Abbott v. Burke

CW-NJ-001-003

RAYMOND ARTHUR ABBOTT, ET AL.,

Plaintiffs-Movants

v.

FRED G. BURKE, ET AL.,

Defendants-Respondents

SUPREME COURT OF NEW JERSEY

CIVIL ACTION

DOCKET NO:

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION IN AID TO LITIGANTS' RIGHTS

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INTRODUCTION

Plaintiffs return to this Court profoundly disappointed. Following this Court's explicit decree in Abbott v. Burke, 136 N.J. 444 (1994) ("Abbott III"), hope was high that the legislative and executive branches would respond by fully and finally vindicating the rights of disadvantaged children to a thorough and efficient education. Plaintiffs worked tirelessly with these branches to try to realize this hope.

It is now crystal clear that Plaintiffs' hope was misplaced. Once again, Plaintiffs have no recourse except this Court, as the "last-resort guarantor" of their constitutional rights. The "Comprehensive Educational Improvement and Financing Act of 1996" ("CEIFA" or "the Act"), passed by the Legislature on December 19, 1996, and signed by the Governor the next day, so patently fails to address the remedial requirements, first established in Abbott v. Burke, 119 N.J. 287 (1990) ("Abbott II"), and then reaffirmed in Abbott III, that this Court is left with no choice but to act quickly and decisively if Plaintiffs' rights are to be met by the 1997-98 school year, the firm deadline fixed in Abbott III.

Plaintiffs recognize that the judicial decision and remedial order sought on this Motion, while well within this Court's authority, are not — and should not be — routinely granted. Yet, as has occurred before in the state's 25 years of school finance litigation, we face again a moment of constitutional truth. This latest legislative venture will not move us forward into a new era of constitutional compliance, as the State predicts. In fact, CEIFA will not even maintain the current, unconstitutional level of educational disparity endured by the state's poorest and least advantaged students. It will instead

propel us backward almost a half century, well before Abbott, and increase the inequities these children experience every day in school.

Like its statutory predecessors, all of which were struck down by this Court, the funding scheme in CEIFA is nothing more than a minimum foundation program. But the Act is even worse than its predecessors. The CEIFA foundation level is indeed a minimum; it is below the statewide average expenditure, far below spending in more affluent school districts, and even below current spending in many poor urban districts.

Poor urban districts, with no ability to raise more education revenue from the local property tax, will find themselves trapped by the Act's minimum foundation, with no way out. On the other hand, wealthier districts can go beyond the foundation, funded by property taxes, to maintain and strengthen the high caliber education they presently offer. The die, then, is cast. CEIFA perpetuates, if not exacerbates, the existing disparity in educational programs, opportunities and resources between the richer and poorer school districts

The State's only retort to this constitutional calamity is yet another educational promise, this one based on a set of achievement standards, known as the core curriculum content standards. This promise is as hollow as the State's optimistic prediction, made nearly ten years ago in Abbott, that the definition, standards, goals and enforcement mechanism for a thorough and efficient education established in P.L. 1975, ch. 212 ("chapter 212"), along with an "effective schools" approach, would ameliorate gross disparity in educational programming and opportunity.

Surely, the time for such promises has long since passed in this litigation. It is now time to break the cycle of non-compliance once and for all. This Court simply

cannot permit the State to ignore the constitutional force of its prior decisions. To do so would render meaningless the historic undertaking begun in Robinson. See Robinson v. Cahill, 62 N.J. 473 (1973)("Robinson I").

Plaintiffs long effort to rely upon this Court to vindicate their constitutional rights in Abbott would also be futile if judicial intervention is not forthcoming. Plaintiffs, instead of taking the next critical steps on the long journey towards a thorough and efficient education -- one that enables them to compete with their more affluent counterparts -- will be consigned to a permanent state of educational inequity. It is now solely in this Court's hands to assure that these children are provided with the education to which they are constitutionally entitled, an education that will allow them the opportunity for full and productive participation in the future of our state.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

In 1990, the Quality Education Act ("QEA"), N.J.S.A. 18A:7D-1 to -37, was adopted in response to this Court's ruling in Abbott II, that chapter 212 failed to provide an education that affords Plaintiffs -- disadvantaged students attending school in poor urban districts -- "a chance to compete with relatively advantaged students," as required under the Education Clause.[1] On July 12, 1994, this Court in Abbott III unanimously affirmed a trial court judgment declaring the QEA unconstitutional as applied to the poor urban districts ("special needs districts"). In Abbott III, the Court held that the QEA did not assure substantial equivalence in regular education expenditures and failed to provide adequate supplemental programs for disadvantaged students.

This Motion addresses that portion of the Abbott III judgment requiring adoption of a law (1) assuring "substantial equivalence, approximating 100%," in regular education expenditures between the special needs and more affluent ("I and J") districts by the 1997-98 school year, and (2) "providing as well for" supplemental programs for poor, disadvantaged students in the special needs districts. Abbott III, 136 N.J. at 447-48.[2] The judgment set a September 1996 date for the enactment of

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[1] The procedural history of Plaintiffs' successful challenge to chapter 212 as applied to poor urban school districts is set forth in Abbott v. Burke, 100 N.J. 269, 280-83 (1985)("Abbott I") and Abbott II, 119 N.J. at 296-300.

[2] "Regular education" means "the school's expenditure budget for the year less all federal aid, categorical aid (and any other state aid except equalization aid), transportation expenditures, monies unused in prior years ('appropriated free balances'), as well as miscellaneous revenues. Essentially it is the sum of local school district property tax revenues and state equalization aid for current expenses." Abbott II, 119 N.J. at 333; Abbott III, 136.N.J. at 448. "Supplemental programs" means the

this law. Id. The Court subsequently extended the date for compliance to December 31, 1996. Abbott v. Burke, M-1117, Order (September 10,1996).

To properly assess whether the State has complied with Abbott III remedial directives, it is necessary to consider (1) the current disparity in regular education expenditures between the poor urban and more affluent school districts, along with the status of supplemental programs in the poor urban districts, and (2) the principal features of CEIFA, which became law on December 20, 1996, in response to Abbott III.

A. Regular Education and Supplemental Programs in the Special Needs Districts In 1996-97

1. Regular Education Expenditures In 1996-97

The Abbott III judgment afforded the State three years to eliminate 16% in disparity in regular education expenditures between the special needs and I and J districts. Id. at 447; see Affidavit of Dr. Margaret E. Goertz, ¶9 ("Goertz Aff.")(16.05% in disparity separated the special needs and the I and J districts). In 1995-96, twenty-six special needs districts were below parity with average expenditures in the I and J districts. Disparity was reduced in that year by 0.63%, leaving 15.42% in disparity to be eliminated or, put differently, increasing the parity ratio to 84.58%. Goertz Aff. ¶10.

In the current school year, 1996-97, twenty-six special needs districts remain below parity. Disparity has been reduced by 2.97%, leaving 12.45% in disparity to be eliminated, and increasing the parity ratio to 87.55%. Goertz Aff. ¶11. This reduction

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"supplemental educational and educationally-related programs and services that are unique to [poor] students, not required in wealthier districts, and that represent an educational cost not included within the amounts expended for regular education." Abbott III, 136 N.J. at 453-54; Abbott II, 119 N.J. at 373-74.

in disparity results in part from the $55.5 million in state aid distributed to special needs districts,[3] and in part from a reduced spending level in the I and J districts of $8,168 per-pupil, down from the 1995-96 average of $8,223 per-pupil.

To eliminate the current disparity requires $232.9 million, an amount that would bring the special needs districts currently below parity to substantial equivalence in regular education expenditures, approximating 100%, with the current I and J district average. Goertz Aff. ¶11.

In 1996-97, the average per-pupil expenditure for regular education in the poor urban districts is $7,151, with a range of $6,918 in Keansburg to $7,737 in Pemberton Township.[4] By contrast, the per-pupil average in the more affluent districts is $8,168. The current gap between the poorer and more affluent districts is approximately $1,017 per pupil.

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[3] In April 1996, plaintiffs filed a Motion In Aid to Litigant's Rights which sought an order directing the State to cut the remaining disparity in half for the 1996-97 school year. In that Motion, plaintiffs argued that the State's performance in reducing disparity in 1995-96, and as proposed for 1996-97, strongly indicated a "less than reasonable likelihood of achieving compliance [parity] by 1997-98," as Abbott III requires. Id., at 447-48. The Court denied the Motion "without prejudice to its renewal" and extended the date for a law assuring substantial equivalence until December 31, 1996. See Order (September 10, 1996).

[4] Four special needs districts have per-pupil spending that is currently above parity with the I and J district average. These are Burlington City ($8,437); Newark ($8,310); Hoboken ($9,931); and Neptune Township ($8,768). Goertz Aff. ¶11, Table 3. On this Motion, Plaintiffs exclude these districts in calculating disparity. However, as discussed infra at 9, the foundation formula authorized by CEIFA results in a spending level in all the special needs districts that is well below parity with the I and J average in 1997-98. Goertz Aff. ¶8.

2. Supplemental Programs in 1996-97

The QEA established "a formula for calculating aid for programs for at-risk pupils," termed "at-risk program aid." See Abbott III, 136 N.J. at 452-53. At-risk program aid was designed to enable districts to provide programs to address the special educational needs of disadvantaged students. Affidavit of Dr. Larry Leverett, ¶5 ("Leverett Aff."). From its inception, the amount of at-risk program aid has not been based on the actual cost of any identified program or set of programs, but rather upon the amount of funding made available by State officials. Leverett Aff. ¶10. The State also did not require school districts to actually implement any specific supplemental programs or set of programs with at-risk program aid. Leverett Aff. ¶11. The State instead prepared an annual list or "menu" of optional strategies and programs that a district could implement, if it chose. Leverett, Aff. ¶¶11-12.[5]

From 1994-95 to the current school year, the State has continued to provide at-risk program aid, but in the same amount as in 1992-93. Leverett Aff. ¶9, Table A. In that year, special needs districts received $183 million in at-risk program aid. The State distributed this same amount in every year since, including in the current school year. Leverett Aff. ¶9, Table A.

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[5] As discussed infra at 27, the lack of specific program identification, adequate funding and required implementation led to this Court's finding in 1994 that at-risk program aid was constitutionally defective. Abbott III, 136 N.J. at 452-54 (in determining the amount of at-risk aid, "the Legislature made no study of the added costs associated with providing services for at-risk students," and, therefore, the State must "identify and implement the special supplemental programs and services that the children in these [special needs] districts require").

Since 1994, there has been no study by the State that identifies required supplemental programs, or that determines the actual cost of such programs.[6] Leverett Aff. ¶11. The State continues to regulate the use of at-risk aid as it did under QEA: a school district is not required to actually implement any specific supplemental program or set of programs. The only mandate continues to be that special needs districts select from a menu list of "demonstrably effective improvement strategies and programs," issued every year, and include the selections in their annual educational improvement plan ("EIP"). Leverett Aff. ¶¶11-12; N.J.A.C. 6:8-9.8(a).

B. The Comprehensive Educational Improvement and Financing Act of 1996

1. Regular Education and Supplemental Programs in Poor Urban Districts Under CEIFA

CEIFA determines the level of funding and spending for regular education in poor urban districts in 1997-98, and provides aid for supplemental programs. The

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[6] In its November 1995 Comprehensive Plan for Educational Improvement and Financing ("1995 Plan"), in which CEIFA was first proposed, the Department of Education ("DOE") recognized that it had not "conduct[ed] legally required studies of what [supplemental] programs are needed, how much funding is required and how funds ought to be used in order to redress the socioeconomic disadvantages of children in pervasively poor communities." 1995 Plan at 13. The 1995 Plan itself, and a revised Comprehensive Plan issued by DOE in May 1996 ("1996 Plan"), do not address these issues, but instead recommend a "new funding law [CEIFA]" that would require the DOE to (1) "periodically identify" specific supplemental programs, and (2) "periodically analyze" the per pupil cost of such programs and "annually" to request the needed funds" based on enrollment. 1995 Plan at 41; 1996 Plan at 18; see also Abbott III, 136 N.J. at 453 (citing the State's failure to undertake the study of needed supplemental programs and costs under P.L. 1991, ch. 2).

scope of the law, however, goes beyond the special needs districts. CEIFA determines funding in all school districts and in all aid categories, as did the QEA.[7]

(a) Regular Education Expenditures Under CEIFA

The formula for regular education in CEIFA is strikingly similar to the QEA foundation formula declared unconstitutional in Abbott III. 136 N.J. at 448-451.[8] As in QEA, the "specific mathematical formulas in calculating the spending and funding provisions" of CEIFA are "complex," but "the basic legislative design is simple and straightforward." Id. at 448.[9] The provisions of CEIFA that determine funding and spending for regular education are examined separately below.

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[7] This Motion seeks only to enforce the remedial requirements in Abbott III concerning regular education expenditures and supplemental programs in poor urban districts. Plaintiffs take no position on the constitutionality of CEIFA in any other school district or in any other aid category. Of course, plaintiffs describe how CEIFA affects regular education expenditures in more affluent districts, as this is necessary to determine whether the Act eliminates the current spending disparity, as Abbott III mandates.

[8] On this Motion, Plaintiffs use the term "special needs districts" to refer to the thirty districts encompassed within the Abbott III judgment. Id. at 447. CEIFA, however, expressly defines "Abbott districts," as the "the 28 urban poor districts specifically identified in Abbott v. Burke." CEIFA, sec. 3. Plaintiffs address this issue more fully infra, at 57.

[9] CEIFA's complexity is in its use of several basic elements of the foundation formula — the foundation or "T&E budget," "local share," for example — in different ways depending on the form of state aid or type of district. For example, state aid for regular education for special needs districts is calculated at the T&E Budget level, plus 5%. CEIFA, sec. 13c. However, supplemental state aid to address low property wealth and high poverty rates is fixed for the special needs districts at the T&E budget level, without the additional 5%. CEIFA, sec. 5b. These differences, however, have little effect on the overall impact of the foundation formula on special needs districts, as described below.

(I) Funding for Regular Education

Under CEIFA, state aid for regular education, referred to as core curriculum standards aid or "CCSA", is established by a predetermined State "contribution" of $2.62 billion for 1997-98. CEIFA, sec. 11; Goertz Aff. ¶16 (total amount of CCSA is $101.4 million less than state foundation aid in 1996-97). The aid is then distributed through a foundation formula. CEIFA, secs.12-15. Like QEA, the formula works by using a per-pupil amount -- or the foundation amount the State considers to be sufficient to cover the cost of an education. Goertz Aff. ¶13. In CEIFA, the per-pupil amount, labeled the "T&E amount," is $6,720 for an elementary school pupil in 1997-98. CEIFA, sec. 12; Goertz Aff. ¶16.

The CEIFA foundation budget, or "T&E budget," for each school district is calculated by multiplying the per pupil amount by enrollment, which is weighted for designated school levels. CEIFA, sec. 12 (weights for kindergarten, elementary, middle and high school are 0.5, 1.0, 1.12 and 1.20, respectively, in 1997-98); Goertz Aff. ¶¶17-18. An adjustment of plus or minus 5% is made to create a minimum to maximum budget range. CEIFA, sec. 12-13; Goertz Aff. ¶17; see also Abbott III, 136 N.J. at 449 (calculation of a district's "maximum foundation budget" under QEA "begins with a legislatively predetermined foundation amount per pupil" multiplied by weighted enrollment).

The T&E budget determines state aid for regular education, or CCSA, each district receives under CEIFA. A local share for each district is determined, based on property wealth and aggregate personal income. CEIFA, secs. 13b and 14a; Goertz

Aff. ¶22.[10]; see Abbott III, 136 N.J. at 449 (QEA and CEIFA use the same factors for local share). State aid for special needs districts is the difference between the local share and the T&E budget at the maximum, or plus 5%, level. CEIFA, sec. 15; Goertz Aff. ¶17; Abbott III, 136 N.J. at 449 (the QEA provides aid to special needs districts "in an amount ... equal to the difference between each district's 'maximum foundation budget' and its 'local fair share'"). For all other districts, state aid is the difference between the local share and a point within the district's T&E budget range, depending upon whether the district's prior year budget was below, above or within the T&E budget range. CEIFA, sec. 13d, 15.[11]

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[10] CEIFA requires that the T&E budget, plus 5% — called "maximum T&E budget" — be used to calculate state aid for regular education, or CCSA, in the special needs districts. CEIFA, sec. 13c. The Act, however, uses "the middle of the T&E range," or the actual T&E budget, to determine the amount of supplemental aid for districts with low property wealth and high concentrations of poverty. CEIFA, sec. 5b. In this brief, the term "T&E budget" for special needs districts means the T&E budget at the maximum (plus 5%) level.

[11] CEIFA authorizes other "supplemental" aids for regular education to certain districts with statutorily defined characteristics. In 1997-98, special needs districts are eligible for three forms of supplemental aid: (1) supplemental core curriculum aid (SCCA) for districts with high concentrations of poor students and low property wealth, CEIFA, sec. 17; (2) stabilization aid for districts with a decrease in state aid of more than 10%, CEIFA, sec. 10b; and (3) for 1997-98, supplemental stabilization aid for certain districts experiencing a state aid decline, CEIFA, sec. 10c; see also Goertz Aff. ¶¶22-26.

Just before the Act was approved, the Legislature added several more supplemental aids, which provide little or no aid to special needs districts. These aids are: (1) additional supplemental stabilization aid for suburban districts with high tax rates and more than 10,000 students, CEIFA, sec. 10d; (2) for 1997-98, additional supplemental stabilization aid for districts receiving reduced state aid for students in special services school districts, CEIFA, sec. 10e; (3) supplemental school tax reduction aid for certain middle income districts with school tax rates in excess of 130% of the state average school tax rate, CEIFA, sec. 10f; and (4) additional supplemental stabilization aid for certain coastal districts with high concentrations of senior citizens.

(ii) Spending for Regular Education

CEIFA does not require any school district to spend for regular education at the level of its calculated T&E budget. CEIFA, secs. 5b and 5c. The T&E budget only sets the local share for purposes of establishing how much state aid for regular education, or CCSA, a district receives, if any. Goertz Aff. ¶¶15-22. Once that calculation is made, the district can adopt a budget to spend at a level less than, equal to, or above its prior year budget, even where that budget is greater or less than the T&E budget. CEIFA, sec. 5c. (fixing "minimum permissible" budgets). Thus, the T&E budget operates as neither a ceiling nor a floor on spending, except in special needs districts. See, eg. CEIFA, sec. 5b (a special needs district cannot reduce its local share from the prior budget year unless the district is spending in excess of the T&E budget).

The only spending limit imposed by the Act is a "spending growth limitation," or a cap limiting increases on current budgets to 3%, or the CPI , whichever is greater, after adjustment for enrollment. CEIFA, sec. 3 (defining "spending growth limitation"), sec. 5d(1),(4)-(9)(setting cap and excluding certain expenditures from cap); Goertz Aff. ¶30 (Act permits maintenance of current spending and growth).

In special needs districts, CEIFA in several ways effectively limits regular education spending to a level that is at or below the calculated T&E budget. Goertz Aff. ¶¶ 33, 42-44. First, the amount of state aid for regular education, or CCSA, for a special needs district is established solely on the basis of the district's calculated T&E budget. Next, no state aid for regular education is provided under the Act to support

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CEIFA, sec. 10g; see also Star Ledger, Slippery Art of the School Deal, at 1, 23

spending above the calculated T&E budget, even where the district's prior year budget exceeds its T&E budget. Finally, special needs districts may exceed the calculated T&E budget, like more affluent districts, but their ability to do so under the Act depends upon raising revenue solely from local property taxes. Goertz Aff. ¶31 (the ability of a district to spend above the T&E range depends entirely upon "the wealth of a district and the willingness of [its] local citizens to tax themselves above the required local share").

(iii) The Definitions of Education Under CEIFA

CEIFA structurally separates a "thorough" from an "efficient" education in approaching the State's constitutional obligation under the Education Clause. A "thorough" education will be defined by the State Board of Education ("State Board") over time, through reviews of a set of achievement standards against the curricula and programs offered in high performing school districts, after future implementation of the standards in each content area. An "efficient" education will be defined by the Commissioner of Education ("Commissioner") every two years beginning 1998-99. This will be done through the creation of efficiency standards intended to address the delivery of educational programs and services, taking into account those programs and services offered in districts spending in excess of the T&E budget level.

(1) CEIFA's Use of Achievement Standards

Under the Act, the substantive educational standards and goals in chapter 212 are replaced with a mandate that State officials implement and review a set of

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(December 15, 1996).

achievement standards, called the "core curriculum content standards." See NJ Department of Education, Core Curriculum Content Standards (adopted May 1, 1996); CEIFA, sec. 85 (repealing the substantive education provisions of chapter 212). The Act specifically directs the State Board to:

> review each core curriculum content standard no later than three years after the school year in which the standard is implemented. In conducting its review, the State Board shall examine the curricula and programs offered in high performing schools and school districts. Thereafter, the State Board shall review and update the [standards] every five years. The standards shall ensure that all children are provided with an educational opportunity needed to equip them for the role of citizen and labor market competitor in the contemporary setting.

CEIFA, sec. 4a. The review also must include an examination of the "elements" contained in "portions" of the budgets of school districts that spend in excess of the calculated T&E budget. CEIFA, sec. 4b.

The achievement standards are defined by the State as a "broad set of expected educational results" that "describe what all students should know and be able to do upon completion" of high school. May 1996 Plan at 3-4; Standards, at I; Affidavit of Dr. Evelyn Ogden ¶7 ("Ogden Aff.")("these are general outcomes or goals for pupil achievement"). The standards are not a curriculum, instructional program or educational service. May 1996 Plan at 4; Ogden Aff. ¶8. Rather, the development and implementation of instructional programs and services consistent with the standards is left to the discretion of school districts, subject to future review by State officials following implementation, as required by CEIFA. Plan, at 4;Ogden ¶15.

None of the achievement standards have been implemented by the State. The State's present schedule provides for implementation of the standards beginning in

1997-98, with each subject to be phased in over a five year period. May 1996 Plan, at Appendix. The State also has not made available tests to measure student performance against the achievement standards. Odgen Aff. ¶11. The State's present schedule is to begin testing at the fourth grade level in 1997-98 and continue through 2001-02 for content areas. Ogden Aff. ¶9. There is no schedule for testing in the eighth and eleventh grades. See 1966 Plan at Appendix.

(2) The Hypothetical School Efficiency Model

The Act separately directs that the Commissioner define the "types" of programs and services needed for an education, as defined by the achievement standards described above. The Act requires that every two years, beginning in 1998-99,

> [t]he Commissioner of Education shall develop and establish, through a report issued [biennially every even numbered year], efficiency standards which define the types of programs, services, activities and materials necessary to achieve a thorough and efficient education. The efficiency standards shall be reviewed biennially and revised as appropriate.

CEIFA, sec. 4b. The "efficiency standards" establish the per-pupil T&E amount for the Act's foundation formula. This, in turn, determines the overall level of state aid, or CCSA, to support regular education. CEIFA, sec. 4c.

This approach to defining efficiency generated the T&E amount for 1997-98 in the Act. CEIFA, sec. 13. The amount — $6720 per elementary pupil — is derived from a set of "efficiency assumptions" about the cost of an education in a hypothetical K-12 school district, a school efficiency model constructed by DOE. In 1995, and again in 1996, the DOE presents the school efficiency model as "illustrative" of the cost of an "efficient" school system. As stated in the 1996 Comprehensive Plan:

> [t]he efficiency standards describe the elements from which the per-pupil amount is calculated. However, the elements of these carefully constructed efficiency assumptions are intended to be only illustrative of a delivery system that would ensure a T&E level which provides the resources needed to allow any school district to attain the 'thoroughness' standards. The elements are not meant to be a prescription that districts must replicate. Districts have different populations and needs and effective innovation requires local flexibility.

May 1996 Plan, at 5; Appendix (for description of components of efficiency model constructed by the State);CEIFA., sec 3 (defining "T&E amount" as the cost of "delivering the [content standards...under the assumptions of reasonableness and efficiency"); and see Ogden Aff. ¶¶19-22 (hypothetical district is unlike any real school district; does not reflect actual curricula, programs and services, or costs, in more affluent districts; and is not supported by research made available by the DOE).

Although presented only as illustrative, CEIFA employs the per-pupil amount derived from the hypothetical school efficiency model to set the uniform T&E amount -- $6,720 per elementary pupil. This amount is then used to calculate the amount of state aid, or CCSA, each district will receive under the Act. Goertz Aff. ¶16. In 1997-98, this T&E amount yields an average per-pupil expenditure level for regular education of $7,190 in the special needs districts, just $39 per-pupil above the 1996-97 average, and less than many special needs districts actually spent per-pupil in that year. See Goertz Aff. ¶32 (providing Plaintiffs' 1997-98 expenditure simulation). The T&E amount generated from the DOE hypothetical school efficiency model, when applied in 1997-98, will result in a level of spending in poor urban districts that is approximately $978

per-pupil less than the more affluent districts are currently spending.[12] Goertz Aff. ¶32 ($8,168 in I and J districts compared to $7,190 in special needs districts).

2. Supplemental Programs Under CEIFA

CEIFA replaces QEA at-risk program aid with demonstrably effective program aid. CEIFA, sec. 18. The stated purpose for demonstrably effective program aid is to provide supplemental programs for disadvantaged students. CEIFA, sec. 18a; Leverett Aff. ¶16. Under the Act, special needs districts receive $112 million of this aid in 1997-98. Leverett Aff. ¶22. This is $71 million, or 39%, less than these districts received in at-risk program aid in 1996-97. Leverett Aff. ¶22 (comparing $183.4 million in at-risk program aid in 1996-97).[13]

The Act directs the Commissioner to establish a definition of "the demonstrably effective programs and services which qualify for aid," although no date is given for this action. CEIFA, sec. 18b(1); Leverett Aff. ¶23. The Act lists several programs which

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[12] In the 1995 Plan, DOE explained that a major problem with school finance in New Jersey is excessive and unnecessary spending in more affluent districts. 1995 Plan at 3-10 (stating, for example, that current spending in wealthy districts "supports many uses of money that are unlikely to contribute significantly to the improvement of student achievement"). To address this purported problem, DOE proposed that districts spending below the CEIFA'S T&E amount need not subject their budget to a local election, while districts spending in excess of that amount would need voter approval of the excess. 1996 Plan at 13-14. As discussed infra at 18, this proposal was quickly dropped following intense public criticism from suburban school districts that the proposal would result in cuts in essential programs and a "leveling down" of educational quality.

[13] Special needs districts have received the same amount of at-risk aid -- $183 million -- since 1992-93. If this amount were simply adjusted for enrollment and inflation, special needs districts would have received $208 million in 1996-97. The difference between the adjusted at-risk aid and the demonstrably effective program aid under the Act is $96 million. Leverett Aff. ¶22.

districts may implement in 1997-98 with the aid, but there is no requirement that these, or any other set of, programs actually be provided to students next year, or thereafter. Leverett Aff. ¶26. The Commissioner also is directed to "establish the per-pupil cost" of whatever programs he defines as qualified, but not until the 1998-99 school year. CEIFA, sec. 18b(1); Leverett Aff. ¶24.

CEIFA also removes funding for children in pre-school and full day kindergarten from foundation aid. Leverett Aff. ¶16. In its place, the Act authorizes early childhood program aid. CEIFA, sec. 16; Leverett Aff. ¶16. Under the Act, special needs districts receive $207 million in early childhood program aid in 1997-98. Leverett Aff. ¶18.

Early childhood program aid is intended for pre-school programs and full day kindergarten. CEIFA, sec. 16; Leverett Aff. ¶16. Although districts must prepare a plan to establish these programs for all four and five year olds by 2001-02, the aid is not restricted to this purpose. Leverett Aff. ¶19. In addition to early childhood programs, the Act permits districts to use the aid for any educational program, as long as it is "meritorious;" for "constructing new school facilities and enlarging existing school facilities;" and for demonstrably effective programs. CEIFA, sec. 16; Leverett Aff. ¶20.

3. Maintenance of Current Spending in Suburban Districts Under CEIFA

When first proposed, CEIFA sharply distinguished between spending above and below the T&E budget level. See 1995 Plan at 5-6 (describing "constitutionally essential" and "optional" spending). The State recommended eliminating local elections in districts proposing to spend at or below the T&E budget. Districts proposing budgets in excess of the T&E budget would need voter approval for such

excess spending, termed "local leeway spending." See 1996 Plan at 11, 14 (spending above the T&E budget "is considered a local option" requiring voter approval); and see CEIFA, Senate Bill 40, sec. 4(d)1(June 3, 1996)(describing conditions under which a vote on local leeway spending would occur).

This proposal came under immediate and intense criticism from suburban school districts. At legislative hearings and public forums, parents, educators and students voiced concern that the State's distinction between necessary and optional spending, along with the proposed budget voting procedures, would lead to budget cuts and a "leveling down" of programs in "high performing" schools. See, eg., Transcript of Public Hearing before Joint Education Committee on Comprehensive Plan, at 16x-26x (January 24, 1996) (statement of Cherry Hill superintendent concerning levels of "excessive" spending and programmatic reductions that could result); see also Star Ledger, "State plan to divert school aid draws fire from suburban schools," at 24 (February 8, 1996)(describing "jammed" forum on State's plan of over 1,000 parents, educators and students, including statement by Madison superintendent Larry Feinsod that "the executive branch does not recognize the need to keep achieving suburban districts viable" and that "[l]eveling-down suburban districts is poor public policy and cannot be allowed to occur").

This criticism intensified when, in July 1996, the Office of Legislative Services ("OLS) produced an analysis of local leeway spending. OLS found over 300 school districts spending in excess of the T&E budget, totaling $670 million statewide, with the I and J districts spending more than $200 million in local leeway spending under the

Act. Goertz Aff. ¶29; see also OLS, Local Leeway Amount Subject To Voter Approval Under Governor's Comprehensive Plan (July 2, 1996).

The legislative hearings on CEIFA in July and August 1996 focused almost exclusively on local leeway spending in suburban districts. Pubic comment criticized (1) the use of the illustrative school district for the T&E amount, along with the absence of any study demonstrating a connection between the T&E amount and either the actual cost of programs in suburban districts or the achievement standards; (2) the need to maintain current spending in these districts to provide an education at high standards; and (3) the reduction in curriculum and programs likely to occur if voters rejected local leeway spending. See, eg. Transcript of Public Hearing before Joint Education Committees and Senate Education Committees, on Senate Bill 40 and Assembly Bill 20, at 40, 55 and 70 (July 25 1996) (containing statements from parents and educators in Summit, Watchung and Sterling expressing concern over large amounts of spending declared excessive and detailing the educational programs jeopardized by the Act).

The Assembly version of CEIFA, introduced in July, responded to this protest by proposing to "grandfather" current spending in districts with budgets over the T&E budget. Grandfathering allowed these districts to substitute their prior year budget, with 3% for growth and an enrollment adjustment, as the T&E budget. The sponsors of this proposal explained that, because current spending in suburban districts' supports necessary teachers and programs, cuts in such spending "should be avoided at all costs." See Final Report of the Assembly Task Force On The Funding Of Education (July 16, 1996) (explaining that "grandfathering" is "intended to stabilize the transition to the new funding scheme without wreaking havoc on established school programs").

The Legislature, in the end, decided that the best way to maintain spending in suburban districts would be to simply restore existing budget procedures. As CEIFA moved towards approval, the Legislature: (1) restored the present requirement for local elections on all school budgets, whether below or above the T&E budget; (2) restored local elections on the entire school budget, not just on spending in excess of the T&E budget; and (3) restored the right to appeal any municipal reductions of defeated budgets to the Commissioner. CEIFA, sec. 5d, e (authorizing Commissioner to restore municipal reductions where "the reductions negatively impact on the stability of the district"). The Legislature also added a provision allowing up to 3% growth on current budgets, adjusted for enrollment. CEIFA, sec. 5d.

The clear intent of these changes was to maintain current programs and spending in suburban districts. See Assembly Republican News, at 2 (December 12, 1996)(purpose of restoring existing budget and appeal procedures is to "maintain the status quo"). This, in turn, entailed making certain that the Act's T&E amount not be used in the budget approval process, which could lead to a "leveling down" of suburban education, as the State initially proposed. According to Senator Martin, this objective became the "first priority" of legislators in considering CEIFA:

> As the Legislature crafts its response to the Supreme Court's mandate in Abbott v. Burke, our first priority must be to ensure that high-performing districts not be placed in jeopardy. Instead, they should serve as models of academic achievement for all school districts within our state.

Star Ledger, December 15, 1996, at A-1; see also NJ Senate Republicans, Press Release, at 2 (November 19,1996)(Senator Martin says the amended CEIFA "ensures that high-performing schools will be able to maintain current levels of excellence").

While moving to protect spending in suburban districts, legislators recognized that, because of the limits on spending in special needs districts, the disparity in regular education between those districts and I and J districts would remain unaddressed by CEIFA. Nonetheless, legislators expressed a willingness to adopt the legislation anyway. As stated by the Chairman of the Assembly Education Committee, "[w]e also wanted to make certain that high performing districts were not targeted for deep spending cuts under the guise of educational parity." Assembly Republican News, at 1(December 12, 1996)(statement of Assemblyman Rocco).

4. The Impact of CEIFA on Regular Education Expenditures and Supplemental Programs in Poor Urban Districts in 1997-98

(a) Regular Education Expenditures in 1997-98

CEIFA affects regular education expenditures in poor urban districts in several ways in 1997-98. First, the Act's foundation formula delivers only $3.6 million more in state aid for regular education to special needs districts next year, representing an increase of only 0.24% over 1996-97. This amount compares to aid increases of $101 and $56 million in 1995-96 and 1996-97, respectively. Goertz Aff. ¶32. Moreover, $11.8 million of the state aid to these districts next year is supplemental stabilization aid, an aid category which is authorized only for the 1997-98 school year. CEIFA, sec. 5b (requiring DOE to determine whether districts can absorb loss of this aid).

Second, the Act effectively compresses spending for regular education in the special needs districts to the T&E budget level. Average per-pupil spending in these districts in 1997-98 is likely to be $7,190, as compared to $7,151 per-pupil in 1996-97. The range of spending among these districts will narrow, from a low of $6,919 per-pupil

in Bridgeton to a high of $7,393 in Irvington. The four districts that currently spend above parity will fall into this range, to levels less than current spending levels and well below the I and J average. Goertz Aff. ¶¶11, 32.

Third, the Act leaves the current disparity of approximately 12%, or $232 million, unaddressed in 1997-98. This disparity will almost certainly grow beyond this level in 1997-98. If spending in the I and J districts remains the same next year — $8,161 per-pupil — disparity will increase by approximately 19.5% over the current year, or from $232 to $278.4 million. If I and J districts raise spending in 1997-98, as allowed by the 3% spending growth limitation in the Act, disparity will widen even further, commensurate with the level of the overall I and J district increase. Goertz Aff. ¶32 (simulating disparity in 1997-98 of $300 million or greater if I and J districts take advantage of permissive growth).

Finally, these effects on regular education spending could be altered if the poor districts were able to raise more revenue solely from local property taxes. In twelve of the special needs districts, local revenue would have to increase by $19 million, or 10.42%, just for these districts to spend up to the calculated T&E budget level. In 12 other districts that have 1996-97 budgets in excess of the T&E budget, local revenue would have to increase by a total of $52.7 million in order to maintain current spending next year. Goertz Aff. ¶32, Table 10. To achieve substantial equivalence with the I and J average would require $238 million more in local revenues in the special needs districts, an increase of 47% over 1996-97 levels, again assuming I and J district spending merely remains the same next year. Goertz Aff. ¶32. The only way

substantial equivalence can therefore be obtained under the Act is through dramatic increases in local property taxes in the poor urban communities.

(b) Supplemental Programs in 1997-98

Special needs districts will receive $112 million in demonstrably effective aid in 1997-98. This amount represents a 39% reduction from at-risk program aid in 1996-97. The Act does not require that a district implement any specific program with this aid or provide adequate funding for any required programs. Instead, the Act continues the practice under QEA of providing districts with a sum of funding unrelated to the actual cost of required programs, and delegating responsibility for program implementation to the districts, subject only to "obtain[ing] the approval" of the State for "planned uses" of the aid. CEIFA, sec. 18b(2).

Special needs districts also will receive $207 million in early childhood program aid. CEIFA does not mandate that a district dedicate this aid to full day kindergarten and pre-school classes. Instead, the Act authorizes the aid to be used for any "educationally meritorious" program, to construct and enlarge school facilities, and for demonstrably effective programs. This means that early childhood aid is not restricted in use, but is available for a wide range of educational purposes and school district needs.

C. Conclusion

CEIFA creates a two-tiered funding scheme for regular education. The first tier consists of the more affluent districts. For these districts, CEIFA changes neither the level of regular education spending nor the procedures by which school budgets are

adopted. Current spending is maintained, and the Act allows spending increases each year to accommodate inflation and enrollment growth.

In the second tier are the poor urban districts. For these districts, the Act's foundation formula operates to limit state aid and local revenue to a level that is no more than the T&E budget. With spending in the poor urban districts effectively "locked-in" at the T&E budget, disparity will not be eliminated but will grow, absent significant increases in local property taxes.

Finally, the Act's provision of aid for supplemental programs does not require that any specific set of programs actually be implemented with the aid. Nor does the Act provide funding that is adequate to implement identified and required programs. Instead, funding under the at-risk program has been reduced by 39% under CEIFA. Once again, the Act delegates the performance of essential tasks — the identification of required programs, the determination of cost, and the provision of adequate funding — to future administrative and legislative action.

Against the backdrop of these facts, Plaintiffs now turn to the legal contentions on this Motion.

ARGUMENT

I. CEIFA PLAINLY FAILS TO ASSURE PARITY IN REGULAR EDUCATION EXPENDITURES AND TO PROVIDE ADEQUATE SUPPLEMENTAL PROGRAMS, AS MANDATED BY THIS COURT'S EXPLICIT REMEDIAL DIRECTIVES IN ABBOTT III

The single issue on this Motion is whether CEIFA satisfies the clear and explicit remedy first mandated in Abbott II, and emphatically reaffirmed in Abbott III. It plainly and unquestionably does not.

In Abbott II, this Court concluded that chapter 212, as applied, deprived children in poorer urban districts of a thorough and efficient education. The Court then, in no uncertain terms, set forth a two-pronged remedy for violation of Plaintiffs' constitutional rights: substantial equivalence in regular education expenditures and adequate supplemental programs to address special educational needs of disadvantaged students. In pertinent part, the Court held:

> The Act must be amended, or new legislation passed, so as to assure that poorer urban districts' educational funding is substantially equal to that of property-rich districts. "Assure" means that such funding cannot depend on the budgeting and taxing decisions of local school boards. Funding must be certain, every year. The level of funding must also be adequate to provide for the special educational needs of these poorer urban districts and address their extreme disadvantages.

Abbott II, 119 N.J. at 385.

The Court was even more specific in directing a "substantially equal" level of spending for regular education. This means that:

> [t]he assured funding per pupil should be substantially equivalent to that spent in those districts providing the kind of education these students need, funding that approximates the average net current expense budget of school districts in DFGs I and J.

Id. at 386. The Court provided the State a degree of latitude in meeting these remedial directives. Thus, the Legislature could "devise any remedy, including one that completely revamps the present system, in terms of funding, organization and management," id. at 387, and could allow such a funding mechanism to be phased-in. Id. at 389. The Court, however, made it patently clear that, whatever approach the State took, the two-pronged remedy for poor urban districts could not be ignored:

> [w]hatever the legislative remedy, however, it must assure that these poorer urban districts have a budget per pupil that is approximately equal to the average of the richer suburban districts, whatever that average may be, and be sufficient to address their special needs.

Id. at 388.

Indeed, the Court observed that "[t]o the extent that the State allows the richer suburban districts to continue to increase that disparity [in spending], it will, by our remedy, be required to increase the funding of the poorer urban districts." Id. Thus, while the means were properly left to State officials, the Abbott II remedial objectives — substantial equivalence in regular education and adequate supplemental programs — were not left open to legislative modification, reconstitution or avoidance altogether.

In Abbott III, the Court concluded that, like chapter 212 before it, the QEA failed to satisfy both prongs of the Abbott II remedy. Abbott III, 136 N.J. at 447. In so doing, the Court unanimously reaffirmed these precise remedial objectives. Id. Yet the Court went further, and established a firm deadline for full compliance. In direct and unambiguous language, the Court explicitly instructed the State to adopt "a law assuring [ ] substantial equivalence, approximating 100%," in regular education expenditures for school year 1997-98 and providing for the special educational needs of

children in the special needs districts. Abbott III, 136 N.J. at 447. By a "law assuring substantial equivalence" the Court stated that it

> mean[s] a law that will by its own terms automatically achieve substantial equivalence in per pupil regular education expenditures without depending on the discretionary actions of officials and, to the extent local fair shares or their equivalent are required, will automatically, and without procedural delay result in the raising of funds for such shares. [Id. at 448.]

This Court also elaborated upon the State's obligation to provide supplemental programs, the second prong of the Abbott II remedy:

> The parties' agreement on the question of special educational needs, consistent with the Court's holding in Abbott and reiterated here, confirms that students in the special needs districts have distinct and specific requirements for supplemental educational and educationally-related programs and services that are unique to those students, not required in wealthier districts, and that represent an educational cost not included within the amounts expended for regular education.

Id. at 453-54. On this point, the Court observed that the Legislature had "made no study of the added costs associated with providing services for at-risk students," nor had the Commissioner completed any study "of the programs and services to be implemented for disadvantaged students." Id. at 453. The Court concluded that, because educational success could not be realized "without significant intervention in the form of special services and programs targeted to the needs of [ ] disadvantaged students," the State must "identify and implement" the supplemental programs "that the children in these districts require." Id. at 454.

The roadmap to constitutional compliance established by both Abbott decisions could not be clearer. The methods of implementation of the specific constitional remedies are left, in the first instance, to the other branches of government. They cannot, however, be ignored or refashioned by the State, after Abbott II, or surely, not

after Abbott III. Put bluntly, it is far too late to recast the test established and re-established by this Court for vindication of Plaintiffs' constitutional rights, especially since these children, the most vulnerble and disadvantaged in our state, have endured over twenty years of continued educational deprivation.

Yet, this is precisely what the State has done in enacting CEIFA. As Plaintiffs now explain, there is simply no conceivable way that CEIFA meets either prong of the Abbott III remedial mandates, and, indeed, the State could not suggest to the contrary. The Act patently fails to achieve substantial equivalence between poor urban and more affluent districts. Rather, the existing disparity will grow during the very first year the Act is in effect. CEIFA fails as well to provide adequate supplemental programs that address Plaintiffs' special educational needs. For these reasons, this Court has no recourse but to declare that CEIFA does not meet the Abbott remedial directives and is, therefore, unconstitutional with respect to poor urban school districts.

A. CEIFA Fails to Assure Substantial Equivalence in Regular Education Expenditures

CEIFA, by its own terms, does not assure substantial equivalence in regular education expenditures between special needs and I and J districts by the school year 1997-98 at any level even close to approximating 100%. The Act also makes no attempt to address, let alone eliminate, the current 1996-97 disparity in spending for regular education. Indeed, disparity will grow under the Act as poor urban districts are left dependent upon local property taxes as the only means available to try to achieve parity in regular education spending with more affluent districts.

In the current 1996-97 school year, there are twenty-six special needs districts below parity with the I and J district average of $8,168 per pupil. For these districts, the total disparity in regular education expenditures is $232.9 million in 1996-97. This disparity results in a parity level of 87.55%, or a parity gap of 12.45%. This disparity will be carried forward to 1997-98 and, along with any projected increase, must be eliminated by CEIFA in order to comply with the Abbott mandate.

However, the Act not only leaves the current disparity fully in place, but it will actually increase the disparity level. Instead of even seeking to achieve substantial equivalence, CEIFA will have the opposite effect: the four special needs districts currently above the I and J district average will be brought below parity in 1997-98 to join the other twenty-six districts. Then, for all thirty districts, the current disparity level will increase next year. Even assuming that per-pupil spending continues at the 1996-97 level in more affluent districts, under CEIFA, the disparity will mushroom to a projected $278.4 million, an increase of $45.5 million, or 19.5%, over this year's level.

Obviously, if the I and J districts increase their spending at any level up to 3%, or even more in light of enrollment increases, as the Act permits, the disparity in regular education expenditures will be even greater next year. So, for example, if average spending in the I and J districts rises by 1, 2 or 3%, disparity also rises to $301.7, $324.8 and $348.1 million, respectively.[14]

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[14] The Act has a built-in difference in its spending limits that also will contribute to disparity. CEIFA allows I and J districts an increase each year of up to 3%, adjusted for enrollment, over prior year spending. On the other hand, the T&E amount is "deemed approved" for two successive fiscal years and, in the second year, the amount is adjusted for inflation, and only "by the CPI." CEIFA, sec. 4c . Thus, the Act in

However, CEIFA does more than authorize growing disparity. It makes certain that the only theoretical means by which poor urban districts can achieve parity is by raising more revenue solely through local property taxes. Under the Act's foundation formula, special needs districts in 1997-98 would have to raise $238 million more in local revenue to reach substantial equivalence with the I and J districts, and that is even under the optimistic assumption that spending in these wealthy districts remains constant.

Even worse, the Act compels reliance on local property taxes in many poor urban districts just to enable them to spend at the maximum T&E budget established under the Act or to maintain current 1996-97 spending in 1997-98. Twelve special needs districts would have to raise $19 million, or 10.4%, more in local revenue than in 1996-97, just to reach a spending level equivalent to the T&E budget for each district in 1997-98, as calculated under CEIFA. Moreover, twelve other special needs districts that currently spend above the maximum T&E budget would have to increase local revenues by $52.7 million over 1996-97 levels to continue current spending levels.

Achieving substantial equivalence in regular education spending by having poor urban districts dramatically increase property taxes is expressly prohibited under both Abbott II and Abbott III.[15] As this Court emphatically stated in Abbott III, "[T]he

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alternate years allows special needs districts to increase spending only by the CPI, which has been consistently less than the 3% annual increases allowed I and J districts. See Goertz Aff. ¶45.

[15] In another fundamental way, CEIFA violates the constitutional mandate in Abbott III that the law, by its own terms, achieve substantial equivalence "without depending on the discretionary actions of officials." Id. at 448. Under the Act, the Governor, "in consultation with the Commissioner," must recommend a new T&E

required level of funding for the special needs districts 'cannot be allowed to depend on the ability of local school districts to tax . . . [and] must be guaranteed and mandated by the State." Abbott III, 136 N.J. at 451 (quoting Abbott II, 119 N.J. at 295). CEIFA, however, ignores this command, despite the historical problem of municipal overburden in these districts. Abbott II, 119 N.J. at 357 (finding that municipal overburden "effectively prevents [poor urban] districts from raising substantially more money for education"). The State, by limiting funding and spending in poor urban districts, mandates a regime that is squarely at odds with the Abbott decisions: the consignment of disadvantaged student to schools that have significantly less resources than are available to support education in suburban schools.

At bottom, CEIFA's flaws are even more profound than those deemed constitutionally deficient in the QEA. In Abbott III, the Court concluded that the QEA was unconstitutional because, while parity could have been theoretically achieved, there was no statutory guarantee that it actually would be achieved. Abbott III, 136 N.J. at 451(because "[t]he statute fails to guarantee adequate funding for [the special needs] districts...the QEA does not comply with Abbott's mandate"). In contrast, CEIFA does not even hold out theoretical hope for parity, but rather ensures perpetuation of, if not significant increases in, the current disparity between poor and richer districts. The

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amount every two years, an amount that "shall be deemed approved" unless the Legislature objects by concurrent resolution. Thus, even if the T&E amount adopted in CEIFA for 1997-98 were sufficient to assure parity, which it clearly is not, the amount can be changed every two years by State and elected officials. Moreover, the potential for frequent manipulation of the foundation amount is even greater since, as discussed more fully, infra at 47, the amount is derived from an illustrative efficiency model, and not from any actual school district or real educational program.

conclusion is therefore "unavoidable" that CEIFA, far more so than QEA, "does not comply with Abbott's mandate." Id.

B. CEIFA Fails to Provide Adequate Supplemental Programs

As mentioned above, the Abbott III remedy encompasses more than equivalence in regular education expenditures; it also directs that the State "identify and implement the special supplemental programs and services that the children in [the special needs] districts require," and provide adequate funding for those programs in addition funds for regular education. Id. at 448-49, 451-54. Just as CEIFA utterly fails to assure substantial equivalence in regular education expenditures, so too it fails to provide adequate supplemental programs.

CEIFA replaces at-risk program aid with demonstrably effective program aid. The Act also removes funding for pre-school and full day kindergarten from foundation aid and instead provides early childhood program aid. In authorizing these aids, however, the State fails to require implementation of an identified set of supplemental programs or to provide sufficient funds to support program implementation. These are the same constitutional defects found in the provision for at-risk aid in the QEA, and they render the Act unconstitutional on this score as well.

1. Demonstrably Effective Program Aid

CEIFA, in establishing demonstrably effective aid to replace at-risk aid, contains no statutory mandate for implementation of an identified set of supplemental programs in poor urban districts. Instead, the only requirement in the Act is for future discretionary action by the Commissioner who will determine the programs which "shall

qualify for [demonstrably effective] aid," and will "establish the per-pupil cost" of "these effective programs and services." CEIFA., sec. 18b(1). Beyond these general directions, the Legislature actually reduced the amount of aid poor urban districts will receive in 1997-98 by 39%, from $183 million in at-risk aid this year to $112 million in demonstrably effective aid next year.

The State's failure to meet the explicit remedial directive in Abbott III in this respect is obvious. Indeed, the State has repeated the very same constitutional error that this Court found in at-risk program aid. Although demonstrably effective aid, like the QEA's at-risk aid, "includes a formula for calculating aid for programs for at-risk pupils," it is clear that in determining the amount of demonstrably effective aid, neither the Legislature nor the Commissioner made any study "of the programs and services to be implemented for disadvantaged students, including their costs." Id. at 452-53.

In over six years, the Legislature and the Commissioner have still failed to identify or implement the "special programs and services targeted to the needs of these disadvantaged students."[16] Id. In CEIFA, the Legislature has done nothing more than,

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[16] As discussed supra at 8, the State baldly admits in its November 1995 Plan that it did not conduct any study to identify a required set of supplemental programs, and that this type of study "is beyond the scope of this report." 1995 Plan, at 35. Instead, some "examples of programs and services that might be provided" were listed, with a recommendation that the Legislature, in the new law, direct the DOE to "periodically" identify and cost-out such programs in the future, which is precisely what has now occurred in CEIFA. The State is no further along in satisfying this prong of the Abbott III remedy than it was in 1994.

Further, the Legislature, just before approving CEIFA, named several supplemental programs that can "qualify" for demonstrably effective aid in 1997-98. CEIFA, sec. 18b(1). Such last minute legislative surgery does not, however, cure the clear constitutional defects which plague this aid. None of the programs listed is required nor is there any evidence whatsoever that districts will have funds in addition

yet again, authorize the Commissioner to define what supplemental programs are needed and to determine the cost of these programs at some point in the future. This provision in the Act represents profound neglect of, if not indifference to, the Abbott II and III mandate.

2. Early Childhood Program Aid

The State has identified pre-school and full day kindergarten as supplemental programs, rather than including funding for such programs in the foundation formula. However, in authorizing early childhood program aid, the Act neither requires that districts use such aid for pre-school and full-day kindergarten nor mandates the actual implementation of such programs. Instead, this form of aid can be used for a wide range of purposes, including programs that are "educationally meritorious;" constructing or enlarging school facilities; or providing demonstrably effective programs.[17] The only requirement attached to early childhood aid in CEIFA is that a district must prepare an "operational plan" to establish pre-school and full day kindergarten by the year 2001-02.

As is the case with demonstrably effective aid, the absence of any requirement for implementation of pre-school and all day kindergarten programs, along with the open invitation to use early childhood aid for school construction projects, other educational programs, and demonstrably effective programs are fatal constitutional

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to regular education to actually implement any of these programs, especially since overall aid is reduced 39% in 1997-98.

[17] CEIFA does not otherwise address school facilities, a matter which is certainly part of the State's constitutional obligation, Abbott II, 119 N.J. at 390-91, but which continues to be unfulfilled. See, eg. CEIFA, sec. 26 (providing only for future action to increase state aid for debt service).

flaws. Indeed, this invitation to poorer districts is especially cynical in light of the serious disparity in regular education spending imposed on these districts by CEIFA, as discussed supra, at 30, and the enormous need for improvement in urban school facilities. See Abbott II, 119 N.J. at 362-63 (finding urban schools that "due to age and lack of maintenance, are crumbling").

The Act's authorization of early childhood aid directly violates the express condition that funding for supplemental programs "represent an educational cost not included within the amounts expended for regular education." Id. At 454. In a word, this aid, like at-risk aid before it, is not "targeted" to the needs of disadvantaged children, and thus does not constitute the "significant intervention" mandated for these children by the Court in the Abbott decisions.

In sum, there can be no doubt that CEIFA violates both prongs of the Abbott remedy. Under CEIFA, there is not, and never will be, substantial equivalence in regular educational expenditures between poorer urban and more affluent districts. Nor are the special educational needs of disadvantaged students adequately addressed, and there is no prospect of appropriate action on this mandate in the foreseeable future.

CEIFA has not remedied the constitutional flaws in the QEA and, if anything, the Act exacerbates those flaws. The State has clearly failed to comply with the directives in Abbott II and III, and the Court should now intervene to order the remedy set forth in Point IIIB.

II. CEIFA CLEARLY FAILS TO MEET THE ABBOTT REMEDIAL DIRECTIVES AND DOES NOT OTHERWISE ASSURE PLAINTIFFS OF A THOROUGH AND EFFICIENT EDUCATION, AS DEFINED BY THIS COURT IN ABBOTT II AND REAFFIRMED IN ABBOTT III

As discussed in Point I, CEIFA completely fails to address the existing disparity in regular education expenditures between poor urban and more affluent districts, and provide for adequate supplemental programs, as Abbott III unequivocally mandates. To the contrary, the Act actually legislates disparity in expenditures, a disparity that will almost certainly grow in 1997-98 and thereafter. See Trenton Times, Quotes on School Funding, at A-5 (December 2, 1996) (Governor states that, in enacting CEIFA, "we very frankly said we are not looking for parity in spending..."). This Court need go no further to declare CEIFA unconstitutional with respect to the poor urban districts.

Despite CEIFA's clear failure to satisfy the Abbott III remedy, however, the State will no doubt assert that growing disparity no longer matters because disadvantaged students will now be offered yet another "new" educational opportunity. This opportunity, according to the State, is based primarily on the Act's directive for future implementation and testing of academic standards. See, eg., CEIFA, sec. 2b(6)(Legislature declares that CEIFA offers all students an educational opportunity based on "academic standards"); see also discussion of core curriculum content standards under CEIFA, supra at 13. As the Governor recently predicted in remarks to the state's business leaders:

> The one thing to me that is imperative and sacrosanct (in the funding debate) is the need to have core curriculum standards. With this kind of support, we are going to be able to ensure that every student will have a chance to compete with anyone, anywhere in the world.

Trenton Times, Core courses touted by Whitman at summit, at A-6 (November 21, 1996). Or as she asserted when signing CEIFA into law:

> [w]e've [the State] set core [achievement] standards, and we have said that it's going to be the state's obligation to ensure that every district has the resources it needs to reach those standards....

Trenton Times, Quotes on School Funding, at A-5 (December 21, 1996).

Optimistic claims such as these -- that simply because the State has "establish[ed] specific educational standards of achievement," it can now assure a constitutionally sufficient education to disadvantaged students in the face of "disparate spending levels" -- must be placed in their proper historical context. See CEIFA, sec. 2a(3). In Abbott II, the State's defense rested entirely upon this very same contention, namely, that because the Legislature in chapter 212 had established standards, goals and methods to measure a thorough and efficient education, the State's obligation to Plaintiffs was met and any actual disparity in educational programming and expenditures was constitutionally irrelevant. As characterized by this Court:

> The State claims that there is now such a "viable criterion" for measuring thorough and efficient; indeed, that is the heart of the State's case when it so strenuously opposes the significance of plaintiffs' disparity measurements. It claims simply that a thorough and efficient education in fact exists regardless of the disparity of expenditures.

Abbott II, 119 N.J at 348.[18]

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[18] Any claim by the State that a thorough and efficient education has been defined for the first time in CEIFA is simply wrong. As this Court is well aware, chapter 212, along with State Board regulations, "together constitute[d] a thoughtful, well-integrated definition of thorough and efficient, described both abstractly and in concrete terms." Abbott II, 119 N.J. at 348. Further, the "standards and goals" of chapter 212, "when considered in conjunction with the mandated procedures, constitute a potentially practical, workable mechanism for achieving a thorough and efficient education

As Plaintiffs explain below, even if the State could somehow ignore the explicit Abbott III remedy, which it clearly cannot, CEIFA nonetheless fails to assure a thorough and efficient education simply by virtue of the State's establishment of achievement standards for future implementation and testing. Before turning to this argument, however, Plaintiffs present the proper constitutional benchmark under Abbott for assessing the State's rosy predictions that it can meet its obligation to through reliance on standards, even as the Act cements gross disparity in regular education expenditures.

A. The State Must Assure That Plaintiffs Have An Educational Opportunity At Least Comparable To That Offered in More Affluent Districts

The New Jersey Constitution entitles all children to a "thorough and efficient education." N.J. Const. of 1947, Art. VIII, §4, para.1. In Abbott II, this Court discussed at length the "scope and content of the constitutional provision." See 119 N.J. at 303-15. The Court reaffirmed the definition first offered in Robinson v. Cahill, 62 N.J. 473, 515, cert. denied, 414 U.S. 976 (1973) ("Robinson I"): a thorough and efficient education requires the State to provide "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." The Court also emphasized that this constitutional requirement

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throughout the state." Id. Finally, the Court reaffirmed its finding, first made in Robinson v. Cahill, 69 N.J. 449 (1976) ("Robinson V"), that the chapter 212 standard was constitutional. Id. at 349. Thus, in Abbott II, the issue of disparity, notwithstanding an acceptable definition of a thorough and efficient education, was squarely joined. Plaintiffs then did not "attack" the definitions, goals and standards for a thorough and efficient education under chapter 212; "[t]heir complaint, rather, is that without adequate funding, it simply cannot be achieved." Id.

means "that poorer disadvantaged students must be given a chance to be able to compete with relatively advantaged students." Abbott II, 119 N.J. at 313; and see Abbott I, 100 N.J. at 296. In Abbott III, the Court reemphasized this constitutional requirement, holding specifically that for special needs districts, a thorough and efficient education is

> one that will enable their students to function effectively in the same *society with their richer peers both as citizens and competitors in the labor* market -- [it] is an education that is the substantial equivalent of that afforded in the richer districts.

136 N.J. at 454 (emphasis added); see also id. at 456-56 (restating Court's finding in Abbott II that the state's economic future depends on "skilled" and "technically proficient" workers from poor urban communities).

This constitutional standard for a thorough and efficient education -- a competitive education based on comparability with the education offered in more affluent districts — formed the basis for the Court's determination in Abbott II of "the constitutional failure of education in poorer urban districts." Id. at 357. This determination rested not on abstract measures or even on "student achievement," as the State suggested. Id. at 358. Rather, drawing upon the voluminous trial record, the Court compared the educational opportunities actually available in real schools in certain groups of districts: those attended by Plaintiffs and those attended by their "richer peers." Id. at 358-364. The focus was upon the actual curricula and programs offered in the respective schools; the condition of school facilities; and upon such factors as student-teacher ratios, and the experience and qualifications of instructional staff. Id. at 359-368.

Thus, the constitutional underpinnings of the Abbott decision inescapably emanate from the comparison of educational opportunity. As the Court found, the affluent districts offered the "chance" for an education far surpassing that available in poor urban districts, by a wide range of indicators: courses in computer programming and training, science education, foreign-language, music, art, industrial art programs, and physical education, id. at 359-62; lower student-teacher ratios and teachers with more experience and qualifications, id. at 366-68; and physical facilities that "[were] newer, cleaner, and safer." Id. at 363. In sharp contrast, poor urban districts offered little more than a "basic skills" education. The gap in the opportunity for education was so great, the Court variously characterized it as "impressive," id. at 358; "tragically inadequate," id. at 359; "severe," id. at 368; and "dramatic:"

> The disparity is dramatic. Alongside these basic skills [poor urban] districts are school systems [in more affluent districts] offering the broadest range of courses, instruction in numerous languages, sophisticated mathematics, arts, and sciences at a high level, fully equipped laboratories, hands-on computer experience, everything a parent seriously concerned for their children's future would want, and everything a child needs.
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> [Id. at 364]

Finally, the remedy in Abbott II and III of substantial equivalence in regular education expenditures and adequate supplemental programs, is directly connected as well to the constitutional standard of an education that enables disadvantaged students to compete with their advantaged peers. Where deep disparity is found in the essential elements that comprise the educational opportunity in schools -- in curriculum, course offerings, instructional programs, class size, teacher qualifications, materials, equipment, physical plant and the like -- the State is obligated to eliminate it:

> They [disadvantaged students] are entitled at least to the chance of [being able to compete], and without an equal educational opportunity, they will not have that chance. Their situation is one of extreme disadvantage; the State must not compound it by providing an inferior education. It is the State and only the State that is responsible for this educational disparity, and only the State can correct it. Through its laws, a system of education exists that is not thorough and efficient for these students in the special needs districts. The State must remedy that failing.

Abbott III, 136 N.J. at 454 ("reaffirming our holding" in Abbott II).

When placed within these proper constitutional parameters, CEIFA contains nothing that assures that the "severe" disparity in educational opportunity for disadvantaged students in poor urban districts, as found by this Court in Abbott II and reaffirmed in Abbott III , will be fully and finally remedied by the State, particularly in light of the large and growing expenditure gap enshrined in the Act. Plaintiffs now turn to the Act's glaring constitutional defects on this score.[19]

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[19] There can be little doubt at this stage of the litigation that the State bears the burden of proof on whether CEIFA is a constitutionally adequate substitute for the Abbott II and III remedial requirements. Both this Court and the United States Supreme Court have held that, when there is a clear remedial mandate, coupled with years of non-compliance with the constitution, conventional principles of deference are inapplicable, and the defendants, not the plaintiffs, are obligated to prove that their alternative approach satisfies the constitutional mandate. See, eg. Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158, 305-06 (1983) ("[w]hen that clear [constitutional] obligation is breached, and instructions given for its satisfaction, it is the municipality, and not the plaintiffs, that must prove every element of compliance"); Green v. School Board of New Kent County, 391 U.S. 430, 438 (1968) (after ten-year mandate for school desegregation, defendant has burden "to come forward with a plan that promises realistically to work, and promises realistically to work now")(emphasis in original).

B. CEIFA Does Not Otherwise Assure A Thorough and Efficient Education to Disadvantaged Students in Poor Urban Districts

1. Untested and Unimplemented Achievement Standards Alone Cannot Assure Parity in Educational Opportunity

By no stretch of the imagination can Plaintiffs' constitutional right to an educational opportunity comparable to that available in more affluent school districts, as described above, be assured through the future implementation of a set of achievement standards, as CEIFA provides. The reasons why the State's achievement standards, standing alone, cannot possibly provide this assurance are several and obvious.

First, the achievement standards, regardless of what the State calls them, are actually a broad set of expectations or goals about what students should know and learn while in school. They are neither a curriculum nor an instructional program. By themselves, the standards mandate no specific set of instructional courses, classes, programs or services. Implementation of the standards at the school level, when this occurs, will be left completely to local discretion. It will be up to school boards and districts to determine, with available funds, what curriculum, programs and services are needed to meet the expectations embodied in the standards. In short, the standards only specify broad results and leave the means of reaching such results to local discretion.

Second, the achievement standards have not been tested against the educational standards in the more affluent districts, the districts that serve as the constitutional frame of reference for determining a competitive education under the Education Clause. Put differently, the State has neither identified the educational

standards nor examined the curriculum and programs in place in more affluent districts to make certain that the achievement standards accurately reflect the educational content -- or opportunity -- offered in those districts. Indeed, the achievement standards have yet to be tested against the curriculum and programs offered in any other successful school district, or in any actual school district for that matter. While the Act contemplates that the State Board will conduct such an analysis, this will occur only after each content area is implemented, far in the future. Absent such testing, there can be no assurance now or in the foreseeable future that the standards encompass the "[m]any opportunities offered to students in the richer suburban districts," opportunities this Court found are "denied" to disadvantaged students in poor urban districts. Abbott II, 119 N.J. at 359.

Finally, the achievement standards have yet to be implemented in any school -- affluent suburban, poor urban or other school -- even in a single core subject. The State has not developed curriculum frameworks, performance indicators or assessment tests, all of which are essential elements for implementation. In light of the present proposed schedule, it will take years for the State to put the standards sufficiently in place to guide school curriculum and programs, let alone to determine if they reduce the disparity in educational opportunity which Plaintiffs have experienced for so long.

The State's attempt to dismiss disparity in expenditures by pointing to these untested and unimplemented achievement standards is strikingly reminiscent of the Commissioner's "effective schools" argument in Abbott II. As he does here, the Commissioner then asserted that implementation of "effective schools" methodology, which relied upon new teaching and leadership methods in urban schools, would

assure Plaintiffs a constitutionally adequate education, thus obviating the need to equalize expenditures. Abbott II, 119 N.J. at 377-79. The Court rejected that argument, finding that there is "nothing in the record, nor did the Commissioner attempt to prove, that even with implementation of 'effective schools,' educational disparity will not remain." Id. at 379. The Court was even willing to assume, for the sake of argument, that an effective schools approach would diminish educational disparity. Id. But the Court also observed that using these methods would not assure a competitive education, and that, just putting the methods in place and testing them, would "take years, perhaps the better part of the school life remaining for some of those disadvantaged students now attending school." Id.

Further, Plaintiffs had waited long enough for a remedy, "one that will give them the same level of opportunity, the same chance, as their colleagues who are lucky enough to be born in a richer suburban district." Id. at 380. If the State wished to pursue the effective schools approach, the Court concluded, the State would have to superimpose it upon a structure that starts out equal. After all, there was nothing "that suggests [the effective schools] approach will not work because it is applied to an urban district that has adequate and equal funding." Id. at 381.

The contention that the State's achievement standards will assure Plaintiffs parity in educational opportunity fails by direct analogy to the effective schools argument. Like effective schools, the achievement standards hold out the promise of a new way of organizing educational curriculum and programs -- one that relies upon

student expectations and outcomes rather than teaching or leadership methods.[20] But even if achievement standards offer promise, as did effective schools, so too they suffer the same constitutional flaw: there is no assurance that, even when the standards are fully implemented, "educational disparity will not remain." Id. at 379. Indeed, the State makes no concomitant attempt in CEIFA to achieve comparability in any actual school curriculum or program that accurately reflects the standards or to assure equivalence in expenditures for such a program. Once again, the State merely brings to disadvantaged students its latest conception of what it asserts constitutes an adequate "opportunity for an education." CEIFA, sec. 2b(6).

Over six years ago, however, this Court was unwilling to await the results of the State's effective schools experiment. The reason was plain: Plaintiffs had already waited too long for a remedy that would assure them a competitive educational opportunity. Id. at 380. There is no reason in logic or justice why the Court should now be willing to wait for the results of the State's newest educational experiment. Nor do Plaintiffs stand in the State's way of pursuing an education based upon achievement standards. It must, however, do so upon "a structure that starts out equal." Id. at 381.[21] Just as there was nothing to suggest that effective schools would not work when

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[20] The State's achievement standards have the alleged benefit of promising a comprehensive education for a relatively low price, which, under the Act, costs approximately $1,000 per-pupil less in poor urban schools than in suburban schools. Cf. Abbott II, 119 N.J. at 378 (noting that effective schools has "the additional advantage of being inexpensive"). Further, as discussed infra at 47, there is no discernable connection between the Act's foundation formula and any actual educational program reflective of the achievement standards.

[21] By building the achievement standards upon a foundation that "starts out equal," the standards may very well prove valuable in assisting the State to achieve

applied to districts with an equivalent level of expenditures, so too is there nothing to suggest that the State's achievement standards would be undermined if implemented in districts that "begin at the same starting line." Abbott III, 136 N.J. at 456. CEIFA, however, does not establish such equality.

2. The T&E Foundation Amount, Derived From A Fictitious School District, Does Not Assure Parity in Educational Opportunity

The State's reliance upon unimplemented and untested achievement standards is not CEIFA's only fatal constitutional defect. The Act fails as well because the T&E foundation amount, which sets the expenditure level in poor urban districts for regular education programs, is absolutely unrelated to any educational program, either one that reflects the State's achievement standards, or one based upon real curricula and programs offering the competitive education the State is obligated to provide. Not surprisingly, the end result is an average per-pupil expenditure in the poor urban districts of $7,190, approximately $1,000, or 12%, lower than the amount available to support the educational program in more affluent districts.

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comparability in substantive educational opportunity. This Court has already called for such an effort:

> We anticipate that the legislative and administrative response to this decision will address fully the State's obligation to verify that the additional funding for the special needs districts mandated by Abbott significantly enhances the likelihood that the school children in those districts attain the constitutionally-prescribed quality of education to which they are entitled.

Abbott III, 136 N.J. at 452.

Flowing from the disconnection between "thorough" and "efficient" under the Act, the T&E amount used in the foundation formula is a number generated by a model, a hypothetical school district created by the Commissioner, using so-called "efficiency standards." Like any other model, this one contains "inputs" -- teachers, student ratios, other staff, materials, etc. -- based entirely on "assumptions" made by State officials based on costs generated from statewide averages. Most importantly, the model is neither based upon, nor is representative of, any real schools or districts anywhere in New Jersey. It is, therefore, wholly divorced from what actually occurs in a school: the teaching of a curriculum through courses, programs and services, whether one reflective of the State's achievement standards or one that offers a competitive education. The model can only be described, therefore, as pure fiction. The Commissioner recognizes the model's inherent limitations when he describes it as an "illustration," not meant to be " a prescription."

Yet the efficiency model is indeed prescriptive as far as poor urban schools are concerned, and it lies at the very heart of the growing disparity engendered by the Act. In CEIFA's formula for distributing foundation aid, the model district is the critical factor that determines the level of resources poor urban districts will have to support regular educational programs. The Act's direct and immediate impact on Plaintiffs, therefore, could not be more stark: the level of educational programs and opportunity available to them under CEIFA are set in stone every two years by a mere illustration, not based upon any real experience.

Stripped of its rhetorical gloss, the T&E amount has an even deeper constitutional shortcoming. Because the foundation amount is derived from a model, it

is not grounded in the educational opportunity -- and the cost of that opportunity -- offered to students in the more affluent districts. The result, therefore, should come as no surprise: the amount does not even come close to the level of resources needed for a curriculum and program comparable to that presently available in the more affluent school districts. In view of the State's constitutional obligation under Abbott II and Abbott III to assure that Plaintiffs "are given the chance to be able to compete with relatively advantaged students," Abbott II, 119 N.J. at 313, it is nothing short of remarkable that the State made absolutely no attempt to either develop or at least analyze the Act's T&E amount in relation to the curricula and programs offered in more affluent districts.

3. CEIFA Only Assures Spending in Poor Urban Districts at the Fictitious T&E Amount, Thereby Widening Disparity in Educational Opportunity

Finally, CEIFA's constitutional defects are compounded by the fact that, after the legislative dust had settled, regular education spending is effectively controlled by the fictitious T&E amount only in the poor urban districts. In these districts, spending is effectively frozen at current levels by the Act's foundation formula and by the inability of these districts to raise more local revenue. Spending in more affluent districts, by contrast, where property taxes overwhelmingly support education, is unaffected by the T&E amount. These districts are free to adopt budgets at current levels, as they do now, and even have opportunities for yearly growth under the Act's generous budget cap. In this elemental way, current disparity is not only tolerated, but is fostered. CEIFA is nothing short of a recipe for constitutional disaster.

The record of the legislative process that led to the enactment of CEIFA amply demonstrates how the T&E amount became a sham. As discussed supra at 18, the State proposed using the T&E amount to determine the level of spending necessary for a thorough and efficient education in all districts. Based on the proposition that surburban districts were spending unnecessarily, any spending in excess of the T&E amount could only continue after a special local leeway vote, without appeal to the Commissioner. Thus, the Act, when proposed, sought to achieve parity by bringing spending in more affluent districts down to the current level in poor urban districts.

This proposal had a legislative life that was very short indeed. The reasons are now obvious to all. The State simply could not support its contention that the current budgets of more affluent districts contained excessive and wasteful spending not needed to provide essential educational opportunity, spending that totaled, according to the Office of Legislative Services, over $670 million dollars statewide. Perhaps even more tellingly, suburban parents, educators and students raised strenuous objections to use of the T&E amount to limit spending, citing both the absence of any connection in the fictitious school model to actual educational programs and costs in more affluent districts, and the inevitable "leveling down" of suburban education resulting from defeated local leeway budgets. Indeed, this Court correctly predicted what actually happened after the State made this proposal:

> If absolute equality were the constitutional mandate, and "basic skills" sufficient to achieve that mandate, there would be nothing short of a revolution in the suburban districts when parents learned that basic skills is what their children are entitled to, limited to, and no more.

Abbott II, 119 N.J. at 364.

The response to this "revolution" was quick and sure. Legislators promptly removed the Act's attempt to employ the T&E amount as a device to limit spending in more affluent, suburban districts. By the time the Act was finally approved, legislators had restored the current budget approval process for the entire budget and in all districts, even those spending in excess of the T&E amount; restored the appeal to the Commissioner on any municipal reductions, even for budgets in excess of the T&E amount; and inserted a generous 3% budget cap on yearly growth.

These changes, however, are evidence of a more fundamental shift, as legislators made protection of current programs and spending in suburban districts the central objective in the legislative process. Any notion of trying to assure substantial equivalence in the poor urban districts, as mandated by this Court, fast receded into the background.[22] Indeed, the very legislators who succeeded in opposing the use of the fictitious T&E to affect the budgets of suburban districts, nonetheless applied the T&E amount with full force to the poor urban districts. The budgets of these districts are effectively frozen by the Act's foundation formula, well below the expenditure level in more affluent districts. Thus, in the end, the only assurance CEIFA provides is that

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[22] The Speaker of the Assembly explained the legislative viewpoint most explicitly when CEIFA was signed into law:

> The Supreme Court wrongly decided [ ] Abbott. To determine that the educational standards in this state is what the wealthiest schools do I think is wrong for this reason: They have the resources. It is called America and capitalism...Who is to say that it's [education in wealthy schools] the best education. Because they spend the most money? They have the money. They spend it. That doesn't mean that everyone should have to.

longstanding disparity -- in both opportunity and expenditures -- will not be eliminated, as this Court so explicitly requires in Abbott. Instead, such disparity increases, remaining in full force and effect as the educational norm in our state.

In sum, CEIFA does not address the Abbott remedy, and does not otherwise assure equality of educational opportunity. It is, accordingly, unconstitutional.

Plaintiffs now turn to their proposed remedial Order on this Motion.

Trenton Times, Quotes on School Funding, at A5 (December 21, 1996).

III. THIS COURT HAS A CONSTITUTIONAL OBLIGATION TO INTERVENE NOW AND AFFORD PLAINTIFFS AN APPROPRIATE REMEDY

When rhetoric and unsupported promises are set aside, and the Act is subjected to basic scrutiny, the State's response to Abbott II and III is nothing short of outright defiance of this Court's decisions. The other co-ordinate branches have simply not addressed the glaring constitutional flaws in the school funding system, as applied to poor urban districts. Instead, they have tried in CEIFA to define away the gross inequity in educational opportunity between poor and more affluent districts while enacting a funding system that perpetuates and exacerbates the existing disparity. The shocking fact, starkly revealed by the legislative process, cannot now be ignored: CEIFA does little more than preserve the status quo, including the current spending levels in suburban districts. Sacrificed in the process was the remedy that disadvantaged students have been awaiting far too long.

The record on this Motion thus compels judicial intervention now. Indeed, the very legitimacy of this Court as a last-resort guarantor of the State Constitution is here at issue, depending upon the necessity for a remedy that assures prompt satisfaction of the constitutional mandate and not another sidestep, similar to that enacted in CEIFA. This Court possesses both the responsibility and authority to provide such a remedy. Further State action that actually perpetuates or exacerbates the very unconstitutional conditions condemned by the Court, while simultaneously paying lip service to judicial decrees, can no longer be tolerated. Under these unique circumstances, immediate relief in no way violates the separation of powers doctrine, as the State is likely to argue, but will instead ensure that the judicial branch fulfills its proper role in our

constitutional scheme of government, namely, preserving the integrity of the State Constitution.

A. This Court Has The Responsibility and the Authority To Enter The Order Sought By Plaintiffs And The Judicial Role Of Last-Resort Guarantor Of The Constitution Rests On Providing A Remedy Now

Throughout this litigation, the Court has routinely and quite properly given the Legislature the first opportunity to devise its own remedy to vindicate Plaintiffs' constitutional right under the Education Clause. See, e.g., Abbott II, 119 N.J. at 389; Robinson v. Cahill, 69 N.J. 449, 467 (1976) ("Robinson V"); Robinson v. Cahill, 63 N.J. 196, 198 (1973) ("Robinson II"); Robinson I, 62 N.J. at 519-21. The Court, however, has made it equally clear that judicial deference extends only so far when a violation of a fundamental constitutional right is at stake. See, e.g., Robinson v. Cahill, 69 N.J. 133, 139-40 (1976). ("Robinson IV") There comes a time when the Court has a constitutional obligation to act. See id. That time is now.

The situation the Court presently faces is strikingly similar to the one it confronted in Robinson IV. In Robinson I, the Court declared this State's education finance system unconstitutional, but refrained from entering any specific orders. See 62 N.J. at 513-21. The Court instead offered the Legislature an opportunity to devise a remedy and established, in Robinson II, the date by which remedial legislation was to be enacted. Robinson II, 63 N.J. at 198. When that date came and went without legislation being adopted, this Court stepped in and ordered the redirection of education funds. See Robinson IV, 69 N.J. at 146-47.

In so doing, this Court recognized that it not only had the authority to act, but the responsibility to do so. "[O]urs is a government of laws and not of men," the Court emphasized, "and the judicial department has imposed upon it the solemn duty to interpret the laws in the last resort. However delicate that duty may be, we are not at liberty to surrender, or ignore, or to waive it." Id. at 147 (internal quotation omitted). That duty includes an obligation to remedy constitutional violations:

> If then, the right of children to a thorough and efficient system of education is a fundamental right guaranteed by the Constitution, as we have already determined, it follows that the court must afford an appropriate remedy to redress a violation of those rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper.
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> [Id. (internal quotation omitted)]

The circumstances in this Motion are no different from those that led to this Court's intervention in Robinson IV. In Abbott II, the Court held that chapter 212 was unconstitutional as applied to the poorer urban districts. The Court required parity in spending and adequate supplemental programs for disadvantaged students, but the Legislature was given the opportunity and time to devise such a remedy. Although the Legislature responded with an unconstitutional act — the QEA — the Court in Abbott III again stayed its hand and declined to enter any orders. Instead, the Court established a deadline by which the Legislature had to comply with the mandate.

Sadly, the Legislature has again gravely defaulted on its constitutional obligation. In CEIFA, as unadorned by optimistic puffery, the State has once more relegated the disadvantaged children who attend real, not fictitious, schools to a second-rate education when compared with the opportunity offered their counterparts in suburban districts. Just as the Court was required to act in Robinson IV to protect these school

children, so it must act again and "proceed to enforce the constitutional right involved" -- the right to a thorough and efficient education. Id., 69 N.J. at 140.

The fact that the remedy may enter the traditional spheres occupied by the other branches cannot warrant withholding it. In Robinson IV, the Court recognized that the remedy it ordered -- redirecting the disbursement of education funds -- intruded somewhat into the legislative and executive arenas. The Court nonetheless proceeded, in order to fulfill its duty to remedy constitutional violations:

> [t]his Court, as the designated last-resort guarantor of the Constitution's command, possesses and must use power equal to its responsibility. Sometimes, unavoidably incident thereto and in response to a constitutional mandate, the Court must act, even in a sense seem to encroach, in areas otherwise reserved to other Branches of government. And while the Court does so, when it must, with restraint and even reluctance, there comes a time when no alternative remains. That time has now arrived.

Robinson IV, 69 N.J. at 154-55 (internal citation omitted). Plaintiffs will now explain the specific terms of their proposed Order.

B. The Court Should Enter An Order Requiring (1) The Elimination Of The Remaining Disparity In Regular Education Expenditures In 1997-98 By The Enactment Of A Law By June 30, 1996 Or, In The Event Such A Law Is Not Enacted, Immediate Redistribution Of State Education Funds; And (2) The State To Hold Special Needs Districts Harmless In 1997-98 As To At-Risk Program Aid, Pending Completion of Judicially Conducted or Supervised Proceedings To Determine Adequate Supplemental Programs

As Plaintiffs have shown, the State has ignored this Court's explicit decrees. Put bluntly, CEIFA cannot satisfy the constitutional mandate for a thorough and efficient education, as applied to disadvantaged students in poor urban districts. Thus, as explained above, there presently exists an immediate and compelling need for a

remedial order to redress the prolonged and continued deprivation of the constitutional rights of these school children. Plaintiffs now turn to the nature and scope of the appropriate remedy.

(1) Elimination Of Remaining Disparity In Regular Education Expenditures In 1997-98

Under the circumstances presented by this Motion, it is entirely appropriate for this Court to enter an Order:

(a) Requiring the Commissioner to certify to the Legislative and Executive branches no later than April 1, 1997, the current 1996-97 disparity in regular education expenditures between each of the special needs districts and average spending in I and J districts, and an estimate of any increase in this disparity projected for 1997-98;

(b) Requiring enactment of a law no later than June 30, 1997, that would eliminate the entire certified disparity projected for 1997-98 and maintain parity between the special needs and I and J districts beyond 1997-98; and

(c) In the event such a law is not enacted, requiring the State to immediately redistribute state aid in an amount sufficient to eliminate the certified disparity for 1997-98.

There is no doubt about the Court's power to enter this proposed Order, or of its appropriate scope in light of the present posture of this litigation.[23] Under this Order,

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[23] As discussed supra at 9, CEIFA excludes two special needs districts from its definition of "Abbott district." This exclusion includes Plainfield, which, although designated a special needs district under QEA, is presently a poor urban district under this Court's criteria in Abbott II. While the Legislature has the authority to name additional districts, it cannot exclude a previously identified school district that meets the Abbott criteria for special needs status. In addition, once a district is added, it should not be subject to arbitrary removal, without at least some showing that the school

the other branches of government retain their traditional power and ability to develop, in the first instance, another approach that assures substantial equivalence in regular education expenditures, and enact that approach into law.[24] The proposed timetable for such action also fits within the constitutional framework for the adoption of a State budget for 1997-98 by those branches. Moreover, the Order creates sufficient opportunity for the Legislature, in crafting the method of eliminating disparity, to properly consider the concerns of other school districts, students, parents and educators, so long as, by June 30, 1997, a remedy is in place to address the constitutional mandate for substantial equivalence, as explicitly set forth in the prior Abbott decrees.

Further, the Order addresses the possibility that no law eliminating disparity is forthcoming from the other branches within the proposed time frame. If this occurs, the Order is self-executing and directs the redistribution of state education funds in an amount sufficient to assure elimination of any remaining disparity. One possible source of such funds is the $286 million in new state aid authorized under CEIFA for the 1997-98 school year. Goertz Aff. ¶14. This amount may exceed Plaintiffs' projected

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children in the district are no longer entitled to the educational benefits afforded by special needs status. Thus, Plaintiffs proposed Order should encompass the thirty special needs districts which were the subject of this Court's judgment in Abbott III.

[24] For example, the Legislature could retain CEIFA for districts other than special needs districts; it could adopt an interim funding plan for all districts; or it could adopt a new, constitutionally adequate permanent plan. In addition, State officials possess ample authority under existing law to continue the development and implementation of the achievement standards approach, independent of any funding plan. In fact, as Plaintiffs have shown on this Motion, a fundamental flaw in CEIFA is that there is no real linkage between the achievement standards and the Act's foundation formula.

disparity for next year, Goertz Aff. ¶32, although any final determination of disparity must await the Commissioner's official certification.

This provision for a self-executing, contingent measure is now entirely appropriate. Indeed, this is the only proper course, for several reasons: the State's protracted history of non-compliance; this Court's increasingly explicit and firm remedial decrees; the urgency of ameliorating a constitutional violation this Court found over six years ago to be "clear, severe, extensive, and of long duration." Abbott II, 119 N.J. at 385.

Finally, there is no doubt about the Court's power to provide for such relief. In Robinson IV, this Court expressly rejected the State's contention that the Court lacked the constitutional authority to redistribute state funds. 69 N.J. at 152-155. In so doing, the Court enjoined state officials from disbursing education funds "in accordance with existing law" and directed those officials to redistribute those funds in a manner consistent with a formula selected by the Court. Moreover, this provision in Plaintiffs' proposed Order, as in Robinson IV, would only go into effect only if there is no "timely and appropriate legislative action." Id. at 155.

(2) Provision For Adequate Supplemental Programs

The second prong of the Abbott remedy -- adequate supplemental programs for disadvantaged students -- must still be addressed. To effectuate that relief, the following Order should be entered:

(a) Requiring the State to hold harmless the special needs districts by distributing in school year 1997-98 the amount of at-risk program aid received by these

districts in school year 1996-97, adjusted for inflation and enrollment change, and requiring that such aid be used to provide supplemental programs for disadvantaged students;

(b) Designating a Superior Court Judge or a Special Master to conduct an evidentiary hearing and to issue a decision, no later than September 30, 1997, which (1) identifies the programs and services needed by disadvantaged students; (2) determines a per-pupil cost for such programs and services; and (3) provides for appropriate implementation of such programs and services in each of the special needs districts; and

(c) Requiring enactment of a law providing for the implementation, beginning in the 1998-99 school year, of such supplemental programs and services as are identified in the above decision, together with adequate state aid.

The entry of this portion of the proposed Order is entirely appropriate because, as Plaintiffs have shown, the directive in Abbott II and III to identify, cost-out and implement adequate supplemental programs for disadvantaged children in special needs districts remains wholly unsatisfied by CEIFA. As a one-year interim measure pending completion of a process to identify and cost-out the necessary supplemental programs, the State should be directed to distribute funds sufficient to continue the existing at-risk program at its current level in the 1997-98 school year, with appropriate adjustments for inflation and enrollment changes.

This element of the proposed Order preserves the status quo until adequate supplemental programs for disadvantaged students in the special needs districts can be properly identified and implemented by the 1998-99 school year. Further, the Order

provides that the Court designate a Superior Court Judge or a Special Master to conduct an evidentiary hearing to determine what specific programs and services are needed, including the costs of such programs and services, along with provisions for implementation. See Abbott III, 136 N.J. at 446-47 (designating a Superior Court Judge to make determinations on the constitutionality of the QEA). The hearing should be conducted and a decision issued promptly so that, if an appeal is taken to this Court, a final decision can be issued with enough time to permit legislative enactment of the identified package of supplemental programs for the 1998-99 school year.

IV. PLAINTIFFS REQUEST THAT THIS COURT AWARD ATTORNEY'S FEES ON THIS MOTION

Generally, "[n]o fee for legal services shall be allowed in the taxed costs or otherwise, except" in specifically enumerated circumstances. R. 4:42-9. One of these circumstances arises where a New Jersey Court Rule ("Rule") expressly allows for the payment of fees. R. 4:42-9(a)(7). Rule 1:10-3 (formerly Rule 1:10), under which Plaintiffs bring the present Motion, is such a rule.

Rule 1:10-3 provides that "a litigant in any action may seek relief by application in the action, "which has been interpreted to mean that a party may bring a motion in aid of its rights. See, e.g., Franklin Township Board of Education v. Quakertown Education Association, 274 N.J. Super. 47, 54 (App. Div. 1994). Such motions are normally brought, as is Plaintiffs' in the case, to enforce existing court order or judgment. Rule 1:10-3 further provides that a "court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule."

Fees are available under Rule 1:10-3 when either an order or a judgment has been entered. See Haynoski v. Haynoski, 264 N.J. Super. 408, 414 (App. Div. 1993) (holding that "[t]he sine qua non for an action in aid of litigant's rights, pursuant to R. 1:10-5 [now R. 1:10-3], in an order or judgment"). Fees are not available under this Rule, by contrast, where a party seeks to enforce a settlement agreement. Id.; see also Pressler, Current N.J. Court Rules, Comment R. 1:10-3 ("The authority to grant fees under this rule has, however, been held to apply only to violations of orders and judgments, not to settlements agreements that have not been so memorialized").

CONCLUSION

Plaintiffs return again to this Court for vindication of their rights under the Education Clause, after twenty-three years of unconstitutional responses by the State. Throughout this ordeal, children in poor urban schools still do not have educational opportunity available to their more affluent peers, as mandated by this Court, nor will they unless this Court intervenes once again. In seeking the immediate judicial intervention, which includes a determination that CEIFA is unconstitutional as applied to poor urban districts, along with entry of a the proposed remedial Order to assure immediate compliance, Plaintiffs cannot state their position more clearly or succinctly than Chief Justice Hughes' forceful pronouncement in Robinson IV, 69 N.J. at 146-47:

> The need for immediate and affirmative action at this juncture is apparent, when one considers the confrontation existing between legislative action...and constitutional rights.

Respectfully submitted,

EDUCATION LAW CENTER

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Dated: 6/6/97

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4. I hereby certify that the foregoing statements made by me are true to the best of my knowledge and belief. I am aware that if any of same are wilfully false, I am subject to punishment.

Noreen Forrest
Noreen Forrest

Dated: February 12, 1998