

BOARD OF EDUCATION OF THE :
TOWNSHIP OF PEMBERTON, :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 NEW JERSEY STATE DEPARTMENT : DECISION
 OF EDUCATION, :
 :
 RESPONDENT. :

SYNOPSIS

Petitioning Abbott District challenged what should properly be included in its budget as “non-discretionary” items and the Department of Education’s determination of excess fund balance as of June 30, 2003.

The ALJ notes there are two issues: (1) whether the District has demonstrated that certain items are nondiscretionary and should, therefore, be added to the base 2002-03 budget and (2) whether the District has demonstrated that the 2% undesignated fund balance and excess surplus were improperly calculated by the Department. The ALJ found that No Child Left Behind (NCLB) Supplementary Services, the NCLB ESL Paraprofessional Position, the two ESL Positions and the two Balanced Literacy Positions should be considered “non-discretionary,” but that radon testing, the Tienet testing and the position of Director of Security should not. Additionally, the ALJ found that the District had carried its burden of demonstrating that the 2% undesignated fund balance and excess surplus were improperly calculated by the Department.

The Commissioner modified the Initial Decision. On the latter issue, the Commissioner adopts the conclusion of the ALJ, subject to the Comprehensive Annual Financial Report (CAFR) in November 2003. However, the Commissioner set aside the ALJ’s conclusion that items (a), (b), (c), (d), (e) and (h), in part, are properly considered “non-discretionary,” within the intentment of the Supreme Court’s Order.

<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>

October 28, 2003

OAL DKT. NO. EDU 4162-03
AGENCY DKT. NO. 186-6/03

BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF PEMBERTON,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF EDUCATION,	:	
	:	
RESPONDENT.	:	
	:	
_____	:	

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. The parties’ exceptions and replies 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 initially concurs with the Administrative Law Judge (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 consider petitioner’s argument regarding the validity and applicability of

the regulation at issue, 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.

Next, 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, the Department did not reduce the District's maintenance budget based on ineffectiveness or inefficiency. (Pemberton's Exceptions at 3) Therefore, the Commissioner notes that the District bears the burden of proving that the Department's calculations were unreasonable or otherwise improper. *N.J.A.C.* 6A:24-9.6(c).

There are essentially two issues before the Commissioner: whether the District has demonstrated that certain items are nondiscretionary and should, therefore, be added to the base 2002-03 budget and whether the District has demonstrated that the 2% undesignated fund balance and excess surplus were improperly calculated by the Department. On the latter issue, the Commissioner adopts the conclusion of the ALJ at page 10, subject to adjustment after receipt of the Comprehensive Annual Financial Report (CAFR) in November 2003.

The Commissioner does not, however, concur with the ALJ that the items proposed by the District, enumerated as (a), (b), (c), (d), (e) and (h)¹ in the Initial Decision at page 4, are properly considered "non-discretionary," within the intendment of the Supreme Court's Order.²

¹ That is, positions other than the Director of Security.

² The Commissioner concurs with the ALJ's conclusion that item (f) Radon testing and item (g) Tienet testing, cannot be considered nondiscretionary maintenance budget items.

In this connection, the Commissioner notes that the pertinent regulations provide the following definition of maintenance budget:

[F]or the 2003-2004 school year, a budget funded at a level such that a district can implement 2002-3003 approved and provided programs, services, and positions and includes documented increases in non-discretionary expenditures and adjustments for actual 2002-2003 expenditures. Examples of non-discretionary expenditures are increases in contracted salaries, health benefits, and special education tuition. Maintenance does not include the restoration of programs, positions or services that were provided in previous years or new programs, positions or services unless necessary to meet Paragraph 2c of the Supreme Court's order of June 24, 2003 in *Abbott v. Burke*. Maintenance also does not include non-recurring 2002-2003 expenditures. *N.J.A.C. 6A:10-1.2*.

Here, the District asserts that the No Child Left Behind (NCLB) Supplementary Services for the Busansky Elementary School, the Stackhouse Elementary School and the Fort Middle School (\$251,638), the NCLB Supplementary Services for the Denbo Elementary School and the Pemberton High School (\$150,000) and the NCLB ESL Paraprofessional Position (\$12,001) should be considered nondiscretionary. The District reasons that, as a result of a mandatory set-aside of funds for supplemental services in these schools, it “does not have that funding to provide in 2003-04 the positions, programs and services in the basic skills area that were provided to students in these schools during the 2002-03 school year.” (Pemberton’s Post-hearing Brief, October 2, 2003, at 3)³ Quite simply, the District asserts that, “[r]egardless of the source of the legal mandate, the District has an obligation to meet federal and state legal requirements, and that obligation renders such expenditures non-discretionary in the 2003-04 school year.” (*Id.* at 4)

³ Notably, however, the District does not provide detail with respect to those programs and services which, it alleges, were approved and provided for 2002-03 and will be sacrificed to the NCLB program and position requirements for the 2003-04 school year.

The Commissioner finds, however, that the District has failed to meet its burden of demonstrating that these items are “non-discretionary” within the intendment of the Supreme Court’s Order and the implementing regulations, *supra*, where the NCLB Supplementary Services and NCLB ESL Paraprofessional Position were neither approved nor provided in 2002-03, and where the District failed to present evidence that it considered other resources or reallocations in order to meet these new requirements. In so finding, the Commissioner notes that *N.J.A.C. 6A:10-3.1(g)* provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

Similarly, the Commissioner finds that the two ESL positions (\$80,000) and the two Balanced Literacy Positions (\$80,000) are unquestionably positions which were neither approved nor provided in the 2002-03 school year. As such, these positions cannot be considered within the definition of “maintenance budget” and are beyond the scope of the Supreme Court’s Order and the implementing regulations.

Finally, the Commissioner acknowledges that the District seeks \$312,353 in salary prorations that were filled for less than the full 2002-03 school year. However, the Department takes the position, and the Commissioner so upholds, that under the maintenance definition, positions are properly funded in accordance with the amounts actually spent on those salaries in the 2002-03 school year, along with the nondiscretionary salary increases, that is, “[t]he district will receive funding for any teacher or substitute that was employed last year based on the amount that the district paid to those individuals plus the agreed contracted salary rate increase agreed upon.” (Department’s Exceptions at 7-8)

In so finding, the Commissioner notes that the Department’s overall charge in this matter was to determine the level of 2003-04 funding that would enable the District to continue

in a “maintenance” mode, that is, to implement in 2003-04 the programs, services and positions provided in 2002-03. While it is true that dollar amounts actually paid out for staffing prior to June 30, 2003 will not perfectly predict the cost of providing comparable staffing in the next, it is *equally* true that originally budgeted amounts and other similar projections are no less imprecise. Thus, in the Commissioner’s view, a methodology which preliminarily establishes the 2003-04 cost of providing positions at “maintenance” levels by determining, as nearly as possible without benefit of audit, the actual approved cost of providing them in 2002-03 and then allowing for reasonable, nondiscretionary adjustments, is a uniform, fair and rational method for estimating future expenditures which cannot otherwise be determined with any degree of precision. In this connection, the Commissioner is not persuaded that this method does not take into account vacancies, retirements, substitutes and positions filled for only part of the year, since variances of these types occur every year and a preliminary district-wide salary budget is appropriately based on the assumption that staffing is a flexible and continuous process, with ebbs and flows that, absent specific evidence to the contrary, generally permit the projection of one year’s experience onto the next.⁴ To the extent that results may be imperfect, even after adjustment following audit, as noted above, *N.J.A.C.* 6A: 10-3.1(g) provides a mechanism to obtain additional supplemental funding where unanticipated expenditures or unforeseen circumstances warrant.

⁴ Moreover, as the Department noted and the District does not dispute:

[T]he District failed to meet its obligation under *N.J.A.C.* 6A:10-3.1(b)2 and 3, [which] required a district prior to submitting its application for additional supplemental funding, to consider its salary appropriations for vacant positions and salary breakage for replacement of retiring staff during the upcoming budget year. Mr. James Flanagan, Assistant Business Administrator for Pemberton testified that he had not completed a salary breakage analysis for the district for the 02-03 school year. (Department’s Exceptions at 8)

Accordingly, the Initial Decision is modified as set forth herein.⁵

IT IS SO ORDERED.⁶

COMMISSIONER OF EDUCATION

Date of Decision: October 28, 2003

Date of Mailing: N/A

⁵ 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, which will reveal the District's true audited fund balance and available revenue, if any, as of June 30, 2003.

⁶ Pursuant to *P.L. 2003, c. 22, "Abbott"* determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court.