



Education Law Center

Standing Up for Public School Children

February 7, 2011

The Honorable Peter E. Doyne, A.J.S.C.
Superior Court of New Jersey
Bergen County Justice Center
Suite 425
Hackensack, NJ 07601-7699

Re: Abbott v. Burke
Docket No. M-1293

Dear Judge Doyne:

Please accept this Letter Brief on behalf of Plaintiffs in support of their motion in limine seeking to bar the introduction of evidence from three of the State Defendants' proposed witnesses: State Treasurer, Andrew P. Sidamon-Eristoff, Mary Byrne, Budget Manager, Department of Treasury Office of Management and Budget, and Barbara Gantwerk, Assistant Commissioner, Department of Education. As explained below, these witnesses will present evidence of the State's fiscal condition and allocations of federal funding to New Jersey, matters that are clearly outside the scope of the Supreme Court's limited remand to the Special Master.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

In its January 13, 2011 Remand Order, the Supreme Court directed the Special Master to develop a record and make findings of fact and conclusions of law, on a limited, discrete issue: "whether school funding through SFRA, at current levels, can provide for the constitutionally mandated thorough and efficient education for New Jersey school children." Remand Order, at 5, ¶2. In allocating the burden of proof to the Defendants, the Court emphasized that the State must demonstrate "that the present level of school funding distributed through the SFRA formula can provide for a thorough and efficient education as measured by the comprehensive core curriculum standards in districts with high medium and low concentrations of disadvantaged pupils." Remand Order, at 6, ¶4.

At a pretrial conference held on January 18, 2011, the Defendants indicated that they would present evidence of the State's fiscal circumstances as a component of its case-in-chief. The Special Master stated at that time that he believed

he was precluded by the limited issue set forth in the Remand Order from considering fiscal evidence, and advised the Defendants to make application to the Supreme Court to obtain permission to present such evidence on remand.

On January 25, 2011, the Defendants filed a "Motion for Clarification" with the Supreme Court specifically "seeking to have [the] Court make clear that the Special Master is permitted to consider the State's fiscal situation during the remand proceeding." State's Brief in Support of Motion for Clarification, at 1. On February 1, 2011, the Supreme Court issued an Order denying the motion. Order on M-853 2-1-11, at 3. In denying this relief, the Court again made clear that the order for a remand to the Special Master was "limited" to a single issue: whether current funding levels through the SFRA formula can provide the comprehensive Core Curriculum Content Standards (CCCS) to New Jersey school children. Order, at 2. The Court further underscored that the Court itself has retained for "future consideration the question of what effect, if any, the State's fiscal condition may have on plaintiffs' entitlement to relief in aid of litigants' rights." Order, at 2-3. Finally, the Court recognized that the Special Master "is authorized to entertain any and all evidence as he sees fit in the proper completion of his assigned task." Order, at 3 (emphasis added).

On February 2, 2011, pursuant to the Case Management Order entered by the Special Master, Plaintiffs received the Defendants' proposed list of witnesses. The list includes the State Treasurer, Andrew P. Sidamon-Eristoff and Mary Byrne, Budget Manager, Department of Treasury Office of Management and Budget. The witness list also includes Barbara Gantwerk, Assistant Commissioner of the Department of Education.

In addition to the witness list, Plaintiffs also received the Defendants' proposed Stipulation of Facts. Following receipt of the proposed Stipulation, the Defendants, at Plaintiffs' request, identified the specific paragraphs in the Stipulation that represent the factual evidence these witnesses would present to the Special Master, if called to testify at the hearing.

In essence, the evidence of the State's fiscal condition to be provided by the State Treasurer Sidamon-Eristoff and Budget Manager Bryne on remand was previously presented by the Defendants to the Supreme Court in the Certification of the State Treasurer filed in opposition to the Plaintiffs' Motion in Aid of Litigants Rights. See Certification of Andrew P. Sidamon-Eristoff, July 8, 2010. The evidence of federal funding allocations to be proffered on remand by Assistant Commissioner Gantwerk was likewise contained in her Certification to the

Supreme Court filed by the Defendants with Plaintiffs Motion to the Court. See Certification of Barbara Gantwerk, July 8, 2010.

Plaintiffs file this motion in limine with the Special Master to have evidence of the State's fiscal condition and federal funding barred from introduction in the remand proceedings since such evidence is beyond the scope of the "Limited Remand Order" in this matter. Order on M-853 2-1-11, at 2.

ARGUMENT

POINT I

EVIDENCE OF THE STATE'S FISCAL CONDITION IS OUTSIDE THE SCOPE OF THE LIMITED REMAND AND SHOULD BE EXCLUDED

In remanding this case to this Court, the Supreme Court expressly limited the scope of the hearing to a narrowly defined issue: whether funding at current levels distributed through the SFRA affords New Jersey students a thorough and efficient education, as measured by the CCCS. As explained below, evidence of the State's fiscal condition is clearly outside the scope of this limited issue on remand and should, therefore, be barred from introduction in the remand proceeding.

First and foremost, the Supreme Court, in its Order of February 1st, explicitly denied the Defendants' specific request, filed in response to the suggestion by the Special Master, to allow evidence of the State's fiscal condition to be presented

in the remand hearing. Order, at 3. If the Supreme Court had wanted to permit such evidence to be developed on remand, it would have granted the Defendants' motion, but it clearly did not. This evidence has now been firmly precluded from consideration at the remand hearing by the express terms of the Supreme Court's Order.

Moreover, the Court's "recognition" that the Special Master can entertain "any and all evidence as he sees fit" is explicitly limited to "his assigned task." Order, at 3. That language cannot be reasonably be construed as authorizing the introduction of the evidence of fiscal circumstances that the Court explicitly refused to allow in denying the State's motion. Rather, "the assigned task" of the Special Master is not only limited, but is also made crystal clear from the Court's January 13th Remand Order, and reiterated in the Order denying the Defendants' motion to include fiscal evidence: whether districts can provide the CCCS to New Jersey school children at current funding levels distributed through the SFRA formula. Consideration of the State's overall fiscal condition is undoubtedly beyond the scope of that "assigned task."

Second, in denying the Defendants' Motion to include fiscal evidence, the February 1st Order makes clear that, to the extent the State's fiscal condition has any "effect" on the ultimate relief sought by Plaintiffs in their Motion in Aid of Litigants'

Rights, the Supreme Court has "retained" that issue for itself. Order, at 2-3. Without question, if the Court had wanted the State's fiscal condition to be included in the remand as part of the development of a record on the "current funding levels," it would have explicitly said so and allocated this broader issue to the Special Master. To the contrary, the Court not only refused to revise or clarify the limited remand order or supplement the directions to the Special Master to include evidence of the State's fiscal condition, but also expressly reserved the issue for later consideration by the Court. At no point in its orders does the Supreme Court suggest that its further consideration of this "retained" issue required additional factual development and consideration during the remand proceedings

Finally, it is clear from the Defendants' proposed Stipulation of Facts on remand that the State Treasurer and Budget Manager will testify to the same evidence previously presented to the Supreme Court, and now part of the record on the issue "retained" by the Court. Thus, even if the State Treasurer and Budget Manager were permitted to testify at the remand hearing, their testimony would merely duplicate evidence that is presently before the Supreme Court, on an issue that the Court has expressly retained for its own consideration.

Put bluntly, the Defendants, in effect, are now requesting another bite at the apple by seeking to present evidence of the State's fiscal condition to the Special Master, in the face of an unequivocal order by the Supreme Court rejecting the Defendants' request. Accordingly, the Special Master should bar any such evidence, and the testimony of the State Treasurer and Budget Manager, from being presented in the remand proceeding.

POINT II

EVIDENCE OF FEDERAL FUNDING IS OUTSIDE THE SCOPE OF THE LIMITED REMAND AND SHOULD BE EXCLUDED

The State Defendants also seek to present evidence of the allocations of federal funding to New Jersey school districts. This evidence is clearly outside the scope of the limited remand order, and should also be excluded from the remand proceeding.

As previously mentioned, the Supreme Court has made clear that the issue on remand is limited to the current levels of funding "distributed through the SFRA formula" to school districts with varying concentrations of at-risk pupils. Remand Order, at 6, ¶6 (emphasis added); see also Remand Order, at 5, ¶2 (directing the remand hearing to consider current levels of funding "through the SFRA").

Indeed, the very basis for the remand hearing is the Court's express finding that the record before the Court on Plaintiffs' Motion in Aid of Litigants Rights is insufficient

"to make the determination whether school funding through the SFRA, at current underfunded levels, can provide a constitutional education to New Jersey school children. Remand Order, at 5 (emphasis added); and see Order Denying State's Motion to Clarify, at 2 (February 1, 2011)(same). Nowhere in the express terms of the limited remand does the Court direct, or even suggest, that federal funding, which is allocated by the federal government outside of State's SFRA funding formula, should be considered in the determination of the constitutionality of current funding levels to New Jersey school districts through the SFRA.

Moreover, as is clear, through the testimony of Assistant Commissioner Gantwerk, Defendants will present the same evidence contained in Ms. Gantwerk's prior Certification to the Supreme Court, now part of the record before the Court on Plaintiffs Motion in Aid of Litigants' Rights. Thus, the Court, had it so intended, would have directed the Special Master to consider evidence of federal funding in determining whether New Jersey school children are receiving adequate funding for a thorough and efficient education, but it did not. Instead, the Court expressly limited the Special Master's consideration to the levels of funding "distributed through the SFRA formula." Given that the Court already has before it the Defendants' evidence of federal funding, there is nothing in the Remand Order that

provides any basis for the superfluous development of the same evidence in the remand proceedings.

CONCLUSION

For the reasons set forth above, Plaintiffs request that the Special Master grant the Plaintiffs' motion in limine and bar the introduction of evidence of fiscal conditions and federal funding, and the testimony of the State Treasurer, Budget Manager and Assistant Commissioner Gantwerk, as outside the scope of the limited issue on remand.

Respectfully submitted,
EDUCATION LAW CENTER

A handwritten signature in black ink, appearing to read "David Sciarra". The signature is fluid and cursive, with a large initial "D".

David G. Sciarra, Esq.
Attorney for Plaintiffs

cc: Jon C. Martin, DAG
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