INTRODUCTION

The crisis facing American schools is well documented. For nearly thirty years, education reformers have waged war on the states, hoping to bridge the gap between the monies spent on students living in richer school districts with the amounts spent on their poorer counterparts. The first wave of this battle was fought on federal equal protection grounds. Yet, because wealth is not a suspect classification and education is not a fundamental right, education reform was not victorious in the federal courts. Still hopeful, however, proponents brought the fight to the state courts. They believed that funding inadequacies could be addressed and redressed within a state forum.

New Jersey’s schools were not exempted from the educational plight facing the rest of the nation; the fight continued there as well. In 1998, after three decades, the New Jersey Supreme Court ended a battle that began as early as 1970 by finally giving flesh and bone to a state constitutional provision that provided all children within the state a right to a “thorough and efficient system of free public
NEW JERSEY'S EDUCATION CRISIS

I. BACKGROUND

For over thirty years, monetary allocations to education have remained one of the most significant items in our nation's combined

schools.” Still, theory and practice being inherently distinct, implementing the court's mandate would prove to be difficult.

Recognizing that increased funding alone would not reduce the education gap, the New Jersey Supreme Court mandated “Whole-School Reform.” Specifically, in a measure of unprecedented judicial activism, the court ordered the state's Department of Education to mandate and implement preschool educational services for all children in special needs districts. This decision, however, came at a time when New Jersey could neither afford, nor had the room, to implement the court's new mandate. Faced with little alternative, the state turned to the private sector.

Whenever the thorny issue arises of whether the public obligations that typically attach to government agencies now apply to private actors, a complicated question must be asked: when do we consider a private entity to be a state actor? While the traditional federal constitutional analysis has shied away from assigning state-actor status to private education providers, the unprecedented ways in which the New Jersey Supreme Court has authorized entwinement between the state and the private sector demand a fresh look.

In exploring the issues presented above, I will briefly examine the history of the school funding dilemma in New Jersey and discuss the seminal case, Abbott v. Burke, and its progeny. Next, by focusing on the involvement between the existing state regulatory system and the private preschool providers, I will undertake an important comparative analysis that examines past United States Supreme Court decisions and the current regulatory framework imposed by New Jersey's Department of Education. This analysis will highlight the stark differences between the levels of state entwinement that produced the traditional state-actor doctrine and the increasing level of regulatory involvement in New Jersey. After exploring the relevant law, I will show that assigning the private preschool providers with state-actor status is appropriate. In conclusion, I will raise important questions that need to be addressed if the State of New Jersey chooses to continue to use the private sector to fulfill its constitutional obligations.

I. BACKGROUND

For over thirty years, monetary allocations to education have remained one of the most significant items in our nation's combined

2 N.J. CONST. art. VIII, § 4, ¶ 1.
3 It has been argued that the court's decision in Abbott v. Burke, 710 A.2d 450 (N.J. 1998) (“Abbott V”), discussed at length infra Part II, was not only the product of judicial activism, but also that the holding was so broad as to approach a separation of powers violation. See Klear, supra note 1, at 1172–74 (examining the court's usurping of legislative powers in Abbott V).
governments' budgets.\textsuperscript{5} Within the United States, the total expenditures on education by local, state, and federal agencies exceed $380 billion annually.\textsuperscript{6} When adjusted to reflect per-pupil spending since 1970, educational expenditures show an increase of nearly 80%.\textsuperscript{7} Thus, if the intrinsic value of a public service is indeed correlated to the amount spent to produce that good, then one is left with the inevitable conclusion that education is highly valued in the United States. Yet, this seemingly obvious conclusion is countered by the reality that our public education system is in disrepair.

Educational deficiencies in the United States extend to both infrastructure and programming. Current estimates report that the decay occurring in our existing school buildings could cost approximately $111 billion to repair.\textsuperscript{8} While this number may seem too large to be true, an examination of the condition of schools within particular states is even more revealing. In New Jersey, for example, it is estimated that approximately 41% of schools are housed in buildings that are over fifty years old.\textsuperscript{9} In poorer districts, as many as thirty-five schools still use buildings that were constructed in the nineteenth century.\textsuperscript{10}

These problems do not end with school buildings. In some communities, classrooms utilize textbooks and supplies which are either out of date or unable to meet current students’ needs.\textsuperscript{11} Sadly, it is not uncommon for teachers to report that they have spent their own private funds to purchase supplies for the classrooms.\textsuperscript{12}

Educational deficiencies extend well beyond infrastructure and supplies. According to recent studies provided by Ohio’s Department of Education, a frighteningly low percentage of their school districts actually deliver efficient educational programs.\textsuperscript{13} An estimated 40% of low-income students in our nation’s capital drop out of high

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\textsuperscript{6} Id. (citing U.S. Census Bureau, Statistical Abstract of the United States 166 (1999)).

\textsuperscript{7} See id. at 69 tbl.4.1 (highlighting that per-pupil spending has increased from $3796 in 1970 to $6931 in 1998).


\textsuperscript{9} Id. at 995 (citing William A. Firestone et al., From Cashbox to Classroom: The Struggle for Fiscal Reform and Educational Change in New Jersey 141 (1997)).

\textsuperscript{10} Id. (citing Firestone, supra note 9, at 141).

\textsuperscript{11} See Timothy D. Lynch, Note, Education as a Fundamental Right: Challenging the Supreme Court’s Jurisprudence, 26 Hofstra L. Rev. 953, 965 (1998) (noting that in the largely poor suburb of Roosevelt, New York, students used outdated materials and inadequate facilities).

\textsuperscript{12} Id. at 964.

\textsuperscript{13} See Safier, supra note 8, at 996 (citing Local News (WMUB 88.5 NPR radio broadcast, Feb. 28, 2000) (reporting that only 31 out of a total 607 school districts were operating effectively)).
school prior to graduation. In Philadelphia, 40% of low-income students score below the fifteenth percentile on standardized tests. This number is as low as 6% for their wealthier counterparts.

International studies also indicate America's continuing failure to educate its students. By the time the average American student reaches the eighth grade, chances are he or she will score below the average level in both math and science as computed by a composite average of industrialized nations. As these students approach high school graduation, the gap only widens. In 1994, the United States Department of Education released a study which revealed that, among North American and Western European nations, adults in the United States scored at the lowest literacy level in the three areas tested.

The evidence outlined above only scratches the surface of the underlying difficulties our educational system faces. While solutions to these problems are not easily found, a recurring question is whether spending on education is high enough. To that end, there is an active debate as to whether there exists any correlation between an increase in educational input usages on the front end and the quality of educational services received on the back end. Surprisingly, however, studies have indicated that increases in spending on education do not necessarily lead to a better outcome. So while the question will remain open as to whether increased spending is sufficient to remedy the public school crisis, for purposes of this analysis it is only necessary to consider the implications posed by the way individual states fund public education.

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14 Lynch, supra note 11, at 960 (citing Richard Lacayo, They'll Vouch for That, TIME, Oct. 27, 1997, at 72, 74).
15 Id. at 961 (citing DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 151 (1993)).
16 Id. (citing MASSEY & DENTON, supra note 15, at 152).
17 See Safier, supra note 8, at 996 (citing THOMAS D. SNYDER, THE DIGEST OF EDUCATION STATISTICS 1998 (1999). See also id. (citing Duke Helfand, U.S. Math, Science Students Still Trail Top Ranks, L.A. TIMES, Dec. 6, 2000, at A17 (stating that although fourth graders score above international averages in math and science, by eighth grade this advantage has slipped in math)).
18 See id. (citation omitted) (noting that by twelfth grade students score well below international averages in math and science).
19 This study compared subjects from the United States, Poland, Switzerland, Canada, Sweden and Germany. BURRUP, supra note 8, at 46-47.
20 See ROSEN, supra note 5, at 71 ("One of the dominant issues in debates over public education is whether spending on it is high enough.").
21 Input usages are quantitative factors identified to help measure increases in educational quality. Some studies have used the following input usages in studying this question: teacher/pupil ratio, teacher education, teacher experience, teacher salary, and expenditures per pupil. Id. at 71-72.
22 See id. ("[R]esearch indicates that we cannot predict which schools will be effective simply by looking at data on their purchased inputs.").
Collectively, our country is consistently a top spender on education. However, the estimated $40 billion the federal government spends on education is remarkably small considering it only accounts for only 7% of the total funding generated. The remaining 93% is shared by individual state and local governments. This spending scheme generates school budgets where per-pupil spending is indirectly correlated to the host community’s local tax base. As any given community’s ability to generate revenues from its citizens’ taxable real-estate decreases, so too will the available funding provided to that particular community’s schools. Thus, lying at the heart of the debate on how to remedy our failing schools is the issue concerning funding discrepancies among individual school districts within each state.

II. ABBOTT V. BURKE, A BRIEF HISTORY

Nearly thirty years ago, proponents for education reform recognized that discrepancies in school funding were at the heart of education disadvantages in America. School districts located in urban settings typically could not produce the same property tax base as their rural counterparts. Thus, total per-student funding was directly correlated to where the student lived. It was this type of spending scheme that came under attack in the early part of the 1970s.

23 BURRUP, supra note 8, at 46–47.

24 See Robert J. Samuelson, Who Governs? Maybe Nobody, NEWSWEEK, Feb. 21, 2000, at 33 (describing President Clinton’s 1996 State of the Union Address announcement that $40.6 billion were to be delegated to education).

25 Safier, supra note 8, at 998 (citing Samuelson, supra note 24, at 33).

26 Id. (citing Robert Berne & Leanna Stiefel, Concepts of School Finance Equity: 1970 to Present, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 7, 8 (Helen F. Ladd et al. eds., 1999) [hereinafter EQUITY AND ADEQUACY]).

27 See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35–37 (1973) (describing appellees’ argument that educational expenditures in Texas were insufficient to ensure adequate education).

28 While it is not universally accepted, there is significant authority that recognizes a causal correlation between the amount spent on education per student and the quality of that education. See, e.g., Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 197–99 (Ky. 1989) (noting that achievement test scores are lower in poorer districts and that “expert opinion clearly established . . . a correlation between those scores and the wealth of the district”); Melissa C. Carr & Susan H. Fuhrman, The Politics of School Finance in the 1990s, in EQUITY AND ADEQUACY, supra note 26, at 136, 152 (indicating that some studies have found a correlation between educational success and per-student spending); Joseph S. Patt, School Finance Battles: Survey Says? It’s All Just a Change in Attitudes, 34 HARV. C.R.-C.L. L. REV. 547, 549 (1999) (citing Edgewood Independent School District v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989), for the assertion that money impacts the educational opportunities offered to students). But see, ROSEN, supra note 5, at 72 (discussing the idea of a direct correlation as controversial); Eric A. Hanushek, Measuring Investment in Education, 10 J. ECON. PERSP. 9, 13–15 (1996) (arguing that, at best, student performance has maintained constant while education expenditures have increased); Eric A. Hanushek, The Economics of Schooling: Production and Efficiency in Public Schools, 24 J. ECON. LITERATURE 1141, 1154–63
The front line in the school-funding battles was drawn in the seminal case of San Antonio Independent School District v. Rodriguez.\textsuperscript{30} It was in Rodriguez that the first challenges to school funding schemes were made based on substantive due process claims. Because of the manner in which the local school districts were funded,\textsuperscript{31} poorer districts that could not sustain high property taxes had less available funding for their schools.\textsuperscript{32} The plaintiffs, who were representative of the poorer school districts, argued that treating students differently based upon where they lived violated the Equal Protection Clauses under the Fifth and Fourteenth Amendments of the United States Constitution. To sustain this claim, the plaintiffs had the burden of convincing the Court either that San Antonio’s differential treatment of school children was the effect of discrimination against them as a suspect class of citizens, or that the right the children were denied was fundamental in nature.\textsuperscript{33} The plaintiffs failed to carry their burden on either point.

The Rodriguez Court was not willing to extend suspect classification to citizens treated differently because of social or economic factors.\textsuperscript{34} Hence, wealth was not considered to be a suspect classification.\textsuperscript{35} Moreover, the Court remained unconvinced that education

\textsuperscript{30} 411 U.S. 1 (1973).

\textsuperscript{31} In San Antonio, school budgets were predominately generated through local property taxes and mirrored the description of school funding provided in the background section to this Comment, \textit{supra} Part I. See Rodriguez, 411 U.S. at 6–7 (stating that most money for education came from taxes, including property taxes specifically).

\textsuperscript{32} During the 1967–68 school year, the plaintiffs’ school district had annual per-pupil expenditures of approximately $356, compared to the $594 per-pupil expenditures provided to the schools located in the most affluent district in San Antonio. See id. at 11–13.

\textsuperscript{33} Under traditional constitutional analysis, the Court will apply two standards of review. The first is the rational basis test. Under this test, so long as the government can rationally relate its objectives to a legitimate state interest, the action will not be overturned. \textit{Id.} at 60 (citing McGowan v. Maryland, 366 U.S. 420, 425–26 (1961)). The second applicable standard is heightened scrutiny, where a government action will be overturned unless it is narrowly tailored to meet a compelling state interest. This test is applied only to suspect classifications or restrictions on fundamental rights. \textit{Id.} at 61.

\textsuperscript{34} See \textit{id.} at 35 (holding that the undisputed importance of education will not alone cause the Court to depart from the usual standard for reviewing a state’s social and economic legislation).

\textsuperscript{35} \textit{Id.} at 29.
was a fundamental right, and refused to extend heightened scrutiny to funding discrepancies between a state's school districts.

Leaving the untested waters of Rodriguez aside, this decision effectively precluded successful federal challenges to a state's public school funding scheme based on equal protection claims. Recouping from their federal losses and hoping to gain ground in a more responsive forum, the plaintiffs' next stage of the school funding battle was waged in the state courts. It is within this framework that I will discuss the Abbott decisions.

Abbott v. Burke was originally docketed in 1981. Poor students from Camden, East Orange, Jersey City, and Irvington school districts challenged the Public School Education Act of 1975 as unconstitutionally applied to students living in poor school districts. Simply stated, the Abbott litigation embarked upon the familiar strategy of attacking the viability of a funding system that was inherently unequal. Because New Jersey's constitution provides that every student has a constitutional right to a "thorough and efficient" education, the gap created by the United States Supreme Court's failure to imply a fundamental right was bridged by New Jersey's explicit constitutional
provision. Thus, the groundwork was laid for attacking disparities in school funding based upon socioeconomic differences.

The *Abbott* litigation bounced around for many years in several different forums. The questions presented were both difficult and contentious as the courts and administrative agencies grappled with the New Jersey constitutional requirement. In essence, a "thorough and efficient" education would ultimately compel the state to equalize the distribution of educational services while funding these services through a system that unequally generated revenue (i.e. property taxes). It was not until approximately seventeen years after the first *Abbott* claim was filed that the New Jersey Supreme Court finalized a redistribution scheme called "Whole-School Reform." 46

Whole-School Reform is a current educational policy adopted by the State of New Jersey in hopes of remedying discrepancies in student performance found to exist between poorer and more affluent school districts. The policy is the result of decisions handed down by the *Abbott* courts and the responses by both the New Jersey Department of Education ("DOE") and the state legislature to those decisions. To understand the impetus for the current levels of state intervention in the private preschool industry, a look at the development of Whole-School Reform is necessary.

Beginning with *Abbott III*, the New Jersey Supreme Court began to solidify the first stages of Whole-School Reform. *Abbott III* involved a successful attack against recently enacted legislation because of its failure to provide parity in spending between the state's "special needs districts" and its more affluent ones. 49 In response, New Jersey's legislature repealed the Quality in Education Act of 1990

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45 See supra note 39 (detailing the progression of the *Abbott* litigation).
46 *Abbott V*, 710 A.2d at 457.
48 "Special needs districts," or "Abbott districts," were created by statute. The labels describe school districts where a certain percentage of the student population is comprised of people living below certain poverty guidelines. There are twenty-eight in New Jersey. *Abbott III*, 643 A.2d at 576; see also Revised Abbott Preschool Educational Program Contract, School Year 2002-2003 [hereinafter Abbott Preschool Contract] (on file with author) (relying on the *Abbott* decisions and requiring a school to meet the enhanced standards); Family Outreach Project, Cumberland County, Parents as Teachers Initial Implementation Plan, at 1 (on file with author) (describing the Cumberland County "Abbott District," which had 24.7% of children and 15.8% of adults below the poverty level in 1997).
49 In response to the *Abbott II* decision, the New Jersey Legislature had enacted the Quality in Education Act of 1990. See Quality Education Act, ch. 52, 1990 N.J. Laws 215 (codified at N.J. STAT. ANN. § 18A:7D-1-37 (West 1998) (repealed 1996)). This act purported to establish special needs districts that allowed for a new system of distribution within the state. A challenge to the constitutionality of the act was upheld in *Abbott III* because of the statute's failure in practice to reach a desired level of parity between special needs districts and affluent ones. 643 A.2d at 576.
enacted the Comprehensive Education Improvement and Financing Act ("CEIFA"). The predominant contributions of the CEIFA were to create a standardized curriculum that applied to all students within the state, enumerate programs that were sufficient in achieving these goals, and establish funding mechanisms to ensure adequate delivery of the services. Essentially, the CEIFA defined the substantive standard of what a thorough and efficient education should be.

It was not long before the CEIFA was challenged under grounds similar to those raised in Abbott III. Again, the plaintiffs argued that the funding models created by the DOE missed its mark of parity and that the CEIFA was unconstitutional as applied. The court agreed with the plaintiffs and, apparently frustrated with the DOE's failure to adequately implement Abbott III's mandate, imposed its own temporary remedies.

First, because the DOE's funding scheme bore "no demonstrable relationship to the real needs of the disadvantaged children attending school in the special needs districts," the court ordered an immediate increase in per-student funding. This would lessen the parity gap between students in special needs districts and those students located in affluent communities.

Second, the court found that the statute failed to consider the need to improve or replace existing school facilities. Therefore, the court held that "[t]he State must, as part of its obligation under the

51 Ch. 138, 1996 N.J. Laws 466 (codified at N.J. STAT. ANN. §18A:7F-1 to -34 (West 1998)).
52 See id. (indicating that the legislature intends the CEIFA to define "thorough and efficient").
53 Under Abbott IV, the court held that CEIFA funding provisions failed to guarantee adequate funding to special needs districts. The courts explained that the DOE's model for providing funding does not take into account the characteristics of the special needs districts. See 693 A.2d 417, 450-31 (N.J. 1997).
54 Id. at 433.
55 The court found:
Not one of the twenty-eight SNDs [Special Needs Districts] conform[ed] with the model district . . . .

The fallacy in the use of a hypothetical model school district is that it can furnish only an aspirational standard. It rests on the unrealistic assumption that, in effectuating the imperative of a thorough and efficient education, all school districts can be treated alike and in isolation from the realities of their surrounding environment. Id. at 430-31. Model districts were hypothetical funding schemes created by the DOE and applied to all districts in an attempt to appropriate school funds. Id. at 426.
56 Id. at 456.
57 Id. at 421.
58 Id. at 456.
59 Id. The court found that parity in funding "remain[ed] a relevant and important element in the attempt to assure constitutionally sufficient educational opportunity." Id. at 440. The increased funding was to be implemented by the 1997-98 school year. Id. at 439.
60 Id. at 437.
education clause, provide facilities for children in the special needs districts that will be sufficient to enable those students to achieve the substantive standards that now define a thorough and efficient education.\textsuperscript{61}

The Abbott IV challenge was remanded to the superior court with the direction to oversee the implementation of the New Jersey Supreme Court's mandates.\textsuperscript{62} In a stunning move of judicial activism, the superior court was authorized by the Abbott IV court to supervise the implementation of any procedure necessary to provide educational, fiscal, and programmatic remedies consistent with the Abbott IV holding.\textsuperscript{63} Furthermore, the DOE's Commissioner was charged with developing a report assessing tangible factors that would contribute to the delivery of a "thorough and efficient" education.\textsuperscript{64} To be included in this report was a comprehensive analysis of exactly what the Commissioner considered to be the "educational capital and facility needs" of the special needs districts and develop of criteria for their implementation.\textsuperscript{65} After remand, the New Jersey Supreme Court issued a due date of January 20, 1998.\textsuperscript{66}

On that deadline, after reviewing the Commissioner's findings, the Superior Court of New Jersey adopted the following criteria, which came to be known as "Whole-School Reform," and now serves as the court order impetus for unprecedented levels of state intervention within a private industry.

As approved on appeal in Abbott V, the DOE would implement the following procedures, believed to level the playing field between students in special needs districts and students in non-Abbott districts: first, full-day kindergarten for five-year-old children;\textsuperscript{67} second, half-day preschooling for three- and four-year-olds;\textsuperscript{68} and finally, a compre-

\textsuperscript{61} Id. at 438. This initial mandate provided the predominate impetus for the state's utilization of the private preschool industry. As will be explored in the upcoming paragraphs, the DOE was neither ready nor capable of building the infrastructure needed to implement the court's mandate. It is this necessity, that later becomes apparent in Abbott V, which thrust the state into partnership with the private sector.

\textsuperscript{62} Id. at 444.

\textsuperscript{63} See id. at 444–45 (outlining the superior court's responsibilities).

\textsuperscript{64} Id. at 444. The Abbott IV court specifically directed the Commissioner to identify the additional needs of students in special needs districts and "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." Id.

\textsuperscript{65} Id.

\textsuperscript{66} Abbott V, 710 A.2d 450, 483 (N.J. 1998).

\textsuperscript{67} The Commissioner's report recognized, and the superior court agreed, that early childhood education was essential for children in Abbott districts. Consequently, full-day kindergarten for all Abbott five-year-olds was recommended for immediate implementation. Id. at 461–62.

\textsuperscript{68} Id. at 462–63.
hensive summer school program.\textsuperscript{69} By providing access to these early learning opportunities, the DOE believed, and the court accepted, that access to resources at an early age would help decrease the learning deficiencies found to be inherently attached to students in poor school districts.\textsuperscript{70}

III. PRIVATIZING A PUBLIC GOOD

Implementing the \textit{Abbott} \textit{V} mandate would prove to be difficult. The court’s decision came at a time when the state was faced with limited options in terms of infrastructure. In addition to these space limitations, both the court and the DOE recognized that duplicating existing services was both cost prohibitive and inefficient.\textsuperscript{71} Thus, in \textit{Abbott} \textit{V} the court approved a DOE regulation requiring local school boards to “contract with . . . Department of Human Services-licensed child care provider[s] to provide services to preschool students [when that provider met certain requirements].\textsuperscript{72} This regulation had the effect of placing the constitutional obligation of a “thorough and efficient” education squarely on the shoulders of private preschool providers located in special needs districts.

Fulfilling this mandate eventually led to contracts between the local school districts located within the state’s special needs districts and private preschool providers. Typically, these contracts dictated

\textsuperscript{69} The New Jersey Supreme Court agreed with the plaintiffs’ report that summer school “would prevent the learning loss that occurs when school is disrupted for an extended period and would also provide structure during these unsupervised months.” \textit{Id.} at 468. The Commissioner’s report also included the following relevant implementations: school-based health and social services, an accountability system, and added security. \textit{Id.} at 466–68.

\textsuperscript{70} The New Jersey Supreme Court went to great lengths to describe the differences between “daycare” and “preschool,” the former being a service providing supervision to young children when their parents are unavailable, and the latter implicating a sophisticated system that provides the educational tools necessary to prepare special need districts’ children for success in advanced grades. \textit{See Abbott v. Burke}, 748 A.2d 82, 87–88 (N.J. 2000). This distinction is paramount because it stresses the importance the state is assigning to the service of providing a preschool education. This distinction necessarily changes the dynamic of what the private providers produce. Care of young children, at least in the Abbott districts, has shifted from daycare services (a valuable, but not a public, commodity) to preschool, which is a constitutionally required public good.

\textsuperscript{71} \textit{See Abbott V}, 710 A.2d at 508. During the \textit{Abbott IV} remand process, both the DOE and the plaintiffs recognized the usefulness of the preexisting infrastructure provided by existing businesses within the private sector. The court authorized cooperative use of these facilities in \textit{Abbott V}. \textit{See id.} at 472 (“While awaiting the construction or renovation of the necessary facilities, the Commissioner should, in order to meet his obligation to begin providing a half day of preschool for three- and four-year-olds in the fall of 1998, make use of trailers, rental space, or cooperative enterprises with the private sector.”).

\textsuperscript{72} N.J. ADMIN. CODE tit. 6A, §24-3.3(c) (2003).

\textsuperscript{73} N.J. CONST. art. VIII, § 4, ¶ 1.
the qualifications for Abbott school teachers, the appropriate curriculum, budgetary allocations, and use of infrastructure. In short, the partnership created by the Abbott mandate "merges pre-existing community daycare centers and district-run programs into a coherent unified system drawing upon social service and education funding streams."

Since the 1998 inception of the Abbott program, its effect on the private preschool industry has become clear. First, the state, by implementing a program required by its constitution, has commandeered the private preschool providers. Second, private providers must now embrace regulations that mandate infrastructure use, employee qualifications, a standardized curriculum, and considerable state oversight (including the intrusive and periodic auditing of the business’s financial statements.) Thus, what was once a totally private system is now replaced by a partnership between the state of New Jersey and the private preschool sector; a necessary partnership that is charged with providing a public good.

A. Traditional State-Actor Status

The United States Constitution provides that no citizen may be treated differently based upon arbitrary decisions of the government or the immutable traits of individuals. These protections were initially applied as a protection against actions taken by the federal government. However, with the enactment of the Fourteenth Amendment and subsequent Supreme Court decisions, the scope of these

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74 Any teacher who is employed by an Abbott preschool must be certified and hold a bachelor’s degree from an accredited four-year program. Abbott v. Burke, 748 A.2d 82, 109 (N.J. 1998).
75 Any preschool within an Abbott district which hosts a certified DOE program must comply with a standardized curriculum. See Abbott v. Burke, 710 A.2d at 455 (recognizing the goal of reforms as "comprehensive substantive educational programs and standards").
76 In order to qualify for state funding, providers are required to submit personal business data, including budgets and financial projections and this data is reviewed by the state. See Letter from Edward Tetelman, Assistant Commissioner, New Jersey Department of Human Services, to Abbott Center Directors (Oct. 10, 2001) (on file with author) (explaining requirements to Abbott center directors).
77 The state requires that class size not exceed a one-to-fifteen teacher-to-student ratio. See Abbott Preschool Contract, supra note 48, at 2 ("Class size shall not exceed 15 children with one Appropriately Qualified Teacher and one Appropriately Qualified Teacher Aide . . . .").
79 See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").
protections now provides a barrier against a state’s infringement of a federal constitutional right.

The protections provided by the Fifth and Fourteenth Amendments as applied to the states are not absolute. In fact, the protections guaranteed only extend to those entities which are direct creatures of the state, and, in some limited circumstances, to private entities that are assigned “state-actor” status.

The state-actor doctrine as applied today has its roots in three cases that reached the Supreme Court in the early part of the 1980s.\(^{81}\) Generally speaking, the Court has been willing to consider a private entity a state actor in two circumstances. The first attributes state-actor status when the “degree of discretion and independent judgment exercised by the private actor and the standards by which the actor governs his conduct"\(^{82}\) are “fairly attributable"\(^{83}\) to the state. In the second circumstance, state-actor status will be assigned to a private entity when the close interaction between that entity and the state creates a “sufficiently close nexus"\(^{84}\) between the two. A finding of either of these circumstances is predicated upon four criteria: public funding, the degree of state regulation, public function, and the nexus between the private entity and the state.\(^{85}\)

B. Public Funding

Generally, receiving public funding alone is not sufficient to trigger state-actor status. In *Rendell-Baker v. Kohn*, a private school\(^{86}\) was sued because of an alleged denial of due process when it terminated several teachers. The Court concluded that, although the school re-

\(^{81}\) See Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (holding that a nursing home that was subject to state regulation and received state subsidies was not a state actor because it was not subject to the state's “coercive power” or “significant encouragement” to comply with state law); Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (holding that, in order for a private action to be fairly attributable to the state, it must be “caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible”); Rendell-Baker v. Kohn, 457 U.S. 830, 840-41 (1982) (holding that neither dependence on state funding alone nor performing a function which solely serves the public is indicative of state action).


\(^{83}\) Lugar, 457 U.S. at 937.

\(^{84}\) Blum, 457 U.S. at 1004 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)).

\(^{85}\) Eg., *Rendell-Baker*, 457 U.S. at 840-42 (using the four factors to conclude that a school in the business of educating “maladjusted high school students” was not a state actor).

\(^{86}\) The school contracted with the State of Massachusetts to provide services to “maladjusted high school students.” *Id.* at 832. Once students were identified as troubled, they were referred to this school by the state agency. *Id.*
ceived up to ninety percent of its funding from the state, the discharge of the teachers did not amount to actions by the state. The Court reasoned that although the private school’s funding was dependent upon strict compliance with state regulations, the discharge of the teachers was not a result of those regulations. Interestingly, the Rendell-Baker decision leaves open the question of what should happen if the funding was the catalyst to a challenged action.

C. State Regulation

The next factor is state regulation. This prong of the Court’s analysis dictates that, in order for state regulations to convert a private entity into a state actor, the state must have “exercised coercive power or... provided such significant encouragement, either overt or covert, that the choice [to act] must in law be deemed to be that of the State.” Under this approach, the Court seemed to suggest that if the state regulated a school’s curriculum, but had nothing to do with that school’s enrollment policies, then a suit challenging its admissions policy would not trigger state-actor status. Again, the Court seemed to focus on the exact nature of the state regulation and asked whether it is the regulation that serves as the impetus for the challenged action.

D. Public Function

When a service that is “traditionally the exclusive prerogative of the State” is provided by a private entity, that entity will be considered a state actor. In Rendell-Baker, the Court held that schools that educate “maladjusted high school students” were not state actors because the service was not traditionally the exclusive province of the state. This analysis creates a dichotomy between a private function that serves the public and a public function provided by a private entity.

87 Id. at 832.
88 Id. at 841.
89 Id.
90 Quite apart from the Rendell-Baker distinction would be a scenario where, because of state funding, private providers excluded non-Abbott students from their facilities.
92 Rendell-Baker, 457 U.S. at 842.
93 Id.
94 Id.
95 Compare Jackson v. Metro. Edison Co., 419 U.S. 345 (1974) (finding that an electric company was not a state actor), with Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 313 (2001) (holding that a nonprofit athletic association served a “public function” and was a state actor).
E. Nexus Between Private Entity and the State

The last approach applied in state-actor analysis is the determination of whether a "symbiotic relationship" exists between the private entity and the state. The analysis under this prong is not clearly articulated. Consider, for example, the dicta in Rendell-Baker, where the Supreme Court compared the discharging of the teachers at issue in Rendell-Baker with an earlier case that involved a restaurant located in a public parking garage that refused service to African-Americans. In the latter circumstance, the Court found the relationship to be sufficiently symbiotic because the restaurant was located on public property and the rent paid to the public garage contributed to the support of the garage. Conversely, in Rendell-Baker the education of maladjusted high school students was not sufficiently intertwined with the state's public function of education in general, so no symbiotic relationship existed. Here, the distinction is not clear. In both circumstances the relationships between the private entity and the public entity were closely linked. Moreover, an argument can be made that educating any student depends much more on a symbiotic relationship with the state than a restaurant in a public garage. Regardless, these issues do not need to be resolved here; the Court's nexus analysis indicates a willingness to find state-actor status if confronted with challenges based upon racial discriminations.

F. A Refined Approach

In recent years the Supreme Court has refined its state-actor analysis; instead of taking a piecemeal approach to the four prongs listed above, it now will apply a synthesized test. In particular, the Court now seems interested not in assessing whether any individual prong can in and of itself meet the required threshold, but rather if a totality of government contacts creates the necessary connection.

IV. THE ABBOTT PRESCHOOLS ARE STATE ACTORS

The measures required under Abbott and performed by any private preschools within the special needs districts are directly attribut-
able to the state. The educational services that are delivered to the Abbott preschoolers are governed by very specific contracts that regulate the qualifications for Abbott school teachers, the appropriate curriculum, budgetary allocations, and infrastructure use. In this regard, it is virtually impossible to distinguish between the private entity and the state. There is little if any discretion and independent judgment exercised by the private preschools and the standards governing the preschools are almost exclusively controlled by the state.

This symbiotic relationship has left the private preschool providers with little choice but to participate in the Abbott program. Purely from a financial point of view, private providers had to contract with the local school districts. Because the Abbott program guarantees preschool education free of charge (with the state providing 100% of the public funding), the Abbott decision has removed a significant percentage of the private provider’s economic base. Here, the state has clearly exercised significant coercive power over the private providers such that their actions as Abbott providers must be attributed to the state.

After nearly thirty years of litigation, the Supreme Court of New Jersey handed down a decision that gave flesh and bone to New Jersey’s constitutional mandate that the legislature provide for every student a “thorough and efficient system of free public schools.” This mandate has expanded New Jersey’s traditional public function of educating its children to include preschoolers located within the state’s special needs districts. Although the guarantee of this constitutional right is the duty of the state, it is provided through a system which “merges pre-existing community daycare centers and district-run programs into a coherent unified system.” Therefore, when this service is delivered to a preschool student attending a private

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100 See supra notes 74–77 (discussing specific provisions of the contract).
101 Again, to enumerate some of the overlap between the state and the Abbott districts, consider that the pre-Abbott curriculum was replaced by the state sponsored curriculum. Strict guidelines have been adopted regarding teacher certification. The state provides specific direction on infrastructure use and resource allocations including the hours of operation the school needs to provide its services to the children. The state requires each facility to employ certain personnel including a nurse and family worker. Routine monitoring and systematic program assessments by the state occurs on a regular basis. And finally, both class size and teacher-student ratios are set by the state.
102 In one particular preschool located within the Vineland School District, Abbott funding now represents approximately 60%–70% of the school’s available income. In addition, preschools that had traditionally hosted kindergarten programs have had to shut those programs down because of their inability to compete with the public sector’s now free full-day programs. Phone Interview with John V. Di Tomo, Business Administrator, My Little Friends Preschool (Oct. 1, 2003) (“Since the inception of Abbott’s full-day kindergarten, the need for a private full-day kindergarten has vanished.”).
103 N.J. CONST. art. VIII, § 4, ¶ 1.
104 See Abbott v. Burke, 748 A.2d 82, 95 (N.J. 2000).
Abbott preschool, that student's constitutional right, as guaranteed by the state, is being delivered by a private entity. It is therefore appropriate to recognize that the private preschools in this circumstance are performing a function that is traditionally within the exclusive prerogative of the state and that the private Abbott providers are thus state actors.

V. Ramifications

Because there is little if any distinction between the private Abbott schools and other public schools within the special needs districts, "an area of individual freedom . . . limiting the reach of federal law" has been removed. As state actors, both the local school districts and the private schools must recognize the ramifications that their combined actions may have on the individual rights and liberties of both the children and staff. Furthermore, the local school districts need to recognize that most, if not all, of the private Abbott preschools are not in a position to defend a costly litigation should a suit be filed for violations of the Federal Constitution. Thus, the realities of this imposed constitutional status must be considered when the local school boards contract with the private schools.

On the surface, theoretical issues may arise due to this new state-actor status. Consider questions from an employment perspective: are federal procedural safeguards now required in hiring and firing practices? Will federal procedural due process attach to employee disciplinary measures? Is an employment contract with a private Abbott preschool a federally protected property right?

Aside from the realm of employment, what issues may arise from the implications of the First Amendment? Can an administrator of an Abbott school remove books from the library simply because she no longer approves of their content? What if a private school, prior to Abbott, had incorporated a particular degree of religious education into its curriculum? Is continued use of such material permitted?

These questions, of course, are simply conjecture. At first glance, they may even appear to be silly. After all, aren't these just three- and four-year-old children? Yet, the state of New Jersey has guaranteed these children a state constitutional right. And if the premise of Abbott is correct—that the effect of early intervention leads to better prepared students—then these questions take on significant import.

105 See Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (finding that to be a state actor a school must be performing a service that is traditionally a state function); see also Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (discussing whether state-actor status should attach when private action is caused by the exercise of a right created by the state).

106 Lugar, 457 U.S. at 936.
Still, it is unlikely that the Federal Constitution will reach any of these issues unless litigation is spun from the same thread as the state's influence over the private Abbott schools. This of course asks the question of whether there are any actual practices within any special needs districts that may offend the Federal Constitution.

Using the Vineland City School District as an example, consider the ramifications of recent policy. In the 2002–2003 school contracts between the school district and the private Abbott providers, the private providers were required to submit to the district the number of spots that would be available for Abbott students that year. Once these numbers were received and approved, the district required the centers to leave open twenty percent of those seats to be assigned by the district itself. The reason for this quota was that the district wanted to ensure diversity in the preschool classrooms.

This contractual provision is troubling indeed. The Supreme Court has held that "[p]refering members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." Thus any state regulation that creates a set-aside for any "specified percentage of a particular group merely because of its race or ethnic origin . . . must be facially invalid."

It is well settled that in the context of an equal protection claim, to withstand a strict scrutiny analysis, a respondent must demonstrate that the use of a suspect classification in its program (i.e., a twenty percent set-aside) employs narrowly tailored measures that further compelling governmental interests. Indeed, here we have an ex-

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107 See supra note 102 and accompanying text (discussing how state-actor status does not attach to an action by the private entity unless such action is directly connected with the state's influence over that private entity).

108 Vineland is one of the twenty-eight special needs districts identified by the Abbott decision. Abbott II, 575 A.2d 359, 412–14 (N.J. 1990).

109 Interview with Helen A. Di Tomo, Director, My Little Friends Preschool, in Philadelphia, Pa. (Mar. 8, 2003). See also, Abbott Preschool Contract, supra note 48, at 6–7 (“Twenty percent . . . of the slots shall be filled by [the district]. In the event that a [private preschool] is unable to designate eighty percent (80%) of the student slots from its enrollment list, [the school district will] assign any remaining slots . . .”).

110 Abbott Preschool Contract, supra note 48, at 6–7; see also Letter from Robert A. De Santo, City of Vineland Solicitor, to Vineland Abbott Preschool Providers (Aug. 12, 2003) (on file with author) (“The district has a fundamental goal of achieving equity and non-discrimination in the placements and in order to secure that goal, is requiring the right to place 20% of the students.”).

111 Id.


113 Id.

ample of an action of the state that may come directly to bear on the shoulders of the private Abbott providers.

In Vineland City, preschool children that participate in the Abbott program register for enrollment with the local school districts or with the individual providers themselves. There are no admission requirements for children to attend the school, and all children within the district have a right to participate in the program. Under this system, it is conceivable that the location of a school acts as the predominant factor influencing where a child will attend school. Nevertheless, schools do offer unique situations that may provide competitive advantages over other schools. For example, teachers at one school may have a unique reputation that parents desire, or one school may have better facilities than others within the district. Regardless, an argument can be made that one school may offer a more advantageous opportunity for children than others schools. This advantage may be deprived if one student is unable to register at a particular school because the district’s set-aside has foreclosed available seating to students who otherwise wished to attend a particular school. On this premise, has the state violated this student’s equal protection rights?

This question posed turns largely on what role diversity should play within a preschool setting. Do children at the age of three or four know what race is? The answer to this question is not clear. We know that diversity in higher education is a compelling interest of the state. Studies have also considered the impact of diversity on children participating in early intervention programs and have determined that children do benefit from diversity in the classroom. Yet is a twenty percent set-aside a narrowly tailored response? Because of Gratz v. Bollinger, we know that the Supreme Court will not permit academic institutions to implement programs that blindly consider race as the sole classification for student enrollment. Since Abbott students in general are not assigned to preschools by any predetermined criteria, the twenty percent set-aside introduces race as the

115 Children that rely on public transportation to and from the Abbott schools must enroll with the district and are not free to choose which Abbott school they attend.

116 See Bakke, 438 U.S. at 311–12 (declaring that a diverse student body is a constitutional goal for a public college); see also Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (discussing educational goals in using racial classifications could be legitimately served by the competitive consideration of race).

117 See NATIONAL ACADEMIES PRESS, CULTURAL DIVERSITY AND EARLY EDUCATION 8, at http://www.nap.edu/readingroom/books/earlyed/contents.html (“All children can benefit from exposure to multilingual and multicultural learning environments.”).

118 See Gratz, 123 S. Ct. at 2428 (holding that when race is used as the decisive factor in school enrollment to the extent that all other considerations are removed that system violates the Fourteenth Amendment of the Constitution).
only admissions consideration and therefore seems to violate the Constitution.

One other justification can permit this set-aside: the action being a narrowly tailored response necessary to remedy past discrimination. Again, it appears that it is not. First, the Abbott program itself is a relatively recent creation of the state. Therefore, discrimination within the Abbott program itself seems unlikely and without an instance of specific past discriminatory practices the state is without justification for the set-aside.\(^1\)

In further support that this provision cannot be rationally related to attempts at remediying past discrimination consider the fact that the Abbott decision itself was predicated upon the reality that the special needs districts had concentrated minority populations.\(^2\) If the Abbott program in its creation was adopted in part to address the needs of a disproportionably large minority population,\(^3\) it becomes difficult to rationalize the set-aside in terms of remediying past discrimination.

The New Jersey courts have on numerous occasions stated that it is the policy of the state to prohibit discrimination and segregation in its public schools. This policy is considered as important to the state as providing a thorough and efficient education.\(^4\) Yet, it is unclear what discrimination the local districts are remedying by the twenty percent set-aside. Furthermore, quotas are not permitted to be used in educational settings even when the purpose of the quota is to ensure diversity in the classroom. Because this quota is not narrowly tailored to effectuate a compelling interest of the state, it runs afoul of the United States Constitution.

CONCLUSION

I have attempted to explore the possible ramifications that occur when a state merges a private sector into a cooperative enterprise charged with fulfilling a state’s constitutional mandate. Undoubtedly, unique challenges are presented by this analysis—both real and conjectural. The ultimate goal, however, is to urge cautious and thoughtful consideration when the local school districts contract with

\(^{121}\) See City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding that a state does not have the degree of discretion that is attributed to Congress when remediying effects of historical discrimination and attempts by the state to provide such a remedy must be tailored to specific instances of past discrimination).

\(^{120}\) Abbott IV, 693 A.2d 417, 433 (N.J. 1997).

\(^{121}\) See id. (taking judicial notice that on aggregate the state’s special needs districts were 47% black, 33.5% Latino, and 15.4% white).

private preschool providers. Provisions within these contracts should serve necessary ends, but short-sighted provisions potentially subject the private providers to costly and unnecessary litigation. The *Abbott* decisions embodied the concept of a partnership between the local school boards and the private providers. In good faith, these parties should contract to effectuate the ends mandated by *Abbott*, keeping an eye on the constitutional status *Abbott* places on private preschools.