

April 17, 2015

Superior Court of New Jersey, Appellate Division  
Hughes Justice Complex  
25 W. Market St.  
P.O. Box 006  
Trenton, New Jersey 08625

Re: Piscataway Township Board of Education v. David Hesse,  
Commissioner of Education of the State of New Jersey  
Docket No.: A-005890-13T4

Honorable Judges of the Appellate Division:

Please accept this Letter Brief, on behalf of the proposed amici curiae Education Law Center ("ELC") and Unitarian Universalist Legislative Ministry of New Jersey ("UULM"),<sup>1</sup> in lieu of a more formal Brief in support of the appeal of Piscataway Township Board of Education ("Piscataway") in this matter.

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<sup>1</sup> Simultaneous with the filing of this brief, ELC and UULM are filing a motion for leave to appear as amici curiae in this case.

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**STATEMENT OF FACTS**

Amici incorporate herein the facts set forth on pages 1-3 of Appellant’s Brief, with a request that those facts be supplemented through the taking of judicial notice of the following publicly available facts:

1) the latest enrollment data published by the New Jersey Department of Education ("NJDOE") demonstrating that the Piscataway serves 7,338 students, of which 1,894 or 25.8% qualify for free and reduced lunch, NJDOE, Fall Survey Collection, "2013-14 Enrollment," Piscataway, available at <http://www.state.nj.us/education/data/enr> (last visited April 7, 2015);

2) the recognition in the 2011 Abbott remand proceeding that Piscataway has been funded "under adequacy levels" established by the School Funding Reform Act of 2008, ("SFRA"),

N.J.S.A. 18A:7F-43 - 63, *Abbott v. Burke*, 206 N.J. 332, 430 (2011);<sup>2</sup>

3) the current underfunding of Piscataway's budget by \$20.8 million, or \$2,856 per pupil, below the adequacy amount needed to fund a thorough and efficient education (T&E) as measured by the SFRA, ELC, "Funding Gaps Widen Between Wealthy and Poor NJ School Districts," February 23, 2015, available at <http://www.edlawcenter.org/news/archives/school-funding/funding-gaps-widen-between-wealthy-and-poor-nj-school-districts.html>, containing link to more detailed analysis and individual district data, available at <http://www.edlawcenter.org/research/school-funding-data.html#FWP>;<sup>3</sup>

4) the number of New Jersey school districts spending below adequacy - 181 in FY 10, 205 in FY 11, *Abbott v. Burke*, supra, 206 N.J. at 458, and currently 247 in 2015, ELC "Funding Gaps," supra;

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<sup>2</sup> Districts that are under or below adequacy are those whose budgets are not at the level established by the SFRA as necessary for providing a thorough and efficient education. If permitted to operate as intended, the SFRA is designed to bring all districts to adequacy. However, as a result of SFRA funding cuts, during the 2010-11 school year, or FY 11, Piscataway's budget was \$13.7 million under adequacy. Id. at 433.

<sup>3</sup> As noted at the bottom of ELC's article, NJDOE's State Aid Notices and User Friendly Budgets are the source for all funding data cited.

5) the 1.37 million New Jersey public school students attending over 2500 schools in 591 operating school districts as of 2013-14, NJDOE, "New Jersey Public Schools Fact Sheet," <http://www.state.nj.us/education/data/fact.htm> (last visited April 7, 2015); and

6) the 87 approved charter schools serving over 35,000 New Jersey students as of September 2014, NJDOE, "New Jersey Charter School Fact Sheet," <http://www.state.nj.us/education/chartsch/about.htm> (last visited April 7, 2015).

#### **PROCEDURAL HISTORY**

Amici incorporate herein the Procedural History set forth on pages 1-3 of Appellant's Brief.

#### **LEGAL ARGUMENT**

##### **Point I**

THE COMMISSIONER HAS THE LEGAL AUTHORITY AND OBLIGATION TO TRANSFER EXCESS CHARTER SURPLUS WHEN NECESSARY TO ASSURE T&E

*Amici* join Appellant Piscataway's argument that the Commissioner has the legal authority to transfer excess surplus<sup>4</sup>

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<sup>4</sup> The term "surplus," when applied to school district budgets, refers to "the amount of undesignated, unreserved fund balance as of July 1 of each year." N.J.A.C. 6A:23A-1.2. For public school districts, the Legislature has set standards governing the amount of surplus that can be accumulated and the ways in which any excess surplus can be used. N.J.S.A. 18A:7F-7. Specifically, districts cannot retain "an undesignated general

funds accumulated by New Jersey charter schools. As argued by Piscataway, the Charter School Program Act, N.J.S.A. 18A:36A-1 to 18, does not constrain the Commissioner's authority in this regard, and instead provides "ample support" for the validity of the regulation on which Piscataway relies. Pb9-13. Moreover, when the issue of the Commissioner's legal authority is viewed in the context of his statutory and constitutional obligations to assure a "thorough and efficient" education (T&E) to New Jersey students, then, for the reasons set forth below, his duty to act cannot be disputed.

First, and foremost, the Commissioner has been legislatively delegated broad responsibility and power to oversee a statewide system of public education that must ensure that all New Jersey schoolchildren receive T&E under the Education Clause of the New Jersey constitution, N.J. Const. Art. VIII, §4, ¶1. Robinson v. Cahill, 69 N.J. 449, 461 (1976) (Commissioner, together with State Board, has been delegated "vast grant of power" and "great and ongoing responsibility" to

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fund balance in excess of 2% of the budgeted general fund for the prebudget year or \$250,000, whichever is greater." Id. Instead, any excess surplus must either be applied to the subsequent year's operating budget or, with the approval of the Commissioner, transferred to a capital reserve account. Id.; see also N.J.A.C. 6A:23A-8.5. Unlike the districts of residence, charter schools face no explicit prohibition against the accumulation of excess surplus. See N.J.A.C. 6A:23A-1.2 (defining "school district" to exclude charter schools, unless specified otherwise).

ensure that constitutional mandate for T&E is met). See also N.J.S.A. 18A:4-22 (establishing Commissioner as official agent of State Board); and N.J.S.A. 18A:4-23 (empowering Commissioner to supervise all schools and enforce all rules of State Board). Based on his vast power, the courts have upheld the Commissioner's authority to: 1) direct the merger of school districts to fulfill the State's educational and desegregation policies in public schools, Jenkins v. Twp. Of Morris School District, 58 N.J. 483 (1971); 2) direct a local school district to issue bonds for a public school capital project after voter rejection, IMO Bd. Of Educ. of Upper Freehold Regional Sch. Dist., 86 N.J. 265 (1981); and 3) transfer excess surplus funds to current operating costs to ensure T&E standards are maintained, Perth Amboy Bd. Of Educ. v. Christie, 413 N.J. Super. 590 (App. Div. 2010). The ability to transfer excess charter surplus by reducing tuition payments by public school districts clearly falls within the scope of this vast power.

Second, the Commissioner's "omnipresent" obligation to supervise the provision of T&E incorporates the obligation that he evaluate the impact that the loss of funds to a charter school has on the ability of a district of residence to deliver T&E to its students. In re Grant of Charter School Application of Englewood on Palisades Charter School, 164 N.J. 316, 336 (2000) (holding Commissioner must consider economic impact of

charter school when district makes preliminary showing of jeopardy to T&E); IMO Proposed Quest Academy Charter School, 216 N.J. 370 (2013) (affirming same). Indeed, the Supreme Court sanctioned the legislative choice to "include charter schools among the array of public entities providing educational services" only "so long as the constitutional mandate to provide a thorough and efficient system of education in New Jersey is satisfied." Englewood on Palisades, supra, 164 N.J. at 323. Under the principles of these cases, when charter schools are accumulating excess surplus while receiving funding from "under adequacy" school districts, a review by the Commissioner must be triggered.

Third, the Commissioner's "essential and affirmative" obligation to safeguard the fundamental constitutional right of all students requires that he ensure that all education funds are used "effectively and efficiently," Abbott v. Burke, 149 N.J. 145, 193 (1997). This necessitates that the Commissioner consider not only the underfunding of Piscataway, but also the proposed use of excess surplus funds by charter schools. Where, as here, neither the charter schools themselves, nor the Commissioner, have proffered any basis for the charter schools to maintain excess surplus, the retention of such surplus should be summarily rejected.

Finally, recognition of a "public need to reduce the diversion of scarce resources from existing traditional public schools so that the State may continue to provide a thorough and efficient education to all students," dictates the regulation of charter surplus. J.D. v. Davy, 415 N.J. Super. 375, 393-4 (App. Div. 2010) (holding no deprivation of equal protection based on funding claims "when charter school students have the unabridged option of attending one of those traditional public schools in their districts"). Id. at 398.

## **Point II**

### TO PROTECT THE INTERESTS OF All SCHOOLCHILDREN, THIS COURT SHOULD REQUIRE THE COMMISSIONER OF EDUCATION TO ESTABLISH REASONABLE STANDARDS GOVERNING THE USE OF CHARTER SCHOOL SURPLUS

As set forth in Appellant's brief, charter schools are public schools whose tuition is "substantially underwritten" by their students' districts of residence. Pb4. Under the existing regulations, limits to charter school accumulation of surplus funds are triggered only when a district board of education petitions the Commissioner to lower its payment rate to the charter school and the Commissioner decides to reduce the rate "based on a determination of excessive surplus." N.J.A.C. 6A:23A-22.4(e). The criteria for determining excess surplus is the same 2% or \$250,000 that applies to districts, but there is



no requirement that a charter school's excess surplus must automatically be applied to the subsequent year's operating budget unless approved for transfer to a capital reserve account by the Commissioner, N.J.A.C. 6A:23A-22.4(e), nor are there otherwise any standards established for the use of charter surplus.<sup>5</sup>

Nearly all of New Jersey's 1.37 million public school children attend traditional public schools, with only 35,000 of those students enrolled in charter schools as of September 2014. See Statement of Facts, supra. Moreover, of New Jersey's 591 operating public school districts, at least one-third of those districts, including Piscataway, have budgets that are below the SFRA-established adequacy levels, therefore compromising their ability to provide a thorough and efficient education to their students. Id.; see also Abbott v. Burke, 206 N.J. at 443 (based on testimony of six superintendents of under adequacy districts, including Piscataway, Special Master found that Core Curriculum Content Standards "are not being met at existing funding levels"). To ensure that all students have the funds necessary for a constitutional education, as determined by the SFRA

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5 The Commissioner in this case initially summarily determined the surplus to be "appropriately retained" by the charter schools at issue, without any indication that the money was necessary for operating expenses, capital reserves, or any other reason. Aa17.

funding formula, it is imperative that the Commissioner establish reasonable standards governing the use of charter school surplus funds.

The pending appeal by Piscataway highlights the urgent need for the establishment of such standards. As noted in Appellant's brief, charter schools receive the bulk of their funding directly from their students' district of residence, in "an amount equal to 90% of the sum of the budget year equalization aid per student and the prebudget year general fund tax levy per pupil, inflated by the CPI rate most recent to the calculation," as well as other categorical aid. Pb13, n.5, quoting L. 2007, c. 260, §58, codified as N.J.S.A. 18A:36A-12(b). In effect, then, every extra dollar that is unused and retained by a charter school is a dollar that could be used to support the education of the more than 7,300 students attending schools operated by Piscataway.

It is well-established that "administrators must do what they can to structure and confine their discretionary powers through safeguards, standards, principles and rules," and that "administrative officers [should] articulate the standards and principles that govern their discretionary decisions in as much detail as possible" in order to satisfy due process and produce reasoned and principled decisions. Crema v. N.J. Dep't of Env'tl. Prot., 94 N.J. 286, 301 (1983) (internal citations omitted).

Moreover, important policies affecting the fundamental right to public education should not be decided on a case-by-case basis, but should be established through the regulatory process. See, e.g. Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 330 (1984) (agency action affecting broad policy issues requires rule-making under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to 15).

In the complete absence of any legislative intent "to permit charter schools to accumulate unlimited surplus at the end of the school year that is entirely unnecessary to fund their operations," Pb9, there is a critical need for State standards to guide the use of surplus funds by all public schools, including charter schools. *Amici* therefore respectfully request that this Court direct the Commissioner to promulgate appropriate rules to govern this issue on a statewide program basis. See J.A. v. Board of Educ. of South Orange, 318 N.J. Super. 512, 526 (App. Div. 1999) (commending the Commissioner of Education to "promulgat[e] a regulation applicable to all local boards of education prescribing the information to be included in a written statement rejecting an application for enrollment").

**CONCLUSION**

For the reasons set forth above, Amici ELC and UULM respectfully request that this Court direct the Commissioner to promulgate regulations establishing reasonable standards for the accumulation and use of excess surplus by charter schools, and remand this case for a new determination in light of those standards.

Respectfully submitted,

EDUCATION LAW CENTER

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