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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3202-11T4

PISCATAWAY TOWNSHIP BOARD
OF EDUCATION,

Appellant,

v.

CHRISTOPHER D. CERF, ACTING
COMMISSIONER OF EDUCATION OF
THE STATE OF NEW JERSEY,

Respondent.

Argued March 4, 2013 - Decided April 2, 2013

Before Judges Parrillo, Sabatino and Maven.

On appeal from a Final Agency Decision of the Department of Education.

David B. Rubin argued the cause for appellant.

Melissa T. Dutton, Deputy Attorney General, argued the cause for respondent (Jeffrey S. Chiesa, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Beth N. Shore, Deputy Attorney General, on the brief).

Education Law Center, attorney for amicus curiae for Piscataway Township Board of Education (Elizabeth A. Athos, on the brief).

PER CURIAM

The Piscataway Township Board of Education ("the district") appeals a February 3, 2012 final agency decision of the State Commissioner of Education[1] ("Commissioner") denying its petition to reduce the per-pupil tuition rate payable to four charter schools attended by its resident students. The district's petition sought relief under N.J.A.C. 6A:23A-22.4(e), a regulation which states that the Commissioner has the discretion to authorize a district to pay a lower per-pupil rate if the charter school spends "significantly less than budgeted and has accumulated a sizable surplus." Ibid. In representing the Commissioner as the respondent on appeal, the Attorney General argues, for the first time, that the discretion set forth in N.J.A.C. 6A:23A-22.4 has been eliminated by statute. For the reasons that follow, we remand this matter to the Commissioner for further consideration, on proper notice to interested parties.

In 1995, the New Jersey Legislature passed the Charter School Program Act of 1995 ("the Act"), N.J.S.A. 18A:36A-1 to -18. That statute contained a section titled "Per pupil payments to charter school," which established that school

[1] At the time of the decision, Christopher D. Cerf was the Acting Commissioner. He has since been confirmed by the State Senate as Commissioner, and we shall refer to him in this opinion as "Commissioner."

districts of residence must pay "a presumptive amount equal to 90% of the local levy budget per pupil" that attends a charter school. L. 1995, c. 426, § 12 (emphasis added). These presumptive per-pupil tuition rates, however, could be adjusted under the statute by the Commissioner. "At the discretion of the [C]ommissioner," the statute provided that "the [C]ommissioner may require the school district of residence to pay . . . an amount equal to less than 90% percent, or an amount which shall not exceed 100% of the local levy budget per pupil[.]" Ibid.

In 1997, the State Board of Education promulgated a regulation, now codified at N.J.A.C. 6A:23A-22.4(e), providing that a district board of education may petition the Commissioner to pay a lower per-pupil rate if the charter school spends "significantly less than budgeted and has accumulated a sizable surplus." See 29 N.J.R. 3492(a) (Aug. 4, 1997) (originally codified at N.J.A.C. 6A:11-7.3(e)). The regulation states that the Commissioner "may reduce the rate based on a determination of excessive surplus," the determination of which is to be made

by the Commissioner using the criteria for excessive surplus set forth in N.J.S.A. 18A:7F-7. N.J.A.C. 6A:23A-22.4(e).[2]

In November 2000, the Legislature amended the language of N.J.S.A. 18A:36A-12. According to the Attorney General's brief on appeal, the 2000 statute eliminated two things: (1) the language stating that the statutory formula was a "presumptive amount"; and, (2) the language granting the Commissioner the discretion to alter the school district's per-pupil payments. See L. 2000 c. 142 § 2.[3] Notwithstanding the Legislature's amendment, in 2004 and again in 2009, the State Board of Education readopted the regulation authorizing the Commissioner to reduce the per-pupil tuition rate, doing so without alteration or comment. See 36 N.J.R. 3895(a) (Aug. 16, 2004) (codified at N.J.A.C. 6A:23-9.6(e)); 41 N.J.R. 2850(a) (Aug. 3, 2009) (codified at N.J.A.C. 6A:23-22.4).

[2] The standard for excessive surplus set forth in N.J.S.A. 18A:7F-7 is "2% of the budgeted general fund for the prebudget year or $250,000, whichever is greater[.]"

[3] The statute was amended again in 2007 to reflect revised terminology. However, the amendment did not restore the "presumptive" language, nor did it restore the Commissioner's explicit discretion under the prior version of the statute to alter the amount that school districts must pay per pupil. L. 2007, c. 260, § 58.

During the 2010-11 school year, 4.4[4] resident students of the district attended four charter schools, each of which had an unreserved fund balance in excess of the criteria set forth in N.J.S.A. 18A:7F-7 defining excess surplus.[5]

In December 2011, the district's superintendent of schools petitioned the Commissioner, requesting that he review the surplus balances of each of the four charter schools. More specifically, the superintendent sought a future reduction from the full 2010-11 per-pupil tuition rate that the district had paid those charter schools for its resident students.

On February 3, 2012, the Commissioner responded to the district with a letter denying its request for a reduction. That letter, which represents the final agency decision in this appeal, reads in its entirety as follows:

> Thank you for your letters dated December 19, 2011 requesting that Piscataway Township School District be allowed to reduce the tuition rates for Central Jersey College Prep Charter School, Union County TEAMS Charter School, Queen City Academy

[4] Presumably, the decimal refers to a student who only attended a charter school for part of the year.

[5] The respective excess unreserved fund balances were as follows: Central Jersey College Prep, $157,963; Union County TEAMS, $117,135; Queen City Academy, $462,558; and, Barack Obama Green, $56,747. The record does not indicate how the district acquired this financial information; however, its accuracy is not disputed by respondent.

> Charter School and Barack Obama Green Charter School.
>
> As a result of your petition pursuant to N.J.A.C. 6A:23A-22.4, the Department examined each school's fund balance and has determined that the unreserved general fund balances are being appropriately retained. Based upon our evaluation, it was determined that at this time your petition to reduce the tuition rate is denied.
>
> Thank you for taking the time to bring this matter to my attention. If you have any questions, please contact Amy Ruck, Interim Director, Office of Charter Schools at [telephone number omitted.]

This letter apparently was not amplified in any further documents issued by the Commissioner.

The district then filed the present appeal, contending that the Commissioner acted arbitrarily, capriciously, and unreasonably by denying its request for a reduction under N.J.A.C. 6A:23A-22.4(e). In response to the appeal, the Attorney General argued — admittedly for the first time — that the district's reliance upon N.J.A.C. 6A:23A-22.4(e) was unavailing because, as a matter of law, the discretion that formerly existed under the statutory scheme had been abolished by intervening legislation.

The district contests the Attorney General's interpretation of the applicable statutes. It argues that the 2000 amendment only modified the presumptive cash flow stream payable to fund

the day-to-day operations of charter schools, and did not alter the Commissioner's overarching responsibility to assure that a charter school uses those funds in a fiscally responsible manner. Moreover, the district maintains that there is nothing in the revised statutory scheme indicating a legislative intent to allow charter schools to accumulate unlimited and unnecessary surplus funds at the end of the school year. The district stresses that N.J.A.C. 6A:23A-22.4(e), granting the Commissioner discretion to reduce a district's payments to charter schools with such a surplus, has been readopted twice by the State Board of Education since the statute was revised, and is presumptively valid and enforceable.

The Attorney General, meanwhile, insists that the regulation is now void, however, he emphasizes that other measures remain at the Commissioner's disposal to encourage charter schools to use taxpayer funds appropriately. See, e.g., N.J.A.C. 6A:11-24 (granting the Commissioner the authority to place a charter on probationary status or revoke its charter).

The Education Law Center, appearing as an amicus curiae, has submitted a brief arguing that: (1) in the absence of reasonable standards governing the use of charter school surplus, the Commissioner's determination in this case was arbitrary and capricious; and, (2) in light of the state

constitutional guaranty to New Jersey school children of a thorough and efficient education, the Commissioner must establish reasonable standards governing the use of charter school surplus funds.

Having considered the parties' briefs as well as supplemental briefs submitted at our invitation following oral argument, we decline at this time to resolve the legal issues presented and remand this matter to the Commissioner for further consideration. We do so because the current appeal has been presented to us in a procedurally suboptimal context, in at least three respects.

First, we note that the four charter schools that would be fiscally affected by our decision were not served with appellant's notice of appeal. Although the specific amounts of money at stake for each of those schools for the 2010-11 school year were relatively modest, the charter schools have a cognizable interest in how the statutes and regulations affecting their ongoing financial affairs are interpreted. We are therefore reluctant to decide this appeal on the merits in their absence. Cf. Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 22-28 (1989) (in which the Supreme Court found an appeal to be

procedurally flawed because of the omission of an interested party).[6]

Second, the State Board of Education, which promulgated and recodified N.J.A.C. 6A:23A-22.4(e), is not a party to the appeal. Although we appreciate the Attorney General's representation at oral argument that the State Board agrees that the regulation is now void and is considering a repeal of the regulation, the record has no documentation from the State Board substantiating that assertion. Nor has the State Board issued to date a notice in the New Jersey Register regarding a repeal of the regulation, despite the fact that the Attorney General's brief repudiating the regulation was filed in December 2012. Because the State Board of Education, rather than the Commissioner, has the rulemaking authority in this area, it is preferable that the State Board's position be confirmed and formalized before the validity of the regulation is adjudicated.

Third, the sparse content of the Commissioner's letter provides none of the reasons for denial of the district's petition that have been crafted on appeal by the Attorney General. Indeed, the Commissioner did not state in his terse denial letter that N.J.A.C. 6A:23a-22.4(e) is invalid, but

[6] We note that, at oral argument, counsel for the district was not opposed to allowing the charter schools to participate in this matter, if they wished to do so.

instead concluded that the charter schools' unreserved general fund balances were not being retained in a manner that warranted regulatory relief. Hence, the Commissioner applied the very regulation that his attorney now contends before us is invalid.

We recognize that the Attorney General is the sole legal adviser to most state departments, see N.J.S.A. 52:17A-4, and we by no means question the Attorney General's responsibilities in that regard. Even so, the manner in which the Commissioner's terse letter of denial was fundamentally changed on appeal is less than ideal for our review of a final agency decision. An agency's appellate brief is no place for it to rehabilitate its order. In re N.J.A.C. 7:1B-1.1, ___ N.J. Super. ___, ___ (App. Div. 2013) (slip op. at 61). "'The grounds upon which an administrative order must be judged are those upon which the record discloses that the action was based,' not an after-the-fact affidavit [or brief by the Attorney General] purporting to explain the administrative agency's decision." In re Elizabethtown Water Co., 107 N.J. 440, 460 (1987) (citations omitted) (quoting Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 87, 63 S. Ct. 454, 459, 87 L. Ed. 626, 633 (1943)).

Given these procedural shortcomings and the apparent importance of the legal and policy issues implicated, we remand this matter to the Commissioner for further consideration. If a

further appeal is pursued, it shall be on notice to all interested parties, including potentially affected charter schools in the district and the State Board of Education.[7]

Remanded. We do not retain jurisdiction.

[7] In light of our decision to remand, we need not address the constitutional and other separate arguments raised by amici. We do note that there is no indication in the record that amici have filed a petition for rulemaking with the State Board of Education pursuant to N.J.S.A. 52:14B-4(f) to address the concerns raised in their brief.