

**State of New Jersey**  
**Council on Local Mandates**

In re Complaint Filed by Rockaway Township Board of Education  
Re: N.J.A.C. 6A:8-3.1(a)(5), a Regulation Concerning Programs for  
Gifted and Talented Students

COLM-0001-15

Decided: January 3, 2017

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Syllabus

(This syllabus was prepared for the convenience of the reader and is not part of the decision of the Council. The syllabus does not purport to summarize all portions of the decision.)

The Rockaway Township Board of Education filed a complaint with the Council seeking a declaration that the requirements set forth in N.J.A.C. 6A:8-3.1(a)(5), a regulation concerning programs for gifted and talented students, should be found to be an unfunded mandate and in violation of Article VIII, section II, paragraph 5 of the New Jersey Constitution (the Amendment), as implemented by the Local Mandates Act, N.J.S.A. 52:13H-1 to -22. The Board claims that the regulation imposes economic burdens on local school boards without authorizing any resources to offset the additional direct expenditures required for implementation of the required gifted and talented programs. Put simply, the Board asserts that the regulation is an unfunded mandate and should cease to be mandatory in its effect.

The New Jersey Department of Education (DOE) argues that the Board's complaint should be dismissed because 1) the Council lacks jurisdiction to review the provisions of N.J.A.C. 6A:8-3.1(a)(5) because the gifted and talented program provision of the challenged regulation existed before the Council's creation in 1996; 2) the gifted and talented program is not an unfunded mandate because it simply revised a long-established regulatory requirement; 3) the gifted and talented program is not an unfunded mandate because it implements a provision of the New Jersey constitution; and 4) the provisions of N.J.A.C. 6A:8-3.1(a)(5) do not constitute an unfunded mandate because it does not require school districts to make additional direct expenditures to implement the regulation and because it is not

otherwise unfunded. The issue is before the Council on cross-motions for summary decision.

The Council, in a unanimous ruling, without deciding the jurisdiction and other issues raised by the DOE in points 1-3 above, agrees with the DOE that the challenged regulation does not constitute an unfunded mandate because it does not require additional direct expenditures for implementation of the regulation.

The determination that a regulation is an unfunded mandate under the terms of the amendment requires that the claimant prove 1) a mandate on the government unit; 2) direct expenditures are required for implementation of the mandate; and 3) the regulation does not authorize resources to offset the required direct expenditures. The Board has not met this test. The regulation gives school boards broad flexibility in deciding how to identify and educate its gifted and talented students. No direct expenditures are required by this regulatory language. How the Board accomplishes these goals is up to the Board. In the absence of a requirement for direct expenditures in the implementation of the regulation, which the Board here has not shown, the regulation is not an unfunded mandate as defined in the Amendment.

Accordingly, the Council unanimously grants the motion of the DOE, denies the cross-motion of the Board, and dismisses the Board's complaint.

Council Members Hon. John A. Sweeney, A.J.S.C. (ret.), Council Chairman; Victor R. McDonald, III, Vice Chairman; Leanna Y. Brown, Robert R. Pacicco, Christopher Pianese, John K. Rafferty, Robert R. Salman, Jack Tarditi, and Edward P. Zimmerman all joined in the Council's decision.

## State of New Jersey

### Council on Local Mandates

In re Complaint Filed by Rockaway Township Board of Education<sup>1</sup>

Re: N.J.A.C. 6A:8-3.1(a)(5), a Regulation Concerning Programs for Gifted and Talented Students

COLM-0001-15

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Nathanya G. Simon argued the cause for the Claimant, Rockaway Township Board of Education (Schwartz Simon Edelstein & Celso LLC, attorneys; Ms. Simon, Marc G. Mucciolo and Kyle J. Trent on the briefs).

Lauren A. Jensen, Deputy Attorney General, argued the cause for the Respondent, New Jersey Department of Education; Ms. Jensen on the briefs.

#### INTRODUCTION

The Claimant, Rockaway Township Board of Education (the Board), filed a complaint with the Council on Local Mandates (the Council) seeking a declaration by the Council that the requirements set forth in N.J.A.C. 6A:8-3.1(a)(5), a regulation concerning programs for gifted and talented students, should be found to be an unfunded mandate and in violation of Article VIII, section II, paragraph 5 of the New Jersey Constitution (the Amendment), as implemented by the Local Mandates Act, N.J.S.A. 52:13H-1 to -22 (the LMA). The Board claims that the

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<sup>1</sup> The Rockaway Township Board of Education has filed two complaints: the instant complaint, COLM-01-15, challenging the gifted and talented regulation, and a complaint challenging a number of state statutes affecting the educating of students with Dyslexia, COLM-02-15. In both complaints, the Board seeks a determination by the Council that the legislative and regulatory enactments are unfunded mandates. To accommodate the parties, the Council consolidated the complaints for oral argument, which was held on July 13, 2016. The Council is required, however, to issue separate decisions for each complaint, as consolidation of the complaints is only permitted in regard to the same provision of a statute or regulation that is challenged by more than one government agency. See N.J.S.A. 52:13H-12; Council on Local Mandates, Rules of Procedures, Rule 11, Consolidation (Council may consolidate “when complaints are filed by more than one governing body, mayor, county executive, or local board [when complaints] relate to the same provision of a statute or to the same part of a rule or regulation.”).

regulation at issue imposes “onerous burdens on local school boards without authorizing any resources to offset the additional direct expenditures required for implementation of the required gifted and talented programs.” Put simply, the Board asserts that because the laws do not authorize resources to offset the additional direct expenses the Board has incurred, and will in the future incur, to implement the laws, the expenses must be paid by property taxes; accordingly, the Board asserts that the regulation is an unfunded mandate and should cease to be mandatory in its effect.

The Respondent, New Jersey Department of Education (the DOE), raises the following four points, arguing that the Board’s complaint should be dismissed because 1) the Council lacks jurisdiction to review the provisions of N.J.A.C. 6A:8-3.1(a)(5) because the gifted and talented program provision of the challenged regulation existed before the Council’s creation in 1996; 2) the gifted and talented program is not an unfunded mandate because it simply revised a long-established regulatory requirement; 3) the gifted and talented program is not an unfunded mandate because it implements a provision of the New Jersey constitution; and 4) the provisions of N.J.A.C. 6A:8-3.1(a)(5) do not constitute an unfunded mandate because it does not require school districts to make additional direct expenditures to implement the regulation and because it is not otherwise unfunded.

The issue is before the Council on cross-motions for summary decision. Summary decision is warranted when there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. R.4:46-2; Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); N.J.A.C. 1:1-12.5 (b) (substantially same standard in Office of Administrative Law proceedings). Here, no material facts are in dispute and the issue is ripe for summary decision. Without deciding the jurisdiction and other issues raised by the DOE in points 1-3 of its brief, the Council agrees with the DOE that the challenged regulation does not constitute an unfunded mandate because it does not require additional direct expenditures for

implementation of the regulation. Accordingly, the Council grants the DOE's motion and dismisses the Board's complaint.

### REGULATORY BACKGROUND

The history of the challenged regulation, N.J.A.C. 6A:8-3.1(a)(5), begins in 1976. The State Board of Education (State Board) adopted a new chapter of the New Jersey Administrative Code titled Thorough and Efficient System of Free Public Schools. 8 N.J.R. 58. The regulations, among other things, would require each school district to adopt an educational program that would "provide educational opportunities for exceptionally gifted and talented pupils." 8 N.J.R. 60. The rule was readopted, substantially unchanged, in 1984. 16 N.J.R. 597.

Jumping ahead following several subsequent readoptions of the rule, in 2000 the rule was revised and recodified. 32 N.J.R. 395 (a), 32 N.J.R. 1528(a). On May 1, 2000, the State Board promulgated N.J.A.C. 6A:8, which, among other revisions, "implemented the Core Curriculum Content Standards . . . to ensure that all providers of public education focus on the Core Curriculum Content Standards and specific academic results expected of all students." 32 N.J.R. 395 (a). This included responsibility to challenge gifted and talented students. Ibid.

Following subsequent amendments, the current regulation, the one challenged by the Board, reads as follows:

- (a) District boards of education shall ensure that curriculum and instruction are designed and delivered in such a way that all students are able to demonstrate the knowledge and skills specified by the [Core Curriculum Content Standards] and shall ensure that appropriate instructional adaptations are designed and delivered . . . for students who are gifted and talented.

....

5. District boards of education shall be responsible for identifying gifted and talented students and shall provide them with appropriate instructional adaptations and services.

i. District boards of education shall make provisions for an ongoing K-12 identification process for gifted and talented students that include multiple measures.

ii. District boards of education shall provide appropriate kindergarten-through-grade 12 (K-12) educational services for gifted and talented students.

iii. District boards of education shall develop appropriate curricular and instructional modifications used for gifted and talented students indicating content, process, products, and learning environment.

iv. District boards of education shall take into consideration the Pre-K-Grade 12 Gifted Program Standards of the National Association for Gifted Children in developing programs for gifted and talented students.

[N.J.A.C. 6A:8-3.1(a)(5).]

### THE BOARD'S EXPENSES

As an exhibit to its brief, the Board included a certification of Donnamarie Palmiere, the Board's business administrator. Palmiere outlined the steps the Board had taken to address N.J.A.C. 6A:8-3.1(a)(5). Referring to the DOE's answers to frequently asked questions (FAQs),<sup>2</sup> Palmiere certified that the Board uses multiple measures to identify gifted and talented students, including extensive testing. Further, the Board employs a full-time gifted and talented teacher, who develops curriculum for students in the program.

Palmiere certified to the costs the school district has expended for the 2014-15 school year for the Gifted and Talented program.<sup>3</sup> The Board anticipated \$89,361 annually to implement the gifted and talented program. Of this, \$84,000 was

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<sup>2</sup> [http://www.state.nj.us/education/genfo/faq\\_gandt.htm](http://www.state.nj.us/education/genfo/faq_gandt.htm)

<sup>3</sup> At oral argument, the Board acknowledged having only minimal expenditures, with "no compelling program" in prior years. It was not until the Board received a visit from state representatives, who told the Board it should be doing more than it had been doing to educate Gifted and Talented students, that the Board hired a specific teacher for the program.

for the gifted and talented program teacher (\$60,935 – salary; \$22,794 – benefits; \$350 – travel expenses;), and \$5280 was for testing materials. The Board received state aid of \$2,709,004 against a \$48.5 million operating budget. Palmiere stated that the Board did not utilize state aid for any costs associated with the school district’s gifted and talented program. The Board therefore claims that its compliance with N.J.A.C. 6A:8-3.1(a)(5) has cost the Board nearly \$90,000, for which the regulation does not authorize any resources, thus constituting an unfunded mandate.

The DOE submitted a certification of Kevin Dehmer, the Executive Director of the New Jersey Department of Education’s Office of School Facilities and Finance. Dehmer certified, among other things, that the state prepares an adequacy budget, which is the state’s estimate of the cost of providing a thorough and efficient education. It is calculated by applying a base cost for each student at the elementary level, and adding weights that reflect the higher cost of educating students with different needs. He stated that costs for gifted and talented programs are included in the adequacy budget. They include a part-time teacher (0.2) along with professional development and substitutes for that teacher, and supplies and materials for the students. Those resources supplement the regular academic program in elementary schools; for higher grades, academic courses are offered at various academic levels.

### DECISION

In addressing the parties’ arguments, the Council is guided by the constitutional amendment that governs its decisions concerning allegations of local unfunded mandates. Article VIII, Section II, paragraph 5 of the New Jersey Constitution states:

any provision of law enacted on or after January 17, 1996, and with respect to any rule or regulation issued pursuant to a law originally

adopted after July 1, 1996, and except as otherwise provided herein, any provision of such law, or of such rule or regulation issued pursuant to a law, which is determined in accordance with this paragraph to be an unfunded mandate upon boards of education . . . because it does not authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law or rule or regulation, shall, upon such determination cease to be mandatory in its effect and expire.

Thus, the determination that a regulation is an unfunded mandate under the terms of the amendment requires that the claimant prove 1) a mandate on the government unit; 2) direct expenditures are required for implementation of the mandate; and 3) the regulation does not authorize resources to offset the required direct expenditures. In re Complaint filed by Ocean Township (Monmouth County) and Frankford Township, Aug. 2, 2002, at 5 (citing Amendment ¶ 5 (a)). Here, the Board has not met this test.

The challenged regulation speaks in broad, generalized terms. District boards are required to design and deliver curriculum and instructions for gifted and talented students “in such a way that all students are able to demonstrate the knowledge and skills specified by the Core Curriculum Content Standards.” N.J.A.C. 6A:8-3.1(a). District boards shall provide “appropriate K-12 educational services” and shall develop “appropriate curricular and instructional modifications” for gifted and talented students. Id. at 5(ii – iii). District boards shall “take into consideration” the Pre-K-Grade 12 Gifted Program Standards of the National Association for Gifted Children in developing programs for gifted and talented students. Id. at 5iv.

Put simply, the regulation gives school boards broad flexibility in deciding how to identify and educate its gifted and talented students. No direct expenditures are required by this regulatory language. The Board is to offer “appropriate” services and an “appropriate curriculum.” How the Board accomplishes these goals is up to the Board. The National Association Gifted Program Standards are just “to

be considered.” In the absence of a requirement for direct expenditures in the implementation of the regulation, which the Board has not shown, the regulation is simply not an unfunded mandate as defined in the Amendment. See In re Complaint filed by the Township of Blairstown, May 23, 2011, at 3 (N.J.S.A. 53:2-1 cannot be construed as unfunded mandate if no direct expenditures required to implement the statute).

Here, the principal expense the Board has incurred is for the teacher hired to teach gifted and talented students. As commendable as that may be, such an expenditure of funds is not required to implement the regulation. There are, no doubt, other potential, appropriate ways to educate gifted and talented students, without hiring a full-time additional teacher for that purpose. Indeed, the state’s model budget does not call for a full-time teacher.

The Board has a choice – how much to spend and how to spend it are discretionary budget choices that fall upon the responsibilities of the Board. Simply because the Board has chosen to expend substantial funds for the education of the district’s gifted and talented students does not equate to a requirement to have done so. The Board has not demonstrated that the regulation requires additional direct expenditures for its implementation.

Accordingly, the Council grants the motion of the DOE, denies the cross-motion of the Board, and dismisses the Board’s complaint.