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COMMENTARY

New Jersey's Odd Route To Achieving Accountability

Comment period skirted in adoption of new rules

By Brenda Liss

For those of us working in areas of law involving government agencies, the Administrative Procedure Act has been one of the most ingenious developments of the past half-century.

The federal APA and its state counterparts have provided, among other things, an effective method for quasi-legislative agencies to promulgate rules with the effect of law only after a formal notice-and-comment period in which the public can point out ambiguities, raise practical concerns and note when a proposal is beyond the agency's statutory authority or inconsistent with some other provision of law. Comments rarely cause an agency to completely change course, but they often result in small but significant changes between proposed and final rules.

Typically, the agency view of the exercise is disdain or impatience. But in the 40 years since adoption of our state's APA, the notice-and-comment period has become a mainstay of public law, with good reason.

Earlier this month, with the blessing of the Legislature, New Jersey's education

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commissioner did what agencies often prefer but rarely do: she bypassed the APA and promulgated new rules through a "special adoption" without the formal notice-and-comment procedure. The new rules implement accountability measures adopted by the Legislature in 2007; apparently, the need for greater accountability and control of spending provided the rationale for the emergency adoption. Even if that were a true emergency — a topic for another day — the result is a set of rules that not only raises practical concerns but could have just the opposite of the desired effect. Some of the new rules could increase district spending. Some are inconsistent with statutory provisions. Some are just silly.

For instance, the new rule prohibiting the distribution of "glossy publications" is one with which local officials probably would have taken umbrage if given the chance. How much, if anything, will the state save with this rule? Does it need to micromanage to this extent? What if a district has a few cases of glossy paper in stock? Does it need to discard it, or use it in art classes rather than district publications, to avoid violating the rule? Can it continue to use glossy paper in classes but not publications?

Other rules raise more serious concerns. One new provision could be read to require that all new teachers be hired at the bottom of the salary guide unless a higher amount is approved by the state. Without

approval, a district could not offer an experienced, highly qualified physics teacher more than it would offer a brand-new gym teacher. Again, how much would the state save? Have school districts been paying overly generous salaries to new teachers? What possible educational benefit could this new rule have? Moreover, this rule is contrary to a statutory provision, in effect since 1954, that gives districts discretion to set starting salaries by agreement with each new employee. Do districts need to refrain from exercising that discretion to avoid violating the rule?

Another new rule requires districts to adopt policies prohibiting the employment of any relative of a board member or chief school administrator without approval of the executive county superintendent. A district cannot, without approval, hire that experienced, highly qualified physics teacher if she is related to a board member. The School Ethics Act, in effect since 1991, already prohibits school officials from voting on the appointment of or supervising a relative. This goes further, prohibiting the appointment even if the member with a conflict does not participate. Do we need this more restrictive rule? It also defines "relative" more broadly than the School Ethics Act. Which definition will apply?

Finally, another new provision requires procedures "to ensure the prudent use of legal services by employees and board of education members and the tracking of the use of those services." Those procedures must include "criteria or guidance to prevent the use of legal counsel unnecessarily for management decisions or [to obtain] readily available information." Requests for legal services must be made in writing, a "log of all legal counsel contact" must be kept and each district must have "a process to determine

whether the request warrants legal advice or if legal advice is necessary.”

This kill-all-the-lawyers approach may backfire. Effective school district administrators know that a quick call to the board attorney in advance can save a lot of trouble and expense. The effect of this rule will

be more attention given to whether an issue warrants legal advice than to the advice itself. More lawyers will be hired to clean up messes and defend lawsuits. Again, how much will the state save? Is there an urgent need to reduce excessive consultation with counsel?

If the commissioner did not realize any of this when she considered how to respond to the demand for accountability and control, the tried-and-true APA notice-and-comment procedure would have been helpful. She would have received an earful. ■