

ORDER PREPARED BY THE COURT

Education Law Center, on behalf of Abbott :
v. Burke Plaintiff Children, :
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 Plaintiff, :
 vs. :
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 New Jersey Department of Education, :
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 Defendant. :
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SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
CHANCERY DIVISION-GENERAL EQUITY
DOCKET NO. C-83-05

CIVIL ACTION

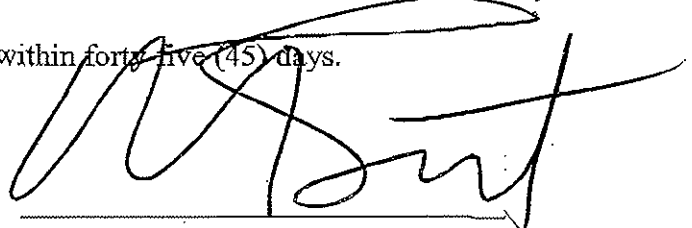
ORDER

This matter having been presented to the Court by way of an Order to Show Cause and Verified Complaint filed by Plaintiff Education Law Center, on behalf of Abbott v. Burke Plaintiff Children, seeking a summary proceeding pursuant to R. 4:67-2; and opposition having been filed by Defendant New Jersey Department of Education; and the court having reviewed the submissions of counsel; and having heard oral argument on July 20, 2005; and for the reasons set forth in the Statement of Reasons attached hereto; and for good cause having been shown;

IT IS ON THIS 8th DAY OF AUGUST 2005,

ORDERED that Judgment is entered in favor of Plaintiff Education Law Center and against Defendant New Jersey Department of Education; and it is further

ORDERED that Defendant shall create a plan for the Abbott Districts for the fiscal years 2006 and 2007 pursuant to N.J.A.C. 6A:10-4.1(b) within forty five (45) days.



Neil H. Shuster, P.J.Ch.

EDUCATION LAW CENTER
on behalf of Abbott v. Burke
Plaintiff Children

v.

NEW JERSEY DEPARTMENT
OF EDUCATION

Docket No. C-83-05

ORDER TO SHOW CAUSE SEEKING A SUMMARY PROCEEDING TO
ENFORCE DOE REGULATION

This order to show cause arises from a verified complaint filed by the Education Law Center on behalf of the Plaintiff children in the Abbott v. Burke cases (“Plaintiff”). Plaintiff seeks an order compelling the New Jersey Department of Education (“Defendant”) to draft a three-year plan regarding the administration of “Abbott Districts.” Plaintiff states that this plan is required by regulatory and constitutional mandates.

Plaintiff filed its verified complaint on June 13, 2005, along with its application for an order to show cause seeking a summary proceeding pursuant to R. 4:67-2. The court signed the order to show cause on June 15, 2005 and heard oral argument on July 20, 2005. The facts reveal that Plaintiff is a non-profit legal services organization that provides advocacy for the education of New Jersey’s poor, minority, and disabled public school

children – in this case the schools that are located in the so-called “Abbott Districts.”

The system of designation and administration of these districts is the result of a line of cases decided by the New Jersey Supreme Court. The Abbott line of cases is originally descended from Robinson v. Cahill, 118 N.J.Super. 223 (Law Div. 1972)(subsequent history omitted), a lawsuit in which students in poor urban school districts sought to enforce the New Jersey Constitution's educational guarantee. See Abbott v. Burke, 153 N.J. 480, 490 (1998)(Abbott V). “In successive decisions, this Court found that the system of public school funding then in place was unconstitutional.” Ibid. (citations omitted). “The Legislature responded by enacting the Public School Education Act of 1975,” which was subsequently found constitutional in a continuing line of cases. Ibid. (citations omitted).

Challenges of the state’s education system continued when the first Abbott case was brought in 1981, “when public school students from Camden, East Orange, Irvington, and Jersey City challenged the constitutionality of the 1975 Act as applied.” Id. at 490-491. The Court remanded the case to an ALJ in order to establish a record regarding the state of these school districts. Id. at 491 (citing Abbott v. Burke, 100 N.J. 269, 301-02 (1985)). As a result of this remand, the Supreme Court

eventually declared the 1975 Act unconstitutional “as applied to the State's twenty-eight poorest urban districts.” Ibid. (citing Abbott v. Burke, 119 N.J. 287 (1990)(Abbott II)). This decision became known as Abbott II, and required parity in funding regardless of local ability to contribute, as well as a legislative plan to address the special needs of Abbott districts. Ibid. The Legislature thereafter enacted the Quality Education Act of 1990. Ibid. (citing N.J.S.A. 18A:7D-1 et seq. (repealed)). This statute was also challenged in the case Abbott III and “the Court, in 1994, found that statute unconstitutional as applied to the special needs districts because it failed to ensure parity of educational spending.” Ibid. (citing Abbott v. Burke, 136 N.J. 444, 451, 643 (1994)(Abbott III)). As a result of Abbott III, the Legislature passed the Comprehensive Educational Improvement and Financing Act (“CEIFA”), which is still the basic legislative framework today. See N.J.S.A. 18A:7F-1 et seq.

In Abbott v. Burke, 149 N.J. 145 (1997)(Abbott IV), the Supreme Court found the portion of CEIFA dealing with supplemental programs unconstitutional and remanded the matter to the trial court. The court also made the general statement that, “The Commissioner has an essential and affirmative role to assure that all education funding is spent effectively and efficiently, especially in the special needs districts, in order to achieve a

constitutional education.” Id. at 193. Abbott V then implemented the Court’s finding after remand, and made additional findings, including the statement that “the State must provide a certain substantive level of education, albeit one that continually changes.” Abbott V, supra, 153 N.J. at 536. Following decisions, up through Abbott X, are relatively minor and involve various clarifications and small adjustments, meaning that Abbott V is the last comprehensive Abbott decision.

Pursuant to Abbott V, the Commissioner must promulgate regulations and guidelines that encompass the findings of the court. Id. at 526. On November 30, 2004, the Commissioner adopted regulations implementing the Abbott requirements for the fiscal year of 2005. See N.J.A.C. 6A:10A-1 et seq. These regulations detail the roles, responsibilities and specific duties of Defendant in managing and supervising implementation of the Abbott remedies. See N.J.A.C. 10A-4.1. The regulation at issue in this case concerns the responsibility of the Abbott Division of Defendant to organize its resources and employees effectively. N.J.A.C. 10A-4.1(b) states:

The division shall prepare a three-year plan for the transformation of the Division to enable it to successfully lead the State’s efforts to improve teaching and learning in the Abbott school districts. The plan will address the recruitment, retention, professional development, and effective deployment of Division staff and consultants, as well as the organizational issues to be addressed. The plan will solicit the advice of Abbott stakeholders and those knowledgeable about other State

divisions of education or ministries of education in other nations going through the same process. The plan shall include annual goals and objectives with benchmarks to permit assessment of progress. The plan shall be approved by the Commissioner and disseminated by the Department to interested parties.

On May 15, 2005, nearly six months after the adoption of the regulations, Plaintiff submitted a formal request under the Open Public Records Act to Defendant for the above three-year plan. On May 20, 2005, Defendant responded to this request by informing Plaintiff that the three-year plan had not yet been prepared and thus was unavailable. On June 30, 2005, the regulations expired and the Assistant Commissioner circulated a draft of the fiscal year 2006 regulations, stating that the Commissioner would likely adopt it during the week of July 4, 2005. See Bell Cert., Appendix B. On July 6, 2005, Defendant announced that the Commissioner was postponing adopting the new regulations until August 1, 2005.¹ See Bell Cert., Appendix D.

Plaintiff contends that Defendant has failed to live up to the regulatory requirement of preparing a three-year plan addressing the organization of the Abbott Division. Defendant raises several arguments challenging Plaintiff's contention that Defendant has neglected its administrative obligation.

Defendant also argues that jurisdiction is not proper in this court, that the

¹ This court has not been advised as to whether such new regulations have been adopted.

section of the Act at issue is not a requirement but discretionary, and that Plaintiff's point is moot because the Act expired on June 30, 2005.

The first issue before the court is whether this court or the Appellate Division has jurisdiction pursuant to R. 2:2-3(a)(2). R. 2:2-3(a)(2) provides in part that "...appeals may be taken to the Appellate Division as of right . . . (2) to review final decisions or actions of any state administrative agency or officer, . . . except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise;" Generally, this rule vests jurisdiction to review actions or inaction of an administrative agency or officer in the Appellate Division. See Prado v. State of New Jersey et al., 376 N.J. Super. 231, 238 (App. Div. 2005)(citing Pascucci v. Vagott, 71 N.J. 40, 51-53 (1976)). The law recognizes that the Appellate Division's exclusive jurisdiction is not eliminated based on the theory of the challenging party's claim or the nature of the relief sought. See Mutschler v. NJDEP, 337 N.J. Super. 1, 9 (App. Div. 2001) certif. den. 168 N.J. 292 (2001). The general rule is that "every proceeding to review the action or inaction of a state administrative agency would be by appeal to the Appellate Division." Seloby v. Keough-Dwyer Corr. Facility, 375 N.J. Super 91, 95 (App. Div. 2005)(quoting Cent. R.R.

Co. of N.J. v. Neeld, 26 N.J. 172, 185, cert. den., 357 U.S. 928 (1958)).

Therefore, aside from the exceptions set forth below, the Appellate Division has exclusive jurisdiction to consider a claim of state administrative agency inaction. Ibid. (citing Pascucci, supra at 52).

Initially, the court agrees with Plaintiff that the doctrine of the exhaustion of administrative remedies does not apply. Defendant does not address this subject and seems to concede this point. “Exhaustion of administrative remedies before resort to the courts is a firmly embedded judicial principle.” Garrow v. Elizabeth General Hospital and Dispensary, 79 N.J. 549, 558-59 (1979). The Garrow court sets forth a persuasive reason for this doctrine, namely that, “the expertise of an administrative agency may not be exercised or known until it renders its final decision, and usually upon judicial review due deference is accorded that expertise.” Id. at 559. However, a number of exceptions to this doctrine exist.

The exhaustion doctrine is not an absolute. Exceptions exist when only a question of law need be resolved, Nolan v. Fitzpatrick, 9 N.J. 477, 487 (1952); when the administrative remedies would be futile, Naylor v. Harkins, 11 N.J. 435, 444 (1953); when irreparable harm would result, Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 142 (1962); when jurisdiction of the agency is doubtful, Ward v. Keenan, 3 N.J. 298, 308-309 (1949); or when an overriding public interest calls for a prompt judicial decision, Baldwin Const. Co. v. Essex Cty. Bd. of Taxation, 24 N.J. Super. 252, 274 (Law Div. 1952), aff'd 27 N.J. Super. 240 (App. Div. 1953).

Id., at 561. It is clear that only a question of law exists in this case, as the sole dispute is whether or not the Commissioner must prepare a plan as outlined in the fiscal year 2005 regulations.

Second, Plaintiff's primary argument consists of the contention that it is seeking to compel Defendant to perform a mandatory duty and that such requests are properly brought in this court as actions in lieu of a prerogative writ²— in this case the writ of mandamus (Plaintiff does not specifically mention this writ, but it is clear that it is invoking mandamus). It argues that the preparation of a three-year plan pursuant to N.J.A.C. 6A:10A-4.1(b) is a constitutional and regulatory obligation of the Commissioner and not something he has the discretion to choose to prepare. Mandamus "is a coercive process that commands the performance of a specific ministerial act or duty, or compels the exercise of a discretionary function, but does not seek to interfere with or control the mode and manner of its exercise or to influence or direct a particular result." Switz v. Middletown, 23 N.J. 580, 587 (1957). In addition, the Appellate Division has recently commented extensively on the nature of mandamus:

Mandamus is inherently coercive. Mandamus is usually appropriate only where the right to performance of a ministerial duty is clear and certain. Vacca v. Stika, 21 N.J. 471, 476

² As noted during the course of colloquy, an action in lieu of prerogative writ is an action filed in the Law Division, not the Chancery Division; however, the court indicated it would hear this matter without making such a distinction.

(1956). An official duty is ministerial "when it is absolutely certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion." Case v. Daniel C. McGuire, Inc., 53 N.J. Super. 494, 498 (Ch. Div. 1959). While the directive usually commands the performance of a specific act or obligation, mandamus may also compel "the exercise of a discretionary function." Switz v. Township of Middletown, 23 N.J. 580, 587 (1957). However, mandamus may not issue to "control the exercise of discretion." Id. at 587- 88.

In re Failure by the Dept. of Banking and Ins. To Transmit a Proposed Dental Fee Schedule to OAL, 336 N.J. Super. 253, 262 (App. Div. 2001).

It is clear that the regulations state that the DOE shall make a three-year plan. The fact that the regulations use the word "shall" militates in favor of finding that it creates, at least for the purposes of jurisdiction, a compulsory, ministerial duty. Regardless of whether or not the action for mandamus succeeds or fails, it is clear that Plaintiff is requesting that the court order Defendant to perform a compulsory duty. Additionally, the fact that the execution of the duty involves discretion simply prevents the court from interfering with that discretion. The court may, if it deems it appropriate, compel the action requested in this case.

The next issue before the court is how the court should interpret the term "shall" in the regulation at hand. In general, the word "shall" is construed to be mandatory and the word "may" permissive or directory. No

Illegal Points, Citizens for Drivers' Rights, Inc. v. Florio, 264 N.J. Super 318, 329 (App. Div.), certif. den., 134 N.J. 479 (1993). Defendant counters that the three-year plan is not a requirement but rather a discretionary action with the discretion vested in the Commissioner. Although the regulation states that the Division "shall" prepare a three-year plan, Defendant argues that the terms "shall" and "may" have been held to be interchangeable when necessary to implement legislative intent. Ibid. Use of the word "shall" has not been found to be conclusive, but rather is indicative of a presumption that can be overcome through interpretation of the legislation's purpose. Ibid. The statute at issue in Florio, N.J.S.A. 39:5-30.6 (2005), stated that the courts shall assess points at the time of conviction for any motor vehicle offense committed in the state. Id. at 322. The court found that carrying this provision out as a mandatory directive would be in conflict with legislative intent, common sense and long standing practice where judges had never been instructed to assess points in open court. Id. at 327-28. The court also found that because no public benefit ensued and no private right was ensured by according the word "shall" an imperative meaning, it should construe it as directory rather than mandatory. Id. at 329 (citing Franklin Estates v. Township of Edison, 142 N.J. Super 179, 184 (App. Div. 1976), aff'd, 73 N.J. 462 (1977)). The Appellate Division has applied this principle to

administrative regulations and summarized the applicable concepts as follows:

The regulation must be interpreted to manifest the intent of the Bureau of Securities. Language is not to be rigidly interpreted if it is apparent that such interpretation was not intended. Alexander v. New Jersey Power & Light Co., 21 N.J. 373, 378 (1956). Words alone do not control. The intent must be gleaned from the subject matter, the contextual setting, and related statutes. Loboda v. Clark Township, 40 N.J. 424, 435 (1963). This rule of construction applies to rules and regulations of administrative agencies. In re Plainfield-Union Water Co., 57 N.J. Super. 158, 177 (App. Div. 1959); In re Port Murray Dairy Co., 6 N.J. Super. 285, 300 (App. Div. 1950).

In re Ridgway, McLeod and Associates, 116 N.J. Super. 172, 174-175 (App. Div. 1971). Defendant, in this case provides no reason why the “shall” should be interpreted as a “may.” It merely cites generally to the Commissioner’s discretion. The court therefore finds that the “shall” in the regulation at hand denotes a mandatory obligation under the regulations.

The court must next address Defendant’s argument that the case is moot because the proposed fiscal year 2006 regulations contain no provision for a three-year plan and the fiscal year 2005 regulations have expired (as of June 30, 2005). Plaintiff responds by stating that despite the fact that the regulations have expired, the action does not become moot because there exists a live controversy and effective relief is available. If the court finds the action to be technically moot, Plaintiff contends that nevertheless, this

matter is of sufficient public importance to warrant prompt judicial resolution. Both parties cite Anderson v. Sills, 143 N.J. Super 432 (Ch. Div. 1976), which states that questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review. Id. at 437. For reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. Ibid.

Despite the fact that the cases that Plaintiff cites are distinguishable, it appears that this is so because mootness is the incorrect principle to apply to an expiring regulation.³ Pursuant to the definition in Anderson the court will

³ Plaintiff, in a footnote, cites Nextel West Corp. v. Unity Township, 282 F.3d 257 (3rd Cir. 2002). The court in Nextel involved the challenge by a cell phone company of a town's denial of a zoning variance pursuant to Federal Telecommunications Act of 1996. Id. at 259-261. The Township changed its statutes in ways that mooted many of plaintiff's contentions, but the court found that these changes did not effectively address all of Nextel's claims. Id. at 263-264. In other words, despite the changes, Nextel's claims were not moot because the important question in determining the mootness of a claim in which a challenged statute is amended is "whether the amendment sufficiently altered or removed the challenged aspects of the original legislation to moot the underlying claims." Id. at 264. However, neither this conclusion nor this test applies to this case because Plaintiff is not challenging a statute. Instead, Plaintiff is seeking the application of an expired regulation. It is unclear how Nextel applies to this case at all.

Plaintiff also cites Wilkinson v. Austin, in which the State of Ohio changed challenged prison regulations on the "eve of trial." 125 S. Ct. 2384, 2391 (2005). Plaintiff states that since the Court still examined the old regulations in Wilkinson, it should in this case too. However, Wilkinson is easily distinguishable. In that case, the Court was faced with the question of whether the old regulations had violated the due process rights of state prisoners. Ibid. In this case, the question is whether expired regulations are enforceable. Once again, the question is completely different than this case and therefore does not apply.

not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest.

Ibid. It is clear that none of these categories apply to this case, as the issue is not hypothetical since Plaintiff seeks the Commissioner to issue a plan pursuant to the regulations and to comply with same. The court could order such a plan, therefore a judgment could grant effective relief. For these reasons, it is also clear that the parties do have a concrete controversy.

Therefore the court finds that the case is not moot.

Plaintiff contends that, additionally, the regulation is enforceable against the Commissioner. Plaintiff filed its complaint on June 13, 2005, seventeen days before the regulations expired. Plaintiff highlights the principle that an administrative agency ordinarily must enforce and adhere to, and may not disregard, the regulations it has promulgated. County of Hudson v. Dept. of Corr., 152 N.J. 60, 70 (1997). In Hudson, the Court found that the Department of Corrections may not disregard its own regulations regarding the transportation of inmates. Id. at 71-72. The Hudson court states that, with regard to an agency's regulations, "so long as they are in force the agency is bound by them." Id. at 71 (citing In re Waterfront Development Permit, 244 N.J. Super. 426, 434 (App. Div. 1990);

Iuppo v. Burke, 162 N.J. Super., 538, 548-50 (App. Div.), certif. den., 79 N.J. 462 (1978)). The only way that the court sees for Plaintiff to ensure that this standard is enforced is by bringing an action while the regulation is in effect, which it has done. Therefore, it seems to this court that the regulation is enforceable against the Commissioner despite now having expired after the timely filing of this litigation.

Finally, Plaintiff argues that even if this court decides that the issue is technically moot, the public interest and constitutional imperatives require this court require the Commissioner to create a plan pursuant to the expired regulations. Although the court has ruled that the issue is not moot, it must address Plaintiff's argument regarding the alleged constitutional imperative. The general law that Plaintiff cites to support its argument, namely the Abbott cases cited above and the fiscal year 2005 and proposed fiscal year 2006 appropriations statutes, says nothing about a specific three-year plan. While they do set forth many requirements with which a plan is consistent, they do not specifically mention such a plan. Therefore, with regard to these general principles, it could be argued there is no compulsory, ministerial duty that would satisfy the requirements of mandamus. See Switz, supra, 23 N.J. at 587. While the Commissioner's actions must conform to constitutional and statutory mandates,

