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Abbott v. Burke

CW-NJ-001-013

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Hand Delivered

March 19, 1998

Stephen W. Townsend, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
CN 970
Trenton, NJ 08625

Re: Raymond Arthur Abbott, et al., v. Fred G. Burke, et al.
Docket No. M-622

Dear Mr. Townsend:

On March 6 and 10, 1998, the defendants ("State"), in response to the Court's inquires at oral argument, submitted "draft legislation ... on the financing of school facility construction," along with "Summary School Prototypes" which, according to the State, "for[m] the basis for the square foot standards in the proposed legislation." See Letters from Peter Verniero, Attorney General, to Stephen Townsend, Clerk, March 6 and 10, 1998. ("March 6 Letter" and "March 10 Letter"). The State also submitted a Department of Education ("DOE") report on Goodstarts, a report that the State contends "is not, and was not designed to be, an objective standardized evaluation of the program." March 10 Letter, 2.

Plaintiffs have not had an opportunity to analyze the State's submissions in detail. Nor can these submissions be subjected to fact-finding, since they were not part of the State's presentation on remand. The substance of these submissions is extremely fact-sensitive and further adjudication is required to

reach firm conclusions. However, because the submissions implicate critical issues now before the Court, plaintiffs make the following preliminary comments.

1. Absence of Facilities' Financing and Construction Program

Rather than establishing a program for facilities' financing and construction in the SNDs, the draft legislation appears only to be the Governor's response to sections of the Comprehensive Educational Improvement and Financing Act ("CEIFA") directing that the formula for distributing state aid for debt service to all school districts be revised and implemented by the 1998-99 school year. Under CEIFA, debt service aid for the 1997-98 school year "shall be determined in the budget." For 1998-99, and thereafter, CEIFA requires implementation of a revised formula for distributing state aid for debt service. In this regard, N.J.S.A. 18A:7F-25 states that, "[b]eginning in the 1998-99 school year, state aid for facilities be distributed to each school district .... through a formula which reimburses districts for all or part of the principal and interest payments on both debt service and lease purchase payments." This provision also states that

> [t]he Governor shall submit to the Legislature at least 60 days prior to the 1998 budget address, criteria for determining approved costs, State support levels, and maintenance incentives applicable to the 1998-99 school year and thereafter along with supporting data. The criteria shall be deemed approved by the Legislature unless a concurrent resolution is passed within 60 days of submission.

Thus, the draft legislation relates solely to the distribution of debt service aid to all school districts, and does not authorize a state program to finance and construct needed school facilities in the SNDs, such as the program that was recommended by the State to the Remand Court. On remand, the Commissioner of Education ("Commissioner") presented "a comprehensive construction management and financing plan" through the Educational Financing Authority ("EFA") to meet the facility needs of the SNDs. Remand Decision, 132-35. Under this plan, the EFA would issue bonds for facility construction projects in the SNDs, and would then manage these construction projects in same way as the EFA has managed college construction projects. The draft legislation does not address what the Remand Court found to be "the one obstacle to utilizing the EFA for financing construction in the [SNDs]; the [EFA] statute must be amended to allow the EFA to finance projects other than higher education." Remand Decision, 135.

2. Absence of Educational Adequacy Standards

While the debt service formula in the draft legislation appears to be based upon "School Prototypes," the draft legislation does not contain any explicit determination by the Commissioner as to the minimum spaces required for educational adequacy in the SNDs. On remand, the State represented that these determinations would be made by January 1998. Remand Decision, 131; see also Testimony of Assistant Commissioner Hespe, Tr. 12/10/97, 225-26.

Nonetheless, the State now indicates that "although the proposed legislation permits flexibility in the specific spaces to be provided by districts within their square foot allotment," the Commissioner will, at some unspecified time, "be proposing regulations to require certain minimum spaces and room sizes be provided in the [SND] facilities." March 6 Letter, 1.

Moreover, even if the spaces in the "School Prototypes" are considered as standards for educational adequacy, they are far below the facilities recommended by every expert who testified on remand, even the elementary schools in Arlington, Virginia, designed by the State's own facilities' expert. See PF-6 (Dr. Alton Hlavin's Elementary Design Guidelines). In addition, the Commissioner's Study of School Facilities and Recommendations for the Abbott Districts ("Study") indicates that the SND schools currently have 135 square feet per student. Study, 3. If the per-pupil square foot standards in the "School Prototypes" are applied to the existing 412 pre-K through secondary schools identified in the Study, the average square footage would be 117.3 per-pupil, or 13% below the existing square feet per-pupil. Study, 3; March 10 Letter, Summary School Prototypes, 1-2.[1] This appears to be inconsistent with the Commissioner's recommendation on remand that 3,137 additional classroom spaces are needed in the SNDs and further demonstrates the need

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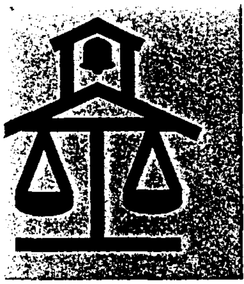
1 The State provides no documentation or analysis to support the educational adequacy of the square foot standards contained in the "School Prototypes."

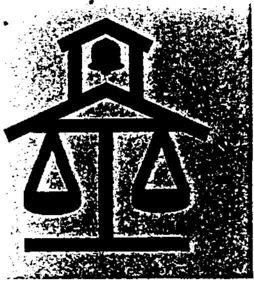


for additional remand proceedings. Study, 14.

3. Inadequate and Unconstitutional Debt Service Formula

Even for school construction projects in the SNDs financed through local bonds – as current state law requires – the debt service formula in the draft legislation appears to provide state aid for only a portion of the debt service on such local bonds. The proposed formula is based on the percentage of the SND budget that consists of core curriculum standards aid under CEIFA, not on the total amount of financing for the project. March 6 Letter, Draft Legislation, 3-4. Under the Commissioner's proposal to the Remand Court to finance and construct SND facilities through EFA, the State would cover 100% of all financing costs, and not a portion of such costs, as is currently the case. Remand Decision, 133-34.

For renovation and modernization projects, debt service aid will be further reduced by a percentage factor based on the age of the school facility that is replaced or upgraded. Letter, Draft Legislation, 4-5. In addition, the calculation of debt service aid for new construction or renovation is based only on the minimum spaces contained in the "School Prototypes." March Letter, Draft Legislation, 6. Thus, under the proposed legislation, it appears that local property taxes will continue to represent a significant portion of the support needed for school facility construction projects in the SNDs, especially if the district officials determine that the "Prototypical Schools" are inadequate and



additional spaces are needed for delivery of the Core Curriculum Content Standards. See Abbott v Burke, 149 N.J. 145, 188 (1997) ("Abbott IV") (requiring the State to provide facilities "sufficient to enable [SND] students to achieve the [content] standards," and holding that the quality of facilities "cannot depend on the district's willingness or ability to raise taxes and incur debt").

While the State indicates that the "proposed legislation provides for an application to the Commissioner by an [SND] in the event that facilities needs related to required programs cannot be addressed within the standards," it appears that the draft legislation gives the Commissioner total discretion in determining whether or not to provide more debt service aid, and only for those programs that he determines are "required." March 6 Letter, 1.[2]

Further, the draft legislation appears to apply the CEIFA funding formula for regular education -- the percentage of the "district's T&E budget" that consists of the "core curriculum standards aid amount" – to fix the level of state aid for debt service in the SNDs. March 6 Letter, 3. However, the CEIFA regular education formula is unconstitutional as applied to the SNDs. Abbott IV, 149 N.J. at 177.

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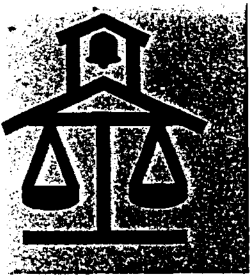
[2] This discretion to increase debt service aid is strikingly similar to the Commissioner's discretion to determine whether or not to request a legislative appropriation for an SND school if the school lacks sufficient funds to provide Success for All or other supplemental programs, as contained in the Commissioner's version of whole school reform.

4. Inconsistencies With "Illustrative Schools"

The programming assumptions in the "School Prototypes" appear to conflict with the assumptions in the "Illustrative Schools" presented by the Commissioner to the Remand Court to support his version of whole school reform. For example, the "School Prototypes" are based upon classification rates for special education of 6%, 8.8% and 12.3% of the elementary, middle and high schools students. March 10 Letter, School Prototypes, 1-3. The "Illustrative Schools, however, are based upon only 1.5% of the students receiving special education in specialized settings. These sharp differences underscore the need for further proceedings, as requested by plaintiffs, to review and approve a state or state-assisted plan for implementation of supplemental programs, including Success for All and other programs designed to improve regular education. Without such proceedings, there is no assurance that current levels of demonstrably effective program aid ("DEPA") are sufficient to support these essential programs in the SNDs.

5. The DOE's Goodstarts Report

In submitting the DOE's report on the Goodstarts program, the State's sole comment on the report is that the district evaluations of the program contain "fundamental flaws." March 10 Letter, 2. Nonetheless, the DOE report shows that the districts found promising gains in the three and four year-old children enrolled in this intensive preschool program, including a "significant

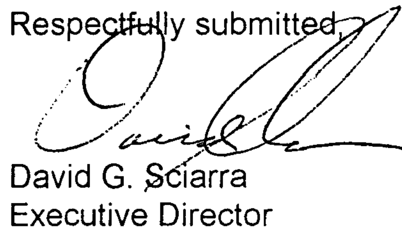


increase in cognitive performance" and "significant gains in initiative, social relations, creative representation, music and movement, literacy and logic." See P-63 (DOE's research grid on supplemental programs). The State also provides no information on the status of the "objective" evaluation of Goodstarts that is "presently being conducted" by the DOE, but "not yet complete," such as the procedures, standards and time-frames for this evaluation. March 10 Letter, 2; see also P-63 (indicating a DOE "statewide evaluation" of Goodstarts "is currently being analyzed").

Conclusion

In sum, these submissions further demonstrate the need, as requested by plaintiffs, for additional remand proceedings to assure the provision of essential supplement programs, educationally adequate facilities, and an appropriate program to finance and construct facilities in the SNDs, as this Court directed in Abbott IV.

Respectfully submitted,



David G. Sciarra
Executive Director

cc: Peter G. Verniero, Attorney General