



September 18, 2020

The Honorable Phil Murphy, Governor

The Honorable Steve Sweeney, Senate President

The Honorable Craig Coughlin, Assembly Speaker

Re: Emergency School Facilities Funding

Dear Governor Murphy, Senator Sweeney and Speaker Coughlin:

As you know, Education Law Center (ELC) advocates for the legal rights of New Jersey's public school children to a thorough and efficient education under state law, particularly for students at risk from family and/or community poverty, students with disabilities, and students of color. Over four decades, ELC has served as the legal representative of the plaintiff urban school children in the Abbott v. Burke litigation.

In response to the unprecedented crisis created by the pandemic, we write seeking support from the Administration and the Legislature to utilize a portion of the bond financing authorized under the "COVID-19 Emergency Bond Act" (Act) to ensure school buildings across New Jersey meet the health and safety standards for reopening established by the Department of Education (DOE). Not only is bond funding for this purpose clearly authorized and appropriate under the Act, the State has a constitutional obligation to ensure students return to in-person instruction in school buildings that are safe and do not pose a threat to their health and well-being.

Health and Safety Requirements for Reopening Schools

The DOE's guidelines for reopening the state's public schools in the pandemic, delineated in the "Checklist for Re-Opening of School 2020-2021" and detailed in "The Road Back: Restart and Recovery Plan for Education" (Road Back), establish minimum standards districts must meet in order to allow students to return to school. With regard to facilities, districts must reconfigure classrooms to a social distancing requirement of 113 square feet per occupant, and their facilities must have adequate ventilation.

The DOE's reopening directives, however, fail to address the on-the-ground conditions in many school buildings before the pandemic, specifically the State's own recent assessments by the DOE and the NJ Schools Development Authority (SDA) documenting

severe overcrowding and unsafe building conditions in many of the high poverty, racially segregated urban, or SDA, districts.

According to DOE school facilities standards, an 800-square-foot classroom can accommodate between 21 and 24 students depending on grade level. Under the Road Back's 113-square-foot per student standard for social distancing, that same 800-square-foot classroom must be reduced to 7-8 students, or to one-third of the total.

Reducing class size by 14-16 students to achieve social distancing will be problematic in buildings with reasonable class sizes pre-COVID-19. Yet, to date the DOE has failed to acknowledge that meeting this standard in already overcrowded school buildings may well be insurmountable. If an 800-square-foot classroom typically holds 30-35 students or more, the district will need to reduce class size by over 20 students to meet the DOE social distancing standard.

This is not a problem confined to a few school buildings. The DOE's own data show that classroom overcrowding is a systemic deficit in many SDA district school buildings. In a January 2019 facilities needs assessment, the DOE analyzed critical space deficiencies and found that 15 SDA districts lacked adequate space in their existing buildings to meet facilities efficiency standards (FES) requirements pre-pandemic.

In addition to space restrictions, the DOE's Road Back requires schools to "ensure that their indoor facilities have adequate ventilation, including operational heating, and ventilation systems where appropriate." Given budget and funding constraints, it will no doubt be a challenge for many districts to perform the continuous maintenance required to ensure ventilation and heating and cooling systems are working properly. More concerning, however, is the stark reality that in the SDA districts, facilities infrastructure includes over seven million square feet of space in buildings over 91 years old and most likely in need of upgrades and repairs.

We know from DOE data that many SDA district buildings have serious ventilation deficiencies. In 2016, the DOE and the SDA surveyed these districts about health and safety projects that may qualify for state school construction funding. In response, 23 of the 31 SDA districts submitted 429 project applications to address significant unsafe, unhealthy and dangerous conditions: leaky roofs, crumbling facades, and fire safety and other basic systems. Seventy-five of those applications involved inadequate heating and ventilation systems, but only two of the four projects chosen for State funding addressed those problems. Since then, the DOE has provided no information on whether districts were able to complete the dozens of additional ventilation projects with other available funds.

The Constitutional Requirement

Under New Jersey's constitutional mandate for a thorough and efficient system of public education, the State is obligated to ensure students attend school in buildings that are safe and do not pose a threat to their health and well-being. Specifically, the Supreme Court found that "adequate physical facilities are an essential component of [the] constitutional mandate [for a thorough and efficient education]." Abbott v. Burke, 149 N.J. 145, 186 (1997) ("Abbott IV"). The Court has reaffirmed that "[t]he State's constitutional

obligation under the thorough and efficient clause, N.J. Const. Art. VIII, §4, includes the provision of adequate school facilities.” Abbott v. Burke, 153 N.J. 480, 519-20 (1998) (“Abbott V”). Moreover, the Court has explicitly directed the State to fund “the complete cost” of “remediating the infrastructure and life cycle deficiencies that have been identified in the Abbott districts,” as well as “the construction of any new classrooms needed to correct capacity deficiencies.” Id. at 524.

In response to the Supreme Court’s 1998 facilities order, the State created a school construction program that has repaired, renovated or replaced many dilapidated and outmoded school buildings in urban communities across the State. Through a companion grant program, the State has also contributed to financing hundreds of facilities improvement projects in Regular Operating Districts (ROD) in suburban, coastal, rural and high need districts statewide. However, despite well documented needs that remain unmet, the program has essentially run out of money, and no additional projects can move forward.

In November, ELC, on behalf of the students in SDA districts, asked the Supreme Court to intervene to compel additional state funding for the construction program. Although the Court dismissed the motion, it did so “without prejudice,” declining to proceed on the assumption that [State] “respondents will fail to comply with their constitutional obligations to provide a thorough and efficient educational system pursuant to [the New Jersey State Constitution].” The Court recognized that any determination of State non-compliance must be made in the “context of Fiscal Year 2021 Budget,” which, although delayed, will conclude on September 30.

The Emergency Bond Act

On July 16, the Emergency Bond Act became law, authorizing the state to borrow up to \$9.9 billion “to respond to the fiscal exigencies caused by the COVID-19 Pandemic and to maintain and preserve the fiscal integrity of the State.” P.L. 2020, c. 60 § 2(II). Under the Act, the state has the authority to issue bonds totaling \$2.7 billion for the remainder of the extended Fiscal Year 2020, which runs through September 30, 2020, and up to an additional \$7.2 billion for the nine-month Fiscal Year 2021 that runs from October 1, 2020, through June 30, 2021.

Although the Act was challenged as unconstitutional in New Jersey Republican State Committee v. Philip D. Murphy, the Supreme Court issued a ruling on August 12 affirming the Administration’s borrowing authority. In a unanimous opinion, the Court concluded that the ongoing health crisis represents the type of major emergency that allows for bonds to be sold without voter sign-off under an exception to restrictions on borrowing and spending in the state Constitution. (A-82-19) (084731).

The Court’s decision does make clear that the Administration will need to define, in formal certifications, the budget deficit created by the health crisis before issuing any debt, and that “not every act of borrowing would ‘meet’ the current emergency.” However, some of the qualifying examples listed in the opinion include “public services like **education**, police, fire, first aid, child welfare, and prisons, among other services” that would “secure the continued functioning of government.” (Emphasis added.) Thus, funds for school

construction to address COVID-19-related issues, such as ventilation and social distancing requirements so that students and teachers can return safely to school, clearly fall within the ambit of the State's borrowing authority under the Act. And, because education is a fundamental constitutional right, COVID-19-related facilities issues in public schools can be addressed wherever the need is shown.

Need for Immediate Action

Given the State's constitutional obligation to provide safe and healthy school facilities and the DOE's reopening requirements, the Administration and the Legislature must take immediate action to ensure that New Jersey public schools have the funding necessary to meet the health and safety standards for reopening during the current emergency health crisis. This action is also urgently needed given that the pandemic has a disproportionate impact on vulnerable student populations, including students with disabilities, English language learners, and homeless students who face educational deprivation due to the digital divide.

Accordingly, we seek two specific actions. First, the DOE and the SDA must undertake a "COVID-19" facilities assessment to determine the need for building repairs, upgrades, or capital maintenance in order to safely reopen under the DOE guidelines for classroom occupancy, ventilation, heating and cooling and other relevant conditions. And second, the Legislature must authorize a minimum of \$500 million in bond financing under the Act dedicated solely to emergency COVID-related health and safety construction projects.

Providing needed school construction funding through the COVID-19 Bond Act gives the State an opportunity not only to meet its constitutional obligation, but to address the dire economic circumstances created by the pandemic by putting thousands of New Jersey construction workers, as well as architects, engineers and building suppliers, quickly back to work. The funding of "shovel ready" projects can serve as an important catalyst to jumpstart the statewide economy when the pandemic subsides.

Sincerely,



David G. Sciarra, Esq.
Executive Director

Via Electronic Mail

Cc: Gurbir S. Grewal, Attorney General of New Jersey
Matt Platkin, Governor's Counsel
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