

SUPREME COURT OF THE STATE OF NEW JERSEY
DOCKET NO. 62,700

RAYMOND ARTHUR ABBOTT, et al.,

Plaintiffs,

v.

FRED G. BURKE, et al.,

Defendants.

Civil Action

BRIEF OF DEFENDANTS REGARDING REPORT OF THE SPECIAL MASTER

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Number	Date / Time	Witness(es)
1T	Feb. 11, 2011	Case Management Conference
2T	Feb. 14, 2011 (a.m.)	Robert L. Copeland
3T	Feb. 14, 2011 (p.m.)	Robert L. Copeland John H. Crowe
4T	Feb. 15, 2011 (a.m.)	Dr. Bari Ehrlichson
5T	Feb. 15, 2011 (p.m.)	Dr. Bari Ehrlichson H. Victor Gilson
6T	Feb. 16, 2011 (a.m.)	Dr. Eric Alan Hanushek
7T	Feb. 16, 2011 (p.m.)	Earl Kim
8T	Feb. 21, 2011 (a.m.)	Earl Kim Kevin Dehmer
9T	Feb. 21, 2011 (p.m.)	Kevin Dehmer
10T	Feb. 23, 2011 (a.m.)	Walter Whitaker
11T	Feb. 23, 2011 (p.m.)	Walter Whitaker
12T	Feb. 24, 2011 (a.m.)	Richard Tardalo
13T	Feb. 24, 2011 (p.m.)	Richard Tardalo
14T	Feb. 25, 2011 (a.m.)	Melvin Wyns
15T	Feb. 25, 2011 (p.m.)	Melvin Wyns

PRELIMINARY STATEMENT

The Court should reject plaintiffs' present motion and defer to the good faith effort of the Governor and the Legislature that provided a constitutionally appropriate level of educational funding out of available revenues. New Jersey's fiscal crisis is arguably the most extreme in the State's modern history. Decreased revenues required that the Fiscal Year 2011 Appropriations Act reduce significantly all areas of State spending. The elected branches acted responsibly in implementing and allocating the necessary reductions in an equitable manner, ensuring that those districts most reliant on State aid were least affected by the cuts.

Full funding of the School Funding Reform Act of 2008 (SFRA) formula does not constitute a constitutional minimum. Rather, the Court should recognize that the formula was designed to exceed the constitutional requirement. Per pupil spending in New Jersey exceeds almost every other state in the nation and spending in the former Abbott districts remains at the highest levels in this State. In other words, although SFRA is not fully funded under the statute's original formula, current funding remains at a significant and constitutionally sufficient level - a level that reflects an appropriate constitutional response to the present crisis.

Faced with perhaps the worst economic conditions since the Great Depression, the elected branches reconciled available resources with all of the State's obligations, including those under the Thorough and Efficient Clause. They did it by focusing cuts in State aid based on each district's general fund balance, rather than on the amount of State aid received, thereby minimizing the cuts that would affect at-risk children in the Abbott districts and elsewhere. Moreover, available federal revenues minimized the effects of reduced State aid.

The Court should honor the Separation of Powers and Appropriation Clauses that are of equal weight to the Thorough and Efficient Clause. Given the Legislature's and Governor's good faith commitment to funding education within the confines of decreased revenues, the Court need not - and, indeed, should not - order relief. At this time of fiscal crisis, the judicial branch should defer to the reasoned judgment of the elected branches, reject the motion before it, and deny plaintiffs all relief.

PROCEDURAL HISTORY

On June 8, 2010, the Education Law Center (ELC) filed a Motion in Aid of Litigants' Rights with this Court. ELC argued that the inability of the Legislature to fully fund the SFRA violated this Court's decision in Abbott v. Burke, 199 N.J. 140 (2009) (Abbott XX), which relieved the State from the Court's prior remedial orders. Id. at 175. Although ELC initially sought, inter alia, injunctive relief with respect to full funding of the formula for Fiscal Year 2011, it now seeks only a declaration that the Constitution requires full funding of the formula.

On July 9, 2010, the State filed responsive papers. The State opposed plaintiffs' motion because the reductions to school aid were necessary in light of the dire economic and fiscal circumstances facing the State, because the necessary reductions were implemented in an equitable manner designed to minimize and mitigate the reduction of funding to poorer districts relying most heavily on State aid, and because the minimal decreases in funding did not give rise to gross disparities in funding.

On January 5, 2011, this Court heard oral argument on the motion. On January 13, 2011, this Court issued an Order. The Order concluded that the factual record before the Court did not allow for a determination whether current funding levels can

meet the requirement of providing for a thorough and efficient system of education. To that end, the Court appointed a Special Master, designated the scope of the remand proceeding, and delegated the burden to the State.

On January 25, 2011, the State moved before this Court seeking clarification of the Court's Order to permit the Special Master to consider the State's fiscal crisis. The State also requested that the Court expand the dates in the January 13, 2011, Order to allow sufficient time to develop and present its case. On February 1, 2011, the Court entered an Order denying both requests.

On February 11, 2011, the remand proceeding began. The Honorable Peter E. Doyne, A.J.S.C., sitting as Special Master, presided. The hearing was held over eight days. The parties submitted post-trial briefs on March 14, 2011. The Special Master issued its report on March 22, 2011.

The State submits this brief consistent with the modified briefing schedule established in this Court's Order of March 23, 2011.

STATEMENT OF FACTS

A. The SFRA Provides A Level Of State Aid That Exceeds The Constitutional Minimum.

In January 2008, approaching the end of a sustained period of unparalleled growth of revenues, the State enacted SFRA. Between Fiscal Year (FY) 2002 and FY 2008, State revenues had increased by approximately \$12 billion. In January 2008, State revenues were at an all-time high. JS ¶¶2, 3.¹ In its design and initial implementation, SFRA was, in many ways, emblematic of that era.

The State initially developed the SFRA through the professional judgment panel (PJP) process. Abbott XX, supra, 199 N.J. at 152. It was then "vetted [and] made more generous due to the input of panels of . . . experts unaffiliated with the DOE." Id. at 171.

As this Court recognized in Abbott XX, the State enhanced the results of the PJP process in numerous ways. Id. at 152-53. The State increased weights for at-risk, limited English proficiency (LEP) students, and combination at-risk/LEP students. D-125 at 10-14. The State also enhanced the PJP outcomes by adjusting salaries and benefits, adjusting costs for inflation and geography, adjusting base cost amounts including capital funds and professional development, increasing security

¹ The Joint Stipulation of Facts submitted to the Special Master will be referred to as "JS."

funding based on at-risk population, and expanding the definition of at-risk from students eligible for free lunch to students eligible for free and reduced lunch. Because of these collective enhancements, the SFRA provided for greater resources than the minimum level necessary to meet the constitutional standard. Abbott XX, supra, 199 N.J. at 164 (noting State's position that SFRA exceeds requirements necessary to provide CCCS to students in each district).

The SFRA also created adjustment aid, a hold harmless aid category providing that, for the first three years of the SFRA, no district would receive less than the amount of State school aid that the district received in FY 2008, plus 2%. N.J.S.A. 18A:7F-58(a); see Abbott XX, supra, 199 N.J. at 157 (describing adjustment aid as "transition assistance").

Consistent with the expectation that State revenues would continue to grow, the SFRA, as enacted, includes several provisions for increases in State funding. First, it contains a provision for annual growth in State aid consistent with a Consumer Price Index (CPI) calculation. N.J.S.A. 18A:7F-45. Second, it provides for growth of State aid on a yearly basis. N.J.S.A. 18A:7F-47(d). Although limited to 10% annual growth for districts above adequacy and 20% annual growth for districts below adequacy, id., the SFRA constructs State aid as a perpetually increasing amount of money.

Because of the SFRA's generosity, school districts were able to accumulate and save State aid as excess surplus.² In FY 2009, the first year of SFRA, districts accumulated \$430 million in excess surplus, with 20 Abbott districts able to accumulate more than \$100 million of that amount. D-162. The districts were legally obligated to appropriate the aggregate \$430 million in excess surplus funds for use in FY 2011, the year subsequent to the audited finding of actual excess surplus from FY 2009. JS ¶150; D-162. The subsequent year saw similar accumulation of excess State aid. In FY 2010, districts were still able to accumulate excess surplus of \$190 million designated for use in FY 2012, notwithstanding the withholding of \$475 million of State aid pursuant to Executive Order 14 (2010), 42 N.J.R. 660(b).³ D-162. Abbott districts accounted for more than \$35 million of that accumulated excess surplus.

² Excess surplus is any unbudgeted surplus in excess of the permitted two percent general fund balance. N.J.S.A. 18A:7F-7(c).

³ The decreased and decreasing revenues required drastic mid-year corrections as the revenue projections contained in the FY 2010 Appropriations Act significantly exceeded actual revenues in FY 2010. By February 2010, a projected deficit for FY 2010 of \$2.2 billion required the State to place certain funds in reserve to ensure that the State would not end the budget year in a deficit. Executive Order No. 14 (2010), 42 N.J.R. 660(b); see also, Perth Amboy v. Christie, 413 N.J. Super. 590, 594 (App. Div. 2010) (detailing projected shortfall). Funds placed into reserve included, initially, \$438 million in State school aid withheld from school districts that had available excess surplus from 2008-2009. Perth Amboy, supra, 413 N.J. Super. at 596-97.

D-162. Even after the reduction in State aid effectuated by Executive Order 14, districts needed to utilize only \$27 million of the identified excess surplus to support the FY 2010 budgets for the rest of that year, leaving more than \$400 million in excess surplus still available for FY 2011. Ibid. Only three Abbott districts needed to transfer surplus to support their FY 2010 budget. The total transfer for those three districts was less than \$5 million. Ibid. In addition to excess surplus, districts projected \$250 million of unused general fund balance, that is, part of the permissible 2% surplus carried by districts each year that went unexpended. Those funds were also appropriated for use in the 2010-11 school year. Ibid. In total, then, even with partial funding of the SFRA in FY 2010 and the withholding of State aid pursuant to Executive Order 14, districts were able to budget almost \$650 million in surplus to support their FY 2011 budgets. Ibid.

B. The FY 2010 Appropriations Act Relied On More Than \$1 Billion In Federal Funds To Support The SFRA, And Even Then Did Not Fully Fund It.

Within months of SFRA's enactment, the bottom fell out of the national and state economy. The trend of increasing revenues ended with the nationwide fiscal collapse that occurred in the Fall of 2008.⁴ JS ¶4. The FY 2010 Appropriations Act

⁴ Indicative of the rapidity and severity of the onset of the national recession and its effects on New Jersey's

softened the blow of these declining revenues on State aid for education by relying on \$1.057 billion of non-recurring federal State Fiscal Stabilization Fund (SFSF) revenues. JS ¶24.

However, even in FY 2010, the reliance on over \$1 billion in federal stimulus funding did not allow the State to fund SFRA as enacted. Rather, the FY 2010 Appropriations Act established State aid growth limits of 0% for districts spending above adequacy and 5% for districts spending below adequacy. L. 2009, c. 68, at 54.

C. In Enacting The FY 2011 Appropriations Act, Diminished Revenues Required The Legislature To Reduce Spending.

At the time of the FY 2011 Appropriations Act, State revenues were significantly diminished. The certified revenues for the FY 2011 Appropriations Act were at about the level of FY 2006 actual revenues and were \$823 million lower than FY 2010 certified revenues. JS ¶¶6, 29. Projected revenues from the Gross Income Tax were below actual results in FY 2006. JS ¶7. Revenues from sales tax and the Corporation Business Tax were projected to grow but to remain below actual results for FY 2007 and FY 2008. JS ¶¶10, 11. The Special Master called the

revenues, the FY 2009 Appropriations Act, effective July 1, 2008, actually funded the SFRA at levels exceeding the statutory level. Compare L. 2008, c.35 with N.J.S.A. 18A:7F-55(b) (fully funding SFRA, including State aid growth caps, plus increasing level for reimbursement of Extraordinary Special Education Aid beyond SFRA level). Just months later, the State's trend of increasing revenues came to an end. JS ¶4.

situation "an extraordinary budget crisis" Opinion/Recommendations to the Supreme Court, Abbott v. Burke, M-1293 (Mar. 22, 2011), at 5 (Opinion). See also, Sidamon-Eristoff Certification, ¶5 (recognizing that declining revenues, a massive structural deficit many years in the making, and the unavailability of federal one-time revenues combined to create "a budget crisis many years in the making and perhaps unmatched in the State's history"). As this Court is well aware, the New Jersey Constitution unconditionally forbids the State from adopting a budget in which expenditures exceed revenues. See N.J. Const. art. VIII, §II, ¶2; Lance v. McGreevey, 180 N.J. 590, 596 (2004). Thus, in response to that constitutional imperative and the State's bleak fiscal condition, lawmakers reduced spending across the entire spectrum of State spending. Sidamon-Eristoff Certification, ¶9.

D. The Legislature Sought To Minimize The Effects Of Reduced Overall Funding For State Aid On Those Districts Most Reliant On State Aid.

State school aid, which comprises more than one-third of the State's budget, was not immune from the necessary reductions in State spending. Although the FY 2011 Appropriations Act increased State resources supporting State education aid and committed a greater share of line item appropriations to school aid than its FY 2010 counterpart, it lacked the resources to replace the loss of \$1.057 billion non-

recurring federal revenues. JS ¶¶24, 44-45; Sidamon-Eristoff Certification, ¶¶18, 19.

While the SFRA contains the several escalating provisions discussed above, it contains no mechanism to conform school aid funding to diminished State fiscal resources. Accordingly, the Appropriations Act necessarily fashioned the reduction through a two-step process. First, it modified three factors in the formula: the Consumer Price Index, redefined consistent with N.J.S.A. 52:27D-442; the State aid growth limit, established as 0% for all districts; and the allocation of Educational Adequacy Aid, maintained at a district's 2009-10 funding level. JS ¶¶51-56.

Second, it reduced the sum of Equalization Aid, Educational Adequacy Aid, Security Aid, Adjustment Aid, School Choice, Special Education Categorical Aid, and Transportation Aid that would have been allocated under the modified formula by an amount equal to the lesser of (a) 4.994% of the district's adopted 2009-10 general fund budget, or (b) the sum of its 2010-11 initial allocation of the above categories of aid. JS ¶57.

The FY 2011 Appropriations Act committed \$6.8 billion to State school aid. JS ¶101. Compared to FY 2010 State school aid, which included the non-recurring and exhausted federal funds, the FY 2011 Act reduced State school aid by \$1.081

billion, or 13.6%, from the FY 2010 levels.⁵ JS ¶¶ 101, 102; D-96.

The reduction methodology resulted in those districts most reliant on State aid receiving a lesser reduction in State aid. Opinion, at 34-35. In FY 2011, Abbott districts received 57.4% of the total K-12 State aid, a greater percentage than in FY 2010. JS ¶118; D-95. The FY 2011 Appropriations Act reduced State aid to the Abbott districts from FY 2010 levels by \$256 million. JS ¶116. Adjustment Aid, recognized by this Court as transition assistance, constituted almost \$180 million, or 70%, of that amount. JS ¶124. No Abbott district lost State aid for education adequacy aid, choice aid, or special education categorical aid. Ibid. The average reduction in aid for Abbott districts was 6.1%; twenty-five of the thirty districts with the smallest percentage of State aid reductions were Abbott districts. JS ¶116; D-97. In contrast, fifty-nine wealthier districts received no State formula aid in FY 2011. JS ¶¶58, 59. The FY 2011 average per pupil State aid amount in districts with less than 20% at-risk students was \$1,543; in districts

⁵ During the course of the remand, it was calculated that the difference between running the SFRA consistent with its original statutory parameters and the aid allocated in the FY 2011 Appropriations Act is \$1.601 billion. JS ¶65. Under that full SFRA run, Abbott districts would have received an additional \$146 million, an amount equal to only 3.7% of the FY 2011 State school aid that they received. D-116.

with 20-40% at-risk students, it was \$3,526; and in districts with 40% or more at-risk students, it was \$10,828. JS ¶104.

In FY 2011, this reduction did not alter the positions of the Abbott districts as being among the highest-spending districts in the State. The average revenues per pupil for Abbott districts of \$16,393 exceed the State average revenues by \$2,195 per pupil and the average revenues for the wealthiest districts by \$1,751. D-101. Of the top thirty K-12 districts in terms of revenue per pupil, half are Abbott districts. Asbury Park's revenues are \$6,718 more than the highest spending K-12 I & J district. Six other Abbott districts also have revenues per pupil higher than the highest spending K-12 I & J district. D-103.

E. Federal Funding Designed To Assist States Support Educational Spending In A Time Of Fiscal Crisis Provided More Than \$800 Million In Stimulus-Based Assistance To School Districts.

Recognizing the depth of fiscal distress facing not only New Jersey but other states as well, the federal government provided stimulus funds to save and create jobs and to reform education through various funding streams. JS ¶¶132, 139, 140. In addition to and apart from the regular and substantial traditional, recurring federal funding streams,⁶ these stimulus-

⁶ In FY 2011, almost \$291 million in traditional Title I and School Improvement Allocation (SIA) funding was made available to districts. More than half that amount, \$153

based funds were intended to provide additional support to assist states in supporting the educational needs of at-risk and special education students during the national recession. 8T104:1-5 (Dehmer).⁷

Federal stimulus funds were available for use by school districts to mitigate the effects of the reduction in State aid. For example, on a statewide basis, New Jersey received \$180 million in American Recovery and Reinvestment Act (ARRA) Title I/SIA funds. JS ¶131. Testimony adduced during the remand revealed that districts used these funds to provide tutors, after-school programs, Saturday instructional programs, and reinstatement of a summer academy. 13T10:12-14 (Tardalo); 13T34:10-12 (Tardalo); 2T71:11-22 (Copeland); D-2.

New Jersey also received \$372 million in ARRA IDEA and Preschool funds. JS ¶138. Evidence before the Special Master demonstrated that some districts appropriately and effectively used the ARRA funds, for example, to support positions they

million, is allocated to Abbott districts. JS ¶¶128-29. Additionally, more than \$330 million in Individuals with Education Act (IDEA) Part B funds were available to support special education programs, and \$76 million of that amount is allocated to the Abbott districts. JS ¶¶135-37.

⁷ "8T104:1-5 (Dehmer)" refers to the eighth hearing transcript, at page 104 and lines 1 to 5. The parenthetical identifies the witness whose testimony is cited. A table of the hearing transcripts correlated to the witnesses who testified and the date of the testimony can be found immediately following the Table of Authorities.

deemed necessary and to reduce out-of-district tuition costs.
13T25:9-21 (Tardalo).

In addition to stimulus funds that augmented traditional federal programs and revenues, school districts also received more than \$262 million in federal funds through the Education Jobs Fund (Ed Jobs). JS ¶144. In light of fiscal constraints facing the states, the federal government implemented and designed Ed Jobs specifically to support public education employment during the current fiscal crisis. 8T91:21 to 92:2; 8T104:1-5 (Dehmer). Ed Jobs was intended to assist school districts to retain, recall, or rehire former employees or to hire new employees. JS ¶¶143, 144. Ed Jobs funds were distributed to school districts consistent with the method for allocating State aid in FY 2011. P-59. The Ed Jobs program allows the districts to use the Ed Jobs funding in FY 2011 or to reserve all or part of those funds for FY 2012. JS ¶148.

Abbott districts had a total of \$139 million in Ed Jobs funds available for use in FY 2011 to prevent reductions in school level staff. D-108; JS ¶¶143, 148. Of their approximately \$113 million two-year allocation of ARRA Title I & SIA funds, Abbott districts had \$83 million remaining as of June 30, 2010. JS ¶¶131, 134; D-110. Of their approximately \$90 million two-year allocation of ARRA IDEA Basic and Preschool funds, Abbott districts had almost \$75 million remaining as of

June 30, 2010. JS ¶¶138, 142; D-110. Combined, putting aside the traditional federal funding, the federal stimulus funds available to the Abbott districts for FY 2011 exceed the difference between funding the SFRA with full statutory parameters and what they received under the FY 2011 Appropriations Act. JS ¶¶131, 134, 138, 142, 143, 148; D-110, D-116. As the Special Master noted, however, he did not consider these sizable and available funds during the remand. Opinion, at 37.

ARGUMENT

POINT I

BECAUSE THE SPECIAL MASTER'S REPORT WAS
CONSTRAINED BY THE NATURE AND EXTENT OF THE
REMAND, ITS CONCLUSIONS DO NOT SIGNIFICANTLY
CONTRIBUTE TO THE COURT'S CONSIDERATION OF
THIS MATTER.

The findings of fact and conclusions reported to the Court by the Special Master are of little relevance to the Court in its consideration of the momentous issues before it. As the Special Master himself emphasized, he lacked authority to address the profound issues before the Court, and thus declined to do so. Thus limited, the remand proceeding and the report of the Special Master itself provide no bases for any real conclusions. The Special Master acknowledged but did not fully credit the persuasive testimony of the State's expert. Further, the Special Master construed the remand orders as precluding him from considering the State's fiscal crisis or the supplemental federal funding in his analysis. That diminished the relevance of his findings, or as the State aptly put it, "'divorc[ed] [the] constitutional analysis under Article VIII, § 4, ¶ 1 from both the pertinent facts, as well as other, co-equal constitutional provisions.'" Opinion, at 22 (quoting Def.'s Br. in Support of Mot. to Clarify, at 6).

Foremost, as the Special Master suggested in terms as stark as his charge and consistent with his respect for this

Court, he did not consider or express a view on the crucial questions outside his purview. He did not consider the fiscal crisis that indisputably confronted the elected branches. He recognized, but did not consider, the role of judicial deference to the co-equal branches of government in questions of educational policy. Such deference is especially relevant when the elected branches are forced to address a fiscal crisis in a manner consistent with multiple and competing constitutional considerations, including, most notably, the immutable command that expenditures not exceed available resources. He did not address the 79% of this State's school children not represented in this litigation. He did not consider the structural issues - such as "last in, first out," the procedure to remove ineffective teachers, and collective bargaining agreements - that reinforce and serve as the bulwark of the educational status quo. Opinion, at 7.

Notwithstanding those limitations, the remand encompassed not only the Abbott districts but "districts with high, medium, and low concentrations of disadvantaged pupils." After Abbott v. Burke, 119 N.J. 287 (1990) (Abbott II), school funding litigation - an issue of unmatched "scrutiny and controversy," Opinion, at 8 - shifted from broad systemic challenges to "as applied" challenges focused on a limited

number of districts. Traditionally, students from other districts have not participated in the Abbott litigation.

The critical distinction between the Abbott districts and every other district in the State is the historical finding of a constitutional violation. See, e.g., Abbott II, supra, 119 N.J. at 320 (concluding that "for the overwhelming number of districts in this State, [] there has been no showing that the constitutional mandate has not been satisfied."). The Court has long recognized that "New Jersey is already one of the highest spending states in the nation in terms of per pupil expenditures." Id. at 302. Funding levels in the State's most affluent school districts constituted the benchmark for the Abbott remedies exactly because the Court believes "such districts provided 'an objective and reasonable indicator of resources needed to achieve the CCCS.'" Abbott XX, supra, 199 N.J. at 150 (quoting Abbott v. Burke, 196 N.J. 544, 562 (2008) (Abbott XIX)).

Prior to this remand, the Court has never required that the State affirmatively demonstrate the constitutionality of funding levels in all districts, including non-Abbott districts. To the contrary, the Court expressly rejected the notion that "the State has failed to provide for a thorough and efficient education in all school districts." Abbott II, supra, 119 N.J. at 393. As the Court explained, given the high level

of spending in New Jersey, "[t]o so conclude would mean that our State Constitution has invented a standard so different from, and substantially higher than, the rest of the country that even though we spend almost the most, constitutionally that is not enough." Ibid. Certainly, a remand proceeding with the scope and duration of the present one does not support the contrary conclusion. Those districts have no proper role in this litigation.

No stronger proof of their misplaced participation is needed than the example of the Montgomery school district. Less than 3% of Montgomery's students are at-risk. See Abbott XX, supra, 199 N.J. at 174 (noting that Court's goal was to ensure constitutional guarantee "for those students who live in municipalities where there are concentrations of poverty and crime.") Montgomery, in its own words, has a "tradition of academic excellence" whose high school students are "among the highest ranking students in the state." D-169. In the 2009-2010 school year, over 97 percent of juniors passed the HSPA and, in that same year, over 940 Advanced Placement tests were taken with 95 percent of students receiving a score high enough to merit college credit. Ibid. The Class of 2010 had a 99.8% graduation rate, with more than 95% percent of those graduating students going on to attend college. Ibid. Perhaps the most telling evidence of the quality and excellence of the Montgomery

school district is that the "Class of 2010 mean SAT score of 1790 was 281 points above the national mean." Ibid. Moreover, the district's general fund budget in FY 2011 actually exceeded its previous year budget. D-132. These achievements and additional resources notwithstanding, the Special Master determined that Montgomery was unable to provide a thorough and efficient education to its students. Opinion, at 70.

The abbreviated schedule of the remand proceeding only exacerbated the unprecedented inclusion of non-Abbott districts. The schedule did not allow sufficient time to quantify fully the numerous enhancements to the SFRA beyond the levels identified in the PJP process, including:

- adjustments to salary and benefits, adjustments to costs for inflation and geography,
- adjustments to the base cost amount including capital funds and professional development,
- increased security funding based on at-risk population, and
- an expanded definition of at-risk students to include students eligible for free and reduced lunch.

[D-125, at 10-14.]

Several conclusions and observations of the Special Master only highlight the implications of the established schedule. Most starkly, the Special Master discounted the State's proofs on efficiencies realized and unrealized by the

districts. His stated rationale for doing so was because the State had failed to present "quantification of savings achieved or to be achieved by all districts for the FY 11 year." Opinion, at 62 (emphasis added). "Any finding concerning the overall amount of savings for 'efficiencies,'" the Special Master explained, would be "mere speculation." With due respect to the Special Master, such analysis was simply impossible within the time allotted. Demanding such a granular level of analysis was unrealistic.⁸

Absent such detail and quantification, the Special Master was not in a position to consider the big picture and therefore discounted the demonstrated ability of successful administrators to sustain, and even improve, educational outcomes while spending less. In contrast, this Court should take a broader view. In so doing, it should consider the opinion of the Montgomery superintendent that those districts spending at levels over "adequacy" have demonstrated far less fiscal restraint than Montgomery. D-29. Similarly, testimony from the superintendents of Piscataway and Woodbridge school

⁸ The Court's review of the Special Master's report is well-settled. It accepts the Special Master's factual findings "to the extent that they are supported by substantial credible evidence in the record." Abbott XX, supra, 199 N.J. at 146 n.2. It reviews legal conclusions de novo. Ibid. These standards of review must be viewed within the context of the Special Master's narrow charge and do not preclude this Court from considering the broader issues concerning the State's fiscal crisis.

districts illustrated both a commitment to providing CCCS at current levels and the ability to do so through effective management, increased efficiencies, shared services and privatization, revenue-generating activities, and reductions targeted to avoid core instructional areas. See, e.g., 2T33:20-34:11 (Copeland) (\$300,000 in additional revenue by providing transportation to other districts); 2T34:21-35:6, 2T35:7-23 (Copeland) (expanded special education programs generated revenues); 2T37:1-38:1 (Copeland) (savings through pooled cash management); 2T60:15-61:17 (Copeland) (savings through privatization); 2T116:13-19 (Copeland) (providing a thorough and efficient education under current funding levels); 3T60:7-16, 3T66:11-13 (Crowe) (saving of at least \$2.4 million through outsourcing of custodial and cafeteria services); 3T:72:22 to 73:25, 3T74:2-4, 3T140:7-145:1 (Crowe) (district can provide CCCS at current funding levels).

Similarly, even at higher concentrations of at-risk students, testimony from the Buena Regional and Clifton school district superintendents demonstrated that districts under adequacy can provide the CCCS through effective administration, cost savings, and programmatic and curricular reforms, even while constrained by questionable expenditures and decisions approved by the school boards. See, e.g., 12T75:10-22, 12T77:7-15, 12T77:16-78:13, 12T78:14-79:5 (Tardalo) (reducing costs

through cheaper health care plan, hiring different attorney, reducing mailing and printing expenses); D-152 (Clifton opened academy programs in visual and performing arts and business to provide opportunity for students to specialize in those areas); 10T98:1-19 (Whitaker) (reduced food service deficit); 11T49:5-21 (Whitaker) (replaced outdated reading program with new guided reading program); 11T60:12-61:25, 11T62:1-22 (Whitaker) (revised policies dramatically increased senior attendance and participation of students in advanced placement classes).

Given the time allotted, the Special Master should not have discounted the testimony of the State's expert based on analyses not performed. The Special Master concurred with Dr. Hanushek's opinion that "how money is spent is much more important than how much money is spent." Opinion, at 92. Dr. Hanushek's inability within the time allotted for this proceeding to undertake a detailed quantitative and systemic evaluation of New Jersey's obstacles to improving student achievement at current levels of funding does not alter the import of his testimony to the ultimate question, i.e., whether districts can provide the CCCS at the current levels of funding.

Dr. Hanushek's testimony further explained that the minimal reductions in FY 2011 State aid should not affect student outcomes because: (a) New Jersey spends more per pupil than any other State in the nation; (b) no actual evidence

exists of what effect these minimal aid reductions might have on student achievement because the nation has not seen reductions in education aid since 1933; and, (c) it is reasonable to infer that, because rapid and significant increases in educational spending have had no significant influence on improving student achievement, reductions in a district's general fund budget of up to 10% should not adversely affect student achievement. D-163; 6T21:8-13, 6T21:15-19, 6T19:17-21, 6T56:12-19 (Hanushek).

Finally, the remand schedule precluded consideration of academic performance data for the current school year. See Opinion, at 50. As a result, the remand record lacks crucial evidence for the Court's review. See Abbott v. Burke, 136 N.J. 444, 457 (1994) (Abbott III) (emphasizing that "ultimate constitutional focus . . . must remain on the students."). The release of the assessment results in or about January 2012 will be the crucible by which the testimony of the superintendents and the conclusions of the Special Master are tested. If the assessments show no appreciable decline in student performance, as the State's expert testimony predicted "with all confidence," 6T79:7-8 (Hanushek), the State will have met its burden, long after the record is closed, and for naught. The Court should stay its hand for that reason alone.

This Court should also reject the Special Master's conclusion that Abbott XX precludes consideration of more than

\$800 million in stimulus-related federal funding available to school districts in FY 2011. To the credit of the Special Master, and for the benefit of this Court's consideration, the record demonstrates the quantity, availability, and allocation of federal funding specifically designed to mitigate and assist districts faced with declining state and local resources as a result of the national recession. Opinion, at 30.

The Special Master erroneously concluded that the State sought to use the federal funds as a "crutch against some structural failing in the scheme itself," Opinion at 30 (quoting Abbott XX, supra, 199 N.J. at 174). First, the Special Master's reasoning begs the question. In Abbott XX, this Court upheld the SFRA as a constitutional funding formula that adequately accounted for the educational needs of at-risk students, so it is a far different analysis than in Abbott II, in which the system failed to do so. Second, as the Special Master explained, school districts had access in FY 2011 to both "recurring [federal] funding," as well as "one-time funding provided for a set period to save and create jobs, and to reform education." Opinion, at 38. Unconstrained by the requirement for a balanced federal budget, and in direct recognition of the depleted State resources available to states such as New Jersey, the federal government disbursed the federal funds to provide additional support for education and educators during the

national recession. In other words, the federal funds were intended to assist states in mitigating the very declines in State revenues that required the reduced State aid in FY 2011. Any reasonable constitutional analysis cannot ignore that massive amounts of federal funds were available to augment State aid and to mitigate the effects of declining state revenues on educational spending during this economic crisis.

Moreover, the stimulus funds are different from the traditional federal funds that the Court declined to consider in Abbott II. In Abbott II, supra, the Court determined not to consider the traditional, recurring federal funds in part because of the disparity in State funding between the Abbott and I & J districts. 119 N.J. at 330-31. Principally, the gross disparities of State funding present in Abbott II no longer exist. In addition, any concerns regarding the fluctuation of federal support should have been of no moment in the Special Master's limited remand. As already noted, the State reduced the funding for school districts in FY 2011 based on the fiscal crisis, not the presence of federal funds, and indeed allocated the federal stimulus funding on the basis of the reduction in State aid. Displacement of State aid by stimulus-based federal funds is not an issue.

Just as the scope of the remand constrained the Special Master from considering the questions that are truly at

issue in this litigation, its brevity similarly precluded the development and production below of a factual record worthy of issues of such import. For those reasons, along with the additional points raised above, this Court should place little weight in the report of the Special Master.

POINT II

SEPARATION OF POWERS COMPELS THAT THIS COURT DEFER TO THE EXECUTIVE AND LEGISLATIVE BRANCHES' METHOD OF MINIMIZING THE EFFECT OF THE FISCAL CRISIS ON THOSE DISTRICTS MOST RELIANT ON STATE FORMULA AID.

Foundational principles of separation of powers compel this Court to defer to the reasonable, good faith, and unavoidable reductions in school funding implemented in the FY 2011 Appropriations Act. The State's unprecedented fiscal crisis required the elected branches to take extraordinary measures to comply with the multiple constitutional provisions that dictate and constrain the appropriation of State resources. Moreover, the conditions that gave rise to the Court's involvement in questions of educational finance have been ameliorated. Given the high level of funding for education in this State, the fiscal crisis and the Legislature's reasonable responses to that crisis, the Court should stay its hand.

The New Jersey Constitution assigns to the Legislature a host of responsibilities, including the power to appropriate state monies. First, it charges the legislative branch with "provid[ing] for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, § 4, ¶ 4. Second, it assigns to the Legislature the exclusive authority to appropriate funds.

N.J. Const. art. VIII, § 2, ¶ 2; see Robinson v. Cahill, 69 N.J. 133, 180 (1975) (Robinson IV) (Mountain, J., dissenting) (noting that "power to appropriate is *singularly* and *peculiarly* the province of the Legislature"). Third, it demands that the State balance its budget. N.J. Const. art. VIII, § 2, ¶ 3; see City of Camden v. Byrne, 82 N.J. 133, 151 (1980) (observing that provision commands that "State's finances be conducted on the basis of a single fiscal year covered by a single balanced budget.").

The Constitution delegates the inherently democratic allocation of State funds to the branch best able to accommodate competing interests within those constitutional constraints. "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 entirety of the appropriations power assigned elsewhere, no residuum powers reside in the Judiciary. Karcher v. Kean, 97 N.J. 483, 491 (1984) (recognizing that "[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"); City of Camden, supra, 82 N.J. at 149 (acknowledging that "[t]here can be no redress in the courts to overcome either the Legislature's action or refusal to take action pursuant to its constitutional power over state appropriations"). This separation of powers is a constitutional imperative. N.J. Const. art. III, ¶ 1.

The Constitution permitted and required that the legislative and executive branches enact the reductions in school aid reflected in the FY 2011 Appropriations Act. Each of the State's major revenues were down. The non-recurring federal revenues relied on in the previous fiscal year were not available. Declining revenues, a massive and persistent structural deficit, and billions of unfunded liabilities compelled the elected branches to reduce spending across the spectrum of State spending in order to enact a balanced budget.

Faced with such inescapable pressures, the FY 2011 Appropriations Act sought to minimize the loss in State aid for those districts most reliant on it. Stated another way, the reductions in State aid most affected those districts with lower percentages of at-risk students. The Abbott districts received a higher percentage of the State's total aid in FY 2011 than they did in FY 2010. D-95. The Appropriations Act reflects, under the most trying of fiscal circumstances, the continued commitment of the Legislature and the Executive to fulfilling

the constitutional mandate. For example, in FY 2011, the State provided \$600 million more in direct aid to school districts than it did in 2006, \$300 million of which went to the Abbott districts. JS ¶79. In contrast, 59 districts received no formula aid. JS ¶58.

The Legislature acted responsibly in fulfilling its obligation to enact an appropriations act that balanced resources and expenses. It determined a fair, equitable, and reasonable means of minimizing the harms to those districts most reliant on State aid. Rather than refusing to discharge its responsibility through inaction, Robinson IV, supra, or "indifference, coincidence, or accident," City of Camden, supra, 82 N.J. at 154, the Legislature here carefully weighed the competing demands for scarce fiscal resources and determinedly sought to limit the effects of the inevitable reductions on plaintiffs' school districts. Abbott XX, 199 N.J. at 175 (emphasizing that "political branches of government . . . are entitled to take reasoned steps, even if the outcome cannot be assured, to address the pressing social, economic, and educational challenges confronting our state").

From that perspective, the Appropriation Act's means of calculating and equitably allocating the reductions in aid are entitled to judicial deference. Such deference would serve as a reasonable accommodation and fulfillment of the dual

mandates of providing for a system of thorough and efficient education and enacting a balanced budget. That is especially so given the generosity of the SFRA, New Jersey's historically and comparatively high level of spending on education, and the minimal reductions in State aid implemented in the FY 2011 Appropriations Act.

Moreover, and crucially, the reductions did not amount to a "deficienc[y] of a constitutional dimension," Abbott XX, supra, 199 N.J. at 146, that might otherwise suggest a role for the Court. As this Court recognized in Abbott XX, supra, "much has changed" between the onset of the Abbott litigation and its most recent incarnations. Id. at 144. Gross disparities in per pupil revenue between the plaintiffs' school districts and the I & J districts no longer exist. The statutory parameters of the SFRA provide resources greater than those needed to provide the CCCS. A marginal reduction of State aid less than 5% from the previous year's general fund budget should not affect districts' ability to deliver the CCCS. Additionally, the districts had access to huge sums of excess surplus and stimulus-based federal funding that they could use to support their ability to deliver the CCCS.

The Special Master ultimately determined that the numerous issues of moment relevant to improving educational outcomes in New Jersey were outside the scope of the remand. He

did not evaluate tenure laws that, in the view of some witnesses, protect ineffective teachers. He did not evaluate teacher contracts that, according to one witness, provided for extreme raises. He did not address contracts that permit teachers to work only a fraction of a day. He did not examine appropriate pay scales for administrators. Opinion, at 96. The Special Master further recognized that consideration of those efficiency issues "must be left to others." Ibid.

The Court recognized more than twenty years ago that the "problems" facing New Jersey "have bedeviled the entire nation. No one has solved them." Abbott II, supra, 119 N.J. at 296. If the Abbott II Court underestimated the challenge of identifying, formulating, implementing, and continually improving those approaches, it was not alone. Those issues remain at the forefront of both the State and national discourse. They are not amenable to easy solutions of any stripe, and far exceed the scope of judicial management or remedies. Because education is "one of the most important functions of government," id. at 304, "[t]he definition of the constitutional provision by this Court . . . must allow the fullest scope to the exercise of the Legislature's legitimate power." Ibid. That these problems persist in New Jersey must be viewed against the backdrop of the State's historically and consistently high level of spending on public education, the

eradication of disparities between its wealthiest districts and poorer urban districts, and decades of this Court's involvement in questions of educational finance.

The above suggests the need for all branches of government to reflect on the efficacy of past approaches. In participating in the ongoing debate on educational policy, the legislative and executive branches must be given room to address New Jersey's fiscal crisis in the manner sought here. Consistent with separation of powers, the Court should reject the motion at hand.

CONCLUSION

The findings of the Special Master do not address the larger questions affecting educational policy or the State's fiscal condition. The findings were compromised by the Special Master's stated limitations on his charge. This Court operates under no such constraints. The State urges the Court to consider the full weight of the State's fiscal crisis. In so doing, the Court should defer to the elected branches and their careful balancing of multiple constitutional mandates. The Court should respect the reasonable, fair, and equitable means of allocation of educational funding reflected in current appropriations. Accordingly, this Court should deny plaintiffs all requested relief.

Respectfully submitted,

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Dated: April 7, 2011