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 PLAINTIFFS' MOTION
IN AID OF LITIGANTS' RIGHTS

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later Judge

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

This matter arises from plaintiffs' application to this Court, filed on April 18, 1996, styled as a Motion in Aid of Litigants' Rights. Plaintiffs allege that the State has failed to comply with the Court's directive in Abbott v. Burke (Abbott III), 136 N.J. 444 (1994), to "address the relative [spending] disparity" between the poor urban districts (hereinafter "special needs districts" or "SNDs") and the wealthy suburban districts (hereinafter "I&J") in the 1995-96 and 1996-97 school years. Plaintiffs do not dispute that the State has made progress each of those school years in closing the spending gap; rather, plaintiffs complain about the pace of closure. Plaintiffs, therefore, are asking the Court to order the appropriation of additional sums of money to the SNDs for the 1996-97 school year.

On June 5, 1990, the Court held that the school funding formula, commonly referred to as Chapter 212, was unconstitutional as applied to the poor urban districts since it did not assure a thorough and efficient education would be provided in those districts. Abbott v. Burke (Abbott II), 119 N.J. 287 (1990). The Court ordered the legislative and executive branches to amend the formula, or to adopt a new formula, that would "assure that poorer urban districts' educational funding is substantially equal to that of property rich districts." Abbott II, 119 N.J. at 385. However, the Court left it to its two co-equal branches of government to work out the details of that funding formula:

> The Legislature may devise any remedy, including one that completely revamps the

> present system, in terms of funding, organization, and management, so long as it achieves a thorough and efficient education as defined herein for poorer urban districts. It may phase in that new system and phase out the old. It may choose, for instance, to equalize expenditures per pupil for all districts in the state at any level that it believes will achieve a thorough and efficient education, and that level need not necessarily be today's average of the affluent suburban districts. The most significant aspect of that average today is not its absolute level, but its disparity with the average of the twenty-eight poorer urban districts. It may determine the division between state aid and local funding and allow school districts such leeway as is consistent with the constitutional obligation, or it may mandate the local share; again, however, funding in poorer urban districts cannot depend on the budgeting and taxing decisions of local school boards. We assume the design of any new funding plan will consider the problem of municipal overburden in these poorer urban districts. [Abbott II, 119 N.J. at 385-86].

The Court required the remedy to be in place for the 1991-92 school year. Abbott II, 119 N.J. at 389.

The Quality Education Act (QEA) was enacted on July 3, 1990 and was implemented, as amended, for the 1991-92 school year. The QEA was immediately challenged and eventually was held unconstitutional by the Court in Abbott III "based on the Act's failure to assure parity of regular education expenditures between the special needs districts and the more affluent districts." Abbott III, 136 N.J. at 447.

In Abbott III, the Court recognized the efforts that had been made in closing the spending gap since the Abbott II decision. The Court found that the substantial increase in State aid to the special needs districts along with no increase in aid to the I&J

districts and the decline in the relative spending gap demonstrated "a constitutionally legitimate response of the other branches of government." Abbott III, 136 N.J. at 447. Thus, while the Court retained jurisdiction, it did not "enter any orders." Ibid. Rather, the Court stated that it would not intervene if a formula that assured parity in regular education spending in the SNDs and I&Js, along with provision for the special educational needs of the SND students, was enacted by September 1996 for implementation in the 1997-98 school year and the "relative disparity, [then] at 16%" was "further addressed in both school years 1995-1996 and 1996-1997." Ibid.

In the 1995-96 school year, the State increased foundation aid to local school districts by $147 million; of that amount $47 million was provided to districts who experienced increased enrollments and the remaining $100 million was provided to the SNDs to address the parity gap. Transition aid, aid that generally goes to wealthier districts, was reduced by $19 million in the 1995-96 school year. Azzara Certification, para. 15.

Of the $100 million in additional aid to the SNDs in 1995-96, 61% was targeted toward the group of lowest spending SNDs so that all SNDs would reach a certain minimum level. So, for example, in 1994-95 the Millville School District was at 68.25% of parity; in 1995-96, the district was at 85%. The Elizabeth school district was at 74.33% in 1994-95 and at 81.58% in 1995-96. Jersey City went from 75.31% to 82.66%. The overall result of this effort to address the parity gap was a 3.51% closure of the gap for the

1995-96 school year. In dollars, the size of the spending gap decreased by $77.2 million.

For the 1996-97 school year, the Governor has proposed again to address the spending disparity by targeting funds to the lowest spending SNDs. Statewide foundation aid is proposed to be increased by $56.2 million; transition aid is to be decreased by $19 million. The increase in foundation aid combined with the reallocation of reduced transition aid has permitted the Governor to propose a foundation aid increase of $60 million to SNDs to address the parity gap. This aid is to be distributed to the lowest spending SNDs so as to move them to the parity target of 86.23%. The Governor anticipated that this funding level would reduce the relative disparity by 1.87% and close the actual funding gap by $44.2 million.* As a result of the infusion of aid to the SNDs and the relatively stable or declining per pupil spending in the I&J districts, the actual spending disparity should be reduced by over $105 million and the relative disparity decreased by 5% since the Abbott III decision. Azzara Certification, para. 20.

Accordingly, during the two years for which the Court directed the State to address the disparity in spending, the parity

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* Neither plaintiffs nor the State can provide the Court with definitive information on the parity gap for the 1996-97 school year. Many of the variables in that calculation rely upon budget and enrollment information which will not be final for some time. Azzara Certification, para. 13. Given the uncertainty of those numbers at this time, the State is presenting to the Court, and relying throughout this brief, on the parity data that the Governor relied upon in crafting her Fiscal Year 1997 recommended budget; that data will provide the Court the factual basis on which to assess the State's good faith effort to "further address" the disparity for the 1996-97 school year.

gap has been decreased both in relative terms and in overall dollars.* Further, the State has targeted all additional foundation aid, unrelated to enrollment changes, to the SNDs and has made significant progress in raising the spending levels of the lowest spending SNDs. Given the progress that has been made in 1995-96 and is projected for 1996-97 in closing the parity gap, the State maintains that it has complied, in good faith, with the Court's directive to "address" the relative spending disparity.

Additionally, the State has made substantial progress in the difficult task of developing a new funding formula to be implemented in the 1997-98 school year. The executive branch announced a legislative proposal that, for the first time in the history of school funding in New Jersey, will be premised on a substantive definition of a "thorough and efficient system of education." The new formula will require the State Board, every five years, to adopt curriculum standards that define what every student needs to know to compete in society -- in other words, standards that define what constitutes a "thorough" education. The Commissioner will then be required, biennially, to determine both how that educational program can be provided to students and the cost of providing that program in an "efficient" manner. Each district will get sufficient State aid so that, in addition to its local fair share, the district will have the funds needed to

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* Moreover, this has been accomplished during a period of a historically low growth rate in the State's overall budget with significant reductions in State departmental operating budgets. Ferrara Certification.

provide the "thorough" and "efficient" education so defined. DiPatri Certification, para. 23.

Districts with concentrations of low income pupils will be required to implement pre-kindergarten and full day kindergarten programs within five years of implementation of the funding law. Those districts will receive additional aid to support these early childhood programs. Also, those schools with low income pupils will be provided restricted aid to be used to establish and support demonstrably effective programs to address the special disadvantages of that student population such as dropout prevention services, safe schools and community environment, vocational counseling and placement and school governance programs. Additional aid is available for districts that have high concentrations of low income pupils, including supplemental aid to address high tax rates. DiPatri Certification, paras. 27 and 28.

Districts that were specifically found by the Court in Abbott II to have longstanding educational deficiencies will have mandated spending requirements and will be given State aid to assure that these identified districts have sufficient funds available to overcome the numerous educational deficiencies identified by the Court in Abbott II without an increased and unreasonable burden on the taxpayer. DiPatri Certification, para. 27.

Under the proposed legislative scheme school districts will have flexibility in meeting the core curriculum standards; however, annual assessments will monitor the achievement of the

standards by the students in each school. If students are not meeting the standards, the Commissioner will have the power to promptly and aggressively intervene in districts or schools by ordering programmatic and budgetary changes to address any deficiencies. These interventions will include restructuring educational programs, directing staff retraining or reassignment, restructuring the budget and redirecting expenditures, and overseeing contract negotiations. DiPatri Certification, para. 29.

The central and most critical component of the plan -- the establishment of core curriculum standards which substantively define the content of a thorough and efficient education -- was finalized on May 1, 1996 when the State Board adopted those standards after an extensive period of development and public hearings. The next phase, determining the cost of implementing those standards in an efficient manner and establishing a legislative formula to fund that cost, was just recently completed by the executive branch. DiPatri Certification, para. 22. The last step is action by the Legislature to pass the proposed plan and formula. The State agrees with plaintiffs that the plan is not final, and therefore not appropriate for Court review at this time. But it is clear that significant progress has been made and good faith demonstrated by the State in meeting the Court's directive to adopt a new formula by September 1996.

ARGUMENT

POINT I

THE STATE HAS FULLY COMPLIED WITH THE COURT'S MANDATE IN ABBOTT III TO ADDRESS THE RELATIVE DISPARITY IN THE 1995-96 AND 1996-97 SCHOOL YEARS.

In Abbott III, the Court held that the Quality Education Act was unconstitutional because it did not "assure parity of regular education expenditures between the special needs districts and the more affluent districts." 136 N.J. at 447. The Court did not enter any order but retained jurisdiction over the matter to permit applications for relief under limited circumstances. The Court went on to specifically identify those circumstances -- the Court would consider applications for relief if (1) "a law assuring substantial equivalence [in regular education spending] ... for school year 1997-98 and providing as well for special educational needs is not adopted by September 1996" or (2) "the relative disparity, now at 16%, is not further addressed in both school years 1995-1996 and 1996-1997." Ibid.

The September 1996 deadline has not yet arrived; plaintiffs therefore cannot assert that a new formula has not yet been enacted. Rather, plaintiffs argue that the State has failed to make sufficient progress in closing the relative parity gap and that, as a result, has not "addressed" the relative disparity in the 1995-1996 and 1996-1997 school years. Based on that misperception, plaintiffs ask this Court to intervene and order the appropriation of additional funds for the SNDs for the 1996-97 school year. However, the State has complied with the Court's

admonition that the relative spending disparity be "addressed" in the 1995-96 and 1996-97 school years. Accordingly, no application for relief is properly brought to the Court at this time.

As noted by the Court, the relative disparity was at 16% when the Abbott III decision was rendered. Thus, the 16% gap forms the baseline for progress in the 1995-96 and 1996-97 school years. In the 1995-96 school year, that relative disparity was reduced by 3.51%. Azzara Certification, para. 16. The Governor's recommendation for State aid to school districts for the 1996-97 school year was based on projections that the additional $60 million will close the relative disparity by another 1.87%. Azzara Certification, para. 17 and 19. Consequently, there is no question that the relative disparity in each of the identified school years has been "further addressed" by the State. Abbott III, 136 N.J. at 447.

Moreover, in those two school years, the actual spending gap has decreased significantly. The 1995-96 and projected 1996-97 closure should result in reductions of $77.2 million and $44.2 million respectively. Regular education aid to the SNDs during those two years will have increased by $158.7 million or 11.6%. During that same time, regular education aid to the wealthier districts has declined by $8.7 million or 9.13%. Azzara Certification, para. 21. Under similar circumstances in Abbott III, the Court found the State's actions to be a "constitutionally legitimate response." Abbott III, 136 N.J. at 447. The same is true today.

In relative terms, almost all new school aid for 1995-96 and 1996-97 has been focused toward addressing the parity gap. The only school districts that will have received foundation aid increases during that period, aside from limited increases tied to enrollment growth, are the SNDs. Other school districts will have received the same or less for 1995-96 and 1996-97 than the amount of foundation aid they received in 1993-94. Those districts which receive only transition aid, the most affluent districts, have faced aid reductions each year as the phase-out of transition aid continues. Yet during that same time period, the Governor and the Legislature have targeted an additional $160 million in foundation aid to the SNDs to address the parity gap.

In addition to addressing relative and actual closure of the gap, the State has targeted the increased aid to the lowest spending districts. The lowest spending districts will have made extraordinary progress in moving toward parity in 1995-1996 and 1996-1997. For example, in projected dollar changes, Millville will have increased its per pupil spending for regular education from $5573 in 1993-94 to $7068 in 1996-97, a change of $1,495. Irvington will have increased its per pupil spending over the same time period by $1,066, from $6002 to $7068. Passaic City will have moved from $6039 to $7068 or a $1,029 per pupil increase. Azzara Certification, Exhibit 8. By targeting aid to the lowest spending districts, the State is focusing limited fiscal resources so as to bring those districts closer to parity at a faster rate.

Given the obvious and significant progress that the State has made in addressing the parity gap for the 1995-96 and the 1996-97 school years, plaintiffs have improperly moved before this Court for relief. Moreover, in their effort to support this untimely and unwarranted request for relief, plaintiffs have mischaracterized the Court's instructions to the State in Abbott III. When the Court's language is properly viewed and the actual progress assessed, the absence of any need for Court intervention at this time becomes self-evident.

According to plaintiffs, the Court in Abbott III "ordered the State, in unequivocal language, to take specific actions ..." Pb25. These actions, again according to plaintiffs, included a requirement of "a measured orderly pace" or "steady" and "even" progress in addressing the spending gap. Pb16, Pb5. Plaintiffs then characterize this requirement as one of a mandated reduction of 5.35% each year in the relative disparity. Pb7. After mischaracterizing the requirement of Abbott III, plaintiffs conclude, in self congratulatory fashion, that the State has "not complied with the judgment in Abbott III", Pb21, and has "failed to respond to this Court's directive," Pb27.

The State acknowledges that it has not met the plaintiffs' criteria of a reduction of 5.35% each year in the relative disparity; however, the State does not accept plaintiffs' contention that the Court ordered, or even suggested, such a requirement. Plaintiffs' interpretation of the Court's language is far from the mark. While the Court stated that it would consider

applications "at any time [movement] suggests less than a reasonable likelihood of achieving compliance by 1997-1998," the Court subsequently, and "[m]ore specifically" defined what it intended by that phrase. Abbott III, 136 N.J. at 447. The Court spoke quite clearly on this subject: "if the relative disparity, now at 16%, is not further addressed in both school years 1995-1996 and 1996-1997, [the Court] will hear applications" for relief. Ibid. (Emphasis added).

The relative disparity has been addressed and reduced in each of those years both in relative terms, as instructed by the Court's decision, and in actual dollars. The Court did not specify how the reduction was to be accomplished nor at what rate, except that substantial equivalence in regular education spending should be achieved in the 1997-98 school year. The State has complied with the Court's direction and has "further addressed" the relative disparity in the two school years before the new formula is implemented. As to the adoption and implementation of a new formula for the 1997-98 school year, any application is premature and plaintiffs recognize it to be so. * Thus, plaintiffs'

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* Plaintiffs' gratuitous derogatory characterization of the constitutionality of the school funding plan being proposed by the Commissioner of Education should be disregarded by this Court. Admittedly, the new funding proposal departs from previous funding schemes that have been premised solely on spending for education. The Commissioner's plan attempts to address substantively what constitutes a "thorough" education and how that education can be delivered in an "efficient" manner. Such an approach is not only a constitutionally legitimate response to the concerns raised by this Court over the past two decades but, in fact, finally fills the void identified by this Court in Robinson I in noting that "the State has never spelled out the content of the educational opportunity the Constitution requires." Robinson v. Cahill,

contention that the State has not complied with the Court's explicit requirements is erroneous and this application for relief is unwarranted.

Moreover, the flexibility provided by Abbott III to the State for the 1995-96 and 1996-97 school years is appropriate, not only out of deference to the work of the two co-equal branches of government on a complex task but also due to the imprecise nature of the statistical data which underlies the relative spending gap. The spending gap is a function of a number of variables -- enrollment changes, budget growth and the ultimate target -- and must rely on assumptions and projections until far into the school year at issue. As is apparent, the assumptions and projections used by Dr. Goertz differ in several respects from those used by the Department of Education and, therefore, the results and conclusions differ.* However, whether the Court accepts her data,

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(Robinson I) 62 N.J. 473, 516 (1973). Given the unique approach taken by this plan and the importance of this venture to the children who live in our State -- funding education based on a substantive definition of what students should know -- this Court may, at some future point, need to assess the school funding issue from the different perspective posed by the executive branch's legislative proposal. However, this new substantively-based approach to school funding certainly deserves, at a minimum, deference to the ongoing work of the co-equal branches of government as they develop and refine their plan without any precipitous intervention by the judiciary.

* These differing assumptions and projections explain, to a large extent, the difference in Dr. Goertz' calculation of the parity gap for 1996-97 and the Department's. For example, Dr. Goertz uses 1 year enrollment data to project future enrollment growth while the Department uses 3 year enrollment data. Another difference is Dr. Goertz' methodology -- Dr. Goertz eliminates those districts that have reached or exceeded 100% parity. The Department keeps those districts in the calculation but maintains them at 100% (or $0 actual gap) so the disparity is not

which the State contends inaccurately expands the relative disparity, or accepts the State's numbers, the conclusion should be the same -- the State has "further addressed" the relative disparity in 1995-96 and 1996-97, albeit not as much as plaintiffs would have preferred.

It is apparent that the rigid approach to closing the parity gap suggested by plaintiffs is not consistent with the inexactness of the calculation of that gap. Projections as to what will occur in 1997-98 are simply that -- mere projections.* The data presented reflects a good faith effort by the two other branches of government to address the relative spending gap based on the information available when the budget is being recommended and considered. The decision to target the additional funds toward those SNDs which were spending at the lowest levels was a reasonable and proper response to the Court decision. The facts clearly demonstrate appropriate action by the State to address the Court's concerns in Abbott III.

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artificially reduced by those districts that exceed the 100% mark. The Department believes that its methodology more accurately reflects the closing of the gap since -- taken to its illogical extreme -- under Dr. Goertz' analysis if all the districts had reached 100% but one, and that district was at 80%, the relative disparity would be 20%. In this case, however, the actual difference in the calculation of the gap for 1996-97 in keeping or dropping the districts that have reached 100% is not significant. Azzara Certification, para. 12.

* Even plaintiffs would have to acknowledge the imprecision of projections. In Abbott III, Dr. Goertz projected that the parity gap for 1995-96 would be $453,389,353; yet her own calculations now show only a $299,750,791 gap. Brown Certification, Exhibit A. This is attributable, in large part, to the minimal growth over the past few years in the I&J budgets.

In sum, neither the statistical data presented by the plaintiffs as to the existing relative disparity nor their projections of what the dollar gap will be in 1997-1998 provide a reliable basis on which this Court should grant the requested relief. The State has addressed the relative spending gap in 1995-96 and 1996-97 and has made considerable progress in closing that gap. At this time and based on an accurate picture of the progress made since the Court's decision in Abbott III, there is no basis to conclude that the plaintiffs are entitled to relief of any sort and certainly not the relief in aid of litigants' rights characterized in their moving papers.

POINT II

PLAINTIFFS' UNPRECEDENTED REQUEST FOR RELIEF CANNOT BE GRANTED BECAUSE THE POWER AND AUTHORITY TO APPROPRIATE FUNDS IS ULTIMATELY VESTED EXCLUSIVELY IN THE LEGISLATIVE AND EXECUTIVE BRANCH OF GOVERNMENT.

In this action, plaintiffs' are seeking an order from this Court that would force the Legislature to appropriate, for FY 97, approximately $140 million above the $60 million in additional school aid to the SNDs that the Governor has recommended in her FY 97 proposed budget. Such an order would be an unprecedented intrusion into the legislative and executive province by the judiciary. The remedy which plaintiffs seek is constitutionally interdicted. As explained by Justice Weintraub, albeit in the context of a matter involving the State's immunity from suit, the Judiciary cannot compel the Legislature to pass, and cannot compel the Governor to sign, an appropriation:

> The State's immunity from suit does not rest upon the notion that the State can do no wrong. Indeed the State can do wrong, so much so that it can expend public moneys to compensate for the wrong it does. In sustaining the legislative power to pay, we explain the State thereby merely recognizes a "moral" obligation, by which we mean only that the obligation is "moral" rather than "legal" because there is no machinery to compel the State to do what in justice it ought to do. Thus the State's "immunity" involves ultimately the question, which branch of government shall decide for the State when it shall pay? In the abstract, a question of that kind would seem "judicial" enough, in the absence of a controlling policy expression by the Legislature. But the judiciary could not enforce a judgment if it gave one. No money may be drawn from the State treasury but for appropriations made by law. Const., Art. VIII, § II, ¶ 2. The Judiciary could not

> order the Legislature to appropriate money, or the Governor to approve an appropriation if one were made. Gallena v. Scott, 11 N.J. 231, 238-239 (1953); cf. Baltzer v. State of North Carolina, 161 U.S. 240, 16 S. Ct. 500, 40 L. Ed. 684 (1896). Nor would it do to issue a writ of execution to sell the State House or the courtroom furnishings. [citation omitted]. Thus, the problem arises from the circumstances that under our system of separation of powers, the Judiciary, not controlling the purse strings, cannot act effectively alone.

Fitzgerald v. Palmer, 47 N.J. 106, 108 (1966).

The power and authority to appropriate funds belongs exclusively to the Legislature, although the Executive has an essential role in the appropriations process prescribed by the State Constitution.

> The power and authority to appropriate funds is vested in the legislative branch of government. City of East Orange v. Palmer, 52 N.J. 329, 337 (1968); Fitzgerald v. Palmer, 47 N.J. 106, 108 (1966); Gallena v. Scott, 11 N.J. 231, 238-39 (1953); Amantia v. Cantwell, 89 N.J. Super. 7, 12-13 (App. Div. 1965). Although this power to appropriate and expend state monies is reserved exclusively to the Legislature, the Governor nonetheless plays a vital constitutional role in the budget process. The ultimate legislative authority over appropriations is subject to checks and balances from the executive. The Governor is statutorily authorized to "examine and consider all requests for appropriations" and to "formulate***budget recommendations to be forwarded to the Legislature for its consideration and ultimate approval." N.J.S.A. 52:27B-20. Further, and of critical relevance in this case, the Governor is constitutionally empowered to object to any item or items excluded in an appropriation bill through the exercise of a selective veto. N.J. Const. (1947) art. V, § I, para. 15.

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> The Governor's statutory authority to propose the State budget, and his constitutional power to exercise a selective veto over legislative appropriations, constitute significant responsibilities for the State's fiscal affairs, and are essential to an efficient, modern system of government. See City of Camden v. Byrne, supra, 82 N.J. at 150. . . .

Karcher v. Kean, 97 N.J. 483, 489 (1984).

The Court has recognized the lack of any role relegated to the judicial branch in the process of the appropriation of State funds.

> With the ultimate constitutional responsibility for appropriations vested in the Legislature, and with executive responsibilities so clearly involved in the budget process, the judiciary has accepted its own absence of authority to compel either the Legislature to make a specific appropriation or the Governor to recommend or approve one. See City of Camden v. Byrne, supra, 82 N.J. at 149 (even if amendment to appropriations act were held unconstitutional, no relief would be available through Courts in absence of legislative appropriation); Doe v. Mathews, 420 F. Supp. 865, 870-72 (D.N.J. 1976); Mountain, "The Role of Judicial Activism: Neither Sword Nor Purse?," 10 Seton Hall L. Rev. 6, 11 (1979) [Karcher v. Kean, supra, 97 N.J. at 490].

Although the Court has suggested that the appropriation of school aid constitutes an exception to the otherwise firm principles excluding the judiciary from any role in the appropriation of public funds, the Court has never ordered the appropriation of funds.* It has enjoined a use of certain school funds and ordered

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* In dicta, the Court has suggested that a violation of a clear constitutional mandate may authorize an appropriation

the traditional actors in the appropriation process to redirect those monies to the Court's directed purposes in a future fiscal year, but no appropriation per se has been effected by the Courts ever.

In Robinson IV, the Court faced a situation where it had previously held the school funding formula to be unconstitutional, Robinson v. Cahill (Robinson I), 62 N.J. 473 (1973), had provided time for the Legislature to act, Robinson v. Cahill (Robinson II), 63 N.J. 196 (1973)(State given until December 31, 1974 to enact a new formula), cert. den. sub nom. Dickey v. Robinson, 414 U.S. 976 (1973) and the deadline for action had passed, Robinson v. Cahill (Robinson III), 67 N.J. 35 (1975) (application for relief after 12/31/74). The Court chose not to act precipitously and order relief for the forthcoming school year, i.e. 1975-76, since the application for relief was filed just before the process for adopting school budgets for the 1975-76 school year was about to commence. The Court found that, given the timing, "it would be inequitable, and, indeed, chaotic as to many school districts to effect financial changes for the [next] school year at this late

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pursuant to a judicial order. See, Div. of Youth & Family Services v. D.C., 118 N.J. 388, 399-400 (1990). But such a step has never been taken; in considering such arguments, the Court has either found no clear constitutional mandate, see D.C., supra, 118 N.J. at 399-400, or has found some other means to achieve its desired goal, such as suspending certain current funding legislative schemes and "reallocating" a future fiscal year's anticipated appropriation of school funds in accordance with a previous statutory allocation consistent with the Governor's arguments for such temporary relief. See Robinson v. Cahill, (Robinson IV) 67 N.J. 333, 354-55 (corrected opin.) 69 N.J. 133 (1975) cert. den. sub nom. Klein v. Robinson, 423 U.S. 913 (1975).

date and on such short notice." Robinson III, 67 N.J. at 37. Thus, the Court decided to extend the deadline for compliance for a year and to accept full briefing on the issue of the appropriate remedy to be ordered in the event that the deadline was not met.

Moreover, the Court took steps to insure that any order which would effect the distribution of State aid to schools would be in place in sufficient time for school districts and the State to plan accordingly -- i.e. by October 1 of the preceding school year. Robinson III, 67 N.J. at 38. In the meantime, State aid continued to be distributed pursuant to the formula that was held unconstitutional in Robinson I.

On May 23, 1975, more than a year before its order would have taken effect, the Court issued its decision in Robinson IV. The Legislature had still not adopted a new funding formula and the Court agreed with the plaintiffs and the executive branch that State aid could not be distributed for yet another school year under the unconstitutional formula. The Court, therefore, ordered that the distribution of "minimum aid" and "save harmless aid" would be enjoined and that the funds appropriated for those aid categories would be redistributed to school districts as part of the equalization formula of a previously enacted legislative formula. However, the Court directed that this order would not become effective until July 1, 1976, more than thirteen months after its entry. Moreover, the order was not required to be implemented if the Legislature took constitutionally appropriate action prior to that date.

The situation at hand is very different than that which faced the Court in Robinson IV. The plaintiffs are requesting that this Court intervene well before the deadline set by this Court for enacting a new formula has arrived.* Moreover, plaintiffs have made this application not only after the commencement of the school budgeting process for 1996-97, but after the process has been essentially completed; yet plaintiffs seek immediate relief for the 1996-97 year ignoring the concerns voiced in Robinson III and IV regarding the advisability of intervening "at this late date and on such short notice." Robinson III, 67 N.J. at 37. See also Robinson IV, 69 N.J. at 143.

Further, the request is premised not on the fact that the State is still distributing aid through an unconstitutional formula but, rather, that the movement being made toward correcting the problems with the prior formula is not fast enough for plaintiffs' liking -- the State has not reduced the relative disparity by the 5.35% each year that plaintiffs claim is required. The State however, has addressed in good faith the relative disparity each year since the Abbott III decision and has continued to phase-out transition aid. Further, the executive branch requests that the Court stay its hand and permit the other two branches of State

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* The Court, in Abbott II, had required a new formula to be implemented by the 1991-92 school year and that deadline was met by the enactment of the QEA. Although eventually the Court found the QEA to be constitutionally deficient, it also noted that it was a "constitutionally legitimate response" to the Court's order in Abbott II. Thus, the Court chose to give the State until September 1996 to enact a new formula which addressed the deficiencies the Court found in the QEA.

government to complete their work on a new formula which the Court indicated should be enacted by September 1996. The situation today is distinguishable from that facing the Court in 1975. There is no abject failure on the part of either the legislative or executive branches. Monies are being directed to the special needs districts. The Legislature and the Executive have acted. There has been sufficient response.

Moreover, the relief being requested by plaintiffs is much more intrusive into the legislative province than this Court's order in Robinson IV. In Robinson IV, the Legislature was given ample time to act before the order became effective and, in fact, did so act. See Robinson v. Cahill (Robinson V), 69 N.J. 449 (1976). Further, in Robinson IV, the Court limited its order to the reallocation of funds appropriated by the Legislature in two school aid categories to other school aid categories. The Court did not order the specific amount of that reallocation and appropriation or that any specific amount of funds be so reallocated and appropriated; nor did the order result in the need to reallocate non-educational funds to education purposes. Plaintiffs, however, are requesting that this Court order the Legislature, in the last month of the appropriations process, to appropriate an additional $140 million to the budget proposed by the Governor for educational purposes. The relief requested here

goes well beyond anything considered by the Court in Robinson IV and would be disruptive of the appropriation process.*

Finally, and most significantly, the Court in Robinson IV was faced with a situation of utter Legislative failure to meet its constitutional obligation to fund a thorough and efficient system of public education. As the Court noted, there was a "profound violation of constitutional right" that was simply not being addressed. In the instant case, there is no such failure. The facts demonstrate a good faith effort of the executive and legislative branches to address the deficiencies identified by the Court in Abbott III since that decision was rendered. The Court did not, in that decision, specify a particular rate of progress that was required; only plaintiffs have articulated such an obligation. The failure of the State to meet plaintiffs' artificial and inflexible standard for appropriate progress does not create the type of "constitutional exigency, on a level of plain, stark and unmistakable reality" which prompted the Court to act in Robinson IV. It certainly does not rise to the level of a constitutional mandate justifying judicial excursion into the appropriation process when the most that can be said is that the legislative and executive branches have not met plaintiffs' expectations.

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*The suggestion that $140 million can, or should, be "found" and allocated to plaintiffs' preferred purposes belies current fiscal realities of the appropriations process for Fiscal Year 1997. Ferrara Certification paras. 6, 10 and 11.

In Abbott III, the Court gave the State three years to achieve certain goals and provided great flexibility in the interim. The Court's only admonitions were that the new formula be adopted by September 1996 and that the relative disparity be "further addressed" in the 1995-1996 and 1996-97 school years. And, as noted in Abbott II, the "parity target" does not need to be the current spending level of the I&J districts but could be a lower amount. 119 N.J. at 386.

Plaintiffs are asking this Court to remove all flexibility and impose on the State both the plaintiffs' preferred rate of reducing the relative disparity as well as the plaintiffs' preferred absolute target, *i.e.* projected I&J spending for 1997-98. By removing the flexibility provided to the State in the Abbott III decision, plaintiffs are, in reality, requesting that the Court order the Legislature to appropriate a fixed sum of money for a particular purpose. There is no justification for the relief being requested at this time by plaintiffs.

POINT III

PLAINTIFFS' ARE NOT ENTITLED TO ATTORNEYS' FEES FOR THIS ACTION.

In addition to asking this Court to order the Legislature to appropriate approximately $200 million for FY 97 to be distributed as foundation aid to the SNDs, plaintiffs further request that this Court order the State to pay attorneys' fees to the plaintiffs for bringing this application for relief to the Court. Plaintiffs claim that they are entitled to attorneys fees pursuant to R. 1:10-3(formerly R. 1:10-5). However, neither the law nor the facts of this matter support an award of attorneys fees and the application, therefore, should be denied.

This Court has adhered to "the general rule that sound judicial administration is best advanced if litigants bear their own counsel fees." Right to Choose v. Byrne, 91 N.J. 287, 316 (1982). Consistently therefore, the Court should hold that "legal expenses, whether for the compensation of attorneys or otherwise, are not recoverable absent express authorization by statute, Court rule, or contract." State, Dept. Of Environmental Protection v. Ventron Corp., 94 N.J. 473, 504 (1983) citing R. 4:42-9; Cohen v. Fair Lawn Dairies, Inc., 86 N.J. Super. 206, 206 A.2d 585 (App. Div.), aff'd 44 N.J. 450, 210 A.2d 73 (1965); Jersey City Sewerage Auth. v. Housing Auth. of Jersey City, 70 N.J. Super. 576, 176 A.2d 44 (Law Div. 1961), aff'd 40 N.J. 145, 190 A.2d 870 (1963). The 1994 amendment to R. 1:10-3, however, recognizes that as a matter of fundamental fairness, a party who wilfully fails to comply with an order or judgment entitling his adversary to litigant's rights

is properly chargeable with his adversary's enforcement expenses. Pressler, Current N.J. Court Rules, Comment, R. 1:10-3 at 134 (1996).

The authority to grant fees under this rule has been held to apply only to violations of orders and judgments. Pressler, Current N.J. Court Rules, Comment, R. 1:10-3 at 134. If the proceeding for which the request of attorneys fees is made is not appropriately brought under R. 1:10-3, the plaintiff cannot rely upon that rule to seek counsel fees. Haynoski v. Haynoski, 264 N.J. Super. 408, 414 (App. Div. 1993). Further, an award of attorney's fees under R. 1:10-3 is limited to "willful violations." See e.g., Greer v. New Jersey Bureau of Securities, 288 N.J. Super. 69, 86 (App. Div. 1996) (court found no "willful disobedience" or "illegal, oppressive or wrongful conduct" that would justify an award of attorneys' fees).

Plaintiffs have styled their application as a Motion in Aid of Litigants' Rights. However, "[t]he *sine qua non* for an action in aid of litigant's rights, pursuant to R. 1:10-[3], is an order or judgment." Haynoski v. Haynoski, supra, 264 N.J. Super. at 414 (settlement agreement cannot be enforced under R. 1:10-3). See also Pressler, Current N.J. Court Rules, Comment, R. 1:10-3 at 132 (1996)(proceedings may not be appropriately instituted based upon the alleged failure to comply with a directive of the Court which has not been embodied in a written order). Plaintiffs are not properly before this Court on a Motion in Aid of Litigants' Rights since the State has not failed to comply with any order or

judgment of this Court. The Court in Abbott III failed to enter any orders. Moreover, the judgment of the Court was that the current funding formula -- QEA -- was unconstitutional and a constitutionally sufficient formula needed to be put in place by the 1997-1998 school year. Compliance with that judgment cannot be assessed until that time. Accordingly, plaintiff's motion for relief is not properly brought pursuant to R. 1:10-3.

Additionally, even if the Court's instructions to "address" the relative disparity in 1995-1996 and 1996-1997 was considered part of the Court's "judgment" in Abbott III, the facts support the State's position that the State has complied. There is no basis to conclude that the State has violated a Court order or judgment and therefore, attorneys' fees are not available.*

Even if this Court were to decide now to adopt plaintiffs' interpretation of the progress that needed to be made in addressing the relative disparity, the Court's prior decision did not clearly articulate such a requirement. Accordingly, the State's conduct and good faith effort to comply with Abbott III certainly cannot be characterized as the type of willful noncompliance necessary to an award of attorneys' fees.**

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* An award of attorney's fees pursuant to R. 1:10-3 is confined to a "successful movant." Jersey City Redevelopment Agency v. Clean-O-Mat Corp., 289 N.J. Super. 381 (App. Div. 1996) quoting *Pressler, Current N.J. Court Rules*, Comment on R. 1:10-3 (1996).

** Plaintiffs' counsel suggest, in part, that they should be awarded attorneys' fees because plaintiffs are unable to compensate them. Pb 27. While the State does not dispute the fact that plaintiffs are not providing compensation to the Education Law Center (ELC) to pursue this action, nonetheless the ELC has not

In sum, the State contends that the plaintiffs are not properly before this Court pursuant to R. 1:10-3 and therefore cannot be awarded attorneys' fees as part of this action. Beyond the absence of any legal basis for awarding attorneys' fees, the facts, which demonstrate the State's full and good faith compliance with the Abbott III decision, do not support such an award. Plaintiffs request for attorneys' fees should, therefore, be denied.

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been uncompensated. In fact, a review of the ELC's filing with the State demonstrates that the ELC receives substantial public funds from local school districts who would benefit from this litigation (in addition to a sizable contribution from the NJEA). Thus, the ELC already has sources of public funds to support this litigation. Brown Certification, Exhibit B, Schedule A-1 of the Financial Statement.

CONCLUSION

For the foregoing reasons, plaintiffs' Motion in Aid of Litigants' Rights should be denied.

Respectfully submitted,

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Dated: May 17, 1996