

**IN THE MATTER OF A COMPLAINT FILED
BY THE HIGHLAND PARK
BOARD OF EDUCATION AND
THE BOROUGH OF HIGHLAND PARK**

Council on Local Mandates

Argued December 17, 2002

Decided January 31, 2003

Syllabus

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

In August 2002, the Highland Park Board of Education and the Borough of Highland Park (“Claimants” or “Highland Park”) filed a Complaint with the Council in which they allege that a 1997 regulation adopted by Respondent Commissioner of Education (“Commissioner”) pursuant to the Charter School Program Act constitutes an unfunded mandate. The regulation at issue provides for the creation of “regional” charter schools through a definition of “region of residence.” Highland Park claims that without the region of residence regulation, Respondent Greater Brunswick Charter School (“Greater Brunswick”), the regional Charter School that some Highland Park students attend, would not exist, and that the monies it has allocated to Greater Brunswick are additional expenditures within the meaning of the Local Mandates Act.

This is the second of two Complaints in which Claimants have raised a claim regarding the region of residence regulation. In its May 2000 decision, the Council dismissed without prejudice Claimants’ previous claim regarding that regulation, holding that although the Council had jurisdiction over the regulation, Highland Park’s claim was premature. In order to prove that the regulation was an unfunded mandate, the Council ruled, Highland Park must first prove that either (1) a certain number of its students attending Greater Brunswick would not have attended a single district charter school; or (2) in the absence of a regional charter school, no district charter school would have been created to fill the void. Claimants here attempt to meet the latter of the two standards of proof. The Commissioner and Greater Brunswick moved to dismiss this Complaint, and argue, *inter alia*, that the Claimants have failed to meet the required standard of proof. On December 17, 2002, the Council heard oral argument on the motions.

Held: The Claimants have failed to prove that a single district charter school would not have been created in the absence of the regional charter school. Based on the evidence before the Council, it is reasonable to conclude that if Greater Brunswick had not been permitted to operate as a regional charter school, at least some of the founders could or would have attempted to create a single district charter school. The evidence also supports the conclusion that creation of Greater Brunswick as a single district charter school was a viable option; nothing in the facts presented regarding the composition of its founders, its search for a suitable site or its student enrollment, establishes that it would not have been possible for Greater Brunswick to operate as a single district charter school.

Because it finds that there is no genuine issue as to any material fact, the Council GRANTS summary judgment in favor of Respondents Commissioner of Education and Greater Brunswick Charter School and the Complaint is DISMISSED with prejudice.

James L. Plosia Jr. argued the cause for Claimant Highland Park Board of Education (*Apruzzese, McDermott, Mastro & Murphy*, attorneys; *Lisa Kent, Courter, Kobert, Laufer & Cohen*, attorneys, and *Mr. Plosia* on the briefs).

Colleen E. Patterson argued the cause for Claimant Borough of Highland Park (*Rogut McCarthy PC*, attorneys).

Michael C. Walters, Deputy Attorney General, argued the cause for Respondent Commissioner of Education (*David Samson*, Attorney General of New Jersey, attorney; *Mr. Walters* on the brief).

Lois H. Goodman argued the cause for Respondent Greater Brunswick Charter School (*Carpenter, Bennett & Morrissey*, attorneys; *Ms. Goodman* on the brief).

Donna A. McBarron argued the cause for Respondent Edison Township Board of Education (*Wilentz, Goldman & Spitzer*, attorneys; *Ms. McBarron* on the brief).

William J. Palatucci argued the cause for amicus curiae New Jersey Charter Public Schools Association (*Dughi, Hewitt & Palatucci*, PC, attorneys; *Gary L. Riveles* on the amicus brief).

DECISION

I Procedural Background

Article VIII, section 2, paragraph 5 of the New Jersey Constitution (“Amendment”) and its enabling statute, the Local Mandates Act (“LMA”), provide that any provision of a law enacted on or after January 17, 1996, or any part of a rule or regulation issued pursuant to a law originally adopted after July 1, 1996, which is determined by the Council on Local Mandates (“Council”) to be an unfunded mandate, shall cease to be mandatory in its effect and shall expire. See N.J. Const. art. VIII, § 2, ¶ 5 (a); N.J.S.A. 52:13H-2. The LMA authorizes the Council to review complaints from school districts, municipalities, and counties to determine whether the statutes and regulations over which the Council has jurisdiction constitute unfunded mandates. See N.J.S.A. 52:13H-12.

Because it lacks jurisdiction over the Charter School Program Act of 1995 (“CSPA”), N.J.S.A. 18A:36A-1 to -18, which was signed into law six days prior to the effective date of the Council’s jurisdiction, the Council has held that it lacks jurisdiction over mandatory regulations enacted pursuant to the CSPA that “merely implement and execute the plain language of the statute.” See In re Board of Education and the Borough of Highland Park (“Highland Park I”) (August 5, 1999) at 19. Conversely, regulations enacted pursuant to the CSPA that are not mere implementation and execution of the CSPA are subject to the Council’s jurisdiction. Id. at 19-20.

In 1997, the Commissioner of Education adopted a regulation that provides for “regional,” as opposed to single district, charter schools through a definition of “region of residence” that provides that the term “region of residence” means “contiguous district boards of education in which a charter

school operates and shall be the charter school's district of residence." See N.J.A.C. 6A:11-1.2. The Council has jurisdiction over this region of residence regulation, because it does more than directly "implement and execute the plain requirements" of the CSPA. See Highland Park I at 19.

On October 29, 1998, the Highland Park Board of Education and the Borough of Highland Park ("Highland Park" or "Claimants") filed a complaint claiming that, by allowing the creation of "regional" charter schools, such as the Greater Brunswick Charter School ("Greater Brunswick"), the region of residence regulation created an unfunded mandate. Specifically, Highland Park argued that the vast majority of its students attending Greater Brunswick are doing so only because it is a "regional," as opposed to a district, charter school, and since it is cheaper for Highland Park to educate its students in its own school system, the creation of the regional charter school constitutes an unfunded mandate.

On May 11, 2000, the Council held that Highland Park's challenge to the region of residence regulation, although within the Council's jurisdiction, was premature inasmuch as the evidence proffered was "essentially speculative" and thus "provide[d] an insufficient basis . . . to find an unfunded mandate." See In the Matter of Complaints Filed by the Highland Park Board of Education and the Borough of Highland Park ("Highland Park II") (May 11, 2000) at 15. Accordingly, we dismissed that portion of the complaint without prejudice. Id. at 16. We further specified that

comparing the cost of educating students in the Highland Park public school system versus the regional charter school would be relevant *only* if Highland Park were to prove that (1) a certain number of students attending Greater Brunswick would not have chosen to attend a district charter school; *or* (2) in the absence of a regional charter school, no district

charter school would have been created to fill the void.

[Id. at 15-16 (emphasis in original)]

On August 12, 2002, Claimants filed a Joint Complaint requesting that the Council find that the region of residence regulation constitutes an unfunded mandate pursuant to N.J.S.A. 52:13H-12. On October 25, 2002, Claimant Highland Park Board of Education filed supporting materials and a memorandum of law supporting the Joint Complaint (“Highland Park Memorandum”). On November 22, 2002, Respondent Greater Brunswick and Respondent Commissioner of Education (“Commissioner”)¹ filed motions to dismiss, with briefs in support thereof. On December 10, 2002, Claimant Highland Park Board of Education and Respondent Edison Township Board of Education filed briefs in response to the motions to dismiss.

On December 17, 2002, the Council conducted a hearing on Respondents’ motions. Because the motions rely on facts that go beyond the pleadings, we treat them as motions for summary judgment, in accordance with our decision in Highland Park I, supra, at 12 (quoting Jersey City Educ. Ass’n v. City of Jersey City, 316 N.J. Super. 245, 254 (App. Div. 1998)). Summary judgment is appropriate where the pleadings, together with any supporting documentation, create no “genuine issue as to any material fact.” Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 529 (1995). Only disputed issues of fact of a “substantial” nature qualify as “material.” Id. If one party must prevail as a matter of law, irrespective of the resolution of any factual dispute, summary disposition should be granted on behalf of the moving party. Id. at 533.

¹ “Respondents,” as used herein, refers to the Commissioner and Greater Brunswick only, and does not include Respondent Edison Township Board of Education.

II Jurisdictional and Procedural Issues

Briefly, we address Respondents' jurisdictional and procedural arguments that we find are without merit. First, Greater Brunswick argues that subjecting the region of residence regulation to the Council's jurisdiction would contradict the decisions of the Appellate Division and the Supreme Court of New Jersey in In re Greater Brunswick Charter School, 332 N.J. Super. 409 (App. Div. 1999), aff'd, 164 N.J. 314 (2000) ("Greater Brunswick"). As we determined in Highland Park I, supra, the Appellate Division's decision in Greater Brunswick, later affirmed by the New Jersey Supreme Court, recognized the Commissioner's discretion to create regions of residence. Conversely, in the matter presently before it, the Council has exclusive jurisdiction to decide whether the region of residence regulation creates an unfunded mandate. This is an issue totally distinct from that concerning agency discretion addressed by the Appellate Division and the New Jersey Supreme Court. Thus, a determination by the Council that the region of residence regulation creates an unfunded mandate would not conflict with any state court decision concerning charter schools.

Greater Brunswick and Commissioner also claim that the Council should invalidate a statutory or regulatory provision only if it creates an unfunded mandate *on its face*, not as applied in any given situation. Respondents rely on the LMA and the Amendment, but those provisions fail to support their position. The language of the LMA does not suggest that regulatory challenges should be evaluated facially to determine the existence of an unfunded mandate. The LMA directs the Council to evaluate whether a subject rule, regulation or statutory provision constitutes an unfunded

mandate “upon the [complaining] county, municipality or school district,” not all counties, municipalities or school districts. See N.J.S.A. 52:13H-12. In addition, the order of proof specified by the Council in Highland Park II, supra, presupposes the need to proffer specific facts to demonstrate the imposition of additional direct expenditures by CSPA regulations. The Council has never required that, in order to prevail, a claimant must prove that a regulation constitutes an unfunded mandate for all school districts in all circumstances.

III Merits of the Complaint

Claimants request that we revisit Highland Park’s claim, first raised in its 1998 Complaint in Highland Park I, that the region of residence regulation constitutes an unfunded mandate. Mindful of our May 2000 decision, the Claimants have framed their argument around the disjunctive test of Highland Park II, supra. Prong one of the test requires that Claimants demonstrate that “a certain number of students attending Greater Brunswick would not have chosen to attend a district charter school.” Claimants have offered no particularized evidence demonstrating this fact. Instead, Claimants focus on the second prong, contending that if the regional charter school model were unavailable to the founders of the Greater Brunswick, no district charter school would (or could) have been created to fill the void. In their motions to dismiss, Respondents Greater Brunswick and Commissioner contend that Claimants have failed to meet their burden since there is sufficient evidence to infer that, had the regional model been unavailable, a single district school would have been proposed in its place.

The evidence contained in the briefs and the certifications of various parties, including several of Greater Brunswick's founders, focus on two distinct issues: first, the founders' interest in and willingness to propose and operate Greater Brunswick as a single district school; and, second, the viability of any such efforts. We will address each in turn.

1. The founders' vision

First, Claimants assert that the Greater Brunswick founders insisted on establishing a regional charter school because "[t]heir political and educational philosophy made a regional, multi-district school an essential element of their vision." Highland Park Memorandum at 5. A September 26, 1996, letter to Commissioner of Education Leo Klagholz supports this contention, as the founders who signed the letter detail the advantages that they perceive in a "multi-district" model, including: student diversity, diffusion of the financial burden on school districts, and the ability of families from smaller school districts "which might not be able to financially support a separate charter school . . . [to] participate in school reform." Klagholz letter, attached as Exhibit C to the Certification of Martha Blom (Highland Park Memorandum) ("Blom Certification") at 1.

Founder Martha Blom also reports that the founders operated consistently under the assumption that Greater Brunswick would be a regional school, in part so that founders' children from all four towns originally² comprising the region of residence would have an equal opportunity to gain admission. Blom Certification at ¶ 10. The charter school application reflects this conviction, listing "multi-district enrollment" as one of "three broad themes that define" Greater

² Milltown was originally part of the region of residence but was ultimately eliminated.

Brunswick. Final Application of the Greater Brunswick Charter School, attached as Exhibit A to Blom Certification, at 6. In fact, the founders refused to abandon the regional model, even after the State Board of Education revoked Greater Brunswick's charter in March 1997 based in part on concerns about its failure to designate a single district of residence.³ Andrew Fisk, one of the founders most intimately involved in the creation of the school, observed that Greater Brunswick's regional approach makes it "unique." Fisk Certification, attached as Exhibit C to Certification of Marylu Simon (Highland Park Memorandum) ("Simon Certification"), at ¶ 54.

Based on the foregoing, it is undisputed that the founders wanted Greater Brunswick to be a regional, as opposed to a single district, charter school. However, the critical inquiry is not which model the founders preferred but, rather, whether they could and/or would have chosen and been able to form a single-district school, if the regional model were not available. Whereas Ms. Blom asserts that the regional model was indispensable, founders Richard Pressler and Lori Freedman contend otherwise. Mr. Pressler, who is currently the Executive Director of Greater Brunswick, states that the founders sought to create a regional school because that model furthered their philosophical and pedagogical goals and the State of New Jersey assured them that their application would not be disqualified based on its "regional status."⁴ Certification of Richard A. Pressler (Brief of

³ "[W]ithout a district of residence," the Board wrote, "the [CSPA] cannot be properly implemented, and the statute does not make any provision for establishing a multi-district charter school." In the Matter of the Grant of the Charter School Application of the Greater Brunswick Regional Charter School, Middlesex County, attached as Exhibit A to Simon Certification, at 9.

⁴ Andrew Fisk noted, in this regard, that the State Department of Education assured a Greater Brunswick delegation at a November 1996 meeting that "a 'region of residence' for the Charter School would be permitted by a ruling of the Attorney General." Fisk Certification at ¶ 21.

Respondent Greater Brunswick) (“Pressler Certification”) at ¶ 7. However, if the circumstances were less favorable, they “simply would have switched gears and applied for a single district charter.” Id.

Founder Lori Freedman concurs. She notes that it was not the school’s regional status that attracted her but rather its mission and emphasis on things such as “small student-teacher ratios, teacher empowerment, strong parental involvement, and authentic performance-based assessment.” Certification of Lori Freedman (Brief of Respondent Greater Brunswick) (“Freedman Certification”) at ¶ 4. Her dedication to the creation of the school would have been no different, she insists, if the school had been originally conceived as a single district school, or if the founders had recast it as such after the rescission of the first charter. Id. at ¶¶ 6, 12.

Based on the foregoing, the Council finds that, if the founders were barred from forming a regional school, at least some could and/or would have attempted to recreate Greater Brunswick as a single district school. The single district model would not be inconsistent with the three themes identified by the founders in their Final Application: child-centered learning, unique degrees of parental involvement, and multi-district enrollment. Final Application at 6. Claimants’ contention that the inclusion of “multi-district enrollment” as a goal renders the single district model unsuitable is inaccurate. While single district schools cannot guarantee spots for applicants residing outside the district, they are free to open their enrollments to non-residents, just as Greater Brunswick has opened its doors to students from six municipalities outside the region of residence. Pressler Certification at ¶¶ 12-13. Moreover, even the regional model did not guarantee spots for all of the founders’ children. In the event applications exceeded the number of slots available, the founders

intended to use a random lottery system to determine who, among the qualified applicants, would be offered a seat. Klagholz letter at 2.

The viability of recasting the school in a different mold is, however, a different matter. If Greater Brunswick were not able to operate as a single district school, the regional model would become indispensable. If this fact were established, then, based on the order of proof specified in Highland Park II, supra, Claimants would have the opportunity to demonstrate, through budgetary expenditures, that the region of residence regulation is an unfunded mandate.

2. Greater Brunswick's Viability as a Single District Charter School

Claimants proffer several arguments in support of their contention that Greater Brunswick could and/or would not have been viable as a single district school. First, they assert that “[t]he organization of Greater Brunswick required the resources of a collaborative, regional effort. In the absence of a regional effort, no district school could have been created to fill the void.” Highland Park Memorandum at 31-32. It is true that the founders came from all four of the originally identified districts. Of the 24 founders for whom a home district is identified in the application materials, nine identify New Brunswick, twelve, Highland Park, one, Edison and two, Milltown. Final Application at 13-16; Greater Brunswick Programmatic Addendum to Final Application, attached as Exhibit B to Blom Certification, at 2-3. While this certainly demonstrates a breadth of participation across the region of residence, it does not suggest, in and of itself, that a single district school could and/or would not have been feasible. It is possible, for example, that the nine founders from New Brunswick or the twelve from Highland Park could and/or would have banded together to form a single district school within their individual districts.

The founders of a single district school need not, moreover, include more than one parent from that district. See In re Charter School Application of Englewood, 320 N.J. Super. 174, 195-197 (App. Div. 1999), aff'd, 164 N.J. 316 (2000). Thus, it is more likely than not that some of the Greater Brunswick founders would have continued to support a single district school located in a neighboring district. In fact, Lori Freedman, a founder residing in Highland Park, states in her certification that, if the school were reformulated as a single district school in New Brunswick, Edison or elsewhere, she “would have remained committed to the project” and “would have applied to send [her] children there.” Freedman Certification at ¶ 12. Ms. Freedman adds that she “believe[s] many of the other founders felt the same way and similarly would have remained involved.” Id.

Second, the Claimants argue that a district school could and/or would not have been formed in Highland Park at any rate because there was no suitable facility available. Highland Park Memorandum at 23, 32. They observe that the Greater Brunswick organizers were able to identify only two potential sites. One, a former industrial site, required renovations that were too costly. The second, a former parochial school, required the consent of the church, “which could not be obtained.” Id. at 23. Respondent Greater Brunswick believes that either of these two sites may have ultimately proved viable. Brief of Respondent Greater Brunswick at 28. Regardless of who is correct about the viability of these two sites, they cannot be the only buildings within the entirety of the region of residence where the single district school could be located. Claimants’ focus, in this regard, on Highland Park is inapposite, since New Brunswick and Edison are equally appropriate venues for the school, and Claimants do not suggest that no facilities exist there that could house the

school.

Finally, Claimants contend that “declining enrollments and lack of interest in charter schools in Highland Park show that a single district charter school would never have been created.” Highland Park Memorandum at 32. In support of this argument, Claimants point to the declining number of students from Highland Park attending Greater Brunswick – from 19 during the school’s first year in 1998-99 to 4 (Respondent Greater Brunswick claims 5) in the current academic year. In addition, Claimants note that Highland Park students have not attended any charter school other than Greater Brunswick, even though at least two operate nearby, and no single district schools have opened in any of the districts within the region, despite the favorable demographics of New Brunswick, an *Abbott* district. *Id.* at 32-34.

At most, Claimants’ data show that it would have been difficult to create a single district school in Highland Park. However, as we stated above, the single district school that would replace Greater Brunswick need not be located in Highland Park. In fact, given the preponderance of currently enrolled students from New Brunswick – 89 out of 154 (Pressler Certification at ¶¶ 12-13) – that would seem the most logical venue. The fact that no single district school has operated there to date does not connote an aversion to the single district model, but is a result of the presence of Greater Brunswick. We also find that a single district school in New Brunswick with the same mission and focus as Greater Brunswick would attract many non-resident students. Since at present 33 of Greater Brunswick’s 154 students reside outside the region of residence, there is no reason to expect that they would be any less interested in the school if it were a single district, as opposed to regional, charter school; either way, they would be considered “out of district” students.

Conclusion

We have carefully weighed the arguments on both sides and find no genuine issue as to any material fact raised by the Complaint and supporting documentation. Accordingly, we grant summary judgment in favor of Respondents Commissioner of Education and Greater Brunswick Charter School. The Complaint is hereby dismissed with prejudice.

So ordered.

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The above decision was adopted by the Council and issued on January 31, 2003. Council Members Marie L. Garibaldi (Chair), Dominick A. Crincoli, Timothy Q. Karcher, Eric E. Martins, Thomas H. Neff, Ronald J. Riccio and Janet L. Whitman join in the written decision. Council Member Kimberly Deal Phillips did not participate in the decision.