



**NEW JERSEY LAW REVISION COMMISSION**

**Final Report**

**“School District of Residence” in the Charter School Program Act**

**May 20, 2021**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

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## Executive Summary

The New Jersey Constitution mandates 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 of the State between the ages of five and eighteen years.”<sup>1</sup> In addition to the State’s program of public education, the Legislature has recognized that charter schools “can assist in promoting comprehensive educational reform by providing a mechanism for the implementation of a variety of educational approaches which may not be available in the traditional public school classroom.”<sup>2</sup>

The Commissioner of Education provides approval and grants charters to charter schools under the Charter School Program Act (CSPA).<sup>3</sup> These charter schools are considered public schools that are operated independently of a local board of education and are managed by a board of trustees.<sup>4</sup> The funding for charter schools is provided by federal, state, and local aid but is not equivalent to the per pupil funding of traditional schools.<sup>5</sup> In recent years, the question of who is responsible for paying for students to attend charter schools in districts other than those in which the students live has been the subject of litigation.<sup>6</sup>

In *Bd. of Educ. of Twp. of Piscataway v. N.J. Dept. of Educ.*, the Appellate Division considered whether a local board of education was obligated to provide funding for its students enrolled in charter schools located in other school districts.<sup>7</sup> The decision turned on the meaning of “school district of residence,” which is not defined in the CSPA.<sup>8</sup> The Commission recommends modification of the statutory language to clarify that the school district in which a student is domiciled is responsible for funding that student’s charter school education.

## Statute Considered

N.J.S. 18A:36A-12 provides, in relevant part:

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, the prebudget year general fund tax levy per pupil inflated by the CPI rate most recent to the calculation, and the employer payroll tax per pupil that is transferred to the school district pursuant to subsection d. of section 1 of P.L.2018, c. 68. 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

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<sup>1</sup> N.J. CONST. of 1947, art. VIII, § IV, ¶ 1 (West, 2020).

<sup>2</sup> N.J. STAT. ANN. § 18A:36A-2 (West 2020).

<sup>3</sup> N.J. STAT. ANN. § 18A:36A-3 (West 2020).

<sup>4</sup> N.J. STAT. ANN. § 18A:36A-3(a) (West 2020).

<sup>5</sup> N.J. STAT. ANN. § 18A:36A-2(b) (West 2020).

<sup>6</sup> See *Highland Park Bd. of Educ. v. Hesper (Highland Park I)*, No. A-3890-14 (App. Div. Jan. 24, 2018), *certif. den.*, 233 N.J. 485 (2018).

<sup>7</sup> *Bd. of Educ. of Twp. of Piscataway v. N.J. Dept. of Educ.*, 2019 WL 2402545 \*1 (App. Div. Jun. 07, 2019).

<sup>8</sup> *Id.*

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... [emphasis added].

### **Background**

When the Court considered *Bd. of Educ. of Twp. of Piscataway v. N.J. Dept. of Educ.*, the Piscataway Township Public School District (Piscataway) did not maintain any charter schools in the municipality.<sup>9</sup> A number of Piscataway's resident students, however, attended charter schools located in other school districts.<sup>10</sup>

On motion for summary decision, Piscataway sought a determination from the New Jersey Commissioner of Education that would relieve the municipality from "any obligation to fund out-of-district [student] placements" in charter schools.<sup>11</sup> The Department of Education (Department) cross-moved for summary decision and argued that "the language and history of the [CSPA], and its implementing regulations, clearly demonstrate that resident districts are responsible for paying for their students to attend charter schools regardless of the charter school's location."<sup>12</sup> The matter was transmitted to the Office of Administrative Law for disposition as a contested case.<sup>13</sup>

The Administrative Law Judge (ALJ) determined that the meaning of the term "district of residence" as used in N.J.S. 18A:36A-12(b) was "clearly ambiguous."<sup>14</sup> After a review of the regulatory definition of this term and the legislative history of this statute, the ALJ concluded that "the interpretation that all school districts must fund their students' attendance at charter schools irrespective of location was consistent with the 'overall purpose of the CSPA,' which declares that '[a] charter school shall be open to all students on a space available basis.'"<sup>15</sup> The ALJ said that "what triggers a school district's funding obligation is the mere fact that one of its residents is enrolled in a charter school, irrespective of location," and noted that the term "district of residence" as used in N.J.S. 18A:36A-12(b) "is reasonably interpreted as the student's district of residence and not the charter school's district of residence."<sup>16</sup>

The Commissioner ultimately adopted the decision of the ALJ.<sup>17</sup> Piscataway appealed, as of right, to the Superior Court, Appellate Division.<sup>18</sup>

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<sup>9</sup> *Bd. of Educ. of Twp. of Piscataway v. N.J. Dept. of Educ.*, 2019 WL 2402545 at \*1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at \*2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at \*2-3.

<sup>16</sup> *Id.* at \*4.

<sup>17</sup> *Id.* at \*5.

<sup>18</sup> *Id.*

## Analysis

The question of whether a local board of education is obligated to provide funding for its students enrolled in charter schools located in other school districts is not a new one. The Appellate Division addressed this issue in the unpublished case of *Highland Park Bd. of Educ. v. Hesper (Highland Park I)*.<sup>19</sup> In that case, the Court rejected Highland Park’s argument that only the charter school’s district of residence was obligated to pay for its students to attend the school.<sup>20</sup> The plain language of N.J.S. 18A:36A-12(b), according to the Court, “expressly provides that the ‘school district of residence’ must pay the charter school for ‘each student’ enrolled in the school.”<sup>21</sup> Thus, the term school district of residence, as used in N.J.S. 18A:36A-12(b), “refers to the district where the student resides not the district where the charter school is located.”<sup>22</sup>

Pursuant to the funding statute, 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...”<sup>23</sup> Although the term “school district of residence” is not defined in the CSPA or the implementing regulations, the Court in *Bd. of Educ. of Twp. of Piscataway* explained that “district of residence” was defined in the regulations as the “school district in which a charter school facility is physically located.”<sup>24</sup>

The Court determined that a review of the term, both in the context of the CSPA as a whole, and in light of the legislative history, did not support the Board’s attempt to equate the two. The Court held that for the purposes of the CSPA “it would make no sense to interpret ‘school district of residence’ to mean ‘district of residence.’”<sup>25</sup> The Court reasoned, “[g]iven that both resident and non-resident students can attend a charter school, the term ‘school district of residence’ logically means the district where the student resides.”<sup>26</sup> The Court noted that “[a] school is located in a district, it does not **reside** in a district [emphasis added].”<sup>27</sup>

The Court concluded that “the Commissioner correctly determined that the Department properly implemented the funding requirements of N.J.S. 18A:36A-12(b) by obligating both a ‘district of residence’ and a ‘non-resident district’ to fund their students’ attendance at charter

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<sup>19</sup> *Bd. of Educ. of Twp. of Piscataway v. N.J. Dept. of Educ.*, 2019 WL 2402545 \*1 (App. Div. Jun. 07, 2019) citing *Highland Park Bd. of Educ. v. Hesper (Highland Park I)*, No. A-3890-14 (App. Div. Jan. 24, 2018), *certif. denied*, 233 N.J. 485 (2018).

<sup>20</sup> *Id. slip op.* at 19.

<sup>21</sup> *Id.* at 16.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Bd. of Educ. of Twp. of Piscataway*, 2019 WL 2402545 at \*7.

<sup>25</sup> *Id.* at 10. The Court noted that the term “district of residence” is defined in N.J.A.C. 6A:11-1.2; N.J.A.C. 6A:23A-15.1.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

schools.”<sup>28</sup> Thus, pursuant to N.J.S. 18A:36A-12(b), Piscataway was obligated to provide funding for its students who were enrolled in charter schools located outside of its school district.<sup>29</sup>

## Outreach

In connection with this Report, the Commission sought comments from knowledgeable individuals and organizations, including: the New Jersey Department of Education, Office of Charter Schools; the New Jersey State Bar Association, Administrative Law Section; the New Jersey School Boards Association; the New Jersey Public Charter Schools Association; the New Jersey Association of School Administrators; Geoffrey Stark, Former Deputy Attorney General in the Education and Higher Education Section; Professor Emeritus Paul Tractenberg of Rutgers Law School; Professor Amy Newcombe of Seton Hall University School of Law; amicus David H. Coates; as well as the attorneys for appellant and appellee in *Bd. of Educ. of Twp. of Piscataway v. N.J. Dept. of Educ.*

### • In Support

Thomas Johnston of Johnston Law Firm LLC, attorney for the charter school in *Bd. of Educ. of Twp. of Piscataway v. N.J. Dept. of Educ.*, opined that the proposed definition of “school district of residence” using domicile makes sense because it avoids ambiguity if students temporarily reside in other districts due to homelessness.<sup>30</sup> The change, he added, ensures that the original district of domicile remains liable for remitting payments – a requirement that is not clearly addressed by the case law.<sup>31</sup>

Professor Emeritus Paul Tractenberg of Rutgers Law School opined that the proposals are “eminently correct and helpful.”<sup>32</sup> He confirmed that the proposed definition of “school district of residence” is in accord with recent decisions and logically consistent with the CSPA.<sup>33</sup> He noted that because charter schools often serve underserved urban districts, a statutory interpretation that relieved the district of domicile of financial responsibility would “do serious violence to the whole institution of charter schools.”<sup>34</sup> He added that expanding the reach of charter schools beyond their district of physical location can also foster student diversity.<sup>35</sup>

### • In Opposition

The New Jersey Department of Education (DOE) advised the Commission that it did “not believe the proposed revisions to the statute offer[ed] additional clarity and may be more

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<sup>28</sup> *Id.* at 12.

<sup>29</sup> *Id.*

<sup>30</sup> See E-mail from Thomas Johnston, Esq., Johnston Law Firm LLC, to the N.J. Law Rev. Comm’n (Mar. 03, 2021, 03:29 P.M.) (on file with the NJLRC).

<sup>31</sup> *Id.*

<sup>32</sup> See E-mail from Prof. Paul Tractenberg, Rutgers Law School, to the N.J. Law Rev. Comm’n (Mar. 22, 2021, 03:15 P.M.) (on file with the NJLRC).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

subjective.”<sup>36</sup> In addition, the DOE commented that “[t]he definition of domiciled, for the purposes of establishing residence, has not been clearly defined and fails to account for specific or unique situations like that of the domiciled status of homeless students, students residing in temporary care, and other undetermined factors.”<sup>37</sup> Without further explanation, the DOE objected to the addition of the term “as applicable” to subsection b. as set forth in the Appendix. The DOE also remarked that “[the] current statute has established precedent through case law to support [its] interpretation.”<sup>38</sup> Finally, the DOE advised the Commission that since “the Department does not support the statutory revision to [N.J.S. 18A:36A-12] as presented...” it did not support the proposed modification to N.J.S. 18A:36C-7.1, a statutory cross-reference to proposed subsection a. of N.J.S. 18A:36A-12.

### **Conclusion**

The term “school district of residence” is not defined in N.J.S. 18A:36A-12. The Appendix includes proposed amendments to N.J.S. 18A:36A-12 and N.J.S. 18A:36C-7.1 based on the decision in *Bd. of Educ. of Twp. of Piscataway v. N.J. Dept. of Educ.* and the guidance provided by the Commission and commenters.

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<sup>36</sup> See Letter from Christopher Huber, State of N.J., Dept. of Ed. to the N.J. Law Rev. Comm’n \*1 (May 13, 2021, received via e-mail May 17, 2021 04:41 P.M.) (on file with the NJLRC). The Dept. of Ed. was under the impression that their comments had been submitted at an earlier date. Due to some administrative confusion at the DOE, the materials were not received by the N.J. Law Rev. Comm’n until May 17, 2021 and thus did not appear in the Commission’s Draft Final Report of May 10, 2021. The concerns of the Dept. of Ed. were conveyed to the Commission during its May 20, 2021, monthly meeting and have been incorporated in this Final Report for the sake of completeness.

<sup>37</sup> *Id.* But see comments of Thomas Johnston, Esq., *supra* at 5.

<sup>38</sup> *Id.*

## Appendix

The proposed modifications to **N.J.S. 18A:36A-12** and **N.J.S. 18A:36C-7.1** (shown with ~~strikethrough~~, or underlining), follow:

### **18A:36A-12. School district of residence to pay charter school for each resident student attending charter school; amount of payment**

a. ~~(Deleted by amendment, P.L.2007, c. 260).~~

~~b. a.~~ For each student who is domiciled within its jurisdiction, and who is enrolled in a charter school, the school district of residence shall be the child's district of residence and shall pay the following directly to the charter school, as applicable: -for each student enrolled in the charter school who resides in the district

(1) an amount equal to 90% of the sum of the budget year equalization aid per pupil;

(2) the prebudget year general fund tax levy per pupil inflated by the CPI rate most recent to the calculation; ~~and~~

(3) the employer payroll tax per pupil that is transferred to the school district pursuant to subsection d. of section 1 of P.L.2018, c. 68;

(4) In addition, the school district of residence shall pay directly to the charter school the security categorical aid attributable to the student; ~~and~~

(5) 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,~~

(6) if applicable, 100% of preschool education aid; ~~and~~

(7) The district of residence shall also pay directly to the charter school any federal funds attributable to the student.

~~c. (Deleted by amendment, P.L.2007, c. 260).~~

~~d. b.~~ Notwithstanding the provisions of subsection ~~b. a.~~ of this section, in the case of a student who was not included in the district's projected resident enrollment for the school year, the State shall pay 100% of the amount required pursuant to subsection ~~b. a.~~ of this section for the first year of the student's enrollment in the charter school.

~~e. c.~~ The State shall make payments required pursuant to subsection ~~d. b.~~ of this section directly to the charter school.

### Comments

The term "school district of residence" is not defined in 18A:36A-12, creating ambiguity over whether it refers to a student's residence or a charter school's physical location. Furthermore, "district of residence" is defined

in N.J.A.C. 6A:11-1.2 and N.J.A.C. 6A:23A-15.1 as referring to a charter school’s physical location, in conflict with the findings of the Appellate Division in *Highland Park Bd. of Educ. v. Hesse (Highland Park I)* and *Bd. of Educ. of Twp. of Piscataway v. New Jersey Dept. of Educ.* The proposed modification clarifies the term “school district of residence” in the text of 18A:36A-12 according to the holdings of both decisions.

Subsections a. and c. were deleted by amendment in 2007 and the remaining references to those subsections are proposed to be deleted, with the balance of the subsections re-lettered. For ease of access and reference, new subsection a. has been divided into seven parts each stating an individual payment requirement.

### **18A:36C-7.1. Renaissance school project located in temporary facility; funding**

Notwithstanding the provisions of subsection e. of section 7 of P.L.2011, c. 176 (C.18A:36C-7) to the contrary, if after approval, a renaissance school project is located in a temporary facility pending completion of the newly constructed facility or substantially reconstructed facility, the renaissance school project shall be funded pursuant to subsection ~~b.~~ a. of ~~section 12 of P.L.1995, c. 426 (C.18A:36A-12)~~ N.J.S. 18A:36A-12 until it has obtained final site plan approval for the newly constructed facility or begun construction on the facility to be substantially reconstructed, provided that a renaissance school project shall not be located in a temporary facility for more than three years.

#### **Comments**

A citation to the previous subsection b. of N.J.S. 18A:36A-12 has been changed to subsection a. to reflect the re-lettering in that statute.