

HOBOKEN BOARD OF EDUCATION,

Petitioner-Appellant,

v.

STATE OF NEW JERSEY DEPARTMENT OF  
EDUCATION, HOBOKEN DUAL LANGUAGE  
CHARTER SCHOOL,

Respondents.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

DOCKET NO.: A-003594-13

On appeal from: Acting  
Commissioner of Education,  
David Hespe's March 20, 2015  
Determination

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**BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES  
UNION OF NEW JERSEY AND EDUCATION LAW CENTER IN  
SUPPORT OF APPELLANT**

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## PRELIMINARY STATEMENT

The American Civil Liberties Union of New Jersey ("ACLU-NJ") and Education Law Center ("ELC") respectfully submit this brief as *amici curiae* pursuant to *New Jersey Court Rule 1:13-9*. Appellant Board of Education of the City of Hoboken challenges decisions by the Commissioner of Education extending the charter of the Hoboken Dual Language Charter School ("HoLa") by five years, and expanding HoLa to include the seventh and eighth grades. *Amici* here join in Appellant's request that the Court reverse the decision of the Commissioner of Education granting the application for the renewal and expansion of the charter in accordance with New Jersey statutes, the New Jersey Administrative Code, and controlling case law. That decision was required, but failed, to fully consider the segregative effects of the renewal and expansion. As documented in repeated studies and as recognized by the New Jersey Supreme Court, segregation in academic settings inflicts lasting harms on all students, but particularly students of color. A comprehensive review, which the Commissioner failed to undertake before granting HoLa's request, is critical to ensuring that HoLa does not exacerbate the already severe racial imbalances in Hoboken's public schools in particular, and New Jersey's in general.



### INTERESTS OF AMICI CURIAE

The ACLU-NJ is a private, non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the New Jersey and United States Constitutions. Founded in 1960, the ACLU-NJ has approximately 15,500 members in the State of New Jersey. The ACLU-NJ strongly supports the right of all students to obtain a thorough and efficient education, in schools that are not segregated based on race. Accordingly, the ACLU-NJ has participated in numerous cases specifically involving the right to a public education, including the *Abbott* cases, *Abbott v. Burke*, 100 N.J. 269 (1985) (*Abbott I*); 119 N.J. 287 (1990) (*Abbott II*), and cases specifically addressed to issues of segregation in general, see *In re Twp. of Warren*, 132 N.J. 1 (1993) (addressing the effect of a Council on Affordable Housing regulation on housing segregation), and to the segregative effect of charter schools in particular, *In re Red Bank Charter School*, 367 N.J. Super. 462 (App. Div. 2004) (challenge to recertification of charter school involving racial disparity between charter school and town's general public school), as well as to other educational issues, see *Estate of Jeffreys v. State of New Jersey*, 1996 U.S. Dist. LEXIS 21360 (D.N.J. Jan. 29, 1996) (resolving under IDEA the question whether local or state educational agency would pay

for educational services provided to disabled child). The ACLU-NJ has additionally participated in numerous cases regarding the rights of schoolchildren in general. See, e.g., *State v. Best*, 201 N.J. 100 (2010) (addressing the applicable standard where a public school principal seeks to search a student's car on school property); *Joye v. Hunterdon*, 176 N.J. 568 (2003) (raising students' state constitutional rights against suspicionless drug testing); *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 381 N.J. Super. 465 (App. Div. 2005) (involving the Law Against Discrimination's application to a student's right to be protected from discrimination-based school bullying).

ELC works to secure the legal rights of New Jersey's 1.3 million public school children to high quality education under state and federal laws, and particularly the rights of New Jersey's at-risk students, students with disabilities, and students of color. ELC has long represented the plaintiff school children in the landmark *Abbott v. Burke*, 119 N.J. 287 (1990), litigation, and continues to advocate on their behalf to ensure effective implementation of the *Abbott* remedies, which have "enabled children in Abbott districts to show measurable educational improvement." *Abbott v. Burke*, 199 N.J. 140, 150 (2009) (*Abbott XX*) (quoting *Abbott v. Burke*, 196 N.J. 544, 549

(2008) (*Abbott XIX*)). ELC has also participated as *amicus curiae* in state educational opportunity cases in California, Colorado, Connecticut, Indiana, Kansas, Maryland, Oregon, and South Carolina. Through its state and national work, ELC has substantial expertise in the areas of school funding and student rights, as well as a significant interest in equal educational opportunity and education justice for public school students.

ELC also has specific familiarity with and interest in the Charter School Program Act ("CSPA") at issue in this case, N.J.S.A. 18A:36A-1 to -18, having served as both *amicus* and a party in prior charter school litigation. See, e.g., *In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch.*, 164 N.J. 316 (2000) (requiring Commissioner to assess racial and, where raised by district, economic impact of approving charter on district of residence) (ELC as *amicus*); *Educ. Law Center v. Bd. of Educ.*, 438 N.J. Super. 108 (App. Div. 2014) (addressing validity of regulations under CSPA); *Piscataway Twp. Bd. of Educ. v. Hespe, Comm'r of Educ.*, Docket No. A-005890-13T4 (currently pending challenge to Commissioner decision denying transfer of excess charter surplus to underfunded school district) (ELC as *amicus*). Further, ELC has special expertise and a strong interest in racial segregation issues, having served in 2005 as *amicus* before the State Board

of Education and the Appellate Division in *Board of Education of the Borough of Englewood Cliffs v. Board of Education of the City of Englewood v. Board of Education of the Borough of Tenafly*, 333 N.J. Super. 370 (App. Div. 2002).

As organizations supporting the right of all students to a thorough and efficient education and with extensive experience in education cases involving the rights of schoolchildren, ACLU-NJ and ELC have particular interests in ensuring that any requests to renew or expand schools' charters are subjected to the required rigorous review processes demanded by statute and, in particular, the constitutional requirement that any segregative effect of granting or extending a charter be weighed in the balance. It is with this special interest and involvement that ACLU-NJ and ELC respectfully submit this brief.

#### **PROCEDURAL HISTORY**

*Amici curiae* adopt the procedural history in the Appellant's brief.

#### **ARGUMENT**

##### **I. New Jersey Abhors Racial Segregation.**

This State has long been at the forefront of efforts to eradicate racial segregation in all its forms. See *Booker v. Bd. Of Educ. Of Plainfield*, 45 N.J. 161, 173 (1965) ("Our own State's policy against racial discrimination and segregation in the public schools has been long standing and vigorous[.]").

Thus, the New Jersey Supreme Court banned segregation in schools over 70 years before the United States Supreme Court did so in *Brown v. Board of Education*, 347 U.S. 483 (1954). See *L. 1881, c. 149* ("[N]o child between the age of five and eighteen years of age shall be excluded from any public school in this state on account of her religion, nationality or color."); *Pierce v. Union Dist. Sch. Trs.*, 46 N.J.L. 76 (Sup. Ct. 1884) (upholding *L. 1881, c. 149* as forbidding exclusion of biracial students from neighborhood school); see *Petition for Authorization to Conduct a Referendum on Withdrawal of N. Haledon Sch. Dist. v. Passaic Cnty. Manchester Reg'l High Sch. Dist.*, 181 N.J. 161, 176-78 (2004) ("*N. Haledon*") (discussing New Jersey's prohibition of segregation in public schooling preceding *Brown*).

In 1947, seven years in advance of the federal *Brown* decision, New Jersey's new State Constitution included the command that "[n]o person shall . . . be segregated . . . in the public schools, because of religious principles, race, color, ancestry or national origin." *N.J. Const. art. I, para. 5*. See *N. Haledon*, 181 N.J. at 176 n.5 (discussing amendment of *N.J. Const. art I, para. 5*).

And, while federal law bars only formal, *de jure* school segregation,<sup>1</sup> New Jersey has gone further and declared its "abhorrence of discrimination and segregation in the public schools," and committed the State to stamping it out regardless of whether it was the result of official action, private discrimination, or sociological patterns. See *In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch.*, 164 N.J. 316, 324 (2000) ("*Englewood*"); see also *N. Haledon*, 181 N.J. at 177 ("We consistently have held that racial imbalance resulting from *de facto* segregation is inimical to the constitutional guarantee of a thorough and efficient education.") (citing N.J. Const. art. VIII, § 4, para. 1); *Jenkins v. Morris Sch. Dist.*, 58 N.J. 483, 499 (1971) (stating that any form of segregation, whether *de facto* or *de jure*, denies "educational advantages which are [students']

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<sup>1</sup> See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 736 (2007) ("The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations."); *Freeman v. Pitts*, 503 U.S. 467, 496 (1992) ("The vestiges of segregation that are the concern of the law in a school case. . . must . . . have a causal link to the *de jure* violation being remedied."); *Washington v. Davis*, 426 U.S. 229, 240 (1976) ("The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. . . . [']The differentiating factor between *De jure* segregation and so-called *De-facto* segregation . . . is [p]urpose or intent to segregate.'") (internal citations omitted).

due"); *Booker*, 45 N.J. at 170 ("It is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors."); *Morean v. Bd. of Educ. of Montclair*, 42 N.J. 237, 243 (1964) ("racial imbalance in . . . schools [] though fortuitous in origin, presents much the same disadvantages as are presented by segregated schools").

Indeed, under the New Jersey Constitution, the State "Commissioner of Education is required to take measures to prevent racial segregation in the public schools." *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan*, 369 N.J. Super. 2, 21 (App. Div. 2004) (citing N.J. Const. art. I, para. 5). New Jersey courts have been vigorous in ensuring that the Commissioner fulfills this responsibility. Thus, in *Booker*, the New Jersey Supreme Court held that the Commissioner had broad power and real responsibility to effect racial integration in public schools. 45 N.J. at 173-74. This responsibility, the New Jersey Supreme Court has held, empowers the Commissioner to affirmatively regulate the education decisions of municipalities in accordance with anti-segregation priorities. See *Jenkins*, 58 N.J. 483 (upholding Commissioner of Education's injunction against

township withdrawing students from municipal high school as authorized to prevent segregative effect). And in *Board of Education of Englewood Cliffs v. Board of Education of City of Englewood*, 257 N.J. Super 413, this Court upheld the Commissioner's authority to regulate schooling across municipalities pursuant to his duty to prioritize the eradication of segregation in elementary and secondary schools. *Id.* at 462 (holding that Commissioner's power to balance negative and positive impacts from proposed school system changes was limited by requirement that no change result in the "substantial negative impact" of racial segregation).

New Jersey has also been at the forefront of combating the economic, residential segregation that contributes to racially segregated schools. In its ground-breaking decision in *South Burlington County NAACP v. Mount Laurel Township*, 61 N.J. 151, 196-97 (1975), our Supreme Court declared that municipalities across the State could not regulate land use based upon, for example, parochial concerns for property values, but instead, that under State constitutional guarantees of substantive due process and equal protection, each would need to assume its "fair share" of low and middle income housing. *Id.* at 174. This decision reflected concern for "the inevitable alternative to assumption by suburban communities of an obligation to



provide their fair share[:]. . . an increase in the size of slums with all their attendant miseries[, i.e.,] the consequences of [] economic, social, and racial segregation[.]” *Id.* at 220 (Pashman, J., concurring); *accord id.* at 172-73 (noting that absence of economic integration in municipal housing in the city of Camden, for example, meant “a consequent critical erosion of the city tax base and inability to provide the amount and quality of those governmental services—education, health, police, fire, housing and the like—so necessary to the very existence of safe and decent city life.”). And even before *Mount Laurel*, the Court had recognized that “[r]esidential segregation is itself an evil” that “will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures.” *Booker*, 45 *N.J.* at 171-72. *Mount Laurel*, then, is also evidence of New Jersey’s longstanding commitment to eradicate segregation, including in education.

## **II. New Jersey Nonetheless Faces a Devastating Reality of Racial Segregation in Its Schools.**

As a recent report astutely observed:

New Jersey has a curious status regarding school desegregation. It has had the nation’s most venerable and strongest state law prohibiting racially segregated schooling and requiring racial balance in the schools whenever feasible. Yet, it simultaneously has had one of the worst records of racially imbalanced schools.

Greg Flaxman, et al., *A Status Quo of Segregation: Racial and Economic Imbalance in New Jersey Schools, 1989-2010*, UCLA Civil Rights Project, at 7 (October 2013) (hereinafter, "Flaxman, *A Status Quo*").<sup>2</sup> This fact has been echoed in the State's courts. As Chief Justice Poritz observed, writing for the majority in *North Haledon*, "[w]e have paid lip service to the idea of diversity in our schools, but in the real world we have not succeeded." 181 N.J. at 179.

Indeed, according to a recent study, 8% of schools in New Jersey are so-called "apartheid schools," defined as schools with student bodies that are less than 1% white. Paul Tractenberg, et al., *New Jersey's Apartheid and Intensely Segregated Urban Schools*, Institute of Education and Policy - Rutgers 5 (October 2013). These schools hold more than one-fourth of all black students and almost 13% of Latino students; only two other states in the country have a higher proportion of black students in such "apartheid schools." *Id.* at 5-6 (noting that "[b]lack students in New Jersey are more than twice as likely as those in the South to attend [apartheid] schools"). In essence, "currently more than one in four black students and

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<sup>2</sup> Available at [http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-status-quo-of-segregation-racial-and-economic-imbalance-in-new-jersey-schools-1989-2010/Norflet\\_NJ\\_Final\\_101013\\_POSTb.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-status-quo-of-segregation-racial-and-economic-imbalance-in-new-jersey-schools-1989-2010/Norflet_NJ_Final_101013_POSTb.pdf).

one in eight Latino students" are in educational settings "where they basically have no contact or interaction with white students." *Id.* at 6. In all of New Jersey, only 314 white students attend these "apartheid schools." *Id.* at 13.

And New Jersey's problems go deeper than "apartheid schools:" another 21.4% of black students and 29.2% of Latino students attend "intensely segregated schools" where the percentage of minority students is greater than 90%. *Id.*

Furthermore, over the past 25 years, segregation has only worsened: since 1989, the percentage of "apartheid schools" (*i.e.*, schools where 99-100% of the student body is composed of students of color) in the state has risen from 4.8% to 8.0%; during the same time period, the percentage of intensely segregated schools (*i.e.*, schools where over 90% of the student body is composed of students of color) has gone from 11.4% to 18.7%. *Id.* at 21. In short, despite New Jersey's constitutional protections and the historical assertiveness of the State judiciary, racial segregation is the norm in New Jersey public schools. In fact, the extent of racial segregation in New Jersey schools places it among the worst in the nation. Niraj Chokshi, *The Most Segregated Schools May Not Be in the States You'd Expect*, Wash. Post, May 15, 2014, <https://www.washingtonpost.com/blogs/govbeat/wp/2014/05/15/the->

most-segregated-schools-may-not-be-in-the-states-you-d-expect-2/;  
Flaxman, *A Status Quo*, at 13 ("New Jersey has consistently ranked as one of the most segregated states in the union in terms of desegregated schooling for the last 30 years.").

### **III. Racial Segregation in New Jersey's Public Schools Causes Myriad Harms.**

Nor is this segregation without real-life consequences. As the United States Supreme Court has recognized, racial diversity in education is a compelling state interest because of its capacity to break down stereotypes, promote cross-racial understanding, and prepare all students for professional and leadership positions in the future. *Grutter v. Bollinger*, 539 U.S. 306, 330-332 (2003); accord *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312-13 (1978). In recognizing this reality, the New Jersey Supreme Court was again ahead of its time, touting the importance of diversity in education well in advance of the federal decision in *Bakke*:

In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs.

<https://advance.lexis.com/search/?pdmfid=1000516&crd=e7d5e4fd-4e31-4cc8-960c-24412141792f&pdsearchterms=58+N.J.+at+499&pdstartin=hlct%3A1%3A1&pdpsf=jur%3A1%3A53&comp=qk3g&prid=b3edf90e-8e84-4134-83e9-070a2bfdcf75>Recognizing this, leading educators stress the democratic and educational advantages of

heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority. . . . The states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by.

*Booker*, 45 N.J. 161, 170-71 (decision in 1965, 13 years before *Bakke* in 1978). And of course, the State Supreme Court has noted the contrapositive - that racial segregation means depriving students of these benefits of diversity. See *N. Haledon*, 181 N.J. at 178 ("Students attending racially imbalanced schools are denied the benefits that come from learning and associating with students from different backgrounds, races, and cultures."). Indeed, this understanding is at the heart of New Jersey's longstanding commitment to root out segregation in public education, discussed *supra*.<sup>3</sup>

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<sup>3</sup> See, e.g., *N. Haledon*, 181 N.J. at 183 ("The Board also failed to consider the 'multi-racial and multi-cultural' opportunities lost to the students from North Haledon should the Borough succeed in its petition."); *Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of City of Englewood*, 257 N.J. Super. 413, 461 (App. Div. 1992) (noting the priority of racial integration in education as rooted in "the considerable value which we have long placed on social and educational development in an atmosphere in which children with differences learn to celebrate and not fear them"); *Booker*, 45 N.J. at 170-71 ("[C]hildren must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this,

The importance of diversity in education is supported by social science research. Studies have shown that desegregating schools results in higher academic achievement for minority students without undermining white students' performance. See Flaxman, *A Status Quo of Segregation*, at 17-18 & nn.53-54 (citing studies). Black students who attend desegregated schools are also significantly more likely to graduate from high school and college. J. Guryan, *Desegregation and Black Dropout Rates*, 94 *American Economic Review* 919 (2004). And the positive effects of racially and socioeconomically mixed schooling manifest throughout students' lives: those who attend desegregated schools earn significantly more and enjoy far better health later in life, Flaxman, *A Status Quo*, at 18, nn. 57-58 (citing studies), have a higher level of civic engagement, *id.* at n.56, and "report a heightened ability to communicate and make friends across racial lines," *id.* at 17, n.52. As New Jersey courts have noted, the absence of diversity - *i.e.*, segregation - thus harms students of all races by providing a homogenous, suboptimal learning environment. See *Bd. of Educ. of Merchantville v. Bd. of Educ. of Pennsauken*, State Board

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leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogenous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority.").

Docket No. 48-92, slip op. at 15 (State Bd. of Educ. Jan. 7, 1998) (explaining that when white students are placed with a "group of homogenous students," they lose "the educational opportunity to learn to live with and respect people from a variety of racial and ethnic backgrounds by attending school with such individuals"); *Bd. of Educ. of Merchantville v. Bd. of Educ. of Pennsauken*, 93 N.J.A.R.2d (EDU) 464, 495-96 (Comm'r of Educ. Sept. 16, 1992) (asserting that "[t]he elimination of racial imbalance is not to be sought as an end in itself but because imbalance stands as a deterrent and handicap to the improvement of education for all").

But there can be no mistaking that segregation in education is most devastating for racial minority students. This is because of the pervasive overlap between racial minority status and poverty in New Jersey's most segregated schools:

The typical New Jersey white student attends a school where 17.6% of children qualify as low-income, whereas the typical black student attends a school where 55.4% of his/her classmates come from low-income families. The typical Latino student attends a school in which 57.6% of his/her classmates are low income. This figure emphasizes the extremely disparate distribution of low-income students, who make up nearly a third of students in New Jersey as of 2010-2011, to schools where

black and Latino students are enrolled. This pattern indicates the presence of double segregation that black and Latino youth experience by attending schools segregated by both race and class. Flaxman, *A Status Quo*, at 28. This combination of racial segregation and poverty yields the most detrimental educational outcomes. For example, teacher pay and training are significantly worse in schools serving areas of concentrated poverty and high concentrations of minority students. See Brookings Institute, *How Within-District Spending Inequities Help Some Schools to Fail* (2011). Relatedly, highly qualified and experienced teachers are significantly less likely to take or remain in positions at such schools. See Charles T. Clotfelter, et al., *Teacher Mobility, School Segregation, and Pay-Based Policies to Level the Playing Field*, 6 *Education, Finance & Policy* 399 (2010); Charles T. Clotfelter, et al., *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 *Economics of Education Review* 377 (2005). The absence of strong teachers is devastating to low-income students of color: one recent longitudinal study showed that having a strong teacher in the elementary grades had a long-lasting, positive impact on students' lives, measured in reduced teenage pregnancy rates, higher levels of college-going, and higher job earnings. Raj Chetty, et al., *The Long-Term Impacts of Teachers: Teacher*



*Value-Added and Student Outcomes in Adulthood*, NBER Working Paper No. 17699 (December 2011).<sup>4</sup>

In addition, studies show that segregated schools provide less challenging curricula, and provide fewer AP and honors-level courses than do schools with predominantly white student bodies. See Flaxman, *A Status Quo*, at 16 & n.42, 44 (citing studies). As a result of the pressures imposed upon schools by standardized testing,<sup>5</sup> segregated schools also tend to focus more

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<sup>4</sup>Available at [http://obs.rc.fas.harvard.edu/chetty/value\\_added.pdf](http://obs.rc.fas.harvard.edu/chetty/value_added.pdf).

<sup>5</sup> The No Child Left Behind Act, 20 U.S.C. § 6301 et seq., applies escalating sanctions against schools whose students do not show annual improvement on standardized tests. *Id.* at § 6316(b)(7). These sanctions include decreased funding, restructuring of school curricula, termination and replacement of school staff, and school closure and subsequent replacement with a charter school. *Id.* Particularly in lower income schools where standardized test performance is depressed, these sanctions exert tremendous pressure and force schools to teach to the test, which in turn drives out the best teachers and reinforces the achievement gap. See Gary Orfield, *Foreword to Jaekyung Lee, Tracking Achievement Gaps and Assessing the Impact of NCLB on the Gaps: An In-depth Look into National and State Reading and Math Outcome Trends*, The Civil Rights Project at Harvard University, at 7 (2006), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/tracking-achievement-gaps-and-assessing-the-impact-of-nclb-on-the-gaps/lee-tracking-achievement-gaps-2006.pdf> ("Particularly in low income schools judged as failures, there often is a tendency to move into highly formulaic and rigidly programmed curriculum, boring to both students and teachers, and, worse yet, to spend time not on teaching their subjects but on drilling on test-taking strategies. Teachers have long tended to transfer out of low-income minority schools as they gain experience. Excessive test pressure tends to accelerate this process, compounding the

on rote skills and memorization to the detriment of creative thinking. *Id.* at 16 & n.43. Even more troubling, segregated schools exhibit a higher rate of draconian "zero tolerance" discipline policies that result in higher rates of suspension, expulsion, drop out, and involvement with the criminal justice system. See Civil Rights Project, Advancement Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies* (2000).<sup>6</sup>

This is not to mention what social science has long known: as the Supreme Court recognized in *Brown*, segregation, in and of itself, is symbolically harmful in a way that creates lasting psychiatric damage. See *Brown*, 347 U.S. at 494 ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."); see also *Bd. of Educ. of Englewood*, 257 N.J. Super. at 422 ("Reemergence of the stigma of inferiority associated with segregated school systems would be a regressive development for public education in New Jersey and would have serious repercussions far beyond the immediate parties to this case."). As a result, segregation in

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schools' problems since experienced teachers are a precious resource for schools.").

<sup>6</sup> Available at <http://escholarship.org/uc/item/99v051v1#page-1>.

education stands to harm all of New Jersey's students, but its racial minority poor are most injured. Such students receive systematically inferior instruction, in institutions with more limited resources, with the result that they internalize feelings of lesser value and realize less success in their adult lives.

**IV. Against this Backdrop, New Jersey Has Taken a Cautious Approach to the Approval of Charter Schools, Tasking the Commissioner of Education with Preventing Racial Segregation.**

Charter schools contribute to the development of innovative educational programming, and they may, in some cases, offer an important alternative to failing public schools, see generally *National Charter School Study*, Stanford University: Center for Research on Education Outcomes (2013).<sup>7</sup> But their proliferation has contributed – both nationally and within New Jersey – to racial segregation in education. See Mark Weber & Julia Sass Rubin, *New Jersey Charter Schools: A Data-Driven View, Part I – Enrollments and Student Demographics* 5 (October 2014);<sup>8</sup> Robert J. Martin, *Charter School Accessibility for Historically Disadvantaged Students: The Experience in New Jersey*, 78 *St. John's L. Rev.* 327, 360-61 (2004) (citing studies documenting

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<sup>7</sup> Available at <http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf>.

<sup>8</sup> Available at [http://www.saveourschoolsnj.org/save/corefiles/wp-content/uploads/2014/10/NJ-Charter-School-Report\\_10.29.2014.pdf](http://www.saveourschoolsnj.org/save/corefiles/wp-content/uploads/2014/10/NJ-Charter-School-Report_10.29.2014.pdf).

charter schools' segregative effect nationally); Flaxman, *A Status Quo*, at 14 ("An analysis of [New Jersey] charter schools and their surrounding neighborhoods . . . revealed that these schools were located primarily in racially isolated black communities, and the schools, on average, were more racially isolated than their neighborhoods.") (internal citation omitted).

The New Jersey Legislature responded to the growth of charter schools with the Charter School Program Act of 1995 ("CSPA" or "the Act"), *N.J.S.A.* 18A:36A-1 to -18, a careful compromise allowing charter schools to remain free from some State regulation in exchange for undergoing a rigorous application process and submitting to annual review. See *N.J.S.A.* 18A:36A-4 & -5 (setting forth requirements for applying for charter); *N.J.S.A.* 18A:36A-11(a) ("[U]pon the request of the board of trustees of a charter school, the commissioner may exempt the school from State regulations concerning public schools, except those pertaining to assessment, testing, civil rights and student health and safety . . . ."); see generally *Englewood*, 164 *N.J.* at 320 (describing how charter schools are subject to fewer regulations but must submit to greater oversight and holding that "the Commissioner must act to avoid a

failure to provide a thorough and efficient education threatened in a district because of the approval of a charter school").

With regard to the threat posed to racial integration in public schools in particular, the CSPA mandates that charter schools "seek the enrollment of a cross section of the community's school age population including racial and academic factors." *N.J.S.A.* 18A:36A-8(e). It forbids charter schools from discriminating on any illegal basis in the admission process. *N.J.S.A.* 18A:36A-7. And it requires a "random selection process" (lottery) whenever there are more applicants than space. *N.J.S.A.* 18A:36A-8(a).

Of particular importance to the present litigation, the CSPA as interpreted by New Jersey courts assigns to the Commissioner of Education a duty of initially assessing, monitoring, and remedying any segregative effect that a charter school may have on the public school district in which it operates. The law mandates that the Commissioner "vigilantly seek to protect a district's racial/ethnic balance" first "during the charter school's initial application," and then throughout its "continued operation, and charter renewal application." *In re Red Bank Charter Sch.*, 367 *N.J. Super.* at 471-72; accord *N.J.A.C.* 6A:11-2.2(c) (Commissioner must annually "assess the student composition of a charter school and the

segregative effect that the loss of the students may have on its district of residence."); see also *N.J.A.C.* 6A:11-2.3(b)(7) (requiring the Commissioner to review, among other things, "[t]he annual assessments of student composition of the charter school").

In the initial application process, "the Commissioner must assess the racial impact that a charter school applicant will have on the district of residence in which the charter school will operate" and "must use the full panoply of [his] powers to avoid" segregation resulting from the grant of a charter school application. *In the Matter of Proposed Quest Academy Charter School of Montclair Founders Group*, 216 *N.J.* 370, 377 (2013) (quoting *Englewood*, 164 *N.J.* at 329). In this regard, the Commissioner must, "be prepared to act if the *de facto* effect of a charter school were to affect a racial balance precariously maintained in a charter school's district of residence." *Englewood*, 164 *N.J.* at 328.

The Commissioner has a similar duty during the charter renewal process. Accordingly, before a renewal application may be granted, the Commissioner must conduct "a comprehensive review" to ensure among other things, that the charter school's continued operation will not exacerbate racial segregation. *N.J.S.A.* § 18A:36A-16(a); *In re Red Bank Charter Sch.*, 367 *N.J.*

*Super.* 462, 469 (App. Div. 2004). As a part of that review, the Commissioner must conduct an "independent study of the school of the charter school program," *N.J.S.A.* 18A:36A-16(d), and submit an evaluation of the school that addresses, among other factors, the charter school's funding effects, *N.J.S.A.* 18A:36A-16(e)(1)-(3), and "the comparative demographics [including race, socioeconomic status, and English-language proficiency] of student enrollments in school districts of residence and the charter schools located within those districts." *N.J.S.A.* 18A:36A-16(3)(5).

In this manner, the New Jersey legislative and judicial branches have assigned to the Commissioner of Education the role of evaluating the impact of charter schools on racial balance within the school districts in which they operate. The State thus embraces the benefits of charter schools, but expressly conditions their approval upon the Commissioner's independent and searching analysis of their segregative effect at every stage of a charter school's life cycle, ranging through "initial application, continued operation, and charter renewal application." *In re Red Bank Charter School*, 367 *N.J. Super.* at 472.

**V. In This Case, the Commissioner Did Not Fulfill His Lawful Duties, Threatening Racial Segregation in Contravention of New Jersey Statutory and Constitutional Principles.**

On October 15, 2013, the Hoboken Dual Language Charter School ("HoLa") submitted a charter renewal and expansion application to the New Jersey Commissioner of Education. PA187. On March 5, 2014, the Chief Innovation Officer of the Department of Education issued a decision renewing HoLa's charter for a five-year period and granting an amendment to the charter permitting an expansion of the school to the seventh and eighth grades for the 2015-2016 and 2016-2017 school years, respectively. PA24. On an appeal brought by the District, the Appellate Division recognized that the Commissioner failed to properly address the segregative impact of this renewal and expansion.<sup>9</sup> PA1037. To insure that the issue would be addressed more fully, the Appellate Division issued an order on December 2, 2014 remanding the matter to the Department of Education for further consideration. *Id.* Nonetheless, the Commissioner again granted HoLa's application for renewal and expansion on March 20, 2015. PA1105. This appeal followed. For the reasons

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<sup>9</sup> The State Department of Education conceded as much on appeal, writing in its brief that "a remand here will afford the Commissioner the opportunity to consider additional data in light of the concerns raised by Hoboken and to reevaluate the granting of HoLa's charter renewal and expansion application." PA 1030.



stated below, the Commissioner should again be reversed and the charter denied.

Initially, the Commissioner failed to perform his statutory duty by overlooking relevant data suggestive of segregative effect and by instead relying on flawed analytical methods. Specifically, the relevant data shows that HoLa's student body is not and has never been remotely representative of Hoboken's demographics: in the past five years, Hoboken's public schools have had a minority-student enrollment ranging between 69 and 78%; HoLa's minority-student enrollment, by contrast, has never surpassed 39%. PA1049, PA1116-20.<sup>10</sup> Likewise, Latino students comprise a significant portion of the population in Hoboken, but HoLa has consistently enrolled a Latino population well below that of comparable district schools: in the 2012-2013 and 2013-2014 school years, HoLa enrolled Latino students at 29% and 28% of its total enrollment, respectively; comparable schools in the district enrolled Latinos at a range from 52-64% and 43-65% over the same time period. PA1044-1049; PA1116-1120. See

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<sup>10</sup> Economic segregation is just as stark. While an average of 72% of students in the public schools qualified as economically disadvantaged between 2010 and 2013, only between 11-16% of HoLa students did. PA98-99, 652, 712, 730, 748, 768, 786, 1116-1120. HoLa also enrolls a smaller percentage of disability students than any district or charter school (between 0-5% from 2010-2013, while other charter and district schools fall within a range between 2-16%), and has 0% students of limited English proficiency. PA786.

Appellant's Brief (hereinafter "AB") 26 (comparing HoLa to the Wallace, Calabro, Connors, and Hoboken Jr./Sr. schools). And HoLa enrolls dramatically more white students than its peers in the district. In 2012-2013, its student body was 61% white, rising slightly to 63% the following year. PA1116-1120. Over the same two year span, district schools enrolled anywhere between 4% and 35% white students for the first year and between 4% and 43% white students in the second. *Id.* As explained in Appellant's brief, there are troubling indications that this disparity is the result of HoLa's policy of giving preference to siblings of currently enrolled students, AB46-47 (citing PA256), historical under-enrollment of low-income students, *id.* at 10 (citing PA1047-48, PA1116-1120), limited recruitment of low-income students and students of color, *id.* at 47-48 (citing PA97-99), HoLa's fundraising practices, *id.* at 48-49 (citing PA1121-1122), and the use of an "opt-in"<sup>11</sup> application program, *id.* at 50. But whatever the reason, the facts are clear: from the time of its opening, HoLa has enrolled a student body that is a near-exact inversion of the racial composition of students in the district as a whole.

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<sup>11</sup> An "opt-in" program is one in which students seeking admission by lottery must voluntarily apply. This is in contrast to an "opt-out" program, in which all district students are entered into the lottery automatically. See AB50.

The Commissioner did not, however, confront this glaring discrepancy, a fact which is at the core of *amici's* involvement in this case. Instead, the Commissioner attempted to side-step the facts: first by analyzing improper data that create a flawed impression of racial parity between HoLa and the district; and second, by focusing narrowly on changes to HoLa's population without regard to its highly segregative initial enrollment.

First, the Commissioner determined that HoLa did not enroll students in a manner that was racially disproportionate to the District as a whole by comparing HoLa demographics to census data for all children ages 0 - 17 district-wide. PA1107. This was legal error. By law, proper comparison is to *school age children attending district schools, Englewood*, 164 N.J. at 325, 328. The distinction is significant because the population used for comparison by the Commissioner - all children ages 0-17 throughout the district - includes not only children who are pre-kindergarten, but also those who are of school age but attend private schools in lieu of district schools. See AB32-35. Hoboken has a pre-kindergarten population that is proportionally larger than the national average, AB34, and relative to other age groups in Hoboken, disproportionately white, PA785, PA1116-1120. Similarly, the private school population, as HoLa itself implies, has a much larger white

population than that enrolled in district schools. See PA 1076. Indeed, HoLa calls it "highly unlikely that the Hoboken school district's demographics represent a cross section of the community's school age population since there are four private, tuition-based (up to \$16,000 a year) K-8 elementary schools in Hoboken[.]" *Id.*

As a result, the Commissioner's comparison of HoLa's demographics to census data for all children in the district age 0-17 introduced serious distortion. Specifically, the Commissioner relied on census data from 2010 showing that the population of children in Hoboken ages 0-17 was 57% white and 26% Latino. PA1107. Against those percentages, HoLa's initial enrollment in 2010 of 61% white students and 36% Latino students does not appear harmfully disproportionate. PA1116. But use of the proper baseline percentages results in a very different picture: when only children in district schools from K-12 are considered, the relevant data shows that only 19% are white and over 60% Latino. *Id.* More generally, considering the proper statistical backdrop, in HoLa's first year, its racial minority population was almost exactly *half* that of the district as a whole at 78%. PA1116-1120. That rough proportion has not changed over the length of HoLa's charter. *Id.* The Commissioner never addressed this uncomfortable reality, but

rather circumvented it by comparing HoLa's demographics to census data, *i.e.*, the wrong data set.

Second, the Commissioner improperly found that HoLa has no segregative effect because, in essence, the white population of Hoboken is growing while the white population of HoLa remains more or less constant. PA1107. From this, the Commissioner concluded that HoLa was not enrolling a disproportionate percentage of non-white students relative to the district school-age population. *Id.* But this comparison fails to consider the appropriate starting point for the analysis: HoLa's initial enrollment, which as previously noted, was an effective inversion of the district's racial demographics. PA1116-1120. That demographic changes in the district suggest HoLa is *no worse* in terms of segregative effect than when it began does not, of course, answer the question of whether renewing the charter (and, indeed expanding it) has a segregative effect. *Id.* at 30-31. And there is no evidence to support the idea that the district school-age population has changed so drastically as to make HoLa's enrollment now proportional to district student demographics.

The Commissioner has thus never addressed the troubling data that emerged from HoLa's first enrolled class: a white population double that of the district's public schools, and a

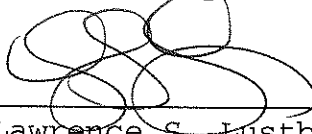
minority population half that of the district's public schools. This is an enormous disparity, far greater than that found intolerable in *North Haledon*, where this Court rejected a proposal to permit North Haledon to withdraw from a school district, in part because withdrawal would result in a mere 9% decrease in the white population of the high school. *In re N. Haledon Sch. Dist.*, 363 N.J. Super. 130, 137-38 (App. Div.), *aff'd*, 181 N.J. 161 (2003). Viewed in this context, and with both New Jersey's commitment to eradicating segregation and its historical failure to do so in mind, the Commissioner cannot be permitted to ignore the realities that present themselves in Hoboken.

For these reasons, *Amici* respectfully submit that, consistent with not only the law, but also deeply held legal principles that undergird New Jersey's system of justice, the Commissioner's decision cannot stand.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully request that this Court reverse the March 20, 2015 decision of the Commissioner of Education granting the requests for the renewal and expansion of the charter of HoLa, unless and until it can be shown that such renewal and expansion will not result in the continuation or exacerbation of school segregation in Hoboken.

Respectfully Submitted,



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