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

REPLY BRIEF OF DEFENDANTS REGARDING REPORT OF THE SPECIAL MASTER

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625

PETER G. VERNIERO, ESQ.
SPECIAL COUNSEL
Sills Cummis & Gross P.C.
One Riverfront Plaza
Newark, New Jersey 07102

Attorneys for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes Cited

Constitutional Provisions Cited

PRELIMINARY STATEMENT

The issue before this Court is whether it should defer to the best efforts of the elected branches to support public education in enacting the Fiscal Year (FY) 2011 Appropriations Act. Despite Plaintiffs' attempt to expand the present motion into a broad, open-ended inquiry of future budget years, the record before the Special Master was limited specifically to FY 2011. Even within that limitation as more fully explained in Defendants' most recent brief, the remand proceeding was incomplete because it lacked, among other things, critical assessment data and its scope did not permit the Special Master to consider uncontested proof that New Jersey's fiscal crisis is perhaps the worst in its modern history.

Within the confines of that crisis, the Legislature and Governor worked in good faith in enacting the Appropriations Act, especially as it relates to funding in the Abbott districts. Evidence of such good faith is best reflected in the fact that the Abbott districts received a smaller decrease in State aid over FY 2010, 6.1%, than any District Factor Group. Thus, the Court should not focus merely on the monetary reductions made in response to the State's severe fiscal condition, but rather on the elected branches' careful attempt to reduce the budgetary impact of the crisis on the Abbott districts.

This Court should defer to the good faith efforts of the elected branches to fairly and equitably allocate educational funding consistent with relatively minimal reductions to Plaintiffs. Separation of powers and this Court's respect for the other branches of government compel such a conclusion.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendants rely upon the procedural and factual histories provided in their main brief regarding the Report of the Special Master.

ARGUMENT

The Court should deny Plaintiffs' request for prospective relief as unsupported by the record, unnecessary in the absence of any constitutional violation, and contrary to its deference to the elected branches of government. Fundamentally, Plaintiffs miscast the issue before this Court. They attempt to reduce the real constitutional issues to a fact that is not in dispute, namely, that the School Funding Reform Act (SFRA) was not fully funded in FY 2011. In so doing, they ask the Court to ignore the huge absolute and relative amount of State funding directed to these districts, as well as the committed efforts of the elected branches to support education funding under the constraints of a constitutionally-mandated balanced budget and

in fulfillment of the many competing and compelling obligations of government.

Plaintiffs' submission could not underscore more boldly the disjuncture between, on the one hand, the limited remand hearing and, on the other, the relief sought from this Court. They expand the Special Master's conclusions beyond their explicit and limited parameters and into generalizations untethered in both scope and time from any evidentiary support in the proceeding below. Neither the record nor argument before this Court provides any basis to discuss anything other than funding levels in FY 2011.

POINT I

THE LEGISLATURE'S REDUCTION IN STATE AID MINIMIZED THE EFFECTS ON PLAINTIFFS AND DID NOT GIVE RISE TO CONSTITUTIONAL DEFICIENCIES.

Before this Court are important questions of interpretation and balancing, including the construction of our State's Constitution as a coherent whole and the allocation of responsibilities and authorities among branches of government. In enacting the FY 2011 Appropriations Act, the Legislature was not able to fully fund the SFRA without doing harm to other critical services provided by the State to its residents. The fact that SFRA was not fully funded in FY 2011 does not assist the Court's consideration of the real issue: whether the

Legislature's good faith, reasonable reduction in funding of the SFRA gave rise to a deficiency of a constitutional dimension for students in the Abbott districts in FY 2011.

The answer is that it did not. The SFRA was designed to provide funding greater than the constitutional minimum. The reduction in overall funding reflects an appropriate and reasonable effort, in response to an extreme fiscal crisis, to maintain funding at a constitutionally sufficient level and, furthermore, to insulate Plaintiffs from the bulk of those reductions.

A. The Legislature minimized the reductions in State aid to those districts most reliant upon such aid.

The reasonable methodology adopted in the Appropriations Act reduced the Abbott districts' allocation of State aid by only 6.1%, as compared to the reduction over FY 2010 of 51.2% in District Factor Group (DFG) I districts and 84.2% in DFG J districts. D-94. Additionally, as the simulations generated during the remand proceeding demonstrate, the majority of Abbott districts would not have received an increase in State aid over FY 2010 levels under the SFRA's statutory parameters.

Stated differently, in FY 2010, the 31 Abbott districts received $4.188 billion in State aid, exlcusive of all

federal funds.[2] In FY 2011, the Abbott districts received $3.932 billion in State aid, $256 million less than the year prior. D-94. Statewide, including the Abbott districts, the decrease in FY 2011 over FY 2010 was $1.081 billion. D-109. When added to the $520 million shortfall of simulated full SFRA funding, the total reduction Statewide was $1.6 billion. D-124. As discussed in the State's main brief, these reductions did not displace the Abbott districts, as a group, from their primacy in terms of revenues per pupil as compared to other districts in the State or New Jersey from its place among the highest-spending states. D-101, D-103; Opinion, at 94.

---

[2] The State used the Abbott district's allocation of $4.188 billion State aid in FY 2010 as the base to simulate the increase in State aid for the SFRA if it was run in FY 2011 utilizing its full statutory parameters, i.e., 1.6% CPI, 10/20% growth caps, and full Education Adequacy Aid. For the Abbott districts, the increase as compared to FY 2010 would have been $146 million, and only 12 Abbott districts would have had an increase. D-116. Statewide, including the Abbott districts, the increase is $520 million. D-120. When these conditions are combined, the difference compared to FY 2010 is $1.6 billion, statewide, and $402 million for the Abbott districts. Comparing actual FY 2011 State aid (which incorporates the reduction as compared to FY 2010) to the simulation of FY 2011 state aid using full statutory parameters, 16 of the 20 districts with the smallest percentage difference were Abbott districts. D-124. (Note: Footnote 5 of Defendants' main brief regarding the report of the Special Master contained a typographic error. The last sentence of that footnote should have read, "Under that full SFRA run, Abbott districts would have received an additional $146 million, an amount equal to only 3.7% of the FY 2010 State school aid that they received. D-116.")

B. The Abbott districts were able to mitigate the minimal reductions in State aid with stimulus-based federal funds.

The Court should recognize that the substantial federal stimulus-based funds available to these districts in FY 2011 to support education spending and employment substantially or entirely mitigated the effects of the minimal reductions in State formula aid. Neither the Constitution nor precedent require that this Court ignore the huge sums of federal funding available to Abbott districts to provide them additional support in meeting their students' educational needs in a time of national economic crisis. Combined, $158 million of these ARRA funds remained available in the Abbott districts as of June 30, 2010. JS ¶¶134, 142. Additionally, the Abbott districts received more than half of the State's Education Jobs Fund award of $262.7 million to support educational employment in Fiscal Years 2011 or 2012. JS ¶¶144, 145.

These federal funds exceed the amount reduced in the Abbott districts over FY 2010 on an aggregate basis. D-111 (combined federal funds of $297 million exceed the $256 million reduction in K-12 State aid over FY 2010). When these federal funds are combined with the significant surpluses from past years appropriated to support FY 2011 budgets, these revenues exceed the reduction in State aid for almost all but three Abbott districts. D-113 (showing 28 of 31 Abbott districts with

federal stimulus and budgeted surplus, which excludes undesignated unreserved funds of up to 2%, in excess of the decrease in K-12 aid over FY 2010).

Nineteen of the Abbott districts would not have had an increase in State aid over FY 2010 compared to simulated FY 2011 aid under full SFRA parameters. Three more Abbott districts have shortfalls under that simulation that are entirely mitigated by these federal stimulus and budgeted surplus revenues. D-113; D-124 (utilizing federal stimulus, Ed Jobs, and Budgeted Fund Balance sums of D-113 and comparing those sums to the aid difference amounts on D-124). For instance, Jersey City's aid difference of $26,835,520 is entirely mitigated by its federal stimulus aid plus budgeted fund balance, $62,863,585. Ibid. New Brunswick's aid difference of $12,979,572 is also met by the sum of its federal stimulus aid and budgeted fund balance of $19,044,391. Ibid. Similarly, Union City's aid difference of $21,810,717 is well exceeded by the sum of its federal stimulus aid and budgeted fund balance, $22,433,881. Ibid.

C. Historical evidence suggests that the relatively minimal reduction in State aid will not affect student achievement.

The relatively minimal decreases experienced by the Abbott districts likely will not negatively affect academic achievement. In the absence of assessment data of any type for

the current school year, past experience, not speculation, is likely the most reliable guide. Massive increases in educational spending have not produced commensurate improvements in academic outcomes. On the national level, the sad truth is that increases in aid have done little to improve achievement. See 6T21:1-4, 6T25:13-14 (Hanushek).[3] A four-fold increase in national spending on education since 1960 supported smaller class sizes and teachers with advanced degrees and years of experience. D-80; 6T22:15-23 (Hanushek). Over that same time period, math and reading scores for seventeen year olds have not changed. D-81; D-82; 6T24:15-20 (Hanushek). In New Jersey, which not only spends more per pupil than any other state but also saw rapid increases in educational spending between 2000 and 2008, those increases unfortunately had no significant influence on student achievement. D-83 to D-86; D-163; 6T28:22-24, 6T29:1-11, 6T31:7-25, 6T32:15-20, 6T33:11-13 (Hanushek). It follows, then, that the reductions also will have little or no effect on achievement.

D. The Constitution does not mandate full funding of SFRA.

The Constitution does not mandate full funding of SFRA. Such a conclusion follows from this Court's prior remand

[3] 6T21:1-4 (Hanushek) refers to the sixth hearing transcript, at page 21, lines 1 through 4. The parenthetical identifies the witness whose testimony is cited. The Table of Transcripts is provided in Defendants' main brief, at iv.

orders in the instant litigation. If anything less than full funding constituted a constitutional violation, Plaintiffs' motion would have been amenable to summary disposition, not one requiring, in this Court's view, additional fact-finding. Such a mindset also would have reduced the State's fiscal crisis to an absolute irrelevancy, not an issue that the Court has retained for its own consideration. It also would reduce the richness of the Constitution to mathematical precision, unable to acknowledge or allow for "the pressing social, economic, and educational challenges confronting our state," Abbott v. Burke, 199 N.J. 140, 175 (2009) (Abbott XX).

Plaintiffs' central assumption to the contrary is wrong for numerous other reasons. First, as discussed at length in Defendants' main brief, any effects of FY 2011 funding levels on students other than Plaintiffs is not material to the Court's review. As the Court long ago recognized, its "function is limited strictly to constitutional review." Abbott v. Burke, 119 N.J. 287, 304 (1990) (Abbott II). Within that framework, the Court further observed that, "for the overwhelming number of districts in this State, [] there has been no showing that the constitutional mandate has not been satisfied." Id. at 320. In the absence of any historical constitutional violation in the

non-Abbott districts, those districts remain outside the purview of this litigation.[4]

Second, prior Abbott decisions do not compel full funding of the SFRA. As the Court previously explained, "[t]he Abbott v. Burke litigation does not provide this Court with jurisdiction to address the statute's applicability to students not before this Court." Abbott v. Burke, 196 N.J. 544, 551 (2008) (Abbott XIX). In the prior remand proceeding, the Special Master recognized this as well, framing the issue as whether SFRA provided the "constitutionally required thorough and efficient education[] specifically to the children in the thirty-one Abbott districts." 199 N.J. at 189; see also, id. at 240 (noting that "the interests of students in all districts other than the Abbott districts are not concretely before the court.").

Despite Plaintiffs' suggestion to the contrary, Abbott XX did not establish a constitutional obligation. See Pls.' Br., at 28 (referring to "continuing constitutional obligations under Abbott XX."). Instead, the Court held in Abbott XX, supra, that SFRA relieved the State from prior remedial orders.

[4] Indeed, in this instant litigation, the Court denied motions of several school districts to participate as intervenors, further underscoring this Court's acknowledgment of the disadvantages inherent in easily expanding the scope of litigation that has been ongoing, in one variant or another, for "nearly four decades." Opinion/Recommendations to the Supreme Court, Abbott v. Burke, M-1293 (Mar. 22, 2011), at 8 (Opinion).

199 N.J. at 175. It did not decide whether any funding level less than SFRA, enacted in good faith, would satisfy the Thourough and Efficient Clause.

In other words, the Court did not elevate SFRA to a constitutional mandate; rather, after careful consideration, it determined it was a "constitutionally adequate scheme." Abbott XX, supra, 199 N.J. at 175. Under Plaintiffs' construction, any reduction in SFRA funding would be a violation of a "constitutional obligation." Again, if their position had merit, the instant motion would have long been resolved. This Court has never countenanced such a mechanical and reductive interpretation of our Constitution.

Third, Plaintiffs' demand for "full funding" of the SFRA ignores the distinction, which they emphasize elsewhere, between over- and under-adequacy districts.[5] As the Special Master - and indeed, Plaintiffs' own expert - recognized, districts above adequacy have, indisputably and by definition, sufficient resources to provide the Core Curriculum Content

[5] During the remand proceeding, Plaintiffs' expert presented an alternative formulation for determining whether a district is above or below adequacy based upon FY 2011 spending, as compared to the district's FY 2011 adequacy budget. P-126; P-136, at 22. This method does not comport with the statutorily-directed method, N.J.S.A. 18A:7F-7, because, at the time a district is preparing its budget in March or April of the pre-budget year, only FY 2010 spending numbers are available to districts and the Department of Education to make that determination. 8T104:21 to 105:8, 9T10:22 to 11:12, 9T12:9-20 (Dehmer).

Standards (CCCS). 15T47:8 (Wyns). It is undisputed that most districts in the State, under FY 2011 funding levels, were above adequacy and had sufficient resources to provide the CCCS.[6]

The converse, however, is not true. The purported "definitional" equivalence of below adequacy budget with some sort of constitutional deficiency ignores that the SFRA does not require districts to spend or tax at levels high enough to be at adequacy. Under the SFRA, each district has an adequacy budget calculated based on the district's student characteristics and the "model" school district. N.J.S.A. 18A:7F-51; Abbott XX, supra, 199 N.J. at 154-55, 161-62. SFRA does not require any district below adequacy to increase its local levy so that it will be at adequacy. N.J.S.A. 18A:7F-5(d). Even with respect to the Abbott districts, SFRA intended only to bring a subset of below-adequacy Abbott districts to the adequacy level within three years through a combination of increased local levy and additional State aid in the form of Educational Adequacy Aid, N.J.S.A. 18A:7F-58(b).

---

[6] The distinction between over- and under-adequacy districts also casts in significantly different light Plaintiffs' assertion that district witnesses testifying before the Special Master constituted anything close to "representative districts of high, medium and low concentrations of at-risk students." Pls.' Br., at 7. To the contrary, the Special Master heard only from six districts, each of which is among the minority of districts in the State that are below adequacy.

Plaintiffs' argument further assumes a relationship between adequacy and student achievement that finds no support in the record. Districts spending above adequacy are not more likely to meet the State passage rate than those spending below adequacy. In fact, while over 73% of over-adequacy districts exceeded the State passage rate on the statewide eighth grade assessment on Language Arts Literacy, as compared to 68.1% of the below-adequacy districts, the below-adequacy districts outperformed the above-adequacy districts on the eighth grade assessment on Mathematics. D-49 (Corrected). Such patterns are not anomalous. On the HSPA, which is the assessment administered to eleventh and twelfth graders as a graduation requirement, a higher percentage of below-adequacy districts exceeded the State passage rate than districts above-adequacy in both Language Arts Literacy and Mathematics. Ibid. Even within District Factor Groups, some districts achieve proficiency at the State passage rate while spending below adequacy and some districts do not while spending above adequacy. D-46 (Corrected) (illustrating performance on fourth grade language arts literacy assessment). Indeed, the lowest performer on the fourth grade language arts literacy assessment - with approximately 15% of students testing proficient - is over adequacy. Ibid.

Moreover, the false equivalence of below-adequacy with inability to provide the CCCS is further illustrated by the testimony of Plaintiffs' expert. The witness was asked to consider an over-adequacy school district that reduces its food service costs through "privatization or some other means" - with its "educational program [] completely unchanged" - and then passes those savings onto local taxpayers through a reduced local levy. The witness admitted that, if the reduced local levy brought the district's spending below-adequacy, the district would, "by definition," be unable to provide the CCCS. 15T49:2-50:2 (Wyns).

Indeed, during summation, the Special Master rejected such an interpretation. During the State's summation, the Special Master commented that, "I don't even think that [Plaintiffs' counsel] wants to be heard for the proposition that if you're under adequacy you cannot deliver thorough and efficient. If that were the case, we'd have no need for a hearing." Transcript, Mar. 2, 2011, 52:19-23. No statute, much less a constitutional provision, can support such a strained construction.

Testimony before the Special Master detailed the numerous and substantial savings available to districts that had no effect on educational program. See, e.g., D-38 (detailing Montgomery school district's efforts to avoid $3 million in

energy expenses through energy-saving strategies); 2T33:20-34:11 (Copeland) (discussing how Piscataway generated over $300,000 in revenues through transportation services to other districts); 3T60:7-16, 3T66:11-13 (Crowe) (explaining how Woodbridge saved at least $2.4 million by outsourcing custodial and cafeteria services). Clearly, a district's ability to provide a thorough and efficient education cannot hang on such a narrow reed as whether the district addresses, or allows to persist, its food service deficit, or, for that matter, takes other steps to increase revenues or decrease costs. Yet, Plaintiffs ask this Court to endorse such flawed analyses and conclusions, and, moreover, stamp them indelibly with a constitutional imprimatur.

This Court should reject Plaintiffs' efforts to substitute the constitutional issues with ill-conceived remedies born of erroneous statutory interpretation. This Court, upon considering the issues, properly framed, should defer to the good faith and reasonable actions of the co-equal branches of government.

POINT II

THE RECORD BEFORE THIS COURT PROVIDES NO BASIS FOR ANY PROSPECTIVE REMEDY.

This record provides no basis for the extraordinary and expansive remedy that Plaintiffs seek. The abbreviated and constrained remand proceeding provides the Court little

assistance in addressing the constitutional issues before it, as they pertain to FY 2011. However, not even Plaintiffs suggest that the record contains any information pertaining to FY 2012. Absent any evidence of any prospective constitutional deficiency, the Court must deny Plaintiffs' requested relief.

The remand proceeding ordered by this Court was, described in one word, "limited." In its Order of February 1, 2011, denying the State's motion to clarify and for an extension of time, this Court used the term "limited" no less than four times. As point of emphasis, the Court named the January 13, 2011, Order as the "Limited Remand Order," a label nowhere found in the January 13, 2011, Order itself. In their papers opposing the State's motion, Plaintiffs argued strenuously against expanding the remand beyond its "specific, defined issue" of "whether school funding through the SFRA, at current levels, can provide for the constitutionally mandated thorough and efficient education for New Jersey school children." Pls.' Br. in Opp'n to State's Mot. to Clarify, at 2.

Constrained by this Court's denial of the State's motion, the Special Master detailed the limitations imposed on his review by the "limited and specific nature of the remand." Opinion, at 7. The Special Master considered only "current funding levels of SFRA." Ibid. Although he provided the Court minimal information about the upcoming fiscal year, id. at 41,

n.17, the remand proceeding and the Special Master's conclusions were limited consistent with his construction of this Court's Orders.

Plaintiffs rely on the Special Master's comments that students "are becoming demonstrably less proficient," Opinion, at 71, or are "at a greater disadvantage in meeting proficiency than they were already," id. at 84. The record, however, lacks sufficient credible evidence to support such sweeping statements. As noted by the Special Master and several witnesses, assessment data reflective of the current year are not yet available. Accordingly, any speculation as to student performance on those assessments is merely that: speculation.

One experienced educator conceded as much. Mr. Copeland, noted by the Special Master for his "forthright testimony, and his concerned and knowledgeable posture," Opinion, at 67-68, agreed that he would not know "with any degree of certainty" whether the reductions in state aid and in programs would affect his students' ability to achieve proficiency in the CCCS until the assessment results were received. 2T98:5-18 (Copeland). Predictive speculation is an inadequate ground to support either conclusions or relief far beyond the scope of the record.

The record before this Court is completely silent about school aid in the next fiscal year, much less for "two

years thereafter," the period encompassed in Plaintiffs' requested relief. The limited remand is inadequate to serve as a springboard to make far-reaching pronouncements about future budget years. Accordingly, the Court should reject Plaintiffs' proposed remedy.

POINT III

THIS COURT CANNOT GRANT PLAINTIFFS THEIR REQUESTED RELIEF.

Plaintiffs' proposed remedy plainly violates fundamental tenets of separation of powers and invites this Court to venture, alone, into an extra-constitutional allocation of State resources. Moreover, as noted above, the relief that Plaintiffs seek would likely have no effect on academic achievement.

In the context of this remand, even when viewed through the prism of this Court's extensive involvement over the course of the Abbott litigation in questions of educational policy, Plaintiffs' requested relief is remarkable. Preliminarily, and as discussed above, the relief has no basis in the record below or the report of the Special Master, as it pertains to fiscal years outside the remand's scope. Now, in a further evolution of their demands since oral argument in January, Plaintiffs seek full funding not only for next year but "the two years thereafter." Thus, Plaintiffs ask this Court to take not just one entirely unprecedented and inappropriate step,

but three, into the appropriations process that, by constitutional design, is assigned to the legislative and executive branches.

A. The Thorough and Efficient Clause must be read consistent with the Appropriation and Budget Clauses of the Constitution.

The Constitution vests the sum of appropriations authority outside the judiciary. This Court has recognized that the Constitution vests the appropriations authority exclusively in the Legislature while, at the same time, granting the Governor a "vital constitutional role in the budget process." Karcher v. Kean, 97 N.J. 483, 490 (1984). In addition to his constitutional authorities, N.J. Const. art. V, § 1, ¶ 15 (establishing selective veto authority), the Governor's "significant responsibilities for the State's fiscal affairs," Karcher, supra, 97 N.J. at 489, include the statutory charge to "examine and consider all requests for proposals" and to "formulate budget recommendations to be forwarded to the Legislature for its consideration and ultimate approval." N.J.S.A. 52:27B-20. As the Court elegantly phrased it, "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.

Despite their efforts to label it otherwise, Plaintiffs' proposed relief asks this Court to trespass on the

legislative and executive functions. In its primary brief in opposition to Plaintiffs' motion, the State explained why Robinson v. Cahill, 69 N.J. 180 (1975) (Robinson IV), does not assist Plaintiffs. While the Robinson IV Court could frame any conflict between the Appropriation Clause and the Thorough and Efficient Clause as a hypothetical or theoretical conflict that it was able to avoid, Plaintiffs' requested relief moves well past conflict and grants one constitutional provision utmost supremacy over all others.

Moreover, their relief would unconstitutionally bind the hands of the elected branches. Such constraints would run counter to the Legislature's "inherent power to disregard prior fiscal enactments." City of Camden v. Byrne, 82 N.J. 133, 147 (1980). See also, New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 13-14 (1972) (noting that debt limitation clause, N.J. Const. art. VIII, § II, ¶ 3, prohibits "one Legislature from incurring debts which subsequent Legislatures would be obligated to pay, without prior approval by public referendum.").

B. In Addition to Being Breathtakingly Broad, Plaintiffs' Requested Relief Would Inappropriately Insert the Judiciary Into the Management of Our Schools

Granting Plaintiffs their requested relief would, in essence, remove the discretion of the elected branches to manage the State's fiscal and educational policies as they deem

appropriate. Such relief also would transform the Thorough and Efficient Clause into something it is not.

At a time of fiscal austerity, local school officials must make choices among competing programs, some of which plainly are not required by the CCCS. The T & E Clause does not obligate the State to subsidize those choices. For example, the CCCS for World Languages are benchmarked by proficiency level, rather than grade level; they do not require that students achieve any specific level of proficiency in the elementary grades. See P-10. Yet, part of the Montgomery superintendent's rationale on why his district could not achieve the CCCS was because the district eliminated World Languages at the first and second grade. Accepting Plaintiffs' requested remedy would mean that, even if a program or approach is not required to achieve the CCCS, the State Legislature would be required to fund it.

More fundamentally, Plaintiffs' approach assumes that if there is an ambiguity or question regarding what might be required under the CCCS, it is the judiciary in the first instance that resolves the question. That approach is fundamentally at odds with the Separation of Powers Clause that squarely places those types of administrative determinations in the hands of the Executive Branch.

Similarly, Plaintiffs' approach would stifle the elected branches as they address profound questions of education

policy, including what the Special Master termed the funding "conundrum." Opinion, at 95. Part of that conundrum is the fact that there does not appear to be a strong correlation between spending and student achievement. Rather then accept Plaintiffs' open-ended judicial approach, the Court ought to recognize that all litigation - even constitutional litigation - has its appropriate limits. We have reached that limit here.

Given the high levels of spending in the Abbott districts, simply increasing funding is neither necessary nor appropriate. As the Special Master's Report paints clearly, he did not consider any of the many critical policy determinations necessary for improved outcomes. In that same vein, the mere discussion of those issues in the Report highlights that those questions are not appropriately subjected to judicial fact-finding, much less judicial implementation or management. Rather, those deliberations and decisions on fundamental questions of educational policy belong in the realm of elected officials.

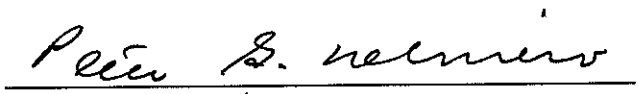
Stated succinctly: Separation of powers precludes granting Plaintiffs their requested relief and properly assigns to the elected branches the sole responsibility to formulate and implement educational policy that may improve academic achievement. The Constitution does not assign or permit the Court such a sweeping role in the allocation of the public fisc.

This Court should decline Plaintiffs' invitation to casually discard such constitutional limitations in favor of a remedy unfounded in law or fact and unlikely to prove effective at improving educational achievement. Accordingly, this Court should deny Plaintiffs their requested relief.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion.

Respectfully submitted,



Peter G. Verniero, Esq.
Special Counsel
Sills Cummis & Gross P.C.