

EDUCATION LAW CENTER ON BEHALF  
OF ABBOTT V. BURKE PLAINTIFF  
SCHOOLCHILDREN

v.

NEW JERSEY STATE BOARD OF  
EDUCATION AND CHRISTOPHER D.  
CERF, COMMISSIONER, NEW JERSEY  
DEPARTMENT OF EDUCATION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

DOCKET NO. A-2816-12

CIVIL ACTION

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APPELLANTS' BRIEF

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## PROCEDURAL HISTORY

This is an appeal of January 7, 2013 amendments to the regulations governing the operation of public charter schools, adopted by Respondents, New Jersey State Board of Education ("State Board") and Commissioner Cerf ("Commissioner") of the New Jersey Department of Education ("Department" or "NJDOE") (collectively, "the State"), pursuant to the Charter School Program Act of 1995 ("Act"), N.J.S.A. 18A:36A-1 to 18. Pa1.

In Discussion Papers to the State Board dated May 2, Pa18, and June 6, 2012, Pa37, then Acting Commissioner Cerf proposed regulations for the expansion of the State's charter school program. Education Law Center ("ELC"), acting in its representative capacity on behalf of the Abbott v. Burke plaintiff school children, submitted comments to the State Board on June 6, 2012, opposing certain proposed changes to the charter regulations, including the satellite campus and charter amendment provisions which are the subject of this appeal. Pa52-61.

At its August 1, 2012 meeting, the State Board voted to proceed with its proposal, officially publishing its Notice of Proposal of amendments to the charter school regulations in the September 4, 2012 New Jersey Register. 44 N.J.R. 2151(a), Pa99. On or around November 1, 2012,

ELC again filed comments opposing the satellite campus and charter amendment proposals, emphasizing the Act's prohibition of any expansion of the charter school program without legislative approval. Pa108-115.

After the close of a 60-day public notice and comment period, the State Board voted on December 5, 2012 to adopt the amendments as proposed; the regulations then became effective upon publication of the Notice of Adoption in the January 7, 2013 New Jersey Register. Pa1.

Appellants filed their Notice of Appeal on February 21, 2012. Pa8. On or about April 12, 2013, Respondents filed a Case Information Statement, Pa12, and Statement of Items Comprising the Record on Appeal, Pa15, and the Court shortly thereafter issued a briefing schedule for the appeal. Appellants' brief is filed in accordance with that schedule and with a fifteen day extension granted upon consent of Respondents.

#### **STATEMENT OF FACTS**

##### A. Charter School Program Act and Amendments

With the adoption of the Act in 1995, the Legislature authorized "the establishment of charter schools as part of this State's program of public education" to "assist in promoting comprehensive educational reform." N.J.S.A. 18A:36A-2. Declaring that charter schools "make the school

the unit for educational improvement," id., the Act sets forth the procedure for establishing a charter school: defining who may start a charter school, N.J.S.A. 18A:36A-4(a) and (b), -4.1(a); who must receive notice of the filing of an application, N.J.S.A. 18A:36A-4(c); and the contents of a charter school application, N.J.S.A. 18A:36A-5. The Act bestows sole authority upon the Commissioner "to grant or reject a charter application," N.J.S.A. 18A:36A-4(c), and provides standards in many areas of charter operation, including: admission policies, enrollment preferences, expulsion, charter location, limits on exemptions from state regulations, board of trustee membership, teacher certification, periodic assessment, and charter renewal. See, e.g., N.J.S.A. 18A:36A-7 to 17.

The Act has been amended three times since becoming law in 1995. In 2000, the Act's requirement that the Commissioner hold public hearings and evaluate the charter school program in its sixth year (2001) was expanded to also mandate a "comprehensive" independent study conducted by an individual or entity "with expertise in the field of education." P.L. 2000, c. 142 (currently codified at N.J.S.A. 18A:36A-16(d)). Based on the hearings and study, the Commissioner was directed to submit an evaluation of the charter school program to the Governor, Legislature,



and State Board by October 1, 2001 that included consideration of twelve statutorily-specified elements. P.L. 2000, c. 142 (currently codified at N.J.S.A. 18A:36A-16(e)).<sup>1</sup> While the Commissioner was afforded the opportunity to make recommendations pertaining to "the advisability of the continuation, modification, expansion, or termination of the [charter school] program," the Act expressly prohibited the Commissioner from implementing "any recommended expansion, modification, or termination of the program until the Legislature acts on that recommendation." Id. (emphasis added).

The Legislature further amended the Act in 2002, 2008, and 2011. The 2002 amendment added a requirement that notice of the filing of a charter school application "shall

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<sup>1</sup> On October 1, 2001, the Commissioner issued his Charter School Evaluation Report and Recommendations. Pa172. The Commissioner made recommendations pertaining to the areas of funding -- particularly for facilities -- support and assistance, planning, personnel, and oversight. Pa172-179. The issues of satellite campuses or charter amendments were not raised in the evaluation report or hearings. Id.; Pa150-171. The Commissioner did recommend modification of the statute and regulations "to eliminate obstacles and create incentives for the establishment of: conversion charter schools; charter schools operated by businesses; and charter schools operated by institutions of higher education." Pa178. The Commissioner also recommended further review and statutory amendment "to more clearly delineate roles, authority and latitude" regarding charter school contracts with "private, for-profit education management entities." Pa179.

be sent immediately by the commissioner to members of the State Legislature, school superintendents, and mayors and governing bodies of all legislative districts, school districts, or municipalities in which there are students who will be eligible for enrollment in the charter school." P.L.2002, c.123 (currently codified as N.J.S.A. 18A:36A-4(c)). The School Funding Reform Act of 2008 ("SFRA"), N.J.S.A. 18A:7F-43 to 63, modified the per pupil payment amount provisions for charter schools and established a requirement that the resident public school district receive notice of, and an opportunity to challenge, the placement by a charter school of a student with a disability in a private day or residential setting at district expense.<sup>2</sup> P.L. 2007, c. 260 (currently codified as N.J.S.A. 18A:36A-11(b) and -12). In 2011, the Legislature enacted N.J.S.A. 18A:36A-4.1, authorizing a process for high-performing non-public schools located in certain districts to convert to charter schools. P.L. 2011, c. 140.

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<sup>2</sup> In general, 90% of each enrolled student's public school funding, plus categorical and federal funds attributable to the student, is paid by the school district of residence to the charter school, N.J.S.A. 18A:36A-12(b), but the public school district is entirely responsible for the cost of any student with a disability whose needs cannot be met in a charter school and must be placed in a private setting, N.J.S.A. 18A:36A-11(b).

According to the Department, as of September 2012, there are "86 approved charter schools currently operating in New Jersey," serving over "30,000 students." NJDOE website, available at <http://www.state.nj.us/education/chartsch/about.htm> (last viewed June 17, 2013). Sixty-five of those 86 approved charter schools are located in 16 former Abbott districts<sup>3</sup>, including 21 in Newark, 10 in Jersey City, and 9 in Camden. See List of Approved Charter Schools, NJDOE, available at [www.state.nj.us/education/chartsch/allcharters.htm](http://www.state.nj.us/education/chartsch/allcharters.htm) (last viewed June 17, 2013). Although there are 15 former Abbott districts and 2 non-Abbott priority<sup>4</sup> school districts (Lakewood and Roselle) that currently have no charter

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<sup>3</sup> The term "former Abbott district" refers to the 31 poor urban districts whose schoolchildren were beneficiaries of the funding and other remedies in the Abbott v. Burke cases. See, e.g., Abbott v. Burke, 206 N.J. 332, 340 (2011).

<sup>4</sup> The concept of a "priority school" originated with the United States Department of Education's "ESEA Flexibility" guidelines, first issued in September 2011, in which states were invited to apply for waivers of requirements of the federal Elementary and Secondary Education Act ("ESEA"), commonly known in its current iteration as the No Child Left Behind Act ("NCLB"). See <http://www2.ed.gov/policy/gen/guid/secletter/110923.html> (last accessed June 17, 2013) (cover letter to ESEA flexibility guidelines, with guidelines attached; the guidelines required states, as a condition of waiver, to effect dramatic, systemic change in the lowest-performing schools by publicly identifying "priority schools").

schools, these districts would also be eligible to receive one or more satellite charter campuses under one of the newly enacted regulations challenged on appeal. Compare List of Priority and Focus Schools, NJDOE, available at <http://www.state.nj.us/education/reform/PFRschools/PriorityFocusSchools.pdf> (last viewed June 17, 2013), with List of Approved Charter Schools, supra.<sup>5</sup>

B. Challenged Regulations

Appellants challenge two related regulatory adoptions and one repeal: 1) the adoption of N.J.A.C. 6A:11-1.2, creating and defining a "satellite campus" of an existing charter school; 2) the adoption of N.J.A.C. 6A:11-2.6(a)(1)(iv), authorizing the opening of a new satellite campus by a charter school as the basis for amendments to a school's charter; and 3) the repeal of N.J.A.C. 6A:11-2.6(a)(2)(former), barring charter amendments that change the mission, goals and objectives of a charter school.

In the State Board Discussion Papers dated May 2, Pa18, and June 6, 2012, Pa37, that preceded the adoption of the regulations at issue on this appeal, Respondents proposed expanding the charter school program by, inter

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<sup>5</sup> Of note, three of the 86 approved charter schools, located in former Abbott districts, are themselves designated as priority schools.

alia, allowing existing charters to establish one or more "satellite campus(es)." A satellite campus was defined to mean:

a school facility, located within a district with a priority school or a former Abbott District as of July 1, 2012, operated by a charter school under the school's charter that is in addition to the facility identified in the charter school application or charter, if subsequently amended. [N.J.A.C. 6A:11-1.2 (proposed), Pa30, Pa49]

The State also proposed a related regulation, establishing the "opening" of a "new satellite campus," as a basis for seeking and obtaining an amendment to an approved school's charter. The State has long had a regulation allowing a charter school to "apply to the Commissioner for an amendment to the charter," N.J.A.C. 6A:11-2.6(a)<sup>6</sup>, but for the first time the State proposed adding language to describe the types of amendments that it considered to be appropriate:

Examples of what a charter school may seek an amendment for include, but are not limited to, the following:

- i. Expanding enrollment;
- ii. Expanding grade levels;

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<sup>6</sup> The amendment regulation has been in effect since the charter regulations were first adopted in 1997. Pa148. Initially, an amendment could be applied for only "[f]ollowing the completion of the first school year of the charter period," id., but that provision changed over time to allow an application for amendment any time "following the final granting of the charter," see Pa31.

- iii. Changing or adding a district or region of residence; or
- iv. Opening a new satellite campus.  
[N.J.A.C. 6A:11-2.6(a)(1)(proposed)(emphasis added), Pa31, Pa50]

The sole explanation offered by the State in its Discussion Papers for the satellite campus proposals was the following:

Allowing charter schools to amend their charters to open a satellite campus, in a district with a priority school or in a former Abbott District as of July 1, 2012, will enable proven, high quality charter schools to expand their capacity to serve additional students by operating an additional facility.  
[Pa21, Pa40]

The State did not offer its rationale for proposing satellite campuses in only certain designated districts.

Also included in the State's proposals of May 2 and June 6, 2012 was the repeal of the 1997 regulation barring amendments that change the mission, goals and objectives of a charter school. N.J.A.C. 6A:11-2.6(a)(2)(former), Pa31, Pa50. The State explained its proposal as providing charter schools "with greater flexibility in expanding the number of high-quality seats that can be made available." Pa26, Pa45. The State further contended the proposed repeal was necessary as that section of the regulations "restricts the types of amendments charter schools can request and runs counter to the Department's goal of

enabling charter schools to continuously improve and grow quality programs." Id.

ELC submitted comments to the State on June 6, 2012, opposing certain proposed changes to the charter regulations, including the satellite campus and charter amendment provisions. Pa52-61. As set forth in Appellants' Argument infra, ELC opposed these changes as lacking any statutory authority.

At its August 1, 2012 meeting, the State issued responses to comments, asserting that its proposal "does not change the types of amendments that may be requested," Pa68, and that "providing for additional high quality charter school seats in urban districts" through the creation of satellite campuses is consistent with the intent of the Act. Pa69. The State withdrew aspects of its proposal not relevant to this appeal,<sup>7</sup> but chose to proceed with its satellite campus and charter amendment proposals.

On or around November 1, 2012, ELC again filed comments opposing the satellite campus and charter amendment proposals, emphasizing the Act's prohibition of any expansion of the charter school program without legislative approval. Pa108-115. ELC pointed to the lack

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<sup>7</sup> For example, the State removed its proposals for the conditional renewal and restructured renewal of charters. Pa75.

of statutory authority for the changes, set forth inconsistencies with existing statutory requirements, and concluded:

If the State believes that its proposals regarding the creation of satellite campuses and the amendment of charters are important to the success of the charter school program, then the State should attempt to obtain the approval of the Legislature for these program expansions.  
[Pa112]

The State's response to the second round of comments included a blanket assertion that "[t]he proposed amendments, repeals, and new rules are within the scope of the charter school statute and do not result in the expansion, modification, or termination of the charter school program." Pa1 (Comment and Response 2). The State also asserted that "[p]roviding for additional high quality charter school seats in urban districts" falls within the Commissioner's statutory authority and the stated intent of the Act "to improve pupil learning; increase the educational choices available to parents and students; and to encourage the use of different and innovative learning methods." Pa2 (Comment and Response 4). The State further claimed that the Act "does not provide limitations on the types of amendments to a charter that may be approved." Pa2 (Comment and Response 7). No changes were made by the State to the satellite campus and charter amendment



proposals; as a result, upon publication in the New Jersey Register on January 7, 2013, the challenged regulations became effective. Pa4, Pa7.

#### STANDARD OF REVIEW

This case presents the issue of whether there is legislative authority for agency regulations allowing the amendment of charters to create satellite campuses or to revise the mission, goals and objectives of an approved charter school, and/or whether such regulations are arbitrary and capricious. Although courts must accord deference when reviewing administrative agency action, it is well settled that a court is "in no way bound by an agency's interpretation of a statute or its determination of a strictly legal issue." Russo v. Board of Trustees, 206 N.J. 14, 27 (2011), quoting Mayflower Sec. Co. v. Bureau of Sec. 64 N.J. 85, 93 (1973). As a result, New Jersey courts "apply *de novo* review to an agency's interpretation of statute or case law." Russo, 206 N.J. at 27, citing Toll Bros. Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002).

Nonetheless, an agency's regulations are accorded a presumption of validity, and the burden is on the appellants to rebut the presumption. New Jersey Ass'n of School Adm'rs v. Schundler, 211 N.J. 535, 548 (2012); New Jersey State League of Municipalities v. Dep't of Cmty.

Affairs, 158 N.J. 211, 222 (1999); New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 561 (1978). As long as a regulation has been properly adopted, it can be set aside "only if it is proved to be arbitrary or capricious or if it plainly transgresses the statute it purports to effectuate ... or if it alters the terms of the statute or frustrates the policy embodied in it." In re Repeal of N.J.A.C. 6:28, 204 N.J. Super. 158, 160-61 (App. Div. 1985), citing New Jersey Guild of Hearing Aid Dispensers, 75 N.J. at 561.

A regulation is "arbitrary and capricious" if it is "unreasonable or irrational," Bergen Pines Hosp. v. NJ Dept. of Human Serv., 96 N.J. 456, 477 (1984); "unduly onerous," New Jersey Guild of Hearing Aid Dispensers, 75 N.J. at 561; or "willful and unreasoning ... without consideration and in disregard of circumstances," Worthington v. Fauver, 88 N.J. 183 (1982). Additionally, an agency's failure to balance the competing interests involved may render its regulation arbitrary and capricious. See D.I.A.L. v. New Jersey Dep't of Community Affairs, 254 N.J. Super. 426, 437 (App. Div. 1992) (finding "significance" in the agency's showing that its challenged regulation balanced "competing interests of all concerned").

A regulation transgresses, alters or frustrates a statute if it "violates the enabling act's express or implied legislative policies," Matter of Petitions for Rulemaking, N.J.A.C. 10:82-1.2 and 10:82-4.1, 117 N.J. 311, 325 (1985), or if it is inconsistent with the statute it implements, extends the statute beyond what the Legislature intended, or creates a conflict with the enabling act or other statutory law that cannot be harmonized, New Jersey Ass'n of School Adm'rs v. Cerf, 428 N.J. Super. 588, 596 (App. Div. 2012) (citations omitted). In assessing whether the Legislature has authorized the administrative action taken, "where there exists reasonable doubt as to whether such power is vested in the administrative body, the power is denied." In re Closing of Jamesburg High Sch., 83 N.J. 540, 549, citing Swede v. City of Clifton, 22 N.J. 303, 312 (1956).

As Appellants demonstrate infra, the State's amended regulations violate the Act's plain language and its clear intent. Moreover, because they are unreasonable and fail to balance competing interests, the challenged regulations are also arbitrary and capricious.

## LEGAL ARGUMENT

I. N.J.A.C. 6A:11-1.2 AND 6A:11-2.6(a)(1)(iv) MUST BE INVALIDATED BECAUSE THE CHARTER SCHOOL PROGRAM ACT DOES NOT AUTHORIZE THE CREATION AND OPERATION OF SATELLITE CAMPUSES

As set forth below, the Commissioner and State Board have exceeded their statutory authority under the Act by adopting regulations that sanction the creation and operation of "satellite campuses" by approved charter schools. Specifically, the establishment and operation of a satellite campus has been neither expressly nor implicitly authorized by the Legislature, is contrary to legislative intent, and directly violates the Act's explicit prohibition against expansion of the charter school program without prior legislative approval.

The principles governing statutory interpretation by the courts when reviewing agency action are well-established. As explained recently by the Supreme Court, a court's "paramount goal in interpreting a statute is to give effect to the Legislature's intent...." Wilson v. City of Jersey City, 209 N.J. 558, 572 (2012) [citations omitted]. To determine legislative intent, courts must look first to a statute's "plain language," or the "ordinary meaning and significance" of the words used by the Legislature. Id. When necessary, courts may also look

to "extrinsic guides" such as legislative history. Id. The statutory provision at issue should not be considered in isolation, but must be harmonized with other parts of the statute or other laws to avoid an absurd result. Id. And, of course, judicial review "also must be guided by the legislative objectives sought to be achieved by enacting the statute..." Id. The application of these principles to this case demonstrates that the State's regulatory changes cannot be sustained.

First, there is nothing in the plain language of the Act that authorizes a charter school to establish a satellite campus. Indeed, the term "satellite campus" can be found nowhere within the four corners of the Act, its legislative history, or the 2001 public hearings or evaluation report pertaining to the charter school program. See N.J.S.A. 18A:36A-1 to 18; Pa150-179. Prior to the challenged regulations, the State never suggested that an existing charter school might spawn additional, new schools nor, until now, has the term "satellite campus" been used by the State Board or Commissioner in interpreting the Act. The Act is wholly devoid of any suggestion that a charter school can create a second, third, or fourth school without going through the established application and approval process, or that the Commissioner has the authority to

circumvent this process. Given that the Act expressly and in detail sets forth the procedure for establishing a charter school, N.J.S.A. 18A:36A:4, as well as delineating the specific information required in an application for charter approval, N.J.S.A. 18A:36A-5, the Legislature clearly and unequivocally determined to keep strict controls on establishment and operation of charter schools and to ensure the vetting of each individual application before these schools can serve New Jersey public school students.<sup>8</sup>

Second, there is no statutory language or any other expression of the Legislature's intent to authorize the expansion of the charter program within "former Abbott districts or districts with "priority schools." To the contrary, the Legislature eliminated the Abbott district designation in 2008 with its passage of the SFRA, N.J.S.A. 18A:7F-43 to 63, finding that "dividing ... districts sharply

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<sup>8</sup> See, in particular, N.J.S.A. 18A:36A-5 (mandating that application for charter school identify the proposed school, and, among other information, provide a "description of, and address for, the physical facility in which the charter school will be located") and N.J.S.A. 18A:36A-4(c) (requiring notice of the filing of the application "to the members of the State Legislature, school superintendents, and mayors and governing bodies of all legislative districts, school districts, or municipalities in which there are students who will be eligible for enrollment in the charter school").

into Abbott and non-Abbott categories for funding purposes without regard to a district's particular pupil characteristics" led to "needlessly adversarial relationships among school districts and between districts and the State." N.J.S.A. 18A:7F-44(f). With the elimination of the Abbott designation, there is simply no support that the Legislature intended to permit the Commissioner to treat charter schools differently in former Abbott districts.

Similarly, the Legislature has never used or endorsed the term "priority" school or designated "priority school districts" in the Act or any other statute. The Department first used the term "priority school" in its ESEA Waiver Request, in which the State sought and obtained United States Department of Education approval for the waiver of certain requirements of the federal NCLB. See note 4, supra, and New Jersey's approved ESEA Waiver Request, available at <http://www.state.nj.us/education/grants/nclb/waiver/waiver.pdf> (defining priority schools as "the lowest performing schools across the State with regard to absolute achievement or graduation outcomes and those that are persistently low achieving"). Thus, there is nothing to even suggest that the Legislature intended in the Act to

permit the expansion of charter schools through one or more satellite campus(es) in districts with schools designated as "priority schools" under the State's federal waiver.

Third, there is nothing in the Act that expressly or implicitly authorizes multiple school sites for an already established and operating charter. The statute establishes a charter "school" as "the unit for educational improvement," N.J.S.A. 18A:36A-2, and does not suggest that a school should be given other than its ordinary meaning as a single bricks and mortar building where students attend classes and are instructed by teachers. See Carpenters v. Borough of Kenilworth, 147 N.J. 171 (1996) (defining "school," for purposes of New Jersey statute providing real estate exemption, as place of primary or secondary instruction).

Throughout the Act, the focus is on the individual "charter school," defined as "a public school operated under a charter granted by the commissioner, which is operated independently of a local board of education and is managed by a board of trustees." N.J.S.A. 18A:36A-3(a).<sup>9</sup>

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<sup>9</sup> Indeed, the use of the word "school" in the Act is consistent with the use of the word throughout Title 18A, the statutes governing New Jersey's public schools, as a physical place that students attend for instruction. See, e.g. N.J.S.A. 18A:38-25 to 31 (requiring regular attendance and establishing consequences when a school age child is



Notably, the application for each and every charter school must include legislatively-specified information that, inter alia, identifies and describes the school, and the school's goals, policies, student body, and staff, including: "[a] description of, and address for, the physical facility in which the charter school will be located." N.J.S.A. 18A:36A-5(j)(emphasis added).

The Act places each charter school in a single physical facility, establishing its location as "in part of an existing public school building, in space provided on a public work site, in a public building, or any other suitable location." N.J.S.A. 18A:36A-10 (emphasis added). In the case of a non-public school that has converted to a charter school, "the charter school may be located in the same school building in which the nonpublic school was located." Id. Thus, the Act is utterly devoid of any language that could even be construed as allowing a charter school to inhabit more than one building. See In re Grant of Charter School Appl. Of Englewood on Palisades Charter School, 164 N.J. 316, 337 (2000) (citations omitted)

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"found away from school during school hours"). Defining "public school," as "a school, under college grade, which derives its support entirely or in part from public funds," the Legislature saw no need to include a separate definition of the commonly understood word "school." N.J.S.A. 18A:1-1.

(upholding two step charter application process that grants final approval for "specific site"); see also In re Charter School Appeal of Greater Brunswick Charter School, 332 N.J. Super. 409, 422-424 (App. Div. 1999) (upholding regional charter schools that draw students to one school from multiple districts, without contemplating multiple school sites).

Fourth, even if the Act permitted the approval of a charter with a satellite campus, there is nothing in the express language of the statute or legislative intent to even hint that a satellite campus can be established through the charter amendment process. While the Act itself authorizes amendment of a charter, its only explicit example of amendment is "an amendment to consolidate" two charter schools "within the same public school district" that are not operating the same grade levels to accommodate the transfer of students from one school to the other without requiring the students to submit to lottery selection process. N.J.S.A. 18A:36A-4(e).<sup>10</sup>

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<sup>10</sup> This provision, added to the charter school statute in a 2000 amendment, states as follows: "[a]ny two charter schools within the same public school district that are not operating the same grade levels may petition the commissioner to amend their charters and consolidate into one school. The commissioner may approve an amendment to consolidate, provided that the basis for consolidation is to accommodate the transfer of students who would otherwise

Allowing the establishment of a satellite campus through charter amendment would also circumvent the statutory notice requirements. Under the Act, notice of the filing of a charter school application must be sent to all of the following: "the members of the State Legislature, school superintendents, and mayors and governing bodies of all legislative districts, school districts, or municipalities in which there are students who will be eligible for enrollment in the charter school." N.J.S.A. 18A:36A-4(c). By contrast, the regulation limits the required notice of an amendment request to "the district board(s) of education or State district superintendent(s) of the district of residence of a charter school." N.J.A.C. 6A:11-2.6(a)(2). Thus, even when seeking to amend its charter to open a satellite campus, a charter school need only notify the board of education of its current district of residence, but not the board or state or local officials of the districts that would be affected by the granting of an amendment. The Legislature's intent that those affected will have the opportunity to comment on

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be subject to the random selection process pursuant to section 8 of P.L. 1995, c. 426 (C. 18A:36A-8)." P.L. 2000, c. 142.

an amendment request will clearly be thwarted.<sup>11</sup>

Finally, the Legislature has explicitly prohibited any changes to the operation of the current charter school program without its express authorization. Although adopted in 2000 to address the results of the 2001 evaluation, the provision that "[t]he commissioner may not implement any recommended expansion, modification, or termination of the program until the Legislature acts on that recommendation" has been maintained through subsequent amendments to the Act and remains in full force and effect. N.J.S.A. 18A:36A-16(e). There can be no clearer indication of legislative intent than the Legislature's own directive that it is retaining control of any expansion, modification, or termination of the State's charter school program. Allowing satellite campuses and their

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<sup>11</sup> Respondents themselves confirmed during the proposal process that the use of an amendment to create a satellite campus does not require the same process as a new application: "[t]he amendment requesting a satellite campus would come from an already approved charter school and would not be considered a new application; therefore would not be subject to the same approval process." Pa75 (emphasis added). Although the State's response to comments in adopting the regulation states that "[a]mendment requests for a satellite campus will be submitted to the board of education where the satellite campus will be located," Pa2 (Comment and Response 6), this is not actually required by the adopted regulation which requires notice to the board(s) of education of the school district(s) of residence of the charter school, and not that of the satellite campus. See N.J.A.C. 6A:11-2.6(a)(2).

establishment by charter amendment would, without question, result in an expansion of the charter school program. Since there is plainly no legislative authorization enabling this form of program expansion, the regulations allowing them must be invalidated. Compare In California Sch. Boards Ass'n v. State Bd. Of Educ. 186 Cal. App. 4<sup>th</sup> 1298, 1305-09, 1319 113 Cal Rptr. 3d 550, 554-57, 565 (2010) (use of single charter to operate satellite schools in different geographical locations resulted in fiscal and other irregularities and led to 2002 amendatory legislation imposing stringent restrictions on such expansion).

Questions such as how many satellites one charter can generate, how far flung the satellites can be, which districts should host satellites, whether each satellite must implement the same goals, and what procedures are required for establishing satellites must be left to the Legislature, and not the agency, to determine. Indeed, there is no indication that the Legislature intends to alter or modify its current statutory requirement that a charter school obtain approval for operation only after identifying and describing its physical facility as part of the initial application process. N.J.S.A. 18A:36A-5(j). In the absence of such legislative authorization, the State's attempt to expand the charter program though

satellites is clearly improper.

In short, in light of the lack of express authorization in the Act, the absence of any legislative intent, and the clear conflict between the statutory language and the State's challenged regulations pertaining to satellite campuses and the amendment of charters, this Court owes no deference to the challenged regulations, see Standard of Review, supra, and should set them aside.

II. THE REPEAL of N.J.A.C. 6A:11-2.6(a) IS ARBITRARY AND CAPRICIOUS AND MUST BE REVERSED

With the adoption of its new charter school regulations, the State repealed an implementing regulation that had been in effect since the first charter school regulations were adopted in 1997. That regulation, the former N.J.A.C. 6A:11-2.6(a)(2), addressed the amendment of approved charters by providing: "[t]he amendment shall not change the mission, goals and objectives of a charter school." In support of the repeal of N.J.A.C. 6A:11-2.6(a)(2), the Department stated that it sought to delete the regulation "as it restricts the types of amendments charter schools can request and runs counter to the Department's goal of enabling charter schools to continuously improve and grow quality programs." Pa101 (44 N.J.R. 2153). As explained below, the prior regulation

properly implemented the Act in restricting the types of amendments that charters could request and its repeal without "reasoned analysis" is arbitrary and capricious.

The United States Supreme Court has established that the repeal of an existing regulation requires an agency to demonstrate that there are good reasons for its change of course because:

revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." (citation omitted.) Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

[Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-42, 103 S. Ct. 2856, 2866, 77 L. Ed. 2d 443 (1983)("StateFarm")]

See also Glukowsky v. Equity One, Inc., 180 N.J. 49, 66 (2004)(citing State Farm and acknowledging "when an agency changes its course, it must provide a 'reasoned analysis'"); In Re Adoption to Amendments to N.J.A.C. 6:11-8.4 and N.J.A.C. 6:11-8.5, 249 N.J. Super. 52, 58, 59-60 (App. Div. 1991)(upholding NJDOE's regulatory amendment shifting testing of bilingual teacher's foreign language proficiency from state to local school district due to

"significant shortage of bilingual teachers, caused in part by the language proficiency evaluation backlog," and distinguishing State Farm, supra, because agency "fully explained the reasons for the changes which were only moderate in nature").

In this case, the State has not demonstrated that allowing charters to be amended to change the mission, goals, and objectives of the charter is consistent with the Act. Since the initial adoption of implementing regulations in 1997, the State has specified that an amendment to a charter "shall not change the mission, goals and objectives of a charter school." The educational goals are at the heart of each charter, defining the "different and innovative" learning methods that will set the school apart from a traditional public school and "offer the potential to improve pupil learning." N.J.S.A. 18A:36A-2. For a charter to be approved, the school's application must include "[t]he educational goals of the charter school, the curriculum to be offered, and the methods of assessing whether students are meeting educational goals." N.J.S.A. 18A:36A-5(d). Moreover, the Legislature has required that the Commissioner "shall annually assess whether each charter school is meeting the goals of its charter, and



shall conduct a comprehensive review prior to granting a renewal of the charter." N.J.S.A. 18A:36A-16.

Indeed, the establishment and measurement of charter goals are the primary method of accountability for this alternative type of public school. Recognizing that charter schools have more autonomy than other public schools, the Supreme Court explained that charters are accountable through their goals and that "if the goals set forth in the school's charter are not fulfilled, the charter is not renewed." In re Grant of Charter School Application of Englewood on Palisades Charter School, supra, 164 N.J. at 320 (citation omitted).

If charter schools may amend their core mission and goals for any reason, as the repeal of former section (a)(2) now allows, then these schools become a moving target, not susceptible to meaningful review. Charter schools operate at a cost to traditional public school districts, since their students and charter school funding come from the school districts. Should a charter school fail to meet its goals, the Act has made the policy decision that the Commissioner should revoke the charter, instead of allowing the charter school to reinvent itself by amending its charter freely. The Legislature made this clear by authorizing the Commissioner to "revoke a school's

charter if the school has not fulfilled any condition imposed by the commissioner in connection with the granting of a charter or if the school has violated any provision of its charter." N.J.S.A. 18A:36A-17.

If the State believes that the Legislature intended an existing charter to be able to alter its mission and goals -- the very basis on which it was approved in the first place -- and then continue operation under a different mission and goals, in the face of interpreting the Act otherwise for over fifteen years, then, at the very least, the agency must provide an analysis of how the alteration of a charter's mission and goals by a mere amendment comports with the Act. It is wholly insufficient for the State to baldly assert that the deleted regulation "restricts the types of amendments charter schools can request," Pa101 (44 N.J.R. 2153), without any explanation as to why a charter should be allowed to alter or redefine the mission, goals, and objectives from those on which the charter was originally approved. The only justification proffered by the State for this repeal of a longstanding regulatory prohibition is that each charter school must submit an annual report with evidence that the school is "achieving the mission, goals, and objectives of its charter as measured against the Performance Frameworks,"

Pa2 (Comment and Response 9). However, this reporting requirement, which applies to all charters, has no bearing on the fundamental issue on appeal as to whether the mission, goals, and objectives of an operating charter school can legally be amended without applying and obtaining approval for a new charter.

Nor is there any support for the assertion that the restriction on changing the mission and goals through an amendment somehow "runs counter to the Department's goal of enabling charter schools to continuously improve and grow quality programs." Pa101 (44 N.J.R. 2153). The Department provides support to charters through the application process and there is currently no limit on the numbers of charters that it may approve. See N.J.S.A. 18A:36A-3(b) (limiting charters to 135 only "during the 48 months following the effective date of this act"). What the Department is prohibited from doing, however, is to let a charter school market itself to the public as a particular type of school, only to come back to the Commissioner with a request to change the very nature of the school through an amendment to its original charter. The Legislature, in weighing the pros and cons of charter schools, as well as the competing interests of students in both district and charter schools, struck its balance by requiring a

stringent application process, with notice to all affected parties, and the measurement of results, as a condition of charter operation. Much as Respondents may wish it were otherwise, the Legislature did not provide charter schools with a blank check to continue to operate, regardless of whether they are fulfilling the purpose for which they were approved.

In sum, restricting the amendment of any charter to ensure that it continues to fulfill the mission, goals, and objectives of its charter is clearly consistent with the Act. For all the reasons set forth above, the State has failed to provide any reasoned analysis of why the deletion of N.J.A.C. 6A:11-2.6(a)(2) (former) is not arbitrary and capricious.

#### **CONCLUSION**

For the reasons set forth above, Appellants request that this Court invalidate the adoption of N.J.A.C. 6A:11-1.2, creating and defining a "satellite campus" of an existing charter school and the adoption of N.J.A.C. 6A:11-2.6(a)(1)(iv), authorizing the opening of a new satellite campus by a charter school as the basis for amendment to a school's charter. Appellants further request that this Court find the repeal of N.J.A.C. 6A:11-2.6(a)(2)(former), barring charter amendments that change the mission, goals

and objectives of a charter school, to be arbitrary and capricious and direct the State to promptly readopt the repealed regulation.

Respectfully submitted,

EDUCATION LAW CENTER



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