

IN THE MATTER OF THE FINAL GRANT :
OF A CHARTER FOR THE UNITY : STATE BOARD OF EDUCATION
CHARTER SCHOOL, MORRIS COUNTY. : DECISION

Decided by the Commissioner of Education, September 3, 1998

For the Appellant, Wiley, Malehorn & Sirota (John G. Geppert, Jr., Esq., of Counsel)

For the Respondent, Harvey Gilbert, Esq.

For the Participant Commissioner of Education, Terri A. Cutrera, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This is an appeal by the Morris School District (hereinafter "District") from a grant of final approval given on September 3, 1998 by the Commissioner of Education to the Unity Charter School (hereinafter "Charter School") to operate a charter school pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. (hereinafter "Act") for the period from July 1, 1998 through June 30, 2002. The District's brief was filed on October 1, 1998, and was accompanied by the certifications of Dr. Dwight Pfenning and John G. Geppert Jr., Esq.

The District alleges that the Commissioner's final approval should be set aside because the Charter School's facility is not suitable for educational purposes. The District further argues that approval must be withdrawn because the Charter School has not shown how it will comply with the State's core curriculum standards and statewide assessment program. It also seeks an order from the State Board that the Charter

School must work with the District to establish a calendar and schedule to enable the District to efficiently transport all students to their respective schools.

In addition, the District raises questions relating to the constitutionality of the Act and the implementing regulations under the New Jersey constitution and claims that approval of the Charter School is in violation of other requirements of New Jersey law. More specifically, the District contends that final approval permits the operation of a segregated public school in violation of New Jersey's constitution and judicial decisions relating to racial balance, including Jenkins v. Tp. of Morris School District and Bd. of Educ., 58 N.J. 483 (1971), which was the foundation for the formation of the Morris School District. The District also contends that New Jersey's guidelines governing the desegregation of the public schools require that all public schools, including charter schools, be balanced.

The District also argues that payment of funds to the Charter School is unconstitutional because the regulations require it to pay more for its resident students attending the Charter School than other district boards must pay for their students. Finally, the District asserts that the regulations are unconstitutional because they require district boards to allocate public funds for the use of private individuals.

The Commissioner is participating in this appeal as provided by N.J.A.C. 6A:11-2.5(d). In the brief filed on his behalf, the Deputy Attorney General representing the Commissioner contends that all issues raised in this appeal relating to the Commissioner's initial approval given on February 5, 1997 should be dismissed as time-barred, arguing that under N.J.A.C. 6A:11-2.5(a), an appeal from 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.” Brief on Behalf of Commissioner, at 5. The Deputy Attorney General representing the Commissioner maintains that the only issue properly before the State Board is whether the Commissioner abused his discretion in finding that the Charter School’s facility was fit for educational purposes.

On the same date, the Charter School filed its answer. Like the Deputy Attorney General representing the Commissioner, the Charter School contends that the appeal is time-barred and that final approval of its charter was proper. In addition, on October 13, the Charter School filed a motion to strike and/or suppress the District’s appeal on the grounds that by relying on the certifications accompanying its appeal brief, the District had included legal argument that was based on facts that were not in the record. It further moved to supplement the record with affidavits relating to the operations of the Morristown Columbian Club, the facility in which the Charter School is housed.

After reviewing the circumstances, we conclude that the District’s appeal is not time-barred. In so concluding, we stress that the Commissioner’s contingent approval of the Charter School was given on February 5, 1997, well before we adopted the regulations upon which the Deputy Attorney General and the Charter School rely. Furthermore, we would hesitate to interpret our regulations to bar any appeal where the appellant had not had notice of the factual circumstances in question and where, as here, those circumstances are material to the determination being challenged.

We are sensitive to the fact that some of the claims raised by the District involve constitutional issues, and we are cognizant of our jurisdictional limitations. E.g., Abbott v Burke, 100 N.J. 269 (1985) (subsequent history omitted). Given the constraints and

the statutory time limit within which we must act, N.J.S.A. 18A:36A-4(d), we have noted the presence of these issues but have presumed the validity of the statute and implementing regulations for purposes of determining whether the Charter School should be permitted to continue to operate. Hence, for purposes of this review, we have focused on whether the appeal has raised concerns of such character that the school should not be permitted to operate at this point. In this respect, the District has not made any showing that the actual composition of the Charter School's student body has had any impact on the racial composition of the Morris School District or that the Charter School is in fact segregated.

Given the focus of our review and the fact that the supplemental materials implicate the suitability of the facility in which the Charter School is housed, we grant the motions to supplement the record filed by the District and the Charter School.

N.J.S.A. 18A:36A-4(c) provides that “[a]n application to establish a charter school shall be submitted to the commissioner and the local board of education...in the school year preceding the school year in which the charter school will be established. The board of education...shall review the application and forward a recommendation to the commissioner within 60 days of receipt of the application.” The application is required to include, inter alia, “[a] description of, and address for, the physical facility in which the charter school will be located.” N.J.S.A. 18A:36A-5. The Act further provides that “[a] charter school may be located in part of an existing public school building, in space provided on a public work site, in a public building, or any other suitable location.” N.J.S.A. 18A:36A-10 (emphasis added).

Careful review reveals that there was nothing in the record before the Commissioner at the time he granted final approval to the Charter School to indicate that the facility it was planning to utilize was a social club in which alcoholic beverages were stored and served.¹ This circumstance raises both policy and legal concerns relating to the presence of alcoholic beverages in or in close proximity to facilities housing schools. See, e.g., N.J.S.A. 33:1-76 (prohibiting the issuance of a license for the sale of alcoholic beverages within two hundred feet of a school) and N.J.S.A. 2C:33-16 (any person who brings alcoholic beverages onto school property without express written permission of the school board is guilty of a disorderly persons offense). In light of the information contained in the supplemental materials, further review and determination by the Commissioner of the suitability of this site for educational purposes is required.² N.J.S.A. 18A:36A-10. We therefore remand this matter to the Commissioner and direct that he make such determination within thirty days of this decision. While the Charter School may continue to operate in the interim, we retain jurisdiction.

¹ We note that Lisa Brick, president of the Charter School's Board of Trustees, indicates in a certification which we have permitted to be supplemented into the record, that she had communicated verbally with an employee of the Department's Office of Innovative Programs "of the possibility of alcohol in the Club's facility." Certification, at 4. However, there is nothing in the record before us that indicates that such information was communicated to the Commissioner or considered by him in determining to grant final approval to the Charter School.

² In R.F. v. Board of Education of Park Ridge, 93 N.J.A.R.2d (EDU) 79, 82 the Commissioner recognized "the Legislature's clear intent as stated in N.J.S.A. 18A:37-1... 'that the public schools of the State of New Jersey will act to help control the problem of youth/alcohol abuse, especially in the school.'" In that regard, N.J.S.A. 18A:40A-1 requires that "[I]nstructional programs on the nature of drugs, alcohol, anabolic steroids, tobacco and controlled dangerous substances...and their physiological, psychological, sociological and legal effects on the individual, the family and society shall be taught in each public school and in each grade from kindergarten through 12 in a manner adapted to the age and understanding of the pupils. The programs shall be based upon the curriculum guidelines established by the Commissioner of Education...."

Finally, we cannot ignore the fact that there is no permanent certificate of occupancy for the Charter School in the record transmitted to us. That record, which is dated October 8, 1998, shows only that a temporary certificate of occupancy was issued by the municipality's construction official on September 2, 1998, specifying that certain building deficiencies were required to be corrected by October 2. Hence, the Commissioner's September 3 grant of final approval to the Charter School was based on the temporary certificate of occupancy, which was only valid for one month, as proof that the school had satisfied all contingencies, including, as required by N.J.A.C. 6A:11-2.1(g), submission of a certificate of occupancy. The Commissioner did not condition his approval of the school's facility upon submission of a permanent certificate of occupancy reflecting full compliance with the New Jersey Uniform Construction Code. Hence, we also direct the Commissioner to verify that such building deficiencies have been corrected and that all documentation required by N.J.A.C. 6A:11-2.1 has been submitted and approved.

November 4, 1998

Date of mailing _____