VOLUME IX

PUBLIC EDUCATION

HISTORICAL RECORD OF MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES IN PUBLIC AND PRIVATE CONTRACTING IN NEW JERSEY

A Report Submitted to
NJ TRANSIT
and the
Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts

by
The Afro-American Studies Program
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Executive Summary

A large proportion of New Jersey's minority citizens have been denied fundamental rights and services guaranteed them by the New Jersey Constitution in the area of public education. These rights are intended to enable citizens to compete on equal terms in the contemporary marketplace and to otherwise function in a multi-racial society.

For more than twenty years, New Jersey's profound failures in these regards have been the subject of judicial, legislative and administrative findings. In the cases of Robinson v. Cahill and Abbott v. Burke the State Supreme Court, time after time, has documented New Jersey's systematic failure to provide children in the poorer urban districts with a constitutionally-adequate education. In a series of enactments prompted by the Court's decisions, the Legislature has acknowledged the unconstitutionality of the State's educational system and has responded in a way purported to rectify the problem. Yet each legislative response, from 1975 to the present, has been challenged in turn as insufficient. Each of those challenges, except the one currently pending in the courts, has been sustained.

The pattern could not be clearer and more consistent. There have been, and persist, longstanding and egregious legislatively-generated disparities in the funding of public education between poorer urban school districts, disproportionately populated by minority students, and wealthy suburban districts. These disparities cause, or at least are strongly correlated with, grossly inadequate educational opportunities and results. No matter what measure is used, the education afforded students in New Jersey's cities is demonstrably inadequate to equip them to function effectively, let alone equally, as citizens or as competitors in the labor market.

The situation is different, but may prove as compelling, regarding the State's failure to assure that New Jersey's public school students learn in a multi-racial, multi-ethnic environment. Since at least 1965, the New Jersey Supreme Court has made clear that the State Constitution requires administrative authorities to assure, wherever feasible, that such a learning environment is provided. Since 1971, it has been clear that district lines are not an impediment to racially-balance educational experiences.

Notwithstanding these constitutional pronouncements, however, New Jersey's public education system has been, and remains, one of the several most segregated systems in the nation. The primary explanation lies in the persistent failure of the state's education officials to accept and act upon their constitutional obligation. In case after case, for more than 25 years the Supreme Court has chided the Commissioner of Education for failing to acknowledge the scope of his

authority and responsibility to achieve racially balanced schools.

The issue has come to a head, once again, in a case now pending in the state courts. The Englewood school district is seeking regionalization of its high school with that of Tenafly, as the only viable means of providing students of those districts, together with the students of Englewood Cliffs, with a racially balanced education. For the first time, the State Board of Education has acknowledged its power to order regionalization of districts, even if they do not constitute a de facto "single community." After evaluating less intrusive means of promoting racial diversity in Englewood, the Commissioner has recommended, and the State Board has ordered, that a regionalization study be carried out. Tenafly and Englewood Cliffs have appealed that order to the courts where it, together with other issues in the case, await decision.

A central aspect of remedying these failures relates directly to the public schools–to providing the educational programs, facilities and services necessary to enhance the ability of students in poorer urban districts to compete with their most advantaged peers, and to providing an educational environment which will equip all students to function in a multi-racial society. But the New Jersey Supreme Court increasingly has recognized, in the context of the school funding cases, that improving the public schools, by itself, is unlikely to cure the problem and achieve the constitutional objective. Nothing short of altering socioeconomic status can do so. And, according to the Court, education alone will not alter socioeconomic status.

What is required is a comprehensive program addressing housing, employment, child care, taxation, welfare, and perhaps health care as well. The Supreme Court recognized this need in its last Abbott v. Burke opinion. The Court also recognized there, however, that a judicial opinion, responding to a specific case and based on a specific documentary record, was not an appropriate vehicle for announcing a sufficiently broad-based remedy. Unconstrained by those limits, and broadly empowered to implement constitutional and public policy objectives, the Legislature, or perhaps the Executive, is the more appropriate governmental branch to promulgate the necessary remedy.

In my judgment, such a remedy could, and should, include affirmative action plans, including even set-asides, relating to public higher education, public employment and public contracting. A clear consequence of the State's failures in public elementary and secondary education is a constricted pool of minority high school graduates fully equipped to compete for positions in higher education or in the marketplace. These constricted pools mean that, without affirmative efforts by the State to rectify the situation, a disproportionately low number of minority applicants will be selected.

So long as the affirmative action plans do not rigidly favor unqualified minority candidates over others, they seem both legally permissible and fully justified from a public policy perspective. After all, this is a situation where the State has been found to have contributed substantially to the creation of the problem. Its longstanding complicity in the massive violation of the constitutional rights of many minority citizens carries with it an obligation and a power to remedy the harms caused.

Introduction and Overview

This chapter will explore the hypotheses that: the kind, quality and extent of education historically available to minorities have limited their business opportunities in a substantial and demonstrable way; and this limitation appropriately can be addressed by race-conscious measures.[1]

These hypotheses will be considered in the context of the relevant requirements imposed by the United States Supreme Court's decision in City of Richmond v. J.A. Croson Company.[2] In short, these are that: (i) to justify race-conscious classifications, even for remedial purposes, there must be "judicial, legislative or administrative findings of constitutional or statutory violations;"[3] and (ii) the race-based remedy must be narrowly tailored to respond to the violation found.[4]

These requirements are designed to preclude race-based decision-making, which is "essentially limitless in scope and duration,"[5] and which is itself a violation of the equal protection rights of those denied opportunities by it.

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[1] Most of the findings, conclusions and remedial recommendations in this chapter apply to Hispanic as well as black students and citizens, but I have not dealt with the special educational problems of Hispanic and other students for whom English is not their first language. I also have not dealt with gender and sex-based discrimination in the schools, which has limited opportunities for women, minority and majority, to compete equally in the employment and contracting spheres. These matters will be treated in other chapters of the report to the Governor's Study Commission.

[2] City of Richmond v. J.A. Croson Company, 488 U.S. 469, 109 S.Ct. 706 (1989).

[3] 109 S.Ct. at 723, quoting from Justice Powell's opinion in University of California Regents v. Bakke, 438 U.S. 235, 307 (1978).

[4] 109 S. Ct. at 728.

[5] Id. at 723.

This chapter will begin with a description and analysis of the judicial, legislative and administrative findings of constitutional and statutory violations of the rights of minorities in New Jersey to the public education guaranteed them by law. In this section, I will discuss the State's constitutional, statutory and regulatory guarantees, both affirmative and negative. Affirmatively, New Jersey's legal structure assures all students a "thorough and efficient system of free public schools," providing them with educational opportunities designed to equip them to be effective citizens and competitors in the contemporary labor market, and a racially-diverse educational experience designed to enable them to function in a multi-racial society. Negatively, New Jersey's students are to be shielded from discrimination and segregation in the schools.

The reality has been quite different, however. In that connection, I will discuss the resounding findings that these guarantees have been violated. I will focus on the school finance decisions by New Jersey's Supreme Court in Robinson v. Cahill[6] and Abbott v. Burke.[7] These decisions demonstrate that for at least 20 years[8] the State had failed to assure students in property-poor districts an adequate and constitutionally-mandated education.

In the Abbott decision, especially, the court made explicit that the students denied their educational entitlement were clustered in poor urban districts and that those districts

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[6] Robinson v. Cahill, 62 N.J. 473 (1973). ("Robinson I")

[7] Abbott v. Burke, 119 N.J. 287 (1990). ("Abbott II")

[8] In Robinson, the Court struck down a 1970 school finance statute, affirming a 1972 trial court decision. It was at least tacitly acknowledged by both courts, and probably by the state defendants as well, that the predecessor statute, originally enacted in 1954, fell well short of meeting constitutional requirements, too.

were disproportionately populated by minority students.[9] This is a function, among other things, of galloping white flight from those districts to adjoining suburbs and outlying exurban and rural areas. Although, to some degree, the thrust of Abbott might be considered race-neutral, in the sense that the plaintiffs were the class of all students residing and attending public school in the Camden, East Orange, Irvington and Jersey City school districts, in fact the case was heavily influenced by the actual demographics. Ignoring race, ethnicity and social class in Abbott would have resulted in a distorted, unreal picture of the situation presented. Treating the full remedy for the proven discrimination in a race and class neutral manner would be equally unrealistic.

I also will discuss the equally longstanding findings by the New Jersey courts that there have been persistent constitutional violations resulting from the State's failure to assure minority students of racially-diverse educational environments.

For many years it has been state policy in New Jersey that de facto as well as de jure segregation is contrary to state law. In effect, feasibly correctable racial imbalance, regardless of its cause and whether or not it involves multi-district situations, violates the constitutional rights of New Jersey students. This principle was enunciated by the New Jersey Supreme Court in the case of Jenkins v. Morris Township School District.[10]

Jenkins also made clear that state education authorities had an affirmative responsibility to search out and deal with deviations from that principle. Notwithstanding

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[9] See, e.g., Abbott II, at 357,342.

[10] Jenkins v. Morris Township School District, 58 N.J. 483 (1971).

that, the State has failed to take any action to deal with interdistrict racial imbalance since 1971.

A case is pending in the state courts in which the State has been urged to exercise its long-deferred responsibility.[11] In that case, the Englewood School District urged the New Jersey Commissioner and State Board of Education to regionalize the three districts involved at the high school level as the only way to achieve meaningful racial balance for the students of all the districts. Although the State Board has acknowledged its authority to do so, and the Commissioner has now recommended a study of regionalization because, in his judgment, lesser remedies will not work, the Englewood Cliffs and Tenafly districts have resisted. The case has been argued in the Appellate Division and a decision is awaited.

A recent study for the National School Boards Association by Professors Gary Orfield and Franklin Montfort of Harvard University's Metropolitan Opportunity Project has confirmed that New Jersey's public schools rank among the several most segregated educational systems in the country. Thus, there seems little doubt that the State's students have been deprived of an education in a racially-diverse setting, to which they are constitutionally entitled, and that the State has failed to fulfill its obligations.

The next focus of the chapter will be on the impact of the constitutionally inadequate education, with special reference to: (i) admission to and success in higher education; and (ii) ability to achieve the skills necessary for effective competition in the

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[11] Englewood Cliffs Board of Education v. Englewood Board of Education v. Tenafly Board of Education, Superior Court of N.J. Appellate Division, Docket No. A-4912-89T5, on appeal from a decision of the N.J. State Board of Education, Docket No. 37-88.

contemporary labor market. In both respects, the picture is bleak. By every outcome measure--academic achievement, retention in school to high school graduation, higher education and job placement, salary levels, etc.--minority students fare poorly as a group. This longstanding pattern has had a substantial, and perhaps self-fulfilling, effect on the psychology of expectations, which shapes perceptions of career and life.

The narrowing funnel, obviously, affects, in turn, the pool of people able to create and operate business enterprises. Those who have fallen by the wayside because of the education system's manifest, documented and judicially-announced inadequacies are, almost without exception, unable to surmount the deficits contributed to, if not produced by, state failures to provide a constitutionally required education. This nexus between inadequate education and the disproportionately low representation of minorities in the supply of business enterprises vying for public contracts will be the subject of the final section of the chapter.

The Constitutional, Statutory and Regulatory Rights of New Jersey's Minority Students

1. Constitutional Rights. The primary educational right of New Jersey's students derives from Article VIII, Section 4, Paragraph 1 of the State Constitution. Dating from 1875, it provides that:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

This provision has been construed many times over the years by the New Jersey courts, as well as by the Commissioner and State Board of Education in their quasi-

judicial functions. The most recent and most important construction, by the New Jersey Supreme Court in its June 1990 decision in Abbott v. Burke,[12] will be discussed in detail. But Abbott is the culmination of a series of high court decisions dating back to 1895, which emphasize that a central purpose of the constitutional clause is to provide students with a public education designed to equip them to enter and compete in the marketplace.

Despite that longstanding constitutional right, a total of eight New Jersey Supreme Court decisions since 1973 document that the State and the Legislature consistently have failed to afford many of the State's students their entitlement, that these students are overwhelmingly urban, poor and minority, and that because of this unconstitutionality generations of these students have been rendered absolutely unable to compete with their advantaged peers in the marketplace.

Abbott, and its main predecessor, Robinson v. Cahill,[13] dealt with the constitutionally-mandated "thorough and efficient" education in terms of equality of educational opportunity, as measured principally by educational funding and educational programs.[14]

Another state constitutional provision, Article I, Paragraph 5 of the New Jersey Constitution, emphasizes equality of treatment, in schools and elsewhere, in terms of race, ethnicity and other personal characteristics. It provides that:

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[12] Abbott II, at 287.

[13] Robinson I, at 473.

[14] Quite probably, racial and ethnic equality in the schools also are part of the "thorough and efficient" mandate; see Jenkins v. Morris School District, 58 N.J. 483, 279 A.2d 619 (1971).

> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

In the very first provision of New Jersey's current constitution, adopted in 1947 as a model state constitution, a related but even broader guarantee appears as Article I, Paragraph 1:

> All persons are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

This provision has been construed to embody many aspects of the federal constitution's due process and equal protection clauses. Indeed, in many areas relating to due process and equal protection the New Jersey courts have interpreted the State Constitution as affording citizens broader rights and protections than the counterpart provisions of the U.S. Constitution.

This broader construction clearly applies to school desegregation and racial balance. For decades, the New Jersey Supreme Court has acknowledged and endorsed a state policy requiring the achievement of racial balance in the schools, whenever feasible, whether the imbalance results from de jure or de facto causes. In its 1971 decision in Jenkins v. Morris School District, the Court applied this policy in an interdistrict situation, effectively requiring the consolidation of two school districts to ensure that racial

balance would be achieved for the students in both districts.

The construction given these constitutional provisions by the New Jersey Supreme Court has emphasized that:

> In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority....[T]he states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by.[15]

Despite the Court's articulation of that constitutional policy, for more than 20 years it has not been enforced in an interdistrict setting by the state's educational authorities. School district lines have been considered sacrosanct, even though districts on opposite sides of the lines have become increasingly segregated in racial, ethnic and socioeconomic terms. A recent study for the National School Boards Association by two

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[15] Booker v. Board of Education, Plainfield, 45 N.J. 161, 170-71 (1965).

Harvard University professors, Gary Orfield and Franklin Montfort, entitled Status of School Desegregation: The Next Generation (Jan. 8, 1992 pre-publication copy), confirms New Jersey's longstanding status as one of the nation's several most segregated public school systems.

In a case pending in New Jersey's intermediate appeals court, the Appellate Division, the court has been petitioned to order the regionalization of two high schools, located in two adjacent school districts and serving the students of several other districts as well, based upon the Constitution's racial balance policy.

In the administrative consideration of that case, Englewood Cliffs Board of Education v. Englewood Board of Education v. Tenafly Board of Education,[16] the State Board of Education ruled that it had the power to order regionalization and would exercise that power if necessary to vindicate the constitutional racial balance policy. Subsequently, the Commissioner recommended to the State Board that a regionalization study be carried out because lesser remedies were not improving the racial imbalance at Dwight Morrow High School in Englewood.[17]

Whether such a study should go forward, together with other issues, are before the court. Almost certainly, this case will be decided ultimately by the New Jersey Supreme Court. In all likelihood, the Court's decision will provide new guidance about the strength

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[16] State Board of Education Docket No. 37-88.

[17] Prior to the State Board decision, the Commissioner had construed the Board's and Commissioner's racial balance authority and responsibility more narrowly--as applying only where the districts, as an historical and geographic matter, constituted a "single community."

of the State's commitment to racial balance, as a principle of constitutional primacy, and about the vigor with which state educational authorities must enforce it.

2. Statutory Rights. The constitutional rights to an equal educational opportunity, provided in a multi-racial and multi-cultural environment, have been the subject of various legislative enactments. Generally, these enactments recognize, and seek to implement, the constitutional rights. As to the first right--to a "thorough and efficient" education--the adequacy of the legislative response has been under virtually continuous legal challenge for the past 20 years. As to the second right--to education in a racially-balanced setting--the legal challenges have focussed more on the administrative than the legislative response.

A succession of four statutes dealing with the funding of public education has been challenged in New Jersey courts since the filing of Robinson v. Cahill in 1970. The statute then in effect was the State School Aid Law of 1954, as amended.[18] During the first year of the Robinson litigation, the State School Aid Law was replaced by the State School Incentive Equalization Aid Law (commonly known as the Bateman-Tanzman Act after its chief sponsors).[19]

As its name implies, the Bateman-Tanzman Act was designed to equalize state education aid to a more substantial degree than its predecessor statute. The problem, then as now, was well-understood to be that property-poor school districts, especially urban districts, could not raise adequate, let alone equal or greater, funds in comparison

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[18] L. 1954, c. 85, as amended; N.J.S.A. 18A:58-1 et seq.

[19] L. 1970, c. 234.

to their wealthier counterparts for the support of their schools. The state, as ultimate guarantor of a "thorough and efficient system of free public schools for the instruction of all the children in the State," had to rectify the situation.

The legislative effort embodied in the Bateman-Tanzman Act was found manifestly deficient by the New Jersey courts, first in the trial court in 1972[20] and then in the Supreme Court in 1973.[21] The Supreme Court issued six more decisions in the Robinson case, primarily dealing with the remedial process. To say that the legislative response was halting is an understatement of enormous magnitude. In fact, it was generally recognized in New Jersey between 1973 and 1976 that the State was on the brink of a constitutional crisis because of the Legislature's inability or unwillingness to adopt and fund a new school finance law which comported with the Court's constitutional ruling.

Finally, the Legislature did adopt the Public School Education Act of 1975[22] and appropriated funds under it. By a substantially divided Court, the Act was found constitutional on its face.[23] The Supreme Court clearly contemplated, however, that there would be a challenge to the constitutionality of the Act as applied, as experience and data accumulated.

Abbott v. Burke, filed in 1981, was that challenge. Four years were consumed by

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[20] Robinson v. Cahill, 118 N.J. Super. 223 (Law Div. 1972).

[21] Robinson I, 62 N.J. 473 (1973).

[22] L. 1975, c. 212; N.J.S.A. 18A:7A-1 to -52.

[23] Robinson v. Cahill, 69 N.J. 449, 355 A.2d 129 (1976). ("Robinson V")

procedural wrangling, culminating in the Supreme Court's 1985 decision to have the trial conducted by an administrative law judge.[24] It took another five years for the case to return to the Supreme Court on the merits, having passed through the Commissioner and State Board of Education en route. Although the administrative law judge had found, in an elaborately detailed 607 page decision, that the Public School Education Act of 1975 failed to pass constitutional muster, the Commissioner and State Board, both named defendants in the case, reached contrary conclusions.

In its June 5, 1990 decision,[25] the Supreme Court agreed with the administrative law judge in significant part. The Court ruled that the Act's minimum aid provisions (providing aid to wealthy districts) were unconstitutional and that the entire Act was unconstitutional as to students residing in New Jersey's 28 poorest urban school districts. The Court refused to invalidate the Act in toto because the record in the case focussed on the unequal and inadequate treatment of the poor urban districts vis a vis the wealthiest districts. The Court did acknowledge, however, that students in other districts, not as desperately situated as the poor urban districts, might be able to demonstrate in a future case that they, too, had been discriminated against in an unconstitutional manner.

Even before the Supreme Court's decision, Governor Florio had begun pressing the Legislature to enact a new school finance statute to replace the Public School Education Act of 1975. A bill, denominated the Quality Education Act of 1990, was

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[24] Abbott I, at 269.

[25] Abbott II, at 287.

introduced, and, with some changes to conform it to the Court's decree in Abbott II, was adopted by the Legislature and enacted into law on July 3, 1990.[26] On March 14, 1991, however, QEA I was substantially amended in Senate Bill 3230.[27] According to the Abbott plaintiffs, not only did QEA II fail to cure problems identified in QEA I, it effectively abandoned earlier attempts to conform the legislative response to the Court's order.[28]

Thus, once again, for the fourth time in 21 years (the fifth if QEA I is included), the New Jersey Legislature's effort to implement the State Constitution's education clause is being challenged as wholly and manifestly inadequate. The Supreme Court has sent this latest challenge to the trial court for the expeditious creation of a factual record. This is expected to happen by Spring 1992, and the case will return then to the Supreme Court.

The legislative response to the Constitution's anti-discrimination provisions, and the State's related constitutional policy requiring racial balance, has met a different fate than the one just outlined. Perhaps this is partly because the main anti-discrimination provision, Article I, Paragraph 5, has a negative, rather than affirmative, thrust. It prohibits discrimination or segregation in public facilities and programs, including the schools; it does not guarantee a particular kind or quality of public service. Moreover, implementation of the State's constitutionally-based race policies is not thought to require enormous expenditures of public dollars, as does school funding. Perhaps the relative

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[26] L. 1990, c.52 (QEA I).

[27] L. 1991, c. 62 (QEA II).

[28] Plaintiffs' Brief in Support of Motion for the Court to Assure Implementation of its Decree in Abbott II, June 11, 1991.

lack of attention to the legislative articulation of rights in this area may result from a generally low level of administrative activity. Finally, it may be that the current statutes implement the constitutional anti-discrimination policy better than those purportedly implementing the education clause.

The Law Against Discrimination[29] is the main legislative elaboration of the Constitution's anti-discrimination policies. The L.A.D. deals comprehensively with discrimination in the State, and vests enforcement responsibilities in the Division on Civil Rights of the Department of Law and Public Safety, which is headed by the State Attorney General. The evolution of the statute shows "burgeoning jurisdiction in the Division on Civil Rights and the continued strengthening of its remedial powers."[30]

Public schools and public education are covered by the L.A.D. As to matters arising in the school or education context, the Division and the State Commissioner of Education generally have concurrent jurisdiction. The Commissioner has both specific power and duty to deal with discrimination in the schools[31] and broad supervisory powers and duties regarding public education generally. The Commissioner has jurisdiction "to hear and determine...all controversies and disputes arising under the school laws...."[32] The Commissioner also is considered to have specialized expertise in most areas involving the public schools. As a consequence, in those areas the

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29 L. 1945, c. 169; N.J.S.A. 10:5-1 to -42 (L.A.D.).

30 Hinfey v. Matawan Regional Board of Education, 77 N.J. 514, 521 (1977).

31 N.J.S.A. 18A:36-20.

32 N.J.S.A. 18A:6-9.

Division should defer to the Commissioner.[33]

The problem with this structure and allocation of responsibility is that the Commissioner of Education has a long history of inactivity or excessively narrow construction of his powers and duties. Time after time, in decision after decision, the New Jersey courts have castigated the Commissioner for his failure to exercise his authority. In Hinfey, the Supreme Court said of this tendency:

> [T]he Commissioner of Education has not only the power to decide controversies under the school law which entail invidious discrimination practices, but indeed he may be regarded as having an affirmative duty to do so. In Booker v. Plainfield Ed. of Ed.,...finding that the Commissioner had too narrow a view of his own powers in the area of school racial desegregation, the Court held that the Commissioner had independent supervening authority to fashion an optimum plan for desegregation consistent with constitutional and statutory strictures. In Jenkins v. Morris Twp. School Dist...., this Court again found the Commissioner's view of his powers too cramped and repeated the principle that his authority to rectify discrimination was independent....[34]

In the area of discrimination and racial imbalance in the public schools, therefore, the statutory authority seems ample to rectify problems; the difficulty relates instead to the unwillingness of administrative authorities, especially the Commissioner of Education,

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[33] Hinfey, 77 N.J. at 534.

[34] Id. at 525-26.

to carry out their constitutional and statutory responsibilities. That is as true of the pending Englewood Cliffs case, where the Commissioner originally disavowed authority to order regionalization, as it was of the Booker and Jenkins cases in the 1960's and 1970's.

3. Regulatory Rights. The State's regulations regarding provision of a "thorough and efficient" education appear in Title 6, Chapter 8 of the New Jersey Administrative Code. There are some significant threshold problems in interpreting them. In the main, they were developed to implement the Public School Education Act and not the QEA. To the extent they have been updated to reflect the QEA, they are interim in nature because the Commissioner and a special task force have been charged with studying aspects of the implementation. Therefore, the regulations are in a state of considerable flux.

Beyond these threshold problems, it is difficult to extract from many of the regulatory provisions explicit rights of students. Generally, these provisions establish systems and processes by which state and local education authorities are to seek to provide the required "thorough and efficient system" of education. As part of the evaluation and monitoring process, for example, districts are expected to meet a variety of "indicators," which are stated in terms of a minimum percentage of students demonstrating certain accomplishments (e.g., 75% of the pupils in grade 9 of each school passing the state-mandated High School Proficiency Test; N.J.A.C. 6:8-4.2(a)(8)(i)). Although this contemplates certain achievement results by groups of students, it does not lead easily and directly to legally or otherwise enforceable student rights.

On the other hand, there are some regulatory provisions which do seem to define student rights or entitlements, often elaborating upon broad constitutional or statutory rights. For example, in N.J.A.C. 6:8-2.1, entitled "State educational goals," the public schools are to "help every pupil in the State:

> 1. To acquire basic skills in obtaining information, solving problems, thinking critically and communicating effectively;...
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> 3. To become an effective and responsible contributor to decision-making processes of the political and other institutions of the community, State, country and world;
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> 4. To acquire the knowledge, skills and understanding that permit him or her to play a satisfying and responsible role as both producer and consumer;
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> 5. To acquire job entry level skills and also to acquire knowledge necessary for further education;...
>
> 11. To develop an understanding of his or her own worth, abilities, potentialities and limitations....

Another potentially significant articulation of regulatory rights appears in subchapter 6. There, each pupil is to be assessed annually, and those found to be below state minimum proficiency levels in reading, writing or mathematics are to be provided with an individual comprehensive assessment, and, unless specifically exempted, a supplemental preventive and remedial program.[35]

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[35] N.J.A.C. 6:8-6.1 et seq.

The State's constitutional and statutory anti-discrimination provisions relating to public education also are implemented by regulation.[36] Adopted in 1975, these regulations initially set out purposes and objectives, and provide several definitions. The former section[37] states that its guarantee of equal educational opportunity is designed to specifically implement federal and state statutes, and a State Board of Education resolution concerning sex equality.

In succeeding sections, the regulations deal with requirements that every school district develop: (i) an equal educational opportunity policy; and (ii) two affirmative action programs or plans, one relating to school and classroom practices, and the other to employment and contracting practices.[38] The section on school and classroom practices[39] comes closest to enunciating additional student rights. It bars a wide range of discriminatory practices regarding educational programs or activities, extracurricular activities, assessment processes, and guidance and counseling activities. The section concludes with the following admonition:

> (h) When informing students about possible career, professional and/or vocational opportunities, school personnel shall in no way restrict or limit the options presented to students on the basis of race, color, creed, religion, sex, ancestry, national origin or social or economic status.

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[36] N.J.A.C. 6:4-1.1 et seq.

[37] N.J.A.C. 6:4-1.1.

[38] N.J.A.C. 6:4-1.3, 6:4-1.5, 6:4-1.6.

[39] N.J.A.C. 6:4-1.5.1.5.

The requirement of an affirmative action program or plan relating to contract practices of the school district[40] is, of course, particularly germane to this report. The regulations specify that the program or plan must include a timetable for corrective action "to overcome the effects of any previous patterns of discrimination," a systematic internal monitoring process, and an affirmative action officer to coordinate and implement the program.[41]

Judicial, Legislative or Administrative Findings of Constitutional or Statutory Violations

The most explicit, powerful and current finding of a constitutional violation of the educational rights of New Jersey's minority citizens is found in the State Supreme Court's unanimous Abbott v. Burke opinion. The finding emphasizes in the strongest terms that New Jersey has denied a substantial percentage of its minority citizens that public service most directly intended to equip them to compete on equal terms for jobs, entry to higher education and professional opportunities.

Far from being general societal discrimination, the denial of educational rights is tied directly and explicitly by the Court to ability to compete in the economy. In effect, the Court is saying that many minority citizens are being forced out of the economic rewards race at the very starting blocks, and that the State itself has contributed to the handicaps.

An important remedial aspect is what the Court ordered in Abbott--that the educational violation be cured completely. But, as the Court acknowledges, the curing

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[40] N.J.A.C. 6:4-1.3 (b)(2).

[41] Id.

process will take years, and those who will eventually be enabled to compete equally are now several decades from the finish line. The Abbott remedy of equalizing educational opportunities over time will leave untouched the generations of minority citizens who have personally suffered from a constitutionally deficient public education system. Can that be the full extent of the State's ability to remedy a harm it has caused for at least the past 20 years? I think not.

The Abbott opinion strongly supports the following six main propositions:

1. New Jersey's Constitution requires that students be assured an educational opportunity which will equip them to function as citizens and to compete in the contemporary market place;

2. The evidence is undebatable and overwhelming that the State has failed to do so for an extended period of time and in an egregious way for students in poorer urban districts;

3. The poorer urban districts are disproportionately populated by minority students;

4. The consequences of the State's well-documented failures are: (a) the total inability of most students from poorer urban districts to enter the same market or the same society as their peers educated in affluent school districts; (b) the consequent isolation, physical and psychological, devastation and hopelessness of students in poorer urban districts; (c) their astronomical drop-out and failure rates; and (d) the negative impact on the entire State and its economy;

5. Improved education, especially when it provides greater resources to those with greater needs, can make a difference, but it will take many years; and

6. The State has a special obligation to right the wrong which its longstanding misbehavior has, at the least, compounded.

Because of the centrality of these propositions to this chapter, I will document each in some detail, frequently using the language of the New Jersey Supreme Court's unanimous opinion in Abbott. I do this for several reasons: the Court's language is more powerful and eloquent than any I could formulate; and, more importantly, I want to leave no confusion about what the Court actually said, as opposed to what I might be conveying.

1. The Constitutionally Guaranteed Education Should Enable All of New Jersey's Citizens to Compete Equally in the Contemporary Marketplace. Harking back to its opinions in Robinson v. Cahill, almost 20 years ago, the New Jersey Supreme Court said in Abbott that "a thorough and efficient education requires a certain level of educational opportunity...that will equip the student to become 'a citizen and...a competitor in the labor market.'"[42] The ability to compete must be evaluated in the contemporary setting,[43] and the standard is whether "'disadvantaged children will...be able to compete in, and contribute to, the society entered by the relatively advantaged children.'"[44]

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[42] Abbott, at 306, quoting in part from Robinson I, 62 N.J. at 515.

[43] Abbott, at 312.

[44] Abbott, at 312, quoting from Abbott I, 100 N.J. at 296.

This theme, that "poorer disadvantaged students must be given a chance to compete with relatively advantaged students,"[45] is at the heart of the Court's interpretation of the constitutional provision.[46] Teaching the skills necessary for such competition is "critically important."[47] The constitutional standard involves more than competition at entry level, minimum wage jobs; it requires "an education that will enable the urban poor to compete in the marketplace, to take their fair share of leadership and professional positions...."[48]

2. The State's Failure to Provide the Constitutionally Required Educational Opportunity Is Undebatable, Overwhelmingly Clear, of Extended Duration, and Especially Egregious as to Students in Poorer Urban School Districts. In Abbott, the New Jersey Supreme Court expresses frequently and in unusually strong judicial language its finding that the State has failed to meet the Constitution's educational mandates for students in poorer urban districts. Early in its opinion, the Court sets the tone: "The inadequacy of poorer urban students' present education measured against their needs is glaring....[T]hese school districts are failing abysmally, dramatically, and tragically."[49]

Later in its opinion, the Court repeatedly bears down more directly on the State's responsibility and abject failures.

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[45] Abbott, at 313.

[46] See also Id. at 317, 318, 320, 322, 336, 381.

[47] Id. at 363.

[48] Id. at 393.

[49] Id. at 302.

...[W]e reject the State's claim that in these poorer urban districts a thorough and efficient education has been or will be achieved. The extent of failure is so deep, its causes so embedded in the present system, as to persuade us that there is no likelihood of achieving a decent education tomorrow, in the reasonable future, or ever....[F]or ten years and more there has been no thorough and efficient education in these districts.[50]

The failure has gone on too long; the factors are ingrained; the remedy must be systemic. The present scheme cannot cure it.[51]
Our constitutional mandate does not allow us to consign poorer children permanently to an inferior education on the theory they cannot afford a better one or that they would not benefit from it.[52]

The primary basis for our decision is the constitutional failure of education in poorer urban districts. The record demonstrates beyond debate that a thorough and efficient education does not exist there.[53]

Concerning the poorer urban districts,...we have found a constitutional failure of education no matter what test is applied to determine thorough and efficient.[54]

...[T]he level of education offered to students in some of the poorer urban districts is tragically inadequate.[55]

...[I]t seems clear to us that experimentation is needed to reverse the staggering failure of our poorer urban districts, and that experimentation itself requires money.[56]

The only thing universally agreed on is that those [urban] schools are

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[50] Id. at 321-22.

[51] Id. at 339.

[52] Id. at 340.

[53] Id. at 357.

[54] Id. at 358.

[55] Id. at 359.

[56] Id. at 366-67, n.30.

failing.[57]

> [The children in poorer urban districts] have already waited too long for a remedy, one that will give them the same level of opportunity, the same chance, as their colleagues who are lucky enough to be born in a richer suburban district.[58]

> [S]tudents in all of the poorer urban districts simply do not receive the quality of education they need to equip them as citizens and competitors in the market, especially when compared to the education given in the affluent suburbs.[59]

> Given the history of the role of disparate funding and the denial of a thorough and efficient education, and the difficulty experienced by the Legislature in providing full funding in accordance with the Act, continuation of minimum aid in its present form threatens the Legislature's effectuation of the remedy provided herein, the attainment of its constitutional goal, and the future maintenance of a thorough and efficient education both in poorer urban districts and elsewhere.[60]

> We find the constitutional failure clear, severe, extensive, and of long duration.[61]

> [T]here is absolutely no question that we are failing to provide the students in the poorer urban districts with the kind of an education that anyone could call thorough and efficient.[62]

The Court recognized that these students have dramatically greater educational needs than advantaged students in wealthy districts, and that this requires more be done for students in poorer urban districts to afford them a thorough and efficient education.

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[57] Id. at 377.

[58] Id. at 380.

[59] Id. at 381.

[60] Id. at 383.

[61] Id. at 385.

[62] Id. at 393.

Poorer students need a special supportive educational effort in order to give them a chance to succeed as citizens and workers. Their educational needs are often dramatically different from those of students in affluent districts. They are getting the least education for the greatest need.[63]

[T]he measurement of the constitutional requirement must account for the needs of the students;...in most poorer urban districts the education needed to equip the students for their roles as citizens and workers exceeds that needed by students in more affluent districts....[64]

[These poorer urban districts] can, and as we view it, constitutionally they must, be treated differently.[65]

This record shows that the educational needs of students in poorer urban districts vastly exceed those of others, especially those from richer districts. The difference is monumental, no matter how it is measured....[T]he goal is to...wipe out their disadvantages as much as a school district can, and to give them an educational opportunity that will enable them to use their innate ability.[66]

They need more, and the law entitles them to more.[67]

It is clear to us that in order to achieve the constitutional standard for the student from these poorer urban districts--the ability to function in that society entered by their relatively advantaged peers-- the totality of the districts' educational offering must contain elements over and above those found in the affluent suburban district. If the educational fare of the seriously disadvantaged student is the same as the "regular education" given to the advantaged student, those serious disadvantages will not be addressed, and students in the poorer urban districts will simply not be able to compete. A thorough and efficient education requires such level of education as will enable all students to function as citizens and workers in the same society, and that necessarily means that in poorer urban districts something more must be added to the regular education in order to achieve

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[63] Id. at 302-03.

[64] Id. at 319.

[65] Id. at 322.

[66] Id. at 369.

[67] Id. at 372.

the command of the Constitution.[68]

The reality is different, however. The Court found that less is spent on the education of those who need more. Were more actually spent, the Court expressed the belief that students in the poorer urban districts actually could compete in the marketplace.

> We have decided this case on the premise that the children of the poorer urban districts are as capable as all others; that their deficiencies stem from their socioeconomic status; and that through effective education and changes in that socioeconomic status, they can perform as well as others. Our constitutional mandate does not allow us to consign poorer children permanently to an inferior education on the theory they cannot afford a better one or that they would not benefit from it.[69]
>
> [The constitutional goal is to give students in poorer urban districts] an educational opportunity that will enable them to use their innate ability.[70]
>
> Included in our perspective are the stories of success. They show that the urban poor are capable, that given sufficient attention in an adequately financed system using the best knowledge and techniques available, a thorough and efficient education is achievable. This record proves what all suspect: that if the children of poorer districts went to school today in richer ones, educationally they would be a lot better off.[71]

3. Poorer Urban Districts Are Disproportionately Populated by Minority Students, a Substantial Percentage of Those in the Entire State, and This Is Significantly a Function of White Flight.

In describing the characteristics of poor urban districts, which make "the need for

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[68] Id. at 374.

[69] Id. at 340.

[70] Id. at 369.

[71] Id. at 394.

a remedy urgent,"[72] the New Jersey Supreme Court stressed:

> That the overwhelming proportion of all minorities in the state are educated in these poorer urban districts is of further significance. [citation omitted]. These are the districts where not only the students and education are failing, these are the districts where society is failing.[73]

A footnote to this statement indicates that the "overwhelming proportion of all minorities in the state," referred to by the court, constitutes 71%. Additionally, in seven of the poorer urban districts, including virtually all of New Jersey's major cities, the minority percentage of school enrollment ranged from 85% in Jersey City to 99% in East Orange. Those poorer urban districts exceeding 90% minority student enrollment, in addition to East Orange, were Paterson (90%), Newark (91%), Irvington (94%), and Camden (95%).[74]

The court well understood that, although racial and socioeconomic isolation is a national problem, New Jersey's problem is especially acute.

> The devastation of the urban poor is more significant in New Jersey than in most states because of our demographics and the structure of our society. Our large black and Hispanic population is more concentrated in poor urban areas and will remain isolated from the rest of society unless this educational deficiency in poorer urban districts is addressed.[75]

The court also understood that this problem has been exacerbated, if not caused, by the flight from poorer urban areas of whites and even middle-class blacks. In citing

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[72] Id. at 342.

[73] Id. at 342.

[74] Id. at 342-43, n.19.

[75] Id. at 392.

an article it referred to as "insightful," the court included in a footnote to its Abbott opinion a lengthy quotation from that article. In part it stated:

> The inner city has long been populated by poor people, but what makes the situation different today--and exacerbates the isolation--is the flight of middle-class blacks and the virtual abandonment of entire black neighborhoods to the poorest of the poor. There has been a bifurcation...that has drained the ghettos of many of those who might be constructive role models for the young.[76]

4. The Consequences of the State's Well-Documented Failures Are: (a) The Total Inability of Most Students From Poorer Urban Districts To Enter the Same Market or the Same Society as Their Peers Educated in Affluent School Districts; (b) The Consequent Isolation, Physical and Psychological, Devastation and Hopelessness of Students in Poorer Urban Districts; (c) Their Astronomical Drop-Out and Failure Rates; and (d) The Negative Impact on the Entire State and Its Economy.

The Supreme Court had no doubt about the consequences of the State's well-documented and longstanding failure to provide students in poorer urban districts with a thorough and efficient education, one even remotely equivalent to the education received by their peers from affluent districts. "[T]hese students simply cannot possibly enter the same market or the same society as their peers educated in wealthier districts."[77]

This was not a new insight for the court. In its 1985 Abbott opinion, the court had said:

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[76] Abbott, at 371-72, n.36 (quoting from Maeroff, Withered Hopes, Stillborn Dreams: The Dismal Panorama of Urban Schools, PHI DELTA KAPPAN 633, 634-35 (May 1988)).

[77] Abbott, at 368.

> [A]fter comparing the education received by children in property-poor districts to that offered in property-rich districts, it appears that the disadvantaged children will not be able to compete in, and contribute to, the society entered by the relatively advantaged children.[78]

The inability of students in poorer urban districts to enter the same market as their advantaged peers was not simply a generic one; the court noted how specifically it affected their ability to compete in the mainstream of the contemporary marketplace. For example, adequate "exposure to computers is necessary to acquire skills to compete in the workplace."[79] Yet, the court carefully documented the inadequacies in computer equipment, space and courses available in poorer urban districts.[80] Precisely the same was found regarding science education and foreign language instruction, among many others.[81]

The State's educational failures with these students led not only to their inability to compete in the market and the society, it also contributed to their increasing isolation, and sense of devastation and hopelessness. The court saw this clearly.

> Urban youth are often isolated from the mainstream of society.[82]
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> Isolation...strengthens the hold of the subculture, giving free play to values that neither reinforce schooling nor encourage the development of the

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78 119 N.J. at 374, quoting from Abbott I, 100 N.J. at 296

79 Abbott, at 359.

80 Id. at 359-60.

81 Id. at 360-61.

82 Id. at 369.

habits of mind needed for academic success.[83]

> Their cities have deteriorated and their lives are often bleak. They live in a culture where schools, studying, and homework are secondary....While education is largely absent from their lives, we get some idea of what is present from the crime rate, disease rate, drug addiction rate, teenage pregnancy rate, and the unemployment rate.[84]
>
> This substantial segment of our population is isolated in a separate culture, in a society they see as rich and poor, for to the urban poor, all other classes are rich. There is despair, and sometimes bitterness and hostility.[85]
>
> They face, through no fault of their own, a life of poverty and isolation that most of us cannot begin to understand or appreciate.[86]

Not surprisingly, this poverty, isolation and consequent despair, dramatically contributed to by the State's longstanding educational failures, have led to astronomically high drop-out and failure rates for New Jersey's minority students. In part it results from the absolute inadequacies of educational resources and programs in poor urban districts, compounded by the greater educational needs which children in those districts bring to school; but, in part it results from the psychology of despair and hopelessness engendered by the rest of society's response to these children and their families--inadequate housing, health care and job opportunities.

The court saw this, too.

> We realize that perhaps nothing short of substantial social and economic change affecting housing, employment, child care, taxation, welfare will

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[83] Id. at 371, n.36.

[84] Id. at 391.

[85] Id. at 392-93.

[86] Id. at 394.

make the difference for these students....[87]

> Disparity of funding, its relationship to poverty, the critical needs--educational and otherwise--of its pupils, the practical inability to raise further funds through [local] taxation..., the likelihood of the permanence of these factors, the level of substantive education actually being given, the failure rate of its students, their dropout rate, were all sufficiently shown, and dramatically contrasted with the situation of students in richer districts.[88]

> The failure rate of these poorer urban districts on even this minimal test [of basic skills], the depth of that failure, testifies eloquently not just about their inadequate performance, but about their need. The shocking contrast to the performance of students from richer suburban districts completes the picture.[89]

> The dropout rate in these poorer urban districts is further testimony to their failure and to the students' needs. The "unofficial" dropout rate...for some urban high schools can be as high as 47%....[90]

> Their test scores, their dropout rate, their attendance at college, all indicate a severe failure of education.[91]

Perhaps the most self-evident, but least widely-perceived, conclusions the Court reached in Abbott were that: (i) this overwhelming pattern of state default and its consequences are having a strongly negative impact on the entire state and its economy; and (ii) that negative impact will increase over time unless the State takes immediate and substantial action.

While the constitutional measure of the educational deficiency is its impact

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[87] Id. at 375.

[88] Id. at 346-47.

[89] Id. at 369.

[90] Id. at 370-71 and n.35. Actually, dropout rates as high as 58% in Camden were included by the Court in its footnote to this statement.

[91] Id. at 391.

> on the lives of these students, we are also aware of its potential impact on the entire state and its economy--not only on its social and cultural fabric, but on its material well-being, on its jobs, industry, and business. Economists and business leaders say that our state's economic well-being is dependent on more skilled workers, technically proficient workers, literate and well-educated citizens. And they point to the urban poor as an integral part of our future economic strength. In short, they urge the state to go about the business of substantially improving the education of the very subjects of this litigation, the students in poorer urban districts. So it is not just that their future depends on the State, the state's future depends on them. That part of the constitutional standard requiring an education that will enable the urban poor to compete in the marketplace, to take their fair share of leadership and professional positions, assumes a new significance.
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> ...Soon, one-third of our citizens will be black or Hispanic, and many of them will be undereducated....The fact is that a large part of our society is disintegrating, so large a part that it cannot help but affect the rest. Everyone's future is at stake, and not just the urban poor's.[92]

5. Improved Education, Especially When It Provides Greater Resources to Those with Greater Needs, Can Make a Difference, But It Will Take Many Years.

The New Jersey Supreme Court was explicit in announcing that it decided Abbott v. Burke "on the premise that the children of poorer urban districts are as capable as all others; that their deficiencies stem from their socioeconomic status; and that through effective education and changes in that socioeconomic status, they can perform as well as others."[93] They must be given "an educational opportunity that will enable them to use their innate ability."[94]

The Court also recognized that in the record before it, even with the educational inadequacies of the state system, there were stories of success as well as failure.

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[92] Id. at 392-93.

[93] Id. at 340.

[94] Id. at 369.

> ...They show that the urban poor are capable, that given sufficient attention in an adequately financed system using the best knowledge and techniques available, a thorough and efficient education is achievable.
>
> This record proves what all suspect: that if the children of poorer districts went to school today in richer ones, educationally they would be a lot better off. Everything in this record confirms what we know: they need that advantage more than the other children. And what everyone knows is that--as children--the only reason they do not get that advantage is that they were born in a poor district.[95]
>
> [Because of their disadvantages, t]hey need more, and the law entitles them to more.[96]

In the remedial section of its opinion, the Court acknowledged that it will take years just to phase in a funding scheme which will begin to afford students in poorer urban districts an equivalent level of educational expenditures to that long afforded students in wealthier districts.[97] But the Court also acknowledged that equalizing funding is only a starting point in equalizing educational opportunities and educational outcomes, the ultimate constitutional measures.[98]

6. The State Has a Special Obligation to Right the Wrong Which Its Longstanding Misbehavior Has, At the Least, Compounded.

According to the Court, "The State has compounded the wrong and must right it."[99] Money is necessary to the righting of the wrong, but not alone sufficient to

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[95] Id. at 394.

[96] Id. at 372.

[97] See, Id. at 387-89.

[98] See, Id. at 370-77.

[99] Id. at 375.

accomplish it. Better use of available funds is necessary, too, but it is not a substitute for adequate and equalized funding.[100]

As indicated above, the State's ability and perhaps obligation to right the wrong is not limited to educational funding and programming. The Court recognized that its remedy in Abbott might "fail to achieve the constitutional object, that no amount of money [spent in the schools] may be able to erase the impact of the socioeconomic factors that define and cause these pupils' disadvantages. We realize that perhaps nothing short of substantial social and economic change affecting housing, employment, child care, taxation, welfare will make the difference for these students; and that this kind of change is far beyond the power or responsibility of school districts."[101]

Part of the Court's realization was that its power to effect a remedy was limited to the case and record before it. But the Legislature is not similarly constrained. "[G]iven the limitation of judicial power, we recognize that the kind of equity that can be done in this area by the Legislature cannot be accomplished by judicial order."[102]

As indicated previously, even under a best case scenario where the educational funding and programming provided students in poorer urban districts comes to equal or exceed that provided advantaged students in wealthy districts, the urban students will continue to labor under at least some of the same economic and societal disadvantages that marred the lives and limited the contributions of their older siblings, and perhaps their

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[100] See, Id. at 380-82.

[101] Id. at 374-75.

[102] Id. at 387.

parents. This justifies, even demands, that the State take other measures to redress the discrimination it has imposed upon the disproportionately minority residents of its poorer urban areas. Minority set-asides, or at least affirmative action goals, in the marketplace are among the obvious techniques for beginning to redress that unconstitutional harm in a more complete and effective way.

In QEA I, the Legislature acknowledged its responsibility to deal with the school funding aspects of the constitutional problem. It found and declared that, in 1973 and again in 1990, the New Jersey Supreme Court had ruled that the legislative schemes were unconstitutional and that, once more, the Legislature was establishing a new school aid formula designed to ensure a thorough and efficient education to all the State's children.[103] The Legislature committed itself to fully fund the new formula (a circumstance achieved only twice in the fourteen year life of the 1975 Act), and to substantially equalize per pupil expenditures between the poorer urban districts and the wealthy suburban districts by the 1995-96 school year.[104]

However, the Legislature left a number of important matters undone. Teachers' Pension and Annuity Fund (TPAF) contributions account for almost 25% of all state funds for education. In Abbott II, the Court had indicated that such state funding was "counter-equalizing" and possibly "constitutionally infirm."[105] In QEA I, the Legislature had made TPAF funding a local, rather than state, responsibility, but in QEA II the Legislature

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[103] N.J.S.A. 18A:7D-2.

[104] Id.

[105] Abbott II, at 384.

equivocated, providing for a delay in transfer of responsibility to local districts. The recently-issued report of the Governor's Quality Education Commission recommended that TPAF funding remain a state responsibility. The Legislature is likely to adopt that recommendation, thereby undermining the equalizing potential of the new school aid formula. In Abbott III, about to go to trial, plaintiffs have asked for a judicial ruling that state funding of TPAF is unconstitutional.

Additionally, the Abbott court found that "municipal overburden," the substantially greater non-school burdens on urban areas, "effectively prevents [urban] districts from raising substantially more money for education."[106] The implication is that the Legislature must do something to cure the problem of municipal overburden. In Robinson V and Abbott I, the New Jersey Supreme Court had been more explicit in its treatment of municipal overburden. In Robinson V, addressing the question of when a school district might be unable to raise sufficient funds, the Court said, "We think it would be wise were the Legislature to address itself to this potential problem. It would be helpful and expedient were there to be guidelines--legislative or administrative...."[107] In Abbott I, because of the absence of a legislative or administrative response to that urging, the Court asked the parties to "directly address the question of how to determine when a taxing district cannot be required to increase its taxes to fund public schools."[108] To date, the Legislature has failed to respond.

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[106] Id. at 357.

[107] Robinson V, at 466.

[108] Abbott I, at 293.

Similarly, the Legislature has failed to deal adequately with the non-educational dimensions of the problem identified by the Supreme Court. The need and justification for a variety of legislative affirmative actions regarding "housing, employment, child care, taxation, welfare"[109] is clear, but, thus far, largely unfulfilled.[110]

The ultimate conclusion is much the same insofar as New Jersey's constitutional commitment to educate students in a multi-racial, multi-ethnic environment is concerned. The requirements are clear and longstanding; the failures equally clear and longstanding. The difference, however, is that the default is more administrative than legislative. As indicated previously, the Legislature has provided adequate enabling legislation for the State Board and Commissioner of Education to act in conformity with the constitutional mandates. The problem is persistent failure of the administrative authorities to interpret their authority and duty as broadly as the courts have construed the constitutional and legislative directives, and their consequent failure to act assertively.

The historical picture is somewhat different, though, depending upon whether one focuses on intradistrict or interdistrict segregation. As to the former, New Jersey's record is at least mixed. As to the latter, for the past 20 years the record shows unmitigated failure. In fact, the pattern which emerges is very much dependent upon the evolving demographics.

Initially, when there were insufficient numbers of minority residents to produce

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[109] Abbott II, at 375.

[110] The Legislature has adopted a controversial welfare reform statute, sponsored by Assemblyman Bryant, but implementation must await federal approval. L. 1991, c.526.

entire schools for their children based upon neighborhood school concepts, the discrimination took the form of ignoring neighborhood school concepts and creating district-wide schools characterized by their racial composition (or, in the earliest days, to just excluding individual minority children from any public school in the district). When the minority population, and its residential concentration, reached sufficient proportions, the neighborhood school became the vehicle to achieve segregation. When entire districts became predominantly minority, as has been true of New Jersey's cities for some years, the instrument of segregation became a refusal to alter or ignore district lines, at least for purposes of achieving racial balance.

The primary actors in this demographic drama have been local school districts. But, state administrative authorities have been willing accomplices for much of the time. This has been especially true during the past 20 years when interdistrict remedies have been the only way to deal seriously with the problem.

Thus, the earliest efforts in New Jersey to achieve racially integrated schools were within individual school districts, where the use of neighborhood attendance zones and residential segregation combined to create racially imbalanced schools, or where even less justifiable policies caused the segregation.

For example, several of the early judicial challenges were to outright exclusion of black children from the public schools in the district of their residence.[111]

In some of those cases, and some later cases, the local district had established

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[111] See, e.g., Pierce v. Union District School Trustees, 46 N.J.L. 76 (1884); Raison v. Board of Education of Berkeley, 103 N.J.L. 547 (1927).

a single school for all its minority students, wherever they resided in the district. Thus, in one case the court found that the Trenton Board of Education's policy was "to send all children of the colored race irrespective of the place of residence in the city to a central junior high school to which only colored children are admitted."[112] The court ruled that it was clear "the children are unlawfully discriminated against. It is unlawful for Boards of Education to exclude children from any public school on the ground that they are of the Negro race."[113]

In the next litigation stage, it is highly revealing that intradistrict failures usually were based upon dogged adherence to the neighborhood school concept, rather than deviations from it. Presumably by then residential segregation had reached the point where a policy of neighborhood school attendance zones could achieve segregated schools.

In an illustrative case, black students attending the public schools of Englewood and their parents went into the federal courts to challenge their district's neighborhood school policy.[114] The gravamen of their complaint was that under this policy the school board had drawn school attendance zones and had constructed new schools in places which resulted in segregated schools. The court acknowledged that such segregation would violate the students' constitutional rights, but it required that plaintiffs exhaust their state administrative remedies through the Commissioner and State Board of Education.

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[112] Hedgepeth v. Board of Education of Trenton, 131 N.J.L. 153, 154 (1944).

[113] Id.

[114] Shepard v. Board of Education of City of Englewood, 207 F.Supp. 341 (D.N.J.1962).

Part of the federal court's reasoning was that the State of New Jersey had shown concern in matters regarding racial discrimination and that, therefore, plaintiffs should have a viable state administrative remedy.

In fact, during the early 1960's the State was relatively consistent in requiring racial balance in the schools within individual districts. This was implemented both by policy pronouncements and enforcement actions. The State's policies and actions even extended beyond de jure to de facto discrimination. Quite consistently during this period, the Commissioner ordered that recalcitrant districts adopt and implement racial balance plans.[115] The Commissioner also sustained racial balance plans adopted by some districts against challenges by white residents who sought continuation of neighborhood school policies.[116]

Morean was one of two New Jersey Supreme Court decisions dealing with racial balance in the schools during the 1960's. In that decision, the Court affirmed a decision by the Commissioner of Education, emphasizing that the Montclair Board of Education had an obligation "to maintain a sound educational system by the furnishment of suitable school facilities and equal educational opportunities. It could not, consistently with either sound legal principles or with sound educational practices, maintain an official policy of segregation with its inherent inequalities of educational opportunities and its withholding

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[115] See, e.g., Fisher v. Board of Education of Orange, 1963 S.L.D. 123; Spruill v. Board of Education of the City of Englewood, 1963 S.L.D. 141.

[116] See, e.g., Morean v. Board of Education of Montclair, 42 N.J. 237 (1964).

of the democratic and educational advantages of heterogeneous student populations."[117]

Beyond that, the school district need not "close its eyes to racial imbalance in its schools which, though fortuitous in origin, presents much the same disadvantages as are presented by [de jure] segregated schools."[118]

The following year the New Jersey Supreme Court returned to the theme of the State's authority to remedy de facto racial imbalance in Booker v. Board of Education of Plainfield,[119] its major decision in this field. In Booker, however, the Court was not so supportive of the Commissioner of Education or of the local district.

After the local board had received complaints about racial imbalance in its schools, it appointed a lay advisory committee to review the matter and submit a report. The committee recommended, and the Board agreed, that a consultant should be retained to conduct a study and submit findings, conclusions and suggestions. The consultant reported to the committee, recommending two alternative plans. The committee was unable to agree on recommendations to be forwarded to the board of education about these plans, and eventually submitted majority and minority reports. The board, in turn, declined to adopt either of the consultant's plans. Instead, it announced its own voluntary transfer plan, which was implemented with limited effect during the 1962-63 school year.

The petitioners in Booker complained to the Commissioner of Education about the

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[117] Id. at 242-43.

[118] Id. at 243.

[119] Booker, at 161.

local board's failure to deal more effectively with the district's racial imbalance. The Commissioner endorsed the board of education's action, stressing that the relevant issue was whether any of the Plainfield schools would remain "almost entirely" Negro. In the Commissioner's view, either of the consultant's plans, or the board's plan, would meet this standard. Therefore, the board had discretion to decide which plan to adopt. On appeal, the State Board affirmed the Commissioner's decision.

When the case reached New Jersey's Supreme Court, it stressed how longstanding and vigorous the State's policy was against racial discrimination and segregation in the public schools. The Commissioner's authority and duty to effectuate that policy here strong and comprehensive. Although, in the first instance, the Commissioner could leave to local districts responsibility for curing racial imbalance, "when the sufficiency of the local choice is brought before him he must affirmatively determine whether the reasonably feasible steps are being taken in proper fulfillment of State policy."[120]

Applying these standards, the Court found that the Commissioner and State Board had "taken a position which we deem too restrictive."[121] In particular, they had limited "relief to situations where the schools in question were entirely or almost entirely Negro."[122]

The fact that the Commissioner and State Board had failed to enforce vigorously

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[120] Id. at 178.

[121] Id.

[122] Id.

the constitutional rights of minority students indicates that the benefits of racially-diverse education had been denied those students, and white students as well. In a widely-referenced quote, the New Jersey Supreme Court said in Booker that the ability of children to attend school in a multi-racial and multi-cultural setting is "vital,"[123] it can provide "firm foundations...for good citizenship and broad participation in the mainstream of affairs,"[124] and its denial can "deprive the oncoming generation of the educational advantages which are its due."[125]

Despite the admonition from the Supreme Court about the Commissioner and State Board being too restrictive in their interpretation of their powers and duties to remedy racial imbalance, that pattern has continued, and even been exacerbated, during the past 26 years.

In 1970, the year following State Board adoption of a strong racial balance policy, the Commissioner rejected a school bussing plan to enhance racial balance within the Trenton school district. His reasoning was that, since the district had a non-white majority of 77%, adequate racial balance could not be achieved within the district. The Commissioner recognized that the solution was regional in nature, but he indicated he lacked the authority to order such a remedy.

The Commissioner also took that position in the Morris Township-Morristown dispute at about the same time. Those two districts originally had been a single

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[123] Id. at 170

[124] Id. at 170-71

[125] Id. at 171.

municipality. Even after they were divided into separate municipalities in 1865, they remained "so interrelated that they may realistically be viewed as a single community."[126] Educationally they had been involved in a sending-receiving relationship, under which Morris Township students attended Morristown High School, for more than 100 years.

In 1968, Morris Township had decided, after a referendum of its resident voters, that it wished to withdraw from the sending-receiving relationship with Morristown and construct its own high school. When the matter came before the Commissioner, he was critical of the Morris Township Board of Education for its refusal to consider any alternative to the new high school and its failure to participate in a regionalization study urged by the Commissioner. A hearing examiner, functioning as part of the Commissioner's consideration of the matter, concurred in Morristown's projections of the strongly negative educational and racial balance consequences of Morris Township's withdrawal from the sending-receiving relationship.

By way of summary, the Commissioner believed that, from an educational standpoint and to avoid racial imbalance, preventing withdrawal of Morris Township's students and even effectuating a merger of the Township and Morristown school systems were highly desirable. Nonetheless, he took the position that he lacked legal authority to order these actions.

In the Jenkins case, where the New Jersey Supreme Court considered this

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[126] Jenkins v. Township of Morris School District & Board of Education, 58 N.J. 483, 485 (1971).

situation, the Court even more strongly condemned the Commissioner's continuing failure to exercise his constitutional powers and duties than it had in the Morean case.

> The Commissioner's flat disavowal of power despite the compelling circumstances may be sharply contrasted with the sweep of our pertinent constitutional and statutory provisions and the tenor of our earlier judicial holdings....[127]
>
> We have from time to time been called upon to reaffirm the breadth of the Commissioner's powers under the State Constitution and the implementing legislation....[128]
> The history and vigor of our State's policy in favor of a thorough and efficient public school system are matched in its policy against racial discrimination and segregation in the public schools....[129]
>
> ...The Commissioner has been appropriately charged with high responsibilities in the educational field and if he is faithfully to discharge them in furtherance of the State's enlightened policies he must have corresponding powers. The Legislature has here granted them in broad terms and it would disserve the interests of the State to permit their administrative narrowing which in effect represents not only a disavowal of power but also a disavowal of responsibility.[130]

The Court concluded its Jenkins opinion by ruling that the Commissioner clearly had erred in dismissing the petition and cross-petition "insofar as they related to withdrawal of Township students from Morristown High School but also insofar as they related to merger of the Morris Township and Morristown school systems."[131] The Commissioner had adequate power to entertain further proceedings and to grant

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[127] Id. at 493.

[128] Id. at 494.

[129] Id. at 495.

[130] Id. at 504.

[131] Id. at 508.

appropriate remedies. Indeed, the Court indicated that the Commissioner had "full power to direct a merger on his own if he finds such course ultimately necessary for fulfillment of the State's educational and desegregation policies in the public schools."[132]

The Court's strong directive to the Commissioner led ultimately to merger of the two school systems, which continues to date. It is generally accepted that the merger has permitted Morristown High School to remain a high quality, racially-balanced school.

Despite the positive results in Morristown, however, the Commissioner has failed to impose a similar remedy since 1972, either in response to requests from parents or school districts, or on his own initiative. Later in the 1970's both the Plainfield and New Brunswick school districts sought regionalization with adjacent predominantly white suburban districts. In the case of New Brunswick, as with Morristown, the suburban districts were seeking termination of sending-receiving relationships. Neither of the city district requests was granted by the Commissioner or State Board, and no appeals were pursued to the courts.[133] Both districts and their high schools are now overwhelmingly populated by minority students, and reflect the educational pathology described in great detail by the New Jersey Supreme Court in Abbott II.

In a pending case involving Englewood, Englewood Cliffs and Tenafly, originally

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[132] Id.

[133] See Board of Education of City of Plainfield v. Board of Education of Borough of Dunellen, 1974 S.L.D. 9, 25, 808; Board of Education of City of New Brunswick v. Board of Education of Township of North Brunswick, 1974 S.L.D. 938 & 1962 (Commissioner), 1975 S.L.D. 1109 (State Board)

filed in December 1985, the Commissioner and State Board were asked once more to use the regionalization remedy to satisfy the constitutional mandate of racial balance. As with Morristown and New Brunswick before it, the Englewood school district responded to a petition by a neighboring predominantly white school district to terminate a sending-receiving relationship, by cross-petitioning for regionalization at the high school level. At the time the litigation was started, Dwight Morrow High School in Englewood already was a predominantly black and Hispanic school. Withdrawal of Englewood Cliffs' remaining students would have exacerbated the racial imbalance. Even under a best case scenario, however, maintenance of the sending-receiving relationship alone would not come close to achieving racial balance at Dwight Morrow.

This case had an aggravating factor. Beginning in 1982, neighboring Tenafly implemented a private tuition policy under which students from a number of nearby districts, including prominently Englewood Cliffs and even Englewood, were accepted at Tenafly High School. Of approximately 900 students at that school, about 100 were from Englewood Cliffs and Englewood, and most of these students were white. In effect, Tenafly had become a white flight academy.

Throughout this litigation, before an administrative law judge, the Commissioner and the State Board, Englewood was successful in resisting termination of the sending-receiving relationship and in obtaining an injunction against Tenafly's private tuition policy. Englewood's effort to have regionalization, or at least a regionalization study, ordered was less successful. But at each administrative level the decision on this issue improved from Englewood's perspective. The administrative law judge, who issued a

recommended decision to the Commissioner, found neither a basis in fact for regionalization nor power in the Commissioner to order it. The main sticking point was a narrow administrative interpretation of the New Jersey Supreme Court's decision in Jenkins.

Almost without exception since 1971, when Jenkins was decided, the Commissioner and State Board have construed that decision to empower them to order regionalization only if the districts in question constituted a "single community," in the unique sense of Morristown and Morris Township. In the New Brunswick case that had been a major rationale for the decisions. In the Englewood case, too, both the administrative law judge and the Commissioner relied on that narrow construction. However, the Commissioner found that Englewood Cliffs had acted partly out of racial motivation. This went some distance toward swinging the regionalization door open for Englewood. Despite New Jersey's unusually strong policy against totally de facto (that is, unintentional) segregation or racial imbalance, evidence of invidious (or intentional) discrimination likely would provoke an even stronger remedial response.

Whether for that reason or otherwise, when the Englewood case reached the State Board of Education the Board ruled that it had the power to order regionalization if that were necessary to vindicate the constitutional rights of students. In effect, the State Board largely read the "single community" standard out of the administrative jurisprudence. But despite this breakthrough, the State Board originally ruled that it was premature to order regionalization, or even a regionalization study. Instead, lesser remedies were to be attempted to resuscitate the sending-receiving relationship.

Within a year of that decision, however, the Commissioner[134] evaluated the effect of those lesser remedies and concluded that they could not achieve adequate racial balance at Dwight Morrow High School. He recommended that the State Board order a regionalization study, and it did so. Both that order, whose operation is currently stayed by the court, and the original State Board decision, are on appeal to the Appellate Division, New Jersey's intermediate appeals court. The appeal was argued on December 17, 1991, and a decision could be handed down at any time. There will almost certainly be an appeal to the New Jersey Supreme Court.

Although Englewood has sought only a ruling based upon the specific facts in this case, the participation of the national office of the NAACP and of the New Jersey Public Advocate as amici curiae has raised the possibility that the Supreme Court might use this case as a vehicle for dealing broadly with the reach of the State's constitutional policy regarding racial and ethnic diversity in the public schools. As the Court acknowledged in Abbott II, the isolation of a large proportion of New Jersey's minority students in the poorer urban districts has greatly compounded the problems of disparate funding between those districts and the wealthy, predominantly white suburban districts.

The State Supreme Court's eventual decision in the Englewood case may provide a companion piece to its existing and future decisions in Abbott. The conclusion of the Court's decision in Jenkins may foreshadow the result. It referred to the "fulfillment of the

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[134] Interestingly, the Commissioner, who had earlier disavowed his power to order regionalization in the Englewood case, was Saul Cooperman; John Ellis became the Commissioner and it was he who recommended a regionalization study.

State's educational and desegregation policies in the public schools."[135] As the Court said earlier in Jenkins, "The history and vigor of our State's policy in favor of a thorough and efficient public school system are matched in its policy against racial discrimination and segregation in the public schools."[136]

Without the fulfillment of both policies, the disadvantaged students will be doubly disabled from functioning as citizens and as competitors in a multi-racial, multi-ethnic society. Regrettably, it is clear from the history of at least the past 20 years in New Jersey that neither of these policies has been fully implemented and that most of the same students have borne, and will continue to bear, the disastrous consequences.

In addition to finally remedying the direct deficits in the public schools, the State must compensate for the long-established discrimination in the world outside the schools--especially in higher education and in the marketplace, where there is great potential for breaking the cycle of disadvantage more expeditiously.

Remedying New Jersey's Educational Discrimination Toward Minority Students By Affirmative Action in Higher Education and Employment

In a number of its opinions, the New Jersey Supreme Court has indicated that actually providing minority students with the public education which they are guaranteed by the State Constitution, in theory, may enable them to function as citizens and to compete in the marketplace with their more advantaged peers. The converse of that

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[135] Jenkins, at 508; emphasis added.

[136] Id. at 495.

proposition--that without an adequate education minority students will be unable to compete in the marketplace--is more definitively stated by the Court. In other words, a "thorough and efficient" elementary and secondary education is essential, but not necessarily sufficient, to enable minority students to compete on equal terms for jobs and contracts.

The August 1991 study by Dr. Timothy Bates, Discrimination and The Capacity of New Jersey Area Minority and Women-Owned Businesses, makes that point strongly. In it, Dr. Bates indicates that the historic restrictions on minority access to adequate educational opportunities have had a profound effect on the ability of minority citizens to become successful self-employed business people. The progression is clear: inadequate elementary and secondary education, often even failure to achieve high school graduation, impedes access to higher education; lack of higher education credentials leads to lower personal incomes; lower personal incomes, and discriminatory practices, limit access to financial capital; the combination of lesser education credentials, lesser personal income and lesser access to financial capital contribute strongly to a much lower rate of minority self-employment.

This clearly supports the notion that, although improving public elementary and secondary educational opportunities is extremely important, in reality, a more comprehensive approach almost certainly will be required to achieve the constitutional and public policy ends to which New Jersey is committed.

In Booker, for example, the Court noted that, "when current attacks on housing and economic discrimination bear fruition, strict neighborhood school districting will present

no problem. But in the meantime the states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by."[137]

In Abbott II, the Court also recognized the inevitable connection between public education, and other public and private functions, in overcoming the socioeconomic disadvantages of many minority students. But, in that opinion the Court reversed the remedial sequence by indicating that, even if the educational objectives were achieved, more would likely have to be done: "[P]erhaps nothing short of substantial social and economic change affecting housing, employment, child care, taxation, welfare will make the difference for these students..."[138]

As this chapter has demonstrated, the State itself has contributed to the problems of these children by denying them equality of educational opportunity. Beyond that, the State has failed to address adequately the special needs of these children, which stem from a combination of societal and economic circumstances.[139] Viewed through the public educational prism, as the New Jersey Supreme Court did in Abbott, these special needs may require and justify special or compensatory educational responses. But the Court recognized that these responses well might not be adequate, by themselves, to achieve the constitutional objective of residents able to function effectively as citizens and

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[137] Booker, at 171.

[138] Abbott II, at 375.

[139] Indeed, the historic inequalities in educational opportunities are a major contributing factor to the social and economic disadvantages of most children residing in poor urban school districts.

to compete fully in the contemporary marketplace.

In fact, there are several logical, commonsense reasons why the public schools alone cannot bear the burden of achieving the constitutional goal. First, there is an extremely long lag time between the point at which the constitutionally required education actually is made available to students and the point at which they can demonstrate its impact upon their ability to function as citizens and as competitors in the labor market. Presumably, it would be the better part, if not all, of the full 13 year public education cycle. Second, the Supreme Court is hardly alone in its concern that even the best public schools simply may lack the capability to alter the socioeconomic circumstances of their disadvantaged students to such a degree that those students truly can compete with their more advantaged peers. Third, an important reality is that students must believe that there will be a tangible, achievable payoff for them if they take advantage of educational opportunities offered them. Given the experience of students in poor urban districts for decades, as a practical matter, the State of New Jersey will have to bear a heavy burden of persuasion.

All of this adds up to a clear message--anything short of a multi-faceted, long-term public program is likely to be insufficient to cure the constitutional harm and to achieve the constitutional objective. The New Jersey Supreme Court has recognized this; now the State and its Legislature must do something serious about it.

The question is where, in addition to the public elementary and secondary schools, should the State look for elements of the solution. An obvious answer is with those State-provided services and programs which can contribute most directly to upgrading the

socioeconomic status, and remedying the more immediate and disabling disadvantages, of the subject children. In Abbott II, the Court listed, illustratively, housing, employment, child care, taxation, welfare. The Court might have added to its list at least health care and nutrition.

However, it is necessary to start somewhere, and arguably the two state-provided services most directly related to the constitutional objective this chapter has been addressing are public higher education and public employment and contracting. Providing affirmative action in those areas could contribute substantially to the solution, but without the convulsive changes which might follow from fundamental alterations in the other areas listed by the court. After all, in both higher education, and employment and contracting there has been a relatively recent history of affirmative action. Moreover, the two are increasingly related to one another, and to elementary and secondary education.

In an increasingly technological world, higher education has become almost a prerequisite for successful entry into business and contracting. Because of the educational and socioeconomic deficits, and consequent sense of isolation and despair, afflicting many minority individuals, however, their participation in higher education is seriously impaired.[140] The State can directly address that barrier to the ability of

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[140] For example, the latest Biennial Report on Higher Education in New Jersey; 1988-89/1989-90 issued by the Board of Higher Education indicates that 9.3% of all students enrolled in New Jersey colleges and universities during Fall 1989 were black. This was slightly up from the prior three school years, but down from the 10% black enrollment figure in Fall 1978. The data for degrees conferred by New Jersey colleges and universities are worse. Of degree recipients for fiscal year 1989, and 6.1% were black. This was lower than comparable figures for the prior three years, and substantially lower than the 7.2% for fiscal year 1978.

minority people to compete equally in the marketplace by providing enhanced opportunities in higher education. One mechanism for doing so is through affirmative action admissions programs, which provide qualified minority and other socioeconomically disadvantaged applicants with access to higher education.

One model among many for such affirmative action in higher education is the Rutgers Law School Minority Student Program (MSP). The name of that program, a vestige of its origins almost 25 years ago, is now a misnomer. The program is open to black, Hispanic, Native American and Asian applicants, as well as to economically and educationally disadvantaged white applicants. Their applications are reviewed on a more personalized basis than the so-called regularly-admitted students, but the ultimate measure is their credentials and potential to succeed in law school.

Now constituting about 30% of each incoming class, students admitted under the MSP receive some additional orientation and tutorial support during the first year, but even during that year their performance is evaluated by exactly the same standards as all other students. After the first year, there is no special support provided.

The purpose of the program is two-fold: to provide students who have the clear potential to succeed in law school and as lawyers with an opportunity to do so even though the residue of their various disadvantages might preclude their admission based on "objective" indicators alone; and to contribute to a more diversified student body and legal profession.

The results of the program, by virtually every measure, are encouraging. The applicant pool has grown in number and quality as knowledge of the opportunity to

compete spreads. The performance of students admitted under the program has improved, and many individual students have achieved high levels of excellence and the most prestigious academic honors. For example, during the past two years students admitted to Rutgers Law School under the MSP have ranked academically at the very top of their classes, have been elected editors-in-chief of the Law Review, Computer and Technology Law Journal, and Women's Rights Law Reporter, and have been chosen through school competitions to represent the law school in regional and national moot court, mock trial, client counseling and negotiations competitions.

During the 22 year life of the Rutgers MSP almost 1,000 minority and disadvantaged white lawyers have been added to the profession. Many have already achieved prominence in large private law firms, corporations, public interest law projects, government service and on the bench. It has become increasingly clear that the program has made it possible for very well-qualified minority individuals to be able to compete for some of the most prestigious positions in the legal profession.

Although several legal challenges have been brought against the MSP, none has succeeded. In effect, the program has been found consistent with the constitutional standards established by the United States Supreme Court in University of California Regents v. Bakke.[141]

Extending programs such as the Rutgers Law School MSP to other New Jersey institutions of higher education, especially those providing training more directly related to the successful establishment of small business enterprises, is clearly justifiable under

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[141] Bakke, at 235.

the logic of the New Jersey Supreme Court's decisions.

Providing similar affirmative action opportunities for minority and disadvantaged white contractors seeking public contracts is a further step toward assuring real equality of opportunity in the marketplace. So long as such a program does not involve rigid quotas amounting to a "racial classification irrespective of qualification," New Jersey permits "affirmative action requirements [which] strongly encourage minority hiring."[142]

Affirmative action goals for minority hiring and contracting are consistent with New Jersey law. They also are justifiable under federal law, given the showing made that New Jersey has long discriminated against a large proportion of its minority citizens in the provision of public education, an explicit, constitutionally-mandated building block for the ability to compete, at all levels, in the contemporary marketplace.

Set-asides, too, may be justified as appropriately tailored to the violations found in New Jersey. As the New Jersey Supreme Court has set out with such force and passion, the educational violations here are of extraordinary depth and length. They have imposed upon generations of citizens, primarily minority, lives of isolation, hopelessness and degradation. They have created serious threats to the future well-being of the entire state.

The direct victims of this profound and longstanding discrimination are identifiable; they are those citizens, primarily minority, who have passed through and been scarred by the unconstitutional public education systems in New Jersey's poorer urban districts.

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[142] United Building & Construction Trades Council v. Camden, 88 N.J. 317, 335 (1982), distinguishing and quoting from Lige v. Town of Montclair, 72 N.J. 5, 22-23 (1976).

By such an approach, as part of a multi-faceted remedial program, New Jersey may at long last be able to actually rectify its long history of unconstitutional conduct.

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