SUPREME COURT OF NEW JERSEY
DOCKET NO. 62,700

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

BRIEF IN RESPONSE TO AMICUS CURIAE BRIDGETON, BURLINGTON CITY, CAMDEN, EAST ORANGE, ELIZABETH, GLOUCESTER CITY, MILLVILLE, NEWARK, PASSAIC, PATERSON, PEMBERTON, PERTH AMBOY, PHILLIPSBURG, TRENTON, VINELAND, NEW JERSEY PROTECTION AND ADVOCACY, INC., ALLIANCE FOR THE BETTERMENT OF CITIZENS WITH DISABILITIES, BRAIN INJURY ASSOCIATION OF NEW JERSEY, NEW JERSEY SPECIAL EDUCATION PRACTITIONERS, SPECIAL EDUCATION CLINIC AT RUTGERS UNIVERSITY SCHOOL OF LAW - NEWARK, SPECIAL EDUCATION LEADERSHIP COUNCIL OF NEW JERSEY, ASSOCIATION FOR CHILDREN OF NEW JERSEY, NEW JERSEY URBAN MAYORS, NEW JERSEY EDUCATION ASSOCIATION, AND BLACK ISSUES CONVENTION

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SUPPLEMENTAL STATEMENT OF THE CASE

The State relies upon the facts and procedural history set forth in the Statement of the Case in its moving brief, as supplemented in its Reply Brief, and as further supplemented herein.

After the filing of the State's Motion Brief, ten applications for participation in the matter were submitted. First, on April 28, 2008, the district of Millville filed a motion to intervene along with a certification. The New Jersey Protection and Advocacy, Inc., filed an amicus application, brief and certification on April 30, 2008 on behalf of itself, Alliance for the Betterment of Citizens with Disabilities, Association of Children of New Jersey (ACNJ)[1], Brain Injury Association of New Jersey, New Jersey Special Education Practitioners, Special Education Clinic at Rutgers University School of Law - Newark, and Special Education Leadership Council of New Jersey (collectively NJP&A). On that same day, ACNJ sought amicus status and filed a brief in support of its position, as did the New Jersey Urban Mayors' Association (Urban Mayors), who filed a certification as well as a brief.

On May 2, 2008, the New Jersey Education Association (NJEA) filed a notice of motion to participate in the matter as

[1]The NJP&A subsequently filed amended papers on May 1, 2008, that removed ACNJ from the listing of organizations represented in its application.

amicus curiae. The Camden school district filed leave to intervene, along with a letter brief and supporting certifications on May 5, 2008. Thereafter, on May 7, 2008, the Vineland school district filed a certification along with a motion for intervenor status.

On May 14, 2008, twelve Abbott districts -- Bridgeton, Burlington City, East Orange, Elizabeth, Gloucester City, Keansburg Borough, City of Passaic, Paterson, Pemberton, Perth Amboy, Phillipsburg and Trenton -- represented by Richard Shapiro, Esq. (Shapiro Districts), moved for intervenor status. The motion was accompanied by a brief and a certification from the superintendent of each of the twelve districts.[2]

On May 15, 2008, the New Jersey Black Issues Convention (NJBIC) filed a motion to participate as amicus curiae and a brief. A supplemental certification was filed by Camden on May 19, 2008 and, on May 23, 2008, Newark sought leave to intervene and filed a letter brief and superintendent certification in support of its motion (collectively, all school district participants will be referred to as Districts).

By Orders dated May 28, 2008, the Court denied intervenor status to all movant districts, granted amicus status to

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[2]By letter dated May 27, 2008, the Keansburg school dist withdrew its certification and its participation in the ma Given no replacement brief has been filed, references i Shapiro Brief to the Keansburg school district and Superint Barbara Trzeszkowski's Certification should be stricken.

movants and directed amicus NJEA to file its substantive brief on or before June 4, 2008. The Court ordered the State's response to the Amici to be filed on June 16, 2006.

This brief, and the accompanying certifications, is filed in response to all of the above Amici briefs and certifications.

LEGAL ARGUMENT

POINT I

AMICI HAVE FAILED TO DEMONSTRATE ANY CONSTITUTIONAL INFIRMITY IN THE SFRA

Amici all argue that, for various reasons, this Court should deny the State's motion for a determination that the SFRA is constitutional. In many respects, Amici merely repeat arguments already raised by the ELC.[3] Those arguments, substantively responded to in detail in the State's Reply Brief, fail to demonstrate any constitutional infirmity in the SFRA. The additional factual and legal arguments presented by Amici as to why the SFRA is constitutionally invalid are similarly unavailing. Accordingly, this Court should grant the State's motion and affirm the facial constitutionality of the SFRA.

A. The SFRA is a Needs-Based Formula that Provides Sufficient Resources for Children Residing in Abbott Districts to Receive a Thorough and Efficient Education.

The critical issue in the Court's review of the constitutionality of the SFRA is whether the resources provided by the Act are sufficient to meet the educational needs of children in the Abbott districts so as to provide them with the opportunity for a thorough and efficient education. Under the SFRA, each district

[3]For example, the Shapiro Districts raise the issues of the Abbott designation, the burden of proof, the flaws in the PJP process, the rationale for just one model and the use of a hypothetical model, all of which were fully responded to in the State's Reply Brief.

is funded based on the cost of the educational resources required by its particular students to meet State performance standards; each at-risk and limited English proficient student generates funds in a district's Adequacy Budget, over and above the base amount, to support the additional educational resources that child needs. Thus, the SFRA is based on the real educational resource needs of Abbott children, and other children with similar disadvantages, and the cost to provide those educational resources.

The Shapiro Districts suggest that the .57 weight for at-risk children in districts with a concentration of 60% or higher serves as a "cap" on at-risk aid thereby failing to provide needed funding to districts with concentrations in excess of 60%.[4] Shaprio Brief at 46. Moreover, they go on to allege that the SFRA's at-risk weight is "the same flawed methodology" as the Quality Education Act (QEA) and the Comprehensive Educational Improvement and Financing Act (CEIFA). Id. at 47. The .57 weight, however, is applied to the base amount for every at-risk student in districts with a concentration of 60% or greater; it is not a "cap" but a very generous weight for each of those at-risk students.

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[4]If the Shapiro Districts are suggesting that the sliding scale for the weights should continue to increase for districts with even higher concentrations of at-risk children, that claim is simply contrary to the evidence. As the consultants have found, the educational resources needed in districts with very-high concentrations of at-risk students do not require a higher weight than for districts with high concentrations. Certification of Justin Ryan Silverstein (Silverstein Certification), ¶12.

Moreover, the .57 at-risk weight is not similar to the methodology for supporting at-risk students in either QEA or CEIFA. In QEA, districts received aid for each at-risk student, defined as eligible for free meals or free milk, based on a weight of .151 for each elementary student, .168 for each middle school student and .202 for each high school student. Former N.J.S.A. 18A:7D-20. The SFRA expands the definition of at-risk to free- or reduced-price lunch students and the QEA weights are well-below the SFRA weight of .57. Moreover, the QEA at-risk weights were determined without any "study of the added costs associated with providing services for at-risk students." Abbott v. Burke, 136 N.J. 444, 453 (1994) (Abbott III). The SFRA at-risk weights were built off an enhanced resource model in which the educational resources needed for at-risk students were specifically identified and the cost of those educational resources determined. Certification of Lucille Davy (Davy Certification), ¶24.

Similar to at-risk funding under the QEA, the Court found no evidence that the DEPA per pupil amounts in CEIFA of $300 and $425 could support the programs identified as eligible for DEPA funding. Abbott v. Burke, 149 N.J. 145, 181-182 (1997) (Abbott IV). Moreover, under CEIFA, a district did not receive any additional DEPA funding for schools with concentration of at-risk students exceeding 40%. In contrast, the SFRA provides for significant additional resources for each and every at-risk student

in a district, thus as the percentage of at-risk students increases, so do the at-risk resources. Moreover, the per pupil amounts in districts with 60% or more at-risk students are substantially higher than the DEPA amounts, and the SFRA at-risk amounts are more than adequate to support the educational resources identified in the enhanced PJP model. See Certification of Lucille Davy (Davy Certification), Exhibit G, A Formula For Success at Appendix E ($5500 for an elementary student; $5720 for a middle school student and $6435 for a high school student).

Citing to this Court's decision in Abbott V, Amici Districts and NJEA argue that a school funding formula cannot be constitutional unless it permits each individual Abbott district to seek additional funding, beyond that provided by the formula, to support the programs, services and positions that the district decides to implement. This Court, however, has never suggested that the ability to seek supplemental funding was the only approach that could be constitutionally valid. Rather, in the Abbott V remand, the former Commissioner recommended, and the Court adopted, that approach. Abbott v. Burke, 153 N.J. 480, 575 (Appendix I) (1998) (Abbott V) ("As reiterated throughout the State's testimony, actual budgets will be calculated school-by-school to account for individual variations and needs."). Based on the remand record, the Court found that it was not "feasible at this time to ascertain or mandate a specific funding level." Id. at 518. Thus, the Court

held that the former Commissioner's recommendation to maintain the funding level at the CEIFA aids plus parity funding and to allow districts to seek additional funding where needed was a constitutionally permissible approach. Moreover, this Court continued the requirement for a supplemental funding process while CEIFA was still in place. Abbott v. Burke, 187 N.J. 191, 195 (2006) (Abbott XV); Abbott v. Burke, 177 N.J. 596, 599 (2003) (Abbott XI); and Abbott v. Burke, 172 N.J. 294, 298 (2002) (Abbott IX).

The SFRA, however, takes a different approach. Relying on educators and education stakeholders (including the ELC) to identify the additional resources needed for at-risk and limited English proficient students and having those resources validated by nationally-renowned school funding experts (including the expert appointed by the remand court in Abbott V), the SFRA ensures that the funding formula itself incorporates sufficient resources to meet the special educational disadvantages facing children in Abbott districts and other high-poverty districts. Accordingly, the supplemental funding process that was an integral component of the prior funding methodology is no longer required.

The Districts argue that the educational resources identified through the PJP process (as enhanced after expert review) are not sufficient to meet the needs of their students.[5]

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[5]A comparison of the resources generated under the enhanced PJP model with the resources generated under the Abbott V model has been conducted for each of the Districts. The enhanced PJP and

In support of this allegation, they identify three positions that were included in Abbott V that are not reflected in the enhanced PJP model - - the community services coordinator, the school-to-work counselor and the attendance officer.[6] The Districts,

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Abbott V models were prorated with the actual enrollment of each District for Kindergarten to grade 5, grades 6-8 and grades 9-12. By prorating with actual enrollment, a clear picture emerges of the FTEs that are generated for the district under the enhanced PJP model and that can be compared to the FTEs that would be generated by the Abbott V model. Attwood Second Supplemental Certification, ¶4.

[6]In addition, some Districts identify positions as not being in the enhanced PJP model that actually are included. For example, Burlington City claims that the enhanced PJP model does not include the Family Support Team at the elementary school level. Certification of Dr. Edward F. Gola, Jr. (Burlington City Certification), ¶15. A Family Support Team, as enhanced by the former Commissioner in Abbott V, is comprised of parent liaison, school facilitator, school counselor, school social worker and a school nurse. All of those positions are included in the enhanced PJP model. See Davy Certification, Exhibit H. Newark asserts that the enhanced PJP model does not include guidance counselors, social workers or parent liaisons but the model does include guidance counselors and social workers at the elementary, middle and high school level and parent liaisons at the elementary school level. Certification of Marion Bolden (Newark Certification), ¶15 and Davy Certification, Exhibit H. Passaic alleges that the enhanced PJP model does not include para-professionals for kindergarten; additional classroom aides for kindergarten classes, however, were added to the enhanced PJP model to support at-risk children in high-poverty districts. Certification of Dr. Robert Holster (Passaic Certification), ¶12 and Davy Certification, ¶26. Passaic also claims that the enhanced PJP model does not provide sufficient additional resources for LEP students. Passaic Certification, ¶13. Yet, at the school level, the model provides an additional teacher for every 25, 21 and 24 LEP students at the elementary, middle and high school level, respectively. In addition, funds for professional development, substitute coverage and per pupil amounts for materials, supplies and assessments are provided. Davy Certification, Exhibit A, Report on the Cost of Education (RCE), at 9-14, 9-17 and 9-23. Two additional teachers are provided for LEP students at the district level. Id. at 9-38.

however, ignore the vast staffing resources included at the elementary, middle and high school levels that would be more than sufficient to maintain those three positions where needed. Davy Certification, Exhibit H (elementary school provides 14.75 additional FTEs for every 400 students of which 13.5 are certificated staff; middle school provides 11.6 additional FTEs for every 600 students of which 11.2 are certificated staff; high school provides 25.3 additional FTEs for every 1640 students of which 24.1 are certificated staff). Accordingly, the SFRA provides sufficient staff to meet all of the Abbott V positions as well as enhanced staffing at every school level.

In addition, the Districts identify certain programs and services that were discussed in Abbott V but are not specifically included in the enhanced PJP model.[7] These include early literacy and secondary education initiatives as well as exemplary art, music and special education programs, school-based management and budget teams, school based youth services and enriched nutrition programs. To the extent additional staffing is required for programs like the early literacy and secondary education initiatives, as discussed

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[7]The Districts further suggest the absence of funds for alternative schools, home instruction, technology and staff development. Every staff member has professional development funds allocated for that position. See RCE 9-14 through 9-19, 9-23 through 9-25 and 9-39 through 9-40. Funds for home instruction are allocated at the district level. See RCE 9-39. Funds for technology and in-school suspension/alternative schools are provided at both the school and district level. See RCE 9-14, 9-17, 9-23 and 9-39 through 40.

above, the enhanced PJP model provides the needed staffing resources. For the remaining programs and services, only a few of the districts present purported additional costs for these programs. To the extent additional costs are noted in the District certifications, those costs are more than covered by the excess at-risk and LEP funding, not to mention the federal Title I monies available.[8]

For example, Millville claims the additional cost for the early literacy is $300,000; the additional cost for on-site health and social services is $190,000 and the additional cost of the enhanced art, music and special education programs is $205,000. The district presents no additional cost for the enriched nutrition program or the school-based management and budgeting team. Certification of Shelly Schneider (Millville Certification), ¶II1. Even assuming the accuracy of these identified additional costs, the Adequacy Budget for Millville includes $2.9 million in excess at-risk funding, $4,750 in excess LEP funding and $1.5 million in federal Title I funding, more than enough to cover these costs. Second Supplemental Certification of Katherine Attwood (Attwood

[8]Although the Court in Abbott v. Burke, 119 N.J. 287, 331-332 (1990) (Abbott II), did not consider federal resources when assessing the disparity in spending between the wealthy suburban districts and the poorer urban districts under the Public School Education Act of 1975, federal dollars were considered as part of the blended revenues to support the school models in Abbott V, 153 N.J. at 567, 575 (Appendix I), and should be considered within the context of the SFRA. See State's Motion Brief at 69n.28.

Second Supplemental Certification), Exhibit H.

Vineland identifies an additional $389,680 for on-site social and health services and $787,000 for an enriched nutrition program. Certification of Charles Ottinger (Vineland Certification), ¶8(d) and (f). Vineland does not identify any additional costs for enhanced art and music or school-based management and budgeting teams. Id. at ¶8 (g) and (h). With a total of $9.5 million in additional funding Vineland can easily provide for these alleged additional identified costs. Attwood Second Supplemental Certification, Exhibit P.

Camden identifies an additional cost for early intensive literacy of $2.2 million and $2 million for math; $3.2 million for on-site health and social services, $3.5 million needed for enriched nutrition and $8 million for enhanced art, music and special education. Certification of Dr. Bessie LeFra Young (Camden Certification), ¶8 (a), (d), (f), and (g). The district does not identify any additional costs for the school-based management and budgeting teams. Id. at ¶8(h). Again, assuming the accuracy of these figures, Camden receives more than $27.1 million in additional funding, enough to cover the cost of these enhanced programs with a significant amount still available. Attwood Second Supplemental Certification, Exhibit D.

Finally, in their form certifications, each District claims that "[w]ithout the ability to demonstrate the need for

Abbott supplemental funding, the District will likely have no alternative but to reduce and/or eliminate programs, services and positions/staff in 2008-09, 2009-10 and 2010-11 in order to address budget shortfalls under the SFRA." Certification of Dr. Michael Gorman (Pemberton Certification), ¶27; Certification of Dr. Michael E. Glascoe (Paterson Certification), ¶27; Certification of Dr. H Victor Gilson (Bridgeton Certification), ¶25; Certification of Rodney Lofton (Trenton Certification), ¶26; Certification of John M. Rodecker (Perth Amboy Certification), ¶25; Passaic Certification, ¶28; Certification of Pablo Munez (Elizabeth Certification), ¶27; Certification of Dr. Clarence Hoover (East Orange Certification), ¶27; Certification of George Chando (Phillipsburg Certification), ¶25. See Camden Certification, ¶33 (only mentioning 2008-2009); Millville Certification, ¶IV,9 (same as Camden); Vineland Certification, ¶19 (same as Camden); Burlington City Certification, ¶24 ("2008-09 and beyond") Certification of Paul Spaventa (Gloucester City Certification), ¶25 (same as Burlington City); Newark Certification, ¶24 ("in the future"). See also Shapiro Brief at 23 (alleging that "the SFRA will immediately result in the elimination of various Abbott remedies"); NJEA Brief at 8 (Absent a procedure for particularized needs funding, "Abbott districts will be forced to eliminate programs, services and staff which are vital to ensuring that students in these districts receive the thorough and efficient

education" to which they are entitled).

In addition, nine of the Districts conclude their certifications by claiming

> the SFRA formulaic approach requires the District to make severe and drastic cuts in programs, services and positions that will prevent us from implementing the Abbott mandates, require the abandonment or reduction of current programs, services and positions to implement the Abbott mandates, threaten the progress we have made in this District under the Abbott decisions, and preclude the District from seeking supplemental funding for demonstrably needed programs and services for our students beyond what the SFRA formulas allow.
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> [Bridgeton Certification, ¶27; Trenton Certification, ¶28; Perth Amboy Certification, ¶27; Passaic Certification, ¶30; Gloucester Certification, ¶27; Elizabeth Certification, ¶29; East Orange Certification, ¶29; Burlington City Certification, ¶29; Phillipsburg Certification, ¶27.]

See also Newark Certification, ¶26 ("the SFRA formulaic approach threatens the progress we have made in this District under the Abbott decisions, and precludes the District from seeking supplemental funding for demonstrably needed programs and services for our students beyond what the SFRA formula allow."); Pemberton Certification, ¶29 ("the SFRA formulaic approach threatens the progress we have made in this District under the Abbott decisions ... ."). Yet, the factual allegations in the certifications fail to support these conclusions in light of the resources actually included in the enhanced PJP model.

To begin with, three of the Districts fail to allege any reductions of Abbott V mandates for 2008-2009. Newark suggests that cuts "may be needed" in 2009-2010 and 2010-2011 but does not even suggest there may be staff or program reduction in 2008-2009. Newark Certification, ¶21. Trenton states that there are "other programs, services and positions" that "the District will have to eliminate or reduce in the 2008-2009 school year and in future school years" but fails to identify any such programs. Trenton Certification, ¶23. Yet, the school budget in Trenton was adopted by the Board and approved by Department prior to the execution of the certification. Attwood Second Supplemental Certification, ¶2. Moreover, the minutes of the meeting in which the school board adopted the budget suggest that no reductions at the school level did occur and that the tax levy was held steady. Minutes of the February 25, 2008 Trenton Board of Education Meeting, <<www.trenton.k12.nj.us/board/board4.08/2-25-08%20Regular%20Minutes.doc(last visited June 13, 2008)>>. Furthermore, press reports about the adoption of the budget suggest that, in fact, there were several additional programs included in the budget. "City Schools' Streamlined Budget Features New Programs," Trenton Times (February 27, 2008) at A3; "No Increase in Trenton School Taxes," Trenton Times (February 28, 2008) at A4.

Finally, Perth Amboy talks generally about reductions but does not specifically identify a single position, program or

service being eliminated or reduced. Perth Amboy Certification, ¶¶23, 25. Again, the certification was executed after the budget was adopted by the Board and approved by the Department. Attwood Second Supplemental Certification, ¶2. Given that Perth Amboy has a $1,339 per pupil increase in revenues in 2008-2009, Attwood Second Supplemental Certification, Exhibit Q, the absence of any staff or program reductions is not surprising.

Moreover, in many instances where the Districts actually identified the current staffing levels in various Abbott V positions, the enhanced PJP model includes a higher staffing level.[9] For example, Millville claims that the district needs approximately 15 security guards in its schools; the enhanced PJP model provides more than 21. Millville Certification, ¶II2(a). Millville further claims that it needs four social workers and a parent liaison; the enhanced PJP model provides nine social workers

[9]It should be noted that this is not true in all instances. For example East Orange claims that the district has a total of 31 social workers for the district's elementary, middle and high schools while its enhanced PJP model includes 17.8. Compare East Orange Certification, ¶17 with Attwood Second Supplemental Certification, Exhibit E. Yet, its enhanced PJP model also provides for 147 FTEs beyond the Abbott V model at the elementary school, 37 FTEs at the middle school and 80 at the high school. Attwood Second Supplemental Certification, Exhibit E. Newark claims to have 62 parent liaisons and 5 parent coordinators while its enhanced PJP model only provides 55.4 parent liaisons. Compare Newark Certification, ¶17 with Attwood Second Supplemental Certification, Exhibit J. Newark's enhanced PJP model, however, includes 654 FTEs at the elementary level, 174 at the middle school level and 354 at the high school level beyond the Abbott V model. Attwood Second Supplemental Certification, Exhibit I.

and six parent liaisons. Compare Millville Certification, ¶II2(c) with Attwood Second Supplemental Certification, Exhibit H. Passaic also claims a shortage of social workers and parent liaisons under the enhanced PJP model; a claim not factually supported. Compare Passaic Certification, ¶¶17 and 18 (claiming a need for 13 social workers and 11 parent liaisons) with Attwood Second Supplemental Certification, Exhibit J (reflecting 21 social workers and 15 parent liaisons in its enhanced PJP model). See also Perth Amboy Certification, ¶¶17 and 18; Attwood Second Supplemental Certification, Exhibit M (enhanced PJP model has more social workers and parent liaisons; Vineland Certification, ¶9; Attwood Second Supplemental Certification, Exhibit P (Enhanced PJP model has more social workers and students served in after-school and summer school programs, but has one less parent liaison and fewer security guards).

Finally, in the Districts that actually identify eliminations or reductions they intend to make in Abbott V positions, programs and services for 2008-2009, the Districts provide no evidence that these cuts were required or that alternatives were not available. Indeed, the facts suggest otherwise. A comparison of the Abbott V positions, programs and services for each District as compared to that District's enhanced PJP model suggests such reductions are not required and that alternatives should have been available.

Under the SFRA, each District has included in its Adequacy Budget significant staffing and fiscal resources over and above the Abbott V requirements. Within the list of staff positions or programs that the Districts intend to eliminate are many that can be supported in the enhanced PJP models. So, for example, Bridgeton intends to eliminate small learning communities at the high school despite having 21 additional FTEs for classroom teachers in its enhanced PJP model than Abbott V; Burlington intends to reduce an elementary teaching position even though its enhanced PJP model provides for 9.5 additional FTEs for elementary teachers than Abbott V; Passaic is eliminating art and music teachers despite its enhanced PJP model specifically providing for 78 "other teachers" at the elementary level to enable districts to employ teachers for specialty areas like art and music in the elementary schools; Pemberton is eliminating literary specialists despite the fact that its enhanced PJP model includes 38 reading specialist positions more than Abbott V; Vineland is reducing three of its eight literacy coaches when its enhanced PJP model includes almost 8 coach/facilitator positions more than the Abbott V model. Bridgeton Certification, ¶22, Burlington Certification, ¶21, Passaic Certification, ¶24, Pemberton Certification, ¶23, Vineland Certification, ¶16 and Attwood Second Supplemental Certification, Exhibits B, C, J, L and P. Moreover, this analysis does not account for the inclusion in these districts' Adequacy Budgets of

other excess staff positions and fiscal resources.

Without question, not all of the Abbott districts have staffed themselves identical to the Abbott V model. Some have not included certain positions or may have less than the Abbott V model included; others may have supported positions outside of the Abbott V model or Abbott V positions at higher levels than that model. See, e.g., Millville Certification, ¶II1(b) (claiming that middle and high school community services coordinators are an "integral position" but noting that it does not employ any community services coordinators); Elizabeth Certification, ¶ 22 (including positions not part of the Abbott V model such as Middle School Teacher Disciplinarians, Special Services Mainstream Facilitators, Inclusion Facilitators and Peer Leadership Teachers).

The enhanced PJP model, however, provides significantly more staffing resources than Abbott V and the districts' Adequacy Budgets include substantial fiscal resources in excess of their enhanced PJP model.[10] The SFRA does not mandate any particular positions but provides the flexibility as well as the resources to Abbott districts, and other high poverty districts, to structure this significant level of educational and fiscal resources in the manner best suited to meeting the particular needs of their

[10]Moreover, 11 of the 15 Districts are spending above their Adequacy Budget in 2008-2009, Attwood Second Supplemental Certification, Exhibit A, and thus have even greater resources available than the Adequacy Budget would provide.

students.

Based on the record before this Court, the State has convincingly demonstrated that the SFRA, as implemented in 2008-2009, provides the educational resources to enable each of the Districts to meet the Abbott V remedies with significant excess staffing and fiscal resources to meet the particular needs of their students. Moreover, there is nothing to suggest the same will not be true in 2009-2010 and 2010-2011.

The Districts suggest that Adjustment Aid might not be provided in the future and predict that its absence would result in dramatic reductions in future years. The SFRA, however, provides for all districts to be held harmless through the provision of Adjustment Aid for at least two more years. Even after that time period is over, Adjustment Aid stays in place unless a district suffers a significant reduction in student enrollment.[11] N.J.S.A. 18A:7F-58.

Moreover, the SFRA has a built-in mechanism to review and adjust the educational and fiscal resources so that the needs of

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[11]Contrary to the Shapiro Districts' claim, Shapiro District Brief at 47-48, Adjustment Aid is quite different from the special needs weight in the QEA that this Court concluded was "discretionary" and failed "to guarantee adequate funding" for the Abbott districts. Abbott III, 136 N.J. at 451. The QEA, as enacted, did not include a special needs weight sufficient for the Abbott districts to achieve parity but rather achievement of parity depended on a future adjustment to the formula by the Governor and Legislature. Ibid. Adjustment Aid is an original and permanent part of the SFRA and therefore not comparable to the discretionary nature of the special needs weight.

the Abbott children and all children will continue to be met in the future. N.J.S.A. 18A:7F-46. Accordingly, the State has demonstrated that the SFRA provides sufficient resources for the Abbott districts to provide a thorough and efficient education to their students in 2008-2009 and that it has the capability of ensuring adequate educational and fiscal resources in future years. Nothing further is required for this Court to conclude that the SFRA is facially constitutional.

B. ACNJ's Reservations About Potential Future Effects of the SFRA are Insufficient to Sustain a Finding that the Act is Unconstitutional.

Similar to the arguments of the Districts, the ACNJ expresses concerns about the effects of the SFRA. ACNJ, however, does not predict dire consequences as the Districts have done. Rather, it suggests that because the funding formula is "untested" and "may negatively affect any continued progress" in the Abbott districts, that the Court should deny the State's motion. ACNJ's Brief at 3. ACNJ's concerns about possible negative consequences, however, are not a sufficient basis on which to invalidate this legislative enactment, especially given the strong presumption of constitutionality to which it is entitled. See State's Reply Brief at 11-15.

Focusing on nine of the 31 Abbott districts, ACNJ argues that these nine districts still have high concentrations of poverty and their children have extraordinary needs. The State does not

dispute that conclusion. ACNJ, however, goes on to argue that "despite the inclusion of greater at-risk aid for districts with high populations of disadvantaged children, the formula-based SFRA is a dramatic departure from this Court's historic emphasis on needs-based funding." ACNJ Brief at 9. As discussed above, the SFRA does provide needs-based funding to all school districts, including Abbott districts. Moreover, not only is the funding provided by the SFRA "needs based" but the Act includes significantly more educational and fiscal resources to support at-risk children than the Abbott V model required. Thus, ACNJ's concerns are unfounded.

ACNJ's brief also addresses the preschool provisions of the SFRA. Although ACNJ "applauds the State's vision and commitment to quality preschool for children beyond the Abbott districts and strongly supports this initiative," ACNJ Brief at 16, it expresses concern that the shift from individual review of each district and provider budget -- a shift critical to the significant expansion of the program -- to a per-pupil amount may create a problem in future years. More specifically, while recognizing that the high-quality standards will remain in place, ACNJ is concerned that "districts may not receive adequate State funding to support those standards." Id. at 17.

As the State's Reply Brief discusses in detail, the funding for preschool is based on actual expenditure data in the

Abbott districts and reflects the real cost of this high-quality program. While the State expands this program to an additional 30,000 children, Abbott districts will be funded the same in 2008-2009 as in the past and will be held-harmless in future years. The State's commitment to this high-quality preschool program is unwavering and the Legislature's decision to significantly expand this program, despite current fiscal issues in the State, reflects the strength of that commitment. "ACNJ's fear that it is a real possibility that future preschool funding will be inadequate," ACNJ Brief at 18-19 (emphasis added), hardly suggests "a thread" let alone the "granite" upon which must rest "a conclusion of constitutional deficiency." Abbott II, 119 N.J. at 320. See also Robinson v. Cahill, 69 N.J. 449, 455 (1976) (Robinson V) (whether or not the funding formula "may or may not pass constitutional muster as applied in the future ... must quite obviously await the event.").

C. The SFRA Does Not, As Suggested by the Shapiro Districts and the Urban Mayors, Force Municipally Overburdened Abbott Districts to Significantly Increase Local Revenues in Order to Meet the Needs of Their Students.

Although for various reasons noted by the Urban Mayors municipal overburden is a concern in New Jersey, it is only of constitutional significance here if, under the SFRA, it will preclude districts from raising the local revenue necessary to provide a thorough and efficient education. In Abbott II, this

Court concluded that municipal overburden did rise to that level under the Public School Reform Act of 1975 for Abbott districts. 119 N.J. at 357. The circumstances in Abbott districts, however, have changed significantly since Abbott II. Moreover, the SFRA does not have the infirmities found in the Public School Education Act of 1975 that would result in a similar finding by this Court.

In Abbott II, the record reflected that the poorer urban districts had local property tax bases "already overtaxed to exhaustion." Ibid. The average equalized tax rates of urban aid cities (exclusive of Atlantic City) was 196% of the State average. Jersey City's equalized tax rate was 218% of the State average; Irvington was 176%, Camden 272% and East Orange 307%. Abbott v. Burke, 1989 S.L.D. 234, 268.

In contrast, most of the Abbott districts are no longer municipally overburdened. In 2007, the total equalized tax rate of eight Abbott districts was below the State average, 14 were below 110% of the State average, 18 were below 120% and 22 were below 130%. Supplemental Certification of Katherine Attwood (Attwood Supplemental Certification), Exhibit I. The average equalized tax rate of the Abbott districts in 2007 is 105% of the State average. Ibid. Jersey City's rate is only 87% of the State average; Irvington, Camden and East Orange would still qualify as municipally overburdened but the percentage above the State average for all three are well below the percentages in Abbott II. Ibid.

Both the number of districts facing municipal overburden and the percentage that Abbott districts' equalized tax rates are above the State average has significantly declined since Abbott II.

Moreover, the SFRA actually considers municipal overburden in the funding of Abbott districts. A municipally overburdened Abbott district with a 2007-2008 K-12 budget less than its Adequacy Budget in 2008-2009 is eligible for additional State aid -- Educational Adequacy Aid (EAA). Two consequences flow from this eligibility for EAA. First, to ensure that the district is not precluded from raising the local funds necessary to support a thorough and efficient budget, the district has a required local levy increase of 4% for the next three years. Second, the district is eligible for additional State aid that, combined with the increased local levy, will bring the district to adequacy within three years. N.J.S.A. 18A:7F-58. Accordingly, for districts "under adequacy," the SFRA has a mechanism to address concerns of municipal overburden while ensuring that the district can spend at the level needed to provide a thorough and efficient education to its students.

Municipally overburdened Abbott districts that in 2007-08 are spending above their 2008-09 Adequacy Budget are treated differently under the SFRA. The SFRA does provide Adjustment Aid to these districts which prevents them from having to raise local revenues to their fair share and even higher to maintain the

current level of spending. Over time, these districts can slowly and incrementally raise their local levy and/or look for efficiencies and reallocations in their "over-adequacy" budgets, using their enhanced PJP model for guidance. Accordingly, these districts are held harmless so that they can maintain the positions, programs and services necessary to meet the needs of their students without a significant impact on their local levy.

The results of the 2008-2009 budget process demonstrates that the State is not shifting the burden of supporting the schools in Abbott districts to tax bases that are unable to support additional local levy increases. State support for Abbott district budgets K-12 in 2008-2009 remained at 86%, the same as in 2007-2008. Attwood Supplemental Certification, Exhibit F. All but 25 Abbott districts sought an increase in the local levy and all but four of those increases were approved by the voters or Board of School Estimates.[12] Id. at Exhibit D. Of those four, the municipal

[12]Camden did not seek any increase in its local tax levy and argues that because of its unique status under the Municipal Rehabilitation and Economic Recovery Act (MRERA), N.J.S.A. 52:27BBB-1, it is precluded from doing so. Supplemental Certification of Rafael C. Haciski (Camden Supplemental Certification), ¶¶6, 9. A close reading of the Act's provisions, however, reveals no such prohibition. N.J.S.A. 52:27BBB-27 directs that the chief operating officer (COO) "shall not increase the municipal portion of the general tax rate." Generally, this provision describes the conduct of the preparation, hearing and vote on the municipal budget consistent with N.J.S.A. 40A:4-1 et seq., without any reference to school district budgeting. Moreover, the school portion of the general tax rate is distinct from the municipal portion -- every municipality has a school tax levy. Finally, the COO has no authority over the school budget.

governing body made reductions in only two of the district budgets and the reductions were significantly less than 1% of the budgets.

Moreover, as discussed supra, and in the State's Motion and Reply Briefs, those budgets were sufficient to provide a thorough and efficient education to their students. In fact, in each instance, the Abbott district budgets for 2008-2009 supports per pupil spending in excess of the I and J average per pupil spending. Attwood Second Supplemental Certification, Exhibit Q. Accordingly, under the SFRA, Abbott districts were not precluded from raising the necessary local revenues in order to support a constitutionally adequate education for their children. Thus, the SFRA is not constitutionally infirm based on concerns of municipal overburden.

D. The SFRA's Funding Provisions for Special Education are Related to Actual Costs, Distributed in a Manner that Recognizes Local Ability to Contribute to Special Education Services, and Further Policy Goals for Public Placements

As set forth in the State's Motion Brief, the SFRA utilizes a "census-based" approach for the distribution of State

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While MRERA impacts the governance of the district, its impact is through the appointment of additional board members by the Governor, and the ability of the Governor to veto board action. N.J.S.A. 52:27BBB-63, N.J.S.A. 52:27BBB-64. Certainly, the oversight of the district could serve to mitigate the proposal of a budget requiring a significant increase in the school tax levy, however, MRERA does not preclude the striking of a school tax levy that is necessary to support a thorough and efficient education in the district.

aid for special education. The SFRA calculates special education aid based on the average classification rate in the State and the average excess cost of educating a special education student Statewide. The aid is distributed through a combination of equalized and categorical aid.[13] This approach, coupled with a reimbursement method for extraordinary special education costs, ensures the necessary resources for special education students distributed in an equitable manner.

The Department's proposal to use a census method was informed, in part, by a study conducted by the Center for Education Finance that identified certain flaws in the tiering/weighted funding methodology of CEIFA and a suggestion to consider a census approach. While the census-based approach may be viewed as having some weakness, i.e., not taking into account the varying percentages of special education students across the State, the SFRA's implementation of this method minimizes the weaknesses and maximizes its strengths. First, the excess cost for educating a special education child in 2008-2009 -- $10,898[14] -- was generated

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[13]There are four general special education financing methods in use across the nation: 1) the use of pupil weights; 2) distribution through flat grants or "census based" methods; 3) reimbursement of allowed costs and 4) allocation of specified education resources. National Conference of State Legislatures, National Center on Education Finance, <<www.ncsl.org/programs/educ/PubsSpecEd.htm (last visited June 13, 2008)>>.

[14]This number will be increased by the CPI in each of the intervening years before the first Educational Adequacy Report and thereafter. N.J.S.A. 18A:7F-55(a).

using actual costs statewide. Utilizing the average classification rate and the average excess per pupil cost, the aid is then distributed in two ways: two-thirds of the aid is distributed on a wealth-equalized basis and one-third of the aid is distributed as a categorical aid.

Next, extraordinary special education costs are addressed through a reimbursement mechanism.[15] Each district is eligible to receive reimbursement of 90% of the cost of direct instructional and support services over $40,000 for in-district programs, 75% of the direct instructional and support services costs over $40,000 for separate public programs and 75% of the tuition costs over $55,000 for separate private school programs.[16] N.J.S.A. 18A:7F-55(b).

In sum, the funding for special education costs under

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[15]The New Jersey Special Education Expenditure Project (SEEP), Final Report, suggested that New Jersey consider ways of financing special education that would not encourage out-of-district placements. New Jersey Special Education Expenditure Project Final Report, Center for Special Education Finance (CSEF), Chambers, Parrish, and Brock, at 53. SEEP Report may be accessed at <<www.state.nj.us/education/sff/seep.pdf (last visited June 13, 2008)>>. And see Testimony of Thomas Parrish, Committee Meeting of Joint Legislative Committee on Public School Funding Reform, October 3, 2006, at 33, 34. The reimbursement thresholds are designed for this purpose.

[16]The Governor, in his Budget for Fiscal Year 2009, has stated his intent to modify the reimbursement formula in his FY2010 budget to provide reimbursement of 95% of the costs over $40,000 for in-district programs, 85% of the costs over $40,000 for separate public programs and 85% of the costs over $55,000 for separate private school programs. NJ State Budget FY 2008-2009 at D-104.

$40,000 is based on the actual excess costs of serving students in New Jersey and the aid is distributed in a manner that recognizes the relative wealth of the district and the incremental cost differences for these services. Additionally, the reimbursement thresholds for extraordinary costs removes any incentive for districts to send students to out-of-district private placements over in-district placements and other public placements. This Court should have no difficulty finding these provisions facially constitutional.

As previously stated, the Department arrived at its special education finance methodology informed by expert suggestion. Moreover, it did so with the understanding of the pros and cons of the methods it was considering and crafted the formula to ensure equitable distribution.

> There are several significant advantages to the [proposed special education funding methods]. First, the proposal accounts for the full Statewide cost of special education, estimated at approximately $4.4 billion for fiscal year 2009, and by wealth-equalizing a portion of the aid, directs more aid to less wealthy districts. This will minimize the "crowding out effect" - where districts are forced to use general education funds to comply with special education mandates, which can result in the elimination of general education programs and services. Moreover, the increase in categorical aid to districts for extraordinary costs will compensate districts that have a higher percentage of children with greater and more expensive needs. The proposal also provides for a predictable level of special education funding for districts. The formula will be easy to

> administer - both for the State and the districts - and will provide districts with greater discretion and flexibility. Finally, the census model disassociates disability category from funding, and because it assumes an equal distribution of disabilities throughout the student population of the state, it reduces any incentive that may exist to inaccurately report special education students.
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> [Davy Certification, Exhibit G, A Formula for Success at 17].

Recognizing that this is a new approach and that, once implemented, adjustments to the rates and costs may be needed, the SFRA requires the Commissioner to authorize an independent study of the new census methodology. The study shall determine if adjustments in the formulas are needed in future years to address the variations in incidence of students with severe disabilities requiring high cost programs, and to make recommendations for adjustments. The study and any recommendations arising therefrom are to be completed by June 30, 2010. N.J.S.A. 18A:7F-55(f). This independent study is in addition to the adjustments to the State average classification rate for general special education services for pupils and speech only pupil; the excess cost for general special education services and the extraordinary special education aid thresholds that must occur through the Educational Adequacy Report, and may inform the first Report to be issued by September 1, 2010. N.J.S.A. 18A:7F-46(b).

The SFRA also permits district-specific adjustments to

the aid generated through applications for emergency or additional special education aid, over the above amounts, where certain circumstances warrant. A district can apply for emergency special education aid "for any classified pupil who enrolls in the districts prior to March of the budget year and who is in a placement with a cost in excess of $40,000 or $55,000, as applicable." N.J.S.A. 18A:7F-55(d). This provision will assist districts with mid-year enrollments of special education students with high and/or intensive needs; students that are not yet generating aid for the district and whose costs for service exceed the extraordinary aid thresholds.

Additionally, a district may apply to the Commissioner to receive additional special education categorical aid where the district "has an unusually high rate of low-incidence disabilities, such as autism, deaf/blindness, severe cognitive impairment, and medically fragile." N.J.S.A. 18A:7F-55(g). In these circumstances, the district must demonstrate "the impact of the unusually high rate of low-incidence disabilities on the school district budget and the extent to which the costs to the district are not sufficiently addressed through special education aid and extraordinary special education aid; and provide details of all special education expenditures, including details on the use of federal funds to support those expenditures." Ibid. This provision ensures relief to districts where special education costs

are encroaching on the district's ability to provide general education services yet requires accountability for the proper expenditure[17] of State and federal special education aid.

Thus, moving forward, there are processes in place to ensure that the formula rates and costs are adjusted, that districts will be held accountable for the special education aid received and that districts with certain unique circumstances can make application for relief. These processes will maintain the integrity of the approach while protecting against substantial impairment on special or general education services in a district.

NJP&A argues that the census-based approach has been found constitutionally infirm in other jurisdictions and, therefore this Court should come to the same result. However, the limited holdings in those cases do not yield such a conclusion.

Relying on unpublished, trial court opinions from the State of Washington[18], the NJP&A argues that the census-based

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[17]Another accountability provision of the SFRA requires the Department to review State and federal aid expenditures of a district in "every instance" where "special education monitoring identifies a failure on the part of a district to provide services consistent with a pupil's [IEP]." N.J.S.A. 18A:7F-55(e).

[18]The Findings of Fact and Conclusions of Law and the Declaratory Judgment in Washington State Special Education Coalition v. State of Washington, et al., Cause No. 85-2-00543 (School Funding III), see Ciccone Certification, Exhibit C and D, are referenced in the 2007 declaratory judgment. See Court's Opinion at 3fn5. The court found that School Funding III does not support a proposition that "if you are going to fund based on averages, [the State has] to have a system in place where a district can go to get more money." Id. at 17. Instead, given the

methodology, with its excess cost component, violates the thorough and efficient clause. In a March 2007 Washington declaratory judgment action, School Districts' Alliance for Adequate Funding of Special Education v. State of Washington, Docket No. 04-2-02000-7, Certification of Mary Ciccone (Ciccone Certification), Exhibit B, plaintiffs "sought a declaratory judgment that the appropriations of the legislature to fund payment of the special education costs of the districts are unconstitutional." Court's Opinion at 7. Notably, and seemingly contrary to the position of the amicus, the court found that the statute providing for a 12.7% cap on special education funds and a safety net (a process to make application for relief from the cap) is not unconstitutional on its face. Id. at 10. Moreover, under an "as-applied" analysis following trial, the court found the excess cost "multiplier" of 93% of the basic education allocation to pass constitutional muster.

The negative holding of the Washington Superior Court arose from the funding of the safety nets. When the formula was created, Washington had a demographics safety net that permitted relief to districts that attract special education students because of high-quality medical and social services available to students in the district. That safety net was subsequently eliminated. Also eliminated was a percentage safety net designed to address the

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funding statute being reviewed in School Funding III, a safety net was necessary for that specific law to be upheld. Ibid.

impact of the cap on districts whose special education population exceeded the cap. "Since sy2001-02, the state has not awarded any money for safety net, except the past year for [high cost individuals]." Id. at 20. Because of these circumstances where the safety nets were not being funded, the court found the statute to be unconstitutional as applied. Ibid.

Certainly, the declaratory judgment opinion does not stand for the proposition that a census-based approach is unconstitutional. Rather, it was the failure to fully fund the safety nets in the facially constitutional special education formula that resulted in the court's findings. See Robinson v. Cahill, 70 N.J. 155 (1976) (Robinson VI) (failure to fund a facially constitutional formula resulted in Court ordering relief).

Another jurisdiction[19] that has found the census based method infirm did so because the structure in that state had no relationship to the actual costs of services. See Opinion of the Justices, 624 So.2d 107, 164 (Ala. 1993). The letter opinion of the Court to the Alabama Legislature has two appended trial court

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[19]The third case cited by NJP&A in support of the proposition that the census-based approach is constitutionally infirm, C.G. v. Commonwealth of Pennsylvania, arises under federal law and therefore the claims are quite distinct from a review for constitutionality under the Thorough and Efficient Clause. In C.G., parents brought a challenge under various federal statutes, that the manner in which the aid was distributed caused their children to lose specific services. The U.S. District Court did not issue a ruling on the merits, but rather, ruled on the State's motion to dismiss for lack of standing and failure to exhaust. 49 IDELR 223 (February 25, 2008).

decisions. In those trial court opinions, the court, after testimony regarding the inability to provide any services to children with certain disabilities, along with other deficiencies, found the manner of funding special education constitutionally infirm. Such fact-based conclusions arising from a funding provision that does not appear to have as its foundation actual costs for special education, are not an appropriate comparison to the SFRA, particularly here where the statute is being reviewed for facial validity.

In sum, the method of calculating and distributing special education funding under the SFRA is both reasonable and equitable. NJP&A has not provided any valid basis upon which to find a constitutional defect in this method, and therefore, the special education funding provisions should be upheld.

POINT II

THE REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED AS AMICI DO NOT HAVE STANDING TO REQUEST INDEPENDENT RELIEF AND THE SFRA PROVIDES DISTRICTS WITH SUFFICIENT RESOURCES FOR THE 2008-2009 SCHOOL YEAR

In its May 14, 2008 application to this Court, the Shapiro Districts sought an interim order preserving the "status quo" and clarifying that the Abbott V supplemental funding and expedited appeal procedures remain in effect. Because the Court denied the Shapiro Districts' motion for intervention and, instead, accorded them amicus status, they do not have standing to seek relief independent of that sought by the primary parties.[20] However, even if the Court was to entertain the request, given the record which establishes the extraordinary resources provided under SFRA - well in excess of the Abbott V model - and that all of the Shapiro Districts have approved budgets for 2008-2009[21], such relief is not warranted.

A. Amici Shapiro Districts Do Not Have Standing to Seek Affirmative Relief.

Amicus practice in New Jersey is governed by the longstanding principals that the amicus must accept the case before

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[20]The fact that on May 16, 2008, the ELC filed a letter in which it expressed support for the Shapiro Districts' application does not alter the fact that no party to the case has moved before the Court for this relief.

[21]All of the Districts, with the exception of Camden, have approved budgets. Attwood Second Supplemental Certification, ¶2.

the court as presented and can not raise issues not raised by the parties.[22] Tice v. Cramer, 133 N.J. 347, 355 (1993); State v. Nance, 148 N.J. 376, 385 (1997). Moreover, the role of amicus is advisory rather than adversary; in the advisory role, the amicus provides information to the court on a matter pending for determination. Casey v. Male, 63 N.J. Super. 255, 259 (Cty Ct. 1960) ("An amicus curiae is not a party to the action, nor can he control the litigation."). Although New Jersey courts have not directly opined on whether an amicus can seek relief independent of the primary parties, Neshaminy Constructors, Inc. v. Krause, 181 N.J. Super. 376, 379 n3 (App. Div. 1981) ("We do not ... decide the question of whether a party permitted to intervene as amicus curiae under R.1:13-9 may seek affirmative relief"), other courts, both federal and state, have ruled on this issue. Joining these holdings would be consistent with the limited role of amicus adopted by this Court.

Various federal courts have opined that they are not bound to afford relief to an amicus separate and distinct from the

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[22]In its amicus papers, NJBIC sets forth various statistics reflecting continuing racial isolation in the Abbott districts and argues that the SFRA should be invalidated because it fails to remedy racial isolation and lack of diversity in these districts. While NJBIC addresses a significant education policy issue for districts across New Jersey, the funding formula is not the vehicle to resolve this issue. Moreover, the NJBIC is raising an issue that has not been raised by the parties, and therefore, goes beyond the circumscribed scope of its amicus role.

relief sought by the parties. In Bling v. Roadway Exp., Inc., the Fifth Circuit found an attempt by the government to broaden the scope of issues on appeal to be improper. "As amicus curiae the Government cannot control the course of this litigation to the extent of requesting individual relief not requested by anyone else." 485 F.2d 441, 452 (5th Cir 1973). And see Forest v. Resor, 379 F.2d 881, 883n3 (D.C. Cir. 1967) (motion to strike amicus brief granted where amicus seeking relief not sought by the parties).

Across the nation, state courts have also precluded the request of affirmative relief by amicus. In an action challenging a violation of the Open Meeting Law, the Louisiana appeals court found that amicus press associations improperly sought "relief beyond that requested by appellants." Parent-Community Alliance for Quality Education, Inc. v. Orleans Parish School Board, 385 So.2d 33, 34 (La. App. 4 Cir.), cert. denied, 386 So.2d 1379 (La 1980). In so finding, the court relied on the "settled law" that "when particular relief has not been requested, or particular questions have not been raised, by the litigants, such relief or question may not be granted or determined at the request of those allowed to appear as amicus curiae." Id. at 34-35. Accord Nationwide Mutual Insurance Co v. Chillura, 952 So.2d 547, 552n.7 (Fla.App. 2d Dist. 2007) ("this court cannot grant relief on an issue raised by the amicus brief but not by the appellant"). In Alaska, the Supreme Court considered the request of the Legislature

for amicus participation in a matter concerning the benefits offered to unmarried employees' domestic partners. Beyond participation, the Legislature sought a stay of the court's deadline for compliance. The Court granted the Legislature's participation, but denied the request for a stay on the grounds that "an amicus party may not seek relief beyond the scope of relief sought by the parties of record." State of Alaska v. Alaska Civil Liberties Union, 159 P.3d 513, 514 (Alaska 2006).

In light of the circumscribed role for amicus under New Jersey case law, the Court should hold that amicus are precluded from requesting affirmative relief that is not sought by the parties. Accordingly, the request for affirmative relief by the Shapiro Districts should be denied for lack of standing.

B. The Shapiro Districts Have Failed to Demonstrate The Requisite Conditions for the Entry of an Interim Order.

If the Court considers the request for interim relief on its merits, however, it is clear that the Shapiro Districts do not meet the legal prerequisites that would give rise to injunctive relief. The standards for granting injunctive relief are well established. The party seeking such relief must demonstrate the existence of each of the following four separate conditions: 1) a clear probability that the movant will prevail on the merits of the underlying controversy; 2) in the absence of such a stay, the movant will suffer irreparable injury; 3) that the probability of

harm to other persons will not be greater than the harm the movant will suffer in the absence of such a stay; and 4) that the public interest will not be adversely affected by such a stay. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Zoning Bd. of Adjustment of Sparta Tp. v. Service Elec. Cable Television of N.J., Inc., 198 N.J. Super. 370, 379 (App. Div. 1985). In challenging the constitutionality of the SFRA and seeking restraints therefrom for the 2008-2009 school year, the Shapiro Districts have failed to meet each of these standards.

With regard to the first condition, likelihood of success on the merits, the Shapiro Districts have failed to meet their burden. For all of the reasons set forth in the State's Motion Brief, Reply Brief, and herein, it is clear that the SFRA represents a fair and equitable formula that provides needed resources for students, particularly those that are at-risk, regardless of where they reside. The SFRA carries a strong presumption of constitutionality. The Shapiro Districts have failed to set forth any insufficiency in the enhanced PJP model or other constitutional defect in the SFRA that would preclude the Court from finding the Act facially valid.

Moreover, it is clear that no irreparable harm will befall the Shapiro Districts in the absence of a stay. Budgets have been developed, approved and voted upon without the Abbott V appeal processes. Additionally, the districts' early childhood

programs will continue in 2008-2009 with the same quality and scope expected of Abbott preschool programs. See State's Reply Brief at 37-41. Finally, given the generous SFRA personnel resources over the Abbott V model as well as the additional fiscal resources generated by the SFRA, Attwood Second Supplemental Certification, ¶¶4,5, none of the Abbott districts will be harmed in the 2008-2009 school year as a result of SFRA implementation. And, as previously stated, all Abbott districts see an increase in State aid, ranging from $298 per pupil in Millville to $2,940 in Union City, Attwood Supplemental Certification, Exhibit B, and all Abbott districts will have available per pupil revenues in excess of the I and J average per pupil revenues, Attwood Second Supplemental Certification, Exhibit Q.

Finally, in any balancing of the competing interests of the State and the Shapiro Districts, the equities should fall in favor of the State. An order permitting applications for supplemental funding and subsequent appeals, at this late juncture, will not only be disruptive to the adopted and approved budgets of 30 Abbott districts, it will be tremendously disruptive to the State budgeting process as the fiscal year is drawing to a close and the resolutions for the FY2009 Appropriations Act are being finalized.

As established above, the Shapiro Districts, as amicus participants, lack standing to seek affirmative relief, and, if

their request is considered, the Shapiro Districts have failed to meet the each of the criteria necessary for entry of interim relief. For these reasons, as well as those set forth in the State's moving and reply briefs, the request for an interim order permitting applications for supplemental funding and expedited appeals must be denied.

CONCLUSION

For the foregoing reasons, this Court should determine that the SFRA is constitutional and therefore the remedial remedies previously ordered are no longer required.

Respectfully submitted,

By: _____
Anne Milgram
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Dated: June 16, 2008