

SUPREME COURT OF NEW JERSEY
DOCKET NO. 62,700
M-969-07 & M-1372-07

RAYMOND ARTHUR ABBOTT, ET AL.,	:	
	:	Civil Action
Plaintiffs,	:	
	:	
v.	:	
	:	
	:	
FRED G. BURKE, ET AL.,	:	
	:	
Defendants.	:	

**THE STATE'S REPLY TO
THE PLAINTIFFS' EXCEPTIONS**

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INTRODUCTION

The Special Master in this case, the Honorable Peter E. Doyne, found that the School Funding Reform Act of 2008, N.J.S.A. 18A:7F-43 to 62, provides to the Abbott districts funding that exceeds the requirements necessary for a thorough and efficient education. Judge Doyne reached this determination after reviewing evidence from hundreds of documents and the testimony of thirty-one witnesses. Judge Doyne particularly examined the funding that the SFRA would provide to the Abbott districts. Judge Doyne further examined the effect that the SFRA would have on the ability of Abbott districts to provide supplemental programs that address the particularized needs of students in those districts. Judge Doyne specifically examined the testimony of Department of Education personnel, of expert witnesses and of educators and administrators from Abbott districts regarding the programs, finances and spending in the Abbott districts.

The Plaintiffs are, therefore, wrong in the fundamental contentions of their exceptions to Judge Doyne's findings. They are wrong in the assertion that Judge Doyne only engaged in a "facial, statewide and general" review of the SFRA. See Pb6.¹ The Plaintiffs are further wrong in their contention that Judge Doyne failed to evaluate whether funding under the SFRA would accommodate

¹"Pb" refers to the Plaintiffs' Exceptions to the Special Master's Report and Recommendations.

needed supplemental programs. Indeed, the Plaintiffs misread Judge Doyne's opinion to state that supplemental programs should be discontinued. Pb27. Judge Doyne actually determined that the SFRA provides "more than ample funds" for supplemental programs. Opinion/Recommendation to the Supreme Court (March 24, 2009) (the "Opinion") at 77.

This Court should, therefore, reject the exceptions of the Plaintiffs. This Court should instead accept the well-founded determination of Judge Doyne that the SFRA provides more than adequate funds to Abbott districts to provide a thorough and efficient education for their students. That determination demonstrates that the SFRA is constitutionally valid and that the Abbott remedies of parity funding and supplemental funding are now unnecessary. This Court should, therefore, end the Abbott remedies of parity funding and supplemental funding.

ARGUMENT

POINT I

THE PLAINTIFFS' EXCEPTION NO. 1 IS WITHOUT MERIT BECAUSE THE SFRA SPECIFICALLY PROVIDES ADEQUATE FUNDING FOR THE SPECIAL NEEDS OF THE AT-RISK AND LEP STUDENTS IN THE ABBOTT DISTRICTS.

The Plaintiffs incorrectly contend that Judge Doyne performed only a "facial, statewide and general review" of the SFRA. Pb6. On the contrary, Judge Doyne carefully and thoroughly examined the multitude of evidence that demonstrated the SFRA specifically provides adequate funding for the Abbott districts.

The principal characteristics of the Abbott districts that affect the cost of education are the numbers of students in poverty, or "at-risk" students, and students with limited English proficiency, or "LEP" students. See, e.g., Abbott v. Burke, 196, N.J. 544, 561 (2008) (Abbott XIX). See also, Opinion at 43. The Department of Education, by using the Professional Judgment Panel ("PJP") method, identified those resources particularly necessary for at-risk and LEP students to achieve the Core Curriculum Content Standards (the "CCCS"), New Jersey's measure of a thorough and efficient education. Opinion at 9-10, 23-24 and 43-44; D-123, ¶20-23. See, also, Abbott XIX, 196 N.J. at 552-53.

In New Jersey, PJP panel members specifically evaluated the effects that concentrations of poverty would have on per pupil

costs. D-124, page 11, ¶24; 4T97:8 to 4T98:6 (Ecks); see also D-12 at 37. The at-risk percentages utilized during the PJP process were developed based on a review of the actual at-risk concentrations in New Jersey school districts. 3T43:10-21 and 3T101:7-18 (Silverstein). One set of panelists determined the resources necessary to provide a thorough and efficient education to all students based on the effects of concentrations of at-risk students of 10%, 20%, 40% and 60%. D-124, page 11, ¶24; see also D-2 at Table 4.

The panelists, as experienced educators, were well-qualified to determine the resources needed to educate at-risk and LEP students. See Opinion at 24-25. Indeed, a representative of the Education Law Center, the organization that represents children in the Abbott districts, participated in the second round panel that specifically considered the resources needed for a 60% concentration of at-risk students. 3T109:15 to 20 (Silverstein). Three of the eight professional educators on the third panel were from Abbott districts. Opinion at 36.

Among the resources that the panelists identified as necessary for at-risk students were social workers, instructional aides, substitute teachers, reading specialists, parent liaisons, security guards, professional development, supplies and materials, and

after-school and summer school programming.² D-12, page 37.

Judge Doyne specifically found that the PJP process is a methodology accepted by experts in the field of educational finance as appropriate to identify necessary educational resources and to develop a funding formula. Opinion at 21. Dr. Monk, an expert whom Judge Doyne found particularly credible and reliable, testified that the PJP process is the "preferred approach" to developing a school funding formula. Opinion at 26 and 28. The foremost expert in conducting PJP processes, Dr. John Augenblick of Augenblick, Palaich and Associates, Inc. ("APA"), implemented the New Jersey PJP process. Opinion at 22. Finally, Judge Doyne found that the Department properly implemented the PJP process. See Opinion at 38.

The Department validated the resources that the New Jersey PJP process identified. Allan Odden, Ph.D. and Lawrence Picus, Ph.D. are nationally recognized experts in education finance and are leaders in the field of adequacy studies. Opinion at 71. They compared the resources developed by the New Jersey PJP process with the resources identified through an Evidence Based method, an alternative, recognized methodology for adequacy studies. Opinion at 19 and 71-72. Dr. Odden and Dr. Picus found that the New Jersey

²Many of the resources that the PJP panels recommended for at-risk students are substantially similar to the types of resources identified in Abbott v. Burke, 153 N.J. 480 (1997) (Abbott V). See, e.g., 153 N.J. at 510 (social services), 513 (security), and 516 (after school and summer school programs).

PJP process resulted in resources that met or exceeded the Evidence Based standards in all essential areas. Opinion at 71-72.

The Department then developed a funding formula that generates the financial wherewithal to provide the resources necessary for at-risk and LEP students to achieve the CCCS. Opinion at 43-44. See, generally, D-12. Sufficient funding is provided for at-risk students and LEP students through the use of appropriate weights that increase the amount of funding with an increase in the numbers of at-risk students and LEP students in a district. The additional funding generated by the weight is applied to **all** at-risk students and LEP students in a district. As the concentration of at-risk students increases to 60%, the weight for those students increases from 0.47 to 0.57. D-12, pages 12-13. The maximum weight of 0.57, which would apply to most Abbott districts, is among the highest at-risk weights used in the country. Opinion at 45.

Despite the Plaintiffs' contentions, the funding mechanism for the SFRA is fundamentally different from the device used under the Comprehensive Educational Improvement and Financing Act of 1996 ("CEIFA"). CEIFA did not, in any concrete way, attempt to link the CCCS to the actual funding needed to deliver that content. Abbott v. Burke, 149 N.J. 145, 169 (1997) (Abbott IV). The panels in the New Jersey PJP process identified the resources necessary for at-risk students and LEP students to achieve the CCCS (Opinion at 23-24), and the SFRA provides the funding to obtain those resources

(D-12, pages 5 and 10-18). As a result of the New Jersey PJP process, the funding under the SFRA was linked specifically to the costs of those resources necessary for at-risk and LEP students to achieve the CCCS.

Judge Doyne considered the testimony of witnesses from the Abbott districts regarding the adequacy of the SFRA. Opinion at 65. Judge Doyne determined that the testimony of these witnesses did not refute his basic finding that the SFRA provides adequate funds for the Abbott districts. The Abbott district witnesses asserted that they needed to spend as much, if not more, than the amounts in their current budgets. Opinion at 65. Judge Doyne specifically rejected the contention of these witnesses that "every dollar spent currently is necessary to provide a thorough and efficient education." Opinion at 65. Moreover, Judge Doyne determined that items these district witnesses considered necessary for a thorough and efficient education were "over aspirational" and optional expenditures. See Opinion at 65.

In short, the SFRA identifies the needs of students in the Abbott districts and adequately funds those needs. Despite the Plaintiffs' contentions, Judge Doyne considered and rejected the assertions of various Abbott district witnesses that the SFRA did not provide adequate funding for a thorough and efficient education. Opinion at 65. Judge Doyne, therefore, was entirely correct in his conclusion that the overwhelming evidence in this

case convincingly demonstrated that the SFRA was "designed to exceed the requirements necessary to provide a thorough and efficient education" to students in the Abbott districts. See Opinion at 70.

POINT II

PLAINTIFFS' EXCEPTION NO. 2 IS WITHOUT MERIT BECAUSE IT RELIES UPON AN INCORRECT ANALYSIS OF THE SFRA'S "BASE COST," WHICH IS BUT A COMPONENT OF THE CALCULATION OF THE ADEQUACY BUDGETS FOR ABBOTT DISTRICTS, AND UPON THE TESTIMONY OF THE PLAINTIFFS' EXPERTS, WHOM JUDGE DOYNE CORRECTLY FOUND UNRELIABLE.

The Plaintiffs assert the flawed argument that because the base cost of \$9,649 under the SFRA model is inadequate to provide a thorough and efficient education in the Abbott districts, the SFRA is constitutionally flawed. Pb19. This analysis, however, completely misunderstands the function of the "base cost" under the SFRA funding system. The base cost is but one of several substantial components of the Abbott districts' Adequacy Budgets. The combination of those various components provides more than adequate funding to the Abbott districts.

Educational funding under the SFRA begins with the calculation of an "Adequacy Budget" designed to support the vast majority of the educational resources needed by children in a district. Opinion at 41; D-12, page 19. See also N.J.S.A. 18A:7F-51. The base cost is not the amount that the Abbott districts are expected to use to provide a thorough and efficient education to their

students. The base amount is but one component of the Abbott district's Adequacy Budget.

The base amount is multiplied by various weights to account for the number of students who are in different grade levels and who are either at-risk or LEP students. For the Abbott districts, the at-risk weights would add to the Adequacy Budget \$5,500 for each at-risk elementary school student, \$5,720 for each at-risk middle school student, and \$6,435 for each at risk high school student. D-12, page 38. Similarly, the weight for LEP students would add \$4,825 for each LEP elementary school student, \$5,017 for each LEP middle school student, and \$5,645 for each LEP high school student.

Moreover, a number of categorical aids augment the Adequacy Budget. Categorical aids include such things as security aid and transportation funding. D-12, page 21.

After accounting for the correct calculation of the Abbott districts' Adequacy Budgets, categorical aids and other aid, the average per pupil revenue for the Abbott districts is \$17,325 for fiscal year 2008-2009. Opinion at 63. The Abbott districts will have among the highest per pupil revenues in the nation. See Opinion at 63. The Abbott districts, moreover, will have an average per pupil revenue 23.3% higher than the average per pupil revenue of the I and J districts. It is the Abbott districts' Adequacy Budget, combined with the various categorical and other

aids, that is the amount available to provide a thorough and efficient education. The elementary base cost of \$9,649 is but one component of the formula that produces the Adequacy Budgets. An analysis of the funding under the SFRA that focuses exclusively on the base cost and ignores the various other significant elements of the funding formula simply misstates the scope of the funding that the SFRA provides to the Abbott districts.

The Plaintiffs also object to Judge Doyne's conclusion that the parity remedy is no longer necessary. Pb14-15. The Plaintiffs tried to support this objection, in part, with the suggestion that the parity is the only measure of adequate funding for a thorough and efficient education. See Pb20.

The parity remedy was meant as an *interim* device to assure that Abbott districts had the resources necessary to provide a thorough and efficient education. See, generally, Abbott XIX, 196 N.J. at 562-63. "The parity order was chosen because of the absence of any other 'measuring stick' by which to gauge the necessary educational resources for the CCCS to be provided in districts having large concentrations of poor children within their pupil population." Abbott XIX, 196 N.J. at 563-64. A thorough and efficient education may be provided with funding less than the parity remedy. See, e.g., Abbott XIX, 196 N.J. at 563-64. Once the necessary level for a thorough and efficient education is achieved, "the constitutional mandate is fully satisfied regardless

of the fact that some districts may exceed it. In other words, the Constitution does not mandate equal expenditures per pupil." Abbott v. Burke, 119 N.J. 287, 306-7 (1990) (Abbott II).

The SFRA specifically provides a "measuring stick" for the educational resources that students in the Abbott districts will require for a thorough and efficient education. The panelists in the New Jersey PJP process specifically determined the resources that at-risk students and LEP students required to achieve the CCCS. See, e.g., D-12, pages 36-38. Among the panelists who identified those resources were professional educators from the Abbott districts. See Opinion at 36; 3T109:15 to 20 (Silverstein).

The Plaintiffs further argue that the SFRA provides inadequate funding for the Abbott districts, and base this argument on the incorrect assertion that the funding formula in the SFRA ignores the characteristics of the Abbott districts. Pb17-18. As already explained, the essential characteristics of the Abbott districts that affect school funding are populations of at-risk and LEP students. The SFRA specifically provides additional and generous funding for the needs of at-risk and LEP students in the Abbott districts through the use of weights.

The Plaintiffs' criticism of the SFRA relies upon the testimony of Bruce Baker, Ph.D. and Margaret Goertz, Ph.D., witnesses whom Judge Doyne pointedly determined were not credible. Judge Doyne found that Dr. Baker's analysis of the SFRA was based

upon highly selective uses of data that improperly skewed the results in favor of the Plaintiffs' contentions. As a consequence, Judge Doyne rejected Dr. Baker's analysis as unreliable. Opinion at 38.

Dr. Goertz offered a critique of the New Jersey PJP process, yet she was singularly unqualified to evaluate that process. Although she "acknowledged the PJP process is one of four accepted methodologies in attempting to construct an adequacy budget," she "was unable to offer an opinion whether the PJP process is an appropriate method to develop an adequacy formula." Opinion at 30; 11T55:23 to 11T56:6 (Goertz). Dr. Goertz' testimony was thus inherently contradictory and revealed a fundamental incapability to offer meaningful analysis of the PJP process.

Dr. Goertz offered an opinion as to the sufficiency of funding under the SFRA. Yet, she admitted that she was not an expert in determining the resources that would be required to achieve a particular educational objective, such as the CCCS, and was unable to determine if the resources developed under the New Jersey PJP process were adequate to attain the CCCS. 11T99:18 to 11T100:3 (Goertz). Dr. Goertz was unable to opine as to whether there is any correlation between funding and educational outcomes and could not determine what amount of funding would be necessary to achieve a thorough and efficient education. 11T103:20 to 11T104:6 (Goertz). Although Dr. Goertz compared funding under the SFRA with

funding under the Abbott remedies, she was unable to opine as to whether all of the funds provided under the Abbott remedies were necessary for a thorough and efficient education. 11T109:21 to 11T110:1 (Goertz).

Given the considerable limits of Dr. Goertz' ability to offer relevant opinions, Judge Doyne was entirely correct in his assessment that "her critique of the PJP process was less than persuasive." Opinion at 29.

The substance of both Dr. Baker's and Dr. Goertz' opinions regarding the New Jersey PJP process are inherently suspect. Both Dr. Baker and Dr. Goertz asserted that the model districts used in the New Jersey PJP process did not "match" any Abbott district, and they therefore incorrectly concluded that the New Jersey PJP process was invalid. See Pb17-18. This criticism misunderstands the purpose of a model district in the PJP process.

As Judge Doyne correctly observed, the model district is not meant to "mirror or replicate any particular district" in a school system. Opinion at 31. Justin Silverstein, an expert in designing and conducting PJP processes, explained that model districts are not meant to "serve as rough estimates for every category or type of school district in a school system." D-124, ¶20. "Instead of mimicking every school district in a school system, the model districts are to provide a framework that accounts for all the factors that affect cost and that is sufficiently comparable to

enough types of school districts in a system that panel members would have a working familiarity with the configurations." D-124, ¶20. If the model districts adequately account for the various factors that affect costs, "adjustments in costs through the use of appropriate weights will allow a Weighted Student Formula based on the models to accommodate the needs of every district in the system." D-124, ¶19.

In the New Jersey PJP process, the panel members specifically considered and determined the resources needed for differing concentrations of at-risk students, which is the principal characteristic of the Abbott districts that affects costs. D-2, Table 8 at page 16. Thus, the New Jersey PJP process appropriately accounted for the characteristics of the Abbott districts.

In addition, Dr. Goertz' and Dr. Baker's descriptions of the "mismatch" between the PJP model districts and the Abbott districts were based upon district characteristics that do not affect per pupil costs and are therefore irrelevant to an adequacy study. For example, Dr. Baker stated that several of the Abbott districts had larger student enrollments than any of the models. P-54, page 12. Newark, the largest Abbott district, has an enrollment of no more than 45,000 students. 18T38:8-13. Dr. Baker admitted that studies that he conducted in several States demonstrated that per pupil costs related to size do not increase significantly for districts between 2,000 and 50,000 students. 18T36:9 to 18T38:12. Dr. Loeb

testified that there is no convincing evidence that district size affects pupil costs in districts with between 5,000 and 50,000 students. D-122, ¶29. Dr. Picus stated that the largest district in New Jersey, Newark, has approximately the most efficient district size of 40,507 students. D-125, page 18, lines 11-13. Dr. Picus thus concluded that "there does not appear to be a need to provide additional resources to large districts" in New Jersey. D-125, page 18, lines 11-13. Thus, Dr. Baker criticized the models used in the New Jersey PJP process because they did not "match" the size of some Abbott districts, but the size of those Abbott districts would have no appreciable effect on per pupil educational costs.

Dr. Baker also criticized the PJP model districts because the percentage of students in poverty did not match the percentage in some of the Abbott districts. P-54, pages 11-12. The maximum percentage of poverty used in the PJP models was 60%. D-2, Table 8, page 16. A number of the Abbott districts have concentrations of poverty greater than 60%. P-54, pages 11-12. Yet, Dr. Baker could not opine whether increases in the concentration of poverty required increases in the weights for at-risk students. 18T39:13 to 18T40:2 (Baker). Dr. Baker also could not state whether the combination of poverty and population density affected educational costs. 18T39:13 to 18T40:2 (Baker). Thus, Dr. Baker criticized the PJP model districts because they did not match the poverty

rates in the Abbott districts, but he could not opine whether such increases actually affected per pupil educational costs.

Dr. Goertz asserted that the PJP models mismatched the Abbott districts because the models did not precisely correlate to the "enrollment levels, grade configurations, school types and numbers and sizes of schools" in the Abbott districts. P-3, ¶32. Yet, Dr. Goertz admitted she was unaware of any study that indicates enrollment levels, grade configurations, school types or school sizes affect per pupil costs. 11T98:7-18 (Goertz).

Judge Doyne specifically found that the New Jersey PJP process was "a fair process leading to an informed review of the necessary funding required to attempt to ensure a thorough and efficient education as required by the CCCS." Opinion at 38. The overwhelming evidence in the case, including the "thoughtful, temperate, non-partisan and moderate" testimony of the State's expert witnesses (Opinion at 26), supports Judge Doyne's finding. See Opinion at 26 and 38. Judge Doyne was also correct in rejecting the testimony of the Plaintiff's experts as "less than persuasive" and seriously deficient. See Opinion at 29 and 36.

POINT III

PLAINTIFFS' EXCEPTION NO. 3 IS WITHOUT MERIT BECAUSE IT IS BASED UPON A MISSTATEMENT OF THIS COURT'S PRIOR RULINGS REGARDING SUPPLEMENTAL PROGRAMS AND OF JUDGE DOYNE'S DECISION.

The Plaintiffs claim that in order to pass constitutional

muster, any funding formula must guarantee the continuation of the precise supplemental programs described in the Abbott cases. This Court never mandated the implementation of the precise supplemental programs described the Abbott cases. As Judge Doyne correctly noted, particular needs determine whether supplemental programs should be instituted in any particular districts. Opinion at 77. The chart appended to the Abbott X decision states, "The determination of need must guide school and district plans and budgets in all program areas. Thus, where the Court established a baseline, schools must either provide the baseline or, ***depending on need, adjust it to provide none, less or more than the baseline, or an alternative design.***" Abbott v. Burke, 177 N.J. 578, 590 (Abbott X) (emphasis added).

The Plaintiffs further incorrectly argue that Judge Doyne recommended that supplemental programs "should no longer be funded" (Pb24) and that they "should be discontinued" (Pb27). On the contrary, Judge Doyne specifically found that the SFRA provides "more than ample funds" for the Abbott districts "to provide whatever supplemental programs are needed." Opinion at 77.

Finally, the Plaintiffs suggest that any funding formula can only be constitutionally valid if the amount of funding for the Abbott districts equals or exceeds the sum of the existing parity remedy plus the costs of all the specific supplemental programs described in the Abbott cases. See Pb20 and 27. This Court has

expressly rejected the notion that the parity remedy is the only means by which to achieve a constitutional funding scheme. Abbott XIX, 196 N.J. at 563-64 (2008). As this Court observed, "Our prior decisions and orders did not preclude experimentation and consideration of alternative approaches to an equitable and constitutional funding approach." Abbott XIX, 196 N.J. at 563-64 (2008).

Similarly, the constitutional sufficiency of a funding formula does not depend upon whether particular supplemental programs are accommodated by that formula. The fundamental issue in this case is "whether the special needs of disadvantaged students can be met sufficiently through the SFRA's orderly and planned approach to addressing special needs, with all the benefits that such deliberate planning provides." Abbott XIX, 196 N.J. at 566. "If . . . that level is reached, the constitutional mandate is fully satisfied regardless of the fact that some districts may exceed it. In other words, the Constitution does not mandate equal expenditures per pupil." Abbott II, 119 N.J. at 306-7.

The Department, through a careful application of an accepted methodology, identified all of the resources required to allow at-risk students and LEP students achieve the CCCS. The Department then constructed a formula that provides more than adequate funding for those resources. Among other things, the SFRA provides more than ample funds for "the Abbott districts to provide whatever

supplemental programs are needed." Opinion at 77. These fact findings, made by Judge Doyme, demonstrate that the SFRA provides constitutionally adequate funding for the Abbott districts.

The Plaintiffs incorrectly assert that the SFRA suffers from the same deficiencies as the Comprehensive Educational Improvement and Financing Act of 1996 ("CEIFA"). Pb28 n. 12. CEIFA listed various supplemental programs that would qualify for Demonstrably Effective Program Aid ("DEPA"). No evidence demonstrated that DEPA would be sufficient to cover the costs of the supplemental programs. Abbott IV, 149 N.J. at 181. Under the SFRA, the necessary resources for at-risk and LEP students are specifically identified and the cost of those resources is determined. See, e.g., D-12, pages 10-12. Funding under SFRA is based upon the costs associated with the specifically identified resources.

The amount of the additional funding for at-risk students under the SFRA is much different from the funding under DEPA. DEPA would have provided **\$572** in fiscal year 2008-2009, for each at-risk elementary school student in a school with a moderate/high concentration of at-risk students. D-41. SFRA's at-risk sliding scale provides **\$5,500** in fiscal year 2008-2009 for each at-risk elementary school student in a district whose student population includes 60% at-risk students. D-41; D-12, page 38.

The Plaintiffs complain that the SFRA does not mandate the Abbott districts implement particular supplemental programs. Pb25-

26. The Commissioner of the Department, however, has adopted regulations to ensure that standards-based instructional priorities are in place in all school districts. See N.J.A.C. 6A:13. While individual school districts have flexibility in implementing the particular programs, positions and services best suited to their student populations, the regulations contain specific curriculum requirements mandated for all school districts and contain specific requirements for districts with 40% or more at-risk students. D-15, 3-4; N.J.A.C. 6A:13. Districts with populations of 40% or more at-risk students are specifically subject to limited class sizes and are required to provide a full day kindergarten program. N.J.A.C. 6A:13-3.1; N.J.A.C. 6A:13-3.2. Further, districts that have 40% or more at-risk populations and that have not met certain benchmark proficiency levels are subject to more stringent curriculum requirements. N.J.A.C. 6A:13-3.3 to 3.5. As such, school districts maintain the necessary discretion to provide the services, programs and positions that will best meet the needs of their students while the Commissioner has adopted regulations that sufficiently guide program requirements.

Just as program guidance is provided for the administration of a thorough and efficient education, there are also mechanisms for addressing issues within a school district that is not meeting the minimum performance requirements. The SFRA works in conjunction with the school accountability measures currently in place through

both New Jersey and federal law. New Jersey's accountability measures include the New Jersey Quality Single Accountability Continuum ("NJQSAC"), N.J.S.A. 18A:7A-10 et seq., the School District Fiscal Accountability Act ("SDFA"), N.J.S.A. 18A:7A-54 et seq., the powers and responsibilities of the executive county superintendent of school under N.J.S.A. 18A:7-1, et seq., and those fiscal accountability measures contained in N.J.S.A. 18A:7F-18, 30 and 60. These measures allow the DOE to identify and intervene in school districts that are not meeting the requisite standards of educational achievement. See D-1, 25-35.

POINT IV

PLAINTIFF'S EXCEPTION NO. 4 IS WITHOUT MERIT BECAUSE THE DEPARTMENT, THROUGH THE PJP PROCESS, SPECIFICALLY IDENTIFIED THE RESOURCES NECESSARY TO MEET THE NEEDS OF AT-RISK STUDENTS.

The Plaintiffs assert that the "SFRA's determinations were not grounded in any study of plaintiffs' special need." Pb29. This claim exhibits a misunderstanding of the evidence in this case and ignores the specific findings of Judge Doyne.

The Department employed a PJP process, a recognized methodology for adequacy studies, to identify the resources necessary for at-risk students and LEP students to achieve the CCCS. John Augenblick, the foremost expert in conducting PJP studies, implemented the New Jersey PJP process. Opinion at 22. As part of the New Jersey PJP process, professional educators

employed their experience and knowledge to determine the resources necessary for students to achieve the CCCS, New Jersey's measure of a thorough and efficient education. Opinion at 17 and 21. The panel members were specifically asked to determine the additional resources that would be required to teach children in districts with high concentrations of at-risk students. See, e.g., D-2, Table 8 at page 16.

The Department then retained Allan Odden Ph.D. and Lawrence Picus, Ph.D., independent and nationally renowned experts, to evaluate the resources that were identified in the New Jersey PJP process. They found the resources identified in the New Jersey PJP process to be more than adequate to enable students to achieve the CCCS. Opinion at 71-71. See, also, D-12, page 8; 1T62:17 to 1T64:3 (Davy); D-74, page 16.

Nonetheless, the Department then enhanced the weights for at-risk students above the weights generated through the PJP process by adopting a sliding scale. D-12, page 12-13. The PJP at-risk weights vary from 0.42 to 0.46. The sliding scale uses a weight that increases from 0.47 to 0.57 as the concentration of at-risk students increases to 60%. D-12, page 38. The at-risk sliding scale uses weights that are among the highest at-risk weights used in the country. Opinion at 45.

After reviewing all of this convincing evidence, Judge Doyne correctly concluded that the SFRA was developed through a

commendable process that ensures a thorough and efficient education for all students in New Jersey. Opinion at 38. Thus, the Plaintiffs' contention that the SFRA was not grounded in any study of the Plaintiffs' special needs is wrong.

The Plaintiffs further complain that the at-risk weight levels off when the concentration of at-risk students reaches 60%. Pb30-31. As the Plaintiffs openly concede, additional funding for at-risk students does not cease at the 60% level. On the contrary, a district receives funding at the higher, at-risk per pupil amount for every at-risk student in the district, no matter how high the concentration of such students. Pb30-31. See, also, Opinion at 44. Hence, the SFRA "does provide more funding for districts with higher [than 60%] concentrations of at-risk students." Opinion at 44.

The sliding scale was based upon the results of the PJP process and the recommendations of the experts who evaluated the PJP process. 29T30:4 to 29T35:6 (Attwood Rebuttal). See also, 1T84:8 to 1T87:16 (Davy). The at-risk weights that were calculated based upon the very large school district model in the PJP process increased from 0.46 for an at-risk concentration of 10%, to 0.47 for an at-risk concentration of 20%, to 0.51 for an at-risk concentration of 40%. The weight, however, declined to 0.37 as the at-risk population rose to 60%. D-2, Table 8, page 16. Thus, the New Jersey PJP study showed that the per pupil costs for at-risk

students did not increase when the concentration of such students reached 60%. A decline in the weight for at-risk students at high concentrations of such students is a result that occurs in other PJP studies. 3T43:22 to 3T44:20 (Silverstein).

Further, Dr. Picus opined that there was a debate in the scholarly literature as to whether the per pupil costs for at-risk students would increase with increasing concentrations of such students. D-74, page 6.

Dr. Odden recommended that the Department adopt one weight of 0.50 for at-risk students. Dr. Odden further opined that a weight of 0.50 would be among the highest weights for at-risk students used anywhere in the nation. 29T16:5-13 and 29T27:18 to 29T30:3 (Attwood Rebuttal).

Finally, Dr. Monk opined that capping the at-risk weight is appropriate because economies of scale can exist if a district has large numbers of children with similar needs. Accordingly, the per pupil costs of addressing those needs will not necessarily continue to increase. D-123, page 20, ¶47.

Judge Doyne relied upon all of these convincing proofs to conclude "there is sufficient evidence in the record [that] leveling off at 60% was an appropriate funding decision." Opinion at 44-45.

The Plaintiffs further contend that testimony from representatives of the Abbott districts "demonstrates that the SFRA

model fails to address numerous programs, services, and positions" that those districts need. Pb33. This contention is unsupported by the evidence in the case.

Various district witnesses testified as to the particular programs they implemented in their districts. None of them, however, could testify whether the SFRA model provided resources for those programs because they did not compare the resources they claimed they needed with the resources provided under the SFRA model. Thus, Mr. Ron Lee, the School Business Administrator for Newark, testified that he had not compared Newark's actual resources with the SFRA model resources. 27T80:3-20 (Lee). George Chando, the Assistant Superintendent of the Phillipsburg school district, stated he looked at the SFRA model, but never did an analysis of the resources described in the model. 21T86:6 to 21T90:13 (Chando). Victor Gilson, the Superintendent of the Bridgeton school district, was similarly unaware of the resources contained in the SFRA model. 19T198:6 to 19T200:10 (Gilson). Dennis Clancy, the Interim State District Superintendent for the City of Paterson, did not compare the actual resources Paterson was using with the SFRA resource model. 26T114:11 to 26T115:20 (Clancy). Dr. Clancy was also completely unaware that the SFRA model contained a capital line item that adds \$4,309,000 to Paterson's Adequacy Budget. 26T109:9 to 26T112:9 (Clancy).

Judge Doyne specifically found that the testimony of these

district witnesses failed to demonstrate that the SFRA did not provide sufficient funding for needed supplemental programs.

Many district educators opined it would not be possible to provide a thorough and efficient education with any reduction in their present funding; some testifying every dollar spent currently is necessary to provide a thorough and efficient education. With all due respect to the district [representatives'] commendable efforts on behalf of their students, this assumption is simply rejected. To argue there are no inefficiencies within a district and that every dollar spent currently is necessary to provide a thorough and efficient education is simply unreasonable. Furthermore, some of the "necessities" discussed during the hearing seem overly aspirational - a digital camera for preschool classrooms, three field trips per year as compared to two field trips per year, etc.

Opinion at 65.

The New Jersey PJP process identified all of the resources that districts with at-risk students would require. The Department then enhanced those resources. D-12, page 12-13 and 38. As Judge Doyne found, the SFRA thus provides "more than ample funds" for "whatever supplemental programs" the Abbott districts may need.

Opinion at 77.

POINT V

THE PLAINTIFFS' EXCEPTION NO. 5, WHICH STATES OBJECTIONS TO THE CENSUS-BASED METHOD OF SPECIAL EDUCATION FUNDING AND THE SFRA'S GEOGRAPHIC COST ADJUSTMENT, IS WITHOUT MERIT.

A. Census Based Special Education Funding

The census based method of funding special education has been adopted by the federal government, New Jersey, California, Connecticut, Massachusetts, and Pennsylvania. 28T30:2 to 28T31:17 (Gantwerk); D-123, ¶16. Plaintiffs contend that this method of funding special education, although not unique to New Jersey, is inherently flawed because it requires an even distribution of special education students throughout the state and New Jersey's special education children are not evenly distributed. Pb38. Plaintiffs also contend that there is a poverty association resulting in higher classification rates in Abbott districts. Pb38-39. The Plaintiffs' contentions are based on the analysis performed by Dr. Baker, who was specifically discredited by Judge Doyne, and, as such, little to no weight should be given to this analysis. Opinion at 38.

Plaintiffs also state that Dr. Picus, one of the State's expert witnesses, found it "likely" that Abbott districts with higher classification rates than provided for in the SFRA will be forced to reallocate funding from other educational areas to cover the costs of mandated special education services. Pb40.

Unfortunately, Plaintiffs misstate Dr. Picus's testimony. Dr. Picus testified that with census based funding there is a "concern" regarding "the possibility that there may be inadequate funding in one district that may need to take some money out of the general fund" and that "it's possible that the district would have to use other general resources to meet the special education needs." 7T98:21 to 7T99:17, 7T:105:1 to 7T105:6 (Picus). Dr. Picus did not testify that it was in anyway "likely," as Plaintiffs quote.

In direct contrast to Plaintiffs' contentions and, as accepted by Judge Doyne, Dr. Loeb testified that lower cost special education students tend to be somewhat evenly distributed. 9T37:1 to 9T37:6 (Loeb). Dr. Loeb further testified that studies have indicated that there is no strong correlation between income and classification rate. 9T:36:14 to 9T36:24 (Loeb).

Perhaps more importantly, Dr. Loeb testified that considerable research in the areas of education finance and education policy has shown that funding based on actual classification rates results in greater proportions of students being classified. Exhibit D-122, ¶34. Dr. Loeb testified that the census based method of funding special education eliminates the financial motive to mis- or over-classify students and that less students are classified under this method. Exhibit D-122, ¶36; 9T32:18 to 9T32:24. Dr. Monk testified that in districts with classification rates above 14.69%, the rate utilized in the SFRA, "you can't assume uncritically that

the incident percentage is an accurate measure of the true presence of student disabilities within the district" because there may be a misclassification problem. 12T53:1 to 12T53:16 (Monk).

Ms. Barbara Gantwerk testified as to the deleterious effects of misclassification on students not requiring special education services, citing both stigma and slowed progress. 29T6:24 to 28T7:4, 29T11:13 to 29T12:22 (Gantwerk)

Dr. Loeb further testified that greater cost special education students are not evenly distributed. 9T35:6 to 9T37:6 (Loeb). The SFRA accounts for this difference in that extraordinary costs for special education are provided as categorical aid. D-12, page 21. Dr. Picus testified that the categorical funding for extraordinary costs provides a "great deal of money in the special ed system." 7T107:4 to 7T107:14 (Picus).

Furthermore, classification rates do not necessarily serve as an accurate indicator of costs for special education students because special education costs vary within classifications and across classification rates. 28T13:1 to 28T14:4 (Gantwerk). Costs within classifications vary depending on each individual student's needs, the services the student receives, the manner in which the student's school provides the services, the location where the student receives services and the number of services the student receives. 28T13:1 to 28T13:10 (Gantwerk). Costs vary across classifications because students in all classifications have a

variety of services available to them, receive different levels of services and are placed in different settings. 28T13:20 to 28T14:22 (Gantwerk).

Thus, Abbott districts may have classification rates higher than 14.69%, but that fact alone does not establish that special education in the Abbott districts is underfunded.

B. SFRA's Geographic Cost Adjustment

The Plaintiffs' principal objection to the SFRA's geographic cost adjustment (the "GCA") is that it provides a greater adjustment to some I and J districts than to the Abbott districts. Pb41; 18T67:3-10 (Baker). The Plaintiffs support their criticism of the GCA with an analysis by Dr. Baker.

Judge Doyle found Dr. Baker's testimony especially unreliable because Dr. Baker inappropriately manipulated data to skew his results in favor of the Plaintiffs' contentions. Opinion at 38. Dr. Baker's misuse of data was again present in his analysis of the SFRA's GCA. Dr. Baker based his conclusion on a comparison of the average of the SFRA's GCA index to an average of certain alternative indices for certain aggregates of school districts. P-54, page 30. That is, Dr. Baker did not compare the indices for particular districts. He produced a contorted analysis by using averages of indices and aggregates of districts. He provided an illustration of the effect of the SFRA's GCA for only four specific districts. P-54, pages 31-32. Dr. Baker selected these four

districts because they produced the greatest contrast between the effect of the SFRA's GCA on an Abbott district compared to a non-Abbott district. 18T28:19 to 18T29:16 (Baker).

A comparison of SFRA's GCA to the principal alternative index, the Taylor-Fowler index, for each Abbott district demonstrates that the SFRA's GCA is a fair and reasonable geographic cost index. D-133; 29T111:21 to 29T113:17 (Attwood). The Department, moreover, developed the SFRA's GCA using a nationally recognized method and the most current census data. Opinion at 50-51. Judge Doyne's acceptance of the validity of the SFRA's GCA is, therefore, correct. See Opinion at 50-51.

POINT VI

THE PLAINTIFFS' EXCEPTION NO. 6 IS WITHOUT MERIT BECAUSE THE SFRA PROPERLY ACCOUNTS FOR MUNICIPAL OVERBURDEN.

The Plaintiffs assert that the SFRA is unconstitutional because it fails to account for "municipal overburden."³ In making this assertion, the Plaintiffs ignore important components of the SFRA.

The Local Fair Share is the amount that the SFRA requires a district to contribute to that district's Adequacy Budget. Opinion at 52; N.J.S.A. 18A:7F-53. The Local Fair Share is based upon the

³Plaintiffs rely principally upon the testimony of Jon Karl Erickson, Ph.D. to support their claim that the Abbott districts experience municipal overburden. Pb44. Dr. Erickson, however, offered no testimony that any Abbott district was municipally overburdened. 14T129:11-14 (Erickson).

district's equalized property wealth and equalized income wealth. Opinion at 52; N.J.S.A. 18A:7F-52. Thus, a district's contribution to its Local Fair Share is limited to an amount that the district can afford, based upon a measure of the community's wealth.

The SFRA also provides Adjustment Aid that enables districts spending above their Adequacy Budgets to maintain current levels of spending without significant tax levy increases or reductions in programs or services. Opinion at 59; N.J.S.A. 18A:7F-58. Adjustment Aid provides funding to ensure "no district in the state would receive less aid in the 2008/2009 school year than it received in a previous year plus two percent." 5T72:18-22 (Attwood). See also Opinion at 59. The funding continues in subsequent years so that no district receives less than its 2008-2009 aid, absent a significant decrease in the district's enrollment. N.J.S.A. 18A:7F-58(a)(2)(3). See also Opinion at 59.

In addition, Abbott districts that received Education Opportunity Aid in fiscal year 2008 are eligible for additional aid if they are under adequacy and they are failing or are municipally overburdened. D-12, page 26; N.J.S.A. 18A:7F-58(b)(2).

Hence, the SFRA adequately limits the obligation of districts to contribute to the Adequacy Budget if the district is subject to municipal overburden.

POINT VII

THE PLAINTIFFS' EXCEPTION NO. 7 IS WITHOUT MERIT BECAUSE THE DEPARTMENT HAS IMPLEMENTED REGULATIONS THAT ENSURE THE CONTINUATION OF HIGH QUALITY PRESCHOOL PROGRAMS.

Plaintiffs' argue that Judge Doyne erred in failing to make any factual findings or conclusions regarding the SFRA's impact on the Abbott preschool program. Pb47. However, Judge Doyne specifically found that:

By using actual cost data, the State ensured the components of the successful Abbott preschool programs could be implemented for all at-risk children throughout the State.

Opinion at 56.

Plaintiffs' assert that the SFRA does not require or ensure the implementation of key portions of the Abbott preschool remedy, such as teacher and classroom quality. Pb48. However, the Commissioner of Education testified that under the SFRA the same high quality preschool program that has been provided in Abbott districts would not only be continued but would be expanded to include all at-risk children in New Jersey. 1T118:16 to 1T119:6, 1T121:19 to 126:5 (Davy). The Commissioner testified that the quality components of the preschool program would "[a]bsolutely not" be changed. 1T126:2 to 1T126:5 (Davy). Under the SFRA, preschool regulations were promulgated by the Commissioner and adopted on June 13, 2008. D-71; N.J.A.C. 6A:13A-1.1 to 11.4. These regulations require the same high quality preschool programs

and standards that were previously required of Abbott preschool programs. See D-1 at 23. As such, Judge Doyne specifically found that "the preschool programs must meet the Abbott quality standards (e.g. small class size, research based curriculum, certificated teachers)." Opinion at 56.

The Plaintiffs, moreover, insist that the Abbott districts be allowed to inflate funding for preschool with "special requests." Pb49. Judge Doyne specifically found that many of the "necessities" that the Abbott districts sought in the past were "overly aspirational" and purely optional expenditures. Opinion at 65. As such, there is no basis for the continuation of funding Abbott preschool programs through the "special request" process.

The Abbott districts, moreover, will receive for preschool the higher of the amount determined under the SFRA, the total dollar amount that the district received in the 2008-2009 fiscal year, or funding based on the per pupil amount attributed to the district in the 2008-2009 fiscal year. 4T29:22 to 4T31:18 (Joye). The costs of the special requests are included in the calculation of the 2008-2009 total funding amount and the 2008-2009 per pupil funding amount. 4T29:22 to 4T31:18 (Joye). Hence, the costs of previous special requests are included in the preschool funding for the Abbott districts.

Judge Doyne correctly found that the SFRA adequately funds preschool programs in the Abbott districts and that the

Department's regulations ensure that those programs will be high quality. See Opinion at 56.

POINT VIII

PLAINTIFFS' EXCEPTION NO. 8 IS WITHOUT MERIT BECAUSE THE CONTINUATION OF ANY SUPPLEMENTAL FUNDING REMEDY IS INAPPROPRIATE.

The Plaintiffs claim that a continuation of supplemental funding is necessary in order for the Abbott districts to provide supplemental programs, services and positions. Pb53. This assertion, however, is directly contrary to Judge Doyne's specific fact finding that funding under the SFRA exceeds the requirements necessary for the Abbott districts to provide a thorough and efficient education to their students. Opinion at 70. Judge Doyne further found that the SFRA gives "more than ample funds" for the Abbott districts to provide the necessary supplemental programs for their students to achieve the CCCS. Opinion at 77.

The Plaintiffs, moreover, base their claim of the need for supplemental funding upon various representatives of the Abbott districts who testified that they would have to reduce spending given the funding provided under the SFRA. Judge Doyne rejected the argument that reductions in spending would prevent these districts from providing a thorough and efficient education. Opinion at 65. Indeed, several of the witnesses specifically admitted that, despite spending reductions, their districts continued to provide a thorough and efficient education. 21T61:13-

16 (Chandos); 27T78:8-20 (Lee). In addition, Judge Doyne rejected the contention that every dollar spent currently is necessary to provide a thorough and efficient education. Opinion at 65. Finally, Judge Doyne found that items the Abbott district witnesses claimed were necessary for a thorough and efficient education were "over aspirational" and optional expenditures. Opinion at 65.

Judge Doyne specifically found that the SFRA provides the Abbott districts sufficient funding for a thorough and efficient education, including any needed supplemental programs. Opinion at 70 and 77. But he made no specific finding of fact that in any way supports a conclusion that somehow the SFRA will prove deficient in some, as yet unknown, way in the future. Hence, Judge Doyne's fact findings refute the need for any supplemental funding remedy.

The continuation of a supplemental funding remedy would undermine the essential purposes of the SFRA. A supplemental funding remedy would unnecessarily perpetuate a two-tiered system of school finance that would supplant the SFRA's "orderly and planned approach to addressing special needs" with a haphazard "open-ended, individual-district-needs-based approach." See Abbott XIX, 196 N.J. at 566; Opinion at 72.

Finally, the continuation of the supplemental funding remedy would violate the essential constitutional doctrine of the separation of powers. In the absence of a well-established constitutional deficiency in the SFRA, the imposition of a


supplemental funding remedy would be an intrusion into the Legislature's responsibility to direct educational policy. See Abbott v. Burke, 170 N.J. 537, 562 (Abbott VIII); Abbott II, 119 N.J. at 304; Robinson v. Cahill, 69 N.J. 133, 144-45 (1975).

In short, both Judge Doyne's and the Plaintiffs' recommendation that the supplemental funding remedy continue are in error. This Court, therefore, should end that remedy.

CONCLUSION

For all of the foregoing reasons, this Court should adopt Judge Doyne's findings of fact that the SFRA provides more than adequate funding for the Abbott districts to provide a thorough and efficient education to their students. Such a fact finding demonstrates that the SFRA is constitutionally valid. This Court should, therefore, end the Abbott remedies of parity funding and supplemental funding.

Respectfully submitted,



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