

# BRINGING HOME THE *BACON*: A CASE FOR APPLYING THE NEW JERSEY URBAN SCHOOL FUNDING REMEDY FROM ABBOTT V. BURKE TO POOR RURAL SCHOOL DISTRICTS

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*In 1997, seventeen poor rural school districts in New Jersey filed a lawsuit seeking a declaration that their districts were in violation of its students' state constitutional right to a "thorough and efficient" education, and a financial remedy akin to the one granted to poor urban districts in Abbott v. Burke. Fifteen years and four decisions later, these districts are still inadequately funded and providing a constitutionally inadequate education to the students therein. This Article analyzes the state of education funding law in New Jersey, under the governing Abbott v. Burke decisions, and argues that there is no significant legal distinction barring the poor rural districts from access to the same, or similar, remedial measures.*

I. INTRODUCTION.....	171
II. EDUCATION FINANCE REFORM IN NEW JERSEY: A JUDICIAL HISTORY.....	172
A. 1970-1975: THE BEGINNING OF EDUCATION EQUITY LITIGATION IN NEW JERSEY.....	172
1. SERRANO, RODRIGUEZ: THE BEGINNING AND END OF A FEDERAL RIGHT TO EDUCATION.....	172
2. ROBINSON: THE "THOROUGH AND EFFICIENT" CLAUSE AND THE ESTABLISHMENT OF A STATE RIGHT TO EDUCATION.....	174
3. THE END OF THE ROBINSON LITIGATION: THE PUBLIC EDUCATION ACT OF 1975.....	175
B. 1976-1990: ABBOTT V. BURKE AND THE URBAN DILEMMA.....	177

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1. THE POST-ROBINSON PLIGHT OF URBAN DISTRICTS.....	177
2. ABBOTT II: THE COURT DECLARES EDUCATION FUNDING UNCONSTITUTIONAL.....	178
3. ABBOTT II: THE URBAN EVIDENCE AND THE LIMITED REMEDY.....	179
C. THE 1990S: THE COURT ASSERTS CONTROL IN ABBOTT.....	183
1. ABBOTT IV: ENOUGH IS ENOUGH.....	183
2. ABBOTT V: THE COURT ORDERS UNPRECEDENTED REMEDIAL MEASURES.....	186
III. VIOLATIONS OF THE CONSTITUTIONAL RIGHT TO A “THOROUGH AND EFFICIENT” EDUCATION IN NEW JERSEY’S NON-URBAN SCHOOL DISTRICTS.....	186
A. BACON V. NEW JERSEY DEPARTMENT OF EDUCATION: THE RURAL DISTRICTS PETITION FOR INCLUSION IN THE COMPREHENSIVE ABBOTT REMEDY.....	187
1. THE BEGINNING OF THE BACON LITIGATION: MINOR VICTORIES, MAJOR SETBACKS.....	187
2. THE BREAKTHROUGH: BACON III AND BACON IV.....	189
3. THE PURGATORY: STATE IN VIOLATION OF CONSTITUTION IN REGARD TO BACON DISTRICTS, BUT NO REMEDY.....	190
4. THE AFTERMATH AND CURRENT STATUS: FURTHER DELAYS AND DEPRIVAL.....	192
B. THE URBAN/RURAL DISTINCTION OF ABBOTT V. BURKE AND BACON V. NJ DOE.....	193
1. WHY DOES ABBOTT ONLY APPLY TO URBAN DISTRICTS?.....	193
2. SIMILARITIES OF THE ABBOTT AND BACON DISTRICTS.....	194
IV. A PROPOSAL: DISREGARD THE URBAN CRITERIA AND GRANT THE ABBOTT REMEDY .....	195
A. THE CONSTITUTIONAL RIGHT MUST TAKE PRECEDENT OVER URBAN CLASSIFICATION.....	195
B. IMPLEMENT THE ABBOTT REMEDY BECAUSE THE REMEDY CAN WORK.....	197
V. CONCLUSION.....	199

## I. INTRODUCTION

Must the state intervene to protect, to the absolute fullest, the paramount constitutional right to a “thorough and efficient” education belonging to *all* New Jersey students attending constitutionally deficient schools? Should an impoverished town that is incapable of funding a constitutionally adequate education for its students be excluded from constitutionally mandated remedial funding based on its urbanization and demographics? These are the questions raised by *Bacon v. New Jersey Department of Education*.<sup>1</sup> *Bacon* challenges the New Jersey Supreme Court to extend the same constitutional safeguard of the right to a “thorough and efficient” education—which is the baseline level of education guaranteed by the New Jersey State Constitution, also described as the level needed to prepare children to function in modern society—and to provide the funding remedies that poor urban districts receive (hereinafter the *Abbott* districts) to poor rural school districts (hereinafter the *Bacon* districts) as well.

In 1973, the New Jersey Supreme Court ruled in *Robinson v. Cahill*<sup>2</sup> that the education clause in the New Jersey state constitution provided a substantive right for students, ages five to eighteen, to receive a mandatory minimum level of education. If a school was incapable of providing an education that was constitutionally satisfactory, then the school district, and therefore the state of New Jersey, was guilty of a constitutional violation. Over the next twenty-eight years, in two separate lines of litigation—*Robinson*, which established the constitutional right to education in New Jersey, and *Abbott v. Burke* in 1990, which mandated explicit and direct funding increases to thirty urban school districts (hereinafter the *Abbott* districts)—the New Jersey Supreme Court repeatedly found that urban school districts were severely underfunded and the resulting educational output was a definitive violation of the constitutional right to a “thorough and efficient” education.<sup>3</sup> The *Abbott* litigation has generated countless law review articles, books, colloquia, and informal debate on a wide range of issues, from school funding to the effectiveness of the judiciary in crafting a substantial remedy. Most importantly, a full twenty-one decisions have been handed down in the *Abbott* litigation, with the most recent New Jersey Supreme Court ruling issued in May of 2011. The remedy crafted by the state supreme court has been meticulously refined over the twenty-one decisions, and whenever the *Abbott* districts believe their remedy is threatened by the state legislature’s actions, they seek redress from the judiciary.

Meanwhile, in 1997, a group of rural districts filed suit, to little fanfare, seeking an extension of the school funding remedy that the New Jersey Supreme Court had granted the poor urban districts in the *Abbott* cases. The litigation, *Bacon v. New Jersey Department of Education*, languished in New Jersey’s administrative law courts for eleven years. The common thread throughout the four *Bacon* rulings was delay. Ultimately, the judiciary found constitutional violations in all of the *Bacon* districts—similar in kind, though not in magnitude—to the violation previously found in the *Abbott* districts. Fourteen years after the filing of the first complaint and three years after the latest court decision in their favor, the *Bacon* districts have yet to receive the funding remedy their students so desperately need and to which they are constitutionally entitled.

This Note argues that the rural school districts in New Jersey, known as the “*Bacon* districts,” must receive a monetary remedy to redress the constitutional violation of the right to a “thorough and efficient” education, a right which students in these districts are being denied. Part II will summarize

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<sup>1</sup> *Bacon v. N.J. Dep’t of Educ.* (*Bacon I*), OAL DKT NOS. EDU 2637-00–2656-00, 2002 WL 31232958 (N.J. Adm. Sept. 23, 2002).

<sup>2</sup> *Robinson v. Cahill* (*Robinson I*), 303 A.2d 273 (N.J. 1973).

<sup>3</sup> *Abbott v. Burke* (*Abbott II*), 575 A.2d 359 (N.J. 1990).

and analyze the lengthy judicial history of education finance litigation in the state of New Jersey. Part III will introduce the *Bacon* litigation and, through an analysis of the decisions and an invocation of the judicial standards set forth in *Abbott*, demonstrate how the level of education provided in the *Bacon* districts was and still is constitutionally inadequate, and thus requires a remedy. Part IV will discuss the reasons why the *Abbott* remedy should be extended to the *Bacon* districts.

## II. EDUCATION FINANCE REFORM IN NEW JERSEY: A JUDICIAL HISTORY<sup>4</sup>

*Part II provides an overview of the history of education finance litigation in New Jersey, starting from 1970 and ending at 1998. The most important judicial decisions in this area prior to the start of the Bacon litigation are examined for their legal significance, in chronological order. The foundation of knowledge necessary to examine the Bacon litigation will be erected here, and by the end of the section, the reader will have a working understanding of the legal reasoning behind the holdings in the landmark Robinson and Abbott cases. The reader will also gain an appreciation of the legal struggle involved in earning and safeguarding a New Jersey student's constitutional right to a "thorough and efficient" education.*

### A. 1970-1975: The Beginning of Education Equity Litigation in New Jersey

#### 1. *Serrano* and *Rodriguez*: The Beginning and End of a Federal Right to Education

The story of New Jersey educational equity litigation has roots in the early 1970s in the courthouses of Los Angeles County. The landmark decision from the California Supreme Court in *Serrano v. Priest*<sup>5</sup> resulted in a deluge of attacks on state funding statutes for public schools throughout the country.<sup>6</sup> The plaintiffs in *Serrano* were students in California public schools who claimed that the California regime for financing public schools violated the Equal Protection Clause of the Fourteenth Amendment. California's plan for financing public schools, which "relie[d] heavily on local property taxes," resulted in "substantial disparities among individual school districts in the amount of revenue available per pupil."<sup>7</sup> The plaintiffs alleged that the immensely disparate levels of funding<sup>8</sup> invariably contributed to the disparate levels of education offered to students in California, resulting in a violation of the Equal Protection Clause.

In finding for the plaintiffs on a motion to dismiss and remanding the case for trial, the California Supreme Court rested its opinion largely upon its decision to apply strict scrutiny as the

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<sup>4</sup> For an excellent historical narrative of the education litigation in New Jersey, including biographical descriptions of the key political and legal players, see DEBORAH YAFFE, OTHER PEOPLE'S CHILDREN: THE BATTLE FOR JUSTICE AND EQUALITY IN NEW JERSEY'S SCHOOLS (2008).

<sup>5</sup> *Serrano v. Priest*, 5 Cal.3d 584 (Cal. 1971).

<sup>6</sup> Challenges to state funding regimes were brought in over thirty states, including New Jersey. In this sweeping reform period of the early 1970s, prior to the *Rodriguez* case, *see infra* pp. 6–8, only two states where challenges took place, New York and Indiana retained their school finance statutes unaltered. Paul L. Tractenberg, *New Jersey: Robinson v. Cahill: The "Thorough and Efficient" Clause*, 38 LAW & CONTEMP. PROBS. 312, 312–13 (1974).

<sup>7</sup> *Serrano*, 5 Cal.3d at 590.

<sup>8</sup> By relying on local property taxes, individual school districts were dependent on the assessed valuation of the real property within the district's borders. Beverly Hills, with an assessed tax base value of \$50,855 per student, spent \$1,231.72 per student in 1970 on education. By comparison, a school district in Los Angeles County possessed an assessed value of \$3,706 per student, and spent \$577.49 per student in that same academic year. *Id.* at 594.

appropriate judicial standard of review. First, the court interpreted United States Supreme Court jurisprudence as considering wealth to be a suspect classification.<sup>9</sup> Second, the court ruled that education was a fundamental interest.<sup>10</sup> With strict scrutiny therefore established, the court had no difficulty in finding that the government lacked any compelling interest in establishing a system that heavily relies upon local property taxes for school funding. Challenges to education funding regimes were then filed in many states, utilizing the legal reasoning from the California Supreme Court in *Serrano* and relying upon the Equal Protection Clause as their primary legal strategy.<sup>11</sup>

Eventually, one of the education reform cases filed in the wake of *Serrano* reached the United States Supreme Court in the case of *San Antonio Independent School District v. Rodriguez*.<sup>12</sup> The case originated in San Antonio, Texas, and challenged a school funding system and an overall educational dilemma very similar to the one found in *Serrano*: an overreliance on local property taxes which created a disparity in wealth among districts. In *Rodriguez*, however, the Court decided that it was improper to invoke the strict scrutiny test to review the challenge to Texas's school funding laws. Rejecting the theories by which the *Serrano* court established strict scrutiny as the requisite standard, the Court ruled that the appellants in *Rodriguez* failed to establish education as a fundamental right under the federal Constitution<sup>13</sup> and also that the appellants did not qualify as a suspect class based on wealth considerations.<sup>14</sup>

From there, the Court applied the rational basis test, a significantly weaker standard that merely requires the government to prove a legitimate state interest in the chosen legislation. The court found that local autonomy over school funding and curriculum by way of property taxation was a legitimate state interest, citing the tradition and importance of local control over education.<sup>15</sup> Reliance upon

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<sup>9</sup> *Id.* at 597 (“[T]he United States Supreme Court has demonstrated a marked antipathy toward legislative classifications which discriminate on the basis of certain ‘suspect’ personal characteristics. One factor which has repeatedly come under the close scrutiny of the high court is wealth. ‘Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.’” (quoting *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966) (invalidating the Virginia poll tax, finding that payment of a fee to determine a person’s qualification to vote to be a “capricious or irrelevant factor.”))

<sup>10</sup> “[T]he distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a ‘fundamental interest.’” *Id.* at 608–09.

<sup>11</sup> The *Serrano* decision was both groundbreaking and significant. *Time* magazine described it as “[p]otentially . . . the most far-reaching court ruling on schooling since *Brown v. Board of Education* in 1954.” Tractenberg, *supra* note 6, at 312 n.2 (citing *Education: Dividing the Cake*, *TIME*, Sept. 13, 1971, at 47).

<sup>12</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>13</sup> “Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.” *Id.* at 35.

<sup>14</sup> “The Texas system does not disadvantage any suspect class. It has not been shown to discriminate against any definable class of ‘poor’ people or to occasion discriminations depending on the relative wealth of the families in any district.” *Id.* at 1.

<sup>15</sup> In addressing the importance of local autonomy over school spending, the Court referenced Justice Brandeis’s observation that “one of the peculiar strengths of our form of government [is] each State’s freedom to ‘serve as a laboratory; and try novel social and economic experiments.’” *Rodriguez*, 411 U.S. at 50 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting)). The majority in *Rodriguez* welcomed state-by-state differences in education finance laws, in particular: “[n]o area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.” *Id.* at 50. This attitude has resulted in the capricious nature of education funding.

property taxes as a means of financing public education thus survived judicial scrutiny under the rational basis standard. *Rodriguez* shut down one means of attacking state education funding laws.<sup>16</sup> In addition, *Rodriguez* foreclosed any future litigation regarding the violation of *federal* constitutional rights concerning educational equity.<sup>17</sup>

## 2. *Robinson*: The “Thorough and Efficient” Clause and the Establishment of a State Right to Education

Shortly after *Rodriguez*, the New Jersey Supreme Court established a new means of attacking education funding on the state level. In launching an attack on the same disparate reality found in California and Texas, plaintiffs in the 1973 New Jersey case of *Robinson v. Cahill*<sup>18</sup> relied upon the same legal arguments that had been successful in *Serrano*. Unfortunately for the plaintiffs, two weeks before the New Jersey Supreme Court handed down the decision in *Robinson*, the United States Supreme Court issued its ruling in *Rodriguez*, preempting the New Jersey court and defeating the federal equal protection claim alleged by the plaintiffs in *Robinson*.<sup>19</sup> Nevertheless, the New Jersey Supreme Court struck down the state’s education funding scheme as unconstitutional. To do so, the majority relied upon education amendments made to the New Jersey State Constitution in 1875 which mandated that the state provide a “thorough and efficient” school system.<sup>20</sup> The amendments and the language therein allowed the New

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<sup>16</sup> For a detailed look at the *Rodriguez* litigation and its impact on the strategies taken in education litigation in the following decades, see PAUL A. SRACIC, *SAN ANTONIO V. RODRIGUEZ AND THE PURSUIT OF EQUAL EDUCATION: THE DEBATE OVER DISCRIMINATION AND SCHOOL FUNDING* (2006).

<sup>17</sup> One of the lasting results of *Rodriguez*, coupled with the developments in subsequent state litigation, is that the fundamental right to education is inconsistently applied. The right is enjoyed differently by students depending on the state in which they live and whether the state’s judiciary has acknowledged a fundamental right to education and ruled in favor of challenges to the state’s education finance system. For example, one of the more swift and efficient declarations of education equity occurred in Kentucky during the late 1980’s. *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989). Compare New York, where claims of unconstitutional school funding were rejected throughout the 1980’s and the right to a “sound basic education” was later won in the 1990’s, *Campaign for Fiscal Equity, Inc. v. State (CFE I)*, 86 N.Y.2d 307 (1995); and finally, the funding apparatus was declared unconstitutional after lengthy discovery culminated in a 2003 ruling. *Campaign for Fiscal Equity, Inc. v. State (CFE II)*, 100 N.Y.2d 893 (2003).

Speaking to the results due to inconsistencies from *Rodriguez*, several states have upheld the constitutionality of their education finance system. *See, e.g.*, *Scott v. Commonwealth*, 443 S.E.2d 138 (Va. 1994) (high court failed to find evidence of the funding system causing a constitutional harm); *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000) (high court refused to hear the litigation on grounds of non-justiciable claims); *Marrero v. Commonwealth*, 709 A.2d 956 (Pa. 1998) (ruling that claim was non-justiciable and dismissing the case with prejudice because funding was a legislative function not subject to judicial discretion); *see also Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996) (finding that disparities in wealth from property taxes did not violate state constitutional education clause and that evaluating school quality and school reform were legislative and not judicial matters). In the wake of *Rodriguez*, a student’s access to equity in education funding is dependent upon location.

For an overview of the education equity litigation and the current status of education funding in all fifty states, see generally *Access: Education Finance Litigation, School Funding Policy and Advocacy*, NATIONAL EDUCATION ACCESS NETWORK, [http://www.schoolfunding.info/states/state\\_by\\_state.php3](http://www.schoolfunding.info/states/state_by_state.php3) (last visited Mar. 10, 2011).

<sup>18</sup> *Robinson v. Cahill (Robinson I)*, 303 A.2d 273 (N.J. 1973)

<sup>19</sup> Tractenberg, *supra* note 6, at 321.

<sup>20</sup> *Robinson I*, 303 A.2d at 285. The New Jersey State Constitution clause reads: “The Legislature shall provide for the maintenance and support of a *thorough and efficient system of free public schools* for the instruction of all the children in the State between the ages of five and eighteen years.” N.J. CONST. art. VIII, § 4, cl. 1 (emphasis added).

Jersey Supreme Court to establish a *state* constitutional right to education, phrased as “thorough and efficient,” despite the *Rodriguez* Court’s failure to acknowledge the existence of a *federal* right to education.<sup>21</sup>

The court did not define the phrase “thorough and efficient” with any particular precision or depth in this first case, beyond indicating that it was an education that prepared children to be functioning citizens in society.<sup>22</sup> For the moment, the majority also declared that the state constitution’s clause required an “equal educational opportunity” for all New Jersey students.<sup>23</sup>

The *Robinson* decision in 1973 laid the legal groundwork for the forthcoming *Abbott* decisions by providing the blueprint for successful educational equity litigation. The majority explicitly held that, if a minimum level of education was not provided to the students, then the state was in violation of the constitution: “[a] system of instruction in any district of the State which is not ‘*thorough and efficient*’ falls short of the constitutional command.”<sup>24</sup> Further, the majority wrote that where education fails to meet the constitutional requirement, “[w]hatever the reason for the violation, the obligation is the State’s to rectify it,” even if the state delegated its duty to a local government.<sup>25</sup> Consequently, this last phrase holds the state government liable for instances of constitutionally inadequate education provided by local school districts under a system that relies heavily upon property taxes to fund public education.

### 3. The End of the *Robinson* Litigation: The Public Education Act of 1975

The second *Robinson* decision in 1973<sup>26</sup> held that the New Jersey legislature was in dereliction of its duty to provide all New Jersey students a “thorough and efficient” education system. The Court wanted the legislature to respond to the problem by devising and enacting a remedy to address the funding disparity, even issuing a decision in *Robinson III* to grant more time for proper action, but the

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<sup>21</sup> All 50 states have language within their constitutions that address education.

<sup>22</sup> *Robinson I*, 303 A.2d at 295. “The Constitution’s guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.” *Id.* The phrasing suggests an evolving standard that expands as our society grows more complex and, in particular, the global labor market requires increasingly higher-level skills to compete for employment. The end result would be a flexible doctrine that guarantees an ever-increasing baseline level of education, one reflecting the changing demands of society.

In *CFE II*, thirty years after the *Robinson I* decision, the New York Court of Appeals rejected the State’s argument that an eighth-grade level of education was sufficient for making students function productively in civic activities and able to compete in employment. *CFE II*, 100 N.Y.2d at 906. Language from the majority’s concluding statements imply an evolving standard, as described above: “a sound basic education back in 1894, when the Education Article was added, may well have consisted of an eighth or ninth grade education, which we unanimously reject. The definition of a sound basic education must serve the future as well as the case now before us.” *Id.* at 931. For further discussion on why the constitutional floor for education must rise to meet society’s demands, see *id.* at 934–36 n.7–9 (citing expert analysis on the difficulties faced by people without a high school education in modern society).

<sup>23</sup> *Robinson I*, 303 A.2d at 294 (emphasis added).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Robinson v. Cahill (Robinson II)*, 306 A.2d 65 (N.J. 1973).

effort was for naught: due to gridlock and disagreement, the legislature failed to act.<sup>27</sup> The plaintiffs returned to court and the decision in *Robinson IV* jolted the legislature into action: the court approved a provisional remedy that would have elevated available funding per pupil by nearly fifty percent.<sup>28</sup>

The legislature finally acted in response to *Robinson IV* and passed the Public School Education Act of 1975 (hereinafter the 1975 Act).<sup>29</sup> The 1975 Act purported to increase aid to the poorest school districts, raise per-pupil expenditures to an acceptable level and thus remedy the violation of the constitutional right to education. The 1975 Act also contained an early attempt at defining what is required for the existence of a “thorough and efficient” educational system: “free public schools shall provide to all children in New Jersey, regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society.”<sup>30</sup>

To achieve this balance, the 1975 Act would raise state education aid for municipalities to a level that would achieve constitutionally satisfactory funding for every school district in New Jersey.<sup>31</sup> Since school districts relied almost exclusively on local property tax bases for funding, the 1975 Act aimed to share the responsibility of school funding between local and state governments, retaining but supplementing the old methods of generating revenue.<sup>32</sup>

Central to the successful implementation of the 1975 Act was the required increase in revenue for raising per-pupil expenditures. The court noted that, in the absence of funding, “[the 1975 Act] could never be considered [to be in] constitutional compliance” with the requirement that the state

<sup>27</sup> *Robinson v. Cahill (Robinson III)*, 335 A.2d 6, 7 (N.J. 1975). Court orders requesting or even demanding a legislative overhaul of the education budget and greatly increased spending can result in great delay for myriad of reasons. See also *Campaign for Fiscal Equity, Inc. v. State (CFE III)*, 8 N.Y.3d 14 (2006). *CFE III* was the third decision in the *CFE* litigation and came three years after *CFE II*, 100 N.Y.2d 893 (2003), in which the court declared the state education funding scheme unconstitutional and ordered the legislature devise a remedy. *CFE III* was litigated because the legislature failed to act in the three-year interim, due to disputes within the legislature over the level of funding necessary to satisfy the state high court’s order.

<sup>28</sup> *Robinson v. Cahill (Robinson IV)*, 351 A.2d 713, 720–22 (N.J. 1975). Guaranteed valuation rate per pupil was \$43,000 for the 1975–76 academic school year; the Court order would have increased that total by over fifty percent to \$67,000.

<sup>29</sup> N.J. STAT. ANN. § 18A:7A-1 (repealed 1996). The 1975 Act was an example of political pragmatism, as it contained something for all the political parties involved in passing the legislation. Where this attempt to please everyone proved problematic was in securing support for establishing the New Jersey state income tax, which was the crucial mechanism to fund the bill. The New Jersey Education Association (NJEA), the formidable teachers union, aggressively fought against demands from state Republicans for accountability on spending by measuring educational outputs via standardizing testing and graduation rates, in return for their votes on establishing the state income tax. BARBARA G. SALMORE & STEPHEN A. SALMORE, *NEW JERSEY POLITICS AND GOVERNMENT: THE SUBURBS COME OF AGE* 315–18 (2008).

<sup>30</sup> *Robinson v. Cahill*, 355 A.2d 129, 132 (N.J. 1976) (*Robinson V*). This definition, like others prior, is quite broad in scope and would require judicial interpretation to establish a baseline requirement.

<sup>31</sup> *Id.* at 137.

<sup>32</sup> The shared responsibility provision was the state’s attempt to split the financial burden of providing a constitutionally adequate education with the local school districts. The provision was paramount to the 1975 Act’s remedy for a constitutionally inadequate education system. Plaintiffs challenged the constitutionality of this provision, arguing that it was the state attempting to abandon its full constitutional duties to students. *Robinson V*, 355 A.2d at 133. The court rejected these claims and upheld the 1975 Act as constitutional on its face.



provide a “thorough and efficient” education to all students.<sup>33</sup> Thus, the court ruled that the 1975 Act was constitutional on its face, however accompanying this ruling was a stern warning: if the legislature failed to enact legislation that fully funded the 1975 Act, the court would, in the absence of a showing of cause, implement its own solutions.<sup>34</sup>

## B. 1976-1990: *Abbott v. Burke* and the Urban Dilemma

### 1. The Post-*Robinson* Plight of Urban Districts

In 1981, the Education Law Center (ELC)<sup>35</sup> filed the first *Abbott v. Burke* case (*Abbott I*), alleging that the 1975 Act established an unconstitutional school funding system in New Jersey.<sup>36</sup> Six years after the New Jersey legislature’s attempt to ameliorate the unconstitutional school funding scheme identified in the *Robinson* litigation, the ELC presented overwhelming statistical evidence that a wide gulf in education funding still existed between two distinct groups of school districts: the poor urban cities and their wealthier suburban satellite towns.<sup>37</sup>

*Abbott I* was brought on behalf of four plaintiff-students in urban districts and the lawsuit alleged that the funding regime in place was unconstitutional as applied to these poor urban districts.<sup>38</sup> From the beginning, the plaintiffs’ focus was on correcting the injustice of a constitutionally inadequate education provided to students in *urban* school districts. This focus has carried throughout the entirety of the *Abbott* litigation history.<sup>39</sup> The evidentiary record created by the plaintiffs’ initial focus in *Abbott I* has guided the court in the twenty-one decisions that followed.

Plaintiffs introduced evidence in *Abbott I* demonstrating that the gap in per-pupil expenditure had actually increased after the passage of the 1975 Act. Dividing the state’s school districts into seven groupings based on wealth, the plaintiffs alleged that weighted per-pupil expenditures in the wealthiest

<sup>33</sup> *Id.* at 131–32.

<sup>34</sup> The court outlined three steps it was prepared to take, declaring that it would “order one or more” as it saw fit, barring a showing of cause by the legislature that explained the delay in funding the 1975 Act and demonstrated why such moves were unnecessary. *Id.* at 139. The three orders were: a redistribution of State Aid monies as the court saw necessary to satisfy the 1975 Act; order injunctive relief deemed “appropriate and necessary”; and order other relief as deemed “appropriate and necessary.” *Id.*

<sup>35</sup> Professor Paul Tractenberg, a faculty member at the Rutgers School of Law-Newark, founded the ELC in 1973 to concentrate the legal efforts in combating “New Jersey’s discriminatory practice of funding suburban schools at a much higher level than urban schools.” Marilyn Morheuser, who was named executive director in 1979, was a former law student of Professor Tractenberg. *History of the Education Law Center*, EDUC. LAW CTR., <http://www.edlawcenter.org/about/mission-history.html> (last visited Jan. 13, 2012).

<sup>36</sup> *Abbott v. Burke* (*Abbott I*), 495 A.2d 376 (N.J. 1985).

<sup>37</sup> *Id.* at 287 (citing *Abbott v. Burke*, 477 A.2d 1278 (App. Div. 1984) (segments of Superior Court decision summarizing the statistical data provided by plaintiffs at trial)).

<sup>38</sup> For a more detailed description of Raymond Abbott and the other plaintiffs in the *Abbott* case, see YAFFE, OTHER PEOPLE’S CHILDREN, *supra* note 4, at 110–44, 214–48, 304–21.

<sup>39</sup> In leading the Education Law Center (ELC) through the *Abbott* litigation in the 1980s, Ms. Marilyn Morheuser imparted on the organization her indomitable spirit and zeal, despite concerns over her own lack of adequate funding to fight for adequate funding for the state’s poor urban students. As a result, the ELC believed “[their fight] was a holy struggle in which they occupied the moral high ground.” YAFFE, OTHER PEOPLE’S CHILDREN *supra* note 4, at 153–54.

group was \$1,681 in 1975–76, while the poorest group spent \$1,372; a difference of \$309. In 1979–80, however, the wealthiest group of districts spent \$2,529 per-pupil, compared to \$1,924 per-pupil in the poorest group: a difference of \$605.<sup>40</sup> The legislature designed the 1975 Act to close the spending gap between the richest and poorest districts in New Jersey, but the gap was still increasing.

At the heart of the initial *Abbott* filings, however, was the claim that the 1975 Act still relied too heavily upon local property taxes for the bulk of school funding. Under the 1975 Act, determinations of state aid to local districts used the local property tax base as a factor.<sup>41</sup> Exemplifying the funding disparity that still existed despite the legislature’s efforts in 1975, the poorer districts were spending an estimated \$600 less per pupil while taxing its citizens nearly seventy cents more per \$100 of assessed property value (\$1.65 per \$100 for poor districts; \$0.97 per \$100 for wealthy districts).<sup>42</sup> Because of the *Robinson* litigation, increased state aid to municipalities mandated by the 1975 Act fell far short of equity in funding, despite contributing more state education aid than ever before.<sup>43</sup>

## 2. *Abbott II: The Court Declares Education Funding Unconstitutional*

In *Abbott I*, the court rejected motions to dismiss from the State and remanded the matter for a trial to establish an evidentiary record before the case inevitably returned to the New Jersey Supreme Court.<sup>44</sup> After a nine-month trial, which included daunting amounts of witness testimony and evidence,<sup>45</sup> Administrative Law Judge (ALJ) Steve Lefelt produced a massive 607-page decision in favor of the ELC—a decision that “rejected virtually all of the state’s case.”<sup>46</sup> Because of the ELC’s pleadings and the plaintiffs attached to the *Abbott* litigation, the ALJ’s fact-finding focus was primarily on the poor urban districts. Paramount to the ALJ’s reasoning was a finding that overreliance on local property taxation meant that citizens in urban districts, taxing themselves at a far higher rate than their suburban

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<sup>40</sup> *Abbott I*, 495 A.2d at 386 n.2.

<sup>41</sup> *Robinson V*, 355 A.2d 129, 136–38 (N.J. 1976).

<sup>42</sup> *A Short History of School Finance Litigation in New Jersey, 1970–2009: The 1980s: Abbott v. Burke*, DEBORAHYAFFE.COM, <http://www.deborahyaffe.com/finance/index.html> (last visited Jan. 13, 2012).

<sup>43</sup> *Abbott I*, 495 A.2d at 386 n.2 (1985). The 1975 Act did not prevent the funding gap from increasing, but it did slow the rate at which it did. The second-poorest grouping of districts actually had *smaller* weighted per-pupil expenditures than the poorest grouping because the 1975 Act sent larger amounts of state aid to the poorest districts. The data suggests that, in the absence of any reform resulting from the *Robinson* cases, the gap between the very richest and very poorest would have been even larger.

<sup>44</sup> In *Abbott I*, the New Jersey Supreme Court ordered the *Abbott* litigation remanded to an administrative law court for initial hearings in order to build a “firm factual foundation before [the New Jersey Supreme Court] ruled on *Abbott*’s merits.” YAFFE, OTHER PEOPLE’S CHILDREN, *supra* note 4, at 147. See *Abbott I*, 495 A.2d at 386 n.2 (1985).

<sup>45</sup> YAFFE, *supra* note 4, at 166. The initial trial featured 99 witnesses, 745 exhibits of evidence, over 16,000 pages of testimony, included 160 factual findings from the ALJ “on everything from the validity of competing statistical methods to the prevalence of mismanagement in urban districts.” *Id.* at 167, 168. Further exemplifying Ms. Morheuser’s devotion to the cause, she seemed to require her witnesses to pass an ideological purity test. She once stated that “as we come to zero hour [prior to trial], I am more and more convinced that we need *true believers* as witnesses.” *Id.* at 153.

<sup>46</sup> *Id.* at 168.

counterparts, could never close the funding gap that existed no matter how hard they tried.<sup>47</sup> The State appealed the decision.

As anticipated, the New Jersey Supreme Court heard the case on appeal from the ALJ and, relying upon the extensive factual record established at trial, issued its landmark ruling in favor of the plaintiffs in *Abbott II*.<sup>48</sup> The court ruled on a number of issues in *Abbott II* that continue to impact education law and school finance in New Jersey to this day. For one, the court rejected the State's assertion that per-pupil expenditure calculations should take into account any aid from the federal government that a district receives for its schools.<sup>49</sup> The court wanted to divorce New Jersey school funding from the dangers of "substantial fluctuation" in federal government spending.<sup>50</sup> Second, in addressing the plaintiffs' complaints that the 1975 Act was still too reliant upon revenue generated by local property taxes, the Court agreed, stating that "while local taxation no longer has the same impact [as it did prior to *Robinson*], it is still [a] significant" factor in determining the total funding available for a school district.<sup>51</sup>

Overall, the Court concluded that the failure of schools to provide a constitutionally adequate education to students in poor urban districts was invariably related, at least in part, to the lack of available funding. In short, regardless of debates about *how* significant funding levels are in providing a quality education, it is inarguable that funding matters.<sup>52</sup> The Court declared that "[t]he failure [of our school systems] has gone on too long; the factors are ingrained; the remedy must be systemic. The present scheme cannot cure it."<sup>53</sup>

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<sup>47</sup> *Id.* at 169.

<sup>48</sup> *Abbott v. Burke (Abbott II)*, 575 A.2d 359 (N.J. 1990).

<sup>49</sup> No Child Left Behind Act (NCLB), Pub. L. No. 107-110, §§ 1001-02, 115 Stat. 1425 (2002). NCLB is the current reauthorization of the 1965 Elementary and Secondary Education Act (ESEA). The federal government disperses funds to districts that qualify as disadvantaged under the NCLB criteria. At the time of trial, the four districts which the plaintiffs represented all received federal education aid under the iteration of ESEA then in effect. At the time, federal ESEA funding amounted to five percent of the districts' current expense budgets, as compared to a nationwide average of eight percent. If federal funds were factored in, the disparity between poor and rich districts "decreased, sometimes dramatically." Nevertheless, the Court reasoned that the "thorough and efficient" clause requires the state to provide an adequate education without any federal assistance whatsoever. *Abbott II*, 575 A.2d at 380-81.

<sup>50</sup> *Abbott II*, 575 A.2d at 381 n.14. The Court believed a remedial funding framework whereby the poorest districts receive federal aid as supplementary but separate from their needs as calculated by the state would result in greater overall funding for said districts. "If New Jersey's funding scheme were equal and fair, *which it is not*, federal aid would continue, and together with state and local expenditures it would provide an even greater opportunity to educate disadvantaged children" *Id.* at 381 (emphasis added).

<sup>51</sup> *Id.* at 384.

<sup>52</sup> The state argued that, even though children in the poorest urban districts generally perform worse than their counterparts in wealthy suburban districts, plenty of students in the poorest districts nevertheless succeed despite the conditions. The Court dismissed this as irrelevant, noting that "[the] constitutional mandate does not allow us to consign poorer children permanently to an inferior education on the theory that they cannot afford a better one or that they would not benefit from it." *Id.* at 385, 386.

<sup>53</sup> *Abbott II*, 575 A.2d 359, 384 (N.J. 1990).

### 3. *Abbott II*: The Urban Evidence and The Limited Remedy

Faced with the tremendous evidentiary record detailing the plight of poor urban districts in New Jersey established by the trial court, the court's *Abbott II* decision explicitly limited its remedy to twenty-eight poor urban districts, now called the *Abbott* districts.<sup>54</sup> These districts were selected after an analysis of the statistical evidence compiled by the New Jersey Department of Education (NJ DOE). Evidence of the constitutional violations was found in a number of categories, including the following: impoverished communities and school funding, standardized test results, and crumbling facilities.

The NJ DOE devised its own test based on multiple criteria to assign a value and ranking to each school district in the state based on socioeconomic status, and from there, sorted the districts into District Factor Groups (DFGs).<sup>55</sup> Districts received a DFG letter grade to denote the group to which they belonged on a scale from A to J, A representing the poorest districts and J the wealthiest.<sup>56</sup> These classifications played a significant role in providing evidence to the court of a constitutional violation to the right to a "thorough and efficient" system of education in the poor urban districts. It is important to note that the fifth and sixth criteria, density and urbanization, worked against demonstrating the poverty of non-urban districts in New Jersey. If a rural or suburban district, otherwise poor and needy, did not have a profile that fit the density and urbanization criteria, it would have impacted their DFG rating by marking them as less needy than their urban counterparts despite the fact that the two sets of school districts confronted identical funding and tax base issues.

When viewed by these DFG categories, large gaps existed between the poorest urban and wealthiest suburban districts in both per-pupil expenditure and the local property tax base. The state average per-pupil expenditure in the 1984–85 school year was \$3,329. During that school year, school districts in DFG J spent \$1,245 more per-pupil than districts in DFG A (\$4,154 compared to \$2,909). In terms of property value, the state average was \$190,401 of property value per pupil. DFG J possessed a staggering \$281,879 more in property value per-pupil than their DFG A counterparts (\$360,101 compared to only \$78,222).<sup>57</sup> Summarizing the findings in the record, the court noted that "[n]o sophisticated analysis can destroy the conclusion: the richer districts spend more than the poorer, and their ability to do so is strongly correlated to their wealth."<sup>58</sup> By highlighting the dramatic disparity in actual per-pupil education spending between rich and poor school districts, and in the local wealth base through which districts can secure additional funding via local property tax increases, the court put to rest the argument that poor districts can overcome funding issues on their own.

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<sup>54</sup> "[T]hese poorer urban districts . . . [are] the sole object of the remedy we impose." *Id.* at 387. The court acknowledged that "[t]he primary basis for our decision is the constitutional failure of education in poorer urban districts." *Id.* at 394.

<sup>55</sup> At the time, seven factors were calculated in determining a school district's DFG ranking: "1) per capita income level, 2) occupation level, 3) education level, 4) percent of residents below the poverty level, 5) density (the average number of persons per household), 6) urbanization (percent of district considered urban), and 7) unemployment (percent of those in the work force who received some unemployment compensation)." *Id.* at 385.

<sup>56</sup> *District Factor Groups (DFGs) for School Districts*, N.J. DEP'T OF EDUC., <http://www.state.nj.us/education/finance/sf/dfg90.shtml> (last visited Jan. 13, 2012). The classifications are A, BC, CD, DE, EF, GH, I and J, with A being the poorest and J the wealthiest districts. As of the 2000 Census, there were 549 school districts in New Jersey that were evaluated by DFG criteria and assigned a group, the breakdown was as follows: A = 39 districts, B = 67, CD = 67, DE = 83, FG = 89, GH = 76, I = 103 and J = 25. *Id.*

<sup>57</sup> *Abbott II*, 575 A.2d at 388.

<sup>58</sup> *Id.*

After determining that the funding disparity was significant and would continue to exist in the absence of state intervention, the court then found that the disparate levels of funding correlated with disparate levels of achievement. The court also found evidence of a constitutional violation of the students' right to a "thorough and efficient" system of education in an examination of standardized tests. In the 1985–86 school year, all but two districts in DFG A and B failed to meet the established state standard for the High School Proficiency Test (HSPT).<sup>59</sup> Most startling about these failure rates is that the HSPT tested students for "mastery of *basic skills* . . . the minimum level of learning needed to go on to more difficult subjects."<sup>60</sup> The legislature admitted that the test was a "prerequisite to, *not the equivalent of*, a thorough and efficient education."<sup>61</sup> In essence, the situation was so dire that high school students in the poorest school districts were performing so poorly that they did not possess the prerequisite knowledge to competently benefit from the absolute minimum level of education that the New Jersey Constitution requires.<sup>62</sup>

Inadequate facilities also played a major role in declaring New Jersey's education funding scheme unconstitutional. Both for their impact upon the ability to provide a "thorough and efficient" education and for the lasting imagery the poor conditions left upon the justices.<sup>63</sup> The court explicitly declared that "[a] thorough and efficient education also requires adequate physical facilities."<sup>64</sup> Several examples of facilities were cited as failing because of educational inadequacy,<sup>65</sup> athletic inadequacy,<sup>66</sup> safety hazards,<sup>67</sup> and hygienic concerns.<sup>68</sup> Just as important was the simple issue of space: schools in poor urban districts

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<sup>59</sup> *Id.* at 400. Today, New Jersey administers the High School Proficiency Assessment (HSPA), a test with a slightly altered name and largely the same goals. One key difference is the grade level: the HSPT (High School Proficiency Test) in the record at trial was administered to ninth graders, *id.*, whereas the current HSPA is given to eleventh graders. *High School Statewide Assessments*, N.J. DEP'T OF EDUC., <http://www.state.nj.us/education/assessment/hs/hspa/> (last visited Jan. 13, 2012).

<sup>60</sup> *Abbott II*, 575 A.2d 359, 400 (N.J. 1990).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* HSPT testing data from the three covered subjects – math, reading and writing – demonstrated that students from the poor urban districts posted passing scores at significantly lower rates than the state average, and an even greater disparity existed between the poor urban districts and the wealthy DFG J districts.

<sup>63</sup> The New Jersey Supreme Court justices' reactions demonstrate how dramatic the case presented was, in particular, the conditions of school facilities in poor urban districts. Stories of "leaking roofs, broken plumbing, and lack of heat in urban school building[s]" outraged several of the justices. In reflecting upon *Abbott II* several years after the decision, Justice Gary Stein described how he believed "[i]t was shameful for the state to have school buildings that were so decrepit. . . . [I]t was evidence of callousness and neglect." YAFFE, *supra* note 4, at 189.

<sup>64</sup> *Abbott II*, 575 A.2d 359, 397 (N.J. 1990).

<sup>65</sup> *Id.* at 395. While wealthier suburbs possessed dedicated science laboratory rooms and state-of-the-art equipment, "many poor urban districts offer[ed] science classes in labs built in the 1920's and 1930's, where sinks do not work [and] equipment . . . is not available . . ."

<sup>66</sup> *Id.* at 396. For example, none of Irvington's elementary schools had an outdoor playground for recess or physical education. East Orange, another poor urban district, had no sports facilities available for its high school student-athletes.

<sup>67</sup> *Id.* at 397. The long-term repairs report for the East Orange school district listed thirteen facilities in need of asbestos removal and ten requiring "immediate" roof repair.

lacked space for classrooms thus leading to larger class sizes held in smaller rooms compared to their wealthy suburban counterparts.<sup>69</sup>

Despite the findings that DFG A or B school districts were significantly worse off than their wealthy counterparts, the court limited the scope of its judicial remedy by eliminating all the non-urban districts that were rated as DFG A or B. Within the poorest two DFG gradings, there were a total of twenty-nine districts classified by the NJ DOE as urban.<sup>70</sup> Relying upon the DFG calculations, the ample evidence on record and the NJ DOE's classification of districts as urban, suburban or rural, the court decided that the poorest urban districts—those districts with a DFG rating of A or B and that also qualify as urban—would be the subject of the remedy the court provided. Excluded from this grouping were the other twenty-seven districts identified as urban but which did not face a socioeconomic situation dire enough to warrant access to the remedy. Also excluded were any suburban or rural districts that would have qualified via socioeconomic status but were disqualified based on urbanization classification.<sup>71</sup> The court's reasoning for exclusion was blunt: because the rural districts are not urban, “they are therefore not as poor or needy.”<sup>72</sup> Little explanation was provided by the court for this proclamation. The court seemed to defer to the DOE's decision to include urbanization and population density as factors in the DFG formula finding that, because those factors were considered relevant to a determination of poverty or need among school districts, the absence of these factors implies lesser poverty or need.<sup>73</sup>

The ELC's singular focus on poor urban plaintiffs produced an evidentiary record in *Abbott* that did not include descriptions of constitutional violations occurring in impoverished, non-urban districts. The court believed it was constrained to rule based upon the evidence before it. With the most underfunded and failing schools located in New Jersey's bleak urban areas, and with the racial composition of the schools reaching over ninety percent minority student enrollment, the ELC made the conscious decision to select plaintiffs from cities like Camden and Trenton to represent their case. The ELC picked the most compelling, extreme circumstances to establish their legal case, and the unfortunate consequence of this strategy was the disregard for dissimilar school districts with similarly failing schools. The court concluded that “there is no direct substantive evidence on [the *Abbott II* trial] record of [the rural districts'] failure to provide a thorough and efficient education.”<sup>74</sup> The court also

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<sup>68</sup> *Id.* Whereas schools in wealthier suburban districts were “newer, cleaner and safer,” one classroom in Irvington was converted from its old usage as a coal bin and an elementary school in Paterson used the basement boiler room as cafeteria space.

<sup>69</sup> *Id.* at 395–97. Lack of space foreclosed adding programs in supplementary subjects, such as foreign language, computer or music education, as there was insufficient space for teaching the core subjects.

<sup>70</sup> At the time of *Abbott II*, there were 56 school districts in total identified as urban. *Id.* at 386. Today, there are 64 districts classified as urban in New Jersey. *Urban District List*, N.J. PRINCIPALS AND SUPERVISORS ASS'N, <http://www.njpsa.org/documents/pdf/Urban%20District%20List.pdf> (last visited Jan. 13, 2012).

<sup>71</sup> One last exclusion in the *Abbott II* decision was the Atlantic City school district, which was in DFG A and classified as urban but possessed a guaranteed tax base “far in excess” of the statutory limit and of the other poor urban districts, owing to the multitude of large casinos and shops within city limits. *Abbott II*, 575 A.2d 359, 408 (N.J. 1990).

<sup>72</sup> *Id.* at 387.

<sup>73</sup> “These non-included districts do not have the characteristics that lead to classification as urban districts by the Department of Community Affairs or by the Commissioner.” *Id.*

<sup>74</sup> *Id.* The reasons for the insufficiency of the evidentiary record will be explained later, *see* discussion *infra* Part III, particularly Part III.B.1.

cites the “monumental” needs of students in urban districts, compared to their affluent suburban counterparts. These urban students require the necessities, such as food and shelter, let alone upgraded school facilities.<sup>75</sup>

With the evidentiary focus squarely on the most compelling poor urban districts within New Jersey, the court turned its attention to designing a remedy that would best address the needs of the aggrieved poor urban districts. The *Abbott II* remedy is stated in broad terms, but the goal is clear: “[T]o motivate [poor urban students], to wipe out their disadvantages as much as a school district can, and to give them an educational opportunity that will enable them to use their innate ability.”<sup>76</sup> In more concrete terms, the state had an obligation to “assure that poorer urban districts’ educational funding is *substantially equal* to that of property-rich districts.”<sup>77</sup> The court emphasized that equalized funding cannot rely upon local property taxes generated by the poorer districts; the aid must come from another source, independent of local taxation, devised by the state legislature.<sup>78</sup>

### C. The 1990s: The Court Asserts Control in *Abbott*

#### 1. *Abbott IV*: Enough is Enough

In *Abbott III*, the court provided a deadline for the legislature to rectify the ongoing constitutional violations.<sup>79</sup> If compliance with *Abbott II* had a “less than reasonable likelihood” of occurring prior to the 1997-98 school year, the court would hear a new motion in the *Abbott* case.<sup>80</sup> In response, the legislature passed another remedial statute,<sup>81</sup> the Comprehensive Educational Improvement and Financing Act (CEIFA).<sup>82</sup>

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<sup>75</sup> “This record shows that the educational needs of students in poorer urban districts vastly exceed those of others, especially those from richer districts. The difference is monumental . . .” *Abbott II*, 575 A.2d at 400. The Court goes further and lists many basic needs beyond education reform including, among others, the need for food, clothing, shelter, community support, and role models. *Id.*

The Court also references the analysis of former New Jersey Governor Thomas Kean’s plan to improve the quality of education in poor urban districts. Governor Kean “made it clear that his concern was with the quality of education in urban areas, in particular, the poorer urban areas.” *Id.* at 386.

<sup>76</sup> *Abbott II*, 575 A.2d 359, 400 (N.J. 1990) (emphasis added).

<sup>77</sup> *Id.* at 408 (emphasis added).

<sup>78</sup> *Id.* at 408, 409 (emphasis added).

<sup>79</sup> *Abbott v. Burke (Abbott III)*, 643 A.2d 575 (N.J. 1994). At issue in *Abbott III* was a remedial funding statute (the Quality Education Act) that the state legislature designed with the hopes of bringing New Jersey into compliance with *Abbott II*. The court ruled this funding scheme unconstitutional, and then provided a deadline for the state to comply with *Abbott II*.

<sup>80</sup> *Id.* at 577.

<sup>81</sup> DOE Archives: History of Funding Equity, N.J. DEP’T OF EDUC., <http://www.state.nj.us/education/archive/abbotts/chrono/> (last visited Jan. 13, 2012) [hereinafter *DOE Archives*].

<sup>82</sup> Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA), N.J. STAT. ANN. § 18A: 7F-1 (repealed 2007).

In the fourth round of the *Abbott* litigation,<sup>83</sup> the ELC alleged that the CEIFA, like the 1975 Act from *Robinson V*, was unconstitutional because it failed to comply with prior court orders for remedying the education funding crisis in poor urban districts.<sup>84</sup> The New Jersey Supreme Court agreed with the ELC and declared it would no longer tolerate the legislature's repeated failed efforts to ameliorate the constitutional violations occurring in school districts across New Jersey. The court struck down CEIFA as unconstitutional as applied to the poor urban districts listed in *Abbott II* and began to fashion its own remedy.<sup>85</sup>

First, the court ruled that the substantive educational requirements of CEIFA (the "thorough" prong of the education clause) were, in fact, constitutionally permissible. The court opted to uphold and maintain the education standards,<sup>86</sup> but ruled that the funding provisions were "clearly inadequate and thus unconstitutional as applied to the special needs districts."<sup>87</sup> CEIFA's funding problems were inherent to the statute. The statute defined what the legislature considered the constitutionally guaranteed minimum level of education. With the statute defining its own constitutional floor, CEIFA then modeled the proposed funding scheme after districts that provided the absolute minimum level of education to satisfy the statute, and no more.<sup>88</sup> The court believed that the absolute minimum was constitutionally inadequate. The court reemphasized that poor urban districts needed even more funding than their wealthy counterparts, as there were significant obstacles in providing a meaningful education in these districts.<sup>89</sup>

Authored by Justice Alan Handler, the opening remarks of the majority decision in *Abbott IV* reflect the court's impatience with the legislature and a sense of urgency on behalf of the students whose

<sup>83</sup> *Abbott v. Burke (Abbott IV)*, 693 A.2d 417 (N.J. 1997).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 429.

<sup>86</sup> *Id.* at 428. The Court detailed the critical aspects of the CEIFA substantive requirements: standardized tests to monitor progress administered in the fourth, eighth and eleventh grades; achievement goals in the seven "core" academic areas ("visual and performing arts, comprehensive health and physical education, language-arts literacy, mathematics, science, social studies, and world languages"); and freedom for local schools to develop official curriculums, so long as they adhere to the aforementioned standards. *Id.* at 425.

<sup>87</sup> *Id.* at 429. The court summarized the state's argument:

CEIFA must stand or fall based on the validity of its premise that the T & E amount [the statute's fixed per-pupil cost] is sufficient to provide a thorough and efficient education for all students and that spending in excess of that amount in the wealthier districts is nothing more than expenditure that is inefficient and unnecessary for a thorough and efficient education.

*Id.* at 427.

<sup>88</sup> *Id.* In response, the State claimed that the wealthiest districts that spent the most per pupil on education had "notable inefficiencies in their spending practices" and thus were overspending to achieve the level of education they provided. The Court cites the outrage from the wealthier districts in having to defend their levels of education spending, and the eventual elimination of the earliest provisions of CEIFA, as proof that "the general perception and widespread belief" is that higher spending is not merely "inefficiency or . . . educational luxuries." *Id.*

<sup>89</sup> *Abbott IV*, 693 A.2d 417, 434 (N.J. 1997). "[T]he needs of students in the [poor urban districts] were much greater than those of students in the DFG I & J districts." These needs include, but are not limited to, early childhood programs, supplemental education programs for English as a Second Language (ESL) students and investment in facilities (describing many of the schools in these districts as "in dramatic disrepair"). *Id.* at 438.



constitutional rights were being unduly harmed in the absence of an adequate remedy. Handler remarked, “[T]he new act [CEIFA] is incapable of assuring that opportunity for children in the special needs districts for any time in the foreseeable future.”<sup>90</sup> Later in the opinion, Justice Handler expresses in greater chronological detail the Court’s displeasure at how onerous and delayed the implementation of a remedy for the problem has been:

The Legislature has known since July 1994, when we decided *Abbott III*, that increased funding would have to be achieved by the 1997-1998 school year. That 1994 order, in turn, was necessitated by the Legislature’s failure to comply with our 1990 order [in *Abbott II*] calling for remedial relief. Thus, the State has had seven years to comply with a remedy intended to address, albeit partially, a profound deprivation that has continued for at least twenty-five years. *Thus, the remedy of increased funding for educational improvement in the poor urban districts should not be delayed any further.*<sup>91</sup>

CEIFA was another failed attempt from the legislature at complying with the court’s orders from *Abbott II* and with remedying the constitutional violation damaging poor students in New Jersey.

With CEIFA declared unconstitutional, the court found that the “continued deprivation of the constitutional right to a thorough and efficient education necessitate[d] a remedy.”<sup>92</sup> Acknowledging the “finiteness of judicial power,” the court nevertheless ordered the state to ensure the immediate remedy of parity in per-pupil school expenditures between the identified poor urban districts and the school districts in DFG I and J for the next school year.<sup>93</sup> The court took a bold step here by finding the state legislature constitutionally mandated to spend money to ensure parity: the gap in per-pupil expenditures had closed from twenty-five percent, at the time of *Abbott II*, to ten percent in the year 1996.<sup>94</sup> Nevertheless, the court felt that CEIFA stifled the gradual march towards total parity in funding and ordered the immediate remedy.<sup>95</sup>

In compliance with the *Abbott IV* decision, the New Jersey legislature allocated \$246 million in additional state education aid to be distributed to the *Abbott* districts for the upcoming school year.<sup>96</sup>

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<sup>90</sup> *Id.* at 420.

<sup>91</sup> *Id.* at 443 (emphasis added).

<sup>92</sup> *Id.* at 439.

<sup>93</sup> *Id.* There are now, and were at the time, approximately 120 school districts in DFG I and J. *District Factor Groups (DFGs) for School Districts*, N.J. DEPT OF EDUC., <http://www.state.nj.us/education/finance/sf/dfg90.shtml> (last visited Jan. 13, 2012).

<sup>94</sup> MICHAEL PARIS, FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM 139 (2010).

<sup>95</sup> *Abbott IV*, 693 A.2d 417, 440 (N.J. 1997).

<sup>96</sup> The poor urban districts, or *Abbott* districts, as they became known, were initially the twenty-eight districts identified in the *Abbott II* decision. In the fall of 1998, the legislature, pursuant to its authority from *Abbott II*, classified two additional districts as *Abbott* districts, bringing the total, prior to the *Bacon* litigation to 30. See *infra* Part III.A; Alexandra Grief, *Politics, Practicalities and Priorities: New Jersey’s Experience Implementing the Abbott V Mandate*, 22 YALE L. & POL’Y REV. 615, 641 (2004).

The calculated spending shortfall resulting from the roughly ten percent gap in per-pupil expenditures was \$248 million.<sup>97</sup>

## 2. *Abbott V*: The Court Orders Unprecedented Remedial Measures

In addition to ordering immediate funding parity, the court in *Abbott IV* remanded the case and ordered a study conducted to determine fully the special needs of students in the *Abbott* districts, the programs necessary to address these needs, and the costs associated with implementing the programs.<sup>98</sup>

After remand, the New Jersey Supreme Court in *Abbott V*<sup>99</sup> ordered an unprecedented series of entitlements for urban schoolchildren.<sup>100</sup> The court ordered whole-school reform for elementary schools,<sup>101</sup> fully funded full-day kindergarten and half-day preschool, construction of new facilities and repair of existing facilities as per the recommended school construction plan.<sup>102</sup> Litigation continued after *Abbott V*, as plaintiffs sought to protect and ensure full enforcement of the remedy that they won.<sup>103</sup> Nonetheless, because of jurisprudence culminating with *Abbott V*, the *Abbott* districts now had a comprehensive, detailed, court-ordered remedy that guaranteed funding parity and provided for a multitude of supplemental programs to ensure the delivery of a constitutionally adequate education to its students.

## III. VIOLATIONS OF THE CONSTITUTIONAL RIGHT TO A “THOROUGH AND EFFICIENT” EDUCATION IN NEW JERSEY’S NON-URBAN SCHOOL DISTRICTS

*Part III will examine the current constitutional and educational plight of the Bacon districts. A complete examination of the entirety of the Bacon litigation, from the first filing until the most recent decision from the New Jersey Appellate Division, will provide the necessary legal and historical background knowledge. A comparison of the Bacon and Abbott districts follows, demonstrating the similarities, both in reality and under the legal doctrine set forth by the various Abbott decisions, between the districts.*

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<sup>97</sup> DOE Archives, *supra* note 81; *Abbott IV*, 693 A.2d at 443 n.35.

<sup>98</sup> *Abbott IV*, 693 A.2d at 444.

<sup>99</sup> *Abbott v. Burke (Abbott V)*, 710 A.2d 450 (N.J. 1998).

<sup>100</sup> *The History of Abbott v. Burke*, EDUC. LAW CTR., <http://www.edlawcenter.org/cases/abbott-v-burke/abbott-history.html> [hereinafter *History of Abbott v. Burke*].

<sup>101</sup> *Abbott V*, 710 A.2d at 473. Broadly speaking, whole-school reform entails dramatically reforming the school as one singular institution, rather than approaching problems individually. For a more detailed look at an example plan for whole-school reform, see SUCCESS FOR ALL FOUNDATION, <http://www.successforall.org> (last visited Jan. 13, 2012).

<sup>102</sup> *Abbott V*, 710 A.2d at 473. Funding was allotted for further programs, including health services, social services, increased security, summer-school programs and after-school programs. *History of Abbott v. Burke*, *supra* note 100.

<sup>103</sup> See generally *Abbott v. Burke (Abbott VI)*, 748 A.2d 82 (N.J. 2000) (holding that the State failed to implement the pre-school reforms ordered in *Abbott V*); *Abbott v. Burke (Abbott VII)*, 751 A.2d 1032 (N.J. 2000) (holding that the State must fully fund the school construction plan ordered in *Abbott V*). To date, *Abbott v. Burke* has produced three decades and twenty-two officially counted decisions.

### A. *Bacon v. New Jersey Department of Education*: The Rural Districts Petition for Inclusion in the Comprehensive Abbott Remedy

In the opening remarks of the majority opinion in *Abbott II*, the court foresaw the potential state constitutional problems that would arise for school districts that were excluded from the court's decision in 1990:

On this record we find a constitutional deficiency only in the poorer urban districts, and our remedy is limited to those districts. We leave unaffected the disparity in substantive education and funding found in other districts throughout the state, *although that disparity too may someday become a matter of constitutional dimension*. We do so without implying in any way that such disparity is not important when considered as a matter of policy. Our decision deals not with optimum educational policy but with constitutional compliance.<sup>104</sup>

Seven years after *Abbott II*, the court's prediction would prove true, as a new litigation was undertaken on behalf of impoverished, constitutionally deficient school districts that were excluded from the *Abbott* remedy by virtue of the court's confinement of the remedy to poor urban districts.

#### 1. The Beginning of the *Bacon* Litigation: Minor Victories, Major Setbacks

In December of 1997, seven months after the New Jersey Supreme Court issued its landmark ruling in *Abbott IV*, a group of seventeen poor rural school districts filed suit in Superior Court in litigation known as *Bacon v. New Jersey Department of Education*.<sup>105</sup> These districts alleged that CEIFA was unconstitutional as applied to them, echoing the arguments made in *Abbott IV* by plaintiffs residing in poor urban districts. Plaintiff school districts claimed that, under CEIFA, they lacked sufficient education funding to provide the constitutionally required "thorough and efficient" education, and as such, they needed state assistance akin to the *Abbott* districts to alleviate the ongoing constitutional harm. The *Bacon* districts argued that they satisfied all of the *Abbott* factors, save for one: urban classification. *Bacon* districts are, largely, sparsely populated townships, many of which are considered rural in terms of geography and population density. Nevertheless, they claimed that because of the constitutional violations occurring due to a lack of education funding, the *Abbott* remedy should be extended to rural school districts.

The first decision in the *Bacon* litigation, issued in 2002,<sup>106</sup> was a partial victory, as only five of the seventeen petitioning districts prevailed, but it demonstrated the substantiality of the case for rural

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<sup>104</sup> *Abbott II*, 575 A.2d at 384 (emphasis added).

<sup>105</sup> *Bacon v. N.J. Dep't of Educ. (Bacon I)*, OAL DKT NOS. EDU 2637-00-2656-00, 2002 WL 31232958 (N.J. Adm. Sept. 23, 2002).

For the purposes of this paper, a numerical naming system for identifying the various *Bacon* decisions will be implemented, akin to that used in the *Abbott* decisions. Note, however, that the *Bacon* decisions are not colloquially known by any numeric designation, unlike the *Abbott* cases, which are commonly referred to in case law and news coverage using Roman numerals.

<sup>106</sup> Many procedural hurdles had to be cleared for the case to reach the trial stage, resulting in nearly four years of delay before the seventeen *Bacon* districts could present their arguments before a court. *Id.* at 3-4. To emphasize the delay in terms of judicial speed or lack thereof, in the interim between the initial filing and the first *Bacon* decision from the ALJ, the New Jersey Supreme Court issued five decisions in the *Abbott* litigation: *Abbott V*, *Abbott VI*, *Abbott VII*, *Abbott VIII* and *Abbott IX*. Education Law Center, To view these decisions, see *Abbott Decisions*, EDUC. LAW CTR., <http://www.edlawcenter.org/cases/abbott-v-burke/abbott-decisions.html> (last visited Jan. 13, 2012).

districts. In describing the five districts for which he found a violation of the “thorough and efficient” education clause, the ALJ wrote that the districts “present[ed] a grim fusion of socioeconomic deprivation, limited educational opportunity, facility deficiency and academic underperformance.”<sup>107</sup> The five districts deemed as “special needs districts” (SNDs) were all DFG A (the most impoverished, needy districts in the state), had substandard test scores and had, overall, profiles similar to the thirty *Abbott* districts.<sup>108</sup>

In the twelve districts he held not to be SNDs, the ALJ determined that lack of education funding or relative community poverty was not adversely affecting education standards severely enough to warrant state intervention.<sup>109</sup> The ALJ also directly addressed the plaintiff’s contention that the relative educational success of some of the impoverished *Bacon* districts should not be misunderstood as proof that greater funding is not needed. The ALJ recognized that the court rewarded failing SNDs with increased funding and unintentionally penalized successful SNDs by withholding the increases, but instead chose to view *Abbott* as a “palliative for deeply entrenched misery” which included poor educational output in addition to poverty and other circumstances.<sup>110</sup>

In *Bacon II*, the Commissioner of the NJ DOE overturned the ALJ decision as to four of the five districts he had identified as SNDs.<sup>111</sup> The Commissioner determined that only one district, Salem City,<sup>112</sup> qualified as having a situation dire enough to require state action to ameliorate a constitutional harm.<sup>113</sup> The Commissioner believed that the issues in the remaining sixteen *Bacon* districts were not matters of a “constitutional dimension” and thus best handled by the legislature, the executive, and the NJ DOE.<sup>114</sup> A key point of contention for the Commissioner was whether inadequate facilities should factor into the analysis of CEIFA’s constitutionality. While the districts argued that facilities were a major factor in the *Abbott* litigation,<sup>115</sup> the Commissioner decided that the Educational Facilities

<sup>107</sup> Five districts sufficiently demonstrated a constitutional violation from the *Abbott II* standard, which the court defined here as circumstances of “clear, severe, extensive, and . . . long duration.” *Bacon I*, *supra* note 105, at 8.

<sup>108</sup> For example, the Buena Regional School District (in which the namesake plaintiff resided) was a DFG A district “roughly in the upper middle of the *Abbott* spectrum” with student suspension rates much higher than *Abbott* averages and issues with overcrowding and antiquated facilities. *Id.* at 27–37.

<sup>109</sup> *Id.* at 63–67. For example, the Lakehurst School District was found to be a “relatively poor working-class community that is performing reasonably well.” *Id.* at 67. The ALJ reached this conclusion, despite Lakehurst having a similar profile to the *Abbott* districts regarding poverty levels and certain school performance indicators (such as suspension rate, student mobility and special education rates), because the standardized test data was quite good and attendance was above the state average in spite of the district’s weaknesses and needs. *Id.* at 66–67. In other words, despite poverty and a student body with needs akin to *Abbott* district students, their relative triumphs foreclose additional state aid, when adequate funding could prove extraordinarily effective, given past performance.

<sup>110</sup> *Id.* at 8.

<sup>111</sup> *Bacon v. N.J. Dep’t of Educ. (Bacon II)*, (N.J. Comm’r of Educ., Feb. 10, 2003), *available at* <http://www.nj.gov/education/legal/commissioner/2003/feb/50-03.pdf>.

<sup>112</sup> Upon recommendation by the NJ DOE following the *Bacon II* decision, Salem City was added as an official *Abbott* district by an act of the New Jersey State Legislature. N.J. STAT. ANN. § 18A:7F-3 (2004).

<sup>113</sup> The Commissioner interpreted *Abbott* as “a remedy for poverty and educational failure so substantial, pervasive and durable that targeted efforts simply cannot produce a constitutionally sufficient result.” *Bacon II*, *supra* note 111, at 137.

<sup>114</sup> *Bacon II*, *supra* note 111, at 137–38.

Construction and Financing Act (EFCFA), a special remedial legislation designed to fund and carry out the construction of new school facilities passed in the wake of *Abbott V*, should govern in the present claims. In essence, the Commissioner divorced facilities from funding in his analysis of a “thorough and efficient” education. As a result, the Commissioner denied *Abbott*-type relief but instead recommended specific evaluations to determine need.<sup>116</sup>

## 2. The Breakthrough: *Bacon III* and *Bacon IV*

Several districts appealed to the New Jersey State Board of Education, arguing that the Commissioner erred in ruling CEIFA constitutional as applied to the plaintiff school districts. In *Bacon III*, all sixteen rural districts from *Bacon I* triumphed in demonstrating the unconstitutionality of the state’s funding scheme as applied to them.<sup>117</sup> First, the State Board spurned the Commissioner’s reliance on standardized test scores as flawed for multiple reasons,<sup>118</sup> and instead turned to the *Abbott II* decision for proper guidance on assessing the sufficiency of education in the *Bacon* districts. In relying upon *Abbott II*, the State Board evaluated the educational inputs, focusing primarily on funding, in assessing the constitutional adequacy of education.<sup>119</sup> A second victory came in the invocation of the *Abbott* needs-based analysis; chiefly, that poor districts with higher concentrations of special needs students and worse socioeconomic conditions “required an educational offering that contained elements *over and above* those found in affluent suburban districts.”<sup>120</sup> Third, the State Board rejected the Commissioner’s exclusion of facilities in determining if a “thorough and efficient” education was being provided.<sup>121</sup>

<sup>115</sup> See *supra* Part II.B.3, p. 17–18 (discussion of findings in *Abbott II*).

<sup>116</sup> *Bacon II*, *supra* note 111, at 169.

<sup>117</sup> *Bacon v. N.J. Dep’t of Educ. (Bacon III)*, (N.J. State Bd. of Educ., Jan. 4, 2006), available at <http://www.state.nj.us/education/legal/sboe/2006/jan/sb4-03.pdf>.

<sup>118</sup> The State Board noted three flaws in relying too heavily upon standardized test scores to determine the constitutional adequacy of education. First is the incompleteness of the testing: only three subjects (language arts, science and mathematics) are assessed on these tests, but “a thorough and efficient education encompasses far more than these three subject areas.” *Id.* at 27. Second is the limited timeframe. *Id.* at 37. Third is the lack of high school data, as most of the *Bacon* districts end at eighth grade. *Id.* at 38.

<sup>119</sup> *Id.* at 28. “We deal with the problem in those terms because dollar input is plainly relevant and because *we have been shown no other viable criterion for measuring compliance with the constitutional mandate.*” *Abbott II*, 575 A.2d 359, 399 (N.J. 1990) (citing *Robinson I*, 303 A.2d at 273) (emphasis in original). The issue of “other viable criterion” was handled, in part, in *Abbott IV*, where the court declined to replace the educational inputs assessment with a purely standards-based approach.

<sup>120</sup> *Bacon III*, *supra* note 117, at 30 (emphasis added). The Education Law Center, the non-profit litigators for the *Abbott* districts, filed an amicus curiae brief that argued the *Bacon* litigation must be judged by the *Abbott II* and *Abbott IV* criteria, described as: “social, economic and educational factors that produce an environment in which the provision of a constitutionally adequate education is effectively impossible without such status.” *Id.* at 13.

<sup>121</sup> *Id.* at 32. The Commissioner’s conclusion was contrary to a litany of prior statements from the Supreme Court on the utmost importance of school facilities and the state’s constitutional duty to ensure adequate facilities. See *Robinson I*, 303 A.2d at 273 (“A thorough and efficient education also requires adequate physical facilities.”); *Abbott II*, 575 A.2d at 397 (“[I]efficient facilities are conducive to a deficient education.”); *Abbott IV*, 693 A.2d at 437 (“Deteriorating 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.”); *Abbott V*, 710 A.2d at 470 (“These deplorable conditions have a direct and deleterious impact on the education available to the at-risk children. The State’s constitutional educational obligation includes the provision of adequate school facilities.”); and *supra* Part I.B.3, p. 19–20 (examples of deficient conditions).

Interpreting the evidence and utilizing legal standards in a way most beneficial to the petitioners, the State Board went on to find a constitutional violation in all sixteen *Bacon* districts, but stopped short of declaring CEIFA itself unconstitutional because of its jurisdictional limitations.<sup>122</sup> The State Board concluded that the *Bacon* districts were failing to provide a “thorough and efficient” education based on the evidentiary record before the ALJ and the Commissioner.<sup>123</sup>

### 3. The Purgatory: State in Violation of Constitution with Regard to *Bacon* Districts, but No Remedy

Despite the State Board finding the *Bacon* districts failed to provide a “thorough and efficient” education to its students, the Board in *Bacon III* refused to recommend the *Abbott* remedy. The State Board claimed that each *Bacon* district had unique circumstances that differentiated an individual rural district from the urban districts and the other rural districts, whereas the *Abbott* districts were similar enough to each other to receive a universal remedy.<sup>124</sup> Because of this belief, the State Board determined that a full implementation of the *Abbott* remedy was improper. Instead, the State Board directed the NJ DOE to assess the needs of the *Bacon* districts individually; in essence, requesting more information and deferring to the legislature and executive to conjure up a new remedy tailored to these districts.<sup>125</sup>

The State Board argued that “different approaches will be required than those utilized in poor urban districts” to properly remedy constitutional violations in the rural school districts.<sup>126</sup> Curiously, however, the State Board reasoned that “growing up in poverty is basically the same, regardless of the district” while simultaneously suggesting that the solutions may differ between urban and non-urban districts.<sup>127</sup> What makes these two statements intriguing is that, while solutions for poverty undoubtedly differ between Newark and rural South New Jersey, the context of poverty here is limited to the impact it has upon education funding, and a comprehensive remedy had already been devised over the course of many years of litigation and judicial-legislative interplay in *Abbott*. Given the narrow facts at issue in *Bacon*, the State Board was tasked with simply evaluating the inadequacy of education funding and providing relevant solutions, not with devising a means of eradicating the root causes of poverty in rural areas. The idea promoted by the State Board here – that because each rural district is a unique snowflake, the *Abbott* remedy is inappropriate – is unsatisfying.

Given the history of repeated delays and ineffective solutions in legislative and executive responses to court orders in the *Robinson* and *Abbott* litigation, it should come as little surprise that the Commissioner, ordered by the State Board to conduct and complete an assessment of all sixteen *Bacon* districts within two months of the decision,<sup>128</sup> delayed in filing the court-mandated report. The

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<sup>122</sup> The State Board describes the legitimacy, authority, duty and limitations on its jurisdiction in greater detail. *Bacon III*, *supra* note 117, at 33–34 n.16.

<sup>123</sup> *Id.* at 40–41. “[W]e have adopted and relied upon the ALJ’s factual findings in arriving at our conclusions.” *Id.* at 35 n.17.

<sup>124</sup> *Bacon III*, *supra* note 117, at 59. “In addition, each district involved must confront a particular set of circumstances not necessarily shared by other poor districts whether urban or not, as, for example, a significant number of students whose parents earn their living through migrant labor.”

<sup>125</sup> *Id.* at 70.

<sup>126</sup> *Id.* at 59.

<sup>127</sup> *Id.* at 66.

<sup>128</sup> *Bacon III*, *supra* note 117, at 69.

Commissioner cited the successor legislation for CEIFA that was, at the time, being drafted in a joint effort between then-Governor Jon Corzine and the legislature as the source of the delay.<sup>129</sup> With no remedy in place and an official report from the Commissioner of Education that deferred any further reporting, thus delaying the construction of a remedy even longer, the *Bacon* districts appealed again – this time to the judiciary.

*Bacon IV* was argued before the New Jersey Appellate Division and decided in March 2008.<sup>130</sup> Most critically, the timing of the decision placed it one month after the enactment of the School Funding Reform Act (SFRA), the legislation that replaced CEIFA.<sup>131</sup> The Court in *Bacon IV* relied heavily upon the State Board's decision in *Bacon III*, and also found the SFRA to be a highly significant new development. Upon evaluation of the record, the Court confirmed that there was a constitutional violation of students' rights to a "thorough and efficient education" in the *Bacon* districts.<sup>132</sup> In deference to the legislature and the recently passed SFRA, however, the Court was unwilling to provide a remedy.<sup>133</sup> Instead of ordering the *Abbott* remedy or any other remedial measure, the State Board's decision in *Bacon III* was restated and reordered: a study to determine the individual needs of the *Bacon* districts must be conducted in light of the SFRA and completed within six months. Declaring the study "the very least [that] our constitutional duty demands," the Court callously noted that "constitutional violations must be remedied in a *timely* fashion."<sup>134</sup>

Remedies have been anything but timely, as the Appellate Division's decision came in the eleventh year of the *Bacon* litigation and with several prior decisions also emphasizing the uniqueness of each *Bacon* district and thus the necessity of further individualized studies. Meanwhile, an entire class of children graduated from the K-12 public school system in the *Bacon* districts. To quote the majority

<sup>129</sup> Press Release, Educ. Law Ctr., *Commissioner Delays Relief to NJ Rural Students* (June 23, 1996), available at <http://www.edlawcenter.org/news/archives/school-funding/209.html>. For full text of the actual report, see *Report to New Jersey State Board of Education: Implementation of the Bacon Decision*, EDUC. LAW CTR. (May 26, 2006), [http://www.edlawcenter.org/assets/files/pdfs/Newsblasts/elcnews\\_060623\\_BaconDecision.pdf](http://www.edlawcenter.org/assets/files/pdfs/Newsblasts/elcnews_060623_BaconDecision.pdf) (last visited Jan. 14, 2012).

<sup>130</sup> *Bacon v. N.J. Dep't of Educ. (Bacon IV)*, 942 A.2d 827 (N.J. Super. Ct. App. Div., 2008).

<sup>131</sup> School Funding Reform Act of 2008 (SFRA), N.J. STAT. ANN. §18A:7F-43 (2008). The SFRA aimed to create a unified school funding formula for the entirety of New Jersey. The SFRA was initially declared constitutional by the New Jersey Supreme Court in 2009, as applying the funding formulas to the *Abbott* districts. The Court, however, refused to abolish the *Abbott* district distinction, leaving intact the programs it established a decade earlier; the decision was limited to the funding streams. *Abbott v. Burke (Abbott XX)*, 971 A.2d 989 (N.J. 2009).

The ELC is currently challenging budget cuts made in 2010 and 2011 as rendering the SFRA unconstitutional as to the *Abbott* districts. The Supreme Court remanded the case in January of 2011 for fact-finding, putting the onus on the State to demonstrate that a "thorough and efficient" education can be delivered with the reduced budget. Jeanette Rundquist and Jessica Calefati, *N.J. Supreme Court Orders State to Prove Christie's Funding Formula is Sufficient*, NEWARK STAR-LEDGER, Jan. 14, 2011, [http://www.nj.com/news/index.ssf/2011/01/nj\\_supreme\\_court\\_orders\\_state.html](http://www.nj.com/news/index.ssf/2011/01/nj_supreme_court_orders_state.html).

<sup>132</sup> *Bacon IV*, 942 A.2d at 837.

<sup>133</sup> *Id.* at 837. While the track record of success is dubious at best, the Court cites *Robinson II*, *Robinson V*, *Abbott II* and *Abbott III* as examples of the judiciary deferring to the legislature to fashion a suitable remedy for the constitutional harms that were outlined in those cases. "[A]n alternative 'wait and see' approach . . . usually is both prudent and preferred in constitutional jurisprudence, and the Court has taken that approach in the past." *Id.* (citing *Abbott IV*, 693 A.2d at 445).

<sup>134</sup> *Bacon IV*, 942 A.2d at 839 (emphasis added).

from *Abbott II*, “[Students in poor districts] have already waited too long for a remedy, one that will give them the same level of opportunity, the same chance, as their colleagues who are lucky enough to be born in a richer suburban district.”<sup>135</sup> For the *Bacon* districts, the deferral of a remedy has equated to the denial of one.

#### 4. The Aftermath and Current Status: Further Delays and Deprival

The Commissioner of Education issued her report on the *Bacon* districts on September 14, 2009, eighteen months after the *Bacon IV* decision and a full year after the court-ordered completion date. The needs assessment report found that all sixteen *Bacon* districts could provide a “thorough and efficient” education under the new SFRA funding regime. The report, however, was flawed in numerous respects. First, the orders of the State Board and the Court were ignored again, as the report lacked a detailed analysis into the special needs of each of the rural *Bacon* districts. Fred Jacob, the lead attorney representing the *Bacon* districts, derided the state’s investigation as being “[a] drive-by, cursory review” of family poverty, district poverty in terms of taxable property value and poor facilities, and for containing nothing specifically addressing the unique problems facing rural communities in New Jersey.<sup>136</sup> ELC described the State Needs Assessments of the *Bacon* districts as failing to investigate the difficulties faced by students coming from families of migrant workers, Spanish-speaking parents or families without adequate health care.

The SFRA was underfunded for the 2009–10 school year, resulting in a shortfall of \$8.6 million of state education aid pledged to seven of the *Bacon* districts.<sup>137</sup> With a finding that the current funding system was a violation of the constitutional right to a “thorough and efficient” education, and the acknowledgement that more funding, additional programs and particularized plans were necessary to alleviate the harm done to the students, this underfunding exacerbates the constitutional harm. An underfunded state education aid statute “does nothing more than tell the SNDs to reorganize (and thus become more efficient, like the model) and to achieve at higher levels (even though they have been failing abysmally), with either the same amount of money or less than they had before.”<sup>138</sup>

Education budgets have been cut severely since the enactment of the SFRA.<sup>139</sup> Even if the SFRA were fully funded by the State, however, the funding would *still* be inadequate to address the

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<sup>135</sup> *Abbott II*, 575 A.2d 359, 380 (N.J. 1990).

<sup>136</sup> News Release, Educ. Law Ctr., *State Turns Its Back on Rural School Children* (Oct. 29, 2009) (on file with the *Columbia Journal of Race and Law*).

<sup>137</sup> *Id.* For a funding breakdown of all the districts, see “*Bacon*” *Districts 2009–10 State Aid Shortfalls*, EDUC. LAW CTR., [http://www.edlawcenter.org/assets/files/pdfs/Newsblasts/elcnews\\_091028\\_BaconDistrictsChart.pdf](http://www.edlawcenter.org/assets/files/pdfs/Newsblasts/elcnews_091028_BaconDistrictsChart.pdf) (last visited Jan. 14, 2012).

<sup>138</sup> *Abbott IV*, 693 A.2d 417, 442 (N.J. 1997) (referring to an inadequately funded CEIFA as applied to SNDs).

<sup>139</sup> Governor Chris Christie, in attempting to tackle New Jersey’s \$10 billion budget deficit, cut state education funding by \$820 million in 2010. For the 2011 fiscal year, Christie has announced an estimated \$250 million increase from 2010, thus leaving a net reduction of roughly \$570 million from his 2010 cuts. Megan DeMarco & Ginger Gibson, *N.J. to Restore a Fifth of Slashed State Aid for Schools Under Gov. Christie’s Budget*, NEWARK STAR-LEDGER, Feb. 24, 2011, [http://www.nj.com/news/index.ssf/2011/02/nj\\_to\\_restore\\_a\\_fifth\\_of\\_slash.html](http://www.nj.com/news/index.ssf/2011/02/nj_to_restore_a_fifth_of_slash.html). The court estimated that the SFRA was \$1.6 billion below optimal funding. *Abbott v. Burke* (*Abbott XXI*), 20 A.3d 1018, 1026 (N.J. 2011). Thus, while the SFRA was underfunded regardless of Christie’s budget cuts, the cuts deepened an existing constitutional harm.

Polling data from New Jersey school officials prior to the 2010–11 school year demonstrates that the impact of the state cuts to education aid has caused larger class sizes, fewer teachers, reduced funding for after-school and other



special needs of these *Bacon* districts, thus the constitutional violation remains and the students continue to be harmed. The dollar amounts may appear nominal in some cases, such as a shortfall of \$73,447 for Lawrence Township, but crucial to the analysis is the understanding that these districts were identified as SNDs. As a SND, funding beyond what a hypothetically normal school district would require is necessary to overcome the myriad of problems these districts must cope with (facilities, poverty, special needs students, etc.). The court has declared that supplemental programs in SNDs are a “fundamental prerequisite to the fulfillment of the State’s constitutional obligation.”<sup>140</sup>

In *Bacon III*, the State Board found it clear that “the children in [the *Bacon* districts] have *special needs* arising from the socioeconomic conditions in the districts.”<sup>141</sup> Some of the highlighted aspects of the findings include high suspension rates, large class sizes, less qualified faculty members, higher-than-average special education populations, overcrowding, inadequate facilities, a curriculum lacking “breadth of [academic] programming,” high mobility rates amongst students, impoverished districts based on local property wealth and family income, lack of special-needs programs such as drug counseling, and lack of adequate early education of programs.<sup>142</sup> In the records of the *Abbott* cases, many of these same conditions were found to be evidence of districts with special needs that needed to correct their failure to educate in accordance with their constitutional requirement.

For comparison’s sake, the *Abbott* districts, which are similarly classified as SNDs, continue to receive *constitutionally mandated* funding levels on par with the wealthiest suburban districts in New Jersey. In addition to funding parity, the *Abbott* districts receive many beneficial supplemental programs, such as free preschool and all-day kindergarten as ordered by *Abbott V*, funded and designed specifically for special needs students. While SFRA purports to increase state education aid to all districts, it does not contemplate the supplemental programs required in SNDs to achieve constitutional compliance. The best-case scenario for the poor, rural *Bacon* districts, under a fully funded SFRA aid package, is an education that still fails to account for the special needs of the districts. SFRA, therefore, even in the best-case scenario where New Jersey fully funds the legislation, can never satisfy the constitutional requirements of SNDs like the *Bacon* districts. The reality of school funding in New Jersey since the passage of SFRA—marked by chronic underfunding and continued legal battles waged by the ELC to ensure the state fully honors its obligation—has fallen far short of the legislature’s goals.

## B. The Urban/Rural Distinction of *Abbott v. Burke* and *Bacon v. NJ DOE*

### 1. Why Does *Abbott* Only Apply to Urban Districts?

The primary, and arguably sole, distinction between the *Abbott* and *Bacon* districts is the urban classification. The New Jersey Supreme Court’s decision in *Abbott II* first narrowed the prospective poor school districts in New Jersey, the districts labeled DFG A and DFG B, from 114 districts down to the twenty-nine districts within DFG A and B that the NJ DOE had designated as urban.<sup>143</sup> There is an

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additional programs. Press Release, New Jersey School Boards Association, *Schools to Reopen with Fewer Teachers, Larger Class Sizes*, (Aug. 10, 2010), available at [http://www.njsba.org/press\\_releases/schools-to-reopen-with-fewer-teachers.html?nr=339](http://www.njsba.org/press_releases/schools-to-reopen-with-fewer-teachers.html?nr=339).

<sup>140</sup> *Abbott IV*, 693 A.2d at 444.

<sup>141</sup> *Bacon III*, *supra* note 117, at 42 (emphasis added).

<sup>142</sup> *Id.* at 40–43.

<sup>143</sup> *Abbott II*, 575 A.2d 359, 386–87 n.18 (N.J. 1990).

undeniable, fact-based logic to the Court's analysis of the evidence in 1990, but the record developed at trial before Judge LeFelt, the thousands of pages of testimony and hundreds of exhibits, focused primarily upon poor urban districts, particularly the districts represented by the plaintiffs at trial.<sup>144</sup> From the first filings on through to the landmark decisions in the 1990's, the case was narrowly focused on poor urban districts, as opposed to poor districts found in all corners of New Jersey.

The startling evidence of a state derelict in its duties to educate students in cities like Camden and Irvington, and the sheer magnitude of the problem in New Jersey's urban areas, undoubtedly provided the strategic and moral motivations to pursue *Abbott* from an urban-centric position. ELC's focus proved immensely successful, but this initial limiting of plaintiffs and of the evidentiary record has caused tremendous roadblocks for non-urban districts in recent years. The court acknowledged the strength of the record when, in narrowing down the list of districts to receive the remedy, it stated, "There is no direct substantive evidence *on this record* of their failure to provide a thorough and efficient education."<sup>145</sup> The shadow of these findings in *Abbott* looms large over the *Bacon* litigation. Amassing a record as vast as the one presented for the poor urban districts in *Abbott* is difficult due to the small size of the *Bacon* districts, in both population and geography.

## 2. Similarities Between the *Abbott* and *Bacon* Districts

The constant emphasis on the special needs of each individual rural district, as compared to the urban districts, obfuscates the many similarities in problems and needs between the two groups. From the outset, the constitutional right at issue is the same: all students must receive a "thorough and efficient" education. Likewise, the argument that the right has been violated is the same: inadequate funding prevents poor school districts from providing the constitutionally required level of education to their students.

First, all of the *Abbott* and *Bacon* districts are very poor compared to the New Jersey state average. All of the *Bacon* districts possess a DFG rating of A or B, just like the *Abbott* districts currently benefiting from the remedial orders.<sup>146</sup> The DFG rating is significant, as a lack of urbanization and population density is considered a mitigating factor in a district's relative poverty and also the district's need for mandated funding.<sup>147</sup> Both groups of districts have an impoverished and thus deficient local property tax base, resulting in an inability to generate constitutionally adequate education funding from their citizens. Central to the findings in the *Abbott* decisions, the New Jersey Supreme Court has repeatedly declared that the state cannot put undue emphasis on the *Abbott* districts to tax its citizens to produce the necessary funding to achieve constitutional compliance.<sup>148</sup> Neither the *Abbott* nor the *Bacon* districts possess the financial wherewithal to overcome the lack of funding via local taxation, and the court recognized this problem and forbid reliance upon local taxation when ordering a remedy for the violation in the urban districts.

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<sup>144</sup> Camden, East Orange, Jersey City and Irvington. *Id.* at 363.

<sup>145</sup> *Id.* at 387 (emphasis added).

<sup>146</sup> *Bacon III*, *supra* note 117, at 42.

<sup>147</sup> DFG Factors, *supra* note 55. For court's statement on relevancy of urbanization and density, see discussion, *infra* Part II.B.3, p. 21.

<sup>148</sup> See *Abbott II*, 575 A.2d at 409 (ruling on the 1975 Act); and *Abbott III*, 643 A.2d 575, 576, 578 (N.J. 1994) (ruling on the QEA).

Second, both groups of districts have special needs to address, apart from the wealthy districts, which necessitate not merely funding parity but greater levels of funding. Failure to address the special needs of the urban districts was a major point of contention for the court when declaring the state funding acts unconstitutional. In *Abbott II*, the court observed that providing the same level of education to a regular student and a “severely disadvantaged” student would do nothing to eliminate the existing gap, thus perpetuating the difference.<sup>149</sup> As such, the court decided that “necessarily” means that, in poorer urban districts, something more must be added to the regular education in order to achieve the command of the Constitution” to provide a “thorough and efficient” education.<sup>150</sup>

#### IV. A PROPOSAL: DISREGARD THE URBAN CRITERIA AND GRANT THE ABBOTT REMEDY

*Part III argues that the Bacon districts deserve the full remedy granted to the Abbott districts. Legal analysis of the Abbott cases will prove that they make the same legal claim as the Abbott cases and therefore deserve the same remedy to end the constitutional harm. Given the principles espoused in Abbott, the Bacon districts must be afforded the same protections and are legally deserving of the same remedy. Evidence of the importance of the increased school funding, vis-à-vis the success of the Abbott remedy in certain school districts, further bolsters the argument for granting the Abbott remedy.*

##### A. The Constitutional Right Must Take Precedent Over Urban Classification

Considering that a remedy was fought for and won in the *Abbott* litigation for poor urban districts that demonstrated severe needs, it is curious why the rural districts, arguing their case nearly a decade after the landmark remedial decisions of *Abbott IV* and *Abbott V*, struggle to obtain a remedy for their own educational plight. Repeated often in the *Bacon* litigation is the urban/rural divide: what is appropriate for urban districts is not necessarily appropriate for rural districts. Differences in demographics and urbanization suggest an approach tailored towards rural districts is appropriate.<sup>151</sup> Thus, the question remains: why is this distinction so critical? If an education funding system is found unconstitutional as applied to a school district, should urbanization matter in determining the expansiveness of the remedy, or instead should the right itself be paramount, and the similarities of the harm dictate the remedy? Given the legal and policy consequences of emphasizing this distinction, it should not factor into the analysis.<sup>152</sup> Remedial plans for an acknowledged violation of the same constitutional right should not depend upon the population densities. It should instead come down to the efficacy of the existing remedy and the ability to implement the remedy to new populations.

Educational equity litigation in New Jersey suffers from competing goals: the general principle of eradicating inadequate and unconstitutional educational conditions within the state, and the specific issue of violations in poor urban districts as shown by the evidentiary record produced at trial proceeding *Abbott II*. Despite this struggle, there is ample evidence found in the Court’s *Abbott* decisions that

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<sup>149</sup> *Abbott II*, 575 A.2d 359, 402 (N.J. 1990).

<sup>150</sup> *Id.* at 403.

<sup>151</sup> The State Board’s order for an individualized assessment of the *Bacon* districts was “focus[ed] on the unique set of circumstances confronting students of . . . poor rural districts that distinguish them from their urban counterparts.” *Bacon IV*, 942 A.2d 827, 838 (N.J. Super. Ct. App. Div., 2008).

<sup>152</sup> The State Board found that “the conditions under which [*Bacon* district] students live[d] mirror[ed] those of the students in the *Abbott* Districts, *which in some cases are only blocks away.*” *Bacon IV*, *supra* note 130, at 833 (citing *Bacon III*, *supra* note 117, at 43) (emphasis added).

demonstrate a clear statement of the larger principles that serve as the spirit of *Abbott*; principles that apply to the *Bacon* districts and any other district that the Court finds to be in violation of the “thorough and efficient” education clause. The Court in *Abbott IV* explicitly declared that:

The constitutional guarantee of a thorough and efficient education attaches to *every school district, and indeed, to every individual school in the State*. Of course, the right to a thorough and efficient education does not ensure that every student will succeed. It must, however, ensure that every child in New Jersey has the opportunity to achieve.<sup>153</sup>

Every school district must provide a “thorough and efficient” education, as mandated by the New Jersey Constitution, or else innocent students are subjected to harm. If “[the New Jersey] Constitution demands that every child be given an equal opportunity to meet his or her promise,” then the promise of a child attending inadequate public schools is suffering a possibly irreparable constitutional injury with every school year that passes.<sup>154</sup> These principles surely apply to students in poor rural districts as strongly as they apply to poor urban students, wealthy suburban students, and indeed, all students within New Jersey.

In the most recent decision in the *Abbott* litigation from May 2011,<sup>155</sup> the court ruled that Governor Christie’s underfunding of the SFRA amounted to a constitutional violation of the rights of students. Two years prior, the court in *Abbott XX* had upheld the constitutionality of the SFRA statewide, but with an explicit condition to *fully* fund the SFRA.<sup>156</sup> With the SFRA underfunded by nearly \$1.6 billion,<sup>157</sup> the ELC brought suit.

Yet a majority of the supreme court again limited its findings to the *Abbott* districts.<sup>158</sup> Absent full funding, the implication was that the court would reevaluate the legislation’s constitutionality. This limitation came despite the court specifically remanding *Abbott XXI* for trial with an order to investigate the constitutional harms inflicted by the education funding cuts on *all* districts: “whether school funding through SFRA, at current levels, can provide for the constitutionally mandated thorough and efficient education for New Jersey school children.”<sup>159</sup> The trial court, under this remand order, investigated the impact of education budget cuts to students statewide and found that a stunning 205 of New Jersey’s 560

<sup>153</sup> *Abbott IV*, 693 A.2d at 443 (emphasis added).

<sup>154</sup> *Id.* at 445.

<sup>155</sup> *Abbott XXI*, 20 A.3d 1018 (N.J. 2011)

<sup>156</sup> *Abbott XX*, 971 A.2d 989, 993 (2009) (“[A] state funding formula’s constitutionality is not an occurrence at a moment in time; it is a continuing obligation. Today’s holding issues in the good faith anticipation of a continued commitment by the Legislature and Executive to address whatever adjustments are necessary to keep SFRA operating at its optimal level.”).

<sup>157</sup> *Abbott XXI*, 20 A.3d at 1026.

<sup>158</sup> *Id.* at 1036 (“[Christie’s budget] reductions have had a significant impact on the beneficiaries of our prior remedial orders, namely the plaintiff pupils of the *Abbott* districts. It was to remedy their decades long constitutional deprivation that this Court issued remedial orders.”).

<sup>159</sup> Opinion/Recommendations to the Supreme Court at 6, *Abbott v. Burke*, (N.J. Super. Ct. Mar. 22, 2011) (No. M-1293), <http://www.judiciary.state.nj.us/supreme/abbott/Abbott%20v%20Burke%20-%202011.pdf>. Judge Doyne, who has presided over many of the trials in the *Abbott v. Burke* litigation, specifically noted that the remand “addresses the rights of *all* New Jersey school children” rather than only the *Abbott* students, and that this was a departure from the prior remands. *Id.* at n.5.

school districts, including 59 high-need school districts, had below adequate school expenditures in 2011.<sup>160</sup> In spite of the evidentiary record at trial, the majority nevertheless confined the scope of their decision and remedial order in *Abbott XXI*, justifying their stance by proclaiming restrictions on the court's power and jurisdiction; namely, that the non-urban plaintiffs are not present, therefore, they cannot receive a ruling on their case.<sup>161</sup>

Justice Barry T. Albin, in filing a concurrence in *Abbott XXI*, explicitly addressed the constitutional, legal, and principled inconsistencies of limiting funding remedies to the *Abbott* districts when others, including the rural *Bacon* districts, are similarly underfunded and in dire need of assistance. Justice Albin departed from the majority in stating that the judicial remedy should include *all* students in New Jersey who reside in underfunded districts, not merely those who live in the *Abbott* districts.<sup>162</sup> Citing the extensive evidentiary record from the trial court,<sup>163</sup> there were 205 school districts that are unable to provide the constitutionally required "thorough and efficient" education.<sup>164</sup> With the majority proffering an unjust solution in the curtailment of the remedy to a select class of constitutionally harmed students, Justice Albin described the perils that await the remaining students. He referenced the problem of incessant delays that have plagued the needy *Bacon* districts for the past fourteen years: "[t]he redress of the rights of those students [in underfunded districts] now must await a day when it may be too late for them to enjoy their right to a constitutionally adequate education."<sup>165</sup> Given the court's narrow tailoring of the *Abbott* litigation and remedy to the *Abbott* districts whose funding schemes were declared unconstitutional back in 1990, the *Bacon* litigation should push forward, relying on the strength of Justice Albin's concurrence and with their own evidentiary record, to achieve justice.

## B. Implement the *Abbott* Remedy Because the Remedy Can Work

For all of the controversy surrounding the *Abbott* litigation and, specifically, the remedial orders of funding parity with the wealthiest districts in New Jersey and additional funding for supplemental programs such as pre-kindergarten, the entire public policy debate can be reduced to one simple question: has the remedy worked? Spending without results is wasteful spending. *Abbott* ordered parity in funding between the poor urban districts and the wealthiest suburbs because of the notion that money was a critical factor in providing a quality education. While a broader discussion of the efficacy of money in ameliorating the problems our education system faces is a fiercely debated issue that is well

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<sup>160</sup> *Abbott XXI*, 20 A.3d 1018, 1095 (N.J. 2011). In sum, seventy-two percent of the state's high-risk students were residing in districts that were below adequacy.

<sup>161</sup> *Id.* at 1043 ("The extent of this Court's jurisdiction in this matter starts and ends with the series of litigated proceedings that preceded this action . . . [t]his Court's jurisdiction is limited to rectification of the constitutional violation suffered by the *Abbott* litigants.").

<sup>162</sup> *Id.* at 1101 (Albin, J., concurring) ("The at-risk children in the 187 underfunded non-*Abbott* districts suffer from the same disadvantages of poverty as the children in the former *Abbott* districts.").

<sup>163</sup> Included in the evidence at trial was testimony from superintendents representing non-*Abbott* school districts, one of which, Buena Vista Regional, is a member of the *Bacon* plaintiff class. *Id.* at 1104, 1105.

<sup>164</sup> *Id.* at 1105.

<sup>165</sup> *Id.* at 1109.

beyond the scope of this note,<sup>166</sup> a much narrower look at the impact of the funding increases from *Abbott* is in order, and the results are promising.

The one undeniable result of the *Abbott* litigation is the substantial increase in education spending in the thirty-one *Abbott* districts. Overall, the *Abbott* districts have far greater resources now than they did prior to the court-ordered parity of school funding in *Abbott IV*. As of 2007, *Abbott* districts were spending, on average, twenty percent *more* than the wealthiest districts in New Jersey.<sup>167</sup> For a nationwide comparison, of the one hundred largest school districts in the United States, the Newark, New Jersey, school district has the highest per-pupil expenditure, with a total that is 224% greater than the average of the remaining ninety-nine school districts.<sup>168</sup> Newark tops this list due to the seventy-four percent increase in education spending resulting from the parity order in *Abbott IV*. Spending, therefore, has increased significantly.

Successful improvements in education are evidenced in several *Abbott* districts.<sup>169</sup> Applying the *Abbott* remedy to the *Bacon* districts, coupled with closely mirroring the strategies taken in the most successful *Abbott* districts, will surely create a greater learning environment for the currently inadequately educated students.

Perhaps the greatest success story of *Abbott v. Burke* is Union City. The demographic profile of Union City schools would suggest challenges in providing an adequate education. Union City is the most densely populated city in the United States, with 67,000 plus people living on just over one square mile of land.<sup>170</sup> Ninety-six percent of students in Union City are Latino, and a large percentage of these

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<sup>166</sup> The most famous critic of increasing education funding, without other reforms to the system, is Eric Hanushek. Hanushek has argued that increasing funding for education is an inefficient and ineffective means of improving the quality of education in schools. See Eric A. Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 J. ECON. LIT. 1141 (1986). This article has been cited several hundred times in academic papers. Eric Hanushek has appeared as a witness in numerous lawsuits on behalf of states, defending school funding systems from allegations of unfairness from plaintiffs.

Hanushek's position in the debate regarding the efficacy of increased funding for schools has provoked considerable criticism from scholars and judges alike. See generally MICHAEL A. REBELL & JOSEPH J. WARDENSKI, OF COURSE MONEY MATTERS: WHY THE ARGUMENTS TO THE CONTRARY NEVER ADDED UP (2004), available at [http://www.schoolfunding.info/resource\\_center/research/MoneyMattersFeb2004.pdf](http://www.schoolfunding.info/resource_center/research/MoneyMattersFeb2004.pdf). Statistical analysis of the data set utilized by Hanushek disputes his claim that education funding has no meaningful relation to increased educational outcomes. L.V. Hedges, R.D. Laine & R. Greenwald, *Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes*, 23 EDUC. RES. 5 (1994).

Hanushek himself admitted the efficacy of increased funding while testifying in an educational equity case: “[M]oney spent wisely, logically and with accountability would be very useful indeed.” MICHAEL A. REBELL, COURTS & KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 34 (2009).

<sup>167</sup> GORDON MACINNES, IN PLAIN SIGHT: SIMPLE, DIFFICULT LESSONS FROM NEW JERSEY'S EXPENSIVE EFFORT TO CLOSE THE ACHIEVEMENT GAP 26 (2009).

<sup>168</sup> *Id.* at 27.

<sup>169</sup> See *infra* Part IV.B (including profile of Union City's school district).

<sup>170</sup> *Union City, New Jersey: Profile of General Demographic Characteristics: 2000*, U.S. CENSUS BUREAU, [http://factfinder.census.gov/servlet/QTTable?\\_bm=y&-qr\\_name=DEC\\_2000\\_SF1\\_U\\_DP1&-ds\\_name=DEC\\_2000\\_SF1\\_U&-\\_lang=en&-geo\\_id=16000US3474630](http://factfinder.census.gov/servlet/QTTable?_bm=y&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U&-_lang=en&-geo_id=16000US3474630) (last visited Jan. 15, 2012).

students are English Language Learners (ELLs). The district itself is the poorest in New Jersey,<sup>171</sup> and its per-pupil expenditures are in the bottom quarter of the *Abbott* districts (though the expenditures still represent a seventy-two percent increase from pre-*Abbott* levels). Yet Union City has persevered, becoming a shining example of a poor district facing immense difficulties that nevertheless has narrowed the achievement gap between its disadvantaged students and students in wealthier districts. In the span of only nine years after the parity-funding order in *Abbott IV*, proficiency amongst Union City eighth graders has risen dramatically and approached the statewide average of proficiency amongst non-*Abbott* students. This achievement exemplifies the goal of *Abbott* and demonstrates both the efficacy of the remedy and that such gains are possible, and not merely ideals.<sup>172</sup>

Gordon MacInnes argues that the most important reason driving the great success of Union City in improving its quality of education is the emphasis on early education programs that stress early literacy.<sup>173</sup> An analysis of specific education reforms is best left to educators and experts on education policy, but a brief synopsis here assists in proving why the *Abbott* remedy is a useful tool if properly instituted and governed at the local level. In studying the efficacy of post-*Abbott* reform, Gordon MacInnes studied several districts that sought to emulate the reform successes taking place in Union City. Applying their now-increased resources in a focused, intelligent manner, the districts that emulated Union City's emphasis on early childhood literacy all saw rapid gains. Most promising is Elizabeth, New Jersey's fourth largest and sixth poorest school district. Elizabeth's school district redoubled its emphasis on early elementary education and saw third grade performance improve by sixteen percent in only four years.<sup>174</sup>

These districts have utilized their increased resources from the *Abbott* remedy (funding parity bestowed upon them by *Abbott IV* and the mandated early education programs from *Abbott V*) in a manner that can be replicated in the *Bacon* districts as well as the remaining *Abbott* districts. What the *Bacon* districts lack is the adequate funding to aggressively pursue early education and increase literacy rates. Union City is proof positive that astronomical per-pupil expenditures, rising to the level of Newark, are not necessary to succeed but it also shows the efficacy of increased funding in impoverished areas. The court should not and cannot set New Jersey education curriculum, but it should look to the Union City experiment and strategy as a persuasive statement that their rulings and remedial orders *can* work.

## V. CONCLUSION

The ELC's initial complaint in the *Abbott* litigation emphasized the impoverished communities and resulting educational inadequacies found in poor school districts:

The money shortages . . . were the direct cause of the educational inadequacies in the poor districts—the dilapidated buildings, the bigger classes, the lower-paid and less-

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<sup>171</sup> Measured by student eligibility for the free lunch program, a widely used means of determining poverty level of students. MACINNES, *supra* note 167, at 34.

<sup>172</sup> The gap in literacy between Union City students and non-*Abbott* students has closed from twenty-six percentage points to roughly equal in math, and from twenty-three percentage points to a mere three in language arts. *Id.* at 35. For a visual representation of the gains made in nine years compared to the average non-*Abbott* district student and average *Abbott* district student, see *id.* fig.5.1.

<sup>173</sup> *Id.* at 36.

<sup>174</sup> *Id.* at 78.

experienced teachers. Yet the children who attended these inadequate schools had overwhelming educational needs . . . for they came from families with little money or education, scored poorly on standardized tests, and dropped out in large numbers. In effect, students who needed the most got the least . . .<sup>175</sup>

These same principles and beliefs that were present in the earliest *Abbott* filings, and are evidenced in myriad of passages from subsequent *Abbott* decisions, can and should have a universal appeal. The *Bacon* districts have sufficiently proven a constitutional violation of those students' right to a "thorough and efficient" education at the Appellate Division level of the New Jersey Judiciary. Individual analyses of the districts conducted by the State incurred long delays, and when the studies were finally conducted, they were not thorough and quick in declaring that the districts did not need any additional funding under SFRA. The SFRA, in subsequent years, has been underfunded, creating budget shortfalls for the *Bacon* districts, rendering the education they provide their students even more constitutionally deficient than anticipated by the lackadaisical NJ DOE studies. The indignation at the delays and constitutional deprivations that took place in *Abbott*, and the resulting court-ordered remedies, should be directed towards the aggrieved schoolchildren in the rural *Bacon* school districts. An entire generation of students has entered into constitutionally deficient schools in *Bacon* districts at kindergarten and graduated high school during the time in which this matter has languished in the courts. The courts must address the students' aggrieved constitutional rights, as their educational futures require the full protection of the New Jersey state constitution.

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<sup>175</sup> YAFFE, *supra* note 4, at 100.