CW-NJ-001-008

RAYMOND ARTHUR ABBOTT, ET AL., Plaintiffs, vs. FRED G. BURKE, ET AL., Defendants.	SUPREME COURT OF NEW JERSEY DOCKET NO. M-622-96 CIVIL ACTION On Review Of: THE SUPERIOR COURT CHANCERY DIVISION Sat Below: Honorable Michael Patrick King, P.J.A.D. (temporarily assigned)

PLAINTIFFS' BRIEF IN REPLY TO DEFENDANTS' BRIEF IN SUPPORT OF THE COMMISSIONER'S RECOMMENDATIONS

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INTRODUCTION

Throughout the long history of school finance litigation in New Jersey, the State recycles the same arguments to avoid constitutional compliance, no matter how strongly this Court has already rejected them. The State's latest brief is true to form.

Yet again, the State argues that its response to this Court's remedial order should be accorded the same deference as a de novo agency decision.

Yet again, the State argues that this Court lacks the power, even as last-resort guarantor of constitutional rights, to require a specific remedy, and that any attempt by this Court to do so would violate the separations of powers doctrine.

Yet again, the State asserts that the other branches must be accorded broad discretion to respond to the constitutional commands of the Education Clause, notwithstanding their repeated failures to do so adequately.

Yet again, the State asserts that the latest educational methodology chosen by the Commissioner -- this time "whole-school reform" and "school-based budgeting" -- satisfies the constitutional mandate that disadvantaged students in poor urban districts be afforded an education comparable to their suburban counterparts, and be provided supplemental programs to address their special needs, with substantially less funding than is required for regular education parity plus necessary supplemental programs.

As it has done so many times before, this Court must once again resist the State's attempt to use deference, discretion, and vague and undeveloped illustrative models to mask its continuing failure to achieve full constitutional compliance for New Jersey's least powerful and most disadvantaged children.

I. THE STATE'S CONTENTION THAT THIS COURT MUST DEFER TO THE COMMISSIONER'S PROPOSALS IS WHOLLY INCONSISTENT WITH PRINCIPLES OF SEPARATION OF POWERS AND THE COURT'S RESPONSIBILITY TO DETERMINE COMPLIANCE WITH ITS CONSTITUTIONAL MANDATES UNDER ABBOTT IV

Throughout its brief, the State claims that this Court is legally, and as a matter of comity, required to defer totally to the Commissioner of Education's ("Commissioner") proposals on remand for supplemental programs and facilities in the special needs districts ("SNDs"). This argument is not a respectful call for deference, but rather a bold claim that the Court cede judicial authority to the Executive in matters of constitutional compliance. The State's claim is not only inappropriate in the context of the present proceedings, but also legally insupportable.

A. Deferring To The Commissioner's Proposals Is Improper In These Remand Proceedings

The State's plea for deference to determinations by the Executive Branch as to what satisfies the Education Clause, N.J. Const. of 1947, Art. VIII, § 4, ¶ 1, is fundamentally flawed for two reasons. First, throughout the decades of school finance litigation, the same argument has been repeatedly advanced by the State and just as consistently rejected by this Court. The teaching of this unbroken line of judicial precedent is that the Gourt will defer in the first instance to the Executive and Legislature to implement a remedy for constitutional violations, but that this Court remains the ultimate arbiter of what constitutes compliance with constitutional mandates. See Abbott v. Burke, 149 N.J. 145, 153-61 (1997) ("Abbott IV") (reviewing the history of Abbott litigation); Id. at 169 (concluding that the Court's function "is to determine whether the new approach encompassing content and performance standards, together with funding measures, comports with the guarantee of a thorough and efficient education for all New Jersey school children"); Robinson v. Cahill, 69 N.J. 133, 144-145 (1975) ("Robinson IV") (concluding that, while the other branches can

select means for implementation, it is the Court's function to appraise constitutional compliance).

Second, deference is especially inappropriate in the context of these proceedings: to determine compliance with the Abbott IV remand order. Both this Court and the United States Supreme Court have held that, when there is a clear remedial mandate, coupled with years of non-compliance with the constitution, conventional principles of deference are inapplicable, and the defendants, not the plaintiffs, are obligated to prove that their alternative approach satisfies the constitutional mandate. See, e.g., Southern Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158, 305-06 (1983) ("When that clear [constitutional] obligation is breached, and instructions given for its satisfaction, it is the municipality, and not the plaintiffs, that must prove every element of compliance."); Green v. School Board of New Kent County, 391 U.S. 430, 438 (1968) (after ten-year mandate for school desegregation, defendant has burden "to come forward with a plan that promises realistically to work, and promises realistically to work now") (emphasis in original). By claiming deference, the State seeks to reverse the burden of proof that must govern the critical determinations concerning the constitutional sufficiency of the Commissioner's proposals after years of non-compliance with this Court's directives.

Indeed, the State's deference argument proceeds from a basic misunderstanding of the nature of the remand proceedings. This Court's remand order does not cede any, much less all, authority to the Commissioner to determine the constitutionality of his own proposals. Nor were the remand proceedings limited solely to a deferential vetting of whatever proposals the Commissioner devised. SB 23, 32. Instead, the Remand Court was expressly directed, based on its review "of the report submitted by the Commissioner, any report that may be submitted by the Special Master, and any additional evidence," to render a decision containing "the court's findings, conclusions and recommendations, including its determination as to whether

the proposals contained in the report submitted by the Commissioner satisfy the requirements of this Order, consistent with the Court's opinion in this case." Abbott IV, 149 N.J. at 226 (emphasis added). The Remand Court's determination is then to be reviewed by this Court. Id. Consequently, while this Court recognized the importance of obtaining the expertise of the Commissioner, and other educators, including any Special Master, on necessary supplemental programs and facilities, id. at 199, the Remand Court was directed to make findings, conclusions and recommendations on whether the Commissioner's proposals satisfy the Abbott IV order. It is the Remand Court's decision, not the Commissioner's proposals, that "shall be reviewed by this Court." Id.

In this respect, the Abbott IV remand order is qualitatively different from the approach to compliance taken in Abbott v. Burke, 119 N.J. 287 (1990) ("Abbott II") and Abbott v. Burke, 136 N.J. 145 (1994) ("Abbott III"). See Abbott IV, 149 N.J. at 179-180. The remand order was expressly designed to cure long-standing non-compliance with those prior decisions and to put teeth into the directive that the Commissioner must study and respond to student disadvantage and facility needs in SNDs.

B. There Is No Legal Basis To Defer To The Commissioner's Proposals

Notwithstanding the "constitutional rights at stake" and the "persistence and depth of the constitutional deprivation," id. at 202, the State urges the Court to defer to the Commissioner's expertise and to await the results, at some indeterminable time in the future, of the Commissioner's proposals on supplemental programs and facilities. The State's "deference" argument is purportedly derived from (1) the separation of powers doctrine; (2) principles of judicial review of agency action; and (3) comity principles that permit the Court to accommodate the lawful and reasonable exercise of powers of the other branches of government. None of those doctrines support the State's claim for deference.

First, the State's separation of powers argument simply recycles the contention, repudiated throughout this litigation, that the Court has limited judicial authority to require constitutional compliance or to mandate affirmative relief. There is simply no legal support for the State's time-worn assertion that the Court would impermissibly encroach upon powers rightfully belonging to the other branches of government if it does not defer to the State's proposals for constitutional compliance. SB 31; see also SB 43 (arguing that failure to defer "would be an outright usurpation of the authority to appropriate funds for a preferred public policy").

More than two decades ago, this Court articulated the legal proposition that separation of powers is not violated by judicial determinations of compliance by the other branches with the dictates of the Education Clause, and by direct orders for affirmative relief. Robinson IV, 69 N.J. at 154-55. This Court reaffirmed this bedrock principle just last year when it flatly rejected the State's claim that consideration of CEIFA's facial constitutionality would violate separation of powers. Abbott IV, 149 N.J. at 203 ("there can be no responsible dissent from the position that the Court has the constitutional obligation to do what it can to effectuate and vindicate the constitutional rights of the school children in the poverty-stricken urban districts").[1]

Stripped to its essentials, the State's separation of powers argument is actually a claim of Executive autonomy in matters relating to the education of disadvantaged children. In claiming undue judicial intrusion upon executive powers, the State seeks to arrogate to the Commissioner primary, if not exclusive, responsibility for determining

[1] The State's reliance on the Rhode Island Supreme Court to support its separation of powers claim is, to put it bluntly, mystifying. SB 1, 52; City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995). If the State is suggesting that this Court is operating outside of the judicial mainstream, it is patently wrong. Of the 22 states' highest courts that have considered the constitutionality of school funding laws since 1989, 15 have invalidated those statutes on constitutional grounds. The Rhode Island Supreme Court is in the distinct minority that have rejected such challenges, relegating it to the judicial backwaters, rather than to a position of authority.

whether his proposals are constitutionally sufficient. To accept the State's deference claim would relegate the Court to a secondary role, a result that would violate, not further, the constitutional doctrine of separation of powers. Beyond the irony of the State invoking separation of powers to support an unprecedented effort to seek Executive dominance over the judiciary, the State has simply provided no legal basis for rejecting the Court's well-settled position on the issue.

Second, the State is equally wrong in claiming that principles governing judicial review of agency actions entitle the Commissioner's proposals to a "high degree of deference by this Court." SB 23. Despite frequent pronouncements on the limited role of courts in reviewing the decisions of administrative agencies, the judiciary has always possessed the authority to consider whether an agency's decision offends the Federal or State Constitution. George Harms Const. v. Turnpike Auth., 137 N.J. 8, 27 (1994). The Commissioner is no more entitled by principles of deference to thwart the Abbott IV mandates than he is to ignore other constitutional commands. The ultimate resolution of the constitutionality of the Commissioner's proposals, and the need for any additional affirmative relief, turns on this Court's, not the Commissioner's, interpretation of the New Jersey Constitution.

When constitutional compliance is at issue, an agency's positions are subject "to appellate review without the presumption of correctness that would attend the resolution of less weighty questions." Board of Education of the Township of Neptune v. Neptune Township Education Assoc., 293 N.J. Super. 1, 9 (App. Div. 1996); see also Abbott v. Burke, 100 N.J. 269, 298-99 (1985) ("Abbott I") (holding that, "although an agency may base its decision on constitutional considerations, such legal determinations do not receive even a presumption of correctness on appellate review"). If anything, the Commissioner's proposals in these proceedings are entitled to even less deference, because they are presented in a remedial proceeding designed to

determine compliance with constitutional dictates, and not as an independent expression of the agency's decision making powers.

Finally, the State's claim that deference is proper on the basis of comity -- after over twenty-five years of non-compliance and a record on remand that demonstrates resistance to the Abbott remedy – is singularly misguided. The Court now has an extensive and unprecedented factual record, providing significant expert testimony and evidence on necessary supplemental programs and facility needs, along with plaintiffs' recommendations. But see PB 8 (describing problems created on remand by the absence of comprehensive needs assessment). The Court also has the benefit of the Remand Court's recommendations based on that record. The Commissioner cannot claim that he did not have an adequate opportunity to present fully his views on all relevant issues and to subject the plaintiffs' proposals to searching cross-examination. To accord deference to the Commissioner's proposals when the record demonstrates that they are unsound, inadequate or based on fiscal, rather than educational, considerations would permit his purported "expert" conclusions to trump an evidentiary record developed for the very purpose of determining the constitutional soundness and sufficiency of his proposals. At bottom, the State's comity argument would render the entire remand process, and the painstaking efforts of the Remand Court to develop a record, a formalistic and superfluous ritual.[2]

In sum, the State's deference argument is nothing more than a disingenuous effort to have the Court ignore the explicit Abbott IV order and refrain from any further

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[2] In Abbott IV, the Court concluded that, against the backdrop of "the inescapable reality of a continuing profound constitutional deprivation that has penalized generations of children," the conventional "wait-and-see" approach to constitutional compliance is inappropriate. Abbott IV, 149 N.J. at 201-02. Despite the Court's disavowal of the "wait-and-see" approach in this case, that is precisely what the Commissioner requests the Court to do -- under the rubric of deference -- while he experiments with his undeveloped version of "whole-school reform," including illustrative school-based budgeting. See PB 18; see also infra Point II.

oversight of constitutional compliance. Even worse, the State proposes that the Court accord such deference -- and withdraw judicial supervision over the Commissioner's proposals -- in the face of a record that overwhelmingly demonstrates that the Commissioner: (1) made his proposals for supplemental programs without ever conducting the study of the special educational needs of students in the SNDs; (2) proposed insufficient supplemental programs, under the guise whole-school reform, to be supported with diversions from the Court's parity remedy for regular education;[3] and (3) failed to complete a comprehensive study of facility needs in the SNDs. Instead of embracing his constitutional responsibility to provide comprehensive relief, the Commissioner makes yet another attempt to circumvent the force and effect of this Court's decrees. Under these circumstances, deference to the Commissioner is unwarranted. Further, the record on remand compels continued judicial oversight to assure constitutional compliance.

II. THE COMMISSIONER HAS NOT SHOWN THAT HIS VERSION OF "WHOLE-SCHOOL REFORM" SATISFIES THIS COURT'S MANDATE FOR SUPPLEMENTAL PROGRAMS TO MEET THE SPECIAL NEEDS OF STUDENTS IN SNDS AND WILL RESULT IN THE ACHIEVEMENT OF THE CONTENT STANDARDS

The State asks this Court to adopt in toto the Commissioner's proposal for the "implementation of a whole-school reform model incorporating certain supplemental programs," asserting that this model "meet[s] the special needs of students attending schools in the [special needs] districts" and is "an appropriate means of meeting the constitutional requirement [in the SNDs] for a 'thorough and efficient system of free

[3] It is striking that the State proposes abandonment of judicial oversight over the Commissioner's compliance with Abbott IV while, at the same time, cryptically and without further explanation, suggesting that parity funding is available only "for the time being." SB 13 n*; see also Testimony of Dr. Jeffrey Osowski, Tr. 11/21/97, 171-196 (discussing plans underway by the Commissioner to develop an alternative to parity).

public schools.'" SB 22. There is simply no basis in the record on remand to support the State's broad and far-reaching claims about the constitutional sufficiency of the Commissioner's model. To the contrary, when examined carefully, the record demonstrates that this model is inadequate to address "the real needs of disadvantaged children in the SNDs," even those needs identified by the parties on remand. Abbott IV, 149 N.J. at 199. The record also is devoid of any evidence that this model will enable students in the SNDs to achieve the Core Curriculum Content Standards ("content standards").

The State asserts that the children in the SNDs "now have the Commissioner's extensive research and thinking" on their special needs, embodied in a "national model" of "whole-school reform." SB 2, 22. When stripped of its rhetorical gloss, a careful review of the Commissioner's model reveals that it is actually a composite of five separable elements: (1) the essential components of the Success for All ("SFA") supplemental program; (2) additional supplements to the SFA program, as recommended by Dr. Slavin; (3) other supplemental programs identified by the Commissioner; (4) several changes in school-level management and staffing; and (5) illustrative school-based budgeting. The Commissioner has failed to show that these elements, taken singly or in combination, sufficiently responds to the mandate for necessary supplemental programs, and for achievement of the content standards through comparable regular education.

A. Essential Components of the Success for All Supplemental Program

The Commissioner's model for "whole-school reform" includes the essential components of the SFA supplemental program. SB 7-10. These components are: tutors to provide one-to-one tutoring for students failing reading in grades 1-3; extra teachers to assure 90 minute reading instruction daily in class size of 15 for the same three grades; intensive teacher training; SFA curriculum and materials; and a full-time

program facilitator to supervise all instructional improvement activities. See Plaintiffs' Brief in Response to the Decision of the Remand Court ("PB") 7-8 (describing the SFA components and their per-school cost); D-4, 4. These components are required to enable all students to reach the goal of the SFA supplemental program: "to make sure every child becomes an enthusiastic and skilled reader by the end of the third grade." Report and Decision of Remand Court ("Remand Decision"), at 34; Commissioner's Study of Supplemental Programs ("Study"), D-2, 22 (describing goal of SFA as "ensuring that all students are reading at grade level by grade three").

The State, however, asserts that SFA not only improves early literacy in reading, SB 9, but also "[e]mpirically ... has demonstrated substantial improvement in student achievement" and "enabl[es] students in the [SNDs] to achieve the rigorous [content] standards." SB 7, 9. There is simply no evidence that supports these claims. Rather, the evidence demonstrates that, when the essential components of SFA are properly implemented, this supplemental program yields improvement in reading proficiency among students who begin participation in the program in kindergarten or grade one.[4] See Remand Decision at 34 (citing results from Dr. Slavin's controlled studies).

Moreover, the research on SFA shows that its improved reading results have been measured only against matched control schools of similar student enrollments;

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[4] In his testimony, Dr. Robert Slavin, the developer of SFA, casts doubt on whether even the Commissioner's recommendation for a critical component of SFA -- 3.5 tutors per-school to provide one-to-one tutoring -- is sufficient to assure that all students will succeed in reaching SFA's goal, and not just some students. Dr. Slavin made it clear that, to have success for all in reading, sufficient tutors are essential, and that the number of tutors needed can only be determined after a school-level assessment. Testimony of Slavin, Tr. 11/17/97, 115-16 and 118 (stating that "we've had schools of 500 with as many as 6 or 7 tutors in very highly impoverished situations"). The Commissioner based his recommendation on the SFA minimum, not on any of the factors identified by Dr. Slavin as determining the actual number of tutors needed, such as achievement levels, retention rates and student mobility. See Abbott IV, 149 N.J. at 199 (directing study of "real needs").

that no studies have been conducted which compare the results of SFA with children attending suburban schools; and that "although SFA students outperformed their counterparts in the comparison schools, they were still below average."[5] P-23 (Commissioner's research grid summarizing whole-school/comprehensive reform); see also Testimony of Dr. Slavin, Tr. 11/17/97, 93, 95, 136-37. Additionally, the Commissioner provided no evidence linking SFA to the achievement of the content standards in reading or language arts.[6]

There is also scant evidence concerning the effect of SFA on achievement in other subject areas embodied in the content standards. The Commissioner's own research summary indicates that the effects of SFA "on the math tests tended to be

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[5] The evidence of positive reading results from SFA consists primarily of studies conducted directly by Dr. Slavin and his associates. Two recent independent studies, however, question the degree of success actually achieved by SFA. See Venezky, An Alternative Perspective on Success for All, University of Delaware, 1994 (examining several schools in the original Baltimore sample of SFA schools and finding that SFA students "begin to fall behind" after the early grades and "by the end of fifth grade are almost 2.4 years behind" national averages and criticizing the test instruments used by the program developers to assess SFA progress); and Gottfredson, Success for Some: An Evaluation of a "Success for All" Program, 21 Evaluation Review 6 (Dec. 1997), at 643 (investigating application of SFA in the Charleston County School District and finding "effect sizes for grades 1 through 3 were generally inconsistent and small" which is "consistent with the independent evaluation of. . . Venezky" and, in addition, because of serious implementation problems, this analysis "calls into question whether it [SFA] will always, without fail, succeed"). Of particular relevance to the Commissioner's proposal to seek SFA implementation in all 319 SND elementary schools is the Gottfredson finding that "[t]he outcomes of the Success for All programs may become more variable now that the program is expanding or "scaling up." See also Will Success Spoil Success for All?, Education Week, February 4, 1998, at 42 (citing experts' concerns that SFA "is growing too fast, and... does not work in all schools – a charge that Slavin has never contested").

[6] The Commissioner admitted that he did not study the achievement results in the 14 New Jersey schools that have had SFA for several years or more. Testimony of Assistant Commissioner Anderson, Tr. 11/18/97, 30-32. Dr. Slavin testified that none of the SFA research covers any New Jersey SFA school. Testimony of Dr. Slavin, Tr. 11/17/97, 92.

negative." P-23 (grid summarizing whole-school/comprehensive reform). There is also no evidence from which to draw any conclusions about the success of the new Roots and Wings program, designed to incorporate math, science, and social studies into SFA. Moreover, SFA makes no express provision for instruction in other important content areas -- music, art, world languages, health and physical education. Finally, Assistant Commissioner Anderson candidly admitted that her staff did not analyze or assess the delivery of the content standards under SFA, even in reading. See Testimony of Assistant Commissioner Anderson, Tr. 11/18/97,143; see also Testimony of Dr. Slavin Tr., 11/17/97, 93 (admitting that he had neither been given nor reviewed the New Jersey content standards).[7] Further, the Commissioner presented no evidence concerning any specific supplemental program designed to improve achievement of the content standards by SND students at the middle and high school levels. SB 10.

Plaintiffs have supported the use of SFA in the past and continue to do so, as a supplemental program. The record, including evidence proffered by plaintiffs, demonstrates that SFA is a necessary supplemental program, but it is only one of many programs and strategies that should be available to SND schools, with appropriate supplemental funding, in order to improve instruction and learning under the content standards. See PB 9-10 (describing plaintiffs' recommendations for instructional facilitators and a School Improvement Fund to support instructional improvement efforts

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[7] The Commissioner's whole-school reform model incorporates SFA as "the preferred" program for SND elementary schools because it is "'substantially better validated"" than other programs. SB 7 (quoting Dr. Slavin's testimony). The Commissioner's model also permits an elementary school to select another "research-based" programs, and identifies the Comer School Program, Accelerated Schools, Adaptive Learning Environments Model, and the Modern Red Schoolhouse as possible choices. Remand Decision, 32-33. However, the Commissioner presented no evidence of the goals and objectives of these alternative programs, their components and costs, and their results, as measured against their own or state assessments or against the content standards.

in all content areas and SND schools). Plaintiffs' objection is rooted in the Commissioner's hyperbole. There is simply no support in the record for the State's claim that the SFA supplemental program alone will result in "substantial improvement in student achievement" in the SNDs, SB 9, or will enable students in the SNDs to achieve the content standards.[8] SB 7.

B. Additional Supplements to the SFA Program

The Commissioner's model for "whole-school reform" also incorporates additional supplements to SFA that are recommended, but not required, by Dr. Slavin. These programs include a half-day of preschool for four-year-olds and full-day kindergarten to meet the special needs in the SNDs for early childhood education. SB 14-17. The Commissioner also recommends a family support team which includes a social worker and parent liaison in elementary schools to address the social and health needs of students in the SNDs. SB 18-20. The State characterizes the inclusion of these supplements as going "beyond the minimum requirements" of SFA, and as funding SFA at a "high" level. SB 28.

The State's characterization, however, is no more than a comparison between the Commissioner's SFA proposal and SFA as implemented in urban school districts in other states. In his testimony, Dr. Slavin made clear that his general approach is to install SFA in urban districts, using available funding. Testimony of Dr. Slavin, Tr. 11/17/97, 180 (explaining that he "deal[s] with the reality of the funding situation as it really is"). He further testified that he understood this to be his role, specifically to help

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[8] State education officials in Kentucky conducted a four-month study of "nationally available curricula and instructional programs for which there is empirical proof of higher student achievement" and identified 64 different curricula and programs that meet this standard and should be available to support school-level efforts to improve instruction in all subjects. See Ky. To Showcase Performance-Linked Curricula, Education Week, November 26,1997, at 5.

the Commissioner "prepare a plan for using those new [parity] dollars more effectively on programs that would be most likely to make a difference with children, and to help them achieve the state standards." Id. at 97. Thus, Dr. Slavin's description of the Commissioner's SFA proposal as "high" must be viewed only as recognition that current Court-ordered parity funding for regular education in New Jersey more than likely exceeds the funding available to poorer urban districts elsewhere. Moreover, his recommendations to the Commissioner do not reflect his expert opinion as to the full-range of supplemental interventions needed to address the extreme disadvantages of urban children.

On cross-examination, Dr. Slavin was asked to comment on the additional programs that he would recommend to address the needs of poor students, based on his experience of implementing SFA in urban schools across the country. When asked about early childhood education, for example, Dr. Slavin readily acknowledged that "the [preschool] programs that have shown the greatest success are ones that provide more intensive services, that start with three-year-olds rather than four year olds and are more likely to be full-day for four-year-olds than half." Id. at 51. He further stated that SFA has developed and implemented "programs for three-year-olds and four-year-olds. . . [t]hat we use when we run into schools that have programs for kids at that age." Id. at 123. Moreover, Dr. Slavin indicated that he "could absolutely see a rationale for a full-day three-year-old program and a full-day four-year-old program. These would be highly unusual in public schools, but if you look at . . . the cases where preschool programs have had . . . particularly powerful impacts on long -- long-term impacts on children, they often have been full-day or quite intensive, involving a great deal of parent outreach and health care and so on." Id. at 122.

Similarly, Dr. Slavin testified that his original plan for SFA contemplated that the health and social needs of students would be met with on-site services, but that "we have rarely been able to pull it off" because of the unavailability of funding. Id. at 117.

He further stated that "[f]or certain children who would be having serious health problems or social problems....that locating services to which children might otherwise be entitled at the school site to integrate more effectively with everything else that's going on in the school would be beneficial." Id.; see also infra, Point III.B. (discussing Dr. Slavin's testimony on the need for after school and summer programs).

As the Remand Court properly found, based on its thorough review of the evidence, the additional supplements to SFA recommended by the Commissioner do not sufficiently address the needs in the SNDs for either early childhood education or for health and social services, despite the State's contentions in its brief. Remand Decision, at 103, 107-08.

C. Other Identified Supplemental Programs

The Commissioner also identifies other supplemental programs which the State contends are "incorporated" into the preferred whole-school reform model. SB 11. The listed programs are parent involvement, "increased use of instructional technology, increased security, and the adoption of codes of conduct, an emphasis on continuous professional development, alternative education and drop-out prevention, and school-to-work and college transition programs." SB, 8, 11, 20.

The evidence on remand shows that, while identifying these supplemental programs, the Commissioner failed to make critical, constitutionally-prescribed, determinations for these programs. In particular, the Commissioner (1) did not assess the actual need for these programs in the SNDs; (2) did not examine I&J district programming and spending in these areas to establish a regular education baseline; (3) did not determine the specific supplemental program components required to address those needs; (4) provided no determinations regarding the cost of the needed supplemental programs on a per-program and per-pupil basis; and (5) provided no plan for implementation. See PB 15-17, 23 n. 9. Importantly, the Commissioner did not

determine what funds are needed for these supplemental programs in addition to those provided for in CEIFA. See Abbott IV, 149 N.J. at 198-99.

Instead, the Commissioner contends, as does the State in its brief, that the needs of the SNDs for these identified supplemental programs, whatever they might be, can be met through regular education parity funding. SB 13. There is absolutely nothing in the record to support this claim. See PB 21 (discussing unconstitutional diversion of parity funding for supplemental programs through illustrative school-based budgeting).

D. Changes in School-Level Management and Staffing

The Commissioner's latest version of "whole-school reform," as presented in the State's brief, includes several changes in school-level management and staffing, including: (1) "school-based decision making" or "site-based management" by "a committee of parents and teachers to oversee the school and coordinate parent involvement," SB 12, 24; (2) "providing an effective principal, if the current one is ineffective, through retraining or replacement," SB 24; and (3) "restaffing the school, through retraining and attrition, to comply with the [whole-school reform] model's requirements." SB 25.

As to "site-based management," the record contains a general recommendation from the Commissioner for this approach to implementing both regular education and supplemental programs in the SNDs. See, e.g., SB 50 (citing the need to integrate regular education and supplemental programs, and not "pile" supplemental programs "on top," an approach that neither party nor any witness proposed on remand). However, the record lacks evidence of any assessment of current management conditions and need for this approach in SND schools, or of any review of the research on site-based management, its effectiveness, and issues related to implementation. Similarly, the record is devoid of evidence concerning the specific site-based

management strategies that the Commissioner intends to implement. There is also no evidence of a plan to effectively implement this approach. Finally, there is no evidence that site-based management, in whatever form the Commissioner might ultimately adopt, contributes to increased student achievement.

Further, the State, in its brief, introduces for the first time in this proceeding recommendations for principal retraining or replacement and school restaffing through retraining or attrition. These recommendations, however, were not included in the Study, D-2, nor was any evidence presented on remand that documented either the need for these recommendations or the procedures that the Commissioner intends to use to implement them.[9] Moreover, the State provides no assurance in its brief that "restaffing the school" to conform to the Commissioner's "model" will not diminish the staff required for a regular education program comparable to I&J districts, and/or the staff to provide needed supplemental programs, special education and bilingual education. See PB 21 (describing the diversion of regular education and other education funding to support the Commissioner's model).

E. Illustrative School-Based Budgeting

The State in its brief insists, "perhaps most importantly," that the Commissioner's version of whole-school reform "requires" illustrative school-based budgeting. SB 12; see also PB 18-19 (describing the Commissioner's illustrative schools and his school-

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[9] The Commissioner has supervised the assessment and replacement of principals, including those with tenure, in Jersey City, Paterson and Newark under the state takeover statute. See N.J.S.A. 18A:7A-45 (requiring the Commissioner to adopt "criteria for the evaluation of building principals and vice-principals" in the state-operated districts, and for the state superintendent to conduct such assessment upon takeover). It is noteworthy that the Commissioner now recommends undertaking a similar effort in all SNDs, but provides no analysis or evidence about the effectiveness of this effort, the problems encountered at the school and district level, and plans to overcome such problems, based on his extensive experience under the takeover statute.

based budgeting approach). However, there is nothing in the record to show that illustrative school-based budgeting, as contained in the Commissioner's model, is a required component of SFA, or of any other supplemental program mentioned in the Study. See D-4 (describing Dr. Slavin's requirements for SFA implementation). Moreover, there is no evidence of any assessment of the readiness of SND schools to switch to school-based budgeting; of the measures needed to prepare schools and district personnel to undertake this fundamental change; or of the DOE's capacity to assist schools and districts to implement this change. Testimony of Assistant Commissioner Azzara, Tr. 11/21/97, 83-5 (admitting that there had been no discussion of school-based budgeting implementation issues). Finally, the record is devoid of any evidence that illustrative school-based budgeting, even if properly implemented, would contribute to a school's capacity to address special student needs and to improve achievement of the content standards.

The State reveals that the central purpose of the school-based budgeting technique is to enable the Commissioner on remand to offer his "preliminary conclusions" that "sufficient resources currently appear to exist" and that "additional funds do not need to be appropriated to implement his [whole-school reform] proposal," including SFA and the other recommended or identified supplemental programs. SB 13, 46; but see PB 21 (describing the diversion of parity funding for supplemental programs through illustrative school-based budgeting).[10] Indeed, the State readily

[10] The Director of Special Education Programs, in a letter responding to concerns about the diversion of special education funds through illustrative school-based budgeting, indicates that the assumptions in the illustrative budgets that virtually all disabled students can be "mainstreamed" into regular education, thereby making special education funds available to support SFA and other supplemental programs, are at best extremely premature since "[c]learly, several years would pass before we would anticipate such a significant drop in the numbers of pupils in need of special education programs." See Letter from Director Barbara Gantwerk, Office of Special Education Programs, to Mr. Gerard M. Thiers, Executive Director, Association of Schools and Agencies for the Handicapped, February 9, 1998.

concedes that the Commissioner will make "re-allocations" of current funding and staffing to support the preferred version of whole-school reform. SB 25, 47. Thus, the Commissioner clearly intends to deploy illustrative school-based budgeting as a means to directly undermine the express purpose of parity funding for the SNDs: to end discrete programmatic disparities by providing comparability with the I&J districts in regular education in order to achieve the content standards. See Abbott II, 119 N.J. at 364 (requiring parity funding to provide the breadth and depth of curriculum and array of course offerings typically found in I&J district schools so that poorer urban districts are not "basic-skills districts"); see also Abbott IV, 149 N.J. at 169 (continuing to adhere to I& J district "recipe for success," particularly in light of rigorous and extensive requirements of the content standards).[11]

F. Conclusion

The State makes broad and sweeping assertions about the constitutional sufficiency of the Commissioner's whole-school reform proposal. However, the Commissioner has utterly failed to demonstrate in the record that his proposal sufficiently responds to the real needs of disadvantaged children in the SNDs. Id. 198-99. Thus, whole-school reform suffers the very same constitutional flaws found in the early childhood and demonstrably effective supplemental programs authorized by CEIFA, and should similarly be rejected by this Court . Id. (finding that the Commissioner's failure to conduct a study and determine programs and their costs made it "impossible to determine, on this record, whether the amounts of aid provided

[11] The State's hyperbole about the sufficiency of the Commissioner's model reaches a zenith when it asserts that "without question an integrated approach [to whole school reform] is more appropriate to meet the regular and supplemental needs of students in the [SNDs] than any particular program being provided by any one of the I&J districts." SB 27. There is not a scintilla of evidence to support this assertion. The continued failure of the Commissioner to develop constitutionally appropriate guidelines for the use of parity funding both inhibits progress towards comparability in SND schools based on I&J district programs and permits funding diversions.

by [Early Childhood Program Aid and Demonstrably Effective Program Aid] sufficient to the real needs of disadvantaged children")

III. THERE IS NO CONSTITUTIONAL OR EVIDENTIARY BASIS TO SUPPORT THE STATE'S CONTENTION THAT NO SUPPLEMENTAL PROGRAMS BEYOND THE COMMISSIONER'S WHOLE-SCHOOL REFORM MODEL ARE NEEDED IN THE SNDS

In addition to asserting that the Commissioner's model of whole-school reform is constitutionally sufficient, the State contends that the specific supplemental programs recommended by the Remand Court and by plaintiffs are neither "indispensable" nor "essential to meeting the constitutional mandate" to address the extreme disadvantages of students in the SNDs. SB 30, 31. To support this contention, the State first posits a test for determining necessary supplemental programs that is incompatible with the constitutional mandate. The State then applies its incorrect test to a highly selective and distorted presentation of the evidence. When the appropriate constitutional principles, as articulated by this Court, are properly applied, the evidence on remand convincingly establishes that the supplemental programs endorsed by the Remand Court, along with those recommended by plaintiffs and established in the record on remand, are necessary to satisfy the constitutional rights of children in the SNDs.

A. The State's Test For Determining Supplemental Programs Is Incompatible With Constitutional Requirements

Since 1990, this Court has made absolutely clear that supplemental programs for disadvantaged students in SNDs are constitutionally required. The rationale is simple and self-evident. "[T]he needs of students in the SNDs [are] much greater than those of students in the DFG I & J districts" and these "special needs clearly must be confronted and overcome in order to achieve a constitutionally thorough and efficient education." Abbott IV, 149 N.J. at 179. Students in the SNDs have "distinct and specific

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

Therefore, the constitution requires supplemental programs "directed to overcome the grave disadvantages of public school children in the special needs districts . . ." Abbott IV, 149 N.J. at 197. Moreover, the constitutional requirement extends beyond improvement of curriculum and instruction. Supplemental programs must be conceived of as a comprehensive effort to "relieve students in the special needs districts of their unique disadvantages." Id. at 190. To do so, they must include interventions "to motivate [children in the SNDs], to wipe out their disadvantages as much as a school can, and to give them an educational opportunity that will enable them to use their innate ability." Abbott II, 119 N.J. at 369.

This Court has long recognized that there can be no definitive litmus test for determining what supplemental programs have the potential to meet the constitutional requirement. "We deal here with questions of educational theory debated over the years, and now debated by experts of the very highest order....The only thing universally agreed on is that those [SND] schools are failing." Id. at 376-77. Indeed, our constantly evolving understanding of education, coupled with the lofty goal set by the constitution, prompted this Court to find that "[t]he fact that the educational dividends derived from those [supplemental] programs may not be immediately apparent or easily measurable does not render them in any sense ancillary to the achievement of a thorough and efficient education." Abbott IV, 149 N.J. at 199. In "this crucial part" of the Abbott remedy – necessary supplemental programs – the constitution requires a rich and robust search for solutions, not an artificial test designed to narrowly define the universe of permissible programs.

In the face of these clear guidelines, the State strenuously promotes a mechanical and inflexible test for supplemental programs. The State's test falls far short of this Court's long-established and consistent interpretations of the Education Clause's command. The State ignores the actual and urgent needs of children in the SNDs, along with the substantial evidence that certain intensive programs effectively address those needs.

The State's test, created out of whole cloth and with no basis in this Court's jurisprudence, asserts that a supplemental program may not be judicially required absent "record-demonstrated empirical evidence that the remedy ordered will be directly responsible for improving student achievement." SB 31. Further, the State contends that "[p]rograms without a strong link to improved academic achievement, even if promising from an individual's policy perspective, could not be recommended as part of the a court-ordered remedy of a constitutional violation. . . ." SB 30.

By means of this test, the State manipulates and distorts both the current body of educational research and the remand record to justify its resistance to programs with demonstrable success in addressing the needs of disadvantaged students. Cynically, the State claims that this Court lacks the power to even "attempt" to order that such programs be implemented. This is nothing less than an effort by the State to evade a "crucial part of the herculean reform that must be undertaken to enhance plaintiffs' educational opportunity." Abbott IV, 149 N.J. at 199.[12]

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[12] For example, Dr. Slavin testified that, to his knowledge, "nobody has made a direct comparison between half-day and full-day programs or between programs that start at three and programs that start at four." Testimony of Dr. Slavin, Tr. 11/17/97, 51. The State then uses the purported lack of definitive research to strenuously argue that intensive early childhood education for children ages 3 and 4 in the SNDs is not needed, despite the substantial evidence in support of such programs. See SB 35; supra, Point II.B. (discussing Dr. Slavin's testimony supporting full-day early childhood program beginning at age 3). The Commissioner's selective use of the evidence under this test illustrates the manner in which the Commissioner attempts to arrogate unto himself unfettered discretion to determine needed supplemental programs.

Surely this Court did not contemplate, and nothing in the Court's decisions ever intimates, that disadvantaged children would have to wait until some arbitrary and undefined point in time – unilaterally determined by the Commissioner in his sole discretion – before they can experience the benefits of supplemental programs with demonstrable records of success. This Court should reject the constitutionally inadequate and overly narrow test advanced by the State. Rather, the Court must continue to apply the principles it has consistently articulated to determine the supplemental programs necessary to meet the constitutional mandate.

B. The Evidence Convincingly Demonstrates That the Supplemental Programs Recommended By The Remand Court and Plaintiffs Are Necessary to Address Disadvantages in the SNDs

The record on remand convincingly establishes that the supplemental programs recommended by the Remand Court and plaintiffs address the special needs of students in SNDs. The State's argument to the contrary relies not only on the application of a constitutionally inappropriate test, but also on a selective and distorted review of the evidence.

1. Early Childhood Education

(a) The Evidence Supports Extended Day And Year Early Childhood Education Beginning At Age Three

The only evidence offered by the State as a basis for rejecting the Remand Court's recommendation for full-day preschool beginning at age three is a series of highly selective citations to the evidence in the record.[13] The State cites (1) an article in

[13] The State's current opposition to intensive preschool programs for three-and four-year-olds is puzzling. The Legislature recognized the need of disadvantaged children for early childhood programs beginning at age 3 when it allocated funding under CEIFA "for the purpose of providing full-day kindergarten and preschool classes and other early childhood programs and services." N.J.S.A. 18A:7F-16. In districts with 40% or more concentration of poor children, CEIFA provides funds "for the purpose of expanding instructional services previously specified to 3 year olds." Id.

which plaintiffs' expert, Dr. Steven Barnett, called for at least one year of preschool in a part-day or full-day program; (2) a 1995 article by Dr. Barnett finding that existing "studies on the effects of age of entry failed to find any significant advantage for children who entered at age three rather than age four;" and 3) an article by Dr. Ellen Frede in which she states that "variations in duration and intensity across [preschool] programs are not associated with striking differences in program effects." SB at 34-35. The State ignores the record evidence in which Dr. Barnett addressed each of these points in detail.

First, Dr. Barnett testified that the recommendation of at least one year of preschool "is the absolute minimum that should be done in terms of public policy." Testimony of Dr. Barnett, Tr. 12/2/97, 38-40. Second, Dr. Barnett explained that his 1995 findings on differences resulting from age of entry were inconclusive

> because the sample size is small. Failing to find statistical significance does not mean there isn't a meaningful difference, and, in fact, as I stated earlier, my best estimate of the difference, for example, and the effects on early IQ, is that the difference is, in fact, 50 percent larger for two years than one year, but that's not statistically significant given the sample size. [Id. at 50]

Third, in discussing his and Dr. Frede's work, Dr. Barnett explained that "studies haven't really been set up with the appropriate power" to isolate and compare effects of variability in program characteristics, such as intensity, quality, and duration. Id. at 90-91. Fourth, the latest analysis by Drs. Barnett and Frede indicates that "[c]ross-study

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Further, the Commissioner's limited preschool proposal retreats even from the Legislature's commitment in CEIFA. The total cost of the Commissioner's proposed half-day of preschool for four year-olds, and full-day kindergarten, is $130.8 million less than the sum of funding for kindergarten and preschool currently available to the SNDs under CEIFA. P-66; Testimony of Dr. Goertz, Tr. 12/9/97, 70. This early childhood funding, however, is diverted by the Commissioner through illustrative school-based budgeting. See PB 21-23.

comparisons indicate that earlier, more intensive (longer days and years), and higher quality (better trained teachers and smaller classes) early childhood programs produce stronger results." P-29 at 2. Finally, Dr. Barnett testified that the Commissioner's half-day program for four year olds, conducted in split sessions, would not be intensive enough to adequately address the needs of children in the SNDs. Plaintiffs Proposed Findings of Fact, Conclusions and Recommendations on Supplemental Programs ("Plaintiffs' Findings') ¶ 46.

The evidence, when reviewed thoroughly, demonstrates that recommendations for early childhood education made by the Remand Court and by plaintiffs are required to compensate for the extensive developmental disadvantages resulting from early years in poverty. Indeed, every expert who testified on early childhood programs agreed that programs which start earlier, last longer, are of high quality, and include attention to health and social needs are more successful in overcoming the early developmental disadvantages of students in the SNDs.[14] Plaintiffs' Findings at ¶53 (referencing testimony of Drs. Barnett, Slavin, and Natriello). Moreover, intensive, high quality early childhood programs result in net societal benefits through long-term reductions in educational costs, decreased crime and welfare dependency, and increased earnings. Testimony of Dr. Barnett, Tr. 12/1/97, 159-62.

[14] Other research supports this conclusion. For example, a long-term study of 20,000 French children who participated in various levels of early childhood programs "indicated that every year of preschool attended reduced the likelihood of school failure, especially for children from the most disadvantaged homes. Each year of preschool narrowed the retention rate gap between children whose fathers were in the highest occupational category and those with unemployed or unskilled fathers." Sarane, Spence, and Boocock, Early Childhood Programs In Other Nations: Goals and Outcomes, 5 Future of Children 3, Winter, 1995, at 100.

(b) There Is No Constitutional Impediment to Requiring Intensive Early Childhood Education in the SNDs

The State argues that the Education Clause "is limited to providing instruction to children between the ages of five and eighteen" and, therefore, "as a matter of constitutional law, the Court cannot mandate these programs and should not attempt to do so." SB 36-7. This argument rests upon a myopic reading of the Education Clause, one that completely ignores this Court's consistent interpretations of this clause, particularly regarding the provision of a thorough and efficient education to disadvantaged students in the SNDs.

First, the substantive content of a thorough and efficient education is constantly evolving to respond to contemporary conditions and student needs. As this Court has determined, "the constitutional guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting . . ." Robinson v. Cahill, 62 N.J. 473, 515 (1973) ("Robinson I") (noting that while the constitutional requirement was not offended in 1895 by the lack of secondary education, today "a system of public education which did not offer high school education would hardly be thorough and efficient").

Second, this Court has determined that, in poorer urban districts in which there has been a finding of educational failure, it is necessary to provide both comparable regular education and necessary supplemental programs in order to achieve a thorough and efficient education. As this Court reaffirmed in Abbott IV, "supplemental programs are essential to remedy the constitutional deprivation." Abbott IV. 149 N.J. at 198, 199 (stating that "supplemental programs for disadvantaged students are the indispensable foundation of a thorough and efficient education and a fundamental prerequisite to the fulfillment of the State's constitutional obligation").

Third, this Court has repeatedly "identified early childhood education as an essential educational program for children in the SNDs." Id. at 183 (citing research

establishing that for most children the long-term success of their learning and development depends to a great extent on what happens to them between the ages of three and ten); Abbott II, 119 N.J. at 373 (recognizing that "intensive pre-school and all-day kindergarten enrichment program[s are necessary] to reverse the educational disadvantage these children [in the SNDs] start out with"); and see Remand Decision at 65 (quoting the 1988 administrative decision in this case). Further, as the Remand Court found in reviewing the extensive record on remand, in today's poorer urban communities, a thorough and efficient education must include intensive early childhood education. Remand Decision at 104 (finding that early childhood education "will have a significant positive impact on academic achievement in both early and later school years").

This Court has ruled that "the right of children to a thorough and efficient system of education is a fundamental right guaranteed by the Constitution" and "it follows that the court must 'afford an appropriate remedy to redress a violation of those rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper.'" Robinson IV, 69 N.J. at 147, quoting Cooper v. Nutley Sun Printing Co., 36 N.J. 189, 197 (1961). Further, the Court has recognized "an unbroken conceptual thread running throughout our decisions . . . that the judicial power imports the power to fashion needed and appropriate remedies. The judicial article reposes in our courts the power to create, mold and apply remedies once jurisdiction is invoked." State v. Abbatti, 99 N.J. 418, 428 (1985); see also Southern Burlington County NAACP v. Township Of Mount Laurel, 92 N.J. at 270. Without question, this Court possesses the authority to remedy long-standing constitutional violations by requiring necessary supplemental programs to include early and intensive educational opportunities in the SNDs.

2. School-Based Health And Social Services

The State "does not dispute that children residing in poor urban districts have significant needs that may benefit from increased access to health and social services." SB 38. The arguments made by the State against school-based social and health services, as recommended by the Remand Court and by plaintiffs, are that (1) there "is utterly no empirical evidence linking the provision of such services to increased academic achievement," and (2) such services are "beyond the realm of the Education Clause" and, therefore, outside the mission of schools. SB 37-39.

The State concedes that schools should respond to the social and health needs of disadvantaged students. However, the State seeks to justify the Commissioner's rejection of the proven school-based services approach by alleging that this approach fails its constitutional litmus test: an empirical link to academic achievement. While this test is clearly improper, see supra Point III.A, the evidence nonetheless contradicts the State's allegation. It is undisputed in the record that providing services directly in schools frees educators for instruction, reduces absenteeism, reduces lag time between identification of a problem and access to services, tackles the problem of unavailability of services in the community, and addresses the health needs of uninsured students. Plaintiffs' Facts at ¶104. Based on a thorough review of this evidence, the Remand Court determined that school-based programs, "when adequately staffed and funded, are designed precisely to overcome the 'extreme disadvantages facing children in the SNDs,' which impede educational improvement." Remand Decision at 108 (noting also that "health and social service programs" are specifically enumerated in CEIFA at N.J.S.A. 18A:7F-18a).[15]

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[15] The Commissioner's recommended approach, providing referrals to outside agencies, is not supported by any evidence that students in the SNDs will actually receive the services they need. Plaintiffs Findings, ¶102. In fact, the Commissioner admitted that he did no assessment of the availability and quality of existing social and health services in the SNDs. Testimony of Assistant Commissioner Anderson, Tr. 11/18/97, 134-35; Plaintiffs' Findings ¶96. The Commissioner's recommendation also requires no additional funds.

In arguing that school-based programs are beyond the mission of schools, the State relies only on this Court's statement that the challenge of social and economic change is daunting, and not solely the responsibility of the schools. SB 38-39, quoting Abbott II, 119 N.J. at 375. The State stops short in its quotation, however, ignoring this Court's full statement which rejected of any suggestion "that because [plaintiffs'] needs cannot be fully met, they will not be met at all." Id. at 375. In fact, the Court has always recognized that the constitutional obligation to provide supplemental programs encompasses "something that deals not only with reading, writing, and arithmetic, but with the environment that shapes these students' lives and determines their educational needs." Id. at 372. School-based social and health services are indispensable to overcome the extreme disadvantages of students in the SNDs and, therefore, must be included as part of the constitutional remedy.

3. Reduced Class Size

The State admits there is "empirical evidence linking ... student achievement ... [to] overall reduced class size in the early elementary grades." SB 28 n*. The State then distorts the evidence by characterizing the effects of overall reduced class size as "small" and by stating that "results for SFA exceed those of an overall reduced class size." SB 18, 28. On this basis, the Commissioner concluded that the increased cost of reducing class size to 15 in all subjects was not justified, and that reducing class size to 15 in reading only as a component of SFA was a sufficient response to the special educational needs of students in the SNDs. SB 18; D-2 at 11; PB 11.

The State seeks to support the Commissioner's rejection of overall class size reduction by comparing the results of the Tennessee studies where class size reduction to 15 was the only change implemented, and the results of SFA research where the full complement of SFA components, including class size reduction in reading, were implemented. SB 28, n*. What the State ignores in making this comparison, is, first, that the positive results from SFA are in reading only, while the positive results from overall class reduction encompass all subjects and include behavioral improvement.

Second, the comparison ignores the significant difference between the class size reduction experiments, which include only one change, and SFA, which includes the same change plus increased instructional time, one-to-one tutoring, teacher retraining and curriculum upgrades.

Obviously, greater results are to be expected when class size reduction to 15 is accompanied by other important changes, as is shown in the reading results from SFA. Indeed, this is the precise formula for elevating achievement levels among students in the SNDs in all content areas, beyond the significant, across-the-board gains documented already in inner-city schools through class size reductions alone. As Dr. Jeremy Finn testified, overall class size reduction "should only be a piece of a multiple point program." Testimony of Dr. Finn, Tr. 12/2/97, 169 (referring to in-service teacher training, new materials and improved curriculum). The State's assertions to the contrary, the special educational need for improved achievement in all content areas is most effectively addressed by reducing class sizes overall, and not just in reading, and then augmenting small classes with other programs and strategies to improve regular education in all subjects and in all grades, including SFA.

4. Summer School

Lastly, the State argues against the Remand Court's recommendation for summer programs in the SNDs because there is "no strong empirical evidence that extending the school year is related to increased performance in student achievement." SB 40. The only evidence cited by the State to support this position is Dr. Slavin's testimony, which the State paraphrases as "there are no research studies that indicate summer school will increase student achievement." SB 41.

A careful examination of Dr. Slavin's testimony, however, reveals only that he was unaware of any test results indicating that summer programs will improve student achievement. Testimony of Dr. Slavin, Tr. 11/17/97, 182-183. Moreover, Dr. Slavin testified that "there are . . . some effective summer school programs." Id. at 84. He further stated that, because summer programs are helpful to "kids who are still having

difficulties over the ... summer, they would be falling behind ..." and "should schools have summer school programs, we do ... have models for them to use." Id. at 126-127.

Dr. Slavin's testimony supports the uncontradicted evidence on remand that summer programs can be an effective response to the unique special educational needs of students in the SNDs. The evidence is undisputed that summer learning loss is particularly severe for disadvantaged students because of the absence of academically stimulating opportunities over the summer. Moreover, the evidence shows that this learning loss is cumulative. Testimony of Dr. Natriello, Tr. 12/4/97, 105-106; Testimony of Dr. Barnett, Tr. 12/1/97, 206. There is simply no evidence to support the State's opposition to the Remand Court's recommendation for summer programs in the SNDs.

IV. THE COMMISSIONER HAS NOT SHOWN THAT HIS STUDY OF FACILITY NEEDS IN THE SNDS IS COMPLETE

The State contends that its "facilities study [of the SNDs] meets the directive of this Court and this Court should forego any further intervention at this time." SB 53. The State, however, ignores the Remand Court's express findings that the Commissioner's study and recommendations were preliminary and incomplete. In light of the clear lack of compliance with the Abbott IV facilities order, further assessment by the Commissioner is required to assure constitutional compliance.

A. Facilities Assessment

The State concedes that "[a] detailed facilities survey of each district and each facility in the district must be undertaken." SB 54. The State also concedes that "difficult" and "site-sensitive" decisions, such as renovation versus rehabilitation, have yet to be considered and explored by the Commissioner. SB 54-55. While the State asserts that "this work could not have been completed [by Vitetta] in the time allowed", SB 54, it fails to mention that "the time allowed" for this work was reduced "essentially [to] a six week period" because the Commissioner waited months after the decision in

Abbott IV to retain Vitetta. Testimony of Stephen Carlidge, Tr. 12/10/97, 91:5-8, 11:10-25.

Nor does the State mention that Vitetta did not perform its standard assessment due to an arbitrary $250,000 fee cap set by the Commissioner. As Vitetta representative Mr. Carlidge testified, when he provided the Assistant Commissioner with a cost estimate to perform Vitetta's "standard study," Testimony of Stephen Carlidge, Tr. 12/10/97, 90:7-10; he "remember[s] some eyeballs rolling at those numbers," id. at 90:15-17; he was told that "that simply wasn't going to happen," id. at 90:3-12; and he was further told "that the legislature was only willing to spend about a quarter million dollars." Id. at 93:1-3. Not surprisingly, Vitetta performed a truncated study that cost only $248,000. Id. at 92:2-5. The Commissioner's facilities survey, therefore, is incomplete because of the financial and time constraints that he imposed.

B. Educational Adequacy Standards

Assistant Commissioner Hespe testified that the facilities standards "proposed" by the Commissioner were "of a limited nature", merely "informational," and would be superseded by more complete standards promised by the end of January 1998. Testimony of Assistant Commissioner Hespe, Tr. 12/10/97, 225-26; Remand Decision at 113. The Remand Court also found the proffered standards to be "relatively incomplete." Remand Decision at 136. Nevertheless, the State asserts, without any support, that its incomplete standards "should not implicate the ability of students to achieve the [content s]tandards and thus no constitutional review of those standards is required." SB 55-56.

Given the Commissioner's admitted failure to complete educational adequacy standards, this Court cannot conclude that the preliminary standards offered thus far by the Commissioner raise no issues of constitutional dimension. As discussed in plaintiffs' opening brief, PB 32-36, the State's incomplete proposal appears to eliminate

art, music, special education and other specialized instructional spaces that are commonly provided for in most other districts. Moreover, the square footage proposed for the general instruction classrooms -- which would at the elementary school level be required to accommodate every subject under the content standards, plus special education -- appears to be wholly inadequate under the broad and rigorous content standards.

C. Facilities Improvement Financing and Implementation

The Commissioner proposed an approach to finance, manage and construct facilities in the SNDs based on using the New Jersey Education Facilities Authority. Plaintiffs did not object to this approach and the Remand Court recommended it. The State now reveals, however, that this proposal was just an "example," and that this Court should allow "the Governor and the Legislature ample time and wide-ranging discretion as to how to approach the highly technical and complex facilities financing issues." SB 57. Moreover, the State argues that "[n]o further directives from this Court on the issue are necessary nor warranted at this time" on this critical recommendation. SB 57.

As with the other facilities issues, the incompleteness of the Commissioner's financing plan, coupled with his overall opposition to the Remand Court's recommendations, necessitates further assessment to assure that the State finalizes a concrete program to finance the remediation of SND facilities to render them compliant with constitutional standards.

V. THIS COURT SHOULD RETAIN JURISDICTION AND REMAND FOR FURTHER PROCEEDINGS ON THE SUPPLEMENTAL PROGRAM AND FACILITY NEEDS IN THE SNDS

The State asks this Court to adopt "in total the Commissioner's recommendations for supplemental programs and facilities." SB 58. The State further posits that, as a result, "[n]o further directives from this Court...are necessary nor warranted at this time." SB 57. As discussed above, the Commissioner's proposal for supplemental programs is insufficient, and his study of facility needs is incomplete. In light of these grave deficiencies, a further order from this Court is required, as in Abbott IV.

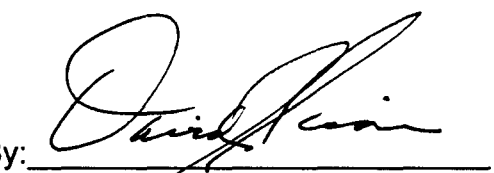
In its order, this Court should require implementation of the supplemental programs recommended by the Remand Court and established in the record on remand, as more fully described in plaintiffs' opening brief. See PB 17-18. This Court should also retain jurisdiction and remand the case to the Superior Court for further assessments and the development of an implementation plan for both supplemental programs and facilities. See PB 28-29 (describing assessments and implementation plan for supplemental programs); and see PB 30-37 (describing assessments and implementation plan for facilities): see also Plaintiffs Findings at 34-38 (setting forth in detail plaintiffs' proposed conclusions and recommendations on supplemental programs and facilities).

CONCLUSION

For the reasons set forth above, plaintiffs respectfully request this Court to enter a remedial order: (1) declaring the Commissioner's proposal for whole-school reform insufficient to satisfy the constitutional mandate for supplemental programs; (2) declaring the Commissioner's facilities study an incomplete response to the constitutional mandate for facilities; (3) requiring the implementation and funding of the supplemental programs recommended by the Remand Court and those established in the record on remand; and (4) retaining jurisdiction and remanding this case to the Superior Court for proceedings to conduct further assessments, and to oversee development of appropriate implementation plans.

Respectfully submitted,

EDUCATION LAW CENTER



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