

SUPREME COURT OF NEW JERSEY
DOCKET NO. 42,170

RAYMOND ARTHUR ABBOTT, et al.,)	
)	
Plaintiffs,)	Civil Action
)	
v.)	
)	
FRED G. BURKE, et al.,)	
)	
Defendants.)	

BRIEF IN OPPOSITION TO PLAINTIFFS'
MOTION IN AID OF LITIGANTS' RIGHTS

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PRELIMINARY STATEMENT

The Education Law Center ("ELC"), through a motion styled as in aid of litigants' rights, asks this Court to sign an order "to ensure the State's compliance" with this Court's prior decisions in the Abbott v. Burke litigation and the Educational Facilities Construction and Financing Act. ELC specifically requests an order from this Court directing the State to do two things: (1) complete and adopt a revised Statewide Strategic Plan for school construction projects and (2) upon completion of said plan, seek and secure funding to complete the projects contained therein. As neither claim is properly before this Court, ELC's motion should be denied.

First, since the filing of ELC's motion, the New Jersey Schools Development Authority ("SDA") has adopted a Statewide Strategic Plan, rendering the first claim for relief entirely moot. Second, any order directing the State to seek and secure funding to complete the projects in the recently adopted Statewide Strategic Plan would be premature and improper. Currently, the SDA has funding to complete the projects identified in its prior Statewide Strategic Plan, which are set to be completed in 2020 through 2025. While the State recognizes that additional funding will be needed for the projects identified in the new Statewide Strategic Plan, it has alerted the Legislature to that need and, with that new Statewide Strategic Plan now in place, the State is

positioned to move forward. Beyond that, the State cannot "secure funding" as requested by ELC. School facilities construction projects are funded through School Facilities Construction Bonds that the Legislature has authorized the Economic Development Authority ("EDA") to issue. The Legislature placed a limit on the amount of such bonds that may be issued by the EDA, and that limit cannot be increased by any act of the EDA, the SDA, or the Department of Education ("DOE").

Because the State has made substantial efforts to advance the School Construction Program, and because neither of ELC's claims for relief can be granted by this Court, ELC's motion in aid of litigants' rights should be denied.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS

The New Jersey Constitution requires the Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years." N.J. Const. (1947) Art. VIII, § 4, ¶ 1 ("T&E Clause"). Adequate physical school facilities "are an essential component of that constitutional mandate." Abbott v. Burke, 149 N.J. 145, 186 (1997) (Abbott IV). In Abbott IV, the Court declared that the State must, as part of its obligation under the T&E Clause, "provide facilities for children in the special needs districts that will be sufficient to enable those students to achieve the

substantive standards that . . . define a thorough and efficient education." Id. at 188. The Court further stated that "[t]he quality of the facilities cannot depend on the district's willingness or ability to raise taxes or incur debt." Ibid.

The next year, in Abbott V, Abbott v. Burke, 153 N.J. 480 (1998), the Court assessed the recommendations by the DOE about renovation and construction, and directed that the proposed formulation of a Five-Year Facilities Management Plan by each district "be undertaken immediately" and that the Commissioner of Education ensure completion and timeliness. Id. at 521. Regarding financing, the Court looked favorably upon a proposal that would allow the Educational Facilities Authority to finance the construction and renovation of elementary and secondary schools in the Abbott Districts¹ through the issuance of bonds secured by annual appropriation by the Legislature. Id. at 523.

In response to the Abbott IV and Abbott V rulings, the New Jersey Legislature enacted the Educational Facilities Construction and Financing Act ("EFCFA"), N.J.S.A. 18A:7G-1 to -48. The EFCFA codifies the recommendations that had been made to the Court in the Abbott cases, including the development and timing of long-

¹ Effective January 13, 2008, the Legislature eliminated the designation "Abbott district" and replaced it with the new designation "SDA district." L. 2007, c. 260. The two terms will be used interchangeably.

range facilities plans, see N.J.S.A. 18A:7G-4, and financing through bonds, see N.J.S.A. 18A:7G-13 and -14. It also recognized the State's obligation to undertake and finance Abbott district school facilities projects and established procedures for the fulfillment of those obligations. See, generally, N.J.S.A. 18A:7G-5. It thus launched the New Jersey School Construction Program – a multi-faceted, comprehensive program for the design, renovation, repair, and new construction of primary and secondary schools throughout New Jersey. Certification of Manuel M. Da Silva Cert. ("Da Silva Cert."), ¶3.

The School Construction Program is implemented by the SDA, which was created by the Legislature in 2007.² Da Silva Cert., ¶7. The SDA manages and funds 100 percent of the predevelopment services, design, and construction for all SDA districts. Da Silva Cert., ¶9. The EFCFA creates a comprehensive scheme, with actions required by both the SDA and the DOE, to ensure that the facilities needs of the SDA districts are being met.

A. The School Facilities Process

The first step is that all New Jersey school districts have in place a long-range facilities plan ("LRFP") approved by the DOE. Certification of Dr. Lamont O. Repollet ("Repollet Cert."),

² Prior to the creation of the SDA, the Schools Construction Program was implemented by the EDA and then by the Schools Construction Corporation ("SCC"), a subsidiary of the EDA. See Da Silva Cert., ¶¶3-7.

¶3. The purpose of an LRFP is to analyze the district's current student enrollment and projected enrollment compared to the current facilities available to serve that enrollment, identify all space and building system deficiencies in serving students adequately, and propose a plan to satisfy those facilities' needs. Repollet Cert., ¶4.

The major LRFP reporting requirements for districts typically include: updating the existing inventory and providing enrollment projections at all grade levels; proposing corrective building system upgrades (e.g., mechanical systems, new windows); proposing corrective inventory actions (i.e., addressing space problems by removing, adding, or altering sites, schools, buildings, and rooms); entering conclusions on the disposition and development of sites, buildings, and program spaces; and, for purposes of assisting the SDA, providing estimated project costs. Repollet Cert., ¶5. Because a district's LRFP serves as both a snapshot of current conditions in the district as well as a blueprint for future projects, proposals to correct building deficiencies and overcrowding may exceed the five-year time period of the LRFP, but districts must still identify those long-range proposals in their LRFPs. Repollet Cert., ¶6. The DOE's review, however, focuses on what the district's strategy is for addressing facilities needs in the next five years. Ibid.

The LRFP approval process requires the DOE to make determinations on health and safety building deficiencies and space deficits that impair the district's ability to deliver the educational programs required to meet the core curriculum content standards. Repollet Cert., ¶7. The DOE assesses the enrollment projections made by each district by reviewing enrollment projections against actual enrollment over the past five years. Ibid. The DOE then reviews proposed room inventories for each school to determine whether the plan provides adequate capacity for district enrollments, as analyzed under several calculation methods to capture classroom space and district practices in using specialized room types. Ibid. Next, the DOE reviews the "functional capacity" of buildings according to the EFCFA formula to determine the unhoused students prior to and after the district's proposed work under the LRFP. Ibid. The DOE must further assure that a district's proposals are educationally adequate and will enable students to achieve statutory core curriculum content standards. Ibid.

Under the EFCFA, each district was required to prepare and submit an LRFP by December 15, 2000, and again by October 1, 2005. N.J.S.A. 18A:7G-4(a); Repollet Cert., ¶8. Following approval of the 2005 LRFP, each district is required to amend its LRFP at least once every five years, to update enrollment projections, building

capacities, and health and safety conditions. N.J.S.A. 18A:7G-4(a); Repollet Cert., ¶13.

Following DOE's final approval of district LRFPs, the EFCFA requires the DOE to create an Educational Facilities Needs Assessment ("EFNA") and Educational Priority Ranking for each SDA district. N.J.S.A. 18A:7G-5(m)(1)-(2); Repollet Cert., ¶15. Based on that, the SDA is then required to establish a Statewide Strategic Plan, which is to be used "in the sequencing of SDA District school facilities projects." N.J.S.A. 18A:7G-5(m)(3); Da Silva Cert., ¶34. The SDA develops the strategic plan based upon the projects' educational priority ranking and issues that impact the SDA's "ability to complete the projects including, but not limited to, the construction schedule and other appropriate factors." N.J.S.A. 18A:7G-5(m)(3); Da Silva Cert., ¶34. Both the EFNA and the Statewide Strategic Plan are to be revised no less than once every five years. N.J.S.A. 18A:7G-5(m).

The LRFP is a high level plan of a district's facility needs, but as districts are cautioned in the LRFP review process, the approval of the LRFP does not imply approval of an individual school facilities project. Repollet Cert., ¶20. Once the SDA's Statewide Strategic Plan is complete, the SDA and DOE consult with SDA districts to review the district's needs, available resources, available project locations, and other district-specific factors to decide whether and how to advance specific school facilities

projects in SDA districts. Repollet Cert., ¶21. Once the SDA, DOE, and SDA district identify the specific projects for advancement to address district needs, the DOE may approve the SDA to engage in the preliminary activities ("pre-development activities") relevant to the proposed project, e.g., feasibility studies, land acquisition, preliminary design, temporary facilities. N.J.A.C. 6A:26-3.9; Repollet Cert., ¶22. If the proposed project is consistent with the district's approved LRFP, and the activities are consistent with the proposed project, the DOE issues a pre-development approval which serves as an authorization for the SDA to undertake the work, but does not constitute a project approval required by section 5 of EFCFA. Repollet Cert., ¶22.

Project approval occurs after the district has authorized the submission of an application with cost estimates, schematic plans, and land acquisition approval (if applicable) so that the DOE can make both an educational adequacy determination and a preliminary eligible cost determination. Ibid. When the project design is at least sixty percent complete, the DOE can make a final educational adequacy determination, and based upon a recommendation of the SDA, determine a project's final eligible costs. N.J.A.C. 6A:26-3.5, -5.4; Repollet Cert., ¶22. Once the SDA has completed design documents, the project can proceed to construction. Repollet Cert., ¶22.

B. Development of the SDA District LRFPs and the EFNA

On December 19, 2005, this Court ruled in Abbott v. Burke, 185 N.J. 612, 615 (2005) ("Abbott XIV"), that the SDA districts' then-overdue LRFPs were to be submitted to the DOE no later than January 15, 2006. Ibid. Due to numerous district errors and incomplete submissions, each SDA district received no less than one letter advising that its submission was incomplete and/or inaccurate and directing it to resubmit a complete and accurate LRF. Repollet Cert., ¶10. Several of the SDA districts' second submissions were similarly incomplete and/or inaccurate and at least one SDA district's third submission was determined to be incomplete and/or inaccurate. Ibid. Due to the fact that numerous submissions were required, final approvals of the SDA district LRFPs were not completed until 2007 or 2008. Ibid. Each SDA district had in place an LRF that was approved by 2008. Repollet Cert., ¶12.

In early 2016, the DOE completed the process of review and approval of five-year amendments to the SDA districts' LRFPs as required by EFCFA. Repollet Cert., ¶14. Based on the 2016 LRF Amendment, the DOE completed an EFNA and Priority Ranking for each SDA district. Repollet Cert., ¶16, Exh. A. Subsequent to the completion of the 2016 EFNA, the SDA funded and completed a number of projects that significantly improved district capacity needs. Repollet Cert., ¶17. DOE thus undertook to review the 2016 EFNA. Ibid. Following that review, in 2019, DOE completed

a revised EFNA and Priority Ranking for each SDA district using updated enrollment projections and building capacity assessments. Repollet Cert., ¶18, Exh. B. The 2019 EFNA was transmitted to the SDA on January 28, 2019. Repollet Cert., ¶19.

C. Development and Implementation of a Statewide Strategic Plan

In 2008, shortly after its creation, the SDA released a 2008 New Funding Allocation and Capital Plan for SDA Districts, which controlled until it presented an update to that plan on March 2, 2011 ("2011 Capital Portfolio"). Da Silva Cert., ¶35. In its 2011 Capital Portfolio, the SDA listed a prioritization of various projects in SDA districts, rating those projects on the basis of the project's efficient response to an educational need, efficient use of public funds, and the manner in which the construction schedule aligned with the efficient use of public resources. Ibid. The list of projects also included a score given by the DOE – a number based upon district-wide overcrowding, Facilities Efficiency Standards compliance, general building conditions, and efficiency. Ibid. Based on that list, and the application of construction factors, the SDA enumerated ten specific projects that would be advanced into the next stage of construction to address educational priority needs in those districts. Ibid. In 2011, the SDA completed three major capital projects in SDA districts. Da Silva Cert., ¶15. In addition, by the end of that year, a total of forty projects in the SDA's Emergent Project

Program had been completed, while an additional seventy-nine emergent projects had advanced into pre-development, design, or construction. Ibid.

On March 7, 2012, the SDA approved an update to the 2011 Capital Portfolio ("2012 Capital Portfolio"). Da Silva Cert., ¶37. In its 2012 Capital Portfolio, the SDA publicized the status of the ten projects identified in the 2011 Capital Portfolio, noting that progress had been made on each of them. Da Silva Cert., ¶38. The SDA then selected twenty projects for advancement in 2012 based on educational priority needs. Ibid. The SDA listed that its goals were to continue to advance construction projects from the 2011 Capital Portfolio, advance eight 2012 Capital Portfolio Projects into Pre-Development or Construction stages, conduct Working Group reviews of District needs in seven Districts, advance five 2012 Portfolio Projects to address serious facility condition deficiencies, and complete active construction projects in SDA districts. Ibid.

In 2012 and 2013, the SDA made significant progress in advancing the projects listed in both the 2011 Capital Portfolio and the 2012 Capital Portfolio. Da Silva Cert., ¶39. In 2012, the SDA completed two major capital projects, both newly constructed facilities. Da Silva Cert., ¶17. In addition, by the end of that year, a total of sixty-seven SDA emergent projects had been completed, while an additional fifty-one emergent projects

had advanced into pre-development, design, or construction. Ibid. In 2013, thirteen major capital projects were advanced by the SDA. Da Silva Cert., ¶19.

On January 2, 2014, the SDA approved an update to the 2012 Capital Portfolio ("2014 Capital Portfolio"), which added five projects to the capital plan to address needs in various schools. Da Silva Cert., ¶¶40-41. On September 3, 2014, the SDA amended the 2014 Capital Portfolio ("2014 Capital Portfolio Amendment") to incorporate one new project for advancement. Da Silva Cert., ¶42.

Following its adoption of the 2014 Capital Portfolio Amendment, the SDA continued to advance and manage the projects listed in the 2011 Capital Portfolio, 2012 Capital Portfolio, 2014 Capital Portfolio, and 2014 Capital Portfolio Amendment. Da Silva Cert., ¶43. In 2014, the SDA completed two major capital projects and had another twelve major capital projects in construction. Da Silva Cert., ¶21. In 2015, two schools were opened in SDA districts while the SDA broke ground on two additional schools in SDA districts and oversaw a total of twelve SDA district construction projects. Da Silva Cert., ¶23. In 2016, the SDA successfully opened nine schools in SDA districts, all of which opened on or ahead of schedule and within their approved budgets. Da Silva Cert., ¶24. The SDA also managed eleven additional construction projects in SDA districts. Ibid. In 2017, the SDA opened five schools in SDA districts and had eight additional major

capital projects and twenty-one emergent projects in construction. Da Silva Cert., ¶27. In 2018, the SDA opened four schools in SDA districts and had nine major capital projects and seventeen emergent projects in construction. Da Silva Cert., ¶29. As of September 30, 2019, six SDA Capital Projects were in construction, with three of those schools scheduled to open to students in September 2020. Da Silva Cert., ¶33.

The 2011 Capital Portfolio, as amended through 2014, identified a total of thirty-nine projects. As of January 20, 2020, twenty-five projects had been completed and delivered to SDA districts. Da Silva Cert., ¶43. The remaining fourteen projects were underway: one project was in the design phase, seven projects were in the construction phase, three projects were in the constructability review phase, one project was in the procurement stage, and two projects were in programming phases. Ibid. The SDA was also managing twelve SDA Emergent Projects. Ibid.

On January 21, 2020, the SDA considered and approved the new 2019 Statewide Strategic Plan for SDA Districts ("2019 Strategic Plan"). Da Silva Cert., ¶44, Exh. A. The 2019 Strategic Plan first provides a comprehensive overview of the SDA's activities to date, identifying the twenty-five projects that have been completed in SDA districts and the fourteen projects that remain to be completed from the 2011 Capital Portfolio, as amended through 2014. Da Silva Cert., ¶45, Exh. A. As set out in the 2019

Strategic Plan, the fourteen projects currently underway are scheduled to be completed between September 2020 and September 2025. Ibid. The 2019 Strategic Plan then identifies remaining priority needs in SDA Districts based on the 2019 EFNA and sets out the SDA's approach to sequencing projects to meet those needs. Ibid. The sequencing of projects is based upon: (1) educational priorities (overcrowding and building age and condition) and (2) logistical factors (availability of land and delivery capacity). Ibid. In that vein, the 2019 Strategic Plan identifies the "first tranche" of projects for advancement, identifies high priority districts with needs to be addressed in the first tranche, and sets out the activities necessary to finalize sequencing of the identified projects. Ibid.

D. Funding for SDA District School Facilities Projects

Under the EFCFA, funding for the School Construction Program comes from the issuance of School Facilities Construction Bonds by the EDA. N.J.S.A. 18A:7G-14; Da Silva Cert., ¶48. The bonds are issued as "State-Contract Bonds," meaning that the bonds are payable from appropriations made by the State Legislature to the State Treasurer, who enters into a contract with the EDA to pay such amounts appropriated for the purpose of paying debt service on the School Facilities Construction Bonds. Da Silva Cert., ¶49.

When enacted in 2000, the EFCFA authorized the issuance of \$8.6 billion in School Facilities Construction Bonds, consisting

of \$6 billion for the Abbott Districts, \$2.5 billion for Regular Operating Districts ("RODs"), and \$100 million for county vocational school districts. N.J.S.A. 18A:7G-14; Da Silva Cert., ¶50. While undertaking reform efforts following a 2005 investigation by the Inspector General, it was determined that there would be insufficient funding available under the EFCFA to complete all the school facilities projects in the Abbott districts. Da Silva Cert., ¶51. Again in 2006, an Interagency Working Group concluded that there was a continuing demand for additional funding for school construction in both Abbott and non-Abbott districts. Da Silva Cert., ¶52. To that end, it recommended seeking an additional \$3.25 billion to finance new school construction projects for a period of approximately two to three years. Ibid. Of this amount, \$2.5 billion would be dedicated to the Abbott districts, with the remaining \$750 million to be used to finance construction in non-Abbott districts. Ibid.

In 2008, the Legislature amended the EFCFA to increase the amount of bonds authorized to be issued by the EDA. N.J.S.A. 18A:7G-14; Da Silva Cert., ¶53. Specifically, the EFCFA amendment authorized an additional \$3.9 billion in bonds, with \$2.9 billion designated for SDA districts and \$1 billion for all other districts (setting aside \$50 million of that \$1 billion for county vocational school districts). Ibid.

The SDA currently has funding authorization to complete the remaining fourteen projects identified in the 2011 Capital Portfolio as amended through September 2014. Da Silva Cert., ¶54. Those fourteen projects are forecasted to be delivered beginning in 2020 and through 2025. Ibid.

The SDA recognizes that more money will be needed to initiate and complete projects to address remaining needs and has expressed that need to the Legislature. Da Silva Cert., ¶55. Specifically, the SDA's December 2014 Biannual Report, December 2018 Biannual Report, June 2019 Biannual Report, and December 2019 Biannual Report all expressed a need for additional funding. Da Silva Cert., ¶56. The December 2014 Biannual Report specifically stated that "additional funding will be necessary to undertake the capital improvement work that will be required throughout the state in the coming years," stating that the SDA was in the process of developing recommendations as to how to address school facilities construction needs beyond the projects that current authorized funding would support. Da Silva Cert., ¶57

More recently, in its December 2018 Biannual Report, the SDA stated that its current funding was committed to existing projects and that the SDA was "unable to undertake additional Capital projects without additional funding." Da Silva Cert., ¶58. Similarly, in its June 2019 Biannual Report, the SDA stated that "additional funding is needed to fulfill our constitutionally

mandated mission of building new schools" Da Silva Cert., ¶59. Finally, in its December 2019 Biannual Report, the SDA states that it "is prepared to advance the significant school facility work needs that were identified in the 2019 Educational Facilities Needs Assessment upon the authorization of additional funding for the program." Da Silva Cert., ¶60.

In addition to those biannual reports, SDA officers have testified before the Senate and Assembly Budget Committees on the need for additional funding. Da Silva Cert., ¶61.

First, on April 17, 2018, former SDA CEO Charles McKenna testified at a budget hearing before the Senate Budget and Appropriations Committee. Da Silva Cert., ¶62. During that hearing, McKenna testified that SDA had \$1.7 billion in bonding authorization remaining, however all but \$70 million of that was already allocated to specific projects in its then-current capital portfolio. Ibid. McKenna anticipated that the allocation of funds for projects in the then-current capital portfolio was accurate and that all of those projects would be completed without leaving any available funds left over. Ibid. In total, at the time of his testimony, McKenna testified that the SDA would be able to fund school facilities construction projects for another four to five years, but would soon need to ask the Legislature to authorize additional funds. Ibid.

Then, on April 10, 2019, former SDA CEO Lizette Delgado Polanco testified before the Assembly Budget Committee regarding the need for additional funding. Da Silva Cert., ¶63. Specifically, she advised that the SDA had funding to complete the eighteen capital projects that were under active construction, but that no additional funding was available to commit to new construction. Ibid. She further advised that \$60 million remained to be reserved for emergent projects approved by the DOE. Ibid.

E. ELC's Prior and Present Filings

In late 2005, ELC filed a motion in aid of litigants' rights, requesting a remedial order to address funding for school construction in SDA districts. Abbott XIV. At that time, work on hundreds of approved projects had been "indefinitely postponed" by the SCC due to insufficient funds, the DOE had failed to file its annual report for the 2005 Fiscal Year ("FY"), and most districts had failed to file their LRFPS that were due on October 3, 2005. 185 N.J. at 614. Thus in response to ELC's motion, the Court ordered that (1) the districts' over-due LRFPS be submitted to the DOE by January 15, 2006; (2) the DOE issue its annual report for FY2005 pursuant to N.J.S.A. 18A:7G-24 no later than February 15, 2006; (3) for purposes of that report, the DOE include cost estimates for the school facilities projects identified in the 2000-2005 LRFPS and submitted to the SCC for development; and (4)

the DOE submit future annual reports as required by the statute. Id. at 615; Repollet Cert., ¶11.

In accordance with this Court's directive, DOE issued its FY2005 Annual Report on February 15, 2006. Repollet Cert., ¶27. That Annual Report included the estimates for all of the school facilities projects identified in the 2000-2005 LRFPs and submitted to SCC for pre-development. Ibid. The DOE also complied with the annual reporting requirements for FY2006 and FY2007. Repollet Cert., ¶¶28-29. Effective August 6, 2007, the EFCFA was amended to require that the SDA, rather than the Commissioner, submit a report on the School Construction Program on a biannual basis. Repollet Cert., ¶30. The SDA has fully complied with its reporting obligations. Da Silva Cert., ¶¶10-13.

In 2007, ELC again sought a remedial order from this Court in respect of funding for school construction in the Abbott districts. Abbott v. Burke, 193 N.J. 34, 35 (2007) (Abbott XVII). Specifically, ELC sought an order directing the State to comply with the Court's orders in Abbott V, Abbott v. Burke, 164 N.J. 84 (2000) (Abbott VII), and Abbott XIV. The Court, however, denied ELC's motion as premature, explaining that the State's compliance had to be considered "in the context of the Fiscal Year 2008 budget," which had not yet been enacted, and indicating that it "declined to proceed on the assumption that [defendants would] fail to comply with their constitutional obligations to provide a

thorough and efficient educational system pursuant to Article VIII, § 4, ¶ 1." 193 N.J. at 35.

ELC again filed a motion in aid of litigants' rights in 2008. Abbott v. Burke, 196 N.J. 451, 453 (2008) (Abbott XVIII). The relief sought was an order directing the State to comply with various Abbott decisions in respect to the provision of funds necessary to construct or repair school facilities in Abbott districts. Id. at 451-52. Again, the Court declined to presume that the Legislature would fail to respond to these issues and to the Governor's request to fund the "next phase of school construction, including addressing needed health and safety concerns." Ibid.

On November 7, 2019, ELC filed its latest motion in aid of litigants' rights. Through this motion, ELC seeks an order directing Defendants to do two things: (1) submit, within 30 days, a revised statewide strategic plan of priority school facilities projects in SDA district and (2) "[p]romptly seek and secure such school construction funding from the Legislature as is required to manage and complete the school facilities projects in the revised statewide strategic plan." Pl. Notice of Motion. ELC's motion should be denied.

LEGAL ARGUMENT

POINT I

ELC'S REQUEST THAT THE COURT COMPEL SDA TO ADOPT A STATEWIDE STRATEGIC PLAN IS MOOT.

ELC's motion first seeks an order from this Court compelling the SDA to adopt a revised Statewide strategic plan, in accordance with N.J.S.A. 18A:7G-5(m)(3). As the SDA did just that on January 21, 2020, this claim is moot and should be dismissed.

Mootness is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm. Jackson v. Dep't of Corr., 335 N.J. Super. 227, 231 (App. Div. 2000), certif. denied, 167 N.J. 630 (2001). "A case is technically moot when the original issue presented has been resolved, at least concerning the parties who initiated the litigation." DeVesa v. Dorsey, 134 N.J. 420, 428 (1993) (Pollock, J., concurring) (citing Oxfeld v. N.J. State Bd. of Educ., 68 N.J. 301, 303 (1975)). In other words, "an issue is moot when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006) (internal citations omitted).

Courts will not normally decide issues when a controversy no longer exists and the disputed issues have become moot. Devesa, 134 N.J. at 428; N.J. Tpk. Auth. V. Parsons, 3 N.J. 235, 240

(1949); Edelstein v. City of Asbury Park, 12 N.J. Super. 509, 514-15 (App. Div. 1951). It is not necessary for a court to intervene in a matter where the underlying issues have become moot due to intervening events. City of Camden v. Whitman, 325 N.J. Super. 236, 243 (App. Div. 1999). The New Jersey Supreme Court has stated that it does not render advisory decisions: "Ordinarily, our interest in preserving judicial resources dictates that we not attempt to resolve legal issues in the abstract." Zirger v. Gen. Accident Ins. Co., 144 N.J. 327, 330 (1996) (citing Oxford, 68 N.J. at 303-04 and Sente v. Major & Mun. Council of Clifton, 66 N.J. 204, 205 (1974)).

Here, ELC's request that this Court compel the SDA to adopt a Statewide Strategic Plan, as required by N.J.S.A. 18A:7G-5(m)(3), is undeniably moot. On January 15, 2020, the SDA published on its website a draft of the 2019 Statewide Strategic Plan. That Plan was voted on and approved by the SDA Board of Directors at a public meeting on January 21, 2020. Da Silva Cert., ¶44. Following the January 21, 2020 meeting, the SDA promptly submitted the 2019 Statewide Strategic Plan to the Governor with a request for expedited review. Da Silva Cert., ¶46. The 2019 Strategic Plan was approved by the Governor on January 22, 2020. Da Silva Cert., ¶47. Thus the SDA has completed its role in developing and publishing a Statewide Strategic Plan. There is no

additional relief that can be granted by this Court and so the Court should dismiss this claim as moot.

POINT II

**DEFENDANTS HAVE ACTED WITHIN THE SCOPE OF
THEIR AUTHORITY TO SEEK AND SECURE NECESSARY
FUNDING, AND CANNOT DO WHAT ELC ASKS.**

ELC next asks this Court to direct the State "to seek and secure such funding as is required to undertake and complete the facilities projects contained in the revised statewide plan." (Pb1). To the extent ELC asks that the State be directed to seek funding, the DOE and the SDA have taken the necessary preliminary steps and the SDA has alerted the Legislature of the need for additional funding. Beyond that, the FY2021 budget process is only just beginning. To the extent ELC asks that the State be directed to secure funding, this request fails to recognize that the Executive Branch lacks the ability to secure funding beyond what has to date been authorized by the Legislature. Thus, ELC's motion should be denied.

In enacting the EFCFA in 2000, the Legislature determined that the Schools Construction Program would be funded through the issuance of School Facilities Construction Bonds. These bonds are issued as "State-Contract Bonds," meaning that the bonds are payable from appropriations made by the State Legislature to the State Treasurer, who enters into a contract with the EDA to pay such amounts appropriated for the purpose of paying debt service

on the School Facilities Construction Bonds. When first enacted, the EFCFA originally authorized the issuance of \$6 billion for the Abbott districts, \$2.5 billion for the RODs, and \$100 million for county vocational schools. N.J.S.A. 18A:7G-13. When it became apparent in 2008 that additional funding was needed, the Legislature amended the EFCFA to increase the amount of bonds authorized to be issued by the EDA. See L. 2008, c. 39. Specifically, the EFCFA amendment authorized an additional \$3.9 billion in bonds, with \$2.9 billion designated for SDA districts and \$1 billion for all other districts (setting aside \$50 million of that \$1 billion for county vocational school districts).

The defendants in this case do not have the ability to increase this bond limit, as the authority to amend the EFCFA and to appropriate funds lies solely with Legislature. See N.J. Const. art. VIII, § 2, ¶ 2 ("No money shall be drawn from the State treasury but for appropriations made by law."); City of Camden v. Byrne, 82 N.J. 133, 148 (1980) ("[T]he power and authority to appropriate funds lie solely and exclusively with the legislative branch of government."). Thus for the current bond limit to be increased, a process must be initiated by the Legislature, not the defendants to this case. And given the legislative history of the EFCFA — which approved a specific amount of bonds in 2000 and increased that bond limit in 2008 when it became apparent that

additional funding was necessary — there is no reason to believe the Legislature will fail to act now.

This is no different than the scenario presented to this Court in Abbott XVII and Abbott XVIII, where the Court declined to proceed on the assumption that the State would fail to comply with constitutional obligations to provide a thorough and efficient education. 193 N.J. at 35; 196 N.J. at 454 (J. Albin concurring) (explaining that the Court would not “presume that the Legislature will fail to respond to the Governor’s request to fund the ‘next phase of school construction . . . in the Abbott districts’”). Again, here there is simply no reason to believe that the Legislature will fail to take necessary action to secure funding for school facilities projects. Thus an order from this Court directing the State to secure additional funding for school facilities would not only be improper, but would prematurely assume a failure to act on the part of the Legislature.

While Defendants are constrained from securing funding, they have taken foundational steps. That is, the DOE has ensured that every SDA district has a current LRFP and it completed an updated EFNA in 2019, and the SDA recently adopted its 2019 Statewide Strategic Plan. With that necessary groundwork, the State is now positioned to be able move forward. Importantly, the New Jersey State budget process for Fiscal Year 2021 has barely just started,

as the Governor has not yet presented a budget message for next fiscal year. See N.J.S.A. 52:27B-20.

And the SDA has ensured that the Legislature is aware that additional funding will be needed. As ELC recognizes: "the SDA has repeatedly alerted the Legislature of the need for additional funding to advance priority projects to construction and completion." (Pb17). It has done so through several recent biannual reports, as well as through testimony before the Senate and Assembly Budget Committees. First, in its December 2014 Biannual Report, the SDA stated that "additional funding will be necessary to undertake the capital improvement work that will be required throughout the state in the coming years," explaining that the SDA was in the process of developing recommendations as to how to address school facilities construction needs once SDA's funding was exhausted. Following that initial presentation of the need for additional funding, the SDA has addressed the need for additional funding in its last three biannual reports.

In its December 2018 Biannual Report, the SDA stated that its current funding was committed to existing projects and that the SDA was "unable to undertake additional Capital projects without additional funding." Da Silva Cert., ¶58. Similarly, in its June 2019 Biannual Report, the SDA stated that "additional funding is needed to fulfill our constitutionally mandated mission of building new schools" Da Silva Cert., ¶ 59. Finally, in

its December 2019 Biannual Report, the SDA reported that "the remaining funding is fully committed for approved projects" and advised the Legislature that it "is prepared to advance the significant school facility work needs that were identified in the [2019 EFNA] upon the authorization of additional funding for the program." Da Silva Cert, ¶60.

In addition to those biannual reports, SDA officers have testified before the Senate and Assembly Budget Committees on the need for additional funding. First, on April 17, 2018, former SDA CEO Charles McKenna testified at a budget hearing before the Senate Budget and Appropriations Committee. During that hearing, McKenna testified that SDA had \$1.7 billion in bonding authorization remaining, however all but \$70 million of that was already allocated to specific projects in its then-current capital portfolio. McKenna anticipated that the allocation of funds for projects in the then-current capital portfolio was accurate and that all of those projects would be completed without leaving any available funds left over. In total, at the time of his testimony, McKenna testified that SDA would be able to fund school facilities construction projects for another four to five years, but would soon need to ask the Legislature to authorize additional funds.

Then, on April 10, 2019, former SDA CEO Lizette Delgado Polanco testified before the Assembly Budget Committee regarding the need for additional funding. Specifically, she advised that

the SDA had funding to complete the eighteen capital projects then under active construction, but that no additional funding was available to commit to new construction. She further advised that \$60 million remained for emergent projects approved by the DOE.

While the SDA cannot authorize additional funding for the School Construction Program, it clearly is not ignoring the fact that additional funding will be needed. Da Silva Cert., ¶¶ 58-64. Rather, the SDA has taken appropriate steps within its authority to apprise the Legislature of the issue and seek additional funding for future school facilities projects. As the Legislature has, in the past, acted on the need for additional funding, there is no reason to believe that it will fail to do so now. ELC's motion in aid of litigants' rights seeks this Court's intervention where it is neither appropriate nor necessary.

POINT III

IN LIGHT OF THE STATE'S SUBSTANTIAL AND CONTINUING EFFORTS TO REMEDY FACILITY DEFICIENCIES IN SDA DISTRICTS, THERE IS NO NEED FOR THIS COURT'S INTERVENTION.

This Court's intervention would not only be improper for the reasons set forth in Parts I and II, above, it also is not required. ELC asserts that, "absent judicial relief," the State "will default on its constitutional and statutory obligation to provide the safe and adequate physical environments that are essential for Plaintiffs' learning and academic success." (Pb1). But this

assertion is contradicted by the State's substantial and continuing efforts to remedy facility deficiencies in the SDA districts. And the case presented by ELC falls far short of the level required to warrant this Court's action on a motion in aid of litigants' rights.

A motion in aid of litigants' rights is "a civil proceeding to coerce the defendant into compliance with the court's order for the benefit of the private litigant." Pasqua v. Council, 186 N.J. 127, 140 (2006); see also R. 1:10-3. It requires a showing that a party has willfully failed to comply with a Court order "manifest[ing] contempt for the Court." Hynes v. Clark, 297 N.J. Super. 44, 57 (App. Div. 1997); see also R. 1:10-3. The comment to R. 1:10-3 makes clear that the Rule only applies to parties who willfully fail to comply with an order or judgment. Hynes, 297 N.J. Super. at 57 (emphasis added). On that point, courts have found that the type of "willful neglect" necessary to invoke the court's power under this Rule requires nothing less than "'a conscious, intentional failure or reckless indifference.'" Arrow Mfg. Co. v. West New York, 18 N.J. Tax 574, 578 (N.J. Tax 2000) (quoting United States v. Boyle, 479 U.S. 241, 245 (1985)). Importantly, the Court must determine that the party has the ability to comply with the order that allegedly has been violated and that the party has no good reason to resist compliance. Essex

County Welfare Bd. v. Perkins, 133 N.J. Super. 189, 195 (App. Div. 1975).

Contrary to ELC's assertion, the State has not failed to comply with this Court's directives in Abbott V and Abbott VII. In response to those decisions, the State enacted "the largest, most comprehensive school construction program in the nation." Lonegan v. State, 174 N.J. 435, 458 (2002). The EFCFA contains all of the elements directed by this Court, including 100 percent funding for approved costs in the SDA districts. Moreover, it authorized \$6 billion in bonds to address the facilities deficiencies in the Abbott districts, more than twice the amount of bonding capacity estimated by the Special Master in Abbott V needed to address the "core facilities" costs. 153 N.J. at 634 (estimating a total cost of \$2.7 to \$2.8 billion for facilities improvements and expansion). Presently, the school construction program has expanded to expend up to \$12.5 billion, comprising \$8.9 billion for SDA districts and \$3.6 billion for RODs.

ELC claims that this Motion must be granted to ensure that the State complies with Abbott facilities mandates. But the State has complied with all requirements necessary to fulfill the directives of the Abbott cases. Of the thirty-nine projects identified in the SDA's 2011 Capital Portfolio, as updated through 2014, SDA has completed twenty-five of those projects and is set to complete the remaining fourteen projects between 2020 and 2025.

with its remaining funding. Each SDA district has in place an up-to-date LRFP that was approved in 2016. The DOE completed an EFNA and Priority Ranking for each SDA district in 2016. Subsequent to that time, the SDA made substantial progress in advancing SDA district capital projects. In light of that progress and its impact on the capacity needs in the SDA districts, the DOE completed a new EFNA and Priority Ranking for each SDA district in 2019. The 2019 EFNA was transmitted to the SDA, which began work on a revised Statewide Strategic Plan, as required by the EFCFA. The SDA finalized and adopted its 2019 Statewide Strategic Plan on January 21, 2020.

These extensive efforts by the State to advance the school facilities projects in SDA districts fall far short of the "conscious, intentional failure or reckless indifference" that is required before a motion in aid of litigants' rights can be granted. Arrow Mfg. Co., 18 N.J. at 578 (internal citations omitted). ELC has presented no evidence demonstrating a willful lack of compliance with the Abbott mandates. There is thus no basis for the Court's intervention at this time and ELC's motion in aid of litigants' rights should be denied.

CONCLUSION

Because this Court's intervention would be improper and is wholly unnecessary, ELC's motion in aid of litigants' rights should be denied.

Respectfully submitted,

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BY:



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