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VIA ELECTRONIC AND REGULAR MAIL

The 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:

We are counsel to the Springfield Board of Education (the "Board") in the above matter. Please accept this letter brief as the Board's submission in opposition to respondent Department of Education's ("DOE") Motion for Summary Decision. For the following reasons, the Board respectfully requests that the Council on Local Mandates (the "Council") deny the DOE's motion and strike down *N.J.S.A.* 18A:39-1 and 18A:39-1a as unconstitutional unfunded mandates.

STATEMENT OF FACTS

This matter arises out of the statutory mandate that local school districts that provide transportation for their own students also provide transportation, or "aid-in-lieu" of transportation, for non-public school students residing within the district. In past years, the Board received, as part of its formula aid from the State, transportation aid that was ostensibly designed to partially offset the cost of providing transportation or aid-in-lieu to these non-public school students, but also to offset the cost of

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providing other State-mandated transportation for students attending publics school. In many of those years, the State transportation aid received by the Board was woefully insufficient to cover the amount paid by the Board for transportation and aid-in-lieu of transportation for those students, much less the entirety of the Board's State-mandated transportation obligations. (*See* Certification of Matthew A. Clarke (hereinafter "Clarke Cert.") at ¶¶ 7-15.) However, in the State budget for fiscal year 2011, the Board received no funding from the State to cover these costs. Indeed, it received no formula aid at all. (*Id.* at ¶ 16.) As a result, the Board, and therefore the local taxpayers, have been forced to shoulder the entire financial burden of this transportation mandate -- amounting to $131,716.00 for non-public school transportation the 2010-2011 school year alone. (*Id.* at ¶¶ 17-19.) Based on communications it has received from the DOE, the Board understands that the projected State budget for fiscal year 2012 (covering the 2011-2012 school year) likewise contains no transportation aid for the Board. (*Id.* at ¶ 21.)

Since the 2002-2003 school year, the Board has received at the end of each school year a reimbursement check purporting to help offset the costs of providing transportation or aid-in-lieu for non-public school students; that reimbursement in fact does little to counterbalance the overall cost of providing such transportation or aid-in-lieu -- a mandate the Board, through the local taxpayers, is now subsidizing entirely on its own. (*Id.* at ¶ 20.) Indeed, the DOE admits that reimbursement amount is meant only to represent the difference between the current aid-in-lieu cap amount as set by the DOE and the cap amount as it existed in the 2001-2002 school year, multiplied by the number of students reported on the Board's District Report of Transported Resident Students ("DRTRS") who received aid-in-lieu payments. The State has never funded, and therefore the Board has always been forced to

subsidize, the difference between the current cap amount and the cap amount as it existed in 1996, the year the New Jersey Constitution was amended to give the Council on Local Mandates the authority to review and strike down laws, rules, or regulations that impose unconstitutional unfunded mandates. (*Id.* at ¶ 20.) Indeed, the State has never funded this mandate in any amount prior to 2001.

For these reasons and the reasons that follow, the Board requests that the Council deny the DOE's Motion to Dismiss.

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

The Council has made clear in prior opinions that it reviews requests for summary disposition "with great caution." *In the Matter of Complaints Filed by the Highland Park Board of Education and the Borough of Highland Park ("Highland Park I"),* decided August 5, 1999, at 13. A party bringing a motion for summary decision must meet a high burden because decisions of the Council are political determinations and are final. *See N.J.S.A.* 52:13H-18; *see also Highland Park I* at 7. The Council will grant such a motion only if it concludes that "no further factual information would be relevant to its decision." *In the matter of a Complaint filed by Ocean Township (Monmouth County) and Frankford Township ("Ocean/Frankford"),* decided August 2, 2002, at 5.

In the present matter, it would be premature for the Council to dismiss the Board's Complaint at this juncture. The DOE has not demonstrated that no further factual information is necessary for the Council to make a decision. Indeed, the DOE has provided no valid factual or legal basis to dismiss the Board's Complaint. Accordingly, the Council should deny the DOE's motion and allow this matter to proceed to a hearing.

II. THE COUNCIL HAS JURISDICTION TO REVIEW THE STATUTORY PROVISIONS AT ISSUE.

Despite the DOE's argument to the contrary, the Council has the authority to review both *N.J.S.A.* 18A:39-1 and 18A:39-1a.

The Local Mandates Act ("LMA") authorizes the Council to review and rule upon statutory provisions enacted on or after January 17, 1996 and "any part of a rule or regulation originally adopted after July 1, 1996 pursuant to a law regardless of when that law was enacted." *N.J.S.A.* 52:13H-12. "The obvious purpose of this legislative provision . . . is to prevent the Council from becoming involved in fiscal policymaking." *Ocean/Frankford* at 12. Nonetheless, the Council has not hesitated in the past to review statutes in place prior to 1996 when a change in State policy or practice subsequently shifts the financial burden of a mandate from the State to a local unit. *See In re Complaints filed by the Counties of Morris, Warren, Monmouth, and Middlesex ("Morris"),* decided September 26, 2006, at 6; *see also In re Mayors of Shiloh Borough and the Borough of Rocky Hill et al. ("Shiloh"),* decided October 22, 2008, at 5. That is, when the State's funding of a mandate prior to 1996 sets a baseline, "any change of policy away from that 'State Pay' baseline after 1996 is a new decision that is subject to the new constitutional rules." *Morris* at 13.

In *Morris,* the State had funded the removal of deer carcasses from State, county, and local roadways for over 20 years, pursuant to a regulation adopted in 1986 and the State's "actual practice." *Id.* at 8. On June 7, 2006, the State issued as a press release a letter to all mayors advising that the State would no longer be providing that service and that counties and municipalities should begin preparing to perform that function themselves. *Id.* at 3. The counties of Morris, Warren, Monmouth

and Middlesex filed a complaint with the Council, alleging that the June 7 notice, which shifted the financial burden of removing deer carcasses from the State to counties and municipalities, created an unconstitutional unfunded mandate. *Id.* The New Jersey Department of Transportation ("NJDOT") answered the complaint and moved to dismiss the counties' complaint. *Id.* The NJDOT argued that the June 7 notice was not a "rule or regulation" reviewable by the Council and that the NJDOT was not mandating that "anyone . . . do anything." *Id.* at 9.

The Council denied the NJDOT's motion to dismiss and in fact granted summary decision on behalf of the claimant counties. *Id.* at 14. Because the practical consequence of the June 7 notice was that counties and municipalities were forced to assume responsibility, at their own expense, for the removal of deer carcasses, the Council had the power to deem the new policy statement an unfunded mandate encompassed by the "rule or regulation" provision of the Amendment. The Council found that "because it does not authorize resources to offset the related costs of what is a new function or responsibility for local governments, the June 7 notice violates the LMA," regardless of its informal promulgation. To hold otherwise, the Council concluded, would render meaningless the constitutional requirement of "State mandate, State pay." *Id.* at 13.

The *Shiloh* case is similarly instructive. Since 1921, the State had been required by statute to provide police protection to numerous rural towns at the State's full expense. *Shiloh* at 5. The Fiscal Year 2009 Appropriations Act, however, shifted a significant portion of the expense from the State to the various municipalities by requiring the municipalities to enter into cost-sharing agreements with the State. *Id.* at 5-6. The Council found that the challenged portion of the Appropriations Act amounted to an unconstitutional unfunded mandate because it did 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." *Shiloh* at 6.

Similarly here, although *N.J.S.A.* 18A:39-1 took effect prior to January 17, 1996 and prior to July 1, 1996, the Fiscal Year 2011 Appropriations Act (and the proposed State budget for fiscal year 2012), which failed to provide any aid to the Board to offset transportation costs, constituted a State policy mandate relative to *N.J.S.A.* 18A:39-1. The "practical effect" of this mandate, as emphasized by the Council in the *Morris* case, was to shift the financial burden of providing transportation or aid-in-lieu of transportation to non-public students residing in Springfield from the State to the Board. While passage of the State budget does not on its face require "anyone to do anything," practically speaking, the Board is still required to abide by the mandates of *N.J.S.A.* 18A:39-1, regardless of whether it receives transportation aid. The State's failure to provide any transportation aid to the Board for the 2010-2011 and 2011-2012 school years renders the requirements of that statutory provision entirely unfunded. Due to this change in the practical reality of State aid to local school districts, the mandate that the Board provide transportation or aid-in-lieu of transportation to non-public students residing in Springfield is an unconstitutional unfunded mandate. As in *Shiloh,* the Council here is not "second-guessing legislative judgments about the adequacy of the legislative funding, but simply recognizing the explicit terms and the acknowledged consequences of the legislation." *Shiloh* at 10.

To permit the DOE to flout the notion of "State mandate, State pay" simply because the challenged statutory provisions took effect prior to 1996, although a later discontinuance of State funding now renders the mandates of those provisions unfunded, would nullify the precise reason this

Council was created. As precedent has established, the Council's authority to review *N.J.S.A.* 18A:39-1 and 18A:39-1a is clear in view of the recent State policy shift rendering those provisions unconstitutional unfunded mandates. The DOE's motion to dismiss should be denied and the challenged statutory provisions struck down.

III. THE COUNCIL SHOULD STRIKE DOWN THE CHALLENGED STATUTORY PROVISIONS IN THEIR ENTIRETY BECAUSE THE STATE'S FAILURE TO PROVIDE TRANSPORTATION AID TO THE BOARD HAS RENDERED THEM UNFUNDED MANDATES.

As the Council has jurisdiction to review *N.J.S.A.* 18A:39-1 and 18A:39-1a, those provisions should be struck down in their entirety as unconstitutional unfunded mandates now that the State is not providing the Board with any transportation funding. *N.J.S.A.* 18A:39-1 *et seq.* governs a school district's obligation to provide transportation to students. Specifically, *N.J.S.A.* 18A:39-1 requires a school district that provides transportation for public school students to also provide transportation for non-public school students residing within the school district. That provision sets a monetary cap for the provision of such transportation. It also provides that, should a school district be unable to provide transportation to non-public school students for the maximum amount or less, the district must provide an "aid in lieu" of transportation payment to the student's parent or guardian in the amount of the cap. Districts are therefore mandated to provide either transportation or aid in lieu payments to these non-public school students.

Pursuant to the State budget for fiscal year 2011, the Board did not receive any State aid for the 2010-2011 school year. (Clarke Cert. at ¶ 16.) Moreover, pursuant to the proposed State budget for fiscal year 2012, the Board has been advised that the only State aid it will receive will be specifically

designated for special education. (*Id.* at ¶ 21.) Therefore, the Board will receive no transportation aid for the 2011-2012 school year. As such, as of the 2010-2011 school year, the requirements contained within *N.J.S.A.* 18A:39-1 and 18A:39-1a, that local boards of education provide transportation or aid in lieu of transportation for non-public school students, have become unfunded mandates for school districts that are receiving no transportation aid. The fact that not every school district in the State lost its transportation aid in fiscal years 2011 and 2012 should not preclude a finding by this Council that the statutes should be struck down as unconstitutional unfunded mandates. Indeed, "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." *Highland Park III* at 7 (recognizing that a narrow application of the unfunded mandate will not limit the Council's holding where the particular issue only applied to regional charter schools).

In proposing and passing the fiscal year 2011 and 2012 State budgets, the Executive branch and the Legislature have stripped the Board and similarly situated school districts of the funding they were previously receiving to implement the mandates of *N.J.S.A.* 18A:39-1 and 18A:39-1a. In effect, the State has rendered its own statute an unfunded mandate. *N.J.S.A.* 18A:39-1 and 18A:39-1a should be struck down in their entirety.

IV. SHOULD THE COUNCIL DECLINE TO STRIKE DOWN THE CHALLENGED STATUTORY PROVISIONS IN THEIR ENTIRETY, THE AMENDMENTS TO THE STATUTES SHOULD STILL BE STRUCK DOWN AS UNCONSTITUTIONAL UNFUNDED MANDATES.

The Council should strike down *N.J.S.A.* 18A:39-1 and 18A:39-1a in their entirety because they amount to unconstitutional unfunded mandates. Should the Council decline to do so, however,

the Council should still strike down the statutory amendments because they placed additional financial mandates on school boards without corresponding increases in funding.

Pursuant to *N.J.S.A.* 18A:39-1a, the cap amount -- the transportation amount school districts are required to pay for students who reside in the district but do not attend district schools -- has been increased several times since the general mandate to provide transportation or aid-in-lieu took effect. These amendments mandated additional financial obligations on local boards of education. [1] The DOE argues in its brief that the State has indeed financed these increases, pursuant to the requirement of *N.J.S.A.* 18A:39-1a that any increase in the cap amount from the 2002-2003 school year onward be borne by the State. (Motion for Summary Decision, p. 11.) The DOE explains that school districts, including the Springfield Board of Education, receive this funding in the form of a reimbursement at the end of each school year for the difference between the current cap amount as set by the State and the 2002-2003 school year. (*Id.* at p. 11-12.)

The Board does not dispute that, each year since the 2002-2003 school year, it has received reimbursement for some portion of the difference between the current cap amount for each of those years and the 2001-2002 cap amount of $710. However, while the DOE urges that the Board has received all moneys to which it is entitled, the Board has not received, in any year, reimbursement for the difference between the current cap amount and the cap amount as it stood in 1996, when the Council on Local Mandates was vested with the authority to strike down unconstitutional unfunded mandates. In 1996, the cap amount was set at $675. This meant that school districts that could

[1] The Board refers to the following amendments: *N.J.S.A.* 18A:39-1, as amended by L. 1990 c. 52, Section 50; L. 1992 c. 33, Section 1 / *N.J.S.A.* 18A:39-1a, as amended by L. 1996, c. 138, Section 66; L. 2001, c. 437, Section 1; and L. 2007, c. 260, Section 62.

provide transportation to non-public school students for $675 or less were obligated to provide such transportation. If they could not, they had to pay the students $675 to cover transportation costs to their non-public schools for that school year. The cap amount was increased several times between 1996 and 2001, when the Legislature amended the statutes to increase the cap amount for the 2002-2003 school year to $735 and provided that:

> this amount shall be increased in each subsequent year in direct proportion to the increase in the State transportation aid per pupil in the year prior to the prebudget year compared to the amount for the prebudget year or by the CPI, whichever is greater.
>
> *N.J.S.A.* 18A:39-1a.

Therefore, increases between $710 and the current cap amount began to be reimbursed by the State at the end of each school year.

By way of example, in the present case, the current cap amount is set at $884. Accordingly, in July 2010, pursuant to *N.J.S.A.* 18A:39-1a, the Board received a reimbursement payment from the State for the amount of the difference between $884 and $710, multiplied by the number of out-of-district students it transported. (Clarke Cert. at ¶ 15.) However, *N.J.S.A.* 18A:39-1a does not mandate, and the State has never provided, reimbursement for the difference between the current cap amount and the 1996 cap amount of $675. Indeed, the State-mandated increase from $675 to $710 has been funded solely by local school districts with no corresponding aid from the State. Therefore, while the reimbursements for increases began in the 2002-2003 school year, the operative date on which the Council must focus is the cap amount as set in 1996, since the increases between $675 and $710 have never been funded by the State.

The fact that the Board has received partial reimbursement for the cap amount increases does not preclude a finding of an unconstitutional unfunded mandate. The Council has recognized that "there would be little substance in the constitutional 'State mandate/State pay' directive if the legislature could avoid it by expressly electing to provide a specified partial amount of funding for a mandate and leaving an acknowledged balance of the cost to be shouldered by the local units." *Shiloh* at 12. In *Shiloh,* the Council still struck down the challenged portion of the Appropriations Act as an unfunded mandate even where the State partially funded the mandate with a $5 million appropriation to offset the $12.5 million cost of implementation.

Because the statutory amendments require additional expenditure of funds by local school districts without providing full reimbursement to offset those expenditures, the amendments should be struck down as unconstitutional unfunded mandates.

V. SHOULD THE COUNCIL DECLINE TO STRIKE DOWN ANY PORTION OF THE CHALLENGED PROVISIONS AT THIS JUNCTURE, THE BOARD IS ENTITLED TO A HEARING.

Should the Council decline to strike down *N.J.S.A.* 18A:39-1 and 18A:39-1a as unconstitutional unfunded mandates at this juncture, the Board is entitled, at least, to a hearing due to the unresolved issues of fact, as evidenced by the conflicting facts reflected in the DOE's Certification of Dorothy Shelmet compared and contributed with the Board's Certification of Matthew A. Clarke. By way of example, while Ms. Shelmet states that the Board has received a reimbursement payment each year through the 2009-2010 school year (*See* Certification of Dorothy Shelmet at ¶ 16), Mr. Clarke points out that the Board has only received reimbursement of the difference between the current cap amount and the 2001-2002 school year amount, but has never been reimbursed for the

difference between the current cap amount and $675, the 1996 cap amount. (*See* Clarke Cert. at ¶ 20.) If the Council declines to strike the challenged provisions at this juncture, it should allow this matter to proceed to a hearing to resolve the outstanding issues of fact.

For the foregoing reasons, the Springfield Board of Education respectfully requests that the Department of Education's Motion to Dismiss be denied and the challenged statutory provision stricken.

Respectfully submitted,

Vito A. Gagliardi, Jr.

cc: Michael Davino, Superintendent of Schools
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