

EDUCATION LAW CENTER

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Filing fees waived under R. 1:13-2

EDUCATION LAW CENTER, on
behalf of ABBOTT V. BURKE
PLAINTIFF CHILDREN

Plaintiff,

v.

NEW JERSEY DEPARTMENT OF
EDUCATION,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:

MERCER COUNTY
DOCKET NUMBER:

Civil Action

COMPLAINT

Education Law Center, on behalf of Abbott v. Burke
Plaintiff School-age Children and Preschoolers, by way of
Complaint against New Jersey Department of Education ("DOE" or
"Department"), states as follows:

1. Plaintiff Education Law Center ("ELC") is a non-profit
legal services organization that provides legal assistance to
New Jersey's low-income public school children, and children
with special needs, in matters related to access to equal and
adequate education under state and federal laws. Specifically,
ELC has served, since 1981, as attorneys in the Abbott v. Burke
case for the plaintiff-class of over 350,000 school-age children
and preschoolers in 31 poor urban communities, commonly referred
to as "Abbott districts." As counsel for the Abbott plaintiff

class, ELC represents the interests of the school children in Abbott districts, and continuously monitors implementation and State compliance with the remedies ordered by the New Jersey Supreme Court in Abbott v. Burke so as to ensure improvements in the quality of education received by the Abbott plaintiff class.

2. Defendant New Jersey Department of Education is the executive agency responsible for managing and implementing the State's public education system, and for ensuring that all students receive a constitutionally sufficient education. Under the Abbott rulings, DOE is specifically required to ensure that "the [Abbott] reforms are conscientiously undertaken and vigorously carried forward." Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V").

3. In the 1997 Abbott ruling, the New Jersey Supreme Court held that the funding provisions of the Comprehensive Educational Improvement and Financing Act ("CEIFA") are constitutionally defective as to the Abbott districts. Abbott v. Burke, 149 N.J. 145, 152-53 (1997) ("Abbott IV"). Specifically, in the context of the poverty faced by these communities, the Court determined that the Act's formula is fundamentally deficient in the critical areas of regular education funding, id. at 169, Demonstrably Effective Program Aid ("DEPA") for "at-risk" students, id. at 180, Early Childhood Program Aid

("ECPA"), id. at 182, and the remediation of dilapidated, unsafe, and overcrowded facilities, id. at 186, because it effectively denies funding for the key elements of a thorough and efficient education. See id.

4. To address CEIFA's deficiencies in the areas identified, the Court, in the 1997 and 1998 Abbott rulings, ordered implementation of programs and reforms designed to ensure a "thorough and efficient" education to the Abbott plaintiff class, as guaranteed under Article VIII, Section IV, ¶1 of the New Jersey Constitution. The Abbott remedies include: (1) standards-based education, supported by foundation per-pupil funding equal to spending in successful suburban schools ("parity funding"); (2) universal, high quality preschool for all three- and four-year olds; (3) supplemental ("at-risk") programs to address student and school needs attributed to high-poverty, such as early literacy and drop-out prevention programs, and social and health services; (4) new and rehabilitated facilities to house all programs, relieve overcrowding, and eliminate safety violations; (5) school and district reforms to improve curriculum and instruction, and for the effective and efficient use of funds to enable students to achieve state standards; and (6) State accountability for effective and timely implementation to ensure district and

school progress in improving student achievement. Abbott IV, 149 N.J. 145; Abbott V, 153 N.J. 480.

5. In 2003, the DOE's Office of School Funding undertook a study to determine the cost of providing a constitutionally adequate education to New Jersey students ("Adequacy Cost Study" or "Study") - i.e. the cost of educating students to meet the Core Curriculum Content Standards ("CCCS"). The purpose of this Study was to provide information to the Department, and to the public stakeholders involved in the process, that could then be used to review and revise CEIFA. The Study was later updated to provide cost figures for subsequent years. See Certification of Elizabeth Athos, Esq., ¶ 3("Athos Cert.").

6. To complete the Adequacy Cost Study, the Department contracted with a consultant, Dr. John Augenblick, who assisted DOE in implementing two well-established methodologies to determine the cost of providing a constitutionally adequate education to New Jersey students. Previously, Dr. Augenblick had provided similar services to over eleven other states - all of which have since made public studies that employed these same methodologies to determine the cost of a constitutionally adequate education in these states. Athos Cert. ¶ 4.

7. Under the first method used by DOE, the "successful school district" approach, the cost of regular education

services was calculated based on measures of district performance that were used to develop a list of districts that meet the CCCS. Then, actual district expenditure data was employed to determine regular education cost per-pupil in these "successful" districts. Athos Cert. ¶ 5, Ex. B.

8. The second method, the "professional judgment" approach, is used to estimate the cost of regular education as well as the additional costs of providing services to students with special needs (i.e. special education, at-risk, and limited English proficiency). To implement this analysis, the DOE convened public stakeholders - superintendents, business administrators, school principals, teachers, and ELC staff - and charged them with determining what inputs and resources are needed by hypothetical school districts with varying characteristics to provide a constitutionally adequate education to students. Athos Cert. ¶ 6, Ex. B.

9. DOE never released the Adequacy Cost Study to the public stakeholders who participated in the Study or to the public at large, despite several informal requests from stakeholders, including ELC, and the clear public importance of this information. Athos Cert. ¶ 7.

10. On May 10, 2006, ELC submitted a formal online OPRA request for "all records (electronic and paper) related to the 2003 study, estimate, review and/or analyses of the cost of

providing a thorough and efficient education undertaken by the Office of School Funding with the assistance of stakeholders and Dr. John Augenblick." This request was designated W21408. Athos Cert. ¶ 8.

11. On May 15, 2006, ELC received an e-mail response from Garry Everson of DOE denying request W21408 in its entirety as "deliberative in nature." In denying this request wholesale, DOE did not distinguish between data and factual material related to the cost of providing a constitutionally adequate education, on the one hand, and any opinions, recommendations, or advice that may have been rendered with respect to the Study, on the other. Athos Cert. ¶ 9.

12. ELC submitted a second OPRA request on May 17, 2006 - designated W21543 and not at issue here - to obtain the contract and other records related to DOE's engaging the services of Dr. John Augenblick for the Adequacy Cost Study. Athos Cert. ¶ 10.

13. In response to this request, on June 8, 2006, ELC received documents related to Dr. Augenblick's services during the Adequacy Cost Study. From these materials, it is apparent that DOE expended at least \$105,000 in 2003 for Dr. Augenblick's work. Athos Cert. ¶ 11, Ex. E.

14. In the meantime, ELC had contacted the Attorney General's office regarding the DOE's initial blanket denial of OPRA request 21408, without any effort to separate the data and

facts used in the Study from any agency deliberations that might have occurred. Athos Cert. ¶ 12.

15. As a result of the intervention by the Attorney General's office, ELC was sent records in four installments that were purportedly responsive to OPRA request W21408. Athos Cert. ¶ 13.

16. The first installment, sent on June 5, 2006, was a diskette containing data. Athos Cert. ¶ 14.

17. The data contained on that diskette was wholly unresponsive to ELC's request for the Adequacy Cost Study. See Certification of Lesley Hirsch ¶¶ 3-6 ("Hirsch Cert.").

18. By letter dated June 9, 2006, ELC received the second installment of records from DOE. Athos Cert. ¶ 16.

19. This second installment was also wholly unresponsive to ELC's request for the results of the Adequacy Cost Study. Athos Cert. ¶ 16. It consisted of e-mail messages, primarily between DOE and John Augenblick, whose substantive content related to the Adequacy Cost Study had been redacted in its entirety. In addition, none of the attachments noted in the emails messages were included with these documents. Athos Cert. ¶ 17, Ex. H, Ex. I. The email subject headings, however, were left un-redacted and suggested undisclosed factual and data content related to the Adequacy Cost Study, including, for example: "Adequacy Budgets;" "Adequacy Comparisons;" "Adequacy

Amounts;" "Estimating the Cost of Adequacy;" "Last Data;" and "Totals." Athos Cert. ¶ 18, Ex. H, Ex. I.

20. Once it became clear that none of the materials in the first two installments sent by DOE contained the information that ELC had requested, ELC submitted a supplemental online OPRA request, on June 14, 2006, identifying and asking for particular information from the Adequacy Cost Study. Athos Cert. ¶ 19.

21. Among the data and information requested, ELC sought: the "base cost figure" of funding a thorough and efficient education using the "professional judgment" method; the complete series of cost adjustments to the base cost figure under the professional judgment method to accommodate variations in student demographics and variations in district needs; the "base cost figure" of funding a thorough and efficient education using the "successful school district" method; a procedure to determine the "fiscal needs" of every school district in the state and, if available, the application of that procedure to every school district in the state; a formula to distribute state aid that includes the need calculation, the regional price factor, and the procedure DOE uses to measure the fiscal capacity of each school district; identification of programmatic resources necessary for an adequate educational program. Athos Cert. ¶ 20.

22. By letter dated June 16, 2006, ELC received the third installment of records from DOE. Athos Cert. ¶ 21.

23. Like the first two installments, this third set of documents was entirely unresponsive to ELC's request. It consisted of various data tables for New Jersey districts and counties, the vast majority of which contained numerical content that had been redacted in full. Athos Cert. ¶ 22.

24. By letter dated June 19, 2006, ELC received the fourth and final installment of records from DOE. Athos Cert. ¶ 24.

25. Like the prior installments, this set of documents failed to respond to ELC's request. This installment contained a variety of materials, most of which had been redacted partially or in their entirety. Of the material disclosed, none of it contained any substantive information about the Adequacy Cost Study. Athos Cert. ¶¶ 24-25.

26. On June 23, 2006, ELC received an e-mail response from Garry Everson of DOE advising us that, with the exception of two items for which there were no records, all of the specific information sought in OPRA request W22025 had already been provided in response to OPRA request W21408. Athos Cert. ¶ 26.

27. To date, DOE has failed to provide any information that is responsive to ELC's two OPRA requests for the results of the Adequacy Cost Study. It is also clear that DOE does not intend to furnish this information in the future. Athos Cert. ¶ 27.

28. The Adequacy Cost Study that ELC seeks is comprised of non-deliberative data and factual information, and further, is of critical importance to plaintiff's client school-children as well as the public at large.

COUNT ONE

29. Plaintiff repeats and incorporates fully herein the allegations set forth in paragraphs 1 through 28.

30. The Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-5(g), requires that "a custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record."

31. By failing to disclose the Adequacy Cost Study, DOE violated ELC's right of access to government records under OPRA, N.J.S.A. 47:1A-5(g).

COUNT TWO

32. Plaintiff repeats and incorporates fully herein the allegations set forth in paragraphs 1 through 28.

33. The common law right of access requires the release of written public records to persons with a cognizable interest in their content, where this interest outweighs the State's need to prevent disclosure.

34. By failing to disclose the Adequacy Cost Study, DOE violated ELC's common law right of access to public records.

WHEREFORE, Plaintiff demands preliminary and permanent relief against Defendant in the form of an Order:

- A. Requiring Defendant DOE to promptly and fully disclose DOE's Adequacy Cost Study and subsequent year updates to the Study;
- B. Awarding Plaintiff reasonable attorney's fees and costs;
- C. Such other relief as the Court may deem appropriate and just.

EDUCATION LAW CENTER

By: Koren L. Bell
KOREN L. BELL, Esq.,
R. 1:21-3(c)

DATED: July 14, 2006

DESIGNATION OF TRIAL COUNSEL

Pursuant to the provisions of Rule 4:25-4, the Court is advised that Koren L. Bell is hereby designated as trial counsel.

Education Law Center

Koren L. Bell
Koren L. Bell, Esq.,
R. 1:21-3(c)

Dated: July 14, 2006

CERTIFICATION

Pursuant to Rule 4:5-1, to Plaintiff's knowledge the matter in controversy is not the subject of any other action pending in any Court or arbitration proceedings.

I certify that the foregoing statements made by me are true and that if willfully false, I am subject to punishment.

Education Law Center

Koren L. Bell
Koren L. Bell, Esq.,
R. 1:21-3(c)

Dated: July 14, 2006