

WILEY, MALEHORN AND SIROTA
ATTORNEYS AT LAW
250 MADISON AVENUE
MORRISTOWN, NEW JERSEY 07960

STEPHEN B. WILEY
DONALD M. MALEHORN
FREDRIC J. SIROTA
ARTHUR L. RAYNES
JOHN G. GEPPERT, JR.
JAMES M. McCREEDY
EUGENE HUANG
CHRISTINA L. DAVIS
ARLA D. CAHILL
ELIZABETH H. REICH
MERI J. VAN BLARCOM

MAUREEN HAMILTON
OF COUNSEL

TELEPHONE
(973) 539-1313

FACSIMILE
(973) 539-0572

E-MAIL ADDRESS

December 4, 1998

VIA REGULAR MAIL

Honorable Judges of the Appellate Division
Superior Court of New Jersey
P.O. Box 006
Trenton, New Jersey 08625

RE: In the Matter of the Final Grant of a Charter for the Unity
Charter School, Morris County
Docket No. A-1713-98T1

Dear Honorable Judges:

We represent the appellant, Morris School District ("District"), in the above referenced matter. Please accept this letter brief in lieu of more formal submission in response to the New Jersey State Board of Education's ("Board") motion to dismiss our appeal.

The Board contends that the District's application presently before the court is interlocutory. However, the District maintains that the Commissioner has rendered a final decision by granting the charter to the Unity School as well as deciding the segregation issue, particularly based upon the Commissioner's action today in finding no basis to reverse the final charter. It is the District's

position, based on R. 2:2-3, that the present case merits an automatic right to appeal without filing a motion for leave to appeal as the Board contends.

In the event that Your Honors determine this order to be interlocutory, then the District respectfully requests that the Court grant the appeal *nunc pro tunc* in the interests of justice. The District directs the court to Pressler, *Rules Governing the Courts of the State of New Jersey* (1999), R. 2:2-4, comment, wherein it is stated that in the public interest leave will be granted *nunc pro tunc* when the appellant filed a notice of appeal rather than a required motion for leave. Moreover, R. 2:4-4(b)(2) allows the Court to grant leave *nunc pro tunc* from an interlocutory order when the appeal was timely filed during the period for an appeal of a final judgment. The comments to R. 2:4-4 indicate that the Court has always had the right to allow a timely filed Notice of Appeal to suffice for an interlocutory appeal wherein the party filing the Notice of Appeal believed the order to be a final order appealable as of right. While the District considers the Order to be a final order, it is respectfully requested that in the event the Court decides otherwise that this rule be applied to enable the District to maintain an appeal of the issues and that, at some point, consideration be given to consolidation with the other charter school cases presently on appeal.

The District acknowledges that the *nunc pro tunc* grant of leave to appeal is not a remedy which is widely provided, however, the situation in this case is suitable for such extraordinary relief. See Frantzen v. Howard, 132 N.J. Super. 226, 227-28 (App. Div. 1975). The critical concern in allowing "piecemeal reviews" is that the litigation would be a disruption of the lower court proceedings and wasteful of judicial resources. Id. On the contrary, in this matter, to allow the appeal to proceed will save judicial resources as it can be consolidated with the ten similar charter school cases, cited in the District's Notice of Appeal, presently before the Court.

In addition, the Board cites Miller v. Passaic Valley Water Commission, 259 N.J. Super. 1, 9 (App. Div.), cert. denied, 130 N.J. 601 (1992), to show that the respondent has a responsibility to file a motion to dismiss an appeal when it appears that an appeal may have been improvidently filed. However, in that same paragraph, the Court went on to use their *nunc pro tunc* power to grant a leave to appeal because the matter involved public property and therefore should be accelerated. Id. Here, at issue is public funds, and various public issues related to education, and race. These matters are of significant import and well within the realm of the Court's scope to allow an appeal *nunc pro tunc*.

Furthermore, the court in Jones v. Jones, 242 N.J. Super. 195, 202 (App. Div.) cert. denied, 122 N.J. 418 (1990), decided that in order to avoid confusion as to whether the appeal was interlocutory

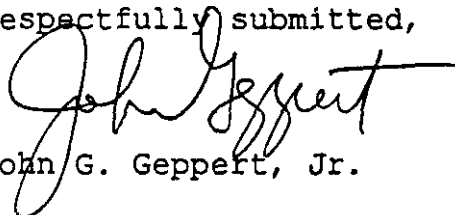
or appealable as of right, they would grant the necessary leave to appeal in order to have prompt disposition of the issue at hand. Id. at 418, note 2.

As noted above, the Commissioner today faxed over his conclusion that there is no basis in law or policy to reverse the charter approval. See Exhibit A. In the event that there is further action taken on this limited issue by the State Board, the District will amend or supplement its Notice of Appeal, if necessary. It is likely that the State Board will act at its January meeting, making the filing of another Notice of Appeal duplicative.

Obviously, if the Court determines that an appeal is premature at this time, the District retains its right to appeal this matter.

For the reasons stated above, the appellant, Morris School District, respectfully requests that Your Honors deny the Board's motion and allow the appeal to continue.

Respectfully submitted,



John G. Geppert, Jr.

cc: Dr. Dwight R. Pfennig
Elizabeth DeMatteo
William Fainglas
Terri Cutrera, D.A.G.
Harvey Gilbert, Esq.
Michele Lyn Miller, D.A.G.
Arlene Lutz, D.A.G.
Leo Klagholz, Commissioner

