

### PRELIMINARY STATEMENT

From time to time, this Court has been asked to "reaffirm the breadth of the Commissioner's powers under the State constitution and the implementing legislation." Jenkins v. Morris Tp. School District, 58 N.J. 483, 494 (1971). The present application by the Commissioner of Education seeks that reaffirmation. The ability of the Commissioner to fulfill his constitutional obligations toward the children residing in the Abbott districts and ensure they are being provided the supplemental programs that enable them to succeed is brought into question by the literal language of Abbott V. This Court, therefore, should resolve any doubt as to the Commissioner's authority and responsibility to make appropriate adjustments to the proposal by former Commissioner Klagholz adopted by this Court in Abbott V.

The proposal by former Commissioner Klagholz mandated a single approach for all Abbott districts and schools. Although research on the "one-size fits all" whole school reform models proposed by the former Commissioner appeared "impressive" at the time, these models are no longer viewed as the best approach for every school. However, the regulations implementing the Abbott V remedies preclude educators from adjusting their approaches in Abbott districts in view of emerging research and the individual circumstances of districts and schools. The concept of a thorough and efficient education cannot properly evolve if Abbott districts are locked into an approach selected by the former Commissioner more than five years ago, an approach that has not achieved the

hoped-for progress in student achievement. To meet recently enacted federal mandates for adequate yearly progress as well as achieve the constitutional promise, the Commissioner has determined that greater local flexibility and individualization is required.

Districts and schools seeking to improve educational outcomes need to shift from pre-packaged reform models to customized solutions (which may or may not include whole school reform models) based on detailed evidence of individual student performance and diagnosis of local problems. Instead of treating all poor urban districts and schools as suffering from the same problems requiring the same solutions, data-driven assessments can individualize both the problems and the solutions to the school level and even to the demographic differences of the children attending each school. Moreover, continuous and specific assessment of problems and solutions within each school allows for the pace of change to be sufficient to challenge educators but not so fast that it overwhelms those responsible for implementation.

To ensure the effective and efficient focus of limited resources in New Jersey, however, relief from the strict "one-size fits all" approach adopted in Abbott V is necessary. The Commissioner recognizes that all Abbott districts should not be treated alike. Each has its own challenges and priorities requiring different educational approaches. Nevertheless, the Commissioner will require that certain fundamental elements to improved student achievement be implemented in all Abbott districts -- i.e., high quality preschool beginning at age 3 and an

effective, intensive early literacy program. But the Commissioner has concluded that other impediments that hinder students from achieving the Core Curriculum Content Standards ("CCCS") must be identified and prioritized locally to maximize local buy-in and to improve results.

By this application, the Commissioner is seeking validation of his authority to satisfy his constitutional obligation of ensuring Abbott students have the opportunity to achieve academically by fine-tuning the Abbott V requirements. The vast resources being provided to Abbott districts must be directed toward programs, practices and instructional strategies that are the most current, sound, and educationally effective approaches. To the extent that explicit language in Abbott V prevents the Commissioner from doing so, he seeks relief from this Court.

## PROCEDURAL HISTORY

The Abbott v. Burke litigation began in the early 1980s as an as-applied challenge to the Public School Education Act of 1975 ("PSEA"). The action was brought on behalf of children attending public schools in Camden, East Orange, Irvington and Jersey City. Plaintiffs alleged that the PSEA violated the Thorough and Efficient clause of the State Constitution and both State and federal equal protection clauses because, under the formula, education was funded primarily by local property taxes. Given the substantial disparities in property wealth among school districts, plaintiffs argued that the formula caused substantial disparities in per pupil expenditures. Abbott v. Burke, 100 N.J. 269 (1985) ("Abbott I").

After plaintiffs exhausted their administrative remedies before the Department of Education ("DOE" or "Department"), the Court reviewed the extensive factual record and concluded that certain poorer urban districts were not providing a thorough and efficient education to their students, and that this constitutional deficiency was "a product of" the PSEA. Abbott v. Burke, 119 N.J. 287, 384-385 (1990) ("Abbott II"). Accordingly, the Court ordered that the funding formula be amended or replaced "so as to assure that poorer urban districts' educational funding is substantially equal to that of property-rich districts." Id. at 385. In addition, the Court noted that the State was to provide, "presumably similar to categorical aid, for the special educational

needs of these districts in order to redress their disadvantages."  
Id. at 386.

Subsequently, two legislative attempts to enact a constitutional funding formula -- the Quality Education Act of 1990 ("QEA") and the Comprehensive Educational Improvement and Financing Act of 1996 ("CEIFA") -- were found unconstitutional as applied to these poor urban districts ("Abbott districts"). In both instances, the Court found that the funding formula did not satisfy the Court's requirement of parity, *i.e.*, substantially equivalent spending for regular education between the Abbott districts and the more affluent districts. Abbott v. Burke, 149 N.J. 145 (1997) ("Abbott IV") (finding the funding provisions of CEIFA unconstitutional as applied to the Abbott districts); Abbott v. Burke, 136 N.J. 444 (1994) ("Abbott III") (finding the QEA unconstitutional as applied to the Abbott districts).

By Abbott IV, the Court had become impatient with the continuing constitutional deprivation in these districts. Abbott IV, *supra*, 149 N.J. at 185 ("Children in the special needs districts have been waiting more than two decades for a constitutionally sufficient educational opportunity."). *See also* Abbott v. Burke, 153 N.J. 480, 492 (1998) ("Abbott V") ("after sixteen years after the start of the Abbott litigation, the Court [in Abbott IV] found that the continuing constitutional deprivation had persisted too long and clearly necessitated a remedy."). The Court, therefore, mandated parity as an "interim remedy." Abbott IV, *supra*, 149 N.J. at 190. Moreover, the Court ordered that the

Commissioner undertake a comprehensive study of the needs of students in the Abbott districts and identify the programs required to address those needs. Id. at 224. Finally, the Court remanded the matter to the Superior Court, Chancery Division to determine by December 31, 1997, what judicial relief was needed to address the particular disadvantages of these students.\* Id. at 226.

As noted by the remand court's educational expert, Dr. Allan Odden, the plaintiffs and former Commissioner Klagholz advocated different approaches to the issues involved in the remand. Abbott V, 153 N.J. at 637 (Appendix II). The plaintiffs' view was that the educational program in the property-rich districts should be the standard and that "more, largely non-educational, K-12 related programs" should be added and funded by the State. Ibid. Commissioner Klagholz, however, proposed that "the specific educational and program strategies in the [property-rich] districts would not be appropriate" for Abbott students and instead proposed a comprehensive school program designed specifically for students in high-poverty schools. Id. at 638.

Based on available research, the Commissioner turned to a pre-packaged strategy that appeared promising -- i.e., whole school

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\* The Commissioner was also directed to review facilities deficiencies, an area that has been addressed by the enactment of the Educational Facilities Construction and Financing Act ("EFCFA"), N.J.S.A. 18A:7G-1 et seq., and is not at issue in this matter.

reform models, and more specifically Success For All ("SFA"). At the time, research suggested that this comprehensive approach to educational reform could be "particularly effective in enabling the disadvantaged children in poor urban communities to reach higher educational levels." Abbott V, supra, 153 N.J. at 494. Moreover, as Dr. Odden noted,

the State's proposal has an effective literacy program at its core, and nearly everyone in education, as well as most policymakers, understand that unless students can read and write proficiently by grade three it is very difficult for them to perform well in any subject at any subsequent year of school.

[Id. at 639(Appendix II).]

Furthermore, the Commissioner took the prototypical SFA program and enhanced it with smaller class size requirements, increased reading tutors, preschool, a certified professional to serve as the family liaison, a five-member family, health and social services team, technology including a technology coordinator, a media-specialist and a substantial increase in the funds budgeted for professional development. Although these enhancements to SFA had no research-based evidence of effectiveness, the Court's expert noted,

the State has taken the best and most solid, research-proven effective, urban district elementary school model in the country and enhanced nearly all of its key features. The proposal is a strong, expensive, substantive proposal which could serve as a model for the rest of the country.

[Id. at 497-498.]

Finding that the Commissioner's proposal for whole school reform was "consistent with both legislative and executive educational policy and comports with the intended effect of this Court's determination in Abbott IV" and that "the evidence in support of the success of whole-school reform encompassing SFA is impressive," the Court adopted the Commissioner's proposal. Id. at 501. The Court directed that implementation of the Commissioner's proposed whole school reform models for all Abbott elementary schools proceed according to the schedule proposed by him. Ibid. Moreover, the Court directed implementation of various positions and/or programs proposed by the Commissioner for secondary schools. Id. at 509-517.\*

In adopting the former Commissioner's proposal for comprehensive whole school reform and supplemental programs, the emphasis in Abbott V shifted from financing schools to the substantive education being provided in those schools. Id. at 517. The goal, however, continued to be the same -- closing the

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\* The only area where the Court did not defer to the Commissioner's proposal was preschool. The Commissioner recommended a half-day program for four-year old children. The Court ordered a half-day program for three- and four-year old children. Abbott V, 153 N.J. at 503, 508. Subsequently, the Commissioner required Abbott districts to implement full day, full-year programs for three- and four-year-old children. Abbott v. Burke, 163 N.J. 95, 119 (2000) ("Abbott VI").



achievement gap between the most disadvantaged school children and their relatively advantaged peers.

The Commissioner now seeks the assistance of this Court in ensuring that he can further that goal and meet his constitutional responsibilities in light of the most current research on what works and how to effectuate change in schools. The Commissioner recently proposed regulations toward that end. 35 N.J.R. 1362(a). The proposed regulations remove the mandate for whole school reform at the elementary level, making it voluntary instead. Each school, in collaboration with the district, will need to rigorously assess their current models and decide whether to continue the model, select another model more compatible with the needs of the students or select research-based programs and instructional strategies that will be more effective in meeting the students' needs. Proposed N.J.A.C. 6A:10-5.2. Schools will also not be required to hire persons with specific job titles to deal with a variety of student needs. Rather, each school will be required to identify the obstacles to student achievement and propose the steps it intends to take to remove those obstacles. Proposed N.J.A.C. 6A:10-4.1 et seq. and N.J.A.C. 6A:10-5.4.

The explicit language of Abbott V, however, suggests that the Commissioner, while maintaining the responsibility to make the needed changes in the reform effort, does not have the flexibility or discretion to do so. Thus, the Commissioner is returning to this Court to reaffirm his proper role in defining the contours of

the educational reforms that are needed to improve educational outcomes for all students.

## STATEMENT OF FACTS

Although the line of Abbott cases still continues, the educational landscape has changed significantly since this Court's decision in Abbott II, and even since Abbott V. As discussed supra, this Court's initial focus in Abbott was to eliminate the disparities in per pupil spending between poor urban and wealthy suburban districts.\* As shown in Section I, parity has not only been achieved but all of the Abbott districts now spend more per pupil than the I&J districts. After achieving funding parity, judicial attention in the Abbott cases turned to the early childhood programs mandated in Abbott V. The substantial progress made in implementing this Court's early childhood orders is described in Section II. See Abbott v. Burke, 170 N.J. 537 (2002) ("Abbott VIII"); Abbott VI, 163 N.J. 95.

Following the decision in Abbott VIII, this Court granted the Commissioner a one-year relaxation of the Abbott V mandates for K-12 programs. See Abbott v. Burke, 172 N.J. 294 (2002) ("Abbott IX"). The Commissioner has devoted much of that year reviewing the

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\* The poor urban districts were identified as those districts having the lowest socio-economic status, i.e., District Factor Group ("DFG") A and B who were also urban aid districts. Abbott II, 119 N.J. at 338-343. Atlantic City was excluded from the remedy based on its high property wealth. Id. at 386. Wealthy suburban districts were identified as those having the highest socio-economic status, i.e., DFG I and J.

Court-mandated K-12 programs, positions and strategies in collaboration with districts, the Education Law Center ("ELC") and other stakeholders to determine if they fully respond to student needs, offer instructional improvement, and are supported by the latest research. The Commissioner also reviewed schools and districts that were performing noticeably better than their demographics would predict. As a result of those reviews, the Commissioner has determined that the proposals adopted by this Court in Abbott V -- requiring every elementary school to implement whole school reform models and secondary schools to hire persons with a specific job title -- need to be modified. Those requirements are more specifically described in Sections III and IV.

Section V describes the federal government's current role in K-12 education. For the first time, the federal government, through the No Child Left Behind Act of 2001("NCLB Act" or "Act"), will be holding educators accountable for improving the performance of all students. Finally, in Section VI, the specific modifications being proposed by the Commissioner and their implications for FY04 and beyond are set forth.

#### **I. Expenditure Disparities**

In Robinson v. Cahill, 62 N.J. 473 (1973)("Robinson I"), this Court held that the statutes establishing the method of financing public elementary and secondary schools in New Jersey violated the Thorough and Efficient clause of the New Jersey Constitution. The Court did so based on the "existing disparities

in expenditures per pupil" and its acceptance of the proposition that "the quality of educational opportunity does depend in substantial measure upon the number of dollars invested." Id. at 481. Further, disparities in expenditures were viewed as the only viable criteria available to measure compliance with the constitutional mandate. "Indeed the State has never spelled out the content of the educational opportunity the Constitution requires." Id. at 516.

Subsequently, the State enacted a new funding formula that sought "to define the constitutional promise, identify the components of which it consists, establish a procedural mechanism for its implementation and afford the financial means necessary for its fulfillment." Robinson v. Cahill, 69 N.J. 449, 456 (1976) ("Robinson V"). This funding formula was facially upheld in Robinson V but was found unconstitutional as applied to poor urban districts in Abbott II.

In Abbott II, the Court again found disparities in expenditure relevant. While recognizing that funding alone will not be enough to ensure achievement of the constitutional mandate, the Court noted that "[m]oney can make a difference if effectively used, it can provide students with an equal educational opportunity, a chance to succeed." Abbott II, 119 N.J. at 295. The Court concluded that the evidence demonstrated "vast disparity in educational funding" under the funding formula at issue. Id. at 323. In fact, wealthier districts were spending 40% more per pupil than poorer districts. Id. at 334. The Court found those

expenditure disparities were linked to the deficiencies in substantive educational opportunities in those poor districts. See id. at 295, 319. Further, although poor districts theoretically could raise more funds locally, municipal overburden prevented them from doing so. Id. at 356-357. Accordingly, the Court ordered what is now commonly referred to as the "parity remedy" -- that any system for financing public schools must assure that "poorer urban districts have a budget per pupil that is approximately equal to the average of the richer suburban districts." Id. at 388.

Although the legislative response to Abbott II -- enactment of the QEA -- was ultimately found deficient in Abbott III, the Court did recognize the progress that had been made in addressing expenditure disparities. The Court noted not only the substantial increase in State aid to the poorer urban districts, approximately \$700 million, but also the change in relative disparity resulting from that infusion of funds, from between 70% and 75% to 84%. Abbott III, 136 N.J. at 447.

Three years later the relative disparity had improved to 89%. Abbott IV, 149 N.J. at 191. The Court, however, determined that the funding formula enacted to replace QEA, i.e., CEIFA, "effectively arrests any movement toward funding equality." Ibid. The Court, as an interim remedy, ordered that increased funding for the Abbott districts should not be delayed any further and that parity be achieved by the commencement of the next school year. Id. at 189.

The State fully complied with that order. Beginning in the 1997-98 school year, Abbott districts were provided a new category of aid -- Abbott v. Burke Parity Remedy aid ("parity aid"). See Appropriations Act for Fiscal Year 1998, L. 1997, c. 131. Parity aid assures that each Abbott district has the ability to spend an amount per pupil equal to the average per pupil spending in the I&J districts. See e.g., Appropriations Act for Fiscal Year 2003, L.2002, c.38.

Further, as a result of the remand proceedings of Abbott V, another special aid category was established -- Additional Abbott v. Burke State aid ("supplemental aid"). See Appropriations Act for Fiscal Year 2000, L.1999, c.138. Supplemental aid was designed to meet this Court's directive in Abbott V that the Commissioner "provide for or secure the funding necessary to implement those programs for which Abbott schools or districts make a request and are able to demonstrate a need." 153 N.J. at 517.

These two aid categories -- parity and supplemental -- assisted New Jersey in reversing the funding gap.\* Total aid to Abbott districts between FY97 and FY03 has increased by almost \$1.5 billion. In FY98, parity aid was \$216 million and by FY03 it was \$512 million. Supplemental aid, first provided in FY00, had risen

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\* Nationally, New Jersey is a leader in closing the gap between high- and low-poverty districts. It ranks number one in making the most progress on closing the gap between 1997 and 2000 and is "far and away the state that targets [state revenues] most heavily to high-poverty districts." The Education Trust, The Funding Gap: Low-Income and Minority Students Receive Fewer Dollars at 4, 8 (August 2002) <<<http://www.edtrust.org/main/documents/investment.pdf>>> (last visited March 21, 2003).

to \$318 million in FY 03. Certification of Gordon MacInnes (hereinafter "MacInnes Certification"), ¶¶29-31.

Within Abbott districts, comparative costs per pupil vary widely although all the Abbott districts are above the I&J average.

In the 2001-2002 school year, as reported in the 2002 New Jersey School Report Card, the I&J average comparative cost per pupil was \$9,344. Perth Amboy's comparative cost per pupil was the lowest among the Abbott districts at \$9,973. Asbury Park was the highest Abbott district at \$15,315 per pupil. MacInnes Certification, ¶32.

Moreover, despite the high level of per pupil spending in the Abbott districts, local school tax rate have decreased since Abbott II. The evidentiary record before the Court in Abbott II reflected equalized school tax rates in the Abbott districts that were "well above average." Abbott II, supra, 119 N.J. at 355. The 2002 equalized school tax rates reflect average rates for Abbott districts that is well below the State average; of the 30 Abbott districts, 23 have school tax rates that are below the State average.\* MacInnes Certification, ¶36, Exhibit M.

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\* As Abbott district spending increased significantly between FY98 and FY03, those districts have not been required to increase their minimum tax levy. See MacInnes Certification, ¶¶36-37. For the first time since FY98, some Abbott districts will be required to increase their minimum tax levy for FY04 if they seek supplemental aid and their equalized combined school, county and local tax rate is not substantially above the state average equalized combined tax rate. The Commissioner will look at both the extent to which the district's equalized combined tax rate exceeds the state average and the affect an increase would have on the average property tax bill before directing an increase in the minimum tax levy. Proposed N.J.A.C. 6A:10-6.1(c), -6.1(e)(3)(iii). And see, Governor's State Budget FY 2003-2004 at D-120 <<<http://www.nj.gov/treasury/omb/publications/04budget/pdf/>



## II. Early Childhood Programs

The Commissioner, the ELC and this Court all agree that "substantive, quality early-childhood education does make a difference, and that poor urban youngsters do better academically when they have participated in enriched preschool programs from an early age." Abbott VI, 163 N.J. at 102. Beginning in the 1999-2000 school year, all Abbott districts were required to provide preschool programs for three- and four-year old children. Abbott V, supra, 153 N.J. at 508. Since that time, the DOE has focused its efforts on improving the quality of those preschool programs and enhancing student recruitment and enrollment. The DOE will continue its efforts in both of these areas.

### A. Program Quality

A high-quality early childhood educational program is critical to providing children in Abbott districts the fundamental learning skills needed for later educational success. Over the past year, the State has focused substantial efforts on improving program quality and increasing parity in program quality across and within districts, and between in-district programs and community providers. These efforts include:

#### 1. Preschool Program Implementation Guidelines

In order to assist Abbott districts in planning, developing and realizing high-quality preschool programs, an Early Childhood Education Work Group was established by the Abbott

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34.pdf>> (last visited March 21, 2003).

Implementation Coordination and Compliance Council to develop recommendations for the Commissioner. The Work Group consists of representatives from the Department, the Department of Human Services ("DHS"), school districts, community childcare providers, Head Start agencies, professional education organizations, advocacy groups, parents and other community organizations. Small task forces and committees of this Work Group were created to assist in developing the Preschool Program Implementation Guidelines ("Implementation Guidelines"). Certification of Ellen Frede (hereinafter "Frede Certification"), ¶8.

The Implementation Guidelines were derived from research where possible and from published expert opinion where no research was available. The Implementation Guidelines assist Abbott districts in planning, developing and realizing high-quality preschool programs. A working draft of the guidelines was shared with the districts in September 2002 and was finalized in January 2003. These guidelines will be continually updated and revised consistent with research-based practices. Frede Certification, ¶¶9-10.

The guidelines are not mandates. Rather, to accommodate local conditions, contexts and needs, the guidelines provide recommendations to districts on how to develop and implement a high-quality preschool program consistent with research-based best practices. Frede Certification, ¶10.

## 2. Revised Expectations and Frameworks

In Abbott VIII, this Court noted that substantive educational guidance for preschool programs in the form of Early Childhood Expectations had been published and that the development of Early Childhood Frameworks had significantly advanced. Abbott VIII, 170 N.J. at 548. Expectations, similar to the CCCS for K-12 students, outlines the goals of a preschool education. Id. at 547. Frameworks, on the other hand, provides strategies to meet those goals and to assess student progress. Id. at 548.

During the past year, the Commissioner established a task force to clarify and strengthen Expectations. Those revised Expectations were presented to the State Board of Education with the revised CCCS in September 2002. The Frameworks are now being revised to align them with the new Expectations. Frede Certification, ¶13.

### 3. Professional Development

Well-qualified teachers are a prerequisite to a high-quality preschool program. Presently, all preschool programs, whether district- or provider-operated, must hire teachers possessing a teacher of Preschool through Grade 3 endorsed certificate ("P-3 certificate").\* N.J.A.C. 6A:24-3.3(a)(5); N.J.A.C. 6A:24-3.3(c)(4). Teachers with experience working with young children and employed by community providers prior to September 2000 must obtain a P-3 certificate by September 2004. N.J.A.C.

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\* The only exception is for elementary teachers with relevant experience who were "grandfathered." See Abbott VIII, 170 N.J. at 555-556.

6A:24-3.3(c)(3). As a condition of continued certification, teachers must participate in continuing professional education. N.J.A.C. 6:11-13.1 et seq.

Moreover, beginning in the 1999-2000 school year, all Abbott districts have been required to employ master teachers "to 'coordinate and facilitate early childhood programs and assist in the provision of early childhood professional development.'" Abbott VI, 163 N.J. at 106. Master teachers are also "expected to assist the providers in the development of programming." Ibid.

Recent research demonstrates that master teachers have not been adequately trained to assist classroom teachers and the master teacher role was not fully understood at the local level. Frede Certification, ¶14. The Department, therefore, is providing a year-long course for master teachers designed to define their role more clearly and to ensure these teachers have the necessary skills to improve classroom quality. Ibid.

#### 4. Research-based Assessments

The Department is currently developing a research-based assessment of the needs of preschool children and the effectiveness of the Abbott preschool program. A consortium has been created to plan, implement and report on this needs assessment initiative. The consortium consists of participating institutions of higher education that will assist the Department and the Abbott districts in identifying the particularized needs of preschool children and to assess progress towards high quality preschool programs. Frede Certification, ¶15-17. The concept is to collect data on the needs

of children and to assist districts in tailoring their programs to those needs. That data collection system will be piloted in the 2003-2004 school year. Ibid.

5. Early Literacy for Preschool

The cornerstone of the State's educational improvement efforts is an intensive early literacy program that begins with a high-quality preschool and results in all children reading on grade level by grade 3. All Abbott preschool programs will be required to have a systematic and intensive approach to the acquisition of early literacy and language abilities. Moreover, the curriculum and the teacher-training activities in preschool programs must be closely connected with those in the K-3 grades. Districts will need to ensure that these programs occur in the natural preschool environment. See Proposed N.J.A.C. 6A:10-3.2(a)(3)(ii), - 3.2(a)(4).

**B. Enrollments and Recruitment**

In October 1999, enrollment in the Abbott preschool programs was at 17,331. Frede Certification, ¶22. Since 1999, there is been a steady increase in enrollments. In October 2000, just over 22,000 preschool students were enrolled. Abbott VIII, 170 N.J. at 544. A January 2003 student count showed a preschool enrollment of 36,465. Frede Certification, ¶22. Based on the approved Early Childhood Three-Year Implementation Plans, 41,745 children are expected to be enrolled in an Abbott program in September 2003. Frede Certification, ¶21.

In addition, the Department regards full inclusion of Head Start eligible preschool children as crucial for successful implementation of the preschool program. The Department is presently working to resolve conflicts between State and federal regulations that may jeopardize full inclusion of Head Start eligible children. Further, DOE, DHS and Head Start are developing a plan to work collaboratively with districts to ensure full inclusion of Head Start funded children. Frede Certification, ¶27.

Finally, the Implementation Guidelines include recommendations on successful outreach and recruitment strategies to increase preschool enrollment. Frede Certification, ¶21.\*

**C. Funding for Preschool Programs**

Preschool programs are funded based on an approved budget that is part of the Early Childhood Three-Year Operational Plan. The plans set forth the goals of the program, how those goals are linked to the children's needs and how the goals will be accomplished. Both the Implementation Guidelines and the revised Expectations informed the development of those plans. Direct technical assistance is provided to districts and community providers where needed to improve the quality of the preschool

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\* One of the critical issues in increasing preschool enrollment is capacity. EFCFA provides 100% funding for expanding preschool capacity in the Abbott districts and the Governor has taken steps to "focus, streamline and coordinate school construction efforts" through the issuance of Executive Order No. 24. See N.J.S.A. 18A:7G-3 (definition of "FTE"); N.J.S.A. 18A:7G-5(k); Executive Order No. 24 (McGreevey 2002).

program. Technical assistance will continue to be provided to all Abbott districts throughout the year. Frede Certification, ¶24.

As part of the review process for the Operational Plans, providers were required to submit zero-based budgets that reflected the actual cost of providing a preschool program meeting Abbott standards for Abbott children. The Department reviewed and approved those budgets, ensuring that the programs and services being funded were effective and not duplicated. Frede Certification, ¶25.

In FY03, a State aid category was established to fund the increased cost of preschool due to rising enrollments and improvements in quality -- Abbott Preschool Expansion Aid. See Appropriations Act for Fiscal Year 2003, L.2002, c.38. The FY03 Appropriations Act provided \$142 million in such aid. This aid category is continued in the Governor's FY 04 Budget Message. See Governor's State Budget FY 2003-2004 at D-117 <<<http://www.nj.gov/treasury/omb/publications/04budget/pdf/34.pdf>>> (last visited March 21, 2003). Any disagreements with districts regarding the approval of preschool plans and budgets are handled through an expedited administrative appeal process. See Abbott VIII, 170 N.J. at 540-541.

### **III. WHOLE SCHOOL REFORM IN THE ELEMENTARY SCHOOLS**

In response to the remand ordered by the Court in Abbott IV, former Commissioner Klagholz proposed that all elementary schools in the Abbott districts adopt a whole school reform model, specifically recommending the adoption of an enhanced version of

Success For All. Based on the record before it, this Court found that "whole school reform is a remedial measure that can create the opportunity to achieve a thorough and efficient education." Abbott V, 153 N.J. at 501. The Court further found that the evidence in support of SFA was "impressive" and that the approach was consistent with legislative and executive educational policy. Ibid. Accordingly, the Court directed implementation of the Commissioner's whole school reform proposal with SFA as the presumptive model.

SFA was developed by researchers at John Hopkins University in 1987 to serve students in high poverty schools who were at risk of failure. Abbott V, 153 N.J. at 554 (Appendix I). SFA "aims to make sure every child becomes an enthusiastic and skilled reader by the end of third grade." Id. at 555. At its core is an early literacy program using a 90-minute block for reading with small class sizes and one-on-one tutors to assist children not reading at grade level. Id. at 495. In 1992, SFA expanded to include Roots and Wings, incorporating a math, science and social studies component. Id. at 556-557 (Appendix I). The development and funding of Roots and Wings was provided by New American Schools.\* Facing the Challenge of Whole School Reform: New American Schools After a Decade, Berends, Bodilly and Kirby, RAND

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\* Other models identified by Dr. Odden as acceptable alternatives to SFA were also New American Schools designs. See Abbott V, 153 N.J. at 644-645 (Appendix II).



Publications (2002) <<<http://www.rand.org/publications/MR/MR1498/>>> (last visited March 21, 2003) ("RAND") at 26n4.

New American Schools ("NAS") was formed in 1991 to create and develop whole school designs to be adopted by schools throughout the country to improve student achievement. NAS proceeded from the premise that schools need a unifying design and that large scale educational improvement could be achieved through cutting edge model designs. RAND at 1. RAND was hired by NAS to assess and analyze the whole school reform design project between 1991 and 1999. RAND at 7. As RAND noted, NAS believed that "[s]chools would adopt the designs and, by adoption, improve student performance. It was that simple." RAND at 7. But RAND has, since the Abbott V ruling, determined that improving student achievement is not that easy:

Attempting to fundamentally change the behaviors and tasks of an existing organization is one of the most difficult reforms to accomplish. This is especially true when multiple levels of government are involved; when significantly different behaviors are called for; when the tasks and behaviors are those of a large and diverse group; and when these actors have varying incentives to change.

[RAND at 8 (internal citations omitted)].

Although initial indications may have been promising, when NAS moved into the scale-up phase of its project during 1995-

1998, RAND found that schools did not make the type of progress that had been anticipated.\*

The initial hypothesis, that by adopting a whole-school design a school could improve its performance, was largely unproven. We found specific positive examples of school implementation and improvement under certain conditions; however, negative examples were found under more common conditions. Our general findings showed difficulties in implementation and lack of strong improvements in school performance in a significant percent of the schools in our sample.

[RAND at Summary, xxxvi].

The post-Abbott V RAND study looked at the factors that affected successful implementation. First, "[l]ocal capacity and will are ultimately the two factors that determine successful implementation." RAND at 8. Undertaking too many reforms at once appeared to detract from successful implementation. RAND at 14. And, although positive implementation effects were evident in high-minority or high-poverty schools, the combination of both factors wiped out those positive effects. RAND at Summary, xxxiii. RAND concluded that their study "underscored the basic inequality among

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\* Only 50% of the schools made gains relative to math and 47% made gains relative to reading. RAND at Summary, xxxiv. Accordingly, a student was as likely to do as well in math whether or not the school had a whole school reform design and was less likely to do as well in reading if the school had a whole school reform design.

schools in terms of capacity to undertake reforms and point to the need for development of leadership and staff capacity as the precursor to reform." RAND at 93. In the final analysis, RAND found that "[t]he scale-up studies indicated that sites did not make as much progress in student achievement as NAS had hoped, and that progress did not appear to be closely related to implementation." RAND at 26.

The RAND study provided the basis for a shift in policy at NAS. While NAS now sees whole school reform designs as one approach, it is not necessarily the best approach for every school.\*

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\* This conclusion is generally consistent with the conclusions reached by others in the field:

Educational research has yet to produce "one best way" to do anything that can be applied as a uniform approach across all schools. ... The conditions of educational practice are such that contextual factors will always interact with each other and the innovation. The field can continue to search for the Holy Grail of "the best method" or we can learn from our collective experiences and begin to create a new approach to research knowledge.

[Phyllis Blumenfeld et al., Creating Useable Innovations in Systemic Reform: Scaling-Up Technology-Embedded

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Project-Based Science in Urban Schools, 35 Educational  
Psychologist 149 at 162].

[W]hile all schools in a district may need assistance to build their capacity for continuous improvement, they all do not necessarily need an externally developed design or model to reform or improve. Outside providers are not for everyone...

[RAND at Afterword by NAS, 161].

The published studies of New Jersey's efforts in whole school reform have not addressed whether whole school reform improves student achievement. These studies do, however, identify various implementation problems in New Jersey, including the short timeline for implementation, undertaking multiple reforms at once, the lack of a comprehensive data system to facilitate continuous improvement and flaws in the selection process. Marilyn Savarese Muirhead et al., Study of Whole School Reform Implementation in New Jersey Abbott Districts (April 2001)("Study")\*; Bari Anhalt Erlichson & Margaret Goertz, Implementing Whole School Reform in New Jersey Year Two (January 2001); Bari Anhalt Erlichson et al., Implementing Whole School Reform in New Jersey: Year One in the First Cohort Schools (October 1999). See also, Abbott VI, 163 N.J. at 131 (Stein, J., concurring) (Justice Stein noting that "the Erlichson Report stated that the model selection process was

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\* The Department commissioned the evaluation presented in this Study to inform the Department of the progress in implementation of whole school reform and the technical assistance needs of districts and schools. Study at iii.

characterized by 'limited information, a lack of significant teacher involvement, and a timeframe that precluded true deliberation.'").).

The data New Jersey has collected on educational improvement in schools that have adopted the enhanced SFA model appear consistent with the findings of the RAND study. No pattern of improvement emerges. Some schools show improvement relative to Abbott schools while others do not. MacInnes Certification, ¶14, Exhibit D. Overall, the results of the fourth grade assessment ("ESPA") for 2002 show that the SFA schools in the Abbott districts did "not make as much progress as ... hoped" and that the premise "that by adopting [SFA], a school could improve its performance" has not been proven.\* See RAND at Summary, xxxvi and 26.

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\* While some of the schools that selected SFA earlier appear to do better on the 2002 ESPA, there is no direct correlation evident. The school with the highest ESPA score, Sara M. Gilmore Elementary School in Union City, was part of the second cohort. See MacInnes Certification, Exhibit D. See also Certification of Fred Carrigg (hereinafter "Carrigg Certification"), ¶¶12-14. Cramer Elementary school, a school that began SFA prior to Abbott V, scored lower on the 2002 ESPA than most schools and lower than all of the schools who selected SFA in the 3rd cohort. See Abbott V, 153 N.J. at 605 (Appendix I)(Judge King noted that he had personally observed the SFA program at

#### IV. REQUIRED SECONDARY PROGRAMS AND POSITIONS

The former Commissioner's proposal to address the needs of secondary school students was different from his approach to the elementary schools. The available research on whole school reform designs at the secondary school level was not strong enough to support a recommendation that such models be adopted by secondary schools. Abbott V, 153 N.J. at 508-509. The Commissioner, therefore, recommended that supplemental programs and/or positions be adopted for secondary schools. These included a community services coordinator to identify student needs and arrange for community-based providers to furnish essential health and social services, a drop-out prevention specialist or counselor, alternative school or a comparable program for disruptive and/or disaffected students, security guards at a ratio of 1:225, a full-time media/technology specialist, a full-time technology coordinator, an accountability system and school-to-work and college-transition programs. Id. at 510, 513, 514-516.

The Court directed implementation of the Commissioner's proposal for a community services coordinator, but further left it to individual schools and districts to request and obtain, on the basis of demonstrated need, the resources to provide on-site social services. Id. at 513. The Court did not adopt the proposed ratio for security guards and instead found that individual Abbott

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Cramer School in East Camden and it was "an impressive operation.") and MacInnes Certification, Exhibit D.

schools had a right to request supplemental programs for security linked to a demonstrated need. Id. at 514. The Court further authorized the Commissioner to implement alternative schools or other comparable educational programs and technology programs at the request of individual schools or districts or as the Commissioner requires. Id. at 517. The Court also directed the Commissioner to authorize accountability programs as deemed necessary and to implement school-to-work and college-transition programs at the request of individual schools and districts or as the Commissioner directs. Ibid. The Court declined to order district-wide implementation of supplemental programs proposed by plaintiffs such as summer school, after school and nutrition but directed the Commissioner to provide for the implementation of such programs based on a demonstrated need by the Abbott school or district. Id. at 516-517.

By regulation, the Commissioner required districts to have a community services coordinator (health and social services coordinator), drop out-prevention specialist, alternative education or comparable program, school-to-work and school-to-college programs, security guards, a full-time media specialist, a full-time technology coordinator and an accountability system. N.J.A.C. 6A:24-1.4(f)(g)(h)(i)and(j); N.J.A.C. 6A:24-1.5; N.J.A.C. 6A:24-6.1(a). See also, 30 N.J.R. 3021 (repealed N.J.A.C. 6:19A-1.5(d),(e),(f),(g) and (h) and N.J.A.C. 6:19A-4.1(a)(4)). In addition, the regulations provided the means through which schools



and districts could receive approval for additional supplemental programs based on demonstrated need. N.J.A.C. 6A:24-5.1 et seq.

**V. NO CHILD LEFT BEHIND ACT**

On January 8, 2002, Congress enacted a landmark educational reform package designed to improve student achievement nationally and change the culture of America's schools. No Child Left Behind Act of 2001, Pub. L. 107-110. The guiding principles behind the NCLB Act are built on the

general consensus [that] has emerged that schools and districts work best when they have greater control and flexibility, when scientifically proven teaching methods are employed, and when schools are held accountable for results.

[U.S. Department of Education, Office of Elementary and Secondary Education, No Child Left Behind, A Desktop Reference, Washington, D.C. 2002 ("Desktop Reference") at 9; <<<http://www.ed.gov/offices/OESE/reference.html>>>(last visited March 21, 2003)].

The Act is focused on ensuring that all children, regardless of background, succeed in school. The Act increases accountability at the State and local level, provides greater flexibility in the expenditure of federal funds, affords parents of children from disadvantaged backgrounds more choice and emphasizes teaching methods that have been demonstrated to work. "[T]he clear intention of the NCLB Act is to impose rigorous accountability measures on a precise timeline designed both to bring about rapid improvement in school quality and to provide immediate options to

students attending identified schools." 67 Fed. Reg. 71710, 71749 (2002).

The Act requires continuous and substantial academic improvement for all students and accountability requirements designed to ensure that all students meet or exceed the state's proficiency level by 2013-2014. 34 C.F.R. 200.13(b)(3); 34 C.F.R. 200.15(a). States, districts and schools are all held accountable to achieve adequate yearly progress ("AYP") toward that goal. 34 C.F.R. 200.21 ("Adequate Yearly Progress of a State"); 34 C.F.R. 200.50 (SEA review of District progress); 34 C.F.R. 200.30 (District review of school progress). See also Certification of Gloria Hancock (hereinafter "Hancock Certification"), ¶28.

States are required to create annual assessments in reading and math for grades three through eight and an assessment test for grades 10 through 12. 34 C.F.R. 200.5. The performance of students in each school is tracked through the assessment data and the data are disaggregated by poverty level, race, ethnicities, disabilities and limited English proficiency. 34 C.F.R. 200.13(b)(7)(ii)(A-D). All sub-groups must make adequate yearly progress for the district to meet the Act's requirements. 34 C.F.R. 200.20. The assessments, as well as other academic indicators, will be used to determine AYP. See 34 C.F.R. 200.20; 34 C.F.R. 200.19.

The district is responsible for ensuring that schools within that district meet AYP as a whole and for each of the disaggregated groups. 34 C.F.R. 200.20. A district must identify any school that fails to make AYP two years as a school in need of

improvement. 34 C.F.R. 200.32 (a)(1). In the following school year, children in the school must be given the right to transfer their child to any other public school in the district. 34 C.F.R. 200.39(a)(1)(i); 34 C.F.R. 200.44(a)(2). The district must also ensure that the school receives technical assistance and that a school improvement plan is developed or revised that incorporate strategies based on scientifically-based research. 34 C.F.R. 200.39(a)(1)(ii) and (2).

After another year of the school failing to make AYP, a district must continue to make school choice and technical assistance available. 34 C.F.R. 200.39(b). In addition, the district must arrange for low-income children who remain in the school to receive supplemental educational services from a State-approved provider selected by the student's parents.\* 34 C.F.R. 200.32(c)(2)(ii); 34 C.F.R. 200.45(c). Supplemental services include tutoring and other enrichment services that are in addition to the programs and services provided during the school day. 34 C.F.R. 200.45(a).

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\* The agreement between the district and the provider must include a requirement that the district, in consultation with the parents and the provider, develop specific goals for the student, a description of how the student's progress will be measured and a timetable for improving achievement. 34 C.F.R. 200.46(b)(2)(i). The State is required to approve providers based on objective criteria including a demonstrated record of effectiveness in increasing academic performance. The State further must monitor the quality and effectiveness of the services offered by approved providers. 34 C.F.R. 200.47. See also Hancock Certification, ¶¶19-20.

If a school fails to make AYP for the fourth year, the district must identify the school as one in need of corrective action. Corrective action must include one of the following: (1) replace school staff relevant to the school's failure; (2) implement new curriculum with appropriate professional development; (3) significantly decrease management authority at the school level; (4) appoint one or more outside experts to advise the school on implementing a revised school improvement plan; (5) extend the school day or year; or (6) reorganize the school internally. 34 C.F.R. 200.42.

After a fifth year of failure to meet AYP, the district must identify the school as in need of restructuring and prepare a restructuring plan for the school to be implemented in the following year if the school again fails to make AYP. 34 C.F.R. 200.34. Restructuring is a major reorganization of the school's governance that makes fundamental reforms designed to enable the school to make AYP. 34 C.F.R. 200.43(a)(1-3). The restructuring must include one of the following: (1) reopening the school as a charter school; (2) replacing all or most of the school staff relevant to the school's failure, including the principal; (3) contracting with a private entity with a demonstrated record of effectiveness to operate the school; (4) turning operation of the school over to the State; or (5) some other major restructuring of the school's governance arrangement. 34 C.F.R. 200.43(b)(3)(i-v).

Annually, the State must review the progress of each district that receives funding under the Act to ensure the district

is making AYP and fulfilling its responsibilities under the Act. 34 C.F.R. 200.50(a). A state must identify a district as in need of improvement if the district that fails to make AYP after two years. 34 C.F.R. 200.50(d). A district in need of improvement must develop an improvement plan that incorporates strategies grounded in scientifically based research to strengthen instruction, identifies actions likely to improve student achievement and addresses professional development needs of the instructional staff. 34 C.F.R. 200.52(a)(3).

If, after two years of being identified in need of improvement, the district still fails to meet AYP, the State must take corrective action that includes one or more of the following steps: (1) defer programmatic funds or reduce administrative funds; (2) implement new curriculum with appropriate professional development; (3) replace district personnel relevant to the failure; (4) remove particular schools from the jurisdiction of the district and provide alternative arrangements for governance and supervision of these schools; (4) appoint a receiver or trustee to administer the district in place of the superintendent or school board; or (5) abolish or restructure the district. 34 C.F.R. 200.53(c).

A major emphasis in the Act is early literacy programs with the goal of having children reading on grade level by the end of grade 3 "through the implementation of instructional programs and materials, assessments, and professional development grounded in scientifically based reading research." Desktop Reference at

23. The Act creates a formula grant program -- Reading First -- that focuses on what works in reading instruction to improve reading in grades K-3. All Reading First programs must address the five essential components of reading: phonemic awareness, phonics, reading fluency, vocabulary development and reading comprehension. Pub. L. 107-110, §1201 et seq.

Districts in New Jersey that receive Reading First funds must provide a reading program that includes those five essential components as well as a 90 minute reading block using flexible grouping strategies including whole and small group instruction, a scientifically-based reading program, professional development activities, appropriate services and strategies to address the needs of limited English proficient students and students with disabilities and appropriate supplemental services for students reading below grade level. Several comprehensive reading programs have been identified by the Department that districts can use for the Reading First program but districts may use any reading program that meets the criteria.\* Carrigg Certification, ¶¶20-21.

In addition, the NCLB Act establishes more stringent requirements for teacher and paraprofessional qualifications. See Pub. L. 107-110, Title II. See also Hancock Certification, ¶¶22-27. The Act further amends various federal educational programs to ensure consistency with the fundamental principles of NCLB --

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\* The SFA program that was presented to this Court in the remand proceedings did not meet NCLB standards for Reading First. SFA had to adapt its program to meet those requirements. <<<http://www.successforall.net>>> (last visited March 21, 2003).

increasing accountability, providing more flexibility and local control, enhancing parental choice and focusing on what works. See Pub. L. 107-110.

**VI. MODIFICATIONS TO ABBOTT V FOR FY 04 AND BEYOND**

In Abbott IX, this Court granted the Commissioner temporary relief from some of the Abbott V mandates providing the DOE time to review Abbott implementation to ensure the goals of Abbott are being achieved. Having spent this past year evaluating the effectiveness of the remedial measures adopted by this Court in Abbott V and how best to ensure that students in Abbott districts master the CCCS, the Commissioner now seeks to modify some of those specific measures so that schools and districts can make the improvements to student achievement anticipated in Abbott V and now mandated by the NCLB Act.\*\*

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\*\* The State is not seeking relief from the Abbott V remedies of preschool for three- and four-year-old children or facilities improvements. In fact, the State is working toward improving the quality and capacity in both of those areas. Moreover, the State is not seeking relief from the interim remedy imposed in Abbott V for parity funding. As this Court noted in Abbott V, "adequate funding remains critical to the achievement of a thorough and efficient education." 153 N.J. 518. Parity funding is presently part of the necessary funding stream for these districts.

Having concluded that whole school reform is not the best, and certainly not the only, means of achieving a thorough and efficient education, new approaches are in order. Given the recent research in the area of whole school reform, and the ongoing debate over the effectiveness of SFA\*, the Commissioner has proposed regulations to provide greater control and more flexibility to schools and districts, consistent with the general consensus identified by the federal government. See generally, MacInnes Certification.

In addition, the Commissioner has concluded that the districts' role in improving educational achievement was inappropriately marginalized by the implementation of the proposals adopted in Abbott V. Districts have a fundamental role to play in areas such as developing a coherent curriculum aligned with the State standards, in hiring and retaining highly qualified staff and in the budget process. See MacInnes Certification, ¶21. Further, district support for improvements at the school level is critical to the success of those efforts. See RAND at 90. Accordingly, the

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\* An interesting example of that ongoing debate is reflected in the published dialog between Dr. Stanley Pogrow and Dr. Robert Slavin published in Phi Delta Kappan. See, e.g., Stanley Pogrow, "Success for All Is A Failure," Phi Delta Kappan, February 2002 at 463; Robert E. Slavin, "Mounting Evidence Supports the Achievement Effects of Success for All," Phi Delta Kappan, February 2002 at 469.



Commissioner intends to redefine and strengthen the role of the central office while building central office capacity to take on its important role in improving schools.

The specific directives in Abbott V that appear inconsistent with the Commissioner's determination as how to best improve student achievement in the Abbott districts are as follows:

(1) Directing that all elementary schools implement a whole school reform model, presumptively SFA, containing all of the essential elements identified by the Commissioner. Abbott V, 153 N.J. at 501.

Under the Commissioner's proposed regulations, schools may, but are not required, to implement whole school reform models. In conjunction with the district's central office, each school will undertake a rigorous review of its whole school reform model as part of a comprehensive school-by-school needs assessment. A determination will be made locally whether to keep the current model, select another model, or choose other programs, practices and instructional strategies that have been proven effective. Proposed N.J.A.C. 6A:10-5.2. The proposed regulations do require that all elementary schools implement an effective, intensive early literacy program. Proposed N.J.A.C. 6A:10-5.1. Early literacy was at the core of the whole school reform proposal adopted by this Court in Abbott V. Abbott V, supra, 153 N.J. at 639 (Appendix II). The proposed regulations also require a media/technology specialist to staff school libraries. Proposed N.J.A.C. 6A:10-4.4(c). The other positions enhancing SFA that were identified by the former

Commissioner in Abbott V, however, will not be mandated.\* Rather, comprehensive needs assessments and three-year-operational plans will determine how best to address the identified problems in schools and districts so that all students are able to master the CCCS. MacInnes Certification, ¶23.

(2) Directing that every secondary school have a community services coordinator. Abbott V, 153 N.J. at 512.

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\* These would include the technology coordinator and the composition of the family support team. See Abbott V, 153 N.J. at 497.

The Commissioner proposes, instead of simply creating a position with a particular title, that districts and schools evaluate the health and social service needs of their children as part of a comprehensive needs assessment and select the approach that effectively and efficiently meets the needs of their student population and location. Proposed N.J.A.C. 6A:10-4.1. Although regulations required other specific positions at the secondary level, the Court did not explicitly direct implementation of those positions. Rather, the Court directed programs to address technology, alternative education, security, school-to-work and college-transition as required by the Commissioner or requested by the individual school or district. Abbott V, 153 N.J. at 514, 517.\*\* Under the Commissioner's proposed regulations, districts will continue to be responsible for addressing these areas as part of the needs assessment and three-year operational plans. Proposed N.J.A.C. 6A:10-4.2 (drop-out prevention); 6A:10-4.3 (technology); 6A:10-4.4(d) (security); 6A:10-4.4(e)(8) (school-to-work and college-transition); 6A:10-4.4(g)(alternative education programs).

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\*\* The Court further directed the Commissioner "to authorize accountability programs as may be deemed necessary or appropriate." Abbott V, 153 N.J. at 517. Former Commissioner Klagholz had proposed a system of accountability including establishment of baseline data and identification of progress benchmarks and standards linked to the CCCS. He also recommended a system of rewards and sanctions for students, teachers and schools. Id. at 516. The Statewide student-level data base that is being established combined with the requirements of the NCLB Act should meet the goals of the accountability system that the former Commissioner had proposed in Abbott V and a separate "accountability program" is not being proposed. See MacInnes Certification, ¶26.

Due to the State's current fiscal situation as well as the time required for completion of the needs assessment and three-year-operational plans, the 2003-2004 school year will be a maintenance year for the K-12 program. The Commissioner will ensure that all effective and efficient programs, positions and services available in the 2002-2003 school year will be continued in 2003-2004. If a school elects not to continue its whole school reform model in 2003-2004, the same funding will be available to support the alternative programs and instructional strategies. Further expansion in preschool programs, both as to quality and enrollment, is anticipated and will be funded through Preschool Expansion Aid. MacInnes Certification, ¶9.

The Commissioner's proposed regulations provide that, beginning in the 2004-2005 school year, school and district programs will be governed by approved three-year operational plans which must include preschool for three- and four- year-old children and an effective early literacy program. Moreover, the plans will need to address problems identified that are specific to that school and/or district and the proposed programmatic solutions. MacInnes Certification, ¶23.

The Commissioner is confident that a more flexible approach towards school reform is appropriate, indeed essential, in view of the State's experience and post-Abbott V pedagogical research. The Commissioner seeks, through this application, the Court's reaffirmation of his authority and discretion to allow these crucial changes to go forward.

## ARGUMENT

TO MEET HIS CONSTITUTIONAL OBLIGATIONS, THE COMMISSIONER MUST BE PROVIDED WITH THE DISCRETION TO IMPLEMENT THE MOST SOUND, EDUCATIONALLY EFFECTIVE APPROACHES TO MEETING THE NEEDS OF THE STUDENTS IN THE ABBOTT DISTRICTS THEREBY ENSURING THAT THE DISTRICTS HAVE THE ABILITY TO MEET THE GOALS OF ABBOTT V AND MAKE ADEQUATE YEARLY PROGRESS AS REQUIRED BY FEDERAL LAW

The Commissioner of Education has a "great and ongoing responsibility" to ensure that the constitutional mandate of a thorough and efficient education is satisfied. Robinson V, 69 N.J. at 461. See also Jenkins, supra, 58 N.J. at 504 (1971) ("The Commissioner has been appropriately charged with high responsibilities in the educational field and if he is faithfully to discharge them in furtherance of the State's enlightened policies he must have corresponding powers."); Board of Ed. of East Brunswick Tp. v. Township Council of East Brunswick Tp., 48 N.J. 94, 103-104 (1966) (the Commissioner has "far reaching powers and duties" to ensure the "constitutional mandate is being discharged."). This Court has often affirmed the vast powers and discretion of the Commissioner when acting to further this constitutional mandate and has deferred to the means selected by the Commissioner to fulfill his responsibilities in this area. See Matter of Board of Ed. of City of Trenton, 86 N.J. 327 (1981) (Commissioner had authority to assign monitor general to supervise activities in the Trenton school to ensure the constitutional mandate of a thorough and efficient education is effectuated);

Application of Board of Ed. of Upper Freehold Regional School Dist., 86 N.J. 265 (1981) (After voter rejection, Commissioner may authorize issuance of bonds for capital project essential to delivery of a thorough and efficient education.); Board of Ed. of City of Elizabeth v. City Council of City of Elizabeth, 55 N.J. 501 (1970) (absence of statutory authority does not preclude Commissioner from rejecting annual school budget and directing an increase over amount fixed by governing body if necessary to provide a thorough and efficient education); Board of Ed. of East Brunswick Tp., supra, 48 N.J. 94 (reductions in the school budget made by governing body after voter rejection can be restored by the Commissioner to ensure mandate for a thorough and efficient education is being met). Moreover, when the Commissioner has viewed his grant of authority too narrowly, the Court not only empowered him to act, but found that he must act if necessary to effectuate the constitutional mandate. See, e.g., Jenkins, supra, 58 N.J. at 493, 508 (Commissioner erred in failing to entertain proceedings to prevent withdrawal of a send/receive relationship and consider merging the two districts; despite his "flat disavowal of power," the Court held that the Commissioner had the "full power" to require a merger "if he finds such course ultimately necessary for fulfillment of the State's educational and desegregation policies in the public schools.")

Recognition of the vast powers and responsibilities of the Commissioner and deference to his educational expertise has been evident in the Abbott cases as well. The Court continually

looked to the Commissioner's expertise to identify the substantive educational elements that would achieve the goals of Abbott -- closing the achievement gap between students in poor urban districts and their wealthy suburban peers. See, e.g., Abbott IV, supra, 149 N.J. at 199 (In ordering the Commissioner to undertake a comprehensive study of needs of students in the Abbott districts and identify the programs required to address those needs, Court noted that the "determination of appropriate remedial relief in the critical area of the special needs of at-risk children and the programs necessary to meet those needs is both fact-sensitive and complex; it is a problem squarely within the special expertise of educators."); Abbott III, supra, 136 N.J. at 453 (Court implied no view as to what supplemental programs should be required but left that question to those responsible for assuring the special needs of these districts are met, i.e., the Department and the Legislature). As this Court noted in Abbott II, the children in poor urban districts are not only entitled to greater equality of funding but to the Commissioner's "best thinking" as to how the substantive education in those districts can be improved. Abbott II, supra, 119 N.J. at 380.

Moreover, this Court has imposed upon the Commissioner the duty to ensure that the increased funding resulting from the Abbott decisions would be used "effectively and efficiently." Abbott IV, supra, 149 N.J. at 193-194 (The Court held the Commissioner had an "essential and affirmative role to assure all education funding is spent effectively and efficiently" and is put

to "optimal educational use."). See also Abbott III, 136 N.J. at 452 (The State is obligated to ensure that additional funding "enhances the likelihood that the school children in those districts attain the constitutionally-prescribed education to which they are entitled."). In fact, as noted by the dissent in Abbott IV, the Court recognized that the Commissioner's ability to determine "the best use of educational funding far exceeds its own." Abbott IV, supra, 149 N.J. at 214 (Garibaldi, J. dissenting).

The funding gap between wealthy suburban districts and poor urban districts, which was the factual predicate of the Abbott litigation, has not only been eliminated -- it has been reversed. School-funding cases in New Jersey have evolved "from [a] focus on parity in per pupil expenditures to [a] focus on substantive educational opportunity." Abbott IV, supra, 149 N.J. at 190. Substantive educational opportunity, however, is clearly an area within the specialized expertise of the Commissioner and his determinations in that regard are entitled to substantial deference by the Court. See, e.g., Campbell v. New Jersey Racing Com'n, 169 N.J. 579, 588 (2001); Merin v. Maqlaki, 126 N.J. 430, 436-37 (1992); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965).

The Court's decision in Abbott V reflects those very principles. The Court provided substantial deference to former Commissioner Klagholz's proposal and, in large part, adopted his recommendations as the Court's remedial order. In doing so, however, the Court converted some elements of what was the former



Commissioner's "best thinking" into a Court mandate that prevents the current Commissioner from implementing changes based on the best and most current thinking on how to improve student achievement. Abbott V, supra, 153 N.J. at 501, 512 (Court directed implementation of the Commissioner's proposal for whole school reform in every elementary school and for a community services coordinator in every middle and high school). The Commissioner, therefore, is asking this Court to resolve the tension that exists between the obligations imposed on him to take actions necessary to effectively and efficiently improve educational achievement in the Abbott districts and explicit language in Abbott V that seems to limit his ability to do so.

The Commissioner agrees with the general consensus that greater control and more flexibility at the local level is important. See Desktop Reference at 9.

[A]ll parties must own and be committed to the innovation. This notion goes further than simple endorsement by the central office. It involves creating a common vision and plans to achieve it.

[Phyllis Blumenfeld et al., Creating Useable Innovations in Systemic Reform: Scaling-Up Technology-Embedded Project-Based Science in Urban Schools, 35 Educational Psychologist at 159].

The success of this type of common vision and local commitment is reflected in the improvements that occurred in Union City, improvements that began before Abbott V and continued in spite of the mandates of Abbott V. See Carrigg Certification, ¶¶11, 14. It

is that type of local investment that is the key to success and that the Commissioner would like replicated in less successful districts.

With a comprehensive needs assessment and a student level data base that can provide for continuous review, reassessment and refinement, schools and districts should have the tools to address their students' needs. The Commissioner recognizes, however, that not all districts have the present capacity to be successful in such an endeavor. The Commissioner, therefore, has initiated leadership projects designed to build capacity at the district office and provide the tools for districts to build capacity at the school level. MacInnes Certification, ¶¶21-22. To succeed, districts and schools need to take responsibility for and ownership of their improvement plans. A state-initiated, state-dictated plan is destined to fail.

The Commissioner's approach is consistent with much of the language in Abbott V that recognizes that districts and schools need to be treated differently. See Abbott V, supra, 153 N.J. at 511-512, 513 (Court noted differing needs of health and social services and security based on different factors specific to individual schools). To the extent that the Court directives of Abbott V preclude implementation of the Commissioner's proposal and require every district and school to be treated alike, the Commissioner is seeking relief from those directives.

In 1997, the State "recommended whole school reform in every school based upon strong empirical support for its likely

effectiveness in improving student achievement." Abbott V, 153 N.J. at 552. More recent research suggests that whole school reform models may not result in improved student achievement. Yet, the literal language of Abbott V would suggest that the Commissioner is precluded from providing those elementary schools and the districts in which they are located with needed flexibility to actually improve student achievement and meet the accountability requirements of the NCLB Act.

Further, the Commissioner has determined that the hiring of persons with specific job titles to deal with a variety of student needs is not the best means of addressing those needs. Yet, in implementing the Abbott V decision, all schools, regardless of actual need, were required to have certain positions specified by the former Commissioner in his proposal adopted by this Court in Abbott V. A comprehensive needs assessment of every school and district, as was contemplated by this Court and is required by the Commissioner's proposed regulations, will better ensure that the instructional improvement Abbott V was designed to achieve can become a reality. See Proposed N.J.A.C. 6A:10-4.1 et seq. (requiring comprehensive needs assessment by Abbott schools and districts); Abbott V, supra, 153 N.J. at 511 (noting that the Commissioner did not conduct a particularized need study but relied on national research unrelated to Abbott schools and that plaintiffs' proposals had the same deficiency).

The Commissioner no longer has confidence that the "one-size-fits all" requirements adopted pursuant to Abbott V will

"enhance the likelihood that the school children in those districts [will] attain the constitutionally-prescribed quality of education to which they are entitled." Abbott III, 136 N.J. at 452. As an alternative, the Commissioner is proposing that in schools and districts where the Abbott V programs, services and positions presently in place are demonstrated effective and efficient, they remain. In those districts and schools where they are not, however, the schools and districts will work with the DOE to identify more effective approaches that meet the needs of that student population and location and that enable all students to master the CCCS.

In either instance, the districts and schools will be responsible for identifying the problems and the solutions using individual student data to find the means for continuous improvement. The DOE will be a partner in these efforts providing the type of assistance contemplated by this Court in Abbott as well as by the NCLB Act. See Proposed N.J.A.C. 6A:10-1.3 (State responsibilities). See also Abbott VI, 163 N.J. at 120 ("Cooperation between the districts and the DOE is essential to this effort if it is to succeed"); 67 Fed. Reg. at 71744 ("The ambitious goals for student achievement contained within the NCLB Act will best be achieved when States, districts, and schools work together.")

Given the new federal oversight role in education, districts and schools are under more pressure than ever to succeed. It is the Commissioner's constitutional and statutory responsibility to

give them the means to do so. Through the proposed Commissioner's regulations, districts, schools and the children for which they are responsible will be better equipped to face the challenges ahead. This Court, therefore, should reaffirm the Commissioner's responsibility and discretion to implement these changes.

**CONCLUSION**

For the reasons set forth herein, the relief requested in the State's motion should be granted.

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Dated: March , 2003