SUPREME COURT OF NEW JERSEY
DOCKET NO. 62,700

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

REPLY BRIEF IN SUPPORT OF STATE'S MOTION

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PRELIMINARY STATEMENT

For several decades, this Court has looked to the legislative and executive branches of government to provide a comprehensive response to the educational needs of disadvantaged children in our State, intervening only upon a clear showing that a sufficient response had not been forthcoming. With the enactment of the School Funding Reform Act of 2008 (SFRA), however, these other branches of government have now fulfilled their constitutional obligation, not only to school children in poor urban districts but to all school children.

The SFRA provides a new standard of educational adequacy and equity for the entire State, with the resources being directed to districts based on the needs of the children. Moreover, it provides all districts with high concentrations of at-risk children, i.e., high-poverty districts, with the ability to provide the programs and services previously supported only in the Abbott districts. Moreover, the SFRA and its implementing regulations require that key Abbott programs, such as intensive early literacy and high-quality preschool, be provided in these districts.

The Education Law Center (ELC) ignores the significant fiscal resources that the SFRA provides to the Abbott districts as well as the expansion of equity that it provides to high-poverty districts. Instead, the ELC focuses on maintaining the "status" of being an Abbott district and the previous remedial orders that the

Court found necessary for Abbott districts based on findings of inequity in prior funding formulas.

The SFRA, however, is not about the designation or de-designation of "Abbott districts" or the provision of "remedies" to those districts. At its core, the SFRA is an enhanced resource model that includes educational resources for meeting the needs of all disadvantaged students, particularly students in high poverty districts. Given the high concentrations of poverty within the Abbott districts, the SFRA, by design, continues to provide significant educational resources to those districts.

The ELC, selectively characterizing aids in the SFRA as "formula" or "off-formula" aids, argues that the Abbott districts are being significantly underfunded in 2008-2009 and that the formula's local fair share provisions create a shortfall for the Abbott districts that can not be met by the local taxpayers. That argument is demonstrably inaccurate.

In 2008-2009, all Abbott districts will receive more than a 2% increase in State aid over 2007-2008. The average "per pupil spending," Sb at 68 n.26, in the Abbott districts in 2008-2009 will be $17,325, an increase of $918 per pupil over 2007-2008. Overall State aid to Abbott districts under the SFRA is $4.679 billion, an increase of $241 million over 2007-2008. Additionally, the SFRA has specific provisions, e.g., Adjustment Aid and Educational

Adequacy Aid, that assist in filling the gap between the Abbott districts' local fair share and their local levy so that no Abbott district has to dramatically increase its local levy but may do so incrementally over time.

In short, the Abbott districts have available the necessary resources to enable the districts to maintain all of the Abbott V programs that they have found effective and, consistent with the Commissioner's implementing regulations, can replace or refine those that have not met the needs of their students. The State, through various monitoring and accountability structures, will provide oversight of student achievement and the effective and efficient use of State funds.

The ELC's misleading presentation of the SFRA's effect on the Abbott districts should not serve as a basis to deny the legislative and executive branches the deference to which they are entitled, nor should it upset the strong presumption of validity to be accorded to the SFRA. The ELC has failed to demonstrate that the SFRA is unconstitutional and, therefore, the State's motion should be granted.

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 herein.

Since the State's application to the Court in March 2008, all of the Abbott district 2008-2009 budgets, with the exception of one, were submitted and approved by the DOE under the provisions of the SFRA.[1] All of the Abbott budgets reflect an increase in State aid over 2007-2008. The increases in State aid range from a 2.3% increase in Pemberton to a 26.2% increase in Hoboken. Attwood Supplemental Certification, Exhibit B. Moreover, the budgets include high-quality early childhood programs as approved by the Department consistent with the Court's order in Abbott v. Burke, 177 N.J. 578 (2003) (Abbott X) that, for the first time, are supported by a single revenue stream -- Preschool Education Aid. N.J.S.A. 18A:7F-54.

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[1]To date, Camden has not submitted an approvable, balanced budget to the Department of Education. See Supplemental Certification of Katherine Attwood (Attwood Supplemental Certification), ¶3. The district has not accepted suggestions by the Department and the State-appointed fiscal monitor for appropriate reallocations and efficiencies that would yield a balanced budget, and has missed several promised deadlines for the submission of a balanced budget to the Department. As a result of the district's actions, a discretionary spending freeze has been directed by the Department and the fiscal monitor has been authorized to veto any discretionary spending approved by the board until such time as the budget is submitted and approved. Id. at Exhibit A.

In addition to the aid categories specifically provided for in the SFRA, the Governor's budget also included additional aid to address increased payments that districts may need to provide to charter schools. New Jersey State Budget FY 2008-2009 at D-104. Moreover, his budget included $15 million in transition aid for Abbott districts that will be opening new school facilities in 2008-2009. Ibid.

The SFRA also includes a required minimum tax levy. All districts, including Abbott districts, had to, at a minimum, maintain the local levy from the prior year or raise the local fair share, whichever was less. N.J.S.A. 18A:7F-5(b). Moreover, seven Abbott districts were eligible for Education Adequacy Aid (EAA), i.e., those with budgets under adequacy that were failing and/or municipally overburdened, and, therefore, were required to raise their levies beyond the prior year's levy by a fixed percentage. N.J.S.A. 18A:7F-58(b)(2).[2] Of the remaining 24 Abbott districts, 16 raised their local levy to the 4% tax levy cap or beyond, two raised their local levy by slightly less than the 4% tax levy cap and six did not raise their local levy beyond the minimum required

[2]For EAA eligible districts that are municipally overburdened, the required tax levy for 2007-08, 2009-10 and 2010-11 is 4%. N.J.S.A. 18A:7F-58(b)(2). For EAA eligible districts that are not municipally overburdened, the required local levy increase is 6%, 8% and 10% for 2007-08, 2009-10 and 2010-11 respectively. Ibid. See also Attwood Supplemental Certification, ¶13.

local levy.[3] Attwood Supplemental Certification, Exhibit D.

Twenty-seven of the Abbott districts had their budgets approved by the voters or the Board of School Estimate. In the remaining four districts where the budgets were defeated -- Vineland, Neptune Township, Salem City and Phillipsburg -- the budgets were reviewed by the municipality pursuant to N.J.S.A. 18A:7F-5(d). In two of those districts, Vineland and Phillipsburg, no reduction to the budgets were made. In the other two districts, Neptune and Salem City, insignificant reductions were made. Attwood Supplemental Certification, Exhibit D. Neither of these districts submitted an application to the Commissioner to appeal the reduction.

The Commissioner has also promulgated program regulations that require districts to maintain and/or implement core literacy and mathematic reforms for all "high need" districts, i.e., those that are performing below expectations on State assessments. Supplemental Certification of Lucille Davy (Davy Supplemental Certification), Exhibit A. And see L. 2007, c. 260, §83 (providing the Commissioner with authority to promulgate regulations that are

[3]One district, Gloucester City, received an automatic adjustment to its tax levy cap permitting it to increase its levy by slightly more than 4%. Additionally, two districts, Millville and Phillipsburg, sought and were granted waivers of the permitted tax levy cap to permit local levy increases of 11.23% and 7.62% respectively. Attwood Supplemental Certification, Exhibit D.

effective upon filing with the Office of Administrative Law). The regulations also codify program requirements for districts with high concentrations of poverty. These requirements include class size limitations for various grade levels. Davy Supplemental Certification, ¶8.

Moreover, the Commissioner will be promulgating Preschool Program Regulations applicable not only to Abbott districts but to the many other districts that will benefit from the expansion of preschool programs under the SFRA. These regulations will include the high-quality standards incorporated previously in the Abbott preschool regulations, including the requirements for a certified teacher and an aide for every 15 students, a full-day, full-year program (180 days), a research-based, comprehensive preschool curriculum and assessment, a seamless transition from program entry through third grade and a continuous evaluation and improvement process. Davy Supplemental Certification, ¶¶23-24.

LEGAL ARGUMENT

POINT I

THIS COURT CAN AND SHOULD DETERMINE THE CONSTITUTIONAL VALIDITY OF THE SFRA

The State seeks a determination from this Court that the SFRA is facially constitutional. Although the State's application is somewhat unusual, given prior decisions of this Court and the supervisory authority it has exercised over this area for decades, the Court should assume jurisdiction and grant the State's motion.

The ELC suggests that this Court should deny the State's motion based on a lack of jurisdiction. The ELC's argument unduly restricts the ability of this Court to address this important issue expeditiously, ignoring past precedent where the Court determined the facial validity of a school funding formula.

In Robinson v. Cahill, 69 N.J. 449 (1976) (Robinson V), the Court was similarly asked, in the first instance, to review the constitutionality of the Public School Education Act of 1975. Recognizing the unique situation, the Court specifically discussed whether it was appropriate to entertain such motions and concluded that not only was it appropriate, but desirable, to make a determination of facial validity of the newly enacted funding formula:

> Immediately following ... passage [of the Public School Education Act of 1975] motions

> were addressed to this Court by a number of different parties in the cause.... We hesitated to entertain the motions. No lower court determination of this underlying issue was before us for review; the parties had had no opportunity to avail themselves of an evidentiary hearing at which a record could be made; a judgment by us might savour somewhat of an advisory opinion. These considerations, however, were felt to be outweighed by the desirability of reaching a speedy decision as to the constitutionality of the enactment - at least when examined *facially*. We thought it would be possible - and if so, highly desirable - to decide at once whether the statute, on its face, did or did not meet constitutional requirements.
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> [69 N.J. 449, 454-455 (original emphasis).]

The Court held that the 1975 Act was "in all respects constitutional on its face" assuming that the Act was fully funded. Id. at 467. The Court went on to reason that only actual experience with the formula would demonstrate whether it was adequate or whether further adjustments or modifications were needed. Id. at 455, 466, 467.

A similar approach should be taken here. After years of litigation over Abbott remedies and Abbott budgets, this Court should take the opportunity to resolve quickly the facial validity of the SFRA. Whether further adjustments and modifications are needed can be determined over time and with actual experience. Indeed, the SFRA calls for such an experience-based review every three years. N.J.S.A. 18A:7F-46(b). The ELC's arguments that the

Court should decline to exercise jurisdiction is again "outweighed by the desirability of reaching a speedy decision" on this critical issue.

POINT II

THE SFRA IS ENTITLED TO A STRONG PRESUMPTION OF CONSTITUTIONALITY

It is well established that an act of the Legislature carries with it a strong presumption of constitutionality. In re C.V.S. Pharmacy Wayne, 116 N.J. 490, 497 (1989), cert. denied, 493 U.S. 1045, 110 S.Ct. 841 (1990). This high degree of deference emanates from the fundamental principles upon which the separation of powers is based, namely, that matters of public policy are within the province and expertise of the Legislature. Vornado, Inc. v. Hyland, 77 N.J. 347, 355 (1978), appeal dismissed sub nom, 439 U.S. 1123, 99 S.Ct. 1037 (1979). "The exercise of the judicial power to invalidate a legislative act 'has always been exercised with extreme self restraint, and with a deep awareness that the challenged enactment represents the considered action of a body composed of popularly elected representatives.'" State v. Trump Hotels & Casino Resorts, 160 N.J. 505, 526 (1999) quoting New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8 (1972). In accordance with this deference, this Court has consistently held that "[a] legislative enactment is presumed to be constitutional and the burden is on those challenging the legislation to show that it lacks a rational basis." Caviglia v. Royal Tours of America, 178 N.J. 460, 477 (2004). Despite ELC's arguments to the contrary,

the SFRA is entitled to this strong presumption of constitutionality.

The ELC argues, based on an unpublished trial court decision in Abbott III, that not only is the SFRA denied a presumption of constitutionality, but that the State bears the burden of proof to establish that the SFRA is constitutional. Pb at 36.[4] The trial court in Abbott v. Burke, 136 N.J. 444 (1994) (Abbott III), relying on this Court's decision in So. Burlington Cty. N.A.A.C.P. v. Mount Laurel, 92 N.J. 158 (1983) ("Mt. Laurel II"), held that the State had the burden of proving the Quality Education Act (QEA) was constitutional given the Court's prior remedial decree. Abbott v. Burke, Dkt. No. 91-C-00150, 1993 WL 379818 (N.J. Super., Ch. Div. 1993) at *3. This Court, however, never adopted this holding of the trial court and, more significantly, subsequently rejected that concept in both the school funding cases and Mt. Laurel.

In Abbott III, the Court was silent as to its view of the trial court's assessment as to the deference afforded a legislative enactment in light of prior remedial orders. The Court in Abbott v. Burke, 149 N.J. 145 (1997) (Abbott IV), however, specifically addressed that issue and reaffirmed the longstanding

[4] "Pb" refers to the brief filed by the ELC in response to the State's motion. "Sb" refers to the brief filed on behalf of the State in support of its Motion.

principles of deference with regard to actions by the other branches of government.

> [A]s a legislative enactment, CEIFA is entitled to a presumption of validity. In re C.V.S. Pharmacy Wayne, 116 N.J. 490, 497, 561 A.2d 1160 (1989), cert. denied, 493 U.S. 1045, 110 S.Ct. 841, 107 L.Ed.2d 836 (1990). We likewise do not depart from the principle that deference is afforded to the determinations that are the product of administrative expertise. Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 92-93, 312 A.2d 497 (1973).
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> [Id. at 174.]

Moreover, in Mt. Laurel II, the Court was dealing with municipalities and their land use ordinances, not a legislative enactment by a co-equal branch of government, when it eliminated any presumption of constitutionality and shifted the burden of proof. 92 N.J. at 198-99. In that very case, however, the Court noted its desire to have the other branches of government act and its willingness to defer to those actions. 92 N.J. at 213. ("We note that there has been some legislative initiative in this field. We look forward to more. ... Our deference to these legislative and executive initiatives can be regarded as a clear signal of our readiness to defer further to more substantial actions."). In fact, similar to the situation in school funding, the Court was clear that legislative, rather than judicial, action was the preferred route. Id. at 213-214 ("In the absence of legislative

and executive help, we must give meaning to the constitutional doctrine ... through our own devices, even if they are relatively less suitable."). See also Hills Dev. Co. v. Bernards Tp. in Somerset Cty., 103 N.J. 1, 21 (1986) (noting that vindication of the constitutional right by the Legislature was "far preferable to vindication by the courts, and may be far more effective").

Subsequently, the other branches of government did act by passage of the Fair Housing Act. The Court found that Act to represent "an unprecedented willingness by the Governor and the Legislature to face the Mount Laurel issue after unprecedented decisions by this Court" and held that "strong deference" was "owed to the Legislature relative to this extraordinary legislation." Id. at 23-24.

Thus, the Court, while vigilant in ensuring compliance with its decrees, has remained keenly aware of its obligation to maintain the delicate interrelationship between the three branches of government. See, e.g., Abbott III, supra, 136 N.J. at 455 ("This Court will not, and should not, assume any part" of "the responsibility for substantive education"). This balance appropriately includes the judiciary's traditional standard of deference to its co-equal branches and the presumption of constitutional validity accorded to legislative enactments. Abbott v. Burke, 119 N.J. 287, 320 (1990) (Abbott II) ("we believe

separation of powers requires us to defer to the Board's, the Commissioner's, and the legislative judgment ... Given the consequences, a conclusion of constitutional deficiency cannot hang by a thread, it must rest on granite."). Here, the SFRA, a product of years of study and duly enacted, is entitled to the traditional standard of a strong presumption of constitutionality.

POINT III

THE SFRA ENSURES THAT ALL HIGH-POVERTY DISTRICTS HAVE THE LEVEL OF RESOURCES NECESSARY TO PROVIDE A THOROUGH AND EFFICIENT EDUCATION THEREBY MAKING THE ABBOTT DESIGNATION AND THE ASSOCIATED COURT-ORDERED REMEDIES OBSOLETE.

The State has accomplished what had long eluded it -- the enactment of a school funding formula that ensures all children in New Jersey, including those in poor urban districts, the opportunity to receive a thorough and efficient education. The SFRA accomplishes this goal by focusing on children rather than certain districts, using New Jersey educators and stakeholders in the identification of needed resources, and relying on independent expert advice and assistance. The SFRA funding provisions, in conjunction with the Core Curriculum Content Standards (CCCS) and the various accountability measures set forth in detail in the State's motion brief, provide the comprehensive system of education that our Constitution requires. See Sb at 45-53. Accordingly, the remedies that this Court determined were necessary to address the needs of children in poor urban districts under prior funding formulas are no longer required and the differentiation of those districts from other districts with high concentrations of at-risk children is no longer appropriate.

A. The PJP Process Was an Appropriate Means of Determining the Resources Needed to Address the Special Disadvantages of At-Risk Children

The process used to identify the resources that schools and districts need to provide children with the opportunity to meet State standards is a well-established method for developing a funding formula based on an adequacy model. To assist in this effort, the State retained a consulting firm that has been analyzing education systems and policies for more than 20 years and has worked with numerous states in identifying the resources needed for children in those states to meet performance standards. Certification of Justin Ryan Silverstein (Silverstein Certification), ¶¶1, 2.

The process relies on panels of experts, familiar with the state's performance standards, working with the consultants in identifying the needed resources for children without any educational disadvantages and the additional resources needed for those with educational disadvantages. The cost of those resources are then determined and a funding formula derived from those costs. Certification of Lucille Davy (Davy Certification), Exhibit A, 6.

Relying on the certification of Dr. Margaret Goertz, the ELC suggests that the process used in New Jersey was fundamentally flawed thereby undermining the constitutional validity of the SFRA. Specifically, Dr. Goertz alleges the following "flaws" in the

process: (1) DOE participation in the initial panel that likely impacted the results; (2) insufficient representation by school-level personnel and Abbott districts on the panels; (3) lack of guidance on Abbott remedies and Abbott students' needs; and (4) the passage of time since the panels convened in 2003. Certification of Margaret E. Goertz (Goertz Certification), ¶56.

As to the use of DOE participation in the initial panel, although not typical, the consultants were comfortable using Department staff for the first round panel.[5] Silverstein Certification, ¶15. The consultants found the individuals selected for that panel to be well-qualified and to have experience working in different size districts and schools throughout the State. Ibid. The first round panel establishes an initial set of resources which is subject to review and revision by two other panels. Ibid. Thus, any suggestion that the resources identified in the final PJP models were somehow limited by use of DOE personnel is simply not credible.

As to the criticism that the make-up of the second and third round panels did not include sufficient numbers of school-level personnel, the consultants identified the types of

[5]Another atypical aspect of the PJP process in New Jersey was the inclusion of advocacy groups, including the ELC, on the second round panels. See Silverstein Certification, ¶17. The ELC, however, has not identified that as a flaw in the process.

individuals required for the panels and, in fact, at least 12 of the 40 second round Professional Judgment Panel Invitees were in positions at the school level. Silverstein Certification, ¶6; Davy Certification, Exhibit A at Appendix 7-1 (nine principals, two whole school reform facilitators and one teacher). Although the list reflects only one teacher, teachers may not be the best group to identify school, rather than classroom, resources needed to meet state standards. Silverstein Certification, ¶23. Moreover, as the third panel was looking at the resource issue from a district-wide perspective, the complete lack of school-level personnel on that panel was entirely appropriate. Ibid.

Additionally, Dr. Goertz, criticizing the level of Abbott district representation, significantly underestimates the level of Abbott representation on the second and third round panels. She claims that only four out of 48 round two and three panel members were from Abbott districts; in fact, the Professional Judgment Panel Invitees for the second and third rounds includes a total of eight representatives from Abbott districts, as well as a representative from the ELC. Davy Certification, Exhibit A at 7-1. The second round invitees have members from Abbott districts - two whole school reform facilitators, one from Paterson and one from Long Branch, a supervisor of instruction from Vineland, a principal from Jersey City and a director from Irvington - and the ELC.

Ibid. The third round includes three participants from Abbott districts out of eight members - superintendents from both Perth Amboy and Harrison and a school business administrator from Long Branch. Id. at 8-1. Thus, the needs and interests of Abbott districts were well represented in the process.

Dr. Goertz's suggestion that the process was flawed because the panel members were not given information on the Abbott remedies or data concerning the needs of Abbott children reflects a misunderstanding of the process being undertaken by the Department. The goal of the PJP process was not to see how to implement Court remedies designed to address the failings of prior funding formulas as applied to poor urban districts; rather, the goal was to develop a funding formula that would provide all children, regardless of where they reside, the opportunity for a thorough and efficient education. Through such a design, the Court-ordered remedies would no longer be necessary and all children in all districts, rather than those in a select group of districts, would have the resources to address their educational needs. The SFRA has accomplished that goal.

Finally, Dr. Goertz claims that the passage of time between the convening of the panels and the enactment of the SFRA made the resource models developed by the panels "out of date." Goertz Certification, ¶56(d). To the extent that there were any

changes in the performance standards provided to the panel members, those changes were minor in nature and would be unlikely to have effected the resource identification.[6] Moreover, as Mr. Silverstein points out, repeating the entire process whenever a change is made in state or federal performance standards would be difficult and time-consuming and the resulting changes are likely to be only marginal. Silverstein Certification, ¶9.

Moreover any possible process issues did not effect the ultimate validity of the resources identified. Given comments about the process and the resource models after the release of the Report on the Cost of Education in December 2006, the State retained a panel of three experts to review and comment on the PJP resource models, with particular focus on the needs of at-risk and limited English proficient students. While those experts did note some of the same process issues that Dr. Goertz identified,[7] they

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[6]Contrary to Dr. Goertz suggestion, panelists were provided with the latest drafts of the proposed revised CCCS. Davy Certification, ¶9. Thus, while the adopted 2004 CCCS were better written and sequenced, the content was substantially the same as provided to the panelists. Davy Supplemental Certification, ¶16. Additionally, the panelists were provided with proficiency rates on the State assessments, along with graduation, school day and school year requirements. Report on the Cost of Education at 8; Appendix 4. While some adjustments have been made to proficiency rates for State assessments and graduation requirements, the changes were minor. Davy Supplemental Certification, ¶16.

[7]It should be noted that Dr. Goertz, in several instances, mischaracterizes the findings and conclusions of the expert panelists. For example, in paragraph 56(a) of her certification,

expressed general support for the recommendations in the Report. Davy Certification, Exhibit E (Final Expert Report) at 15. Importantly, where the experts identified deficiencies, the SFRA addressed those deficiencies. See Sb at 27-29. As Dr. Odden noted in the Final Expert Report, the resources are sufficient not only to support all of the resources in the evidence-based model, but also the resources in the illustrative school budgets of Abbott V remedies. Id. at 16. Thus, any concerns that Abbott districts and the needs of their children were not adequately considered are belied by the results.

Moreover, Dr. Picus, who Dr. Goertz refers to often in supporting her criticisms of the PJP process, concludes his report with the following:

Dr. Goertz suggests that one of the reasons Dr. Picus found the Department role "particularly problematic" was that after DOE staff "developed the initial staffing ratios and resources allocations," it was "only given to stakeholders for reaction." Not only is that statement inaccurate in that the stakeholders were free to make whatever changes they thought appropriate, see Silverstein Certification, ¶19, but Dr. Picus never suggests in his report that the stakeholders' role was that limited. In paragraph 56(b), Dr. Goertz quotes from Dr. Odden's report but leaves out the introductory phrase by Dr. Odden - "this fact might mean..." Dr. Odden Report at 3 (emphasis added). In fact, in his conclusions, he finds that the resource model is sufficient with minor adjustments. Finally, in paragraph 56(d), Dr. Goertz's language appears to suggest that Dr. Picus thought the changes in the policy environment since early 2003 "could significantly impact resource needs." Dr. Picus, however, does not draw that conclusion in his report and the findings of his report, as well as the other experts, as to the adequacy of the resource model suggest otherwise.

> Because of New Jersey's long time commitment to education funding, finding large amounts of additional resources for schools may not be the major problem facing the state's education community. Instead the issue may be determining how to best use the resources in place to dramatically improve student performance. Both the PJP and the EB models offer educator supported or research based approaches to begin that process. The question then facing state policy makers is how to structure a funding system that provides schools and school districts with flexibility to meet the needs of individual children, but at the same time helps districts that are not successful in improving student performance allocate their resources to strategies that have been shown to be successful in the past.
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> [Picus Report at 12.]

The State has now put into place the mechanisms to accomplish this through the funding provisions of the SFRA and the various State and federal accountability measures set forth in detail in the State's Motion Brief. See Sb at 45-53.

B. The SFRA Enables All High-Poverty Districts to Provide the Programs and Services Identified in Abbott V, Making a Separate Designation for Abbott Districts Neither Desirable Nor Necessary.

A fundamental premise of the SFRA is that the State's funding formula should ensure that all children receive a thorough and efficient education regardless of district of residence. This premise is of particular importance for at-risk children where their educational needs may require additional resources.

At-risk children residing in Abbott districts have seen an infusion of funds for close to two decades that have permitted those districts to provide additional programs and services designed to meet the special needs of these children. See Certification of Katherine Attwood (Attwood Certification), Exhibits A, F and I. Meanwhile, at-risk children residing in other districts with similarly high concentrations of poverty have not seen a similar increase in resources. Certification of Ernest C. Reock, Jr. (Reock Certification), ¶7, 8(e).[8] The SFRA is designed to rectify that inequity. By ensuring fiscal resources in these non-Abbott high-poverty districts sufficient to provide the programs and services this Court identified in Abbott V and to meet particular needs of their students, and by continuing to support the high level of fiscal resources in the Abbott districts, the SFRA has eliminated the need for a special designation for Abbott

[8]Reock concludes that "the primary reason the need in poor non-Abbott districts is now acute" is the failure of the State to fully fund the CEIFA formula and not due to the additional aid provided to the Abbott districts beyond that which CEIFA would have generated. Reock Certification, ¶9. In reaching that conclusion, however, Reock fails to consider the fiscal realities of the State and the consequent limitations on its budget. Once the State was required to provide the extraordinary increases in funding to the Abbott districts for aid categories not included within CEIFA (by 2007-2008, almost $2 billion in parity aid, preschool expansion aid and supplemental funding), the fiscal resources were simply not available to provide the remaining school districts with the increases in State aid that CEIFA would have otherwise provided. See Attwood Certification, Exhibits B, C and D; Attwood Supplemental Certification, ¶29.

districts.

The ELC views the elimination of the Abbott designation in the SFRA as ignoring the continuing high levels of poverty and low levels of achievement in these districts.[9] That is simply not the case. The SFRA recognizes that those conditions continue to exist in Abbott districts, but it further recognizes that those conditions also exist in many other school districts and that additional resources should be distributed equitably based on the needs of students in all high-poverty districts. More than 50 non-Abbott districts have concentrations of at-risk students that exceed 40%. Attwood Supplemental Certification, ¶9.

The ELC itself has recognized the need for additional resources in other high-poverty districts. As an amicus, the ELC argued before the State Board in Bacon v. New Jersey Dept. of Educ., (State Board of Education, Dkt. Nos. 53-3/98A-53-3/98J, 53-

[9]Dr. Goertz suggests that elimination of the Abbott designation can only be accomplished by a district by district review of the factors set forth by former Commissioner Librera in a report issued in June 2005. Goertz Certification, ¶13-15. The SFRA, however, is not selecting individual districts to be included or excluded from this separate category of districts as contemplated by the Librera report; rather, the SFRA eliminates the need for that separate category. Moreover, the Librera report was issued pursuant to the Educational Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1 et seq., and, for purposes of that Act, all of the Abbott districts remain a separate group, albeit named SDA Districts, entitled to 100% funding of approved facilities construction. N.J.S.A. 18A:7G-3 (definition of "SDA District"); N.J.S.A. 18A:7G-5(k).

3/98M-53-3/98P, 53-3/98R-53-3/98T), that certain "Bacon districts" were comparable to the Abbott districts and deserved similar treatment with regard to fiscal resources.[10] Walters Certification, Exhibit A. The ELC made similar arguments before the Appellate Division. Id. at Exhibit B. The SFRA accomplishes that very goal. In fact, a number of the Bacon districts, as well as other high poverty districts, are receiving significant increases under the SFRA. Attwood Supplemental Certification, ¶10 (half of the Bacon districts receiving aid increases of approximately 20%).

Moreover, the ELC's suggestion that the SFRA somehow "discontinues" the Abbott K-12 supplemental programs is simply not true. As the State has demonstrated, the adequacy model provides sufficient resources for all Abbott districts to maintain the programs and services identified in Abbott V and the SFRA provides additional fiscal resources to address particular student or

[10]The "Bacon districts" are Buena Regional, Clayton, Commercial, Egg Harbor City, Fairfield, Hammonton, Lakehurst, Lakewood, Lawrence (Cumberland County), Little Egg Harbor, Maurice River, Ocean Township (Ocean County), Quinton, Upper Deerfield, Wallington and Woodbine. See Bacon v. N.J. Dept. Of Educ., 398 N.J. Super. 600 (App. Div. 2008). The ELC argued before the State Board that Woodbine Township, Lawrence Township, Commerical Township, Fairfield Township and Egg Harbor City had socio-economic and educational factors that would entitle them to "special needs status." Certification of Michael C. Walters (Walters Certification), Exhibit A at 22-24. In its brief to the Appellate Division, the ELC argued that, if the Appellate Division affirmed the factual findings of the State Board, the remedial framework of Abbott IV and Abbott V should apply to all 16 Bacon districts. Walters Certification, Exhibit B at 6.

district needs. See Davy Certification, ¶29 and Exhibit H (demonstrating that the enhanced PJP model has sufficient resources to provide the Abbott V remedies, with educational resources to spare). See also Sb at 30, 74-75. More significantly, by providing sufficient resources so that all high-poverty districts, not just Abbott districts, can provide the Abbott V remedies, see Attwood Supplemental Certification, ¶9 (52 non-Abbott districts have concentrations of at-risk pupils at 40% or higher), the number of at-risk children in the State who can benefit from those educational resources is substantially increased.

This is not to suggest that all high-poverty districts will structure their educational programs and services identical to the Abbott V model or, for that matter, the adequacy model in the SFRA. Rather, both the adequacy model and the Abbott V model provide options for these districts in meeting the needs of their students. As Dr. Picus recommended, the SFRA is a funding system that provides "schools and school districts with flexibility to meet the needs of individual children," Picus Report at 12, and gives the districts sufficient fiscal resources to do so.

This Court, within the context of CEIFA, previously expressed concern over providing too much flexibility to the Abbott districts to meet the special needs of their students. In CEIFA, demonstrably effective program aid (DEPA) provided a specific per

pupil amount to schools with moderate (20%-40%) or high (above 40%) concentrations of low-income students.[11] DEPA could be used to support programs off a list developed by the Department, including alternative schools, community schools, class size reduction programs, parent education programs, job training programs, training institutes to improve homework response, telephone tutorial programs, teleconference and video tutoring, and HSPT/Early warning test before school/after school programs. Abbott IV, 149 N.J. at 181.

The Court found that CEIFA had not disclosed the basis for the DEPA per-pupil amounts and that there was no evidence that the amounts were sufficient to cover the cost of the programs that qualified for DEPA funding. Ibid. Moreover, no study or identification of the programmatic needs of these students had been done. Id. at 182. Thus, the Court rejected this "so-called menu approach" concluding that this "'[f]lexibility' does not ensure that the most needed programs will be included in the menu, or that

[11]In 1997-1998, the DEPA per-pupil amount was $300 for moderate concentrations and $425 for high concentrations. Former N.J.S.A. 18A:7F-18. Inflated to 2008-2009, those amounts would be $404 and $572 per pupil for each student in schools with moderate and high concentrations, respectively. Attwood Supplemental Certification, ¶25. In comparison, the SFRA provides between $4,535 per pupil for each at-risk student in a district with a 20% concentration of at-risk students and up to $6,435 per pupil for each at-risk student in districts with a concentration of 60% or higher at-risk students. Davy Certification, Exhibit G at Appendix C.

the money provided by DEPA will be sufficient to implement the needed programs." Ibid.

Within the context of the SFRA, the Court's concerns have all been addressed. Both Abbott V and the PJP process identify the programs, services and staffing that can be implemented to address the special disadvantages of at-risk children; thus "the most needed programs" are "included in the menu." Moreover, the basis for the at-risk amount under SFRA is not only disclosed and directly tied to the identified educational resources, but was also enhanced for districts with high concentrations of poverty ensuring more than sufficient fiscal resources to implement those programs.

Furthermore, the flexibility provided to these districts will be constrained by the administrative regulations that require certain class sizes, intensive literacy programs and math reforms and secondary education initiatives. Davy Supplemental Certification, Exhibit A. Those districts unable to make the necessary improvements in student performance will face additional guidance and possible intervention from the Department as a result of the accountability provisions in the SFRA and other statutory provisions. See Sb at 45-53.