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RAYMOND ARTHUR ABBOTT, et al

Plaintiffs-Movants

-vs-

FRED G. BURKE, et al

Defendants-Respondents

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SUPREME COURT OF NEW JERSEY

Docket No.: 085333

Civil Action

**MASTER'S REPORT**

Submitted by: Thomas C. Miller, A.J.S.C. (Ret.)

Dated: March 29, 2023

**MASTER'S REPORT IN THE MATTER ENTITLED  
RAYMOND ARTHUR ABBOTT, ET AL v. FRED G. BURKE, ET AL  
SUPREME COURT OF NEW JERSEY**

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## I. THE APPOINTMENT AND CHARGE TO THE MASTER

On January 28, 2021, Educational Law Center (hereinafter ELC) filed a motion in aid of litigants' rights before the Supreme Court of New Jersey, asking the Court to direct the State to: (a) seek and secure from the Legislature funding for the school facilities construction projects as set forth in the Schools Development Authority's 2019 Statewide Strategic Plan (2019 Strategic Plan); and (b) seek funding as otherwise needed for health and safety projects, including those necessary to ensure the safe reopening and operation of school buildings in Schools Development Authority (SDA) districts, during the ongoing COVID-19 pandemic. See Plaintiffs' 1/28/21 Brief; Plaintiffs' 4/13/21 Reply Brief. State defendants opposed ELC's motion, arguing that they have acted within the scope of their authority to seek and secure necessary funding for school facilities projects. See State Defendants' 3/22/21 Brief; State Defendants' 8/6/21 Supplemental Brief. State defendants further argued that in light of the State's substantial and continuing efforts to remedy any facility deficiencies in SDA districts, there was no need for the Court's intervention. Id.

On December 14, 2021, after the matter was fully briefed<sup>1</sup>, the Court issued its order remanding the matter to the Honorable Thomas C. Miller, A.J.S.C.<sup>2</sup> to conduct a "detailed analysis" of:

1. [t]he status of the cost estimates at issue, including any outstanding steps required to finalize the State's cost

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<sup>1</sup> The Court had also requested supplemental briefing to address: (1) the impact of the adoption of the fiscal year (FY) 2022 budget, see 7/9/21 Court Correspondence; and (2) the cost estimates for priority projects in the 2019 Statewide Strategic Plan, and emergent projects in SDA districts, see 10/7/21 Court Correspondence. Both ELC and State defendants submitted briefs and certifications on those issues.

<sup>2</sup> At the time of the entry of the Order, Judge Miller was serving as the Assignment Judge of Vicinage XIII in Somerset/Hunterdon/Warren Counties. Judge Miller retired on the eve of his 70<sup>th</sup> birthday on January 12, 2022. Judge Miller continued to serve as a temporary assigned recall judge from January 13, 2022 through March 15, 2022. Since March 15, 2022, Judge Miller has continued to serve as Special Master on a pro bono basis.

estimates for the emergent projects needed in Schools Development Authority [(SDA)] districts; and

2. [t]he areas in which data is available and those in which information is unavailable or yet undeveloped, and, where the information is not available or has not been developed, a recitation of the steps taken to obtain the information, the steps required to complete that task, and a realistic projection of when the data will become available, if possible; and

3. [a]ny other information as is relevant to the pending motion in aid of litigants' rights.

[12/14/21 Order, p. 3.]

The Remand Order noted that “there are unresolved factual questions that bear on the pending motion[,]” and that there were “certain areas in which information is currently unavailable, undeveloped, or underdeveloped” – particularly with respect to the cost estimates for SDA projects listed in the 2019 Strategic Plan, and emergent projects. *Id.* at p. 2. Thus, the Court determined that a “Special Master should be appointed to conduct a detailed analysis regarding the status of the cost estimates at issue, including any outstanding steps required to finalize the State cost estimates for the emergent projects needed in [SDA] districts, and other information as is relevant to the pending motion in aid of litigants’ rights[.]” *Id.*<sup>3</sup>

Judge Miller was also charged with the responsibility to mediate the disputes between the parties to either resolve the issues that were raised in a motion before the Court or at least to narrow the scope of these issues.

With regards to the enlargement of the factual record, the Master reports that during the course of the remand, the State defendants submitted a total of twelve certifications (with

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<sup>3</sup> The Court’s remand has been extended several times to allow State defendants to supplement the record; but on December 7, 2022, the Court issued an order extending the remand through March 20, 2023.

exhibits) and four letters (with attachments), all supplementing the record.<sup>4</sup>

Additionally, on August 30, 2022, ELC submitted "Plaintiffs' Proposed Findings of Fact and Factual Conclusions[,]". In so doing, the ELC provided its version of the status of the enlarged factual record, but it also set forth its argument as to why it considered the record to be deficient.

On October 25, 2022, the Master issued correspondence to the State defendants identifying areas in the record considered to be incomplete. The State responded to the Master's correspondence by submitting an additional Certification to be included in the record as well as a position paper that the record should now be considered to be complete. As such, the State has taken the position that any possible remaining issues should be now referred to the Court for disposition.

On January 18, 2023, the ELC issued an updated and final Statement of Factual Findings and Conclusions to be included as part of the record of remand.

With the submission of the parties' latest submissions, and along with mediation efforts, the record has been supplemented so that the open issues between the parties are narrowed in the manner described in this report.

## **II. THE OVERVIEW OF THE MATTER BEFORE THE COURT AS DESCRIBED IN THE ORIGINAL MOTION PAPERS**

The current iteration of this chapter in the Abbott v. Burke saga was initiated by a motion filed by the Plaintiff, ELC, directly with the New Jersey Supreme Court, Plaintiffs' Motion sought judicial relief purportedly to ensure that the State Respondents' ("State") compliance with the directives for

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<sup>4</sup> See Certifications of Manuel M. Da Silva (dated January 14, 21, and 28 (three), 2022; February 9 and 18, 2022; April 5, 2022; May 3, 2022; and August 29, 2022); Certification of Kevin Dehmer (dated January 21, 2022); and State Defendants' Letters (dated March 2 and 16, 2022; July 20, 2022; and August 29, 2022).

remediating unsafe, overcrowded and inadequate school facilities in poorer urban or "SDA Districts" in Abbott v. Burke, 153 N.J. 480 (1988) ("Abbott V") and Abbott v. Burke, 164 N.J. 84 (2000) ("Abbott VII"), and in the Education Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1 to 48 ("EFCFA"). In the Motion, the Plaintiffs asserted that the record before the Court demonstrates that despite this Court's prior, recent expectancy that the State would "comply with [its] constitutional obligations" for facilities improvements "in the context of the Fiscal Year 2021 budget," Abbott v. Burke, 241 N.J. 249 (2000) ("Abbott XXIII"), the State has not taken the requisite steps to secure funding for urgently needed projects in SDA districts. Thus, Plaintiffs submitted that absent judicial intervention, the State will default, or was "in default" of its constitutional obligation to provide the safe and adequate physical environments essential for Plaintiffs' learning.

The State has opposed the Plaintiffs' motion by alleging that in the recent past the Court found that the relief sought by ELC was premature because any decisions related to the State's compliance with prior decisions in the Abbott v. Burke litigation needed to be made within the context of the as yet enacted Fiscal Year 2021 budget. In its opposition to ELC's Motion, the State indicated that now ELC had prematurely returned to the Court, requesting almost the exact same relief - with the addition of its demand for funding to address issues related to the corona virus (COVID-19) pandemic. The State also submitted that the rationale adopted by the Court when it denied ELC's prior motion "rings just as true today" as it did then. The State also posited that the ELC's attempted to align the Court's facilities mandates in its Abbott decisions with the challenges associated with reopening schools in the wake of COVID-19 is "unavailing."



### III. PROCEDURAL HISTORY AND FACTUAL BACKGROUND OF THE ABBOTT LINE OF CASES

#### A. Procedural History

The New Jersey Constitution requires the Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, §4, ¶1.

The New Jersey Constitution requires:

[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years.

N.J. Const., art. VIII, § 4, ¶1.

In Abbott I, the Supreme Court held plaintiffs should first exhaust their administrative remedies before adjudicating the matter in the courts. Nonetheless, the Court concluded the constitutional issue, whether the funding scheme of the 1975 Act, as applied, violated the plaintiffs' rights to a thorough and efficient education, required establishing a comprehensive factual record before the complex issues could be addressed and, as such, ordered a remand for fact-finding and hearings. 100 N.J. at 301. On remand, the then Administrative Law Judge (ALJ), Steven L. Lefelt (J. Lefelt),<sup>5</sup> after holding exhaustive hearings over eight months, set forth his lengthy decision on August 24, 1988 finding

that evidence of substantial disparities in educational input (such as course offerings, teacher staffing, and per pupil expenditures [sic]) were related to disparities in school district wealth; that the plaintiffs' districts, and others, were not providing the constitutionally mandated thorough and efficient education; that the inequality of educational opportunity statewide itself constituted a denial of a

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<sup>5</sup> The matter was originally remanded to the Commissioner of the Department of Education ("Commissioner"), but as the Commissioner was a defendant in Abbott I, the Court noted the initial hearing and fact-finding should be before an ALJ. Abbott II, supra., 119 N.J. at 297.

thorough and efficient education; that the failure was systemic; and that the statute and its funding were unconstitutional.

Abbott v. Burke, 119 N.J. 287, 297 (1990) (Abbott II).

The ALJ's findings of disparity in educational input, such as course offerings and per pupil expenditures, were related to disparities in school district wealth were rejected by the Commissioner, who then concluded the 1975 Act was constitutional as applied to the entire State, and the State Board of Education ("Board") affirmed his determination. Id. at 297.

In Abbott II, the Court reversed the Board's determination and held the 1975 Act unconstitutional as applied to twenty-eight poor urban districts classified within the District Factor Group (DFG) as A and B districts. 119 N.J. at 394. The DFG designation of districts was a method to group school districts by their socioeconomic status from A through J, with A being the lowest socioeconomic status and J being the highest. Id. at 338. The districts are measured by seven factors: 1) per capita income level, 2) occupation level, 3) education level, 4) percent of residents below the poverty level, 5) density (the average number of persons per household), 6) urbanization (percent of district considered urban), and 7) unemployment (percent of those in the work force who received some unemployment compensation). Id. The factors were weighted according to their level of importance in indicating status, and were then combined in a formula which produced a numerical result. Id.

The Court further held the 1975 Act must be amended to provide for funding of poor urban districts at the same level as affluent districts and such funding cannot depend on the districts' ability to tax; the level of funding must be guaranteed and mandated by the State; and the level of funding must adequately provide for the special needs of the poor urban districts. Id. at 295. The judicial remedy devised to redress the constitutional deficiency

was limited only to the poor urban districts. The Court, while acknowledging disparity may exist in other districts, recognized it could only direct "constitutional compliance" by the State not "optimum educational policy." Id. at 296. Specifically, it noted its function was "limited strictly to constitutional review" and as such "[t]he definition of the constitutional provisions by this Court, therefore must allow the fullest scope to the exercise of the Legislature's legitimate power." Id. at 304.

The Abbott II Court found a thorough and efficient education required, at the minimum, an educational opportunity to "equip the student to become 'a citizen and a competitor in the labor market'," Id. at 306 (quoting Robinson I, supra, 62 N.J. at 515), but more specifically it meant "the ability to participate fully in society, in the life of one's community, the ability to appreciate music, art, and literature, and the ability to share all of that with friends." Id. at 363-64.

The Court, substantially adopting the ALJ's factual-findings regarding the quality of education delivered in poor urban and special needs districts (SNDs), and the lack of adequate facilities, Id. at 359-63, determined "in order to achieve the constitutional standard for the students from these poorer urban districts the ability to function in that society entered by their relatively advantaged peers the totality of the districts' educational offering must contain elements over and above those found in the affluent suburban district," notably in the DFG I and J districts. Id. at 374.

In response to the findings of disparity, the Court fashioned a two-part remedial approach to the deprivation of a constitutional education by ordering: (i) appropriate legislation must be passed to equalize the level of per-pupil funding of the poorer urban districts with the level of funding of affluent school districts in DFGs I and J, id. at 384, and (ii) "[t]he level of funding must also be adequate to provide for the special

educational needs of these poorer urban districts in order to redress their extreme disadvantage." Id. at 295. Implementation of the remedial actions was left to the Legislature as the Court's role was simply to determine whether the legislation passed constitutional muster. Id. at 304. Furthermore, the Court noted the new legislation could equalize per-pupil spending for all districts at a level that provided a thorough and efficient education, which was not necessarily the average level of the affluent districts. Id. at 387.

In 1994, the Court addressed the constitutionality of the Quality of Education Act of 1990 (QEA), N.J.S.A. 18A:7D-1 to -37 (repealed), enacted by the Legislature in response to the Court's instructions in Abbott II. Abbott v. Burke, 136 N.J. 444 (1994) (Abbott III). The QEA was declared unconstitutional as applied to the special needs districts because it failed "to assure parity of regular education expenditures between the special needs districts and the more affluent districts," Id. at 446-47, and it failed to address the needs of the SNDs by way of supplemental programs. Id. at 452-54. While the QEA could theoretically permit parity funding, it failed to guarantee adequate funding to accomplish the same. Id. at 451. The Court also found infirmity in the Commissioner's failure to study and identify which supplemental programs were necessary for disadvantaged children as required in Abbott II. Id. at 453.

In response to Abbott III, the Legislature passed the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA), N.J.S.A. 18A:7F-1 to -34 (repealed). The Act embodied substantive standards to define the content of a constitutionally sufficient education referred to as the Core Curriculum Content Standards (CCCS),<sup>6</sup> Abbott v. Burke, 149 N.J. 145, 161 (1997)

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<sup>6</sup> The CCCS provided achievement objectives for all students in seven subject areas: (1) visual and performing arts, (2) comprehensive health and physical education, (3) language-arts literacy, (4) mathematics,

(Abbott IV), as well as the funding provisions prescribing the costs necessary to implement these standards. Id. at 163.

The Court concluded the CCCS in CEIFA were "facially adequate as a reasonable legislative definition of a constitutional thorough and efficient education," Id. at 168, but held CEIFA's funding provision, which was derived from a hypothetical model school district, was unconstitutional as applied to the special needs districts. Id. at 177. Specifically, the Court determined CEIFA did not link the content standards to the actual level of funding required to implement these standards. Id. at 169. Moreover, the model district did not account for the characteristics of the special needs districts nor did the funding provision prescribe the amount necessary for the special needs districts to conform to the model district. Id. at 172. Additionally, the base per-pupil amounts for supplemental programs were not based on actual studies of the educational needs of the students or the costs necessary to implement these programs in the special needs districts. Id. at 185. Finally, CEIFA failed to address the need for adequate facilities in these districts. Id. at 186. Concluding CEIFA could not provide students in poor urban districts with a thorough and efficient education, and left with no viable alternative, the Court was forced to devise a remedy to redress the continued deprivation of this constitutional right. Id. at 188.

The Court noted the limits of its ability to fully address the educational needs of the school children and advised "[t]he

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(5) science, (6) social studies, and (7) world languages. Abbott IV, 149 N.J. at 161. In addition, the seven subject areas are permeated with "'cross-content workplace readiness standards,' which are designed to incorporate career-planning skills, technology skills, critical-thinking skills, decision-making and problem-solving skills, self-management, and safety principles." Id. at 161-2. At the time, the standards also envisioned incorporating performance indicators from statewide assessment exams based on the standards for grades three, four, eight and eleven. Id. at 162.

judicial remedy is necessarily incomplete; at best it serves only as a practical and incremental measure that can ameliorate but not solve such an enormous problem [and] [i]t cannot substitute for the comprehensive remedy that can be effectuated only through legislative and executive efforts." Id. at 189. As such, the "interim" remedial relief devised by the Court mandated increased funding to assure "parity in per-pupil expenditures between each SND and the budgeted (as opposed to predicted) average expenditures of the DFG I & J districts." Id. at 189. The parity remedy was envisioned by the Court to become "obsolete," particularly if it could be demonstrated that "a substantive thorough and efficient education can be achieved in the SNDs by expenditures that are lower than parity with the most successful districts, that would effectively moot parity as a remedy." Id. at 196. The remedy further included "implementation of administrative measures that will assure that all regular education expenditures are correctly and efficiently used and applied to maximize educational benefits." Id. Finally, the Court insisted the State should determine and implement the necessary supplemental programs for special needs students as had been ordered by the Court since Abbott II. Id. at 190.

Concluding the task of making critical educational findings and determinations concerning the special needs of children should not be left to the Court, the matter was then remanded to the Superior Court to direct the Commissioner and to conduct studies as a basis for specific findings identifying the needs of students in special needs districts, the programs necessary to address those needs, and the expenditures necessary to implement such programs. Id. at 199-200. The Superior Court could appoint a Special Master to assist in the court's review of the parties' recommendations. Id. at 200. The Honorable Michael Patrick King, P.J.A.D., was temporarily assigned to the Chancery Division to conduct the remand proceedings. He appointed Dr. Allan Odden, a professor at the

University of Wisconsin-Madison, as Special Master. Abbott v. Burke, 153 N.J. 480, 493 (1998) (Abbott V).

In the past, in the context of prior iterations of this matter, the Court has been faced with "accounts of crumbling and obsolescent schools" that "inundate[d] the record." Id. at 187. Based on overwhelming evidence of "dilapidated, unsafe, and overcrowded facilities," the Court concluded that capital deficiencies were among "the most significant problems" facing the poorer urban or "SDA districts."<sup>7</sup> Id. at 186.

The Court based its ruling on its finding that adequate physical school facilities are an essential component of that constitutional mandate. Abbott v. Burke (Abbott IV), 149 N.J. 145, 186 (1997); see also Abbott v. Burke (Abbott II) 119 N.J. 287, 362 (1990) ("Abbott II") that "adequate physical facilities are an essential component of [the] constitutional mandate [for a thorough and efficient education]." Id. Further, the Court concluded that facilities improvements are fundamental to the efficacy of the Abbott remedies for adequate K-12 funding, supplemental K-12 programs, and high-quality preschool - all of which implicate physical learning environments. Abbott IV, 149 N.J. at 187-88 ("[w]e cannot expect disadvantaged children to achieve when they are relegated to buildings that are unsafe and often incapable of housing the very programs needed to educate them").

In that vein, among the State's obligations to ensure that students are provided with a thorough and efficient education, the duty states to "provide facilities for children in the special needs districts that will be sufficient to enable those students to achieve the substantive standards that ... define [T&E]." Id. at 188.

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<sup>7</sup> In EFCFA, the poorer urban districts are denominated SDA districts. N.J.S.A. 18A:7G-3.

In 1998, the Abbott VIII Court set forth "the remedial measures that must be implemented in order to ensure that public school children from the poorest urban communities receive the educational entitlements that the Constitution guarantees them." 153 N.J. at 489. The Court directed the Commissioner to implement broad-based educational reform, including a high-quality pre-school program, in the special needs districts, now referred to as the Abbott districts. Id. at 527.

Two years later, in 2000, plaintiffs returned to the Court on a motion in aid of litigants' rights asserting the State failed to implement a high-quality pre-school program for all Abbott children. Abbott v. Burke, 163 N.J. 95, 104 (2000) (Abbott VI). The Court granted the motion in part, concluding the implemented pre-school program did not meet the necessary standards imposed by Abbott V. Id. at 101.

The same year, Jack Collins, then-Speaker of the General Assembly, brought a motion before the Court for intervention in and for clarification of the Court's previous Abbott V decision asking whether the Legislature could require contribution of a fair share of local aid from a district. Abbott v. Burke, 164 N.J. 84, 86 (2000) (Abbott VII). The Court unequivocally confirmed "the State is required to fund all the costs of necessary facilities remediation and construction in Abbott districts." Id. at 88. Furthermore, it noted districts may apply to be designated as Abbott districts and, alternatively, if a district no longer possesses the requisite characteristics of an Abbott district, then the State may take appropriate actions with respect to that district. Id. at 89-90.

In 2002, plaintiffs brought their second motion in aid of litigants' rights since Abbott V, alleging the Commissioner failed to comply with the Court's instructions in Abbott V and Abbott VI, and requested relief regarding pre-school programs in the Abbott districts, including appointing a Judge of the Superior Court to



adjudicate any anticipated disputes. Abbott v. Burke, 170 N.J. 537, 540 (2002) (Abbott VIII). To ensure the pre-school program in the Abbott districts and the budget proposals were reviewed, and final dispositions issued in time for the upcoming school year, the Court set forth a schedule for decision-making by the Appellate Division and by the Executive Branch. Id. at 540-41. Furthermore, having previously found the administrative process adequate for addressing Abbott matters, at that time the Court declined to appoint a Standing Master. Id. at 541. Finally, the Court emphasized they were

acutely aware of the constitutional imperative that undergirds the Abbott decisions, and of the vulnerability of our children in the face of Legislative and Executive Branch inaction. But we do not run school systems. Under our form of government, that task is left to those with the training and authority to do what needs to be done. Only when no other remedy remains should the courts consider the exercise of day-to-day control over the Abbott reform effort.

Id. at 562.

In the same year, the Court considered a motion filed by the Attorney General on behalf of the Department of Education (DOE), with the consent of the ELC, for a one-year relaxation of remedies for K-12 programs for the upcoming school year due to the State's budget crisis. Abbott v. Burke, 172 N.J. 294 (2002) (Abbott IX).

Thereafter, in 2003, the Court ordered mediation between the parties before the Honorable Philip S. Carchman, J.A.D., in response to the State's motion and the plaintiffs' cross-motion to modify the decision in Abbott V. Abbott v. Burke, 177 N.J. 578 (2003) (Abbott X). Following mediation, the Court entered an order approving the parties' mediation agreement pursuant to which the State would continue to implement whole-school reform in Abbott elementary schools with certain limited exceptions. Id. at 584. It was further ordered the remaining issue, whether to extend the one-year cessation of funding previously granted in Abbott IX for

an additional year, would be addressed and oral argument conducted. Id. at 589.

Following oral argument, the Court granted the relief requested by the State by giving authority to the DOE to treat the upcoming 2003-2004 fiscal year as a maintenance year for purposes of calculating the additional aid for the Abbott districts and by providing the K-12 programs for that year are to continue, subject to the conditions set forth by the Court. Abbott v. Burke, 177 N.J. 596, 598 (Abbott XI).

In 2004, the Court granted the DOE's application for a limited relaxation of the deadline for the pre-school teacher certification requirement mandated by Abbott VI, supra, 163 N.J. 95. Abbott v. Burke, 180 N.J. 444 (2004) (Abbott XII).

On November 1, 2004, upon the DOE's application to modify certain provisions of the Abbott X order, supra, 177 N.J. 578, the Supreme Court entered an order directing the parties to mediate the issue and appointed the Honorable Richard J. Williams, J.A.D., as Special Master to preside over the mediation. Abbott v. Burke, 182 N.J. 153 (2004) (Abbott XIII).

On December 19, 2005, the Supreme Court granted, in part, the plaintiffs' motion for relief in aid of litigants' rights alleging violations of the mandate in Abbott V, supra, 153 N.J. 480, and Abbott VII, supra, 164 N.J. 84, concerning funding for school construction in Abbott districts. Abbott v. Burke, 185 N.J. 612 (2005) (Abbott XIV).

In 2006, the Attorney General, on behalf of the DOE, filed an application with the Court requesting authorization to require the Abbott Districts to submit budget requests consonant with the funding provided for in the upcoming 2007 budget and for funding to the Abbott districts to remain "flat" at 2006 level due to the fiscal crisis facing the State of New Jersey. Abbott v. Burke, 187 N.J. 191, 194 (2006) (Abbott XV). The Court granted the request for a funding freeze in Abbott Districts for the 2007 fiscal year.

Id. at 195. Subsequently, on May 22, 2006, sixteen intervenor districts sought clarification of Abbott XV. Abbott v. Burke, 196 N.J. 348 (2006) (Abbott XVI). In response, the Supreme Court set budget timelines and required funding for new and renovated facilities for the 2007 fiscal year. Id.

In 2007, the Supreme Court considered plaintiffs' motion in aid of litigants' rights which sought an order directing defendants to comply with the Court's mandates in Abbott V, 153 N.J. 480, Abbott VII, 164 N.J. 84, and Abbott XIV, 185 N.J. 612, for the then upcoming 2008 fiscal budget. The Court denied the same on the grounds the relief sought was premature as the State's budget had not yet been enacted and defendants had not yet failed to comply. Abbott v. Burke, 193 N.J. 34, 35 (2007) (Abbott XVII).

In 2007, the Legislature amended the EFCFA to establish the SDA as the agency responsible for funding facilities projects in SDA districts. N.J.S.A. 18A:7G-3; see also N.J.S.A. 52:18A-237 to 247 (replacing Schools Construction Corporation with the SDA).

The EFCFA codified the recommendations that were made to the Court in Abbott V, including the development and timing of long-range facilities plans, N.J.S.A. 18A:7G-4, and financing through bonds, N.J.S.A. 18A:7G-13 and -14. It also recognized the State's obligation to undertake and finance Abbott district school facilities projects, and established procedures for the fulfillment of those obligations. See generally, N.J.S.A. 8A:7 G-4 and 5.

The EFCFA required the SDA to fund, plan, design and construct facilities projects determined to be needed in long range facilities plans ("LRFP") prepared by the SDA districts and approved by the Commissioner of Education ("Commissioner"). N.J.S.A. 18A:7G-5k (providing that the "State share" of SDA district projects "shall be 100% of the final eligible costs"). EFCFA also requires the districts to amend their LRFPs once every five years to update enrollment projections, building capacities,

and health and safety conditions and to identify all deficiencies in the current facilities inventory. N.J.S.A. 18A:7G-4(a). District LRFPs must also address the educational adequacy of existing buildings to support student achievement of the State's learning standards. N.J.S.A. 18A:7G-4a; N.J.S.A. 18A:7G-4h.

Following the approval of the LRFPs, the EFCFA required the Commissioner to develop an "educational facilities needs assessment" ("EFNA") that identifies the most critical needs for each SDA district and must be revised every five years. N.J.S.A. 18A:7G-5m(1). Based on the approved LRFPs and the EFNA, the Commissioner must then establish, in consultation with each SDA district, an "educational priority ranking of all school facilities projects in the SDA districts based upon the Commissioner's determination of critical need" in accordance with "priority project categories" that include health and safety, overcrowding, in-district programs for students with disabilities, and educational adequacy. N.J.S.A. 18A:7G-5m(2).

After the Commissioner transmits the EFNA and educational priority rankings to the SDA, the agency - in consultation with the Commissioner, the SDA districts, and the governing bodies of the districts' municipalities - must establish a "statewide strategic plan" for use in sequencing the construction of facilities projects based upon the Commissioner's project priority rankings and issues which may impact the SDA's ability to complete the projects, including, but not limited to, the construction schedule and other appropriate factors. N.J.S.A. 18A:7G-5m(3). The SDA must revise the statewide strategic plan "no less than once every five years." Id.

Finally, the Commissioner adopted regulations under EFCFA codifying an expedited process to review and fund "emergent" projects in SDA district buildings. Emergent projects are defined as a "capital project necessitating expedited review" to remediate a condition that "would render a building so potentially injurious

or hazardous" as to cause "an imminent peril to the health and safety of students or staff." N.J.A.C. 6A:26-1.2.

From this statutory scheme the "New Jersey School Construction Program" was born as a comprehensive program for the design, renovation, repair, and construction of primary and secondary schools throughout New Jersey. See Certification of Manuel M. Da Silva, dated March 22, 2021, ¶3.

Subsequently, the Plaintiffs then again moved for an order in aid of litigants' rights seeking compliance with the Court's previous decisions in Abbott V, supra, 153 N.J. 480, Abbott VII, supra, 164 N.J. 84, and Abbott XIV, supra, 185 N.J. 612, mandating necessary funding for construction and repair of educational facilities in the Abbott districts. Abbott v. Burke, 196 N.J. 451, 451-52 (2008) (Abbott XVIII). In February 2008, the Court denied plaintiffs' motion as premature given the State's representation legislation was pending to finance school construction in the Abbott districts. Id. at 452.

In January 2008, the State filed a motion seeking to declare SFRA constitutionally sound and declaring the Court's prior remedial orders concerning the Abbott districts unnecessary. Abbott v. Burke, 196 N.J. 544, 549 (2008) (Abbott XIX). Plaintiffs, through the ELC, opposed the motion, filed a cross-motion which sought to preserve the "status quo" and to declare the remedial orders continued to apply. Id. The Court, after having heard oral argument, concluded it was unable to resolve the issue of SFRA's constitutionality solely based upon opposing affidavits. Id. at 565. Accordingly, by way of a decision and order, both dated November 18, 2008, the Court remanded the matter to a Special Master to conduct a plenary hearing to develop an evidential record which would address whether SFRA represented an equitable and constitutional funding approach "that can ensure Abbott districts have sufficient resources to enable them to provide a thorough and

efficient education as defined by the [Core Curriculum Content Standards]." Id. at 568-69.

On remand, the Special Master Judge Peter E. Doyne, after weeks of examination and cross-examination of expert testimony and numerous witnesses concluded SFRA passed constitutional muster. Master Doyne further recommended supplemental funding should continue to the Abbott districts during the three-year "look-back" period as SFRA's immediate and practical effects could not be known at the time. Abbott v. Burke, 199 N.J. 140, 172-73 (2009) (Abbott XX). Following submission of the Special Master Doyne's Report, see App. to Abbott XX at 175-250, the Supreme Court accepted the Special Master's findings, while rejecting the recommendation for supplemental funding during the "look-back" period, id. at 170, and issued its decision which found SFRA constitutional "premised on the expectation that the State will continue to provide school funding aid during this and the next two years at the levels required by SFRA's formula each year." Id. at 146.

Specifically, the Court, in Abbott XX, determined SFRA met constitutional muster.

The State has constructed a fair and equitable means designed to fund the costs of a thorough and efficient education, measured against delivery of the CCCS [Comprehensive Core Curriculum Standards].

Id. at 172.

Specifically, the Court found the SFRA formula would remain constitutional provided the required funding was forthcoming. Id. at 169.

While the State argued that the court must defer to the Legislature because the legislative authority over appropriateness is plenary pursuant to the Appropriations Clause of the New Jersey Constitution. See N.J. Const., art. VII, §292. The court found that although the court had recognized the Legislature's authority

to work a modification of the other statutes through the adoption of a annual appropriations act, if the State's position was taken to its logical conclusion it would effectively diminish and undermine the Abbott pupils' right to funding that is required for their receipt of a thorough and efficient education. In other words, under those circumstances, the State could not use the appropriation power as a shield from its constitutional responsibilities. Abbott v. Burke XXI at 342.

Furthermore, it noted while there is "no absolute guarantee that SFRA will achieve the results desired by all... [t]he political branches of the government are entitled to take reasonable steps, even if the outcome cannot be assured, to address the pressing social, economic, and educational challenges confronting our State." Id. at 175. In so doing, the Supreme Court recognized that the State of New Jersey "should not be locked into a constitutional straight-jacket." Id.

Additionally, the Court made clear the finding that SFRA is constitutional "... is tethered to the State's commitment diligently to review the formula after its initial years of implementation and to adjust the formula as necessary based on the results of that review. This Court remains committed to our role in enforcing the constitutional rights of the children of this State should the formula prove ineffective or the required funding not be forthcoming." Id. at 169. The Court, by way of its opinion authored by Associate Justice Jaynee LeVecchia, went on to provide as follows:

SFRA will remain constitutional only if the State is firmly committed to ensuring the formula provides those resources necessary for the delivery of State education standards across the State.

Id. at 170.

## B. The School Construction Program

The School Construction Program is implemented, overseen, and funded by the SDA (generally through the issuance of bonds from the State); and to ensure that the facilities needs of SDA districts are being met, its multi-step process is structured to require significant participation by the DOE and local districts.<sup>8</sup> The approval of a school facilities project is not guaranteed it requires multiple levels of review, cooperation, and prioritization by the SDA, the DOE, and SDA districts.

The State, through the SDA, oversees and funds 100 percent (100%) of the cost for facilities projects in SDA districts, including predevelopment services, design, and construction. Id. at ¶7; N.J.S.A. 18A:7G-6(k); see also N.J.S.A. 18A:7G-3 (defining "school facilities projects")<sup>9</sup> Funding generally comes from "School Facilities Construction Bonds" issued by Economic Development Authority (EDA). Id. at ¶¶47-48; N.J.S.A. 18A:7G-14.<sup>10</sup> As "State-Contract Bonds," the bonds are payable from appropriations made from time to time by the Legislature to the State Treasurer, who enters into a contract with the EDA to pay such amounts appropriated for the purpose of paying debt service on the School Facilities Construction Bonds. Id.; N.J.S.A. 18A:7G-13, -14 and -18.

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<sup>8</sup> The Schools Construction Program was originally implemented by the EDA and then by the Schools Construct 1 on Corporation (SCC), a subsidiary of the EDA. Da Silva Cert., dated March 22, 2021, ¶¶4-5. In 2007, the Legislature replaced the SCC with the SDA. L. 2007, c. 137; Da Silva Cert. dated March 22, 2021, ¶¶4-5.

<sup>9</sup> By contrast, districts do still have the opportunity to manage other projects that are not funded by the SDA. See N.J.A.C. 6A:26-1.2 (defining "[o]ther capital projects") and -3.11 (describing process for initiation of process for "other capital projects") .

<sup>10</sup> In this case, for the first time in the history of Abbott v. Burke funding, the State has chosen not to fund the new projects that are identified in the 2019 Strategic Plan through the proceeds of bond funding. Instead, the State proposes to fund its entire obligation by the appropriation of "cash" into its budget.



To obtain proper funding, planning, design and construction of school facilities, all New Jersey school districts must first have in place a long-range facilities plan (LRFP) approved by the DOE. Certification of Angelica Allen-McMillan, dated March 22, 2021, ¶¶3-7; N.J.S.A. 18A:7G-4; N.J.A.C. 6A:26-2.1 to -2.3. Relying on districts' LRFPs, the DOE is then required to create an educational facilities needs assessment (EFNA) and an educational priority ranking for each SDA district. Id. at ¶15; N.J.S.A. 18A:7G-5(n); N.J.A.C. 6A:26-3.9(a). Then, once it receives the EFNAs and rankings, the SDA must create a statewide strategic plan to be used "in the sequencing of SDA district school facilities projects[,] " which is "based upon the projects' educational priority rankings and issues which impact the [SDA's] ability to complete the projects including, but not limited to, "the construction schedule and other appropriate factors." N.J.S.A. 18A:7G-5(n)(3); see also N.J.A.C. 18A:26-3.9(a)(4) (requiring creation of a statewide strategic plan in accordance with N.J.S.A. 18A:7G-5); Da Silva Cert. dated March 22, 2021, ¶¶35, 37, 39, 45, 67 (discussing requirement to create strategic plan, and identifying scoring process and factors for consideration in development of capital portfolios and statewide strategic plan).

When SDA districts have "facilities issues" requiring expedited attention, the EFCFA also has mechanisms in place to address projects that are "emergent" in nature. N.J.A.C. 6A: 26-3.14 (d) and (e); Da Silva Cert. dated March 22, 2021, ¶13 (n. 1). In particular, DOE regulations provide for expedited action on school facilities in SDA districts facing emergent conditions. Id., Da Silva Cert. dated March 22, 2021, ¶13 (n. 1). Historically, the SDA's "Emergent Project Program" addresses emergent conditions present in SDA district school facilities in need of expeditious repair and rehabilitation. Id. Da Silva Cert. dated March 22, 2021, ¶13 (n. 1) The process typically begins with an outreach initiative by the DOE and the SDA known as the "Potential Emergent Projects

Program," which allows SDA districts to identify potential emergent projects for evaluation by DOE and SDA. Id., Da Silva Cert. dated March 22, 2021, ¶13 (n. 1); Allen-McMillan Cert. dated March 22, 2021, ¶25. Upon project approval by the DOE, projects from the Emergent Project Program are fully funded by the SDA. Id.; Da Silva Cert., dated March 22, 2021, ¶13 (n.1); see also 45 N.J.R. 1026(a) (May 6, 2013) ("[e]mergent projects are eligible for State support if they are school facilities projects") Potential emergent projects that may be eligible for funding must be for the repair or replacement of existing systems that are failing or are anticipated to fail in the near future, and for conditions that can no longer be addressed through general maintenance. N.J.A.C. 6A:26-1.2 and -3. ¶14; Da Silva Cert., dated March 22, 2021, ¶13 (n. 1).

**C. Progress of the School Construction Program.**

The process of obtaining project approval and, ultimately, completion, is a thoroughly vetted one. That process is described below.

1) *The Capital Portfolios and Project Progress  
From 2011 to Present*

By way of background, prior to the creation of the 2019 Strategic Plan, the SDA complied with that part of its statutory obligations by, among other things, generating capital project portfolios that announced new (and funded) projects for advancement before ultimately creating the strategic plan. N.J.S.A. 18A:7G-5(m)(3); N.J.A.C. 6A:26-3.9(a); Da Silva Cert., dated March 22, 2021, ¶35-46. Through those publications, the SDA also provided detailed progress reports on ongoing projects, including (but not limited to) their prioritization, DOE scoring, funding, and scheduling. Da Silva Cert., dated March 22, 2021, ¶35-46.

## 2) *The 2011 Capital Portfolio*

On March 2, 2011, the SDA released its 2011 Capital Portfolio, which amended the 2008 "New Funding Allocation and Capital Plan for SDA Districts" (issued shortly after the SDA's creation). *Id.* at ¶36. The 2011 Capital Portfolio listed a prioritization of various projects in SDA districts. *Id.* at ¶37. Based on that list and the application of other factors, the SDA enumerated ten specific projects that would be advanced into the next stage of construction to address educational priority needs in those districts. *Id.*

Also in 2011, the SDA announced in its mandatory annual and biannual reports<sup>11</sup> that it had completed three major capital projects in SDA districts; and by the end of that year, a total of forty projects in the SDA's Emergent Project Program had been completed, while an additional seventy-nine had advanced into pre-development, design, or construction. *Id.* at ¶¶12-13.

## 3) *The 2012 Capital Portfolio*

On March 7, 2012, the SDA published the 2012 Capital Portfolio as an update to the 2011 Capital Portfolio. *Id.* at ¶38. In the 2012 Capital Portfolio, the SDA reported on the progress of active projects, including the ten projects identified in the 2011 Capital Portfolio. *Id.* at ¶39. And in addition to advancing the remaining projects from the 2011 Capital Portfolio and completing active construction projects in SDA districts, the SDA also announced the selection of twenty more projects for advancement in 2012. *Id.*

Of those twenty new projects, eight would be advanced into pre-development or construction stages, seven would undergo

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<sup>11</sup> The SDA is required to submit detailed biannual reports to various State officials no later than June 1 and December 1 of each year, and it must also separately prepare a comprehensive annual report. *Id.* at ¶8-11; N.J.S.A. 18A:7G-24; Exec. Order No. 37 (Sept. 26, 2006) 38 N.J.R. 4526 (a) (Nov. 6, 2006). The record supports the fact that the SDA has complied with these requirements. *Id.*

working group reviews of district needs, and five would address serious facility deficiencies. Id.

In 2012 and 2013, the SDA made progress in advancing the projects listed in both the 2011 and 2012 Capital Portfolios. Id. at ¶40. As announced in its mandatory annual and biannual reports, in 2012 the SDA completed two major capital projects, both newly constructed facilities. Id. at ¶14-15. And by the end of that year, a total of sixty-seven projects in the Emergent Project Program had been completed, while an additional fifty-one had advanced into pre-development, design, or construction. Id. In 2013, thirteen major capital projects were advanced by the SDA. Id. at ¶17.

4) *The 2014 Capital Portfolio*

On January 2, 2014, the SDA issued the 2014 Capital Portfolio as an update to the 2012 Capital Portfolio, adding five projects addressing needs in various schools. Id. at ¶41-42. Later that year, the SDA amended the 2014 Capital Portfolio to incorporate one more new project for advancement. Id. The SDA continued to advance and manage the projects listed in its capital portfolio in 2014, and announced in its annual and biannual reports of that year that it completed two major capital projects and had another twelve major capital projects in construction. Id. at ¶18-19.

5) *Progress Between 2015 and 2020*

The 2011, 2012, and 2014 Capital Portfolios identified a total of thirty-nine new projects. Id. at ¶43 and 45. As of the date of the filing of ELC's Motion, twenty-eight projects had been completed and delivered to SDA districts. Id. The State also indicated that the remaining eleven projects were progressing with eight projects in the construction phase, while three are in the planning, programming, and design phases. Id. The SDA was also

advancing thirteen projects from the Emergent Project Program.<sup>12</sup>  
Id.

In early 2016, the Commissioner approved revised amendments to the SDA districts' LRFPs as required by EFCEFA. ("2016 LRFP Amendments"). Pa9, ¶19. An analysis of the 2016 LRFP Amendments showed that approximately 381 major capital projects are needed across all 31 SDA districts, impacting over 300,000 children. Pa9, ¶20. These projects include 200 renovations/additions of existing school buildings, 102 new school buildings, 72 upgrades of major building systems (such as new windows or mechanical systems), three capital maintenance projects, and four site upgrades. Id.

In 2016, following approval of the 2016 LRFP Amendments, the Commissioner transmitted to the SDA an EFNA prioritizing major capital projects in each district. ("2016 EFNA"). Pa10, ¶21.

In other words, according to the State, the remaining projects from the portfolios predating the 2019 Strategic Plan are progressing and forecasted to be completed by September 2025. Id. No projects have been halted. Id. In fact, the State boasts that the projects have been completed during the current pandemic. Id. The SDA's annual and biannual reports have also shed light on its progress since 2014, including the many emergent projects completed. Id. at ¶¶12-34.<sup>13</sup>

#### **D. Approval of the 2019 Statewide Strategic Plan**

The SDA created capital project portfolios, including providing updates on funded and advancing projects. In addition to creating those portfolios and advancing the projects listed therein, the SDA - using the EFNA generated by the DOE - created

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<sup>12</sup> The SDA touts that it has also advanced and/or completed dozens of projects from previous Potential Emergent Project initiatives, which continue to advance through the present day. Id. at ¶13-34, 43.

<sup>13</sup> See also id. at ¶6 (describing projects completed in Abbott districts by 2007); Luhm Cert. dated January 20, 2021, ¶31 (describing 695 completed projects in SDA districts since the School Construction Program's inception).

the 2019 Strategic Plan for future projects. The creation of the 2019 Strategic Plan requires some additional context.

On December 19, 2005, this Court entered an order directing Abbott districts to submit their then-overdue LRFPs to the DOE no later than January 15, 2006. Abbott XIV, 185 N.J. at 615; Allen-McMillan Cert., dated March 22, 2021, ¶9. Apparently, due to numerous district errors and incomplete submissions, each defaulting district received at least one letter (some received more than one) advising that their submissions were incomplete or inaccurate, and directing them to resubmit complete and accurate LRFPs. Allen-McMillan Cert., dated March 22, 2021, ¶10. Because of this, final approvals of many LRFPs were not issued until 2007 or 2008 - but each district had an approved LRFP in place by 2008. Id. at ¶¶10-12. And in early 2016, the DOE completed its review and approval of five year amendments to the districts' LRFPs, as required by EFCFA. Id. at ¶14; N.J.S.A. 18A: 7G-4(a). Based on the 2016 LRFP amendments, the DOE completed a statewide EFNA and priority ranking for each SDA district. Id. at ¶16. Exh. A; N.J.S.A. 18A:7G-5(m); N.J.A.C. 6A:26-3.9(a).

Following that review, in 2019 the DOE completed a revised EFNA with priority rankings, encompassing all SDA districts, using updated enrollment projections and building capacity assessments. Id. at ¶18, Exh. B; N.J.S.A. 18A:7G-5(m); N.J.A.C. 6A: 26-3.9 (a).

The 2019 EFNA analyzed enrollment trends, building capacity and square feet per student by four grade groups for each SDA district: Pre-K, K-5, 6-8, 9-12. Pa66. The key findings include:

a) Fifteen of the thirty-one SDA districts have deficient capacity and/or provide fewer square feet per student than prescribed in NJDOE's Facilities Efficiency Standards for one or more grade configurations;

b) Five districts have capacity and square footage deficiencies in two or more grade groups. These deficiencies cannot

be addressed through increased building utilization, the reassignment of buildings, and/or the reconfiguration of school sending areas; and

c) Five districts have capacity or square footage deficiencies in two or more grade groups necessitating additional square footage. Pa105-106.

The 2019 EFNA also identifies projects in the other sixteen (16) SDA districts, "particularly those replacing buildings beyond their useful life for education," as "also worthy of consideration" as priorities. Pa106.

The 2019 Strategic Plan identifies 24 major capital projects in 18 SDA districts for "first tranche advancement" based on three general criteria: 1) educational capacity or overcrowding; 2) building age and condition; and 3) logistical factors, including land availability and SDA construction capacity. Luhm Cert. dated January 20, 2021, ¶8, Ex. B., Pa157.

The priority projects in the 2019 Strategic Plan include schools for elementary, middle and secondary grade levels. Because they are situated on land under SDA or district control, 16 of the 24 projects in 11 SDA districts are described as "construction ready." Luhm Cert. ¶9, dated January 20, 2021, Ex. B., Pa162. The eight additional projects in another seven SDA districts identified in the 2019 Strategic Plan will be "sequenced with other portfolio projects" once appropriate sites are identified by the SDA. Luhm Cert. dated January 20, 2021, ¶10, Ex. B., Pa163.

The 2019 EFNA was transmitted to the SDA on January 28, 2019, and the following year, on January 21, 2020. The SDA considered and approved the 2019 Strategic Plan. Id. at ¶19; Da Silva Cert., dated March 22, 2021, ¶¶44-46. Governor Philip D. Murphy approved the SDA Board's resolution adopting the 2019 Strategic Plan in a letter dated January 22, 2020. Da Silva Cert. dated March 22, 2021, ¶44-46. The 2019 Strategic Plan provided a comprehensive overview of the SDA's activities, identifying the twenty-five

projects from the 2011 through 2014 portfolios that, at the time of the 2019 Strategic Plan's release, had been completed in SDA districts, as well as the fourteen projects that remained to be completed. <sup>14</sup> Id.

The 2019 Strategic Plan also identified the remaining priority needs in SDA districts based on the 2019 EFNA and priority rankings, and set out the SDA's approach to sequencing projects to meet those needs. Id. at ¶¶35, 37, 39, 45 (identifying scoring process and factors for consideration in development of capital portfolios and statewide strategic plan) The sequencing of projects was based upon: (1) educational priorities (overcrowding and building age and condition) and (2) logistical factors (availability of land and delivery capacity) Id. With this framework in mind, the 2019 Strategic Plan identifies the "first tranche" of projects for advancement, identifies high priority districts with needs to be addressed in the first tranche, and sets out the activities necessary to finalize sequencing of the identified projects. Id. at ¶45.

In the 2019 Strategic Plan, the SDA did not provide any estimates of the cost of constructing the priority projects set forth in the Plan, nor did it provide any timetable for seeking additional construction funding for those projects from the Legislature. Luhm Cert. dated January 20, 2021, ¶11. In fact, one of the arguments initially advanced in the ELC's motion before this Court was its claim that due to a lack of funding, the SDA could move forward with any of the priority projects in the 2019 Strategic Plan to the planning and design phase of its construction process. Id. at ¶12. In addition, the ELC has asserted that the absence of funding has also prevented SDA from adding any new major projects to its active construction portfolio since 2014. Id.

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<sup>14</sup> As discussed above, three more projects have been completed since the publication of the 2019 Strategic Plan. Id. at ¶¶43 and 45.



### **E. Funding for Past, Present, and Future SDA District Projects**

To fulfill the Abbott mandate for full funding of facilities projects in SDA districts, the Legislature determined in EFCFA to allow for the utilization of bonding as the mechanisms to fund project costs, including land acquisition, planning, design and construction.

When the EFCFA was enacted in 2000, the Legislature authorized the issuance of \$8.6 billion in School Facilities Construction Bonds, with \$6 billion of the total being dedicated to SDA districts. Id. at ¶49; L. 2000, c. 72, § 14 (see N.J.S.A. 18A: 7G-14(a)). In the wake of the proceedings in Abbott v. Burke, 185 N.J. 612, 615 (2005) ("Abbott XIV") and Abbott v. Burke, 193 N.J. 34 (2007) ("Abbott XVII"), the Legislature, in June 2008, enacted amendatory legislation raising the aggregate principal amount of bonds authorized to be issued by an additional \$2.9 billion for the SDA districts. P.L. 2008, c. 30, codified in N.J.S.A. 18A:7G-14(a).<sup>15</sup> As such, in 2008, the Legislature amended the EFCFA to authorize an additional \$3.9 billion in bonds, with \$2.9 billion designated for SDA districts. Id. at ¶50; L. 2008, c. 39, § 4 (see N.J.S.A. 18A: 7G 14(a)).<sup>16</sup>

To apprise the Legislature of the progress of school construction and the need for additional funding, EFCFA directs the SDA, no later than June 1 and December 1 of each year - and in consultation with the State Treasurer and the Commissioner - to submit to the Senate President and Assembly Speaker a "report on the school facilities construction program" that includes the following information: a) the number of projects approved by the Commissioner; b) the number of projects undertaken and financed

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<sup>15</sup> The Legislature also authorized bonding for school construction for non-SDA school districts and county vocational schools, totaling an additional \$2.6 billion in 2000 and an additional \$1 billion in 2008. N.J.S.A. 18A:7G-14a.

<sup>16</sup> Thereby raising the total available bond funding available to SDA Schools to \$8.9 billion.

by the SDA; and c) the "aggregate principal amount of bonds ... issued by the [SDA]" and "whether there is a need to adjust the aggregate principal amount of bonds" to finance school facilities projects, as needed in SDA districts. N.J.S.A. 18A:7G-24. The report is referred to as the "Biannual Report." Pa17, ¶39.

From EFCFA's enactment through December 31, 2019, the SDA has completed 695 projects (341 major projects plus 354 health and safety projects) in the SDA districts. Certification of Theresa Luhm dated Jan. 20, 2021 ("Luhm Cert.") ¶31. The completed major projects include: 87 new schools, including six demonstration projects; 47 extensive addition, renovation and/or rehabilitation projects; 31 rehabilitation projects; and 176 Section 13 Grants for SDA District-managed projects. Id.

Prior to the filing of the motion that initiated this application, the parties recognized that the SDA currently has funding authorization to complete the remaining projects identified in the 2011 through 2014 Capital Portfolios, as amended. Id. at ¶43, 45, 51. Again, those projects are forecasted to be delivered by 2025. Id. The SDA recognizes, and has recognized, in various biannual reports as well as in testimony before the Legislature, that more money will be needed to initiate and complete projects to address remaining needs as identified in the 2019 EENA. Id. at ¶¶52-62. Specifically, the SDA's biannual reports from December 2014, December 2018, June 2019, December 2019, June 2020, and December 2020 all expressed a critical need for additional funding. Id., Luhm Cert. submitted on behalf of Plaintiff dated January 20, 2021, ¶¶32-34; (pB14-17).<sup>17</sup> And in addition to those biannual reports, SDA officers have testified on multiple occasions before the Senate and Assembly Budget Committees on the critical need for additional funding on multiple occasions. Id. at ¶¶59-62; (Pb14-17).

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<sup>17</sup> "Pb" refers to plaintiffs' brief.

Recognizing the need for funding to begin work on some of the newly identified projects in the 2019 Strategic Plan, on February 23, 2021, Governor Murphy proposed a Fiscal Year 2022 (FY 2022) budget that included a total of \$275 million in appropriations for school facilities project funding. Id. at ¶¶64–69; Philip D Murphy, The Governor's FY 2022 Budget (Feb. 2021) at 16;<sup>18</sup> Press Release, Governor Murphy Presents Fiscal Year 2022 Budget: Investing in a Stronger, Fairer, and More Resilient Post-Pandemic New Jersey (Feb. 23, 2021).<sup>19</sup> In particular, upon enactment of the FY2022 Appropriations Act, a direct appropriation of \$200 million to the SDA. The SDA described that appropriation as a mechanism that will allow it to reduce its planned debt issuance, which in turn will allow the SDA to support the advancement of new SDA district projects identified in the 2019 Strategic Plan. Id. at ¶¶65–67; see also The Governor's FY 2022 Budget at 16 ("to reduce [SDA's] planned debt issuance. According to the SDA, this appropriation will go toward current projects, and may allow the State to issue debt for the SDA for one year beyond what was expected.") Apparently, the \$200 million appropriation was designed to allow the SDA to replace borrowing for current projects. The SDA has represented to the Master that this mechanism will nevertheless continue to allow it to access unused bonding authority for the 2019 Strategic Plan, with such appropriation subject, of course, to the approval of the Director of the Division of Budget and Accounting. Id. <sup>20</sup>

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<sup>18</sup> <https://www.nj.gov/treasury/0111b/publications/22bib/BIB.pdf> (last visited Mar. 21, 2021) .

<sup>19</sup> <https://www.nj.gov/governor/news/news/562021/20210223c.shtml> (last visited Mar. 21, 2021)

<sup>20</sup> Any project advanced through the support of that funding would be identified based on prioritization factors determined through review by the DOE, SDA, and districts. Id. at ¶67.

## **F. Emergent Projects**

In the past, on three (3) occasions - 2007, 2011 and 2016 - the SDA and the Department of Education ("DOE") have jointly undertaken a "Potential Emergent Projects Program" ("PEPP") to identify and evaluate for remediation potential projects impacting the health and safety of students and staff. Pa14, ¶31. In the last PEPP announced on July 26, 2016, the SDA districts identified 429 building conditions in need of emergent action, including leaky roofs, crumbling facades, and inadequate ventilation, heating and cooling, fire safety and other basic systems. Pa14, ¶32. Of the 429 district submissions, the DOE and SDA approved only 15 as emergent. Pa14-15, ¶32.

As of the date of the original filing of the ELC's pending Motion, the SDA reported that it was currently managing eleven (11) emergent projects in the SDA districts. Luhm Cert. dated January 20, 2021, ¶20. At that time, there was no data, reports or information from the DOE or SDA on the existing need for emergent projects. Id. ¶21. The agencies have also provided no public information on the status of the 414 projects submitted in 2016 that were rejected as emergent. Id.

Governor Murphy's 2022 budget proposed directing \$75 million for emergency projects. Id. at ¶¶68-69. See also The Governor's FY2022 Budget at 16 ("To ensure that schools statewide remain safe and welcoming places to learn, the Governor proposes directing \$75 million into the [SDA's] capital maintenance and emergent needs grants program. The \$75 million is to be allocated between SDA and Regular Operating (ROD) Districts. \$50 million is to be directed to SDA Districts under \$25 is directed to ROD Districts (non SDA or Regular Operating Districts). These grants are designed to help school districts undertake emergent facility and system repairs, such as replacing boilers, electrical systems, and roofs.") The State has also represented that while regular operating districts and SDA districts will have the opportunity

to access those funds for emergency projects, mitigation of COVID-related health and safety issues was to receive priority consideration for project approval and SDA districts seeking to mitigate COVID-related health and safety issues will receive priority consideration for those funds. Id.

**G. The COVID-19 Pandemic, the Road Back Plan, and the Emergency General Obligation Bond Act**

In the motion originally filed by the ELC, it also advocates that even leaving aside the familiar but far from uncomplicated challenges of school funding, the perils and "widespread consequences" of the COVID-19 global pandemic are "well-known to this Court" and have presented an entirely new set of challenges to the State of New Jersey and its citizens. New Jersey Republican State Comm. v. Murphy, 243 N.J. 574, 579-83 (2020). Those challenges run the gamut from routine to complex to wholly unprecedented, across virtually every public service and institution including the State's public schools.

By way of background, on March 9, 2020, in light of the dangers posed by COVID-19, the Governor concurrently invoked his powers under the Civilian Defense and Disaster Control Act, and the Emergency Health Powers Act, and issued an executive order declaring both a state of emergency and a public health emergency. Exec. Order No. 103 (Mar. 9, 2020 ) 52 N.J.R. 549 (a) (Apr. 6, 2020). A week later he ordered, among other things, the statewide closure of public and private entities including public and private schools. Exec. Order No. 104 (Mar. 16, 2020) 52 N.J.R. 550(a) (Apr. 6, 2020). Guided by developing information on COVID-19, days later he issued Executive Order 107, which set forth a general stay-at-home requirement for all New Jersey residents (with limited exceptions), and also mandated that (a) 11 public, private, and parochial preschool program premises, and elementary and secondary schools, including charter and renaissance schools, shall remain

closed to students as long as this Order remains in effect. Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020) ¶12.

The Governor subsequently issued a series of executive orders adapting his administration's approach as the crisis evolved, while also addressing a variety of practical and institutional concerns, such as the need to ensure that social distancing measures are effectuated in public and private spaces, as well as the need to ensure that all State, county, and municipal governments are acting in unison.<sup>21</sup>

1) *The Road Back Plan*

To halt the spread of the COVID-19 coronavirus, Governor Philip Murphy ordered all New Jersey public school buildings to close from March 18, 2020 through the end of the 2019-20 school year, with instruction to be provided remotely. Luhm Cert. dated January 20, 2021, ¶¶13-14.

In June 2020, the DOE released a plan - titled The Road Back: Restart and Recovery Plan for Education ("Road Back") - for districts to reopen school buildings in September 2020 and resume in-person, classroom instruction in a safe manner that protects students and staff from the transmission of COVID-19. Luhm Cert. dated January 20, 2021, ¶15. The DOE supported that plan with its August 3, 2020 Reopening Document Checklist for 2020-21 ("Checklist") of health and safety measures for districts to implement prior to reopening school buildings. Id. at ¶16.

Both the DOE's Road Back and the Checklist require districts to ensure school buildings have adequate ventilation prior to reopening and allowing students and staff to return to classrooms for in-person instruction. Id. at ¶17. The Road Back stated that "districts must ensure that their indoor facilities have adequate ventilation, including operational heating and ventilation systems

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<sup>21</sup>All of the Governor's executive orders are publicly available in a databank maintained on the State's website. See <https://nj.gov/infobank/eo/056murphy/> (last visited Mar. 21, 2021)

where appropriate." Id. at ¶18. The Checklist recommended that districts:

ensure that indoor facilities have adequate ventilation, including by: maintaining operational heating and ventilation systems where appropriate; ensuring that recirculated air has a fresh air component; opening windows if A/C is not provided; and maintaining filters for A/C units according to manufacturer recommendations. Id.

Consistent with the federal Center for Disease Control guidelines on social distancing, DOE also recommended that classrooms, hallways and other common areas in school buildings be reconfigured to allow for a six-foot radius between students and staff to prevent the spread of COVID-19. Luhm Cert. dated January 20, 2021, at ¶22.

As part of New Jersey's "Road Back" plan, Governor Murphy took incremental steps to safely reopen the State while preventing deaths and cases of the virus from surging. See, e.g., Release, Governor Murphy Unveils Multi-Stage Approach to Execute a Responsible and Strategic Restart of New Jersey's Economy (May 18, 2020);<sup>22</sup> Press Release, Governor Murphy Announces "The Road Back: Restoring Economic Health Through Public Health (Apr. 27, 2020).<sup>23</sup> Specifically, he has permitted the reopening of parts of the State closed by earlier orders, while requiring that the same social distancing guidelines and safety measures continue to be followed. Id., see also State of New Jersey, What is guiding New Jersey's recovery? What is "the Road Back"? (last updated Jun. 15, 2020) (discussing the multi-stage approach to restart and restore

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<sup>22</sup> <https://www.nj.gov/governor/news/news/562020/20200518a.shtml> (last visited Mar. 21, 2021)

<sup>23</sup> <https://www.nj.gov/governor/news/news/562020/2020042b.shtml> (last visited Mar. 21, 2021)

New Jersey's economic health while continuing to ensure public health).<sup>24</sup>

As part of that initiative, in June 2020 the DOE issued "The Road Back: Restart and Recovery Plan for Education" (Restart and Recovery Plan), which provided guidance and anticipated minimum standards related to health, safety, and operations to assist school districts in the process of safely reopening schools in the fall of 2020. Allen-McMillan Cert. dated March 21, 2021, ¶¶31-32; Luhm Cert., dated January 20, 2021, ¶15; see also Department of Education, The Road Back: Restart and Recovery Plan for Education (Jun. 2020).<sup>25</sup> To assist in the development and review of school reopening plans, on August 3, 2020, the DOE issued a checklist for schools to follow to assist in the reopening of schools in the 2020-2021 school year. Id. at ¶33; Luhm Cert., dated January 20, 2021, ¶16; Department of Education, Reopening Document - Checklist for the Re-Opening of School 2020-2021 (Aug. 3, 2020).<sup>26</sup> The checklist set forth the minimum health and safety standards detailed in the Restart and Recovery Plan for districts to implement, which were also listed in Executive Order 175 (issued days later) Id. at ¶¶33-34; Luhm Cert. dated January 20, 2021, ¶16. The Restart and Recovery plan made it clear that health and safety standards associated with reopening reflect the recommendations of the Department of Health (DOH) and are informed by guidance from the Centers for Disease Control. Id. at ¶¶32-35. In other words, health and safety standards for reopening – via the checklist and the Restart and Recovery Plan have been established by the DOH and incorporated into DOE's guidance. Id.

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<sup>24</sup> <https://covid19.nj.gov/faqs/nj-information/reopening-guidance-and-restrictions/what-is-guiding-new-jerseys-recovery-what-is-%E2%80%9Cthe-road-back%E2%80%9D> (last visited Mar. 21, 2021)

<sup>25</sup> <https://www.nj.gov/education/reopening/NJDOETheRoadBack.pdf> (last visited Mar. 21, 2021)

<sup>26</sup> <https://www.nj.gov/education/reopening/DOEHealthandSafety.pdf> (last visited Mar. 21, 2021)



Among many such standards, both the Restart and Recovery Plan and the checklist require a plan to ensure that indoor facilities have adequate ventilation, which may include operational heating and ventilation systems, recirculated air with a fresh air component, proper filtration for air conditioning units, and the ability to open windows if air conditioning is not provided. Id. at 35; Luhm Cert., dated January 20, 2021, ¶¶15-18. They also propose reconfiguration of classrooms, hallways, and other common areas to allow for the DOH and CDC recommended social distancing between individuals. Id., Luhm Cert. dated January 20, 2021, ¶22 .A statement of assurance, certifying that a school has developed a reopening plan adhering to these minimum standards, is required from schools in order to return to in-person schooling. Id. at ¶¶36-37.

On August 13, 2020, Governor Murphy issued Executive Order 175, which called for the resumption of in-person instruction in New Jersey's schools. Exec. Order No. 175 (Aug. 13, 2020 ) 52 N.J.R. 1699 (a) (Sept. 21, 2020), at ¶¶3-4. Under the order, all school districts that reopen for full or part-time in-person instruction are required to meet health and safety standards as set forth in the Restart and Recovery Plan. Id. at ¶2. In particular, districts were required to submit a reopening plan to the DOE thirty days prior to the first day of school, certifying that they had policies and procedures in place to meet minimum health and safety standards as set forth in the Restart and Recovery Plan. Id. at ¶4. If a district determined it could not provide in-person instruction, it was required to submit documentation to the DOE identifying: the school buildings or grade Levels within the district that could not meet minimum health and safety standards; the anticipated efforts to satisfy those standards; and a date by which the school anticipated the resumption of in-person instruction. Id. at ¶8. Districts with schools offering only remote instruction were required to submit

periodic updates demonstrating that the school district is actively engaged in good-faith efforts toward resumption of in-person instruction. Id. at ¶9.

2) *Available Federal Funding for Reopening School Facilities*

Because the costs and logistical challenges caused by COVID-19 do not fit within the normal school funding paradigm, federal funds have been critical to the continued operations of our schools. The DOE asserted that it has provided a framework for obtaining economic relief associated with operating and/or reopening our schools in the COVID-19 era.

The Restart and Recovery plan explained that "the federal 'Corona virus Aid, Relief, and Economic Security' (CARES) Act established the Elementary and Secondary Emergency Relief (ESSER) Fund to provide direct money to school districts and provide funding to support areas impacted by the disruption and closure of schools from COVI-19." Allen-McMillan Cert., dated March 22, 2021, ¶39 (quoting Restart and Recovery Plan at 62) see also 116 Pub. L. No. 136, 134 Stat. 281, SS 18001 to 18003 (2020) (establishing ESSER fund).<sup>27</sup> The plan further explained that "\$310.4 million [in CARES Act funds] has been allocated to New Jersey, the majority of which will in turn be provided to school districts as subgrants." Id. at ¶40 (quoting Restart and Recovery Plan at 62). In short, federal funding - including CARES ESSER funds - were provided to address the areas impacted by the disruption and closure of schools caused by COVID-19. Id. In addition to ESSER funds provided to Local Education Agencies (LEAs), the Department allocated \$100 million in CARES Act Corona virus Relief Funds (CRF) towards meeting the health and safety

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<sup>27</sup> Additional funds were made available through the then recently- passed American Rescue Plan Act of 2021. See H.R. 1319, 117th Cong. (2021). However, as of the date of this filing, the amount of funds available to SDA districts is undetermined.

criteria outlined in Executive Order 175 and the Restart and Recovery Plan. Id. at ¶44; see also The Governor's FY 2022 Budget at 15; Philip D. Murphy, FY 2021 Revised Budget Proposal at 10 (Aug. 25, 2020).<sup>28</sup>

The CRF provides relief to States to respond to COVID-19, and may only be used to cover costs that are necessary expenditures incurred due to the COVID-19 public health emergency. Id. at ¶45. The fund was administered by the United States Treasury, which issued guidance on the permissible use of the funds. Id. The DOE received an allocation of \$100 million in CRF to provide to LEAs, and provided grant funds to school districts charter schools, and renaissance school projects to address health and safety measures necessary to support reopening for in-person instruction and to support students during periods of remote learning. Id. Allocations were based on districts' applications for state school aid, and were provided based on a flat per pupil amount of \$25 per pupil for all students, and an additional \$128 per pupil for low income students. Id.

Among the uses for CRF funds, districts could purchase furniture to help establish social distancing, equipment to increase the efficacy of social distancing, and filters for heating, ventilation, and air-conditioning. Id. at ¶46. Also among the allowable costs for ESSER I funds were supplies for sanitation and social distancing measures, as well as [o]ther activities that are necessary to maintain the operation of and continuity of services Id. at ¶41.

It is not disputed that in the past SDA districts received "tens of millions of dollars" in CRF and ESSER 1 funds. By way of example, the Camden City School District received \$14,232,248 in ESSER I funds; Elizabeth Public Schools received \$7,592,750;

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<sup>28</sup> [http://d31hzIhk6di2h5.cloudfront.net/20200825/88/b2/df/32/de79b8b5a48a7c430bdf57ed/FINAL Report on the Revised FY 21 Budget.pdf](http://d31hzIhk6di2h5.cloudfront.net/20200825/88/b2/df/32/de79b8b5a48a7c430bdf57ed/FINAL%20Report%20on%20the%20Revised%20FY%2021%20Budget.pdf) (last visited Mar. 21, 2021).

Jersey City Public Schools received \$12,824,478; the Newark Public School District received \$20,676,760; the Paterson Public School District received \$12,254,566; and the Trenton Public School District received \$5,039,747. Id. at ¶42, Exh. C. As for CRF monies, the Elizabeth Public Schools received \$3,297,922 in CRE monies; Jersey City Public Schools received \$2,545,623; the Newark Public School District received \$4,679,544; the Paterson Public School District received \$3,047,847; and the Trenton Public School District received \$1,615,173. Id. at ¶47, Exh. D.

Additional ESSER funding from the Corona virus Response and Relief Supplemental Appropriations (CRRSA) Act (ESSER II), 116 Pub. L. No. 260, 134 Stat. 1182, Div. M, Title III (2020) may also be used to assist reopening efforts. Id. at ¶48. Among the allowable costs qualifying for ESSER II funding as set forth in the CRRSA Act, the DOE enumerated two uses relevant to reopening efforts, including "[s]chool facility repairs and improvements to enable operation of schools ...]" and "[i]nspection, testing, maintenance, repair, replacement, and upgrade projects to improve the indoor air quality in school facilities, including mechanical and non-mechanical heating, ventilation, and air conditioning systems, filtering, purification and other air cleaning, fans, control systems, and window and door repair and replacement." Id.

SDA districts have similarly been allocated federal aid from the ESSER II funding stream: the Camden City School District was allocated \$51,276,194 in ESSER II funds (minus additional funds for learning acceleration and mental health support and services) Elizabeth Public Schools was allocated \$28,568,451; Jersey City Public Schools was allocated \$45,261,094; the Newark Public School District was allocated \$78,956,152; the Paterson Public School District was allocated \$47,502,496; and the Trenton Public School District was allocated \$19,578,467. Id. at ¶49, Exh. E.

As with most state and federal aid, the CARES Act funds were disbursed to LEAs based on resident student populations and the

needs of those students. Specifically, the Act required State Educational Agencies (SEAs) to allocate a minimum of 90% of total ESSER Funds received directly to LEAs, and to "set-aside" the other 10% for other designated purposes. Id. at ¶51. The CRRSA Act followed the same allocation method as the CARES Act. Id.

It is evident that local finances and fiscal policies and practices "may need to be adjusted ... to accommodate social distancing, virtual learning, or other requirements that arise in the post COVID-19 educational environment." Restart and Recovery Plan at 62. However, as described above, the DOE has administered significant guidance and resources to districts to assist in the continued operation of schools through the use of federal funds - more specifically, they have provided districts with a roadmap to "provid[ing] direct money to school districts and provid[ing] funding to support areas impacted by the disruption and closure of schools from COVID-19. " Id.; Allen-McMillan Cert., dated March 22, 2021, ¶¶38-51.

### 3) *The Emergency General Obligation Bond Act*

Additionally, to make up for the "revenue shortfall" resulting from the pandemic, on July 16, 2020, the Legislature passed and the Governor signed into law the "New Jersey COVID-19 Emergency Bond Act " (Emergency General Obligation Bond Act), allowing the State to borrow up to \$9.9 billion. L. 2020, c. 60; New Jersey Republican State Comm., 243 N.J. at 579, 584, 586. In particular, the State was permitted to issue bonds for public or private sale, or to borrow funds from the federal government, totaling \$2.7 billion for Fiscal Year 2020 and another \$7.2 billion for Fiscal Year 2021. L. 2020, c. 60; New Jersey Republican State Comm., 243 N.J. at 579, 586.

The New Jersey Supreme Court upheld the constitutionality of the Emergency General Obligation Bond Act in a decision issued on August 12, 2020, holding that the State was permitted to borrow money necessary to meet the emergency created by the COVID-19

pandemic. New Jersey Republican State Comm., 243 N.J. at 581. The bonds were "authorized to be issued to address the State's financial problems that have arisen as a consequence of the COVID-19 Pandemic [,] " L. 2020, c. 60, and the Court noted that the funds "must relate to or provide for the pending emergency [,] as "not every act of borrowing would 'meet' the emergency caused by the pandemic." New Jersey Republican State Comm., 243 N.J. at 581, 610. The Court held in part that the State "may borrow to provide for public services like education [] ... to secure the continued functioning of government." Id. at 609. The Court left the question of specific uses to the Legislature, but noted that "[b]orrowing for programs unrelated to the emergency would not satisfy the language" of the Emergency General Obligation Bond Act or the New Jersey Constitutional provisions permitting emergency appropriations. Id. at 610.

By letter dated September 18, 2020 - two months after the Emergency General Obligation Bond Act was signed into law, and over a month after New Jersey Republican State Comm. was decided - ELC requested that the State use at least \$500 million of the authorized bond financing to ensure that school facilities meet the health and safety standards for safe reopening of schools during the ongoing COVID-19 pandemic. Luhm Cert., dated January 22, 2021, ¶28. On September 22, 2020, the Department of Treasury released its "Report to the Select Commission on Emergency COVID-19 Borrowing" authorizing the State to issue up to \$4.5 billion in general obligation bonds to offset the decline in State revenue that occurred as a result of the ongoing COVID-19 pandemic. Department of Treasury, New Jersey COVID-19 General Obligation Emergency Bonds Report to the Select Commission on Emergency COVID-19 Borrowing (Sept. 2020).<sup>29</sup> Press Release, Report Authorizing

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<sup>29</sup> <https://www.nj.gov/treasury/publicfinance/pdf/Emergency-Borrowing-Report-to-Select-Commission.pdf> (last visited Mar. 21, 2021)

Crucial Borrowing to Address Steep Drop In Revenue Sent to Legislative Commission for Final Approval (Sept. 22, 2020).<sup>30</sup>

**H. Other Prior and Recent Filings With This Court**

In 2005, ELC sought relief from the New Jersey Supreme Court for three inter-related reasons: work on approved projects had been "indefinitely postponed" by the SCC due to insufficient funds; most districts had failed to meet their deadline for filing their LRFPs; and the DOE had not filed its annual report for the 2005 fiscal year under N.J.S.A. 18A:7G-24. Abbott XIV, 185 N.J. at 614. In response, the Court ordered districts to submit overdue LRFPs, and ordered the DOE to issue its annual report for 2005 (with cost estimates for the school facilities projects that were identified in the 2000-2005 LRFPs and submitted to the SCC). Id. at 615; Allen-McMillan Cert., dated March 22, 2021, ¶9. It appears that both the DOE and the SDA have now complied with the Court's directives in Abbott XIV. Allen-McMillan Cert., dated March 22, 2021, ¶¶26-30; Da Silva Cert., dated March 22, 2021, ¶¶8-11.<sup>31</sup>

In 2007, the ELC again sought a remedial order from this Court, this time with respect to funding for school construction in the Abbott Districts. Abbott v. Burke (Abbott XVII), 193 N.J. 34, 35 (2007). Specifically, ELC sought an order directing the State to comply with the Court's orders in Abbott V, Abbott XIV, and Abbott v. Burke (Abbott VII) 164 N.J. 84 (2000). Abbott XVII, 193 N.J. at 35. At that time, the Court again denied the motion as premature, explaining that the State's compliance had to be considered "in the context of the Fiscal Year 2008 budget," which had not yet been enacted. Id. The Court further "declined to proceed on the assumption that [defendants would] fail to comply

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<sup>30</sup> <https://www.nj.gov/treasury/news/2020/09222020.shtml> (last visited Mar. 21, 2021) .

<sup>31</sup> Effective August 6, 2007, the EFCFA was amended to require that the SDA, rather than the Commissioner, submit a report on the School Construction Program on a biannual basis. L. 2007, c. 137, § 35; Allen-McMillan Cert., dated March 22, 2021, ¶30.

with their constitutional obligations to provide a thorough and efficient educational system pursuant to [N.J. Const. art. VIII, § 4, ¶11]. Id.

The following year, the ELC filed a separate motion in aid of litigants' rights, seeking an order directing the State to comply with various Abbott decisions in order to compel the provision of funds necessary to construct or repair school facilities in Abbott districts. Abbott v. Burke (Abbott XVIII), 196 N.J. 451, 451-53 (2008). At that time, the Court declined to presume that the Legislature would fail to respond to these issues or to the Governor's request to fund the "next phase of school construction, including addressing needed health and safety concerns[.]" Id. Later that year, the Legislature amended the EFCFA to authorize an additional \$3.9 billion in bonds, with \$2.9 billion designated for SDA districts. L. 2008, c. 39, §4 (see N.J.S.A. 18A:7G-14(a)).

On November 7, 2019, the ELC filed another motion in aid of litigants' rights, seeking an order (1) directing the State to submit a revised statewide strategic plan for priority projects in SDA districts, and (2) securing funding from the Legislature as required to manage and complete the school facilities projects in the revised statewide strategic plan. Abbott v. Burke (Abbott XXIII) 241 N.J. 249 (2020). On April 1, 2020, the Supreme Court issued an order denying ELC's motion as premature, declining "to proceed on the assumption that Respondents will fail to comply with their constitutional obligations to provide a thorough and efficient educational system[.] Id.

#### **I. The Current Motion Before the Court**

ELC has filed this motion in aid of litigants' rights, asking the Court to direct the State to: (1) seek and secure from the Legislature funding for the school facilities construction projects as set forth in the SDA's 2019 Statewide Strategic Plan; and (2) seek funding as otherwise needed for health and safety projects, including those necessary to ensure the safe reopening



and operation of school buildings in SDA districts, during the ongoing COVID-19 pandemic.

1) *Regarding the ELC's Claims Concerning Improvements Required to Comply with the 2019 Strategic Plan*

In this Motion, the ELC originally asserted that the parties do not dispute that the School Development Authority's ("SDA") current construction portfolio of eleven (11) capital projects will be completed by 2025. However, the ELC also alleged that the State has effectively confirmed that the SDA is without the necessary funding to commence and complete the "first tranche" of twenty four (24) priority capital projects identified in the SDA's 2019 Statewide Strategic Plan ("2019 Strategic Plan"). Certification of Manuel Da Silva ("Da Silva Cert."), dated March 22, 2021, ¶¶51-52. As such, when the motion was filed, the funding for those "first tranche" projects constituted a key dispute in dispute.

Also, the ELC argued that the State disputed that there was an urgent need for these or dozens of other projects identified in the SDA districts' 2016 Amended Long-Range Facilities Plans ("LRFP") and the Department of Education's ("DOE") 2019 Educational Facilities Needs Assessment ("2019 EFNA"). See Certification of Angelica Allen-McMillan ("Allen-McMillan Cert.") dated March 22, 2021, Ex. A, B:1-B:2 (2019 EFNA List of Recommended Project Priorities).

As a result, the ELC contended that the State's extended delays in completing the requisite steps to secure additional facilities funding was a breach of its constitutional responsibilities. The ELC pointed out that no new major construction projects have been added to the SDA's capital portfolio since 2014, Da Silva Cert. dated March 22, 2021, ¶¶36-43. According to the ELC, those propositions are true, even though the SDA "expressed a critical need for additional funding" to the Legislature as early as December 2014, State's Br. at 16, and

repeatedly over the last six years.

2) *Regarding Emergent Repairs and Capital Maintenance Projects*

Also, Plaintiffs indicate that when its motion in this matter was filed, the State did not dispute the continuing failure of the SDA and DOE to assess the need for emergent repair and capital maintenance projects in existing buildings since 2016 and, as a result, the ELC posited that the SDA and the DOE could provide any current information on the scope of the need and estimated cost of those projects.<sup>32</sup> Plaintiffs submitted that the State does not dispute that the need for emergent repair projects existed before school buildings were closed in response to the coronavirus pandemic in March 2020 and are even more urgently needed given requirements for building ventilation, heating and cooling, and reduced classroom occupancy to safely reopen for in-person instruction. See Certification of Newark Facilities Executive Director Steve Morlino provided as part of Plaintiff's briefing on April 13, 2021 ("Morlino Cert."), ¶21; Certification of Garfield Superintendent Anna Sciacca provided as part of Plaintiff's briefing on April 13, 2021 ("Sciacca Cert."), ¶¶39-48; Certification of Paterson Education Association President John McEntee provided as part of Plaintiff's briefing on April 13, 2021 ("McEntee Cert"), ¶¶26-7; and Certification of Jersey City Superintendent Franklin Walker provided as part of Plaintiff's briefing on April 13, 2021 ("Walker Cert."), ¶¶14-21.

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<sup>32</sup> The State confirmed that, in 2007, 2011 and 2016, the SDA and DOE have jointly undertaken a "Potential Emergent Projects Program" (PEPP) to identify projects to address health and safety in existing SDA district buildings. Allen-McMillan Cert., dated March 22, 2021, ¶25. The third PEPP in 2016 resulted in SDA districts identifying 429 conditions in need of repair, including leaky roofs; crumbling facades; and inadequate heating, fire safety and other basic systems. See 2019 Certification of Theresa Luhm dated January 20, 2021, ("2019 Luhm Cert."), ¶¶31-32 at Pa14.

Finally, the Plaintiffs, in its motion, posited that after notifying the Legislature repeatedly over five years that its funding had been depleted, the State effectively had not contested, or at least tacitly agreed, that it took no action to seek or secure financing for the twenty four (24) priority projects in the 2019 Strategic Plan and needed emergent repair projects in the wake of this Court's April 2020 order. Plaintiffs offered that despite the Court's anticipation that the State would address the need for funding in the Fiscal Year ("FY") 2021 State Budget, Abbott v. Burke, 241 N.J. 249 (2020) ("Abbott XXIII"), that budget did not authorize any such financing, Luhm Cert. dated January 21, 2021, ¶¶36-37. Based upon those assertions, Plaintiff offered that the State has failed to provide any assurance it will "seek or secure" the level of funding needed to support the next phase of the school construction program in the context of the enactment of the FY 2022 Budget.

**J. Regarding the State's Position Counter to the Positions Espoused by ELC in their Motion Regarding Whether Defendants Have Acted Within the Scope of Their Authority to Seek and Secure Necessary Funding, and in Light of the State's Substantial and Continuing Efforts to Remedy Facility Deficiencies in SDA Districts, There is No Need for This Court's Intervention**

The State countered ELC's motion request by asserting that the State has and continues to make substantial and continuing efforts to remedy facility deficiencies in the SDA districts. The State avers that because all current projects are fully funded and progressing, and because additional funds have been proposed for appropriation to support the advancement of projects noted in the 2019 Strategic Plan, ELC's motion is premature and speculative.

*1) Regarding the State's Position that Plaintiffs have not met its Burden*

First, in support of its "legal" position, the State emphasized that the Plaintiffs here are not entitled to the

requested relief since Plaintiff has not met its burden under the applicable standard. The State offers that a motion in aid of litigants' rights is "a civil proceeding to coerce the defendant into compliance with the court's order for the benefit of the private litigant." Pasqua v. Council, 186 N.J. 127, 140 (2006); see also R. 1:10-3 (stating that "a litigant in any action may seek relief by application in the action."). As such, the State has argued that it requires a showing that a party has willfully failed to comply with a court order, manifesting contempt for the Court. Id. at 141 n. 2; Abbott v. Burke (Abbott XXI), 206 N.J. 332, 492-93 (2011) (Hoens, J., dissenting). On that point, the State asserts that it has been noted that the type of willful neglect necessary to invoke the court's power under this Rule should "bespeak 'clear defiance of [a court's] specific and unequivocal orders.'" Abbott XXI, 206 N.J. at 492-93 (Hoens, J., dissenting) (quoting Abbott v. Burke (Abbott VIII), 170 N.J. 537, 565 (2002) (LaVecchia, J., concurring in part and dissenting in part)). The State advocates that, importantly, the Court must determine that the party has the ability to comply with the order that allegedly has been violated, and that the party has no good reason to resist compliance. See Pasqua, 186 N.J. at 141 n. 2; Pressler & Verniero, Current N.J. Court Rules, cmt. 4.3 on R. 1:10-3 (2020).

Thus, the State has argued that in order for the Court to grant ELC's motion, there must be a finding that the State has failed to live up to this Court's Abbott mandates, and that it has done so willfully. According to the State, the record did not and does not support such a conclusion.

2) *Regarding the State's Position that it has Requested the Required Funding and thus has complied with its Constitutional Obligation*

As to ELC's request that the State seek funding, the State initially responded by indicating that not only has the SDA requested additional funds from the Legislature via live testimony

and through the submission of annual and biannual reports, Da Silva Cert., dated March 22, 2021, ¶¶52-62; Luhm Cert. dated January 20, 2021, ¶¶32-24, but on February 23, 2021, subsequent to the filing of this motion and the appointment of the Master by the Court, Governor Murphy proposed the appropriation of \$275 million in funds. In particular, the Governor proposed the appropriation of \$200 million "to reduce [SDA's] planned debt issuance[,]" which in turn will allow the SDA to support the undertaking of some of the capital projects in SDA districts listed in the 2019 Strategic Plan; and he also proposed the appropriation of another \$75 million "into the [SDA's] capital maintenance and emergent needs grants program" to help with pandemic-related issues, for which SDA districts will receive priority consideration, Da Silva Cert. dated March 22, 2021, at ¶¶64-69; The Governor's FY2022 Budget at 16. Thus, according to the State Defendants, by virtue of their request and the Governor's recognition of that request in the FY2022 budget, they have satisfied their constitutional obligation to seek funding.<sup>33</sup> Thus, the State asserts that these extensive efforts by the State to obtain funding and advance the school facilities projects in SDA districts fall far short of the willful or intentional indifference that the State argues is required before a motion in aid of litigants' rights can be granted. ELC has presented no evidence demonstrating such a willful lack of compliance with the Abbott mandates.

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<sup>33</sup> From a broader perspective, the State asserted that the EFCFA itself contains all of the elements directed by the Supreme Court, including a thorough vetting process to ensure the advancement of projects that will assist in the delivery of T&E, 100 percent of funding for approved costs in the SDA districts, and the authorization of billions of dollars in bonds to address the facilities deficiencies in the Abbott districts (see Statement of Facts, Points A, B, & C) – more than twice the amount of bonding capacity estimated by the Special Master in Abbott V, 153 N.J. at 634. The State emphasized that, in the recent past, the school construction program has expanded to expend up to \$12.5 billion, comprising \$8.9 billion for SDA districts.

3) *The State's Position Regarding the ELC's Request for the State to Secure Funding*

As to its request that the State secure funding, the State posits that the ELC motion request fundamentally misconstrued not just the facts on the ground, but the School Construction Program process and the functionality of State budgeting. The State pointed out that at the time the Motion was filed in January, 2021, the budget process was only just beginning. The State contended that ELC's request failed to recognize that the Executive Branch lacks the ability to "secure funding" beyond what has to date been authorized by the Legislature. The State asserted that while ELC claimed there is no "relief in sight," that such an assertion was "purely speculative" and has proven not to be accurate. The State pointed out that the appropriation of funds ultimately rests with the Legislature, and that determination has not yet been made. The State has also emphasized and touted that all capital projects from the portfolios predating the 2019 Strategic Plan are fully funded, advancing, and are forecasted to be completed by 2025; that no projects have been halted – to the contrary, despite the myriad challenges posed by COVID-19, the SDA has managed to complete three more projects during the pandemic; and that the Governor has proposed an appropriation that will allow the SDA to advance projects from the 2019 Strategic Plan. *Id.* at ¶¶43, 45, 52-69. For those reasons, the State argued that ELC's motion should therefore be denied as "speculative and premature."

4) *The Developments With Regards to the FY2022 Budget*

During deliberations on Governor Philip Murphy's proposed FY 2022 Budget, the Legislature was informed of the urgent need for additional funding for school construction in SDA districts.<sup>34</sup> SDA

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<sup>34</sup> On this Motion, Plaintiffs previously addressed the funding for school construction proposed by Governor Murphy in his FY2022 Budget, consisting of \$200 million for capital construction in SDA districts and \$75 million for emergent projects for all districts statewide. See Plaintiffs' Reply Brief at 4-6 (April 13, 2021).

Chief Executive Officer (CEO) Manual Da Silva, in an Assembly Budget Committee hearing on May 10, 2021, testified that "school facilities needs" in the SDA districts are "abundantly clear" and "significant." Recording of the May 10, 2021 Assembly Budget Committee hearing available at <https://www.njleg.state.nj.us/media/mp.asp?M=V/2021/ABUB/05100100PM-H0-1.mp4&S=2020> (last visited July 21, 2021). Noting the existence of building over-crowding and non-compliance with educational standards in SDA districts, CEO Da Silva confirmed that the "SDA's 2019 Statewide Strategic Plan provides a sequence of SDA activities that will address the significant overcrowding and aging infrastructure needs that exist in many SDA districts." Id. (emphasis added). When pressed to give the Budget Committee estimates of the cost to finance the priority projects in the 2019 Strategic Plan and needed emergent building repairs, CEO Da Silva has acknowledged that he declined to respond at the time, stating only that he would try to "circle back" to the Committee with the information. Id.

The SDA also published the biannual report on the school facilities construction program for the period October 1, 2020 to March 31, 2021 as required by the Education Facilities Construction and Financing Act ("EFCFA"), N.J.S.A. 18A:7G-24 (directing twice-a-year reports to the Governor and Legislature on status of projects under construction and whether there is a need for additional construction funding). See June 2021 Biannual Report, available at [https://www.njsda.gov/NJSDA/Content/public/Biannual\\_Report/2021\\_1.PDF](https://www.njsda.gov/NJSDA/Content/public/Biannual_Report/2021_1.PDF) (last visited July 21, 2021) ("Biannual Report"). After confirming the Governor's proposed \$200 million in the FY 2022 Budget "to support the work of the SDA," the Biannual Report stated that:

While substantial SDA program activities continue, this report demonstrates the need for additional funding to advance future SDA construction work to fulfill and deliver more than 17,000 seats needed statewide. District-wide overcrowding is impacting thousands of students trying to

learn in overcrowded classrooms. Also, there are still many schools that do not conform to educational standards.

[Biannual Report at 6.]

Further, while also noting the Governor's proposed \$75 million for emergent projects for all districts statewide, the Biannual Report reiterated the SDA's prior recommendation for a comprehensive assessment of the conditions in existing school facilities:

The current pandemic has further demonstrated the need to fully and properly assess the facility conditions needs in New Jersey's school buildings. SDA leadership has previously recommended, and the 2019 Statewide Strategic Plan included, a plan to conduct a Building Conditions Assessment Survey of all schools in the 31 SDA Districts. This recommendation would serve to inform future long term planning and to assist the SDA in identifying future funding needs.

[Biannual Report at 27.]

The Biannual Report further advised the Governor and Legislature that authorizing "additional funding" would not only enable the SDA to undertake the construction of the capital projects in the 2019 Strategic Plan but would also allow "the Building Conditions Assessment Survey" of existing buildings "to move forward." Id.

The FY 2022 Budget, *supra*, was enacted by the Legislature and signed by the Governor against the backdrop of the record and the pending motion in this matter. In that final Budget, the funding appropriated for school facilities construction is as follows:

(1) First, the FY 2022 Budget contained a \$200 million appropriation to the SDA "to support school facilities projects in the SDA school districts, subject to the approval of the Director of the Division of Budgeting and Accountability." FY 2022 Budget, *supra* at 54. This appropriation mirrors the funding level in the Governor's budget proposal.

(2) Second, the FY 2022 Budget appropriated \$75 million to the SDA, as Governor Murphy proposed, "to support



emergent needs and capital maintenance in school districts, subject to the approval of the Director of the Division of Budget and Accounting." Id. As SDA CEO Da Silva explained to the Assembly Budget Committee, these funds must be made available for emergent projects not just in SDA districts, but in all districts statewide. Recording of May 10, 2021 Assembly Budget Committee hearing, *supra*.

(3) The FY 2022 Budget also included additional appropriations that potentially could be used for school facilities construction. It should be noted that the Plaintiffs point out that those appropriations do not commit these funds to SDA districts nor contains any assurances that they will be made available to fund needed projects in those districts.

(a) First, the FY 2022 Budget appropriated \$180 million for a School and Small Business Energy Efficiency Stimulus Program. FY 2022 Budget, *supra* at 260. In separate implementing legislation, the program is intended "to promote the sustainability of HVAC and water systems within New Jersey schools and small businesses." P.L. \_\_, c. \_\_\_ (S.3033, signed by Governor Murphy, July 2021). The legislation, however, has no directives or other provisions allocating the appropriation between schools and businesses, nor does it specify the level of funding dedicated to upgrade HVAC and water systems in schools generally or to schools in SDA districts. Id. In addition, the legislation restricted the appropriation to HVAC and water systems and, as a result, is not available for other emergent project needs identified in prior surveys of SDA districts, including leaky roofs, crumbling facades, and

inadequate heating, fire safety and other basic building systems.<sup>35</sup>

(b) Second, the FY 2022 Budget appropriated \$3.7 billion for a "New Jersey Debt Defeasance and Prevention Fund" ("Defeasance Fund"). FY 2022 Budget, *supra* at 9. In separate legislation establishing the Defeasance Fund, \$1.2 billion is allocated "for the purpose of funding capital construction projects for which State debt is already authorized by law" or "for which funding would have been derived from future State bond issuances, thereby constituting debt avoidance." P.L. 2021, c. 125. The legislation did not specifically allocate any of the \$1.2 billion to school facilities, even though school facilities are a category of capital construction potentially eligible for support. *Id.* Nor did it delineate the specific areas of capital construction that may be eligible other than school facilities, such as public libraries or community colleges. *Id.* To access an allocation from the Defeasance Fund, the legislation provides for a process in which the State Treasurer must submit a list of proposed capital projects to the Joint Budget Oversight Committee of the Legislature for approval, and within one business day of receipt, the Committee "shall schedule a meeting to consider the submitted items, which hearing shall be held within seven days of receipt of the list." *Id.* There are no timeframes or other

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<sup>35</sup> In 2007, 2011 and 2016, the SDA and DOE implemented a joint "Potential Emergent Projects Program" (PEPP) to identify projects to address health and safety in existing SDA district buildings. The third, and last, PEPP in 2016 resulted in SDA districts identifying 429 conditions in need of repair, including leaky roofs; crumbling facades; and inadequate heating, fire safety and other basic systems. See Plaintiffs' Reply Brief at 3-4; and Luhm Cert. dated January 20, 2021, Ex. A, ¶¶31-32 at Pa14.

guidance in the legislation for securing a funding allocation for school facilities projects from the Defeasance Fund.

While it is evident that the parties to this action viewed the Legislature's approval of the FY2022 Budget quite differently, the State Defendants touted that the Legislature has approved, an additional \$275 million in funding for school facilities projects, with potentially even more funds in the offing through stimulus and debt prevention programs. By so doing, the State Defendants posit that the State has complied with its constitutional obligations. The State Defendants also submitted that, if anything, the inclusion of certain stimulus and debt prevention programs offer the potential for even more funding for school facilities projects.

The State also pointed out that the act incorporated important direct appropriations to the Schools Development Authority (SDA) that were first projected in Governor Philip D. Murphy's proposed budget. The State Defendants previously informed the Court that the appropriations would allow the SDA to begin advancement of projects identified in the 2019 Strategic Plan and to identify and fund potential emergent and capital maintenance projects for which SDA districts will receive priority. The State indicated that while the FY22 Appropriations Act admittedly did not allow the SDA to complete the entirety of the projects identified in the 2019 Strategic Plan, with the \$275 million in appropriations it may now begin collaborating with the Department of Education (DOE) and SDA districts to develop solutions for addressing the needs recognized in the 2019 Strategic Plan, as well as other potential emergent projects.

The State Defendants also reiterated that in formulating its positions in this Motion, the Plaintiffs failed to properly and reasonably acknowledge additional critical facts – namely, that the School Construction Program is now, and has been operational

and has proceeded uninterrupted, that even during a global pandemic the SDA has managed to continue its work and complete projects, and that the work on even more projects will commence. The State Defendants also indicated that while the impacts of the COVID-19 pandemic do not bear directly on this Court's prior mandates or the State's requirements under the Educational Facilities Construction and Financing Act (EFCFA), N.J.S.A. 18A:7G-1 to -48, substantial funding streams are available to SDA districts to address COVID-19 related facilities needs as they prepare for the return to full-time, in-person instruction in the fall.

On the other hand, the Plaintiffs complained that, in sum, the FY2022 Budget specifically appropriates only \$200 million for school construction in SDA districts and \$75 million for capital maintenance and emergent repair projects not just in SDA districts, but in all districts statewide.<sup>36</sup> According to the Plaintiff, the record before the Legislature on its deliberations on the budget is devoid of any analysis, data or other information to inform and evaluate the extent to which the appropriations will enable the SDA to advance to construction the twenty four (24) major capital projects in the 2019 Strategic Plan or to undertake capital maintenance and emergent repairs, as necessary to remediate health, safety and other deficiencies in existing SDA district buildings.<sup>37</sup>

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<sup>36</sup> It was subsequently learned that \$50 Million from that fund was allocated to SDA Districts.

<sup>37</sup> The Biannual Report does list estimated costs, totaling \$797.5 million, for the facilities projects currently under construction as of March 31, 2021. The estimates for the new buildings include a section of Perth Amboy High School at \$58.7M; Paterson Union Avenue Middle School at \$113.9M; Passaic City Dayton Avenue Elementary Campus at \$240.9M and Camden High School at \$133M. The four addition and/or renovation projects range from \$137.5M for Millville High School to \$28.4M for Port Monmouth Road Elementary School in Keansburg. Biannual Report, *supra* at 15. The December 2020 Biannual Report, which included the full cost of the Perth Amboy High School at \$283.8M, estimated the portfolio at nearly \$1 billion for the same eight projects. See Plaintiffs' Reply Brief at 5 and n.2

#### IV. APPOINTMENT OF THE SPECIAL MASTER

In light of those facts and circumstances including the passage of the FY2022 Budget and the factual disagreements between the parties, the New Jersey Supreme Court directed the State to provide additional information concerning the State's Budget. Specifically, the Court directed that:

By this letter, the Court directs the State to provide, by November 8, 2021, cost estimates for (1) the twenty-four priority projects identified in the 2019 Statewide Strategic Plan; and (2) the emergent projects needed in Schools Development Authority districts. If the State is unable to submit cost estimates by November 8, 2021, the State should provide a detailed certification explaining its effort to obtain the cost estimates and a reasonable projection of when the cost estimates will become available.

The State responded to the Court's directive by indicating that the 2019 Strategic Plan identifies a total of sixteen projects for "first tranche advancement" where there is ready availability of land to address high priority needs based on the 2019 EFNA. 11/8/21 Da Silva Cert. at ¶4; 3/22/21 Da Silva Cert. at ¶44. The State indicated that eleven projects address overcrowding, and would provide new capacity of 4,579 seats and a total of 8,830 new seats in those districts; and five projects would deliver replacement facilities to address serious facilities deficiencies, providing 4,233 new seats in those districts. 11/8/21 Da Silva Cert. at ¶4.

In addition, the 2019 Strategic Plan identified seven high priority districts experiencing overcrowding, which are sequenced for first tranche advancement to locate appropriate sites to deliver projects that would alleviate overcrowding. Id. at ¶5. The State explained that because appropriate sites need to be identified in order to advance these projects, the number of new seats and the types of projects required to address the remaining capacity needs in each of these districts has yet to be determined. Id.

The State reminded the Court that the SDA projects are compiled as a result of a collaborative process which included input from a variety of sources. The State noted that in a May 28, 2021 letter to the Assembly Budget Committee, the SDA advised the Committee of a cost estimate of \$1.6 billion for the 17,000 capacity generating seats needed in SDA districts. Id. at ¶¶8-9, Exh. A. This estimate includes "the costs for building construction, site construction, contingency, furniture and technology fit out, and construction management costs to deliver those seats[.]" Id. The estimate also encompasses the eleven projects identified in 2019 Strategic Plan to address high capacity needs, including the seven districts experiencing overcrowding issues. Id. at ¶10, Exh. A.

According to the State, the SDA's estimate goes beyond the projects identified in the 2019 Strategic Plan, and encompasses estimated costs to address the entirety of overcrowding needs across all SDA districts.

The State also emphasized that it was important to understand what the SDA's cost estimate represents, and what it does not represent. In that regard, it explains that:

First, this estimate is based on an average square footage per student and average cost per square foot calculation in today's dollars. This estimate does not recognize additional considerations that could be effectively considered and evaluated through the Working Group activities discussed above and which would impact overall program costs, including:

- Land acquisition/relocation, which is extremely variable per project with potentially significant cost implications[;]
- Cost Escalation over time, to reflect costs for construction at the time of project advancement[;]
- Demolition or remediation needs[;]
- Individual District Logistical factors that impact how a school project would be delivered[.]

[Id. at ¶11, Exh. A.]

The SDA's estimate also does not include costs to address aging or deteriorating school facilities, emergent projects, or needs of regular operating districts. Id. at ¶12, Exh. A.

Additionally, a cost estimate for the five replacement facilities projects identified in the 2019 Strategic Plan is \$370 million – which includes the costs for building construction, site construction, contingency, furniture and technology fit-out, and construction management costs. Id. at ¶¶13-14. Thus, the State offered that combined total cost estimate for delivering projects to address the entirety of the remaining capacity needs (inclusive of the eleven projects identified in the 2019 Strategic Plan to address high capacity needs and the needs of the seven districts experiencing over-crowding), as well as the costs for the five replacement facilities projects, is \$1.97 billion. Id. at ¶¶14-15.

With regards to emergent projects, the State admitted that the SDA represented to the Assembly Budget Committee, “[a] total amount of funding necessary to fund all emergent requests that could be submitted by the SDA Districts is currently unknown.” Id. at Exh. A. As such, any dollar value for emergent projects in SDA districts would thus be limited, as it would be based on information submitted by districts – which admittedly can either under- or over-estimate costs for projects.

Also, the State noted that the status of the need for emergent projects is ever changing and fleeting. A snapshot of that “need” is difficult, if not impossible, to analyze because of its nature. However, the State asserted that the SDA planned, or at least sought, to initiate a “Building Conditions Assessment Survey” across all SDA districts to accurately define, assess costs, and prioritize emergent conditions at school facilities. See id. at Exh. A.

The State also represented that though the State is unable to give a meaningful estimate of the cost of currently known emergent

projects, the SDA is able to begin to advance some of these projects imminently. As noted by the State in its previous submissions, the FY22 Appropriations Act included a \$75 million direct appropriation to address emergent school facilities and capital maintenance projects. L. 2021, c. 133. Of that appropriation, due to subsequent developments, the State announced that \$50 million of that appropriation was specifically designated to address emergent projects in SDA districts. The SDA indicated to the Court at that time that it was closely collaborating with DOE on how to best allocate that appropriation.

In response to the updated information provided by the State, the Court invited the Plaintiff to submit a responding brief to the State's supplemental submission. (See letter of HeatherJoy Baker dated November 17, 2021)

In response, the Plaintiff submitted a supplemental brief dated November 29, 2021 in which it argued that the State has only offered a "rough order of magnitude cost estimate" of \$1.97 billion for the major capital projects listed for "first tranche advancement" to construction in the Strategic Plan. State's Supplemental Cost Estimates Response, November 8, 2021, ("State's Supp. Resp.") at 1-3; Certification of Manuel M. Da Silva, dated November 8, 2021, ("Da Silva Cert.") ¶15. Plaintiffs complained the State's "rough" total cost for those projects lacks crucial details, excludes important cost elements and is, therefore, incomplete. More importantly, the ELC again emphasized that the State's deficient cost estimate vastly exceeds the \$200 million for major capital projects appropriated in the State's FY22 Budget. See State's Supplemental Budget Brief, August 6, 2021, at 6. Plaintiffs also pointed out that the State had admittedly provided no estimate, rough or otherwise, of the cost of emergent projects necessary to ensure the health and safety of students and staff in existing SDA district school buildings, including repairs and



capital maintenance to ameliorate the impact of the COVID-19 pandemic.

After receipt of those submissions, the New Jersey Supreme Court entered an Order dated December 15, 2021 which found, in pertinent part, that:

And the Court having requested supplemental briefing from the parties (1) to address the impact, if any, of the adoption of the budget for Fiscal Year 2022; and (2) to elicit their respective positions as to certain cost estimates, including those for the priority projects identified in the 2019 Statewide Strategic Plan as well as the emergent projects needed in SDA districts;

And the Court having reviewed the record, including the parties' supplemental submissions, and having determined that there are unresolved factual questions that bear on the pending motion and that the parties have identified certain areas in which information currently is unavailable, undeveloped, or underdeveloped;

And the Court having concluded that a Special Master should be appointed to conduct a detailed analysis regarding the status of the cost estimates at issue, including any outstanding steps required to finalize the State's cost estimates for the emergent projects needed in Schools Development Authority districts, and other information as is relevant to the pending motion in aid of litigants' rights,

As a result, the Court ordered that

It is ORDERED that the Court hereby appoints as the Special Master the Honorable Thomas C. Miller, A.J.

It is further ORDERED that the matter is remanded to the Special Master to conduct a detailed analysis of the following issues, along with any other issues that the Special Master in his discretion deems relevant to the undertaking:

1. The status of the cost estimates at issue, including any outstanding steps required to finalize the State's cost estimates for the emergent projects needed in Schools Development Authority districts; and
2. The areas in which data is available and those in which information is unavailable or yet undeveloped, and, where the information is not available or has not been developed, a recitation of the steps taken to obtain the information, the steps required to complete that task, and a realistic projection of when the data will become available, if possible; and

3. Any other information as is relevant to the pending motion in aid of litigants' rights.

It is further ORDERED that the Special Master shall retain discretion over the form of the remand proceedings, including the filing of submissions from the parties, and shall submit to the Court a written report of his findings on the issues presented within 60 days of the date of this order.

The Court Master was charged with engaging the main parties in this action in order to supplement the factual record and to promote communication between those parties in order to explore common ground.

With regards to the factual record, the Master was asked to explore certain specific issues, including (1) the extent of the State's commitment to fund capital improvements that were included in the 2019 Strategic Plan; (2) explore and clarify the nature and or extent of capital improvements included in the 2019 Strategic Plan that are not able to be estimated with reasonable certainty; (3) the extent of the State's commitment to fund emergent improvements that are required by the 31 SDA Districts; and (4) whether the appropriations that are available for emergency projects for SDA Districts is sufficient to address the current needs of those districts.

**V. THE SUPPLEMENTAL RECORD AS SUPPLEMENTED SINCE THE MASTER'S APPOINTMENT**

The Court Master was not specifically charged with conducting hearings in order to supplement the record, but in any event, the parties were encouraged to supplement the record with certifications from knowledgeable persons or by additional briefing. Understandably, as that process evolved, additional questions and lines of inquiry were opened which were then addressed by additional certifications and briefs. All of those Certifications, attachments and additional briefing has been included by the Master as the supplemental record.

As a result, the Master has collected the following exhibits from the parties which constitute the additions to the factual record.

1. Email from Elizabeth Athos dated January 5, 2022 enclosing background information. (Exhibit "A")

2. Cover letter from Christopher Weber, Esq. dated January 14, 2022. (Exhibit "B")

3. Certification of Manual M. DaSilva, CEO of the SDA dated January 14, 2022 providing detailed information concerning emergency projects being funded by the SDA. (Exhibit "C")

4. Letter brief submitted by Elizabeth Athos of the "ELC" dated January 18, 2022 responding to the SDA's submission of January 14, 2022. The ELC noted that the DaSilva Certification was unresponsive to the Master's inquiry since it addressed emergent projects that are already being addressed by the SDA and not emergent projects that are "needed" in the SDA Districts. (Exhibit "D")

5. Cover letter from Christopher Weber, Esq. dated January 21, 2022. (Exhibit "E")

6. Certification of Kevin Dehmer, Assistant Commissioner of Finance and Business Services at the DOE, dated January 21, 2022 which provided an explanation of the formula used to calculate how the \$50 million was allocated to the SDA Districts. (Exhibit "F")

7. Cover letter from Christopher Weber, Esq. dated January 28, 2022. (Exhibit "G")

8. Certification of Manual M. DaSilva, CEO of the SDA dated January 28, 2022 which provides more detail concerning the SDA's approach to identifying and sequencing of capital projects for SDA schools. Mr. DaSilva also provided information concerning how the SDA arrived at the Order of Magnitude ("OOM") cost estimate of \$1.6 billion to address the needs of SDA Districts. Mr. DaSilva further explained the SDA's position regarding certain estimates could not be provided with specificity. He also provided specific

details regarding many of the projects for the eleven (11) "First Tranche" Projects; the seven (7) high priority districts experiencing overcrowding and five (5) projects that face serious facilities deficiencies that require new schools. (Exhibit "H")

9. Certification of Manual M. DaSilva, CEO of the SDA dated January 28, 2022. (Exhibit "I")

10. Letter brief submitted by the Education Law Center (ELC) dated February 1, 2022 pointing out that Mr. DaSilva's January 28, 2022 Certification failed to address cost estimates for six (6) SDA Districts. The ELC also held that the State has still not provided information about the need and estimated cost for emergent projects in SDA Districts. (Exhibit "J")

11. Cover letter from Christopher Weber, Esq. dated February 9, 2022. (Exhibit "K")

12. Certification of Manual M. DaSilva, CEO of the SDA dated February 9, 2022 which offers the SDA's position and explanation as to why the SDA cannot provide a more exact estimate for certain projects where appropriate new sites have not been located. The SDA also explained why it was able to provide more detailed estimates in 2005 (as the ELC raised that issue). (Exhibit "L")

The SDA provided an additional update regarding the total amount of monies disbursed by the SDA to that date from the \$50 million allocation.

13. Cover letter from Christopher Weber, Esq. dated February 18, 2022. (Exhibit "M")

14. Certification of Manual M. DaSilva, CEO of the SDA dated February 18, 2022 addressing issues raised by the Master, including the availability of funding from past bond issues, a breakdown of available funding for current capital and emergent projects; a detailed current ongoing emergency projects that are funded by the SDA; and a further explanation to support the SDA's proposal to implement a new process for addressing emergent projects in SDA

Districts by conducting a Builders Conditions Assessment Survey ("BCAS"). (Exhibit "N")

15. Email from Theresa Luhm dated February 23, 2022 providing the ELC response to Mr. DaSilva's Certification of February 18, 2022. (Exhibit "O")

16. Certification of SDA CEO, Manual DaSilva dated April 5, 2022. (Exhibit "P")

17. Certification of SDA CEO, Manual DaSilva dated May 3, 2022. (Exhibit "Q")

18. Certification of SDA CEO, Manual DaSilva dated August 29, 2022. (Exhibit "R")

19. State defendants' letters dated March 2, March 16, July 20 and August 29, 2022 and January 9, 2023. (Exhibit "S")

20. ELC's Proposed Findings of Fact and Factual Conclusions dated August 30, 2022. (Exhibit "T")

21. ELC's Revised and Updated Proposed Findings of Fact and Factual Conclusions dated January 18, 2023. (Exhibit "U")

## **VI. SUMMARY OF THE CURRENT STATE OF THE RECORD**

As noted, the Master has been charged with developing a record of "[t]he status of the cost estimates at issue, including any outstanding steps required to finalize the State cost estimates for the emergent projects needed in SDA districts[.]" Id. at p. 3. In addition, Paragraph 2 of the Remand Order requires information as to "[t]he areas in which data is available and those in which information is unavailable or yet undeveloped, and, ... a recitation of the steps taken to obtain the information, the steps required to complete that task, and a realistic projection of when the data will become available, if possible[.]" Id. The State defendants claim that they have satisfied both paragraphs one and two of the Remand Order, and have thoroughly responded to the Court's request for more information on the status of, and cost estimates for, the 2019 Strategic Plan and emergent projects in SDA districts.

The ELC counters that the State has not provided crucial data and other information responsive to the specific matters that the Supreme Court sought to clarify in the remand proceedings.

**A. Status of, and Cost Estimates for, the Statewide Strategic Plan**

On January 28, 2022, Manuel Da Silva, the Chief Executive Officer (CEO) of the SDA, provided a certification updating the record with a breakdown of cost estimates for the capital projects identified in the SDA's 2019 Strategic Plan. 1/28/22 Da Silva Cert. #1. The certification provides information as to how projects in the 2019 Strategic Plan are sequenced and advanced. Id. at ¶¶5-6. And in an effort to provide as much information as possible, the certification goes on to provide rough order of magnitude (OOM) cost estimates for the projects listed in the 2019 Strategic plan; and it explains how the SDA arrived at those calculations. Id. at ¶¶8-19; see also 2/18/22 Da Silva Cert., ¶12 (explaining the \$1.66 billion OOM estimate to address the 17,000 capacity generating seats needed in SDA districts).

On February 9, 2022, State defendants supplemented that information and provided status updates regarding the projects listed in the 2019 Strategic Plan – notwithstanding the challenges associated with providing real-time information, given the evolving demographics in SDA districts and cost adjustments due to inflation. 2/9/22 Da Silva Cert. And on April 5, 2022, State defendants provided another certification explaining that the remaining costs associated with existing capital projects were estimated to be \$515 million. 4/5/22 Da Silva Cert., ¶5. (Exhibit "P")

The State also supplemented the record on April 6, 2022 by indicating that the SDA considered and approved the "2022 Strategic Plan Update and Capital Plan Presentation" (2022 Strategic Plan). 8/29/22 Da Silva Cert., ¶¶3-6 (Exhibit "P"); see also 4/5/22 Da Silva Cert., ¶13 (Exhibit "P") (anticipating approval of the 2022

Strategic Plan); State Defendants' 7/20/22 Letter (explaining that the 2022 Strategic Plan was implemented after the SDA and the Department of Education (DOE) had obtained updated capacity data and enrollment information). CEO Da Silva's August 29, 2022 certification provides updated OOM cost projections for sixteen projects in twelve districts to address overcrowding; nine more projects to address overcrowding; and three projects to address facilities deficiencies. Id. at ¶¶6-8. The State advocates that the OOM cost projections for the remaining capacity needs beyond the first tranche projects identified in the 2022 Strategic Plan is adequately provided in CEO Da Silva's certification, dated January 9, 2023 (addressing cost projections for the nine high priority districts experiencing overcrowding).

The ELC has summarized its position concerning the supplemental record in its "Proposed Findings of Fact and Factual Conclusions" dated August 30, 2022 (Exhibit "T") and its "Updated Proposed Findings of Fact and Factual Conclusions" dated January 18, 2023 (Exhibit "U").

**B. Status of and Cost Estimates for Emergent Projects in SDA Districts**

The State also has asserted that it has satisfied its obligation to provide the status of cost estimates for emergent projects in SDA districts. In a January 14, 2022 certification, CEO Da Silva provided detailed information regarding the status of the 23 emergent projects being addressed by the SDA—with 19 of them managed by the SDA, and four being delegated for district management, at an estimated cost of \$62,708,092. 1/14/22 Da Silva Cert., ¶3. (Exhibit "I") According to the State, the certification identified each of the twenty-three emergent projects, and provided date-of-completion and cost estimates for each project. Id. at ¶¶4-27. And in the second of three certifications dated January 28, 2022, the State points out that CEO Da Silva updated this information by explaining how emergent projects are defined

and identified, the distinction between emergent projects and routine maintenance, the nature of emergent projects, and the difficulty in maintaining a real-time understanding of the existing universe of projects. 1/28/22 Da Silva Cert. #2, ¶¶3-12. (Exhibit "I") The State emphasizes that the certification goes on to explain the process for identifying emergent projects – including the Potential Emergent Projects Program, and a new program being considered, known as the Building Conditions Assessment Survey (BCAS). Id. at ¶¶6-22. And in his February 9 and 18, 2022 certifications, CEO Da Silva explained the ongoing collaborative outreach process between the SDA, DOE, and SDA districts while the BCAS process was being considered for implementation. 2/9/22 Da Silva Cert., ¶¶10-13 (Exhibit "L"); 2/18/22 Da Silva Cert., ¶¶9-11 (Exhibit "N"). In other words, the State has indicated that as of August 29, 2022, the State has provided all possible and available information regarding the status of BCAS. See State Defendants' letter of 8/29/22. (Exhibit "R")

The Attorney General's letter dated August 29, 2022 stated "[W]e have no new information to offer at this time." The State's submission dated January 9, 2023 (at n.6) confirmed that status. ("As of August 29, 2022, the State has provided all information possible regarding the status of BCAS"). The State has not provided detailed recitation of steps taken to obtain the BCAS, any steps required to move forward on the BCAS or a realistic projection of when, or if at all, the BCAS may proceed, despite urgings from the Master to supplement the record with that information.

Additionally, State defendants indicate that they have supplemented the record with details regarding the \$50 million grant programs for emergent and capital maintenance projects for FY2022 and FY2023, including the status of the disbursements. 1/21/22 Da Silva Cert.; 8/29/22 Da Silva Cert., ¶¶9-10; 2/9/22 Da Silva Cert., ¶¶14-15; 2/18/22 Da Silva Cert., ¶8; 4/5/22 Da Silva



Cert., ¶15; 8/29/22 Da Silva Cert., ¶¶9-10 (also disclosing that the entirety of the FY2022 emergent funding had been allocated as of July 22, 2022). In particular, the FY2022 and FY2023 Appropriations Acts both included direct appropriations of \$75 million to the SDA to provide funding for projects related to emergent and capital maintenance needs. See L. 2021, c. 133; L. 2022, c. 49; 1/21/22 Da Silva Cert.; 8/29/22 Da Silva Cert., ¶¶9-10; 2/9/22 Da Silva Cert., ¶¶14-15; 2/18/22 Da Silva Cert., ¶8; 4/5/22 Da Silva Cert., ¶15; 8/29/22 Da Silva Cert., ¶¶9-10; State Defendants' 8/29/22 Letter. In each Appropriations Act, \$50 million was specifically allocated to SDA districts, and State defendants have explained how the allocations were made to those districts using calculations performed by the DOE. 1/21/22 Dehmer Cert.; 1/21/22 Da Silva Cert.; 8/29/22 Da Silva Cert., ¶¶9-10; 2/9/22 Da Silva Cert., ¶¶14-15; 2/18/22 Da Silva Cert., ¶8; 4/5/22 Da Silva Cert., ¶15; 8/29/22 Da Silva Cert., ¶¶9-10; State Defendants' 8/29/22 Letter. The State defendants contend that they have also explained the process for SDA districts to obtain those funds. 1/21/22 Dehmer Cert.; 1/21/22 Da Silva Cert.; 8/29/22 Da Silva Cert., ¶¶9-10; 2/9/22 Da Silva Cert., ¶¶14-15.

**C. Fiscal Year 2022 and 2023 Appropriations and the New Jersey Debt Defeasance and Prevention Fund**

Paragraph three of the Remand Order calls for “[a]ny other information as is relevant to the pending motion in aid of litigants' rights.” 12/14/21 Order, p. 3. As the circumstances that are relevant to the issues presented in this matter have evolved, it is evident that significant appropriations of funds have been made available to the SDA by the Legislature in FY2022 and FY2023 (in addition to the \$75 million in appropriations for emergent projects each of those years) that will allow the SDA to undertake work on projects identified in its Strategic Plan, as updated in 2022.

For FY2022, the Legislature enacted, and the Governor signed into law, the FY2022 Appropriations Act, which appropriated an additional \$200 million to the SDA to support school facilities projects in SDA districts. L. 2021, c. 133; 1/28/22 Da Silva Cert. #3. In a third certification dated January 28, 2022, CEO Da Silva explained that the \$200 million is in addition to the \$8.9 billion bond funding authorization for SDA districts set by the Legislature in the Educational Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1 to -48, and also explained that with the direct appropriation, the SDA would be able to reduce its planned debt issuance and therefore support the advancement of new SDA projects listed in the Strategic Plan. 1/28/22 DaSilva Cert.#3, ¶¶5-7; 2/18/22 Da Silva Cert., ¶6.<sup>38</sup> According to the State defendants, it went on to provide information regarding working group discussions with SDA districts to assist the SDA in advancing more projects. Id. at ¶¶8-12.<sup>39</sup>

In its August 6, 2021 supplemental brief to the Court, the State defendants pointed out that the FY2022 Appropriations Act also contained legislation creating the New Jersey Debt Defeasance and Prevention Fund (Fund). See L. 2021, c.133; State Defendants' 8/6/21 Supplemental Brief, p.10. Monies from the Fund are appropriated for capital construction projects for which State debt is already authorized bylaw, or for which funding would have been derived from future State bond issuance, to avoid debt

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<sup>38</sup> In response to inquiries from the Master, the State defendants did provide further detail regarding the use of bond funding, CEO DaSilva provided certifications dated February 18 and April 5, 2022, which, in part, offered information regarding the SDA's issuance of \$11.85 billion in bond funding to date, the \$650 million in authorized bond funding remaining to be issued, and how the FY2022 and FY2023 appropriations would be used to reduce planned debt issuance and advance current and new capital construction projects. 2/18/22 Da Silva Cert., ¶¶3-5; 4/5/22 Da Silva Cert., ¶¶3-12, 14.

<sup>39</sup> In his February 18, 2022 certification, CEO Da Silva also supplemented the record with a breakdown of available funding for capital projects, emergent projects, and additional capital projects as of December 31, 2021. 2/18/22 DaSilva Cert., ¶7.

issuance. L. 2021, c. 133; State Defendants' 8/6/21 Supplemental Brief, p. 10; State Defendants' 3/16/22 Letter. The Fund, N.J.S.A. 52:9H-2.2, consists of two separate parts, defeasance and avoidance, and school construction projects can only be funded from money allocated to debt avoidance. On March 2, 2022, State defendants supplemented the record with correspondence from the State Treasurer to the Joint Budget Oversight Committee, requesting authority to transfer \$150 million to the SDA. See State Defendants' 3/2/22 Letter (enclosing February 28, 2022 from the State Treasurer). The State defendants explain that those funds would be in addition to any fiscal year appropriations by the Legislature. State Defendants' 3/16/22 Letter.

Likely in response to the efforts to develop a record in this matter, for FY2023, the Governor approved legislation that included an appropriation of \$1.9 billion from the Fund to the SDA to fund "school facilities projects, emergent needs, and capital maintenance in school districts for which State debt is already authorized by law, or for which funding would have been derived from future State bond issuances, thereby constituting debt avoidance[.]" L. 2022, c. 18; State Defendants' 7/20/22 Letter.<sup>40</sup> The State Defendants explain that \$1.55 billion of the appropriation—which encompasses the State Treasurer's request for the release of \$150 million from the Fund — is specifically designated for school facilities projects, emergent needs, and capital maintenance in SDA districts. State Defendants' 7/20/22 Letter. That letter, which is part of the record, also provided information regarding the status of remaining monies in the Fund. Id.

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<sup>40</sup> Previously, on March 16, 2022, State defendants submitted information regarding the Governor's proposed FY2023 budget, which had included a \$350 million general fund appropriation for the SDA. State Defendants' 3/16/22 Letter.

Of the FY 2023 \$5.15 billion appropriation to the Fund, of which \$1.55 billion was appropriated for school facilities projects, emergent needs, and capital maintenance in SDA districts, an additional \$2.206 billion has not yet been allocated or disbursed. (Attorney General's Letter to Special Master dated July 20, 2022) Because it has not specifically been allocated to either debt avoidance capital construction or debt defeasance, the remaining \$2.206 billion is potentially available under Sections 5a. and 5b. of P.L. 2022, c. 18 for either purpose. Thus, it appears that the \$2.206 billion could potentially finance school construction projects in SDA districts, subject to the State Treasurer submitting a list of proposed projects to JBOC pursuant to Section 5b. of P.L. 2022, c. 18.

When combined, a total of \$2.971 billion from FY 2022 and FY 2023 appropriations to the Fund remains potentially available to the Administration for proposed school construction projects upon request by the State Treasurer.

The Administration has declined to confirm or commit whether it is its intention or plans for the State Treasurer to seek and secure all or some of the \$2.971 billion to be allocated for proposed SDA facilities projects in FY 2023 or even whether those funds would be committed in the event future Legislatures did not continue to provide funding for SDA projects through either cash (pay as you go) or bonding.

As such, there is currently no ongoing or long-term mechanism for financing needed facilities projects in the SDA districts in future years. All prior bonding authorized by the Legislature has been committed to projects on the SDA's existing capital plan and is not available to be used for new projects.

The Legislature, in the FY 2022 and FY 2023 State Budgets, has directly appropriated funding for a portion of the facilities projects in the 2022 Strategic Plan Update. Absent a direct appropriation to the SDA or the approval of an appropriation in

the Fund for debt avoidance upon request by the State Treasurer, there is no financing in place or commitment to provide funding for the remaining capacity generating projects in the 2022 Strategic Plan Update, aging buildings in need of replacement, and emergent and capital maintenance projects beyond those covered by the FY 2022 and FY 2023 direct appropriations for this purpose.

It is the State defendants' position that since the filing of ELC's motion in January 2021, the State has secured a total of \$1.75 billion in direct appropriations and debt prevention funds for the purpose of advancing school facilities projects in SDA districts (\$200 million in FY22, and \$1.55 billion for FY23), plus \$150 million specifically designated for capital maintenance and emergent projects (\$75 million in FY22, and \$75 million for FY23). Based upon those factual assertions, together with the legal arguments presented, the State defendants advocate that they need not take any further action as they have continued to satisfy its constitutional obligations.

Based upon the facts and circumstances, the ELC counters that the State has not provided sufficient information, plans, commitments or assurances that would establish a secure source of ongoing or recurring revenue to finance needed capital construction projects and emergent capital maintenance projects in SDA districts beyond the \$1.85 billion provided through the FY2022 and FY2023 appropriations process.

#### **VII. MASTER'S CONCLUSIONS AND FINDINGS REGARDING THE STATE OF THE RECORD**

At this point, a substantial record has been accumulated, which includes twelve (12) certifications from SDA CEO, Manuel DaSilva regarding a variety of topics, including, but not limited to, the availability of construction cost estimates, funding for the emergent projects program, the need for a Building Conditions Assessment Survey (BCAS), an updated Strategic Plan and State appropriations made to the school construction program in FY22 and

FY23, along with records from Committee hearings and budgets. Since the Master was engaged in this matter, substantial sums of money have now been committed or, at least are available, as a result of the Administration's efforts in the last two budget cycles. Notwithstanding those circumstances, in October 2022 the Master advised the parties that there are some glaring holes in the record which the Master requested that the parties address.

In the Master's correspondence to the parties dated October 25, 2022, the Master noted, as a premise, that his charge, as noted in the Court Order dated December 15, 2021 referenced three issues lacking in information and clarity before the Court:

- The status of the cost estimates at issue, including any outstanding steps required to finalize the State's cost estimates for the emergent projects needed in SDA districts; and
- The areas in which data is available and those in which information is unavailable or yet undeveloped, and, where the information is not available or has not been developed, a recitation of the steps taken to obtain the information, the steps required to complete that task, and a realistic projection of when the data will become available, if possible; and
- Any other information as is relevant to the pending motion in aid of litigants' rights.

The Court further ordered the Master to submit a written report of my findings within 60 days. That deadline was subsequently extended by the Court *sua sponte* on several occasions.

With regards to the charge provided to the Master by the Supreme Court, the Master noted certain deficiencies in the record.

**A. Regarding the State of the Record Pertaining to the Universe of Need**

The record does reflect that on January 21, 2020, relying on the results of the New Jersey Department of Education's (DOE) 2019 Educational Facilities Needs Assessment, the SDA Board adopted its 2019 Statewide Strategic Plan for the SDA districts (2019 Strategic Plan). For reference, the 2019 Strategic Plan is available on the

SDA's website at [https://www.njsda.gov/Content/Projects/2019 Statewide Strategic Plan.pdf](https://www.njsda.gov/Content/Projects/2019%20Statewide%20Strategic%20Plan.pdf) and is attached to the First of Three Certifications of Manual Da Silva dated January 28, 2022, as Exhibit A. (Da Silva Jan. 28, 2022 #1 Cert.).

As a "first tranche for advancement to address overcrowding," the 2019 Strategic Plan identified 11 projects in 8 districts as "high priority needs" with "ready availability of land under NJSDA and/or District control." 2019 Strategic Plan at 17.

The 2019 Strategic Plan further identified another 7 districts as "high priority ... in recognition of the severity of overcrowding..." with identification of appropriate sites still needed. 2019 Strategic Plan at 18.

To address "serious facilities deficiencies," the 2019 Strategic Plan identified the need for 5 replacement schools in 3 districts. 2019 Strategic Plan at 22.

On January 28, 2022, the SDA provided cost projections for 18 -- of the approximately two dozen -- projects listed for first tranche advancement in the 2019 Strategic Plan in current dollars with cost escalations over 5, 10 and 15 years. In 2022 dollars, the total cost estimate for those 18 specified projects was \$1.4 billion. Da Silva Jan. 28, 2022 #1 Cert., Ex. D.

Cost projections were included for only 18 projects because the SDA had "greater clarity regarding potential logistical factors" including site availability for those specific projects. Id. at ¶16.

Despite a general reference to ongoing "Working Group" discussions between the SDA and school districts to further identify capacity needs, id. at ¶12, the State had not provided a timeline or articulated a process by which the remaining projects will be defined with enough specificity to generate cost estimates.

On April 6, 2022, the SDA Board updated its Strategic Plan using 2019-2020 enrollment data. The 2022 Strategic Plan Update and Capital Plan Presentation (2022 Strategic Plan Update) is

available on the SDA's website at [https://www.njsda.gov/Content/Projects/2022 Statewide Strategic Plan.pdf](https://www.njsda.gov/Content/Projects/2022%20Statewide%20Strategic%20Plan.pdf).

The 2022 Strategic Plan Update reported as follows: 31 projects (of 39 projects from the prior capital plan, last updated April 2014) have now been delivered, with 8 still in the construction process, 2022 Strategic Plan Update at 3-4; there are current capacity needs of 17,580 seats in 21 SDA districts, *id.* at 16; and there are over 50 buildings identified in the 2019 EFNA with "needs based upon building age and condition," *id.* at 21.

In reassessing its "first tranche for advancement," the SDA identifies 16 projects in 12 districts that "address high priority capacity needs" with ready availability of land. 2022 Strategic Plan Update at 18, 24.

In expanding the high priority projects to address overcrowding from 11 in the 2019 Strategic Plan to 16 in the 2022 Strategic Plan Update, the SDA added five projects as follows: projects in Elizabeth, New Brunswick, and Trenton were removed from the TBD (to be determined) list following identification of a site and reclassified as capacity generating facilities with ready availability of land; and two projects in Newark were reclassified from replacement facilities to capacity generating facilities. Compare 2022 Strategic Plan Update at 18 with 2019 Strategic Plan Update at 17, 18, 22.

The SDA also increased the number of districts with capacity needs on its "TBD list" from 7 to 9, pending identification of appropriate sites. In addition to reclassifying the Elizabeth, New Brunswick, and Trenton projects, the SDA added "TBD projects" for Hoboken, Gloucester City, Long Branch, Vineland, and Phillipsburg. 2022 Strategic Plan Update at 22.

On August 29, 2022, the SDA provided updated cost projections for 19 projects listed for first tranche advancement in the 2022 Strategic Plan Update in current dollars with cost escalations over 5, 10 and 15 years. In 2022 dollars, the total cost estimate



for the 19 specified projects was \$1.523 billion. Certification of Manuel Da Silva dated August 29, 2022 (Da Silva Aug. 29, 2022 Cert.), Ex. A.

However, no cost projections have been provided for the nine high priority districts experiencing overcrowding also identified in the 2022 Strategic Plan Update for first tranche advancement because "the number of new seats and the types of projects required to address the remaining capacity needs in each of these districts has yet to be determined." Id. at ¶7.

In testimony before the Assembly Budget Committee on April 11, 2022, SDA CEO Manuel Da Silva explained that in addition to the capacity generating projects specifically named in the 2022 Strategic Plan Update, there are an additional 50 aging school facilities in need of replacement. Without referencing any data or cost analysis, he estimated in a very general way that if each project cost roughly \$100 million to complete, the total cost to address those facilities would amount to an additional \$5 billion. Certification of Manuel Da Silva dated May 3, 2022 (Da Silva May 3, 2022 Cert.) at ¶¶7-8.

Although Mr. DaSilva's estimates may have been couched as "ballpark only", the Master noted that the record appears to be deficient or incomplete in that the estimates provided to date do not provide an overall cost estimate of the projects that likely are or will be necessary. While the Master is certainly mindful that there are impediments to be able to provide specific cost estimates, the Master expressed his view that that there should be an effort made to devise a mechanism to provide generalized estimates so that the Court is able to determine the "universe of need" to be addressed.

**B. Regarding the State of the Record for the Universe of Need for Emergent Projects**

The Master noted to the parties that with regards to emergent projects, because of "the time-sensitive nature of emergent

projects," the Master acknowledged that the SDA has found it understandably "difficult to maintain a real-time understanding of the existing universe of [those] projects at any given time, let alone, the estimated cost to address them." Second of Three Certifications of Manuel Da Silva dated January 28, 2022, ¶6 (Da Silva Jan. 28, 2022 #2 Cert.)

In the past, the SDA and the DOE have asked districts to submit lists of potential projects for consideration. Even though there is funding in place in the current budget (FY23) for emergent projects in the amount of \$50 million, there is currently no process or mechanism in place in order to assess the current "universe of need" for emergent projects. Notwithstanding that circumstance, the Master notes that this Court tasked the Master to ascertain that need. In fact, arguably, that assessment is necessary in order to make a determination of whether there is funding available to meet that obligation.

In the past, the SDA has acknowledged that it has identified certain drawbacks to the current PEPP process including: incomplete or inappropriate applications; varying abilities and staff availability resulting in approved submissions that do not reflect equity and consistency; inability of process to move swiftly enough to address true emergent conditions; underrepresentation of the work truly appropriate for advancement; and unreliability of a process that depends on information provided by SDA districts taking varying approaches in accessing their facilities. Id., ¶¶7-12.

To replace use of the PEPP, which the SDA has itself described as "a reactive response," the SDA proposed in the 2019 Strategic Plan to initiate "a more proactive mechanism" called the Building Conditions Assessment Survey (BCAS). Id., ¶¶13, 17.

The BCAS has been described as "an assessment of all school facilities in SDA districts by a team(s) of professionals utilizing a consistent and uniform set of defined indicators..." Id., ¶14.

The BCAS, if approved, would be expected to "provide a complete, thorough body of information about building conditions and the remaining useful life of building systems," that will result in "dependable information" and will support "the development of reliable cost estimates." In addition, the BCAS will enable planners to "identify potential emergent conditions," "address similar conditions at multiple schools rather than a school-by-school approach," and perform "comparative analyses about cost to fix versus cost to replace a building." Id., ¶¶14-18.

In the past, the SDA projected a current cost of "approximately \$30 million" to undertake a BCAS, estimating it will take "approximately four to six months" to procure firm(s) for the performance of services and "approximately twelve months from initiation of the engagement of the service(s) through completion of the work." Id., ¶20.

The SDA recommended initiating a BCAS across all SDA districts in both its 2019 Strategic Plan (at p. 25) and its 2022 Strategic Plan Update (at p. 26).

On behalf of Plaintiffs, and in a rare instance of agreement between the SDA and the ELC, the ELC has indicated that it concurred that the BCAS would be a business-like approach to the issue and that it would be willing to endorse such a mechanism.

The record currently contains no information from the SDA as to the status, cost and schedule for implementation of the BCAS. The Attorney General's letter dated August 29, 2022 is the latest information on the subject. That letter stated "[W]e have no new information to offer at this time."

Because the DOE and SDA have not used the PEPP process since 2016, the SDA has not yet commenced the BCAS, and the State did not solicit such information from the SDA districts during the remand proceeding, the Master expressed his view to the parties that the record is vague or incomplete concerning the cost of the

universe of potential emergent and capital maintenance projects needed in the SDA districts.

**C. Regarding Issues Involving the Appropriation Process**

Lastly, with regards to the appropriation process, there has been a major change in philosophy for funding SDA projects by the Administration that requires development of further record.

In the FY 2022 and FY 2023 State Budget, the Legislature has shifted to financing school construction on a "pay-as-you-go" basis. As a result, absent a direct appropriation to the SDA or the approval of an appropriation in the Debt Defeasance and Prevention Fund (Fund) for debt avoidance upon request by the State Treasurer, there is not sufficient committed financing in place for all of the projects in the 2022 Strategic Plan Update, aging buildings in need of replacement, and emergent and capital maintenance projects beyond those covered by the FY 2022 and FY 2023 direct appropriations for this purpose.

The Master was pleased that in the FY 2023 budget, the Legislature appropriated \$5.15 billion to the Fund. P.L. 2022, c. 18. Of that total, \$1.9 billion was appropriated to the SDA, of which \$1.55 billion "is appropriated for school facilities projects, emergent needs, and capital maintenance in SDA districts and \$350,000,000 is appropriated for school facilities projects, emergent needs, and capital maintenance in all other districts." P.L. 2022, c. 18, Section 2a. Attorney General's Letter to Special Master Miller dated July 20, 2022.

To date, no information has been provided by the State about how many or which projects in the 2022 Strategic Plan Update, nor how many emergent and capital maintenance projects, will be funded with the \$1.55 billion appropriation in the Fund.

In FY 2023, the Legislature also appropriated another \$75 million for the SDA "to support capital maintenance and emergent needs in districts, subject to the approval of the Director of the Division of Budget and Accounting." P.L. 2022, c. 49. Attorney

General's Letter to Special Master Miller dated July 20, 2022. Although not specified in the legislation, according to SDA CEO Da Silva, "It is planned that the funding will be allocated in the same manner as the FY 2022 appropriations, with \$50 million for SDA districts and \$25 million for RODs. Da Silva Cert., Aug. 29, 2022, ¶10.

The record contains no information about the basis for this appropriation amount and the extent to which it will address outstanding emergent and capital maintenance projects in SDA districts.

The Master recognizes that the record supports the proposition that there is potential facilities funding for SDA Projects in the Debt Defeasance and Prevention Fund. That Fund, N.J.S.A. 52:9H-2.2, consists of two separate parts, defeasance and avoidance, and school construction projects can only be funded from money allocated to debt avoidance.

In FY 2022, the Legislature appropriated \$1.2 billion to the Fund's debt avoidance account. P.L. 2021, c. 125. Of that amount, \$765 million remains in that account, Attorney General's Letter to the Special Master dated July 20, 2022, and is available to finance school construction projects in SDA districts upon submission of a list of such projects by the State Treasurer to the Joint Budget Oversight Committee ("JBOC") pursuant to P.L. 2022, c. 18, section 5b. None of the \$435 million already disbursed from the FY 2022 debt avoidance monies has been spent on school construction.

Of the FY 2023 \$5.15 billion appropriation to the Fund, of which \$1.55 billion was appropriated for school facilities projects, emergent needs, and capital maintenance in SDA districts, an additional \$2.206 billion has not been appropriated or disbursed. (See Attorney General's Letter to the Special Master dated July 20, 2022) Because it has not specifically been allocated to either debt avoidance capital construction or debt defeasance, the remaining \$2.206 billion is apparently available under

Sections 5a. and 5b. of P.L. 2022, c. 18 for either purpose. Thus, the \$2.206 billion can potentially be used to finance school construction projects in SDA districts, subject to the State Treasurer submitting a list of proposed projects to JBOC pursuant to Section 5b. of P.L. 2022, c. 18.

Combined, a total of \$2.971 billion from FY 2022 and FY 2023 appropriations to the Fund remain available to the Administration for proposed school construction projects upon request by the State Treasurer.

While the Master commends the State's efforts to provide for and identify potential sources of funding for SDA projects, notwithstanding those circumstances, to date, the Administration has declined to confirm its intentions, plans or commitment for the SDA to request the State Treasurer to seek and secure funds for proposed school facilities projects in SDA districts from JBOC.

The Administration has also apparently declined to confirm its intention or plans for the State Treasurer to ask for all or some of the \$2.971 billion to be allocated for proposed SDA facilities projects in FY 2023.

As a result, there is currently no ongoing or long-term mechanism for funding the SDA's school construction program. All prior bonding authorized by the Legislature has been committed to projects on the SDA's existing capital plan and is not available to be used for new projects.

Without a long-term financing mechanism, the SDA will be compelled to seek year-to-year funding through the annual budget process. Under this process, funding is not secured until June 30 of each year, only three months before the fiscal year begins.

The Master recognizes that the State has the prerogative to fund the SDA Projects in a "pay as you go" manner. However, that change in philosophy has created uncertainty in the funding process that was not present when the obligation was funded through bond financing which authorized and made funding available for capital

projects like the ones that the State touts have been completed in the last decade.

To be clear, the Master does not intend to report to or recommend to the Court that it mandate a financing mechanism for the State's obligation. Notwithstanding that proposition however, it is likely that not every budget picture will be as favorable as FY22 and FY23 in order to allow 100% of the obligation to be funded on a "pay as you go manner." As a result, the change in the method used for the appropriation of capital projects such as the ones proposed by the SDA requires more, such as an assurance or representation that the State will continue to "seek and secure" funding for the approved capital projects so that those projects can proceed expeditiously regardless of whether any additional appropriation is achieved by bonding, "pay as you go cash", the utilization of Debt Defeasance and Prevention funds that have been established, or any combination of those financing mechanisms. The Master has expressed his view to the parties that these assurances were not necessary when the funding was based upon bond financing since the bonds were "in place" and could be drawn upon. However, the current circumstances, require additional consideration, treatment and assurance that is not yet been forthcoming.

Respectfully submitted,

*/s/ Thomas C. Miller*

**THOMAS C. MILLER, A.J.S.C. (Ret.)  
Court Appointed Master**