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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0945-16T4

IN THE MATTER OF THE APPROVAL  
OF THE APPLICATION OF THE  
AILANTHUS CHARTER SCHOOL.

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Argued February 14, 2018 – Decided May 11, 2018

Before Judges Alvarez, Nugent, and Geiger.<sup>1</sup>

On appeal from the Department of Education.

Brett E.J. Gorman argued the cause for appellant Franklin Township School District (Parker McCay, PA, attorneys; Brett E.J. Gorman, of counsel and on the brief; Kayleen Egan, on the brief).

Nicole T. Castiglione, Deputy Attorney General, argued the cause for respondent New Jersey Commissioner of Education (Gurbir S. Grewal, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Nicole T. Castiglione, on the brief).

Paul P. Josephson argued the cause for respondent Ailanthus Charter School (Duane Morris, LLP, attorneys; Paul P. Josephson, of counsel and on the brief).

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<sup>1</sup> Judge Alvarez did not participate in oral argument, but joins the opinion with the consent of the parties. See R. 2:13-2(b).

PER CURIAM

Appellant Franklin Township School District appeals from the September 30, 2016 approval by the Acting Commissioner (Commissioner) of the Department of Education (Department) of the proposed Ailanthus Charter School (Ailanthus) for a 2017-18 planning year with an opening in the 2018-19 school year. The District argues, in part, that N.J.A.C. 6A:11-2 is invalid because it conflicts with the Charter School Program Act of 1995 (the Act), N.J.S.A. 18A:36A-1 to -18. We uphold N.J.A.C. 6A:11-2 as valid. We also conclude the appeal seeks review of an interlocutory agency decision. Because appellant was required to move for leave to appeal, rather than file an appeal as of right without seeking leave, we dismiss the remaining aspects of this appeal.

I.

We discern the following facts from the record. On March 31, 2016, the founders of Ailanthus submitted a phase one charter school application to serve pupils in kindergarten through fifth grade from the City of New Brunswick and Franklin Township. On April 29, 2016, the Franklin Township Board of Education (the Board) submitted a resolution to the Commissioner opposing Ailanthus's application. In its resolution, the Board expressed the following concerns and objections to Ailanthus's application:

WHEREAS, the Franklin Township Board of Education believes the establishment of a third charter school with the Franklin Township Public School boundaries is not necessary; and

. . . .

WHEREAS, Franklin Township Public Schools have more highly qualified teachers per student than the State average; a diverse student population who report over [sixty] different languages as their home language; positive behavior programs; academic intervention programs; an ESL/Bi-lingual Program that was recently named as a Model Program by the NJ Department of Education; partnerships with institutions of higher learning such as Rutgers University; a state approved health and physical education program at the elementary level with additional interscholastic athletic opportunities at the secondary level; an art, music, and creative movement program at the elementary level with theater arts opportunities, beginning in fifth grade, along with second language opportunities; and

. . . .

WHEREAS, the Ailanthus application states that parents, families and community stakeholders were actively engaged throughout each stage of the application process, it fails to provide details on how information was gathered from other stakeholders; over what period of time this took place and more importantly how many people actually participated; and

WHEREAS, the Franklin Township Board of Education believes that the application submitted to the Department of Education is flawed in its lack of detail; and

WHEREAS, the Ailanthus application states that its recruitment efforts are guided by its mission to serve a socioeconomically diverse population and that the use of a weighted lottery, if permission is granted, will help in this endeavor; and

WHEREAS, the Franklin Township Board of Education recognizes this proposed effort, but notes it is not a comprehensive plan to meet the diversity model of the Franklin Township Public School District. Further, the Board of Education has concerns about charter schools increasing ethnic isolation in our Township schools; and

WHEREAS, the Ailanthus School will occupy the facility vacated by the Thomas Edison EnergySmart Charter School . . . . "Concerns have been raised by the lack of diversity in Thomas Edison EnergySmart Charter School's student population." Further, the location of the proposed charter school services a relatively homogeneous population that is not reflective of the township demographic; and

. . . .

WHEREAS, if approval of the Ailanthus Charter School is granted it would create undue hardship to the tax paying members of the Franklin Township community in that this would be the third charter school within the Franklin Township Public Schools' boundaries drawing needed resources away from the more than 7,500 students enrolled in Franklin Township Public Schools[.]

On May 19, 2016, the Bound Brook Board of Education submitted a similar resolution to the Commissioner opposing Ailanthus's application.

On June 10, 2016, following review of Ailanthus's phase one application and the opposing resolutions, the Commissioner found Ailanthus satisfied each of the standards established by the Department for phase one of the application process, approved it for "qualified applicant" status, and instructed it to submit phase two of its charter school application.

On July 15, 2016, Ailanthus submitted its phase two application. Following review of the phase two application, and determination by the Commissioner that Ailanthus was a "qualified applicant," Ailanthus participated in "an in-depth interview" pursuant to N.J.A.C. 6A:11-2.1(e).

On September 30, 2016, the Commissioner advised Ailanthus that its charter school application was "approved for a 2017-18 planning year with an opening in the 2018-19 school year" pursuant to N.J.A.C. 6A:11-2.1(m). The planning year allows an applicant that receives phase two approval, but is not prepared to open in the subsequent school year, additional time to: demonstrate its qualifications for a charter; submit additional documentation; participate in the Department's preparedness process; and demonstrate compliance with state and federal regulations. N.J.A.C. 6A:1-1.2; N.J.A.C. 6A:1-2.1(m). The Commissioner advised Ailanthus the approval was contingent upon the submission of

additional documentation, approval of that documentation, and successful completion of the preparedness process, stating:

This approval is contingent upon receipt of outstanding documentation not included in your application, successful participation in the preparedness process and compliance with all applicable state and federal regulations. The preparedness process will include an on-site visit by [Department] personnel that will gauge readiness for school opening. The preparedness visit will include a review of program, facility and fiscal documentation and interviews with board of trustee members and staff members of the proposed charter school to assess organizational leadership and capacity.

Once the preparedness process is successfully completed and all documentation is approved, your final charter will be granted and you will enter into a formal charter agreement with the Department to operate in the 2018-19 school year. The charter agreement sets forth the terms and conditions of operating a charter school in New Jersey and defines the academic and non-academic criteria by which your school will be evaluated and held accountable.

On November 1, 2016, without first moving for leave to appeal, the District filed a notice of appeal of the Commissioner's September 30, 2016 approval of Ailanthus's application for a 2017-18 planning year with an opening in the 2018-19 school year. The Commissioner moved to dismiss because a final decision granting or denying Ailanthus's charter application had not yet been issued. On May 8, 2017, the motion was denied.

On appeal, the District raises the following points:

POINT I

N.J.A.C. 6A:11-2.1[(f)] IS INCONSISTENT WITH THE STATUTORY LANGUAGE OF N.J.S.A. 18A:36A-1 ET SEQ., AND IS CONSEQUENTLY, INVALID. (ISSUE CONCERNING REGULATION INAPPROPRIATE TO RAISE BEFORE COMMISSIONER).

POINT II

THE COMMISSIONER'S DECISION WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE.

A. The Commissioner failed to explain the reasons for her decision, making her decision arbitrary, capricious and unreasonable.

B. The Commissioner did not adequately consider the objections raised by the Board, which makes her decision arbitrary.

C. There is not sufficient evidence to support the Commissioner's decision because Ailanthus put forth an unrealistic budget and created a school day that is not educationally sound.

POINT III

THE COMMISSIONER'S DECISION SHOULD BE REVERSED BECAUSE SHE FAILED TO CONSIDER THE SEGREGATIVE IMPACT AILANTHUS WOULD HAVE ON THE DISTRICT.

The Commissioner renews her argument that the appeal should be dismissed because a final agency decision granting or denying Ailanthus's charter application has not yet been made and the District did not move for leave to appeal.

## II.

We begin with an overview of the application and approval process for charter schools. The Act directs the Commissioner to "establish a charter school program which shall provide for the approval and granting of charters to charter schools." N.J.S.A. 18A:36A-3(a). In addition, the Act requires the State Board of Education (the State Board) to "adopt rules and regulations . . . necessary to effectuate the [Act's] provisions." N.J.S.A. 18A:36A-18. "A key aim of the Act, indeed the public policy of the State, is 'to encourage and facilitate the development of charter schools.'" In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 320 N.J. Super. 174, 220 (App. Div. 1999) (quoting N.J.S.A. 18A:36A-2), aff'd as modified, 164 N.J. 316 (2000). The State Board has adopted rules and regulations pursuant to this mandate, N.J.A.C. 6A:11-1.1 to -6.4.

"The application process is governed by the Act, see N.J.S.A. 18A:36A-4, -4.1, -5, and implementing regulations, see N.J.A.C. 6A:11-2.1." In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 373 (2013). A charter school application must meet the comprehensive disclosure requirements imposed by N.J.S.A. 18A:36A-5(a) to -5(n). Regulations impose additional requirements, including completion of the Department's charter school application form. N.J.A.C. 6A:11-2.1(b)(1).



The application process proceeds in two phases. Quest Acad., 216 N.J. at 375. In phase one, the applicant must provide the information required by N.J.A.C. 6A:11-2.1(b)(2). Id. at 375-76. The Commissioner then determines whether the applicant is a "qualified applicant" that advances to phase two. Id. at 376. In order to be declared a qualified applicant and advance to phase two, the applicant must have

submitted an application that has a clear, focused, and results-oriented mission statement that aligns with all parts of the application; demonstrates understanding of the population that the school is likely to serve; has an educational program that is likely to be effective for the student population; has strong and diverse leadership; and has strong financial planning and management.

[N.J.A.C. 6A:11-2.1(b)(3)(ii).]

The phase two application must include the information and documentation required by N.J.A.C. 6A:11-2.1(b)(3)(iii). Quest Acad., 216 N.J. at 376. Following receipt of a satisfactorily completed phase two application, the Commissioner notifies "a qualified applicant about whether it has been invited to participate in an in-depth interview with the Commissioner or his or her designee." N.J.A.C. 6A:11-2.1(b)(3)(iv).

The application must be submitted to the Commissioner and the local board of education. N.J.S.A. 18A:36A-4(c). The local board

must "review the application and recommend to the Commissioner whether she should grant or deny the application." Quest Acad., 216 N.J. at 377 (citing N.J.S.A. 18A:36A-4(c); N.J.A.C. 6A:11-2.1(d)(1)-(2)). "Through N.J.S.A. 18A:36A-4(c), the Legislature has decreed that the Commissioner is the final administrative decision-maker on the grant or rejection of a charter school application." Id. at 383.

The applicant is then required to submit extensive additional documentation to the Commissioner before the dates specified in the letter of approval, the most pertinent of which include:

7. The certificate of occupancy for "E" (education) use issued by the local municipal enforcing official at N.J.A.C. 5:23-2;

. . . .

10. An organizational chart and a list of the lead person, school business administrator, teachers, and professional support staff including required certifications and criminal background check status;

11. A budget summary, budget narrative, and cash flow statement for the following fiscal year, based on the most recent enrollment projections;

. . . .

14. Evidence of enrollment of at least 90 percent of approved maximum enrollment, as verified by student registrations signed by parent/guardian(s); and

15. Documentation that ensures compliance with all applicable Federal and State regulations and statutes.

[N.J.A.C. 6A:11-2.1(i)(7), (10), (11), (14), (15).]

"Prior to final granting of the charter," the Department is required to conduct a "preparedness visit," N.J.A.C. 6A:11-2.1(h), in the form of an on-site inspection by Department personnel to gauge the applicant's readiness for school opening, N.J.A.C. 6A:11-1.2. "The preparedness visit shall include a review of program, facility, and fiscal documentation and interviews with board of trustee members and staff members of the proposed charter school to assess organizational leadership and capacity." N.J.A.C. 6A:11-1.2.

"Prior to the granting of the charter, the Commissioner shall assess the student composition of a charter school and the segregative effect that the loss of students may have on its district of residence." N.J.A.C. 6A:11-2.1(j). The applicant shall submit data for the assessment by February 15. Ibid.

Final approval of an application for a charter is not "effective" until "all necessary documents and information" demonstrating preparedness "are received by the Commissioner," N.J.A.C. 6A:11-2.1(i), and approved by the Department, N.J.A.C.

6A:11-2.1(k), and the Commissioner has determined the satisfactory completion of the preparedness visit, N.J.A.C. 6A:11-2.1(i).

An applicant "that receives application approval, but is not prepared to open in the subsequent school year may request a planning year." N.J.A.C. 6A:11-2.1(m). "Planning year" is defined as "a one-year period between a charter school's application approval and the final granting of its charter to prepare for the charter school's opening." N.J.A.C. 6A:11-1.2. If the applicant "demonstrates a legitimate need for more time to meet the preparedness requirements" imposed by N.J.A.C. 6A:11-2.1(i), the Commissioner may grant a planning year to the applicant. N.J.A.C. 6A:11-2.1(m)(1). A second planning year may also be granted to the applicant. N.J.A.C. 6A:11-2.1(m)(2).

The Act and the regulations "provide no guidance to the Commissioner on how to assess an application." Quest Acad., 216 N.J. at 377. Case law, however, imposes the following requirements:

First, "the Commissioner must assess the racial impact that a charter school applicant will have on the district of residence in which the charter school will operate" and "must use the full panoply of [her] powers to avoid" segregation resulting from the grant of a charter school application. In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 164 N.J. 316, 329 (2000). Second, if the local school district "demonstrates with some specificity that the

constitutional requirements of a thorough and efficient education would be jeopardized by [the district's] loss" of the funds to be allocated to a charter school, "the Commissioner is obligated to evaluate carefully the impact that loss of funds would have on the ability of the district of residence to deliver a thorough and efficient education." Id. at 334-35; see N.J. Const. art. VIII, § 4, ¶ 1 ("The 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 in the State between the ages of five and eighteen years.").

[Id. at 377-78 (alteration in original).]

When reviewing a charter school application, the Commissioner may rely "on her own expertise in assessing [the] overall viability of [a] proposed charter school." Id. at 389.

### III.

The District claims that N.J.A.C. 6A:11-2.1(f) is invalid because it is inconsistent with the Act. The District argues that although the Act gives local boards of education the right to appeal the Commissioner's decision to establish or expand a charter school, N.J.A.C. 6A:11-2.1(f) does not require the Commissioner to notify local boards of education of her decisions and the basis for denial of a charter school application, or give any reasons for disregarding a board of education's objections to a charter school application.

The Commissioner argues because this issue was not previously raised by the District, it was not addressed when approving Ailanthus for a planning year and, therefore, is not properly before this court. Substantively, the Commissioner argues N.J.A.C. 6A:11-2.1(f) "furthers both the legislative policies underlying the [Act] and the express provisions of the Act itself."

The Act directed the State Board of Education to adopt rules and regulations necessary to effectuate the provisions of the Act. N.J.S.A. 18A:36A-18. Rule 2:2-3(a)(2) provides for appellate review as of right of "the validity of any rule promulgated by such [state administrative] agency or officer."

"Judicial review of agency regulations begins with a presumption that the regulations are both 'valid and reasonable.'" N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 548 (2012) (quoting N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 385 (2008) (NJSPCA)). "That deference 'stems from the recognition that agencies have the specialized expertise necessary to enact regulations dealing with technical matters and are 'particularly well equipped to read . . . and to evaluate the factual and technical issues that . . . rulemaking would invite.'" N.J. Healthcare Coalition v. N.J. Dep't of Banking & Ins., 440 N.J. Super. 129, 135 (App. Div. 2015) (quoting N.J. State League of Municipalities v. Dep't of Cmty.

Affairs, 158 N.J. 211, 222 (1999)). In light of its expertise, we "give great deference to an agency's interpretation and implementation of its rules enforcing the statutes for which it is responsible." In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004) (citing In re Distrib'n of Liquid Assets, 168 N.J. 1, 10-11 (2001)). "The party challenging the agency action bears the burden of overcoming the presumption of validity and reasonableness." In re Adoption of N.J.A.C. 11:3-29, 410 N.J. Super. 6, 25 (App. Div. 2009) (citing In re Commissioner's Failure to Adopt 861 CPT Codes, 358 N.J. Super. 135, 149 (App. Div. 2003)).

"We give agencies wide discretion in deciding how best to approach legislatively assigned administrative tasks, especially when the task falls within a particular agency's expertise[.]" In re Failure by the Dep't of Banking & Ins., 336 N.J. Super. 253, 262 (App. Div. 2001) (citations omitted). Nonetheless, "[a] regulation 'must be within the fair contemplation of the delegation of the enabling statute.'" N.J. State League, 158 N.J. at 222 (quoting N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561-62 (1978)). "[C]ourts must invalidate a regulation that is 'inconsistent with the statute it purports to interpret.'" Schundler, 211 N.J. at 549 (quoting NJSPCA, 196 N.J. at 385).

With these principles in mind, we examine N.J.A.C. 6A:11-2.1(f), which provides:

The Commissioner shall notify applicants regarding approval or denial of applications no later than February 15 for applicants seeking fast track approval through expedited action and no later than September 30 for all other applications. The notification to eligible applicants not approved as charter schools shall include reasons for the denials.

The District contends the regulation impedes its right to appeal the Commissioner's final decision. We disagree.

The time frames and notification requirements imposed by the regulation ensure timely decisions are made by the Commissioner on charter school applications and deficiencies are identified. Prompt notification is important given the "tight time frames" for applications and review "as cycle after cycle of charter school applications are submitted seeking approval to open in the ensuing school year." Quest Acad., 216 N.J. at 387 (citing N.J.A.C. 6A:11-2.1(b)(1)). "[S]uch reviews must proceed expeditiously." Id. at 388.

The District further contends the regulation is invalid because it does not require the Commissioner to inform the District of the approval of a charter school application or the reasons for granting a planning year to an applicant. The Commissioner argues imposing a requirement to notify each district board of education of an interlocutory decision finding an applicant qualified or



granting a planning year would be extremely burdensome and taxing of precious department resources.

The District's role is limited to reviewing the phase one and two applications and submitting its recommendations to the Commissioner. N.J.S.A. 18A:36A-4(c); N.J.A.C. 6A:11-2.1(c). Acting quasi-legislatively and not quasi-judicially, the Commissioner "need not provide the kind of formalized findings and conclusions necessary in the traditional contested case." Englewood, 320 N.J. Super. at 217 (citing E. Windsor Reg'l Bd. of Educ. v. State Bd. of Educ., 172 N.J. Super. 547, 551-52 (App. Div. 1980); In re Physical Abuse at Blackacre Acad., 304 N.J. Super. 168, 188 (App. Div. 1997)). The District has no right to an adjudicatory hearing. See ibid. Thus, the District's due process rights are not affected, since its only remedy under the current statutory and regulatory scheme is to appeal the final decision of the Commissioner. N.J.S.A. 18A:36A-4(d); N.J.A.C. 6A:11-2.5.

Moreover, the District was not prejudiced by the regulation's lack of a notice requirement. "It is the practice of the Department to notify the district board(s) of education that serve as the district or region of residence of a charter school regarding all matters involving (1) the approval or denial, (2) revocation or (3) renewal of a charter." 29 N.J.R. 3560(a) (Oct.

2, 2000). The District had actual notice of the Commissioner's decision determining Ailanthus was a qualified applicant and approving its application for a planning year.

Applying our deferential standard of review, we find no basis to invalidate N.J.A.C. 6A:11-2.1(f). The regulation is not inconsistent with or antagonistic to the Act. Rather, we deem it to be "reasonably designed to meet practical issues triggered by the Act's requirements." Englewood, 320 N.J. Super. at 220 (citations omitted).

#### IV.

The District also claims the Commissioner's decision was arbitrary, capricious, and unreasonable, and failed to consider the segregative impact Ailanthus Charter School would have on the District. We decline to reach these issues because the Commissioner's approval of a planning year did not constitute a final agency decision.

"Through N.J.S.A. 18A:36A-4(c), the Legislature has decreed that the Commissioner is the final administrative decision-maker on the grant or rejection of a charter school application." Quest Acad., 216 N.J. at 383; accord N.J.A.C. 6A:11-2.1(a). Accordingly, "an applicant has the right to appeal the Commissioner's rejection of a charter school application pursuant to Rule 2:2-3(a)(2)." Quest Acad., 216 at 383. Additionally, the charter school

applicant and the local board of education have a statutory right to appeal the Commissioner's final decision pursuant to N.J.S.A. 18A:36A-4(d). Ibid.

Rule 2:2-3(a)(2) provides for review as of right of "final decisions or actions of any state administrative agency or officer" in the Appellate Division. The Supreme Court has provided guidance as to when an agency decision or action is final. Generally, a decision or action of a state administrative agency is "considered final if it disposes of all issues as to all parties." Silviera-Francisco v. Bd. of Educ. of City of Elizabeth, 224 N.J. 126, 136 (2016) (citing Petersen v. Falzarano, 6 N.J. 447, 452-53 (1951); In re Donahue, 329 N.J. Super. 488, 494 (App. Div. 2000)). "Final agency action is also characterized by findings of fact, conclusions of law, a definitive ruling, and a clear statement that the interested party may seek review of the decision and the manner in which that may be accomplished." Id. at 139 (citing De Nike v. Bd. of Trs., Emps. Ret. Sys. of N.J., 34 N.J. 430, 435-36 (1961)). "Another feature of a final agency decision is the absence of or exhaustion of 'all avenues of internal administrative review.'" Id. 136-37 (quoting Bouie v. N.J. Dep't of Cmty. Affairs, 407 N.J. Super. 518, 527 (App. Div. 2009)).

The issue of whether a decision of the Commissioner is interlocutory or final was discussed by the Court in Silviera-Francisco:

One of the indicia of final agency action is whether a decision is subject to further review within the agency including review by the Commissioner . . . . Thus, where the Legislature has declared that the Commissioner is the final agency decision-maker on a charter school application, see N.J.S.A. 18A:36A-4(c), a decision rejecting or approving a charter school application by the Commissioner is a final agency decision.

[Id. at 140 (citing Quest Acad., 216 N.J. at 383).]

Applying this standard, we hold the Commissioner's determinations that Ailanthus's phase one and phase two applications were satisfactory, and her approval of a 2017-18 planning year pursuant to N.J.A.C. 6A:11-2.1(m), did not constitute a final agency decision under the Act. Ailanthus was afforded a planning year in which to demonstrate its qualifications for the charter. By definition, a planning year is "a one-year period between a charter school's application approval and the final granting of its charter to prepare for the charter school's opening." N.J.A.C. 6A:11-1.2 (emphasis added).

Final approval and granting of an application for a charter is not "effective" until "all necessary documents and information" demonstrating preparedness are received by the Commissioner and

approved by the Department, and satisfactory completion of a preparedness visit. N.J.A.C. 6A:11-2.1(i), (k). Here, those requirements had not yet been met by Ailanthus when this appeal was filed. The planning year was still underway and the application review process was not yet completed. Consequently, the Commissioner had not yet issued a final decision granting or rejecting Ailanthus's charter school application. See Quest Acad., 216 N.J. at 374-78 (describing the two phase application process – approval of the application as qualified and grant of a charter).

The District's relies on Englewood in support of its argument that the Commissioner rendered a final decision appealable as of right. We find its reliance on Englewood for that proposition to be misplaced. As we explained in Englewood, there is a distinct difference between "approval of a charter" and "final granting of a charter." 320 N.J. Super. at 218-19. "The definitional section explains and distinguishes between the concepts of approval and grant." Id. at 218. "Approval" of a charter is defined as "an endorsement by the Commissioner following the review of an eligible application by the Department and contingent upon the receipt of necessary documentation in accordance with N.J.A.C. 6A:11-2.1(f)." N.J.A.C. 6A:11-1.2. "Final granting of a charter" is defined as "the written notification in which the Commissioner makes the

charter effective as a result of all required documentation being submitted by the charter school and approved by the Department in accordance with N.J.A.C. 6A:11-2.1(f), (h), and (i)." Ibid. Once again, that had not yet occurred.

Additionally, the regulations in place when Englewood was decided provided "two opportunities to appeal to the State Board: an appeal must be filed 'within 30 days from the receipt of a letter from the Commissioner regarding either the approval or final granting or denial of a charter.'" Englewood, 320 N.J. Super. at 219 (alteration in original) (quoting N.J.A.C. 6A:11-2.5(a)). "As explained by the Department in response to the comment, an aggrieved party may appeal first from the Commissioner's contingent approval (the contingency being the submission of further data) and second from the final granting after the data has been submitted." Id. at 220 (citing 29 N.J.R. 3493 (Aug. 4, 1997)). Characterizing that appeal process as "idiosyncratic, if not unique," the panel found the regulation was not "inconsistent with or antagonistic to the Act." Ibid.

In the intervening years since Englewood, the regulations have been significantly amended. In particular, N.J.A.C. 6A:11-2.5(a) now reads: "An eligible applicant for a charter school, a charter school, or a district board of education or State district superintendent of the district of residence of a charter school

may file an appeal according to N.J.S.A. 18A:6-9.1." The regulation no longer permits an appeal from the approval of a charter.

We also note that the Commissioner is not required to assess "the segregative impact" on the district of residence of the loss of students to the proposed charter school before approving a planning year. That assessment need only be completed "[p]rior to the granting of the charter." N.J.A.C. 6A:11-2.1(j). Here, Ailanthus submitted its phase one application on March 21, 2016. The Commissioner approved the phase one application on June 10, 2016. Ailanthus submitted its phase two application on July 15, 2016. The Commissioner approved Ailanthus for a planning year on September 30, 2016. Consequently, pursuant to N.J.A.C. 6A:11-2.1(j)(2), Ailanthus was required to supply the data for the assessment by February 15, 2017. The District filed this appeal on November 1, 2016, long before the segregative impact assessment data was even due. Given these facts, the District can hardly complain the Commissioner failed to consider the segregative impact Ailanthus would have on the District before approving the planning year.

"Jurisdiction is an issue that a court may raise at any time." Silviera-Francisco, 224 N.J. at 141 (citing Pressler & Verniero, Current N.J. Court Rules, cmt. 1.2.4 on R. 2:8-2 (2016)). "When

a court recognizes that it lacks jurisdiction, such as when it recognizes that the appeal is not from a final judgment or final agency action, it may dismiss the appeal." Ibid. (citing Pressler & Verniero, cmt. 1.2.4 on R. 2:8-2).

Under the Act, "the Commissioner is the final administrative decision-maker on the grant or rejection of a charter school application." Quest Acad., 216 N.J. at 383; N.J.S.A. 18A:36A-4(c) (stating "[t]he [C]ommissioner shall have the final authority to grant or reject a charter application"). The Commissioner had not granted or rejected Ailanthus's application for a charter. Accordingly, the Commissioner had not rendered a final agency decision. Absent a final agency decision, the District could not appeal as of right. R. 2:2-3(a)(2). It was required to move for leave to appeal pursuant to Rule 2:2-4. Our power to grant leave to appeal an interlocutory order is "exercised only sparingly." State v. Reldan, 100 N.J. 187, 205 (1985).

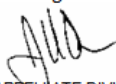
Without obtaining leave to appeal, the District seeks appellate review of an interlocutory decision rendered as part of an ongoing administrative review of Ailanthus's charter school application. Consequently, the Appellate Division does not have jurisdiction to hear the merits of the District's claims under Point II that the Commissioner's decision was arbitrary, capricious, and unreasonable, and Point III that the Commissioner



failed to consider segregative impact. We decline to address those claims and dismiss those aspects of the appeal. Our disposition is, of course, without prejudice to the District's ultimate right to appellate review of any final decision subsequently issued by the Commissioner.

Affirmed in part, and dismissed in part.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION