SUPREME COURT OF NEW JERSEY
DOCKET NO. A-155-97

RAYMOND ARTHUR ABBOTT, et al.,	)	Civil Action
Plaintiffs,	)	
v.	)	Sat Below:
FRED G. BURKE, et al.,	)	Hon. Michael P. King, P.J.A.D.
Defendants.	)	

DEFENDANTS' REPLY BRIEF

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625
(609) 984-9504
Attorney for Defendants

JAYNEE LAVECCHIA
JEFFREY J. MILLER
Assistant Attorneys General
Of Counsel

NANCY KAPLEN
MICHELLE LYN MILLER
Deputy Attorneys General
On the Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES CITED

N.J. CONSTITUTION

STATUTES CITED

LEGAL ARGUMENT

POINT I

THE COMMISSIONER'S STUDY OF SUPPLEMENTAL PROGRAMS FULLY COMPLIED WITH THE ORDER OF THIS COURT IN ABBOTT IV.

In Abbott IV, the Court ordered that the Commissioner "study, identify, fund and implement the supplemental programs required to redress the disadvantages of public school children" in the Abbott districts. Abbott v. Burke, 149 N.J. 145, 153 (1997). In undertaking that study, the Commissioner did not spend time compiling existing statistics of the disadvantaged students in the Abbott districts or making a "catalog" of their needs, a task that, as Dr. Odden noted, "has been done a zillion times." P-13. See also P-14. Rather, the Commissioner chose to focus primarily on "solutions" and "programs that would actually improve [the academic achievement of] students." Tr. (11/19/97) 95:19-20.

The Commissioner turned to experts, such as Dr. Robert Slavin and Dr. Margaret Wang, who have extensively studied the special needs of disadvantaged students and have developed programs to meet those needs. By doing so, the Commissioner was able to integrate the analysis of the needs of at-risk students with programs designed to meet those needs making it a "singular, coherent task." See Tr. (11/19/97) 95:23. Given the extensive information already available on the needs of these students and the time limitations imposed by the Court on his study, the Commissioner's approach was reasonable, appropriate and fully consistent with the requirements of this Court.

Plaintiffs, however, claim that the Commissioner failed to fulfill his responsibilities under the Court order. Pb at 1. Plaintiffs base this claim on a completely unrealistic view of what the scope of the study should have been. Plaintiffs suggest that the Commissioner should have conducted an intensive needs assessment so as to ascertain the specific needs of the students in each of the 420 Abbott schools and subgroups of students within each school. See Tr. (12/8/97) 98:6-99:25. Yet, the scope of a study such as plaintiffs suggest is well beyond what could have been contemplated by this Court given the time frame provided in the Court's order. Moreover, it is highly unlikely that such a study would have furthered the goal of the remand as to supplemental programs -- identifying those programs that are indispensable to a constitutional education in the Abbott districts.

As the Commissioner testified, "the needs of disadvantaged students and those in the Abbott districts are not unknown. We didn't, and would not be able to, survey the needs of each child, obviously." Tr. (11/19/97) 94:1-4. However, plaintiffs appear to contemplate something not far from that. In fact, Dr. Gary Natriello testified on behalf of the plaintiffs that he believed that the Commissioner was asked to do a "needs assessment ... with good information on all of the Abbott schools and all of the Abbott kids..." Tr. (12/4/97) 130:4-6 (emphasis added).

Dr. Natriello believed that a study analogous to the one he conducted of the needs of disadvantaged students in the Hartford school district (a study of one district that took seven months) should serve as the "starting point" for the Commissioner's study and that "more" needed to be added. Tr. (12/8/97) 92:1-8. Dr. Natriello's "more" included, for example: (1) studying the neighborhood outside each school to see if it was conducive to outside learning experiences; (2) assessing the availability of computers in the homes of students in Abbott districts and the I&J districts; (3) studying the experiences of students with criminal activities, both as victims and perpetrators; (4) looking into whether students eligible for free lunch are dissuaded from eating lunch due to the stigma of the free lunch program; (5) assessing, school by school, the number and profile of students who might need alternative education programs; and (6) determining the needs of parents in particular schools as they will "vary substantially from building to building, and from district to district."* Tr. (12/8/97) 53:1-4.

Some of these additional components, such as the needs of students requiring alternative schools, are actually implementation issues that would be addressed under the Commissioner's proposal

---

* In addition to Dr. Natriello's extensive list of what the Commissioner should have studied, Dr. Barnett appears to add a few more items. He testified for that purposes of preschool recommendations, an assessment of such things as the poverty level in each community, the home situations of families, the parents' education levels, the developmental status of the children and the resources currently available in the community would be necessary. Tr. (12/1/97) 105:1-12, 21-23.

during the school by school assessment. Others, such as the stigma of free lunch, the in-home computers or the schools' outdoor environment are well beyond what was necessary or productive to study in order to achieve increased student achievement in the Abbott districts through the implementation of programs designed to meet the special needs of their students.*

It is doubtful that the Commissioner could have accomplished the breadth and depth of the study plaintiffs are suggesting even if that was his only task during the six months between the Court's order and the date established by Judge King for the study to be completed. Moreover, it is unlikely that such a study would have revealed much more than "what people might expect." See Tr. (12/2/97) 239:24 (Dr. Natriello testified that his study of the special needs characteristics in six Abbott districts as well as some middle income and wealthy districts showed "what people might expect."). Given the other, significant tasks that needed to be accomplished for this remand, the Commissioner properly focused on the more critical component of the supplemental program study -- identifying the programs to meet the

---

* In their brief, plaintiffs also criticize the Commissioner for failing to study the needs in the Abbott districts for improvement of regular education and the regular education programs being provided by the I&J districts, Pb at 8-9, issues well beyond the Court's order. In addition, plaintiffs criticize his failure to study extensively the 14 schools in New Jersey that are currently implementing Success for All, Pb at 9, despite the Commissioner's testimony that to do so would not have been "particularly relevant" because SFA was not being implemented in those districts within the context of whole school reform. Tr. (11/19/97) 120:7-18. This Court's attention should not be diverted from the Commissioner's ambitious and salutary proposal by plaintiffs' baseless arguments over process.

students' needs. In doing so, he appropriately declined to study extensively, yet again, the needs of students as they are associated with poverty. The Commissioner's approach to the study resulted in a proposal that has been described by one education expert as a "model for the rest of the country" and by another as the "most promising strategy" that exists. Report Appendix at 6; Tr. (11/17/97) 35:18-19. It is time for all to turn from the process to the results produced -- their appropriateness and how they will be implemented.

POINT II

THE COMMISSIONER'S PROPOSAL FOR SCHOOL-BY-SCHOOL ZERO-BASED BUDGETING IS FUNDAMENTAL TO COMPREHENSIVE EDUCATIONAL REFORM AND IS IN FURTHERANCE OF HIS CONSTITUTIONAL RESPONSIBILITIES.

Consistent with the findings of national educational experts that successful comprehensive reform in urban schools requires site-based decision making including school-based budgeting, the Commissioner recommended an implementation plan for whole school reform that would provide for a school-by-school zero-based budgeting process. This process ensures that needed funds reach the school level and are properly expended in support of the selected whole school reform program. The Commissioner's implementation plan is imminently reasonable and is crucial to meeting his "essential and affirmative role to assure that all education funding is spent effectively and efficiently ... in order to achieve a constitutional education." Abbott IV, 149 N.J. at 193. Furthermore, the Commissioner's implementation plan fully complies with the Abbott IV order and should be adopted by this Court.

This Court previously ordered the State to eliminate the significant disparity in spending between the Abbott districts and the I&J districts and to ensure the implementation of needed supplemental programs. See Abbott v. Burke, 136 N.J. 444 (1994)("Abbott III"). With the achievement of spending parity in the 1997-98 school year (and its recommended continuation in the next school year) and the Commissioner's proposal for whole school

reform in every Abbott school, both requirements have been met. The Abbott districts and schools will have the funds necessary to provide a research-proven comprehensive educational program that integrates regular education and supplemental programs into a cohesive whole -- in other words, an education designed to enable students in the Abbott districts to meet the Core Curriculum Content Standards.

Plaintiffs, however, assert that the Commissioner's implementation plan violates the Education Clause. More specifically, they attack his school-based budget proposal arguing that only a rigid separation of regular and supplemental programs and funding can satisfy the prior decisions of this Court. The artificial separation of programs and spending being advocated by plaintiffs is neither legally required nor educationally sound.

Plaintiffs claim that this Court limited the expenditure of parity funds to the regular education programs provided in the I&J districts. Supplemental programs would then be added to that regular education program and must be funded by separate dollars. However, this Court never has placed such a limitation on the use of parity dollars. Rather, the Court specifically left to the Commissioner the determination as to how the parity funds should be spent within certain parameters. As this Court stated, the Commissioner was responsible for ensuring "that the increased [parity] funding ... be put to optimal educational use" and be used for "the improvement of the students' ability to achieve the

content standards..."* Abbott IV, 149 N.J. at 194. Nothing in Abbott IV required that the funds be used for programs in the Abbott districts that would replicate programs in the I&J districts.

The Commissioner determined that the programs that work in the I&J districts are simply not the same as those that will produce the desired results in the Abbott districts. Tr. (11/19/97) 169:12-172:10. His findings are consistent with the conclusion reached by Judge King's expert. Report Appendix at 3 (Dr. Odden noting that "the reading and mathematics programs in the I&J districts [would not] likely be very effective in the SNDs."). This Court, itself, reached a similar conclusion in Abbott v. Burke, 119 N.J. 287 (1990). ("Abbott II"). "[A] significantly different approach to education is required if these districts and their students are to succeed." Id. at 371. Simply duplicating the I&J programs in the Abbott districts, with supplemental programs added on top, will not further, and can in fact undermine, the attainment of the desired goal -- improved achievement by students in the Abbott districts.

Plaintiffs' position is not only educationally unsound but it also ignores reality. To put it simply, no one regular

---

* The Commissioner's requirement that Abbott districts set aside a small portion of their parity funds in the 1998-99 school year to use for oversight purposes, whole school reform efforts at the local district level or statewide conferences and training efforts to support the successful implementation of whole school reform is clearly within the parameters set by the Court for the expenditure of those funds. See Pb at 21 (citing to letter from Commissioner Klagholz to the Abbott districts). Plaintiffs' suggestion to the contrary is erroneous.

education program exists in all of the I&J districts for the Court to have ordered replicated. As the Commissioner noted, "there isn't 'the' program. There are many practices that exist in the I&J districts, and they're variant." Tr. (11/19/97) 159:10-13. And, these variant practices are provided at widely varying costs.* While expenditures can be averaged, educational programs cannot. Thus, the Court ordered substantially equivalent expenditures to ensure the adequacy of the funding; determining the programmatic needs of these students was left to the expertise of the Commissioner.

Applying that expertise, the Commissioner proposed the implementation of whole school reform models, such as SFA, in all of the Abbott schools. SFA is not designed to replicate what is done in wealthy school districts. Rather, SFA is based on research as to the particular needs of disadvantaged students and designed to deal with the different and difficult challenges of improving the educational achievement of those students. To succeed, these whole school models require a rebuilding of both the programmatic and fiscal practices of the school from the "ground up," including the integration of regular and supplemental educational programs and the combining of all funding streams to support complementary programs.

Yet, plaintiffs ask this Court to set aside a fundamental component of the whole school reform effort -- zero-based budgeting

---

* For example, South Brunswick is a DFG "I" district that spends $6899 per high school pupil, substantially less than the I and J average spending. Report at 129.

and fiscal reform -- premised on their concern that parity funds might be used to support what they label a supplemental program. Clinging to some artificial distinction between regular and supplemental programs is not helpful when it comes to expenditures at the school level and in a classroom, particularly within the context of whole school reform. Educational programs and costs are not so easily categorized and an inflexible mandate to do so does nothing to contribute toward the goal of increased academic achievement. It may also result in wasted efforts.

For example, SFA is considered to be a "supplemental program" and yet, as Judge King recognizes, it is "integrated with a foundational education program." While plaintiffs attempt to parse out the supplemental and regular education components of SFA, those components do not neatly fit within such labels.* As Dr. Odden notes, I&J districts may have a number of SFA components such as instructional facilitators, reading tutors, full-day kindergarten, half-day preschool for four year olds, technology coordinators and even family outreach staff. Report Appendix at 6-7. And, these components would be funded through the "regular" education budget of those I&J districts. Similar complex issues arise in labeling areas such as technology, class size, parental involvement and professional development. P-69. See e.g. Tr. (12/4/97) 83:25-84:14, 87:13-19; Tr. (12/8/97) 47:10-48:17. Drawing

---

* Plaintiffs also suggest that SFA is a supplemental program designed to improve regular education in urban districts. This suggestion ignores the fact that SFA replaces that regular education program.

these meaningless distinctions in funding sources is unworkable and does not further the improvement of education in these districts.

Plaintiffs argue further that the Commissioner's illustrative budget is, in itself, unconstitutional. It is hard to understand how an illustration of a school-based budget could be unconstitutional. Despite cumulative testimony to the contrary, plaintiffs continue to adhere to the notion that the illustrative budget is a funding formula and argue that the budget model is a "minimal reworking" of CEIFA, which has already been held to be unconstitutional.* Pb at 19. Yet the illustrative budget was not intended to be, and could not be, used in such a manner. See Tr. (11/19/97) 130:22-131:20. As the Commissioner testified, the school based budget included in his study is,

> illustrative and marked illustrative as being illustrative because we're not trying to create a funding formula. We have a funding formula and we have a Supreme Court decision, both of which are in place and need to be -- need to be followed, and that's what we intend to do. What we're talking about is how to use that money to better educate students, not create a funding formula.
>
> [Tr. (11/19/97) 134:5-12].

---

* Despite the fact that the illustrative budget is not a replacement for the CEIFA model, the Department was mindful of the Court's criticisms of the CEIFA model in its implementation plan. As the Commissioner testified, "one of the things I believe the Court criticized in CEIFA was that it was too hypothetical. And now we're trying to go the route of, let's get down to school-based realities to do this." Tr. (11/19/97) 134:20-23. Additionally, in the illustrative budget, the Department used I&J averages rather than State averages for all of the costs except those where the Abbott average was used because it was higher due to circumstances peculiar to the Abbott districts.

Nor is the illustrative budget a programmatic model that all elementary schools must follow as amicus curiae, League of Women Voters, suggest. Rather, it reflects the presumptive SFA model in its "ideal" form. Some schools may select other models which would have different components and staffing patterns. See Tr. (11/19/97) 122:15-123:4. Others may decide to retain existing art, music or other specialized teachers. Some may have a need for special education teachers because some children cannot be mainstreamed or "neverstreamed."* But all of these decisions will be made as part of a school-by-school budgeting process "leveraging all [the] funds to support a single coherent approach... " Tr. (11/19/97) 133:6-7.

Further, there is no credible argument that the process described by the Commissioner as to how he intends to convert that illustrative budget into actual school-based budgets violates any constitutional principle. As the Commissioner testified, he will

> Go school by school and look and work with the school and the district at that school, particularly, that school to find out what its current program is. How different is it from the desired program? What its current finances are. Are there any gaps in the finance that

---

* SFA's "neverstreaming" concept attempts to prevent children from being classified as handicapped and SFA has had considerable success in that regard. P-6 at 212. The illustrative budget assumes the SFA ideal of all children being in the regular classroom except for those with severe disabilities. This may not occur immediately and the ideal might never be fully realized. Thus, the Commissioner's school by school implementation (and the excess funds available in the illustrative budget) provides the opportunity to ensure that in reality all children, including handicapped children, are served appropriately. Tr. (11/20/97) 207:23-209:9; (11/21/97) 103:21-105:4. See also Report Appendix at 7-9.

> need to be filled in order to make this a reality? So that we're again not talking in the abstract at the State level as though in a funding formula that's ultra abstract or even at the district level which is an abstract level where we start applying things in generalities, but really working this through school by school to create an integrated comprehensive concerted effort in that school...
>
> [Tr. (11/18/97) 226:6-18].

As part of this school by school analysis, the Commissioner will look for reallocations both at the school level and the district level to support the school-based budget. If the Commissioner finds that, after all reallocations are made, the school still needs additional funds, he will seek such appropriations as are necessary, targeted to the identified need. See Tr. (11/19/97) 8:4-6, 133:19-134:12.

The Commissioner's proposed process is undeniably sound as a matter of fiscal and educational practice and should not be set aside by this Court. Rather than "divert" parity funds, the process permits the Commissioner to fulfill the very obligations placed on him by this Court in Abbott IV -- "maximize" the educational effectiveness of those additional funds. 149 N.J. at 153.

Plaintiffs argue, however, that the process provides too much discretion to the Commissioner and therefore, like the Quality Education Act ("QEA"), N.J.S.A. 18A:7D-1 et seq. (repealed), is unconstitutional. The deficiency regarding "discretion" this Court identified in the QEA was the absence of a guarantee that the special needs districts would reach parity. Abbott III, 136 N.J. at

451. That goal has now been achieved. At issue here is whether the Commissioner can apply his expertise and oversight authority to ensure that funds being provided to the Abbott districts, through the CEIFA formula and the parity remedy, are used efficiently and effectively to further the attainment of the Core Curriculum Content Standards. This is the very responsibility and discretion committed to the Commissioner by this Court in Abbott IV. 149 N.J. at 224 (ordering the Commissioner to "manage, control, and supervise the implementation of [parity] funding to assure that it will be expended and applied effectively and efficiently to further students' ability to achieve at the level prescribed by the Core Curriculum Content Standards... ")*

Moreover, nothing in the illustrative budget suggests that the State intends to curtail parity funding, despite this Court's invitation to establish an alternative to parity.** The illustrative budget is based on the premise that parity funding

---

* Plaintiffs claim that the Commissioner has failed to provide a link between the SFA program and New Jersey's Core Curriculum Content Standards. Yet, as Dr. Slavin assured the Commissioner, SFA's curriculum can be fine-tuned to meet the standards in New Jersey as he has done in other states. Tr. (11/19/97) 237:21-238:5, 238:19-22, 241:16-24. The fundamental premise of SFA is that a strong foundation in reading will allow students to achieve in all subject matters. See D-3 at 2 ("reading and language arts form the core of what school success means in the early grades"); P-6 at 11 ("in the early grades, success in school is virtually synonymous with success in reading"). See also Tr.(12/5/97) 232:17-233:6.

** It should be noted that the State disagrees with the plaintiffs' interpretation of this Court's prior decision regarding the circumstances under which parity would become moot. However, given that the Commissioner's proposal is not a "back doorway" to challenge parity, Tr. (11/19/97) 131:3, that disagreement need not be addressed by the Court at this time.

will continue to be available. Tr. (11/19/97) 132:14-21. As the Commissioner testified repeatedly, his illustrative budget and his whole school reform implementation plan is not an assault on parity.

> [A]gain, we're not trying to create a new funding formula to change the amount of monies spent in the Abbott districts. I'll say it as many times as I can. We're trying to find a way, using whole school reform, whole school budgeting, and site-based decision making to use those funds to maximum effect, to produce better results in student achievement.
>
> [Tr. (11/19/97) 134:25-135:6].

See e.g. Tr.(11/19/97) 57:5-7. This Court in Abbott IV required such a change so that proper expenditure of school funds can be assured. The Commissioner has complied.

This Court has never required the type of rigid separation between parity funding and supplemental program funding that plaintiffs advocate. In fact, this Court specifically recognized the interrelationship of those two areas when it noted that the "expenditures and efforts directed to overcome the grave disadvantages of public school children in the special needs districts will lessen the significance of the level of funding now directed to regular education." Abbott IV, 149 N.J. at 197.

The Commissioner's proposal, including his implementation plan, is a constitutionally appropriate response to the mandates of Abbott IV. It ensures that adequate funds are available not only in each district, but at each school. Further, it ensures that the funds in each school are spent effectively and efficiently as part of a coherent and integrated program proven effective in improving

student achievement. The Commissioner's proposal, implemented as described, will fully realize this Court's request for comprehensive reform in the Abbott district.

POINT III

THE RECORD IN THIS CASE DOES NOT SUPPORT PLAINTIFFS' REQUEST THAT ADDITIONAL PROGRAMS BE APPENDED TO THE COMMISSIONER'S RESEARCH BASED AND PROVEN EFFECTIVE APPROACH TO COMPREHENSIVE REFORM IN THE ABBOTT DISTRICTS.

As more fully described in Defendants' Brief in Support of the Commissioner's Recommendations, the Commissioner's proposal for whole school reform in the Abbott schools is a comprehensive and effective means of improving academic achievement in the Abbott districts. In fact, as Judge King's own expert observed, the Commissioner took "the best and most solid, research-proven effective, urban district elementary school model in the country and enhanced nearly all its key features." Report Appendix at 6. His proposal is consistent with the "constitutional vision" that "presumes that every child is potentially capable of attaining his or her own place as a contributing member in society" and fully complies with the prior orders of this Court. P-6 at 3 (The most important assumption underlying SFA is "that every child can learn. We mean this not as wishful thinking or as a rallying cry, but as a practical, attainable reality.").

In this remand proceeding, plaintiffs have excepted to the Commissioner's proposal, suggesting that whole school reform efforts should merely be a component part of a laundry list of supplemental programs. This approach completely misconstrues the fundamental premise of whole school reform -- taking programs that are proven effective and combining those programs into a coherent design model that can be replicated from school to school. Whole

school reform is not an "add-on" of programs; it rebuilds "'from the ground up' the whole notion of what an effective elementary, middle and high school is ... ." Report Appendix at 4. The model contains the necessary components of a quality educational program, including regular and supplemental programs. There is no competent evidence in this record that adding programs onto the model will enhance its effectiveness. Moreover, as previously argued, Db at 48-51, it will impede the effective implementation of whole school reform in these districts.

Plaintiffs argue that this Court should order extended day, year-round early childhood programs for three- and four-year olds, a fund to improve regular education, a reduction of class size in grades K-3 in all subject areas, school-based health and social services in all Abbott schools, summer and after school programs and parental involvement programs. In addition, plaintiffs ask this Court to require further assessment of alternative education programs, supplemental security, increased technology, school nutrition and the improvement of regular education as part of a future Court-supervised remand. The record in this case, however, does not support plaintiffs' requests to make these additional programs and studies part of a constitutionally-based, court-imposed remedy.

Defendants will not repeat the arguments that were previously made as to why the additional programs that plaintiffs request and Judge King recommended -- full day preschool for three- and four-year olds, summer programs and school based health and

social services for middle and high schools -- should not be ordered by this Court.* Db at 33-42. However, defendants will reiterate the proper legal standard by which these additional programs should be reviewed. Given that the constitutional responsibility for making substantive educational decisions as to what programs will improve student achievement rests with the two other branches of government, this Court should not consider ordering any programs in addition to those recommended by the Commissioner unless plaintiffs have demonstrated that the failure to include that program is arbitrary and capricious. Put another way, the empirical evidence in support of the program must be so strong that its exclusion from the Commissioner's proposal results in a constitutional deprivation. The mere fact that some educators think the program may be "worthwhile" or "beneficial" is not enough. Plaintiffs' list of additional programs falls far short of this standard.

---

* The expansion of school based health and social services, as plaintiffs request, to all elementary schools at a total estimated cost of $126 million, should be rejected for the same reasons that middle and high schools should not be constitutionally required to provide such programs. Db at 37-40. Plaintiffs claim that having schools refer students to services would not address problems such as transportation, family availability, the health needs of the uninsured and the lack of available community services. Pb at 12. Yet, these claims just further support defendants' position that schools should not be constitutionally mandated to take on these roles.

As previously stated, schools cannot replace all other responsible adults and organizations in children's lives. These non-educational issues such as the health needs of the uninsured and the lack of community services should be, and are being, addressed by the other branches of government. Health and social problems should not be addressed by the judiciary through the Education Clause.

135:22-136:2. Plaintiff's proposal is estimated to cost up to $14,000 per child, requiring a total annual appropriation of $616 million.* "Inconclusive" evidence does not provide a basis on which to even consider a constitutionally-mandated expenditure of this magnitude.

The Commissioner's proposal for preschool programs was reasonable given the current research base including the academic improvements that SFA has achieved without an expansive preschool program. D-3 at 8 (noting that most SFA schools "provide a half-day preschool and/or a full day kindergarten" program). See also P-2 at 3 (SFA is built on the assumption that "[t]op quality curriculum and instruction from age 4 on" is needed.). This Court should not, and constitutionally cannot, order more. See Db at 36-37.**

Another example of plaintiffs' inadequately supported requests is reduced class size. While the Commissioner proposed

---

* Dr. Barnett testified that the cost of the plaintiffs' recommended preschool program could be as high as $14,000 per child and that he thought "virtually all of the kids" would sign up. Tr. (12/1/97) 131:19-21, 227:10-18, 231:13-232:1. Thus, $14,000 x 44,000 students = $616 million.

** Contrary to the suggestion of amicus curiae, the New Jersey Legislative Black and Latino Caucus, this Court does have limitations on its interpretation of the Education Clause of the State constitution beyond those imposed by federal law. This Court must interpret the Education Clause consistent with its plain language. See Gangemi v. Berry, 25 N.J. 1, 10 (1957); Matthews v. State, 187 N.J. Super. 1, 7 (App. Div.), appeal dismissed, 93 N.J. 298 (1982). Moreover, the Education Clause must be interpreted consistent other provisions of the State constitution. For example, equal in weight and wisdom to the Education Clause is the Separation of Powers Clause, which provides that "[n]o person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others... ." N.J. Const. (1948) art. III, ¶1.

the targeted class size reduction for grades one through three in reading that is a component part of SFA, plaintiffs seek an order from this Court requiring class sizes not to exceed 15 for all subjects in kindergarten through third grade at an overall cost of $80 million. However, the evidence in the record does not support the need for such a expansive and costly reduction in class size.

Relying on one study of class size reduction -- the Tennessee STAR study -- plaintiffs argue that "significant academic gains" will result from their proposed class size reduction program. Yet, the testimony of plaintiffs' own witness was that the results of that class size reduction study were "small." Tr. (12/2/97) 191:16. And, those effects diminish over time.* See Peter Hill and Phillip Holmes-Smith, Class Size: What Can Be Learnt from the Research? (1997) ("Class Size") at 6, cited in Appendix Report at 17, 18; P-33; P-34.

Researchers who have reviewed class size studies have reached differing conclusions as to their efficacy ranging from "inconclusive," and "substantively negligible," to "at best moderate." Class Size at 1, 7. These are hardly the "significant academic gains" that plaintiffs would have us believe will result from a reduced class size program.

"[D]ramatic achievement effects" can be attained by one-to-one tutoring, a component of SFA. Class Size at 10. Combining

---

* Judge King appeared to misunderstand this point when he noted that "'effect sizes' increased noticeably at the end of seventh, eighth and ninth grades." Report at 74. As Dr. Finn's data reflects, the standard deviation continued to decline in the later years. See P-34 at 10.

one-to-one tutoring with reduced class size and extended time for reading, SFA "produces an overall effect that is 2-4 times larger than that of class size reduction per se". Report Appendix at 18. In comparing the two alternatives -- overall reduced class size and SFA -- clearly SFA is the more efficient and effective means of improving student achievement.* See Class Size at 1 (policy makers have shown caution in implementing class size reduction programs given "the enormous costs" and "the inconclusive nature of the research."). Accordingly, not only was the Commissioner's decision to use the targeted SFA approach neither capricious nor unreasonable but it is actually preferable both educationally and fiscally.

As to after school programs, increased parental involvement and the "other identified supplemental programs," Pb at 16, plaintiffs have failed to demonstrate an adequate basis which would justify rejecting the Commissioner's recommendations as constitutionally insufficient. Plaintiffs presented no strong empirical link that extending the length of the school day or providing after-school day care for students is an essential element in the provision of a thorough and efficient system of education in the Abbott districts. Schools are not constitutionally responsible for providing day care or after-school recreation for students. Schools are responsible for providing

---

* As Judge King correctly noted, SFA and class size reduction are "alternative programs." Report at 105. There is absolutely no empirical evidence that combining the two alternative strategies would further enhance the student achievement gains provided by SFA alone.

educational instruction. Moreover, the record does not support the conclusion that an extended day is essential to improved academic achievement in the Abbott districts.*

Plaintiffs have also failed to demonstrate any reason why this Court should accept their model for increasing parental involvement rather than the Commissioner's. The question of whether the person should be a "parent liaison" or a "parent coordinator" or whether the staffing should be one for each elementary school or one for each 500 students should be left to the expertise and discretion of the Commissioner.

The other identified supplemental programs -- alternative education programs, school-to-work and college transition programs, increased security and instructional technology -- are all included in the Commissioner's proposal. Plaintiffs contend that the Commissioner's proposal is not sufficiently detailed (and that he has failed to separately label the regular education and supplemental parts of those programs) so that further study is needed. Plaintiffs seek a Court directive that the Commissioner conduct a further assessment of the needs and programs.

---

* Dr. Slavin did testify that a study in Memphis showed an additional academic benefit from an extended day program although the study was not introduced by plaintiffs. Tr.(11/17/97) 127:6-8. However, SFA has been successful in significantly increasing student achievement without extended day programs. See D-3; P-6. It should also be noted that the Commissioner's proposal does not foreclose the possibility of using the schools' space for after hours programs. The parent liaison or community outreach coordinator should link with community organizations willing to provide those services including recreation and day care. The Commissioner simply does not believe that schools should be responsible for directly providing these after-school programs. Tr. (11/18/97) 117:14-120:14.

For example, plaintiffs not only request, as Judge King recommended, full day preschool for three- and four-year olds but that the preschool program be extended day and year round. As discussed in defendants' earlier brief, there have never been any research studies that have compared the academic benefits of starting preschool at age three rather than age four or of having full day rather than half day programs. Db at 33-35. Thus there is no evidentiary basis on which to conclude that the Commissioner's proposal -- half-day for four year olds -- is constitutionally inadequate.

Yet, plaintiffs continue to urge extended day, year round services for both three and four year olds. Children could be dropped off as early as 7 a.m. and picked up by 6 p.m. Tr. (12/1/97) 122:3-8. No study was introduced by plaintiffs that supports the conclusion that such a massive expansion of preschool services will substantially enhance the academic outcomes that would otherwise be derived from the Commissioner's proposal. In fact, a program with all the components advocated by plaintiffs' expert has never been implemented. Tr. (12/2/97) 33:7-11.

As Judge King noted, the research on early childhood programs is "inconclusive." Report at 68. Plaintiffs, however, would ask that schools not only expand their educational programs to serve an additional 44,000 students but also would expect the schools to meet "the needs of [three- and four-year old] kids for comprehensive nutrition and health and social services" and provide day care services for working parents. Tr. (12/1/97) 123:8-11,

However, the Commissioner's proposal on these additional programs, combined with his school by school implementation of that proposal, is sufficient. The Commissioner, contrary to plaintiffs' assertions, has provided for additional funds in the area of alternative education, increased security and instructional technology. See D-2 at 45-50. For school-to-work and college transition programs, he has concluded that they must be fully integrated into the instructional program and that such integration does not require additional expenditures. This record provides no reason to reject those conclusions and order further study in these areas.*

---

* Nor are any of the other studies suggested by plaintiffs or amici required. In fact, the scope of the request itself evidences the absurd level of judicial intrusion that would result from continued Court-ordered, Court-supervised studies. In addition to the request for a study on the need for and the elements and costs of supplemental programs of nutrition, security, school to work, technology, and alternative education, plaintiffs also ask this Court to order the Commissioner to study supplemental programs and strategies that will improve regular education and to assess of the I&J district programs necessary in the Abbott districts to establish a comparability standard. Pb at 17 and 18. Further, Plaintiffs ask that the Court order the direct involvement of plaintiffs in the conducting of these studies. Pb at 29.

Amicus curiae, NJEA, requests studies of: (1) each Abbott district's need for special education, art and music programs, how much it will cost to address these needs and how to implement those programs; (2) professional development in the Abbott districts, including what happens in this regard in the I&J districts, and what additional funds are needed to improve curriculum and instruction; (3) the need for and costs of a parent liaison program; (4) full day preschool for three and four year olds and full day kindergarten including the number of potential students, the number of children enrolled in pre-school type programs, and the costs, quality and supplemental services available to these children such as after-school care and health and social services; and (5) security levels in the Abbott district, "[g]iven the undisputed incidences of crime and violence in these communities." NJEA brief at 4, 5, 6, 8 and 12. NJEA also requests that the Court order the Commissioner to collaborate with urban educators during

Finally, plaintiffs' ask this Court to reject the centerpiece of the Commissioner's proposal -- whole school reform -- and instead have districts implement programs such as SFA as part of an interim step in improving regular education in the Abbott districts, funded through a special "School Improvement Fund." The real focus, according to plaintiffs, should be a comprehensive study of the regular education programs in the I&J districts and in the Abbott districts and the hiring of instructional facilitators in the Abbott districts to implement "a comprehensive program and strategy for program comparability with the I&J districts ... ." Pb at 9. The initial cost for the Fund and the instructional facilitators is $58.3 million.

Yet, as previously discussed, Abbott districts should not use the I&J districts' programs as their model when comprehensive whole school reform programs such as SFA have been designed particularly to meet the needs of urban students and have been proven successful in doing so. This Court should defer to the expertise of the Commissioner, supported by several national educational experts, as to how best to address the programmatic deficiencies in the Abbott districts. This Court should reject plaintiffs' attempt to convert the parity remedy into a programmatic edict that is educationally unsound and unworkable.

---

the implementation of whole school reform. NJEA brief at 5.

As this Court has stated, "[t]he primary concern, the goal, of the Department, the Legislature and indeed the public, is the actual achievement of educational success in the special needs districts." Abbott III, 136 N.J. at 454. The Commissioner has presented a proposal that is designed specifically to attain that goal. It is based on years of research as to what does and does not work with disadvantaged children; it combines the programs that work into an integrated and comprehensive model that can be replicated from school to school. It reflects the best thinking currently available on how to provide every student, especially those at-risk of failure, an opportunity to succeed.

Based on traditional notions of review of agency action and separation of powers, this Court should defer to the Commissioner's proposal and not attempt to supplement it with additional programs which have never been demonstrated as educationally enhancing -- whether they are recommended by Judge King, by plaintiffs or by amici. The Commissioner's plan has not been impeached despite a full evidential hearing. Moreover, it fully complies with the parameters of the Remand Order. Now is not the time for substituted preferences and wish lists. It is the time for the three branches of government to unite behind the Commissioner's sound plan to forge forward in improving the educational opportunity available in Abbott districts -- aided by full parity funding. In conclusion, therefore, this Court should approve implementation of the Commissioner's plan unamended.

POINT IV

THE COMMISSIONER'S PROPOSAL TO ADDRESS THE FACILITIES NEEDS OF THE ABBOTT DISTRICTS IS REASONABLE AND WILL ENSURE THAT EACH ABBOTT DISTRICT HAS SAFE AND ADEQUATE EDUCATIONAL FACILITIES.

This Court has determined that the provision of a thorough and efficient system of free public schools cannot be met in the absence of safe and adequate educational facilities. As stated in Abbott IV, "[d]eteriorating physical facilities relate to the State's educational obligation, and we continually have noted that adequate physical facilities are an essential component of that constitutional mandate." 149 N.J. at 186. In that decision the Court also opined "we cannot expect disadvantaged children to achieve when they are relegated to buildings that are unsafe and often incapable of housing the very programs needed to educate them." Id. at 188. School facilities must provide adequate and safe learning environments for students.*

In response to the Court's concerns, the Commissioner undertook a thorough assessment of the existing facilities of these districts which culminated in his Study of School Facilities and Recommendations for the Abbott Districts ("Facilities Study"). Included in that Study was a calculation of the estimated cost to

---

* Plaintiffs suggest facilities parity with the I&J districts is the standard to be met when addressing the facilities needs in the Abbott districts. Pb at 36. The Court, however, has never required "facilities parity" nor would such an order be sensible. Similar to educational programs, there simply is no one "model" facility in the I and J districts to be replicated in the Abbott districts. See discussion supra at 8-9; Tr. (12/10/97) 128:3-129:18.

correct all deficient conditions and provide general classroom space consistent with the Commissioner's pre-school through grade 12 recommendations. DF-1 at 7-15. Also set forth were minimum adequacy standards which describe spaces and requirements for facilities in the Abbott districts. DF-1 at 16-19. Finally, the Commissioner, utilizing research of the "best practices" of other states, offered for the consideration of the Governor and Legislature, a cohesive and fiscally sound approach for construction management and financing.* The Facilities Study and the underlying Vitetta Assessment are both extensive and comprehensive. The Commissioner, however, recognized that this assessment of the facilities needs in the Abbott districts is not finished but rather provides a solid foundation which will be built upon as he progresses through his planned district by district assessment.

Plaintiffs argue that a district by district assessment, including demographic projections and educational program analysis, should have been completed during the time frame imposed for this study. Pb at 32, 37. During the remand proceedings, plaintiffs offered a "model" study that was completed in the Paterson school district by Lee Heckendorn -- a study that took nearly two years to complete. Tr. (12/15/97) 107:7-109:5. However, expert testimony elicited below reflects that a study of this scope for each of the

---

* Plaintiffs concede the viability of the Commissioner's facilities improvement plan with the caveat that they are concerned that the construction funding mechanism would be dependent upon the adequacy standards that are not yet established. Pb at 36; Report at 130.

twenty-eight Abbott districts simply could not have been completed in the time period allowed by the Court. Tr. (12/10/97) 96:11-21; 103:9-13 (Stephen Carlidge noting that "we certainly couldn't get into a program discussion with each of the 28 districts ... we said simply we couldn't do that under the time constraints").

Plaintiffs seek a remand proceeding to remedy the Commissioner's alleged failures in this regard and to "oversee and report to this Court on the Commissioner's further assessment and additional recommendations concerning school facilities in SNDs." Pb at 31. A remand on this issue, however, is unnecessary. The Facilities Study sets forth an estimated timeframe to complete the educational adequacy standards, conduct an educational adequacy inventory of the Abbott districts, and complete and approve facilities management plans in each of the Abbott districts. DF-1 at 29-37. Given the testimony and documentary record developed below concerning the Department's continuing assessment and strategy to address the facilities needs in the Abbott districts, this Court should allow the Commissioner ample time and flexibility to accomplish these complex tasks. Further Court directives or oversight is unnecessary.

Plaintiffs also ask this Court to review the content of educational adequacy standards that have yet to be adopted and make a determination as to classroom sizes and specialized education spaces such as art and music. This Court must not, however, preempt the policy-making branches of government in this regard, by, judicially determining and mandating square footage

requirements for classrooms. That task is appropriately one to be completed by the executive and legislative branches. Once a final proposal on statewide adequacy standards is in place, plaintiffs may, at that time, seek review of those standards in the proper forum if plaintiffs believe them to be flawed.

However, if this Court were to review these components of the unfinished educational adequacy standards and make a determination as to specialized spaces and class size, it should defer to the Commissioner's recommendation. No basis in the record exists to find the Commissioner's recommendation as to specialized spaces and class size constitutionally inadequate. Instead, witnesses for both plaintiffs and defendants concurred that there is no empirical research that directly establishes a cause and effect relationship or correlation between academic performance and the presence, absence or configuration of specialized instructional spaces, provided that these facilities provide a clean, safe and functional environment which is conducive to learning. Report at 127; Tr. (12/16/97) 55:21-23; Tr. (12/12/97) 21:16-22:9.

Moreover, it is well established in the record below that decisions regarding the absence or presence of specialized spaces comport with the educational program of a given district or school. The Commissioner, when testifying on the approach to "specialized" instruction in various whole school reform models, recognized "there are alternative ways of providing art instruction." Tr. (11/19/97) 139:10-11. Thus, the manner by which to deliver necessary instruction in areas such as art and music, i.e., whether

to utilize specialized art teachers or whether to delivery the instruction in the regular classroom, is flexible.

Many districts, including I and J districts, choose not to have "pull out" classes for art and music in a specialized classroom, and opt for that instruction to be provided in the regular classroom. As Mr. Carlidge testified, "[t]here are districts that don't have [independent rooms for art and music] intentionally. There are districts that believe everything should occur in the classroom, and there are districts that are designing classrooms specifically for that." Tr. (12/10/97) 129:11-15. See also Tr. (12/10/97) 103:22-104:4; Tr. (12/10/97) 128:9-20; PF-3 at 2 ("districts in many instances, including I and J districts, continue to offer programs such as art and music, either off the proverbial 'CART' or in areas such as the stage").

With regard to classroom space, Mr. Carlidge testified with specificity as to the adequacy of the elementary class sizes suggested by the Commissioner. "Based on our experience with various types of educational programs ... the 600-square-foot classroom provides adequate space for 21 students ... and the appropriate furnishings for those students to allow all types of activities that would normally occur... " Tr. (12/10/97) 107:23-108:4. Given the adequacy of the classroom sizes proposed by the Commissioner for existing facilities, schools should continue to utilize classrooms in accordance with that recommendation. When building new educational facilities, however, the optimal classroom size requirements recommended by the Commissioner can be achieved.

It is within the context of adequate classroom sizes that plaintiffs raise the issue of renovation of existing facilities and new construction. As was testified to below, the determination whether to renovate or build is a decision that must be made on a site by site basis. Tr. (12/10/97) 36:18-22 ("I wish there were an easy way to say yes, the building is 84 years old, so it needs to come down. However, in our opinion you can't make those determinations based on a formula. Every single instance needs to be looked at individually.") The Commissioner has not prejudged this issue, as suggested by amicus curiae League of Women Voters, nor has the Commissioner decided to renovate more buildings than to engage in new construction in an attempt to shortchange classroom space in the Abbott districts.* Cf. League Brief at 8. Rather, as plainly indicated in the record below, the district by district study to be undertaken by the Commissioner as part of his continuing assessment process will consider site-sensitive issues, such as the ability to acquire land, as appropriate to this determination. Those factors will be assessed, decisions whether to renovate or build new facilities will be made, and the costs to meet each districts' facilities needs will be estimated.

The Commissioner should be provided the time needed to review and inventory schools using the to-be-adopted educational

---

* In Perth Amboy where land acquisition is difficult, the "renovation versus new construction" controversy has been fully explored with success. At the Shull school, innovative renovation strategies "added capacity for 175 students without increasing the footprint of the existing structure." Report at 124, see PF-8 at 8.

adequacy standards in an in-depth and comprehensive manner. This process will allow the Commissioner to review existing utilization of space to address concerns of underutilization and over-capacity. It will also permit the exploration of "opportunities for restructuring space and reconfiguring grades" or for "dual or shared use of space" and ensure distance learning and other interactive technology is used to the fullest extent possible. Report at 123, DF-1 at 15; DF-11; Tr. (12/12/97) 28:16-29:1.

The statewide educational adequacy standards to be adopted by the Commissioner will ensure safe and adequate facilities, and will include provisions for the minimal effect of the Core Curriculum Content Standards on facilities, consistent with the opinions of national experts consulted by the Commissioner. This Court should permit the Commissioner to go forward with his recommendations with ample time and flexibility as needed for this complex and demanding undertaking.

CONCLUSION

Notwithstanding the arguments of plaintiffs and *amici*, this Court should adopt the recommendations of the Commissioner in their entirety.

Respectfully submitted,

Peter Verniero
Attorney General

Dated: 2-24-98