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VIA FEDERAL EXPRESS

Heather Joy Baker, Clerk
Supreme Court of New Jersey
R.J. Hughes Justice Complex
25 W. Market Street
Trenton, New Jersey 08611

Re: *In re Renewal Application of TEAM Academy Charter School, et al., Supreme Court Docket No.: 083014 (LEAD)*

Dear Ms. Baker:

We are counsel to respondents TEAM Academy Charter School, Inc., Robert Treat Charter School, Inc., North Star Academy Charter School, University Heights Charter School, Great Oaks Legacy Charter School and New Horizons Community Charter School (collectively "Respondent Charter Schools") in the above-referenced appeals.¹ Please accept this letter brief in lieu of a more formal brief in opposition to Plainfield Board of Education's ("Plainfield") *amicus curiae* brief.

¹ We do not represent respondent Maria L. Varisco Rogers Charter School.

PRELIMINARY STATEMENT

In sum, Plainfield's arguments are premised on Appellant Education Law Center's ("ELC") erroneous assertion that the Commissioner and Appellate Division "ignored" the allegations of segregation and negative fiscal impact that charter schools have on traditional public schools. Plainfield has not appealed charter decisions in its district on segregation or fiscal grounds, and instead appears here *amicus curiae* "to protect the rights of students protected by this Court's rulings in the landmark Abbott v. Burke litigation and ensure that charter schools authorized by the Commissioner of Education do not interfere with PPSD's ability to provide a constitutionally-mandated 'Thorough and Efficient' education to its students." (Plainfield Amicus Brief at p.1).

Plainfield and other *amici curiae*² in this appeal simply follow ELC's flawed arguments below, and have not provided any information to assist this Court in making its decision on the certified questions of law. Plainfield incorporates ELC's arguments. ELC has failed to meet its burden to demonstrate that the Commissioner's approval of Newark charter school enrollment expansions was arbitrary, capricious or unreasonable.

² Newark Board of Education and Franklin Township Board of Education were granted leave to appear *amicus curiae* in this appeal. Respondent Charter Schools filed separate opposition to those briefs.

STATEMENT OF RELEVANT PROCEDURAL HISTORY AND FACTS³

On February 18, 2016, the Commissioner granted Respondent TEAM Academy Charter School's ("TEAM") application to renew its charter for five years. (Aa28.)⁴ On February 29, 2016, the Commissioner also issued six distinct charter school application decisions as follows: renewing Robert Treat Charter School's ("Robert Treat") charter for five years (Aa12); renewing North Star Academy Charter School's ("North Star") charter for five years (Aa24); increasing Maria L. Varisco Rogers Charter School's enrollment for 2016-2017 and 2017-2018 school years (Aa20), increasing University Heights Charter School's ("University Heights") enrollment for 2016-2017, 2017-2018, 2018-2019 and 2019-2020 school years (Aa30); increasing Great Oaks Legacy Charter School's ("Great Oaks") enrollment for 2016-2017, 2017-2018, 2018-2019 and 2019-2020 school years (Aa18); and increasing New Horizons Charter School's ("New Horizons") enrollment for 2016-2017 and 2017-2018 school years (Aa22).

Appellant ELC appealed the foregoing decisions in a single notice of appeal. After multiple motions, the Appellate Division gave ELC leave to file a notice of appeal for each charter

³ The facts and procedural history are intertwined with respect to Plainfield's amicus appearance.

⁴ "Aa" refers to Appellant Education Law Center's appendix on appeal.

decision and ordered that the appeals be consolidated on September 28, 2016.

On May 7, 2019, the Appellate Division issued its decision affirming the Commissioner's 2016 decisions. *In re Renewal Application of Team Acad. Charter Sch.*, 459 N.J. Super. 111, 208 A.3d 10 (App. Div. 2019) ("*TEAM Academy*"). ELC served a notice of petition for certification to this Court on May 28, 2019. ELC filed its petition on June 21, 2019. Respondent Charter Schools filed their opposition on July 3, 2019.

Newark Board of Education and Franklin Township Board of Education filed motions for leave to appear *amicus curiae* on July 18, 2019. Plainfield filed its motion for leave to appear *amicus curiae* on July 29, 2019. All three movants were granted leave to appear *amicus curiae* on February 6, 2020.

There are five charter schools in Plainfield: College Achieve Central Charter School, Cresthaven Academy Charter School, The Queen City Academy Charter School, Barack Obama Green Charter High School and Union County TEAMS Charter School.⁵ Each of these charter schools owes their existence and enrollment to Commissioner decisions. Plainfield had ample opportunity to contest those decisions on segregation or fiscal

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<https://homeroom5.doe.state.nj.us/directory/charter.php?county=Union> (last accessed on August 6, 2019).

grounds, and it chose not to. Plainfield appears only now, *amicus curiae*, in these appeals which concern multiple distinct charter schools in a different city with different enrollment procedures (with Newark having universal enrollment for most of its students).

LEGAL ARGUMENT

I. PLAINFIELD ERRONEOUSLY ASSERTS THAT THE COMMISSIONER AND APPELLATE DIVISION "IGNORED" ELC'S ALLEGATIONS OF SEGREGATION AND FISCAL IMPACT

A. Alleged Segregative Impact

A common thread of the *amicus curiae* briefs is that they parrot the assertion made by ELC that the Appellate Division and Commissioner "ignored" ELC assertions about possible segregative impacts from charter school expansions. Plainfield further asserts that The Appellate Division "ignored" the "fiscal impacts" of the charter enrollment expansions. (Plainfield Amicus Brief at p.10).

As to "ignoring" threats of segregation, this assertion is contradicted by the opinion. The Appellate Division stated below:

That the demographics of the individual charter schools do not precisely reflect the overall demographics for the District is not sufficient to demonstrate a segregative effect. . . . Thus, although the Commissioner did not specifically address

the issue, ELC's submissions fail to substantiate a segregative effect, either in the pre- or post-enrollment practices, such that the Commissioner's decisions can be characterized as arbitrary, capricious, and unreasonable.

In Renewal Application of TEAM Acad. Charter Sch., 459 N.J. Super. 111, 128.

The Appellate Division squarely addressed ELC's segregation arguments and discounted them. The arguments rested on ELC's own data analysis and cherry-picked information. When the Appellate Division noted that the Commissioner "did not specifically address the issue," it referred to the Commissioner's quasi-legislative letter decision granting the charter applications. In no way can it be construed that the Commissioner or Appellate Division "ignored" allegations or threats of segregation.

The Appellate Division noted that the Commissioner has continuous oversight of charter school applications for renewals and enrollment expansions. *In Re TEAM* 459 N.J Super. at 122-23. Every charter school in the State must sign a "Charter Agreement" between itself and the Commissioner, which in relevant part, requires that the school "seek[] the enrollment of a cross section of the school-age population including racial

and academic factors. . .” in the district. (RCSa281-293)⁶. The Commissioner also scrutinizes “the student composition of a charter school and the segregative effect that the loss of the students may have on its district of residence.” *N.J.A.C.* 6A:11-2.2(c). To facilitate that review, charter schools must submit an annual report to the Commissioner, local boards of education, and the county superintendent of schools. *N.J.S.A.* 18A:36A-16(b); *N.J.A.C.* 6A:11-2.2. *In Re TEAM 459 N.J Super.* at 122. The annual report must include, among other things, access and equity information and records, such as relating to the availability and advertisements of enrollment applications, the student attrition rates, demographics and special education compliance (RCSa96-116; *Id.* at 129). The Commissioner may revoke a charter at any time if the school has not fulfilled or has violated any of the conditions of its charter. *N.J.S.A.* 18A:36A-17.

The Appellate Division cited below the universal enrollment system in Newark, which accounts for 88% of the student enrollment at issue here. *In Re TEAM 459 N.J Super.* at 127-28. As the Appellate Division noted, “ELC does not suggest that any of the respondents’ enrollment policies are other than color blind, random, or keep the schools from being ‘open to all

⁶ “RCSa__” refers to Respondent Charter Schools’ Appendix filed in Opposition to Appeal.

students in the community[.]'" *Id.* at 145. Similarly, there is no suggestion that post-enrollment practices deliberately have a segregative effect. *Id.* at 145.

The Supreme Court has found that the "form and structure" of the appropriate analysis when determining segregative effect is within the discretion of the Commissioner and the State Board of Education. *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 N.J. at 329 (2000). The Commissioner is not required to include reasons for granting, as opposed to denying, an application to renew or amend a charter. *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 320 N.J. Super. at 217, *aff'd as modified* 164 N.J. 336 (citing *Bd. of Educ. of E. Windsor Reg'l Sch. Dist. v. State Bd. of Educ.*, 172 N.J. Super. 547, 551-52 (App. Div. 1980)). The applicable arbitrary, capricious, or unreasonable standard demands only "that the reasons for the decision be discernible, [and] need only be inferable from the record considered by the agency." *Id.*

Plainfield, like ELC, presents cherry-picked data from different sources and from different school years to create a narrative of "de facto" segregation. However, Plainfield's own data shows that charter schools within its district have enrollment demographics similar to its own. Plainfield is

unclear about what segregation it seeks to cure. Without explanation, it combines black and Latino students and asserts that its student population was "comprised of 98.4% black and Latino students" in the 2018-19 school year. It then compares this to "the City of Plainfield's ethnic composition" which includes a population that is "44% Latino and 39% black", or in sum, 83% black and Latino. (Plainfield Amicus Brief at p.4).

The more appropriate comparison in this context is to that of the "school-age population" of Plainfield and not the entire population of Plainfield, per *N.J.S.A. 18A:36A-8(e)*, Plainfield asserts that its student population in the 2017-18 school year is "28.72% Black and 69.68% Hispanic students" or a sum of 98.4% black and Latino. Plaintiff then compares that to Union County Teams Charter School, which has an enrollment of "63.3% black and 35.9 Hispanic", for a sum of 99.2%, and College Achieve Central Charter School's enrollment of 25.7% black and 72.9% Hispanic, for a sum of 98.6% black and Hispanic. Plainfield charter schools are indeed attracting a cross section of the community school age population pursuant to *N.J.S.A. 18A:30A-8(e)*.

B. Alleged Fiscal Impact

Plainfield argues that the Appellate Division did not address the negative fiscal impacts of New Jersey's charter

schools. (Plainfield Amicus Brief at p.9-14). Contrary to this assertion, the Appellate Division did not ignore the fiscal impact of the Respondent Charter Schools' enrollment expansions, but rather, ELC simply did not show a fiscal impact on the District warranting a reversal. The court below held:

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

In re TEAM, 459 N.J Super. at 144.

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

ELC did not specifically demonstrate how the District students would be deprived of a thorough and efficient education by the expansion. ELC represented that the District's budget crisis was caused by both the chronic underfunding of the SFRA⁷ formula and the rapid expansion of charter

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

schools in Newark. ELC was required to separate the two sources it claimed contributed to the budget crisis and failed to do so.

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

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

Thus, the court below did not “ignore” the fiscal impact on the local district. ELC simply failed to demonstrate how the financial impact of charter school renewals and expansions would impair T&E efforts other than conclusory assertions premised on spending reductions. *In re Red Bank Charter School* at 483.

"ELC does not account for the fact that the legislative formula is designed to maintain school funding at the constitutionally required level despite the existence of charter schools. Nor does ELC address the fact that in 2011 at least, 205 districts out of New Jersey's 560 school districts, in addition to Newark, were similarly underfunded." *In Re TEAM 459 N.J Super.* at 142, citing *Abbott XXI*, 206 N.J. at 458.⁸ The court also noted that the SFRA was amended to no longer give the Commissioner discretion in implementing the SFRA formula. *In Re TEAM 459 N.J Super.* at 144, citing *N.J.S.A. 18A:36A-12(b)* (emphasis added). "ELC has not demonstrated the reason, given the SFRA formula, that a different standard should today be applied to former Abbott districts." *In Re TEAM 459 N.J Super.* at 144 citing *J.D. ex rel Scipio-Derrick v. Davy*, 415 N.J. Super 375, 378 n.1 (App. Div. 2010). "[T]he legislature moderated the impact charter schools would have on funding for traditional public schools by reducing the per-pupil amount payable by the district to 90%." *In Re TEAM 459 N.J Super.* at 121-22, citing *Englewood*, 164 N.J. at 333; *N.J.S.A. 18A:7F-43 to -63*.

⁸ 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.

Here, Plainfield concludes that allowing charter schools to expand in Plainfield has “devastated an already underfunded PPSD school budget”. (Plainfield Amicus Brief at p.1). In support of this, it complains that is allocated 11.52% of its budget to charter schools in the 2018-19 school year, increased from 11.49% the prior school year. (Plainfield Amicus Brief at p.1). However, Plainfield, like ELC, fails to account for the fact that with the expansion of charter schools, Plainfield is educating less students.

Plainfield also asserts that charter school growth in its district has “significantly impaired” Plainfield’s ability to “provid[e] and fund[] special education for any student with an eligible disability” without providing any details about that purported impairment. (Plainfield Amicus Brief at p.12). Charter schools receive less than 90 percent of a resident district’s per student funding for resident students. The Legislature contemplated that the fractional share remaining with the resident district is designed to ameliorate the resident district inability to make reductions to the budget which perfectly correlates with a reduction in funds following a charter school student. For every Plainfield resident attending a charter school, Plainfield retains 10 percent or more funding

for that student. This proportionate funding was upheld in the *Englewood on the Palisades* case.

Thus, because Plainfield's appearance *amicus curiae* is premised on an erroneous assertion that the Commissioner and the court below "ignored" issues on fiscal impact and segregation allegations. Plainfield's assertions about the merits of ELC's petition for certification lack factual or legal basis.

Therefore, the decision of the Appellate Division should be affirmed.

Respectfully submitted,



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Bar ID No. 040061998

Enc.

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