

NORTHERN BURLINGTON REGIONAL :
SCHOOL DISTRICT BOARD OF EDUCATION, :
BURLINGTON COUNTY, : COMMISSIONER OF EDUCATION

PETITIONER, : DECISION

V. :

NEW JERSEY STATE DEPARTMENT OF :
EDUCATION AND BRET SCHUNDLER, :
 :
RESPONDENTS. :
_____ :

SYNOPSIS

The Appellate Division charged the Commissioner with determining the amount of reimbursement, if any, to which the petitioning Board is entitled as a result of the respondent Department’s withholding of equalization aid following Governor Christie’s Executive Order 14 on February 11, 2010 – which declared a fiscal emergency and, *inter alia*, ordered the Commissioner to withhold State aid payments to districts based upon any surplus and reserve account monies available to them at the end of the 2009 fiscal year. Citing 20 U.S.C.A. Sec. 7709, the Board asserted that the Department’s withholding of “excess surplus” violated federal law and was *ultra vires* because, in the Board’s case, its excess surplus wholly consisted of federal impact aid. The petitioner demanded reimbursement in the amount of \$1,672,507; respondent contended that the Board failed to prove entitlement to reimbursement of the withheld funds.

The ALJ found, *inter alia*, that: the petitioning Board receives federal impact aid based upon the presence of the joint military base McGuire-Dix-Lakehurst within its boundaries; this impact aid essentially serves as payment in lieu of local property taxes for the children of military families; the Board has proven by a preponderance of the credible evidence that its excess surplus – upon which the Department’s withholding of state aid in 2010 was based – consisted entirely of unanticipated federal impact aid; and the Federal Impact Aid Law prohibits a state from providing less State aid to a local school district than it would have received if the district did not receive federal impact aid. Accordingly, the ALJ concluded that the respondent must restore to the petitioner \$1,672,507 in State aid that was withheld in the 2010 fiscal year in violation of the Federal Impact Aid Law.

Upon review of the record of the remand proceedings in the Office of Administrative Law (OAL) and the Initial Decision of the ALJ, the Commissioner concluded that petitioner has provided expert evidence in support of its position that the withheld funds were comprised of unanticipated federal impact aid received prior to FY 2009, and that respondent has been unable to persuasively rebut the Board’s evidence. Accordingly, the Commissioner found that, under 20 U.S.C.A. Sec. 7709, respondent must reimburse the petitioning Board in the amount of \$1,672,507. In so finding, The Commissioner noted that, under 20 U.S.C.A. Sec. 7709(b), the respondent may apply for certification from the United States Secretary of Education that the State has in effect a program of State aid to equalize expenditures for free public education among local educational agencies in the State; such certification is a prerequisite that can enable the respondent to reduce State aid to an agency which receives federal impact aid, and may thereby eliminate the potential for future litigation over the issues in the present case.

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.

OAL DKT. NO. EDU 2799-12
AGENCY DKT. NO. 131-6/10

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The Commissioner has been charged by the Appellate Division with determining the amount of reimbursement, if any, to which the petitioning Board of Education of the Northern Burlington Regional School District in Burlington County (the Board) is entitled as a result of the respondent Department of Education's (the Department) withholding of equalization aid in 2010. Petitioner demands reimbursement in the amount of \$1,672,507 and respondent contends that petitioner has failed to prove entitlement to same. Upon review of the record and Initial Decision of the Office of Administrative Law¹ the Commissioner concurs with the Administrative Law Judge's determination that, within the framework of the law of the case as articulated by the Appellate Division, the weight of the evidence is in petitioner's favor.

The above-referenced withholding of equalization aid payments was a consequence of Governor Christie's Executive Order 14 (EO14), dated February 11, 2010, which declared a state fiscal emergency and, *inter alia*, ordered the Commissioner of Education to reserve district state aid payments based upon the respective surpluses and reserve account monies available to districts at the

¹ Respondent's exceptions and petitioner's replies thereto were both untimely.

end of Fiscal Year 2009 (FY 2009). The Department posited that petitioner's 'excess surplus' for the 2009 fiscal year had amounted to \$1,672,507, and withheld State aid in that amount.²

Petitioner asserts that the Department's withholding of the 'excess surplus' was *ultra vires* because it violated a federal statute. More specifically, the Board cites 20 U.S.C.A. Sec. 7709, which provides as follows:

State consideration of payments in providing State aid

(a) General prohibition. Except as provided in subsection (b), a State may not –
(1) consider payments under this title [20 USCS §§ 7701 et seq.] in determining, for any fiscal year:

- (A) the eligibility of a local educational agency for State aid for free public education; or
- (B) the amount of such aid; or

(2) make such [federal] aid available to local educational agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would receive if such agency were not so eligible.

Contending that any surplus which might have existed for the 2009 fiscal year consisted primarily of federal impact aid, petitioner urges that the Department violated 20 U.S.C.A. Sec. 7709 when it included such 'surplus' in its determination concerning the withholding of \$1,672,507 of State aid.

The controversy was brought before then Commissioner Bret Schundler, who ruled in favor of the Department's withholding of the \$1,672,507 of State aid. However, the Appellate Division of New Jersey Superior Court reversed the Commissioner's decision. In a ruling which constitutes the law of this case only, the Appellate Division of New Jersey Superior Court advised:

...U.S. Const. art. I, § 8, cl. 1 includes the congressional power to "provide for the . . . general Welfare of the United States. . . [.]" "Incident to this power, Congress may attach conditions on the receipt of federal funds." South Dakota v. Dole, 483 U.S. 203, 206, 107 S. Ct. 2793, 2795, 97 L. Ed. 2d 171 (1987).

Northern Burlington County Regional School District Board of Education v. Bret Schundler, Commissioner, New Jersey Department of Education, Unpublished Decision, Docket No. A-0607-10T3 (App. Div. February 3, 2012), at 8.

² The Department withheld an additional \$468,762, which was the equivalent of 25% of petitioner's reserve account balances, but petitioner does not seek reimbursement of same.

The Appellate Division concluded that:

the Commissioner lacked authority under the Act to reduce state aid by offsetting it against the district's "excess surplus" to the extent that "excess surplus" included Impact Aid, even if not set aside in a "legal reserve." The District asserted that its excess surplus is comprised entirely of unanticipated Federal Impact Aid dating back to the [sic] 1999. In its submissions to the ECS and Commissioner, it included its auditor's report in which the auditor reviewed budget reports and fund balances for a ten-year period and concluded "impact aid is a major contributor to any fund balance being on hand." In view of the Commissioner's determination that Federal Impact Aid becomes part of the general fund, the Commissioner made no findings as to whether the \$2,141,169 withheld was all attributable to the Federal Impact Aid, as the District contends.

Northern Burlington County Regional School District Board of Education v. Bret Schundler, Commissioner, New Jersey Department of Education, Unpublished Decision, Docket No. A-0607-10T3 (App. Div. February 3, 2012), at 10.

Thus, the Appellate Division remanded the case for further proceedings addressing the source of the District's 'excess surplus' funds.

Upon review of the record of the remand proceedings in the Office of Administrative Law (OAL), and the Initial Decision of the officiating Administrative Law Judge (ALJ),³ the Commissioner concludes that the Department has not been able to rebut expert evidence provided by petitioner that the withheld funds were likely comprised of unanticipated federal aid received by petitioner prior to FY 2009. Thus, the Department's withholding of the disputed \$1,672,507 would appear to have negated the intended salutary effect of 20 *U.S.C.A.* Sec. 7709(a)(1)(B) and 20 *U.S.C.A.* Sec. 7709(a)(2).

Petitioner's auditor, Rodney Haines, was qualified in the OAL as an expert witness in public school accounting without objection from the Department. 2T 34-35.⁴ He performed an audit of petitioner's finances for FY 2000 through FY 2009, and testified about his conclusions. It appears undisputed that for fiscal years 2000 through 2009, monies received by the district during a particular

³ The section of the Initial Decision entitled "stipulated facts" was actually the ALJ's summary of what she believed to be undisputed facts.

⁴ 1T signifies the transcript of the February 13, 2013 portion of the hearing in the OAL. 2T signifies the transcript of the balance of the hearing, which took place on March 25, 2013.

fiscal year – whatever the source – were counted as additions to the district’s general fund. Consequently, for those years, receipts could not be tracked from their source to their ultimate use, making it difficult to prove whether a particular federal dollar was used on a computer or went into surplus – which was ultimately used to provide tax relief.

However, Haines was able to draw certain pertinent conclusions from his audit of petitioner’s finances for fiscal years 2000 through 2009, and his review of petitioner’s budget for subsequent years. For example, he noted that following the district’s segregation of its unanticipated federal aid into a separate legal reserve account in FY 2010, its accounting statements no longer revealed any excess surpluses. 2T49. Petitioner’s Exhibit P-21 shows that this was the case for FY 2010, FY 2011 and FY 2012. Haines viewed this as an indication that petitioner’s excess surpluses had been primarily comprised of unanticipated federal aid payments. 2T54-57.

Haines also pointed out that petitioner’s fund balance for FY 2009 (\$9,031,737) minus the sum of all the allowable reserves (\$3,183,192) was \$5,848,545, an amount comparable to the total of unanticipated federal impact aid which the district had received over the prior ten fiscal years (*i.e.*, \$6,403,266). 2T49-53. Thus he concluded that – assuming petitioner had maintained all of its programs – it would not have had any appreciable surplus funds at the end of FY 2009, were it not for the infusions of unanticipated federal aid. 2T50-53.

Haines also drew conclusions from his knowledge of the nature of school districts’ categories of income, how those income categories are received, how budgets are created and how surpluses are calculated. Thus, he noted that when a district formulates its budget, it already knows the amount of local revenues it can count on and the amount of state aid it will receive. By way of contrast, it has no idea how much federal aid it will receive, and typically budgets far less than it ultimately receives for the budgeted year. Consequently, excess funds are more likely attributable to federal aid than to the other major contributing budget categories, *i.e.*, local taxes and state aid. 2T64-65.

Finally, there appeared to be no significant disagreement among the witnesses for both petitioner and respondent⁵ about the budgetary fact that unanticipated federal impact aid received by a district in a given fiscal year is allowed as an adjustment (subtraction) to the calculation of the district's allowable surplus for that fiscal year and is not usually spent in that year; rather, it is rolled over into surplus for a subsequent year, after which it can be used, *inter alia*, to lower the amount of taxes required to support the district's next school budget. *See, e.g.*, the testimony of Richard Kaz, Jr., petitioner's business administrator, at 2T21-22, and the testimony of Patricia Scott, at 2T110.

In light of the foregoing, the petitioner has made a showing that it is more likely than not that its 'excess surplus' calculated for FY 2009 was attributable to the receipt of unanticipated federal impact aid. Respondent did not present a persuasive rebuttal to petitioner's showing. Therefore, in accordance with the mandate of the Appellate Division, all of the \$1,672,507 which respondent withheld from petitioner in FY 2010 should be returned, since it made federal "aid available to [a] local educational agenc[y] in a manner that result[ed] in less State aid to [the] local educational agency that [was] eligible for such payment than such agency would [have] receive[d] if such agency were not so eligible." 20 U.S.C.A. Sec. 7709(a)(2).

The Commissioner further notes that under 20 U.S.C.A. Sec. 7709(b),⁶ respondent – being a State educational agency which has in effect a program of state aid that equalizes

⁵ The Department's only witness, Patricia C. Scott, was not qualified as an expert and presented no expert reports. She had knowledge of school district budgeting issues but had never prepared a school district budget or conducted an audit on behalf of a school district. 2T104-05.

⁶ State equalization plans.

(1) In general. A State may reduce State aid to a local educational agency that receives a payment under section 8002 or 8003(b) [20 USCS § 7702 or 7703(b)] (except the amount calculated in excess of 1.0 under section 8003(a)(2)(B) [20 USCS § 7703(a)(2)(B)] and, with respect to a local educational agency that receives a payment under section 8003(b)(2) [20 USCS § 7703(b)(2)], the amount in excess of the amount that the agency would receive if the agency were deemed to be an agency eligible to receive a payment under section 8003(b)(1) [20 USCS § 7703(b)(1)] and not section 8003(b)(2) [20 USCS § 7703(b)(2)] for any fiscal year if the

expenditures for free public education among local educational agencies in the State – may reduce state aid to an agency which receives federal impact aid. However, certification by the United States Secretary of Education is a prerequisite to such an action on the part of a state. Application by respondent for such certification might eliminate the need for future litigation over the issues in the present case.

In summary, the Commissioner finds that, under the federal law discussed *supra*, respondent must reimburse to petitioner the \$1,672,507 withheld as a result of EO 14 in 2010.

IT IS SO ORDERED.⁷

COMMISSIONER OF EDUCATION

Date of Decision: February 4, 2014

Date of Mailing: February 5, 2014

Secretary determines, and certifies under subsection (c)(3)(A), that the State has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in the State.

⁷ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).