

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

SYNOPSIS

Petitioning “Abbott” District appealed the Department’s determination of its 2003-04 preliminary “maintenance budget,” alleging that the definition of “maintenance budget” set forth in *N.J.A.C.* 6A:10-1.2 conflicts with the July 23, 2003 Order of the Supreme Court and, therefore, should not govern the case; that the Department’s calculation for charter school tuition did not take into account the correct and actual documented increases in tuition; and that the Department’s calculation for utilities rate increases fails to include the utilities costs for two buildings that were not fully utilized in the 2002-03 school year.

The ALJ found: 1) the rule duly promulgated to implement the Court’s Order for “maintenance” controlled in this proceeding, and that the Office of Administrative Law lacked jurisdiction to determine its validity; 2) that the Department properly adjusted the maintenance calculation for charter school tuition; and 3) that the proofs offered by the District in support of its projected utility rate cost increase were deficient and devoid of any competent evidence that would offer credence to the District’s position in this regard. The ALJ upheld the Department’s calculations, concluding that the Department properly determined the District’s increase in utilities costs in accordance with established Supreme Court criteria and appropriate Department regulations, with such calculations being subject to adjustment upon receipt of supportive information from the District in the course of the Comprehensive Annual Financial Report (CAFR) process.

The Commissioner concurred with the ALJ’s findings and conclusions and adopted the Initial Decision.

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.

October 28, 2003

OAL DKT. NO. EDU 05492-03
AGENCY DKT. NO. 191-6/03

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The record of this local “Abbott” District’s appeal of the Department’s decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. East Orange’s exceptions were duly submitted in accordance with the schedule established in response to the Court’s order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner adopts the Administrative Law Judge’s (ALJ) decision as he determines her factual findings, analysis and legal conclusions are consistent with the Supreme Court’s Order of July 23, 2003, as well as the Department’s regulatory amendments adopted on August 22, 2003.

Initially, it is noted that petitioner’s exceptions object to the ALJ’s failure to address an issue, raised in its post-hearing brief, with respect to the legal propriety of the Department’s fund balance calculation. (Petitioner’s Exceptions at 1, 2) In this regard, the District states that the Department’s August 27, 2003 budget letter projected the District’s excess fund balance, made reductions to what it had determined was a balance in excess of the required

two percent, and denied the District's *Abbott v. Burke* receivable for 2002-03 based on its projected calculations. It charges that the Department's "projection of excess fund balance prior to the receipt of the [Comprehensive Annual Financial Review] CAFR violates the language and intent of the FY 04 Appropriations Act." (*Id.* at 8, 9)

The Commissioner finds the District's charge in this regard without merit. It is observed that the Supreme Court's Order directed the Department to provide Abbott districts with their preliminary maintenance budget figures for the 2003-04 school year by August 27, 2003. In fulfillment of that directive, the Department, pursuant to *N.J.A.C.* 6A:10-3.1(c), reviewed the most recent budget calculations provided by the District to determine if all available resources and reallocations and other factors had been incorporated in the budget and that the budget submitted comported with the maintenance standard. Based on this review, the Department made the requisite projections in its August 27, 2003 *preliminary* maintenance budget letter. It must be emphasized that the preliminary maintenance budget figure for the District here is just that, *preliminary*, subject to the CAFR, which will establish the District's actual audited expenses for the 2002-03 school year. Likewise, the estimate of the District's discretionary *Abbott v. Burke* aid is also subject to the District's true audited fund balance and available revenue, if any, as of June 30, 2003.

Next, the Commissioner 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, directly or indirectly, its validity, as such determination is solely within the jurisdictional 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 District's contention that a "choice of law" may be made without passing on the validity of the rule itself, the Commissioner here agrees with the ALJ 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.

In his consideration of the District's remaining arguments herein, the Commissioner finds that a review of the respective parties' burdens of proof is particularly instructive. In this regard, the Commissioner recognizes that the Supreme Court's Order provides that the Department "shall bear the [initial] burden of moving forward to establish the basis for any proposed reductions to the [Abbott] district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations."****Abbott v. Burke*, M-976 September Term 2002, at 7. However, as indicated in the Department's preliminary maintenance decision letter dated August 27, 2003 (Exhibit J-1), the District's maintenance budget was not reduced based on ineffectiveness or inefficiency. Therefore, pursuant to *N.J.A.C. 6A:24-9.6(c)*, the District bears the burden of proving that the Department's calculations were unreasonable or otherwise improper.

This said, the Commissioner agrees with the ALJ that the Department's calculation of charter school tuition must be sustained, as he finds that the District has not met its burden of establishing that the Department's use of an *approved* plan-to-plan review to determine the tuition calculation figure was unreasonable or otherwise improper. In the Commissioner's view, the process used by the Department, based on the only available "like" components for comparison, *i.e.*, approved 2002-03 and 2003-04 charter school tuition, in order to determine the change in the district need from one year to the next, fully allows for

reasonable, fair and consistent preliminary determinations under circumstances where precise calculations must necessarily await the results of the CAFR. As well articulated by the ALJ in her Initial Decision in *Board of Education of the City of Plainfield, Union County, v. New Jersey State Department of Education*, OAL Dkt. No. EDU 5502-03, Agency Dkt. No. 206-6/03, decided September 26, 2003:

I have considered the arguments of counsel and must agree with the position espoused by the DOE. (footnote omitted) Although I agree with the District that the consistent use of the DOE's methodology does not in itself make it correct, I do not agree that simply because it does not work to the District's advantage makes it incorrect. The methodology utilized by the DOE has been applied to all "Abbott Districts" uniformly and has served to increase maintenance budgets in over half of the Districts. The District has not established that the use of this methodology is *per se* improper, illegal, inconsistent with the New Jersey Supreme Court's Order of July 23, 2003 or violative of any of its constitutional rights. The DOE is obligated only to utilize an approach that is reasonable and uniformly applied. Here they have done so. If the methodology is to be changed in each area in which an Abbott District is not advantaged, there will be no uniformity or equity to the provision of Abbott funds. Thus, I reject the District's argument and CONCLUDE that the DOE's methodology is reasonable and will not be second-guessed. (*Id.* at 8)

The Commissioner, however, underscores that, to the extent the results of the Department's reasonable approach may be imperfect, even after adjustment following audit, *N.J.A.C. 6A:10-3.1(g)* provides a mechanism for the District to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

Turning to the projected utilities increase calculation, the Commissioner, similarly, finds that the District has failed to satisfy its burden. The Commissioner is in full agreement with the ALJ that "the proofs [brought to the record are] deficient and devoid of any competent evidence that would offer credence to the District's position with regard to utilities cost increases." (Initial

Decision at 14, 15) The District's exceptions maintain that the ALJ, while recognizing that the Department had not included its two new buildings in the utility increase calculation for 2003-04 (Initial Decision at 14), erred in failing to award the District *any* funding increase based on a lack of documented evidence. (Petitioner's Exceptions at 16) Rather, it proffers, "the ALJ should have directed the DOE to develop appropriate documentation in conjunction with the District to determine what increase should be attributable to these two buildings." (*Id.* at 17)

Upon consideration, the Commissioner finds the District's arguments in this regard specious. The Initial Decision reflects that the Department's witness, Michael Arizechi, testified

that he had not taken into account the utilization of the Glenwood School and the old East Orange High School buildings in arriving at his figure for utility cost increases of \$529,812.50. Rather, he looked at the history and the actual numbers and the auditor[s] report to see what the expenditures had been. He compared the auditor[s] report with the District numbers and used 50% of the difference (the increase) as his basis for arriving at a figure of \$529,812.50 for non-discretionary increased utility costs for 2003-04. (Initial Decision at 12)

Given the total unupportability of the District's calculations in this regard, it cannot reasonably be argued that the Department's calculation for increased utility costs, subject to further refining after receipt of some logical, supportable additional information from the District during the course of the CAFR process, was unreasonable.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed

therein and the instant Petition of Appeal is hereby dismissed.¹

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: October 28, 2003

Date of Mailing: N/A

¹ The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the CAFR until November 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

² 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.