

February 9, 2004

Honorable Stephen Skillman, P.J.A.D

Hughes Justice Complex
P.O. Box 006
25 Market Street
Trenton, New Jersey 08625

Honorable Donald S. Coburn, J.A.D.

158 Headquarters Plaza
Morristown, New Jersey 07960-3965

Honorable Harold B. Wells, III, J.A.D.

216 Haddon Avenue
7th Floor
Westmont, New Jersey 08108-2815

Re: Asbury Park, et al v. NJ Department of Education
Docket No. A-840-03TS

Dear Judges Skillman, Coburn and Wells:

Please accept this Letter Brief under R. 2:6-5 in lieu of a more formal Brief of Petitioners-Appellants (the "Districts") in support of their Motion For Emergent Relief In Aid Of Litigants' Rights and/or For Clarification. Specifically, the Districts claim that the Defendant-Respondent ("DOE") has violated both the letter and intent of the Court's January 26, 2004, Opinion and Order. The Districts require immediate relief from the Court because the DOE has required submission of budgets by February 20, 2004, in accordance with unlawful final budget figures, and the Districts are entitled to know their proper final budget

figures for the 2003-04 school year to plan adequately for the remainder of the school year.

FACTUAL BACKGROUND

The relevant facts are set forth in the Certification of Melvin L. Wyns, School Business Administrator/Board Secretary of the Petitioner-Appellant Trenton Board of Education and in the exhibits appended to that certification. Because the relevant facts are identical in the other Abbott districts, Petitioners-Appellants present the Trenton School District's experience as an example of how the DOE has responded to the Court's Order instead of including certifications and letters from the other twenty Abbott districts affected by the DOE's violation of the Court's Order.

On February 5, 2004, the Trenton School District, along with other Abbott districts, received two faxed budget decision letters, dated February 5, 2004, from the DOE. The first letter purported to be a re-determination of the District's "preliminary maintenance budget figure" in accordance with this Court's decision of January 26, 2004. There are two significant features of the DOE's first letter. First, the DOE advised the District that there were "no adjustments for non-discretionary costs" even though this Court's decision and the DOE's definition of "maintenance budget" under facial review included "non-discretionary expenditures" for the 2003-04 school year.

Second, the DOE advised the District that the final award letter would be based on actual expenditures in 2002-03, as set forth in the CAFR, rather than the approved budget based on the DOE's assertion that "[t]he calculation of the final award was not addressed by the Appellate Division."

A short time thereafter, the District received the second budget decision letter of February 5, 2004, which purported to adjust the District's funding for 2003-04 based on a review of the District's June 30, 2003, Comprehensive Annual Financial Report. ("CAFR"). According to the DOE's second budget decision letter, the District is required to submit a revised district-wide budget consistent with the figures in the DOE 's second letter by February 20, 2004.

As Mr. Wyns states, based on his experience in the District and his prior experience as Director of Office of School Finance: "Based on my professional experience, I am unable to discern any legitimate basis for the DOE to reduce the preliminary maintenance budget figure for 2002-03 in the first budget decision letter to actual expenditures for that year in the second budget decision letter. In the past, the DOE has never used the CAFR, as it did here, to determine a budget figure, but has reviewed the CAFR to determine available revenues from the prior year to fund the budget for the particular school year." (Certification of Melvin L. Wyns at ¶8).

LEGAL ARGUMENT

On a single day, February 5, 2004, the DOE has managed to render the relief required by this Court - and the Supreme Court's July 23, 2003 Order - a virtual nullity. Although the DOE gave a perfunctory and momentary nod Courts' decisions relating to maintenance budgets in the first budget decision letter of February 5, 2004, the DOE repudiated those initial budget decisions in the second budget decision letter.

Although the Defendant-Respondent may rely on technicalities and circumlocutions to justify its use of 2002-03 "actual expenditures" in determining the final 2003-04 maintenance budget,

the DOE's final determinations are legally and logically insupportable. Unless this Court grants emergent relief and sanctions the Defendant-Respondent through an award of attorney's fees for the fees and costs of this motion, we can only anticipate the continued refusal of the DOE to follow Court decrees and Abbott implementation mandates.

**THE COURT SHOULD GRANT PLAINTIFFS'-APPELLANTS'
MOTION FOR EMERGENT RELIEF IN AID OF LITIGANTS'
RIGHTS AND/OR CLARIFICATION OF THE COURT'S
JANUARY 26, 2004, DECISION**

Preliminarily, the Districts challenged the "maintenance budget definition in N.J.A.C. 6A:10-1.2, N.J.A.C. 6A:10-3.1(c) and

N.J.A.C. 6A:10-3(e). Because the final determination letters had not been issued and because neither the Court nor the Districts anticipated that the DOE would distinguish between preliminary and final budget determinations, there was no need for the Court to assess the validity of the final maintenance budget determination prescribed by N.J.A.C. 6A:10-3.1(c).¹ The DOE now takes the position that the failure of the Court to invalidate that specific provision is a license to change the DOE's base budget figure from the approved 2002-03 budget in the preliminary determination to the 2002-03 actual expenditures in the final budget determinations for the 2003-04 school year.

Nothing in the Supreme Court's Order, this Court's opinion or the DOE's own regulations justifies treating the maintenance budget calculation differently in the preliminary or final maintenance budget determinations. Put simply, there is that there is no distinction in the he Supreme Court's Order of July 23,, 2003, or in the DOE's regulations between the application of maintenance budget definition in N.J.A.C. 6A:10-3.1(c) and

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Indeed, Counsel for Petitioners-Appellants recalls a telephone conference call with Judge Skillman and the Attorney General's Office, shortly after oral argument, in which there appeared to be agreement that the maintenance budget calculation in the preliminary and maintenance budget figures would be the same, although there could be adjustments in the available revenues to fund that budget as a result of the CAFR.

N.J.A.C. 6A:10-3(e), and this Court's rationale should apply equally to both determinations.

In the following discussion, Petitioners-Appellants will briefly discuss how each of the DOE's February 5, 2004, violates the letter and intent of the Supreme Court's and this Court's Orders.

1. The First Decision Letter of February 5, 2004

DOE's first letter explicitly omitted any calculations of increases for non-discretionary expenditures. Even under the DOE's crabbed reading of the Supreme Court's Order and this Court's decision, the reference to maintenance budget in Paragraph 4 of the Court's Order must incorporate the Court's intended meaning of maintenance budget in Paragraph 2 of that Order. Under that portion of the Supreme Court's Order, a "maintenance budget shall mean that a district can implement current approved programs, services, and positions and therefore includes documented increases in non-discretionary expenditures."(emphasis added).

Therefore, the DOE was required to include adjustments in documented increases in non-discretionary expenditures in the calculation of the preliminary maintenance budget figures and estimates of supplemental funding. The DOE's failure to do so violates this Court's Opinion and Order and results in an inaccurate determination of the preliminary maintenance budget determinations and estimated supplemental funding under Paragraph 4 of the Court's Order.

2. The DOE's Second Letter of February 5, 2004

Of most importance to the appealing Abbott districts is the DOE's failure to comply with the clear mandates of the Supreme Court's July 23, 2003, Order and with the evident intent of this Court's Opinion

and Order of January 26, 2004. Although the final budget determination was not specifically addressed by the Court since those determinations had not yet been released, there is no legal or basis in the Supreme Court's Order or this Court's Opinion to assume that the definition of maintenance budget should be applied differently in the context of the preliminary and final determinations.

First, nothing in the Order or this Court's decision justifies such a distinction. It is illogical to assume that the Supreme Court or this Court assumed that "maintenance budget" must include the 2002-03 approved budget for purposes of the initial budget calculation, but that the approved budget foundation of the 2003-04 budget could be abandoned in the final budget determination. Certainly, the DOE's review of the CAFR does not support that fundamental shift in orientation because the CAFR has only been used in the past to determine available revenues to fund the budget, not, as the DOE does here, to determine the foundational budget number.

It is also irrational from a planning and budgeting perspective to conclude, as the DOE did here, that an initial budget determination based on one approach could fundamentally shift in when the final budget numbers are released. It is obvious from a legal and logical standpoint that if the preliminary maintenance budget figures had to be based on the approved budget, then the Supreme Court -- and, presumably, this Court -- understood that subsequent budget determinations would not be based on actual expenditures.

Petitioners-Appellants anticipate that the Defendant-Respondent will claim that the final decision letters could be based on actual 2002-03 expenditures because this Court did not address that issue (even though it was explicitly raised by Petitioners-Appellants on appeal) and that the Court invalidated N.J.A.C. 6A:10-3(e), but not N.J.A.C. 6A:10-3.1(c).

Neither in the briefing before this Court nor in the oral arguments was there any indication of the distinction the DOE now seeks to create out of whole cloth. Put bluntly, there is no rational basis anywhere,

including the DOE's regulations, for the DOE's specious distinction between the application of the maintenance budget definition to the preliminary and final budget determinations. Indeed, the DOE invokes this Court's distinction to support the utterly absurd scenario played out on February 5, 2004, when the DOE initially released preliminary budget figures based on the 2002-03 approved budget, but immediately thereafter rendered those budget determinations -- and the Supreme Court's and this Court's decisions -- hollow by the release of final budget figures based on 2002-03 actual expenditures.

In sum, it is difficult to believe that such an absurd, illogical and unprecedented approach to the Abbott districts could be justified by anything other than the DOE's preoccupation with budgetary problems. P.F. v. New Jersey Div. Of Disab., 139 N.J. 322, 330 (1995).

However, even if the Court determines that the DOE's second February 5 letter does not directly violate the specific decrees in the Court's Opinion and Order, this Court should clarify its Opinion and Order. The Court should make explicit what is expressly mandated by the Supreme Court's Order of July 23, 2003, and implicit in this Court's Opinion and Order: there is no distinction, including in the DOE regulations, between the application of the maintenance budget definition to preliminary and final maintenance budget determinations.

CONCLUSION

For the reasons set forth above, Petitioners-Appellants respectfully request the Court to grant the motion for emergent relief in aid of litigants' rights and/or clarification and grant the following relief:

- (1) Require the DOE to issue within five (5)days preliminary maintenance budget and estimated supplemental funding figures in conformance with the Court's decision of January 26, 2004, Opinion and Order;
- (2) Require the DOE to issue within five (5)days final budget and supplemental funding figures utilizing the 2002-03 approved budget figures, not the 2002-03 actual expenditures;
- (3) Award counsel fees and costs to petitioner's Appellants; and
- (4) Issue whatever relief the Court deems appropriate and necessary under the circumstances.

Respectfully submitted,
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By: _____
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Special Counsel for Petitioners-Appellants

DATED: February 9, 2004