

EDUCATION LAW CENTER  
By: David G. Sciarra, Esquire  
Attorney No. 026671978  
60 Park Place Suite 300  
Newark, N.J. 07102  
(973) 624-1815; Fax (973) 624-7339  
dsciarra@edlawcenter.org

Attorneys for Plaintiffs-Movants

RAYMOND ARTHUR ABBOTT, ET AL.,

Plaintiffs-Movants

vs.

FRED G. BURKE, ET AL.,

Defendants-Respondents

SUPREME COURT OF NEW JERSEY  
DOCKET NO. 083626

CIVIL ACTION

**CERTIFICATION OF THERESA LUHM**

THERESA LUHM, of full age, hereby certifies as follows:

1. I am an Attorney licensed in New Jersey and the Managing Director at Education Law Center ("ELC"). ELC represents the Plaintiff class of students in the thirty-one poorer urban districts designated in this litigation for remedial measures to ensure them a constitutional thorough and efficient education.

2. I make this Certification in support of Plaintiffs-Movants' ("Plaintiffs") Motion in Aid of Litigants' Rights seeking Defendants-Respondents' ("State") compliance with the remedial directives for school facilities improvements and construction funding in the designated poorer urban districts, as mandated by this Court in Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V") and Abbott v. Burke, 164 N.J. 84 (2000) ("Abbott VII").

3. The facts presented below update those contained in my Certification to this Court filed on November 7, 2019 ("2019 Certification") in support of Plaintiffs' Motion in Aid of Litigants' Rights ("2019 Motion"). That motion, like the within application, sought this Court's intervention to secure State compliance with the Abbott v. Burke facilities remedy. Abbott v. Burke, 241 N.J. 249 (2020) ("Abbott XXIII").

4. In my 2019 Certification, I describe in detail the statutory and regulatory framework established by the Education Facilities Construction and Financing Act ("EFCFA"), N.J.S.A. 18A:7G-1 et seq., for the financing, planning and construction of school facilities projects in the poorer urban districts, denominated in the EFCFA as "SDA districts." I also describe the status of the school construction program under EFCFA and the continuing need for school facilities improvements in the SDA

districts. My entire 2019 Certification, including exhibits, is attached as Exhibit A.

5. On April 1, 2020, this Court denied Plaintiffs' 2019 Motion without prejudice, stating that the "relief sought by movants is premature in that any arguments by plaintiffs in respect of the State's compliance with relevant portions of prior decisions of the Court have to be made in the context of the Fiscal Year 2021 budget, which has not been enacted." The Court further stated that it "declined to proceed on the assumption that respondents will fail to comply with their constitutional obligations to provide a thorough and efficient educational system pursuant to N.J. Const. art. VIII, § 4, ¶ 1." Abbott XXIII, 241 N.J. at 249.

**2019 Statewide Strategic Plan**

6. In their 2019 Motion, Plaintiffs requested this Court direct the State to finalize and make public a revised statewide strategic plan of priority projects in the SDA districts, as required by N.J.S.A. 18A:7G-5m(3), to be funded and managed by the Schools Development Authority ("SDA") over the next five years. Upon submission of the revised statewide strategic plan, Plaintiffs further requested that the State be ordered to promptly seek and secure such school construction funding from the Legislature as is

required to manage and complete the school facilities projects in the revised statewide strategic plan.

7. On January 21, 2020, as Plaintiffs' 2019 Motion was pending before this Court, the SDA approved and released the 2019 Statewide Strategic Plan for SDA Districts ("2019 Strategic Plan"). The 2019 Strategic Plan identified the next group or "tranche" of priority school facilities projects in the SDA districts, based on the Department of Education's ("DOE") 2019 facilities needs assessment, to be financed through the EFCFA school construction program. The 2019 Strategic Plan is attached as Exhibit B.

8. The 2019 Strategic Plan identifies 24 major capital projects in 18 SDA districts for "first tranche advancement" based on three general criteria: 1) educational capacity or overcrowding; 2) building age and condition; and 3) logistical factors, including land availability and SDA construction capacity. Id. at Pa157.

9. The facilities projects in the 2019 Strategic Plan include schools for elementary, middle and secondary grade levels. Because they are situated on land under SDA or district control, 16 of the 24 projects are construction ready, including:

- Two new preschool-grade 5 schools in Garfield;
- A high school addition and renovation in Paterson;

- Three addition and/or renovation projects serving all grade levels in Bridgeton;
- One new high school in Passaic City;
- One new preschool-grade 5 school in Pleasantville;
- One new preschool in Perth Amboy;
- One new preschool in Jersey City;
- One new preschool-grade 8 school in West New York;
- Two replacement preschool-grade 8 schools in Camden;
- Two replacement preschool-grade 8 schools in Newark; and
- One replacement preschool-grade 8 school in Salem City.

Id. at Pa162.

10. The eight additional projects identified in the 2019 Strategic Plan - in the Elizabeth, New Brunswick, Orange, Union City, Plainfield, East Orange and Trenton districts - will be "sequenced with other portfolio projects" once appropriate sites are identified by the SDA. Id. at Pa163.

11. In the 2019 Strategic Plan, the SDA does not provide any estimates of the cost of constructing the priority projects set forth in the Plan, nor does it provide any timetable for seeking additional construction funding for those projects from the Legislature.

12. Due to a lack of funding, the SDA has been unable to move any of the priority projects in the 2019 Strategic Plan to the

planning and design phase of its construction process. The lack of funding has also prevented SDA from adding any new major projects to its portfolio of active construction projects since 2014. See SDA's Active Capital Program Status at <https://www.njsda.gov/NJSDA/Projects/CapitalProgram> (last visited Jan. 20, 2021).

### **Impact of Coronavirus Pandemic**

13. On March 10, 2020, to halt the spread of the COVID-19 coronavirus, Governor Phil Murphy ordered all New Jersey public school buildings to close on March 18 and for school districts thereafter to provide learning opportunities to students through remote, digital means. See Executive Order No. 104 (2020), available at <https://nj.gov/infobank/eo/056murphy/pdf/EO-104.pdf> (last visited Jan. 20, 2021).

14. On May 4, 2020, Governor Murphy ordered public school buildings to remain closed through the end of the 2019-20 school year due to the prevalence of COVID-19 statewide. See May 4, 2020 Press Release, Governor Murphy Announces that Schools will Remain Closed through the End of the Academic Year, available at <https://www.nj.gov/governor/news/news/562020/20200504a.shtml> (last visited Jan. 20, 2021).

15. In June 2020, the DOE released a plan for districts to reopen school buildings to resume in-person, classroom instruction in a safe manner that protects students and staff from the transmission of COVID-19. The DOE plan, titled The Road Back: Restart and Recovery Plan for Education ("Road Back"), contains a set of minimum health and safety standards for districts to address and minimize the incidence and transmission of COVID-19 among students and staff in reopening school buildings in September 2020. The Road Back is available at <https://www.nj.gov/education/reopening/NJDOETheRoadBack.pdf> (last visited Jan. 20, 2021).

16. On August 3, 2020, the DOE issued a Reopening Document Checklist for 2020-21 ("Checklist"), "to assist with development and review of school reopening plans." Based on the recommendations in the Road Back, the Checklist presents a list of health and safety measures for districts to implement prior to reopening school buildings during the COVID-19 pandemic. The Checklist is available at <https://nj.gov/education/reopening/DOE HealthandSafety.pdf> (last visited Jan. 20, 2021).

17. Both the DOE's Road Back and the Checklist require districts to ensure that each school building has adequate ventilation prior to reopening and allowing students and staff to

return to classrooms for in-person instruction. Road Back at 2; Checklist at 2.

18. The Road Back states that “schools and districts must ensure that their indoor facilities have adequate ventilation, including operational heating and ventilation systems where appropriate.” Road Back at 2. The Checklist recommends that districts “ensure that indoor facilities have adequate ventilation, including by: maintaining operational heating and ventilation systems where appropriate; ensuring that recirculated air has a fresh air component; opening windows if A/C is not provided; and maintaining filters for A/C units according to manufacturer recommendations.” Checklist at 2.

19. As detailed in my 2019 Certification, the DOE and SDA in 2016 surveyed the SDA districts for emergent health and safety projects that may qualify for school construction funding. The districts submitted applications for 429 projects, and at least 75 sought funding for inadequate heating and ventilation systems. Of the total number of submissions, the DOE and SDA approved only 15 as emergent. 2019 Certification at ¶31. The complete list of project applications is available at [https://edlawcenter.org/assets/files/pdfs/facilities/Potential Emergent Projects List.pdf](https://edlawcenter.org/assets/files/pdfs/facilities/Potential_Emergent_Projects_List.pdf) (last visited Jan. 20, 2021).



20. According to the SDA's December 2020 Biannual Report, the agency is currently managing 11 emergent projects. See December 2020 Biannual Report, at 16, available at [https://www.njsda.gov/NJSDA/Content/public/Biannual\\_Report/2020\\_2.PDF](https://www.njsda.gov/NJSDA/Content/public/Biannual_Report/2020_2.PDF) (last visited Jan. 20, 2021).

21. I am unaware of any information from the Commissioner, DOE or the SDA on the current need for emergent projects in the SDA districts beyond those identified in the December 2020 Biannual Report. There is also no information publicly available on the status of the 414 projects submitted by the SDA districts that were rejected by the DOE and SDA as emergent in 2016.

22. Consistent with the federal Center for Disease Control guidelines on social distancing, the Road Back and the Checklist also recommend that classrooms, hallways and other common areas in school buildings be reconfigured to allow for a six-foot radius between students and staff to prevent the spread of COVID-19 in the buildings. See Road Back at 9; Checklist at 1.

23. On August 28, 2020, the DOE issued supplemental guidance requiring all school districts "able to satisfy the required health and safety standards" to "resume hybrid or full-time in-person instruction during the fall of school year 2020-2021." DOE, Supplementary Guidance on Executive Order No. 175 (2020),

Requirement 4, available at <https://www.nj.gov/education/reopening/updates/docs/Restart%20Update%20EO-175%20Final%208.28.20.pdf> (last visited Jan. 20, 2021).

The guidance also required that those districts unable to meet the required COVID-19 health and safety standards and reopen for in-person instruction must complete a "health and safety status form" and provide "periodic updates" to the State "to demonstrate that the school district is actively engaged in good-faith efforts towards the resumption of in-person instruction." Id. at Requirement 5.

24. As of December 2, 2020, 23 of the 31 SDA districts, comprising 90% of the 279,419 students in those 31 districts, continue on remote instruction for all students. Of those, 16 districts have not offered in-person instruction since school buildings were closed in March, while seven switched to full remote in mid-October after partially reopening in September. Of the remaining districts, four districts -- Keansburg, Millville, Orange and Phillipsburg -- are providing hybrid instruction, that is, a mix of in-person and remote instruction; and two districts -- Asbury Park and Long Branch -- are providing a combination of models including in-person, hybrid and/or fully remote instruction, varied among its school buildings. Only two SDA districts -- Neptune and

Salem City -- have fully reopened their buildings to in-person instruction. See NJ Spotlight, December 2, 2020 Your School District's Latest Plans for Remote, In-person or Hybrid Learning available at: <https://www.njspotlight.com/2020/11/nj-school-districts-latest-plans-for-remote-in-person-or-hybrid-learning-approved/> (last visited Jan. 20, 2021).

25. I am unaware of any efforts or actions to date by the DOE and/or SDA to survey the SDA districts or otherwise assess the condition of SDA school buildings under the DOE's recommended standards for ventilation, heating and cooling, and reduced and reconfigured "social distancing" classrooms and other spaces for safe reopening during the COVID-19 pandemic. I am also unaware of any data or other information from the SDA and/or DOE on the need for emergent facilities projects and construction funding to ensure all SDA district school buildings meet the DOE recommended standards for safe reopening during this pandemic.

26. In response to the "fiscal exigencies caused by the coronavirus," on July 16, 2020, the Legislature enacted the Emergency Bond Act ("Act") authorizing the State to issue bonds totaling \$2.7 billion for the remainder of the extended Fiscal Year 2020, and up to an additional \$7.2 billion for the nine-month Fiscal

Year 2021 that runs from October 1, 2020, through June 30, 2021. P.L. 2020, c. 60 § 2(11).

27. The Act was challenged as unconstitutional in New Jersey Republican State Committee v. Philip D. Murphy, but this Court issued a ruling on August 12, 2020 in that case affirming the Administration's borrowing authority. In a unanimous opinion, the Court concluded that the ongoing health crisis represents the type of major emergency that allows for bonding without voter approval. 243 N.J. 574 (2020). The Court's decision makes clear that the Administration will need to define, in formal certifications, the budget deficit created by the health crisis before issuing any debt, and that "not every act of borrowing would 'meet' the current emergency." Id. at 581. However, some of the qualifying examples listed in the opinion include "public services like *education*, police, fire, first aid, child welfare, and prisons, among other services" that would "secure the continued functioning of government." Id. at 609. (emphasis added).

28. By letter dated September 18, 2020, Plaintiffs, through their counsel, requested Governor Murphy, Senate President Stephen Sweeney, Assembly Speaker Craig Coughlin and Attorney General Gurbir Grewal to utilize at least \$500 million of the bond financing authorized under the Act to ensure school buildings meet the health

and safety standards for safe reopening in the COVID-19 public health crisis, as established by Governor Murphy and the DOE. A true and correct copy is attached as Exhibit C.

29. To date, Plaintiffs' counsel has not received a reply from the Murphy Administration, the Legislature or the Attorney General to Plaintiffs' request to utilize the Act's emergency bond financing for facilities projects to ensure buildings meet all requisite standards for safe reopening in the pandemic.

30. To my knowledge, the State has not made any school construction funds available for emergent or other capital repair projects as may be needed to ensure SDA district buildings can comply with the ventilation, heating and cooling and other requirements set by the DOE for safe school reopening in the COVID-19 pandemic.

**SDA June and December 2020 Biannual Reports**

31. From inception through December 31, 2019, the School Construction Program has completed 695 projects in the SDA Districts. The completed projects consist of: 87 new schools, including 6 demonstration projects; 47 extensive addition, renovation and/or rehabilitation projects; 31 rehabilitation projects; 354 health and safety projects; and 176 Section 13 Grants for SDA District-managed projects. See Schools Development

Authority December 2019 Annual Report, Report of Independent Auditors Appendix at 5, available at <https://www.njsda.gov/NJSDA/Content/public/reports/2019AnnualReport.pdf> (last visited Jan. 20, 2021).

32. As required by EFCFA, the SDA submits a report to the Legislature on the status of the school construction program every six months. The most recent reports were completed in June and December 2020. The June 2020 Report acknowledges the urgent need for additional school construction funding for SDA district priority projects in a section titled "Refunding the Authority." Specifically, the SDA states that:

The data demonstrates that there are still 18,000 students in SDA Districts who don't have the seats they need due to District overcrowding. That's 18,000 kids trying to learn every day in spaces not conducive to educational adequacy. There is also still 7 million square feet of schools in SDA Districts that are more than 90 years old, many of which do not conform to educational standards.

See June 2020 Biannual Report, at 30, available at <https://www.njsda.gov/NJSDA/Content/public/Biannual Report/2020 1 .PDF> (last visited Jan. 20, 2021).

33. The December 2020 Biannual Report indicates that the SDA is managing 11 capital projects through the construction process: 8 projects under construction; 1 project in initial design; and 2

projects in design/scope development. The SDA estimates that all 11 capital projects will be completed by 2025. See December 2020 Biannual Report, at 15, available at [https://www.njsda.gov/NJSDA/Content/public/Biannual Report/2020 2 .PDF](https://www.njsda.gov/NJSDA/Content/public/Biannual%20Report/2020%202020.PDF) (last visited Jan. 20, 2021).

34. It is clear from the December 2020 Biannual Report that when the SDA completes the 11 projects in its current management portfolio in four years, the agency has no funding to undertake any additional capital projects in SDA districts and will effectively shut-down its construction operations. In fact, the number of full-time staff members at the agency has already declined from 332 in 2009 to 175 as of December 2020. See Agenda and Materials of New Jersey Schools Development Authority Board Meeting, December 2, 2020 at 35, available at [https://www.njsda.gov/NJSDA/Content/Agenda/2020Agenda/Agenda 1202 2020.pdf](https://www.njsda.gov/NJSDA/Content/Agenda/2020Agenda/Agenda%202020.pdf) (last visited Jan. 20, 2021).

35. As set forth in my 2019 Certification at ¶51, all school construction funds previously authorized by the Legislature under EFCFA have been committed to projects currently in design or under construction.

## **FY2020-21 Budget**

36. The State's fiscal year ends each year on June 30, and the Legislature must adopt a budget for the subsequent year by July 1. N.J. Const. art. VIII, § 2, ¶ 2. However, because of the economic uncertainty caused by the coronavirus pandemic, the Legislature extended the State's 2020 fiscal year to September 30, 2020 and delayed the enactment of the FY2021 Budget until September 29, 2020. P.L. 2020, c. 19 § 3(a).

37. In the FY2021 Budget, the Governor did not propose, nor did the Legislature authorize, any increase or additional funding for the priority school construction projects in the SDA's 2020 Strategic Plan or for projects to remediate health and safety conditions in SDA school buildings. Further, no separate or supplementary legislation was either proposed or enacted to provide funding for the SDA to undertake school construction projects pursuant to EFCFA. See State of New Jersey Appropriations Handbook Fiscal Year 2020-21 available at <https://www.nj.gov/treasury/omb/publications/21approp/FY21FullAppropAct.pdf> (last visited Jan. 20, 2021).

38. The FY2021 Budget has been enacted without the provision of funds for school construction projects, as required by EFCFA and




as necessary to comply with this Court's prior decisions mandating school facilities improvements in SDA districts.

39. On October 20, 2020, Plaintiffs, by letter to Governor Murphy, Senate President Stephen Sweeney, Assembly Speaker Craig Coughlin and Attorney General Gurbir Grewal, notified the State of its failure to provide additional school construction funding for urgently needed facilities improvements in SDA districts in the FY21 Budget, as anticipated by this Court in dismissing Plaintiffs' 2019 Motion last April as "premature." Plaintiffs further offered to work collaboratively on a plan to promptly secure such funding but also made clear that, in the event of no action by the State, Plaintiffs would again seek this Court's intervention. To date, Plaintiffs have received no response to their notice and request for corrective action. A true and correct copy of Plaintiffs' October 20 letter is attached as Exhibit D.

I hereby certify that the statements made by me are true. I am aware that if any of the foregoing is willfully false, I am subject to punishment.

Date: January 20, 2021

  
Theresa Luhm, Esq.