



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
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**A copy of the administrative law
judge's decision is enclosed.**

**This decision was mailed to the parties
on OCT 17 2014**



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 04670-14

AGENCY DKT. NO. 30-2/14

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.

Elizabeth Athos, Esq. (Education Law Center, attorneys) and **Marika M. Lyons, Esq.** (White and Case, attorneys), for petitioner

Lauren Jensen, Deputy Attorney General, for respondent, (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: September 8, 2014

Decided: October 16, 2014

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

STATEMENT OF THE CASE

Petitioner, Education Law Center (ELC), alleges, on behalf of the Abbott v. Burke school children, that respondent, New Jersey Department of Education, Office of School Facilities (the OSF), has failed to ensure the timely submission and approval of updated long range facilities plans (LRFP) for New Jersey's low income school districts, as required by N.J.S.A. 18A:7G-4(a). The OSF replies that it has substantially complied with its statutory and regulatory obligations; that the failure to timely update LRFPs has not been detrimental to the subject school districts or their students; 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 February 7, 2014. OSF filed an answer and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on April 15, 2014. ELC filed a motion for summary decision and accompanying brief and certification on July 25, 2014. The OSF filed a cross-motion for summary decision with accompanying brief and certification on August 26, 2014. ELC replied via letter memorandum filed on September 8, 2014, at which time the record closed.

FINDINGS OF FACT

The material facts are not in dispute. I **FIND** that 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, under the Educational 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), which provides financing and direct construction of school facilities projects in low-income districts, now denoted as "SDA districts." N.J.S.A. 18A:7G-3.

Under the EFCFA, districts are required to file LRFPs that detail their school facilities needs and their plans to address those needs for the ensuing five years. N.J.S.A. 18A:7G-4(a). After submission of an initial LRFP, SDA districts must revise their plans every five years by updating enrollment projections, building capacities, and health and safety conditions; these plans must be submitted to the DOE for review and approval. The EFCFA limits DOE approval of individual school facilities projects to those contained in an approved LRFP or in an approved amendment to the plan. N.J.S.A. 18A:7G-4(b) and (c). As required by the EFCFA, the DOE has adopted rules governing the submission, review and approval of facilities plans and projects. N.J.A.C. 6A:26-1.1 et seq. Via letter dated January 29, 2010, the OSF Director Bernard Piaia reminded the SDA districts of their obligation to update their LRFPs “at least” every five years. But on or about November 25, 2013, ELC notified the Commissioner and Piaia that updated LRFPs were overdue in all 31 of the SDA districts. At the writing of that letter, it had been well over five years since the 31 SDA districts had last had an LRFP approved; for two-thirds of the districts their last LRFP approval was more than six years old. ELC received no response to its letter, and this petition of appeal followed.

The OSF Director of Policy and Planning Susan Kutner does not dispute that the SDA districts are required to amend their LRFPs every five years; or that as of the date of her certification, only eight of the 31 SDA districts have up-to-date approved plans.¹ Kutner described the process through which LRFPs are approved by her office. Much of her certification reads like an apologia for the failure of the SDA districts and her office to meet statutory and regulatory timelines. Indeed, Kutner emphasizes that amending the LRFP is work intensive. A district must prepare enrollment projections; determine the functional capacity of each school facility; take an inventory of district-owned land; prepare a listing of any proposed new sites for school facilities; determine the scope of work for any proposed projects for the ensuing five years; determine plans for new construction; prepare a preliminary estimate of the costs attached to each

¹ Kutner points out that, in the interim, districts can move forward with a capital improvement project that is not consistent with an existing approved LRFP, provided the district makes an amendment request. N.J.A.C. 6A: 26-2.3(c).

proposed facilities project; and obtain local school board approval of submission of the LRFP amendment.

In developing a viable facilities plan for a district, consensus must be obtained among school administrators, the local school board, and the public. Community input is encouraged, particularly if a facilities plan will reconfigure school zones, as this is often controversial. Kutner explained that "[t]he exploration of different scenarios and their presentation to various stakeholders can add considerable but necessary time to the planning process." Some districts retain consultants to assist them, but such consultancy services are costly. Accordingly, completion of an amended LRFP is an arduous and complex task; both Kutner's office and the local districts essentially do the best they can. Kutner noted that she works closely with districts to avoid the problems encountered during the 2005 approval process, when her department needed to address many deficient applications. Kutner clarified that she now provides a preliminary review of select LRFP amendment elements rather than wait for a complete submission to avoid these difficulties. This process may delay the filing of a complete submission, but in Kutner's view, significantly improves review, revision and approval time.

Pursuant to N.J.A.C. 6A:26-2.1(a), the LRFP must be amended on software made available by the DOE via a web-based system. To complete amendments to its LRFP, a district must first request that the department's system be unlocked. After inputting any updated information, the district can formally submit the LRFP amendment; once it is submitted no further changes can be made. The DOE will be updating to a new web-based reporting system by the end of 2014. This change is needed to coordinate with a new project application component that will be available in early 2015. Districts have been advised via memorandum dated August 12, 2014, about the changes in the web-based system, and the memorandum directs districts to immediately begin planning for an amendment submission using the new system if prior LRFP approval was not issued with the last five years. The OSF has also posted Preliminary LRFP Guidelines for the new system on its website.

Facilities projects in the SDA districts flow from approval of the LRFP; it is correctly described by ELC as a “crucial first step” in the process of securing approval for needed improvements to school facilities. Once the plan is approved, the Commissioner must develop a facilities needs assessment for each SDA district, to be used to initiate facilities projects. N.J.S.A. 18A:7G-5(m)(1). An educational priority ranking of all school facilities projects in the SDA districts must be established based on a determination by the Commissioner of “critical need.” N.J.S.A. 18A: 7G-5(m)(2). The Commissioner is then required to transmit that ranking to the SDA for use in establishing a statewide strategic plan for sequencing the construction of school facilities projects in all of the SDA districts. N.J.S.A. 18A:7G-5(m)(3). Accordingly, in ELC’s view, if the LRFPs are out-of-date and do not reflect the actual and changing needs of each SDA district, all downstream decisions and actions taken by the DOE based on these LRFPs likewise will be out-of-date and inaccurate.

But Kutner stresses in her certification that the Educational Facilities Needs Assessments for each SDA district and the Educational Priority Rankings for all school facilities projects state-wide are neither out-of-date nor based on inaccurate information. The first Educational Facilities Needs Assessments and Educational Priority Rankings were completed by the Department in 2008, based on data provided in the 2005 LRFPs. Both were updated in 2010 and again in 2013. Kutner explained that since the EFCFA no longer requires LRFPs to be revised at the same time, the data from the 2008 assessment has been updated independent of the LRFPs in order to utilize the most current information.² The update includes existing enrollments as reported on the Application for School Aid; a review of active district schools using the Department’s County District information system; and an updating of inventory for funded and completed projects. In many cases, districts are contacted to verify inventory changes that may have occurred from the last assessment, or to explain capacity shortages or surpluses based on a comparison of updated enrollments and inventory data. The needs assessment thus is not tied to LRFPs, and does not consider the projected enrollments or specific proposed projects found in the LRFP.

² Previously, submissions of LRFPs were made uniformly on years ending with a “0” or a “5.”

There has been some progress in the submission and approval of LRFPs for the SDA districts since the petition of appeal was filed. Kutner has advised as follows:

1. Asbury Park, Monmouth County: An LRF was last approved on April 10, 2008, over six years ago. The district requested password access to the LRF on-line system in June 2014.
2. Bridgeton, Cumberland County: An LRF was last approved on June 20, 2007, over seven years ago. The district has submitted enrollment projections, updated school grade alignments, and scopes of work. It is anticipated that an amended plan will be completed in late Fall 2014.
3. Burlington City, Burlington County: An LRF was last approved on February 11, 2008, over six years ago. The district submitted an amendment request form in July 2013 and contacted the OSF on August 14, 2014, for assistance in completing the amendment.
4. Camden City, Camden County: An LRF was last approved on January 15, 2008, over six years ago. Although an amendment request form was submitted by the district in February 2013, OSF does not anticipate final submission of an amended LRF until December 2014.
5. City of Orange, Essex County: An LRF was last approved on March 25, 2008, over six years ago. Updated district enrollment projections were approved by the Department on May 1, 2014. The district is currently assessing potential project scopes for inclusion in an amended plan.
6. East Orange, Essex County: An LRF was last approved on December 14, 2007, close to seven years ago. The district submitted an amended LRF in August 2013, which was determined to be deficient. OSF last heard from the district's consultant in August 2014, and a revised submission is anticipated by November 2014.

7. Elizabeth, Union County: An LRFP was approved on May 14, 2013.
8. Garfield, Bergen County: An LRFP was last approved on May 9, 2008, over six years ago. The district submitted an LRFP Amendment Request Form in June 2012 and is currently assessing potential projects for inclusion in an amended LRFP.
9. Gloucester City, Camden County: An LRFP was approved on August 12, 2014.
10. Harrison, Hudson County: An LRFP was last approved on September 12, 2007, over seven years ago. An amended LRFP submitted in August 2013 was found to be deficient. A revised LRFP has yet to be submitted by the district.
11. Hoboken, Hudson County: An LRFP was last approved on March 25, 2008, over six years ago. The district submitted an enrollment projection on April 30, 2014, has retained a consultant, and is currently assessing potential projects for inclusion in an amended plan.
12. Irvington Township, Essex County: An LRFP was approved on November 13, 2011.
13. Jersey City, Hudson County: An LRFP was last approved on November 13, 2007, close to seven years ago. According to Kutner, the district is actively working on an amended LRFP, which she anticipates receiving by November 2014.
14. Keansburg, Monmouth County: An LRFP was last approved on September 12, 2007, over seven years ago. The district submitted an amendment request in August 2012 and has submitted enrollment projections, updated school grade alignments, and scopes of work. It will be unable to

finalize a proposed amended LRFP until proposed room inventories and capacities are finalized.

15. Long Branch, Monmouth County: An LRFP was last approved on October 16, 2007, exactly seven years ago. An Amendment Request Form was submitted in May 2013, but completion of the LRFP is pending a determination regarding disposition of an "old high school building."
16. Millville City, Cumberland County: An LRFP was last approved on September 12, 2007, over seven years ago. District enrollment projects were reviewed by the DOE on July 2, 2014, and the district continues to explore high school building options, which is its major facilities concern. An amendment will be submitted "once a course of action has been decided."
17. Neptune Township, Monmouth County: An LRFP was approved on December 16, 2013.
18. New Brunswick, Middlesex County: An LRFP was approved on May 14, 2013.
19. Newark, Essex County: An LRFP was approved on June 23, 2014.
20. Passaic City, Passaic County: An LRFP was last approved on September 12, 2007, over seven years ago. The district is currently assessing capacities and building scopes for three major projects, after which it will be in a position to amend its plan.
21. Paterson, Passaic County: An LRFP was last approved on September 12, 2007, over seven years ago. The district submitted a LRFP Amendment Request Form in August 2013, and Kutner believes it is in the process of retaining a consultant.

22. Pemberton Township, Burlington County: An LRFP was last approved on June 18, 2007, over seven years ago. The district submitted an amendment request, is currently assessing building options, and "will amend its plan once a consensus is reached."
23. Perth Amboy, Middlesex County: An LRFP was last approved on September 12, 2007, over seven years ago. Enrollment projections have been completed and the "district's LRFP amendment is pending a determination of project scopes."
24. Phillipsburg, Warren County: An LRFP was approved on June 30, 2014.
25. Plainfield, Union County: An LRFP was last approved on January 22, 2008, over six years ago. The district submitted updated enrollment projections in May 2014 and its LRFP amendment is "pending a determination of project scopes."
26. Pleasantville, Atlantic County: An LRFP was approved on October 8, 2013.
27. Salem City, Salem County: An LRFP was last approved on September 12, 2007, over seven years ago. The district submitted an LRFP Amendment Request Form in September 2013 and submitted enrollment projections in April 2014.
28. Trenton, Mercer County: An LRFP was last approved on September 12, 2007, over seven years ago. The district is in the process of retaining a consultant.
29. Union City, Hudson County: An LRFP was last approved on March 25, 2008, over six years ago. The district has submitted an amendment request and is actively working on amending its LRFP with a consultant.

30. Vineland City, Cumberland County: An LRFP was last approved on December 3, 2007, close to seven years ago. The district submitted an Amendment Request Form in January 2013 and is working on finalizing middle school building options.

31. West New York, Hudson County: An LRFP was last approved on September 12, 2007, over seven years ago. The district has submitted an amendment request and is actively working on amending its LRFP with the help of a consultant.

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, and ELC is entitled to judgment as a matter of law.

The claims raised by ELC demand an analysis of whether the OSF has complied with the requirements of the EFCFA, N.J.S.A. 18A:7G-2, et seq., and its implementing regulations relative to the timely updating of LRFPs in the SDA districts. N.J.A.C. 6A:26-1.1 et seq. 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 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 EFCFA, and its accompanying regulations, were enacted in response to a school funding process that was deemed constitutionally infirm, in part, because facilities in poor and urban districts were “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 LRFPs that are the focal point of this litigation are part of the statutory scheme intended

to expedite the repair of these crumbling and obsolescent schools. Indeed, N.J.A.C. 6A:26-1.2 defines an "approved LRFP" as "an LRFP that conforms to the requirements of N.J.A.C. 6A:26-2 and that has been determined by a Commissioner's final determination to ensure the school facilities are educationally adequate to support over the next five years the achievement of the Core Curriculum Content Standards."

It requires little discussion or analysis to **CONCLUDE** that the OSF is noncompliant with the EFCFA and with agency regulations relative to the approval of updated LRFPs. N.J.S.A. 18A: 7G-4(a) is unequivocal, speaks in the imperative and provides:

Following the approval of the 2005 long-range facilities plan, each district shall amend its long-range facilities plan at least once every five years to update enrollment projections, building capacities, and health and safety conditions. The long-range facilities plan shall incorporate the facilities efficiency standards and shall be filed with the Commissioner for approval in accordance with those standards. (Emphasis supplied)

The statute moreover states, consistent with ELC's contention that an up-to-date plan is a prerequisite to any facilities project, as follows:

Notwithstanding any other law or regulation to the contrary, an application for a school facilities project pursuant to section 5 of P.L.2000. c. 72(C.18A:7G-5) shall not be approved unless the district has filed a long-range facilities plan that is consistent with the application and the plan has been approved by the commissioner.

[N.J.S.A. 18A:7G-5(b)]

The accompanying regulations likewise make the SDA districts responsible for submission of an amended LRFP "at least once every five years." N.J.A.C. 6A:26-2.1(a). Both statute and regulation are a response to the Supreme Court directive that the Commissioner ensure that such plans are completed. See: N.J.A.C. 6A:26-1.1. The Court stated:

Before any new classrooms are built, however, each district is expected to complete an enrollment projection and a Five-Year Facilities Management Plan (Plan). This Plan will enable the State and the district to work together to determine how to make the "best use" of existing space...The Commissioner is directed to ensure that the Plans are completed and that the deadlines are met.

[Abbott v. Burke, supra, 153 N.J. at 521 (1998)]

Through Kutner's certification, the OSF has offered what I have no doubt is a sincere and compelling description of the logistical and technical complexities that delay the finalization of updated LRFPs for the SDA districts. But the agency is required to comply with its own regulations. Our courts have recognized that "[b]ecause administrative regulations that apply to the regulated public have the force and effect of statutory law, an administrative agency ordinarily must enforce and adhere to, and may not disregard, the regulations it has promulgated." Cnty of Hudson v. Dept. of Corrections, 152 N.J. 60, 70 (1997). An agency may amend its regulations, but "so long as they are in force the agency is bound by them." Id. at 71. Moreover, any doubt that the OSF has the authority and obligation to compel the local districts to meet their obligations to timely update their LRFPs is assuaged by reference to N.J.A.C. 6A: 26-14.1(a), which authorizes the Commissioner to withhold state aid from any district that fails to obey "the law, or the rules or directions of the State Board or the Commissioner."

The OSF's argument that there is no harm caused by its failure to compel the SDA districts to timely file updated LRFPs is unavailing. The statute and regulations are clear that facilities projects cannot be undertaken unless they are consistent with the LRFP. See: N.J.S.A. 18A:7G-4(b); N.J.A.C. 6A:26-2.3(c). ELC compellingly urges that all facilities construction in the SDA districts flows from the finalization of the LRFP, including the prioritization of projects that must be later undertaken in conjunction with the SDA. N.J.S.A. 18A:7G-5(m)(3). While Kutner's assertion that the OSF keeps facilities priorities up-to-date notwithstanding the failure of the SDA districts to timely update their LRFPs is somewhat reassuring, the steps she describes nonetheless do not constitute compliance with the agency's clear statutory obligations. Under the plain language of the EFCFA, prioritizations of school facilities projects state-wide "[follow]

the approval of an SDA district's long-range facilities plan or of an amendment to that plan..." N.J.S.A. 18:7G-5(m)(2). Thus, to the extent that OSF is prioritizing projects without reference to timely LRFPs, it is doing so in a manner that is noncompliant with the law.

The OSF urges that strict enforcement of the regulatory requirements through a withholding of state aid would serve only to harm the SDA districts and their students, who our courts have described as the "the most disadvantaged school children in the state." Abbott v Burke, supra, 153 N.J. at 528. I agree. But there must be some mechanism at the agency's disposal to ensure that these plans are quickly completed, whether it is via redirecting more funds, time or personnel to ensuring that the agency's legal obligations are met. In any event, the statute and regulations as they now read leave me no option but to **CONCLUDE** that the OSF is in noncompliance with its obligations under law, and that the relief sought by ELC should be granted.

I am likewise compelled to direct that this work be completed under the timeline proposed by ELC in its pleading. The OSF has replied to that timeline only with vague promises that the needed work will be done. These assurances do not pass statutory or constitutional muster.

ORDER

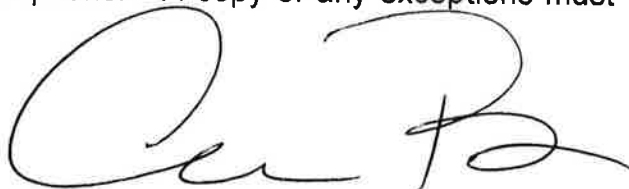
Based on the foregoing, I **ORDER** that the OSF direct those SDA districts that have yet to file an up-to-date LRFP to do so within 60 days of the date of this order. Upon receipt of the updated LRFPs, the OSF is **ORDERED** within 90 days to review and approve the LRFPs, and to thereafter take the steps required under the relevant statutes and regulations to develop a needs assessment and create priority rankings. The needs assessment must be completed within 60 days from the date of approval of the updated LRFP; an educational priority rating must be transmitted to the SDA within 30 days thereafter.

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.

October 16, 2014



DATE

ELLEN S. BASS, ALJ

Date Received at Agency:



Date Mailed to Parties:

OCT 17 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE