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.

C. The Funding Provisions of the SFRA Assure Abbott District Expenditures Sufficient to Enable Students in Those Districts to Achieve the CCCS.

As more fully addressed in the State's brief in support of its motion, the funding provisions of the SFRA provide significant resources to Abbott districts, whether those districts' budgets are above or below their adequacy budget. In 2008-2009, Abbott districts will receive State aid increases of between 2.3% and 26% as compared to 2007-2008. Attwood Supplemental Certification, Exhibit B. The per-pupil spending in the Abbott districts for 2008-2009 range between $14,361 and $25,217. Id. at Exhibit E. Every Abbott district has per pupil spending above the I and J average of $14,046. Ibid. The fiscal resources being provided to the Abbott districts pursuant to the SFRA are more than sufficient to maintain the programs and services identified in Abbott V and to meet other particularized needs of the students.

By attempting to force the SFRA into an outdated model of completely separate categories of "regular education" and "supplemental programs" and by ignoring State aid categories under the SFRA that provide substantial fiscal resources to the Abbott districts, the ELC concludes that the Abbott districts will be unable to meet the educational needs of their students. However, when the SFRA is viewed as a whole, it is clear that the ELC's

conclusion is erroneous.

In Abbott II, this Court directed that poor urban districts be provided fiscal resources substantially equivalent to the average resources available in wealthy suburban districts and that the special needs of disadvantaged children in the poor urban districts be addressed. 119 N.J. at 385. The Court continued to view its remedial response in that manner in Abbott III and Abbott IV. 149 N.J. at 224; 136 N.J. at 447. In Abbott v. Burke, 153 N.J. 480 (1998) (Abbott V), however, the Court recognized that this artificial separation between regular education and supplemental programs was not necessary to ensure that the Abbott children received a constitutionally adequate education. Rather, the Court accepted the approach of having all resources blended to support the educational programs and services being provided and found that additional revenues above parity might not necessarily be required in order to meet the educational needs of Abbott students. 153 N.J. at 498, 518.

Reverting to the Court's earlier view, the ELC argues that the "Commissioner proposes replacing the parity remedy with the 'base' per pupil amount and 'base cost' in the SFRA". Pb at 22. The Commissioner, however, had no such intent. Rather, when reviewing the SFRA, the Court should look to the total resources available to these districts. In doing so, it will conclude that

the resources are sufficient to meet the educational needs of the students.

In 2008-2009, students in the Abbott districts will be supported by an average spending per pupil of $17,325, $3,279 more than the average per pupil spending in the I and J districts. Attwood Supplemental Certification, ¶17. As more fully set forth in the State's Motion Brief, these resources are more than sufficient to meet the special disadvantages of poor urban students and to provide those students with the opportunity to achieve the State standards. Sb at 61, 69-70.

By merely focusing on the base per pupil amount and comparing it to parity, the ELC is attempting to minimize the State's efforts under the SFRA to drive substantially more resources to support at-risk students, while maintaining an adequate base level for non-disadvantaged students.[12] The Court should reject this attempt. As the ELC concedes, "the Court

[12]The base cost per pupil in the SFRA reflects the amount necessary to provide a thorough and efficient education to an elementary student without any disadvantages. ELC compares the "base cost" in CEIFA inflated to 2008-2009 to the "base cost" in the SFRA and, because the base cost under the SFRA is slightly less, concludes that the SFRA, like CEIFA, must be unconstitutional as applied to the Abbott districts. Pb at 43-44. Again, the ELC refuses to view the SFRA in its entirety thereby discounting the enormous increase in other aid categories under SFRA, as compared to CEIFA, for students in the Abbott districts and other high poverty districts. Attwood Supplemental Certification, ¶25 (comparing CEIFA per pupil resources to SFRA per pupil resources for an elementary at-risk student).

ordered the parity remedy to provide sufficient funding to enable Plaintiffs to achieve the Core Curriculum Content Standards." Pb at 13. Accordingly, in reviewing the constitutionality of the SFRA, the Court should consider all funding categories designed to enable Plaintiffs to meet the CCCS, including not only the base aid but at-risk aid, LEP aid, security aid, EAA and Adjustment Aid.

The Court should further reject the ELC's attempt to minimize the substantial amount of revenue being provided to the Abbott districts by arbitrarily determining certain aid categories are "off formula" and therefore somehow "discretionary." In almost all of the comparisons provided in the Certification of Mel Wyns, he excludes one of the most substantial aid categories - Adjustment Aid - thereby making all of those comparisons unreliable. Compare Attwood Supplemental Certification, Exhibit F to Wyns Certification, Exhibit C. He also excludes EAA and charter school aid as "off-formula" aids. Ibid.

As a comparison between Exhibit C of the Wyns Certification and Exhibit F of the Attwood Supplemental Certification demonstrates, the Abbott districts' budgets increased by more than $205 million between 2007-2008 and 2008-2009 rather than decreasing by $447 million as suggested by Mr. Wyns. Wyns Certification, ¶36. Moreover, State aid as a percentage of the Abbott K-12 budgets remained the same in 2008-2009 as in 2007-2008,

i.e., 86%. Attwood Supplemental Certification, Exhibit F.

Furthermore, Mr. Wyns is erroneous in his suggestion that the "SFRA declares" that $447 million of Abbott spending in 2007-08 was "excessive and not necessary to provide T&E for Abbott students." Wyns Certification, ¶37. While it is certainly possible that Abbott districts may have made expenditures in 2007-2008 that were "not necessary to provide T&E for Abbott students,", a fair comparison of 2007-2008 Abbott districts' spending to their 2008-2009 adequacy budgets under the SFRA reflects a difference of only $30.3 million, or less than 1% of their expenditures. Attwood Supplemental Certification, ¶26, Exhibit H.

The ELC further argues that because the model district on which the SFRA is based is not identical in enrollment levels, grade configuration, school types and numbers and sizes of school, Pb at 23, to each of the Abbott districts, the SFRA cannot ensure sufficient resources are allocated to each Abbott district. On this basis, the ELC claims that continuation of the supplemental funding process is essential. The SFRA, however, provides resources to each district on a per-pupil basis; for each at-risk or LEP child enrolled in that district funds are generated to support that child and the special disadvantages that child may face. The differences in grade configurations, enrollment levels, school types and numbers/sizes of schools in the Abbott districts

do not change that fact.

Customizing a funding formula based on how local school districts decide to configure their schools rather than on the needs of children is inconsistent with notions of funding equity. Rather, the appropriate approach, and the one taken by the SFRA, is to fund districts on their student population and hold them accountable for the performance of their students thereby ensuring equity between school districts having students with similar needs and encouraging the efficient and effective expenditure of public funds.

Furthermore, contrary to the ELC's suggestion, the district model selected is very sensitive to the characteristics of the Abbott districts. As discussed in the State's Motion Brief, Sb at 26, in determining which model to select, the State limited its consideration to the large and very large models - the models with the highest percentage of at-risk students. Twenty-two of the 31 Abbott districts fall within either the large or very large model based on the most recent enrollment data. Attwood Supplemental Certification, ¶28. Between those two models, the State chose the one that had the higher base cost and enrollment characteristics reflective of most districts. Moreover, the particular disadvantages facing Abbott districts and other high-poverty districts were the reason that both at-risk aid and Security Aid

were established on a sliding scale.

The SFRA is extraordinarily sensitive to the additional needs of children in high-poverty districts. The SFRA has not only identified and costed out the additional resources needed for at-risk children but has enhanced those resources on a sliding scale based on concentrations of poverty. See Sb at 28-30. Moreover, it has addressed the additional security needs in high poverty districts by using a sliding scale based on concentrations of poverty for Security Aid. Thus, unlike CEIFA, the SFRA does not treat all school districts alike. Rather, it takes into account the realities of the surrounding environment in high poverty districts and provides additional resources to address those unique disadvantages. Accordingly, continuation of the parity remedy and the supplemental funding process is no longer necessary under the SFRA.

POINT IV

THE SFRA AND ITS IMPLEMENTING REGULATIONS WILL ENSURE THE CONTINUATION OF HIGH QUALITY PRESCHOOL PROGRAMS IN THE ABBOTT DISTRICTS AND SIGNIFICANTLY EXPAND THESE PROGRAMS IN OTHER HIGH-POVERTY DISTRICTS.

The SFRA provides categorical aid for the support of universal high-quality, full-day early childhood programs in all DFG A and B districts and all CD districts with an at-risk student concentration of 40% or higher. Moreover, the Act requires that all at-risk students, regardless of the concentration of poverty of their district, be offered a high-quality, full-day preschool program. Abbott districts' early childhood programs will see no change in quality or scope under the SFRA.[13] Non-Abbott districts meeting these criteria will be required to phase-in their program over a period of six years.[14]

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[13]For 2008-2009, the programs will run consistent with early childhood plans and budgets approved by the Department on January 15, 2008. One district, Elizabeth, filed an appeal of the decision to the Commissioner. In accordance with the expedited hearing schedule in the Abbott X, an administrative hearing was conducted and an initial decision was entered. The Commissioner reviewed that decision and issued a final decision on April 21, 2008 affirming the Departmental decision. Davy Supplemental Certification, Exhibit C. That matter is now pending in the Appellate Division. Davy Supplemental Certification, Exhibit D.

[14]For ECPA districts that will now have additional resources to expand existing programs, the Department has provided guidance and support so that some districts could both expand their programs in 2008-2009 and meet the Abbott quality standards. Davy Supplemental Certification, ¶25. In fact, the Department did

The ELC suggests that the SFRA "vacates the Court's preschool mandates." Pb at 51. In fact, the quality standards for the Abbott districts will be incorporated into the Department's implementing regulations for preschool programs adopted pursuant to N.J.S.A. 18A:7F-54(b),(f), and (g). These regulations will mandate the high-quality standards of the Abbott program and establish the parameters, planning and budget protocols for non-Abbott districts that will be expanding already existing early childhood programs or creating new programs. Davy Supplemental Certification, ¶¶23, 24. With regard to program quality, the regulations will require a certified teacher and an aide for every 15 students and positions such as master teachers, social workers and preschool intervention and referral teams (PIRTs). They also will require program articulation with kindergarten to grade three, the use of developmentally-based early childhood screening assessment upon enrollment and a process for evaluating classroom quality using a Department-approved, reliable classroom observation instrument.

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receive several applications for 2008-2009 expansion and it is anticipated that some approval letters will be issued later this month. Id. at ¶26. For districts that were not previously under a requirement to provide any programs for three- and four-year olds, i.e., non-ECPA districts, appropriate planning and program structure is critical. The SFRA requires that 2008-2009 be a planning year for these districts and, during the planning year, they will be required to submit preschool plans consistent with the requirements established in the early childhood program code. N.J.S.A. 18A:7F-54 (b), (c).

The regulations will also provide requirements for student eligibility, enrollment, and the calculation of eligible universe, as well as the opportunity for a mixed delivery system to maximize available seats in quality private providers, Head Start agencies, and neighboring school districts. Moreover, the regulations will require districts that must provide universal preschool to plan for full-day kindergarten where they do not yet offer a full-day. Id. at ¶24.

The ELC also criticizes the decision to establish per-pupil amounts rather than have the Department individually evaluate the district and provider budgets of every district that will now be providing preschool services. Again, as discussed above, the establishment of a uniform per-pupil amount ensures funding equity between similarly situated districts and encourages delivery of the services in the most effective and efficient manner. See supra at 34-35.

Moreover, in this instance, the per-pupil amounts were not arbitrary but rather were derived from the actual experience in the Abbott district programs. See Abbott v. Burke, 170 N.J. 537, 559 (2002) (Abbott VIII) (noting that preschool funding decisions should not be based on arbitrary per-pupil amounts but on a record developed after an assessment of need). The Department had a wealth of data available to it from the detailed preschool budgets

required previously of the Abbott districts. That data, reflecting actual program costs, was the basis for the per-pupil amounts in the SFRA.[15] In years 2009-2010 and 2010-2011, these per pupil amounts will be increased by the CPI. N.J.S.A. 18A:7F-54(d). In subsequent school years, the amounts shall be established as part of the Educational Adequacy Report. Ibid. Thus, the funding approach of the SFRA ensures that, districts "have what they need to provide a quality early childhood education for three- and four-year olds." Bd. of Ed. of Millville v. New Jersey Department of Education, 183 N.J. 264, 277 (2005).

Further, given the wide range of per-pupil spending currently existing in the Abbott districts, the SFRA provides a preschool hold-harmless provision for Abbott districts. In future years, Abbott districts will receive Preschool Education Aid in an amount that represents the higher of the 2008-2009 approved per-pupil amount, the total 2008-2009 Preschool Education Aid award or the per-pupil amount generated by the SFRA.[16] N.J.S.A. 18A:7F-

[15]For the 2008-2009 school year, the SFRA provides $11,506 per pupil for students served in an in-district program, $12,934 per pupil for students served in a community/private provider, and $7,146 per pupil for Head Start programs. N.J.S.A. 18A:7F-54(d) A geographic cost adjustment will be applied to these per-pupil amounts prior to the distribution of aid. Davy Certification, ¶57.

[16]Paragraph 53 of the Certification of Clive Belfield suggests that community providers in Abbott districts will be limited to the SFRA amount rather than benefit from the hold-harmless provision. This appears to reflect a misunderstanding of how the new formula

54(c)(4). The SFRA, therefore, holds the Abbott districts harmless while it expands eligibility for this high-quality preschool program to more than 30,000 additional children in New Jersey. See Davy Certification, ¶56.

The expansion of the Abbott preschool program reflects the State's strong commitment to making Abbott resources designed to meet the needs of at-risk children available to all at-risk children. The per-pupil amounts are based on the actual costs of this high-quality program in the Abbott districts thereby allowing other high-poverty districts to replicate these successful programs. Rather than "vacating the Abbott preschool rulings," Pb at 51, the SFRA ensures that all at-risk children have a similar opportunity to receive the educational benefits of this program.

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for preschool aid and the hold-harmless provision work. All funding will be provided to the district and each Abbott district will receive the higher of (1) the per-pupil amount generated by the SFRA formula times the number of pupils enrolled in the applicable budget year, (2) the average per-pupil amount for in-district and provider programs in 2008-2009 times the number of pupils enrolled in the applicable budget year or (3) the total amount of preschool aid received in 2008-2009. Accordingly, the per-pupil amounts for in-district, as well as community providers are all held harmless assuming that the 2008-2009 per-pupil calculation generates the highest amount of preschool aid for that Abbott district.

POINT V

GIVEN THE SUBSTANTIAL FISCAL RESOURCES PROVIDED BY THE SFRA, MUNICIPAL OVERBURDEN WILL NOT PRECLUDE ABBOTT DISTRICTS FROM PROVIDING A THOROUGH AND EFFICIENT EDUCATION.

In Abbott II, the Court addressed the issue of municipal overburden as it relates to the provision of a constitutionally adequate education. Defining municipal overburden as "a tax rate well above the average," the Court expressed concern that municipal overburden in poor urban districts results in those districts being "extremely reluctant to increase taxes for school purposes." 119 N.J. at 355. Thus, within the context of the Public School Education Act of 1975, the Court concluded that municipal overburden "effectively prevents districts from raising substantially more money for education." 119 N.J. at 357.

The ELC argues that the SFRA fails to account for municipal overburden in the Abbott districts and thus should be declared unconstitutional.[7] The SFRA, however, ensures that there

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[7]It should be noted that more than half of the Abbott districts, under any reasonable definition of municipal overburden, could not be considered overburdened. The State has generally considered a district to be municipally overburdened if the district has a total equalized tax rate of 130% or more over the average total equalized tax rate. See N.J.S.A. 18A:7F-58(b)(2). Currently, according to Dr. Goertz, only nine Abbott districts would meet this definition. Even using the more liberal definition of municipal overburden as a district with a total equalized tax rate of 120% or more above the average total equalized tax rate, less than half the Abbott districts would qualify as municipally overburdened. Goertz Certification, Exhibit C, Table 1. See also,

are sufficient revenues in each Abbott district to support a budget capable of providing a thorough and efficient education to its students. Accordingly, municipal overburden need not be a concern within the context of the SFRA.

ELC premises its municipal overburden argument on the fact that the SFRA assumes a local fair share for the Abbott districts that is substantially greater than the districts' current local levy and fails to ensure the districts can raise that local levy. Pb at 54. The ELC argues that the "immediate and dramatic rise in the districts' local fair share ... is wholly ignored by the State, with no evidentiary assurances that the districts have any realistic capacity to meet this extraordinary requirement." Pb at 56 (emphasis added). What the ELC fails to mention is the fact that no Abbott district was required to raise its local fair share. Moreover, only seven Abbott districts had any requirement to increase their local levy; that requirement was due to the fact that those districts were eligible for EAA. Further, the SFRA not only sets those required increases at a minimal level, it also takes account of municipal overburden.

The seven Abbott districts that were required to raise their local levy under the SFRA were those districts with budgets that were under adequacy and failing to meet certain performance

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Attwood Supplemental Certification, ¶27.

standards and/or were municipally overburdened. To ensure that these districts have the capacity to reach their adequacy budget within three years, and that concerns regarding municipal overburden do not act to effectively preclude these districts from raising sufficient funds, the SFRA provides additional aid -- Educational Adequacy Aid (EAA) -- to these districts. EAA funds the gap between the required increase of local levy of between 6% and 10% for districts that are not municipally overburdened and the 4% increase for those that are.[18] Thus, the minimal required increase in the local levy combined with State aid ensures that, within three years, these districts will reach adequacy.

The remaining Abbott districts were not required to locally raise any more in 2008-2009 than the districts raised in 2007-2008, although 18 Abbott districts did decide to raise additional local revenue. Only four of the budgets were defeated and only two of those budgets were reduced, albeit minimally, by the municipal governing body. Attwood Supplemental Certification, Exhibit D.

The ELC's prediction of an "immediate and dramatic rise"

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[18]For municipally overburdened districts eligible for EAA, the required local levy increase for each of the three years is 4%. For districts eligible for EAA that are not municipally overburdened, the required local levy increases to 8% in 2009-2010 and to 10% in 2010-2011. N.J.S.A. 18A:7F-58(b)(2). See also Attwood Supplemental Certification, ¶13.

in local levies has not been realized; that prediction was based erroneously on ELC's decision to ignore the $599 million in Adjustment Aid that is being provided to the Abbott districts in 2008-2009. That aid, along with EAA, bridges the gap between a district's local fair share and its current local levy, thereby completely obviating the concern being raised by the ELC. Although Adjustment Aid may not increase in future years, it does provide the necessary transition for the Abbott districts to incrementally increase their local levies -- local levies that have been held relatively flat while most districts were experiencing significant increases. Attwood Certification, Exhibit F.

The ELC's rationale for not considering Adjustment Aid is that it is "off formula." Adjustment Aid, however, is a permanent part of the SFRA and is just as reliable and non-discretionary as the other aid categories. Unlike the transition aid provided under the QEA, Adjustment Aid is not designed to phase-out over time, but rather to remain as a permanent safety net for Abbott districts as well as other districts. Compare N.J.S.A. 18A:7F-58(a) with former N.J.S.A. 18A:7D-33 (QEA calculation of transition aid in which that aid category was to be phased-out over four years).

Moreover, while having their local fair share subsidized through Adjustment Aid, Abbott districts that have budgets in excess of adequacy can begin to evaluate their programs, services

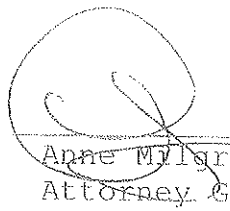
and staffing against the adequacy model to see where they can accomplish efficiencies and reallocations. Over time, therefore, these Abbott budgets might not require the type of increases that have been seen in the past decade in those districts.

Thus, contrary to the ELC's suggestion, the SFRA does not shift the burden of funding education in the Abbott districts onto local taxpayers. Rather, it provides the necessary State aid so that municipal overburden will not act to preclude districts from raising the needed fiscal resources to support a thorough and efficient education.

CONCLUSION

For all of the reasons set forth herein, and for those set forth in the State's moving brief, the Court should find the SFRA facially constitutional and grant the State's motion.

Respectfully submitted,

By: 

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Dated: June 9, 2008