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

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION IN AID OF LITIGANTS' RIGHTS

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PRELIMINARY STATEMENT

Plaintiffs return to this Court again seeking judicial relief to ensure State Respondents' ("State") compliance with the directives for remediating unsafe, overcrowded and inadequate school facilities in poorer urban or "SDA districts" in Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V") and Abbott v. Burke, 164 N.J. 84 (2000) ("Abbott VII"), and in the Education Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1 to 48 ("EFCFA"). As the record on this Motion demonstrates, and despite this Court's expectancy last April that the State would "comply with [its] constitutional obligations" for facilities improvements "in the context of the Fiscal Year 2021 budget," Abbott v. Burke, 241 N.J. 249 (2020) ("Abbott XXIII"), the State has not taken the requisite steps to secure funding for urgently needed projects in SDA districts. Thus, absent judicial intervention, the State will default on its constitutional obligation to provide the safe and adequate physical environments essential for Plaintiffs' learning, especially during the coronavirus pandemic.

Given this continuing failure, Plaintiffs request a remedial order directing the State, by June 30, 2021, to seek and secure such funding as is required to undertake the facilities projects contained in the Schools Development Authority's ("SDA") 2019 Statewide Strategic Plan and as needed to ensure the health and safety of school buildings in SDA districts.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

A. THE ABBOTT FACILITIES MANDATE

In Abbott v. Burke, 149 N.J. 145 (1997) ("Abbott IV"), this Court was faced with "accounts of crumbling and obsolescent schools" that "inundate[d] the record." Id. at 187. Based on overwhelming evidence of "dilapidated, unsafe, and overcrowded facilities," the Court concluded that capital deficiencies were among "the most significant problems" facing the poorer urban or "SDA districts."[1] Id. at 186. The Court also reaffirmed its holding in Abbott v. Burke, 119 N.J. 287, 390 (1990) ("Abbott II") that "adequate physical facilities are an essential component of [the] constitutional mandate [for a thorough and efficient education]." Id. Further, the Court concluded that facilities improvements are fundamental to the efficacy of the Abbott remedies for adequate K-12 funding, supplemental K-12 programs, and high-quality preschool - all of which implicate physical learning environments. Abbott IV, 149 N.J. at 187-88 ("[w]e cannot expect disadvantaged children to achieve when they are relegated to buildings that are unsafe and often incapable of housing the very programs needed to educate them").

To address the "deplorable conditions" in SDA district facilities, 153 N.J. at 519, the Court in Abbott V directed the State to fund "the complete cost" of "remediating the infrastructure and life cycle deficiencies that have been identified in the Abbott districts," as well as "the construction

[1] In EFCFA, the poorer urban districts are denominated SDA districts. N.J.S.A. 18A:7G-3.

of any new classrooms needed to correct capacity deficiencies." Id. at 524. The Court also directed the districts to complete five-year facilities management plans, enrollment projections, and architectural blueprints by fall of 1999 and set "spring of 2000" for the State to commence construction. Id. at 521. Because "projected cost estimates" were speculative, the Court declined to "impose dollar restrictions" on funding. Id. at 521, n.8. Subsequently, in Abbott VII, the Court reaffirmed the State's obligation to fully fund facilities improvements in the SDA districts. 164 N.J. at 88 (holding the State must "fund all of the costs of necessary facilities remediation and construction").

B. EDUCATION FACILITIES CONSTRUCTION AND FINANCING ACT

1. Facilities Project Planning Under EFCFA

In July 2000, the Legislature enacted EFCFA, N.J.S.A. 18A:7G-1 to 48, to comply with the Abbott facilities mandate. In 2007, the Legislature amended EFCFA to establish the SDA as the agency responsible for funding facilities projects in SDA districts. N.J.S.A. 18A:7G-3; see also N.J.S.A. 52:18A-237 to 247 (replacing Schools Construction Corporation with SDA).

EFCFA requires the SDA to fund, plan, design and construct facilities projects determined to be needed in long range facilities plans ("LRFP") prepared by the SDA districts and approved by the Commissioner of Education ("Commissioner"). N.J.S.A. 18A:7G-5k (providing that the "State share" of SDA district projects "shall be 100% of the final eligible costs").

EFCFA requires the districts to amend their LRFPs once every five years to update enrollment projections, building capacities, and health and safety conditions and to identify all deficiencies in the current facilities inventory. N.J.S.A. 18A:7G-4(a). District LRFPs must also address the educational adequacy of existing buildings to support student achievement of the State's learning standards. N.J.S.A. 18A:7G-4a; N.J.S.A. 18A:7G-4h.

Following the approval of the LRFPs, EFCFA requires the Commissioner to develop an "educational facilities needs assessment" ("EFNA") that identifies the most critical needs for each SDA district and must be revised every five years. N.J.S.A. 18A:7G-5m(1). Based on the approved LRFPs and the EFNA, the Commissioner must then establish, in consultation with each SDA district, an "educational priority ranking of all school facilities projects in the SDA districts based upon the Commissioner's determination of critical need" in accordance with "priority project categories" that include health and safety, overcrowding, in-district programs for students with disabilities, and educational adequacy. N.J.S.A. 18A:7G-5m(2).

After the Commissioner transmits the EFNA and educational priority rankings to the SDA, the agency - in consultation with the Commissioner, the SDA districts, and the governing bodies of the districts' municipalities - must establish a "statewide strategic plan" for use in sequencing the construction of

facilities projects based upon the Commissioner's project priority rankings and issues which may impact the SDA's ability to complete the projects, including, but not limited to, the construction schedule and other appropriate factors. N.J.S.A. 18A:7G-5m(3). The SDA must revise the statewide strategic plan "no less than once every five years." Id.

Finally, the Commissioner adopted regulations under EFCFA codifying an expedited process to review and fund "emergent" projects in SDA district buildings. Emergent projects are defined as a "capital project necessitating expedited review" to remediate a condition that "would render a building so potentially injurious or hazardous" as to cause "an imminent peril to the health and safety of students or staff." N.J.A.C. 6A:26-1.2.

2. Facilities Project Funding Under EFCFA

To fulfill the Abbott mandate for full funding of facilities projects in SDA districts, the Legislature determined in EFCFA to utilize bonding as the mechanism to fund project costs, including land acquisition, planning, design and construction. In enacting EFCFA in 2000, the Legislature set the aggregate principal amount of bonds authorized for school construction funding in the SDA districts at $6 billion. N.J.S.A. 18A:7G-14a.

In the wake of the proceedings in Abbott v. Burke, 185 N.J. 612, 615 (2005) ("Abbott XIV") and Abbott v. Burke, 193 N.J. 34 (2007) ("Abbott XVII"), the Legislature, in June 2008, enacted

amendatory legislation raising the aggregate principal amount of bonds authorized to be issued by an additional $2.9 billion for the SDA districts. P.L. 2008, c. 30, codified in N.J.S.A. 18A:7G-14(a).[2]

To apprise the Legislature of the progress of school construction and the need for additional funding, EFCFA directs the SDA, no later than June 1 and December 1 of each year - and in consultation with the State Treasurer and the Commissioner - to submit to the Senate President and Assembly Speaker a "report on the school facilities construction program" that includes the following information: a) the number of projects approved by the Commissioner; b) the number of projects undertaken and financed by the SDA; and c) the "aggregate principal amount of bonds . . . issued by the [SDA]" and "whether there is a need to adjust the aggregate principal amount of bonds" to finance school facilities projects, as needed in SDA districts. N.J.S.A. 18A:7G-24. The report is referred to as the "Biannual Report." Pa17, ¶39.

C. CURRENT NEED FOR SCHOOL FACILITIES PROJECTS

1) Major Capital Projects

From EFCFA's enactment through December 31, 2019, the SDA has

[2] The Legislature also authorized bonding for school construction for non-SDA school districts and county vocational schools, totaling an additional $2.6 billion in 2000 and an additional $1 billion in 2008. N.J.S.A. 18A:7G-14a.

completed 695 projects (341 major projects plus 354 health and safety projects) in the SDA districts. Certification of Theresa Luhm dated Jan. 20, 2021 ("Luhm Cert.") ¶31. The completed major projects include: 87 new schools, including six demonstration projects; 47 extensive addition, renovation and/or rehabilitation projects; 31 rehabilitation projects; and 176 Section 13 Grants for SDA District-managed projects. Id.

In early 2016, the Commissioner approved revised amendments to the SDA districts' LRFPs as required by EFCFA. ("2016 LRFP Amendments"). Pa9, ¶19. An analysis of the 2016 LRFP Amendments shows approximately 381 major capital projects are needed across all 31 SDA districts, impacting over 300,000 children. Pa9, ¶20. These projects include 200 renovations/additions of existing school buildings, 102 new school buildings, 72 upgrades of major building systems (such as new windows or mechanical systems), three capital maintenance projects, and four site upgrades. Id.

In 2016, following approval of the 2016 LRFP Amendments, the Commissioner transmitted to the SDA an EFNA prioritizing major capital projects in each district. ("2016 EFNA"). Pa10, ¶21. In January 2019, the Commissioner revised the 2016 EFNA with updated enrollment projections and building capacity assessments. ("2019 EFNA"). Pa10, ¶22; Pa60-106. The 2019 EFNA analyzed enrollment trends, building capacity and square feet per student by four grade

groups for each SDA district: Pre-K, K-5, 6-8, 9-12. Pa66. The key findings include:

a) Fifteen of the thirty-one SDA districts have deficient capacity and/or provide fewer square feet per student than prescribed in NJDOE's Facilities Efficiency Standards for one or more grade configurations;

b) Five districts have capacity and square footage deficiencies in two or more grade groups. These deficiencies cannot be addressed through increased building utilization, the reassignment of buildings, and/or the reconfiguration of school sending areas; and

c) Five districts have capacity or square footage deficiencies in two or more grade groups necessitating additional square footage. Pa105-106.

The 2019 EFNA also identifies projects in the other 16 SDA districts, "particularly those replacing buildings beyond their useful life for education," as "also worthy of consideration" as priorities. Pa106.

On January 21, 2020, the SDA approved and released the 2019 Statewide Strategic Plan for SDA Districts ("2019 Strategic Plan"). The 2019 Strategic Plan identified the next "tranche" of priority facilities projects in the SDA districts, based on the 2019 EFNA, as required by EFCFA. Luhm Cert. Ex. B., Pa168.

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. Luhm Cert. ¶8, Ex. B., Pa157.

The priority 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 in 11 SDA districts are construction ready. Luhm Cert. ¶9, Ex. B., Pa162. The eight additional projects in another seven SDA districts identified in the 2019 Strategic Plan will be "sequenced with other portfolio projects" once appropriate sites are identified by the SDA. Luhm Cert. ¶10, Ex.B., Pa163.

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. Luhm Cert. ¶11. Due to a lack of funding, the SDA cannot move any of the priority projects in the 2019 Strategic Plan to the planning and design phase of its construction process. Id. at ¶12. The absence of funding has also prevented SDA from adding any new major projects to its active construction portfolio since 2014. Id.

2. Emergent Projects

On three occasions - 2007, 2011 and 2016 - the SDA and the Department of Education ("DOE") have jointly undertaken a "Potential Emergent Projects Program" ("PEPP") to identify and evaluate for remediation potential projects impacting the health and safety of students and staff. Pa14, ¶31. In the last PEPP announced on July 26, 2016, the SDA districts identified 429 building conditions in need of emergent action, including leaky roofs, crumbling facades, and inadequate ventilation, heating and cooling, fire safety and other basic systems. Pa14, ¶32. Of the 429 district submissions, the DOE and SDA approved only 15 as emergent. Pa14-15, ¶32.

The SDA reports that it is currently managing 11 emergent projects in the SDA districts. Luhm Cert. ¶20. There are no data, reports or information from the DOE or SDA on the existing need for emergent projects. Luhm Cert. ¶21. The agencies have also provided no public information on the status of the 414 projects submitted in 2016 that were rejected as emergent. Id.

D. IMPACT OF CORONAVIRUS PANDEMIC

To halt the spread of the COVID-19 coronavirus, Governor Phil Murphy ordered all New Jersey public school buildings to close from March 18, 2020 through the end of the 2019-20 school year, with instruction to be provided remotely. Luhm Cert. ¶¶13-14.

In June 2020, the DOE released a plan - titled The Road Back: Restart and Recovery Plan for Education ("Road Back") - for districts to reopen school buildings in September 2020 and resume in-person, classroom instruction in a safe manner that protects students and staff from the transmission of COVID-19. Luhm Cert. ¶15. DOE supported that plan with its August 3, 2020 Reopening Document Checklist for 2020-21 ("Checklist") of health and safety measures for districts to implement prior to reopening school buildings. Id. at ¶16.

Both the DOE's Road Back and the Checklist require districts to ensure school buildings have adequate ventilation prior to reopening and allowing students and staff to return to classrooms for in-person instruction. Id. at ¶17. The Road Back states that "districts must ensure that their indoor facilities have adequate ventilation, including operational heating and ventilation systems where appropriate." Id. at ¶18. 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. Id.

Consistent with the federal Center for Disease Control guidelines on social distancing, DOE also recommends 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. Luhm Cert. at ¶22.

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." Id. at ¶23. The guidance also requires 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.

As of December 2, 2020, 23 of the 31 SDA districts, enrolling 90% of the 279,419 students in those districts, remain on remote instruction. Luhm Cert. ¶24. 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. Id. 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. Id. Only two districts - Neptune and Salem City – have fully reopened their buildings to in-person instruction. Id.

To date, neither the DOE nor the SDA have surveyed the SDA districts or otherwise assessed the condition of SDA school buildings under the DOE's standards for ventilation, heating and cooling, or reduced and reconfigured "socially distanced" classrooms and other spaces for safe reopening during the COVID-19 pandemic. Luhm Cert. ¶25. Nor has the SDA and/or DOE released information on the need for emergent facilities projects and construction funding to ensure all SDA district school buildings can safely reopen during this pandemic. Id. When the DOE and SDA in 2016 surveyed the SDA districts for emergent health and safety projects that may qualify for school construction funding, at least seventy-five of the 429 applications submitted by SDA districts sought funding for inadequate heating and ventilation systems. Luhm Cert. ¶19.

In response to the "fiscal exigencies caused by the coronavirus," on July 16, 2020, the Legislature enacted the Emergency Bond 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(ll). See New Jersey Republican State Committee v. Philip D. Murphy, 243 N.J. 574, 609 (2020) (unanimously

upholding constitutionality of borrowing authority, to "secure the continued functioning of government" in "public services like education" during an ongoing health crisis).

E. CURRENT NEED FOR SCHOOL CONSTRUCTION FUNDING

From 2014 through 2020, the SDA alerted the Legislature in at least five Biannual Reports — December 2014, June 2018, December 2018, June 2019, and June 2020 — of the unmet facilities needs in SDA districts and that available funding for major capital projects was fully committed to projects already in the construction pipeline. Pa18-19, ¶¶40-43; Luhm Cert. ¶32.

In addition to the Biannual Reports, the SDA testified before the Senate and Assembly Budget Committees on the need for construction funding in 2018 and 2019. In an April 17, 2018 Senate Budget Committee hearing, former SDA Chief Executive Officer Charles McKenna testified that, although the SDA had $1.7 billion in remaining bond authorization, all but $70 million was allocated to specific projects in its capital portfolio. Pa20, ¶46. At that time, Mr. McKenna testified that the SDA would exhaust all available funding within four to five years, or by 2022-23. Id.

In testimony delivered April 10, 2019, former SDA Chief Executive Officer Lizette Delgado Polanco advised the Assembly Budget Committee that SDA officials had visited more than 125 schools in need of improvement, which included schools between 125 and 150 years-old and Newark's 170 years-old Lafayette Elementary

School. Pa21, ¶47. The SDA CEO explained that the tours "have shown us that the SDA and the State of New Jersey MUST do more to help improve conditions and overcrowding in these Districts." Id. (emphasis in original).

The SDA CEO further advised legislators:

> These schools should not be schools…they should be museums. We've visited schools where we found windows that didn't open and classrooms that are 80+ degrees. We've visited schools where subjects like art and music are taught beneath stairwells and bleachers due to lack of classroom space. We've visited schools that aren't meeting STEM/Science requirements because they don't have the necessary equipment or space. We've visited schools that aren't meeting PE requirements because they don't have gyms or the gym floors are bowed, bent and broken. New Jersey students can't receive a 21st Century education in 19th Century facilities.

Pa21-22, ¶48.

In her testimony, the SDA CEO advised legislators that, beyond the then 18 major capital projects under active construction, there is "NO additional funding available to commit to new construction" and only $60 million remaining "for emergent projects that are approved" by the DOE. Pa22, ¶50 (emphasis in original).

The SDA's most recent biannual 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." Luhm Cert. ¶32. 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. Id.

The December 2020 Biannual Report indicates that the SDA is managing 11 capital projects through the construction process: eight projects under construction; one project in initial design; and two projects in design/scope development. Luhm Cert. ¶33. The SDA estimates that all 11 capital projects will be completed by 2025. Id.

The December 2020 Biannual Report makes clear 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 major capital projects in SDA districts and will be forced to cease operations. Luhm Cert. ¶34. 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. Id.

The 2016 LRFP Amendments, 2019 EFNA, 2019 Statewide Strategic Plan, Biannual Reports, and SDA's testimony to the Legislature all document a significant unmet need for major capital projects in SDA districts to ensure facilities are safe and adequate to deliver the State's learning standards and the need for additional funds to undertake those projects. They further document that all construction funds previously authorized by the Legislature under

EFCFA have been committed to projects currently under construction, leaving no money for additional priority major projects and for emergent projects to address unsafe and unhealthy building conditions. Luhm Cert. ¶35; Pa22, ¶51.

F. FY2020-21 BUDGET

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).

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 2019 Strategic Plan or for projects to remediate health and safety conditions in SDA school buildings. Luhm Cert. ¶37. 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. Id. Thus, 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 the Abbott facilities mandate.

G. PLAINTIFFS' EFFORTS TO SECURE COMPLIANCE

In November 2019, Plaintiffs filed a Motion in Aid of Litigants' Rights ("2019 Motion"), contending that the State had defaulted on its funding obligation under the Abbott facilities mandate. On April 1, 2020, this Court denied the 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." Abbott XXIII, 241 N.J. at 249. The Court further "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." Id.

Following the dismissal of the 2019 Motion, Plaintiffs have continued to press the State to comply with its obligations for facilities funding. By letter dated September 18, 2020, Plaintiffs requested Governor Murphy, Senate President Stephen Sweeney, Assembly Speaker Craig Coughlin and Attorney General Gurbir Grewal utilize at least $500 million of the COVID-19 bond financing authorized under the Emergency Bond Act to ensure school buildings meet the DOE's health and safety standards for safe reopening in the coronavirus pandemic. Luhm Cert. Ex. C, Pa171-174. To date, Plaintiffs have received no response to this request. Luhm Cert. ¶29.

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 FY2021 Budget, as anticipated by this Court in dismissing Plaintiffs' 2019 Motion last April as premature. Luhm Cert. Ex. D, Pa175-176. Plaintiffs offered to work collaboratively on a process to promptly secure such funding but made clear that, in the event of no action by the State, Plaintiffs would again seek this Court's intervention. Luhm Cert. ¶39. To date, Plaintiffs have received no response to their notice and request for corrective action. Id.

Plaintiffs' extensive efforts to secure additional construction funding from the State – ongoing since 2015 - have proven unsuccessful. Accordingly, Plaintiffs have no alternative but to again seek this Court's intervention to ensure effectuation of their constitutional right to an education in facilities that are safe, not overcrowded, and educationally adequate.

ARGUMENT

I. PLAINTIFFS' MOTION TO COMPEL STATE COMPLIANCE WITH THE ABBOTT SCHOOL FACILITIES MANDATE SHOULD BE GRANTED

In less than a year, Plaintiffs return to this Court on Motion in Aid of Litigants' Rights to compel State compliance with the constitutional mandate in Abbott V, 153 N.J. at 524 and Abbott VII, 164 N.J. at 90, to fully fund school facilities projects in SDA districts. Last April, the Court anticipated such compliance "in the context of the Fiscal Year 2021 budget" in dismissing Plaintiffs' 2019 Motion without prejudice. Abbott XXIII, 241 N.J. at 249. The record now before the Court establishes that no new facilities funds were provided in FY2021 State budget or otherwise. Luhm Cert. ¶37. Accordingly, as we explain, Plaintiffs' Motion should be granted.

First, despite the progress made since 2002, Luhm Cert. ¶31, the State has documented, in multiple studies, reports and Legislative testimony, the continuing need for school construction funding. The amended LRFPs of the SDA districts, approved by DOE, identify a need for 381 major capital projects, encompassing 200 renovations and additions to existing buildings, over 100 new schools and over 70 major system upgrades. Pa9, ¶20. In its 2019 EFNA, DOE found significant space deficiencies in a majority of the SDA districts. Based on these determinations, the SDA, in its 2019 Strategic Plan prioritized 24 major capital projects in 18

SDA districts for construction, of which 16 projects are shovel ready. Luhm Cert. ¶¶8-9.

Additionally, there is unquestionably a need, as yet determined by the SDA and DOE, for emergency repair projects on SDA district buildings currently in use. This need includes repairs and upgrades to ventilation, heating and cooling, and other systems to ensure buildings meet the DOE requirements for safe reopening in the pandemic. Luhm Cert. ¶25; see id. ¶19, ¶¶23-24; see also Abbott XIV, 185 N.J. at 614 (finding nearly 350 DOE approved projects in SDA districts were awaiting financing and construction management).

Second, as the SDA repeatedly acknowledges in agency reports and testimony to the Legislature in recent years, no funding is available to undertake any needed major capital or emergent projects in SDA districts. See supra at 14-17. Without funding, the SDA has been unable to add any new major capital projects to its construction management portfolio since 2014, nor can the agency begin the construction process for the 24 priority projects in its 2019 Strategic Plan. Luhm Cert. ¶12. The SDA and DOE also cannot respond to the pressing need for emergent repairs to remediate ventilation and other deficiencies so buildings can safely reopen for in-person instruction during the pandemic. See supra at 12-13, 17. Thus the record is undisputed that, absent additional funding, implementation of the Abbott facilities

mandate will come to a complete standstill as the SDA will be forced to close its doors. Luhm Cert. ¶34. See also Abbott XIV, 185 N.J. at 614 (finding that, in 2005, "insufficient funds" put hundreds of approved projects "on hold").

Finally, the State has reached an even more critical juncture on compliance with the Abbott facilities mandate than it did in 2005:

> And the Court having acknowledged that the State has made a substantial effort to improve school facilities conditions in [SDA] districts, but that significant deficiencies in this area persist and are likely to worsen at a severe cost to the State's most disadvantaged school children if there is further delay in addressing the dilapidated, overcrowded and dangerous schools in the [SDA] districts....

Abbott XIV, 185 N.J. at 614 (emphasis added).[3] In even starker terms, the current record demonstrates that without additional construction funding, State implementation of the Abbott directives for facilities improvements will "not comport" with the "constitutional mandate to provide facilities adequate to ensure a thorough and efficient education." Abbott V, 153 N.J. at 524.

[3] In Abbott XIV, the Court directed submission of overdue district LRFPs and ordered the State to complete its overdue 2005 annual report, including estimates of future school construction, and to regularly submit subsequent reports required by EFCFA. On this Motion, the State has already taken these prerequisite steps: adoption of the 2019 Strategic Plan based on the districts' approved 2016 LRFP Amendments and 2019 EFNA, N.J.S.A. 18A:7G-5m(3), see supra at 7-8; and regular submission of biannual reports to the Legislature, N.J.S.A. 18A:7G-24, calling for additional facilities funding, see supra at 14-16.

In sum, granting Plaintiffs' Motion is necessary to remedy the State's default on its obligation to "secure funds to cover the complete cost of remediating identified life-cycle and infrastructure deficiencies" in the SDA districts. Id. at 527.

II. APPROPRIATE RELIEF IS REQUIRED TO ENSURE STATE COMPLIANCE WITH THE ABBOTT FACILITIES MANDATE

The record before this Court not only supports granting Plaintiffs' Motion. It also compels the Court's immediate intervention to provide relief. Given the "constitutional rights at stake," and the prior history of this litigation, there can be no doubt of the Court's authority to provide relief. See Abbott IV, 149 N.J. 145 (ordering parity funding); Abbott v. Burke, 163 N.J. 95 (2000) ("Abbott VI") (compelling compliance with the Abbott V preschool mandates); Abbott v. Burke, 170 N.J. 537 (2002) ("Abbott VIII") (same); Abbott XIV, 185 N.J. 612 and Abbott XVII, 193 N.J. 34 (enforcing Abbott facilities mandate); Abbott v. Burke, 199 N.J. 140 (2009) ("Abbott XX") (upholding the School Funding Reform Act conditioned on formula funding); Abbott v. Burke, 206 N.J. 332 (2011) ("Abbott XXI") (granting relief for SFRA funding).

On this Motion, Plaintiffs specifically request an order directing the Commissioner, by June 30, 2021, to seek and secure the funding necessary to undertake and complete the major priority projects in the 2019 Strategic Plan and such emergent repair projects as may be needed, especially to safely reopen school

buildings in the pandemic. As is abundantly clear, adequate funding for the Abbott remedies, including facilities construction and remediation, is "the measure of the State's constitutional obligation to provide a thorough and efficient education[.]" Abbott V, 153 N.J. at 519 (anticipating Legislature's responsiveness to "constitutional call" once the call is made).

Approximately one year ago, the Court determined the relief now sought by Plaintiffs was premature based on the "assumption" the State would achieve constitutional compliance in the "context of the Fiscal Year 2021 budget." Abbott XXIV, 241 N.J. 249. It is clear the reliance on that assumption was misplaced. Neither the Commissioner nor the SDA made a specific request to the Legislature for additional construction funding in that budgetary process. Luhm Cert. ¶37. Nor have they done so to date, despite Plaintiffs' demands. See supra at 18-19. Plaintiffs do, however, remain confident that, if the Commissioner is directed to promptly provide a specific request, the Legislature will respond to the constitutional call for construction funding by June 30, 2021. See Abbott VII, 193 N.J. 24 (fulfilling the Court's anticipation of State compliance in the FY2008 Budget); see also Abbott XIV, 185 N.J. 612 (ordering the prerequisite steps for the Legislature to consider and approve the 2008 funding increase).

Lastly, the specific relief in Plaintiffs' proposed order is required to prevent a grave constitutional default; to maintain

the momentum of improving unsafe, overcrowded and inadequate facilities in SDA districts; and to ensure the State's continuing compliance with the Abbott facilities mandate. This Court has rejected a "wait and see" approach in the past when confronted with "continuing profound constitutional deprivation that has penalized generations of children." Abbott IV, 149 N.J. at 201-202. The Court must do so again.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court grant the Motion in Aid of Litigants' Rights, enter the relief requested, as set forth in Plaintiffs' proposed Order, and retain jurisdiction to ensure State compliance with that Order.

Respectfully submitted,

Education Law Center

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Dated: January 28, 2021