50-03 (Link to OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu02637-00_1.html)

ROSALIE BACON, INDIVIDUALLY AND ON BEHALF OF G.P., Z.P., J.B., J.B., M.B., D.B., AND Z.H.;	:	
JOSEPH BARUFFI, INDIVIDUALLY AND ON BEHALF OF J.B.;	:	
ELIZABETH CULLEN, INDIVIDUALLY AND ON BEHALF OF T.C.;	:	
EDIE RILEY, INDIVIDUALLY AND ON BEHALF OF S.R.;	:	
ARNETTA RIDGEWAY AND CHRISTOPHER GLASS, INDIVIDUALLY AND ON BEHALF OF J.G., F.G., AND D.G.;	:	COMMISSIONER OF EDUCATION
AND	:	
BUENA REGIONAL, CLAYTON, COMMERCIAL, EGG HARBOR CITY, HAMMONTON, FAIRFIELD, LAKEHURST, LAKEWOOD, LAWRENCE, LITTLE EGG HARBOR, MAURICE RIVER, OCEAN, QUINTON, SALEM CITY, UPPER DEERFIELD, WALLINGTON, AND WOODBINE SCHOOL DISTRICTS,	:	DECISION
PETITIONERS,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning parents and school boards sought "special needs" status for their districts, alleging that the districts lacked the financial capacity to provide the constitutionally required thorough and efficient system of public education (T&E) and that the State's school funding law (CEIFA) did not act to remedy such deficiency.

ALJ found that five of the petitioning districts (Buena Regional, Commercial, Fairfield, Salem and Woodbine) had proven their claims and should be recommended for "special needs" status so as to enable them to provide T&E.

The Commissioner adopted the ALJ's conclusions with respect to the 12 districts found not to have prevailed, but, modifying the standard to be applied in this matter, rejected the Initial Decision as to Buena, Commercial, Fairfield and Woodbine. The Commissioner concurred that Salem City warranted "special needs" status.

February 10, 2003

OAL DKT. NOS. EDU 2637-00; EDU 2638-00; EDU 2639-00; EDU 2640-00; EDU 2641-00; EDU 2642-00; EDU 2643-00; EDU 2644-00; EDU 2645-00; EDU 2646-00; EDU 2649-00; EDU 2650-00; EDU 2651-00; EDU 2652-00; EDU 2654-00; EDU 2655-00; EDU 2656-00

AGENCY DKT. NOS. 53-3/98A; 53-3/98B; 53-3/98C; 53-3/98D; 53-3/98E; 53-3/98F; 53-3/98G; 53-3/98H; 53-3/98I; 53-3/98J; 53-3/98M; 53-3/98N; 53-3/98O; 53-3/98P; 53-3/98R; 53-3/98S; 53-3/98T

ROSALIE BACON, INDIVIDUALLY AND ON BEHALF OF G.P., Z.P., J.B., J.B., M.B., D.B., AND Z.H.;	:	
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ARNETTA RIDGEWAY AND CHRISTOPHER GLASS, INDIVIDUALLY AND ON BEHALF OF J.G., F.G., AND D.G.;	:	COMMISSIONER OF EDUCATION
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BUENA REGIONAL, CLAYTON, COMMERCIAL, EGG HARBOR CITY, HAMMONTON, FAIRFIELD, LAKEHURST, LAKEWOOD, LAWRENCE, LITTLE EGG HARBOR, MAURICE RIVER, OCEAN, QUINTON, SALEM CITY, UPPER DEERFIELD, WALLINGTON, AND WOODBINE SCHOOL DISTRICTS,	:	
PETITIONERS,	:	
V. NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Exceptions to the Initial Decision were filed by the respondent Department of Education (Department) and by the petitioning parents and boards of education

in six of the twelve districts found by the Administrative Law Judge (ALJ) not to have prevailed in their claim.[1] Replies to opposing exceptions were filed by the Department and by the parents and boards of education in five of the six districts submitting exceptions.[2]

Upon careful consideration of the Initial Decision, record and exceptions, the Commissioner determines, for the reasons set forth below, to adopt in part and reject in part the Initial Decision of the ALJ.

THRESHOLD ISSUES

Areas of Agreement

At the outset, the Commissioner notes that, as a general rule, the Initial Decision fairly and accurately reflects the testimony, evidence and argument on record,[3] and that the underlying facts in this matter, as opposed to the conclusions and inferences to be drawn from them, are seldom in dispute among the parties. The Commissioner further concurs with the ALJ that certain issues raised by the instant appeals are appropriately addressed in global fashion, prior to consideration of the proofs presented by individual districts, and that the districts' proofs must then be evaluated in light of the threshold determinations reached.

Having so stated, the Commissioner initially notes his concurrence with several of the preliminary assessments made by the ALJ and applied by him afterward. Specifically, the Commissioner concurs with the ALJ as follows:[4]

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[1] Clayton, Egg Harbor, Lakehurst, Lakewood, Lawrence and Maurice River. The remaining six districts continue to press their claims, but rely on prior submissions. As of November 2, 2002, Lakewood was represented by Michael I. Inzelbuch, Esq., who filed exceptions on behalf of the district.

[2] Clayton, Egg Harbor, Lakehurst, Lawrence and Maurice River.

[3] The ALJ determined, and the parties agreed, that the record of the first phase of hearing in this matter, other than items listed as exhibits in the Initial Decision at 115-32, need not go forward into the present phase.

[4] The parties did not take direct exception to these aspects of the ALJ's discussion, although they continued to press individual points reflecting their respective positions as taken before the ALJ and summarized in the initial decision.

Comparisons with Other Districts. Like the ALJ, the Commissioner rejects the notion that *Abbott II's* designation of DFG A & DFG B urban districts as those in need of remedy entitles any district "lining up" against characteristic Abbott statistics to make a comparable claim; this is particularly so where comparison is made to any one district or characteristic, or to any subset(s) of districts or characteristics, since the Abbotts themselves represent a relatively broad, and continually evolving, spectrum of need and circumstance.[5] Additionally, the Commissioner concurs that the mere existence of gaps in a district's current funding and resources vis-à-vis the Abbotts will not serve to establish deficiency, since Abbott funding is, as aptly stated by the ALJ, a remedial relief and not a "threshold of opportunity." In the same vein, the Commissioner concurs with the ALJ's rejection of the general use of IJ districts as a yardstick for expenditure levels, since, as concluded by the ALJ, most districts in the State would fall short in comparison, and, while the Court may have used IJ's as points of demonstration in its Abbott analyses, "ultimately it was conditions within the Abbotts themselves that gave rise to the constitutional violation" so that "the interior dilemma of each petitioning district" must determine its entitlement to relief.[6] (Initial Decision at 5-8; quotations at 7 and 8)

Reward & Punishment. The Commissioner adopts the ALJ's rejection of petitioning districts' argument that, to the extent that they appear to be operating at levels slightly above the Abbotts, they should not be "punished" because they have employed limited resources well and "done without" in less noticeable areas. Like the ALJ, the

[5] For example, in considering one petitioning district's claim, the ALJ rejected the argument that one of the Abbott districts had property wealth twice the petitioner's, finding that fact not dispositive since the Abbott district's status was not under scrutiny and the courts' broad approach to Abbott status was not fully compatible with isolated linkages. (Initial Decision at 73)

[6] The Commissioner does not entirely concur with the ALJ's specific valuation of certain types of data used to make such determination, as discussed in the Initial Decision at 18-24. However, the Commissioner recognizes that each such type contributes in some measure to an overall socioeconomic and educational characterization of a district, and he generally accepts the ALJ's use of the data on that basis.

Commissioner finds this argument unpersuasive: Special status of the type accorded the Abbott districts is a remedy, not a reward. The benefits of Abbott status are not an "extra," a prize to be coveted, but a "palliative for deeply entrenched misery," (Initial Decision at 8-9; quotations at 8); they constitute extraordinary relief, judicially ordered to address, outside of normal legislative and State policymaking processes, deprivation deemed so durable and substantial as to be constitutional in dimension. For the petitioning districts that have not prevailed herein, absence of Abbott status is not a punishment for their success, but rather a recognition of it.

Alignment with Core Curriculum Standards. The Commissioner concurs with the ALJ that an aligned curriculum, in and of itself, does not necessarily equate to provision of a thorough and efficient system of public education (T&E). The Commissioner recognizes that program alignment, while essential, must be viewed in conjunction with program delivery, and with availability, where necessary in order for students to benefit from instruction, of specialized supports to counter specific effects of socioeconomic deprivation. (Initial Decision at 9)

T & E as an Ultimate Conclusion. The Commissioner endorses the ALJ's comprehensive approach to determining whether T&E is being provided, considering that determination, as did the ALJ, as an "ultimate legal conclusion based on the totality of the evidence" for each petitioning district, rather than as a series of specific assessments to be made in discrete areas such as music, math, science, languages or gymnastics. As the ALJ recognizes, it is quite possible for one or more specific programs within a district to warrant improvement, even though the district overall is not failing, and "the New Jersey Supreme Court did not engage in that level of fine tuning" to determine the Abbott districts' entitlement to constitutional remedy. (Initial Decision at 9-10; quotation at 10) The Commissioner would

further add that the Constitution does not require relief every time the slightest deviation from T&E is found, or where there is clear evidence that a deficiency is being appropriately addressed and sufficient progress is being made toward its correction. Abbott status is not a "fix" for any deficiency that may be found in a district, even a poorer, struggling district; rather, it is a remedy for poverty and educational failure so substantial, pervasive and durable that targeted efforts simply cannot produce a constitutionally sufficient result.

Pinelands and CAFRA Zones. The Commissioner concurs with the ALJ that the impact of these designations and their attendant rules, raised by some petitioning districts to explain why their ratable bases could not be readily expanded so as to raise additional funds through local taxation, cannot be adequately gauged on the present record. Thus, like the ALJ, the Commissioner does not find a district's location within a restricted land use zone to be determinative in assessing its entitlement to special needs status. (Initial Decision at 25)

Areas of Disagreement

Notwithstanding that the Commissioner concurs with the ALJ in a number of significant areas as set forth above, in two critical respects, the Commissioner cannot accept the Initial Decision's threshold determinations.

Initially, the Commissioner does not agree with the ALJ that school facilities are appropriately considered in assessing petitioners' entitlement to special needs status under the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA).[7] [8] Rather,

[7] The Commissioner notes that the remedy petitioners are seeking requires a statutory amendment, so that, even if petitioners prevail, the Commissioner cannot directly grant relief as a result of this proceeding. Rather, the Commissioner's role would be to recommend the appropriate amendment to the Legislature.

[8] The petitioning districts are, in effect, seeking a status comparable to that of the Abbott districts, although they do not wish to be included as such; rather, they seek, through designation as "Bacon" districts, to receive funding at Abbott levels while retaining a degree of operational and programmatic flexibility not accorded to Abbott districts under currently applicable rule and decisional law. (Petitioners' Letter to Commissioner, November 15, 2002, appending Point III of Post-Trial Brief) Throughout the Commissioner's decision herein, the status sought by petitioners is called, as it was in the Initial Decision, "special needs" status.

the Commissioner finds that the Legislature, with its subsequent enactment of the Educational Facilities Construction and Financing Act (EFCFA), *P.L.* 2000, *c*. 72 (*N.J.S.A.* 18A:7G-1 *et seq*.) expressly determined to address the provision of constitutionally adequate facilities through a mechanism independent of CEIFA, including clear and specific provisions for development of long-range facility plans that identify and address deficiencies, criteria for determining whether rehabilitation or renovation is warranted, procedures for requesting space beyond efficiency standards based on particularized need, and avenues of seeking assistance, up to and including 100% of eligible costs, for districts claiming inability to fund projects necessary for T&E. Therefore, by considering the adequacy of the petitioning districts' facilities and then bringing these considerations to bear in concluding that certain of them lacked adequate funding for T&E (Initial Decision at 25-27), the ALJ not only introduced an extraneous factor into the CEIFA analysis, but also, in effect, judged the constitutionality of EFCFA as applied to the petitioning districts. Neither action is appropriate in the present context, and the Commissioner will not follow suit in his own assessments of petitioners' claims.[9] [10]

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[9]Petitioners contend that the *Abbott* decisions *require* questions of outmoded or overcrowded facilities to be considered in assessing district need. The Commissioner rejects this notion, since the *Abbott* decisions preceded enactment of EFCFA and the existence of any independent mechanism to address facility needs. Even accepting the ALJ's justification, Initial Decision at 27, that petitioners should be able to pursue, through their CEIFA claims, a path to full funding under EFCFA as a matter of constitutional right, that end should have been accomplished on the merits of the CEIFA claims independent of any consideration of facilities issues. If, as suggested by petitioners, EFCFA itself sets inferential standards for T&E, with failure to provide conforming facilities equating to failure to provide T&E, those claims are not appropriately litigated here.

[10]Petitioners object to the Department's argument on exception that, because of enactment of EFCFA, considerations of facilities no longer enter into discussions of CEIFA; petitioners contend that the Department is improperly introducing a new argument not supported by previously entered evidence, or by its actions during the OAL proceeding, in violation of *N.J.A.C.* 1:1-18(c). (Petitioners' Reply Exceptions at 3-8) The Commissioner dismisses this objection, since the rule invoked addresses introduction of *new evidence*, which the Department's exceptions do not even attempt to do; he further notes that the Initial Decision at 25-27, and the Department's Post-Hearing Reply Brief at 28-30 and *passim*, clearly show the EFCFA argument to have been raised before, and considered by, the ALJ.

More fundamental, however, is the Commissioner's concern with the standard to which petitioners were held in attempting to demonstrate that they could not offer T&E within the provisions of CEIFA.

Petitioners have, in effect, claimed that CEIFA is unconstitutional as applied to them, on grounds that their districts do not have the economic capacity to provide T&E and that CEIFA does not adequately redress their situation. In order for petitioners to prevail in such a claim, they must be able to demonstrate that the Legislature's duly enacted statutory scheme has been fully effectuated, yet cannot remedy deficiencies that are constitutional in dimension. Thus, the inquiry directed in the Commissioner's bifurcation order of February 2000 was not merely "legitimate in theory" (Initial Decision at 5, Note 2), but central to the resolution of petitioners' claims.

By the terms of the Commissioner's order, the first phase of hearing in this matter, which concluded in February 2001, should have settled the question of effectuation of CEIFA in the petitioning districts. However, in affirming the ALJ's ultimate determination that petitioners had satisfied their threshold burden sufficiently to enable them to proceed to the second phase, the Commissioner made it abundantly clear that, while he was agreeing to let petitioners move forward, he was not satisfied that the first phase of hearing had been entirely responsive to the inquiry posed in his earlier directive. In fact, he expressly held that the question of full and effective utilization of CEIFA would continue into the second phase of hearing, with the petitioning districts bearing the burden of proving such utilization:

> [The Commissioner does not agree with the ALJ] that the only appropriate standard for determining whether a district has made full use of the monies generated by CEIFA is whether its expenditure of such funds is lawful and consistent with sanctioned budgetary practices and efficiency standards. While this may have been an appropriate level of inquiry for the first phase of hearing, *it cannot be deemed controlling in the second*. Where a petitioning district is, as here, seeking additional, extraordinary funding over and above

> that provided to other districts in the State, the effectiveness of its programmatic and fiscal allocation decisions cannot be presumed, or even inferred, from the fact that its expenditures have been lawful or its proposed budget has been approved for thoroughness and efficiency by the county superintendent of schools***. Assessment of a board's compliance with State goals and standards in its exercise of local discretionary authority is a process fundamentally different from the critical examination of programs and expenditures necessary to resolve a claim of Constitutional deficiency. *For the latter, each petitioning district must first prove that deficiencies do, in fact, exist, and second, that these cannot be remedied by different programmatic and fiscal choices within the framework of current law and funding levels.* (Commissioner Decision, February 9, 2001, Slip Opinion at 21, *emphasis supplied*)

That has not occurred in the instant proceeding. Based on difficulties perceived in conducting the first phase of hearing,[11] the ALJ directed that, in the second, notwithstanding that petitioners bore the ultimate burden of proof, the Department would proceed first so that petitioners would not have to "guess at the [Department's] concerns." (Initial Decision at 10) The result, according to the ALJ, was that the "'effective and efficient' issue did surface with some greater precision in Phase 2 regarding the Lakewood district's use of courtesy/safety bussing, Egg Harbor City's inability to account for certain expenditures, and the practice by many districts of allocating excess surplus for tax relief." (Initial Decision at 5, Note 2) In all other respects, the ALJ appears to have found the Department's efforts wanting, noting in a number of instances that the Department was unable to identify, or inappropriately identified, specific steps a district might have taken to effectuate improvement. (See, for example, Initial Decision at 48, 50, 60 and 111-12.)

While this manner of proceeding may have maintained the requisite burden of proof in theory, its practical effect, in cases where the petitioning districts were able to establish what the ALJ deemed to be a sufficient fusion of poverty and educational failure, was to shift the actual burden to the Department. Implicit throughout the Initial Decision is

[11] See Initial Decision at 5, Note 2.

the assumption that it falls to the Department to analyze each district's programs, staffing, fiscal practices and operations in order to identify in the first instance how the district could have adequately addressed its demonstrated or alleged problems; if the Department did not do so, then the district had done all it could do and was entitled to prevail if it could demonstrate sufficient levels of poverty and educational failure. This stands on its head the previously established standard, reiterated and endorsed by the Commissioner herein: In order for a district to prevail in a claim for constitutional remedy, *it* must show that it has done all it can do with statutorily available resources and improvement mechanisms, yet *still* cannot provide T&E because the statutory funding scheme generates insufficient monies for this purpose.

For example, in a number of instances, the Department argued that, although it was certainly not illegal to apply surplus generated over and above required levels ("excess surplus") to the following year's budget for purposes of tax relief, if a petitioning district had not chosen this course of action, it might have avoided deficiencies of which it now complains. The Commissioner considers this argument a valid one, demanding response as to why a district could not have allocated all or part of its surplus to needed improvements. The ALJ, however, rejected the Department's argument outright as an "after the fact" criticism, noting that the Department had, through its county superintendents, routinely approved district budgets making such allocations, including budgets submitted after enactment of CEIFA. The ALJ further found that no expert testimony was introduced to support the contention that continual generation of excess surplus was inappropriate, and that the Department, in arguing against tax relief, ignored evidence of community hardship. (Initial Decision at 11-12) The Department protested on exception that, given the Commissioner's February 2001 order, the ALJ should not have treated a district's ability to allocate surplus as outside the scope of the present inquiry. To the contrary, they argued, petitioners bore the

burden of demonstrating that surplus could not be reallocated; and, moreover, while the practice of consistently generating excess surplus and using it to offset tax levy might be acceptable under ordinary circumstances, it is *not* "unremarkable" where a district is claiming it cannot support a constitutionally sufficient educational system with available monies. (Department's Exceptions at 17-22, quoting, at 20, Initial Decision at 11) In a reply that captures the essence of the disparity between the expectations established by the Commissioner in his February 2001 decision and the conduct of the present proceeding, petitioners countered that the Department was ignoring the ALJ's procedural directive placing upon it the *prima facie* burden, and that the Department had not only failed to meet its burden, but was now also inappropriately trying to re-litigate the first phase of hearing.[12] (Petitioners' Reply to Department Exceptions at 8-11)

In reviewing the ALJ's recommended determinations on special needs status for the individual petitioning districts herein, then, the Commissioner finds the appropriate inquiry to be not whether a district generally presents "a grim fusion of socioeconomic deprivation, limited educational opportunity, facility deficiency and academic underperformance" (Initial Decision at 8), but whether a district has specifically demonstrated that CEIFA has not addressed, and cannot address, in areas other than facilities, proven deficiencies sufficiently to ensure that the district is able to provide the constitutionally required T&E.

The Commissioner stresses, too, that petitioners do not come to this forum in the same posture with respect to CEIFA as did the Abbott districts in coming before the Court in Abbott IV. There, the plaintiff districts had already been found, in a series of decisions reaching back over 30 years, to have been "failing abysmally, dramatically, and tragically"

[12] This argument recurs throughout petitioners' replies to the Department's exceptions.

over an extended period of time (Initial Decision at 6, citing *Abbott II*); thus, the question before the Court was whether CEIFA, the legislative response to the Court's finding of unconstitutionality in the prior statutory scheme as applied to the Abbott districts, would offer resources sufficient to rectify, within a reasonable period of time, the pervasive, unremitting failure previously found to exist in those districts. Here, however, the question is not CEIFA's efficacy as a remedial measure for long-standing past deprivation, but its sufficiency, for purposes of enabling the petitioning districts to meet their constitutional T&E mandate, as an ongoing statutory framework.

It is useful to recall in this context that, when CEIFA was enacted in 1996, it introduced a number of elements not fully present in prior funding schemes. It provided concrete parameters for the educational substance of T&E through Core Curriculum Content Standards (CCCS), and for the cost of delivering T&E through the T&E amount, T&E flexible amount and T&E range. It further provided, through linkages to standardized testing, for measurement of student outcomes achieved within those parameters. It then ensured, through a system of corrective measures, that remedial action would be taken where outcomes, as determined by student test results and district monitoring evaluations, demonstrated that a district was failing to achieve T&E. *P.L.* 1996, *c.* 138 (*N.J.S.A.* 18A:7F-1 *et seq*.) Thus, CEIFA presented not merely a legislative formula for distribution of State aid, but also, and for the first time, a comprehensive, self-correcting statutory scheme based on the premises that T&E is definable, measurable and cost-quantifiable. It is the sufficiency of that scheme, in its entirety, that must be considered with respect to the petitioning districts. In other words, in order for petitioners to prevail, not only must substantial levels of poverty and educational inadequacy join in their districts, but the statutory scheme must be shown to be incapable of addressing, in a constitutionally acceptable manner, the results of that junction.

With this standard as his benchmark, the Commissioner now turns to the proofs of the individual petitioning districts.

DETERMINATIONS AS TO PETITIONING DISTRICTS

Hammonton, Little Egg Harbor, Ocean Township, Quinton, Upper Deerfield and Wallington

Preliminarily, the Commissioner adopts the recommended conclusions of the ALJ with respect to Hammonton (Initial Decision at 60-63), Little Egg Harbor (*Id.* at 79-83), Ocean Township (*Id.* at 87-89), Quinton (*Id.* at 90-94), Upper Deerfield (*Id*. at 100-104) and Wallington (*Id.* at 104-108). Petitioners in these districts did not submit exceptions to the Initial Decision, and the Commissioner is satisfied that the ALJ correctly concluded, even under the less stringent standard applied in the Initial Decision, that they had not demonstrated an inability, in the absence of special needs status, to provide T&E within the provisions of CEIFA.[13]

Clayton, Egg Harbor City, Lakehurst, Lakewood, Lawrence and Maurice River

With regard to those districts for which petitioners submitted exceptions to the Initial Decision, the Commissioner rules as follows:

Clayton

The ALJ concluded that Clayton did not qualify for special needs status, finding, based on a totality of factors, that it did not "project the impression of a failing district in a failing community." The ALJ noted that overall socioeconomic conditions were relatively good, with no indicia of deep poverty, and that child and general poverty statistics were well below those of the Abbott districts; he further noted that the district had produced a number of successful programs, that overall test results and mobility/dropout rates were approaching average, that the faculty was experienced even if relatively low-paid, and that the

[13] See Note 24 below regarding Department assistance to Upper Deerfield.

district's level of staffing seemed to reflect "skimping on personnel to save money" rather than deep need. (Initial Decision at 37-43; quotations at 42) In exceptions, Clayton contends that it is unfair to penalize the district for its successes in passing some tests, since prior court rulings have already held that test scores are not determinative of T&E. The district points to "horrible" math scores despite curriculum alignment, absence of a elementary world languages teacher, deficits in the performing arts program, and the fact that its gifted program involves only a few students. It also contends that, based on the facts, the ALJ reached the wrong conclusion regarding its level of poverty, and that the ALJ ignored the district's having the lowest per-pupil expenditure for regular education in the State and spending only 68 cents for every dollar spent by Abbott and IJ districts. (Petitioners' Exceptions at 1-6) In reply, the Department notes the district's aligned curriculum, broad course offerings, integrated technology and supplemental programs addressing community and student needs, and counters that poverty and funding disparity do not in themselves prove deficiency of constitutional dimension. (Department's Reply to Petitioners' Exceptions at 2-8)

The Commissioner concurs with the ALJ's assessment, which properly took into account the totality of evidence to reach its conclusion on the district's T&E adequacy, and correctly declined to award special needs status based on relative poverty or disparity in expenditure levels as compared to other districts. Therefore, the Commissioner finds that Clayton has not prevailed in its claim.

Egg Harbor City

The ALJ concluded that Egg Harbor City did not qualify for special needs status, substantially because, during the formative 1997-2000 period when CEIFA first went into effect, funds were available, and budgeted, to align curriculum, infuse technology and train teachers, but, due to "benign neglect" and "significant administrative failure" this did not

occur; moreover, the district "did not explain to what other good purposes these funds were put." The ALJ, therefore, concluded that "the mismanagement issue has clouded petitioner's proofs to the point that it cannot isolate underfunding as one cause for its disappointing outcomes." (Initial Decision at 51-55; quotations at 54-55) On exception, Egg Harbor protests that nothing in the record evinces problems rising to the level of "mismanagement," and that, legally, under the manner of proceeding established by the ALJ, the Department had the burden of proving mismanagement and failed to do so. Moreover, the district avers, because the Department produced no witnesses on this point, it had no opportunity to present rebuttal witnesses; indeed, petitioners did not even realize "mismanagement" would be an issue, since appropriate use of CEIFA funds was the subject of the first phase of hearing, where the ALJ ruled, and the Commissioner affirmed, that the petitioning districts were using CEIFA funds appropriately. (Petitioners' Exceptions at 7-14) The Department counters that the issue is not whether the district "mismanaged" funds, but whether educational deficiencies could have been remedied by different programmatic or fiscal choices within the current law; the Department met its burden of showing that tasks necessary to implement CEIFA were budgeted for but left undone, with no account of where the money was actually spent. (Department's Reply Exceptions at 8-14)

The Commissioner concurs that the record shows the Egg Harbor City school district to have been in disarray during the critical period following enactment of CEIFA. Regardless of the appellation placed on the cause of that disarray, the Commissioner agrees that petitioners cannot, under the circumstances, credibly attribute problems and deficiencies to a lack of funding or constitutional infirmity in the statute. Therefore, like the ALJ, the Commissioner finds that Egg Harbor City cannot prevail in its claim for special needs status.

Lakehurst

The ALJ concluded that Lakehurst did not qualify for special needs status based on its being a community that is performing reasonably well, and on its being unable to demonstrate a need for remediation of the type reserved for districts exhibiting "the panoply of problems that stem from underprivilege." (Initial Decision at 63-67; quotation at 67) The district argues on exception that it is *extremely* poor, not "relatively" poor, and that the ALJ ignored high property taxes, old and substandard facilities (inadequate space, asbestos under carpeting, inefficient heating system, roof needing repair, old gym floor, old student furniture), a large special education population, the stresses caused by student mobility and the fact that many students come from the South where education is not as highly valued, and the absence of T&E in world languages, music and science. (Petitioners' Exceptions at 15-22) The Department replies that the school system is not failing, and that its curriculum is aligned, with content delivered, technology infused, supplemental programs offered and multiple measures of student achievement showing success. The Department further notes that the number of classified students is not determinative of deficiency, that CEIFA makes allowances for the additional costs of special education, and that the district does not even claim insufficiency in the funds generated for this purpose. (Department's Reply to Petitioners' Exceptions at 14-16)

The Commissioner concurs with the ALJ, even under the standard applied in the Initial Decision, and certainly under the standard applied herein, that the Lakehurst school district has not demonstrated failure of constitutional dimension. Indeed, the record shows the district to be succeeding overall, and working well in addressing its needs within the context of current law. Therefore, like the ALJ, the Commissioner declines to find that Lakehurst requires special needs status in order to be able to provide T&E.

Lakewood

The ALJ concluded that Lakewood did not qualify for special needs status primarily because the community was capable of supporting the district at higher levels than it did, and because the district routinely chooses to expend substantial funds, which might otherwise have been used to address pressing facility and programmatic needs, on provision of courtesy busing to a large nonpublic school population; he further found that the Township effectively dictated school budgets, with the district routinely acquiescing to municipal demands to keep school costs down. Rejecting the district's complaint of infringement on its statutorily conferred discretion, he concluded that, while the district, indeed, had every right to spend money on nonessential busing, it could not then concomitantly press a claim of constitutional funding deficiency. (Initial Decision at 67-74) On exception, the district argued that the ALJ failed to consider that the full cost of courtesy busing for 2001-02 was taken not from "that portion of the [d]istrict [b]udget dedicated to providing [T&E]," but from funds "entirely attributable" to a Spending Growth Limitation Adjustment (SGLA). (Lakewood's Exceptions at 1-3; quotation at 2) The Department replied that this argument did not undercut the ALJ's conclusion, because the district could have used SGLA funds for programming and put courtesy busing before the voters for approval in a separate ballot question. (Department's Reply to Petitioners' Exceptions at 17-19)

The Commissioner concurs with the ALJ that a district which is not failing educationally, and is capable of providing more support for public schools than it does, cannot claim entitlement to special needs status. Additionally, the Commissioner rejects Lakewood's contention that, because the budget increase used to support courtesy busing in 2001-02 was attributable to a growth adjustment permitting inclusion of expenditures over and above the prior year's budget, the district is somehow relieved of its obligation to have used all available

funds for needed programs before claiming that CEIFA provides insufficient monies for T&E. Therefore, like the ALJ, the Commissioner finds that Lakewood cannot prevail in this matter.[14]

Lawrence

The ALJ concluded that Lawrence did not qualify as a special needs district because, although the district is poor, it is doing well educationally and CEIFA has provided it with significant additional funding. (Initial Decision at 75-79) On exception, the district contends that the ALJ failed to consider that its county tax rate is the highest in the State, that it has a substantial special education population, that its performing arts and gifted programs are not T&E, that technology is not integrated into district programs, that faculty salaries and qualifications and the number of district administrators compare unfavorably with Abbott and IJ districts, and that to reach parity with these districts, Lawrence would need to increase school taxes by nearly 55%. The district further contends that the ALJ gave insufficient consideration to its sending-receiving relationships with Millville and Bridgeton, both Abbott districts; Lawrence contends that it is at a distinct disadvantage in what it can offer its students, so that they are doomed to fall ever further behind as their peers enjoy Abbott benefits. (Petitioners' Exceptions at 23-26, 35-43) The Department replies that claims based on comparison to Abbott districts must fail because Abbotts and non-Abbotts are simply not comparable, that mere differences in programs and staffing do not equate to constitutional deficiencies where the district is providing T&E, and that the additional costs of special

[14] The ALJ opined in passing that the relative size of Lakewood's nonpublic school population was a unique circumstance perhaps requiring individual attention, but that such a policy question was beyond the scope of the administrative forum. The district noted this comment and, in its exceptions, "formally requested [the Department] to immediately consider and establish a mechanism to address head-on the ever-growing and unique situation of Lakewood***." (Lakewood's Exceptions at 4) The Commissioner declines to do so in the present context, finding this situation to be best addressed directly by the Legislature, should it deem appropriate.

education were not shown to be inadequately addressed by CEIFA. (Department's Reply to Petitioners' Exceptions at 19-22)

The Commissioner concurs with the assessment of the ALJ, finding nothing in the district's exceptions that would invalidate the ALJ's conclusions, which are consistent with the general standards set forth as a threshold matter above. The Commissioner further notes that, so long as a district is providing T&E, differences in its programs and resources as compared to district(s) to which it sends its secondary students are not indicative of constitutional infirmity. Therefore, like the ALJ, the Commissioner finds that Lawrence has not met its burden of establishing entitlement to special needs status.

Maurice River

The ALJ concluded that Maurice River did not qualify as a special needs district because, although the district is relatively poor, it is not failing educationally. (Initial Decision at 83-87) On exception, the district argues that the ALJ failed to consider the full extent of the district's municipal overburden, that an increase in school taxes of over 108% would be necessary to reach parity with Abbott and IJ districts, that student test scores are not determinative of T&E, that support and administrative staffing levels are insufficient, and that T&E is not offered in math, world languages, social studies, arts, library skills, science, or gifted and talented programs. Like Lawrence, the district contends that the ALJ gave insufficient consideration to its sending-receiving relationship with Millville, an Abbott district; Maurice River, too, contends that it is at a disadvantage in what it can offer its students, who are likewise doomed to lag behind peers who benefit from Abbott status. Finally, the district argues that the ALJ reached the wrong conclusion on its level of poverty, contending that the facts show it to be a "virtual clone" of Abbott ECP-1 districts, as well as being impeded by a lack of ratables and taxable industry. (Petitioners' Exceptions at 23, 27-

43) In reply, the Department argues that mere statistical line-up with Abbott districts, or a subset thereof, is insufficient to establish special needs status; that the district is making good progress toward remedying such deficiencies as it does have through curriculum alignment and analysis of test results; that a lack of security personnel is irrelevant in the absence of a showing that such lack impacts on the district's ability to provide T&E; that programs are in place to address discipline and the school crime rate is low; that differences in programs or resources as compared to Abbott and IJ districts are immaterial where the CCCS are being achieved; and that claims of old textbooks and the like are undercut by the district's consistent generation of surplus which could have been applied to programmatic needs. (Department's Reply to Petitioners' Exceptions at 23-28)

The Commissioner finds nothing in Maurice River's exceptions that would invalidate the ALJ's conclusions, which are consistent with the general standards set forth as a threshold matter above, and, again, the Commissioner notes that, so long as a district is providing T&E, differences in its programs and resources as compared to district(s) to which it sends its secondary students are not indicative of constitutional infirmity. Therefore, the Commissioner concurs with the ALJ that Maurice River has not demonstrated entitlement to special needs status.

Buena Regional, Commercial Township, Fairfield, Salem City and Woodbine

The ALJ concluded that each of these five districts had prevailed in its claim. The Department takes exception to such conclusion on grounds that none of the petitioning districts met its burden of demonstrating full effectuation of the provisions of CEIFA as required by the Commissioner in his February 2001 order; in particular, the Department points to unused provisions of the law that would authorize, for all five districts, Department-directed reallocation, evaluation and programmatic/operational intervention, and, for four of

the five districts, additional T&E spending. The Department also objects to the ALJ's findings of inadequacy based on facility issues, contending that these are not appropriately considered herein in light of enactment of EFCFA. (Department's Exceptions at 14-17 and *passim*) In reply, petitioners vigorously object to what they characterize as the Department's attempt to re-litigate the first phase of hearing and raise as a new issue the pre-emptive nature of EFCFA with regard to facilities. (Petitioners' Reply to Department Exceptions at 1-11) The Commissioner has, earlier herein, set forth views consonant with the positions taken by the Department as to the appropriate standard to be applied in assessing petitioners' claims; he now turns to consideration of the individual districts based on those views.

Buena Regional

The ALJ concluded that Buena Regional qualified as a special needs district based on a totality of factors including its DFG A classification, 40.3% Free/Reduced Lunch (FRL) rate and relatively low personal income level; its overcrowded schools and classes, lack of support programs, lack of 3-year-old and full-day 4-year-old preschool programs, and chronically low math scores; and its similarity to Vineland, which it abuts, leading to a fundamentally unfair situation where similar students are supported by widely disparate levels of resources. (Initial Decision at 27-36)

The Department argues on exception that CEIFA authorizes the Commissioner to direct additional expenditures in Buena's budget, since it is within but not above the established T&E range, and to conduct a comprehensive evaluation of the district's DEPA plan and redirect such expenditures as are necessary to support programs tailored to district needs. Additionally, the Department contends, because the district has failed assessments for three years in a row, CEIFA, at *N.J.S.A.* 18A:7F-6(b), authorizes the Commissioner to summarily take actions such as directing restructuring of programs and/or reassignment of

staff, conducting a comprehensive budget evaluation, redirecting expenditures, and enforcing spending at the full T&E amount. The Department also urges that the district failed to meet its burden of showing that different fiscal or programmatic choices, including reallocation of excess surplus, could not have addressed its deficiencies, and that the Commissioner has the ability to recommend rescission of the district's certification, so as to initiate the intensive examination/technical assistance/corrective action processes entailed in Level II monitoring. On the question of municipal overburden, the Department argues that the district's recent history has shown it capable of raising more money for education, and that its school tax rate is equal to the state average, placing it just barely within the ambit of overburden as defined by petitioners' own expert (property taxes funding a substantial portion of school costs where the school tax rate is at or higher than the State average). (Department's Exceptions at 5-13, 22-27)

The Department further argues that Buena's test results are not chronically substandard, and that, indeed, they are significantly better than in Abbott districts, being above the State average in several cases, with math scores improving.[15] The Department contends that the ALJ erred in relying on an inapposite study to conclude that high school class sizes were deficient, ignored evidence that class size was not precluding success on the HSPT, and failed to recognize that class size limitations were largely caused by the district's lack of facilities, which is now addressable through EFCFA and is well on its way to remedy through planned construction of a new middle school and an addition to the high school. According to the Department, the ALJ understated the comprehensiveness of the district's high school course offerings and ignored evidence of professional development and

[15] The Department points out that the Initial Decision contains an error in Buena's 2001 ESPA math score, which should be 70.6% proficient rather than 41.2%. (Department's Exceptions at 31) Petitioners do not dispute this contention, although they use the ALJ's number, without comment, in their own discussion. (Petitioners' Reply Exceptions at 38)

curriculum implementation; he also inappropriately relied on suspension data despite the absence of a statewide norm, and disregarded the superintendent's comments to the effect that the district did not have a high incidence of crime or violence. Finally, the Department opines that the ALJ erroneously characterized the district's preschool program as deficient, whereas the record indicates that, unlike students in Abbott districts, the overwhelming majority of Buena students enter kindergarten with proficient math and reading readiness skills. (Department's Exceptions at 28-41)

In reply, the district objects to "re-litigation" of Phase I and any attempt to discount facilities issues. It further avers that the testimony of its municipal officials fully confirms the abysmal level of poverty in constituent districts Buena Borough and Buena Vista Township, thus invalidating the Department's contention that the district is capable of additional taxation; it also renews its post-hearing arguments as to the district's unaddressed educational shortcomings. (Petitioners' Reply to Department Exceptions at 1-3, 11, 12-14, 21-43)

Upon review, the Commissioner rejects the ALJ's conclusion that Buena Regional should be accorded special needs status. The Commissioner initially rejects Buena's contentions with respect to "re-litigation" of Phase I and consideration of facilities issues, for the reasons set forth as a threshold matter above. Those determinations are particularly important with respect to Buena, which has relied, in the numerous allegations regarding class size and insufficient staffing that form the basis of its larger claim of educational inadequacy, on underlying issues that clearly relate to limitations in the district's current physical plant. Neither can the Commissioner find on this record that the community, although clearly struggling, evidences poverty and educational failure so pervasive or extreme that CEIFA, fully effectuated, cannot act to support education at a constitutionally sufficient level. To the

contrary, in the Commissioner's view, the district's newfound ability to address its long-standing facilities issues through EFCFA, together with appropriate interventions by the Department, should amply enable it to remedy deficiencies and effectuate necessary improvements. Therefore, the Commissioner directs the Atlantic County Superintendent of Schools to undertake a thorough review of the Buena Regional district's 2003-04 budget to determine its T&E sufficiency and appropriate use of ECPA and DEPA funds given the district's identified needs, and to take such action as may be necessary as a result of that review, including but not limited to directing additional expenditures within the T&E range and reallocation of ECPA or DEPA monies to targeted areas. Additionally, should the County Superintendent find upon inquiry that the district has had three consecutive years of failing test scores, he shall make recommendations to the Commissioner for actions to be summarily taken pursuant to *N.J.S.A.* 18A:7F-6(b).[16]

Commercial Township

The ALJ concluded that Commercial Township qualified as a special needs district based on a totality of factors including its DFG A classification, child and overall poverty rates hovering just under Abbott averages, FRL rate of 67.3%, significant level of family/home life dysfunction, with children living under circumstances depriving them of "the most basic stability necessary to learning, " and extremely high student mobility rate; its low faculty salaries and rate of advanced degrees, well-below-average standardized test scores, "short shrift" treatment of subjects like music and art, lack of an alternative school

[16] The Department asks the Commissioner to take judicial notice of the results of the 2001-02 State assessments, which were not yet available when the record closed in this matter, and to order specific interventions based upon them; petitioners object to this request. (Department's Exceptions at 8; Petitioners' Reply Exceptions at 3) Rather than further complicate this matter with issues of settling the record, the Commissioner elects not to rely on 2001-02 test scores in his determination herein; instead, he directs the County Superintendent to inquire into the district's status vis-à-vis the applicability of *N.J.S.A.* 18A:7F-6(b) and make specific recommendations based on the results of that inquiry together with review of the district's budget and operations as otherwise authorized.

despite a "critically elevated" middle-school suspension rate, 9% dropout rate among students going on to the Millville district's high school, and lack of full-day preschool despite a desperately needy population. Notwithstanding that CEIFA provides funding to support the district's net budget per pupil at the level of IJ level districts, this is insufficient to remedy the district's deprivation. (Initial Decision at 43-51; quotations at 48-49)

The Department argues on exception that CEIFA authorizes the Commissioner to direct additional expenditures in Commercial's budget, since the current year's budget is within but not above the established T&E range, and since Commercial's budgets in prior years were *below* the minimum T&E range, thus obliging the district, in light of its failures in assessment, to increase spending to at least minimum T&E levels within the next two years; moreover, the Department can and should conduct a comprehensive evaluation of the district's DEPA plan and redirect such expenditures as are necessary to support programs tailored to district needs. Additionally, the Department contends, because the district has failed assessments for three years in a row, CEIFA, at *N.J.S.A.* 18A:7F-6(b), authorizes the Commissioner to summarily take actions such as directing restructuring of programs and/or reassignment of staff, conducting a comprehensive budget evaluation, redirecting expenditures, and enforcing spending at the full T&E amount. The Department also urges that the district failed to meet its burden of showing that different fiscal or programmatic choices, including reallocation of excess surplus, could not have addressed its deficiencies, and that the Commissioner has the ability to recommend rescission of the district's certification, so as to initiate the intensive examination/technical assistance/corrective action processes entailed in Level II monitoring. The Department notes that CEIFA requires, and provides funding for, 3-year-old preschool programs in districts having 40% concentrations of poor students, and that Commercial has a 49.79% such concentration; therefore, the

Commissioner is authorized to direct compliance with the law and withhold State aid for noncompliance. On the question of municipal overburden, the district's recent history has shown that it can raise more money for education, and its school tax rate ($0.63) is significantly below the state average ($1.32), so as to fall outside the ambit of overburden as defined by petitioners' own expert (property taxes funding substantial portion of school costs where school tax rate is at or higher than state average). (Department's Exceptions at 5-13, 22-27)

In reply, the district objects to "re-litigation" of Phase I and any attempt to discount facilities issues. It further avers that the testimony of its municipal officials fully confirms the abysmal level of poverty in the district, thus invalidating the Department's contention that the district is capable of additional taxation, and points to the district's recognition by the federal government as an "empowerment zone," which designation is given only to areas of high unemployment, poverty and municipal distress. (Petitioners' Reply to Department Exceptions at 1-3, 11, 14-15)

Upon review, the Commissioner rejects the ALJ's conclusion that Commercial Township should be accorded special needs status. The Commissioner initially rejects the district's contentions with respect to "re-litigation" of Phase I and consideration of facilities issues, for the reasons set forth as a threshold matter above. Additionally, while Commercial is clearly a poor community with attendant social problems, it does not display the panoply of pervasive ills that characterize deprivation of constitutional dimension; equally clearly, the school district enjoys capable leadership and is making steady progress in addressing previously identified deficiencies. Commercial has taken steps, including passage of a referendum in 2001, to address its facilities issues through EFCFA, and this, together with appropriate interventions by the Department, should enable the district to continue the

progress already made in effectuating improvements. Therefore, the Commissioner directs the Cumberland County Superintendent of Schools to undertake a thorough review of Commercial Township's 2003-04 budget to determine its T&E sufficiency and appropriate use of ECPA and DEPA funds given the district's specific identified needs, and to take such action as may be necessary as a result of that review, including but not limited to directing additional expenditures within the T&E range and reallocation of ECPA or DEPA monies to targeted areas of need. Additionally, should the County Superintendent find upon inquiry that the district has had three consecutive years of failing test scores, he shall make recommendations to the Commissioner for actions to be summarily taken pursuant to *N.J.S.A.* 18A:7F-6(b).[17]

Fairfield

The ALJ concluded that Fairfield qualified as a special needs district based on a totality of factors including its DFG A classification, overall and child poverty rates which are well within Abbott averages, substantial population without high school diplomas, and high unemployment level; its above-average student mobility and suspension rates, with middle school suspension rates being an "astonishing" 77.7%-91% for 1997-2000;[18] its poor student performance on standardized tests; its buildings being in disrepair, and teacher salaries and advanced degree rates being well below state average; and its lack of funding to provide full-day preschool, alternative school and other support services needed by the student population. (Initial Decision at 56-60; quotation at 59)

[17] See note 16 above.

[18] A facial suspension rate of this magnitude, while certainly indicative of disciplinary issues within a district, appears to support the Department's contention that such rates, without closer examination, are unreliable indicators of a district's concentration of disaffected students. (Initial Decision at 22)

The Department argues on exception that CEIFA authorizes the Commissioner to direct reallocations and programmatic adjustments, or take other appropriate measures, in budgets, like Fairfield's, submitted above the maximum T&E amount if deemed necessary to implement T&E standards; moreover, the Department is authorized to conduct a comprehensive evaluation of the district's DEPA plan and redirect such expenditures as are necessary to support programs tailored to district needs. Additionally, the Department contends, because the district has failed assessments for three years in a row, CEIFA, at *N.J.S.A.* 18A:7F-6(b), authorizes the Commissioner to summarily take actions such as directing restructuring of programs and/or reassignment of staff, conducting a comprehensive budget evaluation, redirecting expenditures, and enforcing spending at the full T&E amount. The Department also urges that the district failed to meet its burden of showing that different fiscal or programmatic choices, including reallocation of excess surplus, could not have addressed its deficiencies, and that the Commissioner has the ability to recommend rescission of the district's certification, so as to initiate the intensive examination/technical assistance/corrective action processes entailed in Level II monitoring. The Department notes that CEIFA requires, and provides funding for, 3-year-old preschool programs in districts having 40% concentrations of poor students, and that Fairfield has a 49.67% such concentration; therefore, the Commissioner is authorized to direct compliance with the law and withhold State aid for noncompliance. On the question of municipal overburden, the district's school tax rate ($0.53) is significantly below the state average ($1.32), so as to fall outside the ambit of overburden as defined by petitioners' own expert (property taxes funding substantial portion of school costs where school tax rate is at or higher than state average). (Department's Exceptions at 5-13, 22-27)

In reply, the district objects to "re-litigation" of Phase I and any attempt to discount facilities issues. It further avers that the testimony of its municipal officials fully confirms the abysmal level of poverty in the district, thus invalidating the Department's contention that the district is capable of additional taxation, and points to the fact that the town has no industry and a ratable base of only 54%, the remainder being State and federal tax-exempt properties. (Petitioners' Reply to Department Exceptions at 1-3, 11, 15-18)

Upon review, the Commissioner rejects the ALJ's conclusion that Fairfield should be accorded special needs status. As with Buena and Commercial, the Commissioner initially rejects the district's contentions with respect to "re-litigation" of Phase I and consideration of facilities issues, for the reasons set forth as a threshold matter above. Fairfield, although poor, does not display pervasive community distress of the type that would preclude the district from addressing its educational needs through statutory remedies; indeed, under CEIFA, the district spends close to IJ levels and has seen its school tax cut in half since 1997. Moreover, like Buena, much of the district's testimony and evidence as to educational deprivation pertains to the number and condition of the district's facilities, which, as previously stated, the Commissioner does not find to be appropriately considered here. The Commissioner sees no basis in this record to conclude that CEIFA, fully effectuated together with EFCFA, cannot act to support education in Fairfield at a constitutionally sufficient level through appropriate interventions by the Department and targeted assistance where necessary; for example, the district is working to address the roots of its discipline problem through implementation of a values curriculum and other supporting programs, funded by DEPA monies. (Respondent's Post-Hearing Brief at 52) Therefore, the Commissioner directs the Cumberland County Superintendent of Schools to undertake a thorough review of Fairfield's 2003-04 budget to determine its T&E sufficiency and appropriate use of ECPA and DEPA

funds given the district's specific identified needs, and to take such action as may be necessary as a result of that review, including but not limited to reallocation of ECPA or DEPA monies to targeted areas of need. Additionally, should the County Superintendent find upon inquiry that the district has had three consecutive years of failing test scores, he shall make recommendations to the Commissioner for actions to be summarily taken pursuant to *N.J.S.A.* 18A:7F-6(b).[19]

Salem City

The ALJ concluded that Salem City qualified as a special needs district based on a totality of factors including its DFG A classification, socioeconomic data confirming that it is as poor as the poorest Abbotts, FRL at 71%, child and overall poverty and mobility rates comparable to or above Abbott averages, high rate of crime, unemployment, drug abuse and child abuse, and heavy burden of taxation in relation to statewide averages; its consistent underperformance by wide margins on standardized testing, dropout and suspension rates comparable to or above Abbott averages, old, cramped and dilapidated school buildings, lack of sufficient staff to educate a mobile, socio-economically deprived student body, and inability to retain staff due to low salaries and the difficulty of handling the district's students. The ALJ noted that the Department itself considered the district to be performing poorly and incapable of righting itself without outside intervention, having taken, in 1995, the unusual step of moving the district into Level II monitoring; yet seven years of Department-supervised reorganizing, prioritizing and sharpening planning goals have had no significant impact overall and test scores are no better than the historical pattern. The ALJ found that, although CEIFA provides considerable aid and net per pupil spending in 2000 exceeded the average in

[19] See note 16 above.

IJ districts, it was "nowhere more evident in this record than in Salem City" that more is required to redress long-standing deprivation. (Initial Decision at 94-100; quotation at 100)

The Department argues on exception that CEIFA authorizes the Commissioner to direct additional expenditures in Salem's budget, since it is within but not above the established T&E range, and to conduct a comprehensive evaluation of the district's DEPA plan and redirect such expenditures as are necessary to support programs tailored to district needs. Additionally, the Department contends, because the district has failed assessments for three years in a row, CEIFA, at *N.J.S.A.* 18A:7F-6(b), authorizes the Commissioner to summarily take actions such as directing restructuring of programs and/or reassignment of staff, conducting a comprehensive budget evaluation, redirecting expenditures, and enforcing spending at the full T&E amount. The Department also urges that the district failed to meet its burden of showing that different fiscal or programmatic choices, including reallocation of excess surplus, could not have addressed its deficiencies. The Department notes that CEIFA requires, and provides funding for, 3-year-old preschool programs in districts having 40% concentrations of poor students, and that Salem City has a 63.79% such concentration; therefore, the Commissioner is authorized to direct compliance with the law and withhold State aid for noncompliance. The Department does not, as it did for the other districts found by the ALJ to warrant special needs status, comment on Salem City's school tax rate relative to the State average or suggest that the district is capable of additional taxation. (Department's Exceptions at 5-6, 7-10, 22-23, 26-27)

In reply, the district objects to "re-litigation" of Phase I and any attempt to discount facility issues. It further relies on post-hearing briefs and the Initial Decision to counter the Department's specific assertions. (Petitioners' Reply to Department Exceptions at 1-3, 11)

Upon review, the Commissioner concurs with the ALJ's conclusion that Salem City should be accorded special needs status. While the Commissioner rejects the district's contentions with respect to "re-litigation" of Phase I and consideration of facilities issues for the reasons set forth as a threshold matter above, he cannot concur with the Department that CEIFA, fully effectuated, will be able to act sufficiently to overcome Salem's extreme community distress and educational failure to provide for a constitutionally compliant system of education. With respect to the former, the Commissioner notes that Salem, to a degree not evidenced by any other petitioner in this matter, displays not only extreme poverty, but also the multiplicity of pervasive, durable social ills that rendered the Abbott districts incapable, for so many years, of providing constitutional levels of education to their students absent extraordinary remedy. With respect to the latter, the Commissioner cannot ignore that Salem City failed monitoring in 1990, and that it has, since 1995, remained in Level II status, with all of the assistance and intervention that classification entails. Thus, although the district has been the subject of intensive Department scrutiny for the entire period since CEIFA's enactment and has received a considerable influx of funds, it has *still* been unable to provide T&E. Although it is indeed true, as the Department contends, that the district has not specifically been subjected to the Commissioner's summary intervention pursuant to *N.J.S.A.* 18A:7F-6(b), in this instance, the Commissioner cannot concur that, under circumstances where prior intensive efforts of the type envisioned by the statute have clearly failed, the remedies provided by that statute will suffice, in themselves, to enable the district to meet its constitutional mandate. Therefore, the Commissioner will recommend to the Legislature that CEIFA be amended to include Salem City in its definition of "Abbott district" at *N.J.S.A.* 18A:7F-3, so as to entitle the district to the panoply of remedial benefits flowing from Abbott

status.[20] In addition, however, because certain interventions authorized by CEIFA are outside the ordinary scope of Level II monitoring and corrective action processes, and because the Commissioner finds that such interventions might assist the district in working toward achievement of T&E, particularly during the period it is awaiting action by the Legislature to accord it Abbott status, the Commissioner directs the Salem County Superintendent of Schools to intensify his involvement in the district. Specifically, the County Superintendent is directed to conduct a thorough review of Salem's 2003-04 budget to determine its T&E sufficiency and appropriate use of ECPA and DEPA funds given the district's specific identified needs, and to take such action as may be necessary as a result of that review, including but not limited to reallocation of ECPA or DEPA monies to targeted areas of need; he is further directed to make recommendations to the Commissioner for actions to be summarily taken pursuant to *N.J.S.A.* 18A:7F-6(b), to the extent these appear appropriate.[21]

Woodbine

The ALJ concluded that Woodbine qualified as a special needs district based on a totality of factors including its DFG A classification, FRL of 81.4%, and mobility rate of "an astounding 57.8 percent, [meaning] that well over half the student body begins or ends the school year elsewhere" and is likely to require "considerable assistance" over the norm; its "pitiable" test scores, suspension rate of 31.6%, with no alternative school or even anger-management personnel, and large numbers of students coming to school "hungry, angry and

[20] As previously noted, the petitioning districts seek designation as "Bacon" districts, a class of districts to receive funding at Abbott levels while retaining a degree of operational and programmatic flexibility not accorded to Abbott districts under currently applicable rule and decisional law. The Commissioner finds no basis for distinguishing Salem City from existing Abbott districts, since it has prevailed based upon the same needs as led to the creation of Abbott status.

[21] See note 16 above.

unprepared to learn." The ALJ rejects the Department's position that CEIFA supports the district at IJ levels, and that its failure is not one of funds, but of administration. (Initial Decision at 108-112; quotations at 111)

The Department argues on exception that CEIFA authorizes the Commissioner to direct additional expenditures in Woodbine's budget, since it is within but not above the established T&E range, and to conduct a comprehensive evaluation of the district's DEPA plan and redirect such expenditures as are necessary to support programs tailored to district needs. Additionally, the Department contends, because the district has failed assessments for three years in a row, CEIFA, at *N.J.S.A.* 18A:7F-6(b), authorizes the Commissioner to summarily take actions such as directing restructuring of programs and/or reassignment of staff, conducting a comprehensive budget evaluation, redirecting expenditures, and enforcing spending at the full T&E amount. The Department also urges that the district failed to meet its burden of showing that different fiscal or programmatic choices (other than reallocation of excess surplus, which Woodbine did not generate) could not have addressed its deficiencies, and that the Commissioner has the ability to recommend rescission of the district's certification, so as to initiate the intensive examination/technical assistance/corrective action processes entailed in Level II monitoring. The Department notes that CEIFA requires, and provides funding for, 3-year-old preschool programs in districts having 40% concentrations of poor students, and that Woodbine has a 73.68% such concentration; therefore, the Commissioner is authorized to direct compliance with the law and withhold State aid for noncompliance. On the question of municipal overburden, the district's school tax rate ($1.06) is below the state average ($1.32), so as to fall outside the ambit of overburden as defined by petitioners' own expert (property taxes funding substantial portion of school costs

where school tax rate is at or higher than state average). (Department's Exceptions at 5-6, 7-13, 22-23, 26-27)

In reply, the district objects to "re-litigation" of Phase I and any attempt to discount facilities issues. It further avers that the testimony of its municipal officials fully confirms the abysmal level of poverty and social distress in the district, thus invalidating the Department's contention that the district is capable of additional taxation, and points to the fact that the town's entire assessment is $55 million, of which $45 million is a tax-exempt State property.[22] (Petitioners' Reply to Department Exceptions at 1-3, 11, 18-21)

Upon review, the Commissioner rejects the ALJ's conclusion that Woodbine should be accorded special needs status. As he has previously, the Commissioner again rejects district contentions with respect to "re-litigation" of Phase I and consideration of facilities issues, for the reasons set forth as a threshold matter above. Woodbine, like Salem, is clearly a poor community with attendant socioeconomic issues, some of them very serious and inevitably impacting on the student population of the district. However, unlike Salem, Woodbine has not demonstrated that CEIFA, fully effectuated together with EFCFA, cannot act to provide education at a constitutionally sufficient level through appropriate interventions by the Department and targeted assistance where necessary; to the contrary, the Commissioner is inclined to agree with the Department that some of the programmatic choices made by the district were less than optimal given the supportive service needs of its student population, lending credence to the Department's contention that the district's problems are failures of administration, not of funding. Therefore, the Commissioner directs the Cape May County Superintendent of Schools to undertake a thorough review of

[22] In its reply exceptions, the district references testimony mentioning a 1.268 school tax rate, although it does not actually dispute the Department's representation. (Petitioners' Reply to Department Exceptions at 19) The Commissioner notes that, even accepting the district's figure, the rate quoted is still below the State average.

Woodbine's 2003-04 budget to determine its T&E sufficiency and appropriate use of ECPA and DEPA funds given the district's specific identified needs, and to take such action as may be necessary as a result of that review, including but not limited to reallocation of ECPA or DEPA monies to targeted areas of need. Additionally, should the County Superintendent find upon inquiry that the district has had three consecutive years of failing test scores, he shall make recommendations to the Commissioner for actions to be summarily taken pursuant to *N.J.S.A.* 18A:7F-6(b).[23]

PETITIONERS' EQUAL PROTECTION CLAIM

Prior to bringing this matter to conclusion, the Commissioner must address one final allegation, first raised by petitioners in their post-hearing brief and then renewed on exception: that CEIFA violates petitioners' right of equal protection. The ALJ concluded that petitioners had likely raised this matter to preserve it, since it is more appropriately addressed by the courts, and he declined to issue a ruling on it. (Initial Decision at 27) Petitioners argue on exception that, in any instance where they do not prevail in their T&E claims, the Commissioner is obliged to consider their equal protection claim in the alternative. In that claim, petitioners collectively challenge "a burden placed by the State upon a student's [constitutionally] protected right to have an opportunity to receive a quality education equal to that of the student in a rich district," arguing that children in their districts

> do not receive an equal education to their counterparts in Princeton or Cherry Hill***. Why should a child in Avalon have eight times as much property value supporting his or her education as a child in Salem or Woodbine? Using the property tax as the basis for funding schools is scandalously unequal, because the market values in the districts are scandalously unequal. This system cannot be constitutional.

[23] See note 16 above. The Commissioner acknowledges the Department's request to the ALJ that a regionalization study be recommended to the Commissioner. (Initial Decision at 111) The Commissioner does not preclude the County Superintendent from making such a recommendation, if he finds it appropriate as a result of the review directed herein.

> Here,***, similarly situated children are being treated and affected differently under [CEIFA]: Children of the same age, same sex and same needs who live in Petitioners' districts, simply because of where they live, are being treated differently than those who live in Abbott districts and those who live in IJ districts. They are deprived of computers, social workers, technology specialists, work programs, tutors, after-school programs, alternative schools, highly educated teachers, basic learning tools, and many more educational necessities.
>
> (Petitioners' Exceptions at 44-48; quotations at 47)

The Department counters that the courts have many times in the past rejected claims that funding formulas relying on local taxation deny equal protection (*Robinson, Abbott I, Stubaus, supra*), and further, that differential treatment based on local wealth is appropriate because it allows the State to direct finite resources to areas of greatest need. According to the Department, where the T&E mandate is satisfied, equal protection claims cannot stand. (Department's Reply to Petitioners' Exceptions at 28-32)

The Commissioner finds that the equal protection claim presented by petitioners is, in essence, a broad-based allegation that material reliance on local taxation to support public education is inherently unconstitutional because it will always produce, among the State's varied districts, unequal educational opportunities for students, and that this disparity is exacerbated by the preferential treatment accorded Abbott districts. The Commissioner fully concurs with the arguments of the Department countering this claim, and so opines in the context of the present proceeding. He also recognizes, however, as did the ALJ, that claims such as petitioners' are not best resolved in the administrative forum, so that, like the ALJ, he declines to decide the issue.

CONCLUSION

In conclusion, the Commissioner cannot sufficiently stress that, as reflected in his determinations above, the pivotal question in the present proceeding has been one of

constitutional deficiency, not one of disparity among districts or, for that matter, even of fundamental fairness. Both the record herein and the Commissioner's own experience suggest that the current situation presents a number of issues which, while not rising to constitutional level, clearly warrant attention; but these pose basic questions of State policy which must be pursued through appropriate lawmaking processes so as to allow for full and free debate. As previously stated, Abbott status, which is effectively what petitioners have sought herein, is an extraordinary judicial remedy, not a solution for specific problems of less than constitutional dimension. Issues such as these are matters to be addressed by the Legislature, State Board of Education and the Executive branch, with the Commissioner playing an integral role in his capacity as chief officer of the Department of Education.

Accordingly, the Commissioner adopts the ALJ's determinations that Clayton, Egg Harbor City, Hammonton, Lakehurst, Lakewood, Lawrence, Little Egg Harbor, Maurice River, Ocean Township, Quinton, Upper Deerfield and Wallington have not demonstrated that CEIFA is insufficient, absent special needs status, to enable them to provide T&E. He further adopts the ALJ's determination that Salem City *has* prevailed in that demonstration, and he will consequently recommend to the Legislature that the district be included within CEIFA's definition of "Abbott district." The Commissioner rejects the ALJ's determinations that Buena Regional, Commercial Township, Fairfield and Woodbine have demonstrated entitlement to special needs status, and he directs instead that the specific evaluations and interventions set forth above be initiated by the Department forthwith, so as to enable those districts to address their demonstrated deficiencies as provided by statute. Copies of this decision shall be immediately forwarded to the Assistant Commissioner for the Southern Region, and to the County Superintendents of Schools in Atlantic, Cumberland, Cape May

and Salem counties, so that they may promptly begin planning for implementation of the Commissioner's directives herein. [24]

IT IS SO ORDERED.[25]

COMMISSIONER OF EDUCATION

Date of Decision: February 10, 2003

Date of Mailing: February 10, 2003

[24] The Commissioner concurs with the ALJ that the Upper Deerfield school district might benefit from targeted Department evaluation and assistance. (Initial Decision at 104) Therefore, the Commissioner additionally directs the Cumberland County Superintendent of Schools to inquire into the district's poor student performance and take such actions, or make such recommendations to the Commissioner, as may be appropriate.

[25] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 et seq. and N.J.A.C. 6A:4-1.1 et seq., within 30 days of its filing.