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RAYMOND ARTHUR ABBOTT, et al.,

Plaintiffs,

v.

FRED G. BURKE, et al.,

Defendants.

SUPREME COURT OF NEW JERSEY

Docket No.

Civil Action

**CERTIFICATION OF DAVID C. HESPE**

I, David C. Hespe, of full age, hereby certify that:

1. I am the Commissioner for the New Jersey Department of Education ("DOE") and have held this position since March 2014. I previously led the Department as Commissioner from March 1999 to March 2001. As Commissioner, I am tasked with, among other things, ensuring a constitutionally mandated thorough and efficient education for all children in New Jersey public schools under the purview of the DOE.

2. I was previously involved in what has been known as the Abbott v. Burke litigation from 1997-2001, during my earlier tenure as Commissioner and Assistant Commissioner of Education.

3. When the Abbott v. Burke litigation began, all of the schools in the State were rated pursuant to a District Factor Group ("DFG"). DFGs were developed by the DOE in the 1970s to enable districts of certain socio-economic status to compare their performance against other districts similar to them. The DOE designated the districts as DFG A through DFG J, with A being the districts with the lowest socio-economic status and J the highest. Abbott v. Burke, 119 N.J. 287, 338 (1990) ("Abbott II"). In Abbott II, the Court used the DFGs to create a continuum, identifying underprivileged school districts (DFG A and B) at one end and wealthy suburban districts (DFG I and J) at the other. See generally Abbott II, 119 N.J. 287. DFGs were updated based on Decennial Census data and used various information available in the census data to determine the socio-economic status of the community. The DFGs based on the 2000 census data were calculated based on six factors: (1) percent of adults with a high school diploma; (2) percent of adults with some college education; (3) occupational status; (4) unemployment rate; (5) percent of individuals in poverty; and (6) median family income. The DFGs have not been revised recently.

4. In the 1990s, there were 28 poor, urban schools, many with A and B ratings. Ibid. In Abbott III, this Court called these 28 districts the "Special Needs Districts." Abbott v. Burke, 136 N.J. 444, 446 (1994) ("Abbott III"). Not all the "Special Needs Districts" were categorized as DFG A or DFG B, and not all the DFG A or DFG B districts fell within the "Special Needs Districts." Under the Comprehensive Education Improvement and Financing Act of 1996 ("CEIFA"), the Special Needs Districts were renamed "Abbott Districts," and three districts were added, for a total of thirty-one districts in this category. N.J.S.A. 18A:7F-3. In 2008, the School Funding Reform Act ("SFRA") recognized that these thirty-one districts had special needs and designated them School Development Authority ("SDA") districts because Abbott V required the State to undertake and finance their school facility projects. N.J.S.A. 18A:7G-3. As such, these thirty-one districts are now known as "SDA Districts" and will be referred to as such herein.

5. Schools at all levels in New Jersey's SDA Districts have been significantly underperforming for decades. While there are certain exceptions to this statement, for the overwhelming majority of SDA District schools, there is a significant, persistent educational achievement gap between SDA District students and their counterparts in the public schools of the other 560 (non-SDA) districts.

6. This Court has recognized the Commissioner of Education's duty and responsibility to "take reasoned steps, even if the outcome cannot be assured, to address the social, economic, and educational challenges confronting our state." Abbott v. Burke, 199 N.J. 140, 147 (2009) ("Abbott XX"). Moreover, as the Commissioner, it is my responsibility to "manage, control, and supervise the implementation of [educational] funding to assure that it will be expended and applied effectively and efficiently to further the students' ability to achieve." Abbott IV, supra, 149 N.J. at 224. I have been charged with resolving the problem of constitutional deprivation in the SDA Districts.

7. In 2009, the United States Supreme Court noted that there was "a growing consensus in education research that increased funding alone does not improve student achievement." Horne v. Flores, 557 U.S. 433, 465, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (2009). The "ultimate focus [should be] on the quality of educational programming and services provided to students, not the amount of money spent on them... The weight of research suggests that these types of local reforms, much more than court-imposed funding mandates, lead to improved educational opportunities." Id. at 466-67.

8. Many attempts have been made to improve student outcomes in the SDA Districts, prompted by this Court's mandates in the Abbott v. Burke cases as well as various federal and other State

requirements. Concepts such as whole school reform, full-day preschool, intensive early literacy efforts, curricula alignment to education standards, and others have been implemented, some with better results than others, but all with the good faith expectation that the studies and research supporting those programs meant that significant progress could be made in New Jersey to close the educational achievement gap and thereby eliminate the disparity between SDA and other school districts in the state.

9. In order to achieve these reform efforts, a staggering influx of State aid was provided to these districts - - nearly \$100 billion over 40 years. Moreover, over the last several decades, the average per pupil expenditures in the SDA Districts significantly exceeded the average per pupil expenditure of the non-SDA Districts in New Jersey.

10. While the programmatic mandates and abundant state aid have yielded some improvement in the schools, there has not been sufficient improvement in student performance to conclude that we have met the goal of eliminating the disparities in performance and providing the constitutionally guaranteed Thorough and Efficient system of education for all.

11. The difference in performance levels between the SDA Districts and non-SDA Districts has not changed much since the Abbott litigation began in 1984. For example, Exhibit A to the

accompanying Certification of Jeffrey Hauger demonstrates that, for the 2001/2002 school year through the 2014/2015 school year for third grade, eighth grade, and high school, standardized test scores for math and English/language arts in the SDA Districts have remained low and relatively stagnant. See Hauger Cert. at ¶ 9(a) (Exhibit A). Exhibit B to Hauger's Certification demonstrates that the performance gap between standardized test scores from the SDA District schools and the State's non-SDA District schools has also remained relatively large and that it has not closed over this time period. Ibid. at ¶ 9(b) (Exhibit B).

12. From the 2001/2002 school year through the 2014/2015 school year, the disparity between the SDA Districts and non-SDA Districts remained in the 13-30 percentage point range for high school ELA and in the 14-33 percentage point for high school math. See Hauger Cert. at ¶ 9(b) (Exhibit B). As Exhibit B to the Hauger's Certification reflects, since the 2001/2002 school year, there has been a consistent and significant disparity between standardized testing scores for SDA Districts and non-SDA Districts at all grade levels. Ibid.

13. It is my opinion that certain statutory and contractual restrictions have thwarted the State's efforts to implement real, substantive reform, and will continue to do so, notwithstanding the tremendous expenditures by way of state aid

to the SDA Districts. It is for this reason that the State now moves for modification of the previous Abbott v. Burke remedies. It is critical that the authority be given to the Commissioner of Education to waive or suspend implementation of certain education statutes when the Commissioner determines that the statute, as applied to a particular school or SDA District, is an impediment that actually prevents that school or District from fulfilling the constitutional guarantee of a Thorough and Efficient education. It is just as critical that the Court acknowledge the Commissioner of Education's managerial prerogative to implement education reform, on a case by case basis, as necessary in the SDA Districts, to prevent bureaucratic, contractual, legal, or regulatory impediments from blocking change geared toward providing a Thorough and Efficient education for the children in that District.

#### Our Children Deserve Great Teachers

14. Putting students in contact with great teachers is the single most important aspect to improving student performance. Recent studies have demonstrated that good teacher experiences result not only in higher graduation rates and higher rates of college attendance, but in higher income levels for the students who receive those positive experiences. The converse is also true for those who have poor teacher experiences. The SDA Districts, in particular, need to be filled with teachers who

foster a positive learning experience, to enhance the current and future lives of the children in our urban communities. In my view the achievement gap we see in the New Jersey SDA Districts is directly related to the SDA District's inability to consistently provide excellent teacher experiences for all students.

15. In many districts statewide, the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-17.3, enacted in 2012, has been a valuable tool to eliminate less than effective teachers. While the statute is new and enacted with the laudatory goal to improve teaching practice for all teachers, support struggling teachers, and remove individuals who are unable to improve their poor teaching skills, and are a disservice to our children, the initial implementation results are demonstrating that there is still need for improvement.

16. For example, in Newark, during a recent reduction in force, the State District Superintendent indicated that the district was required to retain those ineffective teachers over highly effective but less senior teachers in the event of a potential reduction in force ("RIF"). RIFs are common in SDA Districts, due to numerous factors, including shifts in student populations. Moreover, after a RIF, the districts are required to recall the laid off teachers, even if those teachers were



rated ineffective or partially effective, or even if they are in the process of tenure charges. See N.J.S.A. 18A:28-12. Thus, even after exiting ineffective teachers in a RIF, the SDA Districts would still be prevented from filling vacancies with talented, out-of-district teachers because the Districts would be required to first draw from the recall list.

17. According to DOE data, in the entire State in the 2013/2014 school year, which had 105,759 teachers Statewide, only 205 (0.1%) teachers were rated as ineffective and 2558 (2.4%) were rated as partially effective. Statewide, 24,897 (23.7%) of teachers were rated as highly effective. The rest were rated as effective. Thus, under the TEACHNJ ratings, the vast majority (97.5%) of New Jersey teachers in the State's 591 school districts in the 2013/2014 school year were rated as effective or highly effective. Most schools had no or very few ineffective or partially effective teachers.

18. By contrast, also in the 2013/2014 school year, Newark, Camden, and Paterson, all SDA Districts, were the only districts in the State that each employed more than 10 ineffective teachers. In the 2013/2014 school year, Newark employed 2,775 teachers in its district schools. Of these, 94 were rated as ineffective and 314 were rated as only partially effective. Only 309 of its 2775 teachers were rated as highly effective. Like Newark, Camden had a very high concentration of

the State's low rated teachers. In the 2013/2014 school year, it employed 11 ineffective teachers and 149 partially effective teachers. Conversely, only 33 of its 1,014 teachers were rated as highly effective. Paterson was similar with 20 of its 1,989 teachers rated as ineffective and 298 rated as partially effective in the 2013/2014 school year.

19. Thus, in 2013/2014, Camden, Newark, and Paterson, just three of the State's 591 school districts, employed 125 (60%) of the State's 205 ineffective teachers. These three districts also employed 758 (29%) of the State's 2,558 partially effective teachers. Conversely, only 526 (9%) of the 5,778 teachers employed in these three districts were rated as "highly effective" as compared to 23% of teachers Statewide who received this top rating. Although utilizing TEACHNJ, these three SDA Districts so far have been unable to fully utilize the process to remove the less than efficient teachers.

#### **Our Children Deserve Increased Opportunities to Learn**

20. Teachers in every district in the State of New Jersey are currently unionized, including in all thirty-one SDA Districts. As such, all of the SDA Districts are bound by a collective negotiation agreement ("CNA") with the teachers' unions that address virtually every aspect of the teacher positions in those districts.

21. Certain consequences of the restrictions in the CNAs, which were negotiated through the collective negotiation process, have led to impediments to a Thorough and Efficient system of education as applied at times in the SDA Districts. We cannot allow needed reforms that will benefit our children to be blocked by bureaucratic agreements. Our children must have those restrictions lifted, to ensure that they have an opportunity to receive a Thorough and Efficient education.

22. The New Jersey Education Association ("NJEA") participates in labor negotiations in almost every district, thereby affecting the resulting CNA in each district. The NJEA maintains that "school boards are required to negotiate with an employee representative" over at least 70 topics, including but not limited to:

- teacher-pupil contact time
- number of teaching periods
- transfer and assignment procedures
- workload
- length and number of preparation periods
- length of the workday
- hours of work
- certain aspects extracurricular assignments
- merit pay - including evaluation criteria
- Reduction in Force (RIF) - notice provisions and compensation for remaining staff if there is a significant increase in workload
- RIF procedures if NOT covered in statutes, such as: seniority, recall, bumping rights
- release time
- shifting unit work from unit employees to employees outside the unit

- work schedule including creation of new shift(s).

23. As such, CNAs between teachers' unions and school boards in New Jersey are typically lengthy, restrictive, and address virtually every aspect of the teacher's position. Certain items in CNAs, as applied in certain SDA Districts, often place insurmountable barriers to needed educational reforms necessary to guarantee a Thorough and Efficient education to the students in those districts. These impediments include CNA provisions that (1) limit, restrict and reduce teaching time, including but not limited to length of the school year, length of the school day, starting and ending time for the school day, the structure of the school day, and amount of teacher-student contact time during working hours; and (2) limit, restrict and reduce the flexibility of superintendents and principals to reorganize schedules for professional development and teaching time around the teachers' required duty-free time, unassigned time and preparatory periods, which must take place during the work day.

24. Even where an SDA State District Superintendent or other superintendent determines that the school day or school year should be lengthened, and the Commissioner approves that decision, explicit provisions in CNAs may prevent that proposed reform. Before that needed reform can be implemented, the CNA will have to be renegotiated; placing the fate of the reform in

the hands of the union. In addition, negotiation of a new CNA could take years to accomplish. Where it is determined that lengthened instructional time would benefit the children in a specific SDA District, that district's superintendent or the State District Superintendent - upon receiving the Commissioner's approval - should be able to implement such a change after a good faith showing that the school administration has made a responsible proposal and the union has failed to move forward with it. The children should be able to benefit from education reform as soon as such reform is deemed necessary.

25. Indeed, studies have shown that lengthening the school day or the school year increases student performance. For example, in a 2012 study performed by the Center for Education Research and Development at Stanford University ("CREDO"), researchers concluded that providing students with "an additional two months in learning in reading over their [traditional public school] counterparts" achieved significant student results. Center for Research on Education Outcomes ("CREDO"), Charter School Performance in New Jersey (November 1, 2012) at 17. CREDO also concluded that "[o]n average, students in New Jersey charter schools learned significantly more than their virtual counterparts in reading and mathematics." Id. at 15.

26. Consistent with this research, North Star Academy, a charter school in Newark, implements an extended 10-month school year and extended academic day program. New Jersey Department of Education, Office of Charter Schools, North Star Academy: Collection of Best Practices at 2. North Star reports some of the best student performance results. Based on 2015 standardized test scores, North Star ranked first in its similar school group<sup>1</sup> on both Math and ELA.

27. In regards to staffing flexibility, another cited impediment in some SDA Districts is seniority, which dictates how teachers are transferred or assigned. A junior teacher must be involuntarily transferred before a more senior teacher is impacted. The end result is that the CNA will often dictate a result contrary to the principal's judgment as to the needs of the particular classroom and the fit of the teacher to be assigned.

28. In addition, restrictive seniority provisions lead to greater inequity in the distribution of experienced and high performing teachers across classrooms in the school and district. For example, regardless of any statutory provision regarding RIFs, such as LIFO, teachers negotiate seniority provisions in their CNAs. In Camden, for example, the district

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<sup>1</sup> This group is compiled by looking at mean standardized testing scores, number of students with disabilities, and number of English language learners.

is expressly prevented from retaining one educator over another based upon performance unless all seniority, certification and length of service factors are equal. See Camden CNA Article XXIV. "No tenured teachers will be laid off before non-tenured teachers. Length of service in the district shall dictate the order of layoff...In the case of all factors equal, teachers will be considered on the basis of their evaluation ratings..." Ibid. The Newark CNA prevents "site-based decision-making" for "transfer provisions and seniority provisions." Newark, CNA Art. IV.

29. In addition, some SDA districts have been met with significant resistance to changing any provisions in their CNAs regarding the flexibility within the teachers' workdays. Items such as the number of class periods in a day, and the length of such class periods, are locked into CNAs. As such, where a superintendent wants to attempt an educational reform that requires a different type of class blocking, the superintendent becomes stymied by the lack of flexibility in the CNA. By way of example, Camden would like to introduce a K-8 literacy program that has had success in the Renaissance Schools in the Camden District and elsewhere. As a result of the Camden CNA's restrictions on scheduling and class flexibility, the CNA essentially prevents the District from instituting this well regarded and needed program. Camden has also made the

determination that suspended students would benefit from in-school suspension with teacher continuity rather than home suspension. The restrictions in the CNA prevent the District from utilizing teachers for this important purpose, and Camden is required to hire proctors to monitor the suspended students. These students miss out on teacher continuity and the instruction that they need.

30. Moreover, some SDA Districts' CNAs contain restrictions regarding professional development. Some educational reforms require teaching the teachers a new methodology. The CNAs, however, do not provide for the time in which to train the teachers in the methodology. As a result, teachers are unprepared to implement needed curricular and instructional reforms. Where a CNA does not allow for adequate, targeted professional development, the superintendent, with my approval, should be permitted to move ahead with needed professional development after a good faith showing that the school administration has made a responsible proposal and the union has failed to move forward with it.

31. Generally, the teachers' CNA is negotiated utilizing the prior agreement as a minimum. Districts have little leverage to negotiate required changes to the collective bargaining agreement because all of the surrounding districts have similar provisions and negotiation practices, and the NJEA



has a representative on each negotiation team and participates actively. The NJEA's interest is to ensure that contracts are negotiated in a way that the pro-union provisions of neighboring districts' contracts are used as leverage to ensure many common provisions across districts. There is resistance to provisions that would make sense only in SDA districts, given their struggles and demographics. Thus the same type of provisions, school day and school year structures that have been around for many years repeatedly end up in the agreement, preventing innovation and flexibility in the schools of the SDA Districts.

32. In negotiating with public employee unions in non-school employment, a public employer in New Jersey has the benefit of what is known as the "last best offer" provision of the New Jersey Employer Employee Relations Act ("EERA"), N.J.S.A. 34:13A-1 et seq. But that provision was eliminated for school districts by The School Employees Contract Resolution and Equity Act ("SECREA"), N.J.S.A. 34:13A-33. Due to the elimination of the "Last Best Offer" the school districts have lost any leverage to compel a change. The enactment of SECREA eliminated the ability of school boards to implement their "last best offer," to their public employees under an expiring CNA.

33. As of July 7, 2016, the inability of the school district to institute its last best offer has resulted in 49 districts in New Jersey (SDA and otherwise) which have not yet

reached an agreement for CNAs which expired on June 30, 2015 or earlier. The provisions of the expired CNA remain in effect pending execution of a new CNA. It is clearly within the best interest of the children of New Jersey for the Commissioner, and the superintendents, including the State District Superintendents, to implement educational reform when it becomes clear that the union is unreasonably blocking those reforms. Otherwise, during the CNA status quo, nothing will change - and the students in the SDA Districts will continue to suffer from the achievement gap.

**Children in Charter Schools Benefit From Enacted Education Reform, and All Children Should Be Able to Reap Similar Benefits**

34. There is evidence from charter school experiences that removal of these impediments will result in greater student achievement. A comparison of improvements in student performance that have been achieved by charter schools in the SDA Districts - which are not bound by CNAs or LIFO - with that of non-charter public schools in the same districts, supports the conclusion that the above-cited impediments to improvement are real. I firmly believe that they are standing in the way of eliminating the disparities between SDA Districts and the other 500+ districts.

35. While charter schools have the option of deciding whether to offer the terms of a collective bargaining agreement

to its certified staff, N.J.S.A. 18A:36A-14(b), most charter schools in New Jersey do not have teachers' unions, including some of the most successful charter schools, such as North Star in Newark.

36. Charter schools in SDA Districts are out-performing their district school counterparts. From my experience with the SDA Districts and charter schools and my review of the studies authored by experts in the field, I have determined five keys to success that, if implemented in district schools are expected to significantly improve outcomes in the SDA Districts:

- a. Extended learning time: Extension of learning time by adding days to the school year, by lengthening the school day, or by eliminating breaks.
- b. Human capital: Flexibility of school administrators in hiring, assigning, evaluating and training staff. This enables them to focus their personnel decisions on professionalism and student performance.
- c. High-dosage tutoring or extra classes for struggling students.
- d. Data-driven instruction: Operation of schools pursuant to benchmark assessments and individual performance goals for students.
- e. Culture of high expectations: Use of flexibility to create a learning culture where the school, staff, students and parents all commit to shared expectations of conduct, dress, participation, and other elements that foster a positive learning environment.

37. The innovative education methods that charter schools have implemented, which include certain keys to success, have led to improved student performance, especially in charter schools in SDA Districts. This evidence supports my experience

that the flexibility provided to charter schools in SDA Districts allow them to out-perform their district school counterparts. This has been a consistent trend since charter schools began operating in 1997.

38. Whether innovative school reform practices work or do not work is based on the needs, demographics, economics, location and culture of schools and districts at any given time. We need to provide the superintendents in these districts with flexibility to implement the best practices necessary to move the SDA districts forward without being limited by unreasonable contractual and statutory impediments.

39. In conclusion, for the achievement gap to be substantially reduced further so as to provide a constitutionally mandated Thorough and Efficient education to the public school children in the SDA districts, the Court should clarify that the Commissioner may allow SDA Superintendents to obviate certain restrictive statutory and contractual provisions, in those limited circumstances in SDA Districts, on an as needed basis, when it becomes clear that the union is unreasonably blocking needed educational reforms in that particular situation. The Supreme Court has indicated the importance of those reforms in stating that: "[f]unding is merely one tool that may be employed to achieve" a Thorough and Efficient education. See Horne, 557 U.S. at 459. The remedy

sought to be added to the Abbott v. Burke rubric is fundamental to education - the need for quality teachers that can be deployed and utilized as the needs of a school or district dictate, and the flexibility for school administrations, to create a learning environment that will result in significant and lasting achievement. The need for this reform is imperative and it is needed now. Every year that goes by where children do not receive the best education we can provide is a lost opportunity. Teachers, great teachers, are the key to education reform and closing the achievement gap in our most struggling districts. The statutory and contractual impediments that prevent us from delivering the Thorough and Efficient education that our Constitution mandates must give way for the benefit of the children.

I hereby certify that the statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

A handwritten signature in black ink, appearing to read "D. Hespe", written over a horizontal line.

DAVID C. HESPE

Dated: August 23, 2016