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September 15, 2011

Via electronic mail

The Honorable John A. Sweeney, A.J.S.C. (ret.)
Chairman of The 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

Dear Judge Sweeney:

Please accept this supplemental brief on behalf of Respondent to address an additional jurisdictional issue that was not previously raised with the Council. In preparing for the hearing in this matter, counsel discovered a separate jurisdictional issue exists that should have been raised in Respondent's Motion to Dismiss and requests the opportunity to more fully address the issue before a hearing on the merits of Complainant's claims. In short, the Council lacks jurisdiction to review N.J.S.A. 18A:39-1 and N.J.S.A. 18A:39-1a because the provision of transportation to nonpublic school students implements Article VIII, Section IV, paragraph 3 of the New Jersey Constitution, and therefore, the



Council cannot consider these statutes unfunded mandates.

As this Council is aware, laws or rules which "implement" the provisions of the New Jersey Constitution cannot be deemed unfunded mandates. See N.J. Const., Art. VIII, Sec. II, Para. 5; N.J.S.A. 52:13H-3. Article VIII, Section IV, paragraph 3 of the New Jersey Constitution states, "[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." The language of this paragraph in the New Jersey Constitution was adopted to directly address the transportation of students to nonpublic schools. In the case of Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947), which was decided before the 1947 Constitution, the Supreme Court upheld a board of education resolution authorizing the reimbursement of transportation costs for students that attended public and Catholic schools pursuant to a New Jersey statute directing boards of education to make rules and contracts for the transportation of children to and from school other than schools operated for profit. The discussions amongst the delegates at the Constitutional Convention make it clear that the purpose of the paragraph was to grant the legislature the unquestionable authority to pass legislation regarding the transportation of students to all schools, not just public schools. See Proceedings of the

Constitutional Convention, pp. 704-726. The inclusion of the provision in the Constitution was to prevent future challenges to the statutes, regulations or policies that mandated transportation of all students to any school on grounds that transportation to and from parochial schools was contrary to separation of church and state. Ibid.

When read in the context of this constitutional provision, it is clear that N.J.S.A. 18A:39-1 and N.J.S.A. 18A:39-1a implement Article VIII, Section IV, paragraph 3 of the New Jersey Constitution. N.J.S.A. 18A:39-1 mandates transportation for all students that live within 2.5 miles from school, regardless of whether it is public or nonpublic. Similarly, N.J.S.A. 18A:39-1a provides a funding source and transportation cost cap for the transportation of nonpublic students. Together, these statutes provide for the transportation of nonpublic school students and they unquestionably "implement" Article VIII, Section IV, paragraph 3, which granted the Legislature the authority to pass a law mandating the transportation of all students to any school.

For the foregoing reasons, this Council cannot find that

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N.J.S.A. 18A:39-1 and N.J.S.A. 18A:39-1a are unfunded mandates.

Respectfully submitted,
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