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VIA ELECTRONIC MAIL AND LAWYERS SERVICE

Honorable John A. Sweeney, A.J.S.C. (Ret.), Chairperson
New Jersey Council on Local Mandates
P.O. Box 627
Trenton, New Jersey 08625-0627

Re: *In re the Complaint of the Springfield Board of Education*
Docket No.: 3-11
Our File No.: 08083.55978

Dear Judge Sweeney:

As you know, we are counsel to the Springfield Board of Education (the "Board") in the above matter. Please accept this letter brief in response to the October 13, 2011 letter brief on behalf of the New Jersey Network of Catholic School Families and the New Jersey Catholic Conference, *amici* in this matter (the "*amici*").

I. THE BOARD OBJECTS TO THE VIOLATIONS OF ITS DUE PROCESS RIGHTS IN CONNECTION WITH THE APPEARANCE OF THE *AMICI*.

In furtherance of its October 7, 2011 letter to the Council, the Board must again emphasize its objection to the appearance of the *amici* in this matter. Contrary to the mandate of Rule 7(d) of the Council's Rules of Procedure, and tenets of basic due process, the Board was not copied on the *amici*'s October 5, 2011 request to appear in this matter, nor was any copy of the request circulated by the Council prior to the Council's vote to allow the appearance. More troubling still, based upon the

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reference in the *amici* brief to an October 13, 2011 letter from NJAIS to the Council, it appears that there is at least one other document submitted to the Council which the Board has not been given the opportunity to review. Understanding that the Council is not a judicial body, the Board should still have the benefit of reviewing a copy of any papers the Council has received in connection with any submissions by parties or *amici* in this case. These ex-parte communications with the Council violate the most basic principles of fairness and due process, as well as the Council's own Rules of Procedure.

In addition, permitting the appearance of the *amici* a mere two weeks before the hearing in this matter -- which has been scheduled for more than ten weeks -- contravenes the Council's own deadline of June 6, 2011 for the appearance of *amici*.

The Board objects to these procedural violations and the appearance of the *amici* in this matter.

II. THE NEW JERSEY CONSTITUTION DOES NOT MANDATE TRANSPORTATION OF STUDENTS.

With regard to the substance of the *amici* brief, the Board is compelled initially to dispel the erroneous notion, raised several times in the brief, that the New Jersey Constitution requires school districts to transport students. This is simply not the case.

The *amici*'s interpretation of art. VIII, § 2, ¶ 5 and art. VIII, § 4, ¶ 3 of the New Jersey Constitution is misguided. The first provision has nothing to do with transportation. Rather, it creates the Council on Local Mandates and outlines the parameters of the Council's jurisdiction. The second provision (the "Transportation Clause") states that, "[t]he Legislature **may**, within reasonable limitations as to distance to be prescribed, provide for the transportation of children within the ages of five to eighteen years inclusive to and from any school." (Emphasis supplied). This provision permits,

but does not require, the Legislature to provide for transportation to and from school. Given the permissive language, this provision simply cannot be reasonably interpreted to mandate anything.

Without actually citing to any statement, the *amici* abstractly assert that “statements” made at the 1947 Constitutional Convention “make clear that it is the responsibility of the local district to provide transportation.” An examination of the actual statements made with regard to the Transportation Clause, however, illuminates that this is completely inaccurate. Indeed, discussions among the delegates at the Convention explicitly acknowledged the permissive, as opposed to mandatory, nature of the Transportation Clause. In considering the Transportation Clause, one delegate explicitly noted “that that proposal is permissive. The Legislature may do something. It permits the Legislature to do what the Legislature has already asserted that it had the right and power to do. . . In other words, if the Legislature in its wisdom does not see fit to enact legislation such as is proposed here, or, to turn it around, sees fit to repeal the present legislation, this clause leaves it perfectly free to do so. . . .” Another delegate clarified that, “this merely eliminates the danger that in the future a judicial interpretation in this State may find that granting little children the right to ride on a bus to school will be held contrary to our State Constitution. That’s all it does. It doesn’t go beyond that either.” *N.J. Constitutional Convention*, Vol. 1, p. 718 (August 21, 1947).

The discussion during the Convention made it clear: the Transportation Clause was included in the 1947 Constitution for the sole purpose of ending the debate as to whether public funding for transportation to and from private or parochial schools offended the First Amendment of the Constitution. It provides nothing more, and it certainly does not require school districts to transport either public school or non-public school students. The *amici*’s contention that the Constitution

“confers responsibility” on a local board of education to provide for non-public school transportation has no basis in reality.

III. THE CONSTITUTIONAL DIRECTIVE OF “STATE MANDATE/STATE PAY” NECESSARILY CREATES A LINK BETWEEN THE MANDATE TO PROVIDE TRANSPORTATION TO NON-PUBLIC SCHOOL STUDENTS AND A SCHOOL DISTRICT’S RECEIPT OF STATE FUNDS FOR TRANSPORTATION.

The *amici* curiously contend that the mandate to pay aid in lieu of transportation is “a statutory obligation irrespective of any funds in the state budget for education.” But that argument wholly ignores the constitutional directive of State mandate/State pay and the reasons for creation of the Council on Local Mandates in the first instance.

The New Jersey Constitution defines an unfunded mandate as a law, rule or regulation that “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.” N.J. Const. of 1947, art. VIII, § 2 (1996). Indeed, the notion of State mandate/State pay, which the Council has repeatedly recognized in its decisions, necessarily creates a link between a school district’s receipt of State funds and the mandate to provide transportation or aid in lieu of transportation to non-public school students.

The assertion by the *amici* that the receipt of State funds in past years has been “a windfall” for school districts that are required by State law to transport students is preposterous. In essence, the *amici* suggest that there is no such thing as an unconstitutional unfunded mandate because, regardless of the explicit language of the Constitution and a body of case law by the Council on Local Mandates

to the contrary, a local governmental body is required to pay for anything and everything a law or regulation requires, even when it receives no resources from the State to do so. This is incorrect.

The *amici*'s argument regarding federal funding pursuant to No Child Left Behind ("NCLB") and the Individuals with Disabilities Education Improvement Act ("IDEA") is similarly befuddling. The present matter before the Council has absolutely nothing to do with federal education dollars. Federal law and federal dollars are not, and have never been, at issue here. Moreover, the Board has never made the argument, in any of its filings with the Council, that funding for aid in lieu of transportation is a "pass-through."

IV. THE BOARD'S CHALLENGE TO THE AID IN LIEU MANDATE IS NOT DISCRIMINATORY.

The *amici* assert that the Board's challenge to its transportation obligations to non-public school students while it still provides transportation to public school students is "discriminatory." They allege that the Board is creating an "artificial distinction" between students based on nothing more than the fact that one group of students attends the Springfield public schools and another group does not.

The "distinction" between public and non-public school students with regard to the provision of transportation by a public school district is not discriminatory. Neither is the Board "creating" that distinction. To the contrary, the Legislature itself created that distinction when it drafted and enacted N.J.S.A. 18A:39-1, which sets forth -- in two completely separate paragraphs -- a board of education's transportation responsibilities for public school students on the one hand, and non-public school students on the other. Those responsibilities are not, and have never been, identical. A local board of

education is required to provide transportation to students who live more than two miles (elementary students) or two and a half miles (secondary students) from their public school of attendance -- regardless of cost. With regard to non-public school students, a district is required to provide transportation within the same distance limitations but, if it cannot do so for the statutory cap amount or less, it must write a check to the non-public school families in the amount of the cap.

It is unsurprising that State law treats public and non-public school students differently in certain respects. Naturally, boards of education provide many services to students who attend their public schools that they are not required to provide to non-public school students -- based entirely on the fact that non-public school students have chosen not to avail themselves of the free education the districts offer. By way of example, non-public school students residing in Springfield are not entitled to participate in Springfield's music and athletic programs. This makes perfect sense -- it is not an "artificial distinction." Those students do not attend Springfield public schools. This differential treatment is not discriminatory.

Though the *amici* do not acknowledge the difficulties of the current economic climate for local boards of education, it is clear that the last several years have presented serious challenges for school boards, as they endeavor to provide those services that are statutorily mandated while, at the same time, remaining mindful of the financial struggles of their local taxpayers. The Board has been forthright from the start that, in examining all of its expenses with great scrutiny, it took a careful look at those expenses that require it to spend money on students who are not enrolled in the Springfield schools. Indeed, one hundred percent of the burden of complying with the State's, as well as the Constitution's, mandates have fallen on the shoulders of the taxpayers of Springfield for the last two

years. As such, it elected to appeal the Department of Education's determination that the Board must transport or pay aid in lieu to non-public school students, although it no longer receives State aid, through a lawful channel made available to it by the New Jersey Constitution -- the Council on Local Mandates.

V. THAT NON-PUBLIC SCHOOL PARENTS MAY BE "ECONOMICALLY HARMED" BY A RULING IN THE BOARD'S FAVOR AND THE EFFECT OF AN INFLUX OF STUDENTS TO THE SCHOOL DISTRICT ARE COMPLETELY IRRELEVANT TO A DETERMINATION OF WHETHER THE AID IN LIEU MANDATE IS AN UNCONSTITUTIONAL UNFUNDED MANDATE.

Predictably, the *amici* argue that a ruling in the Board's favor will "economically harm" non-public school families who rely on the \$884 per student to make transportation arrangements for their children. They contend that if aid in lieu of transportation is no longer available, enrollment in non-public schools will decrease, and an influx of students to the district's public schools will harm Springfield taxpayers and the Board through an increase in class size and space and staffing needs.

These arguments are both highly speculative and completely irrelevant to a determination of whether the non-public school transportation mandate is an unconstitutional unfunded mandate -- the sole issue before the Council. While the Board does not suggest the Council cannot be concerned with the consequences of any decision it may make, the Constitution is clear: if a law, rule or regulation is determined by the Council to be an unfunded mandate, it "shall . . . cease to be mandatory in its effect and expire." The focus here is on whether local taxpayers are being forced to bear the burden of an unconstitutional mandate by the State. This challenge is not, and has never been, about the non-public school families. Similarly, it is not about the effect that an "influx" of students might have on the

Board. The Board is obligated under the law to provide all resident students who attend Springfield public schools with a free and appropriate public education. If the effect of cessation of the non-public school transportation obligation is that additional students enroll in the Springfield public schools, the Board will provide the same quality education to those students. This is simply not before the Council.

Of course, if the State is persuaded that this is a legitimate concern, it can solve the problem -- it can require the transportation funding at issue.

VI. THE RELIEF THE BOARD SEEKS IS NARROW.

The *amici* appear to believe that the Board is challenging only the obligation to provide aid in lieu of transportation to non-public school students, but not the obligation to provide transportation itself, if such transportation can be accomplished for under the cap amount. This is not the case. The Board is challenging, as a whole, its transportation obligations to non-public school students -- including transportation and aid in lieu.¹ The relief the Board seeks is actually quite narrow. The Board is requesting that the Council strike down only the portion of N.J.S.A. 18A:39-1 that requires a local board of education, notwithstanding a lack of funding from the State, to provide transportation or aid in lieu of transportation to non-public school students -- leaving the decision whether to do so in the capable hands of local boards of education. Contrary to the doomsday scenario posited by the *amici*, the instant challenge has never had any relation to “nursing services, textbook aid, special

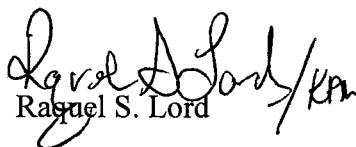
¹ It is worth noting that, as transportation costs continue to rise, it has become increasingly difficult in recent years for the Board to provide bussing to non-public school students for the cap amount or less. As such, the practical effect of a ruling in the Board’s favor will center almost entirely on the payment of aid in lieu of transportation.

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education,” or “educational media services, or teacher benefits, or debt service,” which the *amici* inexplicably claim will be next to go if the Board’s challenge is successful. The Board’s challenge falls squarely, and only, on the requirement that it provide transportation or aid in lieu to non-public school families.

Thank you for your attention to this matter. Should the Council require any additional information from the Board prior to Tuesday’s hearing, please do not hesitate to contact us.

Respectfully submitted,


Raquel S. Lord

RSL:rjs

cc: Michael Davino, Superintendent of Schools
Matthew Clarke, Business Administrator/Board Secretary
Pat Venezia, Board President
Shawn D. Slaughter, Executive Administrator & Coordinator
Christopher Huber, Deputy Attorney General
Christopher Cerf, Acting Commissioner of Education