

IN THE MATTER OF THE FINAL)
GRANT OF A CHARTER FOR THE)
UNITY CHARTER SCHOOL,)
MORRIS COUNTY)

On Appeal From A Final Decision
Of The Commissioner Of Education

BRIEF AND APPENDIX ON BEHALF OF RESPONDENT
COMMISSIONER OF EDUCATION

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INTRODUCTION

The Commissioner of Education submits this brief, pursuant to N.J.A.C. 6A:11-2.5(d), in response to the appeal by the Morris School District of the final approval of the Unity Charter School charter application.

The "Charter School Program Act of 1995," codified at N.J.S.A. 18A:36A-1 et seq., describes the public policy of the State to encourage and facilitate the development of charter schools. N.J.S.A. 18A:36A-2. The Legislature has determined that charter schools will, among other things, increase the potential for pupil learning; increase educational choices for students and parents; encourage the use of different and innovative learning methods; establish a new form of accountability for schools; and make the school the unit for educational improvement. Id.

PROCEDURAL HISTORY AND STATEMENT OF FACTS*

On or about February 5, 1997, the Commissioner of Education granted initial approval of the application for a charter submitted by the founders of the Unity Charter School. The application that received approval indicated that the school was scheduled to open for the 1998-99 school year.

As required by N.J.A.C. 6A:11-2.1(g), after receiving initial approval, Unity Charter School submitted the following documentation which was not available at the time of its initial

*The Procedural History and Statement of Facts have been combined in the interest of continuity and coherence because they are inextricably linked.

application: by-laws of the board of trustees; certificate of incorporation; credit authorization agreement for automatic deposits to the school; federal employer identification number; membership of the board of trustees; statement of the role of the board of trustees in school governance; School Ethics Commission financial disclosure statements for each member of the board of trustees; lease agreement between the school and the Morristown Columbian Club; temporary certificate of occupancy; fire inspection report; sanitary inspection report; copies of the certifications of the school's teachers, director and professional support staff; and verification of a charter school review visit conducted by the County Superintendent. On September 3, 1998 the Commissioner notified the Unity Charter School of his final decision to grant a charter for operation, effective July 1, 1998 to June 30, 2002.

On or about October 1, 1998, the Morris School District filed an appeal with the State Board of Education from "the entire decision of the Commissioner" granting a charter to the Unity Charter School.

LEGAL ARGUMENT

POINT I

MORRIS SCHOOL DISTRICT'S APPEAL OF THE COMMISSIONER'S INITIAL APPROVAL OF UNITY CHARTER SCHOOL'S CHARTER APPLICATION SHOULD BE DISMISSED AS UNTIMELY.

In addition to its appeal of the Commissioner's final decision to grant a charter to the Unity Charter School, Morris School District also seeks to appeal the Commissioner's initial approval of Unity Charter School's charter application. As Morris School

District failed to file an appeal with the State Board within 30 days from notice of the Commissioner's initial decision, as required by N.J.A.C. 6A:11-2.5(a), all issues involving the Commissioner's initial approval are untimely and must be dismissed.

A. N.J.A.C. 6A:11-2.5(a) REQUIRES AN APPEAL OF THE COMMISSIONER'S INITIAL DECISION CONCERNING A CHARTER APPLICATION TO BE FILED WITHIN 30 DAYS.

Morris School District erroneously argues that under N.J.A.C. 6A:11-2.5(a) an applicant may appeal the Commissioner's decision to grant a charter at either the initial approval stage or the final granting or denial stage. This interpretation is contrary to the clear language of the code and the intent of the State Board in creating a two-step application process.

N.J.A.C. 6A:11-2.5(a) provides:

In accordance with N.J.S.A. 18A:6-9, an appeal may be filed by an eligible applicant for a charter school, a charter school or a district board of education or superintendent of a State-operated school district of the district of residence of a charter school with the State Board of Education according to N.J.A.C. 6:2-1.3 within 30 days from the receipt of a letter from the Commissioner regarding either the approval or final granting or denial of a charter.

This provision makes clear, then, that an applicant may file an appeal of the Commissioner's initial approval of a charter within thirty days of receiving notice of such approval, or file an appeal of the Commissioner's final grant or denial of a charter within thirty days of receiving notice of such grant or denial. There is no language in the provision which allows an applicant to appeal

the Commissioner's initial approval of a charter more than thirty days after receiving notice of that approval.'

The fact that N.J.A.C. 6A:11-2.5(a) provides for two distinct and separate opportunities for appeal is reflected in the agency response to a public comment concerning the proposed appeals process:

COMMENT: An appeal may be filed by an eligible applicant for a charter school, a charter school or a district board of education or superintendent of a State-operated school district of the district of residence of a charter school regarding the approval, final granting or denial of a charter. Remove the words "final granting" from this section. There should be only one opportunity to appeal, and the appeal process for school districts beyond the initial approval or denial allows opponents to effectively halt the progress of a charter school.

RESPONSE: The Department disagrees. N.J.S.A. 18A:36A-3 does state that the charter school shall be a public school operated independently of a district board of education. The Department of Education recognizes that charter schools approved in January will not have all of the necessary documentation to begin operations as schools at that time. Therefore, this two level process was developed in the event that an application is approved but a school cannot ultimately open. The schools that are ready to open will receive final granting of their charters when all documentation in accordance with N.J.A.C. 6A:11-2.1(g) and (h) is received, verified and approved by the Department.

In regard to the two opportunities for appeal, the appeal at the time of the final granting can only relate to that documentation which the Commissioner needed from a charter

*In this matter more than nineteen months passed between the Commissioner's initial approval and appellant's notice of appeal.

school beyond what was submitted in the *New Jersey Charter School Application*. It is not a second opportunity for the district boards of education or superintendents of the State-operated school districts of the districts of residence of the charter school to appeal the initial approval. An appeal on the initial approval must be made within 30 days of the approval or denial which will occur on or about January 15. An appeal on the final granting of the charter could be made within 30 days of the notification.

[29 N.J.R. 3493 (Comment 12)].

Thus, both the plain language of the regulation and the agency's published response to public comment make clear that an appeal filed within thirty days of the final grant of a charter can only relate to the documentation which the Commissioner needed beyond that submitted in connection with the initial application. The fact that the appellants in several school charter cases currently before the Appellate Division* understood the regulations and filed timely appeals from the Commissioner's initial approvals further attests to the obvious meaning and common understanding of N.J.A.C. 6A:11-2.5(a).

Moreover, the Appellate Division recently refused to remand two cases to the State Board in which the State Board had declined to consider appeals of the Commissioner's initial approvals which were filed one day beyond the thirty-day time limit. See I/M/O the Approval of the Charter School Application of the International

*In the Matter of Greater Brunswick Charter School, Middlesex County, A-4557-97T1; In the Matter of Englewood on the Palisades Charter School, Bergen County, A-4697-97T1; In the Matter of Red Bank Charter School, Monmouth County, A-4725-97T1; In the Matter of East Orange Community Charter School, Essex County, A-4727-97T1.

Charter School of Trenton and I/M/O the Approval of the Charter School Application of the Granville Charter School (Order of Motion, attached at Ra1). In so doing, the Appellate Division held that the thirty-day time limit for appealing the Commissioner's initial approval is mandatory and jurisdictional. See Schaible Oil v. New Jersey DEP, 246 N.J.Super. 29, 31-32 (App. Div.), certif. denied, 126 N.J. 387 (1991).

Since Morris School District's appeal is only timely with regard to the Commissioner's final grant of a charter to the Unity Charter School, all issues raised by the district which pertain to the Commissioner's initial approval of the charter application must be dismissed. These issues include Unity Charter School's compliance with Jenkins v. Township of Morris School District and Board of Education,* Morris School District's funding obligations under the Charter School Program Act, and Unity Charter School's compliance with the State's core curriculum content standards and statewide assessment program. Thus the only issue properly before the State Board of Education in this appeal is whether the Commissioner abused his discretion in finding that Unity Charter School's facility was fit for educational purposes.

B. THE STATUTORY AND REGULATORY PROVISIONS FOR ANNUAL REPORTING AND FOR PROBATION OR REVOCATION IN THE EVENT OF NON-COMPLIANCE WITH THE CHARTER MORE THAN ADEQUATELY ADDRESS MORRIS SCHOOL DISTRICT'S RIPENESS CONCERNS.

In an attempt to justify the untimeliness of its appeal of the Commissioner's initial charter approval, Morris School District

*58 N.J. 483 (1971)

argues that the issues of racial composition, funding obligations and compliance with core curriculum content standards were not ripe at the time of the initial approval because the facts forming the basis of the appeal had not yet developed. Further, Morris School District alleges, without factual support, that Unity Charter School has failed to abide by the representations it made to the Commissioner in its initial charter application.

The Legislature clearly contemplated that a charter school might fail to comply with the conditions of its charter by enacting N.J.S.A. 18A:36A-16 which provides for periodic assessments of charter schools. This statute is effectuated by N.J.A.C. 6A:11-2.2 which requires the board of trustees of a charter school to submit an annual report to the Commissioner, the county superintendent of schools, and the district board of education or superintendent of the State-operated school district of the district of residence of the charter school which includes, among other things, the school's attainment of core curriculum content standards, the school's public outreach efforts, the school's student admissions policies, and the school's annual sanitary and fire inspection reports. If at any time, including subsequent to a review of the annual report, the Commissioner finds that the charter school is not operating in compliance with its charter, N.J.A.C. 6A:11-2.4 authorizes the Commissioner to place the school on probationary status for ninety days to allow for the implementation of a remedial plan or to revoke its charter entirely and order the school to cease operations.

Thus, if Unity Charter School did, as Morris School District alleges, violate any of the provisions of its charter, the Commissioner is authorized to order remedial action. The proper recourse for Morris School District in such a situation would be to alert the Commissioner to the problem so that the Commissioner could investigate and possibly recommend corrective action. The fact that N.J.A.C. 6A:11-2.2(a) requires the charter school to provide a copy of its annual report to its school district of residence guarantees that the school district of residence will remain informed about the operating conditions of the charter school and may be able to submit appropriate comments and recommendations to the Commissioner concerning the school's compliance with its charter.

If the State Board were to embrace Morris School District's unavailing ripeness argument and allow a district of residence to file an untimely appeal of the Commissioner's initial approval, it would be abandoning the declared public policy of the State to encourage and facilitate the development of charter schools. N.J.S.A. 18A:36A-2. A two-step charter approval process allows a charter school to obtain initial approval of its charter before incurring the considerable expenses involved in procuring facilities and staff and complying with fire and sanitary codes. Allowing an untimely challenge to the Commissioner's initial decision would destroy the finality of the initial approval process, expose charter schools to the possibility of significant financial losses, and constitute a major disincentive to the

charter school program. Because the statutes and regulations already provide a district of residence with adequate redress for its charter-compliance concerns and because allowing untimely appeals of initial approvals would undermine the public policy of encouraging and facilitating the development of charter schools, Morris School District's untimely appeal of the Commissioner's initial approval of Unity Charter School's charter application must be dismissed.

POINT II

AS MORRIS SCHOOL DISTRICT LACKS STANDING TO RAISE A CONSTITUTIONAL ISSUE ON BEHALF OF ITSELF OR ITS STUDENTS, ITS ARGUMENTS CONCERNING THE CONSTITUTIONALITY OF THE CHARTER SCHOOL PROGRAMS ACT, THE STATE BOARD REGULATIONS, AND THE COMMISSIONER'S DECISION MUST BE DISMISSED.

In addition to being untimely, the constitutional arguments raised by the Morris School District should be dismissed for lack of standing. Although Morris School District apparently concedes that it lacks standing to assert constitutional rights on its own behalf*, it nevertheless argues that it has standing to make

*The basis for this rule is that as instrumentalities of the State, school districts are accorded only those rights provided by statute. Durgin v. Brown, 37 N.J. 189, 199 (1962). They may not invoke constitutional privileges against the State, as they are creations of the State itself and not persons entitled to constitutional protection. Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933). This principle, that local governmental entities lack the legal capacity to pursue equal protection challenges to state action, has long been recognized by the New Jersey courts. See North Jersey District Water Supply Commission v. State Water Policy Commission, 129 N.J.L. 326, 332 (1943); Borough of Glassboro v. Byrne, 141 N.J.Super. 19, 23 (App. Div.), certif. denied, 71 N.J. 518-19

constitutional claims on behalf of its students. This argument overlooks and misapplies the long-standing case law of this State.

It is well-established that, generally, a litigant may only assert his or her own constitutional rights. Matter of Quinlan, 70 N.J. 10, 34, cert. denied, 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976). It is also well-established that "[o]rdinarily, a litigant may not claim standing to assert the rights of a third party, especially where one attempts to seek standing to vindicate the constitutional rights of some third party . . . because courts are loath to resolve constitutional issues in advance of necessity." State Department of Environmental Protection and Energy v. Dopp, 268 N.J.Super. 165, 173-74 (App. Div. 1993) (citations omitted). In DEPE v. Dopp, the Appellate Division affirmed the dismissal of a constitutional claim brought by a husband on behalf of his wife for lack of standing noting that the wife was perfectly capable of filing a claim on her own behalf. Id. at 174.

Similarly, in Trombetta v. Atlantic City, 181 N.J.Super. 203, 222 (Law Div. 1981), affirmed, 187 N.J.Super. 351 (App. Div. 1982), a case relied upon by Morris School District, the court held that "[a] plaintiff may . . . assert third-party rights where he himself has suffered injury and third parties find it difficult to assert their own rights or the injury suffered by plaintiff

(1976); New Jersey State League of Municipalities v. State of New Jersey, 257 N.J.Super. 509, 523-24 n.1 (App. Div. 1992) (Skillman, J., concurring), certif. dismissed, 133 N.J. 423, appeal dismissed, 133 N.J. 419 (1993).

adversely affects his relationship with third parties, resulting in an indirect violation of their rights. In this matter, however, Morris School District has failed to show that it has suffered any injury at all. Indeed, even if it were possible to make such a showing, the school district is precluded from doing so by the bar to local governmental entities bringing constitutional challenges against the State imposed by Borough of Glassboro v. Byrne, supra, 141 N.J. Super. at 23. Further, Morris School District has not shown that its students and taxpayers are incapable of asserting their own rights in this matter. Just as in DEPE v. Dopp, the real parties in interest are perfectly capable of filing suit on their own behalf. Finally, since Morris School District has not shown that it has suffered any injury at all, it has not shown that it has suffered an injury that adversely effects its relationship with its students. All of Morris School District's alleged injuries, such as racial imbalances in its classrooms, are totally unsubstantiated.* There simply is no necessity to reach the constitutional issues in this case. If a student or taxpayer in the Morris School District believes that he or she has suffered a constitutional injury resulting from the establishment of the Unity Charter School, he or she can assert his or her constitutional rights based upon his or her specific facts or circumstances.

Morris School District's alternate argument, that it has standing as a "fiduciary and trustee of the public weal," which,

*The school district is in session for the 1998-99 school year, yet the district does not specifically cite one instance of racial imbalance in its classrooms.

incidentally, applies only to its funding claim and not its segregation claim, gives an over broad reading to the unusual Law Division holding in Kenney v. East Brunswick Township, 172 N.J.Super. 45 (Law Div. 1981), affirmed, 187 N.J.Super. 351 (App. Div. 1982).^{*} In Kenney, the court allowed a municipality to challenge the constitutionality of a statute requiring it to grant prior service credit benefits to certain employees who transferred to other municipal or county employment. This specific holding in Kenney has seldom been cited, and when it has been cited it has been limited by the citing court. For example, in Mahwah Township v. Bergen County, 3 N.J.Tax 513, 544 (1981), affirmed, 190 N.J.Super. 84 (App. Div. 1983), affirmed in part, reversed in part on other grounds, 98 N.J. 268 (1985), cert. denied, 471 U.S. 1136, 105 S.Ct. 2677, 86 L.Ed.2d 696 (1985), the court noted that it was very important to Kenney's holding that the constitutional argument was raised by the municipality by way of defense. In Town of Morristown v. Women's Club of Morristown, 10 N.J.Tax 309, 315 (1989), reversed on other grounds, 242 N.J.Super. 654 (App. Div. 1990), decision affirmed, 124 N.J. 605 (1991), the court characterized Kenney as allowing standing to bring a constitutional challenge when there was a danger that public funds would be lost. The characteristics of Kenney which were deemed important in the above cases are notably lacking in this matter. Morris School District does not raise the constitutionality of the Charter School

^{*}Footnote 2 in Kenney acknowledges that the municipality has no standing to bring an equal protection challenge against the State. 172 N.J.Super. at 50.

Program Act by way of defense, but as an assertion of third-party rights. Moreover, there is no danger here that public funds will be lost. The same total amount of money is spent for the public education of the district's school children, whether they are enrolled in public schools or charter schools. No funds are lost as all are applied to the educational expenses of the district's students. Thus, Morris School District has failed to show that it has standing to bring a constitutional challenge under the ruling in Kenney.

Because the Morris School District has no standing to bring an equal protection challenge on its own behalf and it has no standing to bring an equal protection challenge on behalf of its students, either as their protector or as a fiduciary of the public weal, its constitutional arguments must be dismissed.

POINT III

THE COMMISSIONER'S FINAL DECISION TO GRANT A CHARTER TO THE UNITY CHARTER SCHOOL IS IN COMPLIANCE WITH STATE ANTI-DISCRIMINATION LAW AND SHOULD BE AFFIRMED.

It is the Commissioner's position that this point is not properly before the State Board because the Morris School District lacks standing to raise a constitutional challenge against the State and because the Morris School District raises the issue in an untimely manner. However, even if the State Board considers this question it is clear that it must reject Morris School District's contention that the Unity Charter School is a segregated school

which is being operated in contravention of the Supreme Court mandate in Jenkins v. Township of Morris School District and Board of Education, 58 N.J. 483 (1971).

Morris School District does not contend that Unity Charter School failed to honor its charter obligation to reach out to students from a broad cross-section of the community nor that it conducted an unfair lottery nor that it denied admission to anyone on the basis of race. Rather, Morris School District contends that, it just so happens that the final racial composition of the charter school fails to reflect the racial balance of the community as a whole and thus fails to comply with the Court's ruling in Jenkins. For that reason, Morris School District argues that the Commissioner abused his discretion in granting initial approval to Unity Charter School's application. This argument fails because the Charter School Program Act does not impose a duty upon the Commissioner to analyze the racial impact a charter school will have on a school district before granting a charter and because the Supreme Court decision in Jenkins is totally inapplicable to the charter school program.

Initially it is important to point out that since Morris School District has pointed to no specific instance of racial imbalance in its classrooms this year, its contention that the Unity Charter School will have a negative racial impact on the district is, at best, speculative, and must be rejected. Morris School District ignores that N.J.S.A. 18A:36A-7 requires that charter schools utilize open admission policies and ignores the

statute's direction that charter school seek a cross-section of the community's school age population when enrolling students. N.J.S.A. 18A:36A-8. Further, the charter school application includes a requirement that the charter school's admission policy comply with N.J.S.A. 18A:36A-8, and that information concerning admission policies be provided to the Commissioner. N.J.S.A. 18A:36A-5. Thus, regardless of the specific racial composition of Unity Charter School, it is clear that admissions to the school were open to all school age children in the community in the appropriate grades, and that out-reach plans to the community, as set forth in Unity Charter School's application, assured that a cross-section of the community was sought. In short, Morris School District has failed to show that Unity Charter School engaged in any discriminatory conduct whatsoever.

Moreover, the Legislature, in enacting the Charter School Program Act, did not impose a requirement on the Commissioner to undertake a detailed racial impact study prior to granting a school charter. The Commissioner was under no statutory mandate to undertake the type of review that Morris School District apparently believes was necessary. Indeed, to the extent that Morris School District's assertions "reflect merely its disagreement . . . on matters of educational and financial policy, the court is obligated to defer to the judgment of the administrators whom the Legislature has authorized to make the judgments." In re Petition for Authorization to Conduct a Referendum on the Dissolution of Union County Regional High School District No. 1, 298 N.J.Super. 1, 9

(App. Div.) (citing Board of Education of Township of Wayne v. Kraft, 139 N.J. 597, 603-04 (1995)), certif. denied, 149 N.J. 37 (1997).

Even more fundamentally, the Supreme Court decisions in Jenkins v. Township of Morris School District and Board of Education, 58 N.J. 483 (1971) and Booker v. Board of Education, 45 N.J. 161 (1965) are totally inapplicable to a school created pursuant to the Charter School Program Act. In Booker the Supreme Court held that the Commissioner of Education is vested with broad powers to eliminate de facto segregation in the public schools. 45 N.J. at 177-78. Similarly, in Jenkins the Supreme Court noted that de facto segregation existed in the Morris Township School District and the Morristown School District which would only be exacerbated by Morris Township's plan to withdraw its students from Morristown High School. 58 N.J. at 488-93. Stating that "[t]he history and vigor of our State's policy in favor of a thorough and efficient public school system are matched in its policy against racial discrimination and segregation in the public schools", the Court held that the Commissioner had the power to prevent Morris Township from terminating its sending-receiving relationship with Morristown and to order the merger of the two school districts. Id. at 508.

In each of these cases the object of the Court's concern was a public school district which consciously and deliberately decided where its students would go to school. The district's school assignments, which were binding on the students, reinforced racial

segregation that already existed in the community. Thus the school district effectively perpetuated racially discriminatory practices through its system of mandatory school assignments. The Court's essential holding in those cases was that when a school has the power to assign students as it pleases, it must exercise that power in a racially balanced fashion.

Unlike the mandatory school assignment plans utilized in public school districts, the touchstone of the charter school program is choice. No student is required to seek admission to a charter school, just as no student is barred from seeking admission to such a school. All students have an equal chance of gaining admission to a charter school and all students are guaranteed free transportation to the charter school in which they are enrolled. Most critically, no child is assigned to any school because of his or her race. Because no binding decisions are being made concerning students' school assignments - and hence their racial distribution - no overarching balancing formula need be applied. The extraordinary measures taken by the Court in Jenkins are simply inappropriate when each child has a free choice, unhindered by racial discrimination, as to what school to attend.

For these reasons, it would be improper to require that charter schools established in school districts with a history of de facto segregation adhere to rigid racial balancing quotas. Such a requirement would be directly contrary to the Legislature's intent to establish charter schools as instruments of educational

reform. Morris School District's argument concerning the racial balance of the Unity Charter School must therefore be rejected.

POINT IV

MORRIS SCHOOL DISTRICT'S PAYMENT OF FUNDS TO UNITY CHARTER SCHOOL IN ACCORDANCE WITH N.J.A.C. 6A:7.1 ET SEQ. IS NOT UNCONSTITUTIONAL AND MORRIS SCHOOL DISTRICT'S ARGUMENTS TO THE CONTRARY SHOULD BE REJECTED.

It is the Commissioner's position that this point is not properly before the State Board because the Morris School District lacks standing to raise a constitutional challenge against the State and because the Morris School District raises the issue in an untimely manner. However, even if the State Board entertains Morris School District's argument that the charter school funding scheme is unconstitutional, it is clear that this argument must fail.

A. THE STATE BOARD REGULATIONS DO NOT HAVE A NEGATIVE, DISPARATE IMPACT ON THE MORRIS SCHOOL DISTRICT AS THE DISTRICT IS ONLY REQUIRED TO PAY 90% OF ITS LOCAL LEVY BUDGET PER PUPIL FOR THE SPECIFIC GRADE LEVEL, WHICH RESULTS IN A SAVINGS OF 10% FOR EVERY DISTRICT PUPIL WHO ATTENDS THE CHARTER SCHOOL.

Although Morris School District does not clearly state in what way the Act is supposedly unconstitutional, its use of the term "disparate impact" presumably raises an equal protection challenge. The facts and law set forth by the Morris School District, however, do not come close to establishing that students in the district have been denied equal protection of the law.

It is well settled that enactments of the Legislature are entitled to a presumption of validity. In re C.V.S. Pharmacy Wayne, 116 N.J. 490, 497 (1989), cert. denied, 493 U.S. 1045, 110 S.Ct. 841, 107 L.Ed.2d 836 (1990). Parties challenging the validity of a statute have a heavy burden to overcome this presumption. See Smith v. Penta, 81 N.J. 65, 74, appeal dismissed, 444 U.S. 986, 100 S.Ct. 515, 62 L.Ed.2d 416 (1979) (when a statute is challenged on constitutional grounds, "the nature of state government and the distribution of sovereign power within make the plaintiff's burden a heavy one"); see also, Hills Dev. Co. v. Bernards Township, 103 N.J. 1, 21 (1986).

Although Morris School District asserts that the fiscal impact of the charter school funding scheme is unconstitutional, it does not set forth any allegations regarding how the scheme denies its students equal protection of the law. School children, in general, do not constitute a suspect class which has historically been the victim of discrimination. Thus, in order to defeat a disparate impact challenge the State need only show that the charter school funding provisions are rationally related to a legitimate government purpose. Drew Associates of New Jersey, L.P. v. Travisano, 122 N.J. 249, 258-59 (1991). There is no question that N.J.S.A. 18A:36A-12 is rationally related to the legitimate State purpose of providing its school children with educational choice through the establishment of a charter school program. If, on the other hand, Morris School District proposes to subject the charter school funding provisions to a strict scrutiny analysis, then it

must first show that the funding provisions deny its students a fundamental right, such as the thorough and efficient education guaranteed them by the State constitution. Ibid. It has, however, utterly failed to make this showing.

The Charter School Program Act makes clear that the funds for educating each pupil follow the pupil who elects to attend a charter school.* N.J.S.A. 18A:36A-12. If a pupil remains in a regular public school in the district, the district retains the funds for that pupil. Thus, Morris School District receives all of the funds to which it is entitled to educate each child who remains in the district. In fact, Morris School District receives more than the funds to which it is entitled under the school financing

*The agency explains its rationale in applying a per pupil funding formula as follows:

The use of a per pupil formula is required by N.J.S.A. 18A:36-12 The premise of the legislation is that all students in New Jersey are entitled to free education provided by the school district in which they reside in accordance with N.J.S.A. 18A:38-1 Inherent in any calculation based on a per pupil formula is the debate over the true costs of migrations of small numbers of pupils. Incrementally, the cost of one student leaving the district will not offset costs in the school district by the same proportion. Conversely, one student entering the district will not increase costs by the same proportion. The State funding formula is based on a per pupil formula as are the spending growth limitation adjustments, since the per pupil method is accepted as the fairest method of determining school costs. The incremental costs of students entering or leaving the school district generally balance out.

[29 N.J.R. 3494 (Comment 1)].

laws because it only pays the charter school 90% of the cost of educating the district students enrolled in the charter school. Thus, Morris School District is allowed to retain 10% of the cost of educating each student who chooses to attend a charter school. Since no services are rendered in exchange for the retained 10%, this money can be utilized to enhance the education of the children remaining in the school district. Morris School District has failed to show how this additional funding deprives its students of a thorough and efficient education.

B. THE STATE BOARD REGULATIONS DO NOT UNCONSTITUTIONALLY REQUIRE PUBLIC BOARDS OF EDUCATION TO ALLOCATE PUBLIC FUNDS FOR USE BY PRIVATE INDIVIDUALS BECAUSE CHARTER SCHOOLS ARE PUBLIC SCHOOLS WHICH OPERATE UNDER THE SUPERVISION OF THE COMMISSIONER.

Morris School District's argument that funding charter schools violates the prohibition on private use of public funds is contrary to the plain meaning of the statutes and is inconsistent with its own argument with regard to racial segregation in which it asserts that Unity Charter School is a public school.

The Unity Charter School is not a private entity. Instead, it is a public school and a body corporate and politic. N.J.S.A. 18A:36A-3, -6. Moreover, pursuant to N.J.S.A. 18A:36A-3(a), a charter school is managed by a board of trustees and those trustees are ". . . deemed to be public agents authorized by the State Board of Education to supervise and control the charter school." The Board must act in accordance with the Open Public Meetings Act and all board of trustee members must abide by the School Ethics Law.

N.J.S.A. 18A:36A-64, N.J.A.C. 6A:11-3.14. The process of selecting members and the terms of the Board of Trustees are also required to be set forth in the charter school application for review by the Commissioner. N.J.S.A. 18A:36A-5(c). The charter school is also subject to Department of Education oversight procedures such as fiscal auditing, N.J.S.A. 18A:36A-5(1), and is monitored to insure that the percentage of school funds spent in the classroom is "at least comparable to the average percentage of school funds spent in the classroom in all other public schools in the State." N.J.A.C. 6A:11-7.3(d). Furthermore, the board of trustees is required to submit an annual report detailing the workings and success of the charter school. N.J.A.C. 6A:11-2.2. Most significantly, if the Commissioner finds that a charter school is not operating in compliance with its charter, regulations or the Act, the Commissioner may place the charter school on probationary status or revoke the charter. N.J.A.C. 6A:11-2.4. These regulations make clear that a charter school is a public school subject to public review and control, and hence payment of public funds to a charter school does not violate the prohibition on payment of public funds to a private body. Morris School District's argument to the contrary must be rejected.

POINT V

THE COMMISSIONER'S DECISION TO GRANT FINAL APPROVAL TO THE UNITY CHARTER SCHOOL'S CHARTER WAS REASONABLE AND TAKEN PURSUANT TO STATUTE AND REGULATION.

The Commissioner is given the authority to establish charter schools in accordance with the Charter School Program Act, and in doing so abides by the regulations promulgated thereunder. In approving Unity Charter School for charter, the Commissioner acted lawfully and consistent with the Charter School Program Act and its accompanying regulations. The fact that Morris School District may be opposed to the establishment of a charter school in its district does not convert the Commissioner's reasonable and well-supported decision into one that is arbitrary or capricious.

A. THE COMMISSIONER DID NOT ABUSE HIS DISCRETION IN FINDING THAT UNITY CHARTER SCHOOL'S FACILITY WAS FIT FOR EDUCATIONAL PURPOSES.

Morris School District argues that Unity Charter School's facility, the upstairs portion of the Columbian Club in Morristown, is unfit for educational purposes as it is above a bar that serves alcoholic beverages to its members. According to Morris School District, the facility presents a danger to the health and safety of pupils attending the charter school.

When the Commissioner rendered his decision on September 3, 1998 to grant a charter to the Unity Charter School, he was fully informed about the nature and location of the proposed facility. The Commissioner was presented with a copy of Unity Charter

School's lease with the Columbian Club, a satisfactory site inspection report from the County Superintendent, a certificate of occupancy, a fire inspection certificate, and a sanitary inspection report. The Commissioner was informed that even though the first floor of the Columbian Club houses a bar, no drinks are served on the premises during school hours.* Drawing on his considerable expertise and knowledge, the Commissioner reasonably concluded that the proposed site was suitable for educational purposes. This determination was supported by evidence in the record and should be upheld.

B. THE COMMISSIONER'S FINAL DECISION DID NOT INVOLVE A REVIEW OF UNITY CHARTER SCHOOL'S COMPLIANCE WITH STATE CORE CURRICULUM STANDARDS.

Morris School District's argument that Unity Charter School's initial application failed to address how it intended to comply with State core curriculum content standards is based upon bare assertions and materials not part of the record on this appeal.

The Commissioner carefully reviewed Unity Charter School's application before granting initial approval to the school. There is absolutely no evidence in the record that this decision was in any way arbitrary or capricious, especially in light of the Commissioner's unique and unquestioned expertise regarding the core curriculum content standards. Furthermore, the charter school must file an annual report with the Commissioner which details its

*Morris School District's allegation that liquor is accessible to the children while at school is unsubstantiated.

attainment of the core curriculum content standards as well as the results of statewide assessment programs. N.J.A.C. 6A:11-2.2(a)(1)(iii) and (iv). The Commissioner has the authority to place the school on probation or to revoke its charter if he concludes that the school has failed to comply with its charter in either of these areas. N.J.A.C. 6A:11-2.4. Thus, not only did the Commissioner examine Unity Charter School's approach to the core curriculum content standards and the statewide assessment program when he gave initial approval to the school's charter, he continues to monitor and evaluate the school's attainment of those standards to ensure that Unity Charter School's students receive a thorough and efficient education. Under the circumstances, Morris School District's request that the Commissioner be ordered to review Unity Charter School's curriculum is frivolous.

POINT VI

MORRIS SCHOOL DISTRICT'S BALD ASSERTION THAT UNITY CHARTER SCHOOL IS NOT COOPERATING IN THE EFFORT TO ESTABLISH EFFICIENT TRANSPORTATION SCHEDULES IS NOT PROPERLY BEFORE THE STATE BOARD AS MORRIS SCHOOL DISTRICT DID NOT RAISE THIS ISSUE WITH THE COMMISSIONER AND SO HAS FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES.

Although Morris School District raises a transportation issue as Point Six in its Table of Contents, and requests relief on this issue in its Conclusion, it fails to address the issue at all in its legal arguments. There are no facts whatsoever upon which the State Board could rest a ruling on this issue.

Furthermore, Morris School District has failed to raise this issue before the Commissioner, and hence has failed to exhaust its administrative remedies prior to taking an appeal to the State Board.

For these reasons, the State Board must dismiss Morris School District's argument concerning an alleged transportation dispute with the Unity Charter School.

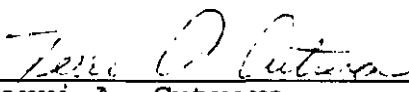
CONCLUSION

In summary, Morris School District's appeal of the Commissioner's initial approval of Unity Charter School's charter application must be dismissed as untimely. Further, Morris School District lacks standing to raise any of the constitutional issues presented in its arguments. Finally, the final decision of the Commissioner of Education to approve the charter of the Unity Charter School was neither arbitrary nor capricious, and thus his grant of a charter to the Unity Charter School must be upheld.

Respectfully submitted,

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY

By:



Terri A. Cutrera
Deputy Attorney General

DATED: October 19, 1998

ORDER ON MOTION

I/M/O THE GRANT OF THE CHARTER SCHOOL APPLICATION OF THE INTERNATIONAL CHARTER SCHOOL OF TRENTON ETC

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A -004932-97T1 MOTION NO. M -008063-97 BEFORE PART: S JUDGE(S): WECKER COLLESTER

MOTION FILED: AUGUST 17, 1998 ANSWER(S) FILED: AUGUST 19, 1998 AUGUST 21, 1998

BY: GRANVILLE CHARTER SCHOOL BY: TRENTON BOARD OF EDUCATION BY: ATTORNEY GENERAL

SUBMITTED TO COURT: SEPTEMBER 02, 1998

REC'D APPELLATE DIVISION

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ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 15th DAY OF September, 1998, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION BY RESPONDENT	()	()	(X)
- FOR STAY			
- FOR RECONSIDERATION	(X)		

SUPPLEMENTAL:

Upon reconsideration, we are satisfied that the thirty-day time limit for filing an appeal to the State Board of Education, pursuant to N.J.S.A. 18A:6-28, is jurisdictional. See Schaible Oil v. New Jersey DEP, 246 N.J. Super. 29, 31-32, certif. denied, 126 N.J. 387 (1991). We therefore vacate our order of August 3, 1998, and hereby deny the motion for remand filed by the Trenton Board of Education.

The Charter School's motion for stay is therefore moot.

FILED APPELLATE DIVISION

SEP 17 1998

GPS 28-98 I hereby certify that the foregoing is a true copy of the original on file in my office.

FOR THE COURT:

[Handwritten signature]
Clerk

JULAP

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BARBARA BYRD WECKER J.A.D.

Clerk

