SUPREME COURT OF NEW JERSEY
DOCKET NO. 42,170

RAYMOND ARTHUR ABBOTT, et al.,	)	
Plaintiffs,	)	Civil Action
v.	)	
FRED G. BURKE, et al.,	)	
Defendants.	)	

BRIEF IN OPPOSITION TO THE ELC'S MOTION IN AID OF LITIGANTS RIGHTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

NEW JERSEY CONSTITUTION CITED

STATUTES CITED

REGULATIONS CITED

RULES CITED

PRELIMINARY STATEMENT

The Court should reject plaintiffs' present motion because the education funding levels provided for by the Appropriations Act should not alter the Court's conclusion that the School Funding Reform Act is a constitutional unitary system of education funding. The decreases in school funding enacted through the Fiscal Year 2011 Appropriations Act were unavoidable. The Legislature allocated the reductions in a manner most consistent with both the funding formula deemed constitutional by this Court and a principled commitment to minimizing the brunt of decreased funding on those districts most reliant upon state aid.

Decreased revenues, pummeled by a national recession, required that the Fiscal Year 2011 Appropriations Act reduce significantly all areas of State spending. It was not possible, in such a situation, to fully fund the School Funding Reform Act (SFRA) or to hold educational funding harmless from reductions. The State simply does not have sufficient revenues to support either option.

The Legislature implemented and allocated the necessary reductions in a uniform and equitable manner such that those districts most reliant upon State aid are less affected by them when compared to wealthier districts. Educational spending in Abbott districts remains at the highest levels in the State. The reductions do not give rise to any constitutional deficiencies in educational funding and, hence, no judicial involvement is

necessary or appropriate.

Not only is judicial intervention unnecessary in the absence of any constitutional deficiency in funding, the Court should decline any interference with the appropriations process. The Court has recognized that the Appropriations Clause, buttressed by Article III, Paragraph 1 of the Constitution, assigns the responsibility to weigh competing public interests to the political branches and that, under such an allocation of powers, the Court's role is constrained and limited. Given the Legislature's commitment to funding SFRA formula aid to the maximum extent allowed by decreased revenues, the Court need not, and should not, consider plaintiffs' request for the extraordinary and unprecedented relief of ordering a fundamental reworking of an enacted Appropriations Act.

Because the Appropriations Act allocates all available educational funding in a manner consistent with constitutional requirements and this Court's prior holdings, the Court should deny plaintiffs' present motion and all requested forms of relief.

PROCEDURAL HISTORY AND COUNTER-STATEMENT OF FACTS

On June 29, 2010, the Legislature passed the FY 2011 Appropriations Act. Governor Christie signed the Act into law on that same day. L. 2010, c. 35. In enacting the FY 2011 Appropriations Act, the Legislature was constrained by significantly declining revenues due to a severe national recession and a longstanding structural deficit that had been exacerbated through the years by relying on myriad non-recurring revenues. Certification of Andrew P. Sidamon-Eristoff (Sidamon-Eristoff Certification), ¶¶5,7. For FY 2010, these "one shot" revenues included $700 million in tax amnesty revenues and $1.3 billion in federal State Fiscal Stabilization Funding (SFSF). Sidamon-Eristoff Certification, ¶8. Projecting revenues and available fund balance for FY 2011 of $28.667 billion, $823 million less than for the FY 2010 budget, the Legislature made reductions in almost all areas of the FY 2011 budget. L. 2010, c. 35; Sidamon-Eristoff Certification, ¶10. The FY 2011 Budget increased funding in only two areas: employee salaries and benefits and funding to address the increasing welfare caseload. Sidamon-Eristoff Certification, ¶15. In all, the FY 2011 Appropriations Act reduces spending from FY 2010 by $2.8 billion, an 8.7% reduction. L. 2010, c. 35; Sidamon-Eristoff Certification, ¶17.

State aid to school districts accounts for a significant portion of the State budget and could not be exempted from

reduction in FY 2011. Sidamon-Eristoff Certification, ¶19. The total projected growth for FY 2011 school aid was $1.8 billion, including the need to replace $1.057 billion of SFSF aid that supported School Funding Reform Act of 2008 (SFRA) formula aid[1] in FY 2010. Sidamon-Eristoff Certification, ¶6. Revenues to replace that amount of State school aid were simply not available. Accordingly, the Legislature reduced the appropriations for SFRA formula aid by $24.7 million and did not replace the $1.057 billion in SFSF funds that supported school aid in FY 2010, resulting in a total reduction of $1.066 billion. L. 2010, c. 35; Sidamon-Eristoff Certification, ¶20. Still, the Appropriations Act dedicates more than one-third of the total FY 2011 line item appropriations to school aid. L. 2010, c. 35; Sidamon-Eristoff Certification, ¶18.

The Appropriations Act modifies three provisions of the SFRA and directs the manner in which the aid allocation should be distributed to school districts. L. 2010, c. 35; Sidamon-Eristoff Certification, ¶¶21-23. The Act defines the Consumer Price Index (CPI) factor in the formula consistent with the CPI factor for aid

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[1] "SFRA formula aid" collectively refers to Equalization Aid, Education Adequacy Aid, Choice Aid, Transportation Aid, Special Education Categorical Aid, Security Aid and Adjustment Aid. If the State refers to State aid that includes Preschool Education Aid, the term "SFRA formula aid including preschool aid" will be utilized.

to municipalities,[2] does not permit any State aid growth,[3] and holds funding for Educational Adequacy Aid at the FY 2010 level.[4] L. 2010, c. 35; Sidamon-Eristoff Certification, ¶23.

The Act reduces the SFRA formula aid that each school district receives by an amount equal to the lesser of (a) 4.994% of its adopted 2009-10 General Fund Budget or (b) the sum of its SFRA formula aid. L. 2010, c. 35; Sidamon-Eristoff Certification, ¶21. The overall reduction in SFRA formula aid is 13.6%. Certification of Yut'se Thomas (Thomas Certification), Exhibits B, D, E. By allocating an individual district's reduction in State aid based on 4.994% of the district's overall General Fund Budget rather than 13.6% of the district's State aid, districts that rely most heavily on State aid do not lose the most State aid.

In fact, this methodology results in districts with higher socio-economic status based on District Factor Group (DFG),

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[2] As calculated pursuant to N.J.S.A. 52:27D-442, the CPI for 2011 is zero. Sidamon-Eristoff Certification, ¶23.

[3] As originally enacted, the SFRA limited State aid growth to 20% for districts spending below adequacy and 10% for districts spending above adequacy. N.J.S.A. 18A:7F-47(d).

[4] The mandated increase in the local levy for districts receiving Educational Adequacy Aid in FY 2011 has not been modified. N.J.S.A. 18A:7F-58(b). Accordingly, districts receiving that category of aid were required to increase their local levy by either 4% or 10%, depending on their equalized total tax rate and equalized school tax rate as compared to the State average. Ibid. Nor was there any change to the substantive programmatic requirements imposed by N.J.A.C. 6A:13. Cf. ELC Brief at 10 (DOE left each district to make its own decision about what "to cut" "to fashion a budget" consistent with FY 2011 aid).

having a greater average percentage loss of SFRA formula aid. Thomas Certification, Exhibit B. The average reduction in DFG I and J districts are 51.2% and 84.2% respectively. Thomas Certification, Exhibit B. Non-Abbott DFG A districts had an average reduction of 12.5% and Non-Abbott DFG B districts of 12.6%. Ibid. Abbott districts, 29 of which are DFG A or B districts, had an average reduction of 6.1%.[5] Ibid.

Viewing the reduction based on SFRA formula aid per-pupil and percentage of at-risk students, the picture is similar. See Thomas Certification, Exhibit A; Certification of Mel Wyns (Wyns Certification), Exhibit C. As Mr. Wyns points out, on an actual dollar basis, districts with higher percentages of at-risk students have a greater per-pupil reduction. Ibid. Those districts, however, receive significantly more State aid per pupil. Districts with less than 20% at-risk students receive an average of $1,692 per pupil in SFRA formula aid while, at the other end of the spectrum, districts with 60% or more at-risk students receive $13,020 per pupil. Thomas Certification, Exhibit A.

On a percentage basis, districts that have a greater number of at-risk students experience smaller SFRA formula aid loss. Districts with 20% or fewer at-risk students experience a

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[5] Hoboken, a DFG FG district, had a 25.6% reduction and Neptune, a DFG CD district, had a 11.1% reduction. Thomas Certification, Exhibit F, G. These reductions were the highest among the Abbott districts.

State aid reduction of 22.5%, districts with 20%-40% at-risk students were reduced 10.3%, districts with 40%-60% at-risk students were reduced 5.9% and districts with more than 60% at-risk students were reduced only 2.4% Thomas Certification, Exhibit A.

In two areas State school aid for FY 2011 reflects an increase over the appropriations in the FY 2010 Budget. Preschool Education Aid calculated using the modified CPI is increased by $17.2 million to support increases in enrollments. Sidamon-Eristoff Certification, ¶25; see also, fn2, *supra*. Extraordinary Special Education aid is increased by $14.9 million although that amount is 15% less than the projected FY 2011 need. L. 2010, c. 35; Sidamon-Eristoff Certification, ¶26.

Finally, the FY 2011 Appropriations Act reduces appropriations in other categories of school funding. It eliminates Adult Education aid, reduces non-public school aid by 15% and reduces debt service aid by 15%.[6] L. 2010, c. 35; Sidamon-Eristoff Certification, ¶27.

Despite a reduction in State aid from FY 2010, Abbott districts are still able to spend at the highest levels in the State. In FY 2011, Abbott districts will receive $3.933 billion of

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[6] Districts that received State support through the School Development Authority (SDA), instead of receiving debt service aid, are assessed an amount equal to 15% of their proportionate share of the principal and interest payments due in FY 2011 on the SDA bonds. SDA districts, i.e., Abbott districts, are exempt from this assessment. L. 2010, c. 35; Sidamon-Eristoff Certification, ¶27.

SFRA formula aid.[7] Thomas Certification, Exhibit C. This amount represents 57.4% of the total SFRA formula aid -- an increase in overall proportion of State aid over FY2010. Ibid. The Abbott average revenue per pupil for FY 2011, exclusive of federal aid, is $16,704. The DFG I&J average is $14,492 and the State average, excluding Abbott districts, is $14,128. Thomas Certification, Exhibit I.

Moreover, the Abbott districts have substantial federal aid available under Title I and the Individuals with Disabilities Education Act (IDEA). Abbott districts have more than $145 million in traditional Title I funding, or an average of $519 per pupil. Certification of Barbara Gantwerk (Gantwerk Certification), ¶4. In addition, as of June 30, 2010, Abbott districts have more than $80 million remaining in the $113 million in additional Title I funding provided under the America Recovery and Reinvestment Act of 2009 (ARRA) for 2009-10 and 2010-11.[8] Under the IDEA Part B Grant program, it is anticipated that the Abbott districts will be allocated approximately $72.5 million for FY 2010-11. Gantwerk Certification, ¶6. Moreover, as of June 30, 2010, Abbott districts

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[7] SFRA formula aid to Abbott districts was reduced in FY 2011 by $256 million. Seventy percent of that reduction was in the category of "hold-harmless" or adjustment aid. For more than half of the Abbott districts, adjustment aid was the only category of aid in which they were reduced. Thomas Certification, Exhibit G.

[8] The ARRA funds are provided on a reimbursement basis and the districts have until August 31, 2011 to obligate funds in order to seek reimbursement. Gantwerk Certification, ¶¶5, 7.

have close to $75 million in IDEA Basic and Preschool remaining from the ARRA two-year funding allocation. Gantwerk Certification, ¶7, Exhibit A.

On June 8, 2010, the Education Law Center (ELC) filed a Motion in Aid of Litigant's Rights with this Court. The ELC argues that the Legislature's failure to fully fund the SFRA violates this Court's decision in Abbott v. Burke, 199 N.J. 140 (2009) (Abbott XX). The ELC seeks from this Court an injunction to fully fund the SFRA for FY 2011. See ELC Proposed Form of Order. This would require the Legislature to appropriate an additional $1.8 billion in State school aid. Sidamon-Eristoff Certification, ¶6. In addition, the ELC argues that this Court should enjoin the State from conducting the legislatively-mandated study of the SFRA. N.J.S.A. 18A:7F-46(b). This brief is filed on behalf of the State in opposition to the ELC's Motion.

ARGUMENT

POINT I

THIS COURT SHOULD DENY THE ELC'S MOTION BECAUSE, DUE TO THE DIRE FISCAL CIRCUMSTANCES FACING THE STATE, THE AID REDUCTIONS WERE UNAVOIDABLE AND THE REDUCTIONS IN STATE AID TO THE ABBOTT DISTRICTS DID NOT RESULT IN DEFICIENCIES OF A CONSTITUTIONAL DIMENSION.

In May 2009, this Court decided Abbott XX. The Court determined that the SFRA was constitutional and "may be implemented as designed, as a state-wide unitary system of education funding." Abbott XX, supra, 199 N.J. at 147. The Court premised its finding "on the expectation that the State will continue to provide school funding aid ... at the levels required by the SFRA's formula each year" and noted that it "would require remediation of any deficiencies of a constitutional dimension." Id. at 146. While fully funding the SFRA was not possible in FY 2011 due to the unprecedented fiscal crisis, the Legislature established an equitable mechanism for allocating the State aid reductions that continued the statewide unitary system of education funding envisioned by the SFRA. By doing so, it allowed spending per pupil in the Abbott districts to remain at some of the highest levels in the State. Accordingly, the FY 2011 Appropriations Act does not result in a "deficiency of constitutional dimension" as contemplated by the Court in Abbott XX as a basis for intervention. The requested relief, therefore, should be denied.

As discussed briefly in the Procedural History and more

fully in the Sidamon-Eristoff Certification, the State is facing a fiscal crisis "perhaps unmatched in the State's history." Sidamon-Eristoff Certification, ¶5. The Legislature had few options this year other than to adopt an extremely austere budget. A national recession has significantly reduced the State's revenues. A structural deficit has grown in size. Reductions have been made in almost all areas with real growth areas limited to obligations for employee salary and benefit increases and support for welfare recipients, where the severe recession has resulted in increased caseloads. School aid, being one of the largest budget items, could not be exempted from reductions given the competing critical priorities. Sidamon-Eristoff Certification, ¶¶5-18.

In equitably and uniformly reducing State aid, the Legislature recognized that reducing aid on a pro-rata basis would affect severely those poorer districts that rely most heavily on State aid. To mitigate that effect, the FY 2011 Appropriations Act allocated the aid reduction more equitably by looking to each district's entire General Fund Budget rather than its amount of State aid. By doing so, the Legislature adopted a methodology consistent with some of the constitutional concerns previously enunciated by this Court. See e.g., Abbott v. Burke, 119 N.J. 287 (1990)(Abbott II) (finding minimum aid that went only to wealthier districts was unconstitutional because it was counter-equalizing and increased funding disparities); Robinson v. Cahill, 69 N.J. 133

(1975) (Robinson IV) (proposed remedy of redistributing of minimum aid and save harmless funds to less wealthy districts furthered goal of equal educational opportunity). Accordingly, the Appropriations Act allocates the higher relative losses in State aid to those districts with higher socio-economic status or lower numbers of at-risk students.

More significantly, far from "regress[ing] to the former problems that necessitated judicial intervention in the first place," Abbott XX, supra, 199 N.J. at 172, the Abbott districts, on average, spend more per pupil than the State average and even than the I and J average. In Abbott II, supra, the Court found that the poorer the district, the greater the need and the less money available, and that wealthier districts were spending, on average, 40% more than poorer districts. 119 N.J. at 335. It further noted that

> expenditure disparity does play a role, an important one, in our conclusion that the constitutional level has not been achieved in the poorer urban districts. This disparity has multiple relevance: to the extent educational quality is deemed related to dollar expenditures, it tends to prove inadequate quality of education in the poorer districts, unless we were to assume that the substantial differential in expenditures is attributable to an education in the richer districts far beyond anything that thorough and efficient demands; it indicates even more strongly the probability that the poorer districts' students will be unable to compete in the society entered by the richer districts' students; and by its consistency over the years, it suggests that the system as

it now operates is unable to correct this.

[Id. at 337.]

Today, under the FY 2011 Appropriations Act, the Abbott districts are able to spend 15% more per pupil on average than the wealthiest districts. Thomas Certification, Exhibit I. In addition, the Abbott districts have access to substantial amounts of federal aid, that, as a "practical consideration," cannot be ignored. Abbott XX, 199 N.J. at 173. Finally, most of the aid reduction in the Abbott districts was a loss of Adjustment aid, aid similar to the "save-harmless" aid that this Court found subject to redistribution in Robinson IV because it did not serve the goal of equal educational opportunity. 69 N.J. at 150.

Thus, based on the FY 2011 Appropriations Act, "a deficiency of constitutional dimension" warranting this Court's intervention has not occurred. Rather, balancing the Court's concerns regarding the Thorough and Efficient clause, N.J. Const. art VIII, § 4, ¶ 1, with the fiscal realities and need to have revenues that meet or exceed expenditures, N.J. Const. art VIII, § 2, ¶ 2, the Legislature and Executive have taken appropriate steps in allocating the unavoidable reductions in State aid to ensure that the "deplorable state of affairs" that "necessitated judicial intervention in the first place" will not reoccur. Abbott XX, 199

N.J. at 172. The motion, therefore, should be denied.[9]

[9]The Court should also deny the ELC's additional request, i.e., enjoining the Educational Adequacy Report that is required by N.J.S.A. 18A:7F-46(b). No legal basis exists for such an injunction. The Legislature has mandated the Report and, to the extent the ELC believes the conclusions reached in the Report are compromised by the level of funding in FY2011, it can certainly make those arguments at the appropriate time and in the appropriate forum.

POINT II

THE PRINCIPLE OF SEPARATION OF POWERS PRECLUDES THE COURT FROM GRANTING PLAINTIFFS' REQUESTED RELIEF

The Constitution allocates the power of appropriations exclusively to the Legislature. The Appropriations Clause mandates that:

> No money shall be drawn from the State treasury but for appropriations made by law. All moneys for the support of the State government and all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering and on the same fiscal year.
>
> [N.J. Const. art. VIII, § II, ¶ 2.]

"The power to appropriate is singularly and peculiarly the province of the Legislature." Robinson IV, supra, 69 N.J. at 180 (Mountain, J., dissenting). This command not only assigns the "ultimate authority of the Legislature over the appropriations function," Karcher v. Kean, 97 N.J. 483, 490 (1984), it serves as the "center beam of the state's fiscal structure," id. at 488. "It expresses the basic understanding that fiscal soundness and integrity are the foundations for proper governmental operations," ibid., that enhance the "responsibility and accountability" of public officials. City of Camden v. Byrne, 82 N.J. 133, 146 (1980). To that end, "the power and authority to appropriate funds lie solely and exclusively with the legislative branch of government." Id. at 148.

The Constitution grants appropriations power to the branch of government best suited to balance the competing demands on the public fisc. "The Constitution has placed the State's conscience in these matters in the Legislature and it is that branch of government which must weigh the interests of its citizens at all levels of government." City of Camden, supra, 82 N.J. at 158.

The Constitution also assigns the Governor a vital and essential role in the appropriations of State funds. As the Court observed, "the constitutional budgetary and appropriations authority is both centered in and shared by the legislative and executive branches." Karcher, supra, 97 N.J. at 490.

Together, then, the Legislature and the Governor share the sum total of authority to appropriate state monies, with the Legislature's exclusive constitutional responsibilities and authorities limiting, and limited by, the powers held by the Governor. The Court has acknowledge its own limited role in this constitutional scheme:

> [w]ith the ultimate constitutional responsibility for appropriations vested in the Legislature, and with executive responsibilities so clearly involved in the budget process, the judiciary has accepted its own absence of authority to compel either the Legislature to make a specific appropriation or the Governor to recommend or approve one.
>
> [Karcher, supra, 97 N.J. at 490].

A contrary conclusion would offend the "bedrock principle of our

federal and state constitutional forms of government—the separation of powers." In re P.L. 2001, Chapter 362, 186 N.J. 368, 378 (2006).[10]

In Robinson IV, the Court suggested that, in the event of a "theoretical conflict" between the Appropriations Clause and the Education Clause, the Education Clause would control. 69 N.J. at 154. Plaintiffs attempt to expand this statement far beyond its perimeter. To misconstrue Robinson IV as they suggest not only does disservice to the Court's reasoning, it does violence to foundational principles of the Constitution. A close examination of the Court's rationale and actions in Robinson IV belies their efforts to root the proposed remedy within its holding.

The Robinson IV Court "doubt[ed] the premise" that the case before it, or the remedy it imposed, represented a conflict between the Appropriations and Education Clauses. 69 N.J. at 154. It strove to craft a remedy consistent with both the Appropriations and Education Clauses and avoid creating such a conflict by constraining its remedy in several important ways. First, the Court's remedy concerned only monies that it assumed the Legislature would appropriate. Ibid. Second, the Court's remedy

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[10] While Article III, ¶ 1 does not mandate "complete insulation of the branches from each other," General Assemb. v. Byrne, 90 N.J. 376, 382 (1982), it commands that each exercises its own powers without transgressing on the functions of the others. Knight v. City of Margate, 86 N.J. 374, 388 (1981) ("Each branch of government is counseled and restrained by the constitution not to seek dominance or hegemony over the other branches.").

concerned only monies appropriated by the Legislature for educational purposes. Id. at 154. Third, the Court adopted a remedy similar in principle with Governor Byrne's proposal.[11] Id. at 148. Fourth, the Court's remedy directed that funds dedicated to educational purposes through the appropriations process be redistributed pursuant to a previously-enacted legislative formula. Id. at 155. Finally, the Court's order related solely to reallocating those educational funds that contributed to or maintained "existing arbitrary ratios of tax resources per pupil." Id. at 149.

At its core, the statement in Robinson IV simply reiterates the basic principle that the Legislature cannot use its appropriations authority to violate constitutional guarantees, whether it is the separation of powers, Communications Workers of Am. v. Florio, 130 N.J. 439, 451 (1992), a thorough and efficient education, Robinson IV, or any other provision. Indeed, in considering the "theoretical conflict" and performing the traditional judicial role of interpreting the Constitution, the Court simply harmonized the operations of two co-equal provisions in a manner most consistent with the language, structure, and foundational principles of the Constitution.

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[11] The Court emphasized that its remedy was more limited than the Governor's proposal. Id. at 148-50. It left untouched those funds suggested by the Governor that it determined were not relevant to the Robinson "criterion of equality of educational resources for the pupils." Id. at 149-50.

A broader reading of Robinson IV is constitutionally untenable. The Court did not abandon separation of powers, nor could it without trespassing upon the Constitution's clear language and thus abrogating its responsibility to protect the entire Constitution.

The situation before the Court in this matter is inapposite with that which confronted the Court in Robinson IV. While the Court could conclude in Robinson IV that its remedy did not implicate the separation of powers, plaintiffs' proposed remedy allows no such conclusion. This is not a matter of legislative inaction, as in Robinson IV. The inability to fully fund the SFRA formula "cannot be ascribed to indifference, coincidence, or accident." Camden v. Byrne, supra, 82 N.J. at 154. Rather, the Appropriations Act reflects the hard choices of the Executive and Legislative Branches required in allocating expenditures of a significantly smaller public fisc. These decisions resulted in an equitable mechanism for allocating State aid reductions to minimize impact on districts most reliant on State aid, akin to the remedy ordered in Robinson IV. To disregard unilaterally the determinations by the other branches would constitute a usurpation of authority unconstrained by any checks and balances by the other branches of government. Fitzgerald v. Palmer, 47 N.J. 106, 108 (1966) (noting that "under our system of separation of powers, the judiciary, not controlling the purse strings, cannot act

effectively alone.").

Plaintiffs' requested relief would require increased educational funding, accompanied by a concomitant decrease in funding for other programs and services, thus rendering asunder the Legislative and Executive branches' balancing of the many competing and worthy interests that demand state funding. Faced with dramatically falling revenues and budgetary demands far exceeding available funds, the political branches enacted an appropriations act that reduces spending across its entire spectrum. These reductions, while necessary, were not easy, pain free, or politically popular, and the political branches labored to achieve them in a manner that balanced competing interests and needs. The Appropriations Act reflects that, during likely the greatest budgetary crisis this State has known under its current Constitution, the State simply cannot continue to spend as it has in the past.

In a fiscal climate that demands retrenched expenditures, it is simply not possible, much less constitutionally compelled, to fully fund the SFRA in FY 2011. To suggest otherwise is to ignore, as do the plaintiffs, that the State has no additional resources to allocate.

POINT III

THE ELC'S REQUEST FOR ATTORNEY'S FEES MUST BE DENIED IN THE ABSENCE OF WILLFUL NONCOMPLIANCE OF A COURT ORDER BY A STATE DEFENDANT

The ELC's application to the Court includes a request for attorney's fees pursuant to R. 1:10-3:

> Notwithstanding that an act or omission may also constitute a contempt of court, a litigant in any action may seek relief by application in the action. ... The court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule.

Because there has been no willful non-compliance with a Court order by a State defendant in this matter, any prayer for attorneys' fees on this application may be dismissed.[12]

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[12]Also questionable is the invocation of the Court's jurisdiction here. The ELC casts its request for relief broadly, i.e., an order to fully fund the formula for all students, and presents analysis on behalf of the students in "high needs districts," which includes the Abbott districts and 62 other districts that meet the criteria of N.J.A.C. 6A:13-3.3. ELC Order; ELC Brief at 8-10. However, the "*Abbott v. Burke* litigation does not provide this Court with jurisdiction to address the statute's applicability to students not before the Court" and therefore the Court can not opine on the constitutionality of the funding levels on behalf of those students. Abbott v. Burke, 196 N.J. 544, 551 (2008) (Abbott XIX). Thus, the motion seeking relief for students beyond the plaintiffs in this lawsuit is improper. Additionally, the relief sought by the ELC -- an injunction of State aid to support the SFRA in an amount less than necessary to fully fund the formula -- requires action by the Legislature and the Governor. See N.J. Const., art. V, § 1, ¶ 14; art. VIII, § 2, ¶ 2. Critically, neither the Legislature nor the Governor are defendants in this matter. As such, the ELC can not argue that the named defendants have failed to comply with this Court's alleged "order" of Abbott XX, much less seek to enjoin the actions of State officials that are not a party to this litigation.

The general guidepost for a motion brought pursuant to R. 1:10-3 is that proceedings may not be appropriately instituted based upon the alleged failure to comply with a directive of the court that has not been embodied in a written order. Haynoski v. Haynoski, 264 N.J. Super. 408, 414 (App. Div. 1993) ("The *sine qua non* for an action in aid of litigant's rights, pursuant to R. 1:10-[3], is an order or judgement"). Additionally, the Court has previously found that a "motion in aid of litigant's right is normally reserved as a means to compel compliance with a judicial order." In the Matter of New Jersey State Board of Dentistry, 84 N.J. 582, 586 n.1 (1980) (it was procedurally inappropriate to bring motion in aid of litigants' rights where Appellate Division judgement invalidating fee schedule did not include order to refund overpayments). Here, the ELC has not directed the Court's attention to any written order of the Court to which it argues the defendants have not complied. Instead, the application seeks to enjoin the fiscal support of the SFRA at a level the ELC believes would be inconsistent with the Court's Abbott XX decision. Thus, it is clear there is no contempt of a written order giving rise to attorney's fees in this matter.

Moreover, it is well-established that "before the contempt finding may be made, the court must be satisfied that the defendant is able to comply and had no good reason to resist compliance." Pressler, Current N.J. Court Rules, Comment R. 1:10-3

at 185 (2010). See Arrow Mfg. Co. v. West New York, 18 N.J. Tax 574, 578 (N.J. Tax 2000) (type of willful neglect needed to invoke court's power under Rule requires nothing less than conscious intentional failure or reckless indifference). As set forth at length in the Statement of the Case, New Jersey -- along with the rest of the nation -- is in the midst of a fiscal crisis that has significantly affected the revenues available in the State to support many significant programs, including the SFRA. In making the difficult determinations how best to allocate the State's resources in this fiscal climate, the Legislature established an equitable methodology to minimize the impact of reductions in scarce State aid to those poorer districts that are most reliant on that aid - including most Abbott districts. These painstaking legislative determinations can not be fairly construed as "reckless indifference" to Abbott XX warranting the award of fees under the Rule.

Thus, while R. 1:10-3 recognizes that as a matter of fundamental fairness a party who wilfully fails to comply with an order or judgement is properly chargeable with his adversary's enforcement expenses, given the absence of an enforceable order, much less the needed "manifest contempt," it is clear that the ELC's request for attorney's fees must be denied.

CONCLUSION

For all of the foregoing reasons, the ELC's motion in aid of litigant's rights should be denied.

Respectfully submitted,

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7/9/10