

Don't Forget the Schools

*Legal Considerations
for Tax Reform*

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The Institute on Education Law and Policy

at Rutgers-Newark is New Jersey's premier center for interdisciplinary research and innovative thinking on education law and policy. Its mission is:

- to promote education reform and improvement through research, policy analysis and public discussion
- to mobilize lawyers, scholars and education practitioners to address complex and controversial issues in education law and policy in a comprehensive, in-depth manner
- to improve public understanding of these issues
- to serve as a center for learning and innovative thinking about legal and public policy issues relating to education.

While issues affecting New Jersey's urban students and educators are the Institute's primary focus, those issues are addressed in the context of the state's wide diversity and with an eye toward their ramifications for the nation as a whole.

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Acknowledgements

In spring 2005, we at the Institute on Education Law and Policy decided to embark on a project examining the complex interplay between education funding and state tax policy. Because our previous work had not required us to deal with the nuances of tax policy or with the technicalities of state and local finance, we knew we would need special help.

So we enlisted some of the state's, and the nation's, leading experts in these fields. We also enlisted, as we had before, some of the most thoughtful policy analysts and practitioners in our more frequent fields of endeavor, public education and the law. In the ensuing year, we have been extremely impressed by the scope and depth of their knowledge, and by their generosity in sharing it. The result, this three-part series, *Don't Forget the Schools*, has truly been an exercise in collaborative, interdisciplinary research and analysis.

We initiated the project with a meeting in June 2005 entitled "What We Know, and What We Need to Know, about Education Funding and Taxes," where about 30 lawyers, economists, and education practitioners helped us forge a research agenda. In December 2005 we circulated a draft report, and in January 2006 we convened another meeting, where we received generally very positive comments but also lots of ideas for additional points and perspectives to include in the final product. The full list of participants in these meetings is included in the appendix. We are grateful to all of them.

Additionally, several people provided extensive background information that has made its way into our text: Rich Brown of NJEA, Peg Goertz of the University of Pennsylvania Graduate School of Education, Joan Ponessa of the Education Law Center, Jon Shure of New Jersey Policy Perspective, and Lynne Strickland of the Garden State Coalition of Schools. Others provided helpful comments: former Commissioner of Education David Hespe, now of Rowan University; Superintendent James Lytle of the Trenton Public Schools; and Professor Robert Williams of Rutgers School of Law – Camden. Finally, Rutgers University Professor Henry Coleman and Professor Emeritus Ernest Reock both provided so much valuable information and such extensive comments on numerous drafts that they merit special thanks. The Institute on Education Law and Policy could not have produced these reports without their input and assistance.

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Though this has been a collaborative effort, the findings and conclusions are our own.

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Introduction

Demands for property tax reform in New Jersey reached a turning point in 2004, when the Legislature created the Property Tax Convention Task Force and charged it with making recommendations for convening a constitutional convention to address property tax reform. The task force indeed recommended such a convention and, while the necessary authorizing legislation has yet to be enacted, the call for tax reform and tax relief still runs high. Voters approved a record-low 53 percent of proposed school budgets this year, suggesting more than usual levels of concern about taxes and education spending; and a recent poll shows that Governor Corzine's approval rating has plummeted since he proposed a state budget that would raise another tax, the state sales tax, by one percent (though it would allow municipalities to hold property taxes steady in most districts).

At the same time, demands for education reform, specifically reform of our state's system of funding schools, run high, although there is little agreement on how to address the problem. Some call for more state aid for education, some less; some would abandon our state's historic and ambitious education reform program, fueled by the judicial mandate of *Abbott v. Burke*, some would extend the reach of that mandate even further.

In the midst of this highly charged public debate, the Rutgers-Newark Institute on Education Law and Policy has issued this series of reports entitled *Don't Forget the Schools*, focusing on the fiscal, legal and education funding

considerations for tax reform. They address the close but complex relationship between state tax policy and education policy and the potential impact of property tax reform on the state's public schools. The point of the series is not to recommend specific reforms or advocate particular policy changes. Rather, it is to inform the debate, and to remind policy makers considering various tax reform proposals of the enormous importance of public education, especially for our state's neediest children. Tax reform and education reform must be considered together. As the reports in this series demonstrate, this can be accomplished as we work toward the important goal of forging rational and equitable state tax and education policy.

In the first report in the series, *Don't Forget the Schools: Fiscal, Budget and Policy Considerations for Tax Reform*, we discussed the context for addressing the current budget crisis while living up to the constitutional commitment to support a thorough and efficient public school system. In this second report, *Don't Forget the Schools: Legal Considerations for Tax Reform*, we discuss the constitutional and legal underpinnings of our state tax and education policy, and current legal issues to be addressed in connection with efforts at reform. In the third report, *Don't Forget the Schools: Education Funding Considerations for Tax Reform*, we focus specifically on New Jersey's school funding mechanism and its relationship to tax policy, and we examine other states' efforts to balance demands for equitable taxation and high-quality education.

Constitutional Provisions

Any discussion of legal considerations for tax and education policy must start with the relevant provisions of the New Jersey constitution: the “Thorough and Efficient” Clause, the Tax Clause, and the prohibition of “private, local or special laws.” Each one of these provisions could shape or limit potential reform.¹

The “Thorough and Efficient” Clause

Of course, Article VIII, section 4, paragraph 1 – the Education Clause, also known as the “Thorough and Efficient” Clause or “T & E” Clause – is most relevant. Interestingly, it is part of the article on taxation and finance, reflecting the close connection between education and taxes. It states:

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

The Thorough and Efficient Clause was inserted into the constitution by an amendment adopted in 1875.² Twenty years later, in *Landis v. Ashworth*,³ the Supreme Court of New Jersey (then a lower court) rejected an interpretation of the clause that would have placed responsibility for funding public schools on the state alone, and upheld the school funding system then in effect that relied largely on local funding through property taxation. With this ruling, *Landis v. Ashworth* established that local funding of schools comported with the constitutional mandate. From then on, local funding developed into the norm in New Jersey, and along with local funding came funding disparities.

Although that stage was set in the Nineteenth Century, it was not until almost one hundred years after its adoption that the T & E Clause took on the leading role it now plays in the state’s education and tax policy. In 1973, in the landmark decision in *Robinson v. Cahill*,⁴ the modern Supreme Court of New Jersey construed the provision to provide not merely a funding requirement but substantive rights to educational opportunity. It ruled that the T & E Clause provides both an educational standard

for the state and a requirement of sufficient state funding for all students to have an opportunity to meet that standard.

Regarding the educational standard, the Court construed the T & E Clause to “embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.”⁵ Regarding funding, it ruled that while the clause gives the state, rather than local governments, ultimate responsibility for ensuring that all public school pupils receive an education that comports with the “thorough and efficient” mandate, it also allows the state to provide funding for schools primarily by means of local taxation (and, moreover, the Tax Clause does not prohibit such an arrangement).⁶ But it also ruled that where such a system results in wide disparities in spending from one district to another with no apparent relationship between the amounts spent and any educational standard set by the state, it is not “thorough and efficient.”⁷

The Supreme Court has reaffirmed these rulings many times since *Robinson*, most notably in *Abbott v. Burke*, where it ruled that in order to provide a thorough and efficient education in the state’s poorer urban districts, the state must assure that per-pupil expenditures in those districts are substantially equivalent to those in more affluent suburban districts, and in addition their students’ “special disadvantages” must be addressed.⁸ And in *In re Grant of the Charter School Application of Englewood on the Palisades Charter School* in 2000, the Court observed that the rights guaranteed by the T & E Clause are “inviolable.”⁹

The Tax Clause

The Tax Clause, sometimes called the Tax Uniformity Clause -- Article VIII, Section 1, paragraph 1 -- was adopted as part of the state’s 1947 Constitution. It states, in part:

(a) Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value, except as

otherwise permitted herein, and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.

Its requirement that all real property be taxed at the “general rate of the taxing district in which it is situated” requires that all real property within a “taxing district” be taxed at a uniformly applied tax rate. However, several succeeding paragraphs of Article VIII, section 1 authorize a variety of exceptions to the basic rule: exemptions for property used exclusively for nonprofit religious, educational, charitable or cemetery purposes (paragraph 2); a deduction for veterans and their surviving spouses (paragraph 3); exemptions for senior citizens and disabled persons (paragraph 4); homestead rebates or credits (paragraph 5); and exemptions or abatements for properties in areas declared “in need of rehabilitation” (paragraph 6). Section 1, paragraph b authorizes another exception, that of farmland assessment at less than full market value; and section 3, paragraph 1 authorizes exemptions for improvements to property in blighted areas.¹⁰

Aside from these exceptions, the uniformity rule applies only to property within a “taxing district.” A “taxing district” is an entity that has the power to assess and collect taxes. This may seem self-evident, but in at least two cases the state’s courts have been asked to rule to the contrary and refused to do so, explicitly holding that entities with no power to tax are not taxing districts and therefore the uniformity requirement is inapplicable to them. Both cases involved regional school districts and claims by constituent municipalities (Princeton Township in one case, the Borough of Sea Bright in the other) that, because their shares of the regional district budgets were larger than those of other constituent municipalities, they had to impose higher tax rates than the other municipalities, in violation of the Tax Uniformity Clause. Each sought a ruling that the clause required uniform tax rates throughout the regional district. The court declined in each case, and held that municipalities, not regional school districts, are taxing districts within the meaning of the constitution, and therefore no violation flowed from unequal tax rates among the constituent municipalities of a regional school district. Property tax rates within municipalities must be

uniform, but there is no such requirement beyond municipal borders.¹¹

Remarking on the limited reach of, and many exceptions to, the uniformity rule – and on the disparities in tax rates among taxing districts – the late Assembly Speaker Alan Karcher, in his 1998 book, *New Jersey’s Multiple Municipal Madness*, called tax uniformity “a constitutional myth.” He said:

The language when analyzed provides for no uniformity or equity on a statewide basis or even a countywide basis. The state’s organic document guarantees only that you won’t be treated any worse than your fellow townspeople are treated. The promise of constitutional protection that ensures taxation by general laws and uniform rules extends only to the borders of your municipality; thus, it is a constitutional myth.¹²

The plaintiffs in *Robinson v. Cahill*, students in the state’s urban school districts,¹³ had sought a ruling that, since the requirement to maintain the public school system was a state obligation, education had to be funded in a manner that imposed substantially equal tax burdens throughout the state. They won on this issue in the lower court: the trial judge, Theodore Botter, ruled that equal taxation among districts was constitutionally required,¹⁴ but the Supreme Court reversed on this ruling, and held that the Tax Clause did not require equal tax rates statewide.¹⁵

Three years later, in *Bonnet v. State of New Jersey*,¹⁶ the Superior Court relied on that ruling in *Robinson* to reject the notion that the Tax Clause provided a remedy for taxpayers and municipalities that sought relief from the cost of providing state-mandated services. The *Bonnet* plaintiffs were Essex County residents, taxpayers, municipalities and the county itself, who all complained that the Tax Clause did not authorize the state to utilize local property taxes to support state services or facilities, such as the state courts. The court disagreed, stating, “[T]he tax clause was not intended to say that a State function may not be delegated to local government to be met by local taxation.”¹⁷

Nor does the Tax Clause require property tax revenues to be spent within the borders of the

municipality in which they are raised, notwithstanding the phrase at the end of the provision, “for the use of such taxing district.” In *Meadowlands Regional Redevelopment Agency v. State of New Jersey*, several constituent municipalities of the Hackensack Meadowlands Development District challenged the inter-municipal tax-sharing provision of the Hackensack Meadowlands Development Law, in part on the basis of the Tax Clause.¹⁸ The tax-sharing provision requires the constituent municipalities to share the benefits and burdens of the Hackensack Meadowlands Development Commission’s development and redevelopment activities. Those that receive new revenues as a result of those activities are required to remit a portion to a tax-sharing account maintained by the Commission, to be distributed to other constituent municipalities where new development and redevelopment has not taken place, where the region’s schools, parks and residences – its tax burdens – are located. As in the cases involving regional school districts, the court ruled the Tax Clause inapplicable, since the tax-sharing provision had no bearing on the uniformity of tax rates within the constituent municipalities and the Tax Clause does not prohibit the spending of revenues outside the borders of the municipality in which they are raised.

The Prohibition of “Private, Local or Special Laws”

Another uniformity provision is Article IV, section 7, paragraph 9, the prohibition of “private, local or special laws.” This provision, located in the article on the legislative branch, prohibits laws that are not of general application, i.e., laws that apply to some but not all similarly-situated parties or parts of the state, such as in one municipality but not elsewhere. It explicitly applies to laws relating to taxation and to the public schools. Notwithstanding its seemingly clear prohibition, courts consistently have upheld laws that create distinctions among taxpayers where they have found them to be rational and reasonable. For instance, a statute authorizing a payroll tax only in Newark was upheld on the basis that it was reasonable, as was a statute pertaining to the public schools only in Camden;¹⁹ but a statute authorizing a sales tax only in Atlantic City was ruled invalid where the court found no rational basis for singling out that one municipality.²⁰

The prohibition of “private, local or special laws” also was another basis of the claim in the *Meadowlands Regional Redevelopment Agency* case. The plaintiff municipalities claimed that the inter-municipal tax-sharing provision was “private, local or special” legislation because it applied to only 14 municipalities in the state, and, beyond that, it created a distinction among the 14, requiring tax revenues raised in some of them to be allocated to the others. The court stated in response to this claim:

No decision which research discloses prohibits the allotment of tax revenues from one municipality to another. Indeed, given the State’s sovereignty over its municipal subdivisions, and the principle that all taxes are imposed under ultimate legislative authority,...the failure to find such a decision is not surprising. Thus, the issue is not whether the Legislature has the power to apportion tax revenues, but whether in particular circumstances the exercise of its power is arbitrary.²¹

Then, on the question of whether the Act’s tax-sharing system was arbitrary, the court found it was not, since the allotments granted to each constituent municipality were “reasonable.” It stated:

[T]he fact that part of the revenues of municipality X are payable to municipality Y is of no constitutional significance, given the relationship between the State and its political subdivisions, so long as the allotments between one and another are reasonable, as they are here, and not arbitrary.²²

Thus, despite the broad terms of the “private, local or special laws” clause, the effect of the ruling in *Meadowlands Regional Redevelopment Agency* is that the provision permits “reasonable” distinctions among similarly situated entities, and precludes only those distinctions – even in laws pertaining to taxes and schools – that are found to be arbitrary.

Litigation, School Funding and Taxes

Robinson v. Cahill and Abbott v. Burke

Robinson v. Cahill was hailed by education advocates nationwide, who saw it as a victory for equal educational opportunity, urban schools and students. It also was reviled by others, including some who said the Supreme Court of New Jersey had overstepped the bounds of judicial authority. Whatever one's position on that score, it is beyond question that 1973 decision, and subsequent Supreme Court decisions in *Robinson* and later *Abbott v. Burke*, have shaped our state's system of school finance, and, to a large extent, its tax policy.

The *Robinson* litigation continued for several years and through several decisions, culminating in extraordinary measures by the Supreme Court to compel the Legislature to adopt a constitutionally viable funding system.²³ The Legislature finally responded with the Public School Education Act of 1975, known as "Chapter 212" and the state's first-ever income tax, adopted in 1976. At the same time, Article VIII, section 1, paragraph 7 was added to the constitution, requiring all receipts from the personal income tax to be used to reduce or offset property taxes.

The Court in *Robinson VI* upheld Chapter 212 against a claim that it was unconstitutional on its face (although it left open the question of whether it eventually would prove to be unconstitutional in application). Chapter 212 remained in effect until 1991, and provided for annual increases in state aid during a period of declining enrollment. Though it was underfunded in most years, it resulted in a decline in average school property tax rates for most of the time it was in effect.

Abbott v. Burke was filed in 1981 to challenge Chapter 212 as applied. Like the plaintiffs in *Robinson*, the *Abbott* plaintiffs were public school students in the state's urban districts.²⁴ They claimed that notwithstanding the ruling in *Robinson* and adoption of Chapter 212, the state's school funding system still failed to satisfy the T & E Clause. In the first of many substantive *Abbott* decisions, issued in 1990 and known as *Abbott II*,²⁵ the Supreme Court compared the quality of education delivered in the state's poorest urban districts (its "special needs districts") with that in districts with the highest socioeconomic levels in the state (DFG I and J districts).²⁶ It found the quality uniformly poorer in the special needs districts, and "tragically inadequate" in some districts.²⁷

The Court in *Abbott II* also found that the "extra-educational needs" of students in the special needs districts "vastly exceed[ed]" those of students in other districts. It described those "extra-educational needs" as follows:

Those needs go beyond educational needs, they include food, clothing and shelter, and extend to lack of close family and community ties and support, and lack of helpful role models. They include the needs that arise from a life led in an environment of violence, poverty, and despair. Urban youth are often isolated from the mainstream of society. Education forms only a small part of their home life, sometimes no part of their school life, and the dropout is almost the norm. There are exceptions, fortunately, but substantial numbers of urban students fit this pattern.²⁸

Robinson v. Cahill ***Decisions of the New Jersey Supreme Court***

Robinson v. Cahill I, 62 N.J. 473, 303 A.2d 273 (1973)
Robinson v. Cahill II, 63 N.J. 196, 306 A.2d 65 (1973)
Robinson v. Cahill III, 67 N.J. 35, 335 A.2d 6 (1975)
Robinson v. Cahill IV, 69 N.J. 133, 351 A.2d 713 (1975)
Robinson v. Cahill V, 69 N.J. 449, 355 A.2d (1976)
Robinson v. Cahill VI, 70 N.J. 155, 358 A.2d (1976), order amended 70 N.J. 464, 360 A.2d 400 (1976)

Abbott v. Burke

Decisions of the New Jersey Supreme Court

Abbott v. Burke I, 100 N.J. 269, 495 A.2d 376 (1985)
Abbott v. Burke II, 119 N.J. 287, 575 A.2d 359 (1990)
Abbott v. Burke III, 136 N.J. 444, 643 A.2d 575 (1994)
Abbott v. Burke IV, 149 N.J. 145, 693 A.2d 417 (1997)
Abbott v. Burke V, 153 N.J. 480, 710 A.2d 450 (1998)
Abbott v. Burke VI, 163 N.J. 95, 748 A.2d 82 (2000)
Abbott v. Burke VII, 164 N.J. 84, 751 A.2d 1032 (2000)
Abbott v. Burke VIII, 170 N.J. 537, 790 A.2d 842 (2002)
Abbott v. Burke IX, 172 N.J. 294, 798 A.2d 602 (2002)
Abbott v. Burke X, 177 N.J. 578, 832 A.2d 891 (2003)
Abbott v. Burke XI, 177 N.J. 596, 832 A.2d 906 (2003)
Abbott v. Burke, 180 N.J. 444, 852 A.2d 185 (2004)
Abbott v. Burke, 181 N.J. 311, 857 A.2d 173 (2004)
Abbott v. Burke, 182 N.J. 153, 862 A.2d 538 (2004)
Abbott v. Burke, 185 N.J. 612, 889 A.2d 1063 (2005)
Abbott v. Burke, ___ N.J. ___, ___ A.2d ___ (Case No. 42,170,
May 9, 2006)
Abbott v. Burke, ___ N.J. ___, ___ A.2d ___, 2006 WL 1388958
(Case No. 42,170, May 22, 2006)

And the Court found that the special needs districts, and the municipalities in which they were located, suffered from “municipal overburden,” the “excessive tax levy some municipalities must impose to meet governmental needs other than education.” As the Court stated:

“Municipal overburden” ... is a common characteristic in poorer urban districts, a product of their relatively low property values against which the local tax is assessed and their high level of governmental need. The governmental need includes the entire range of goods and services made available to citizens: police and fire protection, road maintenance, social services, water, sewer, garbage disposal, and similar services. Although the condition is not precisely defined, it is usually thought of as a tax rate well above the average.²⁹

The consequence of such overburden, the Court found, is that the districts are understandably “extremely reluctant” to increase taxes for school purposes:

Not only is their local tax levy well above average, so is their school tax rate. The oppressiveness of the tax burden on their

citizens by itself would be sufficient to give them pause before raising taxes. Additionally, the rates in some cases are so high that further taxation may actually decrease tax revenues by diminishing total property values, either directly because of the tax-value relationship, or indirectly by causing business and industry to relocate to another municipality.³⁰

In light of the poor quality of education in the special needs districts, “the desperate needs of their students,” and the already existing municipal overburden, the Court concluded that “a significantly different approach to education” was required. It ordered new legislation enacted to assure that funding in the special needs districts was substantially equal to that in property-rich districts. And it ruled that funding in the special needs districts could not be allowed to depend on the “budgeting and taxing decisions” of local school boards, and therefore placed the financial burden primarily on the state. It could find no constitutional violation, on the basis of the record presented in the case, with respect to districts other than the special needs districts, and thus it left the issues of funding and educational quality for all those other districts to legislative discretion.³¹

Special Needs Districts ("Abbott Districts")

Asbury Park	Bridgeton	Burlington City
Camden	East Orange	Elizabeth
Garfield	Gloucester City	Harrison
Hoboken	Irvington	Jersey City
Keansburg	Long Branch	Millville
Neptune	New Brunswick	Newark
Orange	Passaic	Paterson
Pemberton Township	Perth Amboy	Phillipsburg
Plainfield	Pleasantville	Salem City
Trenton	Union City	Vineland
West New York		

In response to *Abbott II*, the Legislature adopted the Quality Education Act of 1990 (QEA).³² In 1994, in *Abbott III*, the Supreme Court ruled QEA unconstitutional, since, like Chapter 212, it failed to assure parity of regular education expenditures between the special needs districts and more affluent districts, and it failed to adequately address the “unique needs” of children in the special needs districts.³³

The Legislature’s next response was the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA).³⁴ CEIFA established substantive educational standards, the state’s core curriculum content standards, that “define[d] the content of a constitutionally sufficient education,” and it included funding provisions that “purport[ed] to implement the efficiency component of the constitutional thorough and efficient education.” In 1997, in *Abbott IV*, the Court upheld CEIFA in part and ruled it unconstitutional in part. It upheld the content standards as “a reasonable legislative definition of a constitutional thorough and efficient education,” but it held the funding provisions unconstitutional as to “special needs” districts, since they “[did] not in any concrete way attempt to link the content standards to the actual funding needed to deliver that content.” It found that CEIFA’s funding mechanism,

which was based on costs incurred in a theoretical “model district,” bore no relationship to the characteristics of the special needs districts, and its provisions for Demonstrably Effective Program Aid and Early Childhood Program Aid, designed to address the “profound disadvantages facing students in the special needs districts” (in the Court’s words) were not based on any study of the needs of those students or the cost of meeting those needs. Moreover, it found that CEIFA “completely fail[ed]” to address the “dilapidated, unsafe, and overcrowded facilities” in the special needs districts, which, the Court found, were “one of the most significant problems facing the [special needs districts].”³⁵

As to a remedy for “the continued constitutional deprivation,” the Court acknowledged that it could not, by judicial order, assure the provision of a thorough and efficient education. It reiterated a comment it had made in *Abbott III*:

We realize our remedy may fail to achieve the constitutional object, that no amount of money may be able to erase the impact of the socioeconomic factors that define and cause these pupils' disadvantages. We realize that perhaps nothing short of substantial social and economic change

affecting housing, employment, child care, taxation, [and] welfare will make the difference for these students.³⁶

The Court directed the Commissioner of Education to conduct a study and prepare a report with specific findings and recommendations on the needs of students in the special needs districts, the programs required to meet those needs, and the costs associated with each of those programs; and it directed the Superior Court to conduct a hearing upon receipt of the Commissioner's report and rule on the remedies required to satisfy the constitutional mandate. In addition, the Court ordered an immediate increase in state aid for the special needs districts, in amounts sufficient to provide for per-pupil regular education spending levels in each of those districts equal to the average per-pupil spending levels in the DFG I and J districts.

The I and J funding level was not chosen arbitrarily. It was, the Court said, "an objective and reasonable indicator of the resources necessary for the provision of a thorough and efficient education." The state had proposed a lower level of funding, such as the average per-pupil spending level in middle-level districts, but the Court rejected this proposal as lacking any relationship to educational quality, as defined by CEIFA's content standards. The Court stated:

Without any information or experience regarding achievement levels in those districts – either in terms of the content standards or any other standard – it is difficult to infer that those districts represent the most appropriate barometer of a basic thorough and efficient education. The DFG I & J districts are achieving and undoubtedly will continue to achieve at high levels, and it is thus eminently reasonable that the Court continue to focus on their recipe for success until experience under the new standards dictates otherwise.³⁷

Thus, the Court suggested that the "parity funding" remedy based on I and J district spending was an interim measure, to remain in place until the state devised another method of providing a thorough and efficient education in the special needs districts. It explained:

The parity remedy is one that will in

all likelihood become obsolete. It can, therefore, be understood to be in the nature of provisional or interim relief. We have assumed, and anticipate, that parity will be displaced as a remedial measure in achieving a constitutional education. We acknowledged in *Abbott II*...that the Legislature may choose "to equalize expenditures per pupil for all districts in the State at any level that it believes will achieve a thorough and efficient education, and that level need not necessarily be today's average of the affluent suburban districts."...Thus, if it can be convincingly demonstrated under CEIFA or by amendatory legislation or administrative regulation that a substantive thorough and efficient education can be achieved in the [special needs districts] by expenditures that are lower than parity with the most successful districts, that would effectively moot parity as a remedy.³⁸

The case was remanded to the Superior Court, and that court conducted a hearing in accordance with the Supreme Court's directive.

On the basis of evidence presented at that hearing, the Supreme Court in *Abbott V*,³⁹ in 1998, prescribed the specific programs that it found necessary to meet the needs of students in the special needs districts: full-day kindergarten, high-quality pre-kindergarten for all three- and four-year olds, whole school reform, and supplemental funding for additional educational programs based on need, including summer school, added security, and school-based health and social service programs. It also ordered substantial funding for improved school facilities.

And, having received no alternative proposal for a funding system or standard designed to meet CEIFA's core curriculum content standards in the special needs districts, the Court ruled that the average per-pupil regular education spending level in the I and J districts was an "objective and reasonable" measure of necessary resources, and ordered the state to continue to provide parity funding based on that amount. But the Court left the door open for the state to establish a different measure of the cost of satisfying the T & E requirement, as long as it was rationally, demonstrably related to meeting the educational standards set by the core curriculum content standards.

Abbott IV and *V* led to dramatic increases in state aid to the special needs districts, to the point that the state has provided most of the operating funds in those districts (though there is a wide range among the special needs districts in the proportion of their operating budgets funded by state aid). No such increases have been provided to non-Abbott districts (and the proportion of their budgets funded by state aid also varies widely). The Legislature has not taken action to establish one comprehensive funding system that incorporates the *Abbott* mandates and addresses the needs of all districts and all students. Abbott parity funding and supplemental funding have never been incorporated into CEIFA or any other statute.

And for the last four years, the Legislature has not even implemented the system set forth in CEIFA. Although CEIFA remains on the books, since 2002-03 the annual recalculation of aid based on the CEIFA formula has been abandoned, and state aid other than aid to special needs districts has been “frozen,” even when enrollments have increased.

The state also has not come up with a method of calculating the cost of basic educational programs, so parity aid to Abbott districts remains tied to I and J district spending. By continuing to rely on the default accepted by the Court rather than establishing an empirical basis for measuring costs, the state effectively has allowed the I and J districts to set not only their own budgets (limited by a spending cap) but also the amount of parity aid given to the state’s poorest districts. And beyond that, given the limit on available resources, by failing to establish a basis for measuring costs it effectively has allowed the I and J districts to set the level of aid given to all school districts in the state. The I and J districts have not asked for this ability; they certainly don’t explicitly consider the needs of the rest of the state in developing their own budgets, nor should they. But by continuing to tie Abbott parity aid to I and J spending, the state has effectively relinquished control of state aid decisions to those districts.

Further, the state’s handling of supplemental funding for Abbott districts, and its effort to allocate that funding in accordance with the rulings in *Abbott IV* and *V*, have been little better. As discussed above, the Court in *Abbott IV* and *V* ordered that this form of aid be provided upon a showing of need for specific

programs to meet specific educational needs. As recently as 2005 the Court reiterated that “there must be in place a clear and effective funding protocol” for supplemental programs.⁴⁰ Nevertheless, large amounts of supplemental aid have gone to the Abbott districts – about \$500 million in 2005-06 – but the State has never established a system for evaluating the need for those funds. According to papers filed with the Supreme Court in April 2006 (in which the state sought the Court’s permission to freeze supplemental aid for 2006-07), supplemental aid never has been provided for its intended purpose, but rather has become a “hole-filler” for Abbott district budgets. The state says in its brief:

While the former Commissioner envisioned a supplemental funding system that would allow districts to seek funding for a specific program or position, the protocols to effectuate this vision were never established. Instead, the Department created a system whereby districts included reverse parity lists in their budgets, delineating those programs that they would not be able to fund in the absence of supplemental funding. Rather than the revenue having a direct link to a specific program, position or service within the district budget, supplemental funding became a “hole-filler” or an anticipated revenue that the Abbott districts would include to balance their budgets.⁴¹

Thus, according to the state, because of its own failures, there is no assurance that supplemental funding is being used to meet identified needs for specific programs, as set forth in *Abbott IV* and *V*; it has been just another generic revenue source for Abbott districts. It may well be that supplemental funding does support important, effective programs in those districts—even the state has not suggested otherwise. We just don’t know whether that’s the case because the state has no system in place for evaluating the need for those programs or their effectiveness.

In sum, eight years after *Abbott V*, spending disparities have been eliminated, but there is little rhyme or reason to the levels of state aid provided for schools in Abbott districts or elsewhere. The Legislature’s failure to implement CEIFA, the Department of Education’s failure to establish a basis for measuring basic educational costs, and its use of

supplemental funding as a “hole-filler” rather than as envisioned by the Court all have contributed to a school funding “system” lacking in rationality. Indeed, notwithstanding decades of litigation in *Robinson* and *Abbott*, one might say the state has no funding “system” in place at all, let alone one that is thorough and efficient.

Stubaus v. Whitman and Bacon v. Department of Education

School districts and taxpayers have responded to rising costs, the shift in state education funding, and the tax impact in two ways: First, some have sought an increase in state aid, to levels closer to those provided to special needs districts. Almost immediately following *Abbott V* in 1998, a group of 42 “middle income districts,” all in the middle DFGs, and taxpayers in those districts filed *Stubaus v. Whitman*,⁴² claiming they were being subjected to burdensome and unequal rates of taxation and seeking additional funding for their schools on the basis of the Equal Protection Clause of the state constitution. The Superior Court rejected their claims on the ground that unequal property tax rates produced no equal protection violation, and the Supreme Court declined to consider the case on appeal.

Second, some districts have sought to be designated special needs districts. In *Bacon v. Department of Education*, 17 non-Abbott school districts, all in DFGs A and B but all non-urban, claim that children attending their schools are at least as disadvantaged as those in Abbott districts, and that, although they are using their fiscal resources efficiently, they are unable to provide their students with a thorough and efficient education. They also claim the burdens on their taxpayers are already so great, and their state aid so inadequate, that they are unable to spend the amounts spent in the I and J districts, which, they say, is the standard for determining whether they are providing a thorough and efficient educational program. Accordingly, in a case filed initially by way of a petition to the Commissioner of Education in 2000, they have sought a determination that CEIFA is unconstitutional as to them and an order requiring that they receive state aid comparable to that given to the Abbott districts.

In 2002, an administrative law judge recommended extending the special-needs designation to six of the 17 “Bacon districts,” but

in 2003 the Commissioner of Education rejected that recommendation as to all but one, Salem City.⁴³ On the basis of the Commissioner’s decision, Salem City has been designated a special needs district and has received Abbott funding since the 2003-04 school year.

Seven of the Bacon districts – Buena Regional, Clayton, Egg Harbor City, Fairfield, Lakehurst, Lawrence and Woodbine – appealed the Commissioner’s decision to the State Board of Education.⁴⁴ They argued on appeal that they lack the property wealth of the more affluent districts, they need such wealth to be able to meet their students’ needs if they are to do so with locally raised revenues, and in fact they need greater resources than those available to the wealthier districts because of the “special educational needs” of their students resulting from the socioeconomic conditions in which they live.

The State Board issued its decision in *Bacon* on January 4, 2006. Before addressing the districts’ claims, it noted, as mentioned above, that CEIFA’s mechanism for funding public schools has not been implemented in recent years, and expressed its dismay with this state of affairs. It stated:

As we assess the validity of the claims being made by the appellant school districts, we cannot ignore the fact that for the last four years, the amount of state aid that has been awarded to New Jersey’s school districts has not been determined by applying the formulas set forth in CEIFA’s statutory provisions. Had the formulas been applied, state aid would have been based on the calculation of the cost of providing the actual number of students enrolled in a given school district with educational inputs which correlated with the educational standards established under CEIFA. However, this has not been the case. Rather, state aid has been awarded for the last four years strictly on the basis of appropriations made by the Legislature that have been based on percentage increases added to the state aid awards that had been calculated under CEIFA in the first year of its operation.... This means that state aid received by a particular district will not account for any significant increases or decreases in student enrollment in that district and will not reflect the actual cost of

“Bacon Districts”

Buena Regional
Clayton
Commercial Twp.
Egg Harbor City
Hammonton
Fairfield

Lakehurst
Lakewood
Lawrence
Little Egg Harbor
Maurice River
Ocean

Quinton
Salem City
Upper Deerfield
Wallington
Woodbine

the educational inputs necessary to provide an education that will enable the students of the district to achieve the educational standards that are now in effect.⁴⁵

Since CEIFA essentially has been ignored for several years, the State Board found that its funding provisions were not the “point of departure” for resolving the case.

The State Board also made clear that it did not view its task in *Bacon* as simply to determine whether the appellant districts should be granted special needs status. Rather, the question to be resolved was the sufficiency of the education provided to students in those districts, under the standards established in *Abbott*. And it determined, on the basis of the evidence presented to the administrative law judge, that the districts were not affording their students a thorough and efficient education. State aid provided pursuant to CEIFA had been of some help, but not enough. The State Board stated: “[W]e cannot avoid the conclusion that it will be necessary to dedicate more resources to providing the educational inputs necessary to correct the situation for these children.” Further, it found that the districts “generally suffer from municipal overburden,” so that “it is not realistic to expect them to fund such needed programs as full-day programs for four-year-olds and alternative education programs by increasing local taxes.”⁴⁶

As to remedy, the State Board found that “merely providing the appellant districts with the same fiscal resources that are provided to the Abbott districts” would not necessarily ensure compliance with the constitutional mandate. Each district has its unique circumstances, the State Board found, so that “an assessment of the educational needs and the identification of approaches that will successfully address those needs is a prerequisite to ensuring that adequate resources, including fiscal resources, are

provided and appropriate accountability for their use is guaranteed.”⁴⁷ It ordered such an assessment, not only of each of the seven appellant districts but all 17 involved in the case.

Finally, the State Board went well beyond the 17 districts. “[W]e cannot ignore the fact,” it stated, “that there are students in other school districts not involved in this litigation who are suffering similar educational inadequacies and whose communities do not have adequate resources to address those inadequacies.” With an eye toward reforming the state’s entire school funding system, it said:

It is impossible at this point to avoid the conclusion that CEIFA is not accomplishing its stated purpose. Rather, as it has been implemented, CEIFA has resulted in the fragmentation of New Jersey’s system of public education so that there is not a single unified system operating throughout the state. As reflected in this litigation, the Abbott Districts are operating under one system with funding and regulatory provisions applicable only to those districts while the rest of New Jersey’s school districts are functioning under another system, one that has continued to allow significant disparities in both educational inputs and educational outcomes and which has not produced educational adequacy for all districts.⁴⁸

It therefore directed the Commissioner to examine the operation of the current system of education funding and recommend “the educational components essential to the establishment of a unified system for public education.”⁴⁹

Thus, if implemented, the State Board decision in *Bacon* could lead to an overhaul of New Jersey’s system of education finance. This could be viewed as an added burden – an increase in

constitutionally mandated funding for public schools. It also could be viewed as an opportunity – a chance to allocate state aid more fairly, in accordance with educational need, and, in doing so, provide relief to districts struggling to fund their schools adequately. The Bacon districts have appealed the State Board decision to the Superior Court, Appellate Division, claiming the State Board erred in failing to order immediate Abbott-level funding for each of them.⁵⁰

Legislative Response

While the *Stubaus* and *Bacon* districts sought to obtain additional state aid through litigation, others have pursued and achieved that objective in the Legislature. In 2005, the Legislature adopted a bill directing that additional aid be granted to districts that are not Abbott districts themselves but border on Abbott districts and serve similar populations under similar economic conditions. The targeted districts were not named in the bill, but the specified eligibility criteria effectively limit its application to a very small number.⁵¹ The bill – now law – provides that state aid in addition to that provided under CEIFA or any other law shall be provided to any school district, other than a regional or consolidated district, that is bordered by three or more Abbott districts and meets at least one of the following criteria:

- the district's per-pupil cost in the prebudget year was less than the average per-pupil cost for the Abbott districts
- the district had an average school student mobility rate of 10 percent or greater
- 35 percent or more of the district's students were eligible for free or reduced-price meals under the federal school lunch program
- 15 percent or more of the district's students, other than prekindergarten students, are in classes with average sizes of 30 or more students
- the per capita personal income of residents of the district was \$19,000 or less in 2004-05 (the amount to be increased in subsequent years based on the consumer price index).⁵²

The amount of aid to be provided to each eligible district is based on the difference between its per-pupil cost and the average per-pupil cost in the Abbott districts. Each eligible district receives a portion of that difference, a percentage based on the number of eligibility criteria it meets, ranging (in 2005-06) from 23 percent for those meeting all five eligibility criteria to four percent for those meeting only one.⁵³ Thus, the greater the need, based on the indicators comprising the eligibility criteria, the greater the additional aid.

Five districts – Bayonne, Clifton, Hillside, North Bergen, and Weehawken -- received a total of \$20 million in aid pursuant to this law in 2005-06, and are slated to receive the same amount in 2006-07. One additional district, Kearny, received no “Abbott Border Aid” in 2005-06 but will receive \$1.9 million in 2006-07.⁵⁴

“Abbott Border Districts”

Bayonne
Clifton
Hillside
North Bergen
Weehawken
Kearny

Fiscal Impact -- Property Taxes

When the Court in *Abbott II* said the increased spending in Abbott districts could not be allowed to depend on the “budgeting and taxing decisions” of district boards of education, it ruled, in effect, that the burden of that spending should not be placed on local taxpayers, because of the existing municipal overburden. The Court stated, “We assume the design of any new funding plan will consider the problem of municipal overburden in these poorer urban districts,”⁵⁵ which has been interpreted as prohibiting, or at least inhibiting, any increase in the property tax levy in the Abbott districts. In accordance with this statement, tax levies in those districts have remained unaffected by the dramatic increases in school spending resulting from *Abbott*. Thus, *Abbott* has provided a double benefit for those districts, increased state aid and a freeze on property tax increases.

In fact, one of the most striking phenomena since *Abbott II*, in 1990, has been the change in property tax rates in Abbott districts. Assessed values in some of the districts have grown substantially, but their tax levies have not. The total equalized value of property in Abbott districts increased by 71.0 percent between 1993-94 and 2004-05, but the total school tax levy in those districts – the amount paid for public schools by taxpayers – increased by only 7.7 percent. The result of the increase in tax values and the freeze on tax levies has been a substantial reduction in property tax rates. The average equalized school tax rate in Abbott districts in 1993-94 was \$1.168 per hundred dollars of true value, and by 2003-04 it dropped to \$.736. In contrast, the state average school tax rate in 1993-94 was \$1.140 per hundred dollars, and by 2003-04 it dropped only slightly, to \$1.067 (after rising during the mid-1990s, then declining with the boom in real estate values). Abbott districts as a group have gone from being among the highest school tax-rate communities to among the lowest.

Like school tax rates, total tax rates in the Abbott districts have declined.⁵⁶ It was the high non-school municipal and county costs and tax rates in those districts that led the Supreme Court in *Abbott II* to rule that additional burdens should not be placed on their communities. Over the past decade, however, school tax rates have been reduced so far that the total property tax rates in Abbott districts are now approaching the state average, and some have total tax rates below the state average. (For a more detailed discussion of tax rates, and disparities in tax rates among the state's municipalities, see the third report in this series, *Don't Forget the Schools: Education Funding Considerations for Tax Reform*.)

In March 2006, the Department of Education decided to reduce state aid to eight Abbott districts with relatively low total equalized tax rates and require them to contribute additional local-raised revenues to the cost of their public schools. In other words, the Department of Education determined that property taxes should be increased in those districts. The eight affected districts – Newark, Garfield, Perth Amboy, Asbury Park, Neptune, Jersey City, Long Branch and New Brunswick – all have total tax rates below 110 percent of the state average.⁵⁷ The Department apparently has determined that total tax rates at that level indicate that the districts no longer suffer from “municipal

overburden,” so that requiring them to make a greater local contribution to school funding is no longer unfair or unconstitutional.

Educational Impact -- Student Achievement

The aid provided pursuant to *Abbott* has indeed addressed the “tragically inadequate” conditions found by the Court and reduced disparities in student achievement levels. But it has not eliminated the achievement gap. The “significantly different approach to education” ordered in *Abbott II* has not brought student achievement in the special needs districts up to the levels in the higher-wealth districts.

This should come as no surprise. That new approach only began to be phased in about eight years ago, much less time than it had taken for conditions to reach the point they had, causing the Court to rule as it did. Moreover, the failure to eliminate the gap is largely due, in all likelihood, to the “extra-educational” needs of students in the special needs districts, needs that any reform focusing solely on schools cannot eliminate easily or entirely.⁵⁸ Some point to the persistent gap in student achievement, as measured by standardized test scores, and say the glass is half empty – *Abbott* has been a failure – while others say it is half full – the gains made in the short time since *Abbott V* have been impressive. The latter is more accurate than the former, but the picture is not all rosy.

In 2004, for the first time, test scores in the Abbott districts rose sharply. A dramatic reduction in the gap between rich and poor districts occurred that year in the elementary grades, although middle school achievement levels and overall achievement in the Abbott districts still lag well behind the rest of the state. In one year, from 2003 to 2004, the number of elementary students in the Abbott districts who achieved proficiency rose 8.7 percent in mathematics and 8.3 percent in language arts, more than twice the statewide increase. In two Abbott districts, Orange and Asbury Park, the number of students achieving proficiency increased by nearly 20 percent.

These gains have been hailed by state officials and attributed to the funding and programs that have been in place since *Abbott V* in 1998.⁵⁹ On the other hand, achievement disparities remain

a concern, not only between urban and suburban districts but among students in different socioeconomic, racial and ethnic groups.

For a more detailed discussion of achievement gains and continued disparities, see the third report in this series, *Don't Forget the Schools: Education Funding Considerations for Tax Reform*.

Current Legal Issues

Is There a Constitutional Right to Equitable Taxation?

What if the Supreme Court had ruled differently in *Robinson v. Cahill*? What if the Court had been willing to address the question of whether the state has an obligation to ensure substantial equality in local government resources? What if it had found such an obligation, and relied on it, instead of or in addition to the mandate for a thorough and efficient education, as the basis for its ruling?

As discussed above, the trial judge in *Robinson* ruled in favor of the plaintiffs not only on their education claim but their equal taxation claim as well. Judge Botter ruled that equal taxation among districts was constitutionally required.⁶⁰ In his view, disparities in tax burdens were as impermissible as disparities in educational opportunity.

The Supreme Court reversed, and, with an opinion that would have profound implications not only for schools but for taxpayers, the Court rejected the notion that the state constitution required equal treatment of taxpayers in its many local jurisdictions. But it left open the question of “whether, apart from the equal protection guarantee, there is an implicit premise in the concept of local government that the State may not distribute its fiscal responsibility through that vehicle if substantial inequality will result.”

Some believe that had the Court chosen to address this issue, or had Judge Botter’s opinion been affirmed, New Jersey might have a more equitable tax system today. The Court did not squarely reject the notion of a constitutional right to equitable taxation on any legal basis. Rather, it expressed concern for the practical consequences of such a ruling, stating, “We need hardly suggest the convulsive implications if home rule is vulnerable upon [this ground]. Nor need we expound the difficulties of management of judicial solutions if the problem must be met by the courts.”⁶¹

Reexamining this question might serve the interests of some taxpayers and some

municipalities and school districts today. Considering the change in relative tax rates that has occurred since *Robinson* and the claims of tax overburden made in *Bacon*, the districts whose interests would be served might be different from those where the *Robinson* plaintiffs resided. Of the municipalities that now have the highest property tax rates, as listed above, only one, Salem City, has received the financial benefit of *Robinson* and *Abbott* (and it has received that benefit only recently, as a result of its participation in *Bacon*). Others with high tax rates might have much to gain from a ruling in favor of a right to equitable taxation. Today’s Supreme Court might be just as wary as the *Robinson* Court of the consequences of such a ruling; but it might be as persuaded, on the merits, as Judge Botter was 34 years ago.

Do We Need a Constitutional Amendment to Achieve Tax Reform?

The Property Tax Convention Task Force was authorized and directed by the Legislature to “study property tax relief and the need for a constitutional convention to review the property tax system.”⁶² In December 2004, the task force issued a report recommending that the Legislature authorize a referendum to be held in November 2005, and, if the referendum were approved, that it organize a convention to be held in Spring 2006. More than a dozen bills were introduced in the Legislature to authorize a convention, some in accordance with the task force’s recommendations, some with different provisions. None was enacted. But it was not clear then, nor is it now, that the constitution needs to be amended to create a more equitable tax system.

Whether we need a constitutional amendment depends, in part, on what we mean by “a more equitable tax system.” Some would argue that, in order to be equitable, property tax rates should be equal throughout the state. For others, the core problem is our state’s over-reliance on local property tax revenues, since we have more than 600 school districts and dramatic disparities in property wealth among them, so that a more equitable system would include heavier reliance on revenues generated by statewide taxes. Still others would contend that a more equitable tax system cannot focus

exclusively on how to raise a predetermined amount of revenue, but also must consider how much revenue should be raised and how it should be allocated. Finally, some distinguish between tax reform and tax relief, the former being more systemic and the latter more targeted.

Property tax reform and relief are on the agendas of many organizations and interest groups. AARP, the New Jersey League of Municipalities, the Black Ministers' Council of New Jersey, Citizens for Property Tax Reform, Citizens for the Public Good, the New Jersey League of Women Voters and New Jersey Policy Perspective all supported legislation in 2005 authorizing a referendum on whether to hold a constitutional convention to address tax reform.⁶³ The New Jersey Education Association, joined by the NAACP of New Jersey and the New Jersey Coalition for School Tax Reform, have pressed for legislative action rather than a constitutional convention, advocating a special legislative session.⁶⁴ The New Jersey School Boards Association likewise opposes a constitutional convention and supports a special session to address property tax reform.⁶⁵

Tax reform proposals by various organizations range from eliminating property taxes as a source of funding for schools (American Reform Party⁶⁶) to a variety of alternatives – replacements – for property taxes. Replacement proposals include expanding the so-called "millionaires tax" (AARP, Fairness Alliance⁶⁷); offsetting a reduction in property taxes with a proportionate increase in the income tax (New Jersey School Boards Association⁶⁸); imposing an income tax "surcharge" ("The SMART Bill" developed by Citizens for School Tax Reform and the New Jersey Coalition for Property Tax Reform⁶⁹); imposing a financial assets tax on the wealthiest New Jersey households (Fairness Alliance⁷⁰); and extending the sales tax to certain goods and services not currently taxed (Fairness Alliance⁷¹).

Proposals for property tax relief, as distinct from reform, include reinstating the senior freeze on property taxes, which was suspended in 2003 (AARP⁷²), and limiting property taxes to a percentage of personal income (New Jersey School Boards Association, NJEA⁷³).

Finally, some organizations call for reforms in the assessment and rating of property for tax purposes. Examples of this approach include split-rate taxation (taxing land and buildings separately) and differentials in tax rates based on the extent of development, which are advocated by the Regional Plan Association.⁷⁴

Governor Corzine's Property Tax Reform Transition Policy Group recommended one substantive measure, providing \$550 million in new funding for property tax rebates. It also recommended a short special session of the Legislature (extending a matter of weeks, at most, or even days) as well as a "Citizens' Convention," which would not be authorized to consider spending issues but would be required to address the "sustainability of proposed property tax reductions" as well as both tax reform and relief.⁷⁵ And the Governor has proposed increasing the sales tax rate from six to seven percent to increase state revenue. As mentioned in the introduction, that proposed increase has been blamed for the Governor's recently reported low approval ratings.

New Jersey already has several measures in effect to provide property tax relief for low-income and otherwise vulnerable taxpayers. With these measures, the state is providing relief estimated at \$14.5 billion in fiscal year 2006. Such relief comes in two forms, aid to local governments and direct relief to individuals. One prominent example is the income tax: as mentioned above, the constitution requires all revenues collected through the personal income tax to be dedicated to property tax relief. In fact, growth in the amount of property tax relief provided by the state to individuals and local governments, through various measures, has outstripped the growth in income tax revenues since that tax was instituted in 1976, to the point that property tax relief now exceeds the annual yield of the personal income tax by several billion dollars.

Several property tax relief programs are targeted to taxpayers with particular characteristics (e.g., senior citizens or veterans) or economic status (income level or extent of property tax burden). These measures include:

The Homestead Rebate. New Jersey's Homestead Rebate Program, enacted in 1976, limits property tax liability to a fixed percentage of annual income for taxpayers with incomes

below a certain level. In recent years this program has been targeted to senior or disabled homeowners and renters with taxable incomes of \$100,000 or less. Six hundred thousand taxpayers annually receive this form of property tax relief.

The Homestead Exemption. A homestead exemption reduces eligible homeowners' property tax liability by excluding a flat amount or fixed percentage of the value of their home from its taxable value. In most states, local taxpayers absorb the cost burden for homestead exemption programs as the overall size of their tax base is contracted. New Jersey's homestead exemption, the New Jersey School Assessed Value Exemption Rebate (NJ SAVER) Program, differs from more traditional programs in three ways: it is a state-financed program; it is not targeted to any class of taxpayers, so all taxpayers receive benefits regardless of income or overall tax burden; and it is linked to school tax liability only. Thus, this program is more of a burden to the state, and less of a burden to local governments, than some other states' homestead exemption programs; it offers relief to a wider range of taxpayers than other states' programs; and it has been designed specifically to provide relief from the portion of the burden attributable to school costs.

The Senior Freeze. The New Jersey Senior Freeze Program limits property tax increases for senior citizens and disabled persons who live in their own homes, and who elect to participate in the program, by reimbursing them the amount of any property tax increase they experience each year. Any increases imposed after a taxpayer joins the program are paid by the state from the Casino Revenue Fund. The amount paid by the state, plus interest, is owed to the state when the property changes ownership upon death or sale. (As mentioned, this program has not been funded since 2003.)

Veterans', Senior Citizens' and Disabled Persons' Deductions. Veterans, senior citizens, and disabled persons are eligible for special property tax relief benefits in the form of \$250 property tax deductions on their local tax bills. The state reimburses municipal governments for the lost revenues.

Property Tax Deduction on the Gross Income Tax. In some but not all recent years, New Jersey has provided for a portion of

taxpayers' property tax liability to be used to offset state gross income tax liability. This property tax relief measure is primarily directed toward middle-income taxpayers.

Thus, providing additional relief to taxpayers in need would not require substantial changes in law or the state tax system. Targeted measures are already in place. The level of relief provided by one or more of them could be increased without a major overhaul. For example, the homestead rebate could be expanded by increasing the rebate amount or raising the income eligibility limit. The homestead exemption could be expanded to apply to all parts of the local tax bill rather than school taxes only. The senior freeze could be reinstated and expanded to apply to all local taxes, or a certain percentage, rather than tax increases only. The question is not whether such measures would be permissible – the programs are authorized by current law; there would be no constitutional impediment to expanding them. Rather, the question is which relief measure, or what combination of them, would be most equitable and effective.

On the other hand, some property tax reform measures that go beyond targeted relief could require a constitutional amendment. Differential tax rates, for instance, as suggested by the Regional Plan Association, would appear to be inconsistent with the Tax Uniformity Clause if the differential would apply within municipal borders. A reform to that effect, therefore, probably would require an amendment eliminating the uniformity requirement or creating yet another exception. Other reforms could be implemented without the need for an amendment. Increasing other taxes, as the Governor has proposed, or broadening the scope of the property tax to include personal property holdings of higher income households, both could be achieved through legislative action.

So could a state property tax. A property tax assessed and collected by the state could be structured either to be revenue-neutral, to offset a reduction in local property taxes, or to raise additional state revenue. The Tax Clause seems to contemplate the possibility of a state property tax, by referring to "real property assessed and taxed...by the State."⁷⁶ While there is opposition to such a tax in some quarters (it was explicitly prohibited in the one bill adopted by

the Assembly authorizing a constitutional convention⁷⁷), it also has had some support. Alan Karcher, commenting on the “constitutional myth” of tax uniformity, suggested, “Life would be breathed into this constitution if a statewide property tax were put into effect.”⁷⁸

In a 1962 case, *Switz v. Kingsley*, the New Jersey Supreme Court referred to a state property tax as “a tax...levied upon all real property for State purposes, as conceivably the State might some day have to do to meet its obligations under bond issues.”⁷⁹ And the Court in *Robinson v. Cahill* discussed a state property tax at some length, addressing the plaintiffs’ argument that the Tax Clause required the state to meet its T & E obligation with state rather than local revenues. The Court rejected that contention, but in doing so it accepted without question that a state property tax would be permissible. It stated:

The tax clause does not restrict the State with respect to [the] decision [to delegate a state service to local government]. Rather it means that if the State decides to handle a service at State level and to do so on the basis of a property tax, it must tax all taxable property in the State rather than only property in a part of the State; and that if the responsibility for the State function is assigned to local government, the local tax must fall uniformly upon all taxable property within the county or the municipality as the case may be.⁸⁰

The *Robinson* Court’s comment on a 1916 case, *Society for Establishing Useful Manufactures v. City of Paterson*, suggests that a state property tax not only would be permissible, but could be used to provide aid to local school districts, since the provision of a thorough and efficient system of education is a “state objective”:

That case does not hold that the State’s obligation under the education clause of the Constitution must be furthered only by a statewide tax. It holds only that if the State does choose to impose such a tax, it is a tax for a State use, notwithstanding that the proceeds are appropriated to local school districts for application to that State objective.⁸¹

Thus, the discussion in *Robinson* certainly suggests that a state property tax to raise revenue for education or other state purposes would be permissible. It further suggests that if such a state tax were imposed, the Tax Uniformity Clause would require its rate to be uniform statewide.

Another option worthy of consideration is a revenue-sharing program. The *Meadowlands Regional Redevelopment Agency* case discussed above suggests that a tax revenue-sharing arrangement encompassing multiple municipalities, or even the entire state, could be constructed in a manner consistent with the constitution. Such a program could serve to allow municipalities and school districts with high tax burdens and costs, such as the cost of meeting the needs of high concentrations of educationally disadvantaged students, to receive the benefit of revenues raised in municipalities that don’t face such burdens. It would maintain the current system of local property taxation, including tax uniformity within municipal borders. To comply with the prohibition of “private, special or local” laws, it would have to allocate the burdens and obligations associated with satisfying the T & E mandate reasonably and rationally. Municipalities with high tax rates would have much to gain from such an arrangement, while those with the lowest rates would contribute locally-raised revenues to the overall state education effort. Surely, the costs and benefits would need to be discussed and debated, but there does not seem to be any constitutional impediment to such an arrangement.

In short, there is room for reform within the confines of the current terms of the constitution. The idea of a constitutional convention may have some appeal, but the Legislature could – with sufficient political will – accomplish the goal of property tax relief and reform through legislative, rather than constitutional, means.

And this discussion does not even begin to address reforms on the spending side that could effectively result in savings and, thus, tax relief. For a more detailed discussion of some of those reforms, such as municipal or school district consolidation, cost-sharing and service-sharing, see the third report in this series, *Don’t Forget the Schools: Education Funding Considerations for Tax Reform*. As with each of the proposed tax reforms, the costs and benefits of each such

spending reform would need to be discussed and debated. The need for a constitutional amendment to achieve any particular reform would depend on its specific terms.

Does the T & E Clause Preclude or Limit Tax Reform?

The Property Tax Convention Task Force recommended a constitutional convention, as discussed above, but it was not unanimous in its view of the scope of issues to be addressed at that convention. The task force majority recommended authorizing the convention to propose amendments to the taxation provisions of the constitution and to propose statutory changes in revenue-related areas, but not to address any spending provisions. The majority view was that a convention that examined spending as well as revenue-raising would become bogged down in debates over “divisive social issues.” Two task force members disagreed, and said revenue-raising reforms could not be addressed in isolation from spending reforms.

Those who wanted to avoid spending issues feared that T & E would be eviscerated in the name of tax reform. Thus, the issue is whether tax reform and education reform are mutually exclusive, whether preserving the T & E obligation and keeping it “inviolable,” in the Court’s words, necessarily precludes or limits efforts to establish a more equitable system of taxation.

One dissenting member of the Task Force, Senator Leonard Lance, submitted a statement in which he said the convention should examine both revenue and spending provisions, since, in his view, “[a]ny lessening of the overall property tax burden in relation to other forms of taxation will only be temporary unless spending proposals are included in the convention’s recommendation to the people.” Senator Lance acknowledged the concern that proposed amendments to spending provisions would raise divisive social issues, but said he did not share that concern. He expressed the view that “discussions of government spending can be limited to matters related to property tax reform.”

The other dissenter, Assemblyman Kevin O’Toole, also said reform would be illusory if it

did not include reform of spending provisions. His dissent stated:

Avoiding difficult choices and controversial ideas is what has brought us to this point, and there cannot be any lasting reduction of the property tax burden unless elected officials, including legislators and future delegates to a constitutional convention, have the fortitude and intellectual honesty to deal with the real factors contributing to the present crisis. Taxpayers deserve nothing less from those they entrust with public office. Spending issues must be fully addressed in order for the convention, or any other overall property tax effort, to have any credibility at all and to have any lasting impact.

Assemblyman O’Toole submitted, accordingly, that the convention should address a range of spending issues, not only overall spending but special education costs, state borrowing, state government spending caps, local government spending, and “waste and fraud.”

The concern in some quarters, reflected in the majority view, was (and still is) that a convention authorized to address spending as well as taxation could vote to delete or modify the T & E Clause in order to eliminate or eviscerate the Abbott mandate, and thus eliminate the obligation to subsidize schools at a level sufficient to meet the needs of the state’s neediest students. To counter those who would support such a result, the task force majority recommended prohibiting the convention from considering any spending issues at all.

Such an approach presupposes a view, assumed to be held by those who would delete or modify the T & E Clause, that the thorough and efficient obligation is a primary cause of all the state’s woes, or at least its fiscal woes. Of course, T & E is a convenient scapegoat, but the state’s fiscal problems have many causes, and, even if we did away with the T & E obligation, or modified the clause or limited its effect, many of those causes and problems would remain.⁸² Beyond that, the view that the T & E Clause precludes or limits the potential for tax reform is not correct.

It is true that the Supreme Court has said the T & E obligation is “inviolable,” and this will be true as long as the provision remains. But it is the

obligation that is inviolate, not any particular means of satisfying it. Nor does the obligation to fund schools require that we do so in a vacuum, without considering other important state objectives. In particular, it does not necessarily preclude efforts to allocate resources judiciously and spend them efficiently, or to tax our citizens fairly and equitably. Some aspects of what has become known as the Abbott mandate probably could be reduced, modified or eliminated, without offending the T & E Clause, as part of a comprehensive effort to reform our system of school finance and taxation.

Let's be clear –the state could not simply eliminate or reduce the funding or programs mandated in *Abbott*, unless the constitution were amended or the Supreme Court were to abrogate its rulings in *Robinson* and *Abbott*. The state cannot disregard or contravene the Court's rulings. It cannot abandon the ambitious education reform efforts sparked by *Abbott* without showing that the requirements of the T & E Clause could be met without them. The burden of proving that those requirements could be met would be heavy indeed, given the state's long history in this area and the Court's strong admonition that specific reforms are required.

But the Court ordered those reforms in *Abbott V* – parity funding, supplemental funding, whole school reform, high-quality prekindergarten, and facilities improvements – on the basis of evidence indicating that that package of reforms was necessary and available to meet the constitutional obligation. If the state – or anyone – now could show that other reforms would do the job as well, and could further show that other reforms could both do the job of educating all our children and providing a more equitable tax system, the T & E Clause, as construed in *Robinson* and *Abbott*, would not be an impediment.

Some elements of the Abbott mandate could be eliminated or modified as part of a comprehensive reform program. For instance:

The “special needs” designation. The Court in *Abbott II* ruled CEIFA unconstitutional only as to the “special needs” districts, not because it found a legal basis for such a distinction, but because it had not been presented with sufficient evidence to support a ruling as to the others. With additional evidence of the extent of

educational need in the rest of the state, or an entirely different but equally effective way of assessing need, the state could conceivably dispense with the label. The T & E Clause does not require some districts to be treated more favorably than others (indeed, it prohibits substantial disparities among districts; that's what *Robinson* was all about); it requires the state to meet the needs of all public school students. Unfortunately, the “special needs” designation has resulted in two separate education systems and levels of state aid, but that is because of the limitations of evidence presented in a judicial proceeding and the Legislature's failure to establish one comprehensive system applicable to all districts. The constitution need not be amended to address this perceived inequity.

Parity funding. Parity funding for the special needs districts is the most costly aspect of the *Abbott* mandate. But neither parity aid levels nor the manner of calculating them is mandated by the T & E Clause. As discussed above, the Court in *Abbott V* tied parity funding levels to I and J district spending levels because the state offered no acceptable alternative. Years later, the state still has established no other method of measuring the cost of providing a thorough and efficient education in the state's poorest districts or elsewhere where students suffer extreme educational disadvantage. If and when it does so, and creates a system of calculating aid to meet those needs, costs may not be lower, but the system should be more rational. The constitution need not be amended to do so.

And beyond the issue of how to calculate parity aid, the Court never intended that the state would provide this form of aid indefinitely. As also discussed above, the Court considered the parity remedy “provisional or interim relief,” to remain in place only until other effective measures could be put in place.

The Court certainly did not rule that the T & E Clause requires parity aid to the exclusion of any other measure. Parity aid could be eliminated as part of a program of comprehensive reform aimed at addressing both the T & E obligation and demands for equitable taxation.

The prohibition of property tax increases in Abbott districts. As mentioned above, the Court in *Abbott II*, in 1990, stated, “We assume the design of any new funding plan will consider

the problem of municipal overburden in these poorer urban districts,” which has been interpreted to prohibit any property tax increases in the Abbott districts. But as reflected in the Court’s own statement, the basis for its concern was the degree of “municipal overburden” in those districts. If some or all of the Abbott districts no longer experience the degree of property tax burden that the Court considered a “problem” in 1990, the basis for its concern and the need for the prohibition of local tax increases no longer exist.

This, in fact, was the stated basis for the Department of Education’s recent determination that eight Abbott districts with relatively low equalized tax rates would receive reduced aid and be required to contribute additional locally-raised revenues to the cost of supporting their schools. The determination does make sense, theoretically – the Court could not have intended to exempt Abbott districts from any local contribution, regardless of their financial circumstances – though the Department’s basis for determining where to draw the line, how much of a local tax burden should reasonably exempt districts from a local share requirement, is as yet unclear.

The notion of local contribution in accordance with ability to pay should apply equally to non-Abbott districts. Just as it makes sense to ask Abbott districts to contribute to the extent that they can, it also would make sense to ask districts with very low property tax rates to pay their fair share toward the cost of our state’s public schools, not just those located within each district’s borders. Where to draw the line – how to calculate each district’s fair share – and how to allocate revenues beyond the borders of the municipalities in which they are raised are delicate and controversial subjects, but we should start by accepting the notion that taxpayers in all districts have an obligation to contribute reasonable amounts toward meeting the state’s obligation to support the public schools.

Again, the T & E Clause would not be an impediment to this kind of reform. Indeed, the constitutional requirement of an “efficient” system could be said to dictate reforms that spread the cost of supporting our public schools more evenly. Nor would the Tax Clause or the prohibition of “private, local or special laws” be impediments, if the system were carefully

crafted based on lessons learned from *Meadowlands Regional Redevelopment Agency v. State of New Jersey*, as discussed above. And spreading the costs more evenly might also be a way of targeting property tax relief to districts, communities and taxpayers that currently carry an inordinately large share of the burden. Thus, one set of reforms could address both the need for an equitable system of education finance and the demand for equitable taxation.

Perhaps, then, the best approach to tax reform would reflect both the majority and dissenting positions of the Property Tax Convention Task Force: that issues of revenue raising and government spending are intertwined and cannot be addressed adequately in isolation, but that any measure – constitutional, statutory or otherwise – that signals a retreat from our state’s historic effort to ensure educational opportunity for its most disadvantaged children should be opposed. Comprehensive reform must include education finance reform. Education finance reform, consistent with the mandate of the T & E Clause, could in fact help, rather than hinder, efforts to provide relief to overburdened taxpayers.

Does the “Special Needs” Designation Have Continued Significance?

As mentioned, in our view, the “special needs” designation is not an indispensable aspect of the T & E mandate. And if special needs districts are required to contribute substantial amounts of locally raised revenue to the cost of their public schools, the designation may have little significance in any event. But while the designation may have less significance than it once did, districts continue to pursue it. As also discussed, the 17 Bacon districts petitioned the Commissioner of Education seeking “special needs” designation; the Commissioner granted that designation to one of the 17; and the State Board of Education ruled that none should be labeled “special needs” but all 17 should be given state aid sufficient to meet their specific needs and satisfy the T & E obligation.

If the State Board’s ruling stands, the significance of the “special needs” designation may be further reduced or even eliminated. If, as the State Board has suggested, state aid is appropriated and allocated in a manner designed to meet the identified educational needs of students in every district, then no

district will need the “special needs” designation. And if any additional districts are found to require aid at levels similar to those provided to the Abbott districts, they too effectively will have become “special needs” districts without the label.

The State Board in *Bacon* did not explicitly suggest that we do away with the designation. Indeed, whether it would have the authority to do so might be questionable, since the designation was integral to the Court’s determination in *Abbott II*. “Special needs” was not merely a label, but an indication of the “extreme disadvantage” found by the Court. Concentrations of poverty and the “extra-educational” needs that go along with it warranted the special designation.

But the Court did not rule that the districts given the designation were the only ones that needed additional aid. Evidence of conditions in other districts that might have established a constitutional violation there as well had not been presented. The State Board now, in effect, has asked for such evidence to be collected, directing the Commissioner to make recommendations for assessing the nature and extent of need in every district. Every district is “special” to the State Board; all have unique needs. This does not negate the fact that some districts’ needs are greater than others, and some districts’ needs are extreme. The clear desirability, indeed the obligation, to meet the needs of all students does not negate the fact that the extreme disadvantage in some districts continues to require special consideration.

In the 2000 school facilities law, the Educational Facilities Construction and Financing Act, the Legislature directed the Commissioner of Education to make recommendations on the criteria by which districts were designated Abbott districts.⁸³ It specified that the criteria “may” include the following:

- the number of residents per 1,000 within the municipality or municipalities in which the district is situate who receive Temporary Assistance for Needy Families (TANF)
- the district's equalized valuation per resident pupil as equalized valuation is defined in section 3 of P.L.1996, c. 138 (C.18A:7F-3)

- the district's income per resident pupil as district income is defined in section 3 of P.L.1996, c. 138 (C.18A:7F-3)
- the population per square mile of the municipality or municipalities in which the district is situate
- the municipal overburden of the municipality or municipalities in which the district is situate as that term is defined by the New Jersey Supreme Court in *Abbott v. Burke*.

Pursuant to this provision, in 2003 the Commissioner issued a report, *Designation of Abbott Districts: Criteria and Process*, and in 2005 he issued the report again, with minor modifications.⁸⁴ He did not adopt the criteria suggested by the Legislature, but rather recommended a two-part analysis: first, “educational adequacy,” the extent to which the district “offer[s] a program that gives students the opportunity to master the [core curriculum content standards],” using factors such as student test scores, course offerings, teacher/pupil ratios, attendance rates and dropout rates; second, “poverty-economic indicators,” with eligible districts required to be in DFG A or B, demonstrate “additional substantial economic hardship,” and satisfy the following criteria:

- low-income concentration of at least 40 percent (as measured by eligibility for federal free lunch subsidies)
- for any district with a low-income concentration of at least 60 percent, equalized property value per capita at least three percent below the state average for any district with a low-income concentration of less than 60 percent, equalized property value per capita at least three percent below the state average and equalized tax rate at least 30 percent greater than the state average
- listing as an “urban aid district” under the New Jersey Redevelopment Act.⁸⁵

In May 2005 the Office of Legislative Services (OLS) issued a report applying the Commissioner’s criteria. Based on its analysis, OLS identified the districts that would continue to be eligible for special needs designation, those

that would be added and those that would be dropped. It concluded that 18 of the 31 current special needs districts, as well as one other, Penns Grove-Carneys Point Regional, would meet the Commissioner's criteria.⁸⁶

The State Board has not adopted the OLS calculation or even the criteria in the Commissioner's reports. It has not amended the method of determining "special needs" status. It has proposed reducing the level of aid for some special needs districts, using criteria based entirely on equalized tax rates.

So what is the continued significance of the "special needs designation? If the Department of Education's aid levels remain as proposed, some special needs districts will receive substantially less state aid than others next year. On the other hand, under the statute creating "Abbott border districts," a few districts are receiving additional aid without the special needs designation. And if the State Board ruling in *Bacon* stands, all districts may receive aid in accordance with need, regardless of any special designation. The significance of the label is clearly diminishing.

The label itself is not the important thing, of course. What is important is having in place an education funding system that assures all children in New Jersey a "thorough and efficient" education. With the increasing recognition that children in districts other than Abbott districts also have serious educational needs, it may be time to consider eliminating the special needs designation. The idea of a continuum of need, as suggested by the State Board in *Bacon*, is worth pursuing, as long as those students facing "extreme disadvantage" (as described in *Abbott II*) are not overlooked. It also fits well with the idea of a continuum of ability to pay the cost, reflected in the decision to require some Abbott districts to pay a share of the cost with local revenue. The goal should be comprehensive reform that addresses the needs of every district and every student and spreads the cost of doing so fairly among all districts, and that the state has the capacity to administer effectively and efficiently.

<i>"Special Needs" Districts</i> (per OLS Analysis of Commissioner's Recommendation)		
Asbury Park	New Brunswick	Plainfield
Bridgeton	Newark	Pleasantville
Camden	Orange	Salem City
East Orange	Passaic	Trenton
Irvington	Paterson	Union City
Keansburg	Penns Grv-Carneys Pt. Reg.	West New York
	Perth Amboy	
<i>Districts Losing "Special Needs" Designation</i>		
Burlington	Hoboken	Neptune
Elizabeth	Jersey City	Pemberton Twp.
Garfield	Long Branch	Phillipsburg
Gloucester	Millville	Vineland
Harrison		
<i>Districts Gaining "Special Needs" Designation</i>		
Penns Grove-Carney's Point Regional		

Conclusion: Legal Considerations for Tax Reform

Certain legal considerations emerge from this discussion. Certain fundamental principles reflect the current situation of our state law, and must be taken into account in any discussion of potential tax reform:

First, the holding in the landmark case of *Robinson v. Cahill*: that a system in which state functions are delegated to local government and financed by locally-raised revenues is consistent with the Tax Clause of the state constitution, even if such a system results in unequal tax burdens; but a system of public schools that results in substantial funding disparities among school districts with no relationship to educational standards set by the state is inconsistent with the Thorough and Efficient Clause;

Second, the main holding in *Abbott v. Burke*: that in light of the poor quality of education in the state's poorest urban districts and the "desperate" needs of their students, a "significantly different approach to education" was required, one that was reasonably likely to enable those students to meet state standards of academic proficiency;

Third, the Supreme Court's observation that the rights guaranteed by the Thorough and Efficient Clause are "inviolable;"

Fourth, the notion that the Tax Clause requires property tax rates to be uniform within municipalities but not beyond municipal borders. The Tax Clause does not require local property tax rates to be equal statewide, or substantially equal or even equitable. It also does not require locally-raised revenues to be spent within the borders of the municipality where they are raised;

Fifth, the fact that the constitutional prohibition of "private, local or special laws" does not prevent the Legislature from making reasonable distinctions among similarly situated entities, including municipalities, even in laws pertaining to taxes and schools.

Several other considerations, perhaps less fundamental but just as important to meaningful reform, also emerge:

The aid provided to the state's poor urban school districts since 1998 pursuant to *Abbott* has indeed addressed the "tragically inadequate" conditions found by the Court and reduced disparities in student achievement levels. But it has not eliminated the achievement gap. This should come as no surprise, since the "significantly different approach to education" ordered in *Abbott II* only began to be phased in about eight years ago, after *Abbott V*. Eight years is much less time than it took for conditions to reach the point they had, causing the Court to rule as it did. Moreover, the failure to eliminate the gap is due, in significant part, to the "extra-educational" needs of students in the special needs districts, needs that any reform focusing solely on schools cannot eliminate easily or entirely. If we are truly committed to eradicating the achievement gap, we will have to address a range of social and economic issues that extend beyond schools.

Property tax rates vary considerably statewide. This applies to both school tax rates and total tax rates, which include taxes collected to support non-school municipal and county functions as well as school taxes. Many municipalities have relatively high school tax rates but relatively low total tax rates, or vice versa. Some have total tax rates among the highest in the state but school tax rates that rank much lower. Others have both high school tax rates and high total tax rates; and others rank substantially higher in school tax rate than total tax rate.

The State Board of Education, in *Bacon v. Department of Education*, found that the non-Abbott districts involved in that case have needs and conditions similar to those in Abbott districts, and tax burdens as heavy as those in Abbott districts, and they are failing to meet their T & E obligation. It also found that the state's system of education funding is in need of overhaul. The State Board's ruling, that educational need in every school district in the state must be assessed and met, could lead to an overhaul of New Jersey's system of education finance. This could be viewed as an added burden – an increase in constitutionally mandated funding for public schools – or as an opportunity – a chance to allocate state aid more fairly, in accordance with educational need, and,

in doing so, provide relief to districts struggling to fund their schools adequately.

It is not at all clear that the state constitution needs to be amended in order to permit property tax relief or achieve a more equitable tax system. Providing relief to taxpayers in need would not require substantial changes in law or the state tax system. Targeted tax relief measures are already in place. The level of relief provided by one or more of them could be increased without a major overhaul.

Some property tax reform measures that go beyond targeted relief could require a constitutional amendment. Other measures could be implemented without the need for an amendment. Increasing sales taxes, as the Governor has proposed, or broadening the scope of the property tax to include personal property holdings of higher income households, both could be achieved through legislative action. So could a state property tax or a municipal revenue-sharing system. Both of these reforms are worth considering.

In short, there is room for reform within the confines of the current constitution. The idea of a constitutional convention may have some appeal, but the Legislature could – with sufficient political will – accomplish the goal of property tax relief and reform through legislative, rather than constitutional, means.

The state could not simply abandon the ambitious education reform efforts sparked by *Abbott*, unless the constitution were amended or the Supreme Court were to abrogate its rulings in *Robinson* and *Abbott*. But the Court ordered a particular package of reforms on the basis of evidence indicating that it was necessary, and available, to meet the constitutional obligation.

If other reforms would do the job as well, and both educate all our children and provide a more equitable tax system, the T & E Clause, as construed in *Robinson* and *Abbott*, would not be an impediment. Some elements of the *Abbott* mandate, such as the “special needs” designation, parity funding, and the prohibition of tax increases in Abbott districts, could be eliminated or modified as part of a comprehensive reform program.

The notion of a local district contribution in accordance with ability to pay should apply equally to both Abbott and non-Abbott districts. Just as it makes sense to ask Abbott districts to contribute to the extent they can, it also would make sense to ask districts with very low property tax rates to pay their fair share, and accordingly to contribute more to the cost of the state’s public schools. There is arguably no rational basis for exempting taxpayers in some districts from the obligation to contribute a reasonable amount toward meeting the state’s obligation to support the public schools.

If the “special needs” label, and the bright line that has been drawn between special needs districts and others, have caused unnecessary political controversy and unfairness to other low-wealth districts, then it may be time to do away with the special needs designation. The idea of a continuum of need, as suggested by the State Board in *Bacon*, is worth pursuing, as long as those students facing “extreme disadvantage” (as described in *Abbott II*) are not overlooked.

Comprehensive reform that addresses the needs of every district and every student, and spreads the cost of doing so fairly among all districts, should be the goal.

Appendix

SETTING THE STAGE FOR INFORMED, OBJECTIVE DELIBERATION ON PROPERTY TAX REFORM

**Invitational Meeting June 3-4, 2005
Invitational Meeting January 10, 2006**

Participants

Jason Barr is Assistant Professor of Economics at Rutgers University – Newark.

Richard Brown is Associate Director of the Research and Economic Services Division of the New Jersey Education Association.

Judith Cambria is Fiscal Policy Director of the League of Women Voters of New Jersey.

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Anthony Cavanna is Principal Research Scientist and Vice President for Education Systems Design at the American Institutes for Research and New American Schools in Washington, D.C. He served as superintendent in Rahway, New Jersey; Fort Lee, New Jersey; and Plainview-Old Bethpage, New York, and was deputy superintendent in New York City.

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Tae-Ho Eom is Assistant Professor of Public Administration at Rutgers University – Newark.

James Florio was Governor of New Jersey from 1990 to 1994.

Laura Goe is Associate Research Scientist in the Policy Evaluation and Research Center at Educational Testing Service (ETS) in Princeton, NJ.

Herb Green is the Director of Rutgers University's Public Education Institute.

Michael Guariglia is a partner in the law firm of McCarter & English, LLP, Chairman of the New Jersey Supreme Court Committee on the Tax Court, and an adjunct professor at Rutgers University Graduate School of Management and Rutgers Law School - Newark.

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David Merriman is a Professor of Economics at Loyola University Chicago. He spent the 1999-2000 academic year as a senior research

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Sheila Murray is an economist at RAND, a part-time Associate Professor in Policy Studies at University of Maryland-Baltimore County, and an adjunct instructor of Public Policy at Georgetown University.

Joan Ponessa is Director of Research of the Education Law Center.

Barbara Reisman is Executive Director of The Schumann Fund for New Jersey.

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The Honorable Gary S. Stein served for 18 years on the New Jersey Supreme Court, retiring in September 2002, and is now Of Counsel to Pashman Stein in Hackensack, New Jersey.

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Notes

¹ Other constitutional provisions have some relevance to education and tax reform as well: Article I, paragraph 5, prohibiting discrimination on the basis of religious principles, race, color, ancestry and national origin and prohibiting segregation in the public schools; Article VIII, section 4, paragraph 2, authorizing establishment of a perpetual fund for support of free public schools; Article VIII, section 4, paragraph 3, regarding transportation of school children; and Article IX generally, regarding amendment of the constitution. See Paul Tractenberg, "Education," in G. Alan Tarr and Robert F. Williams, eds., *State Constitutions for the 21st Century: The Agenda of State Constitutional Reform*. (SUNY Press 2006).

² The wording of the provision was changed slightly in the 1947 Constitution.

³ 57 N.J.L. 509 (Sup. Ct. 1895).

⁴ 62 N.J.473, 303 A.2d 273, cert. denied *sub nom. Dickey v. Robinson*, 414 U.S. 976, 94 S.Ct. 292, 38 L.Ed.2d 219 (1973).

⁵ 62 N.J. at 515, 303 A.2d at 295.

⁶ *Id.* at 502-03, 303 A.2d at 288.

⁷ *Id.* at 515-16, 303 A.2d at 296.

⁸ 119 N.J. 287, 385, 575 A.2d 359, 408 (1990).

⁹ 164 N.J. 316, 753 A.2d 687 (2000).

¹⁰ Personal property also may be taxed at a rate that is different from the real property tax rate -- and for some personal property, such as oil refinery equipment, that difference in the resulting tax bill can be significant. See *Mobil Oil Corp. v. Twp. of Greenwich*, 22 N.J. Tax 1 (2004). See also *General Motors Corp. v. Linden City*, 150 N.J. 522, 696 A.2d 683 (1997); *Switz v. Kingsley*, 37 N.J. 566, 182 A.2d 841 (1962).

¹¹ *Borough of Sea Bright v. New Jersey Dept. of Education*, 242 N.J. 225, 229 576 A.2d 331 (App. Div. 1990); *Twp. of Princeton v. New Jersey Dept. of Education*, 163 N.J. Super. 389, 397, 394 A.2d 1240 (App. Div. 1978). Sea Bright further claimed that the fact that taxpayers in regional districts paid more than those in districts participating in sending-receiving relationships violated the Tax Uniformity Clause. The court rejected that claim as well. In both cases the court cited *Robinson v. Cahill*, 62 N.J. 473, 505 (1973) ("The purpose of [the Tax Clause] is 'to assure that all taxable property within a municipality shall bear the same share of the tax burden of that municipality'").

¹² Alan Karcher, *New Jersey's Multiple Municipal Madness* (Rutgers University Press 1998) at 213.

¹³ Kenneth Robinson, the lead plaintiff, was a Jersey City public school student.

¹⁴ See 118 N.J. Super. 223, 277, 287 A.2d 187, 215 (Law Div. 1972); see also 62 N.J. at 480, 303 A.2d at 276.

¹⁵ 62 N.J. at 500, 303 A.2d at 287.

¹⁶ 141 N.J. Super. 177, 357 A.2d 772 (Law Div. 1976).

¹⁷ *Id.*, 141 N.J. Super. at 193-4, 357 A.2d at 781.

¹⁸ *Meadowlands Regional Redevelopment Agency v. State of New Jersey*, 112 N.J. Super. 89, 270 A.2d 418 (Ch. Div. 1970), aff'd 63 N.J. 35 304 A.2d 545, app. dismissed 414 U.S. 991 (1973). See N.J.S.A. 13:17-1 *et seq.*, specifically, N.J.S.A. 13:17-60 to -76. See also *Town of Secaucus v. Hackensack Meadowlands Dev. Comm'n*, 267 N.J. Super. 361, 631 A.2d 959 (App. Div. 1993), certif. denied 139 N.J. 187, 652 A.2d 175 (1994).

¹⁹ *City of Jersey City v. Farmer*, 329 N.J. Super. 27, 746 A.2d 1018 (App. Div.), certif. denied 165 N.J. 135, 754 A.2d 211 (2000); *Camden Bd. of Ed. v. McGreevey*, 369 N.J. Super 592, 850 A.2d 505 (App. Div. 2004). See also *Raybestos-Manhattan, Inc. v. Glaser*, 144 N.J. Super. 152, 365 A.2d 1 (Ch. Div. 1976), aff'd 156 N.J. Super. 513, 384 A.2d 176 (App. Div. 1978) (Financial Business Tax); *General Public Loan Corp. v. Div. of Taxation*, 13 N.J. 393, 99 A.2d 796 (1953) (Private Nonvested Pension Benefits Protection Tax); *Schwartz v. Essex Cty. Bd. of Taxation*, 129 N.J.L. 129, 28 A.2d 482 (1942) (personal property tax).

²⁰ *Koons v. Bd. of Comm'rs of Atlantic City*, 134 N.J.L. 329, 47 A.2d 589 (Sup. Ct. 1946), aff'd 135 N.J.L. 204, 869 (E. & A. 1947).

²¹ 112 N.J. Super. at 113, 270 A.2d at 431.

²² 112 N.J. Super. at 115, 270 A.2d at 431.

²³ In an infamous standoff in 1976, the Court became so frustrated with the Legislature's recalcitrance that it issued an order enjoining all public school spending until the Legislature acted to fund a system that satisfied the terms of its previous rulings. The Legislature and the Executive (Governor Brendan Byrne) responded by establishing the state's first income tax. See, e.g., Paul Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 Rutgers L.J.827, 902-4 (1998).

²⁴ Raymond Arthur Abbott, the lead plaintiff, was a student in the Camden public school district.

²⁵ In *Abbott I*, 100 N.J. 269, 495 A.2d 376 (1985), the Supreme Court had required the plaintiffs to exhaust their administrative remedies, and accordingly had remanded the case to the Commissioner of Education.

²⁶ Since the 1970s, the state Department of Education has classified local school districts in district factor groups (DFGs) according to the socioeconomic status of their residents. Districts with the lowest socioeconomic status are placed in DFG A, the highest in DFG J. Revisions to the classification have been made after each census. The Court in *Abbott* ruled that districts in DFGs A and B that have urban characteristics required special treatment by the state, and thus designated them special needs districts. See generally New Jersey Department of Education, *District Factor Grouping System*, <http://www.state.nj.us/njded/finance/sf/dfgdesc.shtml>

²⁷ 119 N.J. at 359, 575 A.2d at 395.

²⁸ 119 N.J. at 369, 575 A.2d at 401.

²⁹ 119 N.J. at 255, 575 A.2d at 393.

³⁰ *Id.*

³¹ The Court also left the list of districts to be designated “special needs” to legislative discretion, though it listed 28 districts that it thought would qualify. See 119 N.J. at 385-86, 575 A.2d at 408, and Appendix, 119 N.J. at 394-95, 595 A.2d at 412-13. In the Quality Education Act of 1990, and again in the Comprehensive Education Improvement and Financing Act of 1996, the Legislature added Neptune and Plainfield to the Supreme Court’s list. See L. 1990, c.52; L. 1996, c. 136. Salem City was added as a result of the *Bacon* litigation, as discussed below.

³² L. 1990, c. 52.

³³ 136 N.J. 444, 452-54, 643 A.2d 575 (1994).

³⁴ L. 1996, c. 138, N.J.S.A. 18A:7F-1 *et seq.*

³⁵ 149 N.J. 145, 167-86, 693 A.2d 417, 428-37 (1997).

³⁶ 149 N.J. at 189, 693 A.2d at 439.

³⁷ 149 N.J. at 176, 693 A.2d at 433-34.

³⁸ 149 N.J. at 196, 693 A.2d at 442.

³⁹ 153 N.J. 480, 710 A.2d 450 (1998).

⁴⁰ *Millville Board of Education v. Department of Education*, 183 N.J. 264, 276, 872 A.2d 1052, 1060 (2005).

⁴¹ Brief in Support of the State’s Application for Approval of the Governor’s FY2007 Proposed Budget for School Aid to Abbott Districts, *Abbott v. Burke*, Supreme Court of New Jersey, Case No.

42,170 (filed April 7, 2006), at 10-11. See also John Mooney, “Farber Admits Abbott Fiscal Failures,” *Star-Ledger*, May 3, 2006 (reporting on Supreme Court oral argument). The *Abbott* plaintiffs dispute this characterization, stating in their reply brief that “Commissioners have, since 1999-2000, promulgated regulations governing the Abbott district budgets, including standards and procedures for districts to request supplemental funding based on demonstrated need,” and specifically stating that the Department’s 2007 Abbott budget regulations “provide extensive guidance and direction to the schools and districts on implementing foundational education and supplemental programs” Brief in Opposition to Defendants’ Motion and in Support of Plaintiffs’ Cross-Motion in Aid of Litigants’ Rights (filed April 21, 2006),

http://www.edlawcenter.org/ELCPublic/elcnews_060424_Brief_EducationCuts.pdf, at 3, 12. Those regulations provide that supplemental aid shall be withheld from any district that fails to meet “minimal, customary, and statutory standards of efficient financial management and business operations” or that fails to follow “customary, basic and required instructional standards, policies and practices,” and the regulations specify such standards, N.J.A.C. 6A:10A-7.1. But they provide no standards for assessing need for supplemental aid or the effectiveness of proposed programs. On May 9, 2006, the Supreme Court granted the state’s application but ruled that districts must be permitted to appeal any decision by the state denying a request for supplemental funding. *Abbott v. Burke*, ___ N.J. ___, ___ A.2d ___ (Case No. 42, 170, May 9, 2006).

⁴² 339 N.J. Super. 38, 770 A.2d 1222 (App. Div. 2001), certif. denied 171 N.J. 442, 794 A.2d 181 (2002).

⁴³ *Bacon v. Dept. of Education*, OAL Dkt. No. EDU 2637-00 (2002), Agency Dkt. No. 53-3/98A (2003).

⁴⁴ One other district, Lakewood, also appealed, but its claim on appeal was limited to the administrative law judge’s determination, affirmed by the Commissioner, that it had not used all funds available to it under CEIFA to provide a thorough and efficient education, since it provided courtesy busing pursuant to N.J.S.A. 18A:39-1.1.

⁴⁵ State Board Dkt. No. 4-03, slip op. at 26.

⁴⁶ *Id.* at 55.

⁴⁷ *Id.* at 60.

⁴⁸ *Id.* at 65-66.

⁴⁹ *Id.* at 69.

⁵⁰ App. Div. Docket No. A-2460-05T1.

⁵¹ Indeed, whether the legislation constitutes a “private, local or special law” may be questioned.

⁵² L. 2005, c. 122, N.J.S.A. 18A:7F-10.1. Additionally, the law provides that for 2005-06 eligible districts were required to have received High Expectations for Learning Proficiency Aid in 2004-05. N.J.S.A. 18A:7F-10.2.

⁵³ *Id.* The law provides that these percentages are to increase by ten percent each year. However, the proposed budget for FY 2007 freezes almost all state aid, and provides for no increase in the Abbott border aid except for aid to be provided for the first time to a newly designated district, Kearny.

⁵⁴ NJDOE Press Release, *DOE Releases 2006-07 State Aid Figures*, March 23, 2006, <http://www.state.nj.us/njded/news/2006/0323aid.htm>.

⁵⁵ 119 N.J. at 388, 575 A.2d at 409.

⁵⁶ Property taxes consist of three distinct taxes: school taxes, municipal taxes and county taxes. School taxes are collected by municipalities but designated for public school purposes; similarly, county taxes are collected by municipalities but designated for county purposes. Generally, the three taxes are set at three different rates. The school tax rate is determined largely by the size of the school district budget and the portion of the budget to be borne by local taxpayers, as well as the assessed value of taxable property.

⁵⁷ Memoranda dated March 23, 2006 from Lucille E. Davy, Acting Commissioner of Education, to Chief School Administrators and School Business Administrators, http://www.state.nj.us/njded/news/2006/0323aid_a1.pdf.

⁵⁸ See Gary S. Stein, “Give City Schools a Chance,” *Star-Ledger*, April 28, 2006; Jean Anyon and Alan Sadovnik, “Beyond Newark’s School Yard,” *The New York Times*, April 23, 2006; see also Jean Anyon, *Radical Possibilities* (Routledge 2006); Richard Rothstein, *Class and Schools* (Teachers College Press 2004).

⁵⁹ Former Commissioner William Librera said when the 2004 scores were announced, “What we have are results we have never seen before, the kind of results all of the Abbott decisions have been designed to produce.” Newark *Star-Ledger*, October 29, 2004. For an in-depth discussion of student achievement and other performance indicators in four Abbott districts, see the Education Law Center’s *Abbott Indicators Report*, <http://www.edlawcenter.org>.

⁶⁰ See 118 N.J. Super. 223, 280, 287 A.2d 187, 217 (Law Div. 1972); see also 62 N.J. at 480, 303 A.2d at 276.

⁶¹ 62 N.J. at 500, 303 A.2d at 287.

⁶² P.L. 2004, c.85.

⁶³ See <http://www.njslom.org/m1042505.html>.

⁶⁴ See <http://www.njea.org/news/FullPublicStory.asp?ID=277>

⁶⁵ See <http://www.njsba.org/govrel/legcom/agenda.htm>

⁶⁶ See <http://216.239.51.104/search?q=cache:Js2JediIxQcJ:www.americanreform.org/NewJersey/property.html+American+Reform+Party+tax+New+Jersey&hl=en&gl=us&ct=clnk&cd=2>.

⁶⁷ See http://www.aarp.org/states/nj/nj-news/aarp_new_jersey_announces_support_of_constitutiona.html; <http://www.fairnessalliance.org/>.

⁶⁸ See <http://www.njsba.org/PI/index.html?pn=6>.

⁶⁹ See <http://reformschooltaxes.com/proposals.htm>.

⁷⁰ See http://www.fairnessalliance.org/pr_05-12-05.html.

⁷¹ *Id.*

⁷² See http://www.aarp.org/states/nj/nj-news/aarp_new_jersey_announces_support_of_constitutiona.html

⁷³ See <http://www.njea.org/news/FullPublicStory.asp?ID=277>

⁷⁴ See Regional Plan Association / Lincoln Institute of Land Policy, *Fundamental Property Tax Reform: Land Use Implications of New Jersey’s Tax Debate*, <http://www.rpa.org/pdf/propertytax101705.pdf>; *Fundamental Property Tax Reform II: A Guide for Evaluating Proposals*, <http://www.rpa.org/pdf/RPAproptax050206.pdf>.

⁷⁵ Property Tax Reform Transition Policy Group, *Interim Report*, <http://www.state.nj.us/governor/home/pdf/property.pdf>.

⁷⁶ New Jersey Constitution, Article VIII, Section 1, paragraph 1.

⁷⁷ A. 5269.

⁷⁸ Karcher at 213.

⁷⁹ 37 N.J. 566,573, 182 A.2d 841, 844 (1962).

⁸⁰ 62 N.J. at 501, 303 A.2d at 288.

⁸¹ 62 N.J. at 502-03, 303 A.2d at 288-89, citing *Society for Establishing Useful Manufactures v. City of Paterson*, 89 N.J.L. 208, 98 A. 440 (E. & A. 1916).

⁸² See the first report in this series, *Don’t Forget the Schools: Fiscal, Budget and Policy Considerations for Tax Reform*, for a discussion of the state’s fiscal crisis.

⁸³ P.L.2000, c. 72, §4k, N.J.S.A.18A:7G-4k.

⁸⁴ The Commissioner's 2005 report is available at <http://www.state.nj.us/njded/abbotts/regs/criteria2.pdf>.

⁸⁵ Recognizing that these criteria would represent a change in policy and could lead to substantial loss of aid for some districts, the Commissioner recommended phasing out Abbott aid over a period of four years and grandfathering approved facilities projects so that they maintain eligibility for 100 percent, rather than 40 percent state funding.

⁸⁶ See *Analysis of the New Jersey Budget: Department of Education, Fiscal Year 2005-2006*, <http://www.njleg.state.nj.us/legislativepub/govbudget/2005-2006.asp>, at 89.

Don't Forget the Schools

Legal Considerations for Tax Reform

Demands for tax reform in New Jersey reached a turning point in 2004 when the Legislature's Property Tax Convention Task Force recommended a constitutional convention, and the call for property tax relief is still strong.

At the same time, the call for education reform, including reform of the state school funding system, is also strong, although there is little agreement on how to address the problem. Some call for more state aid for education, some less. Some would abandon the current system, which is fueled largely by the judicial mandate of *Abbott v. Burke*, some would extend that mandate further.

This report presents a clear and comprehensive explanation of the pertinent constitutional provisions and the legal principles that form the underpinnings of our state's education system, and that must be considered in connection with any tax reform.

Taxes and public education are inextricably intertwined; by considering them together, we advance the important goal of forging a rational and equitable state tax and education policy.

A serious and heated debate on tax reform is about to begin, in the legislative and executive halls, in municipalities and school districts across the state, and among citizens. Through it all, our watchword will be **Don't Forget the Schools.**

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