
RAYMOND ARTHUR ABBOTT, et al., : SUPREME COURT OF NEW JERSEY
: DOCKET NO.: 085333
:
Plaintiffs-Movants, : CIVIL ACTION
:
v. :
:
FRED G. BURKE, et al., :
:
Defendants-Respondents. :
:

**BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION
IN AID OF LITIGANTS' RIGHTS**

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PRELIMINARY STATEMENT

Less than one year ago, this Court denied a request from the Education Law Center (ELC) for an order directing the State to seek and secure funding to complete the projects listed in its newly created strategic plan. The Court found that the relief sought by ELC was premature because any decisions related to the State's compliance with prior decisions in the Abbott v. Burke litigation needed to be made within the context of the as yet enacted Fiscal Year 2021 budget. Now ELC is back before the Court, requesting almost the exact same relief – with the addition of its demand for funding to address issues related to the coronavirus (COVID-19) pandemic. But for the reasons that follow, the Court's previous rationale rings just as true today as it did then. And ELC's attempt to align this Court's facilities mandates in its Abbott decisions with the challenges associated with reopening schools in the wake of COVID-19 is unavailing.

First, as to school project funding, just as was represented to this Court last year, the remaining projects identified in the capital project portfolios published and overseen by the Schools Development Authority (SDA), which predate the new 2019 statewide strategic plan for SDA districts (2019 Strategic Plan), are fully funded and forecasted to be completed by 2025. No projects have been halted. The projects are ongoing and indeed progressing. In fact, three projects were completed over the past year, in the

wake of the global pandemic that has taxed the limits of the State's public and private infrastructures.

And while the State has recognized that additional funding will be needed for the projects identified in the 2019 Strategic Plan, it has alerted the Legislature to that need. Moreover, since the time of ELC's filing, the Governor has proposed the appropriation of an additional \$275 million for capital projects managed by the SDA for Fiscal Year 2022. \$200 million of those funds will be used to reduce the SDA's planned debt issuance, which in turn will allow the SDA to support commencement of new SDA district projects identified in the 2019 Strategic Plan; and the remaining \$75 million will go towards emergency projects, for which SDA districts seeking to mitigate COVID-related health and safety issues will receive priority consideration. Beyond that, as both this Court and ELC know, the State cannot "secure funding" overnight. The \$275 million in proposed funding is ultimately in the hands of the Legislature through its budget approval, which is currently underway. The additional funding needed for the remainder of the projects - including, but not limited to, new bonding authority - also requires authorization from the Legislature.

ELC's second request - to direct the State to secure funding to ensure the reopening of schools during the COVID-19 pandemic - has been improvidently placed before this Court. More to the

point: its attempt to equate the challenges associated with reopening schools during a pandemic to the long understood challenges associated with the obligation to provide a thorough and efficient education (T&E) is simply improper. The unique and health-based protocols imposed as a result of COVID-19 cannot be addressed through the ordinary Abbott v. Burke framework. Indeed, neither the Abbott facilities mandates nor the Educational Facilities Construction and Financing Act provide the appropriate mechanism for obtaining the emergent relief necessary to reopen in-person instruction safely during a pandemic. But importantly, given the magnitude of the current crisis, vital federal funding is available for districts in order to assist them in meeting the challenges associated with reopening schools; and not only has the New Jersey Department of Education (DOE) provided significant guidance on obtaining that relief, but SDA districts have indeed received such funding.

Because the State has made substantial efforts to advance the School Construction Program, and because the Governor's proposed Fiscal Year 2022 budget contain substantial funding for SDA projects, ELC's motion in aid of litigants' rights must be denied.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

The New Jersey Constitution requires the Legislature to “provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.” N.J. Const. art. VIII, § 4, ¶ 1. Adequate physical school facilities “are an essential component of that constitutional mandate.” Abbott v. Burke (Abbott IV), 149 N.J. 145, 186 (1997); see also Abbott v. Burke (Abbott II), 119 N.J. 287, 362 (1990) (“A thorough and efficient education also requires adequate facilities”). In that vein, among the State’s obligations to ensure that students are provided with T&E is the duty to “provide facilities for children in the special needs districts that will be sufficient to enable those students to achieve the substantive standards that . . . define [T&E].” Id. at 188.

To comply with those constitutional mandates, Abbott districts² were ordered by this Court to complete enrollment projections and “Five-Year Facilities Management Plan[s]” prior to building new classrooms, and the Commissioner of Education was

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

² Effective January 13, 2008, the Legislature eliminated the designation “Abbott district” and replaced it with a new designation, “SDA district.” L. 2007, c. 260, § 39. The two terms are used interchangeably here.

required to ensure that the “[p]lans are completed and that the deadlines are met.” Abbott v. Burke (Abbott V), 153 N.J. 480, 520-21 (1998) (so holding after assessing and ultimately following renovation and construction recommendations from an engineering firm hired by the DOE to examine “every Abbott school”). As to financing, the Court looked favorably upon a proposal that would allow the Educational Facilities Authority to finance the construction and renovation of elementary and secondary schools in Abbott districts through the issuance of bonds secured through annual appropriations by the Legislature. Id. at 523-24.

Thus, in response to Abbott V and previous Abbott rulings by this Court, in 2000 the State enacted what this Court has described as “the largest, most comprehensive school construction program in the nation” – the Educational Facilities Construction and Financing Act (EFCFA), N.J.S.A. 18A:7G-1 to -48. Lonegan v. State, 174 N.J. 435, 458 (2002); see L. 2000, c. 72; Abbott v. Burke (Abbott XIV), 185 N.J. 612, 613 (2005). The EFCFA codifies the recommendations that were made to the Court in Abbott V, including the development and timing of long-range facilities plans, N.J.S.A. 18A:7G-4, and financing through bonds, N.J.S.A. 18A:7G-13 and -14. It also recognized the State’s obligation to undertake and finance Abbott district school facilities projects, and established procedures for the fulfillment of those obligations. See generally N.J.S.A. 18A:7G-4 and -5.

From this statutory scheme the “New Jersey School Construction Program” was born – a robust, comprehensive program for the design, renovation, repair, and construction of primary and secondary schools throughout New Jersey. Certification of Manuel M. Da Silva, ¶ 3 (annexed hereto).

A. The School Construction Program.

The School Construction Program is implemented, overseen, and funded by the SDA (through the issuance of bonds from the State); and to ensure that the facilities needs of SDA districts are being met, its multi-step process is structured to require significant participation by the DOE and local districts.³ The approval of a school facilities project is not guaranteed – it requires multiple levels of review, cooperation, and prioritization by the SDA, the DOE, and SDA districts. Those processes, though familiar to this Court, bear repeating for purposes of this motion.

The State, through the SDA, oversees and funds 100 percent of the cost for facilities projects in SDA districts, including predevelopment services, design, and construction. Id. at ¶ 7; N.J.S.A. 18A:7G-5(k); see also N.J.S.A. 18A:7G-3 (defining “school

³ The Schools Construction Program was originally implemented by the EDA and then by the Schools Construction Corporation (SCC), a subsidiary of the EDA. Da Silva Cert., ¶¶ 4-5. In 2007, the Legislature replaced the SCC with the SDA. L. 2007, c. 137; Da Silva Cert., ¶¶ 4-5.

facilities projects").⁴ Funding comes from "School Facilities Construction Bonds" issued by the Economic Development Authority (EDA). Id. at ¶ 47-48; N.J.S.A. 18A:7G-14. As "State-Contract Bonds," the bonds are payable from appropriations made from time to time by the Legislature to the State Treasurer, who enters into a contract with the EDA to pay such amounts appropriated for the purpose of paying debt service on the School Facilities Construction Bonds. Ibid.; N.J.S.A. 18A:7G-13, -14, and -18.

To obtain proper funding, planning, designing, and construction of school facilities, all New Jersey school districts must first have in place a long-range facilities plan (LRFP) approved by the DOE. Certification of Angelica Allen-McMillan, ¶¶ 3-7 (annexed hereto); N.J.S.A. 18A:7G-4; N.J.A.C. 6A:26-2.1 to -2.3. Relying on districts' LRFPs, the DOE is then required to create an educational facilities needs assessment (EFNA) and an educational priority ranking for each SDA district. Id. at ¶ 15; N.J.S.A. 18A:7G-5(m); N.J.A.C. 6A:26-3.9(a). Then, once it receives the EFNAs and rankings, the SDA must create a statewide strategic plan to be used "in the sequencing of SDA district school facilities projects[,]" which is "based upon the projects' educational priority rankings and issues which impact the [SDA's]

⁴ By contrast, districts do still have the opportunity to manage other projects that are not funded by the SDA. See N.J.A.C. 6A:26-1.2 (defining "[o]ther capital projects") and -3.11 (describing process for initiation of process for "other capital projects").

ability to complete the projects including, but not limited to, the construction schedule and other appropriate factors.” N.J.S.A. 18A:7G-5(m) (3); see also N.J.A.C. 6A:26-3.9(a) (4) (requiring creation of a statewide strategic plan in accordance with N.J.S.A. 18A:7G-5); Da Silva Cert., ¶¶ 35, 37, 39, 45, 67 (discussing requirement to create strategic plan, and identifying scoring process and factors for consideration in development of capital portfolios and statewide strategic plan).

When SDA districts have facilities issues requiring expedited attention, the EFCFA has mechanisms in place to address projects that are “emergent” in nature. N.J.A.C. 6A:26-3.14(d) and (e); Da Silva Cert., ¶ 13 (n. 1). In particular, DOE regulations provide for expedited action on school facilities in SDA districts facing emergent conditions. Ibid.; Da Silva Cert., ¶ 13 (n. 1). The SDA’s “Emergent Project Program” addresses emergent conditions present in SDA district school facilities in need of expeditious repair and rehabilitation. Ibid.; Da Silva Cert., ¶ 13 (n. 1). The process typically begins with an outreach initiative by the DOE and the SDA known as the “Potential Emergent Projects Program,” which allows SDA districts to identify potential emergent projects for evaluation by DOE and SDA. Ibid.; Da Silva Cert., ¶ 13 (n. 1); Allen-McMillan Cert., ¶ 25. Upon project approval by the DOE, projects from the Emergent Project Program are fully funded by the SDA. Ibid.; Da Silva Cert., ¶ 13

(n. 1); see also 45 N.J.R. 1026(a) (May 6, 2013) (“[e]mergent projects are eligible for State support if they are school facilities projects”). Potential emergent projects that may be eligible for funding must be for the repair or replacement of existing systems that are failing or are anticipated to fail in the near future, and for conditions that can no longer be addressed through general maintenance. N.J.A.C. 6A:26-1.2 and -3.14; Da Silva Cert., ¶ 13 (n. 1).

B. Progress of the School Construction Program.

As discussed above, the process of obtaining project approval and, ultimately, completion, is a thoroughly vetted one. The State has fully engaged in that process, as follows.

1. The Capital Portfolios and Project Progress From 2011 to Present.

By way of background, prior to the creation of the 2019 Strategic Plan, the SDA complied with its statutory obligations by, among other things, generating capital project portfolios that announced new (and funded) projects for advancement before ultimately creating the strategic plan. N.J.S.A. 18A:7G-5(m)(3); N.J.A.C. 6A:26-3.9(a); Da Silva Cert., ¶ 35-46. Through those publications, the SDA also provided detailed progress reports on ongoing projects, including (but not limited to) their prioritization, DOE scoring, funding, and scheduling. Da Silva Cert., ¶¶ 35-46.

a. The 2011 Capital Portfolio.

On March 2, 2011, the SDA released its 2011 Capital Portfolio, which amended the 2008 "New Funding Allocation and Capital Plan for SDA Districts" (issued shortly after the SDA's creation). Id. at ¶ 36. The 2011 Capital Portfolio listed a prioritization of various projects in SDA districts. Id. at ¶ 37. Based on that list and the application of other factors, the SDA enumerated ten specific projects that would be advanced into the next stage of construction to address educational priority needs in those districts. Ibid.

Also in 2011, the SDA announced in its mandatory annual and biannual reports⁵ that it had completed three major capital projects in SDA districts; and by the end of that year, a total of forty projects in the SDA's Emergent Project Program had been completed, while an additional seventy-nine had advanced into pre-development, design, or construction. Id. at ¶¶ 12-13.

b. The 2012 Capital Portfolio.

On March 7, 2012, the SDA published the 2012 Capital Portfolio as an update to the 2011 Capital Portfolio. Id. at ¶ 38. In the

⁵ The SDA is required to submit detailed biannual reports to various State officials no later than June 1 and December 1 of each year, and it must also separately prepare a comprehensive annual report. Id. at ¶¶ 8-11; N.J.S.A. 18A:7G-24; Exec. Order No. 37 (Sept. 26, 2006), 38 N.J.R. 4526(a) (Nov. 6, 2006). The SDA has complied with these requirements. Ibid.

2012 Capital Portfolio, the SDA reported on the progress of active projects, including the ten projects identified in the 2011 Capital Portfolio. Id. at ¶ 39. And in addition to advancing the remaining projects from the 2011 Capital Portfolio and completing active construction projects in SDA districts, the SDA also announced the selection of twenty more projects for advancement in 2012. Ibid. Of those twenty new projects, eight would be advanced into pre-development or construction stages, seven would undergo working group reviews of district needs, and five would address serious facility deficiencies. Ibid.

In 2012 and 2013, the SDA made significant progress in advancing the projects listed in both the 2011 and 2012 Capital Portfolios. Id. at ¶ 40. As announced in its mandatory annual and biannual reports, in 2012 the SDA completed two major capital projects, both newly constructed facilities. Id. at ¶¶ 14-15. And by the end of that year, a total of sixty-seven projects in the Emergent Project Program had been completed, while an additional fifty-one had advanced into pre-development, design, or construction. Ibid. In 2013, thirteen major capital projects were advanced by the SDA. Id. at ¶ 17.

c. The 2014 Capital Portfolio.

On January 2, 2014, the SDA issued the 2014 Capital Portfolio as an update to the 2012 Capital Portfolio, adding five projects addressing needs in various schools. Id. at ¶¶ 41-42. Later that

year, the SDA amended the 2014 Capital Portfolio to incorporate one more new project for advancement. Ibid. The SDA continued to advance and manage the projects listed in its capital portfolios in 2014, and announced in its annual and biannual reports of that year that it completed two major capital projects and had another twelve major capital projects in construction. Id. at ¶¶ 18-19, 41-43.

d. Progress Between 2015 and 2020.

The 2011, 2012, and 2014 Capital Portfolios identified a total of thirty-nine new projects. Id. at ¶¶ 43 and 45. As of the date of this filing, twenty-eight projects have been completed and delivered to SDA districts. Ibid. The remaining eleven projects are progressing: eight projects are in the construction phase; and three are in the planning, programming, and design phases. Ibid. The SDA is also advancing thirteen projects from the Emergent Project Program.⁶ Ibid.

Stated differently, the remaining projects from the portfolios predating the 2019 Strategic Plan are progressing and forecasted to be completed by September 2025. Ibid. No projects have been halted. Ibid. In fact, three projects have been completed during the current pandemic. Ibid. The SDA's annual

⁶ The SDA has also advanced and/or completed dozens of projects from previous "Potential Emergent Project initiatives, which continue to advance through the present day. Id. at ¶¶ 13-34, 43.

and biannual reports have also shed light on its progress since 2014, including the many emergent projects completed. Id. at ¶¶ 12-34.⁷

2. Approval of the 2019 Statewide Strategic Plan.

As described above, the SDA complied with its reporting obligations by creating capital project portfolios, providing updates on funded and advancing projects. In addition to creating those portfolios and advancing the projects listed therein, the SDA – using the EFNA generated by the DOE – created the 2019 Strategic Plan for future projects. The road to creating the 2019 Strategic Plan requires some additional context.

On December 19, 2005, this Court entered an order directing Abbott districts to submit their then-overdue LRFPs to the DOE no later than January 15, 2006. Abbott XIV, 185 N.J. at 615; Allen-McMillan Cert., ¶ 9. Due to numerous district errors and incomplete submissions, each defaulting district received at least one letter (some received more than one) advising that their submissions were incomplete or inaccurate, and directing them to resubmit complete and accurate LRFPs. Allen-McMillan Cert., ¶ 10. Because of this, final approvals of many LRFPs were not issued until 2007 or 2008 – but each district had an approved LRF in

⁷ See also id. at ¶ 6 (describing projects completed in Abbott districts by 2007); Luhm Cert., ¶ 31 (describing 695 completed projects in SDA districts since the School Construction Program's inception).

place by 2008. Id. at ¶¶ 10-12. And in early 2016, the DOE completed its review and approval of five-year amendments to the districts' LRFPs, as required by EFCFA. Id. at ¶ 14; N.J.S.A. 18A:7G-4(a). Based on the 2016 LRFPA amendments, the DOE completed a statewide EFNA and priority ranking for each SDA district. Id. at ¶ 16, Exh. A; N.J.S.A. 18A:7G-5(m); N.J.A.C. 6A:26-3.9(a).

Following that review, in 2019 the DOE completed a revised EFNA with priority rankings, encompassing all SDA districts, using updated enrollment projections and building capacity assessments. Id. at ¶ 18, Exh. B; N.J.S.A. 18A:7G-5(m); N.J.A.C. 6A:26-3.9(a). The 2019 EFNA was transmitted to the SDA on January 28, 2019, and the following year, on January 21, 2020, the SDA considered and approved the 2019 Strategic Plan. Id. at ¶ 19; Da Silva Cert., ¶¶ 44-46. Governor Philip D. Murphy approved the SDA Board's resolution adopting the 2019 Strategic Plan in a letter dated January 22, 2020. Da Silva Cert., ¶¶ 44-46. The 2019 Strategic Plan provides a comprehensive overview of the SDA's activities, identifying the twenty-five projects from the 2011 through 2014 portfolios that, at the time of the 2019 Strategic Plan's release, had been completed in SDA districts, as well as the fourteen projects that remained to be completed.⁸ Ibid.

⁸ As discussed above, three more projects have been completed since the publication of the 2019 Strategic Plan. Id. at ¶¶ 43 and 45.

The 2019 Strategic Plan also identifies the remaining priority needs in SDA districts based on the 2019 EFNA and priority rankings, and sets out the SDA's approach to sequencing projects to meet those needs. Id. at ¶¶ 35, 37, 39, 45 (identifying scoring process and factors for consideration in development of capital portfolios and statewide strategic plan). The sequencing of projects is based upon: (1) educational priorities (overcrowding and building age and condition) and (2) logistical factors (availability of land and delivery capacity). Ibid. With this framework in mind, the 2019 Strategic Plan identifies the "first tranche" of projects for advancement, identifies high priority districts with needs to be addressed in the first tranche, and sets out the activities necessary to finalize sequencing of the identified projects. Id. at ¶ 45.

C. Funding for Past, Present, and Future SDA District Projects.

When the EFCFA was enacted in 2000, the Legislature authorized the issuance of \$8.6 billion in School Facilities Construction Bonds, with \$6 billion of the total being dedicated to SDA districts. Id. at ¶ 49; L. 2000, c. 72, § 14 (see N.J.S.A. 18A:7G-14(a)). In 2008, the Legislature amended the EFCFA to authorize an additional \$3.9 billion in bonds, with \$2.9 billion designated for SDA districts. Id. at ¶ 50; L. 2008, c. 39, § 4 (see N.J.S.A. 18A:7G-14(a)).

The SDA currently has funding authorization to complete the remaining projects identified in the 2011 through 2014 Capital Portfolios, as amended. Id. at ¶¶ 43, 45, 51. Those projects are forecasted to be delivered by 2025. Ibid. The SDA recognizes, and has recognized, in various biannual reports and in testimony before the Legislature, that more money will be needed to initiate and complete projects to address remaining needs as identified in the 2019 EFNA. Id. at ¶¶ 52-62. Specifically, the SDA's biannual reports from December 2014, December 2018, June 2019, December 2019, June 2020, and December 2020 all expressed a critical need for additional funding. Ibid.; Luhm Cert., ¶¶ 32-34; (Pb14-17).⁹ And in addition to those biannual reports, SDA officers have testified on multiple occasions before the Senate and Assembly Budget Committees on the critical need for additional funding on multiple occasions. Id. at ¶ 59-62; (Pb14-17).

Recognizing the need for funding to begin work on some of the newly identified projects in the 2019 Strategic Plan, on February 23, 2021, Governor Murphy proposed a Fiscal Year 2022 (FY 2022) budget that included a total of \$275 million in appropriations for school facilities project funding. Id. at ¶¶ 64-69; Philip D. Murphy, The Governor's FY2022 Budget (Feb. 2021) at 16;¹⁰ Press

⁹ "Pb" refers to plaintiffs' brief.

¹⁰ <https://www.nj.gov/treasury/omb/publications/22bib/BIB.pdf> (last visited Mar. 21, 2021).

Release, Governor Murphy Presents Fiscal Year 2022 Budget: Investing in a Stronger, Fairer, and More Resilient Post-Pandemic New Jersey (Feb. 23, 2021).¹¹ In particular, upon enactment of the FY 2022 Appropriations Act, a direct appropriation of \$200 million to the SDA will allow it to reduce its planned debt issuance, which in turn will allow the SDA to support the advancement of new SDA district projects identified in the 2019 Strategic Plan. Id. at ¶¶ 65-67; see also The Governor's FY2022 Budget at 16 ("to reduce [SDA's] planned debt issuance. This appropriation will go toward current projects, and may allow the State to issue debt for the SDA for one year beyond what was expected."). In other words, the \$200 million will allow the SDA to replace borrowing for current projects, which will allow it to access unused bonding authority for the 2019 Strategic Plan, with such appropriation subject of course to the approval of the Director of the Division of Budget and Accounting. Ibid.¹² Additionally, the Governor's budget proposes directing \$75 million for emergency projects. Id. at ¶¶ 68-69; see also The Governor's FY2022 Budget at 16 ("To ensure that schools statewide remain safe and welcoming places to learn,

¹¹ <https://www.nj.gov/governor/news/news/562021/20210223c.shtml> (last visited Mar. 21, 2021).

¹² Any project advanced through the support of that funding would be identified based on prioritization factors determined through review by the DOE, SDA, and districts. Id. at ¶ 67.

the Governor proposes directing \$75 million into the [SDA's] capital maintenance and emergent needs grants program. These grants help school districts undertake emergent facility and system repairs, such as replacing boilers, electrical systems, and roofs."). While regular operating districts and SDA districts will have the opportunity to access those funds for emergency projects, mitigation of COVID-related health and safety issues will receive priority consideration for project approval and SDA districts seeking to mitigate COVID-related health and safety issues will receive priority consideration for those funds. Ibid.

D. The COVID-19 Pandemic, the Road Back Plan, and the Emergency General Obligation Bond Act.

Leaving aside the familiar but far from uncomplicated challenges of school funding,¹³ the perils and "widespread consequences" of the COVID-19 global pandemic are well-known to this Court and have presented an entirely new set of challenges to the State of New Jersey and its citizens. New Jersey Republican State Comm. v. Murphy, 243 N.J. 574, 579-83 (2020). Those challenges run the gamut from routine to complex to wholly unprecedented, across virtually every public service and

¹³ See Abbott v. Burke (Abbott XX), 199 N.J. 140, 250 (2009) (noting "there is no perfect solution to [the] very complicated issues of school funding.") (alteration in original) (citation and internal quotations omitted).

institution – including the State’s public schools. But mechanisms are in place to deal with these new challenges.

By way of background, on March 9, 2020, in light of the dangers posed by COVID-19, the Governor concurrently invoked his powers under the Civilian Defense and Disaster Control Act, and the Emergency Health Powers Act, and issued an executive order declaring both a state of emergency and a public health emergency. Exec. Order No. 103 (Mar. 9, 2020), 52 N.J.R. 549(a) (Apr. 6, 2020). A week later he ordered, among other things, the statewide closure of public and private entities – including public and private schools. Exec. Order No. 104 (Mar. 16, 2020), 52 N.J.R. 550(a) (Apr. 6, 2020). Guided by developing information on COVID-19, days later he issued Executive Order 107, which set forth a general stay-at-home requirement for all New Jersey residents (with limited exceptions), and also mandated that “[a]ll public, private, and parochial preschool program premises, and elementary and secondary schools, including charter and renaissance schools, shall remain closed to students as long as this Order remains in effect.” Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020), ¶ 12.

The Governor has since issued a series of executive orders adapting his approach as the crisis evolves, while also addressing a variety of practical and institutional concerns, such as the need to ensure that social distancing measures are effectuated in

public and private spaces, as well as the need to ensure that all State, county, and municipal governments are acting in unison.¹⁴

1. The Road Back Plan.

As part of New Jersey's "Road Back" plan, Governor Murphy has taken incremental steps to safely reopen the State while preventing deaths and cases of the virus from surging. See, e.g., Press Release, Governor Murphy Unveils Multi-Stage Approach to Execute a Responsible and Strategic Restart of New Jersey's Economy (May 18, 2020);¹⁵ Press Release, Governor Murphy Announces "The Road Back: Restoring Economic Health Through Public Health" (Apr. 27, 2020).¹⁶ Specifically, he has carefully permitted the reopening of parts of the State closed by earlier orders, while requiring that the same social distancing guidelines and safety measures continue to be followed. Ibid.; see also State of New Jersey, What is guiding New Jersey's recovery? What is "the Road Back"? (last updated Jun. 15, 2020) (discussing the multi-stage approach

¹⁴ All of the Governor's executive orders are publicly available in a databank maintained on the State's website. See <https://nj.gov/infobank/eo/056murphy/> (last visited Mar. 21, 2021).

¹⁵ <https://www.nj.gov/governor/news/news/562020/20200518a.shtml> (last visited Mar. 21, 2021).

¹⁶ <https://www.nj.gov/governor/news/news/562020/20200427b.shtml> (last visited Mar. 21, 2021).

to restart and restore New Jersey's economic health while continuing to ensure public health).¹⁷

As part of that initiative, in June 2020 the DOE issued "The Road Back: Restart and Recovery Plan for Education" (Restart and Recovery Plan), which provided guidance and anticipated minimum standards related to health, safety, and operations to assist school districts in the process of safely reopening schools in the fall of 2020. Allen-McMillan Cert., ¶¶ 31-32; Luhm Cert., ¶ 15; see also Department of Education, The Road Back: Restart and Recovery Plan for Education (Jun. 2020).¹⁸ To assist in the development and review of school reopening plans, on August 3, 2020, the DOE issued a checklist for schools to follow to assist in the reopening of schools in the 2020-2021 school year. Id. at ¶ 33; Luhm Cert., ¶ 16; Department of Education, Reopening Document – Checklist for the Re-Opening of School 2020-2021 (Aug. 3, 2020).¹⁹ The checklist set forth the minimum health and safety standards detailed in the Restart and Recovery Plan for districts to implement, which were also listed in Executive Order 175 (issued

¹⁷ <https://covid19.nj.gov/faqs/nj-information/reopening-guidance-and-restrictions/what-is-guiding-new-jerseys-recovery-what-is-%E2%80%9Cthe-road-back%E2%80%9D> (last visited Mar. 21, 2021).

¹⁸ <https://www.nj.gov/education/reopening/NJDOETheRoadBack.pdf> (last visited Mar. 21, 2021).

¹⁹ https://www.nj.gov/education/reopening/DOE_HealthandSafety.pdf (last visited Mar. 21, 2021).

days later). Id. at ¶ 33-34; Luhm Cert., ¶ 16. The Restart and Recovery plan makes clear that health and safety standards associated with reopening reflect the recommendations of the Department of Health (DOH) and are informed by guidance from the Centers for Disease Control. Id. at ¶¶ 32-35. In other words, health and safety standards for reopening – via the checklist and the Restart and Recovery Plan – have been established by the DOH and incorporated into DOE’s guidance. Ibid.

Among many such standards, both the Restart and Recovery Plan and the checklist require a plan to ensure that indoor facilities have adequate ventilation, which may include operational heating and ventilation systems, recirculated air with a fresh air component, proper filtration for air conditioning units, and the ability to open windows if air conditioning is not provided. Id. at ¶ 35; Luhm Cert., ¶¶ 15-18. They also propose reconfiguration of classrooms, hallways, and other common areas to allow for the DOH and CDC recommended social distancing between individuals. Ibid.; Luhm Cert., ¶ 22. A statement of assurance, certifying that a school has developed a reopening plan adhering to these minimum standards, is required from schools in order to return to in-person schooling. Id. at ¶¶ 36-37.

On August 13, 2020, Governor Murphy issued Executive Order 175, which called for the resumption of in-person instruction in New Jersey’s schools. Exec. Order No. 175 (Aug. 13, 2020), 52

N.J.R. 1699(a) (Sept. 21, 2020), at ¶¶ 3-4. Under the order, all school districts that reopen for full or part-time in-person instruction are required to meet health and safety standards as set forth in the Restart and Recovery Plan. Id. at ¶ 2. In particular, districts were required to submit a reopening plan to the DOE thirty days prior to the first day of school, certifying that they had policies and procedures in place to meet minimum health and safety standards as set forth in the Restart and Recovery Plan. Id. at ¶ 4. If a district determined it could not provide in-person instruction, it was required to submit documentation to the DOE identifying: the school buildings or grade levels within the district that could not meet minimum health and safety standards; the anticipated efforts to satisfy those standards; and a date by which the school anticipated the resumption of in-person instruction. Id. at ¶ 8. Districts with schools offering only remote instruction must submit periodic updates demonstrating that the school district is actively engaged in good-faith efforts toward resumption of in-person instruction. Id. at ¶ 9.

2. Available Federal Funding for Reopening School Facilities.

Because the costs and logistical challenges caused by COVID-19 do not fit within the normal school funding paradigm, federal funds have been critical to the continued operations of our

schools. The DOE has provided a robust framework for obtaining economic relief associated with operating and/or reopening our schools in the COVID-19 era.

Importantly, the Restart and Recovery plan explained that “the federal ‘Coronavirus Aid, Relief, and Economic Security’ (CARES) Act established the Elementary and Secondary Emergency Relief (ESSER) Fund to provide direct money to school districts and provide funding to support areas impacted by the disruption and closure of schools from COVID-19.” Allen-McMillan Cert., ¶ 39 (quoting Restart and Recovery Plan at 62); see also 116 Pub. L. No. 136, 134 Stat. 281, §§ 18001 to 18003 (2020) (establishing ESSER fund).²⁰ The plan further explained that “\$310.4 million [in CARES Act funds] has been allocated to New Jersey, the majority of which will in turn be provided to school districts as subgrants.” Id. at ¶ 40 (quoting Restart and Recovery Plan at 62). In short, federal funding – including CARES ESSER funds – were provided to address the areas impacted by the disruption and closure of schools caused by COVID-19. Ibid. In addition to ESSER funds provided to Local Education Agencies (LEAs), the Department allocated \$100 million in CARES Act Coronavirus Relief Funds (CRF) towards meeting

²⁰ Additional funds will be made available through the recently-passed American Rescue Plan Act of 2021. See H.R. 1319, 117th Cong. (2021). However, as of the date of this filing, the amount of funds available to SDA districts is undetermined.

the health and safety criteria outlined in Executive Order 175 and the Restart and Recovery Plan. Id. at ¶ 44; see also The Governor's FY2022 Budget at 15; Philip D. Murphy, FY2021 Revised Budget Proposal at 10 (Aug. 25, 2020).²¹

The CRF provides relief to States to respond to COVID-19, and may only be used to cover costs that are necessary expenditures incurred due to the COVID-19 public health emergency. Id. at ¶ 45. The fund was administered by the United States Treasury, which issued guidance on the permissible use of the funds. Ibid. The DOE received an allocation of \$100 million in CRF to provide to LEAs, and provided grant funds to school districts, charter schools, and renaissance school projects to address health and safety measures necessary to support reopening for in-person instruction and to support students during periods of remote learning. Ibid. Allocations were based on districts' applications for state school aid, and were provided based on a flat per pupil amount of \$25 per pupil for all students, and an additional \$128 per pupil for low income students. Ibid.

Among the uses for CRF funds, districts could purchase furniture to help establish social distancing, equipment to increase the efficacy of social distancing, and filters for

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http://d31hzh1hk6di2h5.cloudfront.net/20200825/88/b2/df/32/de79b8b5a48a7c430bdf57ed/FINAL_Report_on_the_Revised_FY21_Budget.pdf (last visited Mar. 21, 2021).

heating, ventilation, and air-conditioning. Id. at ¶ 46. And among the allowable costs for ESSER I funds were supplies for sanitation and social distancing measures, as well as “[o]ther activities that are necessary to maintain the operation of and continuity of services” Id. at ¶ 41.

SDA districts received tens of millions of dollars in CRF and ESSER I funds. By way of example, the Camden City School District received \$14,232,248 in ESSER I funds; Elizabeth Public Schools received \$7,592,750; Jersey City Public Schools received \$12,824,478; the Newark Public School District received \$20,676,760; the Paterson Public School District received \$12,254,566; and the Trenton Public School District received \$5,089,747. Id. at ¶ 42, Exh. C. As for CRF monies, the Elizabeth Public Schools received \$3,297,922 in CRF monies; Jersey City Public Schools received \$2,545,623; the Newark Public School District received \$4,679,544; the Paterson Public School District received \$3,047,847; and the Trenton Public School District received \$1,615,173. Id. at ¶ 47, Exh. D.

Additional ESSER funding from the Coronavirus Response and Relief Supplemental Appropriations (CRRSA) Act (ESSER II), 116 Pub. L. No. 260, 134 Stat. 1182, Div. M, Title III (2020), may also be used to assist reopening efforts. Id. at ¶ 48. Among the allowable costs qualifying for ESSER II funding as set forth in the CRRSA Act, the DOE enumerated two uses relevant to reopening

efforts, including “[s]chool facility repairs and improvements to enable operation of schools . . . [,]” and “[i]nspection, testing, maintenance, repair, replacement, and upgrade projects to improve the indoor air quality in school facilities, including mechanical and non-mechanical heating, ventilation, and air conditioning systems, filtering, purification and other air cleaning, fans, control systems, and window and door repair and replacement.”

Ibid.

SDA districts have similarly been allocated significant federal aid from the ESSER II funding stream: the Camden City School District was allocated \$51,276,194 in ESSER II funds (minus additional funds for learning acceleration and mental health support and services); Elizabeth Public Schools was allocated \$28,568,451; Jersey City Public Schools was allocated \$45,261,094; the Newark Public School District was allocated \$78,956,152; the Paterson Public School District was allocated \$47,502,496; and the Trenton Public School District was allocated \$19,578,467. Id. at ¶ 49, Exh. E.

As with most state and federal aid, the CARES Act funds were disbursed to LEAs based on resident student populations and the needs of those students. Specifically, the Act required State Educational Agencies (SEAs) to allocate a minimum of 90% of total ESSER Funds received directly to LEAs, and to “set-aside” the other

10% for other designated purposes. Id. at ¶ 51. The CRRSA Act followed the same allocation method as the CARES Act. Ibid.

To be sure, local finances and fiscal policies and practices “may need to be adjusted . . . to accommodate social distancing, virtual learning, or other requirements that arise in the post COVID-19 educational environment.” Restart and Recovery Plan at 62. However, as described above, the DOE has administered significant guidance and resources to districts to assist in the continued operation of schools through the use of federal funds – more specifically, they have provided districts with a roadmap to “provid[ing] direct money to school districts and provid[ing] funding to support areas impacted by the disruption and closure of schools from COVID-19.” Ibid.; Allen-McMillan Cert., ¶¶ 38-51.

3. The Emergency General Obligation Bond Act.

Additionally, to make up for the “revenue shortfall” resulting from the pandemic, on July 16, 2020, the Legislature passed and the Governor signed into law the “New Jersey COVID-19 Emergency Bond Act” (Emergency General Obligation Bond Act), allowing the State to borrow up to \$9.9 billion. L. 2020, c. 60; New Jersey Republican State Comm., 243 N.J. at 579, 584, 586. In particular, the State was permitted to issue bonds for public or private sale, or to borrow funds from the federal government, totaling \$2.7 billion for Fiscal Year 2020 and another \$7.2 billion

for Fiscal Year 2021. L. 2020, c. 60; New Jersey Republican State Comm., 243 N.J. at 579, 586.

This Court upheld the constitutionality of the Emergency General Obligation Bond Act in a decision issued on August 12, 2020, holding that the State was permitted to borrow money necessary to meet the emergency created by the COVID-19 pandemic. New Jersey Republican State Comm., 243 N.J. at 581. The bonds were “authorized to be issued to address the State’s financial problems that have arisen as a consequence of the COVID-19 Pandemic[,]” L. 2020, c. 60, and the Court noted that the funds “must relate to or provide for the pending emergency[,]” as “not every act of borrowing would ‘meet’ the emergency caused by the pandemic,” New Jersey Republican State Comm., 243 N.J. at 581, 610. The Court held in part that the State “may borrow to provide for public services like education[] . . . to secure the continued functioning of government.” Id. at 609. The Court left the question of specific uses to the Legislature, but noted that “[b]orrowing for programs unrelated to the emergency would not satisfy the language” of the Emergency General Obligation Bond Act or the New Jersey Constitutional provisions permitting emergency appropriations. Id. at 610.

By letter dated September 18, 2020 – two months after the Emergency General Obligation Bond Act was signed into law, and over a month after New Jersey Republican State Comm. was decided

– ELC requested that the State use at least \$500 million of the authorized bond financing to ensure that school facilities meet the health and safety standards for safe reopening of schools during the ongoing COVID-19 pandemic. Luhm Cert., ¶ 28. On September 22, 2020, the Department of Treasury released its “Report to the Select Commission on Emergency COVID-19 Borrowing,” authorizing the State to issue up to \$4.5 billion in general obligation bonds to offset the decline in State revenue that occurred as a result of the ongoing COVID-19 pandemic. Department of Treasury, New Jersey COVID-19 General Obligation Emergency Bonds Report to the Select Commission on Emergency COVID-19 Borrowing (Sept. 2020);²² Press Release, Report Authorizing Crucial Borrowing to Address Steep Drop In Revenue Sent to Legislative Commission for Final Approval (Sept. 22, 2020).²³

E. Prior and Present Filings With This Court.

A brief summary of previous facilities-related applications to this Court is necessary to place this application in its proper context. In 2005, ELC sought relief from this Court for three inter-related reasons: work on approved projects had been

²² https://www.nj.gov/treasury/public_finance/pdf/Emergency-Borrowing-Report-to-Select-Commission.pdf (last visited Mar. 21, 2021).

²³ <https://www.nj.gov/treasury/news/2020/09222020.shtml> (last visited Mar. 21, 2021).

"indefinitely postponed" by the SCC due to insufficient funds; most districts had failed to meet their deadline for filing their LRFPs; and the DOE had not filed its annual report for the 2005 fiscal year under N.J.S.A. 18A:7G-24. Abbott XIV, 185 N.J. at 614. In response, the Court ordered districts to submit overdue LRFPs, and ordered the DOE to issue its annual report for 2005 (with cost estimates for the school facilities projects that were identified in the 2000-2005 LRFPs and submitted to the SCC). Id. at 615; Allen-McMillan Cert., ¶ 9. Both the DOE and the SDA have complied with the Court's directives in Abbott XIV. Allen-McMillan Cert., ¶¶ 26-30; Da Silva Cert., ¶¶ 8-11.²⁴

In 2007, ELC again sought a remedial order from this Court, this time with respect to funding for school construction in the Abbott districts. Abbott v. Burke (Abbott XVII), 193 N.J. 34, 35 (2007). Specifically, ELC sought an order directing the State to comply with the Court's orders in Abbott V, Abbott XIV, and Abbott v. Burke (Abbott VII), 164 N.J. 84 (2000). Abbott XVII, 193 N.J. at 35. The Court denied the motion as premature, explaining that the State's compliance had to be considered "in the context of the Fiscal Year 2008 budget," which had not yet been enacted. Ibid. The Court further "declined to proceed on the assumption that

²⁴ Effective August 6, 2007, the EFCFA was amended to require that the SDA, rather than the Commissioner, submit a report on the School Construction Program on a biannual basis. L. 2007, c. 137, § 35; Allen-McMillan Cert., ¶ 30.

[defendants would] fail to comply with their constitutional obligations to provide a thorough and efficient educational system pursuant to [N.J. Const. art. VIII, § 4, ¶ 1].” Ibid.

The following year, ELC filed another motion in aid of litigants’ rights, seeking an order directing the State to comply with various Abbott decisions in order to compel the provision of funds necessary to construct or repair school facilities in Abbott districts. Abbott v. Burke (Abbott XVIII), 196 N.J. 451, 451-53 (2008). Once again, the Court declined to presume that the Legislature would fail to respond to these issues or to the Governor’s request to fund the “next phase of school construction, including addressing needed health and safety concerns[.]” Ibid. Later that year the Legislature amended the EFCFA to authorize an additional \$3.9 billion in bonds, with \$2.9 billion designated for SDA districts. L. 2008, c. 39, § 4 (see N.J.S.A. 18A:7G-14(a)).

On November 7, 2019, ELC filed another motion in aid of litigants’ rights, seeking an order (1) directing the State to submit a revised statewide strategic plan for priority projects in SDA districts, and (2) securing funding from the Legislature as required to manage and complete the school facilities projects in the revised statewide strategic plan. Abbott v. Burke (Abbott XXIII), 241 N.J. 249 (2020). On April 1, 2020, this Court issued an order denying ELC’s motion as premature, declining “to proceed on the assumption that Respondents will fail to comply with their

constitutional obligations to provide a thorough and efficient educational system[.]” Ibid.

ELC now brings this motion in aid of litigants’ rights, asking the Court to direct the State to: (1) seek and secure from the Legislature funding for the school facilities construction projects as set forth in the SDA’s 2019 Statewide Strategic Plan; and (2) seek funding as otherwise needed for health and safety projects, including those necessary to ensure the safe reopening and operation of school buildings in SDA districts, during the ongoing COVID-19 pandemic.

ELC’s motion must be denied because the State defendants have acted within the scope of their authority to seek and secure funding for the SDA school facilities projects, and because their argument regarding facility deficiencies related to school reopening during the pandemic is an issue not properly placed before this Court.

ARGUMENT

POINT I

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

ELC first asks this Court to direct the State “to seek and secure such funding as is required to undertake the facilities

projects contained in the [SDA's]" 2019 Strategic Plan. (Pb1). It asserts that, "absent judicial relief," the State "will default on its constitutional obligation to provide the safe and adequate physical environments that are essential for Plaintiffs' learning, especially during the coronavirus pandemic." Ibid. ELC's assertion is contradicted by the State's substantial and continuing efforts to remedy facility deficiencies in the SDA districts. Because all current projects are fully funded and progressing, and because additional funds have been proposed for appropriation to support the advancement of projects noted in the 2019 Strategic Plan, ELC's motion is premature and based on speculative reasoning.

A motion in aid of litigants' rights is "a civil proceeding to coerce the defendant into compliance with the court's order for the benefit of the private litigant." Pasqua v. Council, 186 N.J. 127, 140 (2006); see also R. 1:10-3 (stating that "a litigant in any action may seek relief by application in the action."). It requires a showing that a party has willfully failed to comply with a court order, manifesting contempt for the Court. Id. at 141 n. 2; Abbott v. Burke (Abbott XXI), 206 N.J. 332, 492-93 (2011) (Hoens, J., dissenting). On that point, it has been noted that the type of willful neglect necessary to invoke the court's power under this Rule should "bespeak 'clear defiance of [a court's] specific and unequivocal orders.'" Abbott XXI, 206 N.J. at 492-

93 (Hoens, J., dissenting) (quoting Abbott v. Burke (Abbott VIII), 170 N.J. 537, 565 (2002) (LaVecchia, J., concurring in part and dissenting in part)). Importantly, the Court must determine that the party has the ability to comply with the order that allegedly has been violated, and that the party has no good reason to resist compliance. See Pasqua, 186 N.J. at 141 n. 2; Pressler & Verniero, Current N.J. Court Rules, cmt. 4.3 on R. 1:10-3 (2020).

Thus, in order for the Court to grant ELC's motion, there must be a finding that the State has failed to live up to this Court's Abbott mandates, and that it has done so willfully. The record does not support such a conclusion.

As to ELC's request that the State seek funding, not only has the SDA requested additional funds from the Legislature via live testimony and through the submission of annual and biannual reports, Da Silva Cert., ¶¶ 52-62; Luhm Cert., ¶¶ 32-24, but on February 23, 2021, subsequent to the filing of this motion, Governor Murphy proposed the appropriation of \$275 million in funds. In particular, the Governor proposed the appropriation of \$200 million "to reduce [SDA's] planned debt issuance[,] " which in turn will allow the SDA to support the undertaking of some of the capital projects in SDA districts listed in the 2019 Strategic Plan; and he also proposed the appropriation of another \$75 million "into the [SDA's] capital maintenance and emergent needs grants program" to help with pandemic-related issues, for which SDA

districts will receive priority consideration, Da Silva Cert. at ¶¶ 64-69; The Governor's FY2022 Budget at 16. The State defendants have therefore satisfied their obligation to seek funding.²⁵ These extensive efforts by the State to obtain funding and advance the school facilities projects in SDA districts fall far short of the willful or intentional indifference that is required before a motion in aid of litigants' rights can be granted. ELC has presented no evidence demonstrating such a willful lack of compliance with the Abbott mandates.

As to its request that the State secure funding, ELC fundamentally misconstrues not just the facts on the ground, but the School Construction Program process and the functionality of State budgeting. The budget process is only just beginning. ELC's request fails to recognize that the Executive Branch lacks the ability to secure funding beyond what has to date been authorized by the Legislature. ELC claims there is no relief in sight, but such an assertion is purely speculative. The appropriation of

²⁵ From a broader perspective, the EFCFA itself contains all of the elements directed by this Court, including a thorough vetting process to ensure the advancement of projects that will assist in the delivery of T&E, 100 percent of funding for approved costs in the SDA districts, and the authorization of billions of dollars in bonds to address the facilities deficiencies in the Abbott districts (see Statement of Facts, Points A, B, & C) – more than twice the amount of bonding capacity estimated by the Special Master in Abbott V, 153 N.J. at 634. Presently, the school construction program has expanded to expend up to \$12.5 billion, comprising \$8.9 billion for SDA districts.

funds ultimately rests with the Legislature, and that determination is yet to be made. But what is clear is that all capital projects from the portfolios predating the 2019 Strategic Plan are fully funded, advancing, and are forecasted to be completed by 2025; that no projects have been halted – to the contrary, despite the myriad challenges posed by COVID-19, the SDA has managed to complete three more projects during the pandemic; and that the Governor has proposed an appropriation that will allow the SDA to advance projects from the 2019 Strategic Plan. Id. at ¶¶ 43, 45, 52-69. ELC’s motion must therefore be denied as speculative and premature.

To put the issue in context, the New Jersey Constitution requires an annual balanced budget, N.J. Const. art. VIII, § 2, ¶ 2. As a result, each February or March the Governor presents to the Legislature a budget message for the next fiscal year, with revenue projections, balances on hand for the current fiscal year, and proposed spending priorities for the next fiscal year. N.J.S.A. 52:27b-20.²⁶ The State defendants in this case do not have the ability to increase the bond limit, as the authority to

²⁶ The EFCFA, for its part, is consistent with this process. See N.J.S.A. 18A:7G-13 and -14; Da Silva Cert., ¶¶ 47-50. When first enacted, the EFCFA originally authorized the issuance of \$6 billion for the Abbott districts, and when it became apparent in 2008 that additional funding was needed, the Legislature amended the EFCFA to authorize an additional \$2.9 billion in bonds for SDA districts. N.J.S.A. 18A:7G-14(a); L. 2000, c. 72, § 14; L. 2008, c. 39, § 4; Da Silva Cert., ¶¶ 47-50.

amend the EFCFA and to appropriate funds lies with the Legislature. See N.J. Const. art. VIII, § 2, ¶ 2 (“No money shall be drawn from the State treasury but for appropriations made by law.”); City of Camden v. Byrne, 82 N.J. 133, 148 (1980) (“[T]he power and authority to appropriate funds lie solely and exclusively with the legislative branch of government.”).

But they can do their part by carrying out their obligations under the EFCFA, and also requesting appropriations from the Legislature – and they have faithfully done so here. In particular, while the State defendants are constrained from actually securing funding, they have ensured that every SDA district has a current LRFP and updated EFNA; they have adopted the 2019 Strategic Plan; and they have taken necessary steps to seek additional funding (including SDA requests via testimony and annual reports, and via the Governor’s proposal for appropriations). Da Silva Cert. at ¶¶ 12-69; Allen-McMillan Cert., ¶¶ 9-25; The Governor’s FY2022 Budget at 16; Luhm Cert., ¶¶ 32-24. And it is important to remember that the remaining projects from the portfolios predating the 2019 Strategic Plan are fully funded, progressing, and forecasted to be completed by September 2025. Id. at ¶¶ 43, 45, 51; see also id. at ¶¶ 6, 12-46 (describing hundreds of projects completed in Abbott districts by 2007, and subsequent progress on portfolio projects between 2008 and 2020);

Luhm Cert., ¶ 31 (describing 695 completed projects in SDA districts since the School Construction Program's inception).

Thus, the State has complied with all requirements necessary to fulfill the directives of both the Abbott cases and the EFCFA, having obtained significant bond funding and the advancement of scores of capital and emergent projects in SDA districts. Stated differently, in light of that progress and its impact on the capacity needs in SDA districts, each SDA district now has updated LRFPs, EFNAs, and priority rankings in place – which has led to the publication of a new statewide strategic plan and the ability to begin advancement of work to address some of the needs listed therein. Whether the request for \$275 million in total appropriations will be granted by the Legislature remains to be seen, but to suggest that there is “no funding” (Pb21) for capital or emergent projects is to put the cart before the horse. There has been no halt in projects, and there is no reason to believe that the Legislature will fail to act, particularly given the legislative intent and the history of the EFCFA. N.J.S.A. 18A:7G-2 and -14(a).

The State appreciates that additional funding would assist in the advancement of even more projects in the 2019 Strategic Plan. But that does not happen overnight, and the facts on the ground belie any notion that the State defendants have ignored or violated this Court's orders or the EFCFA, or that they have otherwise

failed to “seek” or “secure” funding to advance the 2019 Strategic Plan’s projects.

Time and time again, this Court has declined to entertain plaintiffs’ speculative arguments, or to proceed on the assumption that the State would fail to comply with constitutional obligations to provide T&E. See Abbott XVII, 193 N.J. at 35 (denying motion as premature, explaining that the State’s compliance had to be considered “in the context of the Fiscal Year 2008 budget,” and “declin[ing] to proceed on the assumption that [defendants would] fail to comply with their constitutional obligations to provide [T&E].”); Abbott XVIII, 196 N.J. at 454 (J. Albin concurring) (explaining that the Court would not “presume that the Legislature will fail to respond to the Governor’s request to fund the ‘next phase of school construction . . . in the Abbott districts’”); Abbott XXIII, 241 N.J. at 249 (holding that ELC’s motion was “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[.]”).

There is no reason for that analysis to change here, or to believe that the Legislature will fail to take necessary action to secure funding for school facilities projects. ELC comes before this Court prematurely once again, seeking relief that would interfere with both the EFCFA and the budgeting process mandated

by the Constitution. Entirely absent from ELC's papers is any suggestion that projects have halted, or even slowed. That is because they have not. The Legislature must be given the opportunity to act. The Constitution demands it. A preemptive order from this Court directing the State to secure additional funding for school facilities would not only be improper, but would prematurely assume a breakdown in the School Construction Program and a failure to act on the part of the Legislature. Accordingly, because the State has fully funded ongoing projects from previous capital portfolios, and because the State has taken the necessary and available steps to obtain funding to support the advancement of work on some projects included in the 2019 Strategic Plan – which must abide a determination by the Legislature – ELC's motion is once again "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 [2022] budget, which has not been enacted[.]" Abbott XXIII, 241 N.J. at 249.

Therefore, ELC's motion is both speculative and premature, and must be denied.

POINT II

ELC'S ARGUMENT REGARDING FACILITY DEFICIENCIES AS THEY RELATE TO SCHOOL REOPENINGS IN THE WAKE OF THE COVID-19 PANDEMIC IS NOT PROPERLY BEFORE THIS COURT.

While ELC passingly references the need for funding to reopen schools in the context of the COVID-19 pandemic, it offers little in the way of substantive or legal justification for using Abbott mandates or the EFCFA process to justify its position. That makes sense, because neither framework is appropriate to obtain relief in connection with a global pandemic. But to the extent that SDA districts have emergent facility issues related to the pandemic, the State has not left those concerns unaddressed. There is substantial assistance available to districts, including SDA districts, to address barriers to the provision of educational services to students. ELC's motion must therefore be denied.

It should be noted from the outset that ELC has not provided any specific details regarding projects it claims require emergent funding to enable in-person instruction. So in that regard, this argument too is purely speculative. But aside from that fundamental flaw, ELC suggests (1) that reopening protocols in the wake of COVID-19 may be satisfied using the framework designed to ensure the provision of T&E services in more ordinary circumstances, and (2) no funding has been provided to assist SDA

districts in reopening. (Pb10-13, Pb21). ELC is wrong on both counts.

As to ELC's first claim, this Court has never before been called upon to address the effects of a deadly global pandemic on the State's institutions or infrastructure – let alone in the context of any Abbott decision. No court in New Jersey has prior to the onset of COVID-19. The institutional challenges presented by COVID-19 are legion, and the State has taken action in a variety of ways to combat the spread of the virus while also ensuring the provision of vital services and protections for its citizens. One thing is clear though: neither the EFCFA nor the Abbott litigation were ever intended to provide a roadmap to relief from the calamity caused by COVID-19.

To be sure, this Court has been called upon to address conditions that required significant renovation or adaptation to meet contemporary learning standards. See, e.g., Abbott II, 119 N.J. at 362-63; Abbott IV, 149 N.J. at 177, 183, 186-87; Abbott V, 153 N.J. at 519-22. For all of the reasons set forth at length in this brief, the State has complied with those facilities mandates. Even in the face of COVID-19, the SDA has managed to continue its work. ELC's concerns regarding districts' abilities to adapt their infrastructure are both serious and well-taken. But the Abbott line of decisions never factored a global pandemic into their analyses. Going back to Abbott I, and every iteration of statutory

or policy-based relief designed to provide T&E in the contemporary landscape, no model for addressing the present circumstances exists. What is required by this Court to satisfy facilities mandates to assist in the provision of T&E does not at all fit squarely with what is required to ensure the operation of in-person learning during a pandemic. The EFCFA funding stream is not designed to accommodate or satisfy reopening and Road Back guidelines. N.J.S.A. 18A:7G-2, -13, and -14.

But other options exist that are specifically targeted to the crisis at hand. Turning to ELC's suggestion that there is no funding available to assist SDA districts in reopening, the opposite is true. SDA districts are not alone – they have not been left without guidance or funding to assist in reopening. There are procedures readily available to assist them in the process of reopening. In addition to the \$75 million for pandemic-related emergency projects described above, vital federal funds have also been made available for these precise issues, and the DOE has provided significant guidance to assist in obtaining funding and reopening schools through the CARES Act and CRRSA Act. Allen-McMillan Cert., ¶¶ 38-51. And as noted above, SDA districts have received tens of millions of dollars in federal aid. Id. at ¶¶ 38-51, Exhs. C, D, & E; see also Statement of Facts, Point D.2.

In particular, CARES Act ESSER funds “provide direct money to school districts to support areas impacted by the disruption and

closure of schools from COVID-19.” Id. at ¶ 39 (quoting Restart and Recovery Plan at 62). More specifically, ESSER I funds can be used to fund the acquisition of supplies for sanitization and social distancing measures, as well as “[o]ther activities that are necessary to maintain the operation of and continuity of services in local educational agencies[.]” Id. at ¶ 41. SDA districts have received millions in ESSER I funding. Id. at ¶ 42, Exh. C. In addition to ESSER funds provided to LEAs, the DOE allocated \$100 million in CRF monies towards meeting the health and safety criteria outlined in Executive Order 175 and the Restart and Recovery Plan. Id. at ¶ 44; The Governor’s FY2022 Budget at 15; FY2021 Revised Budget Proposal at 10. The CRF funds “must be used to address health and safety measures necessary to support reopening for in-person instruction and to support students during periods of remote learning.” Ibid. Among those uses, funds are available to:

- Purchas[e] furniture to establish six feet of space between students if the current furniture does not allow it, including additional tables or individual desks for students[;]
-
- Purchas[e] equipment to increase the efficacy of social distancing, such as physical protective barriers (e.g., plastic or plexiglass dividers) and tape, flags, cones, decals, and other markers to delineate safe social distances[;]

- Purchas[e] filters for heating, ventilation, and air conditioning (HVAC) systems.

[Id. at ¶ 46.]

The DOE provided guidance to districts on obtaining grant allocations by memorandum dated September 23, 2020. Id. at ¶ 44. Like the ESSER I funds, SDA districts also received significant CRF aid. Id. at ¶ 47, Exh. D.

Additional ESSER funding from the CRRSA Act (ESSER II), may also be used to assist reopening efforts. Id. at ¶ 48. Among the allowable costs qualifying for ESSER II funding as set forth in the CRRSA Act, the DOE has enumerated two uses relevant to reopening efforts:

- School facility repairs and improvements to enable operation of schools to reduce risk of virus transmission and exposure to environmental health hazards, and to support student health needs[;]
- Inspection, testing, maintenance, repair, replacement, and upgrade projects to improve the indoor air quality in school facilities, including mechanical and non-mechanical heating, ventilation, and air conditioning systems, filtering, purification and other air cleaning, fans, control systems, and window and door repair and replacement.

[Ibid.]

And on March 15, 2021, the DOE launched district applications for ESSER II funding. Id. at ¶ 50. SDA districts have been allocated

tens of millions of dollars in ESSER II funds. Id. at ¶ 49, Exh. E.

The DOE has thus administered significant guidance to districts to assist in the continued operation of schools through the use of federal funds. While the State acknowledges that the availability of federal aid does not necessarily relieve it of its constitutional obligations to ensure the provision of T&E, Abbott II, 119 N.J. at 331-32, this is not the ordinary situation contemplated by the Court in prior holdings. The coordinated effort by all three branches of government to provide T&E – whether through legislation, the implementation of policy, or the Abbott line of decisions – never contemplated or anticipated the interjection of a deadly global pandemic. What is required to satisfy this Court’s mandates differs from what is required to adapt to a dynamic and deadly virus. The EFCFA cannot be used to fix a COVID-19 problem. Reopening schools in a COVID-19 context is wholly unrelated to this Court’s facilities mandates and the EFCFA. N.J.S.A. 18A:7G-2. The challenges go far above and beyond regular sufficiency standards. They include, as just one example, the obligation to adhere to health and safety standards developed by the DOH, which alone distinguishes this matter from normal Abbott or EFCFA facilities mandates. Allen-McMillan Cert., ¶¶ 31-35. Therefore, a motion in aid of litigants’ rights is inappropriate. To argue that the State has failed in its

obligations under the Abbott litigation, requiring the court to entertain a motion in aid of litigant's rights, is incorrect. Nevertheless, the concerns raised by ELC concerning barriers to reopening faced by SDA districts is not going unaddressed by the State.

For these reasons, ELC's motion must be denied.

CONCLUSION

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

Respectfully submitted,

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