

BOARD OF EDUCATION OF THE	:	
CITY OF ORANGE, ESSEX COUNTY,	:	
	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	
V.	:	DECISION
	:	
NEW JERSEY STATE DEPARTMENT	:	
OF EDUCATION,	:	
	:	
RESPONDENT.	:	
_____	:	

### SYNOPSIS

Petitioning “Abbott” District appealed the Department’s determination of its 2003-04 preliminary “maintenance budget,” alleging that the Department’s review was not in accordance with the July 23, 2003 order of the Supreme Court. The District further contended that the Department miscalculated its fund balance (surplus).

The ALJ found that the rule duly promulgated to implement the Court’s order for “maintenance” controlled in this proceeding, and that the Office of Administrative Law (OAL) lacked jurisdiction to determine its validity. The ALJ ordered correction of the District’s fund balance and adjustment of the District’s “maintenance budget” to allow for salary and health benefit increases and funding for certain costs associated with Whole School Reform (WSR).

The Commissioner adopted the ALJ’s decision with respect to OAL jurisdiction and error in calculation of the Board’s fund balance, but rejected the Board’s claims for increases in salary and health benefit accounts, as well as its claims that the Department based its calculations on erroneous figures and improperly excluded the unpaid balance on the District’s WSR contract.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.
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October 20, 2003

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions were filed by both the Board of Education (Board) and the Department of Education (Department), as was a reply by the Board to the Department's exceptions, and all were considered by the Commissioner in reaching his decision herein.

As a preliminary matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that hearing of this matter need not have awaited completion of the District's Comprehensive Annual Financial Report (CAFR), as argued by the Department. Within the appeal framework established by the Court, the Board was clearly entitled to make, prior to the school year in question, the factual and legal record necessary to preserve the substance of its claims, with final adjustments made following audit.

The Commissioner also concurs with the ALJ that *N.J.A.C.* 6A:10-1.2, the regulation duly promulgated to implement the Court's July 23, 2003 order, must control in the instant proceeding, and that the OAL does not have jurisdiction to determine its

validity, such determination being solely within the purview of the Appellate Division or the Supreme Court. R. 2:2-3(a); *see, also, Pascucci v. Vagott*, 71 N.J. 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n.*, 279 N.J. Super. 477, 485 (App. Div. 1995). However, even if the Commissioner were to accept, *arguendo*, the Board's contention that a "choice of law" may be made without passing on the validity of the rule itself, the Commissioner here opines, to the extent that he may do so in an administrative proceeding, that the Department's definition of "maintenance budget," as set forth in *N.J.A.C. 6A:10-1.2*, is entirely consistent with the language and intent of the Court, with no conflict between it and the underlying order.

The Commissioner rejects, however, the ALJ's apparent acceptance of the Board's contention that the Department erroneously used "original" rather than "revised" budget figures in calculating the District's maintenance budget. Although the ALJ appears to have confused and conflated this issue with a more specific error in surplus calculation, as discussed below, the Commissioner agrees with the Department's position that, in making the determination under appeal herein, in the absence of precise information of the type only available through the CAFR, it was appropriate to use the approved Revised School District Budget Statement for 2002-03, dated July 12, 2002, rather than the *unapproved* Revised School District Budget Statement for 2003-04, dated April 5, 2003.

In this regard, the Commissioner observes that the Department's charge in this matter was to determine the level of 2003-04 funding that would enable the District to continue in a "maintenance" mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03. While it is true that dollar amounts paid out prior to June 30, 2003 will not necessarily reflect the actual costs of the programs, services and

positions provided that year, nor can they perfectly predict the actual cost of providing them in the next, it is *equally* true that originally budgeted amounts and other similar projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-04 cost of providing programs, services and positions by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-03 and then allowing for reasonable, non-discretionary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision. To the extent that results may be imperfect, even after adjustment following audit, *N.J.A.C. 6A:10-3.1(g)* provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant. Thus, the Commissioner wholly endorses the Department's fundamental methodology, subject to the correctness of its application based on the evidence presented in any particular instance where its results are disputed.

Turning, then, to the more specific issues raised by the Board, the Commissioner initially rejects the ALJ's conclusion that the Board is entitled to include the balance of its Whole School Reform (WSR) contract amount as part of its maintenance budget. Contrary to the ALJ's finding, the exception provided by the Court in Paragraph 2c of its June 24, 2003 order, which expressly refers to *reinstatement* of WSR in certain schools *not having a WSR contract in 2002-03*, cannot apply to the Board's claim herein, which is manifestly based on the existence of an ongoing WSR contract under which services were provided in 2002-03. Since no evidence was presented by the Board that any portion of that contract for services actually provided in 2002-03 remains unpaid so as to

qualify as a 2002-03 expenditure, the Department correctly excluded the contract balance, as reflecting services not yet provided, from its maintenance budget calculation.

The Commissioner does concur, however, that an error in calculation of the District's surplus was made. It is clear on record and uncontested by the Department that \$1,723,965 already deducted from the Board's 2002-03 additional State aid should not have been reflected in the Department's calculation of excess surplus for 2003-04, so that the fund balance to be appropriated in the District's 2003-04 revised budget should be adjusted downward from \$5,813,312 to \$4,089,347. However, this error in itself results in no entitlement to additional *Abbott v. Burke* State aid, since the Board's excess surplus is still well above the level that would entitle it to such aid.

With respect to increases for salaries and health benefits, the Commissioner does not agree with the ALJ that an increase should be granted to the Board. The Commissioner is unpersuaded by the fact that increases in the cost of health benefits in 2001-02 and 2002-03 were 22.13% and 15.4% respectively, since this alone is insufficient to warrant the conclusion that the 14.5% increase allowed by the Department will not maintain benefits at 2002-03 levels and that an increase of 21% is necessary for this purpose. Similarly, the Commissioner finds, for the reasons more generally set forth above, that applying the District's highest contracted teacher salary increase percentage of 5% to actual salary expenditures for 2002-03 was a reasonable method of projecting preliminary salary costs for 2003-04. The Commissioner is unpersuaded by the Board's argument that this method does not take into account vacancies, retirements, substitutes and positions filled for only part of the year, since variances of these types occur every year and a preliminary district-wide salary budget is appropriately based on the assumption

that staffing is a flexible and continuous process, with ebbs and flows that, absent specific evidence to the contrary, generally permit the projection of one year's experience onto the next.<sup>1</sup>

Finally, with regard to the Board's contention that it requires a further percentage increase in salary amounts to accommodate addition of new positions or restoration of positions eliminated in 2002-03 based on WSR and other regulatory requirements, the Commissioner finds that the "maintenance" standard established by the Court, and embodied in the implementing regulation, requires programs, services and positions to have been actually provided or filled in 2002-03 in order to be included in the maintenance budget for 2003-04, and that, as indicated above, the exception provided by the Court in Paragraph 2c of its June 24, 2003 order does not apply to the Board herein. Additionally, the Commissioner finds that the Board has made no demonstration on the present record that the level of funding provided through the Department's calculations will not support the staff necessary to implement required programs and services. The fact that a particular position, such as a teacher added for reasons of class size, was not included in the maintenance budget does not mean that the position cannot exist; rather, the need for it is expected to be met within existing levels of resources, subject to the ability to seek additional funds under requisite circumstances.<sup>2 3</sup>

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<sup>1</sup> In this context, the Commissioner reiterates the above-noted availability of a mechanism for Abbott districts to address a need for additional resources pursuant to *N.J.A.C.* 6A:10-3.1(g).

<sup>2</sup> See note 1 above.

<sup>3</sup> To the extent that the ALJ's discussion at pages 12-13 of the Initial Decision might suggest otherwise, the Commissioner notes that no reductions were made to the Board's budget on the basis of ineffectiveness or inefficiency.

Accordingly, for the reasons set forth herein, the Initial Decision of the OAL is rejected except insofar as it concludes that the present matter was appropriately heard prior to audit; that the OAL lacks jurisdiction to determine the validity of the rule promulgated to implement the order of the Court; and that an error occurred in calculation of the Board's surplus so as to reduce the amount applied by the Department to support the 2003-04 budget. However, in light of the Commissioner's determinations on the Board's specific claims above, no recalculation of additional *Abbott v. Burke* State aid is directed as a result of the incorrect allocation, since the error does not, in itself, alter the Board's eligibility for such aid.<sup>4</sup>

IT IS SO ORDERED.<sup>5</sup>

COMMISSIONER OF EDUCATION

Date of Decision: October 20, 2003

Date of Mailing: N/A

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<sup>4</sup> The Board's claim to the contrary is based on its contention that, taken together, use of "revised" figures and proper calculation of salaries, health benefits, *etc.*, as requested herein, will substantially reduce the Board's alleged "surplus" so as to render the Board eligible for additional *Abbott v. Burke* State aid. (Board's Reply to Department's Exceptions at 4)

<sup>5</sup> Pursuant to *P.L. 2003, c. 122*, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.