



# Education Law Center

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Alfred T. McNeill, Chief Executive Officer  
New Jersey School Construction Corporation  
PO Box 991  
Trenton, New Jersey 08625-0991

Re: Proposed Rules Governing Construction of Community  
Provider Projects

Dear Mr. McNeill:

The following comments on proposed N.J.A.C. 19:36, entitled “Community Early Childhood Education Facilities,” are submitted by Education Law Center (ELC) on behalf of our clients, the Abbott Plaintiffs – 350,000 pre-K to grade 12 students attending school in Abbott districts. ELC serves as counsel to these children in Abbott v. Burke. In addition to these comments, ELC adopts and fully incorporates herein the comments submitted by the Association for Children of New Jersey.

The proposed regulations violate the plain language and intent of the Educational Construction and Financing Act, N.J.S.A. 18A:7G-1 et seq., (the “facilities law” or “Act”), and in the process, thwart the constitutional underpinnings of the Act. Any regulations implementing the provisions of the facilities law relating to the Abbott school districts must be guided by the Legislature’s intent to comply with the Supreme Court’s remedial directives in the Abbott v. Burke case. The Court found that intensive

preschool is an essential educational program for children in the special needs districts, Abbott v. Burke , 119 N.J. 287, 373 (1990) (Abbott II); Abbott v. Burke, 149 N.J. 145, 183 (1997) (Abbott IV), and directed the State to provide well-planned, high quality preschool education for all three- and four-year old children residing in the Abbott districts. Abbott v. Burke, 153 N.J. 480 (1998) (Abbott V). The Court accepted the State’s commitment “to prioritize construction projects that will facilitate the full implementation of early childhood programs,” id. at 524, and directed the State to “secure funds to cover the costs of ... providing the space necessary to house Abbott students adequately.” Id. at 527. The Court specifically found that collaboration between districts and community providers of childcare would be necessary for the State to meet its constitutional obligation to provide preschool for all Abbott children. Abbott v. Burke, 163 N.J. 95 (2000) (Abbott VI) *citing* Abbott V, 153 N.J. at 508. Further, the Court rejected any attempt by the State to allow a “two-tiered” preschool system in which district-run schools provide better quality services than community providers, and ordered the State to eliminate any disparities between district-run and community preschool programs. Id. at 111.

Accordingly, legislation and regulations relating to construction of Abbott preschool facilities must comply with and further the constitutional mandate for the provision of early childhood education programs for all children in the Abbott districts. Further, any state action relating to Abbott preschools must comport with the Court’s directives to (1) prioritize construction of Abbott preschool facilities, and (2) eliminate disparities between district-run and community-based preschool programs. By its plain

language, the facilities law furthers the constitutional mandate for construction of Abbott preschool facilities for both district-run and community provider programs. The proposed regulations, on the other hand, misconstrue the statutory language and undermine the constitutional purpose of the Act in the following ways:

**N.J.A.C. 19:36-1.1**: This rule, containing the statement of purpose and applicability of the regulations, limits State funding for community provider projects to “facilities owned and operated by community providers.” The rule is based on a misinterpretation of section 7G-3 of the school construction law, which defines a “community early childhood education facilities project” to mean:

[A] school facilities project consisting of facilities in which early childhood education programs are provided to 3 or 4-year old children under contract with the ECPA district but which are owned and operated by the a community provider.

The statutory language describing a community facility as one owned and operated by the provider is not meant as a criterion for funding eligibility, but rather as a prospective description of the status of the facility once construction is completed. A community provider’s ownership of the facility at the end of the construction project is what distinguishes the project from a district project.

Reading the statute as a whole, it is clear that the language in section 7G-3 is prospective: section 7G-5(s)(1) provides that a district may include a community provider in its long range facilities plan if, among other things, “the community provider *is or shall* provide early childhood education programs for the district.” [emphasis added]. Section 7G-3 defines a community early childhood education facility as one “in which early childhood education programs *are* provided ...,” yet it is clear from 7G-

5(s)(1) that the programs do not have to be provided before the district includes the community provider's facility in its long range plan.

Furthermore, had the Legislature intended to limit facilities funding to only projects for which the community provider already owns and operates the facility, it would have done so in no uncertain terms in clear language in section 7G-5(s)(1), which contains the criteria allowing a district to include a community provider in its long range facility plan (e.g., evidence that the provider is licensed by DHS).

Finally, and most importantly, given the fact that approximately 70% of Abbott preschool children are currently enrolled in community provider facilities, and that NJDOE estimates that approximately 60% of these facilities are leased, an interpretation of the Act barring construction funding for providers who presently lease their facilities would relegate a large segment of Abbott preschool children to inadequate and unsafe facilities. This result would clearly violate the Supreme Court's directive that the State prioritize construction of facilities to adequately house Abbott programs and its prohibition on the maintenance of a two-tiered system of Abbott preschools.

**N.J.A.C. 19:36-1.3**: The definition of "community early childhood education facilities project" contained in this rule illegally limits construction projects to "rehabilitation of or an addition to existing facilities in which early childhood education programs are provided." The proposed regulation conflicts with the definition of the same term in the facilities law, which clearly allows, among other things, funding for site acquisition and new construction. Pursuant to section 7G-3, a "community early

childhood education facilities project means *a school facilities project* consisting of facilities in which early childhood education programs are provided ... ." [emphasis added]. Under section 7G-3, a "school facilities project means the acquisition, demolition, construction, improvement, repair, alteration, modernization, renovation, reconstruction or maintenance of all or any part of a school facility ... and shall also include site acquisition ... ." To comply with the Act and the constitutional requirements of the Abbott rulings, the proposed regulations must adopt the full definition of "community early childhood education facilities project" to include "a school facilities project," as set forth in the Act.

In addition to adopting regulations on community provider facilities that comply with the facilities law and the Abbott mandates, the State must also adopt preschool facility standards and standards for districts to undertake a comprehensive needs assessment and planning process for preschool facilities that includes both district and community provider needs. The State must take these actions if it is to meet its obligation to provide safe and adequate preschool facilities for all Abbott children.

Thank you for considering these comments.

Sincerely,

Ellen Boylan, Esq.