

**In the Matter of Complaints Filed by the Highland Park Board of Education
and the Borough of Highland Park**

Council on Local Mandates

Argued January 28, 2000

Decided May 11, 2000

Syllabus

(This syllabus was prepared for the convenience of the reader and is not part of the decision of the Council. The syllabus does not purport to summarize all portions of the decision.)

In its August 5, 1999, written decision, the Council ruled that it had jurisdiction to decide whether two regulations related to charter schools, promulgated by Respondent Commissioner of Education ("Commissioner"), were unfunded mandates, as alleged by the Highland Park Board of Education and the Borough of Highland Park ("Claimant" or "Highland Park"). In making the threshold determination that it has jurisdiction to hear and decide Claimant's allegations, the Council ruled that none of the exemptions in Article VIII, section 2, paragraph 5 of the New Jersey Constitution ("Amendment") or in the Local Mandates Act ("LMA") applied to the two regulations at issue. In the decision that follows, the Council considers the evidence submitted by Claimant, and the arguments and counter-arguments of the parties, on the ultimate issue: whether the challenged regulations are unfunded mandates because they impose additional direct expenditures on Claimant without providing offsetting funds, in violation of the Amendment and the LMA.

The Council's rulings are:

- (a) To prove that a regulation imposes an "additional direct expenditure" and is an unfunded mandate within the meaning of the Amendment and the LMA, a claimant must show an identifiable expense that results directly from the regulation that is the subject of the complaint. Here, Claimant has shown that the amendment to N.J.A.C. 6A:11-1.2, which changed the funding formula used to calculate the "per pupil" amount that Highland Park sends to Greater

Brunswick, results in expenditures to Highland Park that are both direct and identifiable: \$25,124 for the 1998-1999 budget and a projected amount of \$13,660 for the 1999-2000 school budget, which are additional to the amounts that would have been required under the funding formula in the original regulation. Respondents Commissioner of Education and Greater Brunswick Charter School do not dispute Claimant's figures or that Claimant is required to pay more under the amended regulation. Accordingly, the Council finds that the regulation, as amended, is an unfunded mandate, in violation of the Amendment and the LMA.

- (b) Claimant has failed to prove that the Commissioner's regulation providing for "regions of residence" imposes an "additional direct expenditure" on the Highland Park school district within the meaning of the LMA. To meet the required standard of proof within the context of this case, Claimant first must show that (1) an identifiable number of students from Highland Park attending the Greater Brunswick Charter School would not have chosen to attend a district charter school or (2) if there were no regional charter school, no district charter school would have been created to fill the void. In the absence of the required showing, the Council dismisses this portion of the Complaint without prejudice.

Lisa Kent, pro bono, argued the cause for Claimant Highland Park Board of Education (*Ms. Kent* on the briefs).

Dominic J. Cerminaro argued the cause for Claimant Borough of Highland Park.

Michelle Lyn Miller, Deputy Attorney General, argued the cause for Respondent Commissioner of Education (*John J. Farmer, Jr.*, Attorney General of New Jersey, attorney; *Ms. Miller* and Deputy Attorney General *John K. Worthington* on the brief).

Lois H. Goodman argued the cause for Respondent Greater Brunswick Charter School (*Carpenter, Bennett & Morrissey*, attorneys; *Ms. Goodman* on the briefs).

Gordon J. Golum submitted a letter memorandum on behalf of Respondent Edison Township Board of Education (*Wilentz, Goldman & Spitzer*, attorneys).

Michael P. Stanton argued the cause for amicus curiae Ocean City Board of Education.

Georgina Fenichel argued the cause for amicus curiae Child Advocates Renewing Public Education.

Christopher J. Christie argued the cause for amicus curiae Sixteen Abbott Charter Schools (*Dughi and Hewit*, attorneys).

Decision

I Procedural Background

Article VIII, section 2, paragraph 5 of the New Jersey Constitution (the “Amendment”) and its enabling statute, the Local Mandates Act (“LMA”), provide that any law enacted on or after January 17, 1996, or any rule or regulation issued pursuant to a law originally adopted after July 1, 1996, if such law or regulation is determined by the Council on Local Mandates (“Council”) to be an unfunded mandate, shall cease to be mandatory in its effect and shall expire. See N.J. Const. art. VIII, § 2, ¶ 5 (a); N.J.S.A. 52:13H-2. Specifically, the LMA provides:

Except as provided in section 3 of this act, any provision of a law enacted on or after January 17, 1996, or any part of a rule or regulation originally adopted after July 1, 1996 pursuant to a law regardless of when that law was enacted, which is determined in accordance with the provisions of this act to be an unfunded mandate upon boards of education, counties, or municipalities because it does not authorize resources to offset the additional direct expenditures required for the implementation of the law or the rule or regulation, shall cease to be mandatory in its effect and shall expire.

[N.J.S.A. 52:13H-2.]

The LMA established the Council, see N.J.S.A. 52:13H-4, and authorized the Council to review all complaints from school districts, municipalities, and counties to determine whether the statutes and regulations over which it has jurisdiction constitute unfunded mandates. See N.J.S.A. 52:13H-12.

On March 19, 1998, the Clifton Board of Education (“Clifton”) filed a complaint with the Council challenging regulations adopted in 1997 designed to implement the Charter School Program Act of 1995 (“CSPA”). See N.J.S.A. 18A:36A-1. Clifton claimed, among other things, that the 1997 regulations adopting a formula used to determine the dollar amount to be paid by school districts to charter schools created an unfunded mandate. The Council denied injunctive relief and dismissed the complaint for lack of jurisdiction. See In re a Complaint filed by the Board of Education for the City of Clifton (“Clifton”) (May 13, 1998). The Council held that because it lacked jurisdiction over the CSPA itself, which was signed into law six days prior to the effective date of the Council’s jurisdiction, it likewise lacked jurisdiction over mandatory regulations that “merely implement and execute the plain language of the statute.” See In re Board of Education and the Borough of Highland Park (“Highland Park I”) (August 5, 1999) at 19.

In the instant action, the Borough of Highland Park and the Highland Park Board of Education (collectively “Claimant” or “Highland Park”) also claim that regulations adopted pursuant to the CSPA create unfunded mandates. Highland Park cannot challenge the 1997 funding regulations at issue in Clifton, since the Council has already determined that it lacks jurisdiction in respect thereof. It challenges, instead, regulations adopted in 1997 that provide for regional charter schools through a definition of “region of residence” (“1997 region-of-residence regulation”) and a 1998 regulation that materially changed the “local levy budget” funding formula specified in the 1997 regulations (“1998 funding regulation” or “1998 regulation”). Relying on Clifton, Respondents Commissioner of Education (“Commissioner”) and the Greater Brunswick

Charter School (“Greater Brunswick”)¹ moved to dismiss Highland Park’s Complaint, arguing that the Council lacked jurisdiction. In the Council’s August 5, 1999, decision, we disagreed, holding that neither the 1997 region-of-residence regulation nor the 1998 funding regulation directly “implement[s] and execute[s] the plain language” of the CSPA. See Highland Park I at 19. On August 30, 1999, Respondent Greater Brunswick filed a motion for reconsideration of the Council’s August 5, 1999, decision; supporting argument for that motion was filed on October 5, 1999. The Council denied the motion by written Order dated October 22, 1999.

The Commissioner and Greater Brunswick raised two additional arguments in support of their motions to dismiss. They contended that even if the Council asserted jurisdiction over Highland Park’s complaint, it should nonetheless dismiss the Complaint because the challenged regulations fall within two exemptions provided in the LMA. The first, N.J.S.A. 52:13H-3e, provides that laws, rules, or regulations that “implement the provisions of the New Jersey Constitution” shall not be unfunded mandates. Thus, Respondents argued, the 1997 region-of-residence regulation and the 1998 funding regulation cannot create unfunded mandates since they implement the Thorough and Efficient Clause of the New Jersey Constitution, which requires the legislature to “provide for the maintenance and support of a thorough and efficient system of free public schools. . . .” N.J. Const. art. VIII, § 4, ¶ 1. The Council rejected that argument, noting that Respondents failed to explain how the subject regulations specifically

¹ “Respondents,” as used herein, refers to the Commissioner and Greater Brunswick only, and does not include Respondent Edison Township Board of Education (“Edison Township”).

implement the Thorough and Efficient Clause. Because accepting Respondents' argument would substantially erode the purpose of the LMA, the Council refused to invoke the exemption in the absence of a clear and unambiguous declaration and of proofs that charter schools are necessary for a thorough and efficient education. See Highland Park I at 23.

Alternatively, Respondents argued that the 1998 funding regulation cannot be an unfunded mandate since it merely revises an existing mandate. The LMA provides, in this regard, that laws, rules, or regulations that "repeal, revise or ease an existing requirement or mandate or [that] reapportion the costs of activities between boards of education, counties, and municipalities" shall not be unfunded mandates. N.J.S.A. 52:13H-3c. In response, Highland Park argued that a regulation could not "repeal, revise or ease an existing . . . mandate" when it increases the cost of a mandate. The Council agreed with Highland Park, relying, in the absence of any authority on the proper interpretation of "revise" as used in the statute, on the doctrine of *ejusdem generis*: "[W]here, as here, a regulation changes an earlier obligation and that change has the clear potential to increase a claimant's funding obligation, we hold the 'repeal, revise or ease' exemption inapplicable." See Highland Park I at 25.

II

Legal Analysis

Highland Park and Respondents advance various arguments in support of and in opposition to the issues of whether the 1997 region-of-residence regulation and the 1998 funding regulation are unfunded mandates. We begin with an analysis of the latter.

A. Charter School Funding Formulas

At the outset, we refer to the history of the funding of charter schools under the CSPA. The CSPA specifies that the school district of residence must pay directly to the charter school for each enrolled student who resides in the district “a presumptive amount equal to 90% of the local levy budget per pupil for the specific grade level in the district.” N.J.S.A. 18A:36A-12. Pursuant to the Quality Education Act of 1990 as amended (“QEA”), which contained the funding formula in place at the time the CSPA took effect, local levy budget was defined as “the sum of the foundation aid and transition aid received by a school district and the district’s local levy for the general fund.” N.J.S.A. 18A:7D-3 (repealed 1996). After the passage of the CSPA, but prior to the proposal of any implementing charter school regulations, QEA was repealed and was replaced by the Comprehensive Educational Improvement and Financing Act of 1996 (“CEIFA”). See N.J.S.A. 18A:7F-1 to -34. The funding approach of CEIFA differed materially from that of QEA. Most importantly, the “local levy budget” language contained in both the CSPA and QEA was superseded by CEIFA. CEIFA defines school budgets in terms of “T&E program budget” and “T&E amount.” See N.J.S.A. 18A:7F-3. In conforming the CSPA

to CEIFA, the initial charter school regulations reformulated “local levy budget” into the “program budget” and “T&E amount” terminology when describing the funding formula to be used by school districts in fulfilling their obligations under the CSPA. To that end, the initial regulations, adopted July 10, 1997, defined the “local levy budget per pupil for the specific grade level” as

the *lower* of either the “program budget per pupil” *or* the T&E amount plus the T&E flexible amount (maximum T&E amount) weighted for kindergarten, elementary (grades 1 through 5), middle school (grades 6 through 8) and high school (grades 9 through 12) . . . for the applicable budget year.

[29 N.J.R. 3492(a) (emphasis added).]²

Thus, in fulfilling their obligation under the CSPA to pay to the charter school ninety percent of the local levy budget per resident pupil enrolled, see N.J.S.A. 18A:36A-12, school districts under the 1997 funding regulations were required to transfer *either* ninety percent of the maximum T&E amount per pupil³ *or* ninety percent of the program budget, *whichever was the “lower” amount*.

In February 1998, the Commissioner proposed that the 1997 funding regulation that defines “local levy budget per pupil” be amended to require that school districts transfer to charter schools ninety percent of the program budget per pupil enrolled. 30

² “Program budget” was defined in the 1997 regulations as the sum of (1) core curriculum standards aid, (2) supplemental core curriculum standards aid, (3) stabilization aid, (4) designated general fund balance, (5) miscellaneous local general fund revenue, and (6) the district’s general fund tax levy. See 29 N.J.R. 3492(a).

³ The T&E amount is established in the biennial “Report on the Cost of Providing a Thorough and Efficient Education.” See N.J.S.A. 18A:7F-4(c); 18A:7F-12. The T&E flexible amount refers to the amount applied to the T&E amount to determine the T&E range. N.J.S.A. 18A:7F-3.

N.J.R. 588(a). That amendment, which effectively eliminates the school district's option of using the maximum T&E formula and thereby the potential for a lower payment by the school district to support the charter school, became effective on June 1, 1998. 30 N.J.R. 2084(a).

On October 29, 1998, Highland Park filed its Complaint, alleging, *inter alia*, that the 1998 regulation's elimination of the option to use the maximum T&E formula created an unfunded mandate. It compared the amount required to be paid for the 1998-99 school year to Greater Brunswick under the 1998 regulation to the amount that would have been required under the maximum T&E formula, which was an option permitted by the 1997 regulation. The difference, under the 1998 regulation, is reported as an increase of \$25,124. See Certification of Superintendent Marilu Simon in Response to the August 5, 1999, Appendix, ¶¶ 22-26 (filed September 7, 1999). The projected difference for the 1999-2000 school year is stated to be an increase of \$13,660. Id. at ¶¶ 27-30.

Respondents do not dispute those figures. Nor do they take issue with the general proposition that Highland Park is required to pay more to the charter school under the program budget formula than the maximum T&E formula no longer permitted under the 1998 regulation. Instead, the Commissioner contends that the 1998 regulation does not impose an additional direct expenditure because compared to the 1997 regulation the 1998 revision "more closely align[s] with statutory language [of the CSPA] and the sponsors' intent as to the funds to be transferred to the charter school." Brief on Behalf of Respondent Commissioner of Education in Response to Claimant's Submission Regarding Expenditures at 14. But the Commissioner's argument regarding legislative

intent misses the point. In determining whether an unfunded mandate exists, the critical issue is not whether the 1998 regulation better reflects the intent of those sponsoring the CSPA than the 1997 regulation, but whether the 1998 regulation requires Highland Park to pay more to the charter school than was required under the 1997 regulation. To this question, the answer is an unequivocal “yes.” That fundamental reality also disposes of Respondents’ additional arguments.

For example, Greater Brunswick argues that the 1998 regulation can impose no additional expenditure on Highland Park since it simply reallocates the actual cost to Highland Park of providing a “thorough and efficient education” for a given child to the educational system whose services he or she will be using. See Letter Memorandum in Response to Highland Park Board of Education’s October 29, 1999, Letter Brief at 4. The existence of an unfunded mandate does not turn, however, on the symmetry between a district’s actual per pupil expenditure and the amount of funding transferred to the charter school on that student’s behalf. It focuses, instead, on the difference between a district’s funding obligations for that student before and after the promulgation of the 1998 regulation. Thus, even if we were to credit Greater Brunswick’s argument that educational funding “follows the student,”⁴ it does not alter the fact that the 1998 regulation creates an unfunded mandate as defined by the LMA, because it eliminates a school district's option to pay a lower amount to support a charter school.

⁴ Highland Park takes strong issue with this argument, claiming that it “confuses per pupil expenditures with an expense budget[,] . . . completely overlooks the marginal cost concept of adding additional children to a school[, and] . . . ignores the reality of how boards of education budget and fund school programs, instruction and facilities.” Letter Brief in Rebuttal to the

B. “Regions of Residence”

One of the initial regulations, effective August 4, 1997, provides that the term “region of residence” means “contiguous district boards of education in which a charter school operates and shall be the charter school’s ‘district of residence.’” See N.J.A.C. 6A:11-1.2. Greater Brunswick’s “region of residence” includes three contiguous school districts: New Brunswick, Edison Township, and Highland Park. Highland Park claims that the regulations that provide for regional charter schools through “regions of residence” constitute an unfunded mandate.

Neither the CSPA nor its legislative history contains any explicit reference to “regional” charter schools. Instead, the CSPA defines “charter school” as “a public school operated under a charter granted by the commissioner, which is operated independently of a local board of education and is managed by a board of trustees.” N.J.S.A. 18A:36A-3. When it adopted the subject regulations in 1997, the Department of Education commented that the CSPA “does not prohibit a region of residence,” adding that “the sponsors of the legislation support the notion of a region of residence and believe there are sound reasons to permit such an organizational structure for a charter school.” 29 N.J.R. 3492(a). (The Appellate Division has upheld the Commissioner’s authority to create regions of residence, finding that “a regional charter school is a logical variant of the kind of school permitted by the Act.” In re Charter School Appeal of the

Greater Brunswick Charter School, A-4557-97T1F (App. Div. May 17, 1999) (slip op. at 17). That decision is currently under review by the New Jersey Supreme Court.)

Even before the regulation that defines “regions of residence” was adopted, the CSPA permitted, as it still permits, students from any school district in the state to attend another district’s charter school on a space-available basis. See N.J.S.A. 18A:36A-8(d). If a student does so, his or her school district of residence must transfer funds to the charter school on the student’s behalf and provide for his or her transportation. See N.J.S.A. 18A:36A-12, -13; N.J.A.C. 6A:11-4.3. Thus, if Greater Brunswick were merely a “district” charter school located in New Brunswick, Highland Park students would be eligible to attend it on a space-available basis and Highland Park would be obligated to provide for the students’ transportation to and from school and to pay the district for the educational services provided to any resident pupils enrolled there.

Highland Park does not dispute the foregoing. It argues, instead, that the vast majority of its students currently attending Greater Brunswick are doing so only because it is a “regional,” as opposed to a district, charter school, and since it is cheaper for Highland Park to educate its students in its own school system, the creation of the regional charter school constitutes an unfunded mandate. We address each proposition in turn.

Highland Park proffers two arguments in support of the proposition that the students would attend a “regional” charter school but not a district charter school. First, they contend that in the absence of the 1997 region-of-residence regulation, there would be no charter school in New Brunswick since “[t]he necessary support for a school like

Greater Brunswick simply did not exist in New Brunswick alone.” Letter Brief in Rebuttal to the October 5, 1999, Filing of the Greater Brunswick Charter School and the Commissioner of Education (“Letter Brief”) at 12. To bolster that assertion, Highland Park presents general commentary about the purpose and practical effect of the subject regulation to permit “the creation of regional charter schools where single district schools are not feasible.” Ibid.

Speculation about what would or would not have occurred in the absence of the 1997 region-of-residence regulation does not meet the Claimant’s burden of proving the existence of an unfunded mandate. As Respondent Commissioner of Education sets forth in his brief, Greater Brunswick draws students from a total of seven school districts, only three of which are in the “region of residence.” See Brief on Behalf of Respondent Commissioner of Education in Support of Motion to Dismiss at 18. This suggests that charter schools are attractive to some out-of-district students. Based on the record before us, we cannot conclude that parents from the six school districts outside New Brunswick would not have supported a district charter school located in New Brunswick. In fact, since four of those six school districts are located outside the Greater Brunswick region of residence, we cannot assume that parents from those school districts perceive any greater benefit from the regional charter school than they would from a single-district charter school in the same location. In short, Claimant has not established that in the absence of the 1997 region-of-residence regulation, there would have been insufficient parental support to form a single-district charter school in New Brunswick.

Highland Park further argues that even if a district charter school were to exist, “there is no reason to believe that it would have attracted more than a few Highland Park students.” Letter Brief at 12. In support of that contention, Highland Park notes that “[n]either [Greater] Brunswick nor the State have provided any data showing that a single school district – let alone a small district like Highland Park – sent more than a few students to a charter school in another district.” Id. at 12-13. It likewise points out that although Greater Brunswick itself enrolls students from outside the region of residence, there are no more than two pupils from any single, nonresident district. Id. at 12.

Highland Park’s suggestion that Respondents must prove that regional or district charter schools attract many nonresident students is erroneous. It is the Claimant’s burden to prove the existence of an unfunded mandate, in the form of an additional direct expenditure, not the Respondents’ burden to disprove it. Furthermore, while there may be some evidence that a regional charter school tends to enroll more students from school districts within the region of residence than would a district charter school placed in the same location, such evidence is essentially speculative and thus provides an insufficient basis on the record as it now exists to find an unfunded mandate.

The foregoing renders premature Highland Park’s further claim that it is more costly to educate its students in a regional charter school than in its own school district. We emphasize that comparing the cost of educating students in the Highland Park public school system versus the regional charter school would be relevant *only* if Highland Park were to prove that (1) a certain number of students attending Greater Brunswick would

not have chosen to attend a district charter school; *or* (2) in the absence of a regional charter school, no district charter school would have been created to fill the void.

We dismiss without prejudice Highland Park's challenge to the region-of-residence regulation.

III Conclusion

The Council rules as follows:

- (1) The portion of the regulation codified at N.J.A.C. 6A:11-1.2 that was added pursuant to amendments effective June 1, 1998, and that defines "local levy budget per pupil for the specific grade level" as the "program budget per pupil" is an unfunded mandate in violation of Article VIII of the New Jersey Constitution, and therefore ceases to be mandatory in effect and expires.
- (2) Highland Park's complaint challenging the regulation under the CSPA, effective August 4, 1997, that defines "regions of residence" is dismissed without prejudice.

So ordered.

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The above decision was adopted by the Council and issued on May 11, 2000. Council Members Dominick A. Crincoli (Chair), Robert L. Clifford, Sherine El-Abd, George Farrell, III, Karen A. Jezierny, Ronald J. Riccio and Janet L. Whitman join in the written decision. Council Member Timothy Q. Karcher did not participate in the decision.