



July 22, 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 response to the Court's July 9, 2021 request for "additional briefing from the parties to address the impact, if any, of the adoption of the budget for Fiscal Year 2022" on Plaintiffs' Motion In Aid of Litigants' Rights in the above captioned matter.

TABLE OF CONTENTS

Statement of Facts..... 2

Legal Argument..... 9

Point I: THE FY 2022 BUDGET CONFIRMS THE STATE'S
CONTINUING FAILURE TO FULLY FUND NEEDED SCHOOL
FACILITIES IMPROVEMENTS IN SDA DISTRICTS..... 9

Point II: THIS COURT'S INTERVENTION IS REQUIRED TO
EFFECTUATE STATE COMPLIANCE WITH THE ABBOTT
SCHOOL FACILITIES MANDATES.....14

Conclusion.....16

STATEMENT OF FACTS

On June 29, 2021, while the Abbott Plaintiffs' Motion in Aid of Litigants' Rights was pending before this Court, the State Legislature enacted, and the Governor signed, the State's Fiscal Year 2022 Appropriations Act. P.L. 2021, c. 133, available at <https://www.njleg.state.nj.us/2020/Bills/AL21/133 .pdf> (last visited July 21, 2021) ("FY 2022 Budget"). As set forth below, the FY 2022 Budget fails to appropriate the funding necessary to commence and complete construction of the "first tranche" of 24 major school facilities projects in the poorer urban or SDA districts identified as priorities by the New Jersey Schools Development Authority (SDA) in its 2019 Statewide Strategic Plan ("2019 Strategic Plan"). See Certification of Theresa Luhm, Ex. B., Pa168 ("Luhm Cert."). Nor does the FY 2022 Budget fund capital maintenance and emergent repair projects as needed to ensure existing SDA school buildings conform to health and education standards, especially as required to safely reopen for in-person instruction in the coronavirus pandemic.

During deliberations on Governor Phil Murphy's proposed FY 2022 Budget, the Legislature was informed, yet again, of the urgent need for additional funding for school construction in

SDA districts.¹ SDA Chief Executive Officer (CEO) Manual Da Silva, in an Assembly Budget Committee hearing on May 10, 2021, testified that “school facilities needs” in the SDA districts are “abundantly clear” and “significant.” Recording of the May 10, 2021 Assembly Budget Committee hearing available at <https://www.njleg.state.nj.us/media/mp.asp?M=V/2021/ABUB/0510-0100PM-H0-1.mp4&S=2020> (last visited July 21, 2021). Noting building overcrowding and non-compliance with educational standards in SDA districts, CEO Da Silva confirmed that the “SDA’s 2019 Statewide Strategic Plan provides a sequence of SDA activities that will address the significant overcrowding and aging infrastructure needs that exist in many SDA districts.” Id. (emphasis added). But when pressed to give the Budget Committee estimates of the cost to finance the priority projects in the 2019 Strategic Plan and needed emergent building repairs, CEO Da Silva declined to respond, stating only that he would try to “circle back” to the Committee with the information. Id.

The SDA also published the biannual report on the school facilities construction program for the period October 1, 2020

¹ On this Motion, Plaintiffs previously addressed the funding for school construction proposed by Governor Murphy in his FY 2022 Budget, consisting of \$200 million for capital construction in SDA districts and \$75 million for emergent projects for all districts statewide. See Plaintiffs’ Reply Brief at 4-6 (April 13, 2021).

to March 31, 2021 as required by the Education Facilities Construction and Financing Act ("EFCFA"), N.J.S.A. 18A:7G-24 (directing twice-a-year reports to the Governor and Legislature on status of projects under construction and whether there is a need for additional construction funding). See June 2021 Biannual Report, available at https://www.njsda.gov/NJSDA/Content/public/Biannual_Report/2021_1.PDF (last visited July 21, 2021) ("Biannual Report"). After confirming the Governor's proposed \$200 million in the FY 2022 Budget "to support the work of the SDA," the Biannual Report states that:

While substantial SDA program activities continue, this report demonstrates the need for additional funding to advance future SDA construction work to fulfill and deliver more than 17,000 seats needed statewide. District-wide overcrowding is impacting thousands of students trying to learn in overcrowded classrooms. Also, there are still many schools that do not conform to educational standards.
[Biannual Report at 6.]

Further, while also noting the Governor's proposed \$75 million for emergent projects for all districts statewide, the Biannual Report reiterates the SDA's prior recommendation for a comprehensive assessment of the conditions in existing school facilities:

The current pandemic has further demonstrated the need to fully and properly assess the facility conditions needs in New Jersey's school buildings. SDA leadership has previously recommended, and the 2019 Statewide Strategic Plan included, a plan to conduct a Building

Conditions Assessment Survey of all schools in the 31 SDA Districts. This recommendation would serve to inform future long term planning and to assist the SDA in identifying future funding needs.
[Biannual Report at 27.]

The Biannual Report further advised the Governor and Legislature that authorizing "additional funding" would not only enable the SDA to undertake the construction of the capital projects in the 2019 Strategic Plan but would also allow "the Building Conditions Assessment Survey" of existing buildings "to move forward." Id.

The FY 2022 Budget, supra, was enacted by the Legislature and signed by the Governor against the backdrop of this record. In that final Budget, the only funding appropriated for school facilities construction is as follows.

First, the FY 2022 Budget contains a \$200 million appropriation to the SDA "to support school facilities projects in the SDA school districts, subject to the approval of the Director of the Division of Budgeting and Accountability." FY 2022 Budget, supra at 54. This appropriation mirrors the funding level in the Governor's budget proposal.

Second, the FY 2022 Budget appropriates \$75 million to the SDA, as Governor Murphy proposed, "to support emergent needs and capital maintenance in school districts, subject to the approval of the Director of the Division of Budget and Accounting." Id. As SDA CEO Da Silva explained to the Assembly Budget Committee,

these funds must be made available for emergent projects not just in SDA districts, but in all districts statewide. Recording of May 10, 2021 Assembly Budget Committee hearing, supra.

The FY 2022 Budget also includes additional appropriations that potentially could be used for school facilities construction, but neither commits these funds to SDA districts nor contains any assurances that they will be made available to fund needed projects in those districts.

First, the FY 2022 Budget appropriates \$180 million for a School and Small Business Energy Efficiency Stimulus Program. FY 2022 Budget, supra at 260. In separate implementing legislation, the program is intended "to promote the sustainability of HVAC and water systems within New Jersey schools and small businesses." P.L. __, c. ____ (S.3033, signed by Governor Murphy, July 2021). The legislation, however, has no directives or other provisions allocating the appropriation between schools and businesses, nor does it specify the level of funding dedicated to upgrade HVAC and water systems in schools generally or to schools in SDA districts. Id. In addition, the legislation restricts the appropriation to HVAC and water systems and, as a result, is not available for other emergent project needs identified in prior surveys of SDA districts, including leaky roofs, crumbling facades, and inadequate

heating, fire safety and other basic building systems.²

Second, the FY 2022 Budget appropriates \$3.7 billion for a "New Jersey Debt Defeasance and Prevention Fund" ("Defeasance Fund"). FY 2022 Budget, supra at 9. In separate legislation establishing the Defeasance Fund, \$1.2 billion is allocated "for the purpose of funding capital construction projects for which State debt is already authorized by law" or "for which funding would have been derived from future State bond issuances, thereby constituting debt avoidance." P.L. 2021, c. 125. The legislation does not allocate any of the \$1.2 billion to school facilities, a category of capital construction potentially eligible for support. Id. Nor does it delineate the specific areas of capital construction that may be eligible other than school facilities, such as public libraries or community colleges. Id. To access an allocation from the Defeasance Fund, the legislation only provides for a process in which the State Treasurer submits a list of proposed capital projects to the Joint Budget Oversight Committee of the Legislature for approval, and within one business day of

² In 2007, 2011 and 2016, the SDA and DOE implemented a joint "Potential Emergent Projects Program" (PEPP) to identify projects to address health and safety in existing SDA district buildings. 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 Plaintiffs' Reply Brief at 3-4; and Luhm Cert., Ex. A, ¶¶31-32 at Pa14.

receipt, the Committee "shall schedule a meeting to consider the submitted items, which hearing shall be held within seven days of receipt of the list." Id. There are no timeframes or other guidance in the legislation for securing a funding allocation for school facilities projects from the Defeasance Fund.

In sum, the FY 2022 Budget specifically appropriates only \$200 million for school construction in SDA districts and \$75 million for capital maintenance and emergent repair projects not just in SDA districts, but in all districts statewide. In addition, the record before the Legislature on its deliberations on the budget is devoid of any analysis, data or other information to inform and evaluate the extent to which the appropriations will enable the SDA to advance to construction the 24 major capital projects in the 2019 Strategic Plan or to undertake capital maintenance and emergent repairs, as necessary to remediate health, safety and other deficiencies in existing SDA district buildings.³

³ The Biannual Report does list estimated costs, totaling \$797.5 million, for the facilities projects currently under construction as of March 31, 2021. The estimates for the new buildings include a section of Perth Amboy High School at \$58.7M; Paterson Union Avenue Middle School at \$113.9M; Passaic City Dayton Avenue Elementary Campus at \$240.9M and Camden High School at \$133M. The four addition and/or renovation projects range from \$137.5M for Millville High School to \$28.4M for Port Monmouth Road Elementary School in Keansburg. Biannual Report, supra at 15. The December 2020 Biannual Report, which included the full cost of the Perth Amboy High School at \$283.8M,

LEGAL ARGUMENT

I. THE FY 2022 BUDGET CONFIRMS THE STATE'S CONTINUING FAILURE TO FULLY FUND NEEDED SCHOOL FACILITIES IMPROVEMENTS IN SDA DISTRICTS

Through yet another budget cycle, the State has again failed to seek and secure the funding needed to continue implementation of this Court's remedial measures for school facilities improvements in SDA districts. See Abbott v. Burke, 153 N.J. 480, 519 (1998) ("Abbott V"). The extremely limited appropriations for school construction in the FY 2022 Budget are patently insufficient to address the urgent need for the facilities improvements in SDA districts that the State itself has repeatedly acknowledged and, once again, confirmed during the Legislature's just concluded budget process. Thus, in the face of this Court's clear expectations, the FY 2022 Budget is nowhere near responsive to the "constitutional call" to ensure compliance with the school facilities mandates in Abbott V, supra, and Abbott v. Burke, 164 N.J. 84 (2000) ("Abbott VII").

First, the FY 2022 Budget was enacted without the State presenting any cost estimates for the 24 major projects in the SDA's 2019 Strategic Plan and for needed capital maintenance and emergent repair projects. Even more troubling, the SDA did not

estimated the portfolio at nearly \$1 billion for the same eight projects. See Plaintiffs' Reply Brief at 5 and n.2.

proffer that vital information even after being asked to do so by legislators on the Assembly Budget Committee. Thus, for a second straight year, the State failed to provide any concrete plan, including cost estimates, for the financing and construction of major projects in the 2019 Strategic Plan and for needed capital maintenance and emergent repair improvement projects to ensure existing SDA school buildings are safe to reopen and operate, especially in an ongoing pandemic.⁴ 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 as well as the cost of providing the space necessary to house Abbott students adequately”).

Second, only \$200 million is appropriated in the FY 2022 Budget for school construction projects in SDA districts. On

⁴ A recent report highlights the reluctance of parents and students in Jersey City and Paterson to send their children back to dilapidated school buildings that were unsafe even before the pandemic, noting that “[a]fter a year and a half at home, some parents don’t want their kids returning to run-down schools.” July 19, 2021, available at: <https://theundefeated.com/features/after-a-year-and-a-half-at-home-some-parents-dont-want-their-kids-returning-to-run-down-schools/> (last visited July 19, 2021).

its face, that appropriation is wholly inadequate to support any meaningful progress in undertaking the construction of the "first tranche" of 24 priority projects in the 2019 Strategic Plan. As its two most recent biannual reports make clear, the SDA is spending five times that amount, or nearly \$1 billion, to complete one-third as many projects as those prioritized in the 2019 Strategic Plan. See supra at n.3.

Third, while the FY 2022 Budget appropriates \$75 million for capital maintenance and emergent repair projects in existing school buildings, these funds must be made available to all school districts statewide. Here, again, the legislative record on the budget contains no information on the scope and cost of remediating existing building deficiencies against which to evaluate the sufficiency of the appropriation, even if it were entirely allocated to SDA districts. The FY 2022 Budget also fails to fund the SDA's repeated recommendation for a comprehensive needs assessment of the current condition of these buildings, turning a blind eye to the SDA's warning that the "pandemic has further demonstrated the need to fully and properly assess the facility conditions needs in New Jersey's school buildings" which "would serve to inform future long term planning and to assist the SDA in identifying future funding

needs.” Biannual Report at 27.⁵

Fourth, the FY 2022 Budget includes an appropriation of \$1.2 billion in a “Debt Defeasance and Prevention Fund” that could be available to finance school construction projects in SDA districts. Yet the Budget and the enabling legislation for the Defeasance Fund contain no directives or assurances that this appropriation will be used for school facilities construction. Simply put, while school facilities may be potentially eligible for support from the Defeasance Fund, there is no express commitment that any of these funds will, in fact, be dedicated to capital construction projects in the SDA districts.

Finally, the touchstone for evaluation of the impact of the FY 2022 Budget on the Abbott facilities mandates is this Court’s unequivocal directive that the State “is required to fund all of the costs of necessary facilities remediation and construction

⁵ As Plaintiffs explain in their Reply Brief, the State cannot rely on federal emergency COVID-19 relief to meet its constitutional obligation to fund facilities improvements in the SDA districts. That relief is one-time, non-recurring federal funds that must be used to address an array of expenditures related to the impacts of COVID-19 on students and is not available for major capital construction projects. To the extent that districts, including SDA districts, can use these funds for HVAC and other repairs to enable buildings to safely operate in the pandemic, the State has not provided any information to demonstrate that COVID-19 relief will be used to address this need. See Plaintiffs’ Reply Brief at 13-14.

in the [SDA] districts.” Abbott VII, 164 N.J. at 88 (emphasis added), affirming Abbott V, 153 N.J. at 524. In Abbott V, this Court concluded:

any funding formula that does not fund the complete cost of remediating the infrastructure and life cycle deficiencies that have been identified in the Abbott districts or that does not fully fund the construction of any new classrooms needed to correct capacity deficiencies will not comport with the State’s constitutional mandate to provide facilities adequate to ensure a thorough and efficient education.
[Abbott V, supra at 524.]

It is abundantly clear that the appropriations in the FY 2022 Budget for school construction in SDA districts - major capital projects, and capital maintenance and emergent repairs - are wholly unrelated to the actual need for such projects and are so *de minimus* as to render them both arbitrary and constitutionally deficient, an approach soundly rejected by this Court in prior Abbott rulings. See, e.g., Abbott v. Burke, 170 N.J. 537, 559 (2002) (directing the State to ensure preschool budget calculations “yield funding decisions based not on arbitrary, predetermined per-student amounts, but, rather, on a record containing funding allocations developed after a thorough assessment of actual needs”).

In sum, the FY 2022 Budget once again fails to comport with the State’s obligation to seek and secure funding for major facilities construction and emergent repairs in SDA districts. Thus, this Court’s intervention is now required to ensure that

the fundamental interest of the Abbott Plaintiffs to attend school in buildings that are safe, not overcrowded and educationally adequate remains "prominent, paramount, and fully protected." Id. at 527.

II. THIS COURT'S INTERVENTION IS REQUIRED TO EFFECTUATE STATE COMPLIANCE WITH THE ABBOTT SCHOOL FACILITIES MANDATES

Last year, this Court declined to intervene in response to Plaintiffs' request for relief in aid of litigants' rights to ensure compliance with the Abbott school facilities mandates, expressing its anticipation that the State would secure such funding in the FY 2021 Budget. Abbott v. Burke, 241 N.J. 249 (2020). That Budget's failure to appropriate funding for needed facilities projects prompted Plaintiffs to return to the Court for relief. Given a second opportunity, the record on this Motion is now clear: the State has, once again, failed to secure the requisite funding in the FY 2022 Budget. Accordingly, the time has now come for this Court's intervention.

At this juncture, and to address the State's repeated non-compliance, the Plaintiffs ask this Court to enter specific relief directing the State to, by no later than December 31, 2021, secure sufficient funds to: 1) finance the estimated cost of construction of the 24 "first tranche" priority projects in the SDA's 2019 Strategic Plan; and 2) finance the estimated cost of all needed capital improvements and emergent repairs in

existing SDA district buildings, with a priority for those projects necessary to ensure their safe operation during the pandemic.

Given the State's pattern of repeated non-compliance, the Plaintiffs further request the Court retain jurisdiction and direct the State to submit a report, no later than January 31, 2022, detailing the status of its efforts to secure additional funding for the projects in the 2019 Strategic Plan and for capital maintenance and emergent repair projects, as needed and as required to meet health and safety standards for the operation of school buildings in a public health emergency.

The measured relief now sought by Plaintiffs - and compelled by the record on this Motion - is not only appropriate, but also not subject to appropriations decisions and choices made by the Legislature under N.J. Const. art. VIII, § II, ¶ 2. As the Court held in ruling on a prior Motion in Aid of Litigants' Rights in this litigation, "the Appropriations Clause creates no bar to judicial enforcement" in the context of upholding long-promised remedial relief for the Abbott school children. Abbott v. Burke, 206 N.J. 332, 363 ("Abbott XXI") (2011). As Justice LaVecchia emphasized:

To state the question is to present its answer: how is it that children of the plaintiff class of Abbott schoolchildren, who have been designated victims of constitutional deprivation and who have secured judicial orders granting them specific, definite, and

certain relief, must now come begging to the Governor and Legislature for the full measure of their education funding?

[Id.]

See also Abbott v. Burke, 163 N.J. 95, 101-02 (2000) (Chief Justice Poritz underscoring that relief in aid of the Abbott litigants is compelled so that "another generation of children" will not "pay the price for each year of delay" in implementing Court-ordered preschool).

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court grant the Motion in Aid of Litigants' Rights, order the relief requested, and retain jurisdiction to ensure State compliance.

Respectfully submitted,



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