

RAYMOND ARTHUR ABBOTT, et al.,

Plaintiffs,

v.

FRED G. BURKE, et al.,

Defendants.

SUPREME COURT OF NEW JERSEY  
DOCKET NO. 42,170

CIVIL ACTION

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION IN AID OF LITIGANTS' RIGHTS ON BEHALF OF *AMICI CURIAE* DISABILITY RIGHTS NEW JERSEY, ALLIANCE FOR THE BETTERMENT OF CITIZENS WITH DISABILITIES, CHERRY HILL SPECIAL EDUCATION PARENT TEACHER ASSOCIATION, NEW JERSEY DOWN SYNDROME GOVERNMENT AFFAIRS COMMITTEE, NEW JERSEY SPEECH-LANGUAGE-HEARING ASSOCIATION (NJSHA), SPECIAL EDUCATION CLINIC AT RUTGER'S UNIVERSITY SCHOOL OF LAW - NEWARK, SPECIAL EDUCATION LEADERSHIP COUNCIL, AND STATEWIDE PARENT ADVOCACY NETWORK

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PRELIMINARY STATEMENT

In Abbott v. Burke, 199 N.J. 140 (2009) ("Abbott XX"), this Court upheld the constitutionality of the School Funding Reform Act of 2008 ("SFRA") on the expectation that the State would fulfill its obligation to provide educational aid at levels required to fully fund the SFRA formulas, including the special education formulas. However, the special education formulas have not been fully funded. The budget for the Fiscal Year 2010-2011 drastically reduces special education categorical aid by \$300 million, reduces special education Extraordinary Aid, and reduces funding for transportation and security which further affects special education services. These reductions violate the Court's Abbott XX mandate and also jeopardize the school districts' ability to comply with their obligations under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq. (2006), to maintain funding sufficient to provide a free and appropriate public education ("FAPE") to children with special educational needs. This Court must act now to restore these deficits and remediate these "deficiencies of a constitutional dimension" that it had vowed to do in Abbott XX. Abbott XX, 199 N.J. at 146.

### PROCEDURAL HISTORY

Proposed Amici rely on the procedural history set forth in Plaintiffs' Brief in Support of Motion in Aid of Litigants' Rights.

### STATEMENT OF FACTS

The State budget presented by Governor Christie and approved by the New Jersey Legislature for the Fiscal Year 2011 ("FY11") reduces funding for kindergarten through the twelfth grade ("K-12") by \$1.081 billion, a 13.6% reduction from Fiscal Year 2010. These cuts significantly affect the funding of special education services for New Jersey children with disabilities.

The budget cuts over \$300 million (42% of the total reduction) from the categorical aid designed for special education programs. Education Law Center, Governor's Aid Cuts Target Special Education (Mar. 2010), available at [http://www.edlawcenter.org/ELCPublic/elcnews\\_100324\\_GovernorsAidCuts.htm](http://www.edlawcenter.org/ELCPublic/elcnews_100324_GovernorsAidCuts.htm) (last visited July 9, 2010), annexed to Certification of John D. Rue (hereinafter "Rue Cert.") as Exhibit A. These cuts significantly reduce funding across all school districts, including high-needs districts. The low and moderate income districts face cuts ranging from 20.4% to 38.6%. Id. The middle income districts see reductions of 49% and wealthy districts, 65%. Id.

The budget also significantly reduces the Extraordinary Aid that funds high-cost programs for children with significant disabilities. Office of Legislative Services, Analysis of the New Jersey Budget, Department of Education, Fiscal Year 2010-2011, 12 (Apr. 2010), available at [http://www.njleg.state.nj.us/legislativepub/budget\\_2011/education11.pdf](http://www.njleg.state.nj.us/legislativepub/budget_2011/education11.pdf) (last visited July 9, 2010), annexed to Rue Cert. as Exhibit B. The SFRA mandates that the State provide Extraordinary Aid equal to 90% of the direct instructional and student-support costs in excess of \$40,000 or 75% of the costs in excess of \$55,000 for children with disabilities requiring high-cost services. Id. The budget reduces the reimbursement rates from the SFRA-mandated levels to 76.5% and 63.75% respectively in the two categories. Id.

In addition to direct reductions, the provision of special education services is indirectly, but significantly, affected by reductions in aid for transportation (40%-97% depending on the district) and security (41%-96% depending on the district). School districts also face a 39% reduction in the transition aid which was intended to safeguard against steep cuts as districts gradually reduce their budgets in compliance with the SFRA formulas. Rue Cert. Ex. A.

## ARGUMENTS

### I. The State's Failure to Fund Special Education at the SFRA Formula Levels Violates the Mandate of Abbott XX

In 2009, this Court upheld the constitutionality of the SFRA, stating that the funding formula was "designed to achieve a thorough and efficient education for every child, regardless of where he or she lives." Abbott XX, 199 N.J. at 175. But, the Court explicitly based its holding on the assumption that the State would provide school funding aid across all categories, including special education services, "at the levels" required by SFRA's formulas. Id. at 146, 174. In the event of the State's failure to fully fund the Abbott XX mandates, the Court promised to "require remediation of any deficiencies of a constitutional dimension, if such problems do emerge." Id. at 146. As is clear from the budget, the problems feared by the Court in Abbott XX have indeed emerged, urgently requiring immediate judicial intervention.

The Abbott XX Court also recognized that the high-needs districts likely have "greater numbers of special education students and therefore greater needs." Id. at 166. The Court, therefore, premised its approval of the SFRA formula for special education on the presumption that the State would: i) fully fund the SFRA formula for special



education costs; ii) provide Extraordinary Aid at SFRA formula levels to supplement the expenses of educating children requiring high-cost services; and iii) view its obligations as continuing in nature and not restricted in time. Id. at 146, 166. The State has failed to meet these obligations.

The State has indisputably repudiated its obligation to provide aid sufficient to fully fund the SFRA formula for special education categorical aid and reneged on its own calculations as to the appropriate funding for the thorough and efficient education of children with disabilities. The SFRA, with its self-described goal of assuring delivery of a constitutional education to all children, clearly delineates the funding levels the State itself deemed essential for children requiring special education services. See N.J. STAT. ANN. 18A:7F-52 -58 (2010) (prescribing the SFRA aid categories that "shall be" provided to "each school district," including special education categorical aid, security aid, transportation aid, and adjustment aid); Abbott XX, 199 N.J. at 153-57 (analyzing the design of the formula and the aid components). Yet, within two years of obtaining this Court's approval of the SFRA formulas, the State abdicated its statutory obligations by cutting special education

categorical aid by \$300 million and reducing budgets in associated services such as transportation, security, and transition by as much as 40% in the poorer districts. See Rue Cert. Ex. B at 5 (stating that the State's FY11 school aid budget "departs significantly from the funding provisions of the School Funding Reform Act of 2008"). This conduct is in direct opposition to the clear holding of Abbott XX.

The funding cuts also strike at provisions for Extraordinary Aid, which this Court held to be a key factor for compensating districts with greater than average expenditures on special education services. Abbott XX, 199 N.J. at 166-67. This Court has previously recognized that the Abbott districts are likely to serve a greater number of children requiring special education services. Id. at 166 ("[W]e understand that Abbott districts may have greater numbers of special education students and therefore greater needs). This recognition was predicated in part by evidence of "a correlation between higher concentrations of special education students and poverty." Id. The Court sought to assure that the needs of the poorer districts would be fully funded by relying on the SFRA formula for funding two-thirds of special education costs through Extraordinary Aid for children requiring high-cost

services. Id. at 167. The current budget shows that the State has deviated from the mandated formula as the State now proposes to reimburse only 76.5% and 63.5% of the Extraordinary Aid costs versus the 90% and 75% reimbursement rates required by the SFRA. See Rue Cert. Ex. B at 12.

Thus, the proposed budget cuts undermine the factual basis for the Court's finding that SFRA's special education funding formula was constitutional. The categorical aid for special education has been significantly cut and aid for related categories such as transportation, security, and transition have been curtailed. The Extraordinary Aid, which was supposed to fund any deficits, has been reduced across the board, without evidence of a plan to compensate for it. See Rue Cert. Ex. A.; Rue Cert. Ex. B at 12. In short, the State has eviscerated the funding of the very SFRA formulas relied on by this Court to assess the adequacy of State aid for the special education needs of New Jersey School districts. Without this aid, the Abbott XX mandate cannot be met.

Immediate judicial intervention is necessary. The State has clearly failed to provide the special education funding needed to implement this Court's Abbott XX mandates regarding the funding of special education. This Court has

not hesitated previously to order the State to provide funding necessary to fulfill the State's constitutional obligation to provide a thorough and efficient education. For example, in Robinson v. Cahill, 69 N.J. 449 (1976), the Court found the Public School Education Act of 1975 facially constitutional if fully funded and ordered the Legislature to enact a provision for the full funding of the State Aid provisions of the Act. 69 N.J. at 467-68. Similarly, in Abbott IV, this Court ordered the Legislature to fund an increase in per-pupil spending in high-needs districts for the 1997-1998 school year. Abbott v. Burke, 149 N.J. 145, 197-98 (1997). See also N.J. Div. of Youth and Family Servs. v. D.C., 118 N.J. 388, 400 (1990) (holding that "when funds are constitutionally mandated," the principle that the judiciary will not interfere with the Legislature or Governor's discretion is inapplicable).

Here, the State has explicitly reneged on its commitment to comply with special education funding formulas required by Abbott XX, and created the very type of constitutional deficiency this Court has promised to remediate. This Court must protect the needs of the highly vulnerable children requiring special education services and order the State to restore aid to levels compliant with the funding mandate of Abbott XX.

II. The Special Education Aid Reductions will Violate IDEA's Maintenance of Effort Provisions and Deny a Free and Appropriate Public Education to Children with Disabilities

The Abbott XX Court recognized the value of federal funds obtained by the State under IDEA in providing FAPE for students with special education needs. Abbott XX, 199 N.J. at 174 ("we simply refuse to ignore the stark reality of such a large amount of federal funds"). See also M.A. v. State Operated Sch. Dist. of Newark, 344 F.3d 335, 338 (3d Cir. 2003) ("Congress made federal funds available to assist states in providing educational services to children with disabilities."). The IDEA funds may be used by the school district only to pay the excess costs of providing special education and related services to children with disabilities and to supplement state, local, and other federal funds, not supplant such funding. 20 U.S.C. § 1413(a)(2)(A) (2006). Except in specific cases not applicable here, the funds may not be used to reduce the level of state and local special education expenditures below that of the previous year. 20 U.S.C. § 1413(a)(2)(A) (2006). As discussed below, the State's aid reduction is likely to curtail the districts' ability to provide FAPE to children with disabilities and to also reduce their access to federal aid.

State and federal special education laws mandate that New Jersey provide FAPE to all children with disabilities. 20 U.S.C. § 1412(a)(1)(A) (2006); 34 C.F.R. § 300.101(a) (2010); N.J. ADMIN. CODE 6A:14-1.1(b), 1.2(b)(1) (2010). See also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982) (establishing requirements for delivery of FAPE). While the school district bears the responsibility for the educational plan provided to each eligible child, the State shares the overall responsibility for ensuring compliance with the provisions of IDEA. See M.A., 344 F.3d at 351 ("[S]tate agencies and local educational agencies . . . share the responsibility for complying with the requirements of the Act."). Moreover, the State has the power and obligation to condition the funding of the school district's special education programs on the State's approval of the adequacy of such programs. N.J. ADMIN. CODE 6A:14-1.2 (2010), 20 U.S.C. § 1416(a) (2006). Thus, the State cannot ignore the detrimental effects its actions may have on the school districts' ability to deliver FAPE.

The relationship between the State's actions and the local school boards' ability to provide FAPE has been well noted. Courts have recognized that while the school district is ultimately responsible for managing its budget,

the funding provided by the State "plays a major role in whether FAPE is provided." C.G. v. Pa. Dep't of Educ., 547 F.Supp.2d 422, 430 (M.D. Pa. 2009) (rev'd. on other grounds) (noting that the state's formula can have a "powerfully coercive effect on the school districts' deprivation of FAPE.") (internal citations omitted). See also Ryan v. Shawnee, 437 F.Supp.2d 1233, 1257 (D. Kan. 2006) (holding that it was reasonable to believe that the districts' failure to adequately fund special education programs denied those students FAPE). The State is not absolved of its obligation to provide FAPE simply because the school district has discretion as to the special education disbursements from the granted aid. C.G., 547 F.Supp.2d at 429-30 ("While . . . it does not suffice if the injury complained of is the result of the *independent* action of some third party, that does not exclude injury produced by determinative or coercive effect upon the action of someone else." (quoting Bennett v. Spear, 520 U.S. 154, 169 (1997))) (emphasis in original). Here, the massive reduction in State aid directly affects the school districts' ability to fund educational programs, including special education programs, and serves as a "powerfully coercive effect" on the school district's ability to provide FAPE.

Moreover, the aid reduction not only directly curtails the district's special education budget, it also threatens the district's access to federal funds for special education needs through the violation of IDEA's Maintenance of Effort ("MOE") obligations. Indeed, in Abbott XX, the State argued, and this Court accepted, the role of federal funding in determining the constitutionality of the SFRA. See Brief for Defendants, The State's Exceptions to the Opinion/Recommendations of the Special Master at 35, Abbott v. Burke, 199 N.J. 140 (2009) (No. 62,700). ("[T]he State asks that the Court consider federal aid in evaluating whether . . . Abbott districts will . . . require . . . supplemental funding" in the event SFRA funding proves inadequate). Taking the State's arguments into account, the Court noted:

Although we cannot evaluate with precision the changes that a switch to funding under SFRA will entail in each Abbott district, there is comfort in knowing that until the look-back evaluation of SFRA's initial years of implementation takes place, the Abbott districts will have two sources of additional money that will provide a substantial cushion of resources. We cannot ignore the State's estimation that the Abbott districts will receive . . . \$630 million in federal funds. . . . The federal funds are not being used as a crutch against some structural failing in the funding scheme itself. Rather, we simply refuse to ignore the stark reality of such a large amount of federal funds for the Abbott districts' use . . . ."



Abbott XX, 199 N.J. at 173-74.

The Court's reliance on the concrete "reality of such a large amount of federal funds" to supplement each district's special education budget is now challenged by the funding cuts as the relied-upon federal funding may be lost if the State is unable to comply with the MOE provisions required by IDEA for continuation of funding. See 34 C.F.R. § 300.163 (2010). Having argued for the inclusion of federal funding in determining the constitutionality of SFRA, the State cannot ignore the effect that State funding cuts will have upon the availability of federal aid.

IDEA funding, though limited in comparison to IDEA costs, is substantial. New Jersey received over \$359 million in IDEA grants in 2009. See IDEA Money Watch, New Jersey, available at <http://www.ideamoneywatch.com> (last visited July 10, 2010), annexed to Rue Cert. as Exhibit C. In order to qualify for IDEA funds, the State must show that it is in compliance with the MOE provisions imposed by IDEA which requires that an applicant for IDEA funds not have reduced the level of expenditures for support of special education below that for the preceding fiscal year. 20 U.S.C. § 1412(a)(18) (2006); 34 C.F.R. § 300.163 (2010) ("A State must not reduce the amount of State financial

support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year." ). Failure to meet the MOE obligations will result in loss of federal funding under the IDEA. Id. If the State fails to meet its MOE obligations, it may regain federal funds only if it can obtain a waiver from the federal agency, which is granted a single fiscal year at a time and subject to strict requirements. 34 C.F.R. §§ 300.163; 300.164 (2010). Under limited circumstances, school districts may also reduce their budgets without running afoul of their IDEA obligations by showing that the reductions were related to specific activities which reduced special education costs.<sup>1</sup>

Under the current circumstances, the funding reductions will likely make it extremely difficult for the State, and therefore for the school districts, to obtain federal funding that the Court in Abbott XX held would provide a "substantial cushion of resources." First, this

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<sup>1</sup> Acceptable reasons for reduction include voluntary departure of staff, decrease in enrollment of students with special education needs, termination of the district's obligation to such students or termination of costly expenditures such as acquisition of equipment or construction of facilities. 20 U.S.C. § 1413.

Court has recognized that high-needs districts likely have a larger proportion of children requiring special educational services. Thus, it is unlikely that high-needs districts will be able to show savings from dramatic reductions in special education expenditures. Second, while a waiver of MOE requirements is possible, it is the responsibility of the State to seek one and there is no evidence that the State has sought such a waiver.<sup>2</sup>

Moreover, were the State to seek such a waiver, it is highly unlikely that one would be granted. The U.S. Department of Education's waiver guidelines require that "any reduction in the level of state support for special education and related services is not greater than the percentage reduction in revenues experienced by the state, and that the state is treating special education equitably when compared to other programs within the state." See

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<sup>2</sup> Mere application for a waiver is not sufficient assurance that it will be granted. The statute requires the State to demonstrate that students with disabilities will continue to be provided with FAPE and also affords stakeholders and the public the opportunity to present evidence to the contrary. See 34 C.F.R. § 164. Before such a waiver can be granted, an opportunity for public input must be offered. Id. at 164(d). Factual evidence would likely be offered at that time showing that the proposed cuts in the state budget would render it impractical for at least some high-needs districts to provide FAPE to all children. In the event of such an evidentiary showing, a waiver would be precluded by the terms of the federal regulation. Id. at 164(e).

Office of Special Education Programs, Office of Special Education and Rehabilitation Services, U.S. Department of Education, Process and Criteria Used to Evaluate a Request by States to Waive Maintenance of Effort (MOE) Requirements under Part B of the Individuals with Disabilities Education Act (IDEA) (June 2010), available at <http://www2.ed.gov/policy/speced/guid/idea/moe-waivers.pdf> (last visited July 12, 2010), annexed to Rue Cert. as Exhibit D. At a minimum, New Jersey's special education funding reductions are grossly disproportional to its general education reductions, especially when taking into account reductions in Extraordinary Aid and reductions in indirect aid such as transportation, security and transition. The \$300 million special education funding reduction in direct special education services alone constitutes 42% of the education funding reduction, when only 14.69% of New Jersey's students are receiving special education services. N.J. STAT. ANN. 18A:7F-51 (2010).

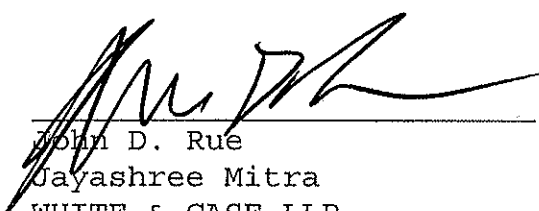
In summary, the Abbott XX Court's finding of SFRA's constitutionality was premised on the supposition that unanticipated deficits would be "cushioned" by the availability of federal funds especially those for special education needs from IDEA. The recent budget has negated this assumption. By failing to appropriately fund special

education services, the federal funding that this Court had expected to provide a cushion in Abbott XX has been jeopardized as well. This cumulative funding deficit not only negates the basis of this Court's approval of the SFRA's constitutionality, but challenges the school districts' ability to provide FAPE to children who require special education services.

CONCLUSION

To effectuate the State's obligation to children with disabilities, the Court should enter an order enjoining the State from funding special education aid below the levels required by the SFRA formula.

July 13, 2010



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CERTIFICATE OF SERVICE

I, Jayashree Mitra, hereby certify that I caused to be served on July 13, 2010 the foregoing Brief In Support Of Plaintiffs' Motion In Aid Of Litigants' Rights On Behalf Of Amici Curiae Disability Rights New Jersey, Alliance For The Betterment Of Citizens With Disabilities, Cherry Hill Special Education Parent Teacher Association, New Jersey Down Syndrome Government Affairs Committee, New Jersey Speech-Language Hearing Association, Special Education Clinic At Rutger's University School Of Law - Newark, Special Education Leadership Council, And Statewide Parent Advocacy Network, Certification of John D. Rue, Notice of Motion for Leave to Appear as Amici Curiae, Motion for Leave to Appear as Amici Curiae, with the New Jersey Supreme Court by mail on to be served upon the New Jersey Supreme Court by overnight mail, postage prepaid, addressed as follows:

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Government Affairs Committee, New Jersey Speech-Language Hearing  
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And Statewide Parent Advocacy Network, Certification of John D.  
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