

SB #46-01

IN RE THE ABBOTT V. BURKE :
IMPLEMENTING REGULATIONS :
ON SCHOOL FACILITIES, : STATE BOARD OF EDUCATION
N.J.A.C. 6A:26. : DECISION ON MOTION

For the Appellants, Education Law Center (David G. Sciarra, Esq. and
Jennifer Weiser, Esq., of Counsel)

For the Respondent, Michael Lombardi, Deputy Attorney General (John J.
Farmer, Jr., Attorney General of New Jersey)

On November 14, 2001, the appellants filed a notice of appeal to the Appellate Division challenging the final agency rules governing educational facilities, N.J.A.C. 6:26, which were adopted by the State Board of Education on September 5, 2001 and became effective on October 1, 2001. The appellants also filed a motion with the State Board seeking an order pursuant to R. 2:5-3(c)(2) to abbreviate the record by waiving production of a transcript of the proceedings and comments before the Department of Education in the adoption of N.J.A.C. 6A:26. The motion is opposed by the Deputy Attorney General representing the State Board in the appeal now before the Appellate Division.

Review of the pertinent court rule which specifies what must be included in the record in matters on appeal to the Appellate Division indicates that the appellants are not required to produce a transcript of the public comment sessions in order to proceed with their appeal. See Baer, et al. v. Leo Klagholz, Commissioner of Education and

State Board of Education, decided by the State Board of Education, November 4, 1998.

Rather, R. 2:5-4(a) specifies that:

The record on appeal shall consist of all papers on file in the court or courts or agencies below, with all entries as to matters made on the records of such courts and agencies, the stenographic transcript or statement of the proceedings therein, and all papers filed with or entries made on the records of the appellate court.

As we explained in Baer, supra:

The State Board's public comment sessions are not required to be part of the administrative rulemaking process by the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. ("APA"), and the State Board does not routinely transcribe these sessions. While tape recordings of the sessions are available, only written comments submitted to the State Board, either in conjunction with public comment or submitted separately, are required by the Administrative Procedure Act and are considered by our agency during the adoption process. [Footnote omitted.] In short, the record in an appeal from the adoption of administrative rules would not ordinarily include a transcription of the State Board's public comment sessions. Hence, there is no need for the State Board to direct that the transcript be abbreviated pursuant to R. 2:5-3(c) in order to relieve the appellants of an obligation to produce transcripts of the public comment sessions.

Similarly, R. 2:5-4 does not necessarily require the appellants to produce a transcript of the State Board meetings at which we considered the rules under challenge....

We therefore grant the appellants' motion to abbreviate the record.

Kathleen A. Dietz abstained.

January 2, 2002

Date of mailing _____