

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5551-14T3

LEARNING COMMUNITY CHARTER
SCHOOL, SOARING HEIGHTS
CHARTER SCHOOL, ETHICAL
COMMUNITY CHARTER SCHOOL, and
GOLDEN DOOR CHARTER SCHOOL,

Petitioners-Appellants,

v.

BOARD OF EDUCATION OF THE CITY
OF JERSEY CITY, HUDSON COUNTY,
and NEW JERSEY STATE DEPARTMENT
OF EDUCATION,

Respondents-Respondents.

Submitted May 2, 2017 – Decided September 14, 2017

Before Judges Messano, Suter and Grall.

On appeal from the Commissioner of Education,
Docket No. 343-11/11.

Hartmann, Doherty, Rosa, Berman & Bulbulia,
LLC, attorneys for appellants (Mark A. Berman,
on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondents Commissioner of
Education and Department of Education (Melissa
Dutton Schaffer, Assistant Attorney General,
of counsel; Geoffrey N. Stark, Deputy Attorney
General, on the brief).

Richard E. Shapiro, attorney for respondent
Board of Education of Jersey City, Hudson
County.

PER CURIAM

In a July 6, 2015 final agency decision, the Commissioner of Education (Commissioner) adopted the initial decision of the administrative law judge (ALJ), granted motions for summary decision filed by the Board of Education of the City of Jersey City (BOE) and the New Jersey Department of Education (DOE), and dismissed the petition filed by four Jersey City charter schools: Learning Community Charter School; Soaring Heights Charter School; The Ethical Community Charter School; and Golden Door Charter School (collectively, petitioners). Petitioners argue, as they did before the ALJ and the Commissioner, that the level of funding the BOE provided to them under the School Funding Reform Act of 2008 (SFRA), N.J.S.A. 18A:7F-43 to -63, was inadequate for their students to receive a thorough and efficient education as required by the New Jersey Constitution. N.J. Const. art. VIII, § 4, ¶ 1.

I.

We briefly discuss the complex statutory scheme that controlled the Commissioner's decision and now our review.

The Charter School Program Act of 1995 (CSPA), N.J.S.A. 18A:36A-1 to -18, authorized the establishment of charter schools in New Jersey. Charter schools are public schools that operate

under a charter granted by the Commissioner, independently of a local board of education, and are managed by a board of trustees, who are "deemed to be public agents authorized by the State Board of Education to supervise and control the charter school." N.J.S.A. 18A:36A-3(a).

The process of applying to the Commissioner for a charter "is extensive and rigorous." J.D. ex rel. Scipio-Derrick v. Davy, 415 N.J. Super. 375, 380 (App. Div. 2010). The application must include, among other information, the "financial plan for the charter school[,]" N.J.S.A. 18A:36A-5(1); N.J.A.C. 6A:11-2.1(b)(3)(iii)(5), formulated within the "funding parameters providing for ninety percent per pupil operational funding and no facilities funding." Davy, supra, 415 N.J. Super. at 380.

Although funding for charter schools comes from the local school district, and state and federal aid, it is not equivalent to per pupil funding that a traditional public school receives. Under the initial, amended, and current versions of N.J.S.A. 18A:36A-12, charter schools have received 90% of certain funding categories from the local school district. In addressing this disparity and upholding the constitutionality of the CSPA, the Court explained that the Legislature "substantially modified" the funding provision in the original Senate bill, which had provided for payment of 100% of the local levy budget per pupil. In re

Grant of Charter Sch. Application in re Englewood on the Palisades Charter Sch., 164 N.J. 316, 333 (2000). These modifications address concerns about school districts' ability to pay full per-pupil cost to charter schools and cover the districts' fixed costs, which were voiced at public hearings. Id. at 332-33.

The current version of N.J.S.A. 18A:36A-12 at issue here was amended by the law that enacted SFRA, which we discuss later, and provides:

b. The school district of residence shall pay directly to the charter school for each student enrolled in the charter school who resides in the district an amount equal to 90% of the sum of the budget year equalization aid per pupil and the prebudget year general fund tax levy per pupil inflated by the CPI rate most recent to the calculation. In addition, the school district of residence shall pay directly to the charter school the security categorical aid attributable to the student and a percentage of the district's special education categorical aid equal to the percentage of the district's special education students enrolled in the charter school and, if applicable, 100% of preschool education aid. The district of residence shall also pay directly to the charter school any federal funds attributable to the student.

[(as emended by L. 2007, c. 206, § 58)].

Notably, there is no requirement that the school district pay the charter school 90% of per pupil Adjustment Aid – a form of aid created by SFRA. N.J.S.A. 18A:7F-58.

Shortly after the Legislature enacted SFRA, the Court described it as "the State's most recent, lengthy and painstaking effort to craft a redesigned school funding formula that satisfies the constitutional standard." Abbott ex rel. Abbott v. Burke, 199 N.J. 140, 147 (2009) (Abbott XX). "SFRA allocates state resources to school districts, while also requiring certain levels of funding at the local level." Id. at 152. In upholding the constitutionality of SFRA's "weighted school funding formula," the Court found:

The State has constructed a fair and equitable means designed to fund the costs of a thorough and efficient education, measured against delivery of the CCCS [comprehensive core curriculum standards].^[1] The quality of the effort and the good faith exhibited in the exercise of discretion over and over again at decision-points during SFRA's development lead us to conclude that the legislative effort deserves deference. The Legislature and Executive have made considerable efforts to confront the difficult question of how to address the education needs of at-risk pupils, no matter where those children attend school. Those efforts are all the more impressive due to the coordinate branches' collective will to do so during difficult economic times when there is extreme pressure on scarce State resources.

[Id. at 172 (footnote omitted).]

At the "core" of SFRA's weighted formula is the Adequacy Budget, which is the spending level necessary to provide public school students "with the CCCS and extracurricular and co-

curricular activities necessary for a thorough and efficient education." Id. at 152-53; N.J.S.A. 18A:7F-51. Equalization Aid is designed to fund any shortfall between a district's Adequacy Budget and its "local share," or local fair share (LFS). N.J.S.A. 18A:7F-52. As noted, SFRA amended the funding formula for charter schools, so that a charter school is entitled to "an amount equal to 90% of the sum of the budget year equalization aid per pupil and the prebudget year general fund tax levy per pupil inflated by the CPI rate most recent to the calculation." L. 2007, c. 260 (emphasis added).

Categorical Aid is a separate funding stream provided to districts on a per-pupil basis for certain expenses. Abbott XX, supra, 199 N.J. at 155. It is not based on a district's wealth or ability to raise funds. Id. at 222 (Appendix-Special Master's Report). Categorical Aid covers: (1) Special Education and Extraordinary Special Education Aid, N.J.S.A. 18A:7F-55; (2) Security Aid, N.J.S.A. 18A-7F-56; (3) Preschool Aid, N.J.S.A. 18A:7F-54; (4) Transportation Aid, N.J.S.A. 18A:7F-57; and various other aid categories, including School Choice Aid. Id. at 155. SFRA amended N.J.S.A. 18A:36A-12 to provide that in addition to 90% of the Equalization Aid and the general fund tax levy per pupil, the district shall pay directly to the charter school, Security Categorical Aid, Special Education Categorical Aid, and

Preschool Aid if applicable, but not Transportation Aid. N.J.S.A. 18A:36A-12(b).

Adjustment Aid, which has also sometimes been referred to as "hold harmless aid," was created to protect districts from a sharp reduction in state aid as a result of the new formula enacted by SFRA. Abbott XX, supra, 199 N.J. at 228 (Appendix-Special Master's Report). As a result, "Adjustment Aid enables districts spending above adequacy to maintain their current level of spending without significant tax levy increases or reductions in programs and services." Ibid. (emphasis added). Adjustment Aid is not determined on a per pupil calculation or based on the Adequacy Budget. Id. at 157. There is no provision in either SFRA or CSPA for charter schools to receive Adjustment Aid.¹

II.

A.

In the administrative proceedings, petitioners argued that because of increased, tax-exempted development, primarily along Jersey City's Hudson River waterfront, the municipality's general tax levy was insufficient to provide all public school students, including those attending petitioners' charter schools, with a

¹ SFRA also provides for Educational Adequacy Aid, N.J.S.A. 18A:7F-58(b), but neither SFRA nor CSPA provide for this type of aid to go to charter schools.

thorough and efficient education. They further argued that SFRA set the formula for calculating the minimum amount of aid that would ensure all students in New Jersey a thorough and efficient education, and that particularly in Jersey City, Adjustment Aid was necessary to bridge any gap occasioned by these reductions in the general tax levy. Public school students received the benefit of that adjustment, but charter schools, which received no Adjustment Aid, did not, leaving petitioners' students receiving less funding than the State determined was necessary to fund a thorough and efficient education in Jersey City. Petitioners argued the Commissioner could and should exercise her discretion and direct the BOE to pay them an amount equal to 90% of the Adjustment Aid per pupil.

In her comprehensive initial decision, the ALJ concluded the statutory scheme was clear and unambiguous. Charter schools were not entitled to receive Adjustment Aid, because Adjustment Aid was not part of the formula designed to fund the costs of a thorough and efficient education. Rather, it was transitional assistance designed to enable districts to maintain their existing level of spending without significant tax levy increases. The ALJ further reasoned that petitioners' students could attend a traditional public school in Jersey City that receives Adjustment Aid and, thus, were not being denied that aid. Lastly, the ALJ found

petitioners have failed to raise a genuine issue that they are unable to provide their students a thorough and efficient education with the funding available to them. Although petitioners submitted affidavits by representatives at their respective schools addressing the impact of not receiving their fair share of the Adjustment Aid, petitioners' submissions are bereft of any specific facts to support the constitutional claim that the education at their schools "fell below applicable state regulations, guidelines and criteria as required to fulfill the [thorough and efficient] obligation."

[(Quoting Davy, supra, 415 N.J. Super. at 391).]

B.

Petitioners reiterate their arguments before us, contending Jersey City charter schools are being funded below the minimum constitutional standards required for all schools, the Legislature never intended such a consequence in enacting SFRA and petitioner's students should not be forced to choose between attending a public school or an underfunded charter school. Having considered these arguments, we affirm the Commissioner's final decision.

Appellate review of a final agency decision is limited. In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 374-77 (2013). "An appellate court may reverse an agency decision if it is arbitrary, capricious, or unreasonable." Id. at 385. "In other words, a court may intervene when 'it is clear that the agency action is inconsistent with its mandate.'"

Ibid. (quoting In re Petitions for Rulemaking, 117 N.J. 311, 325 (1989)).

[T]he judicial role is generally restricted to three inquiries: (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995).]

"However, when an agency's decision is based on the 'agency's interpretation of a statute or its determination of a strictly legal issue,'" we are "not bound by the agency's interpretation." Saccone v. Bd. of Trs. of Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). "Statutory interpretation involves the examination of legal issues and is, therefore, a question of law subject to de novo review." Ibid.

Our role in interpreting the statutes at issue here is to "determine and give meaning to the Legislature's intent," by first examining "the plain language of the statute which is typically the best indicator of intent." In re Plan for Abolition of Council on Affordable Hous., 214 N.J. 444, 467 (2013). We give words

their "ordinary, generally accepted meaning[,]" but when "the Legislature uses technical words and phrases that have 'a special or accepted meaning in the law,' we construe them 'in accordance with such technical or special and accepted meaning.'" Ibid. (quoting N.J.S.A. 1:1-1) (citing Marino v. Marino, 200 N.J. 315, 329 (2009)).

Petitioners argue the statutory framework "envisioned that charter schools would receive 90% of the funds available to the district to educate each public school student." However, that argument ignores the clear and unambiguous language of N.J.S.A. 18A:36A-12(b), which was amended upon passage of SFRA to specifically incorporate the Legislature's determination regarding which funding was, and was not, provided to charter schools. We presume the Legislature was not thoroughly familiar with CSPA, In re Expungement Petition of J.S., 223 N.J. 54, 75 (2015), and could have easily added Adjustment Aid to the categories of funding that a charter school was entitled to receive if it had intended to do so. N.J. Coal. of Health Care Prof'ls, Inc. v. N.J. Dep't of Banking & Ins., Div. of Ins., 323 N.J. Super. 207, 256 (App. Div.), certif. denied, 162 N.J. 485 (1999).

We also decline petitioners' invitation to declare that the CSPA, "as applied to Jersey City's charter schools, violates the Thorough and Efficient Clause of the New Jersey Constitution."

The New Jersey Constitution provides that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, § IV, ¶ 1. "[T]he State's obligation to provide a thorough and efficient system of education in our public schools is inviolate." In re Grant of Charter Sch. Application, supra, 164 N.J. at 323. Charter schools are public schools subject to the "thorough and efficient" education mandate of the New Jersey Constitution. Davy, supra, 415 N.J. Super. at 392. The Court has already upheld the constitutionality of SFRA's funding formula. Abbott XX, supra, 199 N.J. at 146.

Adjustment Aid is not a component of the formulaic base per pupil amount used to calculate the Adequacy Budget, nor is it allocated on a per pupil basis. N.J.S.A. 18A:7F-58. Thus, contrary to petitioners' argument, the fact that CSPA and SFRA do not provide charter schools with Adjustment Aid, does not, "by definition" result in funding below the constitutionally mandated minimum. That is so because the Adequacy Budget – without any Adjustment Aid – is the spending necessary to provide public school students with a thorough and efficient education. Abbott XX, supra, 199 N.J. at 153.

Adjustment Aid was only "provided as transition assistance to SFRA's funding methodology." Id. at 157. Adjustment Aid "enables districts spending above adequacy to maintain their current level of spending without significant tax levy increases or reductions in programs and services." Id. at 228 (Appendix-Special Master's Report) (emphasis added). We reject petitioners' argument that the statutes are unconstitutional.

As a variation of this argument, petitioners contend that the CSPA and SFRA funding formulas, as applied in Jersey City, have resulted in charter schools receiving less than 90% of the Adequacy Budget-funding, i.e., below the minimum constitutionally-necessary per pupil amount, which shortfall has adversely affected their students. They claim that as a result of the plethora of tax abatements granted by Jersey City, the school district has used its Adjustment Aid to subsidize per pupil spending in the traditional public schools, but has withheld this aid from petitioners' schools.

"[A] district with a local levy below its LFS may not be at adequacy even with full funding of State aid." Abbott v. Burke (Abbott XXI), 206 N.J. 332, 438 (2011). However, petitioners did not present any proof as to what amount, if any, Jersey City's general fund tax levy differs from its LFS as a result of the tax-abated properties within its border.

Moreover, we agree with the ALJ's conclusion that petitioners failed to raise a genuine factual dispute regarding their inability to provide students with a thorough and efficient education under the actual funding levels they received. Petitioners have not cited any statute or regulation they fail to satisfy under their current funding and have generally acknowledged they are currently able to satisfy state educational criteria in objective performance measures. See Abbott by Abbott v. Burke (Abbott IV), 149 N.J. 145, 168 (1997) (CCCS provides necessary content to deliver the level of education required by the State Constitution). As a result, we reject the contention that the statutory funding formula is unconstitutional as applied to Jersey City's charter schools.

Lastly, petitioners argue that charter school students should not be forced to choose between an adequately funded traditional public school and a constitutionally underfunded charter school. They claim that the ALJ erred in adopting BOE's and DOE's argument "it [was] irrelevant that Jersey City's charter schools are being denied the required minimum level of funding," because "students can chose to attend adequately funded regular public school."

Initially, as already noted, petitioners' schools are being funded under CSPA and SFRA at the constitutionally required level. More so on point, the ALJ did not find that charter schools could

be underfunded because students had the option to leave and attend public schools. Rather, in her written decision, she properly cited to our opinion in Davy for the proposition that "charter schools are not required to be funded at the same level as traditional public schools." (Emphasis added).

In Davy, we performed an equal protection analysis and concluded, "the charter school program was a reform measure by the Legislature to ensure that every child receives a thorough and efficient education by providing an innovative alternative to traditional public schools. Having enrolled in charter schools, plaintiffs, unlike traditional public school students, receive an education largely exempt from regulation." Davy, supra, 415 N.J. Super. at 392. We noted that if the plaintiffs in that case were dissatisfied with the education they were receiving at a charter school, they were free to enroll in a traditional public school. Id. at 393. "The voluntariness of the program vitiates any asserted deprivation of a right to receive an education at a school that is fully funded to the same extent as other Newark public schools when charter school students have the unabridged option of attending one of those traditional public schools in their district." Ibid.

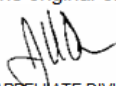
Writing for our court, Judge Lisa noted it was "significant" that "under the very strict statutory and regulatory provisions

applicable to charter schools, they are required to provide at least the level of education, tested by the same standards as traditional public schools, that is designed to provide a thorough and efficient education." Ibid. Charter schools failing to meet that obligation may lose their charter. Ibid.

In examining the public need for the restriction of scarce public funds for schools, we found that the "decision to fund the charter schools at ninety percent and to prohibit them from receiving state facilities funds was . . . not an arbitrary decision. It was a legislative compromise in response to the 'worry that charter schools could siphon off public school funds and eventually undermine public education.'" Id. at 395 (quoting Patrick Graham, Assembly OKs Charter School Bill, Courier Post (New Jersey), Jan. 5, 1996, at 4).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION