

RAYMOND ARTHUR ABBOTT, ET AL.,

Plaintiffs-Movants,

vs.

FRED G. BURKE, ET AL.,

Defendants-Respondents

SUPREME COURT OF NEW JERSEY
DOCKET NO. 42,170

CIVIL ACTION

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION IN AID OF LITIGANTS' RIGHTS

EDUCATION LAW CENTER
DAVID G. SCIARRA, EXECUTIVE DIRECTOR
60 Park Place
Suite 300
Newark, N.J. 07102
(973) 624-1815

LOWENSTEIN SANDLER PC
DOUGLAS S. EAKELEY, ESQUIRE
65 Livingston Avenue
Roseland, N.J. 07068-1791
(973) 597-2500

Attorneys for Plaintiffs-Movants

On the Brief:

Koren L. Bell, Esquire, pursuant to R. 1:21-3(c)
Barbara Spillman Schweiger, Esquire

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INTRODUCTION

Plaintiffs seek this Court's immediate intervention to ensure State compliance with the explicit directives for remediating deplorable and outmoded school facilities in the Abbott districts in Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V") and Abbott v. Burke, 164 N.J. 84 (2000) ("Abbott VII"). As the record on this Motion unquestionably demonstrates, the State is now in default of its constitutional obligation to fund facilities improvements in the Abbott districts, necessitating an appropriate remedial order directing the State to determine and seek additional facilities funding from the Legislature.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

A. THE ABBOTT FACILITIES MANDATES

In Abbott v. Burke, 149 N.J. 145 (1997) ("Abbott IV"), this Court was faced with "accounts of crumbling and obsolescent schools" that "inundate[d] the record." Id. at 186. Based on voluminous evidence of "dilapidated, unsafe, and overcrowded facilities," the Court concluded that capital deficiencies were among "the most significant problems" facing the Abbott districts. Id. In so finding, the Court reaffirmed its prior holding, in Abbott v. Burke, 119 N.J. 287, 390 (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 ruled, capital improvements are fundamental to the efficacy of the entire framework of Abbott remedial measures, all of which have necessary space requirements. Abbott IV, 149 N.J. at 187-88 ("We 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 Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V"), the Court again recognized the "grave state of disrepair" of Abbott school buildings, and underscored the fact that the deplorable physical facilities "have a direct and deleterious impact on the education available to the at-risk children." Id. at 519. The Court also reaffirmed that "[t]he State's constitutional obligation under the thorough and efficient clause, N.J. Const.

Art. VIII, §4, includes the provision of adequate school facilities." Id. at 519-20.

To address these "deplorable conditions," the Court explicitly directed the State to fund "the complete cost" of "remediating the infrastructure and life cycle deficiencies that have been identified in the Abbott districts," as well as "the construction of any new classrooms needed to correct capacity deficiencies." Id. at 524 (emphasis added). Any funding formula that fails to cover the complete facilities' cost "will not comport with the State's constitutional mandate to provide facilities adequate to ensure a thorough and efficient education." Id. (emphasis added). The Court also noted that the State's facilities proposal was "based on the premise that the State would fund 100% of 'approved costs.'" Id.

Further, the Court directed the Abbott districts to complete five-year facilities management plans, later renamed "Long Range Facilities Plans ("LRFP"), along with enrollment projections, by January 1999, and architectural blueprints by the fall of that year. Abbott V, 153 N.J. at 521. The Court set "spring of 2000" as the date to commence construction. Id. Lastly, because "projected cost estimates" were speculative, the Court declined to "impose dollar restrictions" on funding. Id. n.8.

Subsequently, in Abbott v. Burke, 164 N.J. 84 (2000) ("Abbott VII"), the Court reaffirmed that the State is obligated to fully fund all of the facilities improvements needed in the Abbott districts. Id. at 88 (holding that the

State must "fund all of the costs of necessary facilities remediation and construction in the Abbott districts").

B. The Education Facilities Construction And Financing Act

The Education Facilities Construction And Financing Act ("EFCFA"), N.J.S.A. 18A:7G-1 et seq., was enacted in July 2000 in response to the Abbott facilities mandates. EFCFA authorized an initial \$6 billion in bond financing for Abbott school facilities and \$2.5 billion in funding for non-Abbott districts. N.J.S.A. 18A:7G-14(a). The Act also designated the Economic Development Authority ("EDA") as the agency responsible for managing, constructing, and financing school facilities projects, id., although, in July 2002, Governor McGreevey created the New Jersey Schools Construction Corporation ("SCC") within EDA to streamline the school construction process. (See Certification of Joan Ponessa ("Ponessa Cert.") ¶ 8, Ex. A.)

The Act sets forth, together with regulations adopted by SCC and the Department of Education ("DOE"), the procedures districts must follow to obtain approval for a particular project. "School facilities projects" include: new construction; rehabilitation or capital maintenance of the entire building system; acquisition of existing buildings to accommodate unhoused students; furnishings, fixtures, and equipment, when part of a school facilities project; and the rehabilitation of a multi-purpose physical education field or playground when part of the project consists of new construction for unhoused students. N.J.A.C. 6A:26-3.2(a).

To initiate a project, an Abbott district must first submit to the DOE a pre-development application setting forth all activities that need to be undertaken prior to the submission of a school facilities application, including: feasibility studies, remediation, site development, demolition, design work, acquisition of and design work for temporary facilities, review for preliminary approval of a demonstration project and acquisition of land. N.J.A.C. 6A:26-3.9(C)(1); see also N.J.A.C. 19:34-2; 19:34-3; 19:34-4. If the DOE determines that this initial application is consistent with the approved LRFP, the district is notified that the project has been "approved for predevelopment."

The DOE then forwards the district's predevelopment application to the EDA -- in practice, the SCC -- which must fund 100 percent of these costs. N.J.A.C. 6A:26-3.9(c)(1); (c)(2). As soon as the SCC issues a contract for the predevelopment work, the project is considered "under development" at the SCC.

The SCC, in consultation with the district, must then submit detailed plans and specifications to the DOE for project approval and a preliminary cost estimate. See N.J.S.A. 18A:7G-5(d). If the Commissioner of Education ("Commissioner") determines that the project complies with district's LRFP and with the facilities efficiency standards, he must calculate the preliminary eligible costs. N.J.S.A. 18A:7G-5(f). At this point, the project is "approved" for final design and construction.

Upon approval of a school facilities project and determination of the preliminary eligible costs, the Commissioner must "promptly prepare" and submit to the SCC a preliminary project report, in accordance with the specifications set forth in the Act. N.J.S.A. 18A:7G-5(h)(2). In turn, the SCC must, upon receipt of the preliminary report and in consultation with the district, prepare detailed plans and specifications that contain the SCC's estimated cost and schedule to complete the project. N.J.S.A. 18A:7G-5(h)(2)(i). The SCC must then transmit these recommendations to the Commissioner for "final approval." Id.

Once the Commissioner gives "final approval" to the project, he must transmit a final project report to the SCC. N.J.S.A. 18A:7G-5(h)(2)(i). At this point, SCC can complete construction documents and go to bid for construction of a facilities project. See N.J.S.A. 18A:7G-5(j). Once the bid is awarded and notice to proceed has been issued, the project is considered "under construction."

As required by Abbott V and Abbott VII, EFCFA provides that the State's share "shall be 100% of final eligible costs" for Abbott districts. N.J.S.A. 18A:7G-5(k).

Finally, EFCFA requires that "the Commissioner, in consultation with the State Treasurer [] annually submit to the Governor, the Joint Budget Oversight Committee, the President of the Senate and the Speaker of the General Assembly a report on the school construction program." N.J.S.A. 18A:7G-24. Among other information, the Act mandates that the report include data

on the number of projects approved by the Commissioner; the aggregate principal of bonds, notes, or other obligations issued by EDA; and "whether there is a need to adjust the aggregate principal amount" to complete the approved projects. Id. The report must also contain "recommendations for changes in the school facilities program" established pursuant to the Act. Id. The report is to be submitted "no later than August 1 of each year." Id.

C. Implementation of the school facilities program

Between December 2000 and July 2001, the DOE approved the Abbott districts' LRFPs, as required by Abbott V and EFCFA, N.J.S.A. 18A:7G-4, detailing the districts' school facilities needs and plans to address those needs. These five-year plans contemplated approximately 532 projects, estimated at that time to cost \$7.3 billion, excluding the cost of facilities for all-day preschool, inflation, land, relocation, site remediation, temporary classroom units, swing space and administration. (See Ponessa Cert. ¶ 9.) The DOE's approval of the Abbott districts' LRFPs cleared the way for the State to commence predevelopment and actual construction, through the DOE and SCC, on the districts' school facilities projects.

Within the last year, reports surfaced of problems with the school construction program under the SCC. The SCC Chief Operating Officer announced in the Fall of 2004 that the funding for Abbott school construction projects would run out in January 2006. (See Ponessa Cert. ¶ 17.) Then, in April 2005, all new

contracts and change orders were put on temporary hold in response to a report issued by the Inspector General that identified serious management and financial problems with SCC. (Id.)

On July 27, 2005, the SCC announced that approximately \$1.4 billion of the initial \$6 billion EFCFA allotment remained to fund Abbott facilities projects. After "reviewing the universe of projects" and consulting with the DOE, the SCC selected 59 of the projects for completion with the remaining funds. (See Ponessa Cert. ¶ 18, Ex. B.)

The SCC does not maintain a comprehensive database of school construction projects, and there is no database connecting DOE approvals to projects sent to the SCC. (Ponessa Cert. ¶ 19.) Based on data and information provided by the districts, the SCC and the DOE, Plaintiffs estimate that, of the approximately 532 projects originally approved by the DOE in its review of the Abbott districts' LRFPs, 25 are complete and another 49 have "final approval" from the DOE and are "under construction." (See Ponessa Cert. ¶ 20, Ex. C.) Plaintiffs further estimate that another 162 projects are currently "under development" -- i.e., the SCC has issued a contract for "pre-development" work, including feasibility, site development, and architectural design. (See Ponessa Cert. ¶ 21.)

Additionally, an unknown number of projects have been "approved for pre-development" by the DOE and sent to the SCC for predevelopment, although the SCC has not yet issued contracts for this work. (Ponessa Cert. ¶ 21.)

According to the SCC, 59 of the estimated 162 projects currently "under development" will be completed with the remaining \$1.4 billion of funding. (Ponessa Cert. ¶ 22, Ex. B.) However, six of these are not full-scale projects, but rather ancillary improvements tied to larger facilities projects (e.g., athletic fields) or health and safety work. (Id.) Thus, 53 projects will be funded with the remaining money. Another six of the 162 projects "under development" are "demonstration projects," see N.J.S.A. 18A-7G-6, which have already been guaranteed funding by the SCC. (Ponessa Cert. ¶ 22, Ex. B.)

Plaintiffs estimate that 103 facilities projects currently "under development" are without funding, and cannot move forward to completion without additional funding. (Ponessa Cert. ¶ 23.) Further, based on the original LRFPS -- and amendments to those plans since 1999 -- Plaintiffs estimate that, beyond these 103 projects, there are approximately 275 remaining school renovation and new construction projects in the Abbott districts, including those that are at SCC awaiting predevelopment contracts. (Ponessa Cert. ¶ 24.) This number may change when the districts revise their LRPFS for 2005-2010, which must be filed with the DOE this October. (Id.)

The lack of funding for the 103 projects currently under development at the SCC is causing major problems for the districts, their students, and surrounding communities. (Ponessa Cert. ¶ 25.) Some of the reported problems include a "domino effect" whereby a delay in one project disrupts the district's educational program because completion of the delayed

project is necessary to accommodate students from a school where construction is next in line to begin. (Ponessa Cert. ¶ 26.) Another problem occurs when land which has been acquired from private owners for school construction -- up to 80% of the necessary property in some cases -- is left vacant because a project has been stopped, and the remaining residents are then surrounded by boarded-up houses that become unsafe and require increased police patrols to control drug-dealing and arson. (Id.) Additional problems include the lack of funding to acquire temporary classroom units to house students while construction proceeds on certain projects; the possible halt of health and safety projects needed to insure the security of school children; and the lack of provisions for preserving the development work that has been accomplished up to this point so that it may have to be redone when the project is activated in the future (e.g., design and engineering studies left partially complete now that contracts have been cancelled, or purchased land that may be sold to redevelopers in the interim). (Id.)

Ultimately, delays in projects currently "under development" will make them more expensive in the long run, not only because work completed up until now may have to be redone by new architects and engineers, but also because of the effect of inflation on materials, building, and construction costs. (Ponessa Cert. ¶ 27.) Recent cost indexes indicate that the key components of construction costs have risen from 4% to 6% over the last year. See <http://enr.construction.com/features/coneco/subs/recent>

indexes.asp. Accordingly, a delay of \$1 billion in school construction work will cost, at a minimum, an additional \$40 to \$60 million by August of next year. Id.

Lastly, the Commissioner has not this year, or in prior years, completed the comprehensive annual report on the facilities construction program, as EFCFA requires, and submitted that report to the Governor and Legislature. See N.J.S.A. 18A:7G-24; (Ponessa Cert. ¶ 28).

ARGUMENT

I. WITHOUT ADDITIONAL FUNDING, THE STATE WILL DEFAULT ON ITS CONSTITUTIONAL OBLIGATION TO PROVIDE SAFE AND ADEQUATE SCHOOL FACILITIES IN THE ABBOTT DISTRICTS

In successive Abbott decisions, this Court has held -- unequivocally -- that the State has a constitutional obligation to ensure that New Jersey's poorest and most vulnerable school children are provided with adequate school facilities in which to learn. Abbott II, 119 N.J. at 390; Abbott IV, 149 N.J. at 186; Abbott V, 153 N.J. at 519-20. The Court has been equally forceful in its directives requiring that the State fund the complete cost of necessary facilities remediation and construction in the Abbott districts. Abbott V, 153 N.J. at 524; Abbott VII, 164 N.J. at 88; see also N.J.S.A. 18A:7G-5(k); N.J.A.C. 6A:26-3.9(c)(1); (c)(2) (codifying "100% cost" requirement).

The record on this Motion, supra at pp. 2-11, makes clear that THE State has thus far funded only a portion of the "infrastructure and life cycle deficiencies that have been identified in the Abbott districts" and of "the construction of any new classrooms needed to correct capacity deficiencies." Abbott V, 153 N.J. at 524. Moreover, the action taken by the SCC on July 27, 2005, after a review of all facilities projects, demonstrates that the remaining \$1.4 billion will allow a limited number of school facilities projects approved by the DOE to be completed, representing only a fraction of the overall facility needs in the Abbott districts.

As the record unequivocally demonstrates, with the exception of the projects on the SCC July 27th list, implementation of the Abbott facilities mandates is presently at a standstill. It is undisputed, therefore, that the State will default on its constitutional obligation to remediate all the facilities needs in the Abbott districts, unless additional funding is forthcoming.

It is also undisputed that, despite the certainty over the last year that this constitutional default would occur, the Commissioner has not taken any steps to seek and secure additional school construction funding from the Legislature. See Abbott V, 153 N.J. at 518 (requiring the Commissioner to "provide or secure" from the Legislature funding to implement the Abbott remedial measures, as needed). Nor has the SCC, the State Treasurer or any other State official taken such action, even though the SCC, in its final July 27th project list, recognized that hundreds of pending and needed facilities projects could not commence or proceed further without additional funding.

The Commissioner's failure to take action to secure additional funding is even more inexcusable in light of the statutory requirement in EFCFA to report annually to the Legislature on the status of the school construction program, including "the aggregate principal amount of bonds, notes or other obligations issued by the Authority for the State's share of construction and renovation of school facilities and whether there is a need to adjust the aggregate principal amount of

bonds, notes or other obligations authorized for issuance pursuant to (N.J.S.A. 18A:7G-14(a))." N.J.S.A. 18A:7G-24 (emphasis added). Indeed, the Commissioner has never submitted this report since the enactment of EFCFA, leaving the Legislature completely in the dark as to "whether there is a need to adjust the aggregate principal amount of bonds . . . authorized for issuance" in order to fulfill the Abbott mandate for facilities improvements. See id.

In sum, the State's default in the implementation of the school construction program clearly "does not comport" with the "constitutional obligation to provide facilities adequate to ensure a thorough and efficient education." Abbott V, 153 N.J. at 524. There is no justification for this default or any reason for delay by this Court in compelling the State to act promptly.

II. THIS COURT SHOULD ENTER AN APPROPRIATE ORDER TO ENSURE THAT THE STATE CONTINUES TO COMPLY WITH ITS CONSTITUTIONAL OBLIGATION TO PROVIDE ADEQUATE FACILITIES IN THE ABBOTT DISTRICTS

Plaintiffs have been compelled to file this motion because the Commissioner has failed to take action to secure additional school facilities funding. As discussed in Point I, supra, the Commissioner could have kept the Legislature abreast of the ongoing allocations of facilities funds, and issued a timely "constitutional call" for additional funding, if he had submitted the annual reports required under EFCFA. Abbott V, 153 N.J. at 519. At the very least, the Commissioner and the SCC could have provided this information to the Legislature as

part of the SCC's July 27th determinations, once the SCC decided what projects could continue with available funds and what projects could not progress without additional funding. Put simply, given the absence of any action by the State to seek and secure additional funding, as Abbott V requires, it is respectfully submitted that the Court should expedite a decision on this Motion and order immediately the relief proposed by Plaintiffs. See Abbott V, 153 N.J. at 519 (directing implementation of the school construction program in order to prevent yet another generation of Abbott students from attending school in "decrepit," "dangerous," and "deplorable" conditions).

The record on this Motion, therefore, compels this Court's intervention now. Given the "constitutional rights at stake," and the prior history of this litigation, there can be no doubt about the Court's authority and responsibility to act. See, e.g., Abbott IV, 149 N.J. at 202; Abbott v. Burke, 163 N.J. 95 (2000) ("Abbott VI") (compelling compliance with the Abbott V preschool mandates); Abbott v. Burke, 170 N.J. 537 (2002) ("Abbott VIII") (same).

It is also respectfully submitted that the Court should enter an appropriate remedial order that provides immediate relief to cure the State's default on its constitutional obligation to provide adequate facilities in the Abbott districts. The order should include the following specific mandates.

First, the Commissioner, in consultation with the SCC and Treasurer, should be required to promptly determine the amount

of additional funding needed to undertake and complete the necessary work on all school construction projects in the Abbott districts that have been approved by the DOE and transmitted to the SCC, including all projects submitted for predevelopment, pursuant to Abbott V and Abbott VII; EFCFA, N.J.S.A. 18A:7G-1 et seq.; and implementing regulations. Further, this determination should be submitted to the Legislature no later than fifteen (15) days from the date of the Court's order, at which point the Commissioner should be directed to take such actions as are necessary to promptly secure additional construction funds, as required by Abbott V and Abbott VII.

It is imperative that the present crisis in facilities funding be addressed, at least on an interim basis, by the 2004-05 Legislature before the end of the year. The proposed timeframe affords the Commissioner and Treasurer the opportunity to develop and recommend a proposal for additional funding that can be immediately acted upon by the 2004-05 Legislature. Such prompt action will, at the very least, ensure continuation of the school construction program until the 2006-07 Legislature has the opportunity to consider a more permanent funding solutions and mechanisms, along with possible revisions to EFCFA.

Further, the Commissioner's and State Treasurer's funding determination and submission to the Legislature "will be the measure of the State's obligation to provide a thorough and efficient education[.]" Abbott V, 153 N.J. at 519. Accordingly, Plaintiffs, like the Court, "anticipate that the Legislature

