

BOARD OF EDUCATION OF THE :
CITY OF NEW BRUNSWICK, :
MIDDLESEX COUNTY, :

PETITIONER, :
V. : COMMISSIONER OF EDUCATION

NEW JERSEY STATE DEPARTMENT :
OF EDUCATION, :

RESPONDENT. :
_____ :

DECISION

SYNOPSIS

Petitioning Abbott District challenged the Department of Education's determination of excess fund balance as of June 30, 2003, as well as the Department's determination of certain maintenance calculations.

The ALJ recommended adjusting the Department's excess surplus figure by \$3.6 million; found that the salaried contracted raises should be calculated in accordance with the District's figures, including a 6.81% increase; the preliminary budget should be adjusted to include the figures for special education for existing and new students, per the District's testimony; the adjustment for Consumer Price Index (CPI) should be adjusted to reflect an additional \$122,554; the preliminary budget should include \$400,000 for the Special Technical High School and \$503,014 for transportation costs and an increase of \$24,241 for utilities. The ALJ also found that IDEA funds may be included as revenue.

The Commissioner modified the Initial Decision, finding the Department's determination regarding excess fund balance should be undisturbed, pending receipt of the Comprehensive Annual Financial Report (CAFR); the Department's determination regarding increases for contracted salaries is upheld; the District's maintenance budget should be modified to include a nondiscretionary increase of \$859,282, rather than \$462,905; the Department's determinations regarding CPI adjustment, the special technical high school and transportation costs should be upheld; and that the ALJ properly determined that revenue adjustments may include IDEA funds and the District's maintenance budget should include an increase of \$24,241 for utilities.

<p>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.</p>

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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 2003-2004 school year, and the Initial Decision of the Office of Administrative Law have been reviewed. The parties’ exceptions and replies 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 determines to modify the Initial Decision, as set forth below.

BURDEN OF PROOF

Initially, 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 preliminary maintenance decision letter dated August 27, 2003, the Department did not reduce the District’s maintenance budget

based on ineffectiveness or inefficiency. Therefore, the Commissioner notes, and the District so acknowledges, that the District bears the burden of proving that the Department's calculations were unreasonable or otherwise improper. *N.J.A.C.* 6A:24-9.6(c). See, also, Letter from Peter J. Hendricks to the Administrative Law Judge (ALJ), September 23, 2003; see, also, Petitioner's Reply at 1.

SURPLUS

In its exceptions, the Department maintains its position that the District's excess funding balance as of June 30, 2003 is reasonably estimated at \$9,911,707. (Respondent's Exceptions at 5-6) In this connection, respondent contends that the Initial Decision is based on a misunderstanding of its position with respect to encumbrances and accounts payable.

Respondent explains:

An encumbrance is an accounting tool that permits the district to reserve funding for purchase orders that were issued during the 2002-2003 school year, but the goods or services were *not* received by the district as of June 30, 2003. An encumbrance is *not* an expenditure in the 2002-2003 school year, but rather merely a reservation of fund balance, which may be expended in the 2003-2004 school year if the goods and services are received. By contrast, an account payable is an expenditure which is incurred in the 2002-2003 school year for goods and services actually received or provided prior to June 30, 2003.

With regards to those purchase orders for goods and services that have not been received or provided before June 30, 2003, they would be rolled over as encumbrances into [the] 2003-2004 school year. As such these purchase orders are properly excluded from the 2003-2004 maintenance calculation, *i.e.*, approved goods and services actually provided in the 2002-2003 [school year]. (emphasis in text) (*Id.* at 2, 3)

The Commissioner finds that the above explanation is consistent with the record in the matter entitled *Board of Education of the City of Burlington v. New Jersey State Department of*

Education, Commissioner Decision No. 581-03, decided October 20, 2003. Therein, Keith Costello, Budget Manager/Examiner for the Department of Education, Office of Abbott Implementation, testified that, by memo dated September 16, 2003 to all school districts, Assistant Commissioner Richard Rosenberg addressed the procedures to be followed for open purchase orders and encumbrances on the school district's books as of June 30. The September 16, 2003 memo states, in pertinent part:

Open purchase orders at June 30, 200X should be classified into the following two categories for review and reclassification:

1. Category one represents purchase orders for which the goods have been received or the services have been rendered at June 30th that have not been paid. These purchase orders must be expensed in the current audit period, the related encumbrances reversed, and a liability (accounts payable) established. If the invoice has not been received the amount must be estimated. In accordance with GAAP, an expenditure is recorded when goods are received or services are rendered.
2. Category two represents purchase orders which will be honored in the subsequent year. These purchase orders will be rolled over into the next fiscal year and will be shown in the June 30th general fund balance sheet as a reserve for encumbrances. Per NCGA Statement 1, paragraph 91 "encumbrances outstanding at year-end represent the estimated amount of the expenditures ultimately to result *if unperformed contracts in process at year-end are completed. Encumbrances outstanding at year-end do not constitute expenditures or liabilities.*" (emphasis in text)

Therefore, the Commissioner finds that "category one" purchase orders and the related encumbrances are to be considered 2002-2003 fiscal year expenditures in applying *N.J.A.C.* 6A:10-1.2, but "category two" purchase orders are considered expenditures in the 2003-2004 fiscal year and, thus, are not to be included in development of a "maintenance budget" for the 2003-2004 school year.

Notably, although there remains a dispute about *the estimated amount* of excess surplus available, if any, the parties herein do not appear to offer opposing methodologies for calculating that figure. Moreover, in its exceptions, the Commissioner notes that the District respectfully suggests “that the exact surplus, in addition to the \$3.6M calculated by the Administrative Law Judge, abide a [Comprehensive Annual Financial Report] CAFR audit as originally suggested by the New Jersey Department of Education.” (New Brunswick’s Exceptions at 1) Consequently, mindful of the District’s burden in this matter, the Commissioner determines not to disturb respondent’s preliminary calculations at this juncture, subject to receipt of the CAFR in November 2003, whereupon the methodology promulgated by Assistant Commissioner Rosenberg shall be applied.

CONTRACTED SALARIES

The Department reiterates in its exceptions that its salary calculations, contrary to the ALJ’s finding, were based on *actual* expenditures for salaries in the 2002-2003 school year, whereas, New Brunswick’s calculations were erroneously based on the *budgeted* salaries of individuals on its payroll on March 11, 2003. (Department’s Exceptions at 7-8, referencing Exhibits R-27 through R-29, P-9) Respondent continues:

In fact, after hearing testimony pertaining to the methodology employed by the Department, petitioner changed its proposed methodology and based it on the amount of actual expenditures of salary in 2002-2003 as calculated by the Department. R-84 and P-6 demonstrate that petitioner initially sought an increase for contracted salaries in the amount of \$3,746,973. *** However, after the Department testified that *actual* expenditures on salaries in 2002-2003 were used to determine the increase for the non-discretionary contracted salary increase, petitioner changed its calculation, as demonstrated by P-9, by abandoning its request for a 6.81% increase. At that point, petitioner sought an increase of \$5,565,193, or a 10.47% increase over 2002-03 actual expenditures on salaries. *** Petitioner arrived at this amount by comparing *actual* expenditures on salaries in 2002-2003 to the amount of

salaries *budgeted* in 2003-2004 for all individuals employed by petitioner on March 11, 2003. Thus, the 6.81% increase, as initially asserted [by] petitioner, is irrelevant to the methodology. (emphasis in test) (Department's Exceptions at 8-9)

The Department, however, maintains that the District's amended methodology is flawed, in that it takes into account *actual* expenditures in salaries for 2002-2003, but uses amounts *budgeted* in 2003-2004 for individuals employed in the District as of March 11, 2003. Moreover, the Department asserts that "Mr. [Richard] Jannarone agreed that, under the methodology proposed by petitioner, the district could receive such a benefit twice because petitioner's methodology uses *budgeted* salaries for 2003-2004. (emphasis in text) (*Id.* at 9) Furthermore, the Department notes that, using its calculations of actual salary expenditures, and based upon prior conversations with the District, it used 5% as the average contracted rate of increase. (*Id.* at 9-10)

In its replies, petitioner does *not* specifically refute the Department's exception arguments on this issue, but, merely states, "The New Brunswick Board of Education offered detailed proofs on the costs of the contractual maintenance budget. The DOE simply used flat figures and 'estimates.'" (Petitioner's Reply at 1)

Thus, upon consideration of the parties' arguments, particularly those summarized herein, and mindful of the burden of proof, the Commissioner is compelled to conclude that, notwithstanding the credible testimony offered by Mr. Jannarone on this issue, petitioner has not met its burden of demonstrating that the Department's calculation of nondiscretionary salary increase for the 2003-2004 school year, is unreasonable or inconsistent with a maintenance budget, as defined by *N.J.A.C. 6A:10-1.2*. In so finding, the Commissioner recognizes that the Department's overall charge in this matter was to determine the level of 2003-2004 funding that would enable the District to continue in a "maintenance" mode, that is, to implement in 2003-

2004 the programs, services and positions provided in 2002-2003. While it is true that dollar amounts actually paid out for staffing prior to June 30, 2003 will not perfectly predict the cost of providing comparable staffing 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 2003-2004 cost of providing positions at "maintenance" levels by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-2003 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. The ALJ's determination in this regard, is, therefore, set aside.

SPECIAL EDUCATION

The Department takes exception to the ALJ's conclusion that petitioner's preliminary maintenance budget should include a nondiscretionary increase in special education tuition in the amount of \$2,093,697. The ALJ arrives at this conclusion, the Department contends, based upon a misunderstanding of the methodology used by the Department to calculate petitioner's nondiscretionary increases for special education tuition. (Department's Exceptions at 11)

The Department explains that its methodology begins with a trend analysis of the percentage of students that districts send out of district. Based on this trend analysis, the Department determined that 17% of New Brunswick's students are sent out of district. The Department then compared enrollment of special education students in October 2002 (1,121) to the projected enrollment of special education students for October 2003 (1,196) and determined that New Brunswick would have approximately 75 new special education students in the 2003-

2004 school year. (*Id.* at 11-12) Of the 75 new students, it is estimated that 17%, or 13 students, will be sent out of district in the 2003-2004 school year. Multiplying the number of out-of-district placements, 13, by \$36,306, the Department estimates that the District will need an additional \$462,905 [*sic*].

The Department reasons that by basing its calculation on the number of special education students in New Brunswick in previous years, its determination is reasonable and should not be disturbed. (*Id.* at 12) By contrast, the Department asserts that New Brunswick has provided no documentation, but merely uncorroborated testimony, to substantiate its projected increase of 200 students in special education for 2003-2004. As such, the Department contends that petitioner has failed to prove a “*documented* increase in non-discretionary expenditures,” as provided by *N.J.A.C.* 6A:10-3.1(d)(4). (emphasis in text) (Department’s Exceptions at 13)

In reply, New Brunswick merely insists that it “offered detailed proofs on the costs of special education and Judge Reback’s Findings of Fact should be sustained.” (Petitioner’s Reply at 2)

Upon review, the Commissioner is not persuaded that petitioner has met its burden of documenting a need for special education tuition beyond that which was determined by the Department. In this connection, the Commissioner finds that, indeed, there is nothing on this record to substantiate Mr. Jannarone’s testimony that there are likely to be 200 new special education students in New Brunswick in the 2003-2004 school year, as shown in Exhibit P-9, so as to competently challenge the Department’s projected new enrollment figure. Neither is the record clear with respect to the basis for the tuition increases which petitioner alleges are necessary for those students who are currently classified. This lack of clarity notwithstanding,

however, the Commissioner acknowledges that the Department concedes, in its exceptions, that petitioner's preliminary maintenance budget should include a nondiscretionary increase for special education tuition in the amount of \$859,282, rather than \$462,905. (Department's Exceptions at 13) The Commissioner, therefore, modifies the ALJ's finding accordingly.

CONSUMER PRICE INDEX ADJUSTMENT

The Department takes exception to the ALJ's conclusion that the preliminary maintenance budget should be adjusted to reflect an *additional* Consumer Price Index (CPI) increase in the amount of \$122,554, beyond the Department's increase of \$191,605. (Department's Exceptions at 14)¹ In this connection, the Department argues that:

[The] Initial Decision states that petitioner provided "supportive documents which are either evidential or would be made available to the Department or has already been provided to the Department concerning the CPI increase." Initial Decision, p. 24. The only document submitted as evidence by petitioner in support of the CPI increase was P-13 which does not provide any demonstration that petitioner will incur a non-discretionary increase in these specific amounts. For example, the record contains no documentary evidence demonstrating that during 2003-04 petitioner will incur a non-discretionary increase in the following budget accounts: legal services; judgments against the school district; cleaning; repair and maintenance services; rental of land and buildings; insurance; energy; general administration related to capital outlay; and school administration related to capital outlay. (*Id.* at 14-15)

Thus, the Department reasons that petitioner has failed to document an increase, as required by *N.J.A.C.* 6A:10-3.1(d)(4). Additionally, the Department asserts that "on cross-examination, Mr. Jannarone conceded that he did not provide any documentation demonstrating that petitioner will incur a non-discretionary increase in these specific accounts." (*Id.* at 15) Notably, New Brunswick does not challenge the Department's recitation of the facts, but merely

¹ The Department arrived at its CPI adjustment figure of \$191,605 by multiplying certain non-salary accounts by 2.11%. (Department's Post-hearing Brief at 10)

states, that it “offered [a] detailed analysis of its calculated CPI increases. Judge Rebeck’s [sic] Findings of Fact should be sustained.” (Petitioner’s Reply at 2)

Upon review, the Commissioner is compelled to conclude that the record herein does not confirm the validity of the claimed “omission” in CPI adjustment. Here, the ALJ found that Mr. Jannarone’s testimony “demonstrates that of the CPI increases calculated by the Department, an omission of \$122, 554 was made by the auditors, and those calculated omissions may be found on Exhibit P-17 for identification.” (Initial Decision at 22) However, because P-17 was merely marked for identification and not placed into evidence, it is not available for the Commissioner’s review. Moreover, Exhibit P-13, which was submitted as evidence, does not, alone, sufficiently document that petitioner will incur nondiscretionary increases in the specified budget accounts. Therefore, the Department’s CPI adjustment is upheld.

SPECIAL TECHNICAL HIGH SCHOOL

It is undisputed that petitioner’s maintenance budget did not include a non-discretionary increase in the amount of \$400,000 for what is apparently a joint venture with the Robert Wood Johnson Hospital and Medical School which has resulted in the construction of a special technical high school within the District. (Initial Decision at 22) Petitioner describes this as a “contractual agreement with the Science and Technology High School testified to by Richard Jannarone as a contractual obligation that would increase \$400,000 in the school year 2003-2004***.” (Petitioner’s Post-hearing Brief at 6) Respondent, however, asserts that the record is unclear as to whether this service is nondiscretionary or, indeed, what *type* of service is provided. (Department’s Exceptions at 15-16)

The Commissioner determines that the record herein simply does not substantiate that the Department erred in excluding the \$400,000 from petitioner’s maintenance budget. In so

finding, the Commissioner notes that, despite petitioner's assertions that "[t]his is an ongoing contractual obligation****" (Respondent's Reply at 2), this record does not include a copy of the contract and is, in fact, devoid of *any explanation* of the services which are anticipated to be provided pursuant to the contract. Indeed, the ALJ only speculates that the District's contribution to the special high school was "perhaps in terms of rental." (Initial Decision at 22) Moreover, the Commissioner finds that the ALJ appears to have improperly shifted the burden of proof in this regard, as he determined, "there were utterly no proofs offered to contradict the District's position regarding this expenditure***." (Initial Decision at 23) Rather, it was the District's burden, as it so concedes, to prove that the Department's calculation were improper. Given the lack of petitioner's documentation pursuant to this disputed calculation, the Commissioner is simply not persuaded that it has met its burden.

TRANSPORTATION COSTS

It is undisputed that petitioner's preliminary maintenance budget does not include a nondiscretionary increase in the amount of \$503,014 for transportation. Once again, however, the Department asserts that petitioner failed to submit any documentary evidence demonstrating a contractual increase for transportation. (Department's Exceptions at 16) Indeed, the Department contends that "Mr. Jannarone acknowledged that he had not yet received documentation indicating an increase in transportation costs." (*Id.* at 16) Notably, petitioner does not dispute the Department's exceptions on this issue, but merely states that "[t]ransportation cost increases must be included in the Maintenance Budget." (Petitioner's Reply at 2)

The Commissioner again determines that the record herein simply does not demonstrate that the Department erred in not including a nondiscretionary increase in the amount

of \$503,014 for transportation. In so concluding, the Commissioner finds no evidence to substantiate Mr. Jannarone's testimony, however plausible it may be. In this regard, the Commissioner finds that, again, the ALJ appears to have improperly shifted the burden of proof in this regard, as he determined, "No evidence was offered by the Department *** to in any way contradict***" the testimony offered with respect to the district's transportation requirements. (Initial Decision at 23) As noted, it was the District's burden to prove that the Department's omission was improper and, given the absence of documentation on this issue, the Commissioner is not persuaded that petitioner has met its burden.

REVENUE ADJUSTMENTS

Petitioner takes exception to the ALJ's finding that an IDEA grant may be included as revenue, adding that "It is clear that regulations preclude the use of such a grant to replace or supplant State or local revenues." (Petitioner's Exceptions at 2) The Department, however, reiterates that because it included the costs of special education programs and services in the calculation of its maintenance budget, it appropriately included revenues received to fund these services. (Department's Reply at 2) The Department clarifies, however, that it is not requiring the District to use IDEA Part B revenue to fund general education programs, but rather to fund the special education programs and services included in the maintenance calculation. (*Ibid.*)

The Commissioner finds, for the reasons set forth in the Initial Decision, that the Department properly included IDEA Part B revenue in the calculation of the District's 2003-2004 total budget revenues available.

UTILITIES

The Department argues that it did not include a nondiscretionary increase for utilities,

since the amount that petitioner spent on utilities in 2002-03 exceeded the amount budgeted by petitioner in the 2003-04 budget submitted to the Department. In essence the Department accepted the amount budgeted by petitioner for utilities for the 2003-04 school year. At hearing, however, petitioner argued that in 2003-04, it would incur an increase in utilities in the amount of \$24,241 above actual expenditures on utilities in 2002-03. (Department's Exceptions at 17)

Additionally, the Department notes that, to the extent the District experiences an unforeseen increase in utility during the 2003-04 school year, it may apply for an increase in supplemental funding. *N.J.A.C. 6A:10-3.1(g)*.

Moreover, the Department asserts that the Initial Decision "double counts" the increase for utilities, in that the ALJ concluded that the preliminary maintenance budget should be adjusted to reflect an additional CPI increase in the amount of \$122,554, which amount already includes an increase for "Energy (Energy and Electricity)" in the amount of \$24,241. (P-13) Then, the ALJ again increases the preliminary budget for a nondiscretionary increase of \$24,241 for utilities at page 25 of the Initial Decision. Petitioner does not address the issue of the "double count" in its replies, but merely affirms that "[u]tility cost increases must be included in the Maintenance Budget." (Petitioner's Reply at 2)

The Commissioner finds that, given his previous conclusions hereinabove which would eliminate the problem of "double counting" raised by the Department and further noting the Department's failure to dispute the likelihood of increased utilities costs, for the reasons set forth in the Initial Decision, the District's preliminary budget should be adjusted to reflect an increase in the amount of \$24,241 for utilities.

Accordingly, the Initial Decision is modified as set forth above.²

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: October 20, 2003

Date of Mailing: N/A

² 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, which will reveal the District's true audited find balance and available revenue, if any, as of June 30, 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).

³ 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.