

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

Remanded by the State Board of Education, November 4, 1998

Decision on remand by the Commissioner of Education, December 4, 1998

Remanded by the State Board of Education, February 3, 1999

Response by the Commissioner of Education, February 16, 1999

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 matter was initiated by an appeal filed 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, 2002.¹ As set forth in its application, Unity Charter School planned to open with 60

¹ The Morris School District did not file an appeal from the Commissioner's contingent approval of Unity Charter School given on February 5, 1997. As set forth in our decision of November 4, 1998, the Deputy Attorney General representing the Commissioner argued that all issues relating to the Commissioner's initial approval should be dismissed as time-barred. The State Board concluded that the appeal was not time-barred, stressing both that the initial approval had been given before the State Board had adopted

students in grades K-8, and to expand by the fourth year to include 195 students in grades K-12.²

One of the central issues of the District's appeal was the suitability of the Charter School's facility for educational purposes.³ In this regard, the District focused on the fact that the building was owned by a social club which would continue to operate and which served and stored alcoholic beverages at the site for its members. The District was also concerned about whether the bathroom facilities for the students were appropriate in view of the rules pertaining to such facilities in schools and given the possibility that members of the social club might be present during school hours.

On November 4, 1998, we issued our first decision in this matter. We found 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 served and stored.⁴ This circumstance

the regulations upon which the Deputy relied and that it would "hesitate to interpret our regulations to bar any appeal where the appellant had not had notice of the factual circumstances...." State Board's Decision, slip op. at 3.

² Under the terms of the Charter School's three-year lease for its current facility, the school would expand to a maximum of 140 students by the last year of the term of that lease.

³ In addition, the District raised questions relating to the constitutionality of the Act and implementing regulations under the New Jersey constitution and claimed that approval of the Charter School was in violation of other requirements of New Jersey law. More specifically, the District contended that final approval permitted 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 contended that New Jersey's guidelines governing the desegregation of the public schools require that all public schools, including charter schools, be racially balanced. The District further claimed that payment of funds to the Charter School was unconstitutional and that the regulations were unconstitutional because they required district boards to allocate public funds for the use of private individuals. Given the constraints on our jurisdiction and the statutory time limit within which we were required to act, N.J.S.A. 18A:36A-4(d), we noted the presence of these issues in our decision of November 4, 1998, but presumed the validity of the statute and implementing regulations for purposes of determining whether the Charter School should be permitted to continue to operate.

⁴ The Commissioner subsequently indicated in his decision on remand issued on December 4, 1998 that he "was advised [by Department staff] of the fact that the United Charter School is located in a building that also houses a social club" prior to his grant of a final charter to the school. Commissioner's Decision

raised both policy and legal concerns relating to the presence of alcoholic beverages in a facility housing a school. In light of the information contained in materials submitted by the parties in supplementation of the record, we concluded that further review and determination by the Commissioner of the suitability of this site for educational purposes was required pursuant to N.J.S.A. 18A:36A-10.⁵ We therefore retained jurisdiction while remanding this matter to the Commissioner for determination within thirty days of the suitability of the site for educational purposes.

On December 4, 1998, the Commissioner issued his first decision on remand. Based on the Charter School's submission and a report to him describing the facility following a site visit by Department of Education staff, the Commissioner concluded that students did not have access to the social club or to the alcoholic beverages stored in the building and that the facility was suitable for a charter school.

Our Legal Committee's initial review of the Commissioner's December 4, 1998 decision indicated that some items which had been referenced by the Commissioner in his decision had not been included in the record transmitted to us by the Attorney General's office on December 15, 1998. Consequently, on December 29, we sent a letter to the Commissioner requesting those items, which included documentation as to the exact location of the alcoholic beverages that the Commissioner had concluded

on Remand of December 4, 1998, slip op. at 1. The Deputy Attorney General representing the Commissioner, a participant in this appeal, also alleged in her brief to us dated October 19, 1998 that "[w]hen 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 informed that even though the first floor of the Columbian Club houses a bar, no drinks are served on the premises during school hours." Commissioner's Brief, at 23-24. However, there is no documentation in any of the materials transmitted to us on appeal by the Commissioner that indicates that such information was communicated to him or considered by him in determining to grant final approval to the Charter School.

⁵ N.J.S.A. 18A:36A-10 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. The

were not accessible to the Charter School's students. We also requested clarification of the bathroom facilities that were assigned for use by students and those which were used by staff and other adults who had access to the building. See N.J.A.C. 6:22-5.4(h).⁶

On January 5, 1999, the Deputy Attorney General representing the Commissioner responded to our request on his behalf. While providing most of the documents we had requested, the Deputy Attorney General did not furnish documentation relating to the site visit conducted by Department staff which had been relied upon by the Commissioner, indicating that such report had been "communicated orally to the Commissioner." Letter dated 1/5/99 from Deputy Attorney General Cutrera, at 2. Nor did the Deputy Attorney General's submission provide clarification regarding the bathroom facilities or specify the location of the alcoholic beverages stored at the site, stating that "all other information and documentation requested in the [December 29, 1998] letter was not before the Commissioner when he rendered his December 4, 1998 decision." Id.

On February 3, 1999, we remanded this matter to the Commissioner for a second time. Given the issues that had been raised by the District's appeal, we found

facility shall be exempt from public school facility regulations except those pertaining to the health or safety of the pupils...."

⁶ N.J.A.C. 6:22-5.4(h) provides, in part:

2. General pupil toilet rooms are those which are designed and labeled for pupil use, contain at least two of each required fixture and are directly accessible from a corridor or an open plan instructional space. Pupils housed within an instructional space which is in excess of 300 square feet shall not be required to travel through any other space except a corridor to reach a general pupil toilet room.

3. There shall be at least one general toilet room for each sex on each floor occupied by pupils or all instructional rooms shall have individual toilet rooms. Where classrooms, shops or physical education rooms are provided with self-contained individual facilities (water closet, lavatory and drinking fountains), the pupil capacity of these rooms shall not be counted in computing the number of fixtures required in the general pupil toilet rooms.

See also N.J.A.C. 6:22-5.4(h)4, infra, n.7.

that we were unable to resolve this matter without specification of the exact location of the alcoholic beverages in the facility and assurance that the bathroom facilities complied with the requirements of N.J.A.C. 6:22-5.4(h). We directed the Commissioner to direct the County Superintendent to revisit the Charter School's facility and to submit a written report to him which

1) specifically identifies the exact location within the building where the alcoholic beverages are stored, including identification of such location on a site plan and 2) provides clarification of the bathroom facilities which are assigned for use by students and those which are used by staff and other adults who have access to the building, including the specific type and location of bathroom facilities provided for the school's kindergarten students, so as to assure that the facilities are in compliance with the requirements of N.J.A.C. 6:22-5.4(h).

State Board's Decision, slip op. at 4.

We also directed that the County Superintendent assure that the Charter School had complied with the requirements of N.J.A.C. 6:22-5.4(h)4i or submitted an alternative bathroom plan for its kindergarten students in accordance with the requirements of N.J.A.C. 6:22-5.4(h)4ii and iii.⁷ We directed the Commissioner to transmit the County

⁷ N.J.A.C. 6:22-5.4(h)4 provides:

4. Toilet facilities for early intervention, pre-kindergarten and kindergarten classrooms shall be provided as follows:

i. An individual toilet room shall be provided in each classroom and shall meet the following criteria:

(1) Be located and equipped in such a way as to ensure privacy for the pupils;

(2) Be accessible to physically handicapped students and barrier free in design as per N.J.A.C. 5:23-7;

(3) Meet all other provisions of N.J.A.C. 6:22-2.4(b) which pertain to toilet room design;

(4) Pre-kindergarten and kindergarten classrooms shall contain a junior-juvenile size water closet suitable for children's use, equipped with an open front seat with a flood rim height no greater than 14 inches from the floor, and a lavatory (sink) with a flood rim height no greater than 26 inches from the floor; and

(5) Facilities for early intervention programs shall provide a diaper/clothes changing area.

ii. In lieu of providing an individual toilet room in each classroom as required in (h)4i above, toilet rooms may be provided adjacent to or outside the classroom if the following criteria are satisfactorily addressed:

Superintendent's report to us by February 16, 1999. Once again, we retained jurisdiction.

On February 16, 1999, the Commissioner transmitted a report to us prepared by the County Superintendent regarding her visit to the school on February 8, 1999. In her report, the County Superintendent provided a floor plan marked to show where alcoholic beverages were stored in the building, noting that the three cabinets used for such storage had been secured with a padlock requiring a key. She also indicated that a small amount of alcohol was locked in a small storage closet next to the bar.

With regard to the bathroom facilities, the County Superintendent reported that: "Bathroom facilities are located on both the upper and lower levels. There is one handicapped accessible toilet and sink for girls and one for boys located on the upper (school) level. On the lower level are larger restroom facilities. The girls' room consists of three stalls and three sinks. The boys' room consists of three stalls, three urinals and three sinks." Report of County Superintendent, at 2. The County Superintendent attached a copy of a memo from the Charter School's director to staff which directed "all

(1) No child or group of children shall be left unsupervised at any time when traveling to or from the facilities. Provisions shall be made for adult supervision in a manner that will not infringe upon instructional time.

(2) Toilet facilities shall be readily accessible and the toilet room and signage shall be visible to a child from the classroom door.

(3) Toilet facilities for early intervention, pre-kindergarten pupils shall be designated for their exclusive use and shall be so identified.

(4) Toilet facilities shall be provided for both boys and girls and shall meet the requirements of (h)4i(4) above.

iii. If a school district chooses to provide toilet rooms adjacent to or outside the classroom in conformance with (h)4ii above, the chief school administrator shall certify to the county superintendent how the alternate method of compliance shall be addressed, on forms prescribed by the Commissioner. The completed form and a copy of a resolution by the local district board of education approving the alternate method of compliance shall be submitted to the county superintendent for approval. Annually, thereafter, the chief school administrator shall resubmit the form certifying how the alternate method of compliance shall be addressed. Any changes to the approved alternate method of compliance shall be submitted to the county superintendent for approval.

students to use the upstairs bathroom at all times. If the upstairs bathroom is not available, students are required to be accompanied by a staff member to the lower level rest room.” Id. The County Superintendent indicated that the social club’s maintenance man was the only other adult present in the building on a regular basis.

The County Superintendent also reported that a request was received from the Charter School on December 23, 1998 for approval of an alternative method of compliance with the requirements for in-class toilet facilities for kindergarten students. N.J.A.C. 6:22-5.4(h)4. That request stated that kindergarten students would be “escorted to and from the bathrooms by a designated staff person at or around 9:00 a.m. and again at or around 11:00 a.m. daily. Unless otherwise in use, the children will use the bathrooms on the main floor of the school. After lunch and before nap time, at or around 12:30 p.m., the children will use the lower level bathrooms adjacent to the nap area. At any additional time that there is a need for one of our youngest children to use a bathroom, he/she will be escorted to and from the bathroom by a staff member.” The County Superintendent related that she had approved the school’s alternative plan on January 5, 1999.

The County Superintendent did not, however, respond to our request to clarify which of the bathroom facilities at the site were designated for use by staff members and other adults who have access to the building.⁸ Nor did the County Superintendent describe the specific type of toilet facilities provided for the school’s kindergarten

⁸ The State Board requested this specific information in its letter to the Commissioner dated December 29, 1998 and again in its decision of February 3, 1999.

students, so as to ensure compliance with the requirements of N.J.A.C. 6:22-5.4(h)4i(4). See N.J.A.C. 6:22-5.4(h)ii(4). See also N.J.A.C. 6:22-6.1(g)2vi(1).⁹

Hence, we are still unable to determine whether the facility in which the Charter School is housed is suitable for educational purposes as required by N.J.S.A. 18A:36A-10.¹⁰ As a result, we find it necessary at this juncture to solicit additional briefs from the parties. We therefore direct the parties to submit briefs on the question of whether the bathroom facilities offered at the school's facility meet health and safety concerns, including but not necessarily limited to the regulatory provisions listed above. See, e.g., N.J.A.C. 6:22-5.4(h)4, N.J.A.C. 6:22-5.4(h)ii(4) and N.J.A.C. 6:22-6.1(g)2vi(1). In view of the fact that the school anticipates significant expansion, see, supra, at 1-2; n.2, we also direct the parties to address whether the Charter School can provide bathroom facilities at this site that meet health and safety concerns as the school expands. In this respect, the parties should pay particular attention to the health and safety needs of its kindergarten and elementary age children in relation to the middle school age children currently enrolled at the school and the high school students who will be attending school at this facility during the three-year term of the lease, in addition to the fact that the school has been approved by the Commissioner to expand to 140 students at this site by the 2000-2001 school year. Id.

Moreover, we cannot ignore the fact that on March 29, 1999, the Appellate Division issued a lengthy decision disposing of three appeals from contingent approvals of charter applications given by the Commissioner, including the Englewood on the

⁹ N.J.A.C. 6:22-6.1(g)2vi(1), regarding emergency provisions for accommodation of pupils in substandard school facilities, provides that toilet facilities for pupils in off-site, rented or leased buildings "shall be provided for students in early intervention, pre-kindergarten and kindergarten programs as per N.J.A.C. 6:22-5.4(h)4."

¹⁰ See, supra, n.5.

Palisades Charter School. In the Matter of the Grant of the Charter School Application of Englewood on the Palisades Charter School, et al., ___ N.J. Super. ___ (App. Div. 1999) (“Englewood on the Palisades”). The Morris School District appeared as amicus curiae in that case. However, the Court “decline[d] to address specifically the issues raised” by the District because it “has an appeal pending before the State Board at present.” Id., slip op. at 82.¹¹

Given this circumstance, we direct the parties to brief the issues raised by the District that should most appropriately be considered in the first instance by this agency, see Abbott v. Burke, 100 N.J. 269, 301-303 (1985), as well as to address the impact of the Appellate Division’s recent decision in Englewood on the Palisades on the instant appeal.

Finally, we recognize that under the circumstances as they had been presented to him at that point, the Commissioner stated in his decision of December 4, 1998 that he could find no legal prohibition to the Charter School’s location in a building that also houses a social club. He further indicated in a footnote that “it does not appear” that either N.J.S.A. 33:1-76 or N.J.S.A. 2C:33-16 are implicated by the fact that the Charter School is housed in such a facility. Commissioner’s Letter Determination of December 4, 1998, at notes 1 and 2 and accompanying text. However, the Commissioner did not expressly decide the legal issues raised and did not address the practical and policy implications of allowing a public school to operate in a facility where alcoholic beverages are present. In that the jurisdiction to decide these issues now lies with the State Board, we direct that the parties address these questions in more depth

¹¹ We note that, in contrast to the approvals challenged by the parties in that case, the Morris School District’s appeal to the State Board in the instant matter is from the Commissioner’s grant of final approval rather than from a grant of contingent approval. See, supra, n.1 and accompanying text.

on the basis of the information now in the record.

April 7, 1999

Date of mailing _____