

Office of Legislative Services Background Report Abbott Decisions

OLS Background Report No. 58

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**Date Prepared:
December 17, 2001 (Updated July 2006)**

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OLS Background Report On the New Jersey Supreme Court Abbott Decisions

INTRODUCTION

On February 5, 1981, the Education Law Center (ELC) filed a complaint in the Superior Court on behalf of 20 children attending public schools in the cities of Camden, East Orange, Irvington, and Jersey City challenging the State's system of financing public education under the "Public School Education Act of 1975," P.L.1975, c.212 (chapter 212). The plaintiffs contended that the State's education finance system was unconstitutional as applied, as it had caused significant educational expenditure disparities between poor urban and wealthy suburban school districts and that poorer urban districts were unable to adequately meet the educational needs of their students under the act. The trial court dismissed the complaint, holding that the plaintiffs had failed to exhaust the administrative remedies available through the Commissioner of Education. The Appellate Division reversed the trial court's decision, remanding the case for a plenary hearing on the plaintiffs' constitutional claims. The New Jersey Supreme Court granted the defendants' petition for certification. This would be the first in the Supreme Court's Abbott line of decisions.

This background report provides a brief overview of each of the Supreme Court's Abbott decisions, from Abbott I decided in 1985 to a Supreme Court order issued on May 22, 2006. These decisions were a continuation of the court's involvement during the 1970's in school finance reform litigation through the Robinson v. Cahill line of cases. In the Abbott decisions the Supreme Court continues to define the State's obligation pursuant to the thorough and efficient clause of the State constitution.

Abbott I

Abbott v. Burke, 100 N.J. 269 (1985)

Plaintiffs' claims should be considered first by the appropriate administrative agency rather than the courts.

The Supreme Court in Abbott I dealt with one narrow issue: what was the appropriate tribunal to consider the plaintiffs' constitutional challenge to the State's system of funding public education under chapter 212. Chapter 212 had been held facially constitutional under Robinson V.¹ The plaintiffs contended that the law, as applied, violated the thorough and efficient clause of

¹ Robinson v. Cahill, 69 N.J. 449 (1976).

the New Jersey Constitution² and both the State and federal equal protection clauses.³

The Supreme Court in Abbott I held that, prior to judicial consideration, the parties' claims should first be presented to an administrative tribunal in order to develop a record adequate for the complex issues involved. Because the Commissioner of Education was a defendant in the case, the court ruled that the commissioner was required to transfer the case for an initial hearing and fact-finding to an administrative law judge.

It is significant to note that while the court in Abbott I reiterated the constitutional mandate as it had developed through the Robinson line of cases,⁴ it added a new element of considerable relevance to the constitutional standard of the educational opportunity required under the thorough and efficient clause. The court in Abbott I found that the requirement of a thorough and efficient education to provide "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market, meant that poorer disadvantaged students must be given a chance to be able to compete with relatively advantaged students." Abbott I at 296, citations omitted. Where the court in Robinson V, in finding that chapter 212 was facially constitutional, seemed to have focused on whether the State was providing a minimum substantive level of educational opportunity, the Abbott I court seemed to favor a new concept of comparative equal educational opportunity.

Abbott v. Burke, No. EDU 5581-88 (OAL 1988)

After extensive hearings and other proceedings, the Administrative Law Judge (ALJ)

² The thorough and efficient clause of the State Constitution provides:

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. [Article VIII, Section IV, paragraph 1]

³ Article I, paragraphs 1 and 5 of the New Jersey Constitution and Amendment XIV of the United States Constitution.

⁴ See Robinson v. Cahill, 62 N.J. 473 (1973) (Robinson I) cert. denied, 414 U.S. 976 (1973); Robinson v. Cahill, 63 N.J. 196 (1973) (Robinson II) cert. denied, 414 U.S. 976 (1973); Robinson v. Cahill, 67 N.J. 35 (1975) (Robinson III); Robinson v. Cahill, 69 N.J. 133 (1975) (Robinson IV) cert. denied, 423 U.S. 913 (1975); Robinson v. Cahill, 69 N.J. 449 (1976) (Robinson V); Robinson v. Cahill, 70 N.J. 155 (1976) (Robinson VI).

issued a lengthy decision. The ALJ determined that the plaintiffs had proven that there were "unmet educational needs in poor urban districts and vast program and expenditure disparities between property rich suburban and property poor urban school districts." ALJ Decision at 12. The ALJ concluded that evidence of sizable disparities in educational input, such as course offerings, teacher staffing, and per pupil expenditures, were related to disparities in school district wealth; that a constitutionally mandated thorough and efficient education was not being provided by the plaintiffs' districts, and others; that the inequality of educational opportunity Statewide itself constituted a denial of a thorough and efficient education; that the failure was systemic; and that chapter 212 and its funding were unconstitutional. The Commissioner of Education rejected the ALJ's findings and concluded that chapter 212 was not unconstitutional; the State Board of Education affirmed the commissioner's decision in almost all respects.

Abbott II

Abbott v. Burke, 119 N.J. 287 (1990)

Chapter 212 found unconstitutional as applied to 28 poorer urban districts.

In Abbott II a unanimous Supreme Court held that chapter 212 violated the thorough and efficient clause of the State constitution and was unconstitutional as applied to the 28 poorer urban school districts in the State. The court defined the poorer urban districts as those districts which were both classified as urban districts by the Department of Education (DOE) and included by the department within District Factor Groups (DFGs) A or B (those with the lowest socioeconomic status)⁵ with the exception of Atlantic City (which was eliminated because of its high tax base).

The court found that although a thorough and efficient education is to be defined in terms of substantive educational content rather than spending, the expenditure disparity between the 28 poorer urban districts and the wealthy suburban districts was not irrelevant given the absence of a thorough and efficient education in the poorer urban districts. Abbott II at 316, 337. The court compared the quality of education delivered in the poorer urban districts with the education delivered in the more affluent DFG I & J districts and concluded that the poorer urban districts provided an inferior educational opportunity. Specifically, the court pointed to deficiencies

⁵ At that time the DOE divided the State's school districts into ten groups known as the District Factor Groups (DFGs) and designated them as DFG A through DFG J, with A being the group with the lowest socioeconomic status, and J the highest. Socioeconomic status was measured using the following seven factors: per capita income level; occupation level; education level; percent of residents below the poverty level; density (the average number of persons per household); urbanization (percent of district considered urban); and unemployment (percent of those in the work force who received some unemployment compensation). The DOE still classifies districts by DFGs, but the criteria have been somewhat revised.

within the poorer urban districts in educational inputs such as teacher/pupil ratios, teacher qualifications and experience and facilities. In addition, the court found wide disparities in the breadth of course offerings available in the poorer urban districts as opposed to the property rich districts. The court noted that many of the poorer urban districts had in effect become basic skills districts and stated that "these poorer districts offer curricula denuded not only of advanced academic courses but of virtually every subject that ties a child, particularly a child with academic problems, to school - - of art, music, drama, athletics, even, to a very substantial degree, of science and social studies." Abbott II at 364-365.

The court also considered the special needs of the students in the poorer urban districts - those needs that undercut the student's capacity to learn. The court found these needs to be vastly greater than any extra-educational needs of the students in the DFG I & J districts. The court concluded that in order to achieve the constitutional standard - to be able to function in the society entered by the relatively advantaged students - the poorer urban districts must provide educational offerings with elements over and above those found in the affluent suburban districts.

The court formulated a two-part remedy in Abbott II that responded both to the disparity in regular education funding and the special needs of students attending school in the poorer urban districts. The court ordered chapter 212 to be amended, or new legislation passed, that would assure that educational funding in the poorer urban districts was substantially equal to that of the wealthy suburban districts - those districts providing the kind of education that these students needed. The funding was required to approximate the average net expense budget of the DFGs I & J school districts. In addition the court ordered that the level of funding must be sufficient to provide for the special needs of the students in the poorer urban districts in order to address their extreme disadvantages. The court stated that it was up to the Legislature to determine how to meet the mandate, but, the remedy could not depend on the budgeting and taxing decisions of the local school boards and the funding mechanism had to be guaranteed and mandated by the State. The court also stated that the Legislature could, if it chose to do so, equalize per pupil expenditures for all districts at any level that it determined would achieve a thorough and efficient education. This level did not necessarily have to be the average of the DFG I & J districts. The court required the new funding mechanism to be in place legislatively for the 1991-1992 school year, but the court allowed for a phase-in period.

As to capital construction, the court found the record insufficient to fashion a remedy. It noted, however, that the lack of capital investment was great. The court stated that "if squarely presented to us with an adequate record of need and legislative failure, we would be obliged under the Constitution to consider the matter." Abbott II at 391.

Abbott III

Abbott v. Burke, 136 N.J. 444 (1994)

Quality Education Act of 1990 (QEA) held unconstitutional as applied to the 30 special needs districts (SNDs).

In response to the Abbott II decision, the QEA was enacted. The court found the statute unconstitutional because of its failure to assure parity of regular education expenditures between the SNDs⁶ and the more affluent districts.

The funding provisions of the QEA provided payments of foundation aid for current expense and capital outlay to SNDs in an amount essentially equal to the difference between each district's "maximum foundation budget" and its "local fair share." Local fair share was calculated in a manner designed to reflect a school district's fiscal capacity - a formula based primarily on the district's equalized property value and the aggregate income of the district's residents. Since the local fair share was determined by a fixed mathematical formula, the critical variable in determining foundation aid under the QEA was the maximum foundation budget. It was the maximum foundation budget which effectively controlled the amount of foundation aid a district received from the State.

The complex calculation of a school's maximum foundation budget began with a foundation amount per pupil determined by the Legislature. For the 1991-1992 school year that amount was established at \$6,640 for an elementary school student, \$7,304 for a middle school student and \$8,831 for a high school student. Multiplying the foundation amounts by a school district's enrollment determined the district's maximum foundation budget, or the amount necessary for regular education. In the SNDs these foundation amounts were increased by an additional weighting factor - the special needs weight. The weighting factor was set at 1.05 per student for the 1991-1992 school year with the statute authorizing a periodic adjustment of the weight by the Governor, subject to the disapproval of the Legislature. The legislative authorization to increase the special needs weight, which was never exercised, was the mechanism by which the QEA theoretically could have enabled the SNDs to increase their maximum foundation budgets and their foundation aid, in order to achieve parity with the richer suburban districts.

The court held that because under the provisions of the QEA the achievement of parity depended fundamentally on the discretionary action of the executive and legislative branches to increase the special needs weight, which in turn would increase the maximum foundation budget and the amount of foundation aid in the SNDs to the levels required for parity, the statute failed

⁶ The QEA established the category of "special needs districts." As defined in the law, the SNDs included all of the 28 poorer urban districts identified by the Supreme Court in Abbott II and two additional districts, Neptune Township and the City of Plainfield, for a total of 30 SNDs.

to guarantee adequate funding for the SNDs. The statute did not comply with the mandate of Abbott II that the required level of funding for the SNDs "cannot be allowed to depend on the ability of local school districts to tax...[and] must be guaranteed and mandated by the State..." Abbott II at 295.

The court also had concerns about the State's failure to adequately address the "special educational needs" of the SNDs. Abbott II had required funding for the "special educational needs" of the SNDs in addition to that necessary to achieve parity with the richer suburban districts. Although the QEA included a formula for calculating aid for programs for at-risk pupils, there had been no study conducted of the programs and services needed to aid at-risk students and funding under the QEA was not based on any study of the actual costs associated with providing services to these students. The court made it clear that children in the SNDs could not be expected to succeed unless the DOE and the commissioner identified and implemented the special supplemental programs and services that the children in these districts required.

The court was also concerned about the need for supervision of the uses of the additional funding provided to the SNDs. According to the court, no mechanism was in place to control, regulate or monitor the uses of the additional funding, despite the fact that in Abbott II the court had required the State to ensure that the uses of the additional funding were supervised and regulated in order to significantly increase the likelihood that the students in the SNDs would attain the constitutionally-prescribed quality of education to which they were entitled.

The court retained jurisdiction. It declined to direct any immediate, affirmative, remedial relief, in light of the substantial increase in State aid provided to the SNDs since Abbott II, compared to the wealthy suburban districts. According to the court, the increases were a constitutionally legitimate response by the legislative and executive branches to Abbott II. The court held that substantial equivalence of the SNDs and the wealthier districts in expenditures per pupil for regular education must be achieved by the 1997-1998 school year along with a provision for the special education needs of students in the SNDs. The court also stated that if a law assuring substantial equivalence - approximately 100% - and providing, in addition, for the special educational needs was not adopted by September 1996, then the court would consider applications for relief.

Abbott IV

Abbott v. Burke, 149 N.J. 145 (1997)

*Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA) held unconstitutional as applied to the Abbott districts.*⁷

CEIFA was the legislative response to Abbott III. Pursuant to CEIFA, specific substantive standards were provided that defined the content of a constitutionally sufficient education. The substantive requirements were specified by the core curriculum content standards. The content standards were intended to implement the thoroughness component of the constitutionally mandated thorough and efficient education. The court held the content standards were consistent with the education clause of the constitution.

The court, however, found CEIFA unconstitutional as applied to the Abbott districts because the statute failed to guarantee sufficient funds to enable students in those districts to achieve the requisite content standards. The funding provisions in the statute purported to implement the efficiency component of the constitutionally mandated thorough and efficient education. The statute set forth a per pupil amount, the T & E amount, deemed necessary to achieve the content standards. Expenditures in excess of the prescribed T & E amount were deemed to be unnecessary to achieve a thorough and efficient education. The funding scheme of CEIFA was derived from a hypothetical school district that served as the model for all school districts. Using this model the DOE concluded that it would cost \$6,720, plus or minus \$336, to provide the constitutionally required educational opportunity to every elementary school pupil in the State in the 1997-1998 school year.

The court held that the efficiency standards undergirding the statute's funding provisions were derived from a model district that had few, if any, characteristics of any of the State's successful districts. The court rejected the State's argument that the DFG I & J districts should not be the measure of the amount that should be spent on a constitutionally adequate education because those districts had notable inefficiencies in their spending practices. Any expenditure over the T & E amount, according to the State's position, was an expenditure that was inefficient and unnecessary for a thorough and efficient education. The court stated that neither the statute itself, the record in the case, empirical evidence, common experience nor intuition supported the State's position. The court also found that the model district was not based on the characteristics of the Abbott districts. None of the Abbott districts conformed with the model district and CEIFA did not provide the funding necessary to enable them to achieve conformity. According to the court "[t]he model district ...assumes, as the basis for its resource allocations and cost projections, conditions that do not, and simply cannot, exist in these failing districts." Abbott IV at 172.

⁷ CEIFA, as originally enacted, excluded Plainfield and Neptune from its definition of an Abbott district. An Abbott district was defined as one of the 28 poorer urban districts identified by the court in Abbott II.

The court also held that although the statute purported to address the special educational needs of the Abbott districts, CEIFA did not provide for the remediation that would be necessary to overcome the constitutional deprivation that had previously been identified by the court. CEIFA attempted to provide for the deprivation through two programs: demonstrably effective program aid (DEPA) and early childhood program aid (ECPA). All of the Abbott districts qualified under CEIFA for these aid categories. The court found fault with the fact that the amount of aid provided pursuant to these programs was not based on any actual study of the needs of these students or the costs of supplying the necessary programs to address those needs. Under DEPA funds were provided to districts in which certain schools had the required concentration of low-income pupils. The funds could be used for a list of programs including class size reduction programs, parent education programs and job training programs. None of the programs were required to be implemented and there was no evidence presented that the funds provided could cover the cost of the programs.

Funding for ECPA was distributed in a manner similar to DEPA - funds were provided to districts with a specific concentration of low-income pupils. ECPA was intended to provide for full-day kindergarten and preschool classes and other childhood programs and services. Under CEIFA districts receiving ECPA were required to establish preschool and full-day kindergarten for all four and five year olds by the 2001-2002 school year. The court found this implementation date to be a glaring weakness in the statute, noting that if this date was used, four more classes of disadvantaged children in the Abbott districts would miss out on programs that the court considered essential to future educational success. In addition, the court determined that the per pupil amount provided under ECPA was not sufficient to enable the Abbott districts to provide the essential early childhood programs.

The court also held that the State had failed to address one of the most significant problems facing the Abbott districts -- the "dilapidated, unsafe, and overcrowded facilities." Abbott IV at 186. The court held that CEIFA's failure to address the facilities needs of the Abbott districts was of constitutional significance. The court held that it was the State's obligation to provide facilities for students in the Abbott districts in order to enable those students to achieve the substantive standards that had been developed to define a thorough and efficient education. The court stated that the quality of the facilities could not depend on the Abbott districts' willingness or ability to raise taxes or to incur debt.

The court in Abbott IV mandated an interim remedy - increased funding to assure parity in per pupil expenditures for regular education between each Abbott district and the budgeted average expenditures of the DFG I & J districts by the commencement of the 1997-1998 school year. The increased funding was required to be accompanied by firm controls that would ensure that it was spent efficiently and effectively. The court in explaining the reasons for using the DFG I & J districts stated:

The DFG I & J districts are achieving and undoubtedly will continue to achieve at high levels, and it is thus eminently reasonable that the Court continue to focus on their recipe for success until experience under the new standards dictates otherwise. Abbott IV at 176.

The court remanded the case to the Superior Court, Chancery Division, to determine what judicial relief was necessary in order to address the need for supplemental programs and facilities improvements in the Abbott districts. The court authorized the Superior Court to direct the Commissioner of Education

to initiate a study and to prepare a report with specific findings and recommendations covering the special needs that must be addressed to assure a thorough and efficient education to the students in the SNDs. That report shall identify the additional needs of those students, specify the programs required to address those needs, determine the costs associated with each of the required programs, and set forth the Commissioner's plan for implementation of the needed programs. In addition, the Superior Court shall direct the Commissioner to consider the educational capital and facility needs of the SNDs and to determine what actions must be initiated and undertaken by the State to identify and meet those needs. Abbott IV at 199-200 (footnote omitted).

The court authorized the Superior Court to appoint a Special Master to assist in the proceedings and in the Superior Court's review of the recommendations of the parties.

Abbott V

Abbott v. Burke, 153 N.J. 480 (1998)

Commissioner of Education is directed to implement full-day kindergarten and half-day preschool programs for 3 and 4-year-olds in the Abbott districts and to secure funds to cover cost of remediating identified life-cycle and infrastructure deficiencies in Abbott school buildings as well as the cost of providing the space necessary to house Abbott students adequately.

In accordance with Abbott IV Judge Michael Patrick King, who was temporarily assigned to the Chancery Division of the Superior Court, conducted the remand proceeding and appointed a Special Master. The ELC and the DOE submitted reports on and recommendations concerning supplemental programs, facilities needs, and implementation and Judge King conducted hearings on the proposals. A report by the Special Master was also submitted that focused on the special needs programs. Based on the different proposals put forth by the parties,

Judge King recommended that certain programs be implemented. The Supreme Court in Abbott V addressed the recommendations and other proposed remedial measures.

The court in Abbott V adopted Judge King's recommendations that the State require all Abbott districts to adopt some version of a proven, effective whole school reform model, with Success for All - Roots and Wings being the presumptive elementary school model. Whole school reform was the State's response to the direction given by the court in Abbott IV to identify supplemental programs in order to redress the disadvantages of children in the Abbott districts. The whole school reform approach integrates supplemental programs with the regular education format. Instead of simply adding new programs, the whole school reform fundamentally restructures the core curriculum and methods of instruction to ensure that students achieve a constitutionally mandated education. Whole school reform focuses on the individual school rather than the school district. The court directed that whole school reform be implemented according to the schedule proposed by the Commissioner of Education. The court also stated that Success for All must include the essential elements identified by the commissioner, such as the use of zero-based budgeting in which all of the school's funding streams are combined and the aggregate amount is used as the basis for the entire school budget. The court also required that the commissioner utilize a comprehensive formal evaluation program, to verify that whole school reform was being implemented successfully and was resulting in the requisite level of improvement in the Abbott districts.

The court also affirmed Judge King's recommendation that full-day kindergarten be implemented immediately in the Abbott districts. However, if the district could not obtain adequate classroom space or instructional staff immediately, the district was permitted by the court to commence the program in the 1999-2000 school year. The State was required to provide or secure the funds and resources essential for the implementation of the full-day kindergarten program for the Abbott districts.

The court in Abbott V directed the commissioner to use his powers under CEIFA to require all Abbott districts to implement half-day preschool programs for three- and four-year-olds as expeditiously as possible. The court stated that if an Abbott school was able to obtain the necessary space, supplies, staff and transportation to implement the preschool programs for the 1998-1999 school year, the State should supply them with the funding necessary to do so. The court required the commissioner to ensure that all other Abbott schools have the resources and additional funds that are necessary to implement preschool programs by the start of the 1999-2000 school year. The court, in mandating the preschool program, authorized cooperation with, or the use of, existing early childhood and day-care programs in the community.

In Abbott V several supplemental programs were mandated that were targeted to overcoming the disadvantages that prevent middle and high school students in the Abbott districts from achieving a thorough and efficient education. The court directed the commissioner

to provide a community services coordinator in every middle and secondary school to identify student need and arrange for community-based providers to furnish essential health and social services. Because of the acute needs of the Abbott districts, however, individual schools and districts were permitted, based on demonstrated need, to request and receive resources necessary to enable them to provide on-site social services that either were not available within the community or could not effectively and efficiently be provided off-site. The commissioner had a corresponding duty to authorize requested school-based social service programs for which there was a demonstrated need and to provide or secure the necessary funding.

Security was another supplemental program addressed by the court. The court noted that security was a critically important factor in the provision of a thorough and efficient education and held that individual Abbott schools or districts had the right to request supplemental programs for security and that the commissioner was required to authorize the requested programs that were based on demonstrated need and secure or provide the necessary funding. As to other supplemental programs, the court directed the commissioner to implement technology programs, alternative schools or comparable education programs, accountability programs, school-to-work and college transition programs in secondary schools, at the request of an Abbott school or district, to satisfy the school's or district's constitutional obligation to provide a thorough and efficient education. The court also directed the commissioner to provide and secure funding for requested summer-school, after-school and school nutrition programs for which there was a demonstrated need. The court made clear that if an Abbott school demonstrated the need for programs beyond those recommended by the commissioner, including programs in, or facilities for, art, music, and special education, then the commissioner must approve the requests and, when necessary, seek appropriations to ensure the funding and resources necessary for their implementation.

The court held in Abbott V that the DOE had substantially complied with its mandate in Abbott IV in regard to the State's constitutional obligation to provide adequate school facilities. The DOE had undertaken a detailed assessment of the facilities needs of the Abbott districts and provided recommendations concerning how the State should address the identified needs. The DOE also recommended an appropriate funding mechanism. Using the DOE's study and proposals as the basis of its remedy in this area, the court directed that the Five-Year Facilities Management Plans and district enrollment projections, which each district was required to provide to the department, be completed by January, 1999. The court accepted the DOE's educational adequacy standards, which were designed to ensure that every school had the instructional areas sufficient to enable the children to meet the core curriculum content standards. The court stated, however, that every Abbott school or district was authorized to demonstrate the need for additional, specialized space and if that need was demonstrated, the commissioner must secure or provide the necessary funds. As to the State funding of school facilities in the Abbott districts, the court stated that

any funding formula that does not fund the complete cost of remediating the infrastructure and life cycle deficiencies that have been identified in the Abbott districts or that does not fully fund the construction of any new classrooms needed to correct capacity deficiencies will not comport with the State's constitutional mandate to provide facilities adequate to ensure a thorough and efficient education. Abbott V at 524.

The court ordered that the architectural blueprints for the required school facilities be completed by the fall of 1999 and that construction begin by the spring of 2000.

Abbott VI

Abbott v. Burke, 163 N.J. 95 (**March 2000**)

Details the parameters of the quality preschool education which was mandated by the court in Abbott V.

The court in Abbott VI addressed claims that the commissioner had repudiated his promise in Abbott V to provide quality preschool education for the children in the Abbott districts. The court found that the manner in which the DOE had carried out the preschool mandate of Abbott V was not consistent with the commissioner's representations to the remand court in that case. Therefore, the court deemed it appropriate in Abbott VI for it to provide further guidance for the implementation of preschool programs.

The court held that an essential component of a quality preschool program was substantive educational guidance provided by the DOE. The court ordered that the department adopt standards for these programs by April 17, 2000, in order to allow districts to prepare for the 2000-2001 school year. Another area for concern involved teacher certification standards. As a practical matter, given the time constraints within which the districts were required to develop half-day programs for 3- and 4-year-olds, Abbott V recognized that cooperation with, or use of, existing early childhood and day-care programs in the community would be both necessary and appropriate. Department of Human Services (DHS) licensed day care programs, however, do not require certified teachers. The DOE had promulgated regulations, that according to the court, permitted day-care employees too much time to become fully qualified teachers. As a consequence a two-tiered system would be set up - district-run programs with qualified teachers and DHS-licensed providers without them. The court held that existing teachers in DHS-licensed providers who had experience but otherwise lacked academic credentials should be given four years to obtain certification and should be evaluated each year to determine whether they would be retained. New teachers were required to be college graduates and could be given until September, 2001, to obtain the proposed preschool-3 certificate. The DOE was also directed to develop clear standards for providing schools with

waivers if certified teachers could not be found. The court also reaffirmed the requirement of one certified teacher for every fifteen preschool children which was assumed in the Abbott V decision.

The court in Abbott VI also held that: contracts between the school districts and the community providers must spell out the specific responsibilities of the parties to ensure quality preschool programs; children in Head Start programs can be excluded from district enrollment projections only if those programs meet DOE standards; and appointing a Standing Master was unnecessary.

Abbott VII

Abbott v. Burke, 164 N.J. 84 (May 2000)

State is required to fund all costs of necessary facilities remediation and construction in the Abbott districts and the State may remove an Abbott district from classification if it no longer possesses the requisite characteristics.

The Speaker of the General Assembly motioned to intervene and sought clarification of the Abbott V decision. Specifically, the Speaker asked whether Abbott V required the State to provide the full costs of school construction in the Abbott districts or whether, instead, the Legislature could require a district to contribute a fair share of local aid based on the district's ability to pay. The court held that its directive in Abbott V was clear: "The State is required to fund all of the costs of necessary facilities remediation and construction in the Abbott districts." Abbott VII at 88.

The Speaker also asked whether the complete costs of facilities funding had to be provided to Abbott districts that had changed since the commencement of the litigation. The Speaker used as an example the City of Hoboken which had become property and income rich with wealth ratios stronger than some of the wealthiest towns in the State. The court held that "[w]hen a district no longer possesses the requisite characteristics for Abbott district status, the Legislature, the State Board and the Commissioner may take appropriate action in respect of that district." Abbott VII at 90 (citations omitted).

Abbott v. Burke, No. M 1131(N.J. Oct. 22, 2001) (October Order)

On September 25, 2001 the court heard oral arguments on a motion filed by the ELC alleging that the DOE had not carried out its responsibility to review and approve preschool program and budget proposals in a timely manner. The ELC asked the court for the appointment of a Standing Master to oversee and supervise the implementation of the Abbott preschool programs. On October 22, 2001, the Supreme Court issued an order in advance of its opinion on the matter. The court declined to appoint a Standing Master in light of the court's firm

commitment to use the administrative process established by the Legislature for Executive Branch decision-making. The court did find, however, that the DOE had not completed in a timely way its review of certain preschool program and budget proposals. The court ordered that the submission, review, and appeal of Abbott district preschool program and budget proposals were to be carried out pursuant to a schedule set forth by the court that would ensure final dispositions were issued in time for the 2002-2003 school year.

Abbott VIII

Abbott v. Burke, 170 N.J. 537 (Feb. 2002)

Amplification of the court's October Order and further clarification of its direction in Abbott VI regarding preschool programs.

In Abbott VIII, the court elaborated on its decision in its October Order to deny the ELC's request for the appointment of a Standing Master. The court, although it remained concerned about the DOE's reluctance to deal with certain difficult preschool issues in a timely manner, found the appointment of a Standing Master too extreme a remedy. The court could not justify a new and superseding role for the court given the progress made by the DOE and the department's ongoing effort to fulfill the Abbott mandates.

The court stated that in addition to establishing a schedule for the submission, review, and appeal of Abbott preschool program and budget proposals, the October Order also required cooperation between the DOE and the Abbott districts which the court considered essential for the implementation of a successful preschool program. The court in Abbott VIII stated that it was encouraged by the collaborative effort between the parties that had recently been demonstrated. The court had granted two applications by the plaintiffs to modify the schedule established by the court in its October Order, the first was approved on December 21, 2001 and the second on February 11, 2002. The modifications provided extensions for certain deadlines, in part to facilitate decision-making by the incoming administration.

In Abbott VIII, the plaintiffs argued that the department had not provided "the guidance necessary for districts and community providers to implement uniform, high-quality preschool education in the Abbott districts." Abbott VIII at 548. The DOE had adopted an outline of the goals of preschool education, the "Early Childhood Program Expectations: Standards of Quality" (Expectations), which are similar to the Core Curriculum Content Standards for grades K-12, and required Abbott districts to integrate them into their preschool programs. The department was in the process of developing the "Early Childhood Education Curriculum Framework" (Framework), a curriculum strategy intended to provide substantive guidance to aid in the realization of the Expectations. The court set an April 30, 2002 date for the DOE to complete a final draft of the Framework in order to ensure the availability of detailed curricula for use in the 2002-2003 school year.

Another issue the court discussed was one that concerned the court in Abbott VI - the "need for community outreach to inform parents about the availability of preschool for three- and four- year old children in the Abbott districts." Abbott VI at 119. The court in Abbott VIII stated that "[i]n the end, it is the outreach effort that is critical to the success of the Abbott programs." Abbott VIII at 551. The court required the DOE to work with the Abbott districts to develop corrective action plans when the districts do not meet enrollment goals. In addition, the DOE was required to review with these districts the effectiveness of the corrective action plans during the implementation phase.

The utilization and funding of community providers were also addressed by the court. The plaintiffs alleged that the DOE had willfully violated court mandates by excluding Head Start programs from district preschool plans and by insufficiently funding community providers generally. In Abbott VI the court approved the use of community providers, but required that those providers meet the stringent requirements imposed on district- run programs. In Abbott VIII the court required the DOE to provide reasonable supplemental funding so that Head Start and other appropriate community providers could meet the more demanding State preschool requirements. The court also required districts to use Head Start providers "unless they are not able and willing to comply with the Abbott preschool standards, or unless the cost of doing so is demonstrably more expensive than other high-quality alternatives." Abbott VIII at 555.

Qualified, certified teachers were an essential component of adequate State funding for preschool programs according to the court in Abbott VIII. The court required the DOE to provide additional funding for teacher salaries if the community provider could demonstrate an inability to retain qualified staff due to salary parity problems. Head Start and other community providers had complained about certified staff fleeing to district-run programs, lured by the higher compensation packages offered by those programs. The court also found reasonable an administrative code provision that "grandfathered" certified elementary school teachers with two years preschool experience by waiving the requirement of Abbott VI that they obtain an instructional certificate with a P-3 endorsement in order to be hired as teachers in Abbott preschool programs. The court was confident that the grandfathering would not compromise the education of any preschool pupil, and was an appropriate response to the teacher shortage which affected both community providers and district-run preschools.

Funding issues continue to be a concern of the court, as they have been from the start of the litigation. In Abbott VIII the plaintiffs complained that the DOE had "neither provided sufficient budgetary guidance to the district, nor allocated funding based on actual need." Abbott VIII at 556. The court found that the districts, with regulatory guidance from the DOE, must develop and articulate budgetary requests with specificity and that the DOE must respond to those requests with an appropriate explanation regarding the funding it was providing. The court held that the DOE must base funding decisions not on "arbitrary, predetermined per-student

amounts, but, rather, on a record containing funding allocations developed after a thorough assessment of actual needs." Abbott VIII at 559.

The issue of facilities was also discussed briefly by the court. The plaintiffs' claim was that the DOE had failed to provide preschool facilities that were safe and adequate. The court on the record before it could not determine the full extent of the facilities problem. It noted, however, that by conducting outreach initiatives for preschool programs, the districts may experience increased enrollment which could cause some districts to have insufficient classroom space for the children who enroll. The court suggested that Abbott districts that anticipated increased enrollment have in place a contingency facilities plan reviewed and approved by the department.

The court concluded by observing that it was acutely aware of the constitutional imperative that undergirded the Abbott line of decisions, and of "the vulnerability of our children in the face of Legislative and Executive Branch inaction." Abbott VIII at 562. The court was unwilling, however, to step in and run the school system. "Only when no other remedy remains should the courts consider the exercise of day-to-day control over the Abbott reform effort." Abbott VIII at 562.

Abbott IX

Abbott v. Burke, 172 N.J. 294 (June 11, 2002)

DOE is permitted, for 2002-2003 school year, to limit funding for supplemental Abbott aid to 2001-2002 levels on a preliminary basis and suspend some remedial measures ordered pursuant to Abbott IV and Abbott V.

The Attorney General on behalf of the DOE filed a motion, with the consent of the ELC, for a one-year relaxation of some of the remedies provided for in Abbott IV and Abbott V during the 2002-2003 school year. It was argued that this request was based, in part, on the State's budget crisis. In addition, the DOE had concerns about the implementation of the Abbott IV and Abbott V remedial measures. The DOE in its submission to the court stated that it was committed, with the ELC and under the auspices of the Abbott Implementation and Compliance Coordinating Council, to making significant regulatory revisions to assure full, effective, and timely implementation of the Abbott IV and Abbott V remedial measures. The DOE represented to the court that "parity" funding would be maintained, full-day kindergarten and half-day preschool programs for three- and four-year olds would be maintained and enhanced, and the facilities improvement program for Abbott districts would be unaffected by the application.

The court ordered that the DOE could presumptively and preliminarily establish districts' supplemental funding for 2002-2003 at the 2001-2002 level, but the court denied the DOE's request for authorization to preclude any district appeals seeking supplemental funding for 2002-

2003 in excess of that funding level. The court stated that it was unwilling to prejudge an appeal by an Abbott district seeking a higher level of supplemental funding. The DOE was, however, permitted to impose educationally-appropriate limits on the categories for which needs-based funding requests could be submitted by the districts.

The court granted the DOE's request to allow districts flexibility for one year to eliminate, reduce, or limit growth of certain whole school reform enhancements, to eliminate positions and make staffing modifications in various needs-based programs and to make educationally appropriate decisions about retention of certain positions. In addition the court permitted the DOE to suspend for one year the regulatory requirement for middle schools and high schools to implement whole school reform models. The court also permitted the DOE to suspend for one year a formal evaluation of whole school reform.

Abbott X (Mediation Agreement Order)

Abbott v. Burke, 177 N.J. 578 (June 24, 2003)

Supreme Court accepts agreement reached by DOE and plaintiffs regarding improvements to implementation of whole school reform and supplemental programs.

The Attorney General on behalf of the DOE filed a motion for modification of the decision in Abbott V and the plaintiffs filed cross motions. The court ordered mediation and agreements were reached on all issues except the DOE's application to extend by one additional year the one-year relaxations of remedies previously granted in Abbott IX. The court approved the agreements which concerned improvements to implementation of whole school reform and supplemental programs. The court in accepting the agreements ordered: 1) that every Abbott elementary school must continue to implement their whole school reform model as provided in Abbott V; 2) "low performing" elementary schools must undergo a review and planning process to determine strategies and objectives for improving student achievement, ways to implement those strategies and objectives, and the responsibilities of the various individuals and entities involved; 3) "high performing" elementary schools may have more flexibility in establishing whole school reform programs; 4) a working group must be established to develop protocols and guidance for a program of whole school reform in Abbott district middle and high schools and the program itself must be in place for the 2004-2005 school year; 5) every Abbott school must continue to implement supplemental programs and DOE regulations will be developed to guide school and district assessment, planning, and implementation of needs-driven supplemental programs; 6) DOE will not seek to modify or limit the right of Abbott districts to request supplemental funding for all demonstrably needed programs, services and positions and to appeal any denial of such requests, as provided for in Abbott V, for the 2004-2005 school year and thereafter; 7) the Commissioner of Education must establish an Abbott Rulemaking Committee to engage in cooperative rulemaking to develop consensus regulations implementing the Abbott decisions; 8) the parties must support the inclusion of language in the appropriations

act permitting the Commissioner of Education to adopt Abbott regulations effective on filing with the Office of Administrative Law; 9) an expedited process for reviewing preschool budgets must be implemented; and 10) a working group must be formed to recommend the structure, content, scale and duration of a prospective evaluation of the effectiveness of programs and reforms in improving student achievements in the Abbott districts.

Abbott XI (Maintenance Budget Order)

Abbott v. Burke, 177 N.J. 596 (July 23, 2003)

Department of Education is permitted to treat the 2003-2004 school fiscal year as a maintenance year for purposes of calculating Additional Abbott v. Burke State Aid (supplemental funding) for the Abbott districts.

Under the Abbott X court order approving the mediated agreement, the court set oral argument for July 10, 2003 on the issue on which the parties did not reach accord – the DOE’s application to extend by one additional year the one-year relaxation of remedies previously granted in Abbott IX. On July 23, 2003 the court issued an order requiring the Statewide aggregate amount of Additional Abbott v. Burke State Aid for 2003-2004 to be presumptively calculated as the total amount of Additional Abbott v. Burke State Aid approved for the Abbott districts for fiscal year 2002-2003, subject to adjustment as required for a maintenance budget. A maintenance budget meant that the district would be funded at a level such that the district could implement current approved programs, services, and positions and would include documented increases in non-discretionary expenditures, such as increases in contracted salaries, health benefits, and special education tuition.

In addition, the DOE was required to promulgate an emergency regulation establishing the standard for evaluating the effectiveness and efficiency of districts’ non-instructional programs, which were defined as office/administrative expenditures and programs, positions, services and/or expenditures that are not school based or directly serving students. To the extent monies were deleted by the DOE in the districts’ non-instructional programs based on the effective and efficient standard, those monies were made available to the Abbott districts based on applications by the districts for aid for demonstrably needed programs or services.⁸

Abbott XII

⁸ Abbott XI was clarified by the court in Asbury Park Board of Education v. Department of Education, 180 N.J. 109 (March 18, 2004). In this case the Supreme Court ordered the DOE to provide additional funding to 20 Abbott districts because the department had set the final maintenance budget figures for 2003-2004 based on actual 2002-2003 expenditures by the districts, rather than the districts’ 2002-2003 approved budgets.

Abbott v. Burke, 181 N.J. 311 (June 7, 2004)

Limited extension and modification of September 2004 deadline imposed in Abbott VI for DOE certification of preschool teachers at Department of Human Services-licensed community provider preschools and federally-funded Head Start programs.

The DOE applied to the Supreme Court for a limited modification of its judgment in Abbott VI. The DOE sought a relaxation of the September 2004 deadline imposed for certification of preschool teachers at Department of Human Services-licensed community provider preschools and federally-funded Head Start programs whose programs were under contract with Abbott districts. The court granted the DOE's application in light of the agreement of the parties that a relaxation of the Abbott VI deadline was necessary and appropriate. The court ordered that non-certified preschool teachers at DHS-licensed providers may seek a waiver of the mandate and obtain the required DOE certification by September 2006 provided that they: have 30 or fewer credits left to complete a bachelor's degree; make steady progress toward obtaining their bachelor's degree; remain in good academic standing until obtaining a bachelor's degree; and provide the DOE with letters of support from the employer and the Abbott district in which the teacher serves. In the case of a non-certified Head Start teacher, that person could seek a waiver of the mandate and obtain the DOE certification within 4 years of the date when the teacher's program first contracted with an Abbott district to include the teacher's classroom, provided the same four criteria are met.

Bd of Ed of the City of Millville v. DOE, 183 N.J. 264 (May 19, 2005)

Bd of Ed of the City of Passaic v. DOE, 183 N.J. 281 (May 19, 2005)

Although not technically Abbott decisions, these two cases revisit the State's obligation in the context of funding decisions relating to preschool programs. In Bd of Ed of the City of Millville four Abbott districts raised the question of whether the State was legally obligated to fund through State appropriations the districts' preschool programs for the 2003-2004 school year. The DOE had approved the early childhood budgets submitted by the districts for 2003-2004 but the districts were later informed that they would receive less than the entire approved amount from the State. The court restated its holding in Abbott V and Abbott VI that the State must ensure that Abbott districts had sufficient resources to provide quality preschool programs for three and four-year olds; however, the DOE was permitted to require the districts to reallocate monies from other district budget accounts to make up preschool program shortfalls. These reallocated monies were required to be replaced by the DOE through supplemental funding unless the department could demonstrate that additional monies were unnecessary because the district had sufficient resources to cover all of its programming needs.

In Bd of Ed of the City of Passaic the Abbott district challenged a reduction late in the school year of State preschool aid based on a per-pupil methodology (not one calibrated with

program costs). A mid-school year audit in early 2003 had revealed that actual preschool enrollment was less than the projected enrollment. The DOE reduced the district's previously awarded preschool aid using a per-pupil calculation to establish the revised amount. The district argued that when DOE recaptured the preschool monies based on the per-pupil calculation the district suffered a deficit because certain fixed costs were not reduced by the lower enrollments. As a result, the district contended that the preschool funding fell below actual need. The court held that adjustments to State preschool aid that were not calibrated with program costs could not be made late in the school year unless the DOE provided a meaningful opportunity for the district to present information related to actual costs and the adjustment was then realigned with those actual costs.

Abbott XIII

Abbott v. Burke, 185 N.J. 612 (December 19, 2005)

Following a suspension of the school construction program due to lack of funds, the Supreme Court orders the DOE to submit its statutorily-required annual report by February 15, 2006 which will include estimates of future costs on school projects awaiting action by the SCC.

The plaintiffs alleged violations of the court's mandate in Abbott V and Abbott VII and requested a remedial order from the court in respect to funding for school construction in the Abbott districts. In 2000 the Legislature enacted the "Educational Facilities Construction and Financing Act," (EFCFA), to implement the school facilities mandates of Abbott V and Abbott VII. Under the EFCFA the State issued \$6 billion in bonds for school facilities projects in the Abbott districts. In July 2005 the Schools Construction Corporation (SCC) announced that only \$1.4 billion of the original \$6 billion remained and that work on all but 59 school facilities projects had been indefinitely postponed due to insufficient funds. The parties stipulated that, as of July 2005, 100 projects had been approved by the DOE and were under design by the SCC, 97 projects had been approved by the DOE and had some preliminary pre-development work completed, and 134 projects had been approved by the DOE and were awaiting predevelopment work by the SCC.

The court acknowledged that the State had made a substantial effort to improve school facilities conditions in the Abbott districts, but that significant deficiencies in this area persisted and were likely to worsen if there were further delays in addressing the conditions of the schools in the Abbott districts. The court ordered: 1) the DOE to provide its statutorily-required annual report by February 15, 2006, which would include estimates for the school facilities projects that were identified in the 2000-2005 Long Range Facilities Plans submitted by the districts and had been approved by the DOE and submitted to the SCC for development; 2) the districts' 2005-2010 Long Range Facilities Plans to be submitted by January 15, 2006; and 3) the DOE to submit its annual report each year after 2006 no later than August 1st, to ensure a predictable and uniform manner by which all parties will be provided the requisite information needed to assess the progress of the school facilities construction and the need for further appropriations.

Supreme Court Order

Abbott v. Burke, No. M-1110/1184/1205 September Term 2005, 42,170 (**May 9, 2006**)
Supreme Court freezes State aid to Abbott districts, but also gives the districts a right to appeal inadequate funding for demonstrably needed programs.

The Attorney General on behalf of the DOE filed a motion seeking authorization to: keep FY2007 State aid to Abbott districts “flat” at FY2006 levels; preclude Abbott district from requesting additional Educational Opportunity Aid⁹ for FY2007; preclude Abbott districts from appealing DOE budgetary decisions regarding supplemental funding; and require in eight Abbott districts (Asbury Park, Garfield, Jersey City, Long Branch, Neptune, Newark, New Brunswick, and Perth Amboy) whose general tax levy is below 110% of the State equalized tax rate, an increase in their tax rate to 110%, limited to a \$125 increase on the average household’s tax liability.

The court ordered: the Abbott districts to resubmit their 2006-2007 budgets to the DOE consistent with the revenue sources set forth in the Governor’s proposed budget (“flat” funding) and as reflected in their FY2007 State aid notices (which included a decrease in State aid for the eight districts mentioned above); and the DOE to provide the Abbott districts with a right to appeal inadequate funding for demonstrably needed Abbott programs.

Supreme Court Order

Abbott v. Burke, No. M-1336 September Term 2005, 42,170 (**May 22, 2006**)
Clarification by Supreme Court of May 9, 2006 order.

Sixteen districts sought clarification of the court’s order of May 9, 2006. In response, the Supreme Court orders: the DOE to issue its budget decision no more than 14 days from the later of May 31, 2006, or the date it receives a district’s budget; time frames for district budget appeals as set forth in regulation remain the same; DOE must apply Educational Opportunity Aid monies that become available as a result of increased tax levies in designated districts to support funding for new and renovated school facilities opening in FY2007; and the State must fund all

⁹ In FY2005 the new aid category entitled Education Opportunity Aid was created by combining Abbott v. Burke Parity Remedy Aid, the aid to equalize regular education spending between the Abbott districts and the “I” and “J” districts, and Additional Abbott v. Burke State Aid, the aid to fund programs and services required in individual Abbott districts based on particularized needs.

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new and renovated facilities that come “online” in FY2007 and districts may appeal, if necessary funding is not made available.

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