

In re Renewal Application of
TEAM Academy Charter School

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-003416-15T1 (LEAD)

Civil Action

On Appeal From:

Department of Education

In re Renewal Application of
Robert Treat Academy Charter
School

No. A-004384-15T (Consol.)

In re Renewal Application of
North Star Academy Charter
School of Newark

No. A-004385-15T1 (Consol.)

In re Amendment Request to
Increase Enrollment of Maria
L. Varisco Rogers Charter
School

No. A-004386-15T1 (Consol.)

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In re Amendment Request to
Increase Enrollment of
University Heights Charter
School

No. A-004387-15T1 (Consol.)

In re Amendment Request to
Increase Enrollment of Great
Oaks Charter School

No. A-004388-15T1 (Consol.)

In re Amendment Request to
Increase Enrollment of New
Horizons Community Charter
School

No. A-004398-15T1 (Consol.)

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PRELIMINARY STATEMENT

This appeal seeks reversal of decisions by the Commissioner of Education ("Commissioner") granting the applications of seven Newark charter schools to expand enrollment. The aggregate effect of the Commissioner's decisions is to permit those schools to nearly double their combined enrollment in the Newark Public Schools ("NPS" or "District") by adding 8,499 students over the next five years. When completed, this expansion will increase overall enrollment in Newark charters to 18,531, approximately 50% of the District's current total enrollment of 36,034 students.

The dramatic expansion of charter school enrollment authorized by the Commissioner will continue the substantial decline in funding available in the NPS budget to educate students attending NPS schools. The loss of funding will exacerbate an ongoing NPS budget crisis, further diminishing the availability of classroom teachers, support staff and other resources essential to delivering a constitutionally-mandated thorough and efficient education.

The expansion of charter school enrollment will also increase a pattern of segregating high concentrations of at-risk students in NPS schools, namely, students with disabilities and English language learners ("ELL"). Those students require additional funding and resources for a thorough and efficient

education, putting added strain on the NPS budget. Further, the expansion will perpetuate the intense racial isolation of Newark students in an already de facto segregated District.

Before the Commissioner approved the expansions, Education Law Center ("ELC") filed an objection in the record containing data, facts and other evidence on the impact of the proposed charter expansions on the NPS budget, its schools and students. The evidence demonstrated that enrollment expansions would result in the continued loss of funding from year-to-year, and perpetuate and increase student segregation by disability, English language proficiency, and race. In approving the expansions, the Commissioner neither addressed, nor mentioned, the overwhelming record showing the severe impacts that the expansions will have on the delivery of a thorough and efficient education to NPS students.

ELC contends the decisions approving the charter school expansions were arbitrary, capricious and unreasonable because the Commissioner failed to evaluate the loss of funding and assess segregative effects in the District. These failures violate the thorough and efficient provision and the prohibition against segregation in the State Constitution and the Charter School Program Act ("Act"). The Commissioner's decisions also violate the Act by authorizing the establishment of multiple new

charter schools under one charter in unidentified facilities at undisclosed locations in the District.

PROCEDURAL HISTORY

In fall 2015, three existing Newark charter schools filed to renew their charters for the next five years, or through June 30, 2021, pursuant to N.J.S.A. 18A:36A-17, Aa393¹, Aa454, Aa535, and four filed to amend their charters (two through June 30, 2018 and two through June 30, 2020), pursuant to N.J.A.C. 6A:11-2.6. Aa120, Aa132, Aa298, Aa507. In those applications, all seven requested enrollment expansions, ranging from the request of Maria L. Varisco Rogers Charter School ("M.L. Varisco") for 25 new students to the request of TEAM Academy Charter School ("TEAM") for 6,308 new students.

On January 28, 2016, ELC filed with the Commissioner specific objections to the charter schools' expansions, requesting that their applications be denied. Aa32.

On February 18 and 29, 2016, the Commissioner issued decisions in letter format granting expansions for all seven charter schools. Aa18-Aa31.

On April 1, 2016, ELC filed a single notice of appeal seeking reversal of all seven decisions granting the enrollment expansions. Aa1. On April 13, 2016, ELC, at this Court's direction, requested leave to file a single notice of appeal

¹ "Aa__" refers to the ELC's Appendix.

from the seven separate decisions identified in the April 1, 2016 notice of appeal. In opposition to that motion, the Department of Education ("DOE") filed a cross-motion to dismiss the appeal on the basis that ELC lacked standing and the appeal was time barred. On June 2, 2016, this Court entered an Order denying ELC's motion for leave to file a single notice of appeal and directed ELC to file a formal motion for leave to file timely notices of appeal. On that same date, the Court entered an Order denying DOE's cross-motion to dismiss.

ELC filed an amended notice of appeal from the Commissioner's February 18, 2016 decision approving TEAM's application for expansion, as well as six motions for leave to file appeals from the other six charter school decisions. Aa4-Aa17. In opposition, TEAM filed a motion to strike. This Court granted ELC's motions and denied TEAM's motion on July 25, 2016. Seven appeals of seven charter expansion decisions were thereby docketed by this Court. Aa4-Aa17.

On August 23, 2016, ELC filed a motion to consolidate the seven appeals on the basis of judicial economy, common questions of law, and the need to examine the cumulative impact of the seven decisions on NPS. On September 28, 2016, this Court granted the motion to consolidate.

STATEMENT OF FACTS

A. Charter Schools' Expansion Applications

In fall 2015, seven operating Newark charter schools submitted applications to DOE for the renewal or amendment of their charters under the Act and its regulations. The applications included requests not only to continue operating in their designated "district of residence" - the Newark District - but also to expand the number of students enrolled in each of the schools.² The charter schools and the requested enrollment expansions are as follows:

- Great Oaks Charter School ("Great Oaks"), from 462 students in 2015-16 to a requested total enrollment of 939 students by 2019-20 (Aa508);
- M.L. Varisco, from 515 students in 2015-16 (Aa119) to a requested total enrollment of 540 students by 2017-18 (Aa122);

² The Newark District is the designated district of residence for all of the charter schools on this appeal. N.J.A.C. 6A:11-1.2 (defining district of residence as "the school district in which a charter school facility is physically located"). The District is under State operation pursuant to N.J.S.A. 18A:7A-10 to 53.1, and, as a result, is governed by a State District Superintendent, with the Commissioner retaining veto power over all District actions. NPS also is an Abbott district entitled to remedial funding as ordered by the Supreme Court in the Abbott litigation. See, e.g., Abbott v. Burke, 206 N.J. 332, 363 (2011) ("Abbott XXI").

- New Horizons Community Charter School ("New Horizons"), from 504 students in 2015-16 to a requested total enrollment of 756 by 2016-17 (Aa140);
- North Star Academy Charter School of Newark ("North Star"), from 3,998 students in 2015-16 (with a pre-existing maximum enrollment of 4,950) (Aa456) to a requested total enrollment of 6,550 by 2020-2021 (Aa491-Aa492);
- Robert Treat Academy Charter School ("Robert Treat"), from 651 students in 2015-16 (with a pre-existing maximum enrollment of 695) (Aa395) to a requested total enrollment of 860 by 2020-2021 (Aa422);³
- TEAM, from 3,252 students in 2015-16 (Aa537) to a requested total enrollment of 9,560 by 2020-2021 (Aa561); and
- University Heights Charter School ("University Heights"), from 650 students in 2015-16 (with a pre-existing maximum enrollment of 750) to a requested total enrollment of 1,500 by 2019-2020 (Aa298).⁴

³ Although not required by the 2015 application, Robert Treat projected that it would continue to increase enrollment to 972 in 2024-2025 (Aa422-Aa423).

⁴ In the Annual Report accompanying its application, University Heights acknowledged a need to improve performance, stating that the school will "pause" future "growth." Aa212. The Report stated the school "prudently recognize[s] the need to strengthen the performance of our existing grades first" and not add more grades to "focus on our existing program." Aa212. University Heights, nonetheless, asked to expand by 850

Five of the applications included charter board resolutions supporting an amendment to increase enrollment. Aa519 (Great Oaks); Aa122 (M.L. Varisco); Aa136 (New Horizons); Aa428 (Robert Treat); Aa574 (TEAM). In two cases - North Star and University Heights - no board resolution is part of the record.

For six of the seven charter schools, the record included a 2013-14 Performance Framework Report ("Performance Report"), setting forth each school's student demographics. Aa111, Aa124, Aa164, Aa439, Aa493, Aa521. This data revealed a significantly lower rate of enrollment of students with disabilities -- labeled "Special Education" -- and ELL students -- labeled "LEP" for limited English proficient -- as compared to NPS schools. For Robert Treat, the demographics could be calculated from the 2014-15 data in the Annual Report submitted with its application. Aa322. Relevant data from these reports is set forth below:

students, and the Commissioner approved 475 more students. Aa298; Aa30.

School	Total Enrollment 2014-15	%Special Ed	%ELL	%FRPL ⁵	%Black	%Hispanic
NPS	32,098	18%	9%	84%	51%	40%
Great Oaks	333	13%	0%	67%	82%	17%
M.L. Varisco	484	6%	6%	83%	13%	81%
New Horizons	480	8%	0%	96%	93%	7%
North Star	3,417	8%	0%	84%	85%	8%
Robert Treat	626	5.1%	.96%	70.9%	32.2%	62.6%
TEAM	2,743	12%	0%	86%	94%	5%
Univ. Heights	545	9%	1%	96%	88%	12%

See Aa111, Aa124, Aa164, Aa439, Aa493, Aa521, Aa322; NJDOE Enrollment Data available at <http://www.state.nj.us/cgi-bin/education/data/enrllplus.pl>.

In addition to the differences in special education and ELL enrollments, this data shows that five of the charter schools enroll a significantly higher percentage of Black/African American students (ranging from 82% to 94%) than the 51% enrolled by NPS, while the other two -- Robert Treat and M.L. Varisco -- enroll significantly more Hispanic/Latino students (62.6-81%) than the 40% enrolled by NPS.

⁵ "FRPL" is the acronym for student poverty as measured by qualification for the federal Free or Reduced Price Lunch under the National School Lunch Program. 7 CFR Part 210. It is also synonymous with the definition of "at-risk pupils" in the School Funding Reform Act ("SFRA") formula, which provides additional funding for the education of children from households with an income "at or below the most recent federal poverty guidelines . . . multiplied by 1.85." N.J.S.A. 18A:7F-45.

The TEAM data revealed that, although its district of residence is Newark, the charter school enrolls 194 students from seven other districts. For 2015-16, TEAM reported enrolling 2,792 students from Newark, of whom 2,608 were Black (93%), 176 Hispanic (6%), and five White (.18%). Aa527. With the exception of one student from Hillside, all of TEAM's 194 out-of-district students are Black:

Sending District	Number of Students	Black/African American	Hispanic/Latino
Irvington	83	83	
East Orange	68	68	
Hillside	17	16	1
Orange	13	13	
Union	8	8	
Roselle	3	3	
West Orange	2	2	

See Aa528-Aa534.

With regard to facilities, M.L. Varisco did not identify the need for new school facilities to accommodate its requested expansion, while New Horizons stated it had commenced the process to build new facilities behind and adjacent to its existing building. Aa141. The other five charter schools stated that multiple new facilities in locations separate from the existing charter schools would be required to accommodate their requested expansions. Other than a short-term co-location described by Great Oaks, Aa510, and some unfilled capacity in North Star's existing facilities, Aa484-Aa486, these

applications did not identify the location of the new school facilities necessary to accommodate their expansions.⁶

The University Heights application requested two new schools to accommodate 850 additional students. Aa298. Great Oaks indicated the expansion would require adding a second middle school building to accommodate approximately 100 additional students per grade level. Aa510.

The Robert Treat application offered two expansion plans. Aa393. In the first, the school sought to add a third class of eighth graders. Aa421. The second plan proposed an additional class of 25 students in each grade, contingent on relocating the school. Aa422. Robert Treat made clear that, to undertake this second plan, it was "seeking property" of approximately 2 acres "on which to construct a new facility" - a project with an estimated cost of \$10 million. Aa424-Aa425.

The North Star application indicated three new schools were needed, beyond the eleven it currently operates. Aa484. TEAM's application indicated that, to accommodate an increase in enrollment from 4,120 to 9,560 students, the school required

⁶ See Aa510 (Great Oaks) (referring to "long term property search"); Aa486 (North Star) ("planning to acquire and develop two privately owned sites"); Aa422 (Robert Treat) ("currently seeking property on which to construct a new facility"); Aa562 (TEAM) (describing multiple strategies used to pursue its real estate goal of acquiring additional facilities); and Aa298 (University Heights) (noting need to expand from two to four schools, with no further discussion of facilities).

nine new facilities beyond the seven it already operates. Aa562. TEAM revised this request several months later to reduce the expansion from 9,560 to 6,816 students, an increase that still required three new schools. Aa561, Aa582-Aa583. TEAM also advised it would request approval for another three new schools at a later date. Aa582.

None of the five charter school applications that identified the need for new school buildings included an amendment to add a satellite campus in their applications.⁷

B. ELC Objections to Requested Expansion

On January 28, 2016, while the charter schools' applications were pending, ELC submitted to the Commissioner objections to the enrollment expansion requests of all seven charter schools ("ELC Objections").⁸ Aa32. The ELC Objections included a November 2015 report prepared by ELC entitled, "Newark Public Schools: Budget Impacts of Underfunding and Rapid

⁷ The Act's regulations allow an existing charter school located in a "former Abbott district" to amend its charter to open "a school facility" that is "in addition to" its existing facility. N.J.A.C. 6A:11-1.2 (definition of "satellite campus"); N.J.A.C. 6A:11-2.6(a) (authorizing charter amendment to open satellite campus).

⁸ ELC submitted its objections in its capacity as counsel to the class of children attending schools in Abbott districts, which includes NPS students. See Abbott v. Burke, 153 N.J. 480, 551 (1998) ("Abbott V") (acknowledging ELC's representation of "at-risk children" in Abbott districts). ELC's action on behalf of those students is critical where, as here, the district of residence is State-operated and the State itself is charged with review of the charter expansion applications.

Charter Growth" ("ELC Report"). Aa36. The ELC Report noted that DOE's approval of a rapid expansion in charter school enrollments over the preceding years, combined with successive years of underfunding the state school funding formula -- the School Funding Reform Act ("SFRA"), N.J.S.A. 18A:7F-43 to 63 -- have had a "significant negative impact on the availability of resources necessary for a thorough and efficient education" in the Newark Public Schools, an impact that would dramatically worsen if the expansion requests were granted. Aa50.

Describing the NPS budget as being "in its fourth year of crisis," the ELC Report noted that the District was "struggling to close a \$13 million budget hole." Aa36. The ELC Report explained that payments of per pupil funding to charter schools from the NPS budget have nearly quadrupled, from \$60 million in 2008-09 to \$225 million in 2015-16, when those payments represented 27% of the NPS operating budget. Aa41. In addition to rapid charter expansion, the ELC Report identified an "over \$132 million shortfall in state aid to NPS in 2015-16" as a cause of the District's budget crisis. Aa36.

The ELC Report also detailed the significant negative impact the charter school expansions would have on the availability of funding and resources needed to provide a thorough and efficient education to students in NPS schools. The ELC Report documented that NPS spending had declined from

2008-09 to 2014-15 by approximately 20%, a \$2,971 per student reduction. Aa36. Spending on classroom instruction was cut 35% or \$1,610 per pupil. Aa36. The ELC Report pointed out that spending to educate ELLs and students with disabilities -- both of whom require additional programs and services under the SFRA -- has been dramatically reduced in prior years, Aa47, and documented significant reductions in staff, including school psychologists, librarians and instructional staff. Aa48-Aa49.

For example, there has been a 9% reduction in staff in NPS schools over the prior three school years, a cut of 390 positions. Aa48. This includes the loss of 196 teachers in English, Math, Social Studies and Science; 40 supplementary instruction positions; 27 health and physical education teachers; 13 school psychologists; 10 art and 9 music teachers. Aa48-Aa49.

In concluding its analysis of funding loss impacts, the ELC Report stated:

It is clear that the financial stress of successive years of underfunding and the rapid expansion of charter school enrollment have had a significant negative impact on the availability of resources necessary for a thorough and efficient education in Newark schools. Overall revenues have been stagnant, even as the NPS budget must support a greater number of students in both district and charter schools. As charter school enrollments have dramatically increased, the district has had to transfer significantly more funding from its budget to these schools. [Aa50].

The ELC Report also detailed the impact of the charter expansion on student demographics in Newark charter and District schools. The Report documented that Newark charter schools serve far fewer at-risk students, including students with disabilities and ELLs. The data showed 17% of NPS students are classified as special education compared to only 9% in Newark's charters, finding that:

The lower rates of economically disadvantaged, Limited English Proficient, and special education classified students in charter schools result in those students being concentrated at higher rates within the host district schools. This increases segregation and impacts the quality of education that districts can provide and the financial resources available to pay for that education. [Aa60].

The ELC Report found that, as a result of the disparity in student enrollments, NPS schools are serving a much higher percentage of students with disabilities and ELLs than the charter schools. Aa39. At the same time, NPS' funding shortfall has led to a decline in District spending for ELL students by 20% and for special education students by almost 30% between 2008-09 and 2014-15. Aa47. The ELC Report noted that the spending reduction for these higher cost populations was "particularly detrimental" because "there was no coincidental loss in enrollment." Id.

The ELC Objections also included a Rutgers University research report ("Rutgers Report") that further analyzed the

impact of charter schools on District demographics. Aa56. The Rutgers Report found that Newark charter schools are less likely to have students with disabilities in more severe special education classifications, such as autism and emotional disturbance.

As to the District's student demographics, the Rutgers Report found:

Newark's district schools enroll a higher percentage of Free Lunch (80% vs. 70%) and Free or Reduced Price Lunch (84% vs. 81%) students than Newark's charter schools. Newark's district schools also serve nine times the percentage of Limited English Proficient students (9% vs. 1%); two and a half times the percentage of Hispanic students (40% vs. 16%) and six percentage points more male students (52% vs. 46%) than Newark's charter schools. Newark's charter schools serve a higher percentage of Black students than the Newark district schools (81% vs. 51%).

Aa67. Based on the findings of the Rutgers Report, the ELC Objections explained that "continued [charter] expansion will exacerbate the already glaring disparities in the demographics of students served in Newark charters compared to NPS-run schools and will further concentrate the most at-risk students in district schools." Aa33.

Further, the ELC Objections addressed the fact that the proposed expansions in the renewal applications are beyond the capacity of the charter schools' existing facilities, and that in several of the applications, multiple new charter schools

would have to be opened in many separate, but unidentified, locations. Aa32-Aa33.

Finally, the ELC Objections reminded the Commissioner of his affirmative constitutional and statutory responsibility to "evaluate carefully" the impact that granting the charter expansions would have on the delivery of a thorough and efficient education to NPS students. Aa34. ELC also requested the Commissioner hold a public hearing before approving the expansions, stating that the data and evidence proffered in the ELC and Rutgers Reports "demonstrates a compelling need for the development of an evidentiary record on these issues." Aa35.

C. District Submissions

The record before the Commissioner also contained data submitted by NPS estimating the added impact on the District's budget if the expansions were approved. Aa584-Aa595. This data showed NPS would undergo a loss of funding from year-to-year of an additional \$76 million dollars through 2018-19 if charter expansions were approved, at which point 38% of the NPS budget would be allocated to presumptive payments to charter schools:

School Year	Total Charter School Enrollment	Total Charter School Funding	Total NPS Budget Remaining	% of Budget Allocated to Charter Schools
2015-16	14,269	\$234,645,629.99	\$572,990,216.01	29%
2016-17	16,024	\$263,424,790.16	\$544,211,055.84	33%
2017-18	17,297	\$284,452,142.03	\$523,183,703.97	35%
2018-19	18,887	\$310,617,853.14	\$497,017,992.86	38%

Aa584-Aa595. In addition, NPS submitted recommendations on each expansion request, and recommended that the Commissioner deny the requests of New Horizons, TEAM and University Heights, and limit the expansion requests of North Star, Robert Treat and Great Oaks. Aa596-Aa598.

D. Commissioner's Expansion Approvals

On February 18 and February 29, 2016, the Commissioner issued final decisions approving the applications for expansion by all seven charter schools. In the decisions, the Commissioner used the same conclusory language:

"the [Department] has completed a comprehensive review [of the school] including the evaluation of the school's renewal application, annual reports, student performance on state assessments, site visit results, public comments, and other information in order to make a renewal decision."

See, e.g., Aa24. The decisions included a chart reflecting the approved enrollment expansion as follows:

- Great Oaks: an expansion of 477 students over 4 years for a total enrollment of 939, an increase of 103.2%. Aa18.

- M.L. Varisco: an expansion of 25 students over two years for a total enrollment of 540, a 4.85% increase. Aa20.
- New Horizons: an expansion of 168 students over two years for a total enrollment of 672, a 33.3% increase. Aa22.
- North Star: an expansion of 2,552 students over five years for a total enrollment of 6,550, an increase of 63.8%. Aa24.
- TEAM: an expansion of over 4,668 students over five years for a total enrollment of 7,920, a 143.5% increase. Aa28.
- Robert Treat: an expansion of 209 students over five years for a total enrollment of 860, a 32.1% increase. Aa26.
- University Heights: an expansion of 400 students over four years for a total enrollment of 1,050, an increase of 61.5%. Aa30.

The seven charter school expansions approved by the Commissioner represent a cumulative increase of 8,499 students.

The Commissioner's decisions did not discuss, or even mention, the impact of the expansions on the loss of NPS funding or on student segregation in the District. The decisions are also silent on the multiple new facilities required to accommodate the extensive growth in charter enrollment, nor do they address the location of, and financing necessary to construct, these new charter school facilities.

ARGUMENT

STANDARD OF REVIEW

An appellate court may reverse an administrative agency decision if it is arbitrary, capricious, or unreasonable. In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385 (2013) ("Quest Charter"). An agency action is arbitrary, capricious or unreasonable if it "(1) violates express or implied legislative policies" or constitutional mandates; (2) is unsupported by substantial evidence in the record; or (3) "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." Id. (citing Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)). The agency decision on review must also "be supported by the underlying record" by "substantial evidence" which requires "a sifting of the record, and the ability to find support for the conclusions reached by the Commissioner under the statutory framework within which she must act." Quest Charter, 216 N.J. at 387.

Although appellate review of agency decisions on charter school applications is "deferential," it "does not lack content." Id. at 385 and 389 (holding that "there is no right," only "the opportunity to apply," to operate a charter school, and applicants bear the burden "for obtaining permission").

Reviewing courts are obligated to undertake a "careful and principled consideration of the agency record and findings." In re Petition for Authorization to Conduct a Referendum on the Withdrawal of N. Haledon Sch. Dist. From the Passaic County Manchester Regional High Sch. Dist., 181 N.J. 161, 176 (2004) ("North Haledon"). A court may intervene when "it is clear that the agency action is inconsistent with its mandate." Quest Charter, 216 N.J. at 385; Constantino v. N.J. Merit Sys. Bd., 313 N.J. Super. 212, 218 (App. Div. 1998) (reversing board's decision where findings were unsupported by record, based on "total disregard" of facts, against "overwhelming weight" of testimony, and based on record "skew[ed]" by administrative law judge), certif. den., 157 N.J. 544 (1998). Indeed, in charter school cases, recognizing that constitutional issues and public education are at stake, the Supreme Court has directed that "the State's efforts to implement" the Act "require careful scrutiny." In the Matter of the Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch., 164 N.J. 316, 323 (2000) ("Palisades Charter").

Under this standard of appellate review, the Commissioner's decisions to approve the applications for expansion by the seven Newark charter schools were arbitrary, capricious and unreasonable and, therefore, must be reversed.

POINT I

**THE COMMISSIONER VIOLATED HIS AFFIRMATIVE OBLIGATION
TO EVALUATE THE IMPACT OF THE CHARTER SCHOOL
APPLICATIONS FOR EXPANSION ON A THOROUGH AND EFFICIENT
EDUCATION IN THE NEWARK DISTRICT**

(NOT ADDRESSED BY DECISIONS BELOW)⁹

The Commissioner's decisions approved a cumulative enrollment expansion of 8,499 students, as requested by the seven Newark charter schools in their renewal applications. In granting this massive enrollment increase, the Commissioner ignored the specific evidence in the record demonstrating the impacts the expansion would have on funding and segregation in the District. As explained below, the Commissioner violated his affirmative constitutional and statutory obligation to evaluate and address the impact of the charter expansions on the provision of a thorough and efficient education to NPS students.

**A. The Commissioner Failed to Evaluate the Loss of
District Funding from the Proposed Charter Expansions**

It is firmly established that, in determining applications by charter schools to expand enrollment, the Commissioner has an affirmative obligation to carefully evaluate the impact that diverting funding to charter schools will have on the district of residence. This obligation is grounded in both the constitutional mandate for a thorough and efficient education,

⁹ Because the Commissioner's decisions did not address any of the issues raised by ELC before the agency, ELC specifies "not addressed by decisions below." R. 2:6-2.

N.J. Const. art. VIII, §4, ¶1, and the Act's presumptive funding mechanism. N.J.S.A. 18A:36A-12 (requiring a district of residence to "pay directly to the charter school" the presumptive amount of 90% of the "sum" of state equalization aid, local levy and applicable categorical aid per pupil under the SFRA funding formula "for each student enrolled in the charter school").

Beginning with Palisades Charter, the Supreme Court has made clear that, where there is a demonstration "with some specificity" in the record "that the constitutional requirements of a thorough and efficient education would be jeopardized by loss of the presumptive [funding] amount" to charter schools, "then 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." 164 N.J. at 334-35. In finding that the Commissioner "is well positioned to analyze such contentions" and must do so "when they arise," the Supreme Court held that:

the Commissioner must consider the economic impact that approval of a charter school will have on a district of residence when during the approval process a district makes a preliminary showing that satisfaction of the thorough-and-efficient education requirements would be jeopardized.

Id. at 335-36. The Court made clear that specific evidence of a charter school's threat to a constitutional education must be

supported with "reliable information" to "demonstrate that a constitutional violation may occur," not "unsubstantiated, generalized protests." Id. at 336; see also Quest Charter, 216 N.J. at 388-89; IMO Grant of Renewal Application of the Red Bank Charter School, 367 N.J. Super. 462, 482-83 (App. Div.), certif. den., 180 N.J. 457 (2004) ("Red Bank Charter") (requiring specific demonstration of how funding loss would "impair T&E efforts" in district of residence); Educ. Law Ctr., on behalf of Abbott v. Burke Plaintiff Schoolchildren v. N.J. State Bd. of Educ., 438 N.J. Super. 108, 123 (App. Div. 2014) ("ELC v. SBOE") (reaffirming Commissioner's obligation to evaluate funding impacts of charter applications).

Further, the Commissioner's obligation to evaluate funding loss in reviewing a charter application is heightened where students in the district of residence "have been designated victims of constitutional deprivation and who have secured judicial orders" in the Abbott v. Burke litigation "granting them specific, definite and certain" funding relief. Abbott v. Burke, 206 N.J. 332, 363 (2011) ("Abbott XXI"). That funding relief is now embodied in the Supreme Court's directives for the continuing implementation of the SFRA funding formula in Abbott v. Burke, 199 N.J. 140 (2009) ("Abbott XX"). In Abbott XX, the Court upheld the constitutionality of the SFRA, holding that the formula was "painstakingly" developed and, as enacted,

provides the funding necessary to "achieve a thorough and efficient education" as "measured against delivery" of the state's academic standards. Id. at 163, 171-72. Thus, while the Court in Palisades Charter left the "question" of the standard to be applied to evaluate funding loss on a charter application in an Abbott district "for another day," 164 N.J. at 334, that day has arrived on this appeal. See Abbott v. Burke, 196 N.J. 544, 565-66 (2008) ("Abbott XIX") (holding the State bears the burden of proof in matters implicating compliance with the Court's remedial funding orders in Abbott districts). See also Abbott v. Burke, 149 N.J. 145, 196 (1997) ("Abbott IV") (requiring State to "convincingly demonstrate" that thorough and efficient education can be achieved in any alteration of remedial funding in Abbott districts).

The record before the Commissioner on the applications for charter expansions contained detailed facts, data, research and other evidence on the significant and continuing impact the loss of funding would have on the NPS budget if the applications were approved. First, in 2014-15, the NPS budget was in a fourth straight year of crisis as the District struggled to close a \$13 million deficit. Aa36. The crisis resulted in part from the State's decision to chronically underfund the district since 2011 under the SFRA formula, with the NPS state aid shortfall reaching over \$132 million in 2015-16. Id. See also Abbott XXI,

206 N.J. at 359 (describing the State's "conscious and calculated decision to underfund the SFRA" in Fiscal Year 2011 State Budget); Quest Charter, 164 N.J. at 378 (citing record evidence of "negative financial impact" of proposed Montclair charter "in light of recent reductions in state aid").

Second, the NPS budget crisis is also caused by the State's approval of a dramatic increase in enrollment in Newark charter schools from 2008-09 to 2014-15, a period in which charter enrollment tripled, from 4,559 to 12,885 students. Aa38. This rapid enrollment growth, in turn, triggered a dramatic increase in the loss of funding from the NPS budget over the same period. Presumptive payments as required by the Act from the NPS budget to Newark charter schools increased year-to-year from \$60 million in 2008-09 to \$225 million in 2015-16, accounting for 27% of the total NPS budget. Aa41.

Third, the combination of SFRA formula underfunding and the substantial year-to-year increase in funding payments to charter schools has resulted in severe reductions in essential staff, regular classroom instruction, guidance, support, special education, and bilingual education programs in NPS schools. Overall, the District reduced expenditures in NPS schools from 2008-09 to 2014-15 by 20% or almost \$3,000 per pupil. Aa36. These reductions impacted both regular classroom instruction - a 35% or \$1,610 per pupil cut - and support staff such as

librarians, social workers and guidance counselors - a 20% cut. Aa36-Aa37. From the 2012-13 to 2014-15 school years, NPS reduced staff by 390 or 9%, including 196 fewer teachers in core subjects and fewer teachers in the arts, health and world languages.¹⁰ Aa48.

Fourth, while enrollment in NPS schools declined by approximately 4,000 students from 2009-10 to 2014-15 -- or from 40,533 to 36,802 -- the concentration of students with higher resource needs in NPS schools increased: from 14% to 17% students with disabilities requiring special education services and from 9% to 11% ELLs requiring bilingual education programs. Aa39. Yet, spending on special education declined by 28% from 2008-09 to 2014-15, or by \$4,425 per pupil, while bilingual education spending dropped by 20% or \$1,444 per pupil. Aa47.

Finally, the Commissioner's approval of a cumulative expansion of charter enrollments by 8,499 students will result in a continuation of the year-to-year increases in presumptive funding payments to charter schools from NPS' already depleted budget. NPS estimates the expansion will increase charter payments by \$310 million from 2015-16 to 2018-19, raising the

¹⁰ In 2014-15, NPS overall spending level was \$178.4 million, or \$3,941 per pupil, below its "adequacy budget" as determined by the SFRA formula. See <http://www.edlawcenter.org/research/school-funding-data.html>; Abbott XX, 199 N.J. at 153 (describing districts' adequacy budgets as "[a]t the core of the formula" and detailing education cost components in those budgets).

outflow of funding to charters to 38% of the total NPS budget. Aa584-Aa595. As NPS continues to lose funding from presumptive payments to expanding charters, the pattern of steep reductions in essential staff, programs and services will also continue from year-to-year, undermining NPS' ability to provide a thorough and efficient education in District schools required to serve significant numbers of higher cost at-risk, special education, and ELL students. As ELC explained to the Commissioner:

We are gravely concerned that any further expansion of charter enrollments will worsen NPS's financial crisis and severely impede NPS from providing students with the teachers and other resources needed to ensure a constitutionally required thorough and efficient education. [Aa33].

These facts, data and other evidence on the charter expansions in the record before the Commissioner demonstrated not just "with some specificity," but with detailed documentation and painstaking research that a thorough and efficient education "would be jeopardized" by the loss of funding if the expansions were approved. Palisades Charter, 164 N.J. at 334. This evidence, proffered by ELC, NPS and in the charters' own applications, was "reliable," supported and uncontroverted, and in no way can be considered "unsubstantiated, generalized protests." Id. at 336; see also Quest Charter, 164 N.J. at 378 (describing the "specific

deficiencies" of the charter application before the Commissioner). Thus, the record before the Commissioner, without question, demonstrated a real, significant and ongoing threat to the delivery of a thorough and efficient education from the proposed charter expansions. The Commissioner failed to evaluate and address that specific evidence, in clear violation of his affirmative obligation to ensure a thorough and efficient education to students in NPS schools.

B. The Commissioner Failed to Evaluate the Segregative Effects of the Proposed Charter Expansions

In addition to funding loss, the Commissioner's affirmative obligation in determining applications for charter expansion includes evaluating the impact on segregation in the district of residence. As the Supreme Court ruled in Palisades Charter:

We simply hold that the Commissioner's obligation to prevent segregation in the public schools must inform his review of an application to approve a charter school, and if segregation would occur the Commissioner must use the full panoply of his powers to avoid that result.

164 N.J. at 329; see also Quest Charter, 216 N.J. at 377; Red Bank Charter, 367 N.J. Super. at 468; ELC v. SBOE, 438 N.J. Super. at 123.

The obligation to evaluate the segregative effects of charter schools is rooted in the constitutional guarantee of a thorough and efficient education. It is also grounded in the constitutional prohibition against discrimination in the public

schools. N.J. Const. art. I, ¶5. As the Supreme Court explained in Palisades Charter:

Certain principles permeate our school laws . . . one is that the State's obligation to provide a thorough and efficient system of education in our public schools is inviolate. So, too, must the State ensure that no student is discriminated against or subjected to segregation in our public schools. Because of the abiding importance of those two principles and the potential impact of the charter school movement on public education, the Act, and the State's efforts to implement it, require careful scrutiny.

164 N.J. at 323. The Court described our state's "abhorrence of discrimination and segregation in the public schools" as "not tempered by the cause of segregation" or whether "due to an official action, or simply segregation in fact." Id. at 324 (citing Booker v. Bd. of Educ. of Plainfield, 45 N.J. 161 (1965) and Jenkins v. Morris Sch. Dist., 58 N.J. 483 (1971)). Moreover, the Court made clear that the State policy "to ensure that public school pupils are not subjected to segregation" extends to "any type of school within the rubric of the public school designation." Id. at 328 (emphasis added).

This public policy of "abhorrence" of discrimination and segregation in the public schools is incorporated into the Act's provisions. Palisades Charter, 164 N.J. at 325. With regard to charter school enrollment policy, N.J.S.A. 18A:36A-8(e) mandates the schools "seek the enrollment of a cross section of the community's school age population including racial and academic

factors." Further, the Act forbids charter schools from discriminating on any illegal basis including "intellectual or athletic ability, measures of achievement or aptitude, status as a handicapped person, proficiency in the English language, or any other basis that would be illegal if used by a school district" in the admission process. N.J.S.A. 18A:36A-7 (emphasis added). The Act also requires charter schools to comply with applicable "State and federal anti-discrimination statutes." N.J.S.A. 18A:36A-11(c); see also N.J.S.A. 18A:36A-16(a) (Commissioner's annual assessment of charter school performance includes compliance with civil rights mandates).

The Act's regulations also strongly advance the policy of preventing segregation in the implementation of the charter school program. The Commissioner is required both "prior" to granting a charter and "on an annual basis," to "assess the student composition of a charter school and the segregative effect that the loss of the students may have on its district of residence." N.J.A.C. 6A:11-2.1(j) and 2.2(c) (emphasis added). The rules also require charter schools to comply with all federal and state anti-discrimination laws, including the New Jersey Law Against Discrimination, federal civil rights statutes, and federal laws protecting students with disabilities. N.J.A.C. 6A:11-4.12. And, like district public schools, charter schools must comply with New Jersey's equity in

education requirements "to ensure all students, regardless of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, gender identity or expression, religion, disability, or socioeconomic status, are provided equal access to educational programs and services." N.J.A.C. 6A:7-1.1, -1.2.

The record before the Commissioner on the charter school applications for expansion contained specific evidence that the expansions would perpetuate and exacerbate two clear and discernible patterns of segregation in the District: 1) by disability and English language proficiency; and 2) by race.

1. Segregation by Disability and English Language Proficiency

The data and information in the record before the Commissioner clearly demonstrated a wide disparity in the enrollment of students with disabilities in the charter schools versus NPS schools. The percentage of students with disabilities in the seven charter schools according to their 2013-14 Performance Reports ranged from 13% in Great Oaks to 5.1% in Robert Treat. In sharp contrast, those same reports reflected that 18% of NPS' total enrollment was students with disabilities. Further, students with disabilities in NPS schools are more likely to be in more severe classifications for special education services, such as autism and emotional

disturbance, while those in charter schools are in milder classifications, such as speech impaired.

Further, as discussed supra at pages 25-27, the stark disparity in the enrollment of students with disabilities in charter schools has profound consequences for the NPS schools. These schools must not only educate a disproportionate number of students with disabilities, but also those with more severe disabling conditions. This, in turn, impacts the NPS budget because greater numbers of students in NPS schools require more intense and costly special education services. See Abbott XX, 199 N.J. at 152 (describing SFRA formula's "base cost" of educating children "without any particular special needs" and the increases in that cost for ELL and special education students requiring additional programs and services).

With respect to ELL students, the enrollment disparities are even more dramatic. According to their 2013-14 Performance Reports, the seven charter schools enrolled almost no ELLs. North Star, with an enrollment of 3,417 students in 2014-15, and Team, with an enrollment of 2,743 students, served no ELLs. Neither did Great Oaks or New Horizons. In two others, Robert Treat and University Heights, the ELL enrollment was 1%. By contrast, 9% of all students in NPS schools are ELLs. This glaring disparity means almost all ELL students in need of bilingual education programs and English as a Second Language

(ESL) classes in Newark are attending NPS schools, imposing a substantial burden on the NPS budget.¹¹

The undisputed empirical evidence before the Commissioner demonstrated that the enrollment practices of the charter schools seeking expansion had significant segregative effects based on disability and ELL classification within the District. There was simply no support or rationale in the record to conclude that enrollment expansions in these same charters would cure or ameliorate that segregation. In fact, the conclusion compelled by this evidence is that expansion will exacerbate the segregation of these at-risk and higher cost students in ever growing numbers in NPS schools.

The Commissioner failed to assess the segregative effects of the expansion applications on students with disabilities and ELLs and, even worse, ignored specific and detailed evidence that approving the expansions would increase the segregation of these students. The Commissioner's failures contravene his affirmative obligation to "monitor and remedy any segregative effect that a charter school has on the public school district

¹¹ The higher cost of educating students with disabilities and ELLs may well be the reason the charter schools enroll far fewer students with disabilities and almost no ELLs. N.J.A.C. 6A:11-4.7 (mandating charter schools to provide "all required courses and support services" for bilingual education for enrolled ELL students); N.J.A.C. 6A:11-4.8 (mandating charter schools provide a "free, appropriate public education" under federal and state special education laws for enrolled students with disabilities).

in which the charter school operates." Red Bank Charter, 367 N.J. Super. at 471 (emphasis added).

2. Segregation by Race

The Commissioner's affirmative obligation to evaluate the segregative effects of charter school applications rests upon New Jersey's bedrock public policy and jurisprudence "against the continuation of segregation" by race in the public schools. Palisades Charter, 164 N.J. at 324 (emphasis added). The evidence on the charter schools' expansion applications demonstrated, in stark and undisputed terms, that the expansions would perpetuate and deepen the intense racial segregation in charter schools, NPS schools, and the District overall.

First, the data in the record before the Commissioner demonstrates that the charter schools seeking expansion have enrollment patterns that, in comparison, reflect even greater racial segregation than that which exists in NPS. In 2014-15, the enrollment in NPS schools was 51% Black and 40% Hispanic. The cumulative enrollments of these charters demonstrate even more intense segregation of Black students. The percentage of Black students ranged from 82% to 94% Black in Great Oaks, New Horizons, North Star, TEAM and University Heights. The percentage of Hispanic students was 62% in Robert Treat and 81% in M.L. Varisco. It is glaringly evident that the enrollment and admission practices of these charter schools has neither

prevented nor ameliorated, but rather replicated and worsened, the intense pattern of racial segregation endured by NPS students.

Second, the charter schools' enrollments show that the schools themselves are intensely segregated by racial characteristics. The enrollments in two charter schools - Robert Treat and M.L. Varisco - are overwhelming Hispanic, at 62.6% and 81% respectively. The enrollments in the remaining five schools are overwhelmingly Black, from 82% in Great Oaks to 94% in TEAM.¹²

The empirical evidence before the Commissioner demonstrated that the enrollment practices of the charter schools have sustained the entrenched pattern of de facto racial segregation in the District deemed "abhorrent" by our courts. The Commissioner simply ignored this evidence and, consequently, failed to assess whether approving the charter school expansions would continue this pattern of intense racial segregation. By

¹² The record on TEAM's application showed that the school enrolls 194 students from seven districts outside of Newark, TEAM's district of residence. The data also reveals that TEAM's out-of-district enrollment practices are not increasing racial diversity but perpetuating segregation, as all but one of these students is Black. This data is so striking that the Commissioner should have, at the very least, investigated whether TEAM is "recruit[ing] systematically only pupils of a particular race," a basis for revocation of TEAM's charter. See Palisades Charter, 164 N.J. at 328 (holding that Commissioner "is obliged to stop" discriminatory enrollment "activity" by a charter school).

not performing the required evaluation of segregative effects, the Commissioner also failed to use "the full panoply of his powers" to prevent segregation in the public schools. Palisades Charter, 164 N.J. at 329 (emphasis added). This includes the tools available within the confines of the Act to utilize the charter school program as a mechanism to ameliorate the intense racial isolation of District students.

For example, the Commissioner can encourage the establishment of new charter schools serving a "region of residence," rather than a single district, with the mission of enrolling a racially diverse student body. N.J.A.C. 6A:11-1.2 (defining region of residence to include "contiguous school districts"); N.J.A.C. 6A:11-2.1(1) (authorizing charter school to locate its facility "in one of the districts of its region of residence"). The Commissioner can also encourage existing charter schools to add districts of residence to their enrollment pools to increase racial diversity. N.J.A.C. 6A:11-2.6(a)1(iii) (authorizing charter amendments to add district or region of residence); see also Red Bank Charter, 367 N.J. Super. at 482 (directing Commissioner to determine "remedial action" where record demonstrated a charter school's operation resulted in a growing racial imbalance within the Red Bank district). Beyond the Act's provisions, the Commissioner is obligated to take every necessary action to prevent the charter school

program from sustaining and exacerbating racial segregation in public schools that "are among the most segregated in the nation," id. at 480, especially given the Supreme Court's exhortation that the Commissioner "exercise broadly his statutory powers when confronting segregation, whatever the cause." Palisades Charter, 164 N.J. at 324-25 (citing Jenkins, 58 N.J. at 506-07).

It is abundantly clear that the State must "ensure that no student is discriminated against or subjected to segregation in our public schools" and that "segregation, however caused, must be addressed." Palisades Charter, 164 N.J. at 323, 330 (emphasis added); see also Red Bank Charter, 367 N.J. Super. at 472 (holding that "there is no question" the Commissioner "must ensure that the operation of a charter school does not result in district segregation") (emphasis added). That the District lacks racial balance and is de facto racially isolated does not - and simply cannot - absolve the Commissioner of his affirmative obligation to assess the segregative effects of the charter expansions. The failure to undertake that assessment is even more egregious where, as here, the record also demonstrated that the enrollment practices of the charter schools have spawned new forms of discrimination: among students with disabilities and ELLs between charter and NPS schools in a district already experiencing extreme racial isolation. Indeed,

the Commissioner's obligation not only to assess, but to address, these segregative effects -- plainly evident in the record on this appeal -- is essential to achieving the profound and overarching goal of "the promotion of racial balance" and racial diversity in our public schools. Palisades Charter, 164 N.J. at 328. See also, North Haledon, 181 N.J. at 179 (noting that we must do more than pay "lip service to the idea of diversity in our schools").

C. There is No Support in the Record for the Commissioner's Decisions to Approve the Charter Expansions

The Commissioner's decisions approving the charter expansions are, on their face, wholly devoid of any reasons for approving a massive increase in charter school enrollments in the District. Nor do the decisions address, let alone mention, the substantial evidence submitted by ELC and NPS, and in the applications themselves, demonstrating the severe, long-term impact the expansions will have on the provision of a thorough and efficient education to NPS students. On this basis alone, the decisions are arbitrary, capricious and unreasonable and must be reversed. Cf. Quest Charter, 216 N.J. at 379, 389-90 (noting that Commissioner's original letter denying application was "brief and rather form-like," but finding that later written amplification of the decision "demonstrate[d] a thoughtful and

thorough weighing and judgment of the [application's] merits" and was "sustainable on the record").

Even worse, a "sifting of the record" before the Commissioner, Quest Charter, 216 N.J. at 387, reveals not a scintilla of evidence nor any reasons "discernible from the record" that might support granting the charter school expansions. Red Bank Charter, 367 N.J. Super. at 476 (citing E. Windsor Reg'l Bd. of Educ. v. State Bd. of Educ., 172 N.J. Super. 547, 552-53 (App. Div. 1980)). In fact, the record contained overwhelming evidence demonstrating the exact opposite: that approving the applications will jeopardize the delivery of a thorough and efficient education to NPS students by accelerating the loss of funding in the NPS budget, and triggering a continuation of the deep reductions in teachers, support staff, and other essential resources experienced by NPS schools in recent years. Further, the record demonstrated that the expansions will perpetuate and intensify the District's existing patterns of segregation by disability, English language proficiency, and race. In the face of this overwhelming record, and despite the enhanced Abbott status of NPS students, Abbott XIX, 196 N.J. at 565-66, the Commissioner stood mute, not even acknowledging, much less analyzing, the real and substantial threat to a thorough and efficient education presented by the expansion applications. Cf. Quest Charter, 164 N.J. at 389-90

(underscoring that the burden of "obtaining permission" to operate a charter school "is on the applicant" and upholding rejection of application where Commissioner engaged in a "thoughtful and thorough weighing and judgment of the merits").

The Commissioner's utter failure to evaluate and assess the solid evidentiary record of the threat to the provision of a thorough and efficient education posed by the charter school expansions is "perforce . . . arbitrary decision making" and must be reversed. Quest Charter, 216 N.J. at 386. That arbitrary decision-making is compounded where the failure to conduct the required evaluation and assessment of the impacts on the District's delivery of a thorough and efficient education violates not only the Act's express legislative policies, but also fundamental, affirmative and well-settled constitutional obligations. Palisades Charter, 164 N.J. at 329-30.

In sum, the Commissioner's decisions in approving the expansions are arbitrary, capricious and unreasonable and, therefore, must be reversed. Quest Charter, 216 N.J. at 385.¹³

¹³ The Commissioner also acted arbitrarily when he ignored ELC's request to conduct a public hearing on the applications to allow for "testimony on the impact that the requested increases would have on [student] segregation and the NPS's budget." Aa35. Such a hearing is compelled where the record demonstrated with specificity that the constitutional requirements for a thorough and efficient education "would be jeopardized," Palisades Charter, 164 N.J. at 334, a substantial showing that "clearly warrant[s] exploration in a more formalized" public hearing. Red Bank Charter, 367 N.J. Super. at 485.

POINT II

THE COMMISSIONER VIOLATED THE ACT BY APPROVING CHARTER EXPANSIONS REQUIRING MULTIPLE SCHOOLS UNDER ONE CHARTER

(NOT ADDRESSED BY DECISIONS BELOW)

In approving substantial increases in enrollment by the charter schools at issue in this appeal, the Commissioner also erroneously authorized the creation of numerous new charter facilities in unidentified locations in Newark. Because the approvals of these new schools violated the Act and implementing regulations, they must be reversed.

Fundamentally, there is no direct support in the charter school law for allowing existing charters to operate multiple schools in different locations. The Act itself identifies "the school" as "the unit for educational improvement," N.J.S.A. 18A:36A-2, and links the granting of a charter to a specific school facility. N.J.S.A. 18A:36A-5(j). In defining a charter school as "a public school operating under a charter," N.J.S.A. 18A:36A-3(a) (emphasis added), the Act requires that every charter application include a "description of, and address for, the physical facility in which the charter school will be located." N.J.S.A. 18A:36A-5(j).

Under the Act's implementing regulations, a charter school can apply for an amendment to its charter to seek an expansion of enrollment, the addition of grade levels, or a change or

addition of a district or region of residence. N.J.A.C. 6A:11-2.6(a) (initially enacted Aug. 4, 1997, 29 N.J.R. 3492(a)). More recently, this regulation was revised to add "opening a new satellite campus" as another basis for requesting an amendment. N.J.A.C. 6A:11-2.6(a) (amended Jan. 7, 2013, 45 N.J.R. 26(a)). A satellite campus is defined as "a school facility" that "is in addition to the facility identified in the charter school application or charter, if subsequently amended." N.J.A.C. 6A:11-1.2.

This Court upheld the facial validity of the regulatory change allowing for a satellite campus. ELC v. SBOE, 438 N.J. Super. at 120 (holding that "the addition of a new building for purposes of expanding a successful charter school is consistent with these legislative purposes of the Act") (emphasis added). In so doing, this Court made clear that the Commissioner "will require an adequate evaluation of a proposed satellite campus site and reject any charter amendment that fails to meet appropriate standards for a school building." Id. at 122 (emphasis added). The Court also made clear that, since it confronted only a facial challenge to the regulation, there was "no basis on this record to speculate that the Commissioner will not apply statutory and constitutional requirements when reviewing a proposed amendment to add a satellite campus to an existing charter school." Id. at 123.

Here, five of the seven expansion applications indicated that new charter school facilities -- and not just an addition to their existing building -- would be necessary to accommodate the requested increase in enrollments. The applications of University Heights, Great Oaks, Robert Treat, North Star, and TEAM (as revised) identified the need for a combined total of ten new charter schools to accommodate the proposed expansions. See Statement of Facts, supra, at pages 9-11.

The record in this case demonstrates the Commissioner's failure to conduct any evaluation, let alone an "adequate evaluation," of the applications for expansion, insofar as they sought not only increased enrollment, but approval for ten new charter schools to accommodate that expansion. ELC v. SBOE, 438 N.J. Super. at 122. More troubling, there is no evidence in the record that any of the schools seeking approval of additional, separate facilities to facilitate their proposed enrollment expansions obtained board approval or filed with the Commissioner an application to open a satellite campus under the regulation. Moreover, not one of those applications provided a description or address for any new facilities, with most noting instead their intent to undertake a new schools' property search at some future date. See Statement of Facts, supra, at n.6. ¹⁴

¹⁴ The applications of TEAM and North Star reveal that they are presently operating not just one, but seven and eleven

In granting the expanded enrollment requests of the five schools, the Commissioner's decisions made no reference to the facilities needed to accommodate such expansion. Aa18-Aa31. The record on the applications also contains no support or legal justification to show the Commissioner evaluated the adequacy of the new physical facilities needed to house the increase in charter school students. Nor could the Commissioner do so, given that the applications contained no information on these facilities, not even where they will be located within the District.

In sum, the Commissioner's blanket approval of the expansions, which, a fortiori, authorized the charter schools to open numerous, unidentified new facilities at undisclosed locations at some future date, clearly violates the Act and the regulations governing amendments allowing for a satellite campus to an existing charter school -- the only legal mechanism available for a charter to expand enrollments in a new facility. Consequently, the Commissioner's decisions granting the expansions are arbitrary, capricious and unreasonable, and must be reversed.

schools, respectively, each under one charter approved by the Commissioner. (Team) Aa562; (North Star) Aa484. The record contains no information as to the basis for the Commissioner's prior authorization for TEAM and North Star to operate multiple separate charter schools under a single approved charter.

CONCLUSION

In Quest Charter, the Supreme Court relied upon representations by the Attorney General that the Commissioner would be "exceedingly careful in the approval of charter schools" because of "the impact that a wrong decision will have on students who attend a charter school" that "fails to provide an educational program that satisfies the constitutional standard of a thorough and efficient education." 216 N.J. at 388. Surely, this commitment applies with equal, if not more, force to students attending NPS schools who must endure the impact on their fundamental right to a constitutional education if the Commissioner makes a "wrong decision" on a charter school application.

The effects of a "wrong decision" are especially egregious when the affected students are part of a class who have been deprived of a thorough and efficient education for generations, see, e.g., Abbott XXI, 206 N.J. at 360; who are the intended beneficiaries of the Abbott remedial orders, id. at 363; and who now rely on the continuing implementation of school funding reform legislation, N.J.S.A. 18A:7F-43 to 63, upheld as providing constitutionally adequate funding in their districts. See Abbott XX, 199 N.J. at 172 (Court's "finding of constitutionality is based, in no small part, on the expectation

that the Legislature and Executive will not permit that deplorable state of affairs to recur in our school districts”).

The Commissioner’s abject failure to fulfill his affirmative obligation to evaluate and assess the impact of the proposed charter school expansions on a thorough and efficient education for NPS students will result in a bitter historical irony and renewed constitutional deprivation. The historic effort in the landmark Robinson v. Cahill and Abbott v. Burke litigation to ensure adequate funding for NPS students will be further eroded by the Commissioner’s decision to approve the expansions, as the record leaves no doubt that the expansions will continue to siphon-off crucial funds from the NPS budget, with no regard for the depleted resources left behind in NPS schools. The record also leaves no doubt that the expansions will perpetuate and exacerbate insidious patterns of student segregation in NPS on the basis of disability, English language proficiency, and race.

The Commissioner, unquestionably, made the “wrong decision” in approving the charter school expansions. Quest Charter, 216 N.J. at 388. It is a wrong with profound implications for vulnerable NPS students, given the fundamental rights at stake. This Court must correct that wrong.

ELC respectfully requests that the Court reverse the expansion decisions and direct the Commissioner to deny all seven expansion applications.

Respectfully submitted,
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February 14, 2017

By:



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