

INITIAL DECISION
ON CROSS-MOTIONS
FOR SUMMARY DECISION

OAL DKT. NO. EDU 9657-11

AGENCY DKT. NO. 229-8/11

**PRINCETON INTERNATIONAL ACADEMY
CHARTER SCHOOL, INC., PARKER BLOCK,
HELENA MAY, GIORA GRIFFEL AND
RAJAN RAVIKUMAR,**

Petitioners,

v.

**PRINCETON REGIONAL SCHOOLS BOARD
OF EDUCATION, BOARD OF EDUCATION
OF SOUTH BRUNSWICK TWP. AND BOARD
OF EDUCATION OF WEST WINDSOR-PLAINSBORO
REGIONAL SCHOOL DISTRICT,**

Respondents.

Thomas A. Abbate, Esq. for petitioner (Decotiis, Fitzpatrick and Cole, attorneys)

David W. Carroll, Esq. for respondent (Parker McCay, attorneys)

Record Closed: October 11, 2011

Decided: November 16, 2011

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Petitioner Princeton International Academy Charter School, Inc. (PIACS) seeks to enjoin respondents Princeton Regional Board of Education, Board of Education of South Brunswick Township and Board of Education of West Windsor-Plainsboro (WW-P) Regional Board of Education (respondents) from using taxpayer funds (state aid

funds) to engage in activities geared to undermining petitioners' success at opening and operating a new charter school.

PROCEDURAL HISTORY

On August 9, 2011, petitioner PIACS filed an application for Emergent Relief before the Commissioner of Education. The Director of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL) where it was filed on August 15, 2011. The application was scheduled for an immediate hearing on August 22, 2011, before the OAL. However, neither counsel for PIACS nor counsel for respondents was able to attend a hearing on the emergent relief application. A request for adjournment was denied. Thus, by letter of August 22, 2011, counsel for PIACS was invited to re-file the application at such time as he was able to argue it.

PIACS then sought to obtain expedited relief in the form of a preliminary injunction before the Commissioner of Education seeking sanctions against the districts, recoupment of monies, forfeiture of State aid, appointment of a monitor, as well as declaratory judgment that the complained of conduct is unlawful. PIACS also filed an Order to Show Cause with its papers setting forth a briefing schedule with discovery and setting forth a return date of thirty days after entry of the Order to Show Cause. However, the only procedure set forth in the OAL rules for such expedited relief short of a request for emergent relief is an accelerated proceeding, to which all parties must consent. Respondents would not consent. By letter of September 2, 2011, the Director of the Bureau of Controversies and Disputes explained that an Order to Show Cause is for the Commissioner to commence a case on his or her own initiative and that the options for PIACS were to file for an accelerated proceeding pursuant to N.J.A.C. 1:1-9.4 or a motion for summary decision.

On September 13, 2011, respondents filed a Motion for Summary Decision seeking dismissal of PIACS' petition. On September 27, 2011, PIACS filed a cross-motion for summary decision and opposition to respondents' brief arguing that it will suffer irreparable harm if the Commissioner does not enjoin the respondents from using

public funds to try to defeat its charter school. Oral argument on the motions was heard on October 11, 2011.

On November 1, 2011, counsel for PIACS filed additional verifications from petitioners Parker Block, Helena May, Giora Griffel and Rajan Ravikumar in accordance with an Order granting their motion to intervene, but not anonymously. These verifications were provided pursuant to N.J.A.C. 6A:3-1.4. PIACS sought to supplement the record, but he did not set forth sufficient reason to reopen the record.

STATEMENT OF THE FACTS

The following material facts are undisputed and therefore **FOUND** as **FACT**. Petitioner PIACS applied for approval as a charter school under N.J.S.A. 18A:36A-4. In its October 2009 application, PIACS set forth that the region of residence for the proposed charter school and from which students would be enrolled consists of the Princeton Regional, South Brunswick Township and West Windsor-Plainsboro Regional School Districts. The “key, distinguishing feature” of PIACS is its dual language Mandarin-English language program. The proposed charter school would begin serving students in kindergarten through second grades and then add a grade each year until it serves grades kindergarten through fifth grade. Projected enrollment is 180 in the first year, and expected to go up to a figure not to exceed 290 by the fifth year of operation.

In accordance with the statute, the school districts of residence were each served with a copy of the original application. Each district submitted a letter to the Commissioner urging rejection of the charter school application. On January 11, 2010, former Commissioner of Education Lucille Davy granted fast-track approval to PIACS with an anticipated opening in September 2010. Final approval was based on PIACS satisfying certain application requirements by July 15, 2010, including providing a certificate of occupancy for the facility proposed for the charter school as required by N.J.A.C. 6A:11-2.1(i).

Since the approval, respondents have spent public funds seeking to defeat the charter school. Through May 31, 2011, respondents had expended \$44,810.89 in

counsel fees for opposition to PIACS. The fees for legal services are continuing. They have used school district resources to oppose PIACS at a local land use proceeding, disseminate information, which petitioners call misleading if not false, and intervene as amicus curiae in an unrelated lawsuit pending in the Appellate Division to advocate for a legal ruling that disfavors PIACS. They retained a professional planner in connection with the zoning matter and took other actions, which they believe further the interests of the districts. Respondents have authorized their joint legal counsel to advise, assist and represent the Boards with respect to the PIACS application process. They received, approved and paid the invoices from legal counsel that did the aforementioned work. Respondents also hired Maser Consulting for a fee of \$25,000, split among three districts. Maser was contracted to use its staff professionals, including a professional engineer, a traffic engineer and a planner to review the zoning board application and testify at a public hearing related to that application.

The first proposed site for the school was a former seminary in Plainsboro Township. PIACS required approvals from the local Zoning Board of Adjustment. Respondents raised technical objections to the notice at the hearing on July 7, 2010, with which the Planning Board agreed. PIACS abandoned the site because the owner of the property leased it to another entity.

PIACS identified another site in South Brunswick for the following year, which required a land use variance and site plan approval. A hearing before the South Brunswick Zoning Board was scheduled for April 14, 2011. On April 13, 2011, Hermant Marathe, President of the West Windsor-Plainsboro (WW-P) Board of Education, sent an email to the presidents of the Parent Teacher Associations (PTAs) in his district. It set forth the April 14, 2011, date of the hearing and encouraged members to attend to let the Board know that the community is opposed to the proposed charter school. Rebecca Cox, President of the Princeton Regional School District Board of Education, also sent an email to PTO presidents in Princeton Regional encouraging the members to attend the public hearing and show disapproval for the charter school, which she referred to as a "special-interest quasi-private school." Dr. Gary McCartney, Ed.D., the superintendent of the South Brunswick School District, gave an extended interview to a local news site, the South Brunswick Patch, stating his opposition to PIACS.

The April 14, 2011, hearing was held and continued to June 2, 2011. PIACS attributes the fact that the hearing could not be completed to the large number of attendees at the meeting. On May 31, 2011, the South Brunswick School board circulated an email to the presidents of PTOs in the district informing them of the PIACS land use hearings. The WW-P Board also circulated a message to PTA Presidents informing them of the June 2, 2011 public meeting of the South Brunswick Zoning Board and advising them of their ability to ask questions of the applicant witnesses and comment on the application. By letter dated June 30, 2011, PIACS petitioned the Commissioner to allow for an additional “planning year” to seek final approval of its charter. He granted the additional planning year.

The conclusion of the Zoning Board hearing is scheduled for sometime in November 2011.

CONCLUSIONS OF LAW

The issue upon which both PIACS and respondents base their motions for summary decision is whether the respondent boards of education (Boards) may pay attorneys to oppose the establishment of a charter school through zoning challenges, amicus participation, and lobbying activities, and whether members of the Boards may issue public statements in opposition to the establishment of a charter school? I am granting the respondents’ motion and denying that of PIACS. Respondents have discretionary authority to perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district. This discretionary authority includes the activities at issue here, which were taken to protect the financial interest of the resident districts.

Respondents first contend that PIACS has no standing to bring the within petition. The Commissioner has the power to hear and decide controversies and disputes arising under the school laws. N.J.S.A. 18A:6-9. Any interested person may petition the Commissioner for a declaratory ruling with respect to rights, responsibilities

and status arising from any statute or rule within the jurisdiction of the Commissioner. N.J.A.C. 6A:3-2.1(a). Thus, standing in the education statutes is loosely defined and the petition of PIACS should not be defeated on the basis of standing.

I. Although N.J.S.A. 18A:36A-4 Does Not Provide Express or Implied Authority to Engage in the Challenged Activities, Neither It Nor Any Other Provision Prohibits Such Activities.

Under the Charter School Program Act, N.J.S.A. 18A:36A-1 to -18, the Legislature has declared that “the establishment of a charter school program is in the best interests of the students of this State and it is therefore the public policy of the State to encourage and facilitate the development of charter schools.” N.J.S.A. 18A:36A-2. An application to establish a charter school shall be submitted to the Commissioner of Education and the local board of education. N.J.S.A. 18A:36A-4(c). The board of education shall review the application and forward a recommendation to the Commissioner within sixty days of receipt of the application. Ibid; N.J.A.C. 6A:11-2.1(f). The Commissioner has final authority to grant or reject the application. N.J.S.A. 18A:36A-4(c). An eligible applicant for a charter school, a charter school, or a board of education may file an appeal. N.J.A.C. 6A:11-2.5; N.J.A.C. 6A:4-2.5.

The PIACS argues that respondents have neither express nor implied statutory authority under N.J.S.A. 18A:36A-4 to challenge the establishment of a charter school through zoning board hearings, amicus participation, lobbying, and public and press statements. N.J.S.A. 18A:36A-4 authorizes a board of education to review charter school applications, make recommendations to the Commissioner, and appeal any charter school decision made by the Commissioner. This statutory provision and the relevant regulations, N.J.A.C. 6A:11-2.1, N.J.A.C. 6A:11-2.5, and N.J.A.C. 6A:4-2.5, do not specifically authorize, or even address a board’s power to engage in opposition activities such as appearances at zoning board hearings, amicus participation, lobbying, and press and other public statements.

The PIACS further argues that authority cannot be implied from N.J.S.A. 18A:36A-4 or the regulations promulgated under the statute. The Supreme Court has stated that “[l]ocal boards of education are creations of the State and, as such, may

exercise only those powers granted to them by the Legislature – either expressly or by necessary or fair implication.” Fair Lawn Educ. Ass’n v. Teachers’ Pension and Annuity Fund, 79 N.J. 574, 579 (1979). Similarly, the Court has noted that “[t]he grant of express power is always attended by the incidental authority fairly and reasonably necessary or appropriate to make it effective.” Cammarata v. Essex County Park Comm’n, 26 N.J. 404, 411 (1958).

Although N.J.S.A. 18A:36-4 does not provide boards the authority to challenge the establishment of charter schools through zoning board hearings, the filing of amicus briefs in the Appellate Division on matters involving another board of education, lobbying, and the issuance of public statements and such actions are not fairly and reasonably necessary or appropriate to make effective the express power to appeal charter school decisions to the Commissioner, neither the Charter School Program Act nor any other statute or regulation prohibits such activities.

II. The Boards Have Discretionary Authority under N.J.S.A. 18A:11-1(d) to Engage in the Challenged Activities.

While respondents have neither express nor implied authority to conduct the contested activities under N.J.S.A. 18A:36A-4, they have discretionary authority under N.J.S.A. 18A:11-1 to oppose the charter school through zoning challenges, amicus participation, lobbying activities, and public statements. N.J.S.A. 18A:11-1(d) authorizes school boards to “[p]erform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.” This provision implies that school boards have discretion to determine what actions are necessary to maintain their schools. As the Appellate Division noted in Kopera v. Bd. of Educ. of the Town of West Orange, 60 N.J. Super. 288, 294 (App. Div. 1960), “action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives.”

In the present case, the facts show that respondents exercised their discretionary powers under N.J.S.A. 18A:11-1(d) by authorizing their counsel to engage in certain

activities in opposition to the establishment of PIACS. There is no indication that the Boards so acted without rational basis or that such actions were induced by improper motives. While respondents had the right under N.J.S.A. 18A:36A-4 to appeal the approval of PIACS before the Commissioner, they could have rationally concluded that the best interests of their schools necessitated opposition to the establishment of PIACS through other channels. Thus, in the case of zoning opposition, the Boards assert that they are challenging PIACS' zoning application in South Brunswick because "site plan approval depend[s] in part on considerations of traffic and safety" and the Boards "have a particular interest in traffic patterns and safety, since they are the ones that will be responsible for providing transportation to the charter school." Respondents' Brief, p. 18. Further, respondents' standing to challenge the variance application would be argued before the zoning board, not in the present forum.

Respondents also did not act without rational basis in filing an amicus brief in the Appellate Division or by engaging in lobbying activities with respect to charter school legislation. The Boards could rationally engage in these activities to protect their interests relevant to the establishment of PIACS in particular and charter schools in general. N.J.S.A. 18A:36A-4 does not explicitly limit opposition efforts to appeals before the Commissioner, and there is no other statutory provision or case law that necessarily prohibits the Boards from such activities. Again, such actions could reasonably follow from the Boards' discretionary power under N.J.S.A. 18A:11-1(d). And, as the Commissioner stated with respect to a school board's discretionary authority, "boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions." New Jersey Educ. Ass'n v. Trenton Bd. of Educ., 92 N.J.A.R.2d (EDU) 481, 495.

Regarding public statements made by members of the Boards, the cases cited by PIACS for the proposition that the Boards must remain neutral on issues of public importance are limited to public voting matters. See, Citizens to Protect Pub. Funds v. Bd. of Educ. of the Twp. of Parsippany-Troy Hills, 13 N.J. 172 (1953); Gormley v. Lan, 88 N.J. 26 (1981); In re Use of Abbott Funds, 2009 N.J. Super. Unpub. LEXIS 2249 (App. Div. August 18, 2009); Schettino v. Ridgefield Bd. of Educ., 93 N.J.A.R.2d (EDU). In those cases, the courts held that school boards could not spend public funds to

persuade voters how to vote at a referendum or other election. These cases did not address, or limit, the ability of school board members to voice their opposition to the establishment of charter schools through public statements. As Administrative Law Judge Law stated in Wooley v. Bd. of Educ. of the City of Atlantic City, EDU 4553-99, Initial Decision (May 19, 2000), adopted, Comm'r (July 10, 2000) <<http://lawlibrary.rutgers.edu/oal/search.html>>, "Individual Board members have a right to speak out on any topic affecting the operation, policies and administration of the schools under the direction and control of the Board." The Board members must be mindful that charter schools are public schools and should not refer to them as "quasi-private," since they are not. However, their right to speak out cannot be enjoined due to their choice of words.

III. The School Funding Reform Act does not Prohibit the Challenged Activities.

Finally, PIACS' argument that the School Funding Reform Act, N.J.S.A. 18A:7F-43 to -63, provides an independent basis for relief must also fail. Under the Act, "[t]he commissioner shall be authorized to take any affirmative action as is necessary to ensure the effective and efficient expenditure of funds by school districts and county vocational school districts." N.J.S.A. 18A:7F-60. Pursuant to this authority, the commissioner promulgated a rule setting forth measures to ensure effective and efficient expenditures of school district funds with respect to public relations and professional services. N.J.A.C. 6A:23A-5.2. That rule requires school districts to establish policies to minimize the cost of legal services and to prudently use such services. Ibid. The only restriction the rule places on the type of legal service of which a district may avail itself involves any affirmative cause of action on behalf of individual board members in which damages would benefit the individual rather than the district. N.J.A.C. 6A:23A-5.2(b). The types of services at issue here do not fall under this restriction, and PIACS has not set forth any facts showing that the Boards' use of funds for the challenged activities in any way interferes with the provision of a thorough and efficient education to the students in the Boards' jurisdiction such that the Commissioner needs to take affirmative action against the Boards.

The education laws set forth the powers and duties of boards of education. N.J.S.A. 18A:11-1 to 18A:11-15. A board of education shall “[p]erform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.” N.J.S.A. 18A:11-1(d).

For the foregoing reasons, I **CONCLUDE** that respondents have shown that there are no material facts challenged and they are entitled to judgment as a matter of law. Therefore, I **GRANT** respondents’ motion for summary decision and **DENY** PIACS’ motion for summary decision. Although respondents do not have express or implied authority under N.J.S.A. 18A:36A-4 to engage in the challenged activities, there is no express prohibition against the challenged actions. Further, a school board’s general powers under N.J.S.A. 18A:11-1 give school boards discretionary authority to engage in the challenged activities. Finally, the School Funding Reform Act does not prohibit the challenged activities.

DECISION AND ORDER

The respondents’ motion for summary decision is **GRANTED**, and petitioners’ motion for summary decision is **DENIED**. The petitions filed by PIACS and individual residents are **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 16, 2011

DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

Date Mailed to Parties:

cmo