In re Renewal Application of TEAM Academy Charter School	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003416-15T1 (LEAD) Civil Action On Appeal From: Department of Education
In re Renewal Application of Robert Treat Academy Charter School	No. A-004384-15T (Consol.)
In re Renewal Application of North Star Academy Charter School of Newark	No. A-004385-15T1 (Consol.)
In re Amendment Request to Increase Enrollment of Maria L. Varisco Rogers Charter School	No. A-004386-15T1 (Consol.)

(caption continued on inside cover)

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In re Amendment Request to Increase Enrollment of Great Oaks Charter School	No. A-004388-15T1 (Consol.)
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PRELIMINARY STATEMENT

This appeal involves the applications of seven Newark charters to add another 8500 students in at least 10 remote facilities, which, when completed, will bring charter enrollment to over half of all Newark students. The appeal also involves specific evidence about the impact of the expansions on the loss of funding and student segregation in the Newark Public Schools ("NPS"). And the appeal challenges the unmistakable failure of the Commissioner of Education ("State") to evaluate those impacts as required by the Education Clause and the prohibition against segregation in the New Jersey Constitution.

Respondents wholly ignore the Commissioner's failure to perform his obligation to assess these constitutional impacts in approving the massive charter expansions. Instead, in an attempt to prevent this Court from resolving the merits, they erroneously argue Education Law Center ("ELC") lacks the right and standing to appeal on behalf of NPS students.

In asserting ELC lacks standing, the State fails to acknowledge that NPS is a State-operated district and, consequently, any appeal of the Commissioner's decisions to expand charter enrollments would necessitate the State challenging its own actions. In this untenable circumstance, ELC's assumption of its historic role in representing the Abbott v. Burke class of students is essential to advance and protect the constitutional right of NPS students to a thorough and efficient education implicated by the unprecedented expansion.

The central issue on this appeal is whether the State can, through the charter program, expand a separate system of schools when the cumulative effect is to unconstitutionally divert funding and intensify segregation in the district those schools were authorized to serve. Because the right of all students to a thorough and efficient education is inviolate, the Commissioner's decisions must be reversed.

POINT I

THE ACT DOES NOT BAR ELC'S APPEAL

Respondents assert that ELC cannot appeal the Newark expansion decisions under the Charter School Program Act, N.J.S.A. 18A:36A-1 to -18 ("Act"), because ELC and NPS students are neither a charter school applicant nor Newark's State District Superintendent. Brief of Respondent Commissioner of Education ("Db") at 14; Brief of Great Oaks Charter School, et al. ("Cb") at 33; Brief of Varisco Charter School ("Vb") at 11. As we explain, the Act does not preclude ELC from appealing the Commissioner's decisions.

First, while the Act confers appeal rights on Newark charter schools and the State District Superintendent, N.J.S.A. 18A:36A-4(d); N.J.A.C. 6A:11-2.5, it does not bar an appeal by a party who otherwise has standing to raise a claim. In re Grant of Charter to Merit Preparatory Charter Sch. of Newark, 435 N.J. Super. 273, 278-279 (App. Div. 2014), certif. denied 219 N.J. 627 (2014) ("Merit Prep"). In Merit Prep, this Court rejected the identical argument made here, i.e., that N.J.S.A. 18A:36A-

4(d) limits both a right of action and standing to appeal the grant of a charter when the appellant is neither the charter school nor a local school board. Id. This Court, analyzing well-accepted standing principles, determined that the New Jersey Education Association ("NJEA") had "standing to pursue [its] appeal." Id. at 279-80. See also Point II infra.

Second, ELC's appeal does not merely implicate the Newark charters' compliance with the Act's statutory and regulatory requirements or what the State describes as "ordinary discretionary decisions." Db22. Rather, ELC raises constitutional issues based on firmly-established precedent that the Commissioner, in evaluating the expansion applications, is obligated to ensure a thorough and efficient education and prevent segregation in NPS. It is clear that the constitution "superimposes obligations on the Commissioner when he performs his statutory responsibilities under the Charter School Act." In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch., 164 N.J. 316, 328-29 (2000) ("Palisades Charter") (emphasis added) (noting that the Act is "not discordant with [constitutional] obligation"); id. at 334 (Commissioner's obligation to "supervise" the provision of a constitutional system of education is "omnipresent"). The Court has also recognized that, in enacting statutes, the Legislature "is presumed to have full knowledge of," and is acting "consistently with, the constitution's requirements." Id. at 329 (citing Lomarch Corp. v. Mayor and Common Council of Englewood, 51 N.J.

108, 113 (1968)). Thus, the Legislature could not have intended the Act to bar NPS students from asserting their constitutional rights implicated by the Commissioner's charter expansion decisions.[1]

Finally, the State's reliance on R.J. Gaydos Insurance Agency, Inc. v. National Consumer Insurance Co., 168 N.J. 255 (2001), is misplaced. Db15 (arguing that courts are "reluctant" to "infer a statutory private right of action"). In Gaydos, the plaintiff, an insurance agent, was precluded from filing a wrongful termination claim under an insurance reform act because agents were not the intended beneficiaries of the statute. Id. at 279. In sharp contrast, the Act is expressly intended to benefit public school students, N.J.S.A. 18A:36A-2, as one means to advance their "inviolate" right to a "thorough and efficient system of education in our public schools." Palisades Charter, 164 N.J. at 323; see also Polaroid Corp. v. Disney, 862 F.2d 987, 993, 997 (3d Cir. 1988) (holding party still may have standing even where a private right of action is not evident).

In sum, the Act does not bar ELC, as the representative of NPS students, from seeking judicial resolution of the constitutional deficiencies in the Commissioner's decisions.

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[1] The State claims ELC was "uninvolved in the application process" before the Commissioner, Db16, but recognizes ELC submitted "specific objections" to the expansion applications in the administrative record below, Db6-7.

POINT II

ELC HAS STANDING TO APPEAL ON BEHALF OF NPS STUDENTS

Respondents argue that this Court should not reach the merits of the appeal because ELC "lacks standing" to challenge the Commissioner's decisions approving the Newark charter expansions. Db16; Cb37; Vb10, 25. As explained below, the well-established requirements for standing and the compelling issues at stake firmly support ELC's standing to pursue this appeal.

First, in New Jersey, standing is met when a plaintiff has "sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood . . . [of] suffer[ing] harm in the event of an unfavorable decision." In re Camden County, 170 N.J. 439, 449 (2002). In review of administrative agency actions, standing "belongs to all persons who are directly affected by and aggrieved as a result" of the action for which judicial review is sought. In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 87 (App. Div. 2004), certif. denied, 182 N.J. 630 (2005). The State concedes our courts take a "liberal view" on standing, Db17, and this includes review of administrative actions. In re Camden County, 170 N.J. at 448. ELC clearly has standing to appeal on behalf of NPS students whose rights to a constitutional education are directly implicated by the Commissioner's decisions.

Second, our courts have long recognized that organizations possess standing to bring suit to vindicate the common rights of

those whom they represent. Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 109 (1971); N. Haledon Fire Co. No. 1 v. Borough of N. Haledon, 425 N.J. Super. 615, 627 (App. Div. 2012) (citing In Re Association of Trial Lawyers of Am., 228 N.J. Super. 180, 186 (App. Div. 1988)) (confirming that an association has standing "in its own right or on behalf of its members"). As counsel for students in NPS and other Abbott districts in the Abbott v. Burke litigation, the Supreme Court has acknowledged ELC's role in ensuring State compliance with the measures ordered to remedy the constitutional violation in those districts. In Abbott v. Burke, 153 N.J. 480 (1998) ("Abbott V"), the Court underscored that it "remains cognizant of the interests of the parties, particularly those of plaintiffs who speak for and represent the at-risk children of the special needs districts." Id. at 527-28 (emphasis added). The Court also made clear that, in future matters involving the Abbott remedies, the "lessons of the history of the struggle to bring these children a thorough and efficient education render it essential that their interests remain prominent, paramount, and fully protected." Id. Thus, in numerous cases of State action affecting those remedies, ELC's standing to "speak for and represent" the interest of Abbott district students has never been questioned. See, e.g., Educ. Law Ctr. ex rel. Abbott v. N.J. Dep't of Educ., et al., 2012 WL 1080867, *9 n.2 (App. Div. Apr. 3, 2012) (the State does not contest ELC's standing "and we accept it"). See Ra1.

Third, Respondents assert ELC lacks standing as its challenge to the Newark charter expansions "pits" members of the Abbott class "against one another" because, according to the State, there are "two distinct groups" of NPS students: those "who wish" to attend charter schools "but cannot" and those "who do not wish" to do so. Db18-19; see also Cb34; Vb25-27. This assertion is flatly erroneous. The Abbott class consists of students in poorer urban "school districts," which includes NPS students. Abbott v. Burke, 100 N.J. 269, 277 n.1 (1985) ("Abbott I"). It does not include "students attending the Newark charter schools." Db18. Further, all NPS students, regardless of their wishes, have a direct and substantial interest in the State's provision of adequate funding for their schools and in ameliorating patterns of student segregation.[2] On this appeal, ELC is undertaking its pivotal role of representing NPS students, as Abbott class members, to vindicate their right to a constitutional education in the face of State action that will further reduce funding and intensify student segregation in their schools.

Fourth, if there is a conflict of interest on this appeal, it resides with the State itself. The State fails to acknowledge

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[2] Respondents make no mention of the obvious fact that Newark charter school students may -- and do -- return to NPS schools for various reasons and, therefore, have a direct interest in the provision of a constitutional education in those schools.

that NPS is not a typical district, but one under State operation, Ab5, n.2; Cb6, with a State District Superintendent employed by the State Board of Education, N.J.S.A. 18A:7A-35(a), and whose actions are subject to veto by the Commissioner, N.J.S.A. 18A:7A-49(c). The State, through the Commissioner, is also responsible for implementing the charter school program under the Act. Given that NPS students belong to the Abbott class and attend schools operated directly by the State -- which simultaneously makes decisions to open or expand charter schools in their district -- ELC's standing to represent their interest in the Commissioner's decisions is even more compelling. Palisades Charter, 164 N.J. at 334 (leaving the standard for review of decisions on charter school applications in Abbott districts "for another day"). Without ELC's representation, the interests of NPS students in receiving a constitutional education would be left in the indefensible position of the State having to decide whether to challenge its own action.

Finally, ELC raises on this appeal an issue of "great public interest" and, consequently, "any slight additional private interest will be sufficient to afford standing." Salorio v. Glaser, 82 N.J. 482, 491, cert. denied, 449 U.S. 874 (1980); see also People for Open Gov't v. Roberts, 397 N.J. Super. 502, 510 (App. Div. 2008); Booth v. Twp. Of Winslow, 193 N.J. Super. 637, 640 (App. Div. 1984) (holding that courts will resolve issues on the merits as long as question of standing is "at least debatable"). As this Court concluded in Merit Prep, the

"substantial public interest" raised by the Commissioner's approval of a charter school application was sufficient to confer standing on NJEA, the school teachers' union, despite NJEA's "slight private interest" in the outcome of the appeal. 435 N.J. Super. at 280. Surely, the threat of the cumulative impact of seven charter expansions, totaling 8500 students and over 10 new facilities, to further erode a constitutional education and increase student segregation is an issue of public interest requiring resolution by this Court.

At bottom, Respondents' standing argument is an attempt to preclude judicial review of the substantive issues raised by this appeal. That argument should be rejected outright.[3]

POINT III

THE COMMISSIONER DID NOT EVALUATE THE IMPACT OF THE CHARTER EXPANSIONS ON A THOROUGH AND EFFICIENT EDUCATION FOR NPS STUDENTS

Respondents assert the Commissioner's approval of a massive enrollment expansion in the seven Newark charter schools is "reasonable" and "supported by the record," characterizing the

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[3] M.L. Varisco also argues that the appeal of its expansion should be denied because the expansion is in effect. Vb18. It is well-settled, however, that a dispute is not moot if a party will still suffer "adverse consequences" from the decision. N.J. Div. of Youth & Family Servs. v. A.P., 408 N.J. Super. 252, 262 (App. Div. 2009), certif. denied, 201 N.J. 153 (2010); State v. McCabe, 201 N.J. 34, 44 (2010) (deciding issues of "significant public importance"); State v. Gartland, 149 N.J. 456, 464 (1997) (deciding issues "likely to recur"). Because ELC's constitutional challenge alleges the cumulative effects of the expansions on funding loss and student segregation will have a profound impact on NPS students in future years, the M.L. Varisco expansion remains ripe for review.

decisions as "evaluating" the applications against "the requirements and principles" of the Act and its implementing regulations. Db23, 24; Cb39; Vb32-33. What Respondents ignore -- and thereby confirm -- is the Commissioner's failure to fulfill his constitutional obligation to assess the specific evidence of severe impacts the expansions will have on a thorough and efficient education for NPS students. This failure is no mere "disagree[ment]" with "ELC's position on charter school enrollment expansion," Db28, but a profound constitutional violation requiring reversal of the expansion approvals.

As a threshold matter, the State argues that the Commissioner's decisions to dramatically expand charter enrollment in NPS further the Act's "policy giving the Commissioner broad authority to establish and grow the charter school system." Db25-26 (asserting the Act enables the Commissioner to "evaluate the changing demographics" of NPS and the "resulting demands" for "options" other than district schools); see also Cb38-39. This characterization of the Act's goal is simply unfounded. The Act authorizes the approval of charter schools on a school-by-school basis to promote innovative and alternative teaching and learning methods to meet the "complex and difficult" challenge of providing a "quality" public education to all public school students. Palisades Charter, supra, 164 N.J. at 319-20; N.J.S.A. 18A:36A-2 (designating schools as the "unit" of improvement). The State offers no support in the Act's language or history to suggest

the Legislature intended to delegate "broad authority" to the Commissioner to "grow" a "system" of charter schools in NPS, especially where that parallel "system" reduces funding and resources, segregates students, and undermines the provision of a constitutional education to all students. See Utley v. Bd. of Review, Dept. of Labor, 194 N.J. 534, 541 (2008) (holding that courts are "in no way bound by the agency's interpretation" of a statute (internal quotation omitted)).

A. The Commissioner Did Not Evaluate the Impact of Funding Loss

The State describes ELC as raising "speculative concerns" about the "financial impact" of the cumulative charter enrollment expansion on NPS. Db30, 32; see also Cb46. The State then asserts the Commissioner "took those financial concerns into account" and "found" that "they were not sufficient to justify denial of [the] applications." Db30. This contention is without merit.

First, ELC did not raise mere "concerns" about the impact of the charter expansions on the NPS budget. Rather, ELC submitted specific data, facts and research documenting the impact the loss of funding from the proposed expansions will have on NPS. ELC's submission included, inter alia, detailed evidence of NPS' recurring budget deficits due to the rapid increase in charter enrollments and presumptive payments to charter schools from 2008-09 to 2015-16; the deep cuts in essential classroom teachers, support staff and programs in NPS

schools over the same timeframe; and the dramatic reductions in expenditures for special education and bilingual education even as the concentration of those more costly-to-educate students intensified in NPS schools. Aa36, 41, 47-49. The evidence also documented the projected increases in presumptive charter payments over the next five years and the threat of this ongoing funding loss to a constitutional education for NPS students. Aa584-95.

As the administrative record makes clear, ELC's evidence of funding loss impacts can in no way be considered speculative concerns or "unsubstantiated, generalized protests." Palisades Charter, 164 N.J. at 336; In re Proposed Quest Academy Charter Sch. of Montclair Founders Group, 216 N.J. 370, 378-79 (2013) ("Quest Charter"); In re Red Bank Charter Sch., 367 N.J. Super. 462, 482 (App. Div. 2004), certif. denied 180 N.J. 457 (2004) ("Red Bank Charter"). The evidence is specific and uncontroverted, obligating the Commissioner "to evaluate carefully" the impact of the projected funding loss on NPS' ability to deliver a thorough and efficient education to its students. Palisades Charter, 164 N.J. at 335.[4]

[4] M.L. Varisco advances the specious contention that the Commissioner was "not required" to consider the "fiscal impact on the District" because this was a "charter amendment," not an initial application. Vb33-34. Varisco also contends that its limited expansion should be affirmed as statistically insignificant. Vb13. However, a school-by-school analysis is irrelevant to the constitutional issues raised by the cumulative impact of an expansion of 8,500 students in seven schools.

Second, Respondents' contentions aside, the Commissioner made no finding that the "financial impact" to NPS from the expansions was "not sufficient" to deny the applications. Db30. There is nothing in the record of the applications that even suggests the Commissioner subjected ELC's specific evidence of funding loss impacts to any, let alone careful, evaluation. Quest Charter, 216 N.J. at 387; Palisades Charter, 164 N.J. at 323 (holding that "the State's efforts to implement" the Act "require careful scrutiny"); Red Bank Charter, 367 N.J. Super. at 476 (requiring, at the very least, that the "reasons" for the Commissioner's decision on a charter school renewal "be discernible from the record"). Moreover, the absence of any support in the record that the Commissioner fulfilled his affirmative obligation to assess the evidence of funding loss is even more egregious where, as here, the expansions impact the delivery of a constitutional education to the designated beneficiaries of the Abbott remedies. Palisades Charter, supra, 164 N.J. at 323; see also Abbott v. Burke, 149 N.J. 145, 196 (1997) (establishing "convincing" evidence as the standard for the State's alteration of remedial funding in Abbott districts).

Third, the State asserts NPS "does not agree" the loss of funding impacts the district's "ability to comply with its constitutional education requirements." Db30-31. This assertion lacks any support in the record. In fact, in describing NPS' comments on the applications, and its recommendations that some of the requested expansions be scaled back or denied, the State

candidly admits that "NPS made no reference to any financial impact on the district." Db6. NPS also submitted evidence of the year-to-year enrollment growth, and corresponding increase in presumptive payments from its budget, if the Commissioner approved the expansions. Aa584-95. In any event, the obligation to evaluate funding loss impacts rests solely with the Commissioner, regardless of what officials in the State-operated NPS may "believe." Db30.

Finally, in the face of specific record evidence of a continuing funding loss that "would...jeopardiz[e]" a thorough and efficient education in NPS, Palisades Charter, 164 N.J. at 336, Respondents attempt to justify the Commissioner's decisions as responsive to a purported "high demand" for charter schools given their academic performance. Db33; Cb53. Whatever the demand for, and performance of, the Newark charter schools may be, such considerations do not -- and cannot -- absolve the Commissioner of his obligation to carefully evaluate the impact of funding loss on the ability of NPS to provide the resources essential for its students to succeed academically. Put bluntly, the State's constitutional obligation "to provide a thorough and efficient system of education in our public schools is inviolate." Id. at 323 (emphasis added). That bedrock principle cannot countenance the Commissioner's implementation of the Act in a manner that contributes to -- and causes -- severe deficits in education funding, resources and opportunities for students

in NPS schools, regardless of claims of a "demand" for charter schools.

In sum, given the absence of any findings, or even support discernible from the record, that the Commissioner conducted the requisite evaluation of funding loss impacts, the decisions approving the charter expansions are arbitrary, capricious and unreasonable. They must be reversed.

B. The Commissioner Did Not Evaluate Segregation Effects

Respondents do not even attempt to argue the Commissioner evaluated the evidence that the charter expansions would perpetuate and exacerbate trends in the segregation of NPS students by disability, limited English proficiency ("LEP") and race. Db33-41; Cb47-55.[5] Respondents ignore the Commissioner's failure to fulfill his obligation to subject that evidence to rigorous scrutiny. Palisades Charter, 164 N.J. at 323 (holding that the State "must" ensure "no student is discriminated against or subjected to segregation"). Rather than address the Commissioner's failure, Respondents proffer several justifications for the expansions in the face of evidence that they would perpetuate existing patterns of segregation in NPS.

[5] M.L. Varisco denies the Commissioner's responsibility to assess the segregative effects on a charter amendment application. Vb33. Since this position directly contradicts the Supreme Court's mandate for "[c]ontinuing assessment of the charter school's pupil population and impact on the district of residence," Palisades Charter, 164 N.J. at 328, it must be rejected. The other opposition briefs rightfully concede that the Commissioner must always assess that potentially egregious harm. See Db34; Cb49.

First, Respondents characterize the evidence of worsening segregation among NPS students, corresponding with the rapid growth of charter enrollments, as a "broad generalization" based on a "requirement" that "each" charter school "perfectly match" NPS student demographics. Db37; Cb50. This assertion is a brazen misreading of the record before the Commissioner. That record consists of detailed data documenting the growing disparity in the enrollment of students with disabilities and LEP students between NPS and the charter schools. See Aa67, 74 (students with disabilities comprise 18% of NPS enrollment and 9% in charters; LEP students comprise 9% of NPS enrollment and 1% in charters). Similarly, the data revealed that five of the charter schools seeking expansions enroll a significantly higher percentage of Black/African American students (ranging from 82% to 94%) than the 51% in NPS, while the other two -- Robert Treat and M.L. Varisco -- enroll significantly more Hispanic/Latino students (62.6-81%) than the 40% in NPS. Aa111, 124, 164, 322, 439, 493, 521; see also Aa528-34 (data showing TEAM charter enrolls nearly 300 students from districts outside NPS -- its district of residence -- and virtually all are Black).

The record also contained data on the overall enrollment patterns in NPS schools and in Newark charter schools which, as a result of significant increases since 2008-09, enrolled nearly 13,000 students or over 20% of all students in 2014-15. Given that context, the data on the enrollment trends encompassing the universe of Newark students in both charter and NPS schools is

exceedingly valid, reliable and crucial to assessing the impact of the expansions on existing patterns of segregation in NPS. See In Re Petition for Authorization to Conduct a Referendum on the Withdrawal of N. Haledon Sch. Dist. From the Passaic County Manchester Regional High Sch. Dist., 363 N.J. Super. 130, 142 (App. Div. 2003), aff'd as mod., 181 N.J. 161 (2004) (holding that "trends in the student population" are "valid factors" when evaluating segregation impacts).[6]

Second, the State contends the charter schools seeking to expand "have the ability to serve students with special needs and LEP students" and, therefore, are not segregating those students. Db39. This contention is irrelevant. ELC does not contest the schools' "ability" to enroll students with disabilities and LEP students. The Act requires charter schools to provide bilingual education and special education to those students once enrolled. N.J.S.A. 18A:36A-11(a), (b); N.J.A.C. 6A:11-4.7. The central issue on this appeal is the Commissioner's failure to evaluate the specific evidence of enrollment patterns demonstrating that the charter schools, as

[6] Respondents ignore the inter-relationship between funding loss and student segregation in NPS. The record shows that the funding loss from charter growth led to a 20% reduction in NPS' expenditures for LEP students and a 30% reduction for students with disabilities from 2008-09 to 2014-15. Aa47. A simple comparison of the percent of overall charter payments to expenditure reductions in the NPS budget, Cb44, fails to account not only for NPS' fixed costs, but also for the dramatic reductions in spending for bilingual and special education programs as the concentration of higher-cost LEP and students with disabilities in NPS schools has increased. Aa39.

their enrollments have grown, enroll far fewer students with disabilities and almost no LEP students, resulting in higher concentrations of those students -- who require additional funding and programs -- in the chronically underfunded and under-resourced NPS schools.

Finally, Respondents seek to justify the documented patterns of student segregation by disability, LEP status and race as not "the result of anything other than student choice." Db41 (claiming ELC must show the charter schools "are improperly recruiting students"); Cb52 (attributing charter schools' lower rates of ELLs and students with disabilities to choice). Respondents again mischaracterize the issue on appeal. The Act's authorization of charter schools "does not affect the Commissioner's constitutional obligation to prevent segregation in the public schools." Palisades Charter, 164 N.J. at 329. That obligation "is not tempered by the cause of the segregation" and "applies with equal force" to segregation "due to an official action, or simply...in fact." Id. at 324; see also Red Bank Charter, 367 N.J. Super. at 478. Thus, whether attributable to neighborhood, citywide and regional demographics, charter recruitment and enrollment practices, existing charter school locations, choice and/or other factors, the Commissioner "must assess" whether approval of the charter enrollment expansions will worsen patterns of student segregation in NPS. Palisades Charter, 164 N.J. at 329. Further, "if segregation would occur,"

the Commissioner must "use the full panoply of his powers to avoid that result." Id.[7]

In sum, the State confirms the Commissioner ignored the specific evidence that allowing the charters to expand enrollments would continue and exacerbate existing trends of student segregation by disability, LEP status and race in NPS. By failing to assess that evidence, the Commissioner violated his affirmative obligation under the Education Clause and the prohibition against segregation in the Constitution. N.J. Const. art. VIII, §4, ¶1; N.J. Const. art. I, ¶5. That violation renders the expansion decisions arbitrary, capricious and unreasonable, and they must be reversed.

POINT IV

THE COMMISSIONER LACKS AUTHORITY TO APPROVE ENROLLMENT EXPANSIONS REQUIRING MULTIPLE REMOTE FACILITIES

The State concedes that, in approving five of the seven Newark charter applications for expansion, the Commissioner also approved their request "to add new facilities to accommodate the sought-after enrollment expansions" at undisclosed locations at

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[7] Respondents point to information about recruitment practices and participation of some charter schools in a common enrollment process "according to available seats and a weighted lottery." Db40; Cb48. But the Commissioner's obligation to assess segregative effects extends beyond initial charter enrollment, requiring "closer scrutiny" of the "manner of operation" of the school "to determine whether some of the school's practices may be worsening" existing patterns of student segregation in NPS. Red Bank Charter, 367 N.J. Super. at 479-80.

some future date. Db43-44; see also Cb57-60. The State ignores the absence of any authority in the Act or its regulations to support granting such an unprecedented request.

First, the State attempts to obfuscate the difference between an existing charter school "that seeks to expand into additional physical space" and the establishment of separate new school facilities in locations "remote" to the existing school facility. Educ. Law Ctr. v. N.J. State Bd. of Educ., 438 N.J. Super. 108, 120 (App. Div. 2014). This Court has held "it makes little sense" to require a "whole new" application where an operating charter school seeks an "expansion of enrollment and grade levels" and needs to add space to its existing facility through a building addition or occupancy of an adjacent building. Id. at 120-21. But that authority simply does not permit a charter school to expand by hundreds, even thousands of students and then -- at some future date -- establish one or more new facilities on sites remote from its existing facility.

Second, the Act's regulations only permit an existing charter school to expand in a facility remote from its existing school by filing an amendment to establish a "satellite campus." N.J.A.C. 6A:11-1.2, 2.6 (defining satellite campus as "a facility" that is "in addition to" the charter school's existing facility); Educ. Law Ctr., 438 N.J. Super. at 120 (holding that a satellite campus "is not the same as expanding into additional physical space immediately adjacent to the existing facility"). The State admits the five charters seeking to establish multiple

new facilities separate from, and remote to, their existing facility, did not request an amendment to establish a satellite campus, Db44, the only means available to establish a remote facility "as part of the same school." 438 N.J. Super. at 120.[8]

Finally, the State tries to justify the Commissioner's expansion decisions as not approving "the opening of new facilities" but an enrollment increase that "represents a necessary precursor" to the schools' "eventual addition of a new facility." Db44 (arguing the enrollment increase allows the schools "the ability to seek out" additional space). This contention is constructed out of whole cloth. The State offers no support in the Act or its implementing regulations that allows the Commissioner to approve substantial increases in enrollment that require multiple remote facilities, only to have those increases serve as a "precursor" to the "eventual" addition of the new facilities. As discussed in Point III, supra, the Act does not authorize the Commissioner, through up-front approvals of enrollment expansions, to allow existing

[8] In at least three cases, the enrollment expansions would trigger the need for more than one satellite campus: University Heights needs two new schools, Aa298, while North Star and TEAM both require three new schools, Aa484; Aa582-83. Yet, the State concedes N.J.A.C. 6A:11-2.6 (a)(1)(iv) allows an existing charter school to add only one satellite campus per school. Db42. Even if these charter schools had applied for a satellite campus -- which they did not -- the Commissioner lacks authority to approve an expansion beyond one campus.

charter schools to grow networks of separate schools at different locations operating under one charter.[9]

In sum, the Commissioner's decisions granting the expansions of the charters seeking remote facilities - TEAM, North Star, Robert Treat, University Heights and Great Oaks - are arbitrary, capricious and unreasonable, and must be reversed.

POINT V

THE CHARTER SCHOOLS' REQUEST TO ADD NEW MATERIALS TO THE RECORD SHOULD BE DENIED

In their brief, Great Oaks and its companion charter schools attempt to add new materials into the record on appeal that were not before the Commissioner during agency review of the charter expansion applications. Cb60-61. As we explain, this request should be rejected.

Pursuant to R. 2:5-4(a), the record on appeal consists of "all papers on file in the court or courts or agencies below." It is well-settled that, in their review, appellate courts will not consider evidentiary material not in the record below. See Townsend v. Pierre, 221 N.J. 36, 45 n.2 (2015); Hisenaj v. Kuehner, 194 N.J. 6, 25 (2008). Supplementation is not appropriate where the information sought to be included was known to the applicant at the time of the proceedings below. In re Marvin Gastman, 147 N.J. Super. 101, 114 (App. Div. 1977).

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[9] Even if the Act did provide such authority, it could not be implemented without a "duly promulgated regulation" setting forth a "step-by-step review process" in the context of charter amendments. Palisades Charter, supra, 164 N.J. at 337.

Cited throughout the charter schools' Brief, and included in its two-volume appendix, are numerous documents that are not listed in the Statement of Items Comprising the Record on Appeal ("SICRA"). Aa102. These documents include, but are not limited to: a zip code map of Newark, NJ, RCSa1; data derived from the 2010 U.S. Census for various zip codes, RCSa2-10; memorandum of understanding and other documents pertaining to universal enrollment, RCSa424-590; a document entitled "Newark Charter School Fund Compact for Newark Charter Schools," RCSa258-63; a list of State-approved English Language Proficiency Tests, RCSa36-45; NPS Assessment of District Progress dated February 2015, RCSa46-84; excerpts from performance reports for individual NPS schools, RCSa294-331; excerpt from NPS FY2014 budget hearing handout, RCSa421-22; and NPS 2016-17 budget presentation. RCSa339-391. As a review of the SICRA makes clear, none of these documents were part of the record below. Nor did the charter schools submit any documents or other response to ELC's January 28, 2016 submission and objections to the charter expansion applications.

Under the guise of "judicial notice," Cb60, the charter schools are seeking to augment the administrative record before the agency below without even filing an appropriate motion. Not only have the schools failed to identify the specific documents they want inserted into the record, Cb61, but they are attempting to inject materials and evidence that they failed to submit below. See Quest Charter, 216 N.J. at 388-89 (noting that

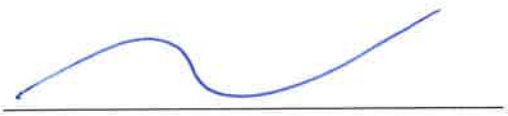
charter school "was entitled to respond" to objections submitted to its pending application "within the tight time frames permitted in the review process").

In sum, augmentation of the administrative record before this Court, as requested by the charter schools, is wholly improper and that request should be summarily denied.

CONCLUSION

The Commissioner, in approving the expansion of charter school enrollments in Newark by 8,500 students, to be accommodated in 10 remote facilities, simply ignored the overwhelming record of severe fiscal impacts and segregative effects the expansions will have on the delivery of a thorough and efficient education to NPS students. This failure is especially egregious where the affected students are part of a class deprived of a thorough and efficient education for generations. For the reasons set forth above, ELC respectfully requests that the Court reverse the expansion decisions and direct the Commissioner to deny all seven expansion applications.

Respectfully submitted,
PASHMAN STEIN WALDER HAYDEN, P.C.

July 27, 2017 By: 
MICHAEL S. STEIN, ESQ.

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

EDUCATION LAW CENTER, on Behalf of ABBOTT VS BURKE PLAINTIFF SCHOOL CHILDREN, Appellant,
v.
NEW JERSEY DEPARTMENT OF EDUCATION and New Jersey Schools Development Authority, Respondents.

Submitted March 14, 2012.
|
Decided April 3, 2012.

On appeal from the Schools Development Authority, Department of Education.

Attorneys and Law Firms

Lowenstein Sandler PC, attorneys for appellant (Stephen R. Buckingham, on the briefs).

Jeffrey S. Chiesa, Attorney General, attorney for respondents (Lewis A. Scheindlin, Assistant Attorney General, of counsel; Christopher T. Huber, Deputy Attorney General, on the brief).

Before Judges AXELRAD, SAPP–PETERSON and OSTRER.

Opinion

PER CURIAM.

*1 Plaintiff Education Law Center seeks an order from this court compelling the New Jersey Schools Development Authority (SDA) to adopt by a date certain regulations governing the delegation of school facilities projects to eligible SDA school districts[1] as required by *L.* 2007, *c.* 137, § 24, *codified at N.J.S.A.* 18A:7G–13(e)(2) (Section 24). Section 24 required the SDA to adopt the regulations by August 6, 2008. As SDA has provided no justification for further delay, we grant the requested relief. Although plaintiff sought a similar order compelling action by the Department of Education (DOE), which was also required to adopt regulations, *N.J.S.A.* 18A:7g–13(e)(1), plaintiff's request was, the parties concede, rendered moot by DOE's adoption of regulations on April 4, 2011. 43 *N.J.R.* 830(a) (April 4, 2011); *N.J.A.C.* 6A:26–19.

I.

This action has its roots in the State's efforts to remedy inadequacies in educational facilities in poor school districts. The Educational Facilities Financing and Construction Act (EFCFA), enacted in 2000, *L.* 2000, *c.* 72, provided for the financing and construction of school facilities. *N.J.S.A.* 18A:7G–1 to–48. The EFCFA was responsive to the Supreme Court's decision in *Abbott v. Burke,* 153 *N.J.* 480, 519–25 (1998) directing the State to implement a school construction program in thirty-one Abbott school districts. *See also Abbott v. Burke,* 164 *N.J.* 84 (2000) (affirming State responsibility to fund facilities remediation and construction in Abbott districts).

In the wake of criticism of the management of the school construction program under the EFCFA, then-Governor Jon Corzine established an Interagency Working Group on School Construction (Working Group) to develop recommendations for reform. Exec. Order No. 3, 38 *N.J.R.* 1263(b) (Feb. 7, 2006). The Working Group issued three extensive reports proposing comprehensive changes in the school construction program. *See Report to the Governor by the Interagency Working Group for School Construction,* (March 15, 2006); *Second Report to the Governor by the Interagency Working Group for School Construction,* (May 17, 2006); *Third Report to the Governor by the Interagency Working Group for School Construction,* (Sept. 14, 2006) *at* http://www.njsda.gov/RP/Interagency_Working_Group.html (last visited March 26, 2012). Among the Working Group's numerous recommendations was the proposal to delegate management of school construction projects to capable local school districts:

> EFCFA should also be amended to allow qualified school districts to assume full responsibility for the design and construction of school facility projects. Concomitantly, the legislation should provide for the development and adoption of criteria to evaluate a district's capability to manage all or part of a project involving a major rehabilitation or the construction of a new school. Moreover, the legislation should encompass a new initiative to assist districts, as needed, to enhance their capacity to manage such projects.

***2** [*Third Report to the Governor by the Interagency Working Group for School Construction* (Sept. 14, 2006), 14, *at* http://www.njsda.gov/RP/Interagency_Working_Group.html (last visited March 26, 2012).]

The Working Group was convinced that delegating management authority to capable local districts would increase efficiencies and promote successful completion of school construction projects. *Id*. at 5, 13–14.

In response to the Working Group's recommendations, the Legislature passed comprehensive legislation that the Governor then signed into law on August 6, 2007 as *L.* 2007, *c.* 137(Act). *See N.J.S.A.* 52:18A–235(g), (h) (recognizing recommendations of Working Group and stating intent to adopt them). Along with creating a new State agency to manage the school construction program and adopting numerous other changes in the EFCFA, the 2007 law authorized SDA to delegate capital maintenance projects to an SDA district and, subject to regulations, authorize the management of other projects. *N.J.S.A.* 18A:7G–13(a). "The development authority may also authorize [an SDA] district to undertake the design, acquisition, construction and all other appropriate actions necessary to complete any other school facilities project in accordance with the procedures established pursuant to subsection e of this section." *Ibid.*

Consistent with that power to delegate, the statute required both the DOE and SDA to adopt regulations pursuant to which DOE would determine whether a district was "eligible" to manage, and SDA would determine whether a district had the "capacity" to manage a school construction project:

> (1) Within one year of the effective date of P.L.2007, c. 137 (C .52:18A–235 et al.), the commissioner, in consultation with the development authority, shall adopt pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B–1 et seq.), rules and regulations by which the commissioner shall determine whether an SDA district is eligible to be considered by the development authority to manage a school facilities project or projects. In making the determination, the commissioner shall consider the district's fiscal integrity and operations, the district's performance in each of the five key components of school district effectiveness under the New Jersey Quality Single Accountability Continuum (NJQSAC) in accordance with section 10 of P.L.1975, c. 212 (C.18A:7A–10), and other relevant factors.
>
> (2) Within one year of the effective date of P.L.2007, c. 137 (C .52:18A–235 et al.), the development authority, in consultation with the commissioner, shall adopt pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B–1 et seq.), rules and regulations by which the development authority shall determine the capacity of an SDA district, deemed eligible by the commissioner pursuant to paragraph (1) of this subsection, to manage a school facilities project or projects identified by the development authority. In making the determination, the development authority shall consider the experience of the SDA district, the size, complexity, and cost of the project, time constraints, and other relevant factors.

***3** [*N.J.S.A.* 18A:7G–13(e).]

As the Act, approved August 6, 2007, became effective immediately, *L.* 2007, *c.* 137, § 62, the deadline for promulgating the required regulations was August 6, 2008. However, the Administration failed to propose or promulgate regulations pursuant to the law adopted to implement its own Working Group's recommendations.

Shortly after the new Administration took office, plaintiff's executive director David G. Sciarra, alerted the Governor's Office and the Attorney General by letters on January 28, and February 23, 2010 of the past delay in adopting regulations and plaintiff's interest in ensuring that SDA and DOE comply with the statutory mandate. On April 15, 2010, Assistant Attorney General Nancy Kaplen responded to the February 23, 2010 letter to the Attorney General, stating the Attorney General had asked the Division of Law to work with DOE and SDA "so that appropriate regulations can be proposed as expeditiously as possible." Plaintiff replied on April 23, 2010 requesting a timeframe for the promulgation of the rules. On May 5, 2010, the Attorney General's office declined to offer a "definitive schedule" for the adoption of the regulations in view of other competing priorities.

On July 1, 2010 plaintiff filed the instant appeal and a motion for summary disposition, seeking an order compelling DOE and SDA to adopt regulations. We denied the motion for summary disposition on September 22, 2010. We then granted two motions by SDA and DOE to stay the appellate proceedings. By order entered November 16, 2010, we stayed the appeal to February 15, 2011, and by order entered April 25, 2011, we stayed the appeal until July 18, 2011, and provided that no further extensions would be granted.

While the appeal was pending, SDA took substantial steps toward adopting regulations but none have yet been promulgated. SDA initially published proposed new rules on October 18, 2010. 42 *N.J.R.* 2380. The rule proposal included seven subchapters. The first subchapter,

consisting of seven sections, covered the purposes and applicability of the rules, defined terms, addressed a district's responsibilities under a grant agreement with SDA, described events of default and non-compliance, described remedies for events of default and non-compliance, and provided for termination of grant agreements. Proposed *N.J.A.C.* 19:34B–1.1 to–1.8. Noncompliance and events of default included: a district's failure to perform under the contract, a determination that the grant was obtained fraudulently, a failure to commence or complete the project in a reasonable time, and the district's use of funds for purposes not approved by SDA. Proposed *N.J.A.C.* 19:34B–1.4. SDA's remedies in the event of noncompliance or default included withholding grant disbursements, suspending the grant agreement, and terminating the agreement. Proposed *N.J.A.C.* 19:34B–1.5. The grant agreement could also be terminated upon the mutual agreement of the parties or if SDA determined termination served the project's best interests. Proposed *N.J.A.C.* 19:34B–1.6, 1.7.

***4** Proposed subchapter 2 required an interested district to request a determination that the district possessed the capacity to manage a school facilities project. Proposed *N.J.A.C.* 19:34B–2.2. A district was required to include in its application information about the qualifications of the district's key personnel; the district's experience managing improvement projects and routine maintenance; a description of the routine maintenance required at the school and district level; and the experience of the district in managing and planning procurement, contract management, and budgeting over the past five years. *Ibid.*

The regulations also described the factors the SDA would consider in assessing the district's capacity to manage a school facilities project. Proposed *N.J.A.C.* 19:34B–2.3. The factors outlined included the district's capacity to administer fundamental district responsibilities regarding capital facilities; the qualification of key district personnel; the district's performance of routine maintenance; and the district's rating on the DOE's Quality Single Accountability Continuum District Performance Review for Facilities Operations. *Ibid.* The proposed rules also provided for training if the district were not deemed able to manage the delegable project. Proposed *N.J.A.C.* 19:34B–2.4(d)(3). Training programs would be available in at least the following areas: financial, accounting, and budgeting; planning; procurement and/or prequalification; evaluation of architectural plans; construction management; documentation of best practices; and governance and compliance. *Ibid.*

If found to have the capacity to manage, then a district would be authorized to apply for actual delegation of delegable portions of a project, subject to satisfaction of additional requirements set forth in the rules. Proposed *N.J.A.C.* 19:34B–2.4. The rules established a right to request reconsideration and appeal from a negative decision regarding capacity, or a denial of delegation. Proposed *N.J.A.C.* 19:34B–2.5.

Subchapter 3 included provisions on the execution of grant agreements. Proposed *N.J.A.C.* 19:34B–3.1 to–3.4. Subchapter 4 governed assignment of contracts. Proposed *N.J.A.C.* 19:34B–4.1 to–4.2. Subchapter 5 addressed disbursements and adjustments of the grant. Proposed *N.J.A.C.* 19:34B–5.1 to 5.4. Subchapter 6 covered procurement and award of contracts by districts. Proposed *N.J.A.C.* 19:34B–6.1 to–6.6. Lastly, subchapter 7 addressed district management of the delegated portion of a school facilities project. Proposed *N.J.A.C.* 19:34B–7.1 to–7.5. The public comment period on SDA's initial rule proposal closed December 17, 2010.

DOE's regulations, which were much less extensive than SDA's proposed regulations, were adopted April 4, 2011. 43 *N.J.R.* 830(a) (April 4, 2011). The DOE rules describe the required components of a district's application to be considered eligible to manage its own facilities projects and the benchmark indicators on the District Performance Review that must be met for a district to be eligible for consideration. *N.J.A.C.* 6A:26–19.3. The DOE rules also require the commissioner to notify school districts of the results of DOE's eligibility determination, allow a district to request a review of a negative eligibility finding once the district meets the benchmark indicators, and allows the commissioner to rescind a district's eligibility if the district no longer meets the requirements. *N.J.A.C.* 6A:26–19.4.

***5** In support of its March 2011 motion to further stay the appeal, the deputy attorney general then handling the case certified, "The Schools Development Authority anticipates that its regulations pursuant to *N.J.S.A.* 18A:7G–13(e) will be published for adoption in the New Jersey Register dated July 18, 2011." However, that did not occur. Instead, SDA determined that comments to its initial proposed rule-making warranted significant changes in its proposed rules, which required re-notice and re-publication. Consequently, on September 6, 2011, SDA published "proposed substantial changes upon adoption to proposed new rules section 13.e delegation of school facilities projects." 43 *N.J.R.* 2288(a). In its re-publication, SDA proposed changes—some minor and some significant—to seven proposed sections of its proposed rules. *See* Re-proposed *N.J.A.C.* 19:34B–1.5, 2.3, 2.4, 2.5, 3.3, 3.4, 6.5 and 6.6.

With regard to non-compliance or events of default under a grant agreement, the re-proposed rules specified that a district that was required to take corrective action would have at least thirty days to do so. Re-proposed *N.J.A.C.* 19:34B–1.5(a)(1). The new proposal also inserted deadlines and time periods governing SDA's provision of notices to districts, including notices to terminate a grant agreement. Re-proposed *N.J.A.C.* 19:34B–1.5(a)(2). The provision on requests for reconsideration and appeal was amplified to provide for informal hearings, and formal hearings before the Office of Administrative Law. Re-proposed *N.J.A.C.* 19:34B–2.5.

The re-proposed rules also addressed commenters' concerns that SDA's review and pre-approval of certain contractors might prevent a district from acting within sixty days of receipt of bids as required by public bidding law. Re-proposed *N.J.A.C.* 19:34B–3.3; *see N.J.S.A.* 18A:18A–36. The new rules "clarif[ied] the nature of the approvals required, and [ ] reflect the possibility that the district will be required to request an extension of the 60–day period for contract award...." 43 *N.J.R.* 2290.

The proposed changes also clarified the respective responsibilities of SDA and a district pertaining to retention of site remediation professionals. In summary, the re-proposed rulemaking clarified:

> [D]espite the Authority's engagement of a Licensed Site Remediation Professional to monitor the performance of remediation activities during the construction process, the school district, as owner of the remediated property, continues to bear responsibility for engagement of an environmental consultant ... to perform or supervise any long-term environmental obligations, such as groundwater testing or monitoring, required to comply with environmental laws and standards.
>
> [43 *N.J.R.* 2290.]

Written comments to the re-proposed regulations were due by November 5, 2011.43 *N.J.R.* 2288(a). As of our writing, SDA has not published any further action.

***6** Plaintiff filed its initial brief on September 30, 2010 and presented the following points on appeal:

> THE DOE AND SDA ARE IN VIOLATION OF *N.J.S.A.* 18A:7G–13(e) AND SHOULD BE ORDERED SUMMARILY TO COMPLY WITH THE STATUTE'S CLEAR MANDATE
>
> 1. This Court Has Exclusive Jurisdiction To Review the DOE's and SDA's Inaction.
>
> 2. ELC Has Standing To Challenge The Inaction of the DOE and SDA.
>
> 3. The DOE and SDA Have Violated the Clear, Legislatively–Defined Deadlines in *N.J.S.A.* 18A:17G–13(e) to Adopt Rules and Regulations.

SDA filed its opposition brief on July 18, 2011. Plaintiff's reply brief was filed on July 29, 2011. Thus, the parties' briefing predates publication of SDA's re-proposed rules on September 6, 2011.

II.

We have exclusive jurisdiction to review a state administrative agency's inaction. *See In re Mar. 22, 2002 Motion to Dismiss and Intervene in the Petition of Howell Twp.*, 371 *N.J.Super.* 167, 187 (App.Div.), *certif. denied,* 182 *N.J.* 140–41 (2004) ("*Howell Twp.*"); *In re Failure by the Dep't of Banking and Ins. to Transmit a Proposed Dental Fee Schedule,* 336 *N.J.Super.* 253, 261 (App.Div.), *certif. denied,* 168 *N.J.* 292 (2001); ("*In re Failure* "); *Hosp. Ctr. at Orange v. Guhl,* 331 *N.J.Super.* 322, 329 (App.Div.2000); *The Equitable Life Mortg. and Realty Investors v. N.J. Div. of Taxation,* 151 *N.J.Super.* 232, 238 (App.Div.1977) ("*Equitable Life* "); *R.* 2:2–3(a)(2) (The Appellate Division has jurisdiction to "review final decisions or actions of any state administrative agency or officer...."). [2] The principle applies both to adjudicative inaction, *see, e.g., Hospital Center at Orange, supra,* (appeal to compel agency to decide hospitals' appeals from administrative rate determinations), and rule-making inaction, *see, e.g., In re Failure, supra,* (appeal to compel agency to revise dental fee schedule embodied in regulation), and *Equitable Life, supra,* 151 *N.J.Super.* at 238 (review of agency rulemaking exclusively rests with appellate court).

We recognize that an appeal to compel state agency action may be brought in the Law Division, "but only if the inaction complained of is the nonperformance of mandated ministerial obligations." *Equitable Life, supra,* 151 *N.J.Super.* at 238. *See also Hosp. Ctr. at Orange, supra,* 331 *N.J.Super.* at 329 n. 2 ("There is some authority for the view that the Law Division has jurisdiction to entertain an action to compel a state agency to perform a ministerial duty.") (citing *Pfleger v. State Highway Dep't,* 104 *N.J.Super.* 289 (App.Div.1968) and *Colon v. Tedesco,* 125 *N.J.Super.* 446 (Law Div.1973)). However, the mandated obligation here—to devise

rules—involves the exercise of significant discretion. *See Equitable Life, supra,* 151 *N.J.Super.* at 238 ("Agency rulemaking is not a ministerial function but rather a highly discretionary undertaking.").

***7** Although we have jurisdiction to consider an appeal from agency inaction, we exercise our power to compel agency action sparingly, mindful of the general deferential standard of review of agency action, and the separation of powers. "We can overturn only those administrative determinations that are arbitrary, capricious, unreasonable, or violative of expressed or implicit legislative policies." *In re Failure, supra,* 336 *N.J.Super.* at 263. We generally defer to an agency's interpretation of its own statute. *Id.* at 265. We are ill-equipped to micromanage an agency's activities. *Sod Farm Assocs. v. Twp. of Springfield,* 366 *N.J.Super.* 116, 130 n. 10 (App.Div.2004); *In re Failure, supra,* 336 *N.J.Super.* at 262. Thus, we allow an agency wide discretion to decide "how best to approach legislatively assigned administrative tasks." *Ibid.* In so doing, we avoid intruding upon the separate powers of the Executive Branch. *U.S. Trust Co. of New York v. State,* 69 *N.J.* 253, 259 (1976) (denying mandamus to compel Port Authority of New York and New Jersey to adopt mass transit plan in part because it would intrude upon the powers of the Governors and Legislatures to control the Authority's policy-making), *rev'd on other grounds,* 431 *U.S.* 1, 97 *S.Ct.* 1505, 52 *L. Ed.*2d 92 (1977); *In re Failure, supra,* 336 *N.J.Super.* at 261–62 (noting separation of powers concerns).

SDA argues that we should decline to grant plaintiff relief because: (1) the matter is moot, since it has commenced the rulemaking process and (2) it has not arbitrarily failed to enact regulations. We are unpersuaded.

First, the matter is not moot so long as regulations are not promulgated. "An issue is 'moot' when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." *Greenfield v. N.J. Dep't of Corrs.,* 382 *N.J.Super.* 254, 257–58 (App.Div.2006) (citation omitted). "Consequently, if a party 'still suffers from the adverse consequences ... caused by [a] proceeding,' an appeal from an order in that proceeding is not moot." *N.J. Div. of Youth & Family Servs. v. A.P.,* 408 *N.J.Super.* 252, 261–62 (App.Div.2009) (citation omitted), *certif. denied,* 201 *N.J.* 153 (2010). Until SDA actually adopts regulations, the legislative mandate for rule adoption has not been satisfied. Moreover, we presume the failure to finally promulgate rules has prevented the actual delegation of management authority to SDA districts—a policy adopted in the 2007 statute, in which plaintiff has an obvious interest.

Second, we conclude that the agency's significant efforts in proposing and re-proposing rules do not excuse the most recent unexplained delay in complying with the statutory mandate. In its July 2011 brief, SDA argued that delays in adoption were a consequence of the mandates of the Administration Procedures Act (APA), *N.J.S.A.* 52:14B–1 to–4.10. We do not question the agency's determination that its changes to its initial proposal required a second round of comments. *See In re Provision of Basic Generation Servs. for Period Beginning June 1, 2008,* 205 *N.J.* 339, 358 (2011); *N.J.S.A.* 52:14B–4.10; *N.J.A.C.* 1:30–6.3. However, SDA represented that final adoption would soon follow the end of that comment period. "After the sixty (60) day public comment period, it is anticipated that a Notice of Adoption will be submitted for publication in the New Jersey Register." Yet, the comment period ended in November of last year, and no adoption notice has been published.

***8** We have been presented with no justification for this additional delay. Nor is one apparent. We have not been provided with the comments that may have been submitted in response to the September 2011 re-proposal. Therefore, we shall not speculate whether those comments raised new and knotty issues that justify new and time-consuming deliberations. However, we have reviewed the substance of SDA's regulations, the issues the revisions addressed, and conclude that the scope of the changes in the re-proposed rules, although significant, were limited. Based on the record before us, including the agency's published proposals, there is no apparent basis for continued delay.

Where an agency violates the express policy of its enabling act, as SDA has done here by violating the clear deadline for promulgating a rule, an agency action may be deemed to have acted arbitrarily and capriciously. *Pub. Serv. Elec. & Gas Co. v. N.J. Dep't of Envtl. Prot.,* 101 *N.J.* 95, 103 (1985) (in determining whether action is arbitrary and capricious, a court may consider "whether the agency action violates the enabling act's express or implied legislative policies"); *In re Failure, supra,* 336 *N.J.Super.* at 263. When an agency action, or in this case, inaction, is unsupported by substantial credible evidence in the record, or is accompanied by no reasonable explanation—as is the case here—then we may likewise conclude it is arbitrary, capricious, and unreasonable. *Pub. Serv. Elec. & Gas Co., supra,* 101 *N.J.* at 103 (arbitrary and capricious determination may also look to whether substantial evidence in the record supports the agency's findings upon which it based its action); *Gilliland v.. Bd. of Review,* 298 *N.J.Super.* 349, 354–55

(App.Div.1997) (deeming agency action arbitrary and capricious where no explanation is provided to support it). Consequently, our intervention is justified.

Our decision in *In re Failure, supra,* does not compel a different result. The plaintiff in that case sought relief in the nature of mandamus to compel the Department of Banking and Insurance to issue revised fee schedules to reflect inflation, consistent with a statutory provision requiring such revisions every two years. However, the agency's obligation to issue rulemaking was not nearly as clear as SDA's in this case. We recognized that the starting point for the two-year period in *In re Failure* was debatable. 336 *N.J.Super.* at 264–65. Moreover, intervening statutory amendments authorized the Department to contract out development of fee schedules. *Id.* at 265. The Department also determined, in what we viewed as a valid exercise of its discretion, to change the underlying basis for its fee schedule, which necessitated significantly more work than simply inflation-adjusting a previous schedule. *Ibid.* Recognizing that the agency was in the midst of revising the schedule, we concluded, "requiring that the Department complete the task or even directing completion by a specific time has the potential of interfering with the orderly workings of the Department." *Id.* at 262–63.

***9** No such extenuating circumstances justify SDA's continuing delay in this case. The deadline for action indisputably was August 7, 2008. No intervening legislation has complicated SDA's rulemaking process. Moreover, SDA has not advised us of any fundamental policy deliberations that have impeded the completion of its rulemaking. Rather, we have the representations of the agency's attorneys in July 2011 that adoption was imminent.

Having concluded that it is appropriate to compel SDA to complete its rulemaking task by a date certain, we must consider what deadline to impose. Plaintiff asked us to require adoption of final rules within thirty days of the close of the most recent comment period, which would have been December 5, 2011. SDA has had almost five months to consider comments submitted in response to its publication of re-proposed rules.

If SDA fails to submit a notice of adoption of its rule proposal by April 18, 2012, its rule proposal will expire, as eighteen months will have elapsed since the publication of its original rule proposal on October 18, 2010. *See N.J.S.A.* 52:14B–4.10(e) (stating that a rule proposal, followed by a notice of substantial changes, shall expire eighteen months after the date of publication of the notice of proposal). If the rule proposal expires, then SDA will need to re-commence the rule-making process. However, we shall not dictate to SDA whether to adopt its current proposal, or to begin anew with a different rule. That involves a policy judgment for the agency. *See Howell Twp., supra,* 371 *N.J.Super.* at 188 (stating the court shall not "compel a specific form of agency action" but may order "a remedy for arbitrary inaction").

Therefore, SDA shall submit a notice of adoption of its current rule proposal by the April 18, 2012 deadline, or it shall publish a new rule proposal within thirty days of the filing date of this opinion, and submit a notice of adoption with respect to that new proposal within thirty days after the close of the new comment period.

All Citations

Not Reported in A.3d, 2012 WL 1080867

Footnotes

1 "SDA district" is defined as "a district that received education opportunity aid or preschool expansion aid in the 2007–2008 school year." *N.J.S.A.* 18A:7G–3.

2 SDA does not challenge plaintiff's standing and we accept it.

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