OAL DKT. NO. EDU 3055-08
AGENCY DKT. NO. 48-2/08

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions and replies filed by the petitioning Board of Education (Board) and the respondent Department of Education (Department) pursuant to the provisions of *N.J.A.C.* 6A:10A-8.7(c).[1]

Upon consideration of the record and the parties' arguments on exception, for the reasons that follow, the Commissioner adopts in part, and rejects in part, the Initial Decision of the Administrative Law Judge (ALJ).

STANDARD OF REVIEW

Initially, the Commissioner concurs with the ALJ that the Board in this matter bears the burden of proving its entitlement to the funds sought by a preponderance of competent, relevant and credible evidence. (Initial Decision at 17).

[1] In its exceptions, the Department included introductory "background" information, together with a related certification of Department Budget and Policy Analyst David Joye, incorporating factual representations not proffered at hearing. The Board vigorously objected to such inclusion, noting that parties to contested matters may not use exceptions to supplement evidence and testimony. The Commissioner agrees, and, accordingly, has not considered this portion of the Department's submission in rendering the within decision. *N.J.A.C.* 1:1-18.4(c).

The Board has contended on exception – as it consistently did before the ALJ – that its burden lies solely in successfully countering the reasons for denial given in the Department's written decision. According to the Board, *N.J.A.C.* 6A:10A-8.7(a)1 requires that the Department's actions be judged exclusively on the basis of the specific written reasons included in its denial letter, and that the Department cannot be permitted to "cobble together" facts from the administrative record on appeal in an attempt to construct *post facto* justifications for its actions. The Board asserts that if the Department's stated reason for denying a request can be shown to lack sufficient evidentiary foundation or to be based on factually or legally unsupportable reasons and assumptions, then the Board must prevail on appeal. (Petitioner's Exceptions at 3-5; see also T1-T3 *passim*, and Petitioner's Post-hearing Brief at 6-7 and *passim* thereafter)

This position, in the Commissioner's view, effectively shifts the burden to the Department and improperly relieves the Board of its affirmative obligation to demonstrate on appeal that programs or expenditures denied by the Department are, in fact, necessary for adequate and efficient provision of required preschool education – an obligation that surely cannot be met by seizing upon the letter of the Department's written determination while ignoring, or attempting to foreclose, the more expansive explications presented at plenary hearing. As pointed out by the Department, the rule cited by the Board – although it does, indeed, require the Department to provide specific reasons for denying a program or expenditure – places no limitations on the scope of the ALJ's and Commissioner's review (Respondent's Reply at 1-3); moreover, the more directly applicable rule, *N.J.A.C.* 6A:10A-8.6(c) expressly states that – over and above the documents and information submitted to the Department by the Board – the record on

appeal shall include "any additional information relied upon by the Department in making the determination at issue."

The Board has further contended that the Supreme Court requires the Department to view the Board's assessment of its own particularized needs with deference, which may not be overcome without sufficient reason. (Petitioner's Exceptions at 5-6; see also Petitioner's Pre-hearing Brief at 5-6) However, as correctly noted by the Department (Respondent's Reply at 3-4), the deference invoked by the Board refers to the Department's review of district requests, not to the Commissioner's review on appeal; certainly, such deference cannot work to preclude the Department (or the Commissioner) from denying insufficiently justified requests – a result surely not intended by the Court, and one that would be manifestly contrary to sound public policy.

Accordingly, if the Board is to prevail on any of the issues in dispute in this matter, it must demonstrate to the Commissioner that the funding it seeks is, in fact, necessary to adequately and efficiently provide required preschool educational programs; anything less would prevent the Commissioner from responsibly exercising the duty of oversight charged to her by law. *Board of Education of the City of New Brunswick, Middlesex County v. New Jersey State Department of Education*, Commissioner's Decision No. 122-05, decided March 15, 2005; *Board of Education of the City of Elizabeth, Union County v. New Jersey State Department of Education*, Commissioner's Decision No. 127-06, decided April 7, 2006; *Board of Education of the Town of Phillipsburg, Warren County* v. *New Jersey State Department of Education*, Commissioner's Decision No. 166-04, decided April 21, 2004.

EXTENDED DAY/EXTENDED SCHOOL YEAR PROGRAM

Turning, then, to the Board's request for funding for an extended day/extended school year (ED/ESY) program in light of the requisite standard of review, the Commissioner concurs with the ALJ that the Board is not entitled to such funding.

The Board contends on exception that – contrary to the finding of the ALJ, who, according to the Board, did not apply the proper standard of review and erroneously focused on irrelevant evidence – it is entitled to the requested funding for its extended day/extended school year (ED/ESY) program. The Board asserts that the Department's stated basis for denial was the Board's exceeding of the six-hour, 180-day minimum preschool program required by law and the apparent overlap of the ED/ESY program with wrap-around services funded by the Department of Human Services (DHS) – the former of which is not precluded by any court decision, statute or rule when based on student need, and the latter having been discounted at hearing through evidence and argument indisputably demonstrating the qualitative difference between the ED/ESY program and DHS-provided child care. (Petitioner's Exceptions at 6-11; see also Post-hearing Brief at 7-9 and 13-17) The Board further contends that the ALJ erred in construing too narrowly the National Institute for Early Education Research (NIEER) study, which – when read properly so as to recognize its broader point that more time in the classroom yields better results for disadvantaged preschoolers – fully supports the Board's determination that the student population it serves would benefit significantly from the ED/ESY model – a determination to which deference should have been accorded as required by the Court. (*Id*. at 11-15; see also Post-hearing Brief at 9-13)

The Commissioner, like the ALJ, is unpersuaded by the Board's arguments. Initially, the Commissioner notes that the State Board of Education has acted

to fulfill the mandate of the Supreme Court that all children in *Abbott* districts be afforded the opportunity to obtain a high-quality preschool education by defining the elements it believes to constitute such education and establishing processes to ensure that sufficient funds are available to support them; to this end, the State Board has directed that children in *Abbott* districts be provided with comprehensive full-day, full-year preschool programs meeting stringent educational and staffing requirements. *N.J.A.C.* 6A:10A-2.1 *et seq.*; *N.J.A.C.* 6A:10A-1.2 (defining "full-day, full year" as a six-hour comprehensive educational program offered for not less than 180 days over the course of the ten-month academic year) Thus, as recognized by the ALJ, and previously by the Commissioner in *Phillipsburg, supra*, any request for funding of preschool education beyond the extensive program already required by law must be justified by a compelling showing that even this program – which is presumed to be fully adequate for its purpose and can in no way be accurately characterized as a minimally sufficient "base line" – does not enable students to enter kindergarten ready to succeed in accordance with *N.J.A.C.* 6A:10A-2.1. In the present matter, as set forth by the ALJ in the Initial Decision at 16-17 and detailed by the Department in its Post-hearing Brief at 4-13 and 21-24, no such showing has been made; to the contrary, both Department and Board witnesses attested that the district is able to meet the needs of its preschool students during the regular school day. (Initial Decision a 6, 12; Testimony of Ellen Wolock at T2:232-34, 291-98, 302;[2] Testimony of Olga Hugelmeyer at T1:160-67)[3]

[2] This and all similar citations refer to transcripts of OAL hearings held on March 13, 2008 (T1), March 18, 2008 (T2) and March 19, 2008 (T3), respectively, followed by applicable page numbers.

[3] Although the Board has evidently been providing ED/ESY programs at some of its schools for a number of years, funds budgeted for this purpose were neither identified nor scrutinized as such, nor was express approval ever granted by the Department. (Initial Decision at 4-5; Board's Pre-hearing Brief at 7; Exhibit P-1 at Bates stamp 092; Testimony of Tracy Markowitz at T1:27; Department's Reply Exceptions at 9, note 7; Testimony of David Joye at T2:62-65, 125-33, 161-63; Testimony of Ellen Wolock at T2:182-83)

Moreover, even entertaining, *arguendo*, the Board's contention that the NIEER study (Exhibit P-6) supports its claims,[4] the Commissioner could not accept a simple "more is better" rationale without a specific factual nexus to the identified unmet needs of district students, which was not provided herein. Finally, as to the Department's reference to "overlap" with DHS wraparound services, the record is clear that such reference was to time and funding, not to educational character, and that the Board would, in fact, be receiving State funding from two sources for the same time period had its request been granted. (Department's Reply at 7-10; Testimony of David Joye at T2:149-60; Testimony of Beverly Wellons at T2:321-22) Accordingly, the Department did not err in citing "overlap" as an additional reason for denying the requested funding.[5]

LUNCH ASSISTANTS

Applying the requisite standard to the Board's request for funding for lunch assistants, the Commissioner adopts in part, and rejects in part, the recommendation of the ALJ.

Both parties take exception to the Initial Decision on this point, the Department to the ALJ's recommendation that funding should be provided for 165 lunch assistants for one hour and the Board to the fact that such funding was limited to one hour

[4] The Department objects to this argument as an interpretation of counsel having no support in the record and not consistent with the testimony of any witness at hearing. (Department's Reply at 10-11) The Department had additionally objected to the introduction of this document into evidence because it was not submitted by the Board either in support of its original application or during subsequent discussions prior to appeal; however, it was ultimately allowed by the ALJ. (T1:29-32, T2:6-11)

[5] The Department recommended that further action be considered to address the possibility of certified teachers being paid twice for overlapping hours, so as to, in effect, be paid for longer days and/or longer school years than they actually worked. (Department's Reply at 9-10) Because the present record does not permit a determination on this point and the Commissioner has an obligation to ensure the effective and efficient use of *Abbott* funds, the Department's Office of Fiscal Accountability and Compliance will be directed to investigate this matter.

rather than granted in full. The Department contends that its use of a 1:3 assistant-to-classroom ratio to determine that 55 was the appropriate number of lunch assistants for the district reflects what it has found to be reasonable, customary and consistent with practices in *Abbott* districts statewide; furthermore, according to the Department, this level of support could be properly effectuated by the Board in this instance – so as to maintain the required 2:15 and 1:15 teacher-to-student ratios during lunch and nap times, respectively, *without* additional lunch assistants – if teachers and teacher assistants were held to the half-hour lunch specified in their contract or relief teachers were utilized for lunch purposes, as they are in other *Abbott* districts, rather than (less appropriately) for specialty instruction in subjects such as physical education, music and art. The Department further stresses that funds for lunch assistants were sought through a special request[6] – *i.e.*, a one-year request either exceeding or not fitting within guidelines for a line-item category on the budget submission form – so that the Board was required to provide a detailed justification including documented evidence of need and effectiveness, which it did not. (Respondent's Exceptions at 4-9; see also Post-Hearing Brief at 13-17 and 24-25)

The Board in turn objects to the ALJ's finding that a 2:15 teacher-to-student ratio need not be maintained during student nap time. According to the Board, the ALJ's provision of single-adult (1:15) coverage during this period – when many students remain active, according to the uncontradicted testimony of Board witnesses – compromises student safety by not allowing for adequate supervision if the one adult must leave the classroom for any reason; moreover, the Board continues, it is inconsistent

[6] The request is erroneously characterized as a line item in the Initial Decision at 2. See Exhibit P-1 at Bates stamp 161; see also testimony of Tracy Markowitz at T1: 9-12, and Testimony of David Joye at T2:62.

with his (correct) finding that safety and security considerations require that two adults be present during lunch hour. The Board asserts that the Department's decision – with respect to both lunch and nap times – was based on inaccurate assumptions about the length of teacher lunch hours, and on arbitrary application of a 1:3 assistant-to-classroom ratio that ignores the district's actual circumstances – including the fact that the Board cannot utilize relief teachers for lunch purposes, as do other *Abbott* districts maintaining a 2:15 teacher-to-student ratio, because they are assigned elsewhere. (Petitioner's Exceptions at 15-21; see also Post-Hearing Brief at 18-23)

Upon review, the Commissioner finds that the Department correctly determined the appropriate number of lunch assistants needed by the Board. The ALJ's recommendation that the requested 165 positions be funded during the student lunch hour is based on his categorical acceptance of the Board's established operational pattern, with teachers permitted to take a one-hour lunch rather than the contractually specified half-hour,[7] and relief teachers unavailable because they are assigned to deliver specialty instruction. However, as evidenced by the testimony of Department witnesses – both the budget analyst involved in making the decision under appeal and the educational expert with whom he collaborated, who was directly familiar with the district's lunch practices – this pattern could readily be altered to make more efficient use of available resources and bring the district's costs and staffing allocations more into line with those of other districts and with best practices, while fully complying with staffing ratios designed to ensure adequate student supervision; indeed, the Department has been working with the

[7] The Commissioner notes that no past or current contract was ever produced specifying a one-hour lunch for teachers and teacher assistants; Exhibit P-19 is a proposed successor agreement pertaining to the 2009-10 and 2010-11 school years. See also Initial Decision at 7; Statements of counsel at T2:46; and Testimony of Olga Hugelmeyer at T1:216-219 and T2:52-58.

district to effectuate exactly that result. (Testimony of David Joye at T2:113-23, 168-70; Testimony of Renee Whelan at T3:11-125) Thus, the Department's determination to limit funding to 55 lunch assistants was neither an arbitrary application of "numbers crunching" nor a mistake based on incorrect factual assumptions; rather, it was a fully informed judgment against State subsidization of an inefficient and ineffective operational arrangement, and must accordingly be upheld on appeal.

TECHNOLOGY INFRASTRUCTURE

Finally, for similar reasons, the Commissioner rejects the ALJ's recommendation that the Board be granted its special request for $44,000 in technology infrastructure funding.

On exception, the Department again contends, as it did before the ALJ, that the Board's existing $132,000 aid allotment – which represents $800 per class that can be spread across all in-district preschool classrooms – is sufficient for infrastructure purposes, which are additionally supported by initial start-up funding for new classrooms ($44,100 in 2008-09, for 18 new classrooms). According to the Department, the fact that the Board was granted an identical request for the 2007-08 school year does not bind the Department to grant similar requests in subsequent years, and certainly cannot prevent the Department from rectifying inefficient use of funds. Moreover, the Department asserts, a special request for technology funds cannot be granted unless the Department can verify that the entire amount of available technology funding has been appropriately allocated – a standard which the Board did not meet, either before the Department or at hearing. The Department notes that its denial of the Board's request is in no way inconsistent with its stance on the importance of technology, as evidenced by the significant level of support provided to the district for this purpose; it further rejects the

Board's contention that denial of the requested special funding will result in elimination of telephone service, the router, internet access and maintenance/support services in three schools, observing that these fundamental costs should be addressed before expending funds, as the Board does, on nonessential items such as digital cameras and smart board bulbs. (Respondent's Exceptions at 9-15; see also Post-hearing Brief at 17-18 and 26-27)

The Board counters that the reason proffered by the Department's denial letter was the sufficiency for infrastructure needs of the Board's $800 per classroom allocation, so that the Department cannot now claim that the Board's request was inadequately supported or that funds could be appropriately reallocated from elsewhere in its budget. According to the Board, the ALJ assessed the evidence and (correctly) concluded that the Board had demonstrated its need for the funding at issue, so that the Department's position to the contrary should be rejected as based on unsupported assumptions, conjecture and speculation, as well as considerations other than need – as evidenced by its own prior approval of the same request. (Board's Reply at 8-13; see also Post-hearing Brief at 23-27)

The Commissioner, however, finds that the ALJ's decision was predicated on need for the items requested while ignoring the Board's manner of addressing its technology expenditures. Although the need for the services at issue in this matter – basic internet and telephone connectivity – is beyond serious dispute, what *is* in question is the need for funding over and above amounts ordinarily provided to support preschool technology.

Notwithstanding that the Board has in the past been allowed to fund infrastructure needs for Schools 50, 51 and 52 through special requests, now that this situation has come to the Commissioner's attention on appeal, she cannot condone and

perpetuate inefficiency by allowing past practice to compel the award of additional funding in an area where the Board has failed to exercise reasonable fiscal discretion. As the Department's denial reflects (Testimony of David Joye at T2:95-112), there is no indication on this record that the Board made any attempt, before seeking additional funding, to first address its basic technological needs, then assess how best to use remaining allocations; to the contrary, the record clearly suggests that the Board treats its $800 per-class allotment as a series of self-contained entitlements, with each class's expenditures expanding to fill the amount available regardless of broader needs and no consideration given to ongoing infrastructure components.[8] Under these circumstances, the Commissioner cannot be persuaded, as she must by law, that the requested *funds* – as opposed to the services identified as their intended purpose – are necessary for the Board's adequate and efficient provision of preschool services.

In so holding, the Commissioner fully recognizes that she is requiring the Board to make choices, since, in the ever-burgeoning realm of technology, services and materials arguably of benefit to students are always likely to exceed levels that can realistically be supported by public funds. However, maintenance of a rich learning environment through use of technology (Exhibit P-15) is not inconsistent with efficiency and fiscal prudence, and proposed expenditures must always be scrutinized to identify items which can be done without, deferred, or provided in a more efficient manner while

[8] Tracy Markowitz testified that a classroom not needing a new smart board lamp ($300) would then have more money to spend on software, or that if software were not purchased, on a digital camera; she further testified that if the Board's special request is not granted, much of the existing classroom technology will be rendered useless due to lack of connectivity. (T1:113, 122-127, 130-131) Olga Hugelmeyer testified that funds are exhausted each year because classroom teachers are informed of the remaining balance on their $800 allotments as the year progresses and invited to submit additional order(s) based on their further needs assessments; she, too testified that denial of the special request would cut off phone and internet connectivity to the affected schools. (T3:133-36)

still meeting student needs; for those items deemed truly necessary but for which funds are otherwise unavailable, the special request process is then appropriately utilized.

CONCLUSION

In sum, the Commissioner finds no merit to the Board's claims that the Department's January 15, 2008 denial of the funding requests herein at issue in any way violated constitutional remedies, court mandates, rules of the State Board of Education or departmental guidelines, nor to its claim that such denial will prevent the district from providing required and needed programs, services, positions and resources for preschool students. (Petition of Appeal at 1-10) Rather, for the reasons set forth above, the Commissioner finds that the Department's actions were reasonable and lawful in all respects, and that the Board on appeal has failed to meet its burden of proving that the funding it has requested is necessary to provide required preschool educational programs in an adequate and efficient manner.

Accordingly, the Initial Decision of the OAL is adopted in part, and rejected in part, as set forth above, and the petition of appeal is dismissed in its entirety.[9]

IT IS SO ORDERED.[10]

COMMISSIONER OF EDUCATION

Date of Decision: April 21, 2008
Date of Mailing: April 21, 2008

[9] The Commissioner notes that, at pages 10-11 of the Initial Decision, the Early Screening Inventory-Revised (ESI-R) is inadvertently referred to as the "ECER" (Early Child Environmental Rating Scale, or ECERS). (Department's Exceptions at 4, note 7)

[10] Pursuant to *N.J.A.C.* 6A:10A-8.7(a)5 and *N.J.A.C.* 6A:10-3.7(a)5, this decision is a final agency action appealable to the Appellate Division of the Superior Court within six (6) days of the Commissioner's decision.