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August 6, 2021

VIA E-MAIL AND HAND DELIVERY

Honorable Chief Justice Stuart Rabner
Associate Justices of the Supreme Court
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
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Re: Raymond Abbott, et al. v. Fred G. Burke, et al.
Docket No.: 085333

Dear Chief Justice Rabner and Associate Justices:

Please accept this letter brief pursuant to Rule 2:6-2(b), on behalf of the State Defendants, in response to the Court's July 9, 2021 letter directing the parties to file briefs addressing the impact of the adoption of the Fiscal Year 2022 (FY22) Appropriations Act.

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ARGUMENT:

THE STATE DEFENDANTS HAVE MET THEIR OBLIGATIONS WITHIN THE SCOPE OF THEIR AUTHORITY TO SEEK AND SECURE NECESSARY FUNDING FOR SDA PROJECTS, AND IN LIGHT OF THE STATE’S SUBSTANTIAL AND CONTINUING EFFORTS TO REMEDY FACILITY DEFICIENCIES IN SDA DISTRICTS, THERE IS NO NEED FOR THIS COURT’S INTERVENTION14

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PRELIMINARY STATEMENT

In its supplemental brief, the Education Law Center (ELC) complains that through the FY22 Appropriations Act, the State has failed to appropriate necessary funding for school facilities projects in the 2019 Statewide Strategic Plan (the 2019 Strategic Plan). It also reiterates its unfounded assertion that the State Defendants have failed to uphold this Court’s Abbott mandates in light of the new facilities-related challenges brought about by the COVID-19 pandemic. ELC is wrong for a number of interrelated reasons.

To begin with, the State Defendants sought, and the Legislature has approved, an additional \$275 million in funding for school facilities projects, with potentially even more funds in the offing through stimulus and debt prevention programs. Thus, the State Defendants’ position in its opening brief remains as true now as it did before the passage of the FY22 Appropriations

Act. If anything, the inclusion of certain stimulus and debt prevention programs offer the potential for even more funding for school facilities projects.

The act incorporates important direct appropriations to the Schools Development Authority (SDA) that were first projected in Governor Philip D. Murphy's proposed budget. The State Defendants previously informed this Court that the appropriations, if enacted, would allow the SDA to begin advancement of projects identified in the 2019 Strategic Plan and to identify and fund potential emergent and capital maintenance projects for which SDA districts will receive priority. And while the FY22 Appropriations Act will not allow the SDA to complete the entirety of the projects identified in the 2019 Strategic Plan, with the \$275 million in appropriations it may now begin collaborating with the Department of Education (DOE) and SDA districts to develop solutions for addressing the needs recognized in the 2019 Strategic Plan, as well as other potential emergent projects.

ELC has also failed to acknowledge additional critical facts – namely, that the School Construction Program is operational and has proceeded uninterrupted, that even during a global pandemic the SDA has managed to continue its work and complete projects, and that the work on even more projects will commence. And while the impacts of the COVID-19 pandemic do not bear directly on this Court's prior mandates or the State's requirements under the

Educational Facilities Construction and Financing Act (EFCFA), N.J.S.A. 18A:7G-1 to -48, substantial funding streams are available to SDA districts to address COVID-19 related facilities needs as they prepare for the return to full-time, in-person instruction in the fall.

Because of all this, in its simplest terms, ELC has overlooked the standard of review on a motion in aid of litigants' rights, which requires a willful failure to comply with a court's order, manifesting contempt of court. That simply cannot be the case here. Perhaps even more fundamentally, ELC continues to misunderstand the law and the School Construction Program's process. It requires careful planning, taking into account a multitude of dynamic factors. Either way, the record on this motion plainly establishes that the State Defendants continue to meet their obligations to students in SDA districts and this Court's Abbott mandates.

For the reasons that follow, ELC's motion must be denied.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

The State Defendants rely upon and incorporate by reference the procedural history and counterstatement of facts set forth in its opening brief, supplemented as follows.

¹ Because they are closely related, the factual and procedural history are combined for efficiency and the Court's convenience.

A. SDA Funding Under the Fiscal Year 2022 Appropriations Act.

Before the enactment of the FY22 Appropriations Act, the SDA again alerted the Legislature to the need for additional funding for SDA projects. In particular, SDA Chief Executive Officer (CEO) Manuel M. Da Silva testified before the Assembly Budget Committee on May 10, 2021, regarding the advancements made with the School Construction Program. 8/6/21 Certification of Manuel Da Silva (Da Silva Cert.), ¶ 10. CEO Da Silva provided testimony regarding completed projects in SDA districts and the number of student seats delivered, the status of ongoing projects and expected seats, the impact of the then-proposed FY 22 budget, the significant school facilities needs that continue to exist statewide, and related topics. Ibid. And while the Committee did request more information about cost estimates that were not immediately available at the time of the Committee's hearing, ibid., on May 28, 2021, the SDA submitted to the Committee a supplemental written response to address the Committee's request for more information, advising the Committee of estimated costs of \$1.6 billion for the 17,000 capacity generating seats needed in SDA districts, id. at ¶ 11, Exhibit A.

And in June 2021, the SDA alerted the Legislature to this need in its biannual report for the reporting period of October 1, 2020 to March 31, 2021. Id. at ¶ 4. As in prior biannual reports,

the SDA expressed a need for additional funding. Id. at ¶ 5.

On June 29, 2021, Governor Murphy signed the FY22 Appropriations Act into law. Press Release, Governor Murphy Signs Fiscal Year 2022 Appropriations Act into Law (June 29, 2021);² L. 2021, c. 133. The act includes critical aspects of Governor Murphy's proposed budget as it relates to school funding, including \$275 million in appropriations for school facilities projects. Ibid.; L. 2021, c. 133.

In particular, it calls for a direct appropriation of \$200 million to the SDA to "support school facilities projects in SDA school districts[.]" L. 2021, c. 133; Press Release, Governor Murphy Signs Fiscal Year 2022 Appropriations Act into Law; Da Silva Cert., ¶¶ 13-15. Thus, by reducing its planned debt issuance through the appropriations, the SDA will be able to support the advancement of projects identified in the 2019 Strategic Plan. Press Release, Governor Murphy Signs Fiscal Year 2022 Appropriations Act into Law; Da Silva Cert., ¶ 15.³ With the \$200 million in funding, the SDA may now initiate the process of collaborating with the DOE and SDA districts in order to develop effective and efficient solutions for addressing the needs

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<https://nj.gov/governor/news/news/562021/approved/20210629b.shtml>
1 (last visited Aug. 6, 2021).

³ See also 3/22/21 Certification of Manuel Da Silva, ¶¶ 65-67.

recognized in the 2019 Strategic Plan. Da Silva Cert., ¶ 13. Developing those solutions and identifying which projects are advanced will require the review of current needs and prioritization factors developed by the SDA, DOE, and local districts. Id. at ¶¶ 13, 16.⁴

The FY22 Appropriations Act also calls for \$75 million for projects related to emergent and capital maintenance needs. L. 2021, c. 133; Press Release, Governor Murphy Signs Fiscal Year 2022 Appropriations Act into Law; Da Silva Cert., ¶ 17. While this emergent funding stream will be open to both regular operating districts and SDA districts, work in SDA districts related to the healthy and safe return of students in the fall will receive priority consideration. Da Silva Cert., ¶ 18.

It also bears repeating that the SDA continues to advance and complete the projects from its portfolios predating the 2019 Strategic Plan, which are all fully funded.⁵ Even during the COVID-19 pandemic, as of March 31, 2021, eight capital projects were in construction and the SDA remains on track to deliver two new school facilities and two school additions by September 2021; and the SDA is advancing nearly a dozen projects represented in

⁴ See also 3/22/21 Certification of Manuel Da Silva, ¶¶ 65-67.

⁵ 3/22/21 Certification of Manuel Da Silva, ¶¶ 43, 45, 51.

the Potential Emergent Project Program. Id. at ¶¶ 7-8.⁶

B. Other Potential Funding Under the Fiscal Year 2022 Appropriations Act.

In addition to the \$275 million in appropriations for school facilities projects, the FY22 Appropriations Act provides several other funding sources that may be available for SDA districts.

For example, the act appropriates \$180 million of funding to the School and Small Business Energy Efficiency Stimulus Program. L. 2021, c. 133. The enabling legislation for the program is pending.⁷ S. 3995 (2021). If enacted, the legislation will establish the School and Small Business Energy Efficiency Stimulus Program Fund, to be administered by the Board of Public Utilities (BPU). Ibid. The goal of the fund will be to provide grants to boards of education and small businesses “for the installation of certain HVAC systems and energy efficient and water-conserving appliances to improve air quality and energy efficiency in school districts under the jurisdiction of a board of education and small businesses, including school districts and small businesses in underserved communities.” Id. at ¶ 2(a).

⁶ See also 3/22/21 Certification of Manuel Da Silva, ¶¶ 43, 45, 51.

⁷ In its brief, ELC incorrectly states that Governor Murphy has signed a similar bill, S. 3033 (2021). (Psb6). This is incorrect. S. 3995, referenced here, passed both houses as of June 24, 2021. A link for S. 3995 and its legislative history can be found at https://www.njleg.state.nj.us/2020/Bills/S4000/3995_I1.PDF (last visited Aug. 6, 2021).

The fund will consist of two programs: the School and Small Business Ventilation and Energy Efficiency Verification and Repair Program (SSBVEEVR), and the School and Small Business Noncompliant Plumbing Fixture and Appliance Program (SSBNPFA). Ibid. Relevant here, the SSBVEEVR program is intended “to ensure schools under board of education jurisdiction and small businesses shall have functional HVAC systems that are tested, adjusted, and, if necessary or cost effective, repaired, upgraded, or replaced to increase efficiency and performance.” Id. at ¶ 4(a).

If the bill is enacted, 75% of the projects funded by either program will be allocated for school districts and small businesses located in “underserved communities.” Id. at ¶ 2(b). An “underserved community” is defined as “a school district in which at least [75%] of public school students are eligible to receive free or reduced-price meals” Id. at ¶ 1. SDA districts within communities that meet this definition will be eligible for the funds. And 75% of the overall grant funds will be allocated specifically to the SSBVEEVR program for ventilation. Id. at ¶ 2(d); Senate Budget and Appropriations Committee Statement to S. 3995 (June 22, 2021). School districts will receive 75% of the funds issued. Id. at ¶ 2(e); Senate Budget and Appropriations Committee Statement to S. 3995 (June 22, 2021). The BPU would also begin to solicit applications on or before October 1, 2021, and begin to approve no later than December 1, 2021. Id. at ¶

2(c).

The New Jersey Debt Defeasance and Prevention Fund (Debt Prevention Fund) is also available in FY22 for capital construction projects. See L. 2021, c. 133. It was created pursuant to L. 2021, c. 125, and \$1.2 billion was appropriated to fund capital construction projects for which State debt is already authorized by law, or for which funding would have been derived from future State bond issuance, to avoid debt issuance. The Debt Prevention Fund requires a process that involves both the Executive and Legislative Branches. Ibid. Disbursements are subject to the approval of the Director of the Division of Budget and Accounting, the State Treasurer, and the Joint Budget Oversight Committee. Ibid.

C. School Reopening and American Rescue Plan Funding.

With regard to the reopening of schools, in June 2021 the DOE (in collaboration with the Department of Health) released a guidance document entitled "The Road Forward: Health and Safety Guidance for the 2021-2022 School Year." 8/6/21 Certification of Angelica Allen-McMillan (Allen-McMillan Cert.), ¶ 3. The document provides guidance and standards for health, safety, and operations to assist school districts in planning for full-day, full-time, in-person instruction and operations for the 2021-2022 school

year. Id. at ¶¶ 3-4.⁸

Moreover, although the EFCFA does not provide a dedicated funding mechanism to assist school districts in their efforts to reopen, there are several federal funding streams available to districts, including those under the Coronavirus Aid, Relief and Economic Security (CARES) Act, which established the Elementary and Secondary Emergency Relief (ESSER) Funds, specifically ESSER I and II, previously highlighted by the State Defendants in its opening submission. See Allen-McMillan Cert., ¶¶ 5-11; 116 Pub. L. No. 136, 134 Stat. 281, §§ 18001 to 18003 (2020) (establishing ESSER fund); 116 Pub. L. No. 260, 134 Stat. 1182, Div. M, Title III (2020) (establishing Coronavirus Response and Relief Supplemental Appropriations (CRRSA) Act (ESSER II)).⁹

And since the filing of the State Defendants' opening brief, even more funding has been made available to districts to address COVID-19 related facilities projects and to prepare districts to open for in person learning in the fall. Id. at ¶¶ 6-11. Specifically, on March 11, 2021, President Biden signed into law the American Rescue Plan Act of 2021 (ARP), Pub. L. No. 117-2, 135 Stat. 4 (2021), which includes funding for ARP's Elementary and

⁸ The "Road Forward" supplants the "Road Back" guidance highlighted in the State Defendants' previous submission to this Court. Ibid.

⁹ See also 3/22/21 Certification of Angela Allen-McMillan, ¶¶ 38-51.

Secondary School Emergency Relief Fund. As with the previous ESSER funds available under the CARES Act and the CRRSA, the additional funding is designed to support districts in preparing for and responding to the impact of COVID-19 on students. Allen-McMillan Cert., ¶¶ 6-7. Under this direct appropriation, SDA districts are allocated to receive substantial funds to address COVID-19 related concerns, including those surrounding facilities issues. Id. at ¶ 10; see also New Jersey Department of Education, American Rescue Plan Elementary and Secondary School Emergency Relief Fund Mandatory Subgrant Awards as of May 18, 2021.¹⁰

ARP funds are separate from, and significantly add to, the already-substantial funds allocated to SDA districts under ESSER I and ESSER II. Allowable uses for ARP funds are the same as those under ESSER I and ESSER II, though 20% of the total must be reserved specifically to address learning loss. Allen-McMillan Cert., ¶ 9. Several of the activities authorized by the ARP that are relevant to ELC's claims are:

- School facility repairs and improvements to enable operation of schools to reduce risk of virus transmission and exposure to environmental health hazards, and to support student health needs;
- Inspection, testing, maintenance, repair, replacement, and upgrade projects to improve the indoor air quality in school

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https://www.nj.gov/education/esser/docs/ARP_ESSER%20III%20Fund%20Allocation%20Table.pdf (last visited Aug. 6, 2021).

facilities, including mechanical and non-mechanical heating, ventilation, and air conditioning systems, filtering, purification and other air cleaning, fans, control systems, and window and door repair and replacement;

- Other activities that are necessary to maintain the operation of and continuity of services in local educational agencies and continuing to employ existing staff of the local educational agency;
- Develop strategies and implement public health protocols including, to the greatest extent practicable, policies in line with guidance from the CDC for the reopening and operation of school facilities to effectively maintain the health and safety of students, educators, and other staff.

[New Jersey Department of Education, American Rescue Plan (ARP) Act.¹¹]

School districts are not required to provide equitable services under ARP. Ibid. ARP includes a separate program for non-public schools. Ibid.

Given these significant developments, ELC's motion must be denied, as the State Defendants have clearly and successfully acted within the scope of their authority to seek and secure funding for the SDA school facilities projects, and because ELC's argument pertaining to facility deficiencies related to school reopening during the pandemic is not an issue not properly placed before this Court.

¹¹ <https://www.nj.gov/education/esser/arp/> (last visited Aug. 6, 2021).

ARGUMENT

THE STATE DEFENDANTS HAVE MET THEIR OBLIGATIONS WITHIN THE SCOPE OF THEIR AUTHORITY TO SEEK AND SECURE NECESSARY FUNDING FOR SDA PROJECTS, AND IN LIGHT OF THE STATE'S SUBSTANTIAL AND CONTINUING EFFORTS TO REMEDY FACILITY DEFICIENCIES IN SDA DISTRICTS, THERE IS NO NEED FOR THIS COURT'S INTERVENTION.

ELC's supplemental brief suffers from the same flaws as its moving brief. Its position is contradicted by both the law and the facts of the case. The State Defendants recognize that the school facilities projects identified in the 2019 Strategic Plan will require additional funding to be completed. But the existence of ongoing school facilities projects and the need for more funding in the future does not compel the extraordinary remedy of this Court's intervention. Thus, because all of the SDA's current projects are fully funded and moving forward, and because the State Defendants have sought and successfully secured funding to support the advancement of projects in the 2019 Strategic Plan, ELC has failed to show that the State Defendants have willfully failed their obligations to students in SDA districts as compelled by this Court's prior mandates or the Constitution. For the reasons that follow, in addition to those set forth in the State Defendants' brief, ELC's motion must be denied.

Contrary to assertions made by ELC, the State Defendants have continued to seek funding for the School Construction Program. Again, the State Defendants acknowledge that more funding will be

needed to completely address the needs identified in the 2019 Strategic Plan and other emergent projects, and they continue to alert the Legislature to those needs.¹² Most recently, prior to the enactment of the FY22 Appropriations Act, the SDA reiterated the need for additional funding to the Legislature. In early May, CEO Da Silva testified before the Assembly Budget Committee about the advancements made with the School Construction Program and its ongoing needs. Da Silva Cert., ¶ 10. The Committee requested more information about costs estimates for future needs that were not immediately available at the time of the Committee's hearing; and within weeks, still well prior to the enactment of the FY22 Appropriations Act, the SDA submitted a supplemental written response to address the request by the Committee for more information. Id. at 11. The letter advised the Committee of estimated costs of \$1.6 billion for the 17,000 capacity generating seats needed in SDA districts. Id. at ¶ 12. And in June, the SDA issued its biannual report for the reporting period of October 1, 2020, to March 31, 2021. Id. at ¶ 4. As in prior biannual reports, the SDA expressed a need for additional funding. Id. at ¶ 5. Certainly, these continued efforts to seek and secure funding cannot be said to be a willful contempt of this Court's Abbott mandates. Moreover, it is important to remember that additional

¹² See generally 3/22/21 Certification of Manuel Da Silva, ¶¶ 52-62.

funds can be secured by the Legislature as it deems necessary and appropriate. See N.J.S.A. 52:27B-20; N.J. Const. art. VIII, § 2, ¶ 2. The \$275 million in appropriations is simply a one-year allocation that supports the SDA in its ongoing work.

And while the State Defendants are constrained from actually securing funding themselves (see Db38),¹³ the FY22 Appropriations Act has now been signed into law. The act includes the aspects of the Governor's proposed budget highlighted by the State Defendants in their opening brief, and allocates funds that will be used to advance facility needs of SDA districts. See Da Silva Cert., ¶¶ 6-7, 15.¹⁴ It includes a \$200 million direct appropriation to the SDA, which will allow the SDA to reduce its planned debt issuance and support the advancement of projects identified in the 2019 Strategic Plan. L. 2021, c. 133; Press Release, Governor Murphy Signs Fiscal Year 2022 Appropriations Act into Law; Da Silva Cert., ¶¶ 13-15. This in turn will allow commencement of certain projects to address needs identified in the 2019 Strategic Plan, to be funded from the unused bonding authority then remaining. See Press Release, Governor Murphy Signs Fiscal Year 2022 Appropriations Act into Law; Da Silva Cert., ¶ 15. The FY22 Appropriations Act also includes a \$75 million direct appropriation that is specifically

¹³ "Psb" refers to ELC's supplemental brief; "Db" refers to the State Defendants' opening brief.

¹⁴ See also 3/22/21 Certification of Manuel Da Silva, ¶¶ 66-67.

designated to address emergent school facilities and capital maintenance projects. L. 2021, c. 133; See Press Release, Governor Murphy Signs Fiscal Year 2022 Appropriations Act into Law; Da Silva Cert., ¶ 17. SDA districts and needs related to the healthy and safe return of students will receive priority consideration. Da Silva Cert., ¶ 18.

In sum and substance, the \$275 million in appropriations will allow the SDA's work to expand by collaborating with the DOE and SDA districts to begin discussions regarding the most effective, efficient solutions to address SDA district needs. Da Silva Cert., ¶ 13. This is an important and substantial step forward in the continuing landscape of SDA school facilities needs in this State – one that is compliant with, not contumacious of, this Court's Abbott mandates and the EFCFA.

The FY22 Appropriations Act also includes additional funding sources that may be available for SDA district projects. In particular, the act appropriates \$180 million of funding to the School and Small Business Energy Efficiency Stimulus Program, L. 2021, c. 133, which will establish the School and Small Business Energy Efficiency Stimulus Program Fund, S. 3995, thereby providing grants to boards of education for the installation of certain HVAC systems and other devices to improve indoor air quality in school districts in “underserved communit[ies]” as defined in the bill, id. at ¶¶ 1 and 2. Of course, SDA districts

in underserved communities meeting this definition would be eligible for the funds. And 75% of the overall grant funds will be allocated specifically to the program for ventilation needs, with approval expected to begin no later than December 1, 2021. Ibid. The Debt Prevention Fund is also available in FY22 for capital construction projects, L. 2021, c. 133, which, as described above, was created to fund capital construction projects for which State debt is already authorized by law, or for which funding would have been derived from future State bond issuance, to avoid debt issuance, L. 2021, c. 125. Although significant policy decisions have yet to be made regarding this \$1.2 billion fund, capital construction projects in SDA districts may be eligible for such funding subject to the process described in Point I.B above. See ibid.

And it is critical to keep in mind that the SDA's work has proceeded uninterrupted, and no school facilities projects have been halted. Stated differently, the SDA continues to advance and complete projects from its previous portfolios, which are already fully funded. Da Silva Cert., ¶¶ 6-7.¹⁵ Even during the COVID-19 pandemic, as of March 31, 2021, eight capital projects were in construction and the SDA remains on track to deliver two new school facilities and two school additions by September 2021. Ibid. The

¹⁵ See also 3/22/21 Certification of Manuel Da Silva, ¶¶ 13-45, 51.

SDA is also advancing and has completed ongoing projects identified in the Potential Emergent Projects Program during this time. Id. at ¶ 8.¹⁶ And while it is not disputed that the State must fund all the costs of qualifying facilities projects in SDA districts, Abbott v. Burke (Abbott VII), 164 N.J. 84 (2000), ELC has continued to misconstrue the law, this Court's Abbott mandates, and the School Construction Program process. Funding does not happen all at once, and projects do not commence at the snap of a finger. School conditions change, and to accommodate those changes the School Construction Program and its implementing statute, the EFCFA, is structured to work in stages based on real-time prioritization factors. See, e.g., N.J.S.A. 18A:7G-2, -4, -5, -13, and -14; N.J.A.C. 6A:26-3.9. Add in the challenges presented by a once-in-a-century global pandemic, and ELC's position becomes all the more tenuous. Ultimately, all of the foregoing developments belie the notion that the State Defendants have willfully failed to comply with the EFCFA or this Court's orders. Quite the opposite, the State Defendants continue to seek funding and have managed to ensure the work of the SDA has continued uninterrupted.

Finally, although neither Abbott precedents nor the EFCFA contemplate the effects of the COVID-19 pandemic on school

¹⁶ See also 3/22/21 Certification of Manuel Da Silva, ¶¶ 13-43.

districts, important additional funding is available to SDA districts to address their unique challenges in responding to the COVID-19 pandemic and reopening their schools. In its supplemental filing, ELC continues to reference those challenges, suggesting they form a basis for this Court's intervention. Yet ELC has provided no specific details about projects that they claim require emergent funding to enable in-person instruction, or which justify this Court's intervention; and it has similarly declined to acknowledge that neither the Abbott framework nor the EFCFA were intended to be used as an apparatus for addressing the myriad challenges posed by COVID-19.¹⁷

Still, the State has committed substantial resources by rolling out three important federal programs that provide hundreds of millions of dollars to each of the SDA districts. This is no small point.

Districts are expected to return to full-time, in-person instruction in the fall. See Allen-McMillan Cert., ¶ 3. The State will continue to support districts through this next phase as outlined by the "Road Forward" guidance. Id. at ¶¶ 3-8. And the

¹⁷ It is therefore impossible for the State Defendants to "provide[] any information to demonstrate that COVID-19 relief will be used to address this need." (Psb12). Significant allocations have been made to SDA districts, who have received notice of the availability of the funds, and the DOE has opened district applications for all three funding streams. See Allen-McMillan Cert., ¶¶ 10-11.

federal appropriations managed by the DOE offer a significant source of funding for districts in their efforts that cannot be overlooked. Id. at ¶¶ 9-11. The amount of money available to SDA districts is not a paltry sum. For example, in addition to the tens of millions of dollars in ESSER funds already allocated, Camden City school district has been allocated more than \$115 million in additional funds under the ARP alone; Newark has been allocated over \$177 million; and nearly \$44 million has been allocated to the Trenton school district. Id. ¶ 10.

All districts, including SDA districts, have flexibility to use these substantial funds in ways tailored specifically to their unique needs. Id. at ¶ 9. And importantly, just like the uses for ESSER funds described in the State Defendants' opening submission, the allowable uses of ARP funds are specifically designed to address the issues raised by ELC surrounding school reopening. Ibid. Thus, to the extent this Court determines that Abbott litigation is the appropriate forum to resolve COVID-related challenges, ELC's motion still falls short. The DOE has administered significant guidance to assist in the acquisition of hundreds of millions of dollars for the continued operation of schools in the wake of COVID-19. Far from abandoning SDA districts or being willfully defiant of any Abbott mandate, the State Defendants have ensured that districts have a clear roadmap to obtaining hundreds of millions of dollars in funding to address

the needs identified by ELC.

In sum, this record does not support ELC's claim that State Defendants have willfully failed in their obligation to students in SDA districts, or that the Court's intervention is required to ensure compliance. Both the State Defendants' opening and supplemental submissions have made clear that the SDA's work has continued unabated, that its projects are progressing, and that even more work can begin in light of the FY22 Appropriations Act – regardless of the potential for additional funding through stimulus and debt prevention programs. And to be sure, the State Defendants recognize the need for more funding and have not relented in their efforts to seek additional funds. Recall that a motion in aid of litigants' rights requires "clear defiance of [a court's] specific and unequivocal orders." Abbott v. Burke (Abbott XXI), 206 N.J. 332, 492-93 (2011) (Hoens, J., dissenting) (quoting Abbott v. Burke (Abbott VIII), 170 N.J. 537, 565 (2002) (LaVecchia, J., concurring in part and dissenting in part)). Not only that, but such noncompliance with a court order must be willful, thereby constituting contempt of court. Pasqua v. Council, 186 N.J. 127, 140, 141 n. 2 (2006); Abbott XXI, 206 N.J. at 492-93 (Hoens, J., dissenting). Measured against this particularly high bar, and in light of all of the foregoing developments, ELC's motion must be denied.

CONCLUSION

In light of the foregoing, ELC's motion in aid of litigants' rights must be denied.

Respectfully submitted,

ANDREW J. BRUCK
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Caroline Jones
Caroline Jones
Deputy Attorney General

cc: all counsel of record (via e-mail and overnight mail)