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February 20, 2020

Honorable Chief Justice Stuart Rabner
Associate Justices of the Supreme Court
Supreme Court of New Jersey
Hughes Justice Complex
Trenton, New Jersey 08625-0970

Re: ABBOTT, ET AL. V. BURKE, ET AL.
Docket NO. 083626

Dear Chief Justice Rabner and Associate Justices:

Please accept this letter brief in reply to the State Defendants' Brief in Opposition to Plaintiffs' Motion in Aid of Litigants' Rights in the above captioned matter.

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PRELIMINARY STATEMENT

The State Defendants ("State"), in their Brief in Opposition to Plaintiffs' Motion in Aid of Litigants' Rights ("State's Br."), reveal that on January 21, 2020, after years of

delay, the Schools Development Authority ("SDA") finally adopted an updated Statewide Strategic Plan identifying 23 priority facilities projects in SDA districts for advancement to actual construction. The State also confirms its extensive and unjustified delays in taking the requisite steps under the Education Facilities Construction and Financing Act ("EFCFA"), N.J.S.A. 18A:7G-4 and -5, to determine the need for additional school construction funding. Despite the demonstrated need for the 23 projects in the newly adopted Plan, the State offers no specific funding proposal for those projects nor a firm commitment to seek and secure that funding from the Legislature.

Plaintiffs respectfully request the Court stay disposition of their Motion until the completion of the FY2021 appropriations process. At that time, the Court will be positioned to determine whether the State has fully complied with the Abbott facilities mandates by securing necessary facilities funding or if further relief in aid of litigants' rights may be appropriate.

SUPPLEMENTAL STATEMENT OF FACTS

As set forth in the State's Brief, an updated Statewide Strategic Plan, as required by N.J.S.A. 18A:7G-5(m)(3), was approved by the SDA on January 21, 2020 while Plaintiffs' Motion was pending before this Court. State Br. at 22. This 2020 Strategic Plan prioritizes "the most severe facilities

deficiencies impacting program delivery," based on overcrowding and building age and condition in SDA districts, as identified in the January 2019 Educational Facilities Needs Assessment ("EFNA"). Certification of Manual M. Da Silva ("Da Silva Cert."), Ex. A at 11-12. The Plan then applies logistical factors, such as availability of land and delivery capacity, to determine the sequencing of priority projects for advancement to construction. Id. at 12-13. Finally, the Plan identifies "first tranche" projects for construction as follows: 11 projects "to address overcrowding," id. at 17; an additional 7 high priority districts "for site identification" to address remaining capacity needs, id. at 18; and 5 projects "to address serious facilities deficiencies through delivery of replacement facilities," id. at 22.

The 2020 Strategic Plan does not include any cost estimates or determinations of the funding needed to advance the 23 priority projects to construction. Nor does the 2020 Plan contain any specific proposals, recommendations or timeframe for securing from the Legislature the funding necessary to undertake and complete the 23 projects identified in the Plan.

POINT I

THE STATE'S EXTENDED, UNJUSTIFIED DELAYS IN TAKING THE REQUISITE ACTIONS TO COMPLY WITH THE ABBOTT FACILITIES MANDATES WARRANTS A STAY OF PLAINTIFFS' MOTION UNTIL COMPLETION OF THE FY2021 APPROPRIATIONS PROCESS

The State asks this Court to dismiss Plaintiffs' Motion, asserting it "has made substantial efforts to advance the School Construction Program." State's Br. at 2. Yet, the State simultaneously corroborates its lengthy and unjustified delays since 2014 in taking the steps required under EFCFA, N.J.S.A. 18A:7G-4 and -5, to secure additional school construction funding from the Legislature and comply with the mandates for school facilities improvements in Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V") and Abbott v. Burke, 164 N.J. 84 (2000) ("Abbott VII"). Consequently, as we explain, this Court should stay disposition of Plaintiffs' motion until completion of the FY2021 appropriations process to assess the State's progress in securing the funding necessary to comply with those mandates.

First, the State admits it publicly "recognize[d] that more money will be needed to initiate and complete projects to address remaining needs" in SDA districts over five years ago. State's Br. at 16. In its December 2014 Biannual Report to the Legislature, as required by N.J.S.A. 18A:7G-24, the State, through the SDA, "expressed a need for additional funding" to continue to remediate facilities deficiencies in those districts

and represented it "was in the process of developing recommendations as to how to address" school construction needs "beyond the projects that current authorized funding would support." State's Br. at 16, citing Da Silva Cert., ¶57. The SDA again "expressed a need" for additional funding for school facilities projects in SDA districts in its December 2018 and June and December 2019 Biannual Reports. State's Br. at 16-17 (citing June 2019 Report admission that additional funding is necessary to "fulfill" SDA's "constitutionally mandated mission of building new schools").

Further, the State confirms it expressed to the Legislature the "need for additional funding" to undertake outstanding SDA district projects in testimony by SDA officials in 2018 and 2019. State's Br. at 17-18. These officials testified that all previously authorized construction funding was committed to existing projects in its "then-current project portfolio," and that no new projects could be undertaken without additional funding. State's Br. at 17-18, citing testimony of SDA CEOs Charles McKenna and Lizette Delgado.

Second, the State confirms its substantial delays in finalizing an updated EFNA containing an educational priority ranking of all SDA district projects based on determinations of "critical need," an essential prerequisite in EFCFA's process for securing additional construction funding from the

Legislature. N.J.S.A. 18A:7G-5m(2) and (3). Pursuant to EFCFA, the Commissioner of Education ("Commissioner") must revise the EFNA every five years following approval of the SDA districts amendments to their Long Range Facilities Plans ("LRFP"), N.J.S.A. 18A:7G-5m(1), which also must be updated every five years, N.J.S.A. 18A:7G-4(a). As the record demonstrates, the Commissioner approved the SDA districts amended LRFPs in 2016 and then completed an updated EFNA. Certification of Lamont Repollet ("Repollet Cert."), ¶14, ¶16. Yet, the State did not use that EFNA to update the 2011 Statewide Strategic Plan for three years, despite Plaintiffs' repeated requests that it do so. Certification of David G. Sciarra, Ex. G, H, J and K. That lengthy delay, in turn, necessitated the Commissioner's revision of the 2016 EFNA in January 2019 to reflect changed conditions in the intervening years. Thus, the State delayed finalizing an updated EFNA based on the amended 2016 LRFPs for three years. Repollet Cert. ¶¶16-19.

Third, the record also makes clear that, after issuing the revised EFNA in January 2019, Repollet Cert., Ex. B, the State then failed to update the 2011 Statewide Strategic Plan -- the crucial, final step required by EFCFA for obtaining additional construction funds from the Legislature -- until January 2020. Da Silva Cert., Ex. A; and see N.J.S.A. 18A:7G-5m(3) (requiring SDA to revise the statewide strategic plan every five years).

Most troubling, while the State has now announced it adopted an updated Strategic Plan on January 21, 2020, it did so only after Plaintiffs filed the within Motion. Thus, it took Plaintiffs' request for this Court's intervention to finally compel the State to take the prescribed step of updating the Strategic Plan identifying the "first tranche" of "high priority" projects for advancement to construction, State's Br. at 14, over five years after its first public acknowledgement of the need for additional construction funding.

Fourth, the State recognizes the Legislature must authorize additional school construction funding under EFCFA. But the State offers no clear and firm commitment to "seek and secure such funding" from the Legislature in the upcoming FY2021 appropriations process. State's Br. at 23 (noting that the "FY2021 budget process is only just beginning"); see also Repollet Cert. (offering no specific information as to the State's efforts to seek and secure additional funding in the FY2021 appropriations process); Da Silva Cert. State's Br. ¶¶56-63 (referencing prior State expressions of the need for additional funding but providing no details on, or indication of, a concrete request to secure that funding from the Legislature). Instead, the State baldly asserts it has fulfilled its Abbott obligation to fully fund the cost of facilities improvements in SDA districts when it "alerted" the

Legislature of the need for additional funding. State's Br. at 23 and 28.¹

These assertions aside, the State cannot sidestep this Court's firm Abbott funding directives. The State's obligation to "seek" and "secure" additional appropriations for continued implementation of the Abbott remedial measures -- including school facilities improvements -- requires more than general notice to the Legislature. Rather, it requires the State, at a minimum, to determine the amount of additional funding needed and then to make a specific request to the Legislature for the requisite appropriations to provide those funds. See Abbott V, 153 N.J. at 518 (directing Commissioner to approve requests for additional funding for Abbott remedial programs and then "seek appropriations to ensure the funding and resources necessary for their implementation"); id. at 527 (directing Commissioner to "secure funds to cover the complete cost" of remediating "infrastructure deficiencies in Abbott school buildings").

Simply put, while the State has finally adopted an updated 2020 Strategic Plan, it has neither disclosed the amount of

¹ The State mischaracterizes Plaintiffs' as seeking an order to compel the SDA itself to provide additional construction funding. State's Br. at 23 (contending that "the Executive Branch lacks the ability to secure funding beyond what has to date been authorized by the Legislature"). Of course, as Plaintiffs make clear, "the provision of adequate funding" for the Abbott facilities mandates "ultimately remains the responsibility of the Legislature." Abbott V, 153 N.J. at 518.

funding needed to implement that plan, nor presented any details of a request for that funding, nor made a commitment to seek and secure the required funding, all essential prerequisites to ensure the Legislature "will be fully responsive to that constitutional call" in the FY2021 appropriations process. Abbott V, 153 N.J. at 519.

Finally, the State's extensive and unjustified delays, along with the absence of a specific funding proposal and a clear commitment to seek and secure that funding, strongly counsels for the Court's retention of Plaintiffs' Motion through the completion of the FY2021 appropriations process. Retention of the Motion during this timeframe will act as a safeguard against even further delays by the State in achieving compliance with the Abbott facilities mandates. Postponing final disposition will also serve to conserve judicial resources -- and those of the parties -- by eliminating the need for the filing of a new motion if the FY2021 appropriations process fails to yield results, as occurred when the Court confronted this same issue a decade ago. See Abbott v. Burke, 185 N.J. 612 (2005) ("Abbott XIV"); Abbott v. Burke, 193 N.J. 34 (2007) ("Abbott XVII"); and Abbott v. Burke, 196 N.J. 451 (2008) ("Abbott XVIII").

In sum, based on the record before this Court, Plaintiffs respectfully request a stay of their pending motion until the

FY2021 appropriations process has been completed, at which point, the Court, through supplemental submissions, can properly evaluate the State's progress in securing additional funding to comply with the Abbott facilities mandates and determine the need for further relief in aid of litigants' rights, if required.

CONCLUSION

For the reasons set forth above, Plaintiffs request the Court stay disposition of their Motion until completion of the FY2021 appropriations process. Plaintiffs further request the parties be directed to file supplemental submissions no later than July 15, 2020 apprising the Court of the status of the State's efforts to secure additional school construction funding and achieve compliance with the Abbott facilities mandates.

Respectfully submitted,



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