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October 4, 2019

Via Hand Delivery

Heather Joy Baker, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
25 Market Street
P.O. Box 097
Trenton, New Jersey 08625

Re: In re Renewal Application of TEAM Academy Charter School
In re Renewal Application of Robert Treat Academy Charter School
In re Renewal Application of North Star Academy Charter School of Newark
In re Amendment Request to Increase Enrollment of Maria L. Varisco-Rogers Charter School
In re Amendment Request to Increase Enrollment of University Heights Charter School
In re Amendment Request to Increase Enrollment of Great Oaks Legacy Charter School
In re Amendment Request to Increase Enrollment of New Horizons Community Charter School
Docket No.: 083014

On Petition for Certification From a Final Judgment of the Superior Court, Appellate Division.

Sat Below:

Hon. Jack M. Sabatino, P.J.A.D.
Hon. Thomas W. Sumners, Jr., J.A.D.
Hon. Richard J. Geiger, J.A.D.



Letter Brief in Opposition to Petition for Certification.

Dear Ms. Baker:

Please accept this letter brief in lieu of a more formal brief on behalf of the New Jersey Commissioner of Education ("Commissioner") in opposition to the Petition for Certification filed by Petitioner-Appellant Education Law Center ("ELC"). Submitted with this letter-brief are four copies of the Commissioner's Brief filed in the Appellate Division.

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PRELIMINARY STATEMENT

ELC's Petition for Certification should be denied because it merely repackages the same arguments that the Appellate Division's well-reasoned opinion considered and rejected. The Petition presents no question of general public importance such that the Supreme Court must weigh in, nor is certification required in the interests of justice. Finally, the issues in this case are not similar to any other matters currently before the court, nor does the Appellate Division's opinion conflict with other appellate decisions. As ELC presents no sufficient grounds justifying certification, the Petition should be denied.

ARGUMENT

**THE EDUCATION LAW CENTER FAILS TO SET FORTH
SUFFICIENT RATIONALE FOR THE SUPREME COURT TO
GRANT ITS PETITION FOR CERTIFICATION UNDER
RULE 2:12-4.**

The New Jersey Court Rules set forth the grounds upon which this Court may grant certification to review an Appellate Division decision. Certification may be granted "only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court." R. 2:12-4. Certification will also be granted "if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's

supervision." Ibid. Finally, the court may grant certification "if the interest of justice requires." Ibid.

Certification is not allowed on final judgments of the Appellate Division "except for special reasons." Ibid. The "special reasons" clause in Rule 2:12-4 underscores that certification decisions are case-specific, and that petitions for certification "will not be granted lightly." Pressler & Verniero, Current N.J. Court Rules, comment on R. 2:12-4 at 845 (2019). Nothing alleged in ELC's Petition satisfies the high standard required for the Supreme Court to grant certification.

The Petition fails to raise any "special reasons" sufficient for this Court to review the decision below. Appellant merely reiterates the arguments that were presented to and considered by the Appellate Division. A fair reading of the opinion shows that the Appellate Division considered these arguments within the context of the agency record and correctly determined they lack merit. The issues here do not present a question of "general public importance," as they relate only to the unique circumstances of the particular decisions under review in these consolidated matters. Further, there is no conflict among Appellate Division opinions that this Court need resolve; nor is counsel aware of any other similar question presented to this Court on appeal. The Appellate Division correctly applied the law to

the facts in this matter, and the interest of justice does not require further review by this Court.

ELC alleges four errors in the Appellate Division's decision relating to: 1) the Commissioner's evaluation of segregative impact; 2) the Commissioner's evaluation of fiscal impact; 3) whether there should be heightened scrutiny of certain charter school applications; and 4) the Commissioner's approval of satellite campuses. Nowhere does ELC address the plain fact that the co-Respondent charter schools are actually accommodating the high demand for high-quality educational options in Newark. The district has incorporated charter schools into its overall enrollment practices, permitting public school students across the district to preference their enrollment in either traditional district schools or charters. The record demonstrates that the co-Respondent schools were all Tier-One or Tier-Two schools, with high levels of achievement, and high levels of demand. The record also demonstrates that the Commissioner reviewed extensive data related to the schools' operational and fiscal management, and considered submissions from the schools, the district, and ELC.

Despite the quality of the schools, the enrollment demand for the expansions the Commissioner approved, and the fact that Newark did not share ELC's concerns regarding segregative or fiscal impact, ELC now seeks review of Appellate Division's

decision by merely raising the very same issues already raised below. The Appellate Division has already addressed each of these items in a decision that represents a straightforward application of the facts to well-settled law. The Petition for Certification should be denied.

- A. THE APPELLATE DIVISION CORRECTLY HELD THAT THE COMMISSIONER WAS NOT REQUIRED TO DISCUSS HIS FINDINGS REGARDING SEGREGATIVE AND FISCAL IMPACT IN HIS DECISIONS GRANTING THE RENEWAL AND AMENDMENT REQUESTS OF THE CO-RESPONDENT CHARTER SCHOOLS.

ELC alleges that the court should have found that the Commissioner's decisions were arbitrary, capricious, and unreasonable because he failed to evaluate the segregative and fiscal impact of the approved enrollment expansions in Newark. But the Commissioner is not required to explain all the reasons why a charter school's application for renewal or amendment should be granted. Instead, his decision must be based on sufficient credible evidence which is discernable from the record. See In re Red Bank Charter Sch., 367 N.J. Super. 462, 476 (App. Div.) certif. denied, 180 N.J. 457 (2004).

ELC unsuccessfully raised this issue before the Appellate Division. Indeed the court made no finding that the Commissioner failed to evaluate the fiscal and segregative effects of his decisions. While the opinion acknowledges that the decisions did not reflect the Commissioner's analyses of those

concerns, it also found that nothing in the record, including ELC's comments to the Commissioner, substantiated the fiscal or segregative effects it claimed. (Pa38; Pa43).¹ To the contrary, the record includes sufficient evidence to support the Commissioner's decisions, and the Appellate Division appropriately affirmed those decisions.

B. THE APPELLATE DIVISION CORRECTLY HELD THAT THE COMMISSIONER'S DECISIONS RELATED TO CHARTER SCHOOLS IN THE FORMER ABBOTT DISTRICTS SHOULD BE NOT SUBJECT TO ANY HEIGHTENED SCRUTINY.

The standard for reviewing the Commissioner's determination of a charter school application is well-settled. Generally, "the agency decision will be sustained unless it is arbitrary, capricious or unreasonable, unsupported by substantial credible evidence in the record as a whole, offensive to the federal or state constitution or inconsistent with its statutory mission." Pressler & Verniero, Current N.J. Court Rules, comment 7.2 on R. 2:10-2, at 800 (2017). See, e.g., In re Proposed Quest Academy Charter Sch. of Montclair Founders Group, 216 N.J. 370, 385-86 (2013). Thus, judicial review is generally restricted to the following three inquiries: (1) whether the agency action violates "express or implied legislative policies;" (2) whether the record contains "substantial evidence to support the findings

¹ "Pa" Shall refer to Petitioner-Appellant ELC's Appendix.

on which the agency based its action;" and (3) in applying the legislative policies to the facts, whether the agency clearly erred "in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Quest Academy, 216 N.J. at 385 (citing Mazza v. Bd. of Trustees, 143 N.J. 22, 25 (1995)).

However, relying on I/M/O the Grant of the Charter Sch. Application of Englewood on the Palisades Charter School, 320 N.J. Super. 174 (App. Div. 1999), ELC claims that the Commissioner must apply a heightened standard of scrutiny to his review of charter school applications in former Abbott districts. But, as the Appellate Division found, Englewood on the Palisades was decided over 8 years prior to the enactment of the SFRA,¹ and determined that there is no reason, "given the SFRA formula, that a different standard should today be applied to former Abbott districts." (Pa41).

ELC also claims that its comments on the applications are due a special deference not afforded to other interested parties because of its particular status as the legal representative of the Abbott schoolchildren. But the Appellate Division rejected that claim and found that the burden to demonstrate that charter school funding will prevent delivery of a thorough and efficient education rests on the district of

¹ School Funding Reform Act of 2008, N.J.S.A. 18A:7F-43 to -66.

residence and that, if the district in which a school is located raises no objection to the increased enrollment, the Commissioner is not required to specifically address the impact of a loss of funding on that district.

ELC argues that the court should place little weight on Newark's failure to vigorously oppose the 2016 charter enrollment requests at issue because at the time, Newark was a State-operated district. But the Commissioner is not the chief school administrator in a State-operated district. See N.J.S.A. 18A:7A-35, and -39. In raising this argument, ELC ignores the history of State-operated districts, including Newark, engaging in litigation against the Commissioner. See, e.g., Abbott v. Burke (Abbott XXI), 206 N.J. 332 (2011) (noting in the caption that the State-operated School District of the City of Newark submitted an amicus curiae letter-brief).

Rather than direct the policies of State-operated districts, the Commissioner merely appoints the State District Superintendent. N.J.S.A. 18A:7A-35. Thus Newark's position on these charter enrollment expansions represents a policy difference between the district leadership and ELC.

Accordingly, the court properly rejected ELC's argument that its comments are due more weight than the comments of the district in which the schools are located. It has raised no

compelling reason for the Supreme Court to review the Appellate Division's opinion, and the Petition should be denied.

C. THE APPELLATE DIVISION CORRECTLY FOUND THAT THE COMMISSIONER WAS WITHIN HIS AUTHORITY TO APPROVE A CHARTER SCHOOL'S PLAN FOR EXPANSION THAT INCLUDES THE ADDITION OF A SATELLITE CAMPUS.

The Commissioner has the authority to approve a charter school's request to expand into a satellite campus. See Educ. Law Center ex rel. Burke v. N.J. State Bd. of Educ., 438 N.J. Super. 108, 112 (App. Div. 2014) (rejecting ELC's challenge to the adoption of regulations permitting the approval of charter school satellite campuses). Despite the Appellate Division's previous rejection of ELC's position, it again argues that the Commissioner may not approve a charter school's expansion into a satellite campus. The court here appropriately relied upon its prior decision to find that it was "reasonable for the Commissioner to have approved expansion before a charter school could be expected to go through the arduous process of identifying and securing a site." (Pa48). Specifically, it noted that "[a]pproval of increases in enrollment is a necessary precursor to the addition of satellite campuses or any investment in additional structures." (Pa48). The court also noted that the Commissioner must still inspect and approve the specific location prior to its use as a school. (Pa48). Nothing in the Appellate Division's opinion

represents a "special reason" as described in R. 2:12-4. The Petition should be denied.

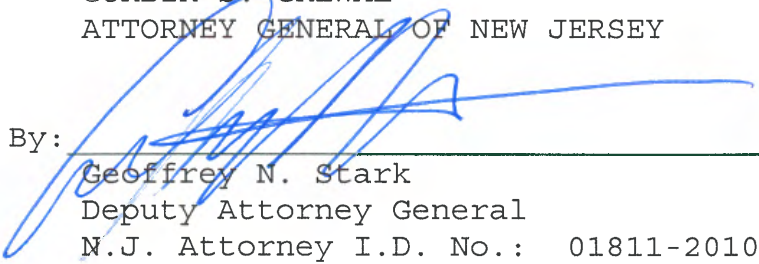
CONCLUSION

For all of the reasons stated above ELC's Petition for Certification should be denied.

Respectfully submitted,

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By:



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SUPREME COURT OF NEW JERSEY
DOCKET NO. 083014

In re Renewal Application of)
TEAM Academy Charter School)
In re Renewal Application of)
Robert Treat Academy Charter)
School)
In re Renewal Application of)
North Star Academy Charter)
School)
In re Amendment Request to)
Increase Enrollment of Maria L.)
Variso-Rogers Charter School)
In Re Amendment Request to)
Increase Enrollment of University)
Heights Charter School)
In re Amendment Request to)
Increase Enrollment of Great)
Oaks Legacy Charter School)
In Re Amendment Request to)
Increase Enrollment of New)
Horizon Community Charter School)

CERTIFICATION OF
SERVICE

KAREN Y. FORD, of full age, hereby certifies and says:

1. I am a Legal Secretary in the Division of Law, Department of Law and Public Safety, State of New Jersey, PO Box 112, Richard J. Hughes Justice Complex, Trenton, New Jersey.

2. On the date stated below, at the direction of Geoffrey Stark, Deputy Attorney General, I filed an original and eight copies of a Letter Brief On Petition for Certification from a final Judgment of the Superior Court along with copies of supporting brief below in the above captioned matter with:

Heather Joy Baker, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
25 Market Street, PO Box 970
Trenton, NJ 08628-0970

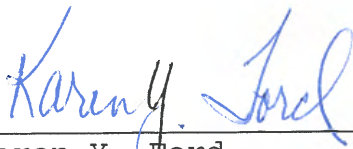
3. On the same date, at the direction of Geoffrey Stark, Deputy Attorney General, I served a copy of same UPS Overnight Mail upon:

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4. I certify that the foregoing statements made by me are true to the best of my knowledge and belief. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Karen Y. Ford

Dated: October 4, 2019

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:
: SUPERIOR COURT OF NEW JERSEY
: APPELLATE DIVISION
IN RE THE RENEWAL APPLICATION :
OF TEAM ACADEMY CHARTER : DOCKET NO. A-3416-15T1
SCHOOL. : (LEAD CASE)
:
: CIVIL ACTION
:

CAPTION CONTINUED ON THE NEXT PAGE

BRIEF AND APPENDIX OF RESPONDENT, THE COMMISSIONER OF EDUCATION

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On the Brief

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APPELLATE DIVISION

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SUPERIOR COURT
OF NEW JERSEY

IN RE THE RENEWAL APPLICATION
OF NORTH STAR ACADEMY CHARTER
SCHOOL.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-4385-15T1
(CONSOLIDATED CASE)

CIVIL ACTION

IN RE THE RENEWAL APPLICATION
OF ROBERT TREAT ACADEMY
CHARTER SCHOOL.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-4384-15T1
(CONSOLIDATED CASE)

CIVIL ACTION

IN RE THE AMENDMENT REQUEST
TO INCREASE ENROLLMENT OF
UNIVERSITY HEIGHTS CHARTER
SCHOOL.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-4387-15T1
(CONSOLIDATED CASE)

CIVIL ACTION

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

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-4398-15T1
(CONSOLIDATED CASE)

CIVIL ACTION

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

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-4386-15T1
(CONSOLIDATED CASE)

CIVIL ACTION

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

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-4386-15T1
(CONSOLIDATED CASE)

CIVIL ACTION

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Commissioner's Cross-Motion to Dismiss the Appeal, filed
on or about May 16, 2016 Ca01 - Ca03

Order On The Commissioner's Cross-Motion to Dismiss the
Appeal Ca04

PRELIMINARY STATEMENT

In February 2016, the Commissioner of Education ("Commissioner") approved the expansion of seven highly successful and in-demand charter schools in Newark, thereby providing more students with alternative educational opportunities. The approvals followed a comprehensive and thorough review of the quality of the schools' educational programs and their impact on the Newark Public Schools ("NPS"). The Education Law Center ("ELC") seeks reversal of these decisions based on its erroneous claim that the Commissioner failed to consider the financial and segregative impact of enrollment growth. This court has recognized that the Commissioner has broad statutorily-granted discretion to establish, develop, and grow a charter school program in the New Jersey. With that discretion in mind, the Commissioner properly granted the expansion requests of the Co-Respondent charter schools.

Without considering the merits of ELC's claims, the appeals should be dismissed because ELC has no private right of action or standing to challenge the Commissioner's decisions. The Charter School Program Act of 1996 ("CSPA") expressly limits challenges to charter school decisions to local boards of education and charter school applicants. ELC lacks standing to bring these appeals because the class it represents does not share a common interest in the outcome of the cases.

Were the court to reach the merits of the appeals, it should affirm the Commissioner's decisions for three reasons. First, the record reflects that the Commissioner properly exercised his authority to oversee the charter school system and determine whether the respective schools should be expanded. Second, the record does not demonstrate that the charter schools' respective current or expanded enrollments have or will have any segregative effect on NPS, nor does the record reflect any impropriety in the schools' respective recruitment or admissions policies. Finally, the Commissioner has the authority to approve a charter school's expansion into new or additional facilities. Because the decisions were neither arbitrary, capricious, nor unreasonable, and were fully supported by the record, they should be affirmed.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF THE FACTS¹

The CSPA, N.J.S.A. 18A:36A-1 to -18, grants the Commissioner the authority to establish a system of charter schools in the State. N.J.S.A. 18A:36A-3. Among the Commissioner's responsibilities is to grant or deny applications to establish, renew, and/or expand charter schools. N.J.S.A. 18A:36A-4, -16, and -17. Successful charter school applicants are granted an initial charter for a four-year term. N.J.S.A. 18A:36A-17. Thereafter, charter schools must apply for a renewal of their charter every

¹ The Procedural History and Counter-Statement of the Facts have been combined for the Court's convenience as they are inextricably linked.

five years. Ibid. Thus, the Commissioner annually reviews numerous applications for: 1) the establishment of new charter schools; 2) the renewal and/or expansion of existing charter schools; and 3) amendments to existing charters to allow for modifications to enrollment, district(s) of residence, facilities, etc. See N.J.A.C. 6A:11-2.6.

Consistent with statutory authority, the Commissioner established the process for seeking a charter renewal. N.J.S.A. 18A:36A-17; N.J.A.C. 6A:11-2.3. Pursuant to that process, the Commissioner conducts a comprehensive review of the school, which includes, but is not limited to the renewal application, the school's annual reports, comments and recommendations from the district(s) of residence, and student performance. N.J.A.C. 6A:2.3(b). The Commissioner, or designee, also conducts a structured interview with certain school representatives. Ibid.

To apply for a charter amendment, a charter school's board of trustees must submit to the Commissioner a resolution detailing the amendment request. N.J.A.C. 6A:11-2.6(a)(2). After determining whether the requested amendments are eligible for approval, the Department evaluates them in the context of the CSPA and implementing regulations. N.J.A.C. 6A:11-2.6(b). The school's performance data is also considered when assessing the need for the amendments. Ibid. As with an application to establish or renew a charter, the regulations expressly permit district boards of

education within the charter school's district-of-residence to comment on the amendment request.² N.J.A.C. 6A:11-2.6(c).

On or about October 15, 2015, Co-Respondents Robert Treat Academy Charter School ("Robert Treat"), (Aa393), North Star Academy Charter School ("North Star"), (Aa454), and TEAM Academy Charter School ("TEAM"), (Aa535), submitted applications to renew their charters pursuant to N.J.S.A. 18A:36A-17 and N.J.A.C. 6A:11-2.3. Robert Treat's renewal application included a request to expand its maximum enrollment from 695 to 860 students. (Aa460). Under one of its proposed plans, the school estimated that such enrollment expansion would require moving the school to a new location and constructing sufficient facilities. (Aa424-25). North Star's renewal application included a request to expand its maximum enrollment from 4950 to 6550 students. (Aa491-92). It estimated that such enrollment expansion would require three additional facilities. (Aa484). TEAM's renewal application included a request to expand its maximum enrollment from 4120 to 6816 students.³ (Aa561). It estimated that such enrollment expansion would require three additional facilities. (Aa582-83).

² Nothing prohibits other interested parties from also submitting comments to the Commissioner.

³ TEAM initially sought to expand its enrollment to 9560 students, but revised its request to the lower total of 6816. (Aa561; Aa582-83).

The remaining Co-Respondent schools applied for charter amendments to allow for an expansion of their respective maximum enrollment as set forth below:

- On or about October 26, 2016, Great Oaks Charter School ("Great Oaks") applied to increase its maximum enrollment from 462 to 939 students. (Aa508).
- On or about November 25, 2016, New Horizons Community Charter School ("New Horizons") applied to increase its maximum enrollment from 504 to 756 students. (Aa140).
- On or about November 25, 2016, University Heights Charter School ("University Heights") applied to increase its maximum enrollment from 750 to 1500 students. (Aa298).
- On or about December 16, 2016,⁴ Maria L. Varisco Rogers Charter School ("Varisco Rogers") applied to increase its maximum enrollment from 515 to 540 students. (Aa122).

Great Oaks estimated that, to accommodate the full extent of its requested enrollment increase, it would require one additional facility. (Aa510). New Horizons indicated that it had begun the process to build a new facility adjacent to its existing facility. (Aa141). University Heights estimated that it would require two additional facilities to accommodate the entirety of its expanded enrollment. (Aa298). Varisco Rogers did not anticipate the need

⁴ Varisco Rogers requested, and was granted, a waiver from the requirement that amendment requests be submitted no later than December 1 in the year prior to the effective date of the requested amendment.

for additional facilities to accommodate its proposed addition of 25 students.

On January 22, 2016, NPS submitted comments and recommendations to the Commissioner regarding the various charter expansion applications under consideration ("NPS Recommendation Chart"). (Aa596-98). It recommended that two of the expanded enrollment requests -- those of Varisco Rogers and Robert Treat -- be fully approved. (Aa597). It recommended partial approval of Great Oaks' expansion request, by limiting the expansion of the sixth-grade class to 125 students, not the 177 Great Oaks requested, and permitting the straight articulation of the remaining grade levels. Ibid. Though it recommended denial of the expansion requests of New Horizons, TEAM, and University Heights, NPS also offered an alternative partial approval recommendation for each. Ibid. For example, in the "Notes/Assumptions" column, NPS proposed that the school's expansion be limited to 100 additional seats in Pre-K and Kindergarten. Ibid. NPS offered no recommendation regarding North Star's application, but accounted for an enrollment expansion in the NPS Recommendation Chart. Ibid. Importantly, NPS made no reference to any financial impact on the district, but did note data related to each school's State testing performance. Ibid.

On January 28, 2016, ELC submitted a letter to the Commissioner asserting specific objections to several renewal

applications and charter amendment requests. (Aa32-35). ELC included an internally-generated report speculating on the potential impact of the expansions on the NPS budget, (Aa36 - Aa55), and a report from Rutgers University examining the demographics of charter school enrollment. (Aa56-101).

On February 18, 2016, the Commissioner granted TEAM's application to renew its charter with expanded enrollment. (Aa28-29). On February 29, 2016, the Commissioner approved charter renewals for North Star and Robert Treat with expanded enrollment, and granted the enrollment expansion amendment requests of Great Oaks, Varisco, New Horizons, and University Heights. (Aa18-27; Aa30-31). The Commissioner's renewal decisions were based upon a comprehensive review of the record, including a detailed analysis of the application, annual reports, student performance rates, and site visit results. See, e.g., (Aa18). The Commissioner also reviewed each schools' programs, including their respective academic, fiscal, and operational standing and found that each of these schools outperformed NPS in various academic areas. (Aa18; Aa20; Aa22; Aa24; Aa26; Aa28; Aa30). He also reviewed and analyzed public comments, the potential fiscal impact on the sending district(s). (Aa18; Aa20; Aa22; Aa24; Aa26; Aa28; Aa30). The reviews revealed that the schools were not only performing well academically, but were also organizationally and fiscally sound. A summary of each school's application supports this conclusion.

Great Oaks, which opened in 2011, sought to increase its enrollment by 100 students per grade level. (Aa493; Aa508). The request was precipitated by a high demand for seats in the school. Ibid. It had nearly 1200 applications for enrollment despite having space for only 462 students. (Aa508). This figure included 131 applicants, who ranked Great Oaks among their top three choices for sixth grade, despite Great Oaks having only 77 spaces. Ibid. With an eye towards expansion, Great Oaks invested in its staff's professional development as a means of producing high-quality leaders amongst the faculty. (Aa508-09). Great Oaks is a Tier 1 School⁵ and has consistently outperformed NPS in both facets of the NJASK across grade levels, and out-performed the State average in Math in 2012-2013 and 2013-2014. (Aa18; Aa512 - Aa513). Thus, the Commissioner determined that expansion of the program was warranted. (Aa18).

Varisco Rogers has been operating since 1999. (Aa111). It applied for an enrollment increase of a mere 60 students. (Aa121). It is a Tier 1 school with high academic achievement outcomes. (Aa112-18). It met or exceeded 7 of 9 indicator targets in the Department's Performance Framework, and its students outperformed the District for grade levels 3-8 in both Math and Language Arts Literacy ("LAL"). (Aa112; Aa116). Varisco Rogers

⁵ Charter schools are evaluated according to the Department's Performance Framework. See N.J.A.C. 6A:11-1.2. Tier 1 schools are the highest performing.

utilizes two teachers in each classroom to maintain a 10:1 student-to-teacher ratio. (Aa121). The school also has a very high demand, with a waiting list of 529 applicants, despite the school's pre-expansion enrollment being only 486 students. (Aa121; Aa597). The Commissioner's approval was supported by the school's thorough application submission and strong academic performance. (Aa20).

New Horizons, also in operation since 1999, applied for an amendment that would add grades 6, 7, and 8; proposing to add 84 students per additional grade level. (Aa124; Aa137-38). It explained that the proposed expansion was premised on a significant decrease in fifth grade enrollment, based on students' decisions to enroll elsewhere in preparation for middle school. (Aa147). It also noted that the school's parents had been asking for expansion since 2002. (Aa147). Further, the school has received permits to begin construction on a new facility for the increased grade-level offerings and has extensive plans for its proposed new grade-level programs. (Aa147-55). New Horizons is also a Tier 1 school. (Aa125). It met or exceeded 6 of 9 indicator targets in the Department's Performance Framework, and its students outperformed the District for grade levels 3-5 in both Math and LAL. (Aa129). Due to results on the more recent PARCC exam NPS recommended that it be denied, or, in the alternative, that its expansion be limited to sixth grade. (Aa597). The Commissioner accepted NPS' alternate

recommendation and approved the school to expand into sixth grade for 2016-2017 and then seventh grade for 2017-2018. (Aa22).

North Star has been open since 1997 and is a Tier 1 school. (Aa439). It applied for renewal of its charter and also asked to increase its enrollment by 90 students. (Aa597). It previously received approval to increase by 540 students by adding a new campus in 2014.⁶ (Aa483). At the time of its application, North Star had a 2535-person wait list. (Aa456). Academically, North Star's high school met 8 of 8 indicator targets for the Department's Performance Framework. (A449). Its K-8 program met 7 of 8 indicator targets. (Aa441). It consistently outperformed the district across grade levels and subject matter. (Aa439-52). North Star has a long history of success in Newark, and the record demonstrated that such success would continue. Thus, the Commissioner approved the renewal based upon the school's high academic performance, including outperforming the State and NPS on the PARCC exam on both the Math and LAL portions, and at the elementary, middle, and high school levels. (Aa24).

Like North Star, Robert Treat has been open since 1997 and applied for a charter renewal. (Aa393-95). Its maximum enrollment at the time of its application was 695, and it had a waiting list of nearly 900 students. (Aa395). It requested

⁶ That plan has been delayed, but the school still intends to add the campus. (Aa483; Aa492).

permission to expand its enrollment to 860 students by the 2020-2021 school year, with a goal of reaching 972 by 2025. (Aa422-23). Also like North Star, Robert Treat has a long history of success in educating its students, and is a Tier 1 school. (Aa26). Its students continue to outperform the State and NPS averages on the PARCC exam in both subject areas, and in all its grade-level offerings. (Aa26). The Commissioner determined that renewal and expansion was justified by the school's record.

TEAM has been open since 2002, and at the time of the renewal application had a maximum enrollment of 4120 students. (Aa521; Aa537; Aa561). It had a wait list of approximately 1900 students. (Aa537). TEAM initially sought to increase its total enrollment to 9560 students, (Aa537), but revised that request to only 6816. (Aa582-83). The school did not believe that its revised request fully met the applicant demand, but would allow it to focus on its continued highly-performing academic program. (Aa582). TEAM is a Tier 1 school which met or exceeded 5 out of 8 Indicator Targets on the Department's Performance Framework. (Aa523). Further, the school has detailed plans to further strengthen the academic program through implementation of the Common Core State Standards. (Aa29; Aa540). Based on this record, the Commissioner renewed the charter and approved enrollment expansion to 7920 students over five years. (Aa28-29).

Finally, University Heights, which opened in 2006, applied to expand its enrollment from 650 to 1500 students over four years. (Aa302). University Heights is a Tier 2 school, (Aa165), despite the fact that its students outperform NPS in nearly every testing measure for both Math and LAL in grades 3-7. (Aa169). It attributes certain testing difficulties to a change in its attempt to implement a blended educational program. (Aa303). It saw improvement when it returned to a more traditional model. (Aa303 - Aa304). The school has a high demand for additional seats, and little turnover in students. (Aa305). For example, in 2014-2015, the school had five or less available seats for grades k-8, but a very high number of applications for those seats. (Aa305). As with the other applicant schools, the Commissioner found University Heights' program to be operationally and fiscally sound. (Aa30).

On April 1, 2016, ELC filed a notice of appeal ("NOA") on behalf of the Abbott v. Burke school children⁷ arguing that the renewal and/or expansion of the Co-Respondent charter schools' charters violated the State Constitution and the CSPA. ELC also argued that the Commissioner's decisions were arbitrary, capricious, and unreasonable because he did not hold an evidentiary

⁷ The Abbott v. Burke school children are a class of public school children residing in various school districts where the Supreme Court has previously found that the State's educational funding unconstitutional. See Abbott v. Burke, 119 N.J. 287, 394 (1989) ("Abbott II").

hearing prior to issuing his decisions. After its single NOA was rejected by the Appellate Division, on April 13, 2016, ELC filed a motion for leave to file a single NOA from the seven decisions described above, or, in the alternative, to file amended notices of appeal as within time.

The Commissioner opposed ELC's Motion and filed a Cross-Motion to Dismiss the Appeal because the CSPA does not confer a private right of action upon ELC or the class it represents. The Commissioner also argued that ELC lacked standing to bring the appeal. The court denied ELC's Motion to file a single NOA on June 2, 2016, and instructed it to file separate notices. Because it denied ELC's motion, the court did not reach the Commissioner's arguments regarding the lack of both a private right of action and standing. Instead, it denied the Commissioner's cross motion without prejudice, thereby permitting the Commissioner to raise the issues of private right of action and standing in the merits brief. (Ca04).

ELC filed seven NOAs on June 16, 2016, and moved for consolidation on August 23, 2016, which was granted over the Commissioner's objection on September 28, 2016.

ARGUMENT

POINT I

THE CSPA DOES NOT CONFER A PRIVATE RIGHT OF
ACTION TO APPEAL A CHARTER SCHOOL DECISION

UPON THE ELC OR UPON A DISTRICT'S SCHOOL CHILDREN.

This appeal should be dismissed because ELC, on behalf of the Abbott v. Burke school children, has no express or implied private right of action permitting it to appeal a charter school decision. The CSPA expressly confers the right to challenge charter school decisions upon two discrete entities -- "[t]he local board of education or a charter school applicant" N.J.S.A. 18A:36A-4(d). No such right of appeal was extended to any other persons or entities. See also N.J.A.C. 6A:11-2.5 (limiting appeals of charter school determinations to a charter applicant, an existing charter school, and the district board of education or State district superintendent of the district of residence of the charter school).

Had the Legislature intended to permit any interested party to appeal the grant or denial of a charter, it would have included language to evince its intent, as it did in other statutory provisions of the CSPA. For example, N.J.S.A. 18A:36A-15 permits "[a]ny individual or group" to bring a complaint alleging a violation of the CSPA to the charter school's trustees. By permitting "[a]ny individual or group" to bring a complaint to the trustees, but limiting appeals of charter application decisions to only "[t]he local board of education [and] a charter school applicant" the Legislature expressed its intent to preclude any

other parties from appealing the granting of a school's charter. Ibid.; N.J.S.A. 18A:36A-4(d). To interpret otherwise would thwart the Legislature's clearly expressed intent.

Further, this court should not find an implied right of action in the CSPA which would permit the ELC's appeal to proceed. New Jersey courts "have been reluctant to infer a statutory private right of action where the Legislature has not expressly provided for such action." R.J. Gaydos, Ins. v. Nat'l Consumer, 168 N.J. 255, 271 (2001).

In determining whether a statute confers upon private litigants a right of action, we consider: (1) whether plaintiff is a member of the class for whose special benefit the statute was enacted; (2) if there is any evidence that the Legislature intended to create a private right of action under the statute; and (3) whether recognition of an implied right of action would be consistent with the purposes of the legislation.

[Warren Cnty. Bar Ass'n v. Bd. of Chosen Freeholders of Warren Cnty., 386 N.J. Super. 194, 200 (App. Div. 2006) (citing Gaydos, supra, 168 N.J. at 272); see also Cort v. Ash, 422 U.S. 66 (1975).]

When applying these factors, courts generally review the statute's legislative history to determine if there is evidence to indicate the class of persons the statute was enacted to protect and to indicate whether the statute's legislative scheme obviates the litigant's need for a private cause of action. Gaydos, supra, 168 N.J. at 273.

Nothing in the CSPA or its legislative history suggests that the Legislature intended to give ELC, or the students it represents, the right to challenge the decision to renew or expand enrollment in a charter school. The CSPA provides no mechanism for a third party, uninvolved in the application process, to challenge the Commissioner's decision on a charter application. Instead it limits such appeals to school districts and applicants. See N.J.S.A. 18A:36A-4(d). Permitting the ELC to pursue this appeal would be antithetical to the Legislature's express intention to provide public school students and their parents with increased educational choices so that they may choose an appropriate educational environment. See N.J.S.A. 18A:36A-2. Through this appeal ELC seeks to limit the choices available to NPS' school children.

The plain and express language of the CSPA, and its implementing regulations, preclude ELC from challenging the decisions at issue here. Therefore, the appeal should be dismissed.

POINT II

ELC LACKS STANDING TO PURSUE THIS APPEAL ON BEHALF OF THE CLASS OF ABBOTT V. BURKE SCHOOLCHILDREN BECAUSE THE ISSUE OF CHARTER SCHOOL ENROLLMENT EXPANSION IS NOT OF COMMON CONCERN TO THE CLASS.

Even if the CSPA permitted third parties to challenge charter school decisions on appeal, ELC lacks standing to do so.

Although New Jersey takes "a liberal view on the issue" of standing, Urban League of Essex Cnty. v. Mahwah Twp., 147 N.J. Super. 28, 33 (App. Div.), certif. denied, 74 N.J. 278 (1977), standing is not automatically granted; it must be established. In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. 61, 85 (App. Div. 2004), certif. denied, 182 N.J. 630 (2005). Generally, "'standing requires that a litigant have a sufficient stake and real adverseness with respect to the subject matter of the litigation, and a substantial likelihood that some harm will fall upon it in the event of an unfavorable decision.'" Neu v. Planning Bd. of Twp. of Union, 352 N.J. Super. 544, 552 (App. Div. 2002) (quoting In re N.J. Bd. of Pub. Utils., 200 N.J. Super. 544, 556 (App. Div. 1985)). Further, litigants usually have no standing to assert the rights of third parties. See Spinnaker Condo. Corp. v. Zoning Bd. of City of Sea Isle City, 357 N.J. Super. 105, 111 (App. Div.), certif. denied, 176 N.J. 280 (2003).

Organizations like ELC, which represent the interests of groups, may generally present claims on behalf of those groups only where the issues presented are of common concern to all the group members. See Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 109 (1971). See also In re Six-Month Extension, supra, 372 N.J. Super. at 86 (holding that the New Jersey Builders Association had standing to challenge Council on Affordable Housing regulations); Indep. Energy Producers of N.J. v. N.J. Dep't of

Envtl. Prot., 275 N.J. Super. 46, 55-56 (App. Div.) (holding that commercial competitors of successful permit applicant had standing to challenge the grant as they may be the only ones with sufficient incentive to advance the public interest in permits being issued only pursuant to law), certif. denied, 139 N.J. 187 (1994). Here, the ELC does not have standing to pursue its claim on behalf of the Abbott v. Burke school children, as the class members do not share the likelihood that harm will befall them based upon an unfavorable decision. Accord Neu, supra, 352 N.J. Super. at 552. Unlike the Abbott v. Burke line of cases, where the relief sought consistently impacted all members of the class equally, here ELC's position pits class members against one-another.

ELC filed this appeal on behalf of the "Abbott v. Burke School Children." See, e.g., (Aa1). That class initially included "all children residing and attending public school in the school district of Camden, East Orange, Irvington, and Jersey City," Abbott v. Burke, 100 N.J. 269, 277 n.1 (1985) ("Abbott I"), and was later expanded to include the public school students of numerous other "poorer urban districts," including Newark. See Abbott II, supra, 119 N.J. at 394. Thus, the Abbott v. Burke school children class includes every student who attends the traditional public schools in Newark, and also those students attending the Newark charter schools. See N.J.S.A. 18A:36A-3(a) (noting that charter schools are public schools). ELC has taken this position in the

past, arguing on behalf of charter school students that they should receive Abbott remedies.⁸ See In re 1999-2000 Abbott v. Burke Implementing Regulations, 348 N.J. Super. 382, 438-441 (App. Div. 2002). Therefore, ELC cannot represent the interests of one segment of the Abbott v. Burke school children class against another segment of the same class. It must represent the whole class with uniformity.

Even under the most restrictive interpretation of the composition of membership of Abbott school children, at least two distinct groups of students with conflicting interests exist: 1) public school students who wish to attend charter schools but cannot, and 2) public school students who do not wish to attend charter schools. ELC cannot overcome these competing interests within the class. The relief it seeks -- to restrict the growth of charter schools in Newark -- is directly at odds with the interests of those students wishing for the opportunity to attend a charter school.

In Crescent Park, supra, the Supreme Court found that the plaintiff tenant's association had standing for a complaint

⁸ In opposition to the Commissioner's motion to dismiss the appeal, ELC argued that charter school students are not members of the class of Abbott v. Burke school children, stating "at no point in the Abbott cases were charter school students involved." (Ca02). It maintained however that all district students had a shared interest in the outcome of this appeal despite the fact that many could lose the ability to attend a charter school if ELC's position is adopted by the court. (Ca02).

"confined strictly to matters of common interest" 58 N.J. at 109 (emphasis added). Such standing avoided the procedural burdens of courts hearing multiple claims from individual association members. Ibid. However, the Court also noted that there would have been no question that standing would have been appropriate for a claim brought by any individual association member had that member brought the same claim asserted by the association on behalf of the membership itself. Id. at 108.

Not so here, where class members do not share a common interest, and where individual school children do not have the right to challenge charter school decisions. Newark students attending charter schools, or who wish to attend charter schools and may be able to do so as a result of expanded enrollment capacity, do not share a common interest with students who wish to challenge the Commissioner's decisions to renew charters and expand charter enrollment. Even assuming for the sake of argument, that the enrollment expansion presents a measure of harm for non-charter-interested members of the class, the denial of expansion harms the class members who wish to enroll in the charter schools, but cannot for lack of seats. The positions of these two groups of public school students, both represented here by ELC as members of a single class, cannot be reconciled.

Further, an individual child in Newark would not have sufficient standing to challenge the Commissioner's decision to

renew a charter school as required by Crescent Park. See 58 N.J. at 108. If the individual membership of a group does not share a common concern, then the organization does not have standing to bring a suit on the collective membership's behalf. Id. at 109. Here, ELC has failed to demonstrate that the class members would all be harmed by the renewal of these seven respondent schools, thus it is clear that the Abbott v. Burke school children do not share a common concern.

ELC also lacks standing because it is improperly attempting to bring claims ELC itself is not entitled to bring. ELC was not a party to the Commissioner's decision to renew the charters at issue, nor was it aggrieved by the Commissioner's decisions. Therefore, ELC is attempting to assert claims that exist, if at all, only as to the parties directly impacted by the continued operation of the respondent charter schools: the schools themselves and the Newark school district. ELC's argument amounts to a third-party claim, for which it lacks standing. See Spinnaker, supra, 357 N.J. Super. at 111.

Finally, the only case in which the Appellate Division found standing for an organization to challenge a charter school decision based its ruling on factors not present here: the review of a novel legal issue and a resultant substantial public interest in that novel issue. See In re Grant of Charter to Merit Preparatory Charter Sch., 435 N.J. Super. 273, 280 (App. Div.),

certif. denied, 219 N.J. 627 (2014) ("Merit Prep"). In Merit Prep, the court considered an appeal by the NJEA from the Commissioner's decision to approve two "blended" charter schools, where students were instructed by both in-person teachers and via the internet. Id. at 276. The court did not believe that the NJEA membership would be adversely affected by the new model of charter school. Id. at 280 (citing Indep. Energy Producers, supra, 275 N.J. Super. at 56, for the proposition that the individual interests of members may be "too ethereal to justify judicial recognition and acknowledgement"). However, because the case involved a novel legal issue, the court found the issue was of substantial public interest and therefore found that the NJEA had standing. Ibid. (citing Falcone v. De Furia, 103 N.J. 219, 226 (1986)).

Here, the class ELC represents does not have a common interest in the outcome of the case because ELC is arguing against the interests of Newark school children for whom the want of charter school seats prevents them from enrolling in a charter school. Additionally, reviews of ordinary discretionary decisions by the Commissioner regarding enrollment expansion or charter renewal are not novel issues presenting substantial public interest.

Because ELC lacks standing, the appeal should be dismissed.

POINT III

THE COMMISSIONER'S DECISIONS TO PERMIT ENROLLMENT EXPANSION IN THE SEVEN CO-RESPONDENT CHARTER SCHOOLS WERE REASONABLE AND SUPPORTED BY THE RECORD.

The Commissioner's approval of enrollment expansions in these seven charter schools is consistent with the CSPA, does not exacerbate segregation in NPS, and is fully supported by the record. The principles governing judicial review of agency actions are well settled--"the agency decision will be sustained unless it is arbitrary, capricious or unreasonable, unsupported by substantial credible evidence in the record as a whole, offensive to the federal or state constitution or inconsistent with its statutory mission." Pressler & Verniero, Current N.J. Court Rules, comment 7.2 on R. 2:10-2, at 772 (2017). See, e.g., In re Proposed Quest Academy Charter Sch. of Montclair Founders Group, 216 N.J. 370, 385-86 (2013) ("Quest Academy"); Circus Liquors Inc. v. Middletown Tp. , 199 N.J. 1, 9-10 (2009). Thus, judicial review is generally restricted to the following three inquiries: (1) whether the agency action violates "express or implied legislative policies;" (2) whether the record contains "substantial evidence to support the findings on which the agency based its action;" and (3) in applying the legislative policies to the facts, whether the agency clearly erred "in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors."

Quest Academy, supra, 216 N.J. at 385 (citing Mazza v. Bd. of Trustees, 143 N.J. 22, 25 (1995)).

Agency action is accorded a strong presumption of reasonableness, validity and regularity, as long as the action taken is within the fair contemplation of the enabling statute, and the burden is on the challenger to overcome these presumptions. Bergen Pines Cnty. Hosp. v. N.J. Dep t of Human Servs., 96 N.J. 456, 477 (1984). Appellate review of agency action is even more limited "when the issue under review is directed to the agency's special 'expertise and superior knowledge of a particular field.'" In re Stallworth, 208 N.J. 182, 195 (2011) (quoting In re Herrmann, 192 N.J. 19, 28 (2007)). Courts have routinely deferred to the Commissioner in charter school matters based on his unique expertise. See, e.g., Quest Academy, supra, 216 N.J. at 389 (noting "the value that administrative expertise can play in the rendering of a sound administrative determination" and that "judicial deference is at a high when reviewing such findings."); I/M/O the Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch., 320 N.J. Super. 174, 213 (App. Div. 1999), aff'd with modifications, 164 N.J. 316 (2000) ("Englewood on the Palisades") (deferring to the Commissioner's expertise in assessing charter applications). Here, the Commissioner applied his expertise in charter school matters when evaluating the schools' respective applications against the requirements and principles of

the CSPA and its implementing regulations. Each of these applicants were high-performing schools whose seats are in great demand. See, e.g., (Aa456) (showing that North Star has over 2500 student applicants on its wait list). The respective grants of charter renewal and enrollment expansion should be affirmed.

The CSPA, enacted in 1996, was intended to increase the potential for pupil learning, increase educational choices for students and parents, encourage the use of different and innovative learning methods, establish a new form of accountability for schools, and make the school the unit for educational improvement. N.J.S.A. 18A:36A-2. The Legislature's goal was to permit "a variety of educational approaches which may not be available in the traditional public classroom." Ibid. Further, the schools are to provide "choices . . . when selecting [a] learning environment." Ibid. Finally, the CSPA was intended to "encourage the use of different and innovative learning methods." Ibid. "In determining whether a particular administrative act enjoys statutory authorization, the reviewing court may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved" N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978).

By explicitly stating its goals and objectives, the Legislature established a policy giving the Commissioner broad authority to establish and grow the charter school system. See

Merit Prep, supra, 435 N.J. Super. at 281. Even lacking a specific statutory authorization to take administrative action, an agency "'must be given broad authority to carry out their mandates.'" Id. at 281-82 (quoting In re Application of Virgo's Inc., 355 N.J. Super. 590, 595 (App. Div. 2002)). Consistent with this statutory mandate, the Commissioner has the ability to evaluate the changing demographics of school districts, and evaluate the resulting demands for public educational options in that district. Responding to these demands with expansion of the charter school program is precisely what the Legislature envisioned when it empowered the Commissioner to create the State's charter school program. See N.J.S.A. 18A:36A-2. The Commissioner is not statutorily charged with maintaining the status quo.

Admission to a charter school is voluntary and at the choice of the parent and student, on a space-available basis, with preference for enrollment given to students who reside in the school district in which the charter school is located. N.J.S.A. 18A:36A-7, -8. NPS students have the option of enrolling in both district schools and in charters. The application for enrollment in the One Newark Enrolls⁹ program gives Newark students the option

⁹ One Newark Enrolls is a school choice program implemented by NPS in which public school students apply to, and enroll in their choice of public schools in Newark, including both NPS district schools and participating charter schools. See generally <http://www.newarkenrolls.org>, last visited June 19, 2017. While participation by charter schools is not required four of the Co-

of indicating a preference for either NPS schools and participating charter schools on the same enrollment application. See (Aa182 - Aa183).

The terms and conditions of charter enrollment are outlined in the school's charter and approved by the Commissioner. N.J.S.A. 18A:36A-7, -8. Students may withdraw from a charter school at any time. N.J.S.A. 18A:36A-9. The Commissioner is authorized to renew a charter after conducting a comprehensive review of the school, N.J.S.A. 18A:36A-17; N.J.A.C. 6A:11-2.3(b), and he may also approve charter amendments, including enrollment expansions. N.J.A.C. 6A:11-2.6.

Here ELC alleges that the approval of Respondent schools' respective enrollment expansions would exacerbate segregation of students in Newark by race, status as a student with Limited English Proficiency ("LEP"), and status as a special education student. These arguments should be rejected for several reasons. The record does not support the claim that these charters have a segregative effect on the district's schools. The record also reflects that these schools are in high demand and are high-performing. Accordingly, the Commissioner's decisions should be affirmed.

Respondent schools do participate in the program. (Aa183-85) (listing the students' possible choices when selecting where to enroll).

A. THE COMMISSIONER'S DECISIONS SHOULD BE
AFFIRMED BECAUSE THEY ARE REASONABLE AND
SUPPORTED BY THE RECORD.

A review of the record supports the Commissioner's decisions to permit Co-Respondent charter schools to expand their enrollment. The fact that the Commissioner disagreed with ELC's position on charter school enrollment expansion is not adequate grounds to reverse an administrative agency's decision. See N.J.S.A. 18A:36A-4(c) (granting the Commissioner the final authority to approve a charter application).

In considering whether to approve the charter schools' requests, the Commissioner reviewed the schools' annual reports, examined their fiscal, operational, and academic standing, and considered comments from the public, including those submitted by ELC. Based upon this comprehensive review of the record, he determined that the students in these schools were measurably outperforming those in Newark's traditional public schools, and in many cases, the State. Each of the Co-Respondent charter schools is a Tier 1 school except University Heights, which is a highly successful Tier 2 school.

Great Oaks students consistently outperformed the District and State average in the Math portion of the NJASK, and outperformed the District in LAL. (Aa508-09). Varisco-Rogers students consistently outperformed NPS students in both Math and LAL for grade levels 3-8. (Aa116). New Horizons students

outperformed the district in both Math and LAL for grade levels 3-5. (Aa129). North Star is one of the highest performing charters in Newark, every grade level outperformed the district across subject matter. (Aa439-52). Its high school met or exceeded all of the indicators in the Department's Performance Framework, while its K-8 program met or exceeded 7 out of 8 indicators. (Aa449; Aa441).

The Commissioner noted that Robert Treat's students outperform the State and NPS averages on the PARCC exam in both subject areas, and in all its grade-level offerings. (Aa26). TEAM has a history of high performance academic outcomes, and met or exceeded 5 of 8 indicators for the Performance Framework. (Aa523). University Heights outperforms NPS in nearly every testing measure for both Math and LAL for grades 3-7. (Aa169).

Each of the Co-Respondent schools is also in high demand, with waiting lists ranging from several hundred to several thousand potential students. See, e.g., (Aa121; Aa456). Schools also experienced demand for expanded grade-level offerings. See, e.g., (Aa147) (noting that there have been petitions from parents asking New Horizons expand to include grades six, seven, and eight since 2002);

Finally, NPS recommended without reservation two of the schools' expansion plans -- Varisco Rogers and Robert Treat -- and recommended Great Oaks' proposal with a slight modification.

(Aa597). While NPS recommended denial of three of the schools' proposals, it proposed alternative expansion plans for those schools. Ibid.

ELC also argues that the Commissioner failed to give adequate consideration to the financial impact that Co-Respondent charter schools' expansion would have on NPS. (Ab21-28). This contention lacks merit. While the Commissioner took those financial concerns into account, he properly found that they were not sufficient to justify denial of Co-Respondents' applications.

Under N.J.S.A. 18A:36A-12, the school district of residence must pay directly to a charter school roughly 90% of the budget attributable to each pupil who attends the charter school. So it is likely that establishment of a charter school will have some financial impact on the resident district. But courts have consistently concluded that the Commissioner should not deny a charter on that basis, absent a showing by the district that the magnitude of the impact would prevent it from providing a thorough and efficient education to its students. See, e.g., Englewood on the Palisades, supra, 164 N.J. at 336. Here, while ELC claims that expansion of charter enrollment would have a deleterious impact on NPS's ability to provide a constitutional education, NPS does not agree. Nothing in the record indicates that NPS believes that the expansion of charter school enrollment would impair its ability to

comply with its constitutional education requirements, and therefore the Commissioner's decision should be affirmed.

In Englewood on the Palisades the Supreme Court held that the Commissioner must consider the economic impact that approval of a charter school will have on the charter school's district of residence only when the district appealing the decision makes a preliminary showing that satisfaction of the thorough and efficient education requirements would be jeopardized. Ibid. "Unsubstantiated, generalized protests" are insufficient to meet that preliminary burden. Ibid. And even where an appealing district raises specific economic concerns, courts have found them to be insufficient unless they amount to a constitutional deprivation. In Englewood on the Palisades, the Franklin Township Board of Education claimed that funding a charter school that was seeking initial approval would require over half a million dollars from the district, thus making it unable to provide a thorough and efficient education to its own students without eliminating about 15 teachers. The Supreme Court rejected this contention, finding that the Commissioner must consider economic impact on the district when "a district makes a preliminary showing that satisfaction of the thorough-and-efficient education requirements would be jeopardized" and that "the district must be able to support its assertions." Ibid.

More recently, in Red Bank, supra, an appealing district claimed that the renewal and expansion of the Red Bank Charter School would result in the district's loss of \$720,000 and the elimination of four teaching positions, courtesy busing, and some monitors and assistants. Red Bank, supra, at 482. The court rejected that argument as lacking specificity, noting "[r]enewal of a successful charter school will be favored, 'unless reliable information is put forward to demonstrate that a constitutional violation may occur.'" Id. at 482-83 (quoting Englewood on the Palisades, supra, 164 N.J. at 334).

Here, the charter schools' district-of-residence did not appeal the expansion decisions. And, while ELC has pointed to an allegedly unsustainable increase in allocation of funding to charter schools (Aa32-35), its speculative concerns about financial impact are at odds with the school district most affected by the enrollment expansion. Nothing in the record indicates that NPS shares ELC's speculative concern that the Commissioner's decision could deny NPS students a thorough and efficient education as required by the New Jersey Constitution. N.J. Const. Art VIII. So ELC's complaints amount to nothing more than the "unsubstantiated, generalized protests" that were rejected in Englewood, supra, 164 N.J. at 334, and Red Bank, supra, 367 N.J. Super. at 482-83, which are not even shared by NPS. Thus, absent any preliminary showing that Co-Respondents' renewal and expansion would jeopardize NPS's

ability to provide a thorough and efficient education, the Commissioner properly concluded that the financial impact to the District was not sufficient to deny Co-Respondents' applications.

In the Commissioner's judgment, the schools' strong academic performance, coupled with high demand for the education Co-Respondent schools provided, and the support of NPS, justified the requested enrollment expansions. Therefore the decisions should be affirmed.

B. THE EXPANSION OF ENROLLMENT IN THE SEVEN CO-RESPONDENT CHARTER SCHOOLS WILL NOT CREATE OR EXACERBATE SEGREGATION IN THE NEWARK PUBLIC SCHOOLS.

The Commissioner's decisions to permit Co-Respondent charter schools to expand their respective maximum enrollments would not have a segregative effect in NPS. ELC does not dispute that the Co-Respondent charter schools have exemplary academic records, nor does it deny that these schools have long waiting lists, signifying a significant demand for additional seats in Newark charter schools. Instead, ELC argues that the Commissioner's decisions granting renewal and expansion of these high-performing charter schools should be reversed because it speculates that such expansion may have a segregative effect on NPS. But, because ELC's argument is based merely on a faulty statistical comparison of individual charter school demographics

with the demographics of the district as a whole, the argument should be rejected.

There is no question that 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." In re Grant of Renewal Application of the Red Bank Charter Sch., 367 N.J. Super. 462, 472 (App. Div. 2004) ("Red Bank"). To that end, "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." N.J.S.A. 18A:36A-8(e).

And 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. Englewood on the Palisades, 164 N.J. 316, 329 (2000). That assessment requires that the Commissioner "consider the racial impact from the perspective of the charter school's proposed pupil population, as well as the effect that loss of the pupils to the charter school would have on the district of residence of the charter school." Ibid. The precise structure of that analysis is committed to the discretion of the Commissioner and State Board. Id. at 329. See also N.J.A.C. 6A:11-2.2(c) (requiring annual assessment of the potential

segregative effect any loss of students to the charter school would have on their district of residence).

In Red Bank, supra, the court set forth the factors that should guide the Commissioner's analysis of racial impact. The Red Bank Charter School was a highly successful school that sought renewal of its charter as well as expansion of the grade levels it served. The Red Bank School District opposed the charter's application, pointing to data showing that since the charter school opened, the percentage of non-minority students enrolled in district schools declined from 32% to 18%. Red Bank, supra, 367 N.J. Super. at 469. The district also argued that the charter school enrolled a disproportionate number of non-minority students as compared to the district population. Ibid. The charter school contended that its enrollment was more reflective of the community's school-age population. Id. at 473.

The Commissioner approved Red Bank Charter School's application for renewal and expansion, finding no evidence that the charter school was responsible for racial segregation in the district. Id. at 476. The Commissioner also concluded that "there is no requirement that the two schools have exactly the same minority/non-minority enrollment figures." Id. at 476-477. The State Board affirmed, finding that the submissions "had not demonstrated that the charter school caused any segregation or that

the proposed expansion would have any 'impermissible impact on the racial composition of the district's schools.'" Id. at 477.

On appeal, this court reiterated New Jersey's strong policy prohibiting discrimination and segregation in the public schools, yet noted that the district had "failed to establish causation by not discounting the pre-existing 'white flight' trend in the district." Ibid. It concluded that the remedy sought by the district--closing a successful charter school--was not warranted. The court explained, "[a]ssuming 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." Ibid. The court reasoned that "[t]he Charter School should not be faulted for developing an attractive educational program," and therefore, "[t]o close this school would undermine the Legislature's policy of 'promoting comprehensive educational reform by fostering the development of charter schools.'" Ibid. (quoting N.J.S.A. 18A:36A-2). The court affirmed the decision to renew and expand the charter.

Here, ELC argues that expanding charter school enrollment has created and/or exacerbated two broad categories of segregation in Newark: student race, and student disability and LEP status. ELC claims that the seven Co-Respondent charter schools enroll

higher percentages of racial minorities than the district as a whole, relying upon a demographic comparison of individual charter schools to the NPS as a whole. See (Ab34-35). However, this broad generalization of the district's demographics as compared with an individual charter school's demographics places a requirement on charter schools not found in statute or regulation: that each individual charter school perfectly match the overall demographics of the district in which it is located.

While ELC cites to demographics representing NPS as a whole, a look at individual schools in NPS shows that those schools reflect demographics as diverse as those ELC complains of in the charter schools. For example, the Speedway Avenue School in Newark enrolled 574 students in the 2016-2017 school year. Of those students, the student body consisted of 2 white students (.03%), 49 Hispanic students (8.5%), and 522 African-American Students (90.9%). See New Jersey Department of Education, 2016-2017 Enrollment District Reported Data, available at http://www.state.nj.us/education/data/enr/enr17/stat_doc.htm. The Wilson Avenue School enrolled 1147 students, of which 15 were African-American (1.3%), 454 were white (39.5%), and 678 were Hispanic (59.1%). Ibid. The Roberto Clemente Elementary School enrolled 480 students, of which 2 were white (.04%), 75 were African-American (15.6%), and 397 were Hispanic (82.7%). Ibid.

The Commissioner is charged with using "the full panoply of his powers" to prevent segregation in the public schools. Englewood on the Palisades, 164 N.J. at 329. However, in all of the cases ELC cites, the court's concern was the potential of racial segregation in the public schools. The Commissioner must remedy segregation in the public schools, but the record here does not reflect that charter school enrollment has had a segregative effect on the district's schools. ELC's allegation focuses exclusively on the racial makeup of certain charter schools, but only compares those charter demographics to the overall NPS demographics. Such a limited comparative claim does not require the Commissioner to deny requests to increase the maximum enrollment in those charter schools.

Further, charter schools are opt-in programs; parents and students will choose whether they wish to enroll or not. See Red Bank, 367 N.J. Super. at 477. Absent some showing in the record, the court cannot assume that the school's recruitment and enrollment practices are improper or contribute to racial imbalance. Ibid. Nor can ELC make such an assumption.

ELC suggests that the Commissioner could encourage new charter schools in a broader region of residence, or encourage existing schools to add districts of residence from which it could draw a different student demographic. However, there is nothing in the record to demonstrate that this would cure the alleged dilemma.

Indeed, ELC admits that the record here demonstrates that the students attending Co-Respondent schools from out-of-district are, in the vast majority, African-American. (Aa528 - Aa534; Ab9).

ELC also claims that Co-Respondent charter segregate students with disabilities and LEP students. However, this assertion is contradicted by evidence in the record demonstrating that Co-Respondent schools have the ability to serve students with special needs and LEP students. See, e.g., (Aa300) (noting the efforts of University Heights to meet the needs of a special-needs population); (Aa475-77) (outlining the special education program at North Star); (Aa419-20) (describing the efforts taken at Robert Treat to identify students in need of English Language Learners ("ELL") services and the corresponding services offered. Robert Treat notes that most students complete their program and no longer need services after the first year). Robert Treat noted in its Renewal Application that it was difficult to target special education students for recruitment because it recruits students as young as four and many students are not classified at that age. (Aa331). Further, it noted that it does not ask for student classification data other than name and contact information prior to the enrollment lottery, and never turns students away or attempts to counsel them out of enrolling. Ibid. Its application makes clear that the school does not discriminate on the basis of

race, national origin, disability status, or numerous other listed grounds. (Aa323).

Additionally, for the schools participating in One Newark Enrolls -- Great Oaks, University Heights, TEAM, and North Star during the 2015-2016 school year -- the enrollment process is the same for charter schools as it is for NPS schools: students rank the schools they wish to attend, whether they be charter schools or NPS schools, and are assigned according to available seats and a weighted lottery. See, e.g., (Aa181-195). Communication of the process for students to participate in the One Newark Enrolls process included advertising on the NPS website, school websites, city-wide school fairs, and school specific advertising such as the distribution of flyers directly to students. (Aa199). Other schools advertised via website, newspaper advertisements, open houses, billboards. (Aa331).

There is no support in the record for ELC's claim that the schools' enrollment practices "had significant segregative effects" in Newark. See (Ab33). As the Red Bank court stated in the context of alleged racial segregation: "[a]ssuming 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." 367 N.J. Super. at 478.

Nothing in the record indicates that the enrollment patterns in the schools here are the result of anything other than student choice, and ELC has raised no objection to any specific enrollment practice or policy by any of the Co-Respondent charter school. Further, absent some showing that the schools here are improperly recruiting students, the remedy ELC seeks is inappropriate. Similar to the Red Bank case, it would be inappropriate to restrict the expansion of a school providing students with a high-quality education simply because the students who chose to enroll in it did not reflect a perfect cross-section of the district-of-residence. Ibid.

The expansion of the Co-Respondent schools does not create or exacerbate segregation in Newark. The decisions should be affirmed.

POINT IV

THE CPSA PERMITS THE COMMISSIONER TO APPROVE A CHARTER SCHOOL TO EXPAND ITS ENROLLMENT INTO NEW FACILITIES.

The Commissioner did not arbitrarily approve unidentified facilities. Rather, he approved the requested enrollment expansions which permitted the schools to begin the process of identifying, securing, and improving such potential sites. Charter schools are permitted, subject to the Commissioner's approval, to expand their operations beyond their original facility. See Educ. Law Ctr. v. N.J. State Bd. of Educ., 438 N.J. Super. 108, 120-21 (App. Div. 2014). The Appellate Division previously affirmed the

State Board's adoption of regulations expressly permitting an existing charter school to amend its charter to include an additional facility or satellite campus. Ibid. In doing so, the court assumed that the Commissioner would conduct an adequate evaluation of the proposed site and reject a site that fails to meet the appropriate standards for a school facility. Id. at 122. As the Commissioner approved the school's requests to expand enrollment with the understanding that new facilities would need to be identified, secured, and potentially improved, prior to their use as a school facility, the decisions under review should be affirmed.

Initially, the court should recognize the difference between a charter school opening a new facility or satellite campus and the foundation of a new school. See, e.g., (Ab43) (alleging that the Respondent schools' applications "identified the need for a combined total of ten new charter schools"). ELC has previously argued that the addition of satellite campuses reflects the establishment of wholly new schools. See Educ. Law Ctr. v. N.J. State Bd. of Educ., supra, 438 N.J. Super. at 121. This court has rejected that argument, finding that "the addition of a satellite campus is more like the expansion of grade and enrollment levels than the opening of an entirely new charter school." Ibid. It also noted:

Furthermore, nothing in the Act or the prior regulations prohibits an existing charter school from expanding its operations with the acquisition or use of additional buildings rather than expanding only within its original building. In the case of an existing charter school that seeks to expand into additional physical space, it makes little sense to require a whole new application and the resulting review process. While a satellite campus is not the same as expanding into additional physical space immediately adjacent to the existing facility, the satellite campus would still be part of the same school. A school is more than a building. It is an educational program, and the teaching, administrative, and operational staff that devises and runs the program. Site unity is an appropriate consideration in evaluating the potential success or problems of a proposed charter school, but a remote site does not make a wholly different school.

[Id. at 120.]

Here, five of the Respondent schools' applications included requests to add new facilities to accommodate the sought-after enrollment expansions. ELC argues that the grant of the enrollment expansion requests must be reversed, as the Commissioner did not conduct an adequate evaluation of the then-unidentified potential school facilities.¹⁰ This argument should be rejected because it imposes requirements upon the charter school which are not present in the statute or regulation: namely that a school

¹⁰ ELC also stated that the CSPa does not permit "existing charters to operate multiple schools in different locations," (Ab41), but that contention is at odds with this court's prior decision on ELC's appeal from the implementation of the satellite campus regulations. See generally Educ. Law Ctr. v. N.J. State Bd. of Educ., supra, 438 N.J. Super. 108.

identify, secure, and prepare for occupation a facility it proposes to use as a new facility in the future.

Schools may amend their charters to add a satellite campus, N.J.A.C. 6A:11-2.6(a)(1)(iv), but, contrary to ELC's contention, the Commissioner did not approve the opening of new facilities in his February 2016 decisions. Rather, the schools were approved to increase their maximum enrollment, thereby permitting those schools which required additional space the ability to seek it out. See (Aa18 - Aa31). In the case of a charter school that seeks to expand and serve more students, but requires additional space to do so, the approval of its expansion plan represents a necessary precursor to its eventual addition of a new facility. The school would be fiscally irresponsible to maintain a facility which is far too large for its operation. Likewise, it would be fiscally irresponsible for a school to secure and make improvements on a new facility prior to obtaining the Commissioner's approval to expand its enrollment.

As the regulations make clear, amendment requests are evaluated based upon the standards set forth in the CSPA and its regulations. N.J.A.C. 6A:11-2.6(b). Therefore, contrary to ELC's contention, prior to the new facility opening, the school must submit to the Department a description of, and address for, its physical facility, N.J.S.A. 18A:36A-5(j), and the lease, mortgage, title, and sanitary and fire inspection reports for the proposed

new facility. N.J.A.C. 6:11-2.1(i)(6) to (9). The decisions should be affirmed.

CONCLUSION

For the reasons set forth above the court should find that there is no private right of action for ELC or for district schoolchildren to appeal the grant of a charter amendment request. Further, the court should find that ELC lacks standing to bring this appeal. In the alternative, the court should affirm the Commissioner's decisions granting the enrollment expansion at Co-Respondent charter schools.

Respectfully submitted,

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ATTORNEY GENERAL OF NEW JERSEY

By: 

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Appendix

Burke school children to ensure they receive a thorough and efficient education.

B. Standing should not be denied because of the diversity of the Abbott v. Burke children.

Although it is true, as the Commissioner asserts, that litigants generally do not have standing to assert the rights of third parties, see Spinnaker Condo. Corp. v. Zoning Bd. of City of Sea Isle City, 357 N.J. Super. 105 (App. Div.) certif. denied, 176 N.J. 280 (2003), the New Jersey Supreme Court has long recognized the right of organizations like the ELC to bring suit to vindicate the common rights of its members. See Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 109 (1971); In re Six-Month Extension, supra, 372 N.J. Super. at 86.

Here, the Commissioner also argues that the ELC lacks standing because the class of children it represents includes both those who attend traditional public schools as well as those who attend or wish to attend charter schools and that, based upon that diversity, the children "lack a common concern" in the outcome of the litigation necessary to confer organizational standing in the ELC. See Db10. The Commissioner's attempt to distinguish this case from the ELC's standing in the Abbott v. Burke cases, based on the suggestion

that here the children are not aligned in interest, is misplaced.

Notably, the Commissioner errs in claiming that the class of students represented by ELC includes more than those students who are currently enrolled in the traditional public schools; at no point in the Abbott cases were charter school students involved.² It is the ELC's position that any student in the Newark public school district, regardless of whether they have a speculative interest in attending a charter school in the future, has an interest in seeing that the school district has the ability to provide a thorough and efficient education to its students.

Moreover, despite some Newark children already attending charter schools and some children hoping to attend charter schools in the future, the fact remains that the Newark school children all continue to face the same potential harm - a lesser education for themselves or their peers - and it is that harm that affects the entire group and that is antithetical to the

² Fifteen years ago, ELC did attempt to argue that students in charter schools should receive Abbott remedies, but that argument was not part of the Abbott cases, was rejected by this Court, and has never been raised again. In re 1999-2000 Abbott v. Burke Implementing Regulations, 348 N.J. Super. 382, 438-441 (App. Div. 2002). The Commissioner himself has never recognized charter school students as part of the Abbott class, so his current assertion that "every student" in Newark is part of the class appears disingenuous. Db12.

intention of the Charter School law that the ELC is seeking to redress here. See Abbott v. Burke, supra, 206 N.J. at 467 (noting that ELC serves as "the equitable representative of all at-risk children in the State.") This "common concern" argument actually provides support for the ELC's appeal. Simply put, there should not be a disparity between the education a child receives in the Newark public school system and the education received in the Newark charter school system. That disparity would be enhanced if the Commissioner's expansion of Charter School enrollment remained unchallenged, because the diversion of funds away from the already underfunded Newark Public Schools and the Charter Schools' exclusion of the Newark Public Schools' most significantly at-risk students, combine to diminish the Public Schools' ability to provide an adequate, much less a thorough and efficient, education for its remaining students.

Given this history, and the general leniency with which standing is reviewed by our Courts, the Commissioner's standing argument should be rejected.

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ORDER ON CROSS MOTION

IN RE RENEWAL APPLICATION AND
REQUESTS FOR EXPANSION OF
SEVEN NEWARK CHARTER SCHOOLS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003416-15T1
MOTION NO. M-006642-15
BEFORE PART A
JUDGE(S): ALLISON E. ACCURSO
AMY O'CONNOR

CROSS MOTION 05/05/2016
FILED:
ANSWER(S) FILED: 05/17/2016

BY: NEW JERSEY DEPARTMENT OF
EDUCATION
BY: EDUCATION LAW CENTER

SUBMITTED TO COURT: May 26, 2016

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS
1st day of June, 2016, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT

CROSS MOTION TO DISMISS APPEAL

DENIED WITHOUT PREJUDICE

SUPPLEMENTAL:

FOR THE COURT:

Allison E. Accurso

ALLISON E. ACCURSO, J.A.D.

N/A STATEWIDE
ORDER ON CROSS-MOTION
EAC