



Education Law Center

Standing Up for Public School Children

By Electronic Transmission

December 17, 2010

Kristen MacLean, Director
Internal Policy and Regulatory Development
New Jersey Schools Development Authority
P.O. Box 991
1 West State Street
Trenton, NJ 08625-0991

Re: SDA's Proposed Regulations Regarding SDA District
Management of School Facilities Projects
PRN 2010-255

Dear Ms. MacLean:

Education Law Center ("ELC") is the legal representative for the class of school children in the SDA school districts and, as such, has the responsibility to ensure the effective and timely delivery of school facilities projects in these districts. On behalf of these school children, we submit these comments to your agency's proposed new rules on "Section 13e Delegation of School Facilities Projects," N.J.A.C. 19:34B, to supplement our comments submitted on November 5, 2010.

Our prior comments (copy enclosed), which we incorporate and reaffirm here, point out the critical need for immediate correction of an obvious legal flaw in the proposal, namely its definition of the "delegable portions of a school facilities project" as "limited to" the areas of "construction administration," "construction," and/or "demolition services," in violation of the language and intent of the governing Educational Facilities Construction Financing Act (EFCFA).

In addition to the illegal restriction of project activities that can be delegated under the regulatory proposal, we raise the following concerns that require revisions to the proposal.

First, the SDA has exceeded its statutory authority in establishing a two-step process of its own for the delegation of the management of school facilities projects to school

districts. EFCFA requires two steps - a determination of eligibility by DOE and a determination of capacity by the SDA - but the SDA improperly establishes an extra layer of review since its own two steps follow the DOE eligibility determination.

Under EFCFA, the SDA is authorized solely to "determine the capacity of an SDA district, deemed eligible by the commissioner pursuant to paragraph (1) of this subsection, to manage a school facilities project or projects identified by the development authority." N.J.S.A. 18A:7G-13(e)(2). However, the SDA's proposed regulations set forth not one, but two different capacity determinations: first, to evaluate the district's capacity to manage school facilities projects; and second, to assess the capacity of a district to manage the delegable portions of a particular school facilities project. These determinations require the districts to undergo two separate application processes and two separate assessment committee reviews (district and project) that take place within an unspecified period of time. The proposed regulations thus establish an unduly burdensome procedure that contravenes the legislative direction that the SDA make a single capacity determination. The two reviews provided by the proposed regulations must therefore be collapsed into one review process, and must be streamlined to ensure there are no duplicative or unnecessary requirements imposed on school districts that, in accordance with EFCFA, have already been determined eligible by the Commissioner of Education for consideration of delegation.

Second, the proposed regulations fail to include any timeframes for SDA to make the requisite capacity determinations of individual districts. The inclusion of a deadline by which the SDA must act on a district application is essential to ensure that the school construction program keeps moving forward and that projects are not left in limbo while capacity determinations are made. Given the critical interest at stake - the right of schoolchildren to safe and adequate facilities - we believe that 30 days from the submission of a district application is a reasonable time frame for agency action.

Third, the SDA's proposed regulatory provision for the termination of a delegation grant agreement "in the best interests of the school facilities project" is arbitrary, vague, and exceeds the agency's statutory authority. The proposed regulations already authorize termination of the grant agreement when there is noncompliance by a district in one of eleven broad ways or when there is mutual agreement for such termination.

Absent a district's agreement that termination is proper or its noncompliance with the grant agreement, it is improper to permit a blanket termination of a grant by the SDA under a vague "best interests" standard.

Fourth, the proposed regulations afford inadequate independent review and dispute resolution in the event of district disagreement with SDA determinations. For example, the proposed regulations authorize the SDA to establish "terms and conditions" of the delegation grant agreements "in its sole discretion," N.J.A.C. 19:34B-3.2, with no mechanism for district appeal of a grant agreement that is believed to be inadequate. Further, the proposed regulations authorize the SDA to withhold disbursement of a grant unless all conditions required by the grant agreement "have been discharged completely and to the full satisfaction of the Authority," N.J.A.C. 19:34B-5.3(f)(3), without a provision for independent judicial review in the event of a dispute over whether all conditions have been discharged completely. As yet another example, the proposed regulations provide a number of remedies to the SDA for district default and noncompliance, such as the rescinding of grant monies or the payment of reasonable attorney's fees "on demand," N.J.A.C. 19:34B-1.5, again without any review to determine whether a default in fact occurred, whether the attorney's fees demanded are reasonable, etc.

While the proposed regulations do incorporate a review process for determinations that a district lacks capacity to manage a school facilities project, that process is inadequate. N.J.A.C. 19:34B-2.5(a) provides merely for "an informal hearing on the papers, in person or via telephone with an Authority hearing officer or panel designated to review the matter." Instead, districts should be afforded the opportunity for a hearing before an independent administrative law judge at the Office of Administrative Law, as is required by the Administrative Procedure Act in all contested agency cases. N.J.S.A. 52:14B-1 et seq. Further, all of the critical determinations made by the SDA under the proposed regulations should be subject to appeal.

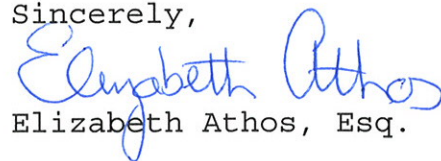
Finally, the regulatory provisions regarding the statutorily-mandated training that must be provided to districts that lack capacity to manage a school facility project fail to implement the language and intent of the statute. N.J.S.A. 18A:7G-13(e)(3) requires that the SDA develop and implement training programs to provide technical assistance "in consultation with the commissioner." Under the proposed

regulations, training "devised and offered by the SDA," is made available only once the SDA makes a determination that a school district does not have the capacity to manage the delegable portions of school facilities projects. N.J.A.C. 19:34B-2.3(a)(3).

To comply with EFCFA, the training that is provided to districts must be developed and implemented in consultation with the DOE. Moreover, the training must be coordinated to give all districts the support necessary to establish eligibility under DOE standards and to develop the capacity to implement specific projects. These training opportunities must not be limited to eligible districts, as determined by DOE, or to those eligible districts that have had their application to manage a specific project rejected by SDA. Such training and technical assistance must be available at the outset to districts that want to qualify -- either for district eligibility by DOE and/or specific project management by SDA. The statutory directive for training, and the intent of EFCFA to promote local control of school facilities projects whenever possible, mandate a unified approach to training in which deficiencies in relevant areas are identified in as many interested districts as early as possible and, as provided by the proposed regulations, targeted with specific training and assistance designed to develop the needed capacity. As proposed, SDA's training regulations offer assistance to too few districts (excluding those who do not pass the DOE eligibility hurdle), and too late in the process.

To ensure that the SDA complies with legislative language and intent and acts reasonably in enacting these delegation rules, we urge the SDA to revise its regulatory proposal in accordance with these comments. Thank you for your consideration.

Sincerely,


Elizabeth Athos, Esq.

Encls.

cc: Melissa T. Dutton, DAG
Stephen R. Buckingham, Esq.