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Opinion

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Chancery Division
Mercer County.

Raymond Arthur ABBOTT, et als., Plaintiffs,
v.
Fred G. BURKE, et als., Defendants.

No. 91-C-00150. | Aug. 31, 1993.

Attorneys and Law Firms

Marilyn J. Morheuser and Jonathan Feldman, Newark, for plaintiffs Education Law Center, Inc., atty.

Benjamin Clarke, Senior Deputy Atty. Gen. and William C. Brown, Deputy Atty. Gen., for defendants Robert J. DelTufo, Attorney General of New Jersey, atty.

Stephen M. Eisdorfer, Asst. Deputy Public Advocate, for amicus curiae Public Advocate Wilfred Caraballo, Public Advocate, atty.[1]

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OPINION

LEVY, Presiding Judge, Chancery.

***1** Beginning with *Robinson v. Cahill,* 62 *N.J.* 473 (1973), *cert. denied sub nom., Dickey v. Robinson,* 414 *U.S.* 976, 94 *S.Ct.* 292, 39 *L.Ed.*2d 219 (1973) (*Robinson I*), *N.J. Const. of 1947* art. VIII, § 4, para. 1, which states that "[t]he 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," was held to require "a certain level of educational opportunity, a minimum level, that will equip the student to become a citizen and ... a competitor in the labor market.' " *Abbott v. Burke,* 119 *N.J.* 287, 306 (1990) (*Abbott II*). *Robinson I* held that the State was absolutely obliged to reach that minimum level of opportunity, and any school district failing to do so could be compelled to comply. The focus of the measure of compliance changed "from the dollar disparity in *Robinson I* to substantive educational content in *Robinson V*." 119 *N.J.* at 308. By the time of the decision in *Robinson v. Cahill,* 69 *N.J.* 449 (1976) (*Robinson V*), the Supreme Court declared that "the clear thrust of [its] decision was to render equal dollars per pupil relevant only if it impacts on the substantive education offered in a given district. Compliance with the constitutional mandate was to be determined on a district-by-district measurement, and if money was a factor in the district's failure, the remedy was not to change the statute but to implement it by forcing the district to spend more or by supplying further state funds." 119 *N.J.* at 309-10. There was no constitutional requirement of equal expenditure per pupil; rather, the emphasis was to be on equality of "substantive educational content." 119 *N.J.* at 307.

Abbott II was a decision concerning the constitutionality of the Public School Education Act of 1975, *L.* 1975, *c.* 212 (herein Chapter 212) as applied, it having been previously declared facially constitutional in *Abbott v. Burke,* 100 *N.J.* 269 (1985) (*Abbott I*). While *Abbott I* was before the Court as a procedural controversy, *Abbott II* was before it for a full substantive review of "an educational funding system specifically designed to conform to a prior court decision, having been declared constitutional by the Court but now attacked as having failed to achieve the constitutional goal." 119 *N.J.* at 315. The remand of *Abbott I* to the Office of Administrative Law and the Department of Education brought the Court's philosophy of all the *Robinson* cases to the fore and added that the constitutional requirement of a thorough and efficient education "meant that poorer disadvantaged students must be given a chance to be able to compete with relatively advantaged students." 119 *N.J.* at 313.

The Court was initially faced with the plaintiffs' contention that the educational system was so systemically infirm as to

make it completely unconstitutional. It was not persuaded by the exhaustive record that the educational scheme devised by the State would provide a thorough and efficient education to all students; no standard was provided to measure the activities of any particular district. Indicating its concern with the problem of providing greater resources to students with greater needs, the Court concluded that the poorer urban districts failed to provide the requisite thorough and efficient education, saying that:

> ***2** ... a significant number of poorer urban districts do not provide a thorough and efficient education for their students; that the measurement of the constitutional requirement must account for the needs of the students; that in most poorer urban districts, the education needed to equip the students for their roles as citizens and workers exceeds that needed by students in more affluent districts; that the education provided depends to a significant extent on the money spent for it, and on what the money can buy-in quality and quantity-and the ability to innovate. 119 *N.J.* at 319.

With specific reference to the paucity of proofs concerning the quality of education in all the districts found in "a vast gulf" between the richer and the poorer districts, the Court found no proof of a lack of a thorough and efficient education in "the overwhelming number of districts in this State." On the other hand, the Court concentrated on the poorer urban districts and determined that the State's failure to provide the constitutionally required education, one which would permit "all the students of this state to perform their roles as citizens and competitors in the same society," was incurable under Chapter 212.

> The extent of failure is so deep, its causes so embedded in the present system, as to persuade us that there is no likelihood of achieving a decent education tomorrow, in the reasonable future, or ever. 119 *N.J.* at 320.

These districts were found to be too poor to be able to raise sufficient funds through local property taxation; the same was not true for the middle upper districts. Distinguishing all the other districts from those classed as "poor urban," the Court found a way to keep the present system, and its hope for the future for the rest of the State, without "sacrificing these poorer urban districts to perpetual failure." It found that, constitutionally, these poorer districts must be treated differently. Rather than declare the Act and the entire educational system entirely invalid, it fashioned a remedy to enable the Legislature to create a system which will provide proof of an effort to achieve the goal of educational sufficiency and a reasonable success of that system. 119 *N.J.* at 322.

Thus, the Court held Chapter 212 unconstitutional, only "as applied to poorer urban school districts." (A motion to consolidate the matter at bar with a challenge to the QEA by certain middle income districts was denied by this court. Both the Appellate Division and the Supreme Court concurred.) In order to cure this situation, the State was required to "assure that [the poorer urban districts'] educational expenditures per pupil are substantially equivalent to those of the more affluent suburban districts," and to address "their special disadvantages." 119 *N.J.* at 385. Since even full funding under Chapter 212 could not yield a thorough and efficient education in these districts, a new legislative scheme was ordered. Such a system would have to: (1) assure funding is substantially equal to that of the property-rich districts, (2) provide for special educational needs of the poor districts and (3) address their extreme disadvantages, without depending on local budget and tax decisions each year. The Legislature and the State educational administrators were to designate these poorer urban districts. Funding for regular education per pupil was to approximate the average net current expense budgets of the wealthier school districts. Additionally, the new legislative plan was to provide categorical aid and new programs which would support the special educational needs of the pupils in these urban districts so they could makeup their disadvantages.

***3** While the various *Robinson* cases concentrated on "thorough and efficient" in the context of funding and the legislative failure to fully fund Chapter 212 in the various annual Appropriation Acts, *Abbott II* required elimination of disparity in opportunity between the poorer urban school districts and the wealthier suburban districts. The court spoke to several problems which caused or indicated such disparity, but the emphasis was on achieving parity between these two types of districts.

The legislative response was the Quality Education Act of 1990, *L.* 1990, *c.* 52, subsequently amended by *L.* 1991, *c.* 62, *N.J.S.A.* 18A:7D-1 *et seq.* (the QEA). Plaintiffs responded by moving for post-judgment relief in an application to the Supreme Court of New Jersey, asking it to assume jurisdiction and to require the Legislature to comply with the rulings of *Abbott II* and declare the QEA unconstitutional on its face. By order of September 23, 1991, the Supreme Court denied the motion in all respects and remanded the matter to this court "for consideration of plaintiffs' claims including the constitutional challenge presented in plaintiffs' application." The parties presented evidence at trial sessions beginning in July 1992 and ending in November 1992 with post-trial submissions completed in March 1993. Since the Supreme Court did not

retain jurisdiction, this court will issue a final order based on its factual findings and legal conclusions concerning the Legislature's conformance to *Abbott II.*

I. ***The Burden of Proof***

Previously, plaintiffs raised the issue of which party must bear the burden of proof at trial. For the following reasons, the court found that defendants have the burden of proof and they were ordered to make the initial presentation of evidence.

Recognizing that the trial will be in the nature of an enforcement of litigant's rights, *So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp.,* 92 *N.J.* 158 (1983) is especially pertinent. There, the Supreme Court ruled that when certain legislation is required under a remedial decree, the burden falls on the legislative body to show that the new legislation meets the requirements of the decree. The cited case, known as *Mt. Laurel II,* reviewed the municipal legislative response to the remedy ordered by *So. Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel,* 67 *N.J.* 151 (1975), *cert.* denied, 423 *U.S.* 808 (1975) (*Mt. Laurel I*) where the court had ordered the municipality to enact, by ordinance, land use regulations which would make low and moderate income housing available. To achieve this goal, the municipality would have to permit multi-family housing without bedroom restrictions, small dwellings on small lots, and high density zoning with realistic lot and building size restrictions, and *Mt. Laurel II* reviewed the legislative response to *Mt. Laurel I.*

Here, the overriding question is whether the QEA conforms to the specifics of the Supreme Court's decrees. Therefore the defendants must persuade the court that the Legislature has provided certain funding for the poor urban districts, not dependent on local budget and tax determinations, that there is adequate funding to provide for special education needs in each poorer urban district, that it has considered the problem of municipal overburden in these districts and that a complete new funding mechanism is in place, although its implementation may be phased in. The defendants must prove that the Commissioner, under QEA, has clearly defined the special education needs of these districts and assessed the cost of specific programs to meet those needs.

***4** This court suggested that the State defendants set out the Supreme Court's definition of thorough and efficient education for these poorer urban districts, analyze how the QEA changed the prior circumstances, and analyze how this provides a thorough and efficient education. That is, the State had the burden of demonstrating that QEA meets the deficiencies identified in *Abbott II;* then plaintiff could attack the adequacy of the funding scheme to provide a thorough and efficient education in these districts. Contrary to the State's argued position, the court ruled that the State must prove that QEA answers the problems defined by the Supreme Court. The QEA is *not* to be evaluated as separate and distinct from the funding system declared unconstitutional by the Supreme Court.

II. ***General Compliance with the Abbott II Remedy***

N.J.S.A. 18A:7D-2 sets forth the findings and expected solutions concerning the legislative response to *Abbott II.* The Legislature found that the faulty school aid formula in Chapter 212 did not yield a thorough and efficient education because:

(1) it was tied to the property tax base but not related to the relative distribution of wealth; and

(2) it was based on budget data from the prior year, so there was insufficient money raised, even when the local property tax burden was substantial; and

(3) the old formula was not fully funded in eleven of fourteen years.

Therefore, a new formula was created, in order to:

(1) make more local funding available by taxation based on both property values and individual incomes in each district;

(2) assure there will be sufficient money to provide a thorough and efficient education in each district through a combination of state aid, local effort, local initiative and State monitoring of local programs;

(3) provide for local budget needs based on a calculation of needs for the current school year, so State support will realistically permit increased local expenditures;

(4) fully fund the formula every year by relating it to the income tax, so revenues increase in proportion to increased need

for more school aid; and

(5) substantially increase per pupil expenditures in the 30 poorer "special needs" districts so they will be substantially equal to those in the wealthy districts.

At the outset, the court merely notes that the QEA, as required, provides a new type of state aid to a specially targeted group of school districts, effective in the 1991-92 school year and phased-in so it will be fully functional in 1995-96. The new aid is based on a foundation formula, not dependent on a district's fiscal capacity, as was aid under Chapter 212. State aid for "regular education," meaning aid exclusive of categorical and transportation aid, will be distributed by reference to a statutorily set "foundation amount" of per pupil spending for a "quality education," rather than by reference to a school district's prior-year budget. Funding based on a foundation formula is acknowledged to be superior to aid that depends on local budgeting and taxing decisions.

***5** The poorer urban districts have been defined by their classification at the low end of a group of factors of socioeconomic status compiled by the Department of Education. The Legislature denominated as Special Needs Districts (SNDs) those districts in the lowest grouping of "District Factors" and added Neptune Township and the City of Plainfield. The wealthier districts, to whom the SNDs are to be compared, are in the upper grouping of District Factors, labeled Districts I and J (I & JDs). Increased state aid to the SNDs is made certain because annual maximum state school aid was set at $4.1 billion for 1991-92 with annual increases based on increases in statewide per capita personal income which yields increased state revenues from the state income tax. *N.J.S.A.* 18A:7D-15(b), 3.

Parity in spending between the poorer and wealthier school districts is to be achieved over a period of five years through the joint operation of the foundation formula and equity spending caps. *N.J.S.A.* 18A:7D-28(c). The concept is that the I & JDs receive little or no foundation aid while application of a "special needs weight" to the foundation formula for the SNDs will yield them more foundation aid. *N.J.S.A.* 18A:7D-13.

To address the extreme educational disadvantages found in the SNDs, the QEA contains a new type of categorical aid known as "at-risk" aid. This particular aid totaled $291 million for 1992-93. *N.J.S.A.* 18A:7D-20. Municipal overburden is addressed by allowing SNDs to keep their pre-QEA tax level during the first four years of the phase-in period and limiting their school tax rate after the fifth year to the statewide average. *N.J.S.A.* 18A:7D-31, 7.

Finally, it is conceded that the QEA has phased out minimum aid. 119 *N.J.* at 383. Minimum aid is called "state transition aid" in the QEA. *N.J.S.A.* 18A:7D-33. By multiplying the amount of state transition aid by the transition aid factor, only three-fourths of this aid is available for the 1992-93 school year, one-half for 1993-94, one-fourth for 1994-95 and none for 1995-96.

Thus the Legislature has satisfied the basic structural requirements of the prescribed remedy by providing a new funding mechanism, with guaranteed certain aid each year for the poor urban districts, increasing spending in those districts until it is equivalent to spending in the more affluent districts, providing for the special educational needs of the poorer districts in order to correct their disadvantages and designed to consider tax overburden in those districts.

Plaintiffs' original demand was to have the court declare the QEA facially unconstitutional, but their trial tactics make it clear that they want the court to declare that the QEA fails to comply with the remedies ordered in *Abbott II,* and is, therefore, unconstitutional as applied. Plaintiffs focus on the two major parts of the *Abbott II* ruling and the QEA response, as implemented for its first two of five planned years. First, they assert that the QEA will not provide for substantial parity of regular education between the SNDs and the I & JDs by the fifth year, because it is highly unlikely that the Governor will recommend and the Legislature adopt an adjustment to the funding formula to provide an additional $450 million in state aid in 1995-96. Second, they argue that the QEA will not adequately provide for the special educational needs of the pupils of the SNDs by the fifth year, and an adjustment in the formula to provide necessary additional support for at-risk programs statewide is not likely.

***6** At the outset, it must be acknowledged that there are no absolute remedial commands in *Abbott II:* (1) funding "*must be certain every year,* " but the level of funding need only be "*adequate* " to provide for special educational needs, must *address* the extreme disadvantages, must be "*substantially equivalent* " to expenditures in the richer districts which "*approximates the average net current expense budget* " of the richer districts, but dependent upon the "*legislative judgment, informed by the Board and the Commissioner;* " (2) the funding cannot depend on the budgeting and taxing decisions of the affected poorer districts, but local funding is not *per se* prohibited since the Legislature is permitted to mandate the local share; (3) the new legislation "*must assure* " that the poorer districts have a per pupil budget "*approximately equal to the average* of the richer

suburban districts;" (4) although the new funding "*must be in place legislatively so as to take effect in the school year 1991-92,*" full implementation was not required at once but "*may be phased in,*" and the court's power to require compliance with the constitutional command "is not limited to a money remedy." The general tone of the prescribed remedy is to require legislation that the Legislature thinks will provide a thorough and efficient education to students in the poorer urban districts. Considerations of averages, judgment, approximate statistical goals and phasing must guide this court on this remand from the Supreme Court.

III. ***Parity: Funding and Expenditures***

The thesis of the QEA is that the *Abbott II* remedy can be achieved by increasing state aid to the SNDs, while restricting the expenditures permitted to the I & JDs, until the respective amounts of per pupil expenditures are substantially the same. The analysis in *Abbott II* focused on the 1989-90 school year which had been funded pursuant to Chapter 212. The 1990-91 school year also was funded by Chapter 212, but with less aid than in the past, as recognized in *Abbott II* in a footnote. 119 *N.J.* at 324 n. 9. In accord with the Supreme Court's direction, the first year of operation under the QEA was 1991-92. When the next Appropriations Act was enacted, over the Governor's veto, the support for the 1992-93 school year was fixed. Based on the evidence presented to the court, the support for the first two school years under the QEA will be compared with the last two years under Chapter 212, and consideration will be given to projections as to what might happen in the immediate future under the QEA, in order to determine whether the degree of compliance with *Abbott II* is adequate to achieve a thorough and efficient education for students in the poorer urban districts. Necessarily, the degree of certainty of the funding and whether the QEA considered the problem of municipal overburden in the poorer districts must be analyzed.

A. ***Increasing State Aid to Special Needs Districts***

***7** The QEA funding formula is very complex and difficult to explain. First one must look to the provision of state aid for so-called regular education, denominated "foundation aid," without regard for the various types of categorical aid. For the first year of the QEA, 1991-92, the cost of a "quality" education (the "State foundation amount") has been set at $6,640 per elementary school pupil. *N.J.S.A.* 18A:7D-6(b).[2] This amount is to be increased each year, as the statewide per capita personal income over the last four years increases, by the average annual percentage increase (PCI). *N.J.S.A.* 18A:7D-3. The QEA established a fixed total of maximum state school aid, to be allocated by the Department of Education for 1991-92, at $4.1 billion, and this amount is to be increased annually, roughly according to the anticipated increases in the PCI. *N.J.S.A.* 18A:7D-15(b). (After the trial ended, the court was able to discover that the 1992-93 total of maximum school aid is $4.2905 billion and the 1993-94 total will be $4.527 billion.) Within this fixed total are various sums of aid allocated to categorical aid for special education, transportation, at-risk pupils, bilingual pupils and vocational school programs. By subtracting those sums from the $4.1 billion maximum state school aid, the cost of the regular quality education, called "maximum statewide foundation aid," is ascertained. Within the maximum statewide foundation aid total, the portion allocated to the SNDs can vary. The QEA anticipates that the portion for the SNDs will increase to the extent that the funds available to spend on each student in the SNDs will become substantially equivalent to funds available to spend on pupils in the I & JDs. *Unfortunately, this legislative anticipation has not been validated by expected increases in funding.*

B. ***Calculating Foundation Aid***

Foundation aid is distributed to local districts to help support general operating expenses such as textbooks, supplies, teacher salaries, costs of administration, maintenance, utilities, tuition for pupils going to other districts, and for the first two years of the QEA, pensions and social security costs. Foundation aid is calculated, by a foundation formula, as the difference between a district's "maximum foundation budget" (MB) and its "local fair share" (LFS). *N.J.S.A.* 18A:7D-4.

In defining the MB and the operation of the formula, the Legislature first determined, for the 1991-92 school year, that the cost to educate an average student in elementary school would be $6,640 (the foundation amount or "F") and the amount needed for improvement of physical facilities would be $107 (the facilities aid amount) per pupil. *N.J.S.A.* 18A:7D-6(b).

The foundation amount is weighted by the district's student enrollment. Recognizing that it costs more to educate a pupil as the pupil progresses through the school system, a "foundation weight," based on grade category and program category, is multiplied by the number of students in each category. The sum of these products is called the district's "foundation aid units" ("U"). *N.J.S.A.* 18A:7D-6. The facilities component equals the facilities aid amount multiplied by the "adjusted resident enrollment" (basically the student enrollment of the *prior* year). The product of the foundation aid units and the

foundation amount yields a dollar figure which is to be added to the "facilities component" ("C"), and the sum of these two dollar figures is the maximum foundation budget ("MB").[3] That is, MB = (F x U) - C. *N.J.S.A.* 18A:7D-6.

***8** For instance, in hypothetical District A for 1991-92, with a hypothetical pupil population, the Maximum Foundation Budget would be calculated in the following way:

Category	*No Students*	x	*Weight*	=	*Foundation Units*
FullDay Kind. Preschool			450	1.0	
HalfDay Kind. Preschool			215	0.5	
Grades 1-5			712	1.0	
Grades 6-8			360	1.1	
Grades 9-12			382	1.33	
Special Ed			500	1.0	
Evening School			110	0.5	
Post-Grad			26	0.5	
County Vocational			44	1.33	
PostSecondary Vocational			12	1.33	
				TOTAL =	

The adjusted resident enrollment as of October 15, 1990 is shown in the first column, totaling 2,811 students, multiplied by $107 equals $300,777 as the facilities component. Foundation units (2816.04) multiplied by the foundation amount ($6,640) equals the base foundation budget of $18,698,506. Add on the facilities component and the maximum foundation budget for hypothetical District A is $18,999,283. If the pension and social security costs were $500,000 the adjusted MB would be $18,499,283.

District A is, hypothetically, an I & JD; it is property-rich. If it was a SND, the QEA would increase the MB by further weighting, but only the first five categories are so weighted. For the first year under the QEA, this additional weight, called the "special needs weight," was set at 1.05, adding 5% to the number of foundation aid units for each grade category. If District B has an identical pupil population to District A, except its property values and income levels bring it within the definition of a Special Needs District, the calculation of the MB would be slightly different. The MB would be significantly higher because the special needs weight is added in.

Category	*No. Students*	x	*Weight*	=	*Foundation Units*
FullDay Kind. Preschool			450	1.0	
HalfDay Kind. Preschool			215	0.5	

Grades 1-5	712	1.0
Grades 6-8	360	1.1
Grades 9-12	382	1.33
Special Needs Weight		
Special Ed	500	1.0
Evening School	110	0.5
Post-Grad	26	0.5
County Vocational	44	1.33
PostSecondary Vocational	12	1.33

TOTAL =

The facilities component still calculates to $300.777 for the 2,811 students. Foundation units (2924.72) multiplied by the foundation amount ($6,640) equals the base foundation budget of $19,420,140. Adding the facilities component and subtracting the pension and social security costs yields an adjusted maximum foundation budget for hypothetical District B is $19,220,917.

C. ***Calculating the Local Fair Share***

***9** It is necessary to calculate the local fair share ("LFS") so the eventual calculation of total foundation aid can be made. First the total equalized valuation of the district (V) is obtained from the Division of Taxation. *N.J.S.A.* 18A:7D-33. That amount is multiplied by a value multiplier (VM), calculated by the Department of Education, pursuant to *N.J.S.A.* 18A:7D-8, as .0116. Then the adjusted gross income of the district (obtained from the Bureau of the Census in the United States Department of Commerce for the most recent year prior to the budget year (per *N.J.S.A.* 18A:7D-3)) is multiplied by the income multiplier, calculated (per *N.J.S.A.* 18A:7D-9) by the Department as .0447 for 1991-92. The Legislature equally weighted these measures of district property wealth and aggregate income, so the sum of these two calculations is divided by two to yield the LFS. *See, N.J.S.A.* 18A:7D-7. If District A (an I & JD) had $1,326,500,000 total equalized valuation and $275,000,000 in aggregate income, the LFS would be ($1,326,500,000 x .0116) - ($275,000,000 x .0447) = 34,772,400 - 11,129,250 = 45,901,650/2 = $22,950,825. If District B, an SND, had total equalized valuation of $775,123,444 and aggregate income of $151,456,888, the LFS would be $7,880,777, unless the aggregate income level is disproportionate to the average statewide property values (under such circumstances, the LFS for a SND would be lowered). *N.J.S.A.* 18A:7D-7.

Total foundation aid is the difference between the maximum foundation budget (MB) and the local fair share (LFS).[4] Under this hypothetical situation, for property-rich I & JD District A, no foundation aid will be received from the State, because the difference ($18,499,284 - $22,950,825) is negative. On the other hand, the poor-urban SND District B will receive ($19,220,917 - $7,880,777) $11,340,140 foundation aid.

D. ***The Equity Spending Cap***

As illustrated above, a district's maximum foundation budget is determined by adding the foundation amount per pupil times its weighted resident enrollment plus a facilities amount times the district's resident enrollment. *N.J.S.A.* 18A:7D-6(a). For the first two years of the act, state aid for anticipated pension and social security received by the district must be subtracted from the preceding sum. *N.J.S.A.* 18A:7D-6(e). A special needs weight is included in the maximum foundation budget formula for the SNDs. As previously discussed, the special needs weight increases the foundation amount per child in special

needs districts by 5%. The 5% weight is an arbitrarily assigned number, and the parties stipulated that the Legislature selected this percentage without relying on any study of the level of funding needed for the SNDs to achieve parity. The Governor is required to recommend any revision in the special needs weight "which is deemed proper." *N.J.S.A.* 18A:7D-13. If the Legislature does not reject any recommended revisions, they become effective in the next fiscal year.

***10** To determine whether the educational funding for regular education of a SND is substantially equal to that of an I & JD, the maximum foundation budget has to interact with the equity spending cap. The equity spending cap is designed to provide for a percentage increase in a SND's budget that, if sustained for each year through the 1995-96 school year, would result in parity in per pupil spending for regular education between SNDs and I & JDs. *N.J.S.A.* 18A:7D-28(c). The equity spending cap calculation establishes local levy budgets for SNDs which are needed to phase in parity by 1995-96.

The local levy budget is funding for regular education and is comprised of state foundation aid, transition aid, and local revenues. *N.J.S.A.* 18A:7D-3. The equity spending cap provision, in theory, is the tool to achieve parity, but the QEA merely *permits,* rather than *requires,* the SNDs to spend up to the cap. If the equity spending cap and the maximum foundation budget calculations do not work together, the calculation of the equity spending cap will yield a different local levy budget than the calculation of the maximum foundation budget, thus causing a gap between what is needed for parity between the poor and rich districts and what is actually provided. Growth of expenditures for 1992-93 and the years beyond must eventually reach the level of expenditures in the I & JDs. That growth is what is permitted by the equity spending cap, and it is only assured if the maximum foundation budget provides the funding needed to reach that level.

While the equity spending cap provides an allowable *spending* level, the maximum foundation budget provides a *funding* level. The maximum foundation budget, *N.J.S.A.* 18A:7D-6, is the maximum amount of funding for regular education available to SNDs, provided that they tax up to their local fair share. In several instances, however, even if the SNDs tax up to their local fair share, the maximum foundation budget funding level is still less than the equity spending cap level.[5] In order to fill the gap between the equity spending cap and the maximum foundation budget, these SNDs would have to tax themselves above their local fair shares. Therefore, if there is no relationship between the equity spending cap and the maximum foundation budget, there will be a failure to assure parity between the SNDs and the I & JDs by 1995-96.

To be sure, the provision of approximately $500 million additional state aid to the SNDs has closed the spending gap between the SNDs and the I & JDs. Still, in order to synchronize the maximum foundation budget and the equity spending cap formulas, thereby coordinating spending and funding, either local taxes must be increased above the local fair share, or the special needs weight must be increased. *Abbott II* would not favor such an increase in local taxes, so the QEA provides for an increase in the special needs weight. A problem is presented in that the special needs weight is not subject to being increased until 1995-96. This is because *N.J.S.A.* 18A:7D-13 provides that the governor may only recommend an increase in the special needs weight "[o]n or before April 1, 1992 and on or before April 1 of each subsequent even numbered year." Any revised weights are then effective for the following year. Since the governor has not exercised his discretion to recommend an increase for 1993-94, the special needs weight is not subject to being increased until 1994 for 1995-96. The plaintiffs' evidence convinced the court that the special needs weight would need to be increased from the current 5% to approximately 24%, in order to reach parity by 1995-96. Otherwise, assuming the same foundation aid units and adjusted enrollment as in 1992-93 and a 3% increase in the foundation level and facilities aid for 1995-96, there is a projected disparity of approximately $450 million between the SNDs and the I & JDs by the 1995-96 school year. The only other way the SNDs can reach parity is by an increase of local taxes above the local fair share.

***11** To use an actual example, the expenditure growth required for Newark, to reach parity in 1995-95 is approximately $12 million more than it has budgeted, so it cannot reach parity in expenditures unless it raises that additional amount by taxation. If the Governor had recommended raising the special needs weight and the Legislature did not reject his proposal, then the maximum foundation budget would match the equity spending cap and Newark would have reached parity without increasing local taxation. Newark's situation cannot be ignored, just because it is so disproportionate, in concluding that the failure to revise the special needs weight in 1992 for all the SNDs will probably prevent parity from being achieved by 1995-96 or shortly thereafter.

E. ***Conclusion as to Parity***

The QEA presents a very complicated formula to administer. Only a few people in the Department of Education and in various school district administrations can apply this formula, but it can be done. Difficulty aside, the required calculations demonstrate that parity depends on making the maximum foundation budget coordinate with the equity spending cap. Without reasonable application of timely increases in the special needs weight, the possibility of success is greatly reduced.

Even the defendants' expert admitted that parity by 1995-96 is not assured but that it is just a *possibility*. Disregarding the burden of proof issue, the convincing evidence leads to the ineluctable conclusion that parity cannot be reached under the QEA without increasing aid to the SNDs for 1995-96 through a revision of the special needs weight by more than 400%. If a revision had been sought for 1993-94, the increase now needed to approach, let alone reach, parity in 1995-96, would be significantly less dramatic. Realistically, it is almost impossible to expect the Governor to recommend, and the Legislature to accept, a meaningful increase of the special needs weight. Therefore, parity will not be reached under the QEA within a reasonable time.

IV. ***Provision for Special Educational Needs of Pupils***

The QEA was supposed to address the extreme disadvantages of students in the SNDs as well as provide an adequate level of funding to support their special educational needs. *Abbott II, supra,* 119 *N.J.* at 385. The solution is to be found in the new concept of at-risk aid which is calculated by multiplying the state foundation amount times the number of pupil units for at-risk students. *N.J.S.A.* 18A:7D-15(c) sets the foundation amount at $6,835 for 1991-92 and for 1992-93 as adjusted. The number of pupil units is determined by multiplying the number of students eligible for free meals or free milk under the National School Lunch Act or the Child Nutrition Act of 1966 by a legislatively determined factor known as the at-risk weight. *See, N.J.S.A.* 18A:7D-20; *N.J.S.A.* 18A:7D-3.[6] Since at-risk aid is directly bound to the incidence of poverty in a district, it goes mostly to the SNDs.

A. ***Adequacy of At-Risk Funding***

***12** The calculation of at-risk program funding, per *N.J.S.A.* 18A:7D-20, requires use of at-risk weights. As with the special needs weights used to calculate aid for regular education, at-risk weights were chosen arbitrarily, and the parties stipulated that the Legislature did not perform a study of the additional costs associated with providing services to at-risk students. Additionally, the at-risk weights are applied to an outdated pupil population, because aid is based on the prior year's pupil population. *N.J.S.A.* 18A:7D-25. *This anomaly always yields insufficient funds to run current programs.* Thirty-three other states use current year enrollment statistics to allocate educational aid, placing New Jersey in the minority.

More importantly, the Governor did not recommend revisions in the at-risk weights in 1992 for the 1993-94 school year, so there can be no increase in the obviously inadequate at-risk aid until the 1995-96 school year. *N.J.S.A.* 18A:7A-13. Before the QEA, the SNDs received state compensatory education aid under *N.J.S.A.* 18A:7D-20 (repealed) on the basis of individual children's test scores indicating need for remediation. The remedial programs are still mandated, but at-risk aid must cover the cost since the compensatory education aid has been terminated. Worse yet, for 1993-94 the foundation amount reverts from $6,835 to $6,640, as adjusted, so at-risk aid for 1993-94 will be reduced from prior years. The available total at-risk aid represents a small portion of the cost of programs and adequate classroom facilities needed for disadvantaged children. Most of this aid will be used for remediation, leaving little to develop much needed new programs and facilities. Without a timely increase in the at-risk weights, the funding of at-risk aid is insufficient to provide for the special educational needs of the disadvantaged children in these 30 districts.

B. ***Availability of At-Risk Programs***

Elena J. Scambio, the State District Superintendent in the Jersey City schools, an expert in urban education, directed the compilation of a needs assessment for at-risk pupils in Jersey City. She determined that more than 60% of all pupils were at-risk students, and that 53% of the students in Jersey City drop out of school before graduation while the drop-out rate in I & JDs is less than 1%. Particularly poignant was her testimony concerning the need for early intervention by the schools with disadvantaged children and their families. She observed that students in urban school districts come to school without the same readiness to learn as the children in I & JDs, they come to school with health needs not prevalent in more affluent districts and their parents are often unemployed and not literate. Preschool programs and all-day kindergarten programs are essential in SND settings. In Jersey City there are insufficient numbers of guidance counselors, the ratio being 1 to 436 students when the American Guidance Association recommends 1 to 100 at-risk students. She recommended that her school district provide a Family Literacy Program, a High School Alternative Education Program, a Multi-lingual Intake Center to assist people speaking languages other than English and a High School Needs Assessment Intake Center.

***13** The funding needs of Jersey City, described by Dr. Scambio, are fairly comparable to needs of the other SNDs. She estimated the cost of her district's needs to be $66 million (including some extraordinarily high salaries), yet only $15.5

million in at-risk aid was received by that district for the 1991-92 school year.

As required by *Abbott II,* the Department of Education has developed several pilot programs for at-risk pupils, but they are not in effect in each of the 30 SNDs. Where they are in effect, only a small portion of the students in the school system participate. Programs such as Success For All (which are very expensive) cannot be placed into all 30 SNDs, and thus far that program has not been available to all at-risk pupils in the school systems where it has been utilized. The Department continues to identify and support programs for at-risk pupils. In this regard, it promulgated *N.J.A.C.* 6:8-9.1 *et seq.* requiring SNDs to develop Educational Improvement Plans which include strategies for early childhood programs, instructional uses of technology and drop-out prevention. Additional rules have been adopted requiring studies to address conditions which place pupils at-risk, studies to develop programs addressing special education needs of children in poor urban districts, and other similar studies.

The trouble with the Department's rule making initiative is that it just provides for studies, not action. *Abbott II* directed action at a reasonable pace, and the five-year plan of the QEA is not an unreasonable phase-in period. It does not appear, however, that significant progress will be made within five years of 1991 to supply enough programs to meet the special educational needs of all the children in the SNDs.

V. ***Dependence on Local Taxation and Municipal Overburden***

Plaintiffs also challenge the effect of the QEA on two other mandates of *Abbott II.* Funding was not to be dependent on "the budgets and taxing decisions of local school boards," but was to be "certain, every year." 119 *N.J.* at 385. Additionally, the new legislation was to "consider the problem of municipal overburden in these poorer urban districts" and "their need not to increase their total tax rate." 119 *N.J.* at 388, 389. It appears that plaintiffs seek to overturn the entire system of school budgeting. They complain that the local budget is subject to voter approval, that it can be appealed and that appeals can take longer than one year. But *Abbott II* did not order that the home rule system of voter approval of school budgets be eliminated, and the QEA has solved the issue of reliance on local approval of school budgets by changing to a foundation formula funding mechanism and by requiring that SNDs raise their local fair share. Once the local fair share is determined, the state provides foundation aid to eliminate any gap between the district's local fair share and its maximum foundation budget. *N.J.S.A.* 18A:7D-4. Since the local fair share is a definite amount for a particular school year, by 1996 local funding in the SNDs will be certain and not dependent on local budgeting determinations. Here, where the focus is on compliance with *Abbott II,* this court cannot find a basis to overturn the budgeting system without a more direct statement from the Supreme Court. Still, there is no doubt that reliance on prior year enrollment statistics to calculate the level of current state aid places the entire burden on the local district for newly enrolled children. Since there is a great turnover of pupil population in the SNDs, this methodology is especially egregious and it should be changed.

***14** Plaintiffs also argued that the QEA fails to assure that the minimum tax levy will be adopted during the first four years or that the local fair share will be adopted in 1995-96 or thereafter. Defendants point out, however, that the QEA makes it feasible to adopt the minimum tax levy by placing a ceiling on local rates at the statewide average. As to the future, there was nothing established during the trial to cause any doubt that the local fair share will be adopted in the fifth year of the QEA and thereafter. Although the lack of executive action to revise the special needs weight or the at-risk weight may breed a suspicion that the rate of growth in maximum state school aid may be unduly restricted, the court was not persuaded. Since future conduct cannot be enforced now, any proofs concerning such action must come from plaintiffs.

Municipal overburden occurs when the total local tax rate significantly exceeds the statewide average tax rate, and, obviously, it is adversely affected if parity cannot be achieved as anticipated. 119 *N.J.* at 389. Without an upwards adjustment of the special needs weight, the shortfall in spending created by the lack of a connection between the foundation formulas and the equity spending cap formulas can only be met by increasing local taxes. State aid to municipalities over and above school funding does not begin to resolve municipal overburden. Further, the Department of Education makes liberal use of waivers of cap limits on spending, which means that the SNDs will not be able to spend at the level of the more affluent districts without collecting more local tax dollars. *Proper application of the QEA's provisions permitting adjustments of the weights could prevent an increase in municipal overburden, but the defendants have not been diligent.*

VI. ***Conclusions***

Although the terms of the QEA call for parity and provide a means to get there, the anticipated recommendations to revise the special needs weight and the at-risk weight were not made in 1992 for the 1992-93 school year. The court concludes that the

QEA does not assure that funding for regular education for the 30 SNDs will be substantially equal to that of the I & JDs within five years. Instead, funding will be dependent on local budgeting and taxing decisions, in direct contravention to the Supreme Court's ruling.

The court also finds that at-risk aid is insufficient to meet the goals set forth by *Abbott II,* and progress in providing programs to ameliorate the disadvantages of the pupils in the SNDs is unacceptably slow. The at-risk provisions are further deficient because the various calculations of aid should be based on pupil enrollment for the current school year, rather than the prior year.

Abbott II advises that a "conclusion of constitutional deficiency cannot hang by a thread,"[7] but here the failure of the plan to reach parity within five years and to provide for the special educational needs of students in the poorer urban districts within five years is not at all tenuous. Further judicial intervention at the highest level is necessary.

Footnotes

1 Midway through the trial, counsel informed the court that the plaintiffs were withdrawing their challenge as it related to state funding of pension and social security costs for teachers. Several parties appeared as *amicus curiae* regarding that issue, but only the Public Advocate was concerned with the basic challenge to the QEA.

2 The original version of the QEA provided for $195 more per pupil, and plaintiffs complain about the reduction created by the amendment of *L.* 1991, *c.* 62, § 3. The court takes the view that it should be concerned with the final version of the QEA and determine whether it complies with the requirements of *Abbott II,* rather than considering that the 1991 reduction of the 1990 allocation was a violation of the *Abbott II* remedy.

3 A further adjustment is required during the first two years. The pension and social security contributions are subtracted and the remainder is called the adjusted maximum foundation budget. *N.J.S.A.* 18A:7D-6(e).

4 Excess surplus is also subtracted out, but for 1991-92 the QEA provides that there is no excess surplus. *N.J.S.A.* 18A:7D-15(a). Beginning in 1992-93, any surplus exceeding 7.5% of the net *budget* of the prebudget year must be subtracted out.

5 For the 1992-93 school year, Burlington, Elizabeth, Gloucester, Harrison, Hoboken, Jersey City, Keansburg, Millville, Neptune, New Brunswick, Newark, Phillipsburg and Plainfield had a funding level less than the spending cap level.

6 As with the statewide foundation amount, plaintiffs complain that these at-risk weights were higher under the original version of the QEA, but the court is concerned only with the current version of the QEA. *See* n. 2, *supra.*

7 *Abbott II, supra,* 119 *N.J.* at 320.