

251-17

BOARD OF EDUCATION OF THE CITY :
OF ELIZABETH, UNION COUNTY, :
 :
PETITIONER, :
 :
V. : COMMISSIONER OF EDUCATION
 :
 : DECISION
NEW JERSEY DEPARTMENT OF :
EDUCATION, DIVISION OF :
EARLY CHILDHOOD DEVELOPMENT, :
 :
RESPONDENT. :
_____ :

SYNOPSIS

The petitioner, Board of Education of the City of Elizabeth (Board), contended that the respondent, New Jersey Department of Education, Division of Early Childhood Education (Department), insufficiently funded the Board's 2015-2016 preschool programs, thereby making it impossible to provide thorough and efficient programming for its preschool-age children. The Department asserted that the Preschool Education Aid (PEA) awarded to the Board was entirely compliant with the requirements of the School Funding Reform Act (SFRA), *N.J.S.A.* 18A:7F-43 to -66, and that, accordingly, the petition should be dismissed.

The ALJ found, *inter alia*, that: PEA supports districts like Elizabeth as part of the SFRA's obligation to fund public preschool education; the level of PEA is determined as set forth in statute; the record of this matter revealed no evidence that the Department's PEA award to Elizabeth for the 2015-2016 school year was in any way at odds with the statutory formula; the Board's argument that the PEA funds allotted were insufficient – and that the shortfall is the fault of the statute and the Department – is without merit; the Board has presented no evidence that the SFRA is unconstitutional as it was applied to its PEA grant for 2015-2016; and the record shows that any financial shortfall experienced by Elizabeth that year was due to its own inefficiencies and mismanagement of funds. Accordingly, the ALJ ordered that the petition of appeal be dismissed.

Upon careful consideration and review, the Commissioner adopted the ALJ's recommended decision as the final decision in this matter, for the reasons well expressed therein. The petition was dismissed.

<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>

August 24, 2017

OAL DKT. NO. EDU 9004-15
AGENCY DKT. NO. 94-4/15

BOARD OF EDUCATION OF THE CITY :
OF ELIZABETH, UNION COUNTY, :
 :
 PETITIONER, : COMMISSIONER OF EDUCATION
V. :
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NEW JERSEY DEPARTMENT OF :
EDUCATION, DIVISION OF :
EARLY CHILDHOOD DEVELOPMENT, :
 :
 RESPONDENT. :
_____ :

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record, the Commissioner concurs with the Administrative Law Judge's (ALJ) determination – for the reasons thoroughly expressed in the Initial Decision – that the amount of preschool education aid (PEA) that the Elizabeth School District received during the 2015-2016 school year was consistent with the School Funding Reform Act (SFRA), *N.J.S.A.* 18A:7F-43-66. The Commissioner also is in accord with the ALJ's determination that Elizabeth failed to offer any evidence to indicate that the SFRA is unconstitutional as it was applied to Elizabeth's PEA grant for the 2015-2016 school year. Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: August 24, 2017

Date of Mailing: August 24, 2017

* 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).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 09004-15

AGENCY DKT. NO. 94-4/15

**BOARD OF EDUCATION OF THE CITY OF
ELIZABETH, UNION COUNTY,**

Petitioner,

v.

**NEW JERSEY STATE DEPARTMENT OF EDUCATION,
DIVISION OF EARLY CHILDHOOD EDUCATION,**

Respondent.

Mark R. Peck, Esq., for petitioner (Florio, Perrucci, Steinhardt and Fader, attorneys)

Lauren A. Jensen, Deputy Attorney General, and **Beth N. Shore**, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: May 31, 2017

Decided: July 14, 2017

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

The Elizabeth Board of Education (“the Board”) contends that the New Jersey Department of Education, Division of Early Childhood Education, (“the Department”) insufficiently funded the Board’s 2015–2016 preschool programs, thus making it impossible to deliver thorough and efficient programming to its preschool-age children. The Department replies that the Preschool Education Aid (“PEA”) awarded the Board was in all respects compliant with the requirements of the School Funding Reform Act (“SFRA”), N.J.S.A. 18A:7F-43 to -66, and that, accordingly, the petition of appeal should be dismissed.

PROCEDURAL HISTORY

The petition of appeal was filed on April 27, 2015. The Department filed an answer on June 16, 2015; the contested case was transmitted to the Office of Administrative Law (“OAL”) on June 18, 2015; and was assigned to the Honorable Caridad Rigo, ALJ.

On November 25, 2015, the Department filed a motion for summary decision. The Board opposed the motion on December 17, 2015, and the Department replied to the opposition on December 24, 2015. Oral argument was conducted on January 14, 2016. Via letter dated January 15, 2016, Judge Rigo denied the motion and directed that the matter proceed to hearing. Several hearing dates were adjourned before the matter was reassigned to me on January 9, 2017, after Judge Rigo’s retirement.¹

A Joint Stipulation of Facts was filed by the parties in January 2017, and hearings were conducted on February 15, 2017, and March 30, 2017. Post-hearing submissions were filed on May 31, 2017, at which time the record closed.

¹ Along the way, the Board changed counsel, which also, in part, delayed proceeding to hearing.

FINDINGS OF FACT

Stipulated Facts

The salient background facts were agreed upon by the parties, who stipulated to the process via which PEA is calculated under the SFRA. I **FIND**:

1. Each year, the districts formerly known as the Abbott districts (“the Abbott districts”), including Elizabeth, receive PEA from the Department.
2. PEA is a State-aid category provided to districts in order to allow them to implement a high-quality preschool program, as required by the School Funding Reform Act (“SFRA”), L. 2007, c. 260 (N.J.S.A. 18A:7F-43 to -66).
3. PEA supports three different types of preschool programs: in-district programs, licensed private-provider programs, and Head Start programs. An in-district program is a program provided inside a district school building. A private-provider program is a program provided in a nursery school or other private program in the community. A Head Start program is part of the federal Head Start program.
4. Under the SFRA, each type of program is designated a different per-pupil aid amount. The SFRA designated the following per-pupil aid amounts for each of the types of preschool programs for the 2008–2009 school year: \$11,506 for in-district programs; \$12,934 for licensed private-provider programs; and \$7,146 for Head Start programs.
5. For each subsequent school year, the SFRA directs that the preschool per-pupil aid amounts be established in accordance with N.J.S.A. 18A:7F-46.
6. Under N.J.S.A. 18A:7F-46, the Governor, after consultation with the Commissioner of Education, recommends to the Legislature, through the

issuance of an Educational Adequacy Report (“EAR”), any appropriate adjustments to, among other things, the per-pupil amounts for full-day preschool.

7. The SFRA directs that an EAR be submitted by September 1, 2010, and by September 1 every three years thereafter. The EAR is applicable to the next three school years, with the per-pupil amounts for full-day preschool, among other things, to be adjusted by the Consumer Price Index (“CPI”), as defined by N.J.S.A. 18A:7F-45, for each of the two school years following the first school year to which the report is applicable.

8. The per-pupil amounts set out in the EAR are deemed approved for the two subsequent school years, unless the Legislature adopts a concurrent resolution stating that the Legislature is not in agreement with any specific part of the report.

9. In accordance with the SFRA, an EAR was issued on December 14, 2012, setting out per-pupil amounts that would apply to the 2013–2014, 2014–2015, and 2015–2016 school years.

10. The Fiscal Year 2014 Educational Adequacy Report (“FY14 EAR”) reassessed the adequacy of the SFRA’s 2008–2009 per-pupil aid amounts for each of the three types of preschool programs. (J-1.)

11. In reassessing the per-pupil aid amounts for preschool, it was determined that districts had been able to meet code requirements with the funding levels established in the SFRA. Accordingly, the FY14 EAR recommended that the Department continue to fund preschool programs based on annual CPI increases to the per-pupil amounts listed in the SFRA.

12. Specifically, the FY14 EAR set out the following per-pupil aid amounts for each of the types of preschool programs for the 2013–2014 school year:

\$12,788 for in-district programs; \$14,375 for licensed private-provider programs; and \$7,943 for Head Start programs.

13. While the Legislature did issue a concurrent resolution stating that it did not agree with specific parts of the FY14 EAR, it took no issue with the adjusted per-pupil aid amounts for preschool. Thus, the preschool per-pupil aid amounts as set out in the FY14 EAR were deemed approved and superseded the per-pupil aid amounts set out in the SFRA.

14. Accordingly, the preschool per-pupil aid amounts set out in the SFRA have been updated.

15. Each of the SFRA per-pupil aid amounts is also adjusted using the Consumer Price Index (“CPI”) and county-based geographic cost adjustment.

16. Elizabeth is one of the thirty-one Abbott districts. As adjusted, Elizabeth’s per-pupil aid amounts for the 2015–2016 school year were: \$13,021 for in-district programs; \$14,637 for licensed private-provider programs; and \$8,088 for Head Start programs.

17. Under the SFRA formula, set out in N.J.S.A. 18A:7F-54, PEA is calculated by multiplying the number of general-education students (non-special-education students) in each of the three types of programs by their respective per-pupil aid amounts and adding the total costs of each of these three types of programs together.

18. The SFRA provides that each year, Abbott districts will receive the greatest of three preschool funding allocations: (1) the per-pupil allocation under the SFRA described above; (2) the district’s per-pupil allocation in its approved 2008–2009 early-childhood plan multiplied by its projected enrollment for the upcoming school year; or (3) the district’s total amount of preschool aid in the 2008–2009 school year after an enrollment adjustment for that year.

19. The purpose behind this funding scheme is to ensure that no district receives less in PEA than it received before the SFRA went into effect.

20. Districts that would receive less under the SFRA formula in any given year are “held harmless” at the rate of PEA they received for the 2008–2009 school year, using the higher of the two 2008–2009 amounts described above.

21. Annually, the Abbott districts must submit documents to the Department, which the Department considers in determining the amount of PEA each district will receive for the following school year.

22. These documents include: the district’s Five-Year Preschool Program Plan Annual Update (“Plan”); One-Year Enrollment Projections Workbook; and Budget Planning Workbook.

23. The purpose of the Plan is to provide a comprehensive description of how the school district will implement each component of high-quality preschool programming for three- and four-year-old children. The Plan is developed every five years, with annual updates in the years in-between. The purpose of the One-Year Enrollment Projections Workbook is for the district to provide current enrollment data, as well as projections for the following school year. These projections are used to calculate the district’s PEA. The Budget Planning Workbook allows the district to indicate how PEA will be used to support the high-quality preschool program described in its Plan, meeting all Administrative Code requirements.

24. Upon reviewing these documents, the Department determines the amount of PEA that each district should receive under the SFRA.

25. Annually, the Department reviews each Abbott district’s enrollment projections, runs the SFRA formula, and compares the resulting calculation to the

district's 2008–2009 funding amounts to determine the district's PEA for the upcoming school year.

26. Elizabeth submitted its 2015–2016 Five-Year Preschool Program Plan Update; 2015–2016 Enrollment Projections Workbook; and 2015–2016 Budget Planning Workbook to the Department. (J-2; J-3; J-4.)

27. In its 2015–2016 Enrollment Projections Workbook, Elizabeth projected a total enrollment of 3,268 general-education students: 2,468 students in in-district programs; 610 students in private-provider programs; and 190 students in Head Start programs.

28. The Department reviewed Elizabeth's enrollment projections for the 2015–2016 school year and did not modify them.

29. Using these enrollment projections, the Department applied the SFRA formula, multiplying the enrollment projections for each of the three types of preschool programs by the per-pupil aid amounts for those programs as follows: *(enrollment) x (per-pupil aid amount) = funding amount.*

30. Applying the SFRA funding formula, the Department calculated the amount of funds available to Elizabeth for the 2015–2016 school year:

PROGRAM TYPE	PROJECTED ENROLLMENT	PER-PUPIL AID AMOUNT	TOTAL AMOUNT
<i>In-District</i>	2,468	\$13,021	\$32,135,828
<i>Private Provider</i>	610	\$14,637	\$8,928,570
<i>Head Start</i>	190	\$8,088	\$1,536,720

31. Added together, the above funding amounts totaled \$42,601,118 of PEA under the SFRA formula.

32. Because the SFRA requires that Abbott districts receive the greatest of three potential funding calculations, the Department then compared the SFRA total of \$42,601,118 PEA to Elizabeth’s 2008–2009 approved preschool budget, which totaled \$40,764,852.

33. Because the 2015–2016 SFRA calculation exceeded Elizabeth’s 2008–2009 approved budget, the Department then calculated the amount of funding Elizabeth would receive using its 2008–2009 average per-pupil rates for preschool, regardless of program placement. Elizabeth’s per-pupil rate in 2008–2009 was \$14,052. Multiplying Elizabeth’s total projected enrollment for the 2015–2016 school year by its 2008–2009 per-pupil rate yielded an amount greater than its SFRA formula total:

PROJECTED ENROLLMENT	x	2008–2009 PER-PUPIL RATE	=	TOTAL AID
3,268		\$14,052		\$45,921,936

34. Since the SFRA mandates that the former Abbott districts receive the highest amount of funding under the three funding calculations, the Department determined that Elizabeth would receive \$45,921,936 in PEA, as further shown below:

A	B	C	RESULT
TOTAL AMOUNT OF PEA USING SFRA FORMULA	TOTAL 2008–2009 APPROVED PRESCHOOL BUDGET	TOTAL OF PROJECTED ENROLLMENT x 2008–2009 PER- PUPIL RATE	HIGHEST AMOUNT OF FUNDING COMPARING COLUMNS A, B, AND C
\$42,601,118	\$40,764,852	\$45,921,936	\$45,921,936

In other words, for the 2015–2016 school year, Elizabeth was “held harmless” at an amount above the total amount of funding it would receive under the SFRA’s formula.

35. Elizabeth received \$45,921,936 in PEA for the 2015–2016 school year, \$3,320,818 more than it would have received under the SFRA formula.

36. As one of the seven districts “held harmless” under the SFRA for the 2015–2016 school year, Elizabeth received more PEA than other former Abbott districts on a per-pupil basis.

37. Of the thirty-one former Abbott districts, Elizabeth’s average per-pupil amount of PEA for the 2015–2016 school year was the fourth highest in the state, as shown below:

DISTRICT	AVERAGE PER-PUPIL AMOUNT OF PEA FOR 2015–2016
Asbury Park	\$16,106.00
Harrison Town	\$14,794.00
Union City	\$14,237.35
Elizabeth	\$14,052.00
Trenton	\$13,926.95
Perth Amboy	\$13,914.00
West New York	\$13,873.08
Hoboken	\$13,639.06
New Brunswick	\$13,508.48
Vineland City	\$13,498.00
Irvington	\$13,440.38

Plainfield	\$13,431.62
Jersey City	\$13,417.44
Paterson	\$13,398.87
Passaic City	\$13,218.33
East Orange	\$13,202.91
Newark	\$13,139.00
Garfield	\$13,026.00
Phillipsburg	\$12,775.85
Jersey City	\$12,728.00
Long Branch	\$12,728.00
Neptune Township	\$12,728.00
Pemberton Township	\$12,704.94
Burlington City	\$12,594.00
Pleasantville	\$12,586.62
Gloucester City	\$12,490.00
Salem	\$12,408.00
City of Orange	\$12,266.85
Millville City	\$12,244.62
Bridgeton City	\$12,236.00
Camden City	\$11,989.13

38. In its initial 2015–2016 Budget Planning Workbook, submitted to the Department on or about December 15, 2014, Elizabeth indicated that it would also use prior year PEA carryover of \$404,768 and funding in the amount of

\$2,979,024 for students with special needs included in general-education classrooms.

39. Including the PEA of \$45,921,936 it would receive under the SFRA, Elizabeth had a total of \$49,305,728 to allocate to its preschool program for the 2015–2016 school year.

40. In its initial 2015–2016 Budget Planning Workbook, Elizabeth allocated a total amount of \$53,469,632 to the preschool program. This is \$4,163,904 more than the district had to allocate, including the 2015–2016 PEA, carryover, and funding for preschoolers with special needs.

41. On or about March 20, 2015, the Department sent a letter to Elizabeth stating that, under the SFRA, Elizabeth would receive PEA in the amount of \$45,921,936 for 3,268 general-education students. (J-5.)

42. The March 20 letter also indicated that Elizabeth needed to submit a revised version of its Budget Planning Workbook with funding allocated to match \$49,305,728 (the district's 2015–2016 PEA amount of \$45,921,936 along with its prior year PEA carryover of \$404,768 and special-education funding in the amount of \$2,979,024).

43. Elizabeth submitted a revised version of its Budget Planning Workbook showing a reduction in the total amount of preschool-program staff salaries budgeted to the preschool program to balance its total budget of \$49,305,728. (J-6.)

The Testimony

1. The Budget Cuts

Tracy Crosby is the director of early childhood education, having held this position for ten years. Together with a fiscal specialist, she drafts the preschool budget. Crosby urged that in 2008, when the SFRA was adopted, the amount of money allocated met the needs of her department. But in the years that followed, her PEA has remained unchanged and is insufficient to provide a high-quality program to Elizabeth's preschoolers.

Elizabeth operates a total of 232 preschool classrooms, to include 177 classrooms in-district; 42 classrooms at eight provider sites; and 13 classrooms via Head Start. After ensuring that there are sufficient teachers, aides, classroom supplies and materials, whatever is left is allocated among remaining line items. The initial budget exceeded \$53 million, but after making some initial cuts, Elizabeth sought \$49,305,728 in funding. Since the PEA only amounted to \$45,921,936, the district cut six master teachers, three nurses, three vice principals, and one social worker. The Board picked up the cost of eighteen custodians and eighteen security guards. The Board picked up \$2.5 million in transportation costs. The specific budget shortfalls were discussed by Crosby. Her testimony was uncontroverted and I **FIND**:

Custodians

The State recommends one custodian for every six classrooms, per the Department's "District Budget Planning Workbook Instructions," <<http://www.nj.gov/education/ece/archives/budget/>>. As there are 177 classrooms, twenty-nine and a half custodians was the appropriate number to retain. But the budget ultimately approved by the Department would only allow funding for five custodians. Crosby explained that this would permit about one custodian for every thirty-six classrooms. With the help of local funding, the Board ultimately employed twenty-three custodians.

Security Guards

Similarly, the “District Budget Planning Workbook Instructions” recommends one security guard for every stand-alone early-childhood-education center. The budget approved by the Department permitted the hiring of only one security guard. Crosby indicated that nineteen were needed to properly operate her program. Elizabeth has over fifty classrooms in trailers, or “temporary classroom units” (TCU), and Crosby views it as necessary that a security guard be with the students and teachers in each of these units. The district policy is to assign one security guard to every six classrooms; the Board made up the budget shortfall and retained eighteen additional security guards at a cost of \$1,187,576.

School Nurses

School nurses perform vision, hearing, height, and weight screenings. They make referrals to doctors, and take care of sick children. They maintain and review immunization records. For the 2015–2016 school year, the district sought eleven nurses, and three were cut from the budget, leaving eight. Noting that the district sought to employ one nurse for every 300 students, per Administrative Code requirements, N.J.A.C. 6A:13A-4.5, Crosby explained that the cut added about 100 students to each nurse’s load. This budget cut was not restored by the Board.

Transportation

Crosby discussed the costs attached to transportation at the preschool level. All children residing more than one and one-half miles away from school receive transportation. Insofar as they are still quite young, Elizabeth determined that it is appropriate to provide transportation door-to-door. Noting that there is already an absenteeism issue in the preschools, Crosby urged that without transportation many of these students would not attend school, and she referenced the district’s obligation to cast a wide net in offering preschool programming. Indeed, N.J.A.C. 6A:13A-2.3(a)

provides that “[d]istrict boards of education that received preschool expansion aid or education opportunity aid in the 2007–2008 school year shall document the school district’s strategies to serve at least 90 percent of the universe of eligible preschool children in the five-year preschool program plan and/or annual update, as required and approved by the Department.”

Master Teachers

Master teachers serve as a coach and provide instructional support in the classroom. They observe instruction, model lessons, and assist the classroom teacher in reflecting upon and improving his or her classroom practices. The district included twelve master teachers in its budget. Indeed, N.J.A.C. 6A:13A-4.2(a) requires that “[t]he district board of education shall provide master teachers at a ratio of no more than 20 preschool classrooms for each master teacher to ensure coaching and classroom support for classroom teachers.” But Elizabeth was only able to fund six master teachers; it thus had a ratio of one master teacher for every forty classrooms. The master teachers were spread thin, and were only able to assess half of the classrooms during the 2015–2016 school year. Nor is the district utilizing them in the manner intended, with the master teachers instead offering more generalized professional development, as opposed to the one-on-one guidance in the classroom setting that was intended by the regulation.

Social Workers

Elizabeth sought funding for nine social workers, and could secure funding for only eight. Crosby asserted that per the Administrative Code, there should be one social worker for about every 250–300 students. N.J.A.C. 6A:13A-4.6. Due to this budget cut, however, the needs of the district students were being met at a ratio of 1:332 students.

Vice Principals

Likewise, the district was forced to reduce the number of vice principals. Per Crosby, the district no longer has administrators who are knowledgeable in preschool education supervising instruction in the classroom.

Lunchroom Aides

There should be a ratio of two adults to fifteen students during lunch and rest times; Crosby urged that this ratio is critical for student safety. While the classrooms have a teacher and aide present during instructional time, per contract, lunch and rest periods are break times for regular classroom staff. An additional adult is thus needed to maintain adequate supervision. The district fully funded this line item, as there was insufficient State aid to cover this expense.

2. District Inefficiencies

The Department argues that “Elizabeth has consistently made expensive, inefficient, and sometimes inappropriate decisions across several areas of its preschool program.” The evidence was disturbing, uncontroverted, and, unfortunately, confirms that the Department is correct. I **FIND**:

Transportation

Raymond Zirilli is a senior transportation specialist for the Department. He evaluates transportation efficiency for local school districts using data submitted by the districts and certified to be accurate via the completion of a District Report of Transported Resident Students. Zirilli’s report compares the total number of students being transported to the district’s total “vehicle capacity.” “Vehicle capacity” is defined as 90 percent of the total number of seats available on all buses in use by the district. The Department’s analysis results in an efficiency rating, which is calculated by dividing the total number of students by the district’s total vehicle capacity. The State standard

for efficiency is 1.2, or 120 percent of total vehicle capacity. Elizabeth inefficiently used its buses; its efficiency rating was only 0.8.

Of the forty-one school buses in use during the 2015–2016 school year, many were less than full. By way of example, the District dispatched seventeen buses with the capacity to carry fifty-four students, but some carried as few as two students; none carried more than thirty students. The Department urged that “[h]igher efficiency equals lower costs, so if Elizabeth were using its buses more efficiently, it could save money on transportation.” The Department moreover pointed out that Elizabeth’s per-pupil cost for preschool transportation is high compared to that of other former Abbott districts. For the 2015–2016 school year, its total cost for transportation of preschool-aged children was \$1,669,582. When this number is divided by the 469 preschoolers who receive transportation, the per-pupil cost is \$3,560. In Millville and Vineland, students are transported less expensively. Granted, these districts are in southern New Jersey, where costs could differ. But the difference is astronomical: Millville spent \$608 per pupil; Elizabeth spent nearly six times as much. Vineland spent a bit more, \$1,053 per pupil; Elizabeth spent about three times as much. These two districts had better efficiency ratings: 1.51 for Millville, and 1.2 for Vineland. And those districts are much larger than Elizabeth, geographically.

Elizabeth expands its transportation services well beyond regulatory requirements.² Of the 469 preschoolers receiving transportation, 269 of them were being provided services not mandated by law. Elizabeth offers door-to-door transportation—again, a costly option, and one that is not mandatory. Finally, Elizabeth contracts with costly vendors. In 2015–2016, Elizabeth contracted with three different companies to provide transportation: Dover/S&E/Fossett (“Dover”); Durham School Services L.P. (“Durham”); and Lun and Run T/A J&J (“Lun and Run”). All the routes serviced by Lun and Run were nearly half the cost of the routes serviced by Dover and Durham. For example, a Durham route with a twenty-four-seat capacity transporting seventeen students cost \$75,420, while a comparable Lun and Run route cost only

² Per N.J.A.C. 6A:27-1.4, preschool-age students who reside more than two miles from school must receive transportation. A district may transport other students, but is not required to do so. N.J.A.C. 6A:27-1.5.

\$37,800. Zirilli questioned this large differential for an almost identical service; Elizabeth offered no witness to clarify or explain. And he pointed out that his Department stands ready to assist districts in efforts to achieve efficiencies, including recommendations for ways to share routes with neighboring districts. Yet, Elizabeth has never turned to Zirilli's Department for assistance.

Staff Salaries

Elizabeth's salaries and benefits are described by the Department as "notably high." I agree. Karin Garver, formerly an education specialist in the Department, conducted a detailed analysis of Elizabeth's average preschool-staff salaries and benefits as compared to Newark, Paterson, and Jersey City, all large former Abbott districts in the same general geographic area. She compared the average cost of salaries and benefits for teachers, assistant teachers, relief teachers, clerical workers, custodians, security guards, fiscal specialists, master teachers, social workers, nurses, preschool intervention and referral team members, principals, assistant principals, and director or supervisor positions. These are all positions that are PEA funded. By multiplying the average cost of each position's salary and benefits by the number of staff Elizabeth had budgeted for each position for the 2015–2016 school year, Garver could directly compare Elizabeth's average salary and benefits to those in these neighboring districts.

The results of her analysis are startling. Using Newark as a comparison, she readily demonstrated that if Elizabeth's costs were comparable to Newark's it could save about \$7,000,000 a year. Indeed, the average teacher's salary and benefits cost \$97,268 in Elizabeth. In Newark the cost is \$84,062. Similarly, an assistant teacher in Newark receives an average of \$46,912 in salary, compared to \$63,984 in Elizabeth. Garver demonstrated that if Elizabeth's costs mirrored those in Paterson, it could save some \$9,000,000 per year. The numbers are less dramatic relative to Jersey City, but Garver indicated that Elizabeth spends about \$780,000 more in salaries than this comparable former Abbott district.

Elizabeth replies that it is bound by collective-bargaining agreements that afford it little wiggle room relative to salary and benefits. But Garver stressed that savings could nonetheless be effectuated in salary and benefits if Elizabeth reduced the number of staff employed in positions not mandated by regulation. For example, while the Department makes recommendations for the number of clerical workers, custodians, and security guards employed, it does not require a given number to operate a high-quality preschool program. And Elizabeth could have eliminated the fiscal specialist position, which is likewise not required. Nor are lunch aides required by regulation.

Garver pointed out that in Elizabeth, only certificated preschool teachers are hired to serve as relief teachers. But the Department does not require this credential. See N.J.A.C. 6A:13A-4.3(a) (certification is applicable only to the classroom teacher). The Department's data reveals that non-certificated teachers have lower salaries. And Elizabeth hires relief teachers to teach "specials" such as art, music, and physical education. This approach is not recommended by the Department, which prefers instead to incorporate such instruction into the regular classroom day, to be delivered by the classroom teacher. Garver urged that hiring teachers certificated to teach these special subjects increases overall instructional costs for the district.

Accounting Errors

Kevin Dehmer is the chief financial officer and assistant commissioner for the Division of Finance at the Department of Education. He shared that each year the Department issues budget guidelines, intended to assist districts in complying with Department rules and regulations regarding budget development. District accounting systems are required to be organized on "a fund basis." Each fund is "a fiscal and accounting entity, with a self-balancing set of accounts recording cash and other resources, together with related liabilities and residual equities or balances, or changes therein." Each fund is completely independent of the others. The General Fund is applicable only to services in grades kindergarten through twelve. Special Revenue Funds are "accounts for the proceeds of specific revenue sources . . . that are legally restricted to expenditures for specified purposes." Dehmer explained that preschool is a

Special Revenue Fund because PEA is a revenue source usable for preschool-related expenses only. Accordingly, a school district should be accounting for all preschool revenues and expenditures in the Special Revenue Fund for preschool.

With this background in mind, Dehmer discussed Elizabeth's obligation to account for Chapter 78 contributions in its budget. Chapter 78 requires employees to contribute to their health-benefit packages. The Department's budget guidelines direct that there be a line item for expenditures for employee health benefits, and that Chapter 78 contributions offset that amount. Dehmer offered the following example: if benefit costs totaled \$10,000,000 and the Chapter 78 withholdings totaled \$1,000,000, the budget line item for employee health benefits would show a net of \$9,000,000. During the 2015–2016 school year, Elizabeth withheld \$1,778,335 in Chapter 78 moneys, but recorded these funds as revenue in its General Fund. This is inconsistent with the Department's budget guidelines. Had Elizabeth properly recorded this offset in the Preschool Special Revenue Fund budget line, it would have reduced its health-benefit expenditures for the preschool program by \$1,778,335. Put another way, I **FIND** that over \$1.5 million dollars was budgeted incorrectly and should have been available to the district for preschool expenses.

Outside Providers

But perhaps the greatest concern about mismanagement of the preschool budget surrounds the district's relationship with its outside providers. Odell Jackson is the fiscal specialist for the Elizabeth public schools, having served in that position for the last eight years. She is a liaison among the private preschool providers, the State Department of Education, and the school district. She also assists with the preparation of the budget. In 2015–2016 there were 630 preschool students educated in forty-two private-provider classrooms, through eight licensed private providers. Their services are retained via a contractual agreement using a Department form. The district funds the private-provider programs via PEA funds, and if at the end of the school year there are unspent funds, these must be recouped. The private providers are selected via a process that includes State review and involvement and approval.

Each month, from September through June, a local district like Elizabeth gives the private provider one-tenth of its budget for the school year. Each quarter, the provider submits an expenditure report to the district. This allows the district to ensure that the provider is in compliance with its contract, and that there is supporting documentation for all noted expenditures. See N.J.A.C. 6A:13A-4.7. And it allows the district to remedy any overpayment or underpayment promptly. Thus, the Department notes, in the event of an overpayment, a local district can reduce or withhold the monthly budget payment or request that the provider reimburse the district via a payment plan.

Jackson readily agreed that since 2011–2012 the eight private providers have routinely overcharged the district; each one has been overpaid, at least once. PEA in the amount of \$842,710 remains owing to Elizabeth. Jackson reviewed an outstanding-payment ledger, which confirmed that some of these providers carried yearly overpayment balances up through and until the 2015–2016 school year. Jefferson Park and New Hope are the most glaring examples, having been overpaid annually each and every year for five years in succession. As to why at some point Elizabeth did not simply allocate less funds to these providers was not adequately clarified by Jackson. And several other providers, to include Proceed I, Proceed II, and Wonder World, were overpaid more than once. These three providers alone owe Elizabeth some \$117,732, enough money to buy at least one of the aides, or nurses, or security guards the district claims to sorely need.

The Department urges that Elizabeth “has failed to take meaningful steps to either reduce the amount of PEA it pays to its private providers or to recoup the funds it is owed.” I must agree. Suzanne Fenske works for the Department’s Office of Fiscal Accountability and Compliance (OFAC) and conducts fiscal reviews for early-childhood education. She highlighted her audit of the two providers with the largest arrearages: New Hope and Jefferson Park. For the 2013–2014 fiscal year, New Hope had overcharged Elizabeth for preschool programming in the amount of \$151,306. But since Elizabeth had withheld \$28,693 of PEA from New Hope, it owed \$122,613 to the

district. In a report issued in October 2015, OFAC memorialized this finding. The report also noted, however, that this was not the only year that such an overpayment took place. Between July 1, 2009, and June 30, 2013, the provider accrued arrears totaling \$295,065. Jackson's ledger revealed that New Hope owed Elizabeth \$418,592.69 at the end of the 2015–2016 year (R-27).

Similarly, OFAC's investigation revealed that Jefferson Park had underspent during the 2011–2012 year in the amount of \$176,276. Elizabeth withheld only \$52,879 in underspent PEA funds. The overpayments continued in 2012–2013, with OFAC concluding that \$17,844 was owed the district that year. Jackson's ledger revealed that Jefferson Park owed Elizabeth \$253,136.27 at the end of the 2015–2016 school year.

Elizabeth does not dispute these findings, and in January 2016 submitted a Corrective Action Plan to the Department. But as of October 2016, Elizabeth still had not finalized a plan to recover the funds payable to the district. Elizabeth did not enter into contracts for repayment with New Hope or Jefferson Park until December 2016. Finally, Fenske noted that during the 2011–2012 fiscal year, Elizabeth had given New Hope a \$51,666,65 loan to cover the provider's rent arrearages, even though Elizabeth had already paid New Hope for its facility costs and the school owed arrears dating back to the 2009–2010 fiscal year. This amount has yet to be repaid to the district.

CONCLUSIONS OF LAW

The SFRA was enacted in 2008 as part of New Jersey's ongoing effort to ensure that public schools throughout the state receive the financial support needed to deliver a thorough and efficient free public education to our children. N.J. Const. art. VIII, § 4; N.J.S.A. 18A:7F-43 et seq. The statute sought to create a "clear, unitary, enforceable statutory formula to govern appropriations for education." N.J.S.A. 18A:7F-44(g). The Legislature recognized as follows regarding preschool education for at-risk students:

In light of the demonstrable, beneficial results and success of the current Abbott preschool program, it is appropriate to

build upon this success by incorporating in the formula an expanded high-quality preschool program for all children who qualify for free and reduced price meals in all districts. It is appropriate for the formula to acknowledge that at-risk children do not always receive the same educational exposure at an early age as their peers and to provide the additional resources necessary through high-quality preschool to prepare every child to learn and succeed.

[N.J.S.A. 18A:7F-44(k).]

PEA supports districts like Elizabeth as part of the SFRA's obligation to fund public preschool education. The level of PEA is determined as set forth in the statute. This record has revealed no evidence that the Department's award of PEA during the 2015–2016 was in any way at odds with the statutory formula. I **CONCLUDE** that Elizabeth received PEA during the 2015–2016 school year in an amount consistent with SFRA requirements. Indeed, it received the highest amount available under the statute.

Elizabeth nonetheless urges that the money it was allotted was insufficient, and it puts the blame for the shortfall on both the statute and the Department. Its arguments are meritless. Elizabeth questions the statute's constitutionality. A per se challenge to the constitutionality of the SFRA is beyond the purview of my jurisdiction. And, in any event, our Supreme Court has determined that

[t]he legislative and executive branches of government have enacted a funding formula that is designed to achieve a thorough and efficient education for every child, regardless of where he or she lives. On the basis of the record before us, we conclude that SFRA is a constitutionally adequate scheme.

[Abbott v. Burke, 199 N.J. 140, 175 (2009).]

But “‘administrative agencies are competent to pass upon constitutional issues germane to proceedings before them,’ and . . . ‘such action is necessary so as to better focus the issues for judicial review, if such action is later necessary.’” Hunterdon Cent. High Sch. Bd. of Educ. v. The Hunterdon Cent. High Sch. Teachers’ Ass’n, 174 N.J. Super. 468,

475 (App. Div. 1980), aff'd, 86 N.J. 43 (1981) (quoting Alcala v. Wyoming State Bd. of Barber Exam'rs, 365 F. Supp. 560, 564 (D. Wyo. 1973)). A challenge to a statute as applied may be appropriately reviewed at the administrative level. See id. at 474.

I **CONCLUDE** that Elizabeth has offered no evidence that the SFRA is unconstitutional as it was applied to its PEA grant for the 2015–2016 school year. To the contrary, I agree with the Department that any financial shortfall experienced by the district that year was due to its own inefficiencies, and its mismanagement of funds. The record confirms that transportation was inefficiently delivered, and private providers were overfunded repeatedly. The Department demonstrated that well over a million dollars was improperly budgeted. Elizabeth needs to get its fiscal house in order. Then and only then could it possibly have a colorable claim that the PEA awarded by the State is constitutionally inadequate.

Moreover, the record reveals that many costs incurred by the district resulted from choices it was not mandated to make, to include courtesy door-to-door bussing, and its use of relief teachers. A fiscal specialist is not a mandated position. N.J.A.C. 6A:13A-4.7. The district can certainly choose to supplement the PEA it receives with funds from its general account. See Millville Bd. of Educ. v. New Jersey Dep't of Educ., 183 N.J. 264, 278 (2005). But Elizabeth's choice to incur additional costs does not and cannot give rise to a claim that the SFRA has not provided funding that passes constitutional muster. See, e.g., Bacon v. New Jersey Dep't of Educ., EDU 2637-00, Comm'r (February 9, 2001), <<http://njlaw.rutgers.edu/collections/oal/>>, where the Commissioner stated that relative to a claim of constitutional deficiency, "each petitioning district must first prove that deficiencies do, in fact, exist, and second, that these cannot be remedied by different programmatic and fiscal choices within the framework of current law and funding levels." Elizabeth urges that in several areas it was unable to meet regulatory requirements for staffing levels. Master teachers and nurses are examples. See N.J.A.C. 6A:13A-4.2, -4.5. But again, Elizabeth failed to demonstrate that its inability to do so could not have been remedied via more prudent fiscal planning.

ORDER

Based on the foregoing, I **ORDER** that the petition of appeal be **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 14, 2017



DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

Date Mailed to Parties:

APPENDIX

Witnesses

For Petitioner:

Tracy Crosby
Odell Jackson

For Respondent:

Raymond Zirilli
Kevin Dehmer
Karin Garver
Suzanne Fenske

Exhibits

Joint Exhibits

- J-1 FY 2014 Educational Adequacy Report
- J-2 Elizabeth's Five-Year Plan (2015--2016)
- J-3 Enrollment projections workbook (2015-2016)
- J-4 Budget Planning Worksheet (2015-2016)
- J-5 Letter dated March 20, 2015
- J-6 Revised Budget Planning Workbook

For Petitioner:

- P-1 Memorandum dated December 16, 2013
- P-2 Memorandum dated December 10, 2013
- P-3 Board Resolution

For Respondent:

- R-1 Not admitted
- R-2 Table of average experience and salaries
- R-3 Graph of salaries
- R-4 Not admitted
- R-5 Chart of Elizabeth funded vs. actual enrollment
- R-6 Not admitted
- R-7 Comparison of preschool salaries
- R-8 Comparison of preschool salaries
- R-9 Comparison of preschool salaries
- R-10 2016 Transportation efficiency table
- R-11 Chart of bus routes (vehicle capacity)
- R-12 Chart of bus routes (operator name)
- R-13 Per-pupil transportation cost and aid estimates (Elizabeth)
- R-14 Per-pupil transportation cost and aid estimates (Millville)
- R-15 Per-pupil transportation cost and aid estimates (Vineland)
- R-16 Chart of Elizabeth bus routes
- R-17 OFAC report, October 2015
- R-18 Not admitted
- R-19 OFAC Report, June 2015 (2011–2012)
- R-20 OFAC Report, June 2015 (2012–2013)
- R-21 Not admitted
- R-22 Corrective Action Plans
- R-23 OFAC Report, October 2016
- R-24 OFAC Report, October 2016
- R-25 Preschool Education Contract
- R-26 Preschool Education Contract
- R-27 Early childhood provider analysis
- R-28 Emails with attachments
- R-29 Answers to interrogatories
- R-30 Transportation cost aid estimates
- R-31 Uniform Minimum Chart of Accounts

