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November 6, 2020

VIA EMAIL AND REGULAR MAIL

Heather Joy Baker, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
25 Market Street
PO Box 097
Trenton, NJ 08625

Re: In Re Renewal Application of Team Academy Charter
School, et al.
Docket No. 083104

Dear Ms. Baker:

This firm represents Petitioner, Education Law Center o/b/o Abbott v. Burke School Children in the above-referenced matter.

Enclosed please find an original and nine (9) copies of Petitioner's Brief in Opposition to the Brief and Appendix of *Amicus Curiae* New Jersey Public Charter Schools Association and New Jersey Children's Foundation, as well as an original and nine (9) copies of the Certification of Service. Kindly file the originals and return time-stamped copies to us in the enclosed self-addressed, stamped envelope.

Thank you for your attention to this matter.

Respectfully submitted,

/s/ Michael S. Stein
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Enc.

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Re: In Re Renewal Application of Team Academy Charter
School, et al.
Docket No. 083104

On Petition for Certification from a Judgment of the
Superior Court, Appellate Division

Dear Ms. Baker:

Please accept this Letter Brief in lieu of a formal brief on behalf of Petitioner/Appellant Education Law Center ("ELC") in Opposition to the Brief and Appendix of *Amicus Curiae* New Jersey Public Charter Schools Association and New Jersey Children's Foundation ("Charter *Amici*") in the above-captioned matter.

Charter *Amici* assert that ELC - and the *Amici* in support of ELC's Petition - want this Court "to substitute their opinions and judgments on complex matters of educational policy for those of the Commissioner of Education." Charter *Amici* Br. at 1. Not so. As is abundantly clear, ELC's Petition focuses squarely on

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the Respondent Commissioner of Education's ("Commissioner" or "State") failure to fulfill the affirmative constitutional obligation to evaluate the impacts on segregation and funding of an increase of 8500 students in seven charter schools on the Newark Public Schools ("NPS"), an Abbott district. That failure is not a matter of policy preferences surrounding the existence of the charter school program, but rather of the State's compliance with the constitutional directives established by this Court's seminal ruling in In Re Grant of Charter School Application of Englewood on Palisades Charter School, 164 N.J. 316 (2000) ("Palisades Charter"). Charter *Amici*'s contentions are without merit.

LEGAL ARGUMENT

I. THE STATE'S CONSTITUTIONAL FAILURE TO EVALUATE THE SEGREGATIVE EFFECTS AND FUNDING LOSS ON THE CHARTER SCHOOLS' EXPANSION IS THE SOLE ISSUE BEFORE THIS COURT

Throughout their Brief, the Charter *Amici* raise a litany of grievances against those whom they perceive as "anti-charter interests," including ELC and NPS. See, e.g., Charter *Amici* Br. at 16 (characterizing ELC's evidentiary submission on the charter expansions as "really objections" to the "charter school model"

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that "br[eaks] the public school educational monopoly" of the "traditional district model"). They also make the broad claim that New Jersey's charter school "experiment" has "proven highly successful and desirable to parents," casting aspersions on "adults" whom they accuse of having "waged a war" of "baseless objections" to program implementation. Charter *Amici* Br. at 17. But in the Charter School Program Act ("CSPA"), N.J.S.A. 18A:36A-1 to 18, the Legislature authorized the inclusion of charter schools "as part of this State's program of public education" to promote options, innovations and improvements for the benefit of all students within their district of residence. N.J.S.A. 18A:36A-2. The CSPA was "not an invitation to retreat from the hard-won progress that our state had made towards guaranteeing the children in Abbott districts the promise of educational opportunity." Abbott v. Burke, 206 N.J. 332, 355 (2011) ("Abbott XXI"). And this is the reason why Palisades Charter "superimposes" upon the CSPA's implementation the constitutional obligation to ensure a thorough and efficient education to all students by preventing segregation and funding loss impacts. 164 N.J. at 328.

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Like the State and Charter School Respondents, the Charter *Amici* neither address, nor dispute, the Commissioner's failure to evaluate the detailed, substantive and unrefuted evidence submitted by ELC of the impact on student segregation and funding loss of expanding Newark charter enrollment by 8500 students, as the Commissioner is constitutionally obligated to do under Palisades Charter. Instead, the Charter *Amici* rely on many of the same justifications to sanction the Commissioner's failings as made by the State and Charter School Respondents before this Court. See, e.g., Charter *Amici* Br. at 22 (reasserting the erroneous contention that ELC bears the burden of proving the loss of funding from the charter expansion threatens a constitutional education to NPS students). ELC, in its Petition and Reply Brief, has already addressed those contentions and will not repeat them here. The Charter *Amici*, however, present several new arguments, all of which are equally devoid of merit.

First, the Charter *Amici* assert that ELC's unrefuted evidence of the 9% to 18% disparity in the enrollment of students

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with disabilities in Newark charter schools and NPS, Aa74¹, is attributable to NPS' legal responsibility for out-of-district placements of students with a severe disability classification. Charter *Amici* Br. at 31-33. Yet they do not - nor can they - cite anything in the record before the Commissioner for the proposition that out-of-district placements are the source of this glaring disparity. Further, the Charter *Amici* ignore ELC's evidence that the charter schools in Newark and six other Abbott districts enroll a higher percentage of students with mild and least costly speech-language and specific learning disability classifications than the Abbott districts do. Aa23, Figure 17.

Second, the Charter *Amici* contend that the disparities in the enrollment of English language learner ("ELL") students - 1% to 9%, Aa67² - in Newark charter schools and NPS is because students in a charter "serving a predominately Latinx student body" are "more likely to be well served by the charter school's

¹ An "internal analysis" proffered by the Charter *Amici* shows a 10% to 16% disparity in the 2018-19 enrollments of students with disabilities between Newark charters and NPS. Charter *Amici* Br. at 30; Charter *Amici* App. at 50.

² The Charter *Amici* indicate that the disparity in ELL enrollments is 1% to 12% between Newark charters and NPS in 2018-19. Charter *Amici* Br. at 30; Charter *Amici* App. at 50.

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design" and, therefore, will not need "additional supports." Charter *Amici* Br. at 34. Again, there is no record evidence attributing the comparatively low ELL enrollments in the two "predominately" Latinx charter schools seeking to expand - less than 1% in Robert Treat, Aa322, and 6% in M.L. Varisco, Aa111 - to the schools' "design."

Third, the Charter *Amici* excuse the Commissioner from the unconditional constitutional command to prevent segregation because the intense "racial isolation" in NPS "is largely the same today as it was before charter schools even existed" and, consequently, charter schools are not "causing segregation in the city." Charter *Amici* Br. at 26-27. But this is precisely why the failure to evaluate the effects on student segregation of a massive increase in charter enrollments in Newark is so egregious. There can be no question that the Commissioner's obligation to prevent segregation in the implementation of the charter school program - grounded in our Constitution's "abhorrence" of segregation - "is not tempered by the cause of segregation" and applies "with equal force" to segregation whether the result of official action or "in fact." Palisades

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Charter, 164 N.J. at 324. Given ELC's unrefuted showing that expanding charters would perpetuate the pernicious *de facto* racial segregation endured by generations of NPS students; would solidify the separation of Black and Latinx students in schools within NPS; and would continue the concentration of students with disabilities and ELLs in NPS schools, the Commissioner's failure to "confront" these insidious forms of segregation, "however caused," and use "the full panoply of his powers" to address them is inexcusable. Id. at 324, 329-30.

Fourth, the Charter *Amici* justify the Commissioner's failure to evaluate the impact of funding loss on NPS' ability to provide a thorough and efficient education by claiming the district is not "appropriately managing its funds" and is "profligate in its spending practices." Charter *Amici* Br. at 23-25 (citing media accounts of a new teacher contract and on employee classification and health benefits). Of course, the record before the Commissioner had no evidence to suggest NPS "manufacture[d] budget crises" or was engaged in "waste, fraud and abuse" of its fiscal resources. Charter *Amici* Br. at 23. The Charter *Amici* can offer nothing other than that the Commissioner "may be presumed

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to have been well aware of these types of factors" in his 2016 decision approving the 8500 increase in charter enrollment. Charter *Amici* Br. at 25.³

Fifth, the Charter *Amici* assert that the Commissioner's failure to apply a heightened standard in evaluating the funding impacts of the charter expansions on NPS as an Abbott district has been "borne out in practice" due to modest gains in performance on state assessments after the Commissioner's 2016 decision. Charter *Amici* Br. at 1-3. As the Charter *Amici* concede, even with these gains, there is "still has considerable room for improvement," as "the district remains among the lowest

³ The Charter *Amici*, like the State, rely heavily on the design of the formula in the School Funding Reform Act, N.J.S.A. 18A:7F-43 to 63 ("SFRA") - standing alone - as mitigating the fiscal impacts of expanding charters on the provision of a constitutional education to NPS students. Charter *Amici* Br. at 22; State Respondent's Brief in Opposition to *Amici Curiae*, at 14-19. What the Charter *Amici* and State ignore is ELC's evidence of the State's significant SFRA underfunding in NPS in 2016, Aa40, a condition that persists to this day. See ELC, SFRA District Profile, available at <https://edlawcenter.org/research/school-funding-data/sfra-district-profile.html> (showing the State shortfall in SFRA funding to NPS was nearly \$166 million or \$3140 per pupil, in 2019-20. See also ELC, Abbott Districts: School Funding Still Unconstitutional (March 2019), available at https://edlawcenter.org/assets/files/pdfs/publications/Abbott_Districts_School_Funding_.pdf.

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performing in the state.” Charter *Amici* Br. at 13; Charter *Amici* App. at 17. In any event, recent results on state assessments alone do not — and cannot — deliver the measures that lie at the heart of this Court’s historic efforts in the Abbott litigation: securing and maintaining the funding, resources, services and programs essential to remedy the profound constitutional deprivation endured for decades by NPS and other Abbott district students. See, e.g., Abbott v. Burke, 149 N.J. 145, 168 (“real improvement” in NPS “still depends on the sufficiency of educational resources” and a “variety” of other “factors needed for a sound education”). See also ELC Petition for Certification at 11-15 (arguing that magnitude of constitutional violation suffered by NPS and their Abbott district peers supports heightened scrutiny).⁴

Finally, the Charter *Amici* raise the specter of “thousands” of Newark students being “left educationally homeless” from an adverse ruling by this Court. Charter *Amici* Br. at 15. Yet ELC has neither requested, nor seeks, the closure of any Newark

⁴ This Court has long recognized the “special status” accorded to Abbott schoolchildren, Abbott XXI, 206 N.J. at 340, whose interests must always “remain prominent, paramount, and fully protected,” Abbott v. Burke, 153 N.J. 480, 528 (1998).

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charter school or the transfer of its students. Rather, ELC asks this Court to reverse the 2016 decision and remand to the Commissioner with instructions to reopen the record and conduct appropriate proceedings - including public hearings - in order to fulfill the State's "inviolable" constitutional obligation to evaluate and determine, under a heightened standard, the impacts on segregation and funding loss in NPS from this, and any further, charter expansion, and use the full range of the State's powers to address and ameliorate those impacts. Palisades Charter, 164 N.J. at 323; see also ELC Petition for Certification at 15, n. 6 (noting a more searching review should include "exploration in a more formalized" hearing and citing In Re Grant of Application of Red Bank Charter School, 367 N.J. Super. 462, 485 (App. Div.), certif. den. 180 N.J. 457 (2004)); ELC Petition for Certification at 20 (citing four additional charter expansion appeals involving NPS pending in the Appellate Division).

CONCLUSION

For the reasons set forth above, ELC respectfully requests that the Appellate Division decision be reversed and the matter of the charter expansions in Newark be remanded to the

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Commissioner for further proceedings consistent with the constitutional standards established by this Court in Palisades Charter.

Respectfully submitted,

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IN RE RENEWAL APPLICATION OF
TEAM ACADEMY CHARTER SCHOOL

IN RE RENEWAL APPLICATION OF
ROBERT TREAT ACADEMY CHARTER
SCHOOL

IN RE RENEWAL APPLICATION OF
NORTH STAR ACADEMY CHARTER
SCHOOL OF NEWARK

IN RE AMENDMENT REQUEST TO
INCREASE ENROLLMENT OF MARIA
L. VARISCO-ROGERS CHARTER
SCHOOL

IN RE AMENDMENT REQUEST TO
INCREASE ENROLLMENT OF
UNIVERSITY HEIGHTS CHARTER
SCHOOL

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

IN RE AMENDMENT REQUEST TO

SUPREME COURT OF NEW JERSEY
DOCKET NO. 083014

ON PETITION FOR
CERTIFICATION FROM A
FINAL JUDGMENT OF THE
SUPERIOR COURT OF NEW
JERSEY, APPELLATE
DIVISION DOCKET NOS.

A-3416-15T1
A-4384-15T1
A-4385-15T1
A-4386-15T1
A-4387-15T1
A-4388-15T1
A-4398-15T1

CIVIL ACTION

CERTIFICATION OF SERVICE

INCREASE ENROLLMENT OF NEW
HORIZONS COMMUNITY
CHARTER SCHOOL

BRENDAN M. WALSH, pursuant to Rule 1:5-3, hereby certifies:

1. I HEREBY CERTIFY that on November 6, 2020, an original and nine copies of Petitioner Education Law Center o/b/o Abbott v. Burke School Children's brief, cover letter and certification of service were served upon the following via e-mail and regular mail to:

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I certify that the foregoing statements made by me are true.

I am aware that if any of the foregoing statements made by me are willfully false I am subject to punishment.

Dated: November 6, 2020

s/ Brendan M. Walsh
Brendan M. Walsh