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October 29, 2021

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Re: In re Complaints filed by the Franklin Township Board of Education, Lower Township Elementary Board of Education and Gloucester City Board of Education
Dkt. Nos. COLM-0001-21, COLM-0001-21-A, COLM-0001-21-B

Dear Judge Sweeney:

In connection with the above-referenced matter, please accept this letter brief in lieu of a more formal brief on behalf of respondent, the Executive Branch of the State of New Jersey, in further support of its motion for summary judgment and in opposition to the cross-motion for summary judgment of claimants, the Franklin Township Board of Education ("Franklin Township"), the Lower Township Elementary Board of Education ("Lower Township"), and the Gloucester City Board of Education ("Gloucester City").

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS

Respondent relies on and incorporates by reference the procedural history and statement of facts set forth in its motion for summary judgment. Respondent further relies on its response to claimants' statement of undisputed material facts, enclosed herewith. Notably, claimants' statement of undisputed material facts are largely comprised of legal arguments pertaining to an interpretation of Chapters 44 and 163.[1] Because the issues raised by claimants involve a "textual interpretation" of the challenged law, "'no further factual information' is needed to resolve [the] issues" and summary judgment is therefore appropriate. In re Complaint Filed by the Borough of Jamesburg ("Jamesburg"), COLM (Oct. 28, 2004), at *6.

ARGUMENT

CLAIMANTS' MOTION FOR SUMMARY JUDGMENT MUST BE DENIED BECAUSE CHAPTER 44, AS AMENDED BY CHAPTER 163, DOES NOT VIOLATE THE NEW JERSEY CONSTITUTION OR THE LOCAL MANDATES ACT.

Claimants make no effort to deny that Chapter 44, as amended by Chapter 163,[2] falls within any of the six exemptions to the

[1] Moreover, while claimants have provided a statement of undisputed material facts in support of their motion for summary judgment, there is no requirement under the Council's rules to provide one. However, in an abundance of caution and for the Council's convenience, respondent has provided a response to claimants' statement of undisputed facts in addition to this letter brief.
[2] Hereinafter referred to as "Chapter 44" unless otherwise denoted.

prohibition against unfunded mandates.[3] See N.J. Const. art. VIII, § 2, ¶ 5(c); N.J.S.A. 52:13H-3. Instead, claimants focus on the allegation that Chapter 44 is a mandate that requires direct expenditures for which they suggest no resources have been provided to offset. For the reasons that follow, claimants' motion must be denied.

In order to prove a claim of unconstitutionality under the New Jersey Constitution and the Local Mandates Act, N.J.S.A. 52:13H-1 to -22, a claimant must demonstrate that: (1) the statute, rule, or regulation imposes a "mandate" on a unit of local government; (2) additional direct expenditures are required for the implementation of the statute, rule, or regulation; and (3) the statute, rule, or regulation fails to "authorize resources, other than the property tax, to offset the additional direct expenditures." Jamesburg at *5; In re Complaint Filed by the N.J. Ass'n of Cntys. ("NJAC III"), COLM (Mar. 31, 2020), at *4. So, if a statute does not actually require direct expenditures, or if it authorizes resources to offset such expenditures, no unfunded mandate exists. Jamesburg at *5; NJAC III at *4.

[3] For the reasons set forth in respondent's moving brief, two of those exemptions apply here, and summary judgment must be granted on that basis. See Respondent's 10/12/21 Brief, Points I.B and I.C.

A. Claimants Have Not Incurred Any Direct Expenditures.

Claimants begin by arguing that Chapter 44 imposes a mandate that requires direct expenditures in order to implement the health benefits plan. Claimants' Brief at 7-8. They are wrong. Not only have claimants not incurred direct expenditures, but even if they did, the Legislature has afforded claimants the necessary resources to offset their hypothetical expenditures.

To start, no direct expenditures are mandated and claimants' restrictive construction of Chapter 44 is wholly unavailing. Claimants narrowly focus on the mandatory nature of Chapter 44 — i.e., that employers "shall" offer certain health benefits to employees — and summarily conclude that an unfunded mandate therefore exists. Claimants' Brief at 7. But that does not end the inquiry. For one, none of the claimants have even engaged in collective negotiations; and for another, Franklin Township has now openly admitted to refusing to implement Chapter 44.[4] Claimants' Brief at 8; Morlok Certification at ¶¶ 4-5; Claimants' Complaint Addendums at ¶¶ 5. So any incurrence of direct

[4] Grasping at straws, Franklin Township also asserts that its failure to engage in negotiations is irrelevant, pointing to N.J.S.A. 52:13H-16 and suggesting that hypothetical assertions of harm are permitted to maintain standing. But that statute pertains solely to applications for preliminary injunctive relief, which the Council has already denied in this matter. In re Complaint Filed by the Franklin Twp. Bd. of Educ., et al., COLM (May 21, 2021 Order).

expenditures is purely hypothetical — claimants have not attempted to negotiate the alleged financial impact of Chapter 44 by negotiating various terms and conditions of employment. They also point to other non-party school districts that may be experiencing increases in healthcare costs, id. at 9-10, but claimants' reliance on the financial impact to other non-party schools is well outside of the record before the Council and wholly irrelevant to its determination. Only three districts have filed complaints in this matter, and claimants are not in a position to speculate on the circumstances surrounding other districts or the status of their collective negotiations.[5] Further, claimants' problems are compounded by the standard of review in matters before the Council

[5] Respondent objects to the SBA's inclusion of purported costs from Warren Hills, Bogota Township, Boonton Township, Hackettstown, Hunterdon County Educational Services Commission, Morris Plains, and Warren County Technical School. Those school districts have not filed complaints in this matter, and neither the SBA nor those districts are parties to the case. See Council Rule 4 ([t]he parties to a proceedings before the Council shall include (a) the person or entity who has filed a Complaint . . . , and (b) any group or individual who has filed an Answer . . . ."); Council Rule 5 (pleading requirements for Claimants). Given the SBA's limited amicus status, and the districts' failure to file a complaint, their inclusion of alleged costs is outside the record in this matter and not properly before the Council. Neither the SBA nor the districts have standing to assert any harm or costs associated with Chapter 44. See Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum, 84 N.J. 137, 144 (1980) ("[A] litigant may not claim standing to assert the rights of a third party.") But even if they did, their claims fail for all of the same reasons as the actual claimants in this matter.

— indeed, clear and convincing evidence must be presented that a county, municipality, or school board will actually incur a direct expenditure. Certainly, claimants cannot present clear and convincing evidence of an unfunded mandate by speculating on fiscal matters unrelated to their districts, and when they have not bothered to engage in mandatory negotiations.

Moreover, the Council should consider not just whether a specific claimant has expended funds, but whether the law in fact requires local entities to expend funds to meet the law's requirements that it otherwise would not have to spend. In In re Complaint Filed by Rockaway Twp. Bd. of Educ., COLM-1-15 (January 3, 2017), at *6, for instance, the Council considered a regulation's requirement for boards of education to "design and deliver curriculum and instruction for gifted and talented students 'in such a way that all students are able to demonstrate the knowledge and skills specified by" certain standards with "'appropriate' K-12 educational services[,]" and which further required boards to "develop 'appropriate curricular and instructional modifications'" for said students. Ibid. The Council found that "[n]o direct expenditures are required by th[e] regulatory language" because the challenged regulation provided "broad flexibility" to the board in determining how it would accomplish the goals of the law, there were no requirement for

direct expenditures. Ibid. In other words, the Council requires more than conjecture to establish the existence of an unfunded mandate, and the collective negotiations safety valve certainly embodies the type of broad flexibility contemplated by the Council. See Respondent's Moving Brief at 22-23.

Thus, Chapter 44 cannot be said to require claimants to incur direct expenditures and, therefore, is not an unfunded mandate. N.J. Const. art. VIII, § 2, ¶ 5(a); N.J.S.A. 52:13H-2 and -12(a).

B. Chapter 44, As Amended By Chapter 163, Provides Claimants With the Resources to Offset Any Purported Expenditures.

To the extent that transitional costs may have been incurred, Chapter 44 authorizes mandatory collective negotiations to offset these costs — and importantly, claimants have failed to avail themselves of this resource. L. 2021, c. 163, § 3.

As noted above, Chapter 44 provides flexibility to school districts to implement the law's requirement to offer certain health care benefits plans. L. 2020, c. 44. In particular, Chapter 163, which revises Section 8 of Chapter 44, explains that school districts are obliged to engage in mandatory collective negotiations encompassing "all terms and conditions of employment," and specifically allows for modification of plan level offerings or contributions for the New Jersey Educators Health Plan or an equivalent plan. L. 2021, c. 163, § 3. The

mandatory collective negotiations process thus authorizes school districts to act within their discretion to determine what costs need to be offset, as they are in the unique position of understanding their own resources and local circumstances.

To the extent that claimants have expended costs associated with offering health benefits plans in accordance with Chapter 44, the law requires mandatory collective negotiations in order to provide a critical safety valve and resource to offset those expenditures. In fact, the Legislature passed Chapter 163, in part, to make clear that employers and unions "shall engage in collective negotiations, that include all terms and conditions of employment, to substantially mitigate the financial impact of the difference as agreed to by the parties[.]" L. 2021, c. 163, § 3 (emphasis added). And while claimants argue that full mitigation is not required (see Claimants' Brief at 10-11) — essentially arguing that collective negotiations will fail (suggesting, among other things, that it is "band aid" legislation, and that there is no mechanism in place to ensure that collective negotiations take place) — their argument falls short of the mark. The plain language of Chapter 44 is completely unrestrictive, and allows for negotiations to encompass past, present, and future financial, impacts with no limit on the scope of mitigation.

The collective negotiations process is not illusory.

Participation by both sides — school employers and unions — is mandatory. L. 2021, c. 163, § 3 ("[T]he employer and the majority representative shall engage in collective negotiations, that include all terms and conditions of employment, to substantially mitigate the financial impact of the difference as agreed to by the parties . . . ."). And importantly, the School Employees Contract Resolution and Equity Act ("Act"), N.J.S.A. 34:13A-31 to -49, is devised to ensure that the collective negotiations process achieves meaningful results. In particular, as detailed in respondent's moving brief, the Act provides a comprehensive mechanism for requiring mediation where school employers and majority representatives reach an impasse in negotiations. N.J.S.A. 34:13A-34 to -36; N.J.A.C. 19:12-4.1 to -4.4. And for these reasons, claimants' argument that Chapter 44 is an unfunded mandate because they cannot take "unilateral action to offset the costs of Chapter 44" is incorrect. Claimants' Brief at 12-13. They conveniently overlook the fact that collective negotiations are mandatory, L. 2021, c. 163, § 3, and that they are guaranteed to move forward without impasse, N.J.S.A. 34:13A-31 to -49. Thus, to the extent claimants argue that collective negotiations will be futile, such a blanket conclusion cannot be made where the parties have not even engaged in the mandatory process.

Claimants' failure to offset any alleged costs by

collectively negotiating as required by law therefore belies any claim of increased costs associated with implementation of the NJEHP. Claimants have not yet completed the mandatory collective negotiations process, and Franklin Township concedes that it has refused to implement the plan for its employees in accordance with Chapter 44. As the Council found in a similar context in Rockaway, simply because claimants chose to expend funds without exhausting their right and obligation to collectively negotiate "does not equate to a requirement to have done so." Id. at *7. "In the absence of a requirement for direct expenditures in the implementation of the [challenged law], which the [claimants] ha[ve] not shown, [Chapter 44] is simply not an unfunded mandate as defined in the Amendment." Ibid.

The importance of the collective negotiations safety valve cannot be overstated. And there is precedent in analogous contexts for deferring to the collective negotiations process — indeed, both the Public Employment Relations Commission and our courts have recognized the importance of engaging in "impact" negotiations to alleviate or offset purported harm when the law or managerial prerogatives affect the terms and conditions of employment. See, e.g., Byram Twp. Bd. of Educ. v. Byram Twp. Educ. Ass'n, 152 N.J. Super. 12, 20 (App. Div. 1977); In re Vernon Twp. Bd. of Educ. & Vernon Twp. Educ. Ass'n, PERC No. 2016-09, 2015 NJ

PERC LEXIS 73, at *9-10 (PERC Aug. 13, 2015); In re Fort Lee Bd. of Educ. & Fort Lee Educ. Assn, H.E. No. 2017-3, 2016 NJ PERC LEXIS 109, at *27-29, *36-37 (PERC Dec. 28, 2016), aff'd in part, rev'd in part, 2017 NJ PERC LEXIS 47, at *33-36 (PERC Jun. 29, 2017); In re Rutgers, The State University & Rutgers Council of Am. Ass'n of Univ. Professors, PERC No. 76-13, 1976 NJ PERC LEXIS 44 (PERC Jan. 23, 1976); Sayreville Bd. of Educ. & Sayreville Educ. Ass'n, H.E. No. 78-10, 1977 NJ PERC LEXIS 116 (PERC Oct. 24, 1977). Deference to that process is equally necessary here.

Accordingly, Chapter 44 plainly provides claimants with additional resources to offset any purported expenditures, and therefore it is not an unfunded mandate. N.J. Const. art. VIII, § 2, ¶ 5(a); N.J.S.A. 52:13H-2 and -12(a).

C. Claimants' Reliance On Council Precedent Is Unavailing.

Claimants rely on prior decisions of the Council to support their claim that Chapter 44 is an unfunded mandate, and that it mandates direct expenditures without authorizing resources to offset those expenditures. All of them are distinguishable from the present case, and provide no support for their motion.

For instance, they rely on In re Complaint Filed by the Allamuchy Twp. Bd. of Educ. ("Allamuchy"), COLM (May 1, 2012), at *6, where the Council determined that certain provisions of the Anti-Bullying Bill of Rights Act constituted an unfunded mandate

because there were costs associated with implementing requirements set forth by the statute, and because there were no additional resources to offset the additional expenditures. In reaching that conclusion, the Council found that the use of already-existing aid for "at-risk pupils" from the State to fund this initiative was insufficient, as the potential victims of bullying were not deemed "at-risk pupils" and no additional aid was provided above and beyond what was already given, in order to implement the statute. Id. at *7. In essence, the Council viewed the new law as providing no new resources and maintaining the status quo with respect to funding.

Likewise, in In re Complaint filed by Deptford Twp. ("Deptford"), COLM (Apr. 20, 2016), at *6, the Council found a statute requiring installation of video recording systems to be an unfunded mandate. In that case, the Council found the $25 surcharge to fund this obligation "illusory" and inadequate as it fell short of "cover[ing] the anticipated costs of municipal compliance without resort to other sources such as increased property taxes, grants, loans, and the like." Ibid.

But unlike the laws in Allamuchy and Deptford, Chapter 44 does specifically authorize a resource, other than property tax, to offset any additional expenditures incurred. L. 2021, c. 163, § 3. Any potential transitional costs to school districts are

dependent upon a number of variables, including the number of enrollees, the scope of coverage, and costs of insurance premiums. Therefore, in order to offset any potential transitional costs incurred, the Legislature required mandatory collective negotiations as a resource for each district to resolve their individual costs, if any, based on the circumstances each district faces.

In doing so, the Legislature specifically sought to allow for local discretion as the most equitable method for districts to offset any potential costs. See Proposed Amendment to the 1947 Constitution, Senate Committee Substitute for Senate Concurrent Resolution Nos. 87, 26 and Assembly Concurrent Resolution No. 1 and Assembly Concurrent Resolution Nos. 77 and 40 (ACS) (Adopted May 15, 1995; Filed June 20, 1995). And as noted in respondent's moving brief, the Legislature was also acutely aware of the great value in negotiation as a cost-saving resource. Public Hearing Before Senate Community Affairs Committee, Senate Concurrent Resolution No. 87 (Jan. 30, 1995), at 40; Public Hearing Before Senate Community Affairs Committee, Senate Committee Substitute (1R), for Senate Concurrent Resolution Nos. 87, 26 and Assembly Concurrent Resolution No. 1 and Assembly Concurrent Resolution Nos. 77 and 40 (ACS) (May 25, 1995), at 2-3, 8.

Claimants also rely on two cases to support a similar

proposition that "a statute or regulation may [not] rely upon existing revenue sources or funds not specifically earmarked in order to establish constitutionality." Claimants' Brief at 11-12 (citing In re Special Servs. Sch. Dists. of Burlington, Atlantic, Cape May, & Bergen Cntys., COLM (July 26, 2007); In re Complaint Filed by the Mayors of Shiloh Borough and the Borough of Rocky Hill, et al., COLM (Dec. 12, 2008)). Neither case is applicable here. In relying on those matters, claimants misconstrue the provisions of Chapter 44. The law does not attempt to utilize either non-specific grants or already-existing State aid in order to offset any potential costs. Rather, Chapter 44 specifically requires engagement in collective negotiations so that school districts may avail themselves of a resource that is tailored to take into account their own specific and unique circumstances.

For these reasons, claimants' reliance on the Council's previous decisions is unavailing, and their motion must be denied.

CONCLUSION

For these reasons, and for all of the reasons set forth in the Executive Branch's moving brief, respondent's motion for summary judgment must be granted, claimants' cross-motion must be denied, and the complaints must be dismissed with prejudice.

Respectfully submitted,

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