

IN THE MATTER OF THE USE OF :
ABBOTT FUNDS BY THE BOARD : COMMISSIONER OF EDUCATION
OF EDUCATION OF THE CITY OF : DECISION
ELIZABETH, UNION COUNTY. :

SYNOPSIS

Following investigation by the Department of Education, the Elizabeth Board of Education was ordered to show cause before the Commissioner why \$88,373 should not be deducted from its 2006-07 school budget as a result of the Board having improperly expended that sum on political advertising presenting incomplete information and advocating only one side of a controversial question regarding the purchase of two parcels of land.

Following hearing at the Office of Administrative Law, the ALJ concluded that the Board communications in question, consisting of a color brochure and four television spots, presented incomplete information and were exhortative and one-sided in violation of *Citizens to Protect Public Funds*, 13 N.J. 172 (1953). The ALJ further concluded that the Commissioner had correctly determined the Board's expenditure to constitute an ineffective and inefficient use of State money, and that a budget deduction was warranted in light of the heightened scrutiny of Abbott district expenditures required by the Legislature and State Board of Education.

The Deputy Commissioner to whom the matter was delegated for hearing pursuant to N.J.S.A. 18A:4-33 adopted the Initial Decision of the ALJ and directed the Department of Education to take the steps necessary to effectuate an \$88,373 deduction from the Board's 2006-07 school budget.

<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>

July 6, 2007

OAL DKT. NO. EDU 10747-06
AGENCY DKT. NO. 369-10/06

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed by the Deputy Commissioner to whom this matter has been delegated pursuant to *N.J.S.A. 18A:4-33*, as have the Elizabeth Board of Education's (Board) exceptions and the State's reply submitted in accordance with *N.J.A.C. 1:1-18.4*.

In its exceptions, the Board contends that the Administrative Law Judge (ALJ) erred in concluding that: 1) the Board's communications did not present both sides of the issue and encouraged citizens to pressure or persuade politicians with a different point of view, and 2) withholding of State aid is an appropriate penalty if the Board is, in fact, found to have acted improperly. (Board's Exceptions at 1-7)

On the first point, the Board claims that its communications plainly reference the potential loss of \$750,000 in tax revenue, the only justification shown on record to have been offered by city officials for their position; and that, even if the commercial appearing to be of greatest concern to the State did, in fact, air – the record on this point being inconclusive – there is nothing improper, inefficient or ineffective about a board of education urging citizens to become politically involved in school matters and express their opinions to public officials, where the matters in question are

not the subject of an impending referendum and citizens are not specifically told what to say. Therefore, according to the Board, adoption of the ALJ's decision would place on local district boards of education the "impractical" and "absurd" obligation to "affirmatively seek out alternate positions on issues, or attempt to guess or present 'Devil's Advocate' arguments" in its communications with the public; it would also set a precedent that "any time a school board mentions any subject that involves local government officials, even tangentially, it runs the risk of being found to have spent money in a manner that was not efficient or effective," thus creating a "slippery slope that will chill, rather than encourage public debate, discussion and communication about issues affecting schools." (Board's Exceptions at 2-5, quotations at 4-5) Moreover, the Board contends – since the State's witness admitted that the Board did not violate any published rule or regulation concerning spending – the ALJ's "shocking" decision would "require school boards to act, not based on any objective written standards, but by guessing as to what any particular commissioner of education will consider to be efficient and effective spending for communications with the public" – a result that is "patently unfair and will have the further effect of chilling any communication with residents who will be at greater danger of becoming misinformed and alienated from their school system." (*Id.* at 5-6)

On its second point, the Board claims that the ALJ offered no convincing explanation of why the penalty in its case should be more severe than that imposed by the Commissioner in *Schettino, supra*; according to the Board, reliance on Elizabeth's status as an Abbott district is flawed because such status reflects nothing more than a difference in the percentage of State aid received – which has "nothing to do with whether the

proposed penalty***is just and proper.” The Board urges instead that this penalty be found “draconian,” “drastic,” unfair, and unreasonable, since the Board violated no objective standards and its actions “by all accounts, were altruistic,” with not even an allegation that it was attempting to confer a benefit on any individual or group. (Board’s Exceptions at 6-7)

In reply, the State counters that the ALJ’s conclusion regarding the one-sidedness of the Board’s communications was not based solely on alleged tax consequences, but more significantly on the Board’s omission of crucial information in its possession regarding lack of State funding and site approval for the land parcels in question (Reply Exceptions at 2-5), and on its blatant espousal – in clear contravention of *Citizens to Protect Public Funds, supra* – of one side of a local political controversy. (*Id.* at 5-9) The point of *Citizens*, according to the State, is that public funds may not be used for advocacy; therefore, if the Board was, in fact, prevented by city officials’ silence from presenting full and fair information about their position – as it contends on exception – then it should have “exercised the restraint discussed in *Citizens* and not spent \$88,373 in public funds,” particularly where cost-free mechanisms for communicating with the public were readily available. (*Id.* at 9-10)

Likewise unpersuasive, the State contends, is the Board’s assertion that its commercial urging contact with local politicians “to tell them to start working for the children” does not say *how* elected officials should be urged to act – given that the immediately preceding footage contrasts the mayor’s willingness to sell the proposed school site to his “developer friend” with his demand for a price nearly ten times as great if the land is to be purchased by the Board “for your children.” Moreover, the State

observes, the Board's suggestion that the offending commercial may not have actually aired is irrelevant in view of the fact that public monies were expended to make it, and, indeed, non-airing of the completed commercial would render the expenditures for its development ineffective and inefficient as well as contrary to the precepts of *Citizens*. (*Id.* at 11-12)

The State additionally posits that no import should be attached to a Department of Education auditor's inability to identify any one specific rule or regulation violated by the Board, or to the Board's contention that its Abbott status does not place it in a distinct posture with respect to use of State funds. To the contrary, the State avers, *N.J.A.C.* 6A:10A-7.1 and the FY 2007 Appropriations Act (P.L. 2006, c. 45) expressly charge the Commissioner with ensuring – through careful scrutiny of district expenditures – that the very substantial amount of State funding received by Abbott districts is expended in a lawful, efficient and effective manner, and to take any affirmative action necessary to achieve this end. (Reply Exceptions at 12-14)

Upon her own independent review, the Deputy Commissioner concurs with the ALJ that the Board did, in fact, improperly expend \$88,373 to produce communications violating the precepts of *Citizens to Protect Public Funds, supra*, and that this amount is, therefore, appropriately deducted from the Board's 2006-07 school budget. In so holding, the Deputy Commissioner is unpersuaded by the Board's exceptions, finding instead that the Initial Decision fully and fairly considers the communications themselves, the circumstances under which they were produced, the positions of the parties, and the appropriateness of the proposed penalty as well as the Commissioner's authority to impose it.

As set forth at length by the ALJ, the proscriptions of *Citizens, supra*, clearly apply in this situation, notwithstanding that the land purchase in question was not itself the subject of an impending referendum. Moreover, the Board's communications – whether taken alone or in context – cannot remotely be viewed as informational, dispassionate or even-handed; rather, as recognized by the ALJ, they plainly represent a one-sided, emotionally charged exhortation to public action on the side of the Board in a local political controversy – a violation of *Citizens* unmitigated by the fact that the subject in question is of clear interest and importance to the school district. Although the Board consistently maintains that its communications 1) did not pertain to a referendum, 2) presented both sides of the tax impact issue, and 3) did not tell citizens precisely what to say when contacting public officials; the manifest reality is that such communications 1) were prepared and disseminated in the context of a contentious municipal primary where the disputed land purchase was a central issue, 2) omitted crucial but potentially detrimental information or referenced it in a misleading manner, and 3) presented the opposing view in an unmistakably negative manner, leaving any reasonable person to conclude that the city administration's position was a self-serving patronage deal while the Board's was an investment in the city's children.

The Deputy Commissioner finds it similarly disingenuous for the Board to evoke the State's purported inability to identify a specific statute or rule violated by the Board's actions, when the parameters of *Citizens, supra*, are both longstanding and well known, and the obligation of Abbott districts to use the significant additional funding they receive from the State in a lawful, effective and efficient manner – and the Commissioner's obligation to ensure that they do so – is beyond dispute. The Deputy

Commissioner, therefore, concurs that the heightened scrutiny of Abbott district expenditures demanded by the Legislature and State Board would be rendered a nullity if, in a matter of this type, the Commissioner failed to impose a meaningful fiscal consequence for unlawful, wasteful spending in addition to putting the Board on notice of the need for prospective compliance.

Accordingly, the Initial Decision of the OAL is adopted for the reasons well and thoroughly expressed therein.¹ The Elizabeth Board of Education is deemed, after full and fair hearing, to have failed to show cause why \$88,373 should not be deducted from its 2006-07 school budget, and the Department of Education is directed forthwith to take the steps necessary to effectuate such deduction.

IT IS SO ORDERED.²

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2007

Date of Mailing: July 6, 2007

¹ It is noted in the interest of technical accuracy that the Initial Decision (at 9) inadvertently identifies *N.J.S.A.* 18A:7F-3 as part of the Quality Education Act of 1990 rather than the Comprehensive Educational Improvement and Financing Act of 1996, and that the number of districts meeting the statutory definition of “Abbott district” is 31 rather than 28.

² 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.*