' repeated pleas to state officials, the Commissioner still has not taken the steps necessary to commence the evaluation. Hirsch Cert. ¶33; ¶34 (describing the efforts

to secure State compliance); see also Karp Cert. ¶13 (noting that the DOE launched the Secondary Initiative with no plan to evaluate implementation and effectiveness).

The State's motion only underscores the glaring deficiencies in State implementation resulting from the absence of solid, ongoing Abbott evaluations since 1999. The State can only speculate about critical implementation issues that can only be illuminated through rigorous research, including the "correlation" between Abbott expenditure and student achievement levels, State's Br. at 21; the educational effectiveness of supplemental programs, such as class size reduction and intensive early literacy, State's Br. at 25; and the differences and variations in achievement levels among the districts. State's Br. at 12 (surmising that district differences in achievement do not "appear" to correlate to spending).

2. Managing Abbott

Not only do the Commissioner and DOE have the "essential and affirmative" responsibility to effectively manage Abbott implementation, State's Br. at 26, the Legislature has imposed this obligation as well. Every annual appropriations act since FY2000 has mandated the Commissioner take "any necessary action" to ensure the

effective and efficient use of Abbott funds. See, e.g., P.L. 2005, c. 132.

The Legislature also annually transfers Abbott funds to the DOE for the "purpose of supervising and managing implementation of Abbott remedies." See, e.g., FY2006 Annual Appropriations Act, P.L. 2005, c. 132. The last two Appropriations Acts - FY2005 and 2006 -- transferred \$14,686,000 to manage and supervise Abbott.

The DOE has had no public plan for managing Abbott, or a budget for the transferred Abbott management funds. In the 2004-05 Abbott regulations, however, the Commissioner directed the DOE to prepare a three-year plan to "transform" its Abbott Division so it can "lead the State's efforts to improve teaching and learning," and ensure effective implementation in the districts. The plan had to address staffing needs, provide a budget, and establish "annual goals and objectives with benchmarks to permit assessment of progress." In preparing the plan, DOE had to "solicit the advice of Abbott stakeholders" and experts, and ensure the plan was "approved by the Commissioner" and "disseminated" to "interested parties." N.J.A.C. 6A:10A-4.1(b)(expired June 30, 2005); Bell Cert. ¶6.

With the 2004-05 regulations set to expire on June 30, 2005, and with no plan from DOE, plaintiffs filed suit to

enforce the regulation requiring the Three-Year plan. On August 8, 2005, Judge Neil Shuster, J.S.C., issued a decision directing DOE to promptly prepare the Abbott management plan in accordance with the regulation. Bell Cert. ¶9, Exhibit A.

On September 25, 2005, the Assistant Commissioner for Abbott Implementation posted a draft plan on the DOE website. Bell Cert. ¶10, Exhibit B. On October 25th, plaintiffs submitted extensive comments on the draft plan to the Commissioner, asking for substantial revisions to conform to the regulation and to address serious shortcomings. Specifically, while the draft listed numerous, serious problems with Abbott implementation, the plan failed to detail the concrete steps DOE would take to address them, and failed to contain the basic plan elements required by the regulation. Bell Cert. ¶11, ¶12, Exhibit C. The Commissioner did not respond to plaintiffs' comments, nor has she finalized the plan as required by the regulation and Judge Shuster's ruling. Bell Cert. ¶14 - ¶16 (discussing unsuccessful attempts to secure compliance).

On this motion, the State admits it must make "structural changes" to the DOE to better fulfill its accountability responsibilities. State's Br. at 26. The motion also demonstrates the absence of, and urgent need

for, a concrete, public plan for managing Abbott, supported by an appropriate budget, especially to address the district-specific problems and to sustain and grow improvements in student achievement. Many of the implementation concerns raised by the State in its motion - ensuring all districts use appropriate curricula, Davy Cert. ¶24; targeting assistance to specific districts and schools where student performance is lagging, State's Br. at 12; assessing and replicating successful practices in high performing districts and schools, State's Br. at 13; continuing to improve implementation of intensive early and middle grade literacy efforts, State's Br. at 10 - were identified by DOE in its September 2005 draft plan. Yet the draft provides no coherent, articulated set of strategies and objectives for addressing these, and other identified problems. See Bell Cert. ¶12, ¶13, Exhibit C.

3. Regulating Abbott

Abbott V requires the Commissioner to "codify" in regulations the Abbott remedial measures, including standards and procedures for requesting the needs-based supplemental funds. Id. at 526.

Since 2002-03, the Commissioner has adopted -- and changed -- the Abbott regulations every year, and often has changed them during the school year. Further, the year-to-

year regulations, and mid-year amendments, are adopted without any public notice or opportunity to provide comment. See, e.g., FY2006 Annual Appropriations Act, P.L. 2005, c. 132(authorizing Commissioner to adopt Abbott regulations, “notwithstanding” the provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.).

It is clear that the State’s constantly changing Abbott rules create a serious obstacle to sound and consistent program planning, budgeting and implementation, and undermine the effectiveness of educational reforms that, by their very nature, require focused, sustained efforts over multiple years. Wyns Cert. ¶6(discussing difficulties in budget planning); Hirsch Cert. ¶17 (discussing effect of altering State’s regulatory framework on sustaining student achievement gains); and Karp Cert. ¶9, ¶10 (discussing uncertainty already surrounding new Secondary Initiative from lack of consistent, stable rules over a multi-year timeframe).

The Governor was alerted to this serious Abbott flaw during his transition. One of the transition teams recommended the Governor:

Convene a Task Force of DOE and District Leadership and other stakeholders to review the DOE Abbott regulations that have been problematic and ever changing. The Task Force would seek to address and adequately define the Abbott

strategies that would allow districts to achieve NJ Supreme Court mandates. The strategies and resulting regulations should be broad and acceptable to allow for a variety of paths within a framework of consistency that should be at least five years.

Take appropriate action to ensure that the Abbott regulations are adopted in accordance with the State Administrative Procedure Act, thereby giving stakeholders in Abbott Districts the opportunity to have notice and comment on the regulations before they are adopted.

"Revitalizing and Investing in Communities Transition Policy Group," Final Report, at 8-9 (January 10, 2006).

ARGUMENT

I. THE ACTING COMMISSIONER'S MOTION TO REDUCE PROGRAMS AND STAFF TO ABBOTT SCHOOL CHILDREN SHOULD BE DENIED

The Acting Commissioner's motion is unprecedented, and its impact on the Abbott school children undisputed. By seeking approval of the Governor's "flat" FY2007 State Budget, the Acting Commissioner is asking this Court for the authority to impose significant reductions in educational programs, staff and services in Abbott schools in the coming school year. As plaintiffs explain below, given the clear violation of the Abbott mandates, and in the absence of any evidentiary basis or other legal justification, the motion should be denied outright.

First, the State's budget proposal, by completely precluding Abbott districts from requesting and obtaining supplemental funding based on demonstrated need, blatantly conflicts with the Abbott V funding mandates. 153 N.J. at 518(directing the Commissioner to establish a "clear and effective funding protocol" for needs-based supplemental program funding requests and, where the need is demonstrated, to approve the requests and seek appropriations to "ensure the funding and resources necessary for their implementation"). Indeed, the State's

proposal strikes at the heart of the remedial measures painstakingly established in this litigation, and carefully tailored to ensure a constitutional education to the Abbott school children. As this Court has repeatedly held, programs, staff and services that are demonstrably needed to meet the unique needs of disadvantaged students in poorer urban districts are essential to the achievement of a thorough and efficient education for those students. See, Abbott v. Burke, 119 N.J. 287, 373-74 (1990) ("Abbott II"); Abbott v. Burke, 136 N.J. 444, 453-54 (1994) ("Abbott III"); Abbott IV, 149 N.J. at 199; Abbott V, 153 N.J. at 489-90; Abbott v. Burke, 163 N.J. 95, 118 (2000) ("Abbott VI").

The State's proposal not only prohibits the districts' from exercising the constitutional right under Abbott V to demonstrate their students' particularized need for supplemental funding but, even worse, would authorize the Commissioner to order the districts to make substantial reductions in current programs, services and positions in order to submit a FY2007 school budget in conformance with the proposed "flat" State Budget.² The State's proposal, by

² As discussed supra, the State has already issued regulations and other directives to the districts to remove all supplemental funding requests, make program cuts, and resubmit a budget "balanced" under the State's proposed funding proposal. A few districts have complied with those

forcing the districts to balance their budgets through program and staffing cuts, constitutes a directive to the districts to flagrantly disregard the educational needs and constitutional rights of their students, as established in the Abbott rulings. See Abbott V, 153 N.J. at 489, (describing the Abbott remedial measures as those "that must be implemented" to ensure Abbott school children "the educational entitlements" guaranteed by the constitution, and recognizing the "commitment" of the Executive Branch "to see these [Abbott] reforms through"); and see Abbott IV, 149 N.J. at 182 (holding that, in the area of supplemental programs, the State "cannot shirk its constitutional obligation under the guise of local autonomy").

Second, the State's proposal reduces and reallocates current Abbott funding supporting existing supplemental programs, staff and services, in direct violation of the Acting Commissioner's basic constitutional responsibility to ensure all of the Abbott remedial measures are adequately funded within district budgets. The Acting Commissioner makes no showing on this motion that the proposed district-by-district reduction and reallocation of

rules and directives, but most have moved to intervene in opposition to the State's motion and budget proposal.

supplemental program funding will not “undermine or weaken either the school’s foundational education program or already existing supplemental programs.” Abbott V, 153 N.J. at 518; see also Abbott VI, 163 N.J. at 118(emphasizing Commissioner’s affirmative responsibility to “first determine” whether existing funding is sufficient to provide “demonstrably needed supplemental[s]”); Millville Board of Education v. New Jersey Department of Education, 183 N.J. 294, 278 (2005)(holding that the Commissioner can only reallocate districts’ funding for K-12 foundational education and supplemental programs to preschool if it does not “undermine or weaken” the K-12 programs). To the contrary, as discussed supra, the reductions and reallocations proposed by the Acting Commissioner on this motion are substantial, and will have serious negative consequences for foundational education and K-12 supplemental programs throughout the Abbott districts and schools.

Third, there is no evidentiary basis for the arguments made by the Acting Commissioner to support the extreme relief she seeks on the motion. State’s Br. at 19. The Acting Commissioner’s central argument - that there is no “correlation” between Abbott district spending and achievement levels - constitutes rank speculation, wholly

unsupported by any evaluation, research or other study. Hirsch Cert. ¶17, ¶37(underscoring error in drawing conclusions without rigorous evaluation controls). Indeed, the irrefutable evidence presented by plaintiffs, and reluctantly conceded by the State on this motion, is that the Abbott districts have made significant educational progress since 1999, particularly in early and elementary education, through implementation of this Court's remedial measures.

The Acting Commissioner's further contention that supplemental program funding should be reduced because the Abbott budgeting process has been "open-ended," resulting in "unlimited" levels of supplemental funding, is belied by the documented record before this Court on the 2002-03 and 2003-04 maintenance budgets, and by the evidence on this motion on the 2004-05 and 2005-06 efficiency and presumptive budgets. As plaintiffs show, the overall Abbott FY2006 budgets are entirely consistent with the funding levels prescribed and anticipated by this Court's remedial mandates. Wyns Cert. ¶43, ¶44; Hirsch Cert. ¶24-25. In prescribing supplemental programs to address the extreme disadvantages of the Abbott school children as the "indispensable foundation" of a constitutional education, Abbott IV, 149 N.J. at 199, this Court fully anticipated

that Abbott budgets would be funded at levels beyond foundational parity, and would exceed those of districts with less student disadvantage. Id. at 178-79 (citing Abbott precedent for supplemental programs and funding).

Moreover, plaintiffs refute the State's assertion that supplemental funding is completely disconnected from supplemental programs. Rather, the available data show significant levels of implementation of mandated and needed K-12 supplemental programs, staff and services, including full-day kindergarten, class size reduction, intensive early literacy, and parent liaisons, counselors and other critical staff and services identified in Abbott V. Hirsch Cert. ¶24-25.

The Acting Commissioner's only other rationale for reducing supplemental program funding in the FY2007 Abbott budgets is the existence of yet another deficit in the State budget. There is nothing in the Abbott rulings, or in the history of this litigation, to suggest that the rights of the Abbott school children to the remedial measures "that must be implemented" to ensure them a constitutional education can rise or fall, as the State would have it, on changing State fiscal conditions, or with varying proposals, plans or agendas of different

administrations. Abbott V, 153 N.J. at 489; see also Abbott IV, 149 N.J. at 198 (ordering a substantial funding increase to ensure parity in foundational education, finding implementation "should not be delayed any further").³ To the contrary, this Court has expressly held that appropriations requests "to implement educational programs deemed essential on the basis of demonstrated need" represents "the measure of the State's constitutional obligation" to provide a thorough and efficient education to the Abbott school children. Abbott V, 153 N.J. at 518.

It is important to underscore the vast difference between the Abbott IX and Abbott X budget orders and the relief sought on this motion. Those orders authorized the Commissioner to establish presumptive or maintenance budgets that would permit continuation of most or all existing supplemental programs -- subject to the districts' right of appeal -- and to secure the additional state appropriations to support the budgets. See Abbott IX, 172 N.J. at 297-98; Abbott XI, 177 N.J. at 598-99. Further, the second year maintenance budget in Abbott XI was

³ As in prior years, alternative proposals are being offered to resolve the present budget deficit. See, e.g., Tractenberg, "Don't Forget the Schools," March 2006, http://ielp.rutgers.edu/docs/DFTS1_web.pdf (presenting overall budgetary and fiscal solutions that also meet Abbott obligations).

approved by this Court after receiving the State's assurances that that it would not return to the Court for similar relief in the future. See Abbott X, 177 N.J. at 587(setting forth agreement to "continue to implement supplemental programs" and to "not otherwise" seek to "modify or limit" the districts' right to request supplemental funding based on demonstrated need). Not only does the State's proposal repudiate that commitment, it goes far beyond the Court-approved budgets by reducing, and not maintaining, existing supplemental programs.⁴

Finally, the State's proposal would set back the strong and undisputed educational progress being made in the Abbott districts and schools, and cripple efforts now underway to strengthen and deepen that progress. The data and research that plaintiffs present on this motion convincingly demonstrate that the Abbott programs and reforms - and the long "struggle" in this litigation to bring the Abbott school children a constitutional education - are beginning to take hold and deliver historic educational dividends. This evidence, and the entire record before this Court, overwhelmingly demonstrate that,

⁴ There is also nothing to prevent the State from working on a new statewide school funding formula while continuing to meet its Abbott obligations. State's Br. at 29; Abbott IV, 149 N.J. at 196 (establishing constitutional conditions for replacing Abbott parity foundation funding).

instead of abruptly reversing Abbott implementation, it is essential that these remedial measures continue to be "conscientiously undertaken and vigorously carried forward." Abbott V, 153 N.J. at 528.

Indeed, the long overdue Court mandated evaluation, and the other corrective steps sought by plaintiffs on cross motion, are now what is needed to sustain Abbott progress, not the Acting Commissioner's proposal to cut essential and needed programs and staff. Now is not the time - nor does this motion present the record - for the State to "slow" the "momentum for reform" clearly accelerating in the Abbott districts and schools. Abbott VI, 163 N.J. at 102; Abbott v. Burke, 172 N.J. 537, 562-63 (2002) ("Abbott VIII") (acknowledging that the Court is "acutely aware" of how the "constitutional imperative" of Abbott holds "the promise of participation in the American dream" for disadvantaged urban children).

In sum, in light of the clear violation of the Abbott rulings, and lack of any evidentiary or legal basis to support the Acting Commissioner's claims, the State's motion should be denied.

II. PLAINTIFFS' RELIEF ON CROSS MOTION SHOULD BE GRANTED TO ENSURE CONTINUED EDUCATIONAL PROGRESS IN THE ABBOTT DISTRICTS AND SCHOOLS

On cross motion, plaintiffs seek affirmative relief to ensure timely submission and review of the districts' FY2007 budgets and requests for supplemental program funds, consistent with Abbott V. Plaintiffs also seek relief to compel the Acting Commissioner to take specific actions to correct glaring flaws in Abbott implementation. As explained below, this relief should be granted.

A. The State Should Promptly Review District FY 2007 Budgets, Consistent with Abbott V

As explained in Point I, the Acting Commissioner's FY2007 budget violates Abbott, lacks any evidentiary basis, and is otherwise legally unsupportable. The proposal, therefore, is unconstitutional and should be rejected.

To effectuate this ruling, this Court should also invalidate the Acting Commissioner's emergency Abbott budget regulation directing implementation of the State's unconstitutional budget proposal. N.J.A.C. 6A:10A-7.3.

This Court should also provide immediate, affirmative relief to get the Abbott district budget process back on proper constitutional and administrative track. The Acting Commissioner should be directed to promptly accept and review the Abbott district budgets, including requests for

supplemental program funding, consistent with the Abbott V requirements. 153 N.J. at 518(authorizing Abbott districts to demonstrate to the Commissioner the need for funds to implement supplemental programs, and for the Commissioner to "provide or secure" the additional funds, if needed).

To facilitate and expedite this process, the Acting Commissioner should be directed to promulgate an emergency budget regulation containing a "clear and effective" funding protocol, including "standards and procedures" to govern district applications for "needed programs and necessary funding." Abbott V, 153 N.J. at 518, 526. Such protocols shall incorporate this Court's schedule for timely decision-making and appeals. See N.J.A.C. 6A:10A-9.8.

B. The State Should Be Directed to Correct Flaws in Abbott Implementation

As the record on this motion demonstrates, there are several affirmative, concrete steps that should be promptly undertaken to improve Abbott implementation, and to hold the State accountable for performance to the Abbott school children, as mandated by the Abbott rulings.

1. The State Should Be Directed to Evaluate Abbott

Nearly eight years have passed since this Court's first directive on the implementation -- "as soon as feasible" -- of a comprehensive formal evaluation of the Abbott programs

and reforms, Abbott V, 153 N.J. at 501-02, and almost three years since DOE made a commitment to the Abbott plaintiffs and this Court to comply with the evaluation directive. Abbott X, 177 N.J. at 589. The State has also not implemented the "accountability system" of "baseline data" and "progress benchmarks" to "inform[] decisions about program improvement," as directed by this Court in Abbott V. 153 N.J. at 515.

As the record on this motion demonstrates, evaluating Abbott is an essential prerequisite to determine the effectiveness of Abbott programs and reforms; to accurately gauge education progress in the Abbott districts; and to inform decision-making on future modifications and course corrections to the Abbott remedial framework.⁵ Put simply, the State's stubborn refusal to comply with this critical Abbott mandate can no longer be countenanced, and should be promptly remedied.

⁵ The State announces that it "will come again before this Court" by year's end to seek "modifications of Abbott V" to enhance student achievement and accountability. State's Br. at 32. To avoid further adversarial proceedings before this Court, it is critical that the State ground any further proposals for Abbott modifications on findings and data derived from solid and rigorous program evaluations, and seek consensus from plaintiffs and other stakeholders before seeking relief. See Abbott X, 177 N.J. at 578 (requiring Court-ordered mediation to resolve disputes over whole school reform).

2. The State Should Be Required to Finalize the Abbott Management Plan

As the State itself admits on this motion, the DOE must be restructured and overhauled to enable the Acting Commissioner to fulfill her "essential and affirmative role to assure that all education funding is spent effectively and efficiently, especially in the [Abbott] districts, in order to achieve a constitutional education." Abbott IV, 149 N.J. at 193; and see State's Br. at 26 (acknowledging the State is constitutionally accountable to improve education for the Abbott school children).

In order to comply with these accountability mandates, it is essential that the Acting Commissioner revise, finalize and disseminate promptly the DOE Abbott management plan, as required by regulation, and Judge Shuster's August 2005 ruling. See Bell Cert., Exhibit A. Further, as this motion demonstrates, the Acting Commissioner should be directed to ensure that the plan: fully comports with all of the requirements in the regulation, including progress benchmarks for assessing whether the State is meeting its articulated accountability goals and objectives; proposes detailed strategies to address district-specific and global problems with Abbott implementation identified by DOE in the September 2005 draft plan and on this motion; and provides a

detailed budget, staffing pattern and expenditure plan for the nearly \$15 million in Abbott funds transferred annually to the DOE for Abbott management purposes.

3. The State Should Adopt Abbott Regulations In Accordance With the APA or Comparable Procedures

Finally, plaintiffs seek affirmative relief to end the continuous, year-to-year cycle of changing Abbott regulations, adopted without any opportunity for input from Abbott stakeholders and other interested parties. As the record on this motion demonstrates, and common logic dictates, this unprecedented annual cycle -- including sudden, mid-year rule amendments -- fosters confusion and uncertainty among administrators, teachers, parents and board members engaged in implementing the Abbott reforms at the district and school levels. It also undercuts multi-year planning, budgeting and implementation of those reforms, and directly militates against critical efforts to build the will, commitment and capacity to engage in, and sustain those reforms long enough to be successful. See Abbott V, 153 N.J. at 528 (calling for a "top-to-bottom" commitment to "conscientiously" undertake and "vigorously" carry forward the Abbott reforms). As this Court notes:

Success for all will only come when the roots of the educational system - the local schools and districts, the teachers, the administrators, the

parents, and the children themselves - embrace the opportunity encompassed by these reforms. Id.

In order to strengthen and deepen implementation of the Abbott remedial measures, the Acting Commissioner should be directed to properly "codify" the 2006-07 Abbott regulations as multi-year regulations, with appropriate public notice and opportunity to comment, either in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-4, or some other procedures consistent with due process and sound educational reform practice. Abbott V, 153 N.J. at 528.

In sum, plaintiffs' requested affirmative relief are critical and essential accountability enhancements that will ensure the State meets this Court's directive to ensure that all educational funding "be put to optimal educational use." See Abbott IV, 149 N.J. at 194.

CONCLUSION

For the reasons stated above, plaintiffs respectfully request that the State's motion be denied. Plaintiffs further request that this Court grant the cross motion for affirmative relief to ensure timely and constitutional Abbott district budgets for FY2007, and State accountability for the effective implementation of the Abbott remedies.

Respectfully submitted,

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