WALTER J. McCARROLL,
ASSISTANT COMMISSIONER
DIVISION OF COUNTY AND
REGIONAL SERVICES, NEW JERSEY
DEPARTMENT OF EDUCATION,
Petitioner

v.

BOARD OF EDUCATION OF JERSEY CITY, ITS
OFFICERS, EMPLOYEES, APPOINTEES AND AGENTS,
Respondent.

Initial Decision: July 26, 1989
Final Agency Decision: August 31, 1989
State Board of Education Decision: October 4, 1989
Approved for Publication: March 8, 1990

SYNOPSIS

By order to show cause, the Commissioner of Education directed the Board of Education of Jersey City to appear before the Office of Administrative Law to show why the State should not take over operation of the Jersey City school district, as permitted by recently enacted legislation, P.L. 1987, c.398 (codified at N.J.S.A. 18A:7A-14 and 7A-15). A hearing was conducted by an administrative law judge on the issue of whether takeover was justified.

The administrative law judge concluded that Jersey City was not providing a thorough and efficient education, as required by law, and that the district was unable to take the necessary corrective measures on its own. The judge found various deficiencies, including failure to maintain academic standards; failure to exercise proper fiscal management; widespread political intrusion into school operations, and failure to maintain appropriate facilities. Takeover by the State of the Jersey City schools was ordered.

Upon review, this initial decision was adopted by the Assistant Commissioner of Education, who was deciding this matter because the Commissioner had recused himself. The Assistant Commissioner recommended that the State Board of Education issue an order directing takeover of the Jersey City schools.

After reviewing the record and the decisions of the administrative law judge and the Assistant Commissioner, the State Board found that takeover was imperative because of the ongoing failure of the Jersey
City school district to fulfill its responsibilities. The State Board issued an administrative order directing removal of the Board of Education of Jersey City and the creation of a State-operated district.

Sally Ann Fields, Deputy Attorney General; H. Edward Gabler III, Deputy Attorney General; Timothy J. Rice, Deputy Attorney General; Vincent J. Rizzo, Jr., Deputy Attorney General; and Marlene Zuberma, Deputy Attorney General, for petitioner (Peter N. Perretti, Jr., Attorney General of New Jersey, attorney) David H. Pikus, Esq., member of the New Jersey Bar, and Helene M. Freeman, Esq., member of the New York Bar, admitted pro hac vice for respondent (Shea & Gould, attorneys). Attorney of Record: William A. Massa, Esq. (Law Department, Board of Education of Jersey City); Michael S. Rubin, Esq., of counsel.

SPRINGER, ALJ:

I. Statement of the Case

This case is about the quality of education for children in the State of New Jersey. Alarmed that a few local school districts are failing to provide the thorough and efficient system of free public schools mandated under the state constitution, N.J. Const. (1947), Art. VIII, §IV, ¶1, the Legislature recently enacted legislation authorizing the State Department of Education ("State") to take over operation of a local district unable or unwilling to correct deficiencies identified during an elaborate State monitoring process. P.L. 1987, c. 398 (effective Jan. 13, 1988). Companion legislation provides for creation of a State-appointed school board to run such district for at least five years and for replacement of the superintendent of schools and other key central office administrators. P.L. 1987, c. 399. Only a small number of school districts are potentially subject to takeover, since the statutory scheme applies only to districts which cannot reasonably

be expected to achieve State certification on their own. The present proceeding is the first and only time the State has sought to invoke the powers conferred by the new law.

State officials charge the Jersey City school district with a recurring pattern of gross deficiencies in the areas of governance and management, educational programs and fiscal practices. Allegedly these problems have produced dire consequences which the State contends have brought the district to the brink of "managerial bankruptcy." Among the more serious charges levied against the present managers are consistent inability of the district to meet minimum certification requirements and academic standards; lack of an adequate policy framework to guide district activities; widespread political intrusion into the school system; personnel decisions made on the basis of patronage, nepotism or union pressure; inadequate evaluation of staff; failure to hold employees accountable for poor performance; use of outmoded curricula and instructional materials; unacceptably low student attendance and unacceptably high dropout rates; disregard of the legal rights of handicapped children and their parents; sloppy financial record-keeping and ineffective controls over expenditure of public money; violations of the public bidding laws and imprudent business practices; misappropriation of Federal and State funds earmarked for specific purposes; and failure to maintain a safe and wholesome environment in which children can successfully learn.

Defense of the local board against the State's charges takes two tacks. As its first line of defense, respondent Jersey City Board of Education ("Jersey City" or the "board") denies the accuracy of the State's description of current conditions and challenges the objectivity of State monitors. Jersey City maintains that it has already instituted significant reforms and improvements, and that it is fully capable of solving any remaining problems without outside intervention. Indeed, Jersey City points to recent developments which it says show that the district has made remarkable progress and is currently on an "up-

2. New Jersey has 583 local and regional school districts, 463 or 80% of which passed Level I and obtained certification immediately. Of the 120 school districts which originally failed, 102 have since obtained certification, seven are still in Level II and eleven are in or about to enter Level III.

3. "Jersey City" refers to the local educational district and its school board, as distinguished from the municipality itself and its governing body, which will be referred to as the "City."
swing." Central to this part of Jersey City's defense is its contention that the State placed excessive reliance on hearsay evidence from biased sources and that the actual record provides little support for the State's purported findings. As its second line of defense, Jersey City seeks to shift responsibility away from itself and onto persons or circumstances beyond its control. Insofar as some deficiencies may still exist, Jersey City blames them on the aftermath of mismanagement under a different school board and mayor, on the claimed failure of the State to act sooner to stop dissipation of resources, and on social and economic conditions prevalent in many large urban settings. Further, Jersey City criticizes the State for making unrealistic demands which do not sufficiently take into account its unique history, socioeconomic character and fiscal constraints.

Both sides agree that the basic issue underlying this litigation is relatively simple, although each accuses the other of distorting the facts, burdening the record and clouding the issues. Despite their differing perspectives, the parties are in fundamental agreement on what this case is all about. Petitioner defines the major issue in terms of whether the local district "has failed to take or is unable to take the corrective actions necessary to provide a thorough and efficient educational system." Similarly, respondent emphasizes the statutory focus on "corrective action" and the extent to which the district is or is not capable of solving its own problems. The takeover statute itself supplies the standard of review applicable at this stage of the proceedings. At the administrative hearing, the State has the burden of proving that the proposed takeover order "is not arbitrary, unreasonable or capricious." Stated in this way, the scope of the inquiry

4. N.J.S.A 18A:7A-14(e). Such limited scope of review at the administrative level is a common feature of education law, although normally it applies to state agency review of local board action. Illustratively, a school board's withholding of a teacher's salary increment may not be upset unless the teacher can show that the action was "patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294-295 (App. Div. 1960). A school board's discretion to grant or deny tenure must be upheld unless "based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served." Ruch v. Greater Egg Harbor Reg. High Sch. Dist., 1968 S.L.D.7, cited with approval in Donaldson v. N. Wildwood Bd. of Educ., 65 N.J. 236, 247 (1974). But see In re Masiello, 25 N.J. 590 (1958), recognizing that the Commissioner of Education may be required to exercise independent judgment if necessary to assure that the terms and policies of the school law are being faithfully effectuated.
is extremely narrow and limited. It is not whether the Commissioner of Education ("Commissioner") and his staff are necessarily correct in their analysis, but merely whether there is enough evidence for a reasonable person to reach the same conclusion.

For reasons discussed in detail below, the State has easily satisfied its limited burden. Even under separate weighing of the evidence and independent factfinding, however, the record strongly supports the need for State takeover to address long-standing problems which the local district has been unable to cure. Ample proofs establish that the children attending public school in the district are not receiving the thorough and efficient education to which they are entitled, that political interference originating in earlier school administrations has continued, that public money allotted to education in the district is being misspent, and that district problems chronicled in so many State reports are deep-rooted and endemic. Social and economic conditions do not excuse shortchanging the children, and in fact provide additional reasons why capable management of the district is so important to the future of the next generation. Children from impoverished backgrounds must not also be condemned to poor schools.

II. Procedural History

A. Results of State Monitoring

Issuance of a takeover order is the last step in a lengthy monitoring process. Regulations prescribe a three-tier procedure for monitoring local school districts.\(^5\)

Level I, conducted by the County Superintendent's Office ("County Office"), involves evaluating performance against a set of ten "elements" subdivided into a total of 51 "indicators."\(^6\) The County Office is an arm of the State and the county superintendent is the agent of the Commissioner on the local scene. If a district passes the first phase of monitoring, it receives certification valid for five years. If not, it must go on to the next level. From March 27 to June 7, 1984, the staff of the Hudson County Office, under the supervision of County Superintendent Louis C. Acocella, conducted an evaluation

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6. These ten elements are planning, school/community relations, curriculum/instruction, student attendance, facilities, professional staff, mandated programs, basic skills, equal educational opportunity/affirmative action, and financial. In turn, each element has from two to six indicators.
of the Jersey City district. On June 15, 1984, the county superintendent rated Jersey City "unacceptable" in nine of the ten elements (all but school/community relations) and in 32 of the 51 indicators.

Level II, also under the auspices of the county superintendent, offers an opportunity for the local district to prepare and implement its own self-study and improvement plan. Although the plan is developed by committees of educators and citizens from the local district, the County Office stands ready to provide technical assistance and must approve the plan before it is put into effect. Again, if the district passes the second phase, it obtains certification without entering the next level. Jersey City took almost the entire 1984-85 school year to write its self-improvement plan, which eventually gained county superintendent approval in April 1985. Throughout the 1985-86 school year, Jersey City implemented its self-improvement plan. Next year, between September 15 and November 17, 1986, County Office staff reevaluated the district to see if the prior deficiencies had been corrected. In a report dated December 17, 1986, the county superintendent rated eight elements and 28 indicators as still unacceptable. Dissatisfied with the rating on five indicators, Jersey City pursued its right of appeal to an assistant commissioner, who changed one indicator and confirmed the others, leaving 27 negative ratings.

Level III represents a marked shift in emphasis. While the earlier levels focused on identifying problems, the third level explores the causes of any continuing deficiencies. There are two distinct components: (1) the preliminary review and, under certain circumstances, (2) a comprehensive compliance investigation (abbreviated "CCI"). The preliminary review has two main features. An external team of educational experts, carefully selected from outside the district, examines those areas previously found to have been deficient. Team members look at documents, visit school buildings and talk with local administrators and teachers before arriving at a consensus. In addition, the Office [now Division] of Compliance, comprised of State auditors and interviewers, undertakes a thorough investigation into management and business functions.

Once the preliminary review is complete, the State must choose between alternate courses of action. Either the State directs the district to establish a corrective action plan and assures that sufficient funds

7. Understandably, because Jersey City was already seven months late in submitting its plan, the State denied the incoming school administration's request for more time to make last-minute revisions.
are available to implement such plan; or, in the event that conditions within the district preclude internal reform, the State initiates a more intensive inquiry known as the CCI. To assist in this endeavor, the State may retain the services of independent accounting or management firms. At the conclusion of the CCI, the State issues a final report documenting the district's irregularities and may issue an order to show cause why the district should not be taken over.

In the case of Jersey City, the State conducted its Level III preliminary review from January through May 1987. During March and April, an external team, chaired by urban educator Greta Shepherd, made extensive visits to district schools. Meanwhile, investigators from the compliance unit, under the leadership of director Richard Kaplan, examined records and interviewed persons knowledgeable about district affairs. Both the compliance unit and the external team gave unfavorable reports about Jersey City and recommended further action. Assistant Commissioner Walter J. McCarroll, in charge of all county offices, determined that a CCI was necessary. On June 5, 1987, McCarroll announced the start of the CCI, which continued for nearly a year and culminated in the preparation of a three-volume report of over 3,000 pages. Highlights of the CCI Report include a management audit performed by the consulting firm of Cresap, McCormick & Paget and an investigation into certain fiscal practices performed by the accounting firm of Peat Marwick Main & Co.

B. Proceedings Before the Office of Administrative Law

By order to show cause entered on May 24, 1988, Commissioner Saul Cooperman directed Jersey City to appear before the Office of Administrative Law ("OAL") to show why a State-operated school district should not be created. Accompanying the order was a verified complaint filed by Assistant Commissioner McCarroll and a motion for emergent relief with supporting affidavits. Commissioner Cooperman transmitted the manner to the OAL on May 26, 1988, but originally retained jurisdiction over the emergent relief motion. Jersey City filed its answer with the OAL on June 1, 1988.

On the return date of the order to show cause, June 3, 1988, counsel for the parties delivered opening statements and participated in a prehearing conference. After a short discovery period, the OAL held 103 days of hearings, commencing on July 11, 1988 and ending
on March 3, 1989. These hearings generated a massive record consisting of more than 21,000 pages of transcript and more than 800 separately identified documents.

While the hearing was in progress, Commissioner Cooperman granted Jersey City’s motion that he recuse himself from further involvement in the decisionmaking process, and he designated Assistant Commissioner Lloyd J. Newbaker to act in his place. Additionally, Commissioner Cooperman authorized the OAL to rule on the pending emergent relief motion. The OAL heard oral argument on July 25, 1988. That same date, the OAL granted the State’s request for immediate veto power over the district’s personnel changes and over expenditures exceeding $5,000, but denied the State’s request for access to the district’s internal communication system.

Counsel filed proposed findings of fact and conclusions of law on May 1, 1989. The record closed on May 22, 1989, on which date counsel made oral closing statements. Time for preparation of the initial decision was extended to July 26, 1989.

III. Findings of Fact

A. Background Characteristics of the Community

Located in Hudson County across from Manhattan, the municipality of Jersey City (“City”), covering an area of 13 square miles, has a population of roughly 220,000, making it the second largest city in New Jersey. A rich diversity of ethnic and cultural heritages is represented. Half of the community at large belong to one or another minority group, including large numbers of African-American, Hispanic, Indian, Asian and Arab residents. Over the last two decades, there has been an influx of immigrants into the City, particularly from Latin American and Asian countries. Correspondingly, the white

8. A large part of the first week of hearings was devoted to evidentiary problems relating to the State’s claim of executive privilege for certain documents.
9. The Commissioner’s decision on motion for recusal was entered on July 21, 1988 and a supplemental order on July 26, 1988.
10. Emergent relief is intended to preserve the status quo until the outcome of a full hearing. Assistant Commissioner Newbaker, on August 9, 1988, affirmed the emergent relief order and on September 6, 1988 declined Jersey City’s request for a stay of his ruling. Subsequently, on December 1, 1988, the State Board of Education also affirmed the emergent relief order, with only minor modifications.
population in the City has been dwindling. Often the newcomers speak native languages other than English or come from poor and underdeveloped countries.

Neither side disputes that the City has its share of social and economic ills, which beset many large metropolitan areas. Surprisingly, for a case so vigorously litigated, the record contains little solid information which might be useful in measuring the actual magnitude of these problems, such as census data, unemployment figures, crime and drug arrest reports, teenage pregnancy rates, or welfare statistics. Rather, the evidence consists mainly of anecdotal accounts by local school leaders of the daily problems they confront.

Illustratively, Franklin Williams, the district’s superintendent of schools and life-long City resident, spoke movingly of squalid living conditions in housing projects and high-rise apartments, of children from broken families or single parent households, of racial unrest, of high unemployment, and of youngsters exposed to derelicts and drug dealers on the way to school. Similarly, Daniel Cupo, born and raised in the City and the principal of School 23, talked about homelessness, about neighborhood fear of crime, and about police occupying the roof of his school building as an observation post. Elementary school principal Claudette Searchwell, called by the State as a witness, also referred in general terms to the adverse effects of hunger, inadequate shelter, inferior city services and substance abuse.

No one, least of all the State, doubts the existence of poverty in the City or its negative impact on quality of life. Expert testimony indicates that, on average, children from lower income families have greater absences from school and receive less encouragement at home for academic achievement. Socioeconomic factors may help to explain why, as a group, students from poor families do less well on standardized tests than students from wealthy families.11

What must be rejected outright, however, is any notion that the undeniable realities of inner-city life constitute a valid reason for mismanagement, political interference, waste and inefficiency, or failure to teach children the minimum basic skills needed to function in modern society. If at all relevant, the underlying social and economic conditions make it all the more imperative that the school system supply the missing advantages which children from more privileged

11. The existing record provides little basis for making such connection, but the literature on effective schools recognizes that standardized test results correlate positively with higher socioeconomic status.
surroundings receive automatically. Greta Shepherd, chosen to head the Level III external team because of her extensive urban school experience, places the fault for failing to educate urban children squarely on those responsible for delivery of instruction and not on the children themselves. Along the same lines, Jersey City’s expert in urban education, Dr. Kenneth Tewel, an assistant professor at Queens College of the City University of New York, has suggested that urban districts should be held to higher standards than their nonurban counterparts because city students live in a more complex and demanding world. Accordingly, to the extent that Jersey City has demonstrated that its children must overcome the destructive influences of poor environment, the quality of education in the district becomes an even more critical issue.

B. Characteristics of the School District

Jersey City is a Type I school district, which means that it has an appointed rather than elected school board and that its budget is set by a board of school estimate rather than the voters. Comprised of nine members, the school board is entrusted with oversight of the far-flung operations of a kindergarten-to-12th-grade system. Every year the mayor of the City names three members to three-year terms on the school board. The five-member board of school estimate, responsible for certifying the district’s appropriations, consists of the mayor, two City council members, and two school board members.

As of May 1988, the district operated 29 elementary schools and 5 high schools. Most of the elementary schools have kindergarten through eighth grade programs and two (Schools 31 and 32) are special schools for handicapped or gifted children. Besides its own schools, Jersey City also has a contract to run the state-sponsored

12. Classification into types of school districts is by statute, N.J.S.A 18A:9-1, "et seq."
13. Upon taking office in July of an election year, the mayor appoints three board members. A year later in July, the mayor appoints three more members and his appointees effectively gain control over the board. In July of the second year, the mayor has an opportunity to rid the board of all holdovers appointed by his predecessor. Appointees of the incumbent, Mayor Anthony R. Cucci, who took office in July 1985, constituted a majority of the board by July 1986 and the full board by July 1987.
14. These five high schools are Dickenson, Snyder, Ferris, Lincoln and Academic.
Regional Day School for classified students, serving all of Hudson County. Districtwide enrollment for the 1987-88 school year totaled about 30,000 students, out of a pool of 52,000 school-aged children residing in the City. Enrollment may be further broken down into 22,300 students at the elementary level and 7,500 at the secondary level. Almost all public schools in the districts have non-white enrollments in excess of 50 percent, with more than half having a non-white enrollment as high as 90 to 100 percent. However, proofs are insufficient to make any meaningful comparison between the proportion of minorities living in the City and the proportion enrolled in the public schools. Public schools must compete for talented City students against a well-established network of parochial and private schools.

In 1987-88 the district's total school budget was $172.6 million, up considerably from two years earlier in 1985-86 when the budget was $140 million. The bulk of that money goes to salary accounts. Jersey City employs about 140 administrators, 2,800 teachers or other professionals, and 1,400 custodians, security guards, lunch aides or other non-instructional staff. Revenues to pay for the Jersey City school system come primarily from taxpayers outside the district. More than two-thirds of the 1987-88 budget (67.4 percent) came from Federal and State aid and less than one-third (32.6 percent) from local taxes and other sources.

C. Historical Overview

One point on which both parties are fully in agreement is the existence of serious irregularities and flagrant political interference in school affairs at the time of former Mayor Gerald McCann, who was mayor of the City from 1981 to 1985. Chief State Investigator Richard Kaplan described the McCann era as one of unparalleled control of the school system by City Hall, while, more colorfully, Jersey City's lawyer described it as a "reign of terror." The record abounds with troubling stories of misdoings by individuals associated with the McCann regime.

Shortly after his inauguration on July 1, 1981, Mayor McCann brought in John Sheeran as president of the school board. Current Superintendent of Schools Franklin Williams recalled that Sheeran

15. The City is governed by an elected mayor and nine-member council, who serve four-year terms of office.
promptly demanded his own room and secretary in the district's central office, where he personally interviewed people for jobs with the district. Williams himself was deputy superintendent throughout the McCann years and, nominally at least, second in command of the district.

Under Sheeran, the board in 1981 abolished the positions of six assistant superintendents and later replaced them with nineteen less qualified principals “assigned to central office.” In 1981 as well, the board terminated 41 untenured teachers who had supported the “wrong” candidates in the mayoral election. Custodial and maintenance people who fell into political disfavor also lost their jobs or were demoted. As Williams memorably put it, “if your father supported the opposition during the election, the child was to suffer.” Ensuing lawsuits embroiled the district in litigation and, ultimately, State education officials restored to their jobs many of the district’s employees who had been purged for political reasons.

In late 1981 a Hudson County Grand Jury handed down a presentment condemning the “widespread and bold-faced injection of political considerations into the selection and assignment of instructional personnel” and recommending that the board's hiring practices be “based upon sound principles of personnel management.” Sheeran resigned in 1982 under pressure resulting from the Grand Jury investigation.

But Sheeran’s successor as board president, Nicholas Introcaso, deputy mayor of the City and a McCann ally, “marched in with his bodyguard and . . . wanted a larger room,” according to the eyewitness account of then Deputy Superintendent Franklin Williams. Introcaso arranged to soundproof his new room and “held audience there . . . [for] people who were looking for his support in obtaining a job or getting something done.” Dr. Pablo Clausell, an assistant superintendent demoted at the time of McCann, portrayed Introcaso in much the same way. Clausell related how Introcaso ejected him from his office and left him sitting in the hallway, how Williams moved Clausell’s desk into the hallway, and how Introcaso “had a wall built right next to the desk” so as not to impede the flow of visitors to Introcaso’s nearby room.

Initially, Introcaso had been loyal to Mayor McCann and his administration. Soon, however, Mayor McCann perceived Introcaso as getting “out of [his] control” and developing other loyalties, so he appointed his campaign manager Aaron Schulman to the school
board to keep track of Introcasso's activities. When Introcasso's term expired in 1983, Schulman succeeded him as board president.

Campaigning as a reform candidate pledged to improve school conditions, Anthony R. Cucci, a former teacher, was a top vote-getter in the May 1985 preliminary election and won the runoff contest for mayor against McCann in June 1985. Mayor Cucci took office on July 1, 1985, and immediately thereafter appointed three new board members, including Dolores Eccleston, a zone leader in his successful campaign who was promptly selected board president. Aaron Schulman, McCann's handpicked choice to replace Introcasso, remained on the board as a continuing irritant to the new administration until his term ended in 1987.

Ironically, the two top administrators presently in charge of the district are the same people who held key administrative posts during the McCann period. Superintendent Williams survived the virtual dismantling of the central office in 1981, and, as deputy superintendent while others around him were losing their jobs, assumed greater responsibility for tasks previously performed by the displaced assistant superintendents. Although Williams insists he was powerless to stop the excesses which admittedly occurred between 1981 and 1985, the fact remains that for most of that time he was the administrator directly responsible for curriculum and facilities. James Jencarelli, another of the few survivors in central office, today occupies the second highest post of deputy superintendent. At the time of McCann, Jencarelli was first assistant superintendent for personnel and, in that capacity, was involved in the wholesale dismissal of disfavored employees.

After Cucci became mayor in July 1985, Jencarelli served as "interim" superintendent for about six months, until forced to resign due to poor health. He still remains, however, in the important role of deputy superintendent. Franklin Williams took over as superintendent on August 16, 1985, under circumstances to be explored in a later section (Section III, Part E). Summing up his experience in the McCann years, Williams called it "one big complete mess, legally
and morally, and financially."16 When Mayor McCann left office, the
district had failed Level I monitoring and was facing a projected $4.4
million budget deficit.17

D. Alleged Bias and Negligence of State Education Officials

Before reaching the merits of the controversy, this decision will
address two of Jersey City's major themes: namely, its claim that the
State itself, through inaction and neglect, contributed to the district's
current predicament; and its claim that State investigators did not
conduct a fair and objective study of existing conditions.

Because the State was aware as early as 1982 of the enormity
of the district's problems, Jersey City lambasts the State for not
moving more quickly to correct the situation. There are several
responses to Jersey City's transparent effort to divert attention from
where it rightfully belongs. Direct State intervention is a last resort
available only when local management has shown itself incapable of
correcting its own problems. State officials can, and here did, provide
the local district with technical assistance and support, but ac-
countability for performance rests with the local educational
authority. Far from being the basis for valid criticism, it is commen-
dable that State officials sought to exhaust all reasonable possibility

16. Administrative Law Judge Steven Lefelt, in the landmark school financing
case, made factual findings that "the pervasive nature of the political
intrusion into Jersey City's school system [was] shocking and harmful
to the school children of Jersey City and qualitatively and quantitatively
different from the pressures present in most other property poor dis-
rev'd on other grounds (Comm'r Feb. 22, 1989), aff'd (St. Bd. April 13,
certif. granted while pending unheard in the Appellate Division, No.
30433 (N.J. April 28, 1989), (at 333).

17. Since budget cuts were made, the anticipated deficit never materialized.
Local school districts are always required to make tough choices on how
best to spend finite public funds to maximize educational benefits. Jersey
City must certify to the State each year that the amount of money it
spends is adequate to satisfy the requirements of a thorough and efficient
education. If Jersey City believed that the amount appropriated in
1985-86 was inadequate for this purpose, it was obligated to appeal to
Council, E. Brunswick, 48 N.J. 94 (1966). In point of fact, the amount
of money Jersey City spent on education rose steadily during the Cucci
years.
for local self-improvement before taking the drastic step of imposing an outside solution. Monitoring of all local districts in New Jersey started in 1984, and for the first few years the State was engaged in collecting information about which districts were failing and why. Legislative proposals to empower the State to take over operation of failing school districts did not become law until January 1988, and within four months the State had moved to take over Jersey City.

Assuming for sake of argument that the State should have done something sooner to save the district from itself (as will be subsequently seen, State officials believe that any remedy short of takeover would be inadequate to cure the district's entrenched problems), certainly the State is not thereafter barred from doing whatever is necessary to protect the children of Jersey City from continuing educational damage. It is pointless to speculate on missed opportunity, when the pressing question is what needs to be done now.

Jersey City's attack on the impartiality of State investigators is equally undeserved. 18 Much of this claim depends on the theory that Commissioner Cooperman had prejudged the outcome of the investigation and that his known predisposition unduly influenced the views of his subordinates. Quite the opposite is true. Instead of trickling down from the top, the initial investigatory work and making of tentative conclusions were done by low-rung State employees, and their negative findings about Jersey City filtered up from the bottom to Kaplan, Dr. McCarroll, and eventually to Commissioner Cooperman. Jersey City itself makes a point of the fact that Dr. McCarroll never personally visited the district, but relied exclusively on the reports of his staff. Commissioner Cooperman did not appear on national television until after the final version of the report had

18 Jersey City's criticisms reveal its fundamental misunderstanding of the administrative process. An administrative agency "is not simply a neutral forum whose function is solely to decide the controversy presented to it." Hackensack v. Winner, 82 N.J. 1, 28 (1980). Agencies are an arm of the executive branch of government, "specially created by the Legislature to administer laws in accordance with the statutory duties that have been selectively delegated to them." In re Uniform Admin. Procedure Rules, 90 N.J. 85, 91-95 (1982). Their adjudicative functions "are actually an aspect of their regulatory powers[.]" Uniform Rules, at 93. Agency staff are not supposed to approach their tasks with completely empty minds, but are chosen for special knowledge and expertise in highly technical fields. "We neither expect nor desire the 'total absence of preconceptions.'" Sheeran v. Progressive Life Ins. Co., 182 N.J. Super. 237, 244 (App. Div. 1981).
been publicly released, and he has since removed himself from further participation in the proceeding. 19

An incident on which Jersey City relies to show lack of balance and objectivity is the much ballyhooed statement by Sherilyn Poole, assistant director of the compliance unit, that her job was "to investigate the district's deficiencies and verify the systemic rottenness of it." In the course of discovery, Jersey City gained access to literally dozens of papers of internal State documents, and it is hardly surprising that some of them would reflect the evolution of the State's thinking at any particular time. By the time of Poole's statement in July 1987, Jersey City had been previously identified as a district in extreme difficulty and the thrust of the investigation had shifted to an examination into the causes. Recognition that something was rotten in Jersey City and needed fixing is a far cry from suggesting, as Jersey City tries to do, that Poole or any other State official refused to give the district credit for genuine improvements. Surely Poole herself does not fit into that category, since she is quoted approvingly by Jersey City for her complimentary observations about the district's revised curriculum documents. Other State witnesses also had some positive things to say about Jersey City, including praise for the many dedicated and fine teachers in the district.

Aspersions cast by Jersey City on the personal competence and integrity of State monitors are another obvious attempt to sidetrack the inquiry and deflect attention from the district's own inadequacies. Worst was Jersey City's denigration of external team leader Greta Shepherd as an "older, tired educator" who had difficulty staying awake. Contrary to the impression sought to be conveyed, at the hearing Ms. Shepherd appeared alert and feisty. Jersey City also issued an unusually harsh denunciation of county superintendent Acocella, whom it accused of not doing enough to stop Mayor McCann. Neither side saw fit to offer Acocella's testimony, although Jersey City had named him as a witness and decided at the last minute not to call him. On the existing record, the most that can be confidently said about Acocella's job performance is that the Level III investigation

19. An agency head is not automatically disqualified merely because he has become familiar with the facts of the case through the performance of statutory or administrative duties or even because he has announced an opinion on a disputed issue; but he must step aside if he is tainted by actual bias. In re Gen. Disciplinary Hearing of Trp. Carberry, 114 N.J. 574, 585-586 (1989).
confirmed many of the deficiencies which Acocella or his staff had previously noted at Levels I and II.

Carping by Jersey City about relatively insignificant items, including complaints about the timing of the State's investigation or excessive paperwork requirements, does little to enhance its image. Prior to Level II monitoring in September 1986, Superintendent Williams and his associates had enjoyed the advantage of a full year (1985-86) to make necessary changes in practices and procedures. State monitors are entitled to check conditions as they actually are and not only under ideal circumstances. Regardless of the desirability of reducing unwanted paperwork, the State must still have a method of assuring that local districts are adhering to applicable statutes and regulations. Unless the State were to assign a cop to every classroom, the State must rely on record-keeping by local districts as a valuable source of information. Similarly, the fact that the State exercised editorial control over its own investigative report did not compromise the professional independence of its outside experts, all of whom testified that the ideas they expressed were their own.

In sum the evidence does not lend support to Jersey City's contentions that the State wanted the district to fail monitoring all along or is overly eager to arrogate for itself the burdensome responsibility of running the district.

E. Governance and Management

1. Abdication of the Proper Board of Education Role

Above all, State officials pinpoint Jersey City's greatest weakness as the absence of effective leadership, direction and vision at the very top of its management structure. Evaluation of this diagnosis must start with the role of the board of education. Each party has a markedly different conception of what a board of education should do and whether the Jersey City board is fulfilling its proper role.

State officials hired the national consulting firm of Cresap, McCormick and Paget ("Cresap McCormick") to conduct a management study of Jersey City and make recommendations. Supervised by Dr. Eugene Smoley, a team of Cresap McCormick researchers spent two months visiting seven Jersey City schools and interviewing 85 people from board members on down. Dr. Smoley, whose qualifications include a doctorate from Johns Hopkins University, administrative experience in a large Maryland school system and a wide range of consulting work for urban as well as nonurban districts, testified
at length regarding his expert opinion and stood up well under blistering cross-examination which lasted several days. Dr. Smoley envisions the board’s primary role as formulating overall policy for the district, setting clear goals and objectives, engaging in planning, picking key administrators responsible for day-to-day management and overseeing the performance of those administrators.

While not completely disagreeing with this approach, Jersey City’s expert, Professor Kenneth Tewel of Queens College, put much greater emphasis on the board’s role as repository of local community sentiment and values, and on the necessity for lay board members in large urban districts to delegate decision-making authority to trained professional educators. Dr. Tewel’s background is much less varied than that of Dr. Smoley and is concentrated on reform of hard-to-manage schools in Queens and Brooklyn. Perhaps because of his personal exposure to some of New York City’s most violent and troubled schools, Dr. Tewel seemed somewhat complacent or jaded, and less inclined to measure a school system against rigorous standards of excellence.

In Dr. Smoley’s view, the Jersey City board has failed adequately to carry out any of its main responsibilities. With respect to establishment of a policy framework, at one time in 1984 the board itself recognized that its policy manual was more than ten years out-of-date and required extensive revision to accommodate many recent changes in law and educational theory. Consequently, in December 1985 the board entered into a contract with the New Jersey School Board Association for assistance in rewriting its policy manual. Two and one-half years later, in May 1988, the board still did not have an updated policy manual, notwithstanding what the Association said were “numerous attempts to schedule the start of the project[.]”

Jersey City’s excuse for assigning such low priority to such an important task raises more questions than it answers. The board attributes part of the delay to the illness of Deputy Superintendent Jencarelli, the person designated to coordinate preparation of the new manual. Solicitude to the health of an employee is an admirable trait, but not at the expense of the welfare of an entire district. This attitude on the part of the board points up a disturbing tendency to elevate personal loyalties and friendships over the needs of the children. Simply put, if Mr. Jencarelli was too sick to work on the manual, the board should have found someone able to do the job. On other occasions, Jersey City sought to downplay the importance of a new policy manual, referring to updated policy statements supposedly kept
in mysterious loose-leaf binders at the central office but never produced at the hearing.

Insofar as planning is concerned, Dr. Smoley commented on the unambitiousness of the district's short-range objectives which dealt with little more than satisfying minimum certification standards, on the lack of fixed timetables for achieving acceptable results, and on the utter absence of any long-range planning. Essentially, Jersey City's response was that its annual objectives must be good because the State had approved them. Apart from immediate steps to acquire greater building space and to phase in new curriculum, Jersey City did not come forward with any coherent long-range planning efforts.

Moreover, Dr. Smoley criticized the board for what he regarded as insufficient attention to educational issues and overemphasis on the details of business and personnel matters. Combing through transcripts of the 1987 board meetings, Dr. Smoley cited specific examples where the board made important educational decisions without advance review of materials furnished by the school administration. For instance, at the meeting on August 19, 1987, no one on the board, not even the chairwoman of the curriculum committee, had actually read the revised curriculum documents which the board approved that very night. Similarly, at a meeting on April 22, 1987, the board hastily approved a textbook list, despite a complaint by one member that she did not have enough time to review voluminous materials received by her the night before the vote. At other times, the administration failed to provide the board with an explanation sufficient to make an intelligent decision or failed to follow through on legitimate requests by board members for additional information. Examples cited by Dr. Smoley include the meeting on April 27, 1987, at which the board authorized large price increases in food service and bus transportation contracts without any clear understanding of the reasons for the extra costs.

According to Dr. Smoley, the cumulative effect of such behavior is to cede the board's policy-making authority over to school administrators and relegate the board to a perfunctory role. His opinion is disputed by Dr. Tewel and Board President Michael Marino, who maintain that volunteer part-time board members cannot possibly manage a large urban school district by themselves and appropriately must defer to recommendations of educational specialists or distribute work among subcommittees of the whole board. President Marino, an experienced business executive, considers it good management practice to rely on the professional judgment of educators in whom
he has confidence. Mr. Marino mentioned several policy changes which originated with the board, including abolition of a grading policy that had allowed students to advance from grade to grade without achieving a minimum level of proficiency.

Dr. Smoley's further criticism that the board wastes a lot of time bickering and squabbling over petty matters was corroborated by the first-hand observations of other State witnesses. Compliance Director Richard Kaplan personally attended several board sessions in 1987 through March 1988 and reported an atmosphere of confusion, characterized by an undercurrent of noise, people milling about the room, board members yelling and screaming at one another or leaving their seats to engage in private conversations, the board secretary making faces at the crowd, and a chorus of hoots and catcalls from the audience. Director Kaplan remembered one especially heated exchange in which Superintendent Williams entered into a shouting match with a board member whose term was about to expire. Delores Eccleston, the board member who preceded Mr. Marino as president, recalled a separate meeting at which Mr. Williams accused her of being ignorant and told her to shut up.

Jersey City seeks to minimize these events by ascribing them to obstructionism by the holdover McCann appointees, particularly Aaron Schulman, described by Mr. Marino as "extremely disruptive" and "very argumentative." Mr. Marino testified that the board meetings became much more businesslike and productive as soon as Mr. Schulman was no longer a member. Carried to its logical extreme, Dr. Tewel conceives of the board not as a single corporate entity, but as a series of different "boards" controlled by whichever faction happens to be dominant at any given time. As Dr. Tewel sees it, the board under Mr. Marino's leadership has become more purposeful and more interested in education.

Dr. Tewel's analysis has several serious flaws and, even if accurate, bodes ill for future progress in the district. In the first place, the Cucci faction constituted a majority of the board by 1986 and cannot continue to blame the other guy for its own mistakes. In addition, it is overly simplistic to split the board neatly into pro-Cucci and pro-McCann forces. The real situation is far more fluid and involves a shifting pattern of personal allegiances and local alliances. One day Mrs. Eccleston would be Mayor Cucci's preference for board president and the next she would be aligned with the Schulman block of votes. One day Aaron Schulman would nominate Franklin Williams to be superintendent of schools and the next he would be leading
the fight against Mr. Williams' appointment. It is not just control by one or another group, but rather the constant infighting and jockeying for power which immobilize the board. More fundamentally, Dr. Tewel's analysis overlooks the importance of continuity and consistency in correcting the district's deficiencies. Inevitably, as Dr. Tewel recognizes, the group in control will change with the tides of political fortune, along with a radical switch of personalities and policies. Instead of illuminating the cause of problem, Dr. Tewel's description of the board's inner dynamics is symptomatic of the bitter factionalism which permeates the board's activities and frustrates any concerted action to bring about enduring reforms.

As a case study of the board's ineffectiveness, this decision will now examine the decision-making process behind Jersey City's most important decision, that of selecting its chief school administrator. Given the current board's condemnation of the McCann administration and the significance of the superintendent's job, it might be expected that the incoming board would want to conduct an exhaustive search for fresh talent and new ideas. Nothing of that sort actually occurred. A short while before the board was scheduled to vote, Mrs. Eccleston got together at City Hall with Mayor Cucci and two council members and the four of them mutually "agreed" (in Eccleston's words) to elevate insider Franklin Williams to the vacant superintendent's post. When it came time to make the actual choice, the board considered only Mr. Williams and no one else.

Improbable as it may sound, it is at least plausible that the exigency of the circumstances prevented the board from embarking on a lengthy recruitment process. After all, appointment of a new superintendent had to be made in August to take charge of the district in September. Interestingly, however, the board never adequately explained why it simply did not appoint another interim superintendent while it continued to look for the best person for the job. Testimony by the major players was strangely inconsistent. Mrs. Eccleston understood that the board had appointed Mr. Williams to a probationary one-year term. On the other hand, Mr. Williams was sure he had struck a deal that his appointment would be permanent and not temporary.

Even granting Jersey City the benefit of the doubt on Mr. Williams' appointment, the conditions under which he ultimately acquired tenure as superintendent, without the board's knowledge or consent, are totally indefensible. Although school districts normally conduct annual job evaluations, the board did not perform its first
formal evaluation of Mr. Williams until January 1987, by which date he had already held the superintendent's office for nearly one and a half years. Much time at the hearing was devoted by both parties to interpreting Williams' ratings on his evaluations, with the State emphasizing his below-average scores in certain areas and Jersey City emphasizing his above-average scores in other areas. Suffice it to say that the board as a body gave its superintendent a mediocre overall rating, not especially impressive for an individual under consideration for tenure.

Less than two years after Mr. Williams' appointment, the board in June 1987 unsuccessfully attempted, by five-to-four vote, to remove him from office and deny him tenure as superintendent. It was then that the board discovered for the first time that Mr. Williams had already attained tenure and could be removed only through a tenure proceeding. Astoundingly, the board had been unaware when its superintendent was about to obtain tenure. Thus, the board was deprived of any opportunity to exercise its collective wisdom on whether to confer tenure status on the individual serving as its chief school administrator.

I FIND that the Jersey City board has abdicated its responsibilities as a board of education. Undoubtedly, as the expert testimony confirms, the line between policy-making by the board and

20. School boards are required by regulation to evaluate all nontenured chief school administrators annually no later than April 30th of each year. N.J.A.C. 6:3-1.22.

21. A school board's duty requires more than mere appointment of properly certified personnel, but "demands that permanent appointments be made only if the teachers are found suitable for the positions after a qualifying trial period." Zimmerman v. Newark Bd. of Ed., 38 N.J. 65, 72-73 (1962) cert. den. 371 U.S. 956 (1962). Courts treat this test period as so important that they do not allow school districts to be "trapped into tenure" by the unintended consequences of contractual language. Canfield v. Bd. of Ed. of Pine Hill, 97 N.J. Super. 483, 493 (App. Div. 1967) (dissenting op.), rev'd for reasons expressed in dissent, 51 N.J. 400 (1968). Ordinarily, a person promoted within a district does not attain tenure until the expiration of two years. N.J.S.A 18A:28-6. An exception to the general rule exists if the board of education shortens the period of eligibility for all members of a defined class. Rall v. Bd. of Ed. of Bayonne, 54 N.J. 373 (1969); Spadaro v. Coyle, 1965 S.L.D. 134 (Comm'r 1965). Because in May 1976 Jersey City had shortened the eligibility period to 18 months for former superintendent Dr. Ross, it was obligated to do the same for Mr. Williams. Jersey City was ignorant of this complication, so Mr. Williams was able to achieve tenure by default.
improper interference in the daily operations of a school district can be fuzzy. The distinction is always a question of degree. Board members invariably must entrust many operating details of a large district to the professional skill and judgment of qualified school administrators. But here the board failed to perform even its rudimentary role. What emerges from the welter of evidence is a board of education without clear-cut policies and without adequate planning capability; a board which allows City Hall to dictate its choice for chief school administrator and then neglects to evaluate him for tenure; a board which is hopelessly divided among warring factions and self-interested cliques; a board which is incapable of providing continuity or any coherent sense of purpose; a board which reacts to State prodding, but is unable to take the initiative to solve its problems. In short, this is a board which has so lost its own way that it cannot be counted on to lead the children to educational quality.

2. Personnel Function

Another matter of considerable controversy is the issue of political intrusion into the district’s personnel department. State officials allege that a person’s political contacts, familial relationships and friendships rather than competence unduly influenced district decisions about hiring, job assignments, transfers and promotions. Jersey City vacillates between arguing that political patronage in the school system never occurred during Mayor Cucci’s term in office and arguing, in the alternative, that political patronage is a natural or even healthy incidence of urban school districts. Both of Jersey City’s arguments are unconvincing.

Relatives of the mayor advanced rapidly in their school careers after the new administration took over in July 1985. Anne Pollara, the mayor’s sister, had been working as a librarian in a school library long before her brother was elected. Assigned to a school facility, she was on the city payroll and technically a City employee. Her continuation in that job was threatened, however, because she lacked the teaching certification required by the State. About a month after her brother became mayor, Ms. Pollara submitted a job application to the board of education. Louis Lanzillo, first assistant superintendent for personnel (who, incidentally, had just been recommended for that position by Mayor Cucci), approved her application. Four days later, the board created a new position with the imaginative title “audio-visual liaison/graphic arts specialist” at an annual starting salary of
$23,000. Superintendent Williams recommended Ms. Pollara on the spot and the board immediately hired her. According to Jersey City, Ms. Pollara was hired solely because of her qualifications as a graphic artist.

Diane Silvestri, the mayor's stepdaughter, also had a sudden change in fortune which coincided with the mayor's rise to power. Ms. Silvestri had been employed by the board in various clerical positions for nine years before the mayor married her mother. Apparently Ms. Silvestri had suffered retaliation by the McCann administration in September 1984, when she was demoted to a menial job and her salary reduced by $6,000. Two months after her mother's husband became mayor, however, Diane Silvestri received a new assignment with the title "special education awareness specialist." Created by the board on the same day as her appointment, this new title involved public relations more than it did special education (as the result of a Civil Service job audit, the title was subsequently changed to "public information assistant.") She received an increase of $5,000, raising her salary to $22,000. Despite an eight-month leave from work in 1985, Ms. Silvestri also continued to enjoy regular salary increases. In September 1987, she obtained a new assignment as an audiometrist, a bona fide job but one for which she lacked the proper qualifications. Forced to resign, she was immediately rehired by the board in December 1987 as an "administrative analyst" at a salary just under $24,000. Jersey City defended the seeming favoritism shown Ms. Silvestri as simply putting her at the salary level she otherwise would have been if not wrongfully demoted.

Friends and supporters of Mayor Cucci also rose quickly in the ranks of school employees. Councilwoman Bernadette O'Reilly-Lando, elected to office on the Cucci ticket and a close friend of the mayor, coveted a transfer to central office from her assignment as school nurse. Mrs. O'Reilly-Lando expressed her interest in the new assignment to Mr. Louis Lanzillo, as well as to the mayor. At that time, however, the position of "nurse coordinator" at central office was occupied by Jeanette Lewin, who had served the district for 22 years. Prior to the start of the 1986-87 school year, Mrs. Lewin was notified of her transfer to school nurse at one of the elementary schools. The only reason for the transfer given by her supervisor was "for the good of the district." In spite of the fact that Mrs. Lewin forfeited a $1,500 stipend and no longer has any supervisory responsibility (whereas before she had coordinated the activities for 48 other nurses), Jersey City insists that the move was merely a "lateral trans-
fer" and not a demotion. Mrs. Lewin was replaced as coordinator by Bernadette O'Reilly-Lando. School nurse Joan Reidy, another campaign supporter of Mayor Cucci, also helped do some of the work previously done by Mrs. Lewin alone.

Mayor Cucci confessed that he told Mrs. Lewin in or about October 1986 that Mrs. O'Reilly-Lando "had wanted ... Lewin's position for over a year" and that he "was unable to put off her request any longer." The mayor added, however, that he said it to be kind, because he didn't have the heart to tell the recently-widowed Mrs. Lewin that she was not properly performing her job. Medical director, Dr. Eugenia Crincoli, who was dissatisfied with Lewin's work and claimed to have brought particular problems to Mrs. Lewin's attention on several occasions, never gave her a negative written evaluation. Dr. Skrypinski, the medical director until April 1986, had consistently given Mrs. Lewin favorable evaluations. First Assistant Superintendent Lanzillo claimed that he checked with Dr. Crincoli before bringing Mrs. O'Reilly-Lando to the central office, but Dr. Crincoli denied ever having been consulted about whom she wanted as her nursing assistant.

Kevin O'Reilly, the councilwoman's son, began working for the district as an "electronics repairer helper" in September 1985. He had been on the job for only about a month, in October 1985, his title was changed to "electrician" and his salary almost doubled. In connection with this substantial increase, Mr. Lanzillo mistakenly advised the board that Mr. O'Reilly possessed an electrician's license. None of these jobs actually required the holder to be licensed as an electrician, and Mr. Lanzillo testified he was personally aware at the time that a license was unnecessary. As the result of a Civil Service survey, Mr. O'Reilly was reclassified as an "electronics repairer" in December 1985 because he was not performing the duties of an electrician. But his salary stayed at the higher amount. While not challenging these facts, Jersey City argues the district faced a shortage of skilled workers and that young O'Reilly was treated no differently than several other employees in similar circumstances.

On the witness stand, Mayor Cucci came across as a warm and compassionate human being. Nonetheless, his personal sense of values puts too much emphasis on loyalty to family and friends. Although Mayor Cucci recognized that it would be wrong for a political leader to interfere directly in a school district's selection of employees, he had no compunction about recommending people for employment, provided that he felt they were qualified for the job. His definition
of being qualified was extremely narrow, equating the holding of minimum State certification with necessarily being competent to do a good job. With unbefitting modesty, he professed to believe that the board of education, whose members are appointed by the mayor, would not give any greater weight to his recommendations than to anyone else’s.

Board member Timothy Dowd testified that Jersey City has had a reputation for political appointments as far back as he could remember. By his own admission, Mayor Cucci did recommend four individuals for employment by the board. All four got jobs, although Superintendent Williams testified that he had no idea of the mayor’s involvement and that their names were first mentioned to him by Mrs. Eccleston or other board members. Mr. Williams’ testimony differed substantially from a prior statement attributed to him by Cresap McCormick researchers, in which he had said that he interviewed persons suggested to him as prospective position holders “to see if there was any reason not to appoint them” (emphasis added). Management expert Dr. Smooley makes the point that the test should be whether there is a good reason to appoint someone to a particular job.

Most controversial of Mayor Cucci’s recommendations was Louis Lanzillo to be assistant superintendent for personnel. Mr. Lanzillo, a gym teacher for 20 years who had never held any administrative post, was approved by the board on August 16, 1985 (moments after Franklin Williams became superintendent) as the chief personnel officer for the entire district. In August 1987 his title became “first” assistant superintendent. Unperturbed about Mr. Lanzillo’s lack of administrative experience, Mayor Cucci joked, “A gym teacher should be able to make a big jump.” Lanzillo’s main qualification for the job was his extensive experience as grievance chairman for the negotiating unit representing the district’s teachers; or, as Williams expressed it, Mr. Lanzillo “sat on the other side of the [bargaining] table.”

Many people regard such intimate identification with the opposing party in any future contract negotiations as a definite liability rather than an asset. Deputy Superintendent Jencarelli, for one, advised Mayor Cucci that Mr. Lanzillo’s status as a teacher representative was “incongruous” with the responsibilities of assistant superintendent for personnel. Former mayor McCann, in his sworn affidavit, stated that in 1981 he had rejected an offer of support for his candidacy from the teachers’ association in exchange for a promise
to appoint Mr. Lanzillo to the same job. (Incidentally, the president of the teachers’ association supported Mr. Cucci in his 1985 bid for mayor.) Last, but not least, board member Aaron Schulman, hardly a disinterested observer but in an excellent position to know, publicly denounced the Lanzillo appointment as “a political deal.”

It is bootstrapping for Jersey City to rely on whatever success Mr. Lanzillo arguably achieved as head of the personnel department to justify his original appointment to that job. In any event, Mr. Lanzillo’s accomplishments are greatly exaggerated by Jersey City. Credit for eliminating uncertified and improperly certified teachers belongs to the State rather than to Mr. Lanzillo, since the State uncovered the problem and demanded immediate correction. Dramatic reduction in the number of employee grievances going to arbitration is not necessarily an encouraging sign. Instead, it suggests that management may have become overly accommodating to the interests of the teachers’ organization or that teachers may be reluctant to bring legitimate grievances now that their chief negotiator has switched sides.

Within a few days after his own appointment, Mr. Lanzillo submitted a resolution for the board to approve Mayor Cucci’s second recommendation, Councilman Chester Kaminski, as a business “administrative intern” at a hefty $36,000 annual salary. Mr. Kaminski had successfully run for City council as Mayor Cucci’s running mate and had received a $1,700 contribution from the mayor’s campaign committee. Employed by the board since 1968, Mr. Kaminski took a leave of absence between 1977 and 1981 to serve as director of the City’s Department of Human Resources, an agency which administers programs totaling $40 million. Immediately prior to his appointment as administrative intern in August 1985, however, Mr. Kaminski was a Spanish teacher and he had no administrative experience in any school system.

Candidly, Mr. Kaminski admitted that he regarded the internship as a “learning experience,” and that he really wanted to be school business administrator but had not yet acquired the proper license. In or about November 1986, the board appointed Mr. Kaminski to an unclassified position known as business manager. Subsequently, State officials disapproved the board’s request for establishment of a separate position known as school business administrator, in part
because existing positions in the business department appeared to have overlapping responsibilities. 22

Mayor Cucci’s third and fourth recommendations were his neighbor, Frank Falcicchio, and another campaign supporter, Edward Fauerbach. Mr. Falcicchio became the assistant superintendent in charge of Jersey City’s faltering special education program, although his experience in special education was limited to a small program in a nonurban district. Before coming to Jersey City, Mr. Falcicchio had supervised a placement for 15 to 20 emotionally disturbed children and had also worked with educationally handicapped children as a guidance counselor in Freehold, New Jersey. He holds no certificate in the field of special education, has never been a district-wide director of special services for any school system, nor has he ever served as a member of a child study team. During his testimony, Mr. Falcicchio could not recall the name of a single special education course he had ever taken. Superintendent Williams turned a blind eye to what was going on around him. Asked whether during his job interview Mr. Falcicchio had informed him of the mayor’s backing, Mr. Williams first emphatically said no and then hedged, “I try not to remember unpleasant things unless they are severely unpleasant.”

Louis Lanzillo displayed a surprising lack of sensitivity about City officeholders interfering with the district’s internal affairs. Drawing a distinction between professional and nonprofessional staff, he openly condoned obtaining jobs for “noninstructional or low entry” employees such as those “who sweep corridors and wax floors.” Thus, he acknowledged accepting job recommendations from community representatives, including the mayor, City council members, and ward leaders. In addition to a person’s ability to do the work, one of the factors considered at the job interview is how much an individual needs a job.

Clerical workers in Mr. Lanzillo’s own office told a Cresap McCormick interviewer about a two-track system for processing ap-

22. Both “business manager” and “school business administrator” are authorized by statute. Duties of business managers include having “charge and care of the public school buildings and other property belonging to the district.” N.J.S.A. 18A:17-28. School business administrators have duties defined by majority vote of a local school board and can only be appointed if “agreed to by the county superintendent of schools . . . and approved by the commissioner and state board.” N.J.S.A. 18A:17-14.1. See also N.J.S.A. 6:3-1.18. No statutory authorization exists for “administrative intern.”
lications for unskilled labor. Some job applicants are put on a fast track and, at Mr. Lanzillo's instruction, they get "all the paperwork" to be filled out on the same day. These applicants are generally hired. Other applicants are given the job application only, and usually do not receive a job offer. Random sampling of Jersey City personnel records corroborated the information provided by the clerks in the personnel department. Nine out of fourteen noninstructional employees hired by the board in August or September 1987 had completed all of the paperwork in a single day.

Beyond proof of overt political intervention, the record also discloses a lackadaisical approach to recruitment of new employees. Upon becoming superintendent in July 1985, Franklin Williams did not even go through the ordinary motions of trying to find the person most suited for the job. To fill the many vacancies in central office, he failed to conduct any search outside the district for talent, but instead made his selection on the basis of which insider was sufficiently savvy and "school system-wise." Amazingly, he invited board members to send him suggestions on whom to recommend for appointments, reversing the proper procedure whereby the superintendent makes his recommendations to the school board for final approval. Mr. Williams could recall no more than four people whom he interviewed other than those who actually got the jobs. Moreover, he freely admitted that he had interviewed only one person for the job of assistant superintendent for personnel.

Standard practices to ensure hiring of only the most qualified applicants were not routinely followed by the district. School administrators did not have a system in place for always checking references of job applicants. In one verifiable instance, Mr. Falcicchio's prior supervisor in Freehold testified that no one from Jersey City, except board member Schulman, had contacted him to inquire about Mr. Falcicchio's qualifications. In another episode, Mr. Lanzillo, evidently through carelessness rather than by design, supplied the Jersey City board with an inaccurate resume for John Scarfo, the successful applicant for the job of internal auditor. When it was discovered that Mr. Scarfo did not possess the previously advertised requirements for the job, the board expediently revised the job requirements to conform to the qualifications which Mr. Scarfo did possess. In other instances,
Mr. Williams was authorized to modify job descriptions as he saw fit, without obtaining approval from the board.\textsuperscript{23}

Aside from inadequate recruitment practices, the State also accuses Jersey City of improper procedures pertaining to assignments, transfers and promotions. A few of the examples raise implications of outright attempts to retaliate against employees regarded as hostile to the current school administration, such as a conversation overheard by Mrs. Eccleston in which Mr. Lanzillo complained to Mayor Cucci about the "cream puff" assignment given to Dr. Henry Przystup, a former superintendent and outspoken critic of the board;\textsuperscript{24} or the reassignment of special education teacher Carol Giannasio from a supervisory post to a less desirable job in the record room, after she had been seen conversing with State investigators; or the fact that central office examined telephone bills to determine if employees had made calls to education officials in Trenton.

But most of the State's examples simply involve poor planning or abuse of power, such as unwarranted transfers for no valid educational purpose. The paramount example of the latter type of transfer was the musical chair-like rearrangement of 20 or more principals and other building-level administrators just prior to the opening of school in September 1986. Claudette Searchwell, principal of School 41 at the time, learned of her impending transfer to School 22 literally days before it actually happened, not directly from her employer but through gossip and rumor. Nobody from central office had bothered

\textsuperscript{23} The parties engaged in a spirited debate about whether board approval of all job descriptions is a legal requirement. The Attorney General's Office takes the position that \textit{N.J.A.C. 6:3-1.21(c)(2)}, which requires that boards of education adopt certain policies and procedures including "development of job descriptions," must be read to mandate board approval of all job descriptions. Jersey City responds that the cited regulation, dealing with evaluation of tenured teaching staff members, permits job descriptions to be developed "under the direction of the district's chief school administrator." Irrespective of which side has the better legal argument, advance approval of all job descriptions by the board is clearly the preferable business practice, and Jersey City's delegation of that authority to its superintendent is yet another example of its abdication of responsibility.

\textsuperscript{24} At that time, Dr. Przystup was the principal of the Regional Day School, a placement for special education students. Testifying as an expert for Jersey City, Dr. Tewel was "struck by the extent to which [Dr. Przystup] knows Special Ed and cares for those children." Yet, the board transferred Dr. Przystup to another building, School 41, which has more mainstream than special education classes.
to consult with her before the decision was made. Instead, Mr. Williams “seized the opportunity” to make plans while the persons most directly affected were away on summer vacation. Although Dr. Tewel, Jersey City’s educational expert, lauded the surprise move as a way to prevent stagnation and “get the system moving again,” more likely Mr. Williams’ real motivation for waiting until the last moment was to minimize anticipated public opposition to his plan.

Speaking from experience, Dr. Tewel conceded that an unexpected transfer is one of the “most personally hurtful things” which can happen in an educator’s career. Certainly Ms. Searchwell, who spent her own time during her summer vacation preparing for the reopening of School 41, did not feel “rejuvenated” by the abrupt change in her assignment. Dr. Smoley was correct in decrying the district’s eleventh-hour transfers, in the absence of any genuine emergency, as irrational and indicative of a lack of planning. Nor were such last-minute shake-ups an isolated occurrence. A year later, in September 1987, Ollie Culbreth found out on only two weeks’ notice that he was being assigned as principal of School 14. Like Ms. Searchwell, Mr. Culbreth first became aware of his new assignment not through regular channels, but from a “leak to the newspapers.”

One of Jersey City’s much-vaunted reforms is its new promotion policy, designed to allay past fears about the fairness of the selection process. Adopted by board resolution in March 1987, the policy establishes a convoluted screening process used that year to winnow down a field of 168 candidates to 22 for actual promotion. Steps in this process include: screening of applicants for minimum requirements; completing of a biographical questionnaire; numerical rating of applicants on a nine-point scale; interviewing of candidates by evaluation committees of administrators, parents and board members; ranking of top candidates by the superintendent; and final selection by the board of education.

While the new promotion policy has an appearance of greater impartiality, management expert Dr. Smoley was critical of its fragmented, disjointed and subjective nature. Each step is intended to stand alone, so that members of the evaluation committee do their work independently and are unaware of each other’s evaluations. Likewise, the superintendent of schools is insulated from the numerical ratings made at a preceding stage of the process, does not know the evaluation committee results, and does not personally have a chance to interview any of the applicants. In Dr. Smoley’s estimation, each step is so “decoupled” from each succeeding step that useful
information collected at an earlier stage is discarded at a later stage. Furthermore, Dr. Smoley described various weaknesses which make the promotion system susceptible of manipulation and control by the administration. Criteria for screening applicants were not published in advance, so applicants had no clear idea why they were not chosen to advance to the next step. Participants in the process believed that some candidates were given special help in completing the biographical questionnaire. Extensive prescreening of credentials gave the administration an opportunity to bar access to the interview. At least one individual complained of having been unfairly excluded from any interview, while others complained that their interviews had been short or perfunctory. As an indication that the promotion process may be biased in favor of certain candidates, Dr. Smoley noted that over 60 percent of the successful candidates were already serving in an acting capacity at the time of their promotions to permanent positions.

In the personnel area, the State also presented evidence of Jersey City's deficiencies in staff evaluation and its inability to hold employees accountable for poor performance. Jersey City's laxity about tenure-eligibility for its chief school administrator has already been covered in detail. No one ever formally evaluated the district's top echelon of financial officers, including the board secretary, business manager, and internal auditor, with disastrous consequences to the district's control over its purse strings. Responsibility for effective oversight of these key personnel fell between the cracks, apparently because of confusion over whether they should report to the superintendent of schools or directly to the board of education.

Cresap McCormick researchers examined written teacher evaluations and reported many instances in which superficial or stereotypic statements were mechanically "copied from year to year and from teacher to teacher." Confidence in this finding is strengthened by Superintendent Williams' acknowledgment of "a lot of likeness" in his own evaluations of central office administrators. Testimony of Jersey City witnesses revealed a blurring of the distinction between evaluation of an individual's performance and the unfinished tasks within an individual's area of responsibility, making it hard for an employee to arrive at any clear understanding of what he must do
to improve personal work habits. Mr. Lanzillo boasted of new forms he introduced to improve the evaluation process, but was forced to admit that they were revised versions of forms already in existence for "a long time."

State monitors identified 58 teachers who were not evaluated at all by the April 30th cutoff date of the 1985-86 school year. Jersey City denied that 15 to 20 of those people needed to be evaluated, tacitly admitting that at least 38 teachers were never evaluated during that year. At Snyder High School, no one evaluated the guidance counselors in 1986-87. Similarly, Dr. Przystup purposely refused to evaluate 16 teachers at School 41 to dramatize the need for additional supervisory staff, yet there is no evidence that any disciplinary action was ever taken against him for dereliction of duty or that the alleged staff shortage at his building was ever alleviated. These 16 teachers simply did not get evaluated.

In another particularly egregious situation, Compliance Director Kaplan, who was touring School 31, observed a classroom where not much instructional activity was occurring. Consequently, Mr. Kaplan asked to see the written evaluations of the classroom teacher. Responding to Kaplan's request, the building principal, Mr. DiTursi, after a fruitless search of the files in his desk drawer, divulged that he didn't have any evaluations for that particular teacher because she was "a friend of the superintendent." During a subsequent conversation with Kaplan, Mr. Williams indicated that he had known the teacher for a long time and was a member of the same church. At the hearing, Jersey City put into evidence what purport to be written evaluations of the teacher in question, but never explained why they were not shown to Mr. Kaplan at the time of his visit, nor offered the testimony of Mr. DiTursi to deny the substance of Kaplan's testimony.

Teacher evaluation problems are further compounded by the district's dual system, in which evaluations were sometimes done by

25. Regulations for evaluation of tenured staff require preparation of a "professional improvement plan," a written statement developed jointly by supervisor and staff member "to correct deficiencies or to continue professional growth." N.J.A.C. 6:3-1.21(f) and (h). See also, N.J.A.C. 6:3-1.22(c)(4). This requirement was honored in the breach. Superintendent Williams never received a professional improvement plan from the board. Assistant Superintendent Horace Smith also did not get such a professional improvement plan in his two years of evaluations (1985-86 and 1986-87).
principals, aided by assistant or vice principals, and sometimes by
subject supervisors under a totally separate jurisdiction. Predictably,
as documented by the Cresap McCormick study, such division of
responsibility produced conflicting evaluations by different evalu-
ators, generated unnecessary disagreements which would then have
to be resolved at a higher level, and undermined the building prin-
cipal's authority over teachers in his or her building. Lack of accoun-
tability is even more aggravated for nonprofessional staff, where re-
sponsibility is further diffused among a director of custodians, a
director of maintenance and the building principal. Building Principal
Claudette Searchwell stated that no one listened to her complaints
about poor performance by school janitors and that workers assigned
to her school report to someone else in the organizational structure.
Her supervisor, Horace Smith, assistant superintendent for elementary
schools, confirmed there are two sets of evaluations for maintenance
or custodial workers, formally by central office department heads and
informally by building principals.

I FIND that political interference, nepotism, and patronage in
the Jersey City school system continued after the advent of Mayor
Cucci. Board members and school administrators misused their public
office to reward friends and punish enemies of the Cucci adminis-
tration. Notwithstanding Mayor Cucci's disingenuous denial, it would
be naive to believe that the rapid advancement of the mayor's relatives
and political allies was unrelated to his ascension to power or that
appointment of four school administrators recommended by him was
simply a matter of coincidence. Close relatives like the mayor's sister
and stepdaughter were given jobs especially created for them. Where
a longtime employee like Mrs. Lewin stood in the way, she was
demoted to make room for promotion of a campaign supporter like
councilwoman O'Reilly-Lando. Meanwhile, Mr. Williams was either
guilty of active complicity or simply incapable of preventing what he
must have known was going on.

Particularly disturbing was the district's eagerness to hire people
with minimum qualifications for top jobs, without even the pretense
of conducting a search for candidates of proven talent and ability.
The hiring of Mr. Falcicchio to manage the important special educa-
tion program and of Mr. Kaminski to receive on-the-job training as
a school business administrator are but two examples in the record.
Franklin Williams' method of selection for his central office staff of
insiders, without bothering to interview other applicants for the job,
is another example.
Putting labor negotiator Louis Lanzillo in charge of personnel was analogous to putting the fox in charge of the chicken coop. In a district so highly politicized and already under suspicion, it is difficult to think of an appointment more calculated to engender doubts and destroy faith in the fairness of the personnel department. Unabashedly and almost brazenly, Mr. Lanzillo described the dispensing of patronage to fill vacancies in the custodial and maintenance staff. Under Mr. Lanzillo's direction, transfers were used to punish dissidents or were so poorly planned that they hurt staff morale. Promotions were made under a new policy too fragmented to be useful and too easily rigged by the administration. Staff evaluations were performed not at all or performed in a meaningless and perfunctory manner. Control of the school by the building principal was weakened by a cumbersome dual evaluation system, which undercut the principal's authority to evaluate staff assigned to his building.

Jersey City has the temerity to argue that preferential treatment is tolerable so long as it involves only a few people occupying low-level positions in a large school district. Unintentionally, this argument reveals much about the culture of the Jersey City school system and the extent to which a tradition of politics is deeply ingrained as an acceptable way of life. Of course, it is no justification whatsoever that the current administration was merely righting old political wrongs or that political interference under Mayor Cucci occurred on a less grand scale than in the past.

From an educational perspective, the damage caused to the district far exceeds the sheer number of patronage jobs. Dr. Smoley described the demoralizing effect in any school system when employees come to believe that career success depends not on competence or hard work but on political machinations and influential friends. Unfortunately, Dr. Smoley found a paralyzing cynicism among Jersey City school employees, which pervasive attitude destroys individual incentive for improvement and robs the district of the strength needed to reform itself. By contrast, Dr. Tewel, whose point of reference is the reality of conditions as they exist in New York City, seemed overly

26. Tracing the City's history back to the infamous days of Mayor Frank Hague, Federal District Judge Harold Ackerman declared that political interference by the Cucci administration into the operation of the police department was "a reflection of 'business as usual' and . . . part of a historical political continuum." Perez v. Cucci, No. 86-3595, slip op. at 6 (D.N.J. May 2, 1989).
willing to tolerate a "symbiotic relationship" between political leadership and the school authorities.

F. Quality of Educational Programs

At the heart of any school system lies the quality of its educational programs. Again the outcome of the factual dispute turns decisively on which of the party's respective experts is more persuasive. Efforts by Jersey City to disparage Dr. Smoley's credibility on the ground that he relied too heavily on information supplied by alleged "malcontents" were unavailing. As in any thorough investigation, Dr. Smoley and his associates contacted a wide variety of informants, some who were favorably disposed to the present school administration and others who were not. Clearly it would have been unscientific for Dr. Smoley to seek out only those satisfied with the status quo. Cresap McCormick researchers kept careful notes of these interviews, and based the final report on a composite of all information collected and the exercise of balanced judgment as to what was significant. Such careful attention to detail contrasts with the methodology of Dr. Tewel, who lost or misplaced his interview notes and did not try to learn all the names or titles of those from whom he solicited data.

Descriptions of the general atmosphere at the school-building level diverge so greatly that it is difficult to believe the experts were talking about the same school system. Dr. Smoley, who personally spent a week visiting schools in the district (talking with principals and teachers, roaming the hallways, attending classes, and generally getting a "feel" for the type of activity taking place), described a wide range of conditions.

School 22, one of the worst elementary schools in the district, was "badly run down," with "extensive graffiti on the walls," cracked blackboards, broken tables and chairs, and an overwhelming sense of "shabbiness." Trash was accumulating on the premises of a number of schools, including School 22. Noise levels were unusually high, with "kids wandering the halls," teachers talking to students in "very loud and directive" tones of voice, and constant disruptions over the public address system. Regarded as "a dumping ground for teachers who were not performing well," School 22 was plagued by disciplinary problems, low test scores and high teacher turnover. Some classes had only "small numbers of students in the rooms." Textbooks were in short supply, and five classes had to share a number of textbooks
sufficient for only two classes. In one classroom, Dr. Smoley saw "no enthusiasm among teacher or students." In another classroom, "a teacher was sarcastic with students." In a third, the teacher's style was "cold and harsh," and he refused to answer students' questions. Even in School 25, known as Nicholas Copernicus School and considered a "top" school, control was "fairly lax" and students were "wandering around at will." In Dr. Smoley's view, the principal of School 25 was resigned to things as they were and "lacked the spark of leadership."

Dr. Smoley's strongest words of condemnation were reserved for conditions at Dickenson High School, which he portrayed as sitting on a hilltop "almost like a fortress." Continuing his figure of speech, Dr. Smoley's first impression as he entered the school yard was "concern for [his] safety" and a feeling that the building was "under siege." Size and layout of the building, which houses 2,500 or more students, made surveillance very difficult. Students were milling around all the time, "both outside and within the building." Unsolicited, a security guard approached Dr. Smoley to say that the building "needed reinforcements." Dickenson has a big auditorium used as a "holding area" for unattended students, many of whom got "lost" in the shuffle. Physical conditions were deplorable, and included "lots of graffiti," "dingy facilities" and "facilities in poor repair." Peering into classrooms, Dr. Smoley witnessed a number of situations "where students were not being taught" and no learning was going on. A substitute teacher in one room was sitting at a desk while some students were talking, a few were doing homework and others were playing. Blackboards in another room had not been washed and could hardly be read. Teachers griped that the administration cared more about paperwork than about quality of teaching, that the building was not kept clean, and that the back gate was left open at night.

Conditions were less dire at Snyder High School, but it too had graffiti, broken windows, damaged doors, peeling paint and other signs of neglect. Pace of life in the school was slow, and students "meandered" to classes which started late and ended early. As at the other schools Dr. Smoley visited, Snyder had extensive class cutting, students congregating in the halls, and a high level of noise caused by the banging of lockers and loud talking.

Several common threads run through Dr. Smoley's testimony about his visits to the schools and his conversations with school
personnel at the scene. First is that Jersey City schools are “ineffective-ly managed” at the building level, not necessarily because of in-competency (some individual principals are very competent) but be-cause principals lack the opportunity to manage their own affairs. Des-pite much lip service paid by the district to the effective schools move-ment, with its emphasis on the importance of the building prin-ci-pal, Dr. Smoley found that many principals were not in control of their own buildings. Second is the lack of support from the central office, manifested not only by inadequate assistance to building staff, but also by obstacles put in the path of effective leadership. Third is inadequate planning for improvements and a crisis mentality. Jersey City needs an infusion of vitality and dynamic leadership at the school level to overcome its problems. But what Dr. Smoley encountered was exhaustion, burnout and lack of energy.

Dr. Tewel, who toured the district’s schools after this litigation had already commenced, painted a much more sanguine picture. Except for Snyder High School, there was no overlap with the schools that Dr. Smoley had personally seen, so Dr. Tewel could not directly refute his testimony. In particular, Dr. Tewel never observed actual conditions at Dickenson High School. Compared to what he was familiar with in New York and other large urban districts, Dr. Tewel was impressed with the orderliness and lack of disruption at Snyder, Ferris and Lincoln high schools. Security guards patrolled the halls or watched doorways while he was there, and “kids knew where they were supposed to be.” He did not see students loitering in the hallways or hanging around outside the school. Acknowledging that children did come late to class, Dr. Tewel viewed it as “a fact of life in an urban area.” Regarding noise interruptions, he thought that urban children crowded into old buildings will necessarily be noisy. Confirm-ing the State’s criticism that classes often do not start on time, he felt the matter was a minor point unworthy of inclusion in the Cresap McCormick report. All in all, the thrust of Dr. Tewel’s opinion testimony is that conditions in Jersey City are better than the State contends and that whatever problems do exist are the natural out-growth of urban living.

Curriculum is a very important aspect of the educational pro-gram, since it determines what material the children will learn. Both sides concur that the district’s curriculum was woefully inadequate and obsolete at the time of the change of administrations in 1985. Franklin Williams, who as deputy superintendent had been re-sponsible for updating the district’s curriculum, conceded that much of
the curriculum had not been revised in 18 years and was a reason for the district's failure of the first level of monitoring in 1984.

Changes have been slow in coming since the current administration took charge. State curriculum specialists examined the district's curriculum documents in use during the 1986-87 school year. Their report concluded that the contents of the documents had a low level of expectation for student achievement, did not identify entry or mastery skill levels for students, and "were, for the most part, of limited value as guides for instruction." A majority of the documents were 15 to 20 years old, and few substantive revisions had been made in any of the curriculum above the third grade level. As recently as January 1986, the board readopted many of the same outdated curriculum documents with only insignificant cosmetic revisions, such as replacing the cover sheet to reflect a new date or superintendent's name.

In January 1988, State monitors undertook a more intensive curriculum review. By that time, the district had completed rewriting its curriculum for 4th to 6th grades. In addition to reviewing documents, State and County experts visited 165 elementary and eighth-grade classrooms to look at lesson plans and verify what materials were available. Although the new curriculum documents had been distributed to the elementary teachers, the lesson plans did not disclose whether or not the teachers were actually utilizing the new materials in the classroom. Topics covered were not fully aligned with the skills being tested by standardized tests. Curricula geared to preparing students to pass the high school proficiency test ("HSPT") omitted many of the basic skills in reading, writing and mathematics.\(^27\) Expectations for student achievement remained minimal, and concentrated on lower cognitive skills, such as recognition and recall, as opposed to higher cognitive skills, such as comprehension and abstract reasoning.

\(27\). Achievement of a minimum level of proficiency on the HSPT is a State requirement for graduation and award of a high school diploma. \(N.J.A.C.\ 6:8-7.1(b)\). The test is administered in ninth grade and, to those students who fail, in tenth and eleventh grades. Districts are obligated to provide remedial services to students who perform below state minimum levels. Basic communications and computational skills tested by the HSPT must be "reasonably related to those levels of proficiency ultimately necessary as part of the preparations of individuals to function politically, economically and socially in a democratic society." \(N.J.S.A.\ 18A:7A-6\).
Since July 1985, Rosemarie Viciconti, assistant superintendent for curriculum and instruction, has had responsibility for coordinating the district's efforts to improve its curriculum. Ms. Viciconti impressed this fact finder as being a well-meaning and sincere individual, but someone who is overwhelmed by the enormity of her tasks. Evidence that the Commissioner sent her a congratulatory letter on the occasion of her thirtieth anniversary in the teaching profession and that State officials once invited her to apply for a job in Trenton indicates that she enjoys an excellent professional reputation, but does not constitute official endorsement of her job performance in the last three years.

Early in her planning, Ms. Viciconti made several dubious decisions which guaranteed that the current crop of high school students would graduate long before receiving any benefit from a revised curriculum. Despite the unmistakable urgency of the situation, Ms. Viciconti rejected any notion of a "quick fix" to update the outmoded curriculum. Instead, she opted for a leisurely "bottoms-up" approach, starting with the lower grades and slowly phasing in the new material over a three-year period extending through May 1988. Also, she decided to reinvent the new curriculum "in-house," rather than purchase one of the ready-made curriculum packages available for immediate use in urban districts. She admitted that she had not given much thought to alternatives, and that she chose the time-consuming "traditional method used in Jersey City" essentially because her immediate predecessor had begun the work. Afterwards, Dr. Tewel justified her choice as giving the district's teachers a feeling of participation in the process and pride of ownership in the new curriculum. Whatever the rationale, the result was clearly to sacrifice the educational needs of the older children who missed out on any changes and will never again have the opportunity to attend high school.

Beyond grade six, the curriculum documents were still shamefully out-of-date as of the 1987-88 school year. Much of the material used to teach children in Jersey City contained incorrect or incomplete information. Deficiencies were most glaring in the social studies department where, for example: the curriculum for ethnic studies refers to African countries which no longer exist and neglects to mention others in existence since the 1960s; the curriculum for Afro-American history stops with the Nixon era in 1974; the curriculum for United States history has as its last entry the Voting Rights Act of 1965; and the curriculum for Puerto Rican culture misidentifies the Spanish surnames of various persons and fails to include recent historical
figures who made important cultural contributions. Jersey City sought to explain these deficiencies away with the lame excuse that there had been a prolonged vacancy in the position of social studies supervisor.

Classes at the same grade level in Jersey City use different textbooks in science and math, a matter of great concern in a district of high student mobility. Science books from as many as eleven different publishers were in use in 1988 during the State inspection. Not only was this contrary to board-mandated use of a uniform science textbook series throughout the district, but also it made the transition more difficult for students transferring to another class within the district. Use of a variety of different textbooks also impeded articulation as a student moves from grade to grade, since each volume in a planned series of textbooks builds on learning mastered in preceding volumes. Part of the problem in providing a uniform set of books may be the high cost (evidence suggests that it costs about $1 million to purchase a new textbook series for the entire district), although that is largely a question of priorities and of wise expenditure of existing funds. However, the problem is more directly traceable to the attitude of the school administration, which defended the current patchwork of textbooks as if it were a strength rather than a weakness.

Due to the presence of large numbers of children with serious academic difficulties, Jersey City has great need for support services designed to remediate specific educational deficiencies. Approximately 36 percent of total enrollment, or one out of every three students, qualify for compensatory education because they fail to achieve the minimum basic skills in reading, writing or mathematics. Another 13 percent are eligible for special programs to assist non-English

28. Funding for basic skills improvement programs in New Jersey derives from two complementary pieces of legislation, Chapter I of the federal Education Consolidation and Improvement Act of 1981 ("ECIA"), 20 U.S.C.A. §3801 et seq., and state compensatory education aid, N.J.S.A. 18A:7A-20(a). ECIA has been repealed by Pub. L. 100-297, effective July 1, 1988, and large parts were readopted as part of amendments to Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C.A. §2701 et seq. Federal and state statutes each have their own set of accompanying regulations, to which local districts must adhere as a condition of receipt of subsidized funds. 34 C.F.R. §200 et seq., N.J.A.C. 6:8-6.1 et seq.
speaking students in overcoming the language barrier.\textsuperscript{29} Investigation revealed that many students in Jersey City were not receiving services to which they are entitled and also that money allocated for these services was being misspent on unauthorized items.

Dr. Sylvia Roberts, director of the State’s division of compensatory and bilingual education, testified that her staff visited the district in March 1987 to review the basic skills program and found numerous violations of applicable code requirements occurring during the 1986-87 fiscal year. Many of them involved failures in delivery of services, such as not testing new entrants to determine eligibility for remedial help, not providing basic skills instruction to non-English speaking students, not communicating with parents, and not disseminating information necessary to plan for individual student needs.

Other violations contravened the fundamental principle that federal and state assistance money must be used to “supplement, not supplant” the regular education program, which the district is obligated to provide anyway. Included among the latter were assignment of basic skills teachers to do work for regular reading and math classes, to perform routine chores such as hall patrol, study hall or cafeteria duty, and to substitute for absent teachers of regular classrooms. Some ninth graders receiving supplemental instruction in mathematics were not enrolled in regular math classes as well, jeopardizing their chances of accumulating the required courses for graduation. While some eligible students did not get basic skills instruction, other students, who scored above the minimum state standards, received such help even though they did not qualify.

One particular bone of contention between the parties was Jersey City’s policy of “split-funding” or prorating salaries of teachers paid

\textsuperscript{29} Two related programs in New Jersey are tailored to the needs of “limited English proficient” or “LEP” students. Under the Bilingual Education Act, \textit{N.J.S.A. 18A:35-15 et seq.}, and the pertinent regulations, \textit{N.J.A.C. 6:31-1.1 et seq.}, school districts which have 20 or more pupils of limited English speaking ability in any one language classification must establish a bilingual education program of courses taught in the particular native language. The purpose of the bilingual education program is to facilitate integration of these children into the regular public school curriculum. \textit{N.J.S.A. 18A:35-15. Fuentes v. Cooperman, No. A-2565-87T1 & A-2567-87TIF,} slip op. at 3 (N.J. App. Div. Feb. 17, 1989). School districts with 10 or more children of limited English speaking ability must provide an English as a Second Language (“ESL”) program, which teaches vocabulary and language structures in English using appropriate teaching techniques. \textit{N.J.A.C. 6:31-1.4.}
in part out of local funds and in part out of aid money. Couched misleadingly in terms of whether such practice was legally permissible, the real problem was faulty record-keeping by Jersey City which was unable to document the amount of time these teachers actually devoted to their supplemental as distinguished from their regular duties. Absent a satisfactory explanation of how the money was allocated, State auditors had no choice but to disallow the entire expenditure, resulting in a demand for reimbursement of almost $528,000 of Chapter I money for 1986-87 alone. Jersey City's failure to verify that basic skills money was being properly spent continued right up to the eve of this litigation. Correspondence in April 1988 shows that the State partially withheld approval of Jersey City's application for compensatory education aid for fiscal year 1988 because the district could not sufficiently verify the supplemental nature of expenditures for grades 9 to 12. Ultimately, the district discontinued its split-funding practice in order to avoid loss of funds.

Bilingual and ESL education, on the other hand, is an area wherein Jersey City faces unique conditions, which genuinely make strict compliance with the letter of the law an elusive goal to attain. Uncontradicted evidence establishes that Jersey City has 32 distinct language classifications, that target populations are widely dispersed geographically throughout the City and at different grade levels in the school system, and that student mobility is high among recent immigrants.30 Qualified bilingual teachers are in short supply in Hudson County and elsewhere in New Jersey, especially for more exotic languages like Gujarati or Tagalog.31 Naturally, these conditions do not absolve the district of responsibility to provide children

30. Jersey City's 1987-88 bilingual program plan lists the following 28 languages: Amharic, Arabic, Armenian, Bengali, Cantonese, Farsi, French Creole, Greek, Gujarati, Hindi, Hungarian, Italian, Korean, Laotian, Malayalam, Mandarin, Pampango, Polish, Portuguese, Punjabi, Russian, Serbo-Croatian, Spanish, Tagalog, Thai, Urdu and Vietnamese.
31. State requirements for permanent certification as a bilingual teacher are exacting, and include course work, practical classroom experience, and demonstration of proficiency in both English and a foreign language. *N.J.A.C. 6:11-8.4. Assistant Superintendent Pablo Clausell estimated that the entire process from start to finish can take from one-and-a-half to two-and-a-half years. Although the alternate route to certification is unavailable to bilingual teachers, an emergency certificate can be issued if a district is unable to locate a suitable certified teacher "due to unforeseen shortages or other extenuating circumstances." *N.J.A.C. 6:11-4.3.
with the full range of needed services, but they do mitigate against unreasonable demands for perfection.

Jersey City has devised strategies to alleviate some of the problems caused by these conditions. To minimize scheduling difficulties, the district has established a multilingual intake center for initial assessment and has attempted to cluster bilingual programs at those schools with the highest concentrations of eligible students. To find certified bilingual teachers, the district has advertised for them at home and abroad. A proposal by Jersey City to bring bilingual services to students’ neighborhoods through the use of mobile vans had to be scrapped when the State would not approve it.

Nevertheless, many of Jersey City’s deficiencies in bilingual and ESL education are simply the inexcusable product of poor management. In an unguarded moment, Dr. Clausell, assistant superintendent for funded programs, conceded that the district’s organizational structure creates unnecessary division and fragmentation, “which inhibit communication, efficiency and proper implementation of districtwide programs.” Specifically, he questioned the duplicate lines of authority between his own job “in charge of federal and state programs” and that of a coequal assistant superintendent “in charge of supportive services.” Similarly, Dr. Roberts alluded to the lack of coordination between school administrators responsible for delivery of bilingual services and those responsible for special education.

Deficiencies due to such poor management include wasteful over-testing of some students, failure to use multiple measures for determining eligibility, exclusion of students living in the district for less than one year, and lengthy delays in referral of Spanish-speaking students for child study team evaluations. Easily correctable deficiencies persisted long after the district had been made aware of them. For example, the district was still using ESL teachers as regular classroom substitutes in February 1988, a problem previously brought to its attention in September 1987. Notwithstanding the State’s willingness to relax standards in order to assure that bilingual students would receive at least minimum services, 42 bilingual students in April 1988 did not receive even the reduced level of services which the district had promised to deliver. The district’s insistence that this number is down from a high of 302 students in 1987 is little comfort to those non-English speaking children who are not getting the help they need.

Special education is another area of high priority in a district with so many handicapped children. District records for 1987-88 provide
a count of 5,343 handicapped children, or about 18 percent of total enrollment. Classifications given to these children's disabilities run the gamut, from perceptual impairment to mental retardation to emotional disturbance. Jersey City's share of Federal "flow-thru" funds earmarked for special education in 1987-88 amounted to $1.4 million. By law, the district must provide specially designed instruction to meet the unique needs of each handicapped child, together with such related services as may be required to assist the child in benefiting from special education.32

State officials are responsible for assuring that the district complies with the conditions attached to receipt of Federal funds. Failure to abide by these conditions could have severe repercussions beyond Jersey City, since the State of New Jersey stands to lose its entire Federal grant, totaling $55 million in 1988-89, if local districts do not comply. Jeffrey Osowski, a doctor of psychology and the State's director of special education, summarized results of a six-day on-site review conducted by a nine-member team in fall of 1987.

Major areas of noncompliance by the district include: lack of sufficient textbooks and teaching materials to carry out promised programs and services; absence of curriculum documents or use of outdated or inappropriate curriculum; deficiencies in specialist evaluations required for proper evaluation; nonexistent or seriously deficient individualized educational programs (abbreviated "IEPs") and instructional guides; shorter hours for handicapped children than for children in regular classes; class sizes which exceed the maximum permitted by regulation; lack of classroom coverage in the absence of the teacher; inadequate notice to parents; failure to obtain parental consent; failure to provide sufficient speech therapy to autistic children; and failure to comply with time deadlines. Pupils were placed in special education classes before evaluation and, in one case, before referral to the child study team for evaluation.

These are not mere technical insufficiencies, but violations of important substantive and procedural safeguards intended to protect the rights of handicapped children and their parents. For instance, the IEP, developed jointly by the school and parents, is the written plan which identifies the child’s particular learning problem, what services are necessary, when and where they will be provided, and how progress will be measured. Notice to parents and an opportunity for them to participate actively in planning for their handicapped child’s program is a key ingredient of special education.33 Disparities in length of the school day thwart the main purpose of the law, which is to give handicapped children equal access to the educational opportunities provided to nonhandicapped children.

Jersey City's pretext that communication with parents is more difficult in an urban setting because families lack telephones, or do not receive their mail, or for a myriad of other excuses, is belied by its own proofs. Principal Daniel Cupo of School 23 believes that urban parents are just as concerned as suburban parents about what is best for their children. He reaches parents by sending notes home with the child, by stopping parents as they drop their child off at school, by word of mouth, or by sending a school social worker to the house. In two decades of urban experience, Mr. Cupo has “never had any problems getting the parent to come” for a conference.

Handicapped students in Jersey City attend school for 45 minutes less than their nonhandicapped peers. Article 22-2 of the teachers’ contract memorializes this difference. Teaching hours end at 2:30 P.M. for special education schools and at 3:15 P.M. for other elementary schools. Ostensibly, the reason is to facilitate busing of handicapped children to their homes. Jersey City argues that handicapped children do not lose any instructional time because the savings is achieved by cutting 30 minutes from the normal one-hour lunch period. Even if that explanation (which fails to account for an extra 15 minutes) is true, handicapped children are deprived of the chance to participate

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in after-school activities and tutoring. Dr. Osowski, who, as head of the State's division of special education, is well acquainted with the practical side of administration, recoiled at the idea of subordinating the needs of handicapped children "for the purposes of transportation ease or administrative convenience."

Because Jersey City represented that it had made substantial progress in bringing its special education program into compliance, the State paid a follow-up visit to the district in late April 1988 to check out this claim. Dr. Osowski participated personally in this phase of the investigation. On their face, the class lists he obtained from the district's central office appeared to comply with mandated limits on class size. Entering into classrooms, however, Dr. Osowski observed that the names of students on teachers' rosters did not match those on the official class lists. A guidance counselor from whom he sought clarification did not have an accurate class list in her possession and told him that she needed his help "to move mountains" to get one. This exchange led Dr. Osowski to conclude that "nobody really knows where the kids are in the Jersey City school district." Both sides agree that it is important for a school district to know where its students are at all times. In a similar context, Jersey City's own expert, Dr. Tewel, quipped, "Listen, if Macy's can count underwear, a school should be able to count kids. It's a basic process before you begin the process of education."

In response to the State's prior criticisms, Jersey City gave assurances that it had begun to implement new forms which would cure any deficiencies in its IEP documents and instructional guides. On their return visit in April 1988, State investigators found new forms used only in nine of 5,343 pupil records. Delving more deeply, Dr. Osowski found "incredibly" outdated IEPs dating as far back as 1983. Instructional guides, which by definition should be "fitted to the pupil's learning style," were written word-for-word in identical language, except for students' names. Special education teachers confided to Dr. Osowski that, in anticipation of the State's arrival, they had been given one week to concoct instructional guides, where none had previously existed. Many teachers were resentful because they lacked sufficient input from child study teams to do a meaningful job, and one resource room teacher at Ferris High School declined to cooperate in the charade.

Significant differences were evident in the quality of expert opinion offered by the parties. The State's expert, Dr. Osowski, spoke not only as a recognized expert in the field of special education, but
also as the person charged with enforcing the law and disbursing grant monies. Jersey City's special education expert, Dr. Jay Gottlieb, is an academic at New York University and author of many published papers and research studies. While his theories are stimulating and thought-provoking, Dr. Gottlieb's personal outlook colored much of his thinking about Jersey City's special education program.

Since he has no responsibility to monitor compliance with existing law, it was easy and cost-free for him to dismiss lightly the lack of an individualized plan for every handicapped child or that such plans as do exist in Jersey City are not tailored to the particular child's unique needs. While extolling certain changes which the district had implemented in September 1987, Dr. Gottlieb nonetheless acknowledged that improvement had thus far been "limited" and that he must "come back in a couple of years" to see whether or not the changes had worked. One of these changes involved adding an extra layer of bureaucracy to the referral process, which the State's management consultants saw simply as a device to circumvent the time frames for delivery of services to handicapped children. Jersey City also claimed credit for opening 105 new special education classes since 1985. It turned out, however, that at least a dozen of these new classes were not yet in operation, but were projections of future increases. More important, the opening of additional special education classes, in itself, does not automatically mean that children are receiving appropriate educational services. Illustratively, the central office had issued a wholesale directive to place all emotionally disturbed or perceptually impaired children in resource rooms, a "misdirected solution," which, according to Dr. Osowski, "showed no attention to the needs of handicapped pupils."

Overall, the parties differ in their interpretation of various "outcome measures" used as indicators of the district's success or failure in educating its children. Standardized tests, such as the HSPT, are one such measure. Assistant Commissioner McCarroll cautioned, however, that they are not the only component of monitoring, and that takeover would not be suggested for any district solely because of poor test results. The HSPT consists of three parts, reading, mathematics and writing, and is designed to test essential skills which all students should have acquired by the end of their entry year into high school. Although Jersey City derives some satisfaction from recent increases in its passing rate on this test, there is little about which to be genuinely proud.

Scores on the HSPT administered to the district's youngsters in
April 1988 are abysmally low.\textsuperscript{34} Practically two-thirds of Jersey City ninth graders who took the test, 64 percent to be exact, could not pass all three subtests as required in order to graduate. By comparison, the failure rate for all districts statewide is only 23.3 percent. Jersey City also fares poorly when compared to 27 other districts in the same "district factor grouping," a category controlled for income, education level and socioeconomic status. Neighboring Hoboken has a more respectable failure rate of 46.7 percent. Only Camden and Newark have worse failure rates than Jersey City.

Breakdown of Jersey City's scores on the subtests is equally distressing. Reading test failure rates are 30.1 percent for Jersey City, compared to 6.6 percent statewide and 15.6 percent for urban districts alone. Writing test failures are 37.4 percent for Jersey City, compared to 9.3 percent statewide and 18.9 percent for urban districts. Mathematics test failures are 51.4 percent for Jersey City, compared to 18.2 percent statewide and 34 percent for urban districts. Moreover, Jersey City's success rates are probably inflated in relation to other districts, because it has the largest number of classified children who are exempt from taking the test. Mr. McCarron was understating the case when he remarked that Jersey City has "nothing to cheer about."

Putting its best foot forward, Jersey City emphasizes the substantial percentage increases in its HSPT scores between 1986 and 1988. While any improvement is laudable, the impressiveness of this accomplishment is tarnished by the low starting point for the calculations and by the distance that Jersey City has yet to go. Comparisons among results on achievement tests administered in the lower grades are rendered meaningless by the fact that different local districts in New Jersey use different test instruments and that Jersey City itself switched tests within the relevant period.

By other conventional measures, Jersey City also lags behind the rest of the State. Student absenteeism consistently exceeds the districtwide rate of 10 percent or less required by the State for certification. At three of the five high schools, absenteeism exceeds the State standard of no more than 15 percent per school. Snyder High School

\textsuperscript{34} At the time the issue first arose, the best available data were preliminary results for the 1987-88 HSPT, which carried its own disclaimer that the information was accurate only to the extent that it had been reviewed as of July 8, 1988, that certain sections may contain errors and misprints, and that all numbers were subject to continuing verification. Neither side has sought to supplement the record with the final summary report containing more accurate data.
had an absenteeism rate of 25 percent in 1986-87, while Dickenson and Lincoln were above 20 percent. Almost as significant as what Jersey City said is what it chose not to say. Most districts in New Jersey measure success in terms of college admission test scores, acceptances to more selective colleges, number of national merit scholars, outside recognition of student achievement, or parent satisfaction. Jersey City was resoundingly silent on these matters. Numerous administrators whose jobs are at stake made self-serving statements, but not even one parent or student vouched for the quality of education in Jersey City. There was, however, one area in which Jersey City did claim to excel. Professor Tewel brought up the low incidence of "missing marks" on student report cards, apparently considering it to be remarkable that teachers in the district gave grades to their students.

I FIND that Jersey City is not providing a thorough and efficient education to its children and is unable to take necessary corrective measures on its own. Culture and climate in several schools are not conducive to learning, as typified by depressing surroundings, inadequate discipline, chaotic hallways, shortages of teaching materials, toleration of tardiness, and disruptive noise levels.

Serious defects occur in virtually every type of program. In the regular classroom, the secondary curriculum is outdated and incomplete. High school curriculum has remained substantially unchanged for 15 to 20 years, except for superficial alterations. Administrators have concentrated on revising the curriculum in the lower grades, neglecting the educational needs of older children. Lack of uniformity in textbooks creates hardships for students moving between classes. Public funds dedicated for supplemental programs are misspent for other purposes. Mismanagement by the district deprives eligible children of basic skills or bilingual/ESL instruction necessary to help them become productive members of society. Programs for handicapped children are not sufficiently individualized to meet special needs. District managers have failed in planning for delivery of special education services, in protecting the rights of handicapped children and their parents, and in developing appropriate policies and procedures for implementing the relevant law.

Conditions are so extreme that the district is unable to keep track of where its students are in the system. Large numbers of children in the Jersey City public schools cannot demonstrate proficiency in basic reading, writing or mathematics skills by ninth grade. Absenteeism is unacceptably high. The learning environment is pol-
luted with the insidious message that school officials lack confidence in the children’s abilities. That message is conveyed in many subtle ways, including a curriculum designed for low cognitive functioning, acceptance of poor performance on basic skills tests, and the defeatist attitude, implicit in the testimony of some defense witnesses, that urban children are inherently unruly or disinterested in education.

G. Fiscal Practices

Attempts by State investigators to probe the complicated financial dealings of Jersey City were hampered by a complete lack of cooperation from the person described by Superintendent Franklin Williams as the district’s chief fiscal officer, responsible for “all the financial matters and accounting, and auditing.” Board Secretary Arsenio Silvestri, who has held that post for many years, invoked his Fifth Amendment privilege against self-incrimination more than 40 times, refusing to answer highly relevant questions about his performance of official duties, his knowledge of employee dental and prescription plans, actions taken in response to independent audits, practices regarding retention of bid documents and contracts, and salary increases awarded to his wife.35

Coupled with extrinsic evidence from other State witnesses about irregularities and fraudulent activities in the financial area, Mr. Silvestri’s silence compels an adverse inference that the board and its employees were extremely careless in their handling of public trust

35. In his capacity as board secretary, Mr. Silvestri is “the general accountant of the board.” N.J.S.A. 18A:17-8. He is required by statute to “collect tuition fees and other moneys due to the board not payable directly to the custodian of school moneys,” Id. at (a), “examine and audit all accounts and demands against the board and present same to the board for its approval in open meeting,” Id. at (b), and “keep and maintain such accounts of the financial transactions as shall be prescribed by the state board.” Id. at (c).
funds, and that Mr. Silvestri remained mute to avoid admitting his personal complicity in possibly criminal wrongdoing.\textsuperscript{36}

Abundant proof of impropriety exists, even without the aid of Mr. Silvestri's testimony. Nowhere is Jersey City's managerial ineptitude more readily apparent than in connection with its employee dental and prescription benefits, where several red flags ought to have put an alert leadership on notice that something was seriously amiss. Actually, Jersey City's dental and prescription plans were self-

\textsuperscript{36} Unlike a criminal case, in a civil or administrative case the trier-of-fact is free to draw an adverse inference from a party's refusal to testify, provided that, as here, "there is other evidence supporting an adverse finding." \textit{Dept. of Law & Pub. Safety v. Merlino}, 216 N.J. Super. 579, 587 (App. Div. 1987), aff'd 109 N.J. 134 (1988). See \textit{Mahne v. Mahne}, 66 N.J. 53, 60 (1974); \textit{Bastas v. Bd. of Review, Dept. of Labor & Ind.}, 155 N.J. Super. 312, 315 (App. Div. 1978); \textit{Duratron Corp. v. Republic Stuyvesant Corp.}, 95 N.J. Super. 527, 531 (App. Div. 1967), certif. den. 50 N.J. 404 (1967). Since Mr. Silvestri was an employee of the board, both at the time of the events in question and on the date of hearing, and the State sought to ask him about matters arising in the course of his employment relationship, his conduct can be imputed to his employer. A further caveat is that an adverse inference may not be drawn "if the penalty imposed at the conclusion of the proceeding is so severe as to effectively destroy the privilege, such as disbarment or the loss of professional reputation." \textit{Merlino}, at 587. Removal of various central administrative and supervisory staff, Mr. Silvestri among them, may be an incidental effect of this proceeding, but that decision is left to the discretion of any State-appointed board of education and is not within the province of this forum. \textit{N.J.S.A.} 18A:7A-44. The sole relief requested in the present proceeding is dissolution of the local board of education and its replacement by a State-operated school district.
insurance arrangements rather than traditional insurance plans.\(^{37}\) Started in 1984, and thereafter renewed in 1985 and 1986, the plans were embodied in a series of contracts between the board and a bewildering succession of interrelated business entities, most recently New Age Administrators, Inc. ("New Age"). Basically, the contracts obligated the board to assume primary responsibility for payment of dental and prescription benefits for its full-time employees and their families, in accordance with incorporated rate schedules, and to pay fees to a third party administrator responsible for administering the program. Also, the board was to pay a 5 percent "broker's fee" to one Ronald Gasalberti for services which are not clearly defined by the agreement. Board employees had no idea why the broker's fee was being paid.

State audits of payments made under the latest version of the contract, covering a one-and-a-half year period commencing February 1, 1986, disclosed a vast number of overcharges or improper payments, conservatively estimated at $1.22 million. Estimates by Jersey City's independent accounting firm of Touche Ross & Co. ("Touche Ross"), performed in connection with contract litigation currently pending in the Superior Court, put the total loss much higher at $1.47 million. What is most damning about the New Age transactions is that the overcharges would have been easily detectable by anyone making a cursory review of the invoices and that several school officials clearly knew about the overcharges all along.

Bernardo Giuliana, a State investigator with an accounting background, recounted the various types of irregularities which he and his colleagues had ferreted out by subpoenaing records. Prices charged by New Age were greatly in excess of contract rates, but Jersey City kept paying the bills as submitted, without any indication that the improper charges were ever questioned. New Age unilaterally began charging extra for prosthetic benefits included within existing coverage, again with no objections from the board.

\(^{37}\) No statutory authority permits local school boards to self-insure for health benefits, and thus it was outside Jersey City's powers to act as its own insurer. At the time, however, the law was less clear than now after issuance of an Attorney General's legal opinion on the subject. Due to the prior ambiguity in the law and the board's reasonable reliance on the erroneous advice of its legal counsel, the board cannot reasonably be expected to have known that the arrangements were illegal from the inception.
Amounts payable to New Age varied with the number of covered employees and dependents at any given time. Under the contract, the board was required to notify the administrator of any additions or deletions within ten days. Nonetheless, the board supplied monthly census reports which remained constant over time, failing to reflect changes for recently terminated or newly hired employees. In one instance, New Age paid a claim for dental services for a former employee who had been terminated half a year earlier. In another, New Age paid a dental claim for a former employee who had resigned two months before any services were rendered. Similarly, billings for prescriptions were governed by the constant number of outstanding prescription cards, rather than by an actual count of eligible employees and dependents. When it finally did report census changes, the district's business office committed frequent errors, such as adding the names of ineligible persons who had not satisfied the waiting period or who worked only part-time.

Additional irregularities involved Jersey City's failure to insist on performance of terms inserted into the contract for its own protection. Thus, the contract obligated New Age to procure reinsurance policies for amounts above the Board's maximum risk exposure. However, New Age allowed a lapse to occur in reinsurance coverage for the dental plan and obtained no coverage whatsoever for the prescription plan, hereby exposing Jersey City to unnecessary liability.

In early 1986, Theresa Gordon, a clerk in the health benefits section, informed her supervisors of the suspicious nature of the New Age billings and asked for guidance. Ms. Gordon had been given her assignment in December 1985, without any training or instruction on how to do the job. She quickly noticed that nobody seemed to be checking the New Age bills, and she promptly brought her concerns to the attention of others in the organization. Her immediate superior, payroll supervisor Dominick Amari, directed Gordon to "just pay the bill" and not worry about checking its accuracy. Continuing up the chain of command, Gordon next contacted Assistant Board Secretary John Yeager, who also instructed her to "go ahead and process the bill for payment." Gordon did not stop there, but went on to Board Secretary Arsenio Silvestri. After listening to her story, Mr. Silvestri offered no advice of his own and said nothing to indicate disagreement with what the others had already told her. Both Amari and Yeager have since left the board's employ, and neither appeared as a witness to refute Gordon's sworn testimony.

Jersey City's assertion that it initiated its own New Age investiga-
tion in November 1987 "independently" of any State investigation is patently false. State investigators had earlier questioned the legality of the self-insurance arrangements in June 1987 and had served subpoenas on the board for New Age records in August 1987. It was only after the State sent a letter in October 1987, advising the board that its dental and prescription plans were not authorized by law, that Jersey City reluctantly canceled its contract with New Age. And it was not until January 1988, when Hudson County Assignment Judge Burrell Ives Humphreys ordered it to do so, that Jersey City finally took legal action to recover whatever sums had been improperly paid to New Age.

Extravagant claims by Jersey City about the organization of its business department and its system of internal control bore little resemblance to actual practice. Despite fine-sounding phrases about "checks and balances" and "segregation of duties," the board's financial witnesses had only vague notions of what each other does, who reports to whom, or how the separate pieces fit together. Lines of responsibility are splintered among seven or more people, including the board secretary, business manager, office manager, controller, internal auditor, budget officer and payroll supervisor. Budget Officer Joanne Gilman did not know what the internal auditor does or whether his duties were similar to her own. Mrs. Gilman said that she reports directly to the board secretary, but Business Manager Chester Kaminski said that she reports to the controller. Some financial officers, notably the controller and internal auditor, have dual reporting responsibilities to both the superintendent of schools and the board of education. No one seemed to know to whom the board secretary is answerable. Financial records pertaining to public bidding or payroll are scattered about in the custody of different financial officers in different offices, rather than centralized in one accessible location. As a result, responsibility in the district is so attenuated that no one is really in charge and no one can be exactly sure of where to go to obtain the full financial picture.

KMG Peat Marwick Main & Co. ("Peat Marwick" or "Peat"), the world's largest accounting firm, was hired by the State to investigate Jersey City's practices and procedures in the two areas of greatest public expense, payments to contract vendors and payroll. Marvin Katz, a certified public accountant and partner in the firm, supervised the collection of data and was responsible for the contents of the final report. Trained staff from Peat Marwick examined 61 contracts from
the 1985-86 and 1986-87 fiscal years, of which 56 were selected at random and 5 selected by the State.

Summarizing his findings, Mr. Katz testified that there were errors or deficiencies in nearly half the cases chosen for review. Sometimes files were missing altogether (M & F Meats, The Paramount Corp., Massa Sound Services). More often, the contract was missing from a file and could not be located (B & G Grocery and Nut Co., Effinger Sporting Goods Co., Harrison Baking, Cooperative Education, etc.), or the contract in a file was unsigned by one or both parties (Bellewood Dairy, Broadhead Garrett Co., Duncan Hardware, Jewel Electric, etc.). State contract numbers were used to purchase goods not under state contract (Jewel Electric, Xerox, Duncan Hardware), which Jersey City blamed on clerical errors by its purchasing agent, who continued to review documents even though his "eyesight was failing due to a progressive disease."

Payments to one vendor (Aritech Corp.) exceeded the contract price, while another vendor (Scientia Corp.) received double payments. Change orders authorizing payment in excess of the original contract price were missing (Quality Roofing). Items in several contracts were not purchased from the lowest bidder (Effinger Sporting Goods, Guardian Supply, Industrial Luncheon), although the amount of money involved was negligible. Supporting documentation was absent for purchases where the district claimed exemption from requirements of the bidding laws, either as an emergency purchase (A Space Station) or as an extraordinary service (Educational In-Road). Jersey City furnished a list of 70 employees who could, subject to board review, "authorize" contracts, a practice which creates control problems and which Mr. Katz said is "unheard of" anywhere else. Signatures of the board's finance chairperson on purchase orders did not match a specimen of her handwriting on her oath of office, and she did not come forward to explain the apparent discrepancy.

Original bids were replaced by copies in nearly every file examined. Office Manager Paul Tyskewicz informed Peat Marwick that the district routinely returned original bids to the bidders, rather than retaining originals as part of the file for possible future use. In a few instances, bid documents had been physically cut up and repasted together out-of-order, an event so bizarre that Mr. Katz had never seen anything like it in almost 40 years as an expert in municipal finance. Charles Cuccia, Mr. Katz's senior associate, confirmed most of the report's findings from his personal observations at the site. Mr. Cuccia surmised that the most likely motive for defacing a bid docu-
ment would be to obscure the fact that an unsuccessful bidder had submitted the lowest bid. Bid advertisements were also frequently missing.

According to Mr. Katz, the significance of Peat's findings is that Jersey City lacks a basic system for safeguarding public assets. Loose controls over purchases and an ineffective method for retrieval of vital contract information expose the board to unauthorized contract obligations and increase the likelihood of misappropriation of funds, contrary to the board's duty to operate economically and efficiently. Similar findings of incomplete bid files and unsigned contracts were noted in Touche Ross audits for the fiscal years ending in 1985, 1986 and 1987 and in a prior study by Cresap McCormick in 1984, prompting Mr. Katz to conclude that Jersey City either "wouldn't or couldn't" correct the problem. State investigators reviewed Touche Ross audits dating back to 1981 and found a continuing pattern of uncorrected citations.

The fact that Jersey City produced some of the missing documents at the hearing does not detract from the strength of proofs that they had been unavailable one year earlier, when investigators requested them. Documents can be too easily fabricated or altered. An outside accounting firm has no way of independently knowing about the existence of missing documents and must rely on whatever documents the district chooses to supply. It was the district's obligations to make all its public records available for Peat's inspection, not the examiner's obligation to hunt for them.

In fairness to Jersey City, it should be noted that Peat Marwick failed to substantiate a few of the alleged contract deficiencies. Peat criticized the bus ticket purchase (Lafayette & Greenvale) because there was no written contract. However, no written contract was necessary because the vendor is a regulated public utility. Other situations involved gray areas, where honest opinions might reasonably differ. Whether or not to aggregate expense for bidding purposes
(Broadhead Garrett Co.) is a subjective judgment call, although Peat clearly appeared to have the better side of the argument.\textsuperscript{38}

It is unnecessary to accept Peat’s word alone about chaotic conditions in the district’s file room, because the facts were corroborated out of the mouths of Jersey City’s own witnesses. Paul Tyskewicz, the clerical employee with custody of the bid files, admitted that for years the district lacked any sign-out system for keeping track of which documents were removed, who removed them, or when and where they were taken. Files were not under lock and key, so an unlimited number of people had potential access to them. At a much later date, business manager Chester Kaminski started to lock the door to the file room and instituted a card system to control access to files, but he could not say exactly when that practice began. Mr. Tyskewicz thought the card system had not begun before May of 1988. Neither Kaminski nor Tyskewicz could establish the chain of custody or adequately explain how various documents had come into his possession. Kaminski suggested that certain unspecified documents might have been delivered to the district’s legal department or even seized by the FBI, but no one knew when or how they had suddenly reappeared.

\textsuperscript{38} The Public School Contracts Law, \textit{N.J.S.A.} 18A:18A-1 \textit{et seq.}, establishes a threshold amount, above which most purchases by school boards must be advertised for public bid. \textit{N.J.S.A.} 18A:18A-8 prohibits circumvention of the threshold by subdividing any purchase “which is single in character” or which necessarily includes “buying materials or supplies or the doing of additional work” for completion of any project. \textit{Guidelines on Public School Contracts} (Oct. 1986), an official state publication, suggest that materials and supplies should be grouped together if they “are commonly made, stocked, or sold by the same sources,” “are all used on the same project” and “are normally needed over the course of a fiscal year.” (at 10). See \textit{S.H. Roemer Co., Inc. v. Camden Cty. Bd. of Freeh’s}, 91 \textit{N.J. Super.} 336 (Law Div. 1966). Elsewhere, the \textit{Guidelines} indicate that for amounts under the threshold “a purchase order may serve as a contract[].” (at 15). \textit{N.J.S.A.} 18A:18A-40. The Broadhead Garrett transaction involved separate purchases of various items, including paints, oils, and varnishes, machine tools, hardware and small tools, non-precious metals, and art supplies. Since Jersey City actually did go to bid for these items, avoidance of the bidding requirement was not involved. Instead, the issue was whether Jersey City needed a formal written contract for the purchases. Mr. Katz took the logical position that since the purchases were in fact bid, there should also have been a contract. Mr. Cuccia was even more emphatic, arguing cogently, “when in doubt, write a contract.”
Peat Marwick's investigation into the payroll area failed to uncover any evidence of either "no show" jobs or employees continuing to receive salary after termination of employment. Nonetheless, Jersey City spent a disproportionate amount of time attempting to disprove that which the State had never successfully proven in the first instance. In so doing, Jersey City missed the nub of Peat's criticism that payroll records do not contain sufficient information, even if the same information might be found in other district records.

Federal and State audits of funded programs in the district have resulted in disallowed amounts totaling almost $7 million. As Jersey City points out, several of the audits date back before July 1985. Under the State's watchful eye, the district has reduced its losses in some programs, such as child nutrition, where losses are down substantially from $165,000 in 1984-85 to $929 in 1986-87. Meanwhile, losses in other programs continue to mount, such as adult education, where Jersey City's losses in 1986-87 were $199,000, or basic skills, where losses were $528,000.

Jersey City also engaged in imprudent business practices. Only a few salient examples need be discussed here. While the board allows many employees to bring district-owned or leased vehicles home at night and on weekends, it has no written policies prohibiting personal or pleasure use, does not require employees to keep trip logs, and has no other way of monitoring vehicle usage. Over the years, school employees driving district vehicles have accumulated thousands of dollars worth of unpaid parking tickets, which the City has asked the district to help collect.

Until late 1987, the district kept large sums of public money in non-interest bearing bank accounts, forfeiting substantial earnings and paying unnecessary service fees. District employees have taken money from petty cash or school accounts to pay for purely personal items, such as parking tickets or newspapers. As recently as February 1988, the district's own internal auditor, John Scarfo, conducted a review of petty cash accounts at the central office and wrote that "[f]unds are not always deposited into checking accounts on a timely basis," that "checks are not always issued in sequential order," and that "numerous errors in addition and subtraction were noted." Controller Donald Sylvester acknowledged one particular incident in which an employee had "inadvertently" deposited money from a school account into his personal bank account by "mix[ing] up his deposit slips."

I FIND that the board has failed to exercise proper managerial
oversight in the financial area, has failed to adopt a prudent policy of cash management, and has tolerated practices which do not conform to the requirements of public school contract law or sound business judgment. Mismanagement and the lack of adequate internal controls have resulted in the increased likelihood of waste of public trust funds dedicated for the education of children. Top school officials, including the board secretary, knew as early as 1986 about fraudulent billings and questionable fees with respect to the district’s dental and prescription plans, but did nothing to stop the plundering of at least $1.22 million.

Record-keeping operations are in shambles. Bid files and contracts are missing, contracts are unsigned, original bid documents have been returned to bidders, and documents have been physically altered. Clerks in charge of the file room could not locate important public records for review by Peat Marwick examiners. Touche Ross audits in 1985, 1986 and 1987 identified many of the same areas of deficiency which continued to exist at the time of the Peat investigation. Cresap McCormick had brought similar problems to the district’s attention in 1984. Jersey City had a pattern of uncorrected audit citations dating back to 1981. Federal and State agencies conducting audits of funded programs have disallowed millions of dollars for noncompliance with program requirements. Substantial sums of aid money were disallowed after 1985. Business administrators have breached their fiduciary duties by failing to take simple steps to protect public property, such as forbidding the personal use of district vehicles or preventing abuse of discretionary cash accounts.

H. Facilities

Both parties agree that the school buildings in Jersey City are old and difficult to maintain. Many were constructed around the turn of the century, and even the newer buildings are 12 to 20 years old.39

39. Antiquated and dilapidated school facilities are a statewide problem, although Jersey City is particularly hard-hit. In recognition of the intractable nature of the problem, the Legislature has provided, “No order for the creation of a State-operated school district shall issue solely on the basis of a district’s failure to correct substandard facilities.” N.J.S.A. 18A:7A-15. Commissioner Cooperman has acknowledged that the problem “can only be addressed by a specific, concerted, coordinated effort at the State level” and that the amount of revenue required is “beyond that which may be reasonably expected to be raised by the existent funding mechanisms.” Abbott v. Burke, supra at 783.
Repair and maintenance problems normally associated with older buildings are aggravated in Jersey City by years of neglect prior to 1985. Most of the district's capital improvement projects are only in the early planning stages. Construction work has started on a new building to replace School 28, but the district is still searching for replacement sites for three other schools. Bonding has been approved for a $17 million renovation of Dickenson High School. The district is justifiably proud of its extensive asbestos removal program.

Claudette Searchwell, principal of School 22, testified that custodial workers assigned to her building were not “self-motivated” or “prideful enough” in performing their jobs. When she complained about her head custodian, “nothing happened.” She had great difficulty arranging for his transfer to another school. Ms. Searchwell gave a vivid account of conditions on her arrival as principal of School 22 in September 1986. As she entered, the front corridor was “mottled, spotted [and] dirty” and her shoes stuck to some unknown substance. Children were sitting on “mismatched furniture” of different shapes and sizes. Secretaries were working at “broken down desks.” Panes of glass in doorways had fingerprint smudges all over them. Rotten drapes hung from windows by threads. Rugs were dirty and not stapled to the floor. Wooden floors in the basement were rotted and raised. Outside in the courtyard were discarded furniture, some rags, and “copious numbers of dead pigeons spread among this debris.”

Even though the district knew the State was monitoring its performance, it was unable to conceal evidence of its extreme negligence. One of the most dramatic moments during the hearing came when Greta Shepherd described her observations of a teacher valiantly attempting to teach young children with “water pouring down the wall” of her classroom. Jersey City’s excuse for this inexcusable situation was that it was planning to build a new school building. In the meantime, however, the district clearly owed a duty to both students and teachers to provide minimally adequate shelter. Ms. Shepherd gave other examples of unsafe or unhealthy conditions observed by members of the external team which she chaired. Water seeped dangerously close to high voltage equipment in a room used for physical education. At one school, the custodian responsible for swimming pool maintenance mixed together volatile cleaning chemicals.

I FIND that Jersey City does not ensure that all its students have a safe, clean and healthy place in which to learn. The shocking and unappetizing conditions described by highly credible witnesses are intolerable in a school setting. At the very least, they interfere with
students' abilities to concentrate on their studies. At worst, they pose an imminent threat to the children's physical safety. Building principals do not have adequate control over janitorial services in their own buildings. Incompetent workers are not properly disciplined. Any school district which would allow youngsters to remain in a classroom while water pours down the walls does not have an adequate sense of educational priorities.

IV. Conclusions of Law

Based on the foregoing facts, I FIND that Jersey City has failed to take or is unable to take the corrective actions necessary to establish a thorough and efficient system of education. Further, I CONCLUDE that the State has satisfied its statutory burden of showing that issuance of an administrative order creating a State-operated school district is not arbitrary, unreasonable or capricious.

As noted at the outset, this case is about the quality of education for children. Recent efforts to promote greater educational equality and a more equitable sharing of financial burdens are meaningful only if there is also some assurance of quality education. Art. VIII, § IV, ¶1 of the New Jersey Constitution (1947) mandates that the Legislature provide for a thorough and efficient system of free public schools for all New Jersey children between the ages of five and eighteen. Pursuant to this constitutional grant of authority, the Legislature has conferred broad powers on the Executive Branch to ensure the thoroughness and efficiency of local public school systems.

General supervision and control of public education in New Jersey is vested in a State Board of Education, N.J.S.A. 18A:4-10, and in a Commissioner who is chief executive and administrative officer of the Department of Education, N.J.S.A. 18A:4-22. In the exercise of his statutory powers, the Commissioner has supervision of all schools receiving support or aid from state appropriations, N.J.S.A. 18A:4-23, must enforce all rules of the State Board, N.J.S.A. 18A:4-23, and may inquire into the thoroughness and efficiency of operation of any public school system of the state, N.J.S.A. 18A:4-24. New Jersey's highest court has uniformly taken an expansive view of these powers, and has consistently upheld the Commissioner's authority to do whatever may be reasonably necessary to carry out the constitutional directive. See, e.g., Bd. of Ed., Plainfield v. Cooperman, 105 N.J. 587 (1987) (power to override local exclusion of student allegedly due to health reasons); In re Upper Freehold Reg'l

Home rule and local control of the public schools are strong and venerable traditions in this state. Case law supports the concept of shared responsibility between the state and the local districts, Robinson v. Cahill, 69 N.J. 449, 458 (1976), and of entrusting the supervision and management of school systems to local boards in the first instance, "subject to the supervisory control" of the State Board and the Commissioner. Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17, 23 (1973). Legally, however, a local school district is nothing more than "an instrumentality of the State itself," and the Legislature could, if it chose to do so, abolish the existence of a local district with the stroke of a pen. Durgin v. Brown, 37 N.J. 189, 199 (1962). Even the most ardent proponents of local autonomy are forced to admit that home rule in the sense of exclusive control at the local level is "an unwarranted myth" and that local school districts "are not sovereign entities." S. Galante, R. Weiss, C. Jahn & T. Scully, Basic School Law, at 2-3 (1984).

Before passage of the school takeover legislation, the Commissioner already possessed the legal authority to appoint a monitor general to act as general supervisor of all activities undertaken by a local school district, In re Trenton Bd. of Ed., 86 N.J. 327 (1981), or to appoint a fiscal monitor to manage a school district's financial affairs, McCarroll v. East Orange Bd. of Ed., OAL Dkt. No. EDU 7777-84 (Oct. 31, 1984), adopted No. 346-84 (Comm'r Nov. 7, 1984). In the Trenton case, the Court held that such authority "emanates from the entire statutory fabric" of the Public School Education Act of 1975. 86 N.J. at 330. Both the plain language of the takeover law and its legislative history evince a clear intent on the part of the Legislature to enlarge rather than diminish the already far-reaching powers of the Commissioner to intercede in failing school districts.

If the [C]ommissioner determines that the district has failed to take or is unable to take the corrective actions necessary to establish a thorough and efficient system of education, the [C]ommissioner shall recommend to the State board that it issue an administrative order creating a State-operated school district.

Use of the disjunctive "or" suggests alternate triggers for State action, that the Commissioner has a duty to intervene if the local district either won't or can't make reasonable progress on its own. Later on, the statutory language concentrates more on the educational needs of children than on the reasonableness of efforts put forth by the local district. Thus, the State Board may direct removal of the local board and creation of a State-operated school district "upon its determining that the school district is not providing a thorough and efficient system of education." _Id._ Similarly, the State Board may issue an administrative order for takeover "[w]henever the Commissioner of Education shall determine . . . that a local school district has failed to assure a thorough and efficient system of education[.]") _N.J.S.A._ 18A:7A-34. Read together, the statutory language shows that the Legislature was attentive to the problems of local districts but more concerned about education for children.

Indicative of the clear legislative intent to broaden the Commissioner's powers is the relatively light burden of proof imposed on the State at the hearing before a judge of the Office of Administrative Law. _N.J.S.A._ 18A:7A-14 specifies that "In the proceeding, the State shall have the burden of showing that the recommended administrative order is not arbitrary, unreasonable or capricious." Construing a similar standard, the New Jersey Supreme Court has stated, "The test is essentially one of rational basis." _Worthington v. Fauer_, 88 _N.J._ 183, 204 (1982). Oft-quoted language in _Bayshore Sewerage Co. v. Dept. Environ. Protection_, 122 _N.J. Super._ 184, 199 (Ch. Div. 1973), aff'd 131 _N.J. Super._ 37 (App. Div. 1974) elaborates on how little the State must show to sustain its case:

Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.

Statutory provisions for the governance of State-operated school districts also reflect the legislative design to strengthen the powers of the Commissioner and the State Board. Upon issuance of an adminis-
trative order by the State Board, the State-operated district "becomes effective immediately." *N.J.S.A.* 18A:7A-34. The statutes contemplate appointment of a State district superintendent of schools to serve for five years, with the power to do all things "necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." *N.J.S.A.* 18A:7A-38. There is automatically established an internal audit team to "monitor the business functions of the district and report its findings to the State district superintendent and the commissioner." *N.J.S.A.* 18A:7A-41. Existing positions of chief school administrator and other central office administrators "shall be abolished upon creation of the State-operated school district," and within six months the new State superintendent shall prepare and implement a reorganization of the district's central office staff. *N.J.S.A.* 18A:7A-44. Such measures are temporary, and the statutory scheme anticipates gradual restoration of local control after the district achieves certification. *N.J.S.A.* 18A:7A-49.

Legislative intent may be further gleaned from the surrounding legislative history, even where no ambiguity appears on the face of the statutory language. *Data Access Systems, Inc. v. State*, 63 N.J. 158, 166 (1973). Enactment of the school takeover law has a long and tortuous history. The push for passage began with earlier versions of legislation, introduced in June 1986 as Senate Bills 2355, 2356 and Assembly Bills 2926, 2927, which passed both Houses in amended form but died after being conditionally vetoed by the Governor in June 1987. Similar proposals were reintroduced in November 1987 as Assembly Bills 4643 and 4644. These bills managed to survive hard-fought battles over many controversial issues, including tenure rights of school principals and funding for corrective action plans. Ultimately, the Governor signed compromise versions of the bills into law on January 13, 1988.

Public hearings before a joint session of the Senate and Assembly Education Committees on September 16, 1986 provide useful insights into what the Legislature was hoping to accomplish. Testifying in favor of the proposed legislation, Dr. Michael Ross, superintendent of schools in Jersey City for ten years prior to 1984 and superintendent in South Orange-Maplewood since then, informed legislators that "the children are still not achieving as well as they should." *Public Hearings Before Senate and Assembly Education Comm's* (Sept. 16, 1986), at 58. He reminded lawmakers that the Legislature has an obligation to assure all taxpayers "that the money allocated under the T & E law is spent properly for the education of the children of the cities." *Public
Hearings, at 59. Moreover, he predicted that if the bills passed "city parents can actually have a more significant voice in the quality of the education their children receive," since in his experience "too often the board has been the politicians' voice, not the people's voice." (Id.) At the bill signing ceremony, Governor Thomas Kean declared that New Jersey had become "the very first state to make the moral statement that when schools fail, adults should pay the price, and not children." Remarks of Gov. Kean (Jan. 13, 1987), at 1.

Jersey City urges that the requested relief is too drastic, relying on legislative findings that the State must be empowered to take over local districts in "extreme cases." P.L. 1987, c. 398 § 1(d). In addition, Jersey City refers to that portion of N.J.S.A. 18A:7A-15 which gives the Commissioner the power, short of a takeover, "to order necessary budgetary changes within the district or other measures the [C]ommissioner deems appropriate to establish a thorough and efficient system[.]" While opposing relief of any type, Jersey City contends that, if some corrective action is necessary, the Commissioner must first exhaust the least intrusive remedy.

Like Jersey City, the State also regards takeover "[a]s a last resort mechanism designed to address only the worst-performing school districts." Finally-Intervention Becomes Law, New Jersey Education Bulletin, Vol. 6, No. 7 (Jan. 1988) at 1. It is, of course, true that the Commissioner retains the option to order lesser remedies in appropriate situations. But that is a moot point here, where the circumstances are so calamitous that the Commissioner or his designee may reasonably conclude that takeover is the only viable remedy. Indeed, it would be difficult for any impartial observer to conclude otherwise. Truly the "extraordinary" nature of the remedy is justified here by the "equally extraordinary" nature of the problem. Trenton, 86 N.J. at 329.

As set forth in the factual findings, Jersey City has serious deficiencies, not just in one area, but in all major areas of monitoring. Therefore, the problems are not susceptible to limited solution. If the problem were only in finance, appointment of a fiscal monitor might arguably be enough. If the problem were only in special education, a new person for special education might be enough. If the problem were only in personnel, a new person for personnel might be enough. But Jersey City's problems are systemic. They run across the various administrative departments and across changes in membership of the local board of education. Whoever happens to be in control, the district has shown an institutionalized resistance to long-overdue re-
forms. This is not an indictment of everyone associated with the district but of the leadership whose job it is to set the tone and provide direction to the organization. School managers cannot be allowed to blame general social conditions, or the State, or the children who are the victims, for their own inadequacies. They must themselves be held accountable.

Proofs convincingly demonstrate that Jersey City's problems are so pervasive that they require outside intervention. State expert witnesses approached the question from different fields of speciality, but each arrived at essentially the same conclusion. Dr. McCarroll, an educational administrator, testified that the district is unable to "identify its problems, let alone, to solve them." Dr. Smoley, a management expert, recommended that the district must be "completely restructured" and that "the State as the governmental entity with ultimate constitutional responsibility for education must establish a structure and a process for providing the effective governance and leadership." Greta Shepherd, an urban education expert, believed that the district's present leaders lack the capacity "to think of alternative strategies, to correct their problems." Vincent Calabrese, an expert in school finance, did not think that the local district had the ability to "reverse a long-standing trend" and saw a need for dramatic change "to break the cycle" of failure. The Commissioner or his designee may reasonably rely on the well-founded advice of these reputable experts.

Next, Jersey City contends that the State acted arbitrarily by excessive reliance on hearsay evidence to prove its charges. Although formal rules of evidence are relaxed in administrative hearings and hearsay is admissible, most state administrative agencies are nevertheless bound by the "residuum rule." The classic statement of that rule appears in Weston v. State, 60 N.J. 36, 51 (1972):

Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

There are several reasons why the residuum rule does not preclude reliance on the credible evidence in this case. First, the residuum rule does not apply here to the State's investigative report. Legal scholars have expressed "near universal criticism" of the residuum rule. Pierce, Use of the Federal Rules of Evidence in Federal Agency Adjudications, 39 Admin. Law. Rev. 1, 9 (1987). In response,

Title 18A does not have any express provision analogous to the federal standard. However, N.J.S.A. 18A:6-24 permits the Commissioner to receive testimony "in the form of written statements verified by oath and accompanied by certified copies of all official documents, and the original or verified copies of all other documents, necessary to a full understanding of the questions involved." That provision, expressly made applicable to hearings in school takeover cases by N.J.S.A. 18A:7A-14(e), is ample authority for the Commissioner to rely on the contents of the CCI report verified under oath by witnesses at the hearing. Investigative reports of government agencies are normally regarded as sufficiently trustworthy so that the United State Supreme Court does not exclude them from a jury's consideration in civil litigation, even if they contain "opinions" rather than "facts." Beech Aircraft Corp. v. Rainey, 109 S.Ct. 439 (1988).

Second, insofar as the residuum rule does apply, its purpose has been fully served by the opportunity for extensive cross-examination of the witnesses whose testimony forms the basis of findings adverse to Jersey City. Dr. Smoley, as only one of many examples, was cross-examined more than five days and divulged all his sources of information. This is not a case where a party is expected to overcome "faceless opposition" or where the identity of those whose views formed the foundation of the adverse judgment was not disclosed. See In re Application of Howard Sav. Bank, 143 N.J. Super. 1 (App. Div. 1976).

Third, and most important, there is more than enough legally competent evidence to support the ultimate findings. In re Cowan, 224 N.J. Super. 737, 750 (App. Div. 1988). See also, S. Lefelt, Administrative Law & Practice, 37 N.J. Practice Series §209 (1988). Many of
the proofs involved testimony of direct observations by witnesses who visited the scene, such as Dr. Smoley, Greta Shepherd, Dr. Osowski and Mr. Cuccia. Much of the remaining proof would have been admissible even in a judicial proceeding under various exceptions to the hearsay rule. *Negron*, 220 N.J. Super. at 433-434. Jersey City instructed all its employees to cooperate fully with the State’s investigation. Statements by district employees about matters within their scope of employment are admissible as vicarious admissions under *Evid. R. 63*(9). Records prepared by either party in the ordinary course of business are admissible as business records under *Evid. R. 63*(13) or as reports and findings of public officials under *Evid. R. 63*(16). Court rules on expert testimony are reminiscent of the evidentiary standard in federal administrative agencies. Opinion testimony need not be based on admissible evidence, provided it is based on facts or data “of a type reasonably relied upon by experts in the particular field.” *Evid. R. 56*. Accordingly, it was proper for chairperson Greta Shepherd to utilize data collected by her fellow team members or for accountant Katz to utilize data collected by his specially trained staff. By extension, it is reasonable for an agency head to rely on information which his trusted subordinates have gathered for his review.

At the end, Jersey City raises two makeweight arguments. First, Jersey City argues that the takeover statute would impair the “contract rights” of tenured employees and is “an ill-disguised attempt” to circumvent the tenure laws. Tenure is a statutory status, and not a contractual term. *Spiewak v. Rutherford Bd. of Ed.*, 90 N.J. 63, 72 (1982). *Zimmerman v. Newark Bd. of Ed.*, 38 N.J. 65, 72 (1962), cert. den. 371 U.S. 956 (1963). The Legislature created tenure and can modify or abolish it. Cf. *Bednar v. Westwood Bd. of Ed.*, 221 N.J. Super. 239, 243 (App. Div. 1987). (State Board cannot erode tenure rights, “which can be removed only by the Legislature.”) If the genuine contract rights of any school employee are in the future threatened, the affected individual may seek redress in the proper forum. To the extent that Jersey City is making a constitutional attack on the facial validity of the statute, that issue must be pursued at a higher level. *Brunetti v. Borough of New Milford*, 68 N.J. 576, 588-591 (1975).

Finally, Jersey City asserts that the takeover law may not be applied retroactively against it, because Level III monitoring was in progress at the time of enactment. Generally, the law favors prospective application of statutes to avoid unfairness to people who have acted in reliance on the old rules. *Gibbons v. Gibbons*, 86 N.J. 515,
521-525 (1981). Exceptions are made, however, when the Legislature has expressed a contrary intent, "either express, that is, stated in the language of the statute or in the pertinent legislative history [citation omitted], or implied, that is, retroactive application may be necessary to make the statute workable or to give it the most sensible interpretation[.]" Gibbons, at 522. Other exceptions exist for cases where the statute is "amelioriative or curative," or where special conditions such as the expectations of the parties may warrant retroactive application of the statute. Gibbons, at 523. In no case will a statute be given retroactive effect if to do so would result in "manifest injustice" to a party. Id. See also, Dept. of Environmental Protection v. Ventrion Corp., 94 N.J. 473, 498-499 (1983).

The right to a thorough and efficient education is not something new, but has been in the current state Constitution since 1947 and the prior Constitution since 1844. N.J. Const. (1844) Art. IV, § VII ¶ 6. Legislative history makes clear that the Legislature wanted the takeover law "to take effect immediately," but to remain inoperative until the mechanism for a State-operated school district could be erected. P.L. 1987, c. 398, § 6. It makes no sense for the Commissioner to know that the Constitution is being violated, yet be powerless to act. But what is most unsettling about Jersey City's stand is the implication that district managers would have done something more or better, if only they had known that administrators' jobs, rather than the education of children, were on the line. State experts did not expect a panacea, but they did expect to see tangible signs of progress in nearly three years' time. Instead, they saw a floundering district, unable after years of trying to meet minimum certification requirements. Even today Jersey City's leadership fails to appreciate the urgency of the situation. They seek new State studies, new State reports, and further delay. Jersey City's children have already waited long enough for the thorough and efficient education to which they are legally entitled.

V. Order

It is hereby ORDERED that the local board of education in the Jersey City school district be removed and that a State-operated school district be created whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34.

This recommended decision may be adopted, modified or rejected by ASSISTANT COMMISSIONER OF EDUCATION, LLOYD J.
NEWBAKER, JR., who by law is empowered to make a final decision in this matter.

FINAL DECISION BY THE ASSISTANT COMMISSIONER OF EDUCATION, LLOYD J. NEWBAKER, JR.:

This matter comes before Assistant Commissioner Lloyd J. Newbaker, Jr. by virtue of the voluntary recusal of Commissioner Saul Cooperman. Assistant Commissioner Newbaker has reviewed the extensive record in this matter. It is noted that the Jersey City Board of Education (Board) informed the Assistant Commissioner by letter dated August 2, 1989 that it intended to file no exceptions to the initial decision. Petitioner Walter McCarroll, Assistant Commissioner for County and Regional Services, (State) likewise through letter from counsel dated August 4, 1989 indicated his waiving of exceptions and requesting that the decision herein be rendered as expeditiously as possible.

Based upon his independent review of the record, the Assistant Commissioner, like the ALJ, finds that the Jersey City School District has failed grievously to meet its responsibility to provide a thorough and efficient system of education to the children of that community. The record in this matter more than amply supports the State's contentions that the Board has manifested gross and flagrant deficiencies in its governance practices, its management procedures, educational programs and fiscal practices. Not only has the State in this matter met the statutory burden imposed by N.J.A.C. 18A:7A-14(e) of demonstrating that its actions in seeking to impose an administrative order establishing a state-operated school district are not arbitrary, capricious and unreasonable, it has conclusively proven its charges that the managers of the district have demonstrated a consistent inability to meet minimum certification requirements and academic standards; failed to provide an adequate policy framework to guide district operations; permitted widespread political intrusion into school operations through the awarding of positions on the basis of patronage and nepotism; failed to adequately evaluate the performance of staff and hold employees accountable; failed in its responsibility to upgrade its curriculum and provide sufficient current instructional materials; failed to adequately raise student performance levels, lower dropout rates, and ensure the legal rights of the handicapped children; failed to maintain appropriate financial records and provide effective control over the expenditure of public monies; vio-
lated public bidding laws, engaged in imprudent business practices and used Federal and State funds for unauthorized purposes; and failed to maintain a safe, clean and appropriate learning environment for the children of the district.

GOVERNANCE AND MANAGEMENT

Even the most cursory review of evidence in the record inevitably leads to the conclusion that the Jersey City Board of Education totally failed in its obligation to formulate clearly defined policy to provide well-defined goals and objectives; to appoint highly qualified and accountable administrative personnel to ensure its implementation; and to ensure that the public's monies are utilized in the most productive and cost effective manner.

The picture of Board operations which emerges from the record is one of a board of education almost wholly indifferent to the vital needs and educational concerns of the district. While almost totally preoccupied with the minutia of relatively minor personnel and business matters, the same Board was capable of virtual total indifference to the vital personnel matters of appointing a new superintendent acquiescing in this regard to a determination made by the City's political power structure outside the confines of the Board's own deliberations. In the Assistant Commissioner's view, it is inconceivable that the Board of Education of a district so beset by educational, management and fiscal problems could limit its consideration of the vital position of chief school officer to a single individual. As the ALJ points out, the Board further compounded its negligence and indifference to important detail by seeking the same superintendent's removal after only a year and one half, without recognizing the fact that he had already acquired tenure as a result of Board action granting tenure to the previous superintendent after only 18 months.

In reviewing the efficacy of the charge against the Board relative to its failure to provide clear and unambiguous policy direction to guide its administrative staff, the Assistant Commissioner, like the ALJ, finds the failure of the Jersey City Board of Education to even schedule the start of a projected policy manual update under the auspices of the New Jersey School Boards Association between December 1985 and May 1988 to be characteristic of the Board's indifference to providing leadership, direction, and purpose in meeting its responsibilities for providing a thorough and efficient school system.
In support of the foregoing conclusion, the Assistant Commissioner particularly notes that even Dr. Kenneth J. Tewel, the Board’s expert witness, acknowledged the serious nature of the failure to carry this project to fruition.

While the Board seeks throughout to characterize its failure to more promptly address the issues of governance and management confronting the district to obstructionism from McCann holdovers, the ALJ correctly points out that the Cucci appointees constituted a majority of the Board’s composition by 1986. The ALJ points out in the Initial Decision in reliance on the record that:

... it is overly simplistic to split the board neatly into pro-Cucci and pro-McCann forces. The real situation is far more fluid and involves a shifting pattern of personal allegiances and local alliances. One day Mrs. Eccleston would be Mayor Cucci’s preference for board president and the next she would be aligned with the Schulman block of votes. One day Aaron Schulman would nominate Franklin Williams to be superintendent of schools and the next would be leading the fight against Mr. Williams’ appointment. It is not just control by one or another group, but rather the constant infighting and jockeying for power which immobilize the board. ...

PERSONNEL FUNCTION

No function is more important to the successful operation of any organization than that of the manner in which it recruits, hires, assigns, evaluates, promotes and dismisses its employees. In this regard, therefore, the allegation that the personnel function of the Jersey City Board of Education is dominated by political interference, nepotism and outright political patronage is perhaps the most serious of all because it bespeaks an indifference to the primary personnel function, namely, the recruitment and employment of the most highly qualified and able people to carry on the functions of the organization.

The record in this matter as ably elaborated upon by the ALJ presents a sorry panoply of employment, promotion and monetary reward for reasons of political affiliation, nepotism, and personal affiliation. It is unnecessary for the Assistant Commissioner to elaborate further upon the specific circumstances established in the record and chronicled by the ALJ of the employment or rewarding of the mayor’s sister, stepdaughter, neighbor and political allies upon his assumption of his office. However, the Assistant Commissioner does feel constrained to take strong exception to the testimony of Dr. Tewel in speaking to the issue of what in his view constituted or did
not constitute political intrusion. In discussing the rapid advancement and salary increases of Diane Silvestri, Mayor Cucci's stepdaughter, Dr. Tewel stated:

I don't know about her qualifications and can't speak to them. I don't know about that. I can only speak to the fact that she's not a high level employee, she's a very low level functionary, and she's not in any policy making position. I would be concerned regarding the issue of political intrusion, which you are focusing on if the superintendent, or if you were giving me a name, the president of the board, or the superintendent, or such as I keep reading about with previous administration, but this is a low level functionary, and I think that needs to be reiterated.

Not only does the Assistant Commissioner find such logic to be appalling in its failure to recognize that political intrusion accepted at any level of the organizational structure must be symptomatic of a more pervasive influence, it totally flies in the face of the overwhelming evidence in the record and elicited in testimony that nepotism, patronage and political influence were the prime factors in the process of selecting high level administrators including the superintendent of schools. Therefore, even were one forced to accept the somewhat tainted definition of what constitutes political interference and influence in the personnel function, evidence of a broader, more comprehensive system of political patronage is rife throughout the record.

Nor does the Assistant Commissioner find any merit whatsoever in Dr. Tewel's justification for why all four of Mayor Anthony Cucci's acknowledged "recommendations" for high level administrative positions within the district were ultimately recommended by the superintendent and accepted by the Jersey City Board of Education. His allusion to the existence in urban areas of a so-called "...symbiotic relationship between a civic entity, and the agency that spends most of its money..." contradicts the clear legislative intent that boards of education, whether popularly elected or appointed by the chief executive officer of the municipality, are independent entities not properly subject to the direction of the municipal authority. Even in the fiscal area where municipalities can legally exercise some degree of influence over board prerogatives by virtue of setting the tax levy upon defeat of a budget in a Type II district and by participation in the budget process through the Board of School Estimate in a Type I district, the board of education enjoys the right of appeal to the Commissioner should it deem the action of the local governing body or the Board of School Estimate in setting the tax levy has failed to
certify a tax levy sufficient to ensure the provision of a thorough and efficient education. See N.J.S.A. 18A:22-14 and N.J.S.A. 18A:22-37. In the Assistant Commissioner's view, Dr. Tewel's attempt to justify the "symbiotic relationship" by illustrating the degree of influence exercised by the municipal political power structure in New York, Chicago and other urban areas bespeaks more of what represents a major obstacle to progress in many urban areas than it does to serve as a rationale for accepting the kind of political intrusion demonstrated herein as being rampant in the Jersey City Public Schools.

The Assistant Commissioner is likewise unmoved by Dr. Tewel's testimony as it relates to his perception of the manner in which central office personnel are selected in large urban areas when he states as follows:

Yes, and I can say it without comment, you know, but the larger the urban district, the more the tendency is of the district to promote and look within for leadership.

Example, in New York City, the last time anybody became principal of a high school, from any place other than New York City, I think it was 1946, the same seems to be true in the largest of—in the other of the eight or ten largest urban districts.

I'm not saying I think this is terrific, but it is the way life is. And urban districts tend to separate themselves from other types of districts because—maybe because of, I don't know why, the uniqueness of their population. Their populations tend to be different than suburbs, complexion of the folks who live in urban areas is different from the suburbs and other areas, in many cases.

But the larger the urban area, the greater the tendency to find leadership from within, and in fact the leadership is there.

You go to a place like Greenwich, or a place like Darien, Connecticut, and you find a couple of hundred teachers in the system, and maybe one principal, and very often there isn't the home grown leadership that there is in urban areas.

While Dr. Tewel may well be correct that urban centers, by virtue of their size, have a considerable pool of talent from which to choose in order to make administrative appointments, that argument can hardly be considered valid in this case, however, given the fact that the record in this matter is clear that the superintendent of schools and the other four persons "recommended" by Mayor Cucci for important administrative posts were the only persons interviewed and considered by the Jersey City Board of Education. There is absolutely no evidence in the record that the Jersey City Board of Education in any manner attempted to determine whether the persons whom they
appointed were the best possible candidates available to fill the positions involved.

It is clear from Mayor Cucci's testimony, despite his protestations to the contrary, that his sole justification for making his recommendations to fill the four high level positions to which Mr. Lanzillo, Mr. Falcicchio, Mr. Kaminski and Mr. Fauerbach were promptly appointed was the fact that these individuals were certified by the State of New Jersey. Despite his attempts in testimony to qualify his position to the extent of adding the ability to do the job as a necessary ingredient, there is absolutely no evidence in the record that there was any attempt whatsoever to determine whether the nominees indeed did demonstrate the ability to perform the tasks of the administrative positions within the school district to which they were assigned.

In the Assistant Commissioner's judgment, it strains all credibility to accept the Mayor's assertion of coincidence of the fact that all four persons whom he acknowledged recommending for administrative positions were duly recommended by the superintendent to the Board and subsequently appointed. The fact that all four appointees to high administrative positions within the school district, whom the Mayor acknowledged recommending, were political supporters makes a mockery of both the Mayor's and the Board's contentions that the political interference, nepotism and patronage of which the Jersey City School District stands accused in this matter were solely the product of past administrations and Boards.

In light of the foregoing, the Assistant Commissioner finds that political interference, nepotism and patronage continued with the advent of the Cucci administration.

**QUALITY OF EDUCATIONAL PROGRAMS**

The Assistant Commissioner has carefully reviewed the initial decision in this area, as well as the submissions of the parties, as they relate to quality of educational programs. Based upon that review, the Assistant Commissioner, like the ALJ, is struck by the extreme variance which exists between the expert testimony of Dr. Smoley, the State's expert, and Dr. Tewel, the Board's expert witness.

In assessing these differences, the Assistant Commissioner, as he did in that portion of the decision relating to personnel practices, finds Dr. Tewel's attempt to apply a relative standard unconvincing. As he did when assessing the personnel practices prevalent in Jersey City, Dr. Tewel seems to believe that physical conditions, noise levels and
class attendance in urban schools must be measured by standards different from those which could be applied in suburban areas. While recognizing the enormity of the problems confronted by urban school districts in coping with the culture of poverty, the Assistant Commissioner rejects those conclusions emphatically and finds instead that poor urban children are no less entitled to clean, safe learning environments and have an absolute right to be measured by standards of attendance and promptness as all other students in the State. To concede and accept that lesser standards are a fact of life in urban schools, as does Dr. Tewel, is to doom all such students to an educational system which is constitutionally impermissible.

Further, the Assistant Commissioner firmly believes that the acceptance of such a posture by the leadership of the Jersey City Public Schools represents convincing evidence of its lack of will to undertake those necessary steps to provide an environment conducive to learning and the achievement of eventual certification. A willingness to accept levels of performance and conduct less than those which would normally prevail in a school environment must inevitably be translated by the student population into perceptions of unworthiness and, ultimately, result in widespread defeatism on the part of both students and staff.

Like the ALJ, the Assistant Commissioner finds the nature, content and level of implementation of the curriculum to be central to the determination in this matter. Despite the Board’s protestations to the contrary, the Assistant Commissioner affirms the finding of the ALJ that Jersey City is failing in its efforts to provide a thorough and efficient system of education to its children and is unable to take those corrective actions necessary to remedy its failures.

The Jersey City Board offers the defense that it has made significant strides since 1985 in revising its curriculum and establishing an effective delivery system. Despite said claims asserted by the Board, the ALJ concluded that only in grades K-6 could the curriculum developed since the advent of Superintendent Williams in 1985 be considered as having being revised. Even in those grades, however, review of lesson plans by State monitors failed to reveal evidence that the revised curricula were in fact being implemented, nor were the State monitors able to detect that the skills contained within the curricula were in any way aligned with the district’s standardized testing program. Further, review of the social studies curricula for the grades beyond grade six by the Assistant Commissioner confirms the ALJ’s conclusion that:
... Much of the material used to teach children in Jersey City contained incorrect or incomplete information. Deficiencies were most glaring in the social studies department where, for example: the curriculum for ethnic studies refers to African countries which no longer exist and neglects to mention others in existence since the 1960s; the curriculum for Afro-American history stops with the Nixon era in 1974; the curriculum for United States history has as its last entry the Voting Rights Acts of 1965; and the curriculum for Puerto Rican culture misidentifies the Spanish surnames of various persons and fails to include recent historical figures who made important cultural contributions.

Given the high degree of mobility which exists within the Jersey City School System, the Assistant Commissioner, as does the ALJ, finds the failure on the part of the Board to provide uniform textbook series both across grade levels and within each grade level and for specific secondary subjects on a districtwide basis to be thoroughly inconsistent with the Board’s contentions of wide-ranging curricular improvement. Permitting the use of science books from eleven different publishers as late as 1988 does not, in the Assistant Commissioner’s view, constitute evidence that the Jersey City Board of Education has made significant progress in turning the district around.

Nor do the very serious deficiencies revealed in the management of the district’s bilingual education, compensatory education and special education programs provide testimony to a district on the rise. Notwithstanding the elaborate defense of the district’s practices in the above-cited areas, the testimony of Dr. Sylvia Roberts and of Dr. Jeffrey Osowski clearly sets forth numerous violations of state requirements in the areas of bilingual, basic skills improvement, and special education. Symbolic of the Board’s defense is its attempt to characterize these deficiencies as problems which are either generic to the programs or merely the result of a picayune bureaucracy seeking to satisfy “... complex and ever-changing web of LEPS and basic skills regulations. ...” (Board’s Post-hearing Brief). Equally characteristic of the defense’s attempt to minimize deficiencies is its failure to concede that the problem of so-called “split-funding” of teachers involved in basic skills programs arose, not from an innovative practice designed to promote “instructional continuity,” but from the district’s inability to precisely verify how much time these basic skills improvement teachers actually spent in the state and federal remedial programs and how much time they spent in activities which were compensable under local funds.

The ultimate in the Board’s attempts to “trivialize serious defi-
ciencies is its boast that by 1987 only 302 students in the Limited English Proficiency (LEP) program were being denied the services to which they were legally entitled under law.

Of such dubious cloth is the defense woven that it seeks to minimize its inefficient and illegal practices by alleging that the number of persons deprived of their rights represent only a fraction of those who are being serviced.

In the area of special education, the Board paints a glowing picture of improvements introduced by Assistant Superintendent Falcicchio including the reorganization of the special education program, increasing the program budget, opening and staffing 93 new classrooms, revising the supervisory structure, and the referral process. (Board's Post-hearing Brief)

Despite such glowing claims, the record as developed by the ALJ demonstrates that newly developed Individualized Educational Plan (IEP) forms were used on a pilot basis in only nine of 5,343 pupil records, many individual folders contained outdated IEPs and the IEPs themselves, when examined, were not individualized in their content. Further and most revealing, the record demonstrates that Dr. Osowski was informed by special education teachers that they had begun preparing instructional guides at the direction of the administrative staff shortly before the State visitation.

Of particular interest to the Assistant Commissioner is the fact that despite its elaborate defense and glowing accounts of improvement, the Board was unable to rebut through intensive cross-examinations the conclusions set forth by Dr. Osowski relative to the deficiencies in the special education program uncovered by the Department of Education's monitoring and as testified to by him.

The Assistant Commissioner has also examined in detail the transcripts of the testimony of Assistant Superintendent Falcicchio, who is responsible for overall administering and supervising of the district's special education programs. Based upon the aforesaid independent review, the Assistant Commissioner in conjunction with the ALJ concludes, as stated in the initial decision, that the State in this matter has conclusively demonstrated:

Major areas of noncompliance by the district include: lack of sufficient textbooks and teaching materials to carry out promised programs and services; absence of curriculum documents or use of outdated or inappropriate curriculum; deficiencies in specialist evaluations required for proper evaluation; nonexistent or seriously deficient individualized educational programs (abbreviated "IEPs")
and instructional guides; shorter hours for handicapped children than for children in regular classes; class sizes which exceed the maximum permitted by regulation; lack of classroom coverage in the absence of the teacher; inadequate notice to parents; failure to obtain parental consent; failure to provide sufficient speech therapy to autistic children; and failure to comply with time deadlines. Pupils were placed in special education classes before evaluation and, in one case, before referral to the child study team for evaluation.

Having so concluded, the Assistant Commissioner is constrained to cite from the record an incident which is, in his view, illustrative of the degree of callous indifference which exists on the part of the Jersey City Board and its agents to the letter and spirit of the law and to both the appearance and reality of conflict of interest. The State by way of cross-examination of Assistant Superintendent Falcicchio elicited testimony regarding a contract in existence between the Jersey City Board of Education and the Jersey City Family Health Center whose function it was to provide services to nine public school pupils pursuant to P.L. 192 and P.L. 193. Despite the acknowledgment by the witness that N.J.A.C. 6:28-5.2 requires annual approval by the New Jersey State Department of Education of any clinic or agency providing services for pupils and despite the fact that no documentation could be provided that specific approval had been applied for or granted, the witnesses continued to assert the legality of the Jersey City Board’s actions by citing the fact that the relationship had been ongoing for 12 years and by asserting a claim, without proof, that the county office was aware of the arrangement. Further compounding the indifference illustrated in these proceedings as to what the Board has frequently characterized as “technical violations” is Falcicchio’s admission that at least five special services employees of the Jersey City Board of Education are employed by the Jersey City Family Health Center, notwithstanding the fact that N.J.A.C. 6:28-5.2(a)(3)iv provides that:

An employee of the district board of education shall not provide service as an employee of a clinic or agency to a pupil who is the responsibility of his or her employing district board of education.

Mr. Falcicchio’s response to the aforesaid provision was as follows:

During the time that they are employed by the district. In other words, there are people employed by the district from 8:30 to three o’clock. So if they did work for a clinic or an agency after that time, that’s not a violation of what you just read.
In the final analysis, the Assistant Commissioner finds said response on the part of a high level official, whose responsibilities require him to not only be familiar with, but to ensure compliance with, all rules and regulations in the area of special education, to be either absolutely insensitive to matters of conflict of interest or cynical to the extreme.

The final issue to be addressed within the confines of this decision as it relates to quality of educational programs is the contention of the Board that its improving High School Proficiency Test (HSPT) scores conclusively demonstrate that educational progress is being made and the district is on the upswing. The Board in this regard has enjoyed the highest or second highest increase in passing rates in the State. In response to the aforesaid contention, the Assistant Commissioner is in total agreement with the ALJ’s assessment when he concluded as follows in the initial decision:

... Although Jersey City derives some satisfaction from recent increases in its passing rate on this test, there is little about which to be genuinely proud.

Scores on the HSPT administered to the district’s youngsters in April 1988 are abysmally low. ... Practically two-thirds of Jersey City ninth graders who took the test, 64% to be exact, could not pass all three subtests as required in order to graduate. By comparison, the failure rate for all districts statewide is only 23.3%. Jersey City also fares poorly when compared to 27 other districts in the same “district factor grouping,” a category controlled for income, education level and socioeconomic status. Neighboring Hoboken has a more respectable failure rate of 46.7%. Only Camden and Newark have worse failure rates than Jersey City.

Breakdown of Jersey City’s scores on the subtests is equally distressing. Reading test failure rates are 30.1% for Jersey City, compared to 6.6% statewide and 15.6% for urban districts alone. Writing test failures are 37.4% for Jersey City, compared to 9.3% statewide and 18.9% for urban districts. Mathematics test failures are 51.4% for Jersey City, compared to 18.2% statewide and 34% for urban districts. Moreover, Jersey City’s success rates are probably inflated in relation to other districts, because it has the largest number of classified children who are exempt from taking the test. Dr. McCarroll was understating the case when he remarked that Jersey City has “nothing to cheer about.”

Putting its best foot forward, Jersey City emphasizes the substantial percentage increases in its HSPT scores between 1986 and 1988. While any improvement is laudable, the impressiveness of this accomplishment is tarnished by the low starting point for the calcu-
lations and by the distance that Jersey City has yet to go. Comparisons among results on achievement tests administered in the lower grades are rendered meaningless by the fact that different local districts in New Jersey use different test instruments and that Jersey City itself switched tests within the relevant period.

By other conventional measures, Jersey City also lags behind the rest of the state. Student absenteeism consistently exceeds the districtwide rate of 10% or less required by the state for certification. At three of the five high schools, absenteeism exceeds the State standard of no more than 15% per school. Snyder High School had an absenteeism rate of 25% in 1986-87, while Dickinson and Lincoln were above 20%. Almost as significant as what Jersey City said is what it chose not to say. Most districts in New Jersey measure success in terms of college admission test scores, acceptances to more selective colleges, number of national merit scholars, outside recognition of student achievement, or parent satisfaction. Jersey City was resoundingly silent on these matters. Numerous administrators whose jobs are at stake made self-serving statements, but not even one parent or student vouched for the quality of education in Jersey City. There was, however, one area in which Jersey City did claim to excel. Professor Tewel brought up the low incidence of "missing marks" on student report cards, apparently considering it to be remarkable that teachers in the district gave grades to their students.

In summary, therefore, the Assistant Commissioner adopts as his own the findings of the ALJ relative to "Quality of Educational Programs" as they are set forth in the initial decision and incorporates them herein by reference.

**FISCAL PRACTICES**

Throughout the proceedings, the Board has frequently alluded to the need for greater availability of monetary resources allegedly in order to overcome the obstacles imposed by the poverty stricken environment from which so many of its students come. Despite such protestations, the Board's performance in the area of the management of the fiscal resources which it does have at its disposal represents one of the most flagrant examples of its ineptitude and mismanagement. As pointed out by the ALJ, the fact of the unwillingness of Board Secretary Arsenio Silvestri to testify and his resort to the protection of the Fifth Amendment more than 40 times, compiled with other evidence in these proceedings, permits an inference "... that the board and its employees were extremely careless in their handling of public trust funds. ..." (Initial Decision)

In reviewing the positions propounded by the parties in this area,
the Assistant Commissioner notes that what the State characterizes as a lack of clearly defined organizational structure as to overall responsibility for fiscal operations with resultant confusion and the myriad deficiencies found in this area by the State, the Board seeks to characterize as "segregation of duties" in order to maintain "... independent review and verification of the propriety of the work of those who handled the transaction in the preceding stage." (Board's Post-hearing Brief)

Based upon his own independent review of the record, the Assistant Commissioner concludes that the position as excerpted below from the State's Post-hearing Brief accurately describes the degree of confusion which reigns in the fiscal operations of the Board of Education of the City of Jersey City:

The search for the truth regarding fiscal practices leads to a conundrum as to actually who is in charge of financial operations. While we have charts prepared by Dr. Duva and testimony from a myriad of employees, we have no clear answer as to the identity of the person solely responsible even though statutorily it must be the Board secretary. Not only is there confusion as to overall responsibility, there is also a quandary among the employees as to duties and reporting responsibilities. Williams, after initially testifying that Silvestri reported to him, changed his answer two questions later and attempted to explain that Silvestri also reported to the Board since he had a dual reporting responsibility. Kaminski stated that there had been an initial disagreement between Williams and the Board regarding the reporting responsibilities of the internal auditor and the controller. Gilman, the budget officer, was not sure to whom Sylvester, the controller, reported but believed that it was either to the superintendent or to the Board. She was also unsure as to Scarfo's duties and whether his function was similar to her own. Kaminski was equally unsure about Sylvester's duties. While Gilman was sure that she did not report to Sylvester, Kaminski thought that she did. Even though she was not sure to whom Kaminski reported, Williams maintained that Kaminski had a dual reporting responsibility.

Gilman stated that the purpose of separating all of the accounting functions into different departments was to create a system of checks and balances; but the vast factual record demonstrates conclusively that the notion of any system of controls is only theoretical and is not being implemented in practice.

Perhaps most illustrative of what may at best be described as ineptitude and at most may result in further legal action are the circumstances surrounding the employee prescription and dental plan with New Age Administration. It is clear from the record that the
Jersey City Board of Education engaged in a self-insurance health benefits plan for which no legal authority exists. Further, as pointed out by the ALJ and verified in the record, state audits revealed significant numbers of overcharges and improper payments to the amount of at least $1.22 million. The full details of the irregularities involved in this transaction, as well as the failure to correct the overpayment by key personnel when confronted with knowledge of the overcharges, are chronicled in detail in the initial decision and are incorporated herein. Most revealing, however, of the obfuscation of the Board's defense is the following excerpt from the ALJ's conclusions:

Jersey City's assertion that it initiated its own New Age investigation in November 1987 "independently" of any State investigators is patently false. State investigators had earlier questioned the legality of the self-insurance arrangements in June 1987 and had served subpoenas on the board for New Age records in August 1987. It was only after the State sent a letter in October 1987, advising the board that its dental and prescription plans were not authorized by law, that Jersey City reluctantly canceled its contract with New Age. And it was not until January 1988, when Hudson County Assignment Judge Burrell Ives Humphreys ordered it to do so, that Jersey City finally took legal action to recover whatever sums had been improperly paid to New Age.

Finally, despite the efforts of the Board to dismiss the seriousness of the irregularities in the financial operation of the Jersey City School District by characterizing them as "... inconsequential human error ..." or minimizing their significance, the Assistant Commissioner adopts as his own the ALJ's conclusion that "... the board has failed to exercise proper managerial oversight in the financial area, has failed to adopt a prudent policy of cash management, and has tolerated practices which do not conform to the requirements of public school contract law or sound business judgment."

FACILITIES

In the area of facilities, as in other areas of district operations, the parties present widely disparate pictures of the circumstances which prevail. The Board consistently uses as a rationale the age of the facilities for what is clearly documented in the record as an extremely poor state of repair and maintenance in the district. While both parties agree as to the age of the Jersey City school buildings and their difficulty to maintain, the ALJ concludes and the Assistant
Commissioner affirms that "... Jersey City does not ensure that all its students have a safe, clean and healthy place in which to learn." That conclusion is best described from the following excerpt from the ALJ’s decision:

Even though the district knew the State was monitoring its performance, it was unable to conceal evidence of its extreme negligence. One of the most dramatic moments during the hearing came when Greta Shepherd described her observations of a teacher valiantly attempting to teach young children with "water pouring down the wall" of her classroom. Jersey City’s excuse for this inexcusable situation was that it was planning to build a new school building. In the meantime, however, the district clearly owed a duty to both students and teachers to provide minimally adequate shelter. Ms. Shepherd gave other examples of unsafe or unhealthy conditions observed by members of the external team which she chaired. Water seeped dangerously close to high voltage equipment in a room used for physical education. At one school, the custodian responsible for swimming pool maintenance mixed together volatile cleaning chemicals.

CONCLUSIONS OF LAW

Having reviewed the record of the administrative proceedings and the recommendations of the Administrative Law Judge relative to the State’s action seeking an administrative order from the State Board of Education directing the creation of a State-operated school district pursuant to the provisions of N.J.S.A. 18A:7A-14 and 15, it remains only to set forth the conclusions of law requisite to the determination in this matter. It is unchallenged as a matter of law that Article VIII, Sec. IV, Para. 1 of the New Jersey Constitution (1947) requires that the Legislature provide for the maintenance of a thorough and efficient system of education for all children between the ages of five and eighteen. In furtherance of that goal, the Legislature has created a statutory scheme which vests supervision and control of public education in a State Board of Education and a Commissioner of Education. The general authority and statutory powers with which the Commissioner and State Board of Education are clothed as set forth in the initial decision are incorporated herein by reference and therefore require no further elaboration.

As the ALJ has ably pointed out, while local control of education is a long-standing and respected institution in this State, it is abundantly clear that home rule is clearly subject to the supervisory control of the State Board of Education and the Commissioner and to the
ability and willingness of the district board of education to fulfill the constitutional mandate of ensuring the provision of a thorough and efficient system of education. As the ALJ further pointed out, the right of the State through the authority of the Commissioner and the State Board of Education to intervene and limit the local autonomy of a district board of education when that entity strayed from its constitutional responsibility was well established prior to the enactment of the Legislature in 1987 of N.J.S.A. 18A:7A-14 et seq. authorizing the State Board of Education to issue an administrative order establishing a State-operated school district. (Trenton, supra; East Orange, supra)

The statutory provisions under which the herein action has commenced were, again as clearly pointed out by the ALJ, enacted as remedial legislation designed to broaden the authority of the Commissioner and the State Board of Education to establish a State-operated school district whenever, after three levels of monitoring, a school district "... has failed to take or is unable to take the corrective actions necessary to establish a thorough and efficient system of education..." N.J.S.A. 18A:7A-15. Pursuant to N.J.S.A. 18A:7A-14, the Legislature placed the burden of proof upon the State; however, in so doing, it required that the State demonstrate that its action in issuing an administrative order was not arbitrary, capricious or unreasonable. As has been indicated at the outset of this decision, the State has, by virtue of its clear showing in the record of the wide-ranging deficiencies and ineptitude which prevail in the Jersey City Public Schools, more than met that limited burden placed upon it by the Legislature. (See Bayshore Sewage Co. v. Department of Environmental Protection, 122 N.J. Super. 184, 199 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974).

As did the ALJ, the Assistant Commissioner notes that the Board argues that the statutory remedy directed by N.J.S.A. 18A:7A-14-16 and as implemented pursuant to N.J.S.A. 18A:7A-34 et seq. was designed to be a drastic remedy only applicable in the most extreme cases when a district board of education "... has failed to take or is unable to take the corrective actions necessary to establish a thorough and efficient system of education..." The Board argues that it has demonstrated "... that [it] has taken and is continuing to take corrective action. Hence, takeover should be out of the question and the issue becomes whether any other remedies are needed." (Board's Post-hearing Brief)
In response to the aforesaid argument, the Assistant Commissioner adopts in toto the conclusions of the ALJ as follows:

As set forth in the factual findings, Jersey City has serious deficiencies, not just in one area, but in all major areas of monitoring. Therefore, the problems are not susceptible to limited solution. If the problem were only in finance, appointment of a fiscal monitor might arguably be enough. If the problem were only in special education, a new person for special education might be enough. If the problem were only in personnel, a new person for personnel might be enough. But Jersey City’s problems are systemic. They run across the various administrative departments and across changes in membership of the local board of education. Whoever happens to be in control, the district has shown an institutionalized resistance to long-overdue reforms. This is not an indictment of everyone associated with the district but of the leadership, whose job it is to set the tone and provide direction to the organization. School managers cannot be allowed to blame general social conditions, or the State, or the children who are the victims, for their own inadequacies. They must themselves be held accountable.

Proofs convincingly demonstrate that Jersey City’s problems are so pervasive that they require outside intervention. State expert witnesses approached the question from different fields of specialty, but each arrived at essentially the same conclusion. Dr. McCarroll, an educational administrator, testified that the district is unable to “identify its problems, let alone solve them.” Dr. Smolev, a management expert, recommended that the district must be “completely restructured” and that “the State as the governmental entity with ultimate constitutional responsibility for education must establish a structure and a process for providing the effective governance and leadership.” Greta Shepherd, an urban education expert, believed that the district’s present leaders lack the capacity “to think of alternative strategies, to correct their problems.” Vincent Calabrese, an expert in school finance, did not think that the local district had the ability to “reverse a long-standing trend” and saw a need for dramatic change “to break the cycle” of failure. The Commissioner or his designee may reasonably rely on the well-founded advice of these reputable experts.

In response to the Board’s contention that the ALJ’s findings in this matter rely overwhelmingly on hearsay evidence and conclusionary reports and interview notes, the Assistant Commissioner notes that the ALJ very ably addressed these contentions, setting forth at length his legal reasoning as to the rationale for his conclusions in the initial decision. The Assistant Commissioner adopts the ALJ’s legal arguments as set forth in the initial decision and makes them his own.
The Assistant Commissioner likewise adopts the finding of the ALJ as it relates to the Board’s attack upon the constitutionality of the takeover statute in that the statute allegedly impairs the “contract rights” of tenured employees and is an attempt to circumvent the tenure laws. In response to the aforesaid contention, the Assistant Commissioner also notes that the Legislature as the conferrer of the tenure rights was fully cognizant of the statute’s effect, and, therefore, the issues of contractual impairment and/or tenure rights are matters which can only be decided by the Courts.

The Board’s final argument that the takeover law may not be applied retroactively because Level III monitoring was in progress at the time of its passage must likewise be unequivocally rejected. In this regard, the Assistant Commissioner notes with approval the ALJ’s rejection of that argument in citing Gibbons, supra, for the proposition that the Legislature in passing the amandatory language in this matter had expressed a contrary intent and that the immediate application of its provisions were necessary to meet its corrective and ameliorative purpose. The Assistant Commissioner would add to the aforesaid reasoning of the ALJ that the monitoring process with all of its 52 indicators upon which the determination of Jersey City’s certification status was based was well in place since 1983. The Jersey City Board of Education was not by virtue of this amending legislation confronted with a set of standards which were new or foreign to it. It was fully aware throughout the monitoring process of both the criteria to be utilized and the steps through which that process would proceed. Further, the Jersey City Board of Education was, through the plenary hearing process, provided with more than ample opportunity to show cause why the recommendation for an administrative order establishing a State-operated school district should not issue. In the Assistant Commissioner’s view, the State in this matter has well met the burden of demonstrating that its action in seeking an administrative order from the State Board of Education creating a State-operated school district was not arbitrary, capricious or unreasonable.

Consequently, in light of the foregoing, the Assistant Commissioner acting as the assigned representative of the Commissioner of Education pursuant to N.J.S.A. 18A:4-34 adopts the findings of fact and conclusions of law of the ALJ as amplified herein and makes them his own. Further, in conformity with the provisions of N.J.S.A. 18A:7A-15, the Assistant Commissioner finds that the Board of Education of the City of Jersey City has failed to take or is unable to take the corrective actions necessary to establish a thorough and
efficient system of education and he, therefore, recommends that the State Board of Education issue an administrative order creating a State-operated school district whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.

IT IS SO ORDERED this 31st day of August, 1989.

STATE BOARD OF EDUCATION DECISION:

This matter is before us today on recommendation of Assistant Commissioner Lloyd Newbaker made pursuant to N.J.S.A. 18A:7A-15. As set forth in his decision of August 31, 1989, based upon his review of the record in this matter, Assistant Commissioner Newbaker determined that the school district of the City of Jersey City has failed to take or is unable to take the corrective actions necessary to establish a thorough and efficient system of education. Therefore, as mandated by N.J.S.A. 18A:7A-15, Assistant Commissioner Newbaker is recommending that the State Board of Education exercise the authority conferred on us by that statute to issue an administrative order directing the removal of the district board and the creation of a State-operated school district whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.

This recommendation results from proceedings initiated by a show cause order issued by the Commissioner of Education pursuant to N.J.S.A. 18A:7A-14(e) following a comprehensive investigation commenced after the district had failed Levels I and II of the monitoring process. As provided by N.J.S.A. 18A:7A-14(e), plenary hearing was held before an Administrative Law Judge (ALJ).

Based upon the evidence presented by the parties, the ALJ found that the State had satisfied its statutory burden to show that the issuance of an administrative order as provided by N.J.S.A. 18A:7A-15 was not arbitrary, unreasonable or capricious.

As detailed in his Initial Decision, the ALJ further found that the proofs presented in this matter established that the children attending public school in Jersey City were not receiving a thorough and efficient education, that political interference originating in earlier administrations had continued, that financial resources allotted to

1. We note that by decision of July 21, 1988, the Commissioner of Education recused himself from acting as the decision-maker in this matter and assigned Assistant Commissioner Newbaker to decide the controversy. See N.J.S.A. 18A:4-34.
education were being misspent, and that the district’s problems were deep-rooted and endemic.

No exceptions were filed with Assistant Commissioner Newbaker to the findings and conclusions set forth in the Initial Decision. Based upon his independent review of the record, Assistant Commissioner Newbaker concluded that the evidence showed that the Jersey City Board of Education had totally failed to meet its obligations with respect to its policy making and personnel functions and that the Board’s performance in the area of the management of its fiscal resources represented “one of the most flagrant examples of its ineptitude and mismanagement.”

As detailed in his decision, Assistant Commissioner Newbaker, like the ALJ, found that the evidence supported the specific charges against the district, including specifically those relating to the consistent inability of the district’s managers to meet certification requirements and academic standards; failure to provide an adequate policy framework; political intrusion; failure to hold employees accountable; deficiencies in curriculum and instructional materials; failure to raise student performance levels, lower dropout rates, and ensure the legal rights of handicapped children; failure to maintain appropriate financial records; violations of the bidding laws; imprudent business practices and use of federal and state funds for unauthorized purposes; and failure to maintain a safe, clean and appropriate learning environment for its students.

On the basis of the record and his findings thereon, Assistant Commissioner Newbaker adopted in toto the ALJ’s conclusions that the deficiencies of the district extended to all major areas of monitoring and, therefore, were not susceptible to a limited solution. He further concluded that the district’s problems were so pervasive as to require outside intervention and that the proofs with respect to the specific charges showed a failure or unwillingness to take the corrective actions necessary to establish a thorough and efficient system of education.

Assistant Commissioner Newbaker’s determination and the record upon which it was based were transmitted to the State Board as required by N.J.A.C. 6:2-2.6(b). By letter dated September 8, 1989, special counsel for the Board of Education of the City of Jersey City provided us with a resolution adopted by the Board on September 6 resolving not to “contest, file exceptions or appeal” Assistant Commissioner Newbaker’s decision. Our decision today, therefore, will be
based solely on the record that has been certified to us. *N.J.A.C.* 6:2-2.6(h).

That record, as found by the ALJ and Assistant Commissioner Newbaker, demonstrates severe, longstanding, deep-rooted deficiencies permeating virtually all aspects of the district's operations. The evidence leaves no doubt that these deficiencies are directly related to the Board's failures with respect to its functions in the areas of policy making, personnel and financial management, for which the Board, as governing body for the district, had both primary and ultimate responsibility. The record further shows a clear and unambiguous picture of the attending failure of the district's top level administrators to provide the operational and educational leadership required to provide a thorough and efficient education to the district's students.

The record demonstrates that the scope and depth of the district's failure and the resulting deficiencies are of such nature and dimension that the students attending the public schools of this district have been deprived of a thorough and efficient education. Nor has the district even suggested at any time during these proceedings that it is now providing such education to its students.

Based on our own review of the record, we find that, as expressed by the ALJ,

...Jersey City has serious deficiencies, not just in one area, but in all areas of monitoring. Therefore, the problems are not susceptible to limited solution. If the problem were only in finance, appointment of a fiscal monitor might arguably be enough. If the problem were only in special education, a new person for special education might be enough. If the problem were only in personnel, a new person for personnel might be enough. But Jersey City's problems are systemic. They run across the various administrative departments and across changes in membership of the local board of education. Whoever happens to be in control, the district has shown an institutionalized resistance to long-overdue reforms. This is not an indictment of everyone associated with the district but of the leadership, whose job it is to set the tone and provide direction to the organization. School managers cannot be allowed to blame general social conditions, or the State, or the children who are the victims, for their own inadequacies. They must themselves be held accountable.

In this respect, we emphasize that, as found by the ALJ and Assistant Commissioner Newbaker and as set forth in statute and regulation, the standards for judging the sufficiency of the education provided to urban children are no less than those for any other
children in this state. Like the ALJ and Assistant Commissioner Newbaker, we find that the general social conditions present in this urban district in no way excused the Board from providing to its students a thorough and efficient system of education as measured by those standards. Rather, it is our firm belief that the existence of such conditions heightened the responsibility of the Board and its administrators to provide sound and effective governance and strong educational leadership in order that the district could provide its students with an education that would effectuate the constitutional right of these children to a thorough and efficient education.

The record leaves no doubt that the district is either unwilling or unable to meet that responsibility. Given the nature and gravity of its deficiencies over a prolonged period of time, assessment of the district’s efforts at “improvement” leads inevitably to the conclusion that they have been woefully inadequate. Not only have the fundamental deficiencies of this district persisted, but the record shows that the district’s leadership has failed to approach its problems comprehensively or structurally so as to even attempt to provide the managerial structure and educational leadership required to correct the deficiencies established in this record and to provide a thorough and efficient system of education to the district’s students. To the contrary, the “improvements” to which the district pointed in the proceedings below are so limited in scope as to show that, as testified by Assistant Commissioner McCarron, the district is unable to “identify its problems, let alone solve them.”

In summary, the record produced by these proceedings clearly and unambiguously shows an educational failure in the extreme and demonstrates that this district has not only failed to meet its obligations in the past, but has failed to recognize the nature of the responsibility delegated to it by the Legislature. We find it deplorable that by virtue of the persistent and ongoing failure of this district to properly fulfill its delegated responsibilities, its students have so long been deprived of their constitutional due.

We recognize fully that it is our responsibility to insure that this situation is rectified. Robinson v. Cahill, 62 N.J. 473, (1973); Robinson v. Cahill, 69 N.J. 479, (1976). Given the total educational failure evidenced here, we conclude that it is imperative that we exercise the authority conferred on us by N.J.S.A. 18A:7A-15 and N.J.S.A. 18A:7A-15.1 to insure that the constitutional right of the children of the school district of Jersey City to a thorough and efficient education is effectuated. We therefore direct that the President of the State Board
of Education immediately execute the administrative order appended to this decision, by which we direct the removal of the district Board of Education of the City of Jersey City and the creation of a State-operated school district whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.

ADMINISTRATIVE ORDER

This matter having been opened before the Commissioner of Education by the filing of an Order to Show Cause and a Verified Petition by the Attorney General of New Jersey, attorney for petitioner, Walter J. McCarroll, Assistant Commissioner, Division of County and Regional Services, by Sally Ann Fields, Deputy Attorney General; and said Petition having been answered by Shea and Gould, Esqs., by David H. Pikus, and William A. Massa, Esq., attorneys for respondent Board of Education of the City of Jersey City; and an Order to Show Cause having been entered by the Commissioner of Education on May 24, 1988; and the Office of Administrative Law having heard and considered the testimony and evidence and arguments of counsel and having issued an Initial Decision on July 26, 1989 recommending that a State-operated school district be created; and the Commissioner of Education having recused himself from the matter and having assigned Assistant Commissioner Lloyd Newbaker to decide the matter; and Assistant Commissioner Newbaker having adopted the Initial Decision on August 31, 1989 and having recommended the issuance of an Administrative Order; and the State Board of Education having considered same and having determined that the school district of the City of Jersey City is not providing a thorough and efficient education, and that determination having been embodied in a written decision issued on October 4, 1989, and the basis of that decision not being solely the district's failure to correct substandard facilities,

It is on this 4th day of October, 1989,


ORDERED that pursuant to N.J.S.A. 18A:7A-35, the Com-
missioner of Education recommend an individual qualified by training and experience for appointment by the State Board of Education pursuant to N.J.S.A. 18A:7A-15.1 as State district superintendent of schools to direct all operations of the district; and it is further

ORDERED that the Commissioner of Education take all other actions as are necessary to implement the provisions of N.J.S.A. 18A:7A-34 et seq.; and it is further

ORDERED that this Administrative Order shall remain in effect until lifted by the State Board of Education upon application and recommendation of the Commissioner of Education made pursuant to N.J.S.A. 18A:7A-49(b).

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.