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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3890-14T1

HIGHLAND PARK BOARD  
OF EDUCATION,

Appellant,

v.

DAVID C. HESPE, COMMISSIONER OF  
EDUCATION OF THE STATE OF  
NEW JERSEY, NEW JERSEY STATE  
BOARD OF EDUCATION and HATIKVAH  
INTERNATIONAL ACADEMY CHARTER SCHOOL,

Respondents.

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EAST BRUNSWICK BOARD OF EDUCATION,

Intervenor-Appellant.

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Argued November 8, 2017 – Decided January 24, 2018

Before Judges Yannotti, Carroll and Leone.

On appeal from the Commissioner of Education.

David B. Rubin argued the cause for appellant  
(David B. Rubin, PC and The Busch Law Group,  
LLC, attorneys; David B. Rubin and Douglas M.  
Silvestro, on the briefs).

Matthew J. Giacobbe argued the cause for intervenor-appellant (Cleary Giacobbe Alfieri Jacobs LLC, attorneys; Matthew J. Giacobbe, of counsel and on the brief, Jessica V. Henry, on the brief).

Jennifer J. McGruther, Deputy Attorney General, argued the cause for respondents Commissioner of Education and State Board of Education (Christopher S. Porrino, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Jennifer J. McGruther, on the brief).

Thomas O. Johnston argued the cause for respondent Hatikvah International Academy Charter School (Johnston Law Firm, LLC, attorneys; Thomas O. Johnston and Jignesh J. Shah, on the brief).

Duane Morris LLP, attorneys for amicus curiae New Jersey Charter Schools Association (Paul P. Josephson, of counsel and on the brief).

Cleary Giacobbe Alfieri Jacobs LLC, attorneys for amicus curiae Manalapan-Englishtown Regional Board of Education (Matthew J. Giacobbe, of counsel and on the brief; Jessica V. Henry, on the brief).

#### PER CURIAM

Highland Park Board of Education (Highland Park) appeals from a final decision of the Commissioner of Education (Commissioner) dated March 19, 2015, which approved an application by Hatikvah International Academy Charter School (Hatikvah) to amend its charter to expand its grades from kindergarten through grade five to kindergarten through grade eight. We affirm.

## I.

We briefly summarize the pertinent facts. In March 2009, Hatikvah applied to the New Jersey Department of Education (NJDOE) for the issuance of a charter pursuant to the Charter School Program Act of 1995 (the CSPA or the Act). N.J.S.A. 18A:36A-1 to -18. In its application, Hatikvah indicated that its proposed charter school would include only grades kindergarten through grade five during the initial four-year charter period, beginning with grades kindergarten through grade two, with the addition of one grade level each year thereafter. Hatikvah stated that its goal was to have the school eventually educate students in grades kindergarten through grade eight.

Hatikvah's initial charter period ended in June 2014, and in March 2014, Hatikvah submitted an application to the NJDOE for a five-year charter renewal. In that application, Hatikvah also sought approval to expand the school to include grades six through eight. The Commissioner granted the renewal but denied the request to expand the school's grades due to a decline in the school's academic performance in the 2012-2013 school year. Hatikvah's current charter expires in June 2019.

In November 2014, Hatikvah submitted an application to amend its charter to add grades six through eight and increase the number of students in kindergarten through grade five. In support of its

application, Hatikvah submitted a resolution of its board of trustees and a rationale statement, which detailed improvements Hatikvah's students made from 2013 to 2014, and compared the academic performance of its students to the performance of students in all New Jersey public and charter schools.

Hatikvah's rationale statement also noted that progress had been made in its quest to become a fully-certified "International Baccalaureate Middle Years Programme." According to Hatikvah, the program "utilizes six transdisciplinary themes as its framework for exploration and study," and requires a multi-year pre-evaluation period before a school may be labelled an International Baccalaureate school.

The East Brunswick Board of Education (East Brunswick), Highland Park, the Borough of Highland Park (Borough), and the South River Board of Education (South River) submitted statements to the Commissioner opposing Hatikvah's application. The Commissioner also received a joint letter from three members of the State Legislature opposing the application.

In its statement, East Brunswick asserted that Hatikvah's proposed expansion would be unfair to East Brunswick because it "would provide no benefit to the East Brunswick Township taxpayers, residents, [or] students . . . and would jeopardize the [district's] ability to maintain its educational programs and meet

its contractual obligations." East Brunswick also asserted that Hatikvah "falsely state[d]" that the proposed expansion would not have any financial impact on East Brunswick's taxpayers.

East Brunswick stated that if Hatikvah's expansion were allowed, it would require East Brunswick's taxpayers to pay more than \$1 million in addition to the district's current charter school budget. According to East Brunswick, this would be forty-two percent of the district's allowed two-percent annual budget increase. East Brunswick claimed that this expenditure would "seriously jeopardize [East Brunswick]'s ability to meet its contractual obligations and maintain and promote competitive educational offerings."

In its statement, Highland Park noted that only fifty-four percent of the students then attending Hatikvah were residents of East Brunswick. According to Highland Park, Hatikvah had become a regional or state-wide school with students from numerous different school districts and five different counties throughout the State. Highland Park stated that this was contrary to Hatikvah's charter.

Highland Park also asserted that it was responsible for paying tuition for Highland Park students to attend Hatikvah and three other charter schools, and these tuition payments amounted to \$562,473 for the 2014-2015 school year. According to Highland

Park, this was twenty-one percent more than the district's allowed two-percent budget cap for the year, "making it difficult for the [d]istrict to meet its contractual obligations and maintain and promote competitive educational offerings." Highland Park stated that expansion of Hatikvah would place an increased burden on Highland Park's taxpayers.

In opposing the application, the Borough stated that if permitted to expand, Hatikvah would be seeking additional students from districts other than East Brunswick, including Highland Park. The Borough asserted that Hatikvah viewed its students as a commodity and a source of income to advance its business. The Borough also asserted that it was "deeply concerned about the impact of the possible expansion of Hatikvah on [its] entire tax base."

In its statement, South River stated that in the 2015-2016 fiscal year, the NJDOE had required the district to budget \$191,300 for South River students to attend Hatikvah. South River also stated that the State-mandated diversion of funds to Hatikvah threatened the competitiveness of its "educational offerings through the reduction of teaching staff and technology and program preparation." South River estimated that increased enrollment at Hatikvah would require South River to pay an additional \$48,000

in 2015-2016, which was seventeen percent of its allowed annual two-percent budget increase.

In their joint letter, the legislators indicated that they were writing on behalf of the "children and districts of Middlesex County." They stated that despite Hatikvah's claims, there is no "excess community demand" because the school "needs to recruit from [twenty-two] other districts, across multiple counties, to fill even their current allowable 300 student enrollment."

The legislators asserted that the proposed expansion of Hatikvah's enrollment would "seriously jeopardize" the ability of the East Brunswick public school district "to meet its contractual obligations and maintain and promote competitive offerings." The legislators also stated that Hatikvah's expansion would have an adverse impact on the Highland Park public school district.

On March 19, 2015, the Commissioner issued a final decision on Hatikvah's application. The Commissioner denied Hatikvah's request to expand the number of students in kindergarten through grade five, but granted the request to add grades six through eight. In his decision, the Commissioner noted that he had reviewed all of the "evidence collected" and "all [of the] public correspondence and comments" before approving Hatikvah's request to expand its operations to include grades six through eight.

The Commissioner found that Hatikvah's academic performance had improved from the 2012-2013 school year to the 2013-2014 school year. The Commissioner stated that these improvements placed Hatikvah's students in the ninety-sixth percentile in language arts literacy and eighty-seventh percentile in mathematics, in comparison to other schools across the State. The Commissioner also stated that the addition of grades six through eight would allow Hatikvah to "fulfill its mission to offer a middle-year International Baccalaureate Programme and continue the development of the Hebrew language proficiency model for students currently attending the school."

Thereafter, Highland Park filed its notice of appeal. We granted East Brunswick's motion to intervene in the appeal. We also granted motions by the Manalapan-Englishtown Board of Education (Manalapan-Englishtown), and the New Jersey Charter School Association (NJCSA) for leave to participate as amici curiae.

## II.

On appeal, Highland Park argues that the Commissioner's decision to approve Hatikvah's request to add grades six through eight was arbitrary, capricious, and unreasonable. Highland Park asserts it must be assumed students from Highland Park and twenty-two other school districts will continue to be enrolled in



Hatikvah. Highland Park contends the NJDOE has erroneously interpreted the CSPA as requiring these sending districts to pay for its students to attend Hatikvah. Highland Park further argues the Commissioner failed to give meaningful consideration to the objectors' challenges to Hatikvah's application.

East Brunswick argues the Commissioner's decision is arbitrary, capricious, and unreasonable because it allegedly allows Hatikvah to continue to operate in violation of the CSPA. East Brunswick contends Hatikvah's "district of residence" is East Brunswick and under the NJDOE's regulations, Hatikvah may only enroll students from East Brunswick and school districts that are contiguous to East Brunswick Township.

East Brunswick asserts that Hatikvah is operating a state-wide charter school, drawing students from multiple districts and counties, which East Brunswick claims is a violation of its charter. It further argues that the Commissioner erred by failing to accord weight to the "negative impact" Hatikvah's expansion will have on other districts.

Manalapan-Englishtown argues that the Commissioner's decision arbitrarily, capriciously, and unreasonably allows Hatikvah to continue to operate a state-wide charter school in violation of its charter and the NJDOE's regulations. Manalapan-Englishtown also asserts that the Commissioner erred by failing to accord

weight to the negative impact Hatikvah's expansion allegedly will have on East Brunswick. Differing with Highland Park, Manalapan-Englishtown argues that the requirement that non-resident districts defray the cost for their students to attend a charter school comports with the CSPA.

Also differing with Highland Park, the NJCSA argues the CSPA requires each school district to pay for its students to attend a charter school. Therefore, the NJCSA argues that Highland Park must pay the cost for Highland Park students to attend Hatikvah.

### III.

Initially, we note that the scope of our review of a final decision of the Commissioner on a charter school application is limited. In re Proposed Quest Acad. Charter Sch. of Montclair Founders Group, 216 N.J. 370, 385 (2013). We may only reverse the Commissioner's decision if arbitrary, capricious, or unreasonable. Ibid. (citing In re Petitions for Rulemaking, N.J.A.C. 10:82-1.2 & 10:85-4.1, 117 N.J. 311, 325 (1989)). We must accord a "strong presumption of reasonableness" to the Commissioner's exercise of his statutorily-delegated responsibilities. City of Newark v. Nat. Res. Council in Dep't of Env'tl. Prot., 82 N.J. 530, 539 (1980).

In determining whether an agency's action is arbitrary, capricious, or unreasonable, our review is generally limited to considering:

- 1) [W]hether the agency's action violates express or implied legislative policies, that is, did the agency follow the law;
- 2) whether the record contains substantial evidence to support the findings on which the agency based its action; and
- 3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[In re Quest Academy, 216 N.J. at 385-86 (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).]

A reviewing court "may not substitute its own judgment for that of the agency, even though the court might have reached a different result." In re Carter, 191 N.J. 474, 483 (2007) (citing Greenwood v. St. Police Training Ctr., 127 N.J. 500, 513 (1992)). Our deference to the agency's decision is especially appropriate when the issue under review pertains to the agency's special "expertise and superior knowledge of a particular field." In re Herrmann, 192 N.J. 19, 28 (2007).

#### IV.

East Brunswick and Manalapan-Englishtown argue that the Commissioner's decision improperly allows Hatikvah to operate in violation of its charter. According to these districts, Hatikvah has been chartered as a school with a "district of residence" in East Brunswick. The districts argue that Hatikvah's charter only

permits it to enroll students from East Brunswick and school districts that are contiguous to East Brunswick Township. East Brunswick and Manalapan-Englishtown maintain the Commissioner's decision improperly permits Hatikvah to continue operating as a state-wide charter school.

The establishment and operation of a charter school in this State is governed by the CSPA and the regulations adopted pursuant to the Act. N.J.S.A. 18A:36A-1 to -18; N.J.A.C. 6A:11-1.1 to -6.4; N.J.A.C. 6A:23A-15.1 to -15.4. Among other things, the CSPA provides that a charter school must operate in accordance with its charter and the relevant statutes and regulations. N.J.S.A. 18A:36A-11(a).

In its initial application for a charter, Hatikvah identified East Brunswick Township as its "district of residence." The term "district of residence" is defined in the regulations as "the school district in which a charter school facility is physically located." N.J.A.C. 6A:11-1.2. The term "[r]egion of residence" is defined as "contiguous school districts in which a charter school operates and is the charter school's district of residence." Ibid.

East Brunswick and Manalapan-Englishtown argue that Hatikvah was chartered as a school with a specified "district of residence," not as a school with a "region of residence." The districts

therefore maintain the Commissioner is improperly allowing Hatikvah to operate a state-wide charter school.

We note that in November 2014, when Hatikvah sought to amend its charter to expand its enrollment and grades, neither East Brunswick nor Manalapan-Englishtown submitted comments to the Commissioner asserting that Hatikvah was operating in violation of its charter. Therefore, the Commissioner did not address this issue in his March 19, 2015 decision, which is the decision before us on appeal.

Generally, an appellate court will not consider questions or issues that were not presented properly in the court or agency below. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Because the contention that Hatikvah was operating in violation of its charter was not raised before the Commissioner, we will not consider the districts' arguments on this issue.

We note, however, that under N.J.S.A. 18A:36A-17, the Commissioner "may revoke a school's charter if the school has not fulfilled any condition imposed by the commissioner in connection with the granting of the charter or if the school has violated any provision of its charter." Therefore, the districts' contention that Hatikvah is operating in violation of its charter implicates the Commissioner's discretionary enforcement authority under N.J.S.A. 18A:36A-17.

If East Brunswick and Manalapan-Englishtown wish to pursue this issue, the districts may submit a complaint to the Hatikvah board of trustees asserting that the school is not being operated in accordance with its charter and, if the complaint is not "adequately addressed," the districts may present the complaint to the Commissioner pursuant to N.J.S.A. 18A:36A-15. We express no opinion on the merits of such a complaint, if filed.

V.

Next, Highland Park argues that it is not required to bear the cost for Highland Park students to attend Hatikvah. Highland Park contends that N.J.S.A. 18A:36A-12(b) limits the financial responsibility for the students' attendance at charter schools to the "school district of residence," which Highland Park interprets to mean the charter school's "district of residence." Highland Park contends that in enacting the CSPA, the Legislature intended to limit this financial responsibility to the charter school's "district of residence" or, at most, the contiguous districts identified in the school's approved "region of residence."

We note that in March 2014, when Hatikvah sought to renew its charter, Highland Park did not assert that it does not have a statutory obligation to pay for Highland Park students to attend the school. Moreover, in November 2014, when Hatikvah filed its

application to expand its enrollment and grades, Highland Park did not raise this issue.

In addition, Highland Park never challenged the validity of the administrative regulation which requires all sending school districts to pay for their students to attend a charter school. Hatikvah also points out that Highland Park has without objection paid tuition for its students to attend the school for at least six years.<sup>1</sup>

For these reasons, Hatikvah argues that the court should preclude Highland Park from challenging its payment obligations to the school. Although the issue is raised for the first time on appeal, we have decided to exercise our discretion and address Highland Park's argument, because it involves an issue of law.

When the court interprets statutory language interpreting a statute, our "goal is to divine and effectuate the Legislature's intent". State v. Shelley, 205 N.J. 320, 323 (2011) (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)). In determining the Legislature's intent, we begin our analysis with the language of the statute, and give the terms used their ordinary and accepted meanings. Ibid.

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<sup>1</sup> In support of these arguments, Hatikvah filed a motion to supplement the record with evidence of Highland Park's payments to the school from at least 2010-2011. We have denied the motion.

If the statutory language leads to one clear and unambiguous result, the interpretive process is at an end. State v. D.A., 191 N.J. 158, 164 (2007) (citation omitted). However, if "there is ambiguity in the statutory language that leads to more than one plausible interpretation" we can consider extrinsic evidence in our search for the interpretation that is consistent with the Legislature's intent. Ibid. (citing DiProspero, 183 N.J. at 492).

The relevant provision of the Act states in pertinent part that:

[t]he school district of residence shall pay directly to the charter school for each student enrolled in the charter school who resides in the district an amount equal to [ninety-percent] of the sum of the budget year equalization aid per pupil and the prebudget year general fund tax levy per pupil inflated by the [Consumer Price Index] rate most recent to the calculation. . . .

[N.J.S.A. 18A:36A-12(b).]

Thus, the statute expressly provides that the "school district of residence" must pay the charter school for "each student" enrolled in the school "who resides in the district." Ibid. Thus, as used in N.J.S.A. 18A:36A-12(b), the term "school district of residence" refers to the district where the student resides, not the district where the charter school is located.

We note that the Act expressly envisions that students may enroll in a charter school, even though they reside in a district



other than the district where the charter school is located. See N.J.S.A. 18A:36A-8(a) (requiring charter schools to give preference for enrollment to students who reside "in the school district in which the charter school is located"). There is nothing in the Act that would allow these students to attend a charter school without a financial contribution from the school districts in which they reside. Thus, under N.J.S.A. 18A:36A-12(a), obligation of a school district to attend a charter school is not limited to the charter school's "district of residence."

The regulations adopted pursuant to the Act are consistent with this interpretation of N.J.S.A. 18A:36A-12(b). Indeed, the regulations expressly provide that both a charter school's "district of residence" and the "non-resident school districts" must pay for their students to attend a charter school. N.J.A.C. 6A:23A-15.3(g)(2), (3).

The extrinsic evidence also supports this interpretation of N.J.S.A. 18A:36A-12(b). The CSPA has its genesis in two bills: Assembly No. 592 and Senate No. 1796. In September 1995, the Office of Legislative Services (OLS) provided the Legislature with its fiscal estimate for Senate No. 1796, which includes the following statement:

In regard to the funding of charter schools, the bill provides that the school district of residence would pay directly to the charter

school for each student enrolled who resides in the district an amount equal to the local levy budget per pupil in the district for the specific grade level. . . . The cost for out of district pupils would be paid by the district of residence of the pupil. . . .

[Legislative Fiscal Estimate, S.1796, at 1 (N.J. 1995) (emphasis added).]

Thus, the OLS's fiscal estimate makes clear that all school districts of residence must pay for students to attend a charter school, and the financial obligation is not limited to the charter school's "district of residence."

In support of its interpretation of the CSPA, Highland Park refers to certain provisions of the Act that pertain to a charter school's "district of residence." Highland Park cites N.J.S.A. 18A:36A-4(c), which requires a proposed charter school to provide a copy of its application to the "local board of education." However, the statute does not support Highland Park's argument. N.J.S.A. 18A:36A-4(c) also requires the Commissioner to provide notice to "members of the State Legislature, school superintendents, and mayors and governing bodies of all legislative districts, school districts, or municipalities in which there are students who will be eligible for enrollment in the charter school."

Highland Park also cites N.J.S.A. 18A:36A-14(b), a statute that limits a charter school's salaries to the salaries of the

highest step in the district where the school is located; and N.J.S.A. 18A:36A-16(b), which requires a charter school to serve a copy of its annual report on the local board of education in the district where the school is located. However, these statutes have no direct bearing on whether a student's "school district of residence" must pay for students from that district to attend at a charter school.

We conclude that under N.J.S.A. 18A:36A-12(b), the term "school district of residence" means the school district where the student resides, and each "school district of residence" must pay the charter school for its student to attend the school, in the amounts required by the Act and the regulations. We therefore reject Highland Park's contention that only the charter school's "district of residence" is obligated to pay for its students to attend the school.

## VI.

Highland Park and East Brunswick further argue that the Commissioner's final decision is arbitrary, capricious, and unreasonable because it fails to provide sufficient reasons for granting Hatikvah's application to add grades six through eight. Highland Park argues that the Commissioner cites the "commendable performance" of Hatikvah's students over a three-year period, and the school's continued implementation of "an innovative model of

instruction," but fails to provide sufficient explanation or analysis for this conclusion.

Highland Park further argues that despite its claim to the contrary, Hatikvah is experiencing "steadily withering enrollment" by East Brunswick students and increased reliance upon marketing the school to families outside Hatikvah's "district or residence." Highland Park also cites what it claims is an "intolerable strain" upon its budget from the "outflow of funds" to support its students' attendance at Hatikvah. Highland Park contends the Commissioner failed to address these issues in his decision.

In addition, Highland Park asserts that it is "manifestly clear" Hatikvah has abandoned its original mission of serving the needs of the East Brunswick community, and the Commissioner arbitrarily relied upon the NJ ASK test results of Hatikvah's students. Highland Park claims that NJ ASK testing is not a "meaningful indicator" of a student's progress. Highland Park further claims that Hatikvah's students scored lower than East Brunswick's students on the NJ ASK tests.

East Brunswick argues that the Commissioner erred by failing to give sufficient weight to the negative impact the Hatikvah expansion will allegedly have upon the East Brunswick school district. East Brunswick asserts that Hatikvah's proposed expansion will jeopardize its ability to maintain existing

educational programs and contractual obligations; require East Brunswick taxpayers to fund an additional up-front amount of more than \$1 million; have a negative impact on its annual budgets for 2016 to 2019; and cause the district to apply a significant amount of the district's two-percent cap on annual budget increases to the charter school. East Brunswick also cites Hatikvah's alleged failure to meet its community target enrollment; East Brunswick's alleged inability to afford to maintain small class sizes like Hatikvah; and certain financial hardships the district allegedly has "endured" since Hatikvah's charter was approved.

We are convinced that these arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We note, however, that we are convinced that there is sufficient credible evidence in the record to support the Commissioner's final decision.

Here, the Commissioner considered Hatikvah's application in accordance with N.J.A.C. 6A:11-2.6, and the record supports the Commissioner's finding that Hatikvah's academic performance had improved from 2012-2013 to 2013-2014. The record also supports the Commissioner's finding that the school continues to implement an innovative model of instruction, as detailed in its charter application. Moreover, Hatikvah's application indicates that its organization is sound and the school remains fiscally viable.

As noted, in opposing Hatikvah's application, Highland Park and East Brunswick cited certain financial and educational harms that allegedly would result if Hatikvah were permitted to expand its enrollment and add grades six through eight. The Commissioner denied Hatikvah's request to increase enrollment in kindergarten through grade five. In any event, the districts' "generalized" protests did not provide a basis to deny Hatikvah's application to add grades six through eight. See In re Red Bank Charter Sch., 367 N.J. Super. 462, 482 (App. Div. 2004) (quoting Charter Sch. Application of Englewood on the Palisades, 164 N.J. 316, 334 (2000)).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION