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September 22, 2011

VIA ELECTRONIC AND REGULAR MAIL

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 in lieu of a more formal brief in opposition to the untimely "supplemental" brief submitted by the respondent Department of Education ("DOE") in further support of its May 24, 2011 motion to dismiss the Board's Complaint.

Initially, we object to the Council's consideration of the DOE's untimely "supplemental" brief. The DOE's motion to dismiss was denied by this Council on August 4, 2011 -- more than 30 days before the DOE's submission of its supplemental brief. The DOE was presented with full opportunity to brief all issues related to its motion to dismiss and to argue such issues fully on August 4. For this reason alone, the Council should reject the DOE's motion and permit the Board to proceed to the hearing presently scheduled for October 18, 2011.

The DOE argues that the Council lacks jurisdiction to hear the Board's Complaint because of a provision in the Constitution permitting the Legislature to provide for the transportation of children to and from any school. The constitutional provision -- set forth within the same Section, Article VIII Section IV, as the Thorough and Efficient Clause -- is as follows:

The 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.

N.J. Constitution, Article VIII, Section IV, Paragraph 3 (hereinafter "the Transportation Clause").

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Respectfully, the exemption declaring that laws, rules or regulations “which implement the provisions of this Constitution” cannot be deemed to be unfunded mandates, does not deprive this Council of jurisdiction to review the statute challenged by the Board. This “Hail Mary” pass tossed by the State has nothing to do with the pending Complaint.

First, as this Council has previously held in *I/M/O Complaints Filed By The Monmouth-Ocean Educational Services Commission, et al.*, decided August 20, 2004, the foregoing exemption was intended to avoid a “constitutional quagmire,” wherein the constitutional requirements of Article VIII, Section II (i.e., the provision prohibiting unfunded mandates and creating the Council on Local Mandates) would be in direct conflict with another constitutional requirement. In analyzing an education mandate in view of the Thorough and Efficient Clause, the Council rationalized the reason for this exemption as follows: “If the courts were to require the Legislature to implement specific measures to provide a thorough and efficient education, but this Council were bound to nullify any law imposing an unfunded mandate, the Legislature would find itself in a constitutional quagmire.” *I/M/O Complaints Filed by the Highland Park Board of Education and the Borough of Highland Park*, decided August 5, 1999. In the cases analyzing this exemption, the ultimate issue was the dichotomy between two constitutional mandates. The rationale is simply that if the Legislature were required to take some action under one constitutional provision, it should not be simultaneously prohibited from doing so by another constitutional provision.

In the current case, the constitutional provision at issue is not a mandate. The Legislature was not and is not constitutionally required to do anything. Instead, the Constitution merely states that the Legislature “may” provide for the transportation of certain students to and from “any school.” The permissive, as opposed to mandatory, nature of this paragraph of the Constitution was made clear during the discussions among the delegates at the Constitutional Convention of 1947. When considering the Transportation Clause, one delegate noted “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*, Volume 1, p. 718 (August 21, 1947). Indeed, another delegate 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. . . .” 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 parochial schools offended the First Amendment of the Constitution. It provides nothing more.

Having been granted permission to act in this arena, the Legislature opted to mandate that local school boards -- through property taxes -- be required to provide transportation for any child residing

more than 2.5 miles from his or her school, regardless of whether that child attends a public or private school. This mandate had always been funded, at least in part, by the State, until last school year. It is currently an unfunded mandate for many school districts, including Springfield. It does not fall within the exemption for those statutes "which implement the provisions of this Constitution" because it does not implement a provision of the Constitution. There is no constitutional quagmire in this case because the Transportation Clause merely put to rest the argument as to whether the First Amendment prohibited providing transportation for children to parochial schools. The Transportation Clause does not require any action by the Legislature; it does not require local taxpayers to bear the burden of subsidizing private school choice. Indeed, the Transportation Clause is unlike virtually any other clause in the Constitution in this respect. The DOE's argument would be equally inapplicable to those clauses that can be said to be similar. By way of example, Article IV, Section VII, Paragraph 2(C), provides that the Legislature may authorize the conduct of State lotteries. It does not provide that the Legislature must do anything with regard to lotteries. Under the DOE's logic, if the Legislature were to authorize State lotteries and require, without funding, that municipalities build booths to sell lottery tickets, man those booths with municipal employees, and pay for the production costs to cover the tickets they sell, this would not be an unfunded mandate under the Constitution. However, it is inconceivable that when the Constitution was amended to prohibit unfunded mandates it was not intended to cover such a mandate.

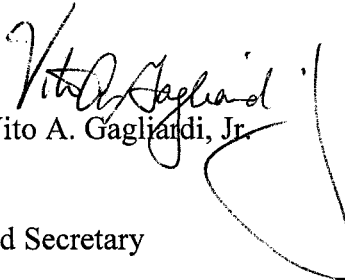
The statute challenged herein does not implement a provision of the Constitution, as the Legislature is not required by the Transportation Clause to take any action, nor is it required to provide for any transportation for any school children. The constitutional amendment prohibiting unfunded mandates should be liberally construed to capture the intent of the amendment -- to control rising property taxes in New Jersey and to keep the State Legislature from passing the buck, so to speak, to local boards and municipalities. If, as the Constitution permits, the State wants to provide free public transportation for students to private schools, it can provide for such transportation. But the State cannot abandon its annual practice of paying for a portion of that transportation and instead dump the cost of such transportation on local boards of education.

Finally, the Transportation Clause permits the Legislature to provide "transportation." However, the statute at issue has, over time, morphed into a subsidy for private school choice, and not a transportation requirement at all. Indeed, the challenged statute requires that -- regardless of whether a student actually needs and/or wants transportation -- the local school board must pay the parent an amount currently set at \$884.00. There is no requirement that these monies be used for transportation. It is a subsidy, plain and simple. Until recently, the State provided funds to help boards of education make such subsidy payments. The issue here is whether the State can cease to provide those funds while maintaining the same mandate.

For the reasons set forth above, the Council on Local Mandates should deny the DOE's belated supplemental submission seeking to dismiss the Board's Complaint.

Thank you for your consideration. Should you have any questions or require any additional information from the Board, please feel free to contact us.

Respectfully,


Vito A. Gagliardi, Jr.

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

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*In re the Complaint of the Springfield Board
of Education*

BEFORE THE NEW JERSEY
COUNCIL ON LOCAL MANDATES

DOCKET NO.: 3-11

CERTIFICATION OF SERVICE

I, Rodger J. Sisco, of full age, hereby certify and say:

1. I am a paralegal employed at the law firm of Porzio, Bromberg & Newman, P.C., attorneys for Complainant Springfield Board of Education (the "Board").

2. On September 22, 2011, I caused to be served via electronic mail and regular mail a properly addressed and sealed envelope containing a copy of the Board's letter brief in opposition to the Department of Education's supplemental brief in further support of its motion to dismiss, to the individuals below at their last known addresses:

Honorable John A. Sweeney, A.J.S.C. (Ret.), Chairperson
New Jersey Council on Local Mandates
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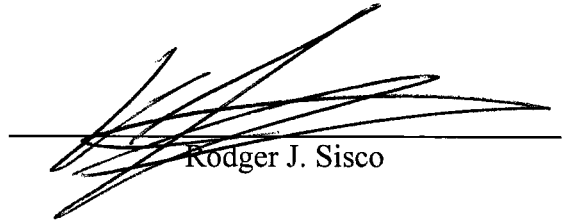
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3. On September 22, 2011, I caused to be served via facsimile and regular mail a properly addressed and sealed envelope containing a copy of the Board's letter brief in opposition to the Department of Education's supplemental brief in further support of its motion to dismiss, to the individual below at his last known address:

Christopher Cerf, Acting Commissioner of Education
New Jersey Department of Education
100 River View Plaza
P.O. Box 500
Trenton, New Jersey 08625-0500
Fax: 609-777-4099

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.


Rodger J. Sisco

Dated: September 22, 2011