

SUPREME COURT OF NEW JERSEY  
DOCKET NO. 083014

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IN RE THE RENEWAL APPLICATION OF TEAM ACADEMY CHARTER SCHOOL	: On Petition for Certification : from a Final Judgment of the : Appellate Division, Dkt. No. A- : 3416-15T1 (Consol.) : : Sat Below: : Hon. Carmen H. Alvarez, J.A.D. : Hon. William E. Nugent, J.A.D. : Hon. Hany A. Mawla, J.A.D.
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IN RE THE AMENDMENT REQUEST TO INCREASE ENROLLMENT OF MARIA VARISCO ROGERS CHARTER SCHOOL	: On Petition for Certification : from a Final Judgment of the : Appellate Division Dkt. No. A- : 4386-15T1 (Consol.)
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IN RE THE AMENDMENT REQUEST TO INCREASE ENROLLMENT OF NEW HORIZONS COMMUNITY CHARTER SCHOOL	: On Petition for Certification : from a Final Judgment of the : Appellate Division Dkt. No. A- : 4398-15T1 (Consol.)
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IN RE THE AMENDMENT REQUEST TO INCREASE ENROLLMENT OF UNIVERSITY HEIGHTS CHARTER SCHOOL	: On Petition for Certification : from a Final Judgment of the : Appellate Division Dkt. No. A- : 4387-15T1 (Consol.)
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IN RE THE AMENDMENT REQUEST TO INCREASE ENROLLMENT OF ROBERT TREAT ACADEMY CHARTER SCHOOL	: On Petition for Certification : from a Final Judgment of the : Appellate Division Dkt. No. A- : 4384-15T1 (Consol.)
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IN RE THE RENEWAL APPLICATION OF NORTH STAR ACADEMY CHARTER SCHOOL	: On Petition for Certification : from a Final Judgment of the : Appellate Division Dkt. No. A- : 4385-15T1 (Consol.)
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IN RE THE AMENDMENT REQUEST TO INCREASE ENROLLMENT OF GREAT OAKS CHARTER SCHOOL	: On Petition for Certification : from a Final Judgment of the : Appellate Division Dkt. No. A- : 4388-15T1 (Consol.)
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BRIEF ON BEHALF OF RESPONDENT COMMISSIONER OF EDUCATION IN  
RESPONSE TO THE AMICUS CURIAE BRIEFS OF THE BOARD OF EDUCATION  
OF THE CITY OF NEWARK, THE FRANKLIN TOWNSHIP BOARD OF  
EDUCATION, AND THE PLAINFIELD BOARD OF EDUCATION

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....ii

PRELIMINARY STATEMENT.....1

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS.....2

    A. State Intervention in NPS.....3

    B. The Amendment Request of Central Jersey College  
    Prep Charter School.....4

    C. ELC’s Present Appeal.....5

ARGUMENT

    POINT I

        THAT NPS WAS UNDER STATE INTERVENTION AT THE  
        TIME OF THE COMMISSIONER’S DECISIONS DOES NOT  
        RENDER THOSE DECISIONS ARBITRARY, CAPRICIOUS,  
        OR UNREASONABLE.....6

    POINT II

        THE COMMISSIONER PROPERLY RELIES UPON LOCAL  
        SCHOOL DISTRICTS WHEN EVALUATING THE FINANCIAL  
        IMPACT OF A CHARTER SCHOOL ON THE DISTRICT.....11

    POINT III

        THE CHALLENGED DECISIONS OF THE COMMISSIONER  
        ARE SUFFICIENT AND SUPPORTED BY THE RECORD.....12

CONCLUSION.....15

**TABLE OF AUTHORITIES**

**Cases**

Abbott v. Burke,  
199 N.J. 140 (2009).....12

In re the Grant of the Charter Sch. Application of Englewood  
on the Palisades Charter Sch.,  
164 N.J. 316 (2000)..... 11, 12, 13

In re the Grant of the Charter Sch. Application of Englewood  
on the Palisades Charter Sch.,  
320 N.J. Super. 174 (App. Div. 1999)..... 13

In re the Proposed Quest Acad. Charter Sch.,  
216 N.J. 370 (2013)..... 10, 12, 13

**Statutes**

N.J.S.A. 18A:7A:-37..... 6

N.J.S.A. 18A:36A-1 to -18..... 7

N.J.S.A. 18A:36A-4 (c)..... 7

N.J.S.A. 18A:36A-16 (a)..... 8

**Regulations**

N.J.A.C. 6A:11-2.1..... 7

N.J.A.C. 6A:11-2.1 (b) (7)..... 7

N.J.A.C. 6A:11-2.1 (d)..... 7

N.J.A.C. 6A:11-2.2 (a)..... 8, 11

N.J.A.C. 6A:11-2.3..... 8

N.J.A.C. 6A:11-2.5..... 9

N.J.A.C. 6A:11-2.6 (a)..... 8

N.J.A.C. 6A:11-2.6 (c)..... 9

## PRELIMINARY STATEMENT

Pending before the Court is a challenge by the Education Law Center ("ELC") to final decisions of the Commissioner of Education approving enrollment increases for seven charter schools in Newark. ELC argues that the Commissioner's decisions were arbitrary, capricious, and unreasonable because, they say, the Commissioner failed to evaluate and address segregation and failed to evaluate the impact of the loss of funding on the Newark Public School District ("NPS"). ELC further asserts that the Commissioner should be required to apply a heightened standard of scrutiny to his review of charter school applications in former Abbott districts like NPS.

At the time of the challenged decisions, NPS was under State intervention and overseen by a State district superintendent. NPS did not oppose certain enrollment increases at the seven charter schools and neither appealed the Commissioner's decisions nor participated in ELC's appeal of those decisions. Two years after the Commissioner issued those decisions, the State Board of Education returned full operating authority to the Newark Board of Education ("NBOE"). NBOE has now joined this matter as Amicus Curiae and would have the Court overturn the Commissioner's decisions on the flawed premise that the State district superintendent overseeing NPS at the time of those decisions

disregarded the needs of the district and its students. But there is no basis for such a conclusion.

Also joining this matter as Amicus Curiae are the Franklin Township Board of Education ("FTBOE") and the Plainfield Board of Education ("PBOE"). Both FTBOE and PBOE seek to bolster ELC's arguments through the presentation of information relating to their school districts and charter schools located within their districts. Such extraneous information is irrelevant to this Court's review of the Commissioner's decisions about charter schools in Newark.

Beyond that, each of the Amici simply echoes the arguments made by ELC, which were properly addressed and rejected by the Appellate Division. There are no grounds to overturn the Appellate Division's decision. The Commissioner's decisions are supported by the record, are not arbitrary, capricious, or unreasonable, and should be affirmed.

**PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS<sup>1</sup>**

The Commissioner relies on the Procedural History and Counterstatement of Facts set forth in his Appellate Division

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<sup>1</sup> Because they are closely related, the procedural history and facts are presented together for efficiency and the Court's convenience.

brief, with the following supplemental procedural history and facts.<sup>2</sup>

**A. State Intervention in NPS**

In 1995, the State Board, pursuant to the then-applicable law, directed the removal of NPS's local board of education and the creation of a State-operated school district because it determined that the local board was not providing its students with a thorough and efficient system of education. See Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 113-14 (App. Div. 1995).

In 2005, the Quality Single Accountability Continuum ("QSAC") was established, which altered the manner in which the thoroughness and efficiency of all public schools would be evaluated. L. 2005, c. 235. The QSAC statute requires that all public school districts be evaluated in five key areas of school district effectiveness: instruction and program, personnel, fiscal management, operations, and governance. N.J.S.A. 18A:7A-10. In 2007, after evaluating NPS's performance under the QSAC statute, the State Board accepted the Commissioner's recommendation that the State withdraw from intervention in the operations component of the school district's

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<sup>2</sup> "App" refers to ELC's Appendix to Petition for Certification, and "Aa" refers to its Appendix filed with the Appellate Division.

"NBOEb" refers to NBOE's Amicus Curiae brief.

"FTBOEb" refers to FTBOE's Amicus Curiae brief, and "FTBOEa" refers to its Appendix.

"PBOE" refers to PBOE's Amicus Curiae brief.

"RCSSa" refers to Respondent Charter Schools' Supplemental Appendix filed with their opposition to NBOE's Amicus Curiae Brief.

effectiveness. (RCSSa4). In 2013, the Commissioner recommended to the State Board that the process for withdrawal of State intervention in the area of fiscal management be initiated. (RCSSa5). The State Board returned full operating authority to the NBOE in 2018. (App7).

**B. The Amendment Request of Central Jersey College Prep Charter School**

On February 28, 2017, the Commissioner approved an application by Central Jersey College Prep Charter School ("CJCP") to amend its charter to, among other things, increase its enrollment. (FTBOEa2). FTBOE had opposed CJCP's application and then filed an appeal of the Commissioner's decision. (FTBOEa9; FTBOEa17). On appeal, FTBOE argued that the Commissioner's decision to approve CJCP's amendment request was arbitrary, capricious, and unreasonable because (1) "she failed to consider the segregative impact of CJCP's charter amendment on the district," (FTBOEa18), and (2) "she failed to consider serious deficiencies and problems in CJCP's application," (FTBOEa31).

The Appellate Division disagreed with FTBOE's assertions. First, the court found that the Commissioner's decision was supported by the record and that "Franklin did not provide sufficient evidence of a segregative effect to warrant either a more detailed scrutiny or the denial of the application." (FTBOEa31). It then explained that "a review of the record



indicate[d] that none of the issues raised by Franklin presented a basis to deny the amendment," (FTBOEa35), and that it was "satisfied that the administrative record amply support[ed] the Commissioner's decision to grant CJCP's request to amend its charter," (FTBOEa39). Thus the Appellate Division affirmed the Commissioner's decision to increase CJCP's enrollment. (FTBOEa40).

FTBOE did not file a Petition for Certification with this Court.

### **C. ELC's Present Appeal**

On May 7, 2019, the Appellate Division issued a decision on ELC's appeal, holding that the challenged decisions of the Commissioner were not arbitrary, capricious, or unreasonable. (App4-App49). Relevant to the issues before this Court, the Appellate Division determined that: (1) "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," (App37); (2) "Districts should continue to bear the burden to demonstrate that charter school funding will prevent delivery of a thorough and efficient education, even in former Abbott districts," (App41); (3) "ELC's submissions fail to substantiate a segregative effect, either in the pre- or post-enrollment practices, such that the Commissioner's decisions can be characterized as arbitrary, capricious, and unreasonable,"

(App43); and (4) the Commissioner's decision as to each charter school was sufficient and supported by the record, (App45).

ELC filed a Petition for Certification with this Court on June 21, 2019. Shortly thereafter, NBOE (which had not participated in the Appellate Division), FTBOE, and PBOE moved to appear as Amicus Curiae in support of ELC's Petition. On February 6, 2020, the Court granted ELC's Petition, in part, and granted all three school districts leave to appear as Amicus Curiae.

### ARGUMENT

#### POINT I

**THAT NPS WAS UNDER STATE INTERVENTION AT THE TIME OF THE COMMISSIONER'S DECISIONS DOES NOT RENDER THOSE DECISIONS ARBITRARY, CAPRICIOUS, OR UNREASONABLE.**

Echoing ELC, NBOE challenges the Appellate Division's decision because of its reliance "on the absence of any objection from the Board, despite recognizing that the Board at the time was under state operation." (NBOEb2). This challenge rests upon a faulty premise: that the State district superintendent lacked the ability to advocate the interests of NPS and its students. To the contrary, the State district superintendent had not only the authority, but the obligation, to represent the interests of NPS and its students when submitting comments on charter school applications.

Even when under State intervention, a local school district remains a separate and distinct entity from the State. See N.J.S.A. 18A:7A:-37. And though under the supervision of a State district superintendent, the interests of the district and its students are relevant to the Commissioner's consideration of charter school applications. Thus, the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 to -18 ("CSPA"), and its implementing regulations expressly contemplate that the State district superintendent of a district under State intervention will represent the interests of the district and submit to the Commissioner any information relevant to the consideration of charter school applications.

Under the CSPA, an application to establish a charter school "shall be submitted to the commissioner and the local board of education or State district superintendent, in the case of a school district under full State intervention." N.J.S.A. 18A:36A-4(c) (emphasis added); see also N.J.A.C. 6A:11-2.1(b)(7). Further, "[t]he board of education or State district superintendent shall review the application and forward a recommendation to the commissioner within 60 days of receipt of the application." N.J.S.A. 18A:36A-4(c) (emphasis added); see also N.J.A.C. 6A:11-2.1(d). The Commissioner "may approve or deny an application for a charter after review of the applications submitted by an eligible applicant and the recommendation(s) from the district board(s) of

education or State district superintendent(s) of the district of residence of the proposed charter school.” N.J.A.C. 6A:11-2.1 (emphasis added).

After a charter is granted, the Commissioner must assess whether a charter school is annually meeting the goals of its charter. N.J.S.A. 18A:36A-16(a). To facilitate this annual review, the charter school must submit an annual report to the Commissioner, the respective executive county superintendent, and the district board(s) of education or State district superintendent(s) of the district of residence of the charter school. N.J.A.C. 6A:11-2.2(a) (emphasis added).

After the initial charter term, the Commissioner may grant or deny the renewal of a charter upon the comprehensive review of the school, which will include, among other things: (1) a renewal application that must be submitted to “the district board(s) of education or State district superintendent(s) of the district of residence of the charter school”; (2) “[t]he recommendation of the district board(s) of education or State district superintendent(s) of the district of residence”; and (3) “[c]omments of the annual reports from the district board(s) of education or State district superintendent(s) of the district of residence of the charter school.” N.J.A.C. 6A:11-2.3 (emphasis added).

The Commissioner may also, at any time, grant a charter school an amendment to its charter, following the filing of an amendment

request, which must be submitted to "the district board(s) of education or State district superintendent(s) of the district of residence." N.J.A.C. 6A:11-2.6(a) (emphasis added). The "district board(s) of education or State district superintendent(s) of the district of residence of a charter school may submit comments regarding the amendment request to the Commissioner." N.J.A.C. 6A:11-2.6(c) (emphasis added).

Finally, the State district superintendent is expressly authorized to appeal final decisions of the Commissioner on charter school applications. See N.J.A.C. 6A:11-2.5 ("An eligible applicant for a charter school, a charter school, or a district board of education or State district superintendent of the district of residence of a charter school may file an appeal.") (emphasis added).

These statutory and regulatory provisions would be meaningless if the State district superintendent could not "advocate independently of the Commissioner," as alleged by NBOE. See (NBOEb8). Under the statutory and regulatory scheme, the State district superintendent was not only permitted to, but indeed was required to, submit relevant information and recommendations to the Commissioner on the pending charter applications. Just as with any local board of education, the recommendations of the State district superintendent must be submitted before the Commissioner makes a decision, and thus would be used to inform, not reflect,

the Commissioner's decision. See In re the Proposed Quest Acad. Charter Sch., 216 N.J. 370, 377 (2013) (recognizing that "[t]he board or district superintendent must review the application and recommend to the Commissioner whether she should grant or deny the application" and that such "information clearly is intended to assist the Commissioner in her consideration of the application.").

Those mandatory recommendations were in fact made when, on January 22, 2016, NPS submitted comments and recommendations to the Commissioner about the various charter expansion applications under consideration. (Aa596-Aa598). NPS recommended that two of the expanded enrollment requests be fully approved, recommended partial approval of one of the expansion requests, and recommended denial of three of the expansions requests while offering an alternative partial approval recommendation. Ibid. Notably, NPS submitted no comments or documentation asserting that the fiscal impact of the charter enrollment expansions would interfere with the district's ability to provide a thorough and efficient education to its students. In other words, NPS supported certain charter enrollment expansions and did not allege it would be unable to provide its students a thorough and efficient education if those expansions were granted. As there is no basis to question the motives of the State district superintendent at the time those comments and recommendations were made to the Commissioner, the

only logical conclusion is that NPS did not foresee any such effect.<sup>3</sup>

## POINT II

### **THE COMMISSIONER PROPERLY RELIES UPON LOCAL SCHOOL DISTRICTS WHEN EVALUATING THE FINANCIAL IMPACT OF A CHARTER SCHOOL ON THE DISTRICT.**

Whether a local school district asserts, or provides documentation to demonstrate, that the granting or expansion of a specific charter school would have a detrimental effect on the district's ability to provide a thorough and efficient education to its students is certainly significant to the Commissioner's decision.

It is well-settled that the Commissioner "is entitled to rely on the district of residence to come forward with a preliminary showing that the requirements of a thorough and efficient education cannot be met." In re the Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch., 164 N.J. 316, 334 (2000). "[I]f the local school district demonstrates with some specificity that the constitutional requirements of a thorough and efficient education would be jeopardized," then "the Commissioner

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<sup>3</sup> To the extent NBOE now alleges - generally and without any factual support - "serious and deep concerns regarding the detrimental impact of these renewals and expansions on the NPS' ability to provide its students with a constitutional thorough and efficient education" (NBOEb7), that does not render the Commissioner's 2016 decisions arbitrary, capricious, or unreasonable. NBOE can use the opportunity granted to it every year to comment upon the charter school's annual report as N.J.A.C. 6A:11-2.2(a) requires.

is obligated to evaluate carefully the impact that loss of funds would have on the ability of the district of residence to deliver a thorough and efficient education.” Quest Acad., 216 N.J. at 377-78.

This standard makes sense because, as the Appellate Division aptly observed, “it is the affected district that can best gauge the impact of charter school funding on its own budget.” (App38). That logic is no less true for former Abbott districts. Additionally, this Court has upheld the constitutionality of both the School Funding Reform Act of 2008, N.J.S.A. 18A:7F-43 to -66, and the funding scheme set out in the CSPA. See Abbott v. Burke, 199 N.J. 140, 146 (2009); Englewood, 164 N.J. at 323. Thus, despite NBOE’s “issue with the Appellate Division failure to institute heightened constitutional scrutiny,” (NBOEb8), a different standard should not be applied to applications for charter schools located in former Abbott districts.

### POINT III

#### **THE COMMISSIONER’S DECISIONS ARE SUFFICIENT AND SUPPORTED BY THE RECORD.**

As the Appellate Division found, the Commissioner’s decisions are supported by the record. While ELC and the Amici would have the Court view the issue as the Commissioner “fail[ing] to evaluate the fiscal and segregative impacts on NPS of the charter schools’ expansion,” see (NBOEb3), that is not so. Rather, the Appellate



Division's decision recognizes the well-settled standard that the Commissioner's written decisions granting a charter application "need not provide the kind of formalized findings and conclusions necessary in the traditional contested case." In re the 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, Englewood, 164 N.J. at 338. Thus application of the arbitrary, capricious, or unreasonable standard does not require, or allow, the court to overturn a decision that does not contain "formalized findings and conclusions." Instead, the court must "find sufficient support in the record to sustain the decision reached by the Commissioner." Quest Acad., 216 N.J. at 385; see also Englewood, 164 N.J. at 338 (explaining that the reasons for the decision "need only be inferable from the record.").

Here, there was, and is, sufficient support in the record to sustain the Commissioner's decisions. First, with regard to fiscal impact, the Commissioner was reasonably guided by the fact that NPS did not foresee, or present any documentation to demonstrate, that the enrollment expansions of the seven charter schools would interfere with its ability to provide a thorough and efficient education to its students. In so finding, the Appellate Division did not "releas[e] the Commissioner from his duty to evaluate a charter school's impact on the ability of local school district to retain sufficient funding to provide its students with a Thorough

and Efficient education.” See (PBOEb14). It applied the standard established by this Court in finding that the lack of any objection from NPS supported the Commissioner’s decisions to grant the expansions. And even without any such objection from NPS, the decisions reflect that the Commissioner also reviewed public comments and the potential fiscal impact of the expansions on NPS. See (Aa18; Aa20; Aa22; Aa24; Aa26; Aa28; Aa30). Thus there is no support for the notion that the Commissioner’s decisions are arbitrary, capricious, or unreasonable as they relate to the fiscal impact on NPS and its ability to provide its students a thorough and efficient education.

Nor did the Appellate Division question that “the Commissioner has an undeniable duty to examine segregation” or express that “the Commissioner can simply ignore” segregation. See (FTBOEb3; FTBOEb4; PBOEb2). It recognized that there was no evidence in the record “to substantiate a segregative effect, either in the pre- or post-enrollment practices.” (App43). Therefore, the record supported the Commissioner’s decisions to grant the enrollment expansions, and there was no basis to overturn those decisions as arbitrary, capricious, or unreasonable.

FTBOE’s and PBOE’s presentations of facts unique to their districts and charter schools located within their districts are irrelevant and do nothing to undermine the validity of the Commissioner’s decisions at issue here. Each charter school

decision is fact-sensitive and unique to that school and the district in which it is located. Here, the decisions challenged by ELC all relate to charter schools in Newark and are fact-specific to Newark and the characteristics of Newark's charter school program; the circumstances in the Plainfield and Franklin Township School Districts are not analogous. The speculative and hypothetical future harms, offered by PBOE, do not render past decisions of the Commissioner arbitrary, capricious, or unreasonable. To the extent any future decisions of the Commissioner impact upon PBOE or FTBOE, they will have the opportunity to challenge those decisions then.

As the Appellate Division found, the Commissioner's decisions are well-supported by the record, consistent with the applicable law, and not arbitrary, capricious, or unreasonable.

**CONCLUSION**

For these reasons, the Appellate Division upholding the Commissioner's decisions should be affirmed.

Respectfully submitted,

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Date: April 27, 2020