

SUPREME COURT OF NEW JERSEY

IN RE RENEWAL APPLICATION OF
TEAM ACADEMY CHARTER SCHOOL

IN RE RENEWAL APPLICATION OF
ROBERT TREAT ACADEMY CHARTER
SCHOOL

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

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

DOCKET NO. 083014

Civil Action

On Appeal from:
Final Decision of the
Appellate Division,
Docket Nos.

A-3416-15T1

A-4384-15T1

A-4385-15T1

A-4386-15T1

A-4387-15T1

A-4388-15T1

A-4398-15T1

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**BRIEF OF PROPOSED AMICUS CURIAE PLAINFIELD BOARD OF EDUCATION
IN SUPPORT OF APPELLANT'S PETITION FOR CERTIFICATION**

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

IN RE AMENDMENT REQUEST TO
INCREASE ENROLLMENT OF NEW
HORIZONS COMMUNITY CHARTER
SCHOOL

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STATEMENT OF INTEREST OF AMICUS CURIAE

Plainfield Public School District ("PPSD") is one of New Jersey's thirty-one (31) poorer urban districts, formerly referred to as "Abbott" districts. As a district that serves predominantly low-income and Black and Latino students, PPSD has a profound interest in supporting Appellant Education Law Center ("ELC")'s attempt 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 ("Commissioner") do not interfere with PPSD's ability to provide a constitutionally-mandated "Thorough and Efficient" education to its students.

As of June 2019, PPSD's student population consists of 7,947 students, 78.6% of which are considered economically disadvantaged. PPSD is in Union County, and all five charter schools in the County are located in the City of Plainfield. The Commissioner's decision in recent years to allow charter schools to expand in Plainfield has devastated an already-underfunded PPSD school budget. Pursuant to the requirements of the Charter School Program Act of 1995 (the "Act"), PPSD was compelled to allocate \$23,111,117 in payments to the Plainfield charter schools in the 2018-2019 school year, representing 11.52% of the total PPSD budget. This represents a nearly \$1.2 million increase from the 2017-2018 school year when PPSD allocated

\$21,905,749 in charter school payments, or 11.49% of the total PPSD budget.

PPSD's request to participate in this matter as *amicus curiae* arises out of the significant impact of the expansion of charter school enrollment on PPSD and other Abbott districts - including Newark Public Schools ("NPS") - that serve a substantial at-risk student population. PPSD is particularly concerned that charter school growth will have a severe impact on: (1) entrenched patterns of student segregation based on race, economic status, disability, and limited-English proficiency ("LEP"); and (2) PPSD's ability to retain sufficient funding to provide its students with its constitutionally-mandated a Thorough and Efficient education.

In absolving the Commissioner of his obligation to address these impacts, the Appellate Division found that "there is no statutory or case law requiring the Commissioner to evaluate the potential impact of funding on the District when that assertion is made by another entity, and not the District itself." PPSD serves a nearly-identical demographic of students as NPS. PPSD's application in this matter, therefore, serves as both NPS' proxy, and as PPSD's own advocate for children in its schools.

Towards that end, the Plainfield Board of Education respectfully moves to participate as *amicus curiae* and submits

this brief in support of Appellant, ELC's Petition for Certification.

PRELIMINARY STATEMENT

Segregation by race, ethnicity, disability, and economic status severely undermines the ability of New Jersey school districts to provide its students with a Thorough and Efficient education, which includes enabling students to attend schools with diverse student populations. In Brown v. Board of Education, 347 U.S. 483 (1954), the United States Supreme Court announced that *de jure* segregation has no place in America's public schools. Yet the New Jersey Constitution - and this Court's well-established jurisprudence go further.

New Jersey's Constitution was amended in 1947 to prohibit both *de jure* and *de facto* segregation in public schools. N.J. Const. Art. I, ¶5. As this Court found, the purpose of prohibiting *de facto* segregation in public schools is to enable children to learn to live together in our increasingly multi-racial society:

In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages

of heterogeneous student populations and point to the disadvantages of homogeneous student populations.. [T]he states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by.

Booker v. Bd. of Educ., 45 N.J. 161, 171 (1965); see also N.J.A.C. § 6A:7-1.7.

More than sixty years after Brown and fifty years after Booker, far too many of New Jersey school districts remain intensely segregated, with longstanding racial and ethnic imbalances that are not proportional with the demographics of the cities and counties in which they reside. By way of example, but not limitation, PPSD's student population is comprised of 98.4% Black and Latino students.¹ In contrast, the City of Plainfield's ethnic composition includes 44% Latino, 39% Black, 9% White and 1% Asian residents.²

As Appellant ELC convincingly argues, the Commissioner cannot and must not be permitted to ignore the patterns of *de facto* segregation intensified by charter school growth in school districts like PPSD that manifest an already segregated student population. If the Commissioner, who is solely responsible for authorizing charter schools, simply refuses to consider the segregative impacts on districts of residence when analyzing

¹ N.J. Dept. of Education, *2018-2019 Enrollment District Reported Data*, available at <https://www.nj.gov/cgi-bin/education/data/enrllplus.pl>

² U.S. Census Bureau, *Census Reporter Profile Page for Plainfield, NJ*, available at <https://censusreporter.org/profiles/16000US3459190-plainfield-nj/>

charter school applications, New Jersey's urban school districts will continue to languish as among the most segregated schools in the nation.

Similarly, the Commissioner must not be permitted to ignore the fiscal impact of a charter school application - in this case the expansion of 7 existing Newark charter schools by a cumulative 8,500 students in numerous new facilities - on the ability of a local school district to retain sufficient funding to provide its students with a Thorough and Efficient education. Public schools like NPS and PPSD are left with depleted resources as charter school enrollment practices have resulted in a hyper-concentration of LEP and special education students. The Commissioner's obligation to evaluate these types of financial effects was erroneously ignored by the Appellate Division.

In sum, this lawsuit will complement and advance the progress made through the Abbott remedies to give all children the opportunity to attend schools that are not only well resourced, but more racially and socio-economically diverse. As this Court stated in In re North Haledon Sch. Dist., 181 N.J. 161, 177 (2004), when reaffirming almost forty years of its own legal precedent: "Students attending racially imbalanced schools are denied the benefits that come from learning and associating with students from different backgrounds, races, and cultures."

ELC's Petition for Certification seeks to vindicate the rights of Abbott students such as those in PPSD and to improve their educational opportunities by combating the rampant *de facto* segregation in NPS. For the reasons set forth below, this Court should grant the Petition in order to address and resolve the critical constitutional issues implicated by the Appellate Division's ruling and raised by the ELC. PPSD respectfully submits that without this Court's intervention, the ability of PPSD and other Abbott districts to deliver a constitutional Thorough and Efficient Education in diverse learning environments will be irreparably compromised.

ARGUMENT

THE COURT SHOULD GRANT CERTIFICATION TO ADDRESS THE CRITICAL QUESTION OF WHETHER THE COMMISSIONER OF EDUCATION MUST CONSIDER THE NEGATIVE IMPACTS OF FUNDING AND SEGREGATION IN AT-RISK SCHOOL DISTRICTS WHEN ANALYZING CHARTER SCHOOL APPLICATIONS

R. 2:12-4 of the New Jersey Court Rules provides, in pertinent part, that certification will be granted if "the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court." This case presents a paradigmatic example of such public importance, presenting constitutional issues having broad ramifications for school districts beyond NPS, the individual charter schools, and, most importantly, the children who attend those schools.

I. THE COURT SHOULD GRANT CERTIFICATION IN ORDER TO ADDRESS THE SEGREGATIVE IMPACTS OF NEW JERSEY'S CHARTER SCHOOLS

This Court in Booker held that our State's constitution prohibited *de facto* segregation in public schools, even when there is no intent to discriminate and where there is only a racial imbalance rather than complete segregation. Booker at 168-175. Despite that firmly established holding, the Appellate Division, in excusing the Commissioner from evaluating the impact of charter school growth on *de facto* segregation in NPS, erroneously concluded that the Newark charter schools formal enrollment practices did not "deliberately have a segregative effect." In re Team Academy Charter School, 459 N.J. Super. 111, 145 (App. Div. 2019). In doing so, the Appellate Division ignored the relevant standard for evaluating *de facto* segregation and focused on the charter schools' motives and intent instead of the existence of a racial imbalance, as first set forth in Booker.

The Appellate Division similarly misapplied the relevant standard governing the Commissioner's duty to evaluate the segregative effects of charter schools. In the matter of In re Grant of Charter School Application of Englewood on the Palisades Charter School, 164 N.J. 316 (2000) ("Palisades"), this Court held that:

The Commissioner must consider the impact that the movement of pupils to a charter school would have on the district of residence. That impact must be assessed when the Commissioner initially reviews a charter school for approval to open, and on an annual basis thereafter...Continuing assessment of the charter school's pupil population and impact on the district of residence must also occur... So, too, must the Commissioner be prepared to act if the de facto effect of a charter school were to affect a racial balance precariously maintained in a charter school's district of residence.

Palisades, 164 N.J. at 328.

Despite clear precedent establishing that the Commissioner must evaluate and address segregative effects, the Appellate Division found that:

"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 re Team Academy Charter School, 459 N.J. Super. 111, 146 (App. Div. 2019). (emphasis added).

As Appellant ELC demonstrated in the record on the applications to expand existing charter schools in Newark, the Commissioner's prior authorization of substantial and rapid charter school enrollment growth significantly increased the concentration of minority, disabled, and LEP students in Newark. As PPSD's data shows, the segregative effects of charter enrollment growth in Plainfield is strikingly similar.

During the 2017-18 school year, PPSD's student population included 28.72% Black and 69.68% Hispanic students.³ In the same year, PPSD enrolled 35.97% LEP students and 19.7% disabled students.⁴ Notably, 73.68% of PPSD students received free lunch, with an additional 6.47% receiving reduced price lunches.⁵

During the same school year, Union County Teams Charter School, residing in Plainfield, enrolled 63.3% Black and 35.9% Hispanic students- with merely 3.9% LEP students and 10.7% students with disabilities.⁶ College Achieve Central Charter School ("College Achieve"), the largest charter school in Plainfield with a student population of 797, consisted of 25.7% Black and 72.9% Hispanic students.⁷ Alarminglly, only 3.8% of College Achieve's students were classified with disabilities.⁸

II. THE COURT SHOULD GRANT CERTIFICATION IN ORDER TO ADDRESS THE NEGATIVE FISCAL IMPACTS OF NEW JERSEY'S CHARTER SCHOOLS

In recent years, the Commissioner has authorized five charter schools to operate in Plainfield. Plainfield charters

³ N.J. Dept. of Education, *2017-2018 Enrollment District Reported Data*, available at <https://www.nj.gov/cgi-bin/education/data/enr11plus.pl>

⁴ *Id.*

⁵ *Id.*

⁶ N.J. Dept. of Education, *Union County Teams Charter School 2017-2018 School Performance Report*, available at <https://rc.doe.state.nj.us/SearchForSchool.aspx>

⁷ N.J. Dept. of Education, *College Achieve Central Charter School 2017-2018 School Performance Report*, available at <https://rc.doe.state.nj.us/SearchForSchool.aspx>

⁸ *Id.*

enrolled 1,735 students during the 2017-18 school year.⁹ The Plainfield Board of Education, as other local boards of education and their taxpayers, is compelled to fund the charter schools pursuant to the Act. Notably, this case does not involve a challenge to the funding requirements of the Act. Nor does this case involve a situation where funds, "on paper," merely "follow the student" as implied by the Appellate Division's finding that:

the District has to pay the charter schools only 90% of certain student funding categories, and retains 10%—an amount designed to respond to concerns about the loss of funding. Englewood, 164 N.J. at 333, 753 A.2d 687; N.J.S.A. 18:36A-12(b). On paper, the reduced per pupil allocation should ease the budgetary pressures—not worsen them.

In re Team Academy Charter School, 459 N.J. Super at 142.

The funding issues raised by Appellant ELC, and ignored by the Appellate Division, concern the Commissioner's constitutional obligation to evaluate the impacts from charter school growth on the district of residence's ability to deliver a Thorough and Efficient education, especially to at-risk students with high levels of need.

In the Palisades matter, *supra*, this Court held that the Commissioner was, as a constitutional matter, required to

⁹ N.J. Dept. of Education, *Charter School 2017-2018 School Performance Reports*, available at <https://rc.doe.state.nj.us/SearchForSchool.aspx>

evaluate the fiscal effects of charter schools on the district of residence. Specifically, this Court found:

"[I]f a district of residence demonstrates with some specificity that the constitutional requirements of a thorough and efficient education would be jeopardized by loss of the presumptive amount, or proposed different amount of per-pupil funds to a charter school, then the Commissioner is obligated to evaluate carefully the impact that loss of funds would have on the ability of the district of residence to deliver a thorough and efficient education."

Id. at 335. (emphasis added).

The Appellate Division, therefore, plainly misapplied the clear standard enunciated by this Court in Palisades to assiduously protect a school district's financial ability to provide a Thorough and Efficient education in the context of charter school application and growth. This oversight responsibility is all the more critical in a school district such as Plainfield, where the Commissioner has allowed five charter schools to operate.

This constitutional obligation is underscored by the requirements for providing special education to students with disabilities. The Individuals with Disabilities Education Act ("IDEA") requires states to ensure that:

"[a]ll children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of

special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.”

20 U.S.C. § 1412(2)(3).

While federal funds partially support New Jersey special education programs and services, state and local funding are also critically important in meet the federal mandate to provide a free, appropriate, public education for students with disabilities. Accordingly, local school districts such as Plainfield, are ultimately responsible for providing and funding special education for any student with an eligible disability. Charter school growth in Plainfield has significantly impaired PPSD’s ability to do so.

During the 2017-18 school year, PPSD’s special education program included 110 autistic students, 462 students with specific learning disabilities, 198 speech or language-impaired students and an additional 342 students classified with other health impairments (“OHI”).¹⁰ By comparison, College Achieve Central Charter School, Plainfield’s largest charter school, did not enroll any students with autism. Of the 797 students enrolled during the 2017-2018 school year, only 11 students were

¹⁰ N.J. Dept. of Education, *2017-2018 Enrollment District Reported Data*, available at <https://www.nj.gov/cgi-bin/education/data/enr11plus.pl>

classified with specific learning disabilities, 14 with speech or language impairments, and just 22 OHI students.¹¹

As Appellant ELC demonstrated on the record in this case, students with disabilities, especially those with more severe classifications requiring intensive and costly service, are generally not enrolled in charter schools, leaving the responsibility of educating these students to the local school districts. The small number of students with disabilities enrolled in charter schools and the resulting hyper-concentration of students requiring special education in PPSD is precisely the type of data that the Commissioner must consider when acting upon charter school applications.

Similarly, charter school enrollment practices have also increased PPSD's concentration of LEP students, or those whose first language is not English. Under federal and state law, public schools must ensure that LEP students are given sufficient instruction to allow them to acquire English proficiency.

Local school districts are mandated to serve all children and therefore have the responsibility for meeting the full range of student needs, including specialized English instruction and low prevalence disabilities that encompass high costs. As a

¹¹ N.J. Dept. of Education, *College Achieve Central Charter School 2017-2018 School Performance Report*, available at <https://rc.doe.state.nj.us/SearchForSchool.aspx>

result, public schools, such as NPS and PPSD, must provide these necessary special services, whether or not state and federal funds are sufficient to cover the costs of doing so.

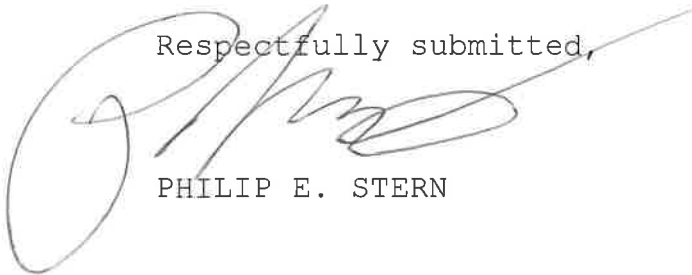
In sum, the Appellate Division's decision ignored this Court's firm precedent by releasing the Commissioner from his duty to evaluate a charter school's impact on the ability of local school district to retain sufficient funding to provide its students with a Thorough and Efficient education. Given the increased fiscal responsibilities resulting from charter school enrollment practices, Abbott districts like PPSD are left with depleted funding and educational resources. These dire consequences are precisely the type of effects that this Court directed the Commissioner to evaluate in Palisades and which the Appellate Division erroneously failed to require him to do.

CONCLUSION

This Court should grant Appellant ELC's Petition for Certification as the Appellate Division mistakenly ignored the Commissioner's duty to ensure that charter schools do not create, contribute to, or intensify student segregation by vulnerable, protected subgroups (e.g., race, disability, LEP status), or divert the funding necessary for public school districts to provide students with a Thorough and Efficient

education. Moreover, this Court should grant PPSD's application to appear as *amicus curiae* in this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'P. Stern', written over the text 'Respectfully submitted,'.

PHILIP E. STERN

Dated: July 19, 2019