



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

REPORT AND RECOMMENDATION

OAL DKT. NO. EDU 8980-15

AGENCY REF. NO. 42-13/15

**IN THE MATTER OF THE BOROUGH
OF FREEHOLD BOARD OF
EDUCATION'S APPLICATION FOR AN
ORDER DIRECTING THE ISSUANCE
OF BONDS.**

Ronald J. Ianoale, Esq., appearing for applicant Borough of Freehold Board of
Education (McManimon, Scotland, Baumann, attorneys)

Record Closed: September 25, 2015

Decided: December 16, 2015

BEFORE **SUSAN M. SCAROLA, ALJ**:

STATEMENT OF THE CASE

Pursuant to the Educational Facilities Construction and Financing Act ("EFCFA" or "Act"), N.J.S.A. 18A:7G-1 to 48, effective July 18, 2000, a school district that has unsuccessfully sought to obtain voter approval for school facilities construction twice within a three-year period may apply to the Commissioner of Education ("Commissioner") for approval to issue school bonds for the local share of the project. Specifically, the statute authorizes the Commissioner to order issuance of such bonds if "the project is necessary for the provision of a thorough and efficient system of

education in the district.” N.J.S.A. 18A:7G-12. The Board of Education (“BOE” or “Board”) of the Borough of Freehold (“Borough”) has filed an application seeking to compel the Commissioner to direct the issuance of school bonds for a capital improvement project said to be necessary to fulfill the Borough’s constitutional mandate to provide a thorough and efficient public education to its students after two referenda failed to obtain voter approval.

PROCEDURAL HISTORY

On or about March 3, 2015, the Board petitioned the Commissioner for appropriate relief under the statute. On May 1, 2015, the New Jersey Department of Education’s Office of School Facilities (“OSF”) completed its review of the petition and determined that the petition contained the information necessary for the Board to seek an Order from the Commissioner directing the issuance of bonds.¹ The Commissioner then solicited written comments from any interested person to be filed by June 8, 2015.² On June 16, 2015, the matter was transmitted to the Office of Administrative Law (OAL) for determination as an uncontested case.³ N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The OAL held public hearings in the Park Avenue School in the Borough on September 24 and 25, 2015,⁴ during which the Board offered sworn testimony on the constitutional need for the bond issue. Once the Board’s proofs were completed, the

¹ The OSF also found that the proposed improvements were consistent with facilities efficiency standards.

² In accordance with the Commissioner’s instructions, the Board caused notice soliciting written comments to be published in a newspaper of statewide circulation, the *Star-Ledger*, on May 12, 2015, and in a newspaper of local circulation, the *Asbury Park Press*, on May 12, 2015, and to be announced at its public meeting on May 11, 2015. A breakdown of the written comments received was prepared by the Board: approximately 385 correspondents were in favor of the bond issue, 8 were neutral, and 15 were opposed.

³ An “uncontested case” is a proceeding designed to afford interested parties the opportunity to present their views; it includes rule-making and investigative hearings.

⁴ The Board arranged for notice of the hearing to be published in the *Star-Ledger* and the *Asbury Park Press* by July 24, 2015, and to be announced at its public meeting on July 20, 2015. Testimony commenced at noon on September 24, and at 9:00 a.m. on September 25, 2015.

hearing was opened to comments from the general public and remained open until all who wished to comment had the opportunity to do so. The record closed thereafter.⁵

FINDINGS OF FACT

Undisputed Facts

The Freehold Borough School District is a Type II school district educating students from pre-kindergarten to eighth grade. Its high-school students in grades nine to twelve are educated in the Freehold Regional High School District, which consists of seven constituent school districts. Besides Freehold Borough, the Freehold Regional High School District (“FRHSD”) consists of Colts Neck Township, Freehold Township, Howell Township, Farmingdale Borough, Marlboro Township, and Manalapan-Englishtown Regional school districts.

The Freehold Borough School District has been designated as a district factor group, or DFG, of “B.”⁶ Its board of education consists of nine elected-at-large residents of the Borough of Freehold. The school district consists of three schools—Park Avenue Elementary School, Park Avenue Middle School, and Freehold Learning Center—in two locations.⁷

In keeping with the requirements of the Facilities Law, the Board submitted a bond proposal and interpretative statement to the Borough’s voters on two different referendum dates. The bond proposals read, in part, as follows:

⁵ An extension of time was provided for the issuance of this Report and Recommendation.

⁶ The New Jersey Department of Education measures a school district’s relative socio-economic status with its DFG ranking system, based on the following six criteria: (1) percentage of adults with no high school diploma, (2) percentage of adults with some college, (3) occupational status, (4) unemployment rate, (5) percentage of individuals in poverty, and (6) median family income. The classifications are A, B, CD, DE, FG, GH, I and J, with a DFG of “A” having the lowest socio-economic status and “J” being the highest. It is significant that the other six districts’ DFG ratings range from “D/E” for Farmingdale (the next lowest) to “I” for Colts Neck and Marlboro Townships (the highest).

⁷ The elementary school and the intermediate school are in one location (Park Avenue Elementary/Middle School).

BOND PROPOSAL

The Board of Education of the Borough of Freehold in the County of Monmouth, New Jersey is authorized: (a) to undertake various improvements, renovations, and additions to the Park Avenue Elementary/Middle School and the Freehold Learning Center; (b) to acquire the necessary furniture and equipment as well as undertake any associated site work; (c) to appropriate \$32,902,400 for such improvements funded, in part, with debt service aid from the State of New Jersey at the rate of 66.89% of a project's eligible costs; (d) to issue bonds in the amount of \$32,902,400

The total final eligible costs for the proposed improvements approved by the New Jersey Commissioner of Education are \$18,702,011, consisting of \$14,969,163 for the Park Avenue Elementary/Middle School and \$3,732,848 for the Freehold Learning Center. The proposed improvements do not include school facility construction elements in addition to the facilities efficiency standards developed by the Commissioner of Education or not otherwise eligible for State support pursuant to N.J.S.A. 18A:7G-5(g).

Interpretative Statement

Aside from numerous health and safety improvements to each of the schools, the building additions at the Park Avenue Elementary/Middle School consist of classrooms, gymnasium, girls' locker room, library, and cafeteria. The Freehold Learning Center's building additions consist of new classrooms and a cafeteria addition.

The referendum was driven by the need, in part, for new space. For example, the new classroom space would have accommodated 429 "unhoused"⁸ students, as that term is defined in the EFCFA, based on the computation of the functional capacity of the three schools. The remaining improvements in the bond proposal consisted generally of health and safety upgrades to the two buildings' aging electrical and environmental systems.

⁸ "Unhoused students' means the number of students in excess of the functional capacity of a school facility." N.J.A.C. 6A:26-1.2. At the time that the petition was filed, the number of unhoused students was 429. That figure grew to 544 as of the date of the public hearings.

The first referendum was conducted on September 30, 2014. The vote was 273 in “favor” and 374 “against.” The second referendum was conducted on December 9, 2014. The vote was 241 in “favor” and 370 “against.”

At the Board’s meeting of January 29, 2015, it unanimously approved a resolution asking the New Jersey Commissioner of Education to request that the New Jersey Legislature authorize an appropriation to fund fully the bond proposal. The resolution also authorized, as an alternative remedy, that the Commissioner authorize the issuance of bonds in the amount of the failed referenda.⁹

The Board of Education adhered to the legal requirements in advancing its petition to have the Commissioner authorize bonds by taking the following actions:

- It adopted a resolution at its meeting of May 11, 2015, authorizing all “interested persons”¹⁰ to submit comments about the referendum and the proposed improvements to the New Jersey Department of Education, with copies to the secretary to the Board of Education. The comment period ended on June 8, 2015. This announcement was published in the *Asbury Park Press* and the *Star-Ledger* on or about May 18, 2015. At the end of the comment period, there were 408 submitted written comments; the overwhelming majority of the comments were in favor of the referendum. (See Exhibit P-3 for Summary of Written Comments.)
- After acknowledging receipt of the petition, the Commissioner of Education on June 16, 2015, transferred the matter to the OAL for assignment to an administrative law judge to serve as a fact-finder for the Commissioner of Education.

⁹ The statutory constructions of the two remedies being sought are not mutually exclusive, but, in some instances, could complement each other.

¹⁰ The term “interested persons” is used in the regulations that outline the procedures for a school district filing a petition with the Commissioner of Education to authorize bonds. This term, however, is not defined in the regulations. For the purposes of the petition, it was assumed that any resident, taxpayer, student or employee of the Freehold Borough School District qualified as an “interested person.” It was also assumed that any member of the public who has a student in the school district, regardless of his or her voting status, was also an “interested person.”

- At its meeting of July 20, 2015, the Board of Education adopted another resolution establishing the meeting dates and times for the evidentiary hearings. The Board also caused this information to be published in the *Asbury Park Press* and the *Star-Ledger*, which it was on or about July 24, 2015.

Testimony and Documentary Evidence

The Board presented the following documents and testimony.

Dr. Rocco Tomazic, the superintendent of schools for the Borough, testified that the students are not getting a thorough and efficient education because of extreme overcrowding and the inability to provide adequate instruction. Based upon the physical facilities required by the statute, pre-kindergarten to fifth grade should have 125 square feet per student, and grades six to eight should have 134 square feet. The Borough has a current capacity of 1,148 students, and as of April 4, 2015, 349 students were unhoused. As of the date of the hearing, 1,700 students were enrolled, for a total of 552 unhoused students. If the classrooms rented in Freehold Township by the Board were considered as available space, the total unhoused student population would be reduced to 365 students, still a significant percentage of the student population.

The Borough is a “high-poverty” district, with 76.7% of the students qualifying for free or reduced-cost lunch. At least 40% of the student population is considered at risk. As a high-poverty district, the class sizes cannot exceed 21 students in grades kindergarten through three; 23 students in grades four and five; and 24 students in grades six through eight. N.J.A.C. 6A:13-3.1(b). As of the hearing date, grades kindergarten through third grade had 79% of classes above the limit (26 of 33); grades four and five had 77% of classes above the limit (10 of 13); and grades six through eight had 14% above the limit (15 of 105). These statistics did not include health, gym, music or art classes. The goal would be to improve class size in order to improve literacy and mathematical skills.

When Dr. Tomazic arrived at the district approximately two years ago, the district was not able to provide the 150 minutes per week of health and physical education required by statute. This was changed, but caused great strain on accommodating the master schedule. Nor was the district able to provide sufficient technology skills so that students met the curricular goal of technological literacy by the end of eighth grade. In 2013, the proficiency of the Borough's eighth graders was 37%. Following reestablishment of a middle-school technology lab and the hiring of a technology teacher, the level rose to 86.8%, but at the cost of other programs.

In order to fit all the students into the school, the administration made unacceptable degradations to the educational programs. Gym had been cut below the legal limit, technology was gutted, and the library space was shut down and converted to other support roles. This affected all the students. Lunch had to be started at 10:30 a.m. to accommodate the overcrowding.

Dr. Tomazic noted that the eighth grade had no library or media center. Art and music were taught by the use of a cart that was wheeled from classroom to classroom. There was one library for the whole district; there was no middle-school library, and only minimally functioning elementary school libraries. At the Park Avenue School, there was no library because it was used for instruction. All academic areas were impacted by the lack of space.

Dr. Tomazic noted that there was not enough staff for the special-education students, and resource-room pull-out could not be covered 100%. Dr. Tomazic found that instructional minutes for language arts and math for special-education students was unusually low, particularly since the assessment scores on the NJASK were well below the State average and even below the average of all DFG B districts. The correlation between that and the lack of space was unsettling. The schools simply did not have enough space to conduct all the resource replacement required for these students. All the classrooms were full. The only thing left would be to have instruction in the hallways and closets. The middle school has been designated as a Focus School because of the wide gap between general and special-education performance.

Bilingual programs were suffering as well. The regulations require two periods of English as a second language (ESL). Hispanic students represent 72.3% of the district,¹¹ and 16.7% of students require bilingual and ESL classes, but the district is only able to offer one period and struggles to find the space for that. The NJASK showed many students with limited English proficiency. The Borough did not meet Annual Measurable Achievement Objectives (which measures individual student proficiency in English) for two years, and is now in a corrective-action plan to improve this area.

For basic skills, the Borough is a high-needs district as defined by the statute. Requirements need to be met in literacy and mathematics. The district has no basic-skills teachers devoted to mathematics at the elementary school level as the result of a lack of space.

Borough students leave the district to attend the FRHSD. The resource disparity among the districts feeding into the FRHSD is reflected in the disparate academic achievement of Borough students as they continue to secondary education. The amount of money spent on students at the elementary level within the high school district ranges from \$11,846 per student in Freehold Borough to \$22,345 per student in Colts Neck. Poverty and language barriers, when combined with the large class sizes, disproportionately impact many students, particularly Hispanic children. The FRHSD opportunity index for honors classes, advanced-placement classes, and the International Baccalaureate, has the Borough in last place. It is unfair to students who leave the Borough's elementary-school system to attend the regional high-school system and have to try to compete with students who have had substantially more educational opportunity provided in their elementary schools.

Without the requested relief of bonding for additional classroom space and mechanical upgrades, the Borough schools may be compelled to have split sessions:

¹¹ Most of the students are American citizens.

this would further reduce instructional time, but would also adversely impact families who reside within the Borough.

Even with improvements, the Borough schools would still be short of space, but the proposed improvements are essential to the educational progress of the students. Their needs must come first, as the alternative to providing these services would fail both the students and the community.

In formulating its school-improvement plans, the Board also took into consideration projections for population growth, which have consistently underestimated the number of children who would be attending school within the district. Based on a demographic study in 2013, enrollment for the 2014–2015 school year was estimated to be 1,579 students. Actual enrollment as of December 2014 was 1,638 students, or 59 more than anticipated. A similar enrollment disparity had occurred the previous school year, where the demographic study had estimated 1,515 students, but 1,586 students were enrolled as of May 2014, a difference of 71 students. Elementary-school population is expected to continue to grow in the Borough in coming years, as the community's student population comes from sources other than live births, the methodology used by the New Jersey Department of Health and Senior Services to estimate population growth.

Ted Hopkins, the AIA architect, testified that he prepared the schematic drawings for the improvements to the school facilities. The improvements to the Learning Center include classrooms, technical upgrades, utility upgrades, fire alarm, public-address system, and gas service (to replace the electric heat). The Park Avenue Elementary/Middle School would have a library, a gymnasium, and classrooms. Other technical improvements would also be made.

Hopkins testified that as to the Learning Center, the design that was selected was the one that offered the maximum amount of space at the least cost and least loss of outside area. The fire-alarm system is forty years old and needs to be modernized. Additional cafeteria space was created to handle the new classrooms. The Park Avenue Elementary/Middle School plans were designed to afford the additional

classroom space and additional cafeteria space with minimal impact upon the existing structures, with modernization of the utilities.

Fiscal Projections

The Board of Education retained the independent financial advisory firm of Phoenix Advisors, LLC, to project the tax increase of a \$32,902,000 bond issue. Phoenix Advisors, LLC, is an independent financial-advisory firm registered with the United States Securities and Exchange Commission to assist municipalities and school districts with their financial projections.

Phoenix Advisors updated its projections on September 18, 2015 (just prior to the hearings). Based on a residential property assessed at \$250,499—which is the average assessed valuation of a real property in the Borough of Freehold in 2015—Phoenix Advisors projected an average annual property-tax increase of \$279.38 given the following assumptions:

- (i) Blended debt service aid rate of 38.02%;¹²
- (ii) 30-year bond term;
- (iii) projected fixed annual interest rate of 4.00%;
- (iv) 2015 total assessed valuation of the Borough of Freehold in the amount of \$1,029,213,400; and
- (v) no increase in the Borough's total assessed valuation for the 30 year bond term.

(See Exhibit P-4 for “Analysis of Tax Impact—Summary.”)

¹² In the case of new construction, even though Freehold Borough School District is entitled to receive 66.89% of debt-service aid, the Facilities Act only provides that percentage of aid on \$143/square foot for new construction. The actual cost for new construction under current market conditions is twice that amount, thus reducing the debt-service aid percentage by approximately one-half. See N.J.S.A. 18A:7G-3, “area cost allowance.” This explains generally why the Freehold Borough School District is only receiving a “blended” debt-service rate of 38.02%, because approximately one-half of the proposed improvements are for new construction. The “blended” debt-service rate was calculated as follows: 66.89% (DAP) of \$18,702,011 (eligible costs) = \$12,509,775 (funded aid amount). The ratio between the funded aid amount of \$12,509,775 and the bonds to be authorized of \$32,902,400 is 38.02%.

The fiscal analysis also considered the effects of the repealed provisions for the 55% Districts in the Facilities Law. Phoenix Advisors calculated the tax projections for the average assessed valuation if the Freehold Borough School District were to receive aid on 66.89% of its proposed new construction instead of 66.89% on \$143 per square foot. This computation was based on the same assumptions as the bond issue for \$32,902,000 in the P-4 exhibit. It was estimated earlier that the Freehold Borough School District lost almost \$9.5 million of facilities aid as a result of the repeal of the 55% Districts provision. Phoenix Advisors was asked to compute a new average annual property-tax increase if the school district were to issue \$9.5 million fewer bonds, or \$23,402,000.¹³ That amount is \$198.41. (See Exhibit P-5.)

Public Comment/Testimony

Public comment came in writings submitted to the Commissioner in June, and with public testimony at the hearings. Members of the public who testified included resident taxpayers, present and former students, teachers, Board members, Latino Action representatives, and a legislator. Almost everyone agreed that the lack of space and overcrowding in the schools was severe and affected learning. Generally, criticism was focused not on the need to improve the schools and to alleviate overcrowding, but rather on the source of funding for the project. Most commentators and witnesses thought the Legislature should appropriate more funds for the non-Abbott school districts: it was not fair for the Borough—a district in such need and with such a limited tax base—to have to pay such a large percentage of the costs when Abbott districts were 100% funded.¹⁴

¹³ Phoenix Advisors was not asked to take 66.89% of \$32,902,000 because the Facilities Law requires non-SDA districts to measure their district aid percentage against \$143 per square foot for new construction. If, however, the commissioner of education were to ask the legislature to approve a supplemental appropriation, as still permitted for a “B” DFG district under N.J.S.A. 18A:7G-5(k), then the Borough of Freehold taxpayers would receive the same economic benefit that the 55% Districts did before this provision was repealed. If such appropriation was approved by the legislature, the commissioner would be faced with authorizing no more than the balance of the bonds required to fully fund the two failed referenda, or \$23,402,000.

¹⁴ In a sense, the commentators felt that the Borough was being penalized for the Herculean efforts made by the teachers and professional staff to provide educational services to the Borough’s children.

Senator Jennifer Beck noted her efforts to try to obtain funding in the Legislature to pay for more of the cost of necessary school improvements. While Abbott districts get complete funding, and more affluent districts also get State aid, the aid for districts such as Freehold Borough—where the need is just as great or greater—is limited. She noted that teachers in the school had taken salary decreases to avoid layoffs, and that the residents were aware of how committed their teachers were to education. The State needed to do the right thing and to allow for school expansion with adequate funding.

Dr. Michael Lichardi, president of the Freehold Elementary School Board, is a conservative on fiscal issues, yet recognized that the district was “running on fumes” and that the quality of the school system has an impact on property values. He felt that taxpayers were asked to do more than elsewhere, but he did not want to see the district fail. Homeowners cannot allow the system to collapse, and residents will suffer if the school fails. He acknowledged that some commentators suggested that some children should not be educated, but opined that marginalizing all children by not supporting education would only result in urban blight.

Linda McCarthy, a special-education teacher in the district and president of the Freehold Borough Education Association (an affiliate of the New Jersey Education Association), testified that she supported the issue because of the impact it would have on the children. She said the children trip over each other; lockers are shared among two or three students; library, art and music come into class on a cart. Third-graders share a gym with eighth-graders. The students had no technology class to go to. Teachers had no privacy to speak with parents. Other teachers and parents agreed as to the conditions within the schools. They noted that it is even more difficult for special-education students, who, when there is no room for push-in support, are kept in the same classroom with two groups of students and two teachers, making more noise, so the students are less able to concentrate.

Other residents and taxpayers, such as Lynn Reich, Ron Reich, and Patricia Koloski, emphasized the need to stabilize property values and to educate all the children residing within the borough. While all felt that other communities and the State should contribute to Borough (the county seat), the net opinion was that this was not

going to happen, and that the Borough must take care of all of its students. Others noted that the tax burden would be passed along by landlords, and that those who may not be homeowners nevertheless would be paying their share of taxes when they paid rent.

Several representatives of the Latino Action Network spoke, and noted that most of the Borough's Hispanic students are American citizens and deserve to be educated. The overcrowding has been more than a decade in the making. The impact on the children affects their future. The cost to the average homeowner would be \$5 per week, and children are worth much more than this. It is so hard to learn in an overcrowded classroom and the future of these children is at stake. Again, all felt that more State assistance is required. If deprived in elementary school, it is unlikely that the difference for the students could ever be made up later.

Negative comments about the proposed bond issue concerned the probable increase in taxes, particularly for those on a fixed income and senior citizens; the alleged overcrowding of homes by landlords, which led to overcrowding in the schools; the need for charter schools to take some of the students out of the schools; the overturning of the vote against the will of the people; the cost of the project; the alleged failure of some persons in the borough to pay taxes because of their status; the failure to use or rehabilitate other older buildings within the borough for use as schools; and the failure of the State and the federal government to address the underlying issues that caused this situation to occur.

Gianna Dellomo thought that the plans were too expansive and should be reduced. She wanted a cost-effective approach to improve the schools. Sharon Shutzer felt that the problem was not the fault of the Borough, the Board or the schools, but that the problem was created by the State and the federal government, and that they should take responsibility. The Borough has not been treated fairly. She wants the children to have classroom space, but the Borough and its taxpayers cannot afford this project. Ronald Griffiths pointed out that because it is the county seat, the Borough has much property that is not taxed, and that its revenue stream has been decimated by the

State. The Borough has been shortchanged with declining State aid; the State should pay for these school improvements, not the taxpayer.

Rebuttal

In rebuttal, Dr. Tomazic noted that there was no evidence of students being driven into the Borough to go to school, or of overcrowding in homes, as they are constantly checked and inspected by the Borough. The old buildings that were suggested to be used as schools might have provided a few classrooms, but only after extensive renovation and retrofitting in order to be compliant with modern code and access requirements. It was more cost effective and efficient to add on to the buildings they had, as the proposed plans indicated. The proposed improvements were reviewed by the State and found to have no "excess costs." Dr. Tomazic recognized the inequity of the current funding formula, but that is the law. The Board did make a formal request through the Commissioner for increased state aid, but no response and no additional funding have been forthcoming.

Personal Observations

Prior to the hearings, I was able to tour the school facilities and to observe firsthand the extreme overcrowding. In multi-purpose rooms, classrooms had been created on the stage. Noise from students in the cafeteria and lunch preparation in the cafeteria interfered with studies. In the Learning Center, students were learning in an open environment. Lessons from one class could be heard in another. Students had to keep their voices low to avoid interference with other classes. Teachers tried to instruct in small groups for resource support, but the diversions were multiple. People were walking by, and the noise level was high in spite of efforts to contain it. Generally, it did not seem conducive to effective learning. Indeed some of the student and teacher witnesses later commented on this at the hearings. One student was being offered support by a teacher at a desk in the hallway. The library was almost non-existent and technology assistance was limited. Without a doubt, these schools are severely overcrowded.

Findings

I accept the testimony and the documentary evidence presented by the Borough as fact. I **FIND** that compelling evidence establishes that the Park Avenue Elementary/Middle School and the Learning Center are severely overcrowded and that such overcrowding seriously impedes and has impeded the ability of the students, both general-education students and special-education students, to access their education and to achieve the core-curriculum objectives. Despite the concern of and resentment by some residents over the anticipated expense of the improvements, most of the citizenry and residents acknowledged the serious problem of overcrowding confronted by the Borough and the Board, and the deleterious effect this has had on all of the children of the district and their educators.

LEGAL ANALYSIS AND CONCLUSION

The issue presented is whether the Commissioner of Education should direct the issuance of school bonds in the amount of \$32,902,400 for a capital improvement project said to be necessary to fulfill the Freehold Borough's constitutional mandate to provide a thorough and efficient public education to its students after two referenda failed to obtain voter approval.

General Background Information

Long before adoption of the EFCFA, New Jersey courts declared the State's responsibility to ensure that children receive the "thorough and efficient system of free public schools" guaranteed under the State constitution. N.J. Const., Art VIII, § IV, ¶ 1. As early as 1966, the New Jersey Supreme Court recognized the Commissioner's broad authority to review local budgetary decisions and ascertain whether the amount fixed is sufficient to satisfy minimum educational standards for the mandated thorough and efficient education. Bd. of Educ. of E. Brunswick v. E. Brunswick Twp. Council, 48 N.J. 94 (1966) (Commissioner has power to reject annual school budget and direct an increase over the amount fixed by the governing body); see also Bd. of Educ. of Elizabeth v. City Council of Elizabeth, 55 N.J. 501 (1970) (Commissioner has power to

reject operating budget and restore cuts where the budget proposed by the school board was rejected by voters).

In the case of In re Upper Freehold Regional School District, 86 N.J. 265 (1981), the New Jersey Supreme Court dealt with the specific issue of the Commissioner's affirmative duty to order issuance of school bonds to alleviate unsafe or unhealthy building conditions. Deteriorating conditions were found to exist at the high school in Upper Freehold, among which were sagging roof planks, water leakage onto ceiling tiles, short-circuited electrical systems, slippery floors, and danger from shattering glass. Citing Robinson v. Cahill, 62 N.J. 473, 520 (1973), the Court reiterated that the obligation of the State to fulfill its constitutional duty extends to capital expenditures as well as current operating expenses. Upper Freehold, supra, 86 N.J. at 275. Since deteriorating building conditions made delivery of minimally acceptable education "inadequate and inefficient, if not impossible," the Court held that "those conditions contravene the constitutional right of the students to a thorough and efficient education and justify invocation of the power of the Commissioner to vindicate that right." Id. at 278. Consequently, the Court concluded that, "after voter rejection, the Commissioner may authorize the issuance of bonds for a capital project for a public school." Id. at 279. Abundant precedent, therefore, allows the Commissioner to intervene in local budgetary affairs when necessary to protect school children from unsafe or dangerous building conditions.

In 1998, the Court had opportunity to reassert these fundamental principles. Confronted with crumbling and obsolete school buildings in such grave state of disrepair as not only to prevent children from receiving a thorough and efficient education but also to threaten their health and safety, the Supreme Court upheld an ambitious State plan to finance the construction and repair of school facilities. Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V"). While Abbott V arose in the context of disadvantaged school districts with special needs, the basic right to a thorough and efficient education belongs to every child attending public school in this state.

Against this backdrop, the Legislature enacted the EFCFA to help school districts finance construction costs of providing a through and efficient education, including

“ensuring that children are educated in physical facilities that are safe, healthy, and conducive to learning.” N.J.S.A. 18A:7G-2(a). The EFCFA represents “the largest, most comprehensive school construction program in the nation.” Lonegan v. State, 174 N.J. 435, 458 (2002). Realizing that “educational infrastructure inadequacies are greatest in the Abbott districts,” the Legislature nevertheless acknowledged that

[i]n other districts, the State must also identify need in view of anticipated growth in school population, and must contribute to the cost of renovation and construction of new facilities to ensure the provision of a thorough and efficient education in those districts.

[Id. at 458–59 (quoting N.J.S.A. 18A:7G-2(c)).]

To effectuate its goals, the EFCFA designated the New Jersey Economic Development Authority (“EDA”) as the State agency responsible “for the financing, planning, design, construction management, acquisition, construction, and completion of school facilities projects.” Id. at 459 (quoting N.J.S.A. 18A:7G-13(a)). Moreover, the act established a formal mechanism for the Commissioner to review school-facilities projects rejected by voters at two elections. N.J.S.A. 18A:7G-12 provides, in pertinent part:

A district . . . that sought approval . . . of a school facilities project without excess costs but failed to receive that approval, and within the three years prior to that, sought and failed to receive approval of that school facilities project with or without excess costs, may submit the project to the commissioner and request that the commissioner approve the project and authorize the issuance of school bonds for the local share of the project. Upon receipt of the request, the commissioner shall review the school facilities project and determine whether the project is necessary for the provision of a thorough and efficient system of education in the district. If the commissioner concludes that the project is necessary, the commissioner may approve the project without excess costs and authorize the issuance of school bonds to fund the local share.

As expressly stated, the Commissioner can only approve a construction project “without excess costs.” The EFCFA defines “excess costs” to mean “the additional

costs, if any, which shall be borne by the district, of a school facilities project which result from design factors that are not required to meet the facilities efficiency standards.” N.J.S.A. 18A:7G-3. Effective November 21, 2000, the Commissioner adopted facilities efficiency standards constituting the characteristics of instructional spaces, specialized instructional areas, and administrative spaces that are educationally adequate to support the achievement of the core-curriculum content standards. 32 N.J.R. 4473(a) (Dec. 18, 2000).

Since all of the improvements proposed by the Board comply with, but do not exceed, the parameters set by the facilities efficiency standards, the project does not involve any “excess costs.”

In In re Application of the Board of Education of the Township of Clark for an Order Directing Issuance of Bonds pursuant to N.J.S.A. 18A:7G-12, No. 261-03, Comm’r (June 2, 2003), <<http://www.nj.gov/education/legal/commissioner/index.html>>, the Commissioner affirmed the findings of the administrative law judge (“ALJ”) that renovations and repairs were necessary for the board’s high school, and that the capital project for which the board sought the issuance of school bonds was necessary in order for the board to continue to provide its students with a thorough and efficient education. The Commissioner authorized the board to prepare for the issuance of bonds in the amount of \$19.2 million to fund the local share of the project.

The Commissioner also followed the recommendations of the ALJ to deny bond issuance in the amount of \$12.2 million to construct additions to two elementary schools, finding that the board did not demonstrate how the overcrowding had affected student performance or compromised the board’s ability to provide a thorough and efficient education.

In In re Application of the Board of Education of the Borough of Milford for an Order Directing Issuance of Bonds pursuant to N.J.S.A. 18A:7G-12, No. 427-08, Comm’r (Oct. 24, 2008), <<http://www.nj.gov/education/legal/commissioner/index.html>>, the Commissioner concurred with the ALJ’s recommendations that the board’s facilities were in desperate need of repair to address core health, safety and security issues, and

that the capital project for which the board sought issuance of school bonds was necessary in order to continue to provide its students with a thorough and efficient education. Accordingly, the Commissioner ordered and authorized the board to prepare for the issuance of bonds in the amount of \$800,000 to fund the local share of the project.

In the matter presented here, a distinction can be drawn between the determination in Clark to deny issuance of bonds for school expansion. The Board has presented evidence not just of severe overcrowding which has resulted in hundreds of unhoused students—which overcrowding is anticipated to continue—but also has shown the effect the overcrowding has had on the ability of the students to access their education. Classes have been limited; instruction has been curtailed. The Board is in a corrective-action plan for bilingual students not meeting English proficiency, and the middle school is a focus district because of the disparity between special-needs students and general-education students. As these students enter the regional high-school district, their achievement is the lowest of all schools feeding into the District.

Insofar as the Commissioner accepts the recommended findings that the school district is severely overcrowded, which condition has affected and will continue to affect the students' ability to access their education and to meet core-curriculum content standards, and which condition is anticipated to be ongoing, and that capital improvements to the schools are necessary to provide the children of the Borough with a suitable environment conducive to learning so that the students (both general-education and special-needs) can receive the thorough and efficient education to which they are constitutionally entitled, I **CONCLUDE** that the Commissioner should permit the Borough to issue bonds in the amount of \$32,902,400.¹⁵

¹⁵ The total final eligible costs for the proposed improvements would be \$18,702,011, consisting of \$14,969,163 for the Park Avenue Elementary/Middle School and \$3,732,848 for the Freehold Learning Center, but the exact amounts would be determined after receipt of the State's contribution.

RECOMMENDATION

It is recommended that the Commissioner order issuance of bonds totaling \$32,902,400 by Freehold Borough to fund improvements, renovations and repairs necessary to provide a thorough and efficient education to the students of the Freehold Borough School District.

I hereby **FILE** my report and recommendation with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

December 16, 2015

DATE



SUSAN M. SCAROLA, ALJ

Date Received at Agency:

December 16, 2015

Date Mailed to Parties:

APPENDIX

WITNESSES

Testimonial Witnesses:

1. Dr. Rocco Tomazic
2. Ted Hopkins, AIA

Opportunity for Public Comment:

1. Nick Palumbo
2. Daniel M. Savino
3. John LaRosa
4. Dr. Michael Lichardi
5. Linda McCarthy
6. Lauren Filipek
7. Deborah O'Melia
8. Diane Dispenza
9. Susan Greitz
10. Kevin Coyne
11. Yeimi Hernandez
12. Joan O'Doud
13. Lynn Reich
14. Ron Reich
15. Patricia "Donna" Koloski
16. Joan Leuth
17. Olivia Edmunds
18. Reimer Leuth
19. Gianna Dellomo
20. Ursula Hurley
21. Joseph Santocita
22. Sharon Shutzer
23. Rita Gravatt

24. Ronald Griffiths
25. Lazaro Cardenas
26. Patrick Martinez
27. Adam Pacheco
28. Frank Argote-Friyre
29. Katherine Mulholland
30. Jean Holtz
31. Senator Jennifer Beck
32. Charles Jewell
33. Gary Corliss
34. William Edwards
35. Joseph Hemphill
36. Denise Furlong
37. Marguerita Dentino
38. Ronnie Dougherty
39. Jillian Lazaro
40. Alyssa Townsend
41. Robert Mututis
42. Becky Axtell
43. Dina Levine