

Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the *Abbott V* Mandate

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INTRODUCTION

New Jersey first became embroiled in school finance litigation in 1973, when the New Jersey Supreme Court declared in *Robinson v. Cahill* that the state's funding statute violated the "thorough and efficient" education clause of the state constitution.¹ After twenty-five years, ten additional New Jersey Supreme Court opinions, and three major legislative overhauls, the New Jersey Supreme Court was faced with an education system that displayed little, if any, improvement. Frustrated with the recalcitrance of the New Jersey Legislature, the court issued its decision in *Abbott v. Burke V*.² An extreme example of a national trend in which courts were more willing to define remedies and provide concrete requirements for educational reform,³ the *Abbott V* mandate set out an ambitious reform plan, requiring districts to institute half-day preschool, improve classroom facilities, provide supplemental programs to compensate for comparative disadvantage, and restructure elementary school curricula.⁴

This Essay examines what happened in the aftermath of *Abbott V*. In light of the problems associated with earlier New Jersey school finance remedies, it seemed the specificity of the *Abbott V* mandate would yield the positive results education reformers had sought for almost three decades. No longer would a resistant legislature be able to alter the definition of a thorough and efficient

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1. *Robinson v. Cahill* (*Robinson I*), 303 A.2d 273, 291-92 (N.J. 1973). The "thorough and efficient" clause states, "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. CONST, art. VIII, § 4, para. 1.

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

3. See Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE* 136, 149 (Helen F. Ladd et al. eds., 1999) (explaining the trend in school finance remedies since 1989).

4. *Abbott V*, 710 A.2d at 473-74.

education, no longer would governors' thrifty spending policies determine to which programs children were entitled.⁵ Yet almost six years after the decision was handed down, much of the court's remedy has yet to become a reality.

As reflected in the title of this Essay, three forces contributed to the slow pace of *Abbott* implementation: politics, practicalities, and priorities. Despite the substantive nature of the *Abbott V* mandate, executive and legislative politics influenced New Jersey's response to *Abbott V*, just as government activities interfered with implementation efforts following the first eleven New Jersey school finance cases. Faced with various manifestations of bureaucratic resistance, the New Jersey Supreme Court issued increasingly detailed mandates. However, regardless of the specificity of the remedy, political leaders continued to find wiggle room to thwart the thrust of the court's orders. The enhanced complexity of the *Abbott V* remedy also presented obstacles that educators had not encountered during the first twenty-five years of litigation. A decline in the New Jersey economy, various logistical problems, and the degree to which individual district leaders embraced, or failed to embrace, the possibility of reform all hindered the progress of implementation. These political and practical difficulties forced education advocates to make pivotal choices about where to invest limited resources, and their personal priorities ultimately influenced which pieces of the mandate were the most successful.

It should be noted that although the period following *Abbott V* is but one chapter in New Jersey's long history of school finance litigation, it is important in its own right, for it marks not only a dramatic shift in New Jersey's struggle to improve urban education, but also the first time a court has so specifically defined the requirements of a constitutional public education. The post-*Abbott V* years demonstrate that even under seemingly good conditions, when a state's highest court is committed to urban educational reform and provides a detailed remedy, implementation is still a difficult task. New Jersey's experience thus undermines the notion that courts encourage legislative recalcitrance by mandating broad reform measures.⁶ In addition, much has already been written on the early years of New Jersey's experience,⁷ while this most recent phase of

5. See Part II for a discussion of how these forces hindered implementation of the court's earlier school finance orders.

6. See, e.g., Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1072-73, 1082-85 (1991) (arguing that judicial reluctance to take an active role in formulating remedies exacerbates the problem of legislative recalcitrance).

7. See, e.g., RICHARD LEHNE, *THE QUEST FOR JUSTICE: THE POLITICS OF SCHOOL FINANCE REFORM* (1978) (discussing the *Robinson* litigation and its aftermath); DOUGLAS S. REED, *ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY* (2001) [hereinafter REED, *ON EQUAL TERMS*] (analyzing the early *Abbott* cases, particularly the Florio and Whitman Administrations' responses to *Abbott II*, *III*, and *IV*); Philip A. Nathan, *School Finance Progress Via the Courts: New Jersey's *Abbott v. Burke* Case and the Quality of Education Act of 1990, and Aftermath* (1996) (unpublished Ph.D. dissertation, University of Virginia) (on file with the Yale Law School Library) (discussing *Robinson v. Cahill* and *Abbott I* through *Abbott III*); Michael Paris, *Legal Mobilization and Social Reform: A Comparative Study of School Finance Litigation in New Jersey and Kentucky* (1998)

litigation has thus far escaped detailed scholarly attention.

The Essay proceeds as follows. After a brief description of relevant background information on education in New Jersey, Part II provides an overview of the history of New Jersey school finance litigation, explaining the numerous court decisions and reform measures that preceded *Abbott V*, as well as the political struggle that characterized relations between the New Jersey Supreme Court and the state legislature throughout that time period. Part III then discusses the *Abbott V* decision in detail, describing the various programs required by the court's mandate. Part IV provides statistics on where key pieces of the mandate stand today and how implementation progressed from year to year. Parts V through VII, the heart of the Essay, examine the executive, legislative, and local responses to *Abbott V*, and the politics, practicalities, and priorities that ultimately shaped the course of implementation.⁸

I. NEW JERSEY OVERVIEW

New Jersey has a population of approximately 8.5 million⁹ and is divided into 21 counties,¹⁰ 40 legislative districts,¹¹ and 616 school districts.¹² It has the highest per-pupil spending rate of any state in the country,¹³ with money for education consuming roughly one-third of the state budget.¹⁴ As a means of comparison, New Jersey spends eleven percent more than Connecticut, the state with the second highest per-pupil spending rate, and twenty percent more than New York, Pennsylvania, and Delaware.¹⁵ Despite a large government

(unpublished Ph.D. dissertation, Brandeis University) (on file with the Yale Law School Library) (discussing the *Robinson* litigation and the early *Abbott* cases); Douglas S. Reed, *Democracy v. Equality: Legal and Political Struggles Over School Finance Equalization* (1995) (unpublished Ph.D. dissertation, Yale University) (on file with the Yale Law School Library) [hereinafter Reed, *Democracy*] (analyzing the early *Abbott* decisions and the State's response).

8. This Essay does not examine the academic impact of the *Abbott V* remedies. A limited amount of data has already been generated on the efficacy of whole-school reform. See Educ. Law Ctr., *Achievement Data Presented to Supreme Court by Dr. Bari Erlichson and Dr. Robert Slavin*, at http://www.edlawcenter.org/ELCPublic/Alert_0403_DataSummary.htm (last visited Apr. 19, 2004). However, the State has only recently considered administering its own tests to assess the effectiveness of court-mandated preschool programs and whole-school reform. Telephone Interview with Gordon MacInnes, Assistant Commissioner for Abbott Implementation, New Jersey Department of Education (Jan. 2, 2003) [hereinafter MacInnes Interview].

9. U.S. Census Bureau, *State and County QuickFacts: New Jersey*, at <http://quickfacts.census.gov/qfd/states/34000.html> (last visited Apr. 19, 2004).

10. U.S. Census Bureau, *State and County QuickFacts: New Jersey County Selection Map*, at http://quickfacts.census.gov/qfd/maps/new_jersey_map.html (last visited Apr. 19, 2004).

11. New Jersey Legislature, *Our Legislature*, at <http://www.njleg.state.nj.us/legislativepub/our.asp> (last visited Apr. 19, 2004).

12. N.J. Dep't of Educ., *DOE FAQs*, at <http://www.state.nj.us/njded/genfo/faq.htm> (last visited Apr. 19, 2004).

13. Maria Newman, *State's School Commissioner Proposes \$5.4 Billion Budget*, N.Y. TIMES, Apr. 15, 1999, at B6.

14. David Glovin, *Growing Districts Get Best of Budget*, BERGEN REC., Jan. 26, 1999, at A13.

15. Newman, *supra* note 13.

investment in public education, the quality of schooling varies greatly among districts. New Jersey's suburbs house some of the best schools in the country, while poorer towns "struggle just to keep their pupils in class."¹⁶ The state is also heavily racially segregated, with blacks and Latinos concentrated in poor urban areas and Caucasians constituting the majority of residents in wealthier suburbs.¹⁷

II. HISTORY OF SCHOOL FINANCE LITIGATION IN NEW JERSEY, 1973-1998

The history of school finance litigation in New Jersey begins long before *Abbott V*, with eleven New Jersey Supreme Court decisions and a twenty-five year battle over the quality of education in New Jersey's poorest school districts. An understanding of what transpired during those early years is crucial to understanding the *Abbott V* decision, as well the events that unfolded after *Abbott V* was handed down. This Part examines the many school finance cases brought before the New Jersey Supreme Court during the 1970s, 1980s, and early 1990s. Over the course of this tumultuous period, the relentless dedication of education advocates, the court's commitment to improving educational opportunity, and the dynamics of New Jersey state politics created a pattern in which the New Jersey Supreme Court was continually called upon to address school finance deficiencies, but was repeatedly proven powerless in its attempts to reform urban education. The court's increasing frustration with this state of affairs ultimately led to its groundbreaking decision in *Abbott V*.

A. Robinson v. Cahill

New Jersey's history of school finance litigation consists of two lines of cases: *Robinson v. Cahill* and *Abbott v. Burke*. *Robinson I* began in March 1970 when Kenneth Robinson, a child attending elementary school in Jersey City, joined with other New Jersey schoolchildren, parents, taxpayers, and municipal governments to challenge New Jersey's system of financing public education.¹⁸ Plaintiffs argued that New Jersey's school funding system, which relied heavily on local property taxes to fund public education, created unconstitutional disparities in the quality of education offered to students across the state.¹⁹ In December 1972, the New Jersey Superior Court found New Jersey's funding scheme to be in violation of the state and federal equal protection clauses.²⁰

16. *Abbott v. Burke* (*Abbott V*), 710 A.2d 450, app. I at 484 n.3 (N.J. 1998) (citing Drew Lindsay, *New Jersey: Quarter-Century Quagmire*, EDUC. WK., Jan. 8, 1998, at 204-05).

17. Carr & Fuhrman, *supra* note 3, at 163-64.

18. *Robinson v. Cahill*, 287 A.2d 187 (N.J. Super. Ct. Law Div. 1972), *modified & aff'd*, *Robinson v. Cahill* (*Robinson I*), 303 A.2d 273 (N.J. 1973).

19. *Robinson*, 287 A.2d at 189.

20. *Id.* at 216-17.

The New Jersey Supreme Court certified a direct appeal and, in April 1973, issued the first in a series of rulings reflecting the court's pro-education stance.²¹ The court rejected both the federal and state equal protection claims raised in the lower court, but unanimously invalidated New Jersey's funding statute on the ground that it violated the "thorough and efficient" clause of the state constitution by generating disparities in per-pupil expenditures among districts.²² Two months later, the New Jersey Supreme Court handed down *Robinson II*.²³ It maintained its original position on school funding, but extended the deadline that had been established by the lower court and gave the legislature until December 31, 1974 to adopt legislation compatible with the court's earlier decision.²⁴

While the court's ruling was a clear victory for the plaintiff class, legislative resistance halted the progress of educational reform. In May 1974, Democratic Governor Brendan T. Byrne proposed a revised funding formula to satisfy the court's order.²⁵ Byrne's plan featured a reduction in local property tax rates and the introduction of a state income tax.²⁶ His proposal received support from the State Assembly, but could not muster a majority in the State Senate, and the bill was ultimately defeated.²⁷ Desperate for the legislature to take action, Byrne personally requested remedial relief from the New Jersey Supreme Court.²⁸ The court, however, refused to disturb the existing statutory scheme for the 1975-76 school year, and agreed in *Robinson III* only to set a date for further argument on an appropriate remedy for the 1976-77 school year.²⁹

Frustrated with the inaction of the state legislature, the court outlined an interim remedy in *Robinson IV* to be implemented in the event the other branches of government failed to enact a constitutional funding system in time for the 1976-77 school year.³⁰ On September 29, 1975, just two days before the

21. *Robinson v. Cahill* (*Robinson I*), 303 A.2d 273 (N.J. 1973). For a description of the court's outlook on education, see Stewart G. Pollock, *School Finance in the Courts*, 1998 ANN. SURV. AM. L. 133, 142 (1998) (explaining that the New Jersey Supreme Court "has striven to speak with one voice when addressing the volatile issue of school finance").

22. The *Robinson I* decision was important not only within the context of New Jersey's struggle to fund urban education, but also for school finance litigation more broadly. It marked the beginning of a second wave of litigation in which plaintiffs looked to state constitutions for relief rather than relying on the Equal Protection Clause of the United States Constitution. William N. Evans et al., *The Impact of Court-Mandated School Finance Reform*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE 72, 72 (Helen F. Ladd et al. eds., 1999).

23. *Robinson v. Cahill* (*Robinson II*), 306 A.2d 65 (N.J. 1973).

24. *Id.* at 66.

25. Lewis B. Kaden, *Courts and Legislatures in a Federal System: The Case of School Finance*, 11 HOFSTRA L. REV. 1205, 1230 (1983).

26. *Id.* at 1231.

27. *Id.*

28. *Id.*

29. *Robinson v. Cahill* (*Robinson III*), 335 A.2d 6, 7 (N.J. 1975).

30. *Robinson v. Cahill* (*Robinson IV*), 339 A.2d 193 (N.J. 1975). The court's funding formula

deadline for court-ordered redistribution of state funds, the legislature enacted the Public School Education Act of 1975, also known as Chapter 212.³¹ Chapter 212 increased overall aid to poor districts but ignored the issue of municipal overburden and continued to rely heavily on local property taxes to fund public schools.³² Nonetheless the court upheld the facial validity of the Act in *Robinson V*, provided that the legislature would fund it fully in time for the 1976-77 school year.³³

Much to the court's dismay, the legislature continued its pattern of noncompliance. With Chapter 212 on the statute books, the legislature dragged its feet in appropriating funds, thereby preventing the Act from going into effect. Concerned by the prospect of yet another school year beginning without any changes in the state's school funding scheme, the court adopted a pressure tactic. In *Robinson VI*, it enjoined all spending for New Jersey public schools as of July 1, 1976 unless the legislature funded the 1975 Act or otherwise complied with the mandate embodied in the constitution's "thorough and efficient" clause.³⁴ The legislature failed to act in time and the injunction went into effect, forcing schools to close statewide, albeit during the summer.³⁵ Only then, faced with a crisis, did the legislature give into judicial authority and approve a two percent state income tax to finance Chapter 212.³⁶ The court was satisfied with the legislature's response and withdrew its injunction in *Robinson VII*.³⁷ Thereafter, the 1975 Act became fully operational.³⁸

B. Abbott v. Burke

Although *Robinson VII* marked the end of the *Robinson v. Cahill* line of cases, it was far from the end of school finance litigation in New Jersey. In 1981, students from four of New Jersey's poorest communities, Camden, East Orange, Irvington, and Jersey City, challenged the constitutionality of the Public School Education Act of 1975, arguing that the Act did not sufficiently ameliorate the educational disparities between poor and wealthy districts.³⁹

provided for an increase in per-pupil expenditures through reallocation of appropriated education aid. Kaden, *supra* note 25, at 1231-32.

31. 1975 N.J. Laws 871 (codified as amended at N.J. STAT. ANN. §§ 18A:7A (West 1999 & Supp. 2003)); Joshua S. Lichtenstein, Note, *Abbott v. Burke: Reaffirming New Jersey's Constitutional Commitment to Equal Educational Opportunity*, 20 HOFSTRA L. REV. 429, 445 (1991).

32. *Unfulfilled Promises*, *supra* note 6, at 1076.

33. *Robinson v. Cahill* (*Robinson V*), 355 A.2d 129 (N.J. 1976).

34. *Robinson v. Cahill* (*Robinson VI*), 358 A.2d 457, 459 (N.J. 1976).

35. James C. Sheil, Note, *The Just-Do-It Decision: School Finance Litigation Tests the Limits of Judicial Deference*, 28 SETON HALL L. REV. 620, 634 (1997).

36. Craig A. Ollenschleger, Comment, *Another Failing Grade: New Jersey Repeats School Funding Reform*, 25 SETON HALL L. REV. 1074, 1091 (1995).

37. *Robinson v. Cahill* (*Robinson VII*), 360 A.2d 400 (N.J. 1976).

38. Ollenschleger, *supra* note 36, at 1091.

39. *Id.*

Plaintiffs were represented by the Education Law Center (ELC), a Newark-based non-profit organization devoted to improving educational opportunities for low-income students. After first remanding the case to an administrative law judge to develop a factual record in *Abbott I*,⁴⁰ the New Jersey Supreme Court continued its pattern of support for urban education. In *Abbott II*, the court found for the plaintiffs, unanimously holding that the 1975 Act violated the New Jersey Constitution as applied to twenty-eight lower-wealth urban school districts (“Abbott districts” or “special needs districts”).⁴¹ Accordingly, the court ordered the legislature to amend the Act to ensure “substantially equivalent” per-pupil expenditures in property-rich and property-poor school districts.⁴² Embracing the idea of vertical equity,⁴³ the court also declared that state aid must include enough money for schools in the Abbott districts to address their students’ unique disadvantages.⁴⁴

The State’s initial response to *Abbott II* provided hope that Democratic Governor Jim Florio’s administration, together with a Democratically controlled legislature, might succeed in bringing about changes that had failed to materialize under Chapter 212. Immediately after *Abbott II* was handed down, Governor Florio introduced a new funding bill into the state legislature, and just two weeks later both houses passed the Quality Education Act of 1990 (QEA).⁴⁵ The QEA provided for increased state aid to the Abbott districts, a phase-out of state aid to wealthy districts, and a reduction in state funding for teachers’ pension plans.⁴⁶

Despite the liberal leanings of key lawmakers, politicians ultimately fell prey to the pressures of public opinion, and state politics succeeded in

40. *Abbott v. Burke* (Abbott I), 495 A.2d 376 (N.J. 1985).

41. *Abbott v. Burke* (Abbott II), 575 A.2d 359, 408 (N.J. 1990). The twenty-eight districts include: Asbury Park, Bridgeton, Burlington City, Camden, East Orange, Elizabeth, Garfield, Gloucester City, Harrison, Hoboken, Irvington, Jersey City, Keansburg, Long Branch, Millville, New Brunswick, Newark, Orange, Passaic, Paterson, Pemberton, Perth Amboy, Phillipsburg, Pleasantville, Trenton, Union City, Vineland, and West New York. For a concise list of criteria the court used in determining which districts to designate as “Abbott districts,” see Educ. Law Ctr., Abbott Districts, at <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottDistricts.htm> (last visited Apr. 19, 2004). The Abbott districts serve approximately twenty-five percent of New Jersey’s public school students. ERAIN APPLEWHITE & LESLEY HIRSCH, EDUC. LAW CTR., THE ABBOTT PRESCHOOL PROGRAM: FIFTH YEAR REPORT ON ENROLLMENT AND BUDGET i (2003), available at <http://www.edlawcenter.org/ELCPublic/Publications/PDF/PreschoolFifthYearReport.pdf>.

42. *Abbott II*, 575 A.2d at 408.

43. Vertical equity is the notion that differently situated children need to be treated differently in order to reach equivalent levels of competency. Robert Berne & Leanna Stiefel, *Concepts of School Finance Equity: 1970 to the Present*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE 7, 20 (Helen F. Ladd et al. eds., 1999). In order to achieve vertical equity, certain students are usually given additional resources.

44. *Abbott II*, 575 A.2d at 408.

45. 1990 N.J. Laws 587 (codified as amended at N.J. STAT. ANN. §§ 18A:7D (West 1999)), repealed by 1991 N.J. Laws 200 & Comprehensive Educational Improvement and Financing Act of 1996, 1996 N.J. Laws 954; see also *Unfulfilled Promises*, *supra* note 6, at 1078.

46. REED, ON EQUAL TERMS, *supra* note 7, at 138.

hampering progress toward more equitable funding. Vocal interest groups throughout the state responded to the passage of the QEA with unrelenting hostility.⁴⁷ Suburban voters, whose property and state taxes were to rise in order to fund the Act, aggressively opposed the QEA, as did New Jersey's largest teacher organization, the NJEA.⁴⁸ Concerned with their fates in the upcoming election, legislators buckled. They quickly replaced the QEA with the QEA II,⁴⁹ a funding statute that decreased the tax burden for state residents, provided for less of an increase in state aid to urban districts, and delayed shifting the costs of teachers' pensions to local school districts.⁵⁰ Although the QEA never went into effect—and thus the Abbott districts never reaped any of its potential benefits—Democrats paid a heavy price for its initial passage, underscoring the highly politicized nature of school funding in New Jersey. The 1991 legislative elections ushered in a Republican majority in both houses of the state legislature, a partisan takeover that scholars have attributed to suburban disapproval of the QEA.⁵¹ Three years later, Florio, too, felt the sting of public opinion; his support of the QEA and accompanying \$2.8 billion tax increase prompted an "electoral revolt" that swept him from office in 1994.⁵² He was the only New Jersey governor in modern history to be denied a second term in office.⁵³

Amidst the political mayhem following passage of Florio's plan, the Education Law Center continued to fight for school funding reform, refusing to settle for the watered-down provisions of the QEA II. The ELC returned to court in the spring of 1994, arguing that the QEA II was facially invalid because it failed to comply with the *Abbott II* mandate.⁵⁴ The court agreed, and in *Abbott III* declared the QEA II unconstitutional, both because it failed to ensure parity funding by the 1995-96 school year and because it did not provide for supplemental programs to help disadvantaged urban students.⁵⁵ The court

47. Ollenschleger, *supra* note 36, at 1096.

48. *Id.* at 1097. The NJEA opposed the QEA because it transferred responsibility for over \$800 million in teacher pension contributions from the state to local districts. *Id.* If districts could not raise enough taxes to offset the new burden, teachers would receive lower wages or benefits. REED, ON EQUAL TERMS, *supra* note 7, at 140.

49. 1991 N.J. Laws 200.

50. Ollenschleger, *supra* note 36, at 1097-98.

51. See, e.g., REED, ON EQUAL TERMS, *supra* note 7, at 137; Russell S. Harrison & G. Alan Tarr, *School Finance and Inequality in New Jersey*, in CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 178, 197 (G. Alan Tarr ed., 1996).

52. Harrison & Tarr, *supra* note 51, at 197.

53. Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL'Y 633, 655 n.146 (2002) (citing Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education Is More Than Just a Tort*, 96 NW. U. L. REV. 99, 142 n.214 (2001)). Florio's removal was particularly surprising given that he entered the governor's office in 1990 with the third largest margin of victory in the history of a modern New Jersey gubernatorial race. REED, ON EQUAL TERMS, *supra* note 7, at 137.

54. See *Abbott v. Burke* (Abbott III), 643 A.2d 575 (N.J. 1994).

55. *Id.* at 576, 580-81.

ordered declaratory relief and gave the legislature until September 1996 to devise a constitutional funding scheme for the 1997-98 school year.⁵⁶

The state legislature, now controlled by a Republican majority and heavily influenced by the conservative views of Republican Governor Christine Todd Whitman,⁵⁷ responded to the *Abbott III* decision but effectively ignored the letter of the court's mandate. The Comprehensive Educational Improvement and Financing Act (CEIFA),⁵⁸ signed into law in December 1996, did not provide for parity funding as the court had ordered, but instead changed the focus of school finance reform from inputs to outputs.⁵⁹ The CEIFA legislation supplied a definition of "thorough and efficient" centered on achievement of substantive educational standards, and allocated funding based on the amount of money a "model school" would need to help children meet the enumerated proficiencies.⁶⁰

When the court once again reviewed the constitutionality of the state's school financing system in *Abbott IV*, it expressed dissatisfaction with the legislature's response and found CEIFA unconstitutional as applied to the twenty-eight Abbott districts.⁶¹ While the court believed CEIFA was facially constitutional in its adoption of substantive standards, the State had failed to establish a connection between CEIFA funding levels and the amount of money districts would need to help students master the core curriculum.⁶² The court thus ordered the legislature to guarantee equivalence of per-pupil expenditures for the 1997-98 school year and to ensure that districts use the remedial funds effectively and efficiently.⁶³ The court also found that many of the school buildings in the Abbott districts were in "dramatic disrepair" and ordered the State to provide adequate classroom facilities.⁶⁴ Dissatisfied with CEIFA's "special needs" provisions, the court further remanded the case to the New Jersey Superior Court to identify the special needs of urban students, specify programs to address those needs, and determine the cost of funding such

56. *Id.* at 576.

57. See *infra* Section V.A for a discussion of Whitman's views on urban education.

58. 1996 N.J. Laws 954 (codified as amended at N.J. STAT. ANN. §§ 18A:7F (West 1999 & Supp. 2003)).

59. The term "inputs" refers to what governments contribute to education, such as labor, equipment, and capital, while "outputs" refers to what schools produce, such as types of achievement or graduates. Berne & Stiefel, *supra* note 43, at 11-12. A debate exists as to whether school finance equity is better achieved by having an equitable distribution of inputs or outputs. *Id.*

60. REED, ON EQUAL TERMS, *supra* note 7, at 152.

61. *Abbott v. Burke* (Abbott IV), 693 A.2d 417 (N.J. 1997).

62. *Id.* at 436-37. CEIFA included core-curriculum content standards codifying the State's definition of a "thorough" education. The standards established achievement goals in seven academic areas, but gave individual districts discretion to create curricula to meet those goals. *Id.* at 425.

63. *Id.* at 456. By "equivalence" the court meant that per-pupil spending in the Abbott districts needed to equal average per-pupil spending in the wealthier suburban districts. *Id.*

64. *Id.* at 438.

programs.⁶⁵

The remand hearing, held before Judge Michael Patrick King, was designed to engage the parties in the court's decision-making process, as well as to solicit the opinions of education experts who could speak to the efficacy of different reform proposals. To that end, both the ELC and the State Administration submitted recommendations to the superior court concerning supplemental programs⁶⁶ and facilities improvement in the Abbott districts, along with cost estimates and implementation plans for effectuating their proposed changes.⁶⁷ On January 22, 1998, after considering seventeen days of testimony on different reform packages, Judge King issued a report to the New Jersey Supreme Court.⁶⁸ He recommended that the State implement whole-school reform,⁶⁹ full-day kindergarten for five-year olds, full-day pre-kindergarten for three- and four-year-olds, summer school, school-based health and social services, a program of fiscal and academic accountability for school districts, and added school security.⁷⁰ He estimated that the reforms would cost a total of \$312 million per year in addition to the parity funding already in place.⁷¹

III. THE *ABBOTT V* MANDATE

Looking back on *Abbott V* a few years after it was decided, political scientist Douglas Reed noted that by remanding *Abbott IV* to the superior court to determine the programs needed to serve urban students, the court ensured that the *Abbott V* ruling "would have a profoundly different tone and quality."⁷² And indeed it did. In May 1998, after twenty-five years of deferring to legislative authority to address the educational disparities among New Jersey school districts, the New Jersey Supreme Court took on the role of "education policymaker."⁷³ It demanded a major overhaul of urban education and ordered

65. *Id.* at 456.

66. In this context the term "supplemental program" refers to any program aimed at addressing the special needs of disadvantaged students. It encompasses whole-school reform and early childhood education, as well as what the court ultimately refers to as "supplemental programs" in the *Abbott V* decision.

67. *Abbott v. Burke* (*Abbott V*), 710 A.2d 450, 483 (N.J. 1998).

68. *Id.* at 456.

69. Whole-school reform is an approach to educational improvement that integrates supplemental programs with the regular education format. Instead of adding additional programs, whole-school reform requires schools to restructure their core curricula. *Id.* at 457. The particular whole-school reform model favored by the Commissioner, Success For All, was developed in 1987 by researchers at Johns Hopkins University. *Id.* at 487. The program emphasizes the importance of reading and "requires administrators, staff, and teachers to undertake intensive reading instruction and tutoring to prevent any student from falling behind in reading skills." REED, ON EQUAL TERMS, *supra* note 7, at 158-59.

70. *Abbott V*, 710 A.2d at 456.

71. REED, ON EQUAL TERMS, *supra* note 7, at 159.

72. *Id.*

73. Paris, *supra* note 7, at 432.

an “unprecedented series of entitlements for disadvantaged children.”⁷⁴

The court’s *Abbott V* mandate, heavily influenced by the proposals of the ELC, the State, and Judge King, spoke to educational reform in four major areas: early childhood education, elementary school curricula, supplemental programs, and classroom facilities.⁷⁵ Supportive of the idea of whole-school reform as introduced by Education Commissioner Leo Klagholz, the court directed that every *Abbott* elementary school adopt a proven, effective whole-school reform model.⁷⁶ The court also established an implementation timetable: fifty *Abbott* elementary schools were to adopt whole-school reform in 1998-99, 100 schools in the following school year, and the remaining *Abbott* elementary schools in the third year.⁷⁷ The court further ordered immediate implementation of full-day kindergarten, as well as mandatory half-day preschool for three- and four-year-olds by the start of the 1999-2000 school year.⁷⁸

Harkening back to its decisions in *Abbott II*, *III*, and *IV*, the court emphasized the need for schools to adopt supplemental programs to help remedy their students’ comparative disadvantages.⁷⁹ The court also recognized that schools in the *Abbott* districts, though similar in certain ways, were not grappling with identical sets of problems. Thus the court stressed the “importance of having the particularized needs of [*Abbott*] children drive the determination of what programs [were] developed.”⁸⁰ The court authorized the Commissioner to implement a limited number of specified programs—technology programs, alternative schools, accountability programs, and school-to-work and college transition programs—but also gave individual schools and districts the right to request additional programs as necessary.⁸¹ The court directed the Commissioner to approve and secure funding for these requests as long as schools could demonstrate a particularized need.⁸²

Finally, the court held that the “deplorable conditions” of school buildings in the *Abbott* districts, which were both crumbling and overcrowded, had not

74. Advocacy Ctr. for Children’s Educ. Success with Standards, Finance Litigation: New Jersey, at http://www.accessednetwork.org/litigation/lit_nj.html (last visited Apr. 19, 2004) [hereinafter ACCESS website].

75. *Abbott V*, 710 A.2d at 456-57, 470.

76. *Id.* at 460-61.

77. *Id.* at 458, 461.

78. *Id.* at 461-62. *Abbott V* marked the first time any court in the nation had declared that public education must include well-planned preschool programs for children starting at age three. APPLEWHITE & HIRSCH, *supra* note 41, at i. For further discussion of preschool and its emerging importance in school finance litigation, see James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL’Y REV. 463, 478-79 (2004), and Tico A. Almeida, *Refocusing School Finance Litigation on At-Risk Children: Leandro v. State of North Carolina*, 22 YALE L. & POL’Y REV. 525, 560-65 (2004).

79. *Abbott V*, 710 A.2d at 464-65.

80. *Id.* at 466.

81. *Id.* at 469.

82. *Id.* at 467-69.

only a “direct and deleterious impact on the education available to . . . at-risk children,” but also presented a health and safety risk.⁸³ The court firmly stated that “[t]he State’s constitutional educational obligation includes the provision of adequate school facilities” and ordered the State to fund the complete cost of improving decrepit facilities and constructing new classrooms to correct capacity shortfalls.⁸⁴ The court also asked the State to prioritize construction of preschool classrooms and to commence general facilities construction by the spring of 2000.⁸⁵

IV. PROGRESS OF IMPLEMENTATION

Although the *Abbott V* mandate established a strict timetable for educational reform, implementation proceeded more slowly than demanded, with districts failing to meet many of the court’s deadlines and educators continually dissatisfied with the quality of newly adopted programs.⁸⁶ This Part briefly summarizes where different components of the mandate stood from year to year, before the remainder of the Essay examines why implementation followed a slow and rocky course.

Preschool: Although the court mandated half-day preschool for all three- and four-year-olds by the fall of 1999, none of the Abbott districts succeeded in meeting the court’s deadline. In the fall of 2000, only 22,020 children were enrolled in *Abbott* preschool programs.⁸⁷ By 2002, three years after the court’s implementation deadline, the enrollment count stood at 36,465, just two-thirds of the total number of eligible preschool-age children living in the Abbott districts.⁸⁸ In addition to low enrollment numbers, studies released in the spring and summer of 2001 revealed that many of the *Abbott* preschool programs were of unacceptably low quality.⁸⁹

83. *Id.* at 470.

84. *Id.* at 470, 472.

85. *Id.* at 471-72. In the fall of 1998, the legislature classified two additional districts—Neptune Township and Plainfield—as Abbott districts, raising the total number of districts entitled to parity funding and mandated programs from twenty-eight to thirty. *See Abbott v. Burke* (Abbott VII), 751 A.2d 1032, 1035 (N.J. 2000). The legislature’s authority to add or remove Abbott districts was established in *Abbott II*. *See Abbott v. Burke* (Abbott II), 575 A.2d 359, 408 (N.J. 1990). In 2000, a coalition of rural school districts petitioned the New Jersey Department of Education to classify them as Abbott districts. *See Keaveney v. N.J. Dep’t of Educ.*, 2000 N.J. Agen. LEXIS 814 (Dec. 26, 2000).

86. It deserves emphasis that, at the time *Abbott V* was handed down, New Jersey occupied a unique status with respect to school finance litigation. Although large amounts of money and resources were devoted to *Abbott* implementation, the demands of the *Abbott V* mandate were so stringent that what might have seemed impressive in the context of another state’s progress was insufficient to institute the changes required under *Abbott*.

87. APPLEWHITE & HIRSCH, *supra* note 41, at 1.

88. *Id.* As of this writing, 2002-2003 is the most recent year for which preschool enrollment data are available. *Id.*

89. *See* Nancy Parello, *State-Funded Preschools Accused of Serious Failings*, BERGEN REC., June 1, 2001, at A1 (discussing a Rutgers report that found that many state-funded preschool programs were failing to help poor children enter kindergarten ready to learn); Jean Rimbach, *Mixed Grades for*

Whole-School Reform: The Abbott districts began implementation of whole-school reform much as the court had ordered. Seventy-two elementary schools adopted whole-school reform models in the fall of 1998, 124 schools in the following school year, and 174 schools in the third year.⁹⁰ As of this writing, all but approximately 50 *Abbott* elementary schools have adopted an approved whole-school reform model.⁹¹ However, despite timely beginnings, the implementation process took longer than anticipated and implementation is still incomplete. Furthermore, over time the ELC and the Assistant Commissioner of Abbott Implementation became dissatisfied with whole-school reform, contending that the models were too rigid and did not adequately accommodate differences among schools.⁹²

Supplemental Programs: Information on supplemental programs is unfortunately lacking. Part of the problem, as will be discussed in Subsection V.A.3, is that the Whitman Administration failed to establish a firm definition of “supplemental.” As a result, the ELC and local school district leaders found it difficult to track the progress of implementation. Nonetheless, representatives of the Abbott districts who were interviewed for this Essay regarded supplemental programs as the biggest failure of *Abbott*,⁹³ which suggests that Abbott districts have been unable to adopt many of the programs necessary to remedy comparative student disadvantage.

Facilities: By the spring of 2000, the court’s deadline for the commencement of facilities construction and rehabilitation, no facilities projects were yet underway. In July 2001, the Coalition for Our Children’s Schools, a New Jersey organization that promotes policies for providing state-of-the-art educational facilities, gave New Jersey a failing grade for its lack of progress. Two years later, in 2003, the grade had improved only to a D.⁹⁴ Districts have thus far proposed 532 projects,⁹⁵ the total number needed to satisfy the court’s mandate, but only one project has been completed⁹⁶ and only

Preschools, BERGEN REC., Aug. 2, 2001, at A3 (outlining the results of the Rutgers study as well as a Westat study, which found that although a number of preschool classrooms were excellent, nineteen percent were of “minimal” and “inadequate” quality).

90. *Welcome, Third Cohort Schools!*, WSR REP. (N.J. Dep’t of Educ., Trenton, N.J.), Fall 2000, at 1.

91. MacInnes Interview, *supra* note 8.

92. See *infra* text accompanying notes 217-218.

93. Telephone Interview with Steve Block, Director of School Reform Initiatives, Education Law Center (Dec. 17, 2002) [hereinafter Block Interview (Dec. 17, 2002)]; Telephone Interview with Lawrence Lustberg, Vice Chair, Education Law Center (Dec. 18, 2002) [hereinafter Lustberg Interview].

94. COALITION FOR OUR CHILDREN’S SCHS., ABBOTT SCHOOL CONSTRUCTION PROGRAM REPORT CARD 3 (2003), available at http://www.edlawcenter.org/ELCPublic/AbbottSchoolFacilities/FacilitiesPages/Resources/COCs_report_card_2_03.pdf.

95. Educ. Law Ctr., Abbott School Construction Program: 1999 Abbott Districts’ Long Range Facilities Plans (LRFPs), <http://www.edlawcenter.org/ELCPublic/AbbottSchoolFacilities/FacilitiesPages/Resources/LRConstructionProjects.htm> (last visited Apr. 19, 2004).

96. Educ. Law Ctr., Status of Abbott School Construction Program (Jan. 2004), at

159 are in development.⁹⁷

V. POLITICS

Notwithstanding the detailed nature of the *Abbott V* mandate, executive and legislative politics influenced the remedial process following *Abbott V*, just as they had played a large role in the implementation of each of the court's earlier school finance decisions.⁹⁸ Since the court entrusted a large amount of responsibility to the state administration, each governor's commitment, or lack thereof, to urban educational reform had a huge impact on the relative success of implementation efforts. Furthermore, despite the more limited role of the state legislature as compared to earlier New Jersey school finance decisions, legislative resistance nonetheless interfered with the timely implementation of the court's orders.

A. *The Whitman Administration, 1998-2002*

Christine Todd Whitman was hardly the governor plaintiffs might have chosen to carry out the *Abbott V* mandate. Characterized by Assistant Commissioner Gordon MacInnes as "the most hostile governor to public education New Jersey ever had,"⁹⁹ Governor Whitman's reputation as an opponent of urban educational reform developed well before *Abbott V* made its way to the courtroom in 1998. During the 1994 gubernatorial race, Whitman defeated incumbent Jim Florio by attacking his support of the QEA and accompanying tax increases, and pledging to reduce government spending and lower state taxes.¹⁰⁰ When the court handed down the *Abbott III* decision in July 1994, Whitman remained committed to her promise. As explained briefly in Part II, Whitman refused to recognize the court's demand for parity funding and focused instead on the importance of "rein[ing] in wasteful education spending" and ridding the central city schools of corruption, mismanagement,

http://www.edlawcenter.org/ELCPublic/AbbottSchoolFacilities/FacilitiesPages/SchoolConstructionProgram_Status.htm (last visited Apr. 19, 2004).

97. Educ. Law Ctr., *Abbott School Construction: Status of New Construction and Renovation* (2004), <http://www.edlawcenter.org/ELCPublic/AbbottSchoolFacilities/FacilitiesPages/Resources/NewConstructionReport.htm> (last visited Apr. 19, 2004).

98. While the particular political dynamics at play throughout *Robinson v. Cahill* and *Abbott v. Burke* were unique to New Jersey, the influence of politics on school finance reform was apparent in other states as well, and has been the topic of scholarly literature. See, e.g., Reed, *Democracy*, *supra* note 7, at 342-43 ("[The success of a school finance decision] hinges more on both gubernatorial and legislative leadership and political interests than on either judicial preferences or capabilities. Although state supreme courts establish the terrain on which the political contest over educational resources is fought, they have little control over who wins or loses this struggle. It is here that legislative or executive branch allies become central to a court's capacity to exercise influence over school finance reform efforts.").

99. MacInnes Interview, *supra* note 8.

100. Harrison & Tarr, *supra* note 51, at 188, 197.

and excessive administrative costs.¹⁰¹ By focusing her attention on problems with district spending and redefining a “thorough and efficient” education in relation to core curricula and model school districts,¹⁰² she was able to avoid unpopular state tax increases.¹⁰³

Whitman’s response to *Abbott V* was but a twist on her reaction to *Abbott III*, again reflecting her determination to minimize the amount of state money earmarked for students in the special needs districts. In the *Abbott V* opinion, the court noticeably failed to attach a price tag to the various components of its lengthy mandate.¹⁰⁴ The court’s omission did not reflect a belief that meaningful reform could be carried out under current funding levels, but rather was a function of the court’s emphasis on program-based budgets and the impossibility of establishing ahead of time how much money would be required to satisfy students’ needs.¹⁰⁵

Whitman, however, capitalized upon the court’s silence and used it to her own advantage. Just as in 1996, when she redefined a “thorough and efficient” education in order to minimize government spending,¹⁰⁶ she redefined quality preschool in a way that required comparatively less funding. She was thereby able to maintain the appearance of complying with the court’s order while at the same time reducing the cost to the State.¹⁰⁷ The lack of a specified funding level also enabled Whitman to withhold money for whole-school reform and supplemental programs without seeming to violate the court’s directive.¹⁰⁸ The

101. REED, ON EQUAL TERMS, *supra* note 7, at 150 (citation omitted). Whitman’s views also reflected those of the New Jersey populace. Carr and Fuhrman wrote that after passage of the QEA in 1990, it was argued—and still is—that more money would only be wasted on the poorer districts, and that “[p]erceptions of the urban districts as corrupt, inefficient, and hopeless ha[d] been strengthened by the rhetoric supporting choice vouchers and charter schools.” Carr & Fuhrman, *supra* note 3, at 164. They further contended that people’s perceptions of urban districts as inefficient and prone to corruption may have been affected by racism—by the “belief that minority children cannot be educated and minority adults cannot run school districts well.” *Id.* at 165.

102. See *supra* text accompanying note 60 (explaining the contents of CEIFA).

103. See also Paris, *supra* note 7, at 418 (“The approach Governor Whitman actually did take in the aftermath of *Abbott III* was consistent with her genteel political style. She nodded, hedged just a little bit, smiled and gave a friendly wave, and then went off in her own direction. Yes (of course) she would comply with the Court’s decision, she said. And no (absolutely not) she would not rethink her promised income tax cuts.”).

104. *Abbott v. Burke* (*Abbott V*), 710 A.2d 450, 469 (N.J. 1998).

105. *Id.*

106. See *supra* text accompanying note 60.

107. States have adopted a similar strategy in the face of the No Child Left Behind Act. Fearful of losing federal education funding, they have tinkered with the definition of “adequate yearly progress” in order to make compliance easier to achieve. See, e.g., Sam Dillon, *States Are Relaxing Education Standards to Avoid Sanctions From Federal Law*, N.Y. TIMES, May 22, 2003, at A29; W. James Popham, *The ‘No Child’ Noose Tightens—But Some States Are Slipping It*, EDUC. WK., Sept. 24, 2003, at 48.

108. As education advocates Steven Barnett and Cecilia Zalkind put it, “While state officials have been forced to make some efforts and invest millions of tax dollars, their efforts continue to fall short of what is needed. Too often the state’s steps seek to create a facade of compliance with little or no money to back them up.” Steven Barnett & Cecilia Zalkind, *No More Stalling on Preschool Education Reforms*, BERGEN REC., June 8, 2001, at L7.

remainder of this Section chronicles the ways in which these “Whitman-style politics” permeated the State’s response to *Abbott V* and frustrated good-faith efforts to implement the court mandate.

1. *Preschool*

From the beginning, the State’s position on preschool implementation failed to substantially comport with Commissioner Klagholz’s representations to the court during the *Abbott IV* remand hearings, as well as the standards that the court articulated in the *Abbott V* decision. According to the Commissioner’s testimony, “well-planned, high-quality” preschool entailed class sizes of no more than fifteen students, facilities consistent with good public school standards, a Department of Education-certified teacher and assistant in every classroom, preschool linkages to whole-school reform, and the provision of health, social, nutrition, and transportation services.¹⁰⁹ Nonetheless, the Commissioner advised the Abbott districts in September 1998 that the *Abbott V* decision did not impose “any qualitative requirement concerning early childhood programs,”¹¹⁰ and in January 1999 the Governor announced a “child care plan” as the State’s response to the *Abbott V* early education directive.¹¹¹ Instead of establishing high-quality preschool, the State wanted the Abbott districts to make use of Department of Human Services (DHS) childcare programs, even though the DHS neither limited class sizes to fifteen students nor required certified preschool teachers.¹¹²

The Whitman Administration further undercut the force of the *Abbott V* mandate by abandoning funding principles that lay at the core of the court’s order. *Abbott V* required the Department of Education (DOE) to give deference to the content of districts’ need-based preschool plans and, if necessary, to secure additional funding from the state legislature.¹¹³ In other words, districts’ operational plans were supposed to determine the amount of money the State made available for preschool programs, not the other way around. Nonetheless, Governor Whitman recommended the same amount of money for preschool education in 1999-2000 as had been available the previous year, when the court’s mandate was not yet in effect.¹¹⁴ In direct defiance of the *Abbott V*

109. *Hearing Before the Abbott Subcomm. of the Joint Comm. on the Public Schools on Earlychildhood Education* (N.J., Mar. 17, 1999) (statement of Steve Block, Director of School Reform Initiatives, Education Law Center), http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottIssues/ech_testim.htm (last visited Apr. 19, 2004) [hereinafter Block Testimony (Mar. 17, 1999)].

110. Plaintiff’s Brief in Support of Motion Aid to Litigants Rights, *Abbott v. Burke* (Abbott VI), 748 A.2d 82 (N.J. 2000), <http://edlawcenter.org/ELCPublic/AbbottvBurke/AbbottBriefs/Brief7Motion.htm> (last visited Apr. 19, 2004) [hereinafter Plaintiff’s Brief].

111. *Id.*

112. *Id.*

113. *Abbott v. Burke* (Abbott V), 710 A.2d 450, 464 (N.J. 1998).

114. Plaintiff’s Brief, *supra* note 110.

mandate, Whitman notified districts of their respective dollar allotments and instructed them to develop their budgets accordingly.¹¹⁵

The ELC decried the Department's approach to implementation as a classic "bait and switch," emphasizing that the State had promised a model of high-quality preschool education, but then deemed childcare standards sufficient.¹¹⁶ According to education advocates, the DOE's approach to early childhood education spelled disaster for students in the Abbott districts. As Steve Block, Director of School Reform Initiatives at the Education Law Center, explained to the state legislature:

[T]he imposition of DHS standards—if allowed—will establish a three-tier system of early childhood education in *Abbott* communities. Programs in public schools will operate on one set of standards, Head Start centers will have a second set of standards, and child care agencies will operate on yet a third set. This proposed system will result in inequalities in staff, facilities, and programs and violates the very premise of equal education that underscores the entire 18 year history of *Abbott*.¹¹⁷

Thirteen districts appealed the DOE's decision to ignore their needs assessments,¹¹⁸ but the Department had taken so long to review preschool operational plans that the appeals process became almost meaningless. Districts needed time to put their plans in motion. By the time the appeals process ended, it was too late for them to realistically incorporate approved changes into their 1999-2000 curricula. Districts also sought an additional \$140 million in state aid, but the DOE rejected almost every request.¹¹⁹

Fed up with Governor Whitman's defiance of the *Abbott V* mandate, the plaintiffs returned to court in the fall of 1999.¹²⁰ The ELC requested that the court order the State to implement high-quality preschool education, as well as provide the facilities and funding necessary for districts to establish adequate programs.¹²¹ The court agreed with the ELC that the Whitman Administration had violated the *Abbott V* mandate by requiring districts to settle for DHS daycare standards.¹²² To remedy the problem, the court mandated class sizes of no more than fifteen students, established certification standards for *Abbott* preschool teachers,¹²³ and ordered the State to adopt substantive educational

115. *Id.*

116. *Id.*

117. Block Testimony (Mar. 17, 1999), *supra* note 109.

118. Plaintiff's Brief, *supra* note 110.

119. David Glovin, *Group Asks Court to Enforce Preschool Order*, BERGEN REC., July 31, 1999, at A3. The State also failed to substantially revise its regulations for the 1999-2000 school year, despite ELC's pleas for it to do so. See Nancy Parelo, *Local Educators Want Preschool Guidelines*, BERGEN REC., Feb. 18, 1999, at A3; *Comments on New Abbott Regulations*, ABBOTT BULL. (Educ. Law Ctr., Newark, N.J.), July 26, 1999, <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottBulletins/Volume1/bulletin10.htm>.

120. *Abbott v. Burke* (Abbott VI), 748 A.2d 82 (N.J. 2000).

121. *Id.* at 84.

122. *Id.* at 85.

123. *Id.* at 92.

guidelines that would reflect the contents of the court's latest ruling.¹²⁴

Despite the greater specificity of the *Abbott VI* mandate, the State continued its pattern of noncompliance.¹²⁵ At the time *Abbott VI* was handed down, districts had already used old DOE standards to create preschool plans for the 2000-01 school year and needed to revise their plans quickly to comply with the new mandate.¹²⁶ However, the DOE failed to issue updated regulations as the court had ordered. Finding the revision process too arduous to undertake without any guidance from the State, many districts chose not to revise their program plans and budgets,¹²⁷ while those that did were denied funding for added programmatic elements.¹²⁸ As a result, Abbott districts were required to provide preschool education during the 2000-01 school year with the same amount of money as the year before, but in the face of more stringent requirements.¹²⁹

The State also ignored the court's directive with respect to the provision of preschool facilities. In the *Abbott V* opinion, the court ordered the Commissioner to provide preschool classrooms and to make use of alternative spaces, such as trailers, rental spaces, and cooperative enterprises, so that districts could maximize the number of three- and four-year-olds attending preschool.¹³⁰ The State, however, managed to avoid its responsibility by giving districts conflicting instructions about how to obtain funding.¹³¹ As a result, Abbott districts were limited in their capacities to enroll eligible preschoolers. For example, in the spring of 2001 Passaic was serving only thirty-three percent of its three-year-olds and forty-seven percent of its four-year-olds, because there were no classrooms in which to house additional students.¹³² Not until the fall of 2001 did the State begin providing districts with temporary sites

124. *Id.* at 93.

125. It should be noted that Whitman left the governor's office in January 2001 to head the Environmental Protection Agency. Alison Vekshin, *Whitman is Confirmed Unanimously*, BERGEN REC., Jan. 31, 2001, at A1. Senate President Donald DiFrancesco became acting governor in Whitman's place, *Id.*, and essentially followed her policy of noncompliance.

126. EDUC. LAW CTR., ABBOTT IMPLEMENTATION REPORT: SECOND YEAR (2000-01) OF PRESCHOOL, <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottReports/PreschoolReportJuly20.htm> [hereinafter IMPLEMENTATION REPORT].

127. *Id.*

128. *Id.*

129. *Id.*

130. *Abbott v. Burke* (Abbott V), 710 A.2d 450, 472 (N.J. 1998).

131. The State initially told districts that facilities issues needed to be addressed in their facilities management plans (FMPs). *Hearing Before the Assembly Education Comm.* (N.J., Sept. 17, 1998) (statement of David Sciarra, Executive Director, Education Law Center), <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottIssues/testify.htm>. But when the DOE issued its decisions on FMPs, the Commissioner informed district leaders that the State would not handle requests for preschool facilities until preschool plans had been approved. IMPLEMENTATION REPORT, *supra* note 126.

132. Nancy Parelo, *Poor Children Still Lack Access to Pre-K*, *Lawyers Say*, BERGEN REC., Mar. 16, 2001, at A4.

to handle student overflow.¹³³ Even then, three districts still had waiting lists totaling over 2,000 students.¹³⁴

These manipulations of *Abbott V* and *VI* prompted further judicial intervention in the fall of 2001.¹³⁵ In *Abbott VIII*, the court found that the State had once again defaulted on its obligation to provide high-quality preschool.¹³⁶ Accordingly, the court ordered the DOE to develop and distribute a preschool curriculum strategy, to make systematic budget decisions based on thorough assessments of actual student need,¹³⁷ and to provide Abbott districts with supplemental funding so that Head Start programs could be upgraded to meet state preschool requirements.¹³⁸ By the time the decision came down in February 2002, Democrat James McGreevey had assumed the governorship, and, much to the ELC's relief, the Whitman Administration was no longer in a position to undermine implementation.¹³⁹

2. Whole-School Reform

The Whitman Administration's concern with minimizing state expenditures affected other parts of the *Abbott V* mandate as well. With respect to whole-school reform, *Abbott V* required "zero-based budgeting," a funding scheme in which schools use the entirety of their revenue streams to create yearly budgets rather than set aside certain sums of money for specific programs.¹⁴⁰ Under this approach, the State was required to "determine whether funds within an existing school budget [were] sufficient to meet . . . request[s] for . . . demonstrably needed supplemental program[s]" before seeking additional appropriations from the state legislature.¹⁴¹ The court explicitly stated that zero-based budgeting was not a license for the State to take money away from foundational education programs. As the court explained, "implicit in any determination that existing appropriations are sufficient is the condition that funds may not be withdrawn from or reallocated within the whole-school budget if that will undermine or weaken either the school's foundational

133. Nancy Parello, *Preschool Master Could be Named*, BERGEN REC., Sept. 26, 2001, at A3.

134. *Id.*

135. *Abbott v. Burke* (Abbott VIII), 790 A.2d 842 (N.J. 2002).

136. *Id.* at 844-45.

137. *Id.* at 850, 853, 856.

138. For example, if community providers such as Head Start could demonstrate an inability to retain qualified staff due to salary parity problems, the DOE needed to consider providing additional funding for teacher salaries. *Id.* at 853.

139. See Dunstan McNichol, *N.J. Falls Short on Preschools*, STAR-LEDGER (Newark, N.J.), Feb. 22, 2002, http://www.warrencoea.org/_Articles/01-02/A02/Abbott%20&%20Court.html. See *infra* Section V.B. for a discussion of the ways in which the McGreevey Administration influenced *Abbott* implementation.

140. *Abbott v. Burke* (Abbott V), 710 A.2d 450, 459 (N.J. 1998).

141. *Id.* at 469.

education program or already existing supplemental programs.”¹⁴²

Nonetheless, the State used the latitude implicit in the court’s order, together with the absence of a specified funding level, to limit the amount of money it spent on urban education. Soon after *Abbott V* was handed down, Dr. Allan Odden, an education expert who had served as the State’s lead witness in the remand hearings before Judge King, met with Abbott district superintendents to explain the impact of the court’s ruling.¹⁴³ In describing how districts should proceed with the implementation of whole-school reform, Dr. Odden told district leaders to dispose of important faculty positions and educational programs, and then to invest the extra money in reduced class sizes and other elements of whole-school reform.¹⁴⁴ Odden’s advice outraged district leaders. According to James Lytle, superintendent of the Trenton school district, the group “nearly hooted him out of the room.”¹⁴⁵ Nonetheless, the State proceeded on the assumption that reallocation of existing school funds would suffice, for the most part, to get the job done. When government officials sought appropriations from the state legislature in August 1998, they requested only \$2.7 million, far less than the \$600,000 per school that the ELC believed was necessary for successful implementation of whole-school reform.¹⁴⁶ The State was aware that education advocates disagreed with the \$2.7 million figure, but argued that schools in the Abbott districts, among the highest spending schools in New Jersey, required only minimum financial aid in order to provide additional programs.¹⁴⁷

Implementation efforts were further hindered by the Whitman Administration’s treatment of budget preparation and approval processes. As with preschool programs, *Abbott V* required the State to distribute whole-school reform funding based on the needs of particular districts.¹⁴⁸ The State diminished the impact of the court’s order by encouraging schools to develop their budgets in accordance with an illustrative budget put together by the DOE. Reminiscent of the model school districts on which Governor Whitman based funding levels under CEIFA,¹⁴⁹ the illustrative budget was a “generic input model . . . applicable to all schools, regardless of their programs or

142. *Id.*

143. Telephone Interview with Dr. James Lytle, Superintendent, Trenton School District (Feb. 21, 2003) [hereinafter Lytle Interview].

144. *Id.*

145. *Id.* Dr. Lytle further commented, “In the abstract [what Odden was saying was] true. In reality, it [was] off the wall.” *Id.*

146. David Glovin, *State Wants Extra \$2.7 M for Elementary Schools*, BERGEN REC., Aug. 7, 1998, at A4.

147. *Id.*

148. DEP’T OF PUB. POLICY & CTR. FOR GOV’T SERVS., RUTGERS UNIV., IMPLEMENTING WHOLE-SCHOOL REFORM IN NEW JERSEY 62 (2000) [hereinafter WSR STUDY].

149. See *supra* text accompanying note 60.

needs.”¹⁵⁰ Thus schools were discouraged from seeking funds for additional programs or staff, even if such funds were necessary for them to implement whole-school reform. The Commissioner thereby succeeded in minimizing government expenditures, but also slowed the progress of implementation, to the point that a Rutgers University study published in 2000 listed the State’s treatment of school-based budgeting as one of the main obstacles to implementation of whole-school reform.¹⁵¹

3. Supplemental Programs

The State’s focus on limited spending also affected the establishment of supplemental programs. In *Abbott III*, and again in *Abbott IV*, the court emphasized that supplemental programs should be aimed at remedying disadvantage and defined such programs as components of a public education “unique to . . . students [in the Abbott districts], not required in wealthier districts, and . . . an educational cost not included within amounts expended for regular education.”¹⁵² By contrast, the DOE regulations defined supplemental programs as any programs not required by whole-school reform.¹⁵³ The regulations did not enumerate the specific supplemental programs the court had mandated in *Abbott V*, nor did they provide examples of the many additional programs the State was required to fund if districts could demonstrate a particularized need.¹⁵⁴ Without any parameters in place, supplemental programs essentially disappeared from the state agenda, and the process whereby districts could request supplemental funding became a way for them to obtain additional money for other inadequately funded pieces of the *Abbott V* mandate.¹⁵⁵

150. WSR STUDY, *supra* note 148, at 62.

151. *Id.*

152. *Abbott v. Burke* (Abbott III), 643 A.2d 575, 580 (N.J. 1994); *Abbott v. Burke* (Abbott IV), 693 A.2d 417, 424 (N.J. 1997).

153. EDUC. LAW CTR., *supra* note 119.

154. *Id.*

155. Lytle Interview, *supra* note 143 (“No one knows what supplemental funding means. [Instead of] implement[ing] it the way the court intended, [the Department] made an incredible mosh out of it and used it as a way to control the amount of additional funding provided to schools.”). The way in which the Whitman Administration dealt with supplemental programs may have been further complicated by state takeovers of three New Jersey school districts in the late 1980s. Raul Garcia, *Building a Better Educational System: The Implementation of New Jersey’s School Construction Program, A Legislator’s Perspective*, 26 SETON HALL LEGIS. J. 91, 98 (2001). Around the same time *Abbott V* was decided, the State started taking serious heat for lack of improvement in state-takeover districts. *Id.* Education leaders alleged that the Whitman Administration was using *Abbott* money to compensate for the State’s failure. Twenty Abbott districts applied for supplemental funding for the 2000-01 school year. WSR STUDY, *supra* note 148, at 65. Although seventeen districts received additional money, thirty-eight percent of the funding—\$60 million—went to Newark, a state takeover district. *Id.* People speculated that the DOE would have given more supplemental funding to other Abbott districts if it had not committed such a large sum of money to Newark. *Id.*

4. Facilities

The Whitman Administration's approach to facilities construction and rehabilitation further frustrated reform efforts. As part of the *Abbott V* mandate, the court ordered the Commissioner to obtain legislation authorizing funding for facilities projects in the Abbott districts.¹⁵⁶ In keeping with the court's demand, Governor Whitman sent a draft proposal to the state legislature in May 1999,¹⁵⁷ calling for \$6 billion in state aid to be distributed to schools over the course of seven years.¹⁵⁸ Under Whitman's plan, the money would be used to fully fund construction projects in the Abbott districts, as well as at least ten percent of new projects in New Jersey's other school districts.¹⁵⁹ However, the two groups would be treated differently: the New Jersey Building Authority would be responsible for designing schools, borrowing money, and overseeing construction in the Abbott districts, while most of the other districts would be free to hire their own contractors.¹⁶⁰

The divide between Abbott and non-Abbott districts reflected Whitman's concern with alleged corruption and mismanagement in New Jersey's urban school districts. Much as she defended CEIFA in 1996 by arguing that Abbott districts engaged in wasteful spending, she supported her facilities proposal on the ground that local architects and engineering consultants would just "squander the [state] money."¹⁶¹ The New Jersey Building Authority, by contrast, would provide state oversight and protect the government's large investment against corruption and waste.¹⁶² Whitman also believed that a state-run agency could seek economies of scale and thereby reduce government costs.¹⁶³

While Whitman's concerns with money mismanagement were not without merit,¹⁶⁴ they resulted in an implementation framework that precluded the

156. *Abbott v. Burke* (Abbott V), 710 A.2d 450, 473-74 (N.J. 1998).

157. *Comments on Proposed Abbott Regulations: Subchapter #8 Facilities*, ABBOTT BULL. (Educ. Law Ctr., Newark, N.J.), Aug. 9, 1999, <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottBulletins/Volume1/bulletin12.htm>.

158. David Glovin, *Funding for New Schools Increased*, BERGEN REC., May 12, 1999, at A1.

159. *Id.*; see also Herb Jackson, *Lawmaker Says Cut School Building Aid*, BERGEN REC., Dec. 2, 1999, at A1.

160. Glovin, *supra* note 158; School Construction and Renovation Program, *at* <http://www.state.nj.us/budget01/fct.sch.html> (last visited Apr. 19, 2004).

161. John J. Farmer, Jr., *Perspective: The Evolution of New Jersey's Gubernatorial Power*, 25 SETON HALL LEGIS. J. 1, 25 (2001).

162. Garcia, *supra* note 155, at 98.

163. See *id.* at 96-97 (explaining the Whitman Administration's focus on efficiency); David Glovin, *\$5.3B School Building Plan Attracts Contractors*, BERGEN REC., Oct. 7, 1998, at A3; ("The state says its management will lead to savings of up to 26 percent by consolidating the financing and construction work . . ."); Herb Jackson, *Architects Worried by State Hand in Schools*, BERGEN REC., Nov. 2, 1998, at A1 ("The administration decided that because it was responsible for the total cost, it would centralize control and seek economies of scale.").

164. See *infra* Section VI.C for a discussion of how certain Abbott district leaders used government money to line their own pockets rather than to improve district-wide education.

possibility of rapid progress. The Educational Facilities Construction and Financing Act—the legislation that eventually grew out of Whitman’s proposal—was impressive in scope.¹⁶⁵ It allocated \$6 billion to construction in the Abbott districts and guaranteed that the State would cover at least forty percent of construction costs in wealthier, suburban areas.¹⁶⁶ However, its centralization of decision-making authority in the hands of a state-run agency proved disastrous for the Abbott districts. The Economic Development Authority (EDA)—the executive body eventually decided upon to oversee the facilities overhaul¹⁶⁷—lacked the experience and resources necessary to carry out its job. As Gordon MacInnes, Assistant Commissioner for Abbott Implementation, explained, “The legislation turn[ed] to an agency with zero experience building anything and expect[ed] it to deal with thirty districts, thirty superintendents, thirty school boards, and to assemble property on the most densely built place on earth.”¹⁶⁸ According to Joan Ponessa, Director of Research at the Education Law Center, the EDA was not nearly equipped to coordinate the large number of projects the Abbott districts had requested; at the time the EDA was put in charge, it was short on staff and had not secured any contracts with architects and builders.¹⁶⁹

Centralization also slowed the implementation process by forcing districts to weave through layers of bureaucracy before they could get construction projects underway. Forms needed to go to the DOE, then to the EDA, and then back to the DOE, creating what Joan Ponessa referred to as a “ping-pong effect.”¹⁷⁰ Both James Lytle and Richard Shapiro, an attorney who represented six of the Abbott districts during the early years of implementation, cited this convoluted planning and approval process as the biggest obstacle to facilities rehabilitation and improvement.¹⁷¹ Without a streamlined process, individual projects “went nowhere” even after districts’ overall facilities plans had been approved by the DOE.¹⁷²

165. 2000 N.J. Laws 565 (codified as amended at N.J. STAT. ANN. §§ 18A:7G (West Supp. 2003)).

166. Randy Diamond, *Billions for Schools*, BERGEN REC., July 14, 2000, at A1.

167. Whitman originally proposed to use the New Jersey Building Authority (NJBA). However, the NJBA had never before built a school, so the governor’s office later persuaded the EDA to get involved instead. Telephone Interview with Joan Ponessa, Director of Research, Education Law Center (May 19, 2003) [hereinafter Ponessa Interview (May 19, 2003)].

168. MacInnes Interview, *supra* note 8. Before *Abbott V*, the EDA did not have a building program. *Id.*

169. Telephone Interview with Joan Ponessa, Director of Research, Education Law Center (Dec. 19, 2002) [hereinafter Ponessa Interview (Dec. 19, 2002)].

170. Ponessa Interview (May 19, 2003), *supra* note 167.

171. Lytle Interview, *supra* note 143; Telephone Interview with Richard Shapiro, Attorney for the Elizabeth, Passaic, Pemberton, Asbury Park, Burlington City, and Trenton school districts (Jan. 3, 2003) [hereinafter Shapiro Interview].

172. Shapiro Interview, *supra* note 171. Larry Leverett, the superintendent of the Plainfield School District, said the EDA suffered from “bureaucratic ineptness” and that the State demonstrated an inability to organize the bureaucratic structure that facilitated implementation. Telephone Interview with Larry Leverett, Superintendent, Plainfield School District (Feb. 17, 2003) [hereinafter Leverett

B. *The McGreevey Administration, 2002-03*

While the years immediately following *Abbott V* revealed that even a specific, substantive mandate was susceptible to political resistance by the executive branch, the first year of the McGreevey Administration demonstrated that a committed governor could likewise make strides in improving education. James McGreevey entered the governor's office in January 2002. McGreevey was a huge supporter of urban educational reform and announced during his inaugural address that education would be the "cornerstone" of his administration. He immediately set out to get the Abbott districts back on track.¹⁷³ McGreevey hired an education expert, Dr. Ellen Frede, to direct the Office of Early Childhood Education at the DOE, and appointed former Democratic Senator Gordon MacInnes to oversee the management and expenditure of state funds for the Abbott districts.¹⁷⁴ MacInnes shared McGreevey's outlook on education, championing the importance of preschool education in closing the gap between urban children and their suburban peers, and he vowed to do away with the bureaucratic hurdles that had impeded earlier efforts to comply with the court mandate.¹⁷⁵ As he explained to a reporter on the day after his appointment, "The previous administration created a paper trail to show they were in compliance We're going to watch out for the taxpayer's dollar and be sure the money is spent for educational purposes, but we don't need to cut down a whole forest in Maine to do that."¹⁷⁶

McGreevey also tried to change the tenor of the relationship between the State and the Abbott districts. On February 19, 2002, he signed an Executive Order establishing the Abbott Implementation and Coordinating Council.¹⁷⁷ Promising "cooperation not confrontation," he announced that the State would no longer be an obstacle to implementation, but instead "a partner to creating excellence in education, such that every child in New Jersey [would] achieve the promise of their [sic] fullest potential."¹⁷⁸ The purpose of the council, which included representatives from the Education Law Center, the Department of Education, the Economic Development Authority, and the Attorney General's

Interview]. As he put it, "It's disgusting that all around Plainfield schools are being built, and in the Abbott districts the same is not happening." *Id.*

173. Governor's Initiatives (on file with author).

174. Block Interview (Dec. 17, 2002), *supra* note 93.

175. Fran Wood, *School Activist Eager to Show He Can Do More Than Criticize*, STAR-LEDGER (Newark, N.J.), Feb. 6, 2002, http://www.warrencoea.org/_Articles/01-02/A02/Fran%20Wood%20ed.html (last visited Apr. 19, 2004).

176. *Id.* MacInnes expressed his enthusiasm at being involved in New Jersey urban educational reform. As he explained, "if you care about education, I've got the best job in America. . . . We can close this gap for poor kids in a way that's never been done." MacInnes Interview, *supra* note 8.

177. Dunstan McNichol, *Those Who Sued N.J. Will Aid School Overhaul*, STAR-LEDGER (Newark, N.J.), Feb. 20, 2002, http://www.warrencoea.org/_Articles/01-02/A02/Abbott%20%20Ed%20Law%20Center.html (last visited Apr. 19, 2004).

178. *Id.*

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Office, was threefold: to create a dialogue between key players in the implementation effort, to ensure that the State was fulfilling its role in carrying out the *Abbott V* mandate, and to determine how the State might aid Abbott districts further in their efforts at reform.¹⁷⁹ McGreevey's actions were well received; plaintiffs applauded the development as "historic,"¹⁸⁰ and Steve Block said he was encouraged by McGreevey's expression of "cooperation and commitment."¹⁸¹

The McGreevey Administration also achieved a number of concrete successes with respect to the implementation of high-quality preschool and the construction and rehabilitation of classroom facilities. During their first few weeks on the job, MacInnes and Frede approved preschool plans that enabled the Abbott districts to increase spending for preschool programs by about \$135 million for the 2002-03 school year.¹⁸² They also amended DOE regulations to help streamline the preschool plan approval process, and they secured money for increased teacher salaries to encourage educators to work at community centers in the Abbott districts.¹⁸³ To increase the pace of facilities rehabilitation, McGreevey established a subsidiary of the Economic Development Authority, the New Jersey Schools Construction Corporation (SCC), to control the construction component of the implementation process.¹⁸⁴ Although certain bureaucratic hurdles remained in place, the SCC enabled the State to make some headway in renovating decrepit classrooms.¹⁸⁵ Coalition For Our Children's Schools assessed that the SCC made more progress in its first six months of operation than the State had made in the preceding two years.¹⁸⁶ According to Joan Ponessa, the situation would have remained stagnant if the EDA had remained the only organization responsible for financing and constructing classrooms in the Abbott districts.¹⁸⁷

C. Legislative Politics

Although gubernatorial politics had the most noticeable influence on the implementation of *Abbott V*, legislative politics played a role as well, albeit in a more limited way.¹⁸⁸ As discussed in Subsection V.A.4, the legislature

179. *Id.*

180. ACCESS website, *supra* note 74.

181. McNichol, *supra* note 177.

182. *Id.*

183. *Id.*

184. Ponessa Interview (May 19, 2003), *supra* note 167; *see also* N.J. Schs. Constr. Corp., The Act, at <http://www.njscc.com/general/theact.asp> (last visited Apr. 19, 2004). The EDA maintained control over financing. *Id.*

185. Ponessa Interview (May 19, 2003), *supra* note 167.

186. COALITION FOR OUR CHILDREN'S SCHS., *supra* note 94, at 1.

187. *Id.*

188. *Abbott v. Burke* (Abbott V), 710 A.2d 450, 474 (N.J. 1998).

ultimately signed off on the allocation of unprecedented sums of money to a major facilities overhaul throughout New Jersey.¹⁸⁹ However, the legislature's concern with suburban interests and resentment of the New Jersey Supreme Court's intrusion into its realm of lawmaking power greatly prolonged the decision-making process. As a result, the court's deadline for commencement of facilities construction and rehabilitation had already passed by the time the Educational Facilities Construction and Financing Act was signed into law on July 18, 2000.

1. *The Influence of Suburban Interests*

Suburban voters influenced the legislative process following *Abbott V*, just as they had influenced the passage of the QEA II in 1990 and CEIFA in 1996.¹⁹⁰ From the outset, suburban residents made it known that they expected to benefit from the new facilities legislation. At a Senate Education Committee meeting held in February 1999, representatives of wealthy school districts pleaded with lawmakers for additional money to fund school construction projects. They argued that because of large imbalances in state funding distribution, they were in desperate need of government help.¹⁹¹ After the houses submitted funding proposals in the fall of 1999, representatives of suburban districts complained that their allotments were insufficient¹⁹² and asserted that there was "pent-up demand" for more state aid.¹⁹³

The preferences of suburban voters weighed heavily on the minds of lawmakers. Following the introduction of a Senate bill in November 1999, the Senate President, Republican Donald DiFrancesco, announced that the legislature and the Whitman Administration were working together on a funding formula that would support middle-income and wealthy school districts in addition to the Abbott districts. He said it would be "virtually impossible" to secure enough votes for legislation that served only lower-income areas.¹⁹⁴ As Democratic Senator Joseph Palaia explained, "You're talking about thirty Abbott districts as opposed to [616] school districts in the state of New Jersey, so you know that others aren't going to be thrilled that the biggest pot of all is

189. See *supra* note 166 and accompanying text.

190. See *supra* text accompanying notes 47-50; see also REED, ON EQUAL TERMS, *supra* note 7, at 156 (explaining that affluent districts played a large role in shaping the CEIFA provisions, managing to "secure[] a number of compromises that advanced their interests, while the central city districts won few concessions from the Republican-dominated state legislature").

191. Nancy Parello, *Suburban Districts Appeal for More Construction Aid*, BERGEN REC., Feb. 19, 1999, at L7. Approximately 250 New Jersey school districts did not receive basic state support. *Id.* District distribution was based on relative district wealth; the poorer the district, the more state aid it received. *Id.*

192. See *id.*

193. Jackson, *supra* note 159.

194. Herb Jackson, *Flurry of Bills on Tap in Trenton*, BERGEN REC., Nov. 8, 1999, at A1.

going to the thirty districts.”¹⁹⁵ Although Senator Palaia’s legislative district included three of the Abbott districts, he still felt pressure to satisfy his suburban constituents:

I am basically known as an affluent district. Yet I also have to deal with my three special needs schools. So I walk a very fine tight rope. I don’t want to neglect them; by the same token I have to represent the others. With 100% funding for the Abbott districts, I’m pleasing three towns but I have twenty-two that are on my case saying, “what’s in it for us?”¹⁹⁶

For other legislators, the pressure was even greater: “Most of [the legislative districts] don’t even have anything to do with Abbott districts and to be truthful some of them could care less. They want to protect what their particular districts are looking for. And that’s what you’re supposed to do as a legislator—protect your districts.”¹⁹⁷

While the complexity of the legislation meant that it was bound to take lawmakers some time to work out the details,¹⁹⁸ the legislature’s pre-occupation with suburban interests prolonged the decision-making process. In March 2000, four months after the Senate had introduced its original funding bill, legislators were still battling over how much money would go to wealthier suburbs, with Republican Senator Norman Robertson insisting the Senate amend its current bill to cover at least thirty percent of facilities costs for suburban districts.¹⁹⁹ Not until June 5, 2000 did both houses finally agree that non-Abbott districts should receive a minimum of forty percent funding to cover their facilities needs.²⁰⁰

2. *Tension Between the Legislature and the Judiciary*

Implementation was further delayed by the dynamic between the legislative and judicial branches of New Jersey state government. New Jersey’s long history of school finance litigation had produced an acrimonious relationship between the New Jersey Supreme Court and the state legislature. The court’s ruling in *Abbott IV*, striking down CEIFA and mandating an additional \$248 million in funding for the special needs districts, so angered state legislators that the Speaker of the Assembly threatened to eliminate the constitutional requirement of a “thorough and efficient” education, while a senator introduced

195. Telephone Interview with Joseph Palaia, Senator, New Jersey Legislature (Feb. 24, 2003).

196. *Id.*

197. *Id.*

198. The drawn-out decision-making process was partially a function of the “magnitude” of the task at hand—the need to work through a multitude of details, from how bonding would work to whether schools needed auditorium-gymnasiums or cafeteriums. Telephone Interview with Joseph Doria, Chair, New Jersey Assembly Education Committee (Feb. 25, 2003).

199. Randy Diamond, *Legislature Far Apart on School Funding*, BERGEN REC., Mar. 9, 2000, at A3.

200. Randy Diamond, *Assembly OKs Billions for School Construction*, BERGEN REC., June 6, 2000, at A3.

legislation that would require New Jersey Supreme Court justices to run for re-election.²⁰¹

The legislature's resentment of the judiciary once again reared its head in the spring of 2000. In the *Abbott V* opinion, the court directed the State to fund fully construction projects in the Abbott districts. The court held:

[A]ny funding formula that does not fund the complete costs of remediating the infrastructure and lifecycle deficiencies that have been identified in the Abbott districts or that does not fully fund the construction of any new classrooms needed to correct capacity deficiencies will not comport with the State's constitutional mandate to provide facilities adequate to ensure a thorough and efficient education.²⁰²

Despite the clear language of the court mandate, the Speaker of the Assembly, Republican Jack Collins, insisted that the State was only required to fund ninety percent of construction and rehabilitation costs.²⁰³ He contended that the court had overstepped its bounds in requiring the State to devote so much money to improving facilities in the Abbott districts.²⁰⁴ He also believed that the court had violated the New Jersey Constitution by telling the legislature how to spend the taxpayers' money.²⁰⁵ As he put it, "They want to sit here and tell us what they would do if they were legislators."²⁰⁶ Collins's views created a logjam in the legislative process. The Assembly refused to compromise on its position, and the Senate and the Whitman Administration insisted that only full funding would satisfy the court's mandate.

After months of trying to convince the Senate to back down on its position, Collins brought his frustrations before the New Jersey Supreme Court in late April 2000.²⁰⁷ He asked whether the *Abbott V* mandate required the State to provide full funding for facilities projects in the Abbott districts, or whether the legislature could require school districts to contribute a fair share of local aid.²⁰⁸ The court handed down its decision on May 25, 2000, reiterating in *Abbott VII* what it had stated in *Abbott V*: "The State is required to fund all of the costs of necessary facilities remediation and construction in the Abbott districts."²⁰⁹ Following the *Abbott VII* decision, it took less than eight weeks for the Educational Facilities Construction and Financing Act to pass both houses of the legislature, receive a conditional veto from the governor, pass through

201. Dunstan McNichol, *School Aid Decision Outrages Lawmakers*, BERGEN REC., May 16, 1997, at A1. At the time, New Jersey Supreme Court justices were appointed rather than elected. *Id.*

202. *Abbott v. Burke* (*Abbott V*), 710 A.2d 450, 472 (N.J. 1998).

203. Ralph Siegel, *Whitman Tells Assembly Leader to Butt Out on School Funding*, BERGEN REC., Dec. 3, 1999, at A4.

204. Paul H. Johnson, *Aid Urged for Education*, BERGEN REC., Apr. 14, 2000, at A4.

205. *Id.*; Randy Diamond, *Justices Reaffirm School Funding*, BERGEN REC., May 26, 2000, at A1.

206. Diamond, *supra* note 166.

207. *Abbott v. Burke* (*Abbott VII*), 751 A.2d 1032 (N.J. 2000).

208. *Id.* at 1033.

209. *Id.* at 1034.

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the legislature once more, and officially be signed into law.²¹⁰ Former Democratic Assemblyman Raul Garcia lamented the time Collins had wasted: “It is only regrettable that the measure could not have proceeded forward with such alacrity without judicial involvement, which unfortunately has become the norm for New Jersey’s education policy.”²¹¹

VI. PRACTICALITIES

While New Jersey politics had a large influence on the course of events following *Abbott V*, the slow pace of implementation was also driven by factors beyond government control. As already highlighted, the *Abbott V* decision established a high bar for “thorough and efficient” and was unique in its provision of specific, substantive reform measures. Due to the magnitude and complexity of the court mandate, successful implementation depended on more than political will—it required a strong economy, coordination among different agencies and key players, and the dedication of Abbott district leaders. Where these elements fell through, implementation suffered as a result.

A. *The New Jersey Economy*

Despite Governor McGreevey’s commitment to urban educational reform and the many achievements of his first year in office, the economic downturn that coincided with his rise to power frustrated implementation efforts. Given the far-reaching nature of the *Abbott V* decision, districts needed substantial government assistance to pay for mandated programs and reforms. While funds were available throughout Governor Whitman’s tenure, Whitman chose to spend money on other pursuits.²¹² Somewhat ironically, the economy experienced a downturn just as McGreevey, a governor who was finally willing to invest state dollars in urban education, made his way to office.²¹³ As Lawrence Lustberg, Vice Chair of the ELC, aptly stated, “It’s one of the cruelest ironies of *Abbott* that finally at the time when we got to a stage where implementation really was in sight, that the economy turned down and the dollars dried up.”²¹⁴

210. Raul Garcia, *supra* note 155, at 103.

211. *Id.*

212. *See supra* Section V.A.

213. New Jersey experienced a \$5 billion deficit in 2002, its largest revenue shortfall since World War II. ACCESS website, *supra* note 74.

214. Lustberg Interview, *supra* note 93. *See Carr & Fuhrman, supra* note 3, at 166, for a discussion of the impact of a state’s economy on political support for reform. “School finance reform is virtually impossible without some sort of fiscal flexibility in the state’s budget.” *Id.* As Larry Leverett put it:

Urban school reform is typically on the chopping block at the first blush of hard times. There is a tendency to abandon the commitment and we’ve seen that over the past two years in New Jersey. The question is, how do you sustain reform in such an unstable funding environment? That threatens the continuity of effort in the state’s most challenged school districts.

Economic troubles began to interfere with *Abbott* implementation in April 2002, when the McGreevey Administration and the Education Law Center approached the court and asked for permission to place a one-year funding freeze on money going to the Abbott districts.²¹⁵ Their purpose was twofold: to give the State time to close its \$5.3 billion budget gap and to enable the DOE to reconsider the efficacy of the whole-school reform regulations promulgated by the previous Administration.²¹⁶ Both the ELC and the McGreevey Administration believed that whole-school reform was too rigid—that in order for students to thrive, schools needed greater flexibility in deciding how best to approach educational reform.²¹⁷ As David Sciarra, Executive Director of the ELC, explained, “[Whole-school reform] is a cookie-cutter model that bears no relationship at all to what’s on the ground You might need more reading tutors, but the model doesn’t contain funding for that. You may have security personnel you don’t need. The problem is, the needs in schools vary.”²¹⁸ The ELC supported the funding freeze because it believed the “timeout” would ultimately benefit the Abbott districts, that the hiatus would give the ELC and the McGreevey Administration time to fix implementation problems as well as give districts greater flexibility in targeting funds to specific student needs.²¹⁹ In addition, by agreeing to the funding freeze, the ELC was able to convince the McGreevey Administration to almost triple state aid for mandated preschool programs.²²⁰

District leaders, however, saw things quite differently. In June 2002, after acknowledging the state budget crisis and the establishment of the Abbott Implementation and Coordinating Council, the court granted McGreevey’s request and allowed a “one-year relaxation of remedies for K-12 programs for

Leverett Interview, *supra* note 172.

215. See *Abbott v. Burke* (Abbott IX), 798 A.2d 602 (N.J. 2002).

216. Ivelisse DeJesus, *Aid Freeze Throws Chill into Schools*, STAR-LEDGER (Newark, N.J.), Aug. 19, 2002, http://www.pburgea.org/_Articles/02-03/A08/AidFreeze.htm.

217. During the *Abbott IV* remand hearing the ELC argued that the whole-school reform model supported by the Commissioner would be ineffective. *Abbott v. Burke* (Abbott V), 710 A.2d 450, 459 (N.J. 1998). As Steve Block put it four years later, Abbott districts should not be implementing a “cockamamie model.” Telephone Interview with Steve Block, Director of School Reform Initiatives, Education Law Center (Nov. 25, 2002).

218. Nancy Parello, *Poor N.J. Schools Face Curb on Funds*, BERGEN REC., Apr. 19, 2002, at A1.

219. *Id.* The fact that the Education Law Center represented school children in the Abbott districts, as opposed to the districts themselves, also helps to explain why the ELC would support a funding freeze despite extreme opposition from district leaders. As Tom Saunders argues in his Essay on Maryland school finance reform in this Symposium, representing a class of school children allows plaintiffs to focus primarily on the interests of students, without also having to concern themselves with the interests of other political players. Thomas Saunders, *Settling Without “Settling”: School Finance Litigation and Governance Reform in Maryland*, 22 YALE L. & POL’Y REV. 571, 572, 578, 582, 584, 599 (2004). Representing *Abbott* school children further afforded ELC the opportunity to sue noncompliant districts, although as of this writing it has yet to exercise that option. See *infra* note 277.

220. See *infra* text accompanying notes 288-290 and 297-300 for a more detailed discussion of the deal struck between the ELC and the McGreevey Administration regarding the one-year funding freeze.

the 2002-2003 school year.”²²¹ Abbott districts were denied an anticipated \$400 million increase in state aid and were forced to accept the same amount of funding for supplemental programs and whole-school reform as had been available the previous year.²²² To adjust for the decreased level of state funding, schools scaled back on extracurricular activities, slashed equipment and supply orders, and laid off scores of school staff.²²³ Many educators felt betrayed by the ELC and failed to understand how cutting off funding midstream could benefit students in the Abbott districts.²²⁴ Edward Kent, New Brunswick’s school business administrator, complained: “We have been put under a mandate of whole-school reform where we hired all these people to come in and work with kids . . . and then all of a sudden to have the rug pulled from underneath. You are hurting the kids and that’s wrong.”²²⁵ In Newark, New Jersey’s largest school district, Superintendent Marion Bolden was forced to shut down one school completely.²²⁶ She also had to cancel field trips and student programs in order to trim her budget down to size.²²⁷

Although the hiatus was initially scheduled to last for only one year, the State announced a proposal in January 2003 to more permanently scale back supplemental programs and to give individual schools more flexibility in their approaches to K-12 education.²²⁸ The State’s aim, according to MacInnes, was to improve literacy rates and help students master the New Jersey Core Curriculum Content Standards, while at the same time “embrace efficiency and effectiveness with regard to the *Abbott* dollars.”²²⁹ David Sciarra “blast[ed]” the State’s proposal, arguing that across the board eliminations of tutors and dropout prevention officers would negatively impact students in the Abbott districts.²³⁰ Richard Shapiro was similarly outraged by the State’s new plan. He believed that the State was shifting back to a pre-*Abbott* funding system in which the government appropriated a given amount of money for urban education and expected the districts to plan their programs and budgets accordingly, instead of basing government funding on the amount of money districts needed to provide a thorough and efficient education.²³¹ He also

221. *Abbott v. Burke* (Abbott IX), 798 A.2d 602, 603 (N.J. 2002).

222. Barbara Fitzgerald, *The Newest Battle Over Poor Schools*, N.Y. TIMES, Aug. 11, 2002, at NJ1.

223. DeJesus, *supra* note 216.

224. Leverett Interview, *supra* note 172 (“The ELC has been characterized more and more as a corrupt entity for taking the risk of partnering with the government to disassemble the *Abbott* remedy. The ELC image has suffered immeasurably as a result.”); *see also* DeJesus, *supra* note 216.

225. DeJesus, *supra* note 216.

226. *Id.*

227. *Id.*

228. *See* Maia Davis, *Abbott Proposals Criticized*, BERGEN REC., Jan. 30, 2003, at A8; John Sullivan, *McGreevey Seeks to Revamp Support for Poorest Schools*, N.Y. TIMES, Dec. 29, 2002, at NJ1.

229. MacInnes Interview, *supra* note 8.

230. Davis, *supra* note 228.

231. Shapiro Interview, *supra* note 171.

echoed Mr. Kent's concerns regarding imposing changes so late in the game. As he explained, "One of the values of education in good districts is there is a consistent move towards excellence. But the Abbott districts seem to get thrown around. So the kids are constantly being taught under different educational systems. That's a problem."²³²

While the McGreevey Administration defended its proposed changes on educational grounds, arguing that they reflected a shift in focus rather than a means of reducing state spending,²³³ district leaders and the ELC suspected that the governor's decisions were driven by economic concerns.²³⁴ When the State announced its 2003-04 budget proposal in early February 2003, the ELC's suspicions only deepened. McGreevey's proposal effectively capped aid for the Abbott districts at 2002-03 spending levels, contradicting the State's previous representations that a funding freeze would last for only one year.²³⁵ In March 2003, the DOE asked the court for formal permission to reduce state funding for the Abbott districts and to remove whole-school reform and supplemental programs from the court's mandate.²³⁶ The ELC vigorously opposed the State's request, arguing that the Commissioner's claim that the *Abbott* reforms were not working "just [didn't] hold up."²³⁷

The court's ruling left Abbott districts in a precarious position. On June 10, 2003, following court-ordered mediation, the court accepted the parties' mediation agreement and ordered them to continue implementing whole-school

232. *Id.* Larry Leverett was similarly outraged. As he put it, "The departure of the State from a commitment to supplemental funding and whole-school reform is morally and ethically bankrupt and lacks any foundation in practice. It's a ploy by McGreevey and others to save money." Leverett Interview, *supra* note 172.

233. Associated Press, *N.J. Gov Seeks Changes in Landmark Education Court Decisions* (Dec. 30, 2002) (on file with author).

234. Davis, *supra* note 228. As Steve Block said, "Now we have our friends in the saddle, but the State's broke and the government doesn't want to raise taxes, so they're looking for places to cut or at least hold the line." Block Interview (Dec. 17, 2002), *supra* note 93.

235. Maia Davis & Monsy Alvarado, *Aid But No Comfort*, BERGEN REC., Feb. 7, 2003, at A1.

236. Educ. Law Ctr., Abbott Alert (May 27, 2003) (on file with author). In defending the State's request, Assistant Commissioner MacInnes explained, "We need to be extremely conscious of the fact that these are very scarce dollars . . . 'Effectiveness' and 'efficiency' are words that people need to automatically associate with Abbott, [not] 'high-spending.'" Maia Davis, *Abbott vs. the Budget*, BERGEN REC., June 23, 2003, at A1.

237. Press Release, Educ. Law Ctr., Abbott Schools Undergoing Whole School Reform Making Significant Achievement Gains (Apr. 9, 2003), http://www.edlawcenter.org/ELCPublic/Alert_0403_PressRelease.htm. The ELC's defense of whole-school reform seemed surprising given that the ELC supported the one year funding freeze because it believed whole-school reform was not working as well as planned. However, Steve Block explained that the hiatus—in effect the "cure"—proved worse than the initial problem. Telephone Interview with Steve Block, Director of School Reform Initiatives, Education Law Center (May 29, 2003) [hereinafter Block Interview (May 29, 2003)]. According to Block, although the pre-established whole-school reform models failed to provide enough flexibility, they were more successful than the State let on, and were preferable to simply abandoning the whole-school reform approach and allowing schools to do whatever they wanted. *Id.* For a discussion of the problems with whole-school reform during the funding freeze, see *infra* text accompanying notes 278-279.

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reform and supplemental programs as required under *Abbott V*.²³⁸ However, after hearing oral arguments on an unresolved issue—whether to extend the one-year relaxation of remedies provided for in *Abbott IX*—the court granted the State’s request to maintain district budgets at the previous year’s levels. The court thereby prevented districts from introducing new, needed programs as well as restoring programs that had been cut during the 2002-03 funding freeze.²³⁹ At the time of this writing, the ELC estimates that the state’s 2004 fiscal year budget falls \$192 million short of covering even the “maintenance budgets” provided for in the court’s most recent ruling,²⁴⁰ as well as \$34 million short of what districts actually need to operate *Abbott* preschool programs.²⁴¹

B. Logistics

Implementation efforts were further hampered by the logistical difficulties inherent in carrying out large-scale change and establishing the types of programs required under the court mandate. This was particularly true of whole-school reform.²⁴² In 2000, the Rutgers University Department for Public Policy and Center for Government Services conducted a study on implementation of whole-school reform in the *Abbott* districts.²⁴³ Researchers found that the short time within which schools were required to implement whole-school reform “precluded the capacity building or development of expertise” necessary to “change long standing governance structures, communication patterns, and teaching practices.”²⁴⁴ The report stated that a number of schools failed to rearrange teachers’ daily schedules to give teachers time to meet with one another and coordinate school-wide curricula for the various grade levels.²⁴⁵ Furthermore, many teachers felt that they had been

238. *Abbott v. Burke* (*Abbott X*), 832 A.2d 891, 893-94, 897 (N.J. 2003).

239. *Abbott v. Burke*, 832 A.2d 906, 899 (N.J. 2003).

240. Educ. Law Ctr., Status Report on 2003-04 *Abbott* District Budgets, at http://www.edlawcenter.org/ELCPublic/ELCNews_031013_BudgetStatusReport.htm (last visited Apr. 19, 2004).

241. Press Release, Educ. Law Ctr., State Refuses to Fully Fund *Abbott* Preschool: Districts to Appeal Rulings (Oct. 8, 2003), http://www.edlawcenter.org/ELCPublic/ELCNews_031008_Press%20Release.htm.

242. Problems with court-ordered whole-school reform have also been documented elsewhere. In a student note on whole-school reform, David Engstrom wrote, “Court-supervised whole-school reform . . . carries with it a considerable risk of implementation that is too rapid, incomplete, or focused more on satisfying courts than the long-term organizational development of schools, or boosting student achievement.” David M. Engstrom, Note, *Post-Brown Politics, Whole-School Reform, and the Case of Norfolk, Virginia*, 12 STAN. L. & POL’Y REV. 163, 173 (2001).

243. WSR STUDY, *supra* note 148. Researchers interviewed principals, teachers, facilitators, and school management team chairs, distributed teacher questionnaires, and conducted in-depth budget analysis. *Id.*

244. *Id.* at vii.

245. *Id.* at 57.

inadequately involved in the model selection process,²⁴⁶ and school officials were frustrated with how little power the management structure of whole-school reform afforded them.²⁴⁷ As a result, whole-school reform lacked administrator and teacher buy-in, crucial elements for introducing any type of educational program or reform. Months after the models were introduced, school staff still exhibited only a limited understanding of what implementation actually entailed.²⁴⁸

The study also revealed that turnover and lack of coordination among developer staff, DOE employees, and district administrators made implementation considerably more difficult.²⁴⁹ Upon choosing an approved whole-school model, each elementary school was provided with outside "developer staff."²⁵⁰ Staff members were supposed to be an integral part of the implementation process, helping schools "to take an honest look at their practices and embrace beneficial changes."²⁵¹ High turnover rates among developer staff, however, spoiled this process. As Superintendent James Lytle explained, "if the staff that's coming to work with your organization changes every three months, all you're doing is reorienting people all the time; you're not really getting any help at all."²⁵² In addition, lack of coordination between DOE programmatic and fiscal personnel made the budgeting process virtually impossible. Schools received conflicting information about what items they needed to include in their budgets, as well as how much justification was necessary in order to receive requested funding for certain programs.²⁵³

Practical difficulties also hindered the establishment of court-mandated preschool programs. In *Abbott VI*, the court made it clear that high-quality preschool instruction entails well-trained, certified teachers.²⁵⁴ However, at the time *Abbott V* was decided, the entire state of New Jersey was experiencing a shortage of quality instructors. Schools everywhere, including those in the Abbott districts, were finding it impossible to attract enough certified teachers to educate the hundreds of thousands of preschool-age children filling their classrooms.²⁵⁵ Even if Governor Whitman had been more supportive of educational reform, Abbott districts would still have found it difficult to recruit

246. *Id.* at 56-57.

247. *Id.* at 61-63. More specifically, administrators felt that the DOE had been given too much power over classroom instruction. *Id.* at 62.

248. *Id.* at 56.

249. *Id.* at 58-61.

250. *Id.*

251. *Id.*

252. Lytle Interview, *supra* note 143.

253. WSR STUDY, *supra* note 148, at xi, 41.

254. *Abbott v. Burke* (Abbott VI), 748 A.2d 82, 88-91 (N.J. 2000).

255. Lustberg Interview, *supra* note 93; see also James Ahearn, Opinion, *Spelling Out Standards for Preschools*, BERGEN REC., Mar. 15, 2000, at L9 (explaining that there existed no untapped pool of teaching talent waiting to be put to work).

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adequate teaching staff. The ELC and the DOE were cognizant of the problem but were unsure of how to remedy it. The DOE identified “availability of sufficient staff who meet credential standards” as one of the biggest challenges facing district leaders.²⁵⁶

Furthermore, the existence of an established system of DHS-run day care facilities made implementation a more delicate, and ultimately time-consuming, undertaking. As retired New Jersey Supreme Court Justice Daniel O’Hern explained:

The nursery school industry had a life of its own when we came to it. We would have been displacing the very people whom we were in a sense trying to help—inner city men and women who were working in that industry. Certainly a period of transition and understanding was needed to bridge a change from unstructured nursery school programs to better-structured programs.²⁵⁷

Education advocates agreed with this sentiment. They wanted to ensure that *Abbott* preschoolers received a high-quality education, but at the same time they hoped to avoid “alienating long-time providers of child care services and the communities they serve[d].”²⁵⁸ In other words, they hoped to integrate DHS-program providers into the implementation process, rather than allowing the process to drive them away. Unfortunately, DHS resisted the idea of ceding its authority to the DOE and turf wars developed between the two agencies,²⁵⁹ thereby compromising districts’ ability to upgrade community-run preschools and delaying implementation.²⁶⁰

Logistical difficulties also influenced the pace of facilities construction and rehabilitation. While the Educational Facilities Construction and Financing Act provided ample funding for improving and expanding classroom space in the *Abbott* districts, it failed to establish the infrastructure necessary to carry out large-scale reform. As explained in Subsection V.A.4, the EDA and the DOE lacked the capacity to successfully coordinate the hundreds of projects requested by the *Abbott* districts.²⁶¹ In addition, some districts did not have any vacant land on which to build additional facilities, while other school districts had trouble obtaining available construction sites.²⁶² Furthermore, facilities projects generally lacked community buy-in. Successful implementation

256. Linda Brown Warren, Snapshot of the *Abbott* Preschool Program (on file with author).

257. Telephone Interview with Justice Daniel O’Hern, Retired Justice, New Jersey Supreme Court (Dec. 20, 2002) [hereinafter O’Hern Interview].

258. Warren, *supra* note 256.

259. *Id.* *Abbott* implementation created a large amount of disenchantment within the provider community. From a national perspective, community day care centers in New Jersey had large budgets. Block Interview (May 29, 2003), *supra* note 237. However, when forced to comply with the *Abbott V* mandate, money became tight. *Id.*

260. Districts also lacked the local and state capacity necessary to meet the technical assistance, assessment, evaluation, and data needs required for implementation. Warren, *supra* note 256.

261. See *supra* text accompanying notes 164-172.

262. Educ. Law Ctr., Status of the *Abbott* School Construction Program (June 2003) (on file with author).

depended upon the community's involvement in the site selection, planning, and design of new schools.²⁶³ However, most districts failed to establish a process whereby local stakeholders could voice their opinions and concerns.²⁶⁴

C. District Capacity

In the *Abbott V* opinion, the court stated that district leaders had a vital role to play in carrying out the court's order and that even whole-hearted commitment on the part of state government leaders could not, on its own, lead to successful implementation. As the decision read, "Success for all will come only when the roots of the educational system—the local school districts, the teachers, the administrators, the parents, and the children themselves—embrace the educational opportunity encompassed by these reforms."²⁶⁵ The court further noted that whether the *Abbott V* mandate lived up to its potential to improve education depended on "a top-to-bottom commitment to ensuring that the reforms are conscientiously undertaken and vigorously carried forward."²⁶⁶

The years following *Abbott V* demonstrated that the degree to which district administrators embraced the possibility of educational reform had a direct impact on the success of implementation. Union City, widely regarded as the premiere Abbott district in terms of instructional improvement and achievement growth, was known to have bright, dedicated people working in its central office.²⁶⁷ As Assistant Commissioner MacInnes explained, people running successful districts like Union City, Perth Amboy, and West New York found the right formula: "They focused on coherence, they had an idea of how things should work from age three through grade twelve, and they had an idea of how you integrate and get people working towards the acceptance of literacy goals."²⁶⁸ Through their shared commitment to educational reform, their willingness to adopt change, and their coherent data-driven approaches, superintendents in these districts succeeded in making significant improvements in the education offered to students of all ages.²⁶⁹

In the Plainfield school district, local leadership was likewise instrumental in carrying out the court's mandate. Instead of depending on the State to drive implementation efforts, Superintendent Larry Leverett took reform into his own hands. As he put it, "Why should we lean on an institution that lacks the

263. Ponessa Interview (May 19, 2003), *supra* note 167.

264. *Id.*; see also Educ. Law Ctr., Guidelines for Community Input: School Construction Program Proposals for Guidelines for Community Input, at <http://www.edlawcenter.org/ELCPublic/AbbottSchoolFacilities/FacilitiesPages/EmergencyGuidelinesCommunityInput.htm> (last visited Apr. 19, 2004).

265. *Abbott v. Burke* (Abbott V), 710 A.2d 450, 474 (N.J. 1998).

266. *Id.*

267. MacInnes Interview, *supra* note 8.

268. *Id.*

269. *Id.*

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capacity to institute reform?”²⁷⁰ Leverett focused on increasing capacity at the classroom, school, district, and community levels. He made a significant investment in professional development and instituted accountability systems even though the State had not required them. Plainfield administrators also dedicated themselves to using education data to drive instructional decision-making.²⁷¹

Yet amidst these tales of success and dedication came stories of district leaders squandering *Abbott* money to benefit themselves and their patrons. As MacInnes explained, “Some districts are trying to reach the moon because of the opportunity of *Abbott* [while other] districts are apparently apathetic. They are happy to take the money and increase their salaries, but they haven’t shown any drive.”²⁷² A series of articles in the *Bergen Record* chronicled suspicions that the Garfield school district was using state money to increase the salaries of school board members.²⁷³ Passaic likewise received negative attention; local government leaders were accused of repeatedly transferring education funds to politically connected landlords.²⁷⁴ Camden was perhaps worst of all. According to Joan Ponessa, Camden “totally flopped” with respect to facilities improvement and did nothing in the way of creating a rational long-range facilities plan.²⁷⁵ A newspaper article in the fall of 2002 suggested that in order for Camden to improve the quality of its schools it needed to use *Abbott* construction money to create market-rate development that would bring back long-gone middle-class residents.²⁷⁶ However, with a “hopelessly inept school board” and a school system better characterized as a “patronage mill,” positive results were, at best, unlikely.²⁷⁷

The behavior of district leaders during the 2002-03 funding freeze further demonstrated that when left to their own devices, local educators were liable to make decisions that hindered the implementation process. At the beginning of

270. Leverett Interview, *supra* note 172.

271. *Id.*

272. MacInnes Interview, *supra* note 8.

273. See Giada Cardoletti, *Garfield Trustees Told Not to Spend*, BERGEN REC., Mar. 21, 2003, at L1 (“In 1999, a state investigation revealed 39 cases of nepotism. Nevertheless at least 12 more relatives of school board members were later added to the payroll.”); Giada Cardoletti, *State Team Leaving Garfield District*, BERGEN REC., Mar. 12, 2003, at L7; Shannon Harrington, *Garfield Trustees Hire Another Relative*, BERGEN REC., Jan. 24, 2001, at L1.

274. Josh Gohlke, *Preschool Lessons*, BERGEN REC., Apr. 22, 2001, at N1; Josh Gohlke, *State Probing Bank-Building Lease*, BERGEN REC., Feb. 13, 2001, at L1.

275. Ponessa Interview (Dec. 19, 2002), *supra* note 169.

276. Brent Staples, Editorial, *The Front Lines of School Reform: Sending Aid to a Corrupt Culture*, N.Y. TIMES, Nov. 3, 2002, § 4, at 12.

277. *Id.* The capacity problem did not go unnoticed by the ELC. At various points, Steve Block and others contemplated suing districts that had failed to implement the *Abbott* remedies. However, ELC leaders believed that it would be difficult to sue the districts for noncompliance absent a state legal framework that fully complied with the *Abbott* mandate. Thus the ELC focused its attention on correcting the legal framework, with the idea in mind that it might later have occasion to bring some of the *Abbott* districts to court. Block Interview (May 29, 2003), *supra* note 237.

the one-year hiatus, seventy-five schools abandoned their pre-established whole-school reform models in favor of models with no proven track record.²⁷⁸ According to Steve Block, these changes created a “political and financial disaster,” and prompted the ELC to oppose the State’s suggestion to continue the funding freeze for another year.²⁷⁹

Strong district leadership proved particularly pivotal given the Whitman Administration’s hostile attitude towards implementation. Although the State was given responsibility for approving budgets and preschool operational plans, the court explicitly provided districts with the right to challenge DOE decisions on appeal.²⁸⁰ If the government failed to follow through with its responsibilities, the appeals process provided the best, if not only, avenue for a district to fight for its entitlements under *Abbott V*. Few districts chose to take advantage of this opportunity, but those that did often succeeded in forcing the State to hand over more money or approve additional programs. As Richard Shapiro explained, “It’s just a matter of the squeaky wheel. Whoever kept pushing the bar might be able to get through.”²⁸¹ Aggressive district leadership also helped to overcome obstacles put in place by the EDA. Joan Ponessa found that certain district leaders refused to let bureaucratic inaction drive the pace of facilities improvement. Instead, they “pushed ahead and didn’t stand for any nonsense. They hired consultants or they had a superintendent who stayed totally on top of it. If a form wasn’t okayed they’d walk it over to the agency themselves.”²⁸² These districts were the first to succeed in getting construction projects underway.²⁸³

VII. PRIORITIES

The various political and practical obstacles surrounding *Abbott* implementation forced supporters of educational reform to prioritize certain pieces of the mandate over others. These priorities, in turn, impacted the course of implementation and played a large role in determining which pieces of the mandate were successful at different points during the implementation process. That key players were forced to make difficult decisions is implicit throughout this Essay. Nonetheless, given that their choices are an integral part of the post-*Abbott V* story, they deserve more explicit attention.

278. Block Interview (May 29, 2003), *supra* note 237.

279. *Id.*

280. *Abbott v. Burke (Abbott V)*, 710 A.2d 450, 472-73 (N.J. 1998).

281. Shapiro Interview, *supra* note 171.

282. Ponessa Interview (Dec. 19, 2002), *supra* note 169.

283. *Id.*

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A. ELC Priorities

During the first several years following *Abbott V*, the ELC made a strategic decision to aggressively pursue implementation of high-quality preschool programs. Although there were problems with implementation of the entire mandate, the ELC recognized that it could not immediately bring every issue to the court's attention.²⁸⁴ The ELC chose to initially focus on preschool because it believed the court "would be most interested in what was happening to the littlest kids."²⁸⁵ The evidence available at the time overwhelmingly showed that providing high-quality preschool had a huge impact on educational achievement later in life.²⁸⁶ Given the data, the ELC reasoned that the court would be hard pressed to find that day care standards satisfied the *Abbott V* mandate.²⁸⁷ Thus, in both *Abbott VI* and *Abbott VIII*, the ELC only raised issues pertaining to the implementation of preschool programs.

The ELC again focused its energies on early childhood education when striking a deal with the McGreevey Administration regarding the 2002-03 funding freeze. The ELC believed that the court wanted to limit any further involvement in *Abbott* implementation—that the justices wanted the parties to work out problems between themselves.²⁸⁸ The ELC also suspected that because of the state's fiscal crisis the court was likely to sign off on a funding freeze, even absent ELC support.²⁸⁹ Rather than fight the proposed funding cuts for whole-school reform and supplemental programs, the ELC therefore leveraged the situation and agreed to support the funding freeze if the Administration maintained parity funding and increased early childhood education funding by \$140 million.²⁹⁰

The ELC was successful in hedging its bets. In both *Abbott VI* and *Abbott VIII*, the court found that the State had failed to establish high-quality preschool programs as required under *Abbott V*.²⁹¹ Furthermore, the State agreed to meet the ELC's demands for increased preschool funding in exchange for a united front in requesting a funding freeze from the court in *Abbott IX*. This series of decisions had a positive impact on preschool implementation: The court's rulings gave the ELC ammunition to prod the Whitman Administration into compliance, and the additional money from the McGreevey Administration enabled Abbott districts to follow through with their preschool plans. However,

284. Block Interview (Dec. 17, 2002), *supra* note 93.

285. *Id.*

286. *Id.*

287. *Id.*

288. Block Interview (May 29, 2003), *supra* note 237.

289. *Id.*

290. *Id.* The ELC also supported the funding freeze for substantive reasons related to the efficacy of whole-school reform. See *supra* text accompanying notes 217-219.

291. See *supra* text accompanying notes 120-123 and 136-138.

the ELC's initial emphasis on early childhood education meant that it was not until much later, when the court ordered mediation between the State and the ELC in the spring of 2003, that problems related to K-12 education began to receive meaningful attention.

The ELC's calculated decisions also affected facilities construction and rehabilitation. Two problems arose while the legislature was debating the contours of a funding bill: the amount of time it was taking for the houses to reach an agreement and the complex, centralized decision-making process supported by a majority of lawmakers.²⁹² The ELC was aware of both issues, but chose to focus on the "threshold issue," the legislature's tardiness in approving funding, rather than on "implementation issues."²⁹³ As Steve Block explained, the ELC was extremely concerned that "shovels were supposed to be in the ground," and yet appropriate funding was still unavailable.²⁹⁴ ELC staff believed it was better to get funding approved as quickly as possible and to deal with the substantive details of the legislation later.²⁹⁵ As a result, the ELC did not lobby for localized control of construction projects,²⁹⁶ allowing the legislature to create bureaucratic barriers to reform. The establishment of the SCC in 2002 ameliorated some of the substantive problems with the Educational Facilities Construction and Financing Act, but that was not until two years after the legislation was enacted.

B. Priorities of the McGreevy Administration

The course of implementation was also affected by the priorities of the McGreevey Administration. As described in Section VI.A, the New Jersey economy took a turn for the worse around the same time McGreevey entered the governor's office. The budget crisis prevented the State from addressing all of the problems facing the Abbott districts and forced administrators to decide which parts of the *Abbott V* mandate demanded immediate attention. The fact that preschool education and parity funding continued to receive state support, while funding for whole-school reform and supplemental programs was put on hold, reflected in part the new Administration's outlook on educational efficacy. MacInnes believed that the best way to improve urban education was to focus on literacy and high-quality preschool programs.²⁹⁷ He worried that whole-school reform would be detrimental to his goals and that supplemental programs would just get in the way.²⁹⁸ As MacInnes explained, "if you don't

292. See *supra* Subsection V.A.4. and Section V.C.

293. Block Interview (May 29, 2003), *supra* note 237.

294. *Id.*

295. *Id.*

296. *Id.*

297. MacInnes Interview, *supra* note 8.

298. *Id.*

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have a laser-like focus on literacy, it will never get done.”²⁹⁹ He also disagreed with the notion that supplemental programs were the key to remedying disadvantage. As he said, “focusing on literacy will create more productive members of society, and *that* will eliminate poverty.”³⁰⁰ The Administration’s focus on preschool education, together with the ELC’s priorities, helps to explain how the one-year funding freeze came about.

C. School District Priorities

While the choices of the ELC and the McGreevey Administration affected implementation across Abbott districts, the priorities of particular district leaders likely affected the success of implementation in individual districts. For example, Superintendent Larry Leverett believed that the Plainfield district lacked the capacity to make all of the curricular changes necessary to improve its students’ life opportunities.³⁰¹ As a result, educators in Plainfield were forced to make difficult choices. They ultimately decided to focus on district-wide literacy, and they succeeded in improving literacy rates. However, attention to math skills consequently dropped off, and math scores throughout the district remained abysmally low.³⁰² Furthermore, whether districts succeeded in securing more funding from the state administration was in certain cases a function of whether superintendents believed that going through the appeals process was the best use of their energy. As Richard Shapiro explained, “There’s only so much fight. The districts have to administer the schools, and there’s a point at which the fight becomes less important than doing what you have to do on a daily basis.”³⁰³

CONCLUSION

In a note on school finance reform, one commentator wrote, “[T]hose who advocate substantive remedies typically ignore implementation problems. They argue as if the fact that effective methods for educating poor students is known—itself a dubious proposition . . . —means that all courts need to do is order schools to adopt those methods. Would that it were so easy.”³⁰⁴ New Jersey’s experience implementing the *Abbott V* mandate demonstrates the

299. *Id.*

300. *Id.* (emphasis added).

301. Leverett Interview, *supra* note 172.

302. *Id.*

303. Shapiro Interview, *supra* note 171.

304. Aaron Saiger, Note, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 COLUM. L. REV. 1830, 1841–42 (1999) (citations omitted); see also Engstrom, *supra* note 242, at 174 (“The most difficult battles in the urban education arena are fought at the implementation and evaluation stage. This is an important point given that current debates are dominated by ideological perspectives, earnest discussion of radical alternatives to traditional models of school organization, and what is too often an uncritical faith in reform panaceas.”).

inherent difficulties of putting educational reforms into practice. Educators had high hopes that the substantive nature of the *Abbott V* mandate would allow them to avoid many of the obstacles that had hindered previous reform efforts. Instead, they faced many of the same obstacles, as well as a host of new problems. The events that unfolded in the years following *Abbott V* are instructive on a number of levels.

Most generally, New Jersey's experience demonstrates both the promises and limitations of school finance litigation. The New Jersey Supreme Court was, and continues to be, uniquely aggressive and far-sighted in its treatment of school funding. It has ordered the most intensive and expansive reforms of any state court and was the first court to demand that a thorough and efficient education include high-quality preschool for three-year-old children. The court has also prodded the State to do a little more, and in some instances a lot more, to address the special needs of disadvantaged children. The *Abbott V* mandate successfully increased state funding for *Abbott* preschool programs—albeit by less than education advocates would have liked—and resulted in facilities legislation more ambitious than any of its kind elsewhere in the country.

At the same time, New Jersey's experience suggests that judicial opinions alone are insufficient to sustain substantial educational reform. While mandates along the lines of *Abbott V* minimize the role of governors and legislators in crafting actual remedies, court orders, regardless of their specificity, allow for some degree of interpretation. By twisting around the court's words, the Whitman Administration succeeded in delivering far less than the court had intended. In addition, even substantive remedies require adequate funding—something only the State can provide. Thus in the absence of political support, educators are bound to have trouble implementing even detailed, substantive remedies.

Furthermore, reform efforts require more than state-level political will. Even if lawmakers are dedicated to helping low-income communities, reform is a complex, time-consuming process. It requires coordination and cooperation among different schools, agencies, and levels of government.³⁰⁵ It is also driven by general variables, such as the state of the economy and the supply of certified teachers, which are not easily influenced by education policy. Finally, successful implementation depends upon the participation of capable district leaders as well as the dedication of state actors.

This is not to suggest that New Jersey's experience should be regarded as a failure. Although *Abbott* districts have a long way to go in fully complying with the court's mandate, their story is not yet complete. Aggressive district

305. Other commentators have advanced this idea as well. See, e.g., Engstrom, *supra* note 242, at 166 ("Because the public school system is a complex bureaucracy that depends on a high degree of synchronization, a chronic lack of coordination among key actors, however slight, can impair performance.").

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leaders, ELC staff, and education advocates in the McGreevey Administration remain committed to improving educational opportunities for students in the Abbott districts. Their success will depend, as it has in the past, on the ability of key players to work together to implement the court's remedy.

