IN RE RENEWAL APPLICATION OF TEAM ACADEMY CHARTER SCHOOL	:	SUPREME COURT OF NEW JERSEY DOCKET NO.: 083014
	:	CIVIL ACTION
IN RE RENEWAL APPLICATION OF ROBERT TREAT ACADEMY CHARTER SCHOOL	:	ON PETITION FOR CERTIFICATION FROM A JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION
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RESPONDENT'S BRIEF IN OPPOSITION AMICI CURIAE

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PRELIMINARY STATEMENT

In May 2019, the Appellate Division affirmed the February 2016 decisions of the Commissioner of Education permitting the expansion of seven highly successful charter schools in Newark, and acknowledged the Commissioner's specialized expertise and understanding of the complexities at issue in the charter school approval process. The American Civil Liberties Union ("ACLU"), the American Federation of Teachers ("AFT"), Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), and the Boards of Education of Paterson and Irvington ("Boards") (collectively "Amici"), join in the Education Law Center's ("ELC") plea to reverse the Appellate Division's sound opinion. But Amici, like the ELC, assert no legitimate basis for doing so.

As the record plainly reflects, the charter schools at issue embody precisely what the Charter School Program Act of 1996 ("CSPA"), N.J.S.A. 18A:36A-1 to -18, was designed to achieve. All seven schools have served students and families of Newark for several years, yielding successful graduation rates, high test scores, and innovative learning environments for Newark's students. As a result of that success, more and more families each year have expressed a desire to send their children to these programs, as reflected in the extensive waiting lists that continued year to year. And it stands to reason that those schools would strive to accommodate those desires. With the resulting

demand, the schools sought to expand their capacity to accommodate the public need and provide a quality education to more of Newark's student population. This is precisely the type of growth envisioned by the Legislature through the CSPA.

Because the intent of the CSPA was to, among other things, increase the availability of educational choices, establish an alternate form of accountability for schools, and encourage the use of innovative learning methods, the Act and its cognate regulations necessarily implement a higher level of regulation over the charter schools in the State than is required for traditional public schools. For instance, in order to continue operating, a charter school must show that it is performing well academically, and that it is operationally and fiscally sound. The Commissioner must also be assured that the existence of a charter school or schools in a particular school district does not result in the district's inability to provide a thorough and efficient education ("T&E") to its students.

The Commissioner's review of the seven applications and related public submissions did not reveal sufficient evidence that Newark Public Schools ("NPS") would be prevented from providing a constitutionally sufficient education to its students as a result of the expansions of the charters. This remains the case, even with NPS's supplementation of the record following the issuance of the decisions. There is no indication that the Commissioner's

review of either fiscal or alleged segregative impacts was insufficient simply because NPS is a former Abbott district. Indeed, the Legislature took care to address charter schools' potential negative fiscal impact on former Abbotts when it enacted the School Funding Reform Act of 2008 ("SFRA"), N.J.S.A. 18A:7F-43 to -70. And there is nothing in the makeup of the charter schools' special education and limited English proficiency ("LEP") population that violates the Constitution; nor does the law require or even suggest that the Commissioner must ensure that they mirror the district of residence population.

The Commissioner's decisions were amply supported by the record of all seven of the charter schools at issue, and the Appellate Division appropriately affirmed those decisions. In acknowledging the Commissioner's expertise in this area and recognizing that the ELC had failed to establish that the decisions were arbitrary, capricious or unreasonable, the Appellate Division reasonably deferred to the Commissioner. Its decision should be affirmed.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

The Commissioner relies on and incorporates by reference the procedural history and counterstatements of facts set forth in the briefs submitted to the Appellate Division and this Court.

ARGUMENT

THE COMMISSIONER'S DECISIONS SHOULD BE AFFIRMED BECAUSE HE PROPERLY ASSESSED BOTH THE FISCAL IMPACT AND THE SEGREGATIVE EFFECT OF THE CHARTER SCHOOL EXPANSIONS.

Amici, like the ELC, challenge the renewal and expansion of the seven charters primarily on the theory that the Commissioner failed to appropriately consider the fiscal impact and segregative effect that granting the applications would have. They also ask this Court to uproot the Commissioner's well-established level of scrutiny for reviewing such applications, seemingly because they feel the circumstances of this case warrant a fundamental shift in the manner in which the CSPA and its policy goals are applied with respect to former Abbott districts. For the reasons that follow, their arguments fall short of the mark.

The Commissioner's decision to grant or deny a charter school application for expansion or renewal is subject to limited review. In re Red Bank Charter Sch., 367 N.J. Super. 462, 475 (App. Div. 2004); In re Proposed Quest Acad. Charter Sch. of Montclair

[1] Because they are closely related, the procedural history and counterstatement of facts are presented together for efficiency and for the Court's convenience.

Founders Grp., 216 N.J. 370, 385 (2013). Such a decision will only be reversed if it is arbitrary, capricious, or unreasonable. Quest Acad., 216 N.J. at 385-86. That standard is important here, as the Court is limited to three inquiries: (1) whether the agency decision violates express or implied legislative policies (i.e., whether the Commissioner followed the law); (2) whether the record contains substantial evidence to support the Commissioner's findings; and (3) whether, in applying the legislative policies to the facts, the Commissioner "clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Ibid. (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).

Our courts have routinely applied deferential principles when reviewing the Commissioner's decision in charter school matters, relying on his or her unique expertise. See, e.g., Quest Acad., 216 N.J. at 385-86; Red Bank, 367 N.J. Super. at 475-76; In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch., 320 N.J. Super. 174, 217 (App. Div. 1999), aff'd as modified, 164 N.J. 316 (2000); In re Team Acad. Charter Sch., 459 N.J. Super. 111, 139-40 (App. Div. 2019), certif. granted, 241 N.J. 1 (2020). This approach makes good sense, as it allows the Commissioner to effectuate the "legislative purpose of authorizing charter schools[,]" which is to promote education 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." Educ. Law Ctr. ex rel. Burke v. N.J. State Bd. of Educ., 438 N.J. Super. 108, 113 (App. Div. 2014) (quoting N.J.S.A. 18A:36A-2); see also In re Grant of Charter to Merit Prep. Charter Sch. of Newark, 435 N.J. Super. 273, 281 (App. Div. 2014); Red Bank, 367 N.J. Super. at 478. Indeed, the Legislature has explained that "the establishment of a charter school program is in the best interests of the students of this State[,]" and thus it is "the public policy of this State to encourage and facilitate the development of charter schools." Ibid. (quoting N.J.S.A. 18A:36A-2); see also Englewood on the Palisades, 164 N.J. at 336 (describing "legislative will to allow charter schools and to advance their goals"); Red Bank, 367 N.J. Super. at 478 (highlighting Legislature's goal of promoting "comprehensive educational reform by fostering the development of charter schools"); Merit Prep., 435 N.J. Super. at 281 (Legislature explicitly stated its objectives to give the Commissioner "broad authority to grant charters"); N.J.S.A. 18A:36A-3(b) (Commissioner "shall encourage the establishment of charter schools in urban districts").

Viewed through this prism, the only reasonable outcome must be affirmance of the Appellate Division's decision. Both the Court's and the Commissioner's standard of review have important implications with respect to any analysis of purported fiscal

impacts or segregative effects. And as to fiscal impacts, the law does not support Amici's contention that the burden should be placed on the Commissioner to apply a heightened standard of scrutiny in this case because NPS is a former Abbott district. Simply stated, a robust body of statutory, regulatory, and decisional law supports the Appellate Division's decision. Amici and the ELC have not adequately overcome their burden or accurately identified any fiscal or segregative disparities resulting from the charters.

Moreover, Amici, through their briefs, have failed to recognize that the policy goals of the CSPA have been met by the seven charter schools. Virtually every benchmark to warrant renewal and expansion has been achieved. Both the ELC and Amici overlook not just the law and evidence to the contrary, but a more fundamental point: a thorough and efficient education is being provided to students in traditional public schools and in charter schools, and the record is devoid of any evidence that the success of the charters was achieved at the expense of the quality of education at the district schools. Renewal and expansion of these charter schools are entirely consistent with all requirements under the law. Thus, after a careful and measured consideration of the fiscal impact and segregative effect of renewal and expansion - issues the Commissioner earnestly reviewed - the decisions to grant their applications were far from arbitrary,

capricious, or unreasonable. For the reasons that follow, the Commissioner's decisions must be affirmed.

A. The Commissioner Applied the Correct Level of Scrutiny, and the Record and the Law Support His Conclusion That Any Fiscal Impact Would Not Deprive Districts of Their Ability to Provide a Thorough and Efficient Education.

Amici argue that any time a charter school is created or expanded, funding for traditional public schools is diverted and therefore reduced, leading to the deprivation of T&E for public school students. (See LCb35, LCb39-40; AFTb7-8).[2] They also urge this Court to alter the long-held burden imposed on districts to come forward with a showing of negative fiscal impacts, and instead require the Commissioner to prove that no such impacts will occur. Amici are wrong on both counts. They overlook salient aspects of the law that foreclose the application of a heightened standard by the Commissioner. Moreover, not only do they assume without support that NPS incurred negative fiscal impacts resulting in an unconstitutional deprivation of T&E, but they ignore strong evidence to the contrary.

Beginning with the Commissioner's role, both this Court and the Appellate Division have routinely adhered to the same standard of scrutiny. As the Appellate Division observed below, this Court

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[2] "ACLUb" refers to Amicus ACLU's brief; "AFTb" refers to Amicus AFT's brief; "LCb" refers to Amicus Lawyers' Committee's brief; "BEPIb" refers to Amici Boards of Education of Paterson and Irvington's brief; "Aa" refers to the ELC's appendix.

has held that the Commissioner does not carry 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[,]" particularly when such assertions are made "based on unsubstantiated, generalized protests." Team Acad., 459 N.J. Super. at 141 (quoting Englewood on the Palisades, 164 N.J. at 336). It is, in fact, incumbent on the district of residence to "come forward with a preliminary showing that" T&E cannot be provided. Englewood on the Palisades, 164 N.J. at 334. Thus, as this Court has explained, and as relied upon by the Appellate Division, the Commissioner is "entitled to rely on the district of residence" to "demonstrate[] with some specificity" that T&E will be jeopardized by the loss of funds; and only then must the Commissioner evaluate the fiscal impact to determine whether an unconstitutional condition will likely result. Team Acad., 459 N.J. Super. at 141 (quoting Quest Acad., 216 N.J. at 377-78; Englewood on the Palisades, 164 N.J. at 334-35).

The Court must also be mindful that because the Commissioner was not acting in a quasi-judicial capacity, but rather a quasi-legislative one, he was not obligated to provide the type of "formalized findings and conclusions necessary in the traditional contested case." Englewood on the Palisades, 320 N.J. Super. at 217. This is because, as a quasi-legislative function in which the Commissioner applies expertise in an investigatory function,

Red Bank, 367 N.J. Super. at 475-76, the grant or renewal process does not require the development of a record through an administrative hearing. Quest Acad., 216 N.J. at 383-84.

In other words, the reasons for the decision to grant an application for a renewal or expansion of a charter need only be discernible from the record, rather than detailed or formalized. Red Bank, 367 N.J. Super. at 476; Englewood on the Palisades, 320 N.J. Super. at 217. This fits squarely with the Commissioner's obligations under the plain language of the CSPA and its concomitant regulations. The Legislature expressed no intent to "subject the renewal of a charter school to adjudicative proceedings accompanied by a full panoply of procedural protections." Red Bank, 367 N.J. Super. at 475. The Appellate Division therefore correctly noted that there is no statutory or regulatory requirement that the Commissioner include reasons for granting, as opposed to denying, an application to renew or amend a school's charter. Team Acad., 459 N.J. Super. at 146 (citing N.J.A.C. 6A:11-2.1(f) and -2.3(d)). The only such requirements found in the regulations pertain to the denials of initial charter school applications and applications for renewal. See N.J.A.C. 6A:11-2.1(f) (notifications to applicants "not approved as charter schools shall include reasons for the denials") (emphasis added); N.J.A.C. 6A:11-2.3(d) (notifications to charter schools "not granted a renewal shall include reasons for the denial[s]")

(emphasis added). The Commissioner's decision must therefore be discernible from the record, but does not require an explicit statement of the reasons for approving a renewal or expansion request. Red Bank, 367 N.J. Super. at 476.

Collectively, Amici argue that under the current precedential framework, the Commissioner can - and in this case, has - rubberstamped a renewal or expansion application without meaningful review or explanation. Without a more jaundiced review of applications, they contend, the likelihood that former Abbott districts will be deprived of T&E through underfunding is compounded; and they claim that such an outcome occurred in this instance. (AFTb17-21; LCb30-44; ACLUb19-25; BEPIb14-16). But there are good reasons that the burden of demonstrating an unconstitutionally negative fiscal impact should reside with the district, and they have nothing to do with a superficial or cavalier approach to renewal or expansion applications. Both the Commissioner's level of scrutiny and, as a corollary, the limited obligation to provide the reasons for granting renewal or expansion, are supported by precedent and by sound policy rationale.

To begin with, not only is the standard applied in this case entirely consistent with principles long held by this Court, but it is in accord with the above-described legislative will to encourage the development of charter schools. N.J.S.A. 18A:36A-

2; Englewood on the Palisades, 164 N.J. at 321, 336; Red Bank, 367 N.J. Super. at 478; Burke, 438 N.J. Super. at 113; Merit Prep., 435 N.J. Super. at 281. The Commissioner is in fact required to "actively encourage the establishment of charter schools in urban school districts . . . ." N.J.S.A. 18A:36A-3(b). Moreover, as our courts have repeatedly found, neither the plain language of the CSPA, nor its implied legislative goals, nor its cognate regulations, evince an intent to require the Commissioner to apply a heightened standard of scrutiny. See Quest Acad., 216 N.J. at 377-78; Englewood on the Palisades, 164 N.J. at 334-35; Team Acad., 459 N.J. Super. at 140-44; see also Red Bank, 367 N.J. Super. at 475 (finding "no evidence in the adopted regulations or for that matter in the legislation or case law that requires the Department . . . to provide greater process for the renewal of a charter . . . ."); N.J.S.A. 18A:36A-2 and -17; N.J.A.C. 6A:11-2.1 and -2.3. As a corollary, no law exists that would require the Commissioner to include amplified reasons for granting, as opposed to denying, an application to renew or amend a school's charter. See N.J.A.C. 6A:11-2.1(f) (applicants not approved as charter schools entitled to reasons for denial) and -2.3(d) (charter schools not granted renewal entitled to reasons for denial); see also N.J.S.A. 18A:36A-2 and -17; Team Acad., 459 N.J. Super. at 146 (citing N.J.A.C. 6A:11-2.1(f) and -2.3(d)).

As a result, there is no reason to change course either in this particular case or from a global policy perspective. Both this Court and the Appellate Division have repeatedly maintained that districts should come forward with a threshold showing of a fiscal impact that impairs their ability to provide T&E, and that evidence supporting the Commissioner's decision need only be discernable from the record. This has been black letter law for decades. And in that time, the Legislature has also declined to take any action to shift the burden to the Commissioner. Amici have not offered any basis for the Court to turn about-face and nullify years of precedent and policy rationale by requiring the Commissioner to carry the burden of proof, or otherwise scour the record for evidence of fiscal disparity that has not been affirmatively and credibly presented by the party best able to produce such evidence – the district.

It is anticipated that Amici will respond by pointing to this Court's holding in Englewood on the Palisades, 164 N.J. at 334, which explained that the question of whether the current level of scrutiny applies with respect to former Abbott districts must abide a separate determination. But to paraphrase the Appellate Division's decision below - while the day may have come to address the standard, the day has not come to change it. See Team Acad., 459 N.J. Super. at 143; Quest Acad., 216 N.J. at 377-78. Aside from long-standing precedent, and the lack of any statutory or

regulatory obligation to employ a "heightened scrutiny" of renewal or expansion applications, there is another reason for declining Amici's invitation to switch the burden from districts to the Commissioner: the Legislature has provided safeguards to protect former Abbott districts from losing the ability to provide T&E. In particular, the CSPA and the SFRA have cast a wide safety net to prevent such an outcome.

The Commissioner is ever-mindful that since the CSPA requires the district of residence to contribute 90% of a charter's per-pupil program budget, the establishment of a charter will inevitably have some fiscal impact on a district. See N.J.S.A. 18A:36A-12. That much is not disputed. Indeed, the Commissioner and the Department enforce the CSPA and have implemented its regulations. The Appellate Division, however, aptly noted that the Legislature anticipated funding concerns and therefore allowed districts to retain 10% of equalization aid and tax levy attributable to each charter student, a feature "designed to respond to concerns about the loss of funding." Team Acad., 459 N.J. Super. at 142 (citing Englewood on the Palisades, 164 N.J. at 333; N.J.S.A. 18A:36A-12(b)). This, in turn, "reduce[s] per pupil allocation" to "ease budgetary pressures - not worsen them." Ibid.

Perhaps even more persuasive are the protections afforded by the SFRA - a body of law previously upheld as constitutional with respect to former Abbott districts. Abbott v. Burke (Abbott XX),

199 N.J. 140 (2009). The SFRA was enacted after decades of Abbott litigation, extensive research, and consultation with numerous experts, and effectively overhauled the prior system of school funding. Ibid.; N.J.S.A. 18A:7F-44. It was "designed to exceed the requirements necessary" to provide T&E, and built in a series of safety mechanisms to accomplish that goal. Abbott XX, 199 N.J. at 164. As described below, any concerns regarding current underfunding for former Abbott districts is soundly assuaged by those mechanisms. And as noted by the Appellate Division, the Commissioner is charged under the CSPA to implement the SFRA formula. Team Acad., 459 N.J. Super. at 144 (citing N.J.S.A. 18A:36A-12(b)).

In particular, the Legislature sought to accomplish the salutary goals of the SFRA by employing a structure of school funding through which districts funded their budgets using a combination of local levy and State aid. N.J.S.A. 18A:7F-44(g).[3] The core of this structure is the "adequacy budget," which is designed to support the majority of educational resources needed by children in each district. N.J.S.A. 18A:7F-51. Specifically,

[3] The SFRA provides for several categories of State aid. See, e.g., N.J.S.A. 18A:7F-52, -54, -55, -56, -57, -58 (equalization, preschool, special education, security, transportation, and adjustment aid, respectively). See Abbott XX, 199 N.J. at 155-57. "State aid" is therefore a term that encompasses multiple categories of aid.

the adequacy budget is an estimate of what it costs each district to provide the "core curriculum content standards"[4] to each student according to the district's enrollment and student characteristics. N.J.S.A. 18A:7F-51. The adequacy budget is calculated on a per-pupil base cost that reflects the cost of educating an elementary school student with no special needs - with the addition of weighted adjustments to reflect the additional costs of educating middle and high school students, at-risk and LEP pupils, and students requiring special education. Abbott XX, 199 N.J. at 153. The Department then uses the adequacy budget calculation in its formula for determining each district's State aid. See N.J.S.A. 18A:7F-51 and -53.[5]

Accordingly, the court below perceptively concluded that there was no deleterious fiscal impact here, in light of the calculated protections of the SFRA. See Team Acad., 459 N.J.

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[4] The core curriculum content standards ("CCCS") are "intended to implement the thoroughness component of the constitutionally mandated thorough and efficient education." See Abbott v. Burke (Abbott IV), 149 N.J. 145, 161-162 (1997). The CCCS "are not a curriculum; rather, they define the result expected without proscribing specific strategies or educational methodologies. . . development of a curriculum . . . is left to the local district." Ibid. In short, the CCCS provide the framework for what all children should learn in their years of public education.

[5] Cognizant of this Court's directive to subject the formula "to periodic reexamination and retooling as necessary to keep the formula operating with equity, transparency, and predictability," Abbott XX, 199 N.J. at 174, the Legislature has amended the SFRA once already to address inconsistencies that have grown over time. L. 2018, c. 67.

Super. at 143-44. Its decision is eminently reasonable, as the CSPA and SFRA provide a strong level of statutory protection for former Abbott district funding, including a dynamic process where the SFRA is reviewed and revised over time to adapt to trends and remedy inconsistencies or disparities.

And in addition to this dynamic process, as well as the fact that the CSPA had its own built-in safety mechanisms, the formula for calculating equalization aid under the SFRA carries with it certain critical characteristics to ensure the provision of T&E and the appropriate allocation of finite resources. In particular, the SFRA is unitary, in that it applies the same funding principles to all districts. See Abbott XX, 199 N.J. at 152, 173-74; N.J.S.A. 18A:7F-44(g). It is also weighted, to ensure that the Department's equalization aid for each district is calculated based on the district's demographics. Abbott XX, 199 N.J. at 152; N.J.S.A. 18A:7F-44(d) and -53. And it is wealth-equalized, so that funding under the formula is a shared responsibility of each district and the State based on districts' relative property and income wealth. Abbott v. Burke (Abbott XIX), 196 N.J. 544, 557 (2008); Abbott XX, 199 at 154-55.

In essence, the law is designed to ensure that the money follows the child – regardless of whether a child attends a traditional public school or a charter school – and to simultaneously provide safeguards against fiscal impacts that

would deprive districts of the ability to provide T&E. One crucial way this is accomplished is by feeding the number of district-wide students into the funding formula. Furthermore, the unitary, weighted, and wealth-equalized aspects of the formula meant that the State no longer needed to distinguish between Abbott and non-Abbott districts – the unique character of each district is recognized by the formula, and funding is allocated accordingly.

The Legislature is presumed to be thoroughly conversant with its own legislation, Brewer v. Porch, 53 N.J. 167, 174 (1969); and as such, it knew when enacting the CSPA and SFRA that both schemes would work in tandem to lessen any fiscal impacts that would deprive students of T&E, and would in fact ensure the provision of T&E. See N.J.S.A. 18A:36A-2 and -12; N.J.S.A. 18A:7F-44; Abbott XX, 199 N.J. 140; Englewood on the Palisades, 164 N.J. 333-36; see also Team Acad., 459 N.J. Super. at 144 ("the Commissioner must implement the SFRA formula" (citing N.J.S.A. 18A:36A-12(b))). The Legislature is also presumed to be aware of the decisional law of this State. Farmers Mut. Fire Ins. Co. of Salem v. N.J. Property-Liability Ins. Guar. Ass'n, 215 N.J. 522, 543 (2013). In fact, the Abbott line of cases is expressly acknowledged by the Legislature in the SFRA. N.J.S.A. 18A:7F-44(f), (k), and (p).

The foregoing analysis militates against the adoption of a heightened level of scrutiny for the Commissioner in this case. To the extent charter schools do create a fiscal impact, the SFRA

ameliorates such impact; and thus a particularized burden of proving the deprivation of T&E by districts is even more necessary. See Englewood on the Palisades, 164 N.J. at 334-46; Quest Acad., 216 N.J. at 377-78; Red Bank, 367 N.J. Super. at 476; Team Acad., 459 N.J. Super. at 141. In other words, while some effects were contemplated by the Legislature, the fiscal impact on a district should have no bearing on the establishment or a renewal of a charter school unless it would deprive a resident district's students of T&E. Id. at 336; Red Bank, 367 N.J. Super. at 482-83. Amici simply fail to grapple with the consequences of the SFRA.

The facts in this particular case do not alter the analysis. In fact, they demonstrate an intuitive point - that districts are in the best position to determine their fiscal state and the impacts of charter school expansions or renewals. Id. at 334; see also Team Acad., 459 N.J. Super. at 142. That NPS itself did not join in the ELC's appeal, and had no objection to renewal or expansion based on fiscal impacts, is telling. See Team Acad., 459 N.J. Super. at 141; (Aa596-98).[6] NPS submitted comments

[6] And as previously explained, NPS's argument that no objection was raised because it was State-operated at the time lacks merit. It essentially presumes that, as a State-operated district, NPS was restrained from objecting. But the law says otherwise - a district is distinct from the State even when under State intervention, N.J.S.A. 18A:7A-37, and the Commissioner is not the district's chief administrator, N.J.S.A. 18A:7A-35 and -39. In

regarding the expansion applications, all of which were considered by the Commissioner. (Aa18-31, Aa596-98). Its submissions lacked any assertion that the fiscal impact of the charter enrollment expansions would interfere with the district's ability to provide T&E. (Aa596-98); see also Team Acad., 459 N.J. Super. at 128-38, 141.

And it makes sense that NPS did not object - in 2018 (after the expansion and renewal applications were granted), the State Board returned full operating authority to the Newark Board of Education after a period of State intervention, largely due to the fact that between 2015 and 2018 both the test scores and graduation rates of Newark's students increased substantially. See Team Acad., 459 N.J. Super. at 120.[7] The District's improved fiscal

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fact, the CSPA requires State district superintendents to represent the interests of its students throughout the charter process. N.J.S.A. 18A:36A-4(c); N.J.A.C. 6A:11-2.1 to -2.6; see also Quest Acad., 216 N.J. at 377. Simply stated, NPS had every opportunity to object in the proceedings below, and was required to do so, but did not.

[7] See also Department of Education, Transition Plan for the Return of Local Control to Newark Public Schools (Dec. 19, 2017), located at https://www.nps.k12.nj.us/mdocs-posts/local-control-nj-doe-transition-plan-for-the-return-of-local-control-to-newark-public-schools-12-19-2017/ (last accessed October 25, 2020); Karen Yi, Newark finally gets control of schools - What we learned about N.J.'s state takeovers, NJ.com (Feb. 1, 2018), https://www.nj.com/essex/2018/02/chris_cerf_newark_schools_local_control.html (last accessed October 21, 2020), (updated Apr. 2, 2019).

state was also a consideration. Ibid.[8] And because NPS was providing T&E to its students, including after the Commissioner's decisions were issued, it cannot reasonably be argued that renewal and expansion threatened a deprivation of T&E to NPS's students.

The Appellate Division's rationale thus supports the conclusion that the diversion of funds which occurred here, when students decided to enroll in charter schools, do not rise to the level of depriving NPS of the ability to provide T&E to its students. See Team Acad., 459 N.J. Super. at 141-44. The record simply does not reflect that the Commissioner ignored the fiscal impact the expansions would have on NPS, nor does it reflect that the Commissioner's decisions effectively denied NPS students a thorough and efficient education. Ibid.

The success of the seven charter schools, and their fulfillment of the CSPA's goals in general, are equally important and cannot be overlooked. See N.J.S.A. 18A:36A-2; Englewood on the Palisades, 164 N.J. at 321, 336; Red Bank, 367 N.J. Super. at 478; Burke, 438 N.J. Super. at 113; Merit Prep., 435 N.J. Super. at 281. As noted in the Commissioner's appellate brief, and by the court below, his review of each charter school revealed that all of the schools were academically high-performing. Team Acad., 459 N.J. Super. at 129-31, 133-35, 137-38; (Aa18-31). Each school

[8] See also fn. 7 above.

was also organizationally and fiscally sound. Ibid.; (Aa18-31). The Commissioner noted that all of the charter schools had a history of providing a high-quality education to the students of Newark. Ibid.; (Aa18-31). The individual factors pertaining to each school and their unique academic programs were persuasive to the Commissioner, and thus he concluded that each of the expansion requests were warranted. Ibid.; (Aa18-31). And the Commissioner's decisions reflect that he reviewed public comments and the potential fiscal impact of the expansions on NPS. Ibid.; (Aa18-31). The Appellate Division correctly reasoned that the decisions - which were wholly in accord with the SFRA and CSPA - cannot be considered arbitrary, capricious or unreasonable. Team Acad., 459 N.J. Super. at 144 (noting that the Commissioner does not have the discretion to deviate from implementation of the SFRA formula).

Accordingly, the Appellate Division's determination that the Commissioner reasonably found that expansion and renewal of the charters would not deprive NPS students of T&E was correct and should be affirmed.

B. The Record and the Law Support the Commissioner's Conclusion That Renewal and Expansion Did Not Lead to Segregative Effects.

Amici offer a similar approach across their briefs with respect to a segregative effects analysis. They collectively raise arguments claiming that the charter school movement has generally caused an uneven demographic distribution among public and charter

schools. With respect to Newark and the seven charter schools, they contend the Commissioner's decisions overlooked the segregative impacts that renewal and expansion purportedly had with respect to LEP students and those with disabilities, as well as amongst black and Hispanic students. (AFTb3-5, AFTb17-21; LCb5-7; ACLUb19-25; BEPIb1-3, BEPIb14-16). Amici fall short of a persuasive argument in several respects, just as they did regarding the economic analysis above. Neither the law nor the factual circumstances presented here support deviation from the deferential standard of review described throughout this brief. Moreover, statutory and regulatory mechanisms have been implemented to protect against the scourge of segregation, and the seven charter schools at issue adhered to those laws.

In 1971, this Court concluded that the Commissioner is empowered by the Legislature to faithfully discharge his or her responsibilities in the educational field by using a bevy of statutory tools at his or her disposal to combat school segregation. Jenkins v. Morris Sch. Dist., 58 N.J. 483 (1971). Through a long line of cases, the Court has time and time again charged the Commissioner and the State Board of Education with "the constitutional imperative to prevent segregation in our public schools . . . ." 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, 181 (2004).

The racial impact of a charter applicant on the district of residence is therefore a critical consideration - one the Commissioner is particularly sensitive to. Quest Acad., 216 N.J. at 377, 388; N.J.A.C. 6A:11-2.1(j) and -2.2(c); see also N.J.S.A. 18A:36A-7; Englewood on the Palisades, 164 N.J. at 329. "The constitutional command to prevent segregation in our public schools superimposes obligations on the Commissioner when he [or she] performs his [or her] statutory responsibilities under the [CSPA]." Englewood on the Palisades, 164 N.J. at 329. It is therefore not disputed that the Commissioner is obligated to "vigilantly seek to protect a district's racial/ethnic balance" throughout the life of a charter school - both in its initial application process and when reviewing its renewal. Red Bank, 367 N.J. Super. at 472.

It is within this framework that the Commissioner is required to "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." Englewood on the Palisades, 164 N.J. at 327. But consistent with the applicable standard of review described above, the "form and structure" of the analysis is left to the Commissioner's discretion. Id. at 329. And, importantly, "[t]he mere fact that the demographics of the charter schools do not mirror the demographics of the District does not

alone establish a segregative effect." Team Acad., 459 N.J. Super. at 128 (citing Red Bank, 367 N.J. Super. at 476-77).

Moreover, while the Commissioner is required to act when a district's ability to provide T&E "is threatened by racial imbalance," N. Haledon Sch. Dist., 181 N.J. at 183, the Supreme Court of the United States has made clear that the Fourteenth Amendment limits a State's ability to remedy de facto school segregation through overt racial balancing, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

With these fundamental precepts in mind, neither the law nor the facts in this case support Amici's concerns as to alleged racial imbalances or disparities in the distribution of LEP and special needs students.

1. Racial Imbalance.

The AFT and the Lawyers' Committee suggest that charter schools in New Jersey perpetuate racial and ethnic segregation, particularly amongst black and Hispanic students - a pattern they claim that Newark's charter and traditional public schools mirror. This concern is without merit - Amici ignore a host of important considerations in law and fact.

Good faith recruitment efforts, non-discriminatory enrollment policies, and family autonomy and student enrollment preferences are essential ingredients in the Commissioner's calculus. They were built into the CSPA by the Legislature to serve a vital

purpose, namely the protection against segregative effects. Thus, "[a]ssuming the school's enrollment practices remain color blind, random, and open to all students in the community," parents must be given the latitude to decide whether or not to enroll, and segregative effects "cannot be attributed solely to the school." Red Bank, 367 N.J. Super. at 478.

Safeguards have been developed and implemented by the Legislature and the Department to counterbalance any segregative effects that may potentially occur as a result of charters. Id. at 471-72. The CSPA mandates that charter schools, "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). Moreover, as noted in the Commissioner's appellate brief, charter school admission is voluntary - application is made at the discretion of the parent and the student on a space-available basis, and preference for enrollment is given to students who reside in the district of residence. N.J.S.A. 18A:36A-7 and -8. A level of autonomy is also built into the system - students have the option to enroll in either district schools or in charter schools. They are given the option of indicating a preference for either charter schools or traditional public schools, and are permitted to withdraw from a charter school at any time. N.J.S.A. 18A:36A-9.

In addition to those statutory provisions, the Department has also promulgated regulations to ensure that the Commissioner has carried out the duty to "assess the student composition of a charter school and the segregative effect" that a charter school may have on the district of residence. Team Acad., 459 N.J. Super. at 145 (quoting N.J.A.C. 6A:11-2.1(j) and -2.2(c)); Red Bank, 367 N.J. Super. at 471-72. Applying these principles to the seven charter schools, the admission policies of all seven schools complied with the requirements of the CSPA and its cognate regulations. See N.J.S.A. 18A:36A-7 to -9; N.J.A.C. 6A:11-2.1(j) and -2.2(c).

There was more than adequate support in the record to sustain the Commissioner's decisions that expansion of the seven charter schools would not result in an unlawful segregative effect. All seven schools engaged in extensive recruitment efforts to attract all of Newark's students. Team Acad., 459 N.J. Super. at 128. They actively sought to enroll every Newark student, and had the ability to provide an education to students of all backgrounds. Ibid. All seven schools admitted "students based on a random blind" and weighted lottery system. Id. at 145; (Aa181-95); see also N.J.S.A. 18A:36A-8. They did not seek to enroll students of one race over those of another, and there was no cap on any racially- or ethnically-based demographic. All seven charter schools submitted reports of their demographics that the

Commissioner relied upon in making his decisions. Id. at 128-138. Further, all of the schools provided detailed information to the Commissioner regarding their recruitment practices and enrollment procedures, which the Commissioner considered before rendering his decisions.

To be sure, the Commissioner is required to take action to prevent the exacerbation of segregation. But no such causation or exacerbation was evident here. The record is devoid of evidence that the charter schools are siphoning minority or non-minority students from NPS schools, or that purported racial imbalances were the result of the practices of the charter schools. Thus, as in Red Bank, curtailing the expansion of academically successful charter schools that have historically provided positive educational opportunities for Newark's students would not have a beneficial impact on the existing racial imbalance in the district. In fact, doing so would run counter to the spirit and intent of the CSPA announced by the Legislature, which was to provide an alternative to traditional public schools by encouraging the establishment of charter schools. N.J.S.A. 18A:36A-2 and -3(b); Englewood on the Palisades, 164 N.J. at 321, 336; Red Bank, 367 N.J. Super. at 478; Burke, 438 N.J. Super. at 113; Merit Prep., 435 N.J. Super. at 281.

Accordingly, the Commissioner's decisions were far from arbitrary, capricious, or unreasonable. Using the framework

approved in Red Bank, Quest, and Englewood on the Palisades, he conducted a holistic examination of the demographics of Newark and the seven charter schools, and found that the operations of those schools did not exacerbate racial imbalance in the district. Team Acad., 459 N.J. Super. at 145. The Commissioner appropriately concluded that the renewal and expansions of the charters would not have a segregative impact on the racial demographics of the district. Ibid. Not only did the charter schools actively seek to enroll and engage all of Newark's diverse students, but they provided a high-quality education to diverse students across all of Newark and consistently received high scores on evaluations of their academic performance. (Aa18-31). As was the case in Red Bank, 367 N.J. Super. at 477-78, the seven charter schools cannot be faulted for developing attractive educational programs while simultaneously engaging in active recruitment efforts to appeal to a diverse cross-section of Newark's student population. To conclude otherwise would contravene the Legislature's stated purpose of the CSPA. See Ibid.; N.J.S.A. 18A:36A-2 and -3(b); Englewood on the Palisades, 164 N.J. at 321, 336; Red Bank, 367 N.J. Super. at 478; see also Burke, 438 N.J. Super. at 113 (discussing policy goals of the CSPA); Merit Prep., 435 N.J. Super. at 281 (Legislature explicitly stated its objectives to give the Commissioner "broad authority to grant charters").

The relevant authority is clear - the fact that the demographics of the seven charter schools do not perfectly match that of NPS does not, on its own, establish a segregative effect. Red Bank, 367 N.J. Super. at 476-77. Moreover, as explained in the Commissioner's appellate brief, both Amici and the ELC overlook the fact that district schools themselves vary in their demographic makeup; and therefore, their comparison of any particular charter school's demographic makeup to the district's overall demographic makeup is unavailing. For all of these reasons, the record supported the Commissioner's decisions to grant the expansion requests. There was no evidence that doing so would have a segregative effect, and there is no basis to overturn those decisions as arbitrary, capricious, or unreasonable. Upon its own review of the record, the Appellate Division correctly held that there was no evidence in the record "to substantiate a segregative effect, either in the pre- or post-enrollment practices." In re Team Acad., 459 N.J. Super. 145-46.

2. LEP and Special Needs Students.

Conspicuously absent from Amici's arguments is any support for the contention that the Commissioner is compelled by statute or constitutional provision to ensure the equal distribution of special needs and LEP students, or to actively redistribute students. This absence is unavoidable because no such mandate exists. But even if one did, no segregative impacts occurred here

for many of the same reasons explained with respect to alleged racial imbalances.

It is important to point out that Amici fail to appreciate the nuanced obligations of the Commissioner and the charter schools in this context.[9] Indeed, the admission policy of a charter school, to the maximum extent practicable, shall be to 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). Charter schools are open to all students on a space-available basis; and to be sure, they may not discriminate in admission policies or practices based on a variety of socioeconomic factors (including LEP students and those with disabilities). N.J.S.A. 18A:36A-7. But, importantly, while charter schools' obligations extend to recruitment efforts and enrollment policies, they do not pertain to actual enrollment numbers. See Red Bank, 367 N.J. Super. at 476-77.

The lack of such obligation is logical, given the CSPA's emphasis on parent and student autonomy. While the Commissioner's duties encompass promoting integration of students with disabilities and LEPs, N.J.S.A. 18A:36A-7, ultimately the choice of whether a student attends a charter school depends on enrollment

[9] This distinction applies with respect to any alleged imbalance of LEP and special education students, as well as any racial or ethnic disparities.

capacity of the charter school and the desires of the parent and the student. The Commissioner is not required to ensure that each charter school has identical demographics to the district of residence. Such an expectation would be unrealistic given the fact that parents and students can voluntarily choose whether or not to attend a particular charter school. N.J.S.A. 18A:36A-7 and -8.

The Commissioner's and the Appellate Division's analysis is consistent with the circumstances in Newark. Newark's charter schools are parties to a compact agreeing to serve "all students in the city, especially the highest need students requiring special education services, students who are [LEP], students who qualify for free or reduced-price lunch, and other underserved or at-risk populations[.]" Team Acad., 459 N.J. Super. at 128. Students are admitted "based on a random blind lottery" system that is also weighted. Id. at 145; (Aa181-95); see also N.J.S.A. 18A:36A-8. Four of the charter schools - Great Oaks, University Heights, TEAM, and North Star - also participate in a universal enrollment system in which students rank their preferred schools (district and charter) and are then assigned to a school pursuant to an algorithm. Id. at 127; (Aa181-95). Under the system, students with the highest needs, such as students who have an individualized education program or are eligible for free lunch, are given greater preference to attend the school of their choice. Ibid.; (Aa181-

95). The remaining three charter schools, through various marketing and recruitment efforts, attempt to reach Newark's students and parents through a variety of advertising methods. Id. at 128. In all, each of the seven charter schools has the ability to provide an education to all types of students, including special needs and LEP students; and they maintain enrollment practices that are open to the entirety of Newark's student population. Ibid.; see also (Aa181-95, Aa300, Aa323, Aa331, Aa419-20, Aa475-77).

Again, the seven charter schools at issue were all performing exceedingly well academically. Id. at 128-30, 133, 135-37; (Aa18-31). This made them attractive choices for parents and students of Newark. Not only that, but all of the charter schools had the ability to serve special education and LEP students. Id. at 127-28; see also (Aa300, Aa323, Aa331, Aa419-20, Aa475-77). There is no basis in the record to conclude that enrollment patterns in the schools reflect anything other than parent and student choice - especially given the fact that all seven schools were willing, and remain willing, and able to serve all of Newark's diverse students. Ibid. No actual, causal link between the charters and any purported segregative disparities exists in the record. Thus, since the record lacked any evidence of discriminatory pre- and post-enrollment practices, the Commissioner's determination that an unlawful segregative effect would not result from the expansions

of the charter schools was not arbitrary, capricious, or unreasonable. Id. at 145.

The ACLU posits that the Commissioner lacked careful consideration of the impact of expansion in light of "Newark's status as a former Abbott district, combined with the financial ramifications caused by the segregation of special education students[.]" (ACLUb24). However, the record reflects that the Commissioner was thorough in his consideration of the expansion applications submitted by the charter schools, which included demographic information for each school. Team Acad., 459 N.J. Super. at 129, 131-133, 135-137. Further, the Commissioner's review does not alter the fact that attendance at a charter school is entirely voluntary, even in a former Abbott district. To conclude otherwise would be inconsistent with the law and the Legislature's policy goals. N.J.S.A. 18A:36A-7 and -8.

Finally, AFT's argument that charter schools continue to enroll students with disabilities at lower percentages than public schools falls short for the same reasons described above. First, it overlooks that in this instance the charter schools made efforts to intentionally and actively recruit all students; and the record evidence fully establishes that the seven high-performing charter schools had achieved the Legislature's policy goals, in terms of academic opportunity and achievement for students. Team Acad., 459 N.J. Super. at 128, 146. Second, the argument similarly does

not consider the latitude afforded to students and families in their enrollment choices. Neither the ELC nor any of the Amici have demonstrated that differences in enrollment figures are anything other than the result of parental choice.

Though repeatedly emphasized, the latter point bears repeating. Student autonomy is an integral aspect of the CSPA that cannot be overlooked. The students and parents of Newark or any other former Abbott district have the discretion to enroll in their traditional public school of residence or a charter school. Parents can enroll their children in a charter school, and withdraw their children from a charter school, at any time - regardless of the district in which they live. After careful consideration of a given record, any active and unsupported interference by the Commissioner with the growth of a successful charter school, or with family autonomy, would undercut the spirit and intent of the CSPA by thwarting its goal of providing a voluntary alternative to traditional public schools. As long as the Commissioner ensures that a charter school is not creating or exacerbating a segregative effect in its pre- or post-enrollment practices, the variable of parental choice must be considered when examining a charter school's demographics.

Each of the seven charter schools made substantial efforts to enroll and educate LEP students and students with disabilities - they maintained open enrollment practices that did not

discriminate against any these groups of students. The Commissioner has broad powers to renew, not renew, or revoke a charter after a review of the evidence contained in the record before him or her. Based on his review of the credible and relevant data concerning the expansion requests, coupled with his expertise and the exceptional academic performance reported by each of the seven schools, the Commissioner was satisfied that the enrollment policies of the seven charter schools appropriately sought a cross section of the community's school age population and that the expansions would not have an unlawful segregative effect.

Therefore, the Commissioner's decisions were not arbitrary or capricious and must be affirmed.

CONCLUSION

For these reasons, the Appellate Division's decision must be affirmed.

Respectfully submitted,

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