

STATE-OPERATED SCHOOL :  
DISTRICT OF THE CITY OF :  
NEWARK, 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” and supplemental aid, alleging that the Department’s review and calculations were not in accordance with the July 23, 2003 order of the Supreme Court. The District also challenged the Department’s reduction, as part of its review of noninstructional expenditures for ineffectiveness or inefficiency, of proposed costs for School Leadership Teams (SLTs), overtime, the Office of Design and Construction, the Office of Development Planning, resource teachers/coordinators, department chairpersons, food service deficits, consultants and drivers for the State District Superintendent.

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 further found that, within the framework of that rule, the Department had made several appropriate determinations, but that the District was entitled to increases for certain previously undocumented encumbrances, salary adjustments and vacancies, workers’ compensation reserves, special education tuition costs, CPI adjustments and utilities. The ALJ further found that, on the Department’s findings of ineffectiveness and inefficiency, the District was entitled to restoration of all reductions except those for the Superintendent’s drivers.

The Commissioner adopted the ALJ’s decision with respect to OAL jurisdiction and several of its specific determinations, but rejected its acceptance of the District’s claims for increases in allowable encumbrances, salary adjustments and vacancies, workers’ compensation reserves, special education tuition costs, CPI adjustments and utilities. With respect to inefficiencies, the Commissioner rejected most of the ALJ’s recommendations and restored only those funds supporting Resource Teachers/Coordinator positions. Additionally, the Commissioner directed the Department to conduct an analysis of the District’s workers’ compensation needs and to make thereafter any necessary adjustments to the District’s budget and supplemental aid.

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 28, 2003

OAL DKT. NO. EDU 5497-03  
AGENCY DKT. NO. 193-6/03

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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) in accordance with the schedule established in response to the Court’s order for expedition, as were replies by each to the other’s exceptions, and all were considered by the Commissioner in reaching his decision herein.

Initially, the Commissioner concurs with the ALJ that the Department’s methodology in reviewing the District’s budget fully comports with the “maintenance” standard established by the Court and implemented by regulations promulgated in accordance with *P.L. 2003, c. 122*. The Commissioner concurs that the OAL does not have jurisdiction to determine directly or indirectly the validity of *N.J.A.C. 6A:10-1.2*, such determination being 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, to the extent that he may appropriately do so in an administrative proceeding, the Commissioner also opines that the Department's definition of "maintenance budget," as set forth in *N.J.A.C.* 6A:10-1.2, is fully consistent with the language and intent of the Court. Thus, like the ALJ, the Commissioner finds the regulatory definition controlling herein, with no conflict between it and the underlying Court order.

Accordingly, pursuant to the standard set forth in rule, the Commissioner makes the following determinations on the specific points in dispute, adopting in part, rejecting in part and modifying in part the Initial Decision of the OAL.

### ADJUSTMENTS TO THE BASE BUDGET

#### Encumbrances

The ALJ ordered restoration of the full amount of \$9,735,823.31 excluded from the maintenance budget set by the Department, based on "undisputed" documentation of qualifying encumbrances presented by the District at hearing and on testimony to the effect that the Department has a history of not increasing aid when Comprehensive Annual Financial Report (CAFR) adjustments warrant. On exception, the Department reiterates that, at the time of the determination under appeal, the District had not yet shown this amount, or any part thereof, to represent 2002-03 expenditures in accordance with established guidelines, and it contends that the Commissioner should, instead of uncritically accepting the District's claims, direct preliminary adjustments to the maintenance budget based on the results of the now-in-progress review of the District's supporting documentation, which the Department saw for the first time during testimony at OAL despite repeated attempts to secure and review it so as to resolve this

matter prior to hearing. (Department's Exceptions at 1-3) In reply, the District characterizes the Department's position as "nothing more than a delay tactic designed to further impede the operation of schools in the District," and reiterates that its documentation at hearing, which it had every right to present at that point and not before, was "uncontested" and, thus, must stand as found by the ALJ. (District's Reply at 3-5, quotation at 4)

Upon review, the Commissioner concurs with the ALJ's recitation of the standard for determining whether encumbrances are to be considered part of the maintenance budget, but does not concur that the District's claim should be accepted wholesale merely because the Department was unable, in effect, to complete a detailed fiscal review of documentation previously available to the District but first proffered at OAL hearing. The Commissioner notes that the Court directed the Department to provide districts with preliminary maintenance figures for the 2003-04 school year by August 27, 2003, and, in fulfillment of that directive, the Department utilized the most recent information provided by the District. The Commissioner, therefore, finds it entirely appropriate and consistent with the Department's established accounting practices<sup>1</sup> for the Department to have excluded from the District's maintenance budget expenditures for which the District did not provide requisite documentation. Moreover, although the Commissioner recognizes the Court's "encouragement," as noted by the District, to accept ongoing supplemental documentation, the Court's holding cannot be construed to require the Commissioner to accept data without benefit of appropriate fiscal

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<sup>1</sup> These practices are both set forth in testimony herein and embodied in instructions to districts with respect to the processing of year-end purchase orders as provided in Assistant Commissioner Richard Rosenberg's letter of September 16, 2003, see *Board of Education of the City of Burlington, Burlington County v. New Jersey State Department of Education*, decided by the Commissioner on October 20, 2003.

review, particularly where the District did not proffer the documentation when requested and the CAFR will be submitted in just over a week from the date of this decision so as to bring finality to the data in question.

Accordingly, while recognizing that adjustments in this area may well prove necessary, because the Commissioner is unable to determine definitively which of the District's encumbrances have become accounts payable by virtue of the receipt of the encumbered goods or services on or before June 30, 2003, the Commissioner concludes that the disputed encumbrances were properly excluded by the Department and rejects the ALJ's recommendation for adjustments to the maintenance budget, instead directing that such adjustments await the results of the impending CAFR.

#### Projected Surplus

The Commissioner concurs with the ALJ that the Department's calculation, to which the District did not object, shall stand, subject to final adjustment following the CAFR.<sup>2</sup>

#### Other Adjustments

The Commissioner notes the ALJ's recitation of corrections made to revenues and receivables, to which neither party objected and which did not result in a finding, conclusion or order.

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<sup>2</sup> The Commissioner notes, however, that the ALJ errs in stating at page 8 of the Initial Decision that the District *must* maintain a surplus balance of 2%. Although that is the threshold for determining *excess* surplus, there is no requirement that surplus actually be *maintained* at 2%.

## NONDISCRETIONARY ITEMS

### Salaries

The ALJ ordered adjustment of the District's maintenance budget to allow for salary increases for substitutes, overtime, stipends, per-diem, summer school and nonaffiliated employees, reasoning that these were nondiscretionary based on past practice as evidenced by prior contracts; she declined, however, to disturb the 4.884% rate of increase applied by the Department to those salaries it found subject to nondiscretionary increase. The Department takes exception to the former, reiterating that these are not *contracted* increases, and that annual contracts expiring in June 2003 but not yet negotiated at the time of hearing are fully within the discretionary control of the District. (Department's Exceptions at 3-5) In reply, the District urges adoption of the ALJ's recommendation, reiterating that it provided evidence at hearing that these categories of employees are, in fact, subject to expected wage increases based on past practice. (District's Reply at 5-6)

The ALJ also found that any teaching or paraprofessional position filled by a permanent employee at the start of the 2002-03 school year, but later vacated, must be considered "provided" within the meaning of "maintenance budget," so that full-year salary amounts for such positions (237 Full-Time Equivalents at \$11,376,000) must be added to the 2003-04 budget. The Department notes on exception that it does not disagree with the ALJ's determination as to positions filled for part of the year being "provided" for maintenance purposes, but contends that the District offered no credible evidence for its claims as to positions meeting this criterion. (Department's Exceptions at 5-7) The District, in reply, characterizes the Department's position as arbitrary and

baseless, with the potential to leave the District without critical staff through no fault of its own. (District's Reply at 6-7)

Upon review, the Commissioner modifies the ALJ's analyses, findings and conclusions with respect to additional salary monies for noncontractual salary increases and filling of specific vacancies. Initially, the Commissioner notes that the Department's overall 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. With respect to salary costs, the Commissioner recognizes that, 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 other types of projections are no less imprecise. Thus, in the Commissioner's view, a methodology which preliminarily establishes the 2003-04 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 2002-03 and then allowing for reasonable, nondiscretionary salary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision. With respect to salary increases, the Commissioner finds that applying the District's currently contracted increase rate of 4.884% was a reasonable method of projecting preliminary nondiscretionary costs for 2003-04, and, moreover, that increases requested in anticipation of upcoming annual negotiations where a contractual obligation does not presently exist cannot properly be considered "non-discretionary" costs appropriate for preliminary State support in a "maintenance" year occasioned in significant part by the

need for fiscal austerity. The Commissioner is likewise unpersuaded by the Board's argument that the Department's method does not take into account vacancies 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. Finally, while the Commissioner recognizes that the results of the Department's method may be imperfect, even after adjustment following audit, he is also cognizant that *N.J.A.C. 6A:10-3.1(g)* provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant. Therefore, the Commissioner adopts the ALJ's recommendation with respect to application of a 4.884% rate of salary increase for preliminary calculation purposes, but rejects her recommendations adding additional monies to the maintenance budget for noncontractual salary increases and filling of specific vacancies.

### Benefits

The ALJ declined to make adjustments to the Department's calculations for benefits, generally because there was insufficient information on record or because the District did not provide evidence to support its claims. On exception, the District argues that the Court, in its July 23, 2003 Order, anticipated that nondiscretionary cost determinations would be based on actual, current numbers, not on a "reasonable methodology," so that the ALJ's acceptance of the Department's projections violates the Court's directive. The District also objects to the ALJ's determination not to order adjustments at this time, alleging that such ruling conflicts with her prior ruling on



encumbrances and ignores the District's testimony about the Department's historical failure to increase aid following the CAFR. Finally, the District contends that the ALJ, in rejecting the District's claim for increased pension costs, ignored testimony that such costs are based upon salaries and, thus, increase as salaries do. (District's Exceptions at 9-12) In reply, the Department reiterates that its method of calculating health benefits, which relies on applying the 2003-04 rate of increase in health benefit plan costs to the District's 2002-03 expenditures for health benefits, is superior to the District's, which takes a "snapshot" of its payroll at a specific point in time and then projects what those individuals' plans would cost in the following year, without regard for the fluctuations that occur during any given year in both numbers of employees and elections of coverage. The Department also urges adoption of the ALJ's finding on pension costs, noting that no documentation was offered in support of the referenced testimony. (Department's Reply at 3-4)

Upon review, the Commissioner concurs with the ALJ that no adjustments to the Department's calculations are warranted at this time, in the case of health benefit costs because the Department's methodology for preliminary determination is sound and the District's arguments and evidence are insufficient to disturb it, and in the case of pensions because no specific evidence was brought to the record to support the District's claims.

#### Workers' Compensation

The ALJ recommended adjustment of the District's maintenance budget to include \$3.5 million in additional workers' compensation costs, based on the actuarial analysis of the District's fiscal agent for its self-insured workers' compensation program,

“[u]nless the Department subsequently analyzes the need for the large increase appropriately\*\*\*.” (Initial Decision at 18) On exception, the Department urges the Commissioner to direct the analysis suggested by the ALJ and decline to order adjustments to the District’s maintenance budget until such analysis is completed. (Department’s Exceptions at 7-8) In reply, the District again accuses the Department of delay tactics. (District’s Reply at 7-8)

Upon review, although the Commissioner is mindful of the reasoned basis for the District’s claim and the ALJ’s conclusion, he is also mindful that the District is not *required* to maintain insurance reserves at the level recommended by its actuarial analyst, and that the need for fiscal austerity is one of the primary bases for the Court’s maintenance order. Accordingly, in the interest of balancing competing concerns, and because this issue is not amenable to resolution by the CAFR, the Commissioner directs the Department to conduct forthwith the analysis suggested by the ALJ, and to make thereafter such adjustments to the District’s budget and supplemental aid as may prove warranted.

#### Charter School Tuition and Pupil Transportation

The Commissioner notes the ALJ’s recitation of the Department’s determination that the District’s charter school tuition and transportation costs represent nondiscretionary increases, so that \$7,512,368 was included in the District’s maintenance budget and no further order results herein.

### Special Education Tuition—Private Schools for the Disabled

The ALJ found the evidence to show a need for \$1,900,000<sup>3</sup> for private school tuition increases, as determined by the Department, rather than the \$6,518,987 requested by the District; however, she also found that the total amount of the District's special education increase should be offset by \$500,000 in anticipated IDEA monies rather than by \$1,159,116 as determined by the Department. The District excepts to the ALJ's recommendation for IDEA offset, contending that she erroneously took into account the Department's disproved "transfer" analysis and failed to consider the substantially decreased IDEA resources available to the District, to which the Department replies that its calculations were not based on transferred funds, but rather on actual 2002-03 expenditures and actual numbers of new students and tuition increases. (District's Exceptions at 13-15; Department's Reply at 4-5) The Department, too, excepts to the ALJ's finding with respect to IDEA funds, without reply from the District, but does so on the basis that the District's IDEA Part B plan has not yet been approved by the Department and that, to the extent that the District is not required to do so as a result of a corrective action plan, it may allocate Part B funds to offset tuition increases. (Department's Exceptions at 8-9)

Upon review, the Commissioner finds the Department's calculation of a \$1,932,929<sup>4</sup> nondiscretionary increase in this category of special education tuition, exclusive of any offset, to be fully supported by the record and not at all, as suggested by

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<sup>3</sup> The ALJ's discussion references an adjustment of \$1,900,000; however, Exhibit R-1, which sets out in summary form the calculations underlying the Department's maintenance budget and supplemental aid determinations as announced in its August 27, 2003 letter (Exhibit J-1), includes a total special education calculation of \$4,673,797, confirming \$1,932,929, as calculated in Exhibit R-10, as the actual amount of allowed increase in private school tuition.

<sup>4</sup> See note 3 above.

the Board, dependent on the Department's inquiries regarding transfers. With respect to allocation of IDEA funds for offset purposes, however, the Commissioner cannot conclude from the present record that the District has shown its inability to make further discretionary allocation from IDEA funds. Accordingly, the Commissioner directs that the District's total need for increased special education tuition, including the \$1,932,929 disputed herein for tuition at private schools for the disabled, be set at \$4,673,797 as determined by the Department, but that this amount be offset by \$1,159,116 in IDEA funds for a total increase of \$3,514,681; *subject*, however, to further increase should the District demonstrate to the Department that any portion of the referenced IDEA funds are, in fact, required to support positions and services required by a corrective action plan.

#### Rent/Lease Obligations and County Vocational School Tuition

The Commissioner notes the ALJ's recitation of the Department's acceptance of certain rent/lease obligations and vocational school tuition as nondiscretionary increases, so that \$222,483 and \$841,410,<sup>5</sup> respectively, were included in the District's maintenance budget and no further order results herein.

#### Consumer Price Index Adjustment

The ALJ found that the appropriate rate for Consumer Price Index (CPI) adjustment was 2.3%, obtained by averaging the 3% CPI for New York, Northern New Jersey, Long Island, NY-NJ-CT-PA, for July 2002—July 2003 with the 1.5% CPI for Philadelphia, Wilmington, Atlantic City, PA-NJ-DE-MD, for August 2002—August 2003. On exception, to which the District did not reply, the Department argues that the

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<sup>5</sup> This amount is incorrectly reported in the Initial Decision as \$932,228. *See* Exhibit R-1.

ALJ recognized the lack of data on record reflecting the fiscal year preceding the prebudget year as required by *N.J.S.A.* 18A:7F-3, yet went on to make a finding in the District's favor notwithstanding that it offered nothing cognizable to counter the Department's calculation. (Department's Exceptions at 9)

Upon review, the Commissioner finds that the District did not meet its burden of demonstrating that the CPI rate of adjustment employed by the Department, which was calculated pursuant to Department procedures for all school districts and in full accordance with applicable statutory requirements, was in any way infirm or improper. Accordingly, the ALJ's recommendation is rejected and the Department's calculation upheld.

#### NONRECURRING ITEMS

##### Legal Expenses

The Commissioner concurs with, and adopts as his own, the ALJ's analysis and conclusion, to which neither the Department nor the District took exception. Accordingly, the Department's calculation is upheld.

##### Insurance Expenses

The Commissioner notes the ALJ's recitation of this calculation, regarding which there is no dispute other than the Workers' Compensation issue discussed at page 66 above.

##### Utilities

The ALJ found that the District had demonstrated its need for the full amount of its utilities request and restored the Department's reduction of \$828,352. On

exception, the Department argues that the District spent \$828,352 more for utilities in 2002-03 than it budgeted in 2003-04; thus, that amount was properly treated by the Department as a nonrecurring expense in calculating a maintenance budget based on adjusted 2002-03 expenditures, and the District cannot use the supplemental funding appeal process to, in effect, revise its 2003-04 budget appropriations. (Department's Exceptions at 10-11) In reply, the District urges adoption of the ALJ's recommendation, as "corrected" to reflect *both* the \$1,055,681 adjustment ordered in the Initial Decision *and* restoration of the Department's \$828,352 reduction for a total increase of \$1,884,033, contending that the actual and current information supplied at hearing was entirely appropriate and amply demonstrated the District's need. (District's Exceptions at 15-16; District's Reply at 8)

Upon review, the Commissioner finds the Department's rationale in considering \$828,352 a nonrecurring expense for purposes of calculating a maintenance budget to be sound, and he further finds the present appeal process to be an inappropriate venue for the District to be, in effect, attempting to revise its approved 2003-04 budget. However, even if the Commissioner were to accept that the increase sought by the District could be considered in this context, he finds the evidence on record (Exhibit P-6, Tab 9) insufficient to support the District's claims, particularly in view of the unique considerations surrounding energy issues, such as ongoing fluctuations in rates and changing patterns of usage. Moreover, if it transpires that the District does, in fact, require funds for utilities beyond those appropriated, and additionally beyond those available through transfer of funds from over-budgeted accounts, the Commissioner notes that *N.J.A.C. 6A:10-3.1(g)* provides a mechanism by which the District can obtain

additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant. Accordingly, the ALJ's recommendation that \$1,055,681 be added to the District's maintenance budget is rejected and the Department's calculation upheld.

#### Belmont Runyon School

The ALJ recommended no further increase to the District's maintenance budget beyond the additional \$1,387,756 conceded by the Department at hearing, so as to permit the District, to the extent previously agreed by the Department, to use general fund dollars for completion of the Belmont Runyon School. On exception, the District claims that it provided ample evidence of its need for \$2.9 million and of the Department's prior agreement to fund the project to completion, and that the ALJ clearly understood the difficulties of addressing completion of this project through the District's Long-Range Facilities Plan; therefore, the ALJ should have ordered additional funding consistent with the evidence. (District's Exceptions at 16-18) In reply, the Department contends that Newark is improperly seeking to extend its agreement to transfer a limited amount of 2001-02 and 2002-03 general fund monies, and it reiterates that the appropriate action to be taken by the District in addressing any remaining costs is amendment of its Long-Range Facilities Plan. (Department's Reply at 6-7)

Upon review, the Commissioner finds the evidence on record insufficient to support the District's claim that its maintenance budget should be increased by an additional \$1.5 million dollars, over and above the approximately \$1.4 million already conceded by the Department, so as to enable it to complete the Belmont Runyon School in 2003-04 with general fund monies supported by supplemental State aid rather than

through more appropriate and available means. Accordingly, the Commissioner adopts the ALJ's recommendation making no increase beyond the \$1,387,756 conceded by the Department at hearing consistent with its prior agreement.

#### Replacement of Title 1 Funds

The Commissioner concurs with, and adopts as his own, the ALJ's analysis and conclusion, to which neither the Department nor the District filed exceptions. Accordingly, the Department's calculation is upheld.

#### INEFFICIENCIES

With one exception, the ALJ recommended restoration of amounts reduced by the Department on the basis of ineffectiveness or inefficiency, generally because, although the Department had demonstrated a *prima facie* basis for its various determinations, the District was able to counter with fact-specific demonstrations, largely unrebutted by the Department, to the effect that the structures, positions, and services at issue had a useful function and made sense in light of the District's particular circumstances.

On exception, the Department generally contends that the ALJ applied the wrong standard with respect to inefficiency/ineffectiveness, misunderstanding the controlling rule to extend the requirements of *N.J.A.C.* 6A:10-3.1(c)1i and 6A:10-3.1(c)1ii for consideration of "historical spending patterns" and "district-specific information regarding staffing needs" to *all* the listed bases for determination of effectiveness and efficiency, thereby ignoring that *N.J.A.C.* 6A:10-3.1(c)1 lists four *separate* bases, each with its own elements, and erroneously expecting the Department to



have addressed each and every element in any identified inefficiency.<sup>6</sup> Thus, the ALJ erred in considering “district-specific information regarding staffing needs” in any instance where the Department’s determination of inefficiency was made on a basis other than *N.J.A.C. 6A:10-3.1(c)1ii* , and ignored that a district’s particular circumstances are not pertinent where the Department’s determination of inefficiency was made on the basis of a comparative analysis among Abbott districts pursuant to *N.J.A.C. 6A:10-3.1(c)1i* or cost savings and/or inefficiencies identified or proposed by the district or by the State Auditor or Office of Legislative Services audit pursuant to *N.J.A.C. 6A:10-3.1(c)1iv*. (Department’s Exceptions at 11-16)

In reply, the District generally counters that the ALJ was correct in her application of the rule, and that the Department’s suggested interpretation would compromise the integrity of the regulations. Moreover, according to the District, “virtually all of the Department’s identified alleged inefficiencies--such as the elimination of an SLT, resource teachers, consultants, or entire departments--were in fact based upon an analysis of district *staffing needs*, an analysis that is inextricably intertwined with the comparative analysis,” and “both the New Jersey Supreme Court and the Department have recognized that all Abbott districts are unique districts in terms of need,” so that it is “fundamental that a credible and legitimate comparative analysis

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<sup>6</sup> The Department notes that part of the confusion may result from the applicable rule as printed in the *New Jersey Register* (35 *N.J.R.* 4329) differing from the text adopted by the Commissioner and transmitted to the Office of Administrative Law, which was effective upon filing pursuant to *P.L. 2003, c. 122*; the District denies this, contending that the ALJ cited and quoted the appropriate regulatory language. (Department’s Exceptions at 12, footnote; District’s Reply at 9, footnote) In fact, examination of these documents reveals that *N.J.A.C. 6A:10-3.1(c)1*, as filed, is punctuated by periods consistent with the Department’s contention that the bases listed are separate and distinct, whereas the punctuation in the *Register* version (a series of semicolons with a penultimate “; and”) creates the impression that they are cumulative.

cannot be accomplished without an analysis of district-specific information.” (District’s Reply at 8-10, 12; quotations at 9-10, emphasis in text)

In considering the parties’ positions on this issue, the Commissioner generally agrees with the Department, and modifies the Initial Decision, to the extent that it suggests that the Department could not identify areas of inefficiency, and have those identifications potentially sustained, without taking into consideration, collectively, the various criteria of *N.J.A.C. 6A:10-3.1*. However, the Commissioner does not agree with the Department that district-specific information has no relevance on appeal unless the Department’s inefficiency determination was made on the basis of a district-specific criterion; indeed, given that the district bears the ultimate burden of proof in an appeal of this type, regardless of the basis for the Department’s finding of inefficiency, district-specific information would appear to be the primary, perhaps even only, basis on which an attempt could reasonably be made to demonstrate that a district’s expenditures were *not* inefficient or ineffective under the regulatory standard. However, in so holding, the Commissioner emphasizes that it is not enough in this context for a district to demonstrate that the structure(s), position(s) or service(s) under scrutiny are explicable under the circumstances and rooted in a plausible district need; rather, it must demonstrate both that they are *specifically* necessary and that they *cannot* be more effectively or efficiently provided than they presently are.<sup>7</sup>

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<sup>7</sup> To the extent that the Initial Decision tends, in effect, to shift the burden of proof to the Department once the District has explained its circumstances, that approach is expressly rejected by the Commissioner. See July 23, 2003 Court Order, paragraph 5.

Within this general framework, then, the Commissioner makes the following determinations on the areas in dispute between the District and the Department.<sup>8</sup>

#### School Leadership Teams (SLTs)

The ALJ found that the five-team approach worked better for the District than the four-team plan proposed by the District in 2001 in order to reduce inefficiencies, but later abandoned as counterproductive; she further found that the savings to be effectuated by that plan had been accomplished in an alternative manner. On exception, in addition to the general objections discussed above, the Department notes that the District itself recognized that its SLT structure could be more efficient, and that the referenced savings occurred prior to development of the four-team plan in September 2001, with only about \$450,000 of the plan's projected \$2 million cost savings having materialized since that time. The Department also objects to the ALJ's summary dismissal of the Rosenfarb Report, noting that, to the extent that the Department's final determinations of inefficiency differed from the Report's, such differences were, as set forth in testimony and exhibits, based on the Department's specific knowledge of the District, and that the Report is not, as characterized by the ALJ, useless as a measure of inefficiency because it lacks district-specific analysis, but is instead directly responsive to the distinct regulatory criterion of comparison to other

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<sup>8</sup> It is here noted that the District's Reply Exceptions on the subject of inefficiencies generally addressed the question of appropriate proofs and standards as set forth above. Where a more specific point was offered in relation to a particular inefficiency, it is included in the summations below.

districts. (Department's Exceptions at 16-20) In reply, the District urges adoption of the ALJ's analysis and recommendation.<sup>9</sup>

Upon review, the Commissioner is not persuaded by the evidence on record that the Department's reduction must be restored. To the contrary, the District is clearly inefficient in terms of comparison to other Abbott districts and has itself recognized that substantial economies needed to be undertaken in this area; to dismiss the criteria of *N.J.A.C.* 6A:10-3.1(c)1i and 6A:10-3.1(c)1ii out of hand, as the ALJ effectively did, is to nullify the clear intent of the controlling regulation. Moreover, even under a fact-specific analysis of the type sought by the District, there has been no showing that the District cannot structure and staff its SLTs in a more efficient manner while still meeting its stated objectives and addressing its stated concerns. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

#### Overtime

The ALJ found that the District justified its substantial blue-collar overtime expenditures based on historical spending patterns, the staffing required to address the District's unique custodial and maintenance needs, and the Department's failure to explain the basis for its determination. On exception, the Department notes that the basis for its determination was comparison to other districts, and that testimony clearly established the Department's calculation as an application of Jersey City's expenditure rate to the District's larger physical plant, with the difference being the amount of identified inefficiency. Additionally, it points to the District's contractual clauses providing for overtime in four-hour minimum increments and the undisputed fact

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<sup>9</sup> See note 8 above.

that in 2002-03 some employees earned more in overtime than an equivalent full-time salary. (Department's Exceptions at 21-22) In reply, the District urges adoption of the ALJ's analysis and recommendation, noting that much of its overtime is weather-related or due to the number and condition of its buildings or the "huge" number of School Construction Corporation (SCC) projects. (District's Reply Exceptions at 11-12)<sup>10</sup>

Upon review, the Commissioner is unpersuaded that the Department's reduction must be restored. Again, the District is clearly inefficient in comparison to other Abbott districts and has itself recognized that economies should be attempted in the area under scrutiny, and, even under a more fact-specific analysis, there has been no showing that the District cannot address its custodial and maintenance needs in a more efficient and effective manner so as to reduce overtime expenditures; moreover, the District should not be provided with the means to avoid negotiation of changes in a clearly inefficient contractual provision. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

#### Office of Design and Construction

The ALJ recommended restoration of the Department's reduction, based on findings that the Office of Design and Construction (ODC) performed necessary services, that the District would incur greater costs by eliminating it, and that the Department failed to consider the staffing requirements of the District in making its determination. On exception, the Department notes that the basis for its determination was comparison to other large K-12 districts, which shows that the District has the highest per pupil expenditure in Operation and Maintenance of Plant, over \$350 more

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<sup>10</sup> See note 8 above.

than the next highest spending district, and comparison to other Abbott districts, which shows a similarly disproportionate amount of expenditure, due largely to the District's unique maintenance of a separate office solely responsible for design and construction of buildings. The Department also notes that the District is like all other Abbott districts in having buildings in various states of disrepair, and in having a Long-Range Facilities Maintenance Plan requiring interface with the SCC, which itself has no plans to provide additional staff to work with the District notwithstanding the District's plans to hire additional project managers. (Department's Exceptions at 22-25) In reply, the District urges adoption of the ALJ's analysis and recommendation, noting in particular how the Department's erroneous assessment of the ODC as overlapping with the functions performed by the SCC and duplicative of the functions performed by the Economic Development Authority (EDA) is, in fact, a staffing analysis, contrary to the Department's contention as to the distinctness of each regulatory criterion. (District's Reply at 10-11)<sup>11</sup>

Upon review, the Commissioner again finds that the District has explained the circumstances and needs to which the identified area of inefficiency responds, but has not demonstrated that these cannot be addressed in an alternative manner so as to bring the District's costs more into line with other districts; in this regard, the Commissioner finds insufficient as proof the ODC director's general, unsupported statement that, based on industry "soft" cost standards, it would cost more to eliminate the ODC than to maintain it. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

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<sup>11</sup> See note 8 above.

### Office of Development Planning

The ALJ recommended restoration of the Department's reduction, based on findings that the Office of Development Planning (ODP) performed necessary services and the Department failed to understand the function of the office. On exception, the Department again contends that the basis for its determination was a comparison to other districts, so that it was not required to consider district-specific information regarding staffing needs. The Department also reiterates that the District is like all other Abbott districts in having a Long-Range Facilities Maintenance Plan with requirements vis-à-vis the functions performed by the ODP, yet other Abbott districts do not incur expenditures at the District's level, and that one of the District's consultant firms handles many of the functions for which the ODP is purportedly responsible. (Department's Exceptions at 25-27) In reply, the District again urges adoption of the ALJ's analysis and recommendation, noting in particular how the Department's assessment of the ODP as overlapping with the functions performed by consultants or capable of performance by other District employees, is, in fact, a staffing analysis, contrary to the Department's contention as to the distinctness of each regulatory criterion. (District's Reply at 11)<sup>12</sup>

Upon review, the Commissioner again finds that the District has explained the circumstances and needs to which the identified area of inefficiency responds, but has not met its burden of demonstrating that these cannot be addressed in an alternative manner so as to bring the District's costs more into line with other districts. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

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<sup>12</sup> See note 8 above.

### Resource Teachers/Coordinators

The ALJ recommended restoration of the Department's reduction, based on findings that the sole basis for the Department's determination appears to have been the District's September 2001 cost savings plan and unfavorable comparison to Jersey City and Paterson and to other Abbott districts, and that the Resource Teachers/Coordinators did, in fact, constitute an effective use of funds, the District having achieved its planned savings through other means such as elimination of a number of facilitators and tutors. On exception, the Department reiterates its objection to consideration of district-specific factors when the basis for the inefficiency determination was a comparative analysis among Abbott districts pursuant to *N.J.A.C. 6A:10-3.1(c)1i* or cost savings and/or inefficiencies identified or proposed by the district pursuant to *N.J.A.C. 6A:10-3.1(c)1iv*, contends that the savings effectuated through elimination of other positions do not obviate the need to address the separately identified inefficiency herein, and notes that the responsibilities of Resource Teachers/Coordinators duplicate those of the District's Department Chairpersons. (Department's Exceptions at 27-30) In reply, the District urges adoption of the ALJ's analysis and recommendation.<sup>13</sup>

Upon review, the Commissioner determines to adopt the ALJ's recommendation. The Commissioner is persuaded that the District's evidence on record (Exhibit P-5, Tab 4) supports the representations made in testimony, and that, in light of his determination on Department Chairpersons below, that the District has demonstrated both the necessity and effectiveness of the Resource Teachers/Coordinator positions. Accordingly, \$3,290,000 is hereby restored to the District's maintenance budget.

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<sup>13</sup> See note 8 above.



### Department Chairpersons

The ALJ recommended restoration of the Department's reduction<sup>14</sup> based on findings that the Department's comparison of the District to Paterson and Jersey City was invalid, that the positions were necessary, and that their elimination would not necessarily result in cost savings. On exception, the Department notes that the District is one of the few in the State with full-time non-teaching Department Chairpersons and points to the substantial overlap between the responsibilities of these positions and those of the Resource Teachers/Coordinators; it also contends that restoring this reduction would be, in effect, rewarding the District for an inefficiency in its collective bargaining agreement that the District itself recognizes. The Department further notes that, contrary to the ALJ's statement, funding for salary and benefits of reclassified Department Chairpersons *was* taken into account, and was not included in the District's inefficiency reduction. (Department's Exceptions at 30-33) In reply, the District urges adoption of the ALJ's analysis and recommendation.<sup>15</sup>

Upon review, the Commissioner finds that the District has once again explained the circumstances addressed by the identified area of inefficiency, but has not demonstrated the necessity for these positions, particularly in light of restoration of the Resource Teachers/Coordinators above, or shown that it cannot address its needs in a more efficient and effective manner. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

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<sup>14</sup> The Department alleged, based on its August 27, 2003 determination letter (Exhibit J-1), that the ALJ ordered restoration of \$3,024,000 when the Department's actual reduction was only \$3,000,000. However, Exhibit R-1, which sets out in summary form the calculations leading to the Department's final determination of supplemental aid as announced in J-1, shows the ALJ to be correct in her statement of the actual number used.

<sup>15</sup> See note 8 above.

### Food Service Deficit

The ALJ recommended restoration of the Department's reduction based on a finding that there is no way the District can further reduce its food service staffing without seriously impinging on the service itself as well as other required services. On exception, the Department again contends that the basis for its determination was a comparison to other districts, so that it is inappropriate to consider district-specific information regarding staffing needs. The Department further argues that an Office of Legislative Services (OLS) audit conducted in December 2000 identified high labor costs and staffing as the cause of the District's unusually high food services costs, and that, while the District may have allowed staff to decrease through attrition and may have negotiated a tiered wage level for new employees, it has done nothing to hire such employees at the new lower wage levels or terminate current employees who continue to receive the level of salary and benefits previously identified as the source of the District's problem. Additionally, the Department observes, the District has privatized food service operations in 30 schools, so that while its work force may have shrunk through attrition, the number of schools requiring staffing has *also* been substantially reduced; thus, the District has done nothing to address the high staff *ratio* identified in the OLS audit. (Department's Exceptions at 33-35) In reply, the District urges adoption of the ALJ's analysis and recommendation.<sup>16</sup>

Upon review, the Commissioner again finds that the District has explained the circumstances underlying the identified area of inefficiency, but he is not persuaded based on the present record that the District cannot address its food service needs in a

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<sup>16</sup> See note 8 above.

more efficient and effective manner. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

### Consultants

The ALJ recommended restoration of the Department's reduction<sup>17</sup> based on findings that the services provided by the identified consultants were necessary and could not be provided more efficiently by District employees, if at all. On exception, the Department repeats its objection to consideration of district-specific factors when the basis for its inefficiency determination was a comparative analysis among Abbott districts pursuant to *N.J.A.C. 6A:10-3.1(c)1i*. The Department also contends that every district in the State has to implement a payroll system, but the District appears to be the only one retaining consultants to do so, and, furthermore, employs a staff of 17 individuals in addition to multiple consultants; that every district in the State has to prepare budgets and maintain accounting records, but other districts do not incur ongoing consultant expenses for training and recording; and that condoning the District's retention of a third-party administrator for prescription drug, vision and temporary disability benefit plans as required by certain collective bargaining agreements, notwithstanding that the District could perform the necessary tasks itself, effectively rewards the District for inefficient labor agreements and provides no incentive to eliminate the pertinent

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<sup>17</sup> The Department alleged, based on its August 27, 2003 determination letter (Exhibit J-1), that the ALJ ordered restoration of \$1,057,000 when the Department's actual reduction was only \$1,000,000. However, Exhibit R-1, which sets out in summary form the calculations leading to the Department's final determination of supplemental aid as announced in J-1, shows the ALJ to be correct in her statement of the number actually used.

provisions during negotiations. (Department's Exceptions at 35-38) In reply, the District urges adoption of the ALJ's analysis and recommendation.<sup>18</sup>

Upon review, the Commissioner finds that the District has once again explained the circumstances and needs to which the identified area of inefficiency responds, but has not demonstrated that these cannot be addressed in an alternative manner so as to bring the District's costs more into line with other districts; in this regard, the Commissioner particularly concurs with the Department that the District should not be provided with the means to avoid negotiation of changes in a clearly inefficient contractual provision. Accordingly, the ALJ's recommendation is rejected and the Department's determination upheld.

#### Drivers

The ALJ recommended sustaining of the Department's reduction of \$78,000 for two full-time drivers for the State District Superintendent. On this point, the Commissioner concurs with the ALJ's analysis, conclusion and recommendation, to which neither the Department nor the District took exception.

#### SUMMARY

Accordingly, the Initial Decision of the OAL is adopted with respect to its recommendations as to OAL jurisdiction over challenges to the validity of the controlling regulation, use of 4.884% as the District's rate of salary increase, allowable amounts for health/pension benefits and legal fees, addition of funds for completion of the Belmont Runyon school consistent with a prior Department agreement, replacement of Title 1

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<sup>18</sup> See note 8 above.

funds, restoration of funds for Resource Teachers/Coordinator positions and reduction of funds for salaries of full-time drivers, but modified or rejected in all other respects for the reasons set forth above. The Department is directed to conduct forthwith the required analysis of the District's workers' compensation needs and to make thereafter such adjustments to the District's budget and supplemental aid its results may warrant.

IT IS SO ORDERED.<sup>19</sup>

COMMISSIONER OF EDUCATION

Date of Decision: October 28, 2003

Date of Mailing: N/A

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<sup>19</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.