576-03 (Link to OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu4158-03_1.html)

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

SYNOPSIS

Petitioning "Abbott" District appealed the Department's determination of its 2003-04 preliminary "maintenance budget," alleging that the Department's review was not in accordance with the July 23, 2003 Order of the Supreme Court.

The ALJ found: 1) the "ancillary" issue of moneys due the District as a consequence of its latest figures indicating that its undesignated general fund balance was below two percent was a "distribution" issue more properly resolved subsequent to receipt of the District's Comprehensive Annual Financial Review (CAFR); 2) the District had demonstrated a reasonable basis to justify its request for a 30 percent natural gas increase; 3) the rule duly promulgated to implement the Court's Order for "maintenance" controlled in this proceeding, and the Office of Administrative Law lacked jurisdiction to determine its validity; 4) the Department had employed a uniform, rational approach in calculating the District's Early Childhood Plan figure and such figure, therefore, was properly established at $650,011; and 5) the District's encumbrances which remained unpaid as of June 30, 2003 were properly excluded from its maintenance budget.

The Commissioner concurred with the ALJ's findings and conclusions with respect to deferring of the undesignated general fund payment question until review of the CAFR, calculation of the Early Childhood Plan figure, and jurisdiction and application of the "maintenance" rule. The Commissioner rejected the granting of a 30 percent increase for natural gas finding that the Department's offered 15 percent increase was not unreasonable or improper, and, while sustaining the propriety of the Department's calculation with respect to the District's encumbrances, he clarified the methodology to be utilized in arriving at this figure.

October 20, 2003

OAL DKT. NO. EDU 4158-03
AGENCY DKT. NO. 188-6/03

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
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The record of this local "Abbott" District's appeal of the Department's decision on its supplemental funding request for the 2003-04 school year, and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of Gloucester and those of the Department, along with both parties' reply exceptions were duly submitted in accordance with the schedule established in response to the Court's Order for expedition and were considered by the Commissioner in reaching this decision.

Upon careful and independent review of the record, the Commissioner determines to adopt in part, reject in part and modify in part the Initial Decision of the OAL as detailed below.

Initially, it is noted that petitioner's exceptions strenuously urge that the Commissioner should reject the Administrative Law Judge's (ALJ) resolution of the undesignated general fund issue in this matter, *i.e.*, that "[this issue] is still not an issue for resolution by this tribunal but rather a simple matter of disbursement," a question which would ultimately be resolved at the time of the Comprehensive Annual Financial Report (CAFR)

review.[1] (Initial Decision at 5) (Petitioner's Exceptions at 10-11) Petitioner reports that, subsequent to the receipt of the Department's August 27, 2003 budget decision letter, its auditor conducted a preliminary audit of the undesignated general fund balance which demonstrated that the District's fund balance was now below the required two percent level, contrary to the Department's budget letter calculation and, therefore, "the District should immediately be awarded the Abbott v. Burke State Aid receivable that was improperly and prematurely deducted in the [Department's] August 27, 2003, letter. (Petitioner's Exceptions at 12) The District argues that the Department has a legal obligation to accept its supplemental documentation and to cure any deficiencies in the District's budget that were based on the Department's consideration of outdated and inaccurate information. It, thus, proffers that the required adjustments should be immediately made based on its newly provided supplemental updated information and should not await the CAFR. The District further charges that the Department improperly reduced the undesignated general fund balance, which it had determined was in excess of two percent, prior to the receipt of the CAFR, in violation of the FY 04 Appropriations Act.

In reply, the Department advances "that the ALJ properly found that the issue of when and how Gloucester City would receive its disbursement from the Department if its undesignated general fund balance was below two percent was not a legal issue before him in this matter. However, the issue of the calculation of Gloucester City's excess fund balance was a legal matter properly reviewable by the ALJ in this case." (Department's Reply Exceptions at 2-3) The Department further advances that the Supreme Court's Order directed it to provide the districts with their preliminary maintenance figures for the 2003-04 school year by

[1] Petitioner charges that such determination of the ALJ was the result of an improper *ex parte* conversation with counsel for respondent in this matter and, therefore, the Commissioner is obligated to grant the relief it seeks. Petitioner is advised that "allegations" of impropriety by an ALJ are not properly before the Commissioner of Education nor do such "allegations" provide a basis for the granting of petitioner's requested relief in this forum. Rather, these are appropriately cognizable before the OAL. *See N.J.A.C.* 1:1-14.5; Code of Judicial Conduct for Administrative Law Judges, Canon 3A(6); and *N.J.A.C.* 1:31-3.1(a)4.

August 27, 2003. In fulfillment of that directive, the Department utilized the most recent calculations, provided by the District, to make the requisite projections in its August 27, 2003 budget letter. Although recognizing "the Supreme Court's encouragement to accept supplemental documentation [from districts], the Supreme Court's holding should not be construed such that the Department should accept piece-meal and potentially inaccurate data on an on-going basis, particularly where the district's CAFR will be submitted in several weeks and there will be finality in the data." (Department's Reply Exceptions at 5)

Upon consideration of the arguments advanced by the parties on this issue, the Commissioner, while conceding that the District's *entitlement* to payment may have been properly addressed by the ALJ in these proceedings, concurs that *timing* of such payment was not amenable to resolution by the ALJ. It must be observed, however, that the District's proffered arguments herein are somewhat disingenuous. While charging that the Department improperly made reductions to its undesignated general fund balance based on preliminary projections in advance of its receipt of the CAFR, it, nonetheless, demands payment based on its "supplementary" projections, also prior to completion of the CAFR process. Under the circumstances existing here, the Commissioner determines that resolution of this issue is appropriately deferred subsequent to the completion of the CAFR process. If the District's supplementary information at that time demonstrates that its undesignated general fund balance is below two percent, adjustment will be made to its aid award pursuant to the Appropriations Act (New Jersey Fiscal FY 04 Appropriations Act, *P.L.* 2003, *c*. 122).

Turning to the remaining issues in dispute herein, the Commissioner, first, concurs with the ALJ that the OAL does not have jurisdiction to determine, directly or indirectly, the validity of *N.J.A.C.* 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. R.2:2-3(a); *see, also, Pascucci v.*

Vagott, 71 *N.J.* 40, 51-52 (1976); *Wendling v. N.J. Racing Com'n*, 279 *N.J. Super.* 477, 485 (App. Div. 1995). Even if it were to be assumed, *arguendo*, that the OAL has jurisdiction to determine "a choice of law" as argued by the District, the Commissioner agrees with the ALJ that the Department's definition of "maintenance budget," as detailed in *N.J.A.C.* 6A:10-1.2, does not differ in any appreciable way from the Supreme Court's definition of that term contained in its Budget Order of July 23, 2003. Consequently, the Department's application of such regulatory definition in its review and approval of the District's 2003-04 budget is wholly appropriate.

In his consideration of the ALJ's grant of a 30 percent natural gas rate increase to the District, the Commissioner cannot agree with the ALJ that the District has met its burden of establishing the necessity of an increase of this magnitude. At this juncture, the Commissioner finds that a review of the respective parties' burdens of proof in this matter is particularly instructive. In this regard, the Commissioner recognizes that the Supreme Court's Order provides that the Department "shall bear the [initial] burden of moving forward to establish the basis for any proposed reductions to the [Abbott] district's maintenance budget based on the effective and efficient standard set forth in the DOE's emergency regulations."***_Abbott v. Burke_, M-976 September Term 2002, at 7. However, as indicated in the Department's preliminary maintenance decision letter dated August 27, 2003 (Exhibit J-1), the District's maintenance budget was not reduced based on ineffectiveness or inefficiency. Therefore, pursuant to *N.J.A.C.* 6A:24-9.6(c), the District bears the burden of proving that the Department's calculations were unreasonable or otherwise improper. Here, the Initial Decision reflects that James Devereaux, Business Administrator and Board Secretary of Gloucester, testified that he arrived at the projected 30 percent increase in natural gas cost

> based upon his research regarding the market conditions and fluctuations in the natural gas market. In that regard, he referred

> and offered into evidence two articles from which he had gleaned the range of increases as occurring between 20 and 70 percent projected for the ensuing year, based upon American Industry Standards and an article from the Energy Information Administration. His conclusion was that the increase would probably fall somewhere between those two areas, and, as a result, *he merely picked the figure of 30 per cent as being on the low end of that range to support that increase.* (emphasis supplied) (Initial Decision at 8)

Although reporting that the Department "accepted and conceded a 15 per cent increase, consistent with the electricity rate increase, in order to maintain as [much] uniformity as possible" *id.* at 11, and recognizing testimony advanced by the Department's witness that such a figure was based on the recommendation of the New Jersey Association of School Business Officials (NJASBO), the ALJ, nonetheless, granted the increase finding "Gloucester had at least some corroborating proofs while DOE did not." The Commissioner disagrees. Mindful of the District's burden on this issue, the Commissioner finds the proofs advanced by the District to be deficient and devoid of any *competent* evidence that would offer credence to its position with respect to a 30 percent natural gas cost increase. As such, the Commissioner finds that the Department's offered 15 percent increase cannot be found unreasonable or improper. Therefore, the ALJ's finding in this regard is rejected. The District is also reminded that, should its actual natural gas cost exceed the allotted 15 percent, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism for it to apply for additional supplemental funding.

The Commissioner, similarly, concludes that the District has not met its burden of establishing that the Department's use of an *approved* plan-to-plan review to determine the District's Early Childhood Plan figure was unreasonable or otherwise improper. In the Commissioner's view, the process used by the Department, based on the only available "like" components for comparison, *i.e.*, approved 2002-03 and 2003-04 Early Childhood Plans, in order to determine the change in district need from one year to the next, fully allows for reasonable,

fair and consistent preliminary determinations under circumstances where precise calculations must necessarily await the results of the CAFR. As well articulated by the ALJ in her Initial Decision in *Board of Education of the City of Plainfield, Union County, v. New Jersey State Department of Education*, OAL Dkt. No. EDU 5502-03, Agency Dkt. No. 206-6/03, decided September 26, 2003:

> I have considered the arguments of counsel and must agree with the position espoused by the DOE.***Although I agree with the District that the consistent use of the DOE's methodology does not in itself make it correct, I do not agree that simply because it does not work to the District's advantage makes it incorrect. The methodology utilized by the DOE has been applied to all "Abbott Districts" uniformly and has served to increase maintenance budgets in over half of the Districts. The District has not established that the use of this methodology is *per se* improper, illegal, inconsistent with the New Jersey Supreme Court's Order of July 23, 2003 or violative of any of its constitutional rights. The DOE is obligated only to utilize an approach that is reasonable and uniformly applied. Here they have done so. If the methodology is to be changed in each area in which an Abbott District is not advantaged, there will be no uniformity or equity to the provision of Abbott funds. Thus, I reject the District's argument and CONCLUDE that the DOE's methodology is reasonable and will not be second-guessed. (*Id.* at 8)

As such, the Commissioner agrees with the ALJ that the District's Early Childhood Plan adjustment for the 2003-04 school year was properly calculated at $650,011. In so holding, the Commissioner is also mindful that, to the extent that the results of the Department's reasonable approach may be imperfect, even after adjustment following audit, *N.J.A.C.* 6A:10-3.1(g) provides a mechanism for the District to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

As to whether the Department appropriately excluded certain of the District's encumbrances in the development of its maintenance budget, the Commissioner finds that the ALJ's analysis erred in concluding that only expenditures fully *paid* by June 30, 2003 were properly attributable to the 2002-03 budget and all expenditures which remained unpaid after

June 30, 2003 were chargeable to the District's 2003-04 budget, and were not to be included in the calculation of its "maintenance budget." Rather, he finds, the focus of the inquiry in this area is properly the timing of the *receipt* of goods and services, not payment. The ALJ's analysis appears to reflect a fundamental misunderstanding of the differentiation between the terms "encumbrances" and "accounts payable." Respondent's exceptions explain:

> An encumbrance is an accounting tool that permits Gloucester City to reserve funding for purchase orders that were issued during the 2002-2003 school year, but the goods or services were *not* received by (sic) as of June 30, 2003. An encumbrance is not an expenditure in the 2002-2003 school year, but rather merely a reservation of fund balance, which may be expended in the 2003-2004 school year if the goods and services are received. By contrast, an account payable is an expenditure which is incurred in the 2002-2003 school year for goods and services actually received or provided prior to June 30, 2003.
>
> With regards (sic) to those purchase orders for goods and services that have not been received or provided before June 30, 2003, they would be rolled over as encumbrances into 2003-2004 school year. As such these purchase orders are properly excluded from the 2003-2004 maintenance calculation, which properly includes only approved goods and services actually provided in the (sic) 2002-2003. They are not to be included in the 2003-2004 maintenance budget for Gloucester City since they have not been received or provided in that year. (emphasis supplied) (Respondent's Exceptions at 5-6)

Therefore, the Commissioner clarifies that, to the extent that the "encumbrances" as discussed in the Initial Decision represent charges for goods and services *provided* by June 30, 2003, *i.e.*, they have become accounts payable, these are properly chargeable to the District's 2002-03 budget and appropriately included in its "maintenance budget" for 2003-04. Those "encumbrances" representing goods and services not received by that date are properly excluded from the 2003-04 maintenance budget calculation. Petitioner's exceptions assert that the auditor for the District audited certain sections of the District's records, subsequent to June 30, 2003 and immediately prior to the hearing, and, citing Exhibits P-3 and P-6, contends

that he found that the Department had failed to allocate certain open encumbrances to 2002-03 expenditures. (Petitioner's Exceptions at 18-19) The Commissioner, while recognizing that it is entirely possible that adjustments in this area are necessary, in light of the District's burden in this regard and based on the proofs brought to the record, is unable to definitively determine which of the District's encumbrances have become accounts payable by virtue of the receipt of the encumbered goods or services on or before June 30, 2003 so as to be considered 2002-03 expenditures. The Commissioner, therefore, concludes that the District's encumbrances were properly excluded as a budget expense for 2002-03 by the Department, and he directs that any required adjustments be made, based on updated information, in the course of the CAFR review scheduled to begin in November 2003.

Accordingly, the Initial Decision of the OAL is adopted in part, rejected in part and modified in part as set forth above. The instant Petition of Appeal is hereby dismissed.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: October 20, 2003
Date of Mailing: N/A

[2] The Commissioner so determines, based upon the proofs brought to *this* record, while acknowledging that the presentation of such evidence may have been disadvantaged by both a Court Order to expedite proceedings and the unavailability of the CAFR until November 2003. In any event, beyond his determination herein, the Commissioner underscores the availability of a mechanism for Abbott districts to address needs, arising during the year due to unanticipated expenditures or unforeseen circumstances, for additional resources to implement Department-approved programs and services. *N.J.A.C.* 6A:10-3.1(g).

[3] Pursuant to *P.L.* 2003, *c.* 122, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.