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September 7, 2010

HAND DELIVERED

Supreme Court of New Jersey
Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

Re: Raymond Arthur Abbott, et al.
v. Fred G. Burke, et al.
Docket No. 42,170

Honorable Justices of the Supreme Court of New Jersey:

Please accept this letter brief, in lieu of a more formal brief, on behalf of amicus curiae New Jersey Education Association (hereinafter NJEA) in support of the plaintiffs' Motion in Aid of Litigants' Rights, seeking an order of this Court enjoining the State from providing school funding aid for the 2010-11 school year at levels which are significantly below those required by the School Funding Reform Act of 2008 (SFRA)

and this Court's decision regarding the constitutionality of the SFRA in Abbott v. Burke, 199 N.J. 140 (2009) ("Abbott XX").

TABLE OF CONTENTS

Table of Contents 2
Procedural History 2
Statement of Facts 3
Legal Argument 3

THIS COURT SHOULD GRANT PLAINTIFFS' MOTION
IN AID OF LITIGANT'S RIGHTS AND ENTER AN
ORDER PROHIBITING THE STATE FROM PROVIDING
SCHOOL FUNDING AID AT LEVELS WHICH ARE
SIGNIFICANTLY BELOW THOSE SET FORTH BY THE
SFRA AND THIS COURT'S DIRECTIVE IN ABBOTT XX

Conclusion 12

PROCEDURAL HISTORY

Amicus curiae NJEA, adopts and incorporates the procedural history set forth in Plaintiff Education Law Center's brief, except to add that the Supreme Court granted NJEA leave to file this brief as amicus curiae.

STATEMENT OF FACTS

Amicus curiae NJEA, adopts and incorporates the statement of facts set forth in Plaintiff Education Law Center's brief.

LEGAL ARGUMENT

THIS COURT SHOULD GRANT PLAINTIFFS' MOTION IN AID OF LITIGANT'S RIGHTS AND ENTER AN ORDER PROHIBITING THE STATE FROM PROVIDING SCHOOL FUNDING AID AT LEVELS WHICH ARE SIGNIFICANTLY BELOW THOSE SET FORTH BY THE SFRA AND THIS COURT'S DIRECTIVE IN ABBOTT XX

The New Jersey Supreme Court has spent almost four (4) decades deliberating the issue of how to ensure that children in the poorer urban districts of this State are actually receiving the "thorough and efficient education" mandated by Article VIII, §4 of the New Jersey Constitution. A concise yet thorough summary of the key issues and rulings of the school funding litigation beginning with Robinson v. Cahill, 62 N.J. 473 (1973) and concluding with Abbott v. Burke, 196 N.J. 544 (2008) (Abbott XIX) is set forth in this Court's most recent decision on this issue in Abbott v. Burke, 199 N.J. 140, 148-150 (2009) (Abbott XX), decided on May 28, 2009, and more particularly in the Opinion/Recommendations to the Supreme Court made by the Honorable Peter E. Doyne, A.J.S.C., in his role as special master, 199 N.J. at 179-190. AS noted in those summaries,

during those many years, the State enacted several public school funding formulas which the Court subsequently declared to be unconstitutional, particularly with regard to low income children in the State's urban areas. Abbott v. Burke, 119 N.J. 287 (1990) (Abbott II); 136 N.J. 444 (1994) (Abbott III); 149 N.J. 145 (1997) (Abbott IV). In the Abbott IV decision, the Court ruled that the regular education funding provisions of the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA) were unconstitutional as they applied to the poorer urban districts, which subsequently became known as "Abbott districts." In doing so, it stressed the existence of unique and seemingly overwhelming disadvantages facing students in these districts, such as poverty, hunger, unstable family situations, poor health, illness, drug-abuse, violence and crime, and acknowledged that those unfavorable conditions and societal ills must be overcome in order for those students to achieve a thorough and efficient education. The Court thus held that the Core Curriculum Content Standards - adopted by the Department of Education in May 1996 as a primary component of CEIFA - substantially defined the content of a thorough and efficient education for all New Jersey children, and remanded the matter to the Superior Court for further proceedings to determine the extra-educational needs of these children.

This shift away from a focus on specific school funding formulas and toward a standards-based education plan was further emphasized when, just 10 years ago, the Court issued its unanimous landmark ruling in Abbott v. Burke, 153 N.J. 480 (1998) (Abbott V). Following the Court's directive in Abbott IV, this matter was remanded to the Superior Court, Chancery Division, and assigned to the Honorable Michael Patrick King, with the directive that he conduct hearings with the Commissioner of Education and all parties. With the Court's approval, Judge King designated a Special Master to assist with the remand proceedings and the review of all evidence. Following extensive testimony over twelve (12) hearing days, review of voluminous exhibits, experts' reports, recommendations by the Special Master, presentations by all parties, and several visits to court-selected schools in one of the Abbott districts, Judge King issued a lengthy and comprehensive report. That report, and the process leading to its creation, were recognized by the Court in its Abbott V decision as "a solid evidentiary record that was fully informed by the views and recommendations of the Commissioner of the Department of Education, expert and knowledgeable witnesses offered by both parties, and the Special Master. Most importantly, the educational programs to be implemented through these remedial measures comport

substantially with the statutory and regulatory policies that define the constitutional thorough and efficient education.”
153 N.J. at 489-490.

Based upon that report, the Court mandated implementation of an unprecedented series of reforms and programs in the Abbott districts to address the additional needs of those students and ensure their academic success, and further required that a process be established by which additional programs and services funded by the State can be added if the need for same is clearly demonstrated. Those reforms and programs are detailed in Abbott V.

In the years since Abbott V., the parties returned before this Court on issues such as preschool programs, Abbott v. Burke, 163 N.J. 95 (2000) (Abbott VI), funding for necessary facilities remediation and construction in Abbott districts, Abbott v. Burke, 164 N.J. 84 (2000) (Abbott VII), and the State's request for a funding freeze in Abbott districts for fiscal year 2007, Abbott v. Burke, 187 N.J. 191 (2006) (Abbott XV). Throughout these disputes and the Court's rulings on them, it was, nevertheless, a certainty that the Core Curriculum Content Standards (CCCS) substantially defined the content of a thorough and efficient education for all New Jersey children, and that the various programs and reforms mandated by Abbott V were an

important means by which to ensure that public school children in the poorest urban communities achieved those standards.

In the spring of 2008, the State moved before this Court seeking a declaration that the recently enacted School Funding Reform Act of 2008 (SFRA) satisfied the requirements of the thorough and efficient clause of the New Jersey Constitution, and that the State could therefore be released from the Court's prior remedial orders regarding the funding of educational programs for student in poorer urban or Abbott districts. After the matter was remanded to a Special Master for development of an extensive evidential record, including lengthy testimony from the State's witnesses about the development of the funding formula and an analysis of its various components, the Special Master issued an opinion and recommendation to the Court in which he indicated that he was convinced that the SFRA "was designed to exceed the requirements necessary to provide a thorough and efficient education such that the parity remedy no longer need be employed." Abbott v. Burke, 199 N.J. 140 at 238 (2009) (Abbott XX). After reviewing the extensive record, including the Special Master's finding and recommendations and the argument of the parties, the Supreme Court adopted the Special Master's finding that the SFRA is constitutional and may be applied to the Abbott districts. This Court specifically

noted, however, that this finding of constitutionality was based upon the expectation, and the State's own assurances, that "the State will continue to provide school funding aid during this and the next two years at the levels required by SFRA's formula each year." Id. at 146, 174.

Unfortunately, as detailed in plaintiff's initial brief in this current matter, a year had not even passed when Governor Christie presented his budget for fiscal year 2011, a budget in which state school funding aid for the 2010-11 school year falls \$1.081 billion below the levels required by the SFRA.

The State acknowledges that this Court's ruling in Abbott XX that the SFRA was constitutional and could be implemented was premised upon the directive that "the State will continue to provide school funding aid during this and the next two years at the levels required by SFRA's formula each year." It claims, however, that the Legislature was forced to adopt a budget with drastic cuts for fiscal year 2011 because the State's revenues were significantly reduced by the national recession and a longstanding structural deficit. The State further argues that budget cuts were made to all areas and it was unavoidable that cuts were also made to educational funding, since State aid to public school districts account for a significant portion of the State budget.

The State acknowledges that the FYI 2011 Appropriations Act modifies several provisions of the SFRA and reduces State appropriations required by the SFRA by more than \$1 billion. However, it claims that the State did not just uniformly cut State aid to all public school districts, but adopted a methodology whereby the larger cuts were in aid to the districts which are better off (i.e. those with higher socio-economic status or fewer at-risk students), such that Abbott districts still get more State aid than do other public school districts.

Amicus curiae NJEA cannot and does not dispute that the State may have some legitimate financial reasons for seeking a reduction in its obligations to the children of New Jersey. Nevertheless, these financial concerns do not entitle the State to simply ignore the Court's directive in Abbott XX that it "continue to provide school funding aid during the next two years at the levels required by SFRA's formula each year." Abbott v. Burke, 199 N.J. at 146. The Court in Abbott XX did not arrive at its decision regarding the constitutionality of the SFRA in a perfunctory fashion, but only after an extensive analysis of the process utilized by the State in developing this funding formula and the State's assurances that this funding formula "provided sufficient support for the delivery of a thorough and efficient education as defined by the CCCS, even

when applied in the context of the peculiar difficulties faced by districts with concentrated levels of at-risk pupils." Id. at 151. It is apparent from a review of the Court's decision in Abbott XX that any reduction in the funding under the SFRA could and would seriously jeopardize the Court's determination regarding the SFRA's constitutionality. "[A] state funding formula's constitutionality is not an occurrence at a moment in time; it is a continuing obligation. Today's holding issues in the good faith anticipation of a continued commitment by the Legislature and Executive to address whatever adjustments are necessary to keep SFRA operating at its optimal level." Id. at 146.

The State has never been prevented from making an application to this Court to seek relief from the mandates of Abbott XX, and, as noted in the plaintiffs' brief in support of its Motion in Aid of Litigant's Rights, the plaintiffs actually suggested just such a course of action in a letter to the Attorney General in March 2010. It is apparent from the State's response, or lack thereof, to that suggestion, as well as from the arguments in the State's brief in opposition to the plaintiffs' Motion in Aid of Litigant's Rights, that the State believes that it is excused from complying with the Court's mandates in Abbott XX because of current financial circumstances

and because the general authority to appropriate public monies rests with the Legislature and the Governor, not with the judiciary. The extensive line of decisions on the issue of the State's constitutional obligation to provide a "thorough and efficient" education to the children of New Jersey make it clear that the funding of such an education takes precedence and that, if the State needs to make financial concessions, it must do so elsewhere.

CONCLUSION

For the above reasons, the Court should grant the plaintiffs' motion for an order enjoining the State from providing school funding aid at levels which are below those required by the SFRA formula for the 2010-11 school year.

Respectfully submitted,

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