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SUPREME COURT OF NEW JERSEY  
DOCKET NO. 62,700

RAYMOND ARTHUR ABBOTT, et al.,)

Plaintiffs, )

Civil Action

v. )

SUPPLEMENTAL CERTIFICATION OF  
LUCILLE E. DAVY

FRED G. BURKE, et al., )

Defendants. )

I, Lucille E. Davy, of full age, hereby certify that:

1. I am the Commissioner for the New Jersey Department of Education ("DOE") and have held this position since September 2005.

2. This certification is filed to supplement my March 17, 2008, certification filed in support of the State's Motion.

Adoption of Program Regulations

3. Under the SFRA, I have the obligation to ensure that all state aid to New Jersey's public schools is being "spent effectively and efficiently in order to enable students to achieve the core curriculum content standards." L. 2007, c. 260, §18. One

of the ways that I will meet this obligation is through regulations that will guide program requirements.

4. On June 2, 2008, pursuant to the authority granted to me under the SFRA, L. 2007, c.260, §83, I filed program regulations that were deemed effective upon filing. The regulations outline the standards-based instructional priorities that all school districts must adopt, and details programs and services that must be initiated for students in high poverty/high need school districts. In sum, the regulations provide the framework for curriculum and professional development statewide. Provided herewith at Exhibit A is a true and complete copy of the program regulations codified at N.J.A.C. 6A:13.

5. More importantly, although the SFRA permits district flexibility in implementing programs, positions and services best geared to the needs of its students, the program regulations serve to limit that discretion in districts with high concentrations of poverty that are not performing well on State assessments. Such limitations on discretion at the district level will ensure that programs known to be effective with such populations of students are implemented, e.g., intensive early literacy and class size restrictions.

6. The regulations have curriculum requirements that are uniformly mandated for all districts. These uniform requirements include:

- a. implementation of a coherent curriculum aligned to the CCCS with modifications for special education students, English language learners and gifted students;
- b. a high school curriculum that contains enhanced rigor in math and science content through the requirement of courses such as Algebra I and Lab Biology to fulfill existing graduation credit requirements;
- c. professional development plans and initiatives;
- d. professional growth plans for school leaders;
- e. the collection and analysis of student achievement data and the submission of required data to NJ SMART (the Department's data warehouse); and
- f. the provision of library-media services under the direction of a certified school library media specialist.

7. The regulations also have requirements applicable to all districts with secondary schools state-wide. These requirements include:

- a. the provision of secondary education initiatives (SEI), i.e., personalized learning

environments that strengthen relationships among students, teachers, families and community, to be implemented in 2009-2010, with the exception of the Abbott districts who were previously subject to this requirement and must implement SEI in 2008-2009;

- b. school-level planning teams; and
- c. where 10 percent or more of a secondary school district's students satisfy high school graduation requirements through the Special Review Assessment (SRA), it must submit an analysis of all students who graduated by means of the SRA to the Department.

8. Additionally, the regulations have specific requirements for high-poverty districts, i.e., school districts where 40 percent or more of the students are eligible for free or reduced lunch/milk. Maximum class sizes in these districts as outlined in the regulations must be implemented during the 2008-2009 school year for Abbott districts, and beginning in the 2009-2010 school year for all other districts. The program regulations also require high-poverty districts to maintain their full-day kindergarten programs with a teacher's aid for each classroom and the class size not to exceed 21 students.

9. With regard to high-need districts, defined as a

school district in which 40% or more of the students are "at-risk" (high-poverty district) and not meeting assessment expectations as delineated in ¶10, *infra*, upon notification, each must immediately begin planning for the implementation of the designated required programs, and shall remain in the "high need" status for a minimum of three years. Abbott districts that are also "high need" districts must implement required literacy programs and services during the 2008-2009 school year.

10. The proficiency benchmarks triggering high-need status are as follows:

- a. Less than 85 percent of total students have achieved proficiency in language arts literacy on the NJ ASK 3;
- b. Less than 80 percent of total students have achieved proficiency in language arts literacy on the NJ ASK 8;
- c. Less than 80 percent of total students have achieved proficiency in language arts literacy on the HSPA;
- d. Less than 85 percent of total students have achieved proficiency in mathematics on the NJ ASK 4;
- e. Less than 80 percent of total students have achieved proficiency in mathematics on the NJ

ASK 8; and/or

- f. Less than 80 percent of total students have achieved proficiency in mathematics on the high school State assessment.

11. Currently, nearly all of the high poverty districts (a total of 85) meet the definition of "high-need," including the 31 Abbott districts. Focusing on the Language Arts Literacy benchmarks, 76 districts (including all Abbott districts) meet the criteria based on NJASK 3 performance, 74 districts (including all Abbott districts) meet the criteria based on NJASK 8 performance, and 45 districts (including 26 Abbott districts) meet the criteria based on HSPA performance.

12. Where high need status is triggered due to proficiency levels in Language Arts Literacy, districts must implement, as appropriate, intensive early literacy programs for preschool to grade three, intensive literacy programs for grades four through eight, and language arts literacy programs for students in grades nine through twelve. The intensive early literacy requirements include: emphasis on small group instruction; a 90-minute reading block; assessment of English language learners; the coordination of professional development by literacy coaches or certified teachers; and the involvement of parents and family members in student instruction.

13. Turning to proficiency in mathematics, 66 districts

(including all Abbott districts) meet the criteria based on NJASK 4 performance, 76 districts (including all Abbott districts) meet the criteria based on NJASK 8 performance, and 61 districts (including all Abbott districts) meet the criteria based on HSPA performance. These districts must implement a comprehensive program for mathematics, appropriately catered to the grade levels not meeting proficiency, i.e. a mathematics program that prepares all students in grades five through eight for success in Algebra at the high school level.

Clarifications Arising from the Certification of Dr. Margaret Goertz

14. I have read the Certification of Dr. Margaret Goertz (Goertz Certification) submitted in support of the plaintiffs' brief in opposition to the State's motion.

15. Dr. Goertz suggests that there were changes in the standards provided to the PJP panelists and that those changes are significant enough to render the PJP model "outdated." The listing of items provided to the panelists is set forth in the Report on the Cost of Education, attached to my initial certification as Exhibit A, at page 8 and Appendix 4. The panelists received drafts of the proposed amended CCCS (ultimately adopted in 2004), assessment criteria, school day and year requirements and credit-load graduation requirements.

16. Since the panelists received this information, some slight adjustments have occurred. For example, while the final,

adopted 2004 CCCS were better written and sequenced, the content was substantially the same as provided to the panelists. Similarly, the assessment criteria remains that 100% of students must attain proficiency by 2013-2014, although slight adjustments have been made to the proficiency percentage leading up to 2013. Finally, the changes to graduation requirements - credit requirements - are the same except that technology is required to be integrated in all content areas and no longer has a credit requirement. To the extent that any substantive details of the materials have changed, any change was minimal, at best.

Status of Early Childhood Programs for 2008-2009 and Beyond

17. I have read the brief and certifications submitted by the ELC. With specific regard to SFRA's preschool program, they suggest that the State is abandoning the quality standards that have made the Abbott program a success. The ELC is incorrect.

18. Early childhood programs for the Abbott districts will be implemented next year under budgets and plans reviewed by the DOE and approved consistent with the Abbott standards outlined by the Court and codified at N.J.A.C. 6A:10A.

19. The submission, review and issuance of decisions for Abbott 2008-2009 programs were conducted in accordance with the time lines established by the Court in Abbott v. Burke, 177 N.J. 578 (2003) ("Abbott X"). The only adjustment to the 2008-2009 process was the opportunity for each district and private provider



to submit a budget based on a presumptive per pupil increase of 2.89%. This option was explained to the districts and providers via memorandum of October, 12, 2007, attached hereto as Exhibit B. It is important to note that this option permitted a district to submit a traditional, line-item budget for its in-district/district-wide program while one or more private providers for that district exercised the presumptive option, or vice versa.

20. Of the 31 Abbott districts, 23 submitted presumptive budgets. Moreover, the Certification of Clive Belfield (Belfield Certification), at ¶31 and Exhibit C, suggests that all districts that opted for a traditional line-item approach received a per pupil increase in excess of 2.89%. However, of the 8 districts that submitted line-item budgets, two were approved for per pupil increases below that which they would have been awarded had they submitted presumptive budgets.

21. After the review of all district and provider plans and budgets, one appeal was taken of DECE's decision. That appeal by the Elizabeth school district was heard in the Office of Administrative Law. Consistent with Abbott X time lines, I issued my decision, attached hereto as Exhibit C, on April 18, 2008. The matter has been appealed by Elizabeth and is now pending in the Superior Court, Appellate Division. See Exhibit D, Notice of Appeal filed by Elizabeth with the Appellate Division.

22. Much like the program regulations recently

promulgated, I will be promulgating preschool program regulations. I anticipate the preschool regulations will be filed with the Office of Administrative Law by June 13, 2008.

23. The preschool program regulations will ensure that the Abbott standards of quality are maintained in the Abbott districts and achieved by all other districts with eligible children. These quality standards include an appropriately certified teacher and a teacher assistant for no more than 15 students in a class, a full-day, full-year program (180 days), preschool intervention and referral teams, Master Teachers, Social Workers and Family Workers/Community Involvement Services. They also require a research-based, comprehensive preschool curriculum and assessment, a seamless transition from program entry through third grade, the use of developmentally-based early childhood screening upon student enrollment and the use of a Department-approved reliable classroom observation instrument to evaluate all classrooms in provider and in-district settings.

24. The regulations will also provide the general framework for the preschool program, including requirements for student eligibility, enrollment, and the calculation of the eligible universe of students. Moreover, the regulations will permit mixed delivery systems, thereby allowing districts the option to serve students in-district, in a provider setting, or through other arrangements to share services, i.e., utilization of

available seats in a neighboring school district. It is hoped that the mixed delivery system will result in more preschool students being served in districts other than Abbott districts, in a shorter time frame than the six-years permitted by the SFRA.

25. Additionally, since the enactment of the SFRA, the DECE has provided regional preschool expansion overview sessions and written notification to districts to get the word out on the opportunities for preschool expansion by former ECPA districts in 2008-2009 and for all other districts with eligible students in the year thereafter.

26. The Department received nine applications for expansion by ECPA districts in 2008-2009. Decisions on those applications, including approvals for expansion are anticipated to be issued by the end of the month.

27. Additionally, I asked the fiscal staff in the Division of Early Childhood Education (DECE) to review Exhibit C of the Belfield Certification because the percentage increases/decreases and amounts contained therein did not seem consistent with the presumptive methodology. DECE staff have advised me of problems with the assumptions and methodologies of his analysis and Exhibit C.

28. First, Dr. Belfield appears to misunderstand the presumptive approach. The presumptive option was for a per pupil increase over 2007-08, not an aggregate increase that would not

account for changes such as enrollment increases/decreases. Moreover, because a district could have opted for presumptive and the private providers serving that district could have submitted line-item budgets, it should not be expected that there is a 2.89% increase for each district over 2007-2008. Next, it appears that Dr. Belfield may not have used final 2007-2008 approved budgets and enrollments. Where a district, such as Hoboken, is able to recruit and enroll significant numbers of preschool students beyond their approved projections, budgets and enrollments are amended accordingly. Also, it appears he did not reduce the approved actual budgets for 2007-2008 and 2008-2009 by all of the special education funding and/or he improperly calculated per pupil amounts using total enrollment instead of general education enrollment.

I hereby certify that the statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

  
\_\_\_\_\_  
Lucille E. Davy

Dated: June 9, 2008



Exhibit A

State of New Jersey  
DEPARTMENT OF EDUCATION  
PO Box 500  
TRENTON, NJ 08625-0500

JON S. CORZINE  
Governor

LUCILLE E. DAVY  
Commissioner

June 2, 2008

TO: Mark J. Stanton, Manager  
Office of Administrative Law  
Division of Administrative Rules

FROM: Lucille E. Davy *LED*  
Commissioner

SUBJECT: N.J.A.C. 6A:13, Programs and Practices to Improve Student Achievement

On June 2, 2008, the Commissioner of Education approved a special adoption of N.J.A.C. 6A:13, Programs and Practices to Improve Student Achievement, for publication in the *New Jersey Register*.

The attached special adoption is effective upon filing pursuant to the School Funding Reform Act, P.L. 2007, c. 260 and should appear in the next available *New Jersey Register*.

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Attachments

c: Members, State Board of Education

Willa Spicer

John Hart

Erika Leak

Kim Belin

[www.nj.gov/education](http://www.nj.gov/education)

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**NEW JERSEY DEPARTMENT OF EDUCATION**

**COMMISSIONER OF EDUCATION**

**Programs and Practices to Support Student Achievement**

**Special Adopted Rules: N.J.A.C. 6A:13**

Adopted: June 2, 2008

Filed: June 2, 2008

Authority: P.L. 2007 c. 260

Effective Date: June 2, 2008

Expiration Date: June 2, 2009

**Take notice** that the Commissioner of Education promulgated new rules to implement the School Funding Reform Act, P.L. 2007, c. 260.

These rules require that school districts:

- Implement a coherent curriculum that is aligned to the Core Curriculum Content Standards;
- Provide professional development for teachers and school leaders;
- Use State assessment data to make instructional decisions; and
- Provide for an academically rigorous, personalized environment to prepare students for post-secondary education and/or careers after graduation.

School districts with a high concentration of students taking the Special Review Assessment (SRA) to meet graduation requirements must conduct a study to determine the causes for the high rate of SRA graduation and to develop a plan for reducing the number of students graduating through the SRA.

The rules address class size in high poverty school districts. The rules also require high need school districts to implement an intensive literacy program in preschool through grade 12 and a comprehensive mathematics program in grades three through 12.

## **SUBCHAPTER 1. GENERAL PROVISIONS**

### **6A:13-1.1 Purpose and applicability of rules**

(a) These rules are promulgated pursuant to the School Funding Reform Act, P.L. 2007, c. 260 to ensure that all students receive the educational entitlements guaranteed them by the New Jersey Constitution. These rules shall ensure that all districts provide students with a rigorous curriculum that is based on the Core Curriculum Content Standards; that relies on the use of State assessments to improve instruction; and that is supported by a professional development plan for teachers and school leaders. In addition, school districts shall provide students with an academically rigorous personalized environment to prepare them for post-secondary education and/or careers after graduation. These rules also address class size in high poverty school districts and focus on improving instruction in literacy and mathematics in high need school districts.

(b) These rules shall supercede the rules in N.J.A.C. 6A:10 and N.J.A.C. 6A:10A where inconsistencies occur.

## **SUBCHAPTER 2. STANDARDS-BASED INSTRUCTIONAL PRIORITIES**

### **6A:13-2.1 Standards-based instruction**

(a) All school districts shall implement a coherent curriculum for all students, including English language learners (ELLs), gifted and talented students and students with disabilities, that is content-rich and aligned to the most recent revision of the Core Curriculum Content Standards (CCCS). The curriculum shall guide instruction to ensure that every student masters the CCCS. Instruction should be

designed to engage all students and modified based on student performance. Such curriculum shall include:

1. Interdisciplinary connections throughout;
2. Integration of 21<sup>st</sup> century skills;
3. A pacing guide;
4. A list of instructional materials, including various levels of text at each grade;
5. Benchmark assessments; and
6. Modifications for special education students, for English language learners in accordance with N.J.A.C. 6A:15 and for gifted students.

(b) All schools and school districts shall develop and implement professional development plans for teachers aligned with the requirements and the Professional Development Standards set forth at N.J.A.C. 6A:9-1 et seq. Professional development activities shall:

1. Improve teachers' understanding of the content and pedagogy related to their teaching assignment;
2. Promote individual and collaborative professional learning with adequate and consistent time for teachers, including English as a second language, gifted and talented, bilingual and special education teachers, to work together in and across content areas and grade levels to review student work, analyze classroom assessments and other achievement data, critique lesson plans, and solve instructional problems;
3. Include evaluation and analysis of professional development results in order to improve professional development by reviewing the following:
  - i. Student test scores, work products and attitudinal measures;
  - ii. Progress made in achieving professional development goals;



iii. Staff feedback on the effectiveness of professional learning activities and Professional Development Plans; and

iv. Analysis of the costs associated with professional development opportunities in relation to the impact on student achievement and district goals;

4. Include ongoing analysis by administrators and teachers regarding the effectiveness of implementation of professional development initiatives; and

5. Include school district support through policies and adequate resources.

(c) All school leaders shall develop and implement a professional growth plan aligned with the requirements and the Professional Development Standards set forth at N.J.A.C. 6A:9-1 et seq.

(d) All schools and school districts shall collect and analyze student achievement data by subgroups (such as economically disadvantaged, race and ethnicity, students with disabilities, English language learners) and make educational decisions based on such data.

1. The school district shall transmit required student, faculty, school and school district data to New Jersey Standards Measurement and Resources for Teaching (NJ SMART), the New Jersey Department of Education's (Department) data warehouse, on a schedule and in a form specified by the Department;

2. The schools and school district shall use NJ SMART and its data query resources to track student progress year-to-year and school-to-school and to identify continuously enrolled students by school and school district;

3. The school district shall ensure that teachers, school administrators and central office supervisors receive training in NJ SMART and its data query resources;

4. The schools and school district shall analyze assessments of student progress in relation to curricular benchmarks and the results of State and non-State year-end tests reported by subgroups (such as economically-disadvantaged, race and ethnicity, students with disabilities and English language learners); and

5. The school district central office shall prepare data on comparative performance for all schools in the district and make them available to the schools. This analysis shall include the following comparisons using State assessment data:

i. Each grade level across all schools within the district;

ii. Schools within the district;

iii. Comparable districts by district factor groups; and

iv. Data with State averages.

(e) All school districts shall ensure that a free appropriate public education is available to all students with disabilities according to the Individuals with Disabilities Education Act (IDEA)(20 U.S.C. § 1400 et seq.); and N.J.A.C. 6A:14.

(f) All school districts shall provide English language learners with instructional services pursuant to N.J.A.C. 6A:15.

(g) All school districts shall provide gifted and talented students with appropriate instructional services pursuant to N.J.A.C. 6A:8-3.1.

(h) All school districts shall provide library-media services that are connected to classroom studies in each school building, including access to computers, district-approved instructional software, appropriate books including novels, anthologies and other reference materials, and supplemental materials that motivate students to read in and out of school and to conduct research. Each school district shall provide these library-media services under the direction of a certified school library media specialist.

#### **6A:13-2.2 Secondary Education Initiatives**

(a) The secondary education initiatives in this section shall apply to all secondary school districts, which shall be defined as school districts that include students in at least two of the grades from six through 12. Where applicable, secondary school districts shall collaborate with sending and receiving districts to implement the secondary education initiatives in this section.

(b) All secondary school districts shall develop a plan in 2008-2009 for implementing the secondary education initiatives specified in N.J.A.C. 6A:13-2.2 (c) through (e) by the 2009-2010 school year, except that secondary school districts previously subject to N.J.A.C. 6A:10 and 6A:10A shall immediately comply with the secondary education initiatives specified in this section.

(c) Secondary school districts shall have a school-level planning team to guide the development and implementation of the secondary education reforms described in this subsection. A representative group of teachers and administrators shall determine team membership and operating procedures.

(d) Secondary school districts shall provide instructional services, professional development and other support to assist secondary schools with the implementation of the secondary education initiatives specified in this section.

(e) Secondary school districts shall create personalized learning environments that strengthen relationships among students, teachers, staff members, families and the larger community for students in grades six through 12. These may include:

1. Small learning communities in free-standing facilities or within larger facilities;
2. Ninth grade academies where freshman students remain together and are provided with a supportive environment to enhance their successful transition to high school;
3. Student support systems where students are assigned an adult mentor or team of adults who know(s) them and can support student efforts in achieving goals and solving problems;
4. Academies with a career focus;
5. Multi-grade academies where students at various grade levels may remain with a core group of teachers for multiple years in an academy-type format which may be organized around a particular theme and involve interdisciplinary teaming; or
6. Other practices for personalizing learning environments that strengthen relationships among students, teachers, staff members, families and the larger community.

(f) All secondary school districts shall implement academic coursework aligned to N.J.A.C. 6A:8-5.1 that prepares all students for success in postsecondary education and/or careers after graduation, including the development of academic skills integral to success in rigorous high school courses. Beginning in 2008-2009, all students entering grade nine shall complete by the end of their high school education, at a minimum, coursework in language arts literacy, mathematics and science. These shall include college level preparatory English I, II, III and IV, Algebra I, Lab Biology or the equivalent

content taught in an integrated or career-based format, and other coursework as specified in N.J.A.C.

6A:8. All required courses shall:

1. Be developed, reviewed, evaluated and revised by a broad cross-section of teachers, content supervisors and principals;
2. Satisfy the CCCS and indicators in each content area according to the graduation requirements in N.J.A.C. 6A:8-5.1; and
3. Be aligned to the district curriculum which identifies the purpose of instruction, including the essential content to be mastered in each course with interim benchmarks and assessments and final assessments.

(g) Secondary school districts that administer the high school State assessment and in which 10 percent or more of their students satisfy high school graduation requirements through the Special Review Assessment (SRA) shall submit to the Department by November 15 of the subsequent school year, an analysis of all students who graduated by means of the SRA in the previous school year. The analysis shall include:

1. Names of high school courses and grades achieved for SRA students in language arts literacy, mathematics and science;
2. Attendance records for SRA students for each year of high school;
3. Review of the High School Proficiency Assessment (HSPA) and corresponding Grade Eight Proficiency Assessment (GEPA)/New Jersey Assessment of Skills and Knowledge 8 (NJ ASK8) scores attained by students;
4. Review of whether SRA students were taught by appropriately certified staff in English, mathematics and science in grades nine through 12; and

5. Development of a plan for increasing the proportion of students graduating by means of the State high school assessment based on data.

(h) The Commissioner shall appoint and consult with an advisory committee composed of educators with experience and knowledge in secondary education to guide the implementation of secondary education reform.

**SUBCHAPTER 3. PROGRAMS AND SERVICES FOR STUDENTS IN HIGH POVERTY  
AND IN HIGH NEED SCHOOL DISTRICTS**

**6A:13-3.1 Class size in high poverty districts**

(a) Class size in school districts in which 40 percent or more of the students are “at-risk” as defined in P.L. 2007, c. 260 shall not exceed 21 students in grades kindergarten through three, 23 in grades four and five and 24 students in grades six through 12; provided that if the district chooses to maintain lower class sizes in grades K-3, class sizes in grades four and five may equal but not exceed 25. Exceptions to these class sizes are permitted for some physical education and performing arts classes, where appropriate.

(b) School districts previously subject to N.J.A.C.6A:10A and N.J.A.C. 6A:10 shall implement the class size requirements set forth in this section during the 2008-2009 school year and all other school districts to which this section applies shall implement the class size requirements beginning in the 2009-2010 school year.

### **6A:13-3.2 Full day kindergarten requirements**

(a) School districts in which 40 percent or more of the students are "at-risk" as defined in P.L. 2007, c. 260 shall maintain all existing full day kindergarten programs with a teacher's aide for each classroom. Class size for these kindergarten classrooms shall not exceed 21 students.

### **6A:13-3.3 Definition of high need school districts and implementation timeline**

(a) A high need school district is defined as a school district in which 40 percent or more of the students are "at-risk" as defined in P.L. 2007, c.260 and is at one or more of the following proficiency levels on State assessments:

1. Less than 85 percent of total students have achieved proficiency in language arts literacy on the NJ ASK 3;
2. Less than 80 percent of total students have achieved proficiency in language arts literacy on the NJ ASK 8;
3. Less than 80 percent of total students have achieved proficiency in language arts literacy on the HSPA;
4. Less than 85 percent of total students have achieved proficiency in mathematics on the NJ ASK 4;
5. Less than 80 percent of total students have achieved proficiency in mathematics on the NJ ASK 8; and/or
6. Less than 80 percent of total students have achieved proficiency in mathematics on the high school State assessment.

(b) On an annual basis, beginning in 2008, the Department shall identify the list of high need school districts based on the State assessments results, and shall promptly notify the districts that are classified as high need. Except as required by (c) below, in the first school year immediately following

identification as a high need district, such districts shall begin planning for implementation of, and shall implement where possible, the designated program(s) (language arts and/or math literacy) as required below. In the subsequent year following identification as a high need district, such districts shall fully implement the designated program(s). High need school districts, once identified, shall remain in that status and shall continue to implement the designated program(s) for a minimum of three years.

(c) High need school districts previously subject to N.J.A.C. 6A:10A and N.J.A.C. 6A:10 shall implement the language arts literacy programs and services required by this subchapter during the 2008-2009 school year.

#### **6A:13-3.4 Language Arts Literacy**

(a) **Intensive early literacy for grades P-3.** High need school districts where less than 85 percent of total students have achieved proficiency in language arts literacy on the NJASK 3 shall provide an intensive early literacy program for preschool to grade three to ensure that all students achieve proficiency on State standards. The intensive early literacy program shall include the following components:

1. An emphasis on small group instruction in at least reading, writing and technology;
2. A comprehensive early literacy assessment program that includes:
  - i. Assessment of English language learners (ELLs) in accordance with N.J.A.C. 6A:15-1.3;



ii. A reading measure used minimally at the beginning of grades kindergarten through three to determine the reading skills and strategies students have mastered;

iii. On-going performance-based assessments;

iv. A comprehensive diagnostic assessment of individual students who are exhibiting persistent difficulty in reading following a sustained period of targeted instruction; and

v. An annual end-of-year achievement assessment of reading with a norm-referenced and/or criterion referenced test in grades one and two.

3. At least a daily 90-minute, uninterrupted language arts literacy block in grades kindergarten through three with guidance in the use of that time that may include the following instructional strategies:

i. Use of a reading measure to differentiate student needs;

ii. Small group instruction;

iii. Direct instruction;

iv. Guided reading; and

v. Shared reading.

4. Instructional materials that include concepts and themes from other content areas;

5. Professional development opportunities for teachers that focus on the elements of intensive early literacy, ways to assist students who exhibit persistent difficulty in reading, or other related topics that have been identified by these teachers as professional development needs

and are reflected in the school and school district professional development plans pursuant to N.J.A.C. 6A:9-15;

6. Consistent and adequate opportunities for teachers to discuss and analyze student work, interim progress measures and assessment results, and to plan any modifications in grouping and/or instruction that may be indicated, consistent with this section;

7. A classroom library that reflects the diversity and needs of all students and includes assistive technology;

8. Use of a highly skilled literacy coach or certified teacher to coordinate professional development and collaboration based on the school and school district professional development plan, if documented as necessary to increase achievement of early literacy; and

9. Methods to involve parents and family members in student learning.

**(b) Intensive literacy for grades four through eight.** High need school districts where less than 80 percent of total students have achieved proficiency in language arts literacy on the NJ ASK 8 shall implement an intensive literacy program for grades four through eight that includes the following components:

1. A comprehensive literacy assessment for grades four through eight as part of the school district's curriculum to measure individual and group progress indicated below:

i. Benchmark analysis that gauges students' performance and is used to assist school staff in determining skills that students still need to attain; and

ii. Assessment of English language learners (ELLs) pursuant to N.J.A.C. 6A:15-1.3;

2. Emphasis on small group instruction with scheduling of double periods, including appropriate classroom materials for small group instruction with evidence-based interventions and additional time for students who are not proficient in language arts literacy;
3. Professional development opportunities for teachers and administrators that are based on effective instructional practices including:
  - i. Enhancing knowledge of the language arts literacy content and pedagogy to engage all students;
  - ii. Learning how and having opportunities to analyze student work and assessment results in a collaborative setting; and
4. Involving parents and family members in student learning.

(c) **Language arts literacy for students in grades nine through 12.** High need school districts where less than 80 percent of total students have achieved proficiency in language arts literacy on the high school State assessment shall implement a language arts literacy program aligned with college preparatory English I, II, III and IV for grades nine through 12 that incorporates the elements in 6A:13-3.4 (b).

#### **6A:13-3.5 Mathematics**

(a) Mathematics instruction throughout the elementary and middle schools should be designed to prepare all students for rigorous mathematics at the high school level.

(b) **Math literacy for students in grades three through four.** High need school districts in which less than 85 percent of total students have achieved proficiency in mathematics on the NJ ASK 4 shall

implement a comprehensive program for mathematics education that prepares students in grades three through four for success in higher order mathematics and that includes the following components:

1. A curriculum that simultaneously develops conceptual understanding, computational fluency and problem solving skills, with meaningful instruction and a focus on critical mathematics skills as part of a successful learning experience;
2. Mathematical reasoning that occurs in contextual learning;
3. An emphasis on communicating mathematics concepts both verbally and in writing;
4. The use of frequent questions and opportunities for class discussion in addition to the math textbook activities to improve student problem solving ability;
5. Professional development in both mathematics content and in the elements of mathematics pedagogy specified in this section, related to the appropriate grade and based on individual professional needs, pursuant to N.J.A.C. 6A:9-15;
6. Use of appropriate instructional materials, technology and manipulatives, aligned with the CCCS in mathematics, that lead students through concrete, symbolic and abstract mathematical thinking;
7. Multiple assessments and benchmarks, including use of formative assessments;
8. Differentiated instruction;
9. Explicit mathematics instruction for struggling students to ensure that these students possess the foundational skills and conceptual knowledge necessary for understanding the mathematics they are learning at their grade level; and
10. Methods to involve parents and family members in student learning.

(c) **Math literacy for students in grades five through eight.** High need school districts where less than 80 percent of total students have not achieved proficiency in mathematics on the NJ ASK 8 shall

implement a mathematics literacy program that prepares all students in grades five through eight for success in Algebra at the high school level and that incorporates the elements in 6A:13-3.5 (b).

(c) **Math literacy for students in grades nine through 12.** High need school districts where 80 percent or more of total students have not achieved proficiency in mathematics on the high school State assessment shall implement a mathematics literacy program for grades nine through 12 which incorporates the elements in 6A:13-3.5 (b) and that is aligned to course expectations as required to meet graduation requirements.

Exhibit B

October 12, 2007

TO: Chief School Administrators of Abbott Districts  
School Business Administrators  
Early Childhood Supervisors

FROM: Lucille E. Davy, Commissioner

SUBJECT: 2008-2009 Abbott Preschool Budget Instructions and Guidance

As you are aware, Governor Corzine and the New Jersey Department of Education have committed to developing a new school funding formula that will improve educational outcomes for all children regardless of where they reside. While extensive work in this area has been accomplished, final details regarding a new funding formula may not be resolved in time to meet the Abbott preschool program's Court-ordered deadlines for 2008-2009. During this transition period, the department proposes to use a revised method for the preschool budget review and approval process. Each district will be able to submit a presumptive budget for 2008-2009 together with the district's two-year report on instructional priorities for preschool. The 2008-2009 presumptive budget shall be calculated as the 2007-2008 approved per pupil amount for in-district, Head Start and other private provider programs, where applicable, increased by a cost-of-living adjustment of 2.89 percent and multiplied by the number of students projected to be served in each setting. Funds for 2007-2008 special requests are included in the 2007-2008 approved per pupil amounts with the exception of requests for one-time purchases. See the attached district budget workbook for the detail of the 2007-2008 special requests that are included in the approved per pupil amounts. Provisions will be made for costs of district withholding and start-up materials and supplies for new classrooms that expand the district's current enrollment.

School district, Head Start and other private provider budgets that support high quality preschool programs at or below the presumptive budget calculated will be reviewed to ensure all supporting documents are complete and that all required educational components are funded within the preschool program budget. Because the presumptive budgets will not contain individualized or specific line-item approvals, programs that have a presumptive budget will be afforded increased flexibility across line-item expenditures. The district budget workbook has been pre-filled with per pupil amounts for in-district, district-wide, Head Start and other private provider program costs where applicable. To ensure that budgets and program plans meet

department requirements specified in N.J.A.C. 6A:10A, for a six-hour 180-day comprehensive educational preschool program, the budget guidance and planning documents provided should be used by all districts, Head Start programs and other private providers.

The department will utilize historical enrollment trends and the school district's past ability to reach at least 90 percent of the universe of eligible children to work with the district to establish projected enrollment. A district board of education enrolling less than 90 percent of the universe of eligible children shall develop a corrective action plan within their two-year preschool program plan setting forth specific plans to address under-enrollment, including plans to remedy lack of facilities and plans for outreach and recruitment of hard-to-reach families.

School district, Head Start and other private provider budgets that are submitted and exceed the presumptive budget calculated will undergo the traditional intensive review by the department. Because specific budgeted line-item costs are approved during this process, consistent with past practice, any subsequent transfers among line items will require approval from the department. The district board of education shall verify for accuracy and efficiency and approve all provider budgets prior to submission of the budget to the department.

All budgets and supporting documentation must be submitted to the department on or before November 15, 2007. If you have any questions, please contact David Joye, budget and policy analyst, Division of Early Childhood Education at 609-777-2074. Thank you for your assistance in this matter.

LED/JJ/dj/k:Abbott budget guidance and forms/2008-09 guidance and forms/2008-2009 Abbott preschool instructions and guidance letter to CSAs 10/12/07

**Attachment**

c: Willa Spicer  
John Hart  
William King  
Jacqueline Jones  
County Superintendents  
David Joye  
Members, Lee Group  
Garden State Coalition of Schools

#180-08

Exhibit C

OAL DKT. NO. EDU 3055-08  
AGENCY DKT. NO. 48-2/08

BOARD OF EDUCATION OF  
THE CITY OF ELIZABETH,  
UNION COUNTY,

COMMISSIONER OF EDUCATION

PETITIONER,

DECISION

v.

NEW JERSEY STATE  
DEPARTMENT OF EDUCATION,

RESPONDENT.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions and replies filed by the petitioning Board of Education (Board) and the respondent Department of Education (Department) pursuant to the provisions of *N.J.A.C. 6A:10A-8.7(c)*.<sup>1</sup>

Upon consideration of the record and the parties' arguments on exception, for the reasons that follow, the Commissioner adopts in part, and rejects in part, the Initial Decision of the Administrative Law Judge (ALJ).

STANDARD OF REVIEW

Initially, the Commissioner concurs with the ALJ that the Board in this matter bears the burden of proving its entitlement to the funds sought by a preponderance of competent, relevant and credible evidence. (Initial Decision at 17).

<sup>1</sup> In its exceptions, the Department included introductory "background" information, together with a related certification of Department Budget and Policy Analyst David Joye, incorporating factual representations not proffered at hearing. The Board vigorously objected to such inclusion, noting that parties to contested matters may not use exceptions to supplement evidence and testimony. The Commissioner agrees, and, accordingly, has not considered this portion of the Department's submission in rendering the within decision. *N.J.A.C. 17:28.4(c)*.



The Board has contended on exception -- as it consistently did before the ALJ -- that its burden lies solely in successfully countering the reasons for denial given in the Department's written decision. According to the Board, *N.J.A.C. 6A:10A-8.7(a)1* requires that the Department's actions be judged exclusively on the basis of the specific written reasons included in its denial letter, and that the Department cannot be permitted to "cobble together" facts from the administrative record on appeal in an attempt to construct *post facto* justifications for its actions. The Board asserts that if the Department's stated reason for denying a request can be shown to lack sufficient evidentiary foundation or to be based on factually or legally unsupportable reasons and assumptions, then the Board must prevail on appeal. (Petitioner's Exceptions at 3-5; see also T1-T3 *passim*, and Petitioner's Post-hearing Brief at 6-7 and *passim* thereafter)

This position, in the Commissioner's view, effectively shifts the burden to the Department and improperly relieves the Board of its affirmative obligation to demonstrate on appeal that programs or expenditures denied by the Department are, in fact, necessary for adequate and efficient provision of required preschool education -- an obligation that surely cannot be met by seizing upon the letter of the Department's written determination while ignoring, or attempting to foreclose, the more expansive explications presented at plenary hearing. As pointed out by the Department, the rule cited by the Board -- although it does, indeed, require the Department to provide specific reasons for denying a program or expenditure -- places no limitations on the scope of the ALJ's and Commissioner's review (Respondent's Reply at 1-3); moreover, the more directly applicable rule, *N.J.A.C. 6A:10A-8.6(c)* expressly states that -- over and above the documents and information submitted to the Department by the Board -- the record on

appeal shall include "any additional information relied upon by the Department in making the determination at issue."

The Board has further contended that the Supreme Court requires the Department to view the Board's assessment of its own particularized needs with deference, which may not be overcome without sufficient reason. (Petitioner's Exceptions at 5-6; see also Petitioner's Pre-hearing Brief at 5-6) However, as correctly noted by the Department (Respondent's Reply at 3-4), the deference invoked by the Board refers to the Department's review of district requests, not to the Commissioner's review on appeal; certainly, such deference cannot work to preclude the Department (or the Commissioner) from denying insufficiently justified requests – a result surely not intended by the Court, and one that would be manifestly contrary to sound public policy.

Accordingly, if the Board is to prevail on any of the issues in dispute in this matter, it must demonstrate to the Commissioner that the funding it seeks is, in fact, necessary to adequately and efficiently provide required preschool educational programs; anything less would prevent the Commissioner from responsibly exercising the duty of oversight charged to her by law. *Board of Education of the City of New Brunswick, Middlesex County v. New Jersey State Department of Education*, Commissioner's Decision No. 122-05, decided March 15, 2005; *Board of Education of the City of Elizabeth, Union County v. New Jersey State Department of Education*, Commissioner's Decision No. 127-06, decided April 7, 2006; *Board of Education of the Town of Phillipsburg, Warren County v. New Jersey State Department of Education*, Commissioner's Decision No. 166-04, decided April 21, 2004.

EXTENDED DAY/EXTENDED SCHOOL YEAR PROGRAM

Turning, then, to the Board's request for funding for an extended day/extended school year (ED/ESY) program in light of the requisite standard of review, the Commissioner concurs with the ALJ that the Board is not entitled to such funding.

The Board contends on exception that – contrary to the finding of the ALJ, who, according to the Board, did not apply the proper standard of review and erroneously focused on irrelevant evidence – it is entitled to the requested funding for its extended day/extended school year (ED/ESY) program. The Board asserts that the Department's stated basis for denial was the Board's exceeding of the six-hour, 180-day minimum preschool program required by law and the apparent overlap of the ED/ESY program with wrap-around services funded by the Department of Human Services (DHS) – the former of which is not precluded by any court decision, statute or rule when based on student need, and the latter having been discounted at hearing through evidence and argument indisputably demonstrating the qualitative difference between the ED/ESY program and DHS-provided child care. (Petitioner's Exceptions at 6-11; see also Post-hearing Brief at 7-9 and 13-17) The Board further contends that the ALJ erred in construing too narrowly the National Institute for Early Education Research (NIEER) study, which – when read properly so as to recognize its broader point that more time in the classroom yields better results for disadvantaged preschoolers – fully supports the Board's determination that the student population it serves would benefit significantly from the ED/ESY model – a determination to which deference should have been accorded as required by the Court. (*Id.* at 11-15; see also Post-hearing Brief at 9-13)

The Commissioner, like the ALJ, is unpersuaded by the Board's arguments. Initially, the Commissioner notes that the State Board of Education has acted

to fulfill the mandate of the Supreme Court that all children in *Abbott* districts be afforded the opportunity to obtain a high-quality preschool education by defining the elements it believes to constitute such education and establishing processes to ensure that sufficient funds are available to support them; to this end, the State Board has directed that children in *Abbott* districts be provided with comprehensive full-day, full-year preschool programs meeting stringent educational and staffing requirements. *N.J.A.C.* 6A:10A-2.1 *et seq.*; *N.J.A.C.* 6A:10A-1.2 (defining “full-day, full year” as a six-hour comprehensive educational program offered for not less than 180 days over the course of the ten-month academic year) Thus, as recognized by the ALJ, and previously by the Commissioner in *Phillipsburg, supra*, any request for funding of preschool education beyond the extensive program already required by law must be justified by a compelling showing that even this program – which is presumed to be fully adequate for its purpose and can in no way be accurately characterized as a minimally sufficient “base line” – does not enable students to enter kindergarten ready to succeed in accordance with *N.J.A.C.* 6A:10A-2.1. In the present matter, as set forth by the ALJ in the Initial Decision at 16-17 and detailed by the Department in its Post-hearing Brief at 4-13 and 21-24, no such showing has been made; to the contrary, both Department and Board witnesses attested that the district is able to meet the needs of its preschool students during the regular school day. (Initial Decision at 6, 12; Testimony of Ellen Wolock at T2:232-34, 291-98, 302;<sup>2</sup> Testimony of Olga Hugelmeyer at T1:160-67)<sup>3</sup>

<sup>2</sup> This and all similar citations refer to transcripts of OAL hearings held on March 13, 2008 (T1), March 18, 2008 (T2) and March 19, 2008 (T3), respectively, followed by applicable page numbers.

<sup>3</sup> Although the Board has evidently been providing ED/ESY programs at some of its schools for a number of years, funds budgeted for this purpose were neither identified nor scrutinized as such, nor was express approval ever granted by the Department. (Initial Decision at 4-5; Board's Pre-hearing Brief at 7; Exhibit P-1 at Bates stamp 092; Testimony of Tracy Markowitz at T1:27; Department's Reply Exceptions at 9, note 7; Testimony of David Joye at T2:62-65, 125-33, 161-63; Testimony of Ellen Wolock at T2:182-83)

Moreover, even entertaining, *arguendo*, the Board's contention that the NIBER study (Exhibit P-6) supports its claims,<sup>4</sup> the Commissioner could not accept a simple "more is better" rationale without a specific factual nexus to the identified unmet needs of district students, which was not provided herein. Finally, as to the Department's reference to "overlap" with DHS wraparound services, the record is clear that such reference was to time and funding, not to educational character, and that the Board would, in fact, be receiving State funding from two sources for the same time period had its request been granted. (Department's Reply at 7-10; Testimony of David Joye at T2:149-60; Testimony of Beverly Wellons at T2:321-22) Accordingly, the Department did not err in citing "overlap" as an additional reason for denying the requested funding.<sup>5</sup>

#### LUNCH ASSISTANTS

Applying the requisite standard to the Board's request for funding for lunch assistants, the Commissioner adopts in part, and rejects in part, the recommendation of the ALJ.

Both parties take exception to the Initial Decision on this point, the Department to the ALJ's recommendation that funding should be provided for 165 lunch assistants for one hour and the Board to the fact that such funding was limited to one hour

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<sup>4</sup> The Department objects to this argument as an interpretation of counsel having no support in the record and not consistent with the testimony of any witness at hearing. (Department's Reply at 10-11) The Department had additionally objected to the introduction of this document into evidence because it was not submitted by the Board either in support of its original application or during subsequent discussions prior to appeal; however, it was ultimately allowed by the ALJ. (T1:29-32, T2:6-11)

<sup>5</sup> The Department recommended that further action be considered to address the possibility of certified teachers being paid twice for overlapping hours, so as to, in effect, be paid for longer days and/or longer school years than they actually worked. (Department's Reply at 9-10) Because the present record does not permit a determination on this point and the Commissioner has an obligation to ensure the effective and efficient use of *Abbott* funds, the Department's Office of Fiscal Accountability and Compliance will be directed to investigate this matter.

rather than granted in full. The Department contends that its use of a 1:3 assistant-to-classroom ratio to determine that 55 was the appropriate number of lunch assistants for the district reflects what it has found to be reasonable, customary and consistent with practices in *Abbott* districts statewide; furthermore, according to the Department, this level of support could be properly effectuated by the Board in this instance – so as to maintain the required 2:15 and 1:15 teacher-to-student ratios during lunch and nap times, respectively, *without* additional lunch assistants – if teachers and teacher assistants were held to the half-hour lunch specified in their contract or relief teachers were utilized for lunch purposes, as they are in other *Abbott* districts, rather than (less appropriately) for specialty instruction in subjects such as physical education, music and art. The Department further stresses that funds for lunch assistants were sought through a special request<sup>6</sup> – *i.e.*, a one-year request either exceeding or not fitting within guidelines for a line-item category on the budget submission form – so that the Board was required to provide a detailed justification including documented evidence of need and effectiveness, which it did not. (Respondent's Exceptions at 4-9; see also Post-Hearing Brief at 13-17 and 24-25)

The Board in turn objects to the ALJ's finding that a 2:15 teacher-to-student ratio need not be maintained during student nap time. According to the Board, the ALJ's provision of single-adult (1:15) coverage during this period – when many students remain active, according to the uncontradicted testimony of Board witnesses – compromises student safety by not allowing for adequate supervision if the one adult must leave the classroom for any reason; moreover, the Board continues, it is inconsistent

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<sup>6</sup> The request is erroneously characterized as a line item in the Initial Decision at 2. See Exhibit P-1 at Bates stamp 161; see also testimony of Tracy Markowitz at T1: 9-12, and Testimony of David Joye at T2:62.

with his (correct) finding that safety and security considerations require that two adults be present during lunch hour. The Board asserts that the Department's decision -- with respect to both lunch and nap times -- was based on inaccurate assumptions about the length of teacher lunch hours, and on arbitrary application of a 1:3 assistant-to-classroom ratio that ignores the district's actual circumstances -- including the fact that the Board cannot utilize relief teachers for lunch purposes, as do other *Abbott* districts maintaining a 2:15 teacher-to-student ratio, because they are assigned elsewhere. (Petitioner's Exceptions at 15-21; see also Post-Hearing Brief at 18-23)

Upon review, the Commissioner finds that the Department correctly determined the appropriate number of lunch assistants needed by the Board. The ALJ's recommendation that the requested 165 positions be funded during the student lunch hour is based on his categorical acceptance of the Board's established operational pattern, with teachers permitted to take a one-hour lunch rather than the contractually specified half-hour,<sup>7</sup> and relief teachers unavailable because they are assigned to deliver specialty instruction. However, as evidenced by the testimony of Department witnesses -- both the budget analyst involved in making the decision under appeal and the educational expert with whom he collaborated, who was directly familiar with the district's lunch practices -- this pattern could readily be altered to make more efficient use of available resources and bring the district's costs and staffing allocations more into line with those of other districts and with best practices, while fully complying with staffing ratios designed to ensure adequate student supervision; indeed, the Department has been working with the

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<sup>7</sup> The Commissioner notes that no past or current contract was ever produced specifying a one-hour lunch for teachers and teacher assistants; Exhibit P-19 is a proposed successor agreement pertaining to the 2009-10 and 2010-11 school years. See also Initial Decision at 7; Statements of counsel at T2:46; and Testimony of Olga Hugelmeyer at T1:216-219 and T2:52-58.

district to effectuate exactly that result. (Testimony of David Joye at T2:113-23, 168-70; Testimony of Renee Whelan at T3:11-125) Thus, the Department's determination to limit funding to 55 lunch assistants was neither an arbitrary application of "numbers crunching" nor a mistake based on incorrect factual assumptions; rather, it was a fully informed judgment against State subsidization of an inefficient and ineffective operational arrangement, and must accordingly be upheld on appeal.

#### TECHNOLOGY INFRASTRUCTURE

Finally, for similar reasons, the Commissioner rejects the ALJ's recommendation that the Board be granted its special request for \$44,000 in technology infrastructure funding.

On exception, the Department again contends, as it did before the ALJ, that the Board's existing \$132,000 aid allotment -- which represents \$800 per class that can be spread across all in-district preschool classrooms -- is sufficient for infrastructure purposes, which are additionally supported by initial start-up funding for new classrooms (\$44,100 in 2008-09, for 18 new classrooms). According to the Department, the fact that the Board was granted an identical request for the 2007-08 school year does not bind the Department to grant similar requests in subsequent years, and certainly cannot prevent the Department from rectifying inefficient use of funds. Moreover, the Department asserts, a special request for technology funds cannot be granted unless the Department can verify that the entire amount of available technology funding has been appropriately allocated -- a standard which the Board did not meet, either before the Department or at hearing. The Department notes that its denial of the Board's request is in no way inconsistent with its stance on the importance of technology, as evidenced by the significant level of support provided to the district for this purpose; it further rejects the



Board's contention that denial of the requested special funding will result in elimination of telephone service, the router, internet access and maintenance/support services in three schools, observing that these fundamental costs should be addressed before expending funds, as the Board does, on nonessential items such as digital cameras and smart board bulbs. (Respondent's Exceptions at 9-15; see also Post-hearing Brief at 17-18 and 26-27)

The Board counters that the reason proffered by the Department's denial letter was the sufficiency for infrastructure needs of the Board's \$800 per classroom allocation, so that the Department cannot now claim that the Board's request was inadequately supported or that funds could be appropriately reallocated from elsewhere in its budget. According to the Board, the ALJ assessed the evidence and (correctly) concluded that the Board had demonstrated its need for the funding at issue, so that the Department's position to the contrary should be rejected as based on unsupported assumptions, conjecture and speculation, as well as considerations other than need -- as evidenced by its own prior approval of the same request. (Board's Reply at 8-13; see also Post-hearing Brief at 23-27)

The Commissioner, however, finds that the ALJ's decision was predicated on need for the items requested while ignoring the Board's manner of addressing its technology expenditures. Although the need for the services at issue in this matter -- basic internet and telephone connectivity -- is beyond serious dispute, what is in question is the need for funding over and above amounts ordinarily provided to support preschool technology.

Notwithstanding that the Board has in the past been allowed to fund infrastructure needs for Schools 50, 51 and 52 through special requests, now that this situation has come to the Commissioner's attention on appeal, she cannot condone and

perpetuate inefficiency by allowing past practice to compel the award of additional funding in an area where the Board has failed to exercise reasonable fiscal discretion. As the Department's denial reflects (Testimony of David Joye at T2:95-112), there is no indication on this record that the Board made any attempt, before seeking additional funding, to first address its basic technological needs, then assess how best to use remaining allocations; to the contrary, the record clearly suggests that the Board treats its \$800 per-class allotment as a series of self-contained entitlements, with each class's expenditures expanding to fill the amount available regardless of broader needs and no consideration given to ongoing infrastructure components.<sup>8</sup> Under these circumstances, the Commissioner cannot be persuaded, as she must by law, that the requested *funds* – as opposed to the services identified as their intended purpose – are necessary for the Board's adequate and efficient provision of preschool services.

In so holding, the Commissioner fully recognizes that she is requiring the Board to make choices, since, in the ever-burgeoning realm of technology, services and materials arguably of benefit to students are always likely to exceed levels that can realistically be supported by public funds. However, maintenance of a rich learning environment through use of technology (Exhibit P-15) is not inconsistent with efficiency and fiscal prudence, and proposed expenditures must always be scrutinized to identify items which can be done without, deferred, or provided in a more efficient manner while

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<sup>8</sup> Tracy Markowitz testified that a classroom not needing a new smart board lamp (\$300) would then have more money to spend on software, or that if software were not purchased, on a digital camera; she further testified that if the Board's special request is not granted, much of the existing classroom technology will be rendered useless due to lack of connectivity. (T1:113, 122-127, 130-131) Olga Hugelmeier testified that funds are exhausted each year because classroom teachers are informed of the remaining balance on their \$800 allotments as the year progresses and invited to submit additional order(s) based on their further needs assessments; she, too testified that denial of the special request would cut off phone and internet connectivity to the affected schools. (T3:133-36)

still meeting student needs; for those items deemed truly necessary but for which funds are otherwise unavailable, the special request process is then appropriately utilized.

### CONCLUSION

In sum, the Commissioner finds no merit to the Board's claims that the Department's January 15, 2008 denial of the funding requests herein at issue in any way violated constitutional remedies, court mandates, rules of the State Board of Education or departmental guidelines, nor to its claim that such denial will prevent the district from providing required and needed programs, services, positions and resources for preschool students. (Petition of Appeal at 1-10) Rather, for the reasons set forth above, the Commissioner finds that the Department's actions were reasonable and lawful in all respects, and that the Board on appeal has failed to meet its burden of proving that the funding it has requested is necessary to provide required preschool educational programs in an adequate and efficient manner.

Accordingly, the Initial Decision of the OAL is adopted in part, and rejected in part, as set forth above, and the petition of appeal is dismissed in its entirety.<sup>9</sup>

IT IS SO ORDERED.<sup>10</sup>

*Luella E. Day*

COMMISSIONER OF EDUCATION

Date of Decision: 4/21/08

Date of Mailing: 4/21/08 (Faxed)

<sup>9</sup> The Commissioner notes that, at pages 10-11 of the Initial Decision, the Early Screening Inventory-Revised (ESI-R) is inadvertently referred to as the "ECER" (Early Child Environmental Rating Scale, or ECERS). (Department's Exceptions at 4, note 7)

<sup>10</sup> Pursuant to *N.J.A.C. 6A:10A-8.7(a)5* and *N.J.A.C. 6A:10-3.7(a)5*, this decision is a final agency action appealable to the Appellate Division of the Superior Court within six (6) days of the Commissioner's decision.

NOTICE OF APPEAL

PLEASE PRINT OR TYPE

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

TITLE IN FULL (AS CAPTIONED BELOW):

ATTORNEY OR PRO SE LITIGANT

Board of Education of the City of Elizabeth, Union County, Petitioner-Appellant, v. New Jersey State Department of Education, Respondent

NAME Richard E. Shapiro, Esq.

ADDRESS 5 Mapleton Road Princeton, NJ 08540

TELEPHONE NO. (609)919-1888

ATTORNEY FOR Peitioner-Appellant  
ON APPEAL FROM:

New Jersey Department of Education

TRIAL COURT OR STATE AGENCY

Agency Dkt. No. 48-2/08

TRIAL COURT OR AGENCY NUMBER

TRIAL COURT JUDGE

CIVIL [ ] CRIMINAL [ ] JUVENILE [ ]

NOTICE IS HEREBY GIVEN THAT Board of Education of City of Elizabeth, Union County APPEALS TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, FROM THE JUDGMENT [ ] ORDER [ ] STATE AGENCY DECISION [X] ENTERED IN THIS ACTION ON April 21, 2008 DATE

IF NOT APPEALING THE ENTIRE JUDGMENT, ORDER OR AGENCY DECISION, SPECIFY WHAT PARTS OR PARAGRAPHS ARE BEING APPEALED.

HAVE ALL ISSUES AS TO ALL PARTIES BEEN DISPOSED OF IN THIS ACTION IN THE TRIAL COURT OR AGENCY?. (IN CONSOLIDATED ACTIONS, ALL ISSUES AS TO ALL PARTIES IN ALL ACTIONS MUST HAVE BEEN DISPOSED OF.) YES [X] NO [ ]

IF NOT, HAS THE ORDER BEEN CERTIFIED AS FINAL PURSUANT TO R. 4:42-2? YES [ ] NO [ ]

IN CRIMINAL, QUASI-CRIMINAL AND JUVENILE ACTIONS:

GIVE A CONCISE STATEMENT OF THE OFFENSE AND OF THE JUDGMENT, DATE ENTERED AND ANY SENTENCE OR DISPOSITION IMPOSED.

IS DEFENDANT INCARCERATED? YES [ ] NO [ ]

WAS BAIL GRANTED OR THE SENTENCE OR DISPOSITION STAYED? YES [ ] NO [ ]

IF IN CUSTODY, GIVE THE PLACE OF CONFINEMENT.



NOTICE OF APPEAL

PLEASE PRINT OR TYPE

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

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IF NOT, HAS THE ORDER BEEN CERTIFIED AS FINAL PURSUANT TO R. 4:42-2? YES [ ] NO [ ]

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GIVE A CONCISE STATEMENT OF THE OFFENSE AND OF THE JUDGMENT, DATE ENTERED AND ANY SENTENCE OR DISPOSITION IMPOSED.

IS DEFENDANT INCARCERATED? YES [ ] NO [ ]

WAS BAIL GRANTED OR THE SENTENCE OR DISPOSITION STAYED? YES [ ] NO [ ]

IF IN CUSTODY, GIVE THE PLACE OF CONFINEMENT.

NOTICE OF APPEAL AND ANNEXED CASE INFORMATION STATEMENT HAVE BEEN SERVED ON:

	<u>NAME</u>	<u>DATE OF SERVICE</u>
TRIAL COURT JUDGE		
TRIAL COURT CLERK OR STATE AGENCY	Lucille Davy, Commissioner of Education	4/28/2008
ATTORNEY GENERAL OR ATTORNEY FOR OTHER GOVERNMENTAL BODY PURSUANT TO R. 2:5-1(a), (e) or (h)	Melissa T. Dutton, DAG	4/28/2008
OTHER PARTIES:		
<u>NAME AND DESIGNATION</u>	<u>ATTORNEY NAME, ADDRESS AND TELEPHONE NO.</u>	<u>DATE OF SERVICE</u>
N.J. Dept. of Education	Melissa T. Dutton, DAG NJ Dept. of Law and Public Safety Division of Law, Hughes Justice Complex, 25 Market Street, P.O. Box 112, Trenton, NJ 08625 (609) 633-1972	4/28/2008

ANNEXED TRANSCRIPT REQUEST FORM HAS BEEN SERVED ON:

	<u>NAME</u>	<u>DATE OF SERVICE</u>	<u>AMOUNT OF DEPOSIT</u>
COURT REPORTER'S SUPERVISOR, CLERK OF COURT OR AGENCY	CRT Support, Corp.	4/28/2008	\$900.00
COURT REPORTER			


EXEMPT FROM ANNEXING THE TRANSCRIPT REQUEST FORM DUE TO THE FOLLOWING:

- NO VERBATIM RECORD.
- TRANSCRIPT IN POSSESSION OF ATTORNEY OR PRO SE LITIGANT. (FOUR COPIES, ALONG WITH THE COMPUTER DISKETTE FROM THE TRANSCRIPT PREPARER, MUST BE SUBMITTED.) LIST THE DATE(S) OF THE TRIAL OR HEARING.
- MOTION FOR ABBREVIATION OF TRANSCRIPT FILED WITH THE COURT OR AGENCY BELOW.
- MOTION FOR FREE TRANSCRIPT FILED WITH THE COURT BELOW.

I CERTIFY THAT THE FOREGOING STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF. I ALSO CERTIFY THAT, UNLESS EXEMPT, THE FILING FEE REQUIRED BY N.J.S.A. 22A:2 HAS BEEN PAID.

April 28, 2008

DATE



SIGNATURE OF ATTORNEY OR PRO SE LITIGANT