#246-05R (OAL Decision not yet on-line)

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FACILITIES AND TRANSPORTATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning *Abbott* district Board of Education appealed the Department's determination to deny retroactive funding, pursuant to the Educational Facilities Construction and Financing Act (ECFCA), for land acquired by the district in 1999 and used for the construction of an early childhood education center approved and funded pursuant to ECFCA in 2001.

In proceedings on remand, the ALJ found that the Board's land purchase was not an eligible school facilities project approved prior to the July 18, 2000 effective date of ECFCA, as required by *N.J.S.A.* 18A:7G-9c in order to be eligible for retroactive funding. The ALJ upheld the Department's determination as consistent with law and dismissed the petition.

Elaborating on the reasoning of the Initial Decision, the Commissioner adopted the ALJ's decision as the final decision in this matter.

OAL DKT. NO. EDU 608-05
(EDU 920-04 ON REMAND)
AGENCY DKT. NO. 19-1/04

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
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RESPONDENT.	:	

The record of this matter and the Initial Decision on Remand issued by the Office of Administrative Law (OAL) have been reviewed. Pursuant to *N.J.A.C.* 1:1-18.4, the Board of Education (Board) filed timely exceptions, to which the Department of Education (Department) duly replied.

In its exceptions, the Board reiterates the position it has consistently taken throughout this matter, incorporating by reference its OAL briefs and previously submitted exceptions. The Board argues that it has met the conditions of the controlling statute with respect to both project eligibility and applicable time frame. With respect to project eligibility, the Board contends that both the Department and the Administrative Law Judge (ALJ) erred in concluding that land acquisition does not constitute a school facilities project within the meaning of the Educational Facilities Construction and Financing Act (ECFCA). According to the Board, this interpretation ignores both the

plain language of the statute, which provides for any of the enumerated activities to constitute an eligible project, and its remedial intent with respect to special needs districts. (Board's Exceptions at 5-7)

With respect to time frame, the Board argues that it did, in fact, have the Department's approval for acquisition of the property in question prior to the July 18, 2000 effective date of ECFCA, in that: 1) the "programmatic elements" of its 1999-2000 Early Childhood Education Plan were approved on March 24, 1999; 2) the "financial elements" of the plan—which, the Board contends, included funding for the proposed land acquisition—were addressed through its 1999-2000 general budget as approved by the Department five days later; 3) and the proposed site for the center was approved on April 28, 1999. These actions, the Board urges, occurred well before the existence of the approval and planning processes set forth in ECFCA and its implementing regulations, so that the Board secured approvals consistent with the laws in place at the time and cannot reasonably be expected to have foreseen the requirements it is now being told it must have met in order to receive retroactive funding. (*Id.* at 8-10) Moreover, the Board continues, its actions must at the very least be viewed as substantially compliant with the requirements of ECFCA, since the Department acknowledges that the property acquisition at issue would have been funded if it had been coupled with construction of the early childhood center; a perceived technical defect, according to the Board, should not prevent it from receiving the funding to which it is entitled—particularly when any such defect can be readily explained by the Board having acted as it did, i.e., acquiring the property promptly despite not receiving the anticipated aid, "in order to comply with the mandates of *Abbott* and the Department to have an early childhood education

program up and running by September 1999." (*Id.* at 10-13, quotation at 12, referencing *Abbott v. Burke*, 149 *N.J.* 145, 183 (1997 and 153 *N.J.* 480, 524 (1998))

The Board reiterates its contention that the Department is estopped from denying its eligibility for retroactive funding on the basis of failure to meet the July 18, 2000 deadline, arguing that the August 22, 2001 settlement agreement that ended the parties' 1999-2000 Early Childhood Education Plan dispute specifically provided that such settlement was "without prejudice to the Board's retroactive funding application for acquisition of the property." The Board proffers that it understood the settlement to mean that "the Department would process the Board's application without consideration of any time constraint set forth in ECFCA, including the July 18, 2000 deadline for approval of a school facilities project," and the Board's agreement to withdraw the appeal was based on that understanding. (*Id.* at 13-15, quotations at 14) Finally, the Board argues that the Initial Decision is contrary to the Court's directives in *Abbott*, since the Board, through the State-mandated needs assessment process, demonstrated a particularized need for an early childhood education facility and is, therefore, entitled under the Court's decision to have the purchase of land associated with the building of such facility funded by the State. (*Id.* at 15-16)[1]

In reply, the Department urges adoption of the Initial Decision on Remand, likewise referencing prior arguments and submissions. With respect to project eligibility under the terms of the statute, the Department contends that the plain language

[1] The Board also objects to the ALJ's failure to consider the Proposed Supplemental Findings of Fact submitted by the Board, contending that, while the Board did enter into a joint Stipulation of Facts for purposes of proceedings on remand, the Board did not concede that the facts within the stipulation were the only relevant facts, so that the ALJ should have addressed the Board's proposed supplemental findings. (*Id.* at 5)

of *N.J.S.A.* 18A:7G-9c, in conjunction with the definition of "school facilities project" at *N.J.S.A.* 18A:7G-3, makes it clear that a planned structure or building must be part of the referenced approval, and that land acquisition alone, even with the intent of eventually using it for a school building, does not meet the statutory requirement; therefore, the Board did not receive "project approval" in April 1999,[2] and, indeed, did not even incorporate the early childhood learning center into its Long Range Facilities Plan until July 18, 2001, a full year after the statutory deadline. (Department's Reply Exceptions at 5-7) The Department offers the rules adopted to implement EFCFA as further clarification of the distinction between 1) a school facilities project including land acquisition and 2) a request for approval of land acquisition independent of a school facilities project, the former being subject to then-effective *N.J.A.C.* 6A:23A—which included site approval pursuant to then-effective *N.J.A.C.* 6:22 as a precondition of project approval—and the latter to *N.J.A.C.* 6:22 alone. (*Id.* at 7-10)

With respect to the Board's other arguments, the Department states that the *Abbott* decisions do not relieve a district from compliance with the requirements of ECFCA, and that the doctrine of substantial compliance is not applicable to this matter because: 1) the Department lacks authority to waive or alter statutory time limits; 2) the Board did not meet the intent of the statute with a facilities project that had progressed to the point specified; 3) permitting land acquisition undertaken apart from a concurrent facilities project to qualify for retroactive funding would open a floodgate of similar claims; and 4) the Board's explanation for its noncompliance is not reasonable.

[2] The Department notes that the Board's land acquisition approval was not actually finalized until June 14, 1999, the Department's April 28 approval covering only one part of the process set out by applicable rules at that time.

Moreover, the Department asserts that the settlement agreement referenced by the Board did nothing more than affirm that the Board's right to apply for retroactive funding under *N.J.S.A.* 18A:7G-9 and its implementing rules was not affected by withdrawal of its early childhood plan appeal. (*Id*. At 10-13)

Upon full and careful review of the record in this matter, the Commissioner must concur with the ALJ that the Board did not receive approval for a school facilities project prior to July 18, 2000 so as to be entitled to retroactive funding under *N.J.S.A.*18A:7G-9c.

In enacting ECFCA in July 2000, the Legislature plainly stated its intent to establish a comprehensive system for addressing New Jersey's school facilities needs, particularly those in the *Abbott* districts. (*N.J.S.A.* 18A:7G-2) Viewed within the context of the full legislative enactment, the remedial relief provided by section 9c of ECFCA (*N.J.S.A.* 18A:7G-9c) is clearly intended to ensure that districts having recently begun the construction of a school facility, or having completed every step of the then-applicable process leading to such construction short of issuing debt, would still be able to avail themselves of the fiscal benefits of the newly enacted law notwithstanding that their project had not been approved under the terms and conditions now prescribed by *N.J.S.A.* 18A:7G-5. It distorts the reach of a carefully circumscribed statute to suggest, as the Board does here, that eligibility for retroactive funding was meant to extend to any lawfully effectuated prior purchase that may subsequently contribute—as evidenced by its inclusion in the list of possible components within the definition of "school facilities project" at *N.J.S.A.* 18A:7G-3—to a project undertaken and approved pursuant to ECFCA; the definition on which the Board relies for the proposition that land acquisition

alone constitutes a school facilities project is applicable to the entire Act, and in context affirms nothing more than that a project submitted for approval pursuant to *N.J.S.A.* 18A:7G-5 may include—among other elements necessary for or ancillary to a school facility—acquisition of the land on which a proposed facility is to be constructed.

Notwithstanding that the Board in this instance was, as evidenced by its application for site approval and inclusion of a proposed early childhood education center in the Early Childhood Education Plan submitted by the district for the 1999-2000 school year, clearly taking steps prior to July 2000 in anticipation of building a school facility, the fact remains that the Board did not receive the type of approval contemplated by *N.J.S.A.* 18A:7G-9c until well beyond the statutory deadline.

Although the Board did receive a site approval from the Department in June 1999 (Exhibit M-1[3]), it is clear from the full regulatory scheme in place at that time (*N.J.A.C.* 6:22, 30 *N.J.R.* 3619(a))[4] that approval pursuant to *N.J.A.C.* 6:22-2.1 constituted nothing more than a determination that a proffered site was suitable for its anticipated eventual use; while site approval was unquestionably a necessary step in the construction approval process, there is no evidence on record that the Board proceeded to obtain the other reviews and approvals required by Chapter 22 before building could have begun. Moreover, the Department's February 11, 1999 review (Exhibit C) of the Board's proposed 1999-2000 Early Childhood Education Plan (Exhibit B) clearly states that requests for facilities (other than temporary) were to be addressed not through Early Childhood Education Plans pursuant to then-applicable *N.J.A.C.* 6:19A-2.3

[3] These and all subsequent similar references are to the Exhibits appended to the Petition of Appeal, which are identical to those appended to the Certification of John M. Rodecker.

[4] At all times pertinent to this matter, regulatory processes were in place by which boards of education were required to obtain Department review and approval before proceeding with planned school facilities.

(30 *N.J.R.* 3019(a)), but through the facilities management plan required elsewhere in the *Abbott* rules, *N.J.A.C.* 6:19A-5.1 *et seq*. (*Ibid*.),[5] and that, in the Board's case, before such a request would be considered, fuller collaboration with community early childhood education providers would have to demonstrated. Consistent with this position and with the regulatory schemes in place at the time, nothing in the Department's approval letter of March 24, 1999 (Exhibit E) suggests that construction of a new center was being approved—let alone required—by the Commissioner, either as part of the "program portion" of the district's plan or as part of the "fiscal elements" to be reviewed within the context of the district's general budget; indeed, such approval did not come until August 21, 2001 (Stipulation of Facts, ¶4), over a year after the effective date of ECFCA.

Under these circumstances,[6] the Commissioner cannot accept, as the Board urges, that the Board "substantially complied" with the standards of *N.J.S.A.*18A:7G-9c so as to have its 1999 land purchase eligible for retroactive funding, or that, in denying funding, the Department unreasonably expected the Board to have foreseen, and acted in accord with, the requirements of not-yet-existing ECFCA regulations. Neither can he accept the Board's explanation that it was "forced" to purchase land in order to comply with *Abbott* directives from the Court and Department to have an early childhood education program "up and running" by September 1999, or

[5] In accord with then-effective *N.J.A.C.* 6:19A-3.4 and 6:19A-8.1 (31 *N.J.R.* 2924(a)), this contention was reiterated by the Department in its review of the district's 2000-01 operational plan. (Exhibits M-3, M-4)

[6] The Commissioner here notes his concurrence with the ALJ (Initial Decision at 2, Findings of Fact) that no fact-finding beyond the parties' joint stipulation (see note 1 above) is necessary to decide this matter. The Commissioner further notes that several of the Board's proposed supplemental findings (¶ 2, 11, 12, 13, 14, 16) incorporate in whole or part allegations from the Petition of Appeal which the Department, in its Answer, either denied or was unable to either admit or deny because of insufficient knowledge, contrary to the parties' cross motions for summary decision.

that a "particularized need" was demonstrated through the regulatory processes established in order to effectuate the Court's mandate.

Finally, the Commissioner rejects the Board's contention that the Department is estopped from denying the requested funding based on the August 22, 2001 settlement agreement reached between the parties in the Board's 1999-2000 Early Childhood Education Plan appeal. To the contrary, whatever the Board now claims it understood that settlement to mean, the parties' agreement as memorialized by the Board attorney (Exhibit I) plainly does nothing more than provide that withdrawal of the early childhood plan appeal, which the Board states that it maintained even after the plan's other elements were approved (Rodecker Certification at 6, ¶16) in order to obtain funding for the land acquisition at issue herein, would not affect the Board's "right to seek" such funding by way of its then-pending application (submitted on July 18, 2001) for retroactive funding pursuant to *N.J.A.C.* 6:23A-3.1 (33 *N.J.R.* 720(a)), the then-effective rule implementing *N.J.S.A.*18A:7G-9c. Even assuming, *arguendo*, that the Department might have, under the circumstances, ignored the lateness of the Board's application vis-à-vis the June 30, 2001 regulatory time frame for its submission, no prejudice resulted from this procedural deficiency because the Department went on to consider the merits of the application and ultimately denied it for substantive reasons (Exhibit N). Certainly, the settlement agreement cannot be construed to have authorized the Department to ignore a statutory deadline for project eligibility, or, indeed, as any kind of promise that the Board's application would be successful; such an interpretation would be contrary to law as well as common sense.

Accordingly, for the reasons expressed therein and above, the Commissioner adopts the Initial Decision of the OAL, dismissing the Petition of Appeal, as the final decision in this matter.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2005
Date of Mailing: July 6, 2005

[7] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq*