

June 16, 2017

VIA NJ LAWYER'S SERVICE

Mr. Joseph Orlando, Clerk
Superior Court of New Jersey
Appellate Division
Attn: Elizabeth Ciccone
25 W. Market Street
Trenton, New Jersey 08625-0006

**Re: *In re Renewal Application of TEAM Academy Charter School*
Docket No. A-003416-15T1 (LEAD)**

Dear Mr. Orlando,

Enclosed is an original and five copies of Respondents Great Oaks Legacy Charter School, New Horizon's Community Charter School, North Star Academy Charter School, Robert Treat Academy Charter School, TEAM Academy Charter School, and University Heights Charter Schools' Opposition Brief and accompanying Appendix.

Kindly stamp one copy "filed" and return it to this office in the enclosed self-addressed, stamped envelope.

Thank you for your courtesies.

Sincerely,



Thomas O. Johnston

enc.

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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-004384-15T1 (Consol.)

In re Renewal Application of North Star
Academy Charter School

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

CERTIFICATION OF SERVICE

(caption continued on next page)

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

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

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.)

I hereby certify that on June 16, 2017, an original and five copies of Respondents Great Oaks Legacy Charter School, New Horizon's Community Charter School, North Star Academy Charter School, Robert Treat Academy Charter School, TEAM Academy Charter School, and University Heights Charter Schools' Opposition Brief and accompanying Appendix were hand delivered via New Jersey Lawyer's Service to:

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Dated: June 16, 2017

In re Renewal Application of TEAM Academy Charter School	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
	:	DOCKET NO. A-003416-15T1 (LEAD)
	:	Civil Action
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In re Amendment Request to Increase Enrollment of Maria L. Varisco Rogers Charter School	:	No. A-004386-15T1 (Consol.)

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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 OPPOSITION TO APPEAL

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In re Amendment Request to Increase
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PRELIMINARY STATEMENT

This appeal is an attempt to revisit educational policy debates leading to the passage of the New Jersey Charter School Program Act of 1995 (the "Act"), cloaked as an endeavor to enforce poor children's rights to a thorough and efficient public education.

In 1995, the State of New Jersey took over operation of the Newark School District after years of proven failure to meet the educational needs of its children to such an extent that the children regressed academically the longer they remained enrolled in the district. No public school alternative was available then to parents. Children from wealthier communities far outpaced Newark children academically. It was this constitutional rights deprivation which gave rise to the *Abbott v. Burke* body of case law.

Soon after the State takeover of Newark School District, the State Legislature enacted the Act as one part of multi-part strategies to improve educational outcomes for poor children and meet the State's obligations to confer on its children a thorough and efficient education. Charter schools are public schools which receive less than 90 percent per student funding than the resident district, operate in accordance with its unique charter and is overseen by a board of trustees.

The charter school program in Newark has been a resounding success. Today, thousands of Newark charter school students outperform students from wealthier communities. Parents are empowered to select for themselves the public school which best meets their children's needs, whether it be in Newark Public Schools ("NPS") or a charter school. Newark maintains a universal enrolment system, so the enrollment process for NPS and charter schools are intertwined to achieve goals of advancing community, transparency, access and equity and

accountability. The charter schools' models of success are transferrable to improving NPS student performance and has been so acknowledged by NPS in helping NPS satisfy its thorough and efficient obligations.

Education Law Center ("ELC") has inexplicably decided to not align itself with the charter school movement in New Jersey, even though the *Abbott v. Burke* children are excelling in charter schools. In this appeal, ELC attempts to draw back the success of charter schools in Newark, in favor of a funding-centered priority at the expense of a student-centered analysis. It lodges serious allegations against the charter schools over its enrollment practices while ignoring entirely in its brief those enrollment practices. ELC relies 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.

ELC is not actually bringing this appeal for *Abbott v. Burke* children. Indeed they are trying to thwart the rights of current and prospective charter school current students to receive a thorough and efficient education at a charter school. There is no statutory basis for them to have standing and their concurrent conflict of interests precludes it from having standing.

For the foregoing reasons, ELC's appeal should be denied and the Commissioner's decisions on the subject charter renewal and amendment applications should be affirmed.

STATEMENT OF PROCEDURAL HISTORY

On February 18, 2016, the Commissioner granted respondent TEAM Academy Charter School's application to renew its charter for five years. (Aa28)¹. On February 29, 2016, the

¹ "Aa__" refers to Appellant ELC's Appendix filed February 14, 2017.

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 ("University Heights") enrollment for 2016-2017, 2017-2018, 2018-2019 and 2019-2020 school years (Aa30); increasing Great Oaks' 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).

Rather than appealing each of the seven aforementioned decisions separately, on April 1, 2016, ELC filed a single notice of appeal challenging seven separate decisions of the Commissioner of the Department of Education. (Aa1). On April 13, 2016, ELC requested leave to file a single notice of appeal of each decision. In opposition to that motion, on May 5, 2016, the Commissioner filed a cross-motion to dismiss the appeal on standing and timeliness grounds. On June 2, 2016, this Court entered an order denying ELC's motion for leave to file a single notice of appeal. Also on June 2, 2016, this Court entered an Order denying the Commissioner's motion "without prejudice." (RCSa423).² On June 17, 2016, as a result of this Court's June 2, 2016 order, ELC filed an amended notice of appeal relating solely to TEAM's application for renewal and expansion of its charter. In opposition, TEAM filed a June 27, 2016 motion to strike ELC's

² "RCSa__" refers to 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 Schools' Appendix filed June 16, 2017.

amended notice of appeal. On July 25, 2016, this Court entered an order granting ELC's motion and denying TEAM's motion to strike. ELC subsequently filed the following separate notices of appeal: notice of appeal from the Commissioner's February 29, 2016 decision granting Great Oak's amendment request filed June 16, 2016 (Aa4); notice of appeal from the Commissioner's February 29, 2016 decision granting Maria L. Varisco Rogers Charter School's amendment request, filed June 16, 2016 (Aa6); notice of appeal from the Commissioner's February 29, 2016 decision granting New Horizons' amendment request, filed June 16, 2016 (Aa8); notice of appeal from the Commissioner's February 29, 2016 decision granting North Star's renewal application, filed June 16, 2016 (Aa10); notice of appeal from the Commissioner's February 29, 2016 decision granting Robert Treat's renewal application, filed June 16, 2016 (Aa12); amended notice of appeal from the Commissioner's February 18, 2016 decision granting TEAM's renewal application, filed June 15, 2016 (Aa14); and notice of appeal from the Commissioner's February 29, 2016 decision granting University Heights's amendment request, filed June 16, 2016. (Aa16).

On August 23, 2016, ELC filed a motion to consolidate the seven appeals, which the court granted on September 28, 2016. On October 25, 2016, the Commissioner of Education filed its Statement of Items Comprising the Record on Appeal ("SICRA"). The Commissioner amended the SICRA on January 13, 2017. (Aa102). On February 14, 2017, ELC filed its brief.

STATEMENT OF FACTS

During the 2015-2016 school year, the Charter Schools³ submitted applications to the Commissioner to renew or amend their charters. The Commissioner reviewed the application

³ "Charter Schools" collectively refers to the following Respondent charter schools that are parties to this appeal: Great Oaks Legacy Charter School, New Horizons Community Charter School, North Star Academy Charter School of Newark, Robert Treat Academy Charter School,

and filings by third parties, including ELC. The Commissioner reviewed Performance Framework Reports from each school, mandatory Annual Reports submitted to the DOE, Renewal Site Visit Summaries, and PARCC Data Preliminary Reports among other records. (Aa102). After a comprehensive review process, the Commissioner granted the mid-term charter amendments to expand enrollment for Great Oaks (Aa18), ML Varisco (Aa20), New Horizons (Aa22) and University Heights (Aa30). He also granted the charter renewals of North Star (Aa24), Robert Treat (Aa26) and TEAM (Aa28).

A. Public Education in Newark

NPS has been a state-operated school district since July 5, 1995. See 96 N.J.A.R.2d(EDU) 196, 1995 N.J. AGEN LEXIS 665. It followed a determination by the Commissioner per *N.J.S.A.* 18A:7A-34 that the Newark local school district failed to assure a thorough and efficient system of education to its children. NPS operates under the supervision of a State district superintendent of schools, appointed by the State Board of Education. The State “takeover” of NPS was the culmination of a decade-long process of evaluation. In 1993 and after a “Level III” monitoring and a Comprehensive Compliance Investigation (“CCI”), the CCI determined that “conditions persisted within the school district which seemed to preclude successful implementation of a corrective action plan”. *Id.* at *58. The CCI found,

[T]he Newark School District has been at best flagrantly delinquent and at worst deceptive in discharging its obligations to the children enrolled in the public schools. The numerous deficiencies found throughout the district are the result of the Newark Board of Education’s failure to meet its governance responsibilities and the

TEAM Academy Charter School and University Heights Charter School. Respondent Maria L. Varisco Charter School is represented by separate counsel.

Executive Superintendent's failure to lead and manage effectively. . . . Clearly, the current governance, leadership and management of the district are inadequate to achieve major improvements in student performance. The need to make such improvements is crucial. Even judging by the narrow standard of achievement test results, evidence shows that the longer children remain in the Newark public schools, the less likely they are to succeed academically.

Id. at *61-63.

The CCI also found that "numerous plans to improve district performance have been developed over the years, but what is lacking above all in the Newark School District is an effective, integrated improvement strategy and the corresponding will and ability to make it happen." *Id.* at *74. In his decision adopting the recommendation of the ALJ, Commissioner Klagholz affirmed, "not only are the students failing to meet minimal State standards of performance, but they are doing so in staggeringly large degrees in both numbers and percentages. The students' test scores, alone, indicate a severe failure in educating the children in this district." *Id.* at 121. The CCI report, ALJ Stephen G. Weiss' recommendation and the Commissioner's decision all came to the same conclusion, that NPS had been failing Newark's school children for at least a decade before the State had to step in. At this time, the Newark Board of Education was the only public school district offering an education to Newark children.

The New Jersey Charter School Program Act was enacted effective 1996, which permitted the operation of charter schools, which are publicly funded and governed by a board of trustees. The first charter schools in Newark began operations in 1997. Among the first charter schools in Newark were Respondents Robert Treat⁴ and North Star.⁵

⁴ http://www.roberttreatacademy.org/about_us__our_history

⁵ <http://northstar.uncommonschoools.org/nsa/our-school>

B. The Charter Schools' Applications

1. Great Oaks Charter School

In its application, Great Oaks noted that it was responding to parent demand for more seats and allow the high school to be fully enrolled with Great Oaks students from the two middle school campuses. (Aa508). Great Oaks has been rated a "Tier 1 school" for two consecutive years for meeting or exceeding targets in 3 out of 3 of the following Key Performance Indicators: Comparative Performance, Student Growth, and Peer Rank.⁶ This places Great Oaks in the top 30% of charter schools statewide. (Aa511). For three consecutive years, starting in the first year of the school's existence, Great Oaks ranked third out of all public schools in Newark in average Student Growth Percentile for Math and Language Arts Literacy ("LAL") combined. According to the 2013-2014 NJLASK LAL data, Great Oaks' pass rates exceeded the state-wide average in all high-needs subgroups except for special education, where median student growth percentiles indicate that it is the fastest growing subgroup in the school. (Aa511). In granting its amendment request, the Commissioner concluded that "Great Oaks Charter School has a history of providing a high-quality education to its students. In the 2012-2013 school year, the school received a Tier Rank of 1, the highest possible based on the standards within the Performance Framework. In the 2014-2015 school year, based on PARCC results, the school significantly outperformed its

⁶ Each school with available data is placed into one of three Tiers based on its academic performance in the New Jersey Department of Education (NJDOE's) Performance Framework Reports – Tier 1 (top performers), Tier 2 (middle performers) or Tier 3 (low performers). A school's Tier-rank is determined by the number of Key Performance Indicators (KPI) it met or exceeded within the Academic Performance Framework. An overview of the ranking system appears on the first page of each school's Performance Framework Report. For example, see North Star's Performance Framework Report (Aa439). See also NJDOE Organizational Performance Framework Guidance Updated August 2015 (RCSa225) and NJDOE Office of Charter Schools Performance Framework July 2012 (RCSa11).

home district of Newark in English language arts and in mathematics in middle and high school.” (Aa18a). Great Oaks sought a maximum enrollment expansion from 462 to 939 students through the 2019-2020 school year, which the Commissioner granted. (Aa508, Aa18).

2. New Horizons Community Charter School

New Horizons has been rated a Tier 1 school for three consecutive years since the 2011-2012 school year for meeting or exceeding targets. (Aa125). Most notably, New Horizons’ peer rank percentile for academic achievement is 90 percent. (Aa125).

New Horizons sought permission to increase maximum enrollment to serve grades from K-5 to K-8. (Aa140). Presently there is a significant decrease in enrollment in New Horizons’ fifth grade students due to parental concern of school environment continuity after the fifth year of instruction, causing students to transfer out of New Horizons following fourth grade. Beginning as early as 2002, there has been a parent petition for expansion to include grades six, seven and eight at New Horizons. During the 2014-2015 school year, fifth grade enrollment increased by almost 30 percent above the typical yearly average due to parent awareness of New Horizons’ plan to add a sixth-grade class for the 2015-2016 school year. (Aa147).

New Horizons requested a maximum enrollment expansion from 504 to 756 students. (Aa140). The Commissioner limited the school’s expansion to one additional grade level each year and granted a maximum enrollment expansion of only 672 students. (Aa22). In granting its amendment request, the Commissioner concluded that “New Horizons Community Charter School has a history of providing a high-quality education to its students. In the 2012-2013 and 2013-2014 school years, the school received a Tier Rank of 1, the highest possible based on the standards within the Performance Framework. In the 2014-2015 school year, based on PARCC

results, the school significantly outperformed its home district of Newark in English language arts and in mathematics in elementary and middle school.” (Aa22).

3. North Star Academy Charter School of Newark

North Star’s ground-breaking instructional leadership model has been replicated nationally and internationally. It has been used in thirteen major urban districts across the country: Baltimore, Chicago, D.C., Memphis, Milwaukee, Minneapolis, New Orleans, New York City, New Orleans, Oakland, Ogden, Rochester, Salt Lake City and Sacramento. (Aa457). North Star boasts a schoolwide LAL pass rate of 72 percent. The statewide LAL pass rate is near 65 percent. In math, North Star has a 91 percent pass rate while the state rate is near 75 percent. The Newark district rate has been approximately at or below 50 percent. (Aa442).

North Star reports a 93 percent parent satisfaction rate as measured by annual parent surveys and North Star is selected on the One Newark universal enrollment application (discussed below) more than any other school. (Aa471). In NPS’ Assessment of District Progress dated February 24, 2015, NPS acknowledged that the memorandum of understanding (“MOU”) signed by all of Newark’s charter schools participating in universal enrollment, “highlights the intent to drive deeper collaboration between the charter schools and NPS to share and implement best practices and there was to be a focus on increasing the collaboration between NPS and participating charter schools on increasing access for Newark’s neediest students.” (RCSa60)⁷. NPS acknowledges that one of the MOU’s “core commitments” is to form a deeper collaboration with North Star specifically as a model school for best practices. (RCSa61).

⁷ “RCSa__” refers to the Charter Schools’ Appendix filed June 16, 2017.

North Star initially requested an increase in its maximum enrollment from 4106 to 6216 students through the 2020-2021 school year. (Aa483-484). It later revised its request to increase its maximum enrollment from 4106 to 6650, which the Commissioner approved. (Aa491-492, Aa24).

In granting North Star's renewal application, the Commissioner concluded that "from 2011-2012 to 2013-2014, the school received a Tier Rank of 1, the highest possible based on the standards within the Performance Framework. In the 2014-15 school year, based on PARCC results, the school outperformed both the state and its home district of Newark in English language arts and mathematics in elementary, middle and high school." He also determined that "the school is performing well academically and is organizationally and fiscally sound". (Aa24).

4. Robert Treat Academy Charter School

Robert Treat commenced instructing students in 1997. It has an eleven-month school year that includes an extended school day program that offers students an opportunity to take remedial and enrichment courses in a safe and secure environment. (Aa396). Data from 2014-2015 state mandated NJASK testing revealed that there were no Partially Proficient students in Science at Grade 4. 37.7 percent received Proficient scores and 62.3 percent were Advanced Proficient for a total proficiency of 100 percent. In science at Grade 8, students had a total proficiency of 88 percent.⁸ (Aa424). From 2012-2013 to 2013-2014, Robert Treat received a Tier Rank of 1. In the 2014-2015 school year, Robert Treat's PARCC results outperformed both the

⁸ Performance level descriptors of proficiencies for particular subjects at particular grade levels are defined at <http://www.nj.gov/education/assessment/descriptors/>

state and its home district of Newark in English language arts and mathematics in elementary and middle school. (Aa26).

Robert Treat initially requested a maximum enrollment expansion 695 to 720 students to accommodate a third class of eighth graders at its Jackie Robinson campus through the 2020-2021 school year. (Aa421). It also provided a second scenario to include further expansion of the Jackie Robinson campus to accommodate an additional 25 students on each grade level bringing the requested maximum enrollment from 695 to 860, which the Commissioner approved. (Aa422, Aa26). In granting Robert Treat's renewal application, the Commissioner also determined that the school is organizationally and fiscally sound. (Aa26).

5. TEAM Academy Charter School

Since 2002 TEAM has operated schools that strive to instill in its students the desire and ability to succeed in college in order to change the world. To help its students make it to and through college, they created a supportive learning environment that focuses on a college-ready school culture, a commitment to high expectations, the use of data-driven instruction and a focus on partnership with families and the community are key elements of its program. (Aa538-540).

According to the New Jersey Department of Education's ("DOE") Renewal Site Visit Summary dated November 4, 2015 (RCSa264), TEAM measures progress towards its mission of seeing students "to and through college and careers" as evidenced by their practice of tracking the post-secondary college matriculation and completion rates of their students who graduated from 8th grade as well as their "KIPP through College" program which provides alumni with counseling services. (RCSa268). In 2014-2015 TEAM scored above the 90th percentile in almost

every measure of parent satisfaction on the KIPP⁹ Healthy Schools Survey compared to KIPP schools nationally. (RCSa269).

TEAM ranked as a Tier 1 school. Seventy-seven percent of TEAM's 8th grade graduates matriculate to college. According to New Jersey's 2013-2014 school performance report, TEAM "outperforms 62% of schools statewide as noted by its statewide percentile and 83% of schools educating students with similar demographic characteristics as noted in its peer school percentile in the performance area of Academic Achievement." (Aa538).

TEAM Academy initially sought a maximum enrollment expansion from 4,120 to 9,560 through the 2020-2021 school year. (Aa561) (Aa582-583). The Commissioner approved a maximum enrollment expansion of 7,920 students. (Aa28). In granting the renewal application, the Commissioner determined that "TEAM Academy Charter School has a history of providing a high-quality education to its students...In the 2014-15 school year, based on PARCC results, the school outperformed its home district of Newark in English language arts in elementary, middle and high school." (Aa28).

6. University Heights Charter School

University Heights' academic performance outpaces district-wide proficiency rates and is gaining ground on statewide proficiency rates. The school has been recognized nationally with the EPIC Silver-Gain award for impressive academic achievement gains. (Aa299). According to the 2013-2014 Performance Report, University Heights outperformed over 70 percent of schools with a similar demographic profile. The school met 100 percent of state-set student academic growth targets. PARCC assessment results for 2014-2015 indicate University Heights overall

⁹ KIPP is the charter management organization that manages TEAM.

outperforms the state’s average for low-income students (the best available peer comparison) in both English Language Arts and Mathematics. (Aa299).

University Heights requested an expansion from 650 to 1,500 students through the 2019-2020 school year, but received approval for only 1,050 students. (Aa298, Aa30). In granting its amendment request, the Commissioner determined that “University Heights Charter School has a history of providing a high-quality education to its students. In the 2014-15 school year, based on PARCC results, the school outperformed its home district of Newark in the English language arts in elementary and middle school. In mathematics, it outperformed Newark school district in the elementary grades...” (Aa30).

In all, North Star and TEAM accounted for 82.8% of the 7,663 total approved maximum enrollment increase.¹⁰ The total maximum enrollment requested by all of the charter schools, including Respondent M.L. Varisco,¹¹ was ultimately reduced by 19.8% from the amount originally submitted.

C. Commissioner Oversight Over Charter School Enrollment Practices

1. Charter Agreements

Every New Jersey charter school must sign a “Charter Agreement”¹² between itself and the Commissioner of Education. It is a condition for charter renewal. The Charter Agreement requires:

¹⁰ 3,800 increase in approved maximum enrollment for TEAM and 2544 increase in approved maximum for North Star

¹¹ Respondent M.L. Varisco requested an increase in maximum enrollment from 515 to 540. (Ab5).

¹² By way of example, see Charter Agreement between the Commissioner of Education and Robert Treat dated March 17, 2016 (RCSa281-293).

The School shall have in place and implement comprehensive policies for admission, enrollment and attendance, which such policies shall be approved by the School's governing board . . . and shall be consistent with applicable law. Such policies shall provide in detail the procedures and practices utilized by the School in regard to admission, enrollment, attendance and withdrawal, including inter alia, the period in which application for admission shall be timely, how to obtain an application for admission, the practices in operating the random selection process, the maintenance of a wait list, the implementation of the preferences required by law. Such changes must be consistent with applicable law and regulations, and the School must report such changes to the [Commissioner], upon the [Commissioner's] request, and as part of its annual report as required by section 18A:36A-16 of the Act . . . The School shall utilize reasonable outreach and marketing measures to make potential applicants aware of opportunities for enrollment at the school, including, but not limited to, seeking the enrollment of a cross section of the school-age population, consistent with the requirements of section 18A:36A-8c. The [Commissioner], upon a finding that the outreach and marketing measures taken by the School are inconsistent with applicable law or the representations made by the School in the Application and/or other submissions to the [Commissioner], may require the School to take further action, including but not limited to, requiring the School to extend its enrolment period, delay or void its random selection process, and/or conduct further specified outreach and marketing steps. (RCSa282).

Thus, the Charter Agreement empowers the Commissioner to enforce contract rights in addition to regulatory rights to rectify any violations of the non-discrimination covenants.

The Charter Agreement further requires that the Commissioner approve the school facility location, and that the school obtain prior approval to change locations. The Charter Agreement requires that the school submit to the Commissioner's continual facility monitoring and oversight, including unannounced visits. (RCSa286).

The Charter Agreement requires that charter schools provide services to students with disabilities in accordance with the Individuals with Disabilities Education Act, 20 U.S.C. 1401 *et*

seq., Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. (RCSa286).

2. Charter School Annual Reports

As to charter school annual reporting obligations to the Commissioner, the charter schools must specify, 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, backfilling policy, suspension and expulsion policies, and special education compliance. (RCSa96-116).

3. Enrollment of High Need Students in Charter Schools

As to enrollment practices particular to Newark, Great Oaks, TEAM, North Star and University Heights are signatories to a Memorandum of Understanding with NPS (“MOU”) regarding a universal student enrollment system for Newark children.¹³ The MOU¹⁴ calls for a single admissions process for all participating schools, including all NPS schools. The objectives of the MOU are transparency, choice, equity in serving “high-needs” students, access (“students with the highest need should have greater preference to attend a school of their choice, whether it is in their neighborhood or not”), community (“students should be able to attend a school close to where they live if that is their preference”) ease and reliability. (RCSa240). In the NPS “Assessment of District Progress” dated February 24, 2015, NPS notes that the MOU “calls for a common accountability system that is ‘fair, transparent, and prioritizes student outcomes.’” (RCSa60).

¹³ Newark’s universal enrollment system is interchangeably referred to as “One Newark,” “Newark Enrolls” or “Universal Enrollment.”

¹⁴ As an example, see the MOU between TEAM and NPS dated October 2015 (RCSa240).

For the MOU-participating schools, its pre-K through 12 students are enrolled through a single selection process, with parents ranking schools with up to 8 choices. The selection is then made through an assignment algorithm, overseen by NPS. The primary criteria for school selection is parental rankings of choices. The student will be assigned the school selected by their parent unless the number of students selected by parents for a school grade exceed the seats available. (RCSa241-242).

The MOU also calls for a neighborhood preference in grades to advance its “community” objectives. If demand for a school exceeds the supply of seats, then 85% of seats in that school will be preferenced for students who live in the “hub in which the school is located and who have ranked the school on their application.” The neighborhood preference however will not take priority over high needs student preferences, such that the 85% preference will not negatively affect a high needs student’s chance at enrollment. (RCSa245).

Preferences are provided for siblings of already-enrolled students. (RCSa242-243). Preference is also given to “high need” students. (RCSa243-245). “High need” students include those that have an IEP and students who are eligible for free lunch. The “preference” is by way of “boosting” the chances of such students in the cases where those students are “underrepresented in the applicant pool compared to the citywide average.” Put another way, high needs students “have a higher chance of securing seats in the schools of their choice if they are underrepresented in that school’s applicant pool relative to the city-wide average for that grade level.” Students will not be “force placed” to meet a pre-determined “floor” or “ceiling.” There is no “cap” – meaning the system “does not stop filling seats with high needs students once a certain number or percentage of seats have been filled.” (RCSa244, emphasis in original). The

MOU also calls for parents of “low incidence” severe disabilities, such as students with blindness or hearing impairment, to be able to directly select their preferences outside the algorithm. (RCSa245).

The DOE also approved a “Compact for Newark Charter Schools.” In this compact, the signatories state a “primary objective is to ensure that every child in Newark is enrolled in a great school, regardless of whether it is operated by the district or under a charter.” (RCSa258-61.) The charter schools commit to, among other things, “[s]erving all students in the city, especially the highest need students requiring special education services, students who are English Language learners, students who qualify for free or reduced-price lunch and other underserved or at-risk populations.” (*Id.*) The compact also calls for a sharing of best practices between the schools and transparency. Robert Treat, Great Oaks, University Heights, TEAM and North Star are signatories to the compact.

While Robert Treat and New Horizons are not signatories to the MOU, they also utilize a blind lottery selection process and are subject to the same Commissioner access and equity oversight described herein. Robert Treat holds a fully randomized and auditable blind lottery. (Aa329). Robert Treat attempts to reach the parents of all Newark students through its recruitment and marketing efforts that include ads in local newspapers in English and Spanish, flyers distributed to local preschools and social media, participation in preschool fairs and community events as well as billboards and open houses. (Aa331). New Horizons has a recruitment and marketing plan that is committed to serving all students, especially highest needs students such as special education students, English Language Learners, students who qualify for free or reduced-price lunch, and other underserved or at-risk populations. (RCSa125).

New Horizons has posted flyers in local public facilities such as the post office, community centers, libraries and other locations of public access both in the area surrounding New Horizons and elsewhere. (RCSa125).¹⁵

The State Department of Education publishes “Guidelines for Access and Equity in New Jersey Charter Schools” (“Guidelines”) (RCSa222). It notes that “[c]harter schools must demonstrate that their recruitment, application, admission, lottery and enrollment policies and practices are fair and equitable, as required by law.” (RCSa223). The Guidelines highlight four areas of focus: recruitment, initial application process, lottery and enrollment. The Guidelines do not permit preferences based on race or ethnicity. (RCSa223). The United States Department of Education also publishes guidelines for equitable charter school enrollment which do not permit preferences based on race or ethnicity.¹⁶

Per the DOE’s “Renewal Site Visit Summary” for each charter applicant, the Department of Education analyzes the charter school’s “access and equity” for “highest needs students.” For example, TEAM’s November 4, 2015 Renewal Site Visit Summary and North Star’s Renewal Site Visit Summary dated December 14, 2015, the DOE cited their participation in universal enrollment and found TEAM’s special education services and their response to intervention services to be “robust” and “compliant with all laws and regulations.” (RCSa269, RCSa276).

¹⁵ In the 2015-2016 school year, Robert Treat and New Horizons served 11.6% percent of the Charter Schools’ students. See data calculated from the 2015-2016 NJ School Performance Report, Enrollment by Grade 2015-16 (RCSa332-338). The rest of the Charter Schools are MOU signatories.

¹⁶ <https://www2.ed.gov/programs/charter/nonregulatory-guidance.html> (see page 20)

D. Student Make Up at Newark Charter Schools

ELC makes multiple misleading statistical assertions in its brief. For example, when comparing enrollment data of NPS to the Charter Schools, it uses data across different enrollment years. (Ab8). It took the NPS enrollment data from the 2014-2015 school year and compared it to the Charter Schools' 2013-2014 enrollment data (except for enrollment data from Robert Treat, which was inexplicably also taken from 2014-2015 numbers). In addition, ELC contends that the impact of charter expansions would result in 38 percent of NPS' budget allocated to presumptive payments to charter schools. (Ab16-17). However, upon closer inspection of the NPS data they rely upon, its analysis includes 13 charter schools that sought renewal or expansion that are not parties to this appeal as well as charter schools that are in the process of being shut down such as Merit Preparatory Charter School of Newark, Paulo Freire Charter School and Newark Prep Charter School. ELC also exaggerates the NPS recommendations on the charter schools' expansion and renewal requests suggesting an outright recommendation that the expansions and renewals be denied. (Ab17). Instead, NPS recommended alternate outcomes and partial approvals. (Aa597). NPS's recommendations were in response to the original applications, which called for 1516¹⁷ students more than what was actually approved.

In its 2016-17 Budget Presentation (RCSa339), NPS acknowledged that its formula for charter aid was based on a lower than expected per pupil rate resulting in \$17.4 million dollars in additional funds becoming available. (RCSa378). In addition, NPS received \$22 million dollars in Host District Support Aid from the State to support increased funding to charters. (RCSa378).

¹⁷ The original maximum approved enrollment requested was 20,231. The approved maximum enrollment was 18,715.

That same budget presentation notes that NPS students are “making significant progress” with increased graduation rates and improved Math and English performance levels. (RCSa343-52).

There are very few charter schools located in Newark’s North and East wards. Of the charter schools that are parties to this appeal, only Robert Treat and M.L. Varisco are located in the North Ward. Only one charter school is located in the East Ward, on the Central/East Wards border, LINK Community Charter School, which is not a party in this appeal. Newark has a total Hispanic/Latino population of 33.8% while the Hispanic/Latino populations in the North and East wards account for approximately 57.9% of that total.¹⁸ According to NPS enrollment data from individual schools’ Performance Reports (RCSa294-331), in the 2015-2016 school year, 71.2 percent of NPS’ students were LEP or ELL¹⁹ students who attended NPS schools in the North and East Wards – where there are few charters schools.²⁰

In the aggregate, Newark’s Hispanic/Latino students are choosing NPS schools over charter schools. According to Newark Enrolls, “Family choices differed widely by neighborhood last year. In the East Ward, 95% of kindergarten families ranked a district school first. In the

¹⁸ 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).

¹⁹ The terms “LEP” and “ELL” refer to “a student whose native language is other than English. The term refers to students with varying degrees of English language proficiency in any one of the domains of speaking, reading, writing, or listening and is synonymous with limited English speaking ability as used in *N.J.S.A. 18A:35-15 to 26.*” *N.J.A.C. 6A:15-1.2*

²⁰ 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 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.

North Ward, 75% of kindergarten families ranked a district school first. However, in the West, Central and South Wards, approximately 70 percent of kindergarten families ranked a charter school first.” (RCSa425).

ELC references a mythical NPS average school to compare with charter schools, which does not actually exist. Indeed, multiple NPS schools have imbalanced student demographics. For example, Rafael Hernandez and Branch Brook Elementary schools, both located in the North Ward, have Hispanic enrollment populations of 77.0 percent and 75.7 percent respectively. (RCSa323, RCSa299). Yet, for the 2015-2016 school year, Rafael Hernandez had an LEP/ELL enrollment of only 8 percent and Branch Brook had an LEP/ELL enrollment of a mere 1 percent. (RCSa323, RCSa299).

ELC contends that the Charter Schools had less than 1 percent LEP/ELL and in some cases 0% LEP/ELL enrollment in the 2014-2015 school year. (Ab32). However, 2015-2016 NPS data from individual schools’ performance reports reveals that NPS schools with similar percentage Hispanic enrollment as the Charter Schools have similar ELL enrollment. (RCSa294-331). For example, ELC points out that North Star and TEAM served relatively little ELLs despite their large enrollment numbers. (Ab32). However, North Star had a Hispanic enrollment of 11.5 percent and TEAM had a Hispanic enrollment of 6.1% in the 2015-2016 school year. (RCSa335, RCSa337). All NPS schools with a Hispanic enrollment of less than 20 percent²¹ also reported ELL enrollment

²¹ According to 2015-16 school performance reports, Louis A. Spencer (RCSa315), Thirteenth Ave. (RCSa330), Cleveland (RCSa302), South 17th Street (RCSa326), Hawthorne Avenue (RCSa311), Chancellor Avenue (RCSa301), Belmont Runyon (RCSa297), Peshine Academy (RCSa322), Speedway (RCSa328), Harriet Tubman (RCSa309), Avon Avenue (RCSa296), Ivy Hill (RCSa312), George Washington Carver (RCSa308) and Lincoln (RCSa314) elementary schools have a Hispanic population of less than 20%.

of 1 percent or less except for Peshine Academy, Harriet Tubman and Ivy Hill Elementary who were all still below the district average of 9 percent. (RCSa322, RCSa309, RCSa312). For example, Hawthorne Avenue School had a Hispanic enrollment of 10.9 percent and reported a 0.3 percent ELL enrollment for the 2015-2016 school year. (RCSa311). The Louise A. Spencer School had a Hispanic enrollment of 17.5 percent and reported a 1 percent ELL enrollment for the 2015-2016 school year. (RCSa315).

In the past, ELLs were counted only if they were participating in a language assistance program. (RCSa32). From 1991 to 2014, school districts needed to have 20 or more pupils of limited English-speaking ability in any one language classification. *N.J.S.A. 18A:35-18*. Beginning in the fall of 2014, any student who is identified as ELL must be reported as such regardless of whether the student is being served in a language assistance program or not. (RCSa32). Under the current regulations, English language services must be provided if there are “at least one, but fewer than 10 ELLs enrolled in the school district” *N.J.A.C. 6A:15-1.4(b)*.

ELC does not address the variability in ELL classifications caused by subjective components of assessment. For example, there are seven different DOE-approved English Language Proficiency Tests. (RCSa36-45). Also, there are several subjective measures including teacher observations and recommendations, parent or guardian input, and “other considerations” (RCSa414-415).

As for special education classified student populations in NPS compared to charter schools, NPS admitted that it classifies too many students at its FY2014 Budget Hearing. “Newark students are too often over-classified as students with disabilities (SWDs). Currently, over 50% of students with disabilities are in segregated classrooms and schools – nearly 2X the national

average...Moving Forward: Increase access to the general education environment to allow students with disabilities to have greater exposure to general education curriculum...this effort will not only provide better academic outcomes, but it will help reduce the future out-of-district placement of students, which today costs NPS approximately \$40 million". (RCSa421-422).

ELC's cited a Rutgers University Report uses the 2013-2014 enrollment numbers to arrive at an average NPS special education enrollment of 18 percent even though more recent data was available.²² (Ab31). The DOE's district classification rates reveal that the classification rate in Newark went from 17.81 percent in 2013 and dropped to 13.26 percent in 2015.²³ Only 14 of the 46 NPS elementary schools²⁴ met or exceeded ELC's purported district wide average enrollment for special education students in the 2013-2014 school year. Of these schools, some reported special education numbers over 30 percent such as Chancellor Avenue (RCSa301),

²² ELC cites 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. Rather than impartial scholarly work, 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); 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://bigthink.com/experts/juliasassrubin>. An alternative analysis of Newark charter schools impact is found at *Urban Charter School Study Report on 41 Regions* (2015), Center For Research on Education Outcomes, Stanford University (2015). See <https://urbancharters.stanford.edu/download/Urban%20Charter%20School%20Study%20Report%20on%2041%20Regions.pdf>

²³ <http://www.nj.gov/education/specialed/data/>

²⁴ Rafael Hernandez (RCSa323), Miller Street at Spencer (RCSa318), Cleveland (RCSa302), Quitman Street, Luis Munoz Marin (RCSa316), Branch Brook (RCSa299), Benjamin Franklin (RCSa298), Thirteenth Ave. (RCSa330), South 17th Street (RCSa326), McKinley (RCSa317), Chancellor Ave. (RCSa301), Fourteenth Ave. (RCSa307), Louise A. Spencer (RCSa315), Camden Street (RCSa300).

Fourteenth Avenue (RCSa307) and Louise A. Spencer (RCSa315) and one school reported special education enrollment even as high as 41% (Camden Street School) (RCSa300). The 32 remaining NPS elementary schools reported special education enrollment of less than 18%. Said differently, over two-thirds of NPS' elementary schools had special education enrollment below the district average in the 2013-14 school year.

E. Financial Impact on NPS

Notwithstanding the financial impact, NPS itself has publicly noted the value of charter school operations in Newark:

Until recent years, Newark Public Schools had a monopoly on public education in the city of Newark, but the emergence of charter schools had created a competitive environment for market share among providers. In fact, Newark was noted as the 3rd highest rated district in the recent Brookings Education Choice and Competition Index (ECCI). Newark has received an "A-" grade (#3 in the ranking behind Orleans Parish, LA and NYC) for its range of choices for schoolchildren.

(RCSa70).

While NPS touted the value of school choice, NPS must pro-actively plan for the financial pressures commensurate with greater charter school enrollment. (RCSa70). NPS acknowledges that it engages in a pattern of "overspending." NPS attributes overspending to costs of salaries and benefits²⁵ 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).

²⁵ Two of ELC's current board trustees are former and current Executive Directors of the New Jersey Education Association. See <http://www.edlawcenter.org/about/board-staff.html>

As to NPS's declining fund balance in 2015, "[t]here is a direct correlation between the decline in the district's reserve funds and overspending for employee salaries and benefits. The overspending is mainly attributed to the rising costs the Employee without Placement Sites Pool ("EWPS") . . . and other compensation such as per diem employees." (RCSa74). The EWPS personnel are not placed in a school position due to their performance not warranting a principal assignment.²⁶ NPS had two recommendations to address overspending, to "implement internal controls" and "strengthen Budget to Actual Reporting." (RCSa73).

Charter Schools receive less than 90 percent of NPS per student funding for Newark resident students. The Charter School Program Act provides that funding shall be at least "90 percent of the sum of the budget year equalization aid per pupil and the prebudget year general fund tax levy per pupil inflated by the CPI rate most recent to the calculation." *N.J.S.A. 18A:36A-12(b)*. In fact, the Charter Schools receive less than 90 percent because their share is taken only from certain funding sources. The Charter Schools do not receive any funds for Adjustment Aid, Additional Adjustment Aid, Per Pupil Growth Aid, PARCC Readiness Aid, or Transportation Aid, as does NPS. (RCSa236).

Even according to ELC projected budget figures (Ab17), after the subject enrollment expansion is implemented through the 2018-2019 school year, NPS will very likely have a general fund balance (\$497,017,992,86 (Ab17)) that is greater than that the next highest spending school district, Jersey City District (\$418,471,290-- 2016-2017 school year.)²⁷

²⁶ The then State District Superintendent stated that "placing teachers in classrooms if they are rated ineffective or have not been selected by school leaders would have a catastrophic impact on student achievement and the district's ability to be on the path to excellence and retaining families." (RCSa75).

²⁷ <http://www.state.nj.us/education/stateaid/1617/>

LEGAL ARGUMENT

I. ELC DOES NOT HAVE STANDING TO BRING THIS APPEAL BECAUSE IT LACKS A STATUTORY BASIS AND IS CONFLICTED IN REPRESENTING BOTH NPS AND CHARTER SCHOOL STUDENTS

The Charter School Program Act of 1995 (the "Act") and its implementing regulations do not permit a representative party to bring a challenge to a commissioner's charter approval decision. See *N.J.S.A. 18A:36A-4d* ("A local board of education or a charter school applicant may appeal the decision of the commissioner to the Appellate Division of the Superior Court.") Per the statutory construction principle of *expressio unius*, by specifying the parties who can appeal charter decisions, the Legislature intended to preclude other parties from doing so. See *Gabel v. Manetto*, 177 N.J. Super. 460, 464 (App. Div. 1981) ("An affirmative expression ordinarily implies a negation of any other alternative. *Expressio unius est exclusio alterius.*") (internal citations omitted) certif. denied, 91 N.J. 270 (1982).

Here, NPS has not challenged the approvals, never mind allege that the approvals will interfere with its provision of a thorough and efficient ("T&E") education to its students. In essence, ELC is purportedly challenging the approval on NPS's behalf, relying on the same basis as in *Abbott v. Burke* cases. Because it lacks authority under the Act to do so, it lacks standing.

Beyond its lack of statutory basis to bring this appeal, ELC cannot bring this appeal because its representation of NPS students is adverse to the Charter Schools' students. Unlike in the *Abbott v. Burke* cases, Newark children will not be uniformly impacted by the outcome of this appeal should ELC prevail. The children who attend or will attend the seven charter schools in this appeal are also *Abbott v. Burke* school children. ELC has effectively chosen to represent only those school-age children who attend NPS. Indeed, by trying to thwart enrollment growth

of charter schools, ELC is specifically trying to diminish educational opportunities available to prospective and existing Newark charter school students.

ELC's conflict extends to its counsel. *R.P.C. 1.7(a)* states, "... a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer."

In an appeal purportedly brought on behalf of poor children in Newark, ELC devotes strikingly little attention to the educational best interest of the Charter School students, even though it purports to bring this appeal on their behalf. This conflict outweighs this state's otherwise liberal standing requirements.

Representational standing is not absolute. "Although there is no express language in New Jersey's Constitution similar to its federal counterpart which confines the exercise of our judicial power to actual cases and controversies, *compare U.S. Const.*, Art. III, § 2, with *N.J. Const.*, Art. VI, § I, this Court has long held that it will not render advisory opinions or function in the abstract. *Crescent Pk. Tenants Assoc. v. Realty Eq. Corp. of N.Y.*, 58 N.J.98, 107 (1971). Nor will it entertain proceedings by litigants who are mere intermeddlers, interlopers or strangers to the dispute." *Matter of Ass'n of Trial Lawyers of Am.*, 228 N.J. Super. 180, 183-84 (App. Div. 1988) cert. denied, 113 N.J. 660 (1988) (internal citations omitted).

In *Ass'n of Trial Lawyers of Am.*, a challenge brought by an association of attorneys to the New Jersey Products Liability Act, this Court ruled that that the association did not have standing

to allege loss of fees resulting from “an amorphous and presently unsubstantiated fear that the number and value of product liability claims may diminish.” *Id.* at 187. That representational interest was “too ethereal to justify judicial recognition and acknowledgement.” *Id.* at 187; *see also, Borough of Seaside Park v. Commissioner of New Jersey Dept. of Educ.* 432 N.J. Super. 167 (App. Div. 2013) (finding that a local board of education and individual taxpayers lacked standing to seek dissolution of a regional school district); *G.H. v. Township of Galloway*, 199 N.J. 135 (2009) (holding that hypothetical variations of an existing ordinance were considered impermissible abstract questions or advisory opinions).

Here, the representational interests of ELC are in conflict. Representational standing has been denied due to conflicts of interest in other courts and would be appropriate here. In *Polaroid Corp. v. Disney*, 862 F.2d 987 (3rd Cir. 1988), the Court acknowledged that “[a]lthough an association may rely on the standing of its members to assert standing for itself by showing that only one of its members has the type of redressable injury that would give it standing to sue individually, associational standing has never been granted in the presence of serious conflicts of interest either among the members of an association or between an association and its members.” *Id.* at 999, citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975). In *Polaroid*, a target corporation did not have standing to assert the interests of its minority shareholders in the case of a hostile takeover. *See also Southwest Suburban Bd. of Realtors v. Beverly Area Planning Assoc.*, 830 F.2d 1374 (7th Cir. 1987) (finding a serious conflict of interest when a realtor association sued certain of its members on behalf of other members).

Likewise here, there exists “serious conflicts of interests” between students who will have opportunities to attend charter schools selected by their parents per the enrollment expansions,

and ELC who is advocating the deprivation of those opportunities. Because ELC is conflicted, it lacks standing to bring this appeal.

II. ELC CANNOT SATISFY ITS BURDEN TO DEMONSTRATE THAT THE CHARTER SCHOOLS' RENEWALS AND AMENDMENTS WERE ARBITRARY, CAPRICIOUS OR UNREASONABLE

A. STANDARD OF REVIEW

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." *Dennery 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.") This is not an action to enforce a right over a remedial measure ordered in *Abbott v. Burke*. ELC bears the burden of proof that the Commissioner acted arbitrarily.

Since enactment of the Act, no court has reversed a Commissioner decision on a charter application, renewal or amendment. This court has noted that 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 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*, 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).

Three inquiries inform the court: (1) whether the agency’s action violates express or implied legislative policies; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably be made on a showing of the relevant factors. *In re Proposed Quest Acad. Charter Sch. of Montclair Founder Grp.*, 216 N.J. at 385 (2013) (internal citation omitted).

Here, the Commissioner’s granting of the charter renewal and amendment applications is surely consistent with the Act’s policies. The Legislature found that it is in the public interest to expand the operations of charter schools:

The Legislature finds and declares that the establishment of charter schools as part of this State’s program of public education can assist in promoting comprehensive educational reform by providing a mechanism for the implementation of a variety of educational approaches which may not be available in the traditional public school classroom. Specifically, charter schools offer the potential to improve pupil learning; increase for students and parents the educational choices available when selecting the learning environment which they feel may be the most appropriate; encourage the use of different and innovative learning methods;

establish a new form of accountability for schools; require the measurement of learning outcomes; make the school the unit for educational improvement; and establish new professional opportunities for teachers.

The Legislature further finds that the establishment of a charter school program is in the best interests of the students of this State and it is therefore the public policy of the State to encourage and facilitate the development of charter schools.

N.J.S.A. 18A:36A-2 (emphasis added). As for the “educational variety” goal, TEAM implements a KIPP managed unique college-ready focused school culture, enforces high expectations and utilizes data driven instruction. (539a). North Star utilizes a *Great Habits, Great Readers* reading model. (459a.)

As for “pupil learning” improvement and “measurement of learning outcomes,” a generation ago Newark children’s education interests were shamefully underserved. Today the Charter Schools students are outperforming students in wealthier communities. TEAM and North Star students outperform a majority of New Jersey school districts as measured by standardized tests. Such tests are what is used by courts to assess whether a thorough and efficient education is being conferred. *Abbott ex rel. Abbott v. Burke*, 199 N.J. 140, 184 (2009), (“*Abbott XX*”). As for “accountability,” unlike NPS, the Charter Schools are not assured continued existence. They can be closed, and, indeed, just this year, 3 Newark charter schools were closed.

The Charter Schools also subject to the “Performance Framework” which assesses clear metrics of charters in the areas of student performance, organizational capacity, school culture and climate, board governance, access and equity standards, among other areas. The Framework “provides the basis upon which the [Commissioner] will decide whether to renew the School’s

charter at the end of the Charter term.” (RCSa283). Traditional resident districts notably are not subject to such standards.

As for “new professional opportunities” for teachers, ELC ignores the effect on charter school hiring associated with charter school expansion. Rather than work in a school workplace subject to a uniform city-wide collective bargaining agreement, the Charter Schools offer educators a variety of professional opportunities in distinct learning settings.

As for the presence of substantial evidence to support the findings, ELC advances an “aggregate effect” narrative while ignoring the undeniable merit of each of the Charter Schools’ applications. As noted above, ELC does not challenge the applications individually. It does not even address the education programs being provided to thousands of charter school students. For example, it does not dispute that North Star and TEAM students are outperforming those from far wealthier communities, or that all the Charter Schools are outperforming NPS.

In arguing that there is “no support in the record for the Commissioner’s decisions to approve the charter expansions,” (Ab38-40) ELC does not address the Performance Framework standards used by the Commissioner in deciding the applications. ELC simply disagrees with the Commissioner’s educational judgments, which is no basis to reverse them. Indeed much of the record cited for its arguments is merely its prior assertions to the Commissioner and the report of a dedicated anti-charter school partisan. No reasonable person could find that there is “no support” in the record for the Commissioner to grant the applications.

ELC fails in its “aggregate effect” argument by not drilling down to student educational outcomes. NPS, while experiencing challenges with monies following the students at charter schools (as contemplated by the Legislature under the Act), acknowledges that the charter

schools' presence is advancing the overall water level of public education in Newark. To ELC, a thorough and efficient education results in striking the right funding formula. But meeting the T&E obligations is judged by improving educational outcomes for children in achieving the core curriculum content standards. *Abbott XX, supra* at 184.

ELC cannot demonstrate the Commissioner's approvals were arbitrary, capricious or unreasonable. Not being able to challenge the merits of each of the Charter Schools' application approvals, ELC resorts to making an aggregate effect argument which relies heavily on erroneous and misleading data to cast the approvals in a discriminatory and financially destructive light.

B. The Charter Schools Receive A Fraction of Per Student Funding Relative to NPS

A critical weakness in ELC's financial arguments is that the Charter Schools students are outperforming NPS with less funding and its funding is derivative of NPS funding. As goes NPS funding so goes the Charter Schools' funding, albeit at a lower percentage.

The Supreme Court "has ruled that the poorest and most vulnerable children of this State, those mostly living in financially strapped urban areas, have a right to a constitutionally adequate education." *Abbott v. Burke*, 206 N.J. 332, 469 (2011) ("*Abbott XXI*"), citing *Abbott XX, supra*, 199 N.J. at 144; *Robinson v. Cahill*, 62 N.J. 473, 481 (1973) ("*Robinson I*"). The Charter Schools students are among the "poorest and most vulnerable" referenced in *Abbott XXI*. "School funding is a matter of enormous complexity and importance." *Abbott XXI* at 469. The Supreme Court acknowledge that "how money is spent is much more important than how much money is spent." *Abbott XXI* at 463.

In *Abbott XX, supra*, at 163, the Supreme Court upheld the "parity" funding alternative under the School Funding Reform Act of 2008 ("SFRA") as sufficient to achieve a through and

efficient education. In *Abbott XXI*, supra, at 421, the Supreme Court found that the State improperly withheld SFRA funding to poor districts and directed that SFRA funding be restored.

ELC is attempting to inject a new concept to the *Abbott v. Burke* line of cases – that the money-following-the-charter student concept in the Act does not pass constitutional scrutiny if charter school enrollment expand to a degree ELC thinks excessive. Given the high achievement levels of the Charter Schools students, T&E clearly being conferred on them.

ELC argues that T&E is not being conferred on NPS students. ELC rests its entire challenge on its T&E argument, as the Act does not require an analysis of the financial impact on a resident district absent a threat to the T&E. *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 N.J. 316, 334-336 (2000).

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

ELC emphasizes the reductions in the NPS total funds to spend, without accounting for the reduction in costs commensurate with reduced enrollment of students attending the Charter Schools. Even according to ELC, from the 2008-2009 and 2015-2016 school years, NPS payments to charter schools increased by 27% of the total NPS budget. NPS reduced expenditures by only 20 percent. (Ab26).

It is incumbent upon ELC to “demonstrate specifically how the [NPS] would be precluded from providing T&E” with specificity. *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). Like in *In re Red Bank Charter Sch.*, ELC has failed to demonstrate how the budget cuts would impair T&E efforts other than conclusory assertions premised on expenditure reductions. *Id.* at 483.

ELC cites employee lay-offs at NPS and other cost reductions as if it is intrinsically bad, even when NPS is educating thousands less students by their enrolment in the Charter Schools. The Act clearly expresses a paramount legislative priority on student outcomes, not job protection in a resident district. Indeed, NPS acknowledge that it engages in a pattern of “overspending” in salaries and benefits and needs to improve internal controls.

When NPS provided input on the applications, it was premised on the originally requested increased maximum enrollments, which was 1516 less than the amount ultimately approved. NPS’s budget impact assessment also presumed the continued existence of three charter schools which were closed this year. It offered alternative outcomes for certain charter applications. For example, for Marion P. Thomas Charter School’s enrollment expansion request, NPS recommend a partial approval. Instead the Commissioner denied the expansion application entirely. (587a). NPS’s input evidenced a thoughtful consideration by the Commissioner in weighing the applications against the budget impact on NPS.

To portray an excessive NPS budget impact, ELC uses an apple to bananas comparison between actual charter enrollment and approved maximum charter school enrollment. ELC

presumes without explanation that the charter schools will reach maximum approved enrollment even though they do not currently reach that.

All students in Newark are unquestionably receiving a better public education than they were at the time of the Act's enactment and State takeover of NPS. The NPS students are also benefiting from the presence of Charter Schools as part of the public school offerings designed by the Legislature to confer T&E on students. Under the cloak of T&E assertions, they are trying to revisit the policy arguments which were settled in passing the Act.

"[U]substantiated, generalized protests" over charter application approves are as "insufficient to prevent renewal, as they were to prevent the initial approval." *Charter Sch. Application of Englewood on the Palisades*, 164 N.J. at 334. Expanding charter school enrollment in Newark will not deprive NPS students T&E. Whether the overall funding dedicated to Newark children under SFRA, for its NPS and charter school students, is sufficient, is a question answered in *Abbott XX*. Charter school funding is a fraction of that formula. Surely the presence and growth of charter schools is not denying T&E to anyone. Instead, their presence directly confers T&E on its students and, through its inclusion in the public school offerings in Newark, assists in the conferring of T&E to NPS students.

C. ELC'S Assertions of Charter School Discrimination Are Without Factual or Legal Basis

ELC argues that the Charter Schools' expanded enrollment would exacerbate discrimination and segregation based on disability, English language proficiency and race. ELC's arguments lack merit.

As to charter school student enrollment, the Act provides:

A charter school shall be opened to all students on a space available basis and shall not discriminate in its admission policies or practices based on 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 . . .

N.J.S.A. 18A:36A-7.

The Act permits sibling preference in enrollment. It further requires:

The admission policy of the charter school shall, to the maximum extent practicable, seek the enrollment of a cross section of the community's school age population including racial and academic factors.

N.J.S.A. 18A:36A-8e (emphasis added.) The Act does not mandate identical student demographics between the resident district and charter school.

ELC asserts that "it is glaringly evident that the enrollment and admission practices of these charter school has neither prevented nor ameliorated, but rather replicated and worsened, the instance pattern of racial segregation endured by NPS students." (Ab35-36). But ELC does not address or identify the actual enrollment practices.

NPS and charter school students are enrolled via a universal enrollment system. Its objective is transparency, choice, equity in serving "high-needs" students, equity, access, community, ease and reliability. (RCSa572). The primary criteria for school selection is parental rankings of choices. (RCSa574). It empowers parents to determine their children's education programs amongst a variety of school models. The higher the student needs, the greater the chance of students getting the school their parents selected. Thus, the universal enrollment systems go beyond the Act's requirements to "seek" a cross section of student enrollment. It

tips the scale in favor of parents of high needs students to “boost” the chances of enrollment in the school of choice. (RCSa575).

The Charter Schools who participate in universal enrollment make up 88 percent of the approved enrollment at issue here.²⁸ ELC ignores the universal enrollment systems, and lodges the reckless allegation that the “higher cost of educating students with disabilities and ELLs may well be the reason the charter schools enroll far few students with disability and almost no ELLS.” (Ab33, footnote 11). That is not only false, the universal enrollment systems give parents of such students’ preferences for the charter school of their choice.

1. Alleged Discrimination Based on Race and English Proficiency

The Commissioner must assess the racial impact that a charter school applicant will have on the district of residence in which the charter school will operate. *Charter Sch. Application of Englewood on the Palisades*, 164 N.J. at 329. The court has expressed “no view on the formality or structure of that analysis except to state that it must take place before final approval is granted to a charter school applicant.” *Id.*

We otherwise leave the form and structure of that analysis to the Commissioner and State Board to determine. 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. The statutory authorization to approve a charter school does not affect the Commissioner's constitutional obligation to prevent segregation in the public schools. Similarly, there is a need to consider the impact a charter school has on other school districts if school districts outside the district of residence provide pupils to fill charter school openings not filled by pupils from within the charter school's district of residence. In performing this evaluation, we note that the Commissioner already requires ongoing and

²⁸ New Horizons and Robert Treat do not participate in universal enrollment.

regular assessments of racial balance in the public schools in the normal course of his supervision.

Id. at 329, 330.

ELC ignores the universal enrollment system. Instead, it presents misleading data. Newark population's ethnic 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%). The North and East Wards have very few charter schools located there. In the 2015-2016 school year, 71.2% of NPS' LEP/ELL students attended schools in the North and East Wards.

The correlation of neighborhoods to student make-up is consistent across NPS and charter schools. All NPS schools with a Hispanic enrollment of less than 20% reported ELL enrollment less than the NPS average with some less than 1 percent. The same is true for charter schools.

Moreover, school district ELL reporting has an inconsistent 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 them at all. ELL distinctions, unlike education disabilities, are frequently phased-out when the students' progress in school. 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.

As to discrimination based on race, the courts have long held the profound commitment of government to rid public schools of racial discrimination. In *In re Red Bank Charter School*, 367 N.J. Super 462, this court harmonized "the public policy of this State to encourage and facilitate

the development of charter school ... with our strong policy against racial discrimination and segregation the public schools." *Id.* at 468.

New Jersey abhors discrimination and segregation in our public schools. Our policy prohibiting segregation is strong and rooted in our constitution. No person may be segregated or discriminated against in the public schools because of that person's "religious principles, race, color, ancestry or national origin." NJ Const. art. 1, pgh 5. Whether due to an official action, or simply segregation in fact, our public policy applies with equal force against the continuation of segregation in our schools. Therefore, the Commissioner must ensure "that no student is discriminated against or subjected to segregation in our public schools.

Id. at 478 (internal citations omitted). The *Red Bank Charter School* case concerned allegations of intentional discrimination conduct by the charter school after enrollment, such as requesting or pressuring minority students' to withdraw from school. There the charter school population was alleged to "become whiter as it progresses towards graduation." *Id.* at 479. The Appellate Division upheld the charter renewal, but remanded the matter to the Commissioner for further proceedings on the allegations of intentional discrimination.²⁹

Here, ELC does not and cannot cite to any evidence of intentional discriminatory conduct by the Charter Schools. Its *de facto* discrimination allegations are premised entirely on a statistical analysis devoid of consideration of the enrollment process itself and parental neighborhood preferences.

²⁹ No findings against the Red Bank Charter School were ever made. In 2007 the school and the local district agreed to a consent order addressing enrollment, special education placement, governance and student transfer practices.

ELC fails to mention the apparent implication of its arguments, that parents should have less choice in selecting schools and be compelled to send their children outside their neighborhood to achieve a “balance” of demographics ELC finds acceptable. ELC cites no legal authority to support that remedy in a district with universal enrollment. Indeed, to achieve the “balance” ELC seeks, the Charter Schools should expand into the North and East wards. Just as wealthier parents can choose which community to reside for their children’s schooling, Newark parents should also have the empowerment of school choice.

Beyond stopping charter school enrollment growth, the only suggestion offered by ELC to address the alleged discrimination is for the Commissioner to authorize Newark charter schools to operate as a region of residence, wherein students from outside Newark can attend Newark charter schools. This is a peculiar assertion by an organization purportedly acting on behalf of *Abbott v. Burke* children. Opening seats of high achieving charter schools to students from wealthier towns outside Newark would crowd out some Newark residents from those schools. It would result in dedicating Newark community based facilities, resources and leadership to serving kids from outside Newark. It would also detract if not cripple the universal enrollment system which grants preferences to high needs students who reside in Newark. ELC argues a demographic balance challenge but does not offer a viable solution.

2. Alleged Discrimination Based on Disability

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 program for all its disabled and non-disabled students. For parents of disabled students who select charter schools, each charter school operates as that child’s local education

agency. *N.J.A.C. 6A:11-4.1*. Even if the charter school cannot meet a disabled student's needs, the charter school is still responsible for formulating a program for the student, with commensurate costs to the charter school, the extent to which dependent on whether the out of school program is in a public or private school. Charter schools cannot refuse enrollment to any child based on disability. *N.J.S.A. 18A:36A-11*.

The universal enrollment system gives parents of disabled students preferences in selecting charter schools. Some parents of students with severe disabilities may indeed select NPS 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, NPS's Technology High School has a specialized auditory impaired program for deaf and hard of hearing students.³⁰ Even after the enrollment expansions, the size of NPS's resources far exceed any charter school in Newark. The program costs associated with low incident, severely disabled, students whose parents do not opt for a charter school placement, are accounted for in the charter school funding formula – giving NPS more than 10 percent of funding for all Newark children attending charter schools.

ELC reports NPS's percentage of disabled students as 17 percent. That figure has changed year to year and was 13 percent in 2015. NPS admits that it has over-classified students as disabled who did not warrant a classification. NPS itself has schools with comparable special education student percentage make up as the Charter Schools. Most NPS schools have a percentage that is less than the NPS aggregate average.

ELC's allegations of discrimination against the Charter Schools is without factual or legal basis.

³⁰ <http://www.nps.k12.nj.us/tec/academics/special-needs/auditorily-impaired/>

D. The Commissioner Decision Was Supported By a Proper Record

ELC asserts that there should have been an evidentiary hearing over the 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, statics, 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 less for a charter renewal or amendment decisions:

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 last year 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 and is a transparent attempt to chill the growth of charter schools.

ELC asserts that the Commissioner "stood moot, not even acknowledging, much less analyzing," ELC's T&E concerns about the Charter Schools' enrollment practices. (Ab39). ELC cites the *Quest Acad. Charter Sch. of Montclair Founders Grp.* decision to argue that more process was due. But in that case, the appellant was a charter applicant denied the ability to operate at all under an original charter application. The degree of process due that school was therefore greater.

The Commissioner is fully aware of and has approved the Newark universal enrollment system. The Commissioner requires annual reporting on enrollment practices. The Commissioner places contractual mandates on charter schools to practice equitable enrollment practices in its student enrollment. Not only is it untrue that the Commissioner ignored ELC's objection to charter school enrollment practices, the Commissioner continuously monitors those practices.

ELC has not satisfied its burden to demonstrate the Commissioner's decisions were arbitrary, capricious or unreasonable.

III. ELC'S CONTENTIONS ABOUT THE CHARTER SCHOOL FACILITY LOCATIONS CONTRADICT THIS COURT'S DECISION IN *EDUCATION LAW CENTER EX REL. BURKE V. NEW JERSEY STATE BD. OF EDUC.*

ELC argues that "the Commissioner violated the Act by approving charter expansions requiring multiple schools under one charter. . . . "[T]here is no direct support in the charter school law for allowing existing charters to operate multiple schools in different locations." (Ab

41). ELC is making a second run of trying to convince this court that multiple charter school locations are not permitted under the Act, after it lost in its appeal in *Education Law Center ex rel. Burke v. New Jersey State Bd. of Educ.*, 438 N.J. Super. 108 (App. Div. 2014).

In that case, ELC alleged that proposed regulations which authorized “satellite” campuses for an existing charter school violated the Act, as did the proposed regulations’ removing a prohibition against amending a charter school’s missions, goals or objectives. This court found that the State Board of Education had statutory authority to make these regulatory changes.

The court noted that it must “accord deference to administrative agency actions.” “That approach reflects the specialized expertise agencies possess to enact technical regulation and evaluate issues that rulemaking invites.” *Id.* at 116, citing *N.J. Ass’n of Sch. Adm’rs v. Schundler*, 211 N.J. 535, 549 (2012). “[T]he absence of an express statutory authorization in the enabling legislation will not preclude administrative agency action where, by reasonable implication, that action can be said to promote or advance the policies and findings that served as the driving force for the enactment of the legislation.” *Id.* at 117 citing *N.J. State League of Municipalities v. Dept. of Community Affairs*, 158 N.J. 211, 223 (1999).

While the Act did not expressly authorize satellite charter school campuses, the courts “do not read the Act as requiring legislative action for every type of amendment to existing school charters that might have the effect of expanding the school's educational program.” *Education Law Center ex rel. Burke* at 119. Permitting the addition of a new building for purposes of expanding a successful charter school is consistent with these legislative purposes of the Act. *Education Law Center ex rel. Burke* at 120.

ELC's arguments are premised on the erroneous assertion that the subject applications would be the only level of review by the Commissioner of a prospective charter school's facility locations. The regulations require a charter school to apply for amendment to its charter to open a satellite campus. *N.J.A.C. 6A:11-2.6(a)*. The Charter Agreement also requires that the charter school obtain prior Commissioner approval before locating at a site other than the one identified in its charter.

The Supreme Court has already approved a multiple step process for the commissioner to approve school facilities. *Charter Sch. Application of Englewood on the Palisades* at 337. There is difficulty with procuring facility space when a charter application outcome is not known several months away from occupancy. Using a multi-step approval process to approve facility locations is "practical and reasonable." and "does not prejudice any legitimate objection to the charter school application." *Charter Sch. Application of Englewood on the Palisades* at 337, 338.

IV. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE GOVERNMENT RECORDS IN THE CHARTER SCHOOLS' APPENDIX

Pursuant to *N.J.R.E. 201(b)*, the Court may take judicial notice of certain facts. "Facts which may be judicially noticed include: (1) such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute, (2) such facts as are so generally known or are of such common notoriety within the area pertinent to the event that they cannot reasonably be the subject of dispute, (3) specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned, and (4) records of the court in which in the action is pending and of any other court of this state or federal court sitting for this

state.” The first three sections of the rule, applicable here, authorize judicial notice of facts that cannot reasonably be questioned or disputed and the records are widely known. *State v. Silva*, N.J. Super 270, 273 (App. Div. 2007).

This permissive grant of power is consistent with the existing discretionary prerogative of the appellate courts to exercise original jurisdiction where necessary to the complete determination of any matter on review. *State v. Flowers*, 328 N.J. Super 205, 215 (App. Div. 2000)(internal citations omitted) (granting judicial notice of Newark’s stolen vehicle problem).

Here, “[t]he commissioner shall have supervision of all schools of the state receiving support or aid from state appropriations . . . and he shall enforce all rules prescribed by the state board.” *N.J.S.A. 18A:4-23*. All the records in the Charter Schools are records of public bodies and provide the general context in which the Commissioner approved the subject applications. For example, in TEAM’s site visit summary, the DOE referenced TEAM’s participation in universal enrollment, records about which are in the Charter Schools’ appendix. Some of the records are included in the SICR but not affixed to ELC’s appendix. Unlike in *Greater Newark Charter Sch. v. NJ Dep’t of Educ.* N.J. Super Unpub. LEXIS 88 (App. Div. 2016), records in the Charter Schools’ appendix beyond the SICR are directly relevant to the decision made by the Commissioner, particularly given the broad aggregate effect assertions made by ELC.

Accordingly, the Court should take judicial notice of the records in the Charter Schools’ appendix which have not been identified in the SICR.

CONCLUSION

For the foregoing reasons, the appeal of 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.

Respectfully submitted,
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By: 
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