RAYMOND ARTHUR ABBOTT, et al., Plaintiffs, v. FRED G. BURKE, et al., Defendants.	SUPREME COURT OF NEW JERSEY Docket No. Civil Action

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MEMORANDUM OF LAW ON BEHALF OF DEFENDANTS' MOTION FOR MODIFICATION OF ABBOTT XX AND ABBOTT XXI

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PRELIMINARY STATEMENT

After thirty years of litigation focused largely on school funding, New Jersey still struggles to meet its mandate to provide a "thorough and efficient system of free public schools" for the thirty-one School Development Authority districts ("SDA Districts"). The unmistakable lesson learned from these past thirty years is that more money does not equal more achievement for the students in the SDA Districts. The approach to funding those school districts, which yielded ever-increasing sums of money without sufficient correlation to educational outcomes, and which is plagued by a host of statutory and contractual impediments to improvement of underperforming districts, has worked to condemn over a generation of students in our most at-risk districts to an inadequate education.

The Court has long acknowledged that money alone could not drive success in the SDA districts and predicted that a funding remedy would be "approaching inutility." The time has come for the Court to find that the point of "inutility" has been reached and accordingly to shift the Court-ordered remedies to ensure that the Commissioner of Education can effectuate the necessary changes to achieve better results for the students.

To ensure significantly improved outcomes, the current approach to funding the SDA Districts must be reconsidered and

the Commissioner of Education must be given the tools to affect meaningful reforms. It is universally accepted that having effective teachers is the most important in-school factor to closing the achievement gap for K-12 children. The best hope for achieving performance gains among the urban poor districts, therefore, is not additional funding but the elimination of impediments to attracting and maintaining the most effective teaching staff in those districts and of restrictions on the districts' abilities to utilize a full complement of tools to provide a thorough and efficient education.

The deficiency of an education system that provides more money every year to failing districts without sufficient correlation to results is compounded by state statutes and labor agreements that prevent the Commissioner and superintendents in low-achieving districts from providing students with the best teachers available and with innovative teaching and learning programs. For example, under the Tenure Act, districts implementing a reduction-in-force must consider tenure above all other factors, even if it means the most effective teachers in the district will be laid off. In Camden, the collective negotiation agreement provides that teachers need only teach for four hours and forty-five minutes out of the seven hour and five minute school day. Moreover, under the current statutory

construct, it takes years and tens of thousands of dollars to terminate an ineffective tenured teacher.

These practices elevate - in a manner unique to teachers and enjoyed by no other profession or industry - collective negotiation agreements and seniority rules over the education of children. These laws and labor agreements unconstitutionally stand in the way of providing a "thorough and efficient system of free public schools" to students in the SDA Districts.

New Jersey spends the third most amount of money in the nation on K-12 education - $13.3 billion or 38% percent of the FY2017 State budget. Although the thirty-one SDA Districts represent only 22.8% of the State's total student population, they will receive more than 56% of the direct state education aid distributed for FY2017, and over 14% of the entire State budget. Under this funding-focused construct, SDA Districts have received $97 billion in school funding over the last three decades. Despite this, there has been no appreciable improvement in the substantive education of New Jersey's disadvantaged students.

The statutory system that has evolved around the School Funding Reform Act ("SFRA") is neither thorough nor efficient. It is doubtful that this Court ever contemplated that in seeking to comply with the Constitution, the State would be required to spend more per pupil at a failing public school than is spent on

tuition at the most prestigious private schools in the State - and yet still get poor results, such as in Asbury Park where nearly $31,000 is spent per pupil annually.

As is now evident, providing more funding to failing districts does nothing to fix the fundamental need for a quality teacher in every classroom, with the fiscal burden fairly supported by all contributors. A critical eye must be focused on the inequities of a system that permit a district like Asbury Park to generate State and other aid sufficient to spend $31,000 per student, that permit districts to shirk their Local Fair Share obligations and not be an active partner in the fiscal support of their schools and allow communities to manipulate their local income and property wealth downward in order to unfairly to receive State support.

It is not only morally repugnant to continue to put failed statutory schemes ahead of students, it is constitutionally invalid. Accordingly, the State seeks to amend the Court's prior orders in this matter. Critically, the Abbott v. Burke remedies must include authority for the Commissioner to override, when necessary, statutory and contractual impediments to hiring and retaining the best teachers and maximizing their effectiveness. The unacceptable disparity in outcomes in SDA districts will not be eliminated while these structural

impediments to providing a thorough and efficient system of education remain in place.

Further, the funding of New Jersey's public schools cannot be viewed through the SFRA alone. While the SFRA is a cornerstone of the system, myriad other laws impact a student's education and the efficiency of the State's fiscal support of schools - many detrimentally so. Viewed holistically, the State is not maintaining a thorough and efficient system of public schools as applied to the SDA Districts. Respectfully, the Court should specifically authorize the Commissioner to remedy the statutory and contractual obstacles in those districts.

Finally, given the many inextricably intertwined statutes with State-wide impact on education, and the constitutional obligations of the Legislature and Executive Branch to support and administer a system of free public schools, it is imperative that those branches devise a system that continues to financially support our public schools, while eliminating the impediments and correcting the deficiencies noted herein. This must be done on an urgent basis and in sufficient time so that school districts can plan and implement the necessary changes for the 2017/2018 school year lest the students in the SDA Districts be relegated to falling even further behind their peers. If such action is not taken expeditiously, the Court

should accept an application for further relief in the next few months.

PROCEDURAL HISTORY

Since the 1970's, this Court has repeatedly addressed the constitutional requirement that the State provide each child with a thorough and efficient education and the means for implementing that constitutional mandate. Robinson v. Cahill, 62 N.J. 473, 481 (1973) ("Robinson I"). In a series of decisions in Abbott v. Burke, this Court has overseen the implementation of measures to ensure a thorough and efficient education in poor urban school districts, frequently referred to as the Abbott Districts. In Abbott v. Burke, 100 N.J. 269 (1985) ("Abbott I"), the first of the Abbott cases, the Court addressed the Public School Education Act of 1975 and found that the 1975 Act was unconstitutional as applied to certain property-poor districts. This Court held that the 1975 Act "must be amended, or new legislation passed, to assure that poorer urban districts' educational funding is substantially equal to that of property-rich districts." Abbott v. Burke, 119 N.J. 287, 385 (1990) ("Abbott II").

The Legislature responded by enacting the Quality Education Act of 1990 ("QEA") and the Comprehensive Education Improvement and Financing Act of 1996 ("CEIFA"); both were found unconstitutional as applied to the poor, urban districts.

Abbott v. Burke, 136 N.J. 444, 446-47 (1994) ("Abbott III"); Abbott v. Burke, 149 N.J. 145, 201 (1997) ("Abbott IV"). The Court directed the Commissioner of Education to devise a plan for the State to assist in implementing solutions or programs to meet the needs of the Abbott Districts, and in the interim, this Court imposed what has become known as the "parity remedy," requiring the State to increase funding to the Abbott Districts to a level "equivalent to the average per-pupil expenditure" in certain non-Abbott districts. Id. at 224. In 1998, this Court accepted the Commissioner's findings and recommendations for "whole school reform." Abbott v. Burke, 153 N.J. 480, 527 (1997) ("Abbott V").

Over the next decade, lawsuits continued concerning implementation of the Abbott V Order. See Abbott VI - XIX. In 2008, the Legislature passed the School Funding Reform Act of 2008 ("SFRA"). Under this rather complex formula, property and income poor districts generally are to receive substantially more State aid per pupil than property and income rich districts.

This Court held in 2009 that "the SFRA is a constitutionally adequate scheme" and relieved the State from prior remedial orders, including the parity payments ordered in Abbott IV. Abbott v. Burke, 199 N.J. 140, 175 (2009) ("Abbott XX"). In 2011, this Court Ordered the State to calculate and

provide funding to the SDA Districts in accordance with the SFRA formula. Abbott v. Burke, 206 N.J. 332, 376 (2011) ("Abbott XXI").

FACTUAL BACKGROUND

Schools in New Jersey's poor, urban districts (previously known as "Abbott Districts," now known as "SDA Districts"[1]) have been underperforming for decades. Abbott II, supra, 119 N.J. at 369-70; Certification of Jeffrey Hauger ("Hauger Cert.") at ¶ 9 (Exhibits A and B). There is a persistent and significant educational achievement gap between the SDA District students and their non-SDA counterparts. Ibid. This Court has held numerous times that the Commissioner of Education is charged with resolving the problem of constitutional deprivation and, as

[1] In 1975, all of the public school districts in the State were categorized into District Factor Groups ("DFG"), which represent an approximate measure of a community's relative socioeconomic status. Abbott II, supra, 119 N.J. at 338-39. The DFGs ranged from A to J, with the most privileged districts receiving I and J ratings and the most underprivileged districts receiving A and B ratings. Ibid. The Abbott II Court identified the 28 districts which received A and B ratings as having special needs. Id. at 343-44. In Abbott III, this Court called these 28 districts the "Special Needs Districts." Abbott III, supra, 136 N.J. at 446. Under CEIFA, these schools were renamed "Abbott Districts" and after districts were added based on updated census data, there were 31 in this category. N.J.S.A. 18A:7F-3. In 2008, the SFRA abolished this distinction, but recognized that these 31 districts had special needs and placed them under the authority of the School Development Authority ("SDA"). N.J.S.A. 18A:7G-3. These 31 districts are now known as "SDA Districts" and will be referred to as such herein.

a remedy, has on multiple occasions ordered the State to increase funding to these underperforming SDA Districts for the purpose of improving student performance and reducing disparity. Abbott II, supra, 119 N.J. at 296-97, 299-300, 309-10; Abbott IV, supra, 149 N.J. at 167, 180, 198, 224; Abbott V, supra, 153 N.J. at 492-93, 614; Abbott XX, supra, 199 N.J. at 144, 245; Abbott XXI, supra, 206 N.J. at 341, 369-70, 391-92; 462-64.

Unfortunately, while tens of billions of dollars were provided to the SDA Districts over 30 years, Certification of Kevin Dehmer ("Dehmer Cert.") at ¶ 7 (Exhibit C), statutory and contractual impediments have thwarted the State's efforts to implement real, substantive reform. The achievement gap that began the Abbott v. Burke litigation in 1984 remains just as wide today. Abbott II, supra, 119 N.J. at 369-70; Hauger Cert. at ¶ 9 (Exhibits A and B). By this motion, the State seeks modification of this Court's Orders in Abbott XX and Abbott XXI to allow the State to remove these impediments and reduce the disparities in achievement.

I. SDA Districts Are Still Performing Poorly as Compared to non-SDA Districts

The SDA Districts have continued their comparatively poor performance since the Abbott v. Burke litigation began in 1984. Abbott II, supra, 119 N.J. at 369-70; Hauger Cert. at ¶ 9 (Exhibits A and B). In the 1985/1986 school year, all but two

of New Jersey's lowest performing schools failed to meet the then applicable basic State school certification requirement that at least 75% of a school's students pass the existing High School Proficiency Test ("HSPT"). Id. at 369. Of the 14,000 students from poor, urban districts who took the test, only 54% passed the reading portion, 42% passed the math, and 43% passed writing. Id. at 369-70. Certain of those urban districts did even worse, with only 41% of Newark students passing the reading portion, 31% passing math, and 39% passing writing. Id. at 370. In Camden, only 39% passed reading, 28% passed math, and 44% passed writing. Ibid. By comparison, statewide, 83% of students passed reading, 72% passed math, and 77% passed writing. Ibid. In the State's highest-performing districts, 97% passed reading, 93% passed math, and 95% passed writing. Ibid. In the 1984/1985 school year, the dropout rate in poor, urban high schools was as high as 47%, significantly higher than the statewide figure. Ibid.

The difference in performance levels between the SDA Districts and non-SDA Districts has not changed much since the Abbott litigation began in 1984. Exhibit A to the Certification of Jeffrey Hauger demonstrates that, for the 2001/2002[2] through

[2] Where no data is shown on the chart for a specific assessment for a specific school year, this means the assessment was not operational that year (i.e., 2001-2008 NJ ASK 3-8) or no state-

the 2014/2015 school years, third grade, eighth grade, and high school[3], standardized test scores for math and English/language arts ("ELA") in the SDA Districts have remained low and relatively stagnant. Hauger Cert. at ¶ 9(a) (Exhibit A). Exhibit B to the Hauger Certification demonstrates that the performance gap between the SDA District schools' standardized test scores and the scores in the other State districts' schools has also remained relatively large and that it has not closed over this time period. Id. at ¶ 9(b) (Exhibit B).

For instance, in school year 1985/1986, the disparity between the SDA Districts and Statewide average scores was 29 percentage points for high school reading, 30 percentage points for math, and 34 percentage points for writing. Abbott II, supra, 119 N.J. at 369-70. From the 2001/2002 school year through the 2014/2015 school year, the disparity between the SDA Districts and non-SDA Districts remained in the 13-30 percentage point range for high school ELA and in the 14-33 percentage point range for high school math. Hauger Cert. at ¶ 9(b)

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wide data associated with the assessment was released that year (i.e., 2007-2008 NJ ASK grade 3). Hauger Cert. at ¶ 9(c).

[3] In analyzing the student proficiency levels, grades 3, 8 and 11 were used as benchmarks. Certification of Katherine Czehut ("Czehut Cert.") at ¶ 13. Grade 3 was used because third grade literacy is commonly used as an indicator of future educational success. Ibid. Grade 8 was included because it is commonly used in educational research. Ibid. Grade 11 was used because, in New Jersey, the eleventh grade assessment is the final assessment of a high school student's knowledge. Ibid.

(Exhibit B). Since the 2001/2002 school year, a consistent and significant disparity between standardized testing scores for SDA Districts and non-SDA Districts has continued at all grade levels. Ibid.

This persistent disparity is also true for graduation rates. Exhibit A to the Certification of Peter Shulman demonstrates that, from the 2010/2011 school year through the 2014/2015 school year, graduation rates in the SDA Districts ranged from 68.6% to 76.7%, while graduation rates in the non-SDA Districts ranged from 86% to 92.9% over the same years. Certification of Peter Shulman ("Shulman Cert.") at ¶ 4 (Exhibit A). Just like the standardized test scores, graduation rates in the SDA Districts remain consistently lower than the non-SDA District averages. Ibid.

Reinforcing these disappointing outcomes, the school district rating site, SchoolDigger.com, which evaluates and ranks districts according to test scores released by state education departments, ranks only 2 of 29 ranked SDA districts in the top 400 of the 610 New Jersey districts[4] that it ranked on

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[4] SchoolDigger.com recognized 673 separate school districts in the State of New Jersey, including the traditional public school districts, charter schools, and specialized schools such as vocational schools. See School Digger Rankings. Only 610 of these districts were ranked because SchoolDigger.com did not have sufficient information to rank the 63 unranked districts. Ibid. Ranking Frequently Asked Questions, <<https://www.

the site based on test scores from 2014/2015. New Jersey School Districts, Updated Tuesday, February 2, 2016, based on the 2014/2015 school year test score, <<https://www.schooldigger.com/go/NJ/districtrank.aspx>> (last visited Sept. 9, 2016) ("School Digger Rankings"). Only 6 SDA districts ranked in the top 500, while 23 of 29 SDA districts ranked were among the bottom 110, including 3 of the bottom 4 (Trenton #607, Camden #608, Asbury Park #609). Ibid.

Looking at the disparity between spending and outcomes yet another way, consider the Asbury Park and Haddonfield school districts. In FY2015, Asbury Park spent an astounding $30,977 per pupil, Dehmer Cert. at ¶ 9 (Exhibit E), and had a graduation rate of only 66%, see NJDOE, 2015 Graduation Rates, 2015 Adjusted Cohort 4 Year Graduation Rates, <<http://www.state.nj.us/education/data/grate/2015/>> (last visited September 14, 2016), while Haddonfield spent less than half that amount per pupil - $15,292, <http://www.state.nj.us/cgi-bin/education/csg/16/csg.pl>, - and has a 98.9% graduation rate. See NJDOE, Taxpayer's Guide to Education Spending 2016, District: Haddonfield Boro,

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schooldigger.com/aboutranking.aspx>> (last visited Sept. 9, 2016) ("School Digger FAQs"). Two of the unranked districts are SDA Districts - Burlington City and Long Branch City. School Digger Rankings. Thus, only 29 of the 31 SDA Districts were ranked by SchoolDigger.com. Ibid.

<http://www.state.nj.us/education/guide/2016/district.shtml> (last visited September 14, 2016). From this, it is clear that more spending, alone, does not equate to improved educational outcomes.

II. SDA District Funding Has Increased Dramatically

State funding to SDA Districts has increased substantially since the Abbott litigation began, to its current disproportionately high level. Dehmer Cert. at ¶ 7 (Exhibit C). State funding has enabled the SDA Districts to spend significantly more per pupil than the non-SDA District average, and more than the national average. Dehmer Cert. at ¶ 9 (Exhibit D); see also Digest of Education Statistics, Table 236.55, Total and current expenditures per pupil in public elementary schools: Selected years, 1919-20 through 2012-13 <https://nces.ed.gov/programs/digest/d15/tables/dt15_236.55.asp?current=yes>> (last visited Sept. 14, 2016) ("NCES Table 236.55").

In the early 1970's, per pupil spending in New Jersey ranged from $700-$1,500. Abbott II, supra, 119 N.J. at 334. In 1975, spending ranged from $1,076-$1,974 per student. Ibid. In the 1984/1985 school year, the New Jersey State average was $3,329 per pupil. Id. at 344. In that year, the average expenditure in the A and B districts (which now comprise most of the the SDA Districts) was $2,861, whereas the average spending

in schools in the State's most affluent districts (the I and J districts at that time) was $4,029 per student. Ibid. In 1984, the national spending average was $3,216 per student. NCES Table 236.55, supra. Thus, at the very beginning of the Abbott litigation, the SDA Districts were spending $400 per student less than the national average but as much as $2,253 less per pupil than the New Jersey State average. This changed significantly after this Court first granted financial relief in Abbott II, which required increased State funding to the Abbott Districts.

As a result of additional State funding for education over the next decade, the average per pupil expenditure in the SDA Districts rose to $10,938 per pupil in the 2001/2002 school year, exceeding the non-SDA District average of $9,007 per pupil, Dehmer Cert. at ¶ 9 (Exhibit D), and the national average of $8,572 per pupil. NCES Table 236.55, supra. In the 2012/2013 school year, the average per pupil spending in the SDA Districts increased further to $16,723 as compared to the non-SDA District average of $13,522, Dehmer Cert. at ¶ 9 (Exhibit D), and the national average of $12,020. NCES Table 236.55, supra. The most recent data from the 2014/2015 school year demonstrates that the SDA District spending remains high at $16,605 per pupil as compared to the non-SDA District average of $14,261. Dehmer Cert. at ¶ 9 (Exhibit D). While those are the

averages, the amounts spent in many SDA districts are significantly higher. For instance, in 2014/2015, education spending in Asbury Park was $30,977 per pupil, Keansburg was $21,306 per pupil, Camden was $19,156 per pupil, Hoboken was $21,505 per pupil, Newark was $17,041 per pupil, Jersey City was $18,154 per pupil and East Orange was $18,980 per pupil. Dehmer Cert. at Exhibit E.

This increased spending in the SDA Districts is possible largely because of significant increases in State education funding. Dehmer Cert. at ¶ 7 (Exhibit C). In FY1985, total State aid to the 31 SDA Districts was $684,903,725, representing 39.5% of the total preschool-12 State aid distributed that year. Dehmer Cert. at ¶ 7(a) (Exhibit C). In the year immediately following Abbott IV, in FY1998, that percentage jumped to 48.5%. Id. at ¶ 7(b) (Exhibit C). At that time, the number of students in the SDA Districts was about 22% of all students in the State. Ibid. In FY2017, the SDA Districts will be receiving nearly 59% of all preschool-12 State aid distributed, while their proportionate student enrollment is virtually unchanged - projected at 22.8% of the State's students for FY2017. Id. at ¶ 7(c) (Exhibit C).

As this data demonstrates, since the Abbott v. Burke litigation began, the SDA Districts have continuously received a significant and expanding portion not only of the State's

education budget, but of the State's overall budget. For example, the entire FY2017 State budget is $34.8 Billion. FY2017 Appropriations Act. Of this, $8.7 Billion is devoted to education spending, nearly $5.1 Billion[5] of which will go to the 31 SDA Districts, alone. Dehmer Cert. at ¶ 7 (Exhibit C). Thus, 14.6% of the State's entire budget will go towards funding just the 31 SDA Districts in FY2017. Ibid.; FY2017 Appropriations Act.

III. Paradoxically, While Court-Ordered State Education Funding Has Increased to the SDA Districts, at the Same Time, their "Local Fair Share" Percentage Contributions Have Decreased, Thus Impacting Other State Budgetary Needs

In addition to receiving State aid, each district is required to raise a portion of its budget through local property taxes. Dehmer Cert. at ¶ 10. A calculation of each district's estimated ability to raise local taxes to support local schools is required as part of the SFRA formula and this calculation is

[5] This number, while staggering, actually does not take into account hundreds of millions of dollars in additional funding that SDA Districts receive from other sources, including approximately $300 Million per year in Federal funds. Dehmer Cert. at ¶ 5 (Exhibit A). While the federal funding figures for FY2017 have not yet been determined, federal funding for FY2017 is best estimated by using the amount of federal aid included in each district's latest audit. Dehmer Cert. at ¶ 5(a) (Exhibit B). The most recent audit is from FY2015. Ibid. Thus, the best estimate of federal funding for FY2017 is $305,375,444 for all SDA Districts, the combined federal aid amount from each district's FY2015 audit. Ibid.

referred to as the district's "local fair share" ("LFS"). Ibid. While the Court-ordered funding for the SDA districts has increased, at the same time, SDA Districts' LFS percentage contributions have decreased, and other distorted financial effects have become evident as well. Despite the high level of State funding for the SDA Districts, many of them pay less than their LFS amounts for education, thus impacting other State budgetary needs.

A district's LFS is based on the district's relative property and income wealth and is calculated pursuant to the formula set forth at N.J.S.A. 18A:7F-52. Dehmer Cert. at ¶ 10. See also Dehmer Cert. at Exhibit F. Most of the SDA Districts pay less than their LFS amount and, through tax abatements, have actually increased the State's burden to fund schools in their districts.

First, SDA Districts are able to use tax abatements to avoid funding their school districts from the local tax base while relying on State aid to fill this gap. See A. Matthew Boxer, New Jersey Office of the State Comptroller, A programmatic Examination of Municipal Tax Abatements, August 18, 2010 <<http://www.nj.gov/comptroller/news/docs/tax_abatement_report.pdf>> (last visited Sept. 9, 2016) ("2010 Comptroller Report"). Through tax abatements, see N.J.S.A. 40A:21-1, 40A:20-1, municipalities may exempt certain property owners,

usually businesses, from paying property taxes. See 2010 Comptroller Report, supra, at 4; Certification of John J. Ficara ("Ficara Cert.") at ¶ 4. In exchange, the businesses are typically required to make payments in lieu of taxes ("PILOT") to the municipality. 2010 Comptroller Report, supra, at 4; Ficara Cert. at ¶ 5. For long term abatements, the municipality retains 95% of the PILOT (the other 5% goes to the county), 2010 Comptroller Report, supra, at 5; Ficara Cert. at ¶ 10, and "[i]n many cases, the negotiated PILOT provides more funds to the municipality than it would have otherwise received." 2010 Comptroller Report, supra, at 5. However, the school districts, which typically receive "a large portion of traditional property tax collections - sometimes more than half," Id. at 12, do not receive any portion of the PILOT payment. Id. at 5-6, 12; see also Ficara Cert. at ¶ 10, 13-14 (the cost of long term tax abatements is "borne by school districts, county residents, and State taxpayers"). In addition, for long-term abatements, the PILOT payment is not reflected in the municipality's "ratable base, meaning formula state aid continues to provide enhanced funding based on artificially low community wealth." Id. at 12. In 2010, the State Comptroller noted that "[t]his system allows the municipality, in essence, to hide its true wealth from the school district and the state, resulting in the school

district's continued reliance on the state for funding." Id. at 13.

In his 2010 Report, the State Comptroller identified twenty municipalities (from the 75 municipalities in New Jersey that granted exceptions exceeding 5% of the total taxable value) that made "significant use of development abatements." Id. at 10. Fifteen of these twenty were SDA Districts (Asbury Park, Bridgeton, Camden, Harrison, Hoboken, Gloucester Township, Jersey City, Long Branch, Millville, Newark, New Brunswick, Paterson, Vineland, Union City, and Trenton). Ibid. The report also focused on three additional municipalities that granted exemptions exceeding 5% of the total taxable value, but which did not provide information in a manner sufficient to determine whether the abatements were development-related. Ibid. Two of these three were SDA Districts (Elizabeth and West New York). Ibid.; see also Ficara Cert. at ¶¶ 11-12 (Exhibit A).

The significance of these abatements is exemplified by Jersey City. For example, as of August 2010, Jersey City had exempted approximately $2 billion in property from taxation. 2010 Comptroller Report, supra, at 12. Based on Jersey City's tax rates, this meant that Jersey City did not collect approximately $120 million in property taxes. Ibid.

Second, despite the high levels of State funding that the SDA Districts receive, local funding for education in the SDA

Districts remains low as compared to their LFS amounts. Thirty of the thirty-one SDA Districts paid less than the amount of their LFS towards education almost every year from FY2010 through FY2017[6]. Dehmer Cert. at ¶ 10 (Exhibit F). In 2017, only six of the 31 SDA Districts contributed at least 80% compared to their LFS amount. Dehmer Cert. at ¶ 10-11 (Exhibit F). Most failed to contribute even 60% compared to their LFS amount. Ibid.

In FY2010, Jersey City paid only 40.3% compared to its LFS amount, Dehmer Cert. at ¶ 10 (Exhibit F), while receiving $417,733,738 in State aid for education. See NJDOE, 2009-10 State Aid Summaries, Jersey City <http://www.state.nj.us/education/stateaid/0910/aidsearch.shtml> (last visited September 14, 2016). In FY2010, Hoboken did not provide $3.5 million to its schools due to tax abatements provided to $298 million worth of property. 2010 Comptroller Report, supra, at 13. In FY2010, Hoboken provided only 35.2%

[6] There are a few instances in which SDA Districts paid their LFS amount or higher. In FY2016, Garfield City paid 101.1% as compared to its LFS amount and in FY2013, it paid 102.7% as compared to its LFS amount. Dehmer Cert. at ¶ 10 (Exhibit F). In FY2010, New Brunswick City paid 101% as compared to its LFS amount. Ibid. In FY2014, Salem City paid 102.4% as compared to its LFS amount. Ibid. Burlington City is the only SDA District that has consistently paid greater than its LFS amount from FY2010 through FY2017. Ibid. In all other instances, the SDA Districts paid less than their LFS amounts each year from FY2010 through FY2017.

compared to its LFS amount. Dehmer Cert. at ¶ 10 (Exhibit F). That year, the State provided $6.99 million in education aid to Hoboken. 2010 Comptroller Report, supra, at 13.[7]

The SDA Districts' inequitable reliance on State funds for education is illustrated by comparing tax rates in SDA Districts to those in the rest of the State. Despite having municipal tax rates well above the State average, from FY2010 through FY2015, the SDA Districts consistently collected less than the State average in school taxes[8]. Certification of Timothy Cunningham ("Cunningham Cert.") at ¶ 4 (Exhibit A).

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[7] Notably, in recent years, the SDA Districts are increasingly paying less and less towards education as compared to their LFS amounts. For instance, Hoboken contributed only 35.2% as compared to its LFS amount for FY2010 and this contribution declined to only 23.5% compared to its LFS amount for FY2017. Dehmer Cert. at ¶ 12 (Exhibit F). Similarly, Jersey City contributed only 40.3% compared to its LFS amount towards education funding, which has since decreased to only 35.3% as compared to its LFS amount in FY2017. Ibid. Asbury Park contributed only 51.6% as compared to its LFS amount in FY2010, which rate declined to 42.6% as compared to its LFS amount in FY2017. Ibid.

[8] For example in FY2015, twenty-four of the thirty-one SDA Districts imposed school tax rates that were 80% or less of the State average while all thirty-one SDA Districts imposed municipal tax rates greater than the State average. Cunningham Cert. at ¶ 4 (Exhibit A). For instance, in FY2015, Camden's school tax rate was only 36% of the State average while its municipal tax rate was 220% of the State average. Ibid. Paterson's school tax rate was only 51% of the State average while its municipal tax rate was 351% of the State average. Ibid.

Quite clearly, the current system has disincentivized SDA Districts from investing in their public school systems, and has resulted in their engagement of practices that shift to the State an undue share of their education costs.

Unfortunately, the disproportionate funding burden that many SDA District municipalities have shifted to the State has come to the detriment of other important State functions, including the State's obligation to schools in the 560 non-SDA Districts, and has diverted money from other important State priorities. See Abbott XXI, supra, 206 N.J. at 502 (Hoens, J., dissenting) (fully funding the SFRA with respect to the SDA Districts in light of a budget crisis ignores "the effect that acceding to [plaintiffs'] demand will have on the rights of the unrepresented school districts and of any other person, program, or interest, including those of potentially equivalent constitutional dimension") see also Connecticut Coalition for Justice in Education Funding, Inc. v. M. Jodi Rell, No. CV-145037565-S (Conn. Super. Ct. Sept. 7, 2016) (slip op. at 7-8) ("any constitutional standard the courts set for overall spending levels must be modest … the costs and benefits of education spending must be weighed against other spending priorities before they can be imposed … only the General Assembly does this … It is nonsense under such a system for a court to set expansive goals for the schools and direct whatever

spending it takes to achieve them when it hasn't thought about how its orders might undercut spending on other important rights, including those protected by the Constitution"). As Justice Hoens noted in her dissenting opinion in Abbott XXI, "our Constitution, [also includes] the requirement that the budget be balanced, see N.J. Const., art. VIII, § 2, ¶ 3, and the provision assigning to the Legislature the exclusive authority to appropriate funds, N.J. Const., art. VIII, § 2, ¶ 2." Abbott XXI, supra, 206 N.J. at 502 (Hoens, J., dissenting). Thus, when a budget is based on "greatly reduced revenues that require[] considerable belt-tightening and shared sacrifice[,]...our co-equal branches of government [are forced] to make hard choices requiring reduction of funding affecting numerous and diverse interests, including those of constitutional dimension." Id. at 495 (Hoens, J., dissenting).

IV. Great Teachers Are the Real Key to Improved Student Performance in the SDA Districts

It is almost universally accepted that putting students in contact with great teachers is the single most important aspect of improving student performance. Certification of Eric Hanushek, Ph.D. ("Hanushek Cert.") at ¶¶ 22-33; Certification of Katharine Strunk, Ph.D. ("Strunk Cert.") at ¶ 33; Certification of Christopher Cerf ("Cerf Cert.") at ¶¶ 8-9; Certification of

David Hespe ("Hespe Cert.") at ¶ 14; Certification of Kimberley Harrington at ¶ 13.

Dr. Eric Hanushek, a nationally recognized expert on school finance policy and a Senior Research Fellow at Stanford University's Hoover Institute, explained that "[l]iterally hundreds of research studies have focused on the importance of teachers for student achievement." Hanushek Cert. at ¶ 25. These studies demonstrate that "teachers are very important; no other measured aspect of schools is nearly as important in determining student achievement." Ibid. Katharine Strunk, Ph.D., another national expert on school finance policy and Associate Professor of Education and Policy at the University of Southern California, Rossier School of Education, agrees that "there is extensive research that shows that individual teachers are the most important school-based factor in predicting student achievement on standardized tests as well as longer-term outcomes." Strunk Cert. at ¶ 25.

Dr. Hanushek explained that his research "shows that some teachers produce 1.5 years of gain in student achievement in an academic year while others . . . produce only 0.5 years of gain in student achievement. Stated differently, two students starting at the same level of achievement can know vastly different amounts of information at the end of a single academic year due solely to the teacher to [whom] they are assigned. If

a bad year is compounded by other bad years, it may not be possible for the student to recover." Hanushek Cert. at ¶ 26. Dr. Hanushek's research shows that "[a] teacher [whose teacher quality level] is one standard deviation above average increases student achievement by 0.2 standard deviations (or approximately 6-8 months of learning) when compared to the average teacher. On the other hand, a teacher who is one standard deviation below average decreases student achievement by 0.2 standard deviations (or approximately 6-8 months of learning)." Id. at ¶ 30.

Moreover, Dr. Hanushek has studied the deep impacts that teacher quality can have not just on the students' lives, but also the State of New Jersey and the Nation as a whole. Id. at ¶ 31. For example, a teacher at the sixtieth percentile of the distribution of teacher effectiveness will on average increase a student's lifetime earnings. Ibid. A teacher at the ninetieth percentile will increase the average student's lifetime income by over $25,000 above that expected for an average teacher. Id. at ¶ 31(b). Thus, "a ninetieth percentile teacher with a class of 25 students will add in total more than $680,000 in future income to the class. This is obtained each year the teacher is in the classroom." Id. at ¶ 31(c). However, "a tenth percentile teacher will each year subtract an equivalent amount from a class of 25 students as compared to an average teacher." Id. at ¶ 31(d).

Dr. Hanushek has also found that if New Jersey could improve student performance, "past economic history suggests that the state GDP could be 3.5 percent higher on average over the next 80 years." Hanushek Cert. at ¶ 33. If the nation, as a whole, could improve just its students performing at a "below basic" level to a basic level, the level of GDP in the United States would, according to historical relationships, be lifted by 3.3 percent - almost as much as the total national spending. Id. at ¶ 32.

Other researchers have reached similar results. A 2005 study performed by Marzano et al. concluded that teacher and principal quality account for nearly 60% of a school's total impact on student achievement. Another study performed in 2009 by Goldhaber found that teacher quality had a much greater impact than other factors such as reductions in class size. Having a highly effective teacher for three to five years can erase the deficits that the typical disadvantaged student brings to school. Dick Startz (2010), Profit of Education (Santa Barbara, CA: Praeger). Another study found that a student earns 3.5 percent more each year, if the student had an above-average teacher (75th percentile) teacher in kindergarten than if the student had a below-average (25th percentile) teacher. Dobbie, Will and Roland G. Fryer (2011). "Are High-Quality Schools Enough to Increase Achievement among the Poor? Evidence

from the Harlem Children's Zone," American Economic Journal: Applied Economics 3, no. 3 (July): 158-87.

Despite the compelling conclusions of this research and the fact that New Jersey school districts typically allocate more than 80% of their budgets to salaries and benefits, Cerf Cert. at ¶ 6, there are a disproportionate number of ineffective teachers in the SDA Districts.

Pursuant to the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-117 et seq., which was enacted in 2012, teachers now are rated annually into one of four categories: highly effective, effective, partially effective, and ineffective. N.J.S.A. 18A:6-123(b)(1).

In the entire State of New Jersey in the 2013/2014 school year, which had 105,759 teachers statewide, 205 (0.1%) teachers were rated as ineffective and 2,558 (2.4%) were rated as partially effective. Hespe Cert. at ¶ 17. Statewide, 24,897 (23.7%) of teachers were rated as highly effective. Ibid. The remaining teachers were rated as effective. Ibid. Thus, under the TEACHNJ ratings, the vast majority (97.5%) of New Jersey teachers in the State's 591 school districts in the 2013/2014 school year were rated as effective or highly effective. Ibid. Most schools had no or very few ineffective or partially effective teachers. Ibid.

By contrast, in the 2013/2014 school year, Newark employed 2,775 teachers in its district schools. Hespe Cert. at ¶ 18. Of those, 94 were rated ineffective and 314 were rated partially effective. Ibid. Only 309 of its 2775 teachers were rated highly effective. Ibid. Like Newark, Camden had a very high concentration of the State's lower rated teachers. Ibid. In the 2013/2014 school year, it employed 11 ineffective teachers and 149 partially effective teachers. Ibid. Conversely, only 33 of its 1,014 teachers were rated highly effective. Ibid. In Paterson, 20 of its 1,989 teachers were rated ineffective, and 298 were rated partially effective in the 2013/2014 school year. Ibid.

Thus in 2013/2014, Camden, Newark, and Paterson, just three of the State's 591 school districts, employed 125 (60%) of the State's 205 ineffective teachers. Hespe Cert. at ¶ 19. These three districts also employed 758 (29%) of the State's 2,558 partially effective teachers. Conversely, only 526 (9%) of the 5,778 teachers employed in these three districts were rated "highly effective", as compared to 23% of teachers statewide who received this top rating. Ibid.

V. Funding Is Not the Answer

This Court has held that a "thorough and efficient education requires a certain level of educational opportunity, a minimum level, that will equip the student to become 'a citizen

and . . . a competitor in the labor market.'" Abbott II, supra, 119 N.J. at 306 (1990) (quoting Robinson I, supra, 62 N.J. at 515). Although the Court's efforts to meet this Constitutional mandate traditionally focused on a gap in funding for poorer school districts, the Court has repeatedly confirmed that increased funding is not a constitutional panacea:

- "Hence while funding is an undeniable pragmatic consideration, it is not the overriding answer to the educational problem, whatever the constitutional solution ultimately required." Robinson v. Cahill, 69 N.J. 133, 141 n.3 (1975) ("Robinson IV").

- "We note the convincing proofs in this record that funding alone will not achieve the constitutional mandate of an equal education in these poorer urban districts; that without educational reform, the money may accomplish nothing; and that in these districts, substantial, far-reaching change in education is absolutely essential to success." Abbott II, supra, 119 N.J. at 287.

- "[T]he Court never has believed that equality of expenditures alone will translate into an educational opportunity in Irvington that is comparable to the one provided in Millburn. The judicial funding remedy, indeed, is likely to be approaching inutility. Only comprehensive and systemic relief will bring about enduring reform." Abbott IV, supra, 149 N.J. at 201.

With respect to funding, several different approaches have been tried over the past three decades, but little has been done to effect "substantial, far-reaching change in education [that]

is absolutely essential to success." Abbott II, supra, 119 N.J. at 295. Three significant conclusions are apparent from a careful review of both state funding and school performance data that bear out these statements by the Court that funding in itself is not the solution to meeting the constitutional mandate.

First, there continues to be a significant achievement gap between the State's best and worst performing schools, and the SDA Districts continue to suffer the negative impact of that disparity. Hauger Cert. at ¶ 9 (Exhibits A and B). Second, the disparity in pupil outcomes in the SDA Districts has not been significantly reduced despite substantially increased funding over the past three decades.[9] Ibid.; Dehmer Cert. at ¶ 7 (Exhibit C). Third, studies nationally demonstrate that, assuming infrastructure, equipment and supplies are maintained at a reasonable level, the most important factor in providing a quality education is the quality of the teaching staff. Hanushek Cert. at ¶¶ 22-31; Strunk Cert. at ¶ 33.

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[9] While the SFRA, enacted by the Legislature in 2008 and addressed by this Court in Abbott XX and Abbott XXI, has not been fully funded by the Legislature since FY2009, see FY2009 Appropriations Act through FY2017 Appropriations Act, the absolute amount of funding for the SDA districts since FY2009 increased from $4.636 Billion in FY2009 to $5.074 Billion for FY2016 and is projected at $5.095 Billion for FY2017. Dehmer Cert. at ¶ 7 (Exhibit C). Based upon the entire Abbott funding and performance history, there is no basis for concluding that full funding under the SFRA would affect the disparity.

The Department of Education has identified specific impediments, as discussed at length below, to attracting and maintaining the highest quality teaching staff in the SDA Districts and concluded that while removing those impediments cannot guarantee the desired results in a short period of time, it will be virtually impossible to eliminate the disparity in performance in the SDA Districts while those impediments remain in place. A considerable change in the current system of education is required for the State to satisfy its constitutional obligation.

VI. The LIFO Provision of the Tenure Act Has Created an Impediment to a Thorough and Efficient Education Because It Discourages New Talent From Applying for Teaching Positions and Leads to Retention of Less Efficient over More Efficient Teachers

The Tenure Act provides, inter alia, that upon rehiring by a district for a fifth year, a teacher shall have tenure in the position "during good behavior and efficiency." N.J.S.A. 18A:28-5. Yet that part of the Tenure Act that concerns reductions in force ("RIFs"), states: "Dismissals resulting from any such reduction . . . shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board." N.J.S.A. 18A:28-10. Traditionally, upon any RIF, seniority is the only basis upon which teachers are released. Non-tenured teachers are subject to release first, irrespective of their

effectiveness, and tenured teachers are released in reverse order of seniority, irrespective of their effectiveness. Indeed, a teacher's evaluated effectiveness plays no role in a RIF. This so-called last-in, first-out ("LIFO") requirement in the event of a RIF is an impediment to a thorough and efficient education because: (1) districts (like many of the SDA Districts) with a declining student population and commensurate likelihood of potential RIFs are unable to attract talented new teachers who know that they will be the first let go in the event of the potential RIF; and (2) more effective but less senior tenured teachers will be released upon a RIF, in favor of retaining less effective teachers with more seniority. The cumulative effect of both factors, as a result of LIFO, is that SDA Districts are disproportionately populated by less effective teachers.

A. Newark Public Schools

For example, in Newark, in the 2015/2016 school year, 10% of the tenured teachers were still rated as ineffective or partially effective. Cerf Cert. at ¶ 9. Christopher Cerf, Superintendent of Newark Public Schools ("Newark"), explained that the district has been unable to exit most of these teachers because they have tenure. Id. at ¶¶ 14-24. As a result, Newark has had to continue to employ ineffective teachers for years. Id. at ¶ 13-15. Recognizing the paramount importance of great

teachers to Newark's students, the district has employed various policies in an attempt to limit the impact that less-than-effective teachers have on students. Id. at ¶ 11-14.

For instance, Newark created a policy requiring mutual consent - of both the principal and teacher - before any teacher is placed in a school. Ibid. Naturally, most principals do not consent to employing less than effective teachers in their schools. Thus, each year there is a pool of hundreds of teachers who have not been placed. In prior years, instead of forcing a placement, the Newark district has borne the continuing financial burden of paying these teachers' salaries and benefits while placing them in supportive but less than full teaching roles, such as in substitute teacher positions or as a co-teacher. Id. at ¶ 11-16. However, although this approach benefitted the education of Newark's students, it was very inefficient and costly because Newark paid full salaries and benefits for positions that could more economically be filled by less senior (and less credentialed personnel), at a cost of tens of millions of dollars each year. Newark is no longer able to fund this approach while also maintaining a balanced budget. Ibid. Thus, schools in the Newark district now must fill nearly all vacancies from within the district - even if this means taking a less than effective teacher from the pool over a more effective teacher from outside the district. Ibid.

This problem would only be exacerbated in the event of a RIF. Cerf Cert. at ¶ 18. Due to declining student population, the Newark school district currently has more teachers than it needs for certain subjects. Id. at ¶ 20. If the district were to conduct a RIF to reduce the number of teachers, because of the LIFO Statute, it would be forced to terminate many of its great teachers while replacing them with less effective teachers. Id. at ¶ 18. For example, the Newark school district performed a hypothetical RIF in 2014 which showed that, under the LIFO Statute, only 4% of the teachers laid off would be rated as ineffective while 75% of the layoff would consist of teachers with effective or highly effective ratings. Id. at ¶ 18. The hypothetical 2014 RIF would have forced the district to cut more than 300 of its effective or highly effective teachers while retaining 72% of its lowest-rated teachers. Ibid. Shockingly, the RIF would have resulted in the layoff of only 11% of the pool of teachers who had not been placed by mutual consent. Ibid. Moreover, 44 of the Newark district's schools would have lost 20% or more of their effective or highly effective teachers. Ibid. The Newark school district recognized that removing this many great teachers from its classrooms and replacing them with less than effective teachers would have been disastrous for its students. Id. at ¶ 18. Consequently, the Newark school district continues to employ

more teachers than needed for its students and takes on a significant financial burden to do this: a financial burden which is becoming increasingly difficult, even impossible, to continue. Id. at ¶ 20.

B. Paterson Public Schools

Paterson has been unable to avoid conducting RIFs and has conducted two major RIFs in recent years. Certification of Donnie Evans ("Evans Cert.") at ¶ 15-16. Most recently, in the 2014/2015 school year, Paterson laid off 376 staff members, 188 of whom were teachers. Ibid. Because of LIFO, all of the teachers laid off were non-tenured and a significant number of those laid off had received effective or highly effective ratings, while many teachers with ineffective or partially effective ratings remained in the district. Id. at ¶ 16. Paterson's Superintendent noted that this result had a negative impact not only upon the current teacher quality in the Paterson district, but also on its ability to attract new recruits in subject areas different from the subject areas of teachers who were laid off in the RIF. Id. at ¶ 17. As Superintendent Evans explained "[b]ecause new teachers anticipate being the target of a future RIF, they are not applying for these positions." Ibid.

C. Recall Lists

Even if some ineffective teachers are exited in a RIF, N.J.S.A. 18A:28-12 provides that any teacher terminated in a RIF

"shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified … full recognition shall be given to previous years of service." Thus, as Newark Superintendent Cerf explained, even after exiting ineffective teachers in a RIF, Newark would still be prevented from filling vacancies with talented, out-of-district teachers because NPS would be required to first draw from the recall list, even if the teachers on that list had less than effective ratings. Cerf Cert. at ¶ 19. Paterson Superintendent Evans also noted this provision, commenting that "it is counter-intuitive for Paterson to be forced to rehire a less than effective teacher once he or she has been laid off." Evans Cert. at ¶ 20.

Research supports that the LIFO provisions have a negative effect on schools. Dr. Hanushek has noted that LIFO "leads to significant costs in terms of achievement of students." Hanushek Cert. at ¶ 45. Dr. Strunk's research suggests that LIFO-based layoffs adversely impact both schools and students. Strunk Cert. at ¶ 36. LIFO has a direct impact on students by removing more effective teachers from schools than would be the case under a layoff process based on teacher quality. Id. at ¶ 37. In addition, research shows that layoffs conducted pursuant to LIFO, as opposed to those based on quality, result in the

layoff of a substantially greater number, and higher quality teachers to reach equivalent budget savings. Id. at ¶ 38. Conversely, where a layoff was conducted based on teacher quality, the layoff actually increased student achievement while also decreasing the number of teachers that the district had to lay off. Id. at ¶ 39.

In addition to these direct impacts, research shows that layoffs conducted pursuant to LIFO cause massive turnover in the district as teachers are shuffled around to fill spaces created by the seniority-based layoff. Id. at ¶ 42. This churn may also impact school culture and student achievement. Id. at ¶ 42. Furthermore, research shows that teachers who receive a RIF notice, but who are not ultimately laid off, are less effective upon their return to teaching. Id. at ¶ 43.

School districts have attempted to use provisions of the Tenure Act, N.J.S.A. 18A:25-1 et seq., as modified by TEACHNJ, N.J.S.A. 18A:6-117, and the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to rid themselves of the less than effective teachers before any potential RIF, so that fewer inefficient teachers will gain seniority, thereby reducing the retention of less efficient teachers in the event of a RIF. Cerf Cert. at ¶¶ 11, 22-23. Unfortunately, as applied in these SDA districts, this statutory framework has fallen short of its goal.

D. TEACHNJ

In 2012, the Legislature enacted TEACHNJ with "[t]he goal . . . to raise student achievement by improving instruction through the adoption of [teacher] evaluations." N.J.S.A. 18A:6-118. However, despite the new evaluation system, and the theoretically expedited removal system for inefficient teachers, once a teacher receives tenure, continued employment is essentially guaranteed, except if the superintendent navigates a convoluted array of lengthy procedural steps.

Pursuant to the Tenure Employee Hearing Law, prior to dismissing a tenured public employee for inefficiency, a hearing must be held before an arbitrator. N.J.S.A. 18A:6-10. Before commencing the removal hearing based on inefficiency charges, however, the teacher must have received at least two annual summative evaluations as "inefficient" or "partially efficient." See N.J.S.A. 18A:6-123 (evaluation rubrics must be adopted for all teaching staff members, which set forth a basis for the ratings of ineffective, partially effective, effective, and highly effective). "[I]f the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of

inefficiency," and the process to remove the teacher from employment commences. N.J.S.A. 18A:6-17.3.

However, once a teacher is rated "ineffective or partially effective on the annual summative evaluation, as measured by the evaluation rubrics, a corrective action plan shall be developed by the teaching staff member and the chief school administrator or the teaching staff member's designated supervisor." N.J.A.C. 6A:10-2.5. At least two years must pass - with the teacher remaining active in the classroom - before an ineffective tenured teacher can be brought up on tenure charges. Until the teacher is actually removed from tenure, the teacher will continue to have seniority rights under the Tenure Act, resulting in the likely termination of more effective, non-tenured teachers while a tenure charge is pending.

Newark has been aggressively proceeding under TEACHNJ and the Tenure Employees Hearing Law to exit its ineffective teachers prior to conducting a RIF, but has found that, as applied in its district, these statutes are an insufficient means of exiting Newark district's low performing teachers. Cerf Cert. at ¶ 23. Newark has filed tenure charges against 200 teachers in the past four years, but numerous ineffective teachers remain. Id. at ¶ 22-23.

Superintendent Cerf explained why these statutory provisions are an insufficient solution to exiting NPS' low

quality teachers. First, it is very expensive to bring tenure charges; it costs the district an average of $50,000 for each teacher against whom charges are filed. Cerf Cert. at ¶ 22-23. Second, it takes a very long time to exit a teacher under the statutory procedure. Id. at ¶ 18. In addition, full salary and benefits can only be withheld for 120 days while charges are pending. Ibid. Under TEACHNJ, a teacher cannot be subject to a tenure charge unless he or she receives less than effective evaluations for two years; some teachers have extended this to three years by avoiding evaluation in the second year. Ibid. Even after charges are brought, the arbitration proceeding can take several months and, in some cases, more than a year, before a decision is rendered. Ibid. Third, arbitrations do not always result in the termination of the ineffective teacher. Id. at ¶ 19. Fourth, the statutory provisions only provide a path for exiting the district's lowest rated teachers and provide no way to exit teachers who receive effective ratings, but who are not a good fit. Ibid.

VII. Certain Provisions of the Collectively Negotiated Agreements in Certain SDA Districts, Including Length of School Days, Length of School Year, and Teacher Assignments Have Created an Impediment to a Thorough and Efficient Education

Teachers in every district in the State of New Jersey are unionized, including in each of the 31 SDA Districts. Hespe Cert. at ¶ 20. Therefore, all of the SDA Districts are bound by

a collective negotiation agreement ("CNA") between the school district and the teachers' union that addresses virtually every aspect of the teachers' positions in those districts. Hespe Cert. at ¶ 20.

The New Jersey Education Association ("NJEA") maintains that, in forming the CNAs, "[s]chool boards are required to negotiate with an employee representative over" at least 70 topics, including but not limited to the following:

- Extracurricular assignments - certain aspects
- Hours of work
- Merit pay - including evaluation criteria
- Physical facilities and working conditions
- Preparation periods - length and number of
- Reduction in Force (RIF) - notice provisions and compensation for remaining staff if there is a significant increase in workload
- RIF procedures if NOT covered in statutes, such as:
    - Seniority
    - Recall
    - Bumping rights
- Release time
- Shifting unit work from unit employees to employees outside the unit
- Teacher-pupil contact time
- Teaching periods - number of
- Transfer and assignment procedures
- Workload
- Workday - length of
- Work schedule including creation of new shift(s)

NJEA, Collective Bargaining Manual at pg. 6-7, <<http://wlbea.org/files/2015/03/NJEA-Collective-Bargaining-Manual.pdf>> (last

visited Sept. 13, 2016); Certification of Kimberley ("Harrington Cert.") at ¶ 15. Thus, CNAs between teachers' unions and school boards in New Jersey are typically lengthy, restrictive, and address virtually every aspect of the teacher's position. Hespe Cert. at ¶ 23; Harrington Cert. at ¶ 17.

National researchers recognize that highly restrictive CNAs are associated with lower student achievement and lower graduation rates. Strunk Cert. at ¶ 15. The Department of Education has deemed that certain items in CNAs, as applied in certain SDA Districts, are impediments to providing a thorough and efficient education to the students in those districts. These impediments include CNA provisions that (A) limit, restrict and reduce teaching time on a daily, weekly and annual basis and (B) restrict the district's ability to control teacher assignments.

A. Restrictions on Teaching and Training Time

It is common for CNAs to contain explicit restrictions on the length of the school year, the length of the school day, when the school day must start, the number of hours of classroom time, when teachers must have breaks, when the school day must end, and when teachers can be scheduled for professional training or development. Hespe Cert. at ¶ 23. For example, the Camden CNA provides that teachers shall only teach for four hours and forty-five minutes of the seven hour and five minute

school day. Hanushek Cert. at ¶ 18; see also Shulman Cert. at Exhibit B. This is because the CNA requires that each teacher's day include a forty-five minute lunch breach, a forty-five minute unassigned preparation period, and forty-five minutes of unassigned time. Ibid. Additionally, the Camden CNA limits the school year to only 185 days. Restrictions such as these prevent the implementation of innovative and proven learning programs. Strunk Cert. at ¶¶ 20-25.

It is axiomatic that essential job training for teachers with respect to district/school/state education initiatives is critical. Harrington Cert. at ¶ 19. To stay current on research-supported best practices for classroom instruction, teachers must be offered on-going essential job training (including professional development opportunities) to support their capacity for sustainable implementation in the classroom. Ibid. Research shows that one-dose professional development does not transfer to instructional gains for children. Ibid. For sustainable change to take place and student gains to increase, the professional development doses must be job embedded and repeated. Ibid.

Many school administrators are frustrated with the inability to implement these training opportunities with their staff knowing how important they are for student growth. Harrington Cert. at ¶ 19. To help effectively train the

teachers, administrators require meaningful (i) grade level planning time; (ii) professional learning communities; (iii) additional professional development opportunities; and/or (iv) student contact time. Id. at ¶ 20. More often than not, these opportunities are thwarted by the CNAs because of the rigidity imposed by contractual mandates for individual preparatory periods and duty periods. Ibid.

For instance, the DOE has recommended administrators use their faculty meeting times to provide instructional trainings for their staff only to be told they are unable to do this because the contract specifically states they may only use that time for agenda items and may not use it for teacher training. Harrington Cert. at ¶ 20. These meetings range from weekly to biweekly and in time increments of 30-45 minutes. Ibid. This means a minimum of 60 minutes a month that could be used for support and training to shift classroom instruction is being used to check off agenda items which are not impactful on student learning. Ibid.

Another example involves the implementation of the Common Core State Standards throughout the State. Harrington Cert. at ¶ 21. District administrators recognized the critical importance of supporting their teachers through training to fully understand the shifts in instruction necessary to move from the New Jersey Core Curriculum Content Standards to the

Common Core State Standards. Ibid. Numerous administrators wanted to use faculty meeting time for such trainings as well as offer afterschool and summer trainings to ensure the instruction in the classroom matched the rigor and expectations of the standards in preparing students for college and careers. Ibid. The administrators were restricted by the contract allowance for the pre-set number of days/hours that could be used for professional development and knew they needed to offer their staff more support in order to make certain the standards were being fully implemented. Ibid.

Another example involves the integration of technology into the classroom, which can be daunting for educators, many of whom do not have the confidence to use and infuse the technology across their curriculum. Harrington Cert. at ¶ 22. Professional development is needed to support educators in this area and to help them increase their own capacity as well as their ability to comfortably use technology to enhance student learning experiences and ready students with the skills business and industry are seeking. Ibid. Once more, school districts are being limited in training their teachers to be more effective. Id. at ¶ 20.

A final example involves Camden, where because the CNA limits the teachers' school day to four hours and forty-five minutes, and the school year to 185 days, there is nothing that

the district can reasonably do to extend its students' learning time. Camden has determined that it would be beneficial to students if in-district teachers proctored in-school suspensions because this would provide educational continuity and stability for the children. Hespe Cert. at ¶ 29. However, because of the four hour and forty-five minute school day, there is limited teacher availability to proctor in-school suspensions. Ibid. Obviously, a suspension from class can be educationally more useful under the supervision of a trained teacher than under an untrained individual.

Camden would also like to implement a literacy program for grades K-5. Such a literacy program has been successful in other school districts, however, it cannot be fully implemented in Camden because it requires block scheduling precluded by the CNA and the CNA effectively prevents the district from being able to properly train its teachers to teach the program. Hespe Cert. at ¶ 29.

Paterson has faced similar restrictions. The Paterson CNA places significant restrictions on the length and layout of the school day. Evans Cert. at ¶¶ 7-8. Pursuant to the Paterson CNA, the school day is seven hours, of which only five hours and forty minutes is permitted to be student contact time because of required unassigned, lunch, and preparation periods. Id. at ¶ 10. To increase this teaching time by even one period, teachers

must individually volunteer for the increase in student contact time and Paterson must pay them extra for the time. Ibid. In addition, pursuant to the Paterson CNA, the school day must begin at all of Paterson's schools at 8:15 a.m. Id. at ¶ 9. This requirement prohibits a staggered bus schedule, thereby costing the district more money than necessary for the transportation program. Ibid.

B. Restrictions on Teacher Assignments

Research shows that seniority transfer provisions in CNAs are, in the words of Dr. Strunk, "likely [to] exacerbate the inequitable distribution of teachers across schools within districts..." Strunk Cert. at ¶ 26. Recently, research has confirmed that "the more restrictive involuntary seniority transfer provisions in CBAs contribute to teacher quality gaps between advantaged and disadvantaged schools." Id. at ¶ 26. Conversely, research shows that when the school districts have the ability to make involuntary teacher transfers, this "appears to improve equity along the dimensions we examine, with some gains to efficiency as well." Ibid.

Many CNAs applicable in SDA Districts contain restrictive transfer provisions requiring that seniority dictates how teachers are transferred, assigned, hired, fired, laid off and recalled. For example, internal applicants must be given preference over new hires for vacant positions. A junior

teacher must be involuntarily transferred before a more senior teacher is impacted. The end result is that the CNA dictates a result contrary to the principal's judgment as to the needs of the particular classroom and the fit of the teacher to be assigned. Hespe Cert. at ¶ 27.

Some CNAs expressly exclude principals from weighing in on teacher transfers to their schools: "A teacher being involuntarily transferred or reassigned shall not suffer a reduction in rank or in total compensation. A list of open positions in the school districts . . . teachers may request positions, in order of preference…" See Camden CNA at Article XXIX. As a result, principals can be saddled with forced placements of teachers in their buildings. Hespe Cert. at ¶ 27. Too often it seems, these teachers are either not a great "fit" or were not found to be effective educators in their prior environment. Ibid. This can contribute to additional teachers in schools and/or situations where such teachers are being paid not to teach.

In addition, restrictive seniority provisions will lead to great inequity in the distribution of experienced and high performing teachers across classrooms in the school and district. Hespe Cert. at ¶ 28. For example, regardless of any statutory provision regarding RIFs, such as LIFO, see point V supra, unions negotiate seniority provisions in their CNAs. Id.

at ¶ 28. In Camden, for example, and as is typical in CNA's, and consistent with the LIFO statute, the district is expressly prevented from retaining one educator over another based upon performance unless all seniority, certification and length of service factors are equal. Id. at ¶ 28. See also Camden CNA, attached to the Shulman Cert., at Article XXIV. "No tenured teachers will be laid off before non-tenured teachers. Length of service in the district shall dictate the order of layoff . . . . In the case of all factors equal, teachers will be considered on the basis of their evaluation ratings…" Ibid. The Newark CNA prevents 'site-based decision-making' for "transfer provisions and seniority provisions." Id. at ¶ 28. See also Newark CNA, attached to the Shulman Cert., at Article IV.

In Paterson, while the CNA does not expressly require teacher consent for a transfer, in Superintendent Evans' experience, teachers will typically grieve reassignments they do not like. Evans Cert. at ¶ 11. After arbitration, 100% of the reassignments have been upheld, but the district had to incur the expense and time associated with the grievance process. Ibid. In addition, the grievance has a chilling effect on the principal of that school, discouraging him or her from making future transfers absent teacher consent, thus shifting the focus

away from benefit to children's education and creating a negative environment in the school. Id. at ¶ 12.

It is evident that student success and the closing of the achievement gap is inhibited by CNAs on time for professional development; collaborative curriculum and lesson planning; extended teaching periods, extended school days, and afterschool enrichment programs. Harrington Cert. at ¶ 13. New Jersey's college and career ready practices of today are not the same as those of yesterday. Id. at ¶ 14. Today's career ready practices incorporate the communication, critical thinking, collaboration, and decision making skills employers are looking for in filling their workforce needs. Ibid. These attributes coupled with the academic skills and knowledge are a tall yet critical order for educators to fill. Ibid.

Our State's students cannot be properly prepared for the world that awaits them working under the confines of a traditional education system. Harrington Cert. at ¶ 14. Rather, the approach must be nimble and flexible to readily adjust and adapt to meet the needs of each and every student to ensure future success. Ibid. Moreover, it cannot be overlooked that the students in the SDA Districts often come to school with achievement gaps of their own - no early intervention, parents unavailable due to needing to work multiple jobs to provide for their family, communication barriers and the like. Id. at ¶ 7.

These gaps coupled with a lack of quality instruction widens the gap, making it difficult for a child to bridge the ever-widening expanse created as school years with ineffective teachers mount. Ibid.

C. CNAs Are Virtually Impossible for Districts to Change

In the past, school districts have been met with significant resistance to changing the above provisions in their collective negotiations agreement. Hespe Cert. at ¶ 29. Such items are locked into CNAs and the school representatives refuse to negotiate any significant change. Ibid. As a group, the teachers are not willing to explore more innovative methods to teaching or structuring the school day. Evans Cert. at ¶ 7.

As set forth in the Certification of Matthew J. Giacobbe, Esq., an experienced labor attorney who frequently negotiates public school contracts, the teachers, represented by their union, often seek reductions in the length of the workday, work year and student contact time during the work day. Certification of Matthew J. Giacobbe, Esq. ("Giacobbe Cert.") at ¶ 8. The teacher's unions also often seek increases in their individual preparation periods, which would reduce student instructional time. Id. at ¶ 9. School districts often encounter tremendous difficulty in increasing student instructional time due to the teacher unions' intransigence to agree to any contractual proposal that results in an increase to the length of the work

day, work year or increase in teacher/student contact time during the work day. Id. at ¶ 11.

Currently, the CNAs are negotiated utilizing the prior agreement as a minimum. Hespe Cert. at ¶ 31; Evans Cert. at ¶ 6. Districts have little leverage to negotiate required changes to the collective negotiations agreement because all of the surrounding districts have similar provisions and negotiation practices, and the State NJEA has a representative on most District's union negotiation teams and who participates actively. Evans Cert. at ¶ 6. The education unions' interest is to ensure that contracts are negotiated so that the pro-union provisions of neighboring districts' contracts are used as leverage to ensure many common provisions across districts. Hespe Cert. at ¶ 31. There is resistance to provisions that would make sense in SDA districts, given their struggles and demographics. Hespe Cert. at ¶ 31; Evans Cert. at ¶ 6. Thus the same type of provisions, school day and school year structures that have been around for many years repeatedly end up in the new agreements, preventing innovation and flexibility in the SDA Districts' schools. Evans Cert. at ¶ 6.

For example, in Paterson, the CNA requires negotiation before the district implements "any aspect of an experimental program which would affect the terms and conditions of employment." Evans Cert. at ¶ 7. Because of the union's

unwillingness to change such terms of the CNA, Paterson has been effectively prevented from implementing research-based, best practices to improve learning for its students, such as the University of Pittsburgh's Institute for Learning's "Principles of Learning." Ibid.

D. School Districts No Longer Have the Benefit of "Last Best Offer" in Negotiating CNAs

Collective negotiations are a lengthy process. It can take years for the parties to agree upon the terms of a new CNA. Meanwhile, the students of SDA Districts suffer unduly for lack of research-proven "improved educational opportunities." See Horne v. Flores, 557 U.S. 433, 466-67, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (2009).

Under the New Jersey Employer-Employee Relations Act ("NJEERA"), N.J.S.A 34:13A-1, when the parties reach an impasse after good faith negotiations, the public employer can institute its last best offer. See In re NJ Transit Bus Ops, 125 N.J. 41, 54 (1999) ("it is the employer's last offer, its unilateral last offer, that prevails and, by law, the employees must abide by it"). In 2003, however, the Legislature enacted School Employees Contract Resolution and Equity Act ("SECREA"), N.J.S.A. 34:13A-33, which eliminated the "last best offer" provisions of the NJEERA for public school employers only. As applied, SECREA eliminated the ability of school boards to

implement their "last best offer," to their public employees under an expiring CNA when a new agreement cannot be reached. Giaccobe Cert. at ¶¶13-14. Those provisions remain in place in the collective negotiation process between other public employers and their employees. It thus prevents school districts from implementing changes to an expiring CNA, such as an increase in the number of school days or the length of the school day, over the objection of the teachers' representatives. No other public employer is so bound. Giaccobe Cert. at ¶¶ 15-22.

As of July 7, 2016, there are 49 districts in New Jersey (SDA and otherwise) which have not yet reached an agreement for CNAs which expired on June 30, 2015 or earlier. New Jersey School Boards Ass'n, Settlement Rates in Perspective, <<http://www.njsba.org/services/laborrelations/settlement-rates-in-perspective/>> (last visited August 24, 2016). Mr. Giacobbe explained that the enactment of SECREA and the inability to use "last best offer" in teacher negotiations has resulted in more protracted negotiations without a terminal proceeding and has made it more difficult for school districts to make meaningful changes to their respective CNA's, including changes to increase student instructional time. Giacobbe Cert. at ¶¶ 12-16.

SECREA has left SDA Districts with no ability and no leverage to implement proven educational policy reforms, if good

faith negotiations fail to convince the teachers' representatives that changes that are in the best interest of the children are a pressing need. Id. at ¶¶ 20-22. Without last best offer, the SDA Districts are especially limited in negotiating to institute educational reforms that will provide a thorough and efficient education to the students in such Districts.

VIII. Many SDA District Schools That do not Operate Under These Impediments Perform Significantly Better

Schools in SDA Districts that do not face the impediments discussed above, namely charter schools, are able to implement other public education techniques and policies that cannot be implemented in district schools, and in general, these schools perform much better than other public schools in the SDA Districts. Czehut Cert. at ¶ 12 (Exhibit B). This comparison provides concrete evidence that eliminating the cited impediments in certain SDA Districts is likely to promote better student performance in those District schools. Ibid.; see also Connecticut Coalition v. Rell, supra, No. CV-145037565-S at *89 ("[t]he court knows what its ruling means for many deeply ingrained practices, but it also has a marrow-deep understanding that if they are to succeed where they are most strained schools have to be about teaching children and nothing else").

A. Background on Charter Schools

A charter school is "a public school operated under a charter granted by the Commissioner that is independent of the district board of education and managed by a board of trustees." N.J.A.C. 6A:11-1.2. When enacting the Charter School Program Act in 1995, the Legislature declared that one purpose was to "assist in promoting comprehensive educational reform by providing a mechanism for the implementation of a variety of educational approaches which may not be available in the traditional public classroom. … [Including by] encourage[ing] the use of different and innovative learning methods." N.J.S.A. 18A:36A-2; see also J.D. ex rel. Scipio-Derrick v. Davy, 415 N.J. Super. 375, 392 (App. Div. 2010) ("the charter school program was a reform measure by the Legislature to ensure that every child receives a thorough and efficient education by providing an innovative alternative to traditional public schools").

Generally speaking, charter schools are funded by the districts where the students reside, to the extent of 90% of the budget allocated to each student that chooses to attend the charter school. N.J.S.A. 18A:36A-12(a); Czehut Cert. at ¶ 15. In exchange for this funding, charter schools must submit regular performance reports to the Commissioner, who has the authority to revoke a charter or place a school on probation if it is not performing properly. N.J.S.A. 18A:36A-17; N.J.A.C.

6A:11-2.4; see also In re 1999-2000 Abbott v. Burke Implementing Regulations, 348 N.J. Super. 382, 441 (App. Div. 2002) ("a charter school will simply cease operating if the Commissioner vacates the charter"); Czehut Cert. at ¶ 11. A charter will only be renewed if the charter school meets certain requirements, including academic requirements that are given the most weight in the renewal decision. Id. at ¶¶ 9-11.

When the charter school is performing well, the charter school board of trustees enjoys a great deal of freedom and flexibility in its operational methods. N.J.S.A. 18A:36-14(a); see also J.D. ex. rel. Scipio-Derrick v. Davy, supra, 415 N.J. Super. at 392 ("having enrolled in charter schools, plaintiffs, unlike traditional public school students, receive an education exempt from regulation").

For example, charter schools have the ability to make personnel decisions, such as which employees to hire, promote, and let go. N.J.S.A. 18A:36-14(a). The Tenure Act, including the LIFO Statute, does not apply to charter schools. Rather, charter schools have the freedom to determine their own definition of "tenure" and set forth the terms of their individualized, streamlined tenure policies. N.J.A.C. 6A:11-6.2. Charter schools also have the option of deciding whether to offer the terms of a collective bargaining agreement to its certified staff. N.J.S.A. 18A:36A-14(b). While some charter

schools in New Jersey have teachers' unions, most do not, including some of the most successful charter schools, such as North Star Academy in Newark. Hespe Cert. at ¶ 35.

Because they are public schools, charter schools are free of charge and are generally open to all students in the district. N.J.S.A. 18A:36A-7. If more students enroll than there are spaces available, then the school must use a random selection process and waiting lists. N.J.S.A. 18A:36A-8; N.J.A.C. 6A:11-4.5. Under the Statute, the school shall "to the extent practicable, seek the enrollment of a cross section of the community's school age population including racial and academic factors." N.J.S.A. 18A:36A-8(e).

Significantly, charter schools in SDA Districts have roughly the same percentage of at-risk students as schools in the same SDA Districts. For example, charter schools in the SDA Districts and other SDA District schools have, respectively, 76.6% and 75.6% of students living in poverty. Czehut Cert. at ¶ 17 (Exhibit E).

B. Most Charter Schools Are Highly Successful

Charter schools in New Jersey's SDA Districts generally outperform schools in SDA Districts. Czehut Cert. at ¶ 12. In 2012, the Center for Research on Education Outcomes ("CREDO") analyzed New Jersey charter schools and found that "[a]t the school level, 30 percent of the charter schools have

significantly more positive learning gains than their [traditional public school] counterparts in reading, while 11 percent of charter schools have significantly lower learning gains. In math, 40 percent of the charter schools studied outperformed their [traditional public school] peers and 13 percent perform worse." CREDO, Charter School Performance in New Jersey (November 1, 2012) at 6. "On average, students in New Jersey charter schools learned significantly more than their virtual counterparts in reading and mathematics." Id. at 15; see also CREDO, Urban Charter School Study: Report on 41 Regions, 2015 at 2 (finding that, nationally, "urban charter schools in the aggregate provide significantly higher levels of annual growth in both math and reading compared to their [district school] peers"); Hanushek Cert. at ¶ 50.

The data shows that, in New Jersey's SDA Districts, the average standardized test scores for charter schools located within SDA Districts exceed the SDA District scores and, in some cases, even the State average. Hauger Cert. at ¶ 9(a) (Exhibit A); Czehut Cert. at ¶ 12-13 (Exhibits B and C). For the 2014/2015 school year, 40 of 45 charter schools serving middle school grades in SDA Districts outperformed the average middle school scores in the SDA District schools in ELA (English Language Arts) and 35 of 45 did so in math. Czehut Cert. at ¶ 12 (Exhibit B). For elementary school, 51 of 57 charter schools

in SDA Districts outperformed the average SDA District school scores in ELA and 46 of 57 did so in math. Ibid. In addition, the magnitude of the difference in the percent of students achieving proficiency in standardized tests at charter schools located in SDA Districts compared to their SDA District counterparts has been increasing since 2009. Id. at ¶ 13 (Exhibit C).

C. Charter Schools Provide a Blueprint for Success in District Schools

Because most charter schools are free from the statutory and contractual impediments, discussed supra, they are able to implement various techniques and policies that district schools are unable to implement. For example, North Star Academy in Newark is one of the most successful charter schools in New Jersey. Czehut Cert. at ¶ 14 (Exhibit D). North Star's 2014/2015 proficiency rates on the PARCC tests were number one in its similar school group[10] on both Math and ELA. Ibid. Its proficiency rate on the 2014/2015 ELA PARCC tests exceeded 84.4% of all schools in the State for ELA and 84.9% of all schools in the State for Math. Ibid. Its 2014/2015 proficiency rate

[10] A "similar school group" is compiled by looking at mean standardized testing scores, number of students with disabilities, and number of English language learners. Czehut Cert. at ¶ 14 (Exhibit D).

exceeded 94.2% of all schools in the district (Newark) for ELA and 96.2% of all schools in the district for math. Ibid.

North Star recognizes that great teaching makes effective education. Bambrick-Santoyo, Paul, Leverage Leadership: A Practical Guide to Building Exceptional Schools at 4. Thus, for example, North Star employs various techniques to encourage great teachers at its schools.

First, North Star is free from the Tenure Act, including the LIFO Statute, and presumably can attract and retain only the best teachers while more freely exiting underperforming teachers. Because it is not constrained by this complicated statutory framework, North Star can quickly exit ineffective teachers once they are identified to ensure that only the best teachers are impacting their students.

Second, because North Star is not constrained by a CNA, it is able to implement reforms to school day length and school year length in ways to best suit their students' needs. Hespe Cert. at ¶ 26. For example, North Star has implemented an extended 10-month school year and an extended academic day when compared to Newark's other schools. Ibid. see also CREDO, Charter School Performance in New Jersey (November 1, 2012) at 17 (on average, New Jersey charter schools provide students with "an additional two months in learning in reading over their [traditional public school] counterparts").

Clearly, charter schools are also able to use the flexibility granted by their freedom from CNAs to quickly and efficiently implement academic programs in the best interest of their students. For example, if a charter school determines that its students are performing poorly in math during the Fall semester, it can change the format of the school day for the Spring semester to implement block scheduling. Such a school can also quickly reassign teachers so that they are in a position that is the best fit for their skills. Without having to be concerned with whether a proposed technique or policy comports with provisions of a CNA, that school can focus on the more important question: "what is in the best interest of the students?"

The high performance of many of the charter schools, such as North Star, is evidence that if SDA Districts had the opportunity to implement reforms similar to those implemented in many charter schools, they would also see academic improvement for their students and reduced disparity from student performance in the rest of the state's districts. This Court should allow the Commissioner discretion, upon relevant findings, to remove the impediments discussed herein to allow SDA Districts to achieve this success.

ARGUMENT

POINT I

The Commissioner Needs the Flexibility To Suspend Portions of Collectively Negotiated Agreements and Statutory Restrictions In Order to Provide a Thorough and Efficient System of Education to the Children of the SDA Districts

Confirming that there is "a growing consensus in education research that increased funding alone does not improve student achievement," the United States Supreme Court stated that the "ultimate focus is on the quality of educational programming and services provided to students, not the amount of money spent on them... The weight of research suggests that these types of local reforms, much more than court-imposed funding mandates, lead to improved educational opportunities." Horne, supra, 557 U.S. at 466-67. Indeed, as this Court has stated:

> Again, the clear import is not of a constitutional mandate governing expenditures per pupil, equal or otherwise, but a requirement of a specific substantive level of education... a thorough and efficient education requires a certain level of educational opportunity, a minimum level, that will equip the student to become 'a citizen and . . . a competitor in the labor market.'

Abbott II, supra, 119 N.J. at 306, citing Robinson I, supra, 62 N.J. at 515-16; see also Connecticut Coalition v. Rell, supra, No. CV-145037565-S at *28-29, 37 ("[t]he state's latitude to decide how much overall money to spend on schools doesn't mean

the state can have a constitutionally adequate school program while spending its money whimsically … [the Court must] require the state's spending plan to be rationally, substantially, and verifiably connected to creating educational opportunities for children…there is no direct correlation between merely adding more money to failing districts and getting better results. This is hard to argue with, and the plaintiffs concede that only well-spent extra money could help").

By this motion to amend the Abbott remedies, the Commissioner seeks authority to remove contractual and statutory restrictions that he finds to be standing in the way of particular SDA Districts' ability to provide a substantive level of education to meet the constitutional mandate of a thorough and efficient education for its students.

The relief requested herein is entirely consistent with this Court's prior jurisprudence. For example, in Abbott II this Court observed that:

> Real improvement still depends on the sufficiency of educational resources, successful teaching, effective supervision, efficient administration, and a variety of other academic, environmental, and societal factors needed to assure a sound education.
>
> * * *
>
> Clearly the delivery of an adequate education requires efficiency in spending. The need to eliminate waste, to increase efficiency, and to maximize the education

> dollar--a need that is believed to be more acute in the special needs districts--does not lessen the need for resources. Both additional money and reformation of the way in which that money is spent are required to improve the conditions in failing school districts.
>
> * * *
>
> Thus, we have always insisted that increased funding to the SNDs be allocated for specific purposes realistically designed to improve education. The Commissioner has an essential and affirmative role to assure that all education funding is spent effectively and efficiently, especially in the special needs districts, in order to achieve a constitutional education.

149 N.J. at 168, 171, 193 (emphasis added); see also Connecticut Coalition v. Rell, supra, No. CV-145037565-S at *87-88 ("the fundamental right to an adequate educational opportunity won't mean much unless the state's major policies have good links to teaching … children"). Indeed, this Court struck down the Comprehensive Educational Improvement and Financing Act of 1996 in part because it did not comply with the constitutional obligation to effectuate change by attracting qualified teachers and improving teaching in the SDAs. Id. at 201 ("Our Constitution demands that every child be given an equal opportunity to meet his or her promise. CEIFA is deficient in that it does not provide adequate resources to help the most educationally deprived children to achieve that promise or to effect change in our most needy schools. . . . Nothing will be

done under the act to attract the most qualified teachers to those environments or to improve teaching") (emphasis added). Similarly, the statutory and contractual limitations described herein prevent the provision of a thorough and efficient education in SDA Districts and, as such, the Commissioner must be provided with the authority to ameliorate this unconstitutional deprivation.

It is axiomatic that the more time students have with teachers, the better their education. However, current collective bargaining practices have led to contractually-mandated decreases in student-teacher time. Such provisions directly prevent a thorough and efficient system of education and the Commissioner should be permitted to set them aside when appropriate.

A. Portions of Collectively Negotiated Agreements Restrict the SDA Districts' Ability to Provide a Thorough and Efficient Education

While "[p]ublic employees have a right to engage in collective negotiations," In re County of Atl., 445 N.J. Super. 1, 21 (App. Div. 2016), citing Council of N.J. State Coll. Locals v. State Bd. of Higher Educ., 91 N.J. 18, 25-26 (1982) (citing N.J. Const., art. I, ¶ 19 and N.J.S.A. 34:13A-5.3), such rights are limited. Public employees "'do not have the right to bargain collectively' like their counterparts in the private sector, public employees may instead engage in 'collective

negotiations.'" Mount Holly Tp. Bd. of Educ. v. Mount Holly Tp. Educ. Ass'n, 199 N.J. 319 (2009); see Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409, 428 (1970) (discussing distinction between "collective bargaining" and "collective negotiations"). "'[T]he scope of negotiations in the public sector is more limited than in the private sector' due to the government's 'special responsibilities to the public" to "make and implement public policy.'" In re County of Atl., supra, 445 N.J. Super. at 21, quoting In re IFPTE Local 195 v. State, 88 N.J. 393, 401-02 (1982) (citations omitted).

As recently reiterated by the New Jersey Supreme Court:

> public employment negotiation has been divided into two categories: mandatorily negotiable terms and conditions of employment and non-negotiable matters of governmental policy.
>
> In light of the competing interests of a public employer and public employees, the Court stated in Local 195 that [t]he role of the courts in a scope of negotiations case is to determine . . . whether an issue is appropriately decided by the political process or by collective negotiations. Thus, the Court articulated a three-part test for weighing those interests, establishing that a subject is negotiable when: (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy.

Borough of Keyport v. International Union of Op. Engineers, 222 N.J. 314, 333-34 (2015) (internal citations omitted), citing, inter alia, Local 195, IFPTE v. State, 88 N.J. 393, 404-05 (1982).

Items falling under the first prong, those items that "intimately and directly affect[] the work and welfare of public employees," Id., are deemed to be mandatorily negotiable, unless the second or third prong applies. Such mandatorily negotiable terms and conditions of employment include items such as salary, In re County of Atl., supra, 445 N.J. Super. at 21, citing In re Hunterdon Cnty. Bd. of Chosen Freeholders, 116 N.J. 322, 331-32 (1989), and vacation time, "unless the term is set by a statute or regulation." Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012), citing State Troopers Fraternal Ass'n of N.J. v. State, 149 N.J. 38, 51 (1997). The third prong of the Local 195 test also precludes negotiation of an item where it may significantly interfere with the determination of governmental policy. Here, the Commissioner seeks confirmation of his authority to effectuate governmental education policy, despite restrictions in the CNA attempting to preclude him from doing so. Moreover, the second prong addressing preemption by "statute or regulations", a fortiori, must recognize the priority of the thorough and efficient constitutional guarantee.

1. Adjustments to the Length of School Day and School Year, as well as Teacher Utilization During the School Day, Must be Available to All SDA Districts When Determined by the Commissioner to be Necessary for a Thorough and Efficient Education

It has long been held that "[a]lthough the establishment of a school calendar is a managerial prerogative, a decision that directly impacts the days worked and compensation for those days implicates a term and condition of employment." Troy v. Rutgers, 168 N.J. 354, 384 (2001). However, "[q]uestions concerning whether subjects are mandatorily negotiable should be made on a case-by-case basis." In re Alleged Improper Practice Under Section XI, Paragraph A(d) of the Port Auth. Labor Relations Instruction, 194 N.J. 314, 343 (2008), citing Troy v. Rutgers, 168 N.J. at 383. Indeed, as this Court has stated:

> It follows that fixing the number of school days and the hours of instruction per school day fall within a fundamental management prerogative. It is also obvious that establishing the number of those days and the hours of instruction per school day impacts upon the teachers' terms and conditions of employment. It is only when the result of bargaining may significantly or substantially encroach upon the management prerogative that the duty to bargain must give way to the more pervasive need of educational policy decisions.

Bd. of Ed. of Woodstown-Pilsegrove Reg'l School Dist. v. Woodstown-Pilesgrove Reg'l Ed. Ass'n, 81 N.J. 582, 591 (1980), citing State v. State Supervisory Ass'n, 78 N.J. 54, 67 (1978).

Studies have confirmed that longer instructional time

improves student performance and has a lasting effect on the students' overall economic well-being over a lifetime. Hanushek Cert. at ¶ 31. The restrictions in the SDA Districts' CNAs significantly or substantially encroach upon the districts' prerogatives to increase the number of school days or school hours and attempts to achieve these reforms through negotiation have been unavailing. Giacobbe Cert. at ¶¶ 7-11. The Commissioner should be able to impose such policy, where it is determined in a particular SDA District, that a longer school day or year is necessary to improve student performance. "When the dominant issue is an educational goal, there is no obligation to negotiate and subject the matter . . . to binding arbitration." Bd. of Ed. of Woodstown-Pilsegrove Reg'l School, 81 N.J. at 591; see Ramapo-Indian Hills Ed. Ass'n Inc. v. Ramapo Indian Hills Reg'l High Sch. Dist. Bd. of Ed., 176 N.J. Super. 35, 43 (App. Div. 1980) (the only inquiry is whether the "dominant concern" involves an educational goal or the work and welfare of the teachers).

Moreover, restrictions in certain SDA Districts' CNAs prohibit those Districts from utilizing their teachers in the manner they determine will best improve student outcomes. For example, due to the restrictiveness of its CNA, Camden has been unable to utilize teachers in a meaningful way to proctor an in-school suspension program. Hespe Cert. at ¶ 29. Moreover,

Camden cannot fully institute its Literacy Program as have its Renaissance Schools, because the CNA does not permit flexibility in scheduling; nor does it allow for the professional development time to teach the Literacy Program. Hespe Cert. at ¶ 29. Without question, students in the SDA Districts would benefit from increased literacy, yet due to restrictive CNAs, the schools are prevented from instituting programs with fidelity to improve student performance. An SDA District should be able to override the restrictions in the CNAs when the Commissioner determines a need in that SDA District, to utilize teachers as necessary to effectuate public policy in the field of education that is essential to providing the thorough and efficient system of education guaranteed by our Constitution. That constitutional guarantee preempts provisions that otherwise fall within the category of negotiable terms and conditions of teachers' employments.

2. The Constitutional Mandate of a Thorough and Efficient Education Overrides Other Constitutional Provisions, Including the Right of Contract

Where there are competing constitutional provisions - as may be argued here - the courts must weigh the conflicting constitutional rights. See, e.g, State v. Lashinsky, 81 N.J. 1, 13 (1979) ("[T]he constitutional prerogatives of the press must yield, under appropriate circumstances, to other important and legitimate government interests."); see Burgos v. State, 222

N.J. 175, 183-84 (2015) (analyzing the "apparent clash of constitutional provisions" between funding pensions of public employees with the constitutional "budgetary and debt limiting clauses" to find that the "Legislature and Governor were without authority" to grant contract rights that override the Debt Limitation Clause of the Constitution).

Here, the DOE is required to effectuate the constitutional mandate to provide a thorough and efficient education to all children. The right of parties to collectively negotiate is clearly of lesser constitutional dimension, given the explicit governmental policy exception. See, e.g., Borough of Keyport, supra, 222 N.J. at 333-34, citing Local 195, supra, 88 N.J. at 404-05. Relying on Borough of Keyport, the Appellate Division of the Superior Court has recently upheld a Public Employment Relations Commission's ("PERC") decision which recognized that, in certain circumstances, the government policy doctrine overrides the employees' rights to negotiate the terms and conditions of their employment. See Robbinsville Twp. Bd. of Educ. v. Wash. Twp. Educ. Ass'n, No. A-2122-13T2 (App. Div. Aug. 7, 2015) (slip op. at 11), certif. granted 223 N.J. 557 (2015). Therein the court conceded that "[t]here is no dispute that the furloughs resulted in reduced hours of work with resultant reductions in pay, and that these actions necessarily implicate the terms and conditions of employment," but held that the

school board's decision to implement three unpaid furlough days was an exercise of its non-negotiable policy determination. Robbinsville Twp. Bd. of Educ., supra, No. A-2122-13T2 at *7-8. "When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions." Id. at *8, quoting City of Jersey City v. Jersey City Police Officers Ben. Ass'n, 154 N.J. 555, 568 (1998). There can be no more significant government policy than fulfillment of the constitutionally mandated thorough and efficient education requirement.

Moreover, there can be no question that those portions of the CNAs that interfere with a thorough and efficient education are overridden by the New Jersey Constitution. While the Constitution protects against government impairment of contractual obligations, N.J. Const., art. IV, § 7, ¶ 3, "[n]ot even a substantial impairment of contract violates the Constitution if the governmental action has a "significant and legitimate public purpose," is based upon reasonable conditions, and is related to "appropriate governmental objectives." Borough of Seaside Park v. Commissioner of New Jersey Dept. of Ed., 432 N.J. Super. 167, 216 (2012), certif. denied 216 N.J. 367 (Dec. 3, 2013), quoting State Farm Mut. Auto Ins. Co. v. State, 124 N.J. 32, 64 (1991); see Burgos v. State, supra, 222

N.J. at 183 (holding that the Debt Limitation Clause of the State Constitution precludes an enforceable contract created via statute).

As a result, the Court should confirm the Commissioner's authority to effectuate educational policy, by conferring managerial prerogative upon specific SDA District Superintendents to reform the school day and school year, and to utilize teachers in the most educationally effective manner throughout the work day.

B. The LIFO Portion of the Tenure Act Impedes the SDA Districts' Ability to Provide a Thorough and Efficient Education and is Therefore Unconstitutional As Applied to Those Districts

CNAs are not the only impediment to a thorough and efficient system of education. The Legislature has passed unconstitutional laws that improperly protect teachers to the detriment of students.

Consider the perverse decisions that the inflexible statutes and labor agreements with teachers foist upon superintendents and principals in our most hard-pressed school districts. Newark has resorted to paying teachers not to teach, at a cost of tens of millions of dollars each year. In Newark and Paterson, keeping and marginalizing poorly-performing teachers is preferred to the burden, expense and disruption of exiting them. During a RIF, the Tenure Act not only requires

districts to retain ineffective teachers and let go less-tenured, effective teachers, it also impedes them from matching teachers with the subject matter needs of classrooms. Even when these superintendents do manage to lay-off ineffective teachers, these same poor-performing teachers remain on a preferred recall list, preventing the superintendents from hiring talented, often less-expensive teachers to replace them. And perhaps most glaring, Camden's CNA limits actual teaching time to four hours, forty-five minutes of a seven-hour, five-minute school day. We cannot allow our most vulnerable students to be so readily short-changed by these statutory and collectively negotiated obstacles to a thorough and efficient education.

To effectuate the thorough and efficient guarantee of the New Jersey Constitution, the Commissioner needs to allow certain SDA districts to align staffing reductions with student learning and teacher effectiveness metrics. New Jersey's LIFO tenure provisions, as applied, ensure that too many ineffective teachers, who are unable to prepare students for the PARCC[11] or for life, will remain employed during a reduction in force, thus violating the students' rights to a thorough and efficient education.

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[11] The Partnership for Assessment of Readiness for College and Careers ("PARCC") is a standardized test that is given to New Jersey students to measure achievement. The PARCC has been used to measure achievement since the 2014/2015 school year.

Pursuant to the Tenure Act, teachers are "under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by" the Tenure Employee Hearing Law. N.J.S.A. 18A:28-5-9. However, despite the Tenure Act expressly permitting teachers to lose tenure due to inefficiency, the LIFO section of the Tenure Act further provides that teacher dismissals resulting from a reduction in force must be "made on the basis of seniority," N.J.S.A. 18A:28-10, and not by releasing the inefficient teachers first. Thus, when the SDA districts determine the need to layoff large numbers of teachers, they are forced to first remove their last-hired teachers, regardless of the quality of the teachers released or the quality of those who remain. See Connecticut Coalition v. Rell, supra, No. CV-145037565-S at *68 ("teachers make significant gains in the early years of teaching but plateau after about five years. No one defended the idea that having a master's degree makes a better teacher … no one said long years on the job and advanced degrees always meant good teaching"); The Mirage: Confronting the Hard Truth About Our Quest for Teacher Development, The New Teacher Project, 2015, at 15 <<http://tntp.org/publications/view/the-mirage-

confronting-the-truth-about-our-quest-for-teacher-development>> (last visited Sept. 12, 2016).

Because teacher salaries generally increase according to the number of years a teacher has been employed in a district, the seniority layoff provisions impede SDA Districts in at least three ways. First, untenured teachers, irrespective of how highly they are evaluated, are let go before tenured teachers, and less senior tenured teachers are let go before those more senior. Second, LIFO creates the probability that districts must lay off a greater number of less senior but highly effective or effective teachers than by laying off a smaller number of more senior, yet less effective teachers for the same financial benefit. Finally, the remaining more senior but potentially less effective teachers will likely be teaching more students, due to necessarily larger class sizes, conflicting with the goal of a thorough and efficient education. Cerf Cert. at ¶ 24. This situation, as discussed above, has disproportionately affected SDA districts, resulting in their school children being deprived of a thorough and efficient education.

Statutes are "presumed to be constitutional — 'a presumption that may be rebutted only on a showing that a provision of the Constitution is clearly violated by the statute.'" Moriarty v. Bradt, 177 N.J. 84 (2003) (upholding

grandparent visitation rights) quoting In re Adoption of a Child by W.P., 163 N.J. 158, 165-66 (2000) (Poritz, C.J., dissenting). See also NYT Cable TV v. Homestead at Mansfield, 111 N.J. 21, 28 (1987). "[W]hen the constitutionality of a statute is threatened, we have excised constitutional defects or engrafted new meanings to assure its survival." NYT Cable TV, supra, 111 N.J. at 28, citing Town Tobacconist v. Kimmelman, 94 N.J. 85, 104 (1983). This is done, however, only where it is determined that the Legislature would have wanted the statute to survive as modified rather than to succumb to constitutional infirmities. NYT Cable TV, supra, 111 N.J. at 28, citing Jordan v. Horsemen's Benevolent and Protective Ass'n, 90 N.J. 422, 431-32, 435 (1982). Here, it is clear that the Legislature wants to protect teacher employment. In SDA Districts, however, LIFO is an unconstitutional impediment to a thorough and efficient education. Therefore, as applied in certain circumstances, the Commissioner should be permitted to waive or suspend these provisions in those cases, but otherwise preserve the Act. Indeed, "under New Jersey law, 'a challenged statute will be construed to avoid constitutional defects if the statute is 'reasonably susceptible' of such construction.'" Gallenthin Realty Devel., Inc. v. Borough of Paulsboro, 191 N.J. 344, 365 (2007), citing Bd. of Higher Educ. v. Bd. of Dirs. of Shelton Coll., 90 N.J. 470, 478 (1982).

C. The Court May Override Employment Terms for Public Employees in the Public Interest

The Court would not be treading new ground to permit the Commissioner to override certain restrictive provisions from CNAs: there is support in prior caselaw where the public interest is at stake. In New Jersey and elsewhere, courts have even permitted states in such circumstances to freeze wages and cost of living increases, reduce wages, and require unpaid furlough days for public employees.

For example, in Robbinsville Twp. Bd. of Educ., supra, No. A-2122-13T2 at *7-8, the court held that the school board's decision to implement unpaid furlough days was an exercise of its non-negotiable policy determination and therefore permissible notwithstanding provisions in the teachers' CNA. See also N.J.A.C. 4A:6-1.23 (voluntary furlough program). As noted above, in that case, the Court permitted the school board to unilaterally override a provision in the teachers' CNA - which provided that they would be paid for 185 (veteran teachers) or 188 (new teachers) days of work - by removing three professional development days (and the corresponding pay for those days) from the teachers' school year. Robbinsville Twp. Bd. of Educ., supra, No. A-2122-13T2 at *3-4. The furlough was required because the school's budget was cut and the only other option would have been to lay off teachers, which the board of

education noted "would simply add to the District's budget crisis, not resolve it." Id. at *3. The court noted that the board of education's decision was justified because it "sought to achieve a balance between the interests of public employees and the need to maintain and provide reasonable services." Id. at *9.

In another instance, this Court held that public employee pensioners do not have a right to continued annual cost of living adjustments ("COLAs"). Berg v. Christie, 225 N.J. 245, 278 (2016). After providing COLAs for many years, in 2011, the State suspended COLAs and essentially froze pension payments at the 2011 levels. Id. at 252-53. Despite a statutory provision that plaintiffs argued created a contractual right to COLAs, this Court held that it was permissible for the State to suspend COLAs because "[f]or the Legislature to have given up so much control over a future Legislature's ability to react to the present needs of the State, the expression of a statutory contract and the individual terms of such a contract must be unmistakably clear. That clarity is absent here…" Id. at 278.

Other state courts have also permitted state and city governments to override employment terms for public employees in the public interest. See Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 376 (2d Cir. 2006) (holding that the City of Buffalo's wage freeze for public employees "constitutes neither a

Contracts Clause nor Takings Clause violation"); Professional Engineers in Cal. Gov't v. Schwarzenegger, 50 Cal. 4th 989 (Cal. 2010) (upholding state imposed furloughs that amounted to a 5% pay cut to public employees).

Furthermore, in the bankruptcy field, it is long settled that "a bankruptcy court may permit a debtor to unilaterally reject or modify an existing collective bargaining agreement," under certain circumstances. In re Kaiser Aluminum Corp., 456 F.3d 328, 340 (3d Cir. 2006) (citing 11 U.S.C. 1113(b)(1)(A)). Moreover, the debtor may unilaterally reject or modify either an existing collective bargaining agreement or the continuing terms and conditions of an expired collective bargaining agreement. In re Trump Entm't Resorts Unite Here Local 54, 810 F.3d 161, 165 (3d Cir. 2016).

Here, the Commissioner seeks the authority, not to freeze or reduce teachers' wages, but to exercise flexibility in regard to managing teachers when necessary to remedy an important and long-standing gap in SDA District students' performance. Recognizing and granting the Commissioner the discretion to eliminate impediments will help achieve the constitutionally required thorough and efficient education for this State's students.

Exercise of such discretion is in the public interest. "A legitimate public purpose is one 'aimed at remedying an

important general social or economic problem rather than providing a benefit to special interests.'" Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 368 (2d Cir. 2006), quoting Sanitation & Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 993 (2d Cir. 1997). Here, there is no greater legitimate public purpose than the constitutional requirement on thorough and efficient education for New Jersey's children.

POINT II

DEFERENCE TO THE COMMISSIONER IS APPROPRIATE

There is strong precedent requiring this Court to defer to the expertise of administrative agencies, especially "when the issue under review is directed to the agency's special 'expertise and superior knowledge of a particular field.'" In re Stallworth, 208 N.J. 182, 195 (2011) (quoting In re Herrmann, 192 N.J. 19, 28 (2007)).

Under the doctrine of separation of powers, as mandated by our Constitution, "[n]o person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution." N.J. Const., art. III, § 1, ¶ 1. As such, this Court has recognized many times that it must defer to agency expertise on technical matters, "where such expertise is a pertinent factor." Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 588 (2001) (citing Close v. Kordulak

Bros., 44 N.J. 589, 599 (1965)); Gloucester City Welfare Bd. v. State Civil Serv. Comm'n, 93 N.J. 384, 390 (1983) (strong presumption of reasonableness accompanies administrative agency's exercise of statutorily delegated responsibility). The court "may not second-guess those judgments of an administrative agency which fall squarely within the agency's expertise." In re Stream Encroachment Permit, Permit No. 0200-04-0002.1 FHA, 402 N.J. Super. 587, 597 (App. Div. 2008). This Court has stated that "[i]n making predictive or judgmental determinations, … case law has recognized the value that administrative expertise can play in the rendering of a sound administrative determination." In re Proposed Quest Academy Charter School of Montclair Founders Group, 216 N.J. 370, 389 (2013). Moreover, "[j]udicial deference is at a high when reviewing such findings." Ibid. (citing Golden Nugget Atl. City Corp. v. Atl. City Elec. Co., 229 N.J. Super. 118, 122-23 (App. Div. 1988)). See also N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535 (2012) (deferring to Commissioner in adoption of regulations limiting certain benefits in new a school administrator contracts); In re the Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch., 164 N.J. 316 (2000) (recognizing discretion allotted to the Commissioner in implementation of the Charter School Program Act).

For example, courts have routinely deferred to the Commissioner of Education in charter school matters based on his unique expertise. See, e.g., Quest Academy, supra, 216 N.J. at 389 (noting "the value that administrative expertise can play in the rendering of a sound administrative determination" and that "judicial deference is at a high when reviewing such findings."); In re Grant of Charter School Application of Englewood on Palisades Charter School, 320 N.J. Super. 174, 213 (App. Div. 1999), aff'd with modifications, 164 N.J. 316 (2000) (deferring to the Commissioner's expertise in assessing charter applications).

In the course of the Abbott litigation, this Court has similarly recognized that deference must be paid to the Commissioner of Education. In Abbott II, this Court declined to apply its remedy to any districts other than what are now known as the SDA Districts, explaining that "[i]n the absence of proof, we believe that the separation of powers requires us to defer to the Board's, the Commissioner's, and the legislative judgment concerning such districts." Abbott II, supra, 119 N.J. at 320. In Abbott IV, this Court held that "[t]he content and performance standards prescribed by [CEIFA] represent the first real effort on the part of the legislative and executive branches to define and to implement the educational opportunity required by the Constitution. It is an effort that strongly

warrants judicial deference." Abbott IV, supra, 149 N.J. at 168. In Abbott XX, this Court recognized the "effort and the good faith" exercised by the Legislature in developing the SFRA and concluded that "the legislative effort deserves deference." Abbott XX, supra, 199 N.J. at 172; see also Abbott v. Burke, 206 N.J. 332, 355 (2011) ("Abbott XXI") (commenting that the holding in Abbott XX "was a good-faith demonstration of deference to the political branches' authority").

Thus, the Court has often deferred to the expertise and judgment of the Commissioner. See, e.g., Abbott I, supra, 100 N.J. at 393 (recognizing Commissioner's "plenary authority"); Abbott IV, supra, 149 N.J. at 224 (Commissioner to "manage, control, and supervise the implementation of … funding to assure it will be expended and applied effectively and efficiently to further the students' ability to achieve"); Abbott V, supra, 153 N.J. at 527 (accepting the Commissioner's "whole school reform" proposals based on the testimony of the Commissioner and other educational experts). In Abbott XX, supra, 199 N.J. at 175, the Court noted that the thorough and efficient clause should not operate as a "constitutional straitjacket," and emphasized that "[t]he political branches of government, however, are entitled to take reasoned steps, even if the outcome cannot be assured, to address the social, economic, and educational challenges confronting our state."

Here, the State is asking this Court to allow the Commissioner to use his knowledge and expertise in education matters: first, to identify those circumstances where students in specific SDA Districts are not being afforded a thorough and efficient system of education; second, to determine whether specific statutory or contractual provisions are impeding those districts' progress toward providing a thorough and efficient system; and finally, to suspend such impediments to allow the SDA District, and thus the State, to fulfill the constitutional obligation to these underserved schoolchildren.

There is no single solution to the educational challenges experienced by thousands of children in the various SDA Districts in this State. This is illustrated by the fact that schools with the flexibility to adapt their educational techniques to meet their students' changing needs tend to be more successful. The Commissioner must be allowed to use his expertise and judgment to determine and implement solutions, especially where the problems are of a constitutional magnitude. Therefore, this Court should recognize and defer to the Commissioner's judgment and expertise just as it has done many times in the past.

POINT III

THE COURT SHOULD VACATE ITS PRIOR ORDER REQUIRING THE FUNDING OF THE SFRA IN ACCORDANCE WITH ITS TERMS AND ACKNOWLEDGE THE DEFICIENCIES OF NEW JERSEY'S EDUCATION SYSTEM THAT DEMAND THE ATTENTION OF THE EXECUTIVE AND LEGISLATURE

The United States Supreme Court has led a national movement towards school reform that is not based on increased funding, but on structural and management reforms that ameliorate many glaring inadequacies towards education. In 1992, students and parents of Arizona's Nogales Unified School District ("Nogales") commenced a class action complaining that Arizona's approach to funding programs for English language-learner ("ELL") students was insufficient as applied in Nogales. The class action alleged that Arizona was violating the Equal Educational Opportunities Act of 1974 ("EEOA"), § 204(f), 88 Stat. 515, 20 U.S.C. § 1703(f), "which requires a State 'to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.'" Horne v. Flores, supra, 557 U.S. at 438-39.

In response, "[i]n 2000, the District Court entered a declaratory judgment with respect to [funding programs for ELL students at] Nogales, and in 2001, the court extended the order to apply to the entire State." Id. at 439. Thereafter the court found Arizona in contempt for its funding failures. In March

2006, the state legislature passed a bill "designed to implement a permanent funding solution to the problems identified by the District Court in 2000." Id. at 442. The Legislators and Superintendent together moved to purge the District Court's contempt order in light of that bill, and alternatively, moved for relief from the court's ELL funding requirements based on changed circumstances. Id. at 443. The Governor, State Board of Education and the original plaintiffs were respondents before the U.S. Supreme Court. Ibid.

The Supreme Court noted that "[f]or nearly a decade, the orders of a Federal District Court have substantially restricted the ability of the State of Arizona to make basic decisions regarding educational policy, appropriations, and budget priorities. The record strongly suggests that some state officials have welcomed the involvement of the federal court as a means of achieving appropriations objectives that could not be achieved through the ordinary democratic process." Horne, supra, 557 U.S. at 447 n.3. Remanding "for a proper examination of at least four important factual and legal changes that may warrant the granting of relief from the judgment: the State's adoption of a new ELL instructional methodology, Congress' enactment of NCLB, structural and management reforms in Nogales, and increased overall education funding," Id. at 459, the Supreme Court stated:

> Both of the lower courts focused excessively on the narrow question of the adequacy of the State's incremental funding for ELL instruction instead of fairly considering the broader question whether, as a result of important changes during the intervening years, the State was fulfilling its obligation under the EEOA by other means. The question at issue in these cases is not whether Arizona must take "appropriate action" to overcome the language barriers that impede ELL students. Of course it must. But petitioners argue that Arizona is now fulfilling its statutory obligation by new means that reflect new policy insights and other changed circumstances. Rule 60(b)(5) provides the vehicle for petitioners to bring such an argument.

Id. at 439. The Court remanded the action "for a proper examination of … factual and legal changes that may warrant the granting of relief from the judgment," including but not limited to reforms in Nogales. Id. at 459. The Nogales superintendent instituted structural and management reforms that "ameliorated or eliminated many of the most glaring inadequacies discussed by the district court." Id. at 465-66. The Court noted that "[a]mong other things, [Superintendent] Cooper reduced class sizes, significantly improved student/teacher ratios, improved teacher quality, pioneered a uniform system of textbook and curriculum planning, and largely eliminated what had been a severe shortage of instructional materials." Id. at 466 (internal citations omitted). The Court found that:

> these reforms might have brought Nogales' ELL programming into compliance with the EEOA even without sufficient ELL incremental funding to satisfy the District Court's original order. … The District Court similarly discounted Cooper's achievements, acknowledging that Nogales was ''doing substantially better than it was in 2000, but concluding that because the progress resulted from management efforts rather than increased funding, its progress was fleeting at best.
>
> Entrenched in the framework of incremental funding, both courts refused to consider that Nogales could be taking appropriate action to address language barriers even without having satisfied the original order. This was error. The EEOA seeks to provide equal educational opportunity to all children enrolled in public schools. Its ultimate focus is on the quality of educational programming and services provided to students, not the amount of money spent on them. Accordingly, there is no statutory basis for precluding petitioners from showing that Nogales has achieved EEOA-compliant programming by means other than increased funding--for example, through Cooper's structural, curricular, and accountability-based reforms. The weight of research suggests that these types of local reforms, much more than court-imposed funding mandates, lead to improved educational opportunities.

Id. at 466-67 (internal citations omitted). In other words, "[f]unding is merely one tool that may be employed to achieve the statutory objective." Id. at 459; see also Connecticut Coalition v. Rell, supra, No. CV-145037565-S at *30-31 ("If there is a meaningful role for the courts in enforcing the constitutional promise of an adequate education, it has to be at

a very high level: the courts can set a minimum base for overall resources and then ensure that the major policies carrying them into action are rationally, substantially, and verifiably calculated to achieve educational opportunities").

Similarly, here, the SFRA alone does not comprise New Jersey's thorough and efficient system of education. Numerous other laws impact the education of our State's children. Many of these laws, as applied to the SDA Districts, impede the State's fiscal support of schools and prevent the State from creating a thorough and efficient system of education in the SDA Districts. Justice Hoens observed that by demanding full funding of the SFRA for the SDA Districts notwithstanding a budget crisis, the Abbott XXI plaintiffs sought "to elevate their interpretation of their funding needs above and ahead of all others" and "effectively lock[] our co-equal branches in a 'constitutional straitjacket.'" Id. at 503 (Hoens, J., dissenting). The SDA Districts' manipulation of their local tax schemes to avoid paying their LFS towards education, knowing that the State will fill the gap, has only worsened the detrimental impact on the State's other obligations.

As set forth supra, the Court should empower the Commissioner to override, when necessary, these impediments in the SDA Districts. In addition, respectfully, the Court should vacate its prior order to fund the SFRA according to its terms,

thereby allowing the Commissioner to remedy the education obstacles in those districts at the current funding levels.

Finally, given that (1) the system has so many inextricably intertwined statutes with State-wide impact, (2) the now evident proposition that more money for SDA Districts is not a panacea, (3) the need to remove statutory and contractual impediments that exist and to assess the impact of those changes, and (4) the constitutional mandate of separation of powers which delegates to the Executive and Legislative branches the tasks of weighing and meeting all of the priorities and needs of the State and its citizens, it is imperative that those branches devise a system within that context that continues to financially support the school districts appropriately and adequately, while eliminating the impediments and correcting the deficiencies. This must be done on an urgent basis and in sufficient time so that school districts can plan and implement the necessary changes no later than for the 2017-18 school year lest the students in the SDA Districts be relegated to falling even further behind their peers with all the detrimental effects to them and to the State as a whole discussed above. If such action is not taken expeditiously, the Court should be prepared to entertain an application from the State in the next few months for further relief.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to grant the requested relief.

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