

ATTORNEY GENERAL

January 14, 1981

HON. FRED G. BURKE
Commissioner of Education
Department of Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 1—1981

Dear Commissioner Burke:

The Department of Education has submitted for our review a contract between the Essex County Educational Services Commission and the Education and Training Consultants, Inc., concerning the provision of educational services to non-public school pupils. The Department indicates that this contract was not submitted by the Commission to either the State Board of Education or to you for review prior to its execution. The question specifically posed, therefore, is whether the Commission, pursuant to the terms of the contract, may appropriately relinquish its responsibilities for the provision of these educational services to a private, profit-making organization.

In accordance with this contract, executed on July 8, 1980, the private corporation, Education and Training Consultants, Inc., is to provide fifty hours of actual instructional time to all pupils enrolled in the "Direct Services to Non-Public Schools Project."¹ The private corporation further agreed to provide the educational services in accordance with a Program Plan approved by the Commission or its Executive Director. The Plan was to provide:

school and instructional calendars, class size, teacher performance evaluation, teacher professional development, student assessment and evaluations, group in-put, both public and non-public instructional materials to be used, the educational strategies to be employed and such other matters as may be deemed necessary by the Commission and/or its Executive Director.

The contract stated that instruction was to be provided in mobile classrooms leased by the Commission and that the private corporation was to assume responsibility for lease payments on these vehicles.

In exchange for the performance of these services, the private contractor was to receive "in ten (10) equal monthly installments for each enrolled

1. At the time the contract was entered into, it was estimated that the number of non-public school pupils, enrolled in various aspects of the "Project," would be:

1. Compensatory Education	9,000
2. English as a Second Language	1,800
3. Corrective Speech Services	4,500
4. Supplementary Instruction without VI-B	450
5. Supplementary Instruction with VI-B	450
6. Home Instruction	180
7. Examination and Classification of Potentially Handicapped	1,800

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student . . . an amount equal to the pupil costs as set forth in the . . . bid proposal . . ." The total cost of pupil services, as set forth in the bid proposal, was \$3,900,114. These monthly payments were to be made by the Commission as it received the moneys due it from local school districts on whose behalf the educational services were to be provided. From these monthly installments would be deducted the lease payments for the mobile classrooms and a charge representing the "administrative services provided by the Commission to carry out the purpose and effect" of the contract.

The contract term is from July 1, 1980 to June 30, 1981 and the agreement contains the following provision:

In the event this entire contract shall be found to be void, illegal, or against public policy, then this contract shall be deemed to be null and void *ab initio* and all rights, obligations and duties hereunder shall be considered terminated and at an end.

In order to determine the propriety of this contractual arrangement, it is necessary to consider two provisions of the school law: the first governing educational services commissions and the second structuring the provision of certain remedial and auxiliary educational services to pupils in both public and nonpublic schools.

In 1968, the Legislature enacted c. 243, P.L. 1968, N.J.S.A. 18A:6-51 *et seq.*, which authorized the establishment of educational services commissions. This Act defined a commission as:

an agency established or to be established in one or more counties for the purpose of carrying on programs of educational research and development and providing to public school districts such educational and administrative services as may be authorized pursuant to rules of the State Board of Education. [N.J.S.A. 18A:6-51(a).]

In order to establish an educational services commission, the interested boards of education must file a petition with the State Board of Education together with a report setting forth the needed educational services to be provided by the Commission, the cost of same and "a method of financing the operation . . . until such can be financed under its first regularly adopted budget. . ." If the State Board determines that the need for the proposed educational services commission exists and that the operation of the commission is feasible, "it shall approve the petition and so notify the petitioning boards of education." N.J.S.A. 18A:6-52.

Once a commission is established, its board of directors:

shall from time to time determine what services are to be provided by the commission, subject to the approval of and pursuant to rules of the State Board of Education. It shall determine the cost of providing such services, and may enter into contracts with member school districts to provide such services. [N.J.S.A. 18A:6-63.]

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Similarly, N.J.S.A. 18A:6-69 provides that the purpose for which an educational services commission was approved may be enlarged, "upon application to and approval by the State Board of Education." Furthermore, an educational services commission is specifically authorized to employ teachers, principals and other employees necessary to provide the educational services so approved by the State Board of Education. N.J.S.A. 18A:6-65.

In accordance with this detailed statutory scheme, on November 29, 1978, the Essex County Superintendent of Schools, on behalf of the petitioning boards of education, requested approval for the establishment of an Educational Services Commission in Essex County. The Program Plan submitted for the proposed commission included, *inter alia*, the provision of educational services to 105 non-public schools. With regard to these services, the Plan specified:

It is anticipated that both diagnostic and instructional services will be provided and that compensatory education will also be included for those non-handicapped students attending non-public facilities.

These services can be divided into six specific areas. These are:

1. Examination and classification of students potentially handicapped.
2. Speech correction services for students defined to have minor articulation disorders.
3. English as a second language.
4. Supplementary instruction.
5. Home instruction services.
6. Compensatory education.

The Plan also provided that resident students requiring services outside the County would be contracted for by the Commission and further that the Commission would "accept tuition students for districts outside Essex County whose students attend any of the (non-public) schools being serviced."

The State Board of Education at its meeting of December 6, 1978, approved establishment of the Educational Services Commission for Essex County for the provision of the educational services included in its Program Plan.² The Commission was, therefore, authorized to provide certain remedial and auxiliary educational services to non-public school pupils.

These educational services were authorized by c. 192, P.L. 1977 and c. 193, P.L. 1977. The intent of this legislation was to insure that the State "provide remedial services for handicapped children" and "furnish on an equal basis auxiliary services" to all pupils in the State in both public and non-public schools. N.J.S.A. 18A:46-19.1 and 18A:46A-1. "Auxiliary ser-

2. On January 2, 1980, the Essex County Educational Services Commission sought an enlargement of its original purpose pursuant to N.J.S.A. 18A:6-69. The State Board, at its January 9, 1980 meeting approved expansion of services provided to local districts to include direct computer services. This change of purpose does not implicate the subject matter of the present opinion.

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vices," authorized by c. 192, were defined as "compensatory education services; supportive services for acquiring communication proficiency in the English language for children of limited English-speaking ability; supplementary instruction services; and, home instruction services." N.J.S.A. 18A:46A-2(c). These services were only to be provided those "children who would be eligible for such services and for the appropriate categorical program support if they were enrolled in the public schools of the State." N.J.S.A. 18A:46A-4. Furthermore, the law specifically precludes the provision of these services in a church or sectarian school. However, a local board of education "may contract with an *educational improvement center, an educational service commission or other public or private agency* other than a church or sectarian school, *approved by the commissioner* for the provision of auxiliary services." N.J.S.A. 18A:46A-7. (Emphasis added.) In addition to these services, c. 193, P.L. 1977, authorizes the provision of diagnostic and therapeutic services to handicapped pupils attending non-public schools. N.J.S.A. 18A:46-19.1, *et seq.* Local boards of education may also contract with educational services commissions or other public or private agencies for the provision of these services. N.J.S.A. 18A:46-19.7. However, both legislative enactments, and the regulations adopted by the State Board of Education to implement them, require that the Commissioner of Education approve such contractual arrangements. N.J.S.A. 18A:46A-7; 18A:46-19.7; N.J.A.C. 6:28-5.3, 6:28-6.3.

Although the above described statutory provisions require local boards of education to provide auxiliary, diagnostic and therapeutic services to non-public pupils resident within their borders, the costs for such services are met entirely with State aid. Pursuant to the statutory scheme, on November 1 of each year, local boards of education are informed of the amount of State aid they may anticipate in their budget for the next school year for the provision of these services. The entitlement of State aid is based on the Statewide average cost of providing these services to public school pupils multiplied by the number of non-public school pupils expected to receive such services. N.J.S.A. 18A:46A-11, 12; 18A:46-19.8; N.J.A.C. 6:28-5.5; 6:28-6.5. Local school districts are paid State aid for these services "in equal amounts beginning on the first day of September and on the first day of each month during the remainder of the school year." Should the amount of State aid received by a district exceed the costs incurred by the district for the provision of educational services to non-public school pupils, the district's State aid for the following year would be reduced to the extent of such surplus. Moreover, a district is not required to make expenditures for those services in "excess to the amount of State aid received." N.J.S.A. 18A:46A-14, 15; 18A:46-19.8.

Pursuant to this statutory scheme, local boards of education contracted with the Essex County Educational Services Commission, during the 1979-80 school year, for the provision of auxiliary, diagnostic and therapeutic services for those non-public school pupils within their districts entitled to these services. Consistent with the provisions of N.J.S.A. 18A:46A-13 and 18A:46-19.8, the monthly State aid payments necessary to meet these educational costs were made to the local school districts. Upon receipt, the districts forwarded the State aid moneys to the Essex County Commission in accordance with their contractual agreement. This

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arrangement was in harmony with the statutory scheme governing the provision of educational services to non-public school pupils and fully comported with the purposes for which the Commission had been authorized by the State Board of Education. Prior to the commencement of the 1980-81 school year, however, the Commission entered into a contract with Education and Training Consultants, Inc., a private, profit-making corporation, which is the subject of the present inquiry. The question projected is whether this further contractual arrangement is consistent with the requirements of N.J.S.A. 18A:6-51 *et seq.*, 18A:46-19.1 *et seq.*, and 18A:46A-1 *et seq.*

It is a fundamental tenet of statutory construction that the overall intention of the Legislature is the controlling factor in interpreting a statute. *Presberg v. Chelton Realty, Inc.*, 136 N.J. Super. 78 (Cty. Ct. 1975); Sands, *Sutherland Statutory Construction*, §45.05. Legislative intent must be gathered from the plain language of the statute under review. *Ritt v. Ritt*, 98 N.J. Super. 590, 595 (Chan. Div. 1967). In construing the laws of this State, words and phrases are to be read and construed with their context and shall "be given their generally accepted meaning according to the approved usage of the language." N.J.S.A. 1:1-1.

Furthermore, when seeking legislative intent the nature of the subject matter, the contextual setting and statutes *in pari materia* must all be viewed together and the import of particular words and phrases is controlled accordingly. *State Bd. of Medical Examiners v. Warren Hospital*, 102 N.J. Super. 407 (Cty. Ct. 1968), *aff'd* 104 N.J. Super. 409 (App. Div. 1969). Indeed, statutes relating to the same subject matter, both special and general, must be construed together as a unitary and harmonious whole so that each will be fully effective. *Bergen County Bd. of Taxation v. Borough of Bogota*, 104 N.J. Super. 499 (Law Div. 1969); Sands, *Sutherland Statutory Construction* §51.03.

The subject matter of the statutory provisions under consideration is the provision of educational services. As such, they find their ultimate source in Art. VIII, §4, ¶1 of the New Jersey Constitution which provides:

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.

A consistent theme throughout the decisions of the Supreme Court of New Jersey in the landmark *Robinson* litigation was the preeminence of education among the various constitutional rights. *Robinson v. Cahill*, 62 N.J. 473 (1973), *cert. den.* 414 U.S. 976, 94 S. Ct. 292, 38 L. Ed. 2d 219 (1973). However, the Education Clause has been consistently construed to allow the Legislature to provide a "thorough and efficient" system of public schools by any means which achieves the ultimate constitutional objective. Historically, the Legislature has discharged its obligation by the creation of local school districts which have the primary responsibility of providing a thorough and efficient education for the children within their districts. *West Morris Reg. Bd. of Ed., et al., v. Sills, et al.*, 58 N.J. 464 (1971); *Board of Education of Elizabeth v. City Council*, 55 N.J. 501 (1970); *Board*

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of *Ed., E. Brunswick Tp. v. Tp. Council*, 48 N.J. 94 (1966).

It is equally well established that local boards of education, as local governmental units, are but creations of the State. As such, they are capable of only exercising those powers granted them, either expressly or by fair implication, by the Legislature. *Fair Lawn Ed. Assn. v. Fair Lawn Bd. of Ed.*, 79 N.J. 574, 579 (1979); *Board of Ed. of Belvidere V. Bosco*, 138 N.J. Super. 368 (Law Div. 1975). The powers of educational services commissions are similarly circumscribed by the legislative act authorizing their establishment.

The act governing educational services commissions specifically states that such agencies are to be established to "carry on" programs of educational research and "to provide" educational and administrative services to public school districts as authorized by the State Board of Education. Indeed, the State Board is only to approve the establishment of an educational services commission when it has ascertained the need for the services which the commission proposes to provide to local boards of education. Once approved by the State Board, the Commission may enter into contracts with school districts "to provide for such services." Furthermore, the Commission is specifically empowered to employ "teachers, principals and other employees" needed to furnish the approved services to local school districts.

From the language utilized in the statute, it is clear that the Legislature intended to create, under certain circumstances, a public agency which would provide educational services on a consolidated or regional basis, to local boards of education. Clearly, the purpose of such undertaking was to upgrade the quality of services which an individual local district might be able to provide or to assure the provision of these services on a cost efficient basis.

Reading this provision within the context of the education laws, it is clear that the Legislature, which has already created local districts to discharge its responsibility under the Education Clause, has further authorized the creation of regional public agencies to assist districts in the performance of their educational functions. There is nothing in the statute authorizing the creation of these entities which indicates that such commissions may contract with private agencies for the performance of instructional services.³ Indeed, the language selected by the legislature supports the conclusion that the Commission, upon authorization and approval by the State Board, is to furnish instructional services directly to local districts and may employ teachers and principals necessary to the performance of these educational services. To construe this statute otherwise would permit local school districts to enter into arrangements whereby their essential function, the provision of instructional services, would be performed by non-public agencies. To so remove "public education" from the public sphere would effectively frustrate the ongoing monitoring of these services by the Commissioner and State Board of Education, as was mandated by the Public School Education Act of 1975, N.J.S.A. 18A:7A-10, and

3. This opinion is strictly limited to the propriety of a contractual arrangement between an educational services commission and local school districts for the provision of instructional services.

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enthusiastically approved by the Supreme Court of New Jersey in *Robinson v. Cahill*, 69 N.J. 449, 459-461 (1976). A departure so radical from the legislative scheme generally governing public education is not to be inferred from the mere silence of N.J.S.A. 18A:6-51 *et seq.* on the subject of contracts with private entities for instructional services. Indeed, where the Legislature has determined it necessary to permit local districts the flexibility of discharging their educational functions by means of a private agency, it has specifically authorized those limited arrangements by statute. Pursuant to N.J.S.A. 18A:46-14(g), local boards may provide special education to handicapped children by sending these children to privately operated day classes. However, such arrangements are only to be made if all other public options are "impractical" and only with the "consent of the commissioner." More recently, local boards have been authorized to enter into contracts with private vocational schools for vocational education courses if such course "cannot be provided by" public entities or where the private schools can "provide substantially equivalent training at a lesser cost." N.J.S.A. 18A:54-10.1. However, such arrangements are subject to detailed regulations adopted by the State Board of Education, N.J.S.A. 18A:54-10.2 and 4, N.J.A.C. 6:46-9.1 *et seq.*, and each contract for these services must be approved by the Commissioner "in writing" before its execution. N.J.S.A. 18A:54-10.4. Additionally, each private school entering into these contractual arrangements is to "make its records available for inspection by the Commissioner or his designated representative." N.J.S.A. 18A:54-10.3.⁴

The final issue to be considered is whether N.J.S.A. 18A:46A-1 *et seq.* and 46:19.1 *et seq.* provide an independent statutory basis for the contract between the Commission and the private agency. Pursuant to those statutory provisions, a local board of education is primarily responsible for the provision of auxiliary, diagnostic and therapeutic educational services to the non-public school pupils resident within its district and receives State aid to meet the costs of providing such services. Local boards, however, may "contract with an educational improvement center, educational services commission or other public or *private agency approved by the commissioner*" for the provision of these services. From the statutory scheme, it is manifest that the local board has the primary responsibility for providing these services and the option of providing them either directly or by contract with certain public or private agencies. However, it may

4. It is clear that in the limited instances where the Legislature has permitted local boards to enter into contracts with private entities for the provision of instructional programs, it has only been under circumstances where the State officials responsible for assuring the quality of public education have had explicit control over those arrangements. Even assuming that the authority to enter into the present contractual arrangement may be inferred from the language of N.J.S.A. 18A:6-5.1 *et seq.*, the Commission failed to comply with the requirement that this highly significant change in its program plan be submitted to the State Board for approval. Had such application been made, the State Board would have had the opportunity to review its propriety and educational soundness, and to impose any conditions on its approval deemed necessary to assure accountability on the part of the private agency. However, in the present situation, the approval process established by N.J.S.A. 18A:6-51 *et seq.* was simply not followed.

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only contract with a private agency if it is approved by the Commissioner. Construing this statute in harmony with N.J.S.A. 18A:6-51, *et seq.*, it is clear that appropriate services to be provided by an educational services commission are those mandated by N.J.S.A. 18A:46A-1, *et seq.* and 46-19.1, *et seq.* Therefore, the State Board of Education appropriately approved that function as part of the proposed services to be provided by the Essex County Educational Services Commission. The local districts, consistent with the statutory scheme, chose to fulfill their responsibilities to non-public school pupils by contracting with a public agency, the Essex County Educational Services Commission. The statutory language makes it abundantly clear that the option of contracting with a private agency was only available to local boards of education and the boards in question rejected that option. The commission has no similar grant of discretion and cannot unilaterally negate the board's choice by entering into a contract with a private agency. Moreover, arrangements between local boards of education and private agencies for the provision of these educational services would only be consistent with the statutory scheme if the private agency were approved by the Commissioner. This statutorily required approval was not sought by the commission in the present matter.

Construing N.J.S.A. 18A:6-51, *et seq.*, within the context of the education laws as a whole and with special reference to the statutes governing educational services to non-public school pupils, it is concluded that only local boards of education have the authority to enter into contracts with private agencies for the provision of auxiliary, diagnostic and therapeutic educational services to non-public school pupils. Furthermore, such contracts may only be entered into if the private agency is approved by the Commissioner of Education. Finally, an educational services commission may only provide those services authorized by the State Board of Education and any change in the services to be provided by the Commission must be reviewed and approved by that body. For these reasons, you are advised that the Essex County Educational Services Commission acted beyond the legitimate scope of its authority when it entered into the present contract with Education and Training Consultants, Inc. Not only did the Commission act without express statutory authorization, but it also entered into this agreement without seeking the review and approval of the State Board or the approval of the Commissioner of Education. Indeed, under the latter circumstances, even local boards of education could not have validly entered into this arrangement.

Very truly yours,
JOHN J. DEGNAN
Attorney General

BY: MARY ANN BURGESS
Deputy Attorney General