SUPREME COURT OF NEW JERSEY
DOCKET NO. 62,700

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

REPLY BRIEF IN SUPPORT OF STATE'S MOTION

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PRELIMINARY STATEMENT

For several decades, this Court has looked to the legislative and executive branches of government to provide a comprehensive response to the educational needs of disadvantaged children in our State, intervening only upon a clear showing that a sufficient response had not been forthcoming. With the enactment of the School Funding Reform Act of 2008 (SFRA), however, these other branches of government have now fulfilled their constitutional obligation, not only to school children in poor urban districts but to all school children.

The SFRA provides a new standard of educational adequacy and equity for the entire State, with the resources being directed to districts based on the needs of the children. Moreover, it provides all districts with high concentrations of at-risk children, i.e., high-poverty districts, with the ability to provide the programs and services previously supported only in the Abbott districts. Moreover, the SFRA and its implementing regulations require that key Abbott programs, such as intensive early literacy and high-quality preschool, be provided in these districts.

The Education Law Center (ELC) ignores the significant fiscal resources that the SFRA provides to the Abbott districts as well as the expansion of equity that it provides to high-poverty districts. Instead, the ELC focuses on maintaining the "status" of being an Abbott district and the previous remedial orders that the

Court found necessary for Abbott districts based on findings of inequity in prior funding formulas.

The SFRA, however, is not about the designation or de-designation of "Abbott districts" or the provision of "remedies" to those districts. At its core, the SFRA is an enhanced resource model that includes educational resources for meeting the needs of all disadvantaged students, particularly students in high poverty districts. Given the high concentrations of poverty within the Abbott districts, the SFRA, by design, continues to provide significant educational resources to those districts.

The ELC, selectively characterizing aids in the SFRA as "formula" or "off-formula" aids, argues that the Abbott districts are being significantly underfunded in 2008-2009 and that the formula's local fair share provisions create a shortfall for the Abbott districts that can not be met by the local taxpayers. That argument is demonstrably inaccurate.

In 2008-2009, all Abbott districts will receive more than a 2% increase in State aid over 2007-2008. The average "per pupil spending," Sb at 68 n.26, in the Abbott districts in 2008-2009 will be $17,325, an increase of $918 per pupil over 2007-2008. Overall State aid to Abbott districts under the SFRA is $4.679 billion, an increase of $241 million over 2007-2008. Additionally, the SFRA has specific provisions, e.g., Adjustment Aid and Educational

Adequacy Aid, that assist in filling the gap between the Abbott districts' local fair share and their local levy so that no Abbott district has to dramatically increase its local levy but may do so incrementally over time.

In short, the Abbott districts have available the necessary resources to enable the districts to maintain all of the Abbott V programs that they have found effective and, consistent with the Commissioner's implementing regulations, can replace or refine those that have not met the needs of their students. The State, through various monitoring and accountability structures, will provide oversight of student achievement and the effective and efficient use of State funds.

The ELC's misleading presentation of the SFRA's effect on the Abbott districts should not serve as a basis to deny the legislative and executive branches the deference to which they are entitled, nor should it upset the strong presumption of validity to be accorded to the SFRA. The ELC has failed to demonstrate that the SFRA is unconstitutional and, therefore, the State's motion should be granted.

SUPPLEMENTAL STATEMENT OF THE CASE

The State relies upon the facts and procedural history set forth in the Statement of the Case in its moving brief, as supplemented herein.

Since the State's application to the Court in March 2008, all of the Abbott district 2008-2009 budgets, with the exception of one, were submitted and approved by the DOE under the provisions of the SFRA.[1] All of the Abbott budgets reflect an increase in State aid over 2007-2008. The increases in State aid range from a 2.3% increase in Pemberton to a 26.2% increase in Hoboken. Attwood Supplemental Certification, Exhibit B. Moreover, the budgets include high-quality early childhood programs as approved by the Department consistent with the Court's order in Abbott v. Burke, 177 N.J. 578 (2003) (Abbott X) that, for the first time, are supported by a single revenue stream -- Preschool Education Aid. N.J.S.A. 18A:7F-54.

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[1]To date, Camden has not submitted an approvable, balanced budget to the Department of Education. See Supplemental Certification of Katherine Attwood (Attwood Supplemental Certification), ¶3. The district has not accepted suggestions by the Department and the State-appointed fiscal monitor for appropriate reallocations and efficiencies that would yield a balanced budget, and has missed several promised deadlines for the submission of a balanced budget to the Department. As a result of the district's actions, a discretionary spending freeze has been directed by the Department and the fiscal monitor has been authorized to veto any discretionary spending approved by the board until such time as the budget is submitted and approved. Id. at Exhibit A.

In addition to the aid categories specifically provided for in the SFRA, the Governor's budget also included additional aid to address increased payments that districts may need to provide to charter schools. New Jersey State Budget FY 2008-2009 at D-104. Moreover, his budget included $15 million in transition aid for Abbott districts that will be opening new school facilities in 2008-2009. Ibid.

The SFRA also includes a required minimum tax levy. All districts, including Abbott districts, had to, at a minimum, maintain the local levy from the prior year or raise the local fair share, whichever was less. N.J.S.A. 18A:7F-5(b). Moreover, seven Abbott districts were eligible for Education Adequacy Aid (EAA), i.e., those with budgets under adequacy that were failing and/or municipally overburdened, and, therefore, were required to raise their levies beyond the prior year's levy by a fixed percentage. N.J.S.A. 18A:7F-58(b)(2).[2] Of the remaining 24 Abbott districts, 16 raised their local levy to the 4% tax levy cap or beyond, two raised their local levy by slightly less than the 4% tax levy cap and six did not raise their local levy beyond the minimum required

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[2]For EAA eligible districts that are municipally overburdened, the required tax levy for 2007-08, 2009-10 and 2010-11 is 4%. N.J.S.A. 18A:7F-58(b)(2). For EAA eligible districts that are not municipally overburdened, the required local levy increase is 6%, 8% and 10% for 2007-08, 2009-10 and 2010-11 respectively. Ibid. See also Attwood Supplemental Certification, ¶13.

local levy.[3] Attwood Supplemental Certification, Exhibit D.

Twenty-seven of the Abbott districts had their budgets approved by the voters or the Board of School Estimate. In the remaining four districts where the budgets were defeated -- Vineland, Neptune Township, Salem City and Phillipsburg -- the budgets were reviewed by the municipality pursuant to N.J.S.A. 18A:7F-5(d). In two of those districts, Vineland and Phillipsburg, no reduction to the budgets were made. In the other two districts, Neptune and Salem City, insignificant reductions were made. Attwood Supplemental Certification, Exhibit D. Neither of these districts submitted an application to the Commissioner to appeal the reduction.

The Commissioner has also promulgated program regulations that require districts to maintain and/or implement core literacy and mathematic reforms for all "high need" districts, i.e., those that are performing below expectations on State assessments. Supplemental Certification of Lucille Davy (Davy Supplemental Certification), Exhibit A. And see L. 2007, c. 260, §83 (providing the Commissioner with authority to promulgate regulations that are

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[3] One district, Gloucester City, received an automatic adjustment to its tax levy cap permitting it to increase its levy by slightly more than 4%. Additionally, two districts, Millville and Phillipsburg, sought and were granted waivers of the permitted tax levy cap to permit local levy increases of 11.23% and 7.62% respectively. Attwood Supplemental Certification, Exhibit D.

effective upon filing with the Office of Administrative Law). The regulations also codify program requirements for districts with high concentrations of poverty. These requirements include class size limitations for various grade levels. Davy Supplemental Certification, ¶8.

Moreover, the Commissioner will be promulgating Preschool Program Regulations applicable not only to Abbott districts but to the many other districts that will benefit from the expansion of preschool programs under the SFRA. These regulations will include the high-quality standards incorporated previously in the Abbott preschool regulations, including the requirements for a certified teacher and an aide for every 15 students, a full-day, full-year program (180 days), a research-based, comprehensive preschool curriculum and assessment, a seamless transition from program entry through third grade and a continuous evaluation and improvement process. Davy Supplemental Certification, ¶¶23-24.

LEGAL ARGUMENT

POINT I

THIS COURT CAN AND SHOULD DETERMINE THE CONSTITUTIONAL VALIDITY OF THE SFRA

The State seeks a determination from this Court that the SFRA is facially constitutional. Although the State's application is somewhat unusual, given prior decisions of this Court and the supervisory authority it has exercised over this area for decades, the Court should assume jurisdiction and grant the State's motion.

The ELC suggests that this Court should deny the State's motion based on a lack of jurisdiction. The ELC's argument unduly restricts the ability of this Court to address this important issue expeditiously, ignoring past precedent where the Court determined the facial validity of a school funding formula.

In Robinson v. Cahill, 69 N.J. 449 (1976) (Robinson V), the Court was similarly asked, in the first instance, to review the constitutionality of the Public School Education Act of 1975. Recognizing the unique situation, the Court specifically discussed whether it was appropriate to entertain such motions and concluded that not only was it appropriate, but desirable, to make a determination of facial validity of the newly enacted funding formula:

> Immediately following ... passage [of the Public School Education Act of 1975] motions

> were addressed to this Court by a number of different parties in the cause.... We hesitated to entertain the motions. No lower court determination of this underlying issue was before us for review; the parties had had no opportunity to avail themselves of an evidentiary hearing at which a record could be made; a judgment by us might savour somewhat of an advisory opinion. These considerations, however, were felt to be outweighed by the desirability of reaching a speedy decision as to the constitutionality of the enactment - at least when examined *facially*. We thought it would be possible - and if so, highly desirable - to decide at once whether the statute, on its face, did or did not meet constitutional requirements.
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> [69 N.J. 449, 454-455 (original emphasis).]

The Court held that the 1975 Act was "in all respects constitutional on its face" assuming that the Act was fully funded. Id. at 467. The Court went on to reason that only actual experience with the formula would demonstrate whether it was adequate or whether further adjustments or modifications were needed. Id. at 455, 466, 467.

A similar approach should be taken here. After years of litigation over Abbott remedies and Abbott budgets, this Court should take the opportunity to resolve quickly the facial validity of the SFRA. Whether further adjustments and modifications are needed can be determined over time and with actual experience. Indeed, the SFRA calls for such an experience-based review every three years. N.J.S.A. 18A:7F-46(b). The ELC's arguments that the

Court should decline to exercise jurisdiction is again "outweighed by the desirability of reaching a speedy decision" on this critical issue.

POINT II

THE SFRA IS ENTITLED TO A STRONG PRESUMPTION OF CONSTITUTIONALITY

It is well established that an act of the Legislature carries with it a strong presumption of constitutionality. In re C.V.S. Pharmacy Wayne, 116 N.J. 490, 497 (1989), cert. denied, 493 U.S. 1045, 110 S.Ct. 841 (1990). This high degree of deference emanates from the fundamental principles upon which the separation of powers is based, namely, that matters of public policy are within the province and expertise of the Legislature. Vornado, Inc. v. Hyland, 77 N.J. 347, 355 (1978), appeal dismissed sub nom, 439 U.S. 1123, 99 S.Ct. 1037 (1979). "The exercise of the judicial power to invalidate a legislative act 'has always been exercised with extreme self restraint, and with a deep awareness that the challenged enactment represents the considered action of a body composed of popularly elected representatives.'" State v. Trump Hotels & Casino Resorts, 160 N.J. 505, 526 (1999) quoting New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8 (1972). In accordance with this deference, this Court has consistently held that "[a] legislative enactment is presumed to be constitutional and the burden is on those challenging the legislation to show that it lacks a rational basis." Caviglia v. Royal Tours of America, 178 N.J. 460, 477 (2004). Despite ELC's arguments to the contrary,

the SFRA is entitled to this strong presumption of constitutionality.

The ELC argues, based on an unpublished trial court decision in Abbott III, that not only is the SFRA denied a presumption of constitutionality, but that the State bears the burden of proof to establish that the SFRA is constitutional. Pb at 36.[4] The trial court in Abbott v. Burke, 136 N.J. 444 (1994) (Abbott III), relying on this Court's decision in So. Burlington Cty. N.A.A.C.P. v. Mount Laurel, 92 N.J. 158 (1983) ("Mt. Laurel II"), held that the State had the burden of proving the Quality Education Act (QEA) was constitutional given the Court's prior remedial decree. Abbott v. Burke, Dkt. No. 91-C-00150, 1993 WL 379818 (N.J. Super., Ch. Div. 1993) at *3. This Court, however, never adopted this holding of the trial court and, more significantly, subsequently rejected that concept in both the school funding cases and Mt. Laurel.

In Abbott III, the Court was silent as to its view of the trial court's assessment as to the deference afforded a legislative enactment in light of prior remedial orders. The Court in Abbott v. Burke, 149 N.J. 145 (1997) (Abbott IV), however, specifically addressed that issue and reaffirmed the longstanding

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[4] "Pb" refers to the brief filed by the ELC in response to the State's motion. "Sb" refers to the brief filed on behalf of the State in support of its Motion.

principles of deference with regard to actions by the other branches of government.

> [A]s a legislative enactment, CEIFA is entitled to a presumption of validity. In re C.V.S. Pharmacy Wayne, 116 N.J. 490, 497, 561 A.2d 1160 (1989), cert. denied, 493 U.S. 1045, 110 S.Ct. 841, 107 L.Ed.2d 836 (1990). We likewise do not depart from the principle that deference is afforded to the determinations that are the product of administrative expertise. Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 92-93, 312 A.2d 497 (1973).
>
> [Id. at 174.]

Moreover, in Mt. Laurel II, the Court was dealing with municipalities and their land use ordinances, not a legislative enactment by a co-equal branch of government, when it eliminated any presumption of constitutionality and shifted the burden of proof. 92 N.J. at 198-99. In that very case, however, the Court noted its desire to have the other branches of government act and its willingness to defer to those actions. 92 N.J. at 213. ("We note that there has been some legislative initiative in this field. We look forward to more. ... Our deference to these legislative and executive initiatives can be regarded as a clear signal of our readiness to defer further to more substantial actions."). In fact, similar to the situation in school funding, the Court was clear that legislative, rather than judicial, action was the preferred route. Id. at 213-214 ("In the absence of legislative

and executive help, we must give meaning to the constitutional doctrine ... through our own devices, even if they are relatively less suitable."). See also Hills Dev. Co. v. Bernards Tp. in Somerset Cty., 103 N.J. 1, 21 (1986) (noting that vindication of the constitutional right by the Legislature was "far preferable to vindication by the courts, and may be far more effective").

Subsequently, the other branches of government did act by passage of the Fair Housing Act. The Court found that Act to represent "an unprecedented willingness by the Governor and the Legislature to face the Mount Laurel issue after unprecedented decisions by this Court" and held that "strong deference" was "owed to the Legislature relative to this extraordinary legislation." Id. at 23-24.

Thus, the Court, while vigilant in ensuring compliance with its decrees, has remained keenly aware of its obligation to maintain the delicate interrelationship between the three branches of government. See, e.g., Abbott III, supra, 136 N.J. at 455 ("This Court will not, and should not, assume any part" of "the responsibility for substantive education"). This balance appropriately includes the judiciary's traditional standard of deference to its co-equal branches and the presumption of constitutional validity accorded to legislative enactments. Abbott v. Burke, 119 N.J. 287, 320 (1990) (Abbott II) ("we believe