

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

THE LEARNING COMMUNITY,	:
<i>Petitioner</i>	:
	:
v.	:
	:
WARWICK PUBLIC SCHOOLS,	:
<i>Respondent</i>	:

DECISION

Held: Public school district did not have right to refuse to pay charter school's tuition invoice on behalf of a student attending the school pursuant to a policy incorporated into the school's reauthorized charter, which permitted children of teachers at the school who resided in Rhode Island to attend, even if they resided outside the school's catchment area and had not participated in a lottery.

DATE: March 10, 2015

I. Jurisdiction and Standard of Review

Petitioner, THE LEARNING COMMUNITY CHARTER SCHOOL (“The Learning Community,” or the “School”), an independent charter school, has invoked RIGL § 16-7-31¹ and requested that the Commissioner direct the state Treasurer to withhold state aid from Respondent, WARWICK PUBLIC SCHOOLS (“Warwick”), due to Warwick’s refusal to pay an invoice (the “Invoice”) pertaining to tuition allegedly owed on behalf of a Warwick resident (the “Warwick Student,” or the “Student”) whose mother has been a teacher at the School.² See the School’s April 16, 2014 letter to the Commissioner (the “Petition”) and attached Exhibits A – D.³

The Commissioner has jurisdiction over disputes like this one “arising under a law relating to schools or education” under RIGL § 16-39-1, and like appeals from school committee actions under § 16-39-2, such disputes are heard *de novo*.⁴ See, e.g., *Alba v. Cranston School Committee*, 90 A.3d 174, 184-85 (R.I. 2014) (quoting rule); *Slattery v. School Committee of City of Cranston*, 116 R.I. 252, 262, 354 A.2d 741, 747 (1976) (“one who appeals to the

¹ Section 16-7-31 provides, in pertinent part, that:

[i]f any community shall fail to maintain local appropriation or fail to appropriate or otherwise make available to the school committee the minimum sums provided in this chapter . . . the commissioner of elementary and secondary education may notify the general treasurer of the amount of any deficiency. The general treasurer, on being so informed in writing of the amount of the deficiency by the commissioner, shall withhold state funds otherwise due during the subsequent state fiscal year to the community for its general uses and purposes in an amount equal to the deficiency.

Id.

² It should be noted that the undersigned Hearing Officer, while stating that he did not believe he was required to recuse himself from this case, disclosed to counsel for the parties that he was: (a) acting as counsel for RIDE in *Warwick School Committee, et al. v. Warwick Teachers’ Union, et al.*, C.A. No. KC 13-1196 (Gallo, J.), where the Warwick School Committee and its teachers’ union have challenged the Commissioner’s power to prohibit the hiring or assignment of teachers based solely upon their seniority; and (b) assisting the BOE, which is a co-defendant with Warwick in a federal court class action alleging that under the federal Individuals with Disabilities Education Act, the state is obligated to provide students with a free, appropriate, public education until they turn 22 years of age, rather than cutting off special education services at the student’s 21st birthday. See *K.S. v. R.I. Board of Education, et al.*, C.A. No. 14-77A (United States District Court for the District of Rhode Island, Smith, J.). Neither counsel for The Learning Community nor Warwick challenged the Hearing Officer’s conclusion, nor filed a motion for his recusal.

³ The \$2,688.50 Invoice covered the third quarter of the 2013-14 school year.

⁴ A hearing *de novo* is one which is heard as if for the first time, i.e., as an entity with original, as opposed to appellate, jurisdiction, would hear it. See *Black’s Law Dictionary* at 649 (West, 1979).

commissioner is entitled to ‘a *de novo* hearing’ and not ‘merely a review of [the] school committee action”); *School Committee of City of Pawtucket v. State Bd. of Ed.*, 103 R.I. 359, 364, 237 A.2d 713, 716 (1968) (commissioner’s jurisdiction “considerably broader than that of this court in reviewing an appeal” since “it is clear that § 16–39–2 and precursory legislation give the commissioner of education the right to make a *de novo* decision in examining and deciding the issue involved”).

II. Undisputed Facts and Procedural History

1. The Learning Community has alleged that although the Warwick Student did not reside in the catchment area described in its Charter,⁵ she was entitled to attend pursuant to a School policy permitting the children of teachers to attend the School, without participating in a lottery, as long as they resided anywhere in Rhode Island, a policy (the “Reg. C-5-2 Policy,” or the “Policy”) which, it claimed, was expressly permitted under Regulations Governing Rhode Island Charter Public Schools (the “Charter Regs.”). *See* Petition at 1-2, citing Charter Reg. C-5-2(c).⁶

2. The Learning Community’s original Charter, which was approved by the Board of Regents in 2004, was enacted prior to the 2011 adoption of Charter Reg. C-5-2 and did not include such a policy. However, on August 6, 2009, the Board of Regents re-authorized the School’s Charter for an additional five (5) years (to expire at the conclusion of the 2013-14 school year), and the reauthorized Charter contained an amendment incorporating the Reg. C-5-2 Policy. *See* Petition at Exhibit D.

⁵ The Learning Community serves students residing in Central Falls, Providence and Pawtucket. *See* The Learning Community’s January 9, 2015 Memorandum (“LC’s Jan. 9 Mem.”), Exhibit A at 2.

⁶ Charter School Regulation C-5-2(c) provides, in pertinent part, that charter schools are “permitted to adopt a policy to exempt the students of teachers or school founders from participation in the lottery so long as these students constitute no more than 10% of the school’s total enrollment.” *Id.* The School’s claim that “only ½ of 1 % of the Learning School’s enrolled students (2/560) is comprised of children of Learning Community teachers,” LC’s Jan. 9 Mem. at 2, was not disputed.

3. Thus, as of August 6, 2009, the School's operative charter included whatever amendments were reflected in its reauthorization application, which, *inter alia*, expressly provided that:

[o]ne low cost way for us to retain our team members is to allow them to automatically send their own children to The Learning Community. If this amendment is passed along with the zip code amendment,⁷ we would maintain that the students of staff percentage does not cause us to dip below our overall student population goal in terms of 80% of students receiving free and reduced price lunch.

Petition, Exhibit D at 12.

4. However, although incorporated into the School's amended Charter approved on August 6, 2009, the Reg. C-5-2 Policy was not expressly incorporated into the School's written Lottery and Enrollment Policy until October 2, 2014, which was *after* the attendance dates referenced in the Invoice. The minutes of the School's Board of Directors' meeting that date, while expressly referencing the dispute with Warwick and noting that the Policy had been the subject of an amendment to the reauthorized Charter in 2009, also reflect that the Board "approved" a revised 2014 Lottery and Enrollment Policy incorporating the Reg. C-5-2 Policy. *See* LC's Jan. 9 Mem., Exhibit D at 5 (p. 1 of minutes).

5. Warwick moved to dismiss the Petition, arguing that:

- (a) the Reg. C-5-2 Policy was not in effect during the period covered by the Invoice, i.e., the third quarter of the 2013-14 school year, as it had not been properly adopted by the School until after that time. *See* Warwick's August 22 Memorandum in Support of its Motion to Dismiss ("Warwick's August 22 Mem.")⁸ at 5;

⁷ The "zip code amendment" provided that a certain minimum percentage of the School's students would be eligible for reduced price lunch, with the specific minimum percentages to vary by zip code. *See* Petition, Exhibit D at 12.

⁸ Due to an apparent clerical error, Warwick's August 22 Mem. was titled a "Brief in Support of the Objection of the Warwick Public Schools to The Learning Community's Motion to Dismiss," however, as noted, it actually was a brief in support of Warwick's motion to dismiss.

- (b) Charter Reg. C-5-2 itself was not authorized by the Charter Public School Act of Rhode Island (the “Charter School Act”), RIGL § 17-77-1, *et seq.*, and therefore was illegal on its face. *See id.* at 9; and
- (c) there was no “educationally measurable justification” supporting the Policy, which “ha[d] no academic purpose,” was “arbitrary and capricious,” and thus was unenforceable as applied. *See id.* at 6-8.

6. On August 29, 2014, the undersigned hearing officer denied Warwick’s motion to dismiss, concluding that:

- (a) Warwick’s claim that the Reg. C-5-2 Policy was not properly adopted raised unresolved factual issues which The Learning Community was entitled to rebut at an evidentiary hearing or by written submission. *See Legal Conclusions and Oder Denying Warwick’s Motion to Dismiss dated August 29, 2014 (the August 29 Oder”)* at 2; and
- (b) Warwick failed as a matter of law to rebut the presumption of validity which attached to Charter Reg. C-5-2 under *Lerner v. Gill*, 463 A.2d 1352, 1354-55 (R.I.1983) and *Great American Nursing Centers, Inc. v. Norberg*, 567 A.2d 354, 356–57 (R.I.1989). *See August 29 Order* at 3.

7. The parties then agreed to submit the remaining issues for decision based upon documentary evidence and legal memoranda and what were, in effect, cross motions for summary judgment. Following some delay due to a substitution of counsel, the parties submitted their supporting documents and legal memoranda on January 9 and February 13, 2015, respectively.

III. The Arguments

In its final submission, Warwick seeks to justify its refusal to pay the Invoice by arguing that:

- (1) the School never effectively adopted the Reg. C-5-2 Policy because it failed to post the minutes of its October 2, 2014 Board meeting on the Secretary of State’s web site, as required by the state’s Open Meetings Act (the “OMA”), RIGL § 42-46-7(c). *See Warwick’s Feb. 13 Mem.* at 2-4 and note 2; and

- (2) even if the School had complied with the OMA, the Reg. C-5-2 Policy was not in effect during the period covered by the Invoice, which was prior to the October 2, 2014 meeting during which the School's Board of Directors amended the School's Lottery and Enrollment Policy. *See* Warwick's Feb. 13 Mem. at 3.

On the other hand, The Learning Community argued that:

- (1) the Reg. C-5-2 Policy was "not an independent school policy subject to the Open Meetings Act," but rather "a term and condition of the Learning Community Charter," *see* LC's Jan. 9 Mem. at 4, which became effective as soon as the Board of Regents reauthorized the amended charter incorporating the Policy on August 6, 2009. *See* Exhibit B to LC's Jan. Mem. at 2; and
- (2) even if Warwick's OMA argument was not moot, the Commissioner lacked jurisdiction to adjudicate OMA claims, which is the exclusive province of the state Attorney General. *See id.* at 5.

IV. Discussion

The School's entitlement to payment of the Invoice depends upon whether or not the Reg. C-5-2 Policy was, as the School contends, a "term and condition" of the amended Charter which became effective as soon as it was approved by the Board of Regents on August 6, 2009, or as Warwick claims, an "independent" school policy which required formal adoption by the School's Board of Directors in order to become effective. In either case, any action by the School's Board of Directors at the October 2, 2014 meeting which is the subject of Warwick's OMA claim is irrelevant, since any such action occurred *after* the dates referenced in the Invoice, and which was not by its terms retroactive.⁹ Thus, the Commissioner need not decide Warwick's OMA claim, or for that matter, her jurisdiction over such claims.

⁹ Nor did the Learning Community argue that the October 2, 2014 action by its Board of Directors was retroactive, and for good reason. The Rhode Island Supreme Court has consistently held that "statutes and their amendments are applied prospectively, absent 'clear, strong language, or by necessary implication that the Legislature intended a statute to have retroactive application * * *.'" *State v. Briggs*, 58 A.3d 164, 168 (R.I. 2013), citing *Rodrigues v. State*, 985 A.2d 311, 318 (R.I.2009) (quoting *Ducally v. State*, 809 A.2d 472, 474 (R.I.2002)). And there is no reason to think the rule would be any different when applied to action taken by the board of a charter school.

In resolving the dispositive issue, it is important to note that under the Charter School Act and implementing regulations, independent charter schools seeking to have an existing charter reauthorized must submit a renewal application which must include, *inter alia*, a description of the “enrollment procedures including the permissible criteria for admission.”¹⁰

Thus, it is clear that the Commissioner and the Board of Regents (now the Board of Education’s Council on Elementary and Secondary Education (the “CESE”), *see* RIGL § 16-60-1) rely upon the information provided by an applicant seeking reauthorization when deciding whether to reauthorize an amended charter.¹¹ And it is equally clear that a charter school is not free to unilaterally alter the policies contained in its application for charter reauthorization after the amended charter has been approved. Indeed, the applicable regulations mandate that charter schools must make a written submission to the Commissioner before making even “minor amendments to a school’s charter,” *see* Charter School Regulation C-2-1(b), and the Charter School Act provides that any material violation of “any of the provisions contained in the charter” is grounds for possible charter revocation. *See* RIGL § 16-77.3-4(a)(1).

It therefore is apparent that:

- (1) the School’s Reg. C-5-2 Policy became effective and binding upon the School as soon as the amended Charter incorporating the Policy was approved and reauthorized by the Board of Regents on August 6, 2009;
- (2) the School’s Board of Directors had no authority to unilaterally alter the Policy after August 6, 2009; and therefore
- (3) the October 2, 2014 action of the School’s Board of Directors “approving” the Reg. C-5-2 Policy must be construed as a correction and update of the existing Lottery and Enrollment Policy to reflect the fact that, as noted in the relevant minutes, the Reg. C-5-2 Policy had been included in an

¹⁰ *See* Charter School Regulation 6-4-3 (“renewed charters shall be written according to the provisions outlined in C-1-4(h)"); *id.* at C-1-4(h) (mandating inclusion of material required by RIGL § 16-77.3-2); RIGL § 16-77.3-2(a)(10) (requiring inclusion of enrollment procedures).

¹¹ *See* Charter School Regulation C-4-3 (affirming reliance upon affirmative evidence provided by applicant for reauthorization).

amendment to the reauthorized Charter, and therefore was in effect since the date the Charter was reauthorized, i.e., since August 6, 2009. *See* LC's Jan. 9 Mem., Exhibit D at 5.

V. Conclusion

For all the above reasons, the Petition of The Learning Community is hereby granted and pursuant to RIGL § 16-7-31, the Commissioner will forthwith direct the state's General Treasurer to withhold \$2,688.50 in state funds which otherwise would be due to Warwick during the next state fiscal year for its general uses and purposes, and transfer said amount to The Learning Community.

ANTHONY F. COTTONE, ESQ.,
as Hearing Officer for the Commissioner

Dated: March 10, 2015

DEBORAH A. GIST,
Commissioner