NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1989 to December 31, 1989

VOLUME 1

PAGES 1-778

Saul Cooperman
Commissioner of Education

NEW JERSEY

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1989 NEW JERSEY SCHOOL LAW DECISIONS

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5695-88
AGENCY DKT. NO. 209-7/88

D. J. and D. J. on behalf
of their son M. J.,

Petitioners,

v.

BOARD OF EDUCATION OF THE
BOROUGH OF MENDHAM, Morris
County,

Respondent.

D. J. and D. J., petitioners, pro se

Ellen S. Bass, Esq., for respondent
(Rand, Algeier, Tosti, Woodruff & Frieze, attorneys)

Record Closed: November 23, 1988 Decided: November 28, 1988

BEFORE: WARD R. YOUNG, ALJ:

Petitioners, parents of a pupil attending the Mendham Borough public schools, seek a declaratory judgment invalidating the dress code requirements imposed on 8th grade pupils for an annual field trip (trip) to Washington, D.C. on the basis of arbitrariness and unreasonableness.

The Board argues that the requirements at issue are imposed as a valid exercise of its statutory and discretionary authority pursuant to N.J.S.A. 18A:11.1 and are neither arbitrary or unreasonable.

The matter was transmitted to the Office of Administrative Law as a contested case on August 1, 1988 pursuant to N.J.S.A. 52:14F-1 et seq. A telephonic prehearing conference was held on October 14, 1988 during which the parties agreed to submit the matter for declaratory judgment. A briefing schedule was incorporated in the Prehearing Order and the record closed on the established date for petitioners' reply brief, which was November 23, 1988.

STIPULATION OF FACTS

The following facts were stipulated during the October 14 conference, incorporated in the Prehearing Order entered on that same date, and are adopted herein as **FINDINGS OF FACT:**

1. Petitioners did not plead financial hardship at the time it learned of dress code requirements for the Washington trip.

2. Petitioners' son, M.J., is not a classified pupil.

3. No relief is sought for their son, M.J., as he participated in the Washington, D. C. field trip during Spring 1988.

4. Relief from the requirement is sought through declaratory judgment in the interest of petitioners' younger children.

THE "POLICY"

Counsel for the Board indicated in a letter to petitioners under date of October 25, 1988 that there is no formal Board policy on dress requirements for the trip other than that contained in a Back To School Night booklet (booklet) and the Mendham Borough Schools folder (folder), and further that the Board considers the requirements therein to be its policy. See, C-1.

The booklet states the following among other things:

> The eighth grade trip to Washington, D.C. is a culmination of our students' elementary education. Although recognized as an important social experience, the trip is an extremely valuable educational experience. Students are carefully prepared in social studies classes so that their observation and listening skills are properly used. The trip usually includes a theater experience.
>
> The Washington trip is also a source of pride to our school and our community. Our students are expected to dress-up for the trip and meet carefully outlined standards for attitude and behavior. Requested dress for the trip is shirts, ties, and jackets for the boys and blouses and skirts, or dresses for the girls.
>
> Preparation for the Washington trip takes place in April. A parents' meeting will be held at that time. (See, C-2)

The folder incorporates a HOW TO LOOK section, which states:

1. Neat, clean, and well groomed.
2. Hair should be trimmed and neatly combed.
3. Dress comfortably, neatly, and attractively.
4. Shoes: If you wear new shoes, be sure you have a pair of comfortable shoes (not sneakers) on the bus with you. You cannot get at your luggage which will be packed in the side of the bus.
5. Boys will wear dress shirts, jackets and ties most of the time. Where such formality is not necessary, you will be so advised. Do not ask us; we will tell you.
6. Plan to change for the theater (Thursday night). We go back to the hotel expressly to get "cleaned up."

   (See, C-3)

ARGUMENTS OF THE PARTIES

Petitioners argue that the issue "centers on the required dress as indicated by practice as compared to the expected, requested or implied dress as indicated by policy." Petitioners also contend "that the Board may not require or request students to dress for a school sponsored educational trip in a manner which goes beyond the requirements for dress during the regular school day." Petitioners further question the legality of the right of a Board to deny student participation in the trip "solely because he or she is not attired in a manner which would not be challenged for regular class participation. Concerning the unreasonableness of the policy, petitioners state that "formal attire was required to be worn from early morning to late at night for each of the four days of the trip while any other dress was specifically permitted to be worn only in the student's hotel room at days end."

The Board argues that the trip is voluntary, and those pupils who choose not to participate are provided an alternative educational experience. See, C-6. The Board does not dispute the entitlement to a free public education pursuant to New Jersey's constitution and statutes as well as Goss v. Lopez, 419 U.S. 565 (1975), which is a property interest, but argues that interest does not extend to extracurricular activities such as interscholastic athletics or field trips. Palmer v. Merluzzi, 689 F. Supp. 400 (D. N.J. 1988). Burnside v. N.J.S.I.A.A., N.J. Super. (App. Div. 1984), Docket No. A-625-84-T-7 (unpublished). The Board also notes that N.J.S.A. 18A:36-21 confirms that fees may be assessed for attendance at voluntary extracurricular field trips. The Board further argues there is no legal basis for petitioners' challenge to its imposed dress requirements on the trip as a pupil's participation is a privilege and not a right. Palmer, supra at 408. Fowler v. Williamson, 448 F. Supp. 497 (W.N.C. 1978).

The Board finally argues that the Commissioner has confirmed the right of local boards of education to adopt reasonable dress code policies for regular class attendance for which a pupil has a constitutional and statutory right to attend, which shall not be set aside in the absence of evidence that the policy at issue is arbitrary, capricious, or

unreasonable. Cuci v. Bd. of Ed. of the Town of Hammonton, 1979 S.L.D. 73, Pelletreau v. Bd. of Ed. of the Boro of New Milford, 1967 S.L.D. 35, 47; Boult & Harris v. Bd. of Ed. of Passaic, 1939-49 (Sup. Ct. 1947), 136 N.J.L. 521 (E & A 1947); Tolliver v. Bd. of Ed. of Metuchen, 1970 S.L.D. 415.

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

The law is clear that the Board has the discretionary authority to adopt a dress code policy applicable to pupils (as well as teachers) for attendance in regular classes as well as for participation in field trips. It is also clear that dress requirements pursuant to such policy adoption may be different for class attendance than field trip participation. The Board may also suspend a pupil from classroom attendance or deny field trip participation in the event of policy non-compliance.

The issue that remains is the alleged arbitrariness and unreasonableness of the dress requirements imposed for the Washington, D. C. trip.

The Board has stipulated that it has not adopted a policy for dress requirements by resolution at a public meeting, but endorses the requirement incorporated in administrative publications and also orally transmitted to parents. A review of the exhibits in this matter indicates that, although intent appears to be clear, construction of the requirements may lead to confusion as to the language.

It cannot be disputed that the booklet incorporates dress expectations and requests. See, C-2. The folder indicates what boys will wear for the trip. See, C-3. The Handbook indicates dress expectations. See, C-4. The Superintendent's letter to petitioners refer to the "dress up" rules and regulations established as "standards to establish pride in our system of government, respect for ourselves and our classmates." See, C-5. Counsel for the Board stipulates that the requested dress for the trip incorporated in the booklet is considered by the Board to be a requirement. See, C-1.

It has long been established that policy adoption is a function of the Board. N.J.S.A. 18A:11-1. It appears that dress code rules and regulations in respondent's school district have been promulgated and adopted by the administration with the Board's endorsement expressed after a challenge is made. It must be clearly stated that the Board may not delegate policy adoption, notwithstanding that school administrators are policy implementators not precluded from recommending policies to the Board for consideration and adoption.

I **FIND** that the Board is vested with discretionary authority to adopt dress code policies for class attendance and field trip participation which may vary and which are reasonable. I **FURTHER FIND** that disciplinary action may be taken administratively for policy non-compliance, such as suspension from class attendance or denial of field trip participation.

The Board of Education of the Borough of Mendham is however **ORDERED** to review the existing dress code rules and regulations and adopt whatever policy it deems appropriate for administrative implementation and enforcement and designed to achieve its legitimate aims with clarity and the avoidance of ambiguity.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

28 November 1988
DATE

WARD R. YOUNG, ALJ

12/1/88
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

DEC 1 1988
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

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D.J. AND D.J., on behalf of their son, M.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MENDHAM, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon his careful and independent review of the record, the Commissioner must remand the instant matter due to the confusion in the decision as to whether the field trip in question is categorized by the Board as an extracurricular trip, such as a trip to a theater by a club, or whether the trip is intimately related to the educational program in the district for which pupil attendance counts towards the 180 days of attendance required for the district to receive state aid pursuant to N.J.A.C. 6:27-1.3.

Accordingly, the Commissioner directs the matter be remanded for consideration by the County Superintendent as to whether the instant trip to Washington is part of the instructional program in Mendham's school district or whether, in fact, it is extracurricular. If deemed part of the district's programming, the Commissioner requires consideration of this fact by the ALJ to ascertain whether such information alters his determination that the Board's policy is not arbitrary or unreasonable.

January 9, 1989 COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 234-89
(remand of EDU 5695-88)
AGENCY DKT. NO. 209-7/88

D. J. and D. J. on behalf of their son M. J.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MENDHAM, Morris County,

Respondent.

D. J. and D. J., petitioners, pro se

Ellen S. Bass, Esq., for respondent
(Rand, Algeier, Tosti, Woodruff & Frieze, attorneys)

Record Closed: January 30, 1989 Decided: February 1, 1989

BEFORE: **WARD R. YOUNG, ALJ:**

Petitioners, sought a declaratory judgment invalidating the dress code requirements imposed on 8th grade pupils for an annual field trip (trip) to Washington, D.C. on the basis of arbitrariness and unreasonableness. The matter was docketed as EDU 5695-88, and an Initial Decision was rendered by the undersigned on November 28, 1988.

The Commisisoner of Education remanded the matter to the Office of Administrative Law on January 12, 1989 for reconsideration by the undersigned in the event the County Superintendent of Schools deems the Washington trip to be "an extracurricular

trip or part of district's instructional program for which pupil attendance counts toward district's state aid allocation."

George A. Snow, Morris County Superintendent of Schools, advised the Commissioner in a letter dated January 27, 1989 that he believed "The record is clear that an educational program [Washington trip] is conducted with full expectation that student attendance is counted toward the district's state aid allocation." A copy of the letter was filed with the undersigned on January 30, 1989, and the record of the remand is deemed closed as of that date.

The County Superintendent found "it difficult to distinguish between a field trip that is extracurricular and the time not utilized toward meeting the minimum 180-day requirement, and an extracurricular field trip when pupil attendance is counted toward the district's minimum 180-day calendar, therefore part of the district's state aid allocation." The letter is attached hereto and marked as C-1 in evidence.

The Commissioner's decision and directive to the County Superintendent seems to suggest that the Board's discretionary authority to determine a dress code policy for the Washington trip is limited for those days of the trip when school is in session and the days count toward state aid allocation, and not so limited (except by reasonableness) for days of the trip when school is not in session. If this be so, it would appear that the Board could require male participants on the school's debate team to wear jackets and ties in an inter-school debate that occurs after school hours, but may not have that discretionary authority if the same debate is held in an assembly program during the school day.

The development of social values, such as appropriate dress, is a worthy educational goal without regard to the time of day or day of the week such a dress code policy is implemented. I **FIND** jackets and ties to be an appropriate male dress requirement for theater attendance or a visit to the hallowed halls of Congress regardless of whether school is in session at that time. It is noted that not all such field trips occur only when school is in regular session.

However, since the Mendham Board was **ORDERED** "to review the existing dress code rules and regulations and adopt whatever policy it deems appropriate . . ." in the Initial Decision entered on November 28, 1988, it is suggested here that the Board be directed to file its adopted policy with the Commissioner for review as to its reasonableness.

Upon careful reconsideration pursuant to the Commissioner's remand, I hereby **REAFFIRM** the determination incorporated in the Initial Decision in EDU 5695-88.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

1 February 1989
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

6 February 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 6 1989
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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D.J. AND D.J., on behalf of their son, M.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MENDHAM, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. Petitioners filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Referring the Commissioner to their original petition to the Board and to the Commissioner of Education as embodying their position, petitioners add the following exceptions to their arguments, which are recited verbatim below:

> In Judge Young's final decree he finds that it is not unreasonable to require students to "dress up" for the theatre or to tour the "hallowed halls" of Congress. A case could certainly be made for that attire in those special circumstances. However, we decided to challenge the school's "dress code" because 1) it was never passed by our Board and more importantly 2) we felt it unreasonable to ask our children to wear "dress up" clothes from early morning until late at night for 3 days while touring Washington D.C. We disagree with school personnel who arbitrarily decided that a jacket, tie, dress shirt and shoes constitute the "correct" representation of Mendham. We ask for your intervention in restoring to parents the judgement of "correct" attire (within the existing Board approved dress code for everyday school attendance.)
>
> The 8th grade trip to D.C. is primarily an educational experience. As part of the 180 day requirement, this trip should have the same dress code as any in-class educational experience. As you can see by our May 5, 1988 letter to the Board we offered a compromise for those special circumstances occurring on the trip. This compromise also satisfies the finding of Judge Young. We urge you to direct the Board of Education of the Borough of Mendham to use its

> everyday dress code as the requirement of the trip realizing that they may want to suggest "dress up" clothing be packed for the special occasions. (Exceptions, at pp. 1-2)

Upon his careful and independent review of the record in this matter, the Commissioner modifies the initial decision on remand as follows.

Initially, the Commissioner notes that the ALJ misperceives the nature of the remand of this matter. In fact, the ALJ incorporated the basis for the remand in his decision dated November 28, 1988. Citing Palmer v. Merluzzi, 689 F. Supp. 400 (D.N.J. 1988), among other cases, the Board argued that "there is no legal basis for petitioners' challenge to its imposed dress requirements on the trip as a pupil's participation is a privilege and not a right. [citations omitted]" (Initial Decision, dated November 28, 1988, ante) Since it has now been determined that the Board considers the annual trip to Washington a curricular event, wherein "***pupil attendance is counted toward the district's minimum 180-day calendar, therefore part of the district's state aid allocation" (Initial Decision on Remand, ante, quoting C-1 in evidence), the Board's argument that petitioners may have no say in what dress code shall prevail during such activities fails.

Notwithstanding this finding, it is emphasized that it is not for the Commissioner to substitute his judgment for that of the Board of Education in determining what its dress code shall be, whether concerning trips to Washington or otherwise. Rather, his role in such matters is to adjudicate whether such policy is reasonably based. Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965), aff'd o.b. 46 N.J. 581 (1966) See also Pelletreau v. New Milford Bd. of Ed., 1967 S.L.D. 35, 41 (board has the inherent power to enact reasonable rules to regulate pupil appearance), aff'd State Board 45. See also N.J.S.A. 18A:11-1. While the Commissioner does agree with the ALJ that the Board has a right to establish a reasonable dress code for certain school-sponsored activities such as athletic events or debate tournaments when the student is clearly representing the school, he soundly rejects the ALJ's unsolicited second-guessing of the Commissioner's intent in remanding this matter, wherein he beclouds an already tangled record by suggesting that the Commissioner intends that the "Board's discretionary authority to determine a dress code policy for the Washington trip is limited for those days of the trip when school is in session and the days count toward state aid allocation, and not so limited (except by reasonableness) for days of the trip when school is not in session." (Initial Decision on Remand, ante)

As to the merits of the matter, it must first be observed that the dress code requirements at issue in this matter, those for the trip to Washington, do not represent a Board-adopted policy, albeit the record indicates that the Board "considers the requirements therein to be its policy. See C-1." (Initial Decision dated November 28, 1988, ante) Rather, it is a directive which was administratively developed. If it is the Board's intent to make

such directive official Board policy, it should so act to memorialize same through the usual procedure.

The language which embodies the dress code directives for the trip to Washington is set forth in two parts in a booklet entitled Back to School Night and is recited below for clarity of discussion:

> The eighth grade trip to Washington, D.C. is a culmination of our students' elementary education. Although recognized as an important social experience, the trip is an extremely valuable educational experience. Students are carefully prepared in social studies classes so that their observation and listening skills are properly used. The trip usually includes a theater experience.
>
> The Washington trip is also a source of pride to our school and our community. Our students are expected to dress-up for the trip and meet carefully outlined standards for attitude and behavior. Requested dress for the trip is shirts, ties, and jackets for the boys and blouses and skirts, or dresses for the giris.
>
> Preparation for the Washington trip takes place in April. A parents' meeting will be held at that time. (See, C-2)

The booklet also incorporates a HOW TO LOOK section, which states:

1. Neat, clean, and well groomed.

2. Hair should be trimmed and neatly combed.

3. Dress comfortably, neatly, and attractively.

4. Shoes: If you wear new shoes, be sure you have a pair of comfortable shoes (not sneakers) on the bus with you. You cannot get at your luggage which will be packed in the side of the bus. (emphasis in text)

5. Boys will wear dress shirts, jackets and ties most of the time. Where such formality is not necessary, you will be so advised. Do not ask us; we will tell you.

6. Plan to change for the theater (Thursday night). We go back to the hotel expressly to get "cleaned up." (See, C-3)
(emphasis supplied)

In examining the booklet instructions, the Commissioner notes a failure to establish clear guidelines as to the extent to which more formal attire shall be required since the instructions do provide that there will be times when students will be permitted to wear more casual clothing than averred by petitioners. For example, at number 3 of the HOW TO LOOK section, it states, "Dress comfortably, neatly, and attractively."

This statement lends support to petitioners' contention that the standard for the trip should be comparable to that suggested by the norms for everyday attendance at school. On the other hand, number 5 of the HOW TO LOOK section of the booklet suggests that dress shirts, jackets and ties for the boys and skirts and dresses for the girls will be the attire most of the time. Yet, the next sentence states, "[W]here such formality is not necessary, you will be so advised. Do not ask us; we will tell you." If the trip to the theater requires the formality of a shirt and tie, and the pupils are to return to their hotel rooms to get cleaned up and suitably dressed for that more formal occasion, what is required for climbing up the hundreds of steps of the Washington Monument? Are street shoes, not sneakers, required for the rigors of walking the length of the Mall? These are decisions for the Board. The Commissioner would only suggest that the rationale for requiring "carefully outlined standards for attitude and behavior" as set forth in the booklet, that is, to establish "a source of pride to our school and our community" is a reasonable and a laudable one. The task before the Board now is the development of a well-reasoned, reasonable and clear set of guidelines explaining precisely what events require formality and what events require less formal appearance.

Accordingly, the Commissioner passes no judgment on the directives embodied in the booklet, Back to School Night, since it is not a Board-adopted policy. He therefore affirms the initial decision conclusions found on page 6 of the Initial Decision dated November 28, 1988. He rejects, however, the suggestion proffered by the ALJ that the Mendham Board file its adopted policy with the Commissioner for review as to its reasonableness since such action, when promulgated, bears with it a presumption of correctness (Thomas, supra) unless challenged by way of a petition of appeal.

Accordingly, the instant Petition of Appeal is dismissed as not being ripe for adjudication.

March 21, 1989 COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 759-88
AGENCY DKT. NO. 5-1/88

WILLIAM J. DE GROOT,
Petitioner,
v.
BOARD OF EDUCATION OF THE PASSAIC COUNTY REGIONAL HIGH SCHOOL, DISTRICT NO. 1, PASSAIC COUNTY,
Respondent.

Louis P. Bucceri, Esq., for petitioner (Bucceri and Pincus, attorneys)

Steven J. Veltri, Esq., for respondent

O. Lisa Dabreu, Esq., for participant, New Jersey School Boards Association, as *amicus curiae*, pursuant to *N.J.A.C.* 1:1-16.6

Record Closed: October 21, 1988 Decided: November 30, 1988

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter involves a claim by William J. DeGroot, a tenured teaching staff member in the respondent school district, who contends that he was entitled to be paid his agreed-upon salary as assistant football coach for the 1987-88 year, although he was absent from his coaching duties because of illness. Petitioner alleges that the compensation should have been covered by sick leave days, and that respondent violated *N.J.S.A.* 18A:30-1 *et seq.* when it refused to pay it to him.

PROCEDURAL HISTORY

The verified petition was filed with the Commissioner of Education on January 8, 1988. Respondent filed an answer on January 29, 1988, denying the substantive allegations of the petition and asserting various affirmative defenses. The Commissioner transmitted the matter to the Office of Administrative Law on February 2, 1988, for hearing and disposition as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

On May 17, 1988, the New Jersey School Boards Association filed a motion to participate in the matter, as *amicus curiae*, pursuant to *N.J.S.A.* 1:1-16.6. The application was not opposed by either party, and it was subsequently granted.

A prehearing conference was held by the Office of Administrative Law on May 31, 1988. A prehearing order was filed, which defined the issues, fixed a hearing date, provided for discovery and dealt with other procedural matters related to the forthcoming hearing. Leave for the New Jersey School Boards Association to participate was granted by inclusion of a provision in the prehearing order, which also contemplated the possibility that complete disposition of the matter might be feasible by way of a proceeding in the nature of summary decision, in lieu of plenary hearing.

The parties subsequently agreed that testimony was not needed because all of the material facts could be stipulated. Oral argument was heard on September 19, 1988, at the Office of Administrative Law in Newark, New Jersey. Stipulations of fact and briefs were subsequently filed and served, and the record was closed on October 21, 1988.

ISSUES

The issues, as defined in the prehearing order, are as follows:

A. Has respondent violated *N.J.S.A.* 18A:30-1 *et seq.* by failing to pay the petitioner his salary as a coach during his absence due to illness?

B. Is petitioner entitled to statutory sick leave on account of his coaching duties?

(In oral argument, petitioner conceded that this issue is moot because Mr. DeGroot had more than enough accumulated earned sick leave available for his use during the entire period of his absence due to illness. This sick leave was indisputably earned because of his tenure as a teacher, and he is not demanding any extra or overlapping allocation of sick leave because of the coaching position. However, petitioner does claim, as seen in Issue A above, that he was entitled to receive monetary sick leave benefits by operation of the applicable statute.)

C. If issues A and B are answered in the affirmative, how much sick leave is he entitled to under the circumstances of his employment as a coach, as of the date of the illness in question?

(The comments made above under issue B are also applicable to this issue.)

FACTS

All of the pertinent facts are set forth in a Stipulation of Facts agreed to and filed by the parties, marked Exhibit J-1 in evidence, as follows:

1. Petitioner was initially employed by respondent (Board) as a teacher effective September 1, 1964 (Exhibit J-1).

2. Petitioner has been employed by respondent as a teacher from September 1, 1964, to the present.

3. Petitioner served as an assistant football coach for respondent for the 1979, 1980 and 1981 seasons. Petitioner has also served at various times as a coach or club advisor for other sports.

4. William J. DeGroot, Jr. applied for the position of assistant football coach for the school year 1987-88 on May 22, 1987.

5. On July 7, 1987, the Board advised DeGroot that, on June 25, 1987, it had approved his appointment as assistant football coach for the 1987-88 school year and would be compensated at $2,300, step 6 of Category 1 of Schedule D of the parties' agreement (J-2).

6. On June 26, 1987, DeGroot signed a statement in which he accepted reappointment as assistant football coach for the 1987-88 school year at a salary of $2,300 (J-3).

7. DeGroot attended a meeting with the head coach during the first week of August 1987. DeGroot came to another meeting during the week of August 24, 1987. Prior to the start of the meeting, DeGroot experienced chest pains and went home.

8. On Friday, August 28, 1987, DeGroot had a heart attack on his way to the doctor's office. DeGroot was surgically treated for his heart condition and was absent until November 23, 1987.

9. DeGroot was paid his teaching salary during his absence but received no payment of his coaching stipend. The parties stipulated that DeGroot had a sufficient number of accumulated sick days based on his employment as a teacher to cover the term of his absence.

10. DeGroot returned on November 23, 1987, and reported to the Head Coach. Petitioner was to be freshman football coach for the 1987 season. The head coach advised him that there was nothing for him to do inasmuch as freshman football season had ended, and the varsity season would end three days later.

11. Coaches normally receive their first payment in the middle of October and receive their last payment on or about November 15.

12. The Board hired Charles Rizzo to replace DeGroot on or before September 7, 1987, and paid him the $2,300 coaching stipend.

13. Petitioner's coaching position is not a tenure-eligible position. The Board is free, each year, to make a decision in regard to hiring or rehiring for this position.

14. District practice has been to pay an individual a coaching stipend for performance of coaching duties. If a coach is prevented from performing his coaching duties because of illness to the extent that the program is adversely affected, the District's practice has been to hire a replacement coach to perform the duties and prorate the coaching stipend between the original coach and the replacement coach. Isolated days of absence, where the program was not adversely affected and no replacement coach was hired, have not resulted in deductions from the coaching stipend.

15. Petitioner filed a grievance claiming the contractual right to be paid his coaching salary, which resulted in the arbitrator's advisory award of May 9, 1988. The contents of said award are attached hereto and marked as J-4.

16. Petitioner has not been paid any portion of the $2,300 stipend for coaching football in 1987. Petitioner has not agreed to accept the arbitrator's award.

17. The 1987-88 varsity football season commenced on or about August 31, 1987, and ended on or about November 26, 1987. Football coaches perform their duties during hours when school is not in session, for a limited number of hours, six days per week, 12 weeks per school year.

18. Neither the Collective Bargaining Agreement, written contract or written Board Policy contains benefits or sick days for coaches. The Teachers' Collective Bargaining Agreement specifies ten (10) sick

days per year for teachers with any unused days accumulated for use as needed in the future.

19. Article 7 of the Teachers' Collective Bargaining Agreement specifies teachers' hours. A copy of Article 7 is attached as J-5.

Attached to the Stipulation of Facts are copies of the following supporting documents:

Petitioner's employment contract as a teacher, dated April 21, 1964.

A letter from the Board to Mr. DeGroot, dated July 7, 1987, approving his appointment as assistant football coach for the 1987-88 school year for $2,300, based on a schedule in the negotiated agreement.

A note from Mr. DeGroot to the Board, dated June 26, 1987, accepting appointment as assistant football coach.

The American Arbitration Association award in case no. 18 39 0010 88N, dated May 9, 1988.

The American Arbitration Association opinion and award in the above arbitration; 11 pages.

The grievance question involved in the above arbitration, stating that the Board is not willing to make the decision binding.

A copy of pages 20-27, Article 7, dealing with teachers' hours; presumably a portion of the agreement mentioned below.

A copy of the complete contract between Passaic Valley Educational Association and Passaic County Regional High School, District No. 1, Board of Education, 1986-87, 1987-88 and 1988-89.

LEGAL DISCUSSION

N.J.S.A. 18A:30-1. Definition of sick leave.

> Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household.

N.J.S.A. 18A:30-2. Sick leave allowable.

> All persons holding any office, position, or employment in all local school districts, regional school districts or county vocational schools of the State who are steadily employed by the board of education or who are protected by tenure in their office, position or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service, of the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year [emphasis added].

It is undisputed that the petitioner is tenured as a teacher, but not as an assistant football coach. Because of his status as a tenured teacher, he received full payment of his teacher's salary during the entire period that he was absent from work, and he used accumulated sick leave for that purpose. The period of petitioner's absence from his duties as assistant football coach was wholly included within the time of his absence as a teacher, but he was not paid the stipend for that position.

Petitioner claims that his services as a coach were an extension of and part and parcel of his teaching responsibilities, so that his right to receive full pay during periods of sick leave should have extended to include his compensation as a coach.

Respondent argues that the rights and benefits of a teacher and those of a coach are separate and distinct, and that the position of coach does not accrue statutory sick leave (or the full pay that accompanies it).

The New Jersey School Boards Association takes the same position as the respondent.

In viewing the pertinent phrases of *N.J.S.A.* 18A:30-2, there is no question that the statutory entitlement does not extend to the petitioner's coach's pay based upon protection by tenure, because he was not tenured as an assistant football coach. Rather, the argument focuses on the second qualification in the statute. Was the petitioner "steadily employed" in the position? In his brief, petitioner at first claims that for purposes of this litigation the definition of "steadily employed" is largely irrelevant because his case is based on a right to apply his accumulated leave as a teacher to any aspect of teaching-related duties during his period of illness, including extracurricular duties. In this regard, petitioner states that a definition of steady employment only assumes importance when looking at an individual's sole form of employment, whereas in this case, petitioner's employment as an assistant football coach was a supplement to his primary employment as a teacher. However, after taking this position, petitioner nevertheless proceeds to argue that his assistant football coaching assignment did constitute regular employment.

Respondent disagrees with both aspects of the petitioner's argument, insisting that the coaching duties are not an extension of or necessarily intertwined with the teaching position. In support of this argument, respondent points out that it is not uncommon for coaches to be hired from the outside, and that in such cases they fully perform their coaching duties with no academic connection whatsoever to the district of such employment. Petitioner claims that this analogy is irrelevant because outside coaches are not involved in this dispute.

Petitioner supports his argument that he was steadily employed, even though his duties involved less hours daily or fewer days per week than would be required for full-time employment, by citing *Woodbridge Township Federation of Teachers v. Board of Ed.*, 1974 *S.L.D.* 1201, which dealt with the acquisition of tenure by teachers serving in part-time positions. Petitioner further refers to the decision in *South Orange-Maplewood Education Association et al. v. Board of Ed*, 1985 *S.L.D.* ___ (Comm'r of Education, June 3, 1985), where lunchroom employees who could not earn tenure were held to be entitled to sick leave because they were steadily employed during a work year that was approximately ten days less than the work year required of teaching staff members.

Respondent disputes petitioner's reasoning and states that the above situations cannot be related to an assistant football coach who works for approximately 12 weeks during the year and performs his duties outside of the normal school day for a limited number of hours per day.

In *South Orange-Maplewood,* the administrative law judge and the Commissioner of Education seemed to apply a rule of practical reasoning to the definition of steady employment:

> In the 1984-85 school year, the petitioners worked for a period of ten days less than other employees. Nevertheless, they were steadily employed for 170 continuous days out of the 180 days of the entire school year, or 94.44 percent of the time. In 1983-84, they worked for 16 days less than the others, 167 days out of 183 days, or 91.26 percent of the total time. The above differentials cannot logically lead to an inference that the petitioner's were not steadily employed while the others were. *South Orange-Maplewood Education Association*, Initial Decision, at 9.

> The Commissioner notes, however, that, in continued discussion in that decision [*Woodbridge*], a shift in terminology is made from "school year" to "academic year" which in the opinion of the Commissioner is more appropriate.
>
> . . . The record shows that the lunchroom aides and lunchroom supervisors are employed during the academic year when lunch is served in the elementary schools. Notwithstanding the fact that their work year varies somewhat, approximately two to four weeks less than the number of school days during the academic year, the Commissioner determines that these lunchroom aides and lunchroom supervisors are steadily employed by contract with the board for a fixed work year pursuant to the statute, *N.J.S.A.* 18A:30-2.
>
> . . . The Commissioner determines that ten (10) sick days be awarded petitioners inasmuch as the difference between that number and a proration of sick days according to their work year would be *de minimis. South Orange-Maplewood Education Association*, Commissioner's Decision, at 13-14.

Petitioner further claims that no aspect of the sick leave statutes, *N.J.S.A.* 18A:30-1 *et seq.*, as interpreted in applicable case law, forbids the application of sick

leave to coaching stipends. This reasoning is rejected because the meaning of a statute is primarily ascertained by reading the language employed in its ordinary and common significance, not by what is omitted from it. *See, Lane v. Holderman*, 23 *N.J.* 304 (1957). In other words, the fact that a statute does not expressly forbid something does not mean that the absent item is then specifically included within the purview of the statute.

Since there is no direct precedent on the point at issue, other related determinations can be instructive in attempting to decide if the petitioner's assignment as assistant football coach qualified him to receive full pay as such, in addition to his teacher's salary, pursuant to the statute. Such an inquiry necessarily revolves around a determination of whether he was steadily employed as a coach and if the extracurricular assignment was a direct extension of his teaching position.

In *Dallolio v. Board of Education of the City of Vineland, Cumberland County*, 1965 *S.L.D.* 18, the petitioner claimed that he acquired tenure not only as a teacher, but in his football coaching assignment, and that he therefore could not be dismissed as a coach except by the filing of tenure charges and the related hearing. The Commissioner of Education agreed that a football coach was a teacher who, in the performance of his coaching duties, employs the professional knowledge, skill and techniques ordinarily required in any teaching-learning situation. However, it was held that "his [Dallolio's] duties as coach were not permanently engrafted on his duties as a teacher, either by rule or by the terms of his employment." Unlike the position of a tenured teacher, the board was not obligated to continue the coaching assignment each year. Despite the fact that this case preceded the decision in *Spiewak v. Rutherford Board of Education*, 90 *N.J.* 63 (1982), the Commissioner remarked that,

> . . . absent a requirement for a certificate other than that of a teacher, no tenure accrues to such assignments and they are renewed or discontinued at the discretion of the board; and that when the extra work is no longer performed, the extra compensation for that purpose can no longer be claimed. *Dallolio* at 22.

In *Bonner v. Board of Education of North Haledon*, OAL DKT. EDU 7568-82 (Jan. 31, 1983), aff'd, Comm'r of Education (Sept. 7, 1983), a tenured teacher was

suspended from his teaching duties by the board, pursuant to its statutory right under *N.J.S.A.* 18A:25-6. However, his teacher's salary was continued in accordance with the contract. Bonner was also a basketball coach, and he petitioned the Commissioner for payment of his $450 coaching stipend along with the teacher's salary. The Commissioner held that the board was not required to pay the stipend during the period of suspension, but only his contractual teaching salary.

In the instant case, the board was compelled by *N.J.S.A.* 18A:30-2 to pay Mr. DeGroot his full teacher's salary as a tenured teacher, without necessarily considering applicable contract provisions. *Bonner* involved a statutory suspension rather than statutory sick leave, but the guiding principle is similar. There, the extracurricular stipend was not tied to the statute that clearly regulated payment of the teacher's salary. In the absence of a contractual obligation, payment of the stipend was not required. DeGroot objects to any connection between the *Bonner* matter and his own situation because Bonner had no signed agreement to coach, and he was not officially employed as such. However, the facts in *Bonner* obviously indicate that he had been engaged by the superintendent to coach basketball, and he began those duties by holding tryouts at the beginning of the basketball season, before his suspension.

The status of an extracurricular stipend has also been discussed in connection with its eligibility for inclusion in the definition of compensation for pension purposes. In *Bishop v. Board of Trustees, Teachers' Pension and Annuity Fund*, 4 *N.J.A.R.* 179 (1980), the petitioner, a mathematics teacher, was employed for one year as chairman of a department of mathematics, for which he was to receive $1,250 as extra compensation at the end of the school year. This stipend was not accepted as creditable compensation for pension and insurance purposes. The Board considered it to be "extra compensation," not "salary," and consistent with the regulation governing the Teachers' Pension and Annuity Fund, only the base or contractual salary is subject to the deduction of contributions towards pension benefits. *N.J.A.C.* 17:3-4.1(a). Extra compensation paid for coaching sports is specifically placed in the same excluded category. *N.J.A.C.* 17:3-4.1(d)2. Application of the pension holdings to the case at hand is disputed by petitioner, who claims that regulations governing pension contributions are designed to avoid the artificial inflation of eligible compensation just prior to retirement, thereby creating greater retirement benefits. However, in *Bishop*, there was no evidence to indicate that the

$1,250 in extra compensation paid to him was inserted by the retiree as a claim for that reason.

The contract between Passaic Valley Educational Association and Passaic County Regional High School District No. 1 concerns itself with sick leave and the other benefits and entitlements of teachers. It is not otherwise dispositive of the question involved here. However, Schedule D of the contract contains a separate listing of salaries for athletic coaches, including the stipend at issue here. Other schedules, such as Schedule C, list other salaries for extracurricular activities. No reference is made in the schedule to sick leave for any of the extracurricular positions.

CONCLUSIONS

Based on the foregoing, it is **CONCLUDED** that the extracurricular assignment of Mr. DeGroot as assistant football coach for the 1987-88 school year does not constitute steady employment for purposes of *N.J.S.A.* 18A:30-2. It is not regular or continuous employment for the entire school year or for the entire academic year. Its duration is only for the 12 weeks surrounding the football season. The duties are performed outside and apart from the normal school day and for a limited number of hours each day. The compensation is a separate stipend paid for services rendered. The assignment is made from year to year, and the board has no obligation to reassign the position to the same person each year. Petitioner did not prove that he was obliged to accept the offer of the position as part of his teaching duties. Instead, the evidence indicated that he voluntarily sought the assignment. The extracurricular function to be performed by petitioner as assistant football coach was not necessarily a direct extension of his teaching duties and responsibilities. Instead, it was an add-on and an adjunct to his steady and regular employment as a teacher.

To characterize this 12-week extracurricular activity as steady employment could lead to an absurd result, because the same consequence would necessarily be extended to other, possibly much shorter, extracurricular activities, such as club advisors or even someone hired to perform a single task for only a few days during the year.

ORDER

It is therefore **ORDERED** that the petition be **DISMISSED**.

This recommended decision may be adopted, modified or rejected by **SAUL COOPERMAN, COMMISSIONER, DEPARTMENT OF EDUCATION**, who by law is empowered to make a final decision in this matter. However, if **Saul Cooperman** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

November 30, 1988
DATE

ARNOLD SAMUELS, ALJ

12/5/88
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

DEC 5 1988
DATE

Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

ms/e

WILLIAM J. DE GROOT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner avers that the initial decision ignores his primary claim, i.e. that his status as a teacher in the district constitutes steady employment under N.J.S.A. 18A:30-1 et seq. and that, as a result, any work performed for the district which requires certification as a teacher must be covered by the sick leave statute's beneficial provisions. Referencing Point II of his brief, petitioner contends that every authority from the administrative courts to the Department of Education to the Superior Court recognizes coaching as a significant teaching function and regardless of the voluntary nature of the assignment, such work must be performed when assigned. Further, if the work is refused or poorly performed, the same sanctions can be applied as would be the case with classroom teaching assignments.

Petitioner acknowledges no tenure claim may be made but reiterates that sick leave was meant to preserve the level of compensation to which he would have been entitled if he had worked during his days of leave, notwithstanding the seasonal nature of the work. Moreover, he distinguishes his situation from that of a coach not steadily employed as a teacher, acknowledging that that individual may not be entitled to such leave.

Upon review of the record in this matter, the Commissioner is in full agreement with the ALJ that petitioner is not entitled to sick leave pay for a coaching assignment he was unable to fulfill due to illness. Petitioner's arguments to the contrary are meritless. It is well established in case law that stipends for coaching or other extracurricular assignments are not part of a teacher's salary. That one may be sanctioned for refusal to fulfill such an assignment or for poor performance of duties associated with an extracurricular assignment has no bearing whatsoever on the issue. N.J.S.A. 18A:30-2 mandates that petitioner be paid his full

salary. Since stipends for extracurricular assignments are not and may not be included as part of a teacher's salary, petitioner has no entitlement to the monies attached to the extracurricular assignment he was unable to assume.

Accordingly, the ALJ's recommended decision is adopted for the reasons well expressed therein. The Petition of Appeal is hereby dismissed.

January 13, 1989

COMMISSIONER OF EDUCATION

WILLIAM J. DE GROOT,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, PASSAIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 13, 1989

For the Petitioner-Appellant, Bucceri & Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Stephen J. Veltri, Esq.

For the amicus curiae New Jersey School Boards Association, Francis J. Campbell, General Counsel (Carol M. Trovato, Esq., of Counsel)

The decision of the Commissioner dismissing Petitioner's appeal from the Board's failure to pay him the stipend from an extracurricular coaching assignment he was unable to fulfill due to illness is affirmed substantially for the reasons expressed in the initial decision of the Administrative Law Judge ("ALJ").

In affirming that determination, we emphasize that the only question involved in these proceedings is whether Petitioner, a tenured teacher also appointed as assistant football coach in the 1987-88 school year, was entitled to sick leave compensation for that extracurricular coaching assignment pursuant to N.J.S.A. 18A:30-1 et seq.

The requirement of N.J.S.A. 18A:30-2 is that persons who are "steadily employed by the board of education or who are protected by tenure in their office, position or employment" be allowed "sick leave with full pay..." We fully agree with the ALJ's determination that Petitioner was neither tenured nor steadily employed as an assistant football coach, and that the extracurricular coaching assignment was not a direct extension of his steady employment as a teacher so as to entitle him to inclusion

of the coaching stipend as part of his "full pay" under N.J.S.A. 18A:30-2 during periods of sick leave. Therefore, for purposes of determining the instant matter, we need not address the validity of the Commissioner's statement that "[i]t is well established in case law that stipends for coaching or other extracurricular assignments are not part of a teacher's salary," Commissioner's decision, at 15, and, in the absence of any citation, we make no judgment about its accuracy.

July 6, 1989

Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4173-88
AGENCY DKT. NO. 118-5/88

ALEXANDRA SPIZZIRI,

Petitioner

v.

BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES,

Respondent.

Nancy Iris Oxfeld, Esq., for petitioner
(Klausner, Hunter & Oxfeld, attorneys)

Stephen R. Fogarty, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: November 17, 1988 Decided: November 29, 1988

BEFORE: **WARD R. YOUNG, ALJ:**

Alexandra Spizziri, a tenured teacher employed by the Franklin Lakes Board of Education, filed a Petition of Appeal challenging the action of the Board which suspended ner from her teaching position without pay.

The Board denied its action was unlawful.

The matter was transmitted to the Office of Administrative Law on June 9, 1988, as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.; was preheard on September 19, 1988 and set down for plenary hearing on November 17 and 18, 1988.

The Board filed a Motion to Dismiss pursuant to N.J.A.C. 1:1-10.5 and N.J.A.C. 1:1-14.4 with supportive documents. Responsive papers were filed by petitioner. Petitioner failed to appear at hearing on November 17, 1988. Oral argument, supplemental to filed papers, was heard on that date on the Board's motion as well as on petitioner's application for adjournment and rescheduling of the hearing. Bench decisions were rendered by the undersigned on November 17, which **GRANTED** the Board's Motion to Dismiss and **DENIED** petitioner's application for adjournment and rescheduling. The Order, prepared by counsel for the Board at the direction of the undersigned, is attached hereto and incorporated herein.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

29 November 1988
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

12/5/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

December 5, 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ALEXANDRA SPIZZIRI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto. However, the Board's second submission dated January 9, 1989 was untimely received and therefore is not made a part of the Commissioner's consideration of this case.

Petitioner's exceptions aver the ALJ erred in dismissing the petition for failure to supply interrogatories to the Board. Petitioner contends the interrogatories were supplied. She further avers, "The Respondent is not alleging and did not allege at the hearing that the Answers supplied by the Petitioner were incomplete, but rather the Respondent alleged that it wished to seek more information then (sic) it had asked for in discovery.***" (Exceptions, at p. 2)

Moreover, the exceptions aver the ALJ erred in dismissing the petition due to petitioner's failure to appear at hearing. She

submits that her unavailability to appear did not have to be dealt with by a "drastic determination" (Exceptions, at p. 3) to dismiss the petition, but instead claims her counsel's motion to adjourn should have been granted until her return from her hunting trip. Petitioner claims her attorney did appear at hearing and, further, that the ALJ failed to wait the 10 days required by N.J.A.C. 1:1-14.4 for an explanation for the non-appearance. Moreover, since the explanation was proffered by her counsel at hearing, petitioner claims the ALJ was required by N.J.A.C. 1:1-14.4(a)(1) to reschedule. Thus, petitioner submits the ALJ acted prematurely in dismissing this case and in violation of the rules in failing to adjourn and reschedule her hearing on the merits.

Further, petitioner suggests an additional reason to have adjourned was to allow her counsel to secure an expert psychiatric witness, since the merits of petitioner's case involved a report by a Board psychiatrist pursuant to N.J.S.A. 18A:16-4.

Finally, petitioner excepts to the determination of the ALJ directing that petitioner pay the attorney fees of the Board. She contends the ALJ does not have the power to issue such an Order, whether or not the power to do so is set forth in OAL rules, "***as the Office of Administrative Law in its rulemaking powers cannot grant a power to the Commissioner which he does not already have, and the Commissioner does not have the power to grant damages, attorneys fees and costs." (Exceptions, at p. 5) She cites Anne Hall v. Board of Education of the Township of Jefferson, decided by the Commissioner October 20, 1988 in support of this proposition.

The Board's exceptions support the initial decision and oppose petitioner's exceptions. On the issues of interrogatories, the Board claims the interrogatories which were filed with the Board were late, the court order having required filing of such Answers by September 30 and, moreover, were incomplete. The Board denies that it was contemplating subpoenaing petitioner's medical record, since it had made a timely discovery demand for such information.

On the issue of petitioner's failure to appear at the scheduled hearing, the Board contends the ALJ acted within the scope of his authority under N.J.A.C. 1:1-14.4 in granting the motion to dismiss. The Board contends that petitioner's counsel did in fact provide at hearing an explanation for her client's absence and that such excuse thus fell within the 10-day period required by N.J.A.C. 1:1-14.4(a). Having so provided an explanation within 10 days, the Board claims that pursuant to N.J.A.C. 1:1-14.(4)(a)(2), the ALJ then could dismiss the claim. In this regard the Board further suggests that the ALJ did not render his formal decision and order until November 29, 1988, 12 days after the hearing. Further, the Board suggests that the ALJ's Order of November 29 dismissing the petition was in accordance with N.J.A.C. 1:1-14.4(c) which allows the ALJ to dismiss "[f]or unreasonable failure to comply with any order of a judge or with any requirements of this chapter***." (Reply Exceptions, at p. 3 citing N.J.A.C. 1:1-14.4(c)) For failure to comply with an order to answer interrogatories by September 30, 1988 or to do so within the time prescribed by N.J.A.C. 1:1-10.4, and for her "persistently delay[ing] expediting this proceeding by ignoring frequent requests by respondent for the answers to interrogatories" (Reply Exceptions, at p. 3) and also for failing

to appear at the scheduled hearing, the Board avers the ALJ acted in accordance with the authority granted him under the New Jersey Administrative Code in dismissing the petition.

As to petitioner's exception averring the Commissioner has no authority to grant attorney fees and costs, and therefore suggesting that the ALJ cannot do so, the Board cites N.J.A.C. 1:1-14.4(a)(1)(i) and (ii) as granting the ALJ such authority. It claims the Commissioner's lack of authority to award attorney fees and costs has no bearing on the enforceability of N.J.A.C. 1:1-14.4(a)(1)(i) and (ii).

The Board urges that the Order of ALJ Ward Young dismissing petitioner's petition and awarding respondent reasonable expenses and attorneys' fees be upheld.

Upon his careful and independent review of the record, the Commissioner must remand the instant matter for consideration of the following:

First, the Commissioner's review of the record reveals no indication of whether petitioner's counsel was prepared to go forward on the day scheduled for hearing, November 17, 1988. The Commissioner is aware of no law or regulation that requires a party to be present at hearing if he or she is represented by counsel, provided the party's testimony is not required. The Commissioner seeks knowledge as to whether counsel was prepared to go forward with the hearing in order to determine whether there was unreasonable delay because of petitioner's absence from the proceedings before the Office of Administrative Law.

Similarly, the Commissioner is unable to determine from the record before him whether or not discovery was in fact completed, albeit belatedly by the time of the scheduled hearing. The Commissioner seeks this information for the purpose of determining whether any such failure to complete interrogatories fully was in fact a subterfuge for delaying the proceedings. Thus, the Commissioner would ask the ALJ to set forth on the record whether, in his understanding, the interrogatories which were filed with the Board's counsel sometime in November were in fact complete.

Further, the Commissioner would note for the record that the only basis set forth in law whereby a Board is empowered to suspend without pay a teaching staff member is upon indictment pursuant to N.J.S.A. 18A:6-8.3, or upon certification of tenure charges pursuant to N.J.S.A. 18A:6-10 et seq. Since the Board has not brought tenure charges, it may not hold such employee out on suspension without pay nor may it suspend her indefinitely, even with pay. The Commissioner directs that during the pendency of these proceedings the Board take whatever action it deems necessary to bring it into conformity with law in this regard.

Accordingly, the Commissioner remands the instant matter for further proceedings consistent with this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 19, 1989

DATE OF MAILING - JANUARY 19, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 478-89
(Remand of EDU 4173-88)
AGENCY DKT. NO. 118-5/88

ALEXANDRA SPIZZIRI,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES,

Respondent.

Nancy Iris Oxfeld, Esq., for petitioner
(Klausner, Hunter & Oxfeld, attorneys)

Stephen R. Fogarty, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: March 27, 1989 Decided: March 30, 1989

BEFORE: **WARD R. YOUNG, ALJ:**

Alexandra Spizziri, a tenured teacher employed by the Franklin Lakes Board of Education, filed a Petition of Appeal challenging the action of the Board which suspended her from her teaching position without pay pursuant to N.J.S.A. 18A:16-4.

The Board denied its action was unlawful.

The initial matter (EDU 4173-88) was transmitted to the Office of Administrative Law on June 9, 1988 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on September 19, 1988, at which the discovery period was extended to September 30, 1988 and the matter set down for plenary hearing on November 17 and 18, 1988.

The Board filed a Motion to Dismiss pursuant to N.J.A.C. 1:1-10.5 and N.J.A.C. 1:1-14.4 with supportive documents. Responsive papers were filed by petitioner. Petitioner failed to appear at hearing on November 17, 1988. Oral argument, supplemental to filed papers, was heard on that date on the Board's motion as well as on petitioner's application for adjournment and rescheduling of the hearing. The Board's Motion to Dismiss and for the imposition of sanctions was **GRANTED** and petitioner's Motion was **DENIED**. An Initial Decision and Order was entered on November 29, 1988.

The Commissioner remanded the matter on January 19, 1989 for the following determinations:

1. Was petitioner's counsel prepared to go forward with the hearing?
2. Was there unreasonable delay because of petitioner's absence from the proceedings?
3. Was discovery completed by petitioner?
4. Does N.J.S.A. 18A:16-4 authorize a Board to suspend or not reinstate without pay?

As the result of the Commissioner's remand, an Order was entered on February 10, 1989 directing the Board to order official transcripts of oral argument on November 17, 1988 upon the gracious offer of the Board to volunteer to do so. Counsel for the parties agreed to submit the first three issues for the ALJ's determination based on the official transcript, and also the N.J.S.A. 18A:16-4 issue as a matter of law as both counsel agree that boards of education are authorized to remove a teacher and not reinstate until satisfactory evidence of fitness to teach is submitted. The transcript was filed on March 15, 1989. The joint request of counsel to file simultaneous letter-memoranda was approved, and the record closed on March 28, 1989 with the filing of same, which are incorporated herein by reference.

WAS PETITIONER'S COUNSEL PREPARED TO GO FORWARD WITH THE HEARING ON NOVEMBER 17, 1988?

Counsel for petitioner made a cross-motion at oral argument on respondent's motion on November 17, 1988 "for the reason that the Petitioner is unavailable and because we have not yet obtained an expert witness." See, Tr. 5. Counsel further elaborated on petitioner's unavailability due to petitioner's decision to go on a hunting trip. See, Tr. 5 and 7.

Concerning the failure to obtain an expert witness, reference is made to Tr. 8.

I **FIND** that petitioner's counsel was not prepared to go forward with the hearing on November 17, 1989 due to the gross negligence of petitioner and failure to adhere to the Prehearing Order entered on September 19, 1989 which incorporated the hearing schedule.

WAS THERE UNREASONABLE DELAY BECAUSE OF PETITIONER'S ABSENCE FROM THE PROCEEDINGS?

The hearing schedule was incorporated in the September 19, 1988 Prehearing Order. Counsel for petitioner notified her of same "in two separate letters." See, Tr. 7. Counsel spoke to petitioner "back in the Spring and she indicated that she would look for an expert witness", and never replied to counsel's written inquiry "would she like me to look for an expert witness and to please let me know". See, Tr. 8.

The Notice of Plenary Hearing scheduled for November 17 and 18, 1988 was incorporated in the Prehearing Order entered on September 19, 1988. An additional Notice was sent to petitioner by the Acting Director of the Office of Administrative Law on October 19, 1988 which also stated: "If you do not attend the hearing, the judge may dismiss your case or order that the action requested by the other party be granted."

I **FIND** that petitioner's gross negligence caused an unreasonable delay in the proceedings.

WAS DISCOVERY COMPLETED BY PETITIONER?

The Notice of Filing sent to the parties upon receipt of a transmittal states:

> All discovery must be complete five days before the hearing unless another date is established by the judge. Therefore, parties must begin immediately to exchange information, to seek access to public documents, to exhaust other informal means of obtaining information and, if necessary, to serve discovery notices and motions.

The Prehearing Order entered on September 19, 1988 stated that "Interrogatories shall be answered no later than September 30, 1988".

Interrogatories were served upon counsel for petitioner on June 16, 1988, which were followed by written requests from respondent for answers under dates of August 16, 1988 and October 20, 1988. The chronology of communications between counsel for petitioner and the petitioner is found in counsel's Certification filed with the undersigned on November 8, 1988. Answers to Interrogatories were transmitted to respondent's counsel on November 16, 1988, the day preceding hearing.

Counsel for respondent stated in oral argument on November 17, 1988. "We received answers to interrogatories from petitioner's counsel at the end of last week which were subsequently amended and were received at our office on yesterday. It has put the respondent in a severe disadvantage in terms of defending the actions, because we had initially requested an authorization for a release of medical information because that is indispensable to our ability to defend the charges that may be placed by the requesting particulars . . . so we were severly prejudiced as a result of her failure to provide answers to interrogatories in a timely way. That almost seems mute [sic] through your Honor, in light of petitioner's failure to appear here today". See, Tr. 3, 4.

I **FIND** that discovery was completed by petitioner, and also that its untimeliness was in violation of the Order as well as the regulatory scheme, and further that respondent was indeed prejudiced by the untimely filing of answers to interrogatories.

DOES N.J.S.A. 18A:16-4 AUTHORIZE A BOARD TO SUSPEND OR NOT REINSTATE A TEACHING STAFF MEMBER WITHOUT PAY?

The Commissioner addressed this issue in his decision at 7 and said:

> Further, the Commissioner would note for the record that the only basis set forth in law whereby a Board is empowered to suspend without pay a teaching staff member is upon indictment pursuant to N.J.S.A. 18A:6-8.3, or upon certification of tenure charges pursuant to N.J.S.A. 18A:6-10 et seq. Since the Board has not brought tenure charges, it may not hold such employee out on suspension without pay nor may it suspend her indefinitely, even with pay.

This issue is incorporated herein because counsel for both petitioner and respondent agree that boards of education do have a basis in law to remove petitioner from her teaching position because she demonstrated that she was suffering from a mental abnormality as defined in N.J.S.A. 18A:16-4, and requested the undersigned to address it.

I am well aware that the Commissioner made his determination on this issue in his Order on Remand, which is appealable to the State Board of Education. I reluctantly agree to address the issue solely for reconsideration by the Commission in the spirit of the single controversy concept to avoid piecemeal or an untimely appeal.

N.J.S.A. 18A:16-4 reads:

> If the result of any such examination [authorized by N.J.S.A. 18A:16-2 and/or N.J.S.A. 18A:16-3] indicates mental abnormality or communicable disease, the employee shall be ineligible for further service until proof of recovery, satisfactory to the board, is furnished, but if the employee is under contract, or has tenure, he may be granted sick leave with compensation as provided by law and shall, upon satisfactory recovery, be permitted to complete the term of his contract, if he is under contract, or be reemployed with the same tenure as he possessed at the time his services were discontinued, if he has tenure, unless his absence shall exceed a period of two years.

In this matter, the Board invoked the provisions of N.J.S.A. 18A:16-2 when it required Spizziri to undergo a psychiatric examination. The Board declared Spizziri ineligible for employment when the psychiatrist's report demonstrated evidence of deviation from normal mental health pending proof of recovery.

SUMMARY OF FINDINGS AND CONCLUSIONS

I **FIND** that counsel for petitioner was not prepared to go forward with the hearing.

I **FIND** there was unreasonable delay because of petitioner's absence from the proceedings.

I **FIND** that discovery (answers to interrogatories) was completed and provided to counsel for the Board the day preceding the hearing, but also find the Board was prejudiced by the late answers because of an inability to secure records from petitioner's treating physicians (which petitioner had authorized through executed releases).

I **FIND** that the Board is statutorily authorized to declare a teaching staff member ineligible for employment based on evidence of a deviation from normal mental health pending proof of recovery.

I **CONCLUDE**, therefore, that the Initial Decision entered on November 29, 1988, which granted the Board's motion to dismiss, denied petitioner's motion to adjourn the hearing scheduled on November 17, 1988, and the Order for petitioner to pay reasonable expenses pursuant to N.J.A.C. 1:1-14.41(a) and (c) is **REAFFIRMED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with Saul Cooperman for consideration.

30 March 1989
DATE

WARD R. YOUNG, ALJ

5 April 1989
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

APR 5 1989
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

g

ALEXANDRA SPIZZIRI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed timely exceptions and reply exceptions to petitioner's exceptions.

Petitioner's counsel concedes in exceptions that she was not prepared to go forward with the hearing which convened on November 17, 1988. However, petitioner argues, as she had in her exceptions dated December 13, 1988, that dismissal of this action as "a drastic remedy" and that "[a] more appropriate remedy for the Petitioner's unavailability would be to adjourn the hearing date and set the matter down for a new date of hearing." (Exceptions, at pp. 1-2) She further excepts to the ALJ's determination that petitioner's absence from the hearing created unreasonable delay. "A delay caused by the Petitioner's absence due to a hunting trip would not create an unreasonable delay, but only delay the proceedings approximately another month or so. Surely, a change such that instead of the hearing taking place two months after the Pre-Hearing Order was entered, it took place three months after the Pre-Hearing Order would not constitute a delay that was so unreasonable or prejudicial to the Respondent as to necessitate a dismissal of the Petition." (Id., at p. 2) Once again, petitioner suggests a more appropriate action would have been to reschedule the hearing.

Petitioner further excepts to the ALJ's conclusion that petitioner's untimely filing of answers to interrogatories prejudiced the Board. Noting that the ALJ indicates in his decision on remand that the interrogatories were fully completed, albeit that "Petitioner did not submit all discovery precisely by the due date," (id.), petitioner iterates her argument that any prejudice to the Board could have been resolved by adjourning the hearing, rather than dismissing the petition.

In response to the ALJ's claim that the Board was prejudiced because it was unable, due to the late filing of interrogatory answers, to obtain an authorization for a release of medical information, petitioner claims the Board never requested

such a release. Instead, she claims, two months before the instant petition was filed, the Board attorney requested a medical release from petitioner before it would provide her counsel with a copy of her medical evaluation performed by Dr. Jerome Goodman. Petitioner claims that release was provided, but claims that the letter of Board counsel dated March 8, 1988 "***gives no indication that the Respondent was seeking a release of any other medical information and it is hard to understand how the Respondent can now argue that two months prior to the filing [of] the Petition in this matter it sought a medical release to obtain information and discovery in a case which had not even been filed and did not yet exist." (Id., at pp. 3-4) Petitioner avers that the only alleged prejudice to the Board concerning the late filing of interrogatories concerned the Board's alleged inability to request information from petitioner's physicians, based upon an allegation that the Board had requested a release for such records which, in fact, had never occurred. Again, petitioner contends an adjournment would have been a more appropriate disposition of the matter than dismissal of the petition so that a new hearing date could be scheduled giving the Board adequate time to receive such information.

Finally, petitioner excepts to the determination of the ALJ ordering her to pay reasonable expenses pursuant to N.J.A.C. 1:1-14.4(a)(1)(i) and (ii), averring the Commissioner does not have the power to grant damages, attorneys fees and costs. She cites Anne Hall v. Board of Education of the Township of Jefferson, decided by the Commissioner October 20, 1988, in support of this proposition.

The Board's primary exceptions support the initial decision. It claims it is irrefutable that petitioner's counsel was not prepared to go forward with the hearing on November 17, 1988 and cites the transcript of that hearing at pages 5 through 8 in support of this proposition. The Board further argues that the ALJ's finding that where discovery was completed by the time of the scheduled hearing, its untimeliness was in violation of his order and prejudiced the Board was amply supported by the record. Acknowledging that petitioner did submit answers to interrogatories on November 11, 1988 which were amended to provide the names of three additional treating physicians on November 16, 1988, the day before the hearing, the Board argues that petitioner's counsel recognized the prejudice to the Board as a result of petitioner's failure to timely provide such information and it cites the transcript at pages 5-12 in support of this position.

Reciting nearly verbatim from its post-hearing submission, which is incorporated herein by reference, the Board contends that there was basis in law to remove petitioner from her teaching position because she was suffering from a mental abnormality as defined in N.J.S.A. 18A:16-4. It claims, however, that a determination as to the merits of whether petitioner demonstrated evidence of deviation from normal mental health "does not have any materially consequential bearing upon whether the within petition should have been dismissed in this case. It is respectfully

submitted that that issue should be decided solely on the basis of a resolution of Issues, 1, 2, and 3, Supra." (Board's Exceptions, at p. 8)

In summary, the Board seeks affirmance of the ALJ's decision on remand dismissing petitioner's petition and awarding respondent reasonable expenses and attorneys fees.

The Board's reply exceptions support the initial decision, citing its brief filed April 17, 1989 in support of its position in this matter. It opposes petitioner's exceptions for the following reasons.

Noting that petitioner was under court order to supply complete interrogatory answers by September 30, 1988, the Board claims:

> The certification of petitioner's counsel in opposition to respondent's motion to dismiss the petition for failure to comply with the Court Order of September 30, 1988, bears evidence of petitioner's blatant contempt for the judicial process. Counsel for petitioner conceded that petitioner's interrogatory answers were incomplete during oral argument before Judge Young on November 17, 1988. Petitioner is now attempting to claim that she supplied complete answers to the interrogatories propounded by respondent.
>
> (Reply Exceptions, at pp. 1-2)

As to the medical release argument posed by petitioner, the Board suggests it "***would have no need to subpoena petitioner's medical records, since respondent made a timely discovery demand for such information. Unfortunately, petitioner failed to communicate the name of her physicians to respondent until the day before the scheduled hearing." (Id., at p. 2)

Further, the Board contends petitioner's failure to appear at the scheduled hearing because she was on a hunting trip "***further exhibits her brazen disregard of the Court" (id.), and it claims the ALJ was within his authority under N.J.A.C. 1:1-14.4 in granting the Board's motion to dismiss the petition. It suggests further that the ALJ's Order of November 29, 1988 granting the Board's motion to dismiss the petition was also in accord with N.J.A.C. 1:1-14.4(c) in failing to provide answers to interrogatories within the time prescribed by N.J.A.C. 1:1-10.4. It contends:

> ***Petitioner completely disregarded the Prehearing Order of September 19, 1988 by failing to supply respondent with interrogatory answers by September 30, 1988. Petitioner persistently delayed expediting this proceeding by ignoring frequent requests by respondent for the answers

> to interrogatories. Finally, the petitioner insulted the Court and made a mockery of the administrative system and of the participants involved in this proceeding by failing to appear at the scheduled hearing and having the audacity to offer the insolent excuse of her hunting trip. Judge Young clearly acted in accordance with the authority granted to him under the New Jersey Administrative Code in dismissing the Petitioner's petition. (Id.)

Finally, citing N.J.A.C. 1:1-14.4(a)(1)(i) and (ii), the Board contends the ALJ, not the Commissioner, is empowered to grant costs, reasonable expenses and attorneys fees to an aggrieved party or representative. It avers the Commissioner's lack of authority to award attorneys fees and costs has no bearing on the enforceability of N.J.A.C. 1:1-14.4(a)(1)(i) and (ii). It goes on to state that the ALJ's decision to impose sanctions is not reviewable by the Commissioner but, rather, is reviewable by the Director of the Office of Administrative Law and cites N.J.A.C. 1:1-14.4 and Laufgas v. Board of Education of the Township of Barnegat, decided by the Commissioner August 31, 1988 for this proposition. The Board adds that petitioner has filed exceptions to the initial decision with the Director of the Office of Administrative Law simultaneously with her exceptions filed before the Commissioner.

By way of summary, the Board avers:

> In conclusion, petitioner's egregious conduct in this matter demonstrates an outrageous and inexcusable disregard for the adjudicative process. Petitioner has wasted the time of the Court, the Commissioner, respondent and counsel. Petitioner has dragged the respondent, a public body, through months of pretrial discovery and judicial proceedings in an effort to defend her claim. Petitioner's cavalier attitude towards her own claim has forced the respondent, as well as the taxpayers of Franklin Lakes, to expend great sums of money on this matter. Respondent even retained an expert witness, who was on call on the date of the hearing. These funds could have been more appropriately spent in the respondent's school system.
>
> For the reasons set forth above, it is respectfully requested that the Order of the Honorable Ward R. Young dismissing petitioner's petition and awarding respondent reasonable expenses and attorneys fees be upheld. (Id., at p. 3)

Upon a careful and independent review of this matter, the Commissioner adopts the initial decision on remand rendered by the Office of Administrative Law with the following clarifications.

Initially, the Commissioner notes that his comment made for the record in the remand of this matter dated January 19, 1989 relative to the Board's "suspension" of petitioner in this matter (see Commissioner's Decision at p. 7, para. 2) was misperceived by the ALJ as a further question for the parties and him to address. What the ALJ perceived to be a question relative to N.J.S.A. 18A:16-4 was in fact an admonition to the Board to ensure that its actions taken pursuant to N.J.S.A. 18A:16-4 were in all repects in conformity with such statutes and not those related to N.J.S.A. 18A:6-8.3 or 6-10 et seq. In so stating, the Commissioner would reinforce his earlier statement that the language "suspend without pay" is a term of art uniquely pertinent to circumstances set forth at N.J.S.A. 18A:6-8.3 or 6-10 et seq. By contrast, the Board's authority to declare an employee "ineligible for further service" shall be accomplished in strict conformity with N.J.S.A. 18A:16-4, without reference to the term "suspension without pay."

As to the two concerns expressed by the Commissioner in his decision dated January 19, 1989, which it is noted now includes a transcript of the proceedings on November 17, 1988, the Commissioner concurs with the ALJ's conclusions that 1) petitioner through her counsel was not prepared to go forward with the hearing on November 17, 1988, and 2) that discovery, albeit inexcusably late, was completed and in Board counsel's possession the day before the hearing. In these conclusions, the Commissioner adopts the initial decision on remand as his own. In finding in accord with the ALJ that discovery was complete (see also initial decision on remand on this point, ante), the Commissioner rejects the Board's argument that it was in possession of a general medical release form from petitioner through which it might seek medical information. The Commissioner finds that the release in question was solely limited to a release from petitioner to the Board to provide petitioner's counsel with a copy of the medical evaluation of petitioner which had been performed by Dr. Jerome Goodman. Said release clearly states that petitioner released disclosure of such medical information to her attorney Ms. Oxfeld and to no other, the psychiatric report of Dr. Goodman dated October 6, 1987. (See release dated March 1988 signed by petitioner.) The Board's letter dated March 8, 1988 from Stephen R. Fogarty, Esq. to Nancy Iris Oxfeld, Esq. confirms that the release was intended to be so limited wherein it is stated, "Therefore, the Board shall require an authorization to release medical records from Mrs. Spizziri before it can release Dr. Goodman's report to you." Nowhere in said release is permission given by petitioner for release of any medical records for the Board's or Board counsel's review. The Commissioner so finds. Accordingly, the Commissioner rejects the Board's contention that such document constituted a general release by petitioner of her medical records, and that a timely request for such information had therefore been denied the Board through interrogatories. He does so noting that the documents in question, while presented by the parties in their submissions as exhibits, were never formally received in the record as exhibits.

Moreover, the Commissioner's review of the record comports with the ALJ's that petitioner unreasonably and blatantly delayed the instant proceedings for the reasons expressed by the ALJ in the transcript at pages 10-12 and for those reasons expressed in the initial decision and the initial decision on remand. In so finding, the Commissioner affirms the ALJ's dismissing the Petition of Appeal pursuant to N.J.A.C. 1:1-14.4. In so doing, the Commissioner adds his accord with the ALJ's that such sanctions are in no way a reflection on petitioner's counsel's representation of Ms. Spizziri. See Tr. 12-13.

However, the Commissioner finds and determines that it is not within his jurisdiction to assess costs against a party under instances like those present in this matter, nor is it his to review an ALJ's determination to impose costs pursuant to N.J.A.C. 1:1-14.4(a)(1)(i) and (ii). See Laufgas, supra, and N.J.A.C. 1:1-3.2(c)4. Such review is within the purview of the Director of the Office of Administrative Law.

Accordingly, for the reasons expressed by the ALJ in his initial decision on remand, as clarified herein, the determination of the Office of Administrative Law is adopted. The Petition of Appeal is accordingly dismissed with prejudice.

COMMISSIONER OF EDUCATION

May 18, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4431-88
AGENCY DKT. NO. 131-5/88

WILLIAM DAVID GUYET,

Petitioner

v.

CALDWELL-WEST CALDWELL BOARD OF EDUCATION,

Respondent.

Stephen E. Klausner, Esq., for petitioner
(Klausner, Hunter & Oxfeld, attorneys)

Brenda Liss, Esq., for respondent
(McCarter & English, attorneys)

Record Closed: November 14, 1988 Decided: December 5, 1988

BEFORE: **WARD R. YOUNG**, ALJ:

William David Guyet, a tenured teaching staff member employed by the Caldwell-West Caldwell Board of Education, filed a Petition of Appeal to challenge the action of the Board in withholding his salary increments (employment and adjustment) for the 1988-89 school year on the basis of arbitrariness, capriciousness, bad faith, and contravention of N.J.S.A. 18A:29-14.

The matter was transmitted to the Office of Administrative Law on June 17, 1988, pursuant to N.J.S.A. 52:14F-1 et seq.; was preheard on August 15, 1988; and proceeded to plenary hearing on October 25 and 26, 1988. Post-hearings submissions were filed and the record closed on November 14, 1988, the date established for final submission.

The Board acted unanimously to withhold petitioner's increments at a special public meeting held on February 22, 1988 and stated in its resolution that its action was based on petitioner's "failure to satisfactorily perform the following responsibilities listed in The Teachers Job Description":

I. The Teacher in the Classroom
(5) Develops a relationship with students which is inspiring and professional

II. The Teacher as a Person
(1) Acts with sincerity and integrity in relations with others
(7) Makes decisions that serve the common good

III. The Teacher as a Member of the Profession
(1) Observes professional ethics
(10) Shows respect for the worth and dignity of colleagues

IV. The Teacher with Parents and Community
(7) Observes professional ethics in relations with parents and other members of the community (See, R-11).

Guyet was noticed of the February 22 meeting and the impending consideration by the Board of its withholding action on recommendation of Assistant Superintendent Fahy, which was conveyed to Guyet in a letter from Fahy under date of January 29, 1988. The letter advised Guyet that the following information related to his alleged unprofessional behavior and conduct unbecoming a teacher would be presented to the Board:

September 1987 - Telling an off-color joke to an eighth grade class.

December 1986 - Sharing the content of a parent conference with one of your classes.

March 1987 - Speaking derogatorily about a colleague with a student teacher

December 1987 - Dismissing a Drama Class before the scheduled time and leaving the class unattended due to poor student behavior.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

Since petitioner's counsel argues that the alleged incidents of Guyet's conduct during the 1986-87 school year are unrelated to the alleged 1986-87 incidents and the Board is therefore prohibited from utilizing them as a basis for its withholding action for 1988-89, the recitation that follows bifurcates them by academic year.

1986-87: Guyet's own testimony does not dispute that he told a student music teacher that her cooperating teacher would do better if she did more singing. This incident was memoralizied in a memo under date of April 1, 1987 entitled "Count of unprofessional conduct" which indicates that Guyet "recognized verbally the unprofessional nature of those actions." It also states that "A third count of unprofessional conduct will result in the withholding of both salary adjustment and earned portions of his salary increment." See, R-3. Guyet testified that he did not respond to the memo.

The first incident of alleged unprofessional conduct is memorialized in a December 10, 1986 memo which addressed a parent complaint "that the substance of his discussion with you during the conference regarding his daughter was subsequently shared with the students in your drama class. See, R-7. Guyet testified that he received the memo but did not respond to it. He neither conceded or denied that the incident occurred.

1986-87: Guyet testified that he concedes the inappropriateness of the "joke" he told to an eighth grade class, which was construed by his principal to be "off color". See, R-5. This concession was also memorialized in his memo to his principal. See, R-2.

Considerable testimony was adduced regarding the allegation that Guyet left his drama class unattended prior to the end of the class period because of disruptive pupil behavior. There is no compelling need to recite the scenario as to the location of the

class on the third floor on December 9, 1987 due to irrelevancy as the gravamen of this allegation is whether Guyet conducted himself unprofessionally if in fact he left his class unattended prior to the end of the class period.

Guyet did not deny that he left the classroom before the period ended or that some pupils remained in the room after Guyet sent the others back to their regular classroom and teacher. He testified that he believed it was not improper for him to leave some children in that classroom as teacher May was sitting in the back of the room doing some work. In response to examination by the undersigned, Guyet testified that he did not speak with May before he left the classroom concerning supervision of the pupils remaining there, and further that he did not assume that May would assume the supervision of those children. Guyet did advise his principal of his action as he left the building for his next assignment in another building. His principal testified he immediately proceeded to the classroom, and upon his arrival there prior to the end of the period discovered the pupils there, but teacher May was not. See, P-1, R-1, and R-6.

FINDINGS OF FACT

I **FIND** the allegations concerning Guyet's conduct related to all four incidents addressed above to be valid, and true.

ARGUMENTS OF COUNSEL

The Board argues that petitioner has failed to meet his burden of proof by a preponderance of credible evidence that its withholding action was evidenced by improper motives or was without a rational basis, and seeks the application of Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 228, 294 (App. Div. 1960) to affirm its action and dismiss the petition.

Petitioner seeks reinstatement of his withheld increments due to the impropriety of utilizing the 1986-87 incidents as a basis for the Board's action as they are unrelated to the 1987-88 incidents, and cites Borrelli v. Rutherford Bd. of Ed., 1983 S.L.D. ____

(decided September 26, 1983), aff'd State Board of Education (decided July 3, 1985). Petitioner also argues that reversal of the Board's action is mandated by Carroll v. Sussex-Wantage Bd. of Ed., N.J. Super. A-2830-86T7 (App. Div. 1987), decided October 26, 1987 (unpublished), and seeks a remand because of the Board's illegal consideration of the 1986-87 incidents and utilization of them to support its withholding action.

DISCUSSION

Notwithstanding that I shall determine that the 1987-88 incidents serve as a sufficient rational basis to affirm the Board's withholding action, the petitioner's arguments shall be addressed in anticipation of the Commissioner's review.

The State Board stated in Borrelli at pp. 5 and 6:

> Thus, where conduct not warranting board action to withhold salary increments in a single year continues to be exhibited in subsequent years, such that the cumulative effect of the pattern of conduct has a deleterious impact on the delivery of educational services, the board may at that point decide that withholding future increments is appropriate. In such cases, the board should not be confined to examining the current school year in a vacuum but should be permitted to consider the developing pattern. However, where no such continuing pattern is identified, no justification exists to review behavior in prior years.

The State Board also reiterated at p. 7 in Borrelli that "conduct occurring in remote school years may not be re-examined to support an adverse increment determination in subsequent years unless such earlier unsatisfactory conduct is cumulative, so as to be added to other conduct occurring during the year in which the decision to withhold the increment is made." (emphasis added).

See also, Trautwein v. Bound Brook Bd. of Ed., 1978 S.L.D. 445, aff'd St. Bd. of Ed. 1979 S.L.D. 876, rev'd 179 N.J. Super. 553 (App. Div. 1980). The State Board stated at

877: "So in the case of withholding an increment, past conduct over a reasonably relevant period of time may properly be considered by a board of education in determining whether or not a teacher's increment should be withheld." The reversal by the Appellate Division was on other grounds.

It must be noted that the issue in Trautwein was absenteeism, and it can hardly be argued there was no relatedness over two academic years.

In the instant matter, petitioner contends the 1986-87 and 1987-88 incidents are not related. The Board argues all incidents are related as a pattern of petitioner's unprofessional conduct is clearly demonstrated. Guyet was noticed in the April 1, 1987 memo that "A third count of unprofessional conduct will result in the withholding of both salary adjustment and earned portions of his salary increments." See. R-3. I FIND petitioner's contention without merit, as the pattern of Guyet's conduct over two academic years is indeed unprofessional and therefore related.

Petitioner's reliance on Carroll is misplaced as the remand therein was not a reversal of the Board's action. The court stated (slip opinion at 2): "We do not mean to suggest that the local board would be abusing its discretion if it chose to reimpose the same penalty. We simply give the local board an opportunity to determine whether the same penalty remains appropriate in light of the reduced number of charges for which petitioner was ultimately found guilty."

CONCLUSION

It is noted that the Board made application at the conclusion of petitioner's case to dismiss the petition. The issue framed and incorporated in the Prehearing Order reflected petitioner's challenge of the Board's action on grounds of arbitrariness and capriciousness and also on an alleged violation of N.J.S.A. 18A:29-14. A bench decision was rendered denying the motion on the former for the development of a full record, but dismissed the alleged statutory violation as petitioner's burden was clearly not met.

Petitioner's burden herein is to demonstrate that the underlying facts upon which the Board acted lack validity, and that it was unreasonable for the Board to conclude as they did upon those facts. I **FIND** that burden has not been met. Kopera.

I CONCLUDE, therefore, that the Petition of Appeal shall be and is hereby **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

5 December 1988
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

12-8-88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 8 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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WILLIAM DAVID GUYET,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed timely replies thereto.

Petitioner's exceptions reiterate the arguments posed at hearing. Relying again on Louis Borrelli v. Board of Education of the Borough of Rutherford, 1983 S.L.D. 914, aff'd State Board July 3, 1985, petitioner claims the 1986-87 allegations upon which the Board relied in withholding his 1988-89 increments are untrue and unrelated to the 1987-88 allegations and, thus, the Board's use of the 1986-87 incidents is improper. He also repeats his contention that William F. Carroll, Jr. v. Board of Education of the Sussex-Wantage Regional School District, decided by the Commissioner August 26, 1985, aff'd with modification State Board February 4, 1987, aff'd Superior Court, Appellate Division October 26, 1987, also mandates reversal. Averring that Carroll was modified by the State Board because it sustained only two of the four original charges against him and thereafter the Appellate Division remanded the matter to the local board for reconsideration of Carroll's penalty, petitioner's counsel herein claims that "[s]ince two of Guyet's four charges were illegally considered by the local Board even if the Commissioner of Education finds that either or both of the other charges are valid, remand is mandatory." (Exceptions, at p. 2)

Petitioner notes that time constraints prevent him from providing the Commissioner with the transcript of the proceedings below. He requests the Commissioner "place this matter with the consent of the Acting Director of the Office of Administrative Law, so that the transcript may be obtained." (Id.) By this the Commissioner understands petitioner as asking that the matter be held in abeyance while transcripts are ordered. He denies such request as there is no provision in law or regulation so allowing.

The reply exceptions filed by the Board note that petitioner's exceptions raise no new arguments. The Board claims that the record contains sufficient credible evidence to support a

finding that the incident which allegedly occurred on December 10, 1986 did in fact occur despite petitioner's later denial of it at trial and, in reply exceptions, the Board contends the Commissioner should adopt the ALJ's finding that the allegations related to this incident were valid and true. The Board also rebuts petitioner's claim made in exceptions that he was not guilty of unprofessional conduct concerning the student teacher episode alleged by the Board. The Board in reply exceptions argues that the record establishes that "petitioner himself admitted the unprofessional nature of his actions" (Reply Exceptions, at p. 2), and the Board cites to Exhibit R-7 in support of this contention. "As petitioner did not recant this admission at the hearing, his effort to do so now must be accorded no weight." (Id.)

In summary, the Board states that "Petitioner's belated efforts to clarify his testimony, and to downplay the seriousness of conduct which even he admitted to be improper, do not provide grounds for rejecting the initial decision." (Id.) The Board concludes that the ALJ correctly found that petitioner failed to meet his burden of proof and that, therefore, the petition should be dismissed.

Upon his careful and independent review of the record, which, it is noted, does not include a transcript of the hearing below, the Commissioner adopts the initial decision substantially for the reasons stated therein. He expressly notes his approval of the ALJ's interpretation of Borrelli, supra, and Carroll, supra, as they relate to the instant matter. Moreover, without benefit of the transcripts of the hearing, the Commissioner will rely upon the ALJ's credibility determinations and factual conclusions derived therefrom. The Commissioner has given "attentive consideration to the ALJ's recommendation" (In re Morrison, 216 N.J. Super. 143 (App. Div. 1987) and on the limited record before him concurs with the ALJ's conclusion that petitioner has failed to meet his burden of proof by a preponderance of credible evidence that the Board's withholding action was evidenced by improper motives or was without a rational basis. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 228 (App. Div. 1960)

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

February 2, 1989 COMMISSIONER OF EDUCATION

STATE BOARD DISMISSED AUGUST 2, 1989 and OCTOBER 4, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4921-88
AGENCY DKT. NO.155-5/88

BOARD OF EDUCATION OF DELAWARE VALLEY REGIONAL HIGH SCHOOL,
Petitioner,
v.
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF ALEXANDRIA; MAYOR AND COUNCIL OF BOROUGH OF FRENCHTOWN; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HOLLAND; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF KINGWOOD; BOROUGH COUNCIL OF THE BOROUGH OF MILFORD,
Respondents.

David W. Carroll, Esq., for petitioner
James P. Granello, Esq., for Respondent Holland Township
Frederick R. Stem, Esq. for Respondent Frenchtown Borough (Stem and Stem, attorneys)
Joseph F. Novack, Esq., for Respondent Kingwood Township
J. Peter Jost, Esq., for Respondent Alexandria Township
Walter G. Luger, Esq., for Respondent Milford Borough (Schaff, Motiuk, Gladstone, Moeller & Reed, attorneys)

Record Closed: November 21, 1988 Decided: December 7, 1988

BEFORE **BRUCE R. CAMPBELL**, ALJ:

The Delaware Valley Regional High School District Board of Education (Board) appeals an action of the governing bodies of Alexandria Township, Frenchtown Borough, Holland Township, Kingwood Township and Milford Borough (governing bodies) by which the governing bodies certified to the Hunterdon County Board of Taxation a lesser amount of appropriations for current expense school purposes for the 1988-89 school year than the amount the Board proposed in its budget which was defeated by the voters on April 5, 1988.

Upon joinder of the case before the Commissioner of Education, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on July 28, 1988. Among other things, it was settled that the issue to be determined is whether the amount certified is sufficient to provide a through and efficient education in the Delaware Valley Regional High School District for 1988-89 and, if not, what additional amounts are necessary to accomplish that purpose.

The petitioner filed an amendment to petition on or about July 8, 1988. Respondent Holland Township, subsequently joined by respondents Alexandria Township, Kingwood Township and Milford Borough, filed a motion to strike the amended petition and supporting documents. I held the motion in abeyance while settlement discussions were held by and among the parties. By letter dated October 10, 1988, Holland Township's counsel advised the petitioner's counsel that settlement did not seem likely. Accordingly, I reactivated the motion.

On October 24, 1988, I issued an order denying the motion to strike the amended petition and supporting documents. The order also disposed of a minor Open Public Meetings Act question. The matter was heard on October 26 and 28, 1988.

RELEVANT EVIDENCE

The superintendent of schools testified both by prefiled written testimony and orally at hearing. Among other things, he stated that the 1988-89 budget represented a 6.2% increase over the 1987-88 budget. In dollar terms, the increase was $327,101. The governing bodies recommended a $155,000 reduction in current expense and no reduction in capital outlay. With the reduction, the 1988-89 budget would be $220,000 greater than the 1987-88 budget.

Pupil population has declined from approximately 765 pupils to approximately 700 pupils. The per pupil cost for 1987-88 was $7,319.71. The per pupil cost of 1988-89 is projected to be approximately $8,024.

Most vocational pupils are sent out of district on a tuition basis. The district runs an employment orientation program for handicapped pupils. Pupil population is expected to stabilize and then grow steadily. The current number of administrators is the same as when the school enrolled over 950 pupils. The transportation supervisor is not a certificated person. Department chairpersons hold supervisory certificates, evaluate teachers and conduct curriculum development with other professional staff. Assistant principals do some evaluations.

Based upon the district's own observations and a study conducted by an outside consultant, the district proposes to establish a district curriculum coordinator position. The Board budgeted $40,000 to fund this position. The superintendent also presented data tending to show that the district is not "top heavy" with administrators when compared to districts of similar size (P-6). The superintendent also testified at some length concerning teacher-pupil ratios and average class sizes.

In 1986-87 and 1987-88 cocurricular activities accounts suffered shortfalls. These negative balances were covered by transfers from other line items. However, because of straitened circumstances this year, it will not be possible to cover the accounts in that way.

The district replaced its internal telephone system in 1987-88. The old system, a rental system, had been in use for 20 years and was irreparable. The new system is a lease- purchase system. Although the cost per year is slightly higher, it will ultimately save money. The 1987-88 budget did not anticipate replacement of the system.

It was undisputed that the Board expended $70,000, on an emergency basis, to effect roof repairs during the 1987-88 school year and appropriated nearly $200,000 for roofing in the present budget.

The governing bodies' expert testified that he had reviewed the written testimony and other data submitted by the Board. He also used various reports and data generated by the New Jersey School Boards Association and the New Jersey Education Association.

In his opinion, a 3% of total budget free balance is appropriate and is supported by both cases and custom. In the present case, 3% of budget would be approximately $160,000. If the free balance were $140,000, that would be a reasonable figure. The witness could not tell if any 1987-88 purchases made from surplus were used to reduce the amount of surplus.

In this witness' opinion, a K-12 district is easier to coordinate than is a sending-receiving relationship. This applies to curriculum articulation as well as to other areas.

The district could do with one less administrator. There would be no detriment to the district. Although assistant principalships are the only positions presently susceptible of reduction, the witness made no suggestion as to what position should be eliminated. The witness also believes the required number of staff is too high. He believes that a 12.15 average class size exists. He derived this figure by taking the number of teacher periods available and dividing by the number of pupils, including pupils assigned to study halls. He made some assumptions from schedules on p. 24 of Exhibit P-2. In physical education classes, for example, 40 teacher periods are available to serve 700 pupils.

Concerning cocurricular activities, the witness stated that because funds had been "deferred" from other lines in other years, one can assume that money will be available this year. He acknowledges there was a 9.2% contractual increase in cocurricular salaries. Also, if more head coaches are secured for girls' sports, higher coaching salaries will result.

The district lists 13 part-time supervisors. Departments could be combined by areas for supervisory purposes. This could lead to lower supervisory costs. Fixed costs, however, do not go down as enrollment decreases. Such items as utilities, insurance and maintenance change little, if any, if enrollments decline.

The witness could not tell if the $109,000 in encumbered funds was justified or not.

The Board's secretary testified that the audited free balance for 1987-88, a figure not available when the present petition was filed, was $146,091.97. For the previous year, the figure was $261,000.

The Board appropriated $200,000 for roofing in the present budget. During 1987-88, it was necessary to expend $70,000 to accomplish roof replacement that could not be put off.

W accounts are reserves for unpaid orders and commitments made in a prior fiscal year but payable in the present fiscal year. All amounts she reported in the W accounts were incurred prior to June 30, 1988. Most of the amounts are being held against an arbitration award. The district has been in arbitration with a contractor since 1985-86. The Board believes it owes the contractor only $38,000. This would come out of $74,000 set aside for this purpose as would legal fees and arbitration fees. The contractor has demanded $285,000.

The witness testified as to purchase orders outstanding as of June 30, 1988. None represent items budgeted for 1988-89. None were improperly issued and there was no intent at any time to do other than to pay 1987-88 debts properly incurred.

The witness also testified as to unanticipated expenses since the budget was established and particularly those that occurred on or after July 1, 1988. It is the secretary's opinion that the Board cannot afford to carry any less surplus. The secretary stated that, although the transportation supervisor's salary is 90% state funded, only full-time positions receive state aid. If the transportation supervisor were reduced to less than full time, the district would actually lose money.

The second day of hearing was taken up by rebuttal testimony. Both parties rested. The Board placed its summation in the record at that time and the governing bodies submitted their summation, in writing, on November 10. On November 21, I received a letter from the Board's counsel advising of the arbitration award handed down in the dispute between the Board and a contractor concerning construction of the track on the athletic field. Assuming no appeal, the Board's net shortfall on the track is $21,486.43. The Board urges that this figure must be added to the district's unanticipated 1988-89 expenses as of October 18, 1988, of $75,824 (P-4), for a total of $97,322 already committed out of the current expense surplus of $146,091.96. While it is true that an additional $70,000 is available from the account originally budgeted for reroofing, the district still would have a net surplus of only $118,780 to cover unanticipated expenses for the remaining 2/3 of the school fiscal year.

DISCUSSION AND DETERMINATION

The governing bodies determined to reduce current expense by $155,000. They proposed reductions of:

$40,000 representing one administrator

$20,000 "taken from the Teaching Staff account"

$18,000 from the cocurricular account

$40,000 from the curriculum development account, and

$37,000 from free balance.

Having heard and observed the witnesses as they testified and having considered all documents presented, I **FIND** as follows.

Account 211

The evidence in support of the present administrative structure is more convincing than the evidence against it. The present assistant principals have more responsibilities than did the former director and assistant principals. One assistant principal manages student discipline and attendance, serves several other functions and evaluates ten teachers, three secretaries and two aides. The other assistant principal serves as head of guidance and the Child Study Team in addition to performing other duties.

Because the governing bodies' recommendation was nonspecific, I had to rely on testimony to determine that an assistant principal position was the actual target of the recommended reduction. The municipalities' resolution states that $40,000 representing one administrator can be taken from the account dealing with administration. The resolution also states the school presently has six administrators plus one athletic director. In fact, the Board employs five certified administrators. The transportation supervisor, it has been established, is not a certified person. In any event, his salary is 90% State funded.

In consideration of the proofs, I **DETERMINE** that the present administrative structure is appropriate. It must be noted that many of the duties performed by these administrators are independent of the number of pupils attending the school. It must also be noted that the duties of these personnel have grown by accretion over the years. For example, the position of affirmative action officer was unknown until recently. Now it is mandatory.

I **ORDER** restoration of $40,000 to this account.

Account 213

Here again, the municipalities' resolution was nonspecific. The thrust, however, is that $20,000 can be taken from this account because the actual number of classes conducted by the teaching staff measured against the number of assignable

teaching periods indicates that two teaching positions are redundant.

This rationale must be rejected. Staffing needs are dictated by course enrollments. The district has recognized changing conditions by reducing one English and one Business Education position and by adding one Science position because of increased enrollments in that area.

Under the negotiated labor agreement, teachers may be assigned six duty periods per day. Chairpersons are assigned either three or four duty periods per day depending on the size of their departments. Assignments include classroom instruction, study hall supervision, curriculum coordination in a department lacking a chairperson, cafeteria supervision and the like.

Class sizes are within the limits deemed appropriate by the Board for a thorough and efficient education. There are two circumstances under which class sizes are relatively small. One is a situation in which classroom size regulations restrict the size of the group and the other occurs in advanced courses where a small class size would be anticipated based upon the number of capable and interested pupils.

Having reviewed the staffing data, I **DETERMINE** that, although it might be possible to accomodate an odd period in a few isolated circumstances, the overall schedule does not permit the reduction of one teaching staff member. The primary reason for this is that it is impossible to accumulate the odd periods and attribute them to one teacher. Although the numbers might match, teaching certificates do not. Further, in consideration of the data presented, I cannot recommend any reduction in the amount of coverage for study halls, cafeteria supervision, relief of the in-school suspension supervisor or relief of the school nurse.

I **ORDER** $20,000 restored to Account 213.

Account 1000

The governing bodies assert $18,000 can be taken from the cocurricular account because of the declining enrollment and a lesser rate of inflation.

The Board argues that the cocurricular and interscholastic athletic programs are funded from two sources: budget account 1402-31 and the separate athletic association account. The separate account consists of money earned from ticket sales to athletic events, refreshment sales, entry fees and money transferred from the district budget. In the 1986-87 school year, there was a shortfall of over $7,000 in this account. In 1987-88 there was a similar shortfall. The increase in appropriation for 1988-89 is $22,041.48. Of that amount, $16,630 goes directly to increased salaries for advisors and coaches covered by the teacher contract. An anticipated cost increase for purchased services of officials accounts for $6,930. I accept the Board's argument that neither of those costs can be modified unless programs are eliminated or curtailed.

I **DETERMINE** that $18,000 must be restored to Account 1000.

Account 212

The Board proposes to establish a new administrative position to coordinate curriculum for the K-8 districts that send pupils to the regional high school. The municipalities propose to strike this item entirely. In the alternative, because the position could not be filled before one-half of the school year has elapsed, the maximum cost to the district should be only $20,000.

The Board's rationale for establishing this position is compelling. Without reciting all testimony on the question, I **DETERMINE** that good and sufficient reason exists to establish this position. The municipalities' argument is equally persuasive. The position cannot now be filled earlier than the beginning of the second semester of the present school year.

According, I **DETERMINE** and **ORDER** that $20,000 shall be restored to Account 212.

Revenue Account 10

The municipalities recommend that $37,000 be taken from free balance. At the time pleadings were filed, this would have left the district with a $140,831 balance. In the governing bodies' view, this was an adequate free balance.

In addition, testimony recited above shows that the Board expended $70,000 on roof repairs in 1987-88. Therefore, $70,000 can be taken from the roofing repair account for 1988-89 and can be considered surplus.

The Board argues that there is no formula for what constitutes appropriate surplus. The 3% figure is often mentioned. However, the amount of surplus should depend on circumstances. In some districts 3% would be adequate and in others it would not. In an extremely large district with a big budget, 3% could be too much to carry in unappropriated free balance. In a small district, 3% could be too little.

The Board had experienced $75,000 in unanticipated expenses only three and one-half months into the school year. In addition, the arbitration matter still was pending when this case was argued. In view of these facts, a $145,000 surplus is not enough.

There is $70,000 in current expense for roof repairs that have already been done. If the Board were allowed to keep this amount plus the remainder of the unappropriated free balance, it would have approximately 4% in reserve. This is not an unreasonable figure in view of the district's circumstances. If the district fares well in its arbitration case, next year's surplus will benefit.

In addition to all other arguments, the Board urges that the minutes of the April 24, 1988 meeting show that the governing bodies discussed voters' sentiments, but not education. This is contrary to the standard of review imposed in Board of Education of East Brunswick Tp. v. Tp. Council of East Brunswick, 48 N.J. 94 (1966).

Although the governing bodies' reasons for reductions could have been more specific, I do not find them so devoid of educational content as to render them useless. The important concept to bear in mind is that if the Commissioner finds the budget of the governing bodies insufficient, he must direct appropriate corrective action.

The governing bodies may properly examine the Board's surplus. Board of Education, Tp. of Branchburg v. Tp. Committee of the Tp. of Branchburg, 187 N.J. Super 540 (App. Div. 1983). On the heels of that decision, the Commissioner held that while governing bodies may consider the budget as a whole, they are not relieved of the responsibility established in East Brunswick, above, to document the amount certified for each of the major accounts and to provide a line item budget stating recommended

specific economies together with supporting reasons. Board of Education of the Borough of Leonia v. Mayor and Council of the Borough of Leonia, OAL DKT. EDU 0232-83 (Jan. 27, 1983), adopted Comm'r of Ed. (Mar. 16, 1983). I call the attention of the Board to Board of Education of the Tp. of Deptford v. Mayor and Council of the Tp. of Deptford, _____ N.J. Super. _____ (App. Div. 1988), in which the Appellate Division held that the filing of reasons in the answer to the petition was an adequate and timely compliance with the intent and spirit of East Brunswick.

In consideration of the foregoing, I **DETERMINE** that no restoration is needed to Revenue Account 10. The $70,000 unexpectedly freed from the roof repair project more than offsets the governing bodies' reduction yet still provides a reasonable, albeit slender, budget reserve.

In sum this decision has restored $40,000 to Account 211, $20,000 to Account 213, $18,000 to Account 1000 and $20,000 to Account 212. No restoration was made to Revenue Account 10. Thus, $98,000 of the $155,000 reduction is restored.

It is **ORDERED** that the additional sum of $98,000 be and is hereby certified to the Hunterdon County Board of Taxation to be levied for current expense school purposes for the Delaware Valley Regional High School District for the 1988-89 school year, bringing the total to be levied for that purpose to $4,013,092. It is so **ORDERED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

7 DECEMBER 1988
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

12/9/88
DATE

Receipt Acknowledged:

Seymour Cooperman
DEPARTMENT OF EDUCATION

DEC 12 1988
DATE

Mailed To Parties:

Ronald L. Plesser 12/13
OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF ALEXANDRIA ET AL., HUNTERDON COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Township Committee of the Township of Holland filed timely exceptions which were joined by the Borough Council of Frenchtown, the Township Committee of the Township of Alexandria, the Borough Council of the Borough of Milford, and the Township Committee of the Township of Kingwood. Petitioner filed timely reply exceptions to the exceptions filed by Holland Township. However, Holland Township's replies to petitioner's reply exceptions were not considered in that there is no provision in law or regulations providing for such submission.

Petitioner first excepts to an error in the ALJ's calculation of the total tax levy and, second, to his determination regarding the reduction in surplus or free balance. Petitioner notes that the ALJ restored $98,000, but inadvertently added this to the original advertised budget local tax levy to arrive at a final certified tax levy of $4,013,092. Counsel notes the restoration should have been added to the tax levy certified by the municipal governing bodies. Thus, counsel for petitioner asserts, assuming no other changes in the ALJ's decision, the revised current expense tax levy should have been $3,858,092.

As to free balance, petitioner excepts only to the ALJ's conclusion, not his findings of fact as to whether the surplus in the district should be reduced. Relying on Bd. of Ed. of Fair Lawn v. Mayor, Council of Fair Lawn, 143 N.J. Super. 259, 273-274 (Law Div. 1976), aff'd o.b. 153 N.J. Super. 480 (App. Div. 1977), petitioner submits that the circumstances in the instant matter compel restoration of the $37,000 in free balance. Counsel argues:

> ***[A]s of October 18, 1988, the Board had encountered $75,825 in necessary but unanticipated expenditures, mostly in the nature of emergency repairs, an excess in out-of-district handicapped child placements, and overages on

> repair and service contracts. P-4 in evidence; testimony of the Board Secretary Mrs. Keller. In addition, the arbitration award which came down shortly after the evidentiary hearing will necessitate an additional appropriation from surplus in the amount of $21,486.43. Affidavit of Mrs. Keller attached to counsel's November 18, 1988, letter.
>
> This leaves the board with an available surplus of only $81,780.97 to cover contingencies for the remaining sixty percent of the school year. ($216,091 less $37,000 less $75,825 less $21,486.43) Given that the Board has already encountered unanticipated expenditures of $97,311 in the first four months, the remaining figure of $81,780 for the balance of the year is clearly inadequate. It constitutes only 1-1/2% of the total current expense budget for 1988-89.
>
> For these reasons, petitioner submits that the Commissioner should restore an additional $37,000 to the tax levy.
>
> (Petitioner's Exceptions at p. 3)

Thus, petitioner would have the Commissioner affirm the ALJ's restoration of $98,000 plus an additional $37,000 for a total restoration of $135,000 constituting a total current expense tax levy to be certified to the Hunterdon County Board of Taxation in the amount of $3,895,092.

As noted above, respondent districts concur with the exceptions filed by Holland Township. Such exceptions are summarized in pertinent part, below.

First, respondents aver the ALJ erred in denying Holland Township's motion to strike the amended petition and dismiss the Petition of Appeal for failure to comply with the Open Public Meetings Act. Despite acknowledging that the Board acted improperly in authorizing this budget appeal at the meeting of April 26, 1988, the ALJ refused to grant a request to dismiss the appeal which was not officially authorized by the Board until October 24, 1988, respondents contend, several months after the deadline for filing budget appeals. Respondents cite P-11 in support of their position and argue that notification of intent to appeal under N.J.S.A. 18A:22-37 is not a valid substitute for compliance with the OPMA regarding public notification for the purpose of taking official Board action. Citing Pollilo v. Deane, 74 N.J. 563, 580 (1977), respondents contend such a failure to give proper notice invalidates the Board action.

In Exceptions #2, 3, 4 and 5 respondents counter the ALJ's restoration of monies to specific line item reductions.

Exception #2 claims the ALJ erred in restoring $40,000 to Account 211, administrative salaries. Reciting the statistics pertaining to the declining enrollment in the district, as stated in its post-hearing submission, Holland Township adds that the ALJ failed to consider the roles of the administrators in question and how their workload would be affected by the number of students attending school. Holland Township further argues that while the ALJ was correct in noting an affirmative action officer is required by law, "***there was no testimony offered that such activity required an inordinate amount of administrative time particularly in a rural setting such as in Hunterdon County. The school expert, Dr. Geiger, opined that the quality of education would not be impaired if the administrative staff was reduced. (R-1 slip p. 10)." (Holland Township Exceptions, at p. 3)

Exception #3 avers the ALJ erred in restoring $20,000 to Account 213, teacher salaries. Reciting the statistics related to the pupil-teacher ratio in the district, Holland Township claims there has been no effort to reschedule classes in order to increase the number of students per class. It contends that the ALJ's statement that it is "impossible" (id. at p. 4 quoting the initial decision) to reschedule classes was not borne out by the testimony presented, "and totally ignores the opinion of Dr. Geiger who has had seventeen years experience as an administrator in the New Jersey public school system. (R-1 p. 2)." (Id.)

Exception #4 argues that the ALJ erred in restoring $18,000 to Account 1000, extracurricular activities. Holland Township contends that the fact that the Board has met deficits in this account through transfer of funds in prior years supports the conclusion that the Board can easily find these funds elsewhere in its budget. It claims the school expert for the municipalities testified that salaries for both coaches and officials appeared to be excessive considering the actual expenditures in 1987-88, and cites R-1 slip at p. 13 in support of this position.

Exception #5 suggests that the ALJ erred in restoring $20,000 to Account 212, the new administrative position of curriculum coordinator. Holland Township contends that there are no compelling arguments which can be made by the Board to justify such a position. It states:

> Dr. Geiger pointed out that the most compelling argument against spending funds for a curriculum coordinator was the recognition of the autonomy of the individual community schools. (R-1 slip p. 7). There has been no attempt by these sending districts to consolidate their schools. The test scores do not indicate a need to do so. P-2(f)(g). It was not a primary recommendation made by the consultant, Dr. Kaplan, who did the education study which recommended five alternative solutions which did not require the employment of a full-time coordinator. P-2(h);

> R-1 at p. 6. Lastly, the individual being hired by only one Board would not have the status of someone able to have "clout" over the elementary districts which is what the consultant's report suggested was needed. See P-2(h). (Id. at p. 5)

Finally, at Exception #6 Holland Township contends that:

> The Administrative Law Judge failed to recognize and credit the municipalities with the additional monies conceded by the Board as not being expended in 1988-89 from the following sources:
>
> A. Reroofing project already paid for in 1987-88, but appropriated in the 1988-89 budget in the amount of $70,000. The Administrative Law Judge only credited the municipalities with $37,000 from surplus when in fact at least $70,000 was discovered as not being needed for expenditures.
>
> B. The replacement of a senior science teacher will generate savings between $4,000 and $8,000. (Id., at pp. 5-6)

Respondents request that the Commissioner reverse the initial decision and affirm the $155,000 budget reduction established in April 1988 by the municipalities.

Petitioner's reply exceptions counter, point for point, respondents' exceptions. In reply to Exception #1, petitioner urges affirmance of the ALJ's October 24, 1988 Decision on Motion for the reasons set forth therein. It also incorporates by reference to this decision its October 17, 1988 letter brief on the motion, particularly pages 5-7.

In reply to Exceptions #2, 4, 5 and 6, petitioner notes that respondents have not ordered or supplied a transcript of the testimony to permit the Commissioner to evaluate those exceptions which pertain to disputed factual findings of the ALJ, and it cites In re Morrison, 216 N.J. Super. 143, 157-160 (App. Div. 1987) for the proposition that a party excepting to an ALJ's factual findings has an obligation to furnish the agency head with relevant portions of the testimony pertaining to such disputed factual issues.

Claiming that there was a day and a half of cross-examination and rebuttal testimony which has not been provided to the Commissioner, petitioner argues the ALJ clearly relied on his direct hearing and observation of the witnesses. Petitioner contends this testimony established that respondents' expert witness "had never visited the school district or its high school; was mistaken as to the number of guidance counsellors on staff; had made incorrect assumptions in his report about the number of coaches; was in error as to the number of department chairpersons; and had

incorrectly assumed the high school ran on a 14 period day, all periods of equal length." (Petitioner's Reply Exceptions, at p. 2) Petitioner claims the Commissioner has no obligation to review and reverse such witness assessment determinations, where the excepting party has not furnished him with a transcript, and cites In re Morrison, supra, in support of this contention.

On the merits, petitioner relates in reply exceptions accord with the ALJ's determinations as to Account 211 (administrators) and Account 213 (teacher salaries). Concerning Account 1000 (cocurricular), petitioner avers that respondent apparently concedes in exceptions that additional monies will be necessary for the Board to meet its contractual obligations for coaches and officials. Petitioner avers respondents' arguments that past transfers of money from other accounts will enable the Board to find such money in other accounts in this year's budget to be conjectural and unsupported in the record. Finally, concerning the Regional Curriculum Coordinator position, petitioner finds the record strongly supports the ALJ's conclusion that the rationale for this new position is "'compelling'." (Reply Exceptions, at p. 3) Petitioner also states it is "extremely noteworthy" that the chief school administrators in each of the five constituent school districts support the creation of this new position. (Id.)

For these reasons, petitioner urges the Commissioner to reject respondent's exceptions. It claims the initial decision should be affirmed with the modifications set forth in its exceptions.

Upon his careful and independent review of the record, which it is noted does not include the transcripts of the hearing below, the Commissioner adopts as his own the initial decision, substantially for the reasons stated therein. He adds the following.

The Commissioner is in accord with the Board's reference to In re Morrison, supra, for the proposition that the Commissioner has no obligation to review and reverse witness credibility determinations, and factual conclusions predicated thereupon, absent a transcript from the excepting party. It is noted that the ALJ heard direct and rebuttal testimony from the witnesses in this matter, in addition to considering the exhibits submitted by the parties. In the absence of transcripts, having given the ALJ's recommendations "attentive consideration" (In re Morrison, supra at 158, citing Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906 (1936) and having reviewed the record independently, the Commissioner concurs with the ALJ's determinations concerning Accounts 211, 212, 213 and 1000 for the reasons expressed in the initial decision. Respondents' exceptions objecting to these conclusions and findings are thus dismissed as being without merit.

As to Revenue Account 10, the free balance, the Commissioner has carefully reviewed the evidence presented, including the letter from Board counsel, David W. Carroll, Esq., dated November 18, 1988, written at the ALJ's request, to advise him

of the arbitration award handed down in the dispute the Board had with the contractor over construction of the track in school year 1986-87. Therein it is stated:

> Assuming no appeal, the Board's net shortfall on the track, as per Mrs. Keller's affidavit, is $21,486.43, which sum must be paid out of 1988-89 surplus. This figure must be added to the district's unanticipated 1988-89 expenses as of October 18, 1988, of $75,825 (P-4 in evidence), for a total of $97,322 already committed for appropriations out of the current expense surplus of $146,091.96 (the surplus the district began the school year with). While it is true that an additional $70,000 is available from the account originally budgeted for re-roofing in 1988-89, the district would still be left with a net surplus of only $118,780 ($146,091 plus $70,000 less $97,311) to cover unanticipated expenses for the remaining two-thirds of the school fiscal year. Given the unanticipated expenses already incurred to date, the retention of $118,780 for unanticipated expenses during the remainder of the year is a very prudent one.
>
> In the Leonia case I cited at the hearing (C. dec. March 16, 1983, OAL Docket No. EDU 0232-83) the Commissioner upheld a surplus of 4% for a full year in a district with a similarly sized budget. Four percent of the Delaware Valley Regional Board's 1988-89 budget is just over $223,000. Certainly the retention of half that amount to (or 2%) to cover the remaining two-thirds of the school year is not unreasonable, and should not be further reduced by the Commissioner.

The Commissioner also notes petitioner's summation in exceptions relative to its surplus following the arbitration award as cited ante.

First, the Commissioner would note for the record that the Board's summation relative to its surplus following the arbitration award is not evidence in the record, but instead represents new argument raised by way of exception with no opportunity for respondents to cross-examine on the alleged facts presented. As such the Commissioner may not consider such information in his disposition of this matter.

Further, as noted by the municipalities' expert, in his report, R-1 in evidence, "[t]he Commissioner of Education has generally ruled that a local school system can exempt up to 3% of its total current expense budget when requesting a budget cap waiver (see N.J.A.C. 6:20-2.14 and Board of Education of the City of Perth

Amboy v. Council of City of Perth Amboy, OAL DKT. EDU 3856-87 (Oct. 20, 1987)." (emphasis supplied) (R-1, at p. 3) The Commissioner concurs with the ALJ that "the amount of surplus should depend on circumstances." (Initial Decision, ante) The 3% figure, while often used as a gauge, is not dispositive of what is an appropriate amount to be held in surplus, especially when a cap waiver is not at issue.

Having carefully perused the instant record excluding the most recent data submitted by the Board on unanticipated expenditures in the district, (see above), the Commissioner concurs with the ALJ that no restoration is needed to Revenue Account 10. With two-thirds of the year yet ahead, the Commissioner deems 4% (now minus the $21,486.93 arbitrator award) of the current expense budget, "reasonable, albeit slender, budget reserve" (Initial Decision, ante) to see the district through the remainder of the school year. The purpose of such surplus is to meet unanticipated expenses. The mere fact that the district has encountered such expenses does not obligate the Commissioner to restore to the Board its full year anticipated figure for such reserves. He so finds.

The Commissioner's review of the ALJ's inadvertent error at page 11 of the initial decision comports with petitioner's counsel's exception. Said error is noted and corrected.

Accordingly, for the reasons expressed in the initial decision, as supplemented herein, the Commissioner adopts as his own the initial decision and the Decision on Motion dated October 24, 1988 as his own. He does so recognizing the significance of compliance with the OPMA, but also recognizing that the Board did on October 24, 1988 remedy its failure to notice the public that formal action might be taken at its April 26, 1988 meeting. See P-11. See also the municipalities' acknowledgement of this correction as stated at pp. 1-2 of its primary exceptions. The Commissioner concurs with the ALJ's admonition to the parties to strictly conform with the requirements of the OPMA and further agrees with the ALJ that the need to ensure a thorough and efficient education for the children in petitioner's district is paramount to dismissing the matter on Oct. 24, 1988 the technicalities of an OPMA violation, particularly since the violation was later corrected. Consequently, the local tax levy for the 1988-89 school budget for the Delaware Valley Regional High School is as follows:

	AMOUNT CERTIFIED	AMOUNT RESTORED	TOTAL
Current Expense	$3,760,092	$98,000	$3,858,092

The Hunterdon County Board of Taxation is hereby directed to make the necessary adjustment set forth above to reflect a total amount of $3,858,092 to be raised in the 1988-89 tax levy for current expense purposes for school year 1988-89.

IT IS SO ORDERED this 6th day of February 1989.

ACTING COMMISSIONER OF EDUCATION

February 6, 1989

BOARD OF EDUCATION OF DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT,	:	
PETITIONER-RESPONDENT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HOLLAND, HUNTERDON COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, February 6, 1989

For the Petitioner-Respondent, Carroll & Weiss
(David W. Carroll, Esq., of Counsel)

For the Respondent-Appellant, James P. Granello, Esq.

This is an appeal from a decision of the Commissioner, which, adopting the Administrative Law Judge's determination, directed restoration of $98,000 out of a total of $155,000 that had been reduced from the Board of Education of Delaware Regional High School District's (hereinafter "Board") proposed current expense budget for 1988-89 by the constituent districts' governing bodies pursuant to N.J.S.A. 18A:22-37 following voter defeat of the budget.

The matter was initiated by petition to the Commissioner, filed on May 25, 1988, in which the Board asserted that the reductions made by the five governing bodies[1] on April 26 at a joint meeting with the Board had been made in an arbitrary manner, and that the reductions would impair the Board's ability to provide and maintain thorough and efficient educational facilities and programs for 1988-89. In their answers, the governing bodies raised as separate defenses allegations that the petition was void in that the Board's notice of the April 26 meeting between itself and the governing bodies, convened pursuant to N.J.S.A. 18A:22-37, at which the Board had authorized the appeal, had not stated that action might be taken, as required by the Open Public Meetings Act,

[1]The five governing bodies were: the Township Committee of the Township of Alexandria, the Council of the Borough of Frenchtown, the Township Committee of the Township of Holland, the Township Committee of the Township of Ringwood, and the Borough Council of the Borough of Milford. As set forth subsequently, only the Township Committee of the Township of Holland has appealed from the Commissioner's decision in this matter.

N.J.S.A. 10:4-4.6 et seq. (hereinafter "OPMA"). On July 8, 1988, the Board filed an amendment to its petition, alleging that at least one of the governing bodies had failed to state in its notice of the April 26 meeting that action might be taken.

The governing bodies moved to strike the amended petition. On October 24, the Administrative Law Judge (ALJ) denied the motion, and determined that, with the exception of the Township Committee of the Township of Holland, the claims of all of the governing bodies made under the Open Public Meetings Act were technically out of time, but that both the Board's notice of the April 26 meeting, and those of the governing bodies, except for Holland Township, had been deficient. He, however, concluded that the public good would be better served if the matter were litigated on the merits, and directed that the matter proceed to plenary hearing.

No interlocutory appeal was taken from the ALJ's order, and on December 7, 1988, the ALJ issued his initial decision on the merits of the Board's appeal. Finding that the district's administrative structure was appropriate, and that the duties performed by the district's five administrators were independent of the number of students and had grown by accretion over the years, the ALJ directed restoration of $40,000, representing one administrative position that would have been eliminated by virtue of the governing bodies' reduction of that account. The ALJ further determined that the overall class schedule did not permit reduction of the teaching staff by one member, and directed restoration of $20,000, representing such reduction, to the teaching staff account. Finding that increased costs for salaries for advisors, coaches and purchased services of officials for co-curricular athletic programs could not be modified unless the programs were curtailed or eliminated, the ALJ determined that $18,000 be restored to the co-curricular account. The ALJ also determined that "good and sufficient reason" existed to direct restoration of $20,000 to the curriculum development account to enable the Board to establish a new administrative position to coordinate curriculum for the K-8 districts that send pupils to Delaware Valley Regional High School.

While recognizing that governing bodies may properly examine a board's surplus when acting pursuant to N.J.S.A. 18A:22-37, the ALJ emphasized that, in doing so, they are not relieved of their responsibility to document the amount certified for each major account and to provide a line item budget stating recommended economies together with supporting reasons. The ALJ, however, determined that no restoration to the revenue account was necessary, observing that $70,000 unexpectedly freed from roof repair offset the governing bodies' reduction, thereby providing a reasonable, but slender budget reserve.

The Commissioner adopted both the ALJ's determination of October 24 and his initial decision on the merits, substantially for the reasons set forth in those determinations. Having independently reviewed the record, the Commissioner concurred with the ALJ that no restoration was needed to the district's free balance, finding that the remaining amount constituting approximately 4% of the current expense budget provided a slender, but reasonable reserve that would enable the district to meet unanticipated expenses for the remaining

2/3 of the school year. In adopting the ALJ's determinations, the Commissioner recognized both the significance of compliance with the OPMA and the fact that on October 24, 1988, the Board had remedied its failure to properly notice the public by authorizing the budget appeal anew. While concurring with the ALJ's admonition to the parties that they comply with the OPMA, he agreed that the need to ensure the provision of a thorough and efficient education took precedence over the technical deficiency in this case, particularly in that the Board subsequently acted to correct the violation.

By notice filed on February 14, 1989, the Township Committee of Holland Township appealed the Commissioner's decision. The other four governing bodies of the district's constituents neither filed an appeal, nor joined the appeal filed by Holland Township. See N.J.A.C. 6:2-1.2(b).

In its appeal, Holland Township renews its contention that the Board's petition should be dismissed on the grounds that its notice of the April 26 meeting was deficient. It further argues that the documentary evidence fails to support the conclusions reached by the Administrative Law Judge and the Commissioner, and maintains that good and sufficient reason exists for the Board to address its curriculum problems in some other way than by hiring a curriculum coordinator. The Township Committee asserts that the municipalities should be credited with appropriations unexpended in 1988-89 and that the resulting free balance justifies denying restoration of the $98,000 at issue in this appeal in that any monies necessary to fund the Board's current expenses can be found in the existing free balance.

We have carefully reviewed the record in this case. Based on our review, we reject the Township Committee's contention that the Board's petition should be dismissed because its notice of the April 26 meeting did not include a statement that action might be taken at that meeting. While there is no dispute that, in this respect, the Board's notice did not strictly comply with the requirements of N.J.S.A. 10:4-8(d), and while, as a result of this failure, pursuant to N.J.S.A. 10:4-15(a) the Board's action authorizing the appeal is voidable,[2] the appeal filed on behalf of the Board stood in full force and effect pending a determination through these proceedings as to whether the action is void, Houman v. Mayor and Council of the Borough of Pompton Lakes, 155 N.J. Super. 129 (Law Div. 1977), and we emphasize that the Open Public Meetings Act does not mandate a conclusion that the Board's appeal is void. Rather, in deciding on appeal the issues arising under the Open Public Meetings Act as they relate to the controversy now before us, e.g. Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184, (App. Div. 1979), it is entirely appropriate that we, as did the ALJ and Commissioner, consider the nature, quality and effect of the the

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[2]In that the Board has not contended that, under the "last proviso clause" of N.J.S.A. 10:4-15, see In re Application of County of Monmouth, 156 N.J. Super. 188, 192-94 (App. Div. 1978), its action is not voidable, we need not consider the application of the clause in this case.

Board's failure to include in its notice a statement that action might occur, and on that basis determine the appropriate remedy. Pollilo v. Deane, 74 N.J. 562, 579 (1977).

In making this assessment, we fully concur with the ALJ and the Commissioner that, given the circumstances here, voiding the Board's action authorizing the appeal so to dismiss the Board's petition is not warranted. While the Board's notice was admittedly deficient, the notice did accurately notify the public as to the date, time and place of the meeting, and specified that the purpose of the meeting was to discuss with its constituents' governing bodies the budget which had been defeated.

Dismissal of the petition is not being sought by any member of the public asserting that the right of the public to be present was adversely affected because of deficiency in the Board's notice, but by one of the constituent districts' governing bodies seeking dismissal of proceedings to determine the sufficiency of amounts determined by those governing bodies pursuant to N.J.S.A. 18A:22-37. There is no claim that the deficiency at issue deprived the governing bodies in any way of the ability to represent their interests in these proceedings, and the Board took corrective action to ratify its original action prior to commencement of hearing in this matter, thereby protecting any interest on the part of the public.

Further, while not dispositive of Holland Township's claim, and while the other governing bodies are not party to the appeal now before us, we can not ignore that the notices of two of those governing bodies suffered from the same deficiency as the Board's, and that two others apparently did not notice the public of the meeting at all. Nor can we ignore that the April 26 meeting was a joint meeting convened pursuant to N.J.S.A. 18A:22-37 in order for those governing bodies to consult with the Board prior to determining the amount to be appropriated to provide a thorough and efficient system of education for the high school students in the constituent districts, and that the governing bodies did act to make such determination. In that the Board's determination to appeal was contingent on and directly resulted from the action of the governing bodies reducing the amount of the proposed budget and in that four of the governing bodies apparently failed to comply with the requirements of the Open Public Meetings Act, we would hesitate to dismiss the Board's petition on grounds of the deficiency in its notice while permitting the underlying action of the governing bodies to stand without review.

We agree with the Commissioner, that, under the circumstances presented, the need to assure that the amount appropriated by the governing bodies pursuant to N.J.S.A. 18A:22-37 was sufficient to assure the provision of a thorough and efficient education is paramount, and given the nature, quality and effect of the deficiency in the Board's notice, we find that the appropriate remedy in this case was, as determined by the ALJ, admonition to all parties except Holland Township to conform with the requirements of the Open Public Meetings Act.

Likewise, we reject Holland Township's contention that the documentary evidence fails to support the factual conclusions reached by the ALJ and Commissioner. While making the general argument that it need not provide transcripts in order for the State Board to arrive at different conclusions, the Township Committee has provided no specific basis for rejecting the factual findings below. Insofar as the Township Committee seeks reversal on the basis of the Commissioner's adoption of the ALJ's assessment of the pre-filed testimony of its expert witness, it was the Committee's obligation to provide this agency with transcripts. In re Morrison, N.J. Super. 143, 157-58 (App. Div. 1987).

Based on our review of the record, for the reasons expressed by the ALJ and Commissioner, we affirm the Commissioner's determination that, pursuant to N.J.S.A. 18A:22-37, the reduction of $40,000 representing one administrator, $20,000 to the teaching staff account, and $18,000 from the co-curricular account can not be sustained and that restoration of those amounts is warranted. In affirming those determinations, we emphasize that while co-curricular activities are not central to the provision of a thorough and efficient education, in reducing the amounts proposed by the Board, the governing bodies in this case did not intend that the Board's co-curricular programs be reduced. Rather, they intended that the Board fund its existing programs from other accounts. Insofar as the governing bodies believed that there was excess in other accounts, it was incumbent on them to examine those accounts and to act to reduce those accounts rather than accounts representing appropriations to fund existing programs at current levels. c.f. Branchburg Bd. of Ed. v. Branchburg, 187 N.J. Super. 540, 543-44 (App. Div. 1983), certif. denied, 94 N.J. 506 (1983).

Likewise, while we recognize that a governing body acting pursuant to N.J.S.A. 18A:22-37 may review and consider a board's allocation of unappropriated free balance, id. at 545, we concur with the Commissioner that the free balance resulting from his decision provides the Board with a reasonable, but slender reserve, and we find that to permit the governing bodies to reduce that amount further would jeopordize the Board's ability to meet unforeseen expenditures. In so concluding, we reject the view that a governing body may fulfill its obligations to determine the amount necessary for each item in order to provide a thorough and efficient education by reducing those items on the grounds that such predictable budgeted expenses can be funded from free balance, or that the Commissioner's directive should be set aside on the basis of free balance that might exist at this point.

We however reverse the Commissioner's determination directing restoration of $20,000 for establishment of a new administrative position to coordinate curriculum for the K-8 districts that send pupils to Delaware Valley Regional High School. In reversing this determination, we emphasize that whether a reduction made by a governing body pursuant to N.J.S.A. 18A:22-37 will be sustained does not turn on whether the board demonstrates, as the ALJ found in this instance, "good and sufficient reason" to warrant restoration. Rather, in proceedings pursuant to N.J.S.A.

18A:22-37, the Board must show that the amount at issue is necessary to the provision of a thorough and efficient education or that the reduction of that amount impairs the educational process. Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick 48 N.J. 94, 105 (1966). See Board of Education of the Borough of South Plainfield v. Mayor and Council of the Borough of South Plainfield, decided by the State Board, May 3, 1989, slip. op. at 5.

While the Board in this case has demonstrated the need to address problems relating to articulation of curriculum, P-2, and while the district's desire to address these problems by establishing a new position would be a proper exercise of educationally based judgment, the Board has shown neither that this option is the only educationally sound option available nor that it could not accomplish its educational objectives through one of the other options available to it. See P-2. In that this appropriation represents an amount necessary to establish a new position rather than that required to maintain current levels of staffing, and given that the district is fully certified, its test scores are not failing to meet state standards and it has other options available through which it may address this need, we find that the Board has not shown that this amount is necessary in order to provide a thorough and efficient education or that this reduction will impair the educational process. In so concluding, we emphasize that while we might include amounts for this purpose were we acting as the original budget-making body, in that the Board has shown neither that this amount is required in order to provide a thorough and efficient education nor that this reduction was arbitrary, in proceedings pursuant to N.J.S.A. 18A:22-37, this reduction must be sustained. Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, supra, at 107.

In sum, for the reasons set forth above, the State Board of Education reverses the Commissioner's determination directing restoration of $20,000 for establishment of a new administrative position, but affirms his decision in all other respects.

Attorney exceptions are noted.
August 2, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4175-88
AGENCY DKT. NO. 114-4/88

RHODA SATHAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE
CITY OF NORTH BRUNSWICK,
Respondent.

Steven F. Satz, Esq., for petitioner (Busch & Busch, attorneys)

Anthony B. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: October 24, 1988 Decided: December 8, 1988

BEFORE RICHARD MURPHY, ALJ:

STATEMENT OF THE CASE

Petitioner Rhoda Sathan alleges that the respondent Board of Education failed to give her proper compensation under a collective bargaining agreement for 116 S accumulated unused sick days. Petitioner stopped working for the respondent Board effective July 1, 1987 and sought deferred retirement effective July 1, 1989 The issue here is whether she retired within the meaning of the collective bargaining agreement so as to be entitled to a higher rate of compensation for her accumulated sick days. For the reasons set forth, the relief request is denied.

PROCEDURAL HISTORY

Rhoda Satnan filed her petition of appeal on April 28, 1988 and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on June 9, 1988, where it was preheard by telephone on August 19 The hearing was conducted on October 12, and the record remained open until October 24 for submission of additional documentation

FINDINGS OF FACT

The facts are not in dispute. The parties stipulate that the petitioner was a teaching staff member in good standing up until July 1, 1987 when she ceased working. On June 29, 1987, petitioner wrote to the superintendent of schools stating that "[u]nexpected personal business matters make it impossible for me to continue teaching. I am therefore compelled to offer my resignation, effective July 1, 1987." (P-1) (emphasis added). The assistant superintendent of schools responded on July 15 that the Township Board of Education had accepted petitioner's "resignation " (R-1). The petitioner wrote again to the superintendent of education on August 31, 1987 and stated the following.

> In preparing to file for retirement benefits with the Division of Pensions, I have discovered that I have accumulated 116 5 unused sick leave I am requesting payment for the unused sick days at the rate of twenty five dollars ($25.00) per pay The total amount due me is $2,912.50.
>
> It was difficult for me to retire after twenty three plus years of service to the children of North Brunswick. . . . (P-2) (emphasis added).

The petitioner testified that she intended, by her letter of June 29, 1987, to retire after teaching for some 23 years, and mistakenly used the word resignation, not realizing its possible significance. After her letter of August 31, 1987, in which she clearly referred to retirement, she contacted the Division of Pensions and started the process for applying for deferred compensation. She also discussed her application for pension with the superintendent of schools, but this s disputed by the assistant superintendent of schools, Robert W Blessing, who recalls speaking to the petitioner concerning this subject. I **FIND** as a matter of fact that it is more probable by a preponderance of the evidence that the petitioner spoke to Mr. Blessing in September of 1987. In any event, petitioner applied for deferred retirement effective July 1, 1989.

On March 3, 1988, Assistant Superintendent Blessing wrote to the petitioner stating the following:

> Per my conversation with you on September 3, 1987, I mentioned that before I can pay $25 00 per day, I had to have confirmation of your retirement from the state retirement system as of July 1987.
>
> Since your letter to Dr. Leppert (Superintendent of Schools) was a letter of resignation, and since you did not go immediately into the state retirement system, you qualify for the $15.00 per day, in accordance with the Association Agreement. (R-2) (emphasis added).

On March 6, petitioner was advised that a request for deferred retirement had been granted effective July 1, 1989 and that her first check would be mailed 30 days after the effective date. (P-3) The parties have stipulated that petitioner was not eligible for pension benefits until July 1, 1989 and consequently could have sought employment in another school system prior to that date, which she did not in fact do.

The collective bargaining agreement in effect for the school years 1986-87 and 1987-88 between the North Brunswick Township Board of Education and the North Brunswick Township Education Association, of which petitioner was a member, provides as to sick leave that:

> [u]pon retirement from a state retirement system, teachers with ten (10) or more years of service in the North Brunswick Township School District will receive payment for each accumulated sick day upon date of retirement at a rate of $25.00 per accumulated sick day. Upon resignation in good standing, teachers with fifteen (15) or more years of service in the district will receive payment for each accumulated sick day upon date of resignation at a rate of $15.00 per accumulated sick day. (P-4 XV, I.4) (emphasis added).

Assistant Superintendent Blessing testified that in 1986-87 a collective bargaining agreement as to unused sick leave had been adopted after a negotiator had left teaching to enter another profession and jokingly requested his sick days under the prior collective bargaining agreement which gave a higher rate to teachers "upon retirement from a state retirement system." Prior to 1983, the collective bargaining agreement had provided for a higher rate of payment "upon retirement from teaching" to members with ten years or more service (R-3) The intent of the 1986-87 provision on unused sick time was, according to Blessing, to make clear that higher rate of payment for sick days was collectible upon retirement system and

only upon the date of retirement. The Board offered a memo from the president of the North Brunswick Township Education Association as the interpretation of Article XV, ¶ 4 of the 1986-87 contract as to unused sick leave that stated

> Past practice and contract interpretation has been that the employee would receive payment at the rate of $25.00 per unused sick day only upon retirement directly into the pension fund in a pay status. Deferred retirement into other than a pay status pension receives compensation for unused sick days at the rate of $15.00 per accumulated unused sick days for teachers in good standing. (R-5).

Blessing conceded that the contract did not expressly address the deferred retirement issue posed by this case.

There is no dispute as to the above facts and I so **FIND**.

ISSUE

The sole issue to resolve is whether the petitioner was entitled under the collective bargaining agreement to be paid at the rate of $25 per accumulated sick day upon her leaving teaching in July of 1987 to take a deferred pension effective July 1, 1989.

DISCUSSION AND CONCLUSION

The petition argues that the contract is silent as to the issue of deferred pensions and must be construed against the Board of Education in this instance. She contends that she was never advised of any interpretation of this agreement reached between the union and Board and should not be bound by it. Respondent Board argues that the petitioner resigned in the summer of 1987 and did not retire until deferred entry into the retirement system on July 1, 1989. As such, petitioner was not eligible to the higher rate of $25 upon her departure from the school system because she had deferred her retirement for a year and was free during that year to seek employment in another school system if she so desired.

This matter is governed by the terms of the collective bargaining agreement which are to be read to effectuate its intent. The plain terms of that agreement state that "upon retiring from a state retirement system, teachers with ten (10) or more years of service in the North Brunswick Township School District will receive payment for each accumulated sick day upon date of retirement at a rate of $25 per

accumulated sick day " The express language of the agreement does not address specifically the question of deferred retirement. By its terms, it provides a higher rate upon date of retirement to teachers with ten or more years of service The apparent purpose of this provision is to provide an increased benefit to teachers who are entering retirement pay status and to give a lower rate to teachers who were merely resigning in good standing with the possibility of teaching elsewhere Given the language of the collective bargaining agreement and prior agreements, as well as its apparent purpose to benefit teachers retiring to pension-pay status, I **CONCLUDE** that petitioner is not entitled to the $25 rate per accumulated sick day because she chose to defer her retirement until July of 1989.

I further **CONCLUDE** that petitioner is entitled to payment of $1,747 15 for 116.5 sick days at a rate of $15 per accumulated sick day.

ORDER

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that the relief requested by the petitioner be **DENIED** by the Commissioner of Education and that she be found to be entitled to payment to $1,747.50 in unused sick time under the collective bargaining agreement as discussed above.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10(c).

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration

Dec. 8, 1988
DATE

RICHARD MURPHY, ALJ

Agency Receipt

12/8/88
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 13 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

jz

RHODA SATHAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Petitioner claims the collective bargaining agreement is silent regarding the distinction between retirement directly into the pension fund in a pay status and deferred retirement. While acknowledging that she chose deferred retirement, petitioner claims she falls squarely within the purview of Article XV, 1.4 of the collective bargaining agreement (P-4) at question in this matter. She contends

> The language is unambiguous, and in the absence of any limiting language excluding deferred retirement there is no basis to look beyond the specified language. Had the Respondent sought to exclude deferred retirement, it was incumbent upon it to include such a caveat directly in the collective bargaining agreement.
>
> (Exceptions, at p. 1)

For these reasons, petitioner seeks reversal of the initial decision.

Upon his careful and independent review of the record before him, the Commissioner rejects in part and adopts in part the initial decision rendered by ALJ Murphy for the reasons which follow.

Initially, the Commissioner rejects the ALJ's determination as stated on page 4 of the initial decision wherein he states "[t]he sole issue to resolve is whether the petitioner was entitled under the collective bargaining agreement to be paid at the rate of $25 per accumulated sick day upon her leaving teaching in July of 1987 to take a deferred pension effective July 1, 1989." The Commissioner finds that to so cast the issue in these terms misperceives the Commissioner's jurisdiction. The Commissioner is not empowered to interpret contract language. Rather, the Commissioner determines that the issue is properly cast as asking whether the letter petitioner tendered to the superintendent of schools on June 29, 1987 represented a letter of resignation or of retirement, and how such letter impacts on her employment status thereafter.

In this regard, the Commissioner finds and determines that the plain reading of the letter dated June 29, 1987, combined with petitioner's later letter dated August 31, 1987 and her application for deferred retirement effective July 1, 1989, indicates that petitioner in fact intended to retire in July 1989. In so finding, the Commissioner is in accord with the ALJ's finding as found on page 3 of the initial decision wherein he states "[t]he parties have

stipulated that petitioner was not eligible for pension benefits until July 1, 1989 and consequently could have sought employment in another school system prior to that date, which she did not in fact do."

Accordingly, the Commissioner finds that petitioner resigned in the summer of 1987 and did not retire until her deferred entry into the retirement system on July 1, 1989. He further finds that petitioner was free during the period after July 1, 1987 until July 1, 1989 to seek employment in another school system if she had so chosen. The Commissioner expressly limits his review of the instant matter to such conclusions. To the extent that the ALJ resolves the matter concerning compensation for sick leave by reference to a collective bargaining agreement, the Commissioner rejects such conclusions as not properly being before him. PERC is the appropriate agency for the interpretation of the language of a collective bargaining agreement.

Since a determination of payment for accumulated sick leave is a matter made part of the collective agreement in respondent's district, the Commissioner is not empowered to assume jurisdiction. Insofar as the Petition of Appeal asks that petitioner be reimbursed in accord with her interpretation of such contract language, the prayer for relief is dismissed. To the limited extent that the ALJ determined that petitioner resigned, not retired, on July 1, 1987, the initial decision is adopted herein. In all other respects pertaining to interpretation of the collective bargaining agreement in respondent's district, the Petition of Appeal is hereby dismissed.

For the record, the Commissioner would correct the initial decision in accord with the parties' stipulation as embodied in correspondence from ALJ Murphy dated January 11, 1989 that the number of accumulated sick days at question in this matter was 111.5, not 116.5 as stated in the initial decision. However, the Commissioner makes no conclusions of law based on this corrected number.

ACTING COMMISSIONER OF EDUCATION

FEBRUARY 3, 1989

DATE OF MAILING - FEBRUARY 3, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0788-88
AGENCY DKT. NO. 1-1/88

PINELAND LEARNING CENTER, INC.,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,
Respondent.

James J. Seeley, Esq., for petitioner

Arlene Goldfus Lutz, Deputy Attorney General, for respondent (W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed November 4, 1988 Decided: December 7, 1988

BEFORE **JEFF S. MASIN,** ALJ:

Pineland Learning Center, Inc. (Pineland) is a private school for the handicapped located in Cumberland County. Private schools for the handicapped are permissible arms of the educational system in the state of New Jersey, permitted by N.J.S.A. 18A:46-14(g). The New Jersey Department of Education monitors and approves such facilities pursuant to its authority contained in N.J.S.A. 18A:46-15 and 6:28-7.1(a)(2) and 28-9.1. The tuition rate which a private school for the handicapped may charge is determined by a process which allows a charge to a sending school district based upon the school's allowed costs and an allowed profit, N.J.A.C. 6:20-4.1 and 4.5. Some costs are non-allowable, N.J.A.C. 6:20-4.4. Salaries of uncertified staff serving in positions for which certification is required may not be reimbursed by way of tuition paid by sending districts, N.J.A.C. 4:20-4.4(a)(3).

Pineland Learning submitted its expenses for approval for the 1986-87 school year. The State Department of Education determined that two teachers, Linda Stewart and Kathrine Phillips, were not certified for a portion of the 1986-87 school year. As a result, it denied inclusion of the costs of these teachers' salaries in the tuition rate. Pineland filed a petition with the Commissioner of Education on December 21, 1987 seeking to obtain approval for allowance of these salaries in the allowable costs making up the tuition rate. The contested case was then transferred to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on April 5, 1988 and a Prehearing Order was issued on April 14, 1988 by Honorable Jeff S. Masin, ALJ. Thereafter, the respondent moved to dismiss the petition for failure to state a claim upon which relief could be granted. This motion was denied by Judge Masin by order issued June 3, 1988. The matter proceeded to hearing held on October 17, 1988 at the Bridgeton City Hall. Following the hearing the parties filed closing statements and the record closed on November 4, 1988.

ISSUES

The Prehearing Order cites the issues for consideration in determining whether or not the salaries of the two teachers were properly excluded from the allowable costs.

A. Did the respondent properly refuse to allow costs for the two teachers or was its denial an improper determination under applicable statutes and regulations?

B. If the matter of allowing the costs is one of discretion, did the respondent abuse its discretion in refusing the costs?

EVIDENCE

(a) The Teachers

According to testimony received at the hearing, Linda Stewart, prior to her employment at Pineland Learning Center in late August/early September 1985, was a certified social studies teacher for grades 7 through 12 and held a substitute certification in Gloucester County. She had also performed substitute work in Cumberland County.

Kathrine Phillips, who was also hired by Pineland in late August/early September 1985, held a certificate as a substitute. Although Ms. Phillips had 155 credits of college work she had not matriculated at the time of her employment with Pineland

Frederick Eccleston, executive director of Pineland Learning Center, testified that in September 1985 he had two vacancies on his staff. Approximately in the middle of August, he had received notice from one teacher that she would not be returning. On August 27 or 28, he received a note from another teacher who was also not returning. According to Eccleston, at that time the school "was back against the wall" as it needed to fill the two vacancies. Advertisements were placed in several newspapers and were sent to several colleges in the hope of obtaining some qualified applicants for the positions. Mr. Eccleston also contacted several school superintendents and probably contacted the county superintendent's office as well. He was unable to find any certified teachers for the handicapped. One of the teachers who had resigned told him that he should contact Linda Stewart. He also received information about Kathrine Phillips, who he found out had a substitute certificate. He determined that these individuals could be employed immediately and applied for provisional certification, which he believed they would be eligible for. He knew that Stewart had a social studies certification and had substituted the year before in Cumberland County. The ladies were employed as of the first day of school as substitutes, but they were applying for permanent positions. According to Eccleston, had he not hired these teachers his facility would not have been able to take all of the children who were supposed to attend from the various sending districts.

Eccleston explained that in order to get the teachers certified he contacted the Cumberland County superintendent's office to get the necessary forms. This contact was actually made by his secretary, Charlotte Cheli. According to the information received by Eccleston, Cheli was told that the required forms would be sent out. Apparently some forms were sent to Pineland and on September 9, 1985 Eccleston sent a letter to Mrs. Cordelia Lane of the Cumberland County Superintendent's Office. This letter stated that

> Enclosed with this letter are the applications for emergency-provisional certificates, of which we spoke.
>
> Also included are the $30.00 money orders from Kathy Phillips and Linda Stewart for applying for the aforementioned certificates.

According to Eccleston's understanding, Ms. Cheli went to the County Superintendent's office and picked up an envelope marked for Pineland which was on the counter. The documents in the envelope were filled out and sent back by him. Eccleston had no list of the forms which had to be filed. He was later advised that the material submitted was incomplete. According to a notation written on the September 9 letter by Mrs. Lane, she noted that the letter had only transmitted "requirements for Linda Stewart. Did not send application. Called 9/12/85 Pineland asked for applications."

Eccleston recalled that when advised of the lack of applications he asked that the forms necessary be sent to Pineland. He waited a week and one-half and called to ask to see if Lane had mailed them out. He was advised that the county office did not always have all the forms. The forms eventually arrived in January. They were forwarded by letter of January 24, 1986 from Mrs. Lane which enclosed "the following materials: Application for certificate and requirements." Applications for Ms. Phillips (P-2) and for Ms. Stewart (P-3) were then submitted.

Mr. Eccleston also recalled receiving a letter of October 1, 1985 from Ms. Lane. This letter, P-4 in evidence, indicates that it encloses official transcripts, a fee in the amount of $30 and a OTEC 800-801-802. At the bottom of the transmittal letter is the following notation typed on the form:

> Please Note:
>
> You must have a degree to be eligible for an emergency certificate.
>
> I am returning the above items.

At the top of the October 1 transmittal letter is a handwritten notation apparently dated October 4, 1985 by Mr. Eccleston which reads:

> Called C. Lane about citation no longer issue provisionals. She "was told" by someone in Trenton. She will check on citation.

Sometime after October 1, Mr. Eccleston spoke to County Superintendent Dr. Steven Kalapos. Dr. Kalapos suggested that because Ms. Phillips did not actually hold a degree, not having matriculated, she should try to get a degree from Thomas A. Edison College in Trenton, which was an institution which granted degrees after investigation of an individual's college record to determine whether or not the individual was qualified to receive the degree. Thomas A. Edison College would act based upon the individual's credits or experience. Mr. Eccleston recalled

calling Edison College and recalled that Ms. Stewart enrolled in order to get her B.A. degree. To the best of Eccleston's recollection, Kalapos told him that a B.A. in education was required for an emergency certification.

Despite the fact that as of October Mr. Eccleston was aware that neither of his two teachers had received their certifications since he "had no one else" the teachers continued in their teaching roles. At some point in December or January, Eccleston spoke to the Director of Certification office and spoke to Mary Ellen Flanagan, who advised that it was not necessary to have a B.A. degree or that the degree be in education, but that before any certification could be granted it would be necessary to see a transcript and paperwork.

Sometime at the end of January 1986 Mr. Eccleston received a letter from Dr. Noreen Gallagher, Supervisor of Special Education from the Department of Education, who indicated that the institution was conditionally approved, but that it could not accept any more students. Mr. Eccleston recognized that a problem existed, although none had been called to his attention since Ms. Lane's October 1 transmittal letter.

According to the witness, both teachers were employed throughout September, October, November and December 1985 as substitutes working in regular classrooms. They were originally assigned a group of children as a regular fully certified teacher would be, but then they moved around because of a great deal of absenteeism on the part of both teachers and students. Two of the teachers at the institution were very ill. Although he had no records to support his position with the exception of a list of the absence dates for teachers which was provided at the hearing, Mr. Eccleston was of the opinion that neither teacher had spent more than 20 days in any one position during September, October, November and December, 1985. As will be noted below, the 20-day figure is significant with respect to the employment of a substitute teacher.

On cross-examination, Mr. Eccleston acknowledged that it was the responsibility of the district to assure that its teachers obtained certification. He acknowledged that after the October 1, 1985 letter from Ms. Lane no calls or letters were sent to the county office during the months of October, November or December and probably until near the end of January. He is uncertain whether the forms transmitted on January 24, 1986 were sent as a result of a call from his office or whether they just arrived. He also asserted that Ms. Phillips functioned as a

teacher's aide during the period following his learning that she could not be certified as a teacher. In fact, Geraldine F. McCormack, who was the director of Pineland, began to teach and Phillips functioned as her aide.

Charlotte Cheli, secretary to Mr. Eccleston, testified that she picked up forms at the county office after having called for them in early September. She picked them up because Pineland was in a "hurry." She went to the county office and saw a manilla envelope laying on the counter which was marked Pineland Learning Center. She asked if these were the forms and was told yes. She took them back to the Pineland and then mailed them to the county office. No additional forms were sent to her or submitted by her during October, November and December 1985. She recalled that she received the October 1, 1985 transmittal from Mrs. Lane (P-4) and, although she did not recall exactly what forms were returned, she knew they were for Ms. Phillips.

Geraldine F. McCormack, the school's director, testified that to the best of her recollection neither of the teachers was assigned to one classroom for more than 20 days during the fall of 1985. She had no records to support this recollection.

Linda Stewart, who is now a certified teacher of the handicapped, testified that when she was hired at Pineland she knew that her hiring was contingent on her getting her certification. She had previously been certified as a grade 7 through 12 social studies teacher and had substituted in Gloucester and Cumberland counties. She filled out an application which was filed on January 29, 1986.

Ms. Stewart recalled that there was a great deal of absenteeism among teachers and students during the fall of 1985 and as a result of this she would either be assigned to the room that she was originally assigned to at the beginning of the year or would be assigned to cover another class. The situation was quite "hectic" and she "never knew from day to day" which class she would be teaching. She would not "normally" take her children from the originally assigned class with her when she went to another classroom.

Kathrine Phillips, who is also now certified as a teacher for the handicapped, acknowledged that she was employed as a substitute and needed a certification. She had been certified as a substitute. She testified that her recollection of the situation concerning classroom assignments was similar to the recollection of

Ms. Stewart. She was unable to say whether or not she served for more than 20 consecutive days in any particular classroom.

Respondent's Case

Cordelia Lane, certification clerk for the Cumberland County Board of Education for the past 16 years, testified that it is her responsibility to process applications for teacher certification. She does not determine the qualifications, but handles the paperwork and serves as liaison between the county and the state.

According to Ms. Lane, a district can apply for emergency certification when it is unable to find a certified individual to fill a teaching position. When applying for such an emergency certificate, it is necessary for the district to file a form asking for an exception from the county superintendent and a form explaining the reasons for the request for the emergency certification, as well as an application for the individual teacher and an oath of allegiance. If all four forms are not sent in, Ms. Lane will hold them for a short time and then if she does not receive the outstanding items, she will return what has previously been filed. In her experience her office never runs out of forms because if they are low she will send to the State Department of Education for them and receive them within three to four days. When a district calls for forms she normally will supply them with the application for the exemption and the oath of allegiance. Districts normally have application forms.

According to Ms. Lane's recollection, she received a letter in September 1985 which contained information for Ms. Stewart. She made a note on the September 9, 1985 letter from Mr. Eccleston concerning the limited materials sent. The fee and oath were contained in the submission, but not the application. She spoke to a secretary at Pineland on September 12, 1985 and made a note concerning the date of the call on the September 9 letter. She explained to the secretary that while she had all of the other necessary forms she did not have the formal application. She was asked for an application form and sent one out "that day or the next." In fact, she would not have sent just one application, but would have sent the district several of the forms. These were available in her office at the time. She believes that she sent a cover letter with this transmission but did not make a copy of it as it was standard procedure to send forms out upon request and she would very seldom make a copy for such a routine matter. She did not receive a completed application back. She had Stewart's application in her office for a few weeks, but then sent it

back by way of the October 1, 1985 transmittal (P-4). Ms. Lane recalled that Ms. Phillips had come into the office and that she had been told she had to hold a degree in order to receive certification. Lane refused to accept Phillips' application forms and explained the reason for the refusal to her.

After the Stewart forms were returned to Eccleston on October 1, Lane did not receive any response. She was never requested to send any other applications and was never contacted concerning what had happened to Stewart's application. She received no call for any forms before January or any call concerning Stewart's certification

Dr. Stephen Kalapos, the county superintendent for the past four years, testified that his office is responsible for assuring that teachers employed by school districts and private schools are certified. The office processes applications for regular and emergency certificates. The Office of Teacher Certification in the Department of Education in Trenton determines if certification is to be granted.

Dr. Kalapos recalled the Phillips application. He became aware of it in early September 1985 when it was brought to his attention by Ms. Lane. Ms. Phillips did not have a degree and he could not recommend that she be certified unless she had a baccalaureate degree. This has always been a requirement for emergency certification to the best of his knowledge. He recalls having spoken to Mr. Eccleston and explained this to him in September or early October 1985. He denied that he had told Eccleston that the degree had to be in education. He knows of no specific directive regarding the need for a degree, but recalled that he had discussed the matter with Dr. Celeste Rorro, the Director of Teacher Certification for the Department. While in vocational education some individuals are permitted to teach who are not in possession of a degree, this is not the case in other areas.

Dr. Kalapos was asked to comment concerning a letter of August 28, 1987 which he had sent to Mr. Vincent Calabrese, Assistant Commissioner. He acknowledged that he was not certain as of the time of the hearing as to whether or not an application was actually submitted for Ms. Phillips in September.

Dr. Celeste Rorro, who for ten years has been the Director of Teacher Certification for the Department of Education, testified that the State Board of Examiners reviews and determines whether to grant certification to teachers. The county office operates as a liaison and a monitor which aggregates information

concerning possible recipients of certificates and forwards the information to the Office of Teacher Certification which serves as a designee of the State Board of Examiners. The Office of Teacher Certification determines if all information required of the applicant is present and checks the credentials. A team of professional examiners are employed in this process. If only part of the application and other necessary data is received, no action is taken.

Dr. Rorro was asked to testify concerning those applicants who claim to be "factually qualified" in that they claim to have all of the necessary course work and credits required for receipt of a degree from an approved institution, but who have not received a degree. In order to receive an instructional certificate it is necessary that a teacher have actually received the degree. A teacher of the handicapped must have a baccalaureate degree. Emergency certification, which is a one-year substandard certificate, can be issued to teachers of the handicapped after August 1 of a coming school year if there appears to be a shortage of qualified teachers in a particular area. This is issued upon the recommendation of the county superintendent, although the final determination is up to the State Board of Examiners. A county substitute certificate is a temporary employment certificate which allows for the employment of a substitute for no more than 20 consecutive days for any particular classroom assignment. Such an individual is not a staff member and the certificate is not an instructional one.

Dr. Rorro testified that receipt of a letter from Edison College advising that Ms. Phillips appeared to have the necessary credits to receive her degree was not acceptable. A candidate would have to present an official transcript from an institution in order to receive certification. The degree must have actually been conferred, as there are many instances where an individual who appears to be qualified to receive a degree does not actually receive one.

Ms. Phillips' degree was actually received from Thomas Edison on April 1, 1986. Notification that she had completed requirements for the degree was submitted to the Office on February 14, 1986. A transcript was received from Edison College on March 14, 1986 and a notification form was sent out to Mr. Eccleston on March 24, 1986 indicating that an emergency certificate was being issued. It was not mailed until April 9 as it was "in process."

On rebuttal, Kathrine Phillips denied ever having met Ms. Lane or Dr. Kalapos and denied that she had gone to the County Superintendent's office, as testified to by Lane.

DISCUSSION AND ANALYSIS

N.J.S.A. 18A:26-2 provides:

> No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools, and/or such other certificate, if any, as may be required by law.

N.J.A.C. 6:11-3.1 provides:

> (a) No teacher shall be entitled to any salary unless such teacher shall be the holder of an appropriate teacher's certificate (N.J.S.A. 18A:26-2).

N.J.A.C. 6:11-3.11 provides:

> In addition to meeting other requirements specified in these rules, applicants for teachers certificates must be at least 18 years old, have been graduates from an approved high school or have an equivalent education as determined by the State Board of Examiners and have received a baccalaureate degree from an accredited institution of higher education except in certain vocational fields as indicated in N.J.A.C. 6:11-6.3.

Regulations concerning tuition for private schools for the handicapped are contained in N.J.A.C. 6:20-4.1 et seq. Subsection 4.4 provides that certain costs are "non-allowable" in the determination of the tuition rate which such a private school may charge to sending districts. Specifically, 4.4(a) provides:

> A cost which is not allowable in the calculation of the certified actual cost per pupil includes the following:
>
> . . .
>
> 3. The salary of the professional staff member who is not certified but is functioning in a position requiring certification.

Based upon the evidence presented it is quite clear that as of the time of their employment at Pineland in early September 1985 neither Ms. Stewart nor

Ms. Phillips was the holder of a certification as a teacher of the handicapped. This is not disputed by the petitioner. While Ms. Phillips was certified to teach social studies in the secondary schools, she did not have the necessary certification for teaching handicapped students. Ms. Stewart had no certification of an instructional nature at all. In addition, as to the certification requirement of N.J.A.C. 6:11-3.11 she did not have a baccalaureate degree from an approved institution. The petitioner does not contest this either, although it argues that she was "factually qualified" in that she had undertaken all of the necessary course work and had the necessary credits to receive her degree and points out that she ultimately did receive the degree from Thomas Edison College after it had reviewed the data submitted to it and determined that she was in fact qualified for the degree. However, there is no dispute that she did not hold a degree, that she had not matriculated.

Initially, there is perhaps some suggestion on the part of petitioner that it was prevented from submitting the necessary applications for certification in a timely fashion because of some fault on behalf of the county office. The documents presented, as well as the testimony, appeared to indicate that initially some forms were submitted by the petitioner on September 9. The letter from Mr. Eccleston to Mrs. Lane references the enclosure of "applications for emergency-provisional certificates." Although Ms. Lane's note placed on the September 9 letter indicates that "only sent requirements for Linda Stewart" and although Ms. Lane testified that she held the forms which had been submitted for a while and then returned them by letter of October 1, 1985, there seems to be some question of exactly what forms were submitted and what were returned. The October 1 letter references the return of official transcripts and a fee in the amount of $30, which is the fee for one application. At the bottom, the note concerning the need for a degree to be eligible was obviously addressed in connection with Ms. Phillips, the teacher who did not have a degree. Thus, if Ms. Stewart's documents were forwarded and not Ms. Phillips, the October 1 letter apparently was transmitting the documents concerning Stewart, but referencing Phillips' problem at the bottom without apparently returning any documents on her behalf, including a $30 money order. Apparently, according to Ms. Lane's version, the $30 money order for Stewart was the only one received and the submission of September 9 not only did not have an application of any sort for Phillips, but also did not have her money order. Mr. Eccleston had insisted in his testimony that both teachers had provided money orders and that these were both sent in and Ms. Cheli appeared to confirm this.

It is fair to say that the apparent co-mingling of the information concerning transmittal of Stewart's documents and the reference to Phillips' situation in the October 1, 1985 transmittal from Lane to Eccleston raises some confusion as to exactly what occurred. However, it is quite certain from the testimony of Mrs. Lane, as well as that of the other witnesses, that a complete package of information was not submitted on behalf of Ms. Phillips, or, if it was, she did not have the degree that Mrs. Lane and Dr. Kalapos felt was required for her to receive an emergency certification. In fact, if she did not visit the office, somehow or other the question was raised to Mrs Lane, who spoke about it with Dr. Kalapos. Apparently they became aware of Ms. Phillips' situation even though the forms may not have been submitted.

When one sorts through the questions concerning what exactly was submitted or not submitted on September 9 and what exactly was or was not returned on October 1, it becomes clear that as of October 1 Mr. Eccleston had been advised that certain documents were being returned to him, that there was a problem concerning Ms. Phillips' situation because of her lack of degree, and that the burden of assuring that steps were taken, if they could be, to get Ms. Phillips' situation straightened out so that she could receive certification was upon Mr. Eccleston, as the director of the school. The burden of assuring certification is on the district, and the petitioner does not deny this burden as resting upon itself, O'Hara v. Camden County Vocational School Board, 1981 S.L.D. 147, 153. From the testimony of Mr. Eccleston it is clear, and I **FIND**, that after receiving the October 1 communication from Mrs. Lane he did nothing of a formal nature by way of telephone call, correspondence, etc. to attempt to clarify the exact situation concerning Ms. Phillips in October, November or probably most of December at best. In addition, although it is perhaps still unclear exactly what was submitted and what if anything was returned concerning Ms. Stewart via the October 1 correspondence, at best Pineland's position is that having submitted documentation in September seeking certification of Ms. Stewart it was aware that the certificate had not been issued to her and she did not hold it throughout October, November, December and January up to the time that it received forms, either by its own request or otherwise and filed an application on her behalf. The requirements make it quite clear that "No teacher shall be entitled to any salary unless such teacher shall be the holder of an appropriate teacher's certificate." There is no question at all but that Pineland was aware, or should have been, from September on that Ms. Stewart did not "hold" the appropriate teacher certification or teacher of the handicapped. The burden of pursuing this certification and assuring that its

employee did get the certification in hand was upon the district and the employees and not on the county office, O'Hara, supra. The language of the statute is plain, clear and unambiguous and mandatory and therefore must be given its full effect. O'Hara, supra, at 162; Application of Howard Savings Institution of Newark, 32 N.J. 29, 48 (1960)

Having considered all of the evidence, I am unconvinced by a preponderance of the credible evidence that Pineland ever filed a full and complete package of documents on behalf of Ms. Stewart on September 9 or thereafter until late January 1986. Instead, I **FIND** that Ms. Lane called Pineland on September 12, 1985 and advised them of the lack of the actual applications, Pineland requested forms, Ms. Lane sent the forms out, and they were apparently never received by Pineland. Thereafter, Pineland continued to employ both Ms. Stewart and Ms. Phillips despite the fact that it knew that Ms. Phillips did not have a degree and that as of at least October 1 if not before the county superintendent's office had called to the attention of Pineland the difficulty concerning the lack of a degree and its effect upon eligibility for an emergency certificate. As for Ms. Stewart, the school continued to employ her despite the fact that it knew, or should have known, that it had not completed the application process on her behalf and that she was not the "holder" of a certificate, a requirement for her continued employment under N.J.S.A. 18A:26-2 and for inclusion of her salary as an allowable cost. This situation continued to exist up to the time the applications were actually filed on behalf of the ladies on January 29, 1986 with respect to Ms. Stewart and on February 26, 1986 on behalf of Ms. Phillips. With respect to Ms. Stewart, she continued to teach throughout the period and continued to do so until notification that her certificate was being issued occurred. With respect to Ms. Phillips, it is quite evident that since she did not have a degree, she was not the "holder" of a degree, she was not eligible for certification pursuant to the applicable regulation. Despite petitioner's position that she was "factually eligible" I **FIND** that N.J.A.C. 6:11-3.11 mandates that an individual who is to receive a teacher's certificate must have "received a baccalaureate degree (emphasis added)," except with respect to certain vocational fields, and that it is completely in accord with the meaning of that regulation that the Board of Examiners and the Bureau of Teacher Certification insist that the degree actually have been received before issuing certification. It is not sufficient to meet the requirement for "have(ing)" received a baccalaureate degree to assert that one could have received one had one matriculated. There are instances where students who have taken all of the course work necessary to receive a degree do not receive the degree for reasons perhaps unrelated to their course work but related

to the interests and policies of the particular institution. In the absence of some validation to the Board of Examiners as to the reason why the degree was not received despite having completed all of the requirements, it would not be appropriate for the Board to grant certification to a teacher who had not "received a baccalaureate degree." Here, there was no assurance in advance that merely because Ms. Phillips had purportedly taken all of the course work necessary and received the credits that she was eligible to receive a degree until such time as Thomas Edison College certified such by way of the issuance of the official transcripts showing the award of the degree. Therefore, the employment of Ms. Phillips, despite her not having the degree, violated the regulations and statute which require that no teacher be employed who does not have a certification since at least at the time of her employment and until the time that the degree was granted Ms. Phillips neither held a certification nor had received a degree and was therefore ineligible for certification.

Substitute Teacher Status

As an alternative basis for qualifying the salaries of the two teachers as allowable costs the school argues that they were hired and acted as substitute teachers pending their receipt of certification and continued in the substitute status until they actually were certified. Pursuant to N.J.A.C. 6:11-4.4, persons who do not have standard instructional certificates but have certain other qualifications may be granted a county substitute certificate for day-to-day substitute teaching within the county granting the certificate. Pursuant to subsection 4.4(c):

> The certificate will be issued for a three-year period but the holder may serve for no more than 20 consecutive days in the same position in one school district during the school year. . . .

Petitioner contends that neither Ms. Stewart nor Ms. Phillips functioned in the "same position" for more than 20 consecutive days. The school presents no documentary evidence to support this contention, relying on the relatively limited recollection of Mr. Eccleston, Ms. McCormack and the two teachers. Again, none of these witnesses had any records. In addition, a document (P-5) listing the dates of absence of the various teachers in the school during the period September 25, 1985 to April 7, 1986 was presented as some indication of the numerous absences referenced by the teachers which required them to move around from one classroom to another. An examination of this document is not overly helpful with respect to the question of whether either of the teachers remained in the same position for more than 20 days. It is noted that there was considerable absence

However, as an example of the uncertainties of the document, there was no absence of any teacher other than Ms. Phillips' own absence on October 25, 1985 between Ms. Riegert's absence of October 15, 1985 and her absence of December 2, 1985. While admittedly there were no doubt a number of days with no school in that period such as perhaps Veteran's Day, Election Day, teachers' convention, Thanksgiving and the day after Thanksgiving, as well as weekends, it is certainly possible that between October 15, 1985 and December 2, 1985 one or both of the teachers remained in the same classroom for more than 20 consecutive school days. No evidence to show that the teachers were shifted around during that time to prevent this was presented. If Ms. Phillips was assigned to a class in the beginning of the year and Ms. Stewart likewise, one of them presumably would have had to cover Ms. Riegert's absence of September 25 and Ms. Riegert's absence of October 15. Ms. Phillips was absent on October 3 and October 25. However, up to the beginning of Ms. Riegert's extended absence of December 2 through 6, 1985 there were really only a limited number of absences and it is not at all certain from this listing who covered Ms. Riegert's class, who covered when Ms. Phillips was absent, or whether either Phillips or Stewart remained in one classroom for more than 20 consecutive days. Without some further documentation to support the allegation that the teachers did not spend more than 20 consecutive days in a particular assignment, P-5 is of little use. In addition, since the teachers were hired with the intention that they would be certified, and without apparently any particular examination of whether or not they qualified for certification, particularly in connection with Ms. Stewart, it seems somewhat unlikely that there was any great attention being paid to the question of how many consecutive days each of these teachers spent in a particular class assignment. Although it was the "guesstimate" of a number of witnesses that they did not spend such a length of time consecutively because of the number of absences both of teachers and students, I strong suspect that no one was very concerned with that question and that it is quite likely that they did, at least during the early part of the year, spend such a consecutive period of time in one assignment. Admittedly, this conclusion is also somewhat of a "guesstimate," but in the absence of records, the burden of establishing entitlement to inclusion of the costs of these non-certified teachers by use of the substitute teacher theory is on Pineland and the absence of records therefore rebounds against the petitioner. I am unable to conclude from a preponderance of the credible evidence that Pineland did not permit either Phillips or Stewart, or perhaps both, to remain in any one teaching assignment for no more than 20 consecutive days in the fall of 1985. Therefore, it appears that they were

not functioning within the regulatory guidelines concerning substitutes and were in fact being used more or less as regular teachers.

REASONABLENESS OF THE DENIAL

Based upon the above, I **CONCLUDE** that the Department of Education correctly and within a reasonable exercise of its authority concluded that it had no choice but to deny the eligibility of the expense of the salaries of Ms. Phillips and Ms. Stewart. In the case of Ms. Phillips, she could not have been certified in accordance with the clear mandatory language of the statute and regulation and therefore should not have been employed in the district except within the guidelines of the substitute teacher category, where I **FIND** the evidence insufficient to establish that her employment in fact occurred. With respect to Ms. Stewart, I **CONCLUDE** that the school failed to carry out its obligation to assure that a teacher who it had hired who did not have the appropriate certification, conduct which was questionable initially, received that certification as quickly as possible. Neither the teacher nor the school appears to have been terribly concerned with taking steps to assure the swift acquisition of certification following the events of early September 1985. While it is not absolutely crystal clear as to whether there was any incorrect action on the part of the county office, it is quite evident that there was a lack of activity on the part of the school. Under the circumstances, there is no basis whatsoever for concluding that the Department incorrectly, in abuse of its powers, denied the eligibility of these expenses. Therefore, the petitioner's appeal from that determination must be **DENIED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 0788-88

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration

DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

12-8-88
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 12 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

ml

PINELAND LEARNING CENTER, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Respondent filed a timely letter supporting the initial decision and also filed timely reply exceptions.

Petitioner posits four exceptions which are summarized in pertinent part below.

Petitioner first takes exception to the finding that it was petitioner's fault that complete application packages were not filed on behalf of the two teachers in question. It claims that since the school made the initial request for all of the documents for emergency certification, but was not provided complete packages for both, although submitted what it was given, "the burden should reasonably shift at some point to the Department to follow-up getting the appropriate forms to the institution as requested." (Exceptions, at pp. 1-2)

Petitioner further takes exception to the ALJ's interpretation of N.J.A.C. 6:11-3.11, as it relates to Ms. Phillips, who did not have a bachelor's degree until March 1986. While conceding that the rule generally requires a bachelor's degree for a teacher's certificate, petitioner cites N.J.A.C. 6:11-4.3 as an example of the fact that a bachelor's degree is not specifically required for emergency certificates. Petitioner contends that the ALJ's interpretation of these regulations requiring the bachelor's degree absolutely for the emergency certificate is in error.

Further, petitioner takes exception to the ALJ's finding that Ms. Stewart and Ms. Hill are ineligible for payment as substitutes during the time period in question. Petitioner argues that both teachers were qualified as substitute teachers and, further, that "[t]he testimony is also completely uncontroverted by any evidence of record that the teachers did not function for more than twenty consecutive days in the same teaching position." (Exceptions, at pp. 2-3) While documentary evidence may have been lacking, petitioner contends that the testimony, along with the record of absenteeism among school employees, is sufficient evidence

upon which a decision should be based that Ms. Stewart and Ms. Hill did function as substitutes and were compensable for such service.

Finally, petitioner takes exception to the finding that the Department of Education did not abuse its discretion in disallowing the salaries of these teachers. "Even assuming that the Petitioner may be faulted for not diligently following up on these applications, it is clear from the uncontroverted testimony that there was more than some uncertainty as to how these applications were handled at the County Office." (Id., at pp. 3-4) Petitioner further contends that

> If the interpretation of the Administrative Law Judge of N.J.A.C. 6:11-3.11 is correct and invariable as a matter of law, then Ms. Phillips' certification could not have been granted at an earlier date, and her salary would properly be disallowed as a regular certified teacher. However, it is submitted that the Department has the discretion to recognize her salary as being proper as a substitute, and has abused its discretion, under all of the circumstances, in failing to do so, when she obviously did function as a properly trained and quite successful teacher. (Id., at p. 4)

As to Ms. Stewart, petitioner submits she was fully qualified for certification. Taking into account "the irregularities with which the matter was handled, some of which are attributable to both sides" (id.), petitioner avers it is an abuse of discretion to disallow her salary from September until February of the year in question and, further, an abuse of discretion to disallow her salary as a substitute during that period.

Petitioner seeks to have the Commissioner modify the initial decision to allow Ms. Stewart's salary as a compensable expense as a certified teacher from the date of her employment. It further seeks to have the Commissioner allow the salary of Ms. Phillips as a certified teacher from her date of employment if it is determined that N.J.A.C. 6:11-3.11 does not impose an absolute obligation for a bachelor's degree on emergency certified teachers or, in the alternative, to allow compensation for both teachers as substitutes during their period of employment based on the evidence presented that they did meet requirements of working as substitutes during that period.

Respondent, by way of primary exceptions, voices its support of the initial decision. By way of reply exceptions, it counters, point for point, the primary exceptions of petitioner.

Respondent first rebuts petitioner's argument that the county office failed to properly provide all documents needed for application for Ms. Stewart to obtain certification. Respondent relies on the testimony of Ms. Lane that she advised the school of the deficiency and sent the forms as per the school's request. It

claims the burden to obtain the certification was on the school, and it is undisputed that the school never made any further effort to follow up on the initial application which it knew was incomplete.

Respondent next rebuts petitioner's contention that a bachelor's degree is not required to obtain an emergency certificate. It claims N.J.A.C. 6:11-3.11 requires a bachelor's degree for teachers' certificates, except with respect to certain vocational fields, and that an emergency certificate is a teaching certificate. Therefore, respondent argues, the general requirement of the minimum degree applies to candidates for an emergency certificate. As to petitioner's contention that a substitute certificate does not require a bachelor's degree, respondent avows that petitioner errs in making the analogy that because county substitute certificates do note require a bachelor's degree therefore not all certificates require a bachelor's degree. It argues that the county substitute certificate is not a teaching certificate, "but rather is exactly what its name indicates: A certificate issued by the County Superintendent intended only for persons temporarily performing the duties of a fully certificated and regularly employed teacher. N.J.A.C. 6:11-4.4(c)." (Reply Exceptions, at p. 2) Moreover, respondent contends, because a substitute certificate is issued by the county office and not by the Office of Teacher Certification, it carries none of the benefits of a standard teacher's certificate, Thus, respondent avows, the ALJ properly found Ms. Phillips had to be a holder of a baccalaureate degree in order to receive an emergency certificate.

Further, respondent contends that petitioner failed to meet its burden of proving that the two teachers functioned fewer than 20 consecutive days in the same teaching position. Respondent contends the burden on petitioner was an affirmative one to show it met the regulatory requirement that the teachers serve no more than 20 days in a single position. Petitioner, respondent argues, claimed there was no evidence that the teachers did not function for more than 20 consecutive days, and thus failed in its burden.

Respondent further argues that although petitioner may take exception to the finding that the Department of Education did not abuse its discretion disallowing the salaries of the two teachers, "it is clear from the regulation that the Department had no discretion pursuant to the requirements contained in N.J.A.C. 6:20-[4.4(a)(3)] which precludes from the calculation of tuition the salary of professional staff members who are not certified but functioning in a position requiring certification." (Id., at p. 3) Respondent contends the testimony demonstrates that both teachers were not certified and were functioning in positions requiring certification. By operation of law their salaries were nonallowable, respondent avows, and the regulation does not permit discretion on the part of the Commissioner to waive that provision. Neither could the Department recognize their alleged service as substitutes, respondent claims, since the school failed to provide evidence demonstrating they were employed as substitutes in accord with the regulations.

Respondent would ask the Commissioner to adopt the initial decision.

Upon his careful and independent review of the record, which it is noted does not include the transcripts of the hearing below, the Commissioner affirms the initial decision substantially for the reasons expressed therein. He adds the following.

The Commissioner is entirely in accord with the ALJ and the respondent that a standard teacher's certificate requires a baccalaureate degree except with respect to certain vocational fields. N.J.A.C. 6:11-3.11 Moreover, he concurs with respondent's analysis that a county substitute certificate is not a teaching certificate issued by the Office of Teacher Certification, but rather is issued by the county superintendent's office and is intended only for one temporarily serving for a fully certificated and regularly employed teacher. N.J.A.C. 6:11-4.4(c) As such, it is a substandard certificate without the benefits due the holder of a standard teacher's certificate that cannot be equated with the requirements of a standard or an emergency teaching certificate. The Commissioner thus adopts the ALJ's finding that Ms. Phillips had to be a holder of a bachelor's degree in order to qualify for an emergency certificate in the field of special education.

Further he agrees with the ALJ and respondent that petitioner has failed to affirmatively demonstrate, by a preponderance of the credible evidence, that the two teachers in question served as substitutes for fewer than 20 consecutive days in any one assignment for the period in question, and not as teachers. Without a transcript from which the Commissioner might derive his own credibility determinations, he accepts those credibility determinations and findings of fact educed therefrom made by the ALJ. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987) In so doing, the Commissioner concludes, as did the ALJ:

> [T]he burden of establishing entitlement to inclusion of the costs of these non-certified teachers by use of the substitute teacher theory is on Pineland and the absence of records therefore rebounds against the petitioner. I am unable to conclude from a preponderance of the credible evidence that Pineland did not permit either Phillips or Stewart, or perhaps both, to remain in any one teaching assignment for no more than 20 consecutive days in the fall of 1985.
> (Initial Decision, ante)

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision as amplified herein.

COMMISSIONER OF EDUCATION

February 3, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7624-88
AGENCY DKT. NO. 272-8/86

GERARD P. WILLIAMS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,
Respondent.

Harold N. Springstead, Esq., for petitioner (Aronsohn, Springstead & Weiner, attorneys)

Suzanne E. Raymond, Esq., for respondent (Gutfleish & Davis, attorneys)

Record Closed: November 29, 1988 Decided: December 27, 1988

BEFORE **RICHARD J. MURPHY,** ALJ:

The Commissioner of Education remanded this matter on October 18, 1988, for reconsideration of salary guide placement and back pay recommendations. Both petitioner and the respondent Board of Education (Board) made written submissions and replies by November 29, 1988 and the record closed on that date. For the reasons set forth below, this opinion recommends that petitioner be placed on the third step of the MA+30 listing of the salary guide placement for the 1986-87 school year and be awarded mitigated back pay in the amount of $10,348.62.

The Commissioner's decision to remand states as follows:

> [T]he Commissioner disagrees with the ALJ's method of calculation whereby he reverted back to the 1980-81 teachers salary guide. To arrive at the proper step for 1986-87 in this matter, it is necessary to take the amount of petitioner's salary for 1985-86, prorate it for a 10 month position, and identify the corresponding step on the teachers salary guide for that year. Thus, the appropriate step for 1986-87 would then flow from that point.
>
> Based on the record before the Commissioner at this time, it is not possible to make an exact calculation because of conflict between the parties as to whether the educational broker position was a 12 month or an 11 month position and whether the salary for 1985-86 was $27,619 $25,573, because petitioner rejected the increment offered by the Board.
>
> Consequently, this matter is remanded to the Office of Administrative Law to determine whether the position as actually fulfilled by petitioner was a 12 month job. A 12 month job in this matter is one which consists of 11 months' work and 1 month paid vacation. If the job consisted of 11 months' work with no compensation for the 12th month, then it was an 11 month position.
>
> As to the issue of petitioner's salary, the ALJ is directed to hear legal argument as to whether the $27,619 figure is the appropriate figure to use or $25,573.
>
> All back pay is then to be recalculated based on the appropriate proration and salary step determined by the ALJ (emphasis added). [Commissioner's decision at 14-15]

Based on the submissions and documentation provided, I **FIND** there is no longer any dispute, as a matter of fact, that the position of educational broker held by Gerard Williams was a 12-month position with 26 equal salary payments for the 1985-86 school year. This finding is documented by the quarterly report submitted by the Board to the Division of Pensions covering the 1985-86 school year. The report notes that petitioner was a 12-month employee whose pension was deducted from three months' salary during the summer because he received payment throughout that period. Petitioner does not dispute that his prior position was on a 12 month basis. My earlier decision was based on the job description provided, and found that the job was an 11-month position. The pension documents provided by the respondent are more accurate in this regard and should be accepted as the definitive statement.

DISCUSSION AND CONCLUSIONS

As to the second issue, which concerns petitioner's salary for the 1985-86 school year, the respondent Board argues that petitioner was paid $25,573 in that year and that this figure should provide the basis for any further calculation of salary guide placement and back pay under the Commissioner's decision. The Board argues that petitioner did not receive $27,619 as salary in the 1985-86 school year, even though this amount was offered in the form of an increment, which he rejected on the grounds that he was seeking to establish his salary guide placement and tenure. The Board argues that the petitioner waived any right to claim the salary of $27,619 for the 1985-86 year by voluntarily rejecting it and failing to file any petition of appeal at that time. On the basis of the $25,573 salary for 1985-86, the Board calculates that the petitioner's prorated salary for that period would have been $21,211, which is equivalent to a step-four placement on the salary guide for that year. This calculation lands the petitioner on step one of the MA+30 scale for the 1986-87 school year at a salary of $23,633 and moving h ontally, places him on the same step for the 1987-88 school year, at a salary of $25,436, which is lower than his actual salary for 1985-86.

Petitioner Gerard Williams argues that the appropriate 1985-86 base salary from which to calculate his current salary entitlement is $27,619, which is the amount he was offered by way of an annual increment and which he declined because he felt that by accepting the Board's offer he would be agreeing to its refusal to place him on the salary guide. The increase in the petitioner's salary to $27,619 had been authorized and approved by the Board and would have been received by the petitioner had he not declined it and contested the Board's action in failing to place him on the teacher's salary scale. Accordingly, petitioner argues that the figure of $27,619 should supply the appropriate figure for 1985-86 salary guide placement.

Although there is no dispute as a matter of fact that petitioner was actually paid $25,573 in the 1985-86 school year for a 12-month position, there is also no dispute that he would have and should have received an increase for that year to the salary of $27,619 had he not declined the raise so as not to jeopardize his position in litigation to establish his status in terms of tenure and salary guide placement. To find that

petitioner's salary for the 1985-86 school year was not the $27,619 to which he was entitled would effectively penalize him for declining to accept his increment out of concern that it might prejudice his action to settle the matter of his tenure and proper salary guide placement. Under these circumstances, I **CONCLUDE** that petitioner's appropriate base salary for the 1985-86 year was the $27,619 to which he was entitled.

The remaining issue concerns the appropriate step for the 1986-87 year and the amount of back pay. Taking the amount of the petitioner's salary for 1985-86 and prorating it for a ten-month position ($27,619 divided by 12 equals $2,301.58 X 10 equals $23,015.80), I **CONCLUDE** that the proper placement on the 1985-86 salary guide for petitioner was at step eight on the MA+30 category, and I further **CONCLUDE** that the appropriate step on the 1986-87 guide would be step three of that same category, at a salary of $24,833.

On the basis of the mitigation calculations (set forth in full in my initial decision of September 8, 1988 in OAL DKT. EDU 5779-86), which totaled $24,760.04, I **CONCLUDE** that petitioner is entitled to $72.96 in back pay for the 1986-87 school year. As to 1987-88 salary guide, I **CONCLUDE** that petitioner is entitled to placement on step three, MA+30, and is thereby entitled to $26,636, or $2,663.60 per month on a ten-month basis. Petitioner is therefore entitled to back pay of $10,275.66 for the 1987-88 year for the six months of unemployment in which he should have received a salary of $15,981.60 and did receive earnings of mitigation of $5,705.94. I so **CONCLUDE.** I further and finally **CONCLUDE** that the total back pay to which the petitioner is entitled is $10,348.62.

ORDER

On the basis of the above findings of fact and conclusions of law it is **ORDERED** that the petitioner be placed on the step three of the MA+30 list on the 1986-87 placement guide and thereafter and that he receive $10,348.62 in retroactive salary.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

Dec. 27, 1988
DATE

RICHARD J. MURPHY, A.L.J.

Receipt Acknowledged:

12-28-88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 30 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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GERARD P. WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4. The Board's response to petitioner's reply exceptions was not considered as there is no provision in law or code to permit such review.

The Board contends that the ALJ erred in concluding that petitioner's appropriate base salary for the 1985-86 school year was $27,619 since petitioner rejected that salary offer and never received that sum. The Board reiterates its position that petitioner's salary was $25,573 and that to conclude otherwise creates a fiction that he received something which he actually refused.

More specifically, the Board argues that the ALJ's decision gives rise to the erroneous impression that the Board took official action by way of formal resolution to set petitioner's salary at $27,619, when he states in the initial decision, ante, that the salary had been authorized and approved by the Board. The Board contends that although it may have indicated a willingness to offer that salary, there is no evidence in the record documenting any official Board action by way of a public resolution setting the salary at $27,619 which might have given him a vested right to the higher salary.

The Board also maintains that the ALJ erroneously assumes that after petitioner rejected the salary offer, he took some action to contest his salary when stating in the initial decision, ante, that petitioner "declined the raise so as not to jeopardize his position in litigation to establish his status in terms of tenure and salary guide placement." As to this, the Board argues that there is a misconception on the ALJ's part that petitioner commenced litigation after rejecting the $27,619 salary in the summer of 1985. It points to the fact that petitioner did not take any action concerning his dissatisfaction with the 1985 offer until August 1986 when the instant matter was commenced following the abolishment of his position.

The Board also believes that there is a misconception that acceptance of the $27,619 salary might have prejudiced petitioner's right had he pursued litigation, averring that:

> Certainly, the petitioner could have accepted the $27,619. salary and immediately commenced an appeal with the Commissioner with respect to tenure and salary claims without in any way prejudicing his rights. Indeed, had the petitioner taken the appropriate steps and filed a petition within 90 days of receiving notice of the salary offer or within 90 days of his rejection of the salary offer, a different outcome might have been reached.
>
> (Board's Exceptions at p. 2)

Petitioner's reply exceptions urge affirmance of the ALJ's decision. He contends that (1) the Board could not pass a resolution authorizing the payment of something which he rejected and (2) he did in fact take action with respect to his dissatisfaction with the 1985 salary offer. He points to Exhibit P-5, a letter to him from the acting superintendent dated January 3, 1986 in which he was advised that the Board had again reviewed his request for salary upgrading but that it was not positively moved to take such action.

Upon review of the record and the legal arguments advanced by the parties regarding the issue of which salary figure, $27,619 or $25,573, should be used to prorate petitioner's 1985-86 salary so as to determine his proper salary guide placement for 1986-87, the Commissioner rejects the ALJ's conclusion that $27,619 is the appropriate figure. He finds that the Board is correct in arguing that the record does not reveal any proof that the Board ever took action to authorize or approve the $27,619 salary. While petitioner thinks this point is "ludicrous," questioning why a Board would be expected to take action on a salary he rejected, the issue is relevant because it establishes that vested right to that salary ever existed. Petitioner chose instead to reject the higher salary offered and in doing so acted at his own peril. He did not file any claim with the Commissioner regarding any salary dispute until August 1986, after having received the salary of $25,573 for the entire 1985-86 school year and only after the abolishment of his position. To have accepted the $27,619 salary and then filed a petition within the timelines mandated by N.J.A.C. 6:24-1.2 would not have prejudiced his claim to salary guide placement. To have rejected it and received a salary of $25,573 for the 1985-86 school year without a timely filing of a petition does, however, preclude the use of the $27,619 figure for prorating the 1985-86 salary.

Accordingly, it is determined that the ALJ erred in granting proration based on the salary figure of $27,619. Petitioner has no entitlement to the use of a 1985-86 salary figure for proration purposes that (1) was never set by formal Board action; (2) he rejected; (3) he never received; and (4) he failed to

appeal within the time constraints dictated by N.J.A.C. 6:24-1.2. The fact that petitioner was still seeking to achieve salary upgrade in December 1985 (P-5) does not alter this determination. Consequently, the salary figure for 1985-86 to be used for proration shall be the salary actually received by petitioner for that year, $25,573. This yields a 10 month salary figure of $21,311.

Accordingly, petitioner shall receive back pay and emoluments, less mitigation based on the above determination and in conformity with the collective bargaining agreement in effect for the period in dispute.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 9, 1989

GERARD P. WILLIAMS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Partial Decision by the Commissioner of Education, June 29,1987

Decision on motion by the Commissioner of Education, August 31, 1987

Decided by the State Board of Education, November 4, 1987

Remanded by the Commissioner of Education, October 18, 1988

Decided by the Commissioner of Education, February 9, 1989

For the Petitioner-Appellant, Aronsohn, Springstead & Weiner (Harold N. Springstead, Esq., of Counsel)

For the Respondent-Respondent, Gutfleish & Davis (Suzanne E. Raymond, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

July 6, 1989

Pending N.J. Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2523-88
AGENCY DKT. NO. 51-3/88

H.U. & J.U., AS GUARDIANS
OF L.T.,
Petitioners,
v.
EAST WINDSOR REGIONAL
BOARD OF EDUCATION,
JAMES FARRELL, AND
EDGAR C. THOMAS,
Respondents.

H.U. and J.U., petitioners, pro se

David H. Coates, Esq., for respondent (Turp, Coates, Essl and Driggers, attorneys)

Record Closed: November 21, 1988 Decided: January 5, 1989

BEFORE JOSEPH LAVERY, ALJ:

This is an appeal by petitioners H.U. and his wife, J.U., mother of L.T., from the discipline of L.T by respondent East Windsor Regional School District Board of Education (Board). Respondent Board had suspended and otherwise placed restrictions on L.T., a pupil at Hightstown High School, for her alleged role in "bomb scares" occurring on February 1 and February 2, 1988.

PROCEDURAL HISTORY

After timely appeal to the Commissioner of Education, and denial of a motion by petitioners to stay the unfulfilled portion of penalty imposed by the respondent, the Commissioner declared the matter a contested case, pursuant to N.J.S.A. 52:14B-9 and 10. He filed it with the Office of Administrative Law on April 11, 1988 for plenary hearing. Subsequently, prehearing convened by telephone on May 20, 1988.

On August 3, 1988, hearing convened and motions were heard concerning burden of proof, admission of transcript (Exh. R-1), appropriate subpoenas, and amendment to caption. New hearing dates were set for October 27 and October 28. Before the hearing dates, a further order issued on September 23, 1988 disposing of the motions. The hearing date of October 27 was adjourned at the request of the Board of Education, because of the absence of a key witness. On October 28, 1988 the hearing convened and concluded. Briefs followed, the last of which was filed in the Office of Administrative Law on November 21, 1988. On that date the record closed.

ISSUES

The issues in this matter can be gleaned from the operative documents:

The basic, determinative issue here is whether the Board's final administrative determination, as expressed in its resolution of February 16, 1988 (Exh. J-4), was arbitrary, capricious and unreasonable. More specifically, it must be decided:

> **Whether petitioner "was implicated in the making of a terroristic threat, by telephone, to the Melvin H. Krepps School on February 1, 1988".**

Additionally, it must be determined whether the foregoing resolution disposed of the initiating charges against L.T., as phrased by the Chief School Administrator, Edgar C. Thomas, in a letter of February 11, 1988 (Exh. J-3). That letter set forth accusations which formed the basis for the Board's February 16, 1988 hearing:

> You are hereby advised that [L.T.'s] alleged conduct in these instances constitutes grounds for expulsion under N.J.S.A. 18A:37-2(a)(c) which reads as follows:
>
> > Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person have authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school.
> >
> > Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to, any of the following:
> >
> > a. Continued and willful disobedience;
> >
> > c. Conduct of such character as to constitute a continuing danger to the physical well-being of other pupils.

Lastly, the parties agreed in prehearing conference that the issues to be decided here could also be framed as follows:

1. Whether L.T. made a terroristic threat involving bomb scares on February 1, 1988, and February 2, 1988.
2. Whether L.T. aided and conspired, abetted, cajoled, assisted, or "implicated herself" in the making of a terroristic threat on February 1, 1988, and February 2, 1988.
3. Whether respondents were arbitrary, capricious or unreasonable in the application of discipline to L.T. in the form of a 5-day suspension among other things, for participation in bomb scares over a period of two days: February 1 and 2, 1988.

Burden of proof:

The **burden of proof** in this matter falls on petitioners, as specified in the order of this tribunal dated September 23, 1988:

> Whether, after affording the Board's action its lawful presumption of correctness, the Board may still be found, by a preponderance of the credible evidence, to have been arbitrary, capricious, or unreasonable in its discipline of L.T.

See Kopera v. West Orange Bd. of Education, 60 N.J. Super. 289 (App. Div. 1960).

Undisputed facts:

Many of the material facts are not in serious contention:

L.T., the child on whose behalf her mother, J.U., and stepfather, H.U., bring this appeal, is a 15-year-old female student in Hightstown High School. On February 1, 1988, she was in the company of other students, who included male students M.S. and A.L. On that day, it is asserted by the Board, M.S. made a telephone call to the Melvin H. Krepps School which was received by Deborah Adams, a substitute clerk, at about 2:07 p.m. Ms. Adams, in an affidavit (Exh. R-2(F)), attested that she heard a young male voice state "There is a bomb in one of the lockers." She informed the principal, Mr. Setaro, and the school was evacuated.

On the following day, February 2, 1988, the Board alleges, the foregoing two male students were involved in a similar phone call to the same school, at about 12:03 p.m. Anna Van Pelt, also a clerk with the school district assigned to Melvin H. Krepps School, attested by affidavit (Exh. R-2(G)) that she received a call from a young man who said "You have five minutes to evacuate." The school was evacuated, and the children were kept from the rain by being placed in buses.

On the evening of February 2, 1988, Detective Carl Corsi of the East Windsor Police Department contacted J.U., mother of L.T., and asked both to come to the E. Windsor police headquarters that evening. At that time, he interviewed L.T. and the other two students, A.L. and M.S., in separate consecutive sessions, lasting approximately one-half hour (Exh. J-8). The upshot of the interviews was that all three students were suspended from school. L.T. was suspended from February 4 through and including February 10.

The High School principal who imposed the suspension, James Farrell, noted in his letter of February 3, 1988, (Exh. R-2(A)) that "This suspension is the result of participating in a bomb scare." In an informal meeting with the parents on February 9, 1988, conducted by Mr. Farrell in the presence of three assistant principals, Carole Nelson, Michael Carr and Virginia Kearns, Mr. Farrell concluded in an affidavit (Exh. R-2(H)) that L.T. had "admitted her involvement in the incident of February 1, 1988" but "She did deny any involvement in the February 2, 1988

incident and she stated that she did not make any of the calls, but admitted her involvement in the incident of February 1, 1988" (Exh. J-7, R-2(H)). Mr. Farrell, during the meeting, informed the parents that L.T. would be referred to a child study team.

Afterward, in a letter of February 11, 1988 (Exh. J-3), Chief School Administrator, Edgar C. Thomas advised Mrs. J.U. and L.T. that on February 1, 1988 and February 2, 1988 "L.T. was involved in two incidents at approximately 2:07 p.m. and 12:03 p.m. respectively. These incidents involved the making of a terroristic threat and conspiracy to make such a threat." Mr. Thomas acknowledged that the suspension imposed February 3 had been continued after the February 9 meeting with Mr. Farrell. Further, he informed the mother and daughter that a hearing before the Board would be held on February 16, 1988 at which time the complaints would be heard. This letter was meant as notice so that Mrs. J.U. and L.T. could "have the opportunity to present your views pertaining to L.T.'s right to continue in school under New Jersey law and policy." More specifically, Mr. Thomas noted that:

> You are hereby given notice of the charges and grounds of complaint against L.T. which, if proven, may lead to expulsion from Hightstown High School.
>
> On February 1, 1988 the said L.T. did conspire with other students of the East Windsor Regional School District to make terroristic threats, by means of pay telephone, to the Melvin H. Krepps School.
>
> You are hereby advised that L.T.'s alleged conduct in these instances constitutes grounds for expulsion under N.J.S.A. 18A:37-2(a)(c) which reads as follows: (*see pages 3 and 4, supra, for the full quotation*)

On the date of the Board hearing, February 16, the East Windsor Child Study Team conferred in response to Mr. Farrell's referral. It issued a classification and IEP conference report which included a social, educational, and psychological summary, and which concluded that L.T. was not classifiable, or in need of special educational services. It stated that "the referring behavior does not appear to have been primarily caused by a handicapping condition." (Exh. J-2).

On the same day, at the hearing before the Board of Education, which was tape-recorded (Exh. R-1), L.T., Mrs. J.U. and H.U. were represented by counsel, who questioned the principal, Mr. Farrell and Detective Corsi. Notwithstanding this proceeding, the Board of Education passed a resolution (Exh. J-4), which found as follows:

> WHEREAS, the Board has deliberated on the evidence presented and drawn conclusions from said evidence and determined that said student was implicated in the making of a terroristic threat, by telephone, to the Melvin H. Krepps School on February 1, 1988; . . .

The Board, in the same resolution, readmitted L.T. to school effective February 17, 1988, under condition that she would not participate in extracurricular activities, would be limited in the time spent at Hightstown High School, could not attend any school-sponsored activities, and would be be expected to be timely and prepared for all classes (Exh. J-4B).

Dissatisfied with this result, J.U. and H.U. appealed on behalf of L.T. to the Commissioner of Education. These proceedings ensued.

ARGUMENTS OF THE PARTIES

Petitioners' argument:

Petitioners submitted their case through the testimony of L.T.'s mother, J.U., and subsequent letter brief. J.U. testified that her attendance at the interview with Detective Corsi on the evening of February 2 was entirely voluntary, and at his request. The detective told her by phone only that he sought information on an incident. After an interview which lasted approximately half an hour, Detective Corsi thanked them both for coming. He never said that L.T. had been arrested, and gave no indication that she was in any manner detained. Mrs. J.U. recalled that she was shocked on the following day to read an article in the newspaper characterizing the visit as an "arrest."

Challenging Detective Corsi's investigative report (Exh. P-1B), J.U. insisted that L.T. had never said that the subject of a bomb scare had arisen during her conversations with fellow students M.S. or A.L. on February 1. Moreover, L.T. had never admitted to planning, conspiring to, or even discussing a bomb threat.

Addressing the affidavit of of high school principal James Farrell (Exh. R-2 (H)), J.U. testified that this too was inaccurate When she and her daughter met with Mr. Farrell, L.T. merely stated that she was "hanging around" M.S. and A.L. on February 1, and that the following day she was at home with her mother during the

time in question. Despite limiting her knowledge to February 1, Mr. Farrell insisted on referring L.T. to the child study team for both days.

By way of pro se legal brief, H.U. recounted the facts, and stated that February 1 *and* 2 were charged initially by school officials to satisfy the threshold provisions of N.J.S.A. 18A:37-2(a) and (c), which speak to "pluralized" behavior. The brief differentiated the behavior of L.T., who denied misconduct throughout, from the students and circumstances in cases cited by the Board.

Additionally, petitioners argue, the charge of "continued and willful disobedience" or "conduct of such character as to constitute a continuing danger to the physical well-being of other pupils" was improper and inaccurate. Neither the Chief School Administrator, Mr. Thomas, nor Hightstown High Principal Farrell had examined the facts carefully. Mr. Farrell at hearing admitted to a complete lack of understanding of the charge of "conspiracy".

Petitioners argue that the Board's responsibility with respect to the charges levelled was to determine whether a 14-year-old girl, with a spotless academic and disciplinary record, was a terroristic conspirator on February 1, 1988. Instead, the Board went beyond its commission by including in their deliberations the principal who prepared the charges. It then decided, without regard to these underlying charges, that guilt and punishment should be affixed solely on the basis of "implication." Nowhere was L.T. ever informed that she was to defend herself against "implication." The Board's action was on its face arbitrary, capricious and unreasonable, pursuant to relevant case law. Therefore, the Board's decision should be reversed, with an order of expungement and award of legal fees and costs.

Respondents' argument:

The Board's case was presented through testimony of **James Farrell**, Principal of Hightstown High School, and Chief School Administrator **Edgar C. Thomas.** He acknowledged that his opinions were grounded in part on a report of a phone conversation which Detective Corsi had with another school official. Mr. Farrell also relied on comments from the police reports. He was convinced that L.T. "had been involved" in the bomb scare. After conversation with all the parents, this belief continued. He had seen the collection of police records (Exh. P-1A and B) but was uncertain of the date. It mattered little to him whether L.T. had been "involved" in one or both bomb scares. It was sufficient that she was in the company of A.L. and

M.S. on February 1. By her association with the boys on that day, she had brought harm to the school district. For that reason, he was justified in following the normal school procedure for discipline.

On the other hand, Mr. Farrell conceded that he had no knowledge of whether L.T. had been arrested. Neither did he know the meaning of "conspiracy", nor was he familiar with the elements of that criminal offense or its legal ramifications. He did outline the "conspiracy" charge at the February 9 meeting with parents, nonetheless. He insisted on charging L.T. with both days because, notwithstanding her denial, he "assumed" that L.T. was involved on both days because she had been part of the group. However, despite the letter of February 11 levelling the conspiracy charge, he now believed that "involvement" better described her presence on February 1. That presence was inappropriate. By being with the other students, she was a participant in the bomb scare.

Mr. Farrell was certain he had not prepared the Board of Education resolution (Exh. J-4), but he did present adverse testimony at the February 16 hearing, and conceded that he was in the room when the Board deliberated.

Chief School Administrator Edgar C. Thomas, Jr., recalled in testimony that he had met with Detective Corsi and with Mr. Coates, counsel to the Board of Education before issuing his letter of charges on February 11, 1988. That letter was the result of assistance from Mr. Coates. He based the substance of his letter on Mr. Corsi's affidavit (Exh. J-8) as well as the affidavits from other school officials. Mr. Thomas stated that he personally did not attend the Board meeting of February 16 because of vacation.

In support of Exhibit R-1, the transcription from tapes, the **Board Secretary, Joan R. Nolan,** confirmed that her transcription was from the Board meeting of February 16, 1988. Further, she herself had used the Panasonic tape recorder that evening, loading it with 30 minute tapes. On the other hand, she cautioned that transcript was prepared by first writing out the contents of the tape, then typing it in its present form. She experienced difficulty with "talk over," pauses, and other interjections. There were parts which she simply could not understand. It took her ten seconds to change each tape, and verbiage was lost from these intervals on two of the tapes involved. Additionally, she would normally have relied on outside technical help to decipher the recording. She did not do so in this transcription

because of the short time allotted for its preparation. The exhibits from the hearing she identified as Exh. R-2A through K.

By way of legal argument, the Board argued through letter brief that L.T.'s suspension from February 4 through the Board meeting of February 16 was appropriate. Additionally, the petition here should be dismissed because the Board of Education provided L.T. with the necessary due process. Its findings and discipline were neither arbitrary nor capricious. L.T. was treated the same as the others involved. The Board's administrative steps were consistent, not only with U.S. Supreme Court guidelines, but with administrative law decisions. Its actions are subject to a presumption of correctness. This bars any hearer or the commissioner of Education from substituting their judgment, whether or not they believe the board's conclusion was erroneous. Additionally, since 18A:37-2(a) and (c) would have required expulsion, the Board properly relied on the advice of its professionals in framing a lesser penalty. The record upon which the Board acted justifies its ultimate decision.

FINDINGS OF FACT

Therefore, after considering the testimony previously set forth, and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following **FINDINGS OF FACT:**

As to **UNDISPUTED** facts, I **FIND** those designated on pages **4** through **6** of this opinion.

As to matters which are **DISPUTED** or **CONTESTED**, I **FIND**:

1. L.T. was in the company of M.S. and A.L. on February 1, 1988, the day the first telephone bomb threat was made to Melvin H. Krepps School.

2. L.T. did not suggest or participate in a plan to make a telephoned bomb threat on February 1.

3. L.T. did not call in a bomb threat on February 1.

4. L.T. was not in the company of M.S. and A.L. on February 2, when the second bomb threat was made. L.T. did not in any way participate in the planning of, or take part in, the bomb threat of February 2.

ANALYSIS

The burden of proof mandated in part under Kopera, supra, makes clear that the evidence must preponderately show that the Board acted in an arbitrary, capricious and unreasonable manner, for petitioner to succeed here. The Board correctly argues that neither this tribunal nor the Commissioner of Education may substitute their judgment on the mere conclusion that the Board's decision was "incorrect." Whether this difficult burden has been met by petitioner, however, turns as well on credibility, a key component of this case. The requirements of the Uniform Administrative Procedures Rules also attach, particularly as they balance admissibility of hearsay with the necessity for a *residuum* of competent evidence to support each finding of fact, N.J.A.C. 1:1-15.5.

Turning to the impact of credibility, it should be noted that, to establish credibility, testimony, to be believed, must not only proceed from the mouth of a credible witness, it must be believable in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances, In re Perrone, 5 N.J. 514, 522 (1950). In this case, the credibility of the witnesses and the absence of a *residuum* of competent evidence renders petitioners' case most credible.

L.T.'s mother, J.U., was entirely believable in her description of a child who was not a behavior problem. The Board offered nothing to rebut this assertion. On the contrary, its own Child Study Team found that L.T. was without any handicapping impairment, emotional or otherwise, and was progressing favorably, without complications, in her academic work. Additionally, no record has been even alluded to by the Board which would have suggested prior behavior consistent with the present action, or which would otherwise warrant such referral. This unsupported conclusion by the school district that the child might be educationally handicapped is puzzling, if the referral was meant to somehow serve as a mechanism for determining guilt (*cf* the elaborate safeguards which must attend "identification" and "referral", N.J.A.C 6:28-3.2 and 3.3.) That action in itself would have been arbitrary, capricious, and unreasonable, since the result of a CST examination would in no sense be competent to establish commission of the offense. If, on the other

hand, it was somehow intended to assist in framing an appropriate penalty, the whole effort by the CST, favorable to L.T., was unmentioned in the Board's resolution, and seems unreasonably to have been ignored in the formulation of penalty.

As to the merits of the controversy, it is more likely that L.T. was, in her mother's words, "hanging around" with the students allegedly involved in the bomb threat of February 1, 1988. This is a far cry from "participating in a bomb scare", as charged by Mr. Farrell in his letter of February 3 (Exh. J-3) when he suspended her without hearing, formal or informal, as of February 4. For Mr. Farrell, mere presence in the company of M.S. And A.L. signified "involvement" and guilt, and the circumstances of her presence, or the number of days she was "involved" were irrelevant. As J.U. credibly related, L.T. had described to Mr. Farrell the bomb scare plan as a device of the two boys, spontaneously conceived, while L.T. was fortuitously in their company. Significantly, in its February 16 resolution, the final administrative decision, the Board does not suggest that L.T. was in any way connected with the February 2 call.

The mother's persuasive version also differs materially from the February 11 accusations by Mr. Thomas, justified by her being "involved in two incidents" on February 1 and 2, despite the protestations of both mother and child that L.T. wasn't even present on February 2. Mr. Thomas, on advice of Board counsel, thought that what he knew at the time justified charging L.T. with violation of N.J.S.A. 18A:37-2(a) and (c), notwithstanding that no continuing behavior was proven or alluded to. The entirely believable testimony of L.T.'s mother adequately disproves the charges of terroristic threats, and conspiracy to make them. It is plain that the positions taken by both Mr. Farrell and Mr. Thomas were vastly influenced by Detective Corsi's conclusions, as illustrated by the legalistic assertions in his affidavit of February 11 (Exh. R-2(E)), the same date as Mr. Thomas' letter of charges (Exh. R-2(D)). Detective Corsi himself was not provided for testimony here (the Board had subpoenaed him, without success) and his views could not be tested in the crucible of cross-examination.

As a matter of law, in any administrative proceeding which is judicial in nature, the basic principle of the exclusiveness of the record must prevail. Nothing can be taken into account which has not been introduced into the record at hearing, otherwise the right to a hearing itself becomes meaningless. All information of relevant probative value underlying a decision must be spread on the record, and be

accompanied by opportunity to test its trustworthiness, Matter of Parlow, 192 N.J. Super. 247, 249- 250 (App. Div. 1983).

The Board's case therefore must be viewed as entirely hearsay with respect to the substance of the incidents (*See N.J.A.C.* 1:1-15.5). Yet, despite this, and in the face of a ruling at the end of petitioners' case that a prima facie showing had been made, the Board decided to rest on the testimony of Mr. Farrell and Mr. Thomas, and the exhibits from the hearing before the Board (Exh. R-2). None of this arises from the testimony of an eyewitness. Neither M.S. nor A.L. testified. The Board strongly urges Exhibit R-1, the "transcript" of its own hearing, as proof that it acted properly, and within its lawful discretion. This argument is not persuasive. The Board's own secretary, Joan Nolan, who prepared the exhibit, testified that: (a) it was seriously incomplete, and (b) not attended by the usual technical assistance which she normally had available. Ms. Nolan is not a certified shorthand reporter.

Most troubling is the Board's final administrative determination of the disputed charges, in its resolution (Exh. J-4). It makes no findings on the charges which prompted the hearing sought by petitioners. These were clearly set forth in Mr. Thomas's letter of February 11. Yet, the Board makes no reference to it. The statutory sections purportedly violated, N.J.S.A. 18A:37-2(a) and (c), are ignored. Yet, on the grounds of "implication", serious prior discipline (suspension from February 4 through February 17) is countenanced and supplemented. The meaning of "implication", the operative word in its decision, is not clear. No citation is given which would serve as a gloss. Relying then on Black's Law Dictionary, 5th Edition, "implication" may be taken to mean the following:

> **Implication.** Intendment or inference, as distinguished from the actual expression of a thing in words. In a will, an estate may pass by mere *implication*, without any express words to direct its course.
>
> An inference of something not directly declared, but arising from what is admitted or expressed. Act of implying or condition of being implied.
>
> "Implication" is also used in the sense of "inference"; *i.e.*, where the existence of an intention is inferred from acts not done for the sole purpose of communicating it, but for some other purpose.
>
> See also **Inference.**

Such ambiguous language does not connote a finding of guilt, and does not rise to the level of an an adjudication on the merits. Neither is it supported by findings of fact relating to the original, damning charges. It is arbitrary, capricious, and unreasonable for the Board to have punished L.T. for an undefined "implication", leaving the serious original charges undecided. The administrative decision relied on by the Board, Scher v. West Orange BOE, 1968 S.L.D. 92 is neither apposite, nor binding precedent. The remaining citations are not at variance with today's Initial Decision. Goss v. Lopez, 419 U.S. 565 (1975) especially raises a question of whether the constitutional "rudimentary precautions" of notice and informal hearing were satisfied by school officials, when L.T.'s suspension began February 4, and the meeting with Mr. Farrell occurred on February 9, *Id* at 581-582. The harm to L.T.'s school record, and the public opprobrium which accompanied the Board's action, therefore, should not be allowed to stand.

CONCLUSION

I **CONCLUDE**, therefore, based on my review of the entire record, including the credibility of witnesses, and the reliability and probativeness of documents submitted, that:

The Board of Education of the East Windsor Regional School District acted arbitrarily, capriciously, and unreasonably when it: (a) accepted the penalty of suspension imposed on L.T., and (b) supplemented that penalty with additional restrictions. This took place with the passage of its resolution of February 16, 1988. That document served as a final administrative determination that L.T. "was implicated in the making of a terroristic threat, by telephone, to the Melvin H. Krepps School on February 1, 1988."

ORDER

I **ORDER**, therefore, that:

1. The East Windsor School District Board of Education's resolution of February 16, 1988 (Exhibit J-4), both as to substance and penalty, be **REVERSED**, insofar as it applies to L.T., and

2. The East Windsor Regional School District Board of Education **EXPUNGE** all its school records, insofar as they reflect any adverse conduct or discipline relating to L.T.

3. Petitioners' request for counsel fees and costs be DENIED, for lack of legal authority, express or implied, in this tribunal.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

1-5-89
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

1/5/89
DATE

DEPARTMENT OF EDUCATION

Mailed ~~to Parties~~:

JAN 10 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

ml

H.U. AND J.U., as guardians of L.T.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT AND EDGAR C.THOMAS, CHIEF SCHOOL ADMINISTRATOR ET AL., MERCER COUNTY.	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Petitioners' reply exceptions thereto were untimely filed, however.

The Board posits four exceptions which are summarized in pertinent part below.

EXCEPTION ONE

> THE ADMINISTRATIVE LAW JUDGE FAILED TO CONSIDER THE TRANSCRIPT OF THE TESTIMONY OF L.T., M.S., AND A.L. ADDUCED AT THE BOARD OF EDUCATION'S DISCIPLINARY HEARING AND ENTERED INTO EVIDENCE AS R-1, WHICH TESTIMONY GOES TO THE HEART OF THIS MATTER AND CONCLUSIVELY REFUTES THE STATEMENTS ON PAGE 12 OF THE INITIAL DECISION REGARDING THE NATURE OF THE BOARD'S CASE. (at p. 1)

Counsel for the Board argues that the ALJ did not consider the testimony embodied in the transcript of the Board hearing at which M.S., A.L. and L.T. testified. Citing L.T.'s testimony from page 47 of that transcript, R-1 in evidence, the Board claims:

> a) she knew of a proposal by A.L. made in a pizza restaurant to make a bomb threat; b) knowing of A.L.'s proposal, she left the pizza restaurant at A.L.'s suggestion and in A.L.'s company; c) accompanying A.L., she walked to a place where two other students were to be seen next to a telephone; d) she stood near enough to A.L. to know he was making a telephone call, although she did not hear what he said. (Exceptions, at p. 3)

Further citing R-1 at pages 2-7 the Board contends the ALJ was not aware of the testimony of M.S. and A.L. who, it argues, testified to a different situation from that portrayed by L.T. "in that both indicate that the three of them, A.L., M.S., and L.T. discussed the making of a bomb threat." (Exceptions, at pp. 3-4) Citing page 6 of the testimony taken at the Board hearing, the Board avers L.T. was listening when A.L. was making his telephone bomb threat on February 1, 1988 and, further, that at hearing both A.L. and M.S., through his counsel, stipulated that concerning the bomb threat of February 1, 1988 L.T., with A.L. and M.S., "'did conspire to make terroristic threats by means of telephone to the Melvin H. Kreps School.' (See R-1, pages 2-7)." (Id., at p. 4)

EXCEPTION TWO

THE ADMINISTRATIVE LAW JUDGE FAILED TO UNDERSTAND THE LAW REGARDING A CHILD STUDY TEAM'S FUNCTION IN SCHOOL DISCIPLINARY SITUATIONS, AND THUS MADE A SERIES OF ERRONEOUS AND HIGHLY PREJUDICIAL STATEMENTS IN HIS ANALYSIS OF THE CASE WHICH CONTRIBUTED TO HIS MAKING AN IMPROPER DECISION. (at p. 5)

The Board claims the ALJ "showed a complete ignorance of N.J.A.C. 6:28-2.8(f) and (g)" (Id., at p. 5) in having "indulged in a dialectical exercise which was highly prejudicial to the School District***." (Id., at p. 6) It avers the initial decision should be reversed due to the ALJ's failure to understand why the district referred L.T. to the child study team for evaluation pursuant to N.J.A.C. 6:28-2.8(f) and (g), since it would be wrong to penalize the school district for following what it believes was required of it.

EXCEPTION THREE

THE ADMINISTRATIVE LAW JUDGE IMPROPERLY APPLIED THE PRESUMPTION OF CORRECTNESS WHICH IS TO BE AFFORDED THE BOARD OF EDUCATION. (at p. 6)

Citing Worthington v. Fauver, 88 N.J. 183 (1982) for the proposition that an ALJ who renders an initial decision is not empowered to substitute his own judgment for that of a board, the Board reiterates its contention that the ALJ was not aware of the record in this case nor the governing law. It claims that the facts in the record provide a reasonable basis for the Board's action and are at variance with his conclusions and, further, the Board claims bomb threats "are not the equivalent of sticking chewing gum on the bottom of desks and it is especially important in a matter of this type that all of the factual evidence be considered and weighed in order to determine if the Board exercised its authority rationally in regard to L.T." (Id., at p. 8)

EXCEPTION FOUR

THE BOARD OF EDUCATION IN ITS RESOLUTION REGARDING L.T. STATED ITS REASON FOR ITS ACTION. (at p. 8)

The Board excepts to the ALJ's concern about how the Board's resolution concerning L.T.'s punishment was drafted. It claims there was no surprise in the penalty assigned, there "was no mystery to L.T.'s counsel why the hearing was being held. (See p. 27 of R-1)." (Id., at p. 9) and, finally, that "[i]t cannot be fairly stated that the finding of the Board did not bring L.T. within the ambit of the cited disciplinary statutes." (Id.)

The Board requests that the initial decision be reversed and that the petition in this matter be dismissed leaving the actions of the Board undisturbed.

Based on his careful and independent review of the record, which, it is noted, includes the transcript of the Board hearing held in this matter on February 16, 1988, the Commissioner for the reasons which follow reverses the conclusion of the ALJ exonerating L.T.

Although the record does not include the transcripts of the hearing held before the ALJ, it does include R-1 in evidence, the transcript of the hearing held before the Board in this matter. Initially, the Commissioner rejects the ALJ's conclusion that R-1 is unreliable evidence. While it must be conceded that the secretary who transcribed the tapes of said meeting is not a court stenographer, that fact in itself does not render the document unreliable. Neither does her testimony taken at the hearing before the ALJ that she did not have the benefit of assistance in transcribing the tapes nor that there were some inaudible blanks noted in her transcription. The Commissioner finds relatively few such blanks in the transcription and those noted are at places that are not critical areas of testimony. Moreover, there is no challenge to the accuracy of those portions of the transcript which are pertinent to a determination of this matter to be found in the record. Accordingly, the Commissioner finds R-1 admissible, relevant and reliable evidence in the record before him.

In reviewing all the record in this matter, the Commissioner would first note his accord with the ALJ that the record does not support a finding that L.T. was in any way involved in the bomb scare called in to the Melvin H. Kreps School on February 2, 1988. He thus adopts the finding of the ALJ concluding that L.T. was not implicated in the activities of February 2, 1988 and directs that any reference to L.T.'s involvement in the bomb scare of February 2, 1988 be stricken from the record if any such documents still exist. However, he disagrees with the ALJ in concluding that L.T. was not involved in the bomb scare at Kreps School on February 1, 1988. L.T.'s own testimony taken at the Board meeting of February 16, 1988 is enlightening in establishing exactly what transpired on the afternoon of February 1, 1988. On cross-examination L.T. stated:

> Mr. Coates: Now you accompanied A.L. to a phone booth outside of the Food Town, did you not?
>
> L.T.: Yes
>
> ***

Mr. Coates: Now you testified that there had been discussion about making a phone call?

L.T.: Yes

Mr. Coates: A bomb threat telephone call. When you started walking toward the phone booth, did it occur to you that that was a good place to make such a call?

L.T.: We were walking over towards those kids so we could talk to them.

***

Mr. Coates: Did it occur to you that this might be A.L.'s purpose in going in that direction?

L.T.: We were walking over towards those kids so we could talk to them.

Mr. Coates: Did you know, at that time, that they were near a phone booth?

L.T.: Yes

Mr. Coates: And you made no connection between that phone booth and a potential call to the Kreps School?

L.T.: I wasn't paying attention, I was just talking to these two kids.

Mr. Coates: So your testimony is that you made no connection of that phone booth and a potential call by A.L. to the Kreps School?

L.T.: No

Mr. Coates: Did you hear any of the conversation by A.L.?

L.T.: I just heard mumbling on the phone. I couldn't make out what it was. I just heard mumbling.

Mr. Coates: O.K., how were you aware of that?

L.T.: Because I heard him ask for the number to the Kreps School.

Mr. Coates: You did hear that?

L.T.: Yes

Mr. Coates: O.K. immediately subsequent to that call also did you note that he made another call?

L.T.: Well, I saw him dialing.

Mr. Coates: O.K., did you know who he was calling at that point?

L.T.: No, not really

Mr. Coates: Did you think it was the Kreps School?

L.T.: Well I had a feeling, then I thought no he couldn't do that.

Mr. Coates: O.K., why did you think he had called information?

L.T.: 'Cause I heard him ask for information.

Mr. Coates: What was his purpose as you understand it for him calling information?

L.T.: I thought that he was just joking around. I thought that he was going to call information and that he was just going to leave it at that.

Mr. Coates: But, in fact, you are aware that he made a second call?

L.T.: Yes, I hear mumbling on the phone.

Mr. Coates: O.K., could you make out any of the words that we said?

L.T.: Not at that point.

Mr. Coates: None of the words?

L.T.: No

Mr. Coates: Was it a short conversation? How long was it? Approximately could you state?

L.T.: Ten seconds

Mr. Coates: O.K., and when he was finished with that conversation, did you talk to him?

L.T.: He hung up the phone and I said who did you call? I made a bomb threat to the Kreps School and I said no you didn't. He said yes I

did. Well, I don't believe you and he said well I did. So one of the kids that was there said that it takes two threats for them to do anything about evacuating the school. So I said Oh I guess nothing is going to happen.

Mr. Coates: And that was the end of it as far as you were concerned. Things happened after that, but that was the end of that incident?

L.T.: Right (R-1, at pp. 53-56)

Earlier at the same hearing, A.L., the student who actually made the call to Kreps School on February 1, 1988, testified. He stated as follows:

A.: Well, we all indicated that, at the Pizza Parlor, we all just decided together.

Mr. Pickett: Everyone decided together, to make the phone call?

A.: I guess so, I can't remember one specific person that - I just can't remember - I just remember we were all talking about it at the table.

Mr. Pickett: I see, now when you got up to make the phone call, was it at a pay phone booth?

A.: Yes

Mr. Pickett: And you made that phone call, did you not?

A.: Yes

Mr. Pickett: And what was L. doing at this time?

A.: She was just standing there listening.

Mr. Pickett: And did she ask you any questions about what you were doing?

A.: No

Mr. Pickett: Did she indicate to you that she she did not believe that you had made the phone call?

A.: No, she didn't.

Mr. Pickett: Did she question you afterwards when you returned to the table about the phone call?

A.: No

Mr. Pickett: She did not. Now A. did it come to a time you left the Pizza Parlor and approached the school bus and indicated to the children on the school bus that you had in fact, made the phone call that allowed them to leave school early?

A.: Yes, we all did.

Mr. Pickett: When you say we all, who are you referring to?

A.: Me, M. and [H.] - I mean L.

Mr. Pickett: H.?

A.: Me, M. and L. went to the bus.

Mr. Pickett: Listen and who made the statement about having made the phone call?

A.: Well, we all just

***

Mr. Pickett: Alright, what did you say then. Tell me, what did you say?

A.: When they walked up to the bus I just asked them if they had a bomb scare and they said yes and I just like flipped my fist and I'm saying like thank you for telling me, and they asked if we did it and M. told them it was us.

Mr. Pickett: M. said it was us? Did you say anything?

A.: The other people came up to me and asked if it was us who called it and I said yes.

Mr. Pickett: Did L. say anything?

A.: No

Mr. Pickett: She didn't admit at all to having done a thing in front of all those kids did she, M. or A.?

A.: No

Mr. Pickett: O.K. no further questions.
(R-1, at pp. 6-7)

From the above testimony the Commissioner finds and determines the following:

1. L.T. was among the three pupils who discussed phoning in a bomb scare at the Melvin H. Kreps School, contrary to the Finding of Fact No. 2 found in initial decision, ante.

2. L.T. was fully aware that A.L. called directory assistance and asked for the telephone number of the Kreps School.

3. L.T. was fully aware that A.L. made a second call immediately after obtaining the telephone number from directory assistance for the Kreps School.

4. L.T. accompanied A.L. to the Kreps School bus thereafter and learned that A.L. had indeed made a bomb scare.

The aforestated testimony reveals that L.T. had clear knowledge of the fact that a discussion had taken place regarding a bomb scare, although she may well have attributed such conversation to being a joke. However, she was aware and admitted that she heard A.L. call information to obtain the telephone number for the Kreps School. She saw him made a second phone call the duration of which was limited to a few seconds. Finally, she was aware that a bomb threat had indeed been perpetrated after talking to the children on the school bus from Kreps School. To argue, as petitioners have, that L.T. was unaware of the fact that A.L. had been the perpetrator of a bomb threat strains credulity.

Even if one were to accept L.T 's farfetched explanation as to her disbelief in the serious intent of A.L. to made such a call, she did nothing to disassociate herself from A.L.'s actions upon confirmation of the fact that a bomb scare had indeed occurred. In a case concerning vandalism and drinking on a school campus where a student argued against the imposition of sanctions based upon his contention that he was merely present and not a perpetrator of the actions, the Commissioner stated:

> Petitioner's argument that he was merely present but did not participate in such acts of vandalism constitutes pure sophistry in that he neither absented himself nor sought to dissuade his companion from their acts if vandalism***.
> (Slip Opinion, at p. 16)

(G.L.H., by his guardians ad litem, G.H.H. and G.R.H. v Board of Education of the Hopewell Valley Regional School District et al., decided

by the Commissioner April 20, 1987, aff'd State Board as to mootness September 2, 1987, appeal dismissed as moot Superior Court, Appellate Division, January 15, 1988.)

As to the appropriateness of the sanctions meted against A.L. and the application of N.J.S.A. 18A:37-2, the Commissioner finds that although the record does not support a finding that L.T. was in any way involved with the bomb threat of February 2, 1988, her involvement in the events of February 1, 1988 alone are sufficient to sustain a finding that the Board's actions and punishments were not unreasonable. See H.A., an infant by his parents and natural guardians v. Board of Education of Warren Hills Regional School District, 1976 S.L.D. 336, 340, where, in circumstances similar to the instant facts in that the individual was found to be involved in one bomb threat, not two as originally charged by the Board, the Commissioner held:

> Additionally, the Commissioner finds that petitioner's position with respect to the Board's expulsion action against him in the context of N.J.S.A. 18A:37-2 is without merit. The Commissioner finds that the fundamental fact herein is that the Board and its administrators were faced with an incident of the highest magnitude on October 8, 1975, wherein an inherent danger to the safety and well-being of the pupils under its jurisdiction was threatened. At the time of the incident the school administration was left with no other alternative but to consider the telephoned bomb threat a potentially dangerous occurrence of incalculable dimension with respect to the imminent peril of injury, destruction and loss of life which might result if, indeed, a bomb were present in the building. In the Commissioner's judgment actions of pupils who perpetrate such incidents, notwithstanding the fact that the incident itself is subsequently found to be false, cannot go unpunished. A board of education has the authority and the responsibility pursuant to the aforementioned statute to deal swiftly and effectively with pupils who wittingly or unwittingly jeopardize the safety and well-being of a pupil population and school staff. All pupils are accountable for their actions to school authorities and the authority for the school administration to require such accountability of pupils is clearly set forth at N.J.S.A. 18A:25-2 which reads as follows:
>
> > "A teacher or other person in authority over such pupil shall hold every pupil accountable for disorderly conduct in school and during recess and on the playgrounds of the school and on the way to and from school."

H.A. was, in fact, expelled for his encouraging the commission of a bomb threat by another student. In the instant matter, petitioner's involvement, while it may have been passive, was nonetheless support for another to commit a serious infraction of the law. The Commissioner dismisses petitioner's contention that the Board's only basis for sustaining the punishment meted L.T. was by bootstrapping onto her involvement on February 1, 1988 the supposition that she was also involved in the bomb scare of February 2, 1988. The Commissioner finds no such "continuing danger" as mentioned in N.J.S.A. 18A:37-2(c) is necessary in order to sustain the penalties directed by the Board in this matter when in fact the Commissioner has sustained expulsion for similar single participation in H.A.

Finally, the Commissioner finds and determines that the Board was entirely within its rights to refer L.T. to the child study team for an evaluation as to whether her alleged behavior was in any way linked to a special educational need, pursuant to N.J.A.C. 6:28-2.8(f) and (g). The Commissioner finds that because it is established in law that expulsion is appropriate on the basis of involvement or participation in a single bomb scare, such as in H.A., supra, and since the Board was provided sufficient testimony at the hearing conducted on February 16, 1988 to conclude that L.T. was in fact involved in the bomb threat call to the Kreps School on February 1, 1988, which could have resulted in expulsion, it was obliged by regulation to refer L.T. to the child study team to determine if her behavior on the day in question was related to a handicapping condition. The Commissioner so finds.

Accordingly, for the reasons stated above, the Commissioner finds that petitioners have failed to meet their burden of persuading him that the Board actions taken against L.T. in regard to the bomb threat of February 1, 1988 were arbitrary, capricious or unreasonable. The Commissioner rejects the initial decision conclusions to the contrary, affirms the Board actions and sanctions meted L.T. as they pertain to her involvement in the bomb threat against Kreps School on February 1, 1988, but not on February 2, 1988, and therefore dismisses the Petition of Appeal in this matter pertaining to the relief sought based on the February 1, 1988 incident.

Finally, the Commissioner dismisses as being of no moment the ALJ's statement questioning whether the "'rudimentary precautions' of notice and informal hearing were satisfied by school officials, when L.T.'s suspension began February 4, and the meeting with Mr. Farrell occurred on February 9, Id at 581-582." (Initial Decision, ante) See R-1 at pp. 7-8 wherein it is stated:

> Mr. Coates: ***I would like if we could just stipulate for the record that both M.S. and A.L. met with Mr. Farrell at a preliminary hearing and were given the opportunity to deny their involvement. If that can be stipulated to also yes, as to we are finished and they can be excused.

> Mr. Pickett: That's fine.
>
> Mr. Coates: Mr. Sussan, do you have any problem stipulating that?
>
> Mr. Sussan: No, I think the stipulations are over and one possible way of proceeding procedurely might be to place on the records the recommendation that the administration would make _____
>
> Mr. Coates: I would be glad to do that.

Moreover, as noted in R-2, L.T.'s parents were informed in writing by letter dated February 3, 1988 of the reason for L.T.'s suspension. The letter also apprised the parents as to when an informal hearing would be held, the purpose of such informal hearing, that the parents and pupil might attend with counsel and explained, generally, the terms of L.T.'s suspension. As noted earlier, this informal hearing was followed by a formal Board hearing on February 16, 1988 wherein witnesses were questioned on direct and cross-examination before the Board from which R-1, a transcription of those proceedings, was made. Goss v. Lopez, 419 U.S. 565 (1975) states:

> ***Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him, and if he denies them, an explanation of the evidence the authorities have and opportunity to present his side of the story.***
>
> There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is***. (emphasis supplied)(43 LW 4186)

The Commissioner thus deems that the Board fully satisfied its obligations under the Goss standards.

COMMISSIONER OF EDUCATION

FEBRUARY 15, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2390-88
AGENCY DKT. NO. 326-11/87

EDWARD GARBOS,
Petitioner,
v.
JACKSON TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Mark J. Blunda, Esq., for petitioner (Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks)

Edward J. Delanoy, Jr., Esq., for the Board (Russo, Foster, Secare & Ford)

Record Closed: November 1, 1988 Decided: December 15, 1988

BEFORE **DANIEL B. MC KEOWN**, ALJ:

On October 16, 1987 Edward Garbos (petitioner) filed a Petition of Appeals for the Commissioner of Education in which he alleges the Jackson Township Board of Education (Board) violated and was continuing to violate his tenure protection by refusing to allow him to return to his teaching position following a leave of absence for 1986-87. Petitioner sought reinstatement, back pay, and all other benefits allegedly withheld from him. The Board, to the contrary, sought dismissal of the Petition of Appeal for failure of petitioner to exhaust local administrative remedies, for failure to state a cause of action, for failure to file the appeal in a timely manner, and because petitioner allegedly induced the Board to grant him a leave of absence by entering an agreement with it he, petitioner, presently repudiates.

The Commissioner had transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. Thereafter the parties settled the matter between themselves. On March 1, 1988 this judge issued an initial decision approving the terms of the settlement. On April 4, 1988 the Commissioner rejected the proposed settlement and remanded the matter to the Office of Administrative Law to either modify two terms of the settlement or for a full plenary hearing. The parties could not agree on a modification of the two controverted terms; consequently, a full plenary hearing was scheduled and conducted September 28, 1988 at the Office of Administrative Law, Mercerville. In the meantime, however, petitioner replaced his counsel with present counsel of record.

The record closed in the matter on November 1, 1988 upon receipt of the parties' cross replies to letter memoranda each filed in support of their respective positions. This initial decision concludes that the Board violated and continues to violate petitioner's tenure rights in its refusal to reinstate him to his position of employment.

BACKGROUND FACTS

Petitioner has been employed by the Board as a teacher of mathematics for the past 15 years. Prior to 1986-87 petitioner filed a number of grievances under the collectively negotiated agreement against various individuals. He generally complained that during and before 1985-86 he was reprimanded on several occasions by school authorities for what he believed to be unjust reasons. During June 1986 a meeting was held regarding petitioner's grievances. This meeting was attended by Assistant Superintendent in Charge of Personnel, Richard E. Whicker, petitioner's representative from the New Jersey Education Association (NJEA) and petitioner. The NJEA representative and the assistant superintendent, along with petitioner, agreed that the assistant superintendent would try to get the Board to grant petitioner a paid leave of absence for 1986-87. The assistant superintendent explained that he saw the need to do something for petitioner and he tried to assist petitioner by seeking to arrange a paid leave of absence.

Another meeting was held soon after and Whicker advised petitioner the Board approved a medical leave of absence for him for one year with pay. In return, petitioner signed an agreement which is reproduced here in full and which plays a pivotal role in this controversy. Nevertheless, Whicker directed petitioner to file a formal written request

for the leave, which petitioner did. (R-4) The agreement provides as follows:

AGREEMENT
Between
EDWARD GARBOS
and the
BOARD OF EDUCATION OF JACKSON TOWNSHIP

1. Mr. Edward Garbos, Teacher of Mathematics, shall be granted a leave of absence, with pay, during the 1986-87 school year for the purpose of physical, emotional, and psychological rehabilitation.

2. The parties agree to hold in abeyance all pending complaints, grievances, charges, and/or potential litigation without prejudice to their respective positions, except as stipulated in this agreement. Any such complaint, grievance, charge or potential litigation may be reinstated at the step or level at which it is now pending.

3. Mr. Garbos shall voluntarily submit for such physical and psychiatric examination and treatment as may be required to restore him to full physical and mental health and in order that he may be reinstated to his teaching duties at the appropriate level of personal and professional effectiveness.

4. Selection of physician(s) or treatment agency(s) shall be by mutual agreement, but subject to final and binding approval by the Board of Education. The Board also reserves the right to require appropriate and timely reports of status and progress. Total cost of all such treatments and services shall be borne by Mr. Garbos and pursuant to the fringe benefit entitlement referenced in item #5 of this agreement.

5. Mr. Garbos' salary for the 1986-87 school year, effective September 1, 1986 through June 30, 1987, shall be $33,460, and all employee fringe benefit entitlements shall be fully maintained.

6. Mr. Garbos shall reimburse the Board of Education to the full extent of all monies he shall receive as the result of his benefit under the Washington National Insurance Program. Such reimbursement shall be on a monthly basis to commence in September 1986.

7. Mr. Garbos shall return to full employment on September 1, 1987. His salary shall be fully restored retroactively to September 1, 1987 at the appropriate guide step in effect on that date, as if his employment had continued without interruption, except that his return and salary reinstatement shall be contingent upon (1) receipt of appropriate medical advice from the assigned physician(s) and/or agency(s) that his physical, psychological, and emotional problems have been

> successfully treated and that he is able to perform his teaching duties with the appropriate level of personal and professional effectiveness, and, (2) a review of his professional performance to be completed by an impartial supervisor on or before December 31, 1987 (salary restoration retroactive to September 1, 1987) which certifies satisfactory professional competence.
>
> 8. Mr. Garbos shall not engage in gainful employment during the period of his leave while under contract with the Jackson School District, except with the specific approval of the Superintendent or his designee, and said approval shall not be unreasonably denied. Such approved full-time employment, if any, shall not extend beyond a period of six (6) months from September 1, 1986. If Mr. Garbos is engaged in such approved employment, he shall either resign his teaching position effective on February 28, 1987 or his leave of absence shall revert to unpaid status on that date and for the remainder of the term of the agreement.

The Board contends petitioner failed and continues to fail to honor the terms of the Agreement. Petitioner contends, to the contrary, that he has done everything humanly possible to comply with each and every term of the Agreement. Finally, it is noted that the Agreement was drawn by the Board; petitioner did not contribute in any way to the preparation of the written document.

Petitioner began his leave September 1, 1986. On September 22, 1986 Whicker requested petitioner to submit the names and addresses of the physicians and/or treatment agencies who were to provide "***the required medical and/or psychiatic services" as the Agreement provides, together with a report on the services that have already been tendered him by an physician. (P-2) Dr. John Drulle, petitioner's personal physician, advised Whicker in a report dated October 18, 1986 that petitioner had been under his care for a variety of physical and emotional problems. Dr. Drulle diagnosed petitioner as having

> ***A high level of anxiety and emotional liability causing somatic problems such as insomnia and chronic abdominal cramping and diarrhea. He is presently being treated for spastic colitus and anxiety. His symptoms are presently less intense and less frequent than previously. His prognosis is good; he will again be seen in December, 1986.
> (P-3)

According to the evidence in this record nothing more was requested of petitioner by Whicker until November 25, 1986. On that date, Whicker supplied petitioner a copy of Dr. Drulle's report as petitioner requested. Whicker went on to advise petitioner in writing as follows:

> Your agreement with the Board requires that you 'voluntarily submit' for physical and psychiatric examination and treatment, subject to appropriate and timely reports of the status and progress of such treatment.
> (P-4)

Thereafter, Whicker requested petitioner to submit the names and addresses of any and all physicians who had treated him since September 1, 1986; the dates of such treatment; the names and addresses of psychiatrists, psychologists, or other specialists who may have treated him since September 1, 1986 for any emotional and/or mental disorder; the dates of such treatments; and, a complete diagnosis and prognosis from physicians regarding his condition. (P-5)

On December 23, 1986 Dr. Drulle advised Whicker that petitioner's various somatic complaints no longer posed a problem; that petitioner uses medication only on occasion; that he, Dr. Drulle, found no need for petitioner to seek psychiatric intervention; and, that petitioner's prognosis of returning to teaching "is good" (P-6).

On January 9, 1987 Whicker advised petitioner that Dr. Drulle's letter of December 23, 1986 was "wholly inadequate to satisfy my request. It (Dr. Drulle's note ?) also tends to confirm my concern that you have failed to comply with the conditions of your medical leave agreement with the Board of Education." (P-7) In the same letter, Whicker advised petitioner that in his judgment, petitioner breached his agreement with the Board and, as such, he, Whicker, directed that his salary payments be discontinued immediately and placed in escrow. Whicker demanded that petitioner provide information he requested on November 25, 1986 (P-4, ante) or an acceptable written explanation for his asserted failure to comply with the conditions of the Agreement.

On January 13, 1988 petitioner responded to Whicker in writing. (P-8) Petitioner advised Whicker of his physician's name, Dr. John Drulle, his address, and the dates he was treated by Dr. Drulle. Petitioner advised that the nature of the treatment was for stress and anxiety as needed; petitioner advised that reports were submitted on October 18 and December 23, 1986; and, he advised that no psychiatrists, psychologists, or

other specialists treated him for any emotional or mental disorders since September 1, 1986 and that Dr. Drulle's prognosis was positive for his return to teaching. Petitioner then proceeds to advise Whicker of the following:

> Mr. Whicker, I have stated all along that I would take any test that the Board of Education may require as to my mental state. I have stated this prior to this leave of absence. Please feel free to contact myself or Dr. Drulle as to what tests and for what reasons they are to be required***You made no effort to contact my doctor of your concerns***you set yourself up as judge and jury and have been a quick trigger-finger when it comes to withholding my salary***I have not broken the agreement with the Board of Education and I do not intend to break it. Remember, I will take any test or examination that the Board requires. All I ask is that they give a reason for whatever test they require. It was the Board of Education that offered me this leave of absence. If you are going to make up deadlines and time schedules that do not appear in the original agreement, please let me know these dates now so that I have plenty of time to adhere to them.

In response, Whicker wrote on January 22, 1987 (P-9) to petitioner that his letter, in Whicker's view, acknowledges and confirms that you have neither sought nor received examination or treatment for any psychological, emotional, or other mental disorder. Whicker went on to advise that "***misrepresentation of the purpose for a leave of absence and/or misuse of such leave when granted, constitutes unbecoming conduct, even fraud, subject to appropriate disciplinary and/or legal action." Whicker further advises as follows:

> It is the Board's sincere desire that you comply with the terms of your agreement and 'voluntarily submit' for the appropriate psychiatric examination and treatment. As an expression of our good faith in that regard, no interruption in your salary payments has yet been implemented. For your information and assistance, there are several institutions which provide excellant programs for psychiatric evaluation and treatment. One suggestion:
>
> > The Carrier Foundation, Belle Mead, NJ, contact person, Gordon Hubel 201-874-4000, ext. 265
>
> You are again directed to provide evidence that you received or are scheduled to receive the psychiatric examination and treatment required by your agreement with the Board of Education. Such evidence must be submitted on or before Friday, February 13, 1987 and shall include the name of the institution or provider and the date(s) treatement is received or scheduled.
> (P-9)

Petitioner subsequently points out to Mr. Whicker on February 2, 1987 (P-10) that the Board itself had not required him to undergo additional testing or evaluation; that his agreement is with the Board and not with Whicker. Nevertheless, petitioner further advised that he had an appointment with a Dr. Zabrowski, at the Freehold Hospital, on February 19, 1987. Petitioner did request of Whicker that he, petitioner, be allowed to meet with the Board in order to discuss the agreement and what it is that it, the Board, was demanding he, petitioner, do. Finally, petitioner pointed out to Whicker that he did attempt contact with the named person, at the listed telephone, at the Carrier Foundation but that no such extension or person was employed at the Carrier Clinic. (P10)

Petitioner did in fact have several sessions during March, April and May 1987 for psychotherapy at the Freehold area hospital. (P-12) On June 24, 1987 Dr. Drulle advised Whicker that petitioner appears very anxious and distressed that he has had no communication from the Board regarding his employment between January and June. (P-11) Dr. Drulle further advised that petitioner was seeing a psychologist on a bi-weekly basis and that he continues to have occasional episodes of anxiety and insomnia, although medication is rarely necessary. On July 10, 1987 petitioner sent a letter (P-13) to Whicker again requesting Whicker to arrange a meeting with the Board in order to discuss his return to employment with it. Once again, Mr. Whicker on July 10, 1987 advised petitioner as follows:

1. Your request for a leave of absence bearing your signature, dated July 2, 1986, specifies the purpose of your leave to be for 'physical, emotional, and psychological rehabilitation'.

2. Your agreement with the Board of Education, which also bears your signature, requires that you "shall voluntarily submit" for physical and psychiatric examination and treatment, in consideration for which the Board has agreed to continue your salary.

3. The same agreement between yourself and the Board requires that you submit appropriate and timely reports of status and progress of such physical and psychiatric treatment.

4. On four separate occasions, 9/22/86, 11/25/86, 1/9/87, 1/22/87, you were advised to submit specific appropriate reports of the status and progress of your physical and psychiatric treatment and progress (copies attached).

5. You have failed to comply with the reasonable and lawful requests of your employer and with the terms of your agreement.

> You are, therefore, for the fifth (5th) and final time advised to comply with the terms of your agreement and to 'voluntarily submit' for the appropriate psychiatric examination and treatment and to submit written evidence of such compliance on or before August 10, 1987.
> (P-14)

On August 10, 1987 Marc D. Abramson, petitioner's NJEA representative wrote (P-16) Whicker and repeated to him that which petitioner said to Whicker during the leave of absence; that is, petitioner is and had been willing to undertake whatever physical or psychiatric tests the Board required. Abramson also advised that the Board failed to specify any physical or psychiatric tests. It appears from a hand-written letter by petitioner to a Dr. Cotugno on September 1, 1987 that Whicker directed petitioner on August 19, 1987 not to return to employment and to take a psychiatric test. According to petitioner, he complied with Whicker's demand of August 19. However, petitioner did not have further communication with Whicker after the August 19 date and he, petitioner, was writing Dr. Cotugno seeking reinstatement.

It further appears from a typed memorandum (P-18) dated September 18, 1987 from petitioner to Whicker that the psychiatric examination petitioner had on or about August 19 was reported to Whicker by the psychiatrist, Dr. Isseroff, but without a copy of the evaluation going to petitioner. Petitioner requested Whicker for a copy.

Petitioner met with Whicker on September 16, 1987 when petitioner reported to school to get his paycheck. Petitioner subsequently memorialized that meeting in writing (P-18) and noted that Whicker refused to give him a copy of Dr. Isseroff's evaluation and Whicker refused to let him see the evaluation document itself. According to petitioner, Whicker then advised that petitioner was running out of sick days and when petitioner questioned that statement, Whicker was supposed to have threatened him with suspension. Petitioner thereafter sought to get a copy of his psychiatric evaluation directly from Dr. Isseroff (P-19). Whicker advised petitioner in writing (P-20) on September 18, 1987 regarding the meeting of September 16 that he, Whicker, advised petitioner he failed to comply with the terms of the agreement; that he would give petitioner a copy of the psychiatric evaluation if authorized by Dr. Isseroff; that Dr. Isseroff did recommend further psychological testing; that he, Whicker, would arrange for the required psychological tests; and that because Dr. Isseroff authorized petitioner to receive a copy of the evaluation, Whicker enclosed a copy to petitioner.

Dr. Isseroff in his evaluation (P-20A) of petitioner concluded as follows:

> This man definitely has a distinctive personality. He also looks somewhat depressed. It is very hard within the individual's psychological interview session to determine if there is severe psycho-pathology. Inter-personally, he has some difficulties in that his style of relating to people could be experienced as antagonistic, and that when he has problems that he would like to deal with, he goes about in a way which others conceivably could find difficult to swallow. To some extent, he admits that this is the case, but doesn't take any responsibility for initiating any difficulties.
>
> Recommendations: I recommend psychological testing to see if there is any major psychiatric disturbance on Axis I or personality disturbance on Axis II. If there was to be any pathology, it would be in the area of a mood disorder of the manic-type mood disorder. I could not determine that, or state that is the case, based on this examination. As far as a personality disorder goes, I have delineated in my report, as I did to him, that his ways of dealing with people, at time, may not be effective. In fact, could be quite the opposite.

Nothing in Dr. Isseroff's report suggests that petitioner's mental state is such that he should not return to teaching. Nevertheless, petitioner did report for recommended further psychological evaluation to Michael G. Miller, a clinical psychologist with the Freehold Psychology Group. Dr. Miller concluded as follows:

> While Mr. Garbos has certainly presented difficulty to his organization, there is insufficient pathology in his current clinical and personal patterns to preclude him from teaching high school students, in my opinion.

Petitioner is still not reinstated to his position of employment with the Board. Mr. Whicker testified petitioner is currently on leave under the agreement but because his allotted sick days are used petitioner has not been paid since his sick days have expired. In Mr. Whicker's view, he is still waiting for a full report from somebody to authorize petitioner's return to work. This full report, according to Mr. Whicker, would address petitioner's physical and mental condition and must state that both are in satisfactory condition for petitioner's return. Mr. Whicker, nevertheless, does not identify who shall prepare and submit such reports. Petitioner is not yet teaching, he is not being paid, he is not on a leave of absence with pay, while no charges have been certified against him by the Board.

The foregoing constitutes all background fcts of the matter giving rise to this dispute. I specifically **FIND** that the foregoing background facts constitute all relevant and material facts of the matter.

LAW AND DISCUSSION

Petitioner, having served the requisite period of time to acquire tenure under N.J.S.A. 18A:28-5, may not be terminated from his employment nor have his salary reduced except in the manner provided by law. Petitioner may be subject to termination of employment if he is found guilty of charges such as conduct unbecoming, incapacity, or other just cause but then only in the manner provided by the statute. That manner includes the certification of tenure charges and a full plenary hearing under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq.

Boards of education do, of course, have the authority to require a psychiatric or physical examination of any employee whenever in its judgment that employee shows evidence of deviation from normal, physical or mental health. N.J.S.A. 18A:16-2. Under N.J.S.A. 18A:16-3 any such examination required by the board may be made by a physician or institution designated by it or, at the employee's option, they may be made by a physician or institution of the employee's own choosing.

In this case, neither the Board nor Assistant Superintendent Whicker ever specified a particular physician to examine petitioner until Dr. Isseroff examined petitioner at Mr. Whicker's request. Dr. Isseroff essentially provided petitioner a clean bill of mental health. Whicker arranged for the psychological testing of petitioner and the psychologist gave petitioner a clean bill of health.

Mr. Whicker's insistence that petitioner was somehow violating the agreement he entered with the Board is misguided. The agreement itself specifically provides petitioner shall voluntarily submit for a physical or psychiatric examination AS MAY BE REQUIRED TO RESTORE HIM TO FULL PHYSICAL AND MENTAL HEALTH. No one of competent medical knowledge and skill ever suggested before Dr. Isseroff that petitioner was in need of any physical or psychiatric examination to restore him to full physical and mental health. Petitioner's selected physician, Dr. Drulle, advised Whicker specifically on December 23, 1986 that petitioner does not require psychiatric intervention. Dr. Drulle is a medical doctor. Mr. Whicker is not a medical doctor; he is an assistant superintendent

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

December 15, 1988
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

12/15/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 19 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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EDWARD GARBOS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and decision on remand issued by the Office of Administrative Law have been reviewed. The Board's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4 and are summarized below.

The Board excepts to the ALJ's finding that several doctors were involved in this matter, all of whom gave petitioner a clean bill of health and did not object to his return to teaching. More specifically, the Board contends that Dr. Drulle who indicated in December 1986 that petitioner did not require psychiatric treatment was not offered as a treating physician by the Board, in accordance with the leave of absence agreement. It also excepts to the ALJ's affording more weight to Dr. Drulle, a medical doctor, regarding judgment as to petitioner's mental state than to the assistant superintendent who formed his opinion based upon knowledge of several incidents involving petitioner (R-2) as well as correspondence with him.

The Board also urges that Dr. Drulle is not a psychiatrist but merely a treating family physician and that petitioner did not seek advice or treatment of a certified psychiatrist until ordered to do so by the assistant superintendent. Moreover, it contends that Dr. Isseroff never provided him a clean bill of health and, given that the Board never received a full report from Dr. Miller, it could not make an informed decision as to petitioner's ability to teach. The Board believes this latter point critical, averring that without the benefit of a complete medical report on petitioner's ability to resume his position, it risks liability for its actions and the welfare of its students.

In addition, the Board takes exception to the ALJ's finding that petitioner did everything expected of him by the terms of the agreement, contending that he merely continued with his regular physician until ordered to go to a psychiatrist by the assistant superintendent more than a year after the leave agreement was drawn up. As to this, the Board states, "Were it not for the order of [the assistant superintendent], petitioner might never have received the treatment required of him under the agreement." (Exceptions, at p. 2)

Upon review of the record in this matter, the Commissioner is in agreement with the ALJ's findings and conclusions. Despite the Board's arguments in this matter, the fact remains that no physician, psychiatrist, or psychologist examining petitioner determined that he was unfit to resume his teaching position at the end of the agreed upon period of leave. Moreover, absent any Board action to suspend petitioner with pay pursuant to N.J.S.A. 18A:6-8.3 or to certify tenure charges against him, no legal right existed whatsoever to keep petitioner from his tenured position. Further, if the Board believed that petitioner was unfit to teach, it could have taken action at any point in time to compel psychiatric evaluation pursuant to N.J.S.A. 18A:16-2 notwithstanding any purported agreement for voluntary submission to such exam. At no time did the Board see fit to invoke its powers under that statute even when the assistant superintendent believed he was violating the terms of the sick leave agreement.

Consequently, petitioner is ordered to be reinstated forthwith with all back pay and emoluments less mitigation. If the Board believes that petitioner poses a danger to its students as expressed, it has an affirmative obligation to take the measures set forth in statute to compel psychiatric evaluation and/or invoke tenure charges.

The Commissioner found it troublesome that the record contained no indication of actual involvement of the Board itself, the Board attorney or the superintendent in this matter when the assistant superintendent reached his conclusion that the controverted agreement was being violated. It is clear from the record that the relationship between petitioner and the assistant superintendent is strained to the limit, if not outright hostile. Neither is faultless in the chain of events that unfold in the record. The Commissioner, therefore, cautions that this situation not be perpetuated and that steps be taken to assure that it is not continued.

COMMISSIONER OF EDUCATION

FEBRUARY 17, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3186-88
AGENCY DKT. NO. 99-4/88

MONTVILLE BOARD OF EDUCATION,

Petitioner,

v.

GIOVANNI PINTO,

Respondent.

David B. Rand, Esq., for petitioner
Rand, Algeier, Tosti, Woodruff & Frieze (attorneys)

Nancy Iris Oxfeld, Esq., for respondent
Klausner, Hunter & Oxfeld (attorneys)

Record Closed: October 17, 1988 Decided: November 10, 1988

BEFORE: WARD R. YOUNG, ALJ:

The Board of Education of Montville (Board) certified seven charges of unbecoming conduct and/or insubordination against tenured teacher Giovanni Pinto (Pinto), and suspended Pinto without pay on April 12, 1988. The Board also acted to withhold the salary increments for Pinto for the 1988-89 school year.

Pinto denies the truth of the charges and seeks reinstatement to his teaching position with back pay and the restoration of his withheld salary increments.

The matter was transmitted to the Office of Administrative Law as a contested case on May 2, 1988 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on June 3, 1988 and eight days of plenary hearings were held at the Morris Township

Municipal Court on August 17, 18 and 22, 1988 and September 6, 8, 10, 14 and 15, 1988. Post-hearing briefs were filed in a timely fashion and the record closed on October 17, 1988. Each charge will be addressed seriatum.

FIRST CHARGE

IN OR ABOUT FEBRUARY 5, 1988, GIOVANNI PINTO, MADE UNPROFESSIONAL AND DISCRIMINATORY REMARKS TO PUPILS IN HIS CLASS REFLECTING INSENSITIVITY TOWARD ISSUES RAISED IN HIS CLASS RELATING TO THE PERSECUTION OF JEWS IN EUROPE PRIOR TO AND DURING WORLD WAR II. SUCH STATEMENTS CONSTITUTED CONDUCT UNBECOMING A TEACHING STAFF MEMBER. BY WAY OF EXAMPLE, AND NOT BY WAY OF LIMITATION, GIOVANNI PINTO ADVISED HIS SPANISH I CLASS, WHICH INCLUDED A PUPIL WHOSE GRANDPARENT HAD SURVIVED THE HOLOCAUST, THAT THE JEWISH HOLOCAUST DID NOT OCCUR, THAT THE JEWISH HOLOCAUST DURING WORLD WAR II WAS A "MYTH" AND THAT IT IS UNTRUE THAT THERE IS PRESENTLY, OR HAS BEEN IN THE PAST, DISCRIMINATION AGAINST OR PERSECUTION OF JEWS IN EUROPEAN COUNTRIES. HE THEREBY CAUSED DISRUPTION WITHIN THE CLASS AND LATER THE LARGER COMMUNITY OF MONTVILLE TOWNSHIP.

TESTIMONIAL EVIDENCE

E. V. was a pupil in Pinto's fifth period Spanish I class and was present on February 5, 1988, the class and date the incidents incorporated in this charge allegedly occurred. She testified that Pinto got mad for some reason and expounded on the lack of respect for elders held by today's youth. A few students engaged in dialogue with Pinto, she said, and Pinto expressed the opinion that education in America was not as good as in

other countries. This led to an exchange of views as to why Jews came to America. The opinion expressed by the pupils was that Jews came to America for a better life and to escape discrimination after the Holocaust. E. V. stated that it was her impression that the pupils interpreted Pinto's nonverbal reaction to pupil comments to mean that Pinto didn't know what the pupils were talking about, as if in disbelief that the Holocaust occurred, and because of this the kids thought Pinto was crazy. E. V. stated the discussion took 10 to 15 minutes and that she was frustrated by it because she often argues with her sister at home and detested observing others argue.

On cross-examination, E. V. testified that she had no recall of hearing Pinto mention the word Holocaust or saying it was a myth or something that never happened. She stated the word Holocaust was mentioned by pupil S. A. in response to Pinto's statement concerning better education outside of America. She stated further that this dialogue did excite a few pupils.

B. G. was also a pupil in Pinto's period five Spanish I class and was present on February 5. He recalled Pinto stating that education in Japan was better than in the United States, but had no recall of any Pinto statement concerning education in Russia. B. G. did recall Pinto stating that Jews were not persecuted in Russia, but had no recall of who brought up the subject of the Holocaust. It was B. G.'s testimony that Pinto did not believe the Holocaust was as bad as people thought and further that the kids thought Pinto was crazy because he didn't seem to know what the Holocaust was all about.

B. G. stated that only four or five pupils were involved in the discussion with Pinto, which occurred during the last 15 minutes of class.

On cross-examination, B. G. testified that just prior to Pinto's comment on education in Japan, pupils in the class expressed concern and objections to homework, which led to Pinto's comments about pupil discipline and respect for elders and about education in other countries. B. G. stated that he did not recall Pinto ever saying the word Holocaust or any pupil comments concerning a grandfather who left Russia because he couldn't get an education or a grandmother with a concentration camp identification

number on her arm. B. G. further testified that he studied the Holocaust in a social studies class in grade eight and that his views were not changed by anything Pinto said.

On redirect examination, B. G. stated that Pinto opined that Jews could leave Russia since they were not retained and that less than six million Jews were killed in the holocaust, but on recross B. G. could not recall any pupil or Pinto mentioning the number six million.

Concerning the pupils' consensus that Pinto was crazy, B. G. responded to an inquiry by the undersigned that kids commonly made negative comments about teachers.

P. Y., a 16-year old pupil in Pinto's period 5 Spanish I class, testified that the controverted discussion took place at the beginning of the period and continued for 20 to 25 minutes. She stated that classmates argued that Jews came to America to get away from war, and Pinto opined that the immigration was motivated by their quest for employment opportunities. She further stated that the active pupil participants and Pinto disagreed as to the inferiority of education in America.

P. Y. testified that Pinto used the word myth, but was unclear as to whether it was related to the war or to the Holocaust. She had no recall of any pupil stating that her grandfather came to America for an education and stated that pupils raised their voices and often shouted comments simultaneously.

S. A., a 15-year old pupil in Pinto's period 5 Spanish I class, testified that the class began with Spanish instruction for 10 to 15 minutes, which was then followed by the controverted discussion. She stated that it was she who said that her grandfather's family came to America to seek job opportunities and education which had been denied because they were Jewish. She stated that pupil J.I. said his (or her) grandmother has her identification number on her arm.

S. A. testified that classmates mentioned the Holocaust and that Pinto responded by stating it was blown out of proportion and was a myth. She further said her mother

learned of the incident from another parent, who sent her daughter to school with a tape recorder.

S. A. said that Ms. Laux, Pinto's supervisor, asked her to prepare a statement, which she did on February 15, 10 days after the incident. She also testified that she discussed the matter with classmate H. S. on either February 17 or 18, and that H. S. related to her that Pinto advised her to tell S. A. to watch her conduct to avoid being thrown out of class.

On cross-examination, S. A. testified that pupils raised their voices to be heard during the discussion, but Pinto did not. She stated it was her belief that Pinto indicated the Holocaust wasn't true and that it was a myth, but she did not hear Pinto mention the word Holocaust. She further testified that she never heard Pinto say that he did not believe the Holocaust or World War II ever took place.

S. A. further testified that the tape recorder brought to class by another pupil (H.S.) was visible to her. H.S. told her before class of her intention to tape Pinto, but S. A. had no recall of that pupil's participation in the controverted discussion.

H. S., a 15-year old pupil in Pinto's period 5 Spanish I class, also testified. She stated that the controverted discussion was initiated by a question from S. A. related to homework. The discussion began 6 to 8 minutes after class began and continued for the remainder of the period. She said it was she (H.S.) who mentioned the Holocaust in the discussion, and testified that Pinto said there was no prejudice against the Jews and the Holocaust was a myth. She further stated she did not recall Pinto making any comment concerning discrimination against Jews in Russia.

H. S. said it was she who tried to tape-record Pinto on February 9 and was not successful, and she did not put forth any effort on that date to involve Pinto in conversation about the topics discussed on February 5. She recalled that at a February 18 conference Pinto held with her, which lasted for about 25 minutes, Pinto indicated to her that the February 5 discussion resulted in a big misunderstanding. She further said that

Pinto advised her to tell S.A. to stop interrupting the class or he would talk to her guidance counselor to have S.A. removed.

On cross-examination, H.S. testified that Pinto opined that Jews were allowed to get an education in Russia but didn't want one. She also said that Pinto, as well as many pupils, raised his voice during the discussion on February 5. Concerning her unsuccessful effort to tape-record Pinto, H.S. said her mother knew of her intent but did not suggest it.

Janet D'Innocenzio, a nontenured French teacher and Pinto's colleague, also testified. She stated that J. P., one of her first period pupils, asked her on February 9 which foreign language teacher was being fired. She also said she overheard a conversation between pupils M.S. and A.R. in her sixth period study hall and first heard that an effort was being made to tape Pinto and "get him." M.S. was not a foreign language pupil and J.P. was not Pinto's pupil. She brought the matter to the immediate attention of supervisor Laux.

D'Innocenzio also testified that Laux conferred with Pinto on that same day, February 9, and asked her to sit in as a witness. During the conference, she stated that Pinto indicated that the controverted discussion was initiated by pupils on February 5 as the result of their protests over a homework assignment. He also told Laux that he would not tolerate "refuseniks" in his class and indicated that some pupils tried to involve him in a discussion on Judaism, which he resisted. She also indicated that she complied with Laux's request to prepare a written statement of the occurrences that day. See, P-16.

On cross-examination, D'Innocenzio said she dismissed the J.P. inquiry as a rumor. She also testified that M.S. told her the tape recording effort was designed as a set-up to trap Pinto in order to secure evidence in support of a dismissal action.

Principal Keezer also testified on this charge. He stated he first learned of the controverted discussion when Laux advised him of the attempt by H. S. to tape-record Pinto. He conferred with H.S., who told him she attempted to get Pinto to repeat his

comments concerning the nonexistence of the Holocaust. They played back the tape, which was blank.

Keezer conferred with Pinto on February 17 in the presence of Laux and Montville Education Association vice-president Palubniak. Keezer asked Pinto if he had made any anti-Semitic comments in class on February 5. Pinto denied having made any such comments and complied with Keezer's request for such a statement in writing. See, P-4.

Keezer stated his position that any comments made by Pinto in his Spanish class concerning education in America and Russia would be inappropriate, as was Pinto's alleged response in that controverted discussion that being a Jew is insufficient reason to be denied an education, notwithstanding that the latter appears to be quite contrary to anti-Semitic leanings.

J. I., also a pupil in Pinto's period 5 Spanish I class, testified on direct that Pinto stated the Holocaust was a myth, but in his deposition he stated that he didn't remember Pinto's exact words. See, P-5, p.57 from 1-23.

A. H., another pupil in Pinto's period 5 Spanish I class, testified that Pinto indicated the Holocaust was exaggerated in relation to the number of Jews pupils thought were killed. A. H. stated she got the impression that Pinto said the Holocaust never occurred but never heard him say it and also testified she never heard Pinto use the word myth. On redirect examination, it was revealed that in A. H.'s deposition she indicated she had the impression that Pinto thought the Holocaust was a myth. On recross, A. H. stated her impression that Pinto said the Holocaust occurred but was exaggerated.

H. B., a pupil in Pinto's period 5 Spanish I class, testified that pupil S. A. provoked the dialogue related to the Holocaust but recalled no mention of it by Pinto. He further stated that comparative education comments by Pinto related to European countries generally with no specific mention of Russia.

W. B., a pupil in Pinto's period 5 Spanish I class, testified that pupils S.A., J. I. and H.S. discussed the Holocaust and that Pinto said nothing about it or that it was a myth, but did indicate that such a discussion had no bearing in his class and tried to get off the subject.

S. L., a pupil in Pinto's period 5 Spanish I class, testified that Pinto did indicate that education in foreign countries was superior to that in the United States, but he heard no comments by Pinto relating to the Holocaust.

K. D., a pupil in Pinto's period 5 Spanish I class, testified that Pinto stated that education in America was taken for granted and that there was greater appreciation for education in other countries. He said this discussion started over a pupil's objection to a weekend homework assignment. K. D. also stated he had no recall of any Pinto comments related to the Holocaust or to discrimination of Jews in Russia, but that pupils S.A., J.I., H.S., and A.N. advised him a few weeks after the class that Pinto did make such comments and further that H.S. stated her mother was going to get a lawyer and get Pinto fired.

D. R., a pupil in Pinto's period 5 Spanish I class, testified that she was uncertain regarding any comments made by Pinto. The transcript of her interrogation (P-6) reinforces her uncertainty but does indicate her belief that Pinto believed the Holocaust never occurred.

Pinto also testified and stated that some pupils protested as he wrote a homework assignment on the board. He said he responded that it was necessary in preparation for an upcoming test and that pupils could use the remaining class time to begin the assignment to reduce the time needed over the weekend. Pupil S.A. insisted that there be no assignment. Pinto stated that he commented that pupils had to "catch up" to the performance level of pupils in other countries. S. A. responded with an inquiry relating to whether the pursuit of education in America was the motivational factor in the immigration movement. Pinto responded with disagreement and stated that the primary objective was employment. S. A. indicated her grandfather was denied an education in

Russia because he was a Jew. Pinto indicated that educational opportunity in Russia was in accordance with a record of academic achievement and that being a Jew was insufficient reason for denial of education.

Pinto said he did express his view that qualified Jews were not denied an education and testified that he never stated the Holocaust was a myth or exaggerated, and never implied it was not as bad as pupils thought. He further stated he never commented on the prejudice or persecution of Jews.

On cross-examination, Pinto indicated he did say that educational discrimination of Jews in Russia was a myth.

Pinto also stated that Laux, his supervisor, and he discussed the incident on Tuesday following the Friday incident. He readily admitted he did say he would not tolerate "refuseniks" in his class, but he stated he used the term in reference to pupils who resisted the homework assignment and not to Jews who were denied visas. Pinto testified he used the term in seeking a cessation of pupil complaints about the weekend homework assignment.

Counsel for the Board attacked the credibility of respondent Pinto in cross-examination through the process of relating the latter's testimony to conflicting responses in his June 23, 1988 depositions (P-21) or his March 24, 1988 statement of evidence (P-19). Counsel seeks the application of Falsus in uno, falsus in omnibus (false in one thing, false in everything).

The application of this maxim is clearly incorporated in Black's Law Dictionary, Fifth Edition (1979) at 543:

> The doctrine means that if testimony of a witness on a material issue is willfully false and given with an intention to deceive, jury may disregard all the witness' testimony. Hargrave v. Stockloss, 127 N.J.L. 262, 21 A.2d 820, 823. The maxim deals

> only with weight of evidence. It does not relieve jury from passing on credibility of the whole testimony of a false swearing witness or excuse jury from weighing the whole testimony. State v. Willard, 346 Mo. 773, 142 S.W.2d 1046, 1052. It is a mere rule of evidence affirming a rebuttable presumption of fact, under which the jury must consider all the evidence of the witness, other than that which is found to be false, and it is their duty to give effect to so much of it, if any, as is relieved from the presumption against it and found to be true. It is not a rule of the law of evidence, but is merely an aid in weighing and sifting of evidence. Dawson v. Bertolini, 70 R.I., 325, 38 A. 2d 765, 768. It is particularly applied to the testimony of a witness who, if he is shown to have sworn falsely in one detail, may be considered unworthy of belief as to all the rest of his evidence.

It must be noted that little, if any, credibility would be accorded the testimony of respondent and the pupil witnesses in this matter if the maxim were applied as counsel suggests. Findings of fact related to the principal charge of conduct unbecoming a teaching staff member must result from a review of all the extensive evidence and the belief of the undersigned as to what occurred during a portion of Pinto's period 5 Spanish I, class on February 5, 1988. This belief now follows and is adopted herein as **FINDINGS OF FACT:**

On Friday, February 5, 1988, Pinto proceeded to transmit a weekend homework assignment to his period 5 Spanish I class with approximately 15 minutes remaining in the period. This assignment was resisted by some pupils because it interfered with a "free" weekend. Pinto did not withdraw the assignment and deemed it necessary because of an upcoming test. Pupil S.A. (one of the poorer achievers in class, See, P-8) persisted in seeking relief from the assignment. Pinto responded by commenting on the necessity of pupils to raise their level of academic performance comparable to pupils in other countries. S. A. attacked this comment by questioning the superiority of a European education because immigrants came to America for educational opportunities. Pinto disagreed and responded that the primary motivation in the immigration movement was employment opportunities. The dialogue between S.A. and Pinto was initially individual but was obviously overheard by other pupils because of S.A.'s increased volume of speech.

S. A. continued the dialogue and stated that her grandfather's family came to America because they were Jewish and were denied an education in Russia. Pinto responded that being a Jew was insufficient reason for denial of an education as those opportunities were available to all residents who qualified through academic achievement. S. A. responded with her belief that Jews were discriminated against in Russia. Pupil J. I. participated and indicated that his grandmother has an identification number tattooed on her arm. H. S. then introduced the topic of the Holocaust.

Pinto referred S.A. to her Rabbi for clarification of historical significance.

I do not believe that Pinto stated that the Holocaust never occurred or was a myth. I do not believe that Pinto stated that Jews were not victims of educational discrimination because they were Jewish, but he held steadfastly to his belief that educational opportunity in Russia existed on the basis of academic achievement, not heritage or religion.

I do **FIND** that since the topic was foreign to the study of Spanish, Pinto failed to assert his authority as teacher to terminate this discussion at the outset and direct the attention of all pupils to the assigned homework.

In determining whether the Board has met its burden of proof by a preponderance of the credible evidence the charge itself must be carefully examined. Did Pinto make unprofessional and discriminatory remarks to his period 5 Spanish I pupils which constituted conduct unbecoming a teaching staff member? I **FIND** he did not. Did Pinto advise the pupils in his class that the Jewish Holocaust did not occur, or that the Jewish Holocaust during World War II was a myth and that it is untrue that there is presently, or has been in the past, discrimination against or persecution of Jews in European countries? **I FIND** he did not. Did Pinto thereby cause disruption within the class and later the larger community of Montville Township? **I FIND** the disruption referred to was initially caused by pupil S. A., and was spread to the school and the Township community by S. A. and other pupils as well as their parents, but that Pinto indeed contributed to the disruption by his failure to effectively assert his authority as teacher in command of the class to cease

the discussion and divert the attention of his pupils to the homework assignment.

I thereby **FIND** that the Board has not met its burden of proof as to the truth of the charge and **CONCLUDE** that Charge #1 shall be and is hereby **DISMISSED**.

SECOND CHARGE

IN OR ABOUT DECEMBER 1987, GIOVANNI PINTO REQUIRED STUDENTS OF THE JEWISH FAITH TO PREPARE CHRISTIAN ORIENTED CHRISTMAS CARDS. NOTWITHSTANDING THE REQUEST BY SEVERAL STUDENTS TO BE EXCUSED FROM THE ASSIGNMENT OR TO BE ALLOWED TO SUBMIT NONSECTARIAN OR RELIGIOUSLY NON-OBJECTIONABLE CARDS, HE NEVERTHELESS REQUIRED THE OBJECTING STUDENTS TO PREPARE CHRISTMAS CARDS. SUCH CONDUCT BY GIOVANNI PINTO CONSTITUTES INSENSITIVITY TOWARDS PERSONS OF NON-CHRISTIAN BELIEF AND CONDUCT UNBECOMING A TEACHING STAFF MEMBER.

It is undisputed that Pinto assigned his pupils to make a Christmas card in Spanish. He wrote Merry Christmas and Happy New Year on the chalkboard in Spanish.

There was, however, conflicting pupil testimony concerning the requirement of the assignment. Some Jewish pupils did request that they be allowed to substitute a Hanukkah card. Pinto preferred a Christmas card as Spain was predominantly Christian and the assignment was intended to be cultural and not religious.

B. G. was excused from the assignment because he brought goods in for a party, and he had no recall of Pinto's response to the few who wanted the substitute assignment. E. V. said that only one girl wanted the substitute assignment. S. A. had no recall of Pinto's acquiescence to a substitute assignment. H. S. testified she requested the substitute assignment which was approved by Pinto.

Marianne Laux, Pinto's supervisor, testified that there are no written Board or administrative policies concerning Christmastime assignments, but it is expected that the religious preferences of the pupils are to be respected. She further testified that she observed Christmas cards as well as Hanukkah cards displayed in classrooms where Pinto is not assigned. A review of Pinto's 1981-82 plan book, R-3 in evidence, reveals her approval of Pinto's Christmas card assignment.

It is evident that Pinto intended the assignment, made annually by him, to reflect the culture of Spain. It also appears to be evident that Pinto allowed for pupil discretion by writing Happy New Year as well as Merry Christmas in Spanish on the chalkboard for pupil guidance. Pinto's less than rigid position, although he indeed preferred the Christmas card, was also evidenced by pupil H.S., who testified that Pinto told her she could make a Hanukkah card if she really wanted to.

I **FIND** that the Board has not met its burden of proof by a preponderance of credible evidence that the charge is true. I **CONCLUDE** that Charge #2 shall be and is hereby **DISMISSED.**

THIRD CHARGE

DURING THE 1987-88 ACADEMIC YEAR, GIOVANNI PINTO REQUIRED STUDENTS IN HIS CLASS TO SUBMIT TO HIM PHOTOGRAPHS OF THEMSELVES AT THE BEACH. THE PHOTOGRAPHS WERE INTENDED TO DEPICT THE STUDENTS IN BATHING SUITS. MR. GIOVANNI PINTO REFUSED TO RETURN A PHOTOGRAPH OF A FEMALE PUPIL, W. F., AND EXHIBITED SUCH PHOTOGRAPH TO MALE STUDENTS IN HIS CLASSES. HE ALSO MADE UNPROFESSIONAL COMMENTS PERTAINING TO THE PHOTOGRAPH TO MALE STUDENTS. THIS CONDUCT BY GIOVANNI PINTO REFLECTED INSENSITIVITY, DISREGARD FOR THE PRIVACY OF THE FEMALE PUPIL INVOLVED, WAS UNPROFESSIONAL AND CONSTITUTED CONDUCT UNBECOMING A TEACHING STAFF MEMBER.

It is undisputed that Pinto assigned his Spanish I pupils to submit a composition about the beach following completion of the textbook unit on the beach. The assignment was apparently designed to emphasize beach vocabulary. Pupils were to attach either a personal beach photo or an illustrative magazine cutout.

This charge also centers on Pinto's alleged display of the personal beach photo of W. F., a 15-year old pupil in Pinto's period 6, Spanish I class.

W. F. testified that a personal beach photo was not required. She submitted her composition without a photo or illustration but the following day she brought in a photo of herself at the beach to attach to the composition without any further directive from Pinto to do so.

W. F. stated that a period 5 Spanish I pupil, H. S., told her that Pinto showed her picture in her class and that one boy, J.C., noticed it. W. F. then requested Pinto not to display her picture to others and to return the picture to her. Pinto returned the picture attached to her composition on a subsequent day because he did not have it with him at the time of her request.

P. Y. testified that Pinto indicated a higher grade would result if a personal beach picture rather than a magazine cutout was attached. She also said that Pinto displayed a composition with an attached picture to the class and that male pupil J. C. made a comment. On cross-examination, she stated she had no recall of a pupil comment on the picture.

S. A. stated she saw Pinto take a composition with an attached photo from his desk, and pupil J. C. saw it. She had no recall of any comment made by J. C.

H. S. testified that Pinto showed the picture of W. F. to J. C. and also walked around the class displaying the photo. She stated that Pinto commented that W. F. was really hot. She further testified that a pupil in Pinto's Italian IV class told her that Pinto passed the picture around in that class. She also stated that W. F. told her the picture

was unattached to the composition when it was returned by Pinto (contrary to W. F.'s own testimony).

W. B. testified that Pinto often would show a paper to illustrate what he expected in an assignment, but had no recall of such a display concerning the beach assignment.

K. D. stated that Pinto held up a composition with an attached picture which evoked a comment from a male pupil, but had no recall of the substance of the comment.

D. R. testified that Pinto showed a composition with an attached picture as an example of an assignment. One boy, who went to Pinto's desk to look at the picture, responded by saying "Wow." She further testified that Pinto remained at his desk and did not walk around the classroom exhibiting the paper. Her testimony is not consistent with her response in interrogation on February 26, 1988, wherein she stated that Pinto walked around showing pictures. In that same response she stated that Pinto invited the guys to come up to view the pictures. See, P-6, p. 34.

Pinto does not dispute the allegation that he showed a composition with an attached photo as a demonstration in response to a pupil's inquiry concerning format and did in fact consent to a request by pupil J. C. to view the picture, which resulted in an off-color comment by J. C. Pinto further stated that the photo of W. F. was never detached from her composition and denies that he ever commented on W. F.'s photo as being hot or that a composition with an attached personal picture would receive a higher grade than one with an illustration. He also stated that an attached photo was an option and not a requirement as an illustration was indeed acceptable.

Counsel for the Board successfully attacked Pinto's credibility on this charge in cross-examination. Pinto had filed a statement under date of March 24, 1988 and was deposed on June 23, 1988. See, P-19 and P-21, respectively.

Pinto testified that he had not indicated a preference for personal or family pictures, but in P-19 he indicates he told students he preferred family pictures. He also testified that compositions were due the day after the unit test, yet this is not clearly demonstrated in his grade book. See, P-8.

Pinto testified that W. F's. composition with photo was shown to his period 5 class to demonstrate format (W. F. was a period 6 pupil). Grades for this assignment were recorded in Pinto's record book as of October 22 for period 5 and as of October 24 for period 6. See, P-8.

Pinto testified that he did not recall W. F. requesting a return of her photo. However, his response in deposition was that she requested her photo and he told her the composition was not yet corrected and that her photo was glued to the composition. See, P-21. An examination of the photo clearly showed the photo had been stapled to the composition and not glued.

Pinto never clearly explained on the record why it was necessary to demonstrate the format of a one-page assignment consisting of 10 sentences using the vocabulary of the unit with an attached illustration or photo.

A review of all testimonial and documentary evidence as well as the demeanor of all witnesses must result in factual findings related to this charge. The approach to this task which was utilized in Charge #1 shall be followed here. The following is my belief as to what occurred and is adopted herein as **FINDINGS OF FACT:**

Pinto followed his normal procedure of a "composition" assignment with an attached illustration or photo at the conclusion of Unit 4 to require pupils to put the newly learned vocabulary to practical use. Presumably, the illustration or photo was designed solely to "dress-up" the paper as no explanation of the purpose of this additional requirement is in the record. An inquiry as to format by a 5th period pupil resulted in Pinto holding up the assignment turned in by a 6th period pupil, W. P., to exhibit the format. Pupil J. C. wanted a closer look, and Pinto consented to his request to examine

the "paper." J. C. apparently reacted with a sexist remark. J. C.'s motivation is unknown as he was not called to testify by either party. Pinto did not walk around the classroom showing the paper and photo, did not pass the picture among pupils and did not detach the photo from the paper while it was in his possession.

I **FIND** that portion of the charge that Pinto required students to submit photos of themselves at the beach to be untrue, based on my belief that the assignment required an illustration or a photo, the latter being optional. I also **FIND** to be untrue that the alleged intention of the assignment was for pupils to depict themselves in bathing suits. I further **FIND** that Pinto did not refuse to return the photo to W. F., but did display the paper and photo of W. F. to all students, not exclusively male students. I also **FIND** the allegation that Pinto made an unprofessional comment about the photo of W. F. to be untrue. I do **FIND** to be **TRUE** however, that Pinto exercised poor judgment in allowing pupil J. C. to make a close and personal assessment of the photo of W. F., and that portion of the charge which alleges Pinto's disregard for the privacy of W. F., unprofessionalism and conduct unbecoming a teacher. I therefore **CONCLUDE** the third charge to be partially **TRUE.**

FOURTH CHARGE

NOTWITHSTANDING SPECIFIC DIRECTIONS FROM HIS PRINCIPAL TO REFRAIN FROM QUESTIONING TWO STUDENTS, S. A. AND H. S., ABOUT ALLEGATIONS REGARDING ANTI-SEMITIC STATEMENTS IN CLASS, GIOVANNI PINTO CONFRONTED H. S., THEN A STUDENT IN HIS CLASS, REGARDING SUCH ALLEGATIONS ON THE FOLLOWING DAY AND ATTEMPTED TO PERSUADE H. S. TO DROP HER COMPLAINTS. HE ALSO MADE THREATS TO RETALIATE AGAINST S. A. AND ADVISED H. S. TO WARN S.A. THAT SHE RISKED BEING "THROWN OUT" OF THE CLASS. SUCH CONDUCT CONSTITUTED DIRECT INSUBORDINATION, ATTEMPTED INTIMIDATION OF STUDENTS, AND AS SUCH CONDUCT UNBECOMING A TEACHING STAFF MEMBER.

Principal Keezer conferred with Pinto in the presence of Laux and Palubniak on February 17 to discuss his alleged anti-Semitic comments on February 5, which Pinto denied. Keezer stated he identified the pupil accusers as H. S. and S. A. and showed Pinto their statements (P-2 and P-3). The principal testified further that he directed Pinto not to communicate with either pupil under any circumstances.

H. S. testified that Pinto conferred with her on February 18 and told her the allegations of anti-Semitic comments were a big misunderstanding. She further stated that Pinto told her to tell S. A. to stop interrupting his class or he would talk to her guidance counselor to have her removed from class.

It is undisputed that Pinto did confer with H. S. after the February 17 conference concerning his alleged conduct on February 5. It is also undisputed that Pinto discussed the conduct of pupil S.A. with H.S. and indicated that continued disruptive behavior by S. A. in his Spanish I class might result in a referral to her guidance counselor for removal from class.

Pinto contends that he did not hear any directive from his principal not to confer with H.S. or S.A. concerning the February 5 allegations. Although Laux testified the principal did issue such a directive, Pinto states that Palubniak, who attended the February 17 conference with him as a Montville Education Association representative, could not or would not testify in this matter as he is now part of management.

I cannot believe that it did not occur to Pinto to subpoena Palubniak to appear. Pinto's prejudgment that Palubniak would perjure himself under oath because he now holds some administrative position and/or is a part of management is not perceived to have merit herein.

I **FIND** that Pinto conferred with H.S. in utter disregard of the principal's directive. I further **FIND** that Pinto did in fact attempt to intimidate pupil S.A., through H.S., regardless of whether such attempt was intended or inadvertent.

I **CONCLUDE** that Charge #4 is **TRUE**.

FIFTH CHARGE

BY LETTER DATED FEBRUARY 25, 1988, THE BOARD DIRECTED GIOVANNI PINTO TO COOPERATE WITH ITS INVESTIGATION OF THE INCIDENTS ALLEGED IN THE FIRST THROUGH THIRD CHARGES BY GIVING A SWORN STATEMENT REGARDING THESE ALLEGATIONS. GIOVANNI PINTO REFUSED TO DO SO. THIS CONDUCT SERVED TO IMPEDE THE BOARD'S INVESTIGATION AND CONSTITUTES INSUBORDINATION.

The facts concerning this charge are stipulated and were admitted as an evidentiary document. See, J-1.

The Board's command, incorporated in a letter under date of February 25, 1988 from Board counsel to counsel for Pinto (attached to J-1), was for Pinto's appearance "for the purpose of giving a sworn statement . . . " related to his alleged classroom conduct on February 5, 1988. That letter also incorporated a requirement for Pinto to give a sworn statement regarding other allegations since incorporated in other charges and also indicated that a refusal by Pinto to do so would "be deemed insubordinate and will subject himself to tenure charges."

A second letter sent by Board counsel to counsel for Pinto under date of March 2, 1988 (also attached to J-1), indicated that the Board would attach a negative inference to Pinto's refusal to respond to the Board's demand dated six days previous.

It is noted that the statement of charges by principal Keezer is dated March 8, 1988 and the Certification of Determination by the Board is dated April 12, 1988, which was filed with the Commissioner on April 14, 1988.

Notwithstanding that Pinto filed a statement of evidence under date of March 24, 1988 (P-19) and appears to have been cooperative in conference appearances, there is no statutory requirement for a tenured teaching staff member to appear before the Board

or give a sworn statement. See, Ott v. Board of Education of Hamilton Township, 160 N.J. Super. 333 (App. Div. 1978).

The regulatory scheme provides an opportunity for the tenured employee to submit a written statement of position and a written statement of evidence, which, if exercised, shall be executed under oath within 15 days of receipt of the tenure charges. See, N.J.A.C. 6:24-5.1(b)3.

I FIND the Board's direction to be ultra vires and CONCLUDE, therefore, that Charge #5 shall be and is hereby DISMISSED.

SIXTH CHARGE

IN OR ABOUT MAY 1986 AND IN OR ABOUT SEPTEMBER 1986, GIOVANNI PINTO DEMONSTRATED CONDUCT UNBECOMING A TEACHING STAFF MEMBER BY FAILING TO FORMALLY EVALUATE HIS STUDENTS ON A REGULAR BASIS AND BY ASSIGNING GRADES ON PUPIL ASSIGNMENTS WITHOUT HAVING ADEQUATELY REVIEWED OR CORRECTED SUCH ASSIGNMENTS. BY WAY OF EXAMPLE, AND NOT BY WAY OF LIMITATION, GIOVANNI PINTO AWARDED PUPILS A GRADE OF "A" ON PROJECTS WHICH CONTAINED NUMEROUS SPELLING AND GRAMMATICAL ERRORS. HE ALSO FAILED TO RECORD GRADES REVIEWED BY STUDENTS IN HIS CLASSES. THIS CONDUCT WAS DIRECTLY CONTRARY TO THE REQUIREMENTS IMPOSED UPON TEACHING STAFF MEMBERS IN THE MONTVILLE SCHOOLS.

Respondent made application to dismiss this charge at the conclusion of the Board's case on the ground of procedural deficiency in violation of N.J.S.A. 18A:6-12. The Motion was GRANTED after oral argument and Charge #6 was DISMISSED. See, 6T, pp. 49-53.

SEVENTH CHARGE

ON OR ABOUT DECEMBER 18, 1986, DURING A POST-EVALUATION CONFERENCE WITH HIS IMMEDIATE SUPERVISOR, MARIANNE LAUX, GIOVANNI PINTO RESPONDED TO CONCERNS RAISED BY MS. LAUX RELATIVE TO HIS TEACHING PERFORMANCE WITH STATEMENTS THAT WERE SEXIST, DISRESPECTFUL AND INSUBORDINATE. BY WAY OF EXAMPLE, AND NOT BY WAY OF LIMITATION, GIOVANNI PINTO SUGGESTED THAT AT THE TIME MS. LAUX COMPLETED THE EVALUATION SHE WAS "SUFFERING FROM P.M.S. (PREMENSTRUAL SYNDROME)." THIS CONDUCT BY GIOVANNI PINTO WAS UNPROFESSIONAL AND CONSTITUTED CONDUCT UNBECOMING A TEACHING STAFF MEMBER.

Supervisor Laux testified that a post-evaluation conference was held with Pinto at 7:35 a.m. on December 18, 1986, which related to her summary report of December 5, 1986, and presumably her observation reports of October 10, 1986 and November 21, 1986. See, P-9. She stated that P-9 covers the period from March 1986 to December 1986, but no evaluative documents for the period from March 1986 until October 10, 1986 were incorporated in P-9.

Laux further testified that Pinto was displeased with her evaluation of his performance, demanded changes, and threatened action by the N.J.E.A. She also stated that Pinto indicated that she must have been suffering from P.M.S. (premenstrual syndrome) at the time she completed the evaluation.

Laux said she brought the matter to the attention of principal Keezer and filed a grievance with the affirmative action officer. Laux advised Pinto in a memo on that same date that his attitude would be reflected in his next evaluation. See, P-10.

Keezer testified that Pinto denied the P.M.S. statement at the grievance hearing and the matter was resolved with Pinto's apology "for any comments I may have made that may be misconstrued as sexist." See, P-11.

Pinto testified that he did not make the alleged P.M.S. statement to Laux, but stated in his June 23, 1988 deposition that, although denying he made such a statement, he did "not think I said that. I was too upset to remember what I said to every detail." See, P-21, p.130, line 21.

An examination of the disputed evaluation reveals 19 checked areas, 16 of which were satisfactory, 1 needed improvement, and 2 were unsatisfactory. The attached observation reports by Laux for October 10, 1986 and November 21, 1986 were largely commendable. Pinto contended Laux was biased in her evaluation, but did not respond to an inquiry by the undersigned to draw a nexus between his contention and the substance of the evaluation.

I **FIND** Pinto's apology is not a concession that he made the alleged sexist remark. Credence is given to supervisor Laux in this instance, however, and I believe Pinto made the remark notwithstanding that he was unable to recall making it. I **CONCLUDE** Charge #7 to be **TRUE.**

SUMMARY OF FINDINGS

The charges found to be true or partially true concern Pinto's unprofessionalism related to his disregard of the privacy to which pupil W. F. was entitled, his confrontation with pupil H.S. in contravention of the principal's directive, and his unprofessionalism related to his sexist remark to his supervisor. It was also found that Pinto failed to exercise his discretionary authority to redirect his pupils' efforts to their Spanish homework assignment on February 5, 1988 and to cease the escalating non-Spanish dialogue.

ARGUMENTS OF COUNSEL

The contentions of counsel incorporated in their briefs on each charge were considered in the process of record review and fact finding. The Board's summary seeks a determination that its burden of proof has been met on all charges and a dismissal of Pinto from his tenured position. Counsel for Pinto characterizes her client as a teacher who has conducted himself properly and professionally at all times and seeks dismissal of all charges and the reinstatement of Pinto with remuneration of salary and emoluments lost and increment restoration.

DISCUSSION

It is obvious from my findings that I do not concur with all contentions of either counsel.

The genesis of this controversy was a teacher's weekend homework assignment and a responding protest by a single pupil which generated dialogue the teacher did not control. The restatements of this dialogue by some class members, although many were not factual, created considerable school-wide and community interest. The filing of tenure charges by the principal may have resulted from the latter, as principal Keezer testified that the Rabbi and adult citizens Bernstein and Kravitz inquired of him as to what he intended to do about the Pinto incident. It appears that Keezer and the Board granted full credence to pupil responses to the interrogation by its counsel concerning Pinto which were negative.

Public interest in this dispute was indeed heightened by the attention directed by the media, largely because of the incorporation of allegations of anti-Semitism in Charges #1 and #2. It is for this reason that it must be emphatically stated that the principal issue herein is the alleged unprofessional conduct of Giovanni Pinto.

The abundance of conflicting testimony adduced during eight days of hearing from 18 witnesses has contributed to the complexity of the fact-finding process, and a

judgment as to the credibility and demeanor of all witnesses is indeed critical. It is clear that many of the allegations of the Board are simply not true. It is also just as clear that the professional conduct of respondent Pinto as a teaching staff member cannot be deemed to be at the level suggested by his counsel.

Pinto has been a teacher of foreign languages in Montville for approximately eight years. Nothing in the record herein attests to his ineffectiveness as a teacher. Charges 6 and 7 involved matters during the 1986-87 school year that did not result in any meaningful disciplinary action. Charge 2 incorporates an annual activity practiced by Pinto with approval for eight years. Charge #3 also incorporates a continuing practice at the end of each unit, but also incorporates the exercise of poor judgment by the teacher. The remaining issues evolve from the principal's charge relating to Pinto's Spanish I period 5 class on February 5, 1988.

Counsel for the Board succeeded in tainting Pinto's credibility through vigorous cross-examination. This was done by comparing Pinto's testimony at hearing with responses he gave at deposition as well as in his statement of evidence and narrative (P-18 and P-19). Pinto's tension on the witness stand was certainly noticeable. He had difficulty distinguishing between a response of denial and one of no recall. Notwithstanding the trauma resulting from the focus of these proceedings and the risk of dismissal, Pinto must nevertheless be held responsible for the fact that his credibility was found lacking.

I do not believe Pinto is an anti-Semite or a bigot. I do believe he exercises poor judgment in making capricious utterances.

CONCLUSIONS OF LAW

The statutory penalty to be imposed when tenure charges are found to be true is dismissal or a reduction in salary if either is deemed to be warranted. Counsel have made references to case law in their briefs, which are incorporated herein by reference and will not be repeated here. It cannot be argued that penalties relate to the circumstances in

each case, vary considerably, and depend largely on the judgment made as to how the conduct of a teaching staff member is measured in relation to an expected standard of conduct.

What penalty, if any, is appropriate in this instance?

Giovanni Pinto is a teacher of foreign languages who has been employed by the Montville Board of Education for about eight years. His performance in that position has been assessed as generally effective and no serious shortcomings were noted that were not rectified, that is until February 5, 1988. On that date, Pinto found himself trapped in a tangential dialogue on a subject foreign to the teaching of Spanish and did not exercise good judgment by asserting his authority to divert pupil attention back to a homework assignment that was being protested. The ensuing litigation exposed other instances wherein Pinto did not exercise good judgment and revealed utterances made by him for which he should not be excused.

The conduct exhibited by Pinto does not measure up to a standard reasonably expected, and improvement is indeed in order. However, I do not **FIND** such conduct to be so far below such an expected standard to warrant his dismissal and forfeiture of tenure. Such a penalty would indeed be too harsh under the circumstances herein. Pinto must nevertheless be impressed with the need to exercise good judgment and have genuine concern and respect for the sensitive feelings of his pupils, peers, and administrators.

I **FIND** that Pinto has not met his burden of proof by a preponderance of credible evidence that the Board's incremental withholding action was without a rational basis, and that the affirmation of the Board's withholding of the salary increment(s) of Giovanni Pinto for the 1988-89 school year shall be an appropriate penalty to be imposed. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960)

I **CONCLUDE**, therefore, that Giovanni Pinto shall be reinstated to his position as a tenured teaching staff member and shall be compensated for salary lost during his suspension at the annual salary rate he received in 1987-88. Such compensation shall be

mitigated by any other earnings during the period of suspension without pay. All emoluments lost during his period of suspension shall be restored. **IT IS SO ORDERED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

10 November 1988
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

11/15/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 16 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

g/e

IN THE MATTER OF THE TENURE	:	
HEARING OF GIOVANNI PINTO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MONTVILLE, MORRIS COUNTY.	:	

The record of this matter including the initial decision rendered by the Office of Administrative Law, has been reviewed by the Commissioner.

Those exceptions to the initial decision filed by the respective parties, as well as respondent's reply to the Board's exceptions, have been filed with the Commissioner in compliance with the applicable provisions of N.J.A.C. 1:1-18.4.

Seven exceptions to the findings and conclusions in the initial decision were filed by the Board:

EXCEPTION ONE

> The Board Takes Exception To The A.L.J.'s Findings Of Fact Relative To Charge One. In Dismissing Charge One, The Administrative Law Judge Either Misconstrued Or Ignored Significant Testimony And Other Evidence Which Plainly Reflected That Pinto Was Guilty Of Unbecoming Conduct In The Manner In Which He Conducted His Spanish I Class On February 5, 1988.
>
> (Board's Exceptions, at p. 1)

EXCEPTION TWO

> The Administrative Law Judge, While Professing To Find Pinto Unbelievable, Incredible And Guilty of Misconduct In Various Charges, Accepted His Version of the Facts Relating To Charge One and Thereby Rejected The Testimony of Credible Witnesses. The Administrative Law Judge Also Gave No Weight To The Fact That Pinto, To This Day, Refuses To Acknowledge That He Deviated From Appropriate Classroom Procedures Or Conduct In The Manner In Which He Dealt With His Classes.
>
> (Id., at p. 20)

[EXCEPTION] THREE

The Findings And Recommendations Of The Administrative Law Judge With Regard To Charge Two Which Are Not Supported By The Record, Or By Evidence Submitted. In Fact, This Charge Was Established By Testimony At The Hearing Including That Given By Pinto Himself. (Id., at p. 24)

EXCEPTION FOUR

No Public Teacher Has Immunity, As A Matter Of Law, From Giving A Sworn Oral Statement Under Oath Which Is Reasonably Requested By A Board of Education In Connection With A Responsible Investigation of Allegations Of A Non-Criminal Nature Made Against A Teacher. (Id., at p. 29)

EXCEPTION FIVE

The Administrative Law Judge's Findings Were Inconsistent Especially With Regard To Charges One and Two. On The One Hand, The Administrative Law Judge Commented On Pinto's Lack of Credibility and Found That He Exercises "Poor Judgment" In Making Capricious Utterances; Yet, On The Other Hand, The Administrative Law Judge Fully Accepted Pinto's Versions and Actions As Being Professional. (Id., at p. 32)

EXCEPTION SIX

The Penalty Recommended By the A.L.J., Merely A Salary Increment, Is Utterly Inappropriate Given The Conduct of Pinto As Demonstrated In The Record. Pinto Should Be Dismissed From His Employment With The Board. (Id., at p. 34)

EXCEPTION SEVEN

The Administrative Law Judge's Summary Dismissal of Charge Six At The End of The Board's Proofs Was Improper. There Were Issues of Fact Which Should Have Been Determined By The Administrative Law Judge Regarding Charge Six Which Should Have Awaited The End Of The Case And The Initial Decision. Consequently The Recommendation To Dismiss Charge Six Should Be Reversed.
(Id., at p. 35)

It is observed that the above-cited Board exceptions relate to the following tenure charges:

Exceptions One, Two and Five - Charge 1
Exceptions Three and Five - Charge 2
Exception Four - Charge 5
Exception Seven - Charge 6

Exception Six does not relate to any specific tenure charge, but rather it represents the Board's objection to the penalty recommended by the ALJ to be imposed upon respondent.

For the record the references to be made to the transcripts of the testimony adduced at the hearing conducted in this matter are designated by the Commissioner as follows:

1T (August 17, 1988)
2T (August 18, 1988)
3T (August 22, 1988)
4T (September 6, 1988)
5T (September 8, 1988)
6T (September 9, 1988)
7T (September 14, 1988)
8T (September 15, 1988).

All of the exceptions filed by the parties and those replies to exceptions filed by respondent are noted by the Commissioner and incorporated by reference herein. A summary of the respective positions taken by the parties to the findings and conclusions by the ALJ to the tenure charges is addressed in pertinent part below.

CHARGE 1

The Board complains that the ALJ, in many instances, misconstrued, twisted or omitted critical testimony and other evidence which adversely reflected upon respondent which demonstrated his unprofessional conduct related to the incident that occurred in his 5th period Spanish class on February 5, 1988.

In support of its contention, the Board relies on portions of the testimony and prior statements under oath adduced from certain pupil witnesses who testified at the hearings in this matter. (E.V., B.G., P.Y., S.A., J.I., H.B., H.S., W.B., K.W. and D.R.)

The Board maintains that there is sufficient credible evidence in the record which was adduced from the above-named pupil witnesses which is also supplemented by the testimony of other witnesses, to establish respondent's guilt with regard to tenure Charge 1.

The Board claims that the following remarks or behavior were attributed to respondent involving the incident that occurred in his Spanish I class on February 5, 1988:

1. Mr. Pinto acted as if he didn't know what his pupils were talking about when they made comments to him about the Holocaust or the reasons why the Jews in Europe came to America for a better life. (E.V. - 2T65:5 to 20)

2. As a result of this behavior by respondent many of his pupils thought he was "crazy" because he acted as if he didn't believe them. (E.V. - 2T68:19)
(D.R.'s Sworn Statement, P-6 at p. 31)

3. Respondent said that the Holocaust "wasn't as bad." (B.G. - 2T101:7 to 15)

4. Respondent said that the Holocaust was a "myth" (P.Y.'s Sworn Statement, P-6 at p. 44) (S.A. - 3T30:17; J.I. - 4T92:3 to 14)

5. Respondent told S.A. that her grandfather, who was Jewish, could have gotten an education in Russia if he really wanted to.
(S.L. - 5T47:19)

The Board also points out that respondent's immediate supervisor (Marianne Laux) and a fellow teacher (Janet D'Innocenzio) asked respondent what could have occurred on February 5, 1988 to upset the students in his class, respondent stated that it could be a remark that he made that there would be no "refuseniks" in his class when students refused to do a homework assignment (3T138:5 et seq.). The Board in objecting to respondent's comment argues as follows:

> ***Pinto later testified at hearing that the term "refuseniks" does not relate to Jews to his understanding, but rather generally described Russians who are denied exit visas. (7T40/15 et seq). Curiously, however, Pinto immediately provided Laux with the names of students who might be the ones who were concerned, pinpointing several Jewish students. (1T45/1).
>
> Later, Pinto wrote an unsolicited narrative of the facts surrounding this incident which is quite enlightening. (P-18). This version of the incident made no reference to comments about "refuseniks." In this version Pinto recalls that S.A. indicated to him that people in Russia are not allowed an education. Pinto confirms that he disputed S.A.'s belief that her grandmother could

> not get an education in Russia because she was Jewish. When S.A. made this point, Pinto asked, "why?" and invited the student to ask her rabbi to provide information on the subject. He confirmed that one student offered her grandmother's experience during the Holocaust as evidence of discrimination. Pinto's version of the facts is no less troubling than that of the students. (Board's Exceptions, at pp. 15-16)

Moreover, the Board relies on the testimony of its expert witness in asserting that:

> ***Also, extremely disconcerting to the Board is the fact that A.L.J. completely ignored the testimony of Dr. Lawrence Kaplan. Dr. Kaplan, who was admitted as an expert before the Court in the field of educational supervision and instruction as well as an expert on educational discrimination in the Soviet Union, testified that Pinto's acknowledged statements regarding discrimination in Russia and education there, were simply "factually incorrect." (4T52).
> (Board's Exceptions, at p. 16)

The Board in rejecting the ALJ's findings further attacks respondent's credibility and insensitiveness as a professional teacher by way of the following:

> ***the record reflects that at the first faculty meeting of the 1987-1988 school year, after teachers were advised by Dr. Keezer to be sensitive to religious holidays in assigning tests***, Pinto rose and suggested that such sensitivity would constitute "pandering" to "certain" ethnic groups, obviously referring to Jewish people. This insensitive and inappropriate remark shocked and insulted many of the staff members present at the time. (8T14/24 to 8T15/3).
>
> Consistent with Pinto's lack of credibility throughout his testimony, at the hearing he denied making such comments (7T112/11), despite the fact that his principal, his supervisor, and a colleague all confirmed that he made the remark. (8T7/18, 8T13/19, 8T20/3).
> (Board's Exceptions, at pp. 17-18)

And,

> [Respondent's] strange personal beliefs, while not directly in issue in the case, are evidential of his credibility in regard to the events in the class. In his deposition he opined that Jews in the Soviet Union are frustrated because they cannot exercise their "commercial instincts" due to the socialist economy of the Soviet Union. (P-21 DT106-12). (Id., at p. 23)

In concluding its exceptions with regard to Charge 1 the Board maintains that

> ***The records (sic) sadly shows that Pinto has no understanding of the impact of his words and conduct upon others. He does not apologize for any of these matters; rather, he rationalizes and blames others for his predicament. Indeed, he blames the students for his own lack of class control; his supervisors for misquoting his sexist statements; the Board for conspiring to bring charges against him.
>
> A fair reading of the evidence listed in connection with Charge One compels the finding that Pinto is guilty of far more than just "allowing the students to digress."
>
> (Id.)

Respondent, in reply to the Board's exceptions to Charge 1, maintains that the two guiding principles that the Commissioner is required to follow in considering this charge, as well as the other charges which involve pupil witnesses, are as follows:

> 1. The board of education has the burden of proving that the tenure charge is true by a preponderance of credible evidence.
>
> 2. The testimony of young pupils must be viewed with a great deal of caution.
>
> (Board's Exceptions, at pp. 4-5, citations omitted)

Respondent argues that a review of the testimony will show that the issue of the Jewish Holocaust was, in fact, raised in his class on February 5, 1988. However, it was not raised by him but rather by certain pupils in an attempt to disrupt classroom activity and to distract the class from its proper topic, Spanish.

Respondent further maintains that the record will show that on that date his classroom became chaotic with pupils shouting and talking at once and that no two witnesses gave the same account of what happened on the day in question.

In maintaining his innocence with respect to Charge 1, respondent essentially relies on the testimony of many of those pupils upon whom the Board relied in its exceptions. However, the portions of the testimony cited by respondent in his reply is conflicting or reveals the uncertainty each of these pupils had regarding what actually occurred on February 5, 1988, and who was responsible for making the offensive remarks which form the basis of the allegations contained in Charge 1.

In addition to the testimony of those pupils who testified on behalf of the Board at the hearing as to what took place in his classroom on February 5, 1988, respondent points out that the ALJ was also confronted with the opposing testimony of those pupils who testified on his behalf, respondent's testimony and the testimony of one of his fellow teachers. In this regard respondent relies on the record and comments as follows:

> In evaluating the testimony of the students, it is important to understand that after this incident, rumors spread very quickly through the school that Pinto had said the Holocaust was a myth. Janet D'Innocenzio, a foreign language teacher, testified on behalf of the Board of Education that within two school days after the incident in Pinto's class, two freshmen in her study hall, M.S. and A.R., asked her who was the teacher who was being fired for saying that the Holocaust was a myth. (3T131-132).
>
> D'Innocenzio indicated that M.S. did not even take foreign languages (3T135) and that A.R. was not in Pinto's class (3T135). Thus it can be seen that within two school days, rumors had spread through the school that Pinto was going to be fired for saying the Holocaust was a myth. Students were spreading this rumor at a time when the administration was not even aware of the charges against Pinto. It was only after D'Innocenzio received this information that she informed Marianne Laux, Foreign Languages Supervisor, who in turn informed Clifford Keezer, Principal of the Montville High School.
>
> If students who were not in a foreign language class or did not have Pinto for a teacher already believed Pinto had said the Holocaust was a myth by Tuesday morning after the Friday incident, how could students who were present in the class avoid interpreting what took place in the class in light of comments of everyone afterwards? It should be noted that student after student testified that after the class students kept making

> comments about how they could not believe that Pinto had said that the Holocaust was myth. (2T89, 2T103-104, 3T10, 3T20-21, 3T37, 3T64, 3T114, 4T112, 6T26, 5T41, 5T54).
>
> Certainly many of the students looked back on the confusion of the February 5 class in light of the rumors sweeping the school, formed an impression that Pinto must have said the Holocaust was a myth and then came out with their rather equivocal testimony at the hearing in this matter, because they were unable to fully factually substantiate that charge, and were thus left to state that they reached the conclusion based upon the way he was acting, rather than upon his actual words. This attempt by students to interpret what occurred in the classroom in terms of rumors spread after the fact accounts for why student witnesses gave varying accounts of what happened, and varying explanations as to why they believed Pinto felt the Holocaust was a myth.
>
> (Respondent's Reply Exceptions, at pp. 12-13)

In support of his position, respondent points to the testimony of pupil witnesses, S.A. and H.S., who testified on behalf of the Board, in which they stated a desire to get him fired from employment. (H.S. - 4T129) (S.A. - 4T130, 4T153)

Respondent also takes issue with the position advanced by the Board with regard to what it considers his inappropriate comments to the effect that Jews had equal access to educational opportunities in the Soviet Union. He challenges the testimony of his principal, Clifford Keezer, who characterized his comments as being factually incorrect. (1T38-39) Respondent relies upon the testimony of the Board's own expert witness, Dr. Lawrence Kaplan, in rejecting the high school principal's testimony in this regard:

> ***Significantly, the expert witness for the Board of Education, Dr. Lawrence Kaplan, testified that in fact hard data was severely lacking on the issue of whether or not Jews had equal access to education in the Soviet Union (4T62) and that in a study of E.R.I.C., a computer data base, Kaplan had only been able to find two studies, both of questionable methodology, dealing with this issue. (4T61). If Kaplan, an expert who indicated that he had done extensive study on the subject of Jews in the Soviet Union, was able to find no hard data and only two flawed

> studies containing soft data on the issue, how was Pinto, calling only on his general knowledge to know other than that which he had learned from his own personal readings and his observations in the media that a large number of Russian Jews who immigrate to this country had achieved excellence in all fields of endeavor, including the arts, sciences and other intellectual areas. It is hard to imagine that Pinto could have been held to have said something factually inaccurate and inappropriate when the expert for the Board of Education could not provide data to show that Pinto was inaccurate.
>
> (Id., at pp. 16-17)

Respondent also rejects the Board's attempt to incorporate under Charge 1 a statement he made in his deposition taken by Board counsel, not in school, not in front of pupils or to the public, in which he expressed his personal opinion, that Jews in the Soviet Union feel frustrated because they cannot exercise the "commercial instinct."

For all of the forgoing reasons set forth above and those incorporated by reference in his reply to the Board's exceptions, respondent maintains that the ALJ properly concluded that the Board did not substantiate by virtue of the evidence that it submitted in support of Charge 1 that he in any way conducted himself in a manner unbecoming a tenured teacher.

CHARGE 2

The Board maintains that the testimony of J.I. (4T83:16 to 23), K.W. (5T82:6 to 10), D.R. (6T17:12), H.B. (4T125:11), as well as respondent's own testimony (P-21 DT41-46) (7T185:23), confirms the fact that he left no option open to his Jewish pupils to make a Hanukkah card rather than a Christmas card in order to satisfy their class assignment given in Spanish I class period 5 on or about December 1987. As an example of respondent's lack of credibility with respect to Charge 2, the Board in its exceptions maintains in pertinent part:

> ***Pinto further unsuccessfully attempted to extricate himself from the charge against him at hearing by asserting that "holiday cards" were the assignment. In support of this assertion, each student was asked on cross examination whether phrases other than Feliz Navidad (Merry Christmas) were offered as options. Several confirmed that Pinto had additionally written Happy New Year on the blackboard. This testimony in no way reflects that the Board failed to prove

the Second Charge against Pinto. Indeed, the following testimony on cross examination confirms the attitude with which Pinto approached this assignment:

Q. Hanukkah cards weren't the assignment, Christmas cards were the assignment, right?

A. Holiday cards. They had a choice. they didn't have to do--

Q. You perceived it as holiday cards. Am I right? What holiday?

A. You might have a point there.

Q. Isn't that right?

A. Yes. (7T187/15 to 188/9).

Indeed, Pinto still does not understand what he should have done to appropriately handle this request by his pupils. In exasperation on cross examination he stated, "what was I to do, stop the class?" (8T192/4). Indeed, how easy it would have been for Pinto to have simply written a Spanish translation for "Happy Hanukkah" on the board. Alternatively, he could have easily provided an alternative assignment to any student who objected to his "holiday" cards on any grounds of personal belief. He could have avoided this entire controversy and would have thereby avoided the Second Charge against him. Plainly, the truth of the Second Charge has been proven by a preponderance of the credible evidence. (Id., at 28-29)

Respondent in his reply to this charge maintains that all of the testimony given by the witnesses supports his contention as well as the ALJ's finding that pupils were given an option as to what type of card they could make - a Christmas card or a Happy New Year card.

Respondent contends that not one pupil testified that he/she found making a Happy New Year card offensive In doing so, respondent maintains that he did in fact provide his pupils in Spanish I class with an opportunity to make a nonsectarian card consistent with the Board's policy as testified by his principal Dr. Keezer, (1T74) and his immediate supervisor, Marianne Laux, (1T192).

Respondent firmly maintains that neither of his superiors articulated a policy which required him to provide a particular alternative to a Christmas card, nor had they testified that a Happy New Year card was an unacceptable alternative to a Christmas card.

CHARGE 5

The Board maintains that the ALJ erred in dismissing this charge inasmuch as it insists it had the right, pursuant to N.J.S.A. 18A:11-1 et seq., to require any of its employees to give oral statements under oath during an investigation. However, the absolute proscription imposed by the ALJ is erroneous and only serves to restrict the Board in such matters. The Board distinguishes these circumstances from Ott v. Hamilton Township, 160 N.J. Super. 333 (App. Div. 1978) as authority immunizing a teacher from giving a sworn statement. The Ott case was a criminal case which involved the possibility of criminal liability attaching to the teacher and, according to the Board, should not have been relied upon by the ALJ herein.

Respondent rejects the Board's argument and further maintains that its allegation against him in Charge 5 is incorrect as confirmed in the Joint Stipulation of Counsel (J-1) submitted in the record. Respondent maintains that he was willing to provide the Board with an affidavit which it refused and demanded that he submit to a deposition. Moreover, respondent claims that he cooperated with the Board authorities throughout the course of its investigation. Respondent submits that there was no basis for the Board to require him to accede to a deposition before Board counsel in order to enable the Board to investigate charges against him.

CHARGE 6

The Board excepts to the ALJ's dismissal of this charge as being procedurally defective. It is claimed that the ALJ, by virtue of his construing this charge to be inefficiency and requiring prior ninety day notice of the specific inefficiencies to be given to respondent before such charge could be certified, N.J.S.A. 18A:6-12, made this finding prematurely. The Board contends that the ALJ's determination should not have been made on this charge until the complete close of all testimony which would thereby afford the Commissioner a complete record and without such he cannot render an appropriate decision.

To this exception respondent replies as follows in supporting the ALJ's determination:

> The rules of the Office of Administrative Law provide summary decision may be granted when "there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

> The Petitioner objects to this decision because they submit that there should be a complete record in regard to this charge (Petitioner's Exception, pages 35-36). It is noteworthy that the Petitioner does not contend that the Administrative Law Judge erred as a matter of law.
>
> It is not surprising that the Petitioner is unable to advance any authority, whether statutory, regulatory or case law, for its unique proposition that if a Board of Education cannot prove the charges in a tenure charge, the Respondent employee should be forced to go ahead and testify on those charges nonetheless.
>
> (Respondent's Reply Exceptions, at p. 28)

Respondent on the other hand has filed exceptions to the ALJ's findings and conclusions with regard to Tenure Charges 3, 4 and 7.

CHARGE 3

Respondent excepts to that portion of the ALJ's findings which holds that he exercised poor judgment in allowing the pupil, J.C., to make a close personal assessment of the photo of the female pupil, W.F., attached to her composition, and that portion of the tenure charge in which the ALJ finds to be true that he showed a disregard for W.F.'s privacy, thereby constituting unprofessionalism and conduct unbecoming a teacher. In support of his contention respondent complains that:

> In effect, the Administrative Law Judge is requiring that the Respondent second guess the reason the student requested to see a composition. How was the Respondent to know that the male student involved was asking to see the composition for the sole purpose of making a remark about the photograph attached to the composition? The Administrative Law Judge is faulting the Respondent for the comment of the student, although the Administrative Law Judge cannot in any way justify the conclusion that the Respondent should in some way have anticipated the student's remark.
>
> The conclusion of the Administrative Law Judge that the Respondent acted incorrectly by showing the composition with W.F.'s photograph attached to J.C. is improper, as there was no way that the Respondent could have anticipated J.C.'s reaction to the photograph.
>
> (Respondent's Exceptions, at pp. 13-14)

CHARGE 4

Respondent submits that the allegations in this charge must be dismissed as it has not been proven by the Board that he was aware of the admonition given to him by his principal not to discuss the incidents of February 5, 1988 with his pupils. Respondent maintains that the record establishes when he attended the meeting with his principal, Dr. Keezer, his immediate supervisor, Marianne Laux, and his representative, Mr. Palubniak, he was extremely distraught about the ongoing investigation into the events of February 5, and the accusations which had been made against him. As a result of these circumstances, respondent claims that he did not recall Dr. Keezer directing him not to talk with pupils about the incidents and that his action in talking with the pupil, H.S., may not be construed as deliberate defiance of an administrative directive. Respondent admits that in his discussion with H.S. he did mention that he was concerned about S.A.'s behavior in his classroom and that he further indicated that he might have to ask the guidance counselor to remove S.A. from his class if she continued her disruptive behavior. (6T110-111) However, respondent denies that he made any threat of retaliation against S.A. as set forth in Charge 4. Moreover, neither S.A. nor H.S. testified that he made any such threat to that effect.

CHARGE 7

Respondent argues that this charge arises out of an allegation made by his supervisor, Marianne Laux, that he asked her if she was suffering from PMS when she wrote a negative evaluation of him. Respondent denies having made this comment to his supervisor and states further that even if this charge were proven to be true, the facts in the record show that he apologized for any remarks he may have made which upset her. This apology was accepted and the affirmative action charges were dropped by his supervisor; consequently, respondent argues that these tenure charges are no longer viable before the Commissioner and should be dismissed.

COMMISSIONER'S DETERMINATION

The Commissioner has reviewed the respective arguments of the parties set forth in their exceptions to the findings in the initial decision including respondent's reply to exceptions. He has also carefully reviewed the transcripts of the testimony of the hearing, exhibits in evidence including the prior deposition of respondent and the earlier oral statements under oath of certain pupil witnesses.

The Commissioner is not persuaded by those arguments advanced by the Board or respondent that the ALJ's findings of fact with respect to each of the tenure charges enumerated above warrant reversal.

More specifically, the Commissioner finds with respect to Charge 1 that the testimony of those pupil witnesses produced by the Board and respondent varies and is sufficiently contradictory to the extent that it fails to establish by a preponderance of credible evidence that respondent is guilty of the following allegations contained in Charge 1:

1. Respondent advised the pupils in his class that the Jewish Holocaust never occurred or that the Jewish Holocaust during World War II was a "myth."

2. Respondent advised his pupils that there was no past or present discrimination or persecution of Jews in European countries.

The quantum of proof required with regard to tenure charges against a teaching staff member is found in In the Matter of the Tenure Hearing of Fred Brown, School District of the City of Bayonne, 1970 S.L.D. 239 wherein the Commissioner held that:

> ***It should also be noted that in an action such as this before the Commissioner of Education, it is not necessary to prove the charge beyond the existence of a reasonable doubt as in a criminal matter. The quantum of proof required herein does not extend beyond a preponderance of the credible evidence. After careful examination and study of all the testimony, the Commissioner concludes that the credible evidence is insufficient to support the charge against the teacher.*** (at 242)

The Commissioner hereby adopts those findings set forth in the initial decision as his own.

What remains for the Commissioner to determine is the appropriateness of the penalty to be imposed upon respondent as the result of his being found guilty as charged with respect to Tenure Charge 3 (in part), Charge 4 and Charge 7. It is evident from a review of the record in this matter that respondent's conduct and behavior complained of by the Board raises serious questions with regard to the conduct he exhibited in class toward his pupils on various occasions, his peers on other occasions and with his ability to maintain control of his class in instances when his pupils attempted to digress from their planned classroom activities and homework assignments.

While it is true that the Board failed to establish respondent's guilt by a preponderance of credible evidence with respect to certain of the tenure charges against him, a reading of the tran-

scripts of the hearing which include respondent's testimony and the review of respondent's deposition in evidence (P-21) reveals that many of the incidents giving rise to the tenure charges against him resulted from his lack of sensitivity to and an understanding of the negative impact that his actions had in generating the disrespect accorded him by the pupils in his Spanish I class and the chaotic classroom climate which resulted from his lack of discretion and good judgment. In certain of the incidents set forth in this record the facts clearly reveal that respondent was less than sensitive with regard to the feelings of his pupils, fellow teachers and his immediate supervisor which created an environment of antagonism, confrontation and disbelief with regard to his ability as a professional teacher.

The incident which occurred in this Spanish I period 5 class on February 5, 1988, which gave rise to the charge of discrimination and anti-Semitism is but one of the examples of respondent's lack of sensitivity and good judgment which impacted upon his professional reputation.

Respondent's failure to follow his principal's directive not to discuss the incident of February 5, 1988 with his pupils pending an investigation of the incident also speaks to the reasons why he could not get pupils in his Spanish I class on February 5, 1988 to follow the directions he gave for a homework assignment and why he permitted himself and his pupils to digress from their assignment and engage in topics of anti-Semitism and educational discrimination for which he was ill-prepared to comment upon without causing emotional turmoil among his pupils.

A final example of respondent's unacceptable conduct relates to the unprofessional and sexist remark he made to his immediate supervisor on or about December 18, 1986 when he met with her and objected to her evaluation of him as a teacher.

It is noted that respondent in his exceptions to the initial decision seeks to persuade the Commissioner that his actions or reactions in certain instances were appropriate, unavoidable, untrue or precipitated by someone other than himself. A careful reading of the transcripts of respondent's testimony and the transcript of respondent's deposition especially as it relates to Charges 3, 4 and 7 is conflicting and casts a reasonable doubt upon his credibility and upon his willingness to accept responsibility for his conduct as a tenured teaching staff member. Nowhere in the record does the Commissioner note any acceptance by respondent that his own actions were a contributing factor to the tenure charges in this matter. His unwillingness or inability to recognize any responsibility for the consequences of those actions, in the Commissioner's view, justifies the findings as contained herein that respondent was guilty of conduct unbecoming a teacher.

The Commissioner cannot condone respondent's failure to conduct himself in a manner which would be a credit to himself as a professional teacher while at the same time maintaining the respect of his pupils, his supervisors and fellow teaching staff members.

Moreover, the Commissioner has previously held in In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302 in pertinent part that:

> ***[T]eachers of this State *** are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.*** (at 321)

And in Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E.& A. 1944) it was held that:

> ***Unfitness for a task is best shown by numerous incidents. Unfitness for a position under a school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it may also be shown by many incidents.*** (130 N.J.L. at 371)

While the Commissioner does not deem the behavior of respondent in the instant matter to be sufficiently flagrant to warrant his dismissal, he does consider the gravity of respondent's conduct in connection with these tenure charges to be without justification and unacceptable for a tenured teaching staff member.

Accordingly, the Commissioner affirms the initial decision with the above modifications. The Commissioner further finds the appropriate penalty to be imposed upon respondent in this matter is the denial of his salary increment for the 1988-89 school year and the forfeiture of the 120 days' salary compensation withheld by the Board as of the date of its certification of tenure charges against respondent to the Commissioner (N.J.S.A 18A:6-14).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 21, 1989

IN THE MATTER OF THE TENURE	:	
HEARING OF GIOVANNI PINTO,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF MONTVILLE, MORRIS COUNTY.	:	
	:	

Decided by the Commissioner of Education, February 21, 1989

For the Petitioner-Appellant, Rand, Algeier, Tosti & Woodruff (Ellen S. Bass, Esq., of Counsel)

For the Respondent-Respondent, Klausner, Hunter & Oxfeld (Nancy Iris Oxfeld, Esq., of Counsel)

On April 12, 1988, the Board of Education of the Township of Montville (hereinafter "Board") certified seven charges of unbecoming conduct and/or insubordination against Giovanni Pinto (hereinafter "Respondent"), a tenured teacher in the district. The Board also acted to withhold Respondent's salary increments for 1988-89.

The certified tenure charges can be summarized as follows:

1. Respondent made unprofessional and discriminatory remarks to pupils in his class concerning the persecution of Jews in Europe prior to and during World War II. These included remarks that the Holocaust was a "myth" and that there is and was no discrimination against or persecution of Jews in Europe.

2. Respondent required Jewish students to prepare Christian-oriented Christmas cards despite the request by several students to be excused from the assignment.

3. Respondent required students to submit photographs of themselves at the beach, which were intended to depict the students in bathing suits. Respondent refused to return such a photograph of a female pupil, exhibited it to male students in his classes and made unprofessional comments regarding the photograph.

4. Notwithstanding specific directions from his principal to refrain from questioning two students, S.A. and H.S., regarding allegations of anti-Semitic statements in class, Respondent confronted H.S., then a student in his class, regarding such allegations and attempted to persuade her to drop her complaints. He also made threats to retaliate against S.A. and advised H.S. to warn S.A. that she risked being "thrown out" of the class.

5. Respondent refused to cooperate with the Board's investigation of the incidents alleged in the first three charges by giving a sworn statement regarding those allegations.

6. In or about May and September 1986, Respondent failed to formally evaluate his students on a regular basis and assigned grades on assignments without having adequately reviewed or corrected such assignments. He also failed to record grades received by students in his class.

7. During a post-evaluation conference with his immediate supervisor, Respondent responded to concerns about his teaching performance with statements that were sexist, disrespectful and insubordinate, suggesting to the supervisor that at the time she completed the evaluation she was "suffering from P.M.S. (Premenstrual Syndrome)."

On November 10, 1988, an Administrative Law Judge ("ALJ") found charges 4 and 7 of the certified charges to be true and charge 3 to be partially true. The ALJ found that Respondent had exercised poor judgment in allowing a student in his Spanish class to make a close and personal assessment of the photo of a 15-year-old female student on the beach which she had handed in as part of an assignment, and that Respondent had disregarded the student's privacy and exhibited unprofessionalism and conduct unbecoming a teacher. In addition, the ALJ found that Respondent had, indeed, conferred with a student involved in the incident alleged in charge 1 "in utter disregard of the principal's directive" not to do so, and attempted to intimidate S.A. The ALJ also found that Respondent had, in fact, indicated to his supervisor that she must have been "suffering from P.M.S." at the time she completed his evaluation.

While finding that the Board had not met its burden of proof as to the truth of charge 1, alleging discriminatory remarks about Jews and the Holocaust, the ALJ found that "Pinto indeed contributed to the disruption by his failure to effectively assert his authority as teacher in command of the class to cease the discussion and divert the attention of his pupils to the homework assignment." Initial decision, at 11-12.

Moreover, the ALJ found that Respondent's credibility at the hearings was "lacking," id. at 24, and that Respondent "exercises poor judgment in making capricious utterances." Id. He concluded that Respondent's conduct "did not measure up to a standard reasonably expected," id. at 25, and that Respondent "must...be impressed with the need to exercise good judgment and have genuine concern and respect for the sensitive feelings of his pupils, peers and administrators." Id. Despite such findings, the ALJ recommended that Respondent be reinstated and compensated for salary lost during his suspension. He did, however, affirm the Board's action in withholding Respondent's increments for the 1988-89 school year, finding that Respondent had not met his burden of proof that the action was unreasonable under Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960).

On February 21, 1989, the Commissioner adopted the findings of the ALJ on the various tenure charges, but, while agreeing that dismissal would be too harsh under the circumstances, increased Respondent's penalty to include denial of his salary increment for 1988-89 and forfeiture of the 120 days' salary withheld by the Board. The Commissioner found "the gravity of respondent's conduct in connection with these tenure charges to be without justification and unacceptable for a tenured teaching staff member." Commissioner's decision, at 48. In support of the heightened penalty, the Commissioner noted:

> It is evident from a review of the record in this matter that respondent's conduct and behavior complained of by the board raises serious questions with regard to the conduct he exhibited in class toward his pupils on various occasions, his peers on other occasions and with his ability to maintain control of his class in instances when his pupils attempted to digress from their planned classroom activities and homework assignments.
>
> While it is true that the Board failed to establish respondent's guilt by a preponderance of credible evident with respect to certain of the tenure charges against him, a reading of the transcripts of the hearing which include respondent's testimony and the review of respondent's deposition in evidence (P-21) reveals that many of the incidents giving rise to the tenure charges against him resulted from his lack of sensitivity to and an understanding of the negative impact that his actions had in generating the disrespect accorded him by the pupils in his Spanish I class and the chaotic classroom climate which resulted from his lack of discretion and good judgment. In certain of the incidents set forth in this record the facts clearly reveal that respondent was less than sensitive with regard to the feelings of his pupils, fellow teachers and his immediate supervisor which created an environment of antagonism, confrontation and disbelief with regard to his ability as a professional teacher.

Id. at 45.

> Nowhere in the record does the Commissioner note any acceptance by respondent that his own actions were a contributing factor to the tenure charges in this matter. His unwillingness or inability to recognize any responsibility for the consequences of those actions, in the Commissioner's

> view, justifies the findings as contained herein that respondent was guilty of conduct unbecoming a teacher.

Id. at 47.

After a thorough review of the record, we concur with the Commissioner's findings on the tenure charges and agree that dismissal is not warranted under the circumstances.[1] We conclude, however, that, in light of Respondent's conduct, a harsher penalty is warranted than the 120 days' salary loss and loss of increment imposed by the Commissioner.

As the Commissioner recognized, Respondent's actions as found herein demonstrated a profound insensitivity towards his students, fellow teachers and supervisors. Respondent not only disregarded specific instructions from his principal not to discuss the allegations of discriminatory statements with the students involved, but, in so doing, threatened to remove one of those students from the class. In discussing an evaluation of his performance with his supervisor, Respondent demeaned her with a disrespectful and sexually derogatory comment, and he demonstrated an insensitivity to the student involved in the beach photo incident. And while the allegation of discriminatory statements in charge 1 was not demonstrated by a preponderance of credible evidence, we agree with the Commissioner's assessment of Respondent's role with respect to the classroom disturbance over the issue of the persecution of Jews in Europe and his inability to control his class, thereby contributing to the class disruption and the ensuing outcry in the community. Nor can we overlook the ALJ's finding that Respondent's credibility at the hearing was "lacking."

While unfitness to teach is best demonstrated by a series of incidents, Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E & A 1944), and although Respondent's conduct certainly warrants disciplinary action, we agree with the Commissioner that dismissal is an unduly harsh penalty to be imposed under the circumstances. See In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967).

However, in light of the Respondent's actions, which we agree amount to conduct unbecoming a teacher, including his failure to demonstrate the self-restraint and controlled behavior expected of teachers, we conclude that the appropriate penalty to be imposed

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[1] We note, in response to the Board's exception to the fact that we have not specifically addressed its challenge to the Commissioner's conclusion on charge 5 of the certified tenure charges, that insofar as we have affirmed the Commissioner's determination on each of the individual charges, we do not find it necessary to restate his findings and conclusions.

is the forfeiture of six months' compensation,[2] as well as the loss of his salary increments for the 1988-89 school year.

We, therefore, affirm the decision of the Commissioner as modified herein with regard to the appropriate penalty. The Board's request for oral argument, which was filed at the time of its exceptions to the Legal Committee Report, is denied as not necessary for a fair determination of the case.

Attorney exceptions are noted.
October 4, 1989

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[2] We note that the Commissioner ordered that Respondent forfeit salary withheld during the first 120 days of his suspension. As provided by N.J.S.A. 18A:6-14, that amount represents loss of pay for a period of 120 calendar days, which would equal the loss of four months' salary.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2905-88
AGENCY DKT. NO. 42-3/88

NORTH ARLINGTON BOARD OF EDUCATION,
Petitioner,
v.
VINCENT CALABRESE, ASSISTANT COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION AND THE DIVISION OF FINANCE,
Respondents.

Glenn T. Leonard, Esq., for petitioner

E. Philip Isaac, Deputy Attorney General, for respondent
(W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: November 14, 1988 Decided: December 14, 1988

BEFORE **STEPHEN G. WEISS,** ALJ:

PROCEDURAL HISTORY

This matter was transmitted by the Department of Education to the Office of Administrative Law as a contested case on April 22, 1988, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. At issue is the propriety of the respondents' decision to reduce by way of disallowance the reimbursement to petitioner of certain state transportation aid relating to the purchase in December 1985 of a Type I school vehicle.

A telephone prehearing conference was conducted by the undersigned administrative law judge on June 20, 1988, and the following issue was identified: "Was the determination by the Assistant Commissioner of Education to disallow state aid for certain pupil transportation costs . . . arbitrary, capricious and unreasonable or otherwise in violation of applicable state law? See, Prehearing Order, paragraph 1B.

A plenary hearing was conducted before me on September 27, 1988, at which the Board presented the testimony of Charles Weigand, its school business administrator for the past eight years. No oral testimony was offered by respondents.

STIPULATED FACTS AND TESTIMONY

Although no joint stipulation of facts was submitted, the answer filed by respondents to the Board's petition admitted a substantial portion of the allegations and is set forth in essential part, with appropriate modifications, as follows:

1. Petitioner is a duly constituted school district of the State of New Jersey, whose boundaries are co-terminous with those of the Borough of North Arlington.

2. Pursuant to N.J.S.A. 18A:4-35, an examination of the financial records maintained by Secretary of the Board/school business administrator and the treasurer of school monies; the activities of the Board; and the records of the General Organization Funds and Special Project Funds under the auspices of the Board was conducted by the New Jersey State Department of Education Division of Finance.

3. The examination was limited to the business practices and procedural phase of fiscal operations and covered a period of operation July 1, 1986 through April 30, 1987.

4. As part of the examination a pupil transportation aid audit was performed. . . . As a result of said audit the acquisition

costs of a Type I vehicle at $27,800.00 . . for pupil transportation [was] disallowed in the audit . . . .*

. . .

5. The Board determined to appeal the disallowance of state aid . . . to the Assistant Commissioner of Education. . . .

. . .

6. The appeal concerning the disallowance for state aid for the Type I vehicle at $27,800.00 . . . was denied. . . . In addition to lack of approval by the county superintendent, the Assistant Commissioner advanced two reasons not included in the audit, to wit:

. . .

> Routes two and six have two 54 passenger vehicles going in the same destinations. Route two transports only 21 pupils and route six transports five pupils.

Weigand's testimony essentially was as follows. Included among his duties as school business administrator is oversight of fiscal matters, including the costs associated with transportation activities and state reporting requirements with respect to them. During late 1985 Weigand recommended that the Board purchase a Type I vehicle since the vehicle the Board had been using, although purchased in 1983, was proving to be mechanically unreliable. A "back-up" Type II vehicle owned by the Board was deemed inadequate because of its age and smaller capacity.

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*Certain other matters raised in the pleadings have been disposed of by agreement between the parties. The only remaining issue, and the item that was addressed at the hearing, pertains solely to the respondents' disallowance of reimbursement for the acquisition of the Type I vehicle.

Weigand's recommendation was approved by the Board, it was put out for bid and proposals were received from three companies. On December 16, 1985, the Board approved purchase of a 1986 General Motors bus at a cost of $27,800 (Exhibit P-1). The vehicle was delivered in March 1986 and was placed immediately in service to transport 25 students, four times a day, to a satellite school in Teterboro. Five students were classified and the other 20 were vocational.

In August 1986, Weigand filed the required "district-wide program cost report" (hereinafter "DPCR") with the Office of the Bergen County Superintendent of Schools (Exhibit P-2). Line 23 on that form disclosed the purchase during 1985-86 of a Type I vehicle for the sum of $27,800. The form indicates that the acquisition was "approved."

Some time during October or November 1986 the Board received a computerized printout from the Division of Finance which reflects that purchase of the Type I vehicle was an "approved expense" (Exhibit P-4). Thereafter, pursuant to N.J.S.A. 18A:58-7, the Board received state aid for that purchase as part of its general state aid.*

However, in late October 1987, the Board received a report of examination and audit of its fiscal operations for the 1986-87 school year, and in an accompanying cover letter respondent Calabrese observed that an exception had been taken to state aid payments for certain pupil transportation costs, which amounts were to be recovered by a reduction in the Board's anticipated receipt of pupil transportation aid in the 1988-89 school year (Exhibit P-5). The audit revealed, in pertinent part, that the Board's expenditure of $27,800 for the Type I vehicle had to be disallowed for state aid purposes since it was made, ". . . without the county

*Although the statute anticipates reimbursement of 90 percent of the cost, the actual reimbursement was slightly less--about 86.5 percent.

superintendent's approval, which is contrary to the statutory requirements under N.J.S.A. 18A:58-7." (Exhibit P-6.)

Following receipt of Calabrese's letter and the audit report, the Board promptly protested the disallowance. A reply from Calabrese advised that after reviewing "the audit and other information" the Board's appeal of the disallowance would continue to be denied. The reasons for the denial included not only that the expenditure was made without the approval of the county superintendent, but, in addition, that the Board's use of certain vehicles on its routes was inappropriate as follows: (1) "Type II vehicle assigned route two which consist totally of unaided pupils"; and (2) routes two and six " . . have two 54 passenger vehicles going in the same destinations. Route two transports only 21 pupils and route six transports five pupils." (Exhibit P-7.)

According to Weigand, the assertions by Calabrese in his denial were in error. In fact, route two was not served by a Type II vehicle; rather, it was served by a Type I vehicle and it serviced only "aided" children during all relevant time periods. Furthermore, although prior approval of the purchase of the Type I vehicle admittedly was not obtained from the county superintendent before the purchase was actually consummated and the vehicle delivered, the fact of the purchase was reported to the county on the DPCR in August 1986, and was approved by the county superintendent.

With respect to alleged underutilization of the Type I vehicle which was replaced by the new bus, Weigand testified that the older one was used only locally because of its mechanical unreliability, and that such use actually obviated the need to purchase yet another vehicle. So, too, with respect to the Board's use of its Type II vehicle to transport more children locally than the larger Type I vehicle, Weigand observed that only the Type II vehicle was small enough to navigate certain local streets.

On cross-examination Weigand conceded that at the time the activities leading to purchase of the Type I vehicle were taking place during 1985 he was not aware of any statutory requirement of prior approval by the county superintendent. In fact,

during his tenure he had purchased other vehicles without such prior approval and it was not until the state auditors commented upon the alleged statutory violation in October 1987 that he became aware that prior approval was said to be required.

On redirect-examination Weigand repeated that the "older" Type I vehicle was too large to traverse narrow local streets and that was why the Type II vehicle was used for that purpose. However, the older vehicle was used for a shorter route to the extent possible. Unfortunately, it was, as he put it, a "lemon." He agreed that the problems with it were never reported to state or county officials and no effort was made to trade it in. Also, of a total of approximately $2,600 spent during 1985-86 on maintenance of both Type I vehicles, about 80 percent of that amount was spent on the older bus.

DISCUSSION

The critical issue in this case involves an interpretation of N.J.S.A. 18A:58-7 which, in pertinent part, states as follows: "Each district shall be paid 90% of the cost to the district of transportation of pupils to a school when the necessity for such transportation and the cost and method thereof have been approved by the county superintendent of the county in which the district paying the cost of such transportation is situated. . . ." [emphasis added]. Since it is undisputed that the Board's purchase of the Type I vehicle for which reimbursement is sought was completed prior to county superintendent approval,* the threshold question is whether the Board's action was in violation of that statute and its petition should be rejected on that basis alone.

*Of course, respondents assert that there was never any approval at all.

According to the Board, the statute simply does not require prior approval of any purchase; rather, it merely requires state reimbursement after the "necessity, cost and method" have been approved by the county superintendent. In other words, the timing of the approval is keyed into the reimbursement--not the purchase. In addition, according to the Board, even if the statute is construed as respondents insist, it would be unfair to permit such an interpretation to bar reimbursement in the circumstances of this case because Weigand's testimony established the necessity for the purchase and fully explained away respondents' erroneous perceptions concerning underutilization and the routes actually involved.

The Board also asserts that the doctrines of laches and/or equitable estoppel preclude respondents from enforcing disallowance of the reimbursement since purchase of the vehicle was disclosed in August 1986 and was reviewed and approved by the county superintendent. Indeed, aid was, in fact, paid to the district in the 1987-88 school year. The Board, of course, has utilized that aid and claims it would be severely prejudiced by having that sum taken away from it now. According to the Board, the only way it can accommodate loss of the aid is to decrease or eliminate a previously budgeted item, which action would be at the expense of a needed program and/or provision of equipment or supplies.

In my view, contrary to the Board's argument, the statute does require that no portion of the purchase price of a vehicle to transport students is qualified for state aid reimbursement unless the necessity for such transportation and the cost and method thereof have knowingly been approved either by the county superintendent in advance of the purchase or by state fiscal officials thereafter. Neither event has occurred here. The law is well settled that where, as here, a statute is clear and unambiguous on its face, and admits of only one reasonable interpretation, the reviewing tribunal should not delve any deeper than the act's literal terms to ascertain the legislative intent. See, e.g., State v. Butler, 89 N.J. 220, 226 (1982); see also, 2A Sutherland, Statutory Construction (4th Ed. 1984), §46.01 at 73. The pertinent provision of N.J.S.A. 18A:58-7 admits of no interpretation other than that the obligation placed upon the state to reimburse transportation costs to a local district is conditioned upon an approval. To permit otherwise would disserve the clear thrust of the statutory provision which plainly is designed to protect the

public fisc from inappropriate local expenditures. Indeed, the approval requirement also seems to me to be designed to protect local districts from the very consequences which resulted here; namely, an expenditure predicated upon an assumption of state reimbursement which ultimately proves not to be available and the need to adjust a future budget to accommodate the "loss."

This is not to say that a board, when faced with an emergent need for a transportation expenditure, cannot move forward with dispatch. In such cases it would appear that prompt communication of that need to the county office with a request for emergent action can easily be accomplished.

The fact that the DPCR submitted by the Board in August 1986 disclosed the purchase and was "approved" by the county superintendent a few months later does not rescue the Board from the consequences of its action here. As the respondents argue, the disclosure on the DPCR was simply a report that a vehicle purchase had been made and does not imply "approval" under N.J.S.A. 18A:58-7.

Interestingly, an education decision particularly pertinent to the present case and supportive of the respondents' position was cited by the Board in its original posthearing brief. In Board of Education of the Borough of Fairfield v. Bureau of Pupil Transportation, State Department of Education, OAL DKT. 5350-83 (Jan. 24, 1984), decided by the Commissioner March 12, 1984, affirmed, State Board of Education, December 5, 1984, the Commissioner affirmed the decision of an administrative law judge which rejected a board's appeal of a reduction in pupil transportation expenses. The board, which had obtained county superintendent approval, was found to have improperly entered into a renewal contract rather than putting the routes out to bid. On appeal, the State Board of Education reviewed the procedure to be followed under N.J.S.A. 18A:39-3 and agreed with the Commissioner and the administrative law judge that the board had inappropriately entered into a renewal contract with the bus company without rebidding. However, for purposes of the instant case, of greater importance was the State Board's observation that contract approval by the county superintendent mandated under N.J.S.A. 18A:58-7 "is not tantamount to a determination of entitlement to state aid by the Bureau" and that the required approval, while, "essential for receipt of state aid," nevertheless "does not constitute a guarantee of such aid." See, Fairfield,

State Board decision at pp. 2 and 4. As the State Board articulated at greater length in language which is of exceptional relevance to the instant matter:

> Thus, the statute specifies that the county superintendent must approve the necessity, cost and method of transportation as a prerequisite to receiving state aid. However, such approval is only one of several predicates to the receipt of aid. The most fundamental requirement is that the transportation contract [or, as here, the purchase] be consistent with all applicable statutes and regulations. If the contract [or, as here, the purchase] is inconsistent with law, county superintendent approval does not validate it for purposes of receipt of state aid. To permit it to do so would give the county superintendent the authority to waive for school districts the requirement that pupil transportation contracts be fully consistent with law. Fairfield, State Board decision, at p. 4.

The State Board went on to reiterate its holding:

> In sum, we hold that a superintendent's approval merely renders a contract [or a purchase] eligible for a determination by the State as to the amount of aid, if any, that is payable to the local board of education. The ultimate responsibility for determining who receives state aid pursuant to N.J.S.A. 18A:58-7 lies with the State Department of Education, which has plenary responsibility for school transportation matters. Rankin v. Board of Education of Egg Harbor Township, 134 N.J.L. 342 (Sup. Ct. 1946). Thus, all pupil transportation contracts [and purchases], notwithstanding county superintendent approval, remain subject to scrutiny by the Division of Finance, or its Bureau of Pupil Transportation, for compliance with all relevant directions, regulations and statutes. Only if the contract is consistent with law and is approved by the county superintendent is the school district eligible to receive state pupil transportation aid. Fairfield at p. 5.

Accordingly, in the Fairfield case, the State Board of Education made crystal clear that county superintendent approval was no guarantee of reimbursement; rather, it was merely a preliminary eligibility determination which continued to remain subject to the scrutiny of state finance officials. In view of the holding of the State Board in Fairfield, it is obvious that the petition in this case should be

dismissed. The Board did not obtain the "approval" anticipated by the statute and, therefore, the requirements of law were not met.

Another education decision which involves the instant issue is Board of Education of the Township of Lakewood v. Commissioner of Education, decided by the Commissioner November 18, 1980, reversed, State Board of Education, August 5, 1981. In that case, which at first blush might appear to be contrary to the Fairfield case, the county superintendent had approved the Board's application for state transportation aid, but a portion of that aid was disallowed following an audit by the Bureau of Pupil Transportation. The state auditor's action was based upon a belief that an agreement adopted a few years earlier by all county superintendents establishing a schedule of maximum salaries for transportation services remained in effect and that the salaries agreed to by Lakewood for the school year in question exceeded those maximums. Following the Commissioner's determination to uphold the auditor's disallowance, the State Board reversed, holding that the agreement between the county superintendents did not automatically extend from year to year and constitute a state standard. Thus, the State Board reinstated the decision of a hearing officer who had approved the reimbursement pursuant to N.J.S.A. 18A:58-7. The Lakewood decision does not support the position advanced by the Board in this case since even though the disallowance was set aside, the State Board's action was not contrary to the statutory interpretation which I believe has to be applied in this case. In Lakewood an error was simply made with regard to the continuing effect of the maximum salary agreement, and the state audit therefore was based upon an erroneous assumption.

Substantial time and attention was devoted during the course of the hearing and in the briefs to various factual allegations surrounding the reliability and/or accuracy of data submitted by the Board to the state. See, e.g., Exhibit R-4. In light of my determination that N.J.S.A. 18A:58-7, on its face, required a degree of approval which did not occur, none of those elements need be addressed. Suffice it to say that the parties' dispute with regard to the reliability and accuracy of the reported data simply points up even more the need for meaningful county and/or state review, rather than having to undertake such a review long after the expenditure has been incurred.

With respect to the laches and equitable estoppel arguments advanced by the Board, respondents observe, and I agree, that it is inappropriate even to consider them since neither was raised in the pleadings. In addition, I would point out that no reference to either doctrine was made during the prehearing conference and therefore they were not included as issues in the prehearing order. See also, N.J.A.C. 1:1-13.2(b). Nevertheless, since the Board has pursued both issues vigorously in its posthearing memoranda and both parties have cited authorities with regard to the two doctrines, I will briefly address them.

The laches argument can be disposed of with relative dispatch. That principle applies only where there has been an unexplained and inexcusable delay in the enforcement of a known right to the prejudice of the party raising the defense. See, e.g., Lavin v. Hackensack Board of Education, 90 N.J. 145 (1982). In this case the facts are insufficient to support the proposition that any untoward "delay" has even occurred, no less an "inexcusable" one. While occasionally the mechanism of state government grinds exceedingly slow with regard to audits and the like, there has been no showing that the timing of the state's audit and its report to the Board was "unexplained" or conducted in such a dilatory manner as to be "inexcusable." Furthermore, I cannot accept in any event the proposition that the "delay," such as it was, has prejudiced the Board. Although the state now seeks to recover approximately $24,000 with respect to the vehicle's cost, there has been no demonstration on the record that loss of this amount will so adversely impact upon the Board as to interdict its ability to deliver a thorough and efficient education.

With respect to the equitable estoppel argument, both sides properly recognize that imposition of the doctrine against the state takes place rarely, and then only in circumstances where some public interest otherwise would be placed in jeopardy. See, e.g., Abbott v. Beth Israel Cemetery Ass'n, 13 N.J. 528 (1953). Had the Board in this case undertaken in timely fashion to comply with the statutory requirement of submitting the proposed purchase for prior review and approval, it would not have found itself in its present predicament and ample opportunity would have existed fully to explore all of the factual underpinnings for the proposed purchase. To apply the doctrine of equitable estoppel against respondents under

these circumstances, where it is the Board which has violated the statute, would be entirely inappropriate.

Accordingly, for the reasons set forth herein, and in light of the undisputed facts bearing upon the Board's failure to obtain appropriate approval of its school vehicle purchase as required by N.J.S.A. 18A:58-7, I **CONCLUDE** that the Board has failed to demonstrate a sufficient basis for the entry of any relief. Accordingly, the petition should be **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **Saul Cooperman** for consideration.

December 14, 1988
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

12/16/88
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 19 1988
DATE

Ronald I. Parker, Acting Director & Chief ALJ

amr/e

BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND VINCENT CALABRESE, COMMISSIONER OF EDUCATION, DIVISION OF FINANCE, RESPONDENTS.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The State's reply exceptions, however, were untimely.

Petitioner filed four exceptions, which are summarized, in pertinent part, below.

> Exception I states:
> N.J.S.A. 18A:58-7. DOES NOT REQUIRE PRIOR APPROVAL OF THE PURCHASE OF THE TYPE I VEHICLE IN QUESTION BY THE COUNTY SUPERINTENDENT.

Petitioner's exception is a nearly verbatim recitation of the argument proffered in its post-hearing brief in this regard. It adds to its previous contention that, contrary to the ALJ's opinion, "the statute *** clearly directs that aid 'shall also be paid' when cost[s] 'have been approved' without saying that the costs must be approved prior to being incurred." (Petitioner's Exceptions, at p. 2) Petitioner contends the statute says nothing "that would dictate the timing of the approval other than to require approval before the aid "shall" be paid. (Id.) It further argues that the record demonstrates that both the County Superintendent and the State approved the purchase, and it cites Exhibits P-2 and P-4 respectively in support of this contention. Petitioner alleges that there is no evidence in the record to indicate that such approvals were made unknowingly, and that the approvals should be presumed to have been made knowingly. Consistent with such conclusion, petitioner avers that even if petitioner lacked prior approval from the County Superintendent for the purchase:

> (a) subsequent approval in the District Wide Program Cost Report (DPCR) should meet the statutory requirements; and

(b) subsequent approval by the State fiscal officials (P-4) should be sufficient for aid entitlement. (Id., at p. 3)

Exception II states:

THE APPROVAL OF THE COUNTY SUPERINTENDENT WAS OBTAINED BY PETITIONER PRIOR TO APPROVAL OF TRANSPORTATION AID REIMBURSEMENT AS REQUIRED BY N.J.S.A. 18A:58-7.

Again reiterating its post-hearing arguments, the Board avows that

> despite County Superintendent approval (P-2), despite its [the Department of Education's (ed.)] approval (P-4) and despite the uncontroverted fact that the vehicle was necessary and was utilized to transport aided children and, therefore, eligible for transportation aid, [the Department (ed.)] has taken from the Board in the 1988-1989 school year the aid previously properly awarded. (Id., at p. 4)

Exception III states:

THE A.L.J. ERRED IN CONCLUDING THAT APPROVAL BY THE COUNTY SUPERINTENDENT IN THE DPCR IS NOT APPROVAL WITHIN THE MEANING OF N.J.S.A. 18A:58-7.

First, petitioner rebuts the ALJ's alleged conclusion that the County Superintendent's approval occurred a few months after the purchase was disclosed in the DPCR report. It claims there is nothing in the record to support such a conclusion. It claims instead that it was very likely that said approval occurred shortly after the County Superintendent received the DPCR since the Department of Education approved aid a few months later.

Second, the Board avers that

> Approval by the County Superintendent, on the DPCR should be considered as approval within the meaning of N.J.S.A. 18A:58-7, at least where, as here, it is uncontroverted that the vehicle was purchased through public bidding, was necessary, was used to transport aided children, was determined by the Department of Education to be eligible for aid, and aid was paid and utilized by the Board. (Id., at pp. 5-6)

Exception IV states:

THE ALJ ERRED IN NOT CONCLUDING THAT THE RESPONDENTS' ACTIONS WERE ARBITRARY, CAPRICIOUS AND UNREASONABLE.

The first six pages of petitioner's Exception IV is a verbatim recitation of its post-hearing brief arguments, which are incorporated herein by reference. The Board adds that the ALJ misinterpreted petitioner's position and misapplied the decision in Board of Education of the Borough of Fairfield v. Bureau of Pupil Transportation, State Department of Education, decided by the Commissioner March 12, 1984, aff'd State Board of Education December 5, 1984. Petitioner believes the ALJ's conclusions support petitioner's position where all other requirements for aid exist as in the instant matter that the lack of an approval by the County Superintendent "should not be deemed fatal if the County Superintendent's approval is not binding upon the State Department of Education for aid purposes in any event. The case adds nothing to the statutory interpretation issue as the ALJ has concluded." (Id., at p. 12) It states further that its position is that "essentially the same factual predicate must [exist] for a conclusion to be reached that the respondents' actions are arbitrary, capricious and unreasonable as must exist to determine that the respondents' actions are barred by laches and estoppel." (Id.) The factual proofs, in the Board's opinion, concerning the passage of time and prejudice associated with estoppel and waiver arguments would also support a conclusion that actions are arbitrary, capricious and unreasonable.

The Board further disagrees with the ALJ's conclusion that "there has been no demonstration on the record that loss of this amount will so adversely impact upon the Board as to interdict its ability to deliver a thorough and efficient education." (emphasis in original) (Exceptions at page 14, quoting the initial decision at p. 11) Petitioner avows that it has lost the $24,000 at the expense of a needed program, equipment or supplies, and avers the ALJ's conclusion to the contrary is without support in the record. The Board avers that

> Mr. Weigand's testimony established not only the need for and cost of the Type I vehicle purchased herein, and the use for the purpose of transporting aided pupils, but also established the necessity for and reasonable use of the vehicle which it replaced, and the prudent and really only use for the Type II vehicle owned by the Board. (Id., at p. 15)

In response to the ALJ's conclusion concerning equitable estoppel, petitioner claims that application of the doctrine is particularly appropriate where the alleged statutory violation, assuming one to exist, is purely technical in nature. "To deny aid

based upon such a technicality under the facts herein is arbitrary, capricious and unreasonable." (Id., at p. 16) Moreover, the Board contends no public interest is served by reducing a school district's future aid to offset previously approved and paid aid under circumstances like those in this matter. Assuming the ALJ's interpretation of N.J.S.A. 18A:58-7 is adopted, the Board contends it should receive the money expended since its actions represent a purely technical noncompliance with a statute.

For the reasons stated above, the Board submits the decision of the ALJ should be reversed and the aid reduction restored.

The Commissioner has carefully reviewed the record of this matter which, it is noted, does not include the transcripts of the hearing below. Based upon his independent review of the matter, the Commissioner is not persuaded that any argument raised in exceptions warrants reversal of the initial decision. Moreover, absent transcripts and having afforded the ALJ's recommendations "attentive consideration," the Commissioner will rely on those credibility determinations and the factual conclusions made thereupon embodied in the initial decision. See In re Morrison, 216 N.J. Super. 143, 158 (App. Div. 1987).

In reviewing the arguments of the parties, the Commissioner is particularly persuaded by the State's argument made in its post-hearing submission at pages 6-7 wherein it states:

> ***Although petitioner contends that it relied to its detriment upon the State's promise to provide the money to purchase the 1986 Type I bus, this, the record reveals, is utterly false. In fact, bids for the purchase of the 54 passenger Type I bus were received by petitioner on December 13, 1985 and the petitioner's Board approved the issuance of a bid on December 16, 1985. R-2 at 18 (red) (same as P-1). The District-Wide Program Costs Report for 1985-86 (P-2), upon which North Arlington so heavily relies, was executed by petitioner some eight months later on August 1, 1986. Any notification from the State thus could not have arrived until after August 1986. Indeed, even if the approval of State transportation aid was received by North Arlington in December 1986, as petitioner contends, this would have meant that North Arlington's Board of Education bought the 1986 bus one year before DOE in Trenton approved the funds (subject to subsequent audit). Thus, Mr. Leonard's argument that the petitioner was "severely prejudiced" by the State's action because North Arlington "had already used the aid

> previously properly given..." (petitioner's post-hearing memorandum at paragraph 22), is nothing less than a deliberate fabrication of the record. For it is clear beyond doubt that the North Arlington Board committed itself to buying a new Type I bus on December 16, 1985 -- months before the purchase was reported by petitioner in the District-Wide Program Cost Report (P-2) and a year before Trenton acted on aid for this bus. Thus, it is clear that North Arlington's Board could not have relied to its detriment on the State's alleged promise to fund the 1986 bus because no such promise existed when the bus was purchased. Simply put, North Arlington purchased the bus at its own peril. Thus, any alleged harm to petitioner was only brought by its own neglect in failing to secure the proper authorizations required by law. (emphasis in original)

With these facts established in the record; the Commissioner finds the ALJ's interpretation of N.J.S.A. 18A:58-7 comports with his own, particularly where he states at pages 8 of the initial decision:

> Indeed, the approval requirement also seems to me to be designed to protect local districts from the very consequences which resulted here; namely, an expenditure predicated upon an assumption of state reimbursement which ultimately proves not to be available and the need to adjust a future budget to accommodate the 'loss.'

Since it is uncontested that no prior approval was sought from the County Superintendent or state fiscal officers before purchasing the vehicle in question in this matter, the Commissioner accordingly accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision, as supplemented herein.

COMMISSIONER OF EDUCATION

FEBRUARY 21, 1989

D.G., A STUDENT OF GLEN ROCK HIGH SCHOOL, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, D.G. and her parents, pro se

For the Respondent, Hannoch Weisman (Michael J. Herbert, Esq., of Counsel)

This matter was opened before the Commissioner by way of a letter of appeal, with attached documents, seeking review of an eligibility determination rendered by the New Jersey Interscholastic Athletic Association Eligibility Appeals Committee (NJSIAA) which denied a waiver of the eight semester eligibility rule, Article V, Section 4.J of the NJSIAA Bylaws.

D.G., presently an eighteen year old senior at Glen Rock High School, transferred from Paramus Catholic High School in the fall of 1985 following her freshman year. Notwithstanding the fact that D.G. had accumulated 27¼ points at Paramus Catholic, her parents determined, for academic and social adjustment reasons, to have D.G. repeat her freshman year at Glen Rock High School. Although D.G. had not competed in interscholastic sports activity at Paramus Catholic, she competed in basketball in her freshman, sophomore and junior years at Glen Rock High School.

In June 1988 petitioner's father requested a formal ruling on the eight semester eligibility rule as it applied to D.G. The aforesaid rule provides as follows:

> No student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his/her entrance into the 9th grade. A student becomes ineligible for high school athletics when the class in which he/she was originally enrolled has graduated.*** (emphasis supplied)

On August 24, 1988 the NJSIAA Eligibility Committee considered the materials submitted on D.G.'s behalf and voted against granting a waiver of the eight semester rule Subsequently

an appeal of the determination by the Eligibility Committee was made. The Eligibility Appeals Committee hearing was held by the Committee on November 14, 1988 at which time D.G.'s parents, her coach and the principal of Paramus Catholic High School were permitted to testify on D.G.'s behalf.

On November 28, 1988 the Eligibility Appeals Committee issued a written decision rejecting D.G.'s appeal and denying the waiver requested. The appeal to the Commissioner pursuant to N.J.S.A. 18A:11-3 followed by way of a letter received by him on December 7, 1988.

Petitioner contends that the eight semester rule should be waived in this matter because she did not transfer from Paramus Catholic and repeat her freshman year at Glen Rock High School for athletic advantage. Petitioner contends that since she did not play at Paramus Catholic, there was no intent to circumvent the applicable rule. In fact, petitioner's parents point out that D.G. never participated in any organized athletics prior to coming to Glen Rock High School and, in fact, was specifically precluded from doing so by virtue of being required to babysit for her brother after school hours.

It is petitioner's contention that transferring to Glen Rock High School and participation in athletics has assisted her in overcoming a mild adolescent adjustment disorder. (See Letter of J. Lawrence Evans, Jr., M.D., also Education Evaluation dated September 30, 1988.)

In testimony before the Appeals Committee petitioner's parents and coach argued that neither her parents nor petitioner were made aware of the fact that petitioner would not have eight full semesters of eligibility upon transfer to Glen Rock High School. (See Transcript, at p. 112.) Petitioner's parents and her coach therefore alleged that had they known about the eligibility limitation, petitioner would not have repeated her freshman year.

Petitioner's father in his letter appeal argues that his daughter was denied due process because of the "***absolute lack of fairness, objectivity and impartiality witnessed at this appeal hearing." (Letter of Appeal, dated December 2, 1988) As illustration of the foregoing, petitioner's father alleges the following:

1. Mr. Michael J. Herbert, Chairman of the Eligibility Appeals Committee, led the proceedings by viciously cutting off my wife and myself from speaking as we were presenting our evidence. I noted these interruptions at least 4 times. Mr. Herbert, at one point, chastised my wife for mentioning the emotional condition of my daughter and family.

2. On 2 occasions, Mr. Herbert stated, "...although I don't vote as part of this board, I don't see how we can grant an exception to your daughter." This statement, made prior to the vote of the Appeals Board, is prejudiced and leading and shows a complete lack of impartiality on the part of the Chairman of the Eligibility Appeals Committee, a non-voting member. while the bylaws of the N.J.S.I.A.A. indicates (sic) that the hearing officer, Mr. Herbert, shall conduct the manner of the proceedings, I believe his manners coincided with the manner of the proceeding; rude, prejudicial, and completely subjective.

3. Not once did Mr. Herbert ask if we had any more to say or anything more to add. Additional evidence was not presented, as Mr. Herbert abruptly ended the proceedings by stating, ".....well, it seems we're repeating ourselves and 45 minutes has elapsed so we will convene and notify you of our results." (Id.)

Respondent NJSIAA argues in favor of the Commissioner's affirmance of the Eligibility Appeals Committee's determination not to grant a waiver in this case. Respondent contends that the "NJSIAA INTERPRETIVE GUIDELINES FOR STUDENT-ATHLETE ELIGIBILITY" on page 63 of the NJSIAA Handbook provide for relaxation of the eight semester rule only in such circumstances where a student has had to extend his/her schooling beyond eight semesters due to circumstances beyond that person's control. In the matter currently before the Commissioner, respondent points out that the decision made by petitioner's parents to repeat the freshman year upon transfer to Glen Rock High School was a voluntary action. Further, respondent contends that the implication of petitioner's transfer upon her eligibility was clearly pointed out on the Transfer Waiver Form completed upon the enrollment of petitioner at Glen Rock High School. (See Transfer Waiver Form attached to Letter of Appeal.)

In response to petitioner's father's allegation that the NJSIAA Eligibility Appeals Committee did not accord a fair and impartial hearing by denying the presentation of all evidence, respondent contends that it carefully reviewed all documents presented and that the documents which petitioner's father contends were not allowed to be presented at the hearing because of time constraints were available for review by all members of the Appeals Committee. Respondent further denies petitioner's father's allegation of rudeness and partiality, contending that any interruption of petitioner's parents was consistent with the role of a hearing officer.

The Commissioner has carefully reviewed the arguments of the parties as well as the transcript of the proceedings before the Eligibility Appeals Committee. Based upon the aforesaid review, the Commissioner finds and determines that petitioner has not borne her burden of demonstrating that the actions of the NJSIAA in denying her the waiver of the eight semester rule was either arbitrary or in conflict with any rule or bylaw of the NJSIAA. In so concluding, the Commissioner notes that the decision of D.G.'s parents to have her repeat her freshman year was a voluntary determination. Petitioner knew, or should have known, from the notation on the Transfer Waiver Form that her eligibility would be limited to the eight semesters dating from her entrance to school at Paramus Catholic. Even assuming that petitioner was unaware that the decision for D.G. to repeat the freshman year would not extend her eligibility to participate in athletics in her senior year, that circumstance would not alter the fact that petitioner did have opportunity to participate in eight semesters of athletics even though she chose not to participate in her two freshman semesters. Petitioner has therefore neither demonstrated a denial of opportunity nor shown that the repeating of her freshman year was for reasons of illness, injury or some other factor beyond her control.

Under the circumstances, the Commissioner agrees with respondent that the long line of case law in matters relating to athletic eligibility and determinations of the NJSIAA stands for the proposition that the actions of that organization enjoy a presumption of correctness provided that it acts within the bounds of its rules and regulations and applies these regulations in a manner which is not arbitrary or capricious. R.S.R. et al. v. NJSIAA, decided November 13, 1986

In regard to the allegations against the hearing officer, the Commissioner's review of the entire transcript fails to reveal the alleged rudeness contended by petitioner's father, nor does he find any evidence of failure to have provided a full and fair hearing.

In view of the foregoing, the Commissioner affirms the decision of the NJSIAA Eligibility Appeals Committee denying the waiver of the eight semester rule for the reasons set forth above.

COMMISSIONER OF EDUCATION

FEBRUARY 22, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5581-85
AGENCY DKT. NO. 307-8/85

RAYMOND ARTHUR ABBOTT, a minor, by his guardian ad litem, Frances Abbott; **ARLENE FIGUEROA, FRANCES FIGUEROA, HECTOR FIGUEROA, ORLANDO FIGUEROA**, and **VIVIAN FIGUEROA**, minors, by their guardian ad litem, Blanca Figueroa; **MICHAEL HADLEY**, a minor, by his guardian ad litem, Lola Moore; **HENRY STEVENS, JR.**, a minor, by his guardian ad litem Henry Stevens, Sr.; **CAROLINE JAMES** and **JERMAINE JAMES**, minors, by their guardian ad litem, Mattie James; **DORIAN WAITERS**, and **KHUDAYJA WAITERS**, minors, by their guardian ad litem, Lynn Waiters; **CHRISTINA KNOWLES, DANIEL KNOWLES** and **GUY KNOWLES, JR.**, minors by their guardian ad litem, Guy Knowles, Sr.; **LIANA DIAZ**, a minor, by her guardian ad litem, Lucila Diaz; **AISHA HARGROVE** and **ZAKIA HARGROVE**, minors, by their guardian ad litem, Patricia Watson; and **LAMAR STEPHENS** and **LESLIE STEPHENS**, minors, by their guardian ad litem, Eddie Stephens,

Plaintiffs,

v.

FRED G. BURKE, Commissioner of Education; **EDWARD G. HOFGESANG**, New Jersey Director of Budget and Accounting; **CLIFFORD A. GOLDMAN**, New Jersey State Treasurer; and **NEW JERSEY STATE BOARD OF EDUCATION**,

Defendants.

Marilyn J. Morheuser, Esq., and **Michael Rubin**, Esq.,for plaintiffs (Education Law Center, Inc.)

David C. Long, Esq., member of the District of Columbia bar, admitted *pro hac vice* for plaintiffs. Attorney of Record: Marilyn J. Morheuser, Esq. (Education Law Center, Inc.)

Joyce D. Miller, Esq., member of the New Jersey bar, admitted *pro hac vice* for plaintiffs. Attorney of Record: Marilyn J. Morheuser, Esq. (Education Law Center, Inc.)

Ida Castro, Esq., Assistant Deputy Public Advocate, for plaintiffs (Alfrec Slocum, Public Advocate)

Clifford Gregory Stewart, Assistant Deputy Public Advocate, for plaintiffs (Alfred Slocum, Public Advocate)

Alfred E. Ramey Jr., Deputy Attorney General; **Philip Isaac**, Deputy Attorney General; and **David Powers**, Deputy Attorney General, for defendants (W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: May 27, 1988 Decided: August 24, 1988

BEFORE **STEVEN L. LEFELT**, ALJ:

Plaintiffs are predominately minority children attending public schools in Camden, East Orange, Irvington and Jersey City. They contend the State's plan for funding public school education [the Public School Education Act of 1975 (*L.*1975, c. 212 - *N.J.S.A.* 18A:7A-1 *et seq.*)] as applied to property poor, urban school districts violates the thorough and efficient (T & E) education clause of the State Constitution, *N.J. Const.* (1947) Art. VIII, Sec 4, para.1; the equal protection clause, *N.J.Const.* Art.I, paras. I and 5; and the Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.* Plaintiffs believe the State defendants have failed in their legal obligations because the funding law has caused unjustifiable, significant educational program disparities and resource inequities between property rich school districts serving

predominately white pupils and property poor school districts serving primarily minority school children.

The defendants, the State Commissioner of Education, the State Board of Education, the State Treasurer, and the State Director of Budget and Accounting, argue that the current public school system is T & E and that the monies already being expended on school districts are adequate to deliver a T & E education to all public school children in New Jersey. Furthermore, defendants assert that if there are some districts not offering a T & E education and if there are program and resource disparities, the causes are primarily local district mismanagement, illegalities and political interference, not the funding law. (While there is some confusion in the record concerning whether the parties should be denominated petitioners and respondents, I have opted for plaintiffs and defendants since the Supreme Court remanded this case with the pleadings intact.)

PROCEDURAL HISTORY

These issues are before the Office of Administrative Law because the New Jersey Supreme Court in *Abbott v. Burke,* 100 *N.J.* 269 (1985) remanded the matter to the OAL and requested this agency to conduct a thorough hearing to produce a complete and informed record containing determinations of any appropriate administrative issues as well as resolutions of factual matters material to the ultimate constitutional issues raised by the parties.

To place the present case in context, it is related to the *Robinson v. Cahill* court cases decided in the 1970's. The complete history of that litigation is referenced in *Abbott v. Burke* at 100 *N.J.* 280-283 (1985). In *Robinson v Cahill,* 62

N.J. 473 (1973) (later history omitted) (*Robinson I*), New Jersey's school financing law was declared unconstitutional. New legislation was subsequently enacted and in *Robinson v. Cahill,* 69 *N.J.* 449 (1976) (per curiam) (later history omitted) (Robinson V), the Public School Education Act of 1975 ("Chapter 212" - the Act involved in the present case) was held facially constitutional. However, the Supreme Court noted that the law would have to "pass muster" in the future as applied.

The case before me, *Abbott v. Burke*, is intended to test whether the 1975 Act is constitutional as applied. The case commenced with a complaint filed February 5,1981 in Superior Court. Defendants' motion to dismiss on the grounds that plaintiffs failed to exhaust administrative remedies was granted by the trial court, but the Appellate Division reversed. *Abbott v. Burke*, 195 *N.J. Super.* 59 (App. Div. 1984). The Supreme Court at that time granted defendants' petition for certification. 97 *N.J.* 669 (1984). In its decision, the Supreme Court held the case should be considered first by the appropriate administrative agency and remanded it to the Commissioner of Education. However, the Court directed the Commissioner to transmit the case for hearing by the Office of Administrative Law rather than hear the case himself as agency head. *Abbott*, 100 *N.J.* at 302.

The case was transmitted to the OAL on September 3, 1985. The Supreme Court had directed that the proceedings be expedited. 100 *N.J.* at 303. Nonetheless, because of numerous delays, more than a year passed from the time *Abbott* was transmitted to the OAL until the first day of the hearing. In part this was caused by several major controversies, including defendants' joinder motion and both parties' resistance to a suggested trial management technique, which I called "segmentation." Another element contributing to the delay was the fact

that, even though the case had been initiated in 1981 and had already been through the courts, discovery was far from complete.

The first prehearing conference in the matter was conducted on October 8, 1985. At that time, in addition to discussing a timetable and structure for the upcoming hearing, I heard oral argument on defendants' motion to join as parties the school districts of Camden, East Orange, Irvington and Jersey City. In a prehearing order dated October 17, 1985 I denied the joinder motion. In addition, a hearing date of February 24, 1986 was set and I proposed in the prehearing order the "segmentation" trial management technique. Under this plan, evidence would be presented by both parties in a series of segments addressing in sequence each of the pertinent issues, rather than having plaintiffs' entire case followed by defendants' evidence. In this way I hoped to focus on the relevant issues in what would obviously be a very complex record. The segments were organized around the issues enumerated by the Supreme Court. *Abbott*, 100 *N.J.* at 296. Both parties expressed reservations about this innovation and, therefore, resolution of the proposal was temporarily continued.

Denial of defendants' joinder motion was appealed interlocutorily to the Commissioner of Education. On November 22, 1985 the Commissioner issued a decision which called for the parties to submit further argument and specification to me on the issue. However, on January 14, 1986, when efforts to voluntarily resolve the joinder issue appeared to be unproductive, defendants withdrew the motion for joinder.

Numerous telephone and in-person conferences continued to be held throughout the prehearing stage of the case, many involving difficulty meeting

discovery deadlines. Completion of discovery continued to be a major problem throughout the prehearing phase of this case. In addition, during the prehearing phase, over the objection of plaintiffs, the defendants conducted State Board hearings to assess the budgeting practices of the four districts in which the plaintiff children reside. Plaintiffs claimed this was an "end run" around my refusal to allow depositions and asked me to intervene, but I ruled that I did not have jurisdiction over the matter.

During a January 10 conference it was decided to move the starting date for the evidentiary hearing to March 24. During a January 21 conference the parties agreed on various procedures related to the use of expert witnesses. In addition, we again discussed the "segmentation" plan that had been proposed as well as amendments to the plan that had been suggested by the parties. Defendants objected in writing on January 29 to the use of segmentation. On March 12, a prehearing conference was held in Newark, at which time I ruled that the hearing would be segmented and outlined for the parties the final form of the segmentation plan. I also denied an oral motion by defendants for a four-month delay.

On March 19, defendants requested interlocutory review of the March 12 rulings and also asked the Commissioner of Education to stay the proceedings. The stay was granted on March 24, the day the hearing had been scheduled to begin.

The Commissioner's decision on the interlocutory review was issued on April 8. Defendants' motion to set aside segmentation was granted by the Commissioner, thereby requiring that I conduct the proceeding in the more traditional adversarial trial format. The motion to delay the hearing for four

months was denied. The Commissioner also ruled that the hearing was to commence during the first week of May.

Following the Commissioner's ruling, several more prehearing conferences were held. These resulted, among other things, in an agreement to begin the hearing on September 22, since both parties said they were unable to begin sooner. (This necessitated a petition for relief from that portion of the Commissioner's interlocutory ruling which required the hearing to begin on the first week of May. The parties filed a joint petition on April 28 and it was granted on May 2.) A prehearing order, issued on May 19, established a final discovery schedule that would enable the parties to begin hearings on September 22.

A telephone conference was held on August 15 at the request of plaintiffs in order to clarify some procedural issues. At that time, both parties said the discovery schedule was being complied with and that they anticipated no problem with the starting date. However, I requested a one-week delay because of a conflicting professional commitment. The parties agreed to start the hearing on September 29.

The first witness testified on September 29, 1986. The final witness was heard on June 5, 1987. The plaintiffs' case was heard in Newark and the defendants' in Trenton, with a short break of approximately one month in between. Except for this break and a few delays for illness, holidays and bad weather, the hearing continued four days per week until all witnesses were heard. There were a total of 95 hearing days, including two days of post-hearing conferences on July 13 and August 25, 1987. The total number of witnesses was 99 - 50 for plaintiffs and 49 for defendants. (See Witness List in appendix.) A total of 745 exhibits were

admitted. (See Exhibit List in appendix.) These exhibits range from one page to several hundred pages and fill approximately seven file drawers. I have highlighted those documents on the Exhibit List that were referenced by the parties in submitting proposed findings.

A schedule for submission of proposed findings, replies and legal briefs was established on August 25, 1987. Two extensions of the final due date were granted. The first was requested by both counsel because they had underestimated the time needed to complete the submissions. The second was requested by one of the attorneys because of health problems.

Approximately 1,500 pages of proposed factual findings were submitted by the parties (on February 10, 1988 by defendants and February 17, 1988 by plaintiffs). The parties submitted approximately 400 pages of legal briefs on March 11, 1988 and plaintiffs replied to defendants' proposed factual findings on April 4, 1988. Defendants replied to plaintiffs' proposed findings and the April 4 reply on April 22, 1988. Defendants' reply consisted of 266 pages with an appendix of approximately 200 pages, in which they recalculated some of the proofs already in evidence and provoked the final controversy of this extremely contentious matter. Plaintiffs urged that I give no weight to the defendants' arguments relating to this appendix, which they called "unvalidated proofs or pseudo-analysis." (See below in Part II where this argument is considered.)

The record closed on May 27, 1988 when I received plaintiffs' rebuttal. The Initial Decision was due on July 11 but I required one extension until August 25, 1988.

THIS TRIBUNAL'S TASK

I believe that it is important to indicate initially how I have construed my task in this litigation. It is not my job to resolve all of the pressing educational problems confronting urban education. While such a prodigious task would be tempting, I cannot and should not do so. Even though this case was presented to an administrative forum and sometimes seemed to be almost a legislative hearing, it was conducted in an adversarial mode. Not only were numerous witnesses presented and vigorously cross-examined, but an extraordinary documentary record was developed by the parties. In sheer volume it would be hard to find a more extensive array of documentary proofs. Nevertheless, it is my task to resolve, on the basis of the record presented, only the issues remanded by the Supreme Court and litigated by the parties. I am bound by the record developed.

My most important function, as recognized by the Supreme Court, is, therefore, to resolve the factual disputes focused upon by the parties. Based on the record developed, I must determine how Chapter 212 has actually been implemented and whether plaintiffs proved their contentions to be more likely true than not by a preponderance of the believable evidence. *In re Darcy*, 114 *N.J. Super.* 454 (App. Div. 1971).

Because resolving the factual disputes is most important, I have divided this initial decision into five parts, with only the last relating to the parties' legal contentions. (For the reader's convenience I have included a Table of Contents in the Appendix and a Summary of the Opinion immediately following this section.) The first part of this decision involves a basic description of the plaintiffs, their

school districts and the general operation of the funding system; the second part considers the evidence on program and resource disparities; the third part deals with the prime dispute between the parties, which is the cause of any program and resource disparities; the fourth part includes facilities problems, resolves the parties' contentions on local control and considers the reform potential contained within the current system; and finally, the fifth part deals with educational research results, the definition of T & E and other legal issues.

Before proceeding to a discussion of the evidence and the factual findings, I will first explain the decisional method I employed. This case was most aggressively defended. The State defendants refused to concede or agree with a single factual submission urged by plaintiffs. (See p. 9, April 22, 1988 cover letter to Defendants' Reply to Plaintiffs' Proposed Findings.) No stipulations were agreed to and the defense contested all of plaintiffs' positions through the presentation of testimony, vigorous cross-examination or argument. This did not make my task easy.

Nevertheless, after carefully evaluating the demeanor of all witnesses and comparing their testimony with the documentary evidence, I have concluded that almost all of the approximately 100 witnesses who testifed were credible, especially those highly skilled, technical witnesses who testified about their various research conclusions. There were only a few instances where I believed testimony lacked credibility. Because of my perception of widespread credibility, I resolved most disagreements and conflicts in the testimony by attempting to discern the particular perception or difference in approach to the problem which I believed must have caused any apparent conflicts between credible witnesses. Unless otherwise indicated, this method, which required harmonizing various testimonial

observations, was used extensively to decide the complicated and important issues raised by the parties.

In all of the following findings, therefore, I will note whenever I am dealing with testimony or documents on which conflicting evidence and argument was presented. In these instances, I will generally explain how I have harmonized the testimony or otherwise handled the dispute to justify whatever I have found as fact and will signify this by specifically indicating that I so **"FIND."**

If no explicit designation of a finding appears, I have concluded that the testimony or documentary evidence being discussed was credible and sufficient for me to rely upon. Generally, evidence in this category will not contain any conflicting evidence in the record, though the testimony may have been vigorously cross-examined and various arguments or interpretations relating to the meaning of the evidence may have been urged. All of the following discussion which falls within this category is therefore **FOUND** as **FACT** and, hopefully, my conclusions with regard to the cross-examination, arguments or interpretations asserted will be clear from the context of the discussion.

SUMMARY OF OPINION

Defendants urged me to accept the testimony of their experts, a number of whom presented observations and suggestions for resolving the ultimate issues raised by plaintiffs. As I have explained, my problem with this approach was my belief that almost all of the witnesses were credible and that therefore harmonization was needed to resolve most of the factual disputes. I could not find for the defendants on many of the disputed questions without disregarding much

of plaintiffs' evidence, which I believed to be very persuasive. Given all of the evidence presented, I believe that on several of the critical issues the defense argues for a system as it ought to be and not what it actually is. This observation is particularly true with regard to the defense's major contention that local boards of education in poor urban districts under the existing system can raise all the funds they need through taxation. (See discussion in Part III.)

Based upon all of the evidence presented, for the reasons to be disclosed following this summary, I have determined that plaintiffs proved there are unmet educational needs in poor urban districts and vast program and expenditure disparities between property rich suburban and property poor urban school districts. The expenditure disparities are in some cases greater now than before Chapter 212 was enacted. I have concluded that the funding law contains systemic defects which contribute to continued inequity. I have also determined that there are substantial statewide school facility needs which I do not believe can be effectively handled under the present system. In addition, although the Supreme Court, when it found Chapter 212 facially constitutional, assumed that the law would be fully funded, this record demonstrates that beginning with the 1979-80 school year, equalization aid has never been funded at the level the Court anticipated. Additionally, transportation aid at the time of the Supreme Court decision had been funded at 100% of the prior year's approved transportation costs. In 1978, effective for the 1979-80 school year, reimbursement was cut to 90% and has never again been funded at the 100% level.

As defendants contend, there is political interference and intrusion, mismanagement and illegality in some urban school districts. Nevertheless, I have decided that property poor districts are unable to meet fully their students needs

not because of these failings, but because of the operation and implementation of the Guaranteed Tax Base financing system and the political accommodation or fiscal pressure which is inherent in school districts, especially Type I districts, sharing property poor tax bases with municipalities. I do not believe that poor urban districts, even with better management practices and the expulsion of politics, could raise sufficient funds and direct adequate administrative energies to address all of the disparities and unmet needs that I believe must be addressed under our Constitution.

I also believe that T & E does not mean exactly what either the plaintiffs or defendants contend. I have concluded that the Supreme Court's definition of T & E does not exclusively require equalizing inputs or expenditures and, on the other hand, is not limited to assessing whether a district has been certified by the State. I do not believe that our Supreme Court has interpreted the Constitution to require only these limited goals.

To be T & E our educational system must enable students to obtain from their education whatever they are capable of and willing to work for, from an entry level job to proper preparation for college. The State must ensure that educational needs are addressed comparably through educational programs designed so that all successful students can compete and function politically, economically and socially in our democratic society.

The plaintiffs proved that substantial numbers of students in our urban centers are not receiving an education which is substantially equivalent to that received by pupils in wealthy suburban school districts. Thus, the system is not T & E

because opportunity is determined by socioeconomic status and geographic location.

I have also concluded that an equal protection violation is present because the defendants' local control, associational interests and cost efficiency justifications are outweighed by the educational rights of children residing in poor urban districts. But, I have determined that the defendants' actions do not violate the Law Against Discrimination because they were motivated by cost efficiency and not race.

Finally, I have recommended that various legislative changes are necessary to conform the system to the constitutional dictates. Some of the available options are considered in Part V of this decision.

To summarize, I believe that the Public School Education Act of 1975, as it is being applied, can be found by a court to violate the New Jersey Constitution.

PART ONE

This part establishes the unique educational challenges presented by plaintiffs and other pupils residing, generally, in property poor urban school districts and explains some of the general characteristics of the school districts plaintiffs attend. It also seeks to explain Chapter 212's budgeting process, cap limits and the various aid components of the school financing system.

The Cities In Which Plaintiffs Attend School

Plaintiffs attend the public schools in Camden, East Orange, Jersey City and Irvington, which can be described as poor urban areas.

Camden

The poverty level in Camden was three times the State average in 1980 when 23% of its families had less than $5,000 income per year. In 1980 Camden ranked first in poverty for cities in the United States with between 25,000 and 100,000 population. The median family income in Camden was $10,607 with per capita income of $3,966 in 1980. Thirty-four percent of its population as of October 1985 received AFDC; more than 90 % of these welfare recipients were black or Hispanic. In Camden, 13.5% of its labor force was unemployed in 1984 (State average, 6.2%). According to the 1980 census, 31.5% of New Jersey residents live in rental housing, but in Camden the number is 43%.

Before World War II, Camden had been an economic hub for South Jersey with one shipyard employing 35,000 persons. Today there are only 35,000 jobs in all of Camden as most businesses have moved to the suburbs. Most restaurants left in Camden are fast food chains. There is one major supermarket, no movie and no theater. Housing has deteriorated significantly. It is difficult to find a block in Camden without a vacant or abandoned property. The City has boarded up and demolished thousands of homes. Of 2,250 public housing units, nearly 500 of these units have been vandalized, boarded up and abandoned. At the time Mayor Primas testified at this hearing, he said there was a three-year waiting list for public housing and the City had recently started a major program to rehabilitate the abandoned units.

Camden's population has also declined. In 1950, it had 125,000 people. By 1980, the population was 84,910. According to the 1980 census, about 50% of the population is black, 30% white and 20% Hispanic. In Camden, 42% of the population is under 18 years old and 10% is over 65 years of age.

Camden's infrastructure is severely deteriorating. The majority of its sewers are brick and close to 100 years old. Many blocks are caving in from sewer deteriorations and its streets contain numerous potholes. It would cost hundreds of millions of dollars to replace Camden's sewers. Because the city has repaved rather than rebuilt, there are some blocks with no curbs.

Camden's tax rate in 1987 was $13.54 per $100 of assessed value. This rate includes $1.85 for schools, $1.15 for the county, $3.63 for the municipality. The city has a 15% rate of delinquent tax collection. Camden's taxes are significantly

higher than surrounding communities. Some of the surrounding area tax rates include Cherry Hill, $5.41, Gloucester City, $4.08; Haddon Township, $4.25; Pennsauken, $4.53. This causes some Camden citizens on the same block in the same type home to pay substantially more in taxes than their neighbors, who live beyond the city limits.

Camden's total budget is $58 million with $18 million raised locally and the balance consisting of federal and State aid. Camden's entire property wealth is $253 million. The last casino built in Atlantic City cost more than the value of all Camden's property wealth.

East Orange

In 1980, East Orange's 77,690 residents lived within the city's 3.9 square miles. In 1980 about 14% of East Orange's families had income levels less than $5,000. At this time, the State average was 5.9%. The number of people in East Orange making less than $10,000 annually is virtually the same as the number of persons making more than $25,000 annually. In fact, 28.1% of East Orange residents earn more than the State median income. The percentage of families earning between $15,000 and $20,000 is the same for both East Orange and the entire State. However, East Orange has a higher percentage in all lower brackets and a lower percentage in all higher brackets.

In East Orange, 16.3% of its population received AFDC in 1985 with almost 95% of these welfare aid recipients being black. In 1984, East Orange had 8.3% of its work force unemployed. Two thirds of East Orange citizens live in rental

homes, as opposed to one third statewide. Almost 85 % of East Orange citizens are black or Hispanic with a median income of $16,296, according to the 1980 census.

In the 1960's, East Orange was a small community with many more middle class black and white families. Many of the richer people left or removed their children from the schools, leaving the schools in East Orange as the repository for the poor. The socioeconomic status of public school children is lower than that of the community as a whole.

East Orange has seen an increase in single parent households. The largely rental population also moves frequently. In the 60's, it was not uncommon to see families where several generations of children had gone to the same schools. That is not the case any longer as student mobility is now a significant problem. Many more families are also sharing homes. The large 15-17 room homes house more than one family. East Orange has also experienced a decline in ratables. One witness said that much of the town looks like Germany after WW II.

Jersey City

As of 1980, Jersey City had 223,523 residents living within 16 square miles with two thirds of its citizens living in rental houses. Jersey City ranked 17th in the nation in 1980 for cities in excess of 100,000 with persons living below the poverty level. In 1969, Jersey City had ranked 82 on this list. As of 1980, about 21% of its residents lived in poverty. Over 14% of Jersey City families had income levels less than $5,000 (State average 5.9%). About 27% of Jersey City's residents earn more than the State median income. Statewide, 11.9% of the population earns between $10,000 and $15,000 while in Jersey City 15.1% of its population falls within this

bracket. As of 1985, almost 14% of Jersey City's population received AFDC with 85.2% of this population being black or Hispanic. Jersey City in 1984 had almost 12% of its work force unemployed (State average, 6.2%).

According to Exhibit P-136 (Jersey City's 1983 Master Plan), "The main problem of Jersey City lies not in the lack of space but in the lack of the quality of housing. Much of the available occupied housing is in just as deplorable condition as those abandoned."

Irvington

Even though New Jersey is the most densely populated state in the nation (our 7.36 million residents live within an area of 7,521 square miles), population density is most extreme in the urban areas. The 61,000 residents of Irvington, for example, in 1980 lived within an area of slightly more than three miles. It is a completely developed area with no vacant lots and is bordered by populous municipalities like Newark, East Orange, Maplewood and Union. The town has many multiple dwellings. With approximately 22,000 persons per square mile, one witness claimed that Irvington was more densely populated than New Delhi, India.

In the late 1960's after the Newark riots Irvington's population shifted. Large numbers of black families moved into Irvington and the white families moved out. Its schools went from all white to 96% minority. The black migration into Irvington was caused in part by the 1967 Newark riots, but also by the construction

of Interstate highway #78 and the dislocation of blacks from poor areas razed for urban renewal. In 1980, 46% of Irvington's population was black or Hispanic.

In 1980, Irvington had slightly more than 11% of its families with income less than $5,000 (State average 5.9%). Another 17.7 % of Irvington's population earns between $10,000 and $15,000 as compared with the statewide average of 11.9%. The median income was $17,382. As of 1985, 12% of Irvington's population was reciving AFDC; 89% of them were black or Hispanic. The town has a population of 20-30% senior citizens and an unemployment rate of over 7%. In 1980, 14.7% of Irvington residents lived in poverty.

Other Urban Areas

The cities in which plaintiffs reside are not the only poor urban areas in the State. New Jersey is the third ranking state in per capita income and yet some of New Jersey's cities are among the poorest in the nation. In 1982 the Brookings Institute identified Camden, Newark, Paterson and Trenton as four of the nation's eleven most distressed cities. In 1980, though less than 14% of our total population lived in Camden, East Orange, Irvington, Jersey City, Newark, Paterson and Trenton, 38.1% of the State's poor lived in these seven cities. Only 11.7% of New Jersey families that have related children are poor. For these seven cities, however, the proportion of poor families with related children ranges from 44% in Camden to 19% in Irvington.

Much of the demographic testimony relating to the seven cities of Camden, East Orange, Jersey City, Newark, Paterson, Irvington and Trenton comes from plaintiffs' witness Richard Roper, Director of the Program for New Jersey

Affairs at Princeton University's Woodrow Wilson School of Public and International Affairs since 1980. Defendants assert that Mr. Roper's testimony should be competely discredited because he lacks sufficient credentials as a researcher and scholar in the areas of demographics, economics, unemployment, education, health and housing. He is not a Ph.D but has only a master's degree in Public Affairs and he has not published in academic journals. The defense also contends that Mr. Roper is an advocate and that the seven cities were selected by plaintiffs and not Mr. Roper.

Mr. Roper's conclusions were based primarily on information extracted from U.S. census and State data. I believe that he has sufficient expertise and special knowledge as Director of the Program for New Jersey Affairs and lecturer in Public and International Affairs at Princeton University to bring these data to our attention, especially because much of his supportive statistics are inherently reliable. *N.J.A.C.* 1:1-15.8(c) and 15.9(b). Because of his limited demographic experience, however, I chose not to draw predictive conclusions as to future demographic trends in our cities based exclusively on his testimony.

In addition, if the defense believed that Mr. Roper's statistics were actually wrong, then, even though they do not have the ultimate burden of persuasion, they should have presented another demographer to challenge Mr. Roper's conclusions. By failing to present contrary evidence, the defense risked my concluding that Mr. Roper's testimony was credible, which is what I have done. I do not believe that the defendants' cross-examination undercut many of Mr. Roper's conclusions. At best, the cross-examination sometimes succeeded in balancing some of Mr. Roper's observations. For example, Mr. Roper testified that approximately 36% of New Jersey Hispanics reside in the seven cities. The defense pointed out that therefore 64% of New Jersey Hispanics do not reside in the seven cities. They also

demonstrated, for example, that Irvington, Jersey City, Paterson and Trenton contain a large number of poor white individuals, not only blacks and Hispanics. I also believe that much of what Mr. Roper said is confirmed by other witnesses and by documentary evidence in this record. In my opinion, also, much of what Mr. Roper testified to was judicially noticeable. I therefore reject the defense contentions and consider Mr. Roper's testimony in evaluating the issues presented by this case.

East Orange and Newark were two of seven major United States cities to achieve black population majorities by 1970. By 1980, Camden had achieved a black population majority and the combination of the substantial black population and the growing Hispanic population in Paterson and Trenton redefined these two cities as majority non-white. In Jersey City and Irvington, the non-white population approached 50% in the 1980 census.

About half of the State's black population is concentrated in these seven cities. Considering that 49% of New Jersey's black population is dispersed among the remaining 500 plus municipalities, this leads me to **FIND** that Mr. Roper was accurate when he concluded that large numbers of New Jersey's black and Hispanic residents are concentrated in the seven cities of Camden, East Orange, Irvington, Jersey City, Newark, Paterson and Trenton.

While the seven cities represent 52.2% of New Jersey's total black population, these same cities account for 65.5% of the black population living in poverty. Not all of these cities have black populations living in poverty in percentages above the State average. For example, East Orange has a black population in poverty of 21.3% and Irvington has a black population in poverty of

18.1%. Both of these percentages are below the State average for blacks of 26%. Additionally, these cities contain large numbers of poor whites. Of the entire poor population, for example, 36.25% in Irvington and 28.6% in Jersey City are white.

Similarly, while the seven cities represent 35.5% of the State's total Hispanic population, these seven cities account for 51.1% of New Jersey's Hispanic population living in poverty. Defendants admitted in their answer that "Plaintiff children are predominantly minority and poor. They live in urban centers where unemployment is high, and many families are on welfare." (Answer filed in 1981, p. 3, para. 2.)

Thus, I FIND that the majority of these cities' inhabitants are non-white. I also FIND that there are significant numbers of poor blacks, Hispanics and whites in these cities.

A total of 10.78% of the work force in the seven cities is unemployed in contrast to the State's unemployment rate of 6.2%. Unemployment rates in New Jersey for minority groups are high. In 1984, the unemployment rate for blacks in New Jersey was 12.8%, more than twice the 5.4% unemployment rate for whites. In 1984, the Hispanic unemployment rate was 12.1%, also more than twice the white unemployment rate. Furthermore, only 24% of black teenagers had jobs in 1985 as compared to 50% of white teenagers. Thirty-three percent of Hispanic teenagers had jobs in 1985. In 1981, New Jersey teenage unemployment rates were 20.1% among whites, 55.1% among black teenagers and 29.8% among Hispanic teenagers.

According to the 1986 New Jersey Department of Health's ranking of areas with the most pressing health needs, Camden, East Orange, Irvington, Jersey City, Newark, Paterson and Trenton were among the top 12 neediest areas in the State. Trenton ranked second most in need; Newark, third; Camden fourth; Jersey City, fifth, and East Orange, sixth. Atlantic City ranked first. Irvington was twelfth.

Urban School Districts

The Department of Education lists 56 school districts as urban. These districts include 51 designated by the Department of Community Affairs as urban aid districts and five districts added by the Department of Education in 1984.

The Department of Education also uses census data to group school districts by the socioeconomic status (SES) of the population comprising the school district. They range from District Factor Group (DFG) A, the lowest SES, to DFG J, the highest SES. Seven characteristics are measured to develop the DFG rankings: average income; educational level; occupational level; percent of families below the poverty level; percent unemployed; density, and urban percentage. All districts are ranked and divided into groups of about 50 districts each; the number of districts within each DFG is therefore roughly equal, but the number of pupils in each group is not. DFG A in 1985 contained the largest pupil enrollment of approximately 248,000 pupils. Some of the school districts listed in DFG A include Asbury Park, Atlantic City, Bridgeton, Camden, East Orange, Elizabeth, Hoboken, Jersey City, Newark, Paterson, Perth Amboy, Trenton, Union City and West New York. Irvington is in DFG B along with, for example, Burlington, Long Branch, Millville, New Brunswick, Orange, and Vineland.

Of the 56 urban districts, 29 of them are in DFG A and B. But of the approximately 411,000 children enrolled in the 56 urban districts, 68% of the children (approximately 279,000) attend school in the 29 DFG A and B districts. Of the approximately 261,000 minority children enrolled in the 56 urban districts, 84% of these children (220,000) attend schoool in DFG A and B districts. Of the approximately 233,000 minority children enrolled in DFG A and B districts, 94% of them attend urban schools.

When the State's pupils are divided by per pupil/property wealth, there is a much higher concentration of minority enrollments in the lowest wealth groups than in the rest of the State. In 1986-87, there were 159,584 students in the public schools of Camden, East Orange, Irvington, Jersey City, Newark, Paterson and Trenton. Of these students, 145,213 were minorities.

Minority enrollment in urban poor districts is also increasing. As an example, since 1979-80, the percentage of minority children attending school in all four plaintiffs' districts has increased. In Irvington, there was an increase of close to 20%. Black and Hispanic enrollment percentages during 1979-80 and 1986-87, respectively, for each of the four districts are: Camden, 91.4% and 94.8%; East Orange, 99.4% and 99.5%; Irvington 72.7% and 91.1%; and Jersey City 75.9% and 77.1%.

Plaintiff witness Dr. Wise, the Director of the Center for the Study of the Teaching Profession within the Rand Corporation, testified that black students will continue to predominate in urban schools into 1990. Defense witness Dr. Bloom, Assistant Commissioner of the Division of General Academic Education, New Jersey

Department of Education, agreed that the changing demography of new students arriving in schools is accelerating the need to change. According to Dr. Bloom, educators have to deliver educational programs to increasing numbers of poor and minority children.

The record shows that large numbers of children attending school in urban districts are minority students. Using the figures from defendants' reply, there were in 1984-85, 310,828 blacks and Hispanics in New Jersey schools. Of these, 233,139 (or 75% of all blacks and Hispanics in the schools) are in 50%-plus minority districts and most of these districts are urban. Only 36, or 6.5%, of the 557 districts listed by defendants are 50%-plus minority enrollments. These 36 districts educate 40,447 or 5.3% of the 768,607 white students in New Jersey public schools. Thus, 6.5% of the districts educate three-quarters of all black and Hispanic children, but only 5.3% of the white children. It is also clear that the 50%-plus minority districts have very large concentrations of blacks and Hispanics, while 50%-plus non-minority districts have very few. There are 149,906 black children (73%) in 50%-plus minority districts out of a total of 205,308 statewide. There are 81,322 Hispanic children (77.1%) in 50%-plus minority districts out of a total of 105,520 statewide. There are 213,618 blacks and Hispanics in 70%-plus minority districts, or over two thirds (68.7%) of the statewide total. These 25 districts (4.5% of the total) educate only 3.8% of the whites (29,028). The remaining 481 (70%-plus non-minority) districts educate 87.2% of the white students in the State, and only 14.2% of the blacks and Hispanics.

Indeed, the term "urban schools" has become a euphemism for minority schools. In the late 60's and early 70's urban districts suffered riots and "white flight." The white flight from the central cities resulted in large concentrations of

black and Hispanic residents in metropolitan areas. Even when whites stayed in the cities, the record indicates that many send their children to private or parochial schools, rather than public schools. Thus, the urban public school population often contains a higher minority percentage than is present in the surrounding municipality.

The four districts from which plaintiff children come contain about 6% of the State's pupils. Some of plaintiffs' proofs consisted of comparisons between these districts and proper[illegible] rich districts. The defense questions the appropriateness of these comparisons. They argue that the racial composition of districts in DFG B, for example, is not like those in DFG A. However, in 1984-85, District Factor Groups A and B contained 67.4% minority enrollment while District Factor Groups H, I and J contained 10% minorities. District Factor Group A had an 80% minority student enrollment.

The defense further argues that comparing DFG A districts to DFG I and J totally ignores a vast majority of pupils in the State: 548,061 pupils (about 49% of the pupils in the State) in DFG's B through H. A comparison of some 22% of the pupils in the State (DFG A) with some 17% of the pupils in the State (DFG's I and J) is, according to defendants, a comparison of extremes. The defense also questions the appropriateness of comparing poor urban districts to 16 "incomparable," "exceptional" affluent high-spending districts and the 19 municipalities with which they are coterminus.

I FIND that such comparisons are not only appropriate but were expected by the Supreme Court. In *Abbott v. Burke*, 100 *N.J.* 269, 296 (1985), the Court stated: "[T]he thorough and efficient education issues call for proofs that, after

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." In order to judge the school system in a State as geographically small as ours, I believe that any district within the system should be examinable and comparable with any other. (See further findings on the relevance and validity of these comparisons in Part II and the meaning of T & E in Part V.)

The Educational Challenges Presented By Urban School Children

Some of the children to be educated in plaintiffs' districts and other urban districts present enormous problems for educators. Many poor children start school with an approximately two-year disadvantage compared to many suburban youngsters. This two-year disadvantage often increases when urban students move through the educational system without receiving special attention. Poor children often do not receive the same verbal stimulation as children in middle class homes. They are not exposed to things like books and blocks, essential for reading readiness. They are often from single-parent households, headed by a mother who is poorly educated. They are exposed to more stress, from street crime, overcrowding and financial problems. Even the noise level of the urban environment may affect reading and language skills, according to one witness. Nutrition and health care are also likely to be deficient.

The record is replete with examples of the educational challenge presented by these students. Camden, East Orange, Irvington, Jersey City, Newark, Paterson and Trenton, for example, have more students, more schools, more minorities and more bilingual students (71% of bilingual students attend schools in

DFG A and B) than most other districts. Jersey City, as the most dramatic example, had in 1983-84 over 10,800 students speaking native languages. Of this group, 2,856 had limited English proficiency and the district was required by law to provide them with bilingual/English as a Second Language (ESL) education programs. The Jersey City students speak Akan, Arabic, Bengali, Cantonese, Chinese, Czech, Farsi, French, Greek, Dujarti, Guyana, Hindi, Hungarian, Italian, Korean, Laotian, Polish, Portugese, Punjadi, Estonian, Russian, Spanish, Swahili, Togoloz, Thai, Urdu, Vietnamese, Slovenian and Yugoslav. In the property rich school district of South Orange/Maplewood, in contrast, there are 33 bilingual students, mostly Spanish speaking. Additionally, districts in DFG's A and B contain numerous students in need of compensatory education, which districts are required by law to provide. About 60% of the statewide Minimum Basic Skills (MBS) test failures were in DFG A and B districts.

When the State switched from the MBS to the High School Proficiency Test (HSPT), there were again many more failures in urban areas. For example, the passing State average reading score on the HSPT was 80; Irvington's mean was 63. With mathematics, the State passing average was over 64 while Irvington's mean was 41. Suburban districts' students scored 20 to 25 points higher than urban districts. In 1986, only 17.5% of Camden's 9th graders and 12.5% of Irvington's passed all three parts of the HSPT. The children who do not pass must be provided with compensatory education.

In 1985, Camden had 53.09% of its 19,000 students enrolled in compensatory education. East Orange, in 1985, had enrolled in compensatory education 41.37% of its 11,500 students. In Irvington, 30.10% of its 8,900 students were served in compensatory education. Finally, in Jersey City, 45.21% of its 34,000

students were similarly served in a compensatory education program. These percentages are overwhelming compared to affluent suburban schools. For example, in the same year, Princeton had 6.44% of its student population in compensatory education while Moorestown had 3.98%, Millburn 3.78% and Paramus 6.24%.

The number of compensatory education students presents significant scheduling and space problems for the districts involved. For example, Jersey City's 45% failure for 3rd grade test takers amounts to 800 students. In Princeton, its 10% math failure in the 3rd grade amounts to 13 students. In Montclair, its 16% failure amounts to 46 students. Jersey City needs more than 50 classrooms to accommodate its compensatory education needs, while Montclair needs only three.

The Plaintiffs and Their Schools

The following findings describe some of the school facilities in plaintiffs' four cities and some of the personal living conditions that confront children in the plaintiffs' cities.

Camden

There are 32 schools in the Type II Camden School District educating approximately 19,000 students. (See discussion below explaining Type I and Type II districts.) There are two high schools, five middle schools, 20 elementary schools, and five special education or adult education schools. The high schools, which serve a total of about 3,500 students, are Camden High and Woodrow Wilson High. The

five middle schools are East Camden, Hatch, Morgan Village, Pyne Point and Veteran's Memorial.

The Pyne Point Middle School in Camden, for example, serves approximately 750 students in grades 6-8. Over 52% of the students are Hispanic with over 42% black and less than 1% white. The school is surrounded by the city's lowest socioeconomic group population. To get to the school the students must walk through an area where houses are burned out and boarded up and where there is a great deal of crime, including the hub of South Jersey's drug traffic, high auto theft and burglary. The district erected a fence to keep incorrigibles out on weekends. Before the fence was erected, after each weekend the principal noticed more grafitti, broken windows and urine around the buildings' entrance.

Because Camden is under a Department of Education desegregation order, 150 students must be bused to Pyne Point each day. The students live close to the school but their parents were concerned about their children walking through the neighborhoods surrounding this school and so the district buses the children. Most of the students' parents are on welfare and food stamps. All the students at Pyne Point receive free lunches. The school has an 85% average daily attendance. One witness said that absenteeism is higher at the beginning of each month because some students accompany their parents to get welfare checks.

Mr. Dover, principal of the Pyne Point Middle School, stated that building administrators in other districts talk of program development and student achievement. He has to be more concerned with custodial/janitorial matters and balancing various educational needs against one another to achieve basic needs.

The Washington Elementary School, a kindergarten (K)-5 three story building, enrolls about 500 students - 57% Hispanic, 31% black and 12% white. Two of Washington's classes must be housed in the cafeteria of Veterans' Memorial Middle School. In the Washington facility, there is only one lavatory for boys and one for girls, both on the first floor. In 1987, there were plans for additional lavatories. The second floor landing serves as classroom/office space for a supplemental reading teacher (working with groups of five or six children), a child study team and a school community coordinator. Because there is no teachers' lounge, teachers eat lunch in a kindergarten or a basic skills classroom.

Camden High School serves approximately 2,000 students in grades 9-12. Nearly 75% of the students are black with 25% Hispanic and a few whites and Asians. Prostitution and drugs surround the area with some teenage prostitution occurring in the school. The park across from the high school is a haven for drug pushers. There are six security people necessary to keep outsiders out of the school. There are teenage gangs, with children hanging around the schools during off hours. It is impossible to schedule nighttime activities at the school because no one wants to come into the neighborhood at night. The area contains many single family dwellings turned into multiple family dwellings.

Absenteeism averages 20-25% daily, notwithstanding various programs designed to increase attendance. Truant officers sweep the city, with students detained and their parents called. Because too many parents do not have phones, this strategy has been ineffective. Camden High's open lunch program, necessitated because the school cannot provide lunch space for 2,000 students, precipitates students cutting afternoon classes.

Students in urban schools seem to move periodically from one urban area to another. This mobility causes obvious instructional problems for the districts. Camden's mobility rate was 52% in 1986. It ranged from a low of 24% at Camden High School to a high of 91% at the Mickle Elementary School. Washington Elementary School's mobility rate was 83%. At Pyne Point, where the 1986 mobility rate was 46%, students transferred intra-district and some out of district to Puerto Rico, New York, Vineland and then back into the district. The other middle schools which send students to Camden High School have mobility rates of 49% (East Camden) and 41% (Morgan Village).

At Woodrow Wilson High School, like Camden High, the mobility rate is only 27%. As one witness explained, by the time the students get to high school they simply drop out.

Camden High School has applied for a National Education Association grant to remedy its dropout problems. The dropout rate at Woodrow Wilson High School was 55% in 1980 (9th to 12th grade) and 57.6% in 1985 (9th to graduation).

East Orange

The East Orange School District is Type I and has 16 schools educating approximately 11,500 students. In 1986-87, the district was 97.3% black, 2.3% Hispanic and .2% white. East Orange was ordered by the Department of Education to implement a desegregation plan. East Orange's schools include two 9-12 high schools (East Orange and Clifford Scott High); one junior high school (Vernon Davey); three middle schools (Costley, Healy and Sojourner Truth, all in the Hart

Complex); ten elementary schools and an adult education center. The Ashland Elementary (K-5) and Elmwood Elementary (K-5) each enroll about 800 students.

The Kentopp Primary School in East Orange, whose 500 children grades K-2 do not go home for lunch, has no cafeteria, no all-purpose room, no auditorium. The children eat lunch in at least two shifts in the first floor corridor. The school is also without a library or media center. Portables on the Kentopp playground are used for instructional purposes. These young children formerly played in a large East Orange city park. Now, however, it is too dangerous to use. A security person is stationed at the school full-time.

East Orange High School had more than 1,900 students as of September 30, 1985 - only 17 are non-black, a 99.89% black enrollment. There are 90 students, mostly Haitians and some Hispanics, in bilingual programs and 35 special education students in three self contained classrooms. The high school knows of 166 families earning below $11,000 and suspects there are more. One of plaintiffs' witnesses from East Orange testified that the home environments of the students range from nice comfortable one family homes with two parents to apartments where stairs have no railings, windows have no glass, doors are kicked in at the bottom, light bulbs are bare and there are many locks on the doors. The first impression one gets on entering such an apartment is of being crowded. For example, some of these apartment dwellings have two or three beds in the livingroom with a small kitchen.

One of plaintiffs' witnesses from East Orange explained that some students appear unable to get sufficient sleep because they live in overcrowded and

noisy environments. Some of the students appear undernourished and seem to suffer from the stress and strain of urban living.

East Orange High School, which houses 2,000 students, is surrounded by a parking lot behind retail stores, apartment houses, abandoned and burned out buildings. Upon arriving at school, students and teachers must walk through debris and trash that has blown out of garbage cans placed in front of stores the night before. Two areas are available for outside activities. One is a grassy plot, not big enough for a tennis court, and the other is a block wide by half a block long fenced in asphalt paved area which is also used for faculty parking. Because of insufficient space, the high school students cannot practice or play any outdoor sport at the school except baseball. They cannot do field events for track. Students practice and play tennis at a city park, some 14 or 15 blocks from the school. Girls play softball at another city park, more than 20 blocks from the school. The football field located at Martens Stadium does not have an official sized track; the track team practices in the hallways of the school after classes finish for the day. East Orange students play in an athletic conference and sometimes travel to Morris County where they see high schools with spreading campuses and playing fields, trees and bushes, benches where students sit during their lunch hour and spacious and clean parking lots.

Mobility is also a problem at East Orange. During a typical school year, some 400 East Orange High School students who enrolled in September leave and are replaced by 400 new students. It is not unusual for an East Orange high school student to have been in six high schools in four years.

The dropout rate between the 9th and 12th grades for East Orange High School was 61% in 1980. For both East Orange and Clifford Scott high schools,

dropout rates were 60% for the graduating class of 1982, 61% for the class of 1983, 59% for the class of 1984, 57% for the class of 1985 and 60% for the class of 1986.

Jersey City

In 1987, Jersey City's public school enrollment was 14.8% white, 44.2% black and 33% Hispanic, while blacks comprised only 27.7% of the city's total population. (Jersey City has a thriving parochial school system that enrolls many non-minority students.) The school district has 28 elementary schools (25 are K-8 and three are K-4) and five high schools: Academic, Ferris, Lincoln, Snyder and Dickinson. Jersey City is also subject to a desegregation order entered by the Department of Education.

In Jersey City through 1983-84, most of the elementary schools (K-8) had enrollments between 800 and 1,000 with only three schools (No.'s 16, 42 and 29) having fewer than 500 students.

In Jersey City, most high school students come from three large public housing projects. These projects have graffiti, little grass surrounding them, and much broken glass and debris all around. The elevator in one of the projects frequently does not function because urine in the elevator corroded the cables at the elevator's base. The Assistant Superintendent in charge of Jersey City's secondary schools since 1985 has witnessed eight children sleeping in one room and three or four families in a very small apartment.

When a Department of Education evaluator entered Lincoln High School, in connection with preparing evidence for the defense in this case, he testified that

he felt the tension and could see policemen in the building. When a loud noise startled a class he was observing, the students ducked under their desks.

Academic High School in Jersey City is located in a Ukranian Church where funerals are still conducted during school hours. These students are bused for physical education, science and a computer course to Jersey City College.

The dropout rate for three Jersey City high schools was: Lincoln 54% in 1980 (9th to 12th grade) and 55% in 1985 (9th to graduation); Dickinson, 40% in 1980 (9th to 12th) and 44.4% in 1985 (9th to graduation); and Ferris, 40% in 1980 (9th to 12th) and 49.2% in 1985 (9th grade to graduation).

Irvington

In 1987, 8,909 children attended public schools in Irvington's Type II district. Like Jersey City, the minority composition of the public school students is much higher than that of city residents. School enrollment is 77.6% black, 14.3% Hispanic and 6.4% white, as compared with 37.7% black, 8.5% Hispanic and 63.8% white for the residents of Irvington.

Irvington has 10 school buildings. The enrollment in its one 9-12 high school fluctuates between 2,400 and 2,600 yearly. There are nine elementary schools with some being quite large. Myrtle Avenue elementary school, for example, houses 800 students; Mt. Vernon educates 640 students; and Grove Street School houses over 1,000 students.

Irvington school facilities are overcrowded. At Madison Avenue elementary school, children attend music classes in a storage room and remedial classes in converted closets. At Chancellor Avenue School, a coal bin was converted into classrooms. The Grove Street School has two girls' and two boys' rooms for its 1,000 students. All nine of Irvington's elementary schools have insufficient playground space and because of difficulty with on-street parking, the schools' staff must park on much of the existing playground space.

One witness testified that Irvington students tend to come from unstable homes, in most instances headed by a single parent. Their living conditions are crowded, with no place to study. The students present great health related problems which strain the nursing capacity of Irvington's schools.

Irvington's Grove Street School is an elementary school in one of the worst areas of the city. A witness explained that the children are surrounded by much crime, vandalism and graffiti. Cars are broken into every day. There are many street gangs congregating around the school. Irvington children must wear their house keys around their necks. It is not safe to go out in the evening. This witness described the neighborhood as one where you have to put your good sneakers in a bag so that no one will steal them on the way to school.

Irvington's children are also highly mobile. During the 1985 school year, the pupil mobility rate was 50.6%. All elementary schools had mobility rates higher than 40%; they ranged from a low of 44.4% at Myrtle Avenue School to a high of 74.6% at the Florence Avenue School. The high school rate was 33.8%. In 1986, mobility rates were similar although the high school rate declined to 28.3%.

The Irvington High School dropout rate increased by 24.8% between 1980 and 1985. The dropout rate for the class of 1980 was 13% (9th to 12th grade) and for the class of 1985 (9th to graduation) it was 37.8%.

Dropouts in Urban School Districts

Districts are required to report dropouts to the Department of Education. The Department's current definition of dropouts includes students who disappear between school terms as well as those who leave during the school year. In suburban districts, with low student mobility, there is considerable follow-up of students who disappear from the rolls. In large urban centers, with high mobility rates, where large numbers of students appear and disappear annually, follow-up is difficult. Consequently, the dropout numbers reported by most urban districts tend to be only those students who officially dropout, i.e., those who tell the school they are leaving. These rates greatly understate the problem. For example, the district-reported dropout rates for East Orange High School were 9% and 2% in 1978 and 1979 respectively when the actual calculated rate was 61%.

The Department of Education was quite concerned about the inaccurate official dropout rates and, therefore, in 1980, examined 23 high schools in the urban districts of Pleasantville, East Orange, Elizabeth, Camden, Irvington, Newark, Orange, Hoboken, Jersey City, Trenton, New Brunswick, Perth Amboy, Asbury Park, Paterson, Passaic and Plainfield.

In this study, the Department calculated the mean difference of class size between 9th graders and 12th graders. This method assumes that if there is no

significant drop in district enrollment, the number of students in the senior class should roughly equal the number of students in the freshmen class. Thus, using this method, the number of seniors in 1978 was subtracted from the number of freshmen in 1975. To increase the confidence level of this calculation, differences for 1979 and 1980 were similarly calculated and the three figures were averaged. This 9th to 12th difference for the 19 schools studied (three did not have 9th grades) ranged from 13% to 61% with an average 46% dropout rate.

Also in this 1980 study, the Department used the cohort dropout rate by class. This method, using September 30 district reported data, follows a particular class from freshman to sophomore year; sophomore to junior year; and junior to senior year. Thus dropout rates are developed for each year the class of 1980 was in high school. This method does not track individual students because many students enter and leave throughout the four years. Nevertheless, in most cases studied there has not been a significant change in overall district enrollment over the four years, and therefore, the adds and drops were expected to even out.

The cohort method yielded results which were consistent with the mean difference method. The 1980 cohort study found that approximately 46% of the students in the 23 schools dropped out annually.

When plaintiffs' witness Dr. Ogden, currently Moorestown's Director of Curriculum, was employed by the Department of Education, she prepared the class of 1980 dropout study. After leaving the Department and before testifying in this hearing, she updated the study using the cohort method. She tracked the class of 1985 to its senior year and then to graduation. Her updated study revealed a 42.4%

dropout rate to senior year and a 47.2% dropout rate from freshman year to graduation.

Dr. Ogden explained that some educators argue that differences between freshman and senior class size can be explained by the number of interschool transfers. But, if students were simply transferring to other schools one would expect to see increases in some districts to balance the decreases in others. However, in a number of urban districts the same pattern of decrease is found. Dr. Ogden further explained that students who do transfer tend to stay within various urban districts and therefore one does not expect to discover that urban students move in sizeable numbers from Newark to Princeton, for example.

Dr. Ogden's updated study confirmed her 1980 results and concluded that the 23 schools had a consistent dropout rate (to graduation) of approximately 47%. This means that 6,404 students dropped out of the 23 high schools between 1981 and the class of 1985's graduation. Dr. Ogden's study confirms other information indicating an enormous dropout problem in urban school districts. For example, from 1962 through 1986 East Orange calculated its precise dropout rates between 9th and 12th grades at approximately 60%. Less precise data from Trenton estimates a relatively constant 50% dropout rate from 1984 to 1986. In 1984, Department of Education officials recognized that each year between 18,000 and 20,000 young adults drop out of high school and that most of them live in urban centers.

Mobility of Urban Students

The apparent mobility of many urban students presents severe problems for urban teachers. A great deal of disruption is caused by this phenomenon.

In Paterson, at least 10,000 students transfer in and out of the school district each year. In Irvington in 1985-86 for example, at the high school, which has a relatively low 28% mobility rate, 452 students transferred in and 281 transferred out. At the Grove Street elementary school, as another Irvington example, 485 students transferred in and 134 out for a 62% mobility.

New Brunswick Superintendent Dr. Larkin explained that no matter when a student arrives and how much previous education a student may have had, that student must be tested along with all other students. The mobile students count in the district High School Proficiency Test (HSPT) profile no matter how long the students were actually in the district. Dr. Larkin emphasized that without counting these students the district scores would be much better. There has been at least one other study confirming Dr. Larkin's observation. (See findings on Testing at Part IV.)

The instructional problems caused by a high mobility rate can only be partially solved. A mobility rate of 90%, for example, means that a teacher may begin the year with a certain number of students who by the end of the year will have been almost completely replaced by others. Some of the problems associated with intra-district transfers can be ameliorated by standardizing instructional programs and textbooks, which was done in Camden as early as 1973. Such

measures, however, do not diminish classroom disruption caused by new children's social adjustment problems, their special calls on teacher time, as well as the need to stock extra materials and supplies.

The Commissioner of Education is concerned about mobility, but according to Assistant Commissioner McCarroll, believes that there are few solutions beyond smaller classes.

The Teachers of Urban Youth

Most of the teachers of urban youth do not live in the same neighborhoods as their students. The teachers are typically more white than black and predominantly middle class.

A larger number of teachers are absent or late each day in inner city schools than in suburban schools. And, at least according to one urban superintendent, urban teachers are in many cases poorly prepared to cope with the enormous educational problems they face everyday.

Turnover of urban teaching staffs is relatively low but there is a high rate of principal turnover. There are teachers whose expectations of their students are low. This group typically makes few demands and usually settles for less. This group must be taught to demand excellence and that it is insufficient just to love their students. Some urban teachers have to be taught not just to exist.

There are serious value conflicts in most city high schools, not only between staff and students but also among staff. Intra-staff value conflict

manifests itself in many inner-city high schools as a lack of goal consensus and educational focus and a staff suspicious of competition with each other.

Some urban teachers exhibit symptoms of high stress bordering on battle fatigue. One Irvington teacher explained that some urban teachers suffer from burnout. She defined this as an inability to function effectively in the school environment or to deal positively with the job and motivate children. It comes from overwork, large numbers of children, stress and feelings of ineffectiveness. Burnout creates health problems and leads to transfer and career changes. "The spark is gone, you plod along from day to day," this teacher testified. Comments such as "I can't give homework, I can't correct it" or "I have to get out of here" are symptoms of burnout.

The School Budgeting Process

Funding for the public school system comes primarily from two sources: local property taxes and State aid. (Federal aid amounts to only approximately 5% of New Jersey's total education aid.) A property tax is levied annually upon all taxable property in each school district. Revenues from the property tax are used for all school purposes (including local, regional and consolidated schools) as well as to provide most funds made available for municipal budgets. In addition, a portion of a county-wide property tax provides revenues for county vocational schools.

Each year every school district develops a budget for the following year which indicates how they will spend the State, local and federal monies. This budget takes into account the amount of State and federal aid which is expected,

and establishes the district's educational spending plan from which is derived the amount of local school property tax which must be levied.

The budgeting process followed by school districts depends upon whether the district is a Type I or Type II. Type I districts do not require voter approval for school budgets, but instead must seek approval from a Board of School Estimate, which is composed of two school board representatives and three from the municipality's governing body. Type II districts must have their budgets approved by the voters unless the district has a Board of School Estimate, in which event the Board of School Estimate must approve the budget as if the district were a Type I.

School budgets in New Jersey, including current expense and capital expense projections, are prepared during the late winter and early spring of the prior year. Thus, the 1987-88 school year budgets were prepared during the late winter of 1986 and early spring of 1987.

The amount of State aid a district will receive in the coming year is calculated in advance by the Department of Education. *N.J.S.A.* 18A:7A-27 requires the Department to calculate by November 1 the Chapter 212 State aid each district can expect for next year. The Department must also notify districts by November 15 of their cap limit. (See cap discussion below.) Therefore, the Department usually begins both notification processes on November 15.

The actual State aid amounts cannot be finalized until the Governor makes a recommendation to the Legislature and the Legislature passes the Appropriation Act. Since the Governor's budget is not submitted until late January

or early February, and the Legislature may consider the recommendations until as late as June 30, districts are kept advised by the Department of the actual aid expected to be available for next years' budgets. Besides the State aid estimates, the Department of Education during this time period must also estimate federal awards from various sources. Sometimes, therefore, the Department notifies districts three or four times before the districts receive figures they can actually rely upon. The final aid figure impacts on how much a district must raise in local taxes or what programs it can expect to implement. When unanticipated State aid reductions occur, districts contend that planning problems are severe, especially when the district is advised of the actual State aid figures close to the school year for which the budget has been prepared.

According to Assistant Commissioner Calabrese, however, announced State aid reductions can almost always be recovered by utilizing the district's budget surplus. For districts receiving large amounts of State aid, the announced cuts normally do not exceed 2% of the district's total budget. According to the Assistant Commissioner, it is rare for more than four or five districts to have to utilize all of their surplus to cover announced State aid reductions. The problem is aid cuts, not the continuing notice. If a district, for example, is notified repeatedly that its aid is being increased, the district will not complain. The Assistant Comissioner, therefore, contends that because these cuts have negligible impact on the total budget it is inaccurate when districts assert they are unable to plan because of the Department's aid revisions.

It is not impossible to plan under these circumstances, however, if the district's surplus cannot cover announced aid reductions, then the district must consider raising taxes or reducing programming. Additionally, it has happened that

changes in the amounts of previously estimated State aid have occurred after all local budget development has been concluded and the district may have been contemplating using its surplus in other ways. Therefore, I **FIND** that accurate district planning is hindered by uncertainty because the actual amount of State aid depends upon the Legislature's appropriation, which may not be finalized when budgets are prepared.

Districts usually begin their budget preparation in sufficient time so that they can submit their budget to the county superintendent's office by January 15. County superintendents are considered part of the Department of Education though their offices are physically located within the various counties. The County Boards of Chosen Freeholders pay for the county superintendent's office rent, secretarial and clerical employees and supplies and equipment. The Department of Education pays the professional employees' salaries and provides the office with State forms.

After review and approval by the county superintendent, the Board of School Estimate in Type I school districts or Type II districts with estimate boards, by March 18 must fix and determine the budget after public hearing. *N.J.S.A.* 18A:22-14, 26. In Type II districts, the Board of Education, no later than 12 days prior to the election, fixes the amount of the budget to be submitted to the voters. *N.J.S.A.* 18A:22-32. Once the electorate determines the amount to be raised, the Board of Education certifies that amount to the county board of taxation for inclusion in municipal taxes. *N.J.S.A.* 18A:22-33, 34. If the voters reject the budget, the municipal governing body, by April 28, must decide the amount appropriated for the school district. *N.J.S.A.* 18A:22-37.

There are many factors that determine whether local voters will support public education. These include whether a large number of voters are childless or have children in private or parochial schools. Retirement communities are disinclined to vote for property taxes to support education. Large businesses with few employees residing in their taxing jurisdictions are sometimes unwilling to pay property taxes to support the education of children who live there. Other factors include the educational background of voters, the proportion of residents who are owner-occupants or renters and the proportion of residents living in poverty. Finally, a factor related to whether voters will support the public schools is the total tax burden for all services paid from the local tax base.

By March 18 for Type I or Type II districts with estimate boards or by April 28 for Type II districts, all local budget development action should be concluded. Since the Appropriations Act, however, will not as yet have been enacted, districts throughout the State still are uncertain as to the final amounts of State aid that will be available.

In Type I districts, or Type II with estimate boards, Boards of Education which disagree with the budget amounts determined by estimate boards may appeal to the Commisioner of Education within 20 days of the estimate board's action. *N.J.S.A.* 18A:22-14, 26. In Type II districts, if a Board of Education disagrees with the municipal governing body's budget determination, after a defeat by the voters, the board may, within 15 days of the municipal governing body's action, appeal to the Commissioner of Education. *N.J.S.A.* 18A:22-37. These appeals, whether in Type I or Type II districts, are called Budget Appeals and are transmitted

by the Commissioner of Education to the Office of Administrative Law as contested cases under *N.J.S.A.* 52:14B-1 *et seq*.

County superintendents are told, according to Assistant Commissioner Calabrese, to try to achieve a compromise among the parties in budget appeals. The budget appeal, from ALJ hearing and initial decision to final decision by the Commissioner of Education, can take from six months to a year to complete. Further appeal to the State Board of Education and thereafter to the Appellate Division is also possible. Usually during the budget appeal period, appealing school districts can spend at the amount approved by either the estimate board or the municipality's governing body. They may not spend the amount in controversy.

If by May 18 the tax levy has not been set, the Commissioner is empowered to establish the rate for the district. Sometimes with regional school districts, towns will dispute among themselves or sometimes the controversy will be so explosive within a town that the district will request the Commissioner to set the levy. The local district can then claim that it tried to keep the taxes down.

Once the budgetary amounts needed have been determined, whether through the ordinary course or by Commissioner's order, the governing body usually includes that amount in local taxes. The money collected is paid to the custodian of school monies.

County, local, school and State taxes must be paid by the governing body when payment is due. *N.J.S.A.* 54:4-76. The duty to pay is absolute and unqualified. *Board of Education of Fair Lawn v. Mayor, Council of Fair Lawn*, 143 *N.J. Super.* 259, 268 (L.Div. 1976), *aff'd o.b.*, 153 *N.J. Super.* 480 (App. Div. 1977). Where funds in the

local treasury are insufficient to make these payments, the governing body is required immediately to borrow sufficient money to pay the taxes. *N.J.S.A.* 54:4-76.

Budget Caps

Chapter 212 places annual limits, known as "budget caps," on the growth of school district budgets. A district may not increase its budget by more than the cap amount. *N.J.S.A.* 18A:7A-25. Budget caps were designed to serve four purposes: first, to prevent large and inefficient budget increases; second, to limit State liability for future aid (State aid is based in part on the district's prior spending); third, to pass on a substantial portion of new State aid as property tax relief; and fourth, to permit low-budget school districts to move toward more nearly equal expenditures per pupil. For reasons to be discussed later, budget caps have been successful in all goals except equalization.

The budget cap is applied to expenditures during the budgeting process described above. In New Jersey, therefore, school boards can reduce their proposed budget following public hearings and thus submit to the voters or school estimate boards budgets below the cap level. In other cases, budgets set by school boards at the cap level may be cut by boards of school estimate or defeated at the polls and later cut by municipal governing bodies. Thus, the level of total current expenditures of a district may fall below budget cap, even in cases in which the school board has actually proposed a budget that uses the district's full cap increase.

The formula used to calculate the budget cap is composed of three components: (1) a basic growth rate; (2) an equalization factor; and (3) a base expenditure level or budget. Essentially, these three components are multiplied

together to determine the percentage by which a school budget is permitted to increase from one year to the next. The Department of Education calculates the cap for each district annually and must certify the amount to each local board of education by November 15.

The basic growth rate, the first component to the cap formula, equals 3/4 times the larger of either the latest annual percentage change in statewide equalized property valuation or the average of the last three years' annual percentage changes. The equalized property valuations are calculated statewide by the Division of Taxation and reported to the Department of Education. The Division makes the equalization calculation to ensure that all property values are comparably related to true market value and not to an individual municipality's perceptions as to value.

Equalization, the second component of the cap formula, is based on net current expense budget. NCEB is an important concept for New Jersey's school finance system, since it also figures prominently in the calculation of State aid, to be discussed later. The NCEB for a district is calculated by deducting certain items from the district's current expense budget. These deductions include federal aid, all state aid except current expense equalization aid, miscellaneous revenues, most transportation expenditures and appropriated free balances. Essentially, NCEB therefore is the sum of property tax revenues and current expense equalization aid. On a statewide basis, NCEB is about 80 percent of the current expense budget and is sometimes thought to represent the district's cost for its regular education program.

The equalization factor equals the prior year's State average NCEB divided by the prior year's district NCEB per resident pupil. For a district where NCEB is below the state average NCEB, the calculation of the equalization factor produces a number greater than one, and therefore permits more rapid budget growth in low-spending districts. For districts spending above the State average NCEB, the equalization factor actually amounts to the prior year's state average NCEB per pupil. (The district NCEB in the equalization factor when multiplied with the base budget, explained below, cancel each other out.) Therefore, all districts spending above the average have the same equalization factor.

The third component of the cap formula is the base budget. The base budget equation is different for below and above average NCEB districts. Districts spending above the State average NCEB use their own NCEB per pupil. Districts spending below the State average NCEB per pupil use a base budget, for cap purposes, of the prior year's state average NCEB per pupil. The NCEB number in both calculations is multiplied by the prior year's resident enrollment to obtain the base budget. Since the basic growth rate, the first component of the formula, is based on one State figure and all districts spending above the average NCEB have the same equalization factor, these districts, if they spend to cap, will be able to increase their budgets the same dollar amount per pupil. Therefore, if all districts whose NCEB's are above the State average spend to their cap limits, a district that is slightly above the average could never catch up to a district that is substantially above the average.

For illustration purposes, consider in 1986-87 Asbury Park, a low-spending district (NCEB $3,764) and Mahwah, a high-spending district (NCEB

$5,069). The formula works as follows: For Asbury Park's basic growth, multiply 3/4 by .129271- the larger of the annual percentage change in statewide equalized valuations or the average of the last three year's annual percentage changes. That product is then multiplied by the equalization factor, which is the prior year's State average NCEB per pupil of $3,797 divided by Asbury Park's prior year's NCEB per pupil of $3,764. (Note that the division required to calculate the equalization factor results in a product greater than one.) This product is then multiplied by the base budget, which is calculated since Asbury Park spends below the State average per pupil NCEB by multiplying the State average NCEB of $3,797 by the district's prior year's resident pupil count of 3,061.5. This calculation permits Asbury Park to raise its budget $1,136,913 over the prior year.

For Mahwah, the formula works as follows: Basic growth is calculated in the same manner: 3/4 multiplied by .129271. This product is then multiplied by Mahwah's equalization factor, calculated by dividing $5,069 into the State average NCEB per pupil of $3,797. (Note that this division, unlike Asbury Park's, results in a product less than one.) This product is then multiplied by the base budget, which is calculated since Mahwah spends above the state average per pupil NCEB by multiplying Mahwah's prior year per pupil NCEB ($5,069) by its prior year's pupil enrollment of 1,741. This calculation permits Mahwah to raise its budget $640,914.

The budget cap formula was amended in 1986-87 so that it now uses adjusted net current expense budget (ANCEB) rather than NCEB. The NCEB for cap purposes only is adjusted to include appropriated free balances and anticipated miscellaneous revenues. Another amendment made in 1981 authorizes the

calculation of separate State average NCEB's for districts responsible for different grade spans: for 9-12 regionals, 7-12 regionals and county vocational schools.

One effect of requiring that a district include appropriated free balances in its cap calculation is that in the year after a free balance is appropriated, the district has to make a greater tax effort to go to cap, unless it has more surplus to appropriate. In the year for which the free balance is appropriated, the tax rate is reduced, but in the following year, there will be a much larger increase in the property tax rate to fund the portion of the budget paid for in the prior year by the appropriated free balance.

Any expenditure increase must be funded totally from the district's local tax base because State aid is provided based on prior year funding. Defendants charge that plaintiffs' districts do not budget to cap and do not seek cap waivers. This charge is more fully considered in Part III. Dr. Reock, one of plaintiffs' witnesses, analyzed budget caps and found that low-spending districts used a smaller percentage of their permissible budget increases than did high-spending districts. For example, in 1979-80, the lowest spending group of districts in his analysis used only 79% of their $173 per pupil permissible budget increase; the highest spending group of districts used 91% of their $229 per pupil permissible increase.

Cap Waivers

A district can exceed its cap limitation by obtaining cap waiver approval from the Commissioner of Education. Until 1986-87, a district could also use appropriated free balances to exceed the budget cap without receiving a cap

waiver. Beginning in that year, a cap waiver must be obtained to use appropriated free balances to exceed the cap limit.

Cap waivers may be granted when districts require additional spending to handle unanticipated increased enrollments or to provide a thorough and efficient education. The district may appeal the Commissioner's cap waiver decision to the State Board of Education. In recent years, most requests for cap waivers have been approved. Cap waivers had the greatest impact on expenditure increases in 1978-79 when they amounted to almost 2% of the prior year's total budgets for education.

County Superintendents' Review of School Districts' Budgets

N.J.S.A. 18A:7A-28 requires the Commissioner of Education to review annually "each item of appropriation within the current expense and budgeted capital outlay budgets" to determine the "adequacy of the budgets with regard to" the district's T & E goals, objectives and standards.

There is some legislative history relating to *N.J.S.A.* 18A:7A-28. The Report of the Joint Education Committee to the New Jersey Legislature, recommended on June 13, 1974 as follows: "For maximum effectiveness, such a budget review should be made not only for technical financial adequacy, but also for adequacy in meeting the educational needs of the district as determined in the program of evaluation and reporting described in Part IV. Such a budget review will require time which is not now available in the school budget timetable. Therefore, the Committee recommends that provision be made for submission of the local

school budget to the Commissioner by December 1 of the year preceding the school year." (Exhibit D-247 at p. 38.)

Under regulations effective until January 1, 1987, *N.J.A.C.* 6:8-5.1, the county superintendent was required to review budgets for the Commissioner and determine their adequacy with regard to each school district's annual report and long and short range objectives, which were to be linked to a district's goals and needs.

On October 3, 1986, Assistant Commissioner McCarroll stated that county superintendents do not review budgets for adeqacy and that the Code does not require such a review. Dr. McCarroll testified that with 21 county superintendents all having their own ideas about adequacy, such a review, presumably, would be impractical. County superintendents, he explained, review budgets for accuracy. This understanding of the law was confirmed by county superintendents who testified in this proceeding. Dr. Elena Scambio, Essex County and Northern Regional Coordinating County Superintendent, for example, agreed that prior to 1987, budgets were reviewed by county superintendents for accuracy. Under this review, according to Dr. Scambio, the county superintendents verified whether all anticipated revenues or appropriations were included by the school district.

The record does indicate some confusion on the review standard. Camden County Superintendent Beineman, for example, testified that he evalutes school budgets for adequacy and efficiency in reaching State goals. Superintendent Beineman did not direct that additional funds be raised in Camden because he did not believe that it was inappropriate for Camden to reduce its program by eliminating over the years, for example, certified art teachers, librarians, physical

education teachers, music teachers and guidance staff. He believed that in all of the areas which suffered reductions some type of program was being continued by the existing personnel.

Hudson County Superintendent Acocella, however, indicated that he approved Jersey City's budget for many years despite his recognition of its insufficiency. The County Superintendent explained that he reviewed the budget for accuracy, not adequacy. It would therefore not be his function to determine whether, for example, Jersey City had sufficient custodial help.

On October 27, 1986, Dr. McCarroll issued a directive (Exhibit P-289) requiring that district budgets not currently certified be reviewed for sufficiency of funding to address deficiencies identified during monitoring. (See discussion of monitoring in Part IV below.) As to districts already certified, Dr. McCarroll directed that their budgets be given a general review for accuracy, assuring only continuing maintenance of the current level of support and, in case the certified districts had failed to meet the standards of non-mandatory monitoring indicators, determining the adequacy of funding to address those deficiencies.

New regulations, effective on January 1, 1987 at *N.J.A.C.* 6:8-4.3(a)10iii(1) and (2), remove the previous reference to the review for adequacy. Currently, regulations require annual budget review and approval by the county superintendent only as a monitoring indicator under the monitoring elements applicable after July 1, 1988. (See *N.J.A.C.* 6:8-4.2(a) and 6:8-4.3(a)10ii and iii (1) and (2).)

It is not clear on this record what the exact implications of the new regulations will be. However, it is clear and I **FIND** that prior to 1987, almost all county superintendents were not reviewing district budgets for funding adequacy and were not expected to do so by the Department of Education. It would also seem that if the new regulations do not require county superintendents to determine funding adequacy, they may be contrary to *N.J.S.A.* 18A:7A-28 and 18A:7A-11. After 1987, the county superintendent budget reviews are linked only to monitoring and seem particularly directed toward uncertified school districts. (See Part IV findings on monitoring.)

Spending for Public School Education in New Jersey

New Jersey ranked high among all states in education spending in the early 1970's and continues to rank quite high. Before Chapter 212 and over the last five years New Jersey has ranked either third or fourth in expenditure per pupil in comparison to all other states. In 1984-85, New Jersey spent nearly $2.4 billion on public elementary and secondary education aid programs that served 1,222,000 students. In 1985-86, State funds for education amounted to nearly $2.7 billion. About 30¢ of each dollar spent by the State was allocated to State education aid (not including higher education funds).

New Jersey in 1984-85 ranked third highest in the nation (behind Alaska and New York) with an average education expenditure of $4,713 per pupil, about $1,500 per student higher than the national average of $3,209. In that year, New Jersey ranked first in the nation by providing $96.4 million to local districts to assist in local compensatory education programs. Although 60% of the states provide no

bilingual education funds, among those that do fund such programs, New Jersey ranked second, spending $24.3 million. The State also provided $207 million in special education aid in 1984-85.

New Jersey therefore has historically been high spending and has increased its lead. In 1975-76 New Jersey spent 136 % of the national average per pupil - a third again more than the national average. In 1985-86 New Jersey spent at 148% of the national average - almost 50% more. Eighty-eight percent of all students in New Jersey go to schools in districts spending above the national average.

In a 1983 Miner and Hancock comparison of educational expenditures among states cited by the defense, New Jersey was found to be spending at 30% above adequate with no other State spending in excess of 17% over what this study deemed adequate. Plaintiffs have demonstrated a variety of problems with this study, including different accounting practices among states and the use of some extrapolated data. I also do not believe that the study's use of the term adequate requires any particular attention, unless it can be shown that the definition comports with New Jersey's constitutional requirements. The report specifically discouraged using its findings to evaluate adequacy of resources within any particular state.

In any event, it is clear that New Jersey is among the highest spending states in the nation for public education.

Financing Public School Education in New Jersey

State aid to education is distributed through five major formulas: (1) equalization/minimum aid; (2) categorical aid for students with special educational needs; (3) transportation aid; (4) debt service and capital outlay aid; and (5) contributions to the teacher pension and annuity fund (TPAF). In addition, there are miscellaneous grants-in-aid.

The State aid components of Chapter 212 are current expense equalization/minimum aid, debt service and capital outlay aid, categorical aid and transportation aid. *N.J.S.A.* 18A:7A-17 *et seq.* and *N.J.S.A.* 18A:39, 58. Aid distributed outside of Chapter 212 includes miscellaneous grants-in-aid and pension aid.

Of the five major aid formulas, however, only equalization/minimum aid directly considers a district's property wealth. In the first year of Chapter 212, equalization aid comprised 56.8% of total State aid. By 1985-86, this share had dropped to 50.9%. In the Governor's recommendations for 1986-87, equalization aid was 50.1% of total State aid.

In the early 1980's the growth in non-equalized aid was in categorical, mostly aid to special education, and TPAF. Starting in 1985-86, there has been a growth in miscellaneous grants-in-aid. From 1984-85 to the Governor's recommended aid for 1986-87, grant programs grew from 3.3% to 6.5% of total State aid for education.

In 1976-77, State aid was 37.7% of total educational expenditures. In 1983-84, school districts provided 55% of public school revenues, State aid provided 40% and the federal government 5%. Without considering federal revenues, the local share was 58 % and the State share was 42%. By 1986-87 State aid was approximately 42% of total expenditures, including non-Chapter 212 aid.

Plaintiffs contend there has been an informal limit of approximately 40% on State aid. The defendants assert that the "allegation that State aid for education has been in some fashion restricted to 40% of the total statewide cost of education was not proven and is irrelevant to this litigation." (Defendant's Proposed Findings at p.87and pp. 110-11.)

Here, I must conclude that the defendants' litigation position on the State aid 40% level is too broadly stated. The defendants admitted in their answer to plaintiffs' complaint that "the legislation has, to date, had the effect of limiting the amount of State aid to education to 40% of total educational expenditures per year." (Answer filed in 1981 at p. 5, para. 21.) In addition, Exhibit-P236, *The Four Year Assessment of the Public School Education Act of 1975*, a 1980 State Board of Education publication, discusses the "Forty Percent State Support" level beginning at p. 156.

Exhibit-P236 explains at p. 157 that the Joint Education Committee recommended that the state share be 50% but this target was reduced to 40% when the Public School Education Act was enacted. The 40% "target" was not achieved until 1979-80. Exhibit P-236 lists as the "major problem" with the 40% support level "that it provides aid sufficient only for equalizing tax resources for the

lower wealth two thirds of all districts." (P. 157.) At p. 170, Exhibit P-236 concludes that "Equalization of financial resources is limited by the decision to hold State support to 40% of educational expenditures." (Emphasis supplied.) There has been no evidence produced that would link the defendants to this "decision," but Dr. Reock's testimony also confirms the existence of such an "assumption."

The fact that State aid has been awarded to cover about 40% of total educational expenditures and that in 1980 the State Board believed that this level adversely affected expenditure equalization, is quite relevant to the issues presented by this litigation. (See also discussion by Conford, partially concurring and partially dissenting in *Robinson v. Cahill*, 69 *N.J.* 449, 495-498 (1976) (*Robinson V*).)

Accordingly, I **FIND** that since 1979-80, the percentage of State aid to total educational expenditures has ranged from 40% to 42% and that prior to 1980, there had been a decision to limit State aid to 40% of total educational expenditures and that in 1980 the State Board believed this decision adversely affected expenditure equalization.

The Guaranteed Tax Base Formula

New Jersey uses a guaranteed tax base formula to finance public education. In concept, this formula ensures that each school district has an effective tax base, against which to levy property taxes, that is at least at the level of the minimum State guaranteed tax base. A guaranteed tax base (GTB) formula in its pure form is designed to provide equal revenues for equal tax rates. It is sometimes called a "power or capacity equalizing" formula. Such a system is not designed to

reduce per pupil expenditure disparities since the level of expenditure is left to the local school district. A pure GTB system, therefore, would not have student equity (in the sense of equal resources for similar educational needs) but the system would have taxpayer equity in the sense of equal yield for equal effort - not uniform tax rates. (See further findings on equity as a system value in Part IV.)

As an example, consider two hypothetical districts, District A and District B. District A has an equalized valuation per pupil of $50,000. District B has an equalized valuation per pupil of $150,000. Further assume the State sets a minimum guaranteed tax base of $200,000 and both districts have a school tax rate of $1.00 per $100 of valuation. If you apply the $1.00 tax rate to the guaranteed tax base of $200,000, the guarantee yields $2,000 per pupil. The GTB formula works therefore by applying the $1.00 to the district's actual property wealth to determine what the local contribution will be and having the State provide whatever is required to achieve the guarantee. Thus, the $1.00 tax rate would yield $500 from the $50,000 tax base in District A; therefore, the State aid which has to be provided if $2,000 per pupil is to be achieved would be $1,500. In District B's case, the $1.00 applied to the $150,000 equalized valuation would yield $1,500; therefore, to obtain $2,000 per pupil, District B would need $500 in State aid.

In theory, if two districts make different tax efforts under a guaranteed tax base formula, the district making the greater effort would be guaranteed more money per pupil than the district making the lower effort. For example, if District A decides that instead of taxing $1.00 it wishes to tax $1.50, its new tax rate would be applied to the $200,000 guaranteed tax base so it would now be guaranteed $3,000 per pupil. If the $1.50 is applied to the equalized property evaluation, instead of raising $500 it would now raise $750. The difference between $3,000 and $750

would come to $2,250, which is the amount of State aid that would now be provided. Thus, using the GTB formula results in unequal yield for unequal effort. If the district levies a higher tax rate, then it is guaranteed more money. Thus, the guaranteed tax base formula is described as a "reward for effort" system.

In New Jersey, the plan works differently than the theoretical explanation. In theory, when a district reaches the guaranteed level it would not be eligible for any State aid. Thus the implicit assumption in GTB systems generally is that the guaranteed level is sufficient to provide an adequate level of education. Thus, if District B were at the guaranteed tax base of $200,000 so that its dollar tax levy would yield $2,000, there would be no need for State aid. New Jersey, however, provides "minimum aid" to those districts that can generate revenue above the guarantee and also provides categorical aid for special needs pupils regardless of how much a district raises in taxes. This difference, and other technical deviations from the GTB theory to be discussed below, is why the defendants describe the New Jersey formula as a modified GTB.

New Jersey's modified GTB system, like all power equalizing formulas, does not address expenditure inequalities resulting from different tax rates. Even if the GTB were set at the level of the most wealthy district in the State, it would still not provide expenditure equalization because the tax rates set locally determine educational spending.

Thus, GTB systems are not intended to equalize education expenditures or program opportunities. Educational opportunities under a GTB system are dependent upon school district or voter willingness to vote for local tax levies. There is no requirement for a minimum education expenditure. The focus of the

GTB or other reward for effort systems is on revenue raising capacity and on tax relief. Local jurisdictions can use the State funds to increase educational expenditures or take tax relief by using State aid to lower property taxes. In fact, in the first year of Chapter 212, school districts only increased their expenditures by about one-third of the maximum permissible increase authorized by the statute. The other two-thirds were used for tax relief and this was not confined to low-wealth districts. According to Assistant Commissioner Calabrese, although tax relief was anticipated, it was not to occur at the expense of educational programming.

Calculation of Current Expense Equalization Aid

As explained above, State equalization aid in New Jersey is the difference between what would theoretically be raised from the guaranted tax base and what can actually be raised from the local tax base. The greater the disparity between actual and guaranteed wealth, the larger the State aid payment. The GTB was set in 1984-85 at $223,100 per pupil and in 1985-86 at $250,927 per pupil.

To calculate current expense equalization aid, four items of basic data are needed: (1) net current expense budget (NCEB) for the prior year (See above discussion of NCEB calculation); (2) current expense budget for the prior year (this is the school budget minus any capital outlay or debt service expenses); (3) resident enrollment as of the last school day in September of the prior year; and (4) equalized valuation of the district's taxable property. (Equalized valuation is prepared by the Department of Treasury based on the estimated true value of taxable real property. The Department analyzes assessments against sales and adjusts the assessed value to true value. The Department also adds assessed value of locally-taxed personal property such as telegraph, telephone companies and Class II

railroad property, which is a factor of little significance. The table of equalized valuations is issued on October 1 of each year and is used to calculate State aid for the next year. Thus for the 1985-86 budgets, aid was based on the equalized valuations from October 1, 1984.)

The guaranteed tax base is generally about 1.344 times the State average equalized valuation per resident pupil. To calculate the guaranteed tax base, the Department of Education divides the total equalized property valuations for the State by the total resident pupil enrollment and multiplies the result by 1.344. For calculation of 1985-86 aid, the State average equalized valuation per resident pupil was $186,718, which when multiplied by 1.344 set a guaranteed tax base of $250,927 per pupil. This multiplier has been set annually by the Legislature in the Appropriations Act.

The formula also requires calculating a district's state share. The state share is calculated by taking 1.000 minus the district's actual equalized property valuation per pupil divided by the guaranteed valuation per pupil. The result is usually expressed as a percentage and is multiplied by the district's previous year's NCEB to get the amount of current expense equalization State aid. For example, the Florence school district for 1985-86 had an equalized valuation per pupil of $147,135, which is divided by the guarantee of $250,927 and subtacted from 1.000 which equals .4136 or a 41.36% state share. (A calculation resulting in less than zero means that a district may qualify for minimum aid under a separate formula.)

To get Florence's current expense equalization aid, the 41.36% is multiplied by the district's prior year's NCEB. Thus, for example, Florence in 1985-86

had an NCEB for 1984-85 of $3,973,336 which when multiplied by the 41.36% state share yields $1,643,372 in equalization aid.

The amount yielded, however, has to be compared to the maximum support budget. The State limits the amount of current expense equalization aid a district may receive. The maximum support budget is calculated by taking all operating school districts, grouping them by type of district (K-6, K-8, K-12, etc.), ranking them from bottom to top by the prior year's NCEB per pupil and determining the amount which represents the 65th percentile. This figure is called the state support limit. For example, in 1985-86 the state support limits for various grade spans was: K-12, $3,764; K-6, $3,262; K-8, $3,624; 9-12 Regional, $3,982, with separate provisions made for county vocational and technical schools. The state support limit times the district's number of resident pupils equals the maximum support budget.

For districts below the guaranteed tax base, current expense equalization aid is the state share times either the district's NCEB or the district's maximum support budget, whichever is less.

In 1983-84, Jersey City received $61 million in equalization aid (its NCEB was $81.9 million). In 1984-85, Camden received 89% of its NCEB from State equalization aid; East Orange 83%; Jersey City 76% and Irvington 71%. By 1986-87, Camden received 92% of its NCEB from State equalization aid; East Orange 84%; Jersey City 73% and Irvington 76%.

Minimum Aid

For wealthy districts which have tax bases greater than the guaranteed tax base, the State provides minimum aid. This formula allocates aid according to a sliding scale based upon property wealth. The defendants admitted in their answer that for those districts in which valuation per pupil equals or exceeds the State guaranteed valuation per pupil, various mechanisms have been utilized over time to ensure that all districts, even those having great property wealth, receive some minimum level of aid. (Answer filed in 1981, p. 4, para. 12.)

Dr. Fowler, the Department's Supervisor of Finance Research, explained that on average the poorest districts in 1985-86 received $1,873 per pupil in equalization aid while the wealthiest districts received $187 per pupil.

The first step in calculating minimum aid is to multiply 11.5 times the State average equalized property valuation per pupil (instead of 1.344 times the State average) to get the minimum aid guaranteed property valuation. In 1985-86, the minimum aid guaranteed property valuation was $2,147,073.

To determine minimum aid, an adjusted state share is calculated by multiplying .10 times 1.000 minus the district's equalized property valuation per pupil divided by the minimum aid guaranteed property valuation.

For example, in the Mahwah school district for 1985-86, its equalized property valuation per pupil was $414,014. To calculate the adjusted state share we multiply 10% by 1.000 minus $414,014 divided by the minimum aid guaranteed

property valuation of $2,147,073, which yields .0807. Consequently, the state share for Mahwah is 8.07%.

This adjusted state share, expressed as a percentage, for Mahwah 8.07%, is multiplied by the maximum support budget (the statewide 65th% of NCEB budgets times the number of resident pupils in a particular district), instead of the district's own NCEB, to get the minimum aid entitlement.

Because the minimum aid formula uses the maximum support budget rather than the district's own NCEB, a minimum aid district with an NCEB less than the maximum support limit receives more State aid than if its own NCEB were used, unlike equalization aid, which uses the district's own NCEB up to the state support limit.

Each year, the Department of Education calculates both equalization aid and minimum aid for every school district in the State and a district will receive aid in whichever amount is greater. (This is the aid information referred to above which is distributed on November 15 with subsequent revisions possible up to the State Appropriations Act.)

In 1985-86, 34.4% of New Jersey's school districts, or 207 districts, with 23.2% of the total student population, were above the guaranteed tax base and received minimum aid. The rest received equalization aid.

Prior Year Data In Calculating Equalization and Minimum Aid

In calculating equalization and minimum aid, the State uses data from the year previous to the year in which the aid is paid. Thus, prior year data are used for resident enrollment, the school district budget and equalized valuation. Therefore, the State aid paid in 1984-85 is based on the number of students a district had in 1983-84 and on its 1983-84 budget and wealth. A district's only source for increasing revenues in a current year is its local property tax.

A change to current year funding would involve paying aid on an anticipated budget and would therefore require anticipating enrollments, equalized property valuations and budget surpluses. Any change from what was anticipated with respect to either enrollments or equalized valuations, for example, or spending would require adjustments for the following year.

A district with one-tenth the tax base per pupil of another district will have to make ten times the increased tax effort to increase its expenditures by any given amount. Therefore, it is more difficult for poor districts to increase spending when aid is based on prior year data.

The use of prior year data also means that if a district decreases its expenditures in one year, its aid in the next year will be reduced.

Three or four years ago, the Department of Education estimated the possibility and cost of shifting the finance system to current year funding. Assistant Commissioner Calabrese was concerned that districts would use current year

funding to obtain tax relief and the Department would experience difficulty adjusting the pay back in the following year. The Department concluded that current year funding could be implemented, but estimated the cost at $84-120 million. The details of how this estimation was made were not disclosed.

Prior year funding appears to be a residuum from pre-computer days. Other states provide education aid on a current year basis and even Indian reservation schools at Point Barrows, Alaska operate on current year funding. In the *Four Year Assessment*, the State Board recommended in 1980 that aid be paid on a current year basis under New Jersey's formula. The importance of current year funding was acknowledged in the recently enacted school takeover legislation. When the Department of Education takes over a district, the district will receive current year funding "calculated on the basis of the budget for the school year in which the expenditures are made." (*L.* 1987, c.399, Sec. 17.) Similarly, a district in Level II monitoring will receive on a current year basis any additional funding which the Commissioner determines the district needs to implement its corrective action plan. (*L.* 1987, c. 398, Sec. 14d.)

Reductions in the Guaranteed Tax Base

Assistant Commissioner Calabrese testified that equalization aid was fully funded in six or seven of the previous 11 years.

For 1976-77, the first year of Chapter 212, the guaranteed tax base was 1.30 times the State average equalized property valuation per pupil. By law, this was to increase to 1.35 in the second year and remain at this level. In 1978, in anticipation of a shortfall in the State budget, the GTB was reduced to 1.344, which

is the level required by the definition of "guaranteed valuation per pupil" in *N.J.S.A.* 18A:7A-3.

In 1982-83, the Legislature reduced the guarantee to 1.3235 (after an initial reduction to 1.2896 and a subsequent mid-year supplemental appropriation). In 1983-84, the Appropriations Act reduced the guarantee to 1.31212. In 1984-85, the Act set the guarantee at 1.339079.

1985-86 was the first year since 1981-82 that the guarantee was at 1.344. In 1986-87, the guarantee was reduced to 1.317925 to provide funding for HSPT compensatory education aid.

Beginning in 1982-83, these reductions in the GTB were accomplished by a footnote in the budget message. Thereafter, the appropriations have simply been reduced by the Act, leaving the recalculation of the guarantee to the Commissioner.

When the guarantee is lowered, one effect is that municipalities move from equalization aid to the minimum aid formula. As the guarantee is lowered, fewer municipalities benefit from the equalization thrust of Chapter 212.

Additionally, in every year in which the Appropriations Act made aid cuts, equalization districts experienced heavier reductions than minimum aid districts. For example, the 1986-87 reduction caused an adverse impact on tax rates in equalization districts that was approximately six times greater than in minimum aid districts.

When the Supreme Court in *Robinson V* found Chapter 212 facially constitutional upon the assumption that the law would be fully funded, 69 *N.J.* 449, 454(n.2) and 467, the guarantee was to increase to 1.35 times the State average equalized valuation per pupil by 1977-78. I **FIND** that the guarantee remained at that level for two school years. In 1979-80 the guarantee was set at 1.34 and since that school year the guarantee has never again been funded at the 1.35 level.

Categorical Aid

The amount of aid supplied through the equalization formula has been decreasing. In 1984-85, 51% of State education aid was distributed through the equalization/minimum aid formula. Under the 1986-87 Appropriations Act, 49.2% of State aid was distributed under the current expense equalization aid and minimum aid formulas.

Equalization aid is intended to cover only general operating expenditures. Districts with students requiring extra educational services receive additional special needs aid called categorical aid. Categorical aid is allocated based upon an additional cost factor for students in certain special needs programs. Categorical aid is distributed for students in special education, bilingual education, compensatory education, and certain vocational education programs. Besides categorical aid, each student in these special categories is also included in the district's pupil enrollment count for purposes of calculating current expense equalization and minimum aid.

Categorical aid accounted for 13.5% of the total State aid in 1984-85. The largest single category of categorical aid was for special education, representing 8.5% of all State aid. Compensatory education aid made up 3.7%, bilingual aid was .9% and local vocational aid .3% of total aid in 1984-85.

Categorical aid is distributed as a flat grant per additional cost unit. The aid is calculated by multiplying the number of pupils in a particular category as of September 30 of the prior year by the additional cost factor for that category, times the prior year's State average NCEB per pupil. (The calculation of compensatory education aid is subject to maximum amounts. See discussion below.)

Additional cost factors were originally listed in Chapter 212 and are now subject to annual change. *N.J.S.A.* 18A:7A-21. On April 1 of each year, the Governor may submit to the Legislature recommendations for revising the additional cost factors. If the Legislature does not act within 60 days, the Governor's recommendations will go into effect one year later beginning on July 1.

The use of the prior year's student enrollment means that students arriving or leaving after September 30 are not counted or subtracted from categorical funding. Thus, special needs students who leave after September 30 benefit the district because the aid for these students can be used to educate remaining students. The large numbers of urban dropouts may in fact benefit urban districts monetarily. Conversely, special needs students who arrive anytime after September 30 must be provided that first school year with special programs completely funded by the district without the possibility of categorical aid

reimbursement. No figures were presented as to whether plaintiffs' districts in general lose or gain an advantage for this reason overall.

In October 1985, for example, East Orange offered a bilingual program for approximately 223 students. As of April 1986, the program contained 287 students, causing an initial loss to the district of about $49,280 for the 64 new students. East Orange High School's principal has noticed that there is usually an increase of 40 to 50 students after September 30. There apparently has been a pattern of students moving to East Orange after Thanksgiving vacation and after Christmas vacation. Those late arriving students would not be counted for categorical aid until the following September 30th.

Several witnesses explained that urban districts annually provide special services to large numbers of students who enter districts after September 30. Camden High School's principal said that after January, pupils who were attending parochial schools and received low grades will be returned to the public schools. Another Camden witness indicated that every year after Chrismas there is a large influx of pupils from Puerto Rico. The principal of Pyne Point Middle School in Camden said that enrollment peaks in January or February. In September 1985, the school district of Orange reported 438 students eligible for special education. At the end of the year, Orange had 469 students, a 31 student increase. The Superintendent of Jersey City said that after October 15 when air fares are reduced, minority students return from visiting their families in the Caribbean. The Superintendent also said that Jersey City typically will have enrolled about 200 extra special education children by the end of the year. In 1986, Piscataway had 406 classified students and on June 30 they had 439 students. In Irvington, 96 handicapped children transferred into the district between September 30 and

November 12, 1986. According to its Superintendent, Irvington's enrollment figures are always greater the year after the one upon which reimbursement is calculated. New Brunswick's Superintendent said that after September 30 there seems to be a rise in enrollment, with a dip in December and a rise again in March and April.

To calculate categorical State aid for special education, compensatory education and bilingual education, a student is counted in only one program category even if the student is served by the district in several categories. East Orange, for example, has children in special education programs who also require bilingual or compensatory education programs. Thus, East Orange receives categor cal aid only for the special education program (the highest aid category) and must provide either the bilingual or compensatory education program from local funds. As one further example, the Superintendent of Jersey City testified that his district had Spanish, Egyptian and Arabic handicapped students; the State aided only the program addressing the handicap, but not the bilingual program needs.

This practice of permitting only an unduplicated count was determined administratively by the Department of Education and is claimed by urban districts to be a serious budgetary problem because they must serve large numbers of students requiring multiple special programs. The only concession to this asserted problem was that for the September 30, 1986 student count, districts were able to count twice those students receiving assistance in bilingual programs who also needed remediation by reason of having failed the 1986 ninth grade High School Proficiency Test (HSPT).

Assistant Commissioner Calabrese testified that all four plaintiffs' districts have unspent categorical aid for compensatory education at the end of

each year. These funds cannot be carried over to the following year (unlike federal aid, such as Chapter 1 funds) and must be offset against the next year's State aid. The record does not indicate how much compensatory education aid remains in the districts at the end of the year. Nor is there a comparison in the record between this excess funding and the impact of the unduplicated count. Therefore, I can make no findings as to the sufficiency of categorical aid for compensatory education.

Compensatory Education Categorical Aid

A "State compensatory education pupil" is defined as a "pupil who is enrolled in preventive and remedial programs. . . . approved by the State Board, supplemental to the regular programs and designed to assist pupils who have academic, social, economic or environmental needs that prevent them from succeeding in the regular school programs." *N.J.S.A.* 18A:7A-3.

The Department of Education recommended in 1981 that the weighting for students in compensatory education programs be increased from .11 to .18 for 1982-83. When this new weighting resulted in an increase in the cost of compensatory education aid programs, a flat percentage reduction was made for each district. Compensatory education aid was prorated at 84.21% in 1982-83; 85.30% in 1983-84, and 91.56% in 1984-85.

Like the unduplicated count used for categorical aid generally, the Department of Education also specifies that a compensatory aid student may only be counted once even though the student requires remediation in two or three skill areas. Thus, students deficient in both computation and communication may need the services of two teachers and must be provided two sets of equipment, materials

and supplies. But the district may only count this student once for compensatory education aid. It is also possible for some students to require remediation services in three skill areas, reading, math and writing. (See discussion above.)

The Department of Education developed in 1977 a maximum student allocation formula for distributing compensatory education funds to districts. In this formula, socioeconomic and academic needs are weighted in the ratio of three to two, with three based on the number of children from AFDC families in the district, and two based on the reported or estimated failure rates on communication and computation proficiency tests.

Compensatory education aid is based on the maximum permitted number calculated by the formula or the number enrolled in a compensatory education class, whichever is lower. This aid does, however, go largely to the poorer districts because more children in those districts require compensatory education. The percent of students within each SES category who are in compensatory education declines as SES increases, from a high of approximately 36.% in DFG A to a low of approximately 3.5% in DFG J.

The Department of Education does not report to districts the maximum number of compensatory education students a district may serve with State compensatory education funds. All State compensatory education projections sent by the State to districts are based only on the total number of students in compensatory education that a district reports it has served. Assistant Commissioner Calabrese explained that the Department does not notify districts of the maximum number to prevent districts from playing with the "State magic... maximum number," and to ensure that districts enroll those they should under their own

standards. Asbury Park, for example, does enroll very close to the "magic number" and has done so for the past seven or eight years. The Assistant Commissioner assumed that Asbury Park must have figured out how to operate the formula. Dr. Fowler, the Department's Supervisor of Finance Research, explained that while information is available on how the maximum number is determined, the computer calculation needed to obtain this number "was no small task" and required reference to 10 or 15 computer printouts to obtain the maximum number for a particular district. Dr. Fowler testified also that if districts asked, they would be given the "magic number."

In January 1987 the State Board of Education by regulation changed the definition of a compensatory education student to include only those who do not meet State-mandated or State-appproved standards of proficiency in communication and/or computation. Before this change, the maximum student allocation formula provided more State funding for preventive work in lower SES urban districts. Compensatory education aid had been provided for students whom the district designated as needing preventive programs, whether or not the students fell below State standards. After the definition was changed, pupils with other than academic difficulties, formerly included in the funding formula as children from AFDC families, were not funded as State compensatory education students, though they may be included in a local district's preventive programs.

Federal Chapter I funds can be used to provide remedial services to students who are above State standards but below local standards. The State appropriation for compensatory education exceeds the federal funds to New Jersey for compensatory education.

(See Part IV for further findings on the compensatory education program.)

Bilingual Education Categorical Aid

Categorical aid is provided for pupils who receive instruction in a second language, as required by State law. (The Bilingual Education Act, *N.J.S.A.* 18A:35-15 *et seq.*) The amount of aid is calculated by multiplying the number of such students in the pre-budget year times an additional cost factor times the prior year's State average NCEB. The additional cost factor was .16 from the beginning of Chapter 212 until 1983-84, when it was increased to .23.

There is no limitation on the number of bilingual students for whom a district may receive aid. For 1986-87, Camden received $1,214,110 for 1,451 students; East Orange received $185,756 for 222 students; Irvington received $287,839 for 344 students; and Jersey City received $2,286,810 for 2,733 students.

According to the Department's Bilingual Education Office Manager, there are approximately 230 school districts offering either or both bilingual and English as Second Language (ESL) programs. (See Part IV for further findings on these programs.)

Special Education Categorical Aid

Special education categorical aid is awarded for students with specified handicapping conditions. As with other categorical programs, the additional cost

factors for each student in the special program are multiplied by the prior year's State average NCEB. As of 1984-85, the additional cost factors ranged from .005 for home instruction to 2.23 for a day training program in a State facility. The program categories to which extra cost factors were assigned in 1984-85 were educable, trainable, neurologically impaired, perceptually impaired, emotionally disturbed, multiple handicapped, socially maladjusted, auditorially handicapped, orthopedically handicapped, chronically ill, visually handicapped and communication handicapped. Extra cost factors are also assigned to certain facilities and service settings, including supplementary home instruction, private school, resource room, home instruction and classes in State facilities. For home instruction, the extra cost factor is multiplied by the number of hours of instruction, not the number of pupils in the category, and then this factor is multiplied by the prior year's State average NCEB.

In special education categorical aid, a separate cost factor is calculated annually for each handicapping condition. The Department of Education selects certain budgeted costs associated with instruction of all children and divides by the total number of teachers in the State. This yields a rough estimate of the per teacher cost of all instruction. The Department then divides the same selected budgeted costs associated with instruction by the total number of pupils in the State to receive the per pupil cost for all instruction. Administrative and other overhead costs are not included in the estimate of costs associated with instruction. The Department then takes the number of pupils in each special education category and divides by the number of teachers in that category to yield an instructional unit factor. This division is done for each handicapping condition and thus represents, in essence, a statewide average class size for each condition. The Department then divides this instuctional unit factor, or the statewide average class size, by the per teacher costs

associated with all instruction and gets in effect the cost of teaching a special education class. The costs of teaching the special education class are then compared to the per pupil costs for all instruction to get the excess cost associated with teaching the handicapped child. This excess cost is then divided by the prior year's statewide average NCEB to get the additional cost factor percentage. These additional cost factors have changed frequently from year to year pursuant to the Department of Education's and the Governor's recommendations to the Legislature.

The Department agrees that the special education categorical aid figure does not necessarily represent the costs of special education in any district. Beginning with the 1989-90 school year, the Department intends to calculate special education excess cost factors by using the actual costs of special education instead of the formula described in the prior paragraph. The Department would prefer to use actual cost figures, but its implementation has been delayed because most districts do not know or report these costs. In one instance, for example, the Department's auditors found that Jersey City was attempting to fund all of its special education costs out of the special education aid, which is supposed to cover only excess costs. But, the actual costs of the program were probably greater than those calculated, since Jersey City had not included all the costs of special education in the line items totalled as special education costs. The Department believes that the actual costs of special education programs will prove to be less than the current estimated costs.

There is no limitation on the number of special education students for whom a district may receive aid, but during the late 1970's special education cost factors were reduced for several years by a flat 16% across the board.

(See Part IV for further findings on the Special Education program.)

Vocational Education Categorical Aid

Categorical aid through an additional cost factor is also provided for local area vocational schools (LAVSD's) that are part of a regular school district. This cost factor was .53 until 1983-84 when it was reduced to .28. Vocational categorical aid is not provided unless the district qualifies as a LAVSD.

Only seven out of the 18 school districts in New Jersey receiving this type of categorical aid are urban. Paterson in Passaic County is not a LAVSD and there are no LAVSD's in Essex County.

Since 1982 when the LAVSD designation was created, only the Millville school district, in 1984-85, has been added to the original list of districts qualified to receive this form of categorical aid.

To qualify as an LAVSD under *N.J.A.C.* 6:46-1.4, districts must offer an expansive vocational curriculum including classes of 600 minutes per week. A LAVSD must also have a full-time vocational director and a job placement coordinator.

(See further findings about LAVSD's and vocational education in Part II.)

Transportation Aid

Transportation aid is calculated by taking the approved expenditures two years prior to the year in which aid is to be paid and multiplying by .90. To be approved, expenditures must be applicable to children that are transported over two and two and a half mile limits. In addition, salary payments must not be in excess of the amounts set by the State Board of Education. For 1984-85, transportation aid represented 5.5% of total State aid.

When Chapter 212 was enacted, transportation aid was paid at 100% of the prior year's approved transportation costs. In 1978, effective for the 1979-80 school year, reimbursement was cut to 90% of the prior year's approved transportation costs. Subsequently, by changes in the Appropriations Act, transportation aid was further reduced to 90% of approved expenditures from the second prior year. In the 1986-87 school year budget, total State transportation aid was frozen to the level of the prior year's Appropriation Act.

Debt Service Aid

Debt service aid is calculated by utilizing the current expense equalization formula. The aid is determined by multiplying the net debt service budget for the pre-budget year by the same state share used for equalization aid. For Type I school districts, debt service aid is paid to the municipality.

For example, assume a district which in the previous year had $496,910 total debt service expenses (principal and interest paid on outstanding bonds) and a

current expense state support ratio of .43. Aid is calculated for this district by multiplying .43 by $496,910 to yield $213,671 in debt service aid. If a district has no debt service expenditures, this aid will not be paid.

There is no minimum aid for debt service aid. This aid is paid only to districts below the GTB. Therefore, when the GTB has been reduced for current expense equalization aid, the guarantee for debt service aid has also been reduced. However, there is no limit on aid for debt service.

Capital Outlay Aid

Capital outlay aid is also calculated by utilizing the current expense equalization formula. This aid is also determined by applying the same state share used for equalization aid. However, the amount of capital outlay upon which aid can be paid is limited to the smaller of the district's budgeted capital outlay for the pre-budget year or 1.5% of the district's current expense and budgeted capital outlay for the pre-budget year.

For example, if a district's total budgeted capital outlay expense for the pre-budget year was $36,873, to calculate State aid we multiply .015 by the current expense budget for this district (assume $2,468,380) plus the prior year's budgeted capital outlay expense ($36,873). This calculation equals $37,579 and is larger than the $36,873 total budgeted capital outlay expense for the pre-budget year. Therefore, State aid is calculated (assuming a .43 state support ratio for this district) by multiplying .43 times $36,873 to yield $15,855 in capital outlay State aid. As with debt service aid, unless a district budgets for capital outlay, this aid will not be paid.

Assistant Commissioner Calabrese explained that repairs are supposed to be paid from the district's current expense budget. If a district modifies or replaces a building, that is capital outlay. If a district repairs a roof, that should be considered current expense. But if a district replaces a flat roof with a pitched roof, that expense can be denominated as capital outlay.

As with debt service aid, there is no minimum aid for capital outlay. Districts above the GTB receive no aid for capital outlay and reductions in the GTB for equalization aid equally affect capital outlay aid.

Debt service and capital outlay aid represented 3.2% of total State aid in 1984-85. The percent of total State aid represented by this aid has declined from 4.2% in 1976-77 to 2.9% in the Governor's recommendations for 1986-87.

Teachers' Pension and Annuity Fund Aid

The Teachers' Pension and Annuity Fund (TPAF) is funded totally by the State. The Fund receives an annual appropriation directly from the State to pay for teacher pensions and the employers' share of Social Security, which in 1984-85 cost $526 million. TPAF appropriations represented 22.3% of total State funds for education in 1984-85.

School districts need not contribute any monies to the TPAF and Social Security for teachers. They must, however, pay a proportionate share of TPAF administrative costs. For non-teaching employees, school districts must contribute

to the Public Employees' Retirement System. These payments are deducted from the total State aid remitted to districts.

The State's contribution to the TPAF is determined as a percentage of teachers' salaries and is totally unrelated to the equalization and categorical aid formulas.

The State Board and Commissioner in 1980 stated: "The only major aid category that has been immune to reduction has been aid to support the district (employer) share of the pension contribution . . . [T]he pension fund contribution has become an increasingly larger percentage of total school expenditures each year since 1976-77. . . ." (*Four Year Assessment,* Exhibit P-236 at pp. 157-58.)

Miscellaneous State Aid

The State provides a number of miscellaneous aid programs, none of which takes district property wealth into account. These programs accounted for 5% of all State aid in 1975-76, but ranged from 3% to 3.9% from 1976 through 1984-85. In the 1985-86 Appropriation Act, miscellaneous grants accounted for 5.1% of the budget.

As an example of miscellaneous aid, the Teachers' Minimum Salary Law was enacted in 1985, effective for the 1985-86 school year. This law provided $34.5 million in State aid which was expended in fiscal year 1986 to enable all school districts to increase teachers' salaries to the minimum level of $18,500. A total of 17,765 teachers in the State were aided. More were in low-wealth districts than affluent districts, although all wealth groups received some aid under this program.

On average, the 51 urban aid districts received about $270,000 while the average for all other districts was about $50,000. Aid is provided on a current year basis. The law provides for full State funding for three years, with a new funding method to be decided after that time.

In 1986-87, as another example of miscellaneous aid, "HSPT aid" was distributed to provide additional services to all children who did not pass the High School Proficiency Test. This program was available to 17 of the 56 urban districts which had 50% or more failures in math, reading and writing. In 1987, 26 urban districts qualified because the Department dropped the standard to 30% failures.

As another source of miscellaneous aid, the State Board of Education is authorized to maintain an emergency fund of $500,000. For the past three years only $250,000 has been actually appropriated by the Legislature, but requests for help have rarely exceeded the available funds. Often, the Department must solicit districts to request grants from this fund. The maximum amount that has been provided to a single district in any one year is about $95,000, which was awarded Newark on one occasion. This aid is distributed to assist districts that incur expenses for emergencies that could not have been foreseen. For example, a district can receive aid for a roof that blows off, but not one that merely leaks.

Federal Aid to Education

Federal aid to New Jersey education constitutes about 5% of total education expenditures in comparison to a national average of slightly over 7%. Most federal aid is earmarked for use in special categories. For example, federal aid is provided for handicapped pupils and under "Chapter I" for economically and

educationally deprived children. In 1986-87, approximately $43 million was received from the federal government for special education.

A district cannot use federal funds to supplant or substitute for local and State funds. The federal funds must supplement the local and State funds expended by the district on children who receive the federally funded assistance. These funds usually are further conditioned with a maintenance of effort provision. Thus, a district can expand existing services with federal funds, but the district cannot replace State and local monies used for a service with federal funds.

Equalizing Effect of Categorical Aid

Equalization aid is awarded in inverse proportion to district wealth. Generally, the lower the district's property wealth, the more equalization aid which is provided. (See further findings in Part II.)

Other than current equalization aid and capital aid, however, "all other aid categories serve purposes other than equalization. . . ." *(Four Year Assessment,* Exhibit P-236 at p. 158.) Categorical aid, for example, is not adjusted for variations in district wealth. However, the overall incidence of special needs pupils is considerably higher in low wealth districts. Therefore, more total categorical aid goes to low wealth districts.

Both equalization aid and categorical aid is highest in districts where students scored poorly on the MBS. Whether one defines need by property wealth, percent minority, number of bilingual students or numbers of students in academic

need, categorical aid flows in substantially greater and statistically significant amounts toward districts in need.

According to Dr. Goertz, Senior Research Scientist at ETS, in 1984-85, the State distributed an average of $426 per pupil in categorical and other current expense non-equalized aid. The lowest wealth districts received, on average, $529 per pupil and the highest wealth districts received $377 per pupil.

The actual amounts of categorical aid distributed to poor districts are not great enough to affect the large expenditure disparities. (See discussion in Part II below.) East Orange in 1984-85, for example, received $209 per pupil more in categorical aid than Millburn. But there was nearly an $1,800 difference between these two districts in local revenues and equalization aid per pupil, with Millburn generating the larger amount. In addition, it should be noted that categorical aid must be used to provide programs - it is not just additional, uncommitted revenue for a district.

The impact of nonequalized aid can be seen by comparing the State aid ratio, which is the percentage of a district's NCEB reimbursed by equalization/minimum aid, and the percentage of current expense budgets paid by State aid. For poorer districts, the State aid percentage is lower than the state share; for wealthier districts the actual State aid percentage is higher than their state share. For example, for 1985-86 Irvington had a State aid ratio of 84% under the equalization /minimum aid formula, but total State aid made up about 66% of its budget; Camden had a 90% State aid ratio, but total State aid was 77% of its budget. For wealthier districts the opposite is true. Millburn, for example, had a 7% State aid ratio, but State aid was 10% of its budget; Paramus had an 8% State

aid ratio with State aid at 13% of its budget. These differences occur because the very wealthy districts receive non-equalized aid in the same proportion as very poor districts.

Dr. Reock calculated the effect of using State funds now paid for pension aid to increase equalization aid and requiring districts to pay for teachers' pensions from general funds. If pension payments were included within the equalization formula, the poorer districts would gain and those with higher property wealth would lose. For example, if this had been done in 1979-80, the six largest urban school districts would have received a substantial net benefit from additional equalization aid in amounts greater than the increase in their budgets from having to pay for teacher pensions.

I therefore FIND that categorical aid has little equalizing effect on the revenue disparities between low wealth and high wealth school districts. As more State aid is distributed on a non-equalized basis, the equalization potential of the overall State aid is reduced.

Total Chapter 212 Aid for Property Poor School Districts

Chapter 212 State aid comprises a large portion of property poor school district budgets. Approximately 67% of all DFG A districts' current expense, for example, originates from Chapter 212 sources. For districts in DFG B, current expense budget includes approximately 46% of Chapter 212 State aid. These figures can be contrasted with districts classified in DFGs H - J, where Chapter 212 funds comprise from only approximately 21% to 10% of current expense.

Several of the low wealth districts which were mentioned in this hearing had in 1984-85 the following percentages of total State aid to curent expenditures: Asbury Park, 70.67%; Camden, 77.60%; East Orange, 71.66%; Elizabeth, 58.37%; Jersey City, 71.80%; Newark, 76.2%; Paterson, 71.95%; Trenton, 72.26%; and Irvington, 64.97%.

The amounts of Chapter 212 State aid provided individual districts can be very substantial. Jersey City, for example, received in 1983-84 $61 million in equalization aid (NCEB of $81.9 million). This district also received $5.5 million in special education aid; $7.7 million in compensatory education aid; and $1.4 million in bilingual education aid. Jersey City received $1.7 million in transportation reimbursement, $600,000 in capital outlay aid and $2.9 million in debt service aid to the municipality.

PART II

Part II includes my findings on one of the most important educational resources available to New Jersey school districts, fiscal revenues, or the amounts spent by districts to deliver and support their educational programs. This part therefore considers tax rates and educational revenues and plaintiffs' position that the expenditure disparities between property rich and property poor districts are greater now than they were before Chapter 212. This part also discusses what plaintiffs contend are the disadvantages caused property poor districts by limited revenues. Here, some of the educational program differences between property poor and property rich districts are explored. The cause of program differences between property rich suburban and property poor urban districts is covered in Part III.

Relevance of Expenditure Disparities

The defense argues that since the GTB system is not designed to achieve expenditure equity and the level of expenditure is totally controlled by the local district, any differences in expenditure levels that exist should be irrelevant. Since the level of expenditure is discretionary with the local school district, the defense claims therefore that it is inappropriate to compare expenditures in a guaranteed tax base system. The defense further explains that since the purpose of the system is to guarantee fiscal capacity to districts below the guaranteed level, it is especially inappropriate to compare expenditures of districts below the guarantee with districts above the guarantee.

This defense seems to ignore plaintiffs' position, which is that the operation of the school finance system, including the GTB and the permitted local discretion, produces system-wide substantial differences in educational resources that especially disadvantage poor urban districts. The purpose of this litigation is not solely to evaluate how the GTB has affected districts below the guaranteed level. It is the implementation of the entire system that plaintiffs attack. Their argument alleges funding disparities between districts above the guaranteed level and those below the guarantee and I therefore believe that plaintiffs' argument makes relevant an analysis of school district expenditures which are permitted by the financing system, especially when contrasting urban with suburban or property poor with property rich districts. (See further findings in Part I.)

Dr. Goertz's and Dr. Reock's Methodologies

To establish the extent of resource and expenditure disparity among school districts, the plaintiffs rely essentially on two experts, Drs. Goertz and Reock. Dr. Goertz and Dr. Reock are both independent school finance researchers who have conducted numerous analyses of the New Jersey school finance system from Chapter 212's inception. Dr. Goertz is a Senior Research Scientist with the Division of Education Policy Research and Service at ETS in Princeton and Dr. Reock is a Research Professor in Political Science and Director of the Bureau of Government Research at Rutgers University.

Both Drs. Goertz and Reock used range and interval analysis for their studies. Dr. Goertz's ranges measure the differences in expenditures and tax rates, for example, between the 5th and 95th percentiles; these percentiles were drawn

from frequency distributions of pupils, not districts. Each of Dr. Goertz's rankings were divided into seven intervals, each interval containing approximately one-seventh of the pupils in the State.

As an example, when Dr. Goertz classified districts by 1984-85 operating expenditures per pupil, her intervals were as follows:

Oper. Exp	# Districts	#Pupils
$2,535-3183	71	160,142
$3191-3547	87	156,900
$3548-3708	51	158,853
$3715-3916	66	159,261
$3918-4280	81	158,759
$4283-4611	84	158,056
$4619-13,606	119	157,382
Total	559	1,109,363

In contrast to Dr. Goertz's methodology, Dr. Reock analyzed every taxing district as being equal to every other taxing district. He used the actual tax levy for the schools on a municipal basis, for example. Dr. Reock fixed his ranges in relation to the State average. For example, when looking at property tax base, he used ten groups in which Group 1 was all taxing districts having less than 50% of the State average equalized valuation per pupil. Group 2 was all those having from 50-70% of the State average per pupil, and so on. The groups selected by Dr. Reock do not necessarily have equal numbers of pupils or equal numbers of taxing districts. When Dr. Reock's data were ranked by equalized valuation per pupil, for another example, districts in groups 7-10 were above the guaranteed tax base. His method

of analysis thus was also basically to compare range relationships, albeit his groups were arranged differently from Dr. Goertz's. Dr. Reock's conclusions, however, were consistent with Dr. Goertz's.

The defense criticized Drs. Goertz's and Reock's research methodology. They asserted that unlike regression analysis, which is the research technique that was used most by defendants' experts, the research of Drs. Reock and Goertz does not show the strength of any purported relationship. In addition, they asserted that range comparisons and interval analysis select two atypical points to compare and that ranges are sensitive to changes in scale. Furthermore, the defense criticized Dr. Goertz for insufficient use of the coefficient of variation, which is, according to the defense, a particularly good measure for considering the equity interests of high-cost disadvantaged students.

I do not believe that defendants' criticism merits rejection of either Dr. Reock's or Dr. Goertz's analyses. Both Drs. Reock and Goertz were very impressive in their testimony. Dr. Geortz is recognized even by the defendants as a leading researcher in school finance. I was impressed with her knowledge and demeanor. She seemed quite concerned about accurately stating her findings and clearly and persuasively defended her methodology. At times, her ability to calculate on the spot examples to better explain her testimony was truly impressive. Dr. Reock was recognized by Assistant Commissioner Calabrese as a good researcher. Dr. Reock seemed impartial and precise in his presentation. He appeared to have no ideological position and was completely familiar with the development, progress and problems of Chapter 212.

It is true that range and interval analysis does not show the strength of relationships and that range measurements are sensitive to any changes in the selected scale. It is not true, however, that Drs. Goertz and Reock compared atypical points. They both include in their analyses the complete results of all groups. In essence, for example, Dr. Goertz does not compare two points, but seven. She often restricted her comparisons to between the 5th and 95th percentile to eliminate aberrational situations. Also, her data include all school districts and each of her seven groups contains approximately the same number of pupils. Her 5th to 95th percentile includes 90% of the students in the State. She also weighted the school districts in her district grouping averages by the size of the districts in each group. Dr. Reock's statistics included all taxing districts in New Jersey and was frequently displayed in 10 groups. These measures therefore cannot be skewed by a small number of aberrant cases.

The defense opposition to much of this testimony is based upon their contention that equality of expenditures is not the financing system's goal and that therefore neither Drs. Goertz nor Reock should have included in their range analysis districts above the guarantee. I have already indicated why I believe this position to be an inappropriate restriction on relevant proofs.

The defense opposition is also based upon their apparent preference for regression analysis. Almost all of defendants' experts, including Dr. Fowler, the Department of Education's Supervisor of Finance Research in the Division of Finance, used this method of analysis. Regression is a statistical method which attempts to discern positive or negative relationships between variables. This method of research can disprove a hypothesis but cannot prove a hypothesis

because no causation can be attributed to regression. Regression analysis says nothing about cause and effect but merely records the strength of any association between the studied variables. Where there is a perfect positive relationship, the correlation coefficient derived from regression analysis would be +1. In these studies the dependent variable is believed affected by the independent variable. Thus, for example, if studying property wealth and expenditure, property wealth would be the independent variable and expenditure the dependent variable. A perfect positive relationship would mean that for each increase in property value there is a like increase in expenditure. A perfect negative relationship would mean that for each increase in property value there is a corresponding equivalent decrease in expenditure.

With regression analysis, there are also acknowledged limitations. For example, this form of statistical study when used in this case generally counted every district similarly. Thus, when considering a possible relationship between SES and property wealth, a very wealthy shore resort community with a tiny school enrollment and low income permanent residents could cancel out the effects of a very large low wealth, low SES district like Newark. Regression analysis also presents other statistical problems caused by multicollinearity and omitted variables. (These limitations are discussed in Part V.)

Even with their acknowledged limitations, I still FIND Dr. Goertz's and Dr. Reock's research results and defendants' regression analyses helpful in understanding expenditure and other variations among school districts. I FIND that I cannot conclude that one form of analysis is superior to another. Each has its

limitations and each limitation must be considered when evaluating the proffered results.

Expenditures Per Pupil

In 1984-85, a difference of over $2,100 in current expense per pupil existed between districts at the 95th and 5th pupil percentiles of spending when Dr. Goertz ranked school districts by current expenditures per pupil. In 1975-76, before Chapter 212, the difference was $900 per pupil. When these differences are adjusted for inflation, the range from the 5th to 95th percentile of current expenditure per pupil has grown from $900 in 1975-76 to $1,165 in 1984-85.

This variation in expenditures among school districts in New Jersey is consistent across all districts and affects a large number of pupils in New Jersey. In 1985, there was on average a disparity of $1,000 in current expenditure per pupil between DFG A and B (on average $3,546.20) and DFG I and J (on average $4,558.48).

Dr. Goertz considered NCEB, current expenditure per pupil, current expenditure per weighted pupil (which takes into account special needs students) and operating expenditures per pupil. Current expenditures include all expenditures other than those required for debt service and capital outlay. Operating expenditures are the dollars spent by districts on students in their schools, whether or not they reside in the district. For purposes of her 1986 study (Exhibit P-2) all federal aid, except Impact Aid, and tuition revenues received have been eliminated. Dr. Goertz ranked the districts from high to low and divided them into seven groups containing approximately the same number of pupils. She found

a difference of approximately $2,000 between the average expenditure in the lowest (Group 1) and the highest spending districts (Group 7). She found also that there was a difference of approximately $1,000 between the averages for Groups 2 and 6. It is important to note that her analysis includes all school districts and that each of the groups contains approximately the same number of pupils.

Poor urban districts are generally below the State average in each of Dr. Goertz's 1984-85 expenditure measurements:

Dist.	NCEB	curr ex/pup	curr ex./wtd pup
Camden	2,492	3,318	2,755
East Orange	2,775	3270	2860
Irvington	2660	3218	2786
Jersey City	2996	3685	3116
Newark	3216	3879	3334
Paterson	2444	2976	2551
Trenton	3083	3888	3306
St. Average	3329	3952	3560

In 1975-76, these districts' current expenditures per pupil were closer to the State average than they are now. With the State average then at $1,550, the districts' current expenditures per pupil were Camden, $1,535; East Orange, $1,546; Irvington, $1,311; Jersey City $1,492; Newark, $1,719; Paterson, $1,162; and Trenton, $1,581.

In contrast with the below average expenditures of urban districts, many wealthy suburban school districts have expenditure levels per pupil that are substantially above the State average. For example, in 1984-85, differences in

current expenditures per pupil between Cherry Hill and Camden exceeded $1,300; between Millburn and East Orange and between Livingston and Irvington exceeded $1,500 and between Ridgewood and Jersey City exceeded $900.

Measuring Equity

The defendants used five different measurements including the coefficient of variation (the standard deviation divided by the mean, discussed separately below); the Thiel Index - which measures movement from the top down or in this case, the cap limit's effectiveness in causing funding transfers from higher spending to lower spending districts; the Gini Index, which measures the degree to which a line or curve differs from a line representing equity; the McLoone Index, which measures movement from the bottom toward the median; and the 95th to 5th range comparisons. These measures were applied to the expenditures of various school district organizations (K-6, K-8, etc.) for the years 1977 through 1980. The defendants found that 132 out of 160 measurements indicated sustained or increased equity of expenditure with the exception of vocational schools and - as to the McLoone only - K-12 regional districts. These findings are consistent with plaintiffs' expert, Dr. Reock, who found that in the first years of Chapter 212, the law produced some equalization of spending levels caused by the infusion of additional funds generally toward districts below the GTB, but that thereafter, since sometime around 1980, there has been a steady drift back toward the situation that existed before the law was enacted.

It is this drift back toward less equity that defendants contest. Dr. Fowler asserts that his studies do not confirm Drs. Reock's and Goertz's findings. He believes that the system has become more equitable. He relies on the statistics

contained in Exhibit D-230, table 2, which illustrates the ratio and coefficient of variation for per pupil expenditures (using day school expenses including federal monies) and district NCEB between 1975-76 and 1984-85. In the ratio measurement (coefficient of variation arguments are considered separately below) Dr. Fowler compares two expenditures, one at the 95th level of expenditures with the other at the 5th level. In 1975-76, for example, a district at the 95th level spent $1,927 and at the 5th spent $955. Thus, there was a $971 difference between the two and the ratio was 971/955 or 1.02. The range ratio for per pupil expenditures declined steadily to .799 in 1979-80. Then it rose and for three years it stayed at approximately .81. In 1983-84 it declined to approximately .80 but then rose to approximately .86 in 1984-85, which was as high as it has been in any year since 1976-77.

For district NCEB, Dr. Fowler found that the ratio in 1975-76 between the 95th and 5th level was 1.00. Here also the ratio declined steadily until 1979-80 when it reached .89. In 1980-81 it rose to .92. The ratio then dipped to .88-.89 for the next two years. In 1983-84 it was .91 and in 1984-85 it was .95. The .95 ratio was as high as it has been in any year since 1976-77.

Based on Dr. Fowler's NCEB and district expenditure findings, I do not believe that the ratios demonstrate increased equity after 1980. Dr. Goertz's research indicates that expenditure inequities continued at least through 1984-85 and I **FIND** that Dr. Fowler's research is in substantial agreement. I **FIND** that after 1980, expenditure inequity has increased.

Plaintiffs' witness Dr. Reock did find and defendants agree that the McLoone Index initially showed significant improvement, that the movement

thereafter was erratic, but that McLoone continues to show improvement. The McLoone Index is the ratio between the actual expenditures on all students who are below the median spending level and the expenditure that would be required if these students were at the median level. This measure therefore shows and I FIND that there has been some leveling of the lowest spending districts toward the median. However, this measurement completely ignores the amounts spent over the median.

Coefficient of Variation as a Measure of Equity

Defendants contend that the coefficient of variation when measuring expenditures (by both day school expenses and NCEB) demonstrates increased equity under Chapter 212. The coefficient of variation is the standard deviation divided by the mean. This statistical device measures the dispersion around the mean and represents a percentage deviation from the mean (on either side) within which approximately two-thirds of the population being measured falls. A higher coefficient of variation means a larger disparity on either side of the mean. For example, in 1975-76, the year prior to Chapter 212, the coefficient of variation for current expenditures per pupil was 17.5. It then dropped in the first three years of Chapter 212 to a low of 15.5 in 1978-79. Thereafter, this coefficient has been increasing and in 1984-85 had risen to 16.7.

Dr. Reock also calculated the coefficient of variation over time for the State-local school budgets per pupil of all 558 taxing districts in New Jersey. Dr. Reock found improvement in the coefficient of variation for several years after the law was implemented, but that the trend reversed in 1982-83 and the trend of the

coefficient has been upwards since then, indicating growing inequality of expenditures.

Dr. Fowler's calculations show that inequalities in NCEB among school districts decreased from a coefficient of 22.66 in 1975-76 to 19.35 in 1981-82 and since then has increased back to 22.2 in 1984-85. The 22.2 coefficient is the highest it has been since 1975-76.

When Dr. Fowler considered day school expenditures, the coefficient of variation declined steadily from 1975-76 (22.86) to 1980-81, when it was 19.97. Thereafter, it rose for two years to 20.32 and 20.41 and then declined for two years to 19.76 in 1983-84 and 19.73 in 1984-85. The 1984-85 coefficient is the lowest it has ever been. Thus, on this measure of day school expenditures, which include federal funds, equity appears to be increasing .

When Dr. Goertz's weighted pupil measure is considered, which accounts for the special needs of pupils, however, her figures show a 17.7 coefficient of variation in 1984-85, which is the same as it was in 1975-76.

In any event, the coefficient of variation should not be misinterpreted. Even defendants' figures demonstrate a continuing substantial variation in expenditures. For example, the average NCEB in 1984-85 was $3,111. A coefficient of variation of 22.2 actually means that approximately two-thirds of the school districts in New Jersey had NCEB's that were $1,380 apart or greater.

Because of the mathematical properties of the coefficient of variation, it can show improvement when disparities in expenditures are in fact widening. As an

illustration, Dr. Fowler's analysis found that the coefficient of variation for day school expenditures (which includes federal monies) over a ten year period had declined from 22.86 in 1975-76 to 19.73 in 1984-85. The mean expenditure in 1975-76 was $1,494; thus, roughly two thirds of the districts in the State may have had expenditures per pupil that were $684 apart or greater, assuming a normal distribution. Therefore two thirds of the districts would have per pupil expenditures that are $684 above or below $1,494. This means that two thirds of the districts would range from expenditures of $810 to $2,178. In 1984-85, when the mean day school expenditure was $4,085 and the coefficient of variation was 19.73, approximately two thirds of the districts may have been $1,612 apart or greater. Therefore two thirds of the districts would have expenditures ranging from $2,473 to $5,697. Thus, I **FIND** that this slight decline in the coefficient of variation for day school expenditures does not reflect any lessening of the substantial differences in expenditures per pupil across the State.

Furthermore, before this litigation began, the State Board's *Four Year Assessment* (Exhibit P-236 at pp. 75, 170) found that even as of 1980, Chapter 212 had failed to provide any substantial improvement in equity of expenditures. Exhibit P-235, a 1981 Department of Education document used to brief gubernatorial candidates, states at p. 81: "The slight trend towards spending equity started by the 1975 act stopped in 1979 and has started to reverse."

I therefore **FIND** that any lessening of expenditure disparities between property rich and property poor districts that occurred in the first few years of Chapter 212's implementation has dissipated and was never very substantial.

Additionally, it should be noted that the largest expenditure disparities present in *Robinson v. Cahill*, 118 *N.J. Super.* at 242 (L. Div. 1972) were approximately $800. I FIND that the expenditure disparities between property rich and property poor districts are greater now, at least through 1984-85, than they were before Chapter 212 and are greater, without considering inflation, than they were when Judge Botter declared the then existing financing system unconstitutional.

Expenditures by Community Type

Budgeted school expenditures per pupil are the lowest in New Jersey's rural areas and the six major urban centers (Newark, Jersey City, Paterson, Camden, Elizabeth and Trenton). Budgeted school expenditures per pupil are highest in suburban communities and seashore resorts. For example, the major urban centers in 1984-85 had budgeted expenditures per pupil that were 95% of the State average, while suburban communities averaged 111% of the State average. Approximately $1,500 per pupil separated the major urban centers and the suburban communities.

In any given year since the implementation of Chapter 212, the higher the socioeconomic status of the community the higher the average level of budgeted school expenditures per pupil. When districts are grouped by DFG, the lowest DFG has the lowest average budgeted expenditure per pupil and expenditures generally increase as the socioeconomic status of the community increases. More than $1,300 per pupil separates the averages of lowest and highest DFG communities.

The lowest DFG districts spend 84% of the State average, while the highest DFG communities averaged 115% of the State average.

Generally, in any given year since 1976-77, the higher the per capita personal income of the district, the higher the average budgeted school expenditure per pupil.

Dr. Fowler found that the average day school expenditures in 1983-84 for the highest SES group, DFG J, was $4,758. In contrast, DFG A districts spent on average $3,729. Dr. Fowler also confirmed that as the socioeconomic status of districts increase, the NCEB's of districts also tend to increase. Dr. Brazer, another of defendants' experts, confirmed that as personal income increases, school districts tend to spend more. Similarly, both Dr. Brazer and Dr. Hanushek, another defense witness, testified that they expected that under a GTB system, in which expenditure levels are chosen by school districts, expenditures per pupil would be related to socioeconomic status.

Defendants' Charge that Plaintiffs' Expenditure Figures Overstate Disparities

Defendants claim that plaintiffs use of NCEB (the cost of the district's regular education program) as opposed to day school expenditures understates resources/expenditures of school districts because it excludes federal and State categorical and miscellaneous funding (which is mostly grants). Defendants charge that use of the NCEB understates in greater proportion the resources/expenditures of districts below the GTB as opposed to those above the GTB, exaggerating and distorting the differences between them. NCEB, argues the defense, understates

expenditures of districts that have large compensatory education, bilingual programs and special education needs because NCEB does not include categorical funds and federal funds. NCEB, however, correlates witn day school expenditures at .869. Therefore, a district's NCEB explains 76% of the relationship to day school expenditures.

Plainfiffs' experts separately analyzed the impact of categorical aid and also considered revenue disparities between wealth groups when categorical aid funds were combined with all other sources of local and State aid. One of the main differences between the defendants' and the plaintiffs' analyses, however, deals with federal funds. Defendants' day school expenditures include federal funds.

Federal funds, with few exceptions, cannot be treated as general aid or used in place of revenues raised by the State and by school districts. Federal funds are outside of the State school finance system and cannot be taken into consideration in allocating State funds to school districts. Federal funds are generally granted for specific extra purposes rather than for general support. Federal funds cannot supplant local or State monies. Districts may not reduce local and State funding by substituting federal funds. Districts may use the monies to supplement, expand, and increase programs but may not replace State or local monies with federal monies. For this reason Drs. Goertz and Reock excluded federal funds from their analyses of the New Jersey school finance system.

Federal funds cannot be counted upon by the State. Whether and how much federal monies a State will receive depends upon the federal budget, which is outside the State's control. For example, in prior years a shift in federal policies deprived municipalities of $67 million in revenue sharing, of which $35-38 million

had gone to urban municipalities. As a further example of federal funding uncertainties, about 10% of vocational education funds are federal. The President in 1986 and 1987 proposed reducing these funds. Nevertheless, until 1987, Congress increased vocational education funding.

When federal education funds are lost, the school district must determine whether and how to fund the previously federally funded program. For example, Montclair originally hired teacher aides for its school system with federal desegregation funds in the late 1970's through the Emergency School Assistance Act. When those funds were terminated in 1981, the district paid for the aides. Currently in Montclair, a federal desegregation school "magnet" grant (for students who are gifted and talented or interested in science and technology, international studies or the arts) pays for some of the aides. When the district's Superintendent testified, she explained her concerns about continuing this funding when the federal grant ends.

Considering federal funds generally available to a district, even though these monies are usually targeted to specific purposes, can make a difference in expenditure disparity. For example, in 1984-85, with federal funds, Jersey City spent $4,327 per pupil and was above the State average while Camden ($3,403) East Orange ($3,292) and Irvington ($3,142) remained below. In that year, including federal funds, Newark, Trenton, Asbury Park, Hoboken and New Brunswick spent above the State average.

Because of federal funding uncertainty and the federal restrictions against supplanting local and State monies, I do not believe we can rely on the constant availability of this funding source. In evaluating the adequacy of New

Jersey's financing system, therefore, it seems improvident to consider federal monies as an integral part of that system. Since this case requires an assessment of how New Jersey's school finance system works, it does not seem inappropriate to eliminate federal monies from the statistical analyses. Dr. Garms, one of defendants' expert witnesses, confirmed the regularity of this analysis method in school finance research. I therefore **FIND** that the analyses of Drs. Goertz and Reock, which did not include federal funds, can be utilized in assessing New Jersey's financing system.

I also **FIND** that it is appropriate to consider a district's use of federal funds when determining the adequacy of specific programs on specific dates. It seems to me that failing to consider available funding when assessing the adequacy of programs for which federal monies were made available could provide a false impression of the programs' fiscal weaknesses. The possible termination of federal funding makes problematic an assessment of whether an adequate program can be continued into the future, but to ignore the existence of federal funding may present a completely falacious picture of the program's fiscal situation.

In any event, the defendants' statistical results on expenditures do not differ markedly from the plaintiffs'. Defendants submitted no proofs establishing that there were no expenditure disparities. On the contrary, they assert that equality of pupil expenditure is not a policy of Chapter 212 and that spending is totally up to the individual districts, restrained only by caps. Defendants virtually concede that there will be expenditure disparities in a GTB system which rewards tax effort and most of their proofs confirm such disparities. I **FIND** that expenditure disparities are an inherent risk in a GTB system.

The most serious dispute between the parties is not the existence of expenditure disparities but rather the cause of the disparities (dealt with in Part III) and the legal consequences of the disparities (dealt with in Part V). The defense asserts, most forcefully, that there are wide differences among similar SES districts in per pupil spending; that some districts below the guarantee are able to spend above the average per pupil expenditures, and that there are districts with above average property wealth spending below average and achieving above average HSPT results. (See findings below relating to the defense argument that districts under the guaranteed level are spending above the State average.)

Property Wealth Per Pupil

In 1984-85, the wealthiest school district in New Jersey had about 350 times the equalized property valuation per pupil as the lowest wealth school district. The range in property wealth between the districts at the 95th and 5th percentiles is $422,955 to $38,585 per pupil, a ratio of 11:1. In the year prior to Chapter 212, the district at the 95th percentile was 5.5 times as wealthy as the district at the 5th percentile.

In 1984-85 there were 207 minimum aid districts (34.3% of the total number of districts) above the GTB per pupil. These districts had 270,657 pupils, which is 23.2% of the State's students.

Considering Dr. Goertz's seven pupil groups, ranked by wealth, the range is from $42,608 to $450,666, a difference of over 10 to 1.

In 1984-85, the State average equalized valuation per pupil was $190,401, while Camden's was $26,055; East Orange's was $40,675; Irvington's was $63,994; Jersey City's was $62,925; Newark's was $38,585; Paterson's was $50,622; and Trenton's was $54,445.

Many suburban communities that surround urban centers have tax bases that are greater than the State average. Some suburban samples are as follows: Ridgewood, $251,749; Paramus, $477,332; South Orange/Maplewood, $244,942; Madison, $344,995; Livingston, $359,159; Summit, $422,955; South Brunswick, $248,772; Lawrence, $423,136; Princeton, $547,384; Cherry Hill, $192,375; Tenafly, $360,026; Millburn, $582,669; and Scotch Plains/Fanwood, $248,176.

In 1975-76, Camden's property wealth was $20,401, about one-third of the State average. By 1984-85, when the State average was $190,401, Camden's wealth was $26,055, less than one seventh of the State average. This pattern of declining equalized valuation per pupil as a percentage of the State average is consistent for urban districts as follows:

Dist.	%of St. Eq. Val. 75-76	% of St.Eq.Val.84-85
Camden	30%	14%
East Or.	54	21
Irv.	76	34
Jer. City	50	33
Newark	33	20
Paterson	43	27
Trenton	40	29

Tax Rates

From 1975-76 to 1984-85, Chapter 212 has resulted in a steady reduction in the State average current school tax rate for education (from $1.69 per $100 equalized valuation to $1.23). The largest decrease in the tax rate occurred between 1975-76 and 1976-77 when Chapter 212 was first implemented. In that year the education tax rates of the poorest districts dropped substantially. Every wealth group has reduced its equalized school tax rate since the enactment of Chapter 212.

Beginning with 1977-78, however, the education tax rates in the poorest districts increased and by 1984-85, these rates averaged $1.71 compared to the State average of $1.23. In 1975-76, the education tax rates of the poorest districts were 106% of the State average; in 1984-85, they were 139% of the average school tax. Under Chapter 212, the gap in school tax rates between high and low wealth districts has widened.

From 1975 to 1979 the coefficient of variation for school tax rates was reduced from .338 to .295. Since 1979, however, the coefficient has increased and in 1984 it was .356.

Dr. Reock found that the highest tax rates in most years since Chapter 212 have been in the major urban centers and the rural centers and the lowest rates in the seashore resorts and in the suburban communities. This is true, even though the average equalized tax rates have been reduced every year since 1975-76.

Camden's school tax effort went from 110% of the State average in 1975-76 to 145% in 1984-85, and was above the State average in seven out of 10 years.

East Orange had a school tax effort that was 129% of the State average in 1975-76 and this increased to 144% in 1984-85. East Orange has been above the State average school tax rate in every year of Chapter 212.

Irvington has been above the State average school tax rate in seven out of 10 years and in 1984-85 was making an effort 117% of the State average.

Jersey City's school tax effort was 117% of the State average in 1975-76 and in 1984-85 was at 127% of the State average. Since 1981-82, Jersey City has had a school tax effort that has been around 130% of the State average.

I **FIND** therefore that the lowest wealth districts, including the districts in which plaintiff children reside, are making a greater tax effort on average than the wealthiest districts.

Property Wealth and Expenditures

All witnesses agreed that a guaranteed tax base system is not designed to equalize expenditures but to provide equal taxing capacity as defined by whether districts making the same tax effort are able to raise the same amount of revenue.

In an ideal GTB system there would, therefore, be a strong relationship between tax rates and expenditures per pupil and no relationship between wealth

per pupil and expenditure per pupil. Dr. Fowler found that for the State as a whole, there was no relationship between tax rates and expenditures. There was according to Dr. Fowler a strong relationship for districts below the GTB. However, there is no evidence that Dr. Fowler conducted any analysis of the relationship between tax rates and expenditures specifically for districts below the guarantee.

When Dr. Goertz compared NCEB's, which include equalization aid, she found that approximately 160,000 students in the wealthiest districts have, on average, NCEB's of $4,056 per pupil. The poorest districts, with the same number of pupils, have, on average, NCEB's of $2,789.

Dr. Goertz also studied what happens when all sources of State aid including categorical aid, for example, are combined with all sources of local revenues. She found a difference of approximately $1,200 between her highest and lowest wealth groups in current expenditures per pupil. When a per weighted pupil calculation was made, the disparity increased to over $1,300. Dr. Goertz found that the average expenditure of every higher wealth group was greater than the expenditure of every lower wealth group.

Dr. Reock found that throughout all of the years Chapter 212 has been in effect, until 1984-1985, average budgeted expenditures per pupil are higher where the property tax base per pupil is larger.

Dr. Goertz also analyzed this relationship over time. Her study showed that in both 1975-76 and 1984-85, the wealthiest districts spent more than the poorest districts. In 1975-76, the poorest districts had curent expenditures per pupil that were within $50 of the State average and the highest wealth group spent 1.16

times as much per pupil as the poorest group. By 1984-85, the expenditures of the poorest districts were nearly $400 below the State average and the wealthiest districts were spending 1.31 times as much per pupil as the poorest group. The expenditure difference has grown in dollars from approximately $250 to over $1,100.

Dr. Goertz also linked her findings for the State generally to Newark, Paterson and Trenton and the four districts in which plaintiffs reside. She found the same conditions in these poor urban districts as those found statewide.

Defendants' Position on the Relationship Between District Wealth and Spending

The *Four Year Assessment*, Exhibit P-236, admitted that for each of the three years examined between 1972 and 1979, average expenditures per pupil varied directly with the wealth of the districts in each of the four groups of districts sampled. The defendants agree that there is a relationship between wealth and spending in New Jersey's school districts.

Dr. Fowler found that the lowest wealth group of districts had per pupil expenditures that were at least $1,800 less than the wealthiest group of districts, and that expenditures tended to increase as district wealth increased.

Defendants tried to minimize this relationship by a regression analysis which showed that "at most 21% of current expenditure [including federal funds] is explained by property wealth." (State Proposed Findings at p. 98.) They further asserted that when one focuses on the change in expenditure, as opposed to total

expenditure, only 3.6% at best of the year to year changes in day school expenditure were related to property wealth.

Professor Hanushek, an economics professor from the University of Rochester, studied property value as an explanation of expenditure. He found that by "attributing all of the expenditure differences possible to differences in property wealth of districts, only 19.9% of day school expenditures would be eliminated." Professor Hanushek explained that his calculation overemphasized the property wealth factor and that as a consequence his 19.9% figure should be regarded as an upperbound estimate. Defendants therefore contend that the property wealth effect is lower that 19.9%.

Dr. Fowler found that the relationship between property wealth and day school expenditures, which includes federal funds, is not linear, and when statistical tests for non-linear relationships were used, he found that 10% of the day school expenditure variations were explained by the district property wealth. Thus, if property wealth were equalized, only 10% of the spending differences would be eliminated. Dr. Fowler also found 21% of the difference in per pupil expenditure is explained by per pupil property wealth. Thus, equalization of property wealth still would leave almost 80% of the existing spending differences.

Even a 21% explanation through regression analysis amounts to a positive correlation between wealth and spending of about .47. This means that as district wealth rises, spending tends to rise also.

The problem with defendants' attempts to minimize the relationship between property wealth and expenditure is that the defendants' studies ignore

the unequal tax effort which is being exerted by New Jersey school districts. It has already been explained how low wealth districts have generally higher tax rates than high wealth districts. This greater tax effort by low wealth districts reduces the relationship between wealth per pupil and expenditure per pupil. In other words, if all districts in New Jersey made the same tax effort, the positive relationship between district wealth and educational spending would be greater than .47. In fact, Dr. Fowler agreed that if all districts in New Jersey taxed at the State average tax rate, there would be nearly a perfect relationship (.955) between property wealth and expenditure per pupil. I FIND therefore that there is a substantial relationship between property wealth and expenditure in the financing system. (Plaintiffs do not assert a one-to-one relationship between property wealth and expenditure and therefore it is not necessary to consider the defense contentions that such a relationship does not exist. See Defendant's April 22, 1988 Reply at p. 137.)

School Tax Rates, District Wealth and Spending

Dr. Goertz calculated for her different district wealth groups the amount of NCEB available per one dollar of tax rate. In 1975-76, the amount a dollar of tax would raise in the lowest wealth group was 87% of the State average and approximately $700 less than the highest wealth group could raise; however, it was more than could be raised by higher wealth groups two, three and four. By 1984-85, for each dollar of tax levied, the lowest wealth districts could raise 62% of the State average and the gap between groups one and seven was more than $3,200. The lowest wealth group, which had been favored over the next poorest groups in 1975-76, was by 1984-85 more than $400 per dollar of tax rate below these groups. Groups one through five in Dr. Goertz 's analysis include all districts that are below

the GTB, yet group five raises over $800 per pupil more per dollar of tax than group one.

The lowest wealth districts raised $1,654 per pupil for each dollar of school tax rate in 1984-85 compared to $4,889 per dollar in the wealthiest group of districts. When adjusted for inflation, Dr. Goertz showed that the lowest wealth districts had only $181 per pupil more for each dollar of school tax rate in 1984-85 than they had in 1975-76. The wealthiest districts, however, had on average $1,280 per pupil more.

For each dollar of school tax rate, in 1984-85, urban centers obtained an average of $2,111 in State-local funds, suburban areas obtained $3,908 and seashore resorts obtained $7,701, compared to the State average of $3,385.

Dr. Goertz also reviewed districts with low, average and high tax rates. She found that district expenditures vary with the property wealth of the school districts within each of her tax rate ranges.

Dr. Reock's study confirmed Dr. Goertz's findings. He found that in 1975-76, the poorest districts could raise 74% of the State average per pupil for each dollar of tax rate. By 1984-85, these districts could raise 70% of the State average. In 1975-76, the wealthiest districts could raise 411% of the State average and by 1984-85, these wealthy districts could raise 413% of the average.

Dr. Reock found that in the first two years of Chapter 212 there was considerable equalization of revenue raising ability, but that by 1984-85, the system was more inequitable than it was in 1975-76. For example, the number of districts

heavily disadvantaged by the system (according to Dr. Reock "heavily disadvantaged" means those able to raise less than 80% of the State average spending level per dollar of tax) went from 157 in 1975-76 to 85 in 1977-78 and then rose steadily thereafter until, in 1984-85, 187 taxing districts were, according to Dr. Reock, in the heavily disadvantaged category.

These relationships between property wealth per pupil and the amounts districts are able to spend for each one dollar of equalized school tax rate are not challenged by defendants. Dr. Fowler on cross-examination disclosed that an analysis found that if all school districts in New Jersey taxed at the State average, the 5th percentile of expenditure would rise about $27 from $2,728 to $2,755; however, the 95th percentile would increase from $4,905 to $8,497, assuming no cap limits.

Dr. Fowler testified that there was a strong relationship between school tax rates and educational expenditures for districts below the GTB. Dr. Reock stated that for districts below the guarantee there is not a plotted horizontal line which there would be if the equalization formula were strictly neutral. Group 1 districts on average obtained $2,380 in total State-local funds for each $1.00 of tax rate; those in group 6 obtained $3,015 for each $1.00 of tax rate in 1984-85. There is thus not a substantial difference for districts below the guarantee, but there remains a difference, even for districts below the guarantee, between the amount a district must tax and the amount they can raise.

Defendants' witness Professor Garms explained that in a perfectly operating GTB, there would be "widely varying tax rates and widely varying expenditures per pupil. . . ." (Garms Transcript, May 7, 1987, p. 41, lines 1-2.) Dr.

Fowler found that for the State as a whole, there is no relationship between school tax rates and educational expenditures. Thus, for the State as a whole, greater school tax effort is not correlated with higher expenditures. In New Jersey the widely varying tax rates and the widely varying expenditures are not positively related. Therefore as tax rates increase from district to district, per pupil expenditures do not also increase.

I FIND that even with considerably higher school tax rates, the poorest districts cannot generate substantially equal revenues in comparison to the higher wealth districts. Property poor districts, even exerting substantial tax effort, are handicapped in raising revenues because of their property poor tax bases. Spending differences among all districts in the State are not related to differences in tax rates. The GTB system is not providing equal yield for equal effort in the State as a whole.

The Meaning of the Per Pupil Expenditure Disparities

Defendants contend that the use of per pupil expenditure measures to compare the quality of education or opportunity between school districts is extremely difficult and inherently unreliable. (See Defendants' Proposed Findings #90 at p. 107 and #126 at p. 55.)

Dr. Galinsky, Paramus' Superintendent of Schools, indicated that the per pupil figure was an unreliable measure of efficiency and quality because it is dependent upon the particular facts and circumstances of the school district being examined.

Dr. Galinsky explained that districts suffering enrollment decline have escalating costs per pupil but may not be able to reduce costs proportionately to the pupil loss. If a district loses 50 students, for example, the district may not be able to reduce staff by one teacher because the student loss may be dispersed through different grade levels. Thus, the district's per pupil costs would increase but one must question whether any adverse effect on the district's educational efficiency has resulted.

Defense witness Dr. Fenwick English, Professor of Education at Lehigh University, agrees with Dr. Galinsky. Dr. English explained that per pupil cost is most often used to demonstrate good or bad management. However, the only way such comparisons would be valid is if the curriculum is the same, the staff is of the same quality, the instruments used to assess pupil learning are the same, etc. Dr. English said that such comparisons are only valid if the conditions in the districts being compared are identical. Since they never are, per pupil cost comparisons are usually misleading.

Dr. Galinsky further explained that he did not believe per pupil cost measures educational quality because there are low spending districts where student performance on the standardized tests is high and there are high spending districts where students are performing poorly on these tests. There are districts above the GTB, spending below average and scoring high on standardized test scores, including districts in DFG's B and C.

In addition, Dr. Galinsky suggested that we cannot equate any level of expenditure on a one-to-one basis with a particular level of quality. In one district,

for example, 70% of its faculty could be at maximum salary with expensive benefits like dental, optical and prescription insurance plans and sick days, etc. Usually, salaries account for almost 70% of a school district's budget. Therefore, if another district has a younger faculty, with a union that has not negotiated favorable benefits, the cost of providing a similar quality program may be far less. Equal expenditure may not mean equal educational opportunity. Dr. Galinsky believes it is how the district spends money, not how much money they have to spend, which determines the district's educational quality.

It seems logical that if a district squanders its resources and spends its monies frivolously, it will be inefficient and probably deliver an educational program in which quality will not improve with greater expenditures. The district which needs new math books but instead purchases cheerleader uniforms may not be improving its educational program.

It is also logical that unique district circumstances like declining enrollments or the composition of teaching staffs may cause higher or lower per pupil expenditures and reflect only these unique circumstances and neither efficiency nor quality.

However, most of plaintiffs' expenditure per pupil figures are based on Dr. Goertz's study in Exhibits P-2 and P- 3 and Dr. Reock's study in Exhibits P-7 and P-8. Dr. Goertz did not simply compare a few districts with each other. When grouped by operating expenditures per enrolled pupil her seven categories included in each group approximately 66 districts and 158,000 students. Dr Reock used as his unit of analysis taxing districts; therefore, most of his analyses dealt with comparisons among over 550 districts. I believe that this quantity of data minimizes

unique district characteristics and makes comparisons between Dr. Goertz's groups and Dr. Reock's districts reliable.

In some circumstances, differing per pupil expenditures may be evidential of equitable or inequitable resource allocation. For example, if there are 25 pupils in a class, a $1,000 actual difference in per pupil expenditure translates into a $25,000 difference per classroom. That amount of available expenditure, if wisely used, can affect educational quality and opportunity. As one of plaintiffs' witnesses explained, the quality of a math course was improved when $2 per pupil was added per classroom because each math student could then own his/her workbook.

All education experts who testified agreed that money has some relation to program opportunity and quality. Money does purchase programs, instructors and support personnel. At some point, in every school district, if funds are reduced sufficiently, program quality and variety of opportunity suffers.

In 1984-85, for example, South Brunswick's current expenditure per pupil was $4,772, as compared to Trenton, which spent $3,888 per pupil. If South Brunswick were funded at Trenton's level, it would receive $1.6 million fewer dollars, which in the opinion of South Brunswick's Superintendent would have a disastrous impact on the quality of its educational program. A cut of this magnitude would, according to the Superintendent, require the elimination of much of the richness from South Brunswick's educational program. If Moorestown's 1984-85 current expenditure per weighted pupil of $4,307 were reduced by nearly $800 to $3,560, the State average current expenditure per weighted pupil, a $1.5 million dollar funding loss would ensue. Such a loss, according to a Moorestown

administrator, would be devastating to the district's curriculum. Additional services for special education and basic skills which the district funds without State reimbursement would have to be reduced and class size would have to be increased.

Additionally, the record does not reflect any other method of comparing the equity of monetary resources and, furthermore, per pupil expenditure comparisons were used in *Robinson v. Cahill* and were recognized by all experts in this case as the traditional measure of student equity in school finance research.

Consequently, I **FIND** that per pupil expenditure comparisons are relevant in determining whether districts are able to provide educational programs of substantially equal quality and variety of opportunity. The conclusions to be drawn solely from such comparisons are limited when comparing districts with differing curriculum, teaching staffs and other costly inputs. But when the student as the recipient of the educational program is the focus of concern, per pupil expenditure amounts is one method, albeit imperfect, of comparing system benefits. I further **FIND** that per pupil expenditure comparisons are not solely determinative of program opportunity and quality, but may be considered in assessing the capability of districts delivering substantially equal programs. Differences in per pupil expenditures may indicate possible inequitable program opportunities assuming the monies are being spent in proportionately similar ways.

Districts Below the GTB Spending Above the State Average

Defendants assert that almost 1/3 of the districts below the GTB (99 out of 325, according to Appendix B in Defendants' April 22, 1988 Reply) spend above the State average current expense per pupil of $3,952. These districts include, for

example, five in Camden county (Cherry Hill, DFG I; Somerdale, DFG D; Blackhorse Pike Regional, DFG D; Lawnside, DFG B; and Barrington, DFG F). They assert that plaintiffs have not proven that on a systematic basis urban districts have significantly less resources than other districts. The defense makes this assertion to support their major argument that any deficiency that exists in the system is caused by the districts' own mismanagement or other failings. (The cause of expenditure and program disparities is discussed in Part III.)

To bolster this major argument, the defense in its April 22, 1988 reply recalculated much of the statistical evidence provided in Exhibit P-4. These recalculations are contained in hundreds of pages of printouts and other tables in an appendix to defendants' reply and seem in part to be well beyond the scope of normal attorney argument. For example, in Appendix T, the defense provided an illustration of how they calculated the average current expenditure per pupil per ethnic group. For each district in each DFG, they multiplied Dr. Goertz's per pupil expenditure by each ethnic group's enrollment. They then summed this product for all DFG districts and then summed the particular ethnic enrollment for each DFG district. They then divided the product's sum by the enrollment. At p. 161 of this reply, defendants explain as follows how they derived the figures appearing on the displayed chart: "Column (1) from P-269; column (2) was reached by multiplication of the SCE aid (P-4) by the resident enrollment (P-4) of each district and the addition of the products of this computation into an aggregate total by DFG; column (3) was arrived at by the addition of resident enrollment for each DFG; column (4) was computed by dividing DFG aggregate of residential enrollment (column (3)) by the State's total residential enrollment; column (5) was reached by utilizing the SCE pupil percentages in P-4 and multiplying by residential enrollment; column (6) was reached by dividing each DFG's SCE pupils by the total State SCE pupils; column (7)

was reached by using columns (2) and (5) and dividing; column (8) was reached by dividing each DFG amount in column (2) by the total for that column."

Because of this unusual conduct, plaintiffs argue that I should assign no weight to this portion of defendants' reply. The plaintiffs question these "unvalidated conclusions." They wonder whether the defense attorneys prepared them or whether an analyst who did not testify made these calculations. Plaintiffs assert that my considering such "unvalidated proofs or pseudo-analysis" would deprive them of basic due process because of an inability to cross-examine the preparer. Furthermore, if an analyst prepared these calculations, plaintiffs argue the appendix and all parts of the related reply can only be considered unreliable hearsay.

The defense recalculations fall basically into two groups. The first supports the defense contention that expenditure disparities are idiosyncratic and related to local decisions rather than Chapter 212. Under this theory, any well-managed urban district should be able to spend above average since numerous urban districts do so and plaintiffs' proofs do not support a finding that there are substantial differences in resources that particularly disadvanatge urban school districts on a systematic basis. The second group of recalculations seeks to establish that whatever adverse expenditure or resource disparities may have been established, they do not adversely impact on minorities and the presence of large minority student populations does not affect the level of per pupil expenditures under Chapter 212. I will consider the first group of calculations here and the second in the section immediately following. To the extent that these arguments

raise causation questions, I deal with the cause of expenditure and program disparities in Part III.

The defense points out that in 1984-85, Hoboken (DFG A - $4,319 current exp./pupil) outspent Bloomfield (DFG F - $3,956 current exp./per pupil) and Nutley (DFG G - $3,920 current exp./per pupil). Hoboken also spent virtually the same as wealthy South Orange/Maplewood ($4,354) and Montclair ($4,450).

According to defendants' Appendix C in their April 22 reply, only 71 school districts listed in Exhibit P-4 have resident enrollments in excess of 4,000 pupils. These represent approximately 12% of all districts, but the districts enroll 567,413 students, representing approximately 51% of the total resident enrollment of the State. Fifty one of these districts have non-minority enrollments in excess of 50%. Twenty of the districts have minority enrollments in excess of 50%. The defense arrayed these districts by current expense per pupil and showed that at $2,700-3,000 there were Paterson, Egg Harbor Twp., Millville, Montroe Twp., Pemberton and Washington Twp. At $3,001-3,500 there were Perth Amboy, Passaic, Camden, East Orange, Vineland, Irvington, Brick Twp., Gloucester Twp., Vernon and Clifton. At $3,501-4,000 there were Parsippany-Troy Hills, Roxbury, East Windsor, Atlantic City, Union City, West New York, Elizabeth, Newark, Jersey City, Trenton, Orange, Lower Camden, Bayonne, Kearny, North Bergen, Neptune, Plainfield, Pennsauken, Belleville, Toms River, West Milford, Bloomfield, Sayerville, Edison, Piscataway, Lenape and Middletown. [Two of the districts listed by the defense in this group were erroneously included. They are Edison ($4,346) and Piscataway ($4,375), both of which should be in the fourth group. Jackson, however, should be included within the $3,501-$4,000 range.] At $4,001-4,500 there were Hoboken, Long Branch, New Brunswick, Lakewood, Willingboro, Hamilton, Old Bridge, Union

Twp, Freehold, Matawan-Aberdeen, East Brunswick, Montclair, South Orange-Maplewood, Wayne and Westfield. At $4,501-5000 were Linden, Woodbridge, West Orange, Cherry Hill, Scotch Plains/Fanwood, Ridgewood, and Livingston. At $5,001 plus were Franklin Twp., Teaneck, Morris and Bridgewater-Raritan. [Appendix C also includes Hackensack in this last group.]

Defendants point out that 40% [actually about 37%] of the districts with enrollments in excess of 4,000 had current expense between $3,501 and $4,000 per pupil. These districts had a total enrollment of 267,729 pupils [248,906 according to Appendix C] which represented 47% [actually about 44%] of the students attending districts with resident enrollments in excess of 4,000. Seven [actually eight] of these districts were in DFG A. One district was in DFG B; seven [actually six] were in DFG C; three were in DFG D; one was in DFG E; two were in DFG F; two were in DFG G [actually 0 were in DFG G], and five were in DFG H. All DFG's with the exception of I and J were represented. [G was also not represented.]

Defendants contend, therefore, that when comparing large districts across the State there is no support for the conclusion that there are substantial differences in resources disadvantaging urban school districts. The defendants assert that plaintiffs' individual comparisons, where for example they compared Jersey City with SouthOrange/Maplewood, were invalid because Jersey City and most of the other urban districts are so much larger than the suburban districts with which they were compared.

Preliminarily, plaintiffs allege that there are various defects in the appendix supplied by defendants. Dr. Goertz analyzed 578 districts (all except vocational school districts). Defendants, according to the plaintiffs, used only 557

districts and did not explain why. Plaintiffs point out that Longport Boro is not in the data, but there is again no explanation for its exclusion. There is also some question as to whether Exhibit P-4 was actually used by the defense. For example, Bloomfield's CE/Pupil is listed at pages 210, 220 and 240 of the defense appendix as "NA" (not available). Exhibit P-4, however, contains a current expenditure per pupil for Bloomfield. Defendants also use undefined terms like "sampling" and "percentage sampling" and "State's mainstream" and "unequivocally comparable." The plaintiffs also assert that the defense has compared combinations of districts that may not be comparable. For example, the state support limits are different for K-12 and K-6 districts. Defendants listed 122 elementary districts as comparable in spending to Pleasantville, which is K-12. Also, defendants list 70 districts, including one elementary district (Gloucester Township) and three high school districts (Lower Camden County Reg., Freehold Reg. and Lenape Reg.), which also have different state support levels. The defense has also combined expenditure data for elementary and K-12 districts at pp. 195, 207, 217, 226, 239 and in Appendix J, K, L, V1 and V2.

Given the nature of the financing system, it is expected that some districts below the guarantee will spend above the State average. Indeed there are also districts with above average wealth and below average per pupil expenditures. Plaintiffs do not contend otherwise. There are several factors which coalesce to determine the level of district spending. These include tax rate, property value, public support for the school system and political support for the Board of Education's budget, to name a few. Because of the varying influences, most of the statistical studies relied upon by experts who testified in this case used averages.

In the defendants' recalculation focusing on districts with enrollments of 4,000 or more, there are six districts spending between $2,700 and $3,000 per pupil (which is $1,252 - $952 below the 1984-85 State average of $3,952 current expenditure per pupil). Of the 52,334 children in five of these six districts funded at that level, 87.4% are from DFG A and B districts. Also, 71.1% of those children (37,195) are from three poor urban districts (Paterson, Millville and Pemberton). Similarly, among 10 districts listed as spending between $3,001 and $3,500 ($951-$452 below the State average), six of the districts are in DFG A and B and all are urban. Of the 91,289 students funded at that level, 70% (64,338 children) are in six poor urban districts (Perth Amboy, Passaic, Camden, East Orange, Vineland, Irvington). In sum, 101,533 children, or 70.6% of all children (143,623) in the 4,000 plus enrollment districts funded below $3,500 current expenditure/pupil, reside in poor urban districts. Finally, inspection of the 12 districts listed in the two highest spending groups indicates that there are no poor urban districts among them and that by restricting the comparison to 4,000 plus student enrollment districts, many affluent high spending districts were eliminated. District size may adversely impact on management. (See findings in Part V.) But, I do not believe that students with similar educational needs from large districts should receive less financial support than students from small districts.

To rebut the assertions contained in the defendants' reply, plaintiffs also ranked the 211 K-12 districts by 1984-85 current expenditure per weighted pupil and found that poor urban children represented only 3.1% of all the children residing in districts spending above the $3,560 State average current expenditure per weighted pupil. (The defense did not consider the weighted pupil concept in their recalculations.) Of the 29 poor urban districts, all of which are K-12 districts,

only three (Burlington City, rank 96th; New Brunswick, rank 98th; and Hoboken, rank 105th) have above average current expenditures per weighted pupil. Further, their combined enrollments of 10,900 children represent only 3.91% of the total enrollment of 278,834 children in all 29 poor urban districts. The remaining 26 urban districts spend between $3,477 (Long Branch) and $2,516 (Millville) in current expenditure per weighted pupil.

The vast majority of the poor urban children included in plaintiffs' ranking of the 211 K-12 districts are in the 22 urban A and B districts between 154th Trenton and 211th Millville. Included in those districts below the State average ($3,560) are: Long Branch, DFG B rank 127; West New York, DFG A rank 135; Asbury Park, DFG A rank 142; Pleasantville City, DFG A rank 143; Trenton, DFG A rank 154; Orange, DFG B rank 159; Newark, DFG A rank 163; Elizabeth, DFG A rank 168; Jersey City, DFG A rank 176; Union City, DFG A rank 177; Atlantic City, DFG A rank 179; Garfield, DFG B rank 181; Harrison, DFG B rank 183; Phillipsburg, DFG B rank 190; Vineland, DFG B rank 191; Perth Amboy, DFG A rank 193; East Orange, DFG A rank 194; Keansburg, DFG A rank 196; Irvington, DFG B rank 198; Camden, DFG A rank 199, Passaic, DFG A rank 202; Bridgeton, DFG A rank 205; Gloucester City, DFG A rank 206; Pemberton, DFG B rank 209; Paterson, DFG A rank 210; and Millville City, DFG B rank 211.

Even though I believe the April 22, 1988 reply contains several calculation errors, raises serious procedural questions and in several parts goes well beyond fair argument based on the record, I have chosen to deal with its assertions on the merits. After considering the proofs as a whole, I am convinced of the validity of plaintiffs' evidence on expenditure disparities. Much of their conclusions are, in fact, corroborated by defense testimony and documentary evidence. The statewide

disparity patterns established by this evidence were not refuted by any defense witnesses. Instead, the defense sought to isolate the data to individual district deficiencies and idiosyncracies.

Plaintiffs never urged that their school districts or other poor districts like Newark, Paterson, and Trenton had a monopoly on poverty, unemployment, and school funding disadvantages. Rather, plaintiffs contend that the larger cities have been disproprtionately affected by the entire range of problems. (See causation discussion in Part III.) No issue has been raised on behalf of all 56 districts labeled "urban" by the State. In fact, plaintiffs elicited testimony and presented documentary proofs to distinguish poor urban districts (DFG A and B) from others so designated by the Department of Education.

Dr. Goertz's data was organized around pupil groups, thereby in a sense neutralizing the various financing system factors which influence district spending. She focused upon those the system purports to serve - the students. I FIND that defendants' recalculations provide insufficient reasons to question the research findings of Drs. Goertz and Reock. In fact, a careful analysis of the district data, as indicated above, finds support for plaintiffs' contentions.

In addition, I have found that property wealth is positively related to spending. As property wealth increases, spending tends to increase also. The Guaranteed Tax Base is 34% greater than the State average equalized valuation per pupil. Therefore, it would stand to reason and I FIND that some districts below the guarantee should be able to spend at and even somewhat above the State spending

average. But I **DO NOT FIND** that all property poor urban districts are therefore able to spend above average.

Given the varying influences on district spending, I ascribe no crucial meaning to the fact that 99 districts below the guarantee can spend above the State average. One reason is that, of those 99 districts, many are close to the guarantee level. For example, Bradley Beach ($211,079 equalized valuation) and Waldwick ($217,764 equalized valuation) were not far below the 1984-85 GTB of $223,100. Only seven of the 99 districts below the guarantee have equalized valuations below $100,000. All four of plaintiffs' districts have equalized valuations below that amount, including Camden at $26,055.

This defense argument also disregards how district spending patterns may be arranged under the guarantee. When Dr. Goertz analyzed 1984-85 district wealth and current expenditure per pupil, for example, she found that expenditures rose through each of her pupil groups, including those below the guarantee. Exhibit P-2, p. II-16, table 10 shows that pupil group one with a $42,608 equalized valuation had $3,482 current expenditure; pupil group two with $78,767 equalized valuation had $3,514 current expenditure; pupil group three with $126,618 equalized valuation had $3,687 current expenditure; group four with $163,644 equalized valuation had a $3,825 current expenditure and group 5 with $205,364 equalized valuation had a $4,041 current expenditure. The rise in expenditures through each pupil group with equalized valuation below the GTB averaged $139 per pupil. The difference in spending between group 1 and group 5 was $559 per pupil.

I **FIND** that because some property poor districts spend above the State average, it does not follow that all, or even substantially all, of the remaining 226 districts below the guarantee must also be able to spend above average. There are too many other restrictive influences and limitations on individual district spending for me to draw such a conclusion. (See causation findings in Part III.)

I **FIND** that plaintiffs have proven by at least a preponderance of the evidence that many poor urban districts, especially those in DFGs A and B, and hundreds of thousands of students being educated in these districts, are receiving substantially less financial resources for their education than students in many property rich suburban districts.

The Impact of Chapter 212 Upon Minority Students

In an effort to establish that the funding system does not adversely impact on minority students and that large numbers of minorities in a district do not determine the level of pupil expenditure under Chapter 212, the defendants supplied additional recalculated data in their April 22, 1988 reply.

The defense asserts that large minority enrollment is not a factor in determining district expenditure. Paterson, for example, has a minority enrollment greater than 50% and has a current expense at $2,976 per pupil. But five other districts with non-minority enrollments greater than 50% and arguably less urban have similar current expense. The defense lists Egg Harbor Twp., DFG B, $2,947; Millvillle, DFG B, $2,832. Monroe, DFG B, $2,844; Pemberton, DFG B, $2,762; and Washington Twp., DFG G, $2,909.

Appendix H in defendants' April 22, 1988 reply lists all K-12 districts with current expense per pupil less than Hoboken. The overwhelming number of K-12 districts under Hoboken are non-minority school districts. There are 133 K-12 districts which have current expenditures per pupil less than Hoboken. Appendix I lists K-12 districts with current expense per pupil less than Trenton. Again the majority of districts under Trenton have resident enrollments which are less than 50% minority. There are, according to defendants, 84 districts under Trenton.

Appendix L in the defendants' reply considers the average current expense per pupil of districts plaintiffs attend and then lists districts with less current expense per pupil. Of the 109 districts (excluding Irvington, Camden and East Orange) total enrollment is 239,224 [this figure includes Irvington, Camden and East Orange; without these districts the enrollment is 198,124], with 83,370 [this figure is incorrect either way: with the three districts enrollment is 86,370 and without it is 45,270] attending districts with minority enrollments over 50% and 152,854 [this figure is correct if the three districts are included] attending districts with non-minority enrollments in excess of 50%. Thus a majority, approximately 64% of the students, with this level of expenditure attend districts which are non-minority by more than half and students attending districts with minority enrollments greater than half are treated no differently.

The defense also compares current expense per pupil between school districts which are primarily non-minority with those which are primarily minority or have sizeable minority resident enrollments. Appendix O in the April 22 reply shows that 431 school districts, or 82.73% of the districts having white enrollment in excess of 50%, fall within the expenditure range of all districts, excluding vocational

districts, which have minority enrollments greater than 50%. The districts have a combined resident enrollment of 726,279 or 86.57% of the total (838,931). Appendix P shows that another 144 districts, or 79.12% of the 182 K-12 districts having white enrollments greater than 50%, have current expense per pupil which falls within the range of K-12 districts which are predominantly minority. These districts have a combined resident enrollment of 450,754 pupils or 80.76% of the total 558,136.

Appendix S in the reply shows that with the exception of DFG H, mean current expense per black pupil exceeds mean current expense per white pupil in each DFG. It also shows that the minority mean current expense per pupil exceeds white mean current expense per pupil in all DFG's with the exception of A. When K-12 districts were surveyed, mean current expense per black pupil exceeded mean current expense per white pupil in all categories except DFG C. Mean curent expense per minority pupil exceeded mean current expense per white pupil in all cases except DFG's A, C and J. In those instances, the differences are minimal according to the defense.

As I have indicated earlier, I have serious misgivings about the recalculations submitted by the defense in their April 22, 1988 reply. However, there is sufficient evidence in the record to handle the merits of the arguments asserted.

Again, plaintiffs illustrate in their rebuttal to the defendants' reply that the defense did not utilize the weighted current expense concept used by Dr.

Goertz. When K-12 districts are ranked on that basis, there are 57 districts (rather than 84) spending less than Trenton, and 21 of these districts are urban.

The plaintiffs demonstrated in their rebuttal (Attachment 1) that in 1984-85 there were 360,155 students being educated in the 58 lowest spending K-12 districts in the State. Of this total, 252,846 students, or 70.2%, reside in the 22 poor urban districts where spending ranges from $254 to $1,044 per weighted pupil less than the State average of $3,560. Furthermore, of the 213,730 black and Hispanic children in these 58 lowest spending K-12 districts, 195,552, or 91.5% of them, are in the 22 poor urban districts. The 252,846 public school children residing in the 22 lowest spending poor urban districts (from Trenton to Millville) represent 90.7% of all children enrolled in the 29 poor urban districts. Of the 291,924 black and Hispanic children enrolled in the State's 211 K-12 school districts, 195,552 or 67% were enrolled in the 22 lowest spending, poor urban districts.

When Exhibit P-4 (1984-85 data) is reviewed for districts with more than 1,200 minority students and less than 50% white students, for example, it shows 27 districts. Of these, four districts spent above the weighted mean (15%) and 23 spent under (85%). Considering the large urban centers of Camden, Jersey City, Newark, Paterson, and Trenton, they were all below the State average current expense weighted mean. East Orange, Elizabeth and Irvington were also below the mean. When comparing these districts by NCEB, 78% or 21 were below the weighted average NCEB and 22% or six were above the weighted average. All of the larger urban centers and East Orange, Elizabeth and Irvington were below.

In 1984-85, of 233,139 black and Hispanic students in 50%-plus minority districts, 211,432 pupils or 90.7% were being educated in districts spending below

the State average. Only nine of the 36 districts with 50% plus minority enrollment spent above the State average. In 50%-plus non-minority districts, 448,955 students out of 838,931 students (53.5%) attend districts which spend above the State average. In 70%-plus non-minority districts, 398,335 students out of 741,041 (53.8%) attend districts which spend above the State average.

To argue as defendants do in their Appendices O, P and Q that expenditures in many 50% (or 70%) non-minority districts fall within the expenditure range of high minority districts ignores where the students are within those ranges. Of the 18 poor urban districts which are 70%-plus minority, 15 spend below the State average. These 15 districts educate 224,135, or 88.8%, of the 252,489 students in 70%-plus minority districts. Of the 213,618 black and Hispanic students in the 70%-plus minority districts, 190,797 (89.3%) attend the 15 low spending, poor urban districts.

I have already determined that large concentrations of black and Hispanic students are being educated in urban districts classified as DFG A and B. DFG A alone is almost 80% black and Hispanic. I **FIND** therefore that hundreds of thousands of minority students are receiving less funding for their education than many non-minority students attending schools in property rich suburban districts. However, the record also demonstrates and I **FIND** that Chapter 212 operates on the basis of property wealth and not race. No proof has been presented that relates expenditure disparities causally to minority status. It just so happens that after whites fled urban areas in the late 60's early 70's, there remained large concentrations of minorities who sent their children to the public schools. The public school financing system then operated to yield the expenditure disparities

that have been proven. (For further findings on whether the Law Against Discrimination was violated see Part V.)

Educational Program Disparities

Plaintiffs contend that New Jersey has two systems of public education. In the poorer districts, schools serve basically as skills academies where there is a limited 3R curriculum aimed at enabling children to pass State-required tests, like the HSPT. In affluent districts, where basic skills are mastered by most students early in their school years, the schools offer broader, more enriching curricula with more options and opportunities. Plaintiffs contrasted program offerings in poor urban districts with those in wealthier communities, depicting disparities in several areas, which are described below.

Defendants did not dispute the existence of disparities in most areas in which plaintiffs presented evidence. Instead, the defense countered with other arguments: for example, that some programs in plaintiffs' districts are actually well-run; that mismanagement is the cause of programs that are not up to par; that different types of programs are the result of local choice and needs.

Neither party presented much evidence about programs in average or mid-SES districts or research about "typical" school programs in New Jersey. Defendants charged that comparing a district like Camden with Princeton is an unfair comparison of extremes and that poor districts were more like the majority of districts; in other words, there are a few very affluent districts in the State with extraordinary programs. Plaintiffs' comparison disticts were Paramus, Princeton, Millburn, Scotch Plains/Fanwood, Livingston, South Brunswick, Cherry Hill, Moorestown, Montclair and South Orange/Maplewood; none of these was below

the guaranteed tax base level in 1984-85. However, defendants did not present specific evidence about programs in the majority of districts. In addition, because the State does not define input requirements and monitoring is district specific (See Part IV findings), there are no standards against which to measure what is offered in the urban districts to determine what is average or, on the other hand, extraordinary.

Therefore, I can **FIND** from the record only that there are extreme disparities in some program offerings between poor urban districts and affluent districts. The following sets forth some areas where disparities have been demonstrated between the very rich and the very poor.

Computer Education

It is beyond question that computer education is fast becoming essential for anyone planning to compete in the job market in any number of areas. In the 1983 report, "A Nation at Risk: The Imperative for Educational Reform," the National Commission on Excellence in Education urged that "all students seeking a high school diploma be required to lay the foundations in the five new Basics". English, mathematics, science, social studies, and computer science. Dr. Garms testified that by 1990, computer literacy and technological sophistication would be essential skills and not merely nice skills to have. Dr. McKenzie, one of plaintiffs' witnesses, believes that the school systems must train students in computer use or the untrained will be condemned to low paid service jobs. The Department of Education does not require any district to provide computer education, however, some districts, including Montclair and Moorestown, have decided on their own to require one year of computer literacy for graduation.

Evidence indicates that poor districts lag behind wealthy districts in providing computer education to students. Wealthier districts have a higher ratio of computers-to-students, more years of experience in the use of computers in the classroom and a higher percentage of staff trained in computer use. Moreover, many suburban students have computers at home and are coming to school with more sophisticated computer knowledge. Fifty percent of the students in Moorestown, for example, have computers at home. For those who do not, the district operates a computer loan program through the school library. Children in poor urban districts therefore begin their computer education at a relative disadvantage to their wealthy suburban peers. Although defendants attacked the qualifications of plaintiffs' witness who testified about computer education and the manner in which his study was undertaken, defendants did not rebut his conclusions.

In October and November 1983, for example, the Department surveyed 591 school districts regarding their computer education programs. Of the 397 districts which responded, 71% had developed and implemented a curriculum plan related to the instructional use of computers. Of the 39 responding districts in DFG A, 38% had not developed a curriculum plan for computer use, compared with less than 6% of the districts in the wealthiest category. The survey indicated also that wealthier districts are likely to have larger numbers of computer workstations. The survey also disclosed that in 48% of the wealthiest districts and 13% of the poorest districts more than 80% of the teachers and administrators had participated in computer literacy or computer awareness training.

One impediment to developing computer education in urban districts is that start-up costs are necessarily higher when there are more students in the

district. In South Orange/Maplewood, for an enrollment 1/6 the size of Jersey City's, the lease -purchase cost of microcomputers alone was $233,547. Just in terms of acquisition of equipment, therefore, a district with many students must spend more than a district with fewer students in order to gain equity. For example, both Ridgewood and Newark spent about the same for computer education in 1983. However, the $132,000 spent by Ridgewood meant all of its 5,100 students were given some access to a computer. The $120,000 spent by Newark gave only 1% of its 58,000 students computer access.

Another problem in urban districts is lack of adequate space for computer laboratories, since many facilities are already overcrowded. In Irvington's elementary schools, the lack of space requires that children share computer consoles. By contrast, each South Orange/Maplewood school is equipped with the equivalent of a microcomputer lab of 12 to 14 micro-computers with disk drives and color monitors, and at least one dot-matrix printer. Montclair offers at least one computer lab in every elementary school. In addition, budget constraints may limit the number of computer teachers a district can provide. Following budget cuts in 1985-86, for example, Jersey City reduced its computer staff from 16 to eight, which required each teacher to serve two schools. Fewer urban classroom teachers, at the same time, are able to be trained to provide computer education. By 1984, again in contrast, 291 South Orange/Maplewood teachers had been trained for the district computer program, 141 of them in summer programs. Training was ongoing in 1984-85 for teachers and volunteers, both beginner and advanced. New teachers continued to be trained by the district computer resource teacher in three half-day released-time sessions, four people per session. While the cost of such training was originally covered by Chapter II federal funds, the district relies on local funding to subsidize the training and pay the cost of the resource teacher.

In addition, while in many urban districts federal Chapter I funds and State compensatory education funds may be used for computers, because of the source of the money, the computers may only be used for remedial work by compensatory education students. This means that many computers that are located in urban districts are limited in their use and are not actually being utilized to teach computer skills. In wealthier districts where computers are purchased with local funds rather than compensatory education funds, the computers may be used by all students and for other types of studies. In Paterson, the only computer education program offered is computer assisted remediation; *i.e.*, a computer is used as a tool to help the student acquire basic skills. Camden had approximately 340 computers in 1986, but 137 of them could only be used by basic skills students. Of the total number of Jersey City high school computers, 98 were purchased with State compensatory education funds and are thus restricted to compensatory education students.

By contrast, wealthier districts may use computers to teach higher order skills, such as problem-solving, rather than merely as aids to instruction. In South Brunswick, for example, teachers encourage the use of computers for simulations, enrichment, logical thinking, on-line data base and to provide students with an opportunity to compose narratives, music and for art. In South Orange/Maplewood, computer education begins in kindergarten with LOGO and continues through elementary and middle school. In elementary school, children begin to learn word processing. In middle school, BASIC computer programming is introduced and various applications of programming are explored. In high school, South Orange/Maplewood students may elect introductory, intermediate and advanced courses in several programming languages as well as project-oriented independent study. Moorestown in 1984-85 enrolled 38.7% of its students in formal computer

instruction, while Camden had only 3.4% of its students in formal computer training.

Beginning in 1982, Princeton began a project with Dow Jones using computers for library research. South Brunswick is also connected to the Dow Jones data base. The Princeton system permits children to look for information in newspapers or periodicals by doing word searches. There are eight terminals in the high school and one in each of the middle and elementary schools. Princeton pays about $4,000 a month for eight passwords and has allocated about $10,000 for the computer terminals. There is no charge for the time which usually costs $30-$40 per hour. A consortium was created to extend this service to some other districts including New Brunswick, which receives two months of free access for its one terminal.

New Brunswick has used privately-raised funds to develop a computer education program. Using a $10,000 grant for equipment and additional funding for a consultant, New Brunswick now has 300 computers which are not restricted to compensatory education. A computer literacy test for each grade level is being developed.

Moorestown has more than 200 microcomputers for 2,400 students, a ratio of one computer for every 11 children. Princeton has 285 computers for 2,200 children, a ratio of 1:8. In Camden, there are 340 computers for approximately 19,000 students, a ratio of 1: 56. East Orange High School has 46 computers for approximately 2,000 students (1:43 ratio). Jersey City has 337 computers for 7,500 high school students (1:22 ratio). It has been estimated that a district needs one computer for every 12 children in order for each child to receive 30 minutes of computer time every day.

Foreign Language

The Department does not require the study of foreign language for graduation from high school, nor are districts required to provide the opportunity to learn a foreign language. However, there is often a language requirement for college admission. Research also indicates that foreign language study makes children better listeners and communicators in their native language. A foreign language may also enhance some career opportunities. Therefore, the opportunity to learn a foreign language can be an advantage in future education and career choices.

The contrast between poor and wealthy districts in New Jersey is that foreign language instruction in poor districts is rudimentary, limited and usually begun no earlier than 7th grade. The President's Commission on Excellence in Education advised in "A Nation at Risk" in 1983 that achieving foreign language proficiency ordinarily requires four to six years and therefore should be started in elementary school. The wealthier districts offer instruction in more languages, offer it in longer sequences that include advanced instruction and begin foreign language study earlier. In Montclair children begin studying French and/or Spanish at the pre-school level. I recall being struck early in the hearing by testimony that elementary school children in Montclair had at one time been given the opportunity to learn Mandarin Chinese. At the same time, I was hearing that many high school students in poor urban districts were barely literate in English.

The description of Princeton's foreign language program by French teacher Raymond Hunt was impressive. All 5th graders at Princeton's Witherspoon Middle School take a half year each of French and Spanish; it is an exploratory curriculum emphasizing listening and speaking rather than grammar. In 6th grade,

students may elect to continue with either language. In 1986-87, 134 out of 155 sixth graders did so. The middle school has four foreign language teachers. Instruction utilizes tapes and cassette players as well as film strips. The school plans to add a computer to each language classroom to aid in instruction. When students reach high school, they may continue studying French or Spanish or begin another language. Additional languages offered in high school include German, Italian, Latin and Russian. All except Russian are offered in four-year sequences. For students who begin French or Spanish in middle school, there is available an advanced placement course for college credit. Princeton High School has eight full-time and three part-time foreign language teachers.

By contrast, in Jersey City and Paterson, foreign language instruction is not offered until 9th and 10th grades. Only 31 percent of Jersey City's high school students were enrolled in foreign language courses in 1986-87. Most Jersey City high schools offer two languages (either French and Spanish or Spanish and Latin), but Dickinson High offers Spanish, French and Italian. However, Dickinson offers no foreign language course beyond the second year. In the other high schools, there are few upper level courses; third and fourth levels may be offered in alternate years.

Spanish and French are the only two languages taught in both of Paterson's high schools, but as of 1986-87, both schools planned to share one Latin teacher and one German teacher.

In East Orange, some 7th graders beginning in 1985-86 were offered exploratory ten-week courses in French, Spanish, German and Latin. Fewer than 20% of the seventh graders were involved in this program. And, only 10% of East Orange students have studied a foreign language for more than one year.

In Irvington, one elementary school which is designated as a magnet school offers foreign language instruction. Children who wish to attend the magnet school must be bused there and testimony indicates that parents are reluctant to permit this.

Science Education

State regulations defining a thorough and efficient education require all schools to help every child "acquire a stock of basic information concerning the principles of the physical, biological and social sciences, the historical record of human achievement and failures, and current social issues." *N.J.A.C.* 6:8-2.1(b)2. The only specific science requirement, however, is for one year of physical or natural science (two years beginning with the 1989 9th grade class) in order to graduate from high school. *N.J.A.C.* 6:8-7.1(c)1.i.(4).

Science education can enhance children's problem solving ability by providing them with investigatory skills and introducing them to scientific procedure. The National Science Foundation reports that 3rd graders generally consider science one of their favorite subjects, but that this interest wanes as students continue their education. This is not the case, however, in school districts that have enriching elementary and middle school science programs.

Plaintiffs contend that science education in poor urban districts is rudimentary and geared to textbook study rather than hands-on experience. In wealthy suburban school districts, like Summit, Paramus and Tenafly, hands-on science instruction, even in the elementary grades, is the practice. Factors contributing to the urban district deficiencies, according to plaintiffs, are older lab facilities that the districts cannot afford to update, lack of funds to purchase new

and adequate equipment, fewer trained science teachers, as well as a focus on basic skills, which detracts from science. Elementary teachers in urban districts which score poorly on the HSPT spend as much time as possible working to get children's scores up in language arts, reading and mathematics. Science classes are de-emphasized in Irvington, for example, as well as in other urban districts, because of the need to have children focus on the HSPT.

Again, plaintiffs were able to contrast conditions in poor urban districts with science programs in wealthy suburban districts. However, the record does not indicate the average condition of science education in all New Jersey school districts or how many districts meet the standards suggested by the New Jersey Science Teachers Association in documents such as Exhibit P-91.

Dr. O'Shea, plaintiffs' expert witness on science education, opined that such education should start in elementary school, with daily opportunities for hands-on experience. Continuing laboratory experience throughout the grades encourages an interest in science. In high school, students should receive daily science classes for two full years. Advanced courses in biology, chemistry, physics and earth sciences should be available. Each school district should have a science supervisor or consultant to develop an articulated K-12 science curriculum. This is what Dr. O'Shea would consider a good program, but these are not requirements in New Jersey.

High schools in affluent areas have more demand for advanced science courses. Dr. O'Shea noted that Summit High School at one time was offering six sections of physics for its 1,100 students. Kennedy High School in Paterson, which has more than 2,200 students, was offering only one physics class.

Neither life science, taught in 7th grade, nor physical science, taught in 8th grade, has a laboratory experience in Jersey City's schools. Because of overcrowding and lack of laboratory facilities in Irvington, no science experiments can be conducted in the 7th and 8th grades. In an East Orange junior high school, 24-27 students are scheduled for science labs containing only 15 work stations. In the middle schools, a science area consists of a wall supporting a sink, a shelf and some storage space, accessible to a maximum of three children. A mobile science cart is wheeled into the science area (approximately 3 feet by 6 feet) to enhance the science wall. No water, gas or electrical lines are available for demonstration or experimentation. Princeton High School has seven science labs, with 13 to 20 students in each lab. Each work station is equipped with water, gas and sink.

When laboratory facilities do exist in urban districts they are more likely to be older, built in the 1920's and 1930's when the prevailing concept was that the teacher did the experiments and the students watched. Therefore, many such facilities are designed with just one lab table. Modern science labs permit all students to do hands-on experiments. They should have lab stations with hot and cold water, alternating and direct current and gas, as well as safety features like eyewash facilities, air circulation systems and fire protection systems. In Paterson, sinks do not work and appear not to have worked for some time. Microscopes and other investigative equipment do not exist. In addition, because Paterson's enrollment is too high for classroom capacity, a potential safety problem is created.

The condition of science facilities in elementary schools may be a statewide problem. Uniplan (Exhibit P-170b at p. 51) noted that "90 percent of all elementary schools have poor or non-existent science facilities." (See findings on Uniplan and facility needs in Part IV.)

There are few true science classrooms at Camden High School. The majority of the rooms used for science are regular classrooms that are used for biology, chemistry and physics. Facilities for hands-on experiments are not available. The laboratory tables in one science class are over 50 years old; there are no safety showers and no ventilation hoods.

By contrast, Princeton, Montclair and South Brunswick high schools have modern, renovated science classrooms with up-to-date equipment and safety features, according to Dr. O'Shea. Some new schools even have distillation apparatus and fresh water and salt water tanks and greenhouses.

According to plaintiffs, financial resources are crucial in science education, since programs require materials, supplies and equipment for hands-on experience. Textbook-centered instruction does not encourage investigative thinking or teach process skills. In Paterson and Jersey City, science instruction is heavily focused on learning about the body of scientific knowledge and memorization. Students do a lot of exercises involving worksheets and make use of audio visual presentations about what science has revealed. Microscopes and other investigative equipment does not exist. Urban districts often use microviewers instead of microscopes for science instruction. A microviewer looks like a microscope, but it uses prepared slides. Affluent districts tend to offer more lab opportunities than urban districts. Only 38% of Jersey City high school students take a lab science. In Summit, introductory high school science courses include lab work three times per week. Students in wealthy suburban districts use real microscopes to observe and analyze living and prepared specimens, allowing them to do investigative procedures. Dr. Yamba, a plaintiff witness, said that when a

biology student receives an "A" in a class and has never done an experiment, that student is not prepared for college.

Because of the high concentration of minorities in urban districts, and the failure to encourage science education in those districts or to provide modernized instruction, the need to reverse the underrepresentation of minorities in science careers is not being addressed in plaintiffs' districts. Children who do not get a good background in science and technology will not be prepared to compete for career opportunities which require that knowledge.

According to Dr. O'Shea, a modern science education program that keeps pace with current trends requires adequate financial resources. He testified that a good science program emphasizes investigation--learning to measure and observe, to control variables, to define and develop data. Good investigative type programs are being offered in affluent suburban districts like West Windsor, Parsippany, Tenafly, Summit and West Essex. Even "normal" suburban district science programs are better than Newark's science high school, Dr. O'Shea said.

Dr. O'Shea also testified that suburban districts can attract better prepared science teachers. The suburban districts often pay more and offer a better working environment. In Paterson and Passaic, administrators report a shortage of qualified math and science teachers each September, resulting in the hiring of science teachers who are not fully trained. At the Union Ave. Elementary School in Irvington, children from grades 1-5 are enrolled in Introduction to Science. However, there is no science instructor assigned to those classes.

Also, Dr. O'Shea noted that some suburban districts will reimburse tuition for a teacher's advanced study in science. A teacher with limited experience in science has a tendency to teach through textbooks, rarely doing experiments.

Inservice training is necessary to convey the understanding that science instructs in process skills and problem solving not just the body of science knowledge. Princeton, Tenafly and South Brunswick all provide staff training to insure a hands-on science program. In Jersey City 20 elementary teachers per year receive inservice science training. In 1985-86 funding from both the Fund for New Jersey and local funds permitted 7th and 8th grade teachers to obtain this training.

Dr. O'Shea said he believed the State should have a science coordinator to oversee improvement of science programs throughout New Jersey. More than 40 states currently have a person in that capacity.

Gifted and Talented Programs and Advanced Placement Courses

State regulations require each school and school district to provide educational programs for pupils with exceptional abilities. *N.J.A.C.* 6:8-4.3(a)3.i.(2)ii. A mandatory indicator under the monitoring program is that "the instructional program shows recognition of individual talents, interests, needs and exceptional abilities of pupils." (Indicator 3.3, Exhibit P-290, page 11.) Gifted and talented programs can cover academic and non-academic subjects. There are, however, no specific standards regarding type of program, curriculum or availability to students. The State does not provide specific funding for gifted and talented programs.

Plaintiffs contend children in poor urban districts are not provided the same opportunity to participate in gifted and talented programs as children in wealthy school districts. Plaintiffs presented as evidence a study by Dr. Jamieson McKenzie, which essentially was not disputed by defendants. In the 1982 study, all school districts in New Jersey were surveyed and 82.5% responded. The results indicated a statistically significant relationship between the level of gifted and

talented participation and three factors: (1) DFG category; (2) expenditure per pupil, and (3) property wealth per pupil. Compared on the basis of DFG, participation is lowest in Group A (4.4%) and highest in Group I (13.8%). The entire breakdown as shown in P-213 is as follows:

DFG group	% Students in G/T Program	Number of Students
A	4.4	5,921
B	8.1	1,953
C	8.8	2,210
D	9.0	3,840
E	13.6	6,328
F	9.9	4,172
G	8.3	4,084
H	9.8	5,226
I	13.8	5,059
J	12.1	5,233

Dr. McKenzie's study also looked at the racial identity of students in gifted and talented programs. He found white and Asian students achieved disproportionately high percentage of enrollments in gifted and talented programs while black and Hispanic students were underrepresented. The percentages were as follows: Asian, 10.11%; white, 6.8%; black, 2.42%; and Hispanic, .87%. Thus, according to Dr. McKenzie's statistics, blacks and Hispanics are less likely to participate in gifted and talented programs than white or Asian students.

Testimony also referred to specific program differences between districts. In 1984-85, 35.6% of the students in Moorestown were involved in one or more gifted and talented programs, as compared to 1% in Camden. In South Orange/Maplewood, two teachers work with a 100 students in social studies and English as part of the gifted and talented program for K-5 students. Gifted 8th graders take courses at the high school in some subject areas.

In Jersey City, 65 7th and 8th graders are involved in the accelerated enrichment program (AEP). They are instructed in advanced math and English and have access to libraries and computer labs at Jersey City State College. They may take courses at the college. In 1987, the AEP program was expanded to involve foreign language, video and geo-science, but these courses were offered on a tuition basis only. The gifted and talented elementary program in Jersey City is part of the magnet school program. Eight elementary schools participate, serving 450 out of 21,610 elementary students. Until 1985, some Jersey City K-8 schools had honors programs, which recognized high-achieving children, but did not have any gifted and talented programs.

In East Orange, the gifted and talented program has four teachers assigned to it. Ten additional teachers were planned for 1986-87, but because of budget cuts the program was not expanded.

Testimony indicated that the situation is similar with regard to advanced placement courses, which enable students to waive introductory college courses. Neither Camden nor East Orange offer any AP programs. In Moorestown, 21.5% of the 11th and 12th graders are enrolled in such courses. In Columbia High School in South Orange/Maplewood, high school students can earn up to a full year of college credits by taking AP courses in foreign languages, physics, chemistry, biology and

others. South Brunswick High School offers advanced placement courses in chemistry, physics and biology. Classes in these South Brunswick advanced placement subjects are typically significantly smaller than other science classes, thereby providing more individual attention to students.

Art Education

Although artistic expression and appreciation are State education goals, *N.J.A.C.* 6:8-2.1(b)9, the State does not require art classes at the elementary level and does not require that art in elementary schools be taught by an art specialist. High school graduation requirements include one year of fine, practical and/or performing arts.

In large urban districts, budget constraints appear to affect the availability of art instruction. In Paterson, each art teacher serves four elementary schools. Since 1981, Camden has not employed any elementary art teachers because of budget cuts. Whatever art instruction occurs must be handled by the classroom teacher with the assistance of a helping teacher who must serve several elementary schools. Another problem is overcrowding and older facilities, which means that many urban schools do not have art rooms. One consequence of that problem is that art teachers in East Orange's elementary schools, for example, travel from room to room, carrying their supplies, instead of the students coming to a central art facility. This limits the type of work that can be done because the teacher must use only supplies and tools that can easily be transported. In Pleasantville, the district had to abandon its art classrooms after they were found to be substandard by the Department. Art is now being offered by one itinerant teacher who travels from class to class.

The defense noted testimony from the Atlantic County Superintendent indicating that six other Atlantic County districts ranging in DFG from A to H in addition to Pleasantville rely on itinerant art teachers as well. The defendants offered no other testimony about art programs in any other county or statewide. The testimony about Atlantic County, however, is also significant because it was among the few comments made by the defense to contest the quality and quantity of program disparity evidence presented by plaintiffs. The defense presented no rebuttal evidence on statewide computer programs, foreign language offerings, science education, gifted and talented programs, advanced placement courses, art education, music education and physical education.

There was extensive testimony about the art program in Jersey City by Anthony Guadadiello, supervisor of art education for the district. Mr. Guadadiello was obviously a dedicated art educator with a commitment to Jersey City. According to Mr. Guadadiello, the recent pattern in Jersey City has been to provide art teachers once a week per class, usually in grades one through three. This is done to give the classroom teachers preparation time during the day; in later grades, this break for the classroom teachers is provided by other things, like shop and gym classes. Usually, art instruction is not provided by an art specialist after third grade. Although Mr. Guadadiello would prefer to have art instruction for all students, his budget permits only a limited number of art instructors to be assigned to the elementary schools. Because not each school has a full-time art teacher and the available teachers cannot provide a class each week for every child, only about 34% of Jersey City's students in grades K-8 receive a full year of art from a certified art teacher.

When he became art supervisor, Mr. Guadadiello made the decision to begin an "artistically talented classes" (ATC) program for students who showed promise in art. This is a pull-out program designed to provide art instruction at every grade level for students who qualify. In order to fund the program, art services in general in Jersey City elementary schools had to be reduced. Also, Jersey City has been unable to offer programs in dance and drama. In other words, Mr. Guadadiello's decision was to devote staff and resources to selected, talented pupils.

Through Mr. Guadadiello, the Jersey City art program has had many successes. There have been "mentorship" programs, where professional artists worked with students on a complete project from start to finish, to explain how to go about planning and execution. There have been "community outreach" programs, like the production of calendars featuring art work by Jersey City students. In some cases, funding for these programs has been provided by grants and government funds not related to the school budget. As as extension of the ATC program, the district initiated the Visual and Performing Arts High School. Through this program, students take academic subjects at their home high school during part of the day and then have art instruction at Jersey City State College for the remainder of the day. In the program's first year, 180 students applied but only 40 students could be accommodated .

Mr. Guadadiello said he was ambivalent about talking about his "successes" because "it looks like, hey Jersey City has got a great art program and I really feel that I do, for a select few. And the sad thing is that I really do make the choice of everybody does not receive art in Jersey City but those who do and who are tested to show the potential talent, I try to give them the best and the best

quality education that I can provide. But the school should provide everyone with that opportunity, not just the few that I can do that for." (Guadadiello Transcript, Nov. 6, 1986, p. 89, lines 9-18.) Though the high school art teachers are excused from study or duty period in order to teach six periods of art rather than five, they still cannot provide a full range of art courses.

Mr. Guadadiello made another point during his testimony that bears mentioning. Because the students in Jersey City are predominantly from poor, disadvantaged homes, the schools have a larger role to play than in suburban districts. He described the importance of field trips to New York City, because his students are not exposed to the world outside their community. He would take five or six students on a Saturday to a museum or special program and "here I am with my black and Hispanic kids playing mommy and daddy" while other children were there with their parents. Because parents of Jersey City students are often so preoccupied with daily survival or do not have a background of exposure to things suburban parents provide, Mr. Guadadiello believes the schools have to take on the parental role if Jersey City students are to compete successfully in today's society.

On a practical level, Mr. Guadadiello pointed out that students in more affluent surroundings who are artistically inclined and want to apply to art schools have the resources to produce portfolios. His students in Jersey City are not aware of these things and do not have access to the resources. Therefore, he has taken students to special workshops at a museum in Harlem where they are taught how to put together a portfolio and how to handle themselves in an interview. In a poor urban district, the teacher has to do these things according to Mr. Guadadiello.

Plaintiffs presented testimony that Montclair, Scotch Plains/Fanwood since 1983 and Princeton all provide art instruction in every elementary school with

certified art teachers. In Montclair, the art program begins at the pre-school level and each school has at least one art room, with certain schools having more than one. The district also has kilns. Each of Princeton's elementary schools has separate art rooms and the district has incorporated the visual arts into all disciplines through an in-service program which instructs teachers in visual literacy. In Princeton, art is considered "basic."

As of February 1986, Jersey City employed 12 secondary school art teachers. Due to budget constraints, that number was reduced to 9 1/2 during the school year. During 1986-87, the art teacher:student ratio was 1:1,240 in Jersey City; 1:500 in Irvington; 1:662 in Newark. In Summit, the ratio was 1:364.

There was no evidence from either party about the availability of art instruction, facilities, supplies or special programs in other New Jersey school districts.

Music Education

Aside from the goal that every child "acquire the ability and the desire to express himself or herself creatively in one or more of the arts and to appreciate the aesthetic expressions of other people," *N.J.A.C.* 6:8-2.1(b)9, New Jersey does not specifically require music education.

Plaintiffs' evidence indicated that several affluent suburban districts offer more exposure to music than some poor urban districts. Again, neither party offered proofs regarding the type or extent of music education in all school districts. However, plaintiff witness Dr. Stephens said that in his experience in New Jersey, only Elizabeth among urban districts provides K-12 music while most suburban districts do provide K-12 and some offer pre-K.

In Millburn, there are 10 music teachers and one director of music for six schools. There are music rooms in each of the elementary schools and the high school has a music suite. Millburn offers a special music curriculum for middle school students featuring cycles of alternate courses, such as guitar, electronic piano laboratory and music composition. In addition, there is an honors program through which a student and individual teacher may work on a one-to-one basis. South Brunswick offers a middle school curriculum like Millburn's. As a result of a referendum, South Brunswick recently renovated its high school music facilities, which now provide two music classrooms, a large space for band and another for dance, a smaller room for vocal music instruction and five Wanger practice rooms, which are soundproof and cost about $10,000 each. In Montclair, instrumental music is part of the basic curriculum, beginning with instruction in harmony, tone, color and melody for preschoolers. Each elementary school has a music instructor. The district charges a small rental fee for musical instruments used by students, but the fee is waived for students eligible for free or reduced lunch.

In Camden and Paterson, music is not offered until 4th grade. Paterson's elementary schools #8 and #11 have no music classrooms. In 1981, due to budget cuts, Camden eliminated elementary music teachers. Helping teachers are assigned to assist classroom teachers in music instruction, with each helping teacher assigned to several elementary schools. Dr. Stephens testified that elementary school students in Camden get 30 minutes of music per week taught by a classroom teacher. In junior high and high school, Camden offers basic music courses, such as general music appreciation, music theory and choral music practice. Camden High School and other urban high schools do not have band and choral pits and instrument storage facilities. Camden has the basic high school performing organizations: a band, glee club and a chorus. In contrast, besides the band and

chorus, South Brunswick also has a jazz ensemble, a madrigal group, a women's ensemble, a concert choir and a winter color guard drill team. South Brunswick allocates $3,000 of its budget to cover travel expenses for the winter guard. Millburn and Princeton also have several choruses or small ensembles in addition to the basic performing groups.

In Jersey City, as in Camden, music does not begin until 4th grade. Students interested in instrumental music must rent their instruments; there are no subsidies, as there are in Montclair. At Jersey City's School #30, 30 students out of 680 participate in the instrumental music program. This instruction takes place in the back of the lunchroom or, during lunch periods, in the basement. In Jersey City, less than 15% of its high school students can be served by the nine music teachers employed by the district.

East Orange High School's band room is a converted gym, two stories high. Classrooms share a common wall with the bandroom and daily, during full band playing, English classes in those adjoining rooms are disturbed by the volume of music. In contrast, all elementary schools in Montclair have a separate music room. Each of the two recently renovated middle schools contain more than one music room.

Dr. Stephens testified that music education is particularly important in poor urban districts because the children in those districts might not otherwise be exposed to formal music instruction. Children in more affluent districts have the resources to obtain private music lessons.

Physical Education

By statute, every school child beginning in first grade must receive 150 minutes per week of physical education, health and safety instruction. Adaptive physical education must be provided for children who are handicapped. *N.J.S.A.* 18A:35-5 *et seq.* Montclair, South Brunswick and Millburn have implemented comprehensive adaptive physical education programs. Urban districts like Irvington and East Orange cannot provide full adaptive physical education programs. The Department does not require that PE be taught by certified PE instructors at the elementary level.

Plaintiffs claim disparities in PE between rich and poor districts are apparent in three areas: staffing, equipment and facilities. They presented evidence of these disparities by contrasting PE programs in plaintiff districts with some affluent districts. Again, there was no evidence from either plaintiffs or defendants regarding PE programs in average or mid-SES districts.

The PE program in Montclair is exemplary, as described by Doris Walker, coordinator of the dance department at the Montclair High School of Performing Arts. (District Superintendent Fitzgerald testified that Montclair is dedicated to the concept of the scholar-athlete.) PE instruction begins in preschool in Montclair and full-time certified PE teachers are assigned to each elementary school. The Nishuane School in Montclair, which serves fewer than 500 K-2 students, has two full-time PE teachers and a part-time paraprofessional. Montclair High School has 13 full-time physical education teachers serving 1,900 students (1 to 146). Facilities at the high school include four gyms, a wrestling room, a rhythm room with dance barre, a weight training room equipped with a universal gym and free-standing weights, and a balcony area for small group activities such as fencing and ping

pong. Students also have access to dance studios at facilities of the High School for Performing Arts (which is adjacent to the high school). Outdoor facilities include access to tennis courts, two recreation fields and a track. Montclair also uses the facilities of Montclair State College for its swimming program and has negotiated the use of the Montclair ice arena for its ice hockey team. Courses are varied, including soccer, tennis and lacrosse. PE class size in high school averages 30-35 students.

Similar facts were presented about Millburn and South Brunswick. Notably, both districts own large tracts of land adjacent to their high schools, providing room for outdoor facilities. In South Brunswick, the high school and middle school share 72 acres. In Millburn High School, 13 physical education instructors serve fewer students than does Montclair High. Millburn High School has one gym, large enough to accommodate its classes. The school has training rooms and adequate locker and shower facilities, with each student assigned a locker. In the summer of 1986, new shower and locker facilities were being built to accommodate students on athletic teams. An all-weather track was recently installed. The school owns several acres of abutting land, part of which is developed as recreation fields (a stadium, a baseball field, soccer/lacrosse field and tennis courts).

By contrast, in Jersey City, Paterson and Camden, elementary school PE instruction is often provided by the classroom teacher. When PE instructors are provided, they usually serve large populations, resulting in large classes with little individualized attention. At Nassau Elementary School in East Orange, one PE instructor teaches 535 students, meaning each student gets 45 minutes of professional instruction per week. In Jersey City's K-8 School Number 30, there are one and one-half PE instructors for 680 students; only children in grades 5-8 receive

instruction from a certified PE teacher. On the high school level, Jersey City has 30 PE instructors for 7,500 students (1 - 250).

Facilities in urban districts tend to be older and in poor repair. Limits on space mean more students use the space at the same time; therefore, types of activities are limited to those which can be done by large groups of students. In Irvington High School, for instance, five to seven classes of about 35 students each use the gym each period. The director of Irvington High's PE program noted that students become disruptive out of boredom and frustration with "spending 20 minutes every gym period waiting to take just one layup shot." At Eastside High School in Paterson, the gym is divided into two sections of 100 students per period. Similar conditions exist in high schools in East Orange and Camden. Irvington High's locker and shower facilities are not in usable condition. What was once Irvington's weight training room presently serves as the school library, as does one of two gyms in Clifford Scott High School in East Orange.

Outdoor facilities in urban districts are also limited because sites are smaller and available space is often converted to such uses as faculty parking. Frequently, elementary schools do not have outdoor play areas; this is the case in all elementary schools in Irvington. Camden High's outdoor facilities, including football and baseball fields, the track and tennis courts, are located 10 blocks from the school, meaning they cannot be used during the school day. At the Washington elementary school in Camden, because of space limitations, indoor physical education activities are limited to those involving little physical movement.

In Doris Walker's witness report, which was essentially not disputed by defendants, she contrasted programs offered in Montclair and Millburn with those in East Orange, Irvington and Paterson. (Exhibit P-93a.) She found "gross

inadequacies" in the latter, which she said "stand in stark contrast" to programs in the suburban districts she observed. She reported that urban programs must "accommodate large groups of children with makedo equipment, at the expense of providing creative and meaningful experiences for the children." At the Nassau Elementary School in East Orange during 1985-86, jump rope techniques were taught in groups, because there were not enough jump ropes for each child. In suburban schools limits are placed on the numbers of students who may participate in an activity not because the equipment is limited, but to preserve the quality of the experience.

In districts like Irvington, East Orange and Paterson, Ms. Walker said, basketball courts are in abundance because large numbers of students can play basketball at one time at little expense. Sports like soccer, tennis, gymnastics and golf are not routinely imparted to inner-city minority children and this fact fails to counteract the stereotype that these are activities at which minorities cannot excel. Montclair has students who have made all-state in gymnastics. East Orange and Paterson students do not have that opportunity because their schools do not have full gymnastic programs. In addition, constraints which prevent individualized attention to student needs discourage PE teachers in poor urban districts, who seem "defeated by having to spend an inordinate amount of their time piecing together necessary equipment, or engaging in redundant activities just to keep all students occupied."

James Conant says in *Slums and Suburbs:* "If I had to choose one department in any school that could do the most to reduce dropouts and hold youngsters emotionally to the institution for education, it would be physical education."

Guidance and Counseling

State Board regulations require that each school district provide "comprehensive guidance facilities and services for each pupil." *N.J.A.C.* 6:8-2.1(c)5. Under current monitoring, districts must demonstrate that they provide guidance and counseling, but there are no specific requirements regarding student:counselor ratio. Nor are counseling programs assessed for sufficiency as they relate to student needs.

A 1980 Department document (Exhibit P-167) defines a comprehensive guidance program as "one which has sufficient resources to provide a full range of services to each pupil by certified personnel." However, currently the State does not require that counseling services in elementary schools be provided by specially certified staff.

Counseling in schools can take several forms: (1) career and academic planning, which focuses on defining the individual's goals; (2) personal counseling, which deals with situational adjustment problems that interfere with functioning, and (3) crisis intervention, which deals with extreme emotional reactions. A guidance counselor's functions could range from helping a high school student select courses to preventive counseling aimed at discouraging a student from dropping out to dealing with attempted suicide. In early grades, preventive counseling can correct problems involving work habits, attitudes and values that may interfere with achievement. In fact, the record indicates that counseling provided in early grades can have even greater impact than when it is provided later in a child's school experience.

Several witnesses testified that children in poor urban schools tend to have greater guidance needs generally than children in middle-class or affluent school districts, especially in terms of preventive measures. They enter school less prepared because they are less likely to be exposed to books, blocks and other learning aids. They are also less likely to be vocationally mature, because they are not exposed to an environment where stable work patterns are common. Their goals and values may not match what is expected in school or in the work world and therefore they are more likely to need vocational guidance. In addition, they tend to be exposed to more stress, from things like crime, unstable family life and financial difficulties. Often, counseling can help children overcome the effects of these problems. If children receive attention in early grades or in preschool, it can help improve their learning and coping skills as well as enhance their self-esteem. Children who do not receive adequate counseling are more likely to have trouble adjusting both in school and after they leave school, thus repeating a pattern of unemployment, crime and welfare.

Despite the evidence of the benefits of extensive and early counseling for disadvantaged children, the record indicates that this need is not met in plaintiffs' districts. Schools are not providing the kind of specialized, intensive counseling that would most benefit students. Altering the self-esteem and self-perceptions of children requires individual attention. Urban educators point to children's numerous personal and socioeconomic problems for which counseling is necessary. These include parents' unemployment, nonsupportive families, frequent family dislocations, early pregnancies--even in elementary schools--drugs, crime on the streets. Several witnesses testified to the following problems in urban districts: too few counselors; lack of funds; counselors diverted to duties like scheduling and course selection; shortage of facilities. The last factor contributes especially to the

inability to provide related programs like alternative education for disaffected students and in-school suspension.

Apparently, the rule of thumb for student:staff ratio in counseling is one counselor for every 250 students. However, plaintiffs' witness Dr. William Bingham testified that even that ratio may be too high when the student population is more diverse or more types of problems arise. For example, in an affluent, homogeneous school district where most students go on to college the guidance staff's main activity may be helping students select a college. In that case, one counselor could work effectively with large numbers of students. Under other circumstances, Dr. Bingham testified, he would not hesitate to recommend a ratio as low as 10 students per counselor.

ASPIRA, a private organization that provides dropout prevention counseling to Hispanic students, belives the proper ratio of counselors to urban students is 100 to one. At this ratio, they found that each counselor could conduct at least three sessions a year with each student and that they had a 96% success rate in dropout prevention. When funding problems required an increase of the ratio to 150 or 200 to one, the success rate dropped 15 to 20 %. When ASPIRA returned the ratio to 100 to one, their success rate went back up.

Although the counselor ratio in high schools in plaintiff districts appears to be within or close to the range of 250:1, plaintiffs contend that student counseling needs are not being met. In Jersey City, guidance counselors spend so much time on course selection they have little time for career and social counseling. There is no program of preventive or intervention counseling. At Ferris High School, a math teacher with a psychology degree provides crisis intervention during her duty period. At East Orange High School, where in 1986 there were nine potential

suicides, funds provided through Operation School Renewal were used in 1987 to add one career counselor, a crisis counselor and two special education counselors to their staff.

At the elementary level, the following ratios were reported by witnesses during the hearing. In Camden, seven counselors serve more than 11,000 students, a ratio of 1 to 1,577. One counselor spends one day per week in the Washington school, which has about 500 students. In 1987 in Jersey City, a guidance counselor spent one day per week in each elementary school to serve primarily 8th graders. In Irvington, there is one counselor for each school, including the Union Avenue school which houses 650 children. In Pleasantville (DFG A) in 1987 there was one guidance counselor for four elementary schools. Paterson in 1987 had five counselors for 30 elementary schools enrolling over 18,000 pupils, a ratio of 1 to 3,600. In New Brunswick in 1987, three counselors served eight schools, but worked predominantly with high-risk students in 7th and 8th grade. Urban educators recognize that more elementary school counselors are needed.

In contrast to urban districts, the record indicates that Red Bank, a high-spending district, had in 1987 two counselors and a Child Study Team providing counseling for 815 children in grades K-8. At Princeton's Witherspoon Middle School, in 1987, three counselors served 600 students. The Terrell Middle School in Scotch Plains/Fanwood in 1983 had two counselors for 560 students; 7th and 8th graders received weekly in-class guidance. Montclair High School in 1987 had nine counselors for 1,750 students, as well as two full-time counselors who worked with 20 high risk students in the disruptive students program. (The state requires that districts provide programs for disaffected and disruptive children but provides no specific funding for these services. Such programs tend to be expensive and resource-intensive, since they require facilities and low student:staff ratios. For

example, New Brunswick spends about $150,000 to accommodate 25 children in an alternative education program. In Highland Park, 20 children in grades 9-12 receive individualized instruction through an alternative education program. Through Operation School Renewal funds, East Orange can serve 50 children at a cost of $226,000. The district has identified 100 more students who should be in the program. Both Camden and Jersey City have identified more than 200 students in need of alternative education, but programs are not being offered. Paterson has no program for disaffected 16 year old and under students. Paterson's Superintendent believes there are between 100 and 120 students annually who could benefit from such a program. Jersey City claimed it had to eliminate most alternative education programs because of lack of funds; the Department disallowed the use of special HSPT funding for such programs.)

The only rebuttal testimony submitted by the defendants indicates that it is common to share counselors among a number of Atlantic County elementary schools. The defense claims that besides Pleasantville, there are seven districts ranging in DFG from A - H in which elementary schools share guidance counselors. There was no other defense evidence about statewide guidance ratios or even the size of the elementary schools in the districts cited. Plaintiffs pointed out in their rebuttal that all but one of the districts referred to by the defense were elementary districts and all of the districts had small enrollments ranging from 153 students to 937 students.

The defendants apparently question whether it is appropriate for the educational system to deal with the "personal" problems urban students bring with them to school. Presumably, as Dr. Galinsky suggested, the defendants believe the problem is not the school system's, but society's generally. However, longitudinal studies conducted in the United States and Great Britain demonstrate that people

who receive good guidance at appropriate times in their lives make better vocational adjustments and receive greater personal satisfaction from their vocational experience. Preventive counseling in the early grades, especially for the educationally disadvantaged, can have a much greater impact than in the later grades. The early counseling deficiencies, demonstrated by plaintiffs' proofs, highlight what might be one of the most serious causes of urban student basic skills failures. According to plaintiffs' witness Dr. Bingham, a vocational psychologist with the Department of Educational Psychology at Rutgers, a comprehensive guidance program, although expensive, is worth the expense in the long run as compared to the alternatives such as welfare and incarceration.

Vocational Education/Industrial Arts Education

Industrial arts, usually offered in middle school, is meant to introduce students to career options and to provide some hands-on skills in areas such as shop. Vocational education is geared to providing specific skills needed in a type of job, such as health occupations or in the food service industry. Industrial arts is career awareness training, whereas vocational education should be employment training. For children who do not plan to continue their education beyond high school, a good vocational education program in high school can provide entry into skilled employment. State Board data indicate, for example, that 73% of the students who were in vocational education programs were employed within three months after the program ended and almost 50% were employed in a job related to the program. The unemployment rate for voc ed graduates (6.1%) is half that of the statewide unemployment rate for the same age level (12.2%).

Adequate funding is vital in vocational/industrial education because equipment and supplies must be replenished and, if a program is to be effective in

providing entry into jobs, equipment must be kept up to current industry standards. A change that has become necessary in recent years is transforming programs in order to help students prepare for new technology, especially computers. Evidence indicates that most urban districts are still offering more traditional hands-on skills instead of making the transition into the new technology. However, in more affluent districts like Pequannock and Vernon Township, the students are being prepared in technology-based programs. One problem in urban districts is that technology programs require literacy. If basic skills are not being mastered it may be difficult to upgrade programs.

Federal funds are available to districts for vocational education through the Carl Perkins Act (the Vocational Education Act of 1985). New Jersey receives about $20 million per year, which is distributed to districts which request the funds on the basis of a formula developed by the Department. The formula incorporates economic need as a factor in distributing funds. However, one drawback for poor districts is that the district must match Perkins funds dollar for dollar from its own budget, including State aid, or the unmatched allotment must be turned back to the State. In one instance, in 1986, local districts were apprised by the Department of the availability of Perkins funding targeted to special education children. Although New Brunswick was able to use some private funding as a match, the district was unable to come up with full matching funds, and, therefore, had to return some of the 1987 Perkins money. New Brunswick had the same problem the following year. Despite the matching requirement, the Perkins Act appears to be an important source of funding for vocational programs in urban districts. In fiscal year 1987, East Orange received about $294,000 in Perkins funds; Jersey City, about $967,000, and Irvington, $191,000.

The State also provides aid for vocational education in two ways. First, there are 20 county vocational schools in New Jersey which offer either full-time or shared-time programs (in which students take academic courses at their home district). These programs are available to plaintiffs' districts, and evidence indicates that this option is used by some students. However, some of the county schools have selective criteria that make it difficult for students from plaintiff districts to qualify academically. Also, if a shared-time program is the only option, a student who must take compensatory education classes may not be able to spend half a day at the vocational school and still meet graduation requirements.

Another way the State provides aid for vocational education is through designation of a district as a LAVSD (local area vocational school district). A LAVSD receives special categorical funding from the State. (See discussion in Part I of this decision.) Since the 1970's there has been approximately $8 million available in State categorical vocational aid annually.

In order to qualify as a LAVSD, at least one school in the district must satisfy certain requirements spelled out in *N.J.A.C.* 6:46-1.4. These include at least five vocational education programs; programs must include at least 600 minutes per week of hands-on vocational skill development to insure occupational competence; a full-time director of vocational education; a full-time job placement coordinator, and cooperative education programs. In 1987, there were 18 LAVSD's, including Camden. As an LAVSD, Camden received $4,598,830 in total State vocational categorical aid from 1982-83 to 1986-87. Among the seven other urban districts which qualified were Willingboro, Bayonne, Trenton and Elizabeth.

According to defendants, Irvington, Jersey City and East Orange could qualify as LAVSD's by adding features to their vocational education programs in

order to meet LAVSD requirements. East Orange currently meets five of the nine criteria for LAVSD designation, Jersey City meets four of those critieria and Irvington meets three. Carl Perkins funds could be used to make these program adjustments. Plaintiffs contend that the districts may not be able to meet program requirements, as was the case in Irvington.

Irvington applied to be a LAVSD when the program began in 1982, but withdrew its application because it did not have enough classroom space to devote to the 600 minutes of laboratory time required. According to Irvington Superintendent Anthony Scardaville, space was the main reason why he felt Irvington could not comply with LAVSD requirements, but another was the 600 hours of lab time, which he felt would cut into other school offerings. The Department offers technical assistance to districts seeking LAVSD designation, but there is no record of Irvington seeking such assistance.

Irvington acquired a new wing of the high school for vocational education in 1975, as the result of $3 million in federal funds that became available. As part of its high school curriculum, Irvington offers vocational courses in cosmetology, commercial food service, auto repair, electrical shop, carpentry, drafting and business education subjects such as typing, shorthand and bookkeeping. Superintendent Scardaville in a videotape (Exhibit D-179a & b) listed Irvington's industrial arts program, which begins in 5th grade, as an example of "excellence in urban education."

Testimony by defendants' witness John Knorr comparing Camden's vocational education program with some neighboring districts indicated that the Camden program was superior to some. In Cherry Hill and Haddon Township, non-LAVSD districts, the quality of vocational education had suffered because

enrollments in general were declining and because the districts were focusing on sending graduates to college. Because so many students plan to continue their education, vocational education is not a priority. Camden had better vocational education equipment than both Cherry Hill and Haddon Township. However, compared to two other LAVSD's in the county--Black Horse Pike Regional and Lower Camden County Regional--the Camden program was assessed as inferior in terms of teaching staff, administration and quality of equipment, although it offered a more extensive range of program areas. Also, Camden's facilities and equipment were not being properly maintained. Several deficiencies were noted during Level I and II monitoring; Knorr said these problems were being addressed and Camden's program was "improving."

In the opinion of Mr. Knorr, Camden's problem in vocational education was not lack of funds, but, rather, the program was "stagnating" and not keeping up with current trends. To support this view, Mr. Knorr explained that in 1984-85 from all sources, Black Horse Pike spent $2,876 per vocational student; Camden spent $3,402 per vocational student, and Lower Camden County spent $3,927 per vocational student. (Exhibit D-85 at p. IV-10.) The plaintiffs challenge this testimony by providing the 1984-85 current expenditures per pupil and per weighted pupil showing Camden spending less than Black Horse and Lower Camden. The figures per pupil and per weighted pupil respectively are Camden: $3,318 and $2,755; Black Horse Pike: $4,297 and $3,661; Lower Camden: $3,782 and $3,175.

Defendants presented vocational education program reviews of Irvington, Jersey City and East Orange by Department employees. These three plaintiff districts were compared to Princeton, Paramus, Livingston and Ocean City. Every high school with a vocational program was visited. Relevant records were

examined and classes were observed and the evaluator talked with the teacher or counselor. As to 15 initial relevant factors, the plaintiff districts were ranked higher than the comparison districts with respect to eight factors, with the differences on five additional factors being insignificant. Plaintiffs' districts scored higher than the comparison districts on such factors as implementation of curriculum, relating tasks to entry level job skills, student success on reaching skills necessary for entry level jobs and in budgeting for tools and maintenance. Only with respect to safety checks of equipment were the comparison districts' responses significantly higher.

In Jersey City and East Orange, the following problems were identified: funds were available for supplies but supplies were not timely delivered and facilities were poorly maintained. The teachers indicated that funds for supplies were adequate but supplies and services were not timely delivered. For example, in one semester at the East Orange High School home economics food preparation program, supplies were ordered but not received until November. (This was caused by the Department of Education's Fiscal Monitor freezing the ordering of supplies, equipment and material to address a deficit problem in the district. See Part III, Management of East Orange's School District.) In Jersey City and East Orange, there was a marked difference in the physical appearance and maintenance between schools in the same district, with newer schools being in the worst condition. In East Orange, for example, Clifford Scott High School was cleaner than East Orange High School. During Level II monitoring in Jersey City, the monitors found that new vocational equipment, including home economics equipment that had been purchased some time prior with State and federal funds, had not been installed. The vocational program review by defendants also faulted East Orange and Jersey City's placement activities as inappropriate and/or non-existent. With regard to East Orange's vocational education placement activities, defendants' findings conflict

with Rutgers University evaluators who reported in 1986 that East Orange's career counseling and job development program were found to be an exemplary program by a national associaton of vocational educators. At both high schools where career assessment and counseling is provided students, the counseling centers "very quickly and effectively became known to the students and recognized by them as a source of information, assistance and possible job referrals." (Exhibit D-292a at p. 36, 1st two paragraphs.)

Plaintiff witness Vincent Walencik, professor of industrial studies at Montclair State College, testified about his observations of various school districts in the State, noting that some suburban districts had more advanced industrial and vocational education programs than urban districts. However, Irvington's program was superior to those in Paterson and Camden and, except for a separate allotment for hand tools and a resource center in Parsippany, Irvington's program appears equal to if not better than Parsippany's. He also testified that he had been involved in offering tuition-free technology courses for high school teachers and that inner-city teachers, including teachers from Camden, Irvington, Paterson, Jersey City and Elizabeth, never participated. In his opinion, these teachers were less willing to change and also perceived more obstacles to reforming their programs. This is reminiscent of Mr. Knorr's observation that the program in Camden was "stagnating." Paterson's Superintendent, Dr. Napier, explained that there is a shortage of industrial arts teachers and no available industrial arts substitutes. With training, the teacher loses a day and at least 125 students miss a class. At the elementary K-8 level, where industrial arts teachers cover two or three schools in Paterson, all of the children in those schools taking industrial arts lose a class when industrial arts teachers attend training. Therefore, according to Dr. Napier, at least in Paterson, the district cannot afford to permit industrial arts teachers to attend

even tuition-free training. Nevertheless, in Paterson there has been no change in response to technology and no apparent desire to change. In suburban districts like Parsippany, especially in the high school, the change to technology is very evident.

There was no evidence that the State requires industrial or vocational education, nor was there a statewide survey of all districts.

Based on the record, I FIND the following. There is categorical aid for vocational education available from both federal and State sources that provides considerable amounts of money for these programs. Because many students in poor urban districts presently do not continue their education beyond high school (and many do not even finish high school), vocational education is particularly important in providing entry level job skills. The urban districts recognize this need and are attempting to meet it, with varying degrees of success.

The vocational education programs in East Orange and Jersey City appear to suffer from some poor management, or inefficiencies, particularly with regard to ensuring that purchased equipment reaches students in a timely manner. The vocational education programs in Camden and Irvington have attempted to keep up with changing needs. Camden let its program stagnate from the early 1970's until 1981 when it reapplied for LAVSD status. Since then Camden has undergone Level I and Level II monitoring and in 1982 hired a new director. Camden has recently used Perkins money to purchase some new equipment, to reinstitute a T4C (Technology for Children program) and is in the process of responding to a vocational education needs assessment done by plaintiffs' witness Mr. Walencik. All five middle schools in Camden offer a work experience program (WCEP). Camden is in the process of improving. Irvington offers a good program

but severe facilities problems may have prevented its qualifying as an LAVSD and thereby receiving additional funding.

In all urban districts, I **FIND** that basic skills and compensatory education needs impact on vocational education. The urban district focus on remediation of basic skills deficiencies impacts upon scheduling and facilities that may otherwise be used for vocational education. The need for county vocational school students to pass the HSPT limits the numbers of urban students, deficient in basic skills, that the vocational schools will accept and retain. For example, of the twenty-four 8th graders who generally apply to Essex County Vocational schools from East Orange middle schools, only five or six with the better academic records are accepted. Jersey City does not fill all of its eligibility places in the county vocational school because the program is a shared-time program and compensatory education students cannot spend half a day at the voc-tech school and still meet graduation requirements. In 1983, the Urban School Superintendents of New Jersey recommended that the Commissioner insure that basic skills deficiencies are not barriers to county vocational-technical programs. Basic skills can be taught within the vocational context, as suggested by some witnesses, but no evidence was presented indicating that any urban districts or county vocational schools are following that course.

I also **FIND** that there is less need for vocational education in affluent suburban districts, but some have developed advanced technology-oriented programs nonetheless. Limited evidence illustrates that some suburban districts like Pequannock and South Brunswick are able to purchase costly state of the art equipment and move more rapidly into technology based programs. For example, Pequannock uses equipment like satellite receiving dishes, solar energy stations and biotechnology centers. No testimony was presented about any urban district with

this type of equipment. The defendants assert that "What is appropriate for Pequannock might not be appropriate for Camden." (Defendants Proposed Finding #35 at p. 205.)

Finally, I **FIND** that there appears to be some duplication of efforts in providing vocational education, since districts and county vocational schools may be serving the same student population. While the State seems committed to providing and funding vocational education, it is not involved in coordinating efforts or programs among schools or geographic areas not designated as LAVSD's. And except for promulgating the LAVSD qualification requirements, there was no evidence of any State efforts directed toward coordinating programs among LAVSD districts. No evidence was presented about any State effort to coordinate the integration of technologically based education into vocational programs generally. No evidence was presented of any Department efforts to ensure that the quality of districts' vocational education programs serving similar student needs are substantially equivalent. (See monitoring findings in Part IV.) Consequently, existing vocational programs can be characterized as uneven in quality.

I have also previously indicated (Part I) that the LAVSD requirements, while they appear rationally based for quality vocational education, have deflected categorical aid from several urban districts, especially the State's three largest (Newark, Jersey City and Paterson). The defendants, on the other hand, presumably believe that mismanagement prevents districts from meeting these requirements. (See mismanagement findings in Part III.) No evidence was presented indicating any statewide Department restudy or outreach to ensure that vocational education categorical aid is being directed toward those students who are most in need.

Library/Media Centers

School libraries are particularly important to urban children who do not have many books at home. Before 1964, districts were required to meet State guidelines for library/media facilities. The State no longer requires any district to provide library facilities or classroom collections, nor are certified librarians required in elementary schools. However, most schools do have libraries. For secondary schools, an incentive to have an adequate library is that it is a requirement for Middle States accreditation. New Jersey formulated guidelines for libraries in a 1979 Department document, "New Jersey Blueprint for School Media Programs" (contained in Exhibit D-81).

Current educational philosophy has expanded the concept of a library to incorporate instructional media centers, distinguished by the use of audio-visual equipment such as cassettes, tapes, and slides. Typically, a media center has a particular location, a professional staff and a professionally organized collection.

The "New Jersey Blueprint" recommends that minimally, library/media centers include 6,000 volumes or 20 books per child, whichever is greater; audio visual equipment (1,500 software titles); one media specialist for every school of 250 or more but no less than one for every 500 students; one media aide and one media technician for every two schools but no less than one for every 500 pupils. The Blueprint also includes various floor area and design requirements for library/media facilities.

In preparation for this litigation, defendants' witness Anne Voss, the Department of Education's coordinator of state and regional service for the State Library, conducted a survey of school districts. (Exhibit D-81A (corrected).) She

surveyed only K-12 districts, which total 211; about 180 responded. She then applied the standards contained in the Blueprint to the survey results to determine whether deficiencies were present. ("Deficiencies" would include such things as not enough books per pupils or lack of certificated staff.) Ms. Voss testified that her results showed a wide range of deficiencies in every DFG group. Deficiencies were not confined to low-SES districts. A number of problems were noted, however, with Ms. Voss' methodology: (1) deficiencies were calculated on a district-wide percentage basis, rather than per school; (2) the survey indicated only the status at that point in time; and (3) by using only K-12 districts, Ms. Voss did not consider many districts that participate in regional high school programs.

By measuring percentage deficiencies, Ms. Voss' report shows Atlantic City, for example, an urban DFG A district, with a 54% deficiency in professional library staff, while the non-urban DFG E district of Creskill had a 71% deficiency. Converting to actual numbers, Atlantic City is short 7.1 staff while Creskill needs 2.4 additional staff to reach the minimum standard. Ms. Voss' survey also provided only a snapshot of one particular time frame, which raises additional reliability questions. For example, the survey does not account for factors which would impact on a district's number of library volumes per pupil, such as an increase or decrease in student population. The survey results setting forth a district's number of volumes per pupil consider neither the quality nor the currency of the volumes. Similarly, a district's high library expenditure one year may reflect an effort to compensate for past deficiencies. As a final example, Emerson School District was recorded as 100% deficient because of the retirement of the high school librarian. In fact, during its search for a new librarian, the district was employing a substitute.

Because of the survey's limitations, Ms. Voss herself did not consider this survey conclusive. Nevertheless, the study revealed statewide variations in library

services. Districts in every DFG failed to meet the study's minimum of one media specialist for every school of 250 pupils but not less than one for every 500 pupils. Even some high DFG districts failed to meet the minimum. For example, Bergenfield (DFG G) was 66% away from the standard. Fort Lee (DFG H) was 40% from the standard. In Essex County, of all the districts surveyed, only Millburn and West Orange met the certificated personnel standard of the study. For non-certificated library/media personnel, low DFG districts were found to be as far away from the standard as high DFG school districts. For expenditures per pupil on books, again, a wide range was observed. Atlantic City, DFG A, spent $7.81; Buena Regional, DFG A, spent $8.85; while Bergenfield, DFG G, spent $4.74. A similar range was discovered in audio-visual expenditures and books per pupil.

Ms. Voss also testified that East Orange has a history of very good school libraries because of an excellent cooperative relationship with the public libraries in the city. The East Orange Public Library is designated as a national depository for U.S. Government documents. Some branches of the public library used to be located in schools; the libraries stayed in the schools after the branches were withdrawn. The East Orange High School library contains between 16,000 and 17,000 volumes. Additionally, the Public Library is only three blocks from East Orange High School. Ms. Voss admitted having stated prior to trial, however, that the quality of East Orange district's library program had declined because of insufficient funds. Also, there is no space for specialized media center activities and the library at East Orange High School shares its 2.8 librarians with another district school.

Irvington, according to Ms. Voss, has also traditionally had a good library program and has sought assistance from the Department to improve its program. A continuing problem in Irvington, however, has been lack of space. For example, the

media room at the Union Avenue Elementary School had to be eliminated to make room for a computer classroom. (Exhibit P-187a at p. 3.) Ms. Voss, however, praised Irvington High School for its creative use of limited library space. Irvington is planning to enlarge the library at its high school, perhaps by adding a new wing. In Ms. Voss' opinion, East Orange and Irvington have better library programs than Jersey City and Camden.

When one of plaintiffs' witnesses was providing in-service to urban teachers, they were told to send students to the library to find the answers that teachers do not know. In Paterson and Camden elementary teachers responded by saying that was impossible since they did not have libraries. Because of budget cuts, Camden eliminated all elementary school librarians in 1981. Again in 1983, Camden was forced to lay off certified library staff because of financial problems. On a priority basis Camden is replacing librarians. As of 1986, however, classroom teachers provided the library skill instruction in most of Camden's elementary schools. Of 24 schools in Camden, 16 had no libraries. In East Orange, the Kentopp Elementary School has no library. By contrast, Scotch Plains/Fanwood had librarians in all its elementary schools between 1979 and 1983, the period covered by the evidence presented.

Of the ten schools in DFG A and B districts identified by Ms. Voss as having exemplary library programs, only two (the Victor Mravlag School in Elizabeth and Phillipsburg Middle School) are located in urban districts. Ms. Voss also testified that some schools with 250 or fewer students employ full-time librarians. However, with one possible exception (a very small school in Elizabeth), probably no urban school meets this standard. Ms. Voss also testified that urban school districts have inferior non-print equipment and no funds to repair or replace the equipment they possess.

Ms. Voss did not testify about the relative quality of the libraries in plaintiffs' districts to more affluent school districts, except as indicated in her survey.

Of the 181 school districts responding to Ms. Voss' study, more high SES districts than low SES districts were able to achieve the Department guideline of providing one non-certified media aide for every 500 children. In DFG's A and C, two districts were able to meet the standard as compared to five districts each in DFG's H and I. No district in DFG B was able to achieve this staffing ratio.

Ms. Voss recommended visiting schools with good library/media programs to districts interested in improving. Her schools were in districts spanning the DFG groups, but there were more in DFG's H, I and J proportionately than in any other group. For example there were five in DFG A, four in B, two in C, two in D, two in E and three in F. Continuing with her recommendations, DFG G had five library programs Ms. Voss thought exemplary and DFG H had 10. From those library programs in DFG I, Ms Voss had selected 11 as models. In DFG J she had selected seven. Also, of the five exemplary programs in DFG A, only Elizabeth was urban.

At the Myrtle Avenue Elementary School in Irvington, the library is located in the basement next to the lunchroom. Washington Elementary School in Irvington has a portable library facility which holds approximately 300 books. As of 1984, Paterson had no libraries in any of its 30 elementary schools. A garage donated to Paterson by New Jersey Bell is being converted to a storage center and elementary media facility. By contrast, South Orange/Maplewood provides a librarian in each elementary school four days a week. The Nassau School in East Orange shows film strips in a converted cloakroom, about 17 feet by 8 feet. And as of 1984-85, School #30 in Jersey City had one 16-millimeter projector, one VCR and four record players for over 680 students. By contrast, the Community Park

Elementary School in Princeton has a television in every classroom, all of which are linked, so that a single videotape can be shown throughout the building.

Red Bank, also by contrast, has a primary school media center where the library is 50 feet by 25 feet with a number of adjacent smaller classrooms containing individual carrels and faculty work area. There is a large circulation desk, with a work room, at least 12 feet by 15 feet behind it. The stacks are on wheels so that they can be moved to establish a smaller space for group activity. Similarly, the South Brunswick High School library, having been newly renovated, seats 36 to 40 students in individual carrels and provides communal tables to permit another 30 students to work together.

Based on the evidence, I FIND that library/media disparities span personnel, spending, quantity of collection, media equipment and facilities and tend to affect poor urban districts more severely, though there are deficiencies across all DFG's. I also FIND that sometime in the early 1980's library/media budget restrictions severely affected some urban centers. These restrictions, characterized by the defendants as a lack of commitment when referring to Camden (Defendants' Proposed Finding #10 at p. 175), resulted in the elimination of libraries and librarians in elementary schools. As of 1987, substantial numbers of elementary students in poor urban districts remain unserved by certified librarians or even in some cases by libraries.

Class Size

The record reflects that there is much less absenteeism in elementary schools than in middle and high schools. All witnesses who testified about average enrollments in elementary schools indicated that these averages were close to actual attendance figures. In addition, several witnesses testified about the

preferred size for an elementary school. The Superintendent of South Brunswick, Dr. Kimple, believes that 500 should be the maximum elementary school enrollment. Ms. Viciconti, Jersey City's Assistant Superintendent for Curriculum and Instruction, believes, however, that an elementary school with over 400 students is too large. Dr. Ross, currently the Superintendent at South Orange/Maplewood, believes 280 - 300 students for an elementary school "is appropriate." On the basis of this record, I **FIND** that an elementary school's enrollment should be between 300-500 students and that elementary schools should not be larger than 500 students. According to most witnesses who testified on this subject, the small size is necessary to personalize the school environment for the young children beginning their educational experience and to facilitate a personalized management approach.

East Orange's Ashland Elementary and Elmwood Elementary schools both enroll some 800 children. The Kentopp Primary School houses 500 children in grades K-2. In the spring of 1986, 59% of the 253 East Orange regular elementary school classes had enrollments of 25 or more. Of the district's 148 primary grade (K-3) classes, 59% or 87 of them contained 25 or more children. Five 1st grades and four 2nd grades had enrollments of 30 or more, while only two primary classes had fewer than 20 children. East Orange budgets for an average class size in kindergraten of 25 (mandated by statute) and for 27 in grades one through 12.

In Jersey City, through 1983-84, most of the elementary schools had enrollments between 800 and 1,000 with only three schools, Numbers 16, 42 and perhaps 29, having fewer than 500 students. In contrast, the elementary schools of South Orange/Maplewood range in enrollments from 280 to 320.

In 1983-84, Scotch Plains/Fanwood's elementary school had 16 or 17 children in its kindergarten classes. The average elementary class size was 21 children.

South Brunswick attempts to keep all classes in elementary school below 25 students per class. In 1986-87, South Brunswick recommended a maximum of 20 per class in kindergarten and 22 per class in 1st grade.

The average class size in Millburn in 1986 in grades K-4 is 15-19, with nine classes of 14 children or less, eight classes of 20-24 children and no classes of 25 or more. In grades 5 to 8, the average class size is also 15-19 with two classes of 14 children or less, three classes of 20-24 and three classes having 25-29. None of the grades 5 to 8 classes have more than 29 children.

There is some evidence of large class sizes in urban high schools. However, the higher incidence of student absenteeism in urban schools makes overcrowding comparisons with suburban schools difficult on this record.

I FIND that poor urban elementary schools tend to house more students with many more large classes than wealthy suburban districts. I also FIND that Paterson, Jersey City and East Orange have elementary schools that exceed the numbers of students preferred for the effective teaching of elementary students.

Teaching Staff

There were two areas of dispute regarding disparities in teaching staff between poor and affluent districts: the ability to attract teachers and the quality

of the teachers. Plaintiffs claimed poor urban districts cannot compete for teachers because teachers would prefer to work in suburban, affluent areas. They also claimed that teaching staff in poor districts is generally less qualified than in affluent districts, in terms of education and experience.

There was considerable testimony about teacher shortages in plaintiff districts. East Orange, Jersey City and other urban districts routinely start the year with vacancies in certified positions. Or, they may be forced to hire teachers that are not qualified. A particular problem in some urban districts is finding qualified bilingual teachers. Math and science teaching positions are also hard to fill. Another serious problem is an inadequate number of substitutes.

Urban districts like East Orange, Paterson and New Brunswick do not have enough substitutes to cover all teacher absences. In Paterson there is an average of 120 teacher absences each day. In 1984-85, the district hired permanent substitutes as unassigned teachers to remedy the daily need for substitutes. These teachers received a full contract with full benefits and were to be assigned where there were absences. By November, those teachers had to be placed in positions of teachers who had left the district since the school year started. The program, according to Paterson's superintendent, has been only marginally successful. In East Orange's 16 schools, there are school days when 60 to 65 substitutes are needed. Usually, the district cannot find substitutes when more than 45 are needed. Almost every day of the school year, New Brunswick lacks substitutes. Instead of a per diem, New Brunswick, as an incentive, pays substitutes a full month's salary after 20 days.

When substitutes are not available, classes are combined with other classes or staff responsible for other duties (such as librarians, art and music

qualified teachers. Dr. Goertz, however, found in 1984-85 that wealthy suburban districts tended to have higher salary schedules with both higher starting and "topping out" salaries.

The New Jersey minimum teacher salary law (the $18.5 legislation) was intended in part to address this problem, but testimony indicated that the law has not had an appreciable effect on the ability of poor urban districts to attract teachers. According to Dr. Fowler, the two lowest wealth groups in his analysis received the most minimum teacher salary aid in 1985-86 and had the most teachers aided. These two groups contained 291 of 557 districts in the State, including the largest school districts in the State. Nevertheless, both poor urban and wealthy suburban districts' starting teachers salaries benefitted from the new law. Districts with under $100,000 equalized valuation per pupil received $2,245 per teacher aided and those with $600,000 to $700,000 in wealth received $2,386 per teacher aided. In fact, Jersey City like a few other urban districts used to offer a relatively high starting salary in order to attract more applicants, but these districts have lost their competitive advantage because now all districts must pay $18,500. The new law leveled out many starting salaries across districts and some urban districts, like Jersey City, lost one method of competition. Also, some suburban districts like Moorestown increased starting salaries above $18,500 in 1986-87 to maintain a competitive edge. Other poor districts are concerned about what will happen when funding for the $18.5 law ends, since the districts will then have to raise the extra money for higher salaries on their own. (The law was enacted in 1985, with full funding for three years. After that time, a new method of funding will be considered. *N.J.S.A.* 18A:29-5 *et seq.*)

There are clearly disparities in average teacher salaries between plaintiff districts and very wealthy districts. In 1985, East Orange's average teacher salary

was $24,774. Nearby suburban districts had much higher average salaries: Montclair, $28,515; Summit, $28,074; Millburn, $31,244. This affects not only the ability to attract teachers, but to keep them as well. An East Orange teacher who successfully competes for a position in one of those suburban communities could not only increase earnings, but could achieve more of the factors identified by Dr. Wise. (Often, new teachers will accept a job in a less desirable district, gain experience and then move to a better position. This problem with retaining teachers adds to the difficulty poor districts have in filling teaching positions and also affects the overall quality of the district's instructional staff.)

There is some dispute in the record as to whether teacher salaries on the whole are lower in poor urban districts. Dr. Goertz testified that when districts are ranked in pupil groups according to operating expenditures, average salaries rose in relation to operating expenditures. She concluded from this that low-spending districts offer lower average salaries than higher-spending districts. However, looking at individual districts, it is true, as defendants point out, that average teacher salaries in the four plaintiff districts are not the lowest in the State. In 1984-85, the average salaries were as follows: Camden, $21,698; Jersey City, $26,756; East Orange, $24,774; Irvington, $23,261. Many individual districts in all DFG groups have lower average salaries. The weighted mean for all districts (as calculated in Exhibit P-4) was $26,389.

Dr. Fowler in Exhibit D-310 Figures 1 and 2 found that for 1984-85 in each DFG, urban aid districts had higher mean teacher salaries than non-urban aid districts. Hoboken, Union City, Newark, West New York, Asbury Park and Jersey City paid their average teacher in 1984-85 more than many districts in all other DFG categories, despite a lower level of equalized expendtiures per pupil. According to

In Jersey City during 1976-77, elementary class size reached 36-37 children despite a proposed limit of 33 children. By 1983-84 class size had been reduced to 26-27 children. By 1987, there were 209 classes containing between 25 and 29 children and 26 classes ranging from 30 to 35 children. The class sizes for School #41 as testified to by defense witness Dr. Przystup included nine grade levels, three of which had average enrollments of 25 or more. Dr. Przystup believed the Jersey City schools were not overcrowded. The Jersey City figures, however, should be compared with those in South Brunswick, Millburn and South Orange/Maplewood. In 1985-86, most of Millburn's elementary classes ranged between 15 and 19 children, with only three classes in excess of 25 children. In South Brunswick, during the 1985-86 school year, there were 10 elementary classes ranging in size from 15 to 19 children; 43 elementary classes ranging from 20 to 24 and 19 elementary classes ranging from 25 to 29. In South Orange/Maplewood, of 68 regular classes (K-5), excluding kindergarten, 51 classes had fewer than 25 children.

In Irvington, the Union Avenue School according to its principal has small, very good class size. However, considering the district as a whole, over 28% of the district's elementary classes have more than 30 children. The 4th grade classes have ranged from 29-32 children over the past eight years. Of all the district elementary classes, 171 had over 25 children; 68 of them ranging from 30-34 children.

In Camden by September 1986, its enrollment was 19,240. The Pyne Point Middle School enrolled approximately 750. Similarly, Washingon Elementary School, K-5, enrolled some 500 children.

In Camden, the Board of Education recommends 25 students per class. Yet, 26% of Camden's elementary classes, 15 1st grade and 14 2nd grade, had enrollments in excess of 30 children. Of all the remaining Camden elementary classes, the majority had 25 children or more. In 1985-86, in one 1st grade there were 40 children, and in all other regular K-5 classses there were 10 classes of 35-39 children; 71 classes of 30-34; 129 classes of 25-29; and 101 classes numbering under 25.

In Paterson, as of 1987, there were three elementary schools housing over 1,000 students. In 1985-86, Paterson elementary school classes included nine regular classes ranging from 35 to 39; 65 classes of 30-34 children; 281classes of 25 to 29; 268 classes of 20 to 24; 93 classes of 15 to 19 and 22 classes of one to 14.

When these urban class sizes are compared with suburban districts the magnitude of urban overcrowding becomes clearer. In Moorestown, for example, its three elementary schools ranged in size from 217 to 265 students. Moorestown has class size guidelines requiring that an aide be hired whenever the kindergarten or 1st grade class size reaches 21 children; and that the class be divided and a second teacher hired whenever class size reaches the State limit of 25 children. Similarly, Moorestown requires that an aide be hired whenever class size exceeds 22 in the 2nd grade or 23 in the 3rd and 4th grades; and that the class be divided and a new teacher hired whenever class size exceeds 26 in the 2nd grade or 27 in the 3rd and 4th grades.

teachers) may substitute. As a last resort, students are sent to the auditorium to watch films. By contrast, Moorestown has a substitute for every three teachers. South Brunswick employs permanent substitutes for the high school and middle school.

Although teacher shortages occur nationwide, especially in areas like science and bilingual education, plaintiffs argue the problem is worse in poor urban districts because they cannot compete for the teachers who are available.

Plaintiff witness Dr. Arthur Wise, Director, Center for the Study of the Teaching Profession, Rand Corporation, testified that research showed teachers generally prefer to teach in certain types of districts. In his own words:

> Those districts which have an easier time attracting teachers are districts which are high in wealth, high in socioeconomic status, high in income, districts which have smaller classes, which teachers mightily prefer, districts which offer high salaries to teachers, districts in which it is easier to teach students, where they come to school better motivated, where they already demonstrate a high level of achievement when they come to school.
>
> Teachers prefer to teach in districts where discipline is good, where there is a wide variety of support personnel, such as guidance counselors and other support personnel. Teachers, like many other people, prefer nice physical facilities over poor facilities. Teachers certainly prefer to teach in environments in which there are high level resources available to them, whether they're computers or laboratory facilities or paper and pencil or books, libraries and so on. Teachers would rather teach in places that have large quality and quantities of those goods. They obviously prefer to have materials available to them than not have materials available to them.

> Teachers like to teach in places where attendance is high, and they like to teach in places where their own personal safety is not an issue. (Wise Transcript, Nov. 25, 1986, pp. 40-41.)

An additional factor is smaller school size, since this promotes a more collegial atmosphere and permits teachers to work more closely with the principal. The result, said Dr. Wise, is that districts which offer these factors tend to have a recruiting advantage over districts which do not. Teachers tend to move from less attractive districts to those with the factors they prefer, which means that teachers tend to move from low-SES to high-SES districts if they can.

Dr. Wise conceded that some teachers prefer to teach in more challenging environments or choose to teach in a particular community because of personal ties, but generally teachers prefer to work where they can find the factors he outlined. While Dr. Wise was most aggressively cross-examined, I do not believe that his testimony was discredited. There was no research to the contrary presented. Defense witness Dr. Coombs, Professor of Educational Policy Studies at the University of Illinois, Urbana-Champagne, confirmed some of Dr. Wise's conclusions when he agreed that outstanding teachers are attracted to more creative teaching possibilities and repelled by statewide tests that dictate what they should be teaching. (See findings on monitoring and testing in Part IV.)

According to Dr. Wise, teachers will to some extent respond to financial incentives, so that higher salaries could increase the number of teacher applicants a district attracts. Defendants' witness Dr. Eric Hanushek, Chairman of the Department of Economics at the University of Rochester, agreed that if a district raised its entry level salary $5,000 above neighboring districts, it could affect its teacher applicant pool, thus permitting the district to attempt to select more

defendants, most urban schools pay a competitive average salary notwithstanding higher expenditures per pupil in some other districts.

In 1984-85 Hoboken paid teachers on average $27,560; Union City with equalized valuation of $61,990 paid on average $28,126; Passaic City with equalized valuation of $53,703 paid on average $26,374; Newark paid $28,718; Jersey City paid $26,756 and Asbury Park paid $26,916. In contrast, Long Branch, with equalized valuation of $141,451 paid $25,271; Bayonne with equalized valuation of $155,177 paid $21,759; Jackson with eqalized valuation of $111,086 paid $24,256; Lakewood with equalized valuation of $145,311 paid $23,387.

East Orange, according to defendants ' cross-examination, offered in 1984-85 a higher maximum teacher salary than 11 out of 23 Essex County school districts. East Orange's maximum was higher than Belleville, Bloomfield, Fairfield, Glen Ridge, Irvington, Montclair, Newark, Orange, Roseland, Verona and Essex County Educational Services. East Orange's maximum was lower than the following more affluent and suburban Essex County districts: Caldwell-West Caldwell, Cedar Grove, Essex County Vocational Schools, Essex Fells, Livingston, Millburn, North Caldwell, Nutley, South Orange/Maplewood, West Essex Regional and West Orange.

Nevertheless, Dr. Fowler found a .65 positive correlation between NCEB and average teachers' salaries. Thus, as the net current expense budget increases, so do teachers' salaries. Plaintiffs also assert that even if salaries are somewhat higher in some urban districts, the advantage is counterbalanced by working conditions which discourage teacher interest, such as large classes, low-SES and poor facilities. Although East Orange offers a higher maximum salary than about half of the districts in Essex County, the districts paying higher salaries are also more

affluent and suburban. Thus, East Orange cannot compete with those districts and routinely starts the school year with teaching vacancies. Similarly, New Brunswick's salary scale is comparable to neighboring districts, but has more difficulty attracting teachers.

In 1984, for example, New Brunswick and South Brunswick both advertised for an 8th grade teacher. South Brunswick had 100 applicants for the position; New Brunswick had two. The more desirable districts can also be more selective. South Brunswick may require potential teachers to teach a demonstration lesson. Paramus, another wealthy district, in hiring new teachers might prefer other college graduates to gradutes of State teaching colleges and may try to hire graduates from more prestigious colleges. Montclair, as another example, hires only teachers who have a chance of being outstanding. Montclair receives hundreds of teacher applications each year. Usually, New Brunswick receives five or six applicants for an advertised position and the district can only hope to employ someone with a good background, but they do not have that "luxury", according to its Superintendent. (Larkin Transcript, Dec. 2, 1986, p. 149, line 7.)

I therefore **FIND** that even when average teachers' salaries are higher in poor urban districts, they are not high enough to enable poor urban districts to compete equally with affluent suburban districts for qualified teaching applicants.

Instruction continues to be an art rather than a science. It is still difficult to tell a teacher to treat a particular student in a particular way and the student will proceed from point A to B. Therefore, it is extremely important for school districts to hire appropriately trained teachers. I **FIND** that there are some very competent and dedicated teachers in poor urban districts, including Mr. Giordano from

Irvington, Mr. Guadadiello from Jersey City and Ms. Jewell, also from Irvington, who testified in this matter.

However, this record also contains subjective indications of poor teaching in urban districts. For example, Assistant Commissioner Bloom believes that high teacher turnover in urban schools is a problem when trying to implement "effective schools" methods. (See discussion in Part IV.) Mr. Kaplan, the Director of the Department's compliance section, said that some Camden teachers lacked some of the skills necessary to instruct students. County Superintendent Beineman believes there are some building principals in Camden who verge on incompetence. They have given up, they have low expectations for their staff and students and cannot impact positively on programs that are in place.

Mr. Doolan, the Department's Coordinator of Bilingual and ESL programs, noted in an East Orange evaluation that in his opinion teachers were using questionable teaching methods and techniques with a lack of variety in method. He observed that the teachers were mostly lecturing with little attention to experiential learning. Mr. Doolan also had concerns about the quality of instruction in Irvington's bilingual programs.

At Level II monitoring in Jersey City, the Department found teachers lecturing to students most of the time. Exhibit P-149, the Comprehensive Basic Skills Review on Dickinson High School in Jersey City, noted that "the staff should do less lecturing and handing out dittos.... Involve students in the learning process with hands-on lessons." "There is too much teacher domination and lesson presentation." (Note the findings relating to research on how children best learn in Part V, The Importance of Educational Outputs to Defendants.) Finally, Dr. Galinsky, Paramus' Superintendent, pointed out that there is also a morale factor causing

people to function poorly because they believe the system does not care how they function.

I recognize that these proofs are not determinative of the quality of urban education. There is, for example, no indication of how many poor teachers were observed and how this teaching compares with suburban teaching. Also, much of the proofs are based on subjective evaluations. However, on the basis of the entire record and the findings I have made on the entry level qualifications of urban teaching staff, I infer and consequently **FIND** that, overall, students in urban districts are more likely to have a greater number of less qualified teachers over the course of their public education than students in affluent suburban districts. (See also teacher in-service findings below.)

I further **FIND** that while there are indications on this record that better leadership by building principals and superintendents may help improve urban teaching, actual improvement may be hindered by the same limiting factors which result in less qualified teaching. Camden and Asbury Park, for example, had to undertake superintendent searches twice because all of the applicants took jobs elsewhere.

Professional Staff

Dr. Goertz also looked at student-staff ratios, average years experience of teachers and number of teachers with advanced degrees as those factors related to operating expenses. Disputing the status of urban districts in relation to staff, defendants point out that the factors examined by Dr. Goertz actually vary throughout DFG groupings, if data from individual districts are considered. Similarly, the defendants claim number of years experience of staff and post-graduate education do not necessarily vary according to whether a district is urban

or according to the district's property wealth. For example, the defense argues that the DFG A and B urban 56 districts, although in some instances spending below other districts, nevertheless have percentages of staff with an MA or with an MA plus 30 which are similar to or better than other districts with higher expenditures. (Defendants' Reply at p. 224.) This argument is another variation on the defendants' observations made with regard to expenditure disparities that because there are exceptions to plaintiffs' statistics, plaintiffs' position is invalid. Unanimity is not present but the proofs on balance tend to support plaintiffs' position for all of the same reasons I have previously articulated.

Dr. Goertz found that in 1981-82 as the average number of certified professional staff per 1,000 students increased, operating expenditures per pupil increased. (Operating expenditure according to Dr. Goertz measures the dollars spent by a school district to operate its own schools.) There was in 1984-85, on average, 29% more total staff in the highest spending districts than in the lowest spending districts.

Analysis of instructional staff demonstrated that between 1981-82 and 1984-85, the highest spending districts had, on average, twice as many art, music, and foreign language teachers per 1,000 pupils and 75% more physical education teachers than the lowest spending districts. The difference for regular classroom teachers was 17% more per 1,000 students.

In 1984-85, including federally paid teachers, Jersey City had 75 certified professional staff per 1,000 pupils, in comparison to the State average of 81. Ridgewood, Tenafly, and Paramus were all above the State average. Paramus, for example, had 96 certified professional staff per 1,000 pupils. Camden had 68 total staff per 1,000 pupils in comparison to Woodbridge, Lawrence and Princeton, which

all had more than 90 per 1,000 pupils. East Orange and Irvington both had 71 total certified professional staff per 1,000 pupils. If federally paid teachers were removed from these statistics, the disparities between poor urban districts and wealthy suburban districts would be greater because poor urban districts have more teachers paid with federal funds.

As of 1981-82,the highest spending districts had 50% more educational services staff (librarians, guidance counselors, nurses and school psychologists, for example), 25% more instructional staff and 60% more administrative staff than the lowest spending districts. (Dr. Goertz's 1981-82 study was not completely updated for 1984-85 because the overall patterns of staff and expenditure variation which were updated indicated to Dr. Goertz that the 1981-82 situation continued into 1984-85.)

In 1981-82, Camden had 55.1 instructional staff per 1,000 pupils in comparison to the State average of 65.3, while Woodbridge, Lawrence and Princeton were all above the State average. Camden was below the State average staff ratios in all categories of instructional staff except for special education and bilingual instructors. Irvington had even fewer instructional staff than Camden; East Orange, Jersey City, Newark, Paterson and Trenton all had below average ratios of instructional staff per 1,000 pupils.

From 1981-82 through 1984-85, the only categories of staff in which the cities approached or exceeded the State average ratios were for special education, remedial and bilingual instructors.

From 1981-82 through 1984-85, all of plaintiffs' districts had fewer administrative staff per 1,000 pupils than the State average ratio.

Dr. Fowler found that in each year between 1978 and 1981, the staff ratios in plaintiffs' districts were substantially less than the State average staff ratios. During that four year period, the pupil to staff ratios in three of the four plaintiffs' districts either became less favorable or stayed the same with respect to the State average. Each of the four districts during this four year period also had substantially more pupils per administrator than the State average.

Dr. Fowler also found a -.59 correlation between pupil to staff ratios and NCEB. This means that as pupils-to-staff ratio gets more favorable, e.g., the ratio decreases because there are fewer pupils to staff, the district's NCEB tends to increase.

Dr. Fowler also determined that there is a -.60 correlation between pupil to staff ratios and day school expenditures. Thus, as the district's day school expenditures increase, the ratio of pupils to staff decreases.

Besides statistical evidence, there is also testimony and documentary evidence which corroborates some of the staffing disadvantage evidence. For example, Sparta with 2,800 students had an assistant superintendent. Paterson with its 27,000 students has three assistant superintendents. There is evidence concerning Jersey City's adminstrative needs. Exhibit D-31, May 30, 1980 commented at p. 9 that there was limited supervisory personnel for Jersey City's size. There was only one person serving as supervisor and administrator for 2,693

students. Exhibit P-131 also noted that Jersey City needed more secretarial and clerical help in many buildings. But the district did not review the schools to determine which needed help. Professor English in his report for the defense said that the number of supervisors in Jersey City is insufficient and he suggested the district employ more.

Dr. Goertz also found that as per pupil expenditures increased, so did the percent of staff holding advanced degrees. In the highest spending districts, 58% of staff have post-graduate degrees, as opposed to 33% in the lowest spending group of districts.

Only 10% of staff in the lowest wealth districts have 30 credits beyond a master's degree; 27% of staff in the highest spending districts have these credits. For example, teachers with master's degrees or above comprise 64.4 % of the staff in Moorestown and only 34% in Camden.

Teacher contracted salaries tend to be linked to years of experience and advanced educational degrees. Teachers generally receive more money as they gain more time in the system and higher educational degrees. Dr. Fowler found a .567 correlation between teachers with MA degrees and NCEB. Thus, those districts with higher NCEB's tend to have more teachers with MA degrees.

Regarding experience, Dr. Goertz found the average staff experience in the lowest spending group is 11.9 years while in the highest spending districts it is 16.4 years. Fewer teachers in the highest spending group have less than five years experience. The lowest spending districts also have more staff with less than five years experience (18%) than the highest wealth districts (8%). Urban districts

generally have less experienced staffs than comparison suburban districts. In Irvington, for example, 31% of the certified professional staff in 1984-85 had less than five years experience in comparison to a 12% State average. In Paterson, 20% had less than five years experience.

Dr. Fowler reported a .50 correlation between teachers' average experience and NCEB. Thus, those districts with higher NCEB's tend also to have more experienced staff.

In summary, I agree with Dr. Goertz and Dr. Fowler and FIND that as the level of per pupil expenditures increases, so also does the size, experience and education of professional staff employed in school districts throughout the state. Higher spending is associated with more staff per 1,000 pupils, with more experience and more post-graduate education.

Teacher In-Service

Monitoring indicator 6.5 requires staff development programs based on the assessed needs of the district. However, there are no specific requirements in terms of type of program or extent of training.

Plaintiffs contend that poor districts cannot provide adequate in-service training for teachers and that wealthy districts offer teachers more in terms of professional development. In Moorestown, for example, the district pays for teacher membership in a professional organization and pays for subscriptions to journals. Affluent districts also have more resources for in-service training. In Montclair, 72 in-service seminars were offered in 1986, including some in the areas of computers, science and writing. Montclair pays teachers $15 per hour to

participate in in-service training, thus offering an additional financial incentive. In Scotch Plains/Fanwood, a comprehensive staff retraining program was initiated in 1982. It includes workshops, visits to other school districts, sabbaticals and after school in-service training, as well as a program in developing computer literacy. A professional improvement plan was developed for every teaching staff member. This entire program was budgeted at about $100,000 per year. In Princeton, its regular staff development program consists of four days of school without students and four days when students are dismissed at 1pm and teachers have half-day sessions, which permits follow-up on concepts taught during the full days. The district also pays $18 per hour for training outside of school time. South Brunswick provides $50 per teacher for out-of-district workshops and conferences and provides additional compensation for teachers who make scholarly presentations at conventions or workshops. In Summit, the district pays 3/4 of the tuition charges for any graduate study in the teachers' subject areas. Teaneck pays full tuition.

In East Orange, in-service training used to be funded at $3,000, with another $3,000 for conferences and seminars; with Operation School Renewal funds, $46,000 was available for staff development with $7,000 for participation in professional conferences. Paterson has no budget line item for in-service training. The district tries to offer four in-service workshops a year. In New Brunswick, a professional development program is funded primarily through private grants from Johnson and Johnson as well as a group called New Brunswick Tomorrow. Camden provides staff development in preparation for the HSPT, the development of Individual Student Improvement Plans (for children in compensatory education) and testing and evaluation. The district also provides one day of in-service for new teachers.

South Orange/Maplewood has a history of extensive, costly and productive in-service training. In addition to ongoing staff training in computer education and in Madeline Hunter Mastery Teaching, the district offers teachers training and planning time in several curriculum areas. For example, an intensive in-service training program in writing has been in place since 1983. Betweeen 1974 and 1984, Jersey City's in-service training was limited primarily to federally funded and required training under Title I and P.L. 94-142 (Education for Handicapped Children Act). Jersey City offers six 1/2 days of special education in-service for its teachers. This is the most special education in-service offered by any district in Hudson County. Dr. Ross, who was Superintendent of Jersey City during 1974-84 and now is South Orange/Maplewood's Superintendent, however, estimated that in-service training similar to that available in his current district would cost Jersey City several millions of dollars.

The Department of Education itself provides teacher training through its three Regional Curriculum Service Units (RCSU's), which each serve seven counties. Prior to 1983, this service was provided by Educational Improvement Centers, which offered in-service assistance in areas requested by local districts. The RCSU's operate differently; the Department sets the agenda offered instead of responding to specific requests. The RCSU's offer workshops, materials, direct service to districts and assistance in pilot projects. RCSU's will also provide assistance in curriculum development. There is no charge for RCSU services, except for a $2 annual fee for individual teacher membership in the learning resource center.

There was some testimony that urban districts and teachers do not take full advantage of the services offered by RCSU's, although between February 1986 and January 1987, 1,669 urban professionals attended RCSU workshops.

Based on the evidence presented, I **FIND** that there are fewer in-service opportunities provided urban teachers by their districts than are provided teachers from some wealthy suburban districts. There is also more in-service money being spent by some wealthy suburban districts than by urban districts. I also **FIND** that in-service efforts for urban teachers are hampered by several factors. These include cost of district in-service; number of teachers involved; emphasis on basic skills, rather than more professionally oriented concerns; insufficient numbers of substitutes; and lack of incentive on the part of some urban teachers.

Health Needs

A statutory provision, last amended in 1965, requires that every Board of Education employ one or more physicians and one or more nurses. *N.J.S.A.* 18A:40-1. The State Board has no regulations covering this provision and monitoring does not consider a district's health needs.

The New Jersey School Nurses Association recommends a ratio of 750 secondary students to one nurse and 500 to one for elementary students. Clifford Scott High School, with an enrollment of 1,250-1,500 has one nurse. Two health professionals serve East Orange High School's 1,950 students, while one nurse serves approximately 1,400-1,900 middle school students in the Hart Complex. At both the Ashland and Elmwood elementary schools in East Orange, one health professional serves between 750 and 900 children. In Paterson, one nurse covers two neighboring elementary schools. New Brunswick has established a school district health program because the Superintendent was able to procure a $250,000 grant from the Robert Wood Johnson Foundation.

In Scotch Plains/Fanwood, one full-time nurse is available in each elementary school, providing a 243:1 ratio. South Brunswick has established a developmental vision program in which an optometrist helps diagnose and develop vision improvements which, according to the district's Superintendent, helps students learn. No other proofs were presented concerning wealthy suburban district health care programs except Dr. Goertz's statistics on staff ratios which did not consider nurses separately. Consequently, all I can **FIND** is that there appear to be some urban schools with fewer health professionals than are recommended by the School Nurses Association.

In-School Suspension

In-school suspension is the preferred method for dealing with disruptive students since they are supervised in school and do not receive what some disciplinarians say the students were seeking in the first place, freedom. In-school suspension programs require funding for staff and materials as well as space. In Jersey City, the district was unable to assign sufficient classroom space and they could not afford to provide staff for such a program. East Orange experiences the same problems. There is no program available at Pyne Point Middle School in Camden. Consequently, these districts must suspend children out-of-school.

South Orange/Maplewood, South Brunswick and Montclair all have in-school suspension programs. They provide teachers, counseling staff, facilities and educational materials for the programs. South Orange/Maplewood is also able to provide a Saturday suspension program in addition to its regular in-school program.

Parent Participation

N.J.S.A. 18A:7A-2 vests the State with primary responsibility for encouraging parent/citizen involvement in the schools. There is research suggesting an association between student achievement and elements of community education, including parent and citizen participation, considering the child's total environment as having educational impact and creating positive self-concepts. *N.J.S.A.* 18A:7A-2a(6) requires "local school districts in which decisions pertaining to the hiring and dismissal of personnel, the curriculum of the schools, the establishment of district budgets, and other essentially local questions are made democratically with a maximum of citizen involvement and self-determination and are consistent with Statewide goals, guidelines and standards."

Testimony indicates that there is less parental participation in urban district schools than in suburban districts. It is easier to find active PTA's taking a serious interest in the operation of the schools in suburban, rather than urban, districts. In most suburban districts there is a zone of tolerance for educational actions. Once the Board of Education takes an action that moves outside the tolerance zone, the public mobilizes and becomes even more involved. In urban districts, this zone of tolerance has become muddled.

Plaintiffs explain that urban parents are themselves often the product of deficient education; many are young and have not finished school. Many are single parents for whom participation is particularly difficult. Babysitting needs and employment obligations prevent a great deal of school contact. Although there are small groups that come together for quality education or on specific issues, such as East Orange's district-wide curriculum and textbook selection committees, trying to

get parents together in a sustained way in large urban districts is very difficult without support.

Proofs show, however, that urban and suburban districts are making efforts to involve parents. For example, Camden maintains a district-wide parent council as well as school-wide parent councils. Camden also has a Parent Education Center to assist parents of special education children. (A Department witness indicated that Cherry Hill does not have such a center, though the witness believed they would like one.) Jersey City offers a center for parents of basic skills students to receive computer assistance so they can help their children. East Orange encourages involvement through newsletter circulations and bi-annual open houses. Irvington has a cable television station it uses to keep parents informed.

The wealthy districts are also involved in encouraging parent participation. Montclair, for example, generates parent participation through personal contact by home/school coordinators. The district employs a Director/Coordinator of Public Information and publishes a newspaper entitled Currents which is disseminated to the community five times a year in addition to a weekly newsletter outlining the Board's agenda and decisions.

However, the proofs also indicate that most districts, urban and suburban, tend to hold parents at arms' length. New Brunswick's Superintendent, Dr. Larkin, said that he "never met a parent who did not want the best for their kids." (Larkin Transcript, Dec. 2, 1986, p. 50, lines 11-12.) However, too much parental involvement is viewed by administrators as burdensome to the smooth educational functioning of schools. Parents in all districts are allowed limited involvement in goal setting, reporting on pupil performance and curriculum

decisions,for example, but they are not permitted involvement in some fundamental district decisions such as hiring and firing of staff.

Plaintiffs urge greater State effort encouraging parental involvement in school operations. They suggest the State fund activities like School Watch's Public Policy and Public Schools course which is offered in 12 urban districts including Paterson, Newark, East Orange, Plainfield, Perth Amboy, Trenton, Neptune Township, Camden, Bridgeton/Fairfield Township, Atlantic City/Pleasantville, New Brunswick and Montclair. This program is designed to provide urban districts with informed parents who could work effectively and cooperatively in school improvement efforts. Plaintiffs also point to South Carolina where local school councils are mandated and where the legislature appropriates funding for the state to develop and disseminate training materials and to produce workshops in cooperation with their state television network. Plaintiffs contend that meaningful parent participation only results from such efforts.

The plaintiffs' proofs criticize the Department of Education for failing to act vigorously enough in encouraging parental involvement. However, on this record, I **CANNOT FIND** that the activities currently undertaken by urban and suburban districts to encourage parental involvement differ markedly. I also **CANNOT FIND** that any of the actions in this area that are taken by the Department fall unevenly upon suburban or urban districts.

Supplies and Materials

Several teachers during the district evaluations undertaken by the defense to prepare for this hearing reportedly told evaluators that they had sufficient supplies and materials. In East Orange's bilingual evaluation, some teachers felt they had budgeted monies for materials and it was difficult to

understand why they did not exist. In Exhibit D-76 at p. 55, 12 of 50 special education teachers in East Orange reported problems with sufficient and appropriate materials and supplies. At interim Level II monitoring, the teachers no longer identified an insufficiency in this area. (See monitoring findings at Part IV.)

Mr. Chiles, a Department Program Specialist, observed a lack of basic skills materials and resources at Irvington's high school but was told that the district did not order the materials because they were redoing student ISIP's for the HSPT. Dr. English, a defense witness, was told by district officals in Camden that they had sufficient materials. Mr. Kile, another Department witness, however, said teachers believe that more supplies are needed in Camden and the County office agrees. But Mr. Kile indicated that in the County office's opinion, Camden has the necessary resources for supplies.

On the other hand, there was evidence of supply shortages presented by plaintiffs. When Ms. Viciconti was Principal of School #30 in Jersey City, for example, she requested new chalkboards, because the boards in that school had been painted from black to green. The paint was peeling so badly that nobody could read the boards. She never received the chalkboards.

Ms. Viciconti also explained that when Jersey City adopted the Charles Morrow textbook science program for kindergarten - 6th grades, it took six years until everybody had the book. She also said that kindergarten and 1st grade were the only grades that actually used workbooks. In other grades they had to save the books. There was very similar evidence presented by representatives from the

school district of Irvington. In fact, when defense witness Mr. Chiles observed Irvington's basic skills program, he observed only old workbooks being used.

The proofs in this area are confusing because they cut across numerous teaching subject matters and did not differentiate between expensive and relatively inexpensive items. After considering all of the evidence, I cannot determine whether the cause of relatively inexpensive equipment and supply shortages in programs like vocational education are caused by inefficiency or funding deficiencies. Therefore, I must **FIND** that plaintiffs have not proven inadequate funding as the cause.

I do believe, however, that there is sufficient evidence for me to **FIND** that when textbooks and workbooks are purchased without categorical State or federal funds, several poor urban districts have professed the need to economize by phasing in these purchases or by re-using consumable materials, like workbooks.

Early Intervention Programs

Several witnesses testified to the benefits of early intervention to counteract educational disadvantages. Plaintiff witness Dr. Deutsch and defendant witness Dr. Guthrie both reported on research done in Ypsilanti, Michigan which indicated the benefits of preschool intervention. Most children in the early grades are quite similar, but by the time they arrive at 5th grade, they appear much further dispersed in abilities. Because low-SES children often do not acquire skills and experiences at home which prepare them for school, they begin school developmentally behind middle-class children and have difficulty catching up. Early failure, especially of educationally disadvantaged children, may continue to hold a child back throughout the child's education. Dr. Guthrie and Dr. Deutsch both

favored extra investment in preschool programs for disadvantaged children. Such investments, including smaller class sizes, intensive counseling, pre-kindergarten, full day kindergarten and combined kindergarten-first grade, tend to pay for themselves, so to speak, because less money is needed for these children later for such things as remedial education, as well as welfare and unemployment benefits. Dr. Deutsch participated in a 20-year study of poor, urban children who participated in a preschool through 3rd grade enrichment program in New York which found that children who received early intervention were less likely to repeat a grade, less likely to need remediation, had better grades, were more likely to graduate from high school, twice as likely to be employed when they were adults and more likely to attend college or vocational training than children who did not receive early intervention efforts.

Camden, in a 1984 proposal to the Department of Education to expand its pre-kindergarten program, presented pre and post-test results of the district's 1983-84 preschoolers. The scores showed that on the pre-test 40 scored above 70 while on the post-test, 412 pre-schoolers scored above 70. The district also believed that preschool participants had fewer attendance problems, fewer referrals for special education, fewer retentions and performed better scholastically than non-participants in the pre-kindergarten program. East Orange tried a transitional program by combining 1st and 2nd grades. They then studied the program and found that it made a difference. They have expanded this program to grades two and three.

Despite the acknowledged benefits of early intervention, such programs are not required nor are they specifically funded by the State. State compensatory education funds may not be used to fund preschool or full-day kindergarten programs. (Red Bank Superintendent Abrams, however, testified that her district

uses comp. ed. money and Chapter I funds for preschool and full-day kindergarten. See below.) Several urban districts besides Camden, including East Orange, Hoboken, New Brunswick, Elizabeth and Plainfield, have such programs, but they are funded by federal Chapter I money. Generally, these funds supply only enough for half-day programs that do not serve the entire population of disadvantaged children. Also, the amount of federal aid varies yearly.

Jersey City has a pilot full-day kindergarten in three schools. The other elementary schools have a half-day kindergarten program. In Chapter I elementary schools, the half-day kindergarten program is supplemented by a half-day of basic skills instruction. The district offers pre-kindergarten only for handicapped children. In 1980 recommendations were made during the Comprehensive Basic Skillls Reviews (See findings in Part IV) to establish full-day kindergarten and/or pre-kindergarden programs for schools #17 and 41 in Jersey City.

In East Orange, assessment tests determined that 70%, or 700, of entering kindergarteners were developmentally delayed and in need of a full-day kindergarten program, which the district could provide to only 100 children, thereby leaving 600 East Orange kindergarteners with unmet needs. The Union Avenue School in Irvington offers a half-day kindergarten. If parents wish to have their children enrolled in a full-day program, they must pay for the additional service.

Preschool and full-day kindergarten puts additional burdens on a district. More classrooms, more teachers and more supplies are needed. To go from half-day to full-day kindergarten necessarily requires a district to double the number of classrooms and teachers.

Witnesses from plaintiff districts testified that they would like to have full-day kindergarten, at the least, but cannot afford to implement such a program. Even New Brunswick, which defendants characterized as a well-run urban district, has not been able to provide full-day kindergarten, although Dr. Larkin said he would like to provide that service.

Some affluent districts are able to offer pre-school and full-day kindergarten. Scotch Plains/Fanwood offers a preschool program. South Brunswick maintains a developmental preschool program for children who demonstrate great need either in language development, physical or visual development. Paramus, Montclair and Princeton have full-day kindergartens.

Children from middle-class families usually receive preschool experience. In Princeton, 85-90% of incoming kindergarten students attend a private pre-school. But, when the district noticed that only 10-20% of the minority children had a preschool experience, they instituted a five-week, pre-kindergarten summer program for 10-12 children identified as having some level of academic deficiency. In the year preceding the implementation of this program, 10 students were retained in kindergarten. Following the first year of the summer program, in which 10 of the 12 participants were black, only two students were retained in kindergarten. The second summer group contained eight or nine whites and two or three blacks. The program began in the summer of 1985 and was funded with about $20,000 in federal money.

Districts like Montclair and Red Bank, which serve many disadvantaged children but are property-rich and high-spending and have smaller student populations than many urban districts, screen four and five-year-olds to determine which need extra help before starting school. Those children are offered programs

designed to overcome their deficiencies. Montclair also offers a summer enrichment program for at-risk four, five and six-year-olds.

In Red Bank, children who are assessed as needing compensatory work are assigned to full-day kindergarten, in which the student/teacher ratio is 17:1; in half-day kindergarten, the ratio is about 23:1. Red Bank also provides some classes for three and four-year-olds who are identified as needing early intervention. Red Bank Superintendent Dr. Abrams testified that the early intervention program, which her district funds with compensatory education money and Chapter I federal money, has been successful in improving student performance and, in addition, it has enabled the district to identify children needing special education earlier than usual so they can begin receiving help sooner. Dr. Abrams testified that many of the students who experienced the pre-kindergarten program are now in the upper ranks of their class and continue to exhibit good behavior.

Some proofs were also presented which related to the facility differences experienced by urban and suburban kindergarteners. Red Bank kindergarten classes, for example, meet in large, open rooms, equipped with water tables, sand tables, play house centers, block centers and an art center with standing easels. There are tables and chairs around the room and a little library. In open space off to one end, little numbered footprints on the floor encourage children to follow, count and hop. In East Orange, by contrast, some kindergarten classes are held in portables, with children on top of each other. In 1986, the district placed sand tables in the classrooms, but no additional equipment would fit.

I **FIND** that irrefutable proof establishes that educationally disadvantaged children can benefit significantly from early intervention. Yet, the Department of Education has not ensured that all districts with large numbers of

educationally disadvantaged children are able to implement such programs. There is some evidence that the Department recognizes the importance of such programs. For example, in Level III at Asbury Park, according to Exhibit D-218 at p. 16, the Department directed the district to examine the feasibility of an extended day and all-day kindergarten program. The monitoring team in Paterson recommended a full-day kindergarten and pre-kindergarten classes. However, witnesses from these districts said they do not have the resources or facilities to provide these services.

Unmet Educational Needs and Program Inequities in Property Poor Urban School Districts

The record established by plaintiffs demonstrates per pupil expenditure differences and a variety of program disparities between property rich suburban districts and property poor urban districts. Defendants ascribe no particular meaning to most of these disparities. Defendants apparently believe that the disparities are merely indications of local control. Each district under our system, according to defendants, is free to address the educational needs of its students in any manner it sees fit so long as it passes monitoring and is certified. (See monitoring findings in Part IV.) To the extent that the program choices exercised by local districts are deemed inappropriate or not fully responsive to educational need, defendants claim that they are caused by local district mismanagement and political interference. This contention is dealt with in Part III of this decision.

However, is it local control that permits suburban wealthy districts to have schools located on spacious campuses surrounded by grass, trees and playing fields with urban district schools cramped by deserted buildings, litter-strewn vacant lots and black top parking lots?

Should local control permit Paterson one year to offer its 5,000 high school students a gospel choir as the only vocal performing group while South Brunswick offers 990 students a concert choir, women's ensemble and a madrigal singing group?

Should local control permit Montclair to offer high school students an opportunity to play ice hockey and lacrosse while neighboring property poor urban districts provide no such opportunities?

In many suburban districts there is employed a lab assistant to help the science teacher set up and take down experiments. The science teacher is able in many suburban areas to focus on providing each student hands-on science exposure in a modern science room. Is it local control that results in some urban districts conducting science instruction through textbooks with teacher directed learning and little, if any, hands-on experiments in science rooms where water is not running in the sinks?

Should local control permit South Brunswick and Irvington, for that matter, to take its pupils on overnight trips to an environmental education center? Should only Camden students benefit from its Environmental Studies Center purchased by Chapter I federal monies?

The evidence demonstrates that neither the Department of Education nor State Board officially compares district programs. The defense focus their efforts almost exclusively on monitoring and basic skills improvements. There is no doubt that basic skills improvement is a serious and important need for urban

students. The argument that basic skills needs should be addressed by local districts first, however, overlooks the interests and needs of a significant number of urban students.

There are many students in urban districts who have passed and will pass the HSPT. Witnesses representing various urban districts extolled some of these academically talented students. They said that they were like most other academically talented students no matter where they may live. Urban administrators and teachers provided examples of students who were capable of competing and winning statewide competitions and who were permitted and encouraged to take advantage of college computer facilities and calculus and physics courses when they were available. Ms. Darden, the East Orange High School Principal, for example, said she had 200 students in honors programs. Many of the academically talented students in urban districts hope to be admitted to college. While the balance of program demands may differ between schools in so called blue collar communities and higher socioeconomic communities, it seems to me that students with similar abilities and needs should be treated substantially equally.

I believe that when the educational needs of these academically talented students are considered, the disparities proved by plaintiffs illuminate unmet educational needs. For example, in computer education, evidence was presented to establish that urban property poor districts provide mostly basic skills remedial computer experience with fewer computers and less computing time per student than suburban areas. Plaintiffs showed how some suburban areas have computer education that consists of programming and advanced problem solving and word

processing. The academically talented students in many urban property poor areas are not offered similar more advanced computer training.

Plaintiffs' proofs concerning foreign language, gifted and talented programs, libraries and advanced placement courses indicate similar deprivations. For example, when compared with his/her suburban couterpart, the academically gifted urban student is offered fewer foreign languages to study much later in the course of his/her education. Thus, students who are interested in learning a language other than the few that are offered are deprived of this opportunity and are also deprived of the opportunity to begin language training at an earlier age. Because of a lack of facilities, Jersey City Academic High students must be bused to Jersey City College for their science, physical education and computer courses. In East Orange in 1986-87, the record demonstrates that 10 additional gifted and talented teachers could have been used. Thus, the students who would have been served by these teachers were deprived of this educational opportunity. Additionally, why should not all districts have similar library facilities? Do not the reading needs and interests of New Jersey students fall into similar patterns that should be addressed similarly? Yet the academically gifted elementary students in some urban schools are completely deprived of library exposure. The proofs also indicate that urban students do not receive the same type or quantity of advanced placement courses as are offered in suburban areas. Academically able urban students are therefore being deprived of significant amounts of advanced education.

The Coordinating County Superintendent of Schools for the Northern Region of New Jersey, Dr. Scambio, believes there are across the board disparities between educational programs offered students in urban districts and those

provided students in suburban districts. When, for example, the Absecon Board of Education petitioned the Commissioner of Education to be permitted to withdraw from its sending relationship with Pleasantville, a poor urban district, Absecon cited old and dilapidated buildings; lack of adequate equipment and materials; lack of science programs, and no advanced courses in math and science. There is further evidence that Department policies do not encourage local district programming for students who will pass the HSPT. Paterson had to decide whether to implement a fine arts high school program or a program for disaffected students. When the district chose fine arts, it was criticized by the County Superintendent. In 1981, a local Livington review team concerned with the Chancellor Avenue School made these comments: "Mandated programs by the State supercede all other important programs. The emphasis on the underachiever, disadvantaged, etc. seems to take precedence over the middle of the road child. He seems to be lost in the shuffle . . . Too much time is taken with the T & E program, leaving very little time to promote and formulate the normal local program." (Exhibit P-182 at p.iv.)

For urban students who are potential dropouts, plaintiffs' proofs demonstrate further unmet need. Studies show that while there are many complex reasons for dropping out of school, school related factors are the most significant cause of dropouts for males and second only to pregnancy and marriage for female students. Programs that work best to keep potential dropouts in school and to prepare those who drop out for work, all involve intensive small group or individualized instruction in basic skills, counseling and training and employment experience. According to the evidence, there are hundreds of urban students who could benefit from alternative educational programs whose needs are unmet.

The evidence indicating larger urban class sizes and larger student bodies which tend to de-personalize the students' educational experiences also falls heaviest on potential dropouts. Monitoring's requirement that schools develop and implement an improvement plan to deal with dropouts has not focused on this unmet need. The Department in monitoring does not make comparisons between districts and does not require districts to implement the most effective programs. For example, a district's dropout prevention plan may include counseling and telephone calls to parents or a modest pilot program serving very few students and be just as acceptable to the Department as a plan to reduce class size to 15 in the early grades and establish a comprehensive alternative education program like those existing in South Brunswick and Highland Park.

These same potential dropouts who might be interested in physical education receive poorer teacher to student ratios and poorer equipment and facilities. A number of the more unusual physical education opportunities, like lacrosse and ice hockey, that may interest these students are not available.

Plaintiffs' program disparity proofs also highlight what appear to be inequitable program offerings. For example, why should an urban student who likes art not receive this instruction in the early grades from certified instructors? Should not all districts offer the same types of physical education opportunities? There is not a difference between the sports and physical exercise needs of urban and suburban students. For students who are interested in music, urban students are taught in poorer facilities, and are offered fewer courses and performance opportunities and a later start in music education than their suburban counterparts. Why is this so? Why should the gifted urban science student be taught in a manner

which has been recognized by science educators as inferior? Why should urban districts not have microscopes and other scientific exploration equipment? Why should one district offer vocational education programs that appear to be substantially different from those offered at other urban high schools? Do entry level job requirements differ from district to district? Why should class sizes be larger in urban elementary schools than in suburban schools? Why are there more teaching staff per pupil in property rich districts? Why do suburban districts spend more per pupil than many urban districts?

Dr. Rubin, the Director of the Business Employment Foundation in Paterson, compared a Wayne elementary school and a Paterson elementary school in 1986. The Wayne school was called Lafayette School, the Paterson school was #8. Lafayette was built in 1954 and Paterson in 1927. Lafayette had 323 children, Paterson 615. There were 395 square feet per child in Lafayette and 87 square feet per child for #8. The play area in Lafayette was 40,000 square feet and in #8 it was 3,300 square feet. The class size was 17 to 23 with an average of 19 in Lafayette and in #8 it was 19 to 33 with an average of 25. Kindergarten in #8 was in one divided room with 60 children; 30 in each part of the room separated by filing cabinets, each with a teacher and aide but no play equipment. In Lafayette, a similar sized room accommodated 15 to 18 children with a large climbing apparatus and many things to be played with. Why should this type of disparity be permitted?

Also, plaintiffs' proofs highlight a very significant failing that if corrected would markedly improve the academic achievement and later life successes of many urban students. In the suburbs, schools account for only about 40 or 50% of what students learn. Parents and the community provide a great deal. In suburban areas, the child's friends speak English and parents own books. Suburban students have

more interaction with their parents, they have more money to spend and there are lots of ways they can learn. In urban areas, educationally disadvantaged students tend to be more dependent on schools for what they learn. Frequently, the parents are poorly educated or do not speak English, there are few books, they have less money to spend and there are few successful role models. Much testimony from defendants' witnesses as well as plaintiffs' concerned the importance of early intervention for these educationally disadvantaged youth.

The evidence indicated that educationally disadvantaged youth start two years behind and become progressively further behind unless early intervention occurs. The proofs in this case establish that early intervention may be the best approach to achieving basic skills improvement and educational success generally for disadvantaged youth. The evidence in this case further establishes that unless a student is classifiable under a special education program, the State mandates remedial help only after a student fails a third grade standardized test normed consistent with the HSPT. In the compensatory education program, the State allows districts to set eligibility levels for children through the 2nd grade.

Plaintiffs' evidence concerning an absence of pre-kindergarten and full-day kindergarten, insufficient early counseling services and excessively large elementary school class sizes indicates that a very successful approach to educational improvement has not been broadly adopted. I FIND that plaintiffs' evidence establishes that the early educational needs of disadvantaged youth entering our public school system between pre-kindergarten and 2nd grade are largely unaddressed.

I believe, therefore, and I **FIND** that plaintiffs' proofs on program disparities illuminate several areas in which the educational needs of identified groups of students in property poor urban districts are not being addressed. I also **FIND** that plaintiffs' proofs highlight apparent program and service inequities in property poor urban districts.

Some of these unmet needs and inequities may be addressed during State monitoring. For example, while monitoring is district specific and there is some doubt as to the consistency of the standards applied statewide among county superintendents, districts without gifted and talented programs or programs for disruptive or disaffected pupils, for example, should be disclosed. However, there are no input standards distributed by the Department or the State Board of Education to define a quality program. Therefore, it is likely that programs will differ markedly. I **FIND** that the extent of disparities proved by plaintiffs indicates that whatever indirect attention monitoring may pay to ensuring programming consistency across district lines is inadvertent. (The cause of these disparities and unmet educational needs is addressed in the following Part III.)

I **FIND** also that a child born in an affluent district who attends public school is likely to obtain the following advantages over a child born in a poor urban district: more breadth of program offerings; earlier exposure to specialized knowledge, such as foreign language, science and computer education; more advanced academic courses, including gifted and talented and advanced placement opportunities; more appropriate physical education facilities and outdoor play space; fewer students with special needs, such as compensatory education and

bilingual education; more attention to individual needs of students; smaller school populations.

The presence of unmet need and program disparities raises some of the most difficult questions in this case. Would more money enable poor districts to offer better programs? Would better planning and management solve the problem without an infusion of funds? Should districts serving blue collar populations have different programs than districts where the majority of children are expected to be college-bound? Should "thorough and efficient" be measured by inputs or by tests of achievement? What is a thorough and efficient education, and is it being provided? What is the role of schools in reversing inequities caused by social and economic disadvantages? Most of these questions are considered in Part V; the cause of the expenditure and program disparities and unmet educational needs is addressed next, in Part III.

PART III

This part of the decision deals with the cause of expenditure and program disparities and the unmet educational needs of students attending schools in property poor urban districts. Plaintiffs' position is that the cause is simply the manner in which the financing system has been implemented and operated. The State defendants acknowledge that some disparities exist, but contend that the causes are (a) local failures of effort and (b) mismanagement, political maneuvering and outright illegalities which have diverted funds from the districts' educational programs.

Competition Between the School District and Municipality Over the Tax Base

There are approximately 600 school districts in New Jersey. All of these districts are geographically coterminus with a municipality or two or more municipalities and share tax bases with a municipality. The need to share a tax base occurs because the source of local funds raised to support the district schools and municipal services is the property tax. New Jersey school districts are not allowed to levy sales or income taxes. The size of the property tax base is therefore a primary factor in determining how much local revenue can be raised for municipal and education purposes. As one witness testified, New Jersey does not really have a tax system. Rather, it has approximately 600 systems, with every municipality being separate.

This sharing of tax bases causes the school district to recognize that its financial support is not boundless and is limited by municipality needs as well as

property valuations. Even in wealthy communities there is tension between quality education and what can be afforded or should be purchased. Sometimes with property rich municipalities, this tension yields more efficient use of tax revenues. For example, in Montclair, the School Superintendent and the Mayor regularly meet to coordinate respective needs. In this way school district recreational facilities, as one example, can be shared with all municipal residents. Or, in South Brunswick, another property rich school district, the high school principal may decide not to request a swimming pool, for example, because that expenditure may appear excessive to the public without broad community support and interest. Thus, this tension restrains some wealthy districts from budgeting for "nice to have" items that may be perceived by the electorate as excessive.

But, in other instances where the property base is poor, sharing results in competition with the municipality over the tax base. For example, municipal officials in Newark from 1975 to 1981 set the budget and told the school district what level of funding it could have. Mayor Gibson asked one of his school board appointees for an undated letter of resignation in case her goals conflicted with his. This board member nevertheless fought with the Mayor over school funding regularly.

Mayor McCann in Jersey City from 1981-85 dictated the hiring and firing of school personnel and limited the size of Jersey City's school budget. A Jersey City Board of Education member explained that during his tenure, the Board never spent above cap as the Mayor would not allow such expenditures to be made.

In Paterson, its school board appealed a $1.5 million 1981-82 budget cut and prevailed. The City nevertheless withheld the school district's funds. The

Paterson Education Board took legal action and won, but because of the delay in receiving its funds, the school district had to terminate staff, including elementary school librarians and approximately 300 aides, that it has never regained.

In Irvington, the town council is viewed as the school district's opponent. One witness said the council acts at times as though it has a mandate to decrease the school budget.

Dr. Kenneth King, one of plaintiffs' witnesses, could recall very few times in East Orange in the past 15 years when the Board of School Estimate and the City Council have approved the school district budget that was adopted by the Board of Education. Almost every year, East Orange appeals the budget cuts by the Board of School Estimate and the City Council. (In fact, Dr. King remarked while he was testifying about spending large amounts of time at the Office of Administrative Law before ALJ's in budget appeal hearings.) The thrust of the Council's opposition is always that they are concerned about the impact that the education budget would have on the tax rate. The Council opposes the budgetary increases because they feel that the district ought to be able to do better with less money.

The competition over the tax base thus causes conflict between municpal needs and the needs of the districts' students. While some testimony indicates that greater fiscal pressure is present in Type I school districts, municipal spending influences school spending in all types of school districts. If any town wants to spend for some municipal function or to lessen the tax burden, it may pressure the school board not to increase the school budget. This pressure emanates directly

from elected officials and indirectly from communities defeating proposed school budgets.

Additionally, virtually every teacher, school administrator or board of education member who testified in this proceeding about a property poor urban district's budget process, expressed an overriding and omnipresent concern over what the municipal residents could afford or would tolerate in tax increases. In East Orange, Paterson, Camden, Jersey City, Irvington, Trenton and Plainfield, for example, school board members feel pressure to keep already high taxes down and limit education budgets.

The State argues that local board of education officials have failed in their duty to be "undivided advocates on behalf of their schools." (See p. 277 of Brief on Behalf of State Respondents.) The State defendants assert that many of the fiscally caused problems would be cured if only the districts did what was expected of them. I agree with this observation, however, the argument seems to postulate a system as it ought to be and not what it actually is.

I believe that the existing financing system, which requires school districts to share tax bases with a municipality and to set an annual tax rate, deters such advocacy in property poor distressed school districts. As expressed by one witness talking about Camden City's "catch 22," either Camden does not raise taxes and faces long term problems with the City's infrastructure, or Camden raises taxes and faces loss of businesses and homeowners, as well as adversely affecting the ability of those who remain to pay their tax bills. It is because of these concerns that local board determinations in property poor school districts I FIND have not related exclusively to educational needs but instead have often involved a consideration of

voter reactions. Educational issues do not drive the budgeting process in property poor urban school districts. Fiscal pressure on board members by the public, elected municipal officials and by the general economic distress of these cities deters the amounts of revenue that can be raised by these local school districts and therefore restricts the ability of the districts to meet student needs.

In Paterson, County Superintendent Persi said the district does not budget from need. Paterson's Superintendent testified that the members of the Paterson Board of Education have one concern: "to keep the taxes down." Their attitude is to "cut, cut, cut." (Napier Transcript, Oct. 30, 1986, p. 62, line 9 through p. 63, line 6.)

For Operation School Renewal (See Part IV findings), Trenton prepared a fully funded 1985-86 budget which included all necessary local funds. When the Board of School Estimate cut this budget, the Board of Education decided not to appeal in spite of the Department of Education's and the District Superintendent's urgings. Mr. Reece, the Director of Special Projects for the Department of Education, Division of Educational Programs, explained that the districts are subject to "many pressures." (Reece Transcript, Mar. 11, 1987, p. 34, line 23.)

A Jersey City Board of Education member said: "Of course, you are concerned about the educational quality and the process and what has to be done educationally in the system. That is at the forefront of your actions and you always have parallel to that, and probably not a step behind, those people who provide the funds to run that city. Without those people being able to pay their taxes, you are not going to have a city. You are going to have delinquent taxes and you are not going to be able to raise the monies that you need to fund this city as a whole."

(Exhibit D-169a at p. 23, lines 10-19.) Dr. Ross, one of plaintiffs'witnesses, said when he was Jersey City Superintendent he was never able to get a budget that was adequate to even begin to take care of the children's needs. When Ms. Viciconti was principal of School #30 in Jersey City she was asked how many staff she needed, but not about textbooks or supplies. Usually in Jersey City, the business department figured out how much the Board of School Estimate would approve.

When preparing the budget in East Orange, the Board of Education always considers the tax capacity of East Orange. The taxpayers believe the tax rate is confiscatory and they do not know why the Board cannot provide a T & E education at less cost. A Columbia University Team evaluating East Orange in 1979 said: "None of the principals think of budgeting as an allocation of values among competing demands. None of the principals tries to use the process as a lever to change their schools." (Exhibit D-90 at p.19.)

In Irvington, principals had been advised to try to keep budget requests within an 8-10% increase, which was a "rule of thumb" to allow for inflation and some growth. Principals could request more than that amount, but usually they tried to stay within the "rule of thumb." According to Mr. Giordano, an Irvington special education teacher, the district has no money for specialized textbooks so they use regular class texts. Mr. Rusak, Principal of Union Ave. School, explained that the education they can offer is of the "meat and potato" variety. Nothing extra is provided. "We get no ice cream, we get no cake, we get our glass of water, we don't get a glass of Coke, we don't have an appetizer . . . ." (Rusak Transcript, Nov. 17, 1986, p. 44, lines 5-16.) They get the textbook/workbook but not the expensive resource book and resource packages that often go along with new books. They get no films or film strips. Teachers offer their own time to supervise

clubs and extra related activities. Sometimes teachers themselves purchase resource books and other needed supplies. The district allows students to write in workbooks every other year. In maintenance, the district spreads the cost over the year, so they cannot paint in July and August, for example, but must move the pupils from class when they paint during the school year. Mr. Giordano has sometimes used his own money and time to paint his classroom. He has purchased lunches and paid admission charges for students on field trips. According to one Irvington witness, urban districts become very adept at survival techniques. (In New Brunswick, the Superintendent spends a great deal of time raising private funds to try to "put the icing on the cake" - to get more for the students than the funding system permits.)

Professor English, a defense witness, discovered in Camden that there was no connection between curriculum priorities and budget priorities. Mr. Kaplan, another defense witness, said that before 1987 Camden developed "politically expedient" budgets.

To better understand what Mr. Kaplan meant by "political expendiency," Camden's budgeting practices can be examined in further detail. The president of its Board of Education, Aletha Wright, testified that the Board wants the district's goals and objectives budgeted. However, she said that the first draft budget is almost always reduced. Even though the first draft budget embodies the district's needs as seen by its principals, teachers and supervisors, she said "we do ask them to go back and look at those real needs of the district, knowing and understanding full well that the needs of the district certainly are not reflected in the resources that we have available." (Wright Transcript, Oct. 14, 1986, p. 163, line 11-15.) Preston Gunning, Assistant Superintendent for Business, said that if the Board felt it was

educationally necessary to propose a budget that would increase taxes, the Board would present such a budget to the voters. However, in the 1986-87 budget, the cuts made from the first draft budget to the one submitted to the County Superintendent, according to Ms. Wright, amounted to about $9 million. The 1986-87 draft budget was cut, according to Assistant Superintendent Gunning, almost across the board in equipment, textbooks and supplies, with the largest cuts in contract services like maintenance and renovations. In previous years, music, art and physical education teachers and libraries were eliminated from elementary schools, and much maintenance was deferred, including repairs to boilers, roofs, lighting, exit doors, sidewalks, fencing and toilets. The principal of the Pyne Point Middle School explained that there are ceiling tiles in his building which loosen and fall, even while teachers are teaching. He has requested that these items be fixed numerous times over the past 10 years, but these repairs were "deferred." He has learned to wait. It took 20 years to replace a leaking roof. And most often, new textbooks are phased in over two or three years. The principal of Camden High School, Riletta Cream, explained that she did not request funding for musical equipment because she believed she would not get the money and because there are other requests that have higher priority.

After considering Camden's budgetary practices, I believe that the "political expendiency" referred to by Mr. Kaplan is simply another way of describing the fiscal pressure and accommodation that limits the budgets of property poor urban districts. As an Irvington Board member explained, "Myself and my colleagues on the Board of Education, we like to work very close to the community. We've worked very hard to try to--we want them to look at the school system in a positive manner . . . . Rather than going to the State and saying, we're going to appeal this, which, again would cause additional adverse feelings, we said,

we're going to sit down with the community. . . . We rather sit down with the community and look at the plan that was defeated and other alternatives." (Exhibit D-173g, p. 43, line 14 to p. 44, line 11.)

The amounts budgeted in these property poor districts are often kept within limits deemed politically acceptable. Given the need to share property poor tax bases and the need for voter or estimate board approval of school budgets, such concern is not unreasonable. In one instance, for example, Assistant Commissioner Calabrese worked out an agreement with Director Skokowski of the Division of Local Government Services so Paterson would receive an increase in Distressed Cities Aid to mitigate the effect of a large increase in the 1987-88 school budget. Despite the Mayor's participation in this agreement, he publicly opposed the school budget increase and it was defeated by the voters. The Council then cut the budget. In Jersey City's 1986-87 budget, the Board of Education representatives on the school estimate board voted in favor of the budget. When the budget was considered by the estimate board and the Mayor expresed concern that the budget would increase taxes too heavily and impact too severely on voters, the estimate board voted 5 to 0 against the school budget. Several years ago, during an election year, the Mayor of Newark was advised by Assistant Commissioner Calabrese that a reduction of $6 million in the school budget would cost the school district $4.8 million in additional State aid the following year. The Mayor indicated that the budget would be cut regardless.

I believe that it is not unreasonable for local districts to be sensitive to fiscal distress and to fear exacerbation of the district's relationship with the public and the governing body. Even *E. Brunswick Bd. of Ed. v. E. Brunswick Tp. Council*, 48 *N.J.* 94, 105 (1966), which is relied on by defendants, acknowledged that when

preparing budgets, the local boards may consider "the nature of the local community, its educational needs and financial abilities." The governing body under *E. Brunswick* may also "seek to effect savings...." It is true that the Supreme Court in *E. Brunswick* emphasized that the educational process should not be impaired, but I **FIND** that the local boards in property poor districts have been unable to insulate themselves from fiscal pressures in part because of the absence of State Board regulations establishing some input standards or minimum requirements for quality programming and because of the manner in which the Commissioner of Education chooses to ensure adequate district budgets. (See findings on County Superintendents' Review of School Districts' Budgets in Part I and Compelling Local Districts to Raise Additional Monies in this Part below.) The Board members in property poor distressed municipalities reasonably fear further financial catastrophe if their communities are further taxed. Whether or not this fear is completely accurate, it has limited the amounts of monies that can be raised in property poor school districts for school purposes.

All Board of Education members in every school district must of course be concerned about spending money wisely and not causing excessively high taxes. And the record demonstrates that fiscal pressures are present to some degree in all school districts whether property rich or poor. However, the record also requires a **FINDING** that fiscal pressure in property poor urban districts has resulted in subordination of the district's true educational needs to fiscal concerns.

Furthermore, the need to make political accommodations because of fiscal concerns is institutionalized in Type I districts because of the role of the Board of School Estimate. According to Paramus Superintendent Galinsky, school estimate boards are primarily concerned with relecting the mayor. The Type I structure

encourages the school board to harmonize its budgetary needs with the municipality's.

Fiscal pressures of the kind described above, however, and the corresponding budgetary limitations are present in all property poor districts, whether Type I or Type II, where the tax rates are already high and the community is relatively poor. The cause of this budgetary limitation I FIND is not the school board members' temerity or unreasonable behavior, but is instead the shared property poor tax bases; the need to set school tax rates annually, especially in districts where the rate is already high; the budgetary approval structure required in Type I districts; and the need for voter approval of all Type II school budgets.

Is Local Choice the Cause of Expenditure Disparities?

A GTB system is not designed to produce expenditure equity. Under the GTB system, districts are free to spend whatever they need (up to the cap limit). Therefore each local district determines its level of expenditure.

Defendants in essence, therefore, argue that local choice as expressed through tax rates determines expenditure. (Defendants' argument that disparities in inputs generally are caused by ineptitude, mismanagement and political considerations is discussed below.) However, the record indicates that fiscal pressures placed on property poor school districts with high tax rates, discussed immediately above, do inhibit the boards from fully pursuing local choice as it pertains to educational need.

It should be noted in addition that poor school districts are making above average tax efforts. Their low expenditures, therefore, are not related to educational disinterest, which would manifest itself in low tax rates. One of plaintiffs' witnesses, Dr. Mary Williams, believed that expenditure disparities in New Jersey would be even greater if low wealth districts were not exerting above average tax effort.

I was particularly impressed with the observations made by Mr. Kaye, Principal at South Brunswick High School, relating to when he was a member of a Comprehensive Basic Skills Review team in Camden. (See monitoring findings in Part IV.) Mr. Kaye spent a week observing a Camden elementary school during this review. What he recalled most vividly was the frustration of the principal and staff caused by their inability to deliver the kind of program that they felt the students deserved because of the limited resources available to the school.

I **FIND** that expenditure disparities are not caused by local choice. I **CANNOT FIND** on the basis of this record that the property poor urban districts wish to spend comparatively less on education than suburban districts.

Defendants Charge that Plaintiffs' Districts Do Not Budget to Cap and Do Not Seek Cap Waivers

The defendants claim that the record requires me to infer from plaintiffs' districts unwillingness to set their budgets at the cap limit or seek cap waivers for additional spending, either that there are adequate monies in plaintiffs' budgets to

run a thorough and efficient educational system or that plaintiffs' districts are being mismanaged.

Defendants assert that neither Irvington nor Camden has ever sought a cap waiver. Jersey City has sought four cap waivers and was granted approval for three (with the sole exception of a cap waiver request for two schools that were to be abandoned in the future). All cap waivers received by Jersey City, however, were not utilized. Finally, the defendants charge that Jersey City, Camden, East Orange and Irvington have not consistently budgeted and spent to the cap limit since the passage of Chapter 212.

It is true that neither Camden nor Irvington have sought cap waivers. However, East Orange and Jersey City have, therefore asserting that more monies were needed to run a thorough and efficient educational program, at least for the years waivers were sought.

Solely because neither Camden nor Irvington have sought cap waivers, I cannot conclude that these districts believe their budgets are adequate. To budget over cap, all revenues required to exceed the cap must be funded completely from the local tax base in the first year because State aid is based on prior year statistics. I have observed the demeanor of several Camden and Irvington witnesses who have participated in the budgeting process and I have concluded that their explanations for not seeking budgets above cap were sincere, especially when considered together with the way the budgeting system actually works. Their primary feeling toward yearly budgeting could best be described as frustration.

Camden is one of the poorest, if not the poorest district in this State (see discussion below) and all of its witnesses who participated in school budgeting decisions expressed serious concern for the voters and the fear of further flight from the City by persons who no longer wish to pay higher taxes, leaving behind an ever increasing percentage of residents least able to support the schools. Preston Gunning, Assistant Superintendent of Schools and Secretary to the Camden Board of Education, explained that Camden never budgets to cap: "[i]f we budget up to cap it would be a tremendous increase in local taxes for school purposes."

Several witnesses from Irvington explained the psychological and political benefit derived from presenting a budget to the voters that is at cap or just below cap. It has been their experience that such a budget carries a higher likelihood of approval than one above cap. The Board of Education in Irvington believes that cap waivers will not be supported by the voters and therefore, the Board directs the Irvington Superintendent to "bring the budget in at cap." Irvington's Superintendent eliminates from his proposed budget those items that he knows from past experience the Board will not authorize. When one considers that in Irvington between 1980 and 1986 only two of seven budgets had both current and capital expense portions approved by the voters, I do not believe that the district fear of budget rejection can be considered unreasonable.

In addition, some of the procedures associated with cap waiver applications also deter low wealth districts from seeking cap waivers. For example, to qualify for a cap waiver, a district must relate expenditures to individual goals and objectives and must indicate whether a new program meets monitoring deficiencies. Money approved for a waiver cannot be used for any other purpose

than that for which it is approved. One of East Orange's waivers, for example, was for additional office facilities. When East Orange used the money for a different purpose, that sum was deducted from the cap waiver sought in the following year.

Once a program is specifically approved as a result of a cap waiver, the district must run that program until such time as the county superintendent gives the district permission to discontinue it. Because a district must assert that the programs for which it seeks a cap waiver are essential for the provision of a thorough and efficient education, the district must provide these programs until permitted to stop even if the Commissioner denies the cap waiver or the subsequent budget review results in non-funding of an approved cap waiver. Therefore a district may have to cut programs that were not specifically identified in its waiver request in order to fund programs that were set out in the waiver application.

The defendants also claim that the Board of Education Secretary and the district superintendent are required to certify annually on the budget submitted for State review that in their judgment the budget is adequate to support a thorough and efficient system of education in the district. Thus, these certifications allegedly further support defendants' position that Irvington and Camden officials must believe their budgets are adequate.

Actually, plaintiffs indicate that no statute requires this certification and the form prepared by the Department (Exhibit D-168) indicates that the budget includes sufficient funds to implement the proposed planning process as described in the district's Annual Report pursuant to *N.J.S.A.* 18A:7A-11. Plaintiffs further explain that since 1984, key specifics of 7A-11 have not been required by the Department of Education. Only *N.J.S.A.* 18A:22-37 requires the municipal officials

in a Type II district, after voter rejection of the budget, to determine the amount of local funds necesssary to be appropriated to provide a thorough and efficient system of schools in the district. Acknowledging the technical correctness of the plaintiffs' position, the intent of the certification is for superintendents to certify that their budgets are sufficient to support the district's annual efforts at comforming to the goals, objectives and standards of Chapter 212. Evidence by district superintendents confirms this understanding.

I **FIND** that these certifications are viewed by the Department of Education as a routine step in the budgeting process. In order to move the district budget along, the certification must be made. Apparently, no particular significance is ascribed to the certification. I make this finding on the basis of evidence illustrating that when superintendents declined to sign budgets, steps were taken to circumvent the superintendent's concerns. In one instance, for example, Dr. Ross, then Jersey City's Superintendent, refused to sign a budget he considered inadequate. The Hudson County Superintendent's Office asked for and accepted the budget as signed by the Board President. In Paterson, its Superintendent stopped signing budgets for five or six years after he became upset with the former County Superintendent, who approved the district's budget even though he indicated that it was inadequate to implement a T&E education. During cross-examination in this proceeding, it was revealed that the Passaic County Superintendent's office had been accepting budgets that had a stamped facsimile of the Paterson Superintendent's name. The Paterson Superintendent indicated that he had no idea who was "certifying" the district's budgets in this manner.

For all of these reasons, I **CANNOT FIND** that a budget certification is evidence of an adequate budget. Also, I **CANNOT FIND** that because Camden and

Irvington never sought cap waivers, the school districts believe their budgets are adequate.

Defendants further argue that had Camden spent to cap each year since Chapter 212 went into effect, the district would have had an additional $63.3 million in State aid and an additional $21.8 million in local funds. The State also argues that had all of the other plaintiffs'districts spent to cap they would have had the following additional amounts: East Orange--$31 million ($20.8 State aid and $10.1 local funds); Irvington--$11.6 million ($6.7 State aid and $4.9 million local funds); and Jersey City--$83.8 million ($53.2 State aid and $30.6 local funds). The State's calculations may be in fact true; however, the political and practical fiscal realities present in these districts reasonably prevented them from consistently budgeting to cap. (It is also true that if property values had substantially risen in these districts, more money could have been raised without raising taxes.)

I have already indicated the pressures placed on districts because they share tax bases with municipalities. After carefully considering the demeanor of each district witness who testified about their budgeting practices and all the documentary evidence, I am convinced that economic and political concerns limit the amounts that can be budgeted by urban districts with property poor tax bases, despite the actual needs of the district children. Budgets prepared below the cap limit reflect these limitations and not what the district believes is actually needed to present a thorough and efficient education. Rather, these district budgets seem to reflect what is sustainable through the budgeting process without losing the support of the voters or alienating town officials. To ascribe mismanagement to these actions would require concluding that a Board of Education member or a

member of a school estimate board should have disregarded these pressures. It would also assume that districts are required to spend to cap, which is not the case.

Plaintiffs and defendants agree that the educational needs of a district's children should come first, but the fact that most members of these boards heavily weigh the district's fiscal capabilities against the children's needs, I do not believe is unreasonable given the structural pressures and practical fiscal realities in poor urban districts. If plaintiffs' districts had spent to cap in every year of Chapter 212, their total tax rates, already far higher than the State average (see further discussion below), would have significantly increased. Camden's total tax rate in 1976-77, which was 170% of the State average total tax rate, would have increased to 288% of the State average in 1985-86. East Orange's total tax rate would have gone from 250% of the State average in 1976-77 to 317% in 1984-85. The total tax rate in Irvington would have increased from 157% in 1976-77 to 177% in 1984-85. Jersey City's total tax rate would have been more than 200% of the State average total tax rate in nine out of ten years.

If Camden had spent to cap in each year of Chapter 212, it would have had to increase its tax rate by over 40¢ in seven out of ten years and in three of those years it would have had an increase of over 60¢. In one year a 73¢ increase would have been required. In 1984, at least 50 school districts had school tax rates that were less than the 73¢ additional tax Camden would have had to levy in one year in order to spend to its cap limit. There are a number of towns with tax rates of 10¢ or less.

Accordingly, I think that the political and economic pressures upon these local officials were too great to expect what the defendants assert. Budgets

actually represent the best program that the district believes it can afford. I **CANNOT FIND** that that is mismanagement under the current funding system. Thus, the "additional" monies allegedly available to plaintiffs' districts had they spent to cap were in practical effect not available to the districts and I so **FIND**.

Despite the cap waiver limitations and the economic and political concerns of property poor districts, some property poor districts seek cap waivers. East Orange, a property poor district, for example, has sought and received four cap waivers. Jersey City, another property poor district, has received three cap waivers. Nevertheless, defendants assert that plaintiffs' districts do not use their full cap waiver approvals, again indicating, according to defendants, either adequate funding or mismanagement.

As budgets proceed through the process, even those with Department of Education approved cap waivers, there are further opportunities for reduction. After the county superintendent approves a budget, that budget must still be further reviewed. The Boards of Education budget is then submitted to either a school estimate board or the voters. The result of these reviews is often further reduction. In Jersey City's case, for example, in all three of their approved cap waivers, the Board of School Estimate and the City Council did not want to raise the tax levy. In 1978-79, for example, Jersey City received a $3 million cap waiver to develop a second academic high school. The subsequent budgeting process resulted in the district abandoning this goal. Before rescinding the waiver, the Department of Education required Jersey City to file a written justification stating why they no longer "needed" the funds.

When a district Board of Education has an approved cap waiver subsequently disapproved, in effect, by the voters or school estimate board, it then must confront the difficult choice of determining whether the amount in jeopardy is worth a budget appeal with the resultant delay and spending uncertainty. (See discussion in Part I concerning the budget apeal process.) In some instances, Jersey City and East Orange have in spite of these problems elected to appeal budget reductions. Given all of the limitations explained above, I DO NOT FIND that any mismanagement can be ascribed to not opting to pursue an appeal.

Defendants also argue that had the plaintiffs' districts consistently spent to the cap limit their alleged expenditure inequalities with property rich districts would have been eliminated. The defendants and plaintiffs agree that the cap system was designed to encourage and permit low budget school districts to move toward equal expenditures. Both plaintiffs and defendants agree that this goal of the cap system has not been realized. (See discussion of caps in Part I.) The defendants assert that in order to achieve this goal fully the districts spending below average would have had to use the full budget cap or close to it and therefore assert that the failure of districts to achieve spending equalization under Chapter 212 was caused by the districts themselves and is another example of district mismanagement. I have already indicated why I do not believe that this district failure can be ascribed to mismanagement and why the districts' actions were actually a reasonable response to the restrictions and limitations caused by the Department of Education's implementation of the cap waiver process.

Furthermore, testimony establishes that to the extent that districts did not use their full cap limit or budget close to the limit, the cap law would be less

effective in achieving the objective of permitting districts spending below the State average to increase expenditures more than those above. Additionally, the waiver has been used by property rich districts as well as property poor districts. High spending South Brunswick, for example, sought and was granted several cap waivers in recent years. In 1980, Princeton had a cap waiver approved for $106,253. It is reasonable to infer that as long as property rich districts are also permitted to exceed the cap, the formula's equalization power will be diminished.

In addition, Dr. Reock testified and I **FIND** that the budget caps formula did not result in greater movement by property poor districts toward equalization with property rich districts because the equalization part of the formula was not powerful enough. This Dr. Reock explained was especially true given an enrollment decline that varied among the districts with the highest and lowest expenditures since Chapter 212 became effective. The highest spending districts have tended to have the greatest enrollment decline. Enrollment decline affects caps since the budget limit is calculated using the prior year's higher pupil enrollment, with the budget being spent for a smaller number of pupils in the current year. For example, in 1979-80, the lowest budget districts - those spending at less than 75% of the state average NCEB per pupil - were permitted to increase their budgets by $172.73 per pupil, while the highest spending districts in the State - those spending over 125% of the average- could increase their budgets by $229.10 per pupil. Therefore, I also **FIND** that even had plaintiffs' districts fully utilized their cap limits, under the existing formula expenditures still would not have completely equalized.

Free Balances

The defendants assert that mismanagement can be seen in the wide disparity among the free balances, or surplus amounts, maintained by plaintiffs' districts. Camden in 1984-85, for example, had 15.7% of its total current expense budget as general fund free balance. Irvington similarly maintained 15.8% of its total current expense budget as free balance. However, East Orange had only .8% and Jersey City had 2.0% of its total current expense budget as free balances in 1984-85.

For Camden and Irvington, the amounts of monies retained in free balance as of June 30, 1985 were substantial. Camden's 15.7% amounted to $10,607,709 and Irvington's 15.8% was $4,892,687. Also, because Jersey City's budget is so large, its 2.0% amounted to $2,780,450. East Orange's .8% meant that it held $369,931 as free balance on June 30, 1985.

These percentages and free balance amounts, however, are not that unique. In the same year, for example, Hamilton Township held $1,320,533 as free balance, which represented 36.5% of its total current expense. Cliffside Park held $2,048,367 or 25.4% of its total current expense. Teaneck held 10.2% or $2,527,134. Ridgefield held $1,305,000 or 22.5%. North Hanover held $3,450,573 or 80% of its total current expense. These districts are merely illustrative of numerous others with similar free balances. In a sample of nine counties,for example, 155 school districts, as of June 30, 1985, had free balances of 10% or more of total current expense budgets.(See Exhibit P-343.)

Most district representatives who testified claimed they held free balances as protection against feared catastrophic facility problems like bursting boilers or falling roofs. Irvington, for example, has used its free balance to make emergency roof repairs.

For emergencies, Type I districts can request additional funds from boards of school estimate. According to Assistant Commissioner Calabrese, there are two to four districts each year which request such additional funds. Montclair, for example, does not maintain a free balance, because as a Type I district it can and has obtained more money from its estimate board when needed to meet emergencies. The Department of Education also receives some school district requests for help from the Department's Emergency Fund. (See further explanation of this fund in Part I.)

Besides emergency needs, however, districts also invest free balances to earn additional revenues and to reduce the local effort required for the next year's budget. Ms. Wright, president of Camden's Board of Education, testified that the 1986-87 budget of $86.5 million, for example, was funded approximately 75% from the State, 16% from local taxes and 5% from free balance. In 1981-82, Camden was able to settle a budget appeal and eliminate a tax increase by appropriating free balance.

One year, Irvington used its free balance to provide eight teacher assistants and to switch its health plan to Blue Cross-Blue Shield. Irvington has also used its free balance to offset expected tax increases and to restore line items cut by the town council after a budget defeat.

The school district of South Brunswick indicated that it can avoid cap waiver applications by using its free balance. South Brunswick has used its free balance to decrease the tax rate and to absorb costs. So, for example, in October 1986, South Brunswick appropriated free balance because transportation expenses for handicapped pupils increased and because one handicapped student required a $29,000 residential placement.

Some evidence was presented claiming that 5% was a reasonable amount to hold as free balance. Also, the State Board in 1987 adopted a rule specifying that the Commissioner, in determining whether to require reallocation of resources in response to a cap waiver request, may consider a surplus of up to 3% of the amount of the budget as reasonable. The rule does not preclude the maintenance of free budgets in excess of 3% and in fact impliedly recognizes that some districts maintain surpluses in excess of the 3%.

At one time, Newark had a $250 million free balance when 3% would have been only $7.5 million. Paterson had a $118 million free balance, when 3% would be $3.5 million. According to Assistant Commissioner Calabrese, neither Newark nor Paterson needed that kind of free balance. Assistant Commissioner Calabrese testified, however, that no general rule exists specifying the appropriate level of surplus that districts should maintain. Mr. Calabrese testified that one district had a $5 million budget with a $3 million surplus (60% of the budget was surplus). Mr. Calabrese agreed that under current regulations a district has the right to hold whatever amounts it wishes as surplus.

Based on this record I cannot find that plaintiffs' districts' free balance amounts indicate mismanagement. On the contrary, I **FIND** that the standard practice is for school districts to maintain surplus in any amounts they deem reasonable. While the total amounts maintained by Irvington and Camden appear large, as a percentage of current expense they are not atypical.

I also **FIND** that free balances are being used by districts as a device to maintain or lower any necessary tax increase and as an incentive for voters to pass school district budgets. I believe that under the present funding system, this use may be critical for some districts. If the Department of Education believes that to maintain a surplus over 3% is mismanagement, a rule precluding such action should be promulgated. *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313 (1984).

Municipal Overburden

In order to bolster their position that whatever problems may exist in property poor districts are caused by the districts themselves, defendants claim that there is no evidence to support the municipal overburden hypothesis in New Jersey. (Defendants' Proposed Finding #16 at p. 34.)

Municipal overburden focuses upon the notion that some communities may not be able to raise sufficient local funds to support education because of the competing need to raise local revenues to support high non-education expenses. The theory provides that "[s]ince the overburdened municipality may be unable to obtain adequate funding for that portion of its budget for which the locality is responsible, it may not be able to provide the requisite levels of educational

opportunity." *Robinson v. Cahill*, 69 *N.J.* 449 (1976) (Justice Pashman dissenting at 555).

Municipal overburden is dependent upon two assertions: first, that cities have characteristics such as high population density, aged housing stock and large concentrations of low income, unemployed, aged and minority populations that lead inexorably to high levels of spending for municipal services; second, that there is a fixed fund from which both school and municipal services must be financed and that therefore spending on education in large cities is relatively low because of unavoidably high levels of spending on municipal services. According to defendants, if municipal overburden exists there should be a causal relationship between high levels of non-school municipal expenditures or high tax rates and low levels of school spending.

Defendants' Proofs on Municipal Overburden

After subjecting municipal overburden to empirical testing, defendants' witness Dr. Harvey Brazer, from the Economics Department at the University of Michigan, asserts the concept is suspect for a variety of reasons:

> 1. Plaintiffs' communities do not expend substantially higher sums per capita for non-education services than other communities. The tax cost of municipal non-school services amounts only to an average of 3% of personal income in New Jersey. This small percentage is unlikely to appreciably influence the demand for any one category of goods, including education.

2. Plaintiffs' communities receive a higher proportion of State and federal aid per capita for non-educational expenditures than do other municipalities. Municipal expenditure in large cities is offset by intergovernmental grants and user charges to a larger extent than in other communities. The level of tax-financed expenditure in large cities is not nearly as high relative to that of other communities as is the level of total municipal expenditure.

3. The proportion of non-education per capita expenditure derived from only residential tax receipts exceeds the State average by only $9. Therefore, this amount is not a burden let alone an overburden in the face of per pupil general expenditures for elementary and secondary education in plaintiffs' cities in 1979-80 averaging $2,312.

4. When subjected to empirical analysis there is little or no support for the hypothesis that factors such as low income, high population density, and large proportions of the population being minority or aged lead inexorably to high levels of non-educational municipal expenditures.

5. High non-school tax rates are not generally associated with low education expenditures per pupil. The demand for municipal services is influenced by much the same factors so where the demand for one is high the demand for the other is also likely to be high. Using regression analysis, there is a .26 positive correlation between municipal and education expenditures in New Jersey.

Dr. Brazer through a series of regression equations tested six measures of the municipal overburden hypothesis. He studied: (1) whether a high non-school tax rate reduced the tax rate levied for schools; (2) whether a high proportion of municipal to total tax rate depresses education expenditures; (3) whether high tax-financed municipal expenditures depress funding available to education; (4) whether a burden is imposed upon personal income by local taxes for municipal purposes; (5) whether a high need for non-education services depresses local funding for education services; and (6) whether funding for education is affected by the availability of disposable income remaining after municipal needs are deducted. After evaluating the regression results, Dr. Brazer concluded that none of the measures supported the municipal overburden hypothesis.

For these reasons, defendants assert that municipal overburden does not influence expenditures for education in New Jersey and is therefore not a relevant or material matter for consideration in this case.

The defendants further assert that school boards under the existing law cannot neglect to support an adequate education by claiming high non-education related responsibilities. They also point out that New Jersey's financing scheme places municipal non-education taxes last in priority behind county, school and State taxes. *N.J.S.A.* 54:4-75 and 76.

Thus, the defendants, besides claiming that municipal overburden does not exist, in effect reassert their claim that school board members should simply be vigilant advocates for the educational needs of the district's children and that whatever problems may be associated with financing relatively high non-education

costs should be, as they are, addressed separately from the school financing system. As an illustration of a district not truly advocating for the school childrens' interests, defendants cite East Orange, where between 1976 and 1983-84, local tax effort declined 34% while the State decline was only 3.1%.

Defendants finally explained that New Jersey is addressing the problem of financing local communities in need through its Department of Community Affairs. The Director of that Department's Division of Local Government Services, Barry Skokowski, explained that it is his responsibility to assure that no municipal bankruptcies occur in New Jersey.

The Division of Local Government Services administers $180 million in State aid programs. The Urban Aid Program began in 1968 with $5 million. In 1986, the program distributed $40 million. The Safe and Clean Neighborhood Program, a $25 million appropriation, is for Urban Aid districts. The money is for the salaries of uniformed police officers on staff, not for new employees. The Supplemental Safe and Clean Neighborhoods program, a $12 million appropriation, is to supplement the police force after January 31, 1985. Sixty-five percent goes to Urban Aid communities. Aid from either program can be used to replace officers who retire or resign. Supplemental Fire Services Aid is for new or replacement fire personnel, 65% of which goes to Urban Aid communities.

A new State aid program, begun in 1987, is the Municipal Public Safety Act, with $12 million in appropriations. The money is used to pay the salaries of existing police officers or new hires.

The Local Finance Board oversees the work of the Director of Local Government Services. Among its responsibilities is to administer the Qualified Bond Act, in which State aid is pledged to back up the bonds of municipal governments, thus reducing interest rates on those bonds. Eight municipalities are qualified under this program, including Camden, East Orange and Jersey City. The program helped reduce interest rates on Jersey City bonds from 11% to 6 1/2%.

In 1986, the Distressed Cities Aid Program was begun. The appropriation for the program was $12 million. In 1987, the appropriation was $70 million. The program is designed to assist fiscally troubled cities until such time as they are self-supporting. The increase from 1986 to 1987 was necessary to avert monumental property tax increases in the cities, to prevent massive layoffs of police and fire officers, and to prevent cuts in critical services. The program does not have a permanent source of funding, so cities are potentially faced with serious fiscal problems in 1988.

The determination of the director of the Division of Local Government Services to award funds from the Distressed Cities Program is based on factors which indicate that a city has "a constrained ability to raise sufficient revenues to meet its budgetary requirements." Camden was thus awarded $4.9 million in 1986 and $9.2 million in 1987. East Orange received $3.8 million in 1986 and $9.3 million in 1987. Irvington received $750,000 in 1986 and $2 million in 1987. Jersey City received $1.5 million in 1986 and $6.6 million in 1987.

As an illustration of the system's fiscal strength, Director Skokowski testified about how he would go about meeting requests from 10 cities for a total

of $100 million in additional aid. There is no doubt that Director Skokowski is supervising the distribution of large amounts of non-education aid in an effort to reverse the economic decline of New Jersey's cities.

Plaintiffs' Proofs on Municipal Overburden

According to Dr. Netzer, the former director and senior fellow of the Urban Research Center at New York University, New Jersey has a number of cities that are truly poor by every measure of economic health available (*i.e.*, level of property values per capita and per school child, the median household income of residents and per-capita income). Cities like New York and Baltimore have raised the issue of "municipal overburden" in the context of school finance litigation to "discount" or explain away their local taxable wealth. But, New York City and Baltimore are not poor places relative to the rest of their states. In fact, Dr. Netzer testified for the State of New York against the municipal overburden thesis in the litigation challenging that state's school financing system. Because of the extreme fiscal distress of New Jersey's cities, however, the issues relating to municipal overburden in New Jersey are substantially different than in those states. Dr. Netzer testified that there is no comparison between the fiscal positions of New Jersey's truly poor cities and the rest of this State. The poor municipalities in New Jersey have no above average amounts of taxable wealth for education to "discount," as does a city like New York.

Dr. Netzer considered Newark, Paterson, Camden and Jersey City as truly poor cities. He explained their characteristics as including a considerable decline in manufacturing and manufacturing employment without any off-set by a substantial increase in service sector employment. These cities also tend to be relatively small

compared to the total size of the metropolitan areas or urban regions in which they are located and do not perform a central role for the rest of the metropolitan area. The proximity of New Jersey's cities to New York and Philadelphia has deprived them of a central function. Truly poor cities also lack suburban-like areas where affluent people live and shop. Another characteristic of truly poor cities is that they have very little tax base per capita from which to raise local revenues. Truly poor cities have become places of residence primarily for the region's poor, who tend to be predominantly black and Hispanic.

According to Dr. Netzer, New Jersey also has truly poor suburbs. These are cities such as East Orange and Irvington that were developed as suburbs but have become largely poor and minority. They have relatively little economic activity and have older housing.

In 1984, the State prepared an assessment of the infrastructure needs of each municipality. The 567 municipalities were ranked from most distressed to least distressed. Eight indicators were used to rank the municipalities: unemployment rate; per capita income; percent of welfare children to total population; percentage change in population from 1970-1980; number of substandard housing units; ratio of pre-1940 housing units to total number of housing units in the municipality; equalized valuation per capita; and average equalized tax rate (averaged over three years). This index identified Jersey City as the most distressed of all 567 municipalities, followed by Camden, Trenton, Newark and Hoboken. Paterson is ranked eight; New Brunswick, fifteenth; East Orange, twenty-fifth; and Irvington, thirty-fifth.

Plaintiffs' witness Dr. Mary Williams, a satistician from the United States Department of Education, described municipal overburden slightly differently from Dr. Brazer. Dr. Williams preferred the term "fiscal stress" and explained that one of its indicators is a high total tax rate. The second is a high proportion of the total tax rate devoted to non-education expenditures including general government, public safety (police, fire, civil defense and disaster control) health and welfare. The third is that the high proportion of taxes for the non-education services is to some extent beyond the control of the local jurisdiction and is not simply a matter of taste or preference, *i.e.*, that by the nature of the community and population served there is a requirement that a high proportion of revenues go to non-education services. Thus, for example, it is probably impossible for a city like Newark to have a volunteer fire department. It is not a matter of choice, therefore, to fund a full-time fire department. A suburban area, however, would be able to decide which alternative fire fighting system was more economical and choose that system.

Thus, Dr. Williams explained that although these factors mean that a jurisdiction spends less for education because of the high need for non-education services, it does not necessarily mean that the tax effort for education is low. The concept is that a smaller proportion of the tax base is available to support education than is true in suburban or rural districts which do not have to support nearly the same scope of non-education services.

In 1976, the Department of Education commissioned Andrew Reschovsky and James Knickman to conduct a study of municipal overburden in New Jersey. Using 1974 data, they compared 28 districts that received aid under the State's urban aid program with 34 districts chosen as representative of municipalities with

a mix of socioeconomic characteristics (high, medium and low) and degrees of urbanization (suburban, rural, rural centers and other urban). They found that on a variety of measures the urban aid districts were considerably disadvantaged relative to other districts. Specifically, they found that urban aid municipalities had considerably less fiscal capacity when measured by per capita income and property taxes per capita. They also found that municipal tax rates for urban aid municipalities were more than four times those of non-urban districts ($1.87 per $100 equalized valuation compared to $0.37) and that non-education expenditures per capita for general government, public safety and health and welfare in urban aid districts were nearly 50 percent more than in non-urban aid districts ($307 compared to $215).

In other states, large cities often are below average in per capita income but at or above the State average in property wealth per capita. In contrast, Knickman and Reschovsky found that New Jersey urban aid districts were different in that they were poor relative to other districts in the State in both per capita income and property wealth per capita.

Dr. Williams updated the Knickman and Reschovsky study using 1981 and 1984 data. The urban districts she examined included the four in which plaintiffs live. She examined property wealth per capita, noneducation expenditures per capita, local revenues per capita and tax rates. She compared different groups of districts to each other and to the State average. Dr. Williams' findings from her analysis are consistent with those of Knickman and Reschovsky.

Both the 1974 and the 1984 studies found that expenditures for non-education purposes are higher in urban aid cities than in other districts, that tax

rates in urban aid cities are higher than in other districts and that a higher proportion of locally generated revenues in urban aid cities goes for non-education services than is the case for the State as a whole.

The 28 urban aid cities minus Atlantic City had higher average municipal expenditures per capita (not including school and county expenditures) than the State average municipal expenditures in 1984 ($576 compared with $442). Three of the four plaintiffs' districts had higher municipal expenditures per capita than the urban average. The exception was Irvington, where municipal expenditure per capita of $379 was below the State average.

Dr. Williams also confirmed that New Jersey's urban aid districts remain poor in both per capita income and property wealth per capita.

Property Wealth of Urban Cities

In 1984, the equalized valuation per capita in plaintiffs' districts was 21% to 34% of the State average equalized valuation per capita. The 28 urban aid cities analyzed by Dr. Williams had, on average, 39 % of the State average property wealth per capita. In contrast, the property wealth per capita in high SES suburbs was 182% of the State average.

Dr. Netzer analyzed the equalized valuations per capita of his truly poor six cities, including the plaintiffs' districts. Irvington in 1984, had the most valuation per capita of the six cities, 31% of the per capita valuation of the State. Thus, if Irvington taxed at a rate that was the same as the average for the State, its expenditures per capita would be only 31% of those for the rest of the State: The

other five districts had less than 30% and Camden's valuation was 19% of the average for the rest of the State.

In 1984, the State average residential equalized value per parcel was $77,000. Dr.Netzer analyzed the homeowners of Newark, Paterson, Jersey City, Camden, Irvington and Trenton. He found that in comparison with the rest of the State, the homeowners in these cities have homes worth less than the rest of the State. For example, the homes in Paterson are worth 54% and those in Camden 17% of the average for the rest of the State. In Camden, the average home value was approximately $12,000.

The growth in equalized valuations in these cities has lagged behind the growth in the State's average equalized valuation. Between 1979 and 1985, for example, the State increase was 84.6%. Camden, however, increased its equalized valuations 15.8%; East Orange 20%; Irvington 37.1% and Jersey City 76.7%.

Dr. Williams found that the major changes between 1981 and 1984 were that the property wealth per capita of three of the four plaintiffs' districts and urban aid cities in general (without Atlantic City) declined in relation to the State average, and the property wealth of the high SES suburbs increased.

When considering total per capita value between New Jersey's cities and the rest of the State the disparities are, according to Dr. Netzer, similar to those found when comparing poor underdeveloped countries with advanced industrial countries. In the best of these cities, Irvington's total per capita value is 31% of the rest of the State. Comparing these truly poor cities with suburban areas is not like comparing the United States with West Germany but is like comparing the United

States with Chad. Thus according to Dr. Netzer, the disparities here are "quite extraordinary." (Netzer Transcript, Dec. 1, 1986, p. 21.)

Per Capita Income of Urban Cities

Based on the 1980 census, plaintiffs' districts have per capita income that ranges from 49% to 81% of the State average per capita income, and urban aid cities have, on average, 72% of the State average. High SES suburbs in Dr. Williams' sample have per capita incomes that are 161% of the State average.

From 1970 to 1980, the percentage increase in per capita income for Camden, East Orange, Irvington and Jersey City has been below the 121% increase in per capita income for the State as a whole. Camden increased 62%, East Orange 61%, Irvington 83% and Jersey City increased 90%. The actual dollar increases in the plaintiffs' districts, of course, represent lower amounts than increases in higher income areas because the percentage is applied to a lower income base.

For comparison purposes, from 1970 to 1980, Cherry Hill, Ocean City and Paramus experienced a greater increase in per capita income than the increase for the State as a whole, and all have per capita incomes that are above the State average. Millburn and Princeton Township had lower rates of increase than the State average, but their per capita incomes in 1980 were approximately twice the State average per capita income.

Tax Rates of Urban Cities

Total, municipal and school tax rates are all higher than the State average rates in plaintiffs' districts, and in urban aid cities (without Atlantic City) in general; and in each of these tax rate categories, high SES suburbs have lower tax rates. Urban aid cities make a relatively higher tax effort for non-educational services than for schools, in contrast with high SES suburbs, where school tax rates tend to be higher than muncipal rates. For example, in 1984, East Orange spent $437 of local revenues per capita on non-education services and $129 on education. In the same year, high SES suburbs spent $380 on non-education services and $612 on education.

Irvington is in transition from a suburban to an urban jurisdiction. This transition can be seen by comparing its 1974 fiscal patterns with 1984. In 1974, Irvington raised $56 per capita for non-education and $147 per capita for schools. In 1984, Irvington spent $227 in local revenues per capita on non-educational services and $149 in local revenue on schools.

In 1984, urban aid cities (without Atlantic City) averaged 288% of the State average municipal tax rate. Irvington's municipal tax rate was 225% of the State average, Camden's was 485% of the State average, East Orange was 514% and Jersey City was 426% of the State average. High SES suburbs had municipal tax rates that were 57% of the State average. Camden, Jersey City and East Orange are three of the five highest municipal tax rate districts in the State.

Dr. Williams in her 1984 analysis found that urban aid cities had equalized school tax rates averaging 127% of the State average school tax rate. Plaintiffs' cities ranged from 120% to 154% of the State average. School tax rates in high SES suburbs were 92% of the State average.

Camden's school tax effort went from 110% of the State average in 1975-76 to 145% in 1984-85 and was above the State average in seven out of 10 years. East Orange had a school tax effort that was 129% of the State average in 1975-76 and this increased to 144% in 1984-85. East Orange has been above the State average school tax rate in every year of Chapter 212. Irvington has been above the State average school tax rate in seven out of ten years and in 1984-85 was making an effort that was 117% of the State average. Jersey City's school tax effort was 117% of the State average in 1975-76, in 1984-85, it was at 127% of the State average. Since 1981-82, Jersey City's school tax effort has been around 130% of the State average.

Dr. Williams testified that in most other states, cities have very high non-education tax rates, but their school tax rates tend to be only average or below average. New Jersey's urban aid cities are unusual in that not only are their total and municipal tax efforts substantially above average, but so is their school tax effort.

In 1984, plaintiffs' cities and urban aid cities in general had total equalized tax rates (municipal, school and county) that were higher than the State average and higher than those in high SES suburbs. For example, Camden's total tax rate was 298% of the State average; total tax rates in urban aid cities (without

Atlantic City) averaged 196% of the State average; three of the four plaintiffs' districts had higher total tax rates than the urban average. In comparison, total tax rates in high SES suburbs were only 80% of the State average.

Dr. Netzer found that equalized total tax rates in the six cities he studied were higher than for the rest of the State. In 1984, Irvington's tax rate was 83% higher than the rest of the State; Jersey City's was 105% higher; Newark's was 140% higher and Camden's was 175% higher. Dr. Netzer also testified that the tax rates in these cities were very high by American standards and that he did not know of any other place in the U.S. with a total tax rate as high as Camden's.

Defense data confirms that the total equalized tax rates in plaintiffs' districts has increased over the period during which Chapter 212 has been in operation. In 1975-76, Camden's total tax rate was $5.92, which was 174% of the State average total tax rate; by 1984-85, its total rate was $7.31, or 272% of the State average. East Orange, according to the defense, lowered its tax rate as a percentage of school taxes more than any other plaintiffs' districts, but for every year, East Orange had a tax rate higher than the State average. The total tax rate levied by East Orange in 1975-76 was $8.05, 242% of the State average; in 1984-85, it was $8.25, which was 307% of the State average. Irvington's total tax rate increased from 154% of the State average in 1975-76 to 176% of the State average in 1984-85. Jersey City's total tax rate has risen from 166% of the State average in 1975-76 to 218% of the State average in 1984-85.

Municipal Revenues in Urban Cities

When the federal government discontinued revenue sharing after 1986, all New Jersey municipalities lost $67 million. Of this loss, $35-38 million was suffered by urban aid municipalities.

In 1984 all of the plaintiffs' districts and urban aid cities generally, were substantially below the State average in total local (municipal, school and county) revenues raised per capita. For example, Irvington was 59% and Camden was 63% of the State average. The average for urban aid districts excluding Atlantic City was about 75% of the State average. In contrast, total local revenues per capita in high SES suburbs were 146% of the State average per capita, or about double the amount raised by urban aid cities.

For local municipal revenues per capita, urban aid cities, and three of the four plaintiffs' districts in 1984, raised slightly above the State average amount of local municipal revenues per capita. High SES suburbs had local municipal revenues that were about at the State average.

For local school revenues, plaintiffs' districts raised 33-41% of the State average per capita with the average for urban districts generally being 49% of the State average. High SES suburbs had local school revenues per capita that were 168% of the State average and more than four times the amounts raised for education by plaintiffs' districts.

Municipal Overburden Conclusions

Besides the Knickman and Reschovsky report, discussed above, the Report of the Joint Education Committee to the New Jersey Legislature states: "There is little doubt that such a problem [municipal overburden] does exist in the state." (Clarification added) (Exhibit D-247 at p. 37.) The exhibit cites as support for this statement the following two papers prepared for the Joint Education Committee: Gurwitz, *Municipal Overburden and School Finance Reform in New Jersey* (1974) and Listokin, *An Examination of Municipal Overburden* (1974). In 1983, County Superintendent Acocella, referring to Jersey City from 1981 to 1983, said the "Municipality has been reluctant to assume a greater share of the educational costs due to the municipal overload." (Exhibit D-34 at p. 142.)

The defense's current position, which denies the existence of municipal overburden, is based upon Dr. Brazer's empirical analysis. The thrust of Dr. Brazer's analysis was to determine whether he could discern through regression any limitation upon education spending which was related to greater non-educational burdens the cities' tax bases must fund. He basically looked for a negative correlation which would show that as non-school tax rates rose educational expenditures fell. On the basis of the record, I **FIND** that a statewide regression analysis cannot discern a relationship between high non-school spending or high municipal tax rates and low levels of school spending, but that Dr. Brazer's analysis failed to test plaintiffs' actual contentions.

Municipal overburden is a phenomenon that applies most severely to a relatively small number of cities and statistical techniques such as correlation or

regression, which look for average relationships, are not likely to discern patterns affecting only a small number of deeply distressed cities out of more than 500. Dr. Netzer explained that, a small pattern of relationships even with a perfect correlation can be added to large numbers of random relationships, and result in a statistically insignificant correlation coefficient because the pattern with the perfect relationship contains too few observations to change the random picture of the other numbers.

In Dr. Brazer's original studies he did no analysis of total tax rates. His only use of total tax rates was to calculate a ratio of municipal to total tax rates. In addition, he did not examine the amount of education and municipal revenues obtained from total tax rates in particular districts. Dr. Brazer did not examine the fiscal distress of a relatively few urban districts. Rather he looked at fiscal relationships across the hundreds of municipalities in the State.

When Dr. Brazer updated his previous reports in 1986 he again looked for a negative correlation between non-school tax rates and education expenditures per pupil. In one of his analyses, he compared five of the lowest tax rate districts with five of the highest tax rate districts in 1982. He found that Camden, Jersey City and East Orange were among the five districts with the highest tax rates. The average tax rate for the five lowest tax rate districts was .41¢ and the average tax rate for the five highest districts was $4.91. His conclusion that municipal overburden does not exist is based in part on his determining that the low tax rate districts were able to average $2,837 in day school expenditures per pupil and the high tax rate districts were able to expend on average $2,805 in day school expenditures. Since the average expenditure, which included federal funds, was almost equal, he concluded that "[o]nce again it is evident that a negative

relationship does not exist between non-school tax rates and expenditure per pupil." (Exhibit D-238 at p. 5.)

Dr. Brazer's study, however, failed to consider the school tax rate and the property base necessary to generate local school revenues. Dr. Brazer also failed to assess the fiscal pressures or competition between the municipality and school district for tax dollars and did not focus on the relative tax burdens of rich and poor districts. Dr. Brazer did not examine the dynamics of the budget process in Type I or Type II districts and did not analyze bond or budget referenda in districts. He also has not visited plaintiff cities in quite a long time. What Dr. Brazer actually found is fully consistent with other evidence disclosing what is actually occurring among New Jersey's fiscally stressed urban centers: with the help of federal and State aid, poor highly-taxed districts manage to spend nearly as much for education as affluent, low-tax districts.

On the basis of the record, I **FIND** that New Jersey's urban cities (except for Atlantic City), including plaintiffs' districts, are poor in per capita income and property wealth compared to the rest of the State.

I **FIND** that plaintiffs' cities and other urban aid cities must use a larger portion of their small tax bases to raise revenues for non-education services than suburban or non-urban municipalities. This leaves a much smaller proportion of what is already a small tax base to generate revenues for schools. This causes fiscal pressures and political conflict which inhibits the ability of poor urban school districts to address fully the educational needs of their students. I **FIND** this phenomenon to be New Jersey's municipal overburden. Thus, what is actually occurring is not what Dr. Brazer studied, because along with the need to fund non-

school services, goes also the need to meet the school district's educational needs. The educational budgets cannot simply be cut just because the municipal budget increases. Rather, the school districts and municipalities must meet, as best they can, both needs from an impoverished tax base.

I **FIND** that plaintiffs' cities and some of the other urban aid cities are so poor by every measure of municipal or educational fiscal ability, that they must levy high tax rates for municipal services and for schools. With these high tax rates, they obtain substantially below average total revenues, below average school revenues and slightly above average municipal resources.

I **FIND** this results because their high tax rates are being levied against very low tax bases. For example, Camden's total tax effort is about three times the State average, but its tax base per capita is about 1/5 the State average; thus, even with this enormous effort, Camden only generates local revenues per capita that are 63% of the State average. The reverse is true for high SES suburbs. Because of high property wealth per capita, they raise above average levels of revenues with below average tax rates.

I **FIND** on the basis of this record,that if the State financed all municipal services except the schools, the cities described by Dr. Netzer as truly poor, including Newark, Trenton, Camden, Paterson, East Orange, Jersey City and Irvington, would have more taxable capacity for their schools, but the basic problem of these cities would remain, which is that they are poor, not that they have excessively high expenditures for non-school purposes. The State in distributing vast amounts of State aid to these municipalities has corroborated this finding through its actions.

I **FIND** that the municipal overburden concept in New Jersey is actually another illustration of the adverse consequences caused by school districts and municipalities sharing poor property bases.

School District Mismanagement

A major part of the State defense asserts that large amounts of the plaintiffs' districts' fiscal resources are being squandered by mismanagement, political maneuvering and illegality. In an effort to show that the districts' own mismanagement is the cause of the problems raised by plaintiffs, each of plaintiffs' districts underwent Department evaluations, beyond the usual monitoring, as part of the defense preparation for this hearing. (The regular monitoring process is discussed in Part IV.) The Department meticulously scrutinized the regular monitoring results from the four plaintiffs' districts and performed additional evaluations covering curriculum development and the quality of the districts' compensatory education, vocational education, special education and bilingual education programs. Evidence on each district's alleged mismangement was presented.

Management of Camden's School District

The Department of Education seems relatively happy with Camden's recent progress. The Department acknowledges that Camden has been a cooperative partner in the monitoring process and has shown both the capacity to improve and improvement. At Level I monitoring, Camden was found unacceptable in 17 Indicators. At Level II Camden was unacceptable in nine Indicators. The

deficiencies were in student attendance, facilities, basic skills test results and in one area of finance. The Department has approved Camden's Level III Monitoring Corrective Action Plan and the district has one year to show sufficient progress toward improvement. The Department will extend the time if sufficent improvement toward certification is demonstrated. Camden's teachers view monitoring hopefully, as an opportunity for programs to be carried out. The Department believes that Camden is capable of achieving certification. Therefore, presumably, by its understanding of the constitutional mandate, the Department believes that Camden is taking steps to achieve a thorough and efficient system of education, in spite of the alleged mismanagement. (Defendants' Proposed Findings at p. 421-424.)

The Department acknowledges that Camden has established a schedule for curriculum revision and is aligning its curriculum to the HSPT so that teachers will teach the skills needed to pass the test. The Department acknowledges that Camden's new Assistant Superintendent for Curriculum and Instruction may make a difference in Camden's ability to implement its new curriculum plans. One result of the MBS and HSPT has been to make more personnel and funds available for basic skills instruction in Camden. The Department of Education believes that Camden High School achieved its goals for the MBS and that it will do so for the HSPT.

Camden's mayor has no involvement, formal or informal, in the development of the school district budget. In fact, the State assumed fiscal control over the City of Camden for 1981. Camden's current mayor requested that the State remain and its representatives were still there in 1987. The State found that in 1981 the entire budgetary process under the prior mayor was political. To maintain the tax rate, but not curtail services, Camden had used a variety of underbudgeting and

improper accounting practices. Under Mayor Primas, according to the State, this is no longer the situation.

The School District of Camden's alleged mismanagement, according to the Department of Education, stems from a "problem with follow up." (Defendants' Proposed Finding #5 at p.422.)

To demonstrate Camden's "follow up" problem, the Department presented proofs that Camden was able to formulate a plan to upgrade or abolish its substandard facility spaces. All but $200,000 of the resources required to implement this plan was State or local money on hand. About 50% of the funds had been available since 1973. Local funds had been available since 1984. The Department contends that Camden has on hand sufficient funds, some of which date back to State Emergency Facilities Aid provided 20 years ago, to fund its facilities plan. Thus, the Department asserts that Camden has money for facility improvements but is not committing it promptly. For example, in 1973 Camden received $2.1 million in Emergency Facilities Aid to build a school but the district did not build the school because the children had moved from the neighborhood in which the school was to be built. The record is not clear on how long it took for the children to move from the neighborhood. However, in 1984-85, Camden sold the bonds and invested the money. Thus, Camden did not use the 1973 aid until 1984-85. During this period, Camden did focus on other facilities projects including building a new middle and elementary school, a special education school and a high school addition.

Camden, the Department of Education further alleges, has a "systemic breakdown" in leadership from the Superintendent, to the Board, to the building

principal, to the attendance officers, etc. (Defendants' Proposed Finding #6 at p. 422. The Department means that Camden's policies are not implemented efficiently. For example, at Level I monitoring in 1984 the Department discovered problems associated with Camden's special education pupil records. Apparently, the district had not changed its recordkeeping practices in response to 1978 State Code amendments modifying pupil record policies. The district explained that it "got away from them."

As another example of leadership or "follow up" problems, the Department explained that Camden had on paper established a student attendance program as part of its monitoring corrective action plan. The program seemed to be well planned and fully funded, however, the Department could not verify that it was fully implemented. Attendance officers had reported making visits to student homes, but when addresses were spot checked, they were vacant lots. As part of this program, truants were to be referred to the courts. But, the judge was unaware of any referrals and the school district complained about the court's poor responsiveness to its 57 referrals.

Camden, according to the Department of Education, in March or April 1984, accumulated $4,000 in vocational education repair money and transferred it to surplus while safety violations went uncorrected. Camden could have submitted purchase orders to fix these violations until June of 1984, but Camden did not make these repairs until 1986. Camden also accumulated maintenance funds and transferred $4.5 million to surplus over a five year period when the district had serious facilities needs. The Department acknowledged that Camden was expeditious at correcting maintenance problems, but in its 1986 Level III monitoring, the Department found 173 uncorrected maintenance problems. And,

when defense witness Mr. Kaplan visited the Broadway School, he was "knocked over with the smell of urine." Mr. Kaplan therefore questions the district's commitment and will.

In January 1986, Camden requested permission to carry into 1987 approximately $167,000 in unspent special education funds. Camden explained that they had recently appointed a new director, had contract disputes from July 1, 1984 to July 1, 1985 and had moved the division several times. The Department of Education approved this carry-over and the defense acknowledged that other districts in the County request carry-over approval.

When Camden moved its special education division, it left files across town and located the division in a new facility with only one telephone for approximately 40 persons. Consequently, the division had to return to its previous location and move again, after properly planning the move.

The defendants acknowledge that Camden's school district wishes to improve the delivery of its educational program and is making progress in that direction. The Department therefore agrees that Camden has been trying to improve its educational program.

The only evidence of political intrusion consists of vague comments by Dr. Galinsky, who is currently the Paramus Superintendent of Schools. His testimony was imprecise as to date and details and consequently I FIND, based on the overwhelming weight of the evidence, that political maneuvering is not a problem

in Camden. The City has not in at least 17 years pressured the Board of Education to avoid tax increases.

There were no proofs submitted detailing the total amounts of monies Camden's alleged mismanagement was diverting from its educational program. There also was no indication of any promulgated or distributed management standards that Camden was improperly applying.

The Department acknowledged that there are other districts within Camden County that have leadership problems of varying degrees, irrespective of DFG. Follow up was a major problem in Haddonfield, for example, which is DFG J. The director of the Department of Education's Compliance Division did not know what the results would be if the Department investigated certified districts. He believed that implementation deficiencies like Camden's "probably" would be discovered.

Much of the mismanagement proofs were presented as if they were clear on their face examples of mismanagement. Some, like the proofs concerning Camden's move of the special education division and failure to promptly invest available monies, do appear to indicate inefficiencies or mismangement that cost the district funds that could have been expended on its educational program.

However, some of the proofs appear to be groping for mismanagement. For example, the Department found in Level II monitoring that middle school bilingual special education teachers did not have appropriate bilingual endorsements. The defense believed this was mismanagement because the district could have shared high school teachers with a middle school and the district could

have provided more endorsement incentives (like tuition reimbursement). However, a district cannot force teachers to get bilingual endorsements and there were no programs in South Jersey colleges by which a teacher could earn this endorsement. Nevertheless, the defense expected that the district, through a Title VII grant jointly with a college, could develop an endorsement program.

The fact that Camden had monies to build a school and then delayed until the school was no longer necessary may demonstrate a problem with planning and implementation, but if they had built the school and the children then moved away, the district would have had another problem. The transfer of funds to surplus or the failure to commit monies promptly may impair the prompt delivery of some educational services, but I cannot conclude on the basis of these proofs that Camden squanders its monies or that these funds were not subsequently used for some educational purpose. The proofs do not demonstrate whether Camden eventually used the particular surplus amounts detailed by the defense for an educational purpose. Camden has in the past used parts of its surplus to fund portions of its budget to avoid raising taxes. The evidence does not detail how much, if any, financial damage was caused by Camden not promptly upgrading substandard spaces or attending to some vocational repairs or maintenance needs. (See facility findings in Part IV.) Additionally, some of the mismangement proofs point to further district spending rather than to monies improperly diverted from educational needs. For example, were the district to change its pupil record policies or eradicate the urine smells from the Broadway School, funds presumably would have to be expended.

I **CANNOT FIND** on the basis of this record, even acknowledging some mismanagement or inefficiencies exist, that by more efficient management,

Camden could eliminate the program and expenditure disparities proved by plaintiffs. I agree with defense witness Mr. Kaplan who said that Camden has deficiencies and needs. I FIND the proofs as a whole demonstrate that Camden, one of the poorest and lowest spending school districts in the State, is struggling valiantly to deliver an educational program in spite of an impoverished tax base and other severe obstacles.

Management of Irvington's School District

The Department of Education has concluded that Irvington provides a thorough and efficient education. Irvington was first monitored in 1984. It failed two Indicators but, as the result of a corrective action plan, was certified without undergoing Level II monitoring.

No mismanagement is ascribed to Irvington. According to the Department of Education, Irvington offers a sound education that is geared to the needs of Irvington's pupil population. Irvington works well, hard and efficiently at setting goals for itself and then acting upon them. Irvington's pupils receive an excellent urban education, according to the Department.

The school facilities in Irvington are in good condition, clean and well maintained as a result of an efficient and aggressive maintenance program. All acknowledge, however, that Irvington is overcrowded and has severe facilities problems. The Department, charges that: "[i]n attempting to resolve what it considers overcrowding in its schools, Irvington has not followed the Recommendations/plan in its 1980 or 1985 Facilities Master Plans, utilized the assistance offered by the Bureau of Facility Planning, nor appealed any bond defeat

to the Commissioner." (Defendants' Proposed Finding #M213 at p. 399.) The Department also contends that Irvington's overcrowding is due to enrollment in the district of non-Irvington residents or illegal residents and that Irvington has never advised the Commissioner of Education that the condition of its facilities precludes provision of a T & E education for its students.

The Department of Education further criticizes Irvington for applying for LAVSD (Local Area Vocational School District) status in 1982 and then withdrawing, indicating that it would reapply. Irvington did not reapply. Irvington, according to the Department, has not sought available technical assistance from the Department to assist in its application to be designated an LAVSD. Irvington officials testified in this proceeding that their students could effectively utilize more vocational training but that they could not qualify as an LAVSD because of fiscal and scheduling limitations. The number of hours required to teach vocational subjects conflicted with their remedial obligations to those students who failed the HSPT. (See Vocational Education, Part II.)

In spite of these criticisms, defendants state that the Irvington school district utilizes efficient administrative and management procedures in effectuating its responsibility to educate Irvington's children. (Defendants' Proposed Finding M218 at p. 400.)

The Department of Education also states that Irvington offers excellent basic skills improvement programs, special education programs and arts education. Irvington provides a rural-like camp environment at its district-owned and operated camp in Flemington, New Jersey. This facility operates 20 weeks yearly in the spring

and fall and also provides residential compensatory education and basic skills services to pupils in need of remedial education.

Although Irvington is certified, it could lose certification if students fail to pass the HSPT in required numbers.

In 1985-86, Irvington was one of the 19 lowest scoring districts on the HSPT. Only 42.8% of Irvington's students passed the reading portion of the HSPT; 15.4% passed math, and 51.7% passed writing. The district is attacking the problem head on by aligning its curriculum, providing 3 1/2 days of staff in-service training, offering double math and English periods, an extra writing program through the Broad Based component of the State's Urban Initiative (See Part IV), a summer HSPT institute (the district received State money for this program) and before and after school programs. The district is mobilizing to meet the challenge of the HSPT just as it did with the MBS.

No evidence was presented of Irvington squandering or diverting resources from its educational program. And no evidence was presented of any political maneuvering in Irvington. Defense criticisms about Irvington's approach to LAVSD status and its overcrowding appear to reflect different opinions on how to resolve some difficult problems and highlight some areas where the Department of Education believes Irvington might improve its district management or educational program.

Management of East Orange's School District

Much evidence was presented concerning East Orange's fiscal improprieties.

In 1981, the Department of Education's Audit Bureau directed East Orange to correct certain fiscal defects. Following the audit report, the Board of Education's president responded that the Department of Education did not understand the school district's accounting system and the Board would take whatever action they deemed necessary on the auditor's recommendations. The Department of Education did nothing until a citizen's group submitted a packet of information about East Orange's fiscal irregularities in April or May 1983. In 1983, when the Department again audited East Orange, it found no sign that the district had complied with the 1981 directives.

The 1983 audit was hindered because East Orange did not have a revenue ledger, copies of paid bills, a complete expense ledger, property or inventory records or minutes of Board meetings. In addition, the Board Secretary's report was incomplete and documents maintained by the Treasurer of School Moneys were not correctly prepared and had been completed by school district staff rather than the Treasurer. The records were in such poor condition that no one in the district could have known its fiscal status. Because of these difficulties, the audit ultimately required the assistance of the Department's entire audit bureau.

The State auditors found a $7.9 million deficit in East Orange. After litigation between the district and the City and State, the deficit estimate was

reduced to about $4.5 million. The audit report found that receipts for various projects were commingled; cash disbursements were not recorded; and bank accounts were not reconciled. In addition, the State-prescribed contractual order system was not followed; accounts were overspent; bids were missing; the daughter of the Board president was on the payroll; and the payroll account had not been reconciled.

The State auditors found that Board members' personal telephone bills were being paid by the district. The State auditors also found that personal credit cards issued to Board of Education members were improperly used. One card had been used by the Board president to pay $3,428.25 for a Ford Mustang and other credit cards had been used to pay for non-educational items from cosmetics to clothing and from travel to traffic tickets.

The East Orange Board Secretary resigned in December 1983 and the Board rquested State help. In response to the Board's request, the Department of Education appointed Edward Kent, the Chief of the Department's audit bureau, to serve as acting Board Secretary in February 1984. He served in that position through May 1984, when a full-time Board Secretary was employed by the Board.

In November 1984, the Commissioner of Education, with the approval of the State Board of Education, appointed Melindo Persi, the current Passaic County Superintendent, as fiscal monitor for East Orange. Mr. Persi arrived in November 1984 and stayed in the district to control East Orange's fiscal practices until April 1, 1986.

Beginning in late 1982 until approximately April 1986, the East Orange schools began to experience more difficulty than normal in receiving supplies, equipment and materials. Orders that were placed by principals sometimes got lost in Central Office. However, by the time lost orders were found, another order would have been placed, thus causing double orders to be filled for some schools. This problem also caused some teachers to run out of instructionally related materials before an order was finally filled. In 1984-85, when the fiscal monitor became concerned that the deficit was growing, he froze district staff hiring and the ordering of supplies, equipment and materials. The hiring freeze left many supervisory positions unfilled until 1986-87 and caused further delays in receiving supplies. One school year during this period, for example, home economics supplies were not received until November.

However, as a result of the freeze and the improvement of the district's fiscal management, the district generated a surplus in 1984-85 and eliminated the deficit.

The East Orange deficit as determined by the State auditors included three contracts in which the auditors claimed the Board of Education had assumed municipal responsibilities or otherwise benefitted the City of East Orange. One contract was for 1981 crossing guard services and one was $119,500 for dental and health care. The auditors could not find official Board approval for either contract. Under the third contract, the school district assumed responsibility for a $1,035,500 data processing operation even though approximately 97.5% of the computer operations were for the City. East Orange did not pay the Board for this work and the fees paid by other cities that had contracted for computer services were paid to

the City of East Orange. Apparently, a member of the municipal governing body who was also Secretary of the Board of Education had signed these three agreements.

The Board of Education disputed the Department's claim that the three contracts with the City were municipal obligations paid for by the school district. After litigation, the school district and the City settled and agreed to split the cost of the data processing, with the City paying $800,000 without interest over ten years. The City also agreed to assume responsibility for the other two contracts.

The Department of Education auditors also challenged the East Orange Board of Education's 1982 unauthorized purchase and renovation of property for Board headquarters at 715 Park Avenue and for asbestos removal at its former headquarters. The funds expended were taken from funding available for earlier approved capital improvement projects, with current expense funds used for the renovation. The Board of Education had proposed to the East Orange City Council a $997,500 bond to purchase the new Board headquarters and to fund the asbestos removal from the Board's prior offices at 490 William Street. When the City Council rejected the bond, the Board spent more than $2 million on these projects without authorization. After the audit, the Board and the City legitimized the property purchase and renovation. The Board of School Estimate approved the reassignment of previously approved capital project balances, and the Department's challenge to these expenditures was withdrawn. Legitimizing this expense did not exacerbate the deficit.

To cover the deficit, the Department of Education, the East Orange Board of Education, the fiscal monitor and the Essex County Superintendent of

Schools proposed a plan which the State Legislature passed to advance East Orange up to $5,000,000 in State aid, to be paid back over ten years in equal installments without interest by deductions from State aid. The district also agreed that any budget surplus in excess of .5% would be used to reduce the loan, but the Department has not enforced that restriction and, according to Assistant Commisioner Calabrese, will not until East Orange's cash flow position improves.

East Orange was billed some $360,000 for the operation of the office and expenses of the fiscal monitor during 1985 and 1986.

From time to time East Orange has also had register audits performed by State auditors to verify the district's justification for State aid. In 1981, the register audit found an overstatement of 823 pupils and consequently the State sought to recover a $929,298 State aid overpayment. In the 1981 audit, the district was given credit for understatements of six bilingual kindergarten students, 236 students receiving supplementary and speech instruction and 559.5 hours of home instruction. In 1982, the auditors found an overstatement of 430 pupils and the State aid exception taken was for $478,723. In that same year, the district understated 34 pupils receiving supplementary and speech instruction and 107.5 hours of home instruction. The major problem causing the overstatements in 1981 and 1982 involved adult education and compensatory education.

The Department maintains continuous surveillance of the district's fiscal condition through monthly fiscal reviews and quarterly audits by one of the Big Eight accounting firms.

Since the Department's fiscal intervention, the entire membership of the East Orange Board of Education has changed except for one person. Also, a new mayor has been elected.

Through the efforts of the Department of Education, a measure of fiscal stability has been restored in East Orange. Although no major fiscal problems were noted in East Orange's Interim Level II monitoring in 1986, there were problems in the details of fiscal reports and in the failure to submit some year-end fiscal statements.

The Board Secretary and the Board President during the "deficit years" were both indicted as a result of the audit. The Board of Education called the bond on the Board Secretary and as a result received reimbursement for some of the funds improperly expended.

The fiscal intervention in East Orange had very little impact on educational planning. It had no effect on the district's facilities needs. (See discussion about facilities in Part IV.)

East Orange has also had leadership instability. Since 1979, East Orange has had seven superintendents and six business administrators. The staff and school community began to view the superintendents as "temporary help."

In 1978, East Orange's Superintendent, Dr. Otha Porter, was suspended by the Board and the legal action which followed was not settled until 1982. Only after that settlement could the Board of Education conduct a nationwide search,

which resulted in their hiring Dr. Drew Guy in 1983. Interim acting superintendents were Bebe Sellers, who left after 18 months because of irreconcilable differences with the Board; Dr. Greta Shepard, who left after two years because the Board feared that a longer period of retention would grant her tenure; and Dr. Lucius Ware, who served for about one year and left after the Board completed its search and appointed Dr. Drew Guy. In 1985, two years after Dr. Guy's apointment, the Board terminated her contract because of performance related concerns. Dr. Josiah Haig, the current Superintendent, followed Dr. Guy, first as Acting Superintendent and then as Superintendent.

In 1979 a team of Columbia University consultants hired by the East Orange Board concluded that there was not a continuous evaluation of the learning process in East Orange and that the system did not learn from its mistakes. The school district acts by reacting to crises rather than planning for change. Recently, during East Orange's participation in Operation School Renewal, the Department of Education observed that the district has implemented a massive effort to upgrade its educational programs with a comprehensive internal monitoring system. The new Superintendent, Dr. Haig, has begun to evaluate school principals very rigorously. Also, East Orange has developed for 1986-87 explicit district goals and objectives.

Before 1980, East Orange had curriculum guides in every discipline, K through 12, although many of these curricula dated back to the 1960's or earlier. Work on new curriculum guides began between 1978-79 and 1981. Between 1981 and 1985-86, East Orange had revised, field-tested, refined and placed in teachers' hands updated curriculum guides in communication skills, math, science and social studies. In addition, a new curriculum had been created in political geography in

the secondary level. In foreign languages, only the 7th grade survey course was newly devised.

Dr. English, Professor of Education at Lehigh University and a defendant witness, criticized East Orange in 1986-87 for having no long-range curriculum plan. Nevertheless, the district's Level I and Level II monitoring reports acknowledged a seven-year cycle for curriculum development and evaluation, which Essex County Superintendent Scambio believed was "minimally acceptable." In the 1983-84 Level I monitoring, Indicator 1.1, goals and objectives, was rated acceptable by the Department. Dr. English's standards were different from the State's.

Dr. English also criticized East Orange's curriculum guides as promoting curriculum bloat by misstating required time units. Here, plaintiffs counter that Dr. English misread the documentation he was provided. Plaintiffs say Dr. English apparently read a memo as relating to the curriculum guides when actually the memo related to pre-existing skill arrays.

Dr. English also believed that the guides were assembled in a "slipshod" manner. Dr. English in 1986-87 reported that the East Orange Board had not adopted any recent objectives. In Interim Level II monitoring conducted by the Department of Education in September and October 1986, however, the district passed indicator 1.1, which requires Board approved objectives.

Furthermore, according to Dr. English, curriculum alignment had only been partially accomplished and context alignment, which assures a greater degree of learning transfer, had not been accomplished. Here there is some confusion as to whether Dr. English used the same criteria as the district to determine alignment. If

Dr. English used the HSPT, and the district aligned to the California Achievement Test, for example, Dr. English would find problems with the alignment.

Dr. Scambio, Essex County Superintendent, also criticized East Orange's curriculum development. She said that 1986-87 was the first year that the district embarked upon a rather active staff training program. Prior to that year, the central office developed curriculum in a vacuum, sent it out to the buildings inconsistently (some teachers received the documents while others did not) and there was very little monitoring of the curriculum's implementation. The Middle States 1983 evaluation of the East Orange high schools confirmed the need for a process to change curriculum which affords input from the entire school population. East Orange develops its curriculum without teacher input because the district belives it cannot afford to hire a sufficient number of teachers to work on curriculum development during the summer. Teachers are encouraged to work on Saturdays during the school year for a $25 per day stipend, but not enough teachers are willing to work for that sum. Accordingly, East Orange field tests all new curricula by asking teachers to try the guides before the district finalizes the curriculum.

In 1983 East Orange's high schools were evaluated by the Middle States Association of Colleges and Schools. The evaluators recommended, for example, that Clifford Scott High School fully utilize its established curriculum evaluation procedures; implement departmentalized midterms and final examinations; change its curriculum after receiving input from the entire school population; include goals and objectives in every course of study; distribute printed course descriptions to pupils; and look into the "exceptionally high drop-out rate in grades nine and ten." The evaluators recommended that East Orange High School,for

example, involve its staff in curricular, budgetary and personnel assignment matters; recruit and employ new staff on a time line comparable to other districts; establish a curriculum committee to evaluate and revise offerings on an ongoing basis; use its department chairs in scheduling and budget planning; and deal with tardy pupils and clarify its discipline policy. The plaintiffs point out that numerous recommendations made by the Middle States evaluators are "resource-related." (See, for example, Plaintiff's Replies at p. 29.)

East Orange High School in 1984, when Ms. Darden became Principal, had approximately 500 students arriving tardy at school each day. By her third year the number was under 100. Ms. Darden and Ms. Lamb, East Orange's Director of Curriculum, both agreed that absenteeism at the high school is a problem. Attendance at East Orange High School in the fall of 1986 was about 85%. The school has adopted various initiatives to address absenteeism, including a computerized notice to parents on the 4th, 9th, 13th and 18th day of the student's absence; a requirement that teachers write or call the student's home on the third consecutive day of an absence; that guidance counselors and administrators consult with students; and various catch words and slogans are used to change attitudes. Between 1984 and 1986, Rutgers University evaluators for Operation School Renewal noted that a strict attendance monitoring policy was in force and that attendance was checked after each class; if a student left school without permission during the school day, he or she was counted absent.

Many students in East Orange arrive at the secondary schools without having demonstrated on standardized tests the proficiencies needed to succeed in high school. Some of East Orange's basic skills teachers believe that 90% of their pupils were promoted due to a policy of social promotion. Ms. Lamb testified that

there is no social promotion policy and that standardized test scores, retention history, teacher recommendations and social-emotional factors were all examined by a promotion committee to determine whether to promote a student. In the 1983 California Achievement Test, 28% of the East Orange 9th graders that were tested were in the lowest quartile for reading; 31% for total language, and 22% for math. Almost 70% of the 9th graders tested were in the bottom two quartiles (50% and below) for reading, language and math. With these test scores it is easy to see why some teachers would believe that students were being promoted for social reasons. But the test data provides no proof of social promotion. There is no evidence that the same children from one class are scoring in the lowest quartile during the 9th, 10th and 11th grades. Additionally, the high mobility of East Orange's students is also a factor in the low test scores.

East Orange 9th grade HSPT passage rates were 49.1% for reading, 19.8% for math and 44% for writing. The Department of Education charges that these low scores were directly linked to East Orange's mismanagement since 1980 of its compensatory education program. Apparently, the Department believes that East Orange's BSI program was well-run from 1977-80, but there is no explanation of the program differences. Proof of East Orange's current mismanagement, according to the Department (Defendants' Proposed Finding #54 at p. 234), consisted of an attendance officer neglecting to bring in pupils who had congregated outside East Orange High School's entrances during school hours with their radios playing. No one dispersed these students though there were security persons located at the doors of the school. Also, students who were to be in the basic skills program were coming to school less than the general population. Absenteeism is a problem that the State believes would be cured with effective in-

servicing of attendance personnel. How this will counter a student's disaffection with teachers and program is not clear on the record.

As another reason for East Orange's low HSPT scores, the Department alleged that resource teachers, paid by State compensatory education aid and Chapter 1 funds exclusively, could not produce records of significant in-service monitorings of BSI teachers. Plan books were found not to have been checked and the Department's evaluator (who visited the district in preparation for this litigation) did not see one resource teacher in a classroom. Teachers' expectations, especially above the 5th grade, were found to be low. Two teachers at Nassau Elementary School noted that "the kids won't pass the test anyway." Contact between the BSI program and the BSI parents was found to be very poor, with no plans to include parents in the Individual Self Improvement Plan (ISIP) process. There was no evidence that parents were notified of their child's ISIP. In fact, the Principal of Clifford Scott High School was not aware of the Code requirement that ISIP's be signed by a parent. Also ISIP's were unevenly used throughout the BSI program. Furthermore, pupils in the 7th and 8th grades at the Vernon L. Davies School did not receive a grade for their BSI work. Other schools gave grades. There was no coordinated plan for grading BSI.

The Department of Education's evaluator also found other difficulties relative to the BSI program in East Orange dealing with discipline and poor classroom management, lack of coordination between the remedial and the developmental program, idle BSI personnel, BSI-funded teachers teaching non-BSI classes, little supervision over staff and lack of positive morale among BSI students,

who were made to feel left out of their school community due to their participation in the BSI program.

The Department's BSI evaluator visited six of 16 schools, including East Orange High School and Clifford Scott High School and Nassau, Kentopp, Stockton and Elmwood Elementary schools. Because of the observed difficulties, the Department's BSI evaluator opined that East Orange has "not properly utilized the resources they have, I would say at this time, no, they should not get more money."

The BSI evaluation was undertaken as part of the preparation by the defense for this litigation. School districts are not normally investigated in this manner for compliance with BSI procedures.

There have been some test score gains in East Orange. For example, in 1984-85, East Orange 8th graders raised their 1983-84 communication scores (5.0) to 9.0. Also in 1984-85, the 7th and 8th graders surpassed the previous year's computation gains. Also, when the district tracks students within quartiles, the students in the lowest quartiles are progressing at the same rate as students in the upper quartiles.

Rutgers Operation School Renewal evaluators also found in September 1986 that discipline had improved over prior years and that an increased number of suspensions "reflected more assertive leadership on the part of the principal." Toward the end of 1985-86, the evaluators noted, East Orange High School appeared "not to be experiencing severe problems with student conduct". (Exhibit D-292(a), section I, p. 30.)

A Department of Education evaluation (also instigated by this litigation) discovered "serious administrative mismanagement" in East Orange's bilingual program. (See Defendants' Proposed Finding #59 at p. 237.) Pupils were found not to have any science and social studies textbooks, not even in English. Materials and supplies were budgeted for pupils who were found to be lacking these materials and supplies. No bilingual curriculum was in place. However, East Orange has an ESL curriculum and the Department did not mandate any bilingual curriculum before 1985.

The Department's bilingual program evaluator also found that supervision was lacking, with little on-going student achievement analysis. The school principals, while verbally expressing support for the program, failed to insure that adequate supplies and instructional materials were provided its participants. There was little articulation of program goals and objectives. For example, Haitian pupils in grades 1-8 received remediation services based on Federal Title VII funds yet high school Hispanic pupils received no remediation. The Department's evaluator concluded that "the administration of the [East Orange bilingual] program is really not adequate to insure that the basic elements of a compliant program are in place...." (Defendants' Proposed Finding #61 at p. 239.)

A Department of Education evaluator (again part of trial preparation) concluded that East Orange's special education program was being mismanaged. During Interim Level II monitoring in 1986, monitors had discovered out-of-date Individual Education Programs (IEP's) and IEP's which were missing information and/or required signatures. A one-form-fits-all IEP format was found which did not allow for the identification of a program based on a student's individual needs. Mr.

Durante, Essex County Supervisor of Child Study, agreed however, that since Level II monitoring, the professional appearance of the district's IEP's has improved.

Contrary to Code requirements, the monitors also found a "unilateral procedure of program selection and placement by the director of pupil personnel services. . . to identify programs and services." (Defendants' Proposed Finding #62 at p. 240.) In 1986, the Interim Level II monitors had also discovered that annual IEP reviews were not conducted in a collaborative manner; re-evaluations of classified pupils were exceeding allowable timelines; and no records indicating that parents were notified in a timely manner of special education actions related to their children. The 1986 monitors also discovered that children were placed on wait-lists for Child Study Team interviews; no case manager system was being utilized in the classification process; pupils were sent to certain classes for the handicapped prior to having been determined eligible for such services; there were no required approvals from the County Superintendent in a number of areas; and part of the clerical special education staff were unreliable.

Similar problems with the special education program had been discovered in 1980 by the Columbia University team and in 1980-81 visits by the State Department of Education during monitoring under the previous monitoring system. Despite these difficulties, the Department of Education's 1984 Level I monitoring found East Orange's special education program acceptable. How this occurred is unexplained on the record; however, the State seems to argue that East Orange's difficulties were "on and off." Defendants' Proposed Finding #66 p. 242.) The defendants' special education evaluator who assessed the district in

preparation for this litigation concluded that East Orange's difficulties are organizational and administrative in nature and not resource oriented.

The State defendants admit that East Orange is a district with serious facility problems. (Defendants' Proposed Finding M156 at p. 210.)

East Orange for a number of years did not budget for maintenance. The majority of the facility problems noted by the Department of Education in Interim Level II monitoring of the district were due to poor maintenance. From September 1979 until March 1984, $9.9 million in capital improvements or repairs in East Orange were authorized and financed through bonds. The district used the funds for purposes other than those authorized and the authorized repairs were not done.

East Orange was formally monitored (Level I) by the State Department of Education in February of 1984 and was found deficient in four elements (Comprehensive Curriculum/Instruction, Facilities, Achievement in State Mandated Basic Skills and Financial) and 13 indicators. East Orange was directed to prepare and implement a Level II corrective action plan, however, the district was granted participation in the State's Urban Initiative Operation School Renewal. Consequently, the district's Level II plan was supposed to be incorporated as part of the OSR operational plan.

The Essex County Superintendent's Office monitored East Orange in September and October 1986 and an Interim Level II Report was issued in December. (The Department considers interim monitoring different from regular Level II monitoring because the OSR districts (Trenton and East Orange) were given

additional time and Level II has not been brought to closure.) The Interim Report found East Orange deficient in seven elements, with Student Attendance, Professional Staff and Mandated Programs being added to the four previously deficient elements. The district was also found deficient in six more indicators, bringing the total to 19. (See monitoring findings in Part IV.)

The Department of Education claims that political interference in East Orange is evident with respect to the contracts with the City which were part of the budget deficit as well as in the setting of the budget itself. East Orange, according to the Department, failed to include any money for capital outlay in its 1977-78 through 1986-87 budgets because of "political interference." (Defendants' Proposed Findings #25 at p. 217.) Actually, East Orange budgets for some capital improvements in the six or seven hundred series of its line item budget under operations or maintenance and for 20 or 30 years City officials have encouraged bonding of capital improvement projects in order to keep the current expense budget and local tax rates down. This has forced the district to make compromises in deciding what to fix. Bonded improvement projects approved by the City of East Orange must designate the specific use of funds, e.g. roof repairs. If, however, a problem develops with building boilers, for example, the district must return to the City Council for permission to redirect the funds.

Professor English said there had been political meddling in East Orange primarily through appointment pressure to hire certain types of people. There was no further specification provided and there was no corroborative proof on this assertion. There was clearly evidence of some fiscal corruption that had been a problem in East Orange. Through the Department of Education's fiscal intervention, this corruption appears to have been eliminated. There is no other

evidence of political intrusion in the East Orange budget setting procedures. The evidence of "interference" appears to be another example of the political accommodations and fiscal pressures caused by the local school district sharing a property poor tax base with a municipality. (See findings on competition over property poor tax bases above in this Part.)

The Essex County Superintendent believes that East Orange is now changing for the better in that there is commitment on behalf of the new Board of Education and an honest hardworking Superintendent whose "intentions are the kids." The County Superintendent applauded the plan for the comprehensive evaluation of principals that had been instituted by the new Superintendent, that East Orange has now developed a plan for improving its facilities and that East Orange has developed explicit goals and objectives. The Board of Education is now getting the kind of information it needs to make informed decisions about budgets and program implementation. However, the district, according to the County Superintendent, still appears to be acting responsively rather than planning for change. Accordingly, the Superintendent believes that infusing substantial moneys into East Orange would benefit the children, but she was not sure that the district could use the money efficiently and effectively.

Based on the evidence submitted I **FIND** that East Orange in 1987 was suffering from years of impropriety, administrative instability and political accommodations or fiscal pressures caused by sharing a property poor tax base with the City of East Orange.

Much evidence was submitted concerning East Orange's abysmal fiscal management. This evidence explained that much of East Orange's fiscal controls

were in total disarray for a number of years during the implementation of Chapter 212. On the basis of this evidence, I **FIND** that monies were diverted from the district's educational programs because of the fiscal excesses and illegal activities of some officials in the district. There were no proofs submitted detailing the total amounts of monies that East Orange's mismanagement and illegalities were diverting from its educational programs, however, there is no doubt but that some educational programs and facility needs could have used these resources.

I also **FIND** that East Orange's management instability and fiscal improprieties deflected much needed energy from the delivery of educational services. East Orange has in the past reacted to crises and has not efficiently planned for change. I **FIND** that East Orange has not fully implemented the planning model that is required by Chapter 212. (See discussion on this planning model in Part IV.)

East Orange did, however, cooperate with the fiscal monitor who was provided by the Department of Education and I **FIND** that the East Orange school district has in recent years begun to improve its fiscal management.

I also **FIND** that East Orange's curriculum guides could be improved and further developed.

The record as a whole concerning program deficiencies in compensatory education, special education and bilingual education, especially the official monitoring results and those deficiencies that amount to violations of regulations, enables me to **FIND** that these programs could also be improved and thereby assist East Orange in more effectively delivering its educational services. However, I

CANNOT FIND that these inefficiencies explain the program and expenditure disparities proved by plaintiffs.

I **FIND** that much of the evidence of educational program mismangement generated by the additional evaluations beyond regular monitoring is inconclusive. Except for some Code violations, most of the evidence appeared to be a Department witness explaining how he or she would have preferred to see the program managed. I **CANNOT CONCLUDE** that all of the observations of the Department witnesses made during the additional evaluations beyond regular monitoring establish East Orange mismanagement.

Much of the program quality evidence generated by the defense and relating to East Orange as well as the other plaintiffs' districts was subjective. There were no specific standards supplied which defendants claimed were violated. Without some indication that the district had advance notice of what was required, I **CANNOT FIND** that all of the alleged program failures subjectively observed by Department witnesses indicate deviations from acceptable conduct, or mismanagement.

For each program disparity they alleged, plaintiffs presented some national or State prepared guide or standard for quality programs. For example, in science, plaintiffs used Exhibit P-176, Educational Facilities Series, *Guide to Planning for Science*, prepared by the Department of Education, dated 1970 and revised in 1979. The defense used effective schools research as the basis for some of their special evaluations (See findings on effective schools in Part IV), but the lack of detailed standards allowed for much subjectivity. One of the Department's program specialists, for example, believed that East Orange could improve its basic

skills program by "kicking the basic skills program in line." This same individual commented that Irvington High School was disorderly and noisy when the students changed classes. He noted that only some teachers were standing in the hallway when classes passed and suggested that if all teachers stood in the hall there would be less disruption. He made no observation on overcrowding. In Jersey City's additional evaluations, a defense witness observed that basic skills' student engagement at the elementary level was "good" but at Lincoln High School it was "warm to lukewarm." Instruction at the elementary level according to this witness was" pretty good." This witness also criticized a teacher for telling his English class to take out their books and do their assignment so the teacher could speak with the witness, who felt the teacher should have done more teaching before talking with the witness. This is not empirical evidence of mismanagement.

Also, no districts other than plaintiffs' were subjected to this additional scrutiny and therefore I do not know whether programs run by other districts are as inefficient or even less efficient based on the standards applied by the defense. There is evidence from which I could conclude that some property rich districts are not as efficient as one would hope either.

Additionally, the evidence discloses some conflict between the special program reviews and monitoring, raising questions about inconsistent standards. For example, in compensatory education, East Orange had placed two teachers in a class and the district believed split funding (between the compensatory education and regular programs) would be appropriate. During monitoring, the district was told by the Department's Manager of Compensatory Education that they could not split fund. In the special program evaluations undertaken by the defense, the evaluator recommended split funding. As another example, East Orange had been

approved by the County Superintendent's Office to teach LEP kindergarteners for 15 minutes bilingual and 30 minutes ESL each day. The special review indicated this was inappropriate.

On this record, I also **FIND** that East Orange, in the last few years, has made a greater commitment toward educational improvement. The participation in Operation School Renewal and the hard-working, dedicated current Superintendent hold promise for further improvements. Under the current administration, for example, each Wednesday a central office team visits a school and, before the next week ends, distributes its report and recommendations to the building principal. Through Operation School Renewal, according to the defendants, the district has already been successful in centralizing its computer records.

I therefore **FIND** that in recent years East Orange appears to be moving toward making significant fiscal, managerial and educational improvements.

Management of Jersey City's School District

Jersey City's school district has had to struggle against a great deal of political intrusion.

The political interference has varied from time to time depending upon who was mayor of Jersey City. At times, political interference was pronounced and extremely disruptive of the district's educational mission.

All instructional and non-instructional personnel are hired by the Assistant Superintendent for Personnel and it is via this department that patronage is doled out. City Hall benefits from patronage and contracts for vendors who fix boilers, doors, windows, etc.

During Dr. Ross' tenure as Superintendent of Jersey City, personnel appointments were discussed by the district's Director of Personnel and a representative from the Mayor's Office. Once, during the early 1980's, the Board of Education - which in Jersey City, a Type I district, is appointed by the mayor - attempted to hire two assistant superintendents over Dr. Ross' objection. Dr. Ross was forced to litigate the appointments, which were declared null and void by the Commissioner of Education, adopting an ALJ decision. *Ross v. Bd. of Ed. of the City of Jersey City*, 1981 *S.L.D.* 307.

In 1981 the Jersey City Board of Education abolished the positions of seven assistant superintendents as well as some other school district personnel. This tragic and inexcusable action was asserted to be for economies but was actually directly related to the refusal by the assistant superintendents to support the election campaign of the victorious Mayor. This blatant political action severely hampered Dr. Ross' management of the school district and was detrimental to the interests of Jersey City's school children.

After these removals, Dr. Ross and Franklin Williams, the current Jersey City Superintendent, had to divide the assistant superintendents' functions between themselves. Dr. Ross supervised the elementary and high schools and Mr. Williams handled the Bureau of Pupil Personnel Services, curriculum, the basic skills program

and bilingual programs. Some principals were brought into the central office to do some of the work of the fired assistant superintendents, but these principals had no authority over other school principals. During this period, Dr. Ross had some 50 individuals reporting directly to him.

The Hudson County Superintendent was informed by Dr. Ross of the politically motivated dismissals. Deputy Superintendent Williams twice appealed to the County Superintendent for help following the dismissals. The County Superintendent admitted that these dismissals inhibited the district's ability to provide a thorough and efficient education but claimed he did not have the authority to force the Board to rehire Dr. Ross' assistants. Dr. Ross also contacted Deputy Commissioner Ruh, who advised him to report any violation of law of which he might be aware.

After the State representatives advised Dr. Ross that they could not help, he attempted to run the district without the seven assistant superintendents for four school years. Assistant superintendents were hired for the 1985-86 school year.

Politics in Jersey City also affected the work schedules of school district employees who were asked to sell tickets for different political affairs and to otherwise support political functions during the work day.

The Jersey City Education Association (JCEA) also plays a very political role, with its president often supporting a mayoral candidate in elections.

Political considerations entered into the hiring and firing of school district staff, including child study teams, supervisors and occasionally classroom

teachers and aides who became involved in political campaigns. Once, politically innocent persons were removed from their jobs in order to reach a person with more seniority whom the political forces wanted to remove. The Comprehensive Basic Skills Review (See findings in Part IV) of Dickinson High School noted as of October 1980 that "educational, budgetary and personnel decisions are based primarily on political considerations and are made with little or no input from the principal." (Exhibit P-149.)

Because persons with political pull were often employed, it was difficult for supervisors to manage. In order to reprimand or withhold an increment for an employee's inefficiency, for example, the supervisor had to be conscious of and perhaps even coordinate with the inefficient employee's political sponsor.

In 1981 a Hudson County grand jury condemned the patronage and political interference in the Jersey City school district but political influence continued nevertheless.

Dr. Ross hired the firm of Cresap, McCormick and Paget to do a management study of the Jersey City school system. This report cost approximately $80,000 and found that the Board of Education placed "excessive reliance on political influence in determining which candidate is hired or promoted." (Exhibit D-258 at p. II-5.) The report criticized the Board for being too actively involved in the personnel process. The report explained that school board members often recommended candidates for teaching, custodial, food services, business and other positions with no written record of these recommendations. The Superintendent and First Assistant Superintendent, charged Cresap,McCormick, often deferred to the Board and recommended candidates for hiring that were in fact recommended

by a Board member in the first place. The report suggested that the school board manage the school district by working through the Superintendent rather than by administering the system itself. The Jersey City school board has not complied with this report. The district never formally accepted the report and the record does not contain any evidence of the district formally addressing any of the suggestions. It was not until after Level II monitoring by the State that the district finally adopted a personnel policy procedure.

After Dr. Ross left Jersey City's superintendency in 1984, Dr. Henry Przystup was appointed Superintendent. He was selected by the Board President without any investigation by a hiring committee or other Board investigation. He was selected because one of the other potential superintendents was unacceptable to the Mayor for political reasons. Dr. Przystup acknowledged that for him to get an employment contract, the Mayor would have to approve.

Dr. Przystup released the Cresap, McCormick report to the press in an effort to focus attention upon the district's problems.

Also resulting from the Board's influence in personnel decisions, Cresap, McCormick found that the qualifications of some incumbent employees did not meet the stated requirements for their positions. The central office was staffed with many individuals who had little prior experience in the function they were expected to perform.

Cresap, McCormick revealed that hundreds of personnel-related grievances were filed against the Board of Education. These grievances in 1982-83 resulted in judgments against the school district of $1,921,618, including $250,000

in workers' compensation awards. In 1986-87, the Jersey City Board of Education budgeted approximately $4 million to settle labor negotiation disputes. In 1983-84, the First Assistant Superintendent, Mr. Jencarelli, who headed the Personnel Department, spent 40-60 days in court.

When supervisors had to deal with a poorly performing employee, the employee was often transferred to another school. Cresap, McCormick indicated that principals were reluctant to give unsatisfactory ratings. They feared being dragged into court and doubted that their recommendations would actually result in Board terminations. This transfer-disciplinary system avoids the formal processes and exports problems around the system without addressing the cause of the problems. Incompetent teachers were moved from school to school. No tenured teacher has ever been terminated in Jersey City. Sometimes political favoritism or retribution would be implemented in this way. A teacher who was politically favored, for example, would be moved to a better school or more pleasant environment. Conversely, the politically disfavored would be moved to less comfortable schools or more difficult student populations.

Four out of the five secondary schools in Jersey City present challenges for urban educators. Attendance levels in these schools, except for Academic High School, have been below 85%. Snyder High School's attendance rate dropped from 80.13% in 1983-84 to 78.6% in 1985-86. Lincoln High School's attendance rate, as another example, also dropped, from 84.4% in 1983-84 to 78.9% in 1985-86. Lincoln High School had one principal and one vice-principal for 1,500 students, many of whom were disaffected. This caused the staff to be virtually overwhelmed by parental contacts and student attendance and discipline problems. According to

one of plaintiffs' experts, Lincoln High School was a "classic case of a school that did not work."

Aside from Academic High School, in 1984-85 none of the high schools was able to attain a 75% passing score on both the reading and math components of the MBS. Only Dickinson High had a passage rate of over 75% and that was only in math. In 1985-86, none of the high schools, again except Academic, reached the required 75% minimum HSPT score for certification. Passage rates ranged from 13.7% in math at Lincoln to a high of 40.9% in reading at Dickinson. Academic High met the MBS and HSPT standards by well over the required 75% passing rate.

Jersey City's secondary schools have scheduling problems at the beginning of the school year. Dr. Przystup testified that in 1984, with approximately 2,000 students in each of four high schools, the scheduling was done by hand. Often, many days went by before students were fully scheduled and able to attend the proper classes. While schedules were being completed, the students sat in auditoriums. During Level II monitoring in Jersey City, it was noticed that students had incomplete schedules. In some cases the students were assigned as many as seven periods of study hall. (Exhibit D-285, Indicator 3.2.) In some study halls, according to defense testimony, the monitors found that nothing educational was going on and they characterized what they observed as "chaos." The teachers were in the corner of the room while the students were doing whatever they wanted to do. Because there is only one vice principal working during the summer, secondary schools have always had scheduling problems in the beginning of the year.

Between 1976 and 1983, one principal in each high school was in charge of ordering all supplies. Subject matter department chairpersons were not allowed to order materials and supplies. Supply shortages were frequently observed. Additionally, with the exception of the D.C. Heath math and reading programs, textbooks were ordered by principals without coordination with other schools or with the district's central office.

Jersey City's subject matter department chairpersons do not have supervisory or evaluation responsibilities over other teachers. After this practice was criticized in the 1982 monitoring of Jersey City, Dr. Przystup testified that he could have established such responsibilities for just under $40,000. However, the Jersey City Education Association opposed the plan and it was not implemented. As of 1986-87, Jersey City does not have chairpersons with supervisory responsibilities. Therefore, principals, vice principals and some named supervisors are the only individuals who can evaluate instructional staff. With the numbers of staff who must be evaluated, it is difficult to evaluate the teachers properly.

For example, from January 1982 to July 1983, Joan Kegelman served as K-12 Developmental Math Supervisor and 9-12 Remedial Math Supervisor. Ms.Kegelman was in charge of 35 schools, with approximately 900 elementary teachers and 45 high school math teachers. She was supposed to evaluate and monitor the delivery of the math curriculum in the elementary and high schools and also to observe and evaluate teachers. She testified that she was able to evaluate all high school teachers during the year but could only do limited evaluations in the elementary schools, concentrating on the upper grades. She also was supposed to conduct in-service for math teachers and develop curriculum. Ms. Kegelman felt

completely overwhelmed and believed that additional supervisors were clearly needed. Allowing the math chairpersons to evaluate teachers would have helped Ms. Kegelman perform her functions.

Jersey City has a complicated line-staff supervisory arrangement. Line supervisors work "through the principals" not through the central office. Staff supervisors do not work through the schools. Thus, for example, Ms. Kegelman is a "line" supervisor, but Louis Lanzillo as head of the Department of Personnel, is a "staff" supervisor. Sometimes, this organization encourages fragmentation of effort. For example, if a principal is not properly responding to the materials developed by the assistant superintendent for curriculum and instruction, a "staff" supervisor, the principal can only be addressed via the "line" assistant superintendent in charge of elementary or secondary schools since the "staff" supervisor has no authority over the principals.

A teachers' contract permits principals to review tenured teachers' lesson plans but only on request while visiting a classroom. Therefore, if this contractual provision is honored, principals could not simply ask teachers to provide them with copies of lesson plans unless they are in the classroom. There was evidence that at least one elementary principal was able, in spite of this provision, to collect and review teachers' lesson plans.

Additionally, Cresap, McCormick found that there was no overall, systematic program of evaluation for non-instructional staff and that none of these staff had received formal performance reviews during their tenure with the district. When Dr. Prszystup was principal of School #5 he evaluated a teacher as being unsatisfactory 13 times and at the time he testified in this matter the teacher was

still teaching and was tenured. The nontenured staff was evaluated all at once as a crisis activity.

Jersey City's size makes it a difficult district to administer. Implementation of policy becomes difficult. In one instance, for example, the 1984 State monitoring discovered that a secretary had disapproved one of the child study team's reports because a form was missing. The form which caused the disapproval was found to have been obsolete for three years. In another instance, according to the 1984 monitoring, the district had completed implementing the D.C. Heath Math and Reading programs but some newer teachers were found by the State monitors to be unfamiliar with the program.

According to Dr. Przystup, who became interim Superintendent in 1984, the Board of Education had not done any curriculum improvement work for 10-15 years. Dr. Przystup found the curriculum for the entire district in a storeroom on the third floor of the Board headquarters. He said it wasn't catalogued properly, and described it as "terrible." Some of the curricula were 20 years old.

Between 1976 and 1983, the Board of Education had curriculum development committees but very little curriculum seemed to be distributed to the elementary schools. Each elementary school in the district devised its own curriculum and implemented it as its principal desired. As principal of School #5 in Jersey City during this period, for example, Dr. Przystup received little or no curriculum support from the central office. In fact, according to Dr. Przystup, he had little if any contact with the central office. Consequently, not every subject and every grade level had a curriculum guide. There was also a lack of curriculum coordination between the elementary schools and the high schools. Without much

written curriculum, the course structure was found in textbooks. Educators agree that a curriculum based on textbooks is not ideal but it is better than nothing. The teachers were provided teachers' editions of the textbooks they were using.

Before 1984-85, very little curriculum improvement was occurring in Jersey City. There was no effort to bring order to the district's curriculum practices and there was little evidence of a centrally coordinated curriculum. In 1985, Jersey City studied the status of the district's curriculum to prioritize and develop a long range revision plan. Jersey City created committees to update and write new curricula from September 1984 to January 1985. During the summer of 1985, 13 secondary courses underwent curriculum revision. Additionally, all K-3 curricula were revised. All the changes incorporated HSPT skills and those tested on the Metropolitan Achievement Test. The curricula were approved by the Board of Education. By August 1986, Jersey City had curriculum guides for every subject in every grade, except for pilot courses in the secondary schools which had course outlines. The revision of the entire curriculum in Jersey City will take a minimum of five years. Some of the curricula currrently being used must still be revised and updated.

Curriculum revision costs money. Teachers are paid $12 per hour in Jersey City to help develop curriculum. Before September, 1986, teachers received $9 per hour to develop curriculum.

The new curriculum requires secondary schools to give mid-term and final examinations. Finals for Grade 9 were made uniform across the district starting in 1985-86 and were to become uniform for Grade 10 the following year.

In Level I monitoring, the State found that teachers were using curriculum documents which had been "at some point in time" approved by the Board; teachers were working from what curriculum existed. Even though the Board had not approved it for that particular year, teachers were implementing the curriculum based on what was available to them. However, at Level II monitoring, the State found no evidence that all the teachers had curricula that were adopted by the Board. Some teachers were found by the State monitors to be using guides prepared by themselves and therefore the State criticized the district for inconsistent curriculum implementation.

According to the defendants' curriculum evaluator, Dr. English, attempts to align Jersey City's curriculum to the MBS and the HSPT did not occur until 1985, the year Ms. Viciconti was appointed Assistant Superintendent for Curriculum. Dr. English discovered no earlier efforts in his review of Jersey City's curriculum management.

In 1982 monitoring, it was disclosed that high school proficiencies were not disseminated to students and that the district had not printed and disseminated its high school graduation requirements. Proficiencies are written explanations of what the students in various classes are supposed to learn. In 1983, proficiencies had still not been distributed. Dr. Ross, the Superintendent at that time, explained that there was simply not enough staff to write these proficiencies according to the complex models the State provided. By August 1986 the district had completed these proficiencies for high school students.

Dr. Przystup charged in a 1984 report that Jersey City was operating parallel and independent instructional programs for regular, special, bilingual, basic skills and other student classifications. Most instructional and support programs in the district had not been evaluated for effectiveness in several years; some had never been evaluated. This caused the district to be unable to monitor and validate its programs or to accurately measure overall performance. As of 1983, the district had not developed a district-wide program improvement schedule.

The Hudson County Superintendent testified that on October 13, 1983 he denied approval for Jersey City's 1983-84 objectives and plans of action. (Exhibit D-44.) He objected to the district listing in its plans the following constraints which might prevent the district from reaching some of its objectives: schools were too conservative, too much time was required for staff training, the staff was reluctant to change and there would be a problem obtaining total staff participation. These according to Superintendent Acoccella are improper constraints because the district must direct its resources to achieving the objectives. However, I FIND that documents confirm what cross-examination revealed: that the County Superintendent must have in October 1983 approved these objectives with the listed constraints. On redirect, the County Superintendent explained that he approved the objectives only, not the constraints.

The Bureau of Pupil Personnel Services (BPPS) from 1980 to 1985 had five different individuals in charge of operations. The titles held by each person varied according to the political climate of the Board of Education. Part of this instability was caused by the political removal of the seven assistant superintendents in 1981.

In 1985, a Rutgers University study found ambiguity in the BPPS organization and a lack of long-range planning and direction. The study found role conflicts in authority, absence of clear objectives and a general lack of direction at the BPPS.

BPPS deficiencies were also noted by the State monitors. In 1984, the monitors discovered that almost half of the Individualized Education Plans (IEP's) were defective. In support of this assertion the State claims that none of the IEP's in School #32 addressed graduation requirements. However, School #32 is a middle school and the State regulations mandate that IEP graduation requirements be included only for high school students. *N.J.A.C.* 6:28-4.4(b) The monitors also found that in the 220 classes visited, few teachers had a written curriculum.

A comparison of the 1984 Level I and 1986 Level II monitoring results shows very few improvements in special education. In 1984 and 1986 there were problems with the assignment of other duties to child study team members; frequent reassignment of team personnel; interference with team autonomy (child study team members revealed that some team members had been ordered not to provide certain kinds of services); problems with the acceptance of internal reports; problems with the flow of information to child study teams; and administrators and principals ignoring the recommendations of child study teams.

The defendants in their Proposed Findings at p. 372 assert that as of December 1, 1985, Jersey City's school district had 15 elementary resource rooms serving 193 pupils and five secondary rooms serving 91 pupils. (A resource room teacher is permitted to teach no more than five pupils at a time with a maximum of

20 pupils per day.) The average enrollment per resource room was 12.86 elementary pupils per day and 18.2 secondary pupils per day. On the basis of a maximum capacity of 20 pupils per resource room per day, the defendants claim that Jersey City had a 36% vacancy rate in elementary resource rooms and 9% vacancy for secondary resource rooms. For the 1986-87 school year, the vacancy rates increased at the elementary level to 42% (220 out of a 380 capacity) and at the secondary level to 23% (123 out of a 160 capacity). Defendants explain that Jersey City could receive $46,032 per resource room if the district had the 20 student maximum for each teacher and that this sum would cover the cost of operating the resource room. The defendants then point out that for the 1986-87 school year, instead of maximimizing its room utilization, the district increased its resource rooms to 16 elementary and eight secondary.

The defendants intended this assertion about the deployment of resource rooms to illustrate Jersey City mismanagement, however, as in other similar arguments, the State seems to treat the students as fungible widgets transferable at will when the district is operating efficiently. I disagree with this criticism. First, the number of students needing resource room instruction is dependent on student need. It may be appropriate for a teacher to see only one student at a time. Certainly the State does not intend Jersey City to place students who do not need resource room help in these rooms to fill the seats. Additionally, gross student numbers in a district like Jersey City with numerous schools are extremely misleading. Students may not easily be moved from school to school without student, parental, faculty and fiscal implications. These factors cannot be disregarded without unfairly criticizing the district.

The defendants further assert that the "utilization by the Jersey City School District of aides in special education classes is marked by fiscal inefficiency." (Defendants' Proposed Findings at p. 374.) As of December 1, 1985, Jersey City employed 196 special education teachers and 157 aides. The aides, who are paid an average of approximately $12,000, cost the district $1,889,000 per year. The State argues that by dividing the number of special education pupils in the district by the number of teachers, and allowing for small class sizes of eight, 10 and 12 pupils as required by law, the district can do away with all teacher's aides in special education at a financial savings to the Board. Instead of paying $1,884,000 yearly, the Board could engage an additional 47 special education teachers at a cost of $947,000 and save $944,000 .

The plaintiffs counter the State's argument by explaining that replacing aides with special education teachers requires additional classrooms which the district does not have. Thus, the plaintiffs state that Jersey City would have to rent space and may also incur student transportation expenses. Again, the defendants' argument looks good on paper, but may not be feasible in reality. Therefore, I **FIND** that mismanagement cannot be proved in this manner.

Defendants charge that the special education program in Jersey City has, for many years, been poorly regarded by the Board and has been relegated to inferior treatment by administrators, principals and teachers. This hostility, however, is not unique to Jersey City and exists in both urban and suburban districts. The hostility results from the amount of space and money devoted to these students.

In 1986 the district budgeted $6,049,900 for bilingual/English as a Second Language (ESL) education. Jersey City provides bilingual education in 21 elementary schools and two high schools. The district has approximately 105 bilingual teachers and 71 ESL teachers. As of October 1986, the district identified more than 2,500 limited English proficient (LEP) pupils spanning 23 languages. Hispanic pupils comprise 70% of the total bilingual population. However, the district provides programs in Arabic, Gujarati, Korean, Polish, Tagalog and Vietnamese. Jersey City has one of the largest and most diverse limited English proficient student populations in the State. All Spanish-speaking pupils are served in self contained classrooms while the other language groups were served in a pull-out model for a total of 90 minutes daily.

The Jersey City bilingual/ESL program was monitored in 1977, 1982, 1983 and 1984. By 1984, fewer deficiencies were noted in the Jersey City program when compared with earlier monitoring. By 1983, the Spanish program was in full compliance with State requirements.

A special review of the bilingual/ESL program by Department staff in preparation for this litigation found that Jersey City provides a very good bilingual education program to its Spanish-speaking students and when it provides service to non-Hispanic speaking pupils it provides an adequate program. The evaluators found the Spanish program to be well administered. The program has clear goals, exemplary materials, a high quality curriculm, in-service training and supervision of the teachers and a teaching staff familiar with the latest teaching techniques. The evaluators, however, did not enumerate the specific standards they used which allowed them to conclude that the program was well administered. They cited

"both funding and management reasons" for the shortcomings that were noted. (Exhibit D- 64 at p. 157.)

The 1984 Level I findings had concluded that the bilingual program was "unacceptable" because not all LEP pupils (predominately non-Hispanic speaking and special education students) were being served and few remedial services were provided to this population. When the district developed a remedial plan to provide a magnet school for non-Hispanic bilingual students, some parents refused to transport their children to the magnet school, making it impossible for the district to provide bilingual/ESL services to some 323 non-Hispanic pupils. As for bilingual special education services, no remedial plan had been developed by the district as of the 1986 Department evaluation.

The Jersey City Basic Skills Instruction (BSI) program in 1985-86 had 13,947 pupils, 1,126 professionals, 227 aides, 11 liaison officers and seven secretaries.

Jersey City serves its K-12 student population with BSI in math and reading. These services include an extended day kindergarten that is dedicated to basic skill remediation, as well as in-class kindergarten remediation. In its elementary schools, Jersey City provides remediation through both pull-out and in-class models. At the secondary level, Jersey City adds computer labs to the pull-out model. The district also has a Parent Center which runs math, reading and computer programs for parents and students. Summer school opportunities are provided those who are deficient in the basic skills.

The performance of BSI grades 3, 6 and 9 in 1984-85 revealed that approximately 25% of the participating pupils scored below State standards in reading and computational skills. Passage rates showed that only a few of the 28 elementary schools were able to reach the State's 3rd and 6th grade minimum levels of proficiency standards (which are related to the HSPT).

The defendants assert various problems with the BSI program. At the Level II monitoring,for example, it was discovered that there was insufficient supervisory staff. The monitors also could not validate the BSI needs assessment for the high schools because records were missing and obvious mathematical errors had been made. Additionally, Level I monitoring found incomplete and improperly executed Individual Student Improvement Plans (ISIP's), the equivalent of IEP's to a BSI pupil. Also, some BSI pupils wasted the first three months of 1983 because of scheduling problems. The State also found that the availability of curriculum guides in the hands of BSI teachers was sporadic. Little alignment between the developmental curriculum and BSI was noted at the secondary level. The defendants believe that to improve the BSI program what is needed is more initiative from the central office and a better organized BSI program. Defendants believe that better central administration is the answer. (Defendants' Proposed Findings at p. 397.)

Cresap, McCormick found in 1983-84 that the district's planning was not coordinated with its budgetary process. There was no method used to determine the relationship between a program's price and its benefits to the district. Budget projections and estimates in Jersey City were made only for one year at a time. A "fixed rate of inflation, contracted annual salary and benefit increments, and

government mandates were applied to base year figures" to set the Jersey City budget. Cresap, McCormick found, for example, that the 1983-84 budget was incrementally increased by 4% over the 1982-83 budget.

Cresap, McCormick found that principals were not active participants in budget development. They merely received allocations and had to spend within the allocated amounts. In 1986-87, however, principals were incorporated into the budget-making process and asked to set forth their schools' budgetary needs.

The budget for 1985-86 was established by Dr. Przystup at $144 million. However, according to Dr. Przystup and the Hudson County Superintendent, the Jersey City Board of Education reduced this budget to $140 million but did not make corresponding reductions in personnel or other line items to match the total budgetary reduction. According to the County Superintendent, he reviewed the $140 million budget for 1985-86 and approved its accuracy.

Shortly after his appointment as Jersey City Superintendent in August 1985, Franklin Williams was visited by the County Superintendent, who informed him that he believed the district was overspending its budget in some of its line items. By October of 1985, the district had calculated its deficit at $4 million. Overspending was occurring because of large increases in transportation, insurance and social security costs, a problem with the food program, the need to hire 40 additional special education teachers and 20 additional aides and higher than budgeted out-of-district tuition for special education students.

Superintendent Williams and other district representatives met with State officials, including Assistant Commissioner Calabrese and the Hudson County

Superintendent, to discuss how to resolve the budget crisis. After the Department of Education informed the district that no additional funds would be provided, the district sought legislation to permit it to borrow from its pension funds. Although the bill passed the Assembly, it died in the Senate. Jersey City then developed a plan to cut expenditures to meet the deficit. Assistant Commissioner Calabrese told the district that the State wanted assurances that any budget cuts would still allow the district to provide a thorough and efficient education. Failure by Jersey City to make these assurances would prompt the Department to certify a tax increase. The district thus passed a resolution which met the State's requirements.

The district then implemented the necessary budget cuts. Because these cuts took place in January 1986, the actual reduction exceeded the $4 million deficit, since only half of the year's budget remained available. Cuts were made in every part of the budget from instruction and non-instructional staff, to equipment, supplies and repairs. Additionally, the district froze all non-salary accounts. The staff reductions included art, music, physical education and computer teachers, librarians, administrators and child study teams. The cuts which were made were restored in the 1986-87 budget.

The County Superintendent testified that he became aware of the deficit only after the district's budget officer informally notified him in June 1985. The County Superintendent testified that he could not recall having seen two *Jersey Journal* newspaper articles preceding that date which raised questions about the accuracy of the district's budget. The first article appeared on March 11, 1985, five days after the County Superintendent had approved the district's budget. This article, enititled "McCann's Fine Hand Seen in Creative School Budget," charged that Jersey City used mirrors and creative accounting to develop the budget. The

second article, headlined "Jersey City School Board Appears to be Going Broke," appeared in May 1985, a month before the County Superintendent contacted the district. The County Superintendent admitted that his office had an informal newspaper clipping policy in which his staff brought to his attention articles concerning the County school districts, but the County Superintendent testified that he did not recall seeing the newspaper articles with which he was confronted during cross-examination. I carefully listened to all this testimony and reviewed the documentary evidence. Based on this review, I **FIND** that the County Superintendent must have had reason to question his initial accuracy determination at least one month before he contacted the district.

According to defendants, this budget deficit scenario is deemed "[r]eflective of the serious budgetary mismanagement of the Jersey City School District. . . ." (Defendants' Proposed Finding #61 at p. 366.) Firstly, from the newspaper accounts after the incident and the testimony, I **FIND** that since this was an election year, the Board and the Mayor were interested in both keeping the taxes down and not having to reduce the teaching force. This is why the Board cut the budget's total and then did not make the corresponding line item reductions. Presumably they planned to face the problem after the election unless a fiscal miracle occurred. Thus, this episode does illustrate the extent of political intrusion present in Jersey City. Secondly, on the basis of this record, I question how the County Superintendent approved this budget for accuracy and why State action was delayed.

After the $4 million deficit episode, a full fiscal compliance audit was initiated in 1986 by the Department of Education. The auditors found late approval of Board minutes; a lack of internal controls on a check signing signature plate;

uncorrelated reports from the Board Secretary and the Treasurer of School Moneys; overspent bids; unauthorized transfer of funds allocated to capital outlay; non-maintenance of fiscal property records; improper maintenance of checking accounts; inadequate certification of payroll records; inadequate recordkeeping and inappropriate direct ordering of materials by school principals.

The 1986 audit cited Jersey City for inadequate maintenance of student activity accounts by school principals. This defect had been identified by the district auditor and reported to the Department of Education for several years. Each year the Board assured the Department that the district would take corrective action.

In 1986, the Department of Education also audited Jersey City's transportation aid records. Here the State took a $567,481 exception because of improper contracts, duplication of names on contracts and the use of vehicles for shuttle trips for visual and performing arts students.

Cresap, McCormick auditors found that "the purchasing process of the Jersey City public schools is characterized by poor managerial controls, overspending, and long delays in the acquisition of goods and services." (Exhibit D-258 at p. IV-10.) Purchases were sometimes awarded without explanation to vendors who had not submitted the lowest bids. Disbursements were made without proper documentation, according to Cresap, McCormick. Furthermore, there was no consistent record of which employees handled which purchase orders, thereby precluding the assignment of accountability. In addition, Cresap, McCormick found that the Board of Education did not have adequate central purchasing and storage and had not established an effective inventory accounting control system. For example, no information was available on the Board's annual paint purchases. The

business office could not determine which schools and departments bought paint in a given year, how much they bought, how much they used, where they used it, how much they stored and where they stored it. As an indication that some of these problems continued, during Level II monitoring in 1986, the monitors found new uninstalled vocational equipment, including home economics equipment that had been purchased with State and Federal funds. Some of this equipment had been uninstalled since 1983. Even as of the day he testified (February 10, 1987) Dr. Przystup said, "they do not know what's in the warehouse."

Cresap, McCormick found that once a requisition reached the business office, it took from 38 to 47 days for that office to issue a purchase order. Since most price quotes were guaranteed only for 30 days, this sometimes caused the district to be charged in excess of the initial price quotes. There were 23 different stations necessary to handle one purchase order from beginning to end. Further, the district used a multitude of different forms, some of which were obsolete. In 1982-83, Cresap, McCormick found that the district business manager had authorized a $118,000 fire insurance increase for the contents of schools that had been closed prior to the start of that school year.

Cresap, McCormick found in 1983-84 that cost efficiencies in Jersey City would result in savings of at least one-half million dollars.

Jersey City in 1983-84 had a program for the evaluation of teachers, but the instructional needs discovered through the evaluations were not linked to the in-service education program for the district teachers. Jersey City during Level I

monitoring offered six 1/2 days in-service training sessions annually. That is the highest total for all Hudson County districts.

Jersey City has serious facility problems dating back to at least 1977-78 and yet the district has made little or no additions to the budget for facilities. In the 1979 monitoring, for example, the County Office found exposed heating units, stairwells needing plastering and other repairs, unprotected steel beams in classroom areas, missing fire extinguishers, buckled gymnasia floors and littered school grounds. The monitors also found leaking roofs, rusted plumbing, uncleaned toilets, inoperative swimming pools, insufficient lighting, deteriorating window frames and inoperative fire doors along with many other deficiencies.

In 1983, the State monitors continued to find numerous facility deficiencies in the various schools. These included buckling and warped floors, leaking roofs, inoperable plumbing, dangerously placed obsolete shop equipment, deficient fire extinguishers, crumbling plaster, pealing paint, inoperable electrical wiring, missing shades, missing exit signs, missing and broken ceiling tiles, excessive graffiti, inoperable toilets, leaking skylights, inadequate lighting, faulty fire doors, broken and rotted window frames, exposed heating units, etc.

In 1984 monitoring, the County Office rated Jersey City's facilities "unacceptable." The monitors found no maintenance plan. They also discovered that work orders for routine maintenance were backlogged a year or more. The State monitors charged that maintenance is handled in a crisis atmosphere. There was no system which established priorities, scheduled work and developed

budgetary requirements, according to the 1984 monitors. (Exhibit D-34, Indicator 5.1 at p.88.)

The 1984 monitors also found no Board approved plan to upgrade or eliminate all substandard classrooms. Consequently the County office recommended that all substandard facilities approved and utilized during 1984-85 had to be brought to acceptable condition or vacated by June 30, 1985 and that a plan of action must be developed.

The 1984 monitors also found that while some individual safety concerns were remedied, no plan of action had been implemented. Some safety conditions remained unchanged and in some cases additional concerns were identified. This was particularly true in the elementary schools where older equipment continually breaks down and in the high schools where routine preventative maintenance was inconsistent.

The district had a long-range facilities plan which was approved in 1980 and updated in 1983.

In Level II monitoring during September, October and November,1986, again, Jersey City was found deficient in facilities. The State evaluators found that Jersey City's multi-year comprehensive maintenance plan did not provide for inspection of instructionally related equipment and furniture and did not include management policies and procedures and implementation methods.

The 1986 monitors again found problems with many fire extinguishers, inadequate lighting, ungrounded electrical receptacles, missing barrier guards for

shop machines, poor ventilation in the shops, improperly labeled and stored chemicals and shop "panic buttons" which were disconnected or blocked. The monitors also discovered rodent droppings in many rooms, foul smelling lavatories with broken and dirty toilets, urinals and sinks, leaking roofs, broken doors and broken windows, missing exit signs and flammable materials stored in boiler rooms. Many of these deficiencies were similar to those noted as early as 1977 and 1978.

Level III monitors again found in 1987 facility-related deficiencies. The State evaluators found, for example, inadequate ventilation, kilns and heating ovens without proper exhaust, boilers with insufficient air supply and renovations that were made without approved fire retardant materials. The monitors found missing electrical switches and receptacles, missing "panic switches" in the shops, nonfunctioning fire alarm systems, missing exit signs, exit doors that were chained closed, inoperable fire doors and continuing problems with some fire extinguishers.

The Level III monitors found inoperable sinks and water fountains, crimped water lines, no protection of potable water from sewer backflow, lack of hot water in bathrooms and some lavatories which were locked during the school day.

The Level III monitors found in the 17 schools they visited an additional 149 substandard spaces over and above the 168 which were previously identified by the County Superintendent.

According to Cresap, McCormick, Jersey City's maintenance and custodial departments were not effectively managed. Neither the Director nor the Trades Foreman effectively monitored the work of the shops nor provided formal

performance guidelines. They left the screening of work requisitions and decisions about priorities and emergencies to a principal clerk who distributed the requisitions. The top personnel had contradicting views about to whom they were reporting and their staff were confused about to whom they were reporting. Additionally, the top management did not coordinate the work of the different shops. Dr. Przystup testified that this department was "horrendous - it was terrible, and it continues to be terrible." (Przystup Transcript, February 10, 1987, p. 26, lines 21-22.)

In 1982, the County Office noticed that there was no follow-up on maintenance requisitions. Principals had to submit and resubmit work orders.

The maintenance department is separated from the instructional departments. Principals submit work order requests directly to the maintenance department, but have no control over the custodial or maintenance workers who are part of the noninstructional departments. Principals sometimes are unaware of the person in charge of buildings and grounds and play no role in the hiring or firing of custodians or maintenance personnnel. Any problems a principal has with a custodian must be referred to the person in charge of the custodians. According to Dr. Przystup, it is in the non-instructional areas where gross mismanagement exists.

Jersey City's School District Mismanagement and Political Maneuvering

After reviewing all of the evidence of Jersey City's mismanagement and political interference, I first feel compelled to focus on the meaning of political interference. It seems to me that the term has been used loosely in this proceeding.

I have already discussed how the need to share property poor tax bases heightens interest in the school budget and the property tax. This interest becomes political when municipal officials or board members focus on how to limit tax increases. This form of political interest is present, in varying degrees, in almost every school district about which this record contains budget process evidence. I believe that several witnesses in this procceding have described this interest as a form of political interference. However, I have already explained why these political accommodations or fiscal pressures are systemic to the financing system and therefore I do not believe they should be pejoratively labeled as political interference. The intrusion of politics into the Jersey City school system has been, however, far in excess of this more common form of accommodation to the fiscal pressures caused by the sharing of property poor tax bases. I **FIND** the pervasive nature of the political intrusion into Jersey City's school system shocking and harmful to the school children of Jersey City and qualitatively and quantitatively different from the pressures present in most other property poor districts.

The fact that the extent of political intrusion seems to depend on the interests of whichever mayor happens to be in office is not sufficiently ameliorative. As one witness said, politics is a way of life in Jersey City. I **FIND** that it has been present to some degree in the school system before and after the enactment of Chapter 212.

In 1983, when the State noted that fiscal, educational and operational support services were not integrated for effective and efficient control, Dr. Ross explained that patronage and civil service requirements made it more difficult for the district to cure these problems. As Dr. Ross further explained, he has known some wonderful Board of Education members in Jersey City who could not prevail

against the "patronage, privilege and power." (Ross Transcript, October 28, 1986, p. 148, lines 17-20.)

The dismissal of seven high ranking school administrators as political retribution without regard to the school district's needs is in my opinion inexcusable. Forcing Jersey City's well-meaning, dedicated and courageous Superintendent to struggle through four school years with woefully inadequate administrative assistance I FIND impaired the delivery of education.

Furthermore, it is also clear that Jersey City has allowed politics to play a role in appointments as well as dismissals. I FIND that marginally qualified persons have been employed in Jersey City for political rather than educational reasons and that some of these employees are difficult to manage because of their allegiances and support in political circles.

I FIND that school employees have been diverted from their education-related functions to perform political services without any direct benefit to the school children and with possible detriment to the efficient delivery of educational services.

While there is no doubt that Jersey City let its curriculum fall into disrepair well before the dismissal of the seven administrators, I FIND that the current curriculum development improvements could have been implemented much earlier, had these political dismissals not occurred.

I also **FIND** that Jersey City's most recent curriculum improvements have come about because of State pressure and the hiring of a dedicated and capable administrator.

I **FIND** that the Bureau of Pupil Personnel Services, the basic skills instruction program, the district's fiscal management practices and the district's purchasing processes can all be improved through better management and more efficient practices, especially in recordkeeping. In stark contrast with East Orange's current attitudes concerning their fiscal management problems, the Department's Chief Auditor described the overall attitude in Jersey City as "lackadaisical and unconcerned."

I **FIND** that the bilingual/ESL program is essentially well run by the district. Jersey City was the first district in the State that had to develop Gujarati, Arabic, Togolog, Urdu and Vietnamese bilingual programs. The defense agrees that these are successful programs. Jersey City also has an exemplary reading curriculum for Spanish bilingual students, which can be used as a model for other districts. The criticism presented by the defense appears minor given the quality of the overall effort in this area and the challenge presented by a large and diverse LEP population.

I **FIND** that the Jersey City school district has not fully implemented the planning model envisioned by Chapter 212 and consequently cannot easily relate its student needs to budgetary considerations. Only recently has the system begun to ask principals, the prime source for school based needs, to participate actively in budget development. In prior years, the Jersey City budget development process of

incremental increases I **FIND** is another example of problems caused by shared property poor tax bases.

Some of the Jersey City problems present in this record are directly related to resource need. For example, the district's scheduling problems at the beginning of the school year could be cured with larger numbers of administrators scheduling students over the summer. Also, Professor English said that the number of supervisors in Jersey City was insufficient and he recommended that more be employed. I **FIND** that more administrators are not hired because Jersey City believes it does not have the necessary funds and that the public cannot afford a tax increase. The implications made by defendants that if teachers were dedicated enough, they would work during the summer for free to improve the system, I **FIND** unfair to dedicated teachers who consider themselves professionals.

The defendants assert that Jersey City can require its chairpersons to assist with supervising teachers by enhancing the salaries of the department chairpersons. The district has not done this and the defendants as in most of these resource-related problems cannot understand why. The defendants point to methods of either finding the money or applying money saved from some efficiency toward this purpose. I **FIND**, however, that Jersey City, as do most property poor school districts, makes management decisions about how to spend limited funds. To require its chairpersons to supervise teachers will not only involve monetary considerations but may also involve the teachers' union. Jersey City also will have to elect not to apply the money toward some other purpose, which may appear more important to the district. It is difficult if not impossible on this record to fault school

districts for such individual decisions. Additionally, defendants' argument may merely illustrate that Jersey City has insufficient staff.

Remedying facility problems was a low priority item for Jersey City from 1976 to 1985. The district viewed its choice as between maintenance and instructional programs. Given that choice, they opted to maintain instruction. They also apparently elected to maintain outstandingly all school auditoriums. In some years, the Jersey City school district, however, budgeted no funds for its facility needs. Rather than cut instructional budgets, the district elected to eliminate or delay needed maintenance and facility improvements. I **FIND** that a substantial number of Jersey City's facility irregularities stem from this decision.

The age of Jersey City's physical plant contributed to the facility problems, but old facilities can be well maintained. Age is not crucial - condition is. Jersey City has inadequately maintained its buildings. Jersey City's management elected to defer important maintenance needs, which caused its old physical plant to further deteriorate. In one building visited by the State monitors, windows and desks had not been washed or cleaned for at least eight years. Although there is some conflict in the evidence concerning whether Jersey City electricians were capable of repairing all of the district's electrical problems, I **FIND** that many of the district's existing safety and cleanliness problems could have been remedied with an ongoing maintenance program.

Many of the facility deficiencies cited by the monitors through the years I **FIND** could have been corrected by a better managed and more efficiently operated maintenance department. There is some evidence that political concerns directly interfered with maintenance operations because the department responded to

requests by those principals in political favor instead of objectively assessing maintenance priorities. The Level II monitors found outstanding work orders outnumbering completed work orders by a ratio of 2:1. Little items which were not taken care of over many years now create unsafe and dangerous conditions for significant numbers of Jersey City students. For example, the maintenance department should have removed obsolete and non-functioning equipment in the shops, repaired fire doors, inspected fire extinguishers, installed guard rails on hazardous machines, installed emergency cut-off or "panic switches" and exit signs, properly stored flammable liquids, replaced burned out lights and otherwise kept the facilities cleaner.

I **FIND** that the deteriorated facilities in Jersey City were caused by the district's decision to defer and eliminate maintenance expenditures and by the mismanagement of the district's custodial and maintenance department.

I **FIND** that the mismanagement and political intrusion apparent on this record has caused monies to be diverted from the district's efforts to provide a thorough and efficient education.

I also **FIND** that the testimony on mismanagement and political intrusion focused largely on conditions before 1984-85, when problems abounded, and ambiguously addressed the situation after 1984-85, when the district appeared to be trying to reform. An imprecise evaluation of this evidence could cause an impression that the situation is worse than it currently is. For example, various recent accomplishments were noted in Exhibit P-134, an August 18, 1986 letter from the County Superintendent to Franklin Williams, the current Jersey City Superintendent. Apparently, the district had planned that by September 1986 the

mathematics and language arts curriculum at the 8th grade level would be realigned to the HSPT. The letter congratulated the district for accomplishing this task and noted that the completed documents had been disseminated to all schools and that Board approval was anticipated shortly. The district had also planned to improve by June 1986 the high school course proficiencies. The letter noted that the district completed and delivered the revised course proficiencies for all high school courses. The district by June 1986 also planned that 25% of 10th grade students who failed the MBS would meet those standards through participating in an alternative educational program at Dickinson, Snyder, Ferris and Lincoln high schools. The letter noted that, in general, the MBS results obtained surpassed the district's 25% objective. The district among other plans also sought to have by June 1986 80% of all grades performing at or above the national norm in reading and math as measured by the California Achievement Test. The letter noted that "what once appeared as a virtual impossibility has now become a realizable challenge. Though [these objectives] are yet to be satisfied, the district is to be commended for the design of its plan of action and for the perseverance and skill as expemplified by the accomplishments of the Assistant Superintendent of Curriculum and Instruction with her associates." (Exhibit P-134 at p.10.)

On this record, there are a number of local forces moving toward improving the district. I was impressed with the dedication and obvious competence of several Jersey City witnesses and believe that the district is making efforts to respond to the Department's prodding and to focus its attentions on improving its educational delivery system. There was insufficient evidence presented for me to determine whether the district will be successful in reforming itself.

There is also some evidence on this record pointing to the defense fixating on Jersey City and in some instances apparently unfairly criticizing the district. For example, Jersey City was charged by defense witnesses with inefficiency for referring students for special education evaluation in numbers substantially above the State average and for classifying substantially below the State average. (Exhibit D-27 at p. 12.) However, Cherry Hill and other wealthy districts in 1985-86 appeared on this basis to be even more inefficient than Jersey City. Cherry Hill referred 12% of its students for evaluation. Jersey City referred 8.3%. Cherry Hill classified 43% of the students referred and Jersey City classified 36% of those referred. Statewide, of the students referred for evaluation, 51% are classified. Millburn refers 2.1% and classifies 33.9%. Paramus refefs 2.2% and classifies 35.1%.

South Brunswick and Montclair use many aides, as another example, and yet there is no record of their being criticized. Exhibit D-34, at p. 128, as a final example, found the "district does not have CST members sufficient to insure implementation of pertinent law and regulation." But the defense's witness report on the condition of Jersey City's special education program makes no mention of this finding.

Are Urban Districts Unable to Address Student Needs Because of Mismanagement, Politics or Illegalities ?

We have seen in previous sections of this decision the variety of unmet educational needs and educational program and expenditure disparities that exist between property rich and property poor urban districts. I will address in Part V defendants' contention that these unmet educational needs or disparities are inconsequential. Assuming for the moment that they are important, the record is

clear that to provide programs and educational interventions costs money and that some programs and educational interventions cost substantial amounts of money.

The defendants have presented much testimony concerning the mismanagement that they believe diverts substantial funds from educational need. Defendants assert that some districts are squandering their resources. Preliminarily, I must FIND that the only evidence that reasonably relates to squandering pertains to some of East Orange's fiscal excesses and improprieties that have occurred in prior years. No other evidence of squandering, as distinguished from the mismanagement and political intrusion evidence, appears on this record.

Defendants largely limited their mismanagement evidence to the plaintiffs' districts. Among the plaintiffs' districts, the defendants agree that Irvington is not being mismanaged and there is no proof of any Irvington illegalities. The only political interference that has been demonstrated for Irvington relates to an excessive municipal interest in school taxes, which I have already concluded is a systemic problem present to some degree in all property poor urban school districts.

Camden's mismanagement according to the defendants essentially relates to a leadership problem or a lack of follow through. No political interference beyond that inherent in the system has been established. The record also does not demonstrate any illegalities in Camden.

The defendants' basic position on illegality, mismanagement and political intrusion seems to rest almost entirely on the East Orange and Jersey City evidence. There is very little evidence in this record from which I could conclude

that the situations in East Orange and Jersey City are typical of urban, property poor districts generally.

Other Urban Districts

Statements were made by a few witnesses to the effect that politics is common in most urban districts. For example, one of plaintiffs' witnesses said, "It's a way of life in most urban districts," although this witness agreed that it was not present in Orange. I **FIND** that I cannot determine whether these cryptic observations relate to the systemic problem of school districts and municipalities sharing property poor tax bases, especially in Type I districts, or to the kind of political intrusion that has been present in Jersey City.

There are some mismanagement and political influence charges concerning Hoboken, an urban DFG A district in Level III monitoring at the time of the Department's testimony. Dr. Galinsky, who had been the Assistant Superintendent of Schools in Hoboken from 1966-71, testified about Hoboken. Dr. Galinsky is currently the Superintendent of Schools in Paramus and has been since 1985. Hoboken is charged with having had no specific plan within its budget processes to address student deficiencies. The school system is alleged to have been the employer of last resort with the Mayor's political base built upon control of school jobs. Hiring was out of City Hall not the Board of Education. A program to reduce teacher absenteeism was stopped because of the political connections of the teachers involved. At times, personnel appointments were made where vacancies did not exist. The Board added personnel without educational relevance. They hired full-time administrators who were not needed. The district had employees who lacked proper certification or who had not even graduated from college.

Funding was not reallocated from non-education positions so that education positions could be filled because non-education positions, like truant officers, were political positions. There was no cost benefit analysis to determine what programs to cut. There were non-education positions to reward the politically active. Many of these persons put in few hours at work. Some malingerers became untouchable because of political influence.

According to Dr. Galinsky, Hoboken also had an inefficient purchasing process. Dr. Galinsky explained that people used to joke that they had the "finest $5 million high school built for $8 million in the State." Dr. Galinsky discovered 250 stainless steel rolling carts which were used to keep food warm. When he asked about them the business administrator said to leave them until he could get rid of them. According to Dr. Galinsky, someone influential had sold the carts to the Board and at an appropriate time the Board planned to donate them to Saint Mary's Hospital.

Dr. Galinsky further explained that the Hoboken budget was built upon an estimate of the amount of money that the Mayor and council were going to be able to provide. He explained it in this manner: "find out how much State aid; we don't want taxes to go up. That means you have X amount of dollars. Then do the best job you can with those dollars that you can do." (Galinsky Transcript, Mar. 18, 1987, p. 38, lines 19-22.) This explanation seems to be another example of political accommodation and fiscal pressure derived from sharing a property poor tax base, especially in a Type I school district.

Dr. Galinsky explained how dispiriting this type of management was to the staff. Such conduct is devastating to running a school system. I agree with Dr.

Galinsky, as I believe my findings on Jersey City demonstrate. However, Dr. Galinsky last worked in Hoboken in 1971. And there are no specific details concerning the Hoboken charges and no evidence concerning the precise situation in Hoboken after Chapter 212 or whether the Department's monitoring or budget review practices had any effect on Hoboken. I also do not know what if any changes ensued when Hoboken changed from a Type I district to Type II and back again.

Dr. Galinsky did testify that he remained in contact with Hoboken friends and associates and that what he "described is not very different from what they described to me in terms of their problems in getting the necessary funds directed to the need process." (Galinsky Transcript, Mar. 18, 1987, p. 39, lines 11-14.) According to Dr. Galinsky, the political situation in Hoboken remains pretty much the same. However, I am uncertain from the record how much of the current political situation in the school district can be ascribed to the systemic problem of sharing a property poor tax base with the City.

While I **FIND** based on Dr. Galinsky's testimony that some political intrusion remains in Hoboken, I **CANNOT FIND** on the basis of this evidence that the nature and scope of political intrusion present in Jersey City also exists in Hoboken. Also based on Dr. Galinsky's testimony, I can **FIND** that political intrusion has probably had adverse consequences to the educational process in Hoboken.

Dr. Galinsky also testified about his knowledge of political interference present in other districts. According to Dr. Galinsky, such interference is present in Trenton with regard to hiring and promotion and was also present in Paterson around 1981. Dr. Galinsky concluded that in his view urban school administrators, unlike suburban administrators, never had the luxury of running their school

districts without political interference. For Trenton, it is unclear as to what time period Dr. Galinsky was referring. For Paterson, Dr. Galinsky referred to conversations with an assistant superintendent which occurred around 1981 when he was approached about taking the superintedent's job in the City. Because of the uncertain meaning of political interference and the vagueness of this testimony, I am unable to make specific findings concerning political interference in Trenton and Paterson beyond the interference which I believe is systemic to sharing property poor tax bases.

Another witness testified that in Pleasantville, like Jersey City, there are no department chairpersons and the Pleasantville Board allowed teachers and others to ask its members for favors and to resolve problems. I have already explained how the lack of department chairpersons can merely confirm that the district has inadequate staff. In addition, no evidence even resembling Jersey City's political intrusion was presented about Pleasantville.

There was some evidence about fiscal audits in districts other than plaintiffs'. This evidence indicated that other urban districts have made fiscal errors and that the State has required refunds and deductions against subsequent State aid to recoup these monies. A Department audit of the Garfield school district, for example, found a $469,426 deficit for 1983-84 and an estimated current expenditure deficit of $606,245, for a total deficit of $1,066,672. A legislative bailout helped reduce this deficit. A Department auditor has been in the Newark school district since 1975, when legislation required oversight of Newark's fiscal affairs. A 1981 audit of the Hudson County Area Vocational Technical School resulted in substantial deductions of State aid. This vocational school had run a

deficit three years in succession and in 1981 a fiscal monitor was appointed for the district. This district's fiscal records were in turmoil - almost nonexistent.

Considering all of the evidence presented, I cannot conclude that the types of fiscal errors made in the audited districts were either more pronounced or typical of other urban property poor districts. Also, I cannot conclude whether the types of audit errors discovered would not be present in any school district. The record indicates that some of the fiscal errors, like difficulty accounting for adult school pupils, were recognized by the Department of Education as statewide problems. There were no proofs that property rich districts did not make these types of fiscal errors.

No evidence was presented that would indicate that the East Orange fiscal excesses and illegalities, such as those that led to the indictment of school district officals, are typical of other property poor districts, though some evidence exists about similar fiscal problems in Newark.

There is evidence about mismanagement in Paterson. According to County Superintendent Persi, Paterson is like having 33 separate districts, with each school constituting a district. The Department discovered children scoring at the 90th percentile in an English test, for example, participating in bilingual programs. Also, the Department found students placed in bilingual programs solely because of their surnames. In one high school, the principal was hostile and obstructive to State monitors. Some of Paterson's desegregation programs, according to the County Superintendent, were poorly planned. Superintendent Persi also observed no connection between program needs and the budget process. He further explained that in Passaic County, he spends 85% of his time dealing with Paterson.

Apparently, the State's questions are always met with other questions and, according to the County Superintendent, little action.

The evidence present in the record about Irvington's management typifies a problem with the record that has been developed on mismanagement. Irvington was criticized by defendants for taking or failing to take certain actions relating to LAVSD designation and its facility needs, but overall the defendants claimed Irvington was well managed. There is much evidence in this record, developed largely through cross-examination of plaintiffs' witnesses, relating to Jersey City, East Orange and Camden which defendants point to as illustrative of mismanagement that in my opinion amounts to *de minimus* defects or to second guessing on difficult management decisions that cannot be deemed mismanagement without regulations or at least some expert testimony detailing the various options confronting the district and explaining why the defendants' approach is necessary for good management.

As an example, a defense evaluation team found that Jersey City had to estimate the number of students placed in jobs as they had no hard data, and East Orange could not even estimate placement. Thus, Jersey City and East Orange were criticized for mismanaging their vocational education programs. No statute or regulation requires placement information and no witness indicated that the failure to collect the data amounts to mismanagement. One dispassionately might agree that it would be informative, helpful or even important to have such data, but I **CANNOT** on this record **FIND** that its absence amounts to mismanagement. Presumably, the placement departments spent their time on other tasks, including attempting to place and counsel students, rather than generating statistics. This evidence is indicative of other assertions claimed by defendants to be

mismanagement that appeared to me to highlight various local management decisions that are criticized solely because the State would have done it differently or which relate primarily to paper work. I do not believe this amounts to mismanagement.

As another example, Camden was criticized because the district's response time for repairs varied from school to school. After Level I monitoring, for example, Veterans Middle School, Hatch Middle School, and Camden High School finished their repairs before Level II monitoring. But as of Level II monitoring, two years later, East Camden Middle School, Morgan Village Middle School, Pyne Point Middle School and Woodrow Wilson High School had not completed the repairs that were needed at the time of Level I. No witness indicated why this was mismanagement. In fact, the defendants' witness did not indicate that any mismangement was indicated by this testimony.

Probably, Camden's building principals do not possess equal management skills. Their individual leadership and administrative capacities may differ widely. Perhaps some schools criticized by the Department could have responded more quickly, but maybe not, given the school based demands that may have otherwise diverted them. I do not think that the failure to respond to monitoring deficiencies in a timely fashion can be equated in all cases with mismanagement. The record, in my opinion, requires more evidence than the Department's implication that the schools could have performed more quickly. Even a skilled and highly regarded school administrator could not determine from this record that a two school year delay in making repairs is mismanagement unless we assume that the school had nothing to do for two school years but respond to the Department, an assumption that is irrational. Once we assume that the school

had other obligations, including student and parental concerns, then where a school places its resources and marshalls its personnel becomes a management decision that must be further explicated and analyzed before it can be legitimately criticized. No evidence was presented that explained why the competing demands that apparently diverted districts from certain Department-directed tasks were unworthy of attention.

Dr. Walberg's Study

The only evidence relating to broad-based statewide mismanagement comes from a study performed by Dr. Walberg, an education professor from the University of Illinois at Chicago. Dr. Walberg first determined what a district's predicted test scores would be based on the accepted relationship between socioeconomic status and achievement. He then plotted a district's actual test scores and assumed that the difference or variance between the prediction and the actual results is attributable to the district's efficiency or inefficiency. Dr Walberg concluded there was no support for the contention that districts with higher per-student expenditures achieve higher achievement scores than districts of comparable socioeconomic status with lower per-student expenditures. He defined "efficient districts" as those which produce high levels of learning even though their students may be less socially and economically advantaged than students in other districts. (Exhibit D-305.)

I have a number of problems with Dr. Walberg's analysis. First, every school district was treated similarly, irrespective of whether it had 40 or 56,000 students. The analysis thus assumed that district efficiency can be measured by a test score averaged for all the schools in the district. Even assuming the validity of

such a measurement, it seems to me that this form of efficiency is more closely related to individual school conditions, including the teachers and subjects provided the tested students. (See findings in Part V.)

Second, Dr. Walberg administered no pre- and post-test which would have provided a time frame within which we might be able to place whatever school or district-wide activities were claimed to be inefficient. In fact, the SES measure used (the district DFG) was based on the 1980 census which was collected in 1979. The test scores were from the 1983-84 MBS administration. Also, the test scores used included children tuitioned into the district, but the SES measure did not. The measurement thus included all teachers in all grades, all subjects and materials provided, and all extracurricular experiences, etc, which influenced the students prior to 1983-84. This is a very imprecise efficiency measurement.

Besides these basic conceptual problems with Dr. Walberg's study, there are also the following technical concerns:

1. Defendants' regression analysis considered many suburban school districts inefficient because it mathematically calculated an impossibility, that their average ninth grade MBS scores should have been greater than 100%.

2. The analysis compared the achievement differences of districts with the same socioeconomic status with each other. This eliminates comparisons among districts with different socioeconomic status and in effect reduces whatever influences the variability of resources may have

because districts within the same SES have substantially similar expenditures.

3. The DFG used by Dr. Walberg as a measure of socioeconomic status measures the community's status and not the families of the children in the public schools, which may be in urban areas lower than the community's SES. For example, Dr. Walberg found that the children in the public schools in Jersey City and Irvington were 11 points under the test scores that he would have predicted based on the socioeconomic status of the municipality. He concluded that Jersey City and Irvington were less efficient without analyzing what percentage of the age-eligible children in Jersey City and Irvington are in private or parochial schools or how the socioeconomic status of those children compares with the status of the public school children. Testimony indicates that large numbers of Jersey City children attend private and parochial schools. On the basis of this record, I can infer that these children may come from homes with higher socioeconomic status than do the public school children.

"Crisis Management" and Desegregation Orders

On the other side of defendants' mismanagement position is arrayed plaintiffs' proofs of vast expenditure and educational program disparities and unmet educational need in property poor districts. Almost every witness who testified from a property poor district indicated the need for greater economic resources. Even Dr. Prsyztup, one of defendants' witnesses, recognized that the Jersey City November 1984 severe budget cutbacks "hurt" and that the Personnel

Department was understaffed in administrative and clerical areas. Dr. Scambio, who is the Coordinating County Superintendent of Schools, Northern Region of New Jersey and the Essex County Superintendent of Schools, acknowledged that additional monies would benefit East Orange's school children and that Irvington's school children were not receiving a T & E education. Some Irvington witnesses explained that they received only the basics compared with suburban property rich districts. One of plaintiffs' witnesses, comparing the special education programs of urban and suburban districts, described them as two different worlds.

Along with the district witnesses, all of whom I found extremely credible and dedicated professionals, plaintiffs presented testimony from Drs. Goertz and Reock which demonstrated that property poor districts were receiving substantially less fiscal resources than property rich districts. Other witnesses, along with Drs. Goertz and Reock, concluded that the financing system is unfair to property poor districts and is the cause of the financial resource disparity.

Also, witnesses from property poor and property rich districts explained why the resources available and the fiscal constraints placed upon the municipality and its tax base prevents them from providing an education that fully meets the needs of their students. They explained how the lack of funds, combined with the tremendous needs of the children and the deteriorating facilities, creates a crisis atmosphere in urban districts. These districts are overwhelmed by planning for survival; therefore, planning for the future may be impractical unless additional resources are provided to fund future plans.

The Department of Education in 1977 confirmed that crisis management as well as political manipulation was present in our cities. This Department

Discussion Paper, titled "Perspective on Urban Education: Perceived Needs and Policy Directions," stated that "with the dynamic nature of change in our cities, the administrative and curriculum leadership has learned to cope with crisis management and political manipulation, but in most cases this has left little energy in resources for taking advantage of the opportunities offered by the diversity of the urban population." (Exhibit P-229, p.31 at IV(d).)

The proofs also demonstrated that property poor urban districts generally have larger schools, more students and fewer supervisory staff than property rich districts. In Montclair, for example, the high school is divided into four "houses" with each house supervised by a vice principal assisted by four counselors. In Jersey City, the four large high schools each have three vice principals and Academic High has none. Insufficient administrative staff makes management more difficult.

Further complicating the job of urban administrators are desegregation obligations. Most urban districts including three of plaintiffs' districts are under desegregation orders. No State funding is provided to assist the districts' compliance. Guidelines for implementing the State's policy include the establishment of a student body that represents a cross-section of the population of the entire district such that if the elementary minority population is 25%, then each building and each class should try to reflect this percentage. These guidelines present a problem for districts like Camden where there are few white students and for districts where minorities tend to be clustered in defined neighborhoods. Lack of minority teaching/administrative staff is also a problem and only in districts under desegregation orders are the following activities mandated: updating of textbooks and other instructional materials to ensure the accurate representation

of minority groups' roles in society; instruction in K-12 of the history of national origin groups; human relations training at all grade levels; special staff training, including training in all aspects of the LEP program; messages to parents from all teachers, not just teachers of LEP students, in the language of the parents. These factors put an additional burden on already overburdened districts, whereas there is no evidence of any such burdens placed on districts that are predominately white.

Budget Structures

Since defendants argued that urban districts were receiving vast sums of monies and misdirecting or squandering their resources, a comparison of urban and suburban budgets was undertaken to discern where the money was going.

In general, urban districts tend to have different cost structures than suburban districts. Urban districts use a higher percentage of their funds for maintenance, insurance and security. Exhibit P- 25a, for example, shows that Camden's maintenance costs in 1982-83 were 39% while Cherry Hill's were 25%. Also, the percentages of expenditures for instruction are relatively lower in urban poor districts than in wealthy suburban districts. The New Jersey School Board Association cost of education index shows suburban districts spending 65% of budget on instructional expenditures and urban districts spending 55%.

Urban districts tend to have relatively higher administrative costs caused by the need to manage programs with larger numbers of schools and students than suburban districts. Although these higher percentages of expenditures for these categories in urban districts would suggest higher per pupil costs for them, the amount spent per pupil for these functions in urban poor districts is, with certain

exceptions, lower than in wealthy suburban districts. Camden in 1982-83 as Exhibit P-25a shows, for example, spent $71.26 per pupil on administration which was 3.2% of their 1982-83 budget. Cherry Hill, however, while spending only 2.5% of their budget for administration, in dollars spent $ 89.19 per pupil.

An urban and suburban comparison of expenditures per child audited by the Department of Education shows that in all but two of 21 expenditure comparisons for a number of years, urban districts spent a larger percentage of their budgets for maintenance, operations and fixed charges. However, in about two thirds of the comparisons, suburban districts spent more per child on these costs. (See Exhibits P-25 a -i.)

This pattern of lower expenditures for instruction and higher for fixed costs in urban districts can be seen when Princeton is compared with Trenton, both of which use program oriented budgets. For 1979 through 1981, Princeton had higher expenditures for all instructional areas except special categorical programs, such as compensatory education, in which Trenton's spending was slightly higher. In the regular instructional areas, Princeton's expenditures exceed Trenton's by a ratio of 2:1 in mathematics, social studies and co-curricular activities; by 4:1 for general sciences; by 7:1 for foreign language.

When comparing Trenton with Lawrence, the following percentages are observed: administration; Board of education: Trenton spends .8% and Lawrence .9%; for district wide administration: Trenton 5.7% and Lawrence 11.3%; for school administration: Trenton 7.3% and Lawrence 5.7%; operation maintenance

plant; Trenton 20.8% and Lawrence 13.8%; regular instruction: Trenton 38.4% and Lawrence 44.3%. (Exhibit P-210e.)

I informed counsel for the parties that I was interested in pursuing budget comparisons. The evidence was presented by plaintiffs and no contrary evidence was presented by defendants. The record does not contain any evidence tracing monies mismanaged or diverted in urban districts' budgets.

In fact, there are some general statements and some specific evidence from which I could conclude that wealthy surburban districts are also not managing their resources as efficiently as defendants perhaps would like. County Superintendent Acocella, for example, said there are similar problems of leadership and management in other Hudson County districts but not as gross as Jersey City's. On cross-examination, Paramus Superintendent Dr. Galinsky was asked if he could cut $1,000 per pupil from his district's budget and still provide a thorough and efficient education. Yes, he replied, he could do that by eliminating "courtesy transportation" -- Paramus provides busing for students who are not required to receive transportation by State law because the community prefers to provide this service. In addition, Dr. Galinsky said the district's special education expenses were very high because the Board of Education is sensitive to the requests of parents for residential teatment and other services above and beyond what the law requires. His district is currently spending $27,000 for a three-year-old autistic child to be driven back and forth from a Princeton program, even though there was an appropriate placement in Bergen County. Dr. Galinsky attributed the placement to a "very emotional reaction" from the parent, to which the Board responded. (Galinsky Transcript, Mar. 18, 1987, pp.65-67.)

Additionally, Professor Garms, a defense witness confirmed the apparent differences in cost structure between urban and suburban districts. He said that security costs were higher in cities. He also testified that the generally older buildings present in city schools were more expensive to heat and to conform with modern State codes. Finally he also indicated that insurance costs were higher in urban areas.

If large amounts of monies were being diverted for political purposes or through mismanagement from the educational program, I expected to find evidence of this in budget comparisons between urban and suburban districts. But, I did not find this evidence.

The fiscal audits which were provided illustrate how the State recaptures in diminished State aid any errors that a district may make. These are not funds that would be available to the district if mismanagement did not occur, even assuming that the fiscal errors were mismanagement. The Department position seems to be that the district was never entitled to these funds.

Financing System Defects

Plaintiffs also provided other evidence explaining how the present system prevents boards of education from raising all the money they need. Tax rate, tax base and State aid are the variables that determine expenditure differences. A school district's tax base and tax rate produce locally raised revenues. We have already seen how property poor tax bases impair some urban districts' tax raising ability. Income of residents and political/fiscal pressures operate on the school tax

rate and then upon the amount of State aid a district receives. I have already explained why it is unreasonable to expect school boards in property poor districts to be singleminded advocates for their students, raising the tax rate to generate all the local monies that are necessary to address their students' needs. Therefore, the only remaining vehicle under the current school finance system to eliminate expenditure differences would be State aid.

However, both plaintiffs and defendants agree that school districts under the current system have used increased State aid as tax relief. Dr. Brazer testified that the ability to use additional State aid for tax relief is inherent in a GTB system. The same pressures that inhibit tax increases in property poor urban districts therefore encourage the utilization of State aid as tax relief and I FIND also hinder the elimination of expenditure differences.

Furthermore, the record contains proofs on the following aspects of the current school financing system which I FIND also limit the amount of money available to poor districts and the equalizing capacity of the State aid being distributed:

1. The GTB Level. As we have seen, the GTB level has been reduced several times. At least two sevenths or about 30% of the State's pupils were outside the guarantee of $223,100 in 1984-85. All districts with equalized valuations per pupil greater than the GTB can raise more education funds at the same tax rate as lower wealth districts or can raise the same amount of funds at a lower tax rate. Each reduction of the GTB also increases the number of minimum aid districts. Maintaining the total State share of educational costs at approximately 40% has resulted

in reducing equalization aid from 56.8% of total aid in 1976-77 to 50.9% of total aid in 1985-86.

2. Prior Year Budget Data. In the *Four Year Assessment* (Exhibit P-236), the State Board pointed out that prior year funding denies low wealth districts the ability to increase spending because no equalization aid is provided for any first year increases. This report also explained that prior year funding makes it impossible for some districts to spend up to the cap level.

3. Prior Year Enrollment Data. Use of prior year enrollment figures provides aid for the number of children a district served in the previous year. This calculation therefore reduces aid for districts with increasing enrollments or with enrollments that are declining at a slower rate than the State average and increases aid to districts whose enrollments are declining faster than the State average. (See related discussion on the impact of declining enrollments on cap limits in Part I.)

4. Prior Year Wealth. The equalization formula uses the prior year's property wealth data. This benefits districts in which tax bases are growing faster than the State average since the use of current year's property wealth would result in their receiving less State aid. This calculation also disadvantages districts, like plaintiffs', where tax bases are growing more slowly than the State average since they would be relatively poorer in comparison to other districts if current year wealth were used.

5. State Support Limit. The state support limit used under Chapter 212 contributes to continued disparities in spending because it continues to direct State aid to higher-spending districts at the expense of low-spending districts. As explained in Part I, the state support limit is the maximum budget for which the State will provide aid. It is set at the 65th percentile of NCEB's for all districts in the State. If a district wants to spend above that level, the additional funding must be generated locally because the State will not contribute aid above the state support limit. Thus, the state support limit is not a deterrent to low-spending districts, which are unlikely to approach the 65th percentile of NCEB's, but may be a factor in limiting the budgets of higher spending districts. It has been suggested that if the limit were lowered to the 60th percentile or below, the limit would then have a more equalizing effect statewide. First, higher spending districts might tend to keep their budgets lower to stay beneath the limit. Also, aid that would have gone to districts spending near the maximum budget could be used instead for low-spending districts.

Additionally, minimum aid is provided districts based on the maximum support budget rather than the districts' own NCEB. A minimum aid district with an NCEB less than the limit therefore receives more State aid than if its own NCEB were used. Lowering the support limit would decrease the amount of minimum aid thereby mitigating the disequalizing effect of minimum aid.

6. Minimum Aid. This aid is provided to districts above the GTB that do not qualify for equalization aid and therefore reduces the amounts available for equalization aid because only a certain amount of money is appropriated by the State for education each year.

7. Distribution of Other Nonequalized Aid. New Jersey has over time increased the percentage of aid that is distributed without regard to district property wealth, such as categorical aid. This has reduced the amount of equalization aid available to property poor districts. Irvington, for example, under the equalization formula has a State aid ratio of 84% but receives 66% of its budget as State aid. Camden, as another example, has a 90% State aid ratio but total State aid of 77%. High wealth districts, however, receive greater State aid than their property wealth would merit. Paramus, for example has an 8% State aid ratio but receives 13% of its budget in State aid. Millburn, as another example, has a 7% State aid ratio with 10% of its budget being State aid.

8. Cap Limits. In the *Four Year Assessment*, the State Board acknowledged that the cap formula has blocked equity by allowing increased expenditures to wealthy districts based on their higher rates of enrollment decline. (See cap discussion Part I and Exhibit P-236 at pages 156, 166 and 171.)

9. Transportation Aid. Transportation costs are largely determined by how far from the school students live and therefore are virtually uncontrollable by districts. Because of the two-year lag and the 80%

limit on transportation aid, the State actually reimburses only about 67% of current transportation costs.

District Comparisons

Constant allusion was made by defense witnesses to the ability to shift monies from poorly functioning programs to new ones, but no evidence was presented as to how much money could be freed by this technique in any district. Additionally, no evidence was presented to detail the kinds of programs that the Department believes are not working and that therefore should be abolished.

The defense argued that plaintiffs' comparisons, for example between Jersey City and South Orange/Maplewood, were invalid. The defense contended that such comparisons would not paint a picture of statewide conditions between poor and wealthy districts. Comparing Jersey City and South Orange/Maplewood was not oranges to apples, but "oranges to rotten apples." (Defendants' April 22, 1988 Reply at p. 51.) The defense listed in its reply each district used by plaintiffs in comparisons and asserted either good or bad management to explain its successes or failings. In such a manner, the defense attempted to argue that all problems plaintiffs proved were explainable by mismanagement, politics and illegalities. To ameliorate the vastness of the disparities proved by plaintiffs, defendants therefore expanded their charges of plaintiffs' district ineptitude and illegal conduct and asserted that most of the property rich districts plaintiffs used as comparisons were either exceptional districts or particularly well managed.

There is no question but that eliminating all political intrusion and making poor urban districts more efficient will improve the delivery of their

educational programs. There is also no doubt that some mismanagement, political intrusion and illegalities hamper the educational actions of some property poor districts.

The evidence, however, leaves me unconvinced that any district's mismanagement or political manipulation causes it to be unable to provide more advanced computer education or more extensive early intervention programs, to list just a few examples. Several witnesses from property poor urban districts indicated that their students would benefit from full day kindergartens but their districts could not afford that program. I believe this testimony based on the credibility of these witnesses and all of the evidence, especially the evidence explaining the budgetary, program and State aid restrictions on property poor urban districts. I cannot infer from the mismanagement and political manipulation evidence that these districts are so inept or politically venal that they cannot make appropriate program adjustments to fund full-day kindergartens or pay for some of the other programs they acknowledge would be beneficial. Plaintiffs countered the defense's "rotten apples" assertion by noting that Dr. Ross had been superintendent of both Jersey City and South Orange/Maplewood; the "metamorphosis of Dr. Michael Ross from a bad manager to a good manager as he moved from a poor school district to an affluent school district was accompanied with an increase of resources in the amount of $912 per weighted pupil." (Plaintiffs' Rebuttal at p. 23.)

I do not believe that the evidence of mismanagement and politics explains the extensive failings plaintiffs have established. The educational problems confronting property poor urban districts are so vast and so intractable that they simply cannot be explained by the mismanagement, politics and illegality evidence. Perhaps if the financing system actually provided equal resources one

could more easily conclude that differences in expenditures among districts were related either to inefficiencies or different educational priorities. But given the unequal distribution of resources it is most difficult to conclude that disparities are caused by mismanagement.

The district deficiencies complicate the situation and make reform more difficult but they are not the cause of the educational problems proved by plaintiffs. I **CANNOT FIND** that property poor districts are being so mismanaged that proper efficiencies, management practices and the expulsion of politics will redirect sufficient funds and administrative energies to address the failings and disparities that have been proven. There was insufficient evidence of actual dollar amounts that would be gained from correcting these problems, when they exist.

Most school district expenses are salaries. Eighty-five percent of Jersey City's budget, for example, funds mandated programs and staff salaries. When County Superintendent Persi testified that he believed there were more administrators per child in Paterson than in Madison, and that, in his opinion, the district was top heavy, he provided no further explanation. No testimony was presented concerning how many administrators at what salaries the County Superintendent believed could be eliminated. No testimony was presented concerning how many education dollars were being diverted by mismangement according to the Department of Education.

The record in fact establishes only a few program costs. Dr. Ross, who was the Superintendent in Jersey City for 10 years and who is now running a wealthy suburban district (South Orange/Maplewood), testified about some program costs. He, perhaps more than any of the witnesses, should be completely

conversant with Jersey City's student needs, mismanagement/political intrusion and available resources. He said that curing all of the problems raised by the defendants would not yield even $2 million and would still leave Jersey City with inadequate resources to handle the vast educational needs of the students. It would require $27 million, according to Dr. Ross, to equalize Jersey City with South Orange/Maplewood.

The record supports Dr. Ross in this opinion. The magnitude of $27 million dollars staggers the imagination, especially when considering what $4 million dollars meant in Jersey City during the deficit crisis. To find that amount of money, the district cut personnel in art, music, physical education, computer education and library. Deficit reduction Plan B to achieve a $1,200,000 reduction, for example, included reducing 44 teachers and 39 instructional employees. Plan C to achieve a staff reduction of $535,000 included eliminating 50 teachers, 25 administrators and 20 non-instructional staff. (Exhibit P- 135.)

The record contains no evidence other than the Cresap, McCormick report which details the total amount of monies that would be saved from efficiencies. Cresap, McCormick recommended the elimination of 33.5 positions, for a savings of $644,000. This amount is approximately one-half of one percent of Jersey City's $125 million 1984-85 budget. Dr. Ross testified that the amount saved would not even cover in-service training costs for elementary school teachers.

To some extent, the gaps in the evidence are caused by plaintiffs and defendants proceeding from two different definitions of "thorough and efficient." The State defendants believe that to be T & E a district needs only to achieve certification under the Department's monitoring process. If this limited definition is

accepted as the only test required by the Constitution, the evidence of mismanagement does not need to explain the vast district disparities plaintiffs have proven. However, plaintiffs proceed from a completely different position. They believe that T & E requires equalization of resources and inputs. As I explain in Part V, I do not believe that either plaintiffs or defendants are entirely correct. I do not believe that T & E is as limited as defendants say or as expansive as plaintiffs claim. While it is not necessary to turn all urban districts into Princeton's, nevertheless, I do believe that T & E requires comparisons among districts and that therefore the question is not whether district mismanagement prevents reasonable progress toward certification, but rather whether district mismanagement prevents poor urban districts from addressing all student needs and from providing expenditures and programs that are substantially comparable with districts serving students with similar needs. (See further discussion in Part V.)

Conclusions

Accordingly, based on the record, I **FIND** that mismanagement, political intrusion and illegalities are not generally present in all poor urban districts. However, the record establishes that mismanagement, political manipulation and illegalities are present in some urban districts. The elimination of these problems would increase the efficiency of these districts and render them better able to serve their students' needs. But, even in those districts like Jersey City and East Orange where mismanagement, political intrusion and illegalities have occurred, I **CANNOT FIND** that this conduct is the cause of the district's inability to address its student needs or to eliminate the program and expenditure disparities that exist between property poor urban and wealthy suburban school districts.

Instead, I **FIND** for all of the above reasons that the cause of property poor urban districts' inability to meet the needs of their students, and the extensive and vast expenditure and program disparities established by the plaintiffs, is not mismanagement, illegalities or political intrusion, but is instead primarily the operation and implementation of the GTB financing system and the political accommodation or fiscal pressure of the kind I have determined to be systemic to sharing a property poor tax base with a municipality. I also **FIND** that the failures are caused by the unavoidable problems of extraordinarily large districts as well as the Department of Education's narrow monitoring focus, which is too district-specific. (See Part IV findings on monitoring.)

Defendants' proofs demonstrate a pervasive and overriding distrust of any remedy leading to additional funding because of the Department of Education's experience with certain districts' poor management practices, illegalities or political approaches to education. Several Department witnesses expressed concern that additional monies to property poor districts would be squandered unless the districts first proved that they can efficiently manage their affairs. On the basis of this record, I **FIND** that the Department's concerns are not unreasonable. There is sufficient evidence of mismanagement, illegalities and political intrusion to raise concerns about the effective and efficient use of tax dollars in some districts. However, this should be handled by better controls, not by maintaining insufficient funding levels. As Dr. Kimple said, the inefficiencies or failures of administrators should not prejudice the students.

Compelling Local Districts to Raise Additional Monies

The defense contends that the Commissioner has the authority to compel the raising of necessary funds and that he has not hesitated to exercise this authority. The plaintiffs counter with the charge that the Commissioner has abdicated his budget review authority.

The Commissioner's power to require the raising of additional local monies under *N.J.S.A.* 18A:7A-14 -16 was considered by *Robinson v. Cahill* (V) to be one of the most crucial features of Chapter 212. This power was a safety valve for the new law. Should the system not work sufficiently, for any reason, the Commissioner could "order necessary budgetary changes" within districts. The Legislature delegated to the Commissioner and the State Board, acccording to the Supreme Court, the duty "to maintain a constant awareness of what elements at any particular time find place in a thorough and efficient system of education". *Robinson V*, 69 *N.J.* 449, 459 (1976).

N.J.S.A. 18A:7A-28 also requires the Commissioner to review each item of appropriation within local district budgets on or before January 15 and to determine "the adequacy" of the budget with regard to the annual reports submitted pursuant to *N.J.S.A.* 18A:7A-11. The annual reports were to include demographic data, the results of student assessment programs, the results of the schools' effectiveness in achieving State, district and school goals, professional improvement plans, school improvement plans and innovative or experimental educational program plans designed to improve the quality of education. The budget review for adequacy, which was to be accomplished on the Commissioner's

behalf by the county superintendents, was therefore on the face of the statute linked to funding adequate monies for school improvement and student achievement under Chapter 212.

On October 3, 1986, Assistant Commissioner McCarroll stated that county superintendents do not review budgets for adequacy. County superintendents review budgets for accuracy, a position that was confirmed by several county superintendents who testified in this proceeding. (See Part I, finding that from 1975 until October 27, 1986, the Commissioner interpreted his budgetary review powers as limiting his administrative review of local budgets to an accuracy review.)

I **FIND** that the accuracy review during this period did not include any attempt to determine whether a particular local budget was sufficient to meet the educational needs of all of the district's students. The record contains instances where county superintendents approved budgets notwithstanding their recognition of insufficiency.

Some New Jersey districts including Montclair, Moorestown and Scotch Plains/Fanwood use program oriented budgets. But most New Jersey school districts develop a line item budget which is organized around staffing needs. Program oriented budgets are organized around programs rather than staff. The Department of Education had required districts to implement program oriented budgeting by 1982-83, but because many districts could not easily convert from line item budgeting to program oriented budgeting, resistance became so great that the State Board rescinded this requirement. With program oriented budgets it is easier to determine whether spending is properly linked to achieving a district's education objectives. Montclair's budget, for example, budgeted for art in the

1984-85 budget at $105,116 and in 1985-86 at $433,799. Language arts was proposed in 1985-86 as $2,234,354, for a $110,956 increase or a 5.23% increase. A line item budget is more difficult to review for program efficiency and adequacy. There is no way anyone can look at a $3 million line item for textbooks, for example, and tell whether it is adequate. The single figure does not tell whether the district is spending more in math than reading or if math was the higher priority.

I FIND that before October 27, 1986, the Commissioner never directed a local budget to be increased as the result of a January 15 county superintendent review. After 1986, with the possible exception of Paterson's 1987-88 budget, the Commissioner continues not to direct budget increases under this power. Additionally, the sufficiency reviews that county superintendents must now perform, after October 27, 1986, are linked to monitoring deficiencies. Therefore, assuming the superintendent can perceive particular programs in line item budgets, the review is district or school specific. No attention is paid to eliminating expenditure disparities among districts or equalizing program opportunities among districts.

The Commisioner has instead utilized his powers under *N.J.S.A.* 18A:7A-15 to direct budgetary changes only after "plenary hearing." This is the budget appeal process referred to in *Board of Ed. of Elizabeth v. City Coun. of Elizabeth*, 55 *N.J.* 501 (1970) and also discussed in Part I.

Under this process, the Commissioner does not review a district's situation until a budget has been disapproved by the voters or a Board of School Estimate and the municipality has reduced the budget, resulting in an appeal to the Commissioner by the local Board of Education. The record in this case includes

instances where the Commissioner has after a full hearing and initial decision by an administrative law judge returned the local budget to the amounts originally recommended by the local Board, thereby in effect reversing the voter disapproval.

There are very relevant and serious adverse consequences involved in the Commissioner electing to proceed in this manner. First, because of the procedural posture of the budget appeal, no determination can be made on whether the budget should be higher than even the local Board originally proposed. The most that local Boards can hope for is to have 100% of the monies that were cut restored. Second, and most significant, school districts have learned that the budget appeal process is costly, adversarial in nature and time-consuming. Accordingly, they seek appeals only when the budget is cut so severely as to compel the necessity for an appeal. When Asbury Park's 1986-87 budget was cut by approximately $200,000, for example, there was no appeal filed because the Board believed too much time would be involved and only part of the cut would be restored anyway.

The inadequacies of this process actually encourage the very fiscal restraints for which the Department now criticizes local Boards. If local Boards were as aggressive in the pursuit of adequate funding for their districts as the Department claims they could be, the Boards would be in annual political turmoil and dispute with the local municipality. Tension over the shared tax base would increase and many more budget appeals would be necessary. Consequently, local Boards try not to provoke the necessity for voter or estimate board rejection by being extremely sensitive to the municipality's fiscal capability. Compromise is essential. I therefore FIND that the Commssioner's reliance on budget appeals instead of the county superintendent's review to adjust inadequate budgets actually contributes to the development of budgets that are modified in response to

political and economic pressure and which may be inadequate to address all student needs.

Furthermore, even if the Commissioner acted upon receipt of the draft budget in January, the same political and economic forces that restrict local Boards of Education restrict the Commissioner under the present system. The Commissioner would have to tell local politicians and voters that he is further increasing a tax burden that is too often perceived as already excessive. In 1981 Commissioner Burke acknowledged that ordering budget increases which require tax increases "will increase the burden on these tax poor districts." (Exhibit P-286 at p 2.)

Accordingly, I **FIND** that the manner in which the Commissioner exercises his delegated powers to direct local budgetary adjustments and the system's inability to tap State education funds in the year of need, has rendered this aspect of Chapter 212 ineffective as a safety valve and is another cause of the existing funding and program disparities.

PART IV

This part of the decision deals with local control and defendants' contentions that monitoring and statewide testing will ensure eventually that all districts provide a thorough and efficient education. The findings on monitoring and testing are particularly important because the defendants assert that districts which are certified under the Department's monitoring program are running thorough and efficient systems. Whether this is so depends upon the nature of monitoring and the definition of T & E, which is considered in Part V.

This part also deals with defendants' claim that the Effective Schools theories, various new teaching techniques and several no or low cost programs can improve student achievement. The defendants point also to various Gubernatorial and Commissioner program initiatives and our existing compensatory education, bilingual education and special education programs as examples of how the State has already focused its attention upon the special needs of urban districts.

Finally, this part of the decision deals with New Jersey's school facilities programs and problems. Here, defendants contend that our existing system is sufficient to deal with our facility needs while plaintiffs argue that a complete overhauling of the system is essential.

Liberty, Equity, Efficiency and Adequacy

Two defense witnesses, Professors Guthrie from the University of California at Berkeley and Garms from the University of Rochester, contended that a

proper school financing system balances the competing values of liberty, equity, efficiency and adequacy. These witnesses explained that there is no single combination of these public values which must be uniformly implemented to support education. The appropriate combination of these values must be set by a state's political processes, usually through the legislature. The balance chosen by the legislature is incorporated into a selected public school financing system. There is no one best funding system. Each system has different needs, preferences and priorities. Even though the design of the system is essentially a political question to be resolved through democratic processes, whatever system is ultimately developed must be evaluated against the thorough and efficient education clause and other constitutional requirements.

These two defense witnesses defined what they meant by "liberty", "efficiency", "adequacy" and "equity" in school financing systems. "Liberty" or choice is the extent to which a community is able to tailor its educational program to community preferences.

Allocative "efficiency" involves utilizing effective means for raising and distributing resources. Technical "efficiency" assures through testing that the system is achieving equal outputs. Thus, "efficiency" seeks to optimize the use of resources toward maximizing the achievement of various educational goals or outputs. This can be difficult to judge because the educational system tries to do a variety of different things simultaneously, with no clear agreement as to which of these outputs are most important.

"Adequacy" means that the education delivered is sufficient to provide an equal opportunity for students to achieve a stated goal or output. The problem

with measuring adequacy is the same as with efficiency - no one really knows what constitutes an adequate education.

There are three components to "equality": (1) resources; (2) inputs, where resources are translated into services and (3) outputs, the result of resources in terms of student achievement. "Equality" as it pertains to students consists of both horizontal and vertical concerns. Horizontal equity requires that students with similar educational needs be treated equally. Vertical equity means that students with unequal needs should be treated fairly to address their special needs. There is no consensus on how much additional resources should be spent for particular handicaps. And, it is entirely possible to have absolutely equal resources not translated into effective services and not achieving the desired outcome objectives because the special needs of some students may require greater resources.

Adequacy and equity are related in political judgment. Whatever the state defines as adequate, the state has an obligation to assure an equal opportunity to achieve. Thus, not only is the state obligated to provide services equally, but, in some instances to provide them unequally to insure that children who approach the learning system with disadvantages learn what is defined as adequate.

Professors Guthrie and Garms testified that the New Jersey financing system appears on paper to be one of the best balanced systems in the country. Equality is addressed comprehensively rather than narrowly. Professor Guthrie explained that taxpayer equity is addressed through the GTB. New Jersey is a high spending state with an extensive testing and monitoring program to assure equality through adequacy in its educational system. The system provides equal access to

funds up to the guarantee with the assumption that the guarantee level will be sufficient to support an adequate education. The policies of choice or liberty are emphasized by allowing local school districts to develop budgets tailored to their particular school district needs and also to obtain cap waivers and to appeal insufficient budgets. In addition, the monitoring system encourages a planning process, which is consistent with efficiency. If the districts fail to achieve certification an increasing State presence will result which counterbalances liberty. Dr. Guthrie believed that monitoring was "just what the doctor ordered." (Guthrie Transcript, Apr. 29, 1987, p.55, line 21.)

Professors Guthrie's and Garm's descriptions of New Jersey's system are helpful for analytical purposes. However, both Professors Garms and Guthrie testified that they had not studied the implementation of Chapter 212, including how the finance and monitoring systems have operated in practice. Both witnesses were unfamiliar with how New Jersey's financing system actually worked. Their description of the program thus supports the Supreme Court's facial approval of the funding law. As previous findings have already indicated, I believe the evidence establishes that the system does not work as designed on paper. And, for the reasons previously explained, I have **FOUND** that the GTB system and the fiscal pressures caused by school districts sharing property poor tax bases with municipalities have prevented the property poor urban districts from meeting their students' needs and from dissipating the vast expenditure and program disparities established by the plaintiffs.

Local Control

The State defendants argue that the local control principle, like the principles of equal protection and a thorough and efficient educational system "springs from the New Jersey Constitution and therefore must be accorded entirely as much weight and respect as its companion constitutional provisions. . . ." (Defendants Brief at p. 7 and Point III C.) I cannot accept this argument.

All of the historical support cited by the defendants for this argument is ambiguous at best and the defendants cannot point to one word in the Constitution that directly supports its argument. The 1947 Constitution after all the years of history cited by defendants added nothing specific concerning local control or autonomy in the delivery of education .

Furthermore, the *Robinson v. Cahill* cases recognized that education in New Jersey is delivered through a partnership between the State and the local school districts. There is obviously a very strong tradition of local control over educational matters in New Jersey. But, the Supreme Court has made clear that ultimate responsibility for the delivery of an educational system that meets constitutional standards rests with the State. Even in a shared system of responsibility, the State has the ultimate constitutional responsibility for the schools. Also, as I find below, much local control has already been eroded by the State in New Jersey.

I believe that defendants through this argument are attempting to shift some of the responsibility for the alleged system failures to the local districts. This

argument cannot prevail because I am bound by previous Supreme Court determinations. If defendants wish to redefine constitutional responsibilities, that argument must be made to the courts.

Importance and Meaning of Local Control

Local control is a traditional part of American political and democratic processes. Local control includes the ability of local districts to respond to the needs and desires of their citizens and therefore encompasses a dimension of fiscal capacity, if local control is to be meaningful. The extent of local control is related to the resources available to plan and exercise various options.

Citizens at the local level are in a better position to influence school policy makers when school districts are administered by local boards of education.

The State may have broad policy objectives to be accomplished through the educational system, but control at that level is not well suited to meeting the more particularized needs or desires of specific local communities. Under the local control concept, the community should be able to exert control over the type of education it wishes to provide for the children of the community.

Factors such as the community's age, its economic and educational base and the ethnic mix affect the educational program demands and expectations for the local school system. Communities may differ in the degree they emphasize various types of courses like art, vocational, pre-college, Hispanic or black heritage, etc. A discipline policy that is appropriate for one community may be quite unworkable in another. Local control tends also to encourage a wide array of

instructional formats. Centralization of control may lead to standardization of curriculum and classroom management. Locally controlled schools are necessary to assure an ability to respond to the special needs and desires of diverse communities. A school serves best when it relates specifically and directly to the community it serves.

Local control in education is primarily exercised through control over administrative matters, such as the selection of staff and textbooks, curriculum and other elements of the instructional program.

Local control which encourages citizen participation creates an environment where the citizenry can feel that they have some control and say in what may go on in their schools. It encourages education of the citizenry about the schools, since school officials must sell their programs to the voters. A sense of ownership of the schools in the community is important for schools to be responsive and effective.

New Jersey exercises a shared control system where State supervision is intended to assure that statewide concerns are implemented while local school districts determine local needs and desires for their respective communities. See *In Re Upper Freehold Reg'l School Distr.*, 86 *N.J.* 265, 273 (1981). Chapter 212 was an effort to be faithful to the Constitution while preserving local authority over schools. The authors of the legislation did not intend to create a system of education that was dominated by the State. The State was, however, to ensure that local control worked on behalf of all children. A State-local partnership was envisioned that would reduce inequities and improve the schools. The Commissioner has an "'affirmative obligation to see to it that the statutory

objectives are met' and that local school boards and governing bodies fulfill their delegated duties." *In Re Upper Freehold Reg'l School Dist.*, 86 *N.J.* 265, 273 (1981) citing *Robinson v. Cahill*, 62 *N.J.* 473, 509 n.9 (1973).

The sharing of control also creates a functional tension between local and State governments which creates circumstances leading to continuing reviews of educational policy and better informed decisionmaking.

A public school system that does not have the confidence of the public is not likely to survive.

Fiscal Support and Local Control

Most experts agree that local school districts should contribute some local tax revenues to the cost of education. This local contribution helps foster a sense of ownership, leading to a public commitment to the education program. Local funds bring local citizens into the decisionmaking process and allow schools some freedom to spend local dollars free from State constraints. Raising local funds for local schools also makes the schools accountable to the local voters.

Fiscal control over local funds may make it easier for the community to hold school officials accountable since citizens have a greater incentive to monitor how their money is being spent.

It does not take much of a local share in school expenditures to create a sufficient stake for local support and participation in education. The record reflects

that a 10% local contribution would be sufficient to foster the benefits of local control.

Some testimony and dispute in this case involved the question of whether State assumption of funding for all or substantially all of the educational system would destroy local control. The question thus becomes how much of a local district's financial responsibilities can be assumed by the State before the local district loses its interest in participation, thereby destroying local control.

Generally, increasing funding from a centralized source is associated with increased political accountability for those funds. The history in New Jersey relating to educational finance illustrates that as the State and federal funding share increased, so did political accountability. To some degree, the plaintiffs' districts are perfect examples of this phenomenon. As the result of Chapter 212, the percentage of net current expense from State equalization aid in plaintiffs' districts is quite high. In 1986-87, Camden's net current expense budget, for example, contained over 90% equalization aid. East Orange received over 80 % and Jersey City and Irvington over 70% of NCEB from State equalization aid. This record reflects extensive State interest in these school districts. The problem with this historical observation, however, is it is not clear that the increasing political accountability was causally linked to increases in the state share.

The educational research and other states' experiences on how increased state funding impacted on local control is inconclusive. Generally, other states' experiences show that state control over school districts may be independent of the level of state funding. For example, New Mexico funds over 90% of local district expenditures, but exercises little control over local school districts. In North

Carolina, the state provides about 80% of the school funds, and local control there is as strong as it is in New Jersey, where the State provides about 40% of the needed funds. Many community colleges in the nation are fully state funded, yet locally controlled.

Part of the problem in discerning any causal relationship between increased state funding and state control is the simultaneous development of an educational reform movement that has increased state oversight over education in recent years. This movement toward "school excellence" or accountability began in the late 1970's and led to the publishing of "A Nation At Risk" in 1983. That movement, discussed further below, has pressed for new regulations or statutes relating to graduation requirements, curriculum, teacher compensation and certification, etc. Two states in particular, Texas and California, have greatly increased state control over curriculum, at the expense of local discretion. California now mandates, for example, textbooks, course requirements, class size, etc. These states have also both experienced parallel increases in the state share of educational expenditures. Thus, it is difficult to discern whether the loss of local control is more closely related to the school reform movement or to school finance reform.

Studies by Benson, Wirt, the Urban Institute and Noah and Sherman found that the relationship between local control of educational decisions and the level of state funding is random and that the variety of combinations of governance and finance that state legislatures and other elected officials have opted to use has varied. These studies have been criticized for examining a small number of cases and for the research methodologies. The four studies, however, used different methodologies, were done in different states and countries, and at different times.

The conclusions were the same: an increase in state share of educational funds is not necessarily associated with an increase in state control.

There is also support in the research for the proposition that it is a state's political history, tradition and culture which influences a state legislature to act consistent with the conventional wisdom that "he who pays the piper calls the tune."

I **FIND** on the basis of this record that it is entirely possible that state share could increase with no corresponding increase in state administrative control. Increasing state funds need not inevitably lead to less local administrative control. In 1973, for example, Florida adopted its major school finance equalization law, which increased the state share in education financing. In so doing, Florida also eliminated certain strictures on local educational decision-making and decentralized participation in educational decisions to the district and individual school level. In Maryland, as another example, its school construction program leaves maximum discretion concerning school construction at the local level while funding is established at the state level. The Maryland program has led to increased local input in school construction decisions. Thus, I **FIND** that it is possible for local control over educational decisions to be expanded at the same time that state resources are increased. However, the research on this point is not conclusive.

And, I **FIND** that inherent in any distribution of state education monies, especially in New Jersey, is the probability of political accountability. It seems reasonable that a legislature will want to ensure that state education funds, which can be used for other important non-education needs and programs, are being spent properly and efficiently. Therefore, I **FIND** that policy makers wishing to

preserve or expand local control and increase the state funding share must specifically preserve or enumerate whatever elements of local control they wish to protect or enhance.

Current Status of Local Control in New Jersey

Before Chapter 212 was enacted, the only State high school requirements were two years of US History and 150 minutes of health, safety and physical education weekly. For elementary children, the standards prohibited formalized reading instruction in kindergarten and mandated 150 minutes of health, safety and physical education weekly.

Beginning in the late 1970's, the educational excellence or accountability movement led in New Jersey to a switch in power as to who controlled what was being taught and what the requirements were for satisfactory performance. As a result of declining enrollments and declining SAT and other standardized test scores, despite increasing educational expenditures, the public became wary of its educators. In state after state, as well as in New Jersey, laws and regulations were passed which mandated: (1) how the education system was to function; (2) what the students should learn in basic skills; (3) how much the students needed to learn; and (4) negative consequences to schools and students when the students did not learn as much of the important skills as the public deemed necessary.

These laws diminished local control in New Jersey. In 1980, the county superintendents reported their concern that the State was continually eroding local

control of education. In their view the State was constantly imposing mandates on local authority and reducing the amount of local prerogatives.

These mandates, including family life courses, gifted and talented programs and programs for disaffected youth, required the districts to behave differently than in the past. The districts had to develop curriculum, hire teaching staff and devote facility space to these programs. The mandates thus are further intrusions into local control because they divert already limited funds from local discretionary programs.

New Jersey, unlike some other states, has issued many of these mandates without corresponding funding. No funding is provided for gifted and talented programs, family life education or career orientation. No money is provided to assist a district ordered by the Department to desegregate. This practice not only erodes local control but also causes local administrators to resent the State intrusion.

These mandates continue. For example, the State Board recently promulgated regulations to increase some of the course requirements for graduation. These changes include the following increases beginning with the following classes: (a) with the September 1990 9th grade class, the math requirement was increased from two to three years; (b) with the September 1988 9th grade class, one credit of world history/culture was added to the previously required two credits of social science and history; (c) with the September 1989 9th grade class, the natural or physical science requirement was increased from one to

two credit years; and (d) with the September 1988 9th grade class, the total four year high school graduation credit requirement was increased from 92 to 110.

Besides the Department of Education's mandates, there are other requirements established by statute that inhibit local control. For example, bilingual, special and compensatory education and the 150 minutes per week of health, safety and physical education.

In 1986, the Commissioner announced the appointment of a committee to consider establishing statewide proficiencies in courses required for graduation which will further intrude into local district classrooms if the proficiencies are established in districts not teaching to the adopted proficiencies.

The State has the responsibility under the accountability model to assure that all districts maintain minimum standards. In New Jersey, the Department of Education's monitoring program serves this function. It is obligatory for the State to step in when a district is not meeting State standards or when malfeasance or overt mismanagement is occurring. In *L.* 1987, c. 398, an act concerning the establishment of State-operated school districts (the "Takeover Act"), the Legislature has embraced a major departure from the tradition of local control. The Act evidences the State's willingness to assume full responsibility for delivering educational services and substantially blurs the distinction between State oversight and direct managerial responsibility. There is no example in the nation of State takeover of a local education district.

Under the current accountability system, districts that do well in monitoring receive less State attention and control than those that do less well. The

districts that pass monitoring are free to spend, plan and manage or mismanage their districts essentially as they wish. The districts which fail monitoring fall under increasing State control until the ultimate and final step in the progression of increasing control, State takeover, occurs. The districts which fail monitoring are by and large property poor urban districts. This has led to the perception that wealthier districts raising large amounts of local revenues have greater local control than do poor districts.

Nevertheless, the budget cap law is restrictive even on wealthy suburban communities, which if they had complete discretion, might spend even more on education. In many Morris County communities, for example, it was noted in 1980 that educational programs had to be eliminated for districts to remain under cap. Exhibit P-235, a 1981 Department of Education document used to brief gubernatorial candidates, noted at p. 79 that caps controlled spending increases but that "nearly a sixth of the districts have had to reduce the quality of their course offerings." Thus, the budget cap is an intrusion into local control for wealthy municipalities.

The property poor districts, with large amounts of equalization aid, have less discretion than the property rich districts because they are unable to raise substantial local monies to fund discretionary programs. This record includes examples of property poor districts struggling because of these limitations. In Plainfield, for example, the school board in 1981-82 approved a $15,000 allocation for special teacher training. In the summer of 1982, after 20 teachers had registered for the program and the new school year was starting, the Department of Education informed districts that State aid would be cut. The Plainfield Board cut their budget and this program was eliminated. I FIND that the excessive fiscal concern that

results from poor property bases further reduces the degree of a district's local discretion under Chapter 212. Dr. Hanushek, a defense economist, agreed that money means that those who have less have fewer choices than those who have more.

The current viability of local control I therefore **FIND** has been eroded statewide. I also **FIND** that property rich districts retain much greater local control than do the property poor urban districts, some of which may lose all local control or district-based education management through a State takeover.

The Department of Education's Monitoring Program Before Chapter 212

Between 1961 and 1975, districts were left largely on their own. Districts functioned with a large degree of autonomy. State supervision was lax. There were no Department of Education tests, nor designated processes for curriculum development. Curriculum was developed by the superintendent and the local board of education. Textbook company representatives evaluated textbooks and provided in-service, for which the Department provided general support. The Department also assisted in questions relating to transportation and finance matters.

From 1961 to 1969 there was no administrative Code for the public schools. Schools received Department approval on the basis of self-study instruments, but the Department did not develop a self-study instrument for use at the elementary level until the late 1960's or early 1970's. High schools ran on

several tracks with college requirements driving curriculum and the marketplace driving vocational training.

Also during this period before 1975, county superintendents rarely visited local districts. A formalized planning process was not uniformly in place. Department employees called "Helping Teachers" were provided to districts, upon request, to assist the district with curriculum development. In the early years after 1961 these Helping Teachers did not have any monitoring functions. After the advent of the federal Elementary and Secondary Education Act (ESEA) in 1965, the Helping Teachers assisted districts in communication and computation program designs and began to exercise some monitoring functions related to the federal Act's requirements. ESEA affected the delivery of basis skills instruction and increased awareness of basic skills problems that disadvantaged children were experiencing.

Between 1969 and 1971, Commissioner Marberger appointed a task force of local school district superintendents known as the "Committee of 17." This group was to explore whether they could develop input standards by which the quality of education in local school districts could be measured. The committee met more than five times over a six to eight month period but could not develop input standards which would clearly indicate the quality of an educational program.

In 1972 the State Board of Education adopted Our Schools Goals. The adoption process began in 1970 and involved input from some 6,000 people who met in large groups and town meetings to provide their best thinking on what they expected of their schools. The Goals consisted of 12 outcome goals and nine process

goals and are still the official goals for New Jersey public schools. (See *N.J.A.C.* 6:8-2.1(a)(b)(c) (1987).)

Establishing the Planning Process After Chapter 212

The Department of Education through the Division of Curriculum and Instruction worked actively with the Legislature's Joint Committee on Education to implement Chapter 212, which was enacted in 1975 after the previous funding law was declared unconstitutional by *Robinson v. Cahill*. The county offices located in the southern part of the State participated actively in developing draft implementation regulations. Local school districts in the southern counties also participated in field testing the new regulations.

"Helping Teachers" were redesignated to become "School Program Coordinators." In this new role, they coordinated activities between the Department's central office, county offices and the local school districts. They played a much more active monitoring role in developing curriculum and overseeing the districts' implementation of the planning model.

The Department produced a "T & E Primer" to assist local school districts in the comprehensive planning that was required under the new law. Also available to assist in implementing T& E were Department operated Educational Improvement Centers and the county offices for providing in-service training to local districts.

The T & E legislation began with goal development at the State and local level, with local district goals required to be consistent with State goals. Next, the

T&E planning process required districts to develop objectives and standards based on the goals. Local districts were then to assess their students' needs in light of the objectives and standards. The assessed needs were to result in whatever program redesign, new curriculum and/or budget revisions were necessary to address those needs. After implementing whatever changes were necessary, then the district was to evaluate annually how successful they were in meeting the students' needs, with annual adjustments possible for budget, curriculum and program, as necessary. In 1976, this planning model was placed on a five-year cycle, so that every five years all school districts, and the State itself (*N.J.S.A.* 18A:7A-8), were supposed to begin the process anew with goals. *N.J.A.C.* 6:8-3.2(c).

N.J.S.A. 18A:7A-5a required that the State Board establish State goals and standards applicable to all public schools and that local boards establish educational goals, objectives and standards. *N.J.S.A.* 18A:7A-6.

The State Board of Education could have under the legislation set whatever goals and standards they considered appropriate as long as they were consistent with the following ten guidelines established at *N.J.S.A.* 18A:7A-5, which define T & E:

a. Establishment of educational goals at both the State and local levels;

b. Encouragement of public involvement in the establishment of educational goals;

c. Instruction intended to produce the attainment of reasonable levels of proficiency in the basic communications and computational skills;

d. A breadth of program offerings designed to develop the individual talents and abilities of pupils;

e. Programs and supportive services for all pupils, especially those who are educationally disadvantaged or who have special educational needs;

f. Adequately equipped, sanitary and secure physical facilities and adequate materials and supplies;

g. Qualified instructional and other personnel;

h. Efficient administrative procedures;

i. An adequate State program of research and development; and

j. Evaluation and monitoring programs at both the State and local levels.

Local districts could establish local goals by following the State goal setting process (the "Our Schools Process") or the Phi Delta Kappa model, which dealt with fewer persons and utilized a multiple choice survey rather than meetings.

It was clear to the Department, during the early days of Chapter 212, that specific implementation of these guidelines could have implications for staff,

programs, support services and equipment in some districts. Initially, the Department envisioned that its regulations would define input standards, that local districts would set goals related to the State goals and define for those goals output standards, and that the local public then could hold the districts accountable for the results. The State would monitor the entire process.

In 1975, the Department drafted and widely circulated proposed input standards that included limitations on the size or organization of schools and would have required a certified school counselor, grades 5 through 12 for every 200 pupils; a full-time child study team for each 1,500 pupils; a full-time speech correctionist for each 1,500 pupils; a full-time principal assigned to each school and an assistant principal when enrollment exceeded 500. These regulations were rejected because of opposition from interest groups concerned about the costs of meeting the standards and infringements of local control. Consequently, the input requirements of the statutory guidelines were left undefined by the State Board.

Specific input standards were never included in the regulations and some general standards have been removed from the Code. Regulations, effective January 1, 1987, for example, no longer require that assistants to principals be provided where necessary because of school enrollment, educational program and/or complexity. (Compare *N.J.A.C.* 6:8-4.3(c)3 (1986) with *N.J.A.C.* 6:8-3.3(b) (1987). Similarly, *N.J.A.C.* 6:8-4.3, (effective through December 31, 1986) used to include a list of certified personnel needed to implement a thorough and efficient system of free public schools. Now the regulations merely require certified personnel "pursuant to law and rule." See *N.J.A.C.* 6:8-4.3(a)6(i) and 6:8-3.3 (1987)

During the period 1976-77 until the close of Commissioner Burke's administration, the Department of Education and its county offices concentrated on implementing the T & E planning model. Monitoring focused primarily upon interacting with local school districts and determining whether they were making satisfactory progress toward implementing the planning model.

Local school districts handled the implementation of the planning process with varying degrees of success. Ideally, the goal setting was to be completed during 1976-77; objectives and standards during 1977-78; assessments during 1978-79; program development by 1979-80 and program evaluation was to occur in 1980-81. It quickly became apparent that the Department had miscalculated the amount of time and personnel that would be necessary to achieve these changes. Some school districts which had in place the expertise and the personnel went through all stages of the five-year planning process in three or four years. Others did not complete the process, even by the end of the fifth year. In 1980, for example, when the State Board's first evaluation was submitted, some districts had not yet set their goals; only 290 had established objectives and standards; many had not done a needs assessment. And, as my previous findings confirm, some districts even in 1987 had not fully implemented a planning process.

At this time, the attempt to establish an overall planning process in each school district appears to have been subsumed into the current monitoring process. Each district must now annually develop a minimum of three objectives designed to improve instruction, to which the district must add those objectives necessary to remedy the non-mandatory monitoring deficiencies. The objectives must be approved by the local board of education and developed annually by the

superintendent after consultation with the district's teaching staff and the community. The county superintendent must review and approve the objectives and action plans, but these district objectives are not verified by the Department as accurately reflecting district need. Also as required by monitoring, every district must develop a master facilities plan and a comprehensive preventive maintenance plan.

Monitoring and Classifying School Districts

N.J.S.A. 18A:7A-10 requires the Commissioner, with the approval of the State Board and after review by the Joint Committee on the Public Schools, to "develop and administer a uniform, Statewide system for evaluating the peformance of each school."

Beginning in 1979-80, the Department of Education began classifying local school districts under the monitoring process. Any district or school that did not pass was to have gone into a remedial mode. The Department was to evaluate schools and districts for compliance with (a) law and regulation; (b) educational plan; (c) basic skills achievement, and (d) assesssment of students' achievement of other local goals and objectives.

In the 1979-80 monitoring the Department had specific standards to judge (a) law and regulation and (c) basic skills achievement. The other evaluation categories had vague standards and accordingly the seriousness of the monitoring was minimized. For example, in evaluating the educational plan requirement, districts were approved if they had any plan. Those that did not have a plan were permitted to produce a plan for developing the plan. Also, schools were

"approved" for local goals achievement even if they had not met minimum standards in two goals, but had developed an acceptable plan to meet them. The State did not judge the appropriateness of any local goal.

Four classifications were used: approved, interim approved, interim approved pending and unapproved. In this period, no school districts were "unapproved." Classification determinations depended on whether a district was demonstrating reasonable effort toward accomplishing each of the planning model components. The assessment of whether a district was making reasonable progress was determined jointly by local school district personnel and county office personnel. A district would have been disapproved only if it refused to develop or implement a remedial plan. Once the remedial plan was submitted, the district was moved from "interim approval pending" to the "interim approval" category.

Most of the classification deficiencies in 1980 were in basic skills achievement. There were 223 schools found deficient in basic skills because fewer than 65% of the students met the State passing MBS scores in reading, math or both.

In 1981, among those schools reclassified from interim approval pending to interim approved in basic skills because they submitted basic skills remedial plans were 172 schools in poor urban DFG A and B districts and five schools in Plainfied, an urban DFG C district. In Newark, 43 schools retained the lowest classification, i.e., interim approval pending, because no remedial plan was submitted.

Between 1978 and 1981, the evaluation for compliance with law and regulation was an ongoing process. County office monitors used two checklists, one

dealing with facilities and categorical program criteria and one dealing with mandated programs. As the School Program Coordinators (formerly helping teachers) visited schools and districts they verified progress by using the checklists.

Comprehensive Basic Skills Reviews

After the first monitoring, the Department was quite concerned about the large number of schools with basic skills deficiencies. The Department therefore performed in 1980 what it called "Comprehensive Basic Skills Reviews" in 107 of the approximately 220 schools which had not met the basic skills achievement requirement. The Department permitted an internal district review process by the remaining 113 schools.

The Department also analyzed 91 studies on "effective schools" (See discussion below) to extract those elements associated with high achievement in basic skills. It selected and trained external evaluator teams to document in each school the presence or absence of the elements associated with improved achievement.

Virtually all of the low scoring schools in 1980 were in DFG A and B. Numerous recommendations which appeared to relate to lack of resources were made by the external teams for improvements in these schools. For example, lack of staff in Paterson prevented the reduction of class size in Paterson elementary schools No. 4 (reduce to 20); No. 15 (primary grade classes too large and rooms too small, and inhibitions to reading development include large classes and classroom size); No. 21 (reduce number of pupils assigned to each class). In Jersey City, the reviewers recommended reducing class size at schools No. 41, 24, and 5, as well as at

both Ferris and Dickinson high schools, and hiring additional personnel at School No. 38, including two reading specialists, two math specialists, one bilingual teacher, one learning disabilities teacher, one librarian, aides to relieve teachers of non-teaching duties and to supervise the lunch program, one full-time guidance counselor, and full-time art, music, and K-4 gym teachers. In Camden, the teams saw the absence of a librarian at the Mickle Elementary School as having a negative impact upon children's educational programs. Reduction of pupil/teacher ratio was recommended at the Morgan Village Middle School. At the Powell Elementary School, the team recommended among other needs: (1) a full-time principal with full-time clerical assistance; (2) an extension of the guidance counselor's time; (3) an extension of the hours the school nurse spends in the building. For the entire Camden district, the team recommended an increase in the number of staff currently employed to meet the basic skills needs of students "considering the amount of time required."

The external review teams also found in 1980 inadequate supplementary materials and that a lack of qualified substitutes caused classes to be doubled up. The teams also found that frequently high teacher absentee rates result from working conditions in the urban high schools.

In July 1981, the county superintendents filed reports on each school. In more than half of the elementary schools, cost was cited as a problem in implementing suggested improvements. Typically, the recommendations which required expenditure of funds were not planned to be implemented until 1982-83 or later.

The Department evaluated the schools visited by the teams one year following the reviews and found that 67% of the 107 schools had met the MBS passing standard. However, several of the large high schools studied were still below State MBS standards.

In 1981, after 45.8% of the 9th graders in New Jersey's poorest high schools failed the MBS, the Commissioner sought an additional $8 million to ameliorate the problems identified in the Comprehensive Basic Skills Reviews, with $6 million to be used to establish Basic Skills Academies in 55 high schools. In his unsuccessful proposal for funding Commissioner Burke said: "The schools wnich are developing remedial plans are almost exclusively in districts with low tax bases and high tax rates. In order to implement the required changes, some additional sources of revenue will have to be found. The Commissioner is empowered to order budget increases which require tax increases. However, this will increase the burden on these tax poor districts." (Exhibit P-286 at pp. 1-2.)

After 1982, the Comprehensive Basic Skills Review process was terminated. The Department did not review how the schools responded to the CBSR reform suggestions. No study of costs or possible reallocation of funds was undertaken and the Department did not do any further follow-up studies.

Monitoring After 1982

Because of concern that the prior monitoring system was burdensome, not uniform and did not determine whether districts were providing a thorough

and efficient education, the new administration under Commissioner Cooperman committed itself to reform.

The Assistant Commissioner for County and Regional Services assumed responsibility for coordinating the county superintendents and in 1983, three Coordinating County Superintendents were appointed for each of three State regions.

During the 1983-84 school year, the Educational Improvement Centers were replaced by three Regional Curriculum Service Units (RCSU's) which were to perform many of the same in-service training functions previously undertaken by the EIC's. Each RCSU serves seven counties within its region. Besides assisting the Assistant Commisioner for County and Regional Services, the three Coordinating County Superintendents also direct the activities of the Regional Curriculum Service Units.

The county office became primarily a compliance office with the county superintendent responsible for general supervision of all public schools, including monitoring; approving school transportation and private school placements of handicapped children; processing teacher certificates and issuing substitute certificates, and reviewing district budgets. To insure monitoring consistency, the Department trained its county office staff and instituted State review of monitoring reports.

In 1982, the Department established the Daniels Committee (chaired by Boundbrook's Superintendent) to reassess the implementation of Chapter 212. The Committee included representatives of the county and district administrators,

boards of educations, the teachers' union, State administrators, the N.J. Parent/Teacher Association and general public organizations such as School Watch and the Puerto Rican Congress.

The Daniels Committee was to develop criteria and instruments for monitoring. They were to focus on the essential elements of a thorough and efficient education and to develop a new process that would hold districts accountable for the education they were providing. They completed their work in the spring of 1983.

The Daniels Committee recommended that State monitors review nine major elements that they believed were indicative of T & E. The Commissioner accepted the nine but added a tenth for fiscal matters. The Committee's further recommendations led to the development of the Level I and Level II processes which were implemented in the 1983-84 school year. The Department issued a 1984 Manual for the Evaluation of Local School Districts, Exhibit P-290, with a Guidebook to accompany the manual, Exhibit P-291.

Monitoring for the 1983-84 school year contained ten elements and 51 indicators of T & E, which are separate requirements organized under each element. The major elements to be evaluated in monitoring and deemed essential for a thorough and efficient educational system are planning, school and community relations, comprehensive curriculum and instruction, student attendance, facilities, professional staff, mandated programs, achievement in State mandated basic skills, equal educational opportunity and financial matters. Of the 51 indicators subsumed under the 10 elements, 40 were mandatory for certification. If the district were rated unacceptable in any of the 40 it could not be certified. If a

district failed one of the 11 non-mandatory indicators, the district had to detail how it would cure the deficiency in its annual local planning process.

As an example of the relationship between elements and indicators, the pupil attendance element may be rated acceptable when the district provides documentation demonstrating the following three indicators: (1) the average daily attendance rate for the district is 90% or higher (if the rate is 85 - 89.9% the district can be rated satisfactory by developing and implementing an attendance improvement plan; if the rate is below 85%, however, the element must be rated unacceptable); (2) the average daily attendance rate for each school within the district is 85 % or higher (if the rate in any school is between 80 and 84.9% the district can be rated acceptable by developing and implementing an attendance improvement plan; if the attendance rate for any school is less than 80%, the element must be rated unaccepable); and (3) the district has developed and implemented an improvement plan to reduce the rate of pupils who drop out after completion of the eighth grade.

Level I monitoring covers the ten elements and consists of a review of documentation in the county or district office and a three to five day on-site visit to the district schools. A district which satisfies the 40 mandatory indicators receives State certification at Level I.

Beginning on July 1, 1988, the 51 indicators will be reduced to 40, all of which are mandatory. Also, districts like Irvington and New Brunswick, which were certified when the basic skills element required meeting the MBS standard, have until 1988 to achieve an interim 60% pass rate on the HSPT (the regular standard

under monitoring is 75%). If districts do not meet the interim standard they will be decertified and go to Level II monitoring.

The Department of Education analogizes its current monitoring system to a routine physical examination which is designed to give a good indication of a school district's effectiveness. Under the current process, the Department assesses the progress each school and district is making toward achieving local goals, objectives and standards; developing and implementing an educational plan; meeting statewide standards in the basic skills; and complying with education laws and regulations. After the evaluation, the Department determines whether corrective action is needed. If no corrective action is necessary and a district is "certified," the district is not re-evaluated by the Department for five years.

Those districts which fail to achieve certification at Level I move to Level II. The district must then design an improvement plan to correct those school and district deficiencies identified during Level I. If the plan is approved, the district implements it, after which the county office returns, monitors, and closes Level II. (Interim Level II monitoring was performed only in East Orange and Trenton because those districts were approved for the Operation School Renewal program. Interim Level II monitoring has afforded additional improvement time to those districts but its procedures are not detailed in any regulation.)

County offices, RCSU's, or Department of Education bilingual or basic skills staff can provide assistance, upon request, to districts developing Level II improvement plans.

Those districts not certified on the implementation of the Level II plan, however, move to Level III. The Level III process is more intensive and focuses the Department's resources upon those few districts which have been unable to attain certification. Under this process, a review team is selected comprised of representatives from the Department's Office of Compliance and educators with expertise in the areas of the district's deficiencies.

The Level III review team under the direction of the Department's Office of Compliance may spend a week to three weeks in the district. The time varies according to the district's size. A Level III review team spent almost a month in Camden. The team reviews the district's deficiencies and tries to determine why the Level II plan failed. The team looks at the district in depth. They interview teachers and parents, administrators, township officials or anybody who might provide insight into the district. The team conducts a qualitative analysis of the district's deficiencies to identify causative failure factors.

At the same time the Level III team is working in the district, the Department's Compliance Unit is also investigating the district. The Office of Compliance is comprised of eight members. Two members work as educational specialists and three serve as auditors. One member is an investigator with 25 years of police expertise. The assistant director is an attorney. According to Assistant Commissioner McCarroll, the Department has "determined on the basis of some experience that sometimes there are conditions at work in the school district that would prevent the educational program from reaching its full potential. By that I mean boards of education who have something other than education as their agenda, relationships between the board of education and the city officials that

sometimes results in questionable fiscal practices, questionable personnel practices, all of these kinds of things eventually impacted the education in the schools." (McCarroll Transcript, Feb. 2, 1987, p. 16, lines 7-16.)

The findings of the Level III team and the Compliance Unit are studied in an effort to determine whether the district can achieve certification. If the Department believes the district can become certified, then the Department issues a series of directives that indicate specifically when and what the district must do to correct the deficiencies. The district then completes a Corrective Action Plan with the assistance of the Department. If that plan is approved by the county superintendent, then the district begins implementation and the county superintendent will review the district's progress periodically. The Department receives quarterly reports and remains actively involved in the district.

The time districts are given to comply after Level III varies. Asbury Park, for example, is being reviewed quarterly for three years. If at the end of the Level III schedule, the district is making reasonable progress, its timelines would be extended.

After the Level III team and the Compliance Unit have completed their reviews, should it be determined that it would be either very difficult or next to impossible for the district to achieve certification, then the Department may initiate a Comprehensive Compliance Investigation, which involves an outside audit firm spending 60 to 90 days doing a management audit.

The result of the Comprehensive Compliance Investigation may be an administrative order to show cause why the district should not comply with what is in effect a corrective action plan with specific time lines.

Another result of the Comprehensive Compliance Investigation or the Level III team review could be takeover of the local district under *L.* 1987, c. 398, approved January 13, 1988.

Certification Status

In February 1987, the Department estimated that 98% of the school districts in the State would achieve certification at either Level I or Level II.

In February of 1987, there were 45 districts in Level II. The Department anticipated that about one dozen districts would not be certified under Levels I and II and that most of those districts would be urban.

As of May 1987, the following six districts were in Level III monitoring: Asbury Park in Monmouth County; Penns Grove-Carney's Point in Salem County; Camden City in Camden County; Jersey City and Hoboken in Hudson County; and Maurice River in Cumberland County. All of these districts are in DFG A and four of them are urban.

Exhibit D-284, a 1986 New Jersey School Boards Association report on districts in Levels II and III, demonstrates that 53% of these districts failed at least one indicator in element three - comprehensive curriculum/instruction. The

indicators failed most frequently were 3.1 and 3.2, which require written and implemented curriculum. The report also shows that 77% of the districts failed at least one indicator in element five on facilities. And 57% of the districts failed at least one indicator in element six on professional staff. Within element six, the most frequently failed indicator was 6.1, which requires all professional staff to be certified in the area of assignment. Fifty three percent of the districts failed at least one indicator in element seven, mandated programs, with the most frequent failures in indicator 7.5, which requires an annual special education plan approved by the county superintendent. Of the districts in Levels II and III, 30% failed at least one indicator in element eight, achievement in State mandated basic skills.

Irvington was not certified in Level I in 1984, but the district did not go into formal Level II monitoring. After developing a basic skills improvement plan and meeting State mandated MBS test standards in 1985, the district was certified.

East Orange was not certified in 1984 Level I monitoring. After Interim Level II monitoring in 1986, the district was directed to develop a plan to correct the identified deficiencies.

Jersey City was not certified in 1984 Level I monitoring. As of February 1987, Jersey City, together with four other Hudson County districts--out of a total of 13 districts--had not been certified. Later in 1987, the Level III process began in Jersey City.

Paterson was not certified in 1984 Level I monitoring because it failed 15 mandatory indicators. Paterson remains uncertified in this record. It is the only

district in the State that failed Level I and, as of the close of this record, had not filed a Level II improvement plan.

Asbury Park was the Department's first Level III school district. The Department evaluated the district in early 1986 and the district was given a three-year time frame to correct its problems.

The Department's Level III evaluation of Camden occurred in October through December of 1986. The district developed a Corrective Action Plan, which was approved by the Department. Camden has one year to show progress in implementing the plan. If there is progress, the district will be given more time.

Exhibit D-284, the New Jersey School Boards Association report on districts in Levels II and III, found that over two thirds were in DFG A, B, and C, with 52.7% in A and B. The Association concluded that the Level II and III districts as compared with other districts in the State were more likely to have appointed boards, to be urban, to have high enrollments, to be large K-12 or vocational systems, to be in the lower socioeconomic categories, to spend less per pupil and to have less property value behind each pupil. The report found that the mean current expense budget per pupil for Levels II and III districts was $4,628 while for all districts it was $4,952. The mean net current expense budget per pupil for Levels II and III districts was $3,681 while for all districts it was $4,064. The mean equalized valuation per pupil for Levels II and III districts was $103,722 while that for all districts was $213,934.

Comparison of Monitoring Results

In the very next section of this decision, I make certain findings about plaintiffs' charge in their proposed findings that defendants have mismanaged monitoring. Thereafter, I make findings on what monitoring measures and the process generally. To better explain these findings, I am including here some illustrations supporting my observations, which were derived from comparing the Level I and Level II monitoring results in Camden, East Orange and Jersey City. The detailed comparisons I provide are from Element 3, comprehensive curriculum/instruction and Element 4, student attendance.

It is important to note that each of the districts would have been evaluated by a different county office. The Camden County Superintendent evaluates Camden, the Essex County Superintendent evaluates East Orange and the Hudson County Superintendent evaluates Jersey City.

Indicator 3.1 requires written, Board approved curriculum, K-12, for all subjects including all mandated State programs and services. On this indicator, Camden was rated acceptable in both Levels I and II. East Orange was unacceptable in both Levels (the second Level being denominated Interim Level II) and Jersey City was rated unacceptable in Level I and acceptable in Level II.

East Orange failed Indicator 3.1 in Level I because the district did not have a written family life education curriculum adopted by the Board. At the Interim Level II evaluation, additional procedural problems were noted, including curriculum design, development and content. Furthermore, the county office this

time discovered that there were no curricula for bilingual, ESL or special education. Some Department witnesses explained that Level II evaluations were not necessarily limited to Level I defects, however, one must question the thoroughness of the Level I evaluation based on these results.

In Jersey City, after the school district initially failed Indicator 3.1, it thereafter in Level II received an acceptable rating. The Level I monitoring team specified problems and made corresponding recommendations. Level II indicates that the recommendations were followed by the school district.

Indicator 3.2 requires that the curriculum be implemented. Camden, on this indicator, was rated unacceptable in Level I and acceptable in Level II. East Orange was unacceptable at both levels and Jersey City was initially rated acceptable and then unacceptable in Level II.

In Camden on Indicator 3.2, the County monitoring team at Level I made 11 pages of findings, suggestions and recommendations. They covered evaluation of texts and text selection, curriculum review and development, in-service training, time on task evaluations, supplies, lesson plans, etc. A total of 22 suggestions/recommendations followed the findings as corrective actions. These included such items as reducing the high school basic skills class size, implementing successful teaching procedures, providing transitional classes for students not developmentally ready to move on and gym equipment for elementary school, etc. Level II reflects the district's responses to the Level I suggestions. A five-page section reviewed the district's progress and then concluded with 15 more suggestions to improve curriculum. It is obvious that both of these reports were very complete and

informative. Additionally, the Level I report's specificity appeared instrumental in assisting the district's compliance efforts.

East Orange was rated unacceptable in both Levels for Indicator 3.2. However, the same pattern appears for this indicator as for 3.1. The only problem noted at Level I was the family life education program but Level II found problems with textbooks, curriculum guides, supplies, staffing discrepancies and various educational inequities, including a failure to provide an art program evenly across the district and a failure to provide equal access to swimming and water safety instruction at the middle school level. Each problem area noted during Level II, however, was followed by a recommendation to correct the deficiency.

Jersey City was rated acceptable at Level I and unacceptable at Level II for Indicator 3.2. One may understandably ask what happened? At Level I the assessment of the district's curriculum implementation could be basically characterized as so-so. At Level II, however, 17 problem areas were found in the high schools and eight in the elementary schools. The problems noted included teachers not having plan books, no individualized instruction, inconsistent implementation of a swimming program, no visible evidence that students were receiving library skills instruction, and others. This time relating to a different County's efforts, I wonder again why these problems were not noted during Level I? Additionally, the county evaluators made no corrective action recommendations to the district on this indicator in the Level II report.

Indicator 3.3 requires that the instructional program recognize individual talents, interests and exceptional abilities of pupils. Camden received an acceptable on this indicator for both Levels. The Camden County evaluators nevertheless

provided improvement suggestions including additional materials and transportation to magnet schools. Given the quality of Camden's monitoring reports, one must wonder whether the Department's conclusion that Camden has become a willing partner in the monitoring process (See Part III) is related to the quality of the monitoring, as well as to the district.

East Orange was also rated acceptable at both Levels for Indicator 3.3 but here the county evaluators made no suggestions or recommendations.

Jersey City was rated unacceptable for Indicator 3.3 at both Levels. At Level I in Jersey City, the evaluators found no formalized course of study or curriculum outline and Level II showed that a curriculum handbook had been developed and adopted by the Board. Three recommendations were made at Level I. The evaluators suggested generally that the district support and expand its alternative education curriculum and that the district use in-district programs when possible before looking outside of the district. No further recommendation specificity appears on the document and no suggestions or recommendations were made at Level II.

These comparisons relating to the various approaches taken to evaluating Indicator 3.3 reveal a significant difference between when and how county evaluators make recommendations or suggestions.

Indicator 3.4 requires that districts provide pupils with guidance and counseling. Both Camden and East Orange were rated acceptable on this indicator at both monitoring levels. Camden's report, however, was starkly different from East Orange's. Camden received a variety of suggestions, including the need for a

full-time counselor for larger elementary schools and the need for a more detailed developmental guidance program. The Level I report noted that middle school students saw their counselor at least twice a year. Level II in Camden provided even more specific suggestions and raised concerns about in-service training and staff/student ratios. The County evaluators' concern for students was prominent in both reports on Levels I and II. East Orange's report contained no recommendations or suggestions.

Jersey City was found unacceptable in Indicator 3.4 at both Levels I and II. The monitoring team at Level I found the guidance and counseling delivery system to be inappropriate. The team criticized the district for not having certain documentation and inadequate internal communication and followup, for example. Five recommendations were made including the need to provide appropriate services for dropouts and to develop a student advocacy program. Level II reiterated the Level I findings and made no further recommendations or suggestions. This was the second indicator that Jersey City failed under Element 3 for both Levels and yet, the report provided little analysis of the problem or improvement guidance to the district.

Element 4 involves student attendance and includes five indicators. Indicator 4.1 requires a 90% average daily attendance rate for the district. Indicator 4.3 requires an 85% daily attendance rate for each school. Indicator 4.2 requires an attendance improvement plan if the district's average daily attendance rate is between 85 and 89.9%. Indicator 4.4 requires an improvement plan for any school where the average daily attendance rate is below 84.9%. Indicator 4.5 requires districts to implement improvement plans to deal with dropouts.

Jersey City was rated unacceptable for each indicator under Element 4 at each monitoring Level. Yet under Indicators 4.2 and 4.4 the monitoring report amounted to "there are no attendance improvement plans" or "the plan had not been updated." No guidance was provided by the State. For Indicator 4.5, requiring a dropout prevention plan, the monitoring comments consisted of "no documentation." There were, again, no recommendations or suggestions.

In contrast with Jersey City, Camden moved from unacceptable in Indicator 4.5 at Level I to acceptable at Level II. At Level I, it was recommended that the district begin with efforts already underway at some of its schools. At Level II, the district had implemented a plan including closer follow-up, counseling, telephone calls to parents, city-wide meetings with parents of potential dropouts, etc. However, the report went on to recognize that a serious dropout problem remained in Camden and therefore further recommendations were offered, including in-school suspension rooms and an alternative school for disruptive students. The monitors also suggested that Camden restructure certain attendance officer procedures to improve student attitudes towards education rather than rely on punitive measures. The Camden County Superintendent's Office seemed concerned with the real problems and made a distinct and apparent effort to make constructive suggestions.

Mismanagement of Monitoring

Plaintiffs contend that the State mismanages monitoring. (Plaintiffs' Proposed Findings #1062-1072 at pp. 197-200.) I **CANNOT FIND** from the several assertions enumerated by plaintiffs that the Department of Education mismanages

monitoring. No one can be fully satisfied with some of the process confusion and inconsistencies that have been demonstrated and with the speed by which monitoring proceeds. Asbury Park, for example, first monitored in 1984, may be in Level III beyond 1990. However, the regulatory task imposed on the Department by *Robinson* and Chapter 212 was truly gargantuan.

I do not believe that the Department ineptly proceeds through monitoring. Great care was taken in developing monitoring and in evolving its procedures. One can second guess the Department. However, the regulatory challenge imposed by Chapter 212 was so immense that monitoring had to evolve as the Department became more familiar with specific problems. The current process appears to contain several improvements over the previous never-ending process. I **FIND** that the Department's monitoring process is a good faith effort to comply with the law and to assess districts' educational systems. The elements and indicators appear to focus attention on most of the significant, relevant problems confronting education, with the exception of adequacy of resources and comparability of programs statewide. (See further findings below and in Part V on the definition of T&E.)

Some emphasis has also been placed on the charge that monitoring focuses the Department's resources on poor urban districts, with the consequence that other districts, whether they pass with comfortable margins or by the skin of their teeth, can run their districts pretty much as they wish, with as much efficiency or inefficiency as they please.

There is no doubt that urban districts present extreme challenges to the Department. It is also clear and I **FIND** that the monitoring system is focusing on

large, poor urban districts. Some poor urban districts, because they have not been certified, are subjected to much greater scrutiny than most other districts. But I can ascribe neither maliciousness nor arbitrariness to the State action. The State honestly believes it is protecting the best interests of the tax-paying public and the school children by monitoring in this manner. Assistant Commissioner McCarroll explained that the Department is focusing its limited resources where it believes they may be most needed. I do not think that this decision, if reasonable, should be second guessed and I decline to do so. There is more than sufficient evidence in the record for the Department to have structured its monitoring process in the manner it chose.

Plaintiffs also made much of a variety of defects occurring during the Department's "special monitoring" done in plaintiffs' districts in preparation for this hearing. These are the additional evaluations referred to in Part III, which were undertaken by defendants to prepare for the trial. This "monitoring" was done at the behest of the Attorney General to prepare for litigation. In fact, some of the evaluators expressed discomfort at being assigned this task by the Attorney General's office. These special additional evaluations are unconnected to the Department's monitoring process and are, therefore, irrelevant to any assertions of Department monitoring mismanagement.

My approval of the overall process, however, should not be misunderstood. I also believe that the manner in which monitoring has been implemented, or what is actually being monitored, raises serious problems and renders the system an ineffective remedy for the defects proved by plaintiffs.

Monitoring Conclusions

The Department of Education believes that the monitoring process adequately discharges the State's responsibility under our Constitution. I have, however, **CONCLUDED** that monitoring as implemented by the Department does not meet constitutional requirements for the reasons that follow and because of my understanding of what T & E requires. (See Part V.)

Monitoring has become a major task of the Department of Education. The County Office "Helping Teacher", as his/her title evolved through "Program Coordinator" to "Program Specialist," which is the current job title, became further removed from local district teachers and is now viewed as the regulator's emissary. Monitoring has become a State-dominated process synonymous with the Department of Education's review activities.

Some local districts now view the Department of Education as the enemy. A statement made by a county official, indicating that as far as he was concerned a property poor local board could raise the $52 million it might lose in State aid itself, add to this perception. Since 1975, monitoring has increasingly become an adversarial process between the Department and some districts.

There is no question that monitoring is district or school specific. Except by attempting to apply consistent standards among counties, the monitors do not compare one district with another. They do not compare a school in one district with a school in another district no matter how similar the student needs appear. If a district has swimming pools in several elementary schools, it will be criticized for

having some inoperable pools, but a neighboring district with no swimming pools will not be criticized. One county superintendent affirmed that within a district, the monitors try to ensure that wherever students live, they receive equitable programs. Exhibit D-34 at p. 204 says that within Jersey City, "equal opportunities should be given to all K-3 pupils for access to the art, music and physical education specialities." No reason has been provided explaining why these equity concerns terminate at the district borders. I **FIND** that the county monitors do not focus on comparable needs of children within the county or the State but instead isolate their evaluation to conditions within particular districts.

I **FIND** that no part of the monitoring system attempts to determine whether a district has properly evaluated its educational needs. I also **FIND** that the monitors do not evaluate whether children with similar abilities are being provided substantially comparable programs and services no matter where they may attend school.

Much of monitoring consists of determining whether the district has on paper what is required. Review of curriculum under monitoring, for example, consists of a review of the curriculum guides or lesson plans to see that the curriculum the local board has approved is reflected in the teachers' materials. The written Board-approved curriculum must include mandated State programs and services but can also include any courses the district may choose. Any written curriculum adopted by the local Board that provides a description of each program and/or course, including its purpose and a list of the desired student outcomes, is acceptable to the State. If a required educational service is being provided but

there is no plan, the district will still fail. If the service is mentioned in a plan but is not being provided, the district will pass.

Apparently also, the Department approves pilot programs in limited schools as an appropriate district response to meeting certain costly student needs. The record is not clear on how rapidly the Department would expect effective pilot programs to be implemented district-wide.

No criteria for program comprehensiveness has ever been developed by the State. Until recently, the words of the statutory guideline requiring a breadth of program offering were simply repeated in the regulations. At present, there is enormous variety in what districts are doing in science, social science, art and music. (See Part II findings.) The absence of courses, except for the mandated ones, which may be necessary to meet student needs is not criticized. For example, the Level II monitors in Pleasantville did not criticize the district for failing to offer science instruction in grades 7, 8 and 9.

N.J.S.A. 18A:7A-11 requires the district's annual report to include, but not be limited to, among other things, the district's effectiveness in achieving State, district and school goals and objectives. However, *N.J.A.C.* 6:8-3.2 does not require this report. The prior rule at *N.J.A.C.* 6:8-6.1(c)4 required the district to report on its progress in achieving State goals. Under *N.J.A.C.* 6:8-3.2, the only provision dealing with educational program reporting relates to basic skills.

The State educational goals, *N.J.A.C.* 6:8-2.1(b)9, require an opportunity for students to acquire the ability and the desire to express themselves creatively in one or more of the arts and to appreciate the aesthetic expressions of other people.

However, the monitors will monitor elementary art and music programs, for example, only if local districts opt to offer such programs. I FIND that monitoring will not disclose any non-State-mandated courses, programs and services that districts eliminate for budgetary reasons.

Monitoring actually measures only whether the district's educational program appears to conform with the Department of Education's minimum standards and State mandates. I FIND the monitoring process focuses on external indications of good schools and generally avoids the more difficult and costly education issues. Whether a district is providing an acceptable level of service, for example, is not monitored. As another example, the student attendance requirements focus on whether a local district has a plan to handle poor attendance. It is not clear on this record what would happen at Levels II or III to a district with attendance below the percentage permitted for developing an improvement plan. (See *N.J.A.C.* 6:8-4.3(a)4i(2).) Presumably a district's corrective action plan developed after Level I could result in passage of the element. Districts with poor attendance, in the past, have developed plans to recognize through awards or public announcements good student attendance and to police truants through computer generated telephone messages to the parents of absent children. These plans have been approved by the Department. Monitoring in this manner avoids confronting the more difficult root causes of high student absence, including student boredom and poor teaching.

Grappling with the more difficult education problems appears to be totally dependent on the abilities and willingness of individual monitors and district personnel to explore the various theories of how children learn. The process does not require that this assistance be provided. I FIND that the monitoring system does

not directly address how to improve student learning. In Camden in 1983, for example, 14 of 20 schools did not meet the State's established Minimum Level of Proficiencies; in 1984, only seven of 20 schools did not meet the MLP. This record would appear to represent improvement. But in 1985, there was a reversal and 15 of 20 schools did not meet the MLP. Level I monitoring would not necessarily help local districts determine whether the educational process should be changed in schools like Mickle, which dropped from a passage rate of 90.5% in 1984 to 33.3% in 1985.

I FIND and both parties agree that monitoring Levels I and II do not evaluate the quality of a district's judgment or the quality of any program offered by a district. Monitoring does not assess directly the competency of district staff or the caliber of the instruction being provided. If the district decides to teach reading from dittos instead of having the students read great works of literature, the Department will not criticize the district. Also, monitoring does not determine whether a district's equipment and facilities are suitable or sufficient for its educational mission, but focuses on safety and maintenance of whatever facilities exist.

The Comprehensive Basic Skills Reviews were attempts by the Department to evaluate quality programming and to focus on some of the very difficult questions confronting urban educators. But monitoring is a quantitative assessment. Mr. Shelton, who is manager of the Department's Office of Compensatory Education, said his office never received a request for a quality assessment. "That term is not even in our vocabulary." (H. Shelton Transcript, Mar. 23, 1987, p. 124, line 13.) When monitors observe classes they do so to verify that

there is a Board appproved lesson plan in the classroom. They make no quality judgments.

The critical priority needs identified for urban children in a 1975 Department assessment included instruction in basic skills information acquisition, critical thinking and effective communication; personal and public methods of promoting physical and mental health; responsible citizenship; and physical, biological and social science basic information. Critical priority needs established for both urban children and non-urban children included social relationships with all peoples and instruction in being a producer/consumer. (Exhibit P-242.) In 1976, the priorities established by the 1975 needs assessment became the priorities of the Department. Since the implementation of Chapter 212, however, I FIND that the Department has not specifically addressed any of the priorities established for urban districts in 1975 other than basic skills.

I FIND also that monitoring seems to have confirmed urban educational needs which were already known at least as early as 1976 and possibly even known as early as 1965 when the federal government enacted the Elementary and Secondary Education Act. Little actual progress appears to have been made toward addressing these needs, since the state of urban education seems not to have significantly improved.

The fiscal monitoring element verifies whether the process followed by a district to manage its finances conforms with sound fiscal management practices but does not consider whether the district's budget is adequate to address actual needs, even if some county staff may be of the opinion that there are insufficient

resources in the district. The system relies on another process to evaluate the district's budget adequacy. (See findings in Parts I and III.)

The Department of Education has made no systematic examination of differences in funding and spending to determine the sufficiency of districts' resources. Except for an alphabetical listing of finance data by county and within counties, by district, the Department does not routinely analyze the extent of differences among school districts in per pupil revenues and expenditures, or of whether and to what extent such differences have increased over time. The Department also does no routine analysis of the relationship between school spending and program offerings, supportive services or personnel ratios; or between school district spending and the ability of districts to attract and retain teachers and staff.

Furthermore, the Department has incorporated the local planning process into a single monitoring requirement and three annual objectives to improve instruction. Because planning is now subsumed within monitoring, it has become decentralizing and isolated within districts. I FIND that the initial Department interpretation of the Chapter 212 planning requirement by which all districts were to assess their student needs and move toward achieving the State T & E goals (*N.J.A.C.* 6:8-2.1) is deemphasized by this action. Instead of districts planning toward common State goals, each district now focuses only on meeting its own educational needs.

If any district's corrective action plan requires expenditures, it "is anticipated that the funds necessary to implement the corrective action plan can be obtained through budget transfers or through the use of the district's free

balances." (Exhibit D-216 at p. 21.) First year financing of any district improvements required under monitoring is therefore the exclusive responsibility of the local district, according to the Department. Thus, monitoring does not consider whether a district has the resources to meet certification requirements, in addition to funding other needs. I **FIND** that relying on local district funding for monitoring improvements is subject to the previously described systemic limitation I believe confronts urban districts sharing property poor tax bases with municipalities. (See findings in Part III.)

I **CONCLUDE** that monitoring as currently implemented does not address and therefore cannot cure resource, expenditure and educational program disparities and will not ensure that the actual needs of all of the State's students are being met. The focus of monitoring is limited and not directed toward curing these problems. I have **FOUND** that monitoring is district or school specific and does not consider whether the district has properly assessed its educational needs. No comparisons are made between districts. Monitoring does not attempt to assess either a particular district's budgetary inadequacies or expenditure disparities between districts. Monitoring as presently implemented does not encourage broadening academic offerings and does not include any educational input standards. Input suggestions are made only sporadically by individual monitors without any rules establishing program quality requirements. Monitoring appears to emphasize basic skills achievement and does not capably assess the quality of any district's educational program or the quality of teaching that is occurring in any district. If quality considerations are reached in Level III, they are limited by what is necessary for the district to achieve certification, which most often relates to basic skills and facilities.

A careful analysis of the monitoring reports leaves one with the distinct impression that their usefulness heavily depends upon the monitors. There are Department monitoring guidelines, but apparently they have not been effective in ensuring that the monitors' reports are consistently meaningful or even that the process followed is completely consistent among counties. The reports on their face indicate discrepancies among counties as to when interviews of district personnel are undertaken and who is interviewed by the monitors and what evaluation standards are being applied. I agree with Assistant Commissioner McCarroll when he said that it is extremely difficult to implement consistency. Exhibit D-284 at p. 19 indicates, for example, that 22 districts reported the county office provided feedback on the district's progress in fulfilling its Level II improvement plan. But five districts reported no such help during the implementation of their plans.

An analysis of the monitoring reports indicates that they vary widely in quality. In several instances monitoring reports, unfortunately, confirmed district witnesses who viewed monitoring as a massive paper exercise with little educational value. However, when qualified monitors take the necessary time to evaluate the problem and make constructive and specific education improvement suggestions, their asistance appears to be beneficial to the district.

I **FIND** further that the existing monitoring system permits some districts to have better schools than others. In fact, the entire education system in New Jersey expects and thereby condones vast variations in educational quality among school districts.

Additionally, I have **FOUND** in Part III that political manipulations occur in some urban districts. However, the record is also clear that the Department of Education has known for some time about these political manipulations. Yet, the record reflects no action taken by county superintendents, even in one instance when Superintendent Ross asked the County Superintendent for help after the political firings of seven assistant superintendents. (See discussion in Part III.) After considering all of the county superintendent witnesses and their testimony, I **FIND** that political manipulation and intrusion in some school districts has been tolerated by some county superintendents and that the monitoring system as established by the Department of Education does not address this problem.

Competency Testing

Before monitoring, the Department administered the Educational Assessment Program (EAP) which began in 1972. This test measured reading and math skills every fall in grades 4, 7, and 10 and once every three years in grade 12. There was no passing score. Districts were provided an item by item analysis of results for self study and comparison with other districts.

Districts had to analyze and make public the results, but only as they related to the curriculum being taught. The DFG's were originally developed to afford school districts an opportunity to compare their EAP test results with other districts with similar socio-economic status. Thus, according to the Department, the Trenton's could compare themselves with other Trenton's and the Princeton's with other Princeton's. Comparison between DFG A and DFG J districts, for example, was considered inappropriate, according to the Department of Education.

History of the MBS and HSPT

The first test used in monitoring by the State was the Minimum Basic Skills test (MBS). The current test is the High School Proficiency Test (HSPT). Local districts also conduct regular student testing to identify students in need of remediation. The basic skills monitoring element currently requires that (1) 75% of the district's 9th grade pupils in each school pass the High School Proficiency Test and (2) 75% of the 3rd and 6th grade pupils in each school score at or above the State Board established minimum levels of proficiency (MLP) for the district's standardized tests.

The statewide tests were developed in response to a 1976 Chapter 212 amendment initiated because of the accountability movement. (See discussion above.) As explained earlier, outside forces became concerned that the educational system was producing academically inferior students at the same time taxes seemed to be increasing ever higher. The amendment required the establishment of "uniform Statewide standards of pupil proficiency in basic communications and computational skills at appropriate points in the educational careers of the pupils of the State, which standards of proficiency shall be reasonably related to those levels of proficiency ultimately necessary as part of the preparations of individuals to function politically, economically and socially in a democratic society." *N.J.S.A.* 18A:7A-6.

The Department first developed the MBS and contended that it assessed a certain set of minimum skills that were needed by students in order to function politically, economically and socially in society.

The skills tested by MBS in reading and math were identified through a comprehensive process involving thousands of people. There were four different committees working on determining what skills were reasonably related to those needed to function politically, economically and socially.

To meet the MBS monitoring standard in the basic skills area, a district and a school had to have 65% or more of its students meeting the cut off scores for the 3rd, 6th, 9th and 11th grade MBS tests.

The MBS was first administered in 1978. Statewide, 25% of the students did not pass either the reading or the math test. This high rate of failure indicated that significant numbers of students did not have a mastery of basic skills before 1978. Additionally, it showed that the instructional focus and curricula in many districts were not directed toward mastery of minimum basic skills.

Originally, along with the MBS, administered in the 3rd, 6th 9th and 11th grades, districts continued to use comprehensive testing for all other grades. Children were assessed for proficiency in basic skills on standardized tests linked to the MBS. Test results, along with teacher judgment, homework, class-work and other test information were used to determine whether children should be placed in preventive and remedial classes. Districts change the standardized tests they use every ten years.

In 1979, the Legislature passed the High School Graduation Law, which became effective with the 9th grade class of 1981-82 (who were scheduled to graduate in 1985). The law established curricular requirements, including four years

of communications, two years of math and a variety of other requirements in science, social studies, physical education, career exploration and fine, practical and performing arts. Credit hour requirements were also instituted. Students had to attain a minimum of 92 1/2 credits over the four-year period. Students also had to meet locally established requirements concerning attendance and curricular matters in addition to those required by the State. Students were also required under the Graduation Law to demonstrate minimum mastery of 9th grade reading, writing and math to earn a high school diploma.

The MBS test was initially used by the Department as the statewide test to meet the requirements of the Graduation Law. Failure on the MBS for individual students did not automatically result in the denial of a diploma. Students who failed in 9th grade could retake the test in subsequent grades. Also, the Graduation Law provided a special review assessment which establishes an alternative means of showing minimum mastery of reading, math and writing.

By 1980, there was a dramatic increase in mastery of the MBS. However, there were 23 urban districts and 123 schools within those districts still not meeting the MBS standards.

In 1982, approximately 90% of the State's students were passing the MBS. The average student also was scoring in the high 80's and low 90's out of a perfect score of 100. There were still problems in the urban areas, although those areas had shown great improvement. The high scores made the test less informative about a district's educational strengths and weaknesses. In addition, according to the Department of Education, it was important to assure that the test

actually tested skills and knowledge needed to function as productive members of society.

By the early 1980's it was recognized that minimum basic skills, as tested on the MBS, were not enough. Commissioner Cooperman decided it was time to raise the bar to include some of the higher order basic skills of critical thinking, problem solving and inferential comprehension. The Commissioner also felt that in light of the Graduation Law, diploma requirements had to be more commensurate with the skills and knowledge needed to function as productive members of society. Therefore, the Department began to reassess the use of the MBS and considered the possibility of substituting a more rigorous test.

The Department recognized in proposing a more difficult high school graduation test that there would probably be higher failure rates in urban districts, and that initially urban districts might not be able to meet State certification standards. A 1985 Department document indicated that "Despite all other efforts during the first few years of the administration of the High School Proficiency Test, the number of students dropping out of school will most likely increase." (Koffler Transcript, Feb. 26, 1987, pp. 175-176.)

The HSPT was developed and first administered in the Spring of 1984. To develop the HSPT the Department created panels on reading, math and writing to examine the MBS skills, commercial tests, major 9th grade textbooks and the skills measured in the New Jersey College Basic Skills Placement Test. The task was to develop a set of reading, math and writing skills which the panels believed appropriate to allow a student to become a productive member of society. These

skills arrays were broadly circulated throughout the State and final determinations were made on the appropriate skills needed to be mastered.

Although there is some overlap between the MBS and HSPT in some of the skills measured and both are multiple choice tests, the complexity of the thought process required is more rigorous on the HSPT. The MBS generally tested rote learning skills. For example, in math, the MBS tested whether a student had learned subtraction, multiplication and division of whole numbers, fractions, and decimal numbers. Elementary geometric skills and the solving of simple one-step word problems were also tested. The HSPT measures the application of knowledge and skills and assumes that students have already mastered the computational skills. The test focuses primarily on two, three and four step word problems. The HSPT also tests pre-algebra skills.

In communications, the HSPT requires more critical reasoning and more rigorous thinking than did the MBS. The HSPT requires reading comprehension and the application of inferential skills rather than merely the literal skills which were tested on the MBS.

Additionally, the HSPT includes essay writing, which was not tested by the MBS. The HSPT includes a multiple choice section testing writing skills along with the essay. The student is expected to be able to write an orderly essay that communicates a message to the reader.

The Department was unable to implement a writing component for the State test until 1983. For a number of years Commissioner Burke sent requests for test funding to the Governor and the Legislature, but that funding was removed

from the State budgets. In 1982-83, when Commissioner Cooperman replaced the MBS test in grades 3, 6 and 11 with the minimum levels of proficiencies (MLP's) geared to the districts standardized tests, he used the saved money to implement the writing test for 1983.

Passing scores on the HSPT are reading, 75; math, 61; and writing, 77.

With the introduction of the HSPT, standardized tests chosen by the districts are used for all grades except the 9th, when the HSPT is administered. The Department established new minimum levels of proficiencies (MLP's) anchored to the HSPT for the standardized tests used by districts. Districts are required annually to report to the Department district scores for grades 3 and 6.

Through 1986, districts were required to provide Individual Student Improvement Plans (ISIP's) for all students, beginning at the 6th grade, who were not meeting the MLP's in basic skills. As of January 1, 1987, this requirement was expanded to 3rd grade students. These ISIP's must be updated regularly, preferably more than once a year.

Although the HSPT was administered in 1984 and 1985, the first students required to pass the test for graduation are the 9th grade class of 1986, the graduating class of 1989.

The first HSPT institutes given by the RCSUs for primary teachers were scheduled in January 1988. Intermediate grade teachers' HSPT institutes were

available in July 1986. Training was offered for 7th, 8th and 9th grade teachers in the summer of 1985 immediately preceding the testing year.

Urban superintendents sought a two to three year phasing in of cut-off scores on the HSPT because there was not time before the 1986 test to do curriculum development. It takes from three to five years to align a curriculum to a new test. Also, it would take more than one year of an appropriate curriculum to prepare students for the test. The urban superintendents were also concerned about children suffering from being denied a diploma and about their school districts being labeled failures.

Establishment of accurate MLP's and alignment of the curriculum to the HSPT are extremely important for districts. Red Bank in 1986, for example, had a total HSPT passing score of 52.7% even though the district's 8th grade students in 1985 scored at the 11.7th grade on the district's Metropolitan Achievement Test.

Test Results

Students graduating before the 9th grade class of 1986 in June 1989 remain under the MBS standard. By 1985 there were 1,528 12th graders as well as 5,618 11th graders and 9,281 10th graders who had not passed the MBS 9th grade reading test. Although 2,400 were denied a diploma in 1985, only 245 did not graduate by reason of failing the MBS. The others failed to fulfill other graduation requirements.

The lowest percentage of students passing the MBS test in 1985 were in DFG A. In this group, for 9th graders taking the MBS reading test for the first time,

76.5% passed; for 10th graders being tested for the second time, 58.9% passed; for 11th graders, on their third attempt, 62.2% passed and for 12th graders, being tested for the fourth time, 66.5% passed.

In 1986, 9th graders no longer took the MBS test. There remained, however, 6,256 10th, 11th and 12th graders in DFG A who still had not passed the 9th grade MBS test. Of the 1,856 11th graders in DFG A who took the test, 550 did not pass. Of those 6,256 students in DFG A as well as 1,251 in DFG B who, as 10th, 11th and 12th graders still had not passed the 9th grade MBS test in 1986, the largest numbers were from urban districts.

Performance on the HSPT was poor in the first two years, 1984 and 1985, but like the MBS, there was a significant improvement in the third year, 1986, in terms of percent students passing the test. In the writing portion of the 1985-86 HSPT, the passage rate for pupils from the 56 districts classified by the Department as urban was 58.3% with a mean score of 77.9, an increase of 2.7 points over the 1984-85 HSPT writing mean score of 75.2. In the essay portion, the mean score (out of an overall range of 0-12 points) went from 6.8 in 1984-85 to 7.2 in 1985-86, an increase of .4 points. In the multiple-choice portion of the HSPT writing test, the 1985-86 urban 56 mean score was 75.7 compared to 71.3 in the previous examination, a 4.4 point increase. In reading, the 1985-86 mean score was 78.2 compared to 68.3 in the previous examination, an increase of 9.9 points. In mathematics, 51.9% of the urban 56 examinees passed. The 1985-86 math mean score was 62.3 compared to 52.2 in the previous examination, a 10.1 point increase.

In 1986, however, of more than 14,000 9th graders in DFG A who took the HSPT as a graduation requirement, 54.1% passed the reading test, 42.4% passed

the math test, and 48.2% passed writing. In DFG J districts, of the 5,400 students tested, 97.3% passed reading; 93.3% passed math and 94.7% passed writing.

In 1986, no urban school district in DFG A or B met the State standard of 75% pass rate in all three sections of the HSPT. In none of the DFG A urban districts did more than 43% of the 9th graders pass all three parts of the graduation test.

The Department contends that curriculum has not narrowed in low-spending districts because of the emphasis on basic skills. However, the Department has never investigated the impact of testing on curriculum and the State Technical Advisory Committee raised the question of narrowed curriculum when the decision was made to make the State test a graduation requirement.

The Department does not advocate restricting curriculum to basic skills. Essex County Superintendent Scambio said, without having done any formal studies, however, that the manner in which remedial courses are sometimes offered at the secondary level significantly limits a student's ability to have a full program and sometimes motivates pupils to drop out of school. Professor English, another defense witness, noted that Irvington was allowing the State to determine the entire curriculum. Dr. English found in interviewing teachers that they did not have time for social studies or other parts of the curriculum not related to MBS passage. Another defense witness contended that the curriculum has focused, rather than narrowed, in response to the State testing. Additionally, the defense seems to urge that plaintiffs' districts must first work on basic skills and then move up to the more academic programs. (Defendants' April 22, 1988 Reply at p. 151.)

This record also includes several comments from district personnel who professed great commitment toward getting their children to pass the test. There have been instances of teachers helping students during the MBS test. Irvington appears to be mobilizing to do better on the HSPT, as it did for the MBS. In districts like New Brunswick, Camden, Pleasantville, Irvington, East Orange and Jersey City, with large percentages of children who have failed the State mandated tests, students are being given double and triple classes of reading, writing and math. At Camden's Pyne Point Middle School in 1987, for example, only five of the 34 classes in the school were not compensatory education classes. In some districts, the courses that some students are coming to school for, like art and music, have been totally eliminated in order to deal adequately with basic skills. Mr. Guadadiello, Jersey City's supervisor of art education, for example, said there has been a decline in art enrollment because the students must take two maths, two English, etc. New Brunswick's Superintendent explained that they have cut down on the number of electives offered, including courses in science, social studies and art. A retired Camden principal said that the basic skills program is the tail and the tail is wagging the dog.

It is true that budget restrictions have also required districts to make hard program choices and that therefore, it would be difficult to ascribe a narrowed curriculum exclusively to State testing. However, on the basis of this record, it is also clear that district program choices are made to effectuate priorities and cost effectiveness. There can be no doubt that passing the HSPT is for almost all poorly achieving urban districts one of their highest priorities.

In at least one urban district, an administrator described what he called "triage." This triage requires poor districts to handle the basic skills needs of the poorly achieving students and try to offer some challenge for the very brightest students. The average students, some of whom do pass the HSPT, cannot be adequately served and many of the very brightest students cannot for cost effectiveness reasons be fully challenged. Some urban teachers also appear to be teaching to the test. For example, instead of reading books, the students are given ditto sheets with paragaraphs and questions. Therefore, I **FIND** that the curriculum in low-achieving, low-wealth districts is devoted increasingly to minimum basic skills at the expense of other subjects.

I also **FIND**, however, that the testing program is an appropriate and important State function. Basic skills are the building blocks to other learning and schools must asssure that all children have the necessary foundation of basic skills. The imposition of graduation standards, to insure that the diplomas of all New Jersey high school graduates signify the achievement of at least a minimum level of competency, is an important quality check on New Jersey education. It is unfortunate that the test implementation has resulted in an added hurdle for the educationally disadvantaged.

The Department contends that the HSPT tests higher order thinking skills and, as with the MBS, evaluates those minimum skills a student needs to function politically, economically and socially in our society. To be a productive member of our society, however, also requires satisfactory progress in acquiring 10th, 11th and 12th grade skills. The HSPT is a 9th grade test. It is not predictive of future college performance. In 1983, the Statewide Task Force on Pre-College Preparation

considered the MBS cleary inadequate and rejected the HSPT as an insufficient high school graduation test. The Department makes no claims that the HSPT is linked to marketplace requirements and it does not test social studies, history, science or economics. Similarly, the HSPT does not test citizenship, learning skills or whether the student can work in groups. Dr. Bloom, a Department of Education witness, testified that the HSPT has moved us into the 20th Century, but we have "a long way to go before we are truly preparing all of our children for those jobs, in those communities they'll live in in the 21st Century." (Bloom Transcript, May 29, 1987, p. 55, lines 22-25 and p. 56, lines 1-2.) I believe this statement accurately assesses the HSPT. Accordingly, I **FIND** the HSPT is a step in the right direction, but that passing the test alone does not mean that a student can be a productive member of our society.

The Chancellor of Higher Education wants an 11th grade test instead of the 9th grade test. There has been work in the Department of Education on an 11th grade test and at the August 1986 State Board meeting the Commissioner of Education established a Department wide task force to look toward changing the law to require an 11th grade test. According to Assistant Commissioner Bloom, the HSPT is a "third generation" competency test and it "is not the end." He said he would not be surprised if a new test surfaces in the future. (Bloom Transcript, May 29, 1987, p. 82, line 9 through p. 83, line 7.)

Middle States Certification

Middle States Association of Colleges and Schools is a membership, dues paying organization, which provides information and evaluation to member schools. The Middle States process uses as the basis of review the staff's subjective

philosophy or priorities, not objective standards of excellence. Accreditation by Middle States, therefore, does not assure provision of a quality education.

Middle States visiting committees are composed of interested and available teachers and administrators. The Middle States process is the model for the current monitoring system under which the State Department certifies districts for five year periods.

Irvington High School, East Orange High School and the Jersey City high schols all have been certified by Middle States. Some of the Jersey City high schools received two year rather than 10 year certifications. Both Snyder and Dickinson high schools in Jersey City were conditionally certified because of facilities inadequacies.

During the accreditation process, both Irvington High School and East Orange High School were determined to have deficiencies which according to the schools they did not have the resources to remediate. In Irvington, for example, science labs were deemed deficient. In East Orange, evaluators recommended, for example, facilities repairs, additional equipment, providing faculty conference rooms, acquisition of land to expand the building and to provide athletic facilites, etc.

No or Low Cost Programs that Increase Student Achievement

The defendants contend that student learning can be enhanced without increasing funding. They advance a number of available no or low cost programs that have proven effective in enhancing student achievement.

Special Teaching and Training Programs

Defendants point to Visual Learning, Perception T, and Project WRITE as examples of many existing low cost programs that can be used by districts to improve learning. There is evidence of other programs being used by districts to improve student learning. For example, East Orange adopted during 1983-84 the Individualized Language Program (ILA), which is a writing program developed and validated in Weehawkin.

Outcome-based education is another technique to enhance student learning. Outcome-based education or Mastery Learning, developed by Benjamin Bloom, starts with the philosophy that all children can learn and that it is really the responsibility of the schools to teach them. Mastery Learning is used in the Red Bank School District, which has a K-8, minority, low income and educationally disadvantaged population of 70%. Through the application of Mastery Learning principles, Red Bank successfully raised student achievement as measured by the Metropolitan Achievement Test and the district was certified as meeting State standards under the MBS. In 1986, as 9th graders, however, only 52.7% of the same students who registered the significant MAT gains passed all three parts of the HSPT. Mastery Learning has been criticized in Chicago, where it has been found that children taught under the program could not read when they got to high school because they had never read books. To promote success in testing, the children had been taught to read small items resembling passages on standardized tests.

Madeline Hunter's teaching program is another example of Mastery Learning. This program also focuses on the act of teaching and teaching behavior in the classroom. It covers lesson organization, questioning techniques and classroom strategies and has been successful in raising student achievement.

Madeline Hunter's program has been adopted by a number of New Jersey school districts. It takes most educators a minimum of two years to finish its six phases. In South Orange/Maplewood, a district that has adopted the program, the cost from the summer of 1986 through the summer of 1987--excluding costs for teacher time, substitute time, and for room, board and air fare for consultants and participants--was $35,400.

Another example of these types of programs is the Achievement Directed Leadership program in New Brunswick which, like Madeline Hunter's program, has also been successful in improving student achievement. This protocol has been developed by Research for Better Schools in Philadelphia (RBS). This technique uses the classroom as the unit of analysis (looking at teacher behaviors and classroom conditions) and differs from "effective schools" research, which uses the school as the unit of analysis. ADL looks to teaching processes and student achievement.

In New Brunswick, ADL was introduced into the elementary schools in 1981-82 and into the high school in 1983-84. RBS contributed their services to New Brunswick because they wanted to determine whether the program could be implemented district-wide. In 1986, no New Brunswick student was denied a diploma for failing the MBS. In 1985, 100% of 6th graders met the State MLP's on

the reading test in six elementary schools. In the other two elementary schools, 96% and 97% met those standards.

During 1981-82, the first year of ADL training in New Brunswick, the RBS contribution in consultants, books, overheads, and videotapes represented approximately $100,000. During the subsequent three years, RBS contributions represented an input of $25,000 per year. Since 1985, New Brunswick has continued the ADL training in the district. To do so, and to introduce other training programs, such as writing workshops and teaching strategies, the district has sought and obtained private assistance from New Brunswick Tomorrow.

I **FIND** that there are many recognized programs that hold promise for increasing the standardized test scores of youths .

The record is insufficient to conclude whether these programs are low cost items. Neither budget comparisons nor complete actual cost figures were provided. On the basis of the record, however, I can **FIND** that these programs all require some costs and cannot be fairly described as no-cost programs.

Effective Schools

Another technique for relatively low cost school improvement advanced by the Department of Education is the "effective schools" process. This theory utilizes some of the principles of effective organizations, including the need for personal investment, or motivation, by the individuals belonging to the organization; responsiveness of the organization to its clientele; and a sense of direction for the organization. Thus, unlike the Mastery Learning programs that

the effective school research. Additionally, while defendants point to effective schools as a low-cost solution, plaintiffs proofs indicate that additional funding was made available in other school systems in order to implement effective schools projects. In some cases, these projects were linked to desegregation efforts, as was the situation in Corpus Christie.

In one school effectiveness study, the question was asked whether "effectiveness" in the effective schools literature would be considered effectiveness in good suburban schools. The study found that achievement at national norms on basic skills tests would not be regarded as either excellence or even a satisfactory set of outcomes in good suburban schools.

The effective schools research indicates also that the six correlates are not the exclusive combination of variables that will produce an effective school. One study listed 13 dimensions of school productivity, including such additional variables as staff stability, curriculum articulation from grade to grade and across classrooms; school-wide staff development; maximum use of learning time; active district support of school efforts; collaborative staff planning, and collegial relationships.

The effective schools research also lacks general applicability to secondary schools. The line of research commonly relied on, which was done in American cities, was done only in elementary schools, with the focus on reading test performance. There are few studies like Michael Rutter's dealing with secondary education.

In St. Louis, where effective schools has been implemented for seven years, the results are uneven. Apparently, St. Louis believes that school size

influences results and that impediments to the achievement goal include high student mobility, instability of trained staff, and an inordinate percent of pupils performing below the national average on standardized tests.

Connecticut was also cited by defendants as having a successful, low-cost effective schools program. In 1985, the Connecticut Department of Education evaluated 10 schools which had participated in the program for at least three years. Even using a low standard of success, the Conecticut evaluators found that results varied greatly among the 10 schools; five showed significant achievement improvement and five showed poor achievement results.

Effective Demonstration Grant Program

In 1986, the Department initiated New Jersey's Effective Demonstration Grant Program, awarding $500,000 to 17 schools for 1986-87, with additional non-competitive grants to go to the same schools during 1987-88 and 1988-89. This grant program was not limited to urban districts or to schools with substantial numbers of students doing poorly on achievement tests. The program was open to all districts in the State.

Of the 17 schools receiving competitive effective schools grants, eight are not urban. Of the nine urban schools receiving grants (Atlantic City, Elizabeth, Hamilton Township, Jersey City, Lakewood, Montclair, Newark, Orange, and Perth Amboy) six are in DFG A and B (Atlantic City, Elizabeth, Jersey City, Newark, Orange, and Perth Amboy). Of the 17 funded schools, seven (the six DFG A and B plus Red Bank) are in districts with 50% or higher minority enrollment. Nine of the 17 funded districts spent above the State average current expenditures per pupil in

focus on the classroom, the effective schools techniques focus on the school as the unit of analysis.

The effective schools approach is derived from research by George Weber, Wilbur Brookover, Ron Edmonds and others in the 1970's. These researchers were reacting to earlier work by Coleman (the "Coleman Report", discussed further in Part V) which indicated that socioeconomic status is the prime determinant of academic success. In other words, schools did not make a difference. Weber and the others looked at schools with high achievement to determine what factors explained their success. Their conclusions are generally listed as a group of correlates or characteristics, which presumably if implemented in any school would result in increased achievement. The results of this scientific research were popularized, primarily by Ron Edmonds, a black scholar from Harvard, who was seen as offering rebuttal to the Coleman study. There is no single effective schools protocol, but school districts in several U.S. cities have instituted projects to attempt to apply the correlates identified by the research. It is generally regarded as an approach to be used in low-achieving urban districts. Apparently, there is no definitive study on how well the theory works when applied to these schools.

According to one defense witness, the Department of Education in 1983 advanced the effective schools initiative as part of its school improvement strategy. The Department believes that for those schools adopting the effective schools principles, improvements will take three to five years. The Department defines effective schools in two ways: an effective school improves its basic skills performance or an effective school contains six correlates found in the effective schools literature to be associated with successful schools.

The six correlates of effective schools are: (1) leadership is executed by the school principal and its faculty; (2) the school has a mission of basic skills achievement; (3) the school engages in an ongoing assessment of student achievement; (4) the staff in the school has raised expectations of student success; (5) the school has a safe and orderly environment; and (6) parents are involved with the school.

Some members of the educational research community believe that the introduction of these six correlates into a school should result in school improvement as measured by standardized test achievement. Assistant Commissioner Bloom believes the six factors are correlates because there is a cause and effect relationship. Others see this assertion as a basic statistics error. Regression correlates do not indicate causality. Having the six factors will not necessarily cause increased effectiveness, say the critics.

The Department asserts that the effective schools initiative may be implemented without substantial increases in school expenditures and should be expected to improve education in the four school districts attended by the plaintiffs. The Department believes that effective schools is an improvement strategy for any site and that change must come not at the district level, but one school at a time.

Most of the effective schools research has not examined differences in the effectiveness of resource rich and resource poor schools. In fact, Professor Maehr, a defense witness, defined an effective school as one which given equal resources does better than others. There are no urban to suburban comparisons in

1985. Only four of the 17 schools are in districts that are not certified. Therefore, 13 of the schools may be already considered effective by the Department of Education's standards.

The emphasis in effective schools research and in application everywhere except New Jersey has been on low achieving urban schools. All of the effective schools projects outside New Jersey (such as St. Louis; Milwaukee; Connecticut; Jackson, Mississippi; Lorain, Ohio) are targeted to high-minority, low-achieving urban schools.

In addition to the Department's Effective Demonstration Grant Program, NJEA is funding some effective schools projects in the State and some schools have contracted with Research for Better Schools (RBS) or with Columbia University's Teachers' College for effective schools assistance.

Effective Schools Factual Conclusions

In view of the experiences in other States and the limitations of the research, I **FIND** that while the effective schools research appears to have some promise, it cannot be viewed as a panacea for all urban school problems. It is possible to have effective classes within ineffective schools and ineffective classes within effective schools. Leadership by principals and faculty cannot be mandated. In addition, some effective schools research seems to indicate that the theory may work best in smaller schools. There is also some concern that an effective school simply matches its curriculum to the standardized test.

To the extent that raising HSPT achievement is important for students, however, the effective schools research cannot be ignored. The Department's efforts at trying to discern what makes an effective school should continue. At this time, however, I **FIND** that much remains to be discovered about how to convert ineffective schools, especially ineffective high schools, into effective schools.

There is some question also as to the speed of this reform. Every one of the New Jersey demonstration schools, according to Assistant Commissioner Bloom, has achieved some governance changes. They all now have established curriculum committees. He believes that the process is now in place for the schools to develop safe and orderly environments and to achieve higher test results. About half, in Assistant Commissioner Bloom's opinion, may be able to achieve better parent/community relationships in 1987. The Assistant Commissioner testified that sometime in January 1989, the Department will report on the progress of this initiative.

The record reflects, however, that the Department as early as 1980 applied the effective schools research in its Comprehensive Basic Skills Reviews of the MBS failing schools. No follow up evaluation was done after 1982, but the HSPT results would indicate that much remains to be done.

Also considering the evidence of program costs that were provided, I **FIND** that one cannot describe the effective schools strategy as a no-cost reform. All agree that teacher and principal training would be an important part of this reform effort and that some funds are necessary for this training. The defendants assert that school districts do not need as much money to fund this reform as the

Department is providing its 17 demonstration districts and that monies can be transferred from ineffective programs to this reform effort. Again, no details were provided as to what specific programs could be eliminated to provide the necessary funds for the reform. Presumably, the Department also means that districts can discern which programs are not increasing standardized test scores and decide from among these which could be eliminated.

There is a dichotomy between the effective schools research literature and the popular movement for effective schools. The former includes empirical educational research attempting to understand and interpret the relationships between the correlates and effectiveness. The movement, by contrast, tries to popularize effective schools work as a kind of formula for success. New Jersey may be caught in this dichotomy. Certainly, I **CANNOT CONCLUDE** from the record that the implementation of effective schools strategies alone will solve the problems in plaintiffs' districts.

State Initiatives and Urban Districts

Since the inception of Chapter 212, the State has made some efforts to target additional funds and programs to urban districts. There have been efforts to direct technical assistance and discretionary funds to help high need districts.

Alternative Certification

In a response to teacher shortages, the alternative teacher training program was instituted in 1984 as a means of attracting more people to teaching who had subject matter expertise but were not formally trained as teachers. It

permits prospective teachers who hold a bachelor's degree but did not participate in a college teacher preparation program an opportunity to receive certification. The candidate must pass a subject matter test in the teaching field or a general test for elementary certification, the National Teachers Examination. The candidate, if offered a position in a school with an approved program, receives a one-year provisional certification and is eligible for permanent certification upon successful completion of the program. This program is not offered in the instructional fields of bilingual education, ESL, teacher of the handicapped or certain vocational fields.

Some urban districts have tried to recruit teachers through this program. Although Paterson has been able to attract some science teachers, they, as well as other alternative route teachers, have not stayed in the district.

In 1985-86 the Department eliminated emergency certification for teachers and required those holding emergency certificates to enroll in either the alternative teacher training program or a traditional teacher training program. In the past, districts such as Jersey City were permitted to use emergency certified teachers in areas such as bilingual, math and science. After requirements changed, at least one district lost teachers who could not meet new certification requirements.

Additional HSPT Aid

In 1986-87, $49 million in additional HSPT aid was distributed outside of the equalization formula to provide additional services to students who failed the 1986 9th grade HSPT. To fund this program, the Department changed the eligibility criteria for State compensatory education aid so that fewer students who needed

preventive services could receive State aid. (Before, the Department funded students who had failed the State tests and/or were considered by the district to be in need of preventive services. After 1986, the Department provides compensatory aid only for students who fail the tests.)

For the summer of 1986, the Department also established the HSPT Summer/School Year Supplemental Instruction Grant Program for youth at risk by reason of having failed the HSPT as 9th graders. District eligibility for the HSPT grant program was a 50% failure rate on all three parts of the 1985 HSPT. Seventeen urban districts and four vocational school districts were eligible. The program included special planning assistance in the spring of 1986, funding for special summer school and for follow-up work with the same students during the 1986-87 school year.

The RSCU's offered a Special Planning Assistance Program to the 17 urban districts, including assistance in developing local district improvement plans, as well as training in the HSPT institute for the teachers who staffed the HSPT summer schools.

For the 1986 summer grant program in 17 urban districts, the Department contributed $50 per day toward teachers' salaries and $3,000 for the project director. Grants did not include costs for support staff, building upkeep or security.

In 1987, 26 urban districts qualified for this program because the Department dropped the eligibility standard to a 30% failure rate in the three parts of the HSPT. Assistant Commissioner Bloom testified in 1987 that the Department

was funding 23 summer school programs in urban aid districts. The Summer HSPT program had a 15 -1 class size with highly individualized planning, tutoring, parental contact and student involvement. The Department according to Dr. Bloom is spending $1.7 million to "show school districts that this is a strategy that works." (Bloom Transcript, May 29, 1987, p. 87, lines 14-14.)

Governor's Teaching Scholars

In 1985-86, the Department initiated the Governor's Teaching Scholar's Program, designed to encourage high achieving high school seniors to pursue teaching and to teach in New Jersey public schools, with monetary incentives for teaching in urban rather than in non-urban schools.

To be eligible for this program, students must wish to be teachers, have a combined SAT score of 1100 and rank in the top fifth of their high school graduating class. These students can apply for a four-year loan, which can be redeemed by teaching in New Jersey schools. In 1985-86, the Department received 300 applicants and selected 100 seniors to receive scholarships of up to $7,500 a year for four years, a $30,000 scholarship. If these students eventually teach in an urban school, the loan is redeemed in four years with the heaviest redemption percentage at the end of the four years. If they teach in any other New Jersey school, the redemption takes six years, with the heavy percentage redemption in the fifth and sixth year.

The Urban Initiative

The Urban Initiative, announced in March 1984, was designed to provide additional assistance to urban districts. It has two components, Operation School Renewal (OSR), which focused on three districts--East Orange, Trenton and Neptune Township--and the Broad Based Component (BBC), a collection of activities available to urban districts other than the three OSR districts.

Operation School Renewal

The three participating urban districts of varying sizes were chosen from among 15 applicants. The applicants had to demonstrate high need and a willingness to absorb into their budgets the costs of OSR projects which proved effective. Members of the Urban Advisory Committee who visited the six finalist districts (Camden and Trenton, large districts; East Orange and Vineland, medium-sized; and Bridgeton and Neptune, small.) informed local officials that selection as an Urban Initiative district would not mean an infusion of significant State funds, but that the local districts would have to provide resources. Camden and Bridgeton were both ruled out, in part, because they were unable to commit local resources to this program.

OSR did not begin until 1985-86 and was to run until 1987-88. During the planning year, the Department directed the three districts to develop plans generally around five objectives: attendance, basic skills, reduction of disruptive behavior, increasing youth employment and improving the effectiveness of building principals. East Orange, for example, opted to (1) improve pupil attendance; (2)

raise math, reading and writing performance; (3) increase building principal effectiveness; (4) reduce reported incidents of disruptive behavior by establishing an alternative school setting; and (5) reduce youth unemployment through vocational education and educational technology improvements, including establishing two computer laboratories.

Under this program, the Department provided statewide seminars for 51 principals in the three OSR districts. In addition, OSR funding has permitted East Orange to add one person to its development staff, to initiate an ADL (Achievement Directed Learning) program and to reactivate Principles of Effective Teaching Supervision. Through these programs, the district has been able to address such problems as excessive teacher lecturing on the high school level and the Superintendent has begun to evaluate principals regularly.

Operating funds for the first year of OSR totalled $3.45 million, of which $800,000 went to the RCSU's. Some $1.2 million was used to establish classroom computer labs in the three districts; the remainder went to the three districts' disruptive youth programs and to Urban Initiative operating expenses.

Trenton's plans to include partial funding for OSR projects during 1986-87 were abandoned when the City Council cut Trenton's budget by $2 million, and the school board refused to appeal the budget cut. Neptune received approximately $25,000 for a latch key program. When the district became concerned about assuming the cost of this program after OSR funding ended, it applied to redirect the $25,000 to an hourly counselor. The East Orange Board has also indicated it may not be possible to continue funding all OSR initiated projects.

Rutgers evaluators of OSR noted "It was difficult for the local personnel to fit long-range planning into hectic school days." The evaluators also recommended permitting local districts to bring issues of their own choosing into the OSR improvement process as a means of enhancing the local sense of ownership. (Exhibit D-292a.)

Broad Based Component

The BBC of the Urban Initiative includes projects for which grants are awarded and pilot projects which receive technical assistance from the RCSU's.

Pilot projects involve single grades in individual schools in the areas of math, writing, reading and computers. Local districts involved in these projects provide release time for teachers, who attend RCSU training sessions, and various supplies. Twenty-five urban schools are involved in pilot projects.

The first grant awards under the BBC were competitive grants for training dropouts and for secondary special education students classified emotionally disturbed and socially maladjusted. Officials noted that some 4,000 to 5,000 secondary school students in urban districts have been classified as either emotionally disturbed or socially maladjusted and that program offerings for these students are especially limited. Both dropout and special education grants were awarded for implementation in September 1985.

As of 1985, of the 10 BBC funded special education projects serving between 1,100 and 1,200 students, only two of the projects were in urban districts, Montclair and Woodbridge (DFGs I and F, respectively).

Adult education projects were funded as part-time projects at seven sites to train young dropouts 14 to 16 years old. Subsequent guidelines have expanded program coverage to age 21. Also, educators learned that part-time projects do not work with dropouts nor do traditional educational delivery systems. During 1987, Joint Training Partnership Act funds and the Division of Adult Education have expanded the program to 16 sites.

In 1984, the Department targeted developing educational alternatives for disruptive students as one of its major issues under the BBC. Five schools in Paterson, Belleville, Camden, New Brunswick and Asbury Park were selected in 1984-85 and received BBC grants to implement alternative education programs for disruptive youth each year until 1986-87. During 1985-86, these districts initiated projects and provided funding for salaries, materials, building space and other expenses. Lack of State funding and lack of sufficient local resources then forced all of the five districts to rethink their participation in the BBC. Although they felt their programs were successful, continuation depended upon finding alternative sources of funding.

During the same year, competitive grants totaling $1 million, outside of the Urban Initiative, to reduce student disruption were awarded other districts. No State witness fully articulated why the disruptive student grant awards were not coordinated with the Urban Initiative. Dr. Bloom, an Assistant Commissioner,

distinguished the programs by stating that the disruptive youth grant project was funded by a $1 million Governor-inititated grant and is for the chronically disruptive child. The Urban Initiative, he said, deals with a larger population (disaffected as well as disruptive youth) which may not require as intense an effort for them to learn and achieve in school. Even assuming the educational validity of this explanation, one must still wonder why the projects were not better coordinated.

Twenty-three districts benefitted from the 1986-87 $1 million Governor's grant program to reduce student disruption. Of the 23, eleven are urban districts (Atlantic City, Pleasantville, Bayonne, Montclair, Rahway, Phillipsburg, Perth Amboy, New Brunswick, Carteret, Old Bridge and Woodbridge). Five of the urban districts are in DFG A and B (Atlantic City, Pleasantville, Phillipsburg, Perth Amboy and New Brunswick). In Atlantic City, Pleasantville, Perth Amboy and New Brunswick, only their disruptive students who attend the County Vocational School will benefit from the funded progam. In Phillipsburg, there are five districts sharing the award, which was given to the Warren Hills Regional School. There are three districts funded as single projects, Bayonne (DFG C), Montclair (DFG I) and Rahway (DFG E).

Compensatory Education

The State provides funding for basic skills remediation programs. In addition, districts obtain federal funds through Chapter 1.

The New Jersey State Compensatory Education (SCE) scheme began to be implemented in 1976-77 pursuant to Chapter 212. This program, together with the

federal government's Chapter 1 program, comprises New Jersey's Basic Skills Improvement Program (BSIP).

In 1986-87, New Jersey spent $158.6 million on its SCE program, thus ranking fourth among those jurisdictions with similar programs. In the same year, $101 million was received from the federal government for Chapter 1 services. Camden received $5 million from Chapter 1, Jersey City received $7 million, East Orange $2 million and Irvington $1 million.

New Jersey's funding for SCE is based upon a formula which provides aid for children who test below the State-established standards and are thus in need of remedial services. (The formula includes a maximum number that can be funded. See discussion in Part I.) Students are tested either on a fall/spring or a spring/spring basis to determine eligibility for the program. Eligibility standards are set by each district for grades K-2 and the State sets standards for grades 3-9, which are aligned with the HSPT. A local school board may determine to exceed the State eligibility standards, but these students will not receive State funding. Chapter 1 funds may be used in such cases to supplement the local funds needed to exceed State eligibility standards.

New Jersey's SCE program is designed to supplement the instruction which occurs in the regular or developmental school program. Both the federal and the State programs, therefore, provide funding for the excess cost of the remedial programs above and beyond the regular school program. In New Jersey, the excess cost for remedial instruction under the SCE scheme has been calculated at 18% of the NCEB, or cost of the regular program. (In 1986, the average NCEB was $3,998.)

A statute requires that the cost factor be recalculated annually to reflect actual statewide average cost of providing the services. Until 1981-82, New Jersey used 11% of the NCEB as the excess cost calculation. This percentage had been arbitrarily chosen, based roughly on Title 1 allotments and budgetary considerations. The change to 18% was recommended and approved for 1982-83 implementation.

Although the increased weighting was to have increased funding from $60 million in 1982 to $95 million in 1983, only $80 million was appropriated by the Legislature for 1983. In 1983-84 and 1984-85, therefore, SCE aid was prorated at 87.6% and 91.6% respectively.

New York uses a 25% weighting to calculate compensatory education costs. In 1980, a New York study concluded that the extra costs for all remedial education programs averaged 37% over the cost of the regular education program.

In 1976-77 there were 208,000 New Jersey pupils who were eligible for SCE services and funding was $32,828,429. By 1985-86, the number of eligible pupils decreased to 195,857 but SCE funding increased to $104,481,657.

A similar pattern of decrease in pupils and increase in funding between 1978-79 and 1985-86 is revealed in the plaintiffs' districts. Camden funding during this period increased $3,043,170, or 111%; East Orange increased $2,131,351, or 214%; Irvington increased $804,161, or 102% and Jersey City increased $3,703,840 or 75%. Camden's eligible pupils, however, decreased during this period from

17,506 to 10,947; Jersey City from 23,188 to 13,947; East Orange from 7,045 to 5,118 and Irvington from 3,990 to 2,231.

The enrollment data, however, indicates that while SCE participants steadily decreased between 1978-79 and 1983-84, for 1984-85 and 1985-86 SCE participation increased. In 1986, when 9th graders took the HSPT for the first time and the MLP's were adjusted for other grades, SCE enrollment increased. Not a single urban school district in DFG A or B met the State 75% pass rate on all three HSPT test sections. In none of the DFG A urban districts did more than 43% of the 9th graders pass all three test parts.

In 1985, for example, Irvington enrolled 30.10% of its students in comp. ed. classes. In 1987, after only 12.5% of Irvington's 9th graders passsed the HSPT, the district enrolled 39.28% of its students. Similarly, in Camden, 53.09% of district children were in comp. ed. in 1985. In 1986, approximately 60% of the district population was eligible for one or more remedial services. In 1986, only 17.5% of Camden's 9th graders had passed all three parts of the HSPT.

Plaintiffs contend that the Department of Education violates *N.J.S.A.* 18A:7A-3, which defines "State compensatory education pupil" as one who is enrolled in preventive and remedial programs designed to assist pupils who have academic, social, economic or environmental needs that prevent them from succeeding in regular school programs. I do not believe it is necessary for me to resolve this collateral legal dispute. However, plaintiffs object to *N.J.A.C.* 6:8-1.1, which was changed in January 1987 to provide compensatory education aid only for pupils who qualify on the basis of not meeting the State testing standards. Before, districts could count as comp. ed. those students who passed the MLP's but were, in

the opinion of the district, still in need of preventive service. Under the new regulation, students who pass the tests can still be included in comp. ed. progams by local districts, but the State will not fund them.

Local districts may implement their SCE remedial programs by choosing from four models: (1) the in-class model (utilized by 33% of participating schools); (2) the out-of-class model (utilized by 61% of the schools); (3) the replacement model (utilized by 1.1% of the schools) and (4) the add-on, or "extended day" model.

The SCE program is designed to prevent learning regression and remediate basic skills difficulties. The program requires districts to develop Individual Student Improvement Plans (ISIP's) for each student to tailor the remedial instruction to a pupil's special needs.

The SCE program does not fund pre-kindergarten remedial education, but Chapter 1 funds may be utilized for this purpose. In New Jersey, 1.3 % of the districts offer pre-K programs, including the districts of Camden, East Orange, Hoboken, New Brunswick, Elizabeth and Plainfield. Camden's program serves 8,000 pupils in comparison with Cherry Hill's 493 pupils. Both districts offer 450 minutes per week solely devoted to remediating basic skills. The programs in Camden and Cherry Hill are 150 minutes longer than the average pre-K education time provided throughout the State. However, as previously noted in Part II, most of the pre-K programs in poor urban districts funded by Chapter 1 are half day programs and most do not serve all of the educationally disadvantaged children in the district.

For pupils in grades K-8, 80.07% of all State districts run a BSI program. Eighteen percent of the State's pupils in grades 9-12 are enrolled in a remedial program. The percent of students within each SES category who are comp. ed. declines as SES increases.

In implementing the SCE program, the Department of Education provides aid in the application process as well as technical assistance to districts which are implementing SCE and Chapter 1 programs. The State also collects data, conducts surveys and disseminates information and curricula to local school districts.

Plaintiffs acknowledge that State compensatory education aid flows in proportion to need to poor urban districts. However, they point out that the need is much greater in urban areas, where many children are educationally disadvantaged. The burden of providing special compensatory services--which involves not only teachers, but classrooms and additional materials--falls most heavily on the districts least able to afford the expense. For example, in East Orange, where in 1985 over 41% of the school children were enrolled in comp. ed., the current expenditure per weighted pupil was $2,860. In Millburn, where in 1985 less than 4% of the children were enrolled in comp. ed., the current expenditure per weighted pupil was $4,755.

In addition, plaintiffs note that some schools in poor urban districts can be characterized as remedial schools, or skills academies, because so many students require comp. ed. At the Pyne Point Middle School in Camden in 1987, for example, only five of the 34 classes were not comp. ed. This means that attention and resources are focused on remedial needs, to the detriment of other programming.

Bilingual and English as a Second Language (ESL) Programs

There is a greater incidence in urban districts of students with limited English proficiency, and State law requires that they receive bilingual or ESL services. New Jersey is one of the nation's leaders in providing bilingual/ESL education services. New Jersey was the fourth state to enact a state-funded bilingual/ESL program and is one of only 20 states with such a program.

New Jersey's bilingual/ESL programs were begun in 1975 in response to the Bilingual Education Act. (*L.* 1974, c.197; *N.J.S.A.* 18A:35-15 to 26.)

A bilingual program is different from an ESL program. In a bilingual program, instruction in regular school courses uses the pupil's native language. New Jersey utilizes the "transitional" bilingual education model, which focuses upon replacing a bilingual child's native language with English as opposed to adding the English language to the child's native tongue. Thus, in the transitional model, English is incrementally utilized at the expense of the pupil's native language so that the child can be moved into regular English-speaking classes. When students achieve a designated exit criterion they are mainstreamed into an English monolingual environment.

There are two levels of language maturity that may be attained by non-English speaking pupils: (1) Cognitive Academic Language Proficiency (CALP) and (2) Basic Interpersonal Communication Skills (BICS). CALP is higher order, abstract "thinking" in a newly acquired language which may be reached in about five years after entry into a bilingual program. BICS represents a basic level of communication

and requires only about two years to attain from the time of entry into a bilingual program. Students should exit from a bilingual program upon attaining CALP, though this may require four to eight years, depending on the individual pupil's abilities.

The Department of Education has encouraged districts to design their bilingual programs so that LEP students are able to function in English-only classes in no more than three years. (Exhibit P-317 at p. 8.) The Bilingual Education Act entitles limited English speaking students to at least three years of bilingual education. The Commissioner apparently believes that LEP students should be equipped with the necessary English skills as soon as possible so that they do not linger to their detriment in bilingual programs.

For ESL programs, instruction is totally in English without the use of native language instruction. ESL is a systematic and sequential teaching of the English language. The ESL teacher develops English vocabulary and instructs in the areas of listening, speaking, reading and writing. The recommended daily class load for an ESL teacher is 50 pupils per day, with up to 10-12 pupils per class. Districts may implement a variety of ESL models. ESL instruction must be provided at the elementary level for a minimum of 30 minutes daily. At the secondary level, the minimum set by the Department of Education is one class period daily. Those pupils who must be enrolled in bilingual programs in self-contained classes also receive an ESL period as well as physical education, art, music, etc.

The Bilingual Education Act, *N.J.S.A.* 18A:35-15 *et seq.*, requires school districts to provide full-time bilingual education programs whenever there are more than 20 limited English proficient (LEP) students in one language group within the

district. When there are fewer than 20 students in the district, the district may in its discretion provide bilingual education. If there are 10 or more LEP's in the district, in any combination of language groups, the district must provide English as a second language (ESL) services. Both the statute and the regulations, *N.J.A.C.* 6:31-1.1 *et seq.*, define bilingual education as a full-time program of instruction in all courses and subjects which a child is required by law or regulation to receive.

In New Jersey, there are several types of full-time bilingual program models used, including self-contained classrooms, magnet programs and levelized programs. The size of a bilingual classroom should reflect the general class size within that district, although the Department has not promulgated class size limits.

In addition, the Department permits districts to use program alternatives which are not full-time, such as pull-outs and resource rooms. Ms. Lopez, the Department's manager of bilingual education, testified that full-time programs are generally preferred, but that the Department may permit the other alternatives depending on the situation in the district. For instance, if a district does not have enough LEP's to justify self-contained classrooms or a magnet plan is not feasible, resource rooms might be used. It is not clear on the record how this approval is obtained or whether it is related exclusively to monitoring.

Plaintiffs assert that any bilingual program that is not full-time violates the law. Defendants argue that the law does not preclude the use of appropriate alternatives. Ms. Lopez testified that she did not know of any district that provides full-time bilingual programs for all LEP's. (However, some districts, including Jersey City, may provide full-time bilingual services for Spanish-speaking LEP's.) There are approximately 230 school districts operating bilingual programs and/or ESL

programs. Of these districts, 60 have bilingual education programs but not one has a full-time bilingual transitional program for all languages spoken by 20 or more LEP students within the district. During 1985-86, for example, Irvington served all of its LEP population by utilizing a pullout model, which provided bilingual services for developmental reading and math for approximately 90 minutes per day. This program was found acceptable during Level I monitoring. I decline to pass on this collateral legal question of whether programs that are not full-time violate the law. The use of other than full-time models appears to have been caused by a combination of practical considerations and funding limitations.

State Board regulations require that districts have a bilingual and ESL curriculum. The Department has not developed any curriculum guides or materials in the area of bilingual education. A Department witness did indicate that the Department intends to compile guides currently in use by districts.

Except for materials in Spanish, materials and instructional supplies in the other foreign languages which comprise the various bilingual programs in the State are often hard to find or not available at all. There are some materials in Portuguese, but materials in the Asian languages and Haitian-Creole are difficult to find and there are no materials in Tagalog and Gujarati. The absence of materials can create serious problems for districts, especially those with many LEP students. Exhibit P-150, for example, shows that Jersey City had 416 Tagalog students with 58 considered LEP and 580 Gujarati students with 290 LEP. Jersey City also had 138 Chinese students, 62 of whom were LEP; 118 Korean students with 53 LEP and 198 Vietnamese students , 90 of whom were considered LEP.

Compounding the difficulties of the 230 districts that offer bilingual and ESL programs in the State, is the shortage in bilingual instructional personnel. Spanish teachers are more plentiful, but there are shortages in this language group also. To assist in solving this problem, the Department hopes in the future to open the "alternate route" program to bilingual and ESL teachers. (See discussion of alternate certification above.) Additionally, the State has been working with various colleges to reinstitute the language proficiency exam and the development of training institutes.

LEP students who enter the system before the 9th grade and fail the HSPT undergo the same special review assessment as any other New Jersey student. LEP's who arrive after 9th grade and fail the HSPT may go through the special review assessment in the student's native language but must also pass an English proficiency test (Maculaitis) with a score of 133 in order to graduate, regardless of years in the district or previous English knowledge. The Department recommends that districts align their high school curriculum with the Maculaitis Test, but the Department has never studied whether the test measures greater or lesser English proficiency than the HSPT.

Statewide between 1978 and 1988, there was a slow increase in the student bilingual population and a sharp increase in State categorical aid for bilingual education. During this period, 1977-78 to 1986-87, the number of pupils in bilingual/ESL programs increased from 26,121 to 34,514 and the State categorical bilingual aid increased from $6,294,115 to $30,434,000.

The increase in both LEP's and funding in the last decade is mirrored in the plaintiffs' districts. For example, Camden's bilingual population increased from 1,051 to 1,451 and its funding increased from $426,499 to $1,214,110; East Orange's population increased from 144 to 222 and its funding increased from $34,698 to $185,756; Irvington's 119 bilingual pupils increased by 1986-87 to 344 while its funding increased from $28,674 to $287,839; and Jersey City increased from 2,396 pupils to 2,733 while its funding increased from $577,340 to $2,286,810.

State categorical aid is provided to cover the "excess cost" of the bilingual/ESL programs over and above State equalization aid. In 1985-86, the bilingual categorical aid provided approximately $770 per student. In 1987, the aid increased to approximately $837 per student. The amount of aid per student is arbitrary and not based on actual need or cost.

In addition to categorical aid, Jersey City, East Orange and Camden also receive Title VII, ESEA aid from the federal government, without which funds they would not be able to implement full-time bilingual programs in certain languages. Furthermore, in Jersey City and Camden, Chapter 1 funds are also expended on remediation for the bilingual population. Additionally, HSPT aid may be utilized for the LEP population which is also in need of remedial basic skills services.

Plaintiffs claim their districts do not have adequate resources to deal with the needs of their LEP students. In addition to providing teachers and books, a district must also devote space and administrative services to bilingual programs. The defense countered this contention by claiming any deficiencies in plaintiffs' districts' bilingual programs were caused by poor management and inefficiency.

Exhibit D-64, an evaluation of bilingual programs in the four plaintiff districts, was prepared by Department staff in preparation for this hearing and is the evidence defendants rely upon to establish mismanagement. In my opinion, D-64 suffers from the same defects as other "litigation reports" offered by the defense. It does not judge plaintiff districts by any identifiable standard. It does not apply whatever standards it uses to other districts, particularly districts with similar LEP populations. Also, the objectivity of the evaluators is questionable.

On the other hand, there are not enough data in the record to allow me to conclude definitively that lack of resources is the only problem. What I can conclude is that the State has made a commitment to bilingual education, which the districts are expected to carry out. Some districts--for the most part, urban districts--have more bilingual students than others. A bilingual program is a drain on a district's resources, in terms of management energies, as well as money and facilities. And it seems it would be more efficient if the State would involve itself in more efforts like locating hard-to-find textbooks and teachers, rather than having individual districts duplicating efforts.

Special Education

The Department also supervises the provision of special education services to handicapped children. As required by law, "[e]ach district board of education shall provide a free, apropriate public education program and related services for handicapped pupils in the least restrictive environment." *N.J.A.C.* 6:28-2.1(a). Programs and services must be provided to pupils between the ages of three and 21. A pupil is eligible for special education if he or she is classified as being any

of the following: auditorily handicapped; chronically ill; communication handicapped; emotionally disturbed; mentally retarded; multiply handicapped; neurologically or perceptually impaired; preschool handicapped; orthopedically handicapped; socially maladjusted; or visually handicapped. The classifications are defined in *N.J.A.C.* 6:28-3.5(e).

Each district Board of Education must identify those children between the ages of three and 21 who reside within the district, who may be handicapped and are not receiving special education. After identifying such children, the district refers them to a Child Study Team (CST), which consists of a school psychologist, a learning disabilities teacher-consultant and a school social worker and, if the child is between ages three to five, a speech correctionist. The CST then must evaluate the child to determine eligibility for special education and a proper classification category and placement. For each child determined eligible for special education, the CST prepares an Individualized Education Program. The IEP consists of a basic plan including annual goals and objectives and an instructional guide to help the child's teachers achieve the goals and objectives.

The State special education aid is supplied categorically and is explained in Part I. Under this program, districts also apply each December to the Department for federal flow-through funds. The application consists of three parts. The first is the district's program needs, goals and objectives, and plan of action. (This part need only be updated every three years.) The second part is a statistical report on the number of handicapped children served by the school district by age and classification. The third part is the comprehensive system of personnel

development, which is the plan to provide in-service training to teachers and staff associated with this program.

The defendants supplied proofs to support their position that urban and suburban districts are more alike than different in the composition of their special education services. (See Defendants' Proposed Finding M137 at p. 158.) The defendants assert that the existing program adequately addresses all statewide special education needs and, therefore, contributes to the systems' efficiency and thoroughness. I agree with the defendants that special education pupils as a whole tend to be evenly distributed among wealthy and poor districts. However, based on the entire record, I have concluded that there are also differences. And, whether the program as implemented contributes to T & E, depends upon the definition of T and E discussed in Part V.

The defendants' survey of handicapped pupils indicated, for example, that when students eligible for special education, excluding speech correction, are compared with the total student population present in a district, there were in Camden, 9.3%; Ocean City, 7.5%; Paramus, 7.3%; East Orange, 6.5%; Irvington, 6.6%; Livingston, 6.5%; Jersey City, 5.5%; and Millburn, 5.3%. While these percentages are relatively similar, the following distinction must be immediately noticed: There is a major difference between 5% of 2,000 students and 5% of 20,000 students. These calculations do not include an adjustment weighting the average by the size of each district's student population. The larger total numbers of handicapped students in urban districts alone causes managerial and scheduling problems. More classes, more teachers and more transportation are necessary as

well as more CSTs and there are more administrative difficulties. This causes more discipline, personnel, facility and transportation problems, to name just a few.

Furthermore, defendants' study utilized an old classification system. Currently, only 28 of the 39 districts considered urban by the defendants' study remain classed urban by the Department of Education standards. In addition, the defendants grouped districts by community type based upon an outdated and no longer used 1970's system that relied on the school superintendents' choice as to which community type their schools represented.

Contrary to defendants' assertion and based upon plaintiff witness Dr. Goertz's report, I **FIND** that for 1984-85, in the two lowest wealth groups, 6% of the students were in full-time special education settings as compared to approximately 3% in the highest wealth districts. The highest wealth districts had a larger percentage of children in supplemental instruction/resource room settings used for milder handicaps than did the lowest wealth districts. (Usually, handicapped students able to attend regular classes go to resource rooms for additional help. More seriously handicapped students are often placed in self-contained classes exclusively for the handicapped.) For example, in 1985, Jersey City had 6.34% of its students enrolled in special education classes with 6.31% enrolled in resource rooms or supplemental instruction. South Orange/Maplewood, a DFG I district, had 1.83% of its students enrolled in special education classes with 10.31% in resource rooms or supplemental instruction. This pattern can be seen in several other comparisons. For example, Camden had 6.37% of its students in special education classes and 1.48% in resource rooms while Moorestown, a DFG I district, had 2.78% in special education classes and 15.6% in resource rooms.

Even when there appears to be a proportionally higher use of the resource room by an urban district, suburban districts seem to be substantially higher. For example, East Orange in 1985 had 3.26 % of its students in special education classes and 7.87% in resource rooms; New Brunswick, a DFG B district, had 8.60% in special education and 11.76% in resource rooms; Paterson had 3.26% in special education and 6.82% in resource rooms; Irvington had 3.62% in special education and 7.13% in resource rooms; Newark had 4.48% in special education and 10.4% in resource rooms.

For further comparison, South Brunswick, a DFG H district, had 1.29% in special education classes and 15.6% in resource rooms; Montclair, a DFG I district, had 3.11% in special education and 8.44% in resource rooms; Princeton, a DFG J district, had 1.57% in special education and 9.10% in resource rooms; Millburn, a DFG J district, had .33% in special education classes and 8.07% in resource rooms; Livingston, a DFG J district, had 1.59% in special education classes and 19.66% in resource rooms; and Cherry Hill, a DFG I district, had 1.29% in special education classes and 13.15% in resource rooms.

Under current State special education rules, every school district, independently or through joint agreements, must employ child study teams and other personnel "in numbers sufficient" to provide required services. *N.J.A.C.* 6:28-1.1(e). There are no regulations specifying the ratio of students per CST. According to defendants' study, the average State district had a CST-to-handicapped pupils ratio of 1:205. The average urban district had a ratio of 1:215 with the average suburban district at 1:187.

Mr. Durante, Essex County Supervisor of Child Study, noted that the generally accepted total pupil to team ratio was 1:1,500. The documentary record indicates the need for more CST's in some urban districts. For example, the 1984 Level I monitoring of Jersey City found that the district did not have sufficient child study teams. As of September 1986, Jersey City, with a total student population of 19,872, had employed 25 CST's, bringing its ratio down to 1:1,194.

The Department of Education's 1986 Level II report on East Orange mandated that the district hire two additional CST's and required the district to review the need for other special education staff. East Orange employed eight CST's during 1986-87 to serve 12,400 students (team/pupil ratio of 1:1,550). Hiring two additional teams would reduce the ratio to 1:1,240.

Camden lost a number of CST members during 1985-86, including five learning disability consultants, one psychologist and one social worker. All left the district to begin employment with a State-run juvenile facility which offered higher salaries. The district lost an additional three CST members to higher paying school districts. The Camden County Supervisor of Child Study admitted that within Camden County annual salaries paid by some districts to CST members exceeded Camden City's by approximately $1,500.

In 1980, the Hudson County Superintendent reported to the State Board that "The consequence of [a great number of requests for CST evaluations] places the district in the position of being backlogged beyond a reasonable number, and further out of compliance in providing needed services. [There are federal time lines required for various steps in the process.] This is particularly true in densely

populated urban areas which are characterized by high student mobility and transiency, and a high percentage of disadvantaged minorities." (Exhibit P-232, Hudson County Superintendent's Report, p. 4.)

Irvington's CST's have backlogs caused in part by student mobility and the fact that many incoming students lack complete records, which are necessary before the CST can place the child. It costs Irvington approximately $80,000 to create one child study team. Additional support personnel, such as secretaries, raises the cost of a child study team to approximately $120,000.

State Board regulations permit districts to request the waiver of various special education regulatory requirements. Defendants' study (an evalution of selected districts prepared for this hearing) indicated that "there was no consistent pattern of waiver rates by community type except that suburban districts tend to request more than the urban[s]. . . ." (Exhibit D-27 at p.20.) For example, Paramus' waiver rate according to the defendants is 22.5% with Jersey City at 10.4%, Irvington at 1.0%, Camden at 1.8% and East Orange at .7%. Waivers may be requested for permission to place several types of handicapped children in one class. Thus, D-27 notes that the higher waiver rate may simply be indicative of the smaller numbers of handicapped children that suburban districts must serve. There might not be enough children in each classification type to fill a class.

The defendants acknowledge that in trainable mentally retarded and orthopedically handicapped classes, the average urban district has fewer classroom aides than the average suburban district or the average State district. And in

trainable mentally retarded and perceptually impaired classes in urban districts, there are a few more pupils per classroom than in the average suburban district.

The major controversy between the defendants and the plaintiffs is over whether urban districts are classifying only the most seriously handicapped and whether there are large numbers of students in poor urban areas who could be classified but who are not because the system is underfunded or overburdened.

There is some testimony alluding to a greater incidence of students with more serious handicapping conditions in low-wealth districts than in high-wealth areas. Dr. Goertz's study confirms this testimony. The record also includes some testimony indicating that there is a higher tolerance for low achievement in urban districts than in suburban areas. This testimony asserts that certain student conduct in suburban areas thought sufficient to generate a CST evaluation would simply be ignored in urban areas and that urban districts could not possibly classify all the students who would need help under the suburban standards. In urban districts a student who is two years below grade level is norm for the entire town. In suburbia, a pupil who is two years below grade level would be referred to the CST. In suburbia, nine out of 10 times the parents' wishes control the classification and placement of the students. Suburban parents will only tolerate certain classifications and make greater demands on the child study teams. (Note Dr. Galinsky's explanation of an autistic child's placement at the parents' request in mismangement findings, Part III.)

While there is a national 16 southern cities study confirming some of this testimony, there has been no statewide study in New Jersey focusing on whether all handicapped students in urban areas are being referred to child study teams. There

are also no studies of the classification process in suburban areas. After considering all of the evidence, I do not believe that it is sufficient for me to find by a preponderance of the evidence that there are large numbers of classifiable students in urban areas who are not being classified. Consequently, I **CANNOT FIND** that urban districts tend to be more tolerant of students with academic problems and that urban districts are not classifying all students who should be classified under the special education laws. However, it is clear that plaintiffs' districts, because they are large, are responsible for providing special education services to large numbers of children.

Funding School Facilities

As one part of a thorough and efficient education, *N.J.S.A.* 18A:7A-5(f) requires "[a]dequately equipped, sanitary, and secure physical facilities. . . ."

State facilities aid is included within the aid distributed by Chapter 212. Over the last 20 years there have also been three acts that provided additional State building aid for school facilities. *L.* 1968, c. 177 authorized $30 million; *L.* 1971, c. 10 authorized $90 million; and *L.* 1978, c. 74 authorized $100 million. A majority of these funds went to urban areas.

All school districts are authorized to issue bonds to finance educational facilities. In a Type I district and a Type II with a Board of School Estimate, approval of bonding is authorized by ordinance of the municipal governing body without referendum. In a Type II district, the voters must approve the issuance of bonds. The Commissioner is also authorized to impose bonded debt service upon a school

district under certrain circumstances. *In Re Upper Freehold Reg'l. School Dist., Monmouth County*, 86 *N.J.* 265 (1981).

Bond financing may cover expenses for site acquisitions, construction of new facilities, additions, modifications, overall planning costs including architects' and engineers' fees and energy conservation projects.

In Type I districts and Type II with school estimate boards, the municipality's chief financial officer prepares a statement detailing the current debt status of the school district and files it with the municipality. The Board of Education adopts a resolution approving the bond issue finance plan and transmits the matter to the school estimate board. The school estimate board fixes the dollar amount of the bond issue and certifies the amount to the municipality's governing body. The municipal governing body must authorize and issue bonds in the name of the municipality in the amount fixed by the school estimate board. The municipality is not required to appropriate any amount which, if added to the net school debt of the district, exceeds one and a half percent of the average equalized valuation of taxable property, but may do so by resolution.

With Type II districts, the current debt status statement prepared by the municipality's chief financial officer is filed with the Division of Local Government Services, the municipality's clerk and the Board of Education's Secretary. The Board of Education passes a resolution approving the bond issue. The voters must approve the issue, the State Attorney General must pass on the bonding procedure's legality and copies of the bond proceedings must be filed with the Commissioner of Education.

Type I school district bonds are general obligation bonds of the municipality and Type II school district bonds are general obligations of the school district.

School bonds must mature within a period of years not exceeding the statutory period of usefulness of the facilities to be financed. These periods range from 10 years for renewal of school furnishings and equipment to 40 years for the construction of a fireproof school building or the acquisition of land.

Once bonds are issued and purchased and either the municipality or school district begins to repay its debt, then the year after the first debt service payments are made, State aid for debt service begins. In the first year, capital outlay expenditures must be totally funded from the local tax base. (Note discussion in Part I on how debt service aid and capital outlay aid are calculated.)

The Department of Education assists local school districts in "qualifying" their bond issues, which guarantees the district a lower interest rate. To qualify, a district must pledge to apply all its State aid to repay debt as a first obligation. This process can result in obtaining a double A rating or interest rates just below the State's rating.

Besides selling bonds, a school district may finance school construction through the use of current expense funds received during the current fiscal year from local revenue receipts or the direct appropriation of State school building aid. In addition, current funds can be used to reduce the amount of a bond issue or to purchase sites or equipment. The use of appropriations from current revenue for

facilities must be authorized by the voters in Type II districts and by the Board of School Estimate in Type I districts.

School districts may engage in pay-as-you-go construction programs by assessing taxpayers through a one time levy or through annual levies that are accumulated in special accounts. This method of financing facilities is practical only for districts with large property valuations or sizeable public utility tax yields.

The Department of Education has recently considered the possible use of lease-purchase arrangements to fund school facilities. The Department is working with a number of districts including Irvington which want to acquire new schools through lease-purchase. Under this financing method, Type II districts may bypass the electorate. Assistant Commissioner Calabrese explained that the Department intends to develop regulations on this financing method because there are risks to the school district that have not as yet been fully considered.

Assessing Facility Needs

After *Robinson v. Cahill,* 62 *N.J.* 473 (1973), the Legislature directed the Department of Education to conduct a statewide survey of public school facilities and to estimate the cost of future statewide and local district facilities needs. *Robinson* stated that "the State's obligation includes capital expenditures without which the required educational opportunity could not be provided."

After *Robinson*, the Legislature passed *L.* 1973, c. 200, which mandated that the Department conduct a statewide survey of elementary and secondary schools. In response to this law, all school buildings in New Jersey were surveyed by

Uniplan, a professional association of architects, engineers and planners from Princeton. Their survey began in 1977 and concluded around 1982.

In 1980, the State Board issued its *Four Year Assessment* of Chapter 212 and stated: "This act [*L.* 1978, c. 74, which authorized $100 million in facilities aid] provided welcome relief, but, with facilities needs of some $4 billion, its impact was hardly felt. The Commissioner and the State Board endorse the request to the Commission on Capital Budgeting and Planning for an additional $200 million in 1980. They support the need for a study on continuing methods of funding school construction." (Exhibit P-236 at p.89.) The $200 million would be for renovation and construction of regular facilities and vocational education facilities for the handicapped. Among other recommendations made by the State Board at this time included the enactment of legislation to provide staff and data processing capacity to keep Uniplan updated.

This record contains no evidence of any further statewide study of facility needs. The Department of Education sought in this litigation to discredit Uniplan.

The $4 billion dollar estimate contained in the State Board's *Four Year Assessment* had been projected from Uniplan's study, which was still underway in 1980. Uniplan subsequently revised its figures and estimated that it would cost $2.8 billion in 1978 dollars to bring all school facilities in the State up to contemporary standards. Uniplan found that the average school in New Jersey was about 33 years old and that 24% of the State's schools were older than 50 years. Uniplan concluded that about 15% of the State's school facilities were so poor as to be inhibiting the delivery of an educational program. Uniplan estimated that it would

cost $1.3 million in 1978 dollars to bring an "average" school up to all State standards.

Uniplan found conditions to be worse in northern urban areas than in other regions of the State. As an illustration of the magnitude of the problem, Uniplan initially extrapolated its estimated $4 billion dollar total statewide cost on the basis of the first districts it had evaluated, which included several northern urban districts. Uniplan later revised its estimate to $2.8 billion after evaluating other districts.

As an example of comparisons between urban and suburban districts, Uniplan found that 51% of Camden's media centers were inadequate as compared to 9% in Cherry Hill. Other districts' rates of media center inadequacy were: East Orange, 44% v. Millburn's 0%; Irvington, 39% v. Livingston's 0%; Jersey City, 71% v. Paramus' 0%; Newark, 67% v. Edison's 9%; and Paterson, 62% v. Ridgewood's 0%.

Uniplan found 18% of East Orange's schools were non-combustible, as compared to 100% in Tenafly, 53% in Millburn and 78% in Paramus. Eighteen percent of schools in East Orange are woodframe, as compared to 0% in Tenafly and Millburn and 11% in Paramus.

Of a possible 500 educational evaluation points, East Orange facilities were scored 350; Tenafly 457; Millburn, 410; and Paramus, 465. The average educational rating for the State was 405. Uniplan explained that the dominant components of this score were the ratings for educational environments and library

environments and the weighted average ages of the school buildings. (Exhibit P-170c at p. 42.)

Of the nine East Orange schools surveyed by Uniplan, five (including both high schools) were characterized as inhibiting the educational program. One of the nine surveyed, the Kentopp School, was found to be in only fair physical condition. The site was too small and the building needed substantial additions. Nothing has been done at the Kentopp School to ameliorate these conditions.

No additional facilities aid after L. 1978, c. 74 has been provided.

In 1985, State Board President S. David Brandt acknowledged that the State Board had done nothing to deal with the worsening facilities problems.

It is the defendants' litigation position that the funding available under Chapter 212 can adequately address the facilities problems. (See Defendants' Proposed Finding M 146 at p. 176.)

Did Uniplan Accurately Assess Facility Needs?

The defendants contend that Uniplan is not a valid assessment of any school district's facilities conditions, needs or costs. (Defendants' Proposed Finding M145 at p.176.)

The defendants charge that Uniplan's evaluation of school facilities (a) did not properly consider the district's educational program, projected enrollment and changes in educational program; (b) used a subjective rating system that is not

helpful to facility planning professionals; and (c) used a suspicious method to estimate costs which cannot be verified because Uniplan's cost data cannot be accessed or replicated.

According to the Department of Education, Uniplan did not assign any capacity to substandard spaces in school buildings. The Department of Education believes that, for example, if Uniplan found a room too small to meet Code standards, Uniplan added the cost to enlarge that room. Often this is impossible to do without razing the building and is not necessary. The district can utilize the classroom and meet Code requirements by assigning fewer students to that room.

Uniplan used a 10% inflation factor per year as a guide to project its cost estimates into the future. This rate was accurate in the late 1970's but inflation has been 3-4% for the last three or four years.

Dr. Michael Macaluso, a Department Program Specialist, testified that he uses Uniplan solely for its floor plans and that this study does not accurately set forth the needs of districts.

Uniplan cost the State about $1 million. This survey was done for the Department and the methodology was adopted only upon completion of a pilot survey conducted in Mercer County. It can be inferred that someone in the Department of Education must have approved the process and methodology utilized.

Uniplan surveyed well over 2,000 schools. Uniplan collected hundreds of pieces of information about each school in close coordination with the Department of Education's Office of Facilities Planning Services. (Exhibit P-170c at p.5.)

The work was done one county at a time. The counties were clustered into four phases that were selected by the Department of Education. The Office of Facilities Planning Services provided Uniplan with drawings from their archives of every school to be evaluated. The various district superintendents and school principals were notified that Uniplan representatives would visit their schools. The first visit was by an architect/engineer who performed a physical evaluation, noting all physical and functional changes made to any spaces. Evaluations were made of some thirty building systems using a point system in which "0" equaled very poor, "1" equaled poor, "2" equaled fair and "3" equaled good. Evaluators were guided through the school by a custodian, who also described any problems with the physical plant. After this evaluation, the drawings provided by the Department of Education were then revised and tentatively completed.

Educational evaluations were then made by Uniplan education experts in consultation with the principal of each school. The spaces and functions were re-verified and 30 educational factors were evaluated, using the same scale as in the physical evaluations. The principals provided basic information on enrollment and staff and were asked to identify ways that the buildings inhibited the educational program.

Unit prices for cost estimating, according to Uniplan were "empirical–based on Uniplan's long experience in school house construction. . . ." Costs were

based on gross square feet of floor area. When there was more than one wing, each was evaluated and estimated separately and evaluations were averaged in accordance with gross wing areas. The thirty items on the physical evaluation were again proportioned on the basis of long technical experience. (Exhibit P-170c at p.6.)

The information gathered by Uniplan during the two evaluations, along with basic data about site size, room size and function, was entered into a Princeton University computer. A two-page draft document was prepared by the computer for each school. The preliminary printout was checked by Uniplan for accuracy of information and professional judgment. A final printout was then generated for each school.

It may be that Uniplan's conclusions are not perfect. Certainly, their 10% inflation factor has proven to be excessive and their overall cost assessments may be inaccurate. The statewide total cost of the districts' own long range facility plans for the next five years is $1.2 billion, $500-600 million of which is related to health and safety. (This calculation was made by Dr. Johnson, a defense witness, who totalled the costs of the facilities plans submitted by the districts to the State. I believe this figure may be low because the district plans may have been inhibited by the same fiscal pressures discussed in Part III.) A district's evolving educational program needs may adversely impact on the accuracy of Uniplan's conclusions concerning individual school facility needs. However, after considering Uniplan's methodology, the extent of the study, subsequent statements made by knowledgeable Department officials about facility problems and the district witnesses in this case who corroborated a number of Uniplan's conclusions, I FIND

that Uniplan's study indicates that there are substantial unmet facility needs in New Jersey.

Facility Needs - Age

As of 1978, over 75% of the schools in the 28 urban aid districts in New Jersey had been constructed prior to 1949. These urban aid districts were using 278 schools that were at least 50 years old in 1978. Of these old schools, over 50% had never been renovated and only 16% had been renovated since the 1960's.

None of Newark's 52 schools that were over 50 years old in 1978 have ever been renovated. Uniplan indicated that the average age of Newark's 75 schools was 60 years, compared with the average age of 41 in Millburn, 21 in Livingston and 23 in Edison. Uniplan also found that only 30% of Newark's buildings were non-combustible; 24% were wood frame construction.

In 1978, Uniplan recommended that Paterson condemn 9% of its buildings. Of the 12 school buildings that were evaluated as inhibiting the educational program, none have been replaced.

As of 1978, only two of Camden's 22 schools over 50 years old had ever been renovated.

As of 1978, Jersey City had 38 operating schools that were built between 1898 and 1969 and only three of Jersey City's 24 schools over 50 years old (63% of its

schools) had ever been renovated. Dickinson High School's "new gym" was built in 1932.

Uniplan showed that in 1978 the average Irvington building age was 61 years as compared with the more affluent suburban districts of Livingston and Scotch Plains/Fanwood, where the average age was 21.

East Orange has an elementary school that is 108 years old. The Hart complex was the last new school built in East Orange. The complex cost $10 million and was opened in 1975.

When the defense looked at the age of the school buildings in plaintiffs' districts, they found that 50% of the schools in plaintiffs' districts were older than 60 years and that there has been minimum effort in the past 20 years, except in Camden, to replace old buildings.

Dr. Garms, one of defendants' witnesses, agreed that the older average age of school buildings in urban settings as compared to suburban settings imposes higher costs on the districts because the older buildings are more difficult to heat and to raise to State Code compliance.

Facility Needs - Use of Substandard Space

By 1980, it became clear that a number of the urban schools were using what the Department of Education called "substandard space." Substandard space

is any space that does not meet the applicable Code requirements. In 1978, for example, East Orange used 118 substandard classrooms.

As the State increased its mandated special programs, especially those that require smaller class sizes, such as special education and compensatory education, the urban schools began converting available space into classrooms. Makeshift areas, like coatrooms, basement storage rooms, pantries, storage closets, auditorium dressing rooms and stairway landings were converted into small classes.

The conversion of all available space into small teaching areas resulted in insufficient space for computer, music, art, science, vocational education, physical education and libraries in some poor urban schools.

Some urban school districts have few places to conduct small group instruction, counseling services, parent conferences and child study team evaluations. Teachers have insufficient space to prepare for class, eat lunch, meet with parents and store their personal belongings. In Camden, for example, a partitioned classroom was used for both a history class and an office; a teachers' lounge was converted to a reading center; the balcony of an auditorium was used as a guidance office and an office for a child study team; a library office was used as a reading resource center and for speech instruction; and an audio visual room was used for an ESL class

In 1983 the "Garvin Bill" (*L.* 1973, c. 373) was enacted. It mandates that no substandard room can be approved for more than two consecutive years by the county superintendent unless inspected by the Bureau of Facility Planning Services of the Department of Education to insure that the building meets health, safety and

educational standards for temporary facilities and that the use of the facility is temporary and limited. Any facility found inadequate must be ordered abandoned. *N.J.S.A.* 18A:33-1.1.

The Department of Education now requires that all districts have an approved plan to eliminate substandard classrooms. In 1984-85, there may have been more than 5,000 substandard classes being used statewide.

In 1984 Level I monitoring, the Department found that Jersey City had no plan to eliminate 156 substandard rooms. At Level II, Jersey City had taken no action and there were now 167 substandard rooms, with 30 reported abandoned.

In 1986, Camden used 76 substandard classrooms. The complete list of Camden's substandard facilities for the 1985-86 school year was in excess of the 1985 subplan to eliminate or upgrade substandard faciliites. (Compare Exhibit P-27b with Exhibit P-28.) In 1987 Camden budgeted $143,000 for upgrading substandard rooms in six schools.

On September 1, 1985, East Orange was using 141 substandard classrooms. By December, 44 of those rooms had been approved by the State and East Orange had a plan to eliminate all remaining substandard spaces by June 1987. (East Orange was unsuccessful in eliminating all of these spaces within this time frame.)

To eliminate substandard instructional spaces, districts consider constructing school additions, increasing class sizes, renting portable classrooms, splitting class sessions and floating teachers. East Orange, for example, eliminated

some of its substandard spaces by increasing class sizes and renting additional portable space.

Facilities Needs - Overcrowding

Defendants concede that Irvington is overcrowded, but contend that East Orange and Jersey City are not. Defendants vigorously cross-examined witnesses from Jersey City and East Orange on the lack of overcrowding and presented two witnesses, Drs. Przystup and Johnson, to confirm that Jersey City was not overcrowded. The record is not clear as to defendants' position on overcrowding in Camden.

Defendants charge that East Orange's school population has been declining. Between 1978-79 and 1986-87, East Orange lost 1,325 pupil seats but gained, due to construction, 2,500 student spaces, for a net gain of 1,175. In the same period, East Orange lost 1,197 pupils due to declining enrollments, thereby freeing an equal number of seats. Hence between 1978-79 and 1986-87, defendants contend that the district of East Orange showed a net gain of 2,372 seats.

Defendants also challenge plaintiffs' assertion that the need for small classes for bilingual, special education and compensatory education caused overcrowding because of an inability to use all available space. In East Orange, the defendants point out that the district served 250 bilingual pupils in 1978-79 and 275 in 1985-86 but in 1986-87 the district served only 222 bilingual students. Additionally, while in 1978-79 East Orange provided compensatory education services to 7,045 pupils, in 1986-87, only 5,118 students were served. The defendants further argue that while the district returned some 250 special

education pupils to the district in the last five years, the excess was absorbed by larger special education classes. The defendants assert that although East Orange "may have increased its special education classes to 42 from some 27 classes . . . it is clearly unlikely that this would have affected the . . . average class sizes in the entire district so as to bring class enrollments to a level that would constitute overcrowding. Even the addition of 15 special education classes, in a district of some 12,000 pupils in 16 buildings, would not greatly raise the average class enrollment in the district." (See Defendants' Proposed Finding #51 at pages 231-232.) Defendants further support their argument for a lack of overcrowding in East Orange by noting that actual attendance in high school is lower than stated enrollments because of high absenteeism. In 1985-86, for example, the attendance rate in East Orange High was only 80.4%.

Thus, the defendants argue that although cases of overcrowding may be found, "there is no sufficient evidence in the record to conclude that overall building capacity in East Orange is exceeeded by enrollments." (Defendants' Proposed Finding #52 at p. 232.)

The defendants assert that the same conditions as pertain to East Orange also exist in Jersey City. For example, Jersey City's K-12 student population decreased from 31,348 in 1979 to 28,242 in 1985. The total district student population including special education decreased from 32,610 in 1979 to 30,418 in 1985. When the total elementary, high school and special education populations are considered against the district's functional capacity on October 1, 1985, the Jersey City school district was 229 pupils short of its functional capacity, which had been revised to take into account small class instruction.

The defendants also point to the testimony of Dr. Przystup, Jersey City's former Superintendent and current Principal of Elementary School #41. Dr. Przystup testified that in 1987 there was no overcrowding at his school, which had average per class enrollments as follows: kindergarten-21; 1st grade-21; 2nd grade-23; 3rd grade-28; 4th grade-25; 5th grade-25; 6th grade-21; 7th grade-20, and 8th grade-20. He also revealed that in six other elementary schools out of the district's total of 28, "no overcrowding existed." (See Defendants' Proposed Finding #54 at pages 354-355.) Plaintiffs contend, however, that three of the six schools Dr. Przystup mentioned exceeded their functional capacity as set out in Jersey City's 1985 Master Plan.

The defendants also asserted that three of the four major Jersey City high schools were below their functional capacities. For example, as of November 3, 1986, enrollment at Ferris High School was 1,558, which was below its capacity of 1,834; Lincoln High School's 1,342 enrollment was below its capacity of 1,550 and the 1,544 enrollment at Snyder High School was below its 1,719 capacity.

The defendants conceded that Dickinson High School's 2,641 enrollment as of November 3, 1986 exceeded its functional capacity of 2,179.

Dr. Johnson, the Manager of the Bureau of Facility Planning Services in the Department of Education, confirmed that the Jersey City School District has a functional capacity greater than enrollment by 671 pupils. He said in some instances some facilities are overcrowded, but that generally Jersey City has sufficient capacity to house the number of students being projected over the next five years. Jersey City is building one new elementary school and is likely to build a

second, thereby further enlarging its facilities capacity. In short, defendants assert that, like East Orange, "the totality of the record reveals no district-wide overcrowding in Jersey City." (See Defendants' Proposed Finding #54 at pages 356-357.)

Presumably, defendants would agree that if a district's total school capacity is exceeded by the number of pupils attending, then district-wide overcrowding exists. Based on the record, I FIND that Irvington has district-wide overcrowding. From the 1970's until September 1986, Irvington's school population increased 100 to 150 students per year with no corresponding increase in school facilities. Its one high school, with 2,200 capacity, fluctuates between enrollments of 2,400 to 2,600. Irvington's nine elementary schools are also overcrowded. Among these schools are Myrtle Avenue, with a 490 capacity and an enrollment of 800 and Mt. Vernon, with a 440 capacity and a 640 student enrollment. Irvington's students when passing between classes are shoulder-to-shoulder in the halls, reported one witness.

Irvington's crowded classrooms perpetuate a feeling of no space. At the Grove Street School, for example, every class, except for special education, according to Mr. Giordano, a special education teacher, has over 30 students. Mr. Giordano has never had a regular size classroom in the 11 years he has taught in Irvington. When he was first assigned to Grove Street, he taught in an area which had been the kitchen for the teachers' room, which had pipes throughout the ceiling and was about 10 feet by 20 feet by seven feet high. One window was bolted shut and the room was next to the garbage room. That room as of 1986 still had a class in it. The Grove Street School has converted coatrooms into classrooms and instruction is provided in a three foot by seven foot space with coats hanging

around the students and with the other class being taught right outside the coatroom door. The library at Grove Street seats 20 at a time and consequently Mr. Giordano can only take his class there once every two weeks. Supplemental instruction is provided in a former ticket booth outside the gymnasium and in a former bathroom in which the fixtures have been removed. The Assistant Principal in Grove Street occupies another former bathroom.

The precise meaning of overcrowding,however, is not clear on this record. If the functional capacity of any school is exceeded by those pupils actually attending, then overcrowding in this school exists, according to both plaintiffs and defendants. Basically, however, defendants assert that in Jersey City and East Orange the district capacity is larger than the actual total student population. The problem with this argument is that it assumes students are fungible. Defendants concede, for example, that Jersey City's Dickinson High School is overcrowded. When it was explained that the overcrowding was caused by a large bilingual program, the defense suggested in cross-examination that 500 of these bilingual students should be transferred to Snyder High School. Jersey City witnesses explained, however, that pursuant to a particular desegregation program students may not be removed involuntarily from one school to another and that the parents of these bilingual students would object to such a transfer. In addition, if busing is required, then some cost to the district would be involved. Thus, district-wide capacities are important, but students cannot be shipped between schools without regard to grades, abilities, residences, parental and student preferences, to name just a few limiting factors. It should be noted that the defense does not suggest shifting students to neighboring suburban districts where declining enrollments may result in underutilized space.

Plaintiffs' witnesses from Irvington, East Orange, Jersey City, Paterson and Camden all testified that some school buildings in these poor urban districts were seriously overcrowded. These witnesses stressed that there are insufficient classsrooms for the regular academic program due to overcrowding. If the maximum class size in Camden High School were 15, Camden would need two new buildings. Every available space in urban school buildings, including general education areas such as libraries, auditoriums and gymnasiums, must be used for classrooms. Children in some schools eat their lunch in hallways or boiler room areas. Common facilities like bathrooms, coatrooms and lockers are insufficient in some schools to meet the needs of all children. In 1986 following Level III monitoring, Asbury Park was forced to close four buildings and put two K-4 schools on split sessions for at least two years. At the time of this hearing, there were double sessions at Westside High School in Newark. Newark's Central High School has no gym. East Orange High School must provide six lunch periods to accommodate all students who eat in the cafeteria. East Orange High School's auditorium has capacity for 832 students, while the school contains approximately 2,000 students. Double faculty meetings have to be scheduled in East Orange to accommodate teachers whose day begins at 7:40 a.m., in a modified split session. I was impressed with the candor of the witnesses from plaintiffs' districts and FIND their testimony credible.

In addition, the Department's own monitors found East Orange's Costley school overcrowded and noted that the Kentopp school (K-3) had no cafeteria, no library and no multipurpose room. Exhibit D-288 confirms that an East Orange supplemental class at Vernon L. Davey Jr. High was being conducted in the hallway

and that supplemental instruction at Clifford J. Scott High School was conducted in an auditorium stage area and in the nurse's office.

I believe that overcrowding cannot be judged solely on the basis of district-wide capacity.

Plaintiffs assert that because of the State's mandates for small student/teacher ratios in special education and compensatory education, children in those classes as well as those in bilingual classes must be taught in makeshift areas, like converted coatrooms and basement storage rooms without heat. In 1980, the Camden County Superintendent in a four-year report after Chapter 212 said that the "increase in the number of mandated and special programs in recent years has necessarily increased the number of staff personnel and the size and number of facilities needed to operate such programs." (Exhibit P-232, Camden County Report, p. 5.) The Camden County Superintendent went on to explain that 24 Camden County districts had substandard facilities approved during the 1978-79 school year.

The record shows that defendants are correct that the school population has been declining in many urban districts, including plaintiffs'. However, the record also demonstrates and I **FIND** that the school population in urban districts has been declining at a slower rate than in suburban districts. On the basis of the record I therefore **FIND** that overcrowding is less today in urban districts than it was in the late 70's and early 80's.

East Orange High School with a functional capacity of some 1,650 to 1,780 has housed about 2,000 students in most recent years. Enrollments overall

were about 27 pupils per class. East Orange's Long Range Facilities Plan shows a total enrollment over capacity of 3,266 children in 1985-86 and 3,271 in 1986-87.

In 1977, the Department of Education recognized that East Orange needed 83 additional classrooms, 40 of which were substandard rooms needing replacement. In the early 80's the district annually received permission to use as many as 152 substandard classrooms. In the June 1, 1980 monitoring letter, the County Superintendent directed East Orange to submit a plan which would ensure suitable accommodations to carry out educational programs and to eliminate currently approved temporary classrooms, with the plan including a list of all emergency, temporary and/or substandard classrooms. The district was also directed to identify all temporary classrooms to be eliminated during the 1981-82 school year and to submit a list of emergency, temporary and/or substandard classsrooms and a work schedule for a number of specific repairs. Similar concerns relating to emergency, temporary and/or substandard classrooms were noted again on June 1, 1982.

For 1986-87, East Orange sought permission to use 118 substandard instructional spaces, and was permitted to use 80 or 90 of them. The Department of Education evaluators who visited East Orange to assess its bilingual programs in preparation for this hearing acknowledged some overcrowding. (Exhibit D-64 at pp. 92-96.) They observed five schools and found that substandard facilities, including poor lighting, poor ventilation and a high noise level, also inhibited teaching and learning.

I **HAVE FOUND** in Part II that poor urban elementary class sizes are significantly larger than in wealthy suburban elementary schools. I have also found

that several elementary schools in poor urban areas, especially in East Orange and Jersey City, are so large that efforts to personalize attention are impaired.

Based on this record, I cannot quantify the extent of overcrowding in poor urban districts. The defendants concede that there is some overcrowding in plaintiffs' districts. I **FIND** that there exists significant overcrowding in plaintiffs' districts and other poor urban districts such as Paterson and Newark. I further **FIND** that the size of most urban districts makes it most difficult, if not almost impossible, to provide personal attention to all of the students who could benefit from such attention .

District Facilities Planning

The State Board required each district to develop and submit to the Bureau of Facility Planning for review by July 1, 1978 a master facilities plan. Each district was free to set its own priorities. However, the master plan was to contain certain data, including local and regional demographic information, transportation and traffic patterns, ethnic and cultural enrollment, evaluation of the educational, recreational and cultural facilities and a timeline for accomplishing improvements. The purpose of this requirement was to force the local districts to plan for facilities improvement.

The Bureau reviewed all master plans to ascertain exactly what the problems were and how the districts intended to rectify the problems.

The Department of Education expected the districts to follow these master plans for five years following 1978 and to update the plans after the first five

year period. While testimony indicates that the requirements were developed to force districts to plan and not to collect State data, the record contains no evidence of any State facility improvement action taken because of the district master plans.

In his testimony in this case, defense witness Dr. Johnson, Manager of the Department's Bureau of Facility Planning Services, compared the construction projects of the plaintiffs' districts with what they planned to do in their 1979 master plans. He found as follows: Irvington planned and built one elementary school; planned to renovate eight schools and did four; planned no additions and built five and spent a total of $25,620,728. Camden planned but did not build one elementary school; planned but did not build one middle school; planned an addition to a middle school and a high school and instead built a different middle school addition; planned no renovations and renovated two elementary, three middle and one high school for a total of $6,170,438. Jersey City planned no new schools and no additions and built one elementary school; planned to renovate 36 schools and did five for a total expenditure of $16,012,373. East Orange planned no new schools and no additions but planned renovations at 11 schools. East Orange renovated one elementary, two middle and one high school and a community education facility for a total expenditure of $1,291,100. The four districts thus spent or incurred obligations for a total of $49,094,639 during the five years of their master plans. More than half of the total was spent by Irvington and more than 75% by Irvington and Camden. From these findings, the defendants assert: "[I]t is apparent from the preceeding finding that none of the four districts followed the master plan they submitted and most built or renovated substantially less than they had indicated they would." (State Proposed Finding #35 at p. 185.)

If by this assertion defendants intend to imply district mismanagement, I do not think the record supports the implication. First, there was no obligation to update master plans annually. And, after 1983, the Department of Education had to approve all construction plans under *N.J.S.A.* 52:27D-130. Therefore, the fact that the districts completed projects that were not listed on the 1979 five-year master plan is not in itself indicative of mismanagement. Second, as stated previously, in order to fund capital projects, school districts are totally dependent on either the voters' approval or authorization by the municipal council. Master plans cannot be implemented without these approvals or authorizations. Many urban districts, especially plaintiffs', have difficulty obtaining approval to issue bonds. In Irvington, for example, it took four consecutive years to issue bonds for an elementary school. In Camden, voters rejected a $5 million capital project three times. Between 1967 and 1978, 43% of all bond referenda submitted to the voters in local school districts were defeated. For these reasons, I **FIND** that plainfiffs' districts cannot be found to have mismanaged their facility improvement problems solely by comparing what they planned for in 1979 with what they actually accomplished during the next five years.

On July 1, 1985, the Department modified the master plan requirements. Districts were to submit long range facility plans to county superintendents. The long range plans were to be directed to school needs. Under *N.J.S.A.* 52:27D-130, the Department of Education must review school construction plans. If a district wants approval for a project not contained in its long range plan, they must submit an updated plan.

As part of its long range plan, a district must list in Table 10 the districts' priority projects, including completion dates and cost. An updated Table 10 must be submitted annually by school districts.

Over the next five years, based on long range facility plans, Jersey City needs $88.6 million, Camden $5.9 million, and Irvington $37.1 million. East Orange, according to Assistant Commissioner Calabrese, estimates its need at $80 - 120 million. Assistant Commissioner Calabrese questions the accuracy of these assessments and based on this record I cannot determine the exact cost of plaintiffs' districts' facility needs. It is obvious,however, and I **FIND** that plaintiffs' districts along with other poor urban districts have significant facility needs that create substantial planning and fiscal pressures for the districts.

Defendants' Claim That Plaintiffs' Districts Forfeited State Capital Outlay Aid

Dr. Johnson analyzed the capital outlay expenditures of the four plaintiffs' districts from fiscal years 1980 to 1984. He computed the amount of additional funds the districts would have had if they had spent to the 1.5% capital outlay maximum (See explanation of capital outlay aid in Part I.)

Dr. Johnson found that Camden spent $1,685,531 and could have spent an additional $2,289,714. East Orange reported 0 dollars expended and could have spent $2,667,856. Irvington spent $1,224,061 and could have spent an additional $400,544. Jersey City spent $1,450,912 and could have spent $7,044,115. Defendants, on the basis of these figures, assert that the "four districts thus forfeited State aid on $12,362,239.00." (Defendants' Proposed Finding #33 at p.

184.) Plaintiffs point out that with regard to Jersey City, Dr. Johnson's calculations may not have considered federal funding for public school construction received under a Department of Commerce public works grant.

For the reasons previously explained, however, I cannot accept the implication that plaintiffs' districts willingly forfeited capital outlay aid. Districts must fund capital outlay in the first year through their own devices. State aid reimburses the district in the next year. All of the restrictions and limitations on district expenditures previously discussed in Part III apply here also.

Facilities Mismanagement and Facility Needs in Plaintiffs' Districts

Defendants challenge the plaintiffs' districts' long range facility assessments because they claim plaintiffs' districts' planning is usually inaccurate and because prior fiscal and administrative mismanagement has worsened facility needs. Defendants argue that the cause of the facility problems is not the financing system as alleged by plaintiffs, but mismanagement. They, therefore, contend that with proper administration, all of plaintiffs' facility needs can be cured within the present system. The Department of Education claims to be addressing the facilities needs of the four plaintiffs' districts. (Defendants' Proposed Finding #M144 at p. 176.)

Assistant Commissioner Calabrese testified that availability of contractors and the need to maintain an ongoing educational program would preclude East Orange's initiating the minimum $80 million in construction the district estimates it needs over the next five years. Assistant Commissioner Calabrese also questioned

whether Irvington, even with building a new school, could efficiently obligate the $27 million it needs over the next five years.

Rather than proving mismanagement, I believe that Assistant Commissioner Calabrese's testimony confirms the great need for facility improvements in East Orange and Irvington. I agree with the Assistant Commissioner and **FIND** that it would be difficult for East Orange and Irvington to obligate this much money over the next five years. We have already seen how the districts' master plans were only partially implemented in the previous five years. Assistant Commisioner Calabrese's testimony confirms the need for additional State facilities assistance, at least in East Orange and Irvington.

East Orange

The defendants claim that East Orange improperly purchased and rehabilitated its Board headquarters at 715 Park Avenue and that a majority of its facility problems are caused by poor maintenance (Defendants' Proposed Findings #64,65, 66 and 68 at p. 190-191.) Defendants also claim that from September 1979 to March 1984, $9.9 million in capital improvements or repairs in East Orange were authorized and financed through bonds, but the district used the funds for purposes other than those authorized and the authorized repairs were not completed. (Defendants' Proposed Finding #70 at p. 191.) Nevertheless, the State admits that East Orange has serious facility problems. (Defendants' Proposed Finding #M156 at p. 210.) And, regardless of the cause of East Orange's facility problems, I **FIND** that severe problems exist.

Defendants further contend that now that some fiscal stability has been restored, East Orange should be able to develop and implement a facilities plan. (Defendants' Proposed Finding #71 at p. 192.) East Orange's prior record in implementing its master plan belies defendants' optimism. It was explained that East Orange failed to include any money for capital outlay in a budget because of "political pressure." (Defendants' Proposed Finding #69 at p. 191.) For 20 to 30 years, City officials encouraged bonding of capital projects to keep local tax rates down. If the Department of Education objected to this process, the County Superintendent should not have approved East Orange's budgets. I have previously **FOUND**, in Part III, that this political pressure is another example of the tension existing between the municipality and the school district, especially a Type I district, sharing a property poor tax base.

According to East Orange's long range facility plan (Exhibit P-20), there are 10 schools in immediate need of roof repair, 15 schools with heating, ventilation or air conditioning problems; two schools that need total roof replacement; nine with electrical system problems; eight with plumbing system problems; 13 that need structural repairs; 18 that need patching, plastering or painting; and 13 that need asbestos removal or containment, etc. The estimated cost for rehabilitating and building additions to bring all East Orange facilities as close as possible to contemporary standards as of August 31, 1978 was $32.14 million. Cost today would be probably between the $32 million figure and $69 million.

In 1978, 100% of East Orange's buildings were found too small and none have been enlarged since 1978. The 1985-86 East Orange budget acknowledged

not addressing a district priority to build new facilities. There were nine schools in 1978 that were 50 years old or older and none have been replaced by East Orange.

Furthermore, I **FIND** that the districts' facility problems were caused partly because the district chose not to maintain its buildings rather than to cut instructional expenditures. This action caused a plethora of minor maintenance needs. In East Orange High School in 1983, Middle States evaluators recommended, for example, that the district repair or replace windows so they could open and close easily; cover radiators and fluorescent lights; repair drinking fountains and lavatory equipment; and repair clocks, window shades and intercoms.

The failure to maintain, however, also resulted in more serious deteriorations to existing school facilities. But the reason expressed for deferring or eliminating maintenance was to enable the district to continue academic programing. As Dr. Yamba, President of Essex County College indicated, "what a choice to make . . . I think you may need another Solomon to answer that one." However, Dr. Yamba could not fault urban districts for choosing instructional needs over maintenance. (Yamba Transcript, Nov. 19, 1986, p. 89, lines 8-17.) I cannot determine that this choice was in the short run unwise.

A similar decision to forego maintainance was made periodically during many of the prior years by a number of poor urban districts and is one of the prime causes of the facility problems presently confronting urban districts. (See findings in Part III relating to Jersey City's inadequate maintenance.) There is also evidence of maintenance failings in several other districts.

Irvington

The defendants point to Irvington as an example of a district that was able to implement a multi-year comprehensive maintenance plan with an aggressive inspection program and a plan to upgrade or eliminate all substandard classrooms. Consequently Irvington had schools that were clean and well maintained. (Defendants' Proposed Findings #72-74 at p. 192.)

The defendants acknowledge, however, that Irvington has had overcrowding problems since 1964-65. When Irvington encountered a crisis requiring the closing of its Florence Avenue elementary school, it took four tries to pass a referendum. When the district could not get the voters to agree to build a new school, a compromise was reached to rehabilitate the school. Florence Avenue School was overcrowded on the day it opened. It also cost more to rehabilitate the school than it would have cost to build the new school as originally planned. The defendants impliedly criticize Irvington for not appealing the referenda defeats. (Defendants' Proposed Finding #78 at p. 193.) However, this failure-of-public-support scenario evidences the current system's inadequacy to handle facilities problems. The tension between the municipality and the school district over the shared property poor tax base leads directly to this result.

Of the 10 school buildings and three administrative buildings in Irvington, all are 50 -70 years old and built entirely of concrete. The electrical systems need work, the plumbing needs constant care and many buildings need to be replaced. Under Uniplan the cost to improve Irvington's buildings was $26.4 million in 1978.

Jersey City

The defendants question Jersey City's long range facility needs on a variety of bases. Apparently, because of previous overpayments to two contractors, the defendants must be implying that Jersey City is incorporating excess need into their long range plans to pay further excess payments. (Defendants' Proposed Finding #40 at p. 186.) Additionally, the defendants assert that Jersey City's facility needs are caused by a failure to provide adequate maintenance and custodial services. The 1980 Comprehensive Basic Skills Review on Dickinson High School, for example, found the following: "Needed desperately and immediately are: Lights in the cafeteria; Better lighting throughout the building; Paint everywhere; Steps are dangerously worn and need replacement; Bannisters are needed; Shades are broken everywhere; Plaster and spackle is needed; Painting bricks should be done; Cafeteria is dingy and needs paint; Swimming pool area dirty; No water is in footbath of the swimming pool; Unclean toilets and faculty rooms must be cleaned; and Floors have wax buildup and need washing and waxing." (Exhibit P-149 at p. iv-5.) (Punctuation added.) The CBSR concluded with "There seems to be a 'why bother' attitude in reference to upkeep of this facility." (See further discussion in Part III.) Defendants assert that "Jersey City could have handled the facilities problems with the custodial and maintenance staff they had in place." (Defendants' Proposed Findings #42 at p. 186 and #41,43, 45,49, 50 and 51 at pages 186-188.)

Defendants claim that since a "substantial number of Jersey City's facilities problems stem from inadequate ongoing maintenance" they "could be remediated with little expense and little time." (Defendants' Proposed Finding #52 at p. 188.) Dr. Johnson concluded that Jersey City has "a good basic stock of

facilities." If the buildings were maintained and upgraded "they could offer a good educational program." (Johnson Transcript, June 1, 1987, p. 87, lines 13-14 and p. 88, line 1.)

The defendants also contend that Jersey City without authorization charged maintenance expenditures against capital outlay and that funded capital improvement projects were not done. (Defendants' Proposed Finding #44 at p. 187.) Defendants further claim that Jersey City as of 1982 fell a year behind schedule despite the availability of $34 million in bond financing and that as of February 1987 the City still had $15 million in bond money which had not been appropriated. (Defendants' Proposed Findings #46 and 47 at p. 187.) Finally, defendants call attention to an illustration of "one aspect of the problem" when the Superintendent of Schools, "Franklin Williams testified that he had never seen the Jersey City Long Range Facilities Plan." (Defendants' Proposed Finding #48 at p. 187.)

Assuming, however, that Jersey City caused many of its own facilities problems by inadequate maintenance and that in the past they improperly paid contractors, were slow in appropriating funds, improperly charged maintenance expenses against capital outlay and have a Superintendent who is unfamiliar with the complete facilities plan, all of this confirms and I **FIND** that Jersey City has substantial facilities needs.

There is also a major distinction between facility defects that can be cured with routine maintenance and serious facility deficits. Much routine maintenance is not handled very well in Jersey City either because of ineptitude or because there is too much else going on for anyone to keep on top of maintenance.

But it is also clear that the more serious facility needs--like modernizing schools, building new schools to replace old buildings--are beyond what Jersey City and many other districts can handle within the financing scheme. (See further findings on Facility Improvement Reform in Part V.)

This record is insufficient for me to determine exactly how much Jersey City needs in facilities aid over the next five years. Exhibit D-108 at pp. 51-52 (Table 10) estimates the cost of facilities improvement needed in Jersey City at more than $88 million. Certainly, Jersey City's prior history gives me some concern about the accuracy of their facility planning. However, Dr. Johnson indicated that Jersey City facilities do need "upgrading." With facilities as old as Jersey City's, I must **FIND** that this district, no matter what the cause of its difficulties, has unmet facility needs. The mismanagement that has been proved in Jersey City (See Part III) is most relevant to the question of how the facilities needs should be met, not whether they exist.

Illustrative of another problem, Exhibit P-136 at p. 8.1 explains that even though Jersey City received full bonding for rebuilding School #28, the construction was delayed several years because of difficulty relocating existing residents. This difficulty raises another problem confronting facility improvements in urban areas like Jersey City. Districts in urban areas generally do not have vacant land, such as is present in many suburban areas. When urban school districts wish to enlarge existing facilities or build new facilities, the district must raze existing buildings and relocate displaced residents. This problem on top of the fiscal problems associated with shared property poor tax bases causes further complications for urban district building plans.

The State area standards for new construction recognizes the space difficulties facing urban districts like Jersey City. As shown below, the State standards require less acreage in more densely populated areas. The chart below illustrates how the State permits urban children to attend schools with limited surrounding grounds. (Exhibit D-112 at p.3.)

	Required Acres			
Dist.Pop.	Ele.	Middle	HS	Add acr/100 pup.
Below 500	10	20	30	1.0
500 -1000	8	16	24	.8
1001-5000	6	12	18	.6
5001-10,000	4	8	12	.4
Above 10,000	2	4	6	.2

Camden

Camden is alleged by the defendants to also suffer from lack of maintenance and a breakdown in management. (Defendants' Proposed Finding #59 at p. 189.) This management failure on Camden's part is characterized as a "lack of follow through and follow up." (See findings in Part III.) Camden, according to the State, does not spend all money budgeted for maintenance and instead transfers those funds at year end to surplus. Over a five-year period more than $4.5 million in appropriations for maintenance were transferred to surplus. (Defendants' Proposed Findings #58, 59, and 61 at pages 189-190.) The Camden

County Superintendent testified that Camden has on hand or can provide the funds to complete its facilities plan. (Defendants' Proposed Finding #57 at p. 189.)

Camden has been directed by the Department of Education to correct its facilities deficiencies and seems to be implementing the directives. (Defendants' Proposed Findings #60 and 63 at p. 190.) For example, seven or eight rooms are being added at Camden's McGraw School. An addition of eight rooms and a library are being constructed at the Hatch Middle School. Seven classrooms are being added at Dudley and a 22-room elementary school is being constructed. Centerville elementary is also receiving approximately 22 new classrooms. Even with all of the district's planned improvements, however, Assistant Superintendent Preston Gunning indicated that when this construction is completed, Camden's space problems still will not be cured, because of the numbers of remedial programs requiring small classes.

County Superintendent Beineman also criticized some of Camden's construction as being insufficient. He explained, for example, that the Washington elementary school (393 capacity with a 456 enrollment - without considering substandard spaces) should have been demolished because it was old, with virtually no outdoor play area. Camden never requested demolition of the school but instead proposed an addition.

Camden's record in complying with its master plan is also indicative of its fiscal stress. I do not agree with the defendants that Camden's problem is exclusively lack of follow through. Much of Camden's lack of follow through I **FIND** is caused precisely because Camden is so poor. (See Part III findings on Camden's alleged mismanagement.) Camden's fiscal juggling to operate the school district

without overly burdening its already severely taxed residents has caused many of the problems highlighted by the defense. While defendants are right that Camden could solve all its facility problems by proper budgeting and spending the amounts budgeted, almost a truism, I **FIND** that the existing system will prevent them from doing so without causing additional fiscal stress.

I believe the record contains more than adequate evidence to conclude that there are enormous facility needs in plaintiffs' districts. The Department of Education believes facility planning and improvement is the function and responsibility of the local school district (Defendants' Proposed Finding #1 at p. 177.) Regardless of whether this is the proper legal standard, I **FIND** that the facility needs of plaintiffs' districts appear overwhelming to address within the existing financing system. (A suggested remedy for facilities problems is considered in Part V.)

Statewide Facility Needs

It is true that some facility improvements are underway. Besides some of the activity in plaintiffs' districts, the defense also points to Atlantic City as a district "on the road to addressing" its school facilities problems. (Defendants' Reply at p. 119.) The district has approved a $25 million bond issue to address elementary school needs and begin to address needs at the secondary level through the purchase of property. Approximately $15 million will be devoted to construct a new Indiana Ave. elementary school and to refurbish Kelsey Heights elementary school and to add a pool within the district. The swimming pool at the Kelsey Ave. school will be similar to the pools at two other school complexes, West Side and Uptown. The West Side pool is an Olympic size swimming pool and has been in the school for

10 years or more. It is in a community complex housing community facilities as well as educational facilities. Only one other school district in Atlantic County, Egg Harbor Township, which constructed a new high school in early 1986, has swimming pool facilities. Additionally, the defense indicates that $10 million has been reserved to purchase property to construct a new high school.

In spite of the ongoing improvements, however, it is relatively obvious that not only are there serious facility needs in plaintiffs' districts but there is also a great need statewide.

Uniplan concluded that the cost to bring all facilities in the State up to contemporary standards in 1978 approached the magnitude of the annual State budget. (Exhibit P-170 b at p. 18.)

Defendants admitted in their answer that many schools in plaintiffs' districts are in a serious state of disrepair and that the Commissioner and State Board have recognized the extensive deterioration of urban schools. (Answer filed in 1981, p. 9, para. 45.)

Paterson, for example, has 18 elementary schools that are K - 8 but one is K-7, three are K-4, two are K-8, two are K-3, one is K-1, one is 4-8, one is 5-8 and one is 1-6. The numerous grade level configurations are to alleviate overcrowded schools. Paterson also buses students to various schools to ameliorate overcrowding. Paterson had two bond issues on April 17, 1987 ($436,000 to renovate substandard classes and about $3million for renovating lavatories, windows and lighting). Both of these bond referenda were defeated by the public.

Paterson, according to County Superintedent Persi, has serious facilities problems which have not been addressed.

Uniplan also concluded in 1978 that richer districts tended only slightly to have better schools than poorer districts. (Exhibit P-170b at p.37.)

Assistant Commissioner McCarroll said facilities is the number one education problem in the State and is present in urban and rural areas.

Coordinating County Superintendent Scambio agreed that urban districts have problems with old buildings and suburban districts have problems with what to do with vacant buildings. In many suburban areas, the school populations have been declining at much faster rates than in urban areas. Some suburban districts adjacent to crowded urban areas have unused school buildings.

Under *N.J.S.A.* 18A:20-36, "The commissioner may direct the entire or partial abandonment of any building used for school purposes and may direct the making of such changes therein as to him may seem proper." The record contains little evidence of the Commissioner ordering any building to be abandoned or renovated. In Asbury Park, after monitoring, the Commissioner directed the closing of school buildings. In the case of Delsea Regional High School, the Commissioner directed the construction of school facilities where after plenary hearing it was shown that such facilitiies and actions were necessary and appropriate for a T & E education. The communities in the Southern Gloucester regional district after a number of attempted bond issues would not vote for the issuance of school district bonds to relieve overcrowding. The Commissioner ordered the issuance of school district bonds for the construction of a middle school within the school district.

(Defendants' Reply at p. 119.) There is no other evidence of the Commissioner intervening to ensure facility improvements.

The Bureau of Facility Planning in the Department of Education will assist districts in facility planning when asked. The Department has worked with local school districts to find financial solutions to facilities problems. After an audit in Jersey City disclosed that the City had almost $1.5 million unbudgeted in capital outlay, for example, the Department suggested to the City that it use that money to float a $10-20 million bond issue, pay off that debt over time and never increase taxes a dollar. The actual bond was in excess of $15 million.

However, the State has not conducted a statewide facilities survey since Uniplan. Assistant Commissioner Calabrese said the Department is now relying on the district annual plans for the most current facilities data and that Uniplan was rapidly becoming outdated.

Dr. Stenzler, Executive Director of Maryland's Public School Construction program, testified that in his opinion students attending schools 50 years of age and older which have never been renovated, do not receive the same quality of educational opportunity as students attending newly constructed or renovated schools.

Nevertheless, the emphasis in New Jersey appears to be on maintenance of school buildings and local planning. The Department is most interested in preservation. I FIND that there is no statewide program which seeks to renovate and modernize school buildings on a regular basis. The Department has no plan which requires buildings to be replaced after so many years or after the educational

environment in a school becomes impaired. The record contains no evidence of any State action taken because of districts' facility plans.

The Department of Education has no rules detailing when districts should initiate facility modernization or renovations. The State does not require districts to implement technical advancements in, for example, school structure, lighting, lab construction, computer facilities, media centers and window structure.

Nor are particular types of facilities required. For example, in earlier decades, most elementary students returned home for lunch; many elementary schools therefore were built without cafeterias. Just in Atlantic County, the districts of Pleasantville (DFG A), Folsom (DFG B) and Weymouth (DFG A) do not have cafeteria facilities. In many of today's elementary schools, students must eat lunch at school because a parent is not at home. Also, in cities, many children take advantage of free or reduced rate lunch programs. Yet, the State does not require or provide specific aid for districts to add cafeterias to schools.

Uniplan found in 1978 that "it is apparent that new sources of school financing must be found. The nearly $3 billion needed to bring these buildings as close as possible to contemporary standards simply cannot be raised by local districts using the property tax." (Exhibit P-170b at p. 52.) I agree with this observation.

I **FIND** that there are unaddressed statewide facility needs which cannot be efficiently handled under the existing system.

PART V

Here, the parties' positions on the meaning of T & E are considered and conclusions are reached as to whether New Jersey's public education system is thorough and efficient and whether plaintiffs have proven violations of equal protection and the Law Against Discrimination. And, finally, the potential remedies presented by the parties are examined.

It is important to note that the parties agree that neither I nor the Commissioner of Education can reach the ultimate question raised by plaintiffs. The plaintiffs do not seek an order that the funding system not be applied against them. They seek instead a determination invalidating the system because it is unconstitutional, a remedy that can only be granted by the courts. Accordingly, the factual findings hopefully will assist the courts in this decision, but my observations about constitutionality and remedy are clearly only recommendations.

Inputs and Outputs

The term inputs refers to programs, courses, equipment, facilities, staffing and other resources related to delivering an educational program. Most inputs are therefore within the control of local districts. There are some, however, like student mobility, numbers of LEP's and handicapped students, that are beyond district control.

Outputs refer to the results of the educational program upon the students. Outputs of education are varied and diverse. Sometimes, for example,

results may be measured by standardized tests like New Jersey's Minimum Basic Skills Test (MBS) and the High School Proficiency Test (HSPT). Other times, outputs may involve a student's socialization skills or job market competitiveness, to list a few.

Inputs and outputs are considered by educational researchers when they do "production studies" which are designed to determine the impact particular inputs may have on students. (These studies will be discussed below.)

The Parties' Positions On The Meaning Of T & E

Assuming for the moment that the defendants are 100% correct and that low or no-cost innovative teaching programs, the effective school principles, various Commissioner and Gubernatorial initiatives and the existing compensatory education, bilingual and special education programs can without any modification to the funding system convert all poor urban districts into districts which can pass monitoring and be certified, there still remains the question whether such a public school system would be thorough and efficient under the New Jersey Constitution.

The defense asserts that passing monitoring indicates presumptively that the district is running an education system which complies with the T & E mandate. Conversely, the defendants assert that failing monitoring indicates presumptively that the district's educational system is not in compliance with constitutional requirements. Thus, the defendants believe that the Department's monitoring elements when present are indicative of a thorough and efficient education system.

The defendants also believe that whether T & E exists should be judged on the basis of pupil achievement and that equalization of educational inputs is not required and is in fact rejected under a proper interpretation of T & E. The defendants thus believe that T & E is measured by an output goal and that if the district has achieved the necessary output or is making reasonable progress toward attainment of that output, then the district's educational inputs are presumptively adequate.

The plaintiffs, however, believe that every student in the State is entitled to equal educational opportunity measured by financial resources and program offerings. They reject the student achievement measure since the only reasonable expectation for such a measure they believe would be minimum reading and calculation levels and mastery of basic subject matter.

Plaintiffs contend that financial resources should be equalized so that children with similar educational needs no matter where they live and how much money their parents earn will have similar resources to support their educational programs. Since financial resources pay for educational programs, the plaintiffs suggest that the simple answer to T & E is to equalize resources so that districts can provide substantially equal programs for students with substantially similar needs.

Thus, plaintiffs argue, essentially, that the poor urban districts should be provided additional resources and programs substantially equal to those available in wealthy suburban districts.

The defendants, who focus on pupil achievement, counter with the charge that based on educational research it cannot be proven that increased spending will make a difference in student achievement as measured by success on standardized tests. Therefore, to the extent that student achievement is the goal desired by T & E, defendants argue that the plaintiffs' focus on inputs should be rejected.

Thus, the positions urged by plaintiffs and defendants raise the question whether T & E is measured by equalized finances and programs or by student achievement.

The Importance of Educational Outputs to Defendants

Both plaintiffs and defendants agree that the constitutional guarantee requires equal educational opportunity. Defendants note that the Supreme Court has held that the guaranteed opportunity "must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his or her role as a citizen and as a competitor in the labor market." *Abbott v. Burke*, 100 *N.J.* 269, 280-281 (1985). Defendants interpret this opportunity to be grounded in educational outputs.

The State Board in accordance with this belief that educational outputs are most important has by regulation promulgated a series of goals for the public schools, stressing outputs, that must "help every pupil . . . 1. To acquire basic skills in obtaining information, solving problems, thinking critically and communicating effectively; 2. To acquire a stock of basic information concerning the principles of

the physical, biological and social sciences, the historical record of human achievement and failures and current social issues; 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; 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; 5. To acquire job entry level skills and also to acquire knowledge necessary for further education; 6. To acquire the understanding of and the ability to form responsible relations with a wide range of other people including, but not limited to, those with social and cultural characteristics different from his or her own; 7. To acquire the capacities for playing satisfying and responsible roles in family life; 8. To acquire the knowledge, habits and attitudes that promote personal and public health, both physical and mental; 9. To acquire the ability and the desire to express himself or herself creatively in one or more of the arts and to appreciate the aesthetic expressions of other people; 10. To acquire an understanding of ethical principles and values and the ability to apply them to his or her own life; 11. To develop an understanding of his or her own worth, abilities, potentialities and limitations; 12. To learn to enjoy the process of learning and to acquire the skills necessary for a lifetime of continuous learning and adaptation to change." *N.J.A.C.* 6:8-2.1(b).

Since defendants thus believe that outputs are the goals of a T & E system, they emphasize certain factors that have been found by some educational research to be powerful determinants of student learning. This research generally uses as the measure of achievement scores on multiple choice standardized tests, though a few have used interest in the subject matter, and occasionally a measure of behavioral skills, e.g., athletics and music. Most of these studies were of

elementary schools or students. This research demonstrates that there are basically nine determinants of student learning that can be divided into three clusters.

The first cluster of determinants of student learning can be defined as aptitude, which is the characteristics the student brings to school. The first determinant in this cluster is the student's ability, measured by aptitude, achievement and intelligence tests. The second determinant is motivation. This includes a student's self-concept and is revealed sometimes by the amount of time a student is willing to devote to a task. The third determinant in the first cluster is age or the student's development. Here, generally, older students do better.

The second cluster of student learning determinants is instructional factors, which are the school factors. In this cluster, the fourth determinant is the amount of instruction. Generally, instructional time is positively associated with learning. The fifth determinant is the quality of instruction or teaching. The research shows that some instructional methods are better than others. Individualizing instruction enhances learning. Tutoring, for example, has been successful, as has cooperative learning in which children are broken down into small groups in a class.

The third cluster of learning determinants is psychological factors in the environment. Under this cluster is the sixth determinant of classroom climate or morale. In an effective group, the people within the group like each other and have a sense of organization and goal direction. A class that is friendly and cohesive and a class that is goal directed and well organized is beneficial. The seventh determinant is the home environment or the curriculum of the home. This factor relates to the extent to which parents intellectually stimulate their children at

home, encourage them to do well, read to them when they are young, monitor their play activities, encourage them to defer immediate gratification for long-term accomplishments, are informed about the child's work in school, are in touch with teachers and participate in school affairs. The eighth determinant is peer group outside of school. This starts as a weaker factor in learning but becomes more important in middle and junior high school. The ninth determinant is the mass media, particularly television. Beyond a certain point the more hours of television students watch, the less well they achieve in school.

Students spend approximately 13% of their waking hours in school. Thus, 87% of their time is spent out of school. Given the relatively large amount of time students are not in school, the home environment or curriculum of the home becomes a very important factor in learning. Small improvements in the educationally stimulating activities of home life, such as reading and discussing challenging materials, have consistent and relatively large impact on student achievement and can be the most effective determinant of learning. This may be one of the reasons there is a strong relationship between student performance and socioeconomic status. As a group, children in higher SES categories tend to perform better on standardized measures of student performance than children from lower SES categories. However, SES is not a good predictor of the achievement of individual children. SES is only weakly related to achievement of individual children. The home environment or curriculum of the home is more important than SES in predicting an individual child's achievement.

The quality or rigor of the instruction in school is also very important. Quality instruction should include positive reinforcement and instruction which is adaptable to the particular needs and abilities of students. For schools to have an

instructional impact on students, regular attendance is important for learning. Students who do not move in and out of districts tend to out-perform those who do move. Thus, low student mobility is also important for student learning.

The defendants contend that to evaluate T & E, attention must be paid to measuring what the student learns and since learning is dependent on the nine factors mentioned above and not on resources, plaintiffs' arguments on the meaning of the constitutional guarantee must be rejected.

The Importance of Educational Inputs to Plaintiffs

Plaintiffs assert that it is far easier for the State to define educational opportunity in terms of educational programs and in terms of financial infrastructure than it is to establish a concept of educational needs based on outcomes. Equality has a quantitative numerical component. It is much more cumbersome and probably impossible for the State to mandate improvements in the quality of education through law.

The definition of equal opportunity according to the plaintiffs is not scientific, but is rather a value judgment. If goals are exclusively evaluated, the plaintiffs warn that standardized tests will be the most effective measure of success, regardless of the recognized limitations of these measures.

A district's financial resources purchase teachers, educational programs, instructional supplies, supervisory personnel and facilities. Therefore, according to

plaintiffs, educational opportunity must be measured by the differences in financial resources and program offerings.

Plaintiffs acknowledge that increasing the dollars available to public schools will not by itself guarantee educational improvement. Resources must be used wisely and must be used to create the conditions under which staff and students can work more productively. Thus, plaintiffs assert that more money wisely spent by poor urban districts is required to satisfy the constitutional mandate for a thorough and efficient educational system.

Production Function Studies

Much of the educational research related to the issue of whether money can increase student achievement, is denominated "production function" research. In an industrial setting the research involves the assumption that between two industrial organizations, the one that produces the same amount or quality of output at a lower price is operating more efficiently or, alternatively, if it produces at the same price an output of higher quality, it is operating more efficiently. These analyses attempt to estimate relationships between quantitative measures of outputs and the various inputs. In the educational process, these studies attempt to determine, for example, whether teachers with higher salaries or higher degrees or more experience can increase student achievement.

The best known production function study is the 1966 "Coleman Report" which studied about 600,000 students in the United States. The report found very little relationship between spending and certain kinds of school characteristics such

as teacher qualifications and how much students learn, after taking into account their socioeconomic status as indicated by parents' education.

Coleman's finding that schools do not make a difference, was needless to say rather controversial. Much criticism of Coleman's research methods and his conclusions ensued. Currently, plaintiffs' and defendants' witnesses agree that Coleman's conclusion that schools do not make a difference is wrong and inappropriate. Schools can make a difference. One defense witness, Professor Walberg found SES "is neither alterable nor proximal to the learning process. It is, moreover, very weakly linked to learning; a quantitative synthesis of 100 studies indicated an average correlation with learning of only .19. Assigining and grading homework, for comparative example, would raise achievement more than four times as much as raising parental socioeconomic status one standard deviation. . . ." (Exhibit D-304 at p. 26.)

Since the Coleman report, a number of investigators have conducted input-output research in education.

In 1970, for example, Levin found teachers with high verbal ability were more effective than those with low verbal ability.

In 1972, a research group at the Rand Corporation looked at administrative characteristics and economic impacts of schools and examined expenditures per student, adminstrative special staff costs, teacher degrees and experience and district expenditures. Their conclusions were that these things made no consistent difference in students' learning.

In 1975, Richard Murnane reviewed the effects of school resources on learning on inner city schools and concluded that more experienced teachers did not consistently get better results.

In 1979, Bridge, Judd and Mook tabulated 28 large surveys of 35 administrative and economic characteristics of schools and districts such as class size and teachers' salaries but they could come to no conclusive finding but that socioeconomic status had the single most significant association with outputs.

In 1981, Glasman and Biniaminov compiled a number of past input-output studies and found that relationships between inputs and outputs were insufficiently consistent to produce statistical significance.

In 1983, Mullen and Summers compiled the results of studies of effects of federal compensatory education for poor and minority children. They were able to evaluate only 28 out of more than 5,000 studies, but from these few they were not able to identify a significant association between expenditures and achievement gains.

Erik Hanushek's 1981 and 1986 Analyses

Dr. Hanushek, the chairperson of the Economics Department at the University of Rochester, testified for the defense. He reviewed production functions from an economist's standpoint. The cost factors he considered included expenditures, class size, teacher/pupil ratios, experience and educational level of teachers. He reviewed 147 studies, which he defined as any estimation of a

production relationship for a specific outcome measure or specific population. Thus, a single research report could include several studies. For example, if a particular study examined three different grade levels and used three different measures of performance for each grade level, he counted this as nine separate studies. In fact, the 147 "studies" considered by Dr. Hanushek were from 33 published articles.

Dr. Hanushek testified that in his review he found no systematic relationship between the school inputs examined and student achievement. Individual studies may find one factor affects achievement, but not another. And the specific input factor that affects achievement varies from study to study. The results in input-output studies appear to arise from particular samples and particular ways that data were collected and analyzed.

As an example of some of Dr. Hanushek's findings, he found 33 studies that had determined a positive and significant relationship between teacher experience and student outputs, while seven studies found a negative significant relationship. He interpreted this finding by explaining that some school districts implicity or explicity allow more senior teachers to choose where they teach. Thus, the more senior teachers may select schools and classes with brighter children and thus no causal conclusions can be drawn from these findings.

Dr. Hanushek reviewed 106 studies related to teacher education, based upon the teachers' total amount of advanced education and training. He found six statistically significant and positively related to student achievement while five were statistically significant and negatively related to student achievement.

Some research evidence suggests that principals currently do a pretty good job of evaluating the performance of teachers. There is a high correlation between evaluations of teachers by principals and objective measures of performance of teachers. But, Dr. Hanushek clarified that production function research has not been successful in identifying a specific set of characteristics that indicate good teachers and bad teachers or that can rate teachers in terms of their ability to teach.

Dr. Hanushek's research review found that 16 of 65 studies of expenditures per pupil and achievement had statistically significant relationships. Of these, 13 were positive and three were negative. However, these relationships are most difficult to interpret because the expenditures per pupil are only calculated at the district level and expenditure figures were not available for many studies.

Problems With the Production Function or Cost/Quality or Input-Output Educational Research

Because the educational research does not prove that increasing inputs enhances student achievement, the defense contends that I must therefore conclude that inputs need not be equalized and are not to be compared between and among districts.

None of the studies reviewed by Dr. Hanushek, however, considered special factors such as education for gifted or handicapped children and none studied performance in vocational education. In fact, the output measures used in

most cost/quality studies tend typically to be scores on standardized reading or math achievement tests confined to a limited number of grades. Research is sparse on output measures such as student attitudes or dropout behavior or future income.

Ability and achievement tests tend to measure one important aspect of human quality, but it is not the only one. Many of the other important outputs of our educational system are unstudied. Most of the output goals mentioned by the State Board in its regulations appear to be unmeasured in output-input studies. (See listing of these output goals above.) All of these outputs are recognized goals of the educational system and there is currently no clear agreement as to which are most important. Neither test scores nor grades predict success in later life such as income, participation in community activities, self-concept, supervisor and peer-related effectiveness, number of prizes, written works, patents and other accomplishments.

Additionally, there appear to be studies that can support either side of the argument. One of the defendants' own witnesses, Professor Guthrie, believed there was a relationship between inputs and achievement. The problem with the studies, however, is that they generally have not been consistently replicated. The conclusion must be drawn and I FIND that the educational research does not confirm that any educational input is consistently and positively related to student achievement. Research cannot confirm that teachers who earn more or have higher degrees, for example, will consistently be associated with higher standardized tests scores. However, from this finding, defendants urge me virtually to disregard the significance of inputs and this I decline to do.

It is interesting to note that when considering the studies relating to local control (see findings in Part IV) the defense urged me to accept the common wisdom linking increased state funding with decreased local control and to disregard four studies that have been unable to find this connection. When dealing with the production function studies, however, the defense urges me to repudiate the common wisdom that you get what you pay for and conclude there is no causality because the studies have been unable to find a consistent connection between inputs and student learning. I acknowledge the clever cross-examination point that common sense once thought the world flat, but nevertheless I declined to reject the common wisdom in the local control area and I decline to reject the common wisdom here. I **CANNOT FIND** that there is no link between expenditure and learning; rather I **FIND** that it cannot be established in accordance with acceptable social science research principles that various educational inputs, including higher expenditures per pupil, will consistently be associated with enhanced student learning, which is usually measured in social science research by increased test scores.

Besides problems with the output measure, there are also questions about the input measure. The studies generally rely on data collected by states and school districts. The measure of inputs (also outputs) commonly used are averages for schools and districts. These averages mask wide variations that commonly exist. For instance, there are studies which attempt to assess whether inputs like science laboratories or library facilities, for example, have a relationship to achievement. To determine the actual inpact of such resources, the researcher would have to trace the daily activities of particular students. This is not done. As one witness explained, trying to learn from these studies what goes on in a school is like trying

to judge what goes on in a factory from observing steel going in and cars coming out.

Similarly, the studies are generally not longitudinal and most look at the application of resources over a limited period of a year or two. However, the effects of schooling are cumulative. A child's performance on a 9th grade test, for example, would be the result of all prior schooling received by that child. Any child who had been in a particular high school for less than a year when the child took the test may actually be representing the effects of some other schools' resources.

Regression analysis is the research method employed in cost/quality or production studies. In this research, multicollinearity problems are sometimes presented. Here, the dependent variable would be the students' test scores and the independent variables would be the various educational inputs being studied. In general, multicollinearity arises when the independent variables included in a regression equation are correlated with one another. A high correlation between two independent variables or between an independent variable and a collection of other independent variables will make it difficult to separate their relative influences on the dependent variable. Thus, in some of these studies, expenditures per pupil and teachers' salaries are sometimes included as additive measures to teacher experience, education and class size. Including expenditures per pupil in the equation tends to reduce its significance because of collinearity with the other independent variables. A teachers' salary almost always increases with more experience and higher education and there is also a correlation between teachers' salaries and per pupil expenditures. Except for the analysis contained in Exhibit D-310 involving four variables (property wealth/pupil, socioeconomic status, audited expenditure/pupil and school district average teacher's salary), there is no evidence

that multicollinearity tests were performed for the other regression analyses in this record.

In other words, the problem of multicollinearity in input-output multiple regression analyses is that almost everything seems to be correlated with everything else. Thus, in some studies it becomes difficult to separate individual factors as having specific effect.

High socioeconomic status is associated with a high level of school resources and low socioeconomic status is associated with a low level of school resources. Holding socioeconomic status constant through regression analysis thus reduces the variation in resources considered in the analysis. In other words, when socioeconomic status is held constant, for example when comparisons are restricted to a DFG category, the variation in expenditures associated with differences in socioeconomic status is in effect removed from the analysis.

Additionally, a failure to include an independent variable that has a statistically significant relationship to the dependent variable will decrease the predictive power of the regression analysis. The omission of an independent variable that has a statistically significant relationship to the dependent variable will give an unreliable estimate of the regression coefficients of the included variables if those variables are correlated with the omitted variables. Thus, if we do not include in the analysis, for example, some aspect of a teacher's skill which is related to increasing test scores, the predictive power of the analysis may be affected. In this type of research it is often difficult to describe what is being recorded. A simple regression analysis using expenditures per pupil as an independent variable may in effect mask many forms of teacher influences, bad and

good, that have not been isolated by the variable. Much of this research appears to rely on relatively crude measures, which may explain why relationships are often found by chance and cannot be replicated.

When educational research finds that a particular input has an effect in one school system, it cannot take into account all the other uncontrolled variables and differences among school districts that may prevent that input from being equally effective in other school systems.

All of the witnesses who testifed acknowledged the limitations of this form of research. It is essentially limited to studying students in actual school settings, so that precise empirical analysis is impossible. Schools are very complex environments made up of different organizational structures and many different people. Social scientific knowledge is insufficient to comprehend the full workings of the educational environment. This research largely ignores the process of what actually goes on in schools. To date the research has been unable to explain much of what goes on in schools as an engineering-type relationship between educational outputs and inputs based on a theory of learning similar to the engineering production functions in economics.

When asked what would be necessary to establish a definitive cost/quality experiment, one of defendants' witnesses explained that ideally large random pools of low, middle and high SES children from different ethnic groups and geographic regions would have to be created. These children would then be taken from their families and randomly assigned to districts with varying levels of expenditure and other characteristics. The length of the school year and the quality of instruction would be randomly varied from district to district. The children would

be kept in the same place and their progress studied from year to year. After several years, the children in the high expenditure districts might be shifted to lower expenditure districts to determine whether their rate of progress then declines.

By contrasting this ideal experiment with the form of most input-output studies one understands the inherent deficiencies of the existing research and the serious ethical limitations on the definitive resolution of this question.

I thus **FIND** that the existing educational research is relatively primitive and does not definitively reveal very much about student learning and therefore does not compel the rejection of input equalization or input comparisons between and among districts.

The Importance of Educational Inputs In a Thorough and Efficient Educational System

If the problem is defined as how to raise the test scores for students of property poor districts, the answer may not be only to provide more money. On the other hand, simply enhancing district efficiencies may also not increase achievement scores. Professor English in his "curriculum audit" of Camden found that Camden High School, for example, had an outstanding principal and was an exceptionally effective school. (Exhibit D-87 at p. 17.) This was true even though test scores were low because, according to Dr. English, other factors, like student mobility, may impact upon achievement.

If the question is whether the quality of a particular educational program can be improved by more money, the answer again may not include only increased expenditures. But, in our contemporary society, money purchases almost everything, including newer and more current text books, scientific laboratory equipment and expendibles, more modern facilities and even more experienced, better trained teachers. (See related findings in Part II, The Meaning of Per Pupil Expenditure Disparities.)

The Superintendent of South Brunswick, for example, was asked to compare his current expense per pupil of $4,772 with Trenton's current expense per pupil of $3,888 and to assess the impact on South Brunswick were it to be funded at Trenton's level. Dr. Kimple indicated that he took the enrollment in his district and multiplied it by the difference in current expenses, which yielded $1.5 million as the total amount that he would have to cut from his budget. He then indicated that such a cut would be an "absolute disaster" and that he "would quit" rather than make such drastic cuts. But, if South Brunswick had to suffer the cuts, he would assess the district's priorities and cut in descending order. He would also use the free balance if possible to avoid making all of the cuts.

Superintendent Kimple listed the cuts that he would have to make. These included the loss of a Community Involvement and Personal Education Development Program (CIPED), which is a work experience program; the Lincoln Center and Metropolitan Opera Programs for about $14,000; all field trips for about $20,000; all courtesy busing; the high school metal shop, graphics, art and mechanical drawing programs; Latin and German at the high school, and an outdoor education program to save another $100,000. The Superintendent also

indicated he would probably have to increase class size about 17%, which would eliminate 20 positions for about $400,000. He would also reduce central administration (including a science/computer coordinator), nursing staff, learning consultants, clerical staff, custodial staff and maintenance and grounds people. (The district then would be unable to paint the school.) Supply accounts would be reduced by $30,000. The district would stop purchasing new computers and new software. The district would not purchase two new school buses and would reduce some sports activities. Superintendent Kimple concluded by exclaiming: "We would have a school district that is as mediocre as some that exist that don't have money enough to spend for some of the things that I just eliminated. And our Kids would . . . get as shortchanged as these Kids in these cities are getting, and I'm convinced that they're shortchanged." (Kimple Transcript, Oct. 22, 1986, p. 102, lines 13-19.)

Several expert witnesses for plaintiffs as well as for defendants acknowledged that additional educational resources effectively used and focused on low-achieving children can positively affect achievement. One of the defendants' witnesses in particular, Dr. Guthrie, Professor of Education, University of California at Berkeley, indicated that additional resources could be more effectively spent on low-achieving children than on children whose achievement levels are already high. In his opinion, assuming reasonably competent administrators, expenditure differences of $700 or $800 per pupil can mean that some children have a more complete level of actual services available to them than to others. Dr. Guthrie believed that if there are dramatically different levels of achievement between districts on the mandated core of knowledge, the State has

the responsibility to assure added resources for those students not performing equally up to standard.

Dr. Koffler, another of defendants' witnesses, who had been at the Department and is now at ETS, testified that based on current research concerning what works with disadvantaged children, if additional funds were used to purchase certain school inputs for disadvantaged students (such as full day preschool for three and four year olds; very small class sizes, especially in the early grades; extensive before and after school tutoring; year-round education; counseling systems from the early grades on that used small student to staff ratios; day care centers for teenagers who have children) it is likely over a period of time that the present correlation between affluence and test results would weaken.

Thus, these witnesses explain that it is what resources are purchased and how they are used that determines educational success.

In marked contrast to Drs. Koffler's and Guthrie's opinions, the defendants at Point IV B of their Brief, p. 277, assert that "Many of the educational problems of our day are but symptoms of a more pervasive social malaise, and with schools and students in particular districts having to contend with drug abuse, prostitution and other manifestations of urban decay, this tribunal must consider the proofs here upon the recognition that the schools can perhaps not be realistically expected to overcome entirely such grave extrinsic handicaps and that the education clause and its implementing legislation were not intended to deal with such non-educational ills." To the extent that this argument implies that the problems inhibiting the learning of poor minority children are realistically intractable and therefore should not be addressed by the school system, it is

rejected as having no support in the record. There is but one vague comment made by Dr. Galinsky indicating that he did not believe that social problems should be addressed by the public school system. All other witnesses, whether plaintiff or defendant, who spoke to this issue agreed that early intervention of the type discussed by Dr. Koffler above can make a difference for educationally disadvantaged children and I so FIND.

The question of whether schools should reverse inequities caused by social and economic disadvantage appears to me to be a non-issue. The reason public schools exist is to educate students. If social and economic disadvantage impairs learning, I do not see how schools can avoid attempting to ameliorate or eliminate this impairment. Obviously, schools should not embark on costly psychotherapy ventures just to enhance student self image or to overcome the ravages of poverty, but schools must look for effective methods of ensuring learning. To enhance learning, it seems to me self evident that whatever impairments that hinder learning must be dealt with.

The State also recognizes the importance of money by, for example, its program increasing minimum teacher salaries. This program was developed so that school systems could offer positions that were competitive with the other job opportunities for potential teachers. Thus, more money will attract better teachers is the implicit assumption of this program. Also, special aid programs like the Urban Initiative recognize the need for additional support for urban education.

The Supreme Court in *Board of Ed. of Elizabeth v. City Coun. of Elizabeth*, 55 *N.J.* 501 (1970), recognized the importance of inputs by acknowledging that T & E includes adequate facilities, adequate educational materials, proper curriculum,

staff and sufficient funds. It also indicated that salary increases for staff to be competitive with suburban and other urban communities was also necessary for a thorough and efficient school system.

Before *Abbott v. Burke*, Commissioners Burke and Cooperman have consistently recognized the importance of inputs in a T & E system. The budget appeal cases are replete with evidence of the Commissioners' beliefs. Enumerating a few limited examples among many, Commissioner Burke adopted as his own an ALJ finding that natatorium repairs to provide students with swimming, health and safety programs are necessary for T & E. (OAL Dkt. #2272-79.) In that same case, Commissioner Burke adopted the belief that a projection room in an auditorium should be repaired because the showing of films and spotlights to illuminate the stage were necessary for a T & E education. Commissioner Cooperman adopted an ALJ decision that found the replacement of wood plank bleachers with aluminum seats and the refinishing of a gym floor and stage to be T & E related. (OAL Dkt. #5577-82 and #653-83.)

Commissioner Cooperman restored money to a school budget for equipment so that a school's vocationally oriented students could have the hands-on experience of building a complete house. (OAL Dkt. #6466-83.) Commissioner Burke restored monies to a school budget so that consummable magazines and periodicals could be purchased for students. (SLD 76:156.) Commisioner Burke also adopted an ALJ finding that convention expenses and reimbursement for conventions which were reasonably related to individual and group professional betterment were related to a T & E education. (OAL Dkt. #3645-81.)

Commissioner Cooperman restored monies to a budget so that six supervisory positions could be continued. He adopted an ALJ's opinion that the constitutional mandate must be interpreted to mean that as a minimum, programs are entitled to a continuing sustenance of support. (OAL Dkt.#9608-83.)

Commissioner Cooperman also adopted an ALJ finding that the salary for a fifth guidance counselor was not excessive in a district of 2,437 students (1 counselor/487 students). In that same case, the Commissioner adopted the ALJ's statement that T & E requires that pupils receive guidance and counseling to assist in academic and career planning. (OAL Dkt. #4663-85.)

Commissioner Burke restored teachers' salaries in OAL Dkt. #2990-80 because he was convinced by a review team's report which stated that socioeconomic factors in the district required: (1) pre-school readiness program, (2) a transitional first grade, and (3) reestablishment of a Title I Migrant Summer Program.

Finally, as the last example offered, Commissioner Cooperman in a case where both the current expense and capital outlay reductions were restored, stated: "[I] find no merit in respondent's contention that the Board should offer only minimal education to its pupils. Such an argument would preclude a rich and varied choice of courses and programs for the pupils seeking better preparation for future career or educational opportunities . . . [I] commend the intent of the Board to enrich the educational opportunities of its pupils beyond the bare minimum by offering a wide choice of viable courses. (OAL Dkt. #6466-83.)

I therefore FIND that much expert opinion, the 1970 *Elizabeth* Supreme Court decision and extensive assertions by both Commissioners Burke and Cooperman acknowledge the importance of educational inputs to a T & E system.

The defense also recognizes the importance of inputs to T & E, but contends that if a district is certified after monitoring the district's inputs are presumptively adequate. The defense also argues that if reasonable progress towards certification is being made, the district's inputs are presumptively adequate. Thus, according to the defense, only if reasonable progress is not being made towards certification, must a district's inputs be examined. (See Defendants' Proposed Finding M50 at p. 81.)

The defense position on inputs appears to be related to Senator Scardino's position on *Robinson*. In Exhibit D-247, *Minority Report Relative to Report of the Joint Education Committee to New Jersey Legislature,* Sen. Anthony Scardino Jr. quotes the Supreme Court's language that it would be unlikely for the lowest level of dollar performance to coincide with the constitutional mandate. The Senator then says: "It is important to note that this unlikely provision is in fact, reality....many districts that are at a low level of dollar performance are in fact, educating their youngsters in compliance with the Legislature's mandate..." The Senator contrasted Englewood, then spending about $2,500 per student, with Garfield, spending approximately $1,212, "which achieved higher scores in the statewide examination than the community of Englewood." The Senator concluded: "Had the Educational Assessment Program [the then statewide examination referred to by the Senator] been available to the court, it is difficult to understand how they would have reached the same result."

Senator Scardino's position is in large part the defendants' position in this case. The defendants believe T & E requires only compliance with monitoring. Thus, by their argument, the lowest spending district would be T & E if it achieves certification. The expenditure disparities would be irrelevant even if the lowest spending district were not certified, under the defense position, if the district were making reasonable progress toward certification. I do not believe that this position is in accord with the meaning of T & E as it has been established by the Supreme Court.

The Meaning of T & E

First, some confusion has been caused by the apparent belief that the Legislature or the Department of Education defines T & E. It is not up to the Legislature or the Department to define what is required under the T & E constitutional clause. This is a judicial function. The Legislature's and the Department of Education's function, it seems to me, is to adopt or provide a system that complies with the constitutional requirements, not to define those requirements.

The Supreme Court has indicated that T & E requires "equal educational opportunity." *Abbott v. Burke*, 100 *N.J.* 269, 280 -281 (1985). This the Court has defined as a system providing all children, regardless of socioeconomic status or geographic location, with the educational opportunity which will prepare them to function politically, economically and socially in a democratic society. *Robinson I*, at p. 515.

Our public school system actually educates students for a continuum of important tasks, from entry level service type jobs to preparation for advanced education. We have already discussed how educators acknowledge the multitude of educational system goals that seem difficult to prioritize when they are viewed from the perspective of societal need. For example, which is more important to society: to acquire information concerning the physical, biological and social sciences or to acquire knowledge, habits and attitudes that promote personal and public health or an appreciation for continued learning? (Consider the various goals listed at *N.J.A.C.* 6:8-2.1.) Some believe that democracy works because of the richness and breadth of our citizens' abilities. Our schools should teach children how to dream and realize great hopes and aspirations; a democracy needs citizens who can think big and develop solutions to difficult social problems.

Because of the system's recognized multiple goals, many of which appear to be of equal importance to our society, I believe that the New Jersey Supreme Court did not construe the Constitution as requiring any specific educational result that must be met by individual students or groups of students. Neither did the Court restrict the Constitution's requirements to any core subjects, foundation or minimum learning. Such a constitutional test might narrow our educational system to the possible detriment of other programs that may be equally valuable to society and probably could broadly succeed only at low levels of achievement.

The Constitution, as construed by the Supreme Court, requires instead that the system provide students with equal opportunity to become, in effect, contributing members of our society. All children must be offered an education

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