

SB #31-98

IN THE MATTER OF THE AMENDMENT :  
TO THE CHARTER OF THE GREATER : STATE BOARD OF EDUCATION  
BRUNSWICK CHARTER SCHOOL, : DECISION  
MIDDLESEX COUNTY. :

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Decided by the Commissioner of Education, March 4, 1998

For the Appellant, Apruzzese, McDermott, Mastro & Murphy (James L.  
Plosia, Jr., Esq., of Counsel)

For the Respondent, Bucca & Campisano (Benjamin S. Bucca, Jr., Esq., of  
Counsel)

On March 4, 1998, the Commissioner of Education approved a request made by the Greater Brunswick Charter School ("Charter School") to amend its charter so as to eliminate Milltown from its region of residence. In granting the approval, which changed the Charter School's region of residence to include only New Brunswick, Highland Park and Edison, the Commissioner expressly relied on a regulatory amendment he had proposed to N.J.A.C. 6A:11-2.6. That regulatory amendment proposed to change the terms of N.J.A.C. 6A:11-2.6 so as to permit the Commissioner to entertain a request at any time by a charter school to amend its charter. See 30 N.J.R. 588(a) (February 19, 1998). However, the State Board did not adopt that proposed rule until May 6, 1998, and it was not effective until June 1, 1998, when it was scheduled for publication in the New Jersey Register. N.J.S.A. 52:14B-5; N.J.A.C.

1:30-4.6(b) (any type rule not listed as an exception in subsection (a) is effective when promulgated in the New Jersey Register).

The Highland Park Board of Education filed an appeal to the State Board from the Commissioner's March 4 approval of the Charter School's request to amend its charter.

The express terms of N.J.A.C. 6A:11-2.6 in effect when the Commissioner's approval was given in this case permitted a charter school to apply to the Commissioner for an amendment to its charter only after completion of the first school year of its charter period. N.J.A.C. 6A:11-2.6(a), effective August 4, 1997. See 29 N.J.R. 3489(a).<sup>1</sup> Hence, when the Commissioner acted to approve the Greater Brunswick Charter School's amendment request in this instance, the terms of the regulatory provisions in effect did not give him the authority to approve or deny such requests until the Charter School had completed its first year of operation. N.J.A.C. 6A:11-2.6(d). The Greater Brunswick Charter School, however, was not even scheduled to begin operation until the 1998-99 school year. Nonetheless, the Commissioner acted on the basis of the proposed regulation to grant the Charter School's request.

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<sup>1</sup> N.J.A.C. 6A:11-2.6 as in effect on March 4, 1998 provided in pertinent part that:

(a) Following the completion of the first school year of the charter period, a charter school may apply to the Commissioner for an amendment to the charter....

(d) The Commissioner may approve or deny amendment requests of charter schools and shall notify charter schools of decisions on or about August 25. If approved, the amendment becomes effective immediately unless a different effective date is established by the Commissioner.

It is well settled that an administrative agency such as the Department of Education is bound by the terms of its own regulations until it acts pursuant to the Administrative Procedure Act to change those regulations. E.g., United States v. Nixon, 418 U.S. 683, 695, 94 S.Ct. 3090, 3101, 41 L. Ed.2d 1039 (1974). See also Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954) (U.S. Attorney General bound by regulations even though he could amend them); Clean Ocean Action, et al. v. Colonel Thomas A. York, et al., 57 F.3d 328, 333 (3d Cir. 1995) (agency bound by express terms of regulations until it amends or revokes them).

In the case of this agency, a regulation cannot become effective until it is adopted by the State Board of Education. N.J.S.A. 18A:4-15 (state board shall make and enforce, and may alter and repeal, rules for implementing and carrying out school laws). See N.J.S.A. 18A:4-1 (state board shall be head of the department of education); N.J.S.A. 18A:4-10 (general supervision and control of the state department of education vested in state board). Consequently, the Commissioner erred in this case by applying a proposed regulation which we had not yet adopted, thereby achieving a result in this case which was contrary to the result mandated by the terms of the regulation then in effect. N.J.A.C. 18A:4-23 (commissioner shall enforce all rules prescribed by the state board).

Again, under the clear and express terms of the regulation in effect when the Commissioner granted the Charter School's request, an amendment to a charter could not be requested or granted until completion of the first school year of the charter period. See supra note 1. In this respect, we stress that the State Board did not express any intent to apply the new regulation retrospectively when we adopted it on

May 6, 1998. E.g., In the Matter of Certain Amendments, 133 N.J. 206, 223 (1993); Gibbons v. Gibbons, 86 N.J. 515, 522-23 (1981).

Thus, for the reasons expressed herein, we reverse the Commissioner's determination and set aside the amendment he granted removing Millville from the Charter School's region of residence. Board of Education of the City of Plainfield v. Cooperman, 209 N.J. Super. 174 (App. Div. 1987), aff'd with modification, 105 N.J. 587 (1987).<sup>2</sup>

June 3, 1998

Date of mailing \_\_\_\_\_

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<sup>2</sup> We see nothing that would preclude the Greater Brunswick Charter School from applying to the Commissioner for an amendment to its charter after the effective date of the amended regulations.