

ROSALIE BACON, et al.,  
Petitioners,

v.

NEW JERSEY STATE DEPARTMENT  
OF EDUCATION,

Respondent.

BEFORE THE STATE BOARD OF  
EDUCATION OF NEW JERSEY  
DOCKET NO. 4-03

Agency Docket Nos.  
53-3/98A THRU 53-3/98J  
53-3/98M THRU 53-3/98P  
53-3/98R THRU 53-3/98T

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BRIEF OF AMICUS CURIAE EDUCATION LAW CENTER

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## STATEMENT OF INTEREST

The Education Law Center ("ELC") is a private, non-profit New Jersey corporation dedicated to the pursuit of equal educational opportunity for New Jersey's children, particularly poor children living in the State's urban areas. Pursuant to this charge, ELC represents the lead plaintiffs in the ongoing Abbott v. Burke litigation, and has done so since the suit was initiated in 1981. See, e.g., Abbott v. Burke, 170 N.J. 537 (2002) ("Abbott VII"); Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V"); Abbott v. Burke, 100 N.J. 269 (1985) ("Abbott I").

This matter requires the State Board to address the standards that govern whether a school district will be recognized as a special needs district. Given ELC's over twenty-year representation of the lead Abbott plaintiffs, this case presents issues that are of vital concern to ELC and with which ELC is extensively familiar. Indeed, it is precisely because of ELC's expertise in dealing with matters pertaining to special needs eligibility that its participation will assist the State Board in resolving the issues presented in this case.

## PRELIMINARY STATEMENT

In Abbott v. Burke, 119 N.J. 287 (1990) ("Abbott II"), the New Jersey Supreme Court classified a group of districts as "special needs:" districts that were too beset by the aggregated effects of severe poverty and deep-rooted educational failure to provide a constitutionally adequate education to their students. Although the Court's opinion focused on a number of precipitants of constitutional inadequacy, the designation of the particular special needs districts was predicated on two primary criteria: the degree of poverty and socio-economic disadvantage in the district; and the degree of substantive failure with respect to the education provided in the district. Moreover, while its analysis focused specifically on the urban districts then petitioning for relief, the Court explicitly left open "the possibility that at some other time a different record might lead to the conclusion" of constitutional inadequacy in non-urban districts. Id. This appeal presents precisely that question.

In identifying the socio-economic deficiencies that give rise to special needs status, the Court focused, as a threshold matter, on the State's District Factor Groups ("DFGs"). Finding that the DFGs provided a functional first-cut assessment of a district's degree of socio-economic disadvantage, the Court proceeded to identify additional criteria that would yield the "poorest and most needy municipalities in the State." Id. at 341. In this analysis, the Court primarily utilized the factors

contained in the State's "urban-aid" statute, which makes available supplemental resources to poor, primarily urban, localities faced with the challenges of concentrated socio-economic disadvantage.

In addition to these indicators of poverty, the Court also considered the degree of substantive educational failure. Because the Abbott II Court then lacked guidance from the State on the content of a constitutionally adequate education, the Court examined key educational indicators, particularly test scores and dropout rates. See id. at 357-72. However, by the time of the Court's ruling in Abbott v. Burke, 149 N.J. 145 (1997) ("Abbott IV"), the State had enacted the Comprehensive Educational Improvement and Financing Act ("CEIFA"), N.J.S.A. 18A:7F-1 et seq., which provided a specific definition of the substance of a constitutionally sufficient thorough and efficient education. In Abbott IV, the Court accepted CEIFA's Core Curriculum Content Standards as an adequate delineation of the constitutional standard, and therefore recognized those standards, along with the panoply of standardized tests that measure performance on these standards, as the constitutional measure of educational adequacy. Id. at 166-68.

Accordingly, these constitutional benchmarks must inform the State Board's review of Petitioners' claims for special needs status. Indeed, these benchmarks are consistent with the standard applied below by the Administrative Law Judge. See Bacon v. New Jersey Dep't of Educ., OAL Docket No. EDU 2637-00,

Decision of Administrative Law Judge, at 8 (September 23, 2002), available at <<http://www.state.nj.us/njded/legal/>> (providing that the appropriate standard is based primarily on whether districts present a "grim fusion" of socio-economic deprivation and educational failure) (hereinafter "ALJ Dec.").

However, instead of relying upon these well-settled principles, the Commissioner in his decision chose an approach directly antithetical to the Court's holdings in Abbott II and IV. While the Court's standard focuses directly on the level of socio-economic need and educational failure in the petitioning district, the Commissioner's standard, on the other hand, focuses on whether CEIFA is an adequate statutory mechanism to address a district's educational difficulties. See Bacon v. New Jersey Dep't of Educ., No. 50-03, Decision of Commissioner of Education, at 142 (February 10, 2003), available at <<http://www.state.nj.us/njded/legal/>> (hereinafter, "Comm. Dec."). This standard completely subverts the Court's holdings in Abbott II and IV, and therefore must be rejected in favor of one, as proposed by amicus curiae, based upon direct indicia of the extent of socio-economic deprivation and educational failure in the districts at issue.

For these reasons, which are developed and discussed more fully below, amicus curiae respectfully submits that the State Board should reverse the Commissioner's decision, and apply the special needs eligibility criteria proposed by amicus curiae,

specifically derived from the Court's controlling opinions in Abbott II and IV.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Amicus curiae Education Law Center adopts the Statement of Facts and Procedural History set forth in Petitioners' Brief.

## ARGUMENT

### **I. THE STANDARDS ARTICULATED BY THE NEW JERSEY SUPREME COURT IN ABBOTT II AND ABBOTT IV GOVERN SPECIAL NEEDS ELIGIBILITY DETERMINATIONS.**

In Abbott II, the Supreme Court held that the confluence of a set of identified social, economic, and educational factors produced an environment in which the provision of a thorough and efficient education, within the meaning of the New Jersey Constitution, was effectively impossible. The Court found that school districts afflicted by severe socio-economic disadvantage were, by and large, "just too poor to raise the money" necessary to provide a constitutionally adequate education to their children. Id. at 321. Furthermore, the Court also found that the interface of such levels of poverty with entrenched and systemic educational failure created a milieu in which "there is no likelihood of achieving a decent education tomorrow, in the reasonable future, or ever." Id. Based primarily on this two-fold analysis of poverty and educational failure, the Court proceeded to identify those districts eligible for special needs remedies.

In identifying the kinds of socio-economic conditions that give rise to special needs status, the Court utilized the State's District Factor Groups ("DFGs"), along with more specific measures of poverty and low property wealth. With respect to indicators of substantive educational failure, the Court assessed a variety of criteria, including district performance on state-required standardized tests and dropout

rates. As discussed more fully below, these factors, derived from the Supreme Court's controlling analyses in Abbott II and Abbott IV, should govern the State Board's consideration of Petitioners' claims for special needs status.

**A. Intense Socio-Economic Disadvantage is a Prerequisite for Special Needs Status.**

1. Districts Must Fall Within Either DFG A or DFG B to be Eligible for Special Needs Status.

In order to identify those school districts with economic disadvantages that impede their attempts to provide a thorough and efficient education, the Abbott II Court focused, as a threshold matter, on the State's DFG classifications. Id. at 338. The DFG classifications, first promulgated by the DOE in 1974, are designed to capture a district's socio-economic status and, as such, represent indicia of comparative levels of poverty and wealth. Id. The DOE references these groupings in evaluating the curricular and substantive performance of school districts, and the Court in Abbott II found that the classifications implicitly recognize the limits that poverty places on the educational performance of disadvantaged districts. Id. at 339.

At the time of Abbott II, DFG classifications were determined through a numerical ranking incorporating the following socio-economic criteria: 1) per capita income; 2) occupation level; 3) education level; 4) percent of residents below the poverty level; 5) average number of persons per

household; 6) urbanization; and 7) unemployment. Id. at 338.<sup>1</sup> Based upon these factors, the DOE assigned each school district in the State to one of ten groups, ranging on a continuum from the most disadvantaged districts -- those in DFG A -- to the most privileged districts -- those in DFG J. Id. at 339-39.

Thus, the DOE itself recognizes the relationship of socio-economic status to educational outputs through its use of DFG status to evaluate the performance of districts. Accordingly, the Court in Abbott II determined that the DFG criteria represent a reliable assessment of the indicators of poverty and need. On this basis, the Court concluded that DFG A and B status is an appropriate initial cutoff with respect to special needs eligibility. Id. at 341-42. Specifically, the Court found that, among the DFGs, districts in DFGs A and B were most susceptible to the kinds of social and economic harms that might trigger the need for special needs status, and therefore held that a district must fall within either DFG A or DFG B to be eligible for special needs remedies. Id.

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<sup>1</sup> The current DFG criteria have been modified slightly. These criteria do not incorporate urbanization factors, and instead focus entirely on direct indicators of poverty and need. Specifically, the DFG classification is currently determined by an evaluation of: 1) the percentage of the population with no high school diploma; 2) the percentage of the population with some college training; 3) occupation; 4) population density; 5) income; 6) unemployment; and 7) poverty. See William L. Librera, Commissioner of New Jersey State Department of Education, Designation of Abbott Districts: Criteria and Process (April 11, 2003) at 4, available at <[www.state.nj.us/njded/abbotts/criteria.htm](http://www.state.nj.us/njded/abbotts/criteria.htm)>.

Accordingly, as a threshold matter, a district must fall within either DFG A or DFG B to be eligible for special needs status.

2. Non-Urban Districts Must Also Have a High Concentration of Poverty and Lack Municipal Capacity to Provide a Thorough and Efficient Education.

While Abbott II recognizes classification in DFG A or DFG B as a necessary precondition for special needs status, the decision also made clear that DFG classification is insufficient by itself to establish such status. Thus, while the DFG classifications significantly narrow the range of eligible districts, these classifications do not identify with sufficient precision those districts with socio-economic problems so acute as to habitually frustrate their attempts to provide a constitutionally adequate education. With the goal of finding the "poorest and most needy municipalities in the state," Abbott II, 119 N.J. at 341, the Court identified additional indicators of poverty and wealth with which to gauge the depth of socio-economic disadvantage in DFG A and DFG B districts. Specifically, beyond the DFG criteria, the Abbott II Court focused principally on the degree to which poverty is concentrated in the district and the extent to which the district's municipality has the fiscal capacity necessary to generate the resources necessary to provide a thorough and efficient education. Id. at 341-42.

In determining the specific evidentiary yardstick with which to assess these supplemental criteria, the Court utilized the guidelines incorporated into the State's "urban aid" statute, N.J.S.A. 52:27D-178. Id. at 340-42. Generally, to qualify as an urban aid district, a municipality must contain at least 250 children whose families receive welfare; it must have public housing within its borders; and either its equalized tax rate must exceed State per capita averages or its property valuation must be less than State per capita averages by specified amounts. Abbott II, 119 N.J. at 341-42; see also N.J.S.A. 52D:27D-178 (2003).<sup>2</sup> Because these guidelines were dispositive of the Abbott II Court's determination of the most needy DFG A and B urban districts, Abbott II, 119 N.J. at 341-42, they provide the starting point for setting the standards applicable to special needs determinations for non-urban districts.

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<sup>2</sup> Urban aid classifications were developed by the Department of Community Affairs, and subsequently adopted by DOE, for the purpose of identifying large, urban municipalities in need of additional resources "to maintain and upgrade municipal services." N.J.S.A. 52:27D-179 (2003). These additional state funds were deemed necessary given the extent to which the tax base of recipient municipalities was simply overwhelmed by the confluence of pressing social and economic needs and a depressed tax base. Id.; Abbott II, 119 N.J. at 340-41. The urban aid classification therefore was of particular consequence to the Court in Abbott II, as it is designed precisely to identify those urban districts in need of additional state resources to provide basic government services. See id.; N.J.S.A. 52:27D-179 (2003).

a. Non-Urban Districts Must Have a Low-Income Concentration of At Least 40%.

The urban aid criteria shed substantial light on the socio-economic status of urban communities. However, they fail to capture the extent of socio-economic disadvantage in the non-urban context. Specifically, the urban aid statute essentially exempts large and highly dense municipalities from its welfare requirement, see N.J.S.A. 52:27D-178 (2003) (providing that a municipality containing more than 7,000 residents per square mile, and more than 20,000 residents overall, is exempted from the welfare requirement when its equalized valuation per capita is less than the State's by at least \$4,500), and applies its public housing requirement only to those municipalities containing more than 15,000 residents, see id.<sup>3</sup> As is obvious, these urban-focused criteria simply are unable to serve as benchmarks of the socio-economic status of non-urban communities.

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<sup>3</sup> Thus, with respect to poor rural and suburban municipalities, many of which -- like all of the petitioning districts here -- contain 15,000 residents or less, the sole direct indicator of poverty under the urban aid statute is whether the municipality contains at least 250 children who receive welfare. While this fact is certainly relevant to the special needs determination, it should not act as the sole determinant thereof; nor does Abbott II hold that this solitary fact, even when coupled with municipal overburden findings, triggers special needs status for DFG A and B districts. The urban aid statute's poverty indicators, therefore, are largely immaterial to localities populated by less than 15,000 residents.

Because the urban aid statute's indicia of poverty are fundamentally inapplicable to non-urban districts, the State Board must look to equivalent criteria that identify the "poorest and most needy municipalities" in DFGs A and B. Abbott II, 119 N.J. at 341. Amicus curiae respectfully submit that a non-urban district with a low-income concentration of 40% as measured by eligibility for the federal free lunch program is a high poverty district for special needs purposes.

The free lunch benchmark is a nationally recognized indicator of poverty and socio-economic need in the educational context. See, e.g., National Center for Education Statistics, Indicator 11: Poverty and Student Achievement (2002) (recognizing the percentage of children receiving free lunch as the primary measure of poverty in public schools). Free lunch qualification is directly correlated to the recipient family's level of poverty, as qualification requires that a child's family make no more than 130% of the poverty level. See United States Department of Agriculture, National School Lunch Program -- Fact Sheet, available at <<http://www.fns.usda.gov/cnd/Lunch/AboutLunch/AboutNLSP.htm>> (August 2002).

Moreover, New Jersey not only recognizes the free lunch measure as a primary benchmark of socio-economic disadvantage, but establishes a 40% concentration of free-lunch students as

the district tipping point for the debilitating effects of poverty on educational outcomes. Specifically, CEIFA provides supplemental funding in the form of Early Childhood Program Aid (hereinafter "ECPA") and Demonstrably Effective Program Aid (hereinafter "DEPA") to those districts with high concentrations of impoverished families. See N.J.S.A. 18A:7F-16 (2003) (providing ECPA standards); N.J.S.A. 18A:7F-18 (2003) (providing DEPA standards). ECPA funds provide additional resources for full-day kindergarten, preschool classes, and other early childhood services, see N.J.S.A. 18A:7F-16 (2003), while DEPA funds are earmarked toward the enhancement of instructional, governance, and health and social service related programs, N.J.S.A. 18A:7F-18 (2003). Although both programs make supplemental funds available when a district has a 20% concentration of poor students, the programs provide their maximum level of aid when districts face a 40% concentration of low-income students. See N.J.S.A. 18A:7F-16 (2003); N.J.S.A. 18A:7F-18 (2003).

In sum, the State itself has recognized that districts containing at least a 40% concentration of students receiving free lunch face uniquely difficult socio-economic challenges in providing a constitutionally adequate education to their students, and are therefore in need of extraordinary resources

to do so.<sup>4</sup> This standard identifies those non-urban DFG A and B districts with high concentrations of poverty, as required by Abbott II for special needs status, and therefore should govern the State Board's consideration of Petitioners' claims.

b. Non-Urban Districts Must Lack Municipal Capacity to Provide a Thorough and Efficient Education.

The Court in Abbott II further determined special needs eligibility on the extent to which the district's municipality lacks the capacity to raise the additional revenues necessary to provide a constitutional education. See Abbott II, 119 N.J. at 346. In assessing this factor, the Abbott II Court again relied upon the criteria prescribed by the urban aid statute.

The urban aid indicia of low municipal capacity may be satisfied, generally, in one of three ways: 1) where the municipality's equalized property valuation per capita is less than the State's by at least \$2,000; 2) where the municipality's equalized tax rate exceeds the State's by \$.75 or more; or 3)

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<sup>4</sup> Moreover, the same evidentiary antecedents motivating the Court in Abbott II to utilize the "urban aid" statute to identify the most needy DFG A and B urban districts also apply to CEIFA's 40% threshold. The Court applied the urban aid criteria precisely because they were predicated upon a State assessment of the need for supplemental resources to respond to socio-economic disadvantage. See Abbott II, 119 N.J. at 340-41; see also supra note 2. ECPA and DEPA aid, similarly, are designed to afford additional State resources to those districts facing the challenges of educating children in a high-poverty context.

where a municipality has both a higher equalized tax rate than the State and a lower equalized valuation per capita than the State. See id. These factors, respectively, recognize that property values may be so low as to show a lack of municipal capacity;<sup>5</sup> tax rates may be so high as to demonstrate municipal incapacity independently; and even where neither property values nor tax rates are sufficiently strained to alone show incapacity, the aggregated effect of these factors may nevertheless suffice. Finally, in addition to these factors, which the Abbott II Court derived specifically from the urban aid statute, the Court also considered whether the municipality's valuation per pupil, as opposed to its valuation per capita, exceeded 134% of the State average. Id. at 324, 345.

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<sup>5</sup> While the urban aid statute, in fact, only permits districts whose populations exceed 25,000 to demonstrate municipal incapacity solely on the basis of exceedingly low property values, see N.J.S.A. 52:27D-178 (2003), that fact, derivative of the more urban-focused antecedents of the statute, is fundamentally immaterial here. The statute recognizes that low property wealth, by itself, may be sufficiently severe to generate municipal incapacity, and nothing in the urban aid statute or in Abbott II suggests that a similar conclusion does not apply in the non-urban context of smaller municipalities. Moreover, even the Commissioner himself has recognized that low property values, by themselves, may be evidence of municipal incapacity. See Librera, Designation of Abbott Districts: Criteria and Process at 5 (providing that a municipality lacks the capacity to provide a through and efficient education where its equalized property valuation per capita is at least 3% below the State's, although limiting this factor to districts with a 60% low-income concentration).

These standards, which governed the Abbott II Court's assessment of municipal capacity for urban districts, likewise control the requisite analysis for non-urban districts. Specifically, amicus curiae submit that non-urban districts should be required to meet one of the following indicators: the municipality's equalized property valuation must be well below the State average; the municipality's equalized tax rate must be well above the State average;<sup>6</sup> or the municipality's equalized property valuation must be less than the State's by any amount and the municipality's equalized tax rate must be higher than the State's by any amount. Upon making this showing, the municipality must demonstrate additionally that its per pupil property valuation is less than 134% of the State average.

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<sup>6</sup> As the Supreme Court recognizes, excessive tax rates are a "common characteristic" of urban municipalities, where population density combined with high poverty generates a "high level of governmental need" for municipal goods and services. Abbott II, 119 N.J. at 355. The demand for such governmental services is generally less acute in rural municipalities, where population density is lower. Thus, tax rate comparisons with the statewide average in a rural municipality with a high concentration of poverty may not necessarily reflect the capacity of such a municipality to provide the resources necessary for a constitutional education.

3. Non-Urban DFG A and B Districts, With a High Concentration of Poverty and a Lack of Municipal Capacity, Satisfy the Abbott II Standard for Special Needs Status.

As amicus curiae demonstrate above, in order to demonstrate the indicators of severe socio-economic disadvantage required in Abbott II, non-urban districts must demonstrate the following:

1. Classification as a DFG A or B district; and
2. A low-income concentration of at least 40% as measured by the percentage of children eligible for the federal free lunch program; and
3. Satisfaction of one of the three per capita indicators of municipal incapacity:
  - a) An equalized property valuation well below the State average;
  - b) An equalized tax rate well above the State average; or
  - c) An equalized property valuation lower than the State's and an equalized tax rate higher than the State's; and
4. An equalized valuation per pupil that is less than 134% of the State average.

**B. Consistent and Invariable Substantive Educational Failure is Required for Special Needs Status.**

In addition to its analysis concerning the extent of intense poverty and socio-economic need, the Abbott II Court was also driven by the character, persistence, and virtual inevitability of educational failure in the special needs

districts. See Abbott II, 119 N.J. at 321 ("The extent of failure is so deep, its causes so embedded in the present system, as to persuade us that there is no likelihood of achieving a decent education tomorrow, in the reasonable future, or ever."). As the Administrative Law Judge below fundamentally recognized, see ALJ Dec. at 8, it was the confluence of compelling socio-economic disadvantage and deep-rooted substantive educational failure that animated the Court's analysis in Abbott II. See Abbott II, 119 N.J. at 342, 346. Thus, along with the above indicators of severe socio-economic disadvantage, non-urban districts must also show educational failure in order to be eligible for special needs status.

In evaluating this factor, the district's performance must be assessed against the Core Curriculum Content Standards prescribed in CEIFA. In Abbott IV, the Supreme Court found that these standards adequately define the substance of a constitutionally sufficient education, see Abbott IV, 149 N.J. at 166-68, and these standards therefore are controlling here. Furthermore, because the State's regime of standardized tests -- namely the Elementary School Proficiency Assessment ("ESPA"), the Grade Eight Proficiency Assessment ("GEPA"), and the High School Proficiency Assessment ("HSPA") -- are specifically designed to measure student performance in relation to the curriculum standards, district results on these assessments must

drive the analysis of substantive educational adequacy. See Abbott IV, 149 N.J. at 162 (finding that the State's assessments are "essential to the success of the standards-based approach effectuated by CEIFA" because they are "designed to measure student progress toward achievement of the substantive standards").

Specifically, amicus curiae submits that the State's assessments, as prescribed by CEIFA, are now the appropriate means by which to assess the level of substantive education in a DFG A or B, high poverty district. See Abbott II, 119 N.J. at 370-71 (analyzing low performance of urban districts on State high school proficiency test). For such districts, evidence of persistently high "failure rates" on the CEIFA-required assessments serve as clear, unequivocal indicators of a "tragically inadequate" level of education and, therefore, special needs status under Abbott II and IV. Id. at 359, 367.

**C. Satisfaction of the Abbott II Standard Suffices for Special Needs Purposes, and Necessarily Informs that CEIFA is a Constitutionally Inadequate Remedy.**

As discussed above, the Abbott II factors define the socio-economic and educational content of special needs districts, and satisfaction of these factors therefore is determinative of special needs eligibility. Notwithstanding the bedrock principles set forth in Abbott II, the Commissioner has

concluded that CEIFA, not Abbott II, provides the foundation for special needs eligibility determinations. Specifically, the Commissioner concluded that -- in sharp contrast to the assessment of the confluence of severe socio-economic disadvantage and educational failure required under Abbott II -- the special needs inquiry examines whether "the district has specifically demonstrated that CEIFA has not addressed, and cannot address . . . proven deficiencies sufficiently to ensure that the district is able to provide the constitutionally required thorough and efficient education." Comm. Dec. at 142. The standard utilized by the Commissioner, however, is irreconcilable with the Supreme Court's holdings in Abbott II and IV, and therefore must be rejected by the State Board.

The Commissioner fundamentally misunderstands the Court's analysis in Abbott II, and the relationship of that analysis to the Court's holding in Abbott IV. In Abbott II, as discussed above, the Court described the socio-economic and educational antecedents of the kind of pervasive and unremitting substantive failure that generates special needs status. See supra. Satisfaction of the criteria described by the Court in Abbott II triggers the special needs conclusion, and the concomitant need for appropriate relief to alleviate the constitutional harm. Under Abbott II, therefore, special needs eligibility is not fundamentally a function of the statutory adequacy, or lack thereof, of any particular legislative framework, but of whether the objective indicators of poverty and educational failure are so severe as to generate a special needs determination.

Moreover, the Court in Abbott IV made clear that, with respect to the constitutional deficiencies afflicting special needs districts, CEIFA is a categorically inadequate remedy. See Abbott IV, 149 N.J. at 169. The Court specifically emphasized the failure of CEIFA to "link [its] content standards to the actual funding needed to deliver that content," id., and found that CEIFA did not specifically tie its funding mechanisms to the particular constitutional needs of special needs districts. On these bases, among others, the Court in Abbott IV concluded, as a threshold matter, that CEIFA is simply an insufficient remedy with respect to the constitutional deficiencies of special needs districts. Id.

That conclusion applies with equal force here. Once a district is shown to be a special needs district based upon its predicate satisfaction of the Abbott II factors, CEIFA, as per Abbott IV, is necessarily an insufficient remedy with respect to alleviating the underlying constitutional deficiencies. Accordingly, the State Board must reject the special needs standard used by the Commissioner below, and must instead apply the controlling standard articulated by the Supreme Court in Abbott II.

**II. WOODBINE TOWNSHIP, LAWRENCE TOWNSHIP, COMMERCIAL TOWNSHIP, FAIRFIELD TOWNSHIP, AND EGG HARBOR CITY MEET THE ABBOTT II AND IV STANDARDS FOR SPECIAL NEEDS ELIGIBILITY AND THEREFORE ARE ENTITLED TO AN APPROPRIATE REMEDY.**

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Based on the foregoing discussion of the socio-economic and educational factors that define special needs status, the

following petitioning districts are clearly entitled to special needs status under Abbott II and IV: Woodbine Township; Lawrence Township; Commercial Township;<sup>7</sup> Fairfield Township; and Egg Harbor City. All of these districts are DFG A or B districts; have concentrations of poverty in excess of 40%; lack municipal capacity based on property wealth well below the state average; and have persistently high rates of failure on the relevant state assessments. See Exh. A (showing the extent of socio-economic disadvantage in eligible districts); Exh. B (showing persistent educational failure on state assessments over several year period).<sup>8</sup>

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<sup>7</sup> Although Commercial Township withdrew its appeal subsequent to the filing of its brief, the State Board should nevertheless grant it special needs status given the compelling socio-economic and educational needs demonstrated by its satisfaction of the Abbott II and IV criteria. The State Board is ultimately responsible for Commercial's failure to provide a thorough and efficient education, and the failure to grant Commercial special needs status, notwithstanding its satisfaction of the Abbott factors, would constitute a breach of the State Board's constitutional duty. Moreover, the parents and children of Commercial Township are the real-party-in-interest with respect to the Township's failure to provide a thorough and efficient education, and therefore, at the very least, Commercial should be required to provide notice to district parents of its decision to withdraw its appeal, and parents should then be provided an opportunity to intervene in this appeal to protect their children's legal entitlement to a constitutionally sufficient education.

<sup>8</sup> Notably, four of the five petitioning districts entitled to special needs status under Abbott II and IV currently send their graduating eighth grade students to high schools in existing special needs districts. Specifically, Woodbine and Commercial send their high school students to Millville High School; and

While these districts are entitled to special needs status, the precise nature of the constitutional remedy to be applied requires further development of a record of the underlying needs of the particular district. See Abbott II, 119 N.J. at 386-87 (directing a remedy for urban districts based on the record of the need of those districts and their students then before the Court). Accordingly, the State Board should remand this matter to the Administrative Law Judge for a district-specific remedial determination.

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Lawrence and Fairfield send their students to Bridgeton High School.

**CONCLUSION**

For the reasons discussed above, the State Board should reverse the Commissioner's Decision, find that Woodbine Township, Lawrence Township, Commercial Township, Fairfield Township, and Egg Harbor City are entitled to special needs status, and remand for the issuance of a district-specific remedy.

Respectfully submitted,

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