Abbott v. Burke

CW-NJ-001-002

RAYMOND ARTHUR ABBOTT, ET AL., Plaintiffs-Movants, vs. FRED G. BURKE, ET AL., Defendants-Respondents.	SUPREME COURT OF NEW JERSEY CIVIL ACTION DOCKET NO.: 42,170

PLAINTIFFS' REPLY BRIEF

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PRELIMINARY STATEMENT

In Response to the Plaintiffs' Motion In Aid of Litigants' Rights, the State does not materially dispute the plaintiffs' figures on present and projected disparity between the special needs and I & J districts. Instead, to avoid the inescapable conclusion from the record that, absent the relief sought by plaintiffs, there is no reasonable likelihood of achieving compliance with the time frame in Abbott v. Burke, 136 N.J. 444 (1994) ("Abbott III"), the State makes several unconvincing and unsupportable arguments to justify demonstrable noncompliance, and dodge judicial action at this time.

First, the State rewrites this Court's constitutional mandate in order to mask the State's indisputable failure to take appropriate actions to reduce the 16% disparity in the aftermath of Abbott III. Second, while manifesting no intent to achieve parity by the Court imposed deadline, the State asks the Court to tolerate this failure because, on May 17, 1996, the State released a "new" plan for school funding. The State then seeks to have the Court consider, in assessing present constitutional compliance, a plan that has not yet even been introduced into legislation. The invitation for this Court to forego judicial intervention is reminiscent of an invitation explicitly rejected in Robinson v. Cahill, 69 N.J. 133, 145-46 (1975)("Robinson IV"). Finally, the State asserts that, in any event, the judiciary is powerless to enforce plaintiffs' constitutional rights if, in so doing, the Court requires action by the executive and legislative branches during the appropriations process. This argument, if accepted, would render the Education Clause a virtual nullity.

At bottom, the State utterly fails to demonstrate, or even suggest, that there

presently exists a reasonable likelihood of a full and final remedy for poor children attending schools in urban districts in 1997-98. Instead, the State proposes to launch another interminable period of protracted litigation and constitutional deprivation. To deny plaintiffs' relief, as the State requests, requires turning away from over twenty years of judicial effort to secure constitutional compliance, surrendering along the way this Court's fundamental place among the other branches. If anything, the State's arguments on this Motion demonstrate that now is not the time to be diverted from, or to pause along, the course charted in Abbott v. Burke, 119 N.J. 287 (1990)("Abbott II") and Abbott III. It is plainly evident that this course is the only one presently available that leads, finally, to full satisfaction of plaintiffs' claims in this litigation.

ARGUMENT

I. IMMEDIATE JUDICIAL INTERVENTION IS REQUIRED BECAUSE THERE IS NO REASONABLE LIKELIHOOD THAT THE STATE WILL ACHIEVE PARITY IN REGULAR EDUCATION EXPENDITURES BETWEEN THE POOR AND WEALTHY SCHOOL DISTRICTS BY 1997-98, AS REQUIRED UNDER ABBOTT III

Plaintiffs' contention on this Motion -- that progress in reducing disparity in 1995-96 and 1996-97 has been insufficient to make parity in 1997-98 reasonably likely -- is now confirmed by the State's response. The State's own calculations, remarkably similar to plaintiffs', show a total of only 5% of disparity reduction in school years 1995-96 and 1996-97. The result is a continuing disparity of 11%, or $256 million, as 1997-98 approaches, the school year in which substantial equivalence must be achieved under Abbott III. Most tellingly, the State fails to even estimate the level of disparity that must be eliminated in 1997-98 -- an amount plaintiffs project to be $341 million -- and doesn't even claim it will try to ensure parity between the special needs and I and J districts.

Facing its undisputed failure to meet this Court's mandate, the State now simply argues that Abbott III is satisfied so long as any action -- no matter how slight -- is taken to "address" disparity. State's Brief ("Sb")9,12. Even more, the State disingenuously asserts that the projected disparity gap for 1997-98 doesn't matter because parity with the I and J districts by 1997-98 is the plaintiffs' "preferred" remedy, and not this Court's constitutional mandate. Sb24. Finally, the State announces in its Response that, under a school funding plan ("Plan") unveiled by the Governor on May 17, 1996, there is no longer any need to move even an inch closer towards equivalence with the I and J

districts and that this Court should defer action now to permit legislative adoption of the Plan. Sb21-24.

The State's arguments should be rejected outright because they completely ignore the clear and unequivocal mandate of Abbott III: the State's actions to reduce disparity in 1995-96 and 1996-97 must be sufficient to suggest a "reasonable likelihood" of achieving parity by 1997-98. Even worse, the State asks this Court to restrain itself from taking any further remedial action so the State can pursue a Plan that flatly rejects the Court's definition of a thorough and efficient education and would, once again, re-introduce increased disparities in educational programs and funding. It is now clear that, absent immediate intervention, the State intends to prolong, and very likely exacerbate, the severe constitutional deprivation endured so long by plaintiff school children.

A. There Is No Likelihood of the State Eliminating the Remaining Disparity By 1997-98, As Abbott III Requires , Nor Does the State Claim It Will Do So

The State and plaintiffs agree that disparity stood at 16% at the start of the timetable established in Abbott III. Azzara Cert. ¶16 (disparity for 1994-95 was 16.42%); Goertz Aff. ¶12(a)(16.05%). The parties are also strikingly close on the disparity reductions made in 1995-96 and projected for 1996-97. Azzara Cert. ¶¶16,19 (disparity fell 3.51%, or to $299 million, in 1995-96; projected 1.87% disparity reduction in 1996-97, or to $256 million); Goertz Aff. ¶¶13(a) and (b), 14(h)(2.69%, or $299 million, in 1995-96; 0.76%, or $291 million, for 1996-97). Any differences are attributable solely to the State's lower projections of enrollment and I and J spending

growth. Goertz Supp. Aff. ¶4(b). Finally, the State calculates a disparity reduction of 5% in 1995-96 and 1996-97, leaving 10.93% in remaining disparity for 1997-98. Azzara Cert. ¶¶16,19.

The State's 5% disparity reduction in school years 1995-96 and 1996-97 is unquestionably inadequate, not "obvious and significant," as the State contends. Sb11.[1] This is so because the State will leave nearly 11%, or $256 million, in disparity as 1997-98 approaches. Given this shortfall, it is not surprising that the State fails to even project the level of disparity that must be eliminated in 1997-98 in order to achieve parity, an amount which plaintiffs project to be $341 million. As is patently obvious, it is extremely unlikely that the State would eliminate this level of disparity in a single year, even if it wanted to.

What is surprising is the State's failure to even claim that it will try to achieve parity by 1997-98. The State never once indicates that the disparity reductions in 1995-96 and 1996-97 were taken to move the special needs districts towards parity with the I and J districts by 1997-98. Under the State's view, Abbott III only "specifies] ... that substantial equivalence in regular education spending should be achieved in the 1997-98 school year." Sb12. Incredibly, the State omits the most essential feature of the decision: spending in the special needs districts must be substantially equivalent to the I and J districts.

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[1] The State indicates that it decided to "target[ ] the increases in state aid to the lowest spending" special needs districts. Azzara Cert. ¶17. Assisting the lowest districts is clearly reasonable. However, in doing so, the State will cut spending in several other districts, thus increasing their disparity level. Azzara Cert., Exhs. 6, 7 (New Brunswick, Trenton, Orange and Long Branch).

To distract attention from this glaring omission, the State accuses plaintiffs of "mischaracterizing" the Abbott III judgment "as one of a mandated reduction of 5.35% each year in relative disparity." Sb11. Plaintiffs do not suggest, let alone assert, that Abbott III requires any specific level of "mandated reduction" during the Abbott III time frame. Rather, plaintiffs contend that the Court's approach clearly reflects an expectation that the State will move the special needs districts towards parity through a phase-in process over the course of the time frame and thereby avoid the need to distribute an inordinately large amount in the final year. This is based upon both the Court's requirement of yearly reductions in the relative disparity at levels sufficient to suggest a reasonable likelihood of achieving parity in 1997-98, and the Court's -- and the State's -- acknowledged concern, id. 136 N.J. at 452, that additional state aid under Abbott be distributed to enable the special needs districts to maximize improvement to plaintiffs' education.

B. The State's Justification for Its Noncompliance Should Be Rejected Out of Hand

To explain and justify its blatant noncompliance with Abbott III, the State offers three arguments: (1) that parity between the special needs and I and J districts by 1997-98 is the plaintiffs' and not the Court's remedy; (2) that any efforts to "further address" the pre-existing disparity reflect "good faith," and this is all that is necessary for compliance; and (3) that the Court should refrain from enforcing the Abbott III judgment because the Governor has proposed a school funding plan. Each of these arguments should be rejected out of hand.

First, the State contends that the requirement of parity with the I and J districts is

not even the remedy imposed by this Court in Abbott III; it is only plaintiffs' "preferred absolute target" for parity on this Motion. Sb24. Quite to the contrary, the explicit language of Abbott III makes abundantly clear that the judgment's core mandate is the achievement of substantial equivalence, approximating 100%, in regular education spending between the special needs and I and J districts by 1997-98. 136 N.J. at 447(the Court will not intervene "if substantial equivalence of the special needs districts and the wealthier districts is achieved for school year 1997-98"). The State's transparent effort to ignore this Court's mandate should be summarily dismissed.

Second, the Court should reject the State's related argument that the 5% reduction in disparity in 1995-96 and 1996-97 constitutes a "good faith" effort to "further address" disparity, and that such good faith constitutes compliance with Abbott III. Sb7 (the State has "demonstrated good faith in meeting the Court's directive"); Sb9-11; Sb24. This argument, however, rests upon a self-serving and highly selective reading of Abbott III, one in which the requirement to address disparity is pulled completely from context and stripped of all meaning relative to the Court's remedial objective. Indeed, the Abbott III judgment has one, overriding purpose: to achieve, over a three year time frame, the full and final vindication of the constitutional rights of plaintiff school children by assuring substantial equivalence in regular education spending between poor and wealthy districts.

Moreover, as a matter of law, more than a good faith attempt is required to satisfy a judgment implicating the fundamental constitutional rights of our most vulnerable citizens, especially where there is a long history of noncompliance with this Court's decrees. This is undoubtedly true here. The time for good intentions or future

hopes has long since passed in this litigation. Actual compliance is now required. Abbott II, 119 N.J. 287 (1990); see also, Southern Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158, 221 (1983) ("Mount Laurel II").

Finally, the State tries to justify its failure to comply with Abbott III by presenting a Plan that, if enacted into law, will replace this Court's definition of thorough and efficient education. Plaintiffs' preliminary analysis indicates that the Plan proposes a statewide per-pupil amount for all education of $8285, which includes both regular and categorical education. It would also allow unlimited optional spending above that amount, subject to local approval. DiPatri Cert. ¶23, Exh.1; Goertz Supp. Aff. ¶6(e),(f). The average regular education amount under the Plan appears to be $7,194 per-pupil, $1,029 below the current I and J district average. DiPatri Cer. ¶25; Goertz Supp. Aff. ¶6(b). This per-pupil amount would be 87.5% of parity with I and J districts, just about the same parity level of special needs districts in 1996-97. Goertz Supp. Aff. ¶¶4(b),6(d).[2]

It is premature for the Court to make any determination on the ultimate constitutionality of the Plan, a point on which the parties agree. Yet in offering this plan to the Court, the State forcefully argues that enforcement of the Abbott III parity remedy should abruptly halt because the Plan, if adopted, would replace that remedy

[2] The apparent regular education per-pupil amount is derived from the information on the Plan presented thus far by the State. DiPatri. Cert., Exh. 1; Goertz Supp. Aff. ¶6. The Plan's per-pupil amount for regular is slightly higher than the State's "projected minimum level of 86.23% parity for the 1996-97 school year," a level at which the State has sought to position most special needs districts with the additional state aid provided in school years 1995-96 and 1996-97. Azzara Cert. ¶17.

altogether. However, as discussed below, the Plan, on its face, runs afoul of the central tenets of the Robinson and Abbott litigation. The Plan, therefore, hardly inspires the confidence necessary to warrant further delay of continued progress towards satisfaction of plaintiffs' constitutional rights under the Abbott III judgment.

The Plan appears to be nothing more than a minimum foundation plan, albeit dressed in new clothing. Per-pupil funding is set at $8,285 for all education spending. $7,194 per-pupil is provided in special need districts for regular education. Districts can spend unlimited, "optional" amounts above $8,285 from local taxes. The long history of school finance litigation in New Jersey shows that a minimum foundation level tends to operate as a ceiling for poor districts, while wealthier districts can more readily use the local option to support their education programs. Moreover, the Plan's approach -- providing a per-pupil foundation amount, with state aid assuring that all districts reach that level and unlimited local spending above that level -- is strikingly reminiscent of the minimum foundation plan contained in the State School Aid Act of 1954, challenged in the trial court's decision in Robinson v. Cahill, 118 N.J. Super. 223, 229-30 (Law. Div. 1972), supplemented at 119 N.J. Super. 40 (Law. Div. 1972).

In addition, under the Plan, the degree of parity in regular education spending would be dependent on the annual budgetary processes of school districts, in direct contradiction of one of the cardinal principles of Abbott. As a result, there is no assurance that special needs districts will achieve full parity or even maintain the current parity under this funding scheme, a feature which, like others before it, flies directly in the face of the constitutional prerequisite of substantial equivalence between poorer and wealthier school districts. This Court has cautioned the State that

> [w]hatever the legislative remedy, however, it must assure that these poorer urban districts have a budget per-pupil that is approximately equal to the average of the richer suburban districts, whatever that average may be, and be sufficient to address their special needs.

Abbott II, 119 N.J. at 388; Abbott III, 136 N.J. at 454. Lastly, the Plan contains neither a guarantee nor a mandate from the State that funding in the special needs districts will be "at the level of the property-rich districts," yet another rule-of-thumb under this Court's prior decisions. Abbott II, 119 N.J. at 295. Given problems as fundamental as these, the Plan fosters little comfort that, by awaiting its enactment, plaintiffs will be any closer to satisfaction of their claims.

In sum, the State fails to demonstrate, or suggest, a reasonable likelihood of achieving parity in 1997-98, in light of the minimal reductions in disparity accomplished thus far. Of even greater significance, the State clearly indicates that it has no intention of complying with the Abbott III parity remedy. Finally, there is simply no reason for this Court to delay intervention on account of the State's proposed Plan, particularly because it has yet to take any legislative form whatsoever. Plaintiffs in no way argue, or even intimate, that the "ongoing work of the co-equal branches" to satisfy the Abbott III judgment should not continue with all deliberate speed. Sb13. The plan's facial problems, of great constitutional dimension, strongly counsel that remaining on the present path to compliance offers the only real prospect of achieving parity.

II. THE RELIEF SOUGHT BY PLAINTIFFS DOES NOT VIOLATE SEPARATION OF POWERS

The State contends that Plaintiffs "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." Sb22. This "unprecedented" request, according to the State, is barred by the principle of separation of powers, because the Court has no power to order an appropriation of funds and would, in any event, be "disruptive of the appropriations process." Id. at 23. This argument is fundamentally flawed in both its premise and its conclusion.

To begin, plaintiffs do not seek an order requiring the State to appropriate an additional $140 million to the budget for education. Rather, plaintiffs are asking the Court to ensure compliance with the constitutional mandate in Abbott III by ordering the State to reduce the remaining disparity in half over the next year. Plaintiffs Brief ("Pb")19. How the State chooses to comply with such an order is an executive and legislative decision. As plaintiffs pointed out in their opening Brief, "the State may have to redirect funds within the proposed 1997 budget; tap anticipated surplus funds; raise revenue beyond the levels presently proposed; or [employ] some combination of all three measures." Pb23-24.

Regardless of the means chosen, the crucial point is that refining the time frame for achieving parity under Abbott III leaves the other branches free to determine how best to comply with the Court's timetable and, as a result, is clearly consistent with the separation of powers doctrine. Cf. Abbott III, 136 N.J. at 447; Abbott II, 119 N.J. at 387; Robinson IV, 69 N.J. at 144-45. As plaintiffs have explained, by acting now, the

Court can afford the other branches the widest possible latitude to choose precisely how to implement the constitutional mandate. Pb24. This judicious approach preserves the respective authority of the legislative and executive branches without abdication of judicial authority.

The fact that the other branches may have to act during the appropriations process, or even increase revenue, to comply with plaintiffs' requested order in no way renders such relief impermissible. Abbott III is illustrative on this point. The Court in Abbott III explicitly required the State to eliminate the disparity in educational spending between the special needs and the I & J districts by 16% over three years. Although the Court did not direct any specific reductions in each of the three years, the reduction of disparity through additional state appropriations was certainly contemplated, foreseeable and, in fact, has occurred. There is no qualitative difference, and the State has suggested none, between the relief now sought by plaintiffs and the relief ordered in Abbott III.

At a more fundamental level, the State's assertion that the Court lacks the power to order the requested relief is clearly -- and dangerously -- incorrect. The State casually acknowledges, but readily disregards, a fundamental principle inherent in the State Constitution: "as the designated last-resort guarantor of the Constitution," this Court possesses both the authority and the responsibility to remedy constitutional violations. Robinson IV, 69 N.J. at 154. "To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper." Id. at 147 (quoting Cooper v. Nutley Sun Printing Co., Inc., 36 N.J. 189, 197 (1961). Accord Abbott I, 100 N.J. at 281; Mount Laurel II, 92 N.J. at 212-213. In the education context, moreover,

this Court has already recognized that it must use "power equal to its responsibility," including the power, if necessary, to override the strictures of the Appropriations Clause. Robinson IV, 69 N.J. at 154.

The State's position, on the other hand, emasculates judicial authority, rendering the Court a bystander, rather than an arbiter of constitutional compliance, Cf. Campbell County School District v. State of Wyoming, 907 P.2d 1238 (Wyo. 1995)(Wyoming Supreme Court notes that separation of powers violations are "routinely advanced]" by defenders of unequal state funding schemes). If anything, the State's approach to separation of powers, if adhered to, would have profound consequences by converting this Court's determinations concerning the Education Clause into exhortations that the executive and legislature could simply ignore during the appropriations process.

The State also seriously mischaracterizes this Court's precedents when it argues that, because appropriations powers lie exclusively with the executive and legislative branches, the Court is powerless to act. Sb16-18. However, as even the State acknowledges, the general principle regarding the power of the other branches to act in the appropriations process "is qualified, however, when funds are constitutionally mandated." Div. Of Youth & Family Serv. v. D.C., 118 N.J. 388, 400 (1990)(citing Robinson v. Cahill, 67 N.J. 333, 354-55 (1975)). More than dictum, as the State believes, this Court clearly possess the authority to enter an order which requires the other branches to take action affecting appropriation, contemplated or not yet contemplated, when fundamental constitutional rights are at stake.

Finally, while the State asserts that the time is not right for the Court's

intervention, it also argues that plaintiffs have made their application both too soon and too late. Sb21. There is nothing wrong with plaintiffs' timing, however, as the plain language of Abbott III indicates. As explained above, the State doesn't even claim that the reductions in the 16% of disparity suggest a reasonable likelihood of achieving parity by 1997-98. Under these circumstances, it not just appropriate for the Court to intervene immediately, it is absolutely essential to continue progress towards full and final vindication of plaintiffs' constitutional rights, as established by this Court.

III. PLAINTIFFS' COUNSEL HAS PROPERLY BROUGHT THIS MOTION PURSUANT TO R. 1:10-3 AND ARE ACCORDINGLY ELIGIBLE FOR ATTORNEYS' FEES.

The parties agree that attorneys' fees are available when a litigant successfully moves pursuant to R. 1:10-3 to enforce a court order or judgment. Sb25-26. The State, however, makes two arguments against the request of plaintiffs' counsel for attorneys' fees on this Motion, neither of which is correct.

First, the State contends that, because the Abbott III judgment only requires the enactment of legislation ensuring parity by September 1996, "compliance with that judgment cannot be assessed until that time," and, therefore, "plaintiff's [sic] motion for relief is not properly brought pursuant to R. 1:10-3." Sb27. The State's argument conveniently ignores the judgment's directive that the State, over the course of two years, make sufficient progress towards parity to suggest a reasonable likelihood of achieving compliance by 1997-98. Id., 136 N.J. at 447-48. The judgment also explicitly invites "applications for relief" if movement towards parity "at any time suggests less than a reasonable likelihood of achieving compliance by 1997-98." Id. To suggest that these directives are not part of the judgment in Abbott III is completely at odds with a fair and straightforward reading of the opinion. Clearly, if there were no judgment to enforce prior to September 1996, the Court would not have invited applications for relief "at any time" after its 1994 decision. Plaintiffs, through their counsel, have moved at the Court's express invitation, and they seek "relief by application," R. 1:10-3, to ensure enforcement of the Court's judgment.

Second, the State contends that attorneys' fees are available under R. 1:10-3

only for "willful violations" of judgments and that the State's failure to comply with Abbott III "cannot be characterized as the type of willful noncompliance necessary to an award of attorneys' fees." Sb26-27. The plain language of the Rule, however, contains no willfulness requirement, allowing "a litigant in any action [to seek relief by application in the action." R. 1:10-3. It further provides that a "court in its discretion may make an allowance for counsel fees to be paid to any party to the action to a party accorded relief under this rule." R. 1:10-3. By its plain terms, the only prerequisite to obtaining counsel fees is securing "relief under this rule." Nothing in the Rule, in turn, suggests that relief can be accorded only when a party demonstrates a willful violation of a court order or judgment. See Haynoski v. Haynoski, 264 N.J. Super. 404, 414 (App. Div. 1993) (noting that the Rule allows parties to enforce an existing court order or judgment). Thus, since plaintiffs are entitled to relief under R. 1:10-3, their counsel is also eligible for attorneys' fees.

The lone case cited by the State provides no support for the State's position. See Greer v. New Jersey Bureau of Securities, 288 N.J. Super. 69 (App.Div. 1996). Contrary to the State's suggestion, Greer does not hold that attorneys' fees are only available under R. 1:10-3 only when a party has willfully violated a court order or judgment. Instead, the Appellate Division expressed its disagreement with the trial court's finding that the defendant had willfully disobeyed the court's order, finding that there was "no illegal, oppressive or wrongful conduct by the Bureau in this case which would justify the Bureau's being required to pay the counsel fees of opposing parties." Id. at 85. In this case, by contrast, there has been -- at the very least -- "wrongful conduct" by the State in its failure to comply with Abbott III. Therefore, even under the

authority cited by the State, an award of attorneys' fees to plaintiffs counsel would be entirely appropriate, particularly where, as here, the judgment sought to be enforced implicates fundamental the constitutional rights of poor children under the Education Clause.[3]

3 The State also suggests, in a footnote, that awarding attorneys' fees would be inappropriate because the Education Law Center "already has sources of public funds to support this litigation." Sb28, n.**. The availability of such funds, however, much like the availability of fees from private clients, does not render plaintiffs ineligible for an award of attorneys' fees. Cf. Szczepanski v. Newcomb Medical Center, 141 N.J. 346, 358 (1995) (holding that "the reasonable counsel fee payable to the prevailing party under fee-shifting statutes is determined independently of the provisions of the fee agreement between that party and his or her counsel"); see also, Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 1546-47(1984)(Upholding attorneys' fee award to nonprofit counsel according to the prevailing market rate without regard to the manner in which counsel was compensated by organization).

CONCLUSION

For these reasons, plaintiffs respectfully request that this Court reject the State's arguments in response to plaintiffs' Motion. Further, plaintiffs request the Court enter an order directing the State (1) to reduce the remaining disparity in half for the school year 1996-97, and (2) to certify by July 15, 1996 the specific steps taken by the Legislative and Executive branches to Achieve the Required level of disparity reduction.

Respectfully submitted,

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