

1 NOT FOR PUBLICATION WITHOUT THE
2 APPROVAL OF THE APPELLATE DIVISION
3

4 SUPERIOR COURT OF NEW JERSEY
5 APPELLATE DIVISION
6 DOCKET NO. A- 0886- 03T3

7 MILLVILLE BOARD OF
8 EDUCATION,

9
10 Appellant,

11
12 v.

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14 NEW JERSEY DEPARTMENT OF
15 EDUCATION,

16
17 Respondent.
18
19 _____

20
21 BOARD OF EDUCATION OF
22 PEMBERTON TOWNSHIP,

DOCKET NO. A- 1481- 03T3

23
24 Appellant,

25
26 v.

27
28 NEW JERSEY DEPARTMENT OF
29 EDUCATION,

30
31 Respondent.
32
33 _____

34
35 PHILLIPSBURG BOARD OF EDUCATION,

DOCKET NO. A- 1482- 03T3

36
37 Appellant,

38
39 v.

40
41 NEW JERSEY DEPARTMENT OF
42 EDUCATION,

43
44 Respondent.
45
46 _____

1
2 NEPTUNE TOWNSHIP BOARD OF
3 EDUCATION,

DOCKET NO. A- 1483- 03T3

4
5 Appellant,

6
7 v.

8
9 NEW JERSEY DEPARTMENT OF
10 EDUCATION,

11
12 Respondent.
13

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15
16 Argued February 10, 2004 - Decided March 12,
17 2004

18
19 Before Judges Skillman, Wells and Fisher.

20
21 On appeal from Department of Education.

22
23 Richard E. Shapiro argued the cause for
24 appellants, Board of Education of Pemberton
25 Township, Phillipsburg Board of Education
26 and Neptune Township Board of Education.

27
28 Robinson & Andujar, attorneys for appellant,
29 Millville Board of Education (Arnold
30 Robinson, on the brief).

31
32 Michele Lyn Miller, Deputy Attorney General
33 argued the cause for respondent (Peter C.
34 Harvey, Attorney General; Nancy Kaplen,
35 Assistant Attorney General, of counsel;
36 Kimberly Lake Franklin and Michael C.
37 Walters, Deputy Attorneys General, on the
38 brief).

39
40 The opinion of the court was delivered by
41 FISHER, J. A. D.

42
43
44 These consolidated appeals require this court to consider
45 whether preschool programs required by Abbott v. Burke, 153 N. J.

1 480 (1998) (Abbott V) must be funded exclusively by the State.
2 The Commissioner of Education concluded that neither the Supreme
3 Court's mandating of preschool programs in Abbott V, nor the
4 Appropriations Act for Fiscal Year 2004, L. 2003, c. 122,
5 requires exclusive State funding. Instead, the Commissioner
6 determined that the Supreme Court has only directed that he
7 "ensure" that there be adequate funding for these programs, thus
8 permitting the utilization of local district funds. We agree
9 with the Commissioner and affirm.

10

11

I

12 Funding for preschool education in the Abbott districts
13 starts with the approval by the Department of Education (DOE) of
14 a budget based on the district's demonstrated need. The DOE
15 then calculates the State aid available. The two components of
16 State aid for preschool are Early Childhood Program Aid (ECPA)
17 and Abbott Preschool Expansion Aid (PSEA). ECPA is based upon a
18 formula contained in N. J. S. A. 18A:7F-16, while PSEA is the
19 amount obtained by subtracting the 2002-03 approved preschool
20 plan from the 2003-04 approved plan. The difference between the
21 approved budget for the 2003-04 preschool plan for these

1 districts, and the ECPA and PSEA State aid components,
2 constitute the funds at issue in these matters.¹

3 Each of the appellants filed appeals challenging the DOE's
4 calculation of their PSEA awards for the year 2003-04. The
5 appeal of the Phillipsburg Board of Education (Phillipsburg) was
6 the first of these four matters to reach disposition. The
7 Administrative Law Judge (ALJ) rendered a summary decision,
8 determining that the DOE correctly calculated the PSEA due
9 Phillipsburg. The ALJ, however, also found that because the
10 combination of PSEA and ECPA was insufficient to fund the entire
11 approved preschool budget, the State was required to provide the
12 shortfall.

13 The other Abbott districts -- Pemberton, Millville and
14 Neptune -- agreed to stipulate to the essential facts and relied
15 on the arguments raised and considered in the Phillipsburg
16 matter. The ALJs in those matters reached similar results, thus
17 collectively imposing upon the State the obligation to fund the
18 shortfall in each of these districts, namely, \$835,034 in
19 Phillipsburg, \$424,569 in Pemberton, \$1,763,866 in Millville,
20 and \$3,768,176 in Neptune.

¹In the Appropriations Act for Fiscal Year 2003, L. 2002, c. 38, the Legislature provided PSEA in the total amount of \$142,400,000. The Appropriations Act for Fiscal Year 2004 provided the same amount, L. 2003, c. 122, even though only \$112,400,000 of the 2003 PSEA was expended.

1 The DOE filed an appeal with the Commissioner of Education
2 who, in final decisions rendered in each matter on September 25,
3 2003, rejected the ALJ's conclusions that the State was
4 obligated to exclusively fund these shortfalls. The Commissioner
5 explained that

6 "[F]ull funding" of Abbott preschool
7 programs cannot be viewed as promises or
8 expectations of dollar-for-dollar State
9 funding regardless of resources available in
10 the local district budget. Rather, they
11 must be understood as reflections of the
12 Department's commitment, and recognition of
13 its obligation, to provide or secure
14 additional State funds to the full degree
15 necessary to support approved programs where
16 local budgetary resources, including formula
17 aids, local levies and monies realized
18 through economies, efficiencies and
19 reallocations, are found inadequate for this
20 purpose.

21
22 Because the Commissioner concluded that the fulfillment of his
23 obligation to "ensure" adequate funding for preschool in the
24 Abbott districts permitted the allocation of local tax levies
25 and other local budgetary resources to those purposes, these
26 four Abbott districts seek our review of the Commissioner's
27 decision.

28 Since the parties do not further dispute the PSEA
29 calculations, the sole question before this court is whether the
30 Commissioner may look to the district's funds, in whole or in
31 part, to bear the shortfall or whether, as the Abbott districts

1 argue, the burden for the payment of these funds rests
2 exclusively upon the State. Resolution of this issue turns on
3 an understanding of the Supreme Court's prior holdings and the
4 Appropriations Act for Fiscal Year 2004, L. 2003, c. 122 (the
5 Appropriations Act).

6

7

II

8 In considering whether the Court's prior decisions require
9 the State to bear alone the shortfall existing after the
10 application of the PSEA and ECPA components, we start with the
11 recognition that the constitutional mandate that the
12 "Legislature shall provide for the maintenance and support of a
13 thorough and efficient system of free public schools" is
14 expressly limited to "the instruction of all the children in the
15 State between the ages of five and eighteen years." N. J. Const.
16 art. VIII, §4, ¶1. Since the issue presented involves the
17 extent of State funding for the education of three- and four-
18 year olds in the Abbott districts, an area of education arguably
19 beyond the scope of the constitutional mandate, we are required
20 to carefully examine the Court's mandate in Abbott V and the
21 backdrop against which it was rendered.

22 Holding that the Legislature had failed to remedy the
23 constitutional violations previously found with regard to the

1 thorough and efficient education promised by the State for
2 children between the ages of five and eighteen,² the Court in
3 Abbott v. Burke, 149 N.J. 145 (1997) (Abbott IV) remanded the
4 matter to the Chancery Division, and temporarily assigned Judge
5 Michael Patrick King, P.J.A.D., to the Chancery Division, to
6 examine potential remedies. Adhering to the Supreme Court's
7 mandate, the Commissioner provided his recommendations to Judge
8 King.

9 The Commissioner proposed that "whole-school reform" be
10 adopted in the Abbott districts. Whole-school reform constitutes
11 "a comprehensive approach to education that fundamentally alters
12 the way in which decisions about education are made." Abbott V,
13 supra, 153 N.J. at 494. In following Judge King's
14 recommendations in this regard, the Court acknowledged that, in
15 his own recommendations, the Commissioner had clearly set his
16 sights on meeting the "State's strong commitment to implementing
17 whole-school reform," id. at 497, an approach which

18 integrat[es] reform throughout the school as
19 a total institution rather than by simply
20 adding reforms piecemeal. If carried out
21 successfully, whole-school reform affects

²In Abbott IV, the Court held the Comprehensive Education Improvement and Financing Act (CEIFA), N. J. S. A. 18A:7F-1 to -34, to be unconstitutional, finding that CEIFA did not assure funding parity with the wealthier districts and failed to fully provide for the special needs of Abbott students. 149 N.J. at 176-77, 185-86. See Abbott V, supra, 153 N.J. at 492.

1 the culture of the entire school, including
2 instruction, curriculum, and assessment.
3 The reform covers education from the
4 earliest levels, including pre-school, and
5 can be particularly effective in enabling
6 the disadvantaged children in poor urban
7 communities to reach higher educational
8 standards.

9
10 [Id. at 494.]

11 The Court emphasized that "early childhood education is
12 essential for children" in the Abbott districts. Id. at 502.
13 Because early childhood education formed "an integral component
14 of whole-school reform," and considering also that the parties
15 had expressed "no fundamental disagreement over the importance
16 of pre-school education,"³ the Court required the systematic
17 implementation of whole-school reform in the Abbott districts,
18 id. at 502-03, and set forth "the remedial measures that must be
19 implemented in order to ensure that public school children from
20 the poorest urban communities receive the educational
21 entitlements that the Constitution guarantees them," id. at 489.

22 In requiring this and the other remedies enunciated in
23 Abbott V, the Court left unresolved the question of whether the
24 constitutional guarantee encompasses a thorough and efficient
25 pre-school education for children ages three and four, but

³The Court also observed that in enacting CEIFA, the Legislature had "recognized the necessity of early childhood education for three- and four-year olds in the poorest school districts." Abbott V, supra, 153 N.J. at 505.

1 concluded that it was "convinced" that preschool was essential
2 for preparing children for the education promised by our
3 Constitution upon their reaching the age of five:

4 This Court is convinced that pre-school
5 for three- and four-year olds will have a
6 significant and substantial positive impact
7 on academic achievement in both early and
8 later school years. As the experts
9 described, the long-term benefits amply
10 justify this investment. Also, the evidence
11 strongly supports the conclusion that, in
12 the poor urban school districts, the earlier
13 children start pre-school, the better
14 prepared they are to face the challenges of
15 kindergarten and first grade. It is this
16 year-to-year improvement that is a critical
17 condition for the attainment of a thorough
18 and efficient education once a child enters
19 regular public school.

20
21 Stated conversely, because the absence
22 of such early educational intervention
23 deleteriously undermines educational
24 performance once the child enters public
25 school, the provision of pre-school
26 education also has strong constitutional
27 underpinning.

28
29 [Id. at 506-07.]

30
31 Thus, while recognizing a link between preschool education and
32 the thorough and efficient education of children between the
33 ages of five and eighteen, the Court did not reach the
34 constitutional issue. Ibid. Instead, the Court concluded that
35 the requirement that preschool be made available in the Abbott
36 districts was a remedy necessarily imposed to redress the prior
37 constitutional deprivation of a thorough and efficient education

1 for children in the Abbott districts upon reaching the age of
2 five. Id. at 489. In short, the Court crafted its requirement
3 that preschool education be provided in the Abbott districts as
4 "a remedial measure that can create the opportunity to achieve a
5 thorough and efficient education." Id. at 501.

6 Since we are satisfied that the Court's Abbott holdings do
7 not include a mandate for the exclusive state funding of
8 preschool, we likewise need not consider whether the scope of
9 the thorough and efficient education clause extends beyond its
10 stated age boundaries, particularly when contemplating the
11 enormity of such a holding beyond the Abbott districts.

12
13

III

14 We conclude, as did the Commissioner, that the adoption of
15 whole-school reform, with its inclusion of preschool education
16 in the Abbott districts, was designed by the Court as a remedy
17 for the past constitutional deprivation of a thorough and
18 efficient education for children between the ages of five and
19 eighteen in the Abbott districts. In so recognizing the nature
20 of Abbott V's mandate, and in comparing that mandate with others
21 rendered by the Court in this context, we also conclude that the
22 Court did not intend to require exclusive state funding of
23 preschool in the Abbott districts.

1 In this vein, we observe that the Court has chosen quite
2 emphatic language when exclusive State funding was intended.
3 See Abbott V, supra, 153 N.J. at 524 ("We conclude that any
4 funding formula that does not fund the complete cost of
5 remediating the infrastructure and life cycle deficiencies that
6 have been identified in the Abbott districts or that does not
7 fully fund the construction of any new classrooms needed to
8 correct capacity deficiencies will not comport with the State's
9 constitutional mandate to provide facilities adequate to ensure
10 a thorough and efficient education."); Abbott v. Burke, 164 N.J.
11 84, 88 (2000) (Abbott VIII) ("The State is required to fund all
12 of the costs of necessary facilities remediation and
13 construction in the Abbott districts.").

14 Here, in requiring preschool programs in the Abbott
15 districts to remediate the prior deprivation of the
16 constitutional right to a thorough and efficient education for
17 children between the ages of five and eighteen, the Court's
18 directives take on a less mandatory tone. Instead of compelling
19 State funding for the implementation of all preschool programs
20 included within whole-school reform, the Court simply imposed an
21 obligation on the Commissioner to "ensure" that such funding is
22 provided:

23 In directing the implementation of pre-
24 school programs in the Abbott schools, the

1 Commissioner must ensure that such programs
2 are adequately funded and assist the schools
3 in meeting the need for transportation and
4 other services, support, and resources
5 related to such programs. The Commissioner
6 may authorize cooperation with or the use of
7 existing early childhood and day-care
8 programs in the community.
9

10 [Abbott V, supra, 153 N.J. at 508 (emphasis
11 added).]
12

13 It is the Court's direction in Abbott V that the Commissioner
14 "ensure" and "assist" which has informed the Commissioner's
15 decision, and our affirmance of that decision, that other
16 resources, including funds existing at the district level, may
17 be allocated for these purposes.

18 In pursuing the difficult question put to us as to how we
19 should consider the Supreme Court's holding in Abbott V
20 regarding the funding of preschool programs in the Abbott
21 districts, we further observe that we do not view the present
22 dispute as exalting the grammatical or syntactical form of the
23 Court's words over the substance of what the Court intended to
24 convey. Instead, in light of the Court's clarification of
25 Abbott V in Abbott v. Burke, 163 N.J. 95, 104 (2000) (Abbott
26 VI), we can rest assured that the Court meant precisely what it
27 said since the Court, in clarifying the Commissioner's
28 obligations, simply reiterated the passage from Abbott V which
29 we quoted above.

1 Accordingly, in answering the single question posed by this
2 appeal, we follow the Court's prior holdings and conclude that
3 the Court has only directed the Commissioner to "ensure" and
4 "assist" in the "adequate funding" of preschool programs in the
5 Abbott districts. We are satisfied that the Court's wording of
6 this obligation -- particularly when viewed against the Court's
7 determination not to declare that a preschool education is
8 constitutionally mandated -- falls significantly short of
9 requiring exclusive State funding for preschool programs in the
10 Abbott districts.⁴

11

12

IV

13 We also agree with the Commissioner that the Appropriations
14 Act does not contain an obligation to fund any aspects of
15 preschool education in the Abbott districts other than through
16 the funding which comes from PSEA and ECPA. The Abbott
17 districts argue that the Governor's 2004 Budget Message

⁴We also reject the Abbott districts' contention that the following general comment made by the assistant commissioner, in a letter advising of various aspects of state funding, prohibited the Commissioner from rendering the decision now under review: "The state will meet its obligation to fully fund parity and preschool programs for Abbott districts." Much of what followed in that letter undercut the significance of this comment. Moreover, we fail to see how the Commissioner would be bound to comply with such a general statement in the particular context in which it was rendered.

1 illuminates the legislative intent to exclusively fund all
2 preschool aspects of whole-school reform. While we acknowledge
3 that the comments of a governor may be considered in
4 ascertaining the intent underlying particular legislation, State
5 v. Sutton, 132 N.J. 471, 483 (1993), we conclude that the
6 Appropriations Act which the Legislature ultimately enacted
7 deliberately limited the scope of funding which the Governor's
8 message appears to have proposed.

9 In urging the significance of the Budget Message,
10 plaintiffs rely specifically upon the Governor's following
11 statement:

12 The amount appropriated hereinabove for
13 Additional Abbott v. Burke State Aid will
14 provide additional resources to "Abbott
15 districts" to meet the State's obligation to
16 fully fund parity and the approved early
17 childhood operational plans.

18 [emphasis added.]

19
20
21 The legislation proposed at the time of the Governor's Budget
22 Message expressed in the same way the scope of funding available
23 for preschool education in Abbott districts. However, the
24 Legislature modified the relevant provision so that instead of
25 stating its intent to provide "additional resources . . . to
26 meet the State's obligation to fully fund . . . the approved
27 early childhood operational plans," the Legislature stated that
28 it was providing "additional resources . . . to meet the State's

1 obligation to fully fund . . . approved 'Abbott' preschool
2 expansion." (emphasis added). This modification presents little
3 question but that the Legislature intended to limit State
4 funding to PSEA, ECPA and the funding for facilities remediation
5 and construction compelled by the Supreme Court's decision in
6 Abbott v. Burke, 164 N.J. 84, 88 (2000) (Abbott VII).

7 Accordingly, we conclude that the Appropriations Act does
8 not contain any provision for the State's exclusive funding of
9 all aspects of preschool education in the Abbott districts.

10

11

V

12 Since the Supreme Court has not mandated exclusive State
13 funding for all aspects of preschool education in the Abbott
14 districts and since the Legislature has not provided for the
15 funding of preschool beyond the funding components of PSEA and
16 ECPA, we agree with the Commissioner's determination that the
17 State is not mandated to exclusively fund preschool in the
18 Abbott districts and that local resources, if available, may be
19 allocated for such purposes.

20

Affirmed.