



Copy of comments submitted online

July 5, 2013

David Corso, Assistant Commissioner
New Jersey Department of Education
River View Executive Plaza
Building 100, P.O. Box 500
Trenton, New Jersey 08625-0500

Re: Educational Facilities: Proposed Readoption with
Amendments, N.J.A.C. 6A:26

Dear Mr. Corso:

Education Law Center ("ELC") advocates for the legal rights of New Jersey's public school children to high quality education under state and federal laws, particularly our state's at-risk students, students with disabilities, and students of color. ELC also serves as counsel to the class of urban school children in the landmark Abbott v. Burke litigation and, on behalf of those children, advocates for effective and timely implementation of the Abbott remedial mandates safe and educationally adequate school facilities in School Development Authority ("SDA") districts, as required by the New Jersey Constitution. On behalf of the school children in those districts, ELC files the within comments on the State Board of Education's proposed re-adoption, with amendments and repeals, regulations, N.J.A.C. 6A:26, to codify the Department of Education's ("DOE") responsibilities to implement school facilities improvements in SDA districts consistent with the Education Clause of the Constitution and the Educational Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1 et seq. ("EFCFA").

As we explain, the Proposed Regulations ("Proposal") would delete in its entirety the existing provision for expedited review, determination and repair of school facilities projects to address emergent conditions having a direct and immediate impact on the health, safety and well being of students and

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faculty in existing SDA district facilities. In addition, the Proposal contains several proposed changes to the regulations governing review and approval of school facilities projects, amendments to districts' Long Range Facilities Plans ("LRFP"), design and construction of SDA facilities projects, preconstruction activities for those projects, and capital maintenance projects that are confusing and irreconcilable, patently inconsistent with the provisions of the EFCFA, and in direct conflict with the Abbott remedial mandates for facilities improvements in SDA districts. We therefore respectfully request the State Board to revise the proposal to address the significant constitutional, statutory and practical issues raised below.

ELC Objections to Proposed Regulations

1. Elimination of Expedited Review of Emergent Projects

The Proposed Regulations eliminate the terms "emergent condition" and "emergent project." Without a category designation for emergent projects - those requiring "expedited review" and correction on an "expedited basis" - the SDA districts are no longer afforded the opportunity to file applications for school facilities projects for repair of emergent conditions, and DOE, working collaboratively with the Schools Development Authority ("SDA"), expedite review, approval and correction of conditions that pose imminent health and safety risks to school children and staff in SDA district facilities. It appears that, under the Proposal, projects that heretofore were considered "emergent" would fall within the general "health and safety" project category, one of several categories identified as "priority" projects in EFCFA. See N.J.S.A. 18A:7G-5m(2).

Further, not only does the Proposal eliminate the prior requirement for expedited review and approval of SDA district applications for emergent projects, the Proposal contains no timeframe for decision making and remediation of "health and safety" projects which, presumably, would encompass emergent conditions. Thus, emergent projects would be treated the same as all other major school facilities projects, subject to the complex, uncertain and time-consuming process, described in more detail below, as new school, school renovation, and other major projects. By eliminating 6A:26-3.16(c) through (f), which provides for an expedited process for review, approval and remediation of emergent conditions, the Proposal not only fails

to ensure the health and safety of students and staff, it also consigns them to harmful, dangerous conditions that could pose a direct threat to their well-being.

2. Burdensome, Confusing and Time-Consuming Process for Health and Safety Projects

The Proposal substantially revises the existing regulation governing applications for school facilities projects, N.J.A.C. 6A:26-3.3, and the regulations governing the design and construction of SDA projects, N.J.A.C. 6A:26-3.9. As discussed above, SDA districts could no longer seek expedited review of school facilities project involving emergent conditions, but would be required to pursue these projects under the health and safety category, subject to the same process as all other major capital projects. Under the Proposal, SDA district would have to undertake the following complicated, confusing and time-consuming process just to secure approval and action to remediate emergent conditions in their buildings:

a) submit an amendment to its Long Range Facilities Plan to DOE under Proposed N.J.A.C. 6A:26-2.3(c), although this regulation contains no process or timeframe by which DOE must review and make a decision on the amendment;

b) if and when DOE approves the LRFP amendment, the district has to wait until the DOE revises the district's educational facility priority to include the project under Proposed N.J.A.C. 6A:26-3.9(a)(3), although this regulation contains no process or timeframe for the DOE to make a determination on revising the district's rankings;

c) if and when the DOE revises the district's educational priority rankings, the district has to wait until the SDA revises and updates its statewide strategic plan to incorporate the project under Proposed N.J.A.C. 6A:26-3.9(a)(4), although this regulation contains no process or timeframe for SDA to make a determination on whether to not to incorporate the project into its statewide strategic plan;

d) upon completion of the above, the district has to file a separate application with DOE seeking approval to initiate pre-construction activities in connection with a project under Proposed N.J.A.C. 6A:26-3.9(b);

e) the DOE reviews the application for preconstruction activities for consistency with the project's priority ranking

and the statewide strategic plan, and decides whether or not to authorize pre-construction activities under Proposed N.J.A.C. 6A:26-3.9(b)(1)), although there is no process or timeframe for DOE to make this determination;

f) if and when preconstruction activities are completed by the SDA, the district then files an application to the DOE for review and approval of a school facilities project under Proposed N.J.A.C. 6A:26-3.3(a), which requires DOE to make a determination on the application within 90 days of the date the DOE determines the application is complete, subject to a 60-day extension under Proposed N.J.A.C. 3.3(a), (b); and

g) if and when all of the above steps are complete and the DOE approves the school facilities project, the district has to wait until SDA decides to undertake actual repair of the project, in accord with its statewide strategic plan.¹

Under the existing regulations, upon approval of an application for an emergent project, the district's LRFP is deemed amended and the application is transmitted promptly to the SDA for preconstruction activities. Under the Proposal, health and safety (i.e., emergent) projects would, somehow, have to be included in DOE priority rankings and the SDA statewide strategic plan before a separate application for preconstruction activities could be filed. Even more troubling, the district could not file an application for a school facilities project until the SDA completes the preconstruction activities. Like other project categories, health and safety projects would no longer be afforded an expedited review process, but rather would be required to abide by the extraordinarily complex and lengthy procedure for building an entirely new school. In fact, the entire process for any project could take not just months, but years, given the absence of timeframes for the DOE and SDA to approve, rank and prioritize, strategically plan, initiate and complete preconstruction, approve a final project application

¹ It should be noted that, even after the and DOE transmits to SDA an approved school facilities project, the SDA district must still await action by the SDA to actually commence construction and complete the project. The SDA has not adopted any regulation requiring the establishment of a definitive construction schedule for completion of SDA district projects, and it is a matter of public record that many DOE approved projects have languished with little or no actual construction by the SDA.

and, finally, wait for the SDA to exercise discretion as to when it may undertake actual construction.

3. Failure to Require Prompt and Proper Revisions to DOE Priority Rankings and Updates to SDA Statewide Strategic Plan

The Proposal omits codification of several critical requirements in the EFCFA with regard to the DOE project priority rankings for each SDA district, and the SDA statewide strategic plan constructing facilities projects in a SDA districts' approved LRFP. See Proposed N.J.A.C. 6A:29-3.9(a)(3) and (4). First, the Proposal eliminates, without any explanation or justification, the existing regulation requiring the SDA district, DOE and SDA to "meet and agree upon a schedule for undertaking the school facilities projects in the approved LRFP and identify the need for temporary facilities, if any." See N.J.A.C. 6A:26-3.9(b)(proposed for repeal). This provision is essential to ensure DOE and SDA fulfill their obligations under EFCFA, N.J.S.A. 18A:7G-5m, and the Abbott facilities remedial orders, for moving needed facilities improvements forward to construction and completion in all SDA districts in a prompt and orderly manner.

Second, the Proposal fails to include the requirement that, in establishing the statewide strategic plan, the SDA consider "the construction schedule and other appropriate factors," and the requirement that the SDA revise the strategic plan and sequencing of projects "no less than once every five years." Compare Proposed 6A:26-3.9(a)(4) and N.J.S.A. 18A:7G-5m(3). Third, the Proposal does not incorporate the EFCFA requirement that the SDA "shall" consider any amendment to an SDA district's LRFP for incorporation into the statewide strategic plan in between the five year updates of a district's LRFP. See N.J.S.A. 18A:7G-5m (3). In fact, there is no timeframe whatsoever for the SDA to establish, let alone update, the strategic plan, thus relegating this essential requirement to the unfettered discretion of the agency.

Finally, the Proposal fails to make clear that, whenever the DOE approves an amendment to the LRFP, the DOE will promptly revise the district's ranking of priority projects and submit the revised rankings to SDA so that agency can promptly update the statewide strategic plan. N.J.S.A. 18A:7G-4c, m(2)(requiring the establishment of educational priority rankings of "all" school facilities projects upon "approval" of an SDA district's LRFP "or an amendment to that plan."

Proper codification of these statutory requirements are essential for effective and timely implementation of school facilities improvements, especially since the proposed rules appear to require the project be priority ranked by DOE and included in the SDA strategic plan before the district can even attempt to initiate preconstruction activities for the project. All of the above listed EFCFA requirements must codified, including prompt timelines for DOE and SDA the revise priority rankings and update the statewide strategic plan.

4. Failure to Set Timelines for Review and Approval of Amendments to Districts' LRFPs

The Proposal fails to properly codify the provision in the EFCFA regarding amendments of a school district's LRFP. EFCFA expressly provides that an SDA district can submit an amendment to a LRFP "at any time" for review and determination on approval or disapproval. N.J.S.A. 18A:7G-4(c). The Proposal does not clearly provide that an SDA district can submit an amendment to its approved LRFP for review and determination on approval or disapproval at any time and, importantly, does not provide a prompt time frame for review and decision on the amendment. Proposed N.J.A.C. 26-2.3(b) and (c) (providing for DOE decision within 60 days of filing a complete LRFP by a district that has "not previously submitted" a LRFP, but providing no procedure for review or approval whenever a district seeks to amend its approved LRFP). This failure is particularly troubling with respect to emergent projects, because under current 6A:26-3.16, an LRFP is automatically amended upon approval of an emergent project. The Proposed Regulations should provide a prompt mechanism for LRFP amendments, particularly for emergent projects and capital maintenance projects.²

5. Improper and Inconsistent Codification of DOE Review and Approval of School Facilities Projects

The Proposal revises the prior regulation governing DOE review and approval of SDA district's applications for school facilities projects in a manner that is inconsistent with the Proposed Regulation pertaining to the design and construction of SDA projects, but also conflicts with EFCFA. First, the Proposal adds new language to require that "preconstruction activities shall be conducted prior to the application being

² Given that review of a newly submitted LRFP is within 60 days pursuant to 6A:26-2.3(b), decisions on amendments should be substantially less than 60 days.

deemed complete," Proposed N.J.A.C. 6A:26-3.3(a), but nowhere does the regulation specify that, upon the filing of an application for a project that necessitates preconstruction activities, the DOE "may authorize," and the SDA "may initiate," "preconstruction activities required to prepare the application for [DOE] approval of the school facilities project." N.J.S.A. 18A:7G-5d(2) (also specifying that preconstruction activities may include site identification, investigation, land acquisition, design work, demolition and other activities). Simply put, there is nothing in this Proposal that makes clear, as EFCFA expressly provides, that upon an application for a project requiring preconstruction activities in order to complete the application, that the DOE must take prompt action to authorize such activities and that the SDA must promptly undertake those activities. Without such clear directives, including prompt timelines, applications will remain incomplete and final approval and construction will not take place.

Second, and even more egregious, the Proposal requires that, "to advance a school facilities project," a district must file a "preconstruction application" under Proposed N.J.A.C. 6A:26-3.9(b) that is separate and distinct from the district's application "to initiate a school facilities project" under Proposed N.J.A.C. 6A:26-3.2 and 3.3. The EFCFA is clear on this point: an SDA district must apply to the DOE for approval of a school facilities project, and that application includes all elements of the project, including any preconstruction activities that may be appropriate. N.J.S.A. 18A:7G-5(d)1; and see N.J.S.A. 18A:7G-3 (defining "school facilities project" to include all elements of the project, including preconstruction activities). Moreover, if the Commissioner determines that the application for a school facilities project requires preconstruction activities in order to complete the application, the DOE is directed to "authorize" the SDA to undertake those activities promptly in order to make a final determination on the project. It is wholly improper for the DOE to put districts in the untenable position of having to decide whether to initiate their project by filing an application under Proposed N.J.A.C. 6A:26-3.2 and 3.3 - only to have the application be deemed incomplete because preconstruction activities have not been completed - or to file an application for preconstruction activities under Proposed N.J.A.C. 6A:26-3.9(b) for a project that hasn't even been properly initiated in the first instance. More importantly, there is simply nothing in EFCFA which requires districts to file two separate applications, one for preconstruction activities and the other for final project approval.

Moreover, under the review and approval process for school facilities projects in Proposed 6A:26-3.3(a), preconstruction activities must be undertaken and finished prior to the district's project application being deemed complete. However, this section cannot be reconciled with Proposed N.J.A.C. 6A:26-3.9(b), which requires that the separate application to initiate preconstruction activities can only be requested *after* a project -- after an approved amendment to the LRFP - has been ranked as a priority by DOE and incorporated into the statewide strategic plan by the SDA. It appears that only after accomplishing all of these uncertain steps, and after the SDA completes preconstruction activities, can a district apply for project approval. It is plainly evident that these provisions are irreconcilable and districts will not know how to even initiate an application for project approval with DOE. Further, read literally, this appears to mean that the time limitations placed on the DOE for approval of a project application (90 days with a 60-day extension if requested in writing) will not be triggered until the project is priority ranked, incorporated into the strategic plan, and has had "preconstruction activities" approved and completed by SDA, all of which will take an unspecified amount of time, not to mention subject SDA districts to unnecessary bureaucratic hurdles in their efforts to remediate unsafe or inadequate learning environments for students.

6. Failure to Codify Capital Maintenance Projects

The Proposal fails to establish a separate and clear procedure for SDA districts to seek review and approval of "Capital Maintenance Projects." This is critical since, in the recent PEPP program, DOE and SDA determined that numerous projects submitted by the districts were not emergent, but capital maintenance. Moreover capital maintenance is distinctly defined by EFCFA, separate from school facilities projects. N.J.S.A. 18A:7G-3. The regulations should include standards and procedures for the prompt application and review of capital maintenance projects, including both pre-construction activities and full construction and completion of these projects.

Impact of the Proposal on State's Obligation to Provide Safe and Educationally Adequate Facilities

1) Indefinite Timeframes to Review and Approve Emergent Projects

By removing the need to expedite projects which pose health and safety risks, and by granting the SDA an unspecified amount of time to engage in "preconstruction activities" prior to completion of the application -- or possibly after the approval of an application -- the DOE and SDA have no constraints on the time they may take address critical health and safety needs in SDA district buildings under the Proposal.

In a recent decision, the Commissioner of Education affirmed that the DOE has a responsibility to "speedily advance projects designed to remediate emergent conditions." Education Law Center on Behalf of Abbott v. Burke Plaintiff Schoolchildren v. N.J. State Dep't of Education, Office of School Facilities, No. 217-13, at 2 (June 13, 2013). This obligation arises out of not only the current regulations, but an "unambiguous legislative intent underlying the statute [EFCFA], i.e. the expeditious delivery of remediation to New Jersey's school facilities, especially to those in SDA districts." Id. at 6. It is well-established that an administrative agency's power is limited by the scope and authority granted by the enabling statute, and as such "[a]dministrative regulations cannot alter the terms of a legislative enactment or frustrate the policy embodied in the statute." D.I.A.L. v. City of Clifton Constr. Bd. of Appeals, 526 A.2d 1125, 1131 (N.J. Super. Ct. App. Div. 1987) (citations omitted); see also T.H. v. Div. of Dev. Disabilities, 886 A.2d 194, 199 (N.J. Super. Ct. App. Div. 2005) rev'd on other grounds, 916 A.2d 1025 (2007) ("It is . . . a basic principle that the agency's power exists solely as granted by the Legislature."). Thus, the obligations of "expeditious delivery of remediation" cannot simply be eliminated by changes to the regulations, and omitting any regulatory requirement to expedite emergent projects creates an improper inconsistency between the EFCFA and the regulations.

Moreover, the proposed removal of the regulations regarding "emergent projects" and the accompanying timeframes for expedited approval is arbitrary and capricious. "[W]hen an agency changes its course, it must provide a 'reasoned analysis.'" Glukowsky v. Equity One, Inc. 848 A.2d 747, 756 (N.J. 2004) (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v.

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983). The expedited process for review, approval and completion for emergent projects has been in the regulation since its initial adoption, and the DOE has provided absolutely no explanation for why the repeal of that process is necessary or appropriate. In fact, the repeal is inconsistent with the mandates of the EFCFA, as the recognized in the Commissioner's June 13, 2013 decision noted above.

Finally, in the Abbott rulings, the Supreme Court has recognized the SDA districts had inadequate and unsafe school facilities which were "crumbling and obsolescent" and "deplorable," and that the "grave state of disrepair not only prevents children from receiving a thorough and efficient education, but also threatens their health and safety." Abbott v. Burke, 710 A.2d 450, 470 (N.J. 1998) ("Abbott V"). In order to remediate the unsafe, overcrowded and educationally inadequate condition of school facilities in SDA districts, the Abbott rulings in no uncertain terms imposed upon the DOE the primary responsibility to ensure prompt remediation of those conditions. Abbott v. Burke, 693 A.2d 417, 437 (N.J. 1997) ("Abbott IV") ("Deteriorating physical facilities relate to the State's educational obligation, and we continually have noted that adequate physical facilities are an essential component of that constitutional mandate."). A failure to ensure that "health and safety" projects are addressed in an expedited manner would contravene the Abbott mandate and the New Jersey Constitution.

2) Increased Need and Cost of Emergency Stabilization

The requirement that SDA districts pay the cost of stabilizing any emergency conditions remains unchanged in the regulations. However, the DOE and SDA have removed any obligation to expedite health and safety conditions which could eventually become emergencies without expedited action.

Given the lengthy process the DOE and SDA currently employ to approve major projects, the inclusion of the emergent conditions in that category will inevitably lead to increased emergency stabilization to be financed by the SDA districts. However, the State is required under the Abbott rulings and the EFCFA to fund, in entirety, school facilities construction in the SDA districts. The DOE and SDA's failure to address "health and safety" projects and require the districts to increasingly rely on emergency stabilization is at odds with the EFCFA and the N.J. Constitution. The Proposed Regulations will amount to

a DOE and SDA sanctioned expansion of emergency stabilization in violation of the law.

Conclusion

ELC requests that the DOE take steps to revise the Proposal so that it fully comports with EFCFA and the Abbott remedial mandates on school facilities improvements in SDA districts. These revisions must address the issues outlined in these comments, including ensuring projects currently categorized as emergent - those threatening the health and safety of school children and staff - must be reviewed, approved and remediated on an expedited basis.

We ask for your attention to this matter, particularly so as to avoid legal action related to the Proposal. We are prepared to assist you in revising this Proposal, so please do not hesitate to contact us should you need our assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "David Sciarra". The signature is fluid and cursive, with a large initial "D" and "S".

David Sciarra, Esq.
Education Law Center

Gregory Little, Esq.
White & Case