



April 13, 2021

Honorable Chief Justice Stuart Rabner
Associate Justices of the Supreme Court
Supreme Court of New Jersey
R.J. Hughes Justice Complex
Trenton, New Jersey 08625-0970

Re: ABBOTT, ET AL. V. BURKE, ET AL.
Docket NO. 085333

Dear Chief Justice Rabner and Associate Justices:

Please accept this letter brief in reply to the State Defendants' Brief in Opposition to Plaintiffs' Motion in Aid of Litigants' Rights ("State's Brief) in the above captioned matter.

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REPLY TO STATE'S COUNTERSTATEMENT OF FACTS

As set forth below, the State's Brief confirms both the essential facts on Plaintiffs' Motion in Aid of Litigants' Rights and the urgent need for relief sought by Plaintiffs.

First, the State does not dispute that the School Development Authority's ("SDA") current construction portfolio of eleven capital projects will be completed by 2025. The State also confirms that the SDA is without the funding to commence and complete the "first tranche" of 24 priority capital projects identified in the SDA's 2019 Statewide Strategic Plan ("2019 Strategic Plan"). Certification of Manuel Da Silva ("Da Silva Cert."), ¶¶51-52. Nor does the State dispute the urgent need for these or dozens of other projects identified in the SDA districts' 2016 Amended Long-Range Facilities Plans ("LRFP") and the Department of Education's ("DOE") 2019 Educational Facilities Needs Assessment ("2019 EFNA"). See Certification of Angelica Allen-McMillan ("Allen-McMillan Cert."), Ex. A, B:1-B:2 (2019 EFNA List of Recommended Project Priorities).

Second, the State's extended delays in completing the requisite steps to secure additional facilities funding cannot be denied. No new major construction projects have been added to the SDA's capital portfolio since 2014, Da Silva Cert., ¶¶36-43, even though the SDA "expressed a critical need for additional funding" to the Legislature as early as December 2014, State's

Br. at 16, and repeatedly over the last six years. The record is also clear on the State's unjustified delays in undertaking the statutorily required process, N.J.S.A. 18A:7G-4 and -5, to obtain that funding at every turn. For example, after the DOE finished an EFNA in 2016 following approval of the SDA districts' amended LRFPs, the State failed to use the project priority rankings to complete the required five-year update of the State's 2011 Strategic Plan. Allen-McMillan Cert., ¶¶14-17. This failure resulted in the need to update the ENFA three years later to reflect changed conditions. Id. at ¶¶17-18.

Third, the State does not dispute the continuing failure of the SDA and DOE to assess the need for emergent repair and capital maintenance projects in existing buildings since 2016 and, as a result, cannot provide any current information on the scope of the need and estimated cost of those projects.¹ The State also cannot dispute that the need for emergent repair projects existed before school buildings were closed in response to the coronavirus pandemic in March 2020 and are even more urgently needed given requirements for building ventilation,

¹ The State confirms that, in 2007, 2011 and 2016, the SDA and DOE have jointly undertaken a "Potential Emergent Projects Program" (PEPP) to identify projects to address health and safety in existing SDA district buildings. Allen-McMillan Cert., ¶25. The third, and last PEPP, in 2016 resulted in SDA districts identifying 429 conditions in need of repair, including leaky roofs; crumbling facades; and inadequate heating, fire safety and other basic systems. See 2019 Certification of Theresa Luhm ("2019 Luhm Cert."), ¶¶31-32 at Pa14.

heating and cooling, and reduced classroom occupancy to safely reopen for in-person instruction. See Certification of Newark Facilities Executive Director Steve Morlino ("Morlino Cert."), ¶21; Certification of Garfield Superintendent Anna Sciacca ("Sciacca Cert."), ¶¶39-48; Certification of Paterson Education Association President John McEntee ("McEntee Cert"), ¶¶26-7; and Certification of Jersey City Superintendent Franklin Walker ("Walker Cert."), ¶¶14-21.

Finally, after notifying the Legislature repeatedly over five years that its funding had been depleted, the State does not contest that it took no action to seek or secure financing for the 24 priority projects in the 2019 Strategic Plan and needed emergent repair projects in the wake of this Court's April 2020 order. Da Silva Cert. ¶¶51-62. Despite the Court's anticipation that the State would address the need for funding in the Fiscal Year ("FY") 2021 State Budget, Abbott v. Burke, 241 N.J. 249 (2020) ("Abbott XXIII"), that budget did not authorize any such financing, Luhm Cert., ¶¶36-37. The State further fails to provide any assurance it will seek or secure the level of funding needed to support the next phase of the school construction program in the context of the enactment of the FY 2022 Budget.

The State now offers as sufficient a \$200 million request in the Governor's proposed FY 2022 Budget that it asserts "may"

be used to fund SDA district projects. State's Br. at 17 (quoting The Governor's FY2022 Budget at 16). Yet the State provides no cost estimate or other information to show how this proposal would address the SDA's identified need for financing the 24 priority projects in the 2019 Strategic Plan. Da Silva Cert, ¶¶65-67. Further, based on the SDA's estimated costs of its current capital portfolio of school construction projects -- \$990 million to construct four new schools and complete four renovation/additions, the proposed funding, even if enacted, would, at best, address only an extremely small portion of the projects in the 2019 Strategic Plan.² See December 2020 Biannual Report, at 15, available at https://www.njsda.gov/NJSDA/Content/public/Biannual_Report/2020_2.PDF (last visited March 31, 2021).

The State also points to an allocation for emergent repair projects of \$75 million in the Governor's proposed FY 2022 Budget. Yet that allocation would be available to fund projects

² The SDA's December 2020 Biannual Report lists estimated costs for the projects currently under construction as of September 30, 2020. The estimates for the new buildings on the list include Perth Amboy High School at \$283.8M; Paterson Union Ave. Middle School at \$113.9M; Passaic City Dayton Avenue Campus at \$209.5M and Camden High School at \$132.6M. The four addition and/or renovation projects on the list range from \$137.5M for Millville High School to \$28.4M for Port Monmouth Road Elementary School in Keansburg. See December 2020 Biannual Report, at 15, available at https://www.njsda.gov/NJSDA/Content/public/Biannual_Report/2020_2.PDF (last visited March 31, 2021).

not only in SDA districts, but for all districts statewide. Again, the State has provided no information, data or analysis to show how this request would, if enacted, adequately address the urgent need for emergent repairs in existing SDA buildings, especially to ensure school buildings meet health and safety standards to safely reopen in the pandemic. Da Silva Cert., ¶¶68-69.

LEGAL ARGUMENT

I. THE STATE CONFIRMS THE URGENT NEED FOR RELIEF IN AID OF LITIGANTS' RIGHTS TO FUND SCHOOL FACILITIES PROJECTS IN SDA DISTRICTS

As it did a year ago, the State asks this Court to dismiss Plaintiffs' Motion, asserting again that it "has made substantial efforts to advance the School Construction Program" in SDA districts. State's Brief at 3. And yet, again the State confirms its lengthy and unjustified delays in taking steps to seek and secure funding from the Legislature necessary to undertake construction of the 24 major renovation and replacement projects in its 2019 Strategic Plan and for needed emergent repairs in existing SDA district buildings. See supra at 2-4. As we explain, this Court should grant the within Motion and provide remedial relief to ensure the State's compliance with the mandates for school facilities improvements in Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V") and Abbott v. Burke, 164 N.J. 84 (2000) ("Abbott VII"). The State's argument is

nothing more than a plea for an open-ended delay in vindicating Plaintiffs' constitutional rights. It should be rejected outright.

First, as set forth supra at 2-4, the essential facts demonstrating the State's non-compliance are not only uncontroverted but confirmed in the State's response. This undisputed evidence includes: 1) the State's failure to advance any of the hundreds of needed projects in SDA districts to its capital plan since 2014 due to a lack of funding; and 2) the State's inability to advance any of the 24 priority projects identified in the 2019 Strategic Plan or to address the need for emergent repair projects without additional funding. Given the uncontroverted need, the State's contention of having "fully funded ongoing projects from previous capital portfolios" dating back to 2014, State's Br. at 41, in no way renders Plaintiffs' present Motion "premature," id.³

Second, the State confirms its lengthy and unjustified delays since 2014 in taking the steps required under EFCFA, N.J.S.A. 18A:7G-4 and -5, to secure additional school construction funding for needed major and emergent projects. See supra at 3-4. Only in response to Plaintiffs' Motion last year

³ Notably, the previous capital portfolios of 2011, 2012, 2013, and 2014, totaling 39 projects, State's Br. at 12, represent just over one-third of the 110 projects prioritized on the State's 2011 Strategic Plan, 2019 Luhm Cert., ¶15 at Pa8. The remaining 71 projects have never been funded.

did the SDA complete the prescribed update to its Strategic Plan identifying the "first tranche" of "high priority" projects ready to advance to the construction process, State's Br. at 15, over five years after the update was due and the SDA's first public acknowledgement of the need for additional funding.

Third, the State provides no evidence that it took steps -- or any other action -- in the context of the FY 2021 budget, finalized on September 29, 2020, to secure the funding necessary to begin construction of the priority projects in the 2019 Strategic Plan and for emergent repairs. See Luhm Cert., ¶¶36-37. This inaction is even more egregious in light of this Court's clear expectation that the State would do so. Abbott XXIII, 241 N.J. 249. In fact, while acknowledging the need for "additional funding," State's Br. at 39, the State's opposition to the within Motion is devoid of any information of efforts made to seek and secure needed construction funding in the FY 2021 Budget, as this Court anticipated.

Fourth, the State again fails to offer a concrete and meaningful plan to seek and secure funding for the major projects for the 2019 Strategic Plan and for emergent projects in the FY 2022 appropriations process, now underway. The State offers only the possibility of a \$200 million allocation that "may" be available for projects in the 2019 Strategic Plan. State's Br. at 17 (quoting The Governor's FY2022 Budget at 16).

This amount represents less than 10% of the “\$2.226 billion dollars” required to fund the new facilities projects in the SDA’s 2011 Strategic Plan. Da Silva Cert. ¶37. Thus, the State’s proposal, even if enacted, is patently inadequate to address the funding needed for the projects in the 2019 Strategic Plan.⁴

Similarly, the State presents no plan to seek and secure the funding for the estimated cost of emergent repair projects in SDA districts. The State again attempts to sidestep its obligations by referencing \$75 million in the Governor’s proposed budget. State’s Br. at 17-18. But those funds, if approved, would be available for all districts statewide, not just SDA districts. Id. at 18. And, most importantly, the State offers no current information on need, especially for ventilation and other building systems and space upgrades necessary for the SDA districts to meet the State’s standards to reopen buildings safely in the pandemic. Luhm Cert., ¶25.

Fifth, the State does not dispute, nor can it, the deleterious impact that the ongoing delay in school construction will have on the education of New Jersey’s most vulnerable children, and the longstanding, continuing and ongoing

⁴ See supra at n.2 for project costs. The SDA itself declines to explain what projects in the 2019 Strategic Plan it will construct with \$200 million, asserting only that “[t]he total number of projects that would ultimately be advanced is of course subject to the cost of those prioritized projects.” Da Silva Cert. ¶67.

deprivation, without any end in sight, of their constitutional right to be educated in buildings that are safe, not overcrowded and educationally adequate. See, generally, Sciacca Cert., Walker Cert., Morlino Cert., McEntee Cert., and Certification of Newark Superintendent Roger Leon, (describing age, educational inadequacy, overcrowding, and decrepit conditions existing in many of their districts' public schools). The State's repeated mantra that "no projects have been halted," State's Br. at 1, 12, 37, id. at 39 ("no halt in projects"), id. at 41 (absence of "any suggestion that projects have halted"), evinces a troubling disregard for the many outmoded and dilapidated schools that could have been replaced or rebuilt if the State had secured additional funding anytime since 2014 nor to the "additional funding needed for the remainder of the projects," State's Br. at 2.

Finally, as this Court has made clear, the State's obligation to seek and secure additional funding for continued implementation of the Abbott school facilities mandate requires more than generalized notice to the Legislature. Rather, it requires the State, at a minimum, to determine the amount of additional funding necessary to undertake construction of needed projects, followed by a specific request for the legislative authorization of that funding. See Abbott V, 153 N.J. at 518 (directing Commissioner to approve requests for additional

funding for Abbott remedial programs and then “seek appropriations to ensure the funding and resources necessary for their implementation”); id. at 527 (directing Commissioner to “secure funds to cover the complete cost” of remediating “infrastructure deficiencies in Abbott school buildings well as the cost of providing the space necessary to house Abbott students adequately”).

In sum, despite finally adopting its updated 2019 Strategic Plan over a year ago, the State has neither disclosed the amount of funding needed to implement that plan or for needed emergent repairs. Nor has the State made a concrete and meaningful commitment to secure those funds in the context of the FY 2022 appropriations process. Thus, the State has again failed to take the prerequisite steps necessary to ensure the Legislature is “fully responsive” to the “constitutional call” for the funding needed to continue and sustain implementation of this Court’s remedial mandate for facilities improvements in SDA districts. Abbott V, 153 N.J. at 519.

II. THE NEED TO FUND HEALTH AND SAFETY PROJECTS IN SDA DISTRICTS EXACERBATED BY THE COVID-19 PANDEMIC IS PROPERLY BEFORE THIS COURT

The State argues that Plaintiffs’ decision to address emergent facilities needs in the SDA districts in the context of the coronavirus pandemic is “improvident” and “improper.” State’s Br. at 2-3. In effect, the State is asking this Court

to render a decision on Plaintiffs' motion in the absence of the current, real-world context in SDA districts. It also mischaracterizes Plaintiffs' request. Quite obviously, the closure of schools in the pandemic cannot exempt the State from addressing emergent building conditions in the SDA districts. Rather, as Plaintiffs' Motion makes clear, it underscores the need for immediate action.

First, as aptly phrased by the facilities director of Newark Public Schools: "The COVID-19 pandemic has not caused our facilities needs, but has highlighted them." Morlino Cert., ¶21. The poor ventilation and overcrowded conditions in SDA buildings existed prior to the onset of COVID-19. In the face of a deadly pandemic, these conditions have been fully exposed as the risk to the health and safety of students and teachers that they were before schools were shuttered. See Allen-McMillan Cert., ¶¶35-36 (explaining when "minimum health and safety standards" such as "adequate ventilation" cannot be met, schools are "unable to reopen"). An all-hands-on-deck effort to remediate these conditions is of particular concern to ensuring the safe return to school of the thousands of Black and Latino students enrolled in the SDA districts. See Br. of Proposed *Amici Curiae* Latino Action Network et al.

Second, the State cannot deny the need to provide funding for, and to prioritize, the mitigation of COVID-related health

and safety issues in SDA district buildings. Da Silva Cert. ¶69; State's Br. at 18 (noting Governor's proposal to budget \$75 million for emergent projects in FY 2022). Instead, the State contends the so-called Abbott "framework" is inappropriate for addressing COVID-19 related health and safety conditions in school buildings, State's Br. at 3, to deflect attention from its failure to provide a funding plan to promptly remediate those conditions. The existence of the pandemic does not excuse the State's failure to provide any prior assessment of the scope of need for emergent repairs to safely reopen SDA school buildings.

Finally, the State's reliance on federal emergency COVID-19 relief funds to address the urgent need for emergent repair projects is misplaced. As the State recognizes, while SDA districts can use these non-recurring federal funds for ventilation and other building conditions to safely reopen schools, Allen-McMillan Cert., ¶48, these funds are also needed to address a host of COVID-19-related needs that are not facilities-related.⁵ Moreover, while the one-time federal funds

⁵ The State's submission denotes other allowable uses for federal emergency relief funds -- such as supplies for sanitation, Cert. of Allen-McMillan, ¶41, support for students during periods of remote instruction, id. at ¶45, and furniture, physical protective barriers, and filters, id. at ¶46 -- thus confirming that federal funds allocations should not be mistaken for, or equated with, facilities funding. Districts will be required to balance the use of those funds for permitted

will assist in enabling SDA districts to address the myriad and complex impacts on students and schools from the pandemic, they do not -- and cannot -- excuse the State from its constitutional obligation to provide Plaintiffs a thorough and efficient education. Abbott v. Burke, 119 N.J. 287, 330 (1990) ("Abbott II") ("the State's constitutional obligation to provide a thorough and efficient education [is] not adequately satisfied if dependent on federal aid"). Indeed, the State itself acknowledges that "the availability of federal aid does not necessarily relieve it of its constitutional obligations..." State's Br. at 47.

In sum, the State's obligation to secure funding for emergent repairs in SDA districts is not alleviated by the pandemic. Rather, given the deleterious pre-existing conditions now exposed and exacerbated by the crisis, this Court's intervention is absolutely essential to ensure all SDA school buildings are safe to reopen.

CONCLUSION

This Motion unquestionably presents "an adequate record of need and [State] failure" sufficient for the Court to "fashion a remedy for capital construction." Abbott II, 119 N.J. at 391.

facilities repairs with their use to cover other reopening costs (such as sanitization and protective equipment), as well as their use to remediate their students' instructional loss during school building closure.

Further, the remedy itself is also clear: directing the Commissioner to fulfill his constitutional obligation to "provid[e] or secur[e]" additional funds to ensure continuation of the critically needed school facilities improvements in the Abbott districts, anticipating that "the Legislature will be fully responsive to that constitutional call." Abbott V, 153 N.J. at 518-19.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "David G. Sciarra". The signature is fluid and cursive, with a horizontal line drawn underneath it.

David G. Sciarra, Esq.
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