

Courts and the Making of Public Policy

Enhancing Court Capacity to Enforce Education Rights

Judicial Tools Used in *Abbott v. Burke*

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Executive Summary

- Enforcement of constitutional or human rights to education and other socio-economic rights implicates courts in resolving complex questions of fact and law, and acting when the elected branches of government fail to act.
- Courts must also balance the imperative to provide a remedy to litigants while giving the legislative bodies and executive branch agencies the opportunity to achieve compliance over an extended time period.
- To undertake and manage this institutional imperative, in which the court serves as the designated last guarantor of constitutional or human rights, requires courts to utilize innovative techniques and adaptive procedures.
- The wide variety of tools used by the New Jersey state Supreme Court in the landmark *Abbott v. Burke* education funding case, in which the Court had to vindicate the rights of the school children in low-income communities, displays an extraordinary degree of institutional creativity and flexibility.
- Among the tools used by the court in *Abbott* to fashion and sustain a remedy for equitable funding of low-income public schools include:
 - remand trials or hearings to assess compliance or fashion remedies where the development of a full factual record, including expert evidence, is required to reach an informed decision concerning complex issues;
 - mediation to resolve disputes over implementation of the remedy;
 - clarification rulings to give more detailed guidance and direction regarding implementation;
 - rulings and orders on motions to compel remedial action;
 - a remand trial to determine whether compliance has been achieved and the court remedy can be vacated.
- The *Abbott* litigation offers important lessons on how courts can improve their competency to fashion and direct implementation of a remedy to vindicate constitutionally guaranteed socio-economic rights, particularly when they implicate politically vulnerable or disenfranchised groups or classes of citizens.

Enhancing Court Capacity to Enforce Education Rights

Judicial Tools Used in *Abbott v. Burke*

In the United States, there is no explicit right to education in the federal Constitution. Further, in the 1973 decision in *San Antonio Independent School District v. Rodriguez*, the United States Supreme Court ruled that education is not a 'fundamental right' warranting higher scrutiny of state education laws under the Equal Protection Clause of the federal constitution.¹

In fact, the civil rights established by the Bill of Rights and subsequent amendments to the federal constitution largely consists of 'negative' rights, that is, limitations or prohibitions of governmental action against citizens.

State constitutions, however, do confer positive rights, and all fifty state constitutions contain an express right to education. Following the *Rodriguez* decision, lawsuits were brought in state courts challenging state school funding laws on the basis that these laws provided inequitable funding and, consequently, inadequate education to children residing in low-wealth communities within states. Legal challenges to school funding laws have been brought in forty-five of the fifty states since 1970, with several experiencing more than one lawsuit over this period.²

Providing quality education to all children requires more equitable school funding, which requires adequate state tax revenue and redistribution

from higher income residents and communities to school districts serving low-wealth communities. The political dynamic within states, where majority power resides in more affluent areas or regions, makes it exceedingly difficult to achieve and sustain legislative solutions that ensure adequate funding, equitably distributed, to local school jurisdictions relative to need. The stubborn political resistance to making needed long-term investments in public education, coupled with a growing recognition that improving education for low-income and minority children is critical to the nation's future economic and civic vitality, means that litigation in state courts over inequitable and inadequate school funding, or 'quality education' cases, is likely to continue.

State courts, then, are called upon to enforce positive education rights for a class of citizens lacking political clout in legislatures: children residing in low-wealth, high-poverty cities and towns, most often economically distressed urban and rural areas. These cases bring state judges and courts directly into the realm of complex and contentious policymaking, particularly when, as often occurs, state legislators fail to properly respond to initial decisions declaring school funding statutes unconstitutional. These quality education cases require courts to tackle 'some of the most political, policy-heavy issues' facing US governments at any level.³

This policy brief examines a critical aspect of quality education litigation: the tools available to courts to fashion and ensure implementation of a constitutional

1. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)

2. Hunter, M. A. (2005) 'Requiring States to Offer a Quality Education to All Students', *Human Rights Quarterly*, American Bar Association (Fall 2005); Institute for Educational Equity and Opportunity (2008) 'Education in the 50 States: A Deskbook of the History of State Constitutions and Laws about Education', 161-202 (July 2008).

3. Elder, S. R. (2007) 'Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Education Rights', *Duke Law Journal*, 57: 755.

method of funding public education to improve schools. As a case study, the brief analyzes the techniques employed by the New Jersey Supreme Court in providing a remedy to disadvantaged urban school children in the long-running *Abbott v. Burke* case. The *Abbott* litigation offers important lessons on how courts can improve their competency to fashion and direct implementation of a remedy to vindicate constitutionally guaranteed socio-economic rights, particularly when they implicate politically vulnerable or disenfranchised groups or classes of citizens.

The Abbott remedies for low-income school children

In 1997 and 1998, the New Jersey Supreme Court, through several rulings in the *Abbott* litigation, directed implementation of specific 'remedial measures' to 'ensure that public school children from the lowest-wealth urban communities receive the educational entitlements that the [State] Constitution guarantees them'.⁴ These '*Abbott* remedies' include:

- 1) base or 'foundational' per-pupil funding equal to the average amount spent in New Jersey's educationally successful, more affluent suburban school districts;
- 2) 'well-planned, high quality' preschool for all three and four-year olds;
- 3) 'supplemental' programmes and school reforms, such as after school tutoring and health and social services, to address the extra educational needs of urban children resulting from extreme poverty and racial isolation;
- 4) the opportunity for the local urban school districts to annually seek additional state funds to implement 'demonstrably needed' programmes and services; and
- 5) full state funding of needed capital improvements to dilapidated, overcrowded, and educationally inadequate school buildings.⁵

The *Abbott* remedies are strikingly detailed and comprehensive. The mandates also break new ground in school finance and education policy in the United States. No other state has equalized, or assured 'parity', in the education resources provided to children in its lowest-wealth communities at the level spent in the more affluent ones. New Jersey is the first state to mandate early education, starting at age three, for children 'at-risk' of entering kindergarten or primary school cognitively and socially behind their more advantaged peers. The Court's 'needs-based' approach to providing supplementary programmes and reforms is an unprecedented effort to target funds to initiatives designed to improve educational outcomes of low-income children and schools. Finally, New Jersey is undertaking the most extensive construction programme in the United States designed to ameliorate the severely deficient condition and quality of school buildings in low-wealth neighbourhoods.

The Court utilized a wide variety of tools and creative procedures to fashion these remedies, and thereafter to sustain implementation and ensure continuing compliance. These judicial techniques are discussed below.

The initial remedial directives

In 1990, the New Jersey Supreme Court upheld the trial court's ruling finding the state's school funding law unconstitutional as applied to children in 'poorer urban' school districts. In this, the Court's *Abbott II* ruling, it directed the Legislature to amend or enact new school legislation that 'assures' funding for the urban districts: 1) at the foundation level 'substantially equivalent' to that in the successful suburban districts; and 2) is 'adequate' to provide for the supplemental programmes necessary to address the extreme disadvantages of urban school children. The Court ordered this 'new funding mechanism' be in place the following year (1991-92), although 'it need not be fully implemented immediately, but may be phased in'. The Court declined to order relief to address inadequate school facilities, leaving the

4. *Abbott v. Burke*, 710 A.2d 450, 454 (1998)(*Abbott V*); N.J.

Const., art. VIII, §4, ¶1.

5. *Abbott v. Burke*, 693 A.2d 417 (1997)(*Abbott IV*); *Abbott V*, 710 A.2d 450

issue to legislative discretion, even though the Court expressly found the 'lack [of adequate facilities] is so great' and the need 'urgent'.⁶

The court's initial approach to a remedy reflects an institutional preference to defer, at least in the first instance, to the legislative branch. Judicial deference is a typical initial remedial approach in litigation of this type. The *Abbott* Court issued general guidance for a constitutionally acceptable remedy, affording the Legislature ample discretion and time to comply. No further judicial action was contemplated, so long as the legislative response adhered to the specified parameters of the Court's remedial decree.

'Remanding' to assess legislative compliance

The New Jersey court rules establish a procedure to enforce judgments, in the form of a 'motion in aid of litigants' rights'.⁷ In 1992, the *Abbott* plaintiffs used this procedure to ask the Supreme Court to review the Legislature's response to the 1990 remedial directives: a new school funding law entitled the 'Quality Education Act' (QEA). The motion presented to the state's highest appellate court contested and complex questions of fact, including expert reports and opinions; asked the Court to determine whether the new funding law met the specific terms of its 1990 decree; and sought further remedial relief.

To adjudicate the motion, the Court utilized a procedural device known as a 'remand' hearing or trial. The Court entered an order remanding the motion to a trial judge, specially appointed by the Court, with instructions to develop a full factual record through direct and cross-examination of witnesses presented by the parties, including testimony of state education officials and school finance experts. The appointed remand judge was further instructed to issue an initial decision, based on the evidentiary record developed, with findings

of fact, conclusions of law, and recommendations. Finally, the Court's order provided for its own direct review of the remand judge's decision.

On remand, the burden of proof was assigned to the state defendants to demonstrate that the QEA complied with the Court's prior remedial directives. Following an extensive trial, the remand judge found that the QEA failed to meet the Court's 1990 remedial order and recommended the law be declared unconstitutional as applied to the urban districts.

In 1994, the Supreme Court on final review affirmed the findings and recommendation of the remand judge. The Court then entered its second remedial order, *Abbott III*, directing the Legislature to adopt another funding law by September 1996 that assures 'substantial equivalence' in per pupil foundation funding with suburban districts and provides the necessary supplemental programmes. The Court, however, directed the Legislature to increase funding annually over the three-year period, and retained jurisdiction to 'entertain applications for relief' if 'at any time' it appears that compliance will not be achieved by 1997-98.⁸

The Court's approach to the remedy at this second stage reflects an attempt to balance deference to the Legislature with the increasing specificity of its order through the imposition of measured progress, a firm deadline for compliance, and the retention of jurisdiction to promptly address future claims of noncompliance.

Decisive remedial action: Abbott IV and Abbott V

In December 1996, the Legislature enacted its second funding law, the Comprehensive Education Improvement and Financing Act (CEIFA), in response to the Court's 1994 remedial directives. In January 2007, the *Abbott* plaintiffs, utilizing the motion procedure to enforce a judgment, asked the Court

6. *Abbott v. Burke*, 575 A.2d 359, 408-10 (1990)(Abbott II)

7. N. J. Ct. Rule 1:10-3 (2008).

8. *Abbott v. Burke*, 643 A.2d 575, 576 (1994)(Abbott III)

to declare CEIFA unconstitutional as applied to the urban districts for failing to achieve compliance with the Court's prior remedial orders.

The Court acted swiftly on the motion. On the basis of the motion certifications and briefs, which included extensive fact and expert analysis and opinions from both parties, the Court found CEIFA unconstitutional as applied to the urban districts.⁹

The Court also took more decisive remedial action. First, the Court ordered parity in foundation funding for the 1997–98 school year, resulting in an immediate state aid increase of \$246 million. Second, parity had to be continued in future years, until such time as the Legislature, through new or amendatory legislation, could 'convincingly demonstrate' that adequate resources for urban school children to meet established academic standards could be provided at a level lower than the amounts expended in the successful suburban districts.

Finally, the Court ordered a second remand trial be conducted by a designated judge, this time for the purpose of developing a full evidentiary record of the need for supplemental programmes for urban school children, including early education, and for capital facilities improvements in the urban districts. The State Education Commissioner was directed to prepare and present a study of these needs, including recommendations for funding levels and a plan for programme implementation, with both parties afforded the right to present and cross-examine witnesses. The remand judge was authorized to retain a 'special master', or educational expert, to assist the Court in the proceedings and to submit a separate report and recommendations. The remand judge was given six months to complete the trial and render an initial decision. The Court retained jurisdiction to review the decision.¹⁰

Following trial, the remand judge issued a decision and recommendations, along with a report by the Court-appointed special master.

On review, the Supreme Court accepted many of the supplemental programmes and reforms, and a plan to fund capital facilities improvements, as recommended by the remand judge. The Court also modified some recommendations, and established a unique process whereby the urban districts were afforded the right to seek additional funding for supplemental programmes and capital improvements, if they could demonstrate these needs. Districts were also afforded the right to seek administrative and judicial review of decisions by the State Education Commissioner denying requests for supplemental funds.¹¹

The Court did not retain jurisdiction or otherwise maintain supervision to ensure implementation of these remedial measures. Rather, the Court once again chose deference, accepting representations by state education officials that implementation would be 'pursued vigorously and in good faith'. On the basis of these commitments, the Court stated that the *Abbott V* decision 'should be the last major judicial involvement in the long and torturous history of the State's extraordinary effort' to provide a constitutional education 'to the children in its poorest school districts'.¹²

Taken together, the 1997 *Abbott IV* and 1998 *Abbott V* rulings directed implementation of a comprehensive set of remedial measures to ensure an adequate and equal education for low-income school children, including high-quality early education, supplemental programmes and reforms, and school facilities improvements. The Court, however, left implementation and compliance with these multi-faceted and innovative measures in the

9. *Abbott IV*, 693 A.2d at 442-43

10. *Abbott IV*, 693 A.2d at 456 (Order)

11. *Abbott IV*, 693 A.2d at 472-73 (Summarizing Directives); 693 A.2d at 475 (Remand Judge Decision); 693 A.2d at 527 (Special Master Report)

12. *Abbott IV*, 710 A.2d at 455

hands of state officials, without putting in place any judicial mechanism to address disputes likely to arise in an undertaking of this magnitude.

Enforcing and sustaining implementation of the remedy

The Court's hopes for a sustained, good faith effort to implement the remedial measures ordered in *Abbott IV* and *V* were quickly dashed. Over the next ten years, both parties sought judicial intervention to resolve numerous implementation delays, disputes, and controversies. Here again, the Court utilized innovative tools to address these issues.

Preschool clarification rulings

Twice, in 2000 and 2002, the *Abbott* plaintiffs filed motions to enforce the *Abbott V* mandate for early education in the urban districts, alleging that state education officials failed to ensure funding for qualified teachers, appropriate class sizes and curriculum, and other essential components of a 'high quality' preschool programme. In 2000, the Court accepted and directly adjudicated the motion, without remanding for fact finding.¹³ In the second 2002 motion, the Court reviewed both the facts presented by the parties on the motion and a decision by an administrative court adjudicating requests by the urban school districts under the *Abbott V* process for additional preschool funding.¹⁴

The Court adopted a measured, but deferential, approach to adjudicating these motions. In the 2000 ruling, the Court characterized plaintiffs' claims of non-compliance by state officials as 'discrepancies' resulting from 'misunderstandings in executing the Court's mandate' and not a demonstration of 'bad faith'. Even so, the Court concluded that the state implementation was not 'consistent' with that decree, and that the Court's 'intervention is warranted now to assure that implementation of preschool in the [urban] districts is faithful to the programs... accepted by this Court less than two years ago'.¹⁵

The Court's rulings did provide critical detail and direction to the state on key aspects of the preschool programme, from qualifications of teachers, to class size, enrollments, facilities and procedures for deciding needed programme funding. In both rulings, the Court rejected plaintiffs' request for appointment of a 'Standing Master' to supervise implementation of the remedy based on the Court's prior commitment in *Abbott IV* and *Abbott V* 'to use the administrative process established by the Legislature for Executive Branch decision-making'.¹⁶

In declining to appoint a special master, the Court concisely articulated a deep institutional reluctance to interject the judiciary into the ongoing operation of the state's public schools:

*We are acutely aware of the constitutional imperative that undergirds the Abbott decisions, and of the vulnerability of our children in the face of Legislative and Executive Branch inaction. But we do not run school systems. Under our form of government, that task is left to those with the training and authority to do what needs to be done. Only when no other remedy remains should the courts consider the exercise of day-to-day control over the Abbott reform effort.*¹⁷

Mediation of programme implementation

In 2003, state education officials filed a motion seeking modification of the Court's *Abbott V* mandate for implementation of school-level programmes and reforms. Plaintiffs cross-moved for relief, including asking for 'formal evaluation' of the ordered reforms. The Court referred the motions to mediation for a thirty-day period, appointing a senior judge to serve as 'mediator for the sole purpose of resolving the issues'.¹⁸

13. *Abbott V. Burke*, 748 A.2d 82 (2000) (Abbott VI)

14. *Abbott V. Burke*, 790 A.2d 842 (2002) (Abbott VIII)

15. *Abbott VI*, 748 A.2d at 85

16. *Abbott VIII*, 790 A.2d at 845

17. *Abbott VIII*, 790 A.2d at 858

18. *Abbott v. Burke*, 832 A.2d 891, 893 (2003) (Abbott X)

The mediation process resulted in an extensive agreement between the parties on a variety of programme implementation issues, including providing more options for school-level reform and clarification of the required supplemental programmes. The agreement also directed a 'cooperative rulemaking' process to develop new rules for implementation of the *Abbott* remedies, along with a 'work group' to design the formal evaluation of the mandated reforms.¹⁹

The agreements reached in mediation were then 'approved' and ordered by the Court.

Adjudicating requests to limit remedial funding

In 2002, 2003, and 2006, the state filed motions with the Court seeking one-year limits on the levels of school funding provided for under the *Abbott* remedies, based on assertions of overall state budget difficulties. The New Jersey Supreme Court directly adjudicated these motions, and, in each case, granted the requested funding limits. Nonetheless, the Court ordered continuation of the process for the urban districts to seek supplemental funds above the established limit, if necessary to maintain needed programmes and reforms.²⁰

Adjudicating requests for school construction funds

By 2005, the state had exhausted the first round of US\$6 billion in school construction funds approved by the Legislature to comply with the 1998 *Abbott V* decree. Costs had escalated, the need was greater than initially anticipated, and hundreds of planned projects were left without funding.

From 2005 through 2007, plaintiffs filed three motions seeking an order to compel the Legislature to approve additional capital construction financing. The Court adjudicated the motions directly, adopting

again a measured, yet deferential approach. In 2005, the Court directed state education officials to report to the Legislature on the amount of funds necessary to undertake outstanding projects. In 2007, the Court dismissed plaintiffs' motion as 'premature', stating that the Court would not assume that the state 'will fail to comply with their constitutional obligations' within the timeframes for adopting the annual state budget. Finally in 2008, the Court denied plaintiffs motion on the basis of the governor's commitment to the Court that additional funds would be approved in the context of the annual state budget.²¹

Following the 2008 order, the legislature approved an additional US\$2.8 billion in school construction funds for school building improvement projects in the urban districts. Although the Court had not expressly ordered this funding, it had continuously reiterated the harm being caused to school children and the constitutional requirement that the state fund facilities improvements.

The latest Abbott remand hearing

In early 2008, the Legislature enacted the third school funding law since the Court's remedial decrees: the School Funding Reform Act (SFRA). Following passage of SFRA, the state filed a motion with the Court seeking to have the funding law declared constitutional and to have the specific funding and programme remedies ordered in the 1997 *Abbott IV* and 1998 *Abbott V* rulings declared 'no longer necessary' after almost ten years of implementation.

In November 2008, the Court found that, because the state's 'assertions that its revised funding scheme is constitutional is supported only by affidavits' that are challenged by plaintiffs, 'we are unable to resolve the matter on the present record'. Concluding that the question of constitutionality of the SFRA 'is not

19. *Abbott X*, 832 A.2d at 891

20. *Abbott v. Burke* 798 A.2d 602 (2002) (*Abbott IX*); *Abbott v. Burke*, 832 A.2d 906 (2003) (*Abbott XI*); *Abbott v. Burke*, 901 A.2d 299 (2006) (*Abbott XV*)

21. *Abbott v. Burke*, 889 A.2d 1063 (2005) (*Abbott XIV*); *Abbott v. Burke* 935 A.2d 1152 (2007) (*Abbott XVII*); *Abbott v. Burke*, 956 A.2d 923 (2008) (*Abbott XVIII*)

sued to summary disposition', the Court decided, once again, to utilize the remand process:

*We have, therefore, determined to remand the matter for the development of an evidential record. Live testimony and cross-examination will be required to resolve disputed matters of fact. The burden of proof shall be on the State, as it has each time the State has advanced a new funding program that it has asserted to be compliant with the thorough and efficient constitutional requirement.*²²

The Court appointed a trial judge to conduct the remand trial 'on an expedited basis' and ordered him to 'file a report on his factual findings and conclusions with the Court within sixty days of the completion of the hearings'. Finally the Court retained jurisdiction to review the judge's report and enter a final decision on whether the new funding law can replace the Court-fashioned remedies.²³

The results: 'measurable education improvement'

Enforcement of positive education or other socio-economic rights implicates courts in resolving complex questions of fact and law; stepping into the breach when the elected branches of government fail to act; and balancing the need to provide a remedy while giving the legislators and elected and appointed executive officials the opportunity to achieve compliance over the long term. To undertake and manage this institutional imperative, in which the court serves as the 'designated last guarantor of the Constitution's command', requires utilization of innovative techniques and adaptive procedures.²⁴

The wide variety of tools used by the New Jersey Supreme Court to 'vindicate the rights of the school children in the poverty-stricken urban

districts' display an extraordinary degree of institutional creativity and flexibility. Most notably, the repeated use of the remand device in the *Abbott* litigation to ensure full development of an evidentiary record to fashion detailed relief when called for, or to determine when courts should exit the field and leave the matter to the other branches of government, elevates the level of competence and confidence in judicially mandated remedies and decisions. In short, the *Abbott* litigation offers important procedural models and techniques for courts when confronted with providing relief in complex cases involving long-standing and severe deprivations of positive constitutional rights.

Yet the real test is whether the imposed remedy actually achieves its intended results. Here, too, evidence shows that the *Abbott* remedies, under implementation for almost ten years, have resulted in substantial improvement in previously under-resourced, neglected, and under-performing schools. As the Court itself found, in remanding the state's newest funding law for trial in November 2008, the *Abbott* remedies have brought about a 'constitutionally sound, mandated education program that is supported by a consistent level of funding'. Even more, the remedies brought about a success that 'has enabled children in the [urban] districts to show measurable educational improvement'.²⁵

22. *Abbott v. Burke*, 960 A.2d 360, 372 (2008) (*Abbott XIX*)

23. *Abbott XIX*, 960 A.2d at 373-74

24. *Robinson v. Cahill*, 351 A.2d 713, 724 (1975)

25. *Abbott XIX*, 960 A.2d at 363

The Foundation

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