

**IN THE MATTER OF COMPLAINTS FILED BY THE
SPECIAL SERVICES SCHOOL DISTRICTS OF
BURLINGTON, ATLANTIC, CAPE MAY, AND BERGEN COUNTIES**

Council on Local Mandates

Argued June 13, 2007

Decided July 26, 2007

Syllabus

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

The Special Services School Districts of Burlington, Atlantic, Cape May and Bergen Counties (“Claimants”) filed Complaints with the Council contending that a Department of Education regulation, N.J.A.C. 6A:14-4.7(a)(2), violates the constitutional prohibition against new unfunded mandates, Article VIII, Section 2, paragraph 5 of the New Jersey Constitution, as codified in the Local Mandates Act (“LMA”). The challenged regulation reduces the maximum age span in elementary school special education classes from four years to three, which Claimants allege will require them to incur additional direct expense for new teachers, classrooms and supplies. As directed by the Council, the Commissioner of Education answered the Complaints. The Commissioner also filed a Motion to Dismiss the Complaints, contending that Claimants lacked standing and further that even if the mandate were unfunded, it was permitted by Article VIII, Section 2, paragraph 5(c)(1) and (c)(2) of the New Jersey Constitution. The Council denied the Motion to Dismiss the Complaints, but ordered additional certifications to be filed on the matter of whether Claimants would incur additional direct expenditures as a result of the regulation.

HELD: The Council unanimously grants Summary Judgment in favor of Claimants.

Under the Council’s liberal approach to standing, Claimants have an “obvious, albeit indirect” interest in the regulation at issue, even if they can pass their costs back to local school districts, because the local districts’ decisions about raising revenue ultimately will affect Claimants’ programs. The unfunded mandate exemption found in Article VIII, Section 2, paragraph 5(c)(1) of the New Jersey Constitution is inapplicable because the Commissioner has not shown with specificity that the challenged regulation is necessary in order to comply with federal statutes or grant programs. The exemption found in Article VIII, Section 2, paragraph 5(c)(2) is inapplicable, even though the regulation applies to “approved private schools” as well as public

schools, because all of the costs of compliance in “approved private schools” are, by law, the responsibility of the local school districts. Also, the regulation does not apply to non-approved non-public schools which provide special education services. Thus, the Motion to Dismiss the Complaints is denied.

On the merits, the burden is on Claimants to prove “additional direct expenditures.” Construing the intent of the Constitution and the LMA, the Council holds that this burden is satisfied by showing such expenditures with respect to any distinct activity of any individual unit of government protected by Article VIII, Section 2, paragraph 5. Claimants having met this burden, additional fact-finding is not required. The Council rejects the Commissioner’s argument that any cost of complying with §4.7(a)(2) can be offset by additional State aid or by unrelated administrative savings; unless earmarked, those resources are intended to be used in the district’s discretion. Nor is it relevant that Claimants might seek a waiver of §4.7(a)(2), because the waiver provision contains no standards that would require the Commissioner to grant a waiver to avoid an unfunded mandate.

Summary judgment is granted. N.J.A.C. 6A:14-4.7(a)(2) is an unfunded mandate in violation of Article VIII, Section 2, paragraph 5 of the New Jersey Constitution. Accordingly, it “shall . . . cease to be mandatory in its effect and expire.”

Donald P. Lucas, Superintendent, for Claimant Burlington County Special Services School District.

Barbara J. Morvay, Superintendent, for Claimant Atlantic County Special Services School District.

Barbara J. Makoski, Superintendent, for Claimant Cape May County Special Services Board of Education.

Robert J. Aloia, Superintendent, for Claimant Bergen County Special Services School District Board of Education.

Michael C. Walters, Deputy Attorney General, argued the cause for Respondent New Jersey Commissioner of Education (Anne Milgram, Attorney General of New Jersey, attorney).

Donna M. Kaye, Esq., argued the cause for amicus curiae New Jersey School Boards Association.

Judith B. Peoples argued the cause for amicus curiae Joint Council of County Special Services School Districts.

DECISION

I

Proceedings

The Complaints. This proceeding was initiated by a Complaint filed by the Burlington County Special Services School District (“the County District,” or “Claimant”) on January 31, 2007. The County District claims that N.J.A.C. 6A:14-4.7(a)(2), a regulation of the Department of Education, imposes an unfunded mandate in violation of the New Jersey Constitution, Art. VIII, § 2, ¶ 5 and the Local Mandates Act, N.J.S.A. 52:13H-1 et seq. (“LMA”). N.J.A.C. 6A:14-4.7 establishes criteria for special education classes. The challenged provision, §4.7(a)(2), requires that the age span of students placed in any single special education class in an elementary school program not exceed three years, beginning July 1, 2007 for the 2007-2008 school year and thereafter. Prior to July 1, 2007, the applicable standard permitted an age span of up to four years per class.¹ Claimants assert that they will incur additional direct expenditures to comply with §4.7(a)(2), because they will have to hire additional teachers and aides, and provide additional classroom space. They further allege that no additional State or federal funds have been made available to offset these costs, forcing them to raise additional funds from local property taxation.

Substantially similar Complaints were filed by the Special Services School District of Atlantic County (February 5), the Cape May County Special Services Board of Education

¹ The standard for secondary school programs remains unchanged at a four year age span and is not in issue in this case. Nor need the Council determine whether §4.7(a)(2) applies to separately-grouped “middle school” classes, e.g. grades 6-8. To the extent that these grades are treated by the Commissioner as elementary school programs and are governed by §4.7(a)(2), however, the analysis of this decision applies.

(February 5), the Bergen County Special Services School District Board of Education (February 13), and by the Shamong Township Board of Education (February 27). These five Complaints were consolidated by the Council on March 1, 2007.² By letter of May 21, 2007, the Council granted leave to the New Jersey School Boards Association to appear as amicus curiae. On June 13, 2007, the Joint Council of County Special Services School Districts was granted amicus status.³ By letter dated June 8, 2007, the Shamong Township Board of Education informed the Council that it wished to withdraw its Complaint,⁴ which was dismissed with prejudice by Council Order dated July 12, 2007.

Answer and Motion to Dismiss. By letter of March 1, 2007, the Council directed the Commissioner of the Department of Education to answer the Complaints as Respondent. No other State official has sought to appear. On March 28, 2007, the Attorney General filed a formal answer on behalf of the Commissioner, together with a Motion to Dismiss the

² During March and early April, 2007, six additional Boards of Education – those of Maple Shade (March 8), Edgewater Park Township (March 19), Mount Holly Township (March 19), Cinnaminson Township (March 23), Medford Township (March 26), and Lumberton Township (April 16) – filed Complaints. By letters of March 23 and April 17, 2007, the Council held these six Complaints in abeyance until after the conclusion of proceedings with respect to the first five consolidated Complaints.

³ By its May 21 letter, the Council had granted permission to the Joint Council's educational consultant, Ms. Judith B. Peoples, to appear as amicus curiae. The Joint Council's status as amicus was clarified at the oral argument on June 13, 2007, based on the representation of Ms. Peoples that she was appearing as the Joint Council's representative.

⁴ As a result, Shamong did not appear at the June 13 hearing, nor did a representative of any of the four remaining Claimants, the County Districts. In light of the important public question presented, affecting the interests both of taxpayers and special needs students, the Council determined that it could proceed on the basis of the prior written submissions of the Claimants and the oral presentation of the amici curiae supporting Claimants' position. The Council emphasizes, however, that the LMA limits party status to municipalities, counties and school districts, see N.J.S.A. 52:13H-12. The Council will not presume that amici speak for absent parties, even if their interests are aligned, and it will exercise its discretion to dismiss Complaints that are not vigorously prosecuted by Claimants.

consolidated Complaints. The Commissioner denied that N.J.A.C. 6A:14-4.7(a)(2) constituted an unfunded mandate and reserved the right to pursue discovery and a fact-finding proceeding on the Claimants' actual direct costs attributable to the regulation. In support of the Motion to Dismiss, however, Respondent argued that *even if* §4.7(a)(2) is unfunded, it is permitted by two exemptions written into Article VIII, Section II, paragraph 5 of the New Jersey Constitution and implemented by the LMA. These are N.J.Const. art VIII, § 2, ¶ 5(c)(1), which permits unfunded mandates required to meet eligibility standards for federal entitlements, and id., ¶ 5(c)(2), which permits unfunded mandates that are also imposed on non-governmental entities in "the same or substantially similar circumstances." After further briefing in response to questions posed to the participants on May 21, 2007, the Council heard argument on the Motion to Dismiss on June 13, 2007 and denied it.⁵

Summary disposition. The Council denies the Motion to Dismiss, for reasons to be explained in this opinion. Although none of the Claimants had formally moved for summary judgment, the record before the Council strongly suggested the likelihood that at least some school districts would incur "additional direct expense" as a result of N.J.A.C. 6A:14-4.7(a)(2), a result that the Attorney General conceded at oral argument was "theoretically . . . a possibility." (Hearing Transcript, p. 49). Nonetheless, the Council agreed with the Commissioner that Claimants' conclusory allegations of costs, unsupported by any data, were insufficient to carry their burden of proving such expenses with the particularity that would remove all question and justify summary disposition in their favor.

The Council heeds the admonition of its previous decisions that it proceed "with great

⁵ The Council deferred its written opinion on the Motion until completion of present proceedings.

caution” when considering whether to grant summary judgment, keeping in mind that the parties have no further recourse once the Council has acted. See In re Board of Education and Borough of Highland Park (“Highland Park I”), decided August 5, 1999, at 13. At the same time, it seeks to avoid burdening the participants with the additional expense and delay of complex fact-finding proceedings where they are not necessary. Therefore, the Council directed that each Claimant separately submit, by affidavit or certification, a detailed accounting of the additional direct expenditure that it would incur for the 2007-2008 academic year as a result of complying with N.J.A.C. 6A:14-4.7(a)(2), or to restate the effect that the regulation would have had if it had been in effect during one or more of the preceding three academic years. The Commissioner was accorded an opportunity to respond. The Council has reviewed the submissions and determines that summary judgment on behalf of Claimants is appropriate, as explained below. Accordingly, the Council determines that N.J.A.C. 6A:14-4.7(a)(2) constitutes an unfunded mandate in violation of Article VIII, Section 2, paragraph 5 of the New Jersey Constitution and “shall . . . cease to be mandatory in its effect and expire.”

II

Jurisdiction

Article VIII, section 2, paragraph 5 of the New Jersey Constitution provides that any provision of a law enacted on or after January 17, 1996, or of any rule or regulation, issued pursuant to a law originally adopted after July 1, 1996, which is determined by the 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). The Legislature adopted the LMA, N.J.S.A. 52:13H-1 to -22, to implement the provisions of the Article VIII, Section 2, paragraph 5, effective May 8, 1996. The Commissioner has not questioned the jurisdiction of the Council to resolve these Complaints, all

of which, on their face, meet the jurisdictional requisites of N.J. Const. art. VIII, § 2, ¶ 5. N.J.A.C. 6A:14-4.7(a)(2) was adopted on September 5, 2006, to become effective on July 1, 2007, see 38 N.J.R. 3561, thus satisfying the threshold dates established by N.J. Const. art. VIII, § 2, ¶ 5(a). Claimants properly allege the substantive basis for invoking the Council's jurisdiction, namely, that the regulation imposes a "mandate" on a unit of local government, that "additional direct expenditures [are] required for [its] implementation," and that the regulation fails to "authorize resources, other than the property tax, to offset the additional direct expenditures." Id. While the Commissioner disputes the allegations of additional costs and of the failure to offset those costs, the Complaints are sufficient to permit the Council to consider them.

III

Standing

The Commissioner makes a preliminary argument that the County Districts lack standing to challenge §4.7(a)(2) because as to them, any compliance costs can be offset by using their existing authority under statutes and regulations to charge tuition to the school districts that send students to them.

The Council adopted a liberal rule of standing in Highland Park I. Taking note of the "traditional" standing criteria applied in the courts, "whether the party has a sufficient stake in and real adverseness with respect to the subject matter, and whether the party will be harmed by an unfavorable decision," Highland Park I at 14, the Council then added:

Additionally, standing requirements are met where a plaintiff has an "obvious, albeit indirect, interest in the effect upon others of statutory and administrative regulations. . . ." New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n, 82 N.J. 57, 68 (1980).

[Ibid.]

Applying those criteria in Highland Park I (which, like the present matter, involved an education mandate), the Council concluded that the Borough of Highland Park had standing to pursue the Complaint as well as its Board of Education, even though it was the latter to which the regulation technically applied and the latter that carried the financial burden of compliance:

[T]hat should not preclude the elected officials of the Borough from vigilantly protecting their electorate from what they perceive to be an unfunded mandate. In this case, we uphold the Borough's standing to challenge the regulations at issue.

[Highland Park I at 15-16]

Whether or not the County Districts will incur additional direct costs as a result of implementing N.J.A.C. 6A:14-4.7(a)(2), they have standing based on the alternative criterion stated in Highland Park I, in that they have an "obvious, albeit indirect, interest in the effect upon others of statutory and administrative regulations" Common sense suggests that the County Districts cannot be indifferent to unfunded mandates whose cost they pass on to local school districts, because they well understand that local taxpayers will press their local school boards to resist such increases. The County Districts have at least as much relationship to the regulation at issue as did the Borough of Highland Park to the unfunded mandate borne by its school board. Indeed, the relationship is arguably stronger here, since it is the County Board that implements the §4.7(a)(2) mandate, whereas in Highland Park I the municipality was only a seriously interested bystander.

The Commissioner's Motion to Dismiss the County Districts' Complaints for lack of standing is denied.

IV

The Motion to Dismiss

The exemptions relied on by the Commissioner in support of the Motion to Dismiss the Complaints are derived from N.J. Const. art. VIII, § 2, ¶ 5(c), which reads in relevant part:

(c) Notwithstanding anything in this paragraph to the contrary, the following categories of laws or rules or regulations issued pursuant to a law, shall not be considered unfunded mandates:

(1) those which are required to comply with federal laws or rules or to meet eligibility standards for federal entitlements;

(2) those which are imposed on both government and non-government entities in the same or substantially similar circumstances;⁶

As to ¶ 5(c)(1), the Commissioner argues that the new age-span regulation is permitted even if it is an unfunded mandate because it is needed to maintain eligibility for federal education funding under the No Child Left Behind Act (“NCLB”), 20 U.S.C. §§ 6301-6578, and the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1482. As to ¶ 5(c)(2), the Commissioner argues that the challenged regulation is permitted because it applies both to public school systems and to private schools that educate special needs students.

The ¶ 5(c)(1) Exemption. The Commissioner concedes that neither NCLB nor IDEA explicitly requires reduction of the age span in special education classes. Rather, she argues that by narrowing the age span, §4.7(a)(2) will help improve test scores and other indicia of progress that the State must demonstrate in order to maintain its eligibility for federal funding, by

⁶ The cited provisions were implemented by Sections 3(a) and (b) of the LMA, N.J.S.A. 52:13H-3. In this decision, the Council uniformly refers to the underlying constitutional provisions.

improving the quality of the education provided to each special needs student.

The Commissioner has the burden of proof as the moving party on the Motion to Dismiss. By stressing her discretion to choose this method of addressing NCLB and IDEA, without attempting to demonstrate that §4.7(a)(2) is essential to maintaining eligibility, the Commissioner has failed to meet her burden of proof. The Council addressed an analogous issue in Highland Park I, supra, where it was contended that several regulations of the Department of Education were exempt from the operation of N.J. Const. art. VIII, § 2, ¶ 5 because they implemented the Thorough and Efficient Education Clause, N.J. Const. art. VIII, § 4, ¶ 1 (“T&E”). The Council noted that the Commissioner’s argument “proves too much.”

Following [this] reasoning, any educational spending would appear to implement the Thorough and Efficient Clause. That interpretation is clearly at odds with Article VIII, section 2, paragraph 5(a) of the New Jersey Constitution, and with the LMA. Both the Amendment and the LMA contemplate the Council’s power over educational rules and regulations; otherwise the exemption would swallow the rule.

[Highland Park I at 21]

The Council therefore concluded:

It would substantially erode the Council statute and the Amendment to say that the subject regulations are covered by the exemption and removed from the Council’s review merely on the basis of Respondents’ *post hoc* justifications. Because neither the redefinition of local levy nor the region of residence regulation can be said, on the basis of the record before us, to further *specific* Thorough and Efficient requirements, they do not fall within the exemption.

[Id. at 22-23, emphasis added]

The Commissioner does not argue that §4.7(a)(2) is relevant to compliance with T&E or that the ¶ 5(c)(5) exemption applies. The ¶ 5(c)(1) exemption is completely analogous, however.

Just as with the State constitutional requirement accommodated by ¶ 5(c)(5), it would “swallow the [constitutional] rule” if the State were permitted to place any unfunded mandate outside the “State mandate/State pay” principle simply by showing that a discretionary choice has some logical connection to meeting the federal requirements. Applying the reasoning of Highland Park I to a claim of exemption under ¶ 5(c)(1), the State must make a record demonstrating with specificity how the challenged mandate is necessary to being in compliance with federal law or to maintaining eligibility for federal programs. The Commissioner having made no such showing, the Motion to Dismiss the Complaints on the basis of the ¶ 5(c)(1) exemption must be denied.

The ¶ 5(c)(2) Exemption. The Commissioner’s second basis for dismissing the Complaints is that even if there is an unfunded mandate (which is assumed for purposes of the Motion without conceding the point otherwise), it applies to similarly situated governmental and non-governmental entities, and therefore is permitted under ¶5 (c)(2). In order to evaluate this argument, it is necessary to describe in general terms the relationship between public and private special education schools, and the applicability of §4.7(a)(2) to each category.

In addition to conventional public schools (as to which §4.7(a)(2) unambiguously applies), there are two categories of non-governmental entities that provide special education to elementary school age children. “Approved private schools” are authorized (“approved”) by the Department of Education to receive special needs students from public school districts at public expense. The Claimants and the Commissioner agree that §4.7(a)(2) “follows” these students to the “approved private school” and that the school must reduce the age span in classes from four to three years in order to continue receiving tax-supported tuition payments. “Non-public schools” may also provide special education services, but they do not receive public funds and

the Commissioner concedes that these schools “are not required to comply with N.J.A.C. 6A:14-4.7(a)(2).” June 4 letter-brief, at p.5. The Department of Education uses “non-public schools” as a catch-all label to describe all other private schools that are not “approved private schools,” including sectarian or parochial schools, and also purely private schools taking students whose parents choose not to avail themselves of public education. The record does not reliably disclose how many disabled students are educated in “non-public schools;” it appears that the number is relatively small, but determining the number is not necessary to the Council’s analysis.⁷

The Commissioner’s reliance on the ¶ 5(c)(2) exemption would clearly fail if there were only two categories of schools – public schools, to which §4.7(a)(2) applies, and “non-public schools,” to which it does not. This is because the two categories of schools are presumptively similarly situated with respect to the educational needs of their students but the unfunded mandate of §4.7(a)(2) is applied only to the public school category. The mandate is not imposed, as N.J. Const. art VIII, § 2, ¶ 5(c)(2) requires, “on both government and non-government entities in the same or substantially similar circumstances.”

Adding consideration of the “approved private school” category complicates the analysis but does not, in the end, bolster the Commissioner’s argument. Because §4.7(a)(2) does apply to this category of schools, and these are private schools, the mandate is, literally, “imposed on both government and non-government entities,” as N.J. Const. art VIII, § 2, ¶ 5(c)(2) provides. Unlike the “non-public schools,” however, the responsibility for complying with (and paying for)

⁷ Non-public schools are eligible under IDEA to receive what are called “proportionate share” funds to support a limited range of special education services. Amicus curiae New Jersey School Boards Association and the Commissioner agree that “non-public schools” receiving these public grants are not obligated to comply with §4.7(a)(2). Association June 4 letter brief at p.5; Commissioner’s June 4 letter brief at p.5.

any costs associated with N.J.A.C. 6A:14-4.7(a)(2) is assigned to the public school district when the student is enrolled in an “approved private school.” See N.J.A.C. 6A:14-7.1(a)(defining “receiving schools,” including “approved private schools”) and id., 6A:14-7.5(a)(“The educational program of a student with a disability provided through contractual agreements as described in N.J.A.C. 6A:14-7.1(a) *shall be considered the educational program of the district board of education.*”) (emphasis added).

The question thus becomes whether the exemption for mandates that apply equally to governmental and non-governmental entities covers a situation such as this, where the regulated entity is nominally private but functionally public in that it is discharging a function that remains the obligation of the government and is wholly paid for by public funds.

Neither N.J. Const. art VIII, § 2, ¶ 5, the LMA nor their legislative histories sheds any light on the purpose of the ¶ 5(c)(2) exemption. Lacking such guidance, the Council concludes that the provision should be construed narrowly, just as it construed ¶ 5(c)(5) narrowly in Highland Park I, lest the exemption “swallow the rule.” In approving N.J. Const. art. VIII, § 2, ¶ 5 and implementing it through the LMA, the judgment of the people of New Jersey was that taxpayers need stronger protection when mandates are imposed only on local government entities.⁸

The Council dealt with an analogous situation in In re Borough of Jamesburg (“Jamesburg”), decided October 28, 2004. The challenged mandate in that case required that

⁸ This need for stronger public protection might be thought to arise from the greater likelihood that an unfunded mandate would be scrutinized for necessity when it is to be applied both to private and public entities, giving the Legislature or a Department a fully balanced picture of the mandate’s benefits and burdens. When a private entity knows that its regulatory cost will be absorbed by the taxpayer, however, that incentive is weakened if not dissipated altogether.

vehicles for the transportation of animals meet certain standards and the State invoked (as it does here) the ¶ 5(c)(2) exemption, arguing that the mandate applied both to municipal animal control operations and to private animal handlers. Claimant responded that the only private animal handlers subject to the mandate were those operating under contract to municipalities to carry out the public animal control function. The Council addressed the competing positions as follows:

[T]he Council does not draw any distinction between municipalities that perform the animal control function themselves (as Claimant apparently does) and those that contract with a private entity to perform the service (to which Respondent points in support of its §3(b) argument). Assuming (without deciding) that Claimant is correct, namely, that the animal control function is performed only by municipalities, directly or by contract, and that the challenged mandate applies only to the animal control function, it follows that the cost of providing the service (including any unfunded mandates) will likely be born by taxpayers of the municipality in either case. *When performed by a private entity, the cost could be passed by contract back to the municipality, and, if so, the mandate would be actionable under the Amendment and the LMA.*

[Jamesburg at 8-9, emphasis added]

In the end, the Council did not rest its decision on the language just quoted, because it went on to conclude that Claimants were incorrect as a matter of law about the application of the mandate to private entities not carrying out the public animal control function. It therefore decided in Jamesburg that ¶ 5(c)(2) exempted the mandate, even if it was unfunded. Here, by contrast, the responsibility for complying with §4.7(a)(2) is conceded to be limited to school districts and “approved private schools” funded by school districts, with the taxpayer ultimately paying the cost of compliance in either case. The Council now concludes that the quoted reasoning of Jamesburg applies here, and it so holds. The Motion to Dismiss the Complaints on the basis of the ¶ 5(c)(2) exemption is denied.

V

Summary Disposition

In order for §4.7(a)(2) to be invalid, it must be a mandate as to the Claimants, it must result in “additional direct expenditures” to them, and it must fail to “authorize resources, other than the property tax, to offset the additional direct expenditures.” N.J. Const. art. VIII, § 2, ¶ 5(a). The Commissioner concedes that §4.7(a)(2) is a mandate but disputes both that it will result in additional costs and that any such cost is unfunded.

Authorized resources. The Commissioner’s second point may be disposed of quickly. She does not contend that the Legislature has addressed the possible cost of implementing §4.7(a)(2) and provided a new source of non-property tax revenue for that purpose. Instead, she points to a generalized appropriation of additional State aid to school districts for the 2007-2008 academic year, and she also notes that other regulatory changes may give districts flexibility to reorganize other services and thereby realize savings that could offset any cost of complying with §4.7(a)(2). The Council concludes that neither of these purported sources of funding satisfies N.J. Const. art. VIII, § 2, ¶ 5(a) or the LMA.

The “offset” argument raises a question that is not directly addressed by N.J. Const. art. VIII, § 2, ¶ 5(a) or the LMA. Each implicitly assumes that a specific source of funding will be identified to pay for the new mandate, and that the mandate either will or will not be constitutional depending on whether specific new funding is required. Here, the Commissioner argues that the Legislature and the Department have indirectly accomplished the equivalent of a specific appropriation by creating a new source of revenue in the form of increased State aid to education or by administrative savings.

The flaw in these arguments is that neither the State aid nor the administrative savings are

earmarked for implementing §4.7(a)(2); if some or all of it is used for that purpose, doing so diminishes the school district's ability to use the "new" money for other equally appropriate purposes that in its discretion it might prefer. Giving resources to local governments on the one hand and immediately taking them away on the other in the form of a new unfunded mandate frustrates the principles of N.J. Const. art. VIII, § 2, ¶ 5(a) and the LMA. In addition, without a clearly earmarked link between the purported new source of revenue and the new mandate to which it is applied, there will be potential problems of proof as the same bundle of State aid or the same administrative savings are cited to justify more than one unfunded mandate. The Commissioner's "bookkeeping" analysis is unworkable and would risk opening a loophole that could severely undermine the "State mandate/State pay" principle.

The cost of complying with §4.7(a)(2). This case differs from those previously heard by the Council, where the mandate imposed a fixed cost that was objectively ascertainable and applicable to most, if not all, of the units of government subject to the mandate. See, e.g., Jamesburg, supra (installing temperature controls in animal transport vehicles); In re Monmouth-Ocean Educational Services Commission et al. ("Monmouth-Ocean"), decided August 20, 2004 (radon testing in public schools). By contrast, §4.7(a)(2) mandates that school districts change one component – age span – of a complex process of assigning special needs students to individual classrooms. Whether this mandate will require any given school district to incur the additional direct expense of hiring new personnel, opening a new classroom, or providing additional supplies cannot be known until the district also knows at least the following:

1. *Total enrollment.* The number of special needs students to be enrolled in any given year can vary dramatically from year to year. Data submitted to the Council by Claimant Cape

May County Special Services School District, for instance, showed classes with total enrollments of 50, 37, and 19 students in Ocean Academy in the academic years 2004-2005, 2005-2006, and 2006-2007 respectively.⁹ The normal movement of families in and out of the school district undoubtedly accounts for some of this variation, but other variations undoubtedly result from the requirement of annual assessment of each special needs student's placement, N.J.A.C. 6A:14-3.7(i); id., §4.2(a)(4), and the Department's policy that students be reassigned to mainstream classrooms whenever possible. Id., §4.2(a)(1). In addition, as has been discussed above, disabled students requiring specialized support are often reassigned to "approved private schools" at school district expense. Because enrollment is dynamic, the Commissioner cannot credibly argue that an increase in enrollments will not push a district to the point where an additional class at additional expense will be required under the new, but not the prior, version of §4.7(a)(2).¹⁰

2. *Types of disabilities and functioning levels.* Ocean Academy (Cape May) provided separate classes for autistic students, students with multiple disabilities, and those classified as "cognitive severe." These are defined as distinct categories of special education need by the Department, see N.J.A.C. 6A:14-§3.5(c)(2) ("autistic"); id. §3.5 (c)(3)(iii) ("severe cognitive impairment"); id. §3.5(c)(6) ("multiply disabled"). The Department also recognizes (and

⁹ The Commissioner objects to this example, noting that the Ocean Academy at Cape May reported a total of 280 special needs students in December 2006; she argues that Cape May has selectively chosen a subset of students to favor its position. She does not question the accuracy of Claimant's data as to these specific classes at Ocean Academy, however. As will be explained below, this suffices to test whether §4.7(a)(2) is an unfunded mandate.

¹⁰The Commissioner's argument that the Cape May data must be rejected because it reveals some classes slightly exceeding even the four-year age span requirement of §4.7(a)(2) as it then existed is without merit.

implicitly requires), id. §4.2(a)(2), that “special classes” or “separate schooling” is to be provided “when the nature or severity of the educational disability is such that education in the student’s general education class . . . cannot be achieved satisfactorily.” While local districts must comply with departmental regulations, N.J.A.C. 6A:14-1.1(d)(4), they retain substantial discretion in administering the system with respect to meeting the needs of individual students. Id. §1.1(d)(1)-(3).

In this regulatory context of the Department’s own making, the Commissioner cannot successfully argue that districts like Cape May can or should disregard the distinct needs of, for instance, autistic, cognitive severe and multiply handicapped students by lumping them into combined classes solely to avoid the cost of complying with the age-span reduction of §4.7(a)(2). (Indeed, it may be questioned whether doing so would actually violate N.J.A.C. 6A:14, NCLB or IDEA, a question beyond the Council’s purview.) In some school years, in some districts, it is obvious that the amended §4.7(a)(2) will require opening additional classes if sound educational policy is to be served.

Claimant Bergen County Special Services School District demonstrated how this would occur. It reported that, in two schools within the County District, for the two academic years 2004-2005 and 2005-2006, 15 classes would have violated §4.7(a)(2) had the regulation been in effect in those years, but that based on considerations of the ages and the “functioning levels” of the students in the classes it would have needed six additional classes to comply. Similarly, in 2004-2005, the Ocean Academy in Cape May offered a single class for autistic students, enrolling six students over a four-year age span. To comply with §4.7(a)(2) while still educating the autistic students separately, it would have had to open a second class for the student(s) who

fell outside the three-year age span (or, perhaps, to make arrangements at the district's expense to educate the student(s) elsewhere).

3. *Maximum class size.* A final consideration is class size. Cape May reported class sizes of between five and nine students per class in the three academic years summarized. If its sole concern were to comply with §4.7(a)(2), it might have been able to regroup students without adding an extra class simply by increasing the number of students in each class (particularly if it also disregarded the functioning level considerations noted in the paragraph above). It is not free to do so, however, because the Department places specific caps on class size according to type of disability involved, ranging from a cap of 3 students (autism, severe cognitive disability) to 12 (mild cognitive). N.J.A.C. 6A:14-4.7(e). These caps can be increased by providing a classroom aide, but of course hiring the aide imposes an additional expense on the district. Id.

The three interrelated considerations make it clear, however, that the cost impact, if any, of §4.7(a)(2) must vary from district to district and from year to year. Indeed, the results of a survey submitted by amicus curiae New Jersey School Boards Association confirm the lack of a categorical answer to the question whether §4.7(a)(2) imposes "additional direct expenditures" in violation of N.J. Const. art. VIII, § 2, ¶ 5. Of 241 districts responding to the survey and subject to §4.7(a)(2), 19 reported that they definitely would incur specific additional expense for teachers, classrooms or supplies in academic year 2007-2008 because of the reduced age span limit, an additional 109 districts predicted that they would but offered only conclusory assertions about the actual impact, and 113 districts reported that they would incur little or no additional expense, although 28 of these districts also said that compliance would cause them

inconvenience in running the program or would detract from its quality.¹¹

This context of indeterminacy forms the backdrop for the Commissioner's assertion that Claimants, on the basis of their pleadings and supplemental certifications, have failed to carry the burden of proving that they will incur additional direct expenditures in order to comply with §4.7(a)(2). She thus argues that summary disposition in favor of the Claimants is inappropriate and that the Council should proceed with discovery and an adversarial hearing as to the cost (or lack thereof) in each of the Claimant's districts. Reduced to formal legal terms, her argument is that §4.7(a)(2) cannot be found facially unconstitutional, but instead must be tested on an as-applied basis, district by district. The Council disagrees. So long as the mandate unambiguously applies to any distinct activity of any individual unit of government protected by N.J. Const. art. VIII, § 2, ¶ 5, and funding is not provided, the mandate itself is unconstitutional and cannot be enforced against any unit of government.

This is an issue of first impression for the Council, one which is not addressed explicitly either by N.J. Const. art. VIII, § 2, ¶ 5 or by the LMA.¹² The actual (and substantially identical) language of the New Jersey Constitution and the LMA is not without significance, however. The Constitution provides that an unfunded mandate "shall upon such determination [by the

¹¹NJSBA's survey data were not collected on sworn affidavits or certifications, and the results are reported anonymously and in conclusory terms. As such, they cannot be accepted as proof that the districts involved will or will not incur the expenses asserted. Taken in the aggregate, however, they support the Council's conclusion that the impact of §4.7(a)(2) will vary from district to district and the Council accepts the survey for that limited purpose.

¹² The legislative history is similarly silent.

Council], cease to be mandatory in its effect and expire.” N.J.Const. art. VIII, § 2, ¶ 5(a).¹³ The force of this provision is directed not at the specific application of the regulation, but at the unconstitutional regulation itself, which “shall cease” and “expire.” In ordinary legal process, by contrast, a regulation that is invalid “as applied” does not “cease” or “expire.” It remains on the books and valid as to all other applications except the one application found unconstitutional.

Considerations of policy support this conclusion. Each “as applied” decision resolves only the case before it, leaving uncertainty when the circumstances vary from case to case, as they certainly do with respect to meeting special education needs. This makes it difficult for school districts to prepare both educational and financial plans in an orderly fashion. In addition, the cost and complexity of multiple proceedings will serve to deter units of local government from invoking the Council’s jurisdiction, thus frustrating achievement of the protective purpose of N.J. Const. art. VIII, § 2, ¶ 5 and the LMA.

The Council’s greatest concern, however, is that case by case determinations will inevitably draw it into close consideration of small factual differences and nuances of application, that is to say, into matters of policy that are beyond its authority. The present case well illustrates this concern. Even the very simplified description given above of how special education enrollments are administered demonstrates that the potential cost of implementing §4.7(a)(2) cannot be explored without weighing and balancing issues of educational policy that are committed to the discretion either of the Department of Education or school districts. If the “as applied” cost of adding a new classroom could be avoided, for instance, by second-guessing the district’s assessment and grouping of students by their “functioning levels,” the process relied

¹³ In relevant part, N.J.S.A. 52:13H-2 provides that an unfunded mandate “shall cease to be mandatory in its effect and shall expire.”

on by Bergen County for its assertion that six additional classes would have been needed, the Council could find itself deeply enmeshed in matters of professional judgment that are not and should not be its primary concern. The same could be said of issues of class size, outplacement of students to avoid creating a new class, and so forth. It is exactly such consideration of alternatives that would be put in contention by further discovery and testimony.

Further fact-finding is not necessary here, however. The Council finds that there are clear and unambiguous instances in which §4.7(a)(2) imposes an unfunded mandate, and that those instances are sufficient to render the regulation invalid under N.J. Const. art. VIII, § 2, ¶ 5 and the LMA. To give but one example: Cape May certified that in the 2004-2005 academic year, the Ocean Academy maintained one class for autistic children with an enrollment of six students comprising an age span of slightly less than four years. It is undisputed that in order to comply with §4.7(a)(2), the school district would have needed a second class.¹⁴ No source of funding other than local property taxation is provided to meet this additional direct expense. It is an unfunded mandate.¹⁵

Claimants' interests would have been well served before the Council had they presented in systematic detail more examples such as the one just given. From a consideration of all the

¹⁴ N.J.A.C. 6A:14-4.7(e) requires a student to teacher ratio of 3:1 for autism classes, but permits a class of four to six students if a classroom aide is also employed. Had Cape May been forced to break up its single autism class, it presumably would have saved the salary of the aide, but that would be more than offset by the greater cost of employing a second teacher.

¹⁵ Nor is it an answer that Cape May could have sought a waiver of §4.7(a)(2). The waiver provision, N.J.A.C. 6A:14-4.9, contains no standard for granting or denying a waiver other than the discretion of the Commissioner. The State mandate/State pay principle cannot be made to stand or fall based on the discretion of the very rule-makers whose disregard of local taxpayer concerns prompted adoption of N.J. Const. art. VIII, § 2, ¶ 5 and the LMA in the first instance.

information presented to it, however, the Council is persuaded that detailed fact-finding through discovery and testimony will not change its conclusion that §4.7(a)(2) constitutes an unfunded mandate. Even allowing for a degree of overstatement in the many conclusory certifications and statements presented to it, there is no reason in experience or common sense to think that the Cape May and Bergen County examples referenced in this opinion are unique to those counties and those school years.¹⁶

Nor is it inappropriate that the Council has relied primarily on a hypothetical reconstruction of the past three years, rather than a factual statement about the costs to be incurred next year. As explained above, enrollment management is fraught with uncertainties that for many districts are coming into focus at the same time as the Council considers §4.7(a)(2), that is, in the summer months just before the start of the next academic year. By rendering its decision now without further proceedings, districts can avoid costs that they would not otherwise incur but for having to comply with §4.7(a)(2). Were the Council to take the more cautious approach and accord the Commissioner the opportunity for the detailed fact-finding that she requests, these proceedings would extend past the point where districts must make commitments for the fall and those costs would presumably be irretrievable, even if the Council rules in Claimants' favor at that time. Because §4.7(a)(2) is definitively an unfunded mandate in

¹⁶ Indeed, the Commissioner conceded as much during the rulemaking process. To a comment expressing concern that the amended §4.7(a)(2) "will cost school districts money," the Department responded, "The Department agrees that the proposed amendment as originally drafted could have a significant financial impact on school districts." The Response went on to assert that these cost considerations had been addressed by changing the proposal to omit secondary schools and to allow elementary schools a year to come into compliance. 38 N.J.R. 3530(b), 3543 (September 5, 2006). While these adjustments may have changed the overall amount and timing of the costs complained of, they do not purport to have eliminated those costs altogether.

some of its application, it is facially invalid and it would frustrate the purposes of N.J. Const. art. VIII, § 2, ¶ 5 and the LMA to force unnecessary (and unconstitutional) expense on local districts for no reason.

As the Council has emphasized on other occasions, see Monmouth-Ocean, *supra*, it has no authority to pass judgment on the merits of any statute or regulation claimed to be an unfunded mandate. The Council appreciates that there are strong opinions, pro and con, about the academic value of reducing the age span in special education classes from four years to three. While those views have had no bearing on the Council's decision, it also does not want this decision to be understood as precluding the Commissioner from readopting an age-span requirement in a form consistent with N.J. Const. art. VIII, § 2, ¶ 5 and the LMA. In the course of its deliberations, for instance, the Council carefully considered whether the waiver provision, §4.9, might save §4.7(a)(2) from being an unfunded mandate but in the end decided that it did not give school districts the protection to which they are entitled under N.J. Const. art. VIII, § 2, ¶ 5 and the LMA, because it is entirely lacking in standards to guide the Commissioner's exercise of discretion.

VI

CONCLUSION

Accordingly, the relief sought by Claimants is granted. N.J.A.C. 6A:14-4.7(a)(2) is an unfunded mandate prohibited by Article VIII, Section 2, paragraph 5 of the New Jersey Constitution and the Local Mandates Act, N.J.S.A. 52:13H-1 et seq. It therefore ceases to be

mandatory in its effect and hereby expires.¹⁷

So ordered.

* * * * *

The above decision was adopted by the Council and issued on July 26, 2007. Council Members Janet L. Whitman (Chair), Victor R. McDonald, III, Rita E. Papaleo, Ryan J. Peene, and Sylvia B. Pressler join in the written opinion. Council Members Timothy Q. Karcher and Richard Levesque, Jr. did not participate in the decision.

¹⁷ As a result of the within decision, the claims raised in the six Complaints held by the Council in abeyance (see footnote 2 above) are rendered moot and are hereby dismissed, with no need for further proceedings pursuant to Rule 9 of the Council's Rules of Procedure.