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BRIEF AND APPENDIX OF PROPOSED *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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PRELIMINARY STATEMENT

This appeal involves the fundamental right of New Jerseyans, enshrined in the State Constitution, to challenge arbitrary administrative agency action in the courts. These cases arise from charter school renewals and expansions, which impose upon the Commissioner of Education (the "Commissioner") particular responsibilities, also rooted in the State Constitution, to avoid exacerbating public school segregation and ensure adequate funding for impoverished school districts. Because the Commissioner failed to fulfill these responsibilities, the American Civil Liberties Union of New Jersey ("ACLU-NJ") respectfully submits this brief *amicus curiae* to vindicate its mission of protecting the constitutional rights of public school students to a thorough, efficient, and non-discriminatory education and to assure meaningful appellate review of administrative decision-making, in this but also in other critical areas of law.

Specifically, in opposing the charter school renewal applications at issue here, Petitioner Education Law Center ("ELC") warned the Commissioner that his approval of the applications would raise constitutional concerns. ELC's claims should have led the Commissioner to seriously evaluate the renewal applications, sifting through the record and explaining why he did (or did not) find the application materials to be satisfactory, in light of ELC's well-founded concerns. Instead, the Commissioner issued brief, conclusory form letters approving the renewal and expansion applications, none of which even mentioned ELC's

concerns, much less explained why the Commissioner rejected them. And even when ELC appealed, the Commissioner did nothing, by way of amplification or otherwise, to in any way address the legally and constitutionally significant issues that ELC raised.

The Commissioner's failure to consider all of the evidence and make a reasoned decision in this matter, either in his initial decisions or through the kind of amplification that the law allows – and that the Commissioner frequently provides in cases regarding charter school renewals – is all the more egregious in light of this Court's recent indication that a "form-like" letter from the Commissioner, without amplification, cannot withstand appellate review, even under the deferential standard that governs such appeals. The Appellate Division's subsequent ratification of the Commissioner's truncated decision-making process is also contrary to its own precedent and the case law of this Court, both of which have frequently remanded administrative matters (including charter school application decisions) when the record lacks the necessary showing that the agency made a reasoned decision deserving of deference. Accordingly, this Court should, at the very least, remand this matter while making clear that administrative agencies in all contexts, but especially in a context in which such fundamental issues are at stake, must issue decisions with findings sufficient to allow for meaningful judicial review.

The ACLU-NJ also seeks to address the Commissioner's particular failure to consider the consequences of the segregation of special education students as between the Newark Public Schools

and that city's charter schools. Specifically, the Commissioner was required to prevent charter schools from siphoning off the district's funds in a manner that would jeopardize its ability to provide a thorough and efficient education. *N.J. Const.* art. VIII, § 4, ¶ 1. But although ELC showed that the charter schools systematically under-enroll special education students, and particularly those special education students who have high-cost needs, thus requiring NPS to both educate those high-cost students while simultaneously losing special education funding to charter schools, the Commissioner failed to analyze those facts – though brought to his attention – in granting the charter school renewals and in permitting those schools to expand their enrollments. The failure to consider these issues is particularly inappropriate because this case involves a former *Abbott* district, which ELC argues – and the ACLU-NJ agrees – should have led the Commissioner to apply a stringent review of charter schools' effect on the district's funding. The Commissioner's failure to perform his basic duties in this manner thus renders his decision arbitrary and capricious, which requires reversal or, at the least, a remand for a serious, thorough evaluation of the issues at stake.

For these reasons, as discussed more fully below, the ACLU-NJ respectfully requests that the Court reverse the grant of the charter school renewal and expansion applications, or, in the alternative, remand to the Commissioner for appropriate consideration of the issues at stake.

INTEREST OF *AMICUS CURIAE*

The ACLU-NJ is a private, non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the New Jersey and United States Constitutions. Founded in 1960, the ACLU-NJ has tens of thousands of members or supporters throughout New Jersey. The ACLU-NJ works through the courts, the legislature, and public education to protect the civil rights of New Jerseyans.

As part of its mission, the ACLU-NJ strongly supports the right of all students to obtain a thorough and efficient education, including because that education is provided in schools that are not unconstitutionally underfunded or segregated. Accordingly, the ACLU-NJ has participated in numerous cases regarding the right to a public education, including cases that involve the segregative effects of charter schools, where that is the case. *See, e.g.*, *In re Red Bank Charter Sch.*, 367 N.J. Super. 462 (App. Div. 2004) (challenge to recertification of charter school involving racial disparity between charter school and town's general public school); *Bd. of Educ. of Hoboken v. N.J. State Dep't of Educ.*, Docket No. A-3690-14T3, 2017 N.J. Super. Unpub. LEXIS 1639 (App. Div. June 29, 2017) (same); *In re Grant of the Charter Renewal of the Red Bank Charter Sch.*, Docket No. A-3342-16T1, 2019 N.J. Super. Unpub. LEXIS 1935 (App. Div. Sept. 20, 2019) (same). As well, the ACLU-NJ has long been engaged in those cases addressing New Jersey's constitutional requirement that a thorough and efficient education be provided to all students, particularly in

impoverished districts. *See Abbott v. Burke*, 100 N.J. 269 (1985) (*Abbott I*); *Abbott v. Burke*, 119 N.J. 287 (1990) (*Abbott II*); *Abbott v. Burke*, 187 N.J. 191 (2006) (*Abbott XV*).

Indeed, the ACLU-NJ has participated in numerous appeals raising important education-related issues, *see In re N.J.A.C. 6A:8 Standards and Assessment*, Docket No. A-0768-16T4, 2018 N.J. Super. Unpub. LEXIS 2850 (App. Div. Dec. 31, 2018) (invalidating school testing regulations), including, as relevant to this appeal, the rights of special education students, *see Estate of Jeffreys v. New Jersey*, Civ. No. 95-6155 (WGB), 1996 U.S. Dist. LEXIS 21360 (D.N.J. Jan. 29, 1996) (resolving under IDEA the question whether local or state educational agency would pay for educational services provided to disabled child); *Adam X., et al. v. N.J. Dep't of Correction, et al.*, Docket No. 3:17-cv-00188-FLW-LGH, ECF No. 26 (D.N.J. Apr. 7, 2017) (complaint alleging violation of rights to appropriate education for disabled high school students incarcerated in adult prisons). *See also State v. Best*, 201 N.J. 100 (2010) (addressing the applicable standard where a public school principal seeks to search a student's car on school property); *Joye v. Hunterdon*, 176 N.J. 568 (2003) (raising students' state constitutional rights against suspicionless drug testing); *L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 381 N.J. Super. 465 (App. Div. 2005) (involving the Law Against Discrimination's application to a student's right to be protected from discrimination-based school bullying).

The ACLU-NJ has also participated in litigation challenging administrative agency action in a number of contexts, including the education context. *See Haley v. Bd. of Review*, 462 N.J. Super. 222 (App. Div. 2020) (denial of unemployment benefits); *Mejia v. N.J. Dep't of Corrections*, 446 N.J. Super. 369 (App. Div. 2016) (imposition of administrative segregation in prison); *In re State Bd. of Educ. Denial of Petition to Adopt Regulations Implementing N.J. High Sch. Voter Registration Law*, 422 N.J. Super. 521 (App. Div. 2011) (denial of petition for rulemaking); *A.Z. ex rel. B.Z. v. Higher Educ. Student Assistance Auth.*, 427 N.J. Super. 389 (App. Div. 2012) (denial of higher education tuition assistance).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus adopts the statement of facts and procedural history set forth in Petitioner's Appellate Division brief and Petition for Certification. Briefly summarized, this case involves challenges to the Commissioner's decisions permitting renewals and expansions of the charters of seven different charter schools in Newark. ELC, in its role as counsel for Newark public school children in the *Abbott* litigation, filed a letter with the Commissioner objecting to the charter renewal applications. 32a-35a. Among other concerns, ELC argued that expanded charter schools would result in reduced funding to the Newark Public Schools ("NPS"), which in turn "will worsen NPS's financial crisis" and prevent NPS from having "resources needed to ensure a constitutionally required thorough and efficient education" for NPS students. 33a. Furthermore, ELC argued that charter school

expansion "will exacerbate the already glaring disparities in the demographics of students served in Newark charters compared to NPS-run schools," in particular with respect to special education students, both because charter schools serve a lower percentage of special education students than do NPS-administered schools, and also because the special education students in charter schools are "more likely to have less severe and less costly classifications, such as specific learning disabilities, and less likely to have high cost classifications, like autism or emotional disturbance." *Ibid.* ELC supported these allegations by providing the Commissioner with two reports, one from ELC detailing the deleterious effects of charter expansion on NPS's budget, 36a-55a, and the other from two Rutgers University researchers explaining the demographic disparities between the student bodies enrolled by Newark charter schools and those served by NPS's public schools. 56a-101a.

The Commissioner approved each of the charter school renewals and expansions through letters dated February 29, 2016. But even after receiving ELC's thorough objection and accompanying materials, the Commissioner's letters did not reference the arguments ELC made or explain why he rejected them. Instead, for the four schools that sought an amendment to increase enrollment, each letter stated, in conclusory fashion, that "[t]he New Jersey Department of Education (Department) has evaluated the school's request based on a review of its academic, operational, and fiscal standing as well as an analysis of public comments, fiscal impact

on sending districts, and other information in order to make a decision regarding the school's amendment request." (*See* 18a, 20a, 22a, 30a.) For the three schools that sought a renewal of their charter as well as an expansion of enrollment, the letter again followed a standard format, indicating that "the Department has completed a comprehensive review of [the school] including the evaluation of the school's renewal application, annual reports, student performance on state assessments, site visit results, public comments, and other information to make a renewal decision." (*See* 24a, 26a, 28a.) Without providing any more detail about the facts he had found, the conclusions he reached, or how his decisions addressed ELC's objections, the Commissioner granted each challenged charter school application.

ELC appealed each of the Commissioner's decisions, and the Appellate Division consolidated the appeals and affirmed in a single published opinion. *In re TEAM Acad. Charter Sch.*, 459 N.J. Super. 111 (App. Div. 2019).[1] The Appellate Division concluded that ELC had not made "any showing" regarding the impact of the charter school expansions on NPS's budget. *Id.* at 142. The court also rejected ELC's argument that in a former *Abbott* district, the Commissioner has a particular responsibility to evaluate the impact of charter schools on district funding even when the district itself does not lodge an objection. *Id.* at 143-44.

[1] The Appellate Division also rejected the argument that ELC lacked standing to appeal. 459 N.J. Super. at 124-27. No party appealed that decision, which is not at issue before this Court.

Regarding ELC's contention that the Commissioner had failed to address its submissions, the Appellate Division noted the absence of a "statutory or regulatory requirement" for the Commissioner to provide detailed reasons, and then concluded that his decision "was sufficient as to each respondent and is supported by the record." *Id.* at 146. The Appellate Division rejected additional arguments made by ELC, including that the charter expansions would result in unconstitutional segregation, *id.* at 144-46, and that the expansions were unauthorized for failure to provide sufficient detail about new campus locations, *id.* at 147-49.

This Court granted ELC's petition for certification. 241 N.J. 1 (2020).

ARGUMENT

I. THE COMMISSIONER'S COMPLETE FAILURE TO EXPLAIN WHY HE DISREGARDED ELC'S ARGUMENTS IN OPPOSITION TO THE CHARTER SCHOOL RENDERS HIS DECISION ARBITRARY AND CAPRICIOUS

This is an appeal from decisions of the Commissioner of Education granting a number of charter school renewals. As this Court recently made clear, judicial review of the Commissioner's decision regarding a charter school "is a matter of constitutional right." *In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp.*, 216 N.J. 370, 383 (2013) (citing *N.J. Const.* art. VI, § 5, ¶ 4). Indeed, as this Court has repeatedly made clear, "[t]he 'core value[] of judicial review of administrative action is the furtherance of accountability.'" *Id.* at 385 (second alteration in original) (quoting *High Horizons Dev. Co. v. N.J. Dep't of Transp.*, 120 N.J. 40, 53 (1990)). For the reasons set

forth below, the Commissioner's decisions in these cases, which failed entirely to describe how he considered ELC's arguments and why he rejected them, improperly insulates these decisions from appellate review. At the very least, then, these matters must be remanded to the Commissioner for the development of a record that would, because it sets forth the reasons for the Commissioner's decision, allow for their review on appeal.

It is of course true, as the Appellate Division here recognized, that judicial review of the Commissioner's decision regarding a charter school renewal is "limited," such that it should be reversed only "if it is arbitrary, capricious, or unreasonable." *TEAM Acad.*, 459 N.J. Super. at 139 (quoting *Quest Acad.*, 216 N.J. at 385). But "[t]he test, though deferential, does not lack content." *Quest Acad.*, 216 N.J. at 386. Indeed, charter school applications in particular require careful scrutiny, both by the Commissioner and by an appellate court, in order to preclude the kinds of constitutional violations that could result from the improper approval of a charter school. Thus, for one, "[t]he constitutional command to prevent segregation in our public schools superimposes obligations on the Commissioner when he performs his statutory responsibilities under the Charter School Act." *See In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 N.J. 316, 328 (2000); *see also N.J. Const.* art. I, § 5 (prohibiting public school segregation); *Jenkins v. Morris Twp. Sch. Dist.*, 58 N.J. 483, 500 (1971) (requiring Commissioner's action "to avoid 'segregation in

fact'" (quoting *Booker v. Bd. of Educ. of Plainfield*, 45 N.J. 161, 168 (1965)). Accordingly, "the Commissioner must assess the racial impact that a charter school applicant will have on the district of residence in which the charter school will operate, and if segregation would occur the Commissioner must use the full panoply of his powers to avoid that result." *Englewood on the Palisades*, 164 N.J. at 329. Likewise, in furtherance of the constitutional requirement to "provide for the maintenance and support of a thorough and efficient system of free public schools," *N.J. Const.* art. VIII, § 4, ¶ 1, the Commissioner, in order to ensure "that the constitutional requirements of a thorough and efficient education would [not] be jeopardized by" loss of funds to a charter school, "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." *Englewood on the Palisades*, 164 N.J. at 335.

To ensure that the Commissioner has fulfilled these weighty obligations – and that an appellate court can evaluate whether and how he has carried out those responsibilities – the Commissioner, like every other administrative agency, "must set forth basic findings of fact supported by the evidence and supporting the ultimate conclusions and final determination so that the parties and any reviewing tribunal will know the basis on which the final decision was reached." *Riverside Gen. Hosp. v. N.J. Hosp. Rate Setting Comm'n*, 98 N.J. 458, 468 (1985). Indeed, in the absence of such a reasoned decision, an appellate court cannot be assured

that the Commissioner reviewed the evidence before him, as is essential given that "a failure to consider all the evidence in a record would perforce lead to arbitrary decision making." *Quest Acad.*, 216 N.J. at 386 (citing *Close v. Kordulak Bros.,* 44 N.J. 589, 599 (1965) (requiring that "the proofs as a whole" must be considered by an administrative agency)); *see also Bailey v. Bd. of Review*, 339 N.J. Super. 29, 33 (App. Div. 2001) ("[T]he exercise of . . . deference [to an agency] is premised on our confidence that there has been a careful consideration of the facts in issue and appropriate findings addressing the critical issues in dispute."). Indeed, this Court made that requirement perfectly clear in *Quest Academy*, where it deferred to the Commissioner's amplification of his original decision because it reflected a "thoughtful and thorough weighing and judgment of the merits of the . . . application." *Id.* at 389.

But in this case, even after ELC provided the Commissioner with detailed objections to the charter school renewals and expansions at issue, *see* 32a-35a, the Commissioner did not provide any reasons explaining why he rejected those objections and granted the applications. Instead, the Commissioner sent essentially the same letter to every school, failing even to discuss, let alone adequately address, any of the significant constitutional issues described by ELC. *See* 18a-31a. But this Court rejected exactly this type of "form-like" letter in *Quest Academy*, 216 N.J. at 379, finding instead that the Commissioner's decision was justified "only as amplified." *Id.* at 389; *see also In re Yucht*, 233 N.J.

267, 285 (2018) (holding that after party raises "some evidence to support questioning the reasonableness of the" agency action, "the burden . . . shift[s] to the [agency] to respond"). And the Appellate Division, in previous charter school cases involving similar issues, has remanded decisions to the Commissioner for further review where they did not fully and fairly address the issues before him. *See In re Red Bank Charter Sch.* (*Red Bank I*), 367 N.J. Super. 462, 482 (App. Div. 2004) (ordering "remand . . . for the Commissioner to conduct a hearing" regarding charter school's post-enrollment practices, which were not addressed in renewal decision); *In re Grant of Renewal of Red Bank Charter Sch.* (*Red Bank II*), Docket No. A-3342-16T1, 2019 N.J. Super. Unpub. LEXIS 1935, at *42-43 (App. Div. Sept. 20, 2019) (following two prior amplifications, ordering "remand . . . to the Commissioner . . . to issue a third amplification" regarding previously unaddressed issues).[2] And the Commissioner himself has recognized the need for more detailed explanations in other charter school cases, by issuing an amplification after an appeal is filed. *See Quest Acad.*, 216 N.J. at 390 (discussing amplification); *Red Bank II*, 2019 N.J. Super. Unpub. LEXIS 1935, at *13-16, *21-23 (same); *In re Amendment Request to Increase Enrollment of Classical Acad. Charter Sch.*, Docket No. A-2889-18T4, 2020 N.J. Super. Unpub. LEXIS 537, at *8-11 (App. Div. Mar. 18, 2020) (same); *see also Bd. of*

[2] In accordance with *Rule* 1:36-3, all of the unpublished opinions cited in this brief are reproduced in *Amicus*'s appendix. No contrary unpublished decisions are known to counsel.

Educ. of Hoboken v. N.J. State Dep't of Educ., Docket No. A-3690-14T3, 2017 N.J. Super. Unpub. LEXIS 1639, at *3 (App. Div. June 29, 2017) (noting that Department of Education requested, and was granted, a remand to the Commissioner to consider additional information).

In light of this history, the Commissioner's failure to amplify his decision is inexplicable. But most fundamentally, it also undermines the very accountability that judicial review is meant to provide. *See R & R Mktg., L.L.C. v. Brown-Forman Corp.*, 158 N.J. 170, 178 (1999) (stating that an agency's "discretion is not unbounded and must be exercised in a manner that will facilitate judicial review" (quoting *In re Vey*, 124 N.J. 534, 545 (1991))); *see also Noble Oil Co., Inc. v. Dep't of Envtl. Prot.*, 123 N.J. 474, 477 (1991) (same). Such judicial review is essential to our democracy: at its core, it embodies "the constitutional role of the Court to prevent any of the branches from exercising illegitimate power over the others." *Gen. Assemb. of N.J. v. Byrne*, 90 N.J. 376, 382 (1982) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). Indeed, in the context of administrative agency action, "[t]he right of judicial review to protect against improper official action is constitutionally secure and available as of right." *In re Camden Cnty.*, 170 N.J. 439, 447 (2002) (citing *N.J. Const.* art. VI, § 5, ¶ 4); *see also Quest Acad.*, 216 N.J. at 383 (same). But as this Court has recognized, "effective judicial review" is not possible in the absence of "a written statement of reasons." *State v. A.T.C.*, 239 N.J. 450, 474 (2019); *see also*

Curtis v. Finneran, 83 N.J. 563, 569-70 (1980) (trial court's failure to make findings and conclusions "constitutes a disservice to the litigants, the attorneys and the appellate court" (internal quotation marks and citation omitted)). In the absence of a clear statement of reasons, then, an appellate court must, at the very least, remand to the agency for a complete explanation of its decision, which then can be subject to appropriate and meaningful appellate review. *See In re Yucht*, 233 N.J. at 280 ("When the challenged agency action arises in a setting where the record is too meager to permit meaningful review, supplementation of the record may be necessary."); *Bailey*, 339 N.J. Super. at 33 (remanding to agency where agency failed to "address, discuss, or make separate finding on" central issue).[3]

In rejecting this argument here, the Appellate Division stated that "[t]here is no statutory or regulatory requirement that the Commissioner include reasons for granting, as opposed to denying, an application to renew or amend." *TEAM Acad.*, 459 N.J. Super. at 146.[4] But in fact, the governing regulations already

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[3] Appellate courts have similarly remanded deficient trial court decisions that lack the reasoned explanations required by *Rule* 1:7-4, because "the record is deficient to make a meaningful review." *Ronan v. Adley*, 182 N.J. 103, 110 (2004); *see also Colon v. Strategic Delivery*, 459 N.J. Super. 349, 360 (App. Div. 2019) (remanding where trial court "did not provide any analysis for its order" or "supply its reasoning"); *Barnes v. E. Orange Bd. of Educ.*, 427 N.J. Super. 516, 520 (App. Div. 2012) (remanding where "[t]he [trial] judge made insufficient findings to allow us to evaluate the arguments made by appellants").

[4] This erroneous holding has already been applied in two subsequent, unpublished Appellate Division cases, which similarly permitted a brief, conclusory letter to meet the Commissioner's

require the Commissioner to consider constitutional objections like those raised by ELC. Thus, "[o]n an annual basis," the Commissioner must "assess 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); *see also* N.J.A.C. 6A:11-2.3(b)(8) (requiring Commissioner to consider "[t]he annual assessments of student composition of the charter school"). And the Department of Education has made clear, both in its rulemaking function and in litigation, that it actually conducts these annual reviews. 46 N.J.R. 2351(c) (Dec. 1, 2014) (Department of Education statement that it "assesses the segregative effects of charter schools by many factors," including "race, . . . religion, ethnicity and gender, students with disabilities, English language learner status, low-income students (socioeconomic status), and students at risk of dropping out or with other special academic needs"); *Red Bank II*, 2019 N.J. Super. Unpub. LEXIS 1935, at *14 (noting "the express committal of" the Commissioner "to monitor . . . trends [regarding segregative effects] closely" through annual reviews). The Commissioner's

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obligations regarding an application to amend a charter, notwithstanding *Quest Academy*'s rejection of such a procedure. *See Highland Park Bd. of Educ. v. Harrington*, Docket No. A-3455-16T1, 2019 N.J. Super. Unpub. LEXIS 1304, at *26-27 (App. Div. June 7, 2019); *N. Brunswick Twp. Bd. of Educ. v. Harrington*, Docket No. A-3415-16T1, 2019 N.J. Super. Unpub. LEXIS 1308, at *11 (App. Div. June 7, 2019). It is thus particularly important for this Court to make clear, as it did in *Quest Academy*, that this type of "form-like" letter is insufficient to permit an appellate court to review the Commissioner's decision regarding a charter school application. *Quest Acad.*, 216 N.J. at 379.

failure to take the basic step of incorporating his annual assessment into a renewal decision thus fails to reflect a "thoughtful and thorough weighing and judgment of the merits of the . . . application," as this Court has required in order to review the Commissioner's decisions regarding charter schools. *Quest Acad.*, 216 N.J. at 389. That failure further frustrates appellate review of the Commissioner's decision, for without the Commissioner's clear delineation of his reasons, the "reviewing tribunal [cannot] know the basis on which the final decision was reached." *Riverside Gen. Hosp.*, 98 N.J. at 468.

The Appellate Division also erred in concluding that the Commissioner "need not provide . . . formalized findings and conclusions," based on its prior precedent that the Commissioner "'was not acting in a quasi-judicial capacity,' [but was] instead acting in his legislative capacity." *TEAM Acad.*, 459 N.J. Super. at 140 (quoting *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 320 N.J. Super. 174, 217 (App. Div. 1999), *aff'd on other grounds*, 164 N.J. 316 (2000)). In *Quest Academy*, this Court noted that "such labels as quasi-adjudicative and quasi-legislative have limits to their usefulness." 216 N.J. at 384; *see also Red Bank I*, 367 N.J. Super. at 481 ("Classification of a proceeding as non-judicial or legislative and therefore undeserving of a hearing, often begs the question."). Indeed, while this Court, unlike the Appellate Division, has not specifically approved the characterization of a charter school decision as "quasi-legislative," in other contexts

regarding permitting or licensing the Court has instead characterized the administrative agency process as "a quasi-judicial procedure possessing some, but not all, of the elements of a traditional adjudicatory proceeding." *In re Issuance of a Permit by Dep't of Envir. Prot. to Ciba-Geigy Corp.*, 120 N.J. 164, 172 (1990) (citing cases). Regardless, even in the quasi-legislative rulemaking context, this Court has made clear that an administrative agency must state the reasons for its decisions. *See, e.g.*, *In re Twp. of Warren*, 132 N.J. 1, 41 (1993) (requiring agency "[i]n the rule-making setting" to "demonstrate at a minimum that its action can be understood to be consistent with the underlying legislative mandate").

The Commissioner's conclusory approval of the charter school applications here thus presents a fundamental challenge to this Court's core function as protector against arbitrary and unreasonable administrative decisions. The Commissioner's failure to issue a decision with a thorough, well-reasoned explanation for rejecting ELC's objections undermines this Court's authority by inhibiting meaningful judicial review. This shortcoming is magnified in the context of the charter school applications at issue here, for which the Commissioner's authority is subject to significant constitutional limitations. The Commissioner's decision to approve the applications through mere conclusory, form-like letters thus constitutes error requiring at least a remand, mandating that the Commissioner make explicit findings

that can be subjected to the kind of appropriate appellate review that is so fundamental to our system of government.

II. THE COMMISSIONER'S FAILURE TO ADDRESS SEGREGATION OF SPECIAL EDUCATION STUDENTS, WHICH IMPOSES DISPROPORTIONATE ECONOMIC IMPACTS UPON THE NEWARK PUBLIC SCHOOLS, RENDERS HIS DECISION ARBITRARY, CAPRICIOUS, AND UNREASONABLE

ELC raised particularly troubling issues with respect to disparities in the numbers of special education students attending Newark Public Schools and those attending charter schools. In particular, ELC alleged that "18% of NPS students are classified as special education compared to only 9% in Newark's charters." 33a. ELC further claimed that there were disparities in the types of special education students served by charter schools versus those in NPS: thus, "[t]he special education population in Newark's charters is also more likely to have less severe and less costly classifications, such as specific learning disabilities, and less likely to have high cost classifications, like autism or emotional disturbance." *Ibid.*

In support of these assertions, ELC provided the Commissioner with a Rutgers University report, which found both that that charter school enrollment consists of a lower percentage of special education students than those in traditional public schools students, and also that the special education students in charter schools tend not to be in "high-cost" categories. 74a-78a. The upshot, then, is that "charter schools educate a much smaller percentage of students with the most costly special education eligibilities." 79a. On the other hand, the report noted that

"districts must fund charter schools at a per pupil rate that does not account for these differences in students' special education needs." *Ibid.* In sum, by failing to enroll the neediest special education students, charter schools not only effect an unlawful segregation but also financially burden the Newark public school system. The report thus concluded that "this disparity between charter schools and district schools places a disparate financial burden on the districts." *Ibid.*

These substantial concerns, supported by the evidence described above, deserved the Commissioner's careful consideration, evaluation, and, if necessary, remediation. *See Red Bank I*, 367 N.J. Super. at 482 (authorizing Commissioner to "determine whether any remedial action is warranted, including whether to develop a remedial plan for the Charter School" (citing N.J.S.A. 18A:36A-17)). Indeed, disability status, like race, is specially protected by law, as both federal and state statutes and regulations require a school district to provide a "free appropriate public education" to students with disabilities. 20 U.S.C. § 1400(d)(1)(A); *accord* 34 C.F.R. § 300.1(a); N.J.A.C. 6A:14-1.1(b)(1). A charter school is similarly required to comply with this requirement. *See* N.J.A.C. 6A:11-4.9 ("A charter school shall provide an enrolled student with educational disabilities with a free, appropriate public education in accordance with" federal and state law); *see also* N.J.S.A. 18A:36A-7 (prohibiting charter school from "discriminat[ing] in its admission policies or practices on the basis of intellectual or athletic ability,

measures of achievement or aptitude, status as a handicapped person, proficiency in the English language, or any other basis that would be illegal if used by a school district").

The disparity in special education students between NPS and Newark-based charter schools is particularly important in light of the Commissioner's obligation, as described above, "to evaluate carefully the impact that loss of funds [to a charter school] would have on the ability of the district of residence to deliver a thorough and efficient education." *Englewood on the Palisades*, 164 N.J. at 335. This is because a charter school's funding for a special education students is based in part on "a percentage of the district's special education categorical aid equal to the percentage of the district's special education students enrolled in the charter school." N.J.S.A. 18A:36A-12; *accord* N.J.A.C. 6A:23A-15.3(g)(3)(ii). The district's "special education categorical aid" amount, in turn, is defined by the School Funding Reform Act (SFRA) as a set percentage of total student enrollment, and not on actual enrollment of special education students. *See* N.J.S.A. 18A:7F-55(a); *see also* Report of New Jersey Task Force on Improving Special Education for Public School Students 7 (Aug. 2015), https://www.state.nj.us/education/specialed/highlights/TaskForceReport.pdf [hereinafter Special Education Task Force Report] ("Currently, special education students are the only specific group of students whose costs are not related to their specific enrollment count under SFRA.").

But the SFRA formula does not allocate special education funding by type of disability, and thus does not provide more funding for special education students whose disabilities may fall into higher cost categories. *See* N.J.S.A. 18A:7F-55(a) (SFRA definition of special education categorical aid, which does not depend on type of disability); Special Education Task Force Report at 8 ("SFRA determines costs not by disability need and not by the individual classified pupil."). Particularly troubling in this case, then, is ELC's allegation that Newark charter schools systematically under-enroll special education students who fall into "high cost" categories, such as autism, visual impairment/ blindness, and multiple disabilities. *See* 75a. That is, when a charter school enrolls a lower-cost special education student, it nonetheless receives funding equivalent to the average cost of educating any special education student. This means that NPS, by contrast, is saddled with the burden of educating special education students at above-average costs, but with only average per-pupil funding. *See* 79a ("The smaller number of special education students in charter schools and those students' lower rates of higher-cost classifications lead to the concentration of more special education students with highest-cost disabilities within the district schools. Yet districts must fund charter schools at a per pupil rate that does not account for these differences in students' special education needs.").

These concerns are magnified in this context, which involves a former *Abbott* district. In *Englewood on the Palisades*, this

Court explicitly "le[ft] . . . for another day" the question of whether, in an *Abbott* district, "the district of residence [must] make an initial showing that" allocating funds to a charter school "would impede, or prevent, the delivery of a thorough and efficient education in th[e] district." 164 N.J. at 334. *Amicus* agrees with ELC, *see* Pet. for Cert. 12-15, that for *Abbott* districts, this Court should require the Commissioner to evaluate the funding impacts of charter school approval on the district regardless of whether the district itself raises the issue. "The Court's one goal has been to ensure that the constitutional guarantee of a thorough and efficient system of public education becomes a reality for those students who live in municipalities where there are concentrations of poverty and crime." *Abbott ex rel. Abbott v. Burke* (*Abbott XX*), 199 N.J. 140, 174 (2009). Thus, this Court has recognized a years-long "violation of a constitutional magnitude" against students in *Abbott* districts, with "the severity of their constitutional violation" requiring "special treatment from the State." *Abbott ex rel. Abbott v. Burke* (*Abbott XXI*), 206 N.J. 332, 340 (2011).[5] In the context of approving charter school

[5] The Appellate Division, in rejecting this heightened standard, noted that "the Commissioner must implement the SFRA formula" to allocate payments to charter schools. *TEAM Acad.*, 459 N.J Super. at 144 (citing N.J.S.A. 18A:36A-12(b)). But while this Court's facial approval of SFRA in *Abbott XX* "was a good-faith demonstration of deference to the political branches' authority," it was also "not an invitation to retreat from the hard-won progress that our state had made toward guaranteeing the children in *Abbott* districts the promise of educational opportunity." *Abbott XXI*, 206 N.J. at 355. Nor did *Abbott XX*, or any other *Abbott* case, address the issue presented here regarding funds that are taken away from an *Abbott* district and provided to a charter

applications, then, this "special status" of *Abbott* district students, *ibid.*, must be considered by the Commissioner in fulfilling his obligation to be "circumspect about the district of residence's continuing ability to provide a thorough and efficient education to its remaining pupils" when approving charter school funding. *Englewood on the Palisades*, 164 N.J. at 334.

In sum, Newark's status as a former *Abbott* district, combined with the financial ramifications caused by the segregation of special education students, and particularly high-cost special education students, in NPS-run schools rather than in charter schools, required the Commissioner to be particularly careful in considering the impact of the charter school expansions at issue in this case on the funding of Newark's public schools. Thus, the Commissioner should have assessed whether the movement of funds from NPS to the charter schools, which will necessarily result from granting the expanded charters, would jeopardize Newark's ability to provide a thorough and efficient education to its students. *See Englewood on the Palisades*, 164 N.J. at 335. Yet even though ELC raised concerns about this segregation of special education students, the Commissioner's decisions say nothing about how he might have considered that issue and why he chose to approve the applications in spite of these facts.

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school. *See* N.J.S.A. 18A:36A-3(a) ("A charter school . . . is operated independently of a local board of education and is managed by a board of trustees.").

The Commissioner's complete failure to consider or address the funding consequences of the segregation of special education students, and especially high-cost special education students, in his approvals of the charter school renewals and expansions renders his decision arbitrary and capricious. *See Quest Acad.*, 216 N.J. at 386 ("[A] failure to consider all the evidence in a record would perforce lead to arbitrary decision making."). Accordingly, this Court should reverse the charter approvals at issue or, at the very least, order a remand for the Commissioner to consider anew the impact of segregation of special education students on NPS's funding. *See In re Yucht*, 233 N.J. at 285 (ordering "a remand for the development of a proper record to permit meaningful judicial review").

CONCLUSION

For the reasons described above, the ACLU-NJ respectfully requests that this Court reverse the Commissioner's decisions granting these charter school applications; in the alternative, it should order a remand for a full and fair consideration of the significant constitutional issues raised by ELC and the drafting of a decision that indicates whether and how those issues were in fact considered and addressed, rather than ignored, by the Commissioner.

Respectfully submitted,

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Dated: May 11, 2020

In re Amendment Request to Increase Enrollment of Classical Acad. Charter Sch.

Superior Court of New Jersey, Appellate Division

March 4, 2020, Argued; March 18, 2020, Decided

DOCKET NO. A-2889-18T4

Reporter
2020 N.J. Super. Unpub. LEXIS 537 *

IN RE AMENDMENT REQUEST TO INCREASE ENROLLMENT OF CLASSICAL ACADEMY CHARTER SCHOOL.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the New Jersey Department of Education.

Core Terms

enrollment, charter school, charter, school year, organizational, fiscal impact, budget, academic performance, maximum, demographic, thorough, amend, capricious, statewide, reasons, fiscal, funds, grade, amplification, approve, renewal, schools

Counsel: Perry L. Lattiboudere argued the cause for appellant Clifton Board of Education (Adams Gutierrez & Lattiboudere, attorneys; Perry L. Lattiboudere, of counsel and on the briefs).

Fiona E. Cousland argued the cause for respondent Classical Academy Charter School of Clifton (Riker Danzig Scherer Hyland & Perretti LLP, attorneys; Brenda C. Liss, of counsel and on the brief; Fiona E. Cousland, on the brief).

Laurie L. Fichera, Deputy Attorney General, argued the cause for respondent Commissioner of Education (Gurbir S. Grewal, Attorney General, attorney; Donna Sue Arons, Assistant Attorney General, of counsel; Laurie L. Fichera, on the brief).

Judges: Before Judges Haas, Mayer and Enright.

Opinion

PER CURIAM

Appellant Clifton Board of Education (Clifton) appeals from a decision by respondent New Jersey Commissioner of Education (Commissioner), approving a request by respondent Classical Academy Charter School (Classical Academy) to amend its charter and increase student enrollment by sixty pupils starting in the 2019-2020 school year. Because the Commissioner's decision was not arbitrary or capricious and was amply supported by the record, we affirm.

Classical **[*2]** Academy, a charter school serving students in sixth, seventh, and eighth grade, is located in Clifton. It received charter approval in 1998. Maximum enrollment from 1998 until 2019 was 120 students. The school has been the recipient of the National Blue Ribbon Award for academic excellence, recognized as a Top Ten New Jersey School and a Title 1 Rewards School, and ranked the highest performing middle school in Passaic County.

Classical Academy submitted a charter renewal request to the Department of Education (Department) in

September 2016. The Department evaluated the school under a Performance Framework based on its academic performance, fiscal viability, and organizational stability.[1] In accordance with the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 to - 18 (CSPA), and implementing regulations, the Department "completed a comprehensive review of the school including, . . . the renewal application, annual reports, student performance on statewide assessments, a structured interview with school officials, public comments, and fiscal impact on sending districts in order to make a renewal decision." *See* N.J.S.A. 18A:36A-17 and *N.J.A.C. 6A:11-2.3(b)*.

Based on the Department's review, the Commissioner issued a February 28, 2017 decision, **[*3]** renewing the school's charter for five years with the following maximum enrollments:

Go to table1

Although the Commissioner approved charter renewal for Classical Academy, he placed the school on "organizational probation until February 28, 2018" for failure to meet certain indicators in the organizational section of the Performance Framework. As a condition of probation, Classical Academy was required to, and did, submit a plan to the Department, outlining steps to remedy the organizational deficiencies.

On May 16, 2018, the Commissioner rescinded Classical Academy's probationary status, finding it "made significant strides in addressing the deficiencies that lead to probation." The Commissioner concluded Classical Academy "satisfied the conditions of probation."

On October 15, 2018, Classical Academy sought to amend its charter to increase maximum approved enrollment from 120 to 180 students, adding one class of twenty students at each grade level in sixth, seventh and eighth grade for the 2019-2020 school year. In support of the application, Classical Academy maintained it demonstrated "evidence **[*4]** of consistent high academic performance, a full enrollment, a robust wait list,[2] and minimal student attrition." The school also represented it had "fiscal stability to support an enrollment increase," and "recently relocated to a new facility to accommodate the continued academic success" of its students.

On November 18, 2018, Classical Academy provided the following additional information in support of its request:

> Our decision to expand is grounded in providing a stellar educational option for the families of Clifton who are seeking public-school choices. Many Clifton parents often call our school requesting to enroll their children. However, as a result of reaching our maximum capacity at only 120 students, on numerous occasions, we have had to turn them down for the current school year. Moreover, several parents whose children's names are on the waiting list call in periodically to check for the possibility that a seat is available . . . .
>
> We currently have students still on the waiting list from the lottery we hosted this past school year who are still interested in attending Classical Academy. In addition, we also have new parents who have made inquiries about enrolling their children **[*5]** for the upcoming school year. There is a strong and positive demand on behalf of the families in the Clifton community to send their children to Classical Academy.

As further support for its request, Classical Academy described proactive measures taken since the Department's visit to the school in April 2017, including: relocating to a larger, renovated school facility with the capacity to provide additional programs; designing a new curriculum aligned with core curriculum standards; increasing professional development opportunities; developing interim and formative assessments to inform student performance; implementing a quality individualized education program (IEP) to address students' behavioral, social, and academic needs; effecting an English Language Learners (ELL) policy; and establishing a "school operations coordinator" to further strengthen organizational capacity. The school also represented its curriculum maps were near completion in math, English, social studies, and science.

In the area of academic performance, Classical Academy reported its students outperformed middle school students statewide on the PARCC standardized tests in English and math. In addition, Classical **[*6]** Academy reported that 56% of its eight grade students

[1] The "Performance Framework" is the Department's accountability system used to evaluate charter schools' performance and sustainability. The Performance Framework consists of three sections: academic, financial, and organizational. ***N.J.A.C. 6A:11-1.2***.

[2] Classical Academy reported an enrollment waiting list of over one hundred students, which continued "to grow daily."

scored "advanced proficient" on the NJASK science assessment for the 2016-2017 school year.

Clifton opposed Classical Academy's application in a December 20, 2018 one-page letter authored by the Superintendent of the Clifton School District (Superintendent). The Superintendent urged the Commissioner to deny the application for several reasons. He challenged Classical Academy's organizational stability because certain promised improvements had yet to be implemented and the school was still operating under an improvement plan. He also questioned Classical Academy's academic performance, contending students struggled in mathematics upon entering Clifton High School. The Superintendent further claimed Classical Academy's students entering the district's high school did not reflect the district's demographic profile, particularly ELL and special education students. The Superintendent also contended the proposed "increase in student population would remove an additional $750,000 from [Clifton's] proposed 2019-2020 budget, forcing the possible elimination of some key programs."

However, no supporting documents accompanied the Superintendent's **[*7]** objections to Classical Academy's request to amend its charter. Specifically, the objection letter lacked any details regarding the claimed financial impact to the district if Classical Academy's request to increase student enrollment was approved.

On February 1, 2019, the Commissioner issued a final decision, granting Classical Academy's application to increase its maximum enrollment. The Commissioner stated the Department reviewed Classical Academy's academic, organizational, and fiscal standing based on the Performance Framework, and considered the public comments, demand for seats, and fiscal impact of the expansion on the district.

Based on preliminary statewide assessment test results for the 2017-2018 school year, the Commissioner concluded Classical Academy "continues to be a high-performing charter school, outperforming the Clifton Public Schools and state averages in English language arts (ELA) and mathematics," thus meeting the academic section of the Performance Framework.

In the category of fiscal performance, the Department assessed the school's financial viability based on measures of near-term financial health, longer term financial sustainability, and fiscal-related compliance, **[*8]** and considered "the fiscal impact of the expansion on sending districts." According to the Commissioner, "[r]eview of the fiscal standing of Classical Academy indicates that it is fiscally sound and there are no foreseen financial issues with the granting of this amendment request."

In assessing organizational performance, the Commissioner found "[t]he amendment request describes the administrative capacity, performance management, and strategic plans for the expansion. After review of Classical Academy's request and annual report submissions, the Department has determined that Classical Academy has the capacity to support the requested amendment to the charter."

Based on these findings, the Commissioner approved the following maximum enrollment for Classical Academy:

Go to table2

Clifton appealed the Commissioner's determination. After Clifton filed its appeal, we permitted the Commissioner to submit an amplification of reasons in support of his February 1, 2019 decision.

In a June 14, 2019 amplification letter, the Commissioner addressed, in more detail, Clifton's concerns regarding Classical Academy's satisfaction **[*9]** of the Performance Framework. The Commissioner wrote:

> Each charter school amendment is holistically reviewed on its own merits, and Classical [Academy]'s request was no exception. Many factors are considered in rendering a final decision in accordance with N.J.S.A. 18A:36A et seq., with primary consideration given to the charter school's potential to improve pupil learning and ability to increase educational options available to New Jersey families. My decision to approve Classical [Academy]'s amendment request was informed by a review of student performance on statewide assessments, [organizational] stability, fiscal impact, demographic data, and public comment.

In addressing the Superintendent's comment regarding the fiscal impact on the district if enrollment at Classical Academy was increased, the Commissioner stated the Department considered both the financial viability of the school and the "fiscal impact of the expansion on sending districts." Because Clifton did not submit any "documentation demonstrating an adverse fiscal impact on the district," the Commissioner was unable to conclude "that there would be any such impact based

on a detailed review of the record."

Regarding the Superintendent's statement **[*10]** addressed to Classical Academy's required organizational improvements, the Commissioner found the two items yet to be completed (curriculum maps and aligned assessments), were undergoing continual revision year-to-year, and that fact did not undermine his decision to approve the charter amendment, "especially in light of the school's academic performance."

In reviewing academic performance, the Commissioner reiterated Classical Academy achieved a Tier 1 rank during the years that were evaluated as part of the school's requested amendment. While Tier ranks for 2017-2018 had yet to be published, preliminary statewide assessment results suggested Classical Academy "continues to be a high-performing charter school."

In addressing Clifton's claim that Classical Academy students did not reflect the district's demographic profile, the Commissioner found the school demonstrated its admission policy, to the maximum extent practicable, sought to enroll "a cross-section of the community's school age population including racial and academic factors" in accordance with *N.J.S.A. 18A:36A-8(e)*. He further determined Classical Academy demonstrated compliance with *N.J.S.A. 18A:36A-7*, requiring a charter school be open to all students, on a **[*11]** space available basis, and prohibiting discrimination in admission policies or practices on the basis of intellectual or athletic ability, status as a handicapped person, and proficiency in the English language.

Clifton moved to accelerate its appeal.[3] In a certification in support of accelerating the appeal, the Business Administrator and Board Secretary for the Clifton Board of Education (Business Administrator) provided additional information regarding the financial impact to the district if the Commissioner approved Classical Academy's charter amendment to increase enrollment.[4]

According to the Business Administrator, Clifton operated two preschools, fifteen elementary schools, two middle schools, and one high school, serving over 10,965 students in the district. He explained revenue from the local tax levy, the main source of its general fund, totaled $131,825,892 in 2017-2018, and $133,094,682 in 2018-2019, and was projected to yield $134,259,260 in 2019-2020. Additionally, Clifton received $30,054,160 in state aid from the Department for the 2017-2018 school year, and $31,556,868 for the 2018-2019 school year. He stated that during this period, costs associated with Clifton's contractual **[*12]** obligations for employee benefits increased significantly.

The Business Administrator also indicated the Department allocated $3,786,448 in charter school aid in Clifton's general appropriations fund for the 2017-2018 school year, $6,074,332 for the 2018-2019 school year, and $8,076,553 for the 2019-2020 school year. As a result of the increased allocation of aid to charter schools for the 2019-2020 school year, the Business Administrator claimed Clifton would experience a net loss of $2,002,221 in total funding. He calculated Classical Academy's requested enrollment increase would remove approximately $800,000 from the district's proposed budget. The Business Administrator maintained the Department's "preliminary budget, including the portion of the budget accommodating Classical Academy's requested enrollment increase, will therefore have immediate and significant repercussions for the [d]istrict's costs."

On appeal, Clifton argues the Commissioner's decision approving increased student enrollment at Classical Academy was arbitrary, capricious, and unreasonable because the Commissioner failed to consider the fiscal impact the expansion would have on the school district's budget, disregarded **[*13]** Classical Academy's failure to meet performance standards, and failed to consider whether the school's demographics were representative of the district.

Our review of a final decision of the Commissioner on a charter school application is limited. *In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385, 80 A.3d 1120 (2013)*. We may reverse only if the Commissioner's decision "is arbitrary, capricious, or unreasonable." *Ibid.* In making that determination, our review is generally restricted to three inquiries:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether

[3] We granted Clifton's motion to accelerate the appeal in a July 19, 2019 order.

[4] The Business Administrator failed to explain why the information contained in his certification was not provided to the Commissioner as part of Clifton's objections to Classical Academy's request to amend its charter.

> in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> [*Id. at 385-86* (quoting *Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)*).]

"[T]he arbitrary, capricious, or unreasonable standard . . . subsumes the need to find sufficient support in the record to sustain the decision reached by the Commissioner." *Id. at 386*. "[A] failure to consider all the evidence in a record would perforce lead to arbitrary decision making." *Ibid.* However, "[w]hen the Commissioner **[*14]** is not acting in a quasi-judicial capacity," and is instead acting in his legislative capacity, as he was doing here, he "need not provide the kind of formalized findings and conclusions necessary in the traditional contested case." *In re TEAM Acad. Charter Sch., 459 N.J. Super. 111, 140, 208 A.3d 10 (App. Div. 2019)*, *certif. granted*, __ N.J. __ (2020) (quoting *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 320 N.J. Super. 174, 217, 727 A.2d 15 (App. Div. 1999)*, *aff'd as modified*, *164 N.J. 316, 753 A.2d 687 (2000)*). Although the arbitrary, capricious, or unreasonable standard demands "that the reasons for the decision be discernible, the reasons need not be as detailed or formalized as an agency adjudication of disputed facts; they need only be inferable from the record considered by the agency." *Ibid. See also In re Red Bank Charter Sch., 367 N.J. Super. 462, 476, 843 A.2d 365 (App. Div. 2004)* (holding reasons need not be detailed or formalized, but must be discernible from the record).

Nor is there any statutory or regulatory provision requiring the Commissioner to include reasons for granting an application to amend a charter. *TEAM Acad., 459 N.J. Super. at 140* (citing *Englewood, 320 N.J. Super. at 217*). Only in cases where an application to amend a charter is denied must the Commissioner provide detailed findings in support of the denial. *See id. at 146*.

Here, the record supports the Commissioner's decision to approve Classical Academy's request to amend its charter. The Commissioner considered Classical Academy's organizational and academic performance standards, and the **[*15]** school's demographics in comparison to the demographics of the district. Clifton's concerns regarding Classical Academy's deficiencies were adequately addressed in the Commissioner's June 14, 2019 amplification letter. Classical Academy was continuing to improve, as shown by the school's strong academic performance and removal from probationary status, which the Commissioner determined carried more weight under the Performance Framework analysis.

Clifton failed to provide any statistical evidence to support its position that students attending Classical Academy struggled in math upon returning to the district's schools. The Commissioner's initial decision and amplification letter concluded Classical Academy students out-performed students attending district schools in standardized testing. He further noted that students enrolled in Classical Academy performed better on mathematical testing compared to students statewide.

Despite Clifton's failure to provide any statistical evidence to support its concerns regarding Classical Academy's demographic profile related to ELL and special needs students, in his amplification letter, the Commissioner determined the school complied with all statutory **[*16]** and regulatory requirements to ensure its admissions practices were non-discriminatory. The Commissioner found Classical Academy complied with charter school admissions policies and demonstrated an increased enrollment of disadvantaged and special needs students.

Having reviewed the record, the Commissioner thoroughly evaluated Classical Academy's application to increase enrollment and considered Clifton's objections to the requested enrollment increase. We are satisfied the Commissioner's decision was not contrary to his legislative authority and is supported by substantial evidence in the record.

We next consider Clifton's argument that the Commissioner failed to consider the fiscal impact on the district associated with an increase in enrollment of students at Classical Academy. Funding for charter schools is provided by the school district of residence, which directly pays the charter school 90% of its program budget per pupil for each of its resident students enrolled in the school. *N.J.S.A. 18A:36A-12(b)*. Despite this statutory limit on funding, case law requires that

> if the local school district "demonstrates with some specificity that the constitutional requirements of a thorough and efficient education **[*17]** would be jeopardized by [the district's] loss" of the funds to be allocated to a charter school, "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."[5]
>
> [*Quest Acad., 216 N.J. at 377-78* (quoting *Englewood*, 164 N.J. at 334-35).]

However, the district "must be able to support its assertions" regarding any fiscal impact. *Englewood*, 164 N.J. at 336. The Commissioner does not have "the burden of canvassing the financial condition of the district of residence in order to determine its ability to adjust to the per-pupil loss upon approval of the charter school based on unsubstantiated, generalized protests." *Ibid.* "[T]he Commissioner is entitled to rely on the district of residence to come forward with a preliminary showing that the requirements of a thorough and efficient education cannot be met." *Id.* at 334. "The legislative will to allow charter schools and to advance their goals suggests our approach which favors the charter school unless reliable information is put forward to demonstrate that a constitutional violation may occur." *Id.* at 336. *See also* *TEAM Acad., 459 N.J. Super. at 142* (holding the district failed to "make any showing, much less a preliminary showing, on which the Commissioner could **[*18]** rely as to the effect the expansions would have on the District's budget").

Here, Clifton posited no specifics as to how district students would be deprived of a thorough and efficient education by the proposed expansion of students enrolled at Classical Academy. The Superintendent argued, without supporting documentation or financial data, that the increase in Classical Academy's student population would "remove an additional $750,000" from the district's proposed 2019-2020 budget, "forcing the possible elimination of some key programs."

Even if Clifton provided such information in objecting to Classical Academy's charter amendment, Clifton failed to demonstrate the requirements of a thorough and efficient education could not be met as a result of sixty additional charter school seats in a district that serves over 10,965 students. Nor did Clifton establish how an estimated loss of $800,000, from a total budget of $170 million, would deprive district students of a thorough and efficient education. The Commissioner was not required to evaluate the loss of funds to the district. Clifton failed to satisfy its burden by demonstrating how expansion of enrollment at Classical Academy by sixty **[*19]** students would prevent delivery of a thorough and efficient education.

In sum, we affirm the Commissioner's decision allowing Classical Academy to amend its charter and increase student enrollment by sixty students for the 2019-2020 and 2020-2021 school years. The decision was not arbitrary, capricious, or unreasonable, promoted the legislative intent of the CSPA, and was amply supported by the record.

Affirmed.

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[5] Our State Constitution imposes an obligation on the Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." *N.J. Const.* art. VIII, § 4, ¶ 1.

Table1 (*Return to related document text*)

Grade Level	2017-2018	2018-2019	2019-2020	2020-2021	2021-2022
6	40	40	40	40	40
7	40	40	40	40	40
8	40	40	40	40	40
Total	120	120	120	120	120

Table1 (*Return to related document text*)

Table2 (*Return to related document text*)

Grade Level	2018-19 (current maximum)	2019-2020	2020-2021
6	40	60	60
7	40	60	60
8	40	60	60
Total	120	180	180

Table2 (*Return to related document text*)

End of Document

In re Grant of the Charter Renewal of the Red Bank Charter Sch.

Superior Court of New Jersey, Appellate Division

September 9, 2019, Argued; September 20, 2019, Decided

DOCKET NO. A-3342-16T1

Reporter
2019 N.J. Super. Unpub. LEXIS 1935 *

IN THE MATTER OF GRANT OF THE CHARTER RENEWAL OF THE RED BANK CHARTER SCHOOL.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the New Jersey Department of Education.

In re Red Bank Charter School, 367 N.J. Super. 462, 843 A.2d 365, 2004 N.J. Super. LEXIS 109 (App.Div., Mar. 17, 2004)

Core Terms

enrollment, charter, sibling, charter school, renewal, amplification, segregation, lottery, weighted, prekindergarten, practices, demographic, school district, public school, recruitment, school-age, schools, ethnic, economically disadvantaged, seats, monitor, district school, advertising, nonprofit, reasons, grade, renewal application, organizations, decisions, residents

Counsel: Michael Ross Noveck argued the cause for appellants Fair Schools Red Bank and the Latino Coalition (Gibbons PC and ACLU New Jersey Foundation, attorneys; Lawrence S. Lustberg, Avram D. Frey, Jessica L. Hunter, Jeanne M. LoCicero, and Michael Ross Noveck, on the briefs).

Thomas Owen Johnston argued the cause for respondent Red Bank Charter School (Johnston Law Firm, LLC, attorneys; Thomas Owen Johnston, of counsel and on the briefs).

Geoffrey Nelson Stark, Deputy Attorney General, argued the cause for respondent Commissioner of Education (Gurbir S. Grewal, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; James M. Esposito, Jr., Deputy Attorney General, on the briefs).

Judges: Before Judges Sabatino, Sumners and Geiger.

Opinion

PER CURIAM

This appeal concerns the enrollment practices of a charter school located in a community of predominantly Latino population. The school, Red Bank Charter School ("RBCS"), historically has had a mainly white enrollment, until very recently when the percentage of white and Latino students became roughly equal. The racial and ethnic mix of RBCS has been the subject of public controversy **[*2]** for several decades, as exemplified by our 2004 opinion describing an earlier phase of that controversy and remanding the matter for an administrative hearing. *See* *In re Red Bank Charter Sch., 367 N.J. Super. 462, 467, 843 A.2d 365 (App. Div. 2004)* ("*Red Bank Charter*").

In the present litigation, two nonprofit advocacy organizations in Red Bank appeal certain aspects of a final agency decision of the New Jersey Department of

Education ("DOE") granting the renewal of RBCS's charter and written amplifications of that decision by two successive DOE Commissioners. Appellants contend the Commissioners' decisions are inadequate because they fail to make explicit findings addressing appellants' claims of discriminatory enrollment practices at RBCS. According to appellants, those practices have suppressed Latino student enrollment at RBCS and perpetrated white enrollment at a level far higher than the white school population in the local public school district. Appellants further argue the Commissioners acted arbitrarily and capriciously by not halting RBCS's admission policies that give preference to applicants who have siblings already enrolled at the school. Appellants also contend the Commissioners' rulings are deficient in not addressing alleged shortcomings of RBCS's **[*3]** advertising and outreach efforts in encouraging Latino parents to apply for admission, and so-called "whisper campaigns" to encourage white families to apply.

In their opposition, RBCS and the Commissioner argue appellants lack standing to pursue this appeal and, moreover, their claims of discrimination lack merit. They maintain the law does not provide organizations such as appellants with a right to litigate their grievances in the context of an appeal from a charter school renewal, especially since the public school district in this case has not exercised its statutory right to bring or take part in this appeal. Respondents further deny there is any proven discrimination in RBCS's enrollment practices, and emphasize the Commissioner's amplifications provide ample assurance the DOE is continuing to monitor the demographic mix of admitted students at RBCS and will take any remedial measures that may be needed before the school's present five-year charter expires.

For the reasons that follow, we conclude appellants possess standing to litigate the important constitutional and statutory issues of alleged discrimination they have raised in this appeal. On the merits, we affirm the agency's **[*4]** rejection of appellants' request to suspend the sibling preference policy, a practice the DOE is closely monitoring. However, we are persuaded the matter must be remanded to the DOE to enable the present Commissioner to provide further amplification of his ruling and explicitly address, based strictly on the existing administrative record, the omitted subjects identified by appellants.

We decline to order the Commissioner at this time to refer disputed issues for an evidentiary hearing in the Office of Administrative Law ("OAL"), or to require the Commissioner to expand the existing factual record. We do so without prejudice to the right of appellants or any other party to pursue the grievance process set forth in *N.J.S.A. 18A:36A-15*, and potential factual development in connection with such a grievance. Furthermore, our opinion does not foreclose appellants from raising their concerns about discriminatory enrollment practices or impacts during RBCS's next charter renewal process, which is scheduled to begin in the fall of 2021.

I.

To place the facts and the parties' arguments in context, we begin with some background concerning our State's charter school laws and regulations, and pertinent anti-segregation **[*5]** principles.

A. *The Charter School Program Act of 1995*

In 1995, the Legislature enacted the *Charter School Program Act of 1995 ("CSPA"), N.J.S.A. 18A:36A-1 to -18*. As part of that initiative, the Legislature declared that "the establishment of charter schools as part of this State's program of public education can assist in promoting comprehensive educational reform by providing a mechanism for the implementation of a variety of educational approaches which may not be available in the traditional public school classroom." *N.J.S.A. 18A:36A-2*. The Legislature further determined that "the establishment of a charter school program is in the best interests of the students of this State and it is therefore the public policy of the State to encourage and facilitate the development of charter schools." *Ibid.*

A charter school is "a public school operated under a charter granted by the [C]ommissioner." *N.J.S.A. 18A:36A-3(a)*. It "is operated independently of a local board of education and is managed by a board of trustees," who are "deemed to be public agents authorized by the State Board of Education to supervise and control the charter school." *Ibid.*

A charter school must operate in accordance with its charter and the laws and regulations governing public **[*6]** schools, unless the school requests and is given an exception by the Commissioner. *N.J.S.A. 18A:36A-11(a)*. As we will discuss in Part III of this opinion, "[a]ny individual or group may bring a complaint to the board of trustees of a charter school alleging a violation of the provisions of this act." *N.J.S.A. 18A:36A-15*.

With respect to admissions, charter schools are "open to

all students on a space available basis." N.J.S.A. 18A:36A-7. A charter school cannot discriminate in its admissions policies and practices, although it "may limit admission to a particular grade level or to areas of concentration of the school, such as mathematics, science, or the arts." N.J.S.A. 18A:36A-7.

Particularly relevant to the present case is N.J.S.A. 18A:36A-8, which provides:

> a. Preference for enrollment in a charter school shall be given to students who reside in the school district in which the charter school is located. *If there are more applications to enroll in the charter school than there are spaces available, the charter school shall select students to attend using a random selection process*. A charter school shall not charge tuition to students who reside in the district.
>
> b. A charter school *shall allow any student who was enrolled in the school in the immediately preceding school year* ***[*7]*** *to enroll* in the charter school in the appropriate grade unless the appropriate grade is not offered at the charter school.
>
> c. A charter school *may give enrollment priority to a sibling of a student enrolled in the charter school*.
> d. If available space permits, a charter school may enroll non-resident students. The terms and condition of the enrollment shall be outlined in the school's charter and approved by the commissioner.
>
> e. The admission policy of the charter school shall, *to the maximum extent practicable, seek the enrollment of a cross[-]section of the community's school age population including racial and academic factors*.
> [(Emphasis added).]

After approving a charter application, the Commissioner must annually assess whether the school is meeting the goals of its charter. N.J.S.A. 18A:36A-16(a). Regulations specify the Commissioner must also annually assess "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 board of education, and the county superintendent of schools. N.J.S.A. 18A:36A-16(b); *N.J.A.C. 6A:11-2.2*. The Commissioner may revoke a charter **[*8]** 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.

B. *Constitutional Anti-Segregation Principles*

It is well-established that, "[r]ooted in our Constitution, New Jersey's public policy prohibits segregation in our public schools." *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 164 N.J. 316, 324, 753 A.2d 687 (2000)*. *See also id. at 330* ("[S]egregation, however caused, must be addressed."); *In re Renewal Application of Team Acad. Charter Sch., 459 N.J. Super. 111, 144, 208 A.3d 10 (App. Div. 2019)* ("Segregation is strictly prohibited in our schools, and is specifically prohibited in charter schools."). In that regard, the CSPA provides that "[t]he admission policy of the charter school shall, *to the maximum extent practicable, seek the enrollment of a cross[-]section of the community's school age population including racial and academic factors*." N.J.S.A. 18A:36A-8(e) (emphasis added). *See also N.J.A.C. 6A:11-4.5(e)* (same).

Our Supreme Court has found that the "form and structure" of the segregative analysis under the CSPA is within the discretion of the DOE Commissioner and the State Board of Education to determine. *Englewood, 164 N.J. at 329*. *See also Team Academy, 459 N.J. Super. at 145* (recognizing the Commissioner's and State Board of Education's discretion when determining segregative effect).

C. *The Oversight Role of the DOE and the Commissioner*

Within this regulatory structure, the Supreme Court has recognized the Commissioner's obligation **[*9]** under the New Jersey State Constitution "to prevent segregation in our public schools . . . when [he or she] performs his [or her] statutory responsibilities under the Charter School Act." *Id. at 328*. Indeed, as far back as 1971 the Commissioner "recognized that . . . there is an 'obligation to take affirmative steps to eliminate racial imbalance, regardless of its causes,'" citing to New Jersey's "constitutional provisions for a thorough and efficient school system (*N.J. Const.* art. VIII, § 4, ¶ 1), and against segregation in the schools (*N.J. Const. art. I, ¶ 5*)." *Jenkins v. Twp. of Morris Sch. Dist., 58 N.J. 483, 506, 279 A.2d 619 (1971)*. This state constitutional duty applies equally in the charter school context. *See, e.g., Englewood, 164 N.J. at 328* ("The constitutional command to prevent segregation in our public schools superimposes obligations on the Commissioner when he performs his statutory responsibilities under the Charter School Act.").

To conform with these constitutional and statutory commands, "the Commissioner must use the full panoply of his powers to avoid [segregation]." *Id. at 329*. *See also* *Booker v. Bd. of Educ. of City of Plainfield, 45 N.J. 161, 178-79, 212 A.2d 1 (1965)* (recognizing Commissioner's power extends beyond addressing segregated schools and includes remedial action to alleviate substantial racial imbalance); **[*10]** *In re Petition for Authorization to Conduct a Referendum on the Withdrawal of North Haledon Sch. Dist. from Passaic Cty. Manchester Reg'l High Sch., 363 N.J. Super. 130, 139, 831 A.2d 555 (App. Div. 2003)* (discussing Supreme Court decisions requiring "education policy makers to anticipate imbalance and to take action to blunt perceived demographic trends which will lead to racial or ethnic imbalance."). Just as the Commissioner is obligated to act if a charter school "systematically" recruits pupils of a particular race or national origin, the Commissioner must also "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." *Englewood, 164 N.J. at 328*.

In response to the Court's decision in *Englewood*, and to the companion case, *In re Greater Brunswick Charter Sch., 164 N.J. 314, 315, 753 A.2d 686 (2000)*, regulations were adopted that required the Commissioner, approving a charter, *N.J.A.C. 6A:11-2.1(j)*, and on an annual basis thereafter, *N.J.A.C. 6A:11-2.2(c)*, to "assess the student composition of a charter school and the segregative effect that the loss of the students may have on its district of residence. The assessment shall be based on the enrollment from the initial recruitment period pursuant to *N.J.A.C. 6A:11-4.4(b)*." 32 *N.J.R.* 3560(a), 3561 (Oct. 2, 2000). *N.J.A.C. 6A:11-4.4(a)* requires "a charter school [to] submit to the Commissioner the number of students by grade level, gender and race/ethnicity from each district selected for enrollment from its **[*11]** initial recruitment period for the following school year."

This court similarly recognized in the previous *Red Bank Charter* appeal the Commissioner's obligation under the State Constitution to prevent segregation in New Jersey's public schools. *See, e.g.*, *367 N.J. Super. at 471-72* (noting that "[a]ll parties agree that the Commissioner is required to monitor and remedy any segregative effect that a charter school has on the public school district in which the charter school operates," and "[t]he Commissioner must vigilantly seek to protect a district's racial/ethnic balance during the charter school's initial application, continued operation, and charter renewal application."). *See also* *Team Academy, 459 N.J. Super. at 145* (recognizing the Commissioner's obligation to annually monitor the possible segregative effective of a charter school upon the local school district).

II.

RBCS opened in 1998. It presently enrolls 200 students, from prekindergarten through eighth grade.[1] The school's charter limits enrollment to twenty students in each of the ten grades.

For many years, starting long before the present litigation, RBCS has been accused of enrolling a student population that does not reflect a cross-section of the Red Bank community. In 2001, the **[*12]** Red Bank Board of Education (the "School Board"), challenged a proposed expansion of RBCS's enrollment on the grounds that RBCS had allegedly "worsened the racial ethnic imbalance in the [Red Bank] district schools." *Red Bank Charter, 367 N.J. Super. at 467*. The School Board contended that RBCS was "siphoning" non-minority students from the district schools, which increased the "exodus of whites from the school district." *Id. at 472*. The School Board appealed the DOE's approval of the charter expansion request.

Based on the record in that earlier case, we remanded the dispute for an administrative hearing. Among other things, we directed the hearing to focus upon "whether some of [RBCS's] practices may be worsening the existing racial/ethnic imbalance in the district schools." *Id. at 480*. We did not specify the manner or venue of the remand hearing.

Several years after our 2004 remand, the Board and RBCS entered into a consent order on March 20, 2007 in the OAL ending the litigation, without any administrative hearing. RBCS's charter was renewed by the DOE in ensuing years in 2006 and 2012, apparently without litigation.[2]

The present appeal arises from the most recent renewal application submitted by RBCS to the DOE in September 2016. As part of **[*13]** its review of that application, the DOE conducted a site visit at RBCS in

[1] The prekindergarten class enrollment was originally capped at fifteen students, but counsel clarified at oral argument the class is now at twenty.

[2] An initial charter is for a term of four years and may be renewed for a five-year period. *N.J.S.A. 18A:36A-17*.

October 2016. Because DOE ranks RBCS as a "Tier 1" school, based on its students' high academic performance on standardized tests, the site visit was shortened to only several hours, instead of a full day. Among other favorable things, the DOE concluded from the site visit that RBCS is "faithful to its mission," that the school "promotes a culture of high expectations," and that the RBCS Board "has the capacity to govern the school effectively."

On February 28, 2017, Kimberly Harrington, who was then the DOE Commissioner, granted RBCS's charter renewal in a "short, congratulatory letter," for a period of five years through June 30, 2022.

A. *The Present Appeal of RBCS's 2017 Charter Renewal*

On April 11, 2017, the Latino Coalition of New Jersey and Fair Schools Red Bank (collectively "the Coalition")[3] appealed Commissioner Harrington's renewal decision to this court. The Coalition asserted the renewal decision violated: (1) the CSPA; (2) the Thorough and Efficient Education Clause of the New Jersey Constitution, *N.J. Const.* art. VIII § 4 ¶ 1; (3) and *Article I, paragraph 5 of the New Jersey Constitution.* The Coalition further argued the Commissioner's decision was arbitrary and capricious.

Pursuant to *Rule 2:5-1(b)*, Commissioner Harrington filed with this court on August 9, **[*14]** 2017 an Amplification of Reasons for her February 28, 2017 decision, on her own initiative. The August 2017 Amplification cited three main reasons as support the renewal decision: (1) RBCS's favorable student performance on statewide assessments; (2) operational sustainability; and (3) demographic enrollment data and public comment.

With regard to the first listed factor of student performance, Commissioner Harrington noted that RBCS is a "Tier Rank 1" school, and had outperformed Red Bank district schools in English language arts and mathematics in 2014-2015 and 2015-2016. The Commissioner observed in this regard that "RBCS has a track record of student success based on the results of statewide assessments."

Regarding the second factor of operational sustainability, Commissioner Harrington noted that: (1) RBCS's charter already had been renewed three times before the 2017 renewal; (2) its enrollment the last term was at capacity, with a waiting list; and (3) leadership at RBCS has been "stable."

As to the third factor of demographics and pupil enrollment, Commissioner Harrington acknowledged that "[a] *cursory review* of the racial/ethnic composition of RBCS's overall student population **[*15]** . . . suggest[s] that it does not currently reflect the community's school-age population." (Emphasis added). However, the Commissioner explained that "*a closer look* reveals the RBCS has taken sufficient action to address the issue and has obtained the necessary results." (Emphasis added).

Commissioner Harrington delineated several reasons to support her conclusion that RBCS had taken "sufficient action" to address its racial imbalance:

- There are limited opportunities for new students to enroll because RBCS has a maximum enrollment of 200 students, or 20 students per grade, and a low attrition rate;
- RBCS had bolstered its outreach for the 2015-2016 school year by mailing the RBCS application and advertisements to all Red Bank residents in both English and Spanish, and targeted high-needs communities with posters and banners;
- Prekindergarten enrollment data from 2015-2016 indicates that the recruitment strategy was effective, with 60% of the 2015-2016 incoming prekindergarten class identifying as Hispanic, as compared to 27% of the 2014-2015 incoming prekindergarten class identifying as Hispanic;

- In April 2016 RBCS implemented a weighted lottery[4] for economically disadvantaged

[3] According to appellants, the Latino Coalition of New Jersey "is a [Section] 501(c)(14) corporation established in 2009, made up of organizations and individuals from Monmouth and Ocean County, New Jersey." Co-appellant Fair Schools Red Bank, meanwhile, "is an unincorporated organization of Red Bank residents." Appellants state they represent "the membership of Fair Schools Red Bank and the Latino Coalition, [which] includes residents of Red Bank with school-age children, some of whom attend Red Bank's [p]rimary and [m]iddle schools." At oral argument, appellants' counsel clarified they do not represent the interests of Latino children who are presently enrolled at RBCS.

[4] According to the Commissioner, pursuant to *N.J.S.A. 18A:36A-7* and *N.J.S.A. 18A:36A-8*, charter schools may seek approval from the DOE to establish certain admission policies, including weighted lotteries, which favor economically disadvantaged students. Economically disadvantaged students who apply to RBCS have their names entered into

students **[*16]** "in order to better represent a cross-section of the community's school-age population;"

• Although the Commissioner considered ending RBCS's sibling preference policy (as the Coalition has advocated) in order to make more seats available to new students, the Commissioner determined it would be unnecessary, citing to the increase in enrollment of Latino prekindergarten students; and

• After comparing the ethnic makeup of the district schools and RBCS, it was determined that there was no compelling evidence to suggest that RBCS is having a segregative effect on the district schools.

Following the August 2017 Amplification, the Coalition filed an objection with this court, arguing the amplification was improperly based on evidence not in the record and had been submitted for the purpose of litigation advocacy.

B. *Post-Remand & Subsequent DOE Proceedings*

In a September 15, 2017 order from this court, we remanded the case to the Commissioner for further "proceedings," in order to provide the Coalition and DOE "with [an] adequate opportunity to supplement the record as it relates to the August 9, 2017 Amplification of Reasons."

The Coalition's November 2017 Submission to the Commissioner

Pursuant **[*17]** to the remand by this court, the Coalition submitted to Commissioner Harrington a detailed twenty-six-page letter on November 13, 2017, which set forth arguments and evidence of RBCS's alleged historical practice of segregation in its recruitment and enrollment practices. In the letter, the Coalition's members expressed "deep[] concern[] that... RBCS is increasing segregation in the [d]istrict schools."[5] The Coalition "submit[ed] [the] letter and attached materials to assist the Commissioner in identifying the problems posed by RBCS' operation, as well as specific remedies to address them."

In its November 2017 submission, the Coalition highlighted the following matters in support of its argument that the Commissioner must make policy changes to remedy the racial imbalance in RBCS:

• Census data showing the demographic shift and increase in Red Bank's Latino community over the past twenty years;

• Statements, letters, and newspaper articles indicating that RBCS had endeavored to position itself as the only public school option for white parents seeking refuge from the majority-Latino district schools. Or, as the Coalition puts it, RBCS was allegedly intending to mitigate against so-called **[*18]** "white flight" from Red Bank to nearby towns;

• RBCS has historically limited information about its application process and lottery system to affluent white social networks and parent groups. In other words, RBCS's recruiting was, in essence, a "whisper campaign" amongst white middle- and upper-class RBCS parents to other white middle- and upper-middle class families;

• The sibling preference policy perpetuates RBCS's skewed racial demographic because most siblings are the same race and enrollment is already very limited. Indeed, the Commissioner noted in the August 2017 Amplification that, according to the "school lead," roughly half of the 20 prekindergarten seats go to siblings each year; and

• The weighted lottery is being undermined by RBCS's sibling preference policy and failure to recruit "a cross-section of the community.

Despite these criticisms, the Coalition clarified that it was not asking the Commissioner to deny RBCS's renewal application altogether, recognizing that the "closure of [RBCS] would disrupt and unfairly penalize its 200 students." However, the Coalition did urge that "corrective action is required if the RBCS charter is to be renewed," and insisted that the Commissioner **[*19]** address the "central causes of RBCS'[s] segregative effect . . . by requiring changes to RBCS policies."

(1) *Proposed Remedial Measures*

The Coalition proposed three specific remedial measures to the Commissioner.

First, the Coalition asked the Commissioner to evaluate standardized tests scores in a manner that accounts for biases along the lines of race, class, and English-language proficiency. The Coalition advocated the charter school's performance should only be compared to the district schools "after differentiating between students of racial, economically disadvantaged, and [limited English proficiency] groups." According to the

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the lottery three times, while all other students have their names entered only twice.

[5] Notably, the district has not participated in this appeal.

Coalition, "[s]uch a policy change would remove the incentive for RBCS to recruit predominantly white, wealthy, English-proficient students . . . . [a]nd it would remove the harmful and unfair stigma that [,by comparison,] the [d]istrict is a poor academic institution."

Second, the Coalition urged the Commissioner to "meaningfully investigate and oversee the charter's marketing and recruitment efforts." The Coalition asserted that, "in light of the accounts of [the letters submitted by numerous] Red Bank parents [detailing the so-called alleged "whisper campaign"], **[*20]** the charter cannot be taken at its word that it is fulfilling its obligation to seek a cross-section of the community."

Third and finally, the Coalition requested the Commissioner suspend RBCS's sibling preference policy until the charter school's racial imbalance is corrected. The Coalition described as "illogical" the Commissioner's conclusion in the amplification that ending the sibling preference policy "could be detrimental" to the enrollment of more Latino students.

(2) *RBCS's Response Letter*

In its administrative response to the Coalition, RBCS urged the Commissioner to: (1) reject the Coalition's letter submission as improper and contrary to the remand order because the submission presented new arguments and information that had not been raised before; (2) find that the Coalition lacked standing to bring an appeal of the charter renewal, and that the appeal was moot since the Coalition was not contesting the continuance of the charter; and (3) dismiss the Coalition's allegations of segregative impact, because "the available evidence clearly demonstrates that RBCS attracts a cross[-]section of the student age population in the Red Bank community." RBCS took issue with the Coalition's **[*21]** claim that RBCS was purposely not recruiting Latino students. In particular, RBCS asserted that recent "diverse enrollment trends" were a direct result of RBCS's positive outreach to the Latino community.

Commissioner Repollet's April 2018 Amplification

In response to those submissions and this court's remand order, Commissioner Lamont Repollet[6] issued a four-page Amplification on April 16, 2018 "reiterate[ing] the February 28, 2017 decision to renew RBCS's charter through June 30, 2022." Commissioner Repollet did not refer the matter for an administrative hearing to delve into factual disagreements between the parties.

Commissioner Repollet's April 2018 Amplification concluded that, after considering the supplemental record, "it is evident . . . that RBCS is seeking, 'to the maximum extent practicable,' to enroll a cross-section of Red Bank Borough's school-age population." The Commissioner, while acknowledging the letters of Red Bank residents suggesting what the Coalition alleged to be a "whisper recruitment campaign," nonetheless found RBCS's recruitment practices were sufficient during the relevant charter term (2013 to 2017), stating:

> RBCS **[*22]** recruited throughout the Red Bank Community by: providing the application in hard-copy and electronically in English/Spanish, direct mailings to Red Bank Borough residents, English/Spanish lawn signs through the community, posted and published advertisements for the application and latter in English/Spanish, a banner on the main Red Bank thoroughfare, and reaching out to local churches and community organizations to include information about RBCS in their bulletins and announcements.

Commissioner Repollet endorsed RBCS's use of a weighted lottery as a tool to promote enrollment of economically disadvantaged students. The weighted lottery, which because effective at RBCS in 2017, "increases the odds a student identified as part of a specific educationally disadvantaged class . . . will gain a seat at RBCS." Thus, according to the Commissioner, "the ultimate purpose of the weighted lottery is to ensure that RBCS's enrollment represents a cross-section of the community's school-age population." Citing a certification from RBCS's principal included with RBCS's letter submission, the Commissioner noted that, in the first year of the weighted lottery, "the number of Hispanic students enrolled **[*23]** [per a] sibling preference increased 26 percent and the number of white students enrolled with a sibling preference decreased 11 percent."[7] Commissioner Repollet

[6] Commissioner Repollet succeeded Commissioner Harrington in January 2018 after the change in gubernatorial administrations. He became Acting Commissioner on January 29, 2018 and was sworn in as Commissioner on June 19, 2018, after he had issued the April 2018 Amplification. *Dr. Lamont Repollet*, DEPARTMENT OF EDUCATION, https://www.nj.gov/education/about/commissioner/repolletbio.shtml.

[7] Of the fifty-nine students admitted in 2016-2017, it is not

recognized that RBCS maintains a policy in which siblings of current RBCS students are automatically granted a seat in RBCS, and that, in the event the number of siblings applying for such seats exceeds the available seats, the sibling student is placed on a waitlist and granted enrollment through a lottery system. However, like Commissioner Harrington, Commissioner Repollet found no reason to discontinue the sibling preference policy, explaining that the weighted lottery will trend in a "direction that better reflects the demographics of school-aged population in the community . . . . [And] [i]t is anticipated that this trend will continue in coming years as [economically disadvantaged students], *and siblings thereof*, obtain seats at RBCS. (Emphasis added).

Although declining to take any immediate remedial action, Commissioner Repollet did caution in his decision that the DOE "will continue to monitor RBCS's demographics and will consider revisiting both the weighted lottery and sibling preference if the trend does not continue." **[*24]**

The Coalition thereafter expanded its appeal to include Commissioner Repollet's amplification.

III.

A.

Our governing standards of review are well established. In general, reviewing courts "need to respect agency action taken pursuant to authority delegated by the Legislature." *In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385, 80 A.3d 1120 (2013)* ("*Quest Academy*"). Consequently, subject to the governing law, an "appellate court may [only] reverse an agency decision if it is arbitrary, capricious, or unreasonable." *Ibid.*

As we recently observed in *Team Academy*, our role in reviewing an agency action is generally restricted to three inquiries:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> [*Team Academy, 459 N.J. Super. at 139* (quoting *Quest Academy, 216 N.J. at 385-86*).]

This limited scope of review particularly applies to the context of a DOE Commissioner's decision on a charter-school renewal application because the Commissioner is "acting in his **[*25]** [or her] legislative capacity and not quasi-judicial capacity" when he or she is reviewing such an application. *Red Bank Charter, 367 N.J. Super. at 475*. As we stated in *Red Bank Charter*, "[t]he Commissioner is merely applying his [or her] education expertise to the collected data, including the documents, statistics, site visit, and comprehensive review, to determine whether the charter school should be renewed . . . . It remains essentially an investigatory proceeding without the need of adversarial procedural trappings." *Id. at 475-76*.

Because the Commissioner is acting in a quasi-legislative, and not quasijudicial capacity in this context, *id. at 476*, "he [or she] need not provide the kind of formalized findings and conclusions necessary in the traditional contested case." *Ibid.* (quoting *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 320 N.J. Super. 174, 217, 727 A.2d 15 (App. Div. 1999)*). That is because when reviewing "quasi-legislative decisions, [reviewing courts generally] do not seek to determine whether sufficient credible evidence is present in the record, but instead consider whether the decision is arbitrary, capricious or unreasonable." *Ibid.* The agency's "reasons for the decision need not be detailed or formalized, but must [at least] be discernible from the record." *Ibid.* (citing *Bd. of Educ. of E. Windsor Reg'l Bd. of Educ. v. State Bd. of Educ., 172 N.J. Super. 547, 552-53, 412 A.2d 1320 (App. Div. 1980)*).

That said, the normal standard of appellate review **[*26]** for arbitrariness nonetheless "subsumes the need to find sufficient support in the record to sustain the decision reached by the [DOE] Commissioner." *Quest Academy, 216 N.J. at 386*. "[A] failure to consider all the evidence in a record would perforce lead to arbitrary decision making." *Ibid.* (citing *Close v. Kordulak Bros., 44 N.J. 589, 599, 210 A.2d 753 (1965)* (noting "the proofs as a whole" must be considered)). In the same vein, a Commissioner's decision that is "based on a complete misperception of the facts submitted in a record would render the agency's conclusion unreasonable." *Id. at*

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clear how many of those students were in prekindergarten, and how many were older students who had been enrolled through sibling preference, but before the implementation of the weighted lottery.

387 (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588-89, 538 A.2d 794 (1988) (recognizing that an appellate court should intervene when agency's "finding is clearly a mistaken one")).

Lastly, we review de novo on appeal pure questions of law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 (1995).

B.

With these principles in mind, we turn to specific issues that have been presented to us.

1. *Appellants' Standing and Mootness Issues*

RBCS and the Commissioner contend the Coalition lacks standing to pursue its claims on this appeal, and that consequently there is no need for this court to address the substance of those claims. We disagree.

Respondents hinge their lack-of-standing argument largely upon N.J.S.A. 18A:36A-4(d), a provision within the CSPA stating that "A local board of education or a charter school applicant may appeal the decision **[*27]** of the [C]ommissioner [concerning a charter school application] to the Appellate Division of the Superior Court." Respondents maintain this facet of the statute precludes any parties, other than a local public school district or a charter school applicant, from obtaining appellate review of a Commissioner's decision to grant, renew, or deny a charter, or the terms of such grants.

As we have noted, the Red Bank Public School District, which filed opposition to RBCS's renewal administratively with the DOE,[8] did not pursue that opposition to the next level through an appeal to this court. Because no such appeal was filed by the school district, respondents urge that we refuse to consider the Coalition's own prayers for relief.

In a related procedural argument not joined by the Commissioner, RBCS further contends we should dismiss the appeal because the Coalition is not seeking to terminate or suspend RBCS's charter, but instead challenges certain aspects of the charter's terms of renewal. Hence, according to RBCS, "there is no controversy about the continuing status of RBCS's charter."

"Standing 'refers to [a litigant's] ability or entitlement to maintain an action before the court.'" In re Adoption of Baby T, 160 N.J. 332, 340, 734 A.2d 304 (1999) (quoting **[*28]** N.J. Citizen Action v. Riveria Motel Corp., 296 N.J. Super. 402, 409, 686 A.2d 1265 (App. Div. 1997)). Under this state's general principles of standing, a party "must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In re Camden Cty., 170 N.J. 439, 449, 790 A.2d 158 (2002). *See also* In re Grant of Charter to Merit Preparatory Charter Sch. of Newark, 435 N.J. Super. 273, 279, 88 A.3d 208 (App. Div. 2014) (similarly applying these standing factors in a charter school case).

Our courts in this State generally take "a liberal approach to standing to seek review of administrative actions." In re Camden Cty., 170 N.J. at 448. "[W]hen an issue involves a 'great public interest, any slight additional private interest will be sufficient to afford standing.'" Merit Charter, 435 N.J. Super. at 279 (quoting Salorio v. Glaser, 82 N.J. 482, 491, 414 A.2d 943 (1980)). "[I]t takes but slight private interest, added to and harmonizing with the public interest[,] to support standing to sue." People for Open Gov't v. Roberts, 397 N.J. Super. 502, 510, 938 A.2d 158 (App. Div. 2008) (quotation omitted).

This court very recently considered these standing principles in *Team Academy*. In doing so, we declined to construe N.J.S.A. 18A:36A-4(d) as an immutable barrier for public interest organizations to seek appellate review of a Commissioner's decisions concerning charter schools.

Specifically, in *Team Academy* we recognized that the petitioner, a nonprofit law center litigating on behalf of *Abbott*[9] schoolchildren, had standing to challenge the Commissioner's **[*29]** decision to approve the expansion of several Newark charter schools. Id. at 125-26. *See also* In re Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180, 185, 549 A.2d 446 (App. Div. 1988) ("The standing of nonprofit associations to litigate in varying contexts has historically been upheld in New Jersey."). As we explained in *Team Academy*, "[n]onprofit organizations have representative standing to pursue claims on behalf of their members that are of 'common interest' and could not more appropriately be pursued by individual members." Team Academy, 459

[8] We have not been supplied on appeal with a copy of the District's opposition submitted to the DOE, but that document is listed in the Statement of Items Comprising the Record.

[9] Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990).

N.J. Super. at 125-26 (citing Crescent Park Tenants Ass'n, 58 N.J. 98, 109, 275 A.2d 433 (1971)).

As we reasoned in *Team Academy*:

> Given our State's goal of providing a thorough and efficient education to all public school students, [the nonprofit law center's] standing seems clear. *That the statute [N.J.S.A. 18A:36A-4(d)] does not explicitly allow for organizations such as [the nonprofit law center] to appeal the Commissioner's decisions is inconsequential*. The unfortunate reality is that, despite systemic improvements, public school children in Abbott districts continue to need representation in order to ensure their constitutional right to a thorough and efficient education is enforced. At no time has the overall statutory scheme regarding education expressly granted standing to entities such as [the nonprofit law center], yet [the center] has over many years successfully **[*30]** litigated on behalf of New Jersey's school children. To coin a phrase, if not [the nonprofit law center], then who?
>
> The issues raised in this appeal, notably the effect of a substantial increase in charter school enrollment on traditional schools in a former *Abbott* school district, are of "great public interest[.]" Merit Preparatory, 435 N.J. Super. at 279 (quoting Salorio, 82 N.J. at 491). *Thus, even if [the nonprofit law center] had demonstrated only a "slight additional private interest," it has standing*.
>
> [Id. at 126-127 (emphasis added).]

In supplemental briefs filed in this case at our invitation, both RBCS and the Commissioner attempt to distinguish the situation in Team Academy from the present matter. They contend the Coalition fundamentally differs from the appellant in *Team Academy* — the Education Law Center — because its two constituent organizations lack a sufficient school-centered mission. Among other things, respondents point out to us that the Latino Coalition is immersed in a variety of community and cultural activities that do not directly concern public education. Meanwhile, Fair Schools Red Bank is characterized by RBCS as an organization whose overall mission is to have RBCS's charter revoked and the school eliminated, although that particular **[*31]** relief is not sought on this appeal. Respondents further attempt to distinguish *Team Academy* because the public schools in the City of Newark are State-operated, and therefore the voice of a local public school board was absent from the litigation.

We are satisfied the Coalition has standing to pursue the present appeal. The Coalition's members have a sufficient stake in the terms of the charter school's renewal, and the ongoing impact of the terms of that renewal and the school's enrollment practices on school-aged children who live in Red Bank, particularly Latino children. As described by the Coalition, it is advocating in this case the interests of "public school students and their families who are harmed by the Commissioner's decision, which has [allegedly] allowed the perpetration and exacerbation of segregation in Red Bank schools." That is an appropriate — indeed, more than "slight" — interest to advocate in a charter school renewal context, and one closely tied to the CSPA. People for Open Gov't, 397 N.J. Super. at 510 (noting the standard of a "slight" private interest, coupled with the public interest). The Coalition has real adverseness to the positions of respondents. It has articulated constitutionally-based and **[*32]** statutorily-based potential harms that could ensue if the Commissioner's decision is not altered.

We recognize that the Coalition does not have the long pedigree of the Education Law Center in litigating public school issues in New Jersey, and that the Coalition's activities are not exclusively focused on educational matters. Even so, the Coalition, which is represented by co-counsel from the American Civil Liberties Union and a law firm's public interest fellowship, has more than ample credentials to advocate the serious issues of alleged segregation it has presented concerning this charter school's renewal.

In addition, the absence of the Red Bank Public School District from this appeal does not nullify the Coalition's standing. The District opposed RBCS's charter renewal before the DOE. There is no reason to believe the District's views concerning the issues before us on appeal diverge from those of the Coalition, except perhaps the District may favor more drastic remedies.

Further, we reject RBCS's contention the appeal is moot. An issue has become moot "when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." N.Y. Susquehanna & W. Ry. Corp. v. State Dep't of Treasury, Div. of Taxation, 6 N.J. Tax 575, 582 (Tax Ct. 1984) (citation omitted), **[*33]** *aff'd*, 204 N.J. Super. 630, 499 A.2d 1037 (App. Div. 1985). The conditions of RBCS's renewal — particularly those concerning the continued sibling preference policy, the effectiveness of the weighted lottery and the school's outreach to the Latino population, and the other discrete issues posed on

appeal — remain viable and unresolved concerns. The Commissioners themselves have stated in their amplifications that the DOE would be continuing to monitor these concerns. The controversy is plainly not moot, and indeed persists.

2. *Sibling Preference and the Newly-Instituted Weighted Lottery*

A main remedial objective of the Coalition, asserted both at the agency level and again on this appeal, is to have the Commissioner suspend RBCS's sibling preference policy in the admissions process. The Coalition argues the sibling preference policy historically has been a significant factor in causing a much higher percentage of white students to be enrolled at RBCS, as compared with the local school-age population. In simple terms, the Coalition argues the sibling preference policy enables applicants who are younger siblings of white students who are already enrolled at RBCS to occupy seats that might be more demographically diverse if they were made **[*34]** open to all applicants, including Latino children.

Sibling preference is statutorily permitted. *N.J.S.A. 18A:36A-8(c)* ("A charter school may give enrollment priority to a sibling of a student enrolled in the charter school."). However, as this court cautioned in the prior appeal involving RBCS, "the statutory sibling preference is not mandatory and in particular circumstances, might not be appropriate, especially if its operation exacerbates existing racial/ethnic imbalance." *Red Bank Charter, 367 N.J. Super. at 481-82*.

As respondents have rightly pointed out, sibling preference admission policies have numerous benefits. Among other things, parents with more than one child at the school can be relieved of the logistical burdens of having their children transported to different school locations. The siblings potentially may benefit academically by having another sibling at the charter school who has been taught the same or similar curriculum, by perhaps the same teachers. The siblings may also benefit socially by having the opportunity to interact with friends of their siblings' own friends and classmates. The siblings might also participate together in extracurricular or recreational activities.

These benefits can be offset, however, if a sibling **[*35]** preference policy is materially thwarting efforts to achieve a racial/ethnic enrollment balance that is more representative of the local school-age population. As we have already noted, there was a sharp increase in the under-eighteen Latino population in Red Bank between 2000 and 2010. During that decade, the Latino under-eighteen population grew from 542 to 1,307, or 141.1%. Consistent with that pattern, the Latino enrollment at the Red Bank public school has grown from 18.9% in 1998 to 89.3% in 2017. Meanwhile, the Latino enrollment at RBCS has risen at a comparatively slower pace, from 5.1% in 1998 to 45.2% in 2017. As we have already noted, the 2017 data indicates the percentages of whites (44.92%) and Latinos (45.2%) attending RBCS are roughly equal, as compared with, say, 2000 when white enrollment was 51.3%, about five times the Latino enrollment of 10.0%.

The key causal question on this issue is to what extent the school's sibling preference policy is unduly impeding further Latino enrollment and diversification at RBCS. Both Commissioner Harrington and her successor Commissioner Repollet considered that precise question, and concluded that the sibling preference policy should **[*36]** not be suspended at this time.

As Commissioner Harrington noted in her amplification, "RBCS's most recent data does not evidence that ending sibling preference would bring about the desired change." She recognized in this regard that in April 2016, RBCS, with the approval of the DOE, became the second charter school in this State to implement a weighted lottery that favors economically disadvantaged students, which would include many students from the Latino community. Through that weighted lottery, economically disadvantaged students enjoy a 3:2 preference in competing for any open slots at RBCS, including situations where multiple applicants have an older sibling at the school.[10]

As Commissioner Harrington underscored, the percentage of Latino children in the incoming prekindergarten class at RBCS increased from 27% in 2014-15 to 60% in 2015-16. Given this sharp increase, Commissioner Harrington found that, even with the policy of sibling preference continued, "the most recently admitted cohort of students is beginning to mirror the racial/ethnic composition of the community's school-age population." In light of this, Commission Harrington specifically "determined that it was unnecessary, **[*37]** and indeed, could be detrimental, to end sibling preference." That said, Commissioner Harrington committed in her August 2017 amplification that the DOE "will continue to monitor the demographic of the

[10] The record indicates the waiting list for admission at RBCS is substantial. For the 2013-14 school year, it was 143 students.

prekindergarten class and will consider revisiting the sibling preference issue if the trend does not continue."

Commissioner Repollet adopted and reinforced these conclusions in his own amplification in April 2018. Among other things, he noted that in the first year of implementation of the weighted lottery, the number of Hispanic students enrolled with a sibling preference increased twenty-six percent and the number of white students enrolled with sibling preference decreased eleven percent. This newer data suggested to Commissioner Repollet that "as a result of the weighted lottery in favor of economically disadvantaged students, enrollment at RBCS is *trending* in a direction that better reflects the demographics of the school-age population in the community." (Emphasis added). Commissioner Repollet also found that "[i]t is anticipated that *this trend will continue in coming years* as students with documented economically disadvantaged statuses, and siblings thereof, obtain seats at **[*38]** RBCS." (Emphasis added). Like his predecessor, Commissioner Repollet committed that the DOE "will *continue to monitor* RBCS's demographics and will *consider revisiting* both the weighted lottery and the sibling preference *if the trend does not continue*." (Emphasis added).

The record furnished to us on this appeal does not demonstrate that either Commissioner acted arbitrarily or capriciously, or violated constitutional norms, by declining to halt sibling preference at the school. Indeed, the actual annual impact of sibling preference on the enrollment numbers appears to be slight.

The record reflects that only about twenty of the 200 enrollment slots at the school open up each year, through the graduation of the eighth grade class and miscellaneous departures. The prekindergarten class — whether it be fifteen or twenty — is realistically the only class level that can significantly affect enrollment percentages, since no one is advocating that presently-enrolled RBCS students be removed from the school. *See also* N.J.S.A. 18A:36A-8(b) (prohibiting such a measure).

According to the certification of the school's principal, in the 2017-18 school year, fifty-nine Latino students and fifty-eight white students were **[*39]** enrolled with a sibling preference, indicating that Latino students at the school are equally likely to have another sibling at the school as a white student. The record does not tell us exactly how many students in the most recent prekindergarten class, which is sixty percent Latino, received a sibling preference.

For the sake of discussion, if, hypothetically, the prekindergarten class consists of twenty students, then about twelve of them probably are Latino, and about seven or eight probably are white. According to the school-wide data and the information from the "school lead," about half of those prekindergarten students would have an older sibling at the school. If sibling preference were eliminated, one might expect that about half of the approximately twelve Latino children (i.e., six children) would possibly lose their seats in the class, while about half of the approximately seven or eight white prekindergarten children (i.e., three or four) would lose their spots. At most, the Latino composition of the prekindergarten class could only increase from twelve students to twenty, a maximum net gain of eight students. When compared with the total enrollment in the school of 200, **[*40]** such a maximum gain of eight Latinos (i.e., four percent) in a particular year is limited at best.

The Commissioners did not misapply their discretion in declining to cease the sibling preference, given this minor effect on the overall enrollment demographic. Moreover, a cessation of sibling enrollment could easily have detrimental impacts on the *Latino* applicants seeking to join their siblings at the school, an important cohort that the Coalition does not represent.

Lastly on this point, we accept as sincere the express committal of the successive Commissioners to monitor these trends closely, and to step in and make adjustments as may be needed. The annual assessment process prescribed by N.J.S.A. 18A:36A-16(a) and *N.J.A.C. 6A:11-2.2(c)* and mandates such review, including any segregative effects of enrollment practices.

For these many reasons, we affirm the respective Commissioners' rejection of the Coalition's request to suspend the sibling preference policy. The rejection is amply supported by the record and cogent reasons. Moreover, the DOE has the power to take remedial interim action if the positive trend towards diversity materially ebbs.

3. *Omission of Express Findings Concerning Alleged Intentional Discrimination and **[*41]** Shortcomings in Advertising*

The Coalition additionally maintains that the Commissioners' decisions critically omit express findings that address the so-called "whisper campaign"

to encourage white applicants, and the claimed shortcomings of RBCS's efforts to advertise the application process to parents in the local Latino community with school-aged children. The Coalition asserts in this regard that the Commissioners have a constitutional and statutory obligation to make express findings about these issues, and to state whether or not there is sufficient evidence of intentional discriminatory practices.

To cure these alleged omissions, the Coalition seeks a further remand to the DOE to afford the Commissioner another chance to address these issues with explicit findings. Although in its brief on appeal, the Coalition requested a remand for an "evidentiary" hearing, at oral argument on the appeal its counsel clarified that it is not seeking a formal administrative hearing in the OAL, but instead an unspecified less-formal process for the Commissioner to delve more deeply into these factual allegations and perhaps to speak with persons having information about the subjects.

To be sure, **[*42]** the record does contain a considerable amount of hearsay in the form of unsworn parent letters, as well as a quotation from a Board member uttered several years ago that may have limited evidential value. On the other hand, the Coalition acknowledged at oral argument on the appeal that it has no evidence that the lottery process has been manipulated in a corrupt fashion, or that Latino students have been denied admission through any such corruption.

We agree with the Coalition that some of the factual allegations it has presented may be indicative of problems with the timing and content of the school's advertising and recruitment process, and may warrant a closer look by the DOE. Among other things, the amplifications did not resolve whether timely mailings went to the full boundaries of the school district, and whether Spanish-language signs advertising the application deadline had been adequately translated to match those in English.

It is fairly implicit in the two amplifications that neither Commissioner was persuaded from the documentary record that intentionally discriminatory practices are presently occurring in RBCS's enrollment process. Even so, we remand this appeal to the **[*43]** Commissioner one more time, on an expedited basis, to consider the Coalition's specific factual allegations and afford the Commissioner the opportunity to issue a third amplification. The Commissioner is not required to conduct or request an evidentiary hearing, as we are not yet convinced (without deciding the legal question) that, under present case law, such an evidentiary hearing can be compelled in the context of a quasilegislative charter renewal. *Quest Academy, 216 N.J. at 384-85* (explaining the quasi-legislative nature of such decisions). We recognize that in 2004 we remanded the case for a hearing, and that the then-DOE Commissioner apparently referred the dispute thereafter to the OAL, where the matter settled three years later. *Red Bank Charter, 367 N.J. Super. at 486*. We are uncertain, and need not reach here, whether the Supreme Court's more recent opinion in *Quest Academy, 216 N.J. at 383-85*, precludes a court-ordered evidentiary hearing.

In any event, given the fact that the first three years of this school's fiveyear charter have already passed, we are not convinced of the practicality and wisdom of conducting further development of the existing record concerning the 2017-2022 charter at a time not long before RBCS's anticipated charter renewal application is filed in the **[*44]** fall of 2021. We instead request the Commissioner to make explicit findings based solely on the existing administrative record,[11] and to communicate those findings in a third written amplification by no later than December 15, 2019. Following that third amplification, any aggrieved party may file a new appeal from that amplified determination. We do not retain jurisdiction, and the present appeal is deemed concluded.[12]

Our disposition is without prejudice, however, to two other important avenues for potential reform and remedial action.

First, as respondents acknowledge, the Coalition or "any individual or group" may bring a complaint pursuant to *N.J.S.A. 18A:36A-15* alleging violations of the CSPA. Such a complaint initially shall be presented to the RBCS Board of Trustees. *Ibid.* If the complainant believes that the trustees have not adequately

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[11] The record should include all of the items listed within the Statement of Items. Within ten days, counsel shall furnish the Commissioner with courtesy copies of their appellate briefs and appendices, which should obviate the need for any other submissions and help expedite the remand.

[12] We need not address in this appeal concerning RBCS's charter renewal appellants' generic criticisms of the State's standardized testing methods. Those issues are more appropriately raised in a different context with an appropriate record.

addressed the complaint, the statute requires the Commissioner to "investigate and respond to the complaint." *Ibid.* Although we need not resolve the question here, respondents' counsel at oral argument appeared to acknowledge that, if a "contested case" under the *Administrative Procedure Act, N.J.S.A. 52:14B-9(a)*, is generated by such a grievance due to the existence of factual disputes, **[*45]** the Commissioner may refer such a dispute to the OAL. The results of such an OAL hearing may aid the DOE in its ongoing oversight.

A second important avenue to underscore is that these dynamic factual issues may be considered anew in the forthcoming charter renewal process. Under *N.J.A.C. 6A:11-2.3(b)*, RBCS must submit its charter renewal application to the DOE by October 15, 2021. In the meantime, more incoming classes at RBCS will be selected and more data generated. That additional data may well shed further light on whether the weighted lottery is working in a desirable fashion, and whether the school's most recent advertising measures to the community are timely and effective.

Affirmed in part and remanded in part. We do not retain jurisdiction.

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Highland Park Bd. of Educ. v. Harrington

Superior Court of New Jersey, Appellate Division

May 30, 2019, Argued; June 7, 2019, Decided

DOCKET NO. A-3455-16T1

Reporter
2019 N.J. Super. Unpub. LEXIS 1304 *; 2019 WL 2402544

HIGHLAND PARK BOARD OF EDUCATION and PISCATAWAY TOWNSHIP BOARD OF EDUCATION, Petitioners-Appellants, v. KIMBERLY HARRINGTON, ACTING COMMISSIONER OF EDUCATION, NEW JERSEY STATE BOARD OF EDUCATION, and HATIKVAH INTERNATIONAL ACADEMY CHARTER SCHOOL, Respondents-Respondents.

Prior History: [*1] On appeal from the New Jersey Department of Education.

Core Terms

charter school, charter, enrollment, school district, districts, resident, grade, attend, non-resident, segregative, renewal, sending, funding, approving, board of education, school year, kindergarten, amend, region, public school, lottery, ethnic, reasons, pupil, final decision, capricious, regulations, thorough, practices, weighted

Counsel: David B. Rubin argued the cause for appellants (David B. Rubin, PC, and The Busch Law Group, LLC, attorneys; David B. Rubin and Douglas M. Silvestro, on the brief).

Thomas O. Johnston argued the cause for respondent Hatikvah International Academy Charter School (Johnston Law Firm, LLC, attorneys; Thomas O. Johnston, of counsel and on the brief; Rula Alzadon Moor, on the brief).

Geoffrey N. Stark, Deputy Attorney General, argued the cause for respondents Kimberly Harrington, Acting Commissioner of Education and State Board of Education (Gurbir S. Grewal, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Donna Arons and Jennifer J. McGruther, Deputy Attorneys General, on the brief).

Judges: Before Judges Haas, Sumners and Mitterhoff.

Opinion

PER CURIAM

Appellants Highland Park Board of Education (Highland Park) and Piscataway Township Board of Education (Piscataway) (collectively appellants) appeal from the February 28, 2017 final decision of the Commissioner of Education (Commissioner), approving an application by Hatikvah International Academy Charter School (Hatikvah) to increase its enrollment from fifty to **[*2]** seventy-five students in kindergarten and first grade, and to implement a weighted enrollment lottery affording preference to economically disadvantaged students. We affirm.[1]

[1] This case was calendared back-to-back with three other appeals, and we heard oral argument on all four matters on the same day. *In re Approval of Charter Amendment of Cent.*

I.

We begin by reciting the essential background facts and procedural history of this matter. In March 2009, Hatikvah submitted a charter school application to the New Jersey Department of Education (Department or NJDOE), seeking to serve students in East Brunswick Township, Middlesex County—its "district of residence."[2] During its initial four-year charter period, it planned to serve students in kindergarten through fifth grade, with a projected maximum enrollment of 240 students. The goal was to eventually "expand grade levels through eighth grade, completing growth with a maximum of 396 students with 44 students per grade." It sought to build on the "multicultural strength" of the district through an International Baccalaureate (IB) program, which included a partial-immersion Hebrew language program. In compliance with the **[*3]** *Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 to -18 (Charter School Act or CSPA)*, East Brunswick students were given preference for enrollment. *N.J.S.A. 18A:36A-8(a)*.

On May 14, 2009, the East Brunswick Board of Education (East Brunswick) adopted a resolution recommending that the Commissioner deny Hatikvah's application. *See In re Approval of Hatikvah Int'l Acad. Charter Sch., No. A-5977-09, 2011 N.J. Super. Unpub. LEXIS 3144 at *5 (App. Div. Dec. 21, 2011)*, *certif. denied*, *210 N.J. 28, 40 A.3d 58 (2012)*. East Brunswick alleged that Hatikvah's application

> interfered with the separation of church and state, had a negative economic impact on the district's taxpayers, and did not comport with the requirements for charter schools as codified in *N.J.A.C. 6A:11* because it did not include an educator from East Brunswick. [It] . . . further asserted Hatikvah's single-cultural, single-emersion Hebrew language charter school would be at odds with and would not serve the multi-cultural community; it would unfairly compete with the Solomon Schechter Day School in East Brunswick; its proposed full day kindergarten would result in a lack of educational equity and access for East Brunswick residents; the petition did not accurately demonstrate East Brunswick's community interest in the charter school; and its needs analysis was flawed, inaccurate **[*4]** and did not document a need for the charter school.
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> [*Ibid.*]

On July 6, 2010, the Commissioner granted final approval of Hatikvah's charter, effective from July 1, 2010 to June 30, 2014, to operate a school for grades kindergarten through fifth, with a maximum of fifty students per grade for a total of 300 students, for an initial four-year period. East Brunswick appealed, arguing that Hatikvah failed to present evidence of sufficient enrollment under *N.J.A.C. 6A:11-2.1(i)(14)*, because as a "district of residence" charter school it could not include non-district students in the count. *2011 N.J. Super. Unpub. LEXIS 3144, at *13*. This court affirmed the Commissioner's decision, finding that "[t]he record reflect[ed] that Hatikvah cooperated with the Department in diligently providing requested information and documentation pertaining to a variety of matters, including student enrollment, by emails, faxes, and site visits." *2011 N.J. Super. Unpub. LEXIS 3144, at *19*. The Supreme Court denied certification. *Hatikvah, 210 N.J. at 28*.

In 2013, Hatikvah submitted an application to the Department for a charter renewal and for an expansion to add grades sixth through eighth. The Commissioner granted the renewal, effective through June 2019, but denied the expansion "due to a decline in the school's academic performance in the **[*5]** 2012-13 school year."

In November 2014, Hatikvah filed another application for an amendment, seeking again to add grades sixth through eighth and to increase enrollment in its existing grades. *See Highland Park Bd. of Educ. v. Hespe, No. A-3890-14, 2018 N.J. Super. Unpub. LEXIS 158, *3 (App. Div. Jan. 24, 2018)*, *certif. denied*, *233 N.J. 485, 186 A.3d 899 (2018)*. East Brunswick, Highland Park, and the South River Board of Education (South River) opposed the application. *2018 N.J. Super. Unpub. LEXIS 158, at *4*.

On March 19, 2015, the Commissioner issued a final

Jersey Coll. Prep (Central Jersey), No. A-3074-16, *North Brunswick Twp. Bd. of Educ. v. Harrington (North Brunswick)*, No. A-3415-16, and *Bd. of Educ. of Twp. of Piscataway v. N.J. Dep't of Educ. (Piscataway)*, No. A-5427-16. Because some of the issues in these appeals overlap, the reader is encouraged to review all four of our opinions in these cases, which are being released simultaneously.

[2] The term "district of residence" is defined as "the school district in which a charter school facility is physically located; if a charter school is approved with a region of residence comprised of contiguous school districts, that region is the charter school's district of residence." ***N.J.A.C. 6A:11-1.2***.

decision granting Hatikvah's request to expand into the middle school grades, at the same fifty-student maximum enrollment, but denied the request to expand the enrollment in kindergarten through fifth grade. *2018 N.J. Super. Unpub. LEXIS 158, at *7*. The Commissioner found that Hatikvah's academic performance had improved from the 2012-2013 school year, placing its students "in the ninety-sixth percentile in language arts literacy and eighty-seventh percentile in mathematics, in comparison to other schools across the State." *2018 N.J. Super. Unpub. LEXIS 158, at *8*.

Highland Park appealed, arguing that it was not required to fund its students' attendance at Hatikvah, a charter school located outside its school district. *2018 N.J. Super. Unpub. LEXIS 158, at *8-19*. We granted East Brunswick's motion to intervene, and granted Manalapan-Englishtown **[*6]** Board of Education's (Manalapan) and the New Jersey Charter School Association's (NJCSA) motions to participate as amici curiae. *Ibid.*

This court affirmed, finding that the record was sufficient to support the Commissioner's decision, and we rejected Highland's contention "that only the charter school's 'district of residence' is obligated to pay for its students to attend the school." *2018 N.J. Super. Unpub. LEXIS 158, at *19-21*. The court also rejected, because it had not been raised below, East Brunswick and Manalapan's argument that Hatikvah was operating in violation of its charter by enrolling out-of-district students, stating that:

> If East Brunswick and Manalapan-Englishtown wish to pursue this issue, the districts may submit a complaint to the Hatikvah board of trustees asserting that the school is not being operated in accordance with its charter and, if the complaint is not "adequately addressed," the districts may present the complaint to the Commissioner pursuant to *N.J.S.A. 18A:36A-15*. We express no opinion on the merits of such a complaint, if filed.
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> [*2018 N.J. Super. Unpub. LEXIS 158, at *14*.]

The Supreme Court denied certification. *Highland Park I, 233 N.J. at 485*.

In November 2015, Hatikvah filed a third application to amend its charter, seeking to expand its enrollment from fifty to seventy-five students **[*7]** per grade by the 2024 school year. On February 29, 2016, the Commissioner issued a final decision denying that request.

II.

We now turn to the application that is at the center of the current appeal. On November 10, 2016, Hatikvah filed a fourth application with the Commissioner to expand its charter, again seeking to increase enrollment from fifty to seventy-five students per grade, and, conditioned upon that approval, to implement a weighted enrollment lottery for economically disadvantaged students. In support of that application, Hatikvah submitted board resolutions and rationale statements.

In its "Resolution One," Hatikvah sought an amendment to its charter to progressively increase the maximum approved number of students per grade from fifty to seventy-five, starting with kindergarten for the 2017-2018 school year and ending with eighth grade for the 2025-2026 school year. In the alternative, in "Resolution Two," Hatikvah sought to amend its charter to increase enrollment from fifty to seventy-five students, starting with kindergarten, first, and second grade for the 2017-2018 school year, and ending with eighth grade for the 2023-2024 school year.

With respect to the request for **[*8]** expanded enrollment, Hatikvah represented that there was "excess demand in the community by parents/guardians to enroll their children at the School." It claimed that the number of applicants outnumbered the available seats in every grade, and that as of June 30, 2016, there were 214 students on the waitlist for kindergarten through second grade, as follows:

Go to table1

Additionally, for the 2016-2017 school year, twenty-four of the available fifty kindergarten seats went to siblings of students thereby "greatly limiting access to the school for new families."

Hatikvah maintained that expanded enrollment would allow it to "implement an even more robust instructional staffing model" and "enhance the extracurricular programs that it can offer to middle school students." It represented that "the unique educational approaches of the School have resulted in strong academic performance and year-to-year growth on the NJ PARCC State tests." For example, in 2016, its third through sixth grade students significantly outperformed their peers:

Go to table2

With regard to the weighted lottery system, Hatikvah sought to amend its charter to "allow economically disadvantaged students to have an increased priority for admission using a 2:1 margin." At the time of the application, Hatikvah operated a random blind lottery under the supervision of an independent official, where each child was assigned a number and each grade level was "divided into three groups drawn in order of the preferences afforded to the groups as delineated in its charter: Siblings, East Brunswick residents and non-East Brunswick residents." It "targeted recruitment efforts in areas within five miles of its location in East Brunswick, including most importantly, Section 8 housing in East Brunswick," utilizing direct mailers, flyers, and television advertisements in English and Spanish. Under that system, Hatikvah asserted it had been "extremely successful in creating a diverse school community." Indeed, many of its students were first-generation Americans whose parents came from about thirty different countries and spoke a variety of languages.

Hatikvah represented that increasing the economic diversity of its student body **[*10]** through the weighted lottery system would "further social cohesion across a broader spectrum of students." It posited that charter schools "are uniquely positioned to create economically diverse student bodies where economically disadvantaged students can thrive," because

> [u]nlike traditional public schools whose seats are limited to students who live within their local geographical boundaries, charter schools can draw students from its resident and neighboring districts. Thus charter schools' student bodies do not reflect residential segregation patterns driven by local geography, be they economic, racial or ethnic. Charter schools have means to intentionally create economically diverse student bodies. . . .

As for the fiscal impact of its application, Hatikvah stated that increasing enrollment would have a "very limited financial impact on taxpayers in East Brunswick" because the majority of the waitlisted students come from districts other than East Brunswick, and thus those districts would be required to pay for the added students. Increased enrollment would thus have a "negligible and immaterial fiscal impact" on both "Hatikvah's resident district East Brunswick as well as non-resident **[*11]** sending districts." Hatikvah calculated that under its Resolution One, the impact on the sending districts' budgets ranged from .077% to .011%, based on enrollment of the waitlisted students:

Go to table3

Under its Resolution Two, Hatikvah calculated that the impact on sending districts' budgets ranged from .196% to .004%, as follows:

Go to table4

Further, Hatikvah estimated that under both its Resolution One and Two, the cost for appellants to send their students to Hatikvah would be less than the projected costs if the students remained in appellants' districts:

Resolution One

Go to table5

Resolution Two

Go to table6

In response to Hatikvah's application, appellants Highland Park and Piscataway submitted almost identical resolutions calling for **[*13]** a moratorium on new charter school seats in Middlesex and Somerset Counties.[3] They raised general objections asserting that payments to the charter schools drained funds from, and diminished money available to serve students in, the traditional public schools. Appellants represented that for the 2016-2017 school year, 2316 students attended the five existing charter schools in Middlesex and Somerset Counties (including Hatikvah), and that if the applications for expansions were approved for these schools, and a sixth charter school was added, the number of charter school seats would increase by 128% to 5283.

Appellants alleged there was already a lack of demand for the existing charter schools located in Middlesex and Somerset counties, and that the expansion of these

[3] Similar resolutions were submitted by North Plainfield Board of Education, Educational Services Commission of New Jersey, Monroe Township Board of Education, South River Board of Education, South Brunswick Board of Education, Middlesex Borough Board of Education, New Brunswick Board of Education, and South Amboy Board of Education.

schools would exacerbate that issue. They also argued that many charter schools, "in direct contradiction to the letter and spirit of the" CSPA, were seeking to "expand in order to enroll additional students from districts outside of the charter schools' approved districts or regions of residence due to a lack of interest from students who live in the very communities for which the charters were created to serve."

Appellants **[*14]** took no position on Hatikvah's weighted lottery system, and instead represented that only 48% of the students enrolled in Hatikvah resided in the school's district of residence. However, they also alleged, without providing any statistics, that Hatikvah and another charter school, Thomas Edison EnergySmart Charter School (TEECS), enrolled "a significantly more segregated student body than any of the resident or non-resident sending districts with respect to race, socioeconomic status, and need for special education."

East Brunswick, Hatikvah's district of residence, also opposed Hatikvah's application. It argued that the Commissioner should not approve Hatikvah's fourth request to increase its enrollment because "[t]he conditions that existed at the time of each of the Commissioner's denials have only negatively escalated." It alleged that enrollment of East Brunswick students in Hatikvah, which had not been approved as a regional charter school,[4] had dropped from 50% in 2015-16 to 45% in 2016-17, and thus there was no community need for increased enrollment. It represented that enrollment totaled:

Go to table7

Therefore, East Brunswick maintained that:

> The supposed need for increasing enrollment from 50 to 75 students per grade is based on a "reported" wait list of non-resident students from 24 communities scattered across multiple counties. Wait lists reported by the Charter School for non-East Brunswick residents should not be considered in reviewing the Charter School's application. Clearly there is more than enough room for any East Brunswick residents if they choose to attend the Charter School.

East Brunswick also alleged that the "financial impact of the expansion combined with ongoing costs to support the Charter School would increase to 107% of the amount of the State's imposed budget cap" and that the "estimate of the cost of their proposed expansion to East Brunswick Public Schools in 2016-2017 is an additional $114,833-$293,457. The additional cost of the grade expansion would escalate to over $1 million per year over the next five years." Further, in order to meet the required financial support of the Charter School, East Brunswick asserted that in 2011, it cut opportunities for traditional public school students, including the elimination **[*16]** of the World Language Program and summer academy, and the reduction in teaching staff.[5]

On February 28, 2017, the Commissioner, based on the Department's recommendation and her review of the record, issued a one-page final decision approving Hatikvah's application to amend its charter to increase enrollment and to implement a weighted lottery. The Commissioner stated that the Department had "completed a comprehensive review, including, but not limited to, student performance on statewide assessments, operational stability, fiscal viability, public comment, fiscal impact on sending districts, and other information in order to make a decision regarding the school's amendment request."

The Commissioner approved the expansion for kindergarten and first grade only, and confirmed the school's maximum approved enrollment through June 2019, the end of the charter renewal period, as follows:

Go to table8

This appeal followed.

On appeal, appellants raise the following contentions:

> *POINT I*
> The Commissioner Failed To Analyze Hatikvah's Application Or To Disclose The Basis For Her Approval.

[4] A regional charter school serves a region or collection of districts, as opposed to a single district. *In re Charter Sch. Appeal of Greater Brunswick Charter Sch., 332 N.J. Super. 409, 423-24, 753 A.2d 1155 (App. Div. 1999)*.

[5] Three New Jersey legislators also wrote to the Commissioner opposing Hatikvah's application. The Commissioner also considered a petition submitted on behalf of more than 1400 individuals urging denial of the application, and approximately 300 other public comments.

POINT II
The Commissioner Failed To Consider The Segregative Impact Of Hatikvah's Charter Amendment.

POINT III

[*17] Other Significant Deficiencies [I]n Hatikvah's Application Render The Commissioner's Approval Arbitrary, Capricious and Unreasonable.

POINT IV
There Is No Authority To Compel Highland Park [A]nd Piscataway To Fund Students' Attendance [A]t Hatikvah.

III.

In Point I of their brief, appellants argue that the Commissioner's decision approving the amendment was arbitrary, capricious or unreasonable because she failed to analyze Hatikvah's application or to provide any discernable reason for the approval. We disagree.

By way of background, charter schools are public schools that operate under a charter granted by the Commissioner, operate independently of a local board of education, and are managed by a board of trustees. N.J.S.A. 18A:36A-3(a). In the CSPA, the Legislature found and declared that

> the establishment of charter schools as part of this State's program of public education can assist in promoting comprehensive educational reform by providing a mechanism for the implementation of a variety of educational approaches which may not be available in the traditional public school classroom. Specifically, charter schools offer the potential to improve pupil learning; increase for students and parents the educational **[*18]** choices available when selecting the learning environment which they feel may be the most appropriate; encourage the use of different and innovative learning methods; establish a new form of accountability for schools; require the measurement of learning outcomes; make the school the unit for educational improvement; and establish new professional opportunities for teachers.
> The Legislature further finds that the establishment of a charter school program is in the best interests of the students of this State and it is therefore the public policy of the State to encourage and facilitate the development of charter schools.
>
> [N.J.S.A. 18A:36A-2.]

Charter schools are "open to all students on a space available basis. . . ." N.J.S.A. 18A:36A-7. A charter school may not discriminate in its admissions policies and practices, but "may limit admission to a particular grade level or to areas of concentration of the school, such as mathematics, science, or the arts." N.J.S.A. 18A:36A-7. Enrollment in a charter school is voluntary, and a student may withdraw from a charter school at any time. *N.J.S.A. 18A:36A-9*.

Preference for enrollment must be given to students who reside in the school district in which the charter school is located, and the school cannot charge those **[*19]** resident students tuition. N.J.S.A. 18A:36A-8(a). "If there are more applications to enroll in the charter school than there are spaces available, the charter school shall select students to attend using a random selection process." N.J.S.A. 18A:36A-8(a). "If available space permits, a charter school may enroll non-resident students. The terms and condition of the enrollment shall be outlined in the school's charter and approved by the commissioner." N.J.S.A. 18A:36A-8(d). A charter school shall maintain a waiting list of grade-eligible students, divided into two groups, students from the district or region of residence and students from non-resident districts. *N.J.A.C. 6A:11-4.6(a)(2)*.

Funding for charter schools comes from the local school district, but is not equivalent to the per pupil funding that a traditional public school receives. N.J.S.A. 18A:36A-12(b). The CSPA funding provision provides in part that "the school district of residence shall pay directly to the charter school for each student enrolled in the charter school who resides in the district an amount equal to 90%" of certain per pupil state aid and any federal funds "attributable to the student." N.J.S.A. 18A:36A-12(b).

Applications to establish a charter school are governed by N.J.S.A. 18A:36A-4 to -5, and the implementing regulation, *N.J.A.C. 6A:11-2.1*. The Commissioner has final **[*20]** authority to grant or reject a charter. N.J.S.A. 18A:36A-4(c). "The notification to eligible applicants *not approved* as charter schools shall include reasons for the denials." *N.J.A.C. 6A:11-2.1(f)* (emphasis added). An initial charter is for a term of four years and may be renewed for a five-year period. N.J.S.A. 18A:36A-17.

After approval, the Commissioner annually assesses whether the charter school is meeting the goals of its

charter. N.J.S.A. 18A:36A-16. The Commissioner also annually assesses "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 board of education, and the county superintendent of schools. N.J.S.A. 18A:36A-16(b); *N.J.A.C. 6A:11-2.2(a)*. 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.

Applications to renew a charter are governed by N.J.S.A. 18A:36A-17, and the implementing regulation, *N.J.A.C. 6A:11-2.3*. The Commissioner shall grant or deny the renewal of a charter based upon a comprehensive review of the school, including, among other things, the annual reports, recommendation of the district board of education or school superintendent, and student **[*21]** performance on statewide tests. *N.J.A.C. 6A:11-2.3(b)*. "The notification to a charter school that *is not granted* a renewal shall include reasons for the denial." *N.J.A.C. 6A:11-2.3(d)* (emphasis added).

As in this case, a charter school may also apply to the Commissioner for an amendment to its charter, including for an expansion of enrollment and the establishment of a weighted lottery. *N.J.A.C. 6A:11-2.6(a)(1)(i)*, (v). In support of that application, the board of trustees of a charter school shall submit the request in the form of a board resolution. *N.J.A.C. 6A:11-2.6*. Similar to the initial approval process, boards of education in the district of residence can submit comments in response to the application. *N.J.A.C. 6A:11-2.6(c)*. The Department "shall determine whether the amendments are eligible for approval and shall evaluate the amendments based on" the Charter School Act and implementing regulations, and the "Commissioner shall review a charter school's performance data in assessing the need for a possible charter amendment." *N.J.A.C. 6A:11-2.6(b)*. "The Commissioner may approve or deny amendment requests of charter schools and shall notify charter schools of decisions." *N.J.A.C. 6A:11-2.6(d)*.

With this essential regulatory background in mind, and before moving to a consideration of appellants' contentions concerning the sufficiency **[*22]** of the Commissioner's decision, we will briefly address Hatikvah's argument that appellants lack standing to challenge the Commissioner's decision because the CSPA does not specifically permit an appeal from a decision approving an amendment to a charter.

As we recently stated in *In re Renewal Application of Team Acad. Charter Sch., N.J. Super. , , 2019 N.J. Super. LEXIS 63 at *8-9 (App. Div. 2019)*:

> "Standing 'refers to the plaintiff's ability or entitlement to maintain an action before the court.'" *In re Adoption of Baby T, 160 N.J. 332, 340, 734 A.2d 304 (1999)* (quoting *N.J. Citizen Action v. Riveria Motel Corp., 296 N.J. Super. 402, 409, 686 A.2d 1265 (App. Div. 1997))*. Standing is a threshold issue that "neither depends on nor determines the merits of a plaintiff's claim." *Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 417, 591 A.2d 592 (1991)*. "Unlike the Federal Constitution, there is no express language in New Jersey's Constitution which confines the exercise of our judicial power to actual cases and controversies. *U.S. Const. art. III, § 2*; *N.J. Const.* art. VI, § 1." *Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107, 275 A.2d 433 (1971)*.
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> Our [c]ourts do not, however, render advisory opinions, function in the abstract, or consider actions brought by plaintiffs who are "merely interlopers or strangers to the dispute." *Ibid.* (citation omitted). "To possess standing in a case, a party must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." *In re Camden Cty., 170 N.J. 439, 449, 790 A.2d 158 (2002)* (citation omitted).

Hatikvah correctly points **[*23]** out that there are no provisions in the CSPA or the implementing regulations providing for an appeal from the Commissioner's decision approving an amendment to a charter, nor is there any provision permitting an appeal of any decision by a non-district of residence. In this regard, N.J.S.A. 18A:36A-4(d), which governs the establishment of charter schools, provides only that "[t]he local board of education or a charter school applicant may appeal the decision of the commissioner to the Appellate Division of the Superior Court." Similarly, *N.J.A.C. 6A:11-2.5*, which controls the "charter appeal process," provides that "[a]n eligible applicant for a charter school, a charter school, or a district board of education or State district superintendent of the district of residence of a charter school may file an appeal according to N.J.S.A. 18A:6-9.1."

However, in "New Jersey, courts take 'a liberal

approach to standing to seek review of administrative actions.'" *In re Grant of Charter to Merit Preparatory Charter Sch. of Newark, 435 N.J. Super. 273, 279, 88 A.3d 208 (App. Div. 2014)* (quoting *In re Camden Cty., 170 N.J. at 448*). In *Merit Preparatory*, the New Jersey Education Association (NJEA) appealed from the Commissioner's decision granting charters to two "blended" charter schools, where students were instructed both in person and online. *Id. at 276-77*. In addressing standing, we concluded that although it was **[*24]** not clear that NJEA's members would be "adversely affected" by approval of the charter schools, the NJEA had nevertheless "demonstrated a slight private interest that, together with the substantial public interest, affords it standing to pursue this appeal." *Id. at 280*.[6]

We are satisfied that a similar conclusion is appropriate here. The record indicates that appellants will be directly affected by the Commissioner's decision that they are required to fund their students' attendance at Hatikvah, and they have a private interest in addressing the application to expand enrollment, which will potentially open more seats for students from their districts. Moreover, the issues raised in this appeal, notably the effect of an increase in enrollment on the sending districts and the interpretation of the funding provision, are of "great public interest" and thus, even if appellants had demonstrated only a "slight additional private interest," they should be afforded standing. *Merit Preparatory, 435 N.J. Super. at 279* (quoting *Salorio v. Glaser, 82 N.J. 482, 491, 414 A.2d 943 (1980)*). Therefore, we reject Hatikvah's contention on this point.

Turning to the merits of appellants' arguments under Point I, we note that the scope of judicial review of a final decision of the Commissioner on **[*25]** a charter school application is limited. *In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385, 80 A.3d 1120 (2013)*. We may reverse only if the Commissioner's decision is "arbitrary, capricious, or unreasonable." *Ibid.* In making that determination, our review is generally restricted to three inquiries:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [*Id. at 385-86* (quoting *Mazza v. Board of Trustees, Police & Firemen's Retirement Sys., 143 N.J. 22, 25, 667 A.2d 1052 (1995)*).]

"When an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." *In re Herrmann, 192 N.J. 19, 28, 926 A.2d 350 (2007)*. The court "may not substitute its own judgment for the agency's even though the court might have reached a different result. . . ." *In re Carter, 191 N.J. 474, 483, 924 A.2d 525 (2007)* (quoting *Greenwood v. State Police Training Ctr., 127 N.J. 500, 513, 606 A.2d 336 (1992)*).

"[T]he arbitrary, capricious, or unreasonable standard . . . subsumes the need to find sufficient support in the record to sustain the decision reached by the Commissioner." *Quest Acad., 216 N.J. at 386*. "[A] failure to consider all the evidence in **[*26]** a record would perforce lead to arbitrary decision making." *Ibid.* However, in cases where "the Commissioner is not acting in a quasi-judicial capacity," and is instead acting in [her] legislative capacity, as [s]he was doing here, [s]he "need not provide the kind of formalized findings and conclusions necessary in the traditional contested case." *TEAM Acad., N.J. Super. , 2019 N.J. Super. LEXIS 63 at *30*) (quoting *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 320 N.J. Super. 174, 217, 727 A.2d 15 (App. Div. 1999)*, *aff'd as modified*, *164 N.J. 316, 753 A.2d 687 (2000)*).

Thus, although the arbitrary, capricious, or unreasonable standard demands "that the reasons for the decision be discernible, the reasons need not be as detailed or formalized as an agency adjudication of disputed facts; they need only be inferable from the record considered by the agency." *Englewood, 320 N.J. Super. at 217*. *See* *Red Bank, 367 N.J. Super. at 476* ("[T]he reasons for the decision need not be detailed or formalized, but must be discernible from the record."); *Bd. of Educ. of E. Windsor Reg'l Sch. Dist. v. State Bd. of Educ., 172 N.J. Super. 547, 552, 412 A.2d 1320 (App. Div. 1980)* (detailed findings of fact not required

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[6] We have also entertained challenges by boards of education to renewals and amendments of charters in other cases, including *In re Red Bank Charter Sch., 367 N.J. Super. 462, 467, 843 A.2d 365 (App. Div. 2004)* (Red Bank Board of Education opposed renewal and expansion of a charter school) and *Highland Park I, No. A-3890-14, 2018 N.J. Super. Unpub. LEXIS 158* (appeal from amendment).

by Commissioner in reducing amount local school board sought to increase its budget).

Furthermore, there is no statutory or regulatory provision requiring the Commissioner to include reasons for granting an application to amend. The regulations provide only that the notification shall include reasons for the denial of an initial charter school application, *N.J.A.C. 6A:11-2.1(f)*, and an **[*27]** application for renewal, *N.J.A.C. 6A:11-2.3(d)*. The Commissioner is not required to include reasons for granting an initial charter or a renewal, nor is he or she required to include reasons for granting or denying an application to amend.

To that end, *Quest Academy, 216 N.J. at 390*, as cited by appellants, is distinguishable. In that case, the operator of a proposed charter school appealed from the Commissioner's decision denying the charter. *Id. at 373*. The Commissioner's initial decision was "short on detail with respect to the application's deficiencies." *Ibid.* However, after the appeal was filed, the Commissioner submitted a written amplification of his reasons for denying the application. *Id. at 374*. The Court affirmed, finding in relevant part that:

> Although the letter of denial did not detail the deficiencies found in the application, it offered instead a face-to-face meeting to review in detail the shortcomings in the application that Quest Academy submitted. According to the Commissioner, the large number of applicants (forty-five) who were reviewed in the batch with Quest Academy rendered lengthy written responses difficult and taxing of precious departmental resources. While it would be naturally preferable from the applicant's perspective to **[*28]** receive initially more than a generic form letter denying an application, here Quest Academy received a bit more than that. Some information about the application's shortcomings was provided in the denial letter, and the subsequent amplification fully detailed those issues. In reviewing as complex a proposal as that required for a newly proposed charter school, there is a benefit to offering a discussion, instead of a written cataloguing, of mistakes or deficiencies in the application that has been rejected. We do not fault the Commissioner for choosing a dialogue involving constructive criticism as her preferred approach for producing approvable applications when resubmitted.
>
> [*Id. at 390*.]

Quest Academy is distinguishable from the present case because there is no requirement that the Commissioner detail her findings in approving an *amendment*. Although it would have been helpful for the Commissioner to make some findings in support of her decision, particularly since she had denied an identical request one year earlier, she was not required to do so. *TEAM Acad., N.J. Super. , 2019 N.J. Super. LEXIS 63 at *40*. Instead, the focus on review is whether the reasons for the Commissioner's decision are discernible from the record. *Red Bank, 367 N.J. Super. at 476*. As explained below, they **[*29]** clearly are.

Here, the Commissioner's decision approving Hatikvah's request to amend its charter to increase enrollment in kindergarten and first grade by fifty students is supported by the record and achieves the legislative policy of promoting charter schools. Most notably, it is undisputed that Hatikvah's performance data, a significant factor in assessing a request to amend a charter, *N.J.A.C. 6A:11-2.6(b)*, was, as represented by its students' PARCC scores, significantly higher than the State average. Further, the approval was in conformance with the legislative policy of encouraging innovative approaches by charter schools, in that, Hatikvah had implemented a partial English/Hebrew language immersion program, which is not widely available in the traditional public schools in the State. *N.J.S.A. 18A:36A-2*.

The record also demonstrates that there was a need for the increase in enrollment for kindergarten and first grade because there was a waiting list of eighty-seven students for kindergarten and sixty-two students for first grade. Expansion of enrollment will allow Hatikvah to meet that need, strengthen its academic program, and enhance its extracurricular program.

Further, the record shows that Hatikvah, which had been **[*30]** submitting detailed annual reports to the Commissioner since it was approved to operate in 2010, and had submitted a financial audit prior to having its charter renewed in 2014, was organizationally sound and fiscally viable. *N.J.S.A. 18A:36A-16(b)*; *N.J.A.C. 6A:11-2.2*. Hatikvah represented that it had a stable and qualified board of directors, and a "finding-free audit for the three years prior to the amendment request." Moreover, Hatikvah presented evidence that the expansion would have little fiscal impact on East Brunswick, its district of residence, and the other sending districts. Lastly, appellants do not dispute that

the weighted lottery will foster expanded enrollment of economically disadvantaged students.

Because the Commissioner's decision was amply supported by the record and achieves the legislative goals of the CSPA, we reject appellants' contentions on this point.

IV.

In Point II, appellants argue that the Commissioner's decision was arbitrary, capricious, or unreasonable because she failed to consider the alleged segregative impact of Hatikvah's charter amendment on the district. However, appellants failed to provide sufficient evidence of a segregative effect to warrant either more detailed scrutiny or the **[*31]** denial of the application and, therefore, we conclude that this argument also lacks merit.

In its resolution in support of its application for an amendment to its charter, Hatikvah asserted that it had "been extremely successful in creating a diverse school community," and that it sought to "increase the diversity of its student body by including more students at risk of academic failure and greater demographic diversity."

In opposition to the amendment, appellants asserted without any statistical evidence, that Hatikvah and TEECS enrolled "a significantly more segregated student body than any of the resident or non-resident sending districts with respect to race, socioeconomic status, and need for special education." They also asserted that it was "unclear whether the NJDOE gives due consideration to the increased segregation of students caused by expanding charter schools."

On appeal, appellants submitted additional enrollment data, which they contend demonstrated that Hatikvah had become "an enclave for white students that does not even remotely reflect the demographics of the local community it purports to serve." They compared Hatikvah's enrollment with the local public school's **[*32]** enrollment for the 2016-2017 school year, as follows:[7]

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Appellants also asserted that for the 2016-2017 school year, only 5.1% of Hatikvah students qualified for free or reduced lunches, in contrast to 15.7% in East Brunswick, 36.9% in Highland Park, and 32% in Piscataway. They argue that these statistics are prima facie proof that Hatikvah does not reflect a "cross section of the community's school age population including racial and academic factors." N.J.S.A. 18A:36A-8(e).

In response, Hatikvah cited to the 2010 census data, which indicated that the racial/ethnic breakdown of the school age population in East Brunswick (including both public and private school students) was: 60% white; 5% black or African American; 27% Asian; and 8% Hispanic. Hatikvah maintained that that data was similar to its students' racial/ethnic breakdown, which was as follows:

Go to table10

Further, Hatikvah represented that for the 2016-2017 school year, 5% **[*33]** of its students qualified for free or reduced lunch, 13% had disabilities, and 3% were English language learners (ELL).

It is well established that, "[r]ooted in our Constitution, New Jersey's public policy prohibits segregation in our public schools. . . ." Englewood, 164 N.J. at 324. Segregation is also "specifically prohibited in charter schools." TEAM Acad., N.J. Super. , 2019 N.J. Super. LEXIS 63 at *37 (citing N.J.S.A. 18A:36A-7). Thus, the CSPA provides that "[t]he admission policy of the charter school shall, to the maximum extent practicable, seek the enrollment of a cross section of the community's school age population including racial and academic factors." N.J.S.A. 18A:36A-8(e). Further, N.J.S.A. 18A:36A-7 states that:

> A charter school shall be open to all students on a space available basis and shall not discriminate in its admission policies or practices on the basis of intellectual or athletic ability, measures of achievement or aptitude, status as a person with a disability, proficiency in the English language, or any other basis that would be illegal if used by a school district; however, a charter school may limit admission to a particular grade level or to areas of concentration of the school, such as mathematics, science, or the arts. A charter school may establish reasonable criteria to evaluate prospective **[*34]** students which shall be outlined in the school's charter.

Our Supreme Court has held that the "form and structure" of the segregative analysis is up to the

[7] Available at https://rc.doe.state.nj.us/PerformanceReports.aspx

Commissioner and the Department to determine. *Englewood, 164 N.J. at 329*. "The Commissioner must consider the impact that the movement of pupils to a charter school would have on the district of residence" and "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." *Id. at 328*. "The Commissioner must vigilantly seek to protect a district's racial/ethnic balance during the charter school's initial application, continued operation, and charter renewal application." *Red Bank, 367 N.J. Super. at 472*.

> [S]egregation, however caused, must be addressed. To be timely addressed, assessment cannot wait until after a charter school has been approved for operation and is already taking pupils from the public schools of a district of residence. The Commissioner must assess whether approval of a charter school will have a segregative effect on the district of residence of the charter school. Once a charter school is operating, the Commissioner must also assess whether there is a segregative effect in any other **[*35]** district sending pupils to the approved charter school.
>
> [*Englewood, 164 N.J. at 330*.]

In response to the Court's decision in *Englewood*, and to the companion case, *In re Greater Brunswick Charter School, 164 N.J. 314, 315, 753 A.2d 686 (2000)*, the Board adopted regulations requiring the Commissioner, prior to approval of a charter, *N.J.A.C. 6A:11-2.1(j)*, and on an annual basis thereafter, *N.J.A.C. 6A:11-2.2(c)*, to "assess the student composition of a charter school and the segregative effect that the loss of the students may have on its district of residence." The assessment shall be based on the enrollment from the initial recruitment period pursuant to *N.J.A.C. 6A:11-4.4(a)* and (b). 32 N.J.R. 3560(a), 3561 (Oct. 2, 2000). *N.J.A.C. 6A:11-4.4(a)* provides that "a charter school shall submit to the Commissioner the number of students by grade level, gender and race/ethnicity from each district selected for enrollment from its initial recruitment period for the following school year."

Appellants argue that the Commissioner's decision granting the expansion of enrollment is arbitrary and capricious because "there is nothing discernable" in either her decision or the record to suggest that she considered its assertions that Hatikvah enrolled a significantly more segregated student body than any of the resident or non-resident school districts. However, as set forth above, the Commissioner was not **[*36]** required to include reasons for granting the application to amend the charter. *See Red Bank, 367 N.J. Super. at 476* (Commissioner did not specifically address the segregation argument in his letter approving the charter school's renewal and expansion). Nor did appellants present to the Commissioner sufficient evidence of a segregative effect to warrant more in-depth scrutiny. *Id. at 472-85*.

Further, appellants' unsubstantiated generalized protests did not provide a basis to deny the application. *Ibid.* It is undisputed that Hatikvah did not discriminate in its admission policies or practices. Hatikvah operated a random race-blind lottery under the supervision of an independent official. It does not interview or otherwise pre-screen applicants based on intellectual ability, race, or ethnicity. It recruited from a cross-section of the school age population, in accordance with its charter agreement, targeting recruitment within a five-mile radius of the school, most notably in Section 8 housing complexes, using direct mailings, face-to-face solicitations, flyers, and television ads in English and Spanish. It also sought to increase its diverse student population through implementation of a weighted lottery system affording preference to economically **[*37]** disadvantaged students.

Additionally, even if appellants had presented the information about student enrollment data to the Commissioner that they now present for the first time in their appellate brief, it would not have provided a basis to reject the application. The data provided by appellants on appeal shows a disparity between the enrollment of minority students in Hatikvah and students in the public schools in East Brunswick, Highland Park, and Piscataway. However, the census data provided by Hatikvah, which includes both public and private school-aged children in East Brunswick (its district of residence, where the majority of students reside), is much closer to the racial/ethnic breakdown of Hatikvah. In any event, appellants do not argue that the school districts are becoming more segregated, or that Hatikvah's existence has worsened the existing racial imbalance. *See Bd. of Educ. of Hoboken v. New Jersey State Dep't of Educ., No. A-3690-14, 2017 N.J. Super. Unpub. LEXIS 1639 at *15 (App. Div. June 29, 2017)* (affirmed charter renewal where there were no allegations that the charter school's practices after the enrollment of students by an impartial lottery exacerbated the racial or ethnic balance); *see also TEAM Acad., N.J. Super. , 2019 N.J. Super. LEXIS 63 at *14* (stating **[*38]** that "[t]he mere fact that the demographics of the charter schools

do not mirror the demographics of the [d]istrict does not alone establish a segregative effect").

In that regard, this case is distinguishable from *Red Bank, 367 N.J. Super. at 462*. In that case, the Board of Education (Board) appealed from the Commissioner's decision approving an application by a charter school to renew its charter. *Id. at 467*. The Board opposed the application on the basis that the school's operation had worsened the racial/ethnic imbalance, citing to data showing that since the charter school opened, the percentage of non-minority students in the traditional public schools had decreased from 32% to 18%, and a disproportionate number of non-minority students were enrolled in the charter school. *Id. at 469*. The Board also alleged that prior to standardized testing, the charter school frequently returned enrolled minority students with poor academic records to the traditional public schools. *Id. at 479*.

The Commissioner in *Red Bank* did not specifically address the segregation argument in the final decision. *Id. at 476*. However, this court discerned from the entire record, including the Commissioner's brief on appeal, that the Commissioner had concluded there was "no evidence **[*39]** in the record to suggest that the charter school has promoted racial segregation among the district's school-age children," and "there is no requirement that the two schools have exactly the same minority/non-minority enrollment figures." *Ibid.* (internal quotation marks omitted). We held that "the Commissioner is to assess whether or not the charter school is seeking 'a cross section of the community's school age population.'" *Ibid.* (quoting *N.J.S.A. 18A:36A-8(e)*).

Despite the disparity in the enrollment, we affirmed the Commissioner's decision, finding that:

> The Charter School should not be faulted for developing an attractive educational program. Assuming the school's enrollment practices remain color blind, random, and open to all students in the community, the parents of age eligible students will decide whether or not to attempt to enroll their child in the Charter School and any racial/ethnic imbalance cannot be attributed solely to the school. To close this school would undermine the Legislature's policy of "promoting comprehensive educational reform" by fostering the development of charter schools. *N.J.S.A. 18A:36A-2*.
>
> [*Id. at 478*.]

Nonetheless, this court found that the school's post-enrollment practices were "disturbing and **[*40]** difficult to dismiss on this record." *Id. at 480*. "While the Charter School's enrollment practices might not be the sole cause of existing racial/ethnic imbalance, the manner of operation of the school after its colorblind lottery, warrants closer scrutiny to determine whether some of the school's practices may be worsening the existing racial/ethnic imbalance in the district schools." *Ibid.* Thus, we remanded the matter to the Commissioner to determine "whether remedial action is warranted." *Ibid.*

Here, and unlike in *Red Bank*, there are no allegations that Hatikvah's practices, after the enrollment of students by an impartial lottery, exacerbated the racial, ethnic, or economically disadvantaged population balance in its district of residence. Instead, appellants simply claimed, in the most general of terms, that Hatikvah was more segregated than the districts—a bald claim insufficient to warrant further review on an application to amend.

It is also undisputed that the Commissioner considered the segregative effect of the charter school in approving the school in 2010, *N.J.A.C. 6A:11-2.1(j)*, in renewing Hatikvah's application in 2013 and 2018, *N.J.A.C. 6A:11-2.3(b)(8)*, and on an annual basis, *N.J.A.C. 6A:11-2.2(c)*. There is no indication in this record that **[*41]** there was any challenge based on the segregative effect either before this application to amend, or after (during the second renewal). *See Hatikvah, No. A-5977-09, 2011 N.J. Super. Unpub. LEXIS 3144*; *Highland Park I, No. A-3890-14, 2018 N.J. Super. Unpub. LEXIS 158*. Nor is there any indication in this record that the Commissioner found a segregative effect during the annual review. *N.J.A.C. 6A:11-2.2(c)*.

Accordingly, we are satisfied that the Commissioner's decision approving the expansion was not arbitrary, capricious, or unreasonable because appellants did not provide sufficient evidence of a segregative effect to warrant either more detailed scrutiny or the denial of the application. Therefore, we reject appellants' contention on this point.

V.

In Point III, appellants argue that the Commissioner's decision approving Hatikvah's application to amend its charter was arbitrary, capricious, and unreasonable because she failed to consider "significant deficiencies" in Hatikvah's application, namely, the financial burden of the expansion on the sending districts and the lack of demand for the increased enrollment. Again, we

disagree.

Before the Commissioner, appellants raised only general objections in opposition to Hatikvah's application to amend its charter, calling for a moratorium **[*42]** on new charter seats in Middlesex and Somerset Counties because of the alleged financial impact on the sending districts. Appellants did not submit any specific financial data to support those assertions.

East Brunswick, the district of residence, alleged, more specifically, that the "financial impact" of Hatikvah's "expansion combined with ongoing costs to support the Charter School would increase to 107% of the amount of the State's imposed budget cap" and estimated that the cost to East Brunswick Public Schools in 2016-2017 was an additional $114,833 to $293,457, or "over $1 million per year over the next five years." East Brunswick also alleged that in order "to meet the required financial support of the Charter School," it had, in 2011, cut educational opportunities for its public school students. Specifically, it: eliminated the World Language program for 2000 public school students (which it partially restored by the 2016-2017 school year); eliminated the Summer Academy serving over 2000 students with remedial needs; and reduced its elementary teaching staff thereby raising class size.

The Commissioner relied on the Department's comprehensive review of the "fiscal impact on sending **[*43]** districts" in approving the amendment.

The Education Clause of the New Jersey Constitution imposes an obligation on the State Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." *N.J. Const.* art. 8, § 4, ¶ 1. Funding for charter schools is provided by "the school district of residence," which is required to pay directly to the charter school 90% of its program budget per pupil for each of its resident students enrolled in the school. *N.J.S.A. 18A:36A-12(b)*. Case law requires that

> if the local school district "demonstrates with some specificity that the constitutional requirements of a thorough and efficient education would be jeopardized by [the district's] loss" of the funds to be allocated to a charter school, "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."
>
> [*Quest Acad., 216 N.J. at 377-78* (quoting *Englewood, 164 N.J. at 334-35*).]

The district must, however, "be able to support its assertions." *Englewood, 164 N.J. at 336*. The Commissioner does not have "the burden of canvassing the financial condition of the district of residence in order to determine its ability to adjust **[*44]** to the per-pupil loss upon approval of the charter school based on unsubstantiated, generalized protests." *Ibid.* "[T]he Commissioner is entitled to rely on the district of residence to come forward with a preliminary showing that the requirements of a thorough and efficient education cannot be met." *Id. at 334*. The Court held that "[t]he legislative will to allow charter schools and to advance their goals suggests our approach which favors the charter school unless reliable information is put forward to demonstrate that a constitutional violation may occur." *Id. at 336*.

For example, in *Red Bank, 367 N.J. Super. at 467*, the Board argued that the Commissioner erred in granting the renewal without adequately considering the detrimental impact on its ability to provide a thorough and efficient education. *Id. at 482*. It claimed that the expansion would cause reduction in the District's budget of $720,000, requiring the elimination of four teaching positions resulting in bigger classes, the elimination of courtesy busing, and the reduction of hall monitors, instructional assistants, and cafeteria monitors. *Ibid.*

On appeal, we affirmed the Commissioner's decision, finding that "[t]he paucity of specificity in the Board's charges is fatal." *Id. at 483*. Notably, **[*45]** the Board had failed to reference the regulations adopted to measure a thorough and efficient education. *Ibid.* (citing N.J.A.C. 6:8-1.1 to 4.2 (subsequently repealed, now *N.J.A.C. 6A:8-1.1 to 5.3*)). Further, a reduction in force would "be expected given that there will be fewer students to educate by the Board after they move to the expanded charter school." *Ibid.* Moreover, while "courtesy busing" might be important for Red Bank, it was not mandated or necessary for a thorough and efficient education. *Ibid.* Nor did the Board demonstrate how the elimination of monitors and other assistants would impair its thorough and efficient education efforts. *Ibid.*

Similarly, here, appellants presented only unsubstantiated generalized protests against the entire charter school scheme and thus did not make a preliminary showing on which the Commissioner could rely. *Englewood, 164 N.J. at 334*.

Further, East Brunswick's allegations of financial impact were less specific than in *Red Bank*, and it failed to demonstrate that the requirements of a thorough and efficient education could not be met as a result of the expansion. As was the case in *Red Bank*, East Brunswick did not refer to the regulations establishing standards for the provision of a thorough and efficient education. **[*46]** *N.J.A.C. 6A:8-1.1 to -5.3*. Although the "New Jersey Student Learning Standards" (NJSLS) include a world language requirement, *N.J.A.C. 6A:8-1.3*, it is not clear from East Brunswick's submission why the program was eliminated in 2011, and more significantly, how it was partially reinstated after the approval of Hatikvah's expansion in 2014.

Moreover, East Brunswick did not account for the fact that although it has to pay the charter school 90% of certain student funding categories, it retains 10%—an amount designed to respond to concerns about the loss of funding to the District. *Englewood, 164 N.J. at 333*; *N.J.S.A. 18A:36A-12(b)*. Nor does it account for the fact that the CSPA funding formula, as amended by the *School Funding Reform Act of 2008 (SFRA), N.J.S.A. 18A:7F-43 to -63*, was specifically designed to fund students at the constitutionally required level. *Abbott ex rel. Abbott v. Burke, 199 N.J. 140, 147, 971 A.2d 989 (2009)*. Therefore, appellants' claim on this point lacks merit.

Appellants also argue that the Commissioner failed to consider the lack of demand for the increased enrollment, as allegedly demonstrated by the fact that only 48% of Hatikvah's students reside in East Brunswick. This contention must also be rejected.

Preference for enrollment in a charter school is given to students who reside in the district where the charter school is located. **[*47]** *N.J.S.A. 18A:36A-8(a)*. A charter school may, however, enroll non-resident students, if available space permits. *N.J.S.A. 18A:36A-8(d)*. As in this case, a charter school may apply to the Commissioner for an amendment to its charter to expand its enrollment. *N.J.A.C. 6A:11-2.6(a)(1)(i)*. There is no statutory or regulatory provision limiting the requested amount of an expanded enrollment, or limiting the expansion to in-district students. The Commissioner evaluates whether amendments are eligible for approval under the CSPA and the implementing regulation, *N.J.A.C. 6A:11-2.6(b)*, under which a charter school must include information showing a "[d]emonstration of need" in its initial application. *N.J.A.C. 6A:11-2.1(b)(2)(vi)*.

Here, Hatikvah demonstrated that need. As of June 2016, there were 149 students, from both East Brunswick and non-resident districts, on the waiting list for kindergarten through second grade. Additionally, for the 2016-2017 school year, twenty-four of the available fifty kindergarten seats went to siblings of students thereby, according to Hatikvah, "greatly limiting access to the school for new families." Thus, the record fully supported the Commissioner's decision approving an increase in enrollment from fifty to seventy-five students in kindergarten and first grade and, therefore, **[*48]** we discern no basis for disturbing it.

VI.

Appellants argue in Point IV that there is no statutory authority under the CSPA to obligate them to fund their students' attendance at Hatikvah and, therefore, the Commissioner's decision was arbitrary, capricious, or unreasonable because it violated express or implied legislative policies. They contend, as other appellants do in two of the companion cases, *Piscataway*, and *North Brunswick*, that *N.J.S.A. 18A:36A-12(b)* explicitly limits financial responsibility for students' attendance at charter schools to the "school district of residence," which they interpret to mean the district where the charter school is located, or at most, the contiguous districts identified in the school's approved "region of residence." Thus, appellants argue that since the Commissioner's approval of the expansion was based on the presumed ongoing flow of revenue from appellants, non-resident school districts, it was inherently arbitrary and should be vacated. For the reasons that follow, however, we conclude that the Commissioner's interpretation of the funding provisions was entirely consistent with the Act and the policies expressed by the Legislature.

In their resolutions calling for **[*49]** a moratorium on all new charter school seats in Middlesex and Somerset Counties, appellants only generally claimed that the Department had interpreted the CSPA "to require all public school districts statewide to pay charter schools for students enrolled in those schools regardless as to whether the charter serves the district's community as part of the charter's approved district or region of residence."

The scope of judicial review of a final decision of the Commissioner is limited. *Quest Acad., 216 N.J. at 385*. Although the Appellate Division is not bound by an agency's determination on a question of law, *Hargrove v. Sleepy's, LLC, 220 N.J. 289, 301, 106 A.3d 449*

(2015), "[c]ourts afford an agency 'great deference' in reviewing its 'interpretation of statutes within its scope of authority and its adoption of rules implementing' the laws for which it is responsible." New Jersey Ass'n of School Adm'rs v. Schundler, 211 N.J. 535, 549, 49 A.3d 860 (2012) (quoting New Jersey Soc. for Prevention of Cruelty to Animals v. New Jersey Dept. of Agriculture, 196 N.J. 366, 385, 955 A.2d 886 (2008)).

"[T]he goal of statutory interpretation is to ascertain and effectuate the Legislature's intent." Cashin v. Bello, 223 N.J. 328, 335, 123 A.3d 1042 (2015). "[T]he best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492, 874 A.2d 1039 (2005). "Accordingly, '[t]he starting point of all statutory interpretation must be the language used in the enactment.'" Spade v. Select Comfort Corp., 232 N.J. 504, 515, 181 A.3d 969 (2018) (quoting New Jersey Div. of Child Protection and Permanency v. Y.N., 220 N.J. 165, 178, 104 A.3d 244 (2014)).

Courts "construe the words of a statute 'in context with related provisions so as to give sense to the legislation **[*50]** as a whole.'" Spade, 232 N.J. at 515 (quoting North Jersey Media Grp., Inc. v. Tp. of Lyndhurst, 229 N.J. 541, 570, 163 A.3d 887 (2017)). If the plain language leads to a clear and unambiguous result, then the court's "interpretative process is over." Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 386, 143 A.3d 254 (2016). Courts "turn to extrinsic tools to discern legislative intent . . . only when the statute is ambiguous, the plain language leads to a result inconsistent with any legitimate public policy objective, or it is at odds with a general statutory scheme." Shelton v. Restaurant.com, Inc., 214 N.J. 419, 429, 70 A.3d 544 (2013).

At issue here, N.J.S.A. 18A:36A-12(b) provides that:

> The *school district of residence* shall pay directly to the charter school for each student enrolled in the charter school who resides in the district an amount equal to 90% of the sum of the budget year equalization aid per pupil, the prebudget year general fund tax levy per pupil inflated by the CPI rate most recent to the calculation, and the employer payroll tax per pupil that is transferred to the school district pursuant to subsection d. of section 1 of P.L.2018, c.68. In addition, the *school district of residence* shall pay directly to the charter school the security categorical aid attributable to the student and a percentage of the district's special education categorical aid equal to the percentage of the district's special education students enrolled in the charter school **[*51]** and, if applicable, 100% of preschool education aid. *The district of residence shall also pay directly to the charter school any federal funds attributable to the student*.
> [(Emphasis added).]

The term "school district of residence" is not defined in the CSPA or the implementing regulations. The term "district of residence" is defined in the regulations as "the school district in which a charter school facility is physically located; if a charter school is approved with a region of residence comprised of contiguous school districts, that region is the charter school's district of residence." *N.J.A.C. 6A:11-1.2*; *N.J.A.C. 6A:23A-15.1*.[8] A school district does not, however, reside in a district; instead, it is located in a district. Moreover, the district of residence where the charter school is located does not receive equalization aid, security categorical aid, or federal funds "attributable" to a charter student who is not a resident of that district. *See* N.J.S.A. 18A:7F-43 to -63 (SFRA). Thus, it would make no sense to interpret "school district of residence" to mean the "district of residence." N.J.S.A. 18A:36A-12(b).

In fact, the State Board of Education promulgated *N.J.A.C. 6A:23A-15.2* and -15.3, which as discussed in more detail in our decision today in *Piscataway*, require both **[*52]** a "district of residence" and a "non-resident district" to fund its students' attendance at a charter school. However, appellants argue that under *N.J.A.C. 6A:23A-15.2* and -15.3, a "non-resident district" should be interpreted to mean only those "non-resident districts" that are within a charter school's region of residence, because those districts would be entitled to the same opportunity for input as the district where the charter school is located. *N.J.A.C. 6A:11-2.1*; *N.J.A.C. 6A:11.2.6(a)(2)*. They contend that the Department's interpretation of N.J.S.A. 18A:36A-12(b) to require all non-resident districts to fund their students' attendance

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[8] A "region of residence" is defined as the "contiguous school districts in which a charter school operates and is the charter school's district of residence." ***N.J.A.C. 6A:11-1.2***. *See* Greater Brunswick Charter Sch., 332 N.J. Super. at 424 ("[R]egulations allowing regional charter schools are a legitimate means of effectuating the Act's purpose of encouraging the establishment of charter schools."). A non-resident school district is defined as "a school district outside the district of residence of the charter school." ***N.J.A.C. 6A:11-1.2***.

at charter schools is inconsistent with the Act, because non-resident districts located outside the approved region of residence are not entitled to receive notice or input as to the approval or amendment process.

Significantly, after the parties filed briefs in this case, we rejected this identical argument in *Highland Park I*.[9] In that case, Highland Park (one of the appellants in this case), appealed from the Commissioner's March 19, 2015 final decision approving Hatikvah's second application to amend its charter to expand its grades. *Highland Park I, 2018 N.J. Super. Unpub. LEXIS 158, at *2*.

In *Highland Park I*, this court initially noted that Highland Park had not **[*53]** raised this issue in March 2014 when Hatikvah sought to renew its charter, or in November 2014 when Hatikvah sought to expand its enrollment. *2018 N.J. Super. Unpub. LEXIS 158, at 1*4*. Highland Park had never challenged the regulations requiring resident and nonresident school districts to fund their students' attendance at a charter school, and had "paid tuition for its students to attend the school for at least six years." *2018 N.J. Super. Unpub. LEXIS 158, at *15*. Nonetheless, because it involved "an issue of law," the court decided to exercise its discretion and address the argument even though it was raised for the first time on appeal. *Ibid.*

Turning to the merits, the court found that the plain language of *N.J.S.A. 18A:36A-12(b)* "expressly provides that the 'school district of residence' must pay the charter school for 'each student' enrolled in the school." *2018 N.J. Super. Unpub. LEXIS 158, at *16*. Thus, the court held that "as used in *N.J.S.A. 18A:36A-12(b)*, the term 'school district of residence' refers to the district where the student resides, not the district where the charter school is located." *Ibid.* The court further found that the CSPA

> expressly envisions that students may enroll in a charter school, even though they reside in a district other than the district where the charter school is located. *See* *N.J.S.A. 18A:36A-8(a)* (requiring charter schools to **[*54]** give preference for enrollment to students who reside "in the school district in which the charter school is located"). There is nothing in the Act that would allow these students to attend a charter school without a financial contribution from the school districts in which they reside. Thus, under *N.J.S.A. 18A:36A-12(b)*, obligation of a school district to attend a charter school is not limited to the charter school's "district of residence."
>
> [*2018 N.J. Super. Unpub. LEXIS 158, at *16-17*.]

Further, we found that the regulations adopted pursuant to the CSPA were "consistent with this interpretation of *N.J.S.A. 18A:36A-12(b)*. Indeed, the regulations expressly provide that both a charter school's 'district of residence' and the 'non-resident school districts' must pay for their students to attend a charter school. *N.J.A.C. 6A:23A-15.3(g)(2)*, (3)." *2018 N.J. Super. Unpub. LEXIS 158, at *17*. *See also N.J.A.C. 6A:23A-15.2* (resident and non-resident school districts shall use projected charter school aid).

The court in *Highland Park I* also found support for this interpretation in the legislative history, explaining that in its fiscal estimate for *S. 1796* (1995), which, combined with *A. 592* (1995), became the CSPA, the Office of Legislative Services (OLS), included the following statement:

> In regard to the funding of charter schools, the bill provides that the school **[*55]** district of residence would pay directly to the charter school for each student enrolled who resides in the district an amount equal to the local levy budget per pupil in the district for the specific grade level. . . . *The cost for out of district pupils would be paid by the district of residence of the pupil*. . . .
>
> [*2018 N.J. Super. Unpub. LEXIS 158, at *17-18* (quoting *Legislative Fiscal Estimate to S. 1796* 1 (Sept. 14, 1995) (emphasis added)).]

That statement "makes clear that all school districts of residence must pay for students to attend a charter school, and the financial obligation is not limited to the charter school's 'district of residence.'" *2018 N.J. Super. Unpub. LEXIS 158, at *18*.

In so ruling, we found unpersuasive Highland Park's citation to other provisions of the Charter School Act that pertain to a charter school's "district of residence." *2018 N.J. Super. Unpub. LEXIS 158, at *18*. For example, the court found that

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[9] Although the case is unpublished, it involved most of the same parties and the identical issue raised here, and thus even if not binding under the doctrine of collateral estoppel, the legal analysis is persuasive and properly constitutes secondary authority in connection with the present appeals. ***R. 1:36-3***.

> Highland Park cites N.J.S.A. 18A:36A-4(c), which requires a proposed charter school to provide a copy of its application to the "local board of education." However, the statute does not support Highland Park's argument. N.J.S.A. 18A:36A-4(c) also requires the Commissioner to provide notice to "members of the State Legislature, school superintendents, and mayors and governing bodies of all legislative districts, school **[*56]** districts, or municipalities in which there are students who will be eligible for enrollment in the charter school."
>
> Highland Park also cites N.J.S.A. 18A:36A-14(b), a statute that limits a charter school's salaries to the salaries of the highest step in the district where the school is located; and N.J.S.A. 18A:36A-16(b), which requires a charter school to serve a copy of its annual report on the local board of education in the district where the school is located. However, these statutes have no direct bearing on whether a student's "school district of residence" must pay for students from that district to attend at a charter school.
>
> [2018 N.J. Super. Unpub. LEXIS 158, at 18-19.]

Thus, we concluded that

> under N.J.S.A. 18A:36A-12(b), the term "school district of residence" means the school district where the student resides, and each "school district of residence" must pay the charter school for its student to attend the school, in the amounts required by the Act and the regulations. We therefore reject Highland Park's contention that only the charter school's "district of residence" is obligated to pay for its students to attend the school.
>
> [Id. at 19.]

Similarly, as addressed in *Piscataway*, the Commissioner issued a final decision in which she interpreted the CSPA and the regulatory provisions, *N.J.A.C. 6A:23A-15.1 to -15.4*, to **[*57]** require school districts to "provide funding for its students enrolled in charter schools located in other school districts." *Bd. of Educ. of Twp. of Piscataway v. NJ Dep't of Educ.*, EDU 10995-16, final decision, (July 27, 2017) (the Piscataway Board of Education was obligated to pay for its resident students to attend a number of out-of-district charter schools, including Hatikvah).

Appellants argue that under that interpretation, non-resident school districts will be deprived of due process because non-resident districts are not entitled to receive formal notice of a charter school's application to amend its charter, or input into the amendment process. *See N.J.A.C. 6A:11-2.6(a)(b)*. They argue that "the net effect of these regulations as applied by the Department is to render every New Jersey district the 'district of residence' of every charter school in the state."

However, because preference for enrollment in a charter school is given to students who reside in the school district in which the charter school is located, N.J.S.A. 18A:36A-8(a), it is likely that the majority of students will reside in that district, and thus it makes sense that the district of residence should receive formal notice and an opportunity for input. **[*58]** Moreover, it was undisputed that appellants in this case, and in the back-to-back companion appeals, were aware of the amendment and had an opportunity to submit comments on the amendment requests involved in these cases. In fact, the Commissioner received, and considered, comments from several school districts, individuals, an educational service commission, and even several legislators. Thus, the notice provisions simply do not relieve non-resident districts from bearing financial responsibility for their students' attendance at charter schools.

We are persuaded by the reasoning expressed in Highland Park I, and by the Commissioner in her final decision in *Piscataway*. The plain language of the statute requires each student's district of residence to pay for the student to attend a charter school. N.J.S.A. 18A:36A-12(b). That interpretation is entirely consistent with the Act and the policy expressed by the Legislature. Charter schools are open to all students, both resident and non-resident students, and there is no indication in the Act that the Legislature intended to exclude nonresident districts from funding their students' attendance at a charter school. It is also consistent with the legislative **[*59]** history and the implementing regulations, which require a non-resident district to fund its students' attendance at a charter school. *N.J.A.C. 6A:23A-15.2* and -15.3. Thus, appellants are obligated to provide funding for their students enrolled in Hatikvah.

VII.

In sum, we affirm the Commissioner's decision approving Hatikvah's application to amend its charter, and compelling appellants to fund their students' attendance at that school. The decision was not arbitrary, capricious, or unreasonable, promoted the

legislative policy of the CSPA, and was fully supported by the record.

Affirmed.

Table1 (*Return to related document text*)

District	Grade K	Grade 1	Grade 2
East Brunswick	11	6	8
Non-East Brunswick	76	56	57
Total (waitlisted students)	**87**	**62**	**65**

Table1 (*Return to related document text*)

Table2 (*Return to related document text*)

Subject	Hatikvah	Weighted Average of All Sending [*9] Districts	NJ State	NJ Charters
ELA	67.8%	64.8%	51.6%	47.9%
Math	67.2%	62.7%	47.2%	41.0%

Table2 (*Return to related document text*)

Table3 (*Return to related document text*)

Sending District	2015-2016 Total District Revenue ($)	2016-2017 Waitlisted Applicants Who Would be Able to Enroll to Fill New Capacity	Projected Costs to Sending Districts	Fiscal Impact (Projected Costs as a Percent of Total District Revenue)
East Brunswick	149,628,859	9	114,833	.077%
South River	32,316,812	2	15,203	.047%
Highland Park	32,655,815	1	14,571	.045%
North Brunswick	89,484,289	3	25,020	.028%
Old Bridge	141,098,853	3	31,607	.022%
Sayreville	85,365,388	2	15,145	.018%
Edison	235,500,869	3	35,553	.015%
South Plainfield	57,169,108	1	10,000	.017%
East Windsor	85,800,550	1	9752	.011%
Total Waitlisted		**25**		

Table3 (*Return to related document text*)

Table4 (*Return to related document text*)

Sending District	2015-2016 Total District Revenue ($)	2016-2017 Waitlisted Applicants Who Would be Able to Enroll to Fill New Capacity	Projected Costs to Sending Districts	Fiscal Impact (Projected Costs as a Percent of Total District Revenue)
East Brunswick	149,628,859	23	293,457	.196%
North Brunswick	89,484,289	13	108,420	.121%
South River	32,316,812	5	38,005	**[*12]** .118%

Sending District	2015-2016 Total District Revenue ($)	2016-2017 Waitlisted Applicants Who Would be Able to Enroll to Fill New Capacity	Projected Costs to Sending Districts	Fiscal Impact (Projected Costs as a Percent of Total District Revenue)
Highland Park	32,655,815	2	29,142	.089%
Milltown	16,216,247	1	10,694	.066%
Sayreville	85,365,388	7	53,011	..062%
Edison	235,500,869	9	106,659	.045%
East Windsor	85,800,550	3	29,256	.034%
Old Bridge	141,098,853	4	42,144	.030%
Marlboro	86,394,503	2	22,363	.026%
South Plainfield	57,169,108	1	10,000	.017%
Manalapan	82,300,339	1	12,542	.015%
Franklin Park	156,416,249	1	13,266	.008%
Piscataway	111,295,663	1	8400	.006%
New Brunswick	180,444,475	1	10,973	.006%
Perth Amboy	233,538,204	1	9648	.004%
Total Waitlisted		**75**		

Table4 (*Return to related document text***)**

Table5 (*Return to related document text***)**

District	Projected Costs to Sending Districts of Students Who Transfer to Hatikvah	Projected Costs to Sending Districts of Students Who Remain in District
Highland Park	$14,571	$15,789

Table5 (*Return to related document text***)**

Table6 (*Return to related document text***)**

District	Projected Costs to Sending Districts of Students Who Transfer to Hatikvah	Projected Costs to Sending Districts of Students Who Remain in District
Highland Park	$29,142	$31,578
Piscataway	$8400	$13,289

Table6 (*Return to related document text***)**

Table7 (*Return to related document text***)**

Grade	Approved Enrollment	East Brunswick Actual Enrollment
	2016-2017	2016-2017
K	50	23
1	50	23
2	50 **[*15]**	23
3	50	33

Grade	Approved Enrollment	East Brunswick Actual Enrollment
	2016-2017	2016-2017
4	50	24
5	50	21
6	50	18
7	50	16
Total	**400**	**181**

Table7 (*Return to related document text*)

Table8 (*Return to related document text*)

Grade	2016-2017	2017-2018	2018-2019
K	50	75	75
1	50	50	75
2	50	50	50
3	50	50	50
4	50	50	50
5	50	50	50
6	50	50	50
7	50	50	50
8		50	50
Total	**400**	**475**	**500**

Table8 (*Return to related document text*)

Table9 (*Return to related document text*)

Ethnic/Racial Group	Hatikvah Students	East Brunswick Students	Highland Park Students	Piscataway Students
White	69.7%	53.7%	37.5%	15.7%
Asian	13.0%	33.5%	24.0%	33.6%
Hispanic	8.2%	6.5%	22.4%	19.0%
Black	6.4%	4.7%	10.8%	28.8%

Table9 (*Return to related document text*)

Table10 (*Return to related document text*)

Hatikvah's School Year	White	Black	Asian	Hispanic
2014-2015	69.5 %	5.4%	16.1 %	7.4%
2015-2016	70.1 %	6.6%	13%	8.5%

Table10 (*Return to related document text*)

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North Brunswick Twp. Bd. of Educ. v. Harrington

Superior Court of New Jersey, Appellate Division

May 30, 2019, Argued; June 7, 2019, Decided

DOCKET NO. A-3415-16T1

Reporter
2019 N.J. Super. Unpub. LEXIS 1308 *; 2019 WL 2402543

NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION, NEW BRUNSWICK BOARD OF EDUCATION, and PISCATAWAY TOWNSHIP BOARD OF EDUCATION, Petitioners-Appellants, v. KIMBERLY HARRINGTON, ACTING COMMISSIONER OF EDUCATION, NEW JERSEY STATE BOARD OF EDUCATION and CENTRAL JERSEY COLLEGE PREP CHARTER SCHOOL, Respondents-Respondents.

Prior History: [*1] On appeal from the New Jersey Department of Education.

In re Approval of the Charter Amendment of Cent. Jersey Coll. Prep, 2019 N.J. Super. Unpub. LEXIS 1305 (App.Div., June 7, 2019)

Core Terms

charter school, charter, school district, enrollment, resident, attend, non-resident, districts, segregative, region, Grade, campus, satellite, capricious, approving, funding, reasons, board of education, amend, regulations, school year, renewal, final decision, demographics, appellants', schools, sending, salary, discernible, fiscal

Counsel: David B. Rubin argued the cause for appellants (David B. Rubin, PC, and The Busch Law Group, LLC, attorneys; David B. Rubin and Douglas M. Silvestro, on the briefs).

Brenda C. Liss argued the cause for respondent Central Jersey College Prep Charter School (Riker Danzig Scherer Hyland & Perretti, LLP, attorneys; Brenda C. Liss, of counsel and on the brief; Stephen M. Turner, on the brief).

Geoffrey N. Stark, Deputy Attorney General, argued the cause for respondent Commissioner of Education (Gurbir S. Grewal, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; James M. Esposito, Deputy Attorney General, on the brief).

Judges: Before Judges Haas, Sumners and Mitterhoff.

Opinion

PER CURIAM

Appellants North Brunswick Township Board of Education (North Brunswick), New Brunswick Board of Education (New Brunswick), and Piscataway Township Board of Education (Piscataway) (collectively appellants), appeal from the February 28, 2017 final decision of the Commissioner of Education (Commissioner), approving an application by Central Jersey College Prep Charter School (CJCP) to amend its charter to increase its enrollment, **[*2]** add a satellite campus, and move its Somer set campus to a new

facility.[1] We affirm.

I.

The procedural history and facts of this case are fully set forth in our decision today in *Central Jersey* and, to avoid repetition, we incorporate that discussion here. Therefore, we need only recite the most salient facts in this opinion.

At the time of this appeal, there were five charter schools operating in Middlesex and Somerset Counties: CJCP and Thomas Edison EnergySmart Charter School (TEECS) in Franklin Township; Hatikvah International Academy Charter School (Hatikvah) in East Brunswick; Greater Brunswick Charter School in New Brunswick; and the Academy for Urban Leadership Charter School in Perth Amboy. A sixth school, Ailanthus Charter School, had received approval to begin operation in Franklin Township for the 2018-2019 school year. *See In re Ailanthus Charter Sch., No. A-0945-16, 2018 N.J. Super. Unpub. LEXIS 1106 (App. Div. May 11, 2018)*. No charter schools were located in Piscataway.

As discussed in detail in *Central Jersey*, on December 1, 2016, CJCP submitted a charter amendment **[*3]** application to the Department seeking to: 1) expand its maximum enrollment from 624 to 1320 students by the 2019-2020 school year; 2) add a satellite campus in New Brunswick (within its region of residence) by the 2019-2020 school year; and 3) relocate its current facility to a new facility on Mettlers Road in Somerset.

On January 13, 2017, Franklin Township Board of Education (Franklin) submitted a letter, also discussed in detail in *Central Jersey*, to the Commissioner asking her to deny CJCP's application. In January and February 2017, appellants North Brunswick and Piscataway passed almost identical resolutions for a general moratorium on new charter school seats in Middlesex and Somerset Counties. They asserted that the *Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 to -18* (Charter School Act or CSPA), "requires that the districts of residence pay the charter schools for each student from their respective communities enrolled in those schools, thereby draining funds and diminishing money available to serve students in the traditional public schools."

Further, North Brunswick and Piscataway stated that the New Jersey Department of Education (Department or NJDOE) "has interpreted the Act to **[*4]** require all public schools statewide to pay charter schools for students enrolled in those schools regardless as to whether the charter serves that district's community as part of the charter's approved district or region of residence." They also alleged that Hatikvah and TEECS, but not CJCP, enrolled a "significantly more segregated student body than any of the resident or non - resident sending districts with respect to race, socioeconomics tatus and need for special education."

By letter dated February 21, 2017, appellant New Brunswick also asked the Commissioner to deny CJCP's, TEECS's and Hatikvah's applications to expand their enrollment. It maintained that in "direct contradiction to the letter and spirit" of the CSPA, "many charter schools are seeking to expand in order to enroll additional students from districts outside of the charter schools' approved districts or regions of residence due to a lack of interest from students who live in the very communities for which the charters were created to serve ." It claimed that "[a]ny increase in charter school seats will have a negative impact on public school district funding, with the proposed 128% increase in such seats in Middlesex **[*5]** and Somerset Counties likely to lead to drastic and debilitating cuts throughout the public school districts in those counties ."

New Brunswick also noted that other entities had filed civil rights complaints against two charter schools in Franklin Township (pres umably referring to CJCP and TEECS) alleging that the demographics of the charter schools did not reflect the demographics of the local school district. It similarly alleged that Hatikvah and TEECS, but not CJCP, enrolled a "significantly more segregated student body than any of the resident or non-resident sending districts with respect to race, socioeconomic status and need for special education ."

On February 28, 2017, the Commissioner granted CJCP's application to amend its charter based on her review of the record. In her written decision, the Commissioner noted that the Department had "completed a comprehensive review including, but not

[1] Calendared back-to-back with this appeal, Franklin Township Board of Education (Franklin) separately appealed from this same decision. *In re Approval of Charter Amendment of Cent. Jersey Coll. Prep* (*Central Jersey*), No. A-3074-16. Two other appeals from final decisions by the Commissioner are also calendared back-to-back with this appeal. *Highland Park Bd. of Educ. v. Harrington* (*Highland Park II*), No. A-3455-16; *Bd. of Educ. of Twp. of Piscataway v. N.J. Dep't of Educ.* (*Piscataway*), No. A-5427-16. Because of this overlap, the reader is encouraged to review all four of our opinions in these cases, which are being released simultaneously.

limited to, student performance on statewide assessments, operational stability, fiscal viability, public comment, fiscal impact on sending districts, and other information in order to make a decision regarding the school's amendment request." The Commissioner confirmed the school's maximum **[*6]** enrollment for the "approved region of residence of Franklin, New and North Brunswick," as follows:

Go to table1

The Commissioner also confirmed the new site location at Mettlers Road, and directed CJCP to "provide all facility related documents to the Office of Charter and Renaissance Schools and the Somerset County Office of Education." Further, the Commissioner directed that once CJCP had identified the final site of the satellite campus, it should provide the Department with the required amended documentation pursuant to *N.J.A.C. 6A:11-2.6*. This appeal followed.

On appeal, appellants raise the following contentions:

> *POINT I*
> The Commissioner Failed To Analyze CJCP's Application Or To Disclose The Basis For Her Approval.
>
> *POINT II*
> The Commissioner Failed To Consider The Segregative Impact of CJCP's Charter Amendment.
>
> *POINT III*
> Other Significant Deficiencies [I]n CJCP's Application Render The Commissioner's Approval Arbitrary, Capricious And Unreasonable.
>
> *POINT IV*
> There Is No Authority To Compel Piscataway To Fund Students' Attendance [A]t CJCP.

II.

In Point I, appellants argue that the **[*7]** Commissioner's decision approving CJCP's application for an amendment of its charter was arbitrary, capricious, or unreasonable because she failed to analyze CJCP's application to amend, or provide any reason for the approval. We disagree.

As a threshold matter, CJCP argues that the appeal filed by Piscataway (but not New Brunswick's and North Brunswick's appeals) must be dismissed because Piscataway, as a non-resident district, lacks standing to pursue it. However, in our decision today in *Highland Park II*, we held that Piscataway had standing to challenge the Commissioner's decision to grant Hatikvah's application for an amendment to its charter. We discern no basis for reaching a different conclusion in this case where Piscataway seeks to challenge CJCP's similar application in the same county. Because we reject CJCP's standing argument for the reasons expressed in *Highland II*, we do not discuss this contention further here. *R. 2:11-3(e)(1)(E)*.

Turning to the merits of appellants' contentions concerning the sufficiency of the Commissioner's decision, charter schools are public schools that operate under a charter granted by the Commissioner, operate independently of a local board of education, and **[*8]** are managed by a board of trustees. *N.J.S.A. 18A:36A-3(a)*.[2] Applications to establish a charter school are governed by *N.J.S.A. 18A:36A-4* and *-5*, and the implementing regulation, *N.J.A.C. 6A:11-2.1*. The Commissioner has final authority to grant or reject a charter. *N.J.S.A. 18A:36A-4(c)*. "The notification to eligible applicants *not approved* as charter schools shall include reasons for the denials." *N.J.A.C. 6A:11-2.1(f)* (emphasis added).

Applications to renew a charter are governed by *N.J.S.A. 18A:36A-17*, and the implementing regulation, *N.J.A.C. 6A:11-2.3*. The Commissioner shall grant or deny the renewal of a charter based upon a comprehensive review of the school, including, among other things, the annual reports, recommendation of the district board of education or school superintendent, and student performance on statewide tests. *N.J.A.C. 6A:11-2.3(b)*. "The notification to a charter school that *is not granted* a renewal shall include reasons for the denial." *N.J.A.C. 6A:11-2.3(d)* (emphasis added).

At issue here, a charter school can also apply to the Commissioner for an amendment to its charter. *N.J.A.C. 6A:11-2.6*. A charter school can seek, as in this case, an expansion of enrollment and the establishment of a satellite campus. *N.J.A.C. 6A:11-2.6(a)(1)(i)*, (iv). Similar to the initial approval process, boards of education in the district of residence can submit comments in response to **[*9]** the application for amendment. *N.J.A.C. 6A:11-2.6(c)*.

"The Commissioner may approve or deny amendment requests of charter schools and shall notify charter schools of decisions. If approved, the amendment

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[2] We discuss the CSPA in more detail in our decision in *Highland Park II*.

becomes effective immediately unless a different effective date is established by the Commissioner." *N.J.A.C. 6A:11-2.6(d)*. In determining whether the amendments are eligible for approval, the Department "shall evaluate the amendments" based on the CSPA and the implementing regulations, and the Commissioner "shall review a charter school's performance data. . . ." *N.J.A.C. 6A:11-2.6(b)*. A school's performance data is reflected in the school's Academic Performance Framework report. *N.J.A.C. 6A:11-1.2*. The Performance Framework consists of three sections: academic, financial, and organizational. *N.J.A.C. 6A:11-1.2*. A charter school's performance on the academic section carries the most weight. That component includes measures of student growth, achievement, graduation rate, and attendance. *N.J.A.C. 6A:11-1.2*.

On appeal, this court may reverse the Commissioner's decision on a charter school application only if it is "arbitrary, capricious, or unreasonable." *In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385, 80 A.3d 1120 (2013)*. In making that determination, our review is generally restricted to three inquiries:

> (1) whether the agency's action violates express or implied **[*10]** legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> [*Id. at 385-86* (quoting *Mazza v. Board of Trustees, 143 N.J. 22, 25, 667 A.2d 1052 (1995)*).]

"[T]he arbitrary, capricious, or unreasonable standard . . . subsumes the need to find sufficient support in the record to sustain the decision reached by the Commissioner." *Id. at 386*. "[A] failure to consider all the evidence in a record would perforce lead to arbitrary decision making." *Ibid.* However, in cases where "the Commissioner is not acting in a quasi-judicial capacity," and is instead acting in [her] legislative capacity, as [s]he was doing here, [s]he "need not provide the kind of formalized findings and conclusions necessary in the traditional contested case." *TEAM Acad., N.J. Super. , 2019 N.J. Super. LEXIS 63 at *30* (quoting *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 320 N.J. Super. 174, 217, 727 A.2d 15 (App. Div. 1999)*, *aff'd as modified*, *164 N.J. 316, 753 A.2d 687 (2000)*).

Thus, although the arbitrary, capricious, or unreasonable standard demands "that the reasons for the decision be discernible, the reasons need not be as detailed or formalized as an agency adjudication of disputed **[*11]** facts; they need only be inferable from the record considered by the agency." *Englewood, 320 N.J. Super. at 217*. *See Red Bank, 367 N.J. Super. at 476* (reasons need not be detailed or formalized, but must be discernible from the record); *Bd. of Educ. of E. Windsor Reg'l Sch. Dist. v. State Bd. of Educ., 172 N.J. Super. 547, 552, 412 A.2d 1320 (App. Div. 1980)* (detailed findings of fact not required by Commissioner in reducing amount school board sought to increase its budget).

There is also no statutory or regulatory provision requiri ng the Commissioner to include reasons for granting an application to amend. The regulations provide only that the notification "shall include reasons for the denial[]" of an initial charter school application, *N.J.A.C. 6A:11-2.1(f)*, and an application for renewal, *N.J.A.C. 6A:11-2.3(d)*. The Commissioner does however, take comments regarding the amendment into consideration when rendering a final decision. *N.J.A.C. 6A:11-2.6(c)*.

To that end, *Quest Academy, 216 N.J. at 390*, as cited by appellants, is distinguishable. In that case, the operator of a proposed charter school appealed from the Commissioner's decision denying the charter. *Id. at 373*. The Commissioner's initial decision was "short on detail with respect to the application's deficiencies." *Ibid.* However, after the appeal was filed, the Commissioner submitted a written amplification of his reasons for denying the application. *Id. at 374*. The Court affirmed, finding in relevant part that:

> Although **[*12]** the letter of denial did not detail the deficiencies found in the application, it offered instead a face-to-face meeting to review in detail the shortcomings in the application that Quest Academy submitted. According to the Commissioner, the large number of applicants (forty-five) who were reviewed in the batch with Quest Academy rendered lengthy written responses difficult and taxing of precious departmental resources. While it would be naturally preferable from the applicant's perspective to receive initially more than a generic form letter denying an application, here Quest Academy received a bit more than that. Some information

> about the application's shortcomings was provided in the denial letter, and the subsequent amplification fully detailed those issues. In reviewing as complex a proposal as that required for a newly proposed charter school, there is a benefit to offering a discussion, instead of a written cataloguing, of mistakes or deficiencies in the application that has been rejected. We do not fault the Commissioner for choosing a dialogue involving constructive criticism as her preferred approach for producing approvable applications when resubmitted.
>
> [*Id. at 390*.]

As we discussed **[*13]** in our decisions in *Highland Park II* and *Central Jersey, Quest Academy* is distinguishable because there is no requirement that the Commissioner detail her findings in approving an amendment. *See also TEAM Acad., N.J. Super. , 2019 N.J. Super. LEXIS 63, [slip op.] at 40*. Instead, the focus on review is whether the reasons for the Commissioner's decision are clearly discernible from the record. *Red Bank, 367 N.J. Super. at 476*.

Here, the record supports the Commissioner's decision approving CJCP's request to amend its charter. Most notably, it is undisputed that CJCP's performance data, a significant factor in assessing a request to amend a charter, *N.J.A.C. 6A:11-2.6(b)*, was, as represented by its students' PARCC scores, significantly higher than the State average. It was also undisputed that CJCP is a high-performing, Tier 1 school, a ranking it received from the Department's assessment of its academic performance based on the metrics set forth in the State's Academic Performance Framework governing charter schools. *N.J.A.C. 6A:11-1.2*; *N.J.A.C. 6A:11-2.3(b)*.

Further, the record shows that CJCP, which has been submitting detailed annual reports to the Commissioner since it was approved to operate in 2006, and had submitted financial audits prior to having its charter renewed, was organizationally sound and fiscally viable. *N.J.S.A. 18A:36A-16(b)*; *N.J.A.C. 6A:11-2.2*. As discussed **[*14]** more fully in *Central Jersey*, there was also a need for the increase in enrollment because there were 628 students on its waiting list and there was a "heavy demand from the community" to enroll in the charter school. Adding a satellite campus in New Brunswick would further allow for the "accessibility and replication" of CJCP's existing model to service that high - needs community. Lastly, the Commissioner approved CJCP's request to expand enrollment with the understanding that facilities would need to be identified, secured, and potentially improved to comply with the charter regulations.

Therefore, we again conclude that the Commissioner's decision to approve CJCP's application was not arbitrary, capricious, or unreasonable because it promoted the legislative policy of developing charter schools and was supported by the record. Therefore, we reject appellants' contentions on this point.

III.

In Point II, appellants argue that the Commissioner's decision was arbitrary, capricious, and unreasonable because she failed to consider the alleged segregative impact of CJCP's charter amendment on the district. Franklin raised this identical issue in *Central Jersey*, in its appeal from the same **[*15]** February 28, 2017 decision involved in the present appeal. For the reasons set forth in our decision in *Central Jersey*, we reject appellants' similar contention in this companion appeal, and add the following comments addressing appellants' specific arguments concerning this issue. *R. 2:11-3(e)(1)(E)*.

Appellants argue that CJCP's demographics do not reflect a cross section of the community's school age population. They contend that CJCP over-enrolled Asian students and under-enrolled Hispanic students, economically disadvantaged students (defined as students receiving free or reduced cost lunch), ELL students, and special needs students, when compared to the populations in the Franklin, North Brunswick, and New Brunswick school districts.

Before the Commissioner, however, appellants only asserted that Hatikvah and TEECS, but not CJCP, enrolled a "significantly more segregated student body than any of the resident or non-resident sending districts with respect to race, socioeconomic status and need for special educatio n." Further, 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 **[*16]** of CJCP's increased enrollment.

Appellants argue that the Commissioner's decision granting the expansion of enrollment is arbitrary and capricious because "there is nothing discernable" in either her decision or the record to suggest that she considered its assertions that CJCP enrolled a significantly more segregated student body than any of

the resident or non-resident school districts. However, as set forth above and in our decision in *Central Jersey*, the Commissioner was not required to include reasons for granting the application to amend the charter. *See Red Bank, 367 N.J. Super. at 476* (Commissioner did not specifically address the segregation argument in his letter approving the Charter School's renewal and expansion). Nor did appellants present to the Commissioner sufficient evidence of a segregative effect to warrant more in-depth scrutiny. *Id. at 472-85*.

Further, appellants' unsubstantiated generalized protests regarding the segregative effect of CJCP's application to increase enrollment did not provide a basis to deny the application. *Ibid.* It is undisputed that CJCP accepts applications from all interested students and operates a publicly held random lottery process that blindly accepts a certain number of applicants **[*17]** to fill available seats per grade. CJCP does not collect any information at the time of the application from the applicants regarding students' socioeconomic and ethnic background, disability status, and English language skills.

Nonetheless, on appeal, appellants submitted school enrollment and census data for Franklin, North Brunswick, and New Brunswick school districts, which it contends for the first time shows that CJCP is becoming increasingly segregated and does not reflect the demographics of the local community:

Go to table2

Go to table3

Appellants argue that the "collective weight of this data is prima facie proof that CJCP does not reflect 'a cross section of the community's school age population including racial and academic factors'" (quoting *N.J.S.A. 18A:36A-8*).

However, on appeal, the Commissioner stated that she had analyzed the potential impact CJCP's expansion would have **[*18]** on racial demographics within the District by reviewing enrollment trends in New Brunswick and North Brunswick, and determined that the student demographics have stayed relatively static over the past few years:

Go to table4

Thus, even if appellants had presented the information about student enrollment and district demographics to the Commissioner prior to her February 28, 2017 decision, it would not have provided a basis to reject the application. The data provided above shows some disparity between the enrollment of Asian, Hispanic, LEP, special needs, and economically disadvantaged students and the students in the population in North Brunswick and New Brunswick. Significantly, however, appellants do not argue that the school districts are becoming more segregated and in fact, the data submitted by the Commissioner indicates that they have not. *See Bd. of Educ. of Hoboken v. New Jersey State Dep't of Educ., No. A-3690-14, 2017 N.J. Super. Unpub. LEXIS 1639 at *15 (App. Div. June 29, 2017)* **[*19]** (affirmed charter renewal where there were no allegations that the charter school's practices after the enrollment of students by an impartial lottery exacerbated the racial or ethnic balance).

A comparison of the demographic data indicates that CJCP enrolled a diverse student population. Moreover, CJCP maintained that the expansion and the operation of a satellite campus in New Brunswick would allow it to develop an even more diverse student population. To that end, appellants have not presented any evidence that the District was becoming more segregated, or that CJCP's existence has worsened the existing racial imbalance. *See ibid.*[4]

Finally, we note, as we did in our decision in *Central Jersey*, that it is undisputed that the Commissioner considered the segregative effect of the charter school in approving CJCP's charter in 2006, *N.J.A.C. 6A:11-2.1(j)*, in renewing its application, *N.J.A.C. 6A:11-2.3(b)(8)*, and on an annual basis, *N.J.A.C. 6A:11-2.2(c)*. There is no indication in this record that there was any challenge based on the segregative effect, **[*20]** nor was there any indication in this record that the Commissioner found a segregative effect during the annual review. *N.J.A.C. 6A:11-2.2(c)*.

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[4] As discussed in our decision today in *Central Jersey*, this matter is distinguishable from *Red Bank, 367 N.J. Super. at 462*, and two other cases specifically cited by appellants, *In re Petition for Authorization to Conduct a Referendum on Withdrawal of N. Haledon Sch. Dist. from Passaic Cty. Manchester Reg'l High Sch. Dist., 181 N.J. 161, 183, 854 A.2d 327 (2004)*, *Board of Educ. of Englewood Cliffs v. Board of Educ. of Englewood, 257 N.J. Super. 413, 459-65, 608 A.2d 914 (App. Div. 1992)*, *aff'd*, *132 N.J. 327, 625 A.2d 483*, *cert. denied*, ***510 U.S. 991, 114 S. Ct. 547, 126 L. Ed. 2d 449 (1993)***. Because we discuss these cases in detail in *Central Jersey*, we need not repeat that discussion again here. ***R. 2:11-3(e)(1)(E)***.

Because appellants did not provide sufficient evidence of a segregative effect to warrant either more detailed scrutiny or the denial of the application, we reject their contention that the Commissioner's decision was arbitrary, capricious, and unreasonable.

IV.

Turning to Point III, appellants argue that the Commissioner's decision approving the amendment was arbitrary, capricious, and unreasonable because she failed to consider "significant deficiencies in CJCP's application ." Specifically they argue that the Commissioner failed to consider: 1) the financial burden of the expansion on the sending districts; 2) the lack of sufficient demand for the increased enrollment in the region of residence; 3) the lack of interest for a satellite campus; 4) that CJCP's sta ffing plan was unrealistic; and 5) that the proposed location of the Somerset campus was unsuitable for a school. Franklin raised some of these same arguments in *Central Jersey*, and we rejected them. We reach the same conclusion here and also address appellants' slightly different presentations on these issues. **[*21]**

First, appellants argue that the Commissioner failed to consider the financial burden of the expansion on the sending districts. However, the Commissioner relied on the Department's "comprehensive review," which included the "fiscal impact on sending districts." Moreover, appellants did not "demonstrate[] with some specificity that the constitutional requirements of a thorough and efficient education would be jeopardized by [the district's] loss" of the funds to be allocated to a charter school. *Quest Acad., 216 N.J. at 377-78* (quoting *Englewood, 164 N.J. at 334-35*). Nor did they account for the fact that although appellants have to pay CJCP 90% of certain student funding categories, they retain 10%—an amount designed to respond to concerns about the loss of funding to the District. *Englewood, 164 N.J. at 333*; *N.J.S.A. 18A:36A-12(b)*. Thus, the Commissioner was not "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." *Ibid.*

Second, appellants contend that the Commissioner failed to consider the lack of demand in the region of residence for the increased enrollment, as represented by its acceptance of non-resident students. However, as set forth in our decision in *Central Jersey*, CJCP **[*22]** had 628 students on its waiting list at the time of the application, and anticipated that approximately 94% of its students would reside in its region of residence in the 2017-2018 school year, and 100% by the 2018-2019 school year. Therefore, we reject appellants' contention.

Third, appellants contend that CJCP's "justification for opening a satellite campus in New Brunswick is baffling." However, a charter school can seek an amendment to open a new satellite campus. *N.J.A.C. 6A:11-2.6(a)(1)(iv)*. *See* *Educ. Law Ctr. ex rel. Burke v. N.J. State Bd. of Educ., 438 N.J. Super. 108, 112, 102 A.3d 929 (App. Div. 2014)* (affirmed State Board's action in adopting regulations allowing satellite campuses). A satellite campus is defined as "a school facility operated by a charter school that is in addition to the facility identified in the charter school application or charter, if subsequently amended." *N.J.A.C. 6A:11-1.2*. "A charter school may operate more than one satellite campus in its district or region of residence, subject to charter amendment approval, pursuant to *N.J.A.C. 6A:11-2.6*." *N.J.A.C. 6A:11-4.15(b)*.

The Department evaluates whether amendments are eligible for approval based on the CSPA. *N.J.A.C. 6A:11-2.6(b)*. Under the CSPA, a school must include information showing a "[d]emonstration of need" in its initial application for a charter. *N.J.A.C. 6A:11-2.1(b)(2)(vi)*. As addressed in *Central Jersey*, CJCP presented a detailed **[*23]** rationale for the addition of a satellite campus—a record that amply supports the Commissioner's decision. Notably, CJCP set forth that New Brunswick's high percentage of economically disadvantaged students (86% (high school) and 93% (middle school)), would benefit from easier access to CJCP. It also cited to a study that "emphasize[d] the importance of residential proximity for charter schools to be a real option for all parents."

CJCP further demonstrated need because even though CJCP received fewer applications than expected from New Brunswick students in 2016 -2017, it still received double the number of applications from 2015-2016, and seventy-seven of the ninety-three students were placed on the waiting list. It also represented that the total number of applications had dramatically increased over the past few years (465 for the 2014-2015 school year and 956 for the 2016-2017 school year), and that at the time of the application, there were 628 stud ents on its waiting list. Therefore, appellants' contrary contention lacks merit.

Fourth, appellants argue that the Commissioner failed to address its concern as to the insufficiency of its staffing budget. However, as set forth in **[*24]** *Central Jersey*, there is no indication in this record that CJCP proposed

to pay its teachers less than the amount required under the CSPA. In this regard, N.J.S.A. 18A:36A-14(b) provides that "[a] charter school shall not set a teacher salary lower than the minimum teacher salary specified pursuant to section 7 of P.L.1985, c.321 (C.18A:29-5.6) nor higher than the highest step in the salary guide in the collective bargaining agreement which is in effect in the district in which the charter school is located." *See also* 34 N.J.R. 2920(a) (Aug. 19, 2002) ("Charter schools pay their teachers and professional staff not less than the State minimum salary nor more than the salaries of the district boards of education in which the charter schools are located.").

Lastly, appellants argue that the Commissioner ignored serious safety concerns about the Mettlers Road location. However, prior to opening the new campus, CJCP must submit to the NJDOE the new lease, mortgage, or title to the facility, a valid certificate of occupancy for educational use issued by the local municipal enforcing official, a sanitary inspection report with a satisfactory rating, and a fire inspection certificate with an "Ae" (education) code life hazard. *N.J.A.C. 6A:11-2.1(i)(6)*-(9). The regulations **[*25]** are designed to ensure that facilities are safe for students.

Thus, none of the issues raised by appellants in this section of their brief present a basis for disturbing the Commissioner's decision.

V.

Finally, appellants argue in Point IV, as the challengers unsuccessfully did with respect to Hatikvah in *Highland Park II* and *Piscataway*, that there is no statutory authority under the CSPA to obligate Piscataway to fund its students' attendance at CJCP and thus, the Commissioner's decision was arbitrary, capricious, or unreasonable because it violated express or implied legislative policies. They contend that N.J.S.A. 18A:36A-12(b) explicitly limits financial responsibility for students' attendance at charter schools to the "school district of residence," which they interpret to mean the district where the charter school is located, or at most, the contiguous districts identified in the school's approved "region of residence."

Unlike New Brunswick and North Brunswick, Piscataway is not included in CJCP's district or region of residence. Thus, appellants argue that since the Commissioner's approval of the expansion was based in part on the presumed ongoing flow of revenue from Piscataway, it was inherently arbitrary **[*26]** and should be vacated. This contention continues to lack merit. Nevertheless, we fully address it here.

Appellants in their resolutions calling for a moratorium on all new charter school seats in Middlesex and Somerset Counties only generally claimed that the Department had interpreted the CSPA "to require all public school districts statewide to pay charter schools for students enrolled in those schools regardless as to whether the charter serves the district's community as part of the charter's approved district or region of residence." Thus, the Commissioner did not address this issue in approving CJCP's application to amend its charter.

The scope of judicial review of a final decision of the Commissioner is limited. Quest Acad., 216 N.J. at 385. Although the Appellate Division is not bound by an agency's determination on a question of law, Hargrove v. Sleepy's, LLC, 220 N.J. 289, 301, 106 A.3d 449 (2015), "[c]ourts afford an agency 'great deference' in reviewing its 'interpretation of statutes within its scope of authority and its adoption of rules implementing' the laws for which it is responsible." New Jersey Ass'n of School Adm'rs v. Schundler, 211 N.J. 535, 549, 49 A.3d 860 (2012) (quoting New Jersey Soc. for Prevention of Cruelty to Animals v. New Jersey Dept. of Agriculture, 196 N.J. 366, 385, 955 A.2d 886 (2008)).

"[T]he goal of statutory interpretation is to ascertain and effectuate the Legislature's intent." Cashin v. Bello, 223 N.J. 328, 335, 123 A.3d 1042 (2015). "[T]he best indicator of that intent is the statutory language." **[*27]** DiProspero v. Penn, 183 N.J. 477, 492, 874 A.2d 1039 (2005). "Accordingly, '[t]he starting point of all statutory interpretation must be the language used in the enactment.'" Spade v. Select Comfort Corp., 232 N.J. 504, 515, 181 A.3d 969 (2018) (quoting New Jersey Div. of Child Protection and Permanency v. Y.N., 220 N.J. 165, 178, 104 A.3d 244 (2014)). Courts "construe the words of a statute 'in context with related provisions so as to give sense to the legislation as a whole.'" Spade, 232 N.J. at 515 (quoting North Jersey Media Grp., Inc. v. Tp. of Lyndhurst, 229 N.J. 541, 570, 163 A.3d 887 (2017)). If the plain language leads to a clear and unambiguous result, then the court's "interpretative process is over." Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 386, 143 A.3d 254 (2016). Courts "turn to extrinsic tools to discern legislative intent . . . only when the statute is ambiguous, the plain language leads to a result inconsistent wi th any legitimate public policy objective, or it is at odds with a general statutory scheme." Shelton v. Restaurant.com, Inc., 214 N.J. 419, 429, 70 A.3d 544 (2013).

At issue here, as it was in *Highland Park II*, N.J.S.A. 18A:36A-12(b) provides that:

> The *school district of residence* shall pay directly to the charter school for each student enrolled in the charter school who resides in the district an amount equal to 90% of the sum of the budget year equalization aid per pupil, the prebudget year general fund tax levy per pupil inflated by the CPI rate most recent to the calculation, and the employer payroll tax per pupil that is transferred to the school district pursuant to subsection d. of section 1 of P.L.2018, c.68. In addition, the *school district* ***[*28]*** *of residen ce* shall pay directly to the charter school the security categorical aid attributable to the student and a percentage of the district's special education categorical aid equal to the percentage of the district's special education students enrolled in the charter school and, if applicable, 100% of preschool education aid. *The district of residence shall also pay directly to the charter school any federal funds attributable to the student*.
> [(Emphasis added).]

The term "school district of residence" is not defined in the CSPA or the implementing regulations. The term "district of residence" is defined in the regulations as "the school district in which a charter school facility is physically located; if a charter school is approved with a region of residence comprised of contiguous school districts, that region is the charter school's district of residence." *N.J.A.C. 6A:11-1.2*; *N.J.A.C. 6A:23A-15.1*.[5] A school district does not, however, reside in a district, it is located in a district. Moreover, the district of residence where the charter school is located does not receive equalization aid, security categorical aid, or federal funds "attributable" to a charter student who is not a resident of that district. *See* N.J.S.A. 18A:7F-43 to -63 (SFRA) **[*29]** . Thus, it would make no sense to interpret "school district of residence" to mean the "district of residence." N.J.S.A. 18A:36A-12(b).

In fact, the State Board of Education promulgated *N.J.A.C. 6A:23A-15.2* and -15.3, which as discussed in more detail in our decision in *Piscataway*, require both a "district of residence" and a "non-resident district" to fund its students' attendance at a charter school. However, appellants argue that under *N.J.A.C. 6A:23A-15.2* and -15.3, a "non-resident district" should be interpreted to mean only those "non-resident districts" that are within a charter school's region of residence because those districts would be entitled to the same opportunity for input as the district where the charter school is located. *N.J.A.C. 6A:11-2.1*; *N.J.A.C. 6A:11.2.6.* They contend that the Department's interpretation of the CSPA to require all non-resident districts to fund their students' attendance at charter schools is inconsistent with that Act because non-resident districts located outside the approved region of residence are not entitled to receive notice or input as to the approval or amendment process.

Significantly, after the parties filed briefs in this case, we rejected this identical argument in *Highland* ***[*30]*** *Park I*.[6] In that case, Highland Park appealed from the Commissioner's March 19, 2015 final decision approving Hatikvah's second application to amend its charter to expand its grades. *Highland Park I, 2018 N.J. Super. Unpub. LEXIS 158 at *2*.

In *Highland Park I*, the Appellate Division initially noted that Highland Park had not raised this issue in March 2014 when Hatikvah sought to renew its charter, or in November 2014 when Hatikvah sought to expand its enrollment. *2018 N.J. Super. Unpub. LEXIS 158 at *13*. Highland Park had never challenged the regulations requiring resident and non-resident school districts to fund their students' attendance at a charter school, and had "paid tuition for its students to attend the school for at least six years." *2018 N.J. Super. Unpub. LEXIS 158 at *15*. Nonetheless, because it involved "an issue of law," the court decided to exercise its discretion and address the argument even though it was raised for the first time on appeal. *Ibid.*

Turning to the merits, this court found that the plain language of N.J.S.A. 18A:36A-12(b) "expressly provides

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[5] A "region of residence" is defined as the "contiguous school districts in which a charter school operates and is the charter school's district of residence." ***N.J.A.C. 6A:11-1.2***. *See In re Charter Sch. Appeal of the Greater Brunswick Charter Sch., 332 N.J. Super. 409, 424, 753 A.2d 1155 (App. Div. 1999)* ("[R]egulations allowing regional charter schools are a legitimate means of effectuating the Act's purpose of encouraging the establishment of charter schools ."). A non-resident school district is defined as "a school district outside the district of residence of the charter school." ***N.J.A.C. 6A:11-1.2***.

[6] Although the case is unpublished, it involved most of the same parties and the identical issue raised here, and thus even if not binding under the doctrine of collateral estoppel, the legal analysis is persuasive and may constitute secondary authority. ***R. 1:36-3***.

that the 'school district of residence' must pay the charter school for 'each student' enrolled in the school." 2018 N.J. Super. Unpub. LEXIS 158 at *16. Thus, the court held that "as used in N.J.S.A. 18A:36A-12(b), the term 'school district of residence' refers to the district where the student resides, not the **[*31]** district where the charter school is located." *Ibid.* The court found that the CSPA

> expressly envisions that students may enroll in a charter school, even though they reside in a district other than the district where the charter school is located. *See* N.J.S.A. 18A:36A-8(a) (requiring charter schools to give preference for enrollment to students who reside "in the school district in which the charter school is located"). There is nothing in the Act that would allow these students to attend a charter school without a financial contribution from the school districts in which they reside. Thus, under N.J.S.A. 18A:36A-12(b), obligation of a school district to attend a charter school is not limited to the charter school's "district of residence."
>
> [2018 N.J. Super. Unpub. LEXIS 158 at *16-17.]

Further, we found that the regulations adopted pursuant to the CSPA were "consistent with this interpretation of N.J.S.A. 18A:36A-12(b). Indeed, the regulations expressly provide that both a charter school's 'district of residence' and the 'non-resident school districts' must pay for their students to attend a charter school. *N.J.A.C. 6A:23A-15.3(g)(2)*, (3)." 2018 N.J. Super. Unpub. LEXIS 158 at *17. *See also N.J.A.C. 6A:23A-15.2* (resident and non-resident school districts shall use projected charter school aid).

The court in *Highland Park I* also found support for this interpretation in the legislative **[*32]** history, explaining that in its fiscal estimate for *S. 1796* (1995), which, combined with *A. 592* (1995), became the CSPA, the Office of Legislative Services, included the following statement:

> In regard to the funding of charter schools, the bill provides that the school district of residence would pay directly to the charter school for each student enrolled who resides in the district an amount equal to the local levy budget per pupil in the district for the specific grade level. . . . *The cost for out of district pupils would be paid by the district of residence of the pupil*. . . .
>
> [2018 N.J. Super. Unpub. LEXIS 158 at *17-18 (quoting *Legislative Fiscal Estimate to S. 1796* 1 (Sept. 14, 1995) (emphasis added)).]

That statement "makes clear that all school districts of residence must pay for students to attend a charter school, and the financial obligation is not limited to the charter school's 'district of residence.'" 2018 N.J. Super. Unpub. LEXIS 158 at *18.

In so ruling, we found unpersuasive Highland Park's citation to other provisions of the Charter School Act that pertain to a charter school's "district of residence." 2018 N.J. Super. Unpub. LEXIS 158 at *18. For example, the court found that

> Highland Park cites N.J.S.A. 18A:36A-4(c), which requires a proposed charter school to provide a copy of its application to the "local **[*33]** board of education." However, the statute does not support Highland Park's argument. N.J.S.A. 18A:36A-4(c) also requires the Commissioner to provide notice to "members of the State Legislature, school superintendents, and mayors and governing bodies of all legislative districts, school districts, or municipalities in which there are students who will be eligible for enrollment in the charter school."
>
> Highland Park also cites N.J.S.A. 18A:36A-14(b), a statute that limits a charter school's salaries to the salaries of the highest step in the district where the school is located; and N.J.S.A. 18A:36A-16(b), which requires a charter school to serve a copy of its annual report on the local board of education in the district where the school is located. However, these statutes have no direct bearing on whether a student's "school district of residence" must pay for students from that district to attend at a charter school.
>
> [2018 N.J. Super. Unpub. LEXIS 158 at *18-19.]

Thus, we concluded that

> under N.J.S.A. 18A:36A-12(b), the term "school district of residence" means the school district where the student resides, and each "school district of residence" must pay the charter school for its student to attend the school, in the amounts required by the Act and the regulations. We therefore reject Highland Park's contention **[*34]** that only the charter school's "district of residence" is obligated to pay for its students to attend the school.

[*2018 N.J. Super. Unpub. LEXIS 158 at *20*.]

Similarly, as addressed in *Piscataway*, the Commissioner issued a final decision in which she interpreted the CSPA and the regulatory provisions, *N.J.A.C. 6A:23A-15.1 to -15.4*, to require school districts to "provide funding for its students enrolled in charter schools located in other school districts." *Bd. of Educ. of Twp. of Piscataway v. NJ Dep't of Educ.*, EDU 10995-16, final decision, (July 27, 2017) (the Piscataway Board of Education was obligated to pay for its resident students to attend a number of out-of-district charter schools).

Appellants argue that under that interpretation, non-resident school districts will be deprived of due process because non-resident districts are not entitled to receive formal notice of a charter school's application to amend its charter, or input into the amendment process. *See N.J.A.C. 6A:11-2.6(a)(b)*. They argue that "the net effect of these regulations as applied by the Department is to render every New Jersey district the 'district of residence' of every charter school in the state."

However, because preference for enrollment in a charter school is given to students who reside in **[*35]** the school district in which the charter school is located, *N.J.S.A. 18A:36A-8(a)*, it is likely that the majority of students will reside in that district, and thus it makes sense that the district of residence should receive formal notice and an opportunity for input. Moreover, it was undisputed that appellants in this case, and in the back-to-back companion appeals, were aware of the amendment and had an opportunity to submit comments on the amendment request. In fact, the Commissioner received, and considered, comments from several school districts, individuals, an educational service commission, and even several legislators. Thus, the notice provisions simply do not relieve non-resident districts from bearing financial responsibility for its students' attendance at charter schools.

As noted in our decisions today in *Highland Park II* and *Piscataway*, we are persuaded by the reasoning expressed in *Highland Park I*, and by the Commissioner in her final decision in *Piscataway*. The plain language of the statute requires each student's district of residence to pay for the student to attend a charter school. *N.J.S.A. 18A:36A-12(b)*. That interpretation is entirely consistent with the CSPA and the policy expressed by the Legislature. **[*36]** Charter schools are open to all students, both resident and non-resident students, and there is no indication in the CSPA that the Legislature intended to exclude non-resident districts from funding their students' attendance at a charter school. It is also consistent with the legislative history and the implementing regulations, which require a non-resident district to fund its students' attendance at a charter school. *N.J.A.C. 6A:23A-15.2* and -15.3. Thus, Piscataway is obligated to provide funding for its students enrolled in CJCP.

VI.

In sum, we affirm the Commissioner's decision approving CJCP's application to amend its charter, and compelling Piscataway to fund its students' attendance at that school. The decision was not arbitrary, capricious, or unreasonable, promoted the legislative policy of the CSPA, and was fully supported by the record.

Affirmed.

Table1 (Return to related document text)

Grade	2017-2018	2018-2019	2019-2020
Kindergarten	72	96	96
Grade 1	72	96	96
Grade 2	72	96	96
Grade 3	48	72	96
Grade 4		48	72
Grade 5			48
Grade 6	72	168	168
Grade 7	48	144	168
Grade 8	48	48	144
Grade 9	48	120	120
Grade 10	48	48	120
Grade 11	48	48	48
Grade 12	48	48	48
Total	**624**	**1032**	**1320**

Table1 (Return to related document text)

Table2 (Return to related document text)

Asian Students	School Year 2010-2011	School Year 2016-2017
Franklin Township	20%	16%
New Brunswick	≤1%	≤1%
North Brunswick	28%	25%
CJCP	3%	38%

Table2 (Return to related document text)

Table3 (Return to related document text)

District or School	Hispanic Students 2016-2017	Free or Reduced Lunch Students 2016-2017	LEP[3] Students 2016-2017	Students with Special Needs 2016-2017
Franklin	31%	48%	8%	19%
New Brunswick	89%	60%	19%	17%
North Brunswick	32%	41%	4%	15%
CJCP	18%	24%	0%	7%

Table3 (Return to related document text)

Table4 (Return to related document text)

Students Pre-K to 12	North Brunswick 2010-2011	North Brunswick 2016-2017	New Brunswick 2010-2011	New Brunswick 2016-2017
White	26.8%	18.8%	1.1%	0.8%
Black	20.0%	21.3%	15.1%	9.7%

[3] Limited English proficiency students.

Students Pre-K to 12	North Brunswick 2010-2011	North Brunswick 2016-2017	New Brunswick 2010-2011	New Brunswick 2016-2017
Asian	28.7%	25.1%	0.8%	0.4%
Hispanic	24.0%	32.5%	82.6%	88.8%
LEP	3.9%	4.4%	16.3%	18.7%
Special needs	14.4%	15%	9.3%	16.8%
Free or reduced lunch	29.4%	41.1%	79.5%	59.7%

Table4 (*Return to related document text*)

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Bd. of Educ. of Hoboken v. New Jersey State Dep't of Educ.

Superior Court of New Jersey, Appellate Division

May 2, 2017, Argued; June 29, 2017, Decided

DOCKET NO. A-3690-14T3

Reporter
2017 N.J. Super. Unpub. LEXIS 1639 *

BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY, Petitioner-Appellant, v. NEW JERSEY STATE DEPARTMENT OF EDUCATION and BOARD OF TRUSTEES OF THE HOBOKEN DUAL LANGUAGE CHARTER SCHOOL, Respondents-Respondents.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the Commissioner of Education.

Core Terms

charter school, enrollment, charter, segregative, public school, pre-K, white student, renewal, thorough, funding, lottery, student population, argues, school district, school year, practices, schools, cross section, special needs, statistics, decrease, census, grades, low-income, withdrawal, imbalance, factors, parties, ethnic

Counsel: Eric L. Harrison argued the cause for appellant (Methfessel & Werbel, attorneys; Mr. Harrison, of counsel and on the brief; Kegan S. Andeskie, on the brief).

Viola S. Lordi argued the cause for respondent Board of Trustees of Hoboken Dual Language Charter School (Wilentz, Goldman & Spitzer, attorneys; Ms. Lordi, of counsel and on the brief; Gordon J. Golum and Maureen S. Binetti, on the brief).

Donna S. Arons, Deputy Attorney General, argued the cause for respondent Department of Education (Christopher S. Porrino, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Ms. Arons and Frederick Wu, Deputy Attorneys General, on the brief).

Avram D. Frey argued the cause for amicus curiae American Civil Liberties Union of New Jersey and Education Law Center (Gibbons, P.C., Education Law Center, and American Civil Liberties Union of New Jersey Foundation, attorneys; Lawrence S. Lustberg, Mr. Frey, David Sciarra, Elizabeth Athos, Edward Barocas and Alexander Shalom, on the brief).

Paul P. Josephson argued the cause for amicus curiae New Jersey Charter Schools Association (Duane Morris LLP, attorneys; Mr. Josephson, **[*2]** on the brief).

Judges: Before Judges Reisner, Koblitz and Rothstadt.

Opinion

PER CURIAM

The Board of Education of the City of Hoboken, Hudson County (Hoboken) appeals the Commissioner of Education's (Commissioner) March 20, 2015 grant of the Hoboken Dual Language Charter School's (HoLa) application to expand its grade-level offerings to seventh

and eighth grade. Hoboken claims that the Commissioner failed to consider the charter school's alleged segregative and funding impact on the district and improperly declined to hold a hearing, conduct interviews, or gather more facts concerning the charter school's policies. Because neither the methodology used by the Commissioner nor his decision were arbitrary, capricious, or unreasonable, we affirm.

On October 15, 2013, HoLa submitted a charter renewal and expansion application to the Commissioner and Hoboken. The Hoboken Superintendent fully supported Hola's charter renewal, but objected to its expansion. On March 5, 2014, Evo Popoff, the Chief Innovation Officer at the Department of Education (the Department), acting on the Commissioner's behalf, renewed HoLa's charter for five years, through June 30, 2019. Popoff also permitted the elementary school to add **[*3]** a seventh-grade class for the 2016-2017 school year and an eighth-grade class for the 2018-2019 school year.

Hoboken appealed, and after our remand to the Commissioner upon application of the Department, and after the parties submitted additional materials, the Commissioner again granted HoLa's renewal and expansion application on March 20, 2015. We denied a stay.

The City of Hoboken has a public school system for students in grades kindergarten (K) through 12 consisting of four public schools: Brandt, Calabro, Connors and Wallace. It also includes three charter schools including HoLa, and four private, tuition-based K-8 schools.

According to HoLa, the original intent of its founders was to implement a dual-language program (Spanish and English) at Hoboken's Connors school (the district's most segregated and poorest school), but Hoboken rejected the plan. HoLa then applied for and was granted a charter to operate a dual-language school beginning in September 2010, starting with grades K-2 and expanding each year until HoLa encompassed grades K-6. HoLa is located in a low-income section of Hoboken, close to the Connors school.

Students are admitted to HoLa through a lottery with no interviews. **[*4]** No demographic data is collected until students are registered. In order to represent a cross section of the Hoboken community, HoLa holds open houses and tours and advertises in local publications. It also partners with local organizations to recruit on-site. Dates for the open houses, tours and events, as well as the lottery, are posted on the school's website and are printed on flyers "distributed throughout the city." In addition, applications and brochures are mailed to every low-income household each year prior to the lottery. HoLa's parents and teachers also canvass subsidized and public housing and help complete applications on the spot.

Parents may enroll children in the lottery online, in person, or by a phone call to the school. HoLa has a sibling preference, so that if a child is enrolled in HoLa, that child's younger sibling will have priority over other lottery applicants. On December 23, 2014, HoLa submitted a request to the Commissioner to include a low-income preference in its lottery.[1]

Initially, in 2013, Popoff conducted "a comprehensive review" of HoLa, "including the evaluation of the school's renewal application, annual reports, student performance on state assessments, **[*5]** site visit results, public comments, and other information." Popoff found that HoLa was "providing a high-quality education to its students." In the 2012-2013 school year, 82% of HoLa's students were at least proficient in Language Arts, while 91% were at least proficient in math. By comparison, only 50% of Hoboken's traditional public school students were at least proficient in Language Arts and 52% were at least proficient in math.

After the remand, the parties submitted more information, including census and student enrollment data. According to 2010 U.S. Census data, Hoboken's under-seventeen population was 57% white, 26% Hispanic, and 16% "other" reflecting a significant increase in the percentage of white children from the 2000 Census data, which showed Hoboken's under-seventeen population as 39% white, 46% Hispanic, and 15% "other." In the 2009-2010 school year (the year before HoLa started operating), Hoboken's traditional public school student population was 22% white, 59% Hispanic, 15% black, and 4% Asian. By the 2013-2014 school year, four years after HoLa began, Hoboken's traditional public school student population had increased its percentage of white students from 22% **[*6]** to 27%.

The Commissioner considered the racial breakdown of the students in the public and charter schools for 2012-2013 and 2013-2014. Between these school years, the percentage of white students at HoLa rose from 60.6%

[1] This request was granted in December 2015 after the record in this case closed.

to 63%, while Connors rose from only 3.9% white students to 4%. Brandt rose from 61.5% to 72%, and Wallace rose from 32.6% to 43%. The final public school, Calabro, dipped from 34.6% to 32%. As can be seen by these statistics, minority students are heavily concentrated at Connors, where in both years they made up approximately 95% of the student population. The percentage of students receiving free or reduced-price lunch decreased for all four Hoboken public elementary schools from 2010-2011 to 2013-2014, although at Connors 88% of the students still received a lunch subsidy in 2013-2014.

In addition to considering the submitted materials, the Office of Charter Schools conducted its own review of data focusing on race and ethnicity to determine whether HoLa was having a segregative effect on the Hoboken Public School District, stating: "After the Department's analysis of publically available student enrollment data, census data, and documentation submitted by the parties, **[*7]** it has been determined that HoLa does [not] and will not have a segregative effect on [Hoboken]." The Commissioner explained:

> [A]lthough HoLa enrolls a higher percentage of White students, and a smaller percentage of Black and Hispanic students than [Hoboken], the percentage of White students attending [Hoboken] has actually increased since HoLa opened in 2010 with the percentage of Hispanic students decreasing in that same period. The percentage of Black students in [Hoboken] has stayed fairly constant since 2010. The increase in percentage of [Hoboken's] White students since 2010, along with the decrease in Hispanic students, and the lack of changes to the percentage of Black students indicates that HoLa's enrollment has not had a segregative effect on [Hoboken]. Instead, the data points towards an overall population shift in the last ten years in the City of Hoboken, which began before the opening of HoLa Charter School.

Hoboken argues that in granting the expansion of HoLa's charter to include seventh and eighth grades, the Commissioner: 1) failed to consider HoLa's alleged racially and economically segregative effect; 2) failed to consider the funding impact to students affected by poverty **[*8]** and special needs; and 3) failed to conduct interviews, gather facts, or hold a hearing to consider HoLa's policies and practices.

Our review of the Commissioner's decision is limited. *In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385, 80 A.3d 1120 (2013)*. "[A] court may intervene when 'it is clear that the agency action is inconsistent with its mandate.'" *Ibid.* (quoting *In re Petition for Rulemaking, 117 N.J. 311, 325, 566 A.2d 1154 (1989)*).

> [A]lthough sometimes phrased in terms of a search for arbitrary or unreasonable agency action, the judicial role [in reviewing an agency's action] is generally restricted to three inquiries: (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> [*Id. at 385-86* (quoting *Mazza v. Bd. of Trs., 143 N.J. 22, 25, 667 A.2d 1052 (1995)*) (second alteration in the original).]

In reviewing administrative decisions, however, courts are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." *Shim v. Rutgers, 191 N.J. 374, 384, 924 A.2d 465 (2007)* (quoting *In re Taylor, 158 N.J. 644, 658, 731 A.2d 35 (1999)*). Nevertheless, "case law has recognized the value that **[*9]** administrative expertise can play in the rendering of a sound administrative determination." *In re Proposed Quest Acad., supra, 216 N.J. at 389*.

The Supreme Court gave the following overview of the law regarding charter schools:

> The *Charter School Program Act of 1995 (the Act)* . . . (codified as amended at *N.J.S.A. 18A:36A-1 to -18*), authorizes the establishment of charter schools in New Jersey. *See N.J.S.A. 18A:36A-2* (finding that charter schools "can assist in promoting comprehensive educational reform" and that their establishment "is in the best interests of the students of this State"). The Act charges the Commissioner of Education (Commissioner) with the responsibility to establish a program to "provide for the approval and granting of charters to charter schools pursuant to [the Act]." *N.J.S.A. 18A:36A-3*. The application process is governed by the Act, *see N.J.S.A. 18A:36A-4*, *-4.1*, and *-5*, and implementing regulations, *see N.J.A.C. 6A:11-2.1*. . . . Ultimately, the Commissioner has the "final authority to grant

> or reject a charter application." N.J.S.A. 18A:36A-4(c); *see also N.J.A.C. 6A:11-2.1(a)*.
>
> [*In re Proposed Quest Acad., supra, 216 N.J. at 373*.]

"Charter schools are public schools, which through legislative authorization are free from many state and local regulations." *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 164 N.J. 316, 320, 753 A.2d 687 (2000)* (*Englewood*). The Commissioner must conduct a "comprehensive review" before granting a charter renewal. *In re Red Bank Charter Sch., 367 N.J. Super. 462, 469, 843 A.2d 365 (App. Div.)*, *certif. denied*, *180 N.J. 457, 852 A.2d 193 (2004)*; *N.J.A.C. 6A:11-2.3(b)*. "[I]f the goals **[*10]** set forth in the charter school's charter are not fulfilled, the charter is not renewed." *Englewood, supra, 164 N.J. at 320*.

I. Racial Segregative Impact

Hoboken first argues that the Commissioner erred by using incomplete or flawed data and ignoring relevant data when finding that HoLa has not had and will not have a racially segregative impact. "Rooted in our Constitution, New Jersey's public policy prohibits segregation in our public schools." *Id. at 324*. "[T]he Commissioner is required to monitor and remedy any segregative effect that a charter school has on the public school district in which the charter school operates." *In re Red Bank Charter Sch., supra, 367 N.J. Super. at 471*. The "form and structure" of the segregation analysis is up to the Commissioner and the state Board of Education to determine. *Englewood, supra, 164 N.J. at 329*.

Hoboken complains of two problems with the data: 1) pre-K data was improperly included in the Department's reports for 2013-2014 and 2) the Commissioner used census data inclusive of the entire Hoboken population under age seventeen instead of data for only the school-age population. Hoboken argues that because the 2013-2014 Department's report erroneously included data for pre-K students in the district and HoLa did not enroll pre-K students, the report was not an accurate reflection **[*11]** of Hoboken's population. The Department data included data from the Brandt school, which served only pre-K and K students, and which enrolled a higher percentage of white students than the other public schools (62% white in 2012-2013 and 72% white in 2013-2014).

It is true that HoLa did not admit pre-K students and the Department's statistics for 2013-14 included data for pre-K students. However, the Department's 2012-2013 data did not include the pre-K data, and those numbers were relied upon to the same extent as the 2013-2014 numbers. Moreover, the inclusion of the pre-K data did not skew the statistics; although the pre-K data included Brandt, a predominately white school in the district, those same statistics also included data on Wallace and Connors, schools that were predominately minority, and which also added pre-K in the 2013-2014 school year. Thus, contrary to Hoboken's suggestion, the inclusion of Brandt did not skew the statistics. And, although HoLa did not offer pre-K, "trends in the student population" are "valid factors" to be considered when determining whether an action will have a segregative impact. ***[*12]*** *In re Petition for Authorization to Conduct a Referendum on the Withdrawal of N. Haledon Sch. Dist. from the Passaic Cty. Manchester Reg'l High Sch. Dist., 363 N.J. Super. 130, 142, 831 A.2d 555 (App. Div. 2003)* (*N. Haledon I*), *aff'd as mod.*, *181 N.J. 161, 854 A.2d 327 (2004)*. The Commissioner properly considered the pre-K data because it provided solid evidence of the trends in the student population.

Hoboken also complains that the Commissioner erred in considering census information concerning all of the children under age seventeen in Hoboken and not just those of school age. It argues this was error because: 1) the statute requires a review of the community's "school age" population; 2) the under-five age group is overrepresented in the Hoboken population; and 3) the relevant comparison is that of the student population in the *district*, not the student population of Hoboken.

N.J.S.A. 18A:36A-8(e) addresses enrollment preferences, stating: "The admission policy of the charter school shall, to the maximum extent practicable, seek the enrollment of a cross section of the community's school age population, including racial and academic factors." The racial make-up of students expected to enroll in school in the next four years is a trend that the Commissioner should consider. *N. Haledon I, supra, 363 N.J. Super. at 142*.

Hoboken argues that the relevant statistics were those that compared HoLa's student population to the student population of **[*13]** the traditional public school system, not to the population of those under age seventeen. To support its position, it cites to *Englewood*, which states the Commissioner "must consider the impact that the movement of pupils to a charter school would have on the district of residence" and it is the Commissioner's

"obligation to oversee the promotion of racial balance in our *public schools* to ensure that *public school pupils* are not subjected to segregation." *Englewood, supra, 164 N.J. at 328* (emphasis added). Hoboken also cites to *N.J.A.C. 6A:11-2.2(c)* that states in part that "the Commissioner shall assess 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.S.A. 18A:36A-8(e), however, states that a charter school's admission policy must seek to enroll "a cross section of the *community's* school age population." (Emphasis added). This indicates that the entire community, not just the students enrolled in the public schools, must be considered. Any other interpretation would exclude potential students who had already elected not to attend public schools, but who were part of the population eligible to attend the public schools. A simple comparison between the charter schools **[*14]** and the traditional public schools is not necessarily representative of the demographics: based on 2013-2014 data, 65% of Hoboken's school-age population was white, but only 27% of Hoboken's students were white. This was largely the result of four private K-8 schools that enrolled thousands of Hoboken's students. Consequently, the analysis is complicated. It is not fair to HoLa to refuse to recognize the impact of the private schools on overall school enrollment in Hoboken, as HoLa has no control over private school enrollment. Hoboken presents no data of its own to support its positions. The Commissioner did not act arbitrarily in considering the data presented.

Assuming that the data the Commissioner relied on was correct, Hoboken maintains that the Commissioner's legal interpretation of that data was wrong in that "the lack of a documented *increase* in HoLa's segregative impact on Hoboken's school-aged children does not negate the *existence* of the segregative impact." We have stated:

> [A] Charter School should not be faulted for developing an attractive educational program. Assuming the school's enrollment practices remain color blind, random, and open to all students in the community, **[*15]** the parents of age eligible students will decide whether or not to attempt to enroll their child in the Charter School and any racial/ethnic imbalance cannot be attributed solely to the school. To close this school would undermine the Legislature's policy of "promoting comprehensive educational reform" by fostering the development of charter schools.
>
> [*In re Red Bank Charter Sch., supra, 367 N.J. Super. at 478* (quoting *N.J.S.A. 18A:36A-2*).]

In *Red Bank*, as here, a disparity existed between the enrollment of minority students in the charter school and the traditional public schools. *Id. at 473-74*. We were concerned that after initial enrollment, the charter school in *Red Bank* decreased the percentage of minority students as the students progressed toward graduation, with the argument being made that the charter school frequently returned minority students with poor academic records to the public schools just in time for standardized testing. *Id. at 479*. We determined that the charter school's "manner of operation of the school after its color-blind lottery, warrants closer scrutiny to determine whether some of the school's practices may be worsening the existing racial/ethnic imbalance in the district" and remanded to the Commissioner to determine "whether remedial action is warranted." **[*16]** *Id. at 480, 482*. Despite the stark disparity in *Red Bank*, however, we approved the renewal and expansion of the charter school. *Id. at 486*. Unlike in *Red Bank*, there are no allegations that HoLa's practices after the enrollment of students by an impartial lottery exacerbated the racial or ethnic balance.

In addition to the arguments Hoboken makes in the context of the charter school statutory scheme, it also argues that the Commissioner violated his duty to enforce the "Thorough and Efficient Education" clause of the New Jersey Constitution when he failed to remedy de facto segregation caused by HoLa's expansion. In the "Education Clause" or the "Thorough and Efficient Provision," the New Jersey Constitution provides: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." *N.J. Const.* art. VIII, § 4, ¶ 3; *see Petition for Authorization to Conduct a Referendum on Withdrawl of N. Haledon Sch. Dist. v. Passaic Cty. Manchester Reg'l High Sch. Dist., 181 N.J. 161, 173 n.3, 854 A.2d 327 (2004)* (*N. Haledon II*). "[R]acial imbalance resulting from *de facto* segregation is inimical to the constitutional guarantee of a thorough and efficient education." *Id. at 177*. The Commissioner must "exercise broadly his statutory powers when confronting segregation, whatever the cause." *Englewood, supra, 164 N.J. at 324*. However, it is "not **[*17]** really possible to establish a precise point when a thorough and efficient education is threatened by racial imbalance." *N. Haledon II, supra, 181 N.J. at 183*.

In North Haledon, the Borough of North Haledon sought a referendum to determine whether it should be allowed to withdraw from the Passaic County Manchester Regional High School District. Id. at 164. Although the Board of Review granted the withdrawal, several interested parties objected arguing that the Board failed to assess the impact of the withdrawal on the racial makeup of the high school, given the white student population would decrease by nine percent, and that the percentage of minorities would continue to rise and the white population would continue to decline due to population trends in the sending towns. Id. at 164, 174. Our Supreme Court stated:

> Not every action that reduces the percentage of white students necessarily implicates the State's policy against segregation in the public schools. . . . What we do know is that in this case, demographic trends are contributing to a steady decrease in the number of white students attending Manchester Regional, and that North Haledon's withdrawal will accelerate this trend. Rather than using the demographic trend as an excuse for approving **[*18]** North Haledon's petition, the Board should have considered the ameliorative effect of denying the petition on the racial balance at Manchester Regional.
>
> [Id. at 183.]

Hoboken does not, however, show that expanding HoLa will increase racial imbalance as it did in North Haledon. To the contrary, the percentage of white students in Hoboken schools increased since HoLa opened.

II. Economic Segregation

Hoboken also claims that the Commissioner failed to consider the economic disparity between the student populations of HoLa and the district. It points out that while 11% to 16% of HoLa's population qualified for free or reduced-price lunch, Hoboken had much higher levels in some schools. N.J.S.A. 18A:36A-8 does not specifically address economic factors, instead requiring the admission policy of a charter school to "seek the enrollment of a cross section of the community's population including racial and academic factors."

The evidence showed that HoLa's policies are geared toward admitting a cross section of the school-aged population, economically as well as racially and ethnically. HoLa canvassed and advertised in Hoboken's subsidized housing developments. On December 23, 2014, HoLa submitted a successful request to the **[*19]** Department to include a low-income preference in its lottery. Hoboken fails to convince us that the facts regarding economically disadvantaged students lead to a conclusion that HoLa should not be permitted to expand.

III. Funding Impact

Hoboken next argues that the Commissioner's decision was arbitrary and capricious because he failed to consider its January 30, 2015, submission to the court and Hoboken Superintendent Mark Toback's December 13, 2010 letter concerning the funding impact that charter schools had on Hoboken's budget, including the number of special needs students enrolled in HoLa versus Hoboken.

N.J.S.A. 18A:36A-12(b) provides:

> The school district of residence shall pay directly to the charter school for each student enrolled in the charter school who resides in the district an amount equal to 90% of the sum of the budget year equalization aid per pupil and the prebudget year general fund tax levy per pupil inflated by the CPI rate most recent to the calculation. In addition, the school district of residence shall pay directly to the charter school the security categorical aid attributable to the student and a percentage of the district's special education categorical aid equal to the percentage **[*20]** of the district's special education students enrolled in the charter school, and, if applicable, 100% of preschool education aid. The district of residence shall also pay directly to the charter school any federal funds attributable to the student.

Toback pointed out that the allocation of funds to the charter schools located in Hoboken had "nearly tripled in only a few short years" and that the pattern was not sustainable "given our enrollment increase at the lower grade levels coupled with a 2% tax cap." He claimed that "[e]ven with tax increases, the district must make cuts to services and programs for our students to support charter expansion." He wrote: "We have four school district leaders in one square mile, four business administrators, four separate payrolls, four separate boards of education and a host of required services that are duplicated." However, he did not submit specific financial data to support those assertions.

As to students with special needs, Toback wrote:

> HoLa does enroll a few special needs children, and the other two charters enroll about the same percentage of special needs students as our district. But it must be noted that the charter schools do not enroll students **[*21]** with significant disabilities. It is the public district that enrolls the most significantly disabled children and pays for private out-of-district placements. This concentrates an expensive undertaking in the public schools, thus raising our per-pupil costs and reducing per-pupil costs in charter schools.

He further noted, again without district-specific evidence, that the existing law gave an "incentive" for charter schools to place special needs students in out-of-district placements, which put the cost back on the district.

> [I]f the local school district "demonstrates with some specificity that the constitutional requirements of a thorough and efficient education would be jeopardized by [the district's] loss" of the funds to be allocated to a charter school, "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."
>
> [*In re Proposed Quest Acad., supra, 216 N.J. at 377-78* (quoting *Englewood, supra, 164 N.J. at 334-35*).]

"[U]nsubstantiated, generalized protests" are insufficient. *Englewood, supra, 164 N.J. at 336*. "Renewal of a successful charter school will be favored, 'unless reliable information is put forward to demonstrate that a constitutional violation may occur.'" *In re Red Bank Charter Sch., supra, 367 N.J. at 482-83* (quoting *Englewood, supra, 164 N.J. at 336*).

"[T]he Commissioner is **[*22]** entitled to rely on the district of residence to come forward with a preliminary showing that the requirements of a thorough and efficient education cannot be met." *Englewood, supra, 164 N.J. at 334*. The district "must be able to support its assertions" as the Commissioner does not have "the burden of canvassing the financial condition of the district of residence in order to determine its ability to adjust to the per-pupil loss upon approval of the charter school based on unsubstantiated, generalized protests." *Id. at 336*.

In *In re Red Bank Charter Sch., supra, 367 N.J. Super. at 482*, the district claimed that the funding of a charter school would cause the district's budget to be reduced by $720,000, and that it would cause the elimination of four positions, resulting in bigger classes, as well as the elimination of courtesy busing and reduction of hall monitors, instructional assistants, and cafeteria monitors. In spite of these representations, we found the "paucity of specificity" in the district's claim to be "fatal." *Id. at 483*.

Here, Hoboken does not argue that the financial losses surrounding HoLa's expansion would impede Hoboken's ability to provide a thorough and efficient education. It mounts only general, non-specific and unconvincing attacks on the entire charter school scheme and **[*23]** does not separate HoLa's impact from the impact of the other two charter schools.

IV. Fact-gathering

In its supplemental submission to the Commissioner after remand, Hoboken requested that the Commissioner "conduct further interviews, fact gathering, and perhaps hold a hearing to better assess possible interventions." On appeal, Hoboken argues that the Commissioner should have held hearings to consider the effect HoLa's policies and practices had on segregation before reaching a decision as to HoLa's renewal and expansion application.

An adjudicatory hearing is not required in every contested renewal application case. *In re Proposed Quest Acad., supra, 216 N.J. at 383*. Hoboken raised the issues of HoLa's sibling preference, recruiting practices, fundraising practices, opt-in practice, and request for a low-income preference in its submissions to the Commissioner. Hoboken fails to state, however, what additional information was needed in order for the Commissioner to complete his review. The decision states: "[a]ll submitted materials from both parties were thoroughly reviewed." "When the Commissioner is not acting in a quasi-judicial capacity, as he was not here, he need not provide the kind of formalized findings and conclusions necessary **[*24]** in the traditional contested case." *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 320 N.J. Super. 174, 217, 727 A.2d 15 (App. Div. 1999)*, *aff'd as mod.*, *164 N.J. 316, 753 A.2d 687 (2000)*.

HoLa provides quality education to a cross section of Hoboken's children. As a dual-language school, HoLa

allows students to become bilingual in a curriculum with a multi-cultural content, and thus advances public policy goals. Hoboken has not shown that the Commissioner's decision to allow HoLa to expand was arbitrary, capricious, or unreasonable.[2]

Affirmed.

End of Document

[2] This decision does not preclude parents who believe their child was unfairly denied admission to HoLa for discriminatory reasons from registering an individual complaint pursuant to *N.J.S.A. 18A:36A-15*.