Committee Meeting

of

SENATE EDUCATION COMMITTEE

"The potential impact of the Abbott v. Burke decision on New Jersey's education and fiscal policy"

LOCATION: Thomas Edison
State College
Trenton, New Jersey

DATE: May 12, 1994
10:00 a.m.

MEMBERS OF COMMITTEE PRESENT:

Senator John H. Ewing, Chairman
Senator Joseph A. Palaia
Senator Robert J. Martin

ALSO PRESENT:

Darby Cannon, III
Office of Legislative Services
Aide, Senate Education Committee

Hearing Recorded and Transcribed by
The Office of Legislative Services, Public Information Office,
Hearing Unit, State House Annex, CN 068, Trenton, New Jersey 08625

REVISED

COMMITTEE NOTICE

TO: MEMBERS OF THE SENATE EDUCATION COMMITTEE

FROM: SENATOR JOHN H. EWING, CHAIRMAN

SUBJECT: **COMMITTEE MEETING - May 12, 1994**

The public may address comments and questions to Darby Cannon, III, Committee Aide, or make bill status and scheduling inquiries to Mary C. Lutz, secretary, at (609) 984-6843.

The Senate Education Committee will meet on **Thursday, May 12, 1994 at 10:00 AM, Thomas Edison State College, Barrack and West State Street, Trenton, New Jersey.**

The committee will receive testimony from State officials on the potential impact of the Abbott v. Burke decision on New Jersey's education and fiscal policy.

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Assistive listening devices available upon 24 hours prior notice to the committee aide(s) listed above

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Assistant Attorney General
New Jersey Department of Law and Public Safety 2

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SENATOR JOHN H. EWING (Chairman): Good morning everybody. I apologize for the delay. The two Democrat Senate members -- unfortunately the Democratic Party had scheduled a conference for the Senate Minority members, and that's where they are. They are going to try and stop in if they can, if we're still going. Senator Martin is on his way, and I was waiting to see as to whether he would get here. But we'll start now.

I want to welcome you all here and thank everyone for coming this morning. Today the Committee will hear from the Assistant Attorney General, Ben Clarke. Mr. Clarke is the lead attorney for the State in the Abbott v. Burke school finance case, which is now before the State.

As most of you know, all arguments before the Court are scheduled to begin next Monday. For that reason, we are particularly appreciative that Mr. Clarke is willing to make himself available.

It is important for all Committee members to note that the case begins Monday. For that reason -- and the lawyers on the Committee will appreciate this fact -- Mr. Clarke cannot be expected to comment in a way which will do harm to his case. In fact, I will note here for the record that Commissioner Klagholz declined an invitation to attend today in light of the pending arguments. His position is certainly understandable.

Therefore, let me establish the following ground rules for this meeting. If Mr. Clarke believes that he cannot answer a question without compromising the State's position, Mr. Clarke is well within his rights to refuse to answer. The decision will be up to him.

Having said this, today's meeting is to provide the Committee with as much information as possible about this important Court case. Mr. Clarke is here today to answer questions about such matters as: the positions of both

plaintiff and defendant, the plaintiffs' requested relief, the potential cost of that relief, and the possible timetable for imposition of a remedy by the Court.

Please be advised that the purpose of today's meeting is not -- and I repeat, not -- to rehash the school finance debate. I think we all know that that debate is coming soon. I ask both sides of the aisle to hold off on asking Mr. Clarke to tell us what we should be doing and to hold off asking Mr. Clarke to tell us what mistakes were made in the past.

Guessing what the Supreme Court may do is a difficult proposition at best. We are not here to determine what the Court will do. Rather, we are here to discuss what the Court might possibly do within the parameters of the arguments presented.

The Legislature will have a responsibility to respond to what the Court determines. That makes it important that all members of this Committee, in particular, understand the potential consequences of the decision.

I, for one, have heard a lot about the possible closing of New Jersey's public schools. Such an action would be a disaster for New Jersey's public schoolchildren, in my opinion. Today, I hope Mr. Clarke can give us his view on whether such an action is a possibility, and if so, when it might happen.

I'll now open up the discussion to members of the Committee who might wish to make opening remarks before we get to Mr. Clarke.

Senator Palaia, do you have any?

SENATOR PALAIA: No. I'm quite anxious to hear Mr. Clarke, and I'm ready to get some input from him.

SENATOR EWING: Mr. Clarke?

ASST. ATT. GEN. BENJAMIN CLARKE, ESQ.: Senator Ewing, Senator Palaia, Mr. Cannon, thank you for having me here today. These are somewhat-- I appreciate very much,

Senator Ewing, your opening statement and the setting of those ground rules, as it is certainly a bit discomforting to be here before this body so close to oral argument. Nonetheless, I also do appreciate the importance to both the Legislature and the public of having a thorough understanding of the legal issues that are to be debated before the Court on Monday. For that reason I am happy to be here to address any questions that the Committee does have.

SENATOR PALAIA: Are you ready for the questions now?

SENATOR EWING: Yes.

SENATOR PALAIA: If I might, Mr. Chairman.

Mr. Clarke, in previous Court decisions -- and maybe we can think that maybe the Court could be thinking along these lines -- one of the things that they established about four years ago was the fact that they established the special needs districts at that time. They also gave us a time frame of a year to implement those programs and to look at another source. Would we have that opportunity to have a leeway of some kind? Because, as you know, this problem has been going on for many, many years, and it's not fair to come now and say, "You have three months; you have four months; you have six months." It's almost impossible to put it together like that.

MR. CLARKE: Well, let me advise you, Senator Palaia, of what the plaintiffs are seeking in the way of a deadline, as they have set forth in their own legal papers. Naturally, the Court wouldn't be bound to adopt that if they are persuaded that the plaintiffs are entitled to relief, nor would they be limited to it. But the date that the plaintiffs have set forth in their brief as an appropriate time frame for the enactment of another piece of legislation on school funding is December 31, 1994. So if the Court went no further than the relief that the plaintiffs are seeking, you would have, at least, until that time frame to come up with a new piece of legislation.

In response to that position, of course, we have taken on the State's behalf, the position that it is inappropriate at this time for the Court to impose any firm or inflexible deadline. We have sought to emphasize to the Court the measures that the State has taken in response to its Abbott mandates, which, we believe, indicate more than good-faith compliance with those mandates, and have vigorously argued that in light of the progress that has been made in those steps, the Court should stay its hand from issuing any further deadlines on that matter.

But as far as the worse-case scenario in compressing the time, the plaintiffs are seeking December 31, 1994.

SENATOR PALAIA: One other question, Mr. Chairman.

You know, I noticed that in the City of Elizabeth, they spend far less money per pupil and have very much the similar disadvantages of the City of Newark, but Elizabeth is certified now. Is there something that we could bring forth that there could be management involved with the schools?

MR. CLARKE: Well, I think very much, from a policy standpoint and from the standpoint of the Department of Education, that is a point of absolute concern and ongoing concern. But I have to say that from a legal standpoint -- and in the current posture of the Abbott litigation -- what you are pointing to really relates to the burning and still existing debate over whether money matters and how much does money matter in determing the quality of an education?

Well, in this posture of the case-- We had the whole round of litigation that led up to the Abbott decision in which the State, at that time, took the position that while money may matter, it isn't all that matters. It isn't the main thing that matters, and it isn't what determines the constitutionally sufficient education. The Supreme Court rejected that position in construing the Constitution, as is its function, and has

essentially, for the time being, determined that money does matter, and money is part of the constitutional remedy that the special needs districts are entitled to.

So on the one hand I would say, from a policy perspective, the Department and the Legislature can continue and must continue to be concerned not merely with money. But from my standpoint as an advocate in the Abbott litigation, there isn't much I can do with it at this point.

SENATOR PALAIA: Do you look, or does the Court look at it -- or they are looking at it differently than we as legislators are looking at the matter? They're looking at the funding -- pure funding to it. As legislators, we have to look at a much bigger picture than just the funding part of it, Mr. Clarke. It disturbs me that the courts can come forward and say you have to provide this amount of money. Then we, as legislators, we're very interested in accountability of how that money is being spent. Maybe they are -- the courts -- but I don't hear that. I just hear the fact that we have to pour in more money. As a legislator, that bothers me.

MR. CLARKE: It's certainly an understandable reaction. I should emphasize that the Court, in all of its decisions -- the Robinson decision, as well as the Abbott decision -- has itself expressed the continuing frustration with having, in essence, nothing better to go on than money. They continually -- the members of the Court, that is -- have stressed that they would much prefer to be able to determine constitutional sufficiency through the use of some other proxy. The frustration is certainly, to that extent, mirrored and shared by the Court.

But nonetheless, they, in announcing a judicial remedy, did choose in the Abbott decision to focus on money. Money is where the Abbott remedy ends up. One can certainly debate whether that was the best or not best judicial

resolution of the case. But it is the resolution, and certainly from my standpoint as a lawyer I have to respect the Court's mandates.

SENATOR PALAIA: Thanks, Mr. Clarke.

Thanks, Mr. Chairman.

SENATOR EWING: Mr. Clarke, how do the plaintiffs define parity?

MR. CLARKE: The plaintiffs define parity -- funding parity -- Senator Ewing, as the Court did in-- I think it's fair to say the plaintiffs define it the same way that the Court did in Abbott. There is a very technical definition of parity, which is that it is funding at a level in the special needs districts -- the poor urban districts -- equal to the per pupil spending in the State's most affluent districts, which in the technical jargon are referred as the DFG I and J -- DFG standing for District Factor Group -- I and J districts.

So what the Court set as parity was a level of spending in the poor urban districts that equals -- or substantially equals, I should say -- the level of spending in the I and J districts, which are the affluent districts.

SENATOR PALAIA: Mr. Chairman, may I ask a question off of that, please?

SENATOR EWING: Yes, sure.

SENATOR PALAIA: Stay with that thought, now. We're saying in those I and J districts, now. We live in a democracy. Are we saying, or are the courts saying that those people who live in that particular community cannot go out and pay more taxes and put it into their schools; that there is going to be a cap on what they can spend so the parity gap can close?

MR. CLARKE: The Court has not said that at all.

SENATOR PALAIA: They haven't said that?

MR. CLARKE: They had said that, but let me point out the practical problem that your question raises.

The Court has made very clear in Abbott, and I should stress this, that the level at which parity is set rests in the legislative judgement. But without the imposition of spending caps on the I and J districts, you may find yourself in the position where the I and J districts continue to go up and up, and the poor urban districts never do catch up.

Since it is mandated that the poor urban districts catch up, that is what leads to the practical necessity of caps. There isn't any legal requirement of caps, though. It would be a very difficult practical solution to come up with though, that did not have some element of a cap scheme.

SENATOR PALAIA: So do you think the Court could say that those districts-- Is it a possibility the Court could say those districts could not go out and raise money through taxes and spend it on their schools, because the parity gets--

MR. CLARKE: When you phrase it in terms of possibility, two days before an argument, almost all things are possible.

SENATOR PALAIA: Yes, well, all things are possible.

MR. CLARKE: The Court has shown a reluctance in the past to dictate specific legislative solutions. I would be hopeful that the Court will abide by its traditional standards in that regard.

SENATOR PALAIA: Thanks, Mr. Clarke.

Thanks, Mr. Chairman.

SENATOR EWING: What legal arguments can you say that the plaintiffs are depending on or relying on?

MR. CLARKE: The plaintiffs, in commencing the enforcement action that has led to this latest round before the Supreme Court, basically pressed two major arguments, I would say.

The first major argument was that the Quality Education Act did not assure parity, and that language they

drew directly from the opinion. One of the mandated things was that any legislative scheme assure parity. And we just discussed how parity was defined.

Their point was that the legislation, the Quality Education Act, anticipated the possible need of adjusting the weights and the formulas to achieve parity. Since there wasn't a specific mandate in the statute that required those adjustments to be made, their point was that it failed to assure parity.

Our response to that was that in the statute there was a firm and really unequivocal commitment to the attainment of parity, and that construing the legislation as a whole, it therefore met the Court's mandate. But the failure to assure parity was their leading legal argument.

The second argument that they pressed was that categorical aid under the Quality Education Act, they said, was insufficient to address the special disadvantages of the students in the poor urban districts. That contention really turns on a very narrow legal issue, which is one of the things that, actually, we would hope to get resolved by the Court. We strongly believe that their construction of that part of the mandate -- the part of the mandate that says, "Funding shall be sufficient to address the special disadvantages," is erroneous. Depending on how the Court resolves that issue, we'll see who is reading the opinion correctly.

So they had two major arguments. One is that it didn't assure parity. The other is that the funding, particularly in the area of categorical aid, was insufficient to address the special disadvantages of poor urban students.

SENATOR PALAIA: Mr. Clarke, I can't fathom that thinking of-- Categorical aid is categorical aid. If you have a special ed student in a special needs district, or if you have a special ed student over in a district I or J, it's still the same cost. You have to get education for the student,

which is fine; we should. But I don't know how they can turn categorical aid into an either/or. Categorical aid deals with special education, transportation, etc. I don't know.

MR. CLARKE: I share a lot of that reaction, so I have to role-play a little bit to answer that. But before I role-play in that fashion, let me just state that when we say they misinterpret the special disadvantages mandate, I think we're expressing, in some ways, the same disbelief that you just expressed, and that is that in Abbott, the Court was very specific in calculating what the cost of -- or what the lowest cost, at least -- the remedy would be. It's calculated at $440 million for the 1989-1990 school year. It said that that was a figure it derived by comparing the net current expense budget of the I and J districts to the special needs districts.

For the plaintiffs' interpretation of the special disadvantages mandate to be correct, the Court would have had to come up with a much larger number than that. So we reject that reading of it, and we remain hopeful that our reading of the opinion will be correct.

But what the plaintiffs say in response to your position is that the Court also said that the funding shall be sufficient to address the special disadvantages, and that there has been no study -- shall we say no empirical development -- of a number that determines what is necessary to address those special needs. So what they have relied on, in essence, I would call it basically anecdotal testimony from educators in urban districts who say, "Well, we need more money, so therefore, you're not meeting the needs."

I think that that is obviously a slippery slope. Any good educator can always find good uses for more money, and we just don't live in that world where it's endlessly available. So the resolution of that issue will turn on a fairly technical legal issue, but those are the two sides of it.

SENATOR PALAIA: Thank you, Mr. Clarke.

Thank you, Mr. Chairman.

SENATOR EWING: One of the questions is what empirical data do the plaintiffs rely on to support their case? How do the plaintiffs distinguish the Newark school districts, which operate at about 96 percent to 97 percent of parity, but which is clearly a district with problems? If the State provided Newark with 100 percent parity, would that end the State's responsibility?

Also, you used the word "nearly parity," or something like that, earlier.

MR. CLARKE: Substantial.

SENATOR EWING: Substantial. What in lawyers' minds, or the Court's mind is substantial, 100 percent or--

MR. CLARKE: That is an issue that has not been determined yet. I think, to address that last question first, Senator Ewing, what is substantial parity may well depend on the overall legislative package that emerges from, as you have anticipated, the coming school funding debate. If you have a package that assures programmatic parity, as well as substantial -- and the definition of substantial, I think, is something that the Legislature itself can address -- it will be subject certainly to judicial review at some point. But it's more likely that the Legislature may get the first crack at defining that term. It may well depend on the overall package.

Certainly, when the -- going back to the Robinson litigation -- when there were aspects of Chapter 212, and if you can recall, Chapter 212 was initially upheld by the Supreme Court as being facially sufficient. If you compare, however, Chapter 212 to the Court's strict mandate in Robinson, the Court did allow the Legislature latitude to go beyond or even tinker with, so to speak, certain aspects of its mandate. It looked at Chapter 212 as a whole package.

I think that the Court would be -- at least I would be hopeful that the Court would again be inclined to view any next legislation in that fashion.

But as far as the Newark-- You asked the question about whether the State's obligations to Newark would end if parity were achieved. I think the answer to that is a clear no for several reasons.

One is that there are independent educational statutes, and of course, Newark is in the midst of the comprehensive--

SENATOR EWING: Compliance review.

MR. CLARKE: --CCI -- I forget -- process. And that process is established independent of the funding scheme, so the State would have that continuing obligation.

Moreover, the Court has made clear -- again, going back to what I mentioned to Senator Palaia earlier -- that money is only a proxy for educational quality. In the future, if we hypothesize the achievement of substantial parity and the nonachievement of educational parity, I don't think the Court would ever say, "Okay. Well, you met the dollar thing, and we can't come up with anything better than that." At that point, both the Legislature and the Court, I think, would be constitutionally impelled to look beyond the dollars and try to come up with another scheme that satisfies the constitutional requirement of a thorough and efficient system of public education.

As far as what the plaintiffs make of the fact that Newark is, I think by most calculations, at substantial parity and still is not evidently meeting its thorough and efficient obligations, in the context of this litigation, they make nothing of it. I have to say that the State, likewise, makes nothing of it because it goes beyond the scope of this litigation. It goes to the question of, again, does money matter?

In the context of this current round, that's not a legal issue that's being raised, because that has been litigated and resolved.

As far as the empirical data that the plaintiffs rely upon, at the most recent hearings before Judge Levy, they presented two experts -- Dr. Goertz, who you may be familiar with, as certainly a prominent expert in the field of educational funding -- who made certain projections. The projections basically anticipated that without adjustments to the funding formulas, substantial parity would not be achieved.

In a certain respect, we viewed that as not a big issue in the lawsuit, because the statute provided mechanisms by which the adjustments could be made. But they basically relied on projections through their expert.

I will add one point on that score, however, which is that thus far, the projections of Dr. Goertz have been verified in some respects and proven to be overpessimistic in others. So the reliability of projections in this area, we do think, is something that everybody should recognize to be questionable.

SENATOR EWING: Could you speculate as to whether a core curriculum was set up and funded throughout the State, and then others could go outside the core curriculum -- have a variation on the core curriculum money that went into it, because certain areas would need additional funding for teachers' aides and things that other areas didn't -- but have a core curriculum that everybody would be funded for, and then a district that wanted to go beyond that could, without getting into problems again?

MR. CLARKE: You're asking me to speculate on the--

SENATOR EWING: If you want, otherwise--

MR. CLARKE: No, I just want to make sure I understand the question. The question is, how would the Court respond to that as complying with its mandates?

I think that at this point, as of May 1994, any legislation that did not contain some provision that addressed the financial parity mandate would not be -- would be on thin constitutional ice. At this point, the Court has issued that mandate and to date it has not dissolved it.

SENATOR PALAIA: Mr. Chairman?

SENATOR EWING: Yes.

SENATOR PALAIA: Mr. Clarke, you know, I have to think, when does all of this end? For example, the courts have made a decision, and whether it be Marilyn Morheuser or whomever comes forward and challenges what the courts have said, and let's say the courts come down and say something -- you know, just what they would like to see. Who is to say somebody else can't come along and institute a suit, and they can come along and institute a suit, and they can come along-- Where does it all end, that somebody can't go to the courts to get relief? That's what our court system is for, I know. But at some point in time-- This is why we get in these predicaments, I think.

MR. CLARKE: I guess I have two reactions to that. The first, you've already anticipated, which is that the courts are there-- I can't imagine the day when the courts will close their doors to people who claim that their constitutional rights are not being met.

SENATOR PALAIA: My point exactly.

MR. CLARKE: My answer would be gloomy to that extent, which is that, yes, I think that educational funding litigation is something that we will continue to see in the coming years.

I also think educational quality litigation is something that we will continue to see in the coming years. I don't believe that there is anything that can be done to prevent that, because just to the same extent that a good educational administrator could always find good uses for

additional money, a good educational advocate can always say that more money is needed. I have no optimistic projections on that score.

But by the same token, I would say that if, for instance-- Take a look-- There is a sense sometimes that there has been continuous legal dispute and litigation over school funding since the first Robinson decision came out. But if you really look at the history, from 1970 to 1976 there was a very compressed and ongoing Court dispute.

From 1976 really up until 1986, it was quiet. The reason was because the Supreme Court said Chapter 212 was facially sufficient, and so the only avenue left for a challenge was to come up with an argument that it was not sufficient as applied.

Likewise, I think that if the Legislature comes up with -- in the next round of legislation -- a facially sufficient package, and it is upheld by the Court, you would see any challenges at that point meeting with a relatively swift exit from the court house. The door would not be barred, but there would be a quick exit, we would hope.

SENATOR PALAIA: Thanks, Mr. Clarke.

SENATOR EWING: Would you describe, as simply as possible, the position the State as it advocates -- what legal arguments does it rely on?

MR. CLARKE: Ultimately, our legal argument goes back to the traditional notions of separation of power and mutual respect among the independent branches of the State government, which the Supreme Court has always respected. What our argument, in a nutshell, is that we have complied with the Abbott mandate. A unique feature of the Abbott mandate is that it anticipated a phase in of the remedy. So it was not -- although something had to be in place by a given date, it was not required that fulfillment -- complete fulfillment of the mandate be put into place by a -- be achieved by that date. So

that necessitates looking at the progress that has been made and that is being made. We have, we thought, and continue to think, fairly impressive data to demonstrate that the State has been responsive to the mandates; that progress in closing the parity gap has been made, and when you view the progress that has been made under traditional legal standards, there is no further reason for the Court to act.

The short of it is, our legal argument is, we are complying.

SENATOR EWING: On what data does the State rely?

MR. CLARKE: I guess there is a wide range of it. But the shortest or the most critical piece of data is that, at the time before the Quality Education Act was enacted, the so-called parity gap was 30 percent; that is, the special needs districts were spending roughly 70 percent as much as the affluent districts. In the time since the enactment of the Quality Education Act, they have moved to an average of 84 percent, so that today they are spending 84 percent as much as the most affluent districts in the State.

That means that you have roughly cut the parity gap in half -- 45 percent. You have achieved a 45 percent reduction in the parity gap, and you've done that at a time when, I'm sure the Court is aware, and certainly all of the people of the State are aware, that it's been absolutely difficult fiscal times. We say that assessing the progress that has been made in light of the well-known fiscal difficulties, that's clear demonstration of the commitment to the mandates and the compliance with the mandates.

But that is the most single piece of data that we have, which is that we have gone from 70 percent to 84 percent.

SENATOR EWING: Well, why are the plaintiffs back in court?

MR. CLARKE: At the time that-- I couldn't address that, but I would say two things about that. One is obviously

Marilyn Morheuser is a very dedicated advocate, and she is back in court because she feels she has a basis for being back in court.

On the other hand, I think one of the things that may have happened at the time was that in the first year of the Quality Education Act, the progress that was made toward parity was not terribly substantial. It was a 2 percent or a 3 percent reduction. It happened that in the second year, and then last year under the Public School Reform Act, very substantial progress was made.

I could say it was a miscalculation. I'm sure she would not agree with that. But when I adverted to the inaccuracy of the projections, that was partly what I was saying. I don't think there was a belief on the other side that as much progress would be made as has been made.

SENATOR PALAIA: Mr. Chairman, a quick question?

SENATOR EWING: Yes.

SENATOR PALAIA: Mr. Clarke, what's the scenario from here? The case is being heard. The Court doesn't have a time frame, obviously. What are we looking at here?

MR. CLARKE: Beyond the argument on Monday, we are looking into a crystal ball which is as foggy for me as it is to you. But I think the Court-- I will say that the Supreme Court has always regarded this case as needing expedience, and I fully anticipate that it will attempt to render a decision expediently again. You're correct that there is no time deadline facing them.

Once we get a decision, obviously, depending on how the issues are resolved, we'll know where we are, ranging from acceptance of the State's position, which has let us continue to work out a scheme to fulfill the Court's mandate and to implement the constitutional guarantee of a thorough and efficient system of public education, to what the plaintiffs

are seeking at the other extreme, which is a very detailed laundry list of provisions that must be implemented by January 1995.

To summarize, my feeling of what we're looking at is, we're looking at something that is going to come down before December 1994 that is going to either allow to let the Legislature to continue about its business as it is currently doing, or that rather speaks directly to the Legislature to say, "These are the things we feel that must be done," in addition, I would always think, to whatever the Legislature wants to do in its own prerogative.

SENATOR PALAIA: Thanks, Mr. Clarke.

SENATOR EWING: What is the worse-case scenario for the cost of the plaintiffs' request for relief?

MR. CLARKE: I don't know. I started to calculate them this morning. The worse-case scenario, I guess, we can't know for sure, because again, the Court is not bound by or limited to the suggestions that the plaintiffs have made. But let me tell you what the plaintiffs have sought and give you an idea of what the price tag attached to each of those items would be if adopted by the Court.

In addition to seeking a definite deadline of 12/31/94 for the adoption of new legislation, they are looking for a three-year phase out of the remaining parity gap. Plaintiffs and the State calculate that gap a little variantly, but it's $360 million today. The plaintiffs want to see that reduced in three steps over the next three years. In rough terms, you would have to come up with $120 million for the '95-'96 school year, $240 million for the next year, and $360 million for the third year. That totals $720 million over the next three years, compared with where we are today.

The second thing that they have asked for is, again, increased categorical aid. They focus their request there on the former categorical aid known as at-risk aid. They have

directly asked the Court for a doubling of at-risk aid to the special needs districts pending some study by the Department or the Legislature to determine what is necessary. Currently, special needs districts receive about $180 million of at-risk aid a year, so they would be seeking an additional $180 million immediately. If you took note of Senator Palaia's, I think, valid observation that an at-risk child is an at-risk child in any district, and you doubled at-risk aid across the board, you would be up to $292 million being doubled, so almost up to $600 million a year on that one.

So you have a range of roughly $260 million at the low end, to $440 million at the high end if that request were to be accepted. And again, I would remind the panel that we believe that request to be founded on an inappropriate reading of the Abbott decision, but that is an issue that will have to be resolved.

In addition to that, they asked the Court to require the State to assess the need for improved facilities -- physical plant -- in the special needs districts. That request, the plaintiffs are candid to say, and the Court would in any event take note, is outside of the scope of the Abbott mandate. So if they were to succeed in that request, the Court would be going beyond what it has previously ordered. For that reason we have, of course, vigorously opposed it because we do not think that the Court should be going beyond it.

They do not put a price tag on it. Nonetheless, I guess it's fair to observe that the Department of Education itself has -- and this came out at the hearing -- been doing studies of the need for facilities improvement. Of course the Public School Reform Act contained a component that was addressed to that need. It's not a fanciful need to say that improved facilities are required in the inner city districts, but it is, so far, not a part of the Abbott mandate. I,

therefore, can't estimate for the panel what the price tag on that one would be, but it is something that they are seeking, and it is a substantial item.

Finally, they are seeking to have the tax rates -- the school tax rates -- within the poor urban districts set at the prior year average of the affluent districts. This is a request that they bottom on a mandate from the Abbott decision that requires the State to consider the problem of municipal overburden in the poor urban districts. As it happens, the special needs districts' school tax rates right now do not deviate all that substantially from the statewide average. They are pretty close to the statewide average, so the plaintiffs have, I think somewhat cagily, chosen the I and J districts who have below average tax rates.

Now, again, that is not something that you can find within the Abbott mandate. There is no requirement that tax rates be equated between the poor urban districts and the special needs districts. Again, I think there they are quite clearly going beyond it. No, I have no price tag on that. It would presumably cost something substantial, but I don't know how much.

SENATOR EWING: Is there anything alluding to comp ed?

MR. CLARKE: Yes. Thank you for reminding me.

In addition to seeking the doubling of at-risk aid, they have asked for the reinstatement of compensatory education aid.

SENATOR EWING: Plus reinstatement.

MR. CLARKE: Right, plus. That's a plus. Before the Quality Education Act, the special needs districts were getting $80 million in compensatory education aid. Statewide there was $150 million. So depending, that would be the range of additional cost.

But when I gave you the $260 million and the $440 million figure, I think I actually was including the additional compensatory aid.

SENATOR EWING: What was the high and low again, total?

MR. CLARKE: I have to go through it myself. But I guess my question would be, in the coming year -- in the next year or over the next three years, because you can look at-- Since they are now seeking a three-year phase in, you can calculate it in either way. But let me do it the next year.

You have somewhere between $120 million and $130 million for the phase in of parity; you would have somewhere between $260 million and $440 million -- so you've got 300 and--

SENATOR EWING: For the at-risk and comp?

MR. CLARKE: Right. So you've got at the low end there, $380 million and at the high end, $570 million -- it's between $380 million and $570 million for those two requested forms of relief alone. The facilities--

SENATOR EWING: That's per year?

MR. CLARKE: That would be for the next year, one year.

SENATOR EWING: Yes, okay.

MR. CLARKE: In the out years, then you would have to add between $120 million and $130 million in each of the next two years, just to address the parity aspect of it. Again, on the facilities aid and the tax rate relief that they're seeking, I don't have any data from which I could calculate a number.

SENATOR EWING: Six twenty would be 620 to 810. How do we get that?

MR. CANNON (Committee Aide): Over three years, after the third year.

SENATOR EWING: Oh, after the third year.

MR. CLARKE: If I might, Senator Ewing, it may be appropriate in considering those figures to differentiate, however, between the requested parity relief, which even as the State, we have to concede as something that they can find within the four corners of the Abbott opinion. So that would

be again going back to the 120, 240, 360 stepladder. And the requested relief on at-risk and special disadvantages -- I'm sorry, compensatory education aid, which we believe is something that goes beyond the four corners of the Abbott opinion.

SENATOR EWING: What measures do the plaintiffs ask the Court to implement if the State fails to comply with their view?

MR. CLARKE: I think the measures that the plaintiffs would ask for, if the State fails to implement the remedies that the Court orders, would be something in the nature of what was done in the Robinson instance, where for a short time there was the threat of, essentially, impoundment of State aid. The Court has historically chosen not to because it's constitutionally questionable whether it can directly compel appropriations to be made in a certain fashion.

So they work with the stick rather than-- You know, they choose to induce the distributions to be made. The way they can induce it is by something sufficiently draconian that basically all right-thinking people would have to act in a particular fashion.

So what they would be seeking is some judicial remedy sufficiently draconian to impel the Legislature to do what the Court is mandating, as you adverted to in your opening statement, "The closing of schools." I don't believe that the plaintiffs have directly sought that. Functionally, if there was an impoundment of State aid, you would be talking about something quite close to it. Again, I think we would all anticipate that if it came to that very unpleasant pass to contemplate. You are to the point where the Legislature is being compelled to act in a certain fashion.

SENATOR EWING: Well can they -- do they have the authority to impound the money?

MR. CLARKE: The Court does have the constitutional authority to direct in extreme cases the use of State funds. It is a power that it exercises with extreme reluctance. Really, the Robinson case represents one of the few -- I may be missing another instance -- but it may represent the only instance in New Jersey history where the Court has taken a step that is that extreme. You, of course, are in that scenario in a constitutional face-off between two branches of the State government. The Court has always shown a desire to avoid those kinds of face-offs. I would remain hopeful and confident that it would be desirous of avoiding it again.

Nonetheless, they have the constitutional power to implement their judicial remedies, so it's a possibility to be contemplated. We certainly hope that it's not a probability that is going to be faced in the immediate future.

SENATOR EWING: We've talked about the dates that these could be imposed, it's -- you say the Legislature has until December of this year, right?

MR. CLARKE: I should correct that. Again, I go back to the-- The Court is not limited to, nor bound by, what the plaintiffs are seeking. If the Court were more impatient than the plaintiffs, they could impose a tighter deadline. But what the plaintiffs have -- and I mean, again in fairness to Ms. Morheuser, she has, herself, recognized the need for some additional time to come up with the next legislative package.

She's suggested 12/31/94 as the date. But I think everybody pretty much recognizes that we're talking about the '95-'96 school year at this point. So that would give at least till December of '94. Realistically, I guess, it could practically be done up until March or so, to effect the '95-'96 school budgets.

SENATOR EWING: How would you ascertain a special master, or as the press has reported, a czar, would operate as far as the school aid and the distribution, would they distribute it unilaterally or what?

MR. CLARKE: I don't think unilateral distribution is the likeliest scenario, no. If there were a special master appointed, the likely way it would operate is that the master would ask for submissions from each side to explain whatever the next package of legislation is and to take a position as to how that package does or doesn't meet whatever the remedy that we will have issued. I think it will work not altogether differently from how this most recent round of compliance litigation worked, except that instead of being remanded to Judge Levy, we would be remanded to a special master. That's how I would anticipate it working. But the master would not him or herself, I think, be empowered to unilaterally dictate a result. Rather, they would always be recommending a course of action for the Court. It would be back to the Court, so you probably have at least a two-step process again built into that, where you would be before the master and then before the Court.

SENATOR EWING: As far as the funding goes, can the Courts-- The Court cannot impose a tax, can they?

MR. CLARKE: It has never purported to have that authority in my knowledge. Obviously--

SENATOR EWING: Do you think they're looking it up? (laughter)

MR. CLARKE: That one I will invoke your privilege to avoid commenting on. What the Court can achieve, it can achieve -- it has historically sought to achieve by presenting either/or scenarios. Either the Legislature acts, or this will happen. It has never, certainly-- Certainly, I think, from a historical perspective almost anybody would recognize that the Robinson v. Cahill had a very direct causal link to the implementation of an income tax.

So if you were to do the shorthand history of the State of New Jersey, you could say that the Supreme Court implemented an income tax. But the reality is -- and the

technical reality, it's important to keep track of the technical reality -- the Court mandated a compliance school funding scheme. The Legislature responded by enacting a tax. That is, I think, the proper operation of the State government. Certainly, I think, the State Supreme Court will again be looking to maintain the proper operation of State government rather than to exercise some new and wholly unprecedented power.

SENATOR EWING: On transition aid, there's a lot of pressure within the Legislature to restore transition aid -- which, I feel, correctly, has been taken out of the school budget. If that should be put in, that would weaken the State's case, wouldn't it? Or would it?

MR. CLARKE: Well, let me comment on that this way, because to say it would weaken or strengthen it at this point-- I'd have to pretend to know what is going on in the minds of the Supreme Court right now. I don't have to pretend to have that ability--

SENATOR EWING: Clairvoyant.

MR. CLARKE: --but certainly in the most recent submissions to the Court-- I should make the panel aware of this -- Ms. Morheuser has submitted the budget recommendations to the Court.

The Court has accepted that submission for consideration. We have responded to that submission by pointing out that the budget -- recommended budget -- does continue to contain features that are addressed to the Abbott mandate, including the proposed continued phase out of transition aid. So we put that, from a compliance standpoint, in the plus column. I do think that that is an important gesture that the budget recommendation makes for compliance.

No doubt, it does carry with it a hardship for the districts that will be receiving the lessened aid, but minimum aid is to be phased out under the Abbott mandate. To the

extent that the budget -- recommended budget -- continues the phase out does demonstrate, we believe, continued compliance. So to that extent we have made note of that feature to the Court.

SENATOR EWING: To go back to the parity issue again, do you think the Court is going to stick to a 100 percent of parity, or this almost word -- or whatever it was?

MR. CLARKE: Substantial parity.

SENATOR EWING: Substantial.

MR. CLARKE: Substantially equivalent.

SENATOR EWING: Thank you, professor.

MR. CLARKE: I have no prediction on that, Senator Ewing. What I would say is that I'm not sure it's an issue that the Court-- If asked in court about that issue, I would say it's not an issue. That would be my answer. It's not before the Court at this time, because at this time we are basically looking at a forthcoming legislative package, and to contemplate what might or might not be in that package is judicially premature.

I do think that it's safe to say that the Court will stand by a requirement of substantial financial parity. I don't believe in this next decision that we will be seeing any relaxation of that. Whether it would go so far as to define it, I would hesitate to guess. But I see no reason why they would feel impelled to go to that step. The language is there for all legislators and lawyers and educational advocates to argue over in the legislative forum. I think that's probably something you will be seeing.

SENATOR EWING: And the word substantial, though, will be in each Justice's mind as to what he feels the word substantial means, right? Or is there a definition available someplace as to what it means?

MR. CLARKE: Substantially equivalent is, in fact, a phrase that appears in the definition of the mandates. There is no definition of the definition.

SENATOR EWING: Okay, so it's in the individual's mind as to what he feels substantial then?

MR. CLARKE: I don't know how to respond to that. But I would say-- I go back to something that I mentioned to Senator Palaia, which is that, coupled with an assurance of programmatic parity, I think you can work with the phrase, substantially equivalent, more, what shall we say, freely, to the extent that you have also provided assurances that there is substantial equivalence in substantive educational terms. So that, substantially equivalent, one might say, and if you could-- The Legislature has a basis for saying why something is substantially equivalent. That is certainly, I think, an area where again, by historical standards at least, the Court would give strong deference.

SENATOR EWING: Senator Martin has joined us.

SENATOR MARTIN: Yes, I have a couple of questions, if I may. I apologize. Stuff with my kids in their public schools slowed me down. (laughter)

SENATOR EWING: There might not be any public schools.

SENATOR MARTIN: Somebody dumped some coffee on my suit coat, so it's been a bad morning.

Substantially equivalent. I would liken that to perhaps something in the standards that evolved over Baker v. Carr, where we are doing reapportionment, where ultimately the courts said that, as far as for districting purposes, there might be a deviation of 12 percent, 15 percent, or 20 percent as far as the lowest to the highest.

Perhaps you could look at it as far as tax assessments, where there is a standard in New Jersey that if you go -- if you're 15 percent one way or the other that you fall within the parameters of something. Maybe not those same words, but the concept of being generally close to the mark but there's some area which you've suggested of deviation. I guess

this is a difficult question, but do you see-- Would you be willing to put any type of parameters on the fractional deviation that the courts might entertain?

MR. CLARKE: I'm not particulary comfortable doing that. I would state only, again, that I think that it would behoove the Legislature if it chooses to address that specific issue, and to tie it in some fashion to a demonstration.

Why is it -- not to pick a number out of a hat, so to speak, but rather to say -- why within the range chosen that is substantially equivalent. Because I think the Court will be sensitive to the possibility, and I am sure my esteemed adversary will strongly, both in the legislative and in the litigator context, assert that you don't want to reintroduce through the back door the notion that money doesn't matter.

If the Court were to sense that in the definition of substantial equivalency, the Legislature is again trying to promote the idea that money doesn't matter, I think it would react adversely to that. If, on the other hand, the Legislature were able to state why the range of deviation itself is not the difference between a constitutionally sufficient and a constitutionally inadequate system of education, then, I believe you'd be on stronger legal ground.

I don't know if that makes sense -- whether I made myself clear there, but that's what--

SENATOR MARTIN: I think so. A related question. Substantial equivalent formula: Do you see that applying not only to funding, which is really what this case is about, but also what you described before as programmatic quality. Is it a two -- does it have a place for both?

MR. CLARKE: I don't know when you came in, so I'll -- I did address that a little bit -- which is that in both the Robinson cases and in Abbott, the Court expressed frustration with having to focus on money and expressed it's own preference

to focus on something else, but saying in the absence of any better idea or better proxy; it was going to continue to focus on money.

The phrase substantially equivalent that we've been talking about, itself, does appear in the Abbott opinion, in the context specifically of a financial definition. But certainly, I think, the Court's interest -- the Court's imposition of the financial remedy is not just because it wanted to see the numbers come out nicely. It wanted to see that poor urban students are getting an education that allows them to compete with students from affluent districts. If the Legislature comes up with a package that assures that and does implement the requirement of substantial financial parity, I think that is very much what the Court is interested to see.

SENATOR MARTIN: Final question: There is concern in some districts that they would be willing to tax themselves above and beyond, in order to provide special types -- I'll call it some type of enrichment programs. Do you see any way, beyond capping that district's-- If you had a formula that there was a determination of a particular number that did meet the minimum requirement for thorough and efficient education; that if a district took it upon themselves to tax themselves further that they would be able to exceed that minimum standard? Without running into equal protection and other types of issues?

MR. CLARKE: Well, that also was somewhat touched upon in a previous answer. I think that if-- Any solution that did not assure substantial parity would be in technical noncompliance of the Abbott mandate. Substantial financial parity, as we all sit in this room today, there is a judicial mandate to achieve that. So any package that did not include that as an element would be in technical noncompliance.

The Court has -- on the other hand, I should say -- always made it clear that it wants to give the Legislature latitude to implement. I think it has always tried to make

clear that it is not looking to ratchet down the affluent districts, but rather, to ratchet up the urban districts to the level of the affluent districts.

In response to one of Senator Palaia's questions, I did say that as a practical problem, if you did not control or cap spending in the affluent districts, you would be confronted with a problem where the affluent districts could, through the exercise of their local taxing power, continue to run away from the poor urban districts, and you would never achieve the parity that is required. Particulary in a State which already leads the nation in per pupil spending, I think, you come to a practical necessity for some form of caps. The caps can be liberal or stringent to a degree.

It would be difficult to come up with a formula that would comply with the requirement of financial parity that did not include a cap element. My answer is, I don't have that solution. I'm not saying there aren't creative minds that could come up with one.

SENATOR EWING: Mr. Clarke, I appreciate very much all the time you've given us. It's fascinating, your mind, the way it works with the retention it has. But I would like you, just once again, to sum up for us the financial aspects of what could be asked for in this first year. Are we looking at a potential of maybe $800 million this year, that the plaintiffs are asking us to put in?

MR. CLARKE: Not to get definitional on you, but this year we're talking the '95-'96 school year, rather than the '94-'95 year, right?

SENATOR EWING: The freshman year, yes.

MR. CLARKE: Okay. The requested relief for the '95-'96 year would include a one-third reduction of the existing parity gap, which, depending how you measure it, would be $120 million to $130 million. The requested relief on the special disadvantages mandate is for doubling of at-risk aid

and reinstitution of comp ed aid. That again, I think, took us to somewhere between $260 million and $440 million. Those are the quantifiable requests. The requests for the tax relief and the facilities aid are not in my ability to quantify.

SENATOR EWING: So that would be $380 million to $570 million for '95-'96?

MR. CLARKE: That's what I--

SENATOR EWING: Yes, I mean--

MR. CLARKE: Those are the numbers I've scribbled out.

SENATOR EWING: Okay. And then, plus another $120 million each year for the next two years after that?

MR. CLARKE: That's what's being requested, yes.

SENATOR EWING: Well, do you thing we're opening ourselves if we should double the at-risk aid for the special needs, and then somebody in another district will say, "Fine, you did it for them, you do it for all of us."

MR. CLARKE: Well, obviously as a legislator, you are in a far better position to judge that than I am. But to put it in the specific context of the litigation, we do, of course, have a representative from what they call now the foundation aid districts, previously known as the middle-income districts, that will also be arguing in Court.

I should say that they have seconded, in their papers, the request for the doubling of at-risk aid. I do not think they are limiting themselves when they second that request to a doubling of at-risk aid in the special needs districts. They are seeking it as well for themselves. Yes, from a legislative standpoint, it would be a difficult sell, I think.

SENATOR EWING: Senator Martin, do you have anything?

SENATOR MARTIN: No. Appreciate it. No, I have no further questions.

SENATOR EWING: Senator Palaia?

SENATOR PALAIA: No. I really want to thank you. It was very informative, and your approach to it, I think, is excellent, and I wish you well.

MR. CLARKE: Thank you for having me. I wish you well in your important work that you face.

SENATOR EWING: Thank the General for letting you come up please.

(MEETING CONCLUDED)