

IN THE MATTER OF THE APPLICATION :
 OF THE BOARD OF EDUCATION OF THE : COMMISSIONER OF EDUCATION
 TOWNSHIP OF CLARK, UNION COUNTY, : DECISION
 FOR AN ORDER DIRECTING ISSUANCE OF :
 BONDS PURSUANT TO *N.J.S.A.* 18A:7G-12. :
 _____ :

SYNOPSIS

Having unsuccessfully sought voter approval for construction of school facilities twice within a three-year period, petitioning Board of Education sought an order, pursuant to *N.J.S.A.* 18A:7G-12, directing issuance of bonds for proposed projects in the total amount of \$31.4 million on grounds that these were necessary for provision of a thorough and efficient system of education (T&E) in the District.

Following a hearing at the Office of Administrative Law pursuant to *N.J.S.A.* 52:14F-5(o), the ALJ issued a report recommending that the Commissioner order issuance of bonds totaling \$19.2 million to fund renovations and repairs to the Board’s high school. The ALJ found the Board’s proofs insufficient to warrant a recommendation ordering issuance of bonds for the remaining \$12.2 million to construct additions to the Board’s two elementary schools.

The Commissioner determined that renovations and repairs to the high school were necessary for T&E and directed the Board to prepare for issuance of bonds covering the local share of the project cost and to submit detailed plans and specifications to the Office of School Facilities, where the project will proceed as an Authority project pursuant to *N.J.S.A.* 18A:7G-12 and applicable provisions of *N.J.A.C.* 6A:26-3. The Commissioner concurred with the ALJ, even after clarification of the ALJ’s Report with respect to the present state of the District’s “unhoused student” situation, that the Board had not demonstrated the necessity of its requested elementary school additions in order to provide T&E.

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.

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The record of this matter, and the Report and Recommendation (Report) of the Administrative Law Judge (ALJ) issued by the Office of Administrative Law following hearing pursuant to *N.J.S.A.* 52:14F-5(o), have been reviewed. Comments on the Report were filed by the petitioning Board of Education (Board) in accordance with procedures established by the Department of Education (Department) on behalf of the Commissioner.

In its comments, the Board examines the ALJ's Report in detail and raises objections to a number of the statements and analyses therein. The great majority of these objections are, in essence, specific applications of the Board's overarching position, reflected in the Initial Decision, that the facilities efficiency standards (FES) adopted in conjunction with the Educational Facilities Construction and Financing Act (EFCFA), *N.J.S.A.* 18A:7G-4(h), are the *minimum* State standards that public school buildings must meet in order to support the provision of a thorough and efficient system of public education (T&E), and that the Commissioner *must* order issuance of bonds where a district appearing before him pursuant to *N.J.S.A.* 18A:7G-12 has established that those standards will not be met absent completion of its proposed capital project(s). In this regard, the Board views the ALJ's

Report as “tantamount to a repudiation” of the FES, and it decries the Report’s “refusal to recognize and apply the criteria defining the minimum standards of public school buildings adequately designed and spatially sufficient” to support T&E in the District. (Board’s Comments at 2, 9, 10, 11) The Board contends that the ALJ inappropriately held it to a burden of proof that may have applied previously, but has now been superseded by enactment of EFCFA and establishment of the FES. (*Id.* at 2-4) It further contends that the ALJ failed to acknowledge and credit the Department’s recognition, in granting a waiver from the requirement for submission of the long-range facilities plan otherwise required by EFCFA prior to permitting a local district to conduct facilities referenda, of “functional capacity [of] less than 90% of the [FES]” in the Board’s two elementary schools, a recognition that was determinative of the Department’s allowing those projects to be included in the Board’s application under *N.J.S.A.* 18A:7G-12. (*Id.* at 4-6) The Board alleges that the ALJ failed to consider sufficiently the Superintendent’s testimony about inadequate space for special education and the absence of library/media centers that are “anywhere near the minimum size set forth in the FES” (*Id.* at 6-7), instead giving undue credence to the few witnesses who spoke against issuance of bonds for the elementary school additions and inappropriately weighing “the existence of unsafe and hazardous conditions found in the Clark Township Schools, which require immediate repairs and renovations as a first priority, with the issues of inadequate space and non-existent facilities to which the students of Clark Township are entitled” under the FES. (*Id.* at 7)

The Board also contends that the ALJ misconstrued the District’s situation with respect to “unhoused” students. Specifically, the Board argues that the ALJ did not recommend issuance of bonds for its two proposed elementary school additions because he

erroneously believed that the Board was claiming need based on *projected* enrollment increases rather than *current* conditions of overcrowding, and because he did not appear to understand that a district's number of "unhoused students" does not refer to students without a place in a school building, but rather serves as an "inadequacy index" in relation to the FES. Thus, the Board claims, because its elementary schools evince 64% and 68% functional capacities as determined under the FES and recognized by the Department in granting a five-year-plan waiver as noted above, and because FES formulas identify over 300 "unhoused students" in the District right now, the Board has demonstrated that its proposed additions are necessary under FES criteria. (Board's Comments at 6, 7-9, 10-11)

Upon careful review of the ALJ's Report, the underlying record including Exhibits and the Board's Post-Hearing Brief, and the Board's comments on the ALJ's Report, the Commissioner fully concurs with the ALJ's assessment of the Board's application. On the necessity for repairs and renovations to the District high school, as demonstrated on this record, there can be no two opinions; clearly, in the absence of the proposed project, the District will be unable to provide T&E due to significant health and safety issues. On the question of expanding elementary school facilities, however, as found by the ALJ, the Board has developed a record demonstrating little more than that its current functional capacity is less than the 90% established as a threshold by the FES, and that it lacks certain specialized rooms conforming to FES standards; even granting that the ALJ's Report may at times suggest that the schools' alleged overcrowding is prospective rather than current (the record supports the Board's request for clarification in this regard), the Board has made no demonstration as to how these alleged shortcomings have affected student performance or compromised the Board's ability to provide T&E. As stated by the ALJ:

Unfortunately, the record***lacks reliable information on average class size in the Clark elementary schools, presently or in the foreseeable future, or any empirical research on the maximum class size at which meaningful learning can be achieved. Thus, it is difficult to quantify the effect that potential overcrowding might have on student performance.

I **FIND** that the proofs are insufficient to show that students in Clark will be deprived of a thorough and efficient education unless new elementary classrooms are built.***Absent an adequate showing that students in the district will be unable to attain satisfactory mastery of core curriculum content, that their learning will be seriously compromised or that their health and safety will be jeopardized, the need for improved facilities cannot justify overturning the will of the electorate as expressed at the polls. (ALJ's Report at 12)

This finding reaches to the heart of the Board's position, which is its contention, noted above, that, as a matter of law, the FES are the *minimum* State standards that public school buildings must meet in order to support T&E, and that the Commissioner *must* order issuance of bonds where a district appearing before him pursuant to *N.J.S.A.* 18A:7G-12 has established that those standards will not be met absent completion of its proposed capital project(s). In the Board's view, then, if it has demonstrated that its schools are below the FES threshold for functional capacity and that they lack specialized instructional spaces as set forth in the FES, that demonstration is, *per se*, equivalent to a finding that the Board cannot provide T&E without construction of its proposed projects.

For the reasons well and thoroughly set forth by the ALJ in his discussion of the law underlying the Board's application (ALJ's Report at 12-18), the Commissioner rejects this view. As stated by the ALJ:

While it is understandable to want to reduce a flexible term like "thorough and efficient education" to certain hard and fast rules, rigid application of an absolute formula to a non-Abbott school district goes beyond the intended usefulness of such device. Facilities efficiency standards "shall not be construction design standards;" rather, "[t]he design of the project may eliminate spaces in the facilities efficiency standards, include spaces not in the facilities efficiency standards, or size spaces differently than in the facilities efficiency standards upon a demonstration of the adequacy of the school

facilities project to deliver the core curriculum content standards[.]” *N.J.S.A.* 18A:7G-4h As the statute provides, the facilities efficiency standards must be “educationally *adequate* to support the achievement of core curriculum standards,” *N.J.S.A.* 18A:7G-4, but not necessarily the only means to achieve that result. (Emphasis added.) Consistent with this approach, the New Jersey Supreme Court has acknowledged that square footage guidelines adopted by the Commissioner are sufficient, but not necessary, for a thorough and efficient education and that local districts “should have the discretion to decide initially whether specialized rooms for art, music, and science instruction are required at the elementary level.” *Abbott V*, at 522.

Nothing in EFCFA, which sets higher standards for *new* construction, evidences a legislative intent to retrofit all existing school facilities in this state to conform to newer, more stringent, building requirements. (citation omitted) Many New Jersey school districts may have antiquated school buildings, but it does not automatically follow that such districts are incapable of providing a quality education to students. Instead, the relevant inquiry is whether the existing configuration of school facilities is inadequate to afford students a thorough and efficient education.

An additional drawback of the Board's statutory interpretation is its contention that the Commissioner lacks discretion to deny issuance of school bonds whenever the project does not have excess costs. But this argument, if accepted, would render nugatory the provisions of *N.J.S.A.* 18A:7G-12, since the discretion vested in the Commissioner to rule on such applications would thereby be effectively eliminated. (citation omitted) *N.J.S.A.* 18A:7G-12 provides that the Commissioner “may approve the project without excess costs” if he or she concludes that the project is necessary for provision of a thorough and efficient system of education in the district. If the Legislature had intended to require approval of all projects that do not have excess costs, it could easily have said so without adding extra language mandating that the Commissioner determine whether such project was “necessary.” (ALJ’s Report at 17-18, emphasis in text)

Contrary to the Board’s assertions, then, the ALJ’s Report is not a “repudiation” of the FES, but rather a recognition of their appropriate role in a proceeding to determine whether proposed facilities projects *must* be ordered despite voter disapproval because they are necessary to meet the constitutional mandate for T&E. Moreover, as recognized by the ALJ, previously applicable standards for the issuance of such an order have *not* been superseded by enactment of EFCFA and establishment of the FES; rather, these have

served to set legislative and administrative parameters to guide the Commissioner's case-by-case determinations in assessing a proposed project's constitutional necessity.¹

Accordingly, the Commissioner concurs with the Report and Recommendation of the ALJ as clarified with respect to the current applicability of the Board's "unhoused student" argument. The Commissioner finds that insufficient evidence exists to warrant a directive for issuance of bonds to fund the Board's proposed elementary school projects, but that its proposed renovations and repairs to the high school are necessary for provision of a thorough and efficient system of education in the District. The Commissioner, therefore, authorizes the Board to prepare for issuance of bonds in the amount necessary to fund the local share of the high school project² and directs it to submit detailed plans and specifications for that project to the Office of School Facilities, where the project shall proceed forthwith as an Authority project pursuant to *N.J.S.A.* 18A:7G-12 and applicable provisions of *N.J.A.C.* 6A:26-3.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: June 2, 2003

Date of Mailing: June 2, 2003

¹ Arguably, they have actually *narrowed* boards' ability to apply to the Commissioner for issuance of bonds, since, prior to enactment of EFCFA, there were no preconditions on such applications as are now set forth in *N.J.S.A.* 18A:7G-12.

² The ALJ's final recommended order directs issuance of \$19.2 million in bonds, reflecting the entire cost of the project; however, as noted on page 2 of the Initial Decision (Note 3), the local share is actually less and will be finally determined pursuant to applicable rules governing Authority projects.

³ 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.*