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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 Franklin Township Board of Education's ("Franklin") *amicus curiae* brief.

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

PRELIMINARY STATEMENT

In sum, Franklin's arguments are premised on Appellant Education Law Center's ("ELC") erroneous assertion that the Commissioner and Appellate Division "ignored" the allegations of segregation.² Franklin cites to its appeal of the Commissioner's grant of a charter amendment expanding the enrollment of a charter school located in its district. *IMO the Approval of the Charter Amendment of Central Jersey College Prep* (App. Div. Docket No. A-3074-16, June 7, 2019) ("CJCP appeal"). In the CJCP appeal, Franklin made the same argument that ELC raises here, that the Commissioner failed to consider the segregative impact of CJCP's charter amendment. Franklin did not appeal that decision.

Franklin and other *amici curiae*³ 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. Franklin incorporates ELC's arguments. ELC has failed to meet its burden to demonstrate

² Franklin does not argue in its *amicus curiae* brief that the Commissioner failed to consider the fiscal impact of charter schools on its district.

³ Newark Board of Education and Plainfield Board of Education were granted leave to appear *amicus curiae* in this appeal. Respondent Charter Schools filed separate opposition to those briefs.

that the Commissioner's approval of Newark charter school enrollment expansions was arbitrary, capricious or unreasonable.

STATEMENT OF RELEVANT PROCEDURAL HISTORY AND FACTS⁴

On February 18, 2016, the Commissioner granted Respondent TEAM Academy Charter School's ("TEAM") application to renew its charter for five years. (Aa28.)⁵ 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

⁴ The facts and procedural history are intertwined with respect to Franklin's amicus appearance.

⁵ "Aa" refers to Appellant Education Law Center's appendix on appeal.

gave ELC leave to file a notice of appeal for each charter decision and ordered that the appeals be consolidated on September 28, 2016.

On May 7, 2019, the Appellate Division issued its decision affirming the Commissioner's 2016 decisions. *In re Renewal Application of Team Acad. Charter Sch.*, 459 N.J. Super. 111, 208 A.3d 10 (App. Div. 2019). 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.

On June 7, 2019, the Appellate Division decided *IMO Approval of the Charter Amendment of Central Jersey College Prep*, (June 7, 2019, Docket No. A-3074-16T4). The Appellate Division rejected Franklin Township's arguments and affirmed the February 28, 2017 final decision of the Commissioner, approving an application by Central Jersey College Prep Charter School to amend its charter to increase enrollment, add a satellite campus, and move its main campus to a new facility. (AA02).⁶ Franklin Township filed that appeal. (AA01).

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

⁶ "AA__" refers to Franklin's Appendix to its *amicus curiae* brief.

amicus curiae on July 29, 2019. All three movants were granted leave to appear *amicus curiae* on February 6, 2020.

Franklin appears *amicus curiae* to "alert this Court that the Appellate Division's undermining of the *Booker* doctrine is not unique to the pending Petition for Certification" and asks this Court "to note the data and language in the CJCP matter where it is evident that the Appellate Division misapplied this State's prohibition against segregation in fact." (Franklin's Amicus Brief, p.1-2). At the time of the CJCP appeal, there were two charter schools operating within Franklin Township, Central Jersey College Prep and Thomas Edison EnergySmart Charter School. Franklin appealed the February 28, 2017 approval of CJCP's charter amendment application. The Appellate Division rejected Franklin Township's arguments and affirmed the final decision of the Commissioner, approving an application by Central Jersey College Prep Charter School to amend its charter to increase enrollment, add a satellite campus, and move its main campus to a new facility. (AA02). Franklin chose not to petition for certification. Franklin appears 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). Franklin makes the same errors as ELC, by insisting

that the demographics of charter schools should mirror the demographics of the resident district, without taking into account actual non-discriminatory enrollment procedures and neighborhood preferences.

LEGAL ARGUMENT

I. FRANKLIN'S AMICUS CURIAE ARGUMENTS HAVE ALREADY BEEN REJECTED BY THE APPELLATE DIVISION AND IT DID NOT PETITION FOR CERTIFICATION

Franklin could have filed a petition for certification if it desires review of the Appellate Division's decision in *IMO Approval of the Charter Amendment Request of Central Jersey College Prep* (June 7, 2019, Docket No. A-3074-16T4). The Appellate Division decided that appeal on June 7, 2019. Pursuant to R. 2:12-3, if Franklin wished to appeal that decision to this Court, it should have filed its notice of petition for certification by June 27, 2019.

Franklin appears *amicus curiae* in these appeals which concern multiple distinct charter schools in a city with a materially different local resident district and student demographic. Wanting to avoid, in Franklin's counsel's words, the "expensive and time consuming" petition for certification in the *IMO Approval of the Charter Amendment Request of Central Jersey College Prep* matter, is not a legitimate reason to appear as an *amicus curiae* here. While Franklin makes provocative

arguments about alleged segregation it is not willing to pay the incremental cost of a petition to this Court concerning a charter school in its district. An *amicus curiae* appearance under R. 1:13-9(a) is not intended to serve as an appeal on the cheap.

Notwithstanding Franklin's procedural posture, Franklin does not provide any new information in its *amicus curiae* brief that would assist this Court in making its decision. As a preliminary matter, Franklin is not an Abbott district. Therefore, the certified issue of whether a heightened level of scrutiny applies to charter decisions in Abbott districts does not apply to it. As an *amicus*, it cannot raise new issues in this matter which are particular to Franklin Township. *State v. O'Driscoll*, 215 N.J. 461 (2013).

II. FRANKLIN 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. Franklin argues that the Appellate Division "completely disregarded its longstanding and well-established constitutional obligation to seek out and

eliminate segregation in fact (also known as de facto segregation).” (Franklin Amicus Brief at 1). However, in the CJCP appeal, Franklin never presented the enrollment data to support its contentions. The Appellate Division noted, “before the Commissioner, Franklin only asserted that CJCP had a ‘poor track record’ with ELL students, and presented no evidence to the Commissioner regarding the racial and economic segregative effects of CJCP’s enrollment”. (AA23). The Appellate Division went further. “Additionally, even if Franklin had presented the information about student enrollment data to the Commissioner at the time she was considering CJCP’s application, it would not have presented a basis to reject the application”. (AA24).

Franklin presents the same enrollment data here that it presented to the Appellate Division in the CJCP appeal. Franklin did not present enrollment data regarding its student demographics over time to adequately compare it to charter school enrollment in its district. The Appellate Division had to rely on the enrollment data from the Commissioner, which showed that “the District’s student demographics, including socioeconomic and racial demographics, have . . . remained relatively static from the 2010-2011 to the 2015-2016 school year, and thus there was no indication that CJCP’s operations were exacerbating the racial imbalance.” (AA26).

As to "ignoring" threats of segregation in the instant appeal, 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 addresses 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)⁷. 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.

⁷ "RCSa" refers to Respondent Charter Schools' Appendix filed in Opposition to Appeal.

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 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.*

Franklin presents data from one charter school in its district without comparing it to the same data from its own student enrollment to create a narrative of "de facto" segregation. (Franklin Amicus Brief at p.2). However, the same data from the CJCP appeal shows that Central Jersey College Prep in Franklin Township has enrollment demographics similar to its own and Franklin Township enrollment demographics have remained relatively static. (AA25-26).

The decision of the Appellate Division should be affirmed.

Respectfully submitted,



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Enc.

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