

SUPREME COURT OF NEW JERSEY  
DOCKET NO. 42,170

RAYMOND ARTHUR ABBOTT, et al.,)

Plaintiffs, )

Civil Action

v. )

FRED G. BURKE, et al., )

Defendants. )

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BRIEF IN SUPPORT OF STATE'S MOTION

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ANNE MILGRAM  
ATTORNEY GENERAL OF NEW JERSEY  
Attorney for Defendants  
R.J. Hughes Justice Complex  
P.O. Box 112  
Trenton, New Jersey 08625  
(609) 984-9504

ROBERT GILSON  
Director, Division of Law  
Assistant Attorney General  
Of Counsel

NANCY KAPLEN  
Assistant Attorney General  
MICHELLE LYN MILLER  
Senior Deputy Attorney General  
On the Brief

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PRELIMINARY STATEMENT

In January 2008, the Legislature enacted and the Governor signed a new school funding formula, the School Funding Reform Act of 2008 (SFRA or Act). That Act is the culmination of over five years of study and deliberation overseen by the Department of Education (DOE), with input from educators, experts, stakeholders and the public. It is designed to ensure that every school district has the fiscal resources available for all of its students to meet the State's educational standards as set forth in the Core Curriculum Content Standards (CCCS). In this motion, the State seeks a determination from the Court that the SFRA meets the requirements of the thorough and efficient clause of the New Jersey Constitution and that this Court's prior remedial orders entered on behalf of the Abbott districts are no longer necessary.

This Court has previously ruled that the CCCS, established in the Comprehensive Education Improvement and Financing Act (CEIFA), provide a constitutionally acceptable definition of a thorough and efficient education. The CCCS remain the foundation of the funding formula in the SFRA.

Moreover, the SFRA addresses the constitutional deficiencies the Court found in the funding provisions of CEIFA as applied to the Abbott districts. The SFRA incorporates an enhanced resource model developed by the DOE, with input from educators and experts, which is directly linked to the funding needed to achieve

the educational standards. Additionally, this enhanced model includes specific educational resources for meeting the special needs of disadvantaged students, particularly students in districts with high concentrations of disadvantaged students. The cost to provide these educational resources was determined and is provided for in the Act. By ensuring the fiscal resources to allow all students to achieve New Jersey's educational performance standards, the SFRA provides all New Jersey students with the opportunity to be productive citizens and compete as workers in the labor market.

The Act also ensures that these resources and costs stay current. Recognizing the need for a dynamic process, the Act requires that the educational resources and the cost of providing them are to be reviewed and updated every three years, with CPI adjustments in intervening years. The Act is also designed to work in conjunction with recently enacted State, as well as existing federal, educational and fiscal accountability legislation. The periodic review and adjustment of the resources called for in the SFRA, coupled with authority for State intervention in districts due to program or fiscal deficiencies, provides the most appropriate means of ensuring that current and future students will be provided the opportunity to achieve the CCCS.

In short, the SFRA embodies reasonable legislative determinations, grounded in sound educational policy and the current socio-economic and demographic landscape of New Jersey's

communities, that are designed to provide a thorough and efficient education to all students. These reasoned choices of the legislative and executive branches are entitled to significant deference and, hence, the State's motion should be granted.

## STATEMENT OF THE CASE

Over the past 35 years, this Court has reviewed the constitutional validity of several school funding formulas adopted by the Legislature. See Abbott v. Burke, 136 N.J. 444 (1994) (Abbott III) (challenge to the Quality Education Act); Abbott v. Burke, 119 N.J. 287 (1990) (Abbott II) (as-applied challenge to the Public School Education Act of 1975); Robinson v. Cahill, 69 N.J. 449 (Robinson V) (facial challenge to the Public School Education Act of 1975); Robinson v. Cahill, 62 N.J. 473 (1973) (Robinson I) (challenge to the State School Aid Incentive Equalization Aid Law, commonly known as the Bateman Act, and the State School Aid Law of 1954).

Most recently, this Court invalidated the Comprehensive Education Improvement and Financing Act (CEIFA) in Abbott v. Burke, 149 N.J. 145 (1997) (Abbott IV), as applied to the poorer urban districts, *i.e.*, Abbott districts. The Court noted that it had "previously held that in the absence of legislation that would assure a constitutionally adequate education, these school children are entitled to judicial relief directed toward the improvement of the educational opportunity available to them." Id. at 152. The Court, however, found that CEIFA did not meet this standard. Although the Court upheld the substantive definition adopted by CEIFA for a thorough and efficient education, *i.e.*, the Core Curriculum Content Standards (CCCS), the Court found the funding

provisions were inadequate to assure that students in the Abbott districts could meet those standards. Id. at 152-53. First, this Court concluded that CEIFA did not, "in any concrete way attempt to link the content standards to the actual funding needed to deliver that content . . . ." Id. at 169. Further, the Court found that the State failed to demonstrate that the formula appropriately addressed the special needs of disadvantaged students in these districts. Thus, the Court ordered that parity in spending be achieved between the wealthy suburban districts, i.e., the DFG I and J districts<sup>1</sup>, and the Abbott districts and that a study be conducted by the Commissioner of Education (Commissioner) to identify the special educational needs of students attending school in the Abbott districts, the programs required to address those needs and the cost of those programs. That study and the remedial orders emanating from that study were incorporated into this

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<sup>1</sup>DFGs or District Factor Groups were developed by the DOE in the 1970s to enable districts of certain socio-economic status to compare their performance against other districts similar to them. The DOE designated the districts as DFG A through DFG J, with A being the districts with the lowest socio-economic status and J the highest. Abbott II, 119 N.J. 287, 338. In Abbott II, the Court used the DFGs to identify "poor" school districts (DFG A and B) and wealthy suburban districts (DFG I and J). See generally, 119 N.J. 287. DFGs are updated based on the latest Decennial Census data and use various information available in the census data to determine the socio-economic status of the community. The most recent DFGs, based on the 2000 census data, were calculated based on six factors: (1) percent of adults with a high school diploma; (2) percent of adults with some college education; (3) occupational status; (4) unemployment rate; (5) percent of individuals in poverty; and (6) median family income. See <<[www.state.nj.us/education/finance/sf/dfg.shtml](http://www.state.nj.us/education/finance/sf/dfg.shtml) (last visited February 27, 2008)>>.

Court's decision in Abbott v. Burke, 153 N.J. 480 (1998) (Abbott V).<sup>2</sup>

After this Court's decisions in Abbott IV and Abbott V, the State implemented the Court's fiscal remedial requirements through supplementing CEIFA's statutory aid provisions with appropriations act language that provided additional State aid to the Abbott districts. See L. 2001, c. 130; L. 2000, c. 53; L. 1999, c. 138; L. 1998, c. 45; L. 1997, c. 131. By the 2002-2003 school year, however, the fiscal situation in the State made it impossible to continue to implement the CEIFA formula for the remaining school districts given that the limited increase in State aid available for education had to be devoted almost exclusively to the Abbott districts. Accordingly, since 2002, CEIFA has not been used as the basis for providing State aid to any school districts in New Jersey. Certification of Katherine Attwood (Attwood Certification), ¶4; Davy Certification, ¶52.

In 2002, the State began work on a new school funding

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<sup>2</sup>In addition to the other deficiencies the Court identified in CEIFA, it also held that the formula failed to address the need for facilities improvement in the Abbott districts. Abbott IV, 149 N.J. at 186. As part of the remand ordered in Abbott IV, the Court directed the Commissioner to review the facilities needs in the Abbott districts and provide recommendations on how to address those needs. Id. at 224-225. After the Court's decision in Abbott V adopting the Commissioner's recommendations for facilities improvements, the Legislature enacted the Educational Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1 et seq., which has and will continue under the SFRA to address facilities issues in the Abbott districts. Thus, facilities are not an issue in assessing the constitutionality of the SFRA.

formula that would address the deficiencies this Court found in CEIFA as applied to the Abbott districts. The process of developing a new funding formula ultimately included: 1) identifying the State's educational standards; 2) developing a formula to provide sufficient resources so that all students could achieve those standards; 3) providing additional resources to meet the special needs of disadvantaged students; 4) determining the cost of providing those educational resources; 5) addressing special education funding; 6) expanding preschool programs; 7) allocating fiscal support between State aid and local revenues; 8) requiring accountability, while permitting local flexibility; and 9) allowing for future adjustments so that the formula is updated as the State gains experience. All of these steps were informed by the knowledge of educators and experts and guided by the decisions of this Court in the Robinson and Abbott cases.

A. Developing the Education Resource Model

Attempts by states to create a model funding formula to determine the cost of education began in the early 1980s. See Rebell, Michael A., "Professional Rigor, Public Engagement and Judicial Review: A Proposal for Enhancing the Validity of Education Adequacy Studies," (2006) at 4 <<[www.mitpressjournals.org/doi/abs/10.1162/edfp.2006.1.4.465](http://www.mitpressjournals.org/doi/abs/10.1162/edfp.2006.1.4.465) (last visited February 27, 2008)>>. The first model, the Resource Cost Model, was an input-oriented model that relied on organized panels of individuals in the

education field to develop a system of services. Ibid. That model evolved into the Professional Judgment Panel (PJP) process in the mid-1990s in response to an order of the Wyoming Supreme Court which directed that state "to calculate the cost of the 'basket of goods and services' needed to provide all students with a 'proper' education." Ibid. (citing Campbell County School District v. State, 907 P.2d 1238, 1279-80 (Wyo. 1995)).

1. New Jersey's PJP Process

In November 2002, the DOE retained the consultant firm Augenblick, Palaich and Associates (APA) to assist it in estimating the cost of providing an adequate education to all of New Jersey's students. See "Report on the Cost of Education" (RCE) at 1, New Jersey Department of Education (December 2007), Certification of Lucille Davy (Davy Certification), ¶4 and Exhibit A. The DOE considered two separate methodologies for developing the funding formula and ultimately decided to use the PJP process.<sup>3</sup> RCE at 1; Davy Certification, ¶5. This same process has been used to estimate the cost of education in at least thirteen other states. "A Formula for Success: All Children, All Communities" (Formula for

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<sup>3</sup>The other option considered was the Successful School District (SSD) methodology. The SSD looks at current base spending in districts deemed successful. The SSD methodology, however, cannot identify the additional costs associated with special needs students. RCE at 2. Moreover, it does not link spending to specific educational resources so it provides no guide on how those fiscal resources are used. Odden, Allen, "Final Report on the Reviews of the Report on the Cost of Education in New Jersey," (Final Expert Report) at 2, Davy Certification, Exhibit E.



Success) at 5, Department of Education (December 18, 2007), Davy Certification, Exhibit G.

The PJP process begins with the identification of a set of desired performance standards or outcomes that define the educational goals of the State. RCE at 2. Then, prototypical model districts and schools are designed to reflect the characteristics of the State's school districts. After that, panels of educational practitioners are assembled to design an educational resource model or models, including equipment, personnel and programs, that will enable all children to meet those goals. Id. at Appendix 4. The panelists first are asked to recommend the necessary educational resources for a school district that has no students with special needs. Thereafter, the panelists are asked to identify the additional educational resources associated with providing programs and services to students who have special needs, i.e., at-risk, LEP or disabled students. Id. at 2. See also Rebell, supra, at 4.

Once all of the necessary components of the program are identified, the actual cost of obtaining those identified components is calculated. Formula for Success at 10-11. After the costs for the various educational resources identified by the panels are determined, a funding formula is then developed that can be used to estimate the cost to provide a thorough and efficient education in any school district. Importantly, resources for

students with special needs -- including at-risk and LEP -- are separately specified and the costs are therefore able to be separately determined. Id. at 12.

a. Identifying the State Standards

The first step in the PJP process requires identification of a set of desired performance standards for the panels. In New Jersey, the CCCS define what all students should know and be able to do by the time they graduate. The CCCS currently specify detailed expectations in nine content areas - Language Arts Literacy, Mathematics, Science, Social Studies, World Languages, Visual and Performing Arts, Comprehensive Health and Physical Education, Technological Literacy and Career Education and Life Skills.<sup>4</sup> N.J.A.C. 6A:8-1.1. These mandated standards are implemented by districts at every grade level and are supported by curriculum frameworks and professional development. Doolan Certification, ¶¶8-11, 18-20. The frameworks include sample teaching strategies, classroom activities, vignettes, adaptations, assessment ideas and background information relevant to each of the content areas. Id. at ¶8. Professional development is offered by the DOE through the website NJPEP, which supports the educational

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<sup>4</sup>The CCCS must be reviewed and updated by the State Board of Education every five years. L. 2007, c. 260, §4; (former) N.J.S.A. 18A:7F-4. The current CCCS are the same as those initially established pursuant to CEIFA, except that the five cross-content workplace readiness standards have been replaced by Technological Literacy and Career Education and Life Skills. Certification of Dr. Jay Doolan (Doolan Certification), ¶¶7, 13.

community in the understanding and implementation of the CCCS and their related statewide assessments. Id. at ¶20. All students must demonstrate proficiency on statewide assessments aligned to the standards.<sup>5</sup>

In Abbott IV, this Court upheld the validity of the CCCS "as a reasonable definition of a constitutional thorough and efficient education" and concluded that the definition strongly warranted judicial deference. 149 N.J. at 168. Thus, the PJP process used the CCCS as the primary basis for the desired performance standards for the panels.<sup>6</sup> RCE at 2 and Appendix 4.

b. Prototype Schools

The second step in the PJP process called for the creation of a set of prototypical model schools and districts that

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<sup>5</sup>Currently, the DOE statewide assessment program tests students in grades 3 through 8 and grade 11 in Mathematics and Language Arts Literacy. Additionally the standardized assessment of Science occurs in grades 4, 8 and 11. When the statewide assessment program was established concurrent with the CCCS, testing was expected to occur at three grade levels, in all of the standard areas. However, difficulties in implementation and subsequent requirements of the No Child Left Behind Act of 2001, 20 U.S.C. §6301 et seq., to test in each grade 3 to 8 required DOE to revise its plans for the assessment program. Aside from the Statewide assessments, school districts are required to locally test all CCCS areas annually at each grade and the monitoring system ensures that this is occurring. Doolan Certification, ¶¶22-29.

<sup>6</sup>In addition, the required proficiency rates on State assessments to ensure that all children are meeting state standards by 2013-2014 as required by the No Child Left Behind Act, other graduation requirements and school day and year requirements were provided to the panels as part of the State's performance standards. RCE, Appendix 4-11 and 4-12.

reflected the actual demographics of school districts in New Jersey. As noted by Dr. Allen Odden, a school finance expert, prototype schools are used "to show how the resource proposals would look in schools. The prototypes are used as a way to communicate the nature of all the recommendations, which if adopted, are then applied to the student numbers and specific demographics of each individual school and district in the state." Final Expert Report at 3 fn.2.

To develop the prototypes, the consultants gathered information on each school district in the State, including district size, grade span, and student characteristics such as the percentage of at-risk, LEP and special education students. After reviewing the characteristics of all New Jersey schools districts, APA created six model districts based on the identified demographics of school districts in the State. RCE at 7-8.

c. Identifying the Educational Resources

Once the performance standards were identified and the model school districts created, panel members were selected to identify the educational resources needed to meet those standards. In New Jersey, three rounds of panel meetings were conducted. All of the panelists were provided with the State's performance standards. The panelists were advised that they were to use their "experience and expertise to organize personnel, supplies and materials, and technology" and "create a set of

programs/curriculum" designed to provide students with the ability to meet the standards. They were further advised that they could base the "design on a 'whole-school approach' (such as Roots and Wings), a charter school approach (such as Edison), or any other philosophical basis (such as Montessori)" with which the panel member was familiar. Moreover, they were told not to be constrained by or concerned with the revenues needed to support the educational resources identified; however, they were cautioned that the exercise was to identify only those educational resources necessary to have all students, with and without special needs, meet the standards, not to create a "dream school." RCE, Appendix 4.

In the first round, educators employed by DOE met for three days in January 2003. The first round panel recommended the educational resources needed in the six prototype schools. RCE at 8 and Appendix 6-1.

The second round was comprised of panel members nominated by various stakeholder groups including the Education Law Center (ELC), Garden State Coalition of Schools, New Jersey Association of Supervision and Curriculum Development, New Jersey Association of School Administrators (NJASA), New Jersey Education Association (NJEA), New Jersey Principals and Supervisors Association (NJPSA), New Jersey School Boards Association (NJSBA) and the Public Education Institute. RCE, Appendix 5-1. The panels included a

representative from the ELC, two whole school reform facilitators from Abbott districts and three other Abbott district representatives, as well as 10 representatives from DFG I and J districts. The panels met for two days in February 2003 and reviewed and modified the educational resources identified in the first round. RCE at 8 and Appendix 7-1.

The third round was comprised of a single panel of eight district-level policy makers, three of whom (two superintendents and one business administrator) were from Abbott districts. One DFG I and J district was represented. RCE, Appendix 8-1. The third-round panel met for two days in March 2003 and reviewed and modified the educational resources identified by the Round 2 panels. Their recommendations resulted in the final set of educational resources used in preparing the RCE. RCE at 8, Davy Certification, ¶8.

The work of the PJP process culminated in the identification of a set of resources for an elementary, middle and high school in each of the model school districts. As an example, for students attending an elementary school in a large district, i.e., a district between 4,000 and 7,999 students, the educational resources included sufficient school teachers to have a class size of 18 students in K-5 or have class sizes of 15 in K-3 and then classes of 25 in grades 4-5. See RCE at 9; Final Expert Report at 4. The resources also included speciality teachers for classes

such as art, music and physical education. Additional certificated and non-certificated personnel were identified for children who are at-risk or LEP, including reading specialists, social workers, parent liaisons and instructional aides. RCE, Appendix 9-15. Moreover, summer school and after-school programs were also specified for 50% of the at-risk and LEP students. RCE, Appendix 9-16.

d. Determining the Cost of the Educational Resources

The next phase in the PJP process required a determination of the cost of the educational resources specified by the panelists. In that phase, the DOE applied actual cost data from 2004-2005 to the identified educational resources and created a base per pupil amount for general education, as well as the additional cost of providing services to students with special needs. RCE, Appendix 10. In certain instances, the panel members identified specific fiscal resources, such as instructional supplies and materials; those amounts were used in the costing out. In other instances, the panel members identified positions in terms of full time equivalents (FTEs). Salaries for positions that require certification were calculated based on actual salaries for the individual type of position in DOE's Certificated Staff Data. For non-certification positions, salary data for the calculation was obtained from the Department of Labor, State Occupational Employment and Wage Estimates. RCE at 10-11 and Appendix 10.

After the costs were applied to the different models, APA developed formulas the DOE could apply to estimate adequate costs for all districts in the State, accounting for demographic, size and configuration differences and weights to be applied to the base cost to support the educational resources identified for students with special needs. RCE at 12-17. Adjustments were also made using the Geographic Cost of Education Index to account for district-level differences in cost of living and difficulties in hiring and retaining teachers.<sup>7</sup> RCE at 17.

## 2. Joint Legislative Hearings

In July 2006, the Legislature adopted a Concurrent Resolution establishing four joint legislative committees to make recommendations on how to address the State's high property taxes. Assembly Concurrent Resolution No. 3. One of those committees was the Joint Legislative Committee on Public School Funding Reform; it was charged with "reviewing and formulating proposals that address the manner in which government provides for the maintenance and support of a system of free public schools for the instruction of the children of this State." Id. at §3a; see also "Public School Funding Reform Final Report" (JLC Report) at 1 (December 2006), Davy Certification, Exhibit B. The Committee held hearings between

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<sup>7</sup>The Geographic Cost of Education Index (GCEI) was created by Dr. Jay Chambers in 1998 for the National Center for Education Statistics (NCES) to measure the differential salary requirements across districts. RCE at 17.



August and December 2006. During those hearings the Committee heard from stakeholders, DOE staff and education finance experts. In October 2006, the DOE and APA presented a general outline of its study in testimony before the Committee. JLC Report at 43-48.

The Committee issued its final report dated December 2006. The report made various recommendations including:

1. the formula should be developed based on a PJP process and should include a geographic cost index;
2. State aid should be based on the characteristics of the student population and the individual district's ability to pay;
3. aid calculations should be simplified and multiple aid categories eliminated;
4. ability to pay should be based equally upon a district's relative property wealth and income;
5. there should be a hold harmless provision;
6. high quality preschool should be provided for all children in DFG A and B districts and for children eligible for free and reduced price meals in all other districts; and
7. support should be provided for full-day kindergarten in all districts.

[See JLC Report at 2-5].

The JLC Report specifically discussed the unfairness of the current funding framework in which the gap between State support for the Abbott districts and for all other districts has grown. In addition, it noted that the "prevailing statutory design, continues to foster protracted negotiations, litigation and unpredictable funding for all districts, including the Abbott districts." JLC

Report at 63. Moreover, it recommended "elimination of the Abbott designation" to ensure that "all children, irrespective of their address, have the financial support to achieve success when measured by the core curriculum content standards and the standards of a society that demands excellence of its youth." JLC Report at 64.

3. Review of the Report on the Cost of Education

On December 12, 2006, the DOE issued its Report on the Cost of Education. The RCE was prepared by the DOE and APA and reflected the work done since 2002 on a new school funding formula. It described the various methods for determining the cost of education including the SSD and PJP approach, it explained the PJP process in New Jersey and the education resource models developed through that process and it discussed the costing-out of those educational resources and the final result of the costing-out process.

a. Public Hearings on the RCE

Immediately after the release of the RCE, the DOE scheduled formal hearings to invite public comment on the RCE. A total of six hearings were scheduled in various locations throughout the State. Moreover, a live Webcast of each hearing was made available through the DOE's web site. See link at <<[www.state.nj.us/education/sff/background.htm](http://www.state.nj.us/education/sff/background.htm) (last visited February 27, 2008)>>.

Testimony was presented or submitted by numerous individuals and organizations, including the ELC and other public interest advocacy groups, NJEA, NJASA, NJSBA, NJPSA, individual legislators, taxpayers, school district employees and board members. The most commonly expressed concerns regarding the Report on the Cost of Education were:

1. Salary figures should be updated and the mean rather than the median salary should be used to calculate personnel costs;
2. The cost for benefits should reflect accurate spending patterns and actual benefit rates for all staff rather than a percentage of salary;
3. The definition of at-risk students should be expanded to include students eligible for a free lunch and those eligible for a reduced price lunch;
4. The calculations contained too few security guards;
5. The actual cost of special education should be studied;
6. Cost of living adjustments should be based on more current data than the Chambers Geographic Cost of Education Index;
7. Preschool programming should not be reduced in any new formula; and
8. The DOE should not have used its staff for the first-level panel.

During this same time period, the DOE worked with APA to update the cost figures to 2005 - 2006 and to modify the calculations based on the updated costs. The updated calculations were published on January 19, 2007 as an Addendum to the Report. Updated Appendix on Report of the Cost of Education, Davy Certification, Exhibit C.

b. Expert Review of the RCE

In addition, while the public hearings were being conducted, the DOE retained three experts in the field of school finance -- Allen Odden from the University of Wisconsin, Lawrence Picus from the University of Southern California, and Joseph Olchefske from the American Institutes for Research.<sup>6</sup> These experts were asked to review and comment on the findings and methodology in the Report.

Two of the experts, Dr. Odden and Dr. Picus, assessed the adequacy of the educational resources identified by the PJP process using a third school finance methodology developed by them -- the Evidence-Based approach. Final Expert Report at 1. The Evidence-Based approach identifies school-based programs and educational

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<sup>6</sup>Dr. Allen Odden is a professor of Education Leadership and Policy Analysis at the University of Wisconsin-Madison. He is also the Co-director of the Consortium for Policy Research in Education. Dr. Odden holds a Ph.D. from Columbia University. Having participated in the Abbott IV remand proceedings as the consultant to Judge King, the Court recognized his expertise as "focus[ing] on education policy, finance and resource allocation." Abbott v. Burke, 163 N.J. 95, 103 fn3 (2000) (Abbott VI). Currently, Dr. Odden is a Principal Partner with Lawrence O. Picus and Associates. Dr. Picus holds a Ph.D. in Public Policy Analysis from the RAND Graduate School. In addition to his consulting work, he is a professor at the Rossier School of Education, University of Southern California and has been the Director of the Center for Research in Education Finance since 1993. He also specializes in education finance, including the adequacy, equity and distribution of funds to local districts. Mr. Olchefske is a national expert in student-based funding systems. He is the Managing Director of the American Institutes of Research, School District Consulting Practice and former Superintendent of Schools in Seattle. Davy Certification, Exhibit D.

strategies that research has shown to be effective in improving student learning. "Although the rigor of the evidence supporting the effectiveness for each recommendation varies, this approach only includes recommendations that are supported by either solid research evidence or best practices." Id. at 3.

Focusing on the resource model for the large district, the experts compared the PJP resources to the Evidence-Based resources in all areas including class size, core teachers, specialist teachers, substitute teachers, other certificated staff such as librarians, technology specialists, principals, assistant principals and guidance counselors. They further compared areas of professional development, teacher salary and benefits, central office costs, books, instructional materials, equipment, technology and student activities. Finally, they reviewed the additional resources for at-risk and LEP children.<sup>9</sup> See generally, Final Expert Report.

The experts identified only one area for which they believed additional educational resources should be added to the

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<sup>9</sup>Although not part of the RCE, the experts were advised that the DOE intended to recommend preschool for all at-risk three- and four-year-old children. The Report opined that this would be the "best state-supported preschool program in the country and should provide a sound, high quality set of experiences designed to have all students ready for school when entering kindergarten." Final Expert Report at 10. In fact, as discussed in detail, *infra*, at 32, the SFRA has a preschool program that is even more expansive.

model -- professional development. Id. at 7. They also recommended two areas in the costing-out process that should be adjusted. First, with respect to the calculations for at-risk students, the experts recommended that the definition of at-risk be expanded to include both students eligible for a reduced-price lunch and those eligible for a free lunch. Id. at 12. Second, the experts advised that mean or average salary data was more commonly used in adequacy studies and, therefore, mean, rather than median, salary data should be used by the DOE in its calculations. Id. at 8.

While not finding any specific deficiency, the experts also proposed that the DOE undertake further review in the areas of substitute pay and employee benefits. Id. at 6, 8. Further, they suggested that the DOE consider using a newer geographic cost adjustment. Id. at 8. Moreover, their Report made some recommendations to simplify the formula including combining the base amounts for moderate, large and very large districts into a single base amount for all three and using a common at-risk weight for all K-12 and for all K-8 districts. Id. at 15.

The Final Expert Report concluded that, with the recommended adjustments, the resources identified were sufficient to meet:

- All of the resources in the evidence-based approach to adequacy ... ;
- All of the resources in the "illustrative" school budgets [from Abbott v. Burke, 153 N.J. 480 (1998)]

(Abbott V)];

- Enhanced versions of all the comprehensive school designs that were part of the New American Schools or created since then ...; [and]
- The Knowledge is Power Program (KIPP), which is an urban focused comprehensive school design... .

[Final Expert Review at 16].

Finally, the Report recommended that the State consider a resource allocation study of successful and unsuccessful schools and districts in New Jersey in an attempt to identify what are effective and successful instructional improvement strategies. Such a study would assist in recalibrating the education resource models in the future. Id. at 16-17.

A comparable study is currently under way. In August 2007, a Memorandum of Understanding between DOE and Rutgers University was executed. Under the MOU, experts at Rutgers, led by Dr. Steven Barnett, are conducting a study that examines resource allocation in highly successful schools, as well as unsuccessful schools, in order to ascertain whether there are certain staffing structures, instructional strategies, professional development activities and/or other uses of school resources that can be linked to successful outcomes in the form of enhanced student achievement. Davy Certification, ¶¶ 84, 85 and Exhibit I. Under the terms of the MOU, a final report will be submitted to the DOE by June 30, 2008. It is anticipated that the report will identify promising

strategies, that with further systemic examination, ultimately may inform the review of the resources in the adequacy budget as required by the SFRA. Id. at ¶86.

B. Finalizing the Funding Formula

After concluding the public hearings and receiving the Final Expert Report, the DOE began the process of considering all of the comments and recommendations. The DOE invited three additional experts in the field -- Thomas Corcoran from Columbia University, Susanna Loeb from Stanford University, and David Monk from Pennsylvania State University, to form an Advisory Panel and assist in the development of a new funding formula. Davy Certification, ¶21.

The panelists each brought a unique perspective to the school funding issues that were being addressed and the process was aided by the particular areas of expertise of each member. Thomas Corcoran is a Senior Research Investigator and Co-Director of the Consortium for Policy Research in Education (CPRE) at Columbia University. Prior to joining CPRE, he served as policy advisor for education to Governor Florio. His work in education policy issues has focused on topics such as systemic reform in urban schools, instructional improvement and evidence based practices. Susanna Loeb holds a Ph.D. in Economics and is an Associate Professor of Education and Business. She is widely published on education topics such as retention of high-quality teachers, school



improvement programs and early childhood. A recent policy brief co-authored by Dr. Loeb, "A Plan to Improve the Quality of Teaching in American Schools," published by the Brookings Institution in Spring 2007, was highlighted in the January 10, 2008 Quality Counts publication issued by Education Week. Finally, David Monk, Dean of the College of Education at the Pennsylvania State University, is a Professor of Educational Administration and holds a Ph.D. in Education Administration. His area of expertise is education finance and he has authored numerous publications in that area. Davy Certification, Exhibit F.

In addition to working with the Advisory Panel, the DOE conducted stakeholder and legislator meetings beginning in April 2007 and continuing into December 2007. In response to the public comments, expert review and in consultation with the Advisory Panel, the DOE made a number of changes to the funding proposal.

1. Selecting a Single Education Resource Model

First, to simplify the formula, the DOE decided to select one model district rather than six. As a policy matter, the DOE concluded that small school districts have inefficiencies that are a product of the lack of economies of scale and that the adequacy model should reflect efficient use of resources. Moreover, the use of a larger model as the base would hopefully provide an incentive for regionalization and the creation of larger, more efficient school districts. Davy Certification, ¶25. The goal of district

consolidation is consistent with recent legislative enactments looking to increase efficiency in the State's system of education. L. 2007, c. 63 (providing for efficiency through shared services, regionalization and consolidation); L. 2007, c. 53 (directing fiscal efficiencies, i.e., maximize participation in Special Education Medicaid Initiative Program reimbursement, participation in E-rate, energy and telecommunications cost-saving plans).

As the Final Expert Report noted, the moderate, large and very large districts were very close in base spending per pupil. Final Expert Report at 15. The base amount for the moderate district was slightly higher and the base amount for the very large district slightly lower than the large district. RCE at 11. All three had the same resource model for the elementary and middle school with slight differences at the high school level. Id. at Appendix 9-16, 9-17.

Moreover, the large and very large model had the highest proportions of at-risk students so those models would have likely been designed with the most emphasis on overcoming the disadvantages of at-risk students. RCE at 9. Given that the large model had a higher base cost than the very large model and had enrollment characteristics reflective of more districts, the large district was selected as the base model for the formula. Formula for Success at 10. With regard to the Abbott districts, 11 Abbott districts would have been within the very large model, 12 were

large, seven would have been moderate and one, Salem City, small. Attwood Certification, Exhibit F; RCE at 9.

In addition, the decision was made to weight students based on grade level thereby recognizing the increased cost of educating a middle and high school student. The weights were determined based on the relative cost of the PJP resource model for elementary, middle and high school in the large school district. Formula for Success at 10. Thus, the base amount in 2008-2009 for an elementary school student is \$9,649 and the base amount is \$10,035 and \$11,289 for a middle and high school student, respectively. Id. at 33.

2. Enhancements to the PJP Model

The DOE also decided to enhance the resources in the single model in a variety of ways. Additional staffing was added for maintenance and grounds employees, \$175 per pupil was added for annual capital improvements, funds for the annual audit were included and the inflation rate for utilities was adjusted to reflect the increases in energy costs that exceeded the CPI. Formula for Success at 11-12. Resources for professional development were expanded to include a facilitator/coach for each school and additional district-level funds for professional development that would be available for enhanced professional development for secondary initiatives. Id. at 12; Davy Certification, ¶26. Instructional aides were increased for at-risk

populations of over 40% to ensure an aide for each kindergarten class. Davy Certification, ¶26.

Security was adjusted based on the fact that school districts could not all "be treated alike and in isolation from the realities of their surrounding environment." Abbott IV, 149 N.J. at 172. As was noted in the public testimony, the PJP resources for security guards appeared inadequate, particularly for high at-risk populations. The PJP education resource model provided for no security guards at the elementary level, one for every 600 students at the middle school level and one for every 234 students at the high school level. The enhancement for a district with 40% or more at-risk students provides one security guard for every 400 students at the elementary school level, one for every 200 students at the middle school level and one for every 174 students at the high school level. Davy Certification, ¶27. Moreover, as recommended by the Final Expert Report as well as public comments, the at-risk definition was expanded for all purposes to include both free- and reduced-price lunch students. Formula for Success at 12.

### 3. Adjustments to the RCE

In addition to enhancing the resources, the DOE made several other adjustments to the costing out process based on public comments and the Final Expert Report.<sup>10</sup> It updated salaries

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<sup>10</sup>DOE reexamined the substitute rate of \$100 per day but decided to maintain that rate, updated by the CPI. Davy

and other unit costs, it used the mean rather than median for salaries, it calculated benefits based on actual costs rather than percentage of salary, it substantially increased the weight for vocational schools based on actual cost data and it replaced the Geographic Cost of Education Index with a more current county-specific geographical cost adjustment scale using 2000 and 2005 census data. Formula for Success at 10-11, 13-14.

Adjustments were also made to the at-risk and LEP weights that are applied to the base amount for elementary, middle and high school students, as applicable. First, a third weight was created for those children who are both at-risk and LEP by comparing the educational resources identified for each group and ensuring sufficient fiscal resources to provide for all non-overlapping educational resources. Formula for Success at 13. Second, a slightly higher LEP weight was used beyond that needed to support the PJP identified educational resources, i.e., .50 rather than .47, thereby generating additional fiscal resources of approximately \$300 per LEP student. Ibid. Combined with the base cost per pupil, the LEP weight results in a per-pupil amount of \$14,474 for an elementary school student, \$15,052 for a middle school student and \$16,934 for a high school student. Formula for Success at 33.

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Certification, ¶31.

Finally, in recognition of the additional challenges faced by districts with high concentrations of at-risk children, a sliding scale was applied to the at-risk weight with values from .47 to .57. Formula for Success at 12. These weights all exceed the weight needed to support the educational resources identified through the PJP process. Accordingly, to provide the elements of the education resource model would require \$4,439, \$4,616 and \$5,193 per at-risk student at the elementary, middle and high school levels respectively. The at-risk weight for a district with an at-risk percentage of 60% or higher provides an additional \$1,061 for each elementary at-risk student, an additional \$1,104 for each middle-school at-risk student and an additional \$1,242 for each high-school at-risk student. Id. at 38. In total, for at-risk students in a district with a 60% or higher at-risk population, the formula generates \$15,149 for each elementary student, \$15,755 for each middle-school student and \$17,724 for each high-school student.<sup>11</sup> Id. at 33.

#### 4. Addressing Special Education Funding

A major revision to the RCE was made in the area of special education funding. Instead of providing additional resources for every special education student based on disability,

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<sup>11</sup>For an at-risk student who is also LEP, the amounts would be \$16,355 for the elementary-school student, \$17,009 for the middle-school student and \$22,635 for the high-school student. Formula for Success at 33.

a census-based methodology was used. This decision was based, in part, on a study by the Center for Special Education Finance of special education expenditures in New Jersey. That study noted the significantly above-average expenditures per student with a disability in the State as compared to the national average and a substantial misunderstanding by school districts regarding the category or "tier" in which to place a disabled student. Based on these findings, Thomas Parrish, Director for the Center for Special Education Finance, suggested that New Jersey consider the census model as an alternative to the tiered funding system currently in use. Formula for Success at 15.

After consultation with the Advisory Panel, the DOE decided to recommend the adoption of the census method in New Jersey. Aid under the census method is based on the average classification rate in the State and the average excess cost of educating special education students statewide. Rather than use the resources identified through the PJP process, the DOE decided to use actual costs in the State for special education students except for students only receiving speech services. Actual costs for "speech only" could not be separately identified because those costs were not accounted for as special education expenditures in a district's budget; thus, the PJP resource model was used to determine speech-only costs. Davy Certification, ¶35. The excess cost for general special education was determined to be \$10,898; an

amount far in excess of all but the highest tier, i.e., Tier IV, under CEIFA. For speech only, a category that did not generate additional funds under CEIFA, the excess cost is \$1,082. Compare Formula for Success at 16 with 2002 Biennial Report at 3.<sup>12</sup>

Although the RCE recommended that special education aid be wealth-equalized (i.e., provided to districts based on the districts' relative wealth), the final DOE proposal recommended that only two-thirds of the excess costs be wealth equalized; the remainder was to be provided as categorical aid.<sup>13</sup> Moreover, extraordinary aid, i.e., a reimbursement for a per-pupil cost over a certain threshold, would be categorical aid; each district would be eligible to receive 75% of the costs above the threshold amount of \$40,000 or \$55,000 for in-district and out-of-district programs, respectively, to educate special education students with these extraordinarily high costs. Formula for Success at 16.

5. Dramatic Expansion of Preschool Program

The final DOE proposal also included the details of a State-funded preschool component for three- and four-year-old children. Preschool is the one remedial program mandated by Abbott

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<sup>12</sup>The Biennial Report can be accessed at <<[www.state.nj.us/education/genfo/birep.htm](http://www.state.nj.us/education/genfo/birep.htm) (last visited February 27, 2008)>>.

<sup>13</sup>Categorical aid is State aid provided to districts regardless of their wealth. It is generally provided based on the number of students a particular district has in that category. See Abbott II, 119 N.J. at 328.



V that has been an unquestioned success. See Barnett and Jung, "Effects of Five State Prekindergarten Programs on Early Learning," The National Institute for Early Education Research (October 2007) at 2, 20 (finding that New Jersey's early childhood program had meaningful effects, adding "to the evidence that preschool education programs of reasonable quality can produce broad gains in children's learning at kindergarten entry. These kinds of effects ... may be expected to yield greater school success, particularly in reading and math."); Frede, Jung and Barnett, "The Abbott Preschool Program Longitudinal Effects Study," The National Institute for Early Education Research (Interim Report, June 2007) at 3 (children who attend preschool "are improving in language, literacy and math at least through the end of their kindergarten year" and "children who attend preschool for two years at both age 3 and 4 significantly out-perform those who attend for only one year at 4 years of age or do not attend at all.").

The DOE recommendation expands preschool for three- and four-year olds to all at-risk students in the State and all students in high-poverty districts. Accordingly, every district, regardless of the socio-economic status of the community, will be required to offer every at-risk three- and four-year-old resident child a preschool program either directly or by contracting with community providers, neighboring school districts or other regional entities. Davy Certification, ¶¶55, 56. Moreover, any district in

DFG A or B or in a DFG CD district with a concentration of 40% or more at-risk children will be required to offer full-day preschool to all three- and four-year-old children in that district.<sup>14</sup> Id. at ¶55.

This dramatic expansion of preschool in the State will be phased in over a six-year period. Ibid. In all, this proposal is projected to increase the number of children eligible for full-day, high-quality preschool by more than 30,000. Id. at ¶56.

Given the detailed fiscal data that the DOE has collected for the high-quality preschool program in the Abbott districts, actual cost data was used to determine appropriate per-pupil amounts for the preschool program. For students served within the district, the per-pupil amount for 2008-2009 is \$11,506; for students served by private providers, the amount is \$12,934. For students served in Head Start programs, funded in part with federal dollars, the amount is \$7,146. Id. at ¶57. The Geographic Cost Adjustment will be applied to each of these per pupil amounts prior

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<sup>14</sup>All Abbott districts with the exception of Neptune and Hoboken are currently in either DFG A or B. Neptune is a CD with more than 40% of its students at-risk and will need to offer preschool to all resident three- and four-year olds. Hoboken is a DFG FG and, therefore, would only be required to provide preschool to their at-risk preschool children. See <<[www.state.nj.us/education/finance/sf/dfg.shtml](http://www.state.nj.us/education/finance/sf/dfg.shtml) (last visited February 27, 2008)>>. The SFRA, however, provides for a phase-out of the preschool program when a district is no longer eligible so that any three-year old who has started the program will be provided the second year of preschool. L. 2007, c. 260, §12.

to the distribution of Preschool Aid. Ibid. The State will fully fund these per-pupil amounts based on actual preschool enrollment and the funds will be accounted for in a special revenue fund.<sup>15</sup> Formula for Success at 23.

6. Determining State Aid

Once the final educational resources and the cost for providing those resources -- including the Geographic Cost Adjustment and the weights to be used for grade level, at-risk and LEP -- are determined, a budget can be generated for each school district. This budget will reflect the particular demographics of that school district and the fiscal resources needed to provide the educational resources in the PJP model, as well as the additional fiscal resources needed for at-risk and LEP students discussed above.

The next step is the allocation of that budget between State aid and local resources. In a departure from the past, the funding formula recommended by the DOE (and subsequently adopted by the Legislature) has almost all aid being wealth-equalized, i.e., determined by each district's ability to raise enough local revenue

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<sup>15</sup>In order to encourage the efficient provision of preschool programs and services while maintaining high quality, the Commissioner may approve a district's use of preschool aid to support K-12 programs or coverage for otherwise ineligible preschool children if the district meets or exceeds its projected enrollment and meets the quality standards established by the Commissioner. Formula for Success at 23-24.

to support their individual budget. More specifically, four categories comprise the wealth-equalized portion of the formula: (1) the base amount for elementary, middle and high school students; (2) the additional weights for at-risk and LEP students, and vocational districts; (3) two-thirds of the census-based cost for general special education; and (4) all of the census-based costs for speech.<sup>16</sup> These categories constitute the "Adequacy Budget." Formula for Success at 19.

The formula to determine a district's contribution to the Adequacy Budget, i.e., a district's local fair share considers equally both a community's property wealth and aggregate income indexed by statewide multipliers to ensure an equalized local tax effort. This portion of the funding formula is applied uniformly to all districts across the State, with State aid to be distributed based on each community's ability to pay relative to other districts in the State. The amount of the Adequacy Budget that the formula determines should be raised through the local levy is

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<sup>16</sup>In prior funding formulas, aid for at-risk and LEP programs, as well as all special education aid, were provided as categorical aid, i.e., a fixed amount per pupil regardless of district wealth times the number of children eligible for that funding. See former N.J.S.A. 18A:7F-16 (CEIFA early childhood program aid); former N.J.S.A. 18A:7F-18 (CEIFA demonstrably effective program aid); former N.J.S.A. 18A:7F-19 (CEIFA special education aid); former N.J.S.A. 18A:7F-20 (CEIFA bilingual education aid); former N.J.S.A. 18A:7D-16 (Quality Education Act (QEA) special education aid); former N.J.S.A. 18A:7D-20 (QEA at-risk aid); former N.J.S.A. 18A:7D-21 (QEA bilingual aid). See also Abbott II, 119 N.J. at 328 (discussion of categorical aids for special education, bilingual education and compensatory education).

designated as the local fair share; the difference between the local fair share and the Adequacy Budget is provided through State Equalization Aid. Formula for Success at 24-25.

Categorical aid is provided in addition to the Equalization Aid. As noted before, categorical aid is allocated regardless of a district's ability to raise local revenue, with the amount of aid generally determined by multiplying the cost factor for a particular aid category by the number of students eligible for the aid. Formula for Success at 19. Categorical aid includes: (1) one-third of the census-based cost for general special education; (2) Security Aid; (3) Preschool Aid and (4) Extraordinary Aid for special education.<sup>17</sup> Formula for Success at 21.

C. A Formula for Success: All Children, All Communities

In December 2007, the DOE issued A Formula for Success: All Children, All Communities, setting forth the DOE's final school funding proposal and the weights and costs for the 2008-2009 school year. As previously noted, the base amount for an elementary school pupil is \$9,649. The amount for a middle and high school pupil is \$10,035 and \$11,289, respectively. The weight for a full-

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<sup>17</sup>In addition, the new funding formula provides aid for transportation, debt service and choice aid (aid that supports an inter-district public choice program) in a similar manner as had been previously provided under CEIFA. It also continues to have the State pay the full cost of pension and FICA payments for certificated staff members. Davy Certification, ¶42.

time vocational school student is 1.31 resulting in a per-pupil amount of \$14,789. Formula for Success at 32.

The at-risk weight ranges from .47 to .57 based on the concentration of at-risk students with an amount added to the base amount for that pupil ranging from \$4,535 to \$6,435. The LEP weight is .50 and ranges, based on grade level, from an additional \$4,825 to \$5,645 per pupil. The combined at-risk/LEP weight generates an additional \$5,741 to \$7,846 per pupil. Security aid provides \$70 for all students plus an additional \$406 per at-risk student for at-risk concentrations of 40% and above; for at-risk concentrations below 40%, the amount ranges between \$70 and \$476 per at-risk student. Ibid.

Finally, for special education, the census model assumes a 1.897% classification rate for speech-only students and a 14.69% classification rate for all other special education students. The formula provides for an average excess cost of \$1,082 for speech-only and \$10,898 for other special education students. The formula calculates the special education aid based on the census percentage times the average excess cost times the resident enrollment of the district. Ibid.

In calculating aid to school districts, the DOE proposal recommended certain aid adjustments to assist in the transition to a new school funding formula. The first adjustment is referred to as "Adjustment Aid." This aid is provided so that in the first

year of the formula, the 2008-2009 school year, every district will receive a minimum of a 2% increase over State-aid amounts for 2007-2008. Moreover, in the future, a district will not receive any less State aid than its aid in the 2008-2009 school year unless the district experiences a significant enrollment decrease. Furthermore, no reduction for significant enrollment decreases will take place prior to the 2011-2012 school year. Id. at 25.

A second aid adjustment was made to limit one year aid increases to school districts. Given the fact that CEIFA had not been updated for current district demographics since FY 2002, the DOE proposed that significant projected increases in aid be capped at 20% for districts spending below their Adequacy Budget and at 10% for districts spending above their Adequacy Budget. This should ensure that districts anticipate and plan for optimal use of any significant aid increases. Ibid. See also Abbott II, 119 N.J. at 389 (Court suggesting a phase-in of additional aid might be appropriate to ensure that districts could "efficiently absorb" the increases).

In addition, certain aid adjustments have been made to assist the transition of Abbott districts into a unified funding formula. Specifically, districts that were formerly identified as Abbott districts that are spending below the amount reflected through the formula as their Adequacy Budget may be eligible for additional State aid in the form of Education Adequacy Aid (EAA) to

bring them to adequacy within three years. Districts will qualify for EAA if they received Education Opportunity Aid in 2007-08 and either are failing to meet educational adequacy standards as determined by the Commissioner or are municipally overburdened and therefore may be reluctant to propose increasing their local levy to their local fair share. L. 2007, c. 260, §16; Formula for Success at 26. See also Abbott II, 119 N.J. at 355 (Court noting that in municipally overburdened towns the school districts are reluctant to increase taxes for school purposes).

Given that the local tax levy in these communities is well below their local fair share and the State average, the DOE concluded that it would not be reasonable to expect these districts to increase their local levy to their local fair share without additional State assistance. Thus, although some annual increase in local contribution toward the local fair share will be required, the remainder of the local fair share necessary to reach the Adequacy Budget amount within three years will be funded through EAA. L. 2007, c. 260, §16.

Finally, in the past, Abbott districts had their aid for preschool programs determined based on individual district and provider budget reviews as part of the DOE approval of the Abbott early childhood plans. Decisions on the Abbott early childhood plans were required to be finalized for the 2008-2009 school year by January 15, 2008, Abbott v. Burke, 177 N.J. 578, 588 (2003)



(Abbott X), and those plans reflect per-pupil amounts that may differ from the per-pupil amount in the funding formula. Accordingly, for the 2008-2009 school year, the approved early childhood plans in Abbott districts will be fully funded with Preschool Aid.<sup>18</sup> L. 2007, c. 260, §12c(4). In future years, these districts will receive the greater of the per-pupil allocation in the formula, the district's per-pupil allocation in its approved 2008-2009 early childhood plan, or the district's total 2008-2009 Preschool Aid amount. Ibid.

D. School Funding Reform Act of 2008

In December 2007, Assembly Bill No. 500 and an identical Senate Bill, No. 4000, were introduced. The first section of those bills provided that "[t]his act shall be known as the School Funding Reform Act of 2008." The SFRA generally incorporates the DOE's proposal for a new funding formula as outlined in Formula for Success. Prior to formal introduction of the bills, the DOE posted draft legislation on its website and the Legislature held hearings before the Assembly Education and Budget Committees and the Senate Education and Budget and Appropriations Committees on the DOE's

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<sup>18</sup>Previously, Abbott districts' preschool programs were supported in primary part by a combination of early childhood program aid (ECPA) and preschool expansion aid (PSEA). See Millville Bd. Of Educ., et al. v. New Jersey Department of Education, 183 N.J. 264, 270 (2004). For Fiscal Year 2009, SFRA provides \$529 million for the Abbott districts in the form of Preschool Education Aid which will fully support, with one revenue stream, those preschool programs. Attwood Certification, Exhibit L.

proposal in December 2007. Subsequent hearings were held before the Assembly Budget Committee and the Senate Budget and Appropriations Committee after the bills were introduced. Testimony at these legislative hearings was presented by the Commissioner, as well as representatives of State education associations, school district employees and board members and various advocacy groups, including the ELC.

In testimony, the ELC and others expressed a general concern that the overall level of fiscal support being provided by the formula was inadequate and that, as such, the formula would depress spending in all districts, including the wealthy suburban districts. The testimony, however, did not focus on any specific educational resources that were not included in the model (despite the fact that the basic model had been publicly available for over a year) or any specific deficiencies in the costing out of that model by the DOE. See Transcripts/Recording of December 13, 2007 and December 27, 2007 legislative hearings, <<[www.njleg.state.nj.us/Proposed\\_school\\_funding/proposedschoolfunding.asp](http://www.njleg.state.nj.us/Proposed_school_funding/proposedschoolfunding.asp) (last visited February 27, 2008)>>.

The SFRA also includes some provisions that were not reflected in the Formula for Success but that nonetheless were supported by the DOE. Davy Certification, ¶47. The Act requires the Governor, after consultation with the Commissioner, to provide the Legislature with an Educational Adequacy Report every three

years that addresses appropriate adjustments to be made to the base per-pupil amount, the per-pupil amounts for full-day preschool, the weights for grade level, county vocational schools, at-risk pupils, LEP pupils and combination pupils, the cost coefficients for security aid and transportation aid, the special education average classification rate and excess cost and the extraordinary special education thresholds. Those adjustments will be implemented in the following school year unless prior to November 30<sup>th</sup> the Legislature rejects the recommendations. L. 2007, c. 260, §4b.

The Commissioner is also required to undertake an independent study of the special education census methodology to determine if adjustments in that formula are needed. The study and any recommendations from that study are to be completed by June 30, 2010. Id. at §13f. The legislation also adjusted the extraordinary aid categories to provide for a reimbursement of 90% of the cost of direct instructional and support services over \$40,000 for in-district programs, 75% of the direct instructional and support services costs over \$40,000 for separate public programs and 75% of the tuition costs over \$55,000 for separate private school programs.<sup>19</sup> Id. at §13b.

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<sup>19</sup>The Governor, in his Budget for Fiscal Year 2009, has stated his intent to modify the reimbursement formula in his FY2010 budget to provide reimbursement of 95% of the costs over \$40,000 for in-district programs, 85% of the costs over \$40,000 for separate public programs and 85% of the costs over \$55,000 for separate private school programs. NJ State Budget FY 2008-2009 at D-104, which can be accessed at <<[www.state.nj.us/treasury/omb/](http://www.state.nj.us/treasury/omb/)

In addition, although local levy growth limitation provisions enacted pursuant to L. 2007, c. 62 remain in effect under the SFRA, those provisions are due to expire after the 2011-2012 school year. The SFRA directs the Commissioner to undertake a study to be completed by the end of the 2010-2011 school year as to the effects of those growth limitations within the context of the SFRA. The Commissioner is to make recommendations as to whether to retain those growth limitation provisions, return to the spending growth limitation provisions of L. 1996, c. 138 or consider a revised growth limitation method that might be more appropriate in reducing spending disparities among school districts. L. 2007, c. 260, §17.

The SFRA also provides that districts for which the School Development Authority (SDA) must undertake their school facilities construction, formerly known as Abbott districts and renamed SDA districts, could undertake small capital projects with DOE approval but without SDA involvement. This revision reflects the fact, as noted above, that the Adequacy Budget provides \$175 per pupil for capital outlay.<sup>20</sup> Id. at §21.

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publications/09budget/index.shtml (last visited March 13, 2008)>>.

<sup>20</sup>Additionally, the Governor's Budget for Fiscal Year 2009 includes \$15 million for SDA New Facilities Transition Aid that will be distributed to Abbott districts opening new school facilities in FY2009, based on criteria established by the Commissioner. NJ State Budget FY 2008-2009 at D-104, which can be accessed at <<[www.state.nj.us/treasury/omb/publications/09budget/index.shtml](http://www.state.nj.us/treasury/omb/publications/09budget/index.shtml) (last visited March 13, 2008)>>.

Finally, for districts spending over their Adequacy Budget amount and also taxing at greater than their local fair share under the formula, the SFRA requires a portion of the increase to be used to reduce the local tax levy. Id. at §37.

On January 7, 2008, both houses of the Legislature passed the School Funding Reform Act of 2008. The Governor signed the bill into law on January 13, 2008. The Act is effective immediately and will govern distribution of State aid for the 2008-2009 school year and beyond. Id. at §85.

E. Accountability Measures

The SFRA was designed to "work in conjunction with the key school accountability measures that have been enacted in recent years to promote greater oversight, transparency, and efficiency in the delivery of educational services." L. 2007, c. 260, §20. Moreover, federal law has established a system of addressing schools and districts that are not meeting requisite standards for educational achievement. All of these mechanisms permit heightened intervention in a district (or school) by the DOE so that deficiencies can be corrected and barriers to the achievement of the CCCS can be removed, thereby ensuring that the funding being provided through the SFRA is supporting a thorough and efficient system of education.

In the SFRA, four of these measures were specifically referenced in the legislative findings - - the New Jersey Quality

Single Accountability Continuum (NJQSAC), N.J.S.A. 18A:7A-10 et seq., the School District Fiscal Accountability Act (SDFAA), N.J.S.A. 18A:7A-54 et seq., the duties and responsibilities of the new executive county superintendent of school pursuant to L. 2007, c. 63, and the other fiscal accountability measures contained in L. 2007, c. 53. L. 2007, c. 260, §20. In addition, the SFRA expands the Commissioner's accountability powers, and federal law -- the No Child Left Behind Act of 2001 (NCLB) -- imposes accountability measures to ensure that all children can meet State standards by 2013-2014. L. 2007, c. 260, §§ 18, 30; 20 U.S.C.A. §6301.

NJQSAC substantially amended the prior statute providing for monitoring, evaluation and intervention into districts. NJQSAC requires the DOE to assess district capacity every three years in five key components of school district effectiveness: (1) instruction and program, (2) personnel, (3) fiscal management, (4) operations, and (5) governance. Each of the key components is evaluated based upon a District Performance Review (DPR) which consists of quality performance indicators. The DPR for each key component is codified at N.J.A.C. 6A:30, Appendix. All districts in the State are assessed on the same measures, lending to the consistency of review and assessment among districts.

NJQSAC moves the monitoring system away from just a paper review and establishes rigorous standards for school districts to meet before they are considered to be providing a thorough and

efficient education. One critical area that has been substantially strengthened under NJQSAC monitoring is in the Instruction and Program area. Here the breadth of curriculum and program offerings is judged against the CCCS. A district must demonstrate that it has a curriculum that is aligned with each of the nine CCCS. The district must verify that the curricula are fully implemented at all grade levels and are articulated among all grades, content areas and schools, and that there are benchmarks and interim assessments at each grade level. See Instruction and Program DPR, Section B, Curriculum. Moreover, the district must verify that it is assessing the progress of all students in mastering the CCCS at least twice a year, including the content areas that are not included in the Statewide assessment program. See Instruction and Program DPR, Section A, Student Performance, Indicator 12. This review ensures that children are receiving instruction in all of the content areas and are being provided the constitutionally required educational opportunity.

Failure in one or more of the five key components establishes the basis for the Commissioner to intervene. Intervention could range from the appointment of one or more highly skilled professionals (HSPs) to provide technical assistance, placing the district under partial intervention, the appointment of an HSP with direct oversight of one or more deficient areas and

placing the district under full intervention.<sup>21</sup> N.J.S.A. 18A:7A-14.

A second accountability measure is the SDFAA which permits intervention by the Commissioner to address serious fiscal deficiencies in school districts, thereby ensuring that funds are spent appropriately. The SDFAA gives the Commissioner the authority to appoint a monitor where certain severe fiscal circumstances exist in a district. N.J.S.A. 18A:7A-55(a). The SDFAA imbues the monitor with considerable authority to effectuate the purposes of the law, including, but not limited to, the ability to hire, promote, and terminate employees and the authority to override a chief school administrator's action and a vote by the board of education within the areas of the monitor's responsibility. N.J.S.A. 18A:7A-55(b).<sup>22</sup>

As for county superintendents, L. 2007, c. 63 changes that title to Executive County Superintendent - a position appointed by the Governor. L. 2007, c. 63, §42. Along with that enhanced title are increased powers and duties. Executive County Superintendents must review and submit a plan to the Commissioner

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<sup>21</sup>In 2007, all of the Level II, Level III and State-operated school districts (SOSD), as well as districts in year 3 "District in Need of Improvement" (DINI) status under NCLB, were subjected to a full review by independent experts and have been placed on the performance continuum. Davy Certification, ¶71.

<sup>22</sup>The Commissioner has exercised her ability to appoint a monitor on seven occasions since the Act became effective in April 2006. Currently, monitors are in place in Asbury Park, Beverly City, Camden, Irvington, Pleasantville, Paterson, and Willingboro. Davy Certification, ¶73.



concerning the elimination of any non-operating district in the county, recommend to the Commissioner the elimination of laws deemed to be unnecessary mandates, and recommend to the Commissioner a plan to regionalize all districts that are not configured as K-12 districts. L. 2007, c. 63, §49.

Executive County Superintendents must also review and approve all employment contracts for superintendents, assistant superintendents and business administrators in the district in addition to reviewing all school budgets. Also notable are the obligations to track the types and capacities of district special education programs, track special education students in out-of-district placements, and serve as a reference for districts to seek appropriate placements in other school districts rather than in out of district placements. To this end, the Executive County Superintendent must report regularly on the progress to ensure all special education students are being served in the least restrictive environment. Ibid.

L. 2007, c. 53 is another statute designed to ensure the efficient use of fiscal resources by school districts. It requires, as a condition of receiving State aid, that districts undertake efficiencies such as participating in the most cost effective insurance plans and energy services, participating in E-rate and telecommunications programs, maximizing reimbursements for special education services and refinancing debt if sufficient

savings are achievable. Id. at §1. The legislation also requires districts to put the public on notice of contract action for certain district employees, i.e., superintendents and business administrators, and hold a public hearing on such contract action. Id. at §5. Other fiscal accountability measures in this legislation include Commissioner approval of any agreement for early termination of an employment contract of a superintendent, Id. at §6, restrictions and parameters placed on district employee and board member travel, and the ability of the Commissioner to order a compliance audit upon determination that a district is not spending State funds consistent with statute and regulation. Id. at §§14, 15.

In addition to the specific statutory schemes built around accountability, the SFRA also imbues the Commissioner with certain powers that may be exercised where circumstances warrant. First, the Act directs that the Commissioner shall not authorize the "disbursement of funds to any district" until she is "satisfied that all educational expenditures in the district will be spent effectively and efficiently in order to enable students to achieve the core curriculum content standards." L. 2007, c. 260, §18. The Act further authorizes the Commissioner "to take any affirmative action as is necessary to ensure the effective and efficient expenditure of funds by school districts and county vocational

school districts.<sup>23</sup>" Ibid. That action may include, where a district is spending above the amount of its Adequacy Budget, the Commissioner directing "such budgetary reallocations and programmatic adjustments, or tak[ing] such other measures, as [s]he deems necessary to ensure implementation of the required thoroughness and efficiency standards." Id. at §30(a).

Moreover, a district spending below the amount of its Adequacy Budget and failing to meet the CCCS in any school year, "shall be required to increase expenditures so as to meet at least the adequacy budget within the next two years." Ibid. Additionally, if after review of Statewide assessment results or through the NJQSAC process, the Commissioner determines that a district, or one or more schools within the district, is failing to achieve the CCCS, the Commissioner may take appropriate summary actions with regard to curriculum, staffing and budgeting in order to improve student achievement. Id. at §30(b).

The other accountability measure with which the SFRA will work in conjunction is the No Child Left Behind Act of 2001. Its four pillars are: stronger accountability for results, more freedom for states and communities, proven education methods, and more choices for parents. The NCLB is focused on ensuring that all

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<sup>23</sup>Pursuant to this authority, the Commissioner intends to adopt regulations that will establish certain programmatic requirements including intensive literacy programs and maximum class sizes in early grades for districts with high concentrations of at-risk students. Davy Certification, ¶82.

children, regardless of background, succeed in school.  
<<www.ed.gov/nclb/overview/intro/4pillars.html (last visited March  
6, 2008)>>

With specific regard to its stringent accountability provisions, the NCLB requires continuous and substantial academic improvement for all students and accountability requirements designed to ensure that all students meet or exceed the state's proficiency level by 2013-2014. 34 C.F.R. 200.13(b)(3); 34 C.F.R. 200.15. States, districts and schools are all held accountable to achieve adequate yearly progress ("AYP") toward that goal. 34 C.F.R. 200.21 (AYP of a State); 34 C.F.R. 200.50 (State review of district progress); 34 C.F.R. 200.30 (district review of school progress).

To gauge progress under this federal rubric, states were required to create annual assessments in language arts literacy and math for grades 3 through 8 and at least once in grades 10 through 12 by 2005-2006. 34 C.F.R. 200.5. And see Doolan Certification, ¶29. Additionally, states were required to create an annual assessment in science to be administered at least once during grades 3 through 5, grades 6 through 9 and grades 10 through 12 by 2007-2008. Id. Student performance is tracked through the assessment data and the data are disaggregated by each racial/ethnic group, low-income students, students with disabilities and students with LEP. 34 C.F.R. 200.13(b)(7)(ii)(A-

D). All sub-groups must make adequate yearly progress to meet NCLB requirements. 34 C.F.R. 200.20. Failure of any district or school to meet AYP benchmarks places them "in need of improvement" status with concomitant directives for improvement and, if necessary, ultimately restructuring. 34 C.F.R. 200.32, 200.34, 200.42-45, 200.50 and 200.52-53.

These State and federal accountability measures in conjunction with the CCCS and SFRA's funding provisions comprise the constitutionally-mandated "system of free public schools" in New Jersey. They establish a substantive definition for the content of a thorough and efficient education, provide for a combination of State and local funding to support the educational resources necessary to fulfill those requirements and establish a means for evaluating the success of local school districts in meeting their obligations and, taking corrective action. In short, the SFRA combined with these accountability measures results in a system that is both "thorough" and "efficient" as mandated by the Constitution.

## ARGUMENT

THE LEGISLATURE HAS ENACTED A SCHOOL FUNDING FORMULA THAT SUPPORTS A THOROUGH AND EFFICIENT SYSTEM OF EDUCATION FOR ALL CHILDREN IN NEW JERSEY.

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The New Jersey Constitution requires the Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. Art. VIII, sec. 4. Over the past 35 years, the Legislature, assisted by the Executive Branch, and guided by the opinions of this Court, has endeavored to come up with a formula to ensure that all New Jersey children are provided the opportunity for a thorough and efficient education. See generally Robinson v. Cahill and Abbott v. Burke. During that process, the Court has repeatedly recognized the primacy of the Legislature in defining and providing for a thorough and efficient system of education in New Jersey. See e.g., Abbott IV, 149 N.J. at 166; Abbott II, 119 N.J. at 304. The Court has also noted that the Legislature is due substantial deference in undertaking this obligation. See e.g., Abbott IV, 149 N.J. at 168; Abbott II, 119 N.J. at 385-386. Equally important, this Court has looked to the other branches of government to undertake the task and has only acted when it determined those branches have defaulted on their obligation and that default is not likely to be remedied any time

soon. Abbott II, 119 N.J. at 321. Indeed, the Court has acknowledged that the other branches were better suited for this task and expressed the hope they would eventually provide the comprehensive relief needed to ensure all children received a thorough and efficient education. Abbott IV, 149 N.J. at 202.

The funding formula adopted by the Legislature through the SFRA represents what the Court was seeking - a funding formula that meets the constitutional requirements of a thorough and efficient education. The SFRA is founded on a PJP process, designed by New Jersey educators and validated by national experts. Moreover, stakeholders and advocacy groups, including representatives of Abbott children and Abbott districts, participated in and commented on that process. The Legislature, aided by educators, experts and the DOE, crafted a formula that cures the constitutional shortcomings of prior funding formulas and provides the required link to the CCCS, standards that the Court found to be an "essential component of a thorough and efficient education." Id. at 152.

In enacting the SFRA, the Legislature designed the Act to work in conjunction with State and federal educational accountability standards including some enacted as part of the SFRA. In addition, the SFRA has a mechanism to adjust with changing times thereby ensuring that the school funding formula stays current in providing a thorough and efficient education.

Accordingly, this Court should rule that (1) the SFRA is constitutional and (2) this Court's prior remedial orders, entered on behalf of poor urban districts (i.e., the Abbott districts), are no longer necessary.

A. The SFRA Affords Sufficient Financial Support for a Thorough and Efficient System of Education for All New Jersey Children.

This Court has stated,

The Legislature's role in education is fundamental and primary; this Court's function is limited strictly to constitutional review. The definition of the constitutional provision by this Court, therefore, must allow the fullest scope to the exercise of the Legislature's legitimate power.

[Abbott II, 119 N.J. at 304].

This Court has also held that the constitutional mandate is to be defined in terms of the opportunity for "a specific substantive level of education" rather than an expenditure amount per pupil. Id. at 306. The Court has generally defined the educational opportunity required by the constitution as "a minimum level, that will equip the student to become 'a citizen and ... a competitor in the labor market.'" Ibid. citing Robinson I, 62 N.J. at 515.

In an effort to more specifically define the substantive content of that educational opportunity, the Legislature mandated the development of the CCCS as part of CEIFA. (former) N.J.S.A. 18A:7F-4. The CCCS define what all students should know and be



able to do at the completion of their public school education. Originally, the CCCS were comprised of seven content areas (Language Arts Literacy, Mathematics, Science, Social Studies, World Languages, Visual and Performing Arts and Comprehensive Health and Physical Education) and the Cross-Content Workplace Readiness standards. See (former) N.J.S.A. 18A:7F-4.1(d). The Cross-Content Workplace Readiness standards have now been replaced by two content standards -- Technological Literacy and Career Education and Life Skills. Doolan Certification, ¶13. See also N.J.S.A. 18A:7F-4.2. The standards work in conjunction with State-established curriculum frameworks in each content area that provide sample teaching strategies, classroom activities and assessment ideas. The standards do not impose a State-wide curriculum; rather local school districts are required to develop curriculum aligned to the standards to deliver those educational achievement levels. Doolan Certification, ¶7. NJQSAC ensures that local districts have met this requirement. Davy Certification, ¶63.

In Abbott IV, the Court held that the CCCS were a reasonable legislative definition of the educational opportunity required by the constitution and thus were entitled to substantial deference by the Court. 149 N.J. at 168. The Court, however, looked beyond the substantive definition in CEIFA of a thorough and efficient education to determine if the funding provisions of that Act assured the necessary resources were available to enable

children to meet the CCCS. Ibid. After reviewing CEIFA's funding provisions, the Court concluded that the Act was "incapable of assuring" a thorough and efficient education for children in the Abbott districts "for any time in the foreseeable future." Id. at 152. More specifically, it found that the funding provisions of CEIFA failed to provide the necessary link to the attainment of the CCCS. Id. at 168, 169. Moreover, CEIFA failed to identify and fund the programs and services that would be required to address the special needs of children in the Abbott districts.<sup>24</sup> Id. at 198-199.

The SFRA maintains CEIFA's substantive definition of a thorough and efficient education -- the CCCS -- that the Court found to be "an essential component of a thorough and efficient education." Id. at 152. Unlike CEIFA, however, the SFRA directly links those substantive educational standards to the funding needed to deliver those standards. The link was accomplished by using New Jersey educators and nationally recognized experts to identify the educational resources that the funding formula supports. Because funding is now "realistically geared" to the educational standards, Id. at 153, the SFRA meets the constitutional definition of a

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<sup>24</sup>As noted *supra* at 6 fn. 2, the Court also found CEIFA failed to address the facilities needs in the Abbott districts but those needs are now provided for through a separate legislative enactment, the Educational Facilities Construction and Financing Act. N.J.S.A. 18A:7G-1 et seq. The SFRA is designed to address the remaining areas of constitutional deficiency in CEIFA identified by the Court in Abbott IV.

thorough and efficient system of education.

Over a number of years, the DOE has undertaken a comprehensive and rigorous process to specifically identify the educational resources needed for all children to meet the State standards. Panels of New Jersey practitioners were assembled and asked to determine what resources were needed to provide students the educational opportunities that would allow them to meet the State's educational standards. The panel members identified resources for a school district without any students with special needs and then recommended additional resources associated with providing programs and services to students with special needs. The panel members were directed to identify the resources without regard to cost, but also only to recommend those resources needed to meet the educational outcomes or standards. See RCE at 2. Thus, while the panels would not be creating a "dream school," cost was not to inhibit the identification of needed educational resources. In other words, the direction was to provide a "thorough" education in an "efficient" manner.

After the panels completed their work, the actual costs of providing the educational resources identified by the panel members were determined. If the panel members specifically identified the costs, those costs were used but were inflated to make those costs current. If salaries for certificated positions needed to be identified, DOE used actual fall 2006 Statewide salary

data for each specific certificated position and calculated the mean salary for that position. May 2006 data from the Bureau of Labor Statistics was used for non-certificated staff since the DOE does not collect that salary data. Benefits for the certificated and non-certificated staff reflected the actual costs for those benefits. See Formula for Success at 10-11 and Appendix E. All costs were then inflated to anticipate 2008-2009 costs. Id. at 11. Once these costs were determined, an Adequacy Budget for each district could be developed.

To ensure that the educational resources identified by the panel members were sufficient for all children, and in particular at-risk and LEP children, the DOE contracted with three nationally-recognized educational experts to assess the adequacy of those resources. All three consultants expressed general support for the panel recommendations, but made several suggestions for improvement including using mean rather than median salaries, including free- and reduced-price lunch students in the count of at-risk students, rather than just free-lunch students, and increasing the resources for professional development. Adjustments in all of these areas were made in the final proposal and incorporated in the SFRA. Formula for Success at 8.

In addition, while the experts were retained to review the sufficiency of the resources identified by the panel members, public hearings were also conducted at which educators, advocacy

groups and taxpayers were given an opportunity to express their views on the work of the panels. The public comments were all considered by the DOE when, in consultation with another group of nationally-recognized educational experts, the final formula was developed.

Both the process and the educational resources identified and incorporated into the Adequacy Budgets through that process should be considered in this Court's review of the SFRA. By using the CCCS as the basis for developing the educational resources and having New Jersey educators as well as national education experts identify and validate those resources, the process ensured the crucial link between the educational standards and the funding provisions of the Act that this Court found lacking in CEIFA. See Abbott IV, 149 N.J. at 169. Moreover, having a cross-section of district types represented as panel members, including poor urban districts and the ELC, as well as selecting national experts with specialized knowledge of the needs of at-risk children, the State ensured that the particular needs of disadvantaged children were carefully considered in developing the formula.

In fact, rather than assuming "that all children are equally capable of taking advantage of educational opportunity," the SFRA provides the necessary funding for "the special and extra-educational programs and services required" for disadvantaged students. Id. at 173; and see Formula for Success at 36-38. It

does so by specifically identifying programs and services needed by students with special needs, determining the cost for those programs and services, and including that cost as part of the Adequacy Budget. See Formula for Success at 36-38. These programs and services include reading specialists, social workers, parent liaisons, coach/facilitators, after-school and summer-school programs and enhanced security, as well as preschool programs for three- and four-year olds. L. 2007, c. 260, §12; Formula for Success at 36-38.

Furthermore, the SFRA not only provides sufficient funds for the additional education resources identified for disadvantaged students, but also includes additional fiscal resources in the Adequacy Budget based on the concentration of at-risk children in the district. L. 2007, c. 260, §9; Formula for Success at 12. These additional fiscal resources are available to address the particular disadvantages facing children in districts with a high concentration of poverty. Districts could use the additional funds for programs or services that would address particularized needs of their students or for increased professional development of staff or even to provide more competitive salaries to attract and retain highly-qualified teaching staff.

For districts with an at-risk population of 60% or higher (which includes 24 Abbott districts), this additional funding ranges from \$1,061 per elementary pupil to \$1,242 per high school

pupil. So, for example, the Adequacy Budget for Newark for 2008-2009, with a projected at-risk population of 65.9%, includes an additional \$29.5 million for its at-risk population; Jersey City, with a projected at-risk population of 68.4%, an additional \$20.6 million and Camden, with a projected at-risk population of 78.7%, an additional \$12.6 million. For districts with an at-risk population between 40% and 60% (which includes the remaining seven Abbott districts), the range is from \$579 per elementary pupil to \$677 per high school pupil. For example, Millville, with a projected at-risk population of 56% will receive an additional \$2.8 million and Garfield with a projected at-risk population of 55.3% will generate an additional \$2.2 million. Attwood Certification, Exhibit M. It is significant to note that these amounts do not include the additional funds in the Adequacy Budget attributable to the enhanced LEP weight or combined at-risk and LEP students.

Moreover, by September 1, 2010 and every three years thereafter, the Commissioner will be reviewing the resources that generate the per-pupil amounts in the formula as part of an Education Adequacy Report to the Legislature. L. 2007, c. 260, §4(b). This ensures that over time and with experience, the educational resources upon which the formula is premised will continue to reflect what is needed for children, with and without disadvantages, to achieve the CCCS.

In short, a review of the educational resources in the

model and the funding supporting those educational resources leads to the conclusion that the SFRA will provide school districts with the resources needed to ensure that all children, regardless of their disadvantages, have the chance "to participate fully as citizens and workers in our society." Abbott II, 119 N.J. at 384. Moreover, the educational resources in the model will be updated every three years, thereby maintaining the link between the funding formula and the achievement of the CCCS. L. 2007, c. 260, §4.

B. The Legislature Has Enacted a Constitutional School Funding Formula and, Thus, the Court's Prior Remedial Orders are No Longer Necessary to Achieve the Constitutional Mandate.

The provision of a thorough and efficient system of education is constitutionally delegated to the Legislature. N.J. Const. Art. VIII, sec. 4. See also Abbott IV, 149 N.J. at 166; Abbott II, 119 N.J. at 304. In the past, this Court has, however, felt compelled to intervene in the legislative arena, but only when it has found a "continuing profound constitutional deprivation" that the Legislature has failed to remedy itself. Abbott IV, 149 N.J. at 201.

In Abbott IV, the Court found that CEIFA did not provide sufficient resources to help the most educationally disadvantaged children attain their place as contributing members of society and to compete and succeed in the economy. 149 N.J. at 152-153. The Court, therefore, saw no alternative but to enforce its prior



remedial order of parity funding and also require additional proceedings on the supplemental needs of disadvantaged children in the poor urban districts. Id. at 223-226. The result of those remand proceedings was the identification of programs, positions and services that would meet those supplemental needs. The remand record indicated that sufficient fiscal resources already existed to fund the identified programs, positions and services. The Court, however, directed that if the Commissioner determined the existing fiscal resources in a district were not sufficient to meet a school's request for a demonstrably needed supplemental program, the Commissioner was to seek an additional appropriation to fund that program. Abbott V, 153 N.J. at 518-519. Thus, pursuant to this Court's prior directives in Abbott IV and Abbott V, the State has been providing parity aid and supplemental funding to the Abbott districts through annual budget appropriations.

With the enactment of the SFRA, these additional categories of State aid for this limited group of districts are no longer needed. The SFRA ensures that all disadvantaged children, regardless of where they reside, will have access to the special programs and services needed so they have an equal opportunity to succeed. By doing so, the SFRA will eliminate the "fragmented system" that has developed "under which limited resources cannot be distributed equitably to all districts where at-risk children reside" and districts are divided "sharply into Abbott and non-

Abbott categories for funding purposes." L. 2007, c. 260, §2f.

A district, Abbott or non-Abbott, with a very-high at-risk concentration (i.e., greater than 60%) has an Adequacy Budget for 2008-09 under the SFRA that includes, depending on grade level, either \$15,149, \$15,755 or \$17,724 for each at-risk student, \$14,474, \$15,052 or \$16,934 for each LEP student and \$16,355, \$17,009 or \$19,135 for each combined at-risk and LEP student. Formula for Success at 33. Moreover, these funding amounts are directly linked to the achievement of the CCCS. The PJP panel members used the CCCS as the standard in developing the needed educational resources which are supported by the Adequacy Budget. RCE at Appendix 4. As such, the SFRA appropriately implements both the State's constitutional and moral obligation to all of New Jersey's children. L. 2007, c. 260, §2b.

Thus, while this Court's remedial orders may have been necessary and appropriate when issued, the enactment of the SFRA, as well as the changed circumstances in Abbott and other districts (as discussed more fully below), combined with enhanced accountability measures at the State and federal levels, makes those orders no longer necessary.

1. The Provisional Remedy of Parity Has Now Become Obsolete and the SFRA has Replaced it as a Means of Ensuring a Constitutionally Adequate Education in the Poorer Urban Districts.

In Abbott II, the Court ordered that Abbott districts have a budget per-pupil that is substantially equal to the DFG I&J districts. 119 N.J. at 388. The Court viewed parity as a remedy of "practicality and necessity" because it was "without any constitutional measuring stick against which to gauge the resources needed to provide that educational opportunity [for a thorough and efficient education] other than the inputs in the DFG I & J districts." Abbott IV, 149 N.J. at 176, 190. In mandating parity funding, however, the Court noted that it viewed that remedy as provisional. Id. at 196. The Court anticipated that once the programs needed to meet the special disadvantages of children attending poor urban schools are addressed, that it would "lessen the significance of the level of funding now directed to regular education." Id. at 197. As the Court specifically noted, "[t]he parity remedy is one that will in all likelihood become obsolete." Id. at 196. With the enactment of SFRA, that likelihood has become a reality.

Today, the SFRA provides a different and more appropriate "measuring stick" for the cost of providing a thorough and efficient education to children in the Abbott districts. The SFRA is based on the identification by educational practitioners and

experts of the educational resources needed to provide an education that will permit children without special needs to meet State standards and the additional resources to support programs and services to permit children with special needs to meet those same standards.

Moreover, the parity remedy was ordered at a time when there was a significant disparity in spending between the Abbott districts and the I and J districts. That situation has changed substantially. While New Jersey has been and continues to be one of the highest spending states in the nation on public education, the Abbott districts are now some of the highest-spending districts in the State.<sup>25</sup> Attwood Certification, Exhibit G.

In 1998, the average per-pupil spending in the Abbott districts was \$9,559 per pupil.<sup>26</sup> Id. at ¶12. Between FY1998 and

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<sup>25</sup>In the 1988-89 and 1989-90 school years, New Jersey ranked second only to Alaska in current expenditures per pupil. Abbott II, 119 N.J. at 302, fn4 (citing to data by the National Center for Education Statistics or NCES). The most recent NCES data reveals that New Jersey has surpassed even Alaska and is the highest spending State in the nation. In FY2005, New Jersey had average current expenditures per pupil of \$14,117, while the national average was \$8,701; Alaska was at \$10,847 per pupil. The closest states to New Jersey were New York at \$13,703, the District of Columbia at \$13,348 and, Connecticut at \$12,263. NCES data for 2004-2005 School Year accessed at <<[www.state.nj.us/education/sff/information.htm](http://www.state.nj.us/education/sff/information.htm) (last visited February 27, 2008)>>.

<sup>26</sup>"Per-pupil spending" in this brief is defined as the sum of local levy and total State aid with the exception of transportation, debt service and any revenues supporting preschool programs divided by resident enrollment with each full-day and half-day kindergarten students counted as 1 and .5, respectively.

FY2008, that amount has increased by almost 72% and is currently \$16,407 per pupil. By comparison, average per pupil spending in the I and J districts during that same period went up only 53.1% from \$9,026 to \$13,703 per pupil. The State average per-pupil spending went up 55% or from \$8,524 to \$13,209. Id. at Exhibit F.

Under the SFRA, the Abbott districts will continue to spend at a very high level, even though State aid for most of the Abbott districts will increase only 2% in FY2009. Assuming no increase in the tax levy in the Abbott districts beyond compliance with the required minimum tax levy<sup>27</sup>, Abbott districts will be spending an average of \$17,151 per pupil for the 2008-2009 school year. Furthermore, this spending does not include the additional federal NCLB (formerly Title I) dollars that the Abbott districts receive.<sup>28</sup> If I and J districts raise their levy by 4%, consistent

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<sup>27</sup>As discussed *supra* at 39-40, some Abbott districts that are spending below the amount of their Adequacy Budget are eligible for EAA to bring them to the Adequacy Budget level within three years. Those districts are also required to increase their local school tax levy to move closer to their fair share calculation. For districts that are eligible for this aid and municipally overburdened, the local levy is required to increase by 4% each year; for eligible districts that are not municipally overburdened, the local tax levy must be increased by 6%, 8% and 10% in 2008-09, 2009-10 and 2010-11, respectively. L. 2007, c. 260, §16b(4). All other districts are also subject to a required minimum tax levy which is the lesser of its local fair share for its Adequacy Budget or the budgeted tax levy for the prebudget year. Id. at §28(b).

<sup>28</sup>In 2006, Abbott districts received, on average, over \$500 per pupil in federal NCLB funds. For Newark, this provided an additional \$34 million; for Jersey City an additional \$18 million, for Paterson an additional \$15 million and for Camden an additional \$13 million. Attwood Certification, Exhibit E. Although this Court noted in Abbott II that federal aid should not be considered

with the local levy growth limitation of L. 2007, c. 62, those districts will spend, on average, \$14,117 per pupil in the next school year. Attwood Certification, Exhibit F.

For the 2008-2009 school year, aid to the Abbott districts under the SFRA, exclusive of debt service, will increase by \$209 million from \$4.44 billion to \$4.64 billion. Id. at Exhibit L. Of the Statewide total of \$7.8 billion in K-12 school aid, 52% will be provided to the Abbott districts while these districts serve only 20% of the students. If preschool is included, Abbott districts receive \$4.6 billion of the \$8.4 billion in State aid or 55% of the State aid with only 23% of the enrollment. Id. at ¶23 and Exhibit K.

Under the SFRA, every school district in New Jersey has an Adequacy Budget that is designed to support the educational resources needed by children in that district. Depending on the composition of their student body, some districts may need more resources and other districts less resources. Nevertheless, all districts will be ensured the ability to fund schools at the level needed based on the demographics of their students. The State now

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in the analysis of disparity in spending, it did note that "[i]f New Jersey's funding scheme was equal and fair ... federal aid would continue, and together with state and local expenditures it would provide an even greater opportunity to educate disadvantaged children." 119 N.J. at 330. Given that the SFRA provides sufficient resources to satisfy the constitutional mandate without depending on federal aid to do so, federal aid is available to meet additional needs of disadvantaged children and, therefore, should be considered in that context.

has a school funding formula that links achievement of the State standards to specific educational resources needed to achieve those standards and that concretely addresses the additional needs of disadvantaged students and the funding to address those needs. As was anticipated by this Court in Abbott IV, the "judicial funding remedy" has now reached "inutility." 149 N.J. at 202.

2. Needs-based Supplemental Funding is  
Neither Practical Nor Necessary for  
a Constitutionally Adequate Funding  
Formula.

In Abbott IV, this Court remanded the matter to the Superior Court, Chancery Division and had the Superior Court direct the Commissioner to undertake a study that would identify the special educational needs of the children in the Abbott districts, specify the programs required to address those needs and determine the cost of those programs. 149 N.J. at 224-225. As part of that remand proceeding, the Commissioner presented a plan in which all forms of available revenue would be combined to support the school budget. Abbott V, 153 N.J. at 498. Based on that combined funding stream, the Commissioner concluded that the educational resources he recommended could be implemented within the current revenue stream available to the Abbott districts, a revenue stream that included the parity aid previously ordered by the Court. Ibid. The Commissioner noted, however, that if there were a need for additional funds to meet a district's request for a demonstrably needed supplemental program, he would seek additional funds from the

Legislature for that purpose. Id. at 518. The Court ordered that this funding be provided and the Legislature did so through annual appropriations language in each budget since FY2000.

Over the past decade, reliance on these supplemental requests by the Abbott districts has grown and the efficacy of this process has been brought into question. Since 1998, spending in the Abbott districts has increased by almost \$7,000 per pupil or 73%. Attwood Certification, ¶12. Supplemental funding, i.e., funding over and above parity that a district was awarded as part of the annual budget process, has increased from \$81.9 million in Fiscal Year 2000 to \$676 million in Fiscal Year 2008. Id. at Exhibit C. These annual requests for increasing amounts of funding over and above the funding provided through CEIFA and Parity Aid have made budgeting and planning at both the district and State level exceedingly difficult. Moreover, it has created an ongoing adversarial relationship between the DOE and the Abbott districts that has negatively affected the ability of the DOE to assist the districts in using funds in an effective and efficient manner to improve student achievement. Davy Certification, ¶53.

Further, it has brought this Court into almost annual litigation due to the State's need to place some constraints on the growth of these additional awards of State aid. See Abbott v. Burke, 2006 N.J. Lexis 655 (May 22, 2006) (intervenor districts seeking clarification of Court's May 9, 2006 order); Abbott v.



Burke, 187 N.J. 191 (2006) (Abbott XV) (State seeking Court to approve "flat" funding for 2006-2007 school year); Asbury Park Board of Education, Keansburg Board of Education, Passaic Board of Education, Phillipsburg Board of Education and Trenton Board of Education v. New Jersey Department of Education, 180 N.J. 113 (2004) (State seeking clarification of Court's March 18, 2004 order); Asbury Park Board of Education, Keansburg Board of Education, Passaic Board of Education, Phillipsburg Board of Education and Trenton Board of Education v. New Jersey Department of Education, 180 N.J. 109 (2004) (districts challenged the DOE's interpretation of the Court's order in Abbott XI); Abbott v. Burke, 177 N.J. 596 (2003) (Abbott XI) (State seeking continued relaxation of remedies including limiting requests for supplemental funding); and Abbott v. Burke, 172 N.J. 294 (2002) (Abbott IX) (DOE with the consent of the ELC seeking relief from certain remedial orders including limiting requests for supplemental funding). History has demonstrated that this process simply does not work and it certainly is not "efficient" as required by the Constitution. Thus, it is time to abandon this process and refocus, as the SFRA does, on providing a thorough and efficient education for all New Jersey children through a unified funding formula.

The SFRA has now identified the additional educational resources needed to address the special disadvantages of at-risk and LEP students and provides for the funding to support those

educational resources. The educational resources in the enhanced PJP model would also permit Abbott districts to continue any of the programs, positions and services identified by the Court in Abbott V for grades K-12.<sup>29</sup> Davy Certification, Exhibit H. The enhanced PJP model provides for 14.75 more certificated staff at the elementary level, 11.6 at the middle school and 25.3 at the high school. Ibid. In addition, more non-certificated support staff are included. Moreover, the PJP model provides for after-school and summer-school for at-risk and LEP children, a program that was not specifically required in Abbott V. Formula for Success Appendix E. See also Abbott V, 153 N.J. at 516-517 (while plaintiffs proposed both summer-school and after-school programs as needed supplemental programs, the Commissioner did not recommend those programs and the Court declined to order those programs for "district-wide implementation").

Furthermore, the SFRA provides additional resources, for districts with disadvantaged children above and beyond that which is needed to support the educational resources in the enhanced PJP model. These additional resources increase based on the concentration of low-income children in a particular district. For example, Newark's Adequacy Budget has an additional \$33.2 million based on its at-risk and LEP population; Jersey City and Paterson

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<sup>29</sup>As noted *supra* at 34 fn.14, Hoboken will only be required to offer preschool to its three- and four-year old at-risk children rather than all children in that age category.

approximately \$22 million; and Camden approximately \$13.5 million. Attwood Certification, Exhibit M. Again, all districts with high concentrations of at-risk children get this additional support, not just Abbott districts. Consequently, the Act recognizes that additional challenges exist in all districts with significant numbers of at-risk students and provides the resources to address those challenges. Id. at ¶25.

In sum, the SFRA provides all of the resources needed to address the special disadvantages of children in the Abbott districts. Continuation of annual requests for supplemental aid, therefore, is no longer appropriate or constitutionally warranted.

3. Given Changes in the Abbott Districts, the Court's Remedial Measures Are No Longer Necessary.

When the Court ordered certain remedial measures for the Abbott districts in Abbott II, it acted based on a record that showed significant disparities in spending between the Abbott districts and other wealthier districts and significantly higher school tax rates in the Abbott districts as compared to other districts. That disparity was of particular concern to the Court given its conclusion that "the educational needs of students in poorer urban districts vastly exceed those of others, especially those from richer districts." Abbott II, 119 N.J. at 369.

The Court, however, noted that "the factors that determine our decision can change." Id. at 389. Those factors have changed.

The Abbott districts are some of the highest spending districts in the State and most have school tax rates well below average. Attwood Certification, ¶¶12-15, Exhibits G and H. In addition, many disadvantaged and minority students currently reside outside of Abbott districts. Davy Certification, ¶¶49, 50. Thus, the continued focus of limited resources toward the Abbott districts is creating the likelihood of additional groups of districts being unable to meet the special needs of their student populations. The SFRA is designed to bring equity back to the school funding system and create a unified system that treats all districts fairly by providing the necessary support for all disadvantaged children wherever they reside.

In Abbott II, the Court noted that richer districts were spending 40% more than poorer districts. 119 N.J. at 334. In 2007-2008, a completely different picture emerges with regard to poorer urban districts. Average per-pupil spending in the Abbott districts is \$16,407, while the I and J districts are spending an average of \$13,703 per pupil. Attwood Certification, Exhibit F. Thus, Abbott districts now spend almost 25% more on a per pupil basis than the I and J districts. This high level of spending will continue in 2008-2009 with Abbott districts' average per pupil spending projected at \$17,151 and I and J districts projected at \$14,117. Ibid.

Moreover, this significant increase in per-pupil spending

in the Abbott districts has not resulted in similar large increases in their tax levies. In contrast to the record in Abbott II where Abbott districts were taxing significantly in excess of the State average equalized school tax rate, those same districts now have well-below average tax rates. Attwood Certification, ¶15, Exhibit H. For example, in 1984, Camden had a school tax rate that was 145% of the State average; in 2006, Camden's school tax rate was 67% of the State average. Likewise, in East Orange, the school tax rate in 1984 was 144% of the State average and in 2006 the rate was 75%. Jersey City went from 127% of the State average in 1984 to 45.5% in 2006, and Irvington went from 117% to 77.5%. See Attwood Certification, Exhibit H and Abbott v. Burke, 1989 S.L.D. 234, 267. Similar reductions can be seen across the Abbott districts. In fact, only one of the original 28 districts identified by this Court in Abbott II has a school tax rate that exceeds the State average. Attwood Certification, Exhibit H. Specifically, Burlington City had a school tax rate in 2006 that was 119.6% of the State average. Ibid.

Furthermore, the demographics in the State have shifted. Currently, almost half of the at-risk children reside outside of the Abbott districts. In 1984-85, 71% of all black and Hispanic students were educated in the poorer urban districts. Abbott II, 119 N.J. at 342, fn.19. Now less than half are educated by those districts. Davy Certification, ¶50.

In adopting the SFRA, the Legislature decided to allocate limited resources in a manner that would benefit disadvantaged student who reside in all districts, including Abbott districts. Recognizing that the decisions of this Court in the Abbott cases resulted in the enhancement of both fiscal and educational resources available to children in the Abbott districts, the SFRA is designed to expand these resources to all disadvantaged children in the State. Given the current demographics, this is a reasonable legislative choice entitled to deference from this Court.

4. Enhanced Accountability Measures Will Ensure That Districts Are Providing Students with the Opportunity to Achieve State Standards.

In Abbott II, the Court concluded that the monitoring system in place at that time was not, in practice, measuring whether a thorough and efficient education was being achieved. The Court found that "[b]eyond a few state-mandated courses, the local board could approve any curriculum it chose or, presumably, could afford." Abbott II, 119 N.J. at 353. Moreover, the Court noted that the curriculum in poorer districts did not include the very subjects "that ties a child, particularly a child with academic problems, to school - of art, music, drama, athletics, even, to a very substantial degree, of science and social studies." Id. at 364-65.

In addition, the Court found that the record in Abbott II reflected a State assessment program that did "not purport to

measure or define a thorough and efficient education" but rather "mastery of basic skills." Abbott II, 119 N.J. at 369. It noted that the Legislature, at that time, regarded the State assessments "as a prerequisite to, not an equivalent of, a thorough and efficient education." Ibid.

As discussed earlier, the State now has a substantive definition of a thorough and efficient education, the CCCS, and districts must provide instruction in all of the subject areas included in the standards. These include higher level courses in science and social studies, as well as the performing arts and physical education. Moreover, the new State monitoring system, NJQSAC, ensures this is occurring by a rigorous review of curriculum and instruction. See discussion, *supra*, at 46-47.

Moreover, the State's assessment program tests the very definition of a thorough and efficient education as defined by the CCCS rather than just "basic skills." Standardized State tests evaluate a student's proficiency in Math, Language Arts Literacy and Science. Local assessments are required in the other content areas and, again, NJQSAC monitors to ensure that testing occurs. Doolan Certification, ¶¶28-29. Where students are failing to achieve, NJQSAC and NCLB provide for heightened intervention in a district (or school) by the DOE so that deficiencies can be corrected and barriers to the achievement of the CCCS can be removed. Thus, the accountability system that this Court found lacking in Abbott II has

been substantially enhanced so as to ensure that students are provided the opportunity to achieve State standards in all areas.

C. The Legislature Has Met its Constitutional Obligation to Provide for a Thorough and Efficient System of Free Public Schools Through its Adoption of the SFRA

This Court has consistently recognized, "educational sufficiency ultimately must be a responsibility of the Legislature." Abbott II, 119 N.J. at 322. The Court only inserted itself into the legislative province of school funding because it found a severe and profound constitutional deprivation in the Abbott districts.

The SFRA was designed to ensure that all children have the opportunity to become productive citizens and workers in their communities and our global economy by directly linking the funding to achievement of the State standards. Moreover, the educational resources that form the basis of the funding formula will be reassessed every three years to ensure that the formula keeps pace with the most current expert thinking regarding what is needed for children to succeed. With the enactment of the SFRA, the time has come for the Court, in recognition of the primacy of the Legislature in this area, to permit the Legislature's exercise of its legitimate power to be implemented. See Abbott IV, 149 N.J. at 166.

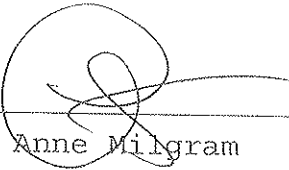


CONCLUSION

For the foregoing reasons, this Court should determine that the SFRA is constitutional and therefore the remedial remedies previously ordered are no longer required.

Respectfully submitted,

By: \_\_\_\_\_

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Anne Milgram

Attorney General of New Jersey

