



TESTIMONY OF EDUCATION LAW CENTER
ASSEMBLY APPROPRIATIONS COMMITTEE

ASSEMBLY BILL 4496

February 23, 2023

Chairwoman Swain and honorable members of the Assembly Appropriations Committee, we submit these comments in opposition to Assembly bill 4496. As the legal representative of the Abbott plaintiff schoolchildren, Education Law Center (ELC) strongly opposes the provisions in A4496 which would allow charter and renaissance schools located only in the urban Schools Development Authority districts (SDA districts) to access 100% state facilities financing under the Education Facilities Construction and Financing Act (EFCFA), N.J.S.A. 18A:7G-1 to 48.

A. A4496 Must be Rejected on Policy Grounds

First, public tax dollars must not be used to construct or renovate property owned by private parties. Many charter schools lease facilities or operate in privately owned buildings, and any work done with taxpayer dollars will directly benefit the private owner by increasing the property value. Should the charter school close, change location, or if a landlord simply decides to terminate the lease, the public's investment is at-risk. Limiting construction funding to charter schools with a ten-year lease agreement does not address the fundamental problem of having the public investment of millions of dollars in public funds that will ultimately benefit private parties, corporations or other entities. Simply put, the State's school construction program for public school districts should not be another investment opportunity for those in the private real estate business.

Second, charter school closures – by choice or by order of the Department of Education – are not an unusual occurrence. The Department's website lists at least 40 charter schools that are no longer in existence. Given that there are only 91 operating

charters, the closure rate is extraordinarily high. Investing in charter facilities is simply too risky for taxpayer money, especially when those funds are required under court mandate to remediate and modernize schools owned by the public.

B. A4496 Must be Rejected as Undermining the Constitutional Rights of the Abbott Plaintiff Class

EFCFA's program of 100% state financing of school facilities improvements was enacted in 2002 to comply with the New Jersey Supreme Court's order in the Abbott v. Burke litigation. The sole beneficiaries of this order are the Abbott district students who "are relegated to buildings that are unsafe," in "dramatic disrepair," and "crumbling and obsolescent." Abbott v. Burke, 149 N.J. 145, 186-88 (1997).¹ To address the deplorable conditions in SDA district buildings, the Court accepted a proposal by the State to "fund the complete cost of remediating the infrastructure and life cycle deficiencies" in SDA districts. Abbott v. Burke, 153 N.J. 480, 524 (1998). The Court made clear that any construction program that falls short of full funding of all facilities improvements in SDA district buildings "will not comport with the State's constitutional mandate to provide facilities adequate to ensure a thorough and efficient education."

Although progress has been made since EFCFA was enacted in 2002, a substantial need for school construction financing remains in the SDA districts. In the record on ELC's motion in the Abbott case to secure facilities funding for SDA districts currently pending before the Supreme Court, the Attorney General's office recently filed documents clarifying how much additional funding is needed to address priority construction projects in the SDA districts. In a certification filed on January 9, 2023, the SDA provided rough cost estimates for the projects necessary to address the

¹EFCFA was specifically enacted to implement the Supreme Court's mandate for State-funded school facilities improvement resulting from the Abbott v. Burke litigation – a mandate which only includes students in SDA district public schools. The sole beneficiaries of that judicial mandate are the Abbott Plaintiffs: the class of students who attend school in those district buildings and who "have been denominated victims of a violation of constitutional magnitude for more than twenty years." Abbott v. Burke, 206 N.J. 332, 340 (2011). Charter and Renaissance schools are not under the purview, control or ownership of the SDA districts, nor have their students been judicially determined to have been denied a thorough and efficient education or to be "deserving of special treatment from the State." Id. The fact that some charter and renaissance schools are located geographically within the boundaries of SDA districts has already been judicially rejected as a basis for applying the Abbott mandates to their students. In re 1999-2000 Abbott v. Burke Implementing Regulations, 348 N.J. Super. 382, 439-441 (2002) (rejecting charter school students in SDA districts as beneficiaries of Abbott remedies).

remaining capacity needs identified in the 2022 Strategic Plan, beyond the 19 projects already advanced to the construction phase. In 2022 dollars, the total estimate for the needed capacity generating projects is \$2.128 billion. That cost escalates over time to \$2.663 billion in 5 years, \$3.195 billion in 10 years and \$3.727 billion in 15 years. In addition to the remaining capacity needs, the SDA 2022 Statewide Strategic Plan identifies 50 aging school buildings in need of replacement, and the SDA has roughly estimated that the replacement cost for those facilities is around \$5 billion.

Using the cost projections provided by the SDA for the remaining capacity generating projects and the \$5 billion estimate for the 50 aging facilities, a minimum of \$7.128 billion is needed to fund the remaining capacity needs and aging facilities in the 2022 Strategic Plan Update, and, according to the cost escalations provided by the SDA, that number could grow to \$7.63 billion in 5 years, \$8.2 billion in 10 years and \$8.7 billion in 15 years. At present, no money is currently available to fund any of these projects, and there is no timeline indicating when any additional projects might advance to construction.

In addition, funds are urgently needed to address emergent and capital maintenance repairs in existing SDA district buildings, but the State has not provided estimates of the cost of those projects. Given this overwhelming unmet need, any diversion of state financing in EFCFA's school construction program to repair, renovate and replace SDA district schools in future years would put the State's compliance with the Abbott facilities court order in grave jeopardy.

The Supreme Court has imposed upon the State the constitutional obligation to ensure charter schools do not have an adverse economic impact on their district of residence such that it deprives students in district-run schools of essential funds and resources. In re Grant of the Charter School Application of Englewood on the Palisades (Palisades), 164 N.J. 316, 336 ("In sum, we hold that the Commissioner must consider the economic impact that approval of a charter school will have on a district of residence when during the approval process a district makes a preliminary showing that satisfaction of the thorough-and-efficient education requirements would be jeopardized.) By allowing the diversion of facilities financing demonstrably needed by the SDA

districts to charter schools, A4496 would clearly undermine the delivery of a constitutional education to students in SDA district schools.

C. A4496 Must be Rejected Because it Conflicts with Current Charter Law and Program Implementation

Finally, in addition to the troubling constitutional issues raised by the bill, A4496 conflicts with the Legislature's Charter Program Act of 1995 (Charter Program Act), N.J.S.A. 18A:36A-1 to 18, and its implementing regulations. Under the Charter Program Act, the Commissioner cannot approve or allow a charter school to operate without demonstrating that it has adequate facilities. N.J.S.A. 18A:36-5(j) (requiring "[a] description of, and address for, the physical facility in which the charter school will be located" as part of the application process); N.J.S.A. 18A:36-10 (declining to exempt charter school facilities from health and safety requirements); and N.J.S.A. 18A:36-16(a) (authorizing ongoing access by the county superintendent to charter facilities "to ensure ...State board regulations concerning...student health and safety are being met").

And, given the regulations codified to implement the Charter Program Act, the Legislature should be deeply concerned with the Department of Education's charter approval process if a charter school is serving students in a facility that is unsafe or inadequate, whether in an SDA district or otherwise. The Commissioner's "step-by-step review process" under N.J.A.C. 6A:11-2.1, in which preliminary approval is granted before "the applicant takes the next step of legally and financially committing to a specific site for the school" and providing related documentation, has been upheld by the Supreme Court as "reasonable," "efficient and practical." Palisades, supra, 164 N.J. at 337-338. Under N.J.A.C. 6A:11-2.1(h), as the last step in the process before a final charter can be granted, the Department must conduct a "preparedness visit" which includes an on-site inspection by Department personnel to gauge readiness for school opening. "The preparedness visit shall include a review of program, **facility**, and fiscal documentation and interviews with board of trustee members and staff members of the proposed charter school to assess organizational leadership and capacity." N.J.A.C. 6A:11-1.2 (emphasis added). Thus, the Commissioner explicitly approves the facility before any charter school is allowed to open.

We are unaware of any information that a charter school, whether located in an SDA district or elsewhere, is housed in a facility that is unsafe and inadequate. If such data or information were to be brought forward, rather than diverting needed facilities funding from SDA districts, the Legislature should focus on ensuring that the Department is conducting a thorough analysis of charter school facilities before applications are approved or charters are renewed every five years.

Thank you for considering these comments. We will continue to review the extensive changes to EFCFA proposed by this bill and will submit additional comments if this bill proceeds through the Legislature. Please do not hesitate to contact me at eathos@edlawcenter.org for additional information or to answer any questions.