



November 29, 2021

Honorable Chief Justice Stuart Rabner
Associate Justices of the Supreme Court
Supreme Court of New Jersey
R.J. Hughes Justice Complex
Trenton, New Jersey 08625-0970

Re: ABBOTT, ET AL. V. BURKE, ET AL.
Docket NO. 085333

Dear Chief Justice Rabner and Associate Justices:

Please accept Plaintiffs' letter brief in the above-captioned matter pursuant to the Court's invitation to address the State's supplemental response, dated November 8, 2021, giving cost estimates for the major capital projects prioritized in the 2019 Statewide Strategic Plan ("Strategic Plan") and emergent projects in the Schools Development Authority districts ("SDA districts").

In its response, the State offers a "rough order of magnitude cost estimate" of \$1.97 billion for the major capital projects listed for "first tranche advancement" to construction in the Strategic Plan. State's Supplemental Cost Estimates Response, November 8, 2021, ("State's Supp. Resp.") at 1-3; Certification of Manuel M. Da Silva, November 8, 2021, ("Da Silva Cert.") ¶15. As Plaintiffs explain, the State's "rough" total cost for those projects lacks crucial details, excludes important cost elements and is, therefore, incomplete. More

importantly, the State's deficient cost estimate vastly exceeds the \$200 million for major capital projects appropriated in the State's FY22 Budget. See State's Supplemental Budget Brief, August 6, 2021, at 6. And, once again, the State provides no estimate, rough or otherwise, of the cost of emergent projects necessary to ensure the health and safety of students and staff in existing SDA district school buildings, including repairs and capital maintenance to ameliorate the impact of the COVID-19 pandemic.

STATEMENT OF FACTS

The State's response describes the "first tranche" of major capital projects in SDA districts in need of funding for "advancement" to construction. State's Supp. Resp. at 1-3. These include 11 specific projects to relieve overcrowding in 8 SDA districts; a to-be-determined ("TBD") number of projects to add seat capacity in 7 more overcrowded SDA districts; and 5 schools to replace aging facilities in 3 SDA districts. See Da Silva Cert., Strategic Plan appended to Exhibit A, at 17, 18 and 22.¹ On this motion, Plaintiffs estimated there were 8 TBD projects needed to relieve overcrowding in the 7 additional districts

¹ Plaintiffs' citations are to the page numbers of the Strategic Plan, also available at [https://www.njsda.gov/NJSDA/Content/Projects/2019 Statewide Strategic Plan.pdf](https://www.njsda.gov/NJSDA/Content/Projects/2019%20Statewide%20Strategic%20Plan.pdf).

and, accordingly, represented that the Strategic Plan prioritized construction of 24 projects. However, given the number of districts and grade ranges for the TBD projects on the advancement list, the actual number of unspecified projects to relieve overcrowding is likely higher than the 8 projects in Plaintiffs' estimate. Strategic Plan at 18.²

1. Projects to Relieve Overcrowding

The State makes clear that approximately 17,000 classroom seats must be added to relieve overcrowding in 15 SDA districts. Da Silva Cert. at ¶9. As discussed above, the State represents that those 17,000 seats are prioritized in the Strategic Plan by constructing 11 specific projects in 8 districts and an unspecified number of TBD projects in 7 additional districts. Strategic Plan at 17 and 18. All TBD projects, as well as the 11 identified projects, are listed in the "first tranche for advancement" to construction in the Strategic Plan. Strategic Plan at 23.

In its response, the State does not provide a breakdown of the complete cost to relieve overcrowding in the SDA districts

² The State, in its previous filings on this motion and in its November 8 response, does not contest the Plaintiffs' projection of 24 priority projects in the Strategic Plan, stating that "the number of new seats and the types of projects required to address the remaining capacity needs in each of these districts has yet to be determined." State's Supp Resp. at 2.

on a project-by-project basis. Instead, the State calculates the “average cost per square foot” for adding 17,000 seats which then translates to a “rough order of magnitude cost estimate” of \$1.6 billion “to address the entirety of overcrowding needs across all SDA districts.” State’s Supp. Resp. at 2; Da Silva Cert. at ¶¶9-11. This “rough” cost estimate includes the 11 specified projects in 8 districts and the as-yet unknown number of TBD projects across the remaining 7 districts. State’s Supp. Resp. at 2; Da Silva Cert. at ¶10.

2. Projects to Replace Aging Facilities

In addition to the \$1.6 billion estimate for the square footage to relieve classroom overcrowding, the State also gives the cost of replacing 5 aging buildings in 3 districts. These 5 replacement projects are prioritized for “first tranche advancement” to construction in the Strategic Plan. State’s Supp. Resp. at 3; Strategic Plan at 22. Here again, the State does not include a breakdown of the complete costs of constructing these 5 replacement projects. The State only offers a total “rough” estimate of \$370 million encompassing “building construction, site construction, contingency, furniture and technology fit-out and construction management” for these projects. State’s Supp. Resp. at 3; Da Silva Cert. at ¶13.

3. The State's Rough Cost Estimate of Major Capital Projects

Based on its "rough" estimates, the State gives a total cost of \$1.97 billion to "address the entirety of the remaining capacity needs" and the five replacement projects listed for "first tranche advancement" in the Strategic Plan. State's Supp. Resp. at 3. The State admits, however, that its estimate "does not represent" the cost of many project components, including: 1) land acquisition; 2) demolition; 3) cost escalation over time; and 4) individual district logistical factors. State's Supp. Resp. at 2-3; Da Silva Cert. at ¶11. The State also notes there will likely be cost adjustments through the "Working Group Discussions" with individual school districts and the Department of Education ("DOE"). State's Supp. Resp. at 2. Finally, because the State has yet to identify all projects necessary to relieve overcrowding, its total cost estimate is, by the State's own admission, incomplete.

The State's \$1.97 billion "rough order of magnitude cost estimate" for the major capital projects to relieve overcrowding and replace aging buildings vastly exceeds the \$200 million appropriation in the FY22 State Budget. The State fails to acknowledge this enormous gap. The State also makes no attempt to explain how or when it will seek and secure the funding for the complete cost of constructing all priority projects in the Strategic Plan.

4. Emergent Projects Costs

The State candidly admits that it is “unable to give a meaningful estimate of the cost of currently known emergent projects” in the SDA districts. State’s Supp. Resp. at 4. While the State indicates it will allocate the \$50 million appropriated in the FY22 State Budget towards “emergent school facilities and capital maintenance projects,” it also asserts that an accurate cost estimate of those projects must await the results of a “Building Conditions Assessment Survey” by the SDA and DOE. State’s Supp. Resp. at 3-4. The State, however, fails to acknowledge that in the Strategic Plan issued nearly two years ago, it represented that the SDA and DOE would undertake this survey to “accurately define, assess costs and prioritize emergent conditions” in existing SDA district facilities. Strategic Plan at 25. While the State’s response again acknowledges the urgent need for an assessment of building conditions to obtain meaningful cost estimates for emergent projects, the State again offers no firm commitment that it will undertake the survey with a timeframe for its completion.³

³ In a supplemental submission dated November 23, 2021, the State advises it has allocated the \$50 million appropriation in the FY22 State Budget as grants to all thirty-one SDA districts to pay or to reimburse for the cost of emergent repair and capital maintenance projects. The State provides no information on whether the specific grant allocations have any basis in district needs or, more importantly, the extent to which the

LEGAL ARGUMENT

I. THE STATE'S RESPONSE CONFIRMS THE STATE'S CONTINUING FAILURE TO FULLY FUND NEEDED SCHOOL FACILITIES IMPROVEMENTS IN SDA DISTRICTS AND THE NEED FOR THIS COURT'S INTERVENTION

Over twenty years ago, this Court made crystal clear the contours of the State's obligation to address unsafe, overcrowded and dilapidated school facilities in SDA districts: "the State is required to fund all of the costs of necessary facilities remediation and construction." Abbott v. Burke, 164 N.J. 84, 88 (2000) ("Abbott VII"). This directive was grounded in the State's promise to the Court during the 1997 remedial proceedings:

The State's proposal is based on the premise that the State will fund 100% of approved costs. After oral argument the State submitted to the Court its master funding formula for determining which costs will be approved. We conclude that any funding formula that does not fund the complete cost of remediating the infrastructure and life cycle deficiencies that have been identified in the Abbott districts or that does not fully fund the construction of any new classrooms needed to correct capacity deficiencies will not comport with the State's constitutional mandate to provide facilities adequate to ensure a thorough and efficient education.

Abbott v. Burke, 153 N.J. 480, 524 (1998) ("Abbott V").

The deficient cost estimates provided to the Court by the State clearly do not comport with the firm remedial directive for state funding of "all of the costs" and the "complete cost"

grants will remedy outstanding unmet needs.

of facilities improvements in SDA districts. As the State admits, its rough cost estimate does not include the "complete cost of remediating the infrastructure and life-cycle deficiencies" identified in the Strategic Plan by failing to identify all of the projects necessary "to address capacity deficiency" in the Strategic Plan. See State's Supp. Resp. at 2-3; Da Silva Cert., Exhibit A. As set forth in the Statement of Facts, supra, the State has failed to provide a project-by-project breakdown of those costs; to include the "complete costs" of correcting capacity deficits and replace aging facilities; and to provide any cost estimates of emergent projects in existing SDA facilities. See Abbott V, 153 N.J. at 524. Despite these failures, the State refuses to acknowledge that, even based on its incomplete "rough" cost estimate of nearly \$2 billion, the extremely limited appropriations for major capital and emergent projects in the FY 2022 State Budget are patently insufficient to fund "all of the costs of necessary facilities remediation and construction" prioritized in the SDA districts in the Strategic Plan. Abbott VII, 164 N.J. at 88.

The record on this motion, therefore, compels Plaintiffs to renew their request for the Court's immediate intervention to remedy the State's continuing failure -- if not outright refusal -- to fund the full and complete cost of needed facilities improvements in the SDA districts. The requisite remedial relief

remains a two-pronged directive for the State to seek and secure 1) funding for the complete cost of all major capital projects to relieve overcrowding and replace aging buildings, as prioritized for "first tranche advancement" in the Strategic Plan; and 2) funding for the cost of emergent projects as may be identified in a building conditions assessment survey of SDA districts or by such other means designed to yield accurate and meaningful cost estimates. Finally, given that the State's ongoing failures have resulted in the deprivation of Plaintiffs' right to safe and adequate facilities over the course of several years -- and necessitated two separate applications by Plaintiffs for judicial relief -- imposition of a deadline of January 31, 2022 for the State to secure the requisite funding is entirely appropriate to prevent any further delay.

On this motion and in its November 8 response to this Court on cost estimates, the State takes no issue with its obligation to fund the complete cost of remediation and construction of facilities improvements as needed in the SDA districts. As it has throughout the course of this litigation, the provision of such funding remains "the measure of the State's constitutional obligation to provide a thorough and efficient education[.]" Abbott V, 153 N.J. at 519 (anticipating Legislature's responsiveness to "constitutional call" once that call is made by the State).

CONCLUSION

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

Respectfully submitted,



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