

By Electronic and Overnight Mail

December 16, 2021

Heather Baker, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
25 Market Street
CN 970
Trenton, NJ 08625

Re: Abbott, et al., v. Burke, et al.
Docket No. 085333

Dear Ms. Baker:

Please accept Plaintiffs' letter brief in opposition to the Motion to Appear as *Amicus Curiae* filed by the New Jersey Public Charter Schools Association, Inc. (hereinafter "Charter Schools") in the above matter.

As a threshold matter, the Charter Schools' motion to appear as *amicus curiae* is untimely. The motion has not been filed "on or before the day on which the last brief is due from any party," as required by R. 1:13-9(e). Plaintiffs filed their Motion in Aid of Litigants' Rights on January 28, 2021, followed by the State's Opposition Brief on March 22 and Plaintiffs' Reply Brief on April 13. Supplemental briefing by the parties in response to this Court's inquiries on the FY22 budget and cost estimates for the facilities projects in the Statewide Strategic Plan were completed last month. As this matter has been pending

for nearly a year and concerns enforcement of the constitutional right to safe and adequate facilities, Plaintiffs will be unduly prejudiced by any further delay in the resolution of their motion.

Further, as argued below, the Charter Schools' motion, on its face, fails to demonstrate any relevant interest in the pending matter and, consequently, will not "assist in the resolution" of the constitutional issue before the Court. R. 1:13-9(a).

LEGAL ARGUMENT

THE CHARTER SCHOOLS FAIL TO DEMONSTRATE A RELEVANT INTEREST IN THE ABBOTT FACILITIES MANDATES AT ISSUE BEFORE THE COURT AND, THEREFORE, THEIR MOTION TO APPEAR AS *AMICUS CURIAE* SHOULD BE DENIED

Under R. 1:13-9, leave to appear as *amicus curiae* requires the applicant to "state with specificity" the "nature of the applicant's special interest, involvement or expertise" on a pertinent issue presented in the underlying proceeding and to demonstrate that the applicant's participation "will assist" the Court "in the resolution" of that issue. R. 1:13-9(a). On its face, the Charter Schools' motion fails to demonstrate any specific interest relevant to the central issue before this Court, namely, the State's compliance with the Abbott facilities mandates. The motion to appear as *amicus curiae* should, therefore, be denied.

At the outset, the Abbott mandates for State remediation of "unsafe, overcrowded and inadequate facilities" at issue before this Court apply only to the poorer urban districts -- now denominated "SDA districts" -- that were the subject of the constitutional violation found in the Abbott litigation. Abbott v. Burke, 119 N.J. 287, 295 (1990) ("Abbott II") (finding violation of a constitutional thorough and efficient education only in designated poorer urban districts); Abbott v. Burke, 153 N.J. 480, 519 (1998) ("Abbott V") (directing State remediation of "school buildings in Abbott districts" found to be "crumbling and obsolescent" and in a "grave state of disrepair"); Abbott v. Burke, 164 N.J. 84, 86 (2000) ("Abbott VII") (clarifying State obligation "to provide the full cost of school construction in the Abbott districts").

Given Abbott's explicit mandate for State-funded school facilities improvements in SDA districts, the beneficiaries of that judicial mandate are the Abbott Plaintiffs: the class of students who attend school in those district buildings. This Court reaffirmed this bedrock holding in recent decisions addressing State compliance with the Abbott mandates for adequate K-12 and preschool funding. Abbott v. Burke, 199 N.J. 140, 189 (2009) ("Abbott XX") (noting issue before Court was "whether the new funding approach" in the State's School Funding Reform Act ("SFRA") provided a constitutional education

"specifically to children in the thirty-one Abbott districts"); Abbott v. Burke, 206 N.J. 322, 370-71 (2011) ("Abbott XXI") (holding that judicial authority to remediate funding cuts on motion in aid of litigants' rights in Abbott litigation restricted to students "who attend schools in certain constitutionally deficient districts," i.e., poorer urban districts).

As is plainly evident, charter schools are not under the purview, control or ownership of the SDA districts. Consequently, the facilities of charter schools are not the subject of the Abbott facilities mandates. Under the Charter School Program Act, N.J.S.A. 18A:36A-1 to 18, charter schools are governed by a statutory structure in which they are authorized and operate independently of a local board of education. See also N.J.S.A. 18A:36A-6 and -10 (authorizing charter schools to purchase or lease their own facilities and prohibiting a charter school from constructing a facility "with public funds other than federal funds"). SDA districts do not educate charter students nor are they responsible for the condition of their facilities. Simply put, charter schools are not SDA districts nor are charter students district students, i.e., within the Abbott Plaintiff class who are the designated beneficiaries of this Court's remedial facilities mandates.

Further, in implementing the Abbott facilities mandates in the Education Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1 to 48 ("EFCFA"), the Legislature has chosen to exclude charter schools from the State's school construction program. EFCFA explicitly defines the eligible recipients of facilities funding as a "local or regional school district," or a "county special services school district," or a "county vocational school district." N.J.S.A. 18A:7G-3. To the extent the Charter Schools may have concerns over the need for facilities funding, those concerns are clearly not relevant to the Abbott facilities compliance issue presently before the Court. Rather, those concerns "must be reserved for a different forum," namely, the Legislature. Abbott XXI, 206 N.J. at 367 (declining to address education policy issues "collateral" to the Abbott funding remedy at issue before the Court). If the Charter Schools wish to advance their interest in obtaining facilities funding, the Legislature is the appropriate forum for asserting that interest, not this Court in the Abbott litigation.

Finally, it is well-established that an *amicus* must accept the case before the court as presented by the parties. State v. O'Driscoll, 215 N.J. at 461, 479 (2013); see also State v. Lazo, 209 N.J. 9, 25 (2012) (*amicus curiae* "cannot raise issues not raised by the parties"); State v. Gandhi, 201 N.J. 161, 191

(2010) (“[A]n *amicus* must take the case on appeal as they find it”). The Charter Schools assert the importance of their participation because the Court “should have the benefit” of considering “the facility needs of children attending charter schools in former Abbott districts.” Charter Schools Br. at 2. Yet, as discussed above, this issue is plainly outside the express contours of the Abbott facilities mandates and not one that the parties have presented to the Court on Plaintiffs’ pending compliance motion.

There is simply no basis for entertaining the Charter Schools’ attempt as *amicus curiae* to interject into this proceeding an issue wholly irrelevant to the Abbott litigation, and one not presented by the parties, for resolution by the Court.

CONCLUSION

For the foregoing reasons, the Charter Schools’ motion to appear as *amicus curiae* should be denied.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "David G. Sciarra", is written above a horizontal line.

David G. Sciarra, Esq.

On the letter brief:
Elizabeth Athos, Esq.
Theresa Luhm, Esq.

Encls.

Cc: Christopher Weber, DAG
Thomas O. Johnston, Esq.
Counsel for Proposed *Amici Curiae*