State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

33 Washington Street
Newark, NJ 07102
(973) 648-6008

A copy of the administrative law judge's decision is enclosed.

This decision was mailed to the parties on DEC 14 2012

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 07652-12
AGENCY DKT. NO. 115-4/12

EDUCATION LAW CENTER ON BEHALF OF ABBOTT V. BURKE PLAINTIFF SCHOOL CHILDREN,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FACILITIES,
Respondent.

David Sciarra, Esq. (Education Law Center, attorneys) and **Marika Maris**, Esq. (White and Case, attorneys), for petitioner

Melissa T. Dutton, Deputy Attorney General, for respondent, (Jeffrey S. Chiesa, Attorney General of New Jersey, attorney)

Record Closed: September 20, 2012 Decided: December 13, 2012

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, Education Law Center (ELC), seeks an order, on behalf of the Abbott v. Burke school children, requiring the respondent, New Jersey Department of Education, 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). OSF replies that it has reviewed all PEPP program applications in a manner consistent with law and regulation, and that accordingly, the petition of appeal should be dismissed.

PROCEDURAL HISTORY

ELC filed its petition of appeal with the Commissioner of Education (the Commissioner) on April 25, 2012. OSF filed its answer on June 6, 2012, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on June 8, 2012. ELC filed a motion for summary decision and accompanying brief and certification on July 5, 2012. OSF filed a cross-motion with accompanying brief and certification on July 24, 2012. ELC replied via letter memorandum filed on August 7, 2012. Oral argument was heard on September 20, 2012, at which time the record closed.

FINDINGS OF FACT

I **FIND** that the material facts are not in dispute. ELC is a non-profit organization that, since 1981, has served as counsel in the Abbott v. Burke cases for the class of children who attend school in thirty-one poor or urban school districts. OSF is the office within the Department of Education (DOE) responsible for reviewing and approving school facility projects, including emergent projects, under the Education Facilities Construction and Financing Act (EFCFA). N.J.S.A. 18A:7G-1 et seq. In 2007, amendments to the EFCFA created the School Development Authority (SDA) to provide financing and direct construction of school facilities projects in low-income districts, which were denoted as "SDA districts." N.J.S.A. 18A:7G-3.

The Department of Education approved long-range facilities plans (LRFP) for each of the SDA districts, as required by N.J.S.A. 18A:7G-4; individual facilities projects, including emergent projects, are then approved by OSF in conjunction with the SDA. See N.J.A.C. 6A:26-1.1. At the SDA meeting on March 2, 2011, the PEPP program was approved, through which $100 million was allocated to fund emergent projects in the 31 SDA districts. Via letter dated May 24, 2011, OSF and the SDA notified the districts that "[t]ogether the [SDA] and the New Jersey Department of Education are launching our second extensive State-wide effort since 2007 to identify and evaluate eligible emergent projects in over 475 school facilities." (Piaia certification, Exhibit A.) Districts were advised to complete application materials on or before June 22, 2011. They were reminded that an emergent project means, in accordance with N.J.A.C. 6A:26-1.2:

> 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 cause an imminent peril to the health and safety of student or staff. (Emphasis in original.)
>
> [(Piaia certification, Exhibit A.)]

The letter to districts noted that funding was limited, and would "not be sufficient to address all emergent needs in the 31 SDA districts." The districts were advised to complete and return a spreadsheet that listed all health and safety capital maintenance projects that each believed were emergent conditions. In an effort to facilitate the submission process, an open telephone conference call was held on June 9, 2011, during which the process was reviewed and questions answered.

OSF received responses from each of the 31 SDA districts; twenty-eight of them identified a total of 716 emergent projects. OSF responded by scheduling on-site visits in or about September 2011 to review those projects identified as requiring additional research and assessment. Of the 716 identified projects, OSF undertook further review of only 320 of them; characterizing these as projects placed on the "short lists." During

the review process some additional projects were added to district lists for consideration.

In January 2012, ELC, through its executive director, wrote to OSF Director Bernard Piaia expressing concern that districts had received no explanation why certain projects were not being actively considered by the DOE. The letter urged that these districts were entitled to "a written determination or explanation of reasons, before eliminating a significant number of potential emergent projects from review and final consideration." Moreover, ELC urged that even as to the projects on the "short lists," OSF had yet to make final approval determinations. ELC stressed that these proposed projects sought to remediate conditions that directly impacted the health and safety of thousands of students, teachers, and staff in the SDA districts. This letter received no reply.

On March 12, 2012, OSF and the SDA sent a joint letter providing each district with the results of the project reviews. (Piaia Exhibit C.) Projects were classified as Routine and/or Required Maintenance (RRM); Potential Capital Maintenance Project (CMP); Potential School Facilities Project (SFP); or Potential Emergent Project (EP). The letter stated unequivocally that any condition that was not classified as EP "has not been deemed to be emergent." (Piaia Exhibit C.) Nowhere does the letter describe the process or timelines for a formal appeal of an OSF and SDA determination as to emergent status, although it does offer an opportunity to comment or request further consideration. Only seven districts took advantage of the opportunity to seek further consideration, and no changes were ultimately made to the project classifications. The March letter explained that the DOE would advance each proposed project to the SDA via a Pre-Construction Letter to the district superintendent, and that projects would proceed in accordance with specified priorities; to wit, fire-safety issues, followed by structural, HVAC, and electrical issues. Executive County Superintendents signed-off on the proposed emergent projects in late March 2012.

In April 2012, ELC again communicated with Piaia. Its executive director urged that the March 12, 2012, letter did not approve or disapprove the proposed projects with sufficient finality, writing:

> The March 12 letters do not, on their face, comport with the applicable regulations, which require the DOE, upon certification of an emergent condition, to approve the project as emergent and issue a final determination, on an expedited basis, of preliminary eligible project costs . . . . Indeed, such approvals and final determination by your Office are necessary for submission of a preliminary project reports to the SDA, a prerequisite for the SDA to promptly repair and complete emergent projects in SDA districts . . . .
>
> [(Exhibit E to petition.)]

He threatened legal action if final determinations were not forthcoming. Again, ELC's correspondence received no reply.

Thereafter, OSF issued twenty-seven Pre-Construction Letters in April and May 2012, advancing twenty-eight of the projects classified as EP. An April 18, 2012, letter to Cami Anderson, State Superintendent for the Newark School District, is representative. It advises that her district has received approval "to advance all pre-construction activities necessary to advance the identified emergent project." (Piaia Exhibit E-1.) The letter specifies that "[t]his approval gives authorization to proceed with [pre-construction] Activities, **but this approval does not constitute either project or land approval.**" (Emphasis in original.) On July 18, 2012, OSF issued an additional forty-two Pre-Construction Letters for the remaining projects classified as EP. Piaia notes that along the way, several projects were withdrawn by districts; for example, on July 19, 2012, the Harrison district confirmed a proposed roofing project could be removed from the EP list because the work had been completed by the district. Ultimately 70 EP projects remained viable; Piaia has certified that all of these projects have been advanced to the SDA to undertake the necessary pre-construction activities.

According to Piaia, Preliminary Project Reports (PPR) are issued by OSF upon SDA's completion of pre-construction activities and submission of a completed school

facilities project application. The PPR contains the scope of the work to be completed and the preliminary estimated costs of the project. As of the date of Piaia's certification, three PPRs had been issued to the Newark School District. Determination of final eligible costs and issuance of a Final Project Report (FPR) occurs after bids are received for the construction projects and final eligible cost recommendations are received from the SDA.

CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, supra, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-

sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts which require a plenary hearing.

The arguments made by ELC are compelling. The SDA districts were invited to identify emergency projects in May 2011, more than a year ago. The approval process has not culminated in completed repairs to date, even as to the 70 projects that have been advanced to the SDA for pre-construction activities. Since by definition an emergency project is one that is "so potentially injurious or hazardous that it causes an imminent peril to the health and safety of student or staff," such a painfully slow process, on its face, defies logic. ELC goes further than that; asserting that the process defies the requirements of the "thorough and efficient" clause of the New Jersey Constitution. N.J. Const. art. VIII, § 4.

The claims raised by this petition require an analysis of whether the OSF response to the SDA district applications complied with the requirements of the EFCFA, N.J.S.A. 18A:7G-2, et seq., and its implementing regulations. N.J.A.C. 6A:26-1.1 et seq.[1] The legislature has recognized that the constitutional mandate that New Jersey school children receive a thorough and efficient free public education includes the assurance "that students are educated in physical facilities that are safe, healthy, and conducive to learning." N.J.S.A. 18A:7G-2(a). Although seeking to address the adequacy of school facilities statewide, the legislature acknowledged that "[e]ducational infrastructure 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 requires that:

> To remedy the facilities inadequacies of the SDA districts, the State must promptly engage in a facilities needs assessment and fund the entire cost of repairing, renovating, and constructing the new school facilities determined by the

[1] If OSF has complied with law and regulation, its process may nonetheless be constitutionally infirm, but ELC's arguments in this regard would have to be made elsewhere. A challenge to the constitutionality of legislation is beyond my purview and may be addressed only in the Superior Court. Baldwin Constr. Co. v. Essex County Bd. of Taxation, 24 N.J. Super. 252, 272 (Law Div. 1952).

> Commissioner of Education to be required to meet the school facilities efficiency standards in the SDA districts.
>
> [N.J.S.A. 18A:7G-2(c).]

The State funds one hundred percent of the cost of eligible facilities projects in the SDA districts. N.J.S.A. 18A:7G-5(k); see Abbott v. Burke, 164 N.J. 84, 90 (2000); E. Orange Bd. of Educ. v. New Jersey School Constr. Corp., 405 N.J. Super. 132, 136 (App. Div. 2009). The lawmakers were careful to note, that "[w]hile providing that the educational infrastructure meets the requirements of a thorough and efficient education, the State must also protect the interests of the taxpayers who will bear the burden of this obligation." N.J.S.A. 18A:7G-2(d). Accordingly, the EFCFA includes a rather complex procedural process through which SDA districts submit long-range facilities plans for approval, as well as secure OSF approval for the individual projects contemplated by those plans. LRFPs must identify facility deficiencies that "involve emergent health and safety concerns." N.J.S.A. 18A:7G-4(e). The statutory scheme vests a good deal of authority in OSF to determine project priorities.

The SDA was created "with a specific focus on Abbott district construction, a governance structure tailored to its mission, project implementation requirements to ensure that projects are undertaken consistent with educational priorities, [and] land acquisition and procurement reforms to improve efficiencies, provide flexibility, and control costs . . . ." N.J.S.A. 52:18A-235(g). An SDA district seeking to fund a project submits a detailed application to the Commissioner. N.J.S.A. 18A:7G-5(d)(1). N.J.S.A. 18A:7G-5(e) requires the Commissioner to review proposed projects to ensure that they comport with long-range plans, and with facilities efficiency standards; in the case of SDA districts he must also review the project's educational priority ranking and the Statewide strategic plan.

ELC does not challenge the breadth of OSF's discretion to approve or disapprove the proposed projects. Rather, the issue raised by this petition is narrower in scope; ELC asserts that having invited the SDA districts to participate in the PEPP program the DOE was legally obliged to issue a written determination approving or rejecting each of the 716 proposed projects. OSF replies that it did so via both its

March 12, 2012, letter advising districts how it had categorized each of its proposed projects, together with the letters that followed in April and July 2012. I agree.

ELC likewise challenges the timelines under which OSF processed the district applications. It seeks an order requiring OSF "to transmit projects approved as emergent to the SDA for construction on an expedited basis." OSF contends this issue is moot because the approved projects have been transmitted to the SDA. They have, but this begs the question of whether the projects were processed within the timelines contemplated by law and regulation. ELC contends that they were not. Again, I agree. Moreover, since per Piaia's certification the approval process for those projects designated as emergent has nowhere reached closure, the concerns raised by ELC hardly can be characterized as moot. Indeed, a PPR, including an analysis of preliminary eligible costs, has not been issued for most of the controverted projects, and ELC is entitled to a ruling on its contention that OSF's failure to do so contravenes the regulatory and statutory scheme governing school construction in SDA districts.

The Notice Issue

There is no specific statute or rule that specifies what form a final agency's action must take. In re CAFRA Permit No. 87-0959-5, 152 N.J. 287, 300 (1997). But the decision must not be advisory or informal; must be adequately communicated to the person to be bound; must unmistakably evidence that it is the agency's final decision or action concerning the matter; must clearly set forth the agency determination and the basis for same; and must clearly evidence the consummation of the agency's decision making process. DeNike v. Bd. of Tr. of the Pub. Emp't Ret. Sys., 34 N.J. 430 (1961); In re CAFRA, supra, 152 N.J. at 299; Northwest Cov. Med. Ctr. v. Fishman, 167 N.J. 123, 139 (2001). An explanation of the procedures for appeal is preferred, but not mandatory. In re CAFRA, supra, 152 N.J. at 299.

ELC relies heavily on DeNike, supra, which held that a state agency "must speak out with unmistakable finality." DeNike, supra, 34 N.J. at 434. But in DeNike, the letter that the PERS Board of Trustees claimed constituted final agency action was informal

and referenced a poll, not a vote, of PERS trustees. Citing case law that would characterize such a letter as an "informal or ex parte determination made by administrative officials charged with the performance of ministerial functions," the Court held that the letter at issue thus did not create a "sufficient crystallization of a dispute along firm lines to call forth the policy of repose." Ibid. (citing Shack v. Trimble, 28 N.J. 40 (1958)).

The matter before me is readily distinguishable. After being invited to identify emergent facilities issues, districts were informed, quite unequivocally, that most of the projects they proposed had not been designated as emergent by the DOE. The March 12, 2012, letter indicates that projects were placed in four different categories; as to all categories other than EP the letter advises that "[t]his condition has not been deemed to be emergent." Accordingly, the letter plainly puts the school district on notice that these projects have not been approved. The spreadsheet that accompanies the March 12 letter explains the rationale behind each categorization: for example, the Asbury Park School District was informed that proposed repairs to the Barak Obama Elementary School were not emergent, but rather routine or required maintenance, (RRM), noting "[u]se warranty, insurance for fix. School may be closing." (Exhibit C-2 to Piaia certification.) Applicant SDA districts were advised that "[t]his letter has provided a Determination with respect to the Status of conditions submitted to the Department by your District and guidance on Next Steps." (Emphasis supplied.) To my mind, the agency correspondence creates unmistakable evidence of its decision relative to those projects it does not deem emergent. While I would have preferred that the March 12, 2102, letter discuss the right to appeal under N.J.A.C. 6A:26-7.1, the case law makes it plain that this omission, in and of itself, does not invalidate the notice.

In so concluding, I have considered that this letter was not sent to an unsophisticated citizen with a limited understanding of the process that guided agency thinking. To the contrary, these districts interact routinely with the DOE, doing so with the assistance of duly certificated experts in school business affairs and attorneys who could apprise them of their appeal rights. The application process was explained during

a conference call, and the districts had ongoing access to the resources of their county DOE offices, including the Executive County Superintendent, and his or her staff.

However, ELC points out, correctly so, that as to those projects identified as emergent the March letter offers no finality. These projects were denoted as "potentially" emergent, and the letter goes on to delineate the steps needed to bring the approval process to closure. Approval comes later; an April 18, 2012, letter to the Newark School District is representative. (Exhibit E-1 to Piaia certification.) That letter states that a proposed project at West Side High School has been "approved for pre-construction activities . . . " pursuant to N.J.A.C. 6A:26-3.9. ELC's concern is that the SDA districts have received nothing from the agency that would trigger an appeal. But the April letter plainly confirms that the DOE has determined that an emergency exists; accordingly, there would be nothing to appeal. Accordingly, I **CONCLUDE** that OSF has provided adequate formal notice to the SDA districts of its determination whether to approve individual projects as emergent.

The Approval Process

The Timelines for Approval

The timeline for completion of the review and approval of individual construction projects is not limitless. N.J.S.A. 18A:7G-5(e) provides as follows:

> The commissioner shall make a determination on a district's application within 90 days from the date that he determines that the application is fully and accurately completed and that all information necessary for a decision has been filed by the district, or from the date of the latest revision made by the district. If the commissioner is not able to make a decision within 90 days, he shall notify the district in writing explaining the reason for the delay and indicating the date on which a decision on the project will be made, provided that the date shall not be later than 60 days from the expiration of the original 90 days . . . . If the decision is not made by the subsequent date indicated by the commissioner, then the project shall be deemed approved . .
> . .

DOE regulations are in accord, providing that "within 90 days of receipt of a completed school facilities project application" OSF must determine if the project is consistent with the district's LRFP and facilities efficiency standards. N.J.A.C. 6A:26-3.3(b). The possibility of extending this time is contemplated by the regulation, which like the statute, makes it plain that any such extensions may not exceed an additional 60 days. Ibid.

I **CONCLUDE** that the process of approving the SDA district applications under the PEPP program was at odds with statutory and regulatory timeline requirements. At a minimum, it is clear that both N.J.S.A. 18A:7G-5(e) and N.J.A.C. 6A:26-3.3(b) required that the projects PEPP applications be approved or disapproved within ninety days. The applications were due and received by OSEF on June 11, 2011. At the earliest, the districts heard that most of their projects were not deemed emergent on March 12, 2012, well more than ninety days later. Approval of those projects deemed emergent came even later, in April and July 2012. Even if OSF is given the benefit of the sixty-day extension contemplated by both law and regulation, its March, April and July 2012 letters came well more than 150 days after the applications by the SDA districts were complete.

Moreover, ELC argues persuasively that these applications were intended to address emergency facilities issues and accordingly required an even quicker response. This surely seems required by the applicable regulation, which provides:

> If the existence of the emergent condition has been certified . . . the school facilities project application shall be forwarded to [OSF] for review pursuant to N.J.A.C. 6A:26-3.3(a) through (o) on an expedited basis. The expedited basis shall include [OSF] acceptance of school district submission of the school facilities project application or a predevelopment request in the case of [SDA] managed projects within 45 days of the date of such submission.
>
> [N.J.A.C. 6A:36-3.16(e)(2).]

The regulation contemplates approval of an emergent condition only after an on-site inspection and the certification by the County Superintendent of Schools that an emergent condition exists. N.J.A.C. 6A:36-3.16(e)(1). But these steps should not delay the application process, and rather should be subsumed within that process, which clearly must be completed in its entirety "within 45 days of submission [of the application.]" N.J.A.C. 6A:36-3.16(e)(2).[2]

Accordingly, I **CONCLUDE** that the approval process under the PEPP program was noncompliant with statutory and regulatory timelines.

Issuance of PPRs

OSF correctly points out that it has acted to either disapprove or approve the proposed emergent projects at issue. Thus, it urges that "[t]o the extent Petitioners claim that the process was not completed expeditiously, the remedy available and sought by Petitioners, i.e., completion of the review process and issuance of written determinations, has already occurred." (OSF brief, pages 13-14.) But OSF has not met its obligation to promptly issue PPRs for these projects. Piaia has confirmed that all of the 70 projects that were deemed emergent have been advanced to the SDA for the needed pre-construction activities, yet as of the time of his certification PPRs had been issued only as to three of the projects.

While the statute generally contemplates that preliminary eligible costs will be determined by the Department of Education at the time of approval, for SDA districts the process is a bit different. Instead, the Commissioner prepares a PPR. N.J.S.A. 18A:7G-5(f); N.J.S.A. 18A:7G-5(h)(1); N.J.S.A. 18A:7G-5(h)(2). That document includes the preliminary eligible costs for the project, which the statute provides will "equal the estimated cost as determined by the development authority." N.J.S.A. 18A:7G-5(f)(2). OSF thus asserts that for SDA districts, a PPR is issued only upon the SDA's submission of a completed school facilities project application, containing the

[2] It should be noted that the County Superintendent's office is a part of the DOE, and not a separate entity or agency.

scope of the work to be completed and the preliminary estimated cost of the project. Accordingly OSF urges that it cannot issue PPR's unless and until the SDA completes its work. While this contention appears consistent with N.J.S.A. 18A:7G-5(f)(2), elsewhere the statute clearly requires otherwise, providing that:

> [i]n the case of an SDA district, the commissioner 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 . . . any other factors . . . . (Emphasis supplied.)
>
> [N.J.S.A. 18A:7G-5(h)(2).]

This latter provision of the EFCFA appears not to contemplate, as Piaia suggests, that OSF wait to issue a PPR until the SDA completes its pre-construction activities.

When interpreting a statute or regulation, our courts assume that the framers intended to ascribe to words their ordinary meaning. Jablonowska v. Suther, 195 N.J. 91, 105 (2008); In re N.J.A.C. 14A:20-1.1, 216 N.J. Super. 297, 306 (App. Div. 1987). The intent of a statute or regulation should be gleaned from a view of the whole and of every part of the statute, with the real intention prevailing over the literal sense of its terms. Schierstead v. City of Brigantine, 29 N.J. 220 (1959). Where statutory language is ambiguous, courts rely on legislative history to gain further insight into the probable intent of the legislature. State v. Brannon, 178 N.J. 500, 507 (2004).

The EFCFA, and its accompanying regulatory scheme, were enacted in response to a funding process that was deemed constitutionally infirm, in part, because facilities in poor and urban districts are "crumbling and obsolescent and . . . this grave state of disrepair not only prevents children from receiving a through and efficient education, but also threatens their health and safety." Abbott v. Burke, 153 N.J. 480, 519 (1998). The statute's plain language mandates a speedy and efficient project approval process, with the goal of ensuring that children in the SDA districts receive

their education in appropriate facilities, and as soon as possible. Thus, any apparent incongruity in the requirements contained in N.J.S.A. 18A:7G-5(h)(2) and N.J.S.A. 18A:7G-5(f)(2) must be resolved in favor of a statutory interpretation that expedites the construction process, rather than stalls it.

Indeed, OSF appears to suggest that a facilities emergency may be addressed more slowly for SDA districts than for districts that do not rely on SDA funding either in whole or in part. This interpretation is at odds with the intent of a statute and implementing regulations enacted specifically in recognition of the fact that inadequate facilities equate with inadequate education in SDA districts. OSF's approach passes the proverbial buck to another agency, one over which it urges it has no authority or control. But the EFCFA directs the DOE, not another agency, to take action to repair our school facilities. For this reason, the only reasonable interpretation of the statutory scheme is that it intends that a PPR be issued upon approval of a facilities project; that the PPR be issued "promptly" at the time of approval and prior to SDA involvement; and that the PPR include an analysis of preliminary eligible costs for the project.

I **CONCLUDE** that the requirement that, upon approving a project OSF will provide a calculation of preliminary eligible costs is thus also applicable to SDA districts, albeit for these districts as part of the PPR. I **CONCLUDE** that rights of the SDA districts, and of the children who attend their schools, have been violated, and that the ELC's demand on their behalf for the issuance of PPR's within thirty days should be granted.

ELC's Constitutional Claims

While a per se challenge to the constitutionality of the EFCFA is beyond the purview of my jurisdiction, it is well-established that "administrative agencies are competent to pass upon constitutional issues germane to proceedings before them, and that such action is necessary so as to better focus the issues for judicial review, if such action is later necessary." Hunterdon Cent. High Sch. Bd. of Educ. v. The Hunterdon Cent. High Sch. Teachers' Assoc., 174 N.J. Super. 468, 475 (App. Div. 1980), aff'd, 86

N.J. 43 (1981) (quoting Alcala v. Wyoming State Bd. of Barber Exam'rs, 365 F. Supp. 560, 564 (D. Wyo. 1973)). A challenge to a statute as applied may be appropriately reviewed at the administrative level. See Hunterdon Cent., supra, 174 N.J. Super. at 474.

Our Supreme Court has described the condition of the schools in the SDA districts as "deplorable"; has stated that these conditions "have a direct and deleterious impact on the education available to at-risk children"; and has repeatedly confirmed that the children in these districts are constitutionally entitled to receive their educations in adequate school facilities. Abbott v. Burke, 153 N.J. 480, 519 (1998). I **CONCLUDE** that OSF has violated the requirements of the "thorough and efficient" clause of the New Jersey Constitution, N.J. Const. art. VIII, §4, by failing to comply with the very statute enacted to ensure that facilities in SDA districts meet constitutional standards.

ORDER

Based on the foregoing, I **ORDER** that OSF issue PPRs within thirty days for each emergent project that it has advanced to the SDA as part of the PEPP program. The PPR is to include an analysis of preliminary eligible costs for each project.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 13, 2012

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: December 13, 2012

Date Mailed to Parties: DEC 14 2012

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE