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February 25, 2020

VIA FEDERAL EXPRESS

Heather Joy Baker, Clerk
Supreme Court of New Jersey
R.J. Hughes Justice Complex
25 W. Market Street
Trenton, New Jersey 08611

Re: *In re Renewal Application of TEAM Academy Charter School, et al.* - SC Docket No. 083014 (LEAD)

Dear Ms. Baker,

We are counsel to Respondents TEAM Academy Charter School, Inc., Robert Treat Charter School, Inc., North Star Academy Charter School, University Heights Charter School, Great Oaks Legacy Charter School and New Horizons Community Charter School (collectively, "Respondent Charter Schools").¹ Please accept this letter brief in lieu of a more formal brief in opposition to Newark Board of Education ("NBOE")'s *amicus curiae* brief submitted on July 31, 2019.

¹ We do not represent Respondent Maria L. Varisco Rogers Charter School.

PRELIMINARY STATEMENT

NBOE erroneously describes its governance in 2016. NBOE then had fiscal oversight over Newark School District and had standing to appeal the subject charter decisions by the Commissioner of Education ("Commissioner.") NBOE seeks to re-litigate the charter decisions as an objecting party in remand proceedings, after the decisions have been implemented for three years. NJBOE's *amicus* arguments are in reality a late appeal. NBOE is also barred from untimely appearing in this matter under R. 1:13-9(a).

NBOE's appearance in this case is prejudicial to four of the respondent charter schools who are signatories to a Memorandum of Understanding agreement ("MOU") with NBOE. This MOU sets the terms and conditions for universal enrollment between NBOE students and the vast majority of students served by respondent charter schools. NBOE now comes before the Court with absurd allegations of school segregation in an enrolment system NBOE administers.

NBOE incorporates ELC's arguments. ELC has failed to meet its burden to demonstrate that the Commissioner's approval of Newark charter school enrollment expansions was arbitrary, capricious or unreasonable.

STATEMENT OF RELEVANT PROCEDURAL HISTORY

On February 18, 2016, the Commissioner granted Respondent TEAM Academy Charter School's ("TEAM") application to renew its

charter for five years. (Aa28).² On February 29, 2016, the Commissioner also issued six distinct charter school application decisions as follows: renewing Robert Treat Charter School's ("Robert Treat") charter for five years (Aa12); renewing North Star Academy Charter School's ("North Star") charter for five years (Aa24); increasing Maria L. Varisco Rogers Charter School's enrollment for 2016-2017 and 2017-2018 school years (Aa20), increasing University Heights Charter School's ("University Heights") enrollment for 2016-2017, 2017-2018, 2018-2019 and 2019-2020 school years (Aa30); increasing Great Oaks Legacy Charter School's ("Great Oaks") enrollment for 2016-2017, 2017-2018, 2018-2019 and 2019-2020 school years (Aa18); and increasing New Horizons Charter School's ("New Horizons") enrollment for 2016-2017 and 2017-2018 school years (Aa22).

Appellant Education Law Center ("ELC") appealed the foregoing decisions in a single notice of appeal. After multiple motions, the Appellate Division gave ELC leave to file a notice of appeal for each charter decision and ordered that the appeals be consolidated on September 28, 2016.

On May 7, 2019, the Appellate Division issued its decision affirming the Commissioner's 2016 decisions. The Appellate Division held, "[t]he mere fact that the demographics of the

² "Aa" refers to Appellant's appendix on appeal.

charter schools do not mirror the demographics of the District does not alone establish a segregative effect. . . Thus, ELC has not created a record that demonstrates the schools engage in enrollment practices that worsen the District's racial, ethnic, or special needs balance". *In re Renewal Application of TEAM Acad. Charter Sch.*, 459 N.J. Super. 111, 128 (App. Div. 2019) ("TEAM Academy"). The Appellate Division was also clear about the deficiencies in ELC's presentation of the record on the issue of funding, "ELC did not make any showing, much less a preliminary showing, on which the Commissioner could rely as to the effect the expansions would have on the District's budget". *TEAM Academy* at 142. According to the Appellate Division, ELC failed to (1) "specifically demonstrate how the District students would be deprived of a thorough and efficient education by the expansion" (2) "account for the fact that the District has to pay the charter schools only 90% of certain student funding categories, and retains 10% - an amount designed to respond to concerns about the loss of funding" and (3) "ELC does not account for the fact that the legislative formula is designed to maintain school funding at the constitutionally required level despite the existence of charter schools." *Id.*

ELC served a notice of petition for certification to this Court on May 28, 2019. ELC filed its petition on June 21, 2019.

Respondent Charter Schools filed their opposition on July 3, 2019. The petition was granted on February 6, 2020, and limited to issues I, II, and III of petitioner's brief.

On July 18, 2019, NBOE filed its motion to leave to appear *amicus curiae*. NBOE's June 2019 meeting agenda made no reference to discussions about these appeals, nor was there discussion about it per the publicly released videotaped recordings. (RCSSa98.)³ NBOE filed a revised motion for leave to appear *amicus curiae* on July 31, 2019 attaching a proposed *amicus curiae* brief adopting and incorporating by reference, ELC's petition for certification. NBOE's motion for leave to appear *amicus curiae* was granted on February 6, 2020, along with the motions to appear *amicus curiae* of Plainfield Board of Education and Franklin Township Board of Education.⁴

STATEMENT OF FACTS

NJBOE relies exclusively on the factual record created by ELC in this appeal, and did not provide any additional factual information by way of an appendix to its *amicus curiae* brief.

³ "RCSSa" refers to Respondent Charter Schools' Supplemental Appendix in opposition to NBOE's *amicus curiae* brief.

⁴ Respondent Charter Schools have filed separate opposition briefs to Plainfield Board of Education and Franklin Township Board of Education's *amicus curiae* briefs.

LEGAL ARGUMENT

**I. NBOE'S APPEARANCE AS AN AMICUS CURIAE IS
CONTRARY TO THE PUBLIC INTEREST AND
PREJUDICIAL TO THE CHARTER SCHOOL RESPONDENTS**

In its *amicus curiae* brief, NJBOE argues, in essence, that the Appellate Division (1) "fail[ed] to institute heightened constitutional scrutiny required under well-established Abbott jurisprudence" (2) the Commissioner "ignor[ed] the segregative effect of the expansion on Limited English Proficient students and students with disabilities requiring special education programs and services" and (3) the Commissioner "failed to evaluate the enormous significant fiscal impact that adding thousands of students to charter school enrollments would have on the funding and teachers, support staff and other essential resources required for the Board to deliver a thorough and efficient education to its students". (See NJBOE Amicus Brief p. 5).

**A. NBOE Erroneously Describes its
Governance in 2016**

The Legislature empowered the Commissioner and the State Board of Education to create a school district under full State intervention when the local school district fails to assure a thorough and efficient system of education. *N.J.S.A.* 18A:7A-34. In 1995, the State Board of Education (State Board), acting pursuant to the then-applicable provisions of the Public School Education Act of 1975 (PSEA), *L.* 1975, *c.* 212, as amended by *L.*

1987, c. 398, authorized the removal of Newark's local board of education and the creation of a State-operated school district, based on its determination that the district was not providing its students with a thorough and efficient system of education. *Contini v. Bd. of Educ. of Newark*, 286 N.J. Super. 106, 110, 668 A.2d 434 (App. Div. 1995).

In 2010, the Newark Public Schools Advisory Board (NPSAB) appealed from a final determination of the Commissioner, refusing to recommend partial withdrawal of the State's intervention in the Newark school district in the areas of fiscal management, personnel and governance. The appellants named the Commissioner as respondent. (RCSSa3.) The Commissioner moved to dismiss the appeal based on a lack of standing. The Appellate Division denied that motion. *In re Newark QSAC Appeal*, 2013 N.J. Super. Unpub. LEXIS 1682, *8 DOCKET NOS. A-6295-10T4, A-6302-10T4 (App. Div. 2013) (RCSSa5.) In 2014, the Commissioner announced a return of fiscal management to the NPSAB. (RCSSa1.)

Thus, in 2016, NPSAB had every opportunity to appeal the charter decisions at issue here. The subject matter squarely centered on fiscal management and the Appellate Division had already upheld the NPSAB's standing to pursue appeals. See also *In re Paterson QSAC Appeal*, 2013 N.J. Super. Unpub. LEXIS 2046, fn 1 Dkt No. A-1049-11T4 (App. Div. 2013) (Paterson Public School

Advisory Board has standing to challenge Commissioner decision on the question of return to local control) (RCSSa9.)

Newark resident voters elected members of NPSAB.⁵ (RCSSa21.) The members of the NPSAB as of February 1, 2018 continued serving on the NBOE when it assumed full local control. Despite NBOE's assertions, NPSAB representatives participated fully in the renewal and amendment proceedings in 2016.

The NPSAB took positions on charter school growth in Newark. The NPSAB stated in an assessment dated February 24, 2015:

We acknowledge that the expansion and growth of charter schools has provided a broader variety of school options, but we also know that this variety comes at a steep price: declining enrollment in traditional schools means enormous financial pressure on the district and is the root cause for employee layoffs and reduction in per pupil resources.

(RCSSa18.) NBOE stated that "the district and Board should collectively weigh-in on the granting of new charters in Newark."

(RCSSa20.)

At the time of the subject charter applications, the Newark School District "weighed-in" on the charter applications. It commented negatively on Marion P. Thomas Charter School's application for enrollment growth. (Aa596-97.) The Commissioner denied that school's application for growth entirely. (Aa587.)

⁵ One current Board of Education member, Tave Padilla, won election in 2016 and remains on the NBOE. See

Overall its comments led to charter school enrollment growth that was 1,600 less than requested. (Aa584-97.) The Appellate Division in *TEAM Academy* noted NPSAB's participation in the renewal process: "The record also shows that there is a need for increase in charter school enrollment in Newark, as the District acknowledged in recommending full approval of two applications, the partial approval of one application, and the denial, with an alternative partial approval recommendation for three applications." *TEAM Academy* at 146. Despite its assertions, the NBOE has already actively participated in the application process before the Commissioner.

After the Commissioner made his decision, like in *In re Newark QSAC Appeal* and *in re Paterson QSAC*, the NPSAB was fully capable of voting to authorize the filing of an appeal. It did not do so. Nor did it vote to appeal the 2017 approvals, which were also appealed by ELC. (See appeals bearing docket numbers A-3358-16; A-3359-16; A-3356-16 and A-3357-16, Respondent Charter Schools have sought a continued stay pending these appeals.)

NBOE asserts that since "the reinstatement of local control, the Board has actively responded and opposed numerous applications to establish new charter schools or further increase charter school enrollment beyond current levels." Yet, in January 2018, the Commissioner approved 8 Newark charter schools to expand growth by

2,805 students. (RCSSa32-58.) NBOE, having assumed full control on February 1, 2018, did not appeal those decisions.

B. NBOE Breached Common Law Duties Owed Charter Schools in the Memorandum of Understanding for Universal Enrollment

Since 2016, charter schools have renewed three agreements over the universal enrollment of Newark children. On November 2018, NBOE approved the current version of the "Memorandum of Understanding" ("MOU"). (RCSSa59-97.) It is in mid-term, as it covers enrollment during the 2019-2020 school year. (RCSSa77.) Charter schools relied on NBOE assurances of a genuine collaborative relationship to have an enrollment system which advances policies of transparency, choice, equity, access, community, ease and reliability. (RCSSa61.) As referenced in the Appellate Division decision and in the Respondent Charter Schools' opposition to the petition for certification, these goals have been realized. NBOE and charter schools agreed upon issues regarding enrollment objectives, preferences for guiding school assignments of students, residency verification, system administration, recruitment, ongoing student enrollment, among other matters. (*Id.*)

The universal enrollment system for Newark students were and remains entirely administered by NBOE. Per the current MOU, NBOE serves as the "System Administrator." (RCSSa74-75.) Four of the

charter schools who are parties to this appeal and who account for 88 percent of the enrollment at issue are signatories to the MOU. (App17a.)⁶ After charter schools relied on NBOE representations in agreeing to universal enrollment, NBOE now pivots and accuse charter schools of segregation in an enrollment system NBOE administers.

In addition to the express terms of a contract, the law provides that every contract contains an implied covenant of good faith and fair dealing. It is implied that each party to the contract must act in good faith and deal fairly with the other party in performing the terms of the contract. See *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396 (1997). To act in good faith and deal fairly, a party must act in a way that is honest and faithful to the agreed purposes of the contract and consistent with the reasonable expectations of the parties. *Id.* A party cannot act with an improper motive to destroy or injure the right of the other party to receive the reasonable expectations of the contract. *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Assoc.*, 182 N.J. 210, 230-234 (2005).

Universal enrollment per an MOU contract has been in place for more than five years. The MOU states that it "is an agreement

⁶ "App__" refers to ELC's Appendix to the Petition for Certification.

between an LEA and the Newark Board of Education . . .”⁷ (RCSSa61.)
The “Universal Enrollment System will cover the school assignment process for students in all grades, Pre-K to 12, for enrollment in the 2019-2020 year.” (RCSSa61-62.)

NBOE does not reference universal enrollment. Instead, it asserts “segregative impacts” from charter school expansion. Charter schools reasonably expected that NBOE would not have disavowed the universal enrollment system in court filings while the parties are performing under the MOU mid-term. NBOE blames charter schools for alleged segregation in a system NBOE administers.

II. NBOE’S ASSERTIONS ABOUT THE IMPACT OF THE CHARTER SCHOOL RENEWALS AND EXPANSIONS LACK FACTUAL OR LEGAL BASIS

A. Alleged Funding Impact

Consistent with well-established case law, the Appellate Division acknowledged, but did not assign great weight, to the budget impact information proffered by ELC, due to its lack of specificity and reliability. The State-Appointed Superintendent and NPSAB knew full well the financial impact from the 2016 charter school decisions and did not appeal them. Three weeks prior to assuming full control, the Commissioner approved charter school

⁷Charter schools are the only identified LEA’s other than Newark Public Schools.

enrollment expansion by 2,805 students, and NBOE did not appeal that. NBOE released a 2016-2019 Strategic Plan. NBOE's current Superintendent Roger Leon, then Assistant Superintendent, was a member of a committee which "oversaw and managed the process from start to finish." (RCSSa31.) The Strategic Plan describes the economic impact from charter schools as being "neutral" but for fixed and legacy costs. See "Priority 4" at <https://www.nps.k12.nj.us/mdocs-posts/2016-19-strategic-plan/> (Accessed on July 29, 2019).

ELC did demonstrate that Newark district would be unable to provide a thorough and efficient education for its students as required by *Englewood on the Palisades*, 164 N.J. at 334. Even after the Appellate Division specifically outlined the deficiencies in ELC's arguments, NBOE in its *amicus curiae* brief, declines to make any attempt to cure those deficiencies by demonstrating with any specificity, the alleged funding impact on their district that would prevent them from providing a thorough and efficient education for its students.

The Appellate Division noted, "In the case before us, the District does not join in ELC's appeal. It does not object to the expansions on the basis of budgetary or other detrimental effect. ELC did not make any showing, much less a preliminary showing, on which the Commissioner could rely as to the effect of the

expansions would have on the District's budget" *TEAM* at 141-42. NBOE makes no attempt to cure this deficiency. Instead, it adopts ELC's Petition for Certification in its entirety. As the Appellate Division in *TEAM Academy* aptly noted, "The District's budget is reduced by charter school expansion. But it is educating significantly fewer students. It is simply not clear whether the reductions in available funds is attributable to reduced enrollment". *TEAM Academy* at 143. Neither ELC nor NBOE have demonstrated any reason, given the SFRA formula, that a different standard should today be applied to former Abbott districts.

As set forth in its Opposition Brief on Appeal, the Respondent Charter Schools demonstrated that NPS has attributed its lack of funding to its own overspending. (RCSa72).⁸ "[I]t is clear that [NPS] must operate more efficiently in order to drive more dollars to the classroom, and to adjust budgets against actual costs such as the increases in total administrative costs, and salaries and benefits for administration." (RCSa73).

As to NPS's declining fund balance in 2015, "[t]here is a direct correlation between the decline in the district's reserve funds and overspending for employee salaries and benefits. The overspending is mainly attributed to the rising costs the Employee

⁸ "RCSa__" refers to Respondent Charter Schools' Appendix on appeal.

without Placement Sites Pool "(EWPS)" . . . and other compensation such as per diem employees." (RCSa74). The EWPS personnel are not placed in a school position due to their performance not warranting a principal assignment.⁹ NPS had two recommendations to address overspending, to "implement internal controls" and "strengthen Budget to Actual Reporting." (RCSa73). NBOE does not dispute its overspending in its *amicus curiae* brief.

Charter Schools receive less than 90 percent of NPS per student funding for Newark resident students. The Charter School Program Act provides that funding shall be at least "90 percent of the sum of the budget year equalization aid per pupil and the prebudget year general fund tax levy per pupil inflated by the CPI rate most recent to the calculation." N.J.S.A. 18A:36A-12(b). In fact, the Charter Schools receive less than 90 percent because their share is taken only from certain funding sources. The Charter Schools do not receive any funds for Adjustment Aid, Additional Adjustment Aid, Per Pupil Growth Aid, PARCC Readiness Aid, or Transportation Aid, as does NPS. (RCSa236).

⁹ The then State District Superintendent stated that "placing teachers in classrooms if they are rated ineffective or have not been selected by school leaders would have a catastrophic impact on student achievement and the district's ability to be on the path to excellence and retaining families." (RCSa75).

Even according to ELC projected budget figures (Ab17)¹⁰, which NBOE does not dispute, after the subject enrollment expansion is implemented through the 2018-2019 school year, NPS will very likely have a general fund balance (\$497,017,992.86 (Ab17)) that is greater than that the next highest spending school district, Jersey City District (\$418,471,290-- 2016-2017 school year.)¹¹

B. Alleged Segregative Impact

As to allegations of segregation, the Appellate Division correctly noted the role universal enrollment has to prevent segregation in Newark public schools. (App43a.) The Appellate Division found that the policies and practices of Newark's charter schools are non-discriminatory and, pursuant to the Charter School Program Act and its implementing regulations, that the Commissioner's decision was sufficient as to each respondent and is supported by the record. (App45a). NBOE's assertions of the Commissioner "ignoring" issues of segregation are simply untrue.

Under the universal enrollment system, there is a common application for all participating schools, both regular district schools and charter schools. The system is designed so that students are matched with the school their parent lists as most preferred. If the demand for a school exceeds the supply of seats,

¹⁰ "Ab__" refers to ELC's brief on appeal.

¹¹ <http://www.state.nj.us/education/stateaid/1617/>

then an algorithm is used to assign students that gives students with the highest needs, that is, those who have an Individualized Education Program ("IEP"), are ELL or are eligible for free or reduced price lunch, a greater preference to attend the school of their choice. There is no "cap" or numerical limit on the number of high-need students who can attend an individual school. (App17a).

As for the charter schools who are not signatories to the MOU (New Horizons Charter School and Robert Treat Charter School), the record contains undisputed evidence of their extensive effort to attract a cross section of the community's school age population per *N.J.S.A. 18A:36A-8(e)*. (RCSa117, 334, 336). ELC cites to its own statistical analysis and cherry-picks data to present an erroneous appearance of de facto segregation at charter schools. Newark's North and East Wards have a disproportionate amount of non-English language speaking children attributable to their large Hispanic/Latino demographic (57.9%).¹² The correlation of nearby schools to student make-up is consistent across NBOE schools and charter schools.

¹² According to NBOE enrollment data from individual schools' Performance Reports (RCSa294-331), in the 2015-2016 school year, 71.2 percent of NBOE students whose native language was other than English (referred to as LEP or ELL) attended NBOE schools in the North and East wards where there are few charter schools.

ELC suggests in reply arguments that because two different commissioners filed detailed amplifications of reasons in the Red Bank Charter School renewals, the Commissioner should similarly amplify the record here. The *Red Bank Charter School* case concerned allegations of intentional discrimination in its student recruitment practices, unlike here.

Here, neither ELC nor NBOE cite to any evidence of intentional discriminatory conduct by the Charter Schools. Its *de facto* discrimination allegations are premised entirely on a statistical analysis devoid of consideration of the enrollment process itself and parental neighborhood preferences.

As to alleged discriminatory enrollment of disabled students, ELC reported NPS's percentage of disabled students as 17 percent. That figure has changed year to year and was 13 percent in 2015.⁷ NBOE has admitted that it has over-classified students as disabled who did not warrant a classification. (RCSa422). NBOE itself has schools with comparable special education student percentage make up as the Charter Schools. Charter Schools are subject to clear mandates to provide education programs for all its disabled and non-disabled students. Even if the charter school cannot meet a disabled student's needs, the charter school is still responsible for formulating a program for the student, with commensurate costs to the charter school, the extent to which is dependent on whether

the out of school program is in a public or private school. Charter schools cannot refuse enrollment to any child based on disability. N.J.S.A. 18A:36A-11. NBOE has not submitted any information to refute the Respondent Charter Schools assessment of perceived discriminatory enrollment of disabled students in Newark. As such, ELC and NBOE's factual assertions lack merit.

CONCLUSION

NBOE, as the resident district in this matter, has not provided any additional information to assist this Court in deciding this appeal. NBOE's assertions about the merits of ELC's appeal lacks factual or legal basis. Therefore, decision of the Appellate Division should be affirmed.

Respectfully submitted,



Thomas O. Johnston

Enc.

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