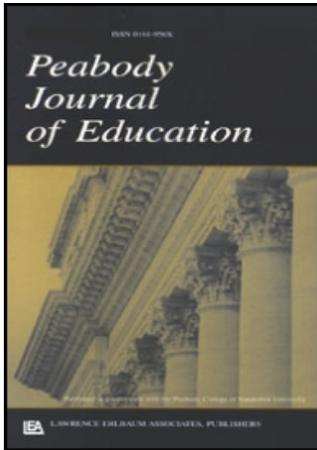


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Hope for Children Trapped in Failing Schools: The Promise of *Crawford v. Davy*

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On October 4, 2007, a trial level court in New Jersey dismissed *Crawford v. Davy*, a class action lawsuit filed on behalf of 60,000 schoolchildren throughout the state seeking the court's authority to leave schools that fail to educate their students. By filing suit, plaintiff schoolchildren had hoped to be transferred to an alternative successful public or private school utilizing their pro rata share of state and local school funds to subsidize the transfer. Now, the dismissal of *Crawford* consigns these children to poor inadequate neighborhood schools indefinitely. If the dismissal of *Crawford v. Davy* is not reversed on appeal, it will not only extinguish the hope of plaintiff schoolchildren to receive an equal and adequate educational opportunity, but could threaten the right of a thorough and efficient education guaranteed by the State Constitution and reverse gains achieved over the past 40 years in New Jersey's education jurisprudence. This article places *Crawford* in the context of the state's enduring legal struggle to equalize educational opportunities and discusses its claims and purposes in relation to that history. The article then addresses the significance of the *Crawford* dismissal on the state's legal precedents, especially rulings in the on-going *Abbott v. Burke* equity funding litigation. Finally, the article concludes with a prediction of the impact that *Crawford's* dismissal may pose for the larger equity/adequacy litigation movement playing out across the country. For the moment, the hope of 60,000 plaintiff schoolchildren is diminished. Only time and New Jersey's appellate courts will dictate whether their hope for an equal and adequate education shall survive.

On October 4, 2007, the Chancery Division of the Superior Court of the State of New Jersey dismissed *Crawford v. Davy*, a class action lawsuit filed on behalf of approximately 60,000 schoolchildren throughout the state who seek to leave

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schools that fail to educate the majority of their students.¹ Primarily, plaintiffs allege that the schools they are assigned to attend do not provide an equal or adequate educational opportunity and therefore violate their right, under the State Constitution, to receive a thorough and efficient education.

By filing suit, plaintiff schoolchildren hoped to be transferred to alternative successful public (or private) schools utilizing their pro rata share of public school funds to subsidize the transfer. Now, the dismissal of *Crawford* consigns these children to inadequate neighborhood schools indefinitely. If the dismissal of *Crawford* is affirmed on appeal, it will not only extinguish the hope of these children to receive a proper education but could potentially threaten the right to a thorough and efficient education under the State Constitution and begin to reverse gains achieved over the past 34 years in New Jersey's education jurisprudence.

This article discusses the case of *Crawford v. Davy*, the grounds for its dismissal, and the consequences thereof. It begins with a discussion of the state fundamental right to a thorough and efficient education and state litigation to equalize educational opportunities for all children. By placing *Crawford* in that context the legal claims and purposes of the lawsuit are explained. An analysis of the Chancery Court's reasoning and the purported grounds for dismissing *Crawford* follows. The significance of the dismissal on the state right to education, and principally the ongoing *Abbott v. Burke* litigation, is also analyzed. Finally, the article concludes with a prediction about the effect the dismissal of *Crawford* could pose for the larger equity and adequacy litigation explosion blanketing the rest of the country. For the moment, the hope of 60,000 schoolchildren in New Jersey is diminished. Only time and the state's appellate courts will dictate whether their hope for an equal and adequate education can survive.

CRAWFORD IN CONTEXT: THEMES, CLAIMS, AND PURPOSES

New Jersey has demonstrated a long deep commitment to public education. As early as 1817, the State Legislature enacted a school fund "as a first step toward establishing a state system of public common schools."² In 1844 the State Constitution made that fund permanent.³ Later, in 1875 the State Constitution was amended again to include the well-known language of the Thorough and Efficient

¹ See generally *Crawford v. Davy*, Docket No. C-137-06, slip op. and order (N.J. Super. Ct. Ch. Div. Oct. 4, 2007).

² Paul L. Tractenberg, *The Evolution and Implementation of Education Rights under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 832 fn. 17 (1998). However appropriations to support public schools were not authorized until 1829. See *Robinson v. Cahill*, 62 N.J. 473, 506 (1973) (citing I. Myers, *The Story of New Jersey* (1945), pp. 447-450).

³ N.J. Const. of 1844, Art. IV, §7, ¶6.

(T&E) clause, which required the legislature to “provide for the maintenance and support of a *thorough and efficient* [italics added] system of free public schools” in the State of New Jersey.⁴ The T&E clause reappeared in the 1947 (and now current) version of the State Constitution,⁵ and has served as the basis for a state fundamental right to education fueling long and tortuous litigation.⁶

In 1895, when the New Jersey Supreme Court interpreted the T&E clause for the first time, it declared that the purpose of the clause “was to impose on the legislature a duty of providing for a thorough and efficient system of free schools, capable of affording every *child* such instruction as is necessary to fit it *for the ordinary duties of citizenship*.”⁷ Thus, from its inception, public education under New Jersey law was associated with preparing every person in the state for civic participation, and the court invoked themes of *equality* and *quality* to describe the constitutional mandate. When the State Supreme Court issued its landmark education rulings in the *Robinson v. Cahill* line of cases, the court affirmed and expanded this early reading of the T&E clause reinvoking the same themes:

⁴N.J. Const. of 1844, Art. IV, §7, ¶6 (amended 1875). Similar education clauses appear in numerous state constitutions. For example, the “thorough and efficient” language also appears in the constitutions of Maryland, Minnesota, New Jersey, Ohio, Pennsylvania, and West Virginia. See Martin R. West and Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal*, p. 7.

⁵N.J. Const., Art. VIII, §4, ¶1.

⁶The T&E clause has been invoked to uphold a statute permitting free transportation of children to remote public and private schools, see *West Morris Regional Bd. of Educ. v. Sills*, 58 N.J. 464 (1971); to authorize sending students across district boundaries and merging school districts to avoid racial imbalance or segregated schools, see *Jenkins v. Morris Township School District*, 58 N.J. 483 (1971); to direct an increase in a particular school district’s annual school budget to achieve an adequate education, see *Elizabeth Board of Education v. Elizabeth City Council*, 55 N.J. 501 (1970); and to authorize a local board of education to unilaterally alter a collective bargaining agreement to achieve racial diversity among school administrators in response to race riots in the city of Newark. See *Porcelli v. Titus*, 108 N.J. Super 301 (App. Div. 1969). Most notably (and more recently) the clause was invoked to declare an individual fundamental right to an education of a certain quality and to order billions of dollars in increased appropriations for public schools as well as specific school-based policy reforms. See generally *Robinson v. Cahill*, 62 N.J. 473 (1973) and *Abbott v. Burke*, 119 N.J. 287 (1990). It is no surprise therefore that the New Jersey Supreme Court has explicitly acknowledged that “the education of a child has always been of supreme importance and an ideal which has long been required in our State.” *State v. Vaughn*, 44 N.J. 142, 145 (1965).

⁷*Landis v. Ashworth*, 57 N.J.L. 509, 512 (1895) (involving challenge to school tax levied on a local school district). The New Jersey Supreme Court cited the T&E clause in two earlier decisions, *Pierce v. Union District School Trustees*, 46 N.J.L. 76 (1884) (ordering public school to admit Black children under school law entitling all children between the ages of 5 and 18 to free public school), and *Kimball v. Hendee*, 57 N.J.L. 307 (1894) (affirming the status of a de facto board of education, composed of persons actually elected as school trustees at a school meeting, despite action of the county superintendent, in appointing other trustees, upon the supposition that the election was illegally conducted). But *Landis* is the first instance in which the Supreme Court gave meaning to the T&E clause.

We do not doubt that an *equal* educational opportunity for children was precisely in mind. The [constitutional] mandate . . . can have no other import . . . the Constitution's guarantee must be understood 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* [italics added].⁸

Thus, the concept of an adequate education under the state constitutional mandate involved an equal opportunity to receive not only sufficient preparation for civic duties but also personal vocational development that met the exigencies of modern times. When the State Supreme Court issued another series of landmark rulings, this time in the *Abbott v. Burke* line of cases, this concept of the state right to education was affirmed and described thusly: "At its core, a constitutionally adequate education has been defined as an education that will prepare public school children for a meaningful role in society, one that will enable them to compete effectively in the economy and to contribute and to participate as citizens and members of their communities."⁹ The State Supreme Court further added:

The constitutional guarantee of a thorough and efficient education attaches to every school district, and indeed, to every individual school in the State. Of course, the right to a thorough and efficient education does not ensure that every student will succeed. It must, however, ensure that every child in New Jersey has the opportunity to achieve.¹⁰

In sum, the state right to an education in New Jersey has from its inception required not only an *equal* educational opportunity but an education of a certain kind or *quality*. Even though the State could delegate the task of delivering an education to children, it could not dispense with the duty to achieve the constitutional mandate of educational equity and adequacy. Despite such powerful interpretations of the T&E clause, however, the State Supreme Court has never ordered an immediate remedy to correct a deprivation of a child's right to a thorough and efficient education. Consider *Robinson* and *Abbott*, the state's most prominent education cases.

Robinson v. Cahill was an action brought in the early 1970s by residents, taxpayers, and various municipal officials challenging the constitutionality of New Jersey's system of financing public schools. At the time, New Jersey's method of financing public schools relied heavily on local taxation for the bulk of a school district's funding (67%) even though it was clear that certain municipalities did not have sufficient taxable real property to raise enough funds to meet the

⁸*Robinson v. Cahill*, 62 N.J. 473, 513 and 515 (1973) (*Robinson I*).

⁹*Abbott v. Burke*, 149 N.J. 145, 166 (1997) (*Abbott IV*) (citing *Abbott v. Burke*, 100 N.J. 269, 280-81 (1985) (*Abbott I*) and *Robinson v. Cahill*, 62 N.J. 473, 515 (1973)).

¹⁰*Id.* at 198.

educational needs of their students.¹¹ Plaintiffs claimed a denial of the right to a thorough and efficient education where local taxation could not achieve levels of school funding equal to other districts. Reasoning that the T&E clause required “equality of educational opportunity,” the Court in *Robinson I*, determined that the financing scheme at the time was unconstitutional and “not demonstrably designed to guarantee that local effort plus the State aid will yield to all the pupils in the State that level of educational opportunity which the 1975 amendment [the T&E clause] mandates.” But, in fashioning an appropriate remedy, the *Robinson* Court fell short. The New Jersey Supreme Court did not issue any immediate remedy for the State’s confirmed failure to comply with the constitutional obligation to provide a thorough and efficient education. Rather, the court heard further argument with respect to appropriate remedies including whether the judiciary could redirect appropriations of the legislature.¹² Following those arguments, the *Robinson II* Court resolved to give the State Legislature a year and half (until December 31, 1974) to adopt revised legislation and specifically withheld any ruling on the consequence of the legislature’s failure to do so.¹³ When the legislature failed to heed that deadline, the *Robinson III* Court determined that it would be inequitable to order remedies for the 1975–1976 school year¹⁴ and scheduled still more briefing and oral argument on the scope of its remedial authority and proposed remedies.¹⁵ Four months later, in *Robinson IV*, the Court finally declared that “the right of children to a thorough and efficient education is a fundamental right guaranteed by the [State] Constitution,” and proceeded to order a *redistribution* of approximately \$300,000,000 in state aid funds as a provisional remedy.¹⁶ Thereafter, the state legislature finally enacted a revised funding scheme (the Public School Education Act of 1975) to address the deprivation identified by the Court, and the Court vacated its prior remedy orders. In early 1976, in *Robinson V*, the Court held the new act to be facially constitutional and brought the *Robinson* litigation to a close.¹⁷

Robinson can be described as the first chapter in New Jersey’s saga to equalize and enhance educational opportunities in public schools throughout the state. The *Robinson* line of cases established an individual fundamental right to a thorough and efficient education and the court’s authority to judge violations of that right and to issue remedies to compel enforcement but only after substantial (if not excruciating) deference to the other branches of government to act. Thus, *Robinson*

¹¹*Robinson v. Cahill*, 62 N.J. 473, 519 (1973) (*Robinson I*).

¹²*Id.* at 520–521. Evidently the Court in *Robinson I* was sensitive to issues of justiciability and separation of powers that judicial review of legislative funding schemes necessarily implicated.

¹³*Robinson v. Cahill*, 63 N.J. 196, 198 (1973) (*Robinson II*).

¹⁴*Robinson v. Cahill*, 67 N.J. 35, 36–37 (1975) (*Robinson III*).

¹⁵*Id.* at 37–38.

¹⁶*Robinson v. Cahill*, 69 N.J. 133, 147 (1975) (*Robinson IV*).

¹⁷*Id.* at 467.

fell short of establishing any immediate remedy for the violation of a child's right to a thorough and efficient education—a right deemed fundamental. Whether the Public School Education Act would be applied evenhandedly to ensure equal and adequate educational opportunity would have to wait, and thus the stage was set for the second chapter in New Jersey's equity litigation saga, *Abbott v. Burke*.¹⁸

The case resulting in the landmark *Abbott v. Burke* rulings was initially filed on February 5, 1981.¹⁹ *Abbott* was an action brought by students seeking to declare provisions of the state's school funding statute at that time (the Public School Education Act) unconstitutional on the grounds that it violated the T&E clause. In *Abbott*, the Court declared the act unconstitutional as applied to poorer urban school districts and ordered an amended funding scheme to ensure parity of educational funding between property-rich and property-poor school districts (equity funding) as well as supplemental funding to meet the "special educational needs" of students in property-poor districts (adequacy funding).²⁰ But like *Robinson*, the *Abbott* Court also deferred to the State Legislature to devise specific amendments to the school funding statute.²¹

Four years later the revised school funding statute (the Quality Education Act) challenged in *Abbott III* was declared unconstitutional because it did not ensure parity between the rich and poor districts and its supplemental funding provisions were not based on any informed study of student needs and real costs.²² But again, no further remedy was ordered. Three years after that, in *Abbott IV*, another revised school funding statute (the Comprehensive Educational Improvement and Financing Act) was declared unconstitutional because it failed to guarantee sufficient funds for students in poor districts to achieve state standards and supplemental funding was unsupported by any study.²³ This time the Court finally entered a specific order requiring parity funding and a study to determine the amount of supplemental funding that was required and previously ordered among other remedies.²⁴ A year later, in *Abbott V*, the Court finally approved supplemental funding for a series of programs to meet the "special educational needs" of students in poor districts including whole-school reform, expanded kindergarten and prekindergarten, summer school, school-based health and social services, and other programs.²⁵

¹⁸*Abbott v. Burke*, 100 N.J. 269 (1985).

¹⁹See *Abbott v. Burke*, 477 A.2d 1278, 1979 (NJ App. Div. 1984) and its progeny.

²⁰*Abbott v. Burke*, 119 N.J. 287, 385 (1990) (*Abbott II*).

²¹*Id.* at 388.

²²*Abbott v. Burke*, 136 N.J. 444, 446–47 (1994) (*Abbott III*).

²³*Abbott v. Burke*, 149 N.J. 145 (1997) (*Abbott IV*).

²⁴*Id.* at 224–26.

²⁵*Abbott v. Burke*, 153 N.J. 480, 493 (1998).

Since then the State Supreme Court has rendered several more *Abbott* decisions dealing with a range of issues including but not limited to teacher certification,²⁶ school building remediation and construction,²⁷ preschool curriculum and enrollment,²⁸ and school improvement programs.²⁹ Further appeals seeking the court's review of the state's implementation of prior *Abbott* Court orders, and the efficacy of those efforts, continues to this day. But consider this: when the lawsuit was filed, young Raymond Arthur Abbott, the lead student-plaintiff in the case, was only 12 years old.³⁰ Like most complex litigation, *Abbott v. Burke* suffered from time-consuming setbacks and was plagued by appeals; it took 9 years for the New Jersey Supreme Court to review the case on the merits for the first time in *Abbott II* and issue the first decision in favor of the plaintiffs' claims. By that time Raymond Arthur Abbott was 21 years old and had dropped out of high school.³¹ Moreover, "despite more than \$3 billion in additional funds" as a result of the *Abbott* decisions, there has been no improvement across the [school] districts that received such funding increases and student achievement in New Jersey's lowest income school districts remains "persistently far worse than that in other school districts in the state."³² According to Peter Denton, founder and chairman of Excellent Education for Everyone, the most prominent education rights organization in the state, "over the several decades in which New Jersey has tripled spending on its low-income urban schools, their performance has steadily declined, as measured by college attendance rates, standardized test scores, K-12 attendance rates, and high school graduation rates."³³

Regardless of the extraordinary holdings of the New Jersey Supreme Court in *Robinson* and *Abbott*, the greatest failure of those decisions appears to be the absence of an immediate and effective remedy that directly benefited children, not educational institutions and bureaucrats with increased funds and programs. The effects of increased funding and whole school reforms take years to implement, and if any progress is realized, it occurs long after hundreds of children are sacrificed to trial and error, red tape and incompetence. Today, New Jersey spends more than any other state on K-12 education.³⁴ Evidently, a new approach was needed to correct deprivations of a child's fundamental right to receive a thorough

²⁶*Abbott v. Burke*, 163 N.J. 95 (2000); *Abbott v. Burke*, 180 N.J. 444 (2004); *Abbott v. Burke*, 181 N.J. 311 (2004).

²⁷*Abbott v. Burke*, 164 N.J. 84 (2000).

²⁸*Abbott v. Burke*, 170 N.J. 537 (2002).

²⁹*Abbott v. Burke*, 177 N.J. 578 (2003).

³⁰Jonathan Kozol, *Savage Inequalities: Children in America's School*, p. 172.

³¹*Id.*

³²COURTING FAILURE, Eric A. Hanushek, ed., Williamson M. Evers and Paul Clopton, *High-Spending, Low-Performing School Districts*, pp. 133-34.

³³*Id.*

³⁴*Id.* In fact, New Jersey "has been the top spender nearly every year since 1990." *Id.*

and efficient education. Toward the end of its opinion in *Abbott II*, the State Supreme Court made one noteworthy (and somewhat clairvoyant) observation: “*If the children of poorer districts went to school today in richer ones, educationally they would be a lot better off* [italics added].”³⁵ Thus, the *Abbott* Court ignored the most obvious remedy to the problem it encountered of unequal and inadequate educational opportunity: the immediate transfer of plaintiff schoolchildren from failing schools to good schools.³⁶ Therein lay the seeds of *Crawford v. Davy*.

Crawford v. Davy purports to be the third chapter in New Jersey’s ongoing saga to enforce the state constitutional mandate of an equal and adequate, thorough and efficient, education. *Crawford* was filed precisely to secure once and for all an immediate and meaningful remedy for children who are trapped in schools that fail to educate and do not live up to the standard of thorough and efficient. Plaintiff schoolchildren in *Crawford* do not seek increased funding for their schools, school-based reforms, or supplemental programs. They simply seek the right to leave their assigned school and to attend an alternative school that does not fail the majority of its children, regardless of whether the alternative school is public or private. In New Jersey, as in many other states, children are required to attend their neighborhood school regardless of whether that school complies with state law, has demonstrated an ability to educate its students, or is physically falling apart. The 96 schools listed in the complaint in *Crawford* appear therein because the majority of students in those schools have not been taught the skills and knowledge necessary to pass the state’s basic proficiency examinations. It is the central theme of *Crawford* that no child should be required to attend a school year after year with an ongoing track record of failure. Thus, *Crawford* seeks to correct the shortcomings of the *Robinson* and *Abbott* lines of cases by first and foremost establishing an immediate remedy for the violation of an individual child’s right to a thorough and efficient education that benefits a child directly and by establishing an overwhelming incentive for failing schools (and their districts) to improve outcomes with the threatened loss of their monopoly—the exclusive privilege to educate the children in their neighborhood.

Plaintiff schoolchildren in *Crawford* asserted three distinct legal claims: (a) denial of the right to a thorough and efficient education, (b) denial of the right to equal protection (under both the State and Federal Constitutions), and (c) and a

³⁵*Abbott v. Burke*, 119 N.J. 287, 394 (1990) (*Abbott II*).

³⁶It is not surprising that there is no mention of vouchers or school transfers in the *Abbott* litigation, either in the proceedings at the State Supreme Court or below at the administrative level. Although the plaintiffs were schoolchildren, the type of remedies sought in *Abbott* (primarily equalized funding) inured first and foremost to the benefit of educational bureaucracies that were not providing a thorough and efficient education in the first place—the school districts. A voucher or school transfer remedy would have benefited the economic interests of those institutions far less.

violation of the New Jersey Civil Rights Act.³⁷ Defendants named in the lawsuit are state officials such as the State Commissioner of Education and the State Board of Education, as well as the 25 local Boards of Education responsible for almost 100 failing schools identified in the complaint.

With respect to the first legal claim—denial of the right to a thorough and efficient education—Plaintiffs allege that they are not provided with the “skills and knowledge they need to pass” the state’s standardized assessment tests; they therefore receive unequal and inadequate “educational opportunities.” The tests that plaintiff schoolchildren do not receive the skills and knowledge to pass are the very tests the state designed to measure attainment of the state’s education standards, denominated Core Curriculum Content Standards (CCCS), which were adopted 10 years ago by the State Department of Education to define the substantive meaning of a thorough and efficient education in New Jersey. Plaintiffs further allege that defendant school boards are “charged with conducting and supervising” their schools “in accordance with constitutional, statutory and regulatory mandates” for public education. Plaintiffs allege the existence of a legal framework of school regulations, state laws, and constitutional mandates that all school boards and state officials are required to follow, including but not limited to, aligning curriculum with CCCS, providing appropriate instruction to underperforming students, and implementing school-level improvement plans. Plaintiffs further allege that defendant state officials must “supervise,” “support,” “review,” “control,” and “enforce” this entire scheme, which they themselves helped to create. Plaintiffs further allege that the law requires *all* students to demonstrate the “knowledge and skills” of CCCS.³⁸ Because the defendants fail to comply with these requirements, Plaintiffs claim a deprivation of a thorough and efficient education results.

With respect to Plaintiffs’ second legal claim in *Crawford*—the denial of equal protection—Plaintiffs allege that they are similarly situated to other schoolchildren in the state because the State Constitution entitles every school-aged child to a thorough and efficient education and an equal educational opportunity.³⁹ Plaintiffs

³⁷See generally *Crawford v. Davy*, Docket No. C-137-06, first amended complaint (N.J. Super. Ct. Ch. Div. Jan. 12. 2007). Technically the complaint in *Crawford* asserts four counts or legal causes of action because the denial of equal protection is alleged separately under the 14th Amendment and the New Jersey State Constitution. *Id.*

³⁸Plaintiffs’ Complaint does not encompass every school where not all students demonstrate CCCS; rather Plaintiffs’ Complaint embraces the 96 worst performing schools in New Jersey where the failure to demonstrate proficiency is the norm for the majority, as opposed to minority, of the students.

³⁹*Crawford v. Davy*, Docket No. C-137-06, first amended complaint ¶¶61-64, 152 (N.J. Super. Ct. Ch. Div. Jan. 12. 2007); see also *Robinson v. Cahill*, 69 N.J. 133, 147 (1975) (holding that “the right of children to a thorough and efficient system of education is fundamental . . .”); *Abbott v. Burke*, 119 N.J. 287, 296 (1990) (holding children are “constitutionally entitled” to an “equal educational opportunity”).

further allege that defendants treat them differently from other schoolchildren in the state by consigning them year after year to inadequate or failing schools that do not impart the required skills and knowledge that constitute a thorough and efficient education. The defendants consign the plaintiffs to such schools by enforcing district boundaries and residence-based school assignments. District boundaries and residence-based school assignments classify plaintiff schoolchildren on the basis of residence, thereby consigning them to failing schools that deprive scores of children of an equal and adequate education. Plaintiffs further allege that district boundaries and residence-based school assignments do not serve any appropriate governmental objective when they operate to deny plaintiff schoolchildren the education right fundamentally guaranteed by the State Constitution. As result, Plaintiffs allege Defendants treat them unequally by denying to them the same educational opportunities that are afforded to other students in schools that meet the constitutional mandate of thorough and efficient. These actions allegedly constitute a violation of equal protection.

Plaintiffs' third legal claim—violation of the New Jersey Civil Rights Act—simply incorporates each of the first two claims by reference because the act creates a separate statutory cause of action for violations of civil rights.⁴⁰ Under the plain meaning of the act deprivations of “equal protection rights” under the Federal Constitution and deprivations of “any substantive rights” under the State Constitution are actionable.⁴¹ As previously stated, plaintiffs asserted a cause of action for denial of equal protection under the federal and state constitutions and a denial of the right to a thorough and efficient education under the State Constitution. Any violation of those civil rights would constitute a violation of New Jersey's Civil Rights Act.

Considering the historical context in which *Crawford* was filed and the small number of potential beneficiaries, the lawsuit is modest by comparison to *Robinson* and *Abbott*. Unlike *Robinson* and *Abbott*, the *Crawford* case was filed after the definition and educational standards for a thorough and efficient education became well defined by statute and regulation, after performance measures for schools had already been developed, and after detailed reports evaluating school district performance were already being released to the public on an annual basis. As a result of such data, only 96 of more than 3,000 schools (in 25 of about 600 school districts) are subject of the suit (roughly 4% of the total student population in New Jersey). In addition, *Crawford* does not seek (or require) any substantial increases in state spending, as Plaintiffs would have public school funds currently expended on their education (their pro-rata share) to be used to fund their transfer to an adequate school. Plaintiffs have also proposed a staggered remedy beginning with

⁴⁰See N.J.S.A. 10:6-2(c). The New Jersey Civil Rights Act also provides for reasonable attorney's fees and costs of suit. N.J.S.A. 10:6-2(f).

⁴¹N.J.S.A. 10:6-2(c).

public school transfers first, followed by private school transfers when capacity in public schools is exceeded, and an out-of-district transfer only when a transfer to a school within district is not possible.

Most notably, *Crawford* was intended to enforce a void that existed at the time the *Robinson* and *Abbott* line of cases were decided: the absence of a regulatory definition of thorough and efficient. In *Robinson* the Court acknowledged the absence of such a measuring stick. Recognizing that “the State ha[d] never spelled out the content of the educational opportunity the Constitution requires,” the *Robinson* Court was left with no alternative but to define educational opportunity in terms of “dollar input per pupil.”⁴² Indeed, because the plaintiffs in *Robinson* were seeking to eliminate funding disparities, the *Robinson* Court “was shown no other viable criterion for measuring compliance with the constitutional mandate.”⁴³ When the first *Abbott* ruling came down, the Court also recognized the absence of an effective substantive definition of a thorough and efficient education and defaulted on funding disparity as the yardstick for measuring constitutional compliance.⁴⁴ Two critical limitations resulted from this default yardstick: first, courts were hesitant to apply equal protection analysis to claims of constitutional deprivation fearful of slippery slope concerns that all governmental services (e.g., utilities, social services, security) would be subject to similar equity claims; second, courts did not have a judicially manageable substantive definition of thorough and efficient from which they could assess the appropriateness of funding remedies, or indeed gauge whether increased funding produced the intended result: improved student achievement. *Crawford* sought to move beyond this paradigm. Relying primarily on state educational standards, *Crawford* abandons the funding yardstick for a substantive standard of measure, the statutory and regulatory definition of “thorough and efficient”—not a court-ordered interpretation of an adequate education. Thus, equity in *Crawford* is measured in terms of equal educational opportunities and access to successful schools, not simply dollars, and adequacy is measured in terms of satisfactory student outcomes, namely, achievement of the State’s specific educational standards. Thus, *Crawford* invokes the same themes of *quality* and *equality* that permeate New Jersey’s education jurisprudence, but in different ways.

Finally, *Crawford* was not filed with the intent to dismantle the remedies ordered in the *Robinson* and *Abbott* line of cases. Plaintiffs in *Crawford* are not seeking to reduce the amount of funds that property poor districts receive in state aid or the variety of programs supported by supplemental funds. Plaintiffs in *Crawford*

⁴²*Robinson v. Cahill*, 62 N.J. 473, 515-516 (1973)(*Robinson I*).

⁴³*Id.*

⁴⁴*Abbott v. Burke*, 119 N.J. 287, 317 (1990) (“there is no standard of breadth of curriculum that must be offered, no standard of other commonly accepted educational criteria . . . and no broad-gauged standard of performance of any district”).

are not oblivious to the advantages that equity funding and adequacy programs may present to many children in poor school districts. However, the plaintiffs in *Crawford* insist that such resources belong to schoolchildren and not to the bureaucracies that serve them. To the extent that those bureaucracies fail to educate schoolchildren they must forfeit resources earmarked for those children; they must also forfeit the privilege of providing a service to those children, and the monopoly granted by the state to educate them. The money used to educate children who are underserved should follow those children to better schools. Thus the remedies established in *Abbott*, and those contemplated by *Crawford*, are intended to co-exist—for example, a property poor district deserves parity funding with property rich school districts so that it has the resources to provide an equally adequate educational opportunity; moreover, property poor districts deserve supplemental funding to overcome the adversities that confront the overwhelming majority of the children that they must serve. But, property poor districts do not deserve immunity from accountability; when their schools fail to educate the majority of their children despite increased resources and funding, those students should not be held captive in defective schools. Those students must be transferred (or permitted to transfer out) to better schools. *Crawford* is intended not only to provide an immediate remedy to a child (not the school district—a distinct difference from *Robinson* and *Abbott*) but also to create a powerful incentive for any school district to operate efficiently and efficaciously: the loss of its consumers. Armed with this understanding of *Crawford*, and its place in New Jersey’s education jurisprudence, a review of the decision to dismiss the case is now appropriate.

GROUNDS AND CONTRADICTIONS FOR DISMISSING *CRAWFORD*

Like the *Abbott* case, *Crawford v. Davy* sustained its first setback 6 months ago, when Judge Neil H. Shuster, J.S.C., issued a blistering decision dismissing the lawsuit in its entirety for a number of reasons, but primarily on the grounds that the plaintiffs’ claims and the remedy requested involved nonjusticiable political questions.⁴⁵ The Court also dismissed the entire case on the alternative grounds

⁴⁵See *Crawford v. Davy*, Docket No. C-137-06, slip op. at pp. 27-42 (N.J. Super. Ct. Ch. Div. Oct. 4, 2007). It should not go unnoticed that the Court did not rule against the plaintiffs on the issue of standing. *Id.* at pp. 13-22. The plaintiffs in *Crawford* named 25 local school boards as codefendants with state officials. However, the 15 named representative plaintiffs in *Crawford* attended only 9 of the 25 school districts operated by the defendant school boards. The school boards that operated school districts that none of the 15 named representative plaintiffs attended, therefore, argued for dismissal on the basis that the lawsuit could not proceed as to them without a representative plaintiff from their school district. In essence, such boards had no dealings with the named representative plaintiffs in the complaint and therefore those plaintiffs had no legal “standing” to assert claims against them. Plaintiffs

that the plaintiffs had not pled a cause of action with respect to the denial of the right to a thorough and efficient education and the denial of equal protection.⁴⁶ In addition, the Court held that even if the claims were justiciable, and properly pled, that the plaintiffs were required to exhaust their administrative remedies before seeking relief in a court of law.⁴⁷ Finally, the Court dismissed the lawsuit as to the 25 local school board defendants on the grounds that such defendants lacked legal authority to provide plaintiff schoolchildren with any of the remedies they sought.⁴⁸

The issue of political question nonjusticiability “is primarily a function of [the] separation of powers” doctrine.⁴⁹ Our system of government is based on the principle that the powers of government shall be divided among three distinct branches (the legislative, executive, and judicial) and that no one branch shall exercise the powers properly belonging to either of the others. To decide whether a matter is justiciable, a court must determine not only whether it is authorized to review the matter but also whether judicially identifiable and judicially manageable standards exist to render a decision. The court dismissing the lawsuit concluded that *Crawford* was not justiciable because it raised matters that were committed to another branch of government, the State Legislature, and that there were no judicially discoverable or judicially manageable standards for rendering a decision. According to the court, there were no standards to determine if a violation of plaintiffs’ rights had occurred and no standards to issue a remedy in the form of a school transfer or voucher. The court reached this conclusion by reasoning that the issues in *Crawford* were textually committed to the legislature under the T&E clause; that the legislature’s role in education in New Jersey is fundamental and primary; and that “in the absence of constitutional or statutory standards, it is not the function of [the] Court to substitute its judgment for that of the Legislature with respect to the rules it has adopted or the procedures followed in giving effect to the constitutionally-declared scheme.”⁵⁰ According to the court:

Plaintiffs seek to have the Court devise and adopt a standard for determining when the fundamental right to a “thorough and efficient” education is in fact being deprived, rather than have the Court follow an already existing framework for determining this

countered by arguing that the 15 named representative plaintiffs could represent children in those other school districts because the claims and issues would be similar (if not identical) and, furthermore, that all school boards are legally related or “juridically linked” to the state defendants as agents who carry out a uniform policy that is depriving plaintiff schoolchildren of their civil rights. The Court agreed and held that the 15 named representative plaintiffs had legal standing to sue 25 local school boards. *Id.* at 22.

⁴⁶*Id.* at 42–48.

⁴⁷*Id.* at 48–50.

⁴⁸*Id.* at 22–27.

⁴⁹See *Baker v. Carr*, 369 U.S. 186 (1962).

⁵⁰*Crawford v. Davy*, Docket No. C-137-06, slip op. at p. 30 (N.J. Super. Ct. Ch. Div. Oct. 4, 2007).

issue. Such a decision is clearly non-justiciable. Moreover, Plaintiffs seek to have the Court order that consecutive years of failing Assessment scores constitutes “failing” to provide a “thorough and efficient education” . . . [T]he Court finds it lacks the ability to “judicially determine” that consecutive years of failing Assessment scores, alone, constitutes a “breach” of the “duty” to provide a “thorough and efficient education,” and that it lacks the authority to “judicially mold” a remedy to “protect” that duty. Essentially, there is a lack of judicially discoverable and manageable standards for determining the “breach.” Moreover, determination of such issues are “impossibl[e]. . . without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government.”

The court’s reasoning hereabove is flawed for a number of reasons. First, *Crawford* does not require any review of the action of the State Legislature at all. No statute or legislative action is challenged by the plaintiffs in *Crawford*—a situation quite unlike the *Robinson* and *Abbott* lines of cases where plaintiffs challenged the legislature’s manner of funding public school education and the State Supreme Court reviewed that scheme, held it unconstitutional, and established parameters for the legislature to follow in re-devising it.⁵¹ Even if *Crawford* required a court to review legislative action, the State Supreme Court in *Robinson* specifically considered whether such involvement by a court would violate the separation of powers doctrine and whether such claims would raise a nonjusticiable political question.⁵² Rejecting that argument the State Supreme Court reasoned as follows:

The people in 1875 ordained the Legislature to be their agent to effectuate an educational system but did not intend to tolerate an unconstitutional vacuum should the Legislature default in seeing to their specification that the system be thorough and efficient. We have adjudicated such a default. Under emerging modern concepts as to judicial responsibility to enforce constitutional right there has been no paucity of examples of affirmative judicial action towards such ends.⁵³

The State Supreme Court further reasoned,

The argument is recast in terms of the doctrine of separation of powers, purportedly precluding judicial direction for expenditure of State moneys, that being exclusively for the other Branches. . . . The interest here at stake transcends that of an ordinary individual claimant against the State. It is that of all the school children of the

⁵¹ See e.g. *Robinson v. Cahill*, 69 N.J. 133, 150 (1975) (*Robinson IV*) (ordering a redistribution of \$300,000,000 in school funding appropriated by the state legislature); *Abbott v. Burke*, 149 N.J. 145, 198 n. 35 and 223 (1997) (ordering the state legislature to increase funding for 28 school districts by upwards of \$248,000,000).

⁵² *Robinson v. Cahill*, 69 N.J. 133, 151-155 (1975) (*Robinson IV*).

⁵³ *Id.* at 152.

State, guaranteed by the constitutional voice of the sovereign people: equality of educational opportunity. This Court, as the designated last-resort guarantor of the Constitution's command, possesses and must use power equal to its responsibility. Sometimes, unavoidably incident thereto and in response to a constitutional mandate, the Court must act, even in a sense seem to encroach, in areas otherwise reserved to other Branches of government.⁵⁴

As a result, the State Supreme Court has already determined that the kind of inquiry required by plaintiffs' claims in *Crawford* is in fact justiciable. But, even though the plaintiffs argued this precedent to the Court, no consideration of it appears anywhere in the Court's opinion dismissing *Crawford*. The Court simply makes no attempt to reconcile its decision with this precedent from *Robinson*.

Second, no fair reading of the complaint in *Crawford* supports the view that plaintiffs "seek to have the Court devise and adopt a standard for determining when the fundamental right to a thorough and efficient education is in fact being deprived," or that the Court not "follow an already existing framework," as the dismissal opinion states. On the contrary, as discussed above, *Crawford* is entirely based on an existing statutory and regulatory framework that requires the state (and local boards) to identify educational standards that define the meaning of a "thorough and efficient" education, to administer tests that measure student achievement of those educational standards, to set uniform proficiency benchmarks demonstrating adequate progress towards achieving those standards, to report the results of those tests, to review the performance of schools and school districts using the percentage of students performing proficiently as a measure, and to provide appropriate instruction to improve the skills and knowledge for students performing below established levels of student proficiency. The existing framework commands in no uncertain terms that "[a]ll students shall be expected to demonstrate the knowledge and skills of the CCCS as measured by the Statewide assessment [test] system."⁵⁵ The framework also provides that a school district "may be certified" if it achieves the state's proficiency benchmarks on these examinations as "providing a thorough and efficient system of education."⁵⁶ Clearly, demonstrating proficiency on the state's assessment tests is a *prerequisite* to a thorough and efficient education. In view of this explicit statutory and regulatory framework, which plaintiffs embraced fully and cited extensively in the complaint and in their briefs, it is quite stunning that the Court takes the position that plaintiffs "seek to have the Court devise and adopt [its own] standard" and "not follow an already existing framework." The point of *Crawford* is that a legal framework *already* exists but is not being followed, either by state officials or local school

⁵⁴*Id.* at 154.

⁵⁵N.J.A.C. 6A:8-4.3(d).

⁵⁶See N.J.A.C. 6A:8-4.4(c)(1) and N.J.S.A. 18A:7A-14.

boards. The Court dismissing *Crawford* inexplicably appears to deny the existence of that framework.

Moreover, the existing framework would give the Court test and year specific standards to judicially determine each of the issues it claims to lack standards for. With respect to determining that consecutive years of failing test scores *alone* constitutes a “breach” of the “duty” to provide a “thorough and efficient education,” the framework specifically provides judicially discoverable and manageable standards in the form of proficiency percentage benchmarks (which are actually more rigorous than the ones employed by plaintiffs).⁵⁷ A school district must meet those benchmarks to be certified by the state as providing a thorough and efficient education.⁵⁸ Similarly, the Court could employ those very same benchmarks and, based on the evidence presented at trial, determine whether they are being met or not by the defendants. Relying on the regulatory requirement that a school district may be certified as providing a thorough and efficient education once those benchmarks are met, the Court could easily rule that schools not meeting those benchmarks are not providing a thorough and efficient education. The Court need not develop or adopt any standard of its own to make these judicial determinations. The Court might even be able to entertain defenses from the defendants to excuse their failure to meet the required benchmarks, if the framework provides for such defenses. But again, the matter would be justiciable nonetheless.

With respect to the court’s claimed lack of authority to “judicially mold” a remedy to “protect” a breach of the duty to provide a thorough and efficient education, the Court need only follow the specific example of the State Supreme

⁵⁷See generally N.J.A.C. 6A:8-4.4. In *Crawford* Plaintiffs employ an average uniform standard to evaluate school performance. Plaintiffs allege that any school that achieves proficiency of only 49% or less on both the Language Arts and Mathematics assessments fails to provide a thorough and efficient education and any school that achieves proficiency of merely 24% or less on either the Language Arts or Mathematics assessment fails to provide a thorough and efficient education. New Jersey’s regulatory standards are more grade and year specific and more rigorous than the standard employed by plaintiffs to plead their case. For example, among fourth graders, schools and school districts were required to achieve 68% language arts proficiency and 53% mathematics proficiency in 2003–2004, 75% language arts proficiency and 62% mathematics proficiency from 2004 to 2007, and 82% language arts proficiency and 73% mathematics proficiency by the current academic year, 2007–2008. N.J.A.C. 6A:8-4.4(a)(1)(i). Among eighth graders, schools and school districts were required to achieve 58% language arts proficiency and 39% mathematics proficiency in 2003–2004, 66% language arts proficiency and 49% mathematics proficiency from 2004 to 2007, and 76% language arts proficiency and 62% mathematics proficiency by the current academic year, 2007–2008. N.J.A.C. 6A:8-4.4(a)(2)(i). Similarly, among high school students, schools and school districts were required to achieve 73% language arts proficiency and 55% mathematics proficiency in 2003–2004, 79% language arts proficiency and 64% mathematics proficiency from 2004 to 2007, and 85% language arts and 74% mathematics proficiency by the current academic year. N.J.A.C. 6A:8-4.4(a)(3)(i). None of the schools identified in *Crawford* fully comply with these proficiency percentage benchmarks; rather they perform abysmally below these regulatory standards.

⁵⁸See N.J.A.C. 6A:8-4.4(c)(1) and N.J.S.A. 18A:7A-14.

Court in the *Abbott* line of cases. For instance, in *Abbott II* and *Abbott III*, the State Supreme Court declared that “supplemental” funding was necessary to address the social and economic disadvantages of children in poor urban districts and ordered it for that purpose. The State having failed to act appropriately on supplemental funding by the time of *Abbott IV*, the Supreme Court ordered as follows:

The determination of appropriate remedial relief in the critical area of the special needs of at-risk children and the programs necessary to meet those needs is both fact-sensitive and complex; it is a problem squarely within the special expertise of educators. A court alone cannot, and should not, assume the responsibility for independently making the critical educational findings and determinations that will be the basis for such relief. *We can, however, provide necessary procedures and identify the parties who best may devise the educational, programmatic, and fiscal measures to be incorporated in such remedial relief.* Accordingly, we remand the matter to the Superior Court to implement that aspect of the Court’s remedial order.

The Superior Court, consistent with this opinion, shall direct the Commissioner to initiate a study and to prepare a report with specific findings and recommendations covering the special needs that must be addressed to assure a thorough and efficient education to the students in the SNDs [special needs districts]. That report shall identify the additional needs of those students, specify the programs required to address those needs, determine the costs associated with each of the required programs, and set forth the Commissioner’s plan for implementation of the needed programs. In addition, the Superior Court shall direct the Commissioner to consider the educational capital and facility needs of the SNDs and to determine what actions must be initiated and undertaken by the State to identify and meet those needs.

The parties shall be given the opportunity to participate in the proceedings conducted by the Commissioner and to respond to and file exceptions to the Commissioner’s report prior to its submission to the Superior Court.

The Superior Court may, in addition, conduct hearings with the participation of the Commissioner and all parties. The Superior Court may appoint, with the approval of this Court, a Special Master to assist the court in all proceedings and in reaching its determinations and rendering its decision. The Superior Court, based on its review of the Commissioner’s report, any additional evidence, and any findings and determinations of the Special Master, shall render a decision with its findings, conclusions, and recommendations covering the special programs that should be implemented in the special needs districts and the costs of their implementation. That decision will be made available to all parties, and shall be reviewed by this Court. [italics added]⁵⁹

The preceding Order of the State Supreme Court in *Abbott IV* succinctly describes the power that a court in New Jersey has to formulate the remedy plaintiffs are seeking in *Crawford*. Upon ordering that a school transfer is necessary to

⁵⁹*Abbott v. Burke*, 149 N.J. 145, 199-201 (1997)(*Abbott IV*).

correct deprivations of the state constitutional right to an education, a court could order a study to develop a plan to effectuate school transfers. In its subsequent decision, *Abbott V*, the State Supreme Court further commanded as follows: “We, therefore, direct the Commissioner to promulgate regulations and guidelines that will codify the education reforms incorporated in the Court’s remedial measures.”⁶⁰

Likewise, in *Crawford*, a court could order the Commissioner to promulgate regulations and guidelines to affect transfers from failing schools. Considering what the State Supreme Court actually held and ordered over the past 16 years in *Abbott*, the court dismissing *Crawford* clearly has legal authority to judicially mold and order an appropriate remedy by identifying the cause of the constitutional deprivation and requiring the Commissioner to study and develop a specific remedy that corrects it. In their briefs (and at oral argument), Plaintiffs specifically proposed such a procedure.⁶¹ But the court dismissing *Crawford* renounced its authority to mold a remedy in this fashion. By doing so, it deviated from the *Abbott* precedent and arguably committed reversible legal error. In sum, by concluding that *Crawford* presents non-justiciable political questions, the court dismissing *Crawford* ignores the statutory and regulatory legal framework that provides judicially identifiable and manageable standards to rule in the case, and ignores or misreads well-established precedents that authorize it to mold a judicial remedy.⁶²

The court’s grounds for dismissing *Crawford* for plaintiffs’ failure to plead violations of the rights to a thorough and efficient education and equal protection are equally flawed and subject to reversal. Regarding plaintiffs’ failure to plead a violation of the right to a thorough and efficient education, the court appears to

⁶⁰*Abbott v. Burke*, 153 N.J. 480, 526 (1998)(*Abbott V*).

⁶¹*Crawford v. Davy*, Docket No. C-137-06, Plaintiffs’ omnibus memorandum of law in opposition to all dispositive motions filed by Defendants at p. 47 (N.J. Super. Ct. Ch. Div. January 31, 2007) (This Court could always issue a declaratory judgment regarding the constitutional violations alleged by the plaintiffs’ complaint; restrain the enforcement of district boundaries only when *applied* to consign plaintiff schoolchildren to failing schools; and then submit the “voucher” remedy to the Commissioner for specific study and recommendation just as our State Supreme Court did [with supplemental aid programs] in *Abbott IV*).

⁶²It should not go unnoticed that the court’s opinion dismissing *Crawford* fails to discuss (and arguably) consider the holdings of certain landmark U.S. Supreme Court precedents cited by the plaintiffs on the issues of justiciability and a court’s broad remedial authority to correct violations of civil rights, namely, *Baker v. Carr*, 369 U.S. 186 (1962) (striking down state’s General Assembly apportionment statute because it diluted or debased the black vote in violation of equal protection), *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (applying the 15th Amendment to strike down a redrafting of municipal boundaries that affected a discriminatory impairment of voting rights despite “sweeping commitment” to state legislatures of the power to draw and redraw such boundaries), and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (where school board failed in its duty to devise a desegregation plan, court had authority to appoint its own expert and impose a plan).

apply the same reasoning it did on the issue of nonjusticiability. Because the court denies any existing framework that requires schools to achieve a certain level of proficiency on the state's assessment tests as a prerequisite for demonstrating a thorough and efficient education, then presumably a deprivation of that right cannot be plead on that basis. Regarding plaintiffs' failure to plead a violation of equal protection (whether under the State or Federal Constitution), the court adopts the unsupportable position that plaintiffs are required to allege (and prove) that school district boundaries were intended by the legislature to deprive some children of an equal and adequate education when they were enacted. The former may constitute reversible legal error for the same reasons stated earlier: a statutory and regulatory framework *already* exists that requires a certain level of proficiency to demonstrate compliance with the constitutional mandate of thorough and efficient. The latter may constitute reversible legal error because there is no legal requirement to allege (much less prove) intent to discriminate when a facially neutral law is applied to deprive a fundamental right to any group of persons. Again, turning to the *Robinson* and *Abbott* line of cases, the State Supreme Court dealt with facially neutral funding schemes. But in *Robinson*, the Court never required plaintiffs to prove that the legislature intended to deprive an equal educational opportunity to students in school districts with low real property rates. In *Abbott*, the Court also never required plaintiffs to prove that the legislature intended to deprive a thorough and efficient education to students in poor urban school districts. Similarly, in *Crawford*, the Court dismissing the suit should not have required the plaintiffs to plead that the legislature intended municipal school boundaries to deprive plaintiffs of an equal and adequate education.

The court's grounds for dismissal of the local boards may also constitute legal error. The dismissal of all local school boards from *Crawford* is premised on the theory that such boards "only have authority to act within the statutory framework within which they were created."⁶³ Because the state does not give local school boards "authority to simply ignore district boundaries or compulsory attendance laws," then such boards "cannot unilaterally provide the relief sought by Plaintiffs,"⁶⁴ no relief may be obtained from them, and they are not proper defendants in the case. However, the court's reasoning completely disregards that plaintiffs have requested relief in the form of a transfer to any successful public school. To the extent that a successful public school exists within the same school district in which plaintiffs reside, then defendant school boards would not have to cross district boundaries in order to effectuate a remedy. The court's dismissal of the local boards is evidently premised upon the ill-conceived notion that plaintiffs are only seeking interschool district transfers in reassigning a child to an adequate school.

⁶³*Crawford v. Davy*, Docket No. C-137-06, slip op. at 23 (N.J. Super. Ct. Ch. Div. Oct. 4, 2007).

⁶⁴*Id.* at 25.

Finally, the dismissal of *Crawford* on the alternative grounds of Plaintiffs' failure to exhaust administrative remedies may also be reversible, even though it may present a closer legal question. The doctrine of exhaustion of administrative remedies requires a prospective plaintiff to seek relief in all administrative for a prior to filing suit in court. Judicial efficiency is its primary purpose. In New Jersey, the doctrine may require the plaintiffs in *Crawford* to file an administrative complaint with the State Department of Education and participate in hearings before an administrative law judge whose decision would be reviewed by the Commissioner of Education (a defendant in *Crawford*) and later by the State Board of Education (yet another defendant in the suit). On this issue, the court dismissing *Crawford* holds that "no court should decide constitutional issues in a vacuum, in the absence of a well-developed record isolating the essential factual question at their basis and including findings of fact." As a result, the court concludes that the plaintiffs' claims are "premature in the absence of well-developed factual record before the "special expertise" of Defendants' agency heads, and if appropriate, the Legislature."⁶⁵ Plaintiffs in *Crawford* therefore must exhaust the administrative remedy of prosecuting an administrative complaint at the Department of Education before coming to the court for redress. In reaching its conclusion, however, the court fails to consider (and therefore distinguish) any of New Jersey's exceptions to the exhaustion requirement that are cited at length by the plaintiffs (e.g., when only questions of law are at issue; when administrative remedies are futile; when irreparable harm would result; when the jurisdiction of the agency is doubtful; or when an overriding public interest calls for a prompt judicial resolution, exhaustion of administrative remedies is *not* required). More important, the court fails to consider plaintiffs' argument that the ultimate decision makers in any administrative proceeding (the Commissioner and State Board of Education) have already prejudged the case based on the arguments they presented in their briefs to dismiss the case. Therefore, requiring plaintiffs to seek administrative relief essentially from the defendants themselves is a *fait accompli* and utterly futile. Plaintiffs in *Crawford* are not oblivious to the fact that the State Supreme Court ordered the plaintiffs in *Abbott* to exhaust administrative remedies before pursuing their claims in court.⁶⁶ However, that experience bears out plaintiffs' futility argument:

In the *Abbott* line of cases, where plaintiffs were ordered to exhaust their so-called administrative "remedy," the Administrative Law Judge declined to rule on remedies, the Commissioner of Education declined to accept the recommendations made by the Administrative Law Judge (including findings of fact *and* conclusions of law),

⁶⁵*Id.* at 48 and 50.

⁶⁶*See Abbott v. Burke*, 100 N.J. 269 (1985).

and the State Board of Education “adopted the Commissioner’s decision in almost all respects.” *Abbott v. Burke*, 119 N.J. 287, 297-300 (1990). The plaintiffs in *Abbott* lost 4 years to that process.⁶⁷

As plaintiffs argued in their brief, “what justice can plaintiff schoolchildren expect to receive if they are ordered by th[e] Court to plead their case directly to the State Defendants and to ask them to declare themselves in violation of the Constitution?”⁶⁸ Ultimately, the administrative process can produce no record that cannot also be produced in the first instance in a court of law, giving the state defendants every opportunity to present their expertise, and giving all parties the additional procedural safeguards afforded by the Rules of Evidence and the Rules of Civil Procedure, not to mention a speedier resolution of matters concerning a substantial public concern—the proper education of 60,000 schoolchildren.

In sum, the Court’s decision to dismiss *Crawford* on all of the aforementioned bases is replete with unsupportable conclusions that are contrary to established precedent. Apart from failing to address in its opinion a multitude of the plaintiffs’ arguments and citations to controlling precedent, the Court also misapplies the cases it does cite. Ironically, by failing to acknowledge the existing legal framework, the Court actually engages in an analysis that is based less on judicial standards and more on judicial prejudices. Consider the following remarkable commentary in the Court’s opinion: “The Court questions how it could adequately safeguard what Plaintiffs would suggest are “successful” schools from becoming “failing” schools, if the Court were to permit a mass exodus of approximately 60,000 schoolchildren.”⁶⁹

Without hearing any evidence at all this Court has apparently decided that allowing the plaintiff schoolchildren in *Crawford* to transfer to better schools would only cause the schools receiving them to fail. Evidently, the Court has predetermined that the plaintiff schoolchildren should be blamed for the failure of their schools, not the teachers or administrators who are responsible for, and paid to, educate those children.

The dismissal of *Crawford* should be reversed on appeal simply because it does not follow well-established legal precedent. If it is not reversed, however, the opinion dismissing *Crawford* may pose grave consequences for the individual right to a thorough and efficient education in the state, the ongoing *Abbott* litigation, and perhaps the larger equity/adequacy legal movement throughout the country.

⁶⁷*Crawford v. Davy*, Docket No. C-137-06, plaintiffs’ omnibus surreply to all dispositive motions filed by defendants at p. 27 (N.J. Super. Ct. Ch. Div. April 6, 2007).

⁶⁸*Id.*

⁶⁹*Crawford v. Davy*, Docket No. C-137-06, slip op. at p. 38 (N.J. Super. Ct. Ch. Div. Oct. 4, 2007).

CONSEQUENCES OF *CRAWFORD'S* DISMISSAL

The consequences of *Crawford's* dismissal could conceivably diminish the right to a thorough and efficient education under the New Jersey Constitution; it could also reverse gains perceived in the *Robinson* and *Abbott* lines of cases, as well as direct the course of the ongoing equity/adequacy litigation in a manner ill-suited to securing enhanced educational opportunities for children across the country.

With respect to the right to a thorough and efficient education as guaranteed by the New Jersey Constitution, the court's holding clearly weakens it. First, the holding essentially renounces the existing statutory and regulatory framework that substantively defines that right. Since the *Landis* case in 1895, the State Supreme Court has struggled to define the meaning of a thorough and efficient education. In both *Robinson* and *Abbott* the Court explicitly acknowledged the failure of the legislative and executive branches to define that right. But the state's adoption of substantive educational standards (in the form of CCCS) was held to be "a major step to spell out and explain the meaning of a constitutional education."⁷⁰ Not surprisingly the State Legislature enacted statutes requiring continuous review and revision of the state's educational standards and the Department of Education promulgated regulations requiring ongoing review and readoption every 5 years.⁷¹ Moreover, the standards themselves explicitly state that they "define what all students should know and be able to do by the end of their public school education."⁷² It could be argued that the current framework is the product of several contributing forces, such as the State's deeply rooted commitment to education; the legislative and executive response to the judiciary's findings and orders in *Robinson* and *Abbott*; not to mention the educational standards movement, the requirements of the federal No Child Left Behind Act, and the influence of the teacher's union (the New Jersey Education Association).

For these reasons, the Court's decision to refuse to acknowledge that framework as a basis for asserting a violation of the right to a thorough and efficient education is particularly egregious. The current framework did not develop overnight and certainly involved extensive consideration and negotiation over many years by many stakeholders and each of the three branches of government. It is not worthy of the short shrift given to it in the opinion dismissing *Crawford*. Moreover, it is not clear from the Court's opinion whether the Court simply failed to grasp the significance of the existing framework in relation to the issues in the case or

⁷⁰*Abbott v. Burke*, 149 N.J. 145, 167-68 (1997) (*Abbott IV*).

⁷¹N.J.A.C. 6A:8-2.1. The review process requires "advisory panels of public school educators, higher education representatives, business representatives, and other citizens" to recommend revised education standards, preapproval publication of any proposed standards and public hearings before final approval by the State Board of Education.

⁷²N.J.A.C. 6A:8-1.1(a).

whether the Court regards the existing framework as only a set of aspirations or goals that cannot be legally enforced. The Court also fails to demonstrate how a deprivation of the right to a thorough and efficient education should be pled, regardless of the existing regulatory framework. One is left to wonder whether a deprivation of the right can be pled at all.

If *Crawford's* dismissal is not reversed, the opinion could be cited in the future for the proposition that the right to a thorough and efficient education can only be understood in terms of funding and that no substantive definition of the right is controlling. The implication would be that no claim of deprivation could be based on substantive inequality regarding deficient teaching methodologies, disparate teacher qualifications, unaligned curricula, or student underperformance. The opinion could be cited more broadly, however, for the proposition that any alleged deprivation of the right to a thorough and efficient education is non-justiciable by a court of law because the legislature has primary (and arguably exclusive) responsibility under the State Constitution to maintain and enforce a thorough and efficient system of public schools. It could be cited to argue that there are simply no judicially discoverable or manageable standards for determining a violation of the state right to an education or formulating an appropriate remedy. Such an application of the opinion dismissing *Crawford* would eviscerate the constitutional mandate. Of what benefit to anyone is a judicially unenforceable fundamental right? Chief Justice John Marshall aptly stated in the landmark decision of *Marbury v. Madison*, "it is a general and undisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."⁷³ Not so, according to *Crawford's* dismissal.

Remarkably, the *Abbott* litigation has not concluded and the implications that *Crawford's* dismissal could pose for *Abbott* are considerable. Most recently, in *Abbott*, plaintiffs have sought further review of the state's implementation of various orders issued in prior *Abbott* decisions.⁷⁴ But the State Supreme Court has deemed those claims premature and ordered plaintiffs to recast their arguments in light of the budget for fiscal year 2008. The dismissal of *Crawford* could serve as a basis for the State Supreme Court to retreat from the perpetual oversight of *Abbott* remedies. Worse, the dismissal opinion could be used to encourage the Court to revisit the separation of powers doctrine and the conflict posed by judicial review of State compliance with the constitutional mandate, urging reversal of the court's rulings in *Robinson* and *Abbott*. As indicated earlier, the dismissal of *Crawford* on grounds of nonjusticiability is irreconcilable with the *Robinson* and *Abbott* lines of cases. If the dismissal of *Crawford* stands, then *Robinson* and *Abbott* should be reversed.

⁷³*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

⁷⁴*Abbott v. Burke*, 2007 WL 1518909, slip op. (N.J. May 24, 2007).

Finally, the dismissal of *Crawford* may impact the larger equity/adequacy legal movement. At last count, more than 125 cases have been filed throughout the country challenging the constitutionality of public school funding schemes. Previously, these plaintiffs sought increased funding for disadvantaged school districts (in *equity* suits akin to the *Robinson* line of cases); currently, the trend has moved toward overall increases in school funding to achieve a certain level of educational quality (in *adequacy* suits more like *Abbott*).⁷⁵ The breadth and scope of this legal movement is staggering:

Beginning in the 1990s, enactment in virtually every state of learning objectives and curriculum standards provided a new reference point for plaintiffs arguing that funding was inadequate overall. By 2006, the constitutionality of funding mechanisms in 39 states had been challenged on adequacy grounds. Indeed, through the first half of 2006, funding mechanisms in only five states – Delaware, Hawaii, Mississippi, Nevada, and Utah – have been spared constitutional challenge.⁷⁶

Scholars posit that “the national push for educational standards and accountability” has fueled such litigation, noting that once “several states moved quickly on their own to establish proficiency standards and regular assessments of the performance of their students,” then “plaintiffs in adequacy cases soon began citing newly collected data on student proficiency, which routinely revealed student performance to be lagging well below state targets.”⁷⁷ In that respect, *Crawford* does not differ. New Jersey’s educational standards and state assessments play the central role in Plaintiff’s legal theory in *Crawford*. The dismissal of *Crawford*, however, suggests that state educational standards are not judicially enforceable, however, even if they were passed specifically to define a constitutional right or obligation of the State. Like *Crawford*, any adequacy suit that uses state standards to define an adequate education would fail. But the import of the *Crawford* dismissal is much graver than a failed funding suit. The *Crawford* dismissal stands for the proposition that achievement or failure to meet state educational standards can only be gauged by school boards and administrators who are less likely to police themselves and hold each other accountable. The dismissal also compels the view that educational standards themselves may not be legal requirements but rather aspirational goals, unenforceable in any court of law. Either way, accountability in public education is reduced and parents will encounter greater difficulty ensuring that educational delivery systems actually meet the needs of their children.

⁷⁵James W. Guthrie and Matthew G. Springer, *Courtroom Alchemy, Adequacy Advocates Turn Guesstimates Into Gold*, EDUCATION NEXT (Winter 2007), p. 21.

⁷⁶*Id.*

⁷⁷Martin R. West and Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal*, p. 8.

CONCLUSION

Crawford v. Davy promises to give children access to better schools when they are assigned to deficient schools that do not educate their students. By ignoring well-established precedent the dismissal of *Crawford v. Davy* weakens a child's right to an equal and adequate education in the State of New Jersey (and possibly elsewhere). The dismissal could serve to deprive litigants of a substantive definition of their right upon which to base their renewed claims of equity and adequacy in education. The dismissal could also persuade courts to abandon their role as "last-resort guarantors" of constitutional rights, depriving plaintiff schoolchildren of a forum in which to seek an immediate and meaningful remedy. The gravest implication of *Crawford's* dismissal is that state educational standards may not be judicially enforceable and that a court does not have authority to oversee compliance with a constitutional mandate to educate. In other words, courts may not consider deprivations of the constitutional right to an education or issue any remedy to correct an alleged deprivation. If the dismissal of *Crawford* is affirmed on appeal, schools that fail to educate their students in New Jersey will likely continue to fail. If the children in such schools are not allowed to leave, then their future participation as citizens will be compromised and their productivity as competitors in the marketplace will be disadvantaged. Without standards, without a court to enforce them, and without an immediate remedy, scores of children will remain trapped in failing schools year after year. *Crawford v. Davy* must be reversed, and hope restored.