

RAYMOND ARTHUR ABBOTT, ET AL.

**SUPREME COURT OF NEW JERSEY
DOCKET NO. 085333**

Plaintiffs-Movants

Civil Action

vs.

FRED G. BURKE, ET AL.

Defendants-Respondents

**Brief in Support of New Jersey Education Association's Motion
for Leave to be Admitted as *Amicus Curiae***

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PRELIMINARY STATEMENT

In 1998, this Court in *Abbott v. Burke*, ("Abbott V"), directed the State to take action to ensure school facilities serving students in poorer urban school districts -- now denominated "SDA districts" -- are safe, not overcrowded and educationally adequate to deliver the thorough and efficient education guaranteed by the New Jersey Constitution.

While over the last 15 years the State has made progress in fulfilling that directive, far too many school buildings in the SDA districts remain in urgent need of remediation. The New Jersey Education Association ("NJEA") represents teachers and staff in those districts employed to work in those buildings. As a result, they are well familiar with the health, safety, capacity and other conditions that impair their ability to educate their students to meet New Jersey curriculum and learning standards. Those conditions are only more unjust today, in the midst of an unprecedented 100-year pandemic. The failing and overcrowded facilities of SDA districts has left them disproportionately among those Districts unable to offer any in-person instruction to students, leaving the most at need students even further behind.

NJEA submits this *Amicus Curiae* brief to illustrate the

stark impact of the continuing need for school facilities' improvements in the Paterson Public Schools ("PPS"), an SDA district with significant building deficiencies, and which has provided only fully remote instruction throughout the pandemic.

As discussed below, before the pandemic, many PPS students attended school in conditions that directly impacted their ability to learn, including overcrowded schools with class sizes of 40 students on average and the use of outdoor trailer facilities without temperature controls. Many buildings have crumbling stairwells and ceilings, leaking roofs that go unfixed year after year, causing structural damage, mold and even infestations of mice and cockroaches. The buildings often lack even the most basic amenities, such as shades to keep out blinding light from outside, or locks to secure classroom doors. Buildings lack air conditioning and are subject to suffocating heat in warmer months and long-outmoded boiler systems struggle to heat buildings in winter.

The list of unsafe, inadequate and harmful building deficiencies in the PPS are the very same conditions that resulted in this Court's 1998 directive for State financing of the improvements necessary to ensure all students - and their teachers and support staff - are educated in buildings that afford them the opportunity for success. They are also

conditions that will impede, if not make impossible, any orderly and effective reopening of the schools on a reasonable schedule for in-person instruction. Thus, NJEA submits this brief in full support of the motion of the Abbott v. Burke Plaintiff school children to enforce litigant's rights.

**IDENTITY OF THE NJEA, ISSUES TO BE ADDRESSED, PUBLIC INTEREST,
AND EXPERTISE OF THE NJEA**

The NJEA brings this Motion for Leave to be Admitted as *Amicus Curiae*. Pursuant to R. 1:13-9(c), NJEA's proposed *amicus curiae* brief is attached herewith in the Argument section that is set forth below. The application is governed by R. 1:13-9, which provides:

An application for leave to appear as *amicus curiae* in any court shall be made by motion in the cause stating with specificity the identity of the applicant, the issue intended to be addressed, the nature of the public interest therein and the nature of the applicant's special interest, involvement or expertise in respect thereof. The court shall grant the motion if it is satisfied under all the circumstances that the motion is timely, the applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby.

The NJEA is New Jersey's largest statewide teacher's union, serving as the collective representative for the overwhelming

majority of our state's public school employees. The nearly 180,000 active NJEA members are employed in both professional and support staff capacities. The NJEA protects the professional and economic interests of its members in all areas of their rights as employees. Moreover, its mission includes the promotion of a thorough and efficient system of public education in New Jersey, and the promotion of equal educational opportunity for all students. Since 1853, the NJEA has been instrumental in advocating for the interests of its members and in formulating policy and legislation concerning public education.

The issues to be addressed in this application are the unsafe, overcrowded and inadequate school facilities in poorer urban, or "SDA districts," through the unique perspective of NJEA's members in the Paterson Public Schools ("PPS"), whose direct experience informs this application. Unfortunately, these issues are not new to this Court, and were discussed at length in prior Abbott litigation, where the Court required the State to remediate the conditions in SDA districts. See e.g., Abbott v. Burke, 153 N.J. 480, 519-20 (1998) ("Abbott V"). As the Abbott Plaintiffs demonstrate in their motion, that requirement remains unfulfilled in the PPS. Due to the current absence of school construction funding, the Schools Development Authority ("SDA") is unable to remedy the many PPS facilities

that are crumbling, unsafe, overcrowded and inadequate to deliver a constitutional thorough and efficient education to PPS students. The immense overcrowding and lack of ventilated facilities also poses a direct obstacle to an effective reopening of the Paterson schools in a post-COVID world, as will be discussed.

The NJEA's application focuses on how deficient facilities directly impact teachers and students, by explaining, in concrete terms, how those deficiencies severely undercut the educational process and cause it to fall short of the constitutional mandates in this Court's Abbott V ruling. More particularly, the NJEA's proposed *amicus* brief discusses the current condition in PPS facilities as they were last known before the pandemic hit and instruction shifted to fully remote instruction. These are conditions that mirror those detailed by this Court 22 years ago in Abbott V as rising to the level of a glaring constitutional violation. Members of NJEA's local affiliate, the Paterson Education Association ("PEA"), have been closely monitoring health and safety issues caused by the deteriorating conditions in the PPS. PEA members are acutely aware that, through no fault of the PPS but the result of inadequate facilities funding from the State, they and their students continue to endure conditions that put them at a

severe educational disadvantage. That disadvantage even takes the form of being deprived of any in-person instruction this year, as their peers in the majority of New Jersey Districts enjoy at least some hybrid or partially in-person instruction.

The public interest addressed by the NJEA's application is obvious and uncontroversial. On the issues raised by the motion in aid of litigant's rights, NJEA's interests directly align with the Abbott Plaintiffs. In addressing the thorough and efficient clause of the New Jersey Constitution, this application inherently concerns a public interest of the highest magnitude, namely providing "such level of education as will enable all students to function as citizens and workers in the same society." Abbott v. Burke, 119 N.J. 287, 374 (1990) ("Abbott II"). As this Court has also noted, school funding "is a matter of enormous complexity and importance." Abbott v. Burke, 206 N.J. 332, 462 (2011) ("Abbott XXI").

The NJEA also has a special interest and expertise in this matter. For nearly eighty years,¹ NJEA has served as *amicus curiae* in matters of school law and school funding, filing briefs and arguing orally as a friend of the Court in matters involving the protection of economic and professional rights of its members. More importantly, it has served as *amicus curiae* in

¹See Greenway v. Bd. of Educ., 129 N.J.L. 46 (1942).

the Abbott matters, including in the seminal Abbott II decision, and every Abbott decision since. See e.g. Abbott v. Burke, 119 N.J. 287 (1990) (Abbott II); 136 N.J. 444 (1994) (Abbott III); 149 N.J. 145 (1997) (Abbott IV); 153 N.J. 480 (1998) (Abbott V); 163 N.J. 95 (2000) (Abbott VI); 170 N.J. 537 (2002) (Abbott VIII).

Here, the facts and issues presented are of substantial concern to the NJEA and its members, because they involve the adequacy of public resources allocated to remedy deficient school facilities in SDA districts. The lack of resources would adversely affect both NJEA members and their students' educational rights and opportunities.

As noted, the Court must consider whether NJEA's motion to participate as *Amicus Curiae* is timely, will assist in the resolution of an issue of public importance, and will not unduly prejudice any party to the litigation. Applying these criteria, it is clear that the NJEA's motion to participate as *amicus curiae* should be granted First, the NJEA's application is timely filed. Second, the NJEA's presence as *amicus* will assist the Court as it is uniquely suited to provide insight into the issues raised in this matter from its institutional experience, along with the presence of its PPS affiliate and members' in PPS facilities everyday. Its members are well-suited to advise this

Court about the impact of facilities deficiencies and the need for additional school construction funding. Third, and finally, no party will be prejudiced because this application does not raise considerations of due process or notice - indeed, they concern issues of which the Court, and the parties herein, are unfortunately all too aware.

For the above reasons, the NJEA respectfully requests that this Court grant participation in this matter as an *amicus curiae* by way of submission of the instant brief and participation in oral argument.

LEGAL ARGUMENT

As this Court has long recognized in discussing educational requirements, "the condition of school facilities always has been of constitutional import...adequate physical facilities are an essential component of [the Abbott] mandate." Abbott v. Burke, 149 N.J. 145, 186 (1997) ("Abbott IV"). As the Court said in Abbott IV, "we 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." Id. at 188. That statement aptly describes the current reality faced by PPS students and teachers, as documented by the PEA's continuing investigation of health and safety issues in PPS school buildings. See (Certification of John McEntee

generally) ("McEntee Cert"). The Paterson schools are overcrowded, antiquated and crumbling. They were poorly prepared to cope with a COVID-19 stricken world, and have been able to provide only fully remote instruction since March 2020 when the pandemic began. (McEntee Cert., ¶¶ 4-5). As result of the failure to fund school facilities, Paterson is behind on delivering in-person instruction both now and in the event of any attempt at school reopening in coming months. Ibid. at ¶¶ 25-29).

As is well explained in the submission of the ELC, in the midst of the COVID-19 pandemic, SDA districts are even further at a disadvantage, and have unsurprisingly comprised a disproportionate number of the Districts unable to provide hybrid instruction to students. (Plaintiffs Brief, at P. 12). Reopening for hybrid or in-person instruction requires the ability to maintain social distancing of six feet. Id. at p. 11-12. It requires adequate heating and ventilation systems to ensure fresh air and suitable learning conditions. Id. at P. 11. Thus, in SDA districts such as Paterson, what were once substandard conditions that failed to meet the Constitutional minimum are now life-threatening conditions that impede the reopening of schools.

The constitutional mandate of the Abbott cases requires nothing less than full State funding of facilities projects necessary to remedy infrastructure and lifecycle, as well as capacity deficiencies. Abbott V, supra, 153 N.J., at 524; Abbott v. Burke, 164 N.J. 84, 87-88 (2000) ("Abbott VII"). After Abbott VII, the Legislature passed the EFCFA, N.J.S.A. 18A:7G-1 to 48, creating the SDA, to ensure that obligation was met. The EFCFA requires the submission by SDA districts of updated long range facilities plans every 5 years to ensure the SDA has the necessary information to fulfill the EFCFA's mission. N.J.S.A. 18A:7G-4(a) to (g). A biannual report must also be submitted to the Legislature by the SDA outlining the major projects approved for construction, the progress in completing those projects, and the need for additional school construction funding. N.J.S.A. 18A:7G-24.

As discussed in the Abbott Plaintiffs Motion, the SDA lacks funding to commit to new construction and has only \$60 million left for emergent projects. (Plaintiffs' Brief at P. 15). All but \$70 million of its funds are appropriated for existing projects and will be exhausted by 2022-23. (Plaintiffs' Brief, P. 14). Meanwhile, each successive Biannual Report of the SDA over the past 6 years has alerted the Legislature of the unmet

facilities needs and the necessity of providing additional construction funding. (Plaintiffs' Brief, P. 14).

As demonstrated by the Abbott Plaintiffs in the within motion, while the State has completed numerous projects over the last 15 years, the same deplorable and unconstitutional conditions set forth in Abbott V persist in SDA district facilities. These deficiencies include health and safety issues requiring emergent repair, an area where the record presented by the Abbott Plaintiffs shows the SDA has failed to address by being unable to fund any of the badly needed Emergent Projects out of hundreds requested by SDA districts. (ELC Brief at P. 21).

Further, the Abbott Plaintiffs show numerous SDA Districts continue to suffer from the lack of capacity and overcrowding. (Abbott Plaintiffs' Brief at p. 14 - 16). In many SDA districts students attend classes in schools that are more than 100 years old, lacking amenities necessary for a modern education, including lack of temperature control, technology readiness, lighting, and building security. (Abbott Plaintiffs' Brief at P. 15).

As explained below, the PPS exemplifies these persistent conditions and facilities needs.

a. Overcrowding in the Paterson District

The PPS fall into the highest category of need among just 4 other SDA districts, as a "Tier 1" district, according to the most recent Educational Facilities Needs Assessment completed by the Department of Education. (See Exh. D to the 2019 Luhm Cert, attached as Exh. A to 2021 Luhm Cert, at TL Ex. 083-084.) The "Tier 1" designation means that it suffers from capacity and square footage deficiencies in two or more grade levels. However, this statistic barely scratches the surface in showing the severity of the unmet educational needs. Before the pandemic put an end to in person instruction, PPS classrooms currently had an average classroom size of 40 students per class, which is nearly double the maximum of 21 per class mandated by Department of Education rules. (McEntee Cert at ¶ 5) ("McEntee Cert."); N.J.A.C. 6A:32-8.3(c)(3). Indeed, these are the exact same overcrowding conditions that the Abbott V order required the State to remediate but have barely changed in the intervening years. Abbott V, supra, 153 N.J., at 519 ("Some class sizes hover around forty"). The overcrowding in the Paterson schools raises serious questions about how it will ever manage to reopen in a post-COVID world that will likely require 6 feet of social distancing for the indefinite future.

In particular, Paterson has needed new high school for some time, as is noted in the SDAs last 2019 Statewide Strategic Plan. (Luhm Cert., Exh. B). As discussed within, one of Paterson's high schools, JFK, has even resorted to the use of "trailer" facilities to alleviate overcrowding, with dangerous and unsanitary consequences. The need to alleviate such overcrowding will only be more acute in the new world we inhabit.

Of course, the consequences of building and classroom overcrowding go beyond excessive class size, but extend to other unsuitable learning conditions. Due to overcrowding, resource teachers who work with academically at-risk students on a "pull-out" basis frequently lack quiet, private spaces to conduct tests and provide instruction. (McEntee Cert at ¶ 13). They are required to conduct pull-out instruction in spaces such as hallways and copy rooms next to frequent visitors and loud copying. Ibid. The problem is so severe that in one Paterson school, in the not distant past resource teachers were assigned to a poorly lit small closet area without ventilation, where physical education equipment was also stored. (McEntee Cert at ¶ 14). At the time, the resource teachers did not complain until others intervened on their behalf, because they considered

the space an improvement over normal conditions, because their workplace was finally quiet. Ibid.

At many PPS' facilities, including John F. Kennedy - one of three high schools serving PPS students -- the overcrowding forced the District, over the past two decades to conduct some classes in outdoor trailers that lack heating, requiring students to attend class wearing coats in the winter. (McEntee Cert. at ¶ 10-11). At School 1, a teacher fell through the floor while teaching in one of these flimsy outdoor structures, as it literally collapsed underneath her (she was fortunately unharmed). (McEntee Cert. at ¶ 11). Although such facilities are only intended for short term use, or by law only for 5 years, trailers were used for periods exceeding 15 years.² Many of these trailers were closed last year by an order of the Public Employees Occupational Safety and Health ("PEOSH") agency. (McEntee Cert at ¶ 12). Prior to closure of the trailers, there were reports of mold and other unsanitary conditions resulting from to damage caused by hurricane Florence.³ The reliance of clearly unsuitable structures such as trailers to provide adequate housing for the Paterson District only further underscores how ill-prepared the District

² See e.g. <https://abc7ny.com/4233207/> (discussing the closure of "17-year old trailers")

³ See e.g. <https://www.northjersey.com/story/news/paterson-press/2018/10/11/paterson-nj-schools-finish-mold-inspections-temporary-classrooms/1604996002/>.

is to emerge with functioning instruction in a post-COVID world. If those structures were unsuitable prior to COVID, they are unthinkable now.

Due to overcrowding, when in person class was in session, it was not uncommon to see two teachers assigned to one classroom or to conduct classes in a cafeteria. (McEntee Cert. at ¶ 9). In one PPS school, an administrative office was placed under a stairwell. Ibid. Moreover, these reports may represent only a limited subset of the appalling conditions that exist because teachers are reluctant or afraid to raise issues or else have abandoned any hope of getting the problems addressed. (McEntee Cert. at ¶ 8). The PPS attempts to fix problems where it can, but ultimately lacks the resources to address the overwhelming number of issues that arise. Ibid.

b. Unconstitutional School Conditions Existing Pre-Pandemic

In Abbott V, this Court found unconstitutional the “decrepit and dangerous conditions” in the SDA districts. Abbott V, supra, 153 N.J., at 519. The conditions, as described then, are not much different from the present conditions in many PPS buildings. They included:

[C]rumbling and obsolescent [school buildings]...this grave state of disrepair not only prevents children from receiving a thorough and efficient education, but also

threatens their health and safety. Windows, cracked and off their runners, do not open; broken lighting fixtures dangle precipitously from the ceilings...rooms are heated by boilers that have exceeded that have exceeded their critical life expectancies and are fueled by leaking pumps; electrical connections are frayed; floors are buckled and dotted with falling plaster; toilet partitions are broken and teetering; and water leaks through patchwork roofs into rooms with deteriorating electrical insulation. Abbott V, supra, 153 N.J., supra, at 519.

Despite that prescient call to action that is now decades old, a visitor to the PPS today could describe similar building conditions. The average age of schools in the PPS is now 85 years. (McEntee Cert., ¶ 15). Many buildings are more than 100 years old. (McEntee Cert., Exh. A, Long Range Facilities Plan, Appendix (from P. 14)). Throughout the PPS, roofs are leaking, particularly at all three high schools: John F. Kennedy, East Side, and Panther Academy. (McEntee Cert., ¶ 17).⁴ As shown in recent photographs, the water damage at facilities with leaking roofs has caused falling plaster and plasterboard. (McEntee Cert., Exh. B). It has also resulted in mold in the ceilings and deteriorating electrical wire. (McEntee Cert., ¶ 16). Related to these leakages, the PPS' buildings have pervasive infestation from rodents and cockroaches. (McEntee Cert., ¶15)

⁴The John F. Kennedy High School is 58 years old and has never been renovated; East Side High School is 94 years old and was last renovated in 1973. The East Side building is historically significant and the subject of the famous movie "Lean on Me." (McEntee Cert., Exh. A, LRFP, Appendix).

Exh. B). A teacher recently reported opening a container to be served for the school breakfast program only to find a dead rodent inside the container. (McEntee Cert., ¶ 18). At School 20, a leaking roof caused a warped gymnasium floor (it has since been fixed). (McEntee Cert., ¶17).

The lack of facilities funding has at times caused the PPS to operate without meeting the most basic structural needs. Throughout the PPS, classrooms do not have shades for the windows. (McEntee Cert, ¶ 19). When in-person instruction was in effect, blinding light from outside might pour in on sunny days, distracting students, and making it impossible to read a chalkboard, and forcing teachers to improvise through actions such as taping opaque paper to the windows (as documented in NJEA's photo submissions herein). (McEntee Cert ¶ 20, and Exh. A). In recent years, the PPS has slowly worked to install locks in all classrooms to permit the staff to conduct mandatory lockdown procedures, but as recently as several years ago, a very high number of schools did not have such locks installed. (McEntee Cert, ¶ 21). The PPS was forced to install locks in classrooms at the rate of two schools per year due to lack of funding. (McEntee Cert., ¶ 21).⁵ At the International High

⁵Out of a prudent sense of caution, and in the interests of teacher and student security, the NJEA has decided not to publish specific details of the extent of this problem, and how far it has come towards being remedied.

School, 11th and 12th grade students did not have lockers until recently. (McEntee Cert., ¶ 20).

At times, PPS schools have faced sudden structural failures that can occur without warning and underscore the safety issues in the facilities. At Panther Academy high school, cement collapsed from the ceiling in one classroom, requiring closure and repair of the room. (McEntee Cert., ¶ 22). At John F Kennedy high school, the steps to one of the stairwells collapsed and had to be cordoned off with tape. (McEntee Cert., ¶ 22).

One of the most serious problems is with so many aging buildings in the PPS continues to be the lack of adequate temperature controls and adequate ventilation systems (or any ventilation system). Indeed, only 60% of PPS schools have air conditioning systems. (McEntee Cert., ¶ 23). In warmer months, due to poor ventilation and lack of air conditioning, temperatures have reached in the high 80's Fahrenheit. Ibid. Sometimes the temperature have reached even higher, and on several occasions in recent years, there have been school closures on certain days due to heat. Ibid. In warmer months PPS students have attended class in buildings that lack air conditioning sit in class distracted by heat and unable to learn, or needed to ask to go to the school nurse's office to escape the conditions. Ibid.

In the winter, many PPS schools have been heated with obsolete boiler systems that often make some rooms too hot and leave some rooms in outdoor cold temperatures. (McEntee Cert., ¶ 24). On cold days, as the boilers began operating, the bottom rooms in buildings heat up first, and the boiler must be run long enough for heat to reach the upper floors of the school. Ibid. Students and teachers in upper floors have sat in class in freezing cold temperatures waiting for heat to reach them. Ibid. On the bottom floors closest to the boilers, temperatures have reached 90 degrees of suffocating heat. Ibid.

Jointly or severally, these deficiencies represent the exact same deplorable conditions that this Court held are unconstitutional in 1998 - and they are no less unconstitutional today. Were these the only conditions faced by the PPS and there was no COVID-19 pandemic to contend with, it is respectfully submitted this Court would be required grant the Abbott Plaintiffs' Motion to Enforce Litigants Rights. However, pandemic conditions have only further exacerbated and highlighted the severe handicap posed by crumbling and inadequate facilities.

c. Post-Pandemic Challenges Posed by Aging Facilities

Since the onset of the COVID-19 pandemic, Paterson has been constrained to limit its instruction to only remote instruction, and the district's inadequate facilities have surely played a

large if not the dominant role in that decision. (McEntee Cert., at ¶¶ 25-26). As noted, NJDOE guidance requires maintenance of 6 feet of social distancing, which would be challenging to maintain in District that was not severely overcrowded, but which will only be more difficult for Paterson in light of its severe overcrowding. Adequate ventilation is also required, but some 40% of Paterson school lack any HVAC system, and those that have HVAC systems are unsuited to the task of purifying air of virus particles. Id. at ¶ 27. The District currently lacks the funds to provide adequate masks, having contemplated in recent discussions of reopening that a mere one cloth mask every three months be supplied to faculty. Id. at 28. Meanwhile, as Paterson schools have remained closed for an entire year with no immediate end in sight, the facilities have not been maintained and were allowed to languish, exacerbating already unsanitary, crumbling conditions. Id. at 28. The severe deterioration of the Paterson schools is attested to in recent photographs of the JFK High School. Id. t Exh. C.

In short, the pandemic has taken an already unconstitutional situation and made it even more severe, adding life-threatening health risks and the inability to deliver even basic instruction to the mix of the PPS severe facilities woes.

These dire circumstances call on the Court to act and enforce the mandate of Abbott.

CONCLUSION

For all of the reasons set forth herein, the NJEA's Motion for Leave to Appear as *Amicus Curiae* should be granted. As set forth in the proposed *Amicus Curiae* brief included in this application, the conditions in the Paterson Public School District are unconstitutional and demonstrate the merit of the pending Motion to Enforce Litigant's rights. To enforce the Constitutional rights of Paterson students and all other similarly effected District's, the NJEA respectfully submits that the ELC's Motion to Enforce Litigant's rights should be granted.

Dated: March 16, 2021

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