

In RE RENEWAL APPLICATION OF TEAM ACADEMY CHARTER SCHOOL	:	SUPREME COURT OF NEW JERSEY
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	:	DOCKET NO. 083014
IN RE RENEWAL APPLICATION OF ROBERT TREAT ACADEMY CHARTER SCHOOL	:	
	:	Civil Action
	:	
	:	On Appeal from:
IN RE RENEWAL APPLICATION OF NORTH STAR ACADEMY CHARTER SCHOOL OF NEWARK	:	Final Decision of the Appellate Division, Docket No.
	:	
	:	A-3416-15T1
	:	A-4384-15T1
	:	A-4385-15T1
IN RE AMENDMENT REQUEST TO INCREASE ENROLLMENT OF MARIA L. VARISCO-ROGERS CHARTER SCHOOL	:	A-4386-15T1
	:	A-4387-15T1
	:	A-4388-15T1
	:	A-4398-15T1

*(caption continued on inside cover)*

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**BRIEF ON BEHALF OF RESPONDENTS GREAT OAKS LEGACY CHARTER SCHOOL,  
NEW HORIZONS COMMUNITY CHARTER SCHOOL, NORTH STAR ACADEMY  
CHARTER SCHOOL OF NEWARK, ROBERT TREAT ACADEMY CHARTER SCHOOL,  
TEAM ACADEMY CHARTER SCHOOL, AND UNIVERSITY HEIGHTS CHARTER  
SCHOOL IN RESPONSE TO BRIEFS FILED BY AMICI PARTIES PATERSON  
BOARD OF EDUCATION, IRVINGTON BOARD OF EDUCATION, AMERICAN CIVIL  
LIBERTIES UNION OF NEW JERSEY, AMERICAN FEDERATION OF TEACHERS,  
AFL-CIO, AFT NEW JERSEY, NEWARK TEACHERS' UNION AND LAWYERS  
COMMITTEE FOR CIVIL RIGHTS**

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School of Newark, Robert Treat Academy Charter School, TEAM  
Academy Charter School and University Heights Charter School

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IN RE AMENDMENT REQUEST TO :  
INCREASE ENROLLMENT OF :  
UNIVERSITY HEIGHTTS CHARTER :  
SCHOOL :

IN RE AMENDMENT REQUEST TO :  
INCREASE ENROLLMENT OF GREAT :  
OAKS LEGACY CHARTER SCHOOL :

IN RE AMENDMENT REQUEST TO :  
INCREASE ENROLLMENT OF NEW :  
HORIZONS COMMUNITY CHARTER :  
SCHOOL :

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## PRELIMINARY STATEMENT

The Amici Parties'<sup>1</sup> arguments should be given no weight by the court. They rely on an anti-charter school legislative policy narrative, which the State Legislature rejected in passing the Charter School Program Act, N.J.S.A. 18A:36A-11 ("Act") in 1995. The Act was upheld by this Court as one of a multitude of public school offerings by the State to meet its obligations to confer on students a thorough and efficient education.

Appellant Education Law Center ("ELC") and the Amici Parties rely on misleading aggregate data to portray the presence of segregation which is statistically erroneous and devoid of consideration of parental preferences for neighborhood schools to serve their children. The percentage of disabled students in Newark has remained flat even during charter school enrolment expansion. The percentage of White students in Newark School District ("Newark District") today compared to 1997, the first year of charter school operations in Newark, is essentially the same. As for fiscal impact from charter school

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<sup>1</sup> This brief is in response to the merits briefs filed by amici Paterson Board of Education, Irvington Board of Education, American Civil Liberties Union of New Jersey, the American Federation of Teachers, AFL-CIO ("AFT"), AFT New Jersey, AFL-CIO ("AFTNJ"), the Newark Teachers' Union, AFT, AFL-CIO ("NTU") and the Lawyers' Committee for Civil Rights Under Law and the Constitutional and Education Law Scholars (collectively "Amici Parties.")

enrollment growth, Newark District's state aid has substantially increased while its enrollment has remained about flat or less, leaving it with such high budget surpluses that it became disqualified for certain emergency aid monies. Newark Board of Education ("NBOE") itself has described the economic impact from charter schools in Newark as being neutral, notwithstanding NBOE's belated appearance in these appeals.

The Amici Parties raise new issues over charter school practices well beyond the merits to the Charter Schools' charter applications, including alleged out-of-state charter school impacts and the broader residency-based system of public education in New Jersey. Consideration of such allegations would be prejudicial to the Charter Schools.

Each of the charter school applications were decided based on their individual merits. ELC and the Amici Parties notably do not allege segregative practices by any of the Charter Schools. The Commissioner regularly examines charter school practices to ensure an absence of unlawful segregation.

The Legislature passed the Act in close time to the State's take-over of Newark District's operations. The Act explicitly encouraged the growth of charter school in communities like Newark. Its policy goals of educational innovation, parent choice, accountability and improved student educational outcomes have been realized in Newark.

ELC and the Amici Parties should not be permitted to glom onto the charter decisions to advance policy goals using meritless arguments over student segregation and the local district financial impact. ELC asks the court to saddle a charter school enrollment expansion with a *de facto* presumption of segregative impact, when there is no factual support for that. These appeals are an attempt to wound the charter school movement with an unfair stigma of segregation even in the face of undeniable enhanced educational outcomes for Newark children in both charter schools and Newark District.

The Charter Decisions should be affirmed in their entirety.

**STATEMENT OF RELEVANT PROCEDURAL HISTORY**

On February 18, 2016, the Commissioner granted Respondent TEAM Academy Charter School's ("TEAM") application to renew its charter for five years. (Aa28.)<sup>2</sup> On February 29, 2016, the Commissioner also issued six distinct charter school application decisions as follows: renewing Robert Treat Charter School's ("Robert Treat") charter for five years (Aa12); renewing North Star Academy Charter School's ("North Star") charter for five years (Aa24); increasing Maria L. Varisco Rogers Charter School's enrollment for 2016-2017 and 2017-2018 school years (Aa20), increasing University Heights Charter School's

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<sup>2</sup> "Aa" refers to Appellant Education Law Center's appendix on appeal filed with the Appellate Division.

("University Heights") enrollment for 2016-2017, 2017-2018, 2018-2019 and 2019-2020 school years (Aa30); increasing Great Oaks Legacy Charter School's ("Great Oaks") enrollment for 2016-2017, 2017-2018, 2018-2019 and 2019-2020 school years (Aa18); and increasing New Horizons Charter School's ("New Horizons") enrollment for 2016-2017 and 2017-2018 school years (Aa22).

ELC appealed the foregoing decisions in a single notice of appeal. After multiple motions, the Appellate Division gave ELC leave to file a notice of appeal for each charter decision and ordered that the appeals be consolidated on September 28, 2016.

On May 7, 2019, the Appellate Division issued its decision affirming the Commissioner's 2016 decisions. *In re Renewal Application of Team Acad. Charter Sch.*, 459 N.J. Super. 111, 208 A.3d 10 (Super. Ct. App. Div. 2019). ELC served a notice of petition for certification to this Court on May 28, 2019. This Court granted the petition on February 3, 2020.

NBOE, Plainfield Board of Education and Franklin Township Board of Education filed motions for leave to appear *amicus curiae*, which were granted.

The Lawyers' Committee for Civil Rights Under Law and the Constitutional and Education Law Scholars' ("Lawyers' Committee") filed its motion for leave to appear *amicus curiae* on May 7, 2020. The American Civil Liberties Union ("ACLU") filed its motion for leave to appear *amicus curiae* on May 11,

2020. The AFT Movants filed their motion for leave to appear *amicus curiae* on May 11, 2020.

The Paterson and Irvington boards of education also filed a motion to appear as *amicus curiae* parties.

The Court granted the foregoing motions by the Amici Parties and directed that the Charter Schools file responsive briefs to same by August 26, 2020. The court granted an extension to file responsive briefs by September 25, 2020.

On or about July 22, 2020, the New Jersey Charter School Association and NJ Children First ("NJCSA") filed a motion to appear as an *amicus curiae*, which, upon information and belief, is currently pending. ELC did not oppose the motion and reserved the right to file responsive brief if the court grants the motion. If the NJCSA's motion is not granted, the Court will receive only those *amici* arguments aligned with ELC's positions.

LEGAL ARGUMENT

**I. THE CHARTER SCHOOLS' RENEWAL DECISIONS SHOULD BE AFFIRMED BASED ON THE APPLICABLE STANDARD OF REVIEW GIVEN THE UNDISPUTED MERITS TO EACH CHARTER APPLICATION**

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It is well settled that the Commissioner's quasi-legislative decisions like here are not second-guessed by the courts unless the Commissioner acts in an arbitrary capricious or unreasonable manner. *Kaprow v. Board of Educ.*, 131 N.J. 572, 591 (1993) ("Ordinarily, we will not reverse the determination of an administrative agency unless it is arbitrary, capricious or unreasonable, or is not supported by substantial credible evidence in the record as a whole.") That rule derives from the courts' recognition that "certain subjects are within the peculiar competence of the agency." *Denney v. Board of Educ.*, 131 N.J. 626, 637 (1993) (internal citations omitted); See also *G.E. Solid State, Inc. v. Director, Div. Of Taxation*, 132 N.J. 298, 306 (1993) ("Generally courts accord substantial deference to the interpretation an agency gives to a statute that the agency is charged with enforcing.") ELC bears the burden of proof that the Commissioner acted arbitrarily.

The "Legislature's overarching purpose [is] to encourage and facilitate the development of charter schools." *Education Law Center ex rel. Burke v. New Jersey State Bd. of Educ.* 438 N.J. Super. 108, 117 (App. Div. 2014). "The commissioner shall



actively encourage the establishment of charter schools in urban school districts . . . ." N.J.S.A. 18A:36A-3(b). "The question of whether an educational program achieves the goals of the education laws is uniquely committed to the Commissioner and State Board, the executive arms to which the legislature has entrusted those judgments." *In re Charter School Application of Englewood On Palisades Charter School*, 320 N.J. Super. 174, 206 (App. Div. 1999), citing *Abbott v. Burke*, 100 N.J. 269, 300 (1985), *aff'd*, 164 N.J. 314 (1999).

"In making predictive or judgmental determinations, case law has recognized the value that administrative expertise can play in the rendering of a sound administrative determination. Judicial deference is at a high when reviewing such findings. *In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp.*, 216 N.J. 370, 389 (2013) citing *Golden Nugget Atl. City Corp. v. Atl. City Elec. Co.*, 229 N.J. Super. 118, 122-23 (App. Div. 1988).

"Because the Commissioner is acting in a quasi-legislative, and not quasi-judicial capacity in this context he [or she] need not provide the kind of formalized findings and conclusions necessary in the traditional contested case." *In re Grant of the Charter Renewal of the Red Bank Charter Sch.*, No. A-3342-16T1, 2019 N.J. Super. Unpub. LEXIS 1935, at \*25 (Super. Ct. App. Div. Sep. 20, 2019) (quoting *In re Red Bank Charter*

Sch., 367 N.J. Super. 462, 843 A.2d 365 (Super. Ct. App. Div. 2004), cert. denied, 180 N.J. 457 (2004), and *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 320 N.J. Super. 174, 217, 727 A.2d 15 (App. Div. 1999)).

ELC and some Amici Parties assert that there should have been an evidentiary hearing over the Charter Schools' application approvals. It is well settled that there is no right to an evidentiary hearing over a charter decision. *In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp.*, 216 N.J. at 383. The Legislature did not intend to subject the renewal of a charter school to adjudicative proceedings accompanied by a full panoply of procedural protections. *In re Red Bank Charter School*, 367 N.J. Super 462, 475 citing *Charter Sch. Application of Englewood on the Palisades*, supra, 320 N.J. Super. at 235-36. "The Commissioner is merely applying his education expertise to the collected data, including the documents, statistics, site visit, and comprehensive review," to determine whether the charter should be renewed. *In re Red Bank Charter School*, 367 N.J. Super 462, 475. The renewal process "does not implicate the strictures of constitutional due process." *Id.* at 476, quoting *Charter Sch. Application of Englewood on the Palisades* at 235.

The degree of process is even less for a charter renewal or amendment decisions than for a charter application denial:

The major difference between the initial approval process and a renewal application is that much of the supposition and predictive fact that necessarily permeated the approval process is no longer necessary because the school's performance record is available for evaluation. Despite the availability of the performance record, however, we do not conclude that an adjudicatory hearing is required in every contested renewal-application-case.

*In re Red Bank Charter School*, 367 N.J. Super 462, 475.

Each of the Charter Schools were existing in prior years and had a track record of success. The statutory and regulatory scheme for the approval of applications to operate a charter school occurs under tight time frames as cycle after cycle of charter school applications are submitted seeking approval for the ensuing school year. *N.J.A.C. 6A:11-2.1(b)(1)*. *In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp.*, 216 N.J. at 387. ELC's attempts to interpose hearings into charter approval decisions contradicts settled case law. It is a transparent attempt to chill or even end the growth of charter school enrollment through protracted and expensive litigation.

The Commissioner correctly found that the Charter Schools' record of student performance warranted renewal. That success also benefited non-charter school students. As Newark District's Superintendent Roger Leon stated, "there is no question that the creation and expansion of the Newark charter

school system has played a critical role in improving education in the city . . .” *Newark Charter School Fund, 12 Years Success Transforming Education Through Innovation and Collaboration*, Forward from Superintendent Roger Leon, 2020. (RCSRespa7.)<sup>3</sup> In a report dated January 2020, Dr. Marcus Winters estimated the effect of enrolling in a charter school on student standardized test scores in Newark. The results indicated that attending a Newark charter school that participated in the city’s universal enrollment system leads to large improvements in math and reading scores. *Charter Schools in Newark: The Effect on Student Test Scores*, Marcus A. Winters, Ph.D., Manhattan Institute at Executive Summary, January 2020 available at <https://www.manhattan-institute.org/charter-schools-newark-effect-on-student-test-scores#:~:text=The%20results%20indicate%20that%20attending,or%20Uncommon%20public%20schools%20networks>. (Accessed on September 25, 2020).

A 2015 study by Stanford University Center for Research on Education Outcomes (“CREDO Report”) found that Newark was the second highest performing among the 41 urban charter school sectors studied. *Urban Charter School Study Report on 41 Regions*, at pp 8-9 (Center for Research on Education Outcomes,

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<sup>3</sup> “RCSRespa” refers to Respondents Charter Schools responsive appendix to the Amici Parties’ brief, filed simultaneously herewith.

<http://urbancharters.stanford.edu/download/Urban%20Charter%20School%20Study%20Report%20on%2041%20Regions.pdf> (Accessed on Sept. 25, 2020). Even state-wide, “[c]ompared to the educational gains that charter students would have had in a traditional public school . . . the analysis shows that students in New Jersey charter school on average make larger learning gains in both reading and mathematics.” See *id.* at pp 5-6.

Contrary to ELC and the Amici Parties’ assertions about the deleterious effect from charter school enrollment growth on Newark District, between 2006 and 2018, when compared to other low-income cities and towns in New Jersey, Newark’s citywide average test score rank has improved from 39<sup>th</sup> to the 78<sup>th</sup> percentile in ELA and math. *A New Baseline: Progress in Newark’s District and Charter Schools from 2006 to 2018*, Figure ES1, Jesse Margolis, Ph.D., MarGrady Research, June 2019, <http://margrady.com/newbaseline/> (Accessed on Sept. 25, 2020). “The share of black students in Newark attending a school that beat the state proficiency average in their grade has more than quadrupled, from 7% in 2006 to 31% in 2018. See *id.* at p. 4. These results reflect substantial improvement from when the State took over operation of Newark District in 1995.

**II. THE AMICI PARTIES' ASSERTIONS OF CHARTER SCHOOL SEGREGATION ARE WITHOUT FACTUAL OR LEGAL BASIS**

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The Amici Parties parrot the assertion made by ELC that the Appellate Division and Commissioner "ignored" ELC assertions about possible segregative impacts from charter school expansions. The Amici Parties argue that the Commissioner did not "carefully evaluate" whether the charter school applications would have negative fiscal impacts and segregative effects on Newark District. These assertions are contradicted by the opinion. The Amici Parties advocate a reversal or remand based on a failure which did not occur. The Appellate Division stated below:

That the demographics of the individual charter schools do not precisely reflect the overall demographics for the District is not sufficient to demonstrate a segregative effect. . . Thus, although the Commissioner did not specifically address the issue, ELC's submissions fail to substantiate a segregative effect, either in the pre- or post-enrollment practices, such that the Commissioner's decisions can be characterized as arbitrary, capricious, and unreasonable.

*In Re TEAM Academy*, 459 N.J Super. at 145.

The Appellate Division squarely addressed ELC's segregation arguments and discounted them. Indeed, the Commissioner made "record-based factual findings," contrary to the Amici Parties' assertion. (See AFT Movants' *Amicus Curiae* Brief at p. 11.)

The ELC arguments rested on ELC's own data and cherry-picked information. When the Appellate Division noted that the Commissioner "did not specifically address the issue," it was referring to the Commissioner's letter decision granting the charter applications, and it was not suggesting that the Commissioner did not review the segregative impact or fiscal impacts on Newark District at all. In no way can it be construed that the Commissioner or Appellate Division ignored allegations or threats of segregation.

The Appellate Division noted that the Commissioner has continuous oversight of charter school applications for renewals and enrollment expansions. Every charter school in the State must sign a "Charter Agreement" between itself and the Commissioner, which in relevant part, requires that the school, "seek[] the enrollment of a cross section of the school-age population including racial and academic factors. . ." in the district. (RCSa281-293).<sup>4</sup> The Commissioner also scrutinizes "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: 11-2.2(c). To facilitate that review, charter schools must submit an annual report to the Commissioner, local boards of education, and the county

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<sup>4</sup> "RCSa" refers to Charter Schools' Appendix filed with the Appellate Division in Opposition to Appeal.

superintendent of schools. N.J.S.A. 18A:36A-16(b); N.J.A.C. 6A:11-2.2. (App10a.)<sup>5</sup> The annual report must include, among other things, access and equity information and records, such as relating to the availability and advertisements of enrollment applications, the student attrition rates, demographics and special education compliance (RCSa96-116; App18a.) The Commissioner may revoke a charter at any time if the school has not fulfilled or has violated any of the conditions of its charter. N.J.S.A. 18A:36A-17.

The Appellate Division cited the universal enrollment system in Newark, which accounted for 88% of the student enrollment at issue here. (App17a.) ELC and the Amici Parties simply refuse to address universal enrollment since it is inconvenient to their segregative impact arguments.

As the Appellate Division noted, "ELC does not suggest that any of the respondents' enrollment policies are other than color blind, random, or keep the schools from being 'open to all students in the community [.]'" *In re TEAM Academy*, 459 N.J. Super. at 145. Similarly, there is no suggestion that post-enrollment practices deliberately have a segregative effect". *Id.*

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<sup>5</sup> ("App\_\_a") refers to Appellant/Petitioner ELC's Appendix to its Petition for Certification filed on June 20, 2019.



Newark's universal enrollment uses an algorithm and allows all Newark resident families to centrally enroll students in NBOE and participating charter schools. It provides weighted preferences based on neighborhood and disability (RCSa243-245.) It is administered by NBOE.

Moreover, the AFT and Lawyers Committee Movants are raising new issues of alleged out-of-state charter school enrollment practices. (See AFT Movants' *Amicus Curiae* Brief at pp 9, 13, 15.) The Charter Schools' charter applications were decided on their individual merits based on governing New Jersey law.

The Amici Parties also attempt to use the Charter School decisions to make broader arguments about the residency-based system of public education in New Jersey causing segregation between communities. (See AFT Movants' *Amicus Curiae* Brief at p. 16.) AFT Movants admit that students in charter schools in Newark are in segregated schools relative to other surrounding communities to the same extent as Newark District. The responsibility for that does not lie with the Charter Schools. "[I]t is clear that whatever degree of attention the Commissioner has given to these issues when considering charter school applications, little has been done to reverse or even curtail segregation within the State's traditional public schools and charter schools". (See AFT Movants' *Amicus Curiae* brief at p.19.) (emphasis added). AFT Movants' issue with

residency-based segregation is not an appropriate subject of this appeal.

It is undisputed that Newark District and charter schools have a very low percentage of White students. It did in the first year of charter school operations in Newark in 1997 and it does today.<sup>6</sup> ELC faults the Charter Schools' enrollment patterns for not reaching the Black and Hispanic/Latino balance ELC thinks is ideal. But Newark population's non-White resident make-up is not evenly distributed throughout the city. The city's North and East wards have a disproportionate amount of non-English language speaking children because there is a relative higher percentage of Hispanic/Latino residents in those wards (57.9%).<sup>7</sup> The North and East Wards have very few charter schools located there. In the 2015-2016 school year, 71.2 percent of NBOE's English Language Learner ("ELL") students attended schools in the North and East Wards.<sup>8</sup>

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<sup>6</sup> Four percent White student population in 1999-2000 year (<https://www.nj.gov/cgi-bin/education/data/enr.pl>) compared to same percentage in 2018-2019 year (<https://www.nj.gov/cgi-bin/education/data/enr11plus.pl>) (Accessed on Sept. 25, 2020).

<sup>7</sup> Data derived from 2010 U.S. Census data for zip codes 07102, 07103, 07104, 07106, 07107, 07108, 07112 and 07114. (RCSa2-10). Zip codes 07104 and 07107 are most representative of the North and East Wards. (RCSa1).

<sup>8</sup>According to Newark Enrolls, Ridge Street (RCSa494), Roberto Clemente (RCSa495), Abington Avenue (RCSa453), Park Elementary (RCSa489), Elliott Street (RCSa465), First Avenue (RCSa466), Rafael Hernandez (RCSa493), Branch Brook (RCSa459) and Luis Munoz Marin (RCSa479) elementary schools are located in the

The correlation of neighborhoods to student make-up is consistent across Newark District and charter schools. All NBOE schools with a Hispanic/Latino enrollment of less than 20% reported ELL enrollment less than the NBOE average with some less than 1 percent. The same is true for charter schools. All NBOE schools with a Hispanic/Latino enrollment of less than 20 percent<sup>9</sup> also reported ELL enrollment of 1 percent or less except for Pershine Academy, Harriet Tubman and Ivy Hill Elementary who were all still below the district average of 9 percent. (RCS322, RCSa309, RCSa312). As the CREDO Report noted, "parents and students who choose to attend charter school select school for a variety of reasons such as location, school safety, small school size, academic focus or special interest programs." *CREDO Report, supra*, at p. 12.

The Charter Schools located themselves in the highest need areas of Newark. By ELC and the Amici Parties' logic, they

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North Ward and Lafayette Street (RCSa476), South Street (RCSa498), Oliver Street (RCSa488), Hawkins Street (RCSa471), Ann Street (RCSa455), Wilson Avenue (RCSa503) and North 10th Street (RCSa486) elementary schools are located in the East Wards. North 10th Street Elementary School has no reported 2015-16 performance report.

<sup>9</sup> According to 2016-2016 school performance reports, Louis A. Spencer (RCSa315), Thirteen Ave. (RCSa330), Cleveland (RCSa302), South 17<sup>th</sup> Street (RCSa326), Hawthorne Avenue (RCSa311), Chancellor Avenue (RCSa301), Belmont Runyon (RCSa297), Peshine Academy (RCSa332), Speedway (RCSa328), Harriet Tubman (RCS3069), Avon Avenue (RCSa296), Ivy Hill (RCSa312), George Washington Carver (RCSa308) and Lincoln (RCSa314) elementary schools have a Hispanic/Latino population of less than 20%.

should expand in the North and East wards, seemingly to indulge ELC's view of ethnic balance which Newark District itself does not have in each school. Moreover, school district ELL reporting has an inconsistent and only recent history which casts severe doubts on ELC's assertions. Until 2014, a charter school had to have a critical mass of 20 or more students in a language assistance program to report ELL at all. The assessments themselves entail subjective components of teacher and parent input and observations which limit the ability to perform reliable one-to-one comparisons across schools. (RCSa36-45; RCSa414-415.) Indeed, schools strive to improve English language ability of ELL students so that they no longer need the ELL classification and services. See *Special Education and English Language Learner Students in Boston Charter School: Impact and Classification*, Elizabeth Setren, Ph.D., Massachusetts Institute of Technology, September 2016, at p. 4, <http://economics.mit.edu/files/12050> (Accessed on Sept. 25, 2020). In Dr. Setren's 2016 study of Boston public school students, charters removed ELL classifications three times as often as traditional public schools. *Id.* at p. 1.

The AFT Movants and Lawyers' Committee cite to conclusions in a report issued by Mark Weber, Ph.D. Student at Rutgers Graduate School of Education and Julia Sass Rubin, Associate Professor at Rutgers Edward J. Bloustein School of Planning and

Policy. The report is a work product of public anti-charter school activist and founder of Save Our Schools New Jersey, an anti-charter organization and co-litigant with ELC in the matter *Education Law Center ex rel. Burke v. New Jersey State Bd. of Educ.*, 438 N.J. Super. 108 (App. Div. 2014)<sup>10</sup>

As to alleged discriminatory enrollment of disabled students, in the Act, the Charter Agreement and in the regulations, the Charter Schools are subject to clear mandates to provide education programs for all its disabled and non-disabled students. The universal enrollment system gives parents of disabled students preferences in selecting charter schools. Some parents of students with severe disabilities may indeed select NBOE for their child when no particular charter school has the size to operate a specialized program which will meet the student's needs. For example, NBOE's Technology High School has a specialized auditory impaired program for deaf and hard of hearing students.<sup>11</sup>

ELC reports NPS's percentage of disabled students as 17 percent. The percentage has remained about flat even with

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<sup>10</sup> See also <http://www.huffingtonpost.com/author/julia-sass-rubin-phd>;  
[http://www.nj.com/opinion/index.ssf/2016/06/christies\\_radical\\_school\\_funding\\_change\\_is\\_dishonest\\_heres\\_why\\_opinion.html](http://www.nj.com/opinion/index.ssf/2016/06/christies_radical_school_funding_change_is_dishonest_heres_why_opinion.html)  
(Accessed on Sept. 25, 2020) ;  
<http://bigthink.com/experts/juliasassrubin>. (Accessed on Sept. 25, 2020.)

<sup>11</sup><http://www.nps.k12.nj.us/tec/academics/specialneeds/auditorily-impaired/>

significant increases in charter school enrollment. In the 2016-2017 year, the special education portion was 16.2%; in 2018-2019 year, the special education percentage was 16.6%. <https://www.nps.k12.nj.us/departments/data-research/district-summary/> (Accessed on September 25, 2020).

NBOE admits that it has over-classified students as disabled who did not warrant a classification. (RCSa422). The over-classification of minority students is a serious problem recognized by the State's public education leaders. The New Jersey School Boards Association Special Education Task Force found in 2014 that minority students were over-classified, causing a "disproportionate number of minorities and English language learners identified as learning disabled." *Special Education: A Service, Not a Place*, NJ Schools Boards Association Task Force on Special Education Final Report, March 2014, p. 6, <https://www.njsba.org/wp-content/uploads/2016/02/news-special-ed-task-force-full-report.pdf> (Accessed on Sept. 25, 2020). (Newark District's School Business Administrator, Valerie Wilson, sat on that task force. See *id.* at p. 2.) Beyond that, Newark District itself has individual schools with comparable special education student percentage make up as the Charter Schools.

**III. THE COMMISSIONER OF EDUCATION REASONABLY  
CONSIDERED THE FISCAL IMPACT ON NEWARK  
DISTRICT FROM THE CHARTER SCHOOL ENROLLMENT  
EXPANSIONS**

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The AFT Movants argue that the Commissioner and Appellate Division failed to "carefully evaluate" whether the charter applications would have a negative fiscal impact on Newark District students. But the Commissioner and Appellate Division did not ignore the fiscal impact of the Charter Schools' enrollment expansions. ELC did not show a fiscal impact on the District warranting a reversal. The court below held:

[T]he Commissioner was not required to evaluate the impact of the potential loss of funding allocated to charter schools over time because of the District's former classification as an Abbott district, and current status as an SDA district, in the absence of objection by the District. Districts should continue to bear the burden to demonstrate that charter school funding will prevent delivery of a thorough and efficient education, even in former Abbott districts.

*In Re TEAM Academy*, 459 N.J Super. at 144.

In so holding, the Appellate Division analyzed the record cited by ELC to support its fiscal impact arguments. "ELC did not make any showing, much less a preliminary showing, on which the Commissioner could rely as to the effect the expansions would have on the District's budget". *Id.* at 142, citing *In re Red Bank Charter Sch.*, 367 N.J. Super at 334.

ELC did not specifically demonstrate how the District students would be deprived of a thorough and efficient education by the expansion. ELC represented that the District's budget crisis was caused by both the chronic underfunding of the SFRA<sup>[12]</sup> formula and the rapid expansion of charter schools in Newark. ELC was required to separate the two sources it claimed contributed to the budget crisis and failed to do so.

*In Re TEAM Academy*, 459 N.J Super. at 142, citing *Abbott v. Burke*, 206 N.J. 332, 359, ("Abbott XXI"). "It is simply not clear whether the reductions in available funds is attributable to reduced enrollment." *In Re TEAM Academy*, 459 N.J Super. at 143.

The court below reaffirmed that local districts must demonstrate specifically how a district would be precluded from providing a thorough and efficient education ("T&E") if a charter school was granted its application. It is incumbent upon a local resident district to "demonstrate specifically how the board would be precluded from providing T&E". *In re Red Bank Charter School*, 367 N.J. Super 462, 482 (App. Div. 2004). "Renewal of a successful charter school will be favored, 'unless reliable information is put forward to demonstrate that a constitutional violation may occur.'" *Id.* at 483, citing *Charter Sch. Application of Englewood on the Palisades*, 164 N.J. at 334, 336 (2000).

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<sup>12</sup> School Funding Reform Act of 2008, N.J.S.A. 18A:7F-43 to -63



Here, NBOE did not challenge the charter decisions. It belatedly moved to appear as an amicus, even after gaining full local control and passing on challenging the significant charter enrollment expansions approved in 2018. In January 2018, the Commissioner approved 8 Newark charter schools to expand growth by 2,805 students. (RCSSa32-58.)<sup>13</sup> NBOE, having assumed full control on February 1, 2018, did not appeal those decisions.

Even with enrollment trends flat or down, NBOE's annual state aid has steadily increased by almost \$100 million from 2015 to the current school year. See State DOE, 2015-2016 K-12 State Aid School Districts, [www.nj.gov/education/stateaid/1516/district.pdf](http://www.nj.gov/education/stateaid/1516/district.pdf); compare to State DOE, 2019-2020 K-12 State Aid School Districts, (www.nj.gov/education/stateaid/1920/District%20Details%20FY20%20Revised.pdf. (Accessed on Sept. 25, 2020). The NBOE's budget summaries report that even after charter school enrollment growth, the district has run large budget surpluses due to "aggressive budget management." *Newark Board of Education, FYI 19-20 Budget Hearing*, 4 (March 27, 2019), [www.nps.k12.nj.us/mdocs-posts/fy-2019-2020-budget-hearing/](http://www.nps.k12.nj.us/mdocs-posts/fy-2019-2020-budget-hearing/).

Indeed, the State recently rejected NBOE's request for "emergency aid" given its large surplus. Patrick Wall, Newark

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<sup>13</sup> "RCSSa: refers to Respondent Charter Schools' Supplemental Appendix in opposition to NBOE's amicus curiae brief, filed February 26, 2020.

Asked for \$37M in 'Emergency aid' for schools. The State gave it \$4 Million."

<https://newark.chalkbeat.org/2019/12/9/21109336/newark-asked-for-37m-in-emergency-aid-for-schools-the-state-gave-it-4-million> (Accessed Sept. 25, 2020).

Newark District had acknowledged that it engages in a pattern of "overspending." Newark District attributed overspending to costs of salaries and benefits and payments to charter schools without commensurate reduction in costs. (RCSa72). "[I]t is clear that [NPS] must operate more efficiently in order to drive more dollars to the classroom, and to adjust budgets against actual costs such as the increases in total administrative costs, and salaries and benefits for administration." (RCSa73). NBOE released a 2016-2019 Strategic Plan. NBOE's current Superintendent Roger Leon, then Assistant Superintendent, was a member of a committee which "oversaw and managed the process from start to finish." <https://www.nps.k12.nj.us/mdocs-posts/2016-19-strategic-plan/> at. P. 83 (Accessed on Sept. 25, 2020.) The Strategic Plan describes the economic impact from charter schools as being "neutral" but for fixed and legacy costs. See "Priority 4" at p. 68, <https://www.nps.k12.nj.us/mdocs-posts/2016-19-strategic-plan/> (Accessed on Sept. 25, 2020).

Thus, the Commissioner did not fail to "carefully evaluate" or assess the fiscal impact on the local district. (See AFT Movants' *Amicus Curiae* Brief at p.2.) ELC simply cannot demonstrate how the financial impact of charter school renewals and expansions would impair efforts other than conclusory assertions premised on spending reductions. See *In re Red Bank Charter School*, 367 N.J. Super at 483. "ELC does not account for the fact that the legislative formula is designed to maintain school funding at the constitutionally required level despite the existence of charter schools. Nor does ELC address the fact that in 2011 at least, 205 districts out of New Jersey's 560 school districts, in addition to Newark, were similarly underfunded." *In Re TEAM Academy*, 459 N.J Super. at 142, citing *Abbott XXI*, 206 N.J. at 458.

The court also noted that the SFRA was amended to no longer give the Commissioner discretion in implementing the SFRA formula. *In Re TEAM Academy*, 459 N.J Super. at 144, citing *N.J.S.A. 18A:36A-12(b)* (emphasis added). "ELC has not demonstrated the reason, given the SFRA formula, that a different standard should today be applied to former Abbott districts." *In Re TEAM Academy*, 459 N.J Super. at 144 citing *J.D. ex rel Scipio-Derrick v. Davy*, 415 N.J. Super 375, 378 n.1 (App. Div. 2010). "[T]he legislature moderated the impact charter schools would have on funding for traditional public

schools by reducing the per-pupil amount payable by the district to 90%." *In Re TEAM Academy*, 459 N.J Super. at 121-22, citing *Englewood*, 164 N.J. at 333; N.J.S.A. 18A:7F-43 to -63.

Charter schools receive less than 90 percent of a resident district's per student funding for resident students. The Legislature contemplated that the fractional share remaining with the resident district is designed to ameliorate the resident district's inability to make reductions to the budget which perfectly correlate with a reduction in funds following a student to a charter school. For every Newark resident attending a charter school, Newark District retains 10 percent or more funding for that student. This proportionate funding was upheld in the *Englewood on the Palisades* case.

The Amici Parties' arguments over financial impact on Newark District are not supported by facts and woefully fall short of the level of reduction which would prevent the charter school enrollment growth encouraged by the State Legislature.

CONCLUSION

For the foregoing reasons, the appeal of Appellant Education Law Center should be denied and the decisions of the Commissioner of Education to approve the subject charter renewal and amendment applications should be affirmed in its entirety.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "T. O. Johnston", with a long horizontal flourish extending to the right.

Thomas O. Johnston  
Bar ID No. 040061998

September 25, 2020