

RAYMOND ARTHUR ABBOTT, et al.,

Plaintiffs,

v.

FRED G. BURKE, et al.,

Defendants.

SUPREME COURT OF NEW JERSEY
DOCKET NO. M-1293

CIVIL ACTION

REPLY TO DEFENDANTS' RESPONSE TO SPECIAL MASTER'S REPORT

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PRELIMINARY STATEMENT

The State's brief in response to the Special Master's Report is most notable for what it fails to say. Specifically, it does not -- because it cannot -- contest the Special Master's conclusion, based on the exhaustive record created on remand, that the State failed to meet its burden of demonstrating that districts with varying concentrations of at-risk students can provide a thorough and efficient education, as measured by the Core Curriculum Content Standards ("CCCS"), at current funding levels. Nor does the State dispute the Special Master's conclusion that the \$1.601 billion reduction in formula aid under the School Funding Reform Act of 2008 ("SFRA") resulted in significant cuts to core teachers, academic supports, and other programs necessary to deliver the CCCS to all students, with the greatest impact on "our high at-risk districts and the children educated within those districts." Opinion/Recommendations to The Supreme Court at 93(March 22, 2011)("Report").

Instead, the State, for the most part, criticizes the scope and schedule of the Court's remand Orders, claiming that they unduly constrained the remand proceedings and rendered the Special Master's findings and conclusions of "little relevance," to be accorded "little weight" in the

resolution of Plaintiffs' motion. Brief of Defendants Regarding Report of the Special Master at 17, 28 ("Db"). The State even faults the remand Orders and the Special Master's determinations as preventing consideration of "larger questions" of educational policy that "reinforce and serve as the bulwark of the educational status quo." Db at 18, 36.

These criticisms are wholly unfounded and inapposite. The Special Master's Report directly responds to the Court's directives; provides detailed findings on the limited remand issue; and convincingly, if not overwhelmingly, demonstrates the harm caused to New Jersey school children, particularly at-risk children, by the State's failure to fund, implement and review the SFRA, as the State promised it would do and as this Court required for the SFRA to remain constitutional. Abbott v. Burke, 199 N.J. 140, 146 (2009) ("Abbott XX").

The State's complaints about being constrained on remand, along with vague references and speculation about possible efficiencies and cost savings, cannot overcome the grave constitutional harm found by the Special Master. Nor has the State established any other basis to deny relief for the proven harm. The time to remedy the State's failure is now.

ARGUMENT

I. THE STATE DOES NOT DISPUTE THE SPECIAL MASTER'S FINDINGS AND CONCLUSIONS AND, ACCORDINGLY, THEY SHOULD BE ADOPTED BY THIS COURT

The State, in its Brief, does not dispute the findings made and conclusions reached with regard to the State's failure to meet its burden on the limited issue assigned to the Special Master on remand: that school districts with varying concentrations of at-risk students are unable to provide a thorough and efficient education, as measured by the CCCS, at current funding levels. Since these findings of fact and conclusions are uncontested, they should be adopted by this Court.

More specifically, the State does not challenge any particular finding or conclusion as lacking substantial, credible evidentiary support in the remand record. This includes the following pivotal facts: (1) the State reduced SFRA formula aid by \$1.601 billion, or 19%; (2) high at-risk districts experienced the greater impact as a result of this reduction; (3) over one-third of school districts have moved further away from SFRA-defined funding adequacy; (4) the districts have suffered cuts in core teachers, academic supports, and other staff, programs and services necessary for the delivery of the CCCS; and (5) the districts have made their best efforts to mitigate the

impact of the aid loss through efficiencies, cost savings and the prudent use of surplus funds. Report at 71, 93.

The State also does not challenge the Special Master's credibility determinations with regard to the witnesses it heard, nor does it suggest that the Special Master, in reaching his conclusions, did not consider any of the relevant evidence proffered by the State on remand. Abbott XX, 199 N.J. at 146, n.2(citing State v. Chun, 194 N.J. 54, 93 (2008)).

Indeed, in the few instances in which the State even touches upon conclusions in the Report that are relevant to the limited remand issue, it offers no more than selective citations to the record in an effort to support assertions that are not, in fact, supported by record evidence, let alone substantial, credible evidence. Most notably, the State cites isolated portions of the testimony of the representative district superintendents to suggest that districts "can provide the CCCS through effective administration, cost savings, and programmatic and curricular reforms," Db 23, even as it wholly ignores the overwhelming evidence that, despite using their "best efforts" to achieve efficiencies and cost savings through a "thoughtful" budgeting process, the districts were still unable to prevent making significant cuts to core teachers,

academic supports, programs and services essential for the delivery of the CCCS to their students. Report at 62-63, 70-71, 85. The State also implies that districts could have offset the aid reduction through "excess surplus" by referring to year-end, summary accounting data from the Department of Education ("DOE"), Db 7-8, while ignoring the substantial record evidence, based on the superintendents' testimony, that the districts use of available surplus not only conformed to DOE guidelines, but also represented "fiscally responsible" planning for "future contingencies" in "uncertain" times. Report at 64-65.

Further, the State's suggestion that the "remand record lacks crucial evidence," because 2010-11 results from State assessments are not yet available, Db 25, fails to take into account the undisputed record evidence that many of the CCCS areas most heavily impacted by the cuts in teachers and programs are those not assessed by the State, Report at 49, and that, even in the tested areas, at-risk students "are becoming demonstrably less proficient." Report at 71, 84. Lastly, while baldly asserting that its expert Dr. Hanushek "explained" that the State's \$1.601 billion aid cut -- improbably characterized as "minimal" -- "should not adversely affect student achievement," Db 24-25, the State fails to address the Special Master's finding

that Hanushek's opinions were "of no probative force" because they were based on national, prior year data, and had no basis in any analysis or study of the State's reduction in SFRA formula aid and its impact on the delivery of the CCCS in New Jersey school districts. Report at 79.

With regard to Hanushek, the State now also complains that, because of this Court's remand schedule, he was unable to study "obstacles to improving student achievement at current levels of funding." Db 24. Yet the State fails to mention Hanushek's admission that he reached his opinion that New Jersey could absorb an aid cut of up to 10% and still provide a thorough and efficient education after just 30 minutes of conversation with State's counsel, and that, if asked, he would provide the very same opinion regarding any other state experiencing a similar aid cut. Hanushek Tr. 63:14-63:10; 76:23-77:12.

In sum, the State does not challenge the Special Master's meticulous and comprehensive factual findings and conclusions on the limited remand. Accordingly, this Court should adopt the Special Master's conclusion that, as a result of the State's underfunding of the SFRA in 2010-11, districts with low, medium and high at-risk concentrations are unable to deliver the CCCS, thereby depriving New

Jersey school children, particularly at-risk children, of a constitutional thorough and efficient education.

II. THE SPECIAL MASTER'S REPORT IS DIRECTLY RELEVANT TO DETERMINING THE STATE'S COMPLIANCE WITH ABBOTT XX

As discussed in Point I, supra, the State does not address, nor dispute, the record evidence on remand directly related to the State's failure to fully fund and implement the SFRA, as mandated by Abbott XX, and the resulting harm to the provision of a thorough and efficient education to New Jersey school children. Instead, the State argues that, because the Special Master failed to consider "crucial questions outside his purview," not only are his factual findings and conclusions "of little relevance," but also the entire Report and remand proceeding itself "provide no bases for any real conclusions." Db 17-18. These extraordinary claims are devoid of merit and should be rejected outright.

At the outset, as the Court's remand Orders make clear, the issue raised by Plaintiffs' motion is whether the State has complied with the "execution of its duties" under Abbott XX, given that the SFRA's continuing constitutionality was "predicated on the express assumption that SFRA would be fully funded and adjusted as its terms prescribed." Remand Order I, at 4(citing Abbott XX, 199 N.J. at 170). In order to assist the Court in its determination of this issue, the Court assigned the Special

Master the task of assessing the impact of the State's underfunding of the SFRA on the delivery of the CCCS in districts with low, medium and high concentrations of at-risk students, placing the burden of proof on the State. Thus, the provision of aid through the SFRA in conformance with Abbott XX is the issue -- indeed, the only issue -- implicated by Plaintiffs' motion, regardless of whatever other "momentous issues" or other generalized policy concerns the State may presently have with what it characterizes as "the educational status quo." Db 17-18.

Next, the State asserts that the SFRA formula, as enacted and upheld by this Court, contains "collective enhancements" that provide "for greater resources than the minimum level necessary to meet the constitutional [thorough and efficient] standard." Db 5-6. This contention has no basis in the SFRA formula itself, which, as the Court is aware, utilized the Professional Judgment Panel process ("PJP") to establish an initial framework that was then further refined in response to additional expert input. It was the final cumulative product that was enacted into law in the SFRA. Indeed, in carefully reviewing the development of the SFRA formula in Abbott XX, this Court found that the PJP process to be "a fair and

equitable first step in the creation of a constitutional funding formula." Id. at 160(emphasis added).

Moreover, there is nothing in the declarations upholding the constitutionality of the SFRA in Abbott XX to suggest that the formula, as enacted, does not define the funding required to provide a constitutional education to New Jersey school children. See, e.g., Abbott XX, 199 N.J. at 175(holding that, with the SFRA, "the legislative and executive branches...have enacted a funding formula that is designed to achieve a thorough and efficient education for every child, regardless of where he or she lives"); id. at 168(finding that the "level and manner of SFRA's funding" for at-risk students "satisfies the constitutional standard"); id. at 172(holding that, with the SFRA, the State "has constructed a fair and equitable means designed to fund the costs of a thorough and efficient education, as measured against the delivery of the CCCS").¹

¹The State asserts, without any showing, that it lacked time on remand to "quantify" certain "enhancements" to the SFRA, including salary and benefits adjustments and security. Db 21. However, the State fails to mention the testimony of DOE analyst Kevin Dehmer who calculated the dollar value of the most crucial changes made by DOE to the PJP results -- the increases in the at-risk and LEP weights. Mr. Dehmer's analysis demonstrated only a "minimal change" to the required SFRA funding level and are "self-evidently insufficient to even attempt to counterbalance the \$1.6 billion underfunded amount." Report at 81.

Indeed, the State's attempt to create out of whole cloth a constitutional distinction between the results of the "first step" PJP process, Abbott XX, 199 N.J. at 160, and the final SFRA formula, contradicts the State's own representations in urging the constitutionality of the SFRA before this Court. See State's Brief In Support of Motion, at 61 (March 17, 2008)(arguing that the SFRA, "[b]y using the CCCS as the basis for developing the educational resources and having New Jersey educators as well as national education experts identify and validate those resources," created the "crucial link" between the CCCS and the funding found lacking in the prior formula). There is simply no basis for the State's attempt to lower its funding obligations by uncoupling the initial PJP results from the entire SFRA development process, given that the funding levels provided by the SFRA formula, as enacted, were so central to this Court's declaration of the SFRA's constitutionality in Abbott XX.

Third, the State argues that school districts other than Abbott districts "have no proper role in this litigation." Db 19-20. However, it was the State itself that sought, and obtained, a ruling from this Court that "[t]he SFRA affords sufficient financial support for a thorough and efficient system of education for all New

Jersey children." State's Brief In Support of Motion at 56 (March 17, 2008)(emphasis added). Throughout the proceedings that culminated in the Abbott XX ruling, "[t]he State could not have been stronger" in arguing for the SFRA as a formula "designed to operate as a unitary whole," through which "all districts will benefit" and, "at the same time, at-risk children across the state will benefit." Abbott XX, 199 N.J. at 173; Report at 92(observing that the SFRA's "core objective" is "to create a unitary funding scheme to ensure all students are provided with a thorough and efficient education").

Contrary to the State's assertions, the Court's directive to the Special Master to develop an evidentiary record on the impact of the State's underfunding of the SFRA on low, medium, and high at-risk districts is entirely consistent with the determination of the statewide constitutionality of the SFRA in Abbott XX. Thus, the participation of representative districts, including Montgomery, a district with a low concentration of at-risk students, was not, as the State asserts, "misplaced," Db 20, but rather provides critical evidence on the impact of the State's aid reduction on the delivery of the CCCS to all New Jersey school children, the very issue remanded to the Special Master and now back before this Court. See

Abbott XX, 199 N.J. at 168-69 (finding the SFRA "implements a new innovative approach to providing sufficient resources to at-risk pupils wherever they happen to attend public school in New Jersey").

Fourth, the State again seeks to be excused from its obligation under Abbott XX to fully fund the SFRA formula because federal funds "were available for use by school districts to mitigate the effects of the reduction in State aid." Db 14. In continuing to advance this contention, the State ignores its own representation, accepted by this Court in Abbott XX, that federal funds would not be used "as a crutch against some structural failing in the funding scheme itself." 199 N.J. at 174; see also Report at 37. Moreover, even if federal funds could satisfy the State's constitutional obligation, the State's selective citations to the remand record fail to support its claim that such funds can offset the State's SFRA funding obligations. Rather, the record convincingly demonstrates that the purpose of the federal funds provided in 2010-11 was to augment state funds for specific programs, such as special education, preschool and federal Title I initiatives, Report at 37-40; or, as in the case of one-time Education Jobs funds, have largely been carried over by districts to

support the FY12 budget, in response to advice from the Acting Commissioner of Education. Report at 40.

More importantly, the record evidence makes abundantly clear that whatever federal funds were available in the districts' budgets could not, and did not, prevent the significant cuts to core teachers, academic supports, and other staff, programs and services essential to the delivery of the CCCS, triggered by the State's substantial reduction in SFRA formula aid. Report at 66-67, 71. The State offers no challenge to this finding.

Finally, the State sharply criticizes the Special Master for failing to consider what the State characterizes as "structural issues - such as 'last in, first out,' the procedure to remove ineffective teachers, and collective bargaining agreements." Db 18; see also Db 33-34(referring to Special Master's refusal to consider "numerous issues of moment relevant to improving educational outcomes"). In light of the issue of State compliance with Abbott XX presented by Plaintiffs' motion, and the limited task on remand to facilitate this Court's consideration of that issue, the Special Master had no reason to entertain evidence related to such general matters under broader public discussion, matters which were not raised by the State in response to Plaintiffs' motion and were not a part

of the Court's remand Order. In short, none of the State's concerns with what it calls "the educational status quo," Db 18, are currently before this Court and, as the Special Master correctly observes, are "better left examined on another day, possibly in another forum." Report at 79.

In sum, the State does not directly address the substantial issue of compliance with the Abbott XX obligation to provide constitutionally adequate funding to New Jersey school children through full funding of the SFRA formula, the very same formula it vigorously urged this Court to approve two years ago. Report at 94-95. Rather, the State attempts to divert attention from its failure to meet its burden on remand, and its own constitutional responsibilities under Abbott XX, by criticizing the Special Master's diligent efforts to perform and complete his "assigned task" within the time and issue framework established by this Court's remand Orders. Even worse, the State seeks to inject generalized concerns about educational policy into the case, lending further credence to the Special Master's observations that, rather than addressing the issue raised by the Court, the State instead now believes that "the formula is ill conceived and therefore need not be fully funded," and thus "seeks to abandon the formula it fought so strenuously to support."

Report at 93, 94-95. The State's present position is unresponsive to the Court's directives, unsupported by the evidence of record, and irrelevant to the serious constitutional issues that once again bring this matter before this Court.

III. THERE IS NO BASIS FOR JUDICIAL DEFERENCE TO STATE SCHOOL FUNDING DECISIONS THAT CONFLICT WITH THE PROVISION OF A THOROUGH AND EFFICIENT EDUCATION TO NEW JERSEY SCHOOL CHILDREN

The State contends that the Separation of Powers doctrine requires judicial deference to the substantial underfunding of the SFRA in the FY11 Appropriations Act. Db 29. Further, although not challenging the Court's authority to remedy a constitutional violation of the Thorough and Efficient Education Clause, the State nonetheless urges the Court to "stay its hand," *id.*, contending that "the legislative and executive branches must be given room to address New Jersey's fiscal crisis in the manner sought here." Db 35. The Court should reject these arguments.

First, throughout the history of the Court's efforts to resolve matters involving school funding, the Court has repeatedly confronted and rejected the State's argument that the Separation of Powers doctrine bars judicial relief for a constitutional violation, even if, as is always the case, such relief has budgetary implications. See Plaintiffs' Reply Brief at 9-15 (July 19, 2010)(citing Robinson v. Cahill, 69 N.J. 133, 154-155 (1975) ("Robinson IV") and Robinson v. Cahill, 70 N.J. 155, 159-160 (1976) ("Robinson VI"). Most recently, with respect to this same

issue, the Court in Abbott XX reaffirmed its "role in enforcing the constitutional rights of the children of this State should the formula prove ineffective or the required funding not be forthcoming." Abbott XX, 199 N.J. at 169.

Second, there is no basis for the State's assertion that the underfunding of the SFRA formula in 2010-11 does not amount to a "deficienc[y] of a constitutional dimension." Db 33, quoting Abbott XX, supra, 199 N.J. at 146. To the contrary, the extensive record developed on Plaintiffs' motion, now supported and augmented by the detailed findings of fact and conclusions of the Special Master, unequivocally demonstrates that the State's aid reductions resulted in a substantial violation of the fundamental right of New Jersey school children to a thorough and efficient education under the Education Clause of the New Jersey Constitution. Report at 92-93. The State cannot and does not take issue with these findings or conclusions, and fails to explain how, given those facts, a constitutional violation has not been established.

Third, and instead, the State argues that the Court, though faced with a proven constitutional violation, should defer to the other branches of government because, confronting a fiscal crisis and the need to balance the State budget, the FY11 Appropriations Act contained a

"fair, equitable, and reasonable means of minimizing the harms to those districts most reliant on State aid." Db 32. There is, however, nothing in this Court's established jurisprudence regarding the Thorough and Efficient Education Clause that recognizes factors such as these as an appropriate basis for the Court to simply fail to act. The very premise of the State's argument -- that any harm from the State's aid reductions has been "minimized" -- requires that the Court ignore, as the State has, the Special Master's finding that these cuts "fell, most significantly, on those [high at-risk] districts least able to withstand the reductions." Report at 95.

Finally, the State implores the Court not to act on the basis of the claim that policy "issues" and "approaches" to improve public education -- that "remain at the forefront of both the State and national discourse" -- "are not amenable to easy solutions of any stripe, and far exceed the scope of judicial management or remedies." Db 34. This Court, however, has not been asked by Plaintiffs on this motion to consider educational policy concerns, or determine the optimum set of measures to improve educational performance. Rather, Plaintiffs seek only the prospective enforcement of the judicial mandates in Abbott XX -- mandates that resulted from now reneged-upon promises

by the State. The State does not, and cannot, assert that those mandates, and their enforcement by this Court, were or are beyond the Court's well-settled judicial authority.

In sum, there are no "principles" of Separation of Powers, as the State asserts, Db 29, that prevent the Court from providing the realistic and measured relief sought by Plaintiffs to remedy the stark constitutional violation resulting from the State's underfunding of the SFRA, an action that directly conflicts with this Court's Abbott XX mandate. Faced with a clear showing of constitutional default in the implementation of the SFRA, and the demonstrable harm to New Jersey school children caused by that default, the Court "must now proceed to enforce the constitutional rights involved," Robinson IV, supra, 69 N.J. at 139-40, and order the relief requested by Plaintiffs.

CONCLUSION

For the reasons stated above, and in Plaintiffs' prior briefs on the motion before this Court, Plaintiffs respectfully submit that the Court adopt the findings of fact and conclusions in the Special Master's Report. Plaintiffs also request that the Court grant Plaintiffs' motion and enter an immediate order directing the State to fully implement the SFRA formula, as enacted and approved by this Court, by providing full funding for 2011-12 and two years thereafter, and by conducting in 2014 the statutorily required three year review of the SFRA's efficacy.

Respectfully submitted,



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