

**COMMENTS OF EDUCATION LAW CENTER  
ON REVIEW OF DEPARTMENT OF EDUCATION'S IMPLEMENTATION  
OF THE CHARTER SCHOOL PROGRAM ACT OF 1995**

**November 26, 2018**

The Department of Education (“DOE”) has undertaken a comprehensive review of the agency’s implementation of New Jersey’s charter school program, as authorized under the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. (“Act”).<sup>1</sup>

Education Law Center (“ELC”) submits these comments in response to the DOE’s solicitation of input from stakeholders to inform its review. ELC serves as counsel to the Plaintiffs in the landmark Abbott v. Burke litigation and, in that capacity, has substantial expertise in analyzing and addressing impact of the DOE’s implementation of the charter school program since the Act’s passage in 1995, especially in the urban districts subject to the Abbott remedies ordered by the New Jersey Supreme Court in that case.

ELC’s experience and expertise on charter school program implementation is multi-faceted and includes litigation challenging amendments to DOE regulations; litigation challenging DOE decisions to allow charter schools to expand; conducting research on charter school impacts and filing objections to applications for new or expanded charter schools; submitting comments on proposed rule changes; presenting testimony on to legislative committees; and proposing legislative reforms to the Act.

Enacted over thirty years ago, the Act explicitly directed the DOE to authorize charter schools as an alternative form of school governance for the express purpose of testing new practices and approaches to delivering instruction and curriculum, particularly for at-risk and other students with special needs. The Legislature’s explicit objective for the charter program was to allow local stakeholders to organically develop laboratories of innovation on a school-by-school basis for the express purpose of inform and assisting the districts they serve – or “districts of residence” -- about new instructional and learning methods to improve outcomes for all students in those districts.

Unfortunately, the manner in which the DOE has implemented the Act has directly conflicted with this express legislative mandate. Put bluntly, DOE implementation has not resulted in the authorization of charter schools that operate effectively, with transparency, and make a positive contribution to improving educational opportunities for all students in the districts they serve, whether or not students attend public schools run by the district or by a charter operator.

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<sup>1</sup> These comments also apply to DOE implementation of the charter school program in Camden denominated as “renaissance schools” pursuant to the Urban Hope Act of 2012, N.J.S.A. 18A:36C-1 et. seq.

In fact, as we explain below, the DOE, particularly under the administration of former Governor Chris Christie, has gone far beyond the Act's language and legislative intent by authorizing the growth and expansion of networks of charter schools that, in numerous districts, presently operate as a separate system of schools parallel to, and in competition with, the schools in their district of residence. Given the grave consequences of rapid charter school growth on the education rights, resources and outcomes of students in district schools, it is crucial that DOE promptly change course and align future implementation with the Act's express provisions and intent.

Over the last decade, under former Governor Christie's direction, the DOE has shifted from authorizing single, community-based schools to allowing national charter management organizations to establish entire networks of schools, most notably in the State-operated districts – Camden, Newark, Paterson and Jersey City. When he took office in 2010, Governor Christie made no secret of his intention to rapidly “grow” these charter school networks for the explicit purpose of competing with -- and replacing -- district public schools altogether.

The consequences of the DOE's pursuit this “charter growth” agenda are now plainly evident. The DOE has aggressively promoted and fostered the unchecked proliferation of charter schools in State-operated and other high need districts, while wholly ignoring the impact of this growth on district schools and the students they serve. Even worse, this proliferation has been accomplished entirely through agency administrative rules and practices that directly conflict with the Act's provisions and intent.

The growth through DOE authorization of multiple charters and charter networks is evident in the enrollment data over the last decade. In 2008-09, 18,792 students attended charter schools in districts across the state. By 2018-19, charter enrollment rose to 56,767 students, an increase of 300%. This growth is concentrated in several high poverty, urban districts. Newark had the largest increase in charter enrollment, from 4,559 students in 2008-09 to 18,546 students in 2018-19, or a 307% increase. After Newark, the top ten districts experiencing the highest growth in charter enrollment are Paterson (876 to 4,116 students); Jersey City (2,991 to 6,174); Camden (2,385 to 4,926); Trenton (1,923 to 3,497); Plainfield (760 to 2,069); Passaic (37 to 1,164); Franklin Township (87 to 1,033); Irvington (147 to 1,024); Vineland (4 to 785); Perth Amboy (3 to 778); and East Orange (519 to 1,020).

The concentration of charter growth in a specific set of districts, as authorized by DOE over the last decade, is reflected in the difference in the share of enrollment in charter schools to the total enrollment in their district of residence. In 2008-09, only nine districts had over 10% of their enrollment in charters, with Red Bank Borough the highest at 17%. By 2018-19, charter enrollment in Newark and Camden grew to over 30% in Newark (36%), Camden (32%) and Asbury Park (31%). Four districts – Hoboken, Trenton, Plainfield and Jersey City – have between 20% and 30% of students enrolled in charters. Another ten districts have between 10% and 20% of students enrolled in charters.

The DOE's relentless pursuit of a charter growth agenda is further illustrated by the fact that, shockingly, the agency doesn't even know how many individual charter schools are now operating across state. The DOE website lists 89 as the “official” number of charter

schools, but that number is entirely misleading. The DOE official count actually represents approved charter operators, not separate charter schools. In a 2014 court hearing, the Attorney General conceded the number is not accurate. ELC has attempted to determine the correct number and discovered at least 40 more schools, which could bring the total number of operating charter schools to 130 or more.

The main reason for the explosive growth in charter enrollments is because the DOE has, through rule changes and the five-year charter renewal process, authorized already-operating charter schools to expand enrollments and open numerous, separate charter schools to accommodate the approved enrollment increase.

For example, the DOE has authorized the New York-based Uncommon charter management organization to operate an entire network of charter schools in Newark, presently consisting of six elementary schools, five middle schools and two high schools. In 2018-19, Uncommon enrolled 4,979 students in its 13 separate charter schools. In another example, the DOE has approved the KIPP charter management organization, also based in New York, to open and operate eight separate charter schools in Newark: four elementary schools, three middle schools and one high school. These schools in 2018-19 enrolled 4,271 students, 4,061 students from Newark, KIPP's district of residence. KIPP also enrolls 210 students from 13 surrounding districts, even though KIPP claims to have a waiting list for Newark students. The DOE counts, reports and regulates these multi-school charter networks as a single charter school.

Over the last decade, the DOE has authorized charter schools to expand and open multiple schools in two ways. First, the DOE amended its regulations to permit an approved charter school to open a "satellite campus" in the former Abbott districts, bypassing the more rigorous application and district review process for establishing a new charter school.

Second, the DOE approved significant expansions of existing charter schools as part of the five-year charter renewal process. In their renewal applications, charter management organizations such as KIPP and Uncommon request approval of an expansion of enrollment over the next five years, sometimes in the thousands, without designating where the new charter schools will be located in the district. The DOE then approves the expansion, allowing charters to "bank" enrollment growth over the ensuing five year period, opening new schools as needed to accommodate the approved growth. There is simply nothing in the Act to support the DOE's implementation of a "growth through renewal" strategy, which again bypasses the Act's more stringent requirements for establishing a new charter school.

There is also no support in the Act for allowing existing charters to operate multiple schools in different locations. In fact, the law ties the granting of a charter to a specific school, requiring that every charter application include a "description of, and address for, the physical facility in which the charter school will be located." Furthermore, the DOE's "satellite" campus rule and "growth through renewal" practice disenfranchises local school districts -- and the parents and students in district schools -- because requests for satellite campuses or for an enrollment increase on renewal occur "under an administrative radar screen," largely out of public view and not subject to requirements for public notice and meaningful opportunity to comment or file objections to the charter school requests.

Most troubling is the fact that the DOE, in authorizing enrollment growth through multiple charter schools operated under a single charter, has acted in complete disregard for the affirmative constitutional obligation imposed by several NJ Supreme Court rulings requiring careful evaluation of the impact of a new or expanded charter school on district schools and their students. In these decisions, most recently in December 2013, the Court firmly established the Commissioner's responsibility under the thorough and efficient clause to evaluate and determine whether a proposed charter school would: 1) exacerbate patterns of student segregation, and 2) cause a loss of funding that deprives students in district-run schools of essential resources. This mandate is further heightened when the charter proposes to operate in a district subject to the Abbott remedies.

Newark best illustrates the DOE's continuing failure to address the impacts on a thorough and efficient education in approving the massive expansion of charter schools in the district over the last 10 years. The NPS budget was flat from 2011 until this year as a result of the State's failure to fund New Jersey's school funding formula. But payments from NPS to Newark charter schools have risen dramatically to \$225 million, or 27% of the total NPS budget for 2015-16. Even if district budgets remain flat, or have small increases in aid, the district must first make per-pupil payments to charter schools even when the charter school enrollments increase from year-to-year.

Further, if a district must cut to balance its budget, the charter schools are off-limits from any reductions. Districts can only cut the budgets for their own schools. In Newark, Trenton and Paterson, ELC has documented the impact of the combination of flat budgets and rising charter payments: ongoing, and often severe, reductions in spending on regular classroom instruction, guidance and other support services, and special education and bilingual education in district schools.

Even in the face of this overwhelming and undisputed evidence, the DOE in 2016 approved the renewal request of KIPP, Uncommon and other charter operators to dramatically expand enrollment and, by doing so, open tens of new charter schools to accommodate the approved enrollment growth over the next five year charter renewal period. This is the reason why charter enrollments now account for a substantial share of total enrollment in Newark, Camden and numerous other districts. Even worse, the DOE has ignored the research evidence submitted by ELC that the unprecedented -- and unauthorized -- expansion of charter growth would continue to fuel district budget shortfalls, triggering cuts to essential staff and programs in district schools.

The DOE's implementation of its charter growth strategy not only has dire fiscal impacts on district budget and resources for students. It also has promoted student segregation, both by allowing patterns of racial isolation and segregation to persist and by spawning new forms of student segregation within the impacted districts. In Newark and other districts, the DOE has allowed charters to mirror, even exacerbate, the segregation and isolation of African-American and Latino students in districts of residence that have a history of such segregation and isolation. More troubling, the DOE has allowed the KIPP charter organization to enroll over 200 students from numerous diverse districts outside of Newark, virtually all of whom are African American.

Beyond race, the data on other forms of student segregation is stark. In Newark, Camden, Red Bank, Hoboken and other districts, charters do not educate the same population of students as district schools. The charter student population is less poor (fewer free-lunch-eligible students) and includes very few, if any, English language learners (ELL). For example, Newark charters serve almost no ELLs despite a 9% overall ELL rate in the district. Charters also serve fewer students with disabilities and those they do enroll have mild classifications, such as speech.

This is the main reason why any claims of charter success based on test score comparisons between charters and district schools must be discounted at the outset. These raw comparisons are grossly misleading since they do not account for the significant differences in student populations served by charter and district schools.

Adding to the concentration of disadvantaged students in district schools is the DOE's unwillingness to address the practices of some charter operators to counsel out and push out more challenging and costly to educate students, such as those with learning, behavioral or other disabilities. ELC and others have represented students in legal challenges to such practices, particularly in the case of "no excuses" charters, such as those in Newark's Uncommon network. These cases may be the tip of the iceberg as the DOE has refused to require charter schools to document and accurately report the exiting and attrition of students during the school year.

The bottom line of DOE implementation in Newark and other districts with significant charter enrollment: the loss of funding has triggered recurring cuts to essential staff, programs and services in district schools, which now must serve higher concentrations of students who are more costly to educate because they need to learn English, have a disability, or are academically at-risk of falling behind or dropping out.

The DOE, through its unchecked authorization of charter operator growth, has created deep fiscal stress, coupled with new forms of student sorting and segregation, in districts isolated by race and socio-economic status and, in the former Abbott districts where the Supreme Court has ordered remedies for the State's severe and longstanding violation of the constitutional right of students to a thorough and efficient education.

There are several initial steps DOE can – and must – take to re-align implementation of the charter school program with the Act and constitutional mandates. These actions are:

- 1) No longer approve a satellite campus in a former Abbott district and promptly remove the campus regulation from the code;
- 2) Identify and regulate each charter school separately, including those operated by a single authorized charter school and/or charter management organization, and require the authorized charter school or management organization to file separate annual reports for each school;
- 2) Issue guidance clarifying that no expansion of enrollment, unless accommodated in an existing school facility, will be approved on charter renewal;

- 3) Issue guidance clarifying that any charter school seeking to expand enrollment beyond their existing school facility or facilities must file an application for a new and separate charter school;
- 4) Immediately comply with the Supreme Court's constitutional mandate for rigorous evaluation of both fiscal impacts and segregative effects on any application for a new charter school in a district where the share of total enrollment in charters is above 5%;
- 5) Immediately comply with the Supreme Court's constitutional mandate for heightened scrutiny of any application to open a new charter in former Abbott districts by requiring the applicant, before filing the application, to secure the district's approval and present specific evidence that the expansion of charter enrollment through the new charter school will not have negative fiscal impacts and segregative effects on the district of residence;
- 6) Rigorously enforce the requirement that charter schools enroll students only from their designated district of residence and further require that, if a charter school is under-enrolled and seeks to enroll students from districts other than the district of residence, the school must obtain DOE approval on notice to the affected districts;
- 7) Require charter schools to notify the district of residence of any student who leaves the school during the school year, including the reasons for leaving the school, and provide DOE with a report on student attrition each year; and
- 8) Require charter schools to properly maintain and audit waiting lists on an annual basis and submit the waiting lists to the DOE and their district of residence.

ELC is prepared to offer more detail on these, and other, changes in DOE rules and practice that will ensure that the Act is implemented by the agency as the Legislature intended. It is essential that the DOE undertake administrative corrections in the implementation of the charter program to ensure charter schools will no longer be authorized and utilized as a vehicle to allow charter operators and management organizations to open multiple schools to compete with, or to replace, schools under the governance of their district of residence.