



Education Law Center

Standing Up for Public School Children

April 29, 2010

Honorable Judges of the Appellate Division
Superior Court of New Jersey/ Appellate Division
Hughes Justice Complex
25 W. Market St.
P.O. Box 0006
Trenton, New Jersey 08625-0006

Re: SPAN v. Hendricks
Docket No. A-000852-10

Honorable Judges of the Appellate Division:

Please accept this letter brief and appendix on behalf of Appellant Statewide Parent Advocacy Network ("SPAN") in the above- captioned matter.

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PRELIMINARY STATEMENT

This is an action by the Statewide Parent Advocacy Network ("SPAN") seeking an order compelling the Commissioner of the New Jersey Department of Education ("Commissioner") to comply with the unambiguous mandate of N.J.S.A. 18A:7F-55(f).¹ That statute clearly requires the Commissioner to have completed an independent study of the State's special education census funding methodology that includes recommendations to the Legislature regarding any needed adjustments to the State's formula for special education funding -- no later than June 30, 2010. Notwithstanding the clear legal mandate to complete such study and issue such recommendations, the Commissioner has yet to do so, even though nearly one year has elapsed since the statutory June 2010 deadline.

The parents and their children with disabilities for whom SPAN advocates are directly impacted by the inaction of the Commissioner. Those parents and students have been deprived of an independent study of the efficacy of the controversial census method of funding, under which special education services are funded based on the statewide average classification rate of students with disabilities - and not on the actual number of special education students in each school district, nor the

¹ At the time of the filing of this appeal, the Commissioner was Acting Commissioner Rochelle Hendricks. Currently, that role is filled by Acting Commissioner Christopher Cerf.

actual cost of providing different levels of service for different types of disability classifications.

The exclusive method for review of the DOE's inaction and failure to comply with the law is by direct appeal to this Court, pursuant to Rule 2:2-3(a)(2). Because the failure by the Commissioner to comply with the law is so clear, this Court should rule in SPAN's favor, and issue an order directing the Commissioner to complete and publish the independent study and recommendations by a date certain.

PROCEDURAL HISTORY

On October 18, 2010, SPAN filed a Notice of Appeal of agency inaction, based on the Commissioner's failure to comply with the statutory requirements of N.J.S.A. 18A:7F-55(f). As directed by this Court, counsel for both parties appeared before the Honorable Harold B. Wells, III on December 13, 2010 pursuant to the Civil Appeals Settlement Program. When no settlement was reached, an Order was issued on March 22, 2011 establishing a schedule for the briefing of the pending appeal. Appellant submits this brief in accordance with that schedule.

STATEMENT OF FACTS

The School Funding Reform Act ("SFRA"), N.J.S.A. 18A:7F-43 to -63, was enacted into law in 2008 to provide an "equitable and predictable way to distribute State aid" to public schools "based on the characteristics of the student population and up-

to-date measures of the individual district's ability to pay." N.J.S.A. 18A:7F-44(d) and (h). With regard to special education funding, SFRA incorporated a census-based method to fund special education costs. N.J.S.A. 18A:7F-51(a) and (e); N.J.S.A. 18A:7F-55. Under that method, aid is allocated by utilizing a statewide average classification rate of 14.69%, regardless of the actual number of students with disabilities enrolled in any particular district. N.J.S.A. 18A:7F-51(e). The propriety of that funding method was at issue in the Supreme Court's review of the SFRA formula in Abbott v. Burke as not taking into account "an uneven distribution of children with disabilities throughout New Jersey" and "a correlation between higher concentrations of special education students and poverty." Abbott v. Burke, ("Abbott XX"), 199 N.J. 140, 166 (2009).

In upholding SFRA's use of the census-based methodology, the Supreme Court relied on several factors - that "[t]he census-based method only accounts for one-third [sic] of the special education funding;"² that "Extraordinary Aid is provided to reimburse districts for the expense of providing special

² The Court apparently erred in characterizing only one-third of special education aid as based on the census method. In accordance with SFRA, two-thirds of special education aid is wealth equalized and one-third is provided as categorical aid, regardless of district wealth; under both calculations, however, the state average classification rate - not the district's actual number of students with disabilities - is used to determine the amount of aid due. Compare N.J.S.A. 18A:7F-51(e) and N.J.S.A. 18A:7F-55.

education for those students whose costs are extraordinary;" and, most critically, that "[a]s part of its periodic review, the DOE [Department of Education] must analyze the census-based methodology to determine if adjustments are necessary." Abbott XX, 199 N.J. at 166-167. The Court was persuaded by the "combination of those elements" that SFRA was "designed to provide adequate funding for special education," emphasizing that "[t]he Commissioner's obligation to review the census-based methodology in 2010 provides reassurance that any potential deficiencies will be corrected." Id. at 167.

SPAN is a New Jersey non-profit advocacy organization that is dedicated to empowering and supporting families in the healthy development and education of their children, and whose foremost commitment is to those with the greatest needs due to disabilities or other special needs. See SPAN Mission Statement, available at <http://www.spannj.org/mission.htm> (last visited April 29, 2011). Recognized as an "organizatio[n] representing the interests of children with disabilities and their parents," SPAN has previously served in its organizational capacity as a litigant advancing the interests of New Jersey special education students. See, e.g., Baer v. Klagholz, 339 N.J. Super. 168, 180-181 (App. Div. 2001). SPAN participated in the public hearings related to the development of the SFRA and

has continued to monitor that legislation's implementation on behalf of the families for whom it advocates.

As of today, the Commissioner has not completed the study, nor issued the recommendations, required by N.J.S.A. 18A:7F-55(f). The New Jersey students with disabilities for whom SPAN advocates were the intended beneficiaries of the independent study required by the SFRA and are directly impacted by the inaction of the Commissioner in failing to complete such study.

LEGAL ARGUMENT

POINT ONE

THE COMMISSIONER IS IN VIOLATION OF N.J.S.A. 18A:7F-55(f) AND SHOULD BE ORDERED TO COMPLY WITH THE STATUTE'S CLEAR MANDATE

A. This Court Has Exclusive Jurisdiction to Review the Inaction of the Commissioner

This is an appeal to remedy the failure of the Commissioner to complete an independent study and issue recommendations that were required by the SFRA statute to have been completed by June 30, 2010. The Supreme Court has made clear that "every proceeding to review the action or inaction of a state administrative agency [is] by appeal to the Appellate Division." Infinity Broadcasting Corp. v. New Jersey Meadowlands Commission, 187 N.J. 212, 223, 225, 227 (2006) (citations omitted). Rule 2:2-3(a)(2) gives the Appellate Division

jurisdiction over "final decisions or actions of any state administrative agency." The term agency "actions" in Rule 2:2-3(a)(2) has been interpreted to include agency "inactions." Hospital Center at Orange v. Guhl, 331 N.J. Super. 322, 329 (App. Div. 2000) (citations omitted). Thus, this Court has jurisdiction to decide SPAN's appeal. Id.

B. SPAN Has Standing to Challenge the Commissioner's Inaction

SPAN has standing before this Court to challenge the Commissioner's failure, for almost one year past the statutory deadline, to complete the independent study at issue on this appeal. The doctrine of standing "requires that a litigant have a sufficient stake and real adverseness with respect to the subject matter of the litigation, and a substantial likelihood that some harm will fall upon it in the event of an unfavorable decision." In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 85 (App. Div. 2004). This test has been construed broadly: "New Jersey courts have set a low threshold for standing in various types of cases, civil and criminal, affording parties to lawsuits the benefits of liberal interpretations of requirements that bear upon eligibility to litigate particular issues." Id. at 86.

The right to seek review of administrative agency actions and inactions "belongs to all persons who are directly affected by and aggrieved as a result of the particular action sought to

be brought before the courts for review." Id. at 87 (quoting Eliz. Fed. Sav. & Loan Ass'n v. Howell, 24 N.J. 488, 499-500 (1957)). "In public interest and group litigation, especially, standing has been approached permissively." Id.

The Commissioner's failure to complete the independent study and recommendations required by N.J.S.A. 18A:7F-55(f) directly and adversely impacts students with disabilities in New Jersey. Thus, as a public interest organization which has advocated for years for the rights of children with disabilities in New Jersey, see, e.g., Baer v. Klagholz, supra, 339 N.J. Super. at 180-181, SPAN has organizational standing to challenge the Commissioner's failure to comply with N.J.S.A. 18A:7F-55(f). See In re Six Month Extension, 372 N.J. Super. at 86 (holding that non-profit organizations had standing to challenge administrative agency actions that impacted groups whose interests they represented).

3. The Commissioner Has Violated the Clear, Legislatively-Mandated Deadline in N.J.S.A. 18A:7F-55(f) to Complete an Independent Study and Recommendations

There can be no dispute as to the material facts on this appeal. The Legislature passed legislation, including N.J.S.A. 18A:7F-55(f), which was signed into law by the Governor in January 2008. That statute mandated that the Commissioner of the Education:

shall commission an independent study of the special education census funding methodology to determine if adjustments in the special education funding formulas are needed in future years to address the variations in incidence of students with severe disabilities requiring high cost programs and to make recommendations for any such adjustments.

[N.J.S.A. 18A:7F-55(f)]

That statute further explicitly provides that such "study and recommendations shall be completed by June 30, 2010." Id.

Thus, N.J.S.A. 18A:7F-55(f) unequivocally mandates that, no later than June 30, 2010, the Commissioner complete an independent study of the census funding method and issue the study's recommendations regarding any adjustments needed to that funding methodology. Moreover, in upholding the census-based method of funding special education, the Supreme Court placed great weight on the SFRA's mandate to the Commissioner to "analyze the census-based methodology to determine if adjustments are necessary." Abbott XX, 199 N.J. at 167. Despite these clear directives, as of May 2011, the required study and recommendations have not been completed or released. This clear failure to act, in continuing violation of a specific, legislatively-imposed deadline that expired almost one year ago, requires immediate judicial relief.

This Court has recognized that:

If a state administrative agency fails to complete its proceedings in a timely manner,

a party adversely affected by such inaction may apply to this court for an order to compel the agency to act. This form of application does not seek to compel a specific form of agency action; it only seeks a remedy for arbitrary inaction.

In re Petition of Howell Twp., 371 N.J. Super. 167, 187 (App. Div. 2004)(citations omitted). Here, the Legislature legally mandated that the Commissioner commission the completion of an independent study and recommendations by a date certain. This Court has held that when the Legislature "incorporate[s] a specific provision in the applicable legislation establishing a deadline for agency action," it is clear evidence that "the Legislature has concluded that an agency should be required to take action within a fixed time period." Hospital Center at Orange, 331 N.J. Super. at 335.

Notwithstanding that the Commissioner's lengthy failure to comply with the law has encompassed the term of several Commissioners and Acting Commissioners, such legal failing cannot be excused or justified. As this Court has held:

Changes in the identity of individuals who occupy high-level government positions are commonplace. When such changes occur, one of the primary responsibilities of any newly appointed official is to assure continuity of governmental operations. An agency's discharge of its statutory responsibilities cannot be put on hold while a new official becomes familiar with every pending matter.

In re Petition of Howell Twp., 371 N.J. Super. at 184-85.

Although this Court generally expresses "reluctance to undertake supervision of a state agency's operations," when circumstances are sufficiently egregious, as they are here, the Court is "constrained to establish a schedule for completion" of an agency's legally-mandated obligations. Id. at 188. As this Court did in In re Petition of Howell Twp., it should impose a schedule on the Commissioner for completing the statutorily-mandated actions that have so far been delayed for almost one year past the Legislature's deadline.

The necessity of a court-imposed schedule is even more compelling in this case than it was in In re Petition of Howell Twp. There, this Court imposed a schedule on a state agency because the agency had delayed fourteen months in completing proceedings for which there was no specific statutory completion deadline. Id. at 184, 187-88. Here, the Commissioner's failure to comply with a statutory obligation has extended almost one year beyond the expiration of a specific statutory deadline.

CONCLUSION

For the reasons stated above, the Commissioner should be ordered to complete the independent study required by N.J.S.A. 18A:7F-55(f) and issue the recommendations resulting from that study to the Legislature and the public by no later than June 30, 2011.

Respectfully submitted,

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