

**IN THE MATTER OF A COMPLAINT FILED BY
SPRINGFIELD TOWNSHIP (UNION COUNTY) BOARD OF EDUCATION**

Council on Local Mandates

Argued October 18, 2011

Decided October 18, 2011

Written Opinion issued February 15, 2012

Syllabus

(This syllabus was prepared for the benefit 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 Springfield Board of Education filed a complaint with the Council alleging that N.J.S.A. 18A:39A-1 and 1a impose unfunded mandates insofar as they "increased the amount local boards of education are required to pay for the transportation of nonpublic school students . . . without a corresponding increase in state aid specifically earmarked for this transportation."

The Attorney General filed an answer on behalf of the New Jersey Department of Education and the parties filed cross-motions for judgment, which were argued before the Council on August 4 and October 18, 2011. At the conclusion of the October 18 argument, the Council Chair announced that the Council determined that it did not have jurisdiction to consider the issues projected in the complaint because the challenged statutes were enacted prior to January 17, 1996. See N.J. Const. Art. VIII, §2, ¶5(a); N.J.S.A. 52:13H-2. This opinion explains and memorializes that decision.

HELD: The complaint is dismissed for lack of jurisdiction.

N.J.S.A. 18A:39-1, enacted in 1967 and last amended in 1990, mandates that school districts provide transportation to both public and nonpublic school students attending school within specified distances; it also directs that the per pupil payment for nonpublic school transportation shall be determined

as set forth in N.J.S.A.18A:39-1a and that if transportation cannot be provided at that cost, the district must make the required payment to the parent or other legal custodian of the nonpublic school student.

N.J.S.A. 18:39-1a, as amended in 1990, provided that "the maximum amount of nonpublic school costs shall be the State transportation aid per pupil in the year prior to the prebudget year compared to the amount for the prebudget year." In 2001, the statute was amended to fix a new formula to cap the per pupil cost for the 2002-03 and ensuing school years, but also provided that "any additional costs incurred by a school district . . . pursuant to this section shall be borne by the State." The 2001 amendment remains in effect to this day. Thus neither the Board's present obligation to provide nonpublic student transportation nor the dollar amount of that obligation is imposed by a law "enacted on or after January 17, 1996." N.J.Const. Art. VIII, §2, ¶5(a); N.J.S.A. 52:13H-2.

The Council rejects the Board's argument, based on the fact that the district is not presently receiving State transportation aid, that the alleged "unfunding" arises from a 2011 Department of Education memorandum, directed to all district and county school administrators, advising that "State transportation aid . . . is not a prerequisite for the payment of aid in lieu of transportation." That memorandum did not impose any new mandate on local districts, but simply explained the State's view of governing law. The Board's dispute is with the State's interpretation and application of the pre-1996 statutes, but those statutes are beyond the Council's jurisdiction.

In light of that finding, the Council does not address the State's alternate argument that N.J.S.A. 18A:39-1 and 1a are beyond the Council's jurisdiction because they implement N.J. Const. VIII, §4, ¶3. See N.J.Const. VIII, §2, ¶5(c)(5); N.J.S.A. 52:13H-3.

Council Chair John A. Sweeney and members Timothy Q. Karcher, Jack Rafferty, Jack Tarditi and Sharon L. Weiner join in the opinion; members Leanna Y. Brown, Nirmal Mulye and Janet L.

Whitman dissent; member James Toolen did not participate in the proceedings or the decision.

Vito A. Gagliardi, Jr. argued the cause for complainant Springfield Township Board of Education (Porzio Bromberg & Newman, attorneys).

Christopher Huber, Deputy Attorney General, argued the cause for respondent New Jersey Department of Education (Paula T. Dow, Attorney General, attorney).

New Jersey Network of Catholic School Families and New Jersey Association of Independent Schools filed letter briefs as amici curiae.

OPINION

On March 28, 2011 the Springfield Township (Union County) Board of Education filed a complaint with the Council on Local Mandates seeking a declaration that N.J.S.A. 18A:39-1 and 1a, which govern the transportation of elementary and secondary school pupils to nonpublic schools, constitute an unfunded mandate.

The Council duly notified the appropriate State officials of the filing of the complaint, directed the Attorney General to file an answer and fixed a schedule for the further proceedings. The Attorney General answered on behalf of the New Jersey Department of Education and the parties ultimately filed cross-motions for judgment, with full briefing, which were argued

before the Council on August 4 and October 18, 2011. Following a brief recess called at the conclusion of the October 18 argument, the Council Chair announced that the Council determined that it did not have jurisdiction to address the issues raised by the Board of Education because the challenged provisions of N.J.S.A. 18A:39-1 and 1a were enacted before January 17, 1996. N.J. Const. Art. VIII, §2, ¶5(a); N.J.S.A. 52:13H-2. This opinion explains and memorializes that decision.

I

The core allegation of the complaint is that post-1996 amendments of N.J.S.A. 18A:39-1 and 1a “increased the amount local boards of education are required to pay for the transportation of nonpublic school students (either through providing transportation or aid in lieu of transportation payments) without a corresponding increase in state aid specifically earmarked for this transportation or aid in lieu amounts to an unfunded mandate.”

N.J.S.A. 18A:39-1 was enacted in 1967 and most recently amended in 1992. See L. 1992, c. 33. The statute mandates, in relevant part, that (1) “the district shall provide transportation to and from school” for elementary school pupils who live more than 2 miles from their public school of attendance or secondary school pupils who live more than 2½

miles from their public school of attendance, (2) any district providing transportation for public school students shall also provide transportation "to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil", (3) the per pupil payment for nonpublic student transportation, capped at \$675 for the 1992-93 school year, is to be determined for future years pursuant to N.J.S.A. 18A:39-1a and (4) if transportation cannot be provided for a nonpublic student at the capped cost, the district must pay the capped cost to the parent or other legal custodian of the nonpublic student.

N.J.S.A. 18A:39-1a was enacted in 1981. It originally provided that from and after the 1982-83 school year "the maximum amount of nonpublic school transportation costs per student shall be increased or decreased by an amount equal to the percentage increase or decrease in the total amount of estimated approved transportation costs per pupil for the year prior to the prebudget year compared to amount estimated for the prebudget year."

That formula was amended by L.1990, c. 52, §51 to provide that "the maximum amount of non-public school costs shall be the

State transportation aid per pupil in the year prior to the prebudget year compared to the amount for the prebudget year."

N.J.S.A. 18A:39-1a was thereafter amended in 1992 and 1996 (L.1992, c.33, §2; L.1996, c.138, §66), but the formula for fixing the amount of nonpublic school transportation costs was not amended until the enactment of L. 2001, c. 437, §1. That amendment - now the current law - capped the per pupil costs for the 2002-2003 school year at \$735 and directed that

this amount shall be increased in each subsequent year in direct proportion to the increase in the State transportation aid per pupil in the year prior to the prebudget year compared to the prebudget year or by the CPI, whichever is greater.

The 2001 amendment of N.J.S.A. 18A-39-1a also added the following provision:

In the 2002-2003 school year and thereafter, any additional costs incurred by a school district due to the increase in the maximum of nonpublic school transportation costs per pupil pursuant to this section shall be borne by the State.

II

The past and present operation of those statutory enactments is undisputed. The mandate to provide transportation, or in lieu payments, for nonpublic school students was imposed

on school districts by N.J.S.A. 18A:39-1 in 1967 and remains in full effect today. The 1990 amendment to N.J.S.A. 18A:39-1a determined the amount of the districts' per pupil obligation for each ensuing school year until 2001-02, when the sum was fixed at \$710. The 2001 amendment to N.J.S.A. 18A:39-1a imposed all subsequent additional costs of nonpublic student transportation on the State; those additional costs - \$174 per nonpublic student for the 2010-11 school year – are paid by the State regardless of the level of State aid paid to districts. In short, neither the Board's present obligation to provide transportation to nonpublic school students nor the dollar amount of that obligation is imposed by a law "enacted on or after January 17, 1996." N.J.Const. Art. VIII, §2, ¶5(a); N.J.S.A. 52:13H-2.

The Board's contrary argument is that, by couching the district obligation in terms of the amount of State aid, the legislature "intended that mandated student transportation or aid in lieu thereof would be funded through State aid." Asserting that the Springfield district will not receive any State aid for the 2011-12 school year, the Board contends that the requirements of N.J.S.A. 18A:39-1 and 1a "have become unfunded mandates with regard to school districts that are receiving no transportation aid." The alleged "unfunding", the

Board says, did not arise directly from the pre-1996 statutes but from a February 18, 2011 memorandum of Acting Assistant Commissioner of Education Yut'se O. Thomas. That memorandum, directed to all district and county school administrators, stated that it was responding to local boards "questioning their responsibility to pay aid in lieu of transportation under certain circumstances" and advised that:

No state law relieves a local board of education of the obligation to pay aid in lieu of transportation when a student is eligible for this transportation service. State transportation aid paid to local boards of education have never covered the full cost of these mandated transportation services, and is not a prerequisite for the payment of aid in lieu of transportation.

Relying on the decisions of this Council in I/M/O Counties of Morris et al. (September 6, 2006) and I/M/O Mayors of Shilo et al. (October 22, 2008), the Board argues that that memorandum constituted an unfunded mandate because it announced a "change in State policy or practice" that "shifts the financial burden of a mandate from the State to a local unit." The Council rejects that reading. The memorandum did not impose any new mandate on local districts, but simply explained the State's view of the governing law; it did not announce, as in Morris and Shilo, that programs previously conducted and funded by the State would henceforward be local responsibilities. The Board

disputes the conclusion stated in the memorandum, but that is a dispute about the interpretation and implementation of pre-1996 statutes, which are beyond the Council's jurisdiction. The suspension of State funding to the Springfield district for the 2011-12 school year does not overcome that jurisdictional bar. Moreover, the fact is that the State never fully funded district nonpublic school transportation costs and continues to pay that portion of those costs fixed by the 2001 amendment of N.J.S.A. 18A:39-1a; the Council is without authority to determine whether that partial funding is adequate. N.J.S.A. 52:13H-12a; see I/M/O Ocean Township (Council on Local Mandates, August 2, 2002).

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The Council thus holds that it is without jurisdiction to consider the merits of the complaint because of the bar imposed by N.J.Const. Art. VIII, §2, ¶5(a) and N.J.S.A. 52:13H-2. In light of that determination, the Council does not address the State's alternate contention that N.J.S.A. 18A:39-1 and 1a implement N.J.Const.Art. VIII, §4, ¶3 and are thus beyond the Council's jurisdiction. See N.J.Const.Art. VIII, §2, ¶5(c)(5); N.J.S.A. 52:13H-3. The complaint is dismissed.