SUPREME COURT OF NEW JERSEY
DOCKET NO. 42,170

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

BRIEF IN RESPONSE TO MOVANT ABBOTT DISTRICTS AND CROSS-MOTION OF THE PLAINTIFFS AND IN REPLY TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION

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STATEMENT OF FACTS

The State relies upon the Statement of Facts presented in its initial brief filed on April 7, 2006, as well as those additional facts set forth in the Supplemental Certification of Lucille Davy ("Davy Supp. Certification") as if set forth in full herein.

LEGAL ARGUMENT

POINT I

THE COURT SHOULD GRANT THE NEW ADMINISTRATION'S REQUEST FOR THE OPPORTUNITY TO EVALUATE CURRENT PROGRAMMATIC AND FISCAL CONTROLS AND TO ENSURE THAT APPROPRIATE ACCOUNTABILITY MEASURES ARE IN PLACE IN ABBOTT DISTRICTS.

The State seeks the Court's approval to hold Abbott district funding relatively flat for FY2007 while undertaking a comprehensive review of Abbott, both programmatically and fiscally. The State recognizes the Constitutional obligation to provide children with a thorough and efficient education and our own obligation to exercise fiscal and programmatic oversight over the expenditure of Abbott funds. See e.g. Abbott v. Burke, 149 N.J. 145, 194 (1997) ("Abbott IV")("we require that the Commissioner use his statutory and regulatory authority to ensure that the increased funding that we have ordered today be put to optimal educational use."); Abbott v. Burke, 136 N.J. 422, 452 (1994) ("Abbott III") ("We find inescapable the conclusion that the Legislature or the Department should ensure that the uses of the additional funding available to the [Abbott] districts are supervised and regulated."). Moreover, the Governor has expressed his personal commitment to assuring that this review occurs and that appropriate accountability measures are in put in place. Initial Certification of Lucille Davy ("Davy Certification"), Exhibit X.

In opposition to the State's motion, Plaintiffs and the twenty movant Abbott districts make two central arguments. First, they contend that the State should not be given additional time to institute accountability measures in funding Abbott districts since the State has been given this opportunity for the preceding four years but failed to institute such reform. Second, they argue that the State's motion should be denied because it will require cuts to critical components of Abbott education programs. For the reasons set forth below, the Court should reject these arguments and grant the State its requested relief.

A. Contrary to Plaintiffs' and Movants' Contention, the New Administration Requires Additional Time to Institute Accountability Measures.

Plaintiffs and Movants[1] argue that the State should not be granted more time to do what a prior Administration promised to do but failed to accomplish. However, neither Plaintiffs nor Movants dispute the need for greater accountability, tightened fiscal controls, and real programmatic reviews and fiscal audits in our Abbott school districts. The fact that the State has failed to institute accountability measures or to control skyrocketing funding requests for supplemental funding does not mean that reform is not desperately needed. On the contrary, failure to implement

[1]As used in this brief, "Movants" refers to all of the school districts that are seeking to intervene in this matter; "Movants' Brief" refers to the brief filed on behalf of 16 of those school districts.

fiscal and programmatic reforms means that they are needed now, more than ever.

The State's dire financial situation requires that the Governor maintain Abbott school funding at slightly higher than FY2006 levels, while implementing accountability measures and working towards the creation of a new funding formula. As the past four years have demonstrated, it is not enough to spend large sums of money in Abbott school districts; the State must make sure that the system works and that all children receive the thorough and efficient education to which they are constitutionally entitled.

The difficulty that the State presently faces is that we will not be able to take all necessary steps to put in place accountability measures for the FY2007 school budget review and approval process. Programmatic and fiscal reviews must be conducted in a thorough, fair, and unhurried manner. While the State wishes that it had ample time to conduct such reviews and evaluate school budgets, the simple fact is that we do not.

To institute appropriate accountability measures, the State must first determine what is occurring in the Abbott districts, how Abbott funds are being spent, and whether these expenditures are complying with the mandate to provide Abbott students with a thorough and efficient education.[2] The State is

[2]Whether some of this information could have collected through the formal evaluation required by Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V") is irrelevant at this point. The

committed to doing this. Moreover, our review will not be limited to the Abbott districts but will also include an analysis of the oversight and technical assistance the Department of Education ("Department") provides.

The new administration, led by Governor Jon S. Corzine, has already taken concrete steps toward meaningful reform and the implementation of accountability measures in Abbott districts. First, at the Governor's request, the Department issued a Request For Qualifications ("RFQ") to complete comprehensive fiscal audits of the Newark, Jersey City, Paterson and Camden school districts. Davy Supp. Certification, ¶23. The Department anticipates conducting further comprehensive audits of Abbott school districts but has chosen these four critical areas as a starting point.

In addition to issuing the RFQ, the Governor has asked the Department to make internal structural changes to enhance its fiscal oversight capabilities. Id. at ¶24. The Department is also in the process of hiring an expert in urban education issues to oversee its program accountability efforts. Id. at ¶27. Finally,

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"comprehensive formal evaluation" directed by Abbott V was "to verify that [Success for All] SFA is being implemented successfully and is resulting in the anticipated levels of improvement in the Abbott elementary schools." Id. at 501-02. It does not appear that such a focused evaluation would have provided what the ELC claims. Moreover, the broadening of the scope of that formal evaluation in the Abbott v. Burke, 177 N.J. 578 (2003) ("Abbott X") mediation agreement to the "effectiveness of programs and reforms in improving student achievement in the Abbott districts" may have made procuring such an evaluation much more difficult. See Davy Supp. Certification, ¶29.

on April 17, 2006, Governor Corzine signed the School District Fiscal Accountability Act, P.L. 2006, c.15, which authorizes the Commissioner to appoint a State monitor in districts lacking appropriate controls and procedures. Id. at ¶25. The Commissioner will use this important new tool by appointing State monitors in those Abbott districts that meet the Act's criteria. Ibid.

Even though the State has understood the need for fiscal reform and greater accountability for several years, the simple fact is that we need additional time to truly reform our present system of Abbott funding. Neither the Court nor the State could have anticipated that Abbott V would result in a $1 billion increase in funding for Abbott districts during the past four years. Nor could the Court have anticipated that this funding would have been distributed without the State fully knowing either what programs were being funded or whether the programs were effective. See also Abbott v. Burke, 119 N.J 287, 386 (1990) ("Abbott II") (Court estimating that the total additional cost of meeting the Abbott remedies would be $440 million in 1989-90 school year with continuation of aid similar to categorical programs).

The State acknowledges that it has not imposed the level of fiscal oversight required in the Abbott districts. The State also recognizes that, to actually vindicate the constitutional rights of our children, oversight and accountability measures must be put into place. Going forward, the State plans to ensure that

the constitutional rights of all children who have similar disadvantages are vindicated in a fiscally responsible manner by establishing a new system of school funding that is child rather than district focused. The system must focus on the needs of all our disadvantaged children, regardless of what school district they live in. For this reason, the State strongly opposes Movants' suggestion that funding Abbott districts be done at the expense of meeting the needs of children in other districts and urges the Court to reject this argument. See Movants' Brief at 50. ("The Abbott districts and students have constitutional entitlements under the Abbott decisions. The other claimants cited by the State, whatever their needs may be, have no similar constitutional foundation for their claims on the budget.").

There is one point on which the State, the Plaintiffs and Movants all agree, which is that the annually changing standards for Abbott budgets is an obstacle to sound planning and good fiscal policies. The State submits that the best solution to this problem is to give the new administration time to find a better way. ELC and Movants, however, ask this Court to permit another one-year emergent fix to the budgeting process.[3] Understandably, ELC and

[3]The ELC suggests a presumptive process similar to last year where if districts submit budgets that increase no greater than the cost of living increase, i.e., 4.04%, the budget is approved without an in-depth review. See ELC Brief at 35-36. Such a process brings us further rather than closer to understanding the real fiscal and programmatic needs of these districts. It should also be noted that the Movants criticized this process because if

Movants question whether that will occur given unsuccessful efforts in the past to do so.[4] However, given the concrete steps that the Governor and Department have already taken to increase accountability at the State and district level, the new administration should be provided the opportunity to finally fix the system, either by establishing a sustainable process for implementing the funding protocols contemplated by Abbott V, and consistent with the modification of supplemental program requirements incorporated in Abbott X, or through legislative enactment of a new funding formula. For all of these reasons, the State asks this Court to give the new administration one-year to institute accountability measures and strive towards the creation of a new funding formula.

B. Contrary to the Contention of the Plaintiffs and Movants, the State's Proposed Funding for FY2007 Will Not Require Cuts to Critical Education Programs.

The second argument made by Plaintiffs and Movants, that the Court cannot grant the relief sought by the State without

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a district sought more than the 4.04% increase, it was to be subjected to increased scrutiny. See Movants' Brief at 20-21.

[4]Both Movants and ELC suggest the Commissioner's representation in Abbott X and Abbott v. Burke, 177 N.J. 596 (2003) ("Abbott XI"), that the relief being requested was only for FY2004, was an "assurance" that the State would never again return to Court for relief from the funding protocols of Abbott V. The Commissioner, however, did not (and quite frankly could not) bind future administrations in that manner. Rather, the Commissioner was merely reflecting the State's understanding that any future relief could not be done without a further application to this Court, an application such as the present one.

adversely impacting the education received by children in Abbott districts, must also fail. Several Abbott districts have come in with essentially flat budget requests that are consistent with the Governor's Proposed Budget. Davy Supp. Certification, Exhibit G. These districts have streamlined their budgets to protect crucial programs while reducing funding to other, less critical programs.

In their papers, Plaintiffs incorrectly allege that the State is seeking to completely preclude Abbott districts from obtaining supplemental funding. ELC Brief at 17, 29-31. This is simply inaccurate. The Governor's budget provides significant funding to the Abbott districts, over and above parity, along with a slight increase in supplemental funding. In fact, the Governor has recommended over $500 million in above-parity EOA[5] or supplemental funding. Davy Supp. Certification, Exhibit B. Thus, Abbott districts have significant resources above parity under the Governor's proposed budget to support educational programs in the Abbott districts.

In reality, the districts are seeking an additional $1 billion, or close to a 100% increase over their funding during the prior year. Id. at Exhibit C. The districts alleged "requests for supplemental funding," are actually requests for increases over the

[5]This aid is often referred to as "supplemental aid." However, to avoid the confusion that because it is supplemental aid it is available only to support supplemental programs, see infra at 10-12, we refer to it in this brief as "above-parity EOA."

amount of "supplemental funding" that they received during the prior school year (i.e., above-parity EOA from FY2006). The Abbott districts have taken the prior year's total funding allocation - including both parity and supplemental aid – as the starting point, or baseline, for this year's funding request. Starting from last year's total funding allocation, they now seek extraordinary increases in supplemental aid. For example, Elizabeth contends it is requesting approximately $23 million in supplemental funding. Certification of Pablo Munoz ("Munoz Certification"), ¶3. However, Elizabeth is actually seeking an additional $23 million over and above the $20 million in supplemental aid that the Governor has provided in this year's budget. As such, Elizabeth is really asking for a total of almost $44 million in supplemental aid. Davy Supp. Certification, Exhibits B, C. Similarly, Keansburg is actually seeking $12 million in supplemental aid, not $4 million as it alleges, and Pemberton is seeking $26 million in supplemental aid, not $9 million, as it alleges. Id. at Exhibit C; Certification of Barbara A. Trzeszkowski ("Trzeszkowski Certification", ¶3; Certification of Mark Cowell ("Cowell Certification"), ¶3.

In recent years, the Abbott districts have viewed supplemental aid not as a vehicle for limited and specific programs but rather as a means to fill gaps in their overall budget. While this is clearly not the intent of Abbott V, we have now reached the point where supplemental funding requests are submitted by

districts to fund major components of their school budgets. It is difficult to believe that these increases are required to solely fund increases in supplemental programs, positions and services. If the districts were in fact utilizing supplemental aid (or above-parity EOA) in the manner for which it was intended, the increases in the funding requests for this year would be truly astonishing. In total, for FY2007, Abbott districts are seeking an increase of more than $450 million over above-parity EOA. Davy Supp. Certification, Exhibit C. Elizabeth received $29.1 million in above-parity EOA in FY2006 but now seeks an additional $23 million in that aid category for FY2007, which translates into a 79% increase in this funding stream. Id. at Exhibit B, C. Passaic received $12.8 million in above-parity EOA in FY2006 but now seeks an additional $31 million, or a 242% increase for FY2007. Camden received $27 million in above-parity EOA in FY2006 but now seeks an additional $78 million, or a 289% increase for FY2007. Ibid. These requests, on their face, could not reasonably be required for new or expanded supplemental programs, positions and services which, it must be noted, are not specified.

Movants fail to acknowledge that a fundamental premise of the remedies in Abbott V was the blending of the different funding streams, creating one pot of money, to satisfy all school district needs. Abbott V, supra, 153 N.J. at 498 ("Under this scheme, the school combines all of its sources of revenue or 'funding streams'

and uses the aggregated amount as the basis for the entire school budget.").[6] Rather, plaintiffs and Movants claim that an Abbott budget has three main elements -- preschool, "K-12 foundational program supported by parity" and "K-12 mandated and other supplemental programs based on need."[7] ELC Brief at 4; Movants' Brief at 7. But K-12 funding since Abbott V has not been allocated in separate categories of aid designed to support separate types of programs.

It is important to note that granting the State the requested relief will not lead to a reduction in existing supplemental programs. Cf. ELC Brief at 30-31. Since all K-12 funding streams are available to support all K-12 programs, this does not need to be the result. Moreover, it should not occur if the supplemental programs are truly based on a demonstrated need

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[6]The inability to segregate funding neatly into supplemental or foundational programs is exemplified by Plaintiffs' own list of "supplemental programs," which includes items such as reducing class size to Comprehensive Education Improvement and Financing Act ("CEIFA"), N.J.S.A. 18A:7F-1 et seq., models, library media specialists, nurses and technology coordinators -- the very type of expenditures one would expect to find in an I&J district and that therefore makes them part of the "foundational budget supported by parity." ELC Brief at 11-12.

[7]Although Abbott V had certain mandated positions, those positions are no longer mandated after the mediation agreement incorporated into Abbott X. Rather "[t]he determination of need must guide school and district plans and budgets in all program areas. Thus, where the Court established a baseline [in Abbott V], schools must either provide the baseline or, depending on need, adjust it to provide the baseline or, depending on need, adjust it to provide none, less or more than the baseline, or an alternate design." Abbott X, supra, 177 N.J. at 590.

and are effective in meeting that need. In fact, seven Abbott districts have already made the difficult budget decisions to meet the Governor's budget recommendations, and another district is anticipated to do likewise, all without the dire consequences predicted by the ELC and movants. See Davy Supp. Certification, ¶18, Exhibit G.

Those districts that have not made appropriate reallocations and reductions in their budgets, in particular those seeking to intervene in this matter, seem to be focusing most of the proposed cuts in instructional areas and directing many of the reductions to supplemental programs, see e.g. after school and summer school programs, tutors, facilitators, literacy and math coaches, security guards. Movants' Brief at 28-29. This might be appropriate if the districts were proposing those cuts because the identified programs were not effective in meeting the needs of their students. This, however, does not seem to be the case, given the characterization of these reductions as "devastating." Id. at 29. Quite frankly, a number of the proposed cuts certainly should raise questions as to the efficacy of the programs or positions. For example, proposed cuts include instructional aides, Certification of Victor Gilson, ¶13; non-essential educational assistants, Certification of Edward Gola, Jr., ¶13; technology coordinators as well as educational technology coordinators, Cowell Certification, ¶13; alternative education program for elementary

school students, Certification of H. Gordon Pethick, ¶13; and parenting programs as well as parent liaisons, Certification of Margaret J. Nicolosi, ¶13.

Moreover, some of the proposed "cuts" make little sense. For example, Newark proposes cutting Title I and ECPA Carryforward. Certification of Marion Bolden ("Bolden Certification"), Exhibit B. Elizabeth notes it will eliminate special education staff positions and contract for those services "at a substantially higher cost to the district." Munoz Certification, ¶13. Other suggested areas appear completely appropriate for reduction such as catered food and travel, Bolden Certification, Exhibit B; adult school, Cowell Certification, ¶13; and courtesy busing, Trzeszkowski Certification, ¶13.

Movants describe the request for relief by the State as extraordinary, but these are extraordinary times. The new Governor has taken seriously the State's fiscal crisis and is trying to deal with it in a responsible manner rather than through one-shot revenues. He is committed to reforming school funding in Abbott districts and statewide so that the constitutional promise is fulfilled for every child. The State asks that this Court give the new Governor time to effectuate this plan and provide the one-year relief being sought by the State.

POINT II

THE REQUIREMENT THAT EIGHT ABBOTT DISTRICTS INCREASE THEIR LOCAL TAX LEVY IS A PROPER EXERCISE OF THE COMMISSIONER'S AUTHORITY.

The Movants assert that the requirement that eight Abbott districts impose a modest increase in their local tax levies is an improper delegation of the Legislature's taxing power. However, this is neither an improper delegation of the Legislature's taxing power nor is it otherwise inconsistent with the Legislature's revenue or school funding enactments. The Commissioner's directive to these eight districts is entirely consistent with the exercise of her statutory authority to review and approve school district budgets as part of her mandate to ensure that a thorough and efficient education is available to all students in the State.

Although the Court in Abbott IV declared CEIFA unconstitutional as applied to the Abbott districts, CEIFA remains the substantive statutory mechanism for the calculation of State school aid and the required local contribution of school districts. After Abbott IV, Abbott districts still followed the budget process established in CEIFA and received statutory formula aid through that Act; other aid categories (parity aid, additional Abbott v. Burke aid, preschool expansion aid) were added through the annual Appropriations Act. The required local tax levy for Abbott districts was set forth each year in the Appropriations Act as a condition on the districts' receipt of additional aid. That

language had not changed since FY1998 and simply required Abbott districts to raise a local tax levy that was no less than the tax levy of the prior year. See e.g. Appropriations Act for FY2006, L. 2005, c.132; Appropriations Act for FY2005, L.2004, c.71; Appropriations Act for FY2004, L.2003, c.122; Appropriations Act for FY2003, L.2002, c.38. Accordingly, despite the substantial increases in spending, local per pupil tax levies in these districts have remained relatively constant since FY1998; during that same period, non-Abbott districts have seen significant growth in their per pupil levies. Davy Certification, ¶¶11, 12.

Under CEIFA, the Governor's Budget Message to the Legislature is the first critical fiscal event for school districts' budgeting decisions for the upcoming year only. Two days later, the Commissioner must "notify each district of the maximum state aid payable to the district in the succeeding year." N.J.S.A. 18A:7F-5. This year, the Governor conditioned the receipt of EOA to certain Abbott districts on increasing their local levy; he also reduced each of these district's EOA by the amount they were required to raise. Subsequent to the Governor's Budget Message, the Commissioner distributed State aid notifications pursuant to N.J.S.A. 18A:7F-5 and notified certain Abbott districts that a tax levy increase was required and the amount of that increase. She further promulgated regulations consistent with this requirement and with the Governor's Budget Message. See N.J.A.C.

6A:10A-7.3(g). Under these regulations, Abbott districts with total equalized tax rates below 110% of the State average total equalized tax rate are required to increase their local tax levies to reach this level, unless such an increase would result in an increase on the average household's tax liability of more than $125. Ibid.

The Commissioner's directive to the eight districts is entirely appropriate. CEIFA's requirement that the Commissioner notify each district of its share of State school aid two days after the Governor's Budget Message clearly demonstrates that the Budget Message shall be the basis for the Commissioner's notifications concerning State aid and school district budgets. Since districts must have their budgets approved prior to the State adopting its budget, the Governor's Budget Message impacts the local district budgets that are presented to the voters or Board of School Estimates. Here, eight Abbott districts were notified that they would be required to raise additional local contributions and that their EOA would be reduced by that amount. If the local levy was not increased, these Abbott districts would not be in compliance with the Appropriations Act as of July 1 (assuming the Governor's recommendations for school aid are accepted) and would not be eligible for EOA. The Commissioner, therefore, acted properly in notifying these districts of their required tax levy

and reduced aid award and in directing them to prepare a budget in compliance with those amounts.

Moreover, the Commissioner has the statutory authority and constitutional obligation to order a higher local tax levy where necessary. Board of Education of Deptford v. Deptford Township, 116 N.J. 305, 318-21 (1989); Board of Education of Elizabeth v. City Council of Elizabeth, 55 N.J. 501, 509-10 (1970); Board of Education of East Brunswick v. Township Council of East Brunswick, 48 N.J. 94, 103-07 (1966). Here, the Commissioner gave the affected districts the opportunity to make the necessary adjustment to the tax levy in the budget presented to the voters/ Board of School Estimates. And, it appears that all but Perth Amboy and Asbury Park[8] complied. Davy Supp. Certification, ¶14.

Movants' argument that the Commissioner's directive constitutes an improper delegation of the Legislature's taxing power is similarly inapposite.[9] Here, the decision to require a modest increase in the local tax levy of eight Abbott districts in no way constitutes a usurpation of the Legislature's delegation of the taxing authority to the local authorities in these districts.

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[8]The budget submitted by Asbury Park reflects the required tax levy. Davy Supp. Certification, Exhibit F; the certification of the Superintendent, however, states that the higher level was not included. Supplemental Certification of Antonio Lewis, ¶14.

[9]In addition, Movants fail to address the issue of whether they have standing to challenge tax levies imposed on taxpayers in those districts. See, e.g., Stubaus v. Whitman, 339 N.J. Super. 38, 50 (App. Div. 2001), certif. denied, 171 N.J. 442 (2002).

The taxing power remains vested in the local authorities to the extent delegated to those authorities by the Legislature. The Legislature, however, through CEIFA and the annual Appropriations Acts, require the local authorities to establish a minimum local school tax levy. Such a requirement is clearly permissible.

Further, the decision is entirely consistent with the Commissioner's role in the local tax levy process envisioned by the Legislature in CEIFA and her constitutional responsibilities. See e.g., Deptford, supra, 116 N.J. at 318-21; Elizabeth, supra, 55 N.J. at 509-10; East Brunswick, supra, 48 N.J. at 103-07. It is no longer possible for the State to continue to ignore the disparities in local tax levy rates between Abbott and non-Abbott districts. This directive is a first step in that process.

Movants also argue that the decision to require a modest increase in the local tax levy of eight Abbott districts violates this Court's decisions in Abbott II and Abbott IV because it fails to consider the ability of taxpayers in these districts to absorb the increased tax burden. This argument, however, simply ignores the dramatic change in the relative tax burdens between Abbott and non-Abbott districts since the Court examined the issue of municipal overburden in Abbott II. It also fails to recognize the critical steps that were taken to avoid any undue burden on local taxpayers.

In Abbott II, the Court discussed the ability of the Abbott districts to correct the disparities in per-pupil spending through increases in local taxes in the context of "municipal overburden." The Court noted that "[a]lthough the condition is not precisely defined, it is usually thought of as a tax rate well above the average." Abbott II, supra, 119 N.J at 355. Moreover, the Court in Abbott II was not concerned with municipal overburden as an abstract matter but rather the pressures it put on the school districts not to raise needed revenues.

> The underlying causes of municipal overburden are many and complex. Its consequences in this case, however, are clear and simple. The poorer urban school districts, sharing the same tax base with the municipality, suffer from severe municipal overburden; they are extremely reluctant to increase taxes for school purposes. Not only is their local tax levy well above average, so is their school tax rate. The oppressiveness of the tax burden on their citizens by itself would be sufficient to give them pause before raising taxes.
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> [Ibid.][10]

[10]See also id. at 357 ("Our conclusion concerning municipal overburden is that it effectively prevents districts from raising substantially more money for education. It is a factual conclusion. It is based on the record history of the failure of any effort, whether through the actions of a school district or the Board or Commissioner, legal or otherwise, through the more than ten year period that the Act has been in effect, to achieve substantially increased local funding through school tax increases. That factual finding is one of the bases for our conclusion that the funding mechanism of the Act will never achieve a thorough and efficient education because it relies so heavily on a local property base already over-taxed to exhaustion.")

And, under the funding formula at issue in Abbott II, the amount of the school tax levy was not a requirement but rather was established at the discretion of the school district. In fact, in its discussion of municipal overburden, the Court specifically noted that "the present Commissioner has (with one possible exception) never compelled a tax increase ... ." Id. at 357.

Since Abbott II, the situation has changed dramatically. The evidentiary record in Abbott II reflected school tax rates well above average in the Abbott districts. The average school tax rates in urban aid cities was found to be 127% of the State average; plaintiff cities ranged from 120% to 154% of the State average. Abbott v. Burke, 1989 S.L.D. 234, 267.[11] Yet, as spending has increased dramatically in the Abbott districts, those districts have not been required to raise their local tax levies beyond the amount raised in FY1998. As a result, the average equalized school tax rate of the Abbott districts in 2005 was 0.639, a rate 36% below the State average of 0.998, and twenty-nine of the thirty-one Abbott districts had a rate below the State average. Davy Certification, Exhibit J. Moreover, the record in Abbott II

[11]The Abbott II record reflected that the school tax rate in Camden was 145% of the State average, East Orange was 144% of the State average, Irvington was 117% of the State average and Jersey City was 127% of the State average. Abbott v. Burke, 1989 S.L.D. at 267-8. For 2005, the school tax rate in Camden was 31% below the State average, East Orange was 17.4% below the State average, Irvington was 15.7% below the State average and Jersey City was 49.5% below the State average. Davy Certification, Exhibit J.

reflected an average total tax rate in urban cities (exclusive of Atlantic City) of 196% of the State average, significantly higher than the 110% at issue here.[12] See Abbott v. Burke, 1989 S.L.D. at 267.

Thus, for the first time since FY1998, some Abbott districts will be required to increase their minimum tax levy for FY2007. Under the Commissioner's regulations (and consistent with the Governor's Budget Message), Abbott districts with equalized tax rates below 110% of the State average equalized tax rate are required to increase their local tax levies to reach this level, unless such an increase would result in an increase on the average household's tax liability of more than $125. N.J.A.C. 6A:10A-7.3(g). By taking this approach, the State has responded to vastly changed circumstances since Abbott II concerning the relative tax levies between Abbott and non-Abbott districts and the fact that municipal overburden is no longer creating the pressures on local school districts not to raise sufficient funds to support the educational program. Moreover, this is an important step in bringing the equalized tax rates in the Abbott districts in line with those throughout the State.

[12]In requiring these tax increases the Commissioner was not, as Movants suggest, defining municipal overburden as a total equalized tax rate that is 110% or more above the State average total equalized tax rate. Quite to the contrary, this is just a first step toward bringing Abbott districts to a more equitable school tax rate. Davy Supp. Certification, ¶13.

At the same time, the State is mindful that the current financial circumstances of citizens in the Abbott districts may limit their ability to make up this disparity quickly. Thus, the increase is capped at an increase in the average household's tax liability of $125.[13] Accordingly, the State has acted responsibly by beginning to address the tax levy rate disparities that have developed since Abbott II, while remaining cognizant of and sensitive to the Court's concerns about municipal overburden and the circumstance facing many of the citizens who reside in the Abbott districts.

[13]For example, without the $125 cap, Asbury Park would be required to increase their levy by $3.21 million to reach the 110% threshold – with the cap, the required increase is $581,971. For Jersey City, the comparable amounts are $62.2 million vs. $7.53 million. For all eight districts, the $125 cap substantially limits the local tax levy increase. Davy Certification, Exhibit L.

POINT III

ELC'S CROSS MOTION SHOULD BE DENIED AS AN UNNECESSARY AND UNWARRANTED INTRUSION INTO THE FUNCTIONS OF THE OTHER BRANCHES OF GOVERNMENT.

In addition to opposing the relief requested by the State, the ELC has also cross-moved for relief. The ELC's requested relief should be denied by this Court as an unnecessary and unwarranted intrusion into efforts by the other branches of government to address the difficult fiscal and programmatic issues in Abbott districts.

First, the ELC asks that the Court order the DOE to accept and review the FY2007 budgets consistent with the Abbott V requirements (presumably as modified by Abbott X) and to adopt emergency regulations for the FY 2007 budget process that meet the requirements of Abbott V.[14] Obviously, if this Court denies the relief being requested by the State, the Department will have to revise its budget regulations and review Abbott budgets consistent with those revised regulations. The Court does not need to direct it to do so.

However, the regulations requested by the ELC will be just another set of "emergency" regulations that will not move us

[14]Plaintiffs also request that the Department comply with the regular schedule for budget review and approval which would require all decisions be completed by May 31, 2006. This Court, however, should make appropriate modifications to that schedule should it deny the State's motion so that the Department has time to subject the budgets to some level of scrutiny before approval is required.

closer to resolving the systemic problem of constantly changing budget regulations. The Department will simply not have the time or the needed baseline information to establish the type of fiscally and programmatically responsible regulations that can be sustained from year to year.

Next, ELC requests that the Department be ordered to undertake the evaluation required by this Court in Abbott V. That evaluation was of Success For All, a model that is no longer being widely implemented. The delay in undertaking that evaluation may make it meaningless at this point. Davy Supp. Certification, ¶29. The type of evaluation that was contemplated in the mediation agreement of Abbott X will be part of the work the Department intends to do over the next year; however, it should not be tied to one particular model of how to get the information. The Department intends to look at individual districts through fiscal audits and program and reviews audits as a means as starting to address the underlying goal of any such evaluation -- finding out what works and what doesn't so that funds can be directed to programs that work and reallocated from programs that do not. Thus, ELC's request for this relief should be denied and the State should be given the flexibility to approach this as planned.

Next, ELC asks this Court to order the Department to develop an Abbott management plan in compliance with a previously expired regulation. While undoubtedly the Department needs to

critically analyze Abbott implementation both in the districts and in the Department, no specific means of doing so should be prescribed by this Court. Rather, the Department should be free to determine how best to review its own resources (both fiscal and personnel) and structure in order to better meet the oversight responsibilities of Abbott. To grant ELC's requested relief would be an unwarranted intrusion into the Executive Branch function.

Finally, the ELC asks this Court to repudiate the specific rulemaking authority given to the Commissioner by the Legislature and require compliance with the Administrative Procedures Act. While the State understands the frustration of the districts (as well as the Plaintiffs) in having annual changes made to the budget process, correcting the problem should not be done by this Court directing the method for the promulgation of regulations but rather by this Court granting the new administration the time to develop sustainable funding protocols.

CONCLUSION

For the foregoing reasons and those set forth in the State's initial brief, this Court should grant the State's application for approval of the Governor's FY2007 proposed budget for school aid in Abbott districts and deny the relief sought in the cross-motion of the Plaintiffs.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases Cited

Statutes Cited

Regulation Cited