



IN THE MATTER OF THE COMPLAINT
FILED BY THE ALLAMUCHY TOWNSHIP
BOARD OF EDUCATION

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BEFORE THE COUNCIL ON
LOCAL MANDATES

DOCKET NO.: 9-11

MEMORANDUM OF CLAIMANT ALLAMUCHY TOWNSHIP
BOARD OF EDUCATION
IN RESPONSE TO
THE APPLICATION OF THE STATE OF NEW JERSEY
FOR SUMMARY JUDGMENT

This memorandum is being submitted on behalf the claimant Allamuchy Township Board of Education [hereafter: "Allamuchy"]. Allamuchy submits this memorandum and the accompanying certification of Peter Pearson in opposition to the cross motion of the Respondent, State of New Jersey, for summary judgment and also in support of Allamuchy's application for summary judgment. This memorandum will serve as Allamuchy's pleading summary of this procedural step.

Allamuchy has moved for summary judgment. In support, Allamuchy has submitted the certification of Timothy Frederiks, the chief school administrator for the District. The State has cross moved. Although the State in its answer to the original complaint and in the response and cross motion to Allamuchy's pleadings, denies the factual assertions of Allamuchy, the State has

submitted no admissible evidence through certification or public record with the exception to a reference to state aid figures for the fiscal year 2011-2012. The State has raised several points for which facts had not been initially offered but which now are directly addressed in the certification of Peter Pearson. The facts, uncontroverted by the State, are set forth hereafter.

The Allamuchy Township School District [hereafter: "ATSD"] is a pre-kindergarten through grade 8 school district providing educational services to 427 students from Allamuchy Township. The ATSD provides such services in two schools, the Mountain Villa [hereafter: MV] School for pre-kindergarten through grade 1 students and the Allamuchy Township School [hereafter: ATS] for grade 2 through grade 8 students. The ATSD employs 9 teachers at the Mountain Villa School and 28 teachers at the Allamuchy Township School. At ATS there is one full time certificated administrator, the principal, Seth Cohen, Ed.D. At the Mountain Villa School, Timothy Frederiks, Ed.D. acts as the full time certificated administrator, namely the principal, in addition to his duties as CSA.

The implementation of the new Harassment, Intimidation and Bullying law [hereafter: HIB] has imposed significant additional duties on the administration of the district. As a result, Dr. Cohen, the principal of ATS, and Dr. Frederiks, as the CSA and to a lesser degree as principal of MV, spend a significant amount of time, in addition to the time spent previous to the adoption of the HIB law, on the mandated procedures under HIB. This additional expenditure of time has indirect financial consequences.

Before HIB was enacted, the ATSD had adopted policies in conformance with the then existing law that effectively addressed conduct that now is defined as HIB under the new law. ATSD crafted procedures that did so efficiently and that were tailored to the size and organization of the district. It was not a significant drain of the attention and energy of the

administration. The administration was able to address effectively any HIB within the district's traditional disciplinary processes.

Now the law requires several additional procedural steps including personal notification of parents or guardians for every complaint possibly invoking HIB, conducting formal investigations on every such complaint, preparing written reports on such investigations and then preparing reports monthly for the board of education on such complaints and investigations. This has increased the administrative work load by an estimated 10%. While this has not translated into a discrete financial expenditure and therefore a direct unfunded mandate, it has caused the administration to focus a significant amount of additional time on HIB than previously and more importantly to the exclusion of other activities designed to further advance student learning. Although the cost is not readily quantifiable, there is clearly a reallocation of significant district financial resources from student learning to HIB. The additional procedures have added only inefficiency to what was, for us, a rather efficient and effective system for addressing HIB.

The law requires ATSD, among other things, to annually establish and implement bullying prevention programs designed to create school-wide conditions to prevent and address harassment, intimidation, and bullying. These are new programs. Based on suggestions from the State Department of Education ATSD has identified the Olweus Bullying Prevention Program as an appropriate program to discharge the new obligations of the law. The initial cost of the program is \$6,000 with an annual subscription update of \$1,000. The ATSD has secured partial funding, approximately \$4,000 from the local PTO and the Allamuchy Education Foundation.

The remainder is to be funded from the district's budget.

The law refers to a Bullying Prevention Fund as a potential source of funding for programs described above. The law indicates that a District can apply to the Department of Education for a grant from that Fund. The ABOE inquired of the Department of Education about applying for a grant. The Department advised that the Legislature has appropriated no money to the Fund and therefore no process has been established. Moreover, ATSD directly requested that the State Department of Education fund the additional mandated costs as allowed by the preexisting legislation. By their failure to respond, the State has effectively denied that request.

The law has also required the ATSD to establish a district anti-bullying coordinator and a school anti-bullying specialist in each of its two schools. The law also required the establishment of a school safety team for each, to which the law assigns specific duties. One of the mandatory positions must be filled by a teacher in the school. ATSD filled those positions as follows:

District anti-bullying coordinator – Dr. Cohen, who also serves as the principal of ATS
ATS anti-bullying specialist – Julie Profito, the district guidance counselor
MV anti-bullying specialist – Julie Profito, the district guidance counselor
ATS safety team teacher member – Jennifer Chickey, Christine Rodriguez
MV safety team teacher member – Jennifer Sauter.

Dr. Cohen is an administrator. As such, his appointment as district anti-bullying coordinator has not generated any direct additional expenditure. It has, however, required ATSD to reallocate his time and attention to the HIB process rather than student learning and other administrative functions. This poses an indirect cost to the district.

Ms. Profito is the district guidance counselor. She has duties in both of the district's schools. That has allowed ATSD to appoint one person to do perform both functions. Although she is a guidance counselor, her job description under which she work does not include the title or the specific duties of the anti-bullying specialist. She is a member of the local bargaining unit

of the teaching staff, the Allamuchy Education Association. The ABOE and the Allamuchy Education Association have not reached agreement on the amount of compensation for this additional position and these additional duties.

The ATSD has filled the positions for each school safety team, including the position of teacher members as listed above. These teacher positions must be filled by a teacher from each school. All of these teachers are members of the Allamuchy Education Association. The ABOE and the Allamuchy Education Association have not reached agreement on the amount of compensation for this additional position and these additional duties.

Part of the difficulty in negotiating the amount of stipends is that the Department of Education has not yet issued regulations or guidelines on implementation of HIB. Another element of uncertainty, related to the absence of guidelines is that the application of the law to every day settings and a deeper understanding of what constitutes HIB is still evolving. While there is a significant amount of time that the district anti-bullying coordinator and the school anti-bullying specialists must spend on meeting the requirements of the HIB law, it is hoped that as it evolves the dedication of time will diminish. Hence, finding an appropriate amount for a stipend must also evolve. Likewise, the uncertainty the time requirements of the safety team render uncertain a proper amount of a stipend for a teacher's serving on the team. It may ultimately result that the stipend will be negotiated only after sufficient time and experience has occurred to gauge accurately the time commitment with ultimate payment being made retroactively. We anticipate that the stipend for the anti-bullying specialist may be as much as \$4,000 and the safety team member \$2,000.

The law also requires the district to provide a range of responses to a confirmed incident of HIB. Many of the responses are within the district's usual disciplinary regimen. However,

some, such as counseling, support services, intervention services and others, to be defined by the Commissioner of Education, all would require the district to incur additional costs because ATSD is not equipped to provide such services within the district. ATSD would have to contract for the provision of outside professional services.

The State has offered that ATSD receives State Aid, an element of which is denominated as Security Aid. The State suggests that this aid specifically reimburses ATSD for any newly or additionally mandated costs associated with HIB. Security Aid to ATSD decreased from fiscal year 2009-10 to 2010-11 and remained unchanged from 2010-11 to 2012. In the transmittal advice to ATSD, the State has never suggested in any way that Security Aid was intended to reimburse the ATSD for any newly or additionally mandated costs associated with HIB.

The matter before the Council is one of unfunded local mandates. This matter presents only the issue of the constitutional prohibition on the imposition on a local governmental unit, the Allamuchy Board of Education, of the necessity to fund new requirements from local sources. Allamuchy is not questioning the underlying policy goals of combating harassment, intimidation and bullying. Indeed, ATSD takes no issue with the goal of effectively combating harassment, intimidation and bullying. The district has historically cultivated a caring and familial atmosphere in its relatively small student population by using its own internal procedures and policies. ATSD objects to the imposition of costs to comply with the new required programs and procedures.

EXEMPTIONS

Constitutional Implementation

The State suggests that the Anti-Bullying Bill of Rights Act of 2011 [HIB] qualifies as one of the exemptions under the New Jersey Constitutional prohibition for unfunded mandates and the implementing legislation. Specifically, the State suggests that HIB implements the Thorough and Efficient Education clause of the New Jersey Constitution. N.J. Const. Art. VIII, §IV, ¶1.

This issue has been addressed previously by the Council on Unfunded Mandates in *In the Matter of Complaints Filed by the Highland Park Board of Education and the Borough of Highland Park* (Council on Local Mandates August 5, 1999). As the Council noted:

* * * The Thorough and Efficient Clause of the Constitution requires the Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools. . . ." N.J. Const. art. VIII, § 4, ¶ 1. The Legislature has long struggled to accommodate judicial interpretation of what is required to provide a thorough and efficient education. See N.J.S.A. 18A:7F-2a(2) ("Although the New Jersey Supreme Court has held that prior school funding laws did not establish a system of public education that was thorough and efficient, the court has consistently held that the Legislature is responsible to substantively define what constitutes a thorough and efficient system of education responsive to that constitutional requirement."). * * *

Further review of the statutory history, however, shows that the exemption was not intended to remove from the Council's jurisdiction all rules or regulations related to education. The interpretive statement accompanying the ballot initiative and the discussions at the public hearings serve as evidence that educational mandates were a motivating factor behind the ballot initiative. The Commissioner and Greater Brunswick are almost matter of fact in asserting that because the subject spending is for education, it necessarily implements the Thorough and Efficient Clause. But their argument proves too much. Following their reasoning, any educational spending would appear to implement the Thorough and Efficient Clause. That interpretation is clearly at odds with Article VIII, section 2, paragraph 5(a) of the New Jersey Constitution, and with the LMA. Both the Amendment and the LMA contemplate the Council's power over educational rules and regulations; otherwise the exemption would swallow the rule.

The New Jersey Constitution empowers the Legislature "to substantively define what constitutes a thorough and efficient system of education," and the Legislature provides such a definition in CEIFA. See N.J.S.A. 18A:7F-2(a)(2) and (b)(1). CEIFA demonstrates "the legislative determination that a thorough and efficient education can be provided . . . in accordance with specific substantive standards that define the content of a constitutionally sufficient education and in accordance with performance assessments that measure levels of educational achievement." Abbott v. Burke, 149 N.J. 145, 161 (1997). The Commissioner set forth those curriculum standards, and the Department of Education subsequently adopted those standards. See ibid. CEIFA also specifies a level of financial support sufficient to provide those programs and services. See N.J.S.A. 18A:7F-2b(3). The "T&E range" is the "range of regular education spending which shall be considered thorough and efficient." See N.J.S.A. 18A:7F-3.

Distilled to its essence, the Thorough and Efficient Education Clause addresses school funding.

The creation and implementation of a program for the prevention of certain conduct is unrelated to a scheme of school funding except by virtue that any such program must be funded in order to be implemented. Moreover, when enacting HIB, the Legislature set forth its findings justifying the legislation as follows:

The Legislature finds and declares that:

- a. A 2009 study by the United States Departments of Justice and Education, "Indicators of School Crime and Safety," reported that 32% of students aged 12 through 18 were bullied in the previous school year. The study reported that 25% of the responding public schools indicated that bullying was a daily or weekly problem;
- b. A 2009 study by the United States Centers for Disease Control and Prevention, "Youth Risk Behavior Surveillance," reported that the percentage of students bullied in New Jersey is 1 percentage point higher than the national median;
- c. In 2010, the chronic persistence of school bullying has led to student suicides across the country, including in New Jersey;
- d. Significant research has emerged since New Jersey enacted its public school anti-bullying statute in 2002, and since the State amended that law in 2007 to include cyber-bullying and in 2008 to require each school district to post its

anti-bullying policy on its website and distribute it annually to parents or guardians of students enrolled in the district;

e. School districts and their students, parents, teachers, principals, other school staff, and board of education members would benefit by the establishment of clearer standards on what constitutes harassment, intimidation, and bullying, and clearer standards on how to prevent, report, investigate, and respond to incidents of harassment, intimidation, and bullying;

f. It is the intent of the Legislature in enacting this legislation to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises;

g. Fiscal responsibility requires New Jersey to take a smarter, clearer approach to fight school bullying by ensuring that existing resources are better managed and used to make our schools safer for students;

h. In keeping with the aforementioned goal of fiscal responsibility and in an effort to minimize any burden placed on schools and school districts, existing personnel and resources shall be utilized in every possible instance to accomplish the goals of increased prevention, reporting, and responsiveness to incidents of harassment, intimidation, or bullying, including in the appointment of school anti-bullying specialists and district anti-bullying coordinators;

i. By strengthening standards for preventing, reporting, investigating, and responding to incidents of bullying this act will help to reduce the risk of suicide among students and avert not only the needless loss of a young life, but also the tragedy that such loss represents to the student's family and the community at large; and

j. Harassment, intimidation, and bullying is also a problem which occurs on the campuses of institutions of higher education in this State, and by requiring the public institutions to include in their student codes of conduct a specific prohibition against bullying, this act will be a significant step in reducing incidents of such activity.

N.J.Laws 2010 ch.122 §2 *codified at* N.J.S.A 18A:37-13.1. Conspicuously absent is any

invocation of the Thorough and Efficient Education Clause of the New Jersey Constitution.

As for the litany of cases cited by the State, none even hint at the proposition that the Thorough and Efficient Education Clause of the New Jersey Constitution is implemented by

HIB. The cases focus on extending civil liability, whether under common law principles or other statutory authority, to Boards of Education. As such they cannot stand even on an attenuated basis as authority that HIB is an implementation of the Thorough and Efficient Education Clause of the New Jersey Constitution.

HIB As a Revision of Prior Law

The State suggests that HIB qualifies as an exemption from the prohibition on unfunded local mandates because it revises a prior law, N.J. Laws 2002 ch. 83. The Council has already addressed the proper analysis for this exception in *In the Matter of Complaints Filed by the Highland Park Board of Education and the Borough of Highland Park*, *supra*. There the Council noted:

Research has not uncovered any legislative history regarding this exemption. Likewise, no New Jersey statute incorporates the phrase "repeal, revise or ease." In the absence of any explicit indication of legislative intent, courts sometimes rely on the doctrine of *ejusdem generis*. The principle of *ejusdem generis* provides that when general words follow an enumeration of more specific things, the general words should be construed as being of the same class as those enumerated. See Denbo v. Township of Moorestown, 23 N.J. 476, 482 (1957). Here, the statute provides that regulations are not unfunded mandates where they "repeal, revise or ease" an existing requirement. See N.J.S.A. 52:13H-3(c). Under *ejusdem generis*, "revise" should be interpreted consistently with the more specific terms, "repeal" and "ease," as Highland Park suggests in its brief.

As indicated above, to qualify as an exemption the succeeding legislation must act to ease or repeal a previous requirement of the law. HIB does no such thing. It adds on new obligations and procedures without funding them.

STATE AID

The State suggests that if there are any costs that ATSD has incurred as a result of HIB, State Aid meets any such additional and new expenditures thereby making such local mandate funded. The State specifically refers to aid that is denominated as Security Aid.

The State fails to take into account the fact that since the adoption of the HIB legislation, ATSD's Security Aid has not changed to match the increased costs. Costs directly attributable to HIB have increased but the aid ostensibly devoted to defray such costs has not increased. Such costs remain unfunded.

Moreover, the suggestion that Security Aid is somehow a funding source for costs associated with HIB is feckless. Security Aid is a statutory creation and is determined by a statutory formula:

Security categorical aid for each school district and county vocational school district shall be calculated as follows:

$$\text{SA} = ((\text{RE} \times \$70) + (\text{AREN} \times \text{ARSA})) \times \text{GCA}$$

where

RE means the school district's or county vocational school district's resident enrollment;

AREN means the district's number of at-risk pupils;

ARSA means the at-risk security amount; and

GCA is the geographic cost adjustment as developed by the commissioner.

For the 2008-2009 through 2010-2011 school years the at-risk security amount shall be calculated as follows:

for a district in which the concentration of at-risk pupils is less than 40% of resident enrollment, the at-risk security amount shall equal the district's $(\text{AR}\% \times \$10.15 \times 100)$; and

for a district in which the concentration of at-risk pupils is equal to or greater than 40%, the at-risk security amount shall equal \$406.

The security cost coefficients, \$70, \$10.15 and \$406, used to determine the security amount, shall be adjusted by the CPI in the 2009-2010 and 2010-2011 school years as required pursuant to subsection b. of section 4 of this act. For subsequent school years, the cost coefficients shall be established in the Educational Adequacy Report, with adjustments by the CPI for each of the two school years following the first school year to which the report is applicable.

N.J.S.A. 18A:7F-56. Costs associated with HIB have no nexus to Security Aid. The argument of the State in this regard fails.

COSTS

The State suggests that the law does not impose unfunded mandates on ATSD because the law does allow for some flexibility in assigning personnel and developing programs including training programs. However that flexibility transforms to inflexibility with a school district of such a small size as ATSD. There are not enough administrators to assign to the various tasks. Teachers and others who are members of the collective bargaining unit must fulfill some positions either by direct mandate or by necessity due to personnel limitations of ATSD. This situation was predicted the Office of Legislative Services as part of their analysis of the proposed legislation which became HIB. The exact language of fiscal analysis, in relevant part, is as follows:

Assembly Bill No. 3466 (1R) contains certain provisions that will likely lead to an indeterminate increase in expenditures by local school districts. Section 17 requires that each school principal assign a current staff member to serve as the school's anti-bullying specialist. The bill requires that the principal appoint a guidance counselor, school psychologist, or similarly trained staff member if such an individual works in the school; otherwise, the principal must appoint another individual who is currently employed in the school. The

same section of the bill requires that the superintendent appoint an individual, preferably a current employee of the district, to serve as the anti-bullying coordinator. Under section 18, the principal must assign individuals, including a teacher in the school, to serve on the school safety team. The types of personnel specified in the bill who would serve as the anti-bullying specialist or on the school safety team are generally members of collective bargaining units and have salaries that are determined pursuant to existing collective bargaining agreements. These agreements specify additional compensation that an individual will receive to perform additional duties or to serve on committees. Presumably, appointing such a staff member to serve as the anti-bullying specialist or on the school safety team would require additional compensation to be determined by the collective bargaining agreement. Since the person who would be appointed to serve as the district's anti-bullying coordinator is not specified in the bill, it is possible that the superintendent would assign the duties to someone who is not a member of a collective bargaining unit and would not need to provide additional compensation. However, while the bill encourages the superintendent to appoint an existing staff member to be the anti-bullying coordinator, the hiring of an additional person would be permissible and would generate an additional local cost.

Current law provides that schools are "...encouraged to establish bullying prevention programs and other initiatives..." Assembly Bill No. 3466 (1R) would make the implementation of such programs and approaches mandatory. The extent to which this provision may increase costs to local school districts is indeterminate; however, the fiscal effect would be contingent on two factors. First, if a school has already implemented a program or other initiative to prevent harassment, intimidation, and bullying based on current law, then the school would not incur any new costs as a result of this provision. Second, among schools that have not yet implemented such a program, the incurrence of additional costs would depend on how the school elects to satisfy this provision. The language included in the bill appears to provide schools with flexibility in determining what program, approach, or other initiative it will implement and would appear to include the development of a "home grown" program or approach, the use of training material that is available at no cost, or the purchase of a commercially available program.

One such commercially available program specifically mentioned by the Office of Legislative Services is the Olweus Bullying Prevention Program:

One example of a commercially available bullying prevention program for which cost data are readily available is the Olweus Bullying Prevention Program. The cost of this program is estimated to be between \$1,500 and \$3,200 per school, depending on the size of the school.

Id. This program is in fact necessary in part because the new legislation requires a broad array of personnel to be trained in the prevention of and administration of procedures concerning harassment, intimidation and bullying. The new proposed trainees include members of the Board of Education, substitutes, non-certificated staff and certain members of the public who may serve on the required safety committees. These trainees are not within the usual scope of professional development in which administrators and certified teachers found. The training of these individuals are beyond the ken of experience of the administration thereby making particularly appropriate the acquisition of formal training programs from commercial sources. In addition, the scope of conduct outside the school setting that the new law reaches also requires new training perspectives. The same experience in training applies to the implementation of bullying prevention programs within the school and attendant community. While ABOE had previously adopted policies regarding bullying for the immediate school community, the new law has instituted such broadly sweeping procedural and cultural changes, both within and outside the schools, that it would be unreasonable to adapt any preexisting programs to the new law.

Moreover, the law has authorized new and additional remedies for acts of bullying including counseling, support services, intervention services and others, to be defined by the Commissioner of Education. The authorization of these remedies creates an expectation that where appropriate the ATSD will cause them to be provided thereby incurring costs. The State has not provided for any of these costs.

The ATSD will incur the following costs, as yet not quantified with certitude because they are subject to collective bargaining:

- \$4,000 for an Anti-bullying specialist;

- \$2,000 for each of the three teacher safety team members;
- \$2,000 for the Olweus Anti-bullying program plus an additional \$1,000 annually for updates;
- and an unspecified amount for services in remediation of bullying.

None of these costs have been provided for in any State appropriation. They are all needed to implement the mandate of the Anti-Bullying Bill of Rights. As such, they run afoul of the New Jersey Constitution.

For the foregoing reasons, complainant, Allamuchy Township Board of Education, requests that the Council on Local Mandates enter judgment as follows:

- A. Declaring that section 14 of P.L. 2010ch.122 amending section 5 of P.L. 2002 ch.8 (NJS 18A:37-17) which statute requires schools and school districts annually to establish, implement, document and assess bullying prevention programs or approaches and other initiatives involving school staff, students, administrators, volunteers, parents, law enforcement and community members so as to create school-wide conditions to prevent and address harassment, intimidation and bullying is an unfunded mandate in violation N.J.Const. art VIII, §2, ¶5 and NJSA 52:13H-2 and shall cease to be mandatory in effect and shall expire.
- B. Declaring that section 17 of P.L. 2010 ch. 122 which is codified at NJSA 18A:27-20 which statute requires local school districts to create and staff new work titles of anti-bullying specialist and anti-bullying coordinator and to train those individuals is an unfunded mandate in violation N.J.Const. art VIII, §2, ¶5 and NJSA 52:13H-2 and shall cease to be mandatory in effect and shall expire.

- C. Declaring that section 18 of P.L. 2010 ch. 122 which is codified at NJSA 18A:37-21 which statute requires each school district to establish a school safety team in each school is an unfunded mandate in violation N.J.Const. art VIII, §2, ¶5 and NJSA 52:13H-2 and shall cease to be mandatory in effect and shall expire to the extent that any compulsory appointment to the team requires payment of compensation for such service.
- D. Declaring that section 12 of P.L. 2010 ch. 122 amending Section 3 of P.L.2002, c.83 (C.18A:37-15) which statute provides in subsection 3(b)(7) that a district's policies must make provision for "the range of ways in which a school will respond once an incident of harassment, intimidation or bullying is identified, which shall be defined by the principal in conjunction with the school anti-bullying specialist, but shall include an appropriate combination of counseling, support services, intervention services, and other programs, as defined by the commissioner" thereby requiring the district to provide services, all of which are not funded by the State and therefore will requiring local funds is an unfunded mandate in violation N.J.Const. art VIII, §2, ¶5 and NJSA 52:13H-2 and shall cease to be mandatory in effect and shall expire.

Francis Gavin
Francis Gavin, President
Allamuchy Township Board of Education

December 15, 2011