



July 17, 2012

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. Christopher Cerf,
Acting Commissioner of Education of the State of New Jersey
Docket No.: A-003202-11

Honorable Judges of the Appellate Division:

Please accept this Letter Brief, on behalf of the proposed amicus curiae Education Law Center ("ELC"),¹ 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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¹ Simultaneous with the filing of this brief, ELC is filing a motion for leave to appear as amicus curiae in this case.

Point II: TO PROTECT THE INTERESTS OF ALL SCHOOLCHILDREN, THIS COURT SHOULD REQUIRE THE ACTING COMMISSIONER OF EDUCATION TO ESTABLISH REASONABLE STANDARDS GOVERNING THE USE OF CHARTER SCHOOL SURPLUS.....7

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STATEMENT OF FACTS

Amicus incorporates herein the facts set forth on page 1 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 over 7,190 students, of which 1,711 or 23.8% qualify for free and reduced lunch, NJDOE, Fall Survey Collection, "2010-11 Enrollment," Piscataway, available at <http://www.state.nj.us/education/data/enr> (last visited July 17, 2012);

2) as recognized in the 2011 Abbott remand proceeding, Piscataway has been funded "under adequacy levels" that were 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);²

² 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

3) the numbers of school districts spending below adequacy was 181 in FY 10, Abbott v. Burke, supra, 206 N.J. at 458, increased to 205 in FY 11, id. , and to 221 in FY 12, ELC, "How the Governor's Budget Veto Hurt School Districts: The Breakdown," August 2, 2011, available at <http://www.edlawcenter.org/news/archives/schoolfunding/339.html>;

4) as of 2011-12, New Jersey has 1.35 million public school students attending 2500 schools in 603 school districts, NJDOE, "New Jersey Public Schools Fact Sheet," <http://www.state.nj.us/education/data/fact.htm> (last visited July 17, 2012);

5) with the approval of 23 new charter schools since January 2011, there are expected to be approximately 100 charter schools serving 25,000 New Jersey students by September 2012, NJDOE, "New Jersey Charter Schools Fact Sheet," <http://www.state.nj.us/education/chartsch/fact.htm> (last visited July 17, 2012); and

cuts, during the 2010-11 school year, or FY 11, Piscataway's budget was \$13.7 million under adequacy. Id. at 433; see also ELC, "Below Adequacy Districts: 2010-11 and 2011-12 School Aid," June 8, 2011, available at http://www.edlawcenter.org/assets/files/pdfs/Newsblasts/elcnews_110307_BelowAdeqAidChart.pdf. With an actual increase of state funding of less than \$2 million for 2011-12, or FY 12, Piscataway remained significantly underfunded in that year. See ELC, "School Aid Loss for 2011-12 School Year: District Breakdown," August 2, 2011, available at <http://www.edlawcenter.org/assets/files/pdfs/Newsblasts/FY12%20Aid%20Loss%20by%20District.pdf>.

6) there has been significant charter school turnover in New Jersey, with 35 charters having been revoked, surrendered, or not renewed since the program's initiation in 1995, id.

PROCEDURAL HISTORY

Amicus incorporates herein the Procedural History set forth on page 1 of Appellant's Brief.

LEGAL ARGUMENT

Point I

IN THE ABSENCE OF REASONABLE STANDARDS GOVERNING THE USE OF CHARTER SCHOOL SURPLUS, THE COMMISSIONER'S DETERMINATION IN THIS CASE IS ARBITRARY AND CAPRICIOUS

In this case, the Piscataway school district, underfunded under the SFRA, has been denied a reduction in the tuition it pays for its students who attend public charter schools, while the four charter schools at issue have been permitted to accumulate excess surplus funds that Piscataway itself would be prohibited from accumulating. This denial of needed funds to Piscataway and its students, together with the accumulation of excess surplus by the charter schools, has occurred not only in the absence of any explanation for the Commissioner's determination, as argued by the Appellant in its brief, but also in the absence of any standards governing the use of those funds by the charter schools. As argued below, the Acting Commissioner's failure to establish standards for the use of

excess surplus funds by charter schools renders his determination in the pending appeal arbitrary and capricious.

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 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.

As set forth in Appellant's brief, charter schools are public schools whose tuition is "substantially underwritten" by their students' districts of residence. Pb2. 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). Indeed, 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). Under this regulatory structure, which provides no standards for the use of charter school surplus, the Acting Commissioner in this case 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.

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 case at bar, the Acting Commissioner's decision was clearly made in the absence of any standards governing the use of excess surplus by charter schools. His determination implicates important public policy regarding the use of surplus funds by public schools, and reaches an outcome for charter schools that could not have been reached under the regulations governing Piscataway, other affected districts and their schools. Accordingly, the Acting Commissioner's determination in this case is clearly arbitrary and capricious.

Point II

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

The Acting Commissioner has been delegated broad responsibility to oversee a statewide system of public education that must ensure that all New Jersey schoolchildren receive a thorough and efficient education. *Robinson v. Cahill*, 69 N.J. 449, 461 (1976) (Commissioner, together with State Board, has

been delegated power by Legislature to ensure that constitutional mandate for thorough and efficient education 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). Nearly all of New Jersey's 1.35 million public school children attend traditional public schools; 25,000 students of those students are expected to be enrolled in an increased number of charter schools by September 2012. See Statement of Facts, supra. Moreover, of New Jersey's 603 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 funding formula, it is imperative that the Acting 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 reasonable standards governing the use of charter school surplus funds. 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. N.J.S.A. 18A:36A-12(b)." Pb2. 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 7,000 students attending schools operated by Piscataway.

In establishing statewide policy, the Acting Commissioner must ensure that the interests of the all public school students to a constitutional thorough and efficient education are advanced and protected, regardless of whether the students attend schools operated by district boards of education or by boards of trustees under a NJDOE-approved charter. See, e.g., In Re Charter School Application of Englewood on Palisades Charter School, 164 N.J. 316, 323 (2000) (upholding legislative choice to "include charter schools among the array of public entities providing educational services ... so long as the constitutional mandate to provide a thorough and efficient

system of education in New Jersey is satisfied"). Indeed, the Acting Commissioner's "essential and affirmative" obligation to safeguard the fundamental constitutional right of all students by ensuring that all education funds are used "effectively and efficiently," Abbott v. Burke, 149 N.J. 145, 193 (1997), necessitates the promulgation of reasonable rules governing the surplus funds not only for districts, but also for charter schools. This imperative is heightened given the increasing number of charter schools in operation and the extent to which those schools have closed their doors for various reasons. See Statement of Facts, supra (citing the data on the opening and closing of school under New Jersey's charter school program).

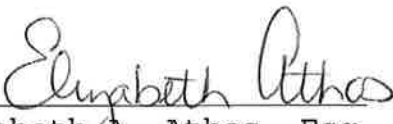
In the absence of regulations governing how charter school surplus can be used - and limiting the accumulation of such surplus as a matter of routine, not merely in response to a public school district complaint - *amicus* respectfully requests that this Court direct the Acting Commissioner to promulgate 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, Amicus ELC respectfully requests that this Court reverse the Acting Commissioner's denial of Piscataway's application to reduce the tuition of the four charter schools with excess surplus that serve Piscataway students, and direct the Acting Commissioner to promulgate regulations establishing reasonable standards for the accumulation and use of excess surplus by charter schools.

Respectfully submitted,

EDUCATION LAW CENTER

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