

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

Council on Local Mandates

Argued April 12, 1999

Decided August 5, 1999

**Syllabus**

The Highland Park Board of Education and the Borough of Highland Park challenge two regulations adopted by the Commissioner of Education ("Commissioner") pursuant to the Charter School Program Act ("CSPA"). Claimants contend that the regulations violate the constitutional prohibition against unfunded mandates codified in the Local Mandates Act ("LMA"). The challenged regulations modify the funding obligation imposed on local boards of education and provide for "regions of residence," which allow one charter school to serve multiple contiguous school districts. Claimants argue that those regulations impose additional direct expenditures on local boards of education and they therefore urge the Council on Local Mandates ("Council") to declare the regulations unconstitutional unfunded mandates. The Respondents, the Commissioner and the Greater Brunswick Charter School, filed motions for summary disposition of the complaints, maintaining that the Council lacks jurisdiction under its ruling in Clifton, and that the challenged regulations come within two exemptions from the prohibition against unfunded mandates. The Commissioner also moved to dismiss the Complaint filed by the Borough of Highland Park, on the grounds that the Borough lacked standing.

The motions are denied. The Council has jurisdiction and, on the current record, no exemption applies to the challenged regulations.

- (a) The Council has jurisdiction to review regulations adopted pursuant to a statute, even where the statute predates the effective date of the Council's jurisdiction. In Clifton, the Council held that it did not have jurisdiction over a regulation adopted pursuant to the CSPA, a statute that predates the effective date of the Council's jurisdiction, because that regulation merely implemented and executed the plain requirements of the CSPA. Unlike the regulation at issue in Clifton, the challenged regulations create new obligations, not required by the plain language of the CSPA, that have the potential of being unfunded mandates. Therefore, they are within the Council's jurisdiction.

- (b) Section 3c of the LMA exempts laws, rules, or regulations that repeal, revise, or ease existing mandates. Respondents maintain that the challenged funding regulation revises an existing obligation and thus is exempt from the constitutional and statutory prohibition. The regulation is not covered by the exemption because it has the potential to increase Claimants' funding obligations.
- (c) Section 3e of the LMA exempts laws, rules, or regulations that implement provisions of the New Jersey Constitution. Respondents argue that the funding regulation and the "region of residence" regulation implement the Thorough and Efficient Clause. Absent a showing that the regulations further a specific Thorough and Efficient requirement, however, the Council will not apply the exemption.
- (d) The Borough of Highland Park has standing to challenge the Commissioner's regulations. The Commissioner asserts that the Borough lacks standing to challenge the regulations because they allegedly affect only the local board of education, not the municipality. The interest shown by the Borough here in protecting its residents from the alleged unfunded mandates is sufficient to satisfy the requirements for standing.

Having decided the above threshold issues, the Council will determine next whether the challenged regulations are unfunded mandates. It directs Claimants to supply the Council with additional information, described in the Appendix to the decision.

## **Decision**

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### **I Introduction**

The Highland Park Board of Education and the Borough of Highland Park (collectively “Highland Park”) urge the Council on Local Mandates (“Council”) to declare two provisions of the New Jersey Administrative Code unfunded mandates. The Commissioner of Education (“Commissioner”) and the Greater Brunswick Charter School (“Greater Brunswick”) argue that the Council has no jurisdiction, or, alternatively, that the challenged regulations fall within two exemptions from the Local Mandates Act

("LMA" or "Council statute"), N.J.S.A. 52:13H-1 to -20. We conclude that the Council does have jurisdiction. We further hold that the challenged regulations, on the basis of the record before us, do not fall within any of the limited exemptions from the LMA. Therefore, we deny the Commissioner's and Greater Brunswick's motions for summary disposition of Highland Park's Complaint, and we direct Highland Park to submit additional proofs bearing on the question of whether the challenged Code provisions are unfunded mandates.

Since the creation of the Council in 1996, it has decided one other challenge to a regulation: In re a Complaint filed by the Board of Education for the City of Clifton ("Clifton"), issued May 13, 1998, discussed below. In Clifton, however, the Council denied injunctive relief and dismissed the Complaint for lack of jurisdiction. This Complaint presents the Council with the opportunity to give further definition to its jurisdictional boundaries and to interpret the scope of two exemptions from the LMA.

## **II Purpose of the Council**

On November 7, 1995, the voters approved an amendment to the New Jersey Constitution, at Article VIII, section 2, paragraph 5, which, in effect, prohibits State government from requiring units of local government to implement additional or expanded activities without providing offsetting funding for those activities. See N.J. Const. art. VIII, § 2, ¶ 5 ("Amendment"). The Legislature adopted the LMA, effective May 8, 1996, to implement the provisions of the Amendment. The Amendment and the LMA followed a similar trend in a majority of the states, as well as at the federal level.

See, e.g., Cal. Gov. Code § 17500 (West 1995) (creating quasi-judicial body called the Commission on State Mandates to decide complaints regarding California's constitutional obligation to reimburse local entities for mandates); N.Y. Legis. Law § 83-h (McKinney's 1994) (establishing Legislative Commission on State-Local Relations to make recommendations concerning state aid to local government units). Forty-four states have enacted unfunded-mandate reforms or prohibitions, most of them in the form of either a constitutional amendment or a statute.

The Amendment was prompted by the "long-standing, prior practice of State-imposed, unfunded mandates. . . ." See N.J.S.A. 52:13H-1c. The stated purpose of the Amendment was "to prevent the Legislative and Executive branches of State government from forcing local governments and boards of education to implement many new or expanded programs, unless those programs are accompanied by the means to pay for them." Senate Committee Substitute for Senate Concurrent Resolution No. 87, Interpretive Statement (May 15, 1995). The popular support necessary to pass the Amendment and the LMA evinces a broad remedial purpose.

The Amendment and the LMA, however, do not abolish all unfunded mandates; they are limited by the intention to preserve existing statutes and programs. Both apply only to laws enacted on and after January 17, 1996, and to rules or regulations adopted after July 1, 1996. See N.J. Const. art. VIII, § 2, ¶ 5(a); N.J.S.A. 52:13H-2. The Amendment states:

With respect to any provision of a law enacted on and after January 17, 1996, and with respect to any rule or regulation issued pursuant to a law originally adopted after July 1,

1996, and except as otherwise provided herein, any provision of such law, or of such rule or regulation issued pursuant to a law, which is determined in accordance with this paragraph to be an unfunded mandate upon boards of education, counties, or municipalities because it does not authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law or rule or regulation, shall, upon such determination cease to be mandatory in its effect and expire.

Additionally, the Amendment and the LMA contain six exemptions. Two of those exemptions are relevant here. N.J.S.A. 52:13H-3c exempts 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." N.J.S.A. 52:13H-3e exempts laws, rules, or regulations that "implement the provisions of the New Jersey Constitution."

There is a dearth of legislative history regarding the exemptions. Concerning N.J.S.A. 52:13H-3c, the Council has uncovered no relevant history. In respect of N.J.S.A. 52:13H-3e, contemporaneous news reports indicate that New Jersey's constitutional obligation to provide a thorough and efficient education was among the considerations behind the exemption. See Public Hearing before the Senate Community Affairs Committee at 9X-11X, 13X-14X (May 25, 1995).

The Amendment directed the New Jersey Legislature to create a Council on Local Mandates. See N.J.S.A. 52:13H-1d. The Legislature discharged that duty by enacting the LMA. The purpose of this Council, under the LMA, is to "resolve disputes regarding whether a law or a rule or regulation, covered by the amendment, constitutes an unfunded

State mandate.” Ibid. For any challenged law, rule, or regulation enacted after the dates specified in the Amendment and the LMA, and not coming within any of its enumerated exemptions, the Council is responsible for determining whether it is an unfunded mandate. If the Council finds that a challenged provision of a law or regulation is an unfunded mandate, that provision will “cease to be mandatory in its effect and shall expire.” N.J.S.A. 52:13H-12a. The Council’s rulings are political determinations, not subject to judicial review. See N.J.S.A. 52:13H-18.

The committee hearings preceding legislative approval of the Amendment reveal that its sponsors knew they would be ceding a measure of legislative and executive authority to the Council. See Public Hearing before the Senate Community Affairs Committee (May 25, 1995). In vesting the Council with authority to decide whether a law is an unfunded mandate, the Amendment necessarily divests the courts of jurisdiction over that issue. See N.J. Const. art. VIII, § 2, ¶ 5(b) (“The Council shall resolve any dispute regarding whether a law or rule or regulation issued pursuant to a law constitutes an unfunded mandate.”). The Council’s jurisdiction is exclusive. See N.J.S.A. 52:13H-18.

The function of the Council is judicial. Like a court, the Council’s deliberations begin only with the filing of a complaint. The Council considers evidence, hears testimony, and issues rulings. Although its jurisdiction is exclusive, the Council is strictly limited to a single inquiry: whether a law or rule or regulation, or provision thereof, imposes an unfunded mandate. The Council has no jurisdiction to rule on whether the actions of the Commissioner or the State Board of Education exceed their delegated statutory authority. The Council must defer to the judiciary on whether any

provision of a rule is unfair or unduly burdens one board or municipality compared to another. Although the scope of the Council's power is more limited than that of the coordinate branches of government, within its sphere the Council is supreme, as it derives its authority directly from the New Jersey Constitution and the people.

### **III Facts**

On January 11, 1996, six days prior to the effective date of the Council's jurisdiction, the Charter School Program Act of 1995 ("CSPA"), N.J.S.A. 18A:36A-1 to -18, was signed into law. The purpose of the CSPA is to encourage innovation by creating competition with traditional public schools. See N.J.S.A. 18A:36A-2. At the same time, charter schools are to provide New Jersey parents with educational alternatives for their children. See ibid. The CSPA authorizes the establishment of not more than 135 charter schools in New Jersey within the forty-eight months following the Act's effective date. See N.J.S.A. 18A:36A-3b.

The CSPA establishes a funding mechanism for charter schools. See N.J.S.A. 18A:36A-12. That funding mechanism requires the school district in which a charter school student resides to pay the charter school, for each such student, "a presumptive amount equal to 90% of the local levy budget per pupil for the specific grade level in the district." Ibid. The CSPA employed the funding terminology of the Quality Education Act of 1990 ("QEA"), N.J.S.A. 18A:7D-1 to -37 (repealed).

On December 20, 1996, the Legislature repealed QEA and passed the Comprehensive Educational Improvement and Financing Act of 1996 ("CEIFA"),

N.J.S.A. 18A:7F-1 to -34. The Commissioner had not promulgated any rules or regulations to implement the CSPA at the time CEIFA superseded QEA. Unlike QEA, CEIFA defines school budgets in terms of “T&E program budget” and “T&E amount” rather than “local levy budget.” See N.J.S.A. 18A:7F-3. Although the CSPA described the funding mechanism in QEA terms, CEIFA had superseded QEA when the Commissioner adopted the first regulations implementing the CSPA on July 10, 1997. Those regulations defined the charter school funding obligation using CEIFA terminology. The initial regulations defined “local levy budget per pupil for the specific grade level” (“local levy budget”) 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) respectively as set forth in N.J.S.A. 18A:7F-12 for the applicable budget year.

[29 N.J.R. 3492(a).]

The initial regulations also defined “region of residence” as “contiguous district boards of education in which a charter school operates. . . .” Ibid.

In Clifton, the Council dismissed a challenge to the initial funding regulations. At issue was the Commissioner’s order to the Clifton Board of Education (“Clifton”), made pursuant to the regulations, requiring it to include \$693,881 in its 1998-1999 school budget as aid for the Classical Academy Charter School of Clifton. Clifton argued that those funds were an additional direct expenditure within the meaning of the Council statute.

The Council determined in Clifton that the CSPA obligates the school district of residence to pay a charter school “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. The Council reasoned that the funding regulation in 29 N.J.R. 3492(a) merely provided the definition of “local levy budget,” without which the funding provision of the CSPA would have been meaningless. Likewise, the Commissioner’s order to Clifton merely executed the clear statutory requirement that local school boards pay for the education of resident students. See N.J.S.A. 18A:36A-12 (“The school district of residence shall pay directly to the charter school for each student enrolled in the charter school 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.”). Thus, the Council concluded in Clifton that the CSPA itself, not the Commissioner’s order, imposed the funding obligation, and therefore the Council had no jurisdiction because the CSPA predated the commencement of the Council’s jurisdiction.

On May 6, 1998, the Commissioner adopted 30 N.J.R. 2084(a), which changed the definition of “local levy budget.” Whereas the original regulations had defined “local levy budget” to reflect the change in the funding mechanism that occurred when CEIFA superseded QEA, no such change prompted the Commissioner’s redefinition of the term in 30 N.J.R. 2084(a). The amended regulation redefined “local levy budget,” starting with the 1998-99 school year, as “program budget per pupil.” 30 N.J.R. 2084(a). In response to objections raised regarding the proposed amendment, the Department of Education commented that the amendment “correct[ed] the rule to restore it to the

original meaning as intended by the sponsors involved in the writing of the Charter School Program Act of 1995.” Ibid.

On January 21, 1998, the Commissioner granted a regional charter to Greater Brunswick. Although Greater Brunswick is physically located in New Brunswick, it is part of a broader “region of residence” that includes the districts of New Brunswick, Highland Park, and Edison Township. On February 11, 1998, the State Department of Education instructed Highland Park to allocate \$214,931 for the twenty-six Highland Park students estimated to be enrolled at Greater Brunswick for the 1998-1999 school year. On September 8, 1998, the Department of Education sent a revised bill to the Highland Park Board of Education for \$156,325 for the nineteen students then scheduled to enroll. The revised bill was pursuant to the amended funding-formula regulation. Additionally, the Highland Park Board estimated its cost to transport the nineteen Highland Park residents to Greater Brunswick to be \$13,338. Highland Park filed the present Complaint on October 29, 1998.

#### **IV Procedural History**

Highland Park alleges that provisions of 29 N.J.R. 3492(a) and 30 N.J.R. 2084(a), codified at N.J.A.C. 6A:11-1.2, are unfunded mandates and urges the Council to void the challenged provisions. The Respondents, Greater Brunswick, the Commissioner, and the Edison Township Board of Education, filed answers to the Complaint, and Greater Brunswick and the Commissioner moved for summary disposition. They argue that the Council lacks jurisdiction to hear the Complaint, relying on the reasoning of our decision

in Clifton, and that even if the Council has jurisdiction, the challenged regulations fall within two exemptions from the LMA. The Commissioner also moved to dismiss the Borough of Highland Park's Complaint on the grounds that the Borough lacked standing. On April 12, 1999, the Council heard oral argument.

## V Summary Disposition

Greater Brunswick has moved for summary judgment and the Commissioner has filed a Motion to Dismiss. In the judicial context, New Jersey courts have recognized that

a motion to dismiss under R. 4:6-2(e) is effectually converted into a motion for summary judgment when the court relies on facts beyond the pleadings. The submission of documents in addition to the pleadings converts a motion to dismiss for failure to state a claim into a motion for summary judgment.

[Jersey City Educ. Ass'n. v. City of Jersey City,  
316 N.J. Super. 245, 254 (App. Div. 1998)  
(citation omitted).]

New Jersey courts will refuse summary judgment where “the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995).

Although the Council performs a judicial function, the judiciary’s procedural rules do not bind the Council. The Council’s enabling statute specifically provides that the Council may “adopt rules governing its procedures.” N.J.S.A. 52:13H-10. Although the Council dismissed the Clifton Complaint for lack of subject-matter jurisdiction, the

Council has not adopted formal procedural rules or standards governing summary disposition on the merits. Where the Council is without subject-matter jurisdiction, it cannot hear or decide a matter on the merits — regardless of whether it adopts a specific procedural device.

The judiciary has identified several interests served by summary disposition of claims. Among those are avoiding the “‘needless delay and expense in awaiting and conducting trial.’” Home Owner’s Constr. Co. v. Borough of Glen Rock, 34 N.J. 305, 311 (1961) (quoting Templeton v. Borough of Glen Rock, 11 N.J. Super. 1, 4 (App. Div. 1950)). There is strong indication that similar concerns motivated the Legislature to create this Council. See Public Hearing before the Senate Community Affairs Committee (May 25, 1995). Although summary dispositions might give effect to that legislative intent, several countervailing factors weigh against the Council deciding cases in a summary manner.

The rulings of the Council are not subject to judicial review. See N.J. Const. art. VIII, § 2, ¶ 5(b); N.J.S.A. 52:13H-18. Given that the parties will have no other forum in which to challenge mandates, we are wary of disposing of matters in a summary manner. Further, where the Council identifies an unfunded mandate, its rulings bind not only the parties before it but all parties who are subject to the challenged rules or regulations. In light of the foregoing considerations, the Council must proceed with great caution when deciding whether to grant motions to dismiss or for summary judgment.

## **VI Standing**

The Commissioner argues that the Council should dismiss the Borough of Highland Park's Complaint for lack of standing, asserting that the Borough does not bear any of the financial burden under the CSPA. (Commr's Motion to Dismiss Borough Complaint at 9.) The Commissioner sets forth the prerequisites for standing typically employed by New Jersey courts and urges the Council to adopt those standards. The traditional "standing" criteria are 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. See Town of Secaucus v. Hudson County Bd. of Taxation, 133 N.J. 482, 491-92 (1993). 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).

The New Jersey Constitution does not explicitly limit the exercise of judicial power to actual cases and controversies, see Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107 (1971). The Council statute, however, defines the Council's authority to grant standing. It provides:

It shall be the duty of the council to review, and issue rulings upon, complaints filed with the council by a county, municipality or school district that any provision of a statute enacted on or after January 17, 1996 and any part of a rule or regulation originally adopted after July 1, 1996 pursuant to a law regardless of when that law was enacted constitutes an unfunded mandate upon the county, municipality or school district because it does not authorize

resources to offset the additional direct expenditures required for the implementation of the statute or the rule or regulation. . . . A county executive or a mayor who has been directly elected by the voters of the municipality may also file a written complaint with the council, after the mayor or county executive has provided the governing body with written notice of intention to file a complaint with the council.

[N.J.S.A. 52:13H-12a.]

Although the Council statute specifically confers standing on municipalities, it does so only when the challenged statute, rule, or regulation imposes an unfunded mandate on the municipality.

The LMA also limits standing before the Council by prohibiting advisory opinions. See N.J.S.A. 52:13H-13 (stating "The council shall not consider complaints concerning pending legislation or proposed rules or regulations and shall not issue advisory rulings or opinions on any matter."). The Council may not, therefore, issue opinions regarding a statute, rule, or regulation absent a formal complaint.

The Commissioner argues that although the regulations at issue allegedly impose a burden on the Highland Park School Board, they cannot be said to burden the Borough itself. This is so, the Commissioner maintains, because the municipality does not provide any funds directly to Greater Brunswick. At oral argument, the Borough asserted two bases for its standing. First, the Borough contended that the municipality must take the school budget into account when creating the municipal budget, given that the Borough's residents will accept only a limited property tax burden. (Hearing Transcript, pp. 59-60.) Second, the Borough asserted that the municipality plays a direct role in the school board

budgeting process if the Borough residents reject the initial school board budget. (Hearing Transcript, p. 60.)

The Commissioner asserts that the Highland Park Board of Education adequately represents the interests of the Borough's property owners. That may be true. But that 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.

## **VII Jurisdiction**

The New Jersey Constitution and the Council statute carefully circumscribe the jurisdiction of the Council. Even if a statute or regulation is an unfunded mandate, the Council can assert jurisdiction only in cases in which the challenged statute was enacted on or after January 17, 1996, or in the case of a regulation, when it was adopted after July 1, 1996. See N.J.S.A. 52:13H-12a ("It shall be the duty of the council to review, and issue rulings upon, complaints filed with the council by a county, municipality or school district that any provision of a statute enacted on or after January 17, 1996 and any part of a rule or regulation originally adopted after July 1, 1996 pursuant to a law regardless of when that law was enacted constitutes an unfunded mandate. . . ."). As the Council acknowledged in Clifton, the CSPA is outside the Council's jurisdiction. In Clifton, the Council also recognized the corollary proposition that it cannot properly assert jurisdiction over regulations that merely implement and execute mandatory provisions of the CSPA. See Clifton at 3. Respondents contend that the regulations at issue here fall

within our Clifton ruling, and that the Council is therefore without jurisdiction to consider Highland Park's Complaint. We disagree.

Clifton dealt with a challenge to N.J.A.C. 6A:11-1.1 to -8.2. The challenged funding regulations in Clifton preceded the amended funding regulation at issue here. Pursuant to those initial funding regulations, the Commissioner ordered the Clifton Board of Education to pay \$693,881 to the Classical Academy Charter School of Clifton. Clifton challenged the Commissioner's order, insisting that those funds were an additional direct expenditure within the meaning of the Council statute. Clifton argued that because the CSPA did not identify a specific funding level, the regulations and the Commissioner's order were unfunded mandates within the Council's jurisdiction. The CSPA, however, directs the school district in which a student resides to make payments to the charter school at which that student is enrolled. See N.J.S.A. 18A:36A-12. The Council rejected Clifton's claims, reasoning that the funding regulation and the Commissioner's order merely implemented and executed the mandatory plain language of the CSPA.

The Commissioner contends that the change to the funding regulation at 30 N.J.R. 2084(a) was "to conform [the definition] to the intent of the sponsors of the Charter School Act." (Commr's Motion to Dismiss Board Complaint at 4.) Highland Park urges, conversely, that once a funding formula has been adopted, changing that formula cannot be said merely to implement N.J.S.A. 18A:36A-12, and therefore the regulation modifying the local levy budget formula is within the Council's jurisdiction. (Highland Park Response at 16.) The Borough of Highland Park noted that if the subject regulations

are outside of the Council's jurisdiction, we ought to "fold up our tents and go home." (Hearing Transcript, p. 28, ln. 23.) We agree. If the Council were restricted to reviewing only those regulations both adopted after July 1, 1996, and adopted pursuant to laws enacted on or after January 17, 1996, its scope of authority would be greatly circumscribed. That result is clearly inconsistent with the intent of the Legislature and the plain language of the LMA. See N.J.S.A. 52:13H-12a. Because the funding regulation works a substantive change in the implementation of the CSPA, we are satisfied that the Council has jurisdiction to review N.J.A.C. 6A:11-1.2 as amended.

Likewise, the "region of residence" regulation does not directly implement a specific provision of the CSPA. The Commissioner and Greater Brunswick argue that the "region of residence" regulation is based on a reasonable interpretation of the scope of the CSPA. We have no authority to decide whether the Commissioner has the discretion to adopt the "region of residence" regulation. That matter has been decided recently by the Appellate Division.

In In re Charter School Appeal of the Greater Brunswick Charter School, the court upheld the Commissioner's authority to create regions of residence, finding that "a regional charter school is a logical variant of the kind of charter school permitted by the Act." No. A-4557-97T1F, \_\_\_\_ N.J. Super. \_\_\_\_ (slip op. at 17) (App. Div. May 17, 1999). Concerning Highland Park's claims of the adverse financial impact caused by Greater Brunswick, the Appellate Division concluded: "While we find appellant's protestations deserving of concern, they are in the nature of disagreements with the

Legislature's choice of educational policy, as to which there is no judicial remedy." Slip op. at 18.

We share the Appellate Division's concern and we acknowledge the breadth of the Commissioner's delegated discretion. We must draw a distinction, however, between questions of agency discretion, about which we say nothing, and questions of whether a rule or regulation is an unfunded mandate, about which we say everything. Even though the "region of residence" regulation is within the Commissioner's discretion according to Greater Brunswick, that regulation does more than implement and execute the plain requirements of the CSPA.

We read our decision in Clifton far more narrowly than do the Commissioner and Greater Brunswick. To come within Clifton, a regulation must be required and must merely implement and execute the plain language of the statute. This is a standard more strict than that applied by courts when determining whether an administrative agency has properly exercised its authority to promulgate rules necessary to effectuate the purpose of an act. See In re Englewood on the Palisades Charter School, 320 N.J. Super. 174, 206 (App. Div. 1999) ("The question of whether an educational program achieves the goals of the education laws is uniquely committed to the Commissioner and State Board, the executive arms to which the Legislature has entrusted those judgments."). Our inquiry does not turn on questions of agency power, discretion, or scope of delegated authority. The regulation challenged in Clifton, which established a school funding mechanism, defined "local levy budget." The Commissioner's order in Clifton merely carried out what the statute's clear language required. But regulations creating a region of residence

or redefining “local levy budget” do not track plain and unambiguous statutory requirements. They create new obligations that carry the potential of being unfunded mandates.

We hold that the Council has jurisdiction to review the challenged provisions of N.J.A.C. 6A:11-1.2. This determination, of course, says nothing about the merits of Highland Park's claims, nor should it be read in any way to limit the Commissioner's due discretion to promulgate regulations. See Greater Brunswick at 17-18.

## **VIII Exemptions**

The Commissioner and Greater Brunswick contend that if the Council finds it has jurisdiction, it should nonetheless dismiss Highland Park's Complaint because the challenged regulations fall within two exemptions from the Council statute.

### **A *Thorough and Efficient Clause***

The Council statute, N.J.S.A. 52:13H-3e, provides that laws and rules or regulations that “implement the provisions of the New Jersey Constitution” shall not be unfunded mandates. The Thorough and Efficient Clause of the Constitution 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 Legislature has long struggled to accommodate judicial interpretation of what is required to provide a thorough and efficient education. See N.J.S.A. 18A:7F-2a(2) (“Although the New Jersey Supreme Court has held that prior school funding laws did not establish a system of

public education that was thorough and efficient, the court has consistently held that the Legislature is responsible to substantively define what constitutes a thorough and efficient system of education responsive to that constitutional requirement.”). Obviously, if the courts were to require the Legislature to implement specific measures to provide a thorough and efficient education, but this Council were bound to nullify any law imposing an unfunded mandate, the Legislature would find itself in a constitutional quagmire. To avoid that, the Amendment’s sponsors included the present exemption. Thus, any law, rule, or regulation that implements the Thorough and Efficient Clause is not, by virtue of the Amendment and the Council Statute, an unfunded mandate — even where it requires municipalities or school boards to make additional direct expenditures without providing offsetting funds.

Further review of the statutory history, however, shows that the exemption was not intended to remove from the Council’s jurisdiction all rules or regulations related to education. The interpretive statement accompanying the ballot initiative and the discussions at the public hearings serve as evidence that educational mandates were a motivating factor behind the ballot initiative. The Commissioner and Greater Brunswick are almost matter of fact in asserting that because the subject spending is for education, it necessarily implements the Thorough and Efficient Clause. But their argument proves too much. Following their 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.

The New Jersey Constitution empowers the Legislature "to substantively define what constitutes a thorough and efficient system of education," and the Legislature provides such a definition in CEIFA. See N.J.S.A. 18A:7F-2(a)(2) and (b)(1). CEIFA demonstrates "the legislative determination that a thorough and efficient education can be provided . . . in accordance with specific substantive standards that define the content of a constitutionally sufficient education and in accordance with performance assessments that measure levels of educational achievement." Abbott v. Burke, 149 N.J. 145, 161 (1997). The Commissioner set forth those curriculum standards, and the Department of Education subsequently adopted those standards. See ibid. CEIFA also specifies a level of financial support sufficient to provide those programs and services. See N.J.S.A. 18A:7F-2b(3). The "T&E range" is the "range of regular education spending which shall be considered thorough and efficient." See N.J.S.A. 18A:7F-3.

Although the Commissioner contends that the most recent change in the funding definition implements the Thorough and Efficient Clause, no proofs are before the Council to show that the initial regulations brought Greater Brunswick's funding below the T&E range. Since the Legislature has defined the funding range necessary to provide a thorough and efficient education, and since the record before the Council does not suggest that the initial regulations provided funding below that range, the amended regulation cannot be said to implement the Thorough and Efficient Clause.

Equally unclear is how the "region of residence" regulation implements the Thorough and Efficient Clause. The CSPA's section on Legislative findings states that "it is . . . the public policy of the State to encourage and facilitate the development of charter schools." N.J.S.A. 18A:36A-2. This is far different from declaring that charter schools are necessary for a thorough and efficient education. Absent such a declaration, and in the current state of the record, we will not invoke the exemption. 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.

***B***  
***Repeal, Revise, or Ease***

The Commissioner and Greater Brunswick argue that the amended local levy provision falls within N.J.S.A. 52:13H-3c, since it revises an existing mandate. N.J.S.A. 52:13H-3c provides 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.

Both the Commissioner and Highland Park offer conclusory statements regarding the meaning of "revise" in N.J.S.A. 52:13H-3c. The Commissioner insists that "[w]ithout question, the amended regulation is a 'revision' of an existing requirement, not a new

mandate.” (Commr's Motion to Dismiss Borough Complaint at 16.) In contrast, Highland Park reads the provision narrowly, suggesting that a regulation could not “repeal, revise or ease an existing . . . mandate” where it increases the cost of the mandate. (Highland Park Board Brief at 21.) None of the parties offers any authority regarding the proper interpretation of “revise” as used in the statute.

Judicial precedents regarding statutory construction are useful. New Jersey courts have held that when the language of a statute is clear and unambiguous, courts should not interpret or construe the legislative intent. See Watt v. Mayor of Franklin, 21 N.J. 274, 277 (1956). Standing alone, “revise” suggests a change or alteration. Read that way, the regulation’s redefinition of local levy budget would properly fall within the exemption. As Highland Park points out, however, that interpretation of “revise,” if taken to the extreme, could justify virtually any change made under color of a statute or regulation, regardless of its impact on a local board or municipality. (Highland Park Response at 16.)

Research has not uncovered any legislative history regarding this exemption. Likewise, no New Jersey statute incorporates the phrase “repeal, revise or ease.” In the absence of any explicit indication of legislative intent, courts sometimes rely on the doctrine of *ejusdem generis*. The principle of *ejusdem generis* provides that when general words follow an enumeration of more specific things, the general words should be construed as being of the same class as those enumerated. See Denbo v. Township of Moorestown, 23 N.J. 476, 482 (1957). Here, the statute provides that regulations are not unfunded mandates where they “repeal, revise or ease” an existing requirement. See N.J.S.A. 52:13H-3(c). Under *ejusdem generis*, “revise” should be interpreted consistently

with the more specific terms, “repeal” and “ease,” as Highland Park suggests in its brief. (Highland Park Response at 15.)

On its face, the amended local levy regulation has the clear potential to increase Highland Park's funding to Greater Brunswick, because it removes the "lower of" alternative from resident districts' funding obligation to charter schools. In construing the scope of this exemption, the Council returns to the broad remedial purpose of the Council statute. New Jersey courts liberally construe remedial statutes to give effect to the legislative intent. See Bodnarchuk v. Board of Review, 309 N.J. Super. 399, 403 (App. Div. 1998). Accordingly, where, 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. In the absence of proof that Highland Park's funding obligation has increased as a result of the amended local levy regulation, the applicability of the "repeal, revise or ease" exemption resolves itself.

## **IX Conclusion and Further Proceedings**

For the foregoing reasons, we hold that the Council has jurisdiction to decide the challenges to the New Jersey Administrative Code raised in the Complaints brought by Highland Park. Further, we hold that none of the exemptions from the LMA applies to the challenged regulations on the record as it stands. Our holding is limited to the issues of justiciability, jurisdiction, and the relevant statutory exemptions, and should not be read to bear on the ultimate issues raised by Highland Park. Having decided those threshold issues, we will proceed to determine whether the challenged regulations impose

an additional direct expenditure without providing offsetting funds. Before making that determination, we first ask Highland Park to provide the Council with additional evidence, and deliver to the Council the information described in the attached Appendix within thirty days from the date of this decision. Respondents will have fourteen days from their receipt of the information from Highland Park to respond.

\* \* \* \* \*

The above decision was adopted by the Council and issued on August 5, 1999. Council Members Robert L. Clifford (Chair), Dominick A. Crincoli, Sherine El-Abd, George Farrell, III, Karen A. Jezierny, Ronald J. Riccio and Janet L. Whitman participated in the April 12, 1999, hearing and join in the written decision.

## Appendix

Each answer should be accompanied by, or in the form of, an affidavit or certification from the school district official or other person who is the source of the information and by the name of any other person who would support the claimed items of expense at any factual hearing.

1. Describe and quantify (in dollars) every item of “additional direct expense” the Claimant alleges it was or is required to make as a result of N.J.A.C. 6A:11-1.2, the “region of residence” regulation, from its 1998-1999 school budget. Please limit your response to expenses you allege are required by the "region of residence" regulation. Any expenses you allege are the result of the redefinition of "local levy budget per pupil" should be supplied in response to Question 3, below.
2. For each item of expense in response to question one above, provide an estimate of the same item of expense in the 1999-2000 school year budget, based on the per-pupil calculations and other data in the prebudget year report provided to Claimant by the Commissioner of Education, pursuant to N.J.A.C. 6A:11-7.1.
3. Describe and quantify (in dollars) every item of “additional direct expense” the Claimant alleges it was or is required to make, from its 1998-1999 school year budget, as a result of the June 1998 redefinition of “local levy budget per pupil for the specific grade level” at N.J.A.C. 6A:11-1.2.
4. For each item of expense included in response to question three above, provide a dollar estimate of what the same item of expense will be, from Claimant’s 1999-2000 school year budget, based on the per-pupil calculation and other data in the prebudget year report provided to Claimant by the Commissioner of Education, pursuant to N.J.A.C. 6A:11-7.1.