

SUPREME COURT OF NEW JERSEY
DOCKET NO. 42,170

RAYMOND ARTHUR ABBOTT, et al.,)

Plaintiffs,)

Civil Action

v.)

FRED G. BURKE, et al.,)

Defendants.)

BRIEF IN RESPONSE TO AMICUS CURIAE

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PROCEDURAL HISTORY

The State relies upon the procedural history and statement of facts set forth in the Statement of the Case in its July 9, 2010 Response Brief, as supplemented herein.

Since the Education Law Center's (ELC) Motion for relief was filed, seven applications for participation in the matter were submitted.

On or about July 6, 2010, the school district of Montgomery filed a motion for leave to appear as amicus curiae supported by factual certifications. On or about July 13, 2010, Disability Rights New Jersey, Alliance for the Betterment of Citizens with Disabilities, Cherry Hill Special Education Parent Teachers Association, New Jersey Down Syndrome Government Affairs Committee, New Jersey Speech-Language-Hearing Association, Special Education Clinic at Rutgers' University School of Law - Newark, Special Education Leadership Council, and Statewide Parent Advocacy Network (collectively referenced as DRNJ), filed a motion to participate in the matter as amicus curiae, along with a merits brief and supporting certification.

On or about July 12, 2010, the New Jersey State Conference of the NAACP, New Jersey Black Issues Convention and Paterson Education Fund (collectively referenced as NAACP), moved for amicus status. Thereafter, on July 30, 2010, NAACP filed a legal brief and factual certification.

On August 6, 2010 the New Jersey Education Association (NJEA)

filed a motion for leave to participate as amicus curiae along with a supporting certification of counsel.

On August 9, 2010, the Boards of Education of Bridgeton, Burlington City, East Orange, Jersey City, Perth Amboy, Phillipsburg and Trenton (collectively referenced as Shapiro Districts) filed a motion for leave to intervene. The Shapiro Districts' motion was accompanied by a brief and seven factual certifications.

On August 17, 2010, this Court issued several orders related to the various motions for participation. With regard to DRNJ and NAACP, the Court granted amicus participation to each, limited to the brief already served and directed any responsive briefs to be filed on or before September 13, 2010. Amicus status was also granted to Montgomery and NJEA with the direction that any amicus briefs must be filed on or before September 7, 2010, with responding briefs due September 27, 2010. Also, on August 17, 2010, the Court denied the motion by the Shapiro Districts to intervene; the Districts were granted amicus status and ordered to file their brief on or before September 7, 2010, with responding briefs due September 27, 2010.¹

¹ Upon receipt of the Court's August 17, 2010 Orders setting forth the briefing schedule for the amici, the State made application to file one, comprehensive response to the amicus briefs and certifications and to file that unified brief on September 27, 2010. On August 31, 2010, the Court granted the State's request.

Consistent with the Court's August 17 Orders, on September 7, 2010, the NJEA filed a letter-brief. On that same date, the Shapiro Districts filed a merits brief and Montgomery filed a brief and supplemental certifications.

Also on September 7, 2010, the Piscataway Township Board of Education filed a motion for leave to participate as amicus curiae and filed a supporting certification. Piscataway represented in its motion papers that it would rely upon the substantive brief filed by Montgomery on that same date.

On September 24, 2010, the Newark School District (Newark) filed a motion for leave to participate as amicus curiae and filed a supporting brief and certification.

This brief is filed by the State in response to all participants who have been granted amicus curiae status to date.²

² Because the motions by Piscataway and Newark for leave to appear as amicus curiae have not yet been decided by the Court, the State will not respond to the specific assertions in their papers. To the extent that Piscataway is relying on the brief of amicus Montgomery, the State will address Piscataway's general assertions through its response to Montgomery. To the extent that Newark's assertions are similar to those of the Shapiro Districts, the State will address those through its response to those Districts.

SUPPLEMENTAL STATEMENT OF FACTS

On August 10, 2010, Congress enacted the Education Jobs Fund Act. Public Law No. 111-226. The Act provides \$10 billion in fiscal relief to address the looming cuts that school districts faced as a result of the current economic downturn and to assist schools throughout the nation in avoiding widespread layoffs of education personnel. See e.g., Obama Signs Bill Aimed at Saving Teachers' Jobs, Education Week (Aug. 23, 2010) <<www.edweek.org/ew/articles/2010/08/10/01jobs.h30.html (last visited September 27, 2010)>>; Teaching Our Way to a Stronger Economy, <<www.whitehouse.gov/blog/2010/08/10/teaching-our-way-a-stronger-economy (last visited September 27, 2010)>>. As President Obama remarked with regard to the legislation, the recession has imposed extreme challenges for states and local communities, leaving states to balance their budgets with less revenues and resulting in the need to lay off public employees, including teachers. Remarks by the President on Teacher Jobs, <<www.whitehouse.gov/the-press-office/2010/08/10remarks-president-teacher-jobs (last visited September 27, 2010)>>. New Jersey is entitled to \$268 million from the Education Jobs Fund.

On September 9, 2010, the Governor filed an application with the United States Department of Education for the funds. Applications Submitted by States, <<www2.ed.gov/programs/educationjobsfund/applicant.html (last visited September 27,

2010)>>. On September 14, 2010, New Jersey's application was approved. The New Jersey Department of Education (DOE) announced the allocation to each district on September 20, 2010. See <<www.state.nj.us/education/news/010/920jobs.htm (last visited September 27, 2010)>>. Each district's share of the Education Jobs Fund is proportional to the district's aid under the SFRA formula for 2010-11. The funds are to be used for expenses necessary to retain, recall or rehire former employees or to hire new employees. The employees must provide school-level education and/or related services. Initial Guidance for States on the Education Jobs Fund Program, U.S. DOE (August 13, 2010) <<www2.ed.gov/programs/educationjobsfund/applicant.html (last visited September 27, 2010)>>.

In total, New Jersey's school districts will receive \$262,742,643.³ See <<www.state.nj.us/education/news/2010/0920jobs.htm>>. More than half of these funds will be provided to Abbott school districts. Ibid. All but three of the Abbott districts will receive at least \$1 million from the Education Jobs Fund.⁴ Newark will receive the largest share, i.e., \$23.69 million. The allocation to the Shapiro Districts are as follows: Jersey City,

³ The Act permits the DOE to retain 2% for administration of the program.

⁴ Hoboken, Burlington City and Harrison will each receive less than \$1 million dollars. In contrast, only 21 of the 550 non-Abbott districts (or less than 4%) will receive in excess of \$1 million. Ibid.

\$13.84 million; Trenton, \$7.55 million; East Orange, \$5.95 million; Perth Amboy, \$4.18 million; Bridgeton, \$2.13 million; Phillipsburg, \$1.25 million; and Burlington City, \$561,864. Ibid. The allocation to Montgomery, a DFG J, is much smaller, i.e., \$179,387; Piscataway, a DFG GH, will receive slightly less than Burlington City, i.e., \$556,854.

LEGAL ARGUMENT

THE REDUCTIONS IN STATE AID FOR THE 2010-2011 SCHOOL YEAR, MADE NECESSARY BY A SIGNIFICANT DECLINE IN AVAILABLE REVENUES TO SUPPORT EDUCATION, WERE ALLOCATED BY THE GOVERNOR AND LEGISLATURE IN AN EQUITABLE MANNER CONSISTENT WITH CONSTITUTIONAL REQUIREMENTS.

The School Funding Reform Act (SFRA) was designed "as a state-wide unitary system of education funding." Abbott v. Burke, 199 N.J. 140, 147 (2009) (Abbott XX). Viewing the prior system of funding school districts as "inefficient and inequitable," the Legislature created the SFRA as a "single, uniform formula" rather than a "dual system; that is, one for the Abbott districts and one for all other districts." Id. at 156 (Opinion of Judge Doyne). The fiscal crisis facing New Jersey, as well as the other states, forced a significant reduction in State education spending for the 2010-11 school year. School districts, therefore, are not receiving their full allocation of funding under the SFRA formula.

In determining how to address the State aid reduction, the Governor and Legislature were guided by the equity principles underlying the SFRA as well as prior decisions of this Court. As stated by this Court in Abbott v. Burke, 119 N.J. 287, 375 (1990) (Abbott II):

All of the money that supports education is public money, local money no less than state money. ... The students of Newark and Trenton are no less citizens than their friends in Millburn and Princeton. They are entitled to be treated equally, to begin at the same

starting line.

Accordingly, rather than simply reduce State aid to districts based on that district's relative share of State aid, the Fiscal Year 2011 Appropriations Act considers both State and local resources in determining the amount of the State aid reduction. All districts were treated the same, regardless of whether their education funding came primarily from local or State support; each district had its State aid reduced in an amount equal to 4.99% of the district's 2009-10 school district budget. Newark and Trenton experienced State aid reductions of 5.9% and 5.5% respectively; Millburn and Princeton experienced State aid reductions of 100% and 67.9%, respectively. Certification of Yut'se Thomas, Exhibit E.

This allocation method is consistent with the Court's approach to a possible reallocation of State school aid in Robinson v. Cahill, 69 N.J. 133 (1975) (Robinson IV) and its invalidation of minimum aid in Abbott II. See State's Response Bf. at 11-13. Moreover, it prevents districts that rely heavily on State aid from experiencing much larger aid reductions. If only State aid, rather than State and local resources, had been considered in the allocation, the aid reductions to districts such as Newark and Trenton would have more than doubled. Compare Thomas Certification, Exhibit B (13.6% reduction in State aid) with Exhibit E (Trenton and Newark experiencing State aid reductions of 5.5% and 5.9% respectively). Thus, the unavoidable State education

aid reduction was accomplished in a manner sensitive to and consistent with the State's constitutional obligation and the underlying goals of the SFRA.

The Shapiro Districts argue that the funding cuts have "devastated all the critical components of the Boards' educational programs and supplemental support services" and that this Court should find the constitutional standard of a thorough and efficient system of education has not been met.⁵ Shapiro Districts' Bf. at 21. Initially, given the small percentage of State aid reductions experienced by these districts, ranging from a low of 4% in Perth Amboy to a high of 6.3% in Phillipsburg, it is difficult to give credence to the Shapiro District's claim of "devastation."

Moreover, their argument ignores the fact that expenditure disparity plays an "important" role in a "conclusion that the constitutional level has not been achieved." Abbott II, 119 N.J. at 337. While in Abbott II this Court found that a "vast gulf

⁵ The Shapiro Districts, similar to the ELC, argue that the Court can compel the State to fully fund the SFRA, i.e., to appropriate over \$1 billion in additional funding, without violating the fundamental principles of separation of powers. Shapiro Districts' Bf. at 22-23. Putting aside from where those funds would be appropriated, as set forth in the State's Response Brief, such an Order would be precluded by the separation of powers doctrine. See State's Response Bf. at Point II. Moreover both the Shapiro Districts and the ELC appear to concede that point given the relief they actually request -- enjoining all State aid unless that level of funding is provided. Even if the Court had the power to issue such an injunction, these very districts would be the most harmed by enjoining all State aid, while more affluent districts that are receiving very little or no aid this year would be unaffected.

exists between the richer and the poorer districts," 119 N.J. at 320, in Abbott XX, this Court recognized that "today we are in a different place," 199 N.J. at 172. As set forth in more detail in the State's Response Brief, the Abbott districts are some of the highest spending districts in the State. See State's Bf. at 12-14; Thomas Certification, Exhibit H. All but one of the Shapiro Districts have revenues per pupil that exceed the average revenues per pupil in the DFG I and J districts. Thomas Certification, Exhibit I. In light of the fact that in Abbott II the constitutional concern was not an absolute level of spending but the disparity between the DFG I and J districts and the Abbott districts, 119 N.J. at 387-88, the necessary reduction of State aid that was equitably allocated for the 2010-11 school year should not result in a finding of constitutional deficiency.

Finally, the Shapiro Districts set forth in certifications the reductions to staff and programs they were forced to undertake for the 2010-11 school year. Assuming for the purposes of this response that the best interests of the students were considered in determining the reductions, the identified reductions represent the elimination of actual positions or programs rather than vacant positions or planned programs and that reductions were accomplished in the most efficacious manner, the Education Jobs Fund will directly assist the districts in restoring needed positions or programs. Reductions in staff due to State aid reductions is

exactly what the Education Jobs Fund was enacted to address.

The amicus brief for the NAACP presents extensive data on the racial isolation, poverty and crime, and substandard housing and foreclosure rates in support of the Abbott districts' argument for additional school funding. NAACP Bf. at 5-16. But this Court has already recognized that such issues are "far beyond the power or responsibility of school districts" to change. Abbott II, 119 N.J. at 375. What the Court concluded, however, is that the Abbott districts "are entitled to pass or fail with at least the same amount of money" as the more affluent districts. Ibid. In contrast to the "vast disparity in educational funding" the Court found in Abbott II, 119 N.J. at 323, under the SFRA for 2010-11, even with the State aid reduction, 28 of the 31 Abbott districts have per pupil revenues above the I&J average. Thomas Certification, Exhibit I. Further, more than half of the 25 highest spending K-12 districts in the State are Abbott districts. Thomas Certification, Exhibit H.

Finally, the NAACP argues that the cuts disproportionately effected school districts with the highest concentrations of poor and minority students. NAACP Bf. at 16-22. Yet, looking at the percentage cuts by at-risk concentration or DFG demonstrate the opposite is true. Thomas Certification, Exhibit A and B. The poorer the students in the district or the lower the socio-economic status of the district, the smaller percentage of State aid that

was lost. Ibid.

In fact, the high percentage of State aid losses by wealthier districts is what underlies the very complaints by the Montgomery school district. Montgomery is a DFG J district, i.e., in the highest socio-economic group. Less than 10% of Montgomery's budget is supported by State aid. Certification of Earl T. Kim, ¶22. In contrast to the Abbott districts, Montgomery lost 65.4% of its State aid for 2010-11. Thomas Certification, Exhibit E. Yet, although Montgomery mentions some reductions for 2010-11⁶, its main complaint appears to be its inability to accumulate excess surplus to use in future years. Thus, it argues about the effects of Executive Order No. 14 (Christie) which reduced its State aid for 2009-10 by the amount of its excess surplus. Montgomery Bf. at 8-12. Further, it claims that the 2010-11 State aid reductions will make it impossible to accumulate excess surplus for 2011-12. Id. at 12-14, 18.

Neither of these arguments are relevant to the issue before this Court because they involve either past or future years' State aid. More significantly, the SFRA is intended to fund the current

⁶ Montgomery argues that it had to increase class sizes, although it does not identify how large those classes were or will be. It further claims it lost the first and second grade world language programs but does not explain why those programs were "lost" and, if it was due to teacher reductions, why other means of providing world language to first and second grade students, such as through computers, was not considered as an alternative. Montgomery Bf. at 14. Piscataway provides no specific examples of reductions. Certification of Brain Delucia.

years' educational programs and services not to provide a means of funding a "savings account" for future years.

DRNJ, which focuses their amicus brief solely on the State aid reductions to special education funding, misstates the actual reductions that occurred in the FY 2011 Appropriations Act and fundamentally misunderstands how the SFRA works. DRNJ states that special education categorical aid was "drastically reduced" by \$300 million as reflected in the Governor's Budget. DRNJ Bf. at 1. The reduction of special education categorical aid in the Appropriations Act was actually \$110 million. Thomas Certification, Exhibit D. Moreover, not one Abbott district saw a reduction in this aid category. Id. at Exhibit G. Furthermore, two-thirds of the special education census funding is actually included in equalization aid; special education categorical aid only funds the other one-third.⁷ Abbott XX, 199 N.J. at 153, 154.

Additionally, all of the funds provided to the districts under the SFRA for the K-12 program are fungible. Whether State aid is provided to a district as equalization aid, security aid, special education aid or transportation aid, the district is not restricted as to what those funds can support. Given the obligations of the

⁷ DRNJ also mistakenly asserts that two-thirds of special education funds is "extraordinary special education aid." DRNJ Bf. at 6. Rather, two-thirds of the special education census funding is provided through equalization aid. Extraordinary aid is a reimbursement in the following school year for high cost special education expenses. Abbott XX, 199 N.J. at 156.

Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (IDEA), and a district's responsibility for providing a free, appropriate public education (FAPE) to classified students, 20 U.S.C. §1400(d), districts are required to meet these federal mandates. Thus, in contrast to DRNJ's suggestion, the provision of FAPE is not implicated by the reductions.

Finally, DRNJ claims that the distribution threatens federal funding because of federal maintenance of effort (MOE) requirements. This claim, however, is based on the inaccurate allegation that special education categorical aid was reduced by \$300 million. The adjustment in this aid category between the Governor's Budget and the Appropriations Act significantly reduces any concerns with MOE requirements.⁸

Unlike the other amici, the NJEA concedes that it "cannot and does not dispute that the State may have some legitimate financial reasons for seeking a reduction" in State school aid. NJEA Bf. at 9. NJEA, however, argues that the State has ignored its constitutional obligation because it failed to affirmatively seek relief from this Court's decision in Abbott XX. In Abbott XX, this

⁸ To the extent MOE requirements are implicated, a waiver process is available for "exceptional or uncontrollable" circumstances which include "a precipitous and unforeseen decline in the financial resources of the State." 20 U.S.C. §1412(a)(18)(C); 34 C.F.R. 300.163(c)(1). Furthermore, any reduction to federal aid, based on a failure to meet MOE in, or be granted a waiver for 2010-11, would be made in a future year and thus does not implicate the 2010-11 school aid at issue in this matter. 34 C.F.R. 300.163(b).

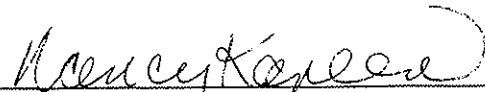
Court found that the SFRA was constitutional, premised on the expectation that it would be funded at the required levels. 199 N.J. at 146. The Court, however, wisely did not address whether the SFRA would automatically be unconstitutional if it was not funded at that level. Such a determination should not be made in the abstract. See G.H v. Township of Galloway, 199 N.J. 135, 136 (2009) (noting the Court "cannot answer abstract questions or give advisory opinions" the Court declined to "answer hypothetical questions about un-enacted ordinances"). Rather the Court would need to look at the facts and circumstances at that time. For example, when Abbott XX was decided, the Court would not have known what the level of funding of the Abbott districts would be, how the reduction would be accomplished, and what other funding might be available to address any shortfall in 2010-11. For the reasons set forth in this brief as well as the State's Brief in Response to the Motion, this Court should conclude that, based on the equitable manner of accomplishing the reductions, the high level of fiscal resources available to Abbott districts and the additional federal funding provided by the Education Jobs Fund to supplement State aid to schools because of the declining available State revenues, the State is meeting its constitutional obligations for school funding in 2010-11.

CONCLUSION

For all of the foregoing reasons as well as those set forth in the State's brief of July 9, 2010, the Education Law Center's motion in aid of litigant's rights should be denied.

Respectfully submitted,

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