#171-01

IN THE MATTER OF THE	:	COMMISSIONER OF EDUCATION
ABBOTT GLOBAL ISSUES.	:	DECISION
	:	

SYNOPSIS

Petitioning boards of education and parents alleged that the New Jersey Department of Education (DOE) had failed to comply with the mandate of the New Jersey Supreme Court in implementing the Court's decisions regarding programs and funding to be provided in "Abbott" school districts. In particular, they alleged violation of the Court's 1998 (*Abbott V*) and 2000 (*Abbott VI*) rulings on preschool programs.

The ALJ distilled petitioners' numerous specific allegations into a handful of fundamental issues and addressed them by summarizing the parties' positions, reviewing the record without fact-finding, and offering comments, suggestions and recommended orders based on that review. These included adoption of a uniform regulatory standard for calculating the projected population of eligible preschool students; review of time frames for applications, DOE decisions, and appeals; DOE adoption of a planned curriculum *Framework* document, or an interim version, by June 15, 2001; negotiation with Head Start in order to bring deficient programs up to Abbott standards; assurance that discussions with Head Start and other community providers, and consideration of additional program and funding requests, are based on assessments of needs and not pre-determined levels of funding; and timely addressing of facilities needs through the program established by the Legislature for this purpose (EFCFA).

The Commissioner affirmed, modified and reversed various aspects of the Initial Decision. The Commissioner affirmed the ALJ's conclusions that preschool is a significant legal right in the present context but has not been declared a Constitutional entitlement, that the Department had not violated the Court's mandates by excluding students based on parental status, and that facilities issues must be addressed through the mechanism established by the Legislature for this purpose (EFCFA and its implementing rules). He affirmed that, to the extent DOE assessment of district preschool curriculum plans and district enrollment/recruitment plans may not be occurring in sufficient depth, DOE must revise its practices and procedures. The Commissioner concurred that DOE should develop rules for a uniform regulatory method of determining the projected number of eligible preschool students. The Commissioner also affirmed that, to the extent that DOE determinations on preschool program and funding applications may ever have been based on predetermined fiscal considerations rather than on assessment of student needs, that practice is not to occur and DOE must provide guidance to districts on information needed for adequate review. Finally, the Commissioner agreed that the various time frames operative in Abbott applications, determinations and appeals appeared problematic and directed that the Department examine these time frames and report its conclusions and recommendations so that he may effectuate changes in preparation for the 2002-2003 school year. Where the Department was directed to revise practices and procedures or develop guidelines, rules or recommendations, the Commissioner ordered that this be done by August 31, 2001.

The Commissioner modified the ALJ's directive with respect to needs assessments, concurring that these are essential and that the manner in which such assessments are to be undertaken must be determined by DOE, but clarifying that the State may allocate responsibility as appropriate and that the Court did not place responsibility for Abbott mandates exclusively on the DOE. The Commissioner rejected the ALJ's conclusion on the necessity of the preschool *Framework* document and reversed the order directing its promulgation by June 15, 2001, finding instead that quality, Court-compliant preschool programs can be implemented based upon standards set forth in the definitive *Expectations* document already promulgated; however, because the *Framework* will be a valuable supplemental tool for districts, the Commissioner directed that it be promulgated as scheduled by August 2002, with no delays or extensions. Finally, the Commissioner reversed the order of the ALJ with regard to Head Start, stressing that identifying and contracting with community providers is a district responsibility; that while districts must use community providers where practical, there is no requirement to use any particular provider; and that the State is not required to provide funds to bring Head Start, or any other willing community provider, up to Abbott standards regardless of cost or the availability of alternative means of serving students.

June 1, 2001

OAL DKT. NO. EDU 3236-01

IN THE MATTER OF THE	:	COMMISSIONER OF EDUCATION
ABBOTT GLOBAL ISSUES.	:	DECISION
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by the respondent Department of Education ("Department"), as were replies by Petitioners Hoyos, Doresa, Aranda and DeWitt ("petitioners") and participant Boards of Education of Passaic and Elizabeth ("participants").[1]

In its exceptions, the Department observes that the Initial Decision consists of various suggestions and a few orders, and requests that, to the extent these suggestions and recommended orders are adopted, any changes resulting from them should apply to early childhood education plan cycles beginning with the 2002-2003 school year. Specifically, completion of the Early Childhood Education Curriculum Framework should be set within a reasonable time from the date of the Commissioner's final decision; draft or interim frameworks are not appropriate for adoption, since these might differ substantively from the finalized framework, necessitating mid-year modification of plans and services. (Department's Exceptions at 2)

The Department next requests that the Commissioner clarify, to the extent the Initial Decision suggests otherwise, that the Court placed the entire state-level burden for assurance of quality early childhood education programs not exclusively on the

[1] Other petitioning/participating boards of education, although contributing to the record before the ALJ (Initial Decision at 5), made no submissions on exception.

Department of Education, but rather on the *State*. Therefore, the State must have the flexibility to allocate tasks to appropriate agencies other than the Department of Education, such as the Department of Human Services, the New Jersey Economic Development Authority, and the Commission on Higher Education. The State must also be able, in its discretion, to retain responsibility for accomplishing tasks itself, either directly or through procurement of services, rather than delegate them to districts. (Department's Exceptions at 2-3)

Finally, the Department urges the Commissioner to clarify that, while the Court plainly authorized collaboration with community providers in the delivery of early childhood education services, it did not *require* the use of any particular provider, including Head Start. Therefore, as with any other provider, if Head Start is unable or unwilling to deliver services meeting Abbott standards at a cost the State determines to be efficient, the State is under no obligation to collaborate with it or bring it up to Abbott standards, fiscally or programmatically. (Department's Exceptions at 3-4)

In reply to the Department's first exception, petitioners and participants contend that the record is devoid of factual basis for the Department's claims that compliance with the Initial Decision's recommended time frames is not feasible, and they strenuously object to any further delay in its implementation. Participants additionally contend that interim or draft curriculum frameworks would be neither inappropriate nor unworkable, since the Department routinely issues guidelines, standards and suggestions that are subject to change during the course of their implementation, and no reason is given why interim standards cannot be employed during the 2001-2002 school year with final standards to apply in 2002-2003 and thereafter. (Petitioners' Reply at 1, Participants' Reply at 2-3)

In reply to the Department's contention that responsibility for Abbott preschool programs may be delegated to State agencies other than the Department of Education, petitioners and participants respond that the Court unequivocally placed responsibility for providing required preschool programs on the Abbott districts and the Department of Education. Participants add that it is somewhat disingenuous for the Department to now back away from responsibility for programs it, itself, proposed to the Court, and that any means the Department chooses to implement the Court's mandates must be consistent with the Court's directives and result in prompt and timely fulfillment of obligations. (Petitioners' Reply at 1-2, Participants' Reply at 3-4)

Finally, in reply to the Department's contentions regarding its obligations to community service providers generally, and to Head Start in particular, petitioners and participants contend that the Court clearly required all Head Start programs to be included within districts' Abbott preschool plans, and that the only appropriate course of action with respect to Head Start is for the Department to assess what is needed to bring all Head Start programs up to Abbott standards and fund them accordingly. Even assuming, *arguendo*, that the Department's exclusion of Head Start on grounds of fiscal inefficiency were permissible under the Court's mandate, the record in this matter is totally devoid of factual evidence that would support such an action; indeed, it does not even include an explanation as to how and why the Department determined not to contract with Head Start. (Petitioners' Reply at 2, Participants' Reply at 4-5)

Over and above their replies to the Department's exceptions, petitioners and participants urge the Commissioner to adopt the findings, determinations, conclusions and recommendations of the Initial Decision in their entirety. At the very least the Commissioner should require the Department to direct completion of an Early

Childhood Education Curriculum Framework, interim if not final, at the earliest feasible date and in as much detail as possible; reaffirm the responsibility of every district to serve every eligible child in a quality preschool program and the responsibility of the Department to fund plans and programs for this purpose; require the Department to issue clear guidelines and standards for the specific information required to understand and evaluate the adequacy of plans and funding requests, rather than reviewing them based on preset cost determinations; assure expeditious decisions on requests for permanent facilities and provide for temporary facilities in the interim; and require the Department to establish fixed and firm dates for the early childhood program application and approval process. (Petitioners' Reply at 2-3, Participants' Reply at 1-2)

COMMISSIONER'S DETERMINATION

As set forth in the Initial Decision, petitioners[2] allege that, in a host of ways, the Department has failed to meet the mandate of the Court and has otherwise violated the law. Specifically, they allege:

> (1) Failure to provide timely and concrete guidance to enable and assure that districts plan and implement preschool for all children under the *Abbott VI* quality standards;
>
> (2) Failure to require the development and implementation of plans to provide high-quality preschool for all eligible three- and four-year-old children in the Abbott districts, based on need;
>
> (3) Failure to require the development and implementation of concerted and aggressive outreach and recruitment efforts to improve and maximize enrollments;
>
> (4) Failure to include Head Start children and programs in the districts' preschool plans and budgets;

[2] For purposes of the following discussion, "petitioners" refers to all petitioners and participants, consistent with the procedural explanation of the ALJ (Initial Decision at 4-5). Where specific filings are referenced, the submitting party is individually identified.

(5) Failure to require assessment of children's needs and the development and implementation of program plans and budgets based on those needs;

(6) Failure to require assessment of all school- and community-based programs and the development and implementation of improvement plans to enable each program to meet *Abbott VI* quality standards, including class size limits and teacher certification;

(7) Failure to require the development and implementation of uniform, age-appropriate content and curriculum for all programs;

(8) Failure to require the development and implementation of plans for transportation, social, health and other services, based on need;

(9) Failure to require the development and implementation of plans for safe and educationally adequate preschool facilities, including temporary and permanent facilities to address increased enrollments and the needs of unhoused children as a result of class size reduction;

(10) Failure to require the development and implementation of plans to provide preschool to children with disabilities, with limited English proficiency and other special needs;

(11) Failure to require the development and implementation of plans for district-wide assessments, supervision, technical assistance, coordination, training, evaluation and accountability measures to assure uniform, high-quality preschool education in all programs, whether community- or school-based, based upon an assessment of district-wide need;

(12) Failure to require the development and implementation of needs-driven district budgets and supplemental funding requests;

(13) Imposition of pre-determined, per-pupil funding amounts for preschool in community-based providers, based upon available state funding;
(14) Approval of district-revised plans for 2000-2001 that fail to comply with the *Abbott VI* preschool directives; and

(15) Arbitrary rejection of various components of district plans requiring supplemental funding for implementation. (Initial Decision at 6-7)

Based on these allegations, petitioners seek a decision[3] that "finds that the DOE's 2000-2001 implementation of preschool programs in the Abbott districts violates

[3] Petitioners agree that any relief must be prospective. (Initial Decision at 8)

Abbott V and VI, federal and state special education laws and state bilingual education law, and, as relief, directs the Commissioner to require and assist the Jersey City, Newark, Paterson and West New York districts, and other Abbott districts, to

> (1) Conduct a comprehensive assessment of the particular academic, social and health needs of preschool-age children;
>
> (2) Conduct an assessment of all school and community providers of preschool to determine their needs and develop site-specific improvement plans and budgets therefore to assure maximum enrollment of three- and four-year-old children without regard to parental status;
>
> (3) Assure inclusion of all children enrolled in federally funded Head Start and services for children with disabilities;
>
> (4) Assure timely transition to classes of fifteen students where necessary;
>
> (5) Assure sufficient and ongoing professional development;
>
> (6) Assure teacher certification for non-certified teachers with needed supports and accessible higher education and phase-in of comparability between district and provider salaries, benefits and schedules for similarly credentialed and experienced teachers;
>
> (7) Assure high-quality curriculum at each site;
>
> (8) Assure all necessary transportation, health and social services;
>
> (9) Assure needed facility improvements and, as necessary, expansion and/or new construction;
>
> (10) Assure adequate programs and staff for oversight, training assistance, etc., and adequate provider-specific and district plans, budgets, facilities and state funding." (Initial Decision at 6-8)

The Administrative Law Judge (ALJ) addresses petitioners' allegations by distilling them into a handful of broad systemic issues and, by and large, resolving them not through the customary findings of fact and conclusions of law, but rather through reflections and observations culminating in a handful of orders, most of which are more in the form of suggestions for consideration than of directives for specific action.

Recognizing the inherently difficult task before him, the ALJ himself acknowledges the unusual character of the resulting decision in transitional comments between his statement of the parties' positions and his own discussion of specific issues:

> Judging the legal sufficiency of any steps taken in an ongoing process that is intended to reach a goal that admittedly cannot be achieved in a definably short time is difficult. Similarly, where some possible action has not occurred, the determination as to whether that lack of action at any given time in the long-term process constitutes a legally actionable violation can be difficult to determine.*** To the extent that the evidence presented establishes that the DOE has not done what the Court mandated it to do, the remedy for such non-compliance necessarily must be directive, that is, the DOE must be ordered to comply, and in that vein, possibly be given somewhat more detailed directives as to how to assure that it does so.*** The decision here is therefore addressed to systemic concerns and is perceived as far more applicable to the next and future rounds of plans and applications, as any identified failings in the DOE's systemic response to the task set out for it by the Supreme Court must be immediately rectified so that the 2001-2002 school year can proceed in a more ordered and less contentious manner, and so that, in future years, the interested parties, agencies and groups can all address the issues in a more coordinated and cooperative manner. As a result, some of the comments and conclusions reached are perhaps more suggestive than they are adjudicative. (Initial Decision at 36-37)

He reiterates this view when reaching his actual orders, in comments introducing the Initial Decision's Summary, Conclusion and Order:

> In summary of the above, based on the record as presented by the parties and the arguments of counsel, I make the following findings and conclusions, as well as the following suggestions that are, in my view, worth further consideration by the Department and the districts. To the extent that these require action, the parties are ORDERED to comply and act in accord with the following: (Initial Decision at 56-57)

While the ALJ's approach is an understandable one – arguably the only feasible one under the circumstances – its result is paradoxical. The Department, noting the general absence of determinations that the evidence showed clear and pervasive violation of the Court's mandate, finds only limited bases on which to take specific exception. Petitioners, on the other hand, noting the limited extent of the Department's

exceptions, view the decision as a vindication of their claims and urge its immediate affirmance in all respects, contending that the Department's comment to the effect that no violation was demonstrated "flies in the face" of a detailed and well-reasoned determination. (Participants' Reply at 1)

The Commissioner, as agency head, stands in an unusual posture in reviewing a recommended decision of this nature. In accordance with the rules for adjudication of contested cases, he may accept, reject or modify findings of fact, conclusions of law and recommended orders based upon the record before him, and he does so below, to the extent that the Initial Decision presents these. However, where the ALJ has made suggestions for improvement, or expressed a conditional opinion because the record by which both he and the Commissioner are bound did not permit a firm conclusion, the Commissioner takes the ALJ's observations under advisement and, where appropriate, directs, as a matter of policy, further exploration and activity on the part of the Department.

Consistent with the parameters set forth above, the Commissioner now turns to the specific issues addressed in the Initial Decision.

Constitutional Basis for Preschool in the Abbott Districts

The ALJ analyzes the writings of the Court and concludes that he cannot find preschool to have been clearly declared a constitutional entitlement, although in the current context it is plainly a significant legal right. (Initial Decision at 37-38) The Commissioner concurs with this conclusion, which does not reappear in the Summary, Conclusion and Order.

Substantive Educational Standards

Addressing allegations that the Department has failed to meet the Court's directive for provision of substantive preschool educational standards, the ALJ reasons as follows: If the Department's adoption of its *Early Childhood Education Program Expectations: Standards of Quality* ("*Expectations*") document (Initial Decision at 18-19) is enough to satisfy the Court, then DOE has not violated the Court's mandate. However, the Department clearly intends to go further, as evidenced by its ongoing development of an *Early Childhood Education Curriculum Framework* ("*Framework*") document to give more specific guidance than is provided in the *Expectations*; thus it may be that the standards set by the *Expectations* are not substantive enough to meet the Court's mandate. If this is so, then the Department must move quickly to adopt more substantive standards in time for the 2001-2002 school year. (Initial Decision at 39)

From this reasoning, the ALJ concludes, and so orders, that although the Department is not in violation at this time, in order to truly meet the Court's mandate and avoid concerns that the *Expectations* are not fully sufficient as standards, the final *Framework*, or an interim version, must be in place by June 15, 2001, so as to apply to the 2001-2002 school year. The ALJ further states, with general reference to substantive educational standards, that the Department must insist on review of district early childhood education curriculum plans, seeking such information as the agency in its expertise determines to be necessary for this purpose, in order to ensure that the goal of effective schooling is being met. (Initial Decision at 39-40 and 57)

While wholeheartedly endorsing the ongoing process of developing the *Framework* document, the Commissioner cannot concur that the Department is in violation of the Court's mandate to provide substantive educational standards if the

Framework document is not in place prior to commencement of the 2001-2002 school year. In effect, the ALJ's analysis construes the Department's plan to develop the *Framework* as *per se* evidence that the *Expectations* are not sufficiently substantive to meet the mandate of the Court. The Commissioner disagrees. The *Expectations* document is analogous to the Core Curriculum Content Standards (CCCS). It is the definitive document that clearly establishes State standards for what students are expected to know and be able to do upon completion of preschool, and it offers a wealth of strategies and resources for development of programs and practices that will lead to the desired results. Like the CCCS, it is a "stand-alone" document, albeit one designed to permit ongoing supplementation by further resources and support strategies, both at the State and the local levels. That such supplementation is possible and, indeed, is being actively undertaken by the Department in an effort to encourage creation of the best programs achievable, does not alter the essential value and character of the *Expectations* document, nor render it inherently deficient in terms of meeting the Court's mandate for substantive preschool standards. To the contrary, the early childhood *Framework* document will be analogous to the frameworks adopted for each content area of the CCCS[4] – a supporting resource, developed by a broad-based panel of experts over a period of time subsequent to the establishment of standards, intended to enhance and amplify strategies previously presented in conjunction with those standards.[5]

[4] Both the CCCS and their corresponding frameworks are accessible through the Department's website at http://www.state.nj.us/njded/stass/index.html

[5] The Commissioner rejects petitioners' claim that the *Expectations* document is deficient because it does not deal with budgeting, professional development and "clear, measurable standards of high-quality classroom practice to which the teaching staff can be held accountable." (Initial Decision at 18-19) Not every matter to be addressed as part of Abbott implementation falls within the rubric of "substantive educational standards" as used by the Court in this context.

Because neither its effectiveness nor its validity is contingent upon existence of a corresponding *Framework*, the Commissioner finds the *Expectations* document to be more than adequate to guide development of high-quality preschool programs consistent with the Court's mandate. Thus, he can ascertain no reason why the *Framework* cannot continue to be developed as currently scheduled, through the same careful, inclusive and highly successful process that was used to develop the *Expectations* and the various CCCS frameworks, as described in the introductory sections of those documents. However, because the Commissioner is committed to assisting districts in achievement of preschool standards of quality and the *Framework* will be yet another valuable tool in that endeavor, he directs the Department to ensure that the planned schedule for development of the *Framework* be maintained as announced, without delay or extension, so that the *Framework* will be finalized and disseminated, as planned, by August 2002.

Additionally, the Commissioner finds the requirement for Department review and approval of district preschool program plans, including plans for a district curriculum that conforms to *Expectations* standards which are linked to the CCCS, to be implicit in the rules governing early childhood education operational plans at *N.J.A.C.* 6A:24-3.4. However, to the extent that district curriculum plans may *not* be undergoing sufficient review in the context of Department review of early childhood education operational plans or otherwise, the Commissioner directs that the Department revise its practices and procedures as may be necessary to include such review, and that it provide guidance to districts as to what they must submit in order for such review to occur. If necessary, the Department should also develop amendments to existing rules for presentation to the State Board of Education, so that, with public input and discussion,

that body may duly consider their promulgation pursuant to the Administrative Procedure Act (*N.J.S.A.* 52:14B). In order to insure that any changes to, or clarifications of, the review process are in place prior to the due date for submission of early childhood education operational plans for 2002-2003, so as to allow for adequate preparation by districts, the Commissioner directs that the Department develop and publicize any such revisions or clarifications by August 31, 2001.

Enrollment & Recruitment

The ALJ endorses basic principles which all parties recognize: that intensified outreach is necessary when enrollment does not reach a minimum threshold of eligible students, and that adequately funded plans are needed for ongoing and expeditious improvement of existing enrollment patterns even where the minimum threshold has been met, so that, as soon as practicable, access to preschool programs meeting State standards is available to all eligible students as intended by the Court. Noting that the current regulation establishing a threshold of 50 percent of eligible students is presumptively valid and not open to review herein, the ALJ discusses the discrepancy in the parties' views as to the correct method of determining the projected number of eligible three- and four-year-old students to which the threshold percentage is to be applied, and the possible impact of distinguishing between three- and four-year olds. Finding that the record does not permit him to draw a conclusion as to which of the parties' two respective methods results in the more reliable indicator, or indeed, what the proper method of calculation might actually be, the ALJ concludes that the Department should establish, by rule after due public input, a uniform standard for determining the number of eligible students in a district. In the Summary, Conclusion and Order, he states that "further refinement [of the current regulation] may be warranted," that the Department should carefully consider the

data generated by petitioners' method, and that the Department must insure that districts develop, and are provided adequate funding for, corrective action plans for further outreach in conformity with regulation when the most reliable, up-to-date data so warrants. (Initial Decision at 40-45 and 57)

The Commissioner fully concurs with the basic principles enunciated by the ALJ, and further concurs that a uniform regulatory method of calculating the projected number of eligible students is warranted. Accordingly, the Commissioner directs the Department to develop an amendment to *N.J.A.C.* 6A:24-3.3(a)8 for presentation to the State Board of Education at its August 2001 meeting, so that, with public input and discussion, that body may duly consider its promulgation pursuant to the Administrative Procedure Act (*N.J.S.A.* 52:14B). Additionally, as with district curriculum plans, to the extent, if any, that enrollment and recruitment plans, or corrective action plans where necessary, may *not* be undergoing sufficient review in the context of Department review of Early childhood education operational plans or otherwise, the Commissioner directs that, by August 31, 2001, the Department revise its practices and procedures as may be necessary to include such review, and, if warranted, develop corresponding rule amendments for presentation to the State Board of Education.

Head Start

The ALJ notes that the Court's directive and applicable regulatory provisions require that, wherever possible, districts must use community providers willing and able to meet Abbott preschool standards. Concomitantly, the ALJ reasons, the burden is on the Department to explain why it rejected the use of willing Head Start programs as unfeasible. If the Department is suggesting that the programs made unreasonable fiscal demands, the record is completely devoid of information that would

support such a claim. Neither does the record present any response to petitioners' allegation that the Department offered an inadequate, predetermined dollar amount to bring the programs up to Abbott standards, without any assessment of student or program needs; indeed, the record provides no explanation at all as to why agreement could not be reached. (Initial Decision at 45-47)

Based on this analysis, the ALJ concludes that he cannot find the Department to have met its burden of demonstrating that it acted in a reasonable and compliant manner with respect to Head Start. He further concludes that the Department violates the spirit and intent of the Court's directive, and its own rule, if it does, in fact, refuse to provide appropriate levels of funding based on particularized needs to willing but deficient Head Start programs, thereby requiring districts to duplicate Head Start services, as well as provide for those components found lacking in the rejected programs. Finally, he concludes that where the Department is going to reject a provider as impractical, it must have a clear, documented basis for doing so, so that the lawfulness of its action can be properly gauged. Accordingly, reiterating that the present record does not permit a determination that the Department's offer to Head Start was need-based and adequate, and that there appears to have been a lack of district- and program-specific analysis of the level of funding necessary to upgrade to Abbott standards, the ALJ orders that the Department must negotiate in good faith with Head Start; that the Department and districts must coordinate their efforts to assure that discussions with Head Start and other community providers are based on adequate assessments of student needs; and that funding must be based on such needs and not on pre-determined per pupil amounts. (Initial Decision at 47-48 and 57-58)

On the issue, the Commissioner cannot concur with the ALJ's analysis and conclusion, which appear to suggest that Head Start programs *must* be used, that the State has an independent obligation to negotiate with Head Start at the state level, and that, if a Head Start program – or for that matter any community preschool provider – is not offering a program that meets Abbott standards but is willing to do so, the State must pay for remediation of its deficiencies *regardless* of the availability of acceptable alternative means to serve the district's eligible student population.[6] If read in this manner, the Initial Decision would stand the relationship between Abbott districts and community providers on its head. Under applicable rules at *N.J.A.C.* 6A:24-3.3(b), districts are required to provide preschool programs through existing community providers willing and able to meet Abbott standards, *whenever practical*. Thus, identifying and contracting with appropriate providers is a *district* responsibility, subject to Department approval through review of the district's early childhood education operational plan. To the extent that a district seeks additional funding to bring willing but below-standard providers up to Abbott levels, the State surely has the right – indeed, the responsibility – to deny such funding in whole or part based on a determination that the bringing of any particular substandard non-district program, including a Head Start program, up to Abbott expectations is not cost-effective or is otherwise impractical, and to direct the district to serve its students in an acceptable alternative manner. Certainly, there is no independent obligation for the State to "negotiate" with any particular community provider, including Head Start, or for districts to contract with any particular provider, including Head Start. *However*, the Commissioner *does* concur that where the State determines not to supply

[6] There is no question but that students attending deficient programs, including deficient Head Start programs, may not be excluded from calculation of the eligible student population.

additional funding for a particular provider, such determinations cannot be made without consideration of student needs. Therefore, the Commissioner directs that, to the extent that the Department, in the formative stages of Abbott implementation, may ever have used pre-determined dollar amounts[7] or other apparently arbitrary standards as bases for excluding Head Start or other willing community providers from district preschool plans, this is not to occur. Rather, plans to use community providers, including Head Start, must be evaluated based upon student needs, with considerations of cost and practicality assessed relative to other means of meeting State standards.

Parental Status

The Commissioner fully concurs with the ALJ's summary conclusion and order that the record provides no evidence of the Department having violated the Court's mandate by denying, or permitting the denial of, preschool services to any student based on the status of his or her parent, vis-à-vis ineligibility to enroll their children in Head Start or otherwise. (Initial Decision at 48 and 58)

The Role of Assessment

The ALJ characterizes the crux of petitioners' complaints regarding the adequacy of the Department's direct and supplemental funding processes as follows: Districts have not properly examined and assessed the conditions, circumstances, strengths and weaknesses surrounding their delivery of an appropriate Abbott-quality preschool program, and have, therefore, failed to properly determine their needs and those of the local community-based centers. The Department has failed to insist upon such district activity so that it can properly oversee the planning and implementation

[7] That is, amounts derived through fiscal considerations without regard to reasonably determined actual costs for meeting needs or to the comparability of such costs among programs.

process, and do all that is necessary to assure its success. Failure to insist upon districts formulating plans and submitting them for assessment, in turn, has led to inadequate funding in a number of areas. The Department's response is that petitioners are attempting to foist a responsibility on districts to assess students and preschools prior to designing plans or revising them, a responsibility which the Court nowhere requires. (Initial Decision at 48-49)

The ALJ rejects the Department's position as totally unwarranted, especially after *Abbott VI*, *supra*. Instead, he holds that assessment must be viewed as central to any meaningful implementation of *Abbott*, which inherently demands ongoing evaluation of students, preschools and programs, to ensure that quality services are being delivered and identified needs are being met. In examining records of specific claims of inadequate funding vis-à-vis systemic issues, the ALJ finds that the Department understands its obligation to provide adequate funding, as evidenced by its provision of funding for early childhood education programs over and above the funds provided by Early Childhood Program Aid. He further finds, however, that while the funding at issue in the matters on record may, in fact, have been adequate, and appropriate underlying assessments may, in fact, have been made, the corresponding request determination letters do not indicate that Department decisions were based on specific assessments and analyses of district or student needs; to the contrary, they lack explanations, take little or no account of differences between districts, and generally create the appearance of the very arbitrariness that previously troubled the Court. With reference to this deficiency, the ALJ opines:

> In the end, regarding issues relating to the need for specific levels of funding, supplemental services and the funding therefore [*sic*], facilities, and the like, the DOE must carefully guide the districts as to the

> information it must have in order to fairly assess their needs and requests. It must insist that districts both assess and regularly monitor their own and community-provider programs. It must do so regarding teacher certification and the progression of staff towards mandated certification, and regarding the need for transportation and health services, overall special education staffing and funding (as opposed to pupil-specific needs properly determined under IDEA provisions, including due process hearings), and bilingual education. While the DOE might prefer to allow districts to deal with the planning and implementation of Abbott programs on their own, and while the districts do have the front-line responsibility for properly planning, assessing, monitoring and, where needed, revising the manner in which they deliver services, the DOE has an inescapable, constitutionally significant responsibility that requires that it not merely sit back and receive what the districts give it, that it not merely offer limited guidance and assistance to the districts, but that, as Justice Stein said, it boldly and even aggressively act as the strong and active insurer of the planning and implementation of Abbott preschool education.
>
> (Initial Decision at 54-55)

Following this discussion, the ALJ concludes that districts are required to conduct reasonable evaluations, reviews and assessments of themselves, their preschool children and their providers' circumstances and to use these as aids in formulating plans for the implementation of Abbott preschool. He further concludes that these must be made available to the Department so that it can conduct reasonable reviews and assessments of the districts' actions. Finally, he concludes that, above all, the Department must issue clear guidelines and standards concerning the information that it requires from districts to understand, evaluate and ultimately decide upon the adequacy of their plans, requested funding and program implementation. (Initial Decision at 49-55)

In the recommended orders based upon this section, the ALJ states that the Department clearly understands its obligation to provide adequate funding and has in some circumstances demonstrated that understanding, from which specific disputes do not detract. However, noting that "there appears to be some concern that the understanding is at times only theoretical," the ALJ directs:

> Districts, as well as the Department, must engage in specific evaluations and assessments of the needs of their students, programs and community-based providers so as to determine in detail their specific requirements and to formulate plans and applications reasonably geared to meet those needs and thereby assure that Abbott-quality preschool is available for all eligible children. In addition, the DOE must make assessments and ultimately assure that the districts are providing such programs. In order to properly undertake these tasks, the DOE must issue guidelines, probably in the form of detailed regulations, that advise districts and providers as to the information deemed necessary to allow for the districts and the DOE to adequately understand the needs and plan, fund and carry out the programs, as well as assess their adequacy and success. The exact details of what is necessary to do this must be left, in the first instance, to the DOE to determine. (Initial Decision at 58-59)

The Commissioner fully concurs that assessment of needs and evaluation of programs is central to any meaningful implementation of Abbott mandates; indeed, requirements for such assessment and evaluation are inherent throughout the detailed rules governing urban education reform in Abbott districts, at *N.J.A.C.* 6A:24-1.1 *et seq*. While the record is not conclusive on this point, as recognized by the ALJ, it would come as no surprise if, in the first stages of implementing so vast and new an undertaking as the Abbott initiative – where programs needed to be put into place quickly so as not to delay immediate benefit to Abbott students – assessment and evaluation processes as they pertain to preschool and supplemental programs may not have been as refined as they should ideally become. Thus, while recognizing that improvement has been an ongoing process that continues to this day, the Commissioner directs, with respect to preschool operational plans and requests for supplemental funding, that to the extent that the Department may not be ensuring that assessments of student need are occurring or providing sufficient guidance as to how they are to be conducted, to the extent that the Department may not be ensuring that programs are being evaluated for compliance with approved plans, and to the extent that the Department may not be making its

determinations on preschool and supplemental funding requests based on assessment of student needs, the Department shall, by August 31, 2001, recommend to the Commissioner such revisions to its practices and procedures as may be necessary to achieve these goals, as well as recommend whether any guidelines or rules may be warranted.[8]

Facilities

The ALJ concludes, and subsequently orders, that facilities needs must be addressed through the process established by the Legislature through the Educational Facilities Construction and Financing Act (EFCFA). He further concludes that short-term facilities needs must be promptly addressed through determination as to the actual needs of the districts to allow for full implementation of the necessary programs, based upon careful and detailed assessment of such needs, and that, to the extent that disputes exist over the needs of a specific district, these must be determined on a case-by-case basis in accordance with applicable appeal procedures. (Initial Decision at 55-56 and 59)

The Commissioner fully concurs with these conclusions and orders, clarifying that addressing of facilities needs must occur through the process established in the rules implementing EFCFA at *N.J.A.C.* 6:23A-1 *et seq.*[9]

Miscellaneous Orders

The ALJ makes recommendations regarding further procedures in the specific disputes pending at OAL with regard to Perth Amboy's and Vineland's claims to

[8] The respective roles of districts and the State in assessment and evaluation processes (see discussion at 84-85 below), and what specific information is necessary in order to ensure that needs are identified and met, is a matter to be determined through development of the directed procedures.

[9] It is noted that the State Board of Education in May 2001 proposed superseding rules, to be codified as N.J.A.C. 6A:26 upon adoption, consistent with the requirements of the Administrative Procedure Act (N.J.S.A. 52:14B).

restitution of funds already spent, and with regard to other discrete matters pertaining to the 1999-2000 or 2000-2001 school year. (Initial Decision at 59) The Commissioner concurs with these recommendations and adopts them in their entirety.

Time Frames for Submission/Review of Applications and Resolution of Disputes

In a footnote to his summary and conclusions, the ALJ finds it "appropriate to express***some thoughts regarding the timing of decision making in Abbott matters." The ALJ opines that, while resolution apart from the contested case hearing process is both possible and desirable, where this does not occur, the parties' time for resolution must be limited so that districts can know where they stand early in a given year; thus, OAL rules limiting the time for discovery and settlement efforts in cases of this type may be warranted. He further opines that the Department's application process suffers because there are no fixed time frames for submission of filings and rendering of decisions; he suggests that district papers should be due on dates certain, with Department decisions based on whatever is submitted and resulting claims of deficiency addressed on appeal, and that the effectiveness of rules already including time frames may need reconsideration. He urges all interested parties – such as the Department, districts, the Education Law Center, OAL and the New Jersey Economic Development Authority – to consider how to accomplish expeditious movement of plans, applications, reviews/assessments, decisions and appeals, suggesting that there should be "discussions to determine the best means to achieve the desired resolutions in a fair yet timely fashion." (Initial Decision at 59-60)

While these comments of the ALJ do not constitute a finding or order, it is clear from the record that problems exist with the time frames within which various Abbott determinations are occurring, although the Commissioner must observe with

respect to Department determinations that, as alluded to by the ALJ, this appears to be due in no small part to district failure to submit requested information and the ensuing protracted efforts to obtain such information. Therefore, the Commissioner directs the Department to examine this issue, identify the places where improvement is necessary and the means required to effectuate such improvement (for example, regulatory or operational revisions, additional staff, coordination with other affected agencies regarding possible changes to their rules and procedures, and so forth), and report its conclusions and recommendations to the Commissioner by August 31, 2001, so that the Commissioner may effectuate changes in preparation for the 2002-2003 school year.

Burden on the Department of Education

Although the issue was not addressed or analyzed by the ALJ as a discrete topic, the Department contends in its exceptions, *supra*, that the wording of the Initial Decision in several places implies that the Court placed the entire burden for assurance of quality early childhood education programs exclusively on the Department of Education, thus precluding reliance on other State agencies. The Department stresses that compliance with the Court's directive is a responsibility of the *State*, not solely of the Department of Education, and that the State must be given the flexibility to allocate its responsibility among agencies, such as the Department of Human Services, the New Jersey Economic Development Authority, and the Commission on Higher Education, which are appropriate to handle the necessary tasks. Additionally, the State must be accorded the ability, in its discretion, to handle responsibilities, such as, perhaps, the needs assessments recommended by the ALJ, on its own or through procurement of services, rather than by assigning them to local districts. Such allocation of State responsibilities

should not be viewed as inconsistent with the Court's directives, and the Initial Decision should not be construed to suggest that it is.

The Commissioner readily acknowledges that, because education is the fundamental right at issue in the Abbott rulings, the Department of Education is the State agency with primary responsibility for ensuring that Abbott mandates are met. However, he fully concurs with the Department that ultimate responsibility lies with the State, not exclusively with the Department of Education, and that, particularly in view of the wide-ranging nature of the Abbott directives, it would be both unwarranted and counterproductive to preclude the State in its discretion from allocating responsibilities among its various agencies and subdivisions as appropriate, so long as obligations to Abbott students are fulfilled.

Summary and Conclusion

Herein, the Commissioner is confronted with review of the Department's implementation of a task of enormous size, complexity and urgency, a task described by the Court in *Abbott VI* as nothing less than "a major transformation of the educational system serving the State's poor, urban districts." (*Supra,* at 101) It is clear from the record of this matter that, particularly since *Abbott VI*, a number of crucial formative tasks have been successfully accomplished (Initial Decision at 15-17), representing a Herculean effort of which the Commissioner is proud, a significant improvement in the education offered in poor, urban districts, and a good-faith commitment to the Abbott children as envisioned by the Court. That not every goal has yet been fulfilled to its utmost – that more remains to be done – should not be allowed to detract from the magnitude of what has already been accomplished. Pervasive bad faith and violation of Court directives, as alleged by petitioners, is not the same thing as a need for refinement,

improvement and ongoing readjustment, based on practical experience with a vast and unprecedented undertaking.

That being said, it is equally clear that the first stages of Abbott implementation are behind us and the time is now right for such refinement, improvement and readjustment. Although the Initial Decision did not present the unequivocal findings and conclusions sought by petitioners, the Commissioner does concur with the ALJ that there are specific ways in which effectuation of Abbott requirements might now be bettered, and that the Department must be proactive in seeing that this occurs.

Accordingly, the Commissioner specifically finds, determines and directs as follows:

1. The Commissioner declines, as did the ALJ, to find that the Department's implementation of early childhood education in the Abbott districts is generally in violation of *Abbott V*, *Abbott VI* or other applicable law.

2. The Commissioner affirms the ALJ's conclusion that preschool, while a significant legal right in the present context, has not been declared a Constitutional entitlement.

3. The Commissioner rejects the ALJ's conclusion on the necessity of the preschool *Framework* document and accordingly reverses his order directing its promulgation in final or interim form by June 15, 2001, finding instead that quality, Court-compliant preschool programs can be implemented based upon standards set forth in the detailed *Expectations* document already promulgated, together with rules of the State Board and

technical assistance provided by the Department. Notwithstanding, the Commissioner concurs that the *Framework* is an important part of the State's continuing commitment to Abbott children, and he directs that the schedule currently in place for its development be maintained without delay or extension, so that the *Framework* document will be finalized and disseminated by August 2002.

4. The Commissioner endorses the ALJ's observation that Department review of district preschool curriculum plans is required for implementation of the Abbott mandate, and to the extent this may not be sufficiently occurring as part of the Department's review of Early childhood education operational plans or otherwise, the Commissioner directs that the Department make, by August 31, 2001, such revisions to its practices and procedures as may be necessary to ensure district compliance with preschool standards.

5. The Commissioner affirms the ALJ's conclusion that a uniform regulatory method of determining the projected number of eligible preschool students is warranted, and he directs the Department to develop appropriate rule language for presentation to the State Board of Education at its August 2001 meeting, so that the Board may consider promulgation of rules in accordance with the Administrative Procedure Act.

6. The Commissioner endorses the ALJ's observation that review of district enrollment and recruitment plans is necessary for effective implementation of the preschool mandate, and, to the extent that these, or corrective action plans where necessary, may not be undergoing sufficient review as part of the Department's review of early childhood education operational plans or otherwise, the Commissioner directs that the Department make, by August 31, 2001, such revisions to its practices and procedures as may be necessary to ensure district compliance with established regulatory standards.

7. The Commissioner rejects the analysis, conclusion and order of the ALJ with regard to Head Start, to the extent that it appears to require use of Head Start or any other particular provider by districts, negotiation with Head Start or any other particular provider at the state level, or provision of funds to bring Head Start or any other willing community provider up to Abbott standards regardless of the availability of alternative means of serving students.

8. The Commissioner stresses that identifying and contracting with community providers is a district responsibility and is required when practical. He affirms the ALJ's finding that, to the extent that Department determinations on preschool program and funding applications may ever have been based on predetermined fiscal considerations rather than on assessment of student needs, this must not occur. He further directs that

the Department's method of review must be adjusted to the extent necessary, if any, to ensure that district plans to use community providers, including Head Start, are evaluated based upon student needs, with considerations of cost and practicality assessed relative to other means of meeting State standards, and that guidance is provided to districts as to the information the Department needs for adequate review.

9. The Commissioner affirms the ALJ's conclusion that the Department has not violated the Court's mandates in regard to exclusion of students based on parental status.

10. The Commissioner modifies the ALJ's directive with respect to needs assessments and program evaluation by clarifying that the State may allocate responsibility as it deems appropriate for particular tasks. However, the Commissioner concurs that assessments of student needs, and evaluation of programs, are essential to proper fulfillment of the Abbott mandate, and that the manner in which such assessments and evaluations are to be undertaken must be determined by the Department. Therefore, he directs, with respect to preschool plans and applications and requests for supplemental funding, that to the extent that the Department may not be ensuring that assessments of student need are occurring or providing sufficient guidance as to how they are to be conducted, to the extent that the Department may not be ensuring that programs are being evaluated for compliance with approved plans, and to the extent that the

Department may not be making its determinations on preschool and supplemental funding requests based on assessment of student needs, the Department shall, by August 31, 2001, recommend to the Commissioner such revisions to its practices and procedures as may be necessary to achieve these goals, as well recommend whether any guidelines or rules may be warranted.

11. The Commissioner affirms the ALJ's conclusion that facilities issues must be addressed through the mechanism established by the Legislature for this purpose, that is, through EFCFA and its implementing rules.

12. The Commissioner affirms in their entirety the ALJ's orders (Initial Decision at 59, Nos. 8 and 9) with regard to further proceedings in the specific disputes pending, apart from the "global" issues determined herein.

13. The Commissioner concurs with the ALJ's suggestion that there is room for improvement in the various time frames operative in Abbott applications, determinations and appeals. He directs the Department to examine this issue, identify the places where improvement is necessary and the means required to achieve it, and report to him with conclusions and recommendations by August 31, 2001, so that he may effectuate changes in preparation for the 2002-2003 school year.

14. The Commissioner recognizes that the Department of Education has the primary state-level responsibility for ensuring that Abbott mandates are met, but clarifies the Initial Decision to the extent that it may be construed as finding that the Court placed this responsibility *exclusively* on the Department of Education, rather than on the State. He further clarifies that the State may retain tasks itself rather than delegate them to districts if, in its discretion, it deems that appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: June 1, 2001

Date of Mailing: June 1, 2001