

#217-13 (OAL Decision: Not yet available online)

EDUCATION LAW CENTER ON	:	
BEHALF OF ABBOTT V. BURKE	:	
PLAINTIFF SCHOOL CHILDREN,	:	COMMISSIONER OF EDUCATION
	:	
PETITIONER,	:	DECISION
	:	
V.	:	
	:	
NEW JERSEY STATE DEPARTMENT	:	
OF EDUCATION, OFFICE OF SCHOOL	:	
FACILITIES,	:	
	:	
RESPONDENT.	:	

SYNOPSIS

The petitioner sought an order, on behalf of the “Abbott v. Burke” school children of New Jersey, requiring the respondent Office of School Facilities (OSF) to formally act on applications for emergent repairs to school facilities under the 2011 New Jersey Potential Emergent Projects Program (PEPP). The OSF asserted that it had reviewed all applications in a manner consistent with law and regulation, and that, accordingly, the petition should be dismissed. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the case is ripe for summary decision; the OSF is responsible for reviewing and approving school facility projects under the Education Facilities Construction and Financing Act (EFCFA), *N.J.S.A. 18A:7G-1 et seq.*; amendments to the EFCFA in 2007 created the School Development Authority (SDA) to provide financing and direct construction of school facilities projects in low-income districts, known as “SDA districts”; the PEPP program was approved by the SDA in March 2011 and money was allocated to fund emergent projects in the 31 SDA districts; applications for this funding were due by June 22, 2011; *N.J.S.A. 18A:7G-5(e)* and Department of Education (DOE) regulations both require that OSF make determinations on school facilities projects within 90 days of the receipt of a project application, and contain provisions for extensions of time up to an additional 60 days; the determinations on the PEPP projects at issue here came significantly later than 150 days after the application date; the approval process for projects designated by the OSF as emergent has yet to reach closure; and the OSF has not met its obligation to promptly issue Preliminary Project Reports (PPR) for these projects. The ALJ concluded that the process of approving the SDA district applications under the PEPP program was at odds with statutory and regulatory timeline requirements, and ordered the respondent OSF to issue PPRs within 30 days for each emergent project that it has advanced to the SDA as part of the PEPP program.

Upon full consideration, the Commissioner recognized that OSF has worked with the SDA and the districts to review a record number of proposed projects, but nevertheless found that respondent’s actions in this matter did not comply with the EFSFA. Accordingly, the Commissioner granted petitioner’s motion for summary disposition in part, and denied respondent’s motion. The Commissioner ordered that OSF issue PPRs for the projects at issue in this case no later than August 30, 2013.

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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June 13, 2013

OAL DKT. NO. EDU 7652-12
AGENCY DKT. NO. 115-4/12

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The gravamen of this controversy, brought by the Education Law Center (ELC) on behalf of the “Abbott v. Burke” school children of New Jersey, is the pace at which the respondent Office of School Facilities of the Department of Education (OSF) is advancing school facility improvement projects that have been designated by the OSF as emergent.¹ As the material facts do not appear to be in dispute, the respective parties have filed a motion and a cross motion for summary disposition. Adjudication of the matter requires analysis of certain provisions of the Educational Facilities Construction and Financing Act (EFCFA), *N.J.S.A.* 18A:7G-1 *et seq.*, and implementing regulations promulgated by the Department of Education.

As is explained in the Initial Decision of the Office of Administrative Law (OAL), the EFCFA was enacted as a result of the legislature’s recognition that New Jersey’s constitutional mandate to provide all students with a thorough and efficient system of education includes the responsibility to ensure that “students are educated in physical facilities that are

¹ Petitioner also asserts that the OSF did not provide proper notice to SDA districts of the progress and ranking of their respective applications to address emergent facility conditions. The Commissioner rejects that contention for the reasons articulated in the Initial Decision.

safe, healthy, and conducive to learning.” *N.J.S.A.* 18A: 7G-2(a). Amendments to the EFCFA in 2007 established the School Development Authority (SDA) to provide for the financing and construction of school facility projects in low income districts – which the statute refers to as “SDA districts.” *N.J.S.A.* 18A:7G-3. Although the legislature intended that the adequacy of all school facilities be assessed, it acknowledged that facility inadequacies “are greatest in the SDA districts where maintenance has been deferred and new construction has not been initiated due to concerns about cost.” *N.J.S.A.* 18A:7G-2(c). Thus, the EFCFA directed the State to:

promptly engage in a facilities needs assessment and fund the entire cost of repairing, renovating, and constructing . . . school facilities determined by the Commissioner of Education to be required to meet the school facilities efficiency standards in the SDA districts.
[*Ibid.*]

Finally, the Department of Education’s regulations have instituted procedures for expedited action on school facilities with emergent conditions. *N.J.A.C.* 6A:26-3.16 (e).

The OSF and SDA each bear responsibilities in the processing of school facility projects. This is so regarding both ordinary school facility projects and emergent projects – such as those at issue in the instant matter. After consideration of the record, the Initial Decision, the parties’ exceptions, and the EFSFA and its regulations, the Commissioner is constrained to concur with the Administrative Law Judge (ALJ) that the OSF fell short of its responsibility to speedily advance projects designed to remediate emergent conditions.

N.J.A.C. 6A:26-1.2 defines an emergent school facilities project as:

a capital project necessitating expedited review and, if applicable, approval, in order to alleviate a condition that, if not corrected on an expedited basis, would render a building or facility so potentially injurious or hazardous that it causes[sic]an imminent peril to the health and safety of student or staff.

N.J.A.C. 6A:26-3.16 (e) requires that review of applications for such emergent school facilities projects be effectuated within 45 days of their submission:

After approval of a school district's LRFP, a school district may, on a form provided by the Department, apply directly to the Division for approval of a school facilities project when an emergent condition exists.

1. The Division shall approve a school facilities project for an emergent condition only [when] after an on-site inspection, the county superintendent of schools, in consultation with the Division, certifies that an emergent condition exists.

2. If the existence of the emergent condition has been certified pursuant to (e)1 above, the school facilities project application shall be forwarded to the Division for review, pursuant to *N.J.A.C. 6A:26-3.3(a)* through (o), on an expedited basis. The expedited basis shall include Division acceptance of school district submission of the school facilities project application or a predevelopment request in the case of Authority managed projects, within 45 days of the date of such submission . . . The scope of work contained in the application shall be limited to those actions determined by the Division to be reasonable considering the emergent condition and the capital projects in the school district's approved LRFP. (Emphasis added.)

3. Preliminary eligible costs and final eligible costs for the school facilities project shall be determined consistent with this chapter.

N.J.A.C. 6A:26-3.16 (e).

The record² indicates that by way of a May 24, 2011 letter, the OSF and SDA invited all SDA districts to submit applications for emergent project implementation by June 22, 2011. It appears undisputed that by June 22, 2011, the SDA districts had submitted their applications for emergent construction projects.³ However, it was not until March 19, 2012 that the OSF sent forms out to the Department of Education's executive county superintendents asking them to verify in writing – pursuant to *N.J.A.C. 6A:26-3.16 (e)(1)* – that they had visited the sites of the emergent facilities projects proposed within their counties and had ascertained that emergent conditions did indeed exist. (Exhibit D to Piaia Certification) All but two

² Many of the facts relied upon in this case were presented by way of the certification of Bernard E. Piaia, Director of the OSF, and the exhibits attached thereto.

³ The Commissioner is not aware of any allegations in the record that suggest that the applications submitted to respondent on June 22, 2011 – in conjunction with the OSF and SDA's joint Potential Emergent Projects Program (PEPP) – were deficient, *i.e.*, that they did not include the detailed information required by *N.J.A.C. 6A:26-3.2(b)* or that the emergent conditions had not been included in the long range facilities plans (LRFP) which the OSF had approved.

executive county superintendents executed and returned the forms by the end of March 2012.⁴ (*Ibid.*) At that point, with the certifications having been made and the applications having been submitted, *N.J.A.C.* 6A:26-3.16(e) required respondent to accept (or reject) the applications for emergent construction projects no later than May 20, 2012. Nonetheless, it was not until July 2012 that respondent completed its project acceptances.⁵

Upon its acceptance of the seventy projects, respondent was required by *N.J.S.A.* 18A:7G-5(h) and *N.J.A.C.* 6A:26-3.16(e)(3) to identify the preliminary eligible costs. In addition, respondent was required – pursuant to *N.J.S.A.* 18A:7G-5(h)(2) and *N.J.A.C.* 6A:26-3.5(c) – to promptly prepare preliminary project reports (PPRs) for delivery to the SDA. A PPR includes a complete description of a project, including its location, the preliminary eligible costs, square footage for each identified project function, the project’s priority ranking, and contact information for the district representative. *N.J.S.A.* 18A:7G-5(h)(2); *N.J.A.C.* 6A:26-3.5(c). Receipt of a PPR allows the SDA to work with the local district to prepare detailed plans, specifications, schedules and estimated costs to present – along with its recommendations – to the Commissioner of Education for review and final approval. *N.J.S.A.* 18A:7G-5(h)(2)(i).

As of the date of the OAL’s Initial Decision in this matter – December 13, 2012 – the OSF had issued Preliminary Project Reports (PPRs) for only three of the approximately seventy projects which it had certified as emergent in April and July of 2012. Petitioner urges

⁴ The remaining two forms were executed on April 5, 2012.

⁵ Respondent’s letter notifying the SDA districts of its acceptance of their emergent project applications was entitled: “Pre-construction Activities Determination for Districts Required to Use the Authority to Undertake the Project Below, Pursuant to the Educational Facilities Construction and Finance [sic] Act . . .” (The “Preconstruction Letter”). (*See*, Piaia’s Exhibit E) In the Preconstruction Letter, respondent confirmed that the recipient district’s proposed emergent project was consistent with its LRFP and that the SDA would commence pre-construction activities. However, the Preconstruction Letter stated “this approval does not constitute either project or land approval.” (*Ibid.*)

the Commissioner to find that the OSF has violated the EFSFA and its regulations by not timely completing PPRs for the seventy emergent projects it has approved, and asks that respondent be ordered to issue all written determinations setting forth whether or not such projects will be approved as emergent – and reasons for such decisions – within thirty days.

In its exceptions, respondent argues that it is not required to issue a PPR until after the SDA has completed its preconstruction activities. For this proposition respondent points to *N.J.S.A. 18A:7G-5(f)(2)*, which states “the commissioner shall calculate the preliminary eligible costs [for an approved school facilities project] to equal the estimated cost as determined by the development authority.” That provision does appear on its face to suggest that respondent may wait until the SDA formulates its preconstruction plans, specifications, schedules and cost estimates before it prepares its preliminary cost estimates and PPRs. However, such an interpretation is inconsistent with other provisions of the EFSFA, and with the EFSFA’s clear legislative intent.

For example, as the ALJ pointed out, *N.J.S.A. 18A:7G-5(h)(2)* directs respondent to “promptly” prepare and submit a PPR to the SDA. *N.J.A.C. 6A:26-3.5(c)* also so directs. Second, examination of the required content of PPRs – as set forth in *N.J.S.A. 18A:7G-5(h)(2)* and *N.J.A.C. 6A:26-3.5(c)* – reveals that they are documents that are meant to be given to the SDA before the SDA has conducted its preconstruction activities.⁶ Such matters as contact

⁶ *N.J.S.A. 18A:7G-5(h)(2)* provides, in pertinent part, that respondent:

shall promptly prepare and submit to the development authority a preliminary project report which shall consist, at a minimum, of the following information: a complete description of the school facilities project; the actual location of the project; the total square footage of the project together with a breakdown of total square footage by functional component; the preliminary eligible costs of the project; the project's priority ranking determined pursuant to subsection m. of this section; any other factors to be considered by the development authority in undertaking the project; and the name and address of the person from the district to contact in regard to the project.

N.J.A.C. 6A:26-3.5(c) is worded similarly.

information for the district representative, the location of the school project, the project's priority ranking and a project description are items that the SDA would need before undertaking its preconstruction duties – not afterwards.

In addition, *N.J.S.A. 18A:7G-5(h)(2)(i)* clearly contemplates that the SDA will engage in its preconstruction activities, such as preparing detailed plans, specifications, schedules and estimating costs, after respondent provides it with PPRs:

Upon receipt by the development authority of the preliminary project report, the development authority, upon consultation with the district, shall prepare detailed plans and specifications and schedules which contain the development authority's estimated cost and schedule to complete the school facilities project. . . . (Emphasis added.)

[*N.J.S.A. 18A:7G-5(h)(2)(i)*]

Finally, as the ALJ explained, accepting respondent's interpretation of the EFSFA and its regulations would support a result contrary to the unambiguous legislative intent underlying the statute, *i.e.* the expeditious delivery of remediation to New Jersey's school facilities, especially to those in SDA districts. A project approval process pursuant to which the executive county superintendents are not asked to certify alleged emergent conditions until nine months after submission of the emergent facility remediation applications is not consistent with that legislative intent.⁷ Similarly, a project approval process which results in a more than 18 month stretch between the SDA districts' submission of emergent applications and the first issuances of PPRs also appears contrary to the spirit of the regulations and statute governing the emergent project program. Thus, the Commissioner agrees with the ALJ's conclusion that any possible incongruities between the language of *N.J.S.A. 18A:7G-5(f)(2)* and the other statutory

⁷ The Executive County Superintendents are not local or independent officers, but rather Department of Education employees. Thus, one would expect that respondent would promptly call upon them to visit sites for the purpose of determining whether emergent conditions exist. In the present case, the OSF could have sent the certification forms out to the executive county superintendents prior to March 19, 2012, nine months after the initial application was received.

and regulatory provisions discussed above must be resolved in a way that advances the EFSFA's legislative purpose of expeditious facility remediation. *State v. Brannon*, 178 N.J. 500, 507 (2004); *Schierstead v. City of Brigantine*, 29 N.J. 220 (1959).

Although the Commissioner recognizes that OSF has been working closely with the SDA and the districts to review this record number of proposed projects, nevertheless it is clear that respondent's actions in this matter did not comply with the EFSFA. Having so found, it is unnecessary to reach the constitutional question raised by petitioner. Petitioner's motion for summary decision is granted in part as indicated hereinabove and respondent's motion is denied. If OSF is still in need of information from the districts or SDA, it is instructed to obtain that information immediately and issue the remaining PPRs no later than August 30, 2013.

IT IS SO ORDERED.⁸

COMMISSIONER OF EDUCATION

Date of Decision: June 13, 2013

Date of Mailing: June 13, 2013

⁸ 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*).