

Supreme Court of New Jersey

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IN RE RENEWAL APPLICATION OF  
TEAM ACADEMY CHARTER SCHOOL

SUPREME COURT DOCKET NO.  
083014

IN RE RENEWAL APPLICATION OF  
ROBERT TREAT ACADEMY CHARTER  
SCHOOL

ON APPEAL FROM FINAL  
JUDGMENT OF THE SUPERIOR  
COURT OF NEW JERSEY  
APPELLATE DIVISION,

IN RE RENEWAL APPLICATION OF  
NORTH STAR ACADEMY CHARTER  
SCHOOL OF NEWARK

APPELLATE DIVISION DOCKET  
NOS.

IN RE AMENDMENT REQUEST TO  
INCREASE ENROLLMENT OF MARIA  
L. VARISCO-ROGERS CHARTER  
SCHOOL

A-3416-15T1  
A-4384-15T1  
A-4385-15T1  
A-4386-15T1

IN RE AMENDMENT REQUEST TO  
INCREASE ENROLLMENT OF  
UNIVERSITY HEIGHTS CHARTER  
SCHOOL

A-4387-15T1  
A-4388-15T1  
A-4398-15T1

IN RE AMENDMENT REQUEST TO  
INCREASE ENROLLMENT OF NEW  
HORIZONS COMMUNITY  
CHARTER SCHOOL

SAT BELOW: Hons. Carmen H.  
Alvarez, William E. Nugent,  
Haney A. Mawla

CIVIL ACTION

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**BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS  
UNDER LAW AND CONSTITUTIONAL AND EDUCATION SCHOLARS IN  
SUPPORT OF APPELLANTS THE EDUCATION LAW CENTER**

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**STATEMENT OF INTERESTS OF AMICI CURIAE**

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, non-profit civil rights organization founded in 1963 at the request of President John F. Kennedy to mobilize the private bar in vindicating the civil rights of African-Americans and other racial and ethnic minorities. The Lawyers' Committee is dedicated to, among other goals, eradicating all forms of inequity and racial discrimination in education. The Lawyers' Committee promotes integration and diversity in public schools as a foundational principle—particularly in districts located within communities of color. The Lawyers' Committee is also committed to ensuring that the needs of low-income students, students with disabilities, and English Language Learners ("ELLs") are served in all school districts. As a leading racial justice organization, the Lawyers' Committee has a vested interest in challenging unconstitutional or statutorily unlawful practices that may exacerbate segregation in public education, or have a negative fiscal impact on traditional public schools that serve communities of color.

Consistent with these principles, the Lawyers' Committee has experience advocating for policies that promote greater racial integration across schools (e.g., Silver v. Halifax County Board of Commissioners, 371 N.C. 855 (N.C. 2018)) and enforcing antidiscrimination laws that ensure all students can access a

meaningful education regardless of race and disability status (e.g., Orleans Parish School Board v. Pastorek, 2012-1174 (La. App. 1 Cir. 2013)). The Lawyers' Committee is also counsel for intervenor underserved students and parents in the current remedial phase of a state adequacy challenge in Hoke Cty. Bd. of Educ. v. State, 95-CVS-1158 (Wake Cty., N.C.).

The Constitutional and Education Law Scholars ("Constitutional Scholars") are scholars of constitutional and education law, and experts on judicial review. The Constitutional Scholars believe that the courts have an obligation to uphold constitutional rights and principles, and guard against some majoritarian processes that may infringe on the constitutional rights of minorities and protected classes. The Constitutional Scholars are also well-versed in state education jurisprudence, including in New Jersey, and the historical and social science context within which the education jurisprudence has evolved. The scholars have a vested interest in ensuring that states use their authority—where the requisite state-constitutional, statutory, and regulatory authority exists—to analyze the potential segregative effects and fiscal impact of charter school expansion on resident school districts.

### SUMMARY OF ARGUMENT

*Amici* respectfully urge the Court to require the Commissioner of Education to affirmatively and meaningfully determine whether a charter school renewal application will have a segregative effect or impede the public school district's ability to provide a thorough and efficient education to all of the district's students. Such a ruling would be consistent with this Court's lengthy and strong history of constraining state action that allows *de facto* or *de jure* segregated schools and impedes the delivery of a thorough and efficient education, in violation of state law and the New Jersey Constitution.

Recent research, cited below, on the tremendous academic and social benefits of integrated schools for all students supports this Court's prior admonishments of state action, and inaction, that perpetuates segregative effects in public education. This is especially important in the charter school context where data and research, in New Jersey and nationally, show how the accelerated expansion of charter schools has furthered segregation by race, national origin, language and disability. New Jersey and other state courts have demonstrated how reasonable safeguards can be enacted to ensure the Commissioner meaningfully fulfills its affirmative duty to prevent segregation.

So too, consistent with this Court's prior rulings, the Commissioner must affirmatively act to meaningfully determine whether the expansion of charter schools impedes the resident district's ability to provide a thorough and efficient education to all of its students. The need for such a ruling is heightened in cases like this where the expansion of charter schools is resulting in significant losses of resources in a high-need district, while at the same time, the district is educating higher concentrations of costlier students, including English Language Learners and students with disabilities. The negative impact on educational opportunity in Newark for marginalized students is not isolated. State and national research demonstrate how charter school growth has stratified educational opportunity in other parts of the country.

Accordingly, *Amici*, as a national civil rights organization and twenty-six constitutional scholars, respectfully ask this Court to enact important judicial protections to ensure the Commissioner carries out its affirmative duties to prevent segregated schools and to avoid impeding a thorough and efficient education; and if such action is taking place, to require the Commissioner to enact a reasonable plan to prevent segregation and restore educational opportunity.

## ARGUMENT

### **I. Meaningfully analyzing the potential segregative impact of charter school expansion is an inherent and affirmative constitutional and statutory duty of the Commissioner of Education.**

It defies well-settled law to suggest that the Commissioner of Education ("Commissioner") has an affirmative obligation to investigate segregative effects when charter schools initially apply for a charter but not when they seek expansion. This is especially true when the sheer number of additional spaces sought by the charter schools (8,499 students, here) could have a demonstrable effect on the demographics of the district of residence and the charter schools. The seven charter schools reflect highly segregated schools that are mostly Black or mostly Hispanic students,<sup>1</sup> and they enroll very few students with disabilities and English Language Learner students ("ELLs"), in stark contrast to Newark Public School District's ("NPS") demographics. Instead of holding the Commissioner to his affirmative statutory and constitutional duty to meaningfully evaluate the segregative effect of charter schools, and, if necessary, to require the schools to enact safeguards that would prevent segregation of students by race, national origin, language and disability, the Appellate Division gave the Commissioner, and

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<sup>1</sup> For briefing purposes, the terms "Black" and "African American" are used interchangeably, as are the terms "Latinx" and "Hispanic."

in turn the charter schools, a pass. See In re Renewal Application of Team Academy Charter School, 495 N.J. Super. 111, 144-46 (App. Div. 2019) ("Team Academy").

This Court's authority to require the Commissioner to affirmatively act is grounded in the Court's duty to ensure state actors do not violate the constitution and laws of New Jersey and is further buttressed by other state court decisions. The Court's oversight includes ensuring that charter schools do not "recruit systematically only pupils of a particular race or national origin" and do not recreate or further the "the *de facto* effect" in a charter school's district of residence. In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch., 164 N.J. 316, 328 (2000) ("Englewood"). The Commissioner's duty to protect students from segregation also applies to ELLs and students with disabilities. N.J.S.A. 18A:36A-7. As shown below, national research on the harms of segregated schools and the benefits of desegregated schools demonstrates a need for the Commissioner to affirmatively and meaningfully act to prevent the segregation of schools by race, national origin, language, and disability (collectively, "protected classes") both at the charter school application phase and when those same schools seek to expand their enrollment.

While the Court need not prescribe the specific components of the Commissioner's review, *Amici* urge the Court to consider

requiring the Commissioner to evaluate carefully factors such as: nearby interdistrict and resident district demographics and the charter schools, themselves; proposed site locations; whether a charter school has made reasonable efforts to attract, recruit, enroll and retain a more diverse student body within the district and across nearby district boundaries; the racial and ethnic make-up of the school staff; whether the school is staffed with appropriate certified and trained staff to educate students with disabilities and ELLs; extracurricular activities and participation rates; and parent and student supports to meet the needs of diverse students, including students of different races and ethnicities. See, e.g., Green v. Cty. Sch. Bd. of New Kent Cty., Va., 391 U.S. 430, 435 (1968) (citing non-exhaustive facets of a segregated school system); Latino Action Network v. New Jersey, Civ. No. MER-L-0010706-18, Compl. at 24 (Mercer Cty., NJ) (statewide desegregation lawsuit proposing interdistrict remedies and regional controlled choice plans).

The need for such action by this Court is especially compelling in light of research and several reports, noted below, showing how charter school expansion across the U.S. and in New Jersey has tended to resegregate schools.

**A. Continuing research recognizes the tremendous academic and social benefits of desegregated, diverse schools.**

The Commissioner's obligation to affirmatively and meaningfully prevent the segregation of protected classes is rooted in this Court's recognition of both the academic and non-academic benefits of school desegregation. In Booker v. Bd. of Ed. of City of Plainfield, Union Cty. ("Booker"), the Court noted:

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 multiracial 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, leading educators stress the democratic and educational advantages of heterogeneous student populations . . . . It may well be, as has been suggested, that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem. But in the meantime 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.

45 N.J. 161, 170-71 (1965).

Research continues to demonstrate the short-term and long-term two-way benefits of desegregated schools in overcoming many of the harmful effects wrought by continuing housing and economic discrimination against persons of color and underserved students. Racial integration, for example, provides measurably positive educational benefits, including higher academic attainment, better problem-solving skills, and cultural competency skills necessary



for success in an increasingly diverse job market. See Robert L. Linn & Kevin G. Welner, Race-Conscious Policies for Assigning Students to Schools: Social Science Research and Supreme Court Cases, Nat'l Acad. of Educ, 2007, at 32, <https://files.eric.ed.gov/fulltext/ED531144.pdf>. These positive academic benefits contrast the negative effects racial segregation has on, for example, the quality of teachers, breadth and depth of curriculum, availability of guidance counselors and other in-school supports, as well as access to social and professional networks. Id.

Non-academic benefits cited in the research are immense and demonstrate how desegregated school settings help tackle many of society's greatest social problems, which can also impact educational opportunity for all students. Research shows, for example, that racially diverse students attending school together can help reduce individual levels of racial and ethnic bias and prejudice. See, e.g., Roslyn Arlin Mickelson, School Integration and K-12 Outcomes: An Updated Quick Synthesis of the Social Science Evidence, 5 Nat'l Coal. on Schl. Diversity Research Brief at 1 (2016) ("Mickelson, School Integration and K-12 Outcomes").

Diverse schools can also cease perpetuating intergenerational stereotypes and fears of the "other" while also increasing cross-racial trust and friendships among youths and adults. Id. Educating students in more diverse environments can increase all

students' ability for "conscious effortful, deep thinking," and help "develop stronger identities and a better understanding of society." Julius L. Chambers et al., The Socioeconomic Composition of the Public Schools: A Crucial Consideration in Student Assignment Policy, UNC Center for Civil Rights, 2005 at 15, <http://swannfellowship.org/wp-content/uploads/Socioeconomic.pdf>. Desegregated schooling has also been shown to lower rates of juvenile delinquency. Mickelson, School Integration and K-12 Outcomes, at 4.

Importantly, researchers agree that primary and secondary education is the "critical time to expose children to different races and ethnicities" because "the racial attitudes children develop early on can become entrenched, life-long beliefs." Robert A. Garda, Jr., The White Interest in School Integration, 63 Fla. L. Rev. 599, 626 (2011). Once students reach college, though diversity experiences can continue to shape one's attitudes, it tends to be more difficult because they may be locked into racialized thinking. Id.

Positive long-term impacts of school desegregation for persons of color graduating from racially diverse schools include significantly increased educational and occupational attainments, college quality and adult earnings, reduced probability of incarceration, and improved health and wellness. Rucker C. Johnson, Long-run Impacts of School Desegregation & School Quality

on Adult Attainments No. w16664, Nat'l Bureau of Econ. Res., 2011, <https://www.nber.org/papers/w16664.pdf>.

Attending integrated schools can further address one of society's the greatest ills, also recognized in Booker, that continues to undermine modern-day school desegregation efforts: housing segregation. See 45 N.J. 161 (1965). For example, researchers found that students attending more segregated K-12 schools maintained accompanying feelings of social distance and were more likely to prefer same-race neighbors. Braddock, J. H., III, & Gonzales, A. D. C., Social Isolation and Social Cohesion: The Effects of K-12 Neighborhood and School Segregation on Intergroup Orientations, 112 Teachers College Record 1631-1653 (2010). Learning in diverse schools also helps prepare all students to collaborate and participate in an increasingly diverse workforce. Mickelson, School Integration and K-12 Outcomes, at 3.

The potential harms of segregated schools and the tremendous benefits of desegregated schools for all students logically transfer beyond race and can impact students based on national origin, language and disability. Segregating Black and Latinx students not only from White students but also from each other, as well as segregating ELLs and students with disabilities, may perpetuate negative stereotypes, prejudice, and bias about one another while also creating barriers to cross-student group understanding and friendships. See, e.g., Keyes v. Sch. Dist. No.

1, Denver, Colo., 413 U.S. 189, 197-98 (1973) (noting that Hispanic and Black children experienced similar economic and cultural deprivation and discrimination). Furthermore, because education is particularly "critical for closing the opportunity gap for disenfranchised children, particularly children living in poverty or remote areas with limited resources, children with disabilities, and children from diverse cultures and racial backgrounds,"<sup>2</sup> it is imperative that the state reduce and remove obstacles to educational opportunity created by segregated schools.

In Mendez v. Westminster Sch. Dist. of Orange Cty., a federal court found that the segregation of Mexican American children, including Spanish-speaking children, harmed those students academically and "that commingling of the *entire student body* instills and develops a common cultural attitude *among the school children* which is imperative for the perpetuation of American institutions and ideals." 64 F. Supp. 544, 549 (S.D. Cal. 1946), aff'd sub nom., Westminster Sch. Dist. of Orange Cty. v. Mendez, 161 F.2d 774 (9th Cir. 1947) (emphasis added). The court further found that the segregation "foster[ed] antagonisms

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<sup>2</sup> Nat'l Council on Disability, The Segregation of Students with Disabilities, IDEA Series, Feb. 7, 2018 at 13, [https://ncd.gov/sites/default/files/NCD\\_Segregation-SWD\\_508.pdf](https://ncd.gov/sites/default/files/NCD_Segregation-SWD_508.pdf)

in the children and suggest[ed] inferiority among them where none exists." Mendez, 64 F. Supp. at 549.

Recent research continues to show that separating ELLs for learning may perpetuate a larger linguistic isolation that is occurring in society. Beatriz Arias, School Desegregation, Linguistic Segregation and Access to English for Latino Students, 2 J. of Educ. Controversy 1, 9 (2007). Research also shows that "students. . . isolated from peers of different racial/ethnic, linguistic, or socioeconomic backgrounds. . . are deprived of appropriate occasions for inter-group interactions" and are "deprived of the opportunity to develop the sociocultural knowledge, shared understandings, and behavior patterns that they will need as adults in order to function harmoniously and productively in ethnically heterogeneous settings—a serious problem for a society as increasingly diverse as ours." Laosa, L. M., Intercultural Transitions in Human Development and Education, 20 J. of Applied Dev. Psychol., 355-406 (1999). These impacts are felt by students of all races and ethnicities.

In the area of special education, Congress enacted the Individuals with Disabilities Education Act ("IDEA") "to end the long history of segregation and exclusion of children with disabilities from the American public school system." Nat'l Council on Disability, The Segregation of Students with Disabilities, at 13. IDEA requires that students with disabilities

be educated in inclusive school settings to the maximum extent possible with students without disabilities.<sup>3</sup>

A 2018 report by the National Council on Disability examined the research on segregating students with disabilities, finding that “students with disabilities who are educated in segregated special education placements [receive] less instruction, having fewer opportunities to learn, and fewer opportunities to use knowledge and skills during instruction and other meaningful activities.” Nat’l Council on Disability, The Segregation of Students with Disabilities, at 40. However, when students with disabilities are educated in general education classes, “they have more access to the general curriculum and effective instructional methods,” “achieve at higher rates of academic performance,” and “acquire better social and behavioral outcomes.” Id. at 45. The report noted several other benefits resulting from inclusive school settings, including “increased student engagement, improved communication, improved expressive language and literacy skills, more satisfying and diverse friendships, higher levels of social

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<sup>3</sup> “Inclusive schools” are places where students are in the same classes and schools as their same-age peers, are “valued and active participants[,] and where they are provided supports needed to succeed in the academic, social, and extra-curricular activities of the school.” James McLeskey, Nancy L. Waldron, Fred Spooner, and Bob Algozzine, What Are Effective Inclusive Schools and Why are They Important? in Handbook of Effective Inclusive Schools, 3-16 (New York: Routledge, 2014).

engagement with peers without disabilities, less disruptive behavior, and more social competence.” Id. at 38.

Importantly, research also shows positive effects on students without disabilities, including reduced fear of human differences, increased comfort and awareness of differences, growth in social cognition, improvements in self-concept, growth of ethical principles, and caring friendships. Id. at 39.

**B. Local, State and National Data and Research Show How Charter School Expansion Is Perpetuating and Increasing Segregated Schools Based On Race, National Origin, Language, and Disability.**

Despite the numerous benefits flowing from integrated schools and the contrasting harms emanating from segregated schools, data and numerous studies show that charter school expansion in New Jersey and across the nation has both perpetuated and increased the number of racially segregated schools.<sup>4</sup> Charter schools tend

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<sup>4</sup> See, e.g., Peter Bergman & Isaac McFarlin, Education for All? A Nationwide Audit Study of School Choice 53 (2019); see also Matthew Chingos et al., Charter School Effects on School Segregation, Urban Institute, (Jul. 2019); see also Erica Frankenberg et al., Exploring School Choice and the Consequences for Student Racial Segregation within Pennsylvania’s Charter School Transfers, 25 Education Policy Analysis Archives 22 (2017); see also Erica Frankenberg et al., Choice without Equity: Charter School Segregation, 19 Education Policy Analysis Archives 1 (2011), (CCD, SASS, OCR data; race/ethnicity; ELL status; FRL eligibility, 2011); Gary Miron et al., Education Management Organizations, Charter Schools, and the Demographic Stratification of the American School System, Education and Public Interest Center & Education Policy Research Unit (Feb. 2010).

to exacerbate segregation in many ways.<sup>5</sup> These include charter schools opening in urban areas within communities of color, where they often attract greater percentages of African American and Latinx students than other demographic groups; and in suburban districts where they attract greater percentages of White students. See Frankenberg et al., *Choice Without Equity*; see also Wendy Parker, *From the Failure of Desegregation to the Failure of Choice*, 40 Wash. U. J. L. & Pol'y 117 36 (2012). Higher racial isolation in charters also arises from current norms of the school choice paradigm, which do not sufficiently prioritize school integration. Id. Overall, segregation within charter schools is more common and extensive compared to public school districts ("PSDs"), causing racial isolation, exacerbating concentrated poverty, and failing to adequately serve ELLs, students with disabilities and students of all races and ethnicities.<sup>6</sup> These

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<sup>5</sup> Kevin G. Welner, *The Dirty Dozen: How Charter Schools Influence Student Enrollment*, 17104 Teachers College Record (Apr. 2013), <http://www.tcrecord.org> (noting twelve practices, including: description and design, location, marketing and advertising, conditional applications; and illegal practices.)

<sup>6</sup> Frankenberg et al., *Choice Without Equity* at 2; Vasquez Heilig et al., *Choice without Inclusion?: Comparing the Intensity of Racial Segregation in Charters and Public Schools at the Local, State and National Levels*, 9 Education Sciences 205 (2019); Chingos, et al., *Charter School Effects on School Segregation*; Ivan Moreno, *US charter schools put growing numbers in racial isolation*, AP News (Dec. 3, 2017), <https://apnews.com/e9c25534dfd44851a5e56bd57454b4f5>; Gary Miron et al., *Schools Without Diversity: Education Management Organizations, Charter Schools, and the Demographic Stratification of the American School System*, Boulder and Tempe: Education and



trends warrant appropriate intervention by this Court to ensure the Commissioner does not allow continued segregation in New Jersey's charter schools.

**1. Charter School Trends in Newark and New Jersey Show Segregative Patterns.**

Over the last decade, charter school enrollment in New Jersey has tripled, surpassing 53,000 students in 2017-18 (3.6% of the total student population). Mark Weber, Julia Sass Rubin, New Jersey Charter Schools: A Data-Driven View - 2018 Update, Part I, 2018, at 3 (hereafter, "Weber, New Jersey Charter Schools"). In 2017-18, New Jersey charter schools enrolled lower percentages of students with disabilities and ELLs compared to their PSDs. Id. at 3. When comparing the enrollment of students with disabilities in PSDs sending fifty or more students to statewide charter school enrollment, researchers noted that charter schools enrolled just 9.7% of students with disabilities compared to 15.6% in the sending districts. Id. at 14. In Newark City, charter schools enrolled 10.4% of students with disabilities compared to 14.5% in the district in 2016-17. Id. at 17. By comparison, two of the seven charter schools before this Court enrolled as few as 6% and five were below 10%. Team Academy, 459 N.J. Super. at 120, 129-137 (2014-15 demographics for seven charter schools).

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the Public Interest Center & Education Policy Research Unit, February 2010; Bergman & McFarlin, Education for All?.

Regarding ELLs, the difference is even more stark. In 2016-17, statewide, charter schools enrolled 2.8% ELLs compared to 11.4% ELLs in the PSD sending 50 or more students. Weber, New Jersey Charter Schools at 18. In Newark City, ELL charter enrollment was only 1.2% compared to 11.8%. Id. at 19. Among the seven charter schools in this case, six enrolled *less than* 1% and the other, Varisco-Rogers, enrolled just 6%. Team Academy, 459 N.J. Super. at 120, 129-137 (2014-15 demographics for seven charter schools).

Across New Jersey, charter schools enroll a "smaller percentage of Hispanic students (28% vs. 47%) and a higher percentage of Black students (62% vs. 40%) than their host districts." Weber, New Jersey Charter Schools at 4. In Newark, five of the seven charter schools in this case enrolled more than 80% of Black students compared to 51% in NPS. Team Academy, 459 N.J. Super. at 120, 129-137 (2014-15 demographics for seven charter schools). The two other charter schools enrolled 60% and 81% of Hispanic students compared to 40% in NPS. Id. One school (Robert Treat) enrolled 4% White, another 2% White, and no others enrolled above 1%, compared to 8% White in NPS. Thus, not only are the charter schools lacking racial diversity but they also seem to be creating starker segregative patterns between Black and Hispanic students with the approval of the Commissioner. This is not to suggest that these numbers alone require the Commissioner to conclude that the schools are legally segregated, or to enact a

plan that racially balances schools for the purpose of racial balancing. However, it does highlight critical factors, among others, for the need to require the Commissioner to proactively investigate.

## **2. Charter School Trends Nationally Also Show Segregative Patterns.**

The patterns in New Jersey and, more specifically, in Newark, are troubling but also represent national trends. Using absolute measures, national data show that charter schools are overrepresented in the number of racially isolated schools that have minority enrollments of 99% or more. Moreno, US charter schools put growing numbers in racial isolation. In the 2014-15 school year, more than 1,000 of the country's 6,747 charter schools (17%) had 99% minority enrollment, compared to 4% in PSDs. Id. This proportion is even higher in urban areas—where most charters tend to be located in minority communities—rising to 25%, compared to 10% for PSDs. Id.

Although segregation has also been increasing in PSDs for decades, 70% of Black charter school students attend intensely segregated (defined as 90 to 100 percent underrepresented minority) charter schools—twice as many as the share attending district schools. Frankenberg et al, Choice Without Equity. Additionally, half of Latinx charter school students attend racially isolated schools. Id. While charter school expansion is

often advocated for based on their purported ability to outperform district schools, some studies show a mixed record while others studies indicate lower achievement levels, nationwide. See id.; Moreno, US charter schools put growing numbers in racial isolation; Heilig et al., Choice without Inclusion?.

Relative measures also show the segregative effects of charter school expansion. The Urban Institute conducted a comprehensive study of the impact of charter schools on segregation and found substantial evidence that the growth of charter schools in the past two decades has led to higher levels of racial segregation, on average. Chingos, et al., Charter School Effects on Segregation. Even when controlling for student demographics, charter school expansion has led to small but statistically significant in-district increases of African American, Latinx, and White students' segregation. See id. The authors found that segregation would fall by about 5% in the average district if charter schools were eliminated. See id.

Nationwide, segregation at the cross-section of race and concentrated poverty has been increasing during the past 20 years. The U.S. Government Accountability Office found that schools with high concentrations of poverty and high enrollment from African American and/or Latinx students increased from 9% to 16% between

2000 and 2014.<sup>7</sup> While segregation for African American and Latinx students in PSDs has been increasing for over two decades, it is even worse in charter schools. One study showed that charters in virtually all 40 states analyzed were more racially isolated than PSDs in those states. Frankenberg et al, Choice Without Equity.

Charter schools have also been used by some communities to avoid integration. Charter enrollment patterns in the Southern and Western regions of the U.S. suggest that some charter schools have become havens for “White Flight” from more diverse PSDs. See generally id. For example, in North Carolina, research shows heavy correlations of White parents’ strong preference for disproportionately White charter schools, thereby increasing overall levels of school segregation.<sup>8</sup>

Charter schools have also affected the segregation of ELLs and students with disabilities. Available data show that charter schools enroll lower rates of ELL students than PSDs. Frankenberg et al, Choice Without Equity; Miron et al., Education Management

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<sup>7</sup> U.S. Government Accountability Office, K-12 Education: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination, Report to Congressional Requesters (2016), <https://www.gao.gov/assets/680/676745.pdf>.

<sup>8</sup> Helen Ladd & Mavzuna Turaeva, Parental Preferences for Charter Schools in North Carolina: Implications for Racial Segregation and Isolation, National Center for Analysis of Longitudinal Data in Education Research, Jun. 2018, <https://caldercenter.org/publications/parental-preferences-charter-schools-north-carolina-implications-racial-segregation-and>.

Organizations. In 2014, the U.S. Department of Education issued guidance highlighting the requirement for charter schools to admit and support ELL students, as has been required by all PSDs. Sarah D. Sparks, Teaching English-Language Learners: What Does the Research Tell Us?, Education Week, May 11, 2016, <https://www.edweek.org/ew/articles/2016/05/11/teaching-english-language-learners-what-does-the-research.html>.

Overall, data showed charter schools consistently serving lower proportions of students with disabilities than PSDs - 10.6% compared to 12.5%, respectively. Miron et al., Education Management Organizations. These rates for charter schools were lower for both those that operate independently of local school systems and those that operate under the local LEA. Christina Samuels, Special Education Enrollment on Upward Trend in Charter Schools, Education Week, (May 4, 2020, 3:19 PM), [https://blogs.edweek.org/edweek/speced/2018/02/special\\_education\\_enrollment\\_up\\_in\\_charter\\_schools.html](https://blogs.edweek.org/edweek/speced/2018/02/special_education_enrollment_up_in_charter_schools.html).

Perhaps most disturbing is a study from 2020 that provided the first experimental evidence testing whether charter schools provide less application information to students whom they may deem more difficult to educate. The study found that charter schools were 5.8 percentage points less likely to respond to a question about enrollment eligibility from a parent of a student with severe disabilities. Bergman & McFarlin, Education for All?.

**C. New Jersey's commitment to stamp out segregation in public schools.**

New Jersey has a "long standing and vigorous" commitment to stamping out segregation in all its forms. Booker, 45 N.J. 161 at 173. The state constitution guarantees all New Jersey children "a thorough and efficient school system." N.J. Const. art. VIII, § 4, ¶ 1. It also specifically prohibits racial discrimination, providing 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, ¶ 5. These provisions prohibit not only intentional, de jure school segregation but also de facto segregation. Englewood, 164 N.J. 316 at 324.

New Jersey has further codified its abhorrence of segregation in its state statutes. N.J.S.A. 18A:38-5.1; N.J.S.A. 18A:36A-7. This strong foundation recognizes how constitutional and statutory violations may occur when the creation or expansion of charter schools intensifies segregation, or reduces public funding and stratifies educational opportunity so as to deny an adequate or equitable education to all students in the PSDs. Derek W. Black, Preferencing Educational Choice: The Constitutional Limits, 103 Cornell L. Rev. 1359, 1364 (2018).

To conform to these constitutional and statutory commands, the Commissioner of Education is charged with the responsibility

of taking "affirmative steps to eliminate racial imbalance, regardless of its causes." Jenkins v. Twp. of Morris Sch. Dist., 58 N.J. 483, 506 (1971). In fulfilling these duties, the Commissioner is endowed with "broad supervisory powers" and must wield "the full panoply of his powers" to prevent segregation. Englewood, 164 N.J. at 329, 335. This Court's decisions have repeatedly ensured the Commissioner does not fall short of this affirmative duty. See, e.g., Booker, 45 N.J. at 178 (mandating that the Commissioner proactively effectuate a meaningful plan to combat segregation.)

In Booker, the Court reversed the Commissioner's decision permitting the Plainfield Board of Education to select a desegregation plan that achieved less integration than two alternative plans. 45 N.J. at 163-68. This Court faulted the Commissioner's view that a desegregation plan was acceptable so long as it avoided schools with "all or nearly all" Black students. Id. at 167. On remand, the Court instructed the Commissioner to either call for a further plan by the local officials or "prescribe a plan of his own." Id. at 178.

Since Booker, this Court's decisions have consistently reaffirmed the Commissioner's duty to take all reasonable steps to alleviate racial isolation, including in the charter school context. In Englewood, the Court held that "[t]he constitutional command to prevent segregation in our public schools superimposes



obligations on the Commissioner when he performs his statutory responsibilities under the Charter School Act.” 164 N.J. at 328. 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. 462, 471-72 (App. Div. 2004); accord N.J.A.C. 6A:11-2.2(c). While the Commissioner generally has discretion over the “form and structure” of this analysis, this Court has firmly stated certain requirements must be satisfied: “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.” Englewood, 164 N.J. at 694-95.

The Commissioner's affirmative duties also encompass promoting integration of students with disabilities and ELLs. N.J.S.A. 18A:36A-7. New Jersey law incorporates a duty to integrate students with disabilities, mandating that each board of education “shall ensure that: [t]o the maximum extent appropriate, a student with a disability is educated with students who are not disabled.” N.J.A.C. 6A:14-4.2(a). With equal force, New Jersey law strictly prohibits the segregation of ELLs. State law commands that ELLs “shall be provided with equitable instructional opportunities to participate in all nonacademic courses necessary to meet the NJSLs, including comprehensive health and physical

education, the visual and performing arts, and career awareness programs.” N.J.S.A. 6A:15-1.4(e). Laws further require that when dual language bilingual classes are offered, “[w]here possible,” they “shall be comprised of approximately equal numbers of ELLs and of students whose native language is English.” N.J.S.A. 6A:15-1.4(h).

Federal courts and guidance similarly recognize ELLs may be separated for language instructional purposes, but also note such separation should “be minimized to the greatest extent possible” and school programs should “have as a *goal the integration*” of students with different language backgrounds. Castañeda v. Pickard, 648 F.2d 989, 998 n.4 (5th Cir. 1981) (emphasis added).<sup>9</sup> Charged with the “faithful execution of the school laws” the Commissioner must administer these legal presumptions favoring integration among students with disabilities and ELLs. Jenkins, 58 N.J. at 626.

Directly contravening the aforementioned duties, the record here shows that, in approving the seven charter school expansions, the Commissioner made no attempt to analyze how this substantial

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<sup>9</sup> See also U.S. Dep’t of Educ., Office for Civil Rights and U.S. Dep’t of Justice, Civil Rights Division, Dear Colleague Letter on English Learners (January 7, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf> (governing law requires states and districts to carry out English Learner programs in the “least segregative manner consistent with...educational goals.”).

expansion would impact segregation by protected classes across district schools. See Team Academy, 459 N.J. Super. at 145-46. That fact alone violates governing law, which requires the Commissioner to analyze "the racial impact [of charter expansion] . . . on the district of residence." Englewood, 164 N.J. at 329.

**D. Other states similarly hold that state officials must affirmatively act to prevent segregated schools.**

Other state courts have similarly held their constitutions enshrine a right to education free from segregation, and that this right places an affirmative duty on state actors to eliminate such isolation. For example, the Connecticut Supreme Court in Sheff v. O'Neill read together the state's equal protection clause and anti-segregation clause, to conclude "racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity and requires the state to take further remedial measures," irrespective of de facto or de jure origins. 238 Conn. 1, 25-26 (Conn. 1996). When analyzing whether the state met its "affirmative duty" to ameliorate segregation, the Connecticut Supreme Court acknowledged that the state's policies advanced legitimate purposes and were facially neutral with regard to race. Id. at 40-41. The Supreme Court further acknowledged the state had already taken various actions to promote integration including: reorganizing school boards, enacting laws to remedy racial imbalances *within* public school

districts, and encouraging voluntary plans for inter-district diversity. Id. The Connecticut Supreme Court, however, found these efforts were not sufficient to satisfy the state's "difficult burden" of proving it had met its affirmative obligation in light of stark racial disparities that persisted across Connecticut's schools and districts. To comply with the Sheff Court's mandate, Connecticut entered a series of agreements to expand inter-district magnet programs and interdistrict open enrollment programs.<sup>10</sup> These interventions have significantly increased the number of Hartford children attending integrated schools with high academic achievement and graduation rates.<sup>11</sup>

California's Supreme Court has similarly recognized state actors "bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin." Crawford v. Bd. of Ed., 17 Cal. 3d 280, 290 (Cal. 1976). This constitutional mandate requires state actors to immediately institute desegregative steps, and the adopted plan should "produce[] meaningful progress

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<sup>10</sup> Sheff Movement, Measuring Progress, Sheff Movement: Quality Integrated Education for all Students (May 3, 2020, 6:23 PM) <https://sheffmovement.org/measuring-progress/>.

<sup>11</sup> Hartford public schools consisted of over 90% minority students in the pre-Sheff era. See Sheff, 238 Conn. 1, 38 (Conn. 1996). Recent data show that over 40% of Hartford "minority" students now attend racially and economically integrated schools, and that students attending such integrated schools performed extremely well on state tests and had graduation rates exceeding rates for many suburban high schools. Id.

in the elimination of segregated schools.” Id. at 306-07. When state actors fail to implement a course of action, California’s constitution compels courts to order the swift preparation and implementation of a desegregation plan. Id. at 302-07.

Most recently, Minnesota’s Supreme Court held their state’s constitution prohibits racial segregation that rises to the level of depriving students of an adequate education. In Cruz-Guzman v. State, students alleged the state enabled school segregation in Minneapolis and St. Paul in violation of the Equal Protection, Due Process, and Education clauses of the state constitution. 916 N.W.2d 1 (Minn. 2018). Among other facts, the students supported their claim by citing the “formation of segregated charter schools” and “failure to implement effective desegregation remedies.” Id. at 6. In holding school segregation is actionable, the Court explained: “[a]n education that does not equip Minnesotans to discharge their duties as citizens intelligently cannot fulfill the Legislature’s duty to provide an adequate education under the Education Clause.” Id. at 12.

Sister courts affirm the soundness of placing an affirmative duty on the Commissioner to alleviate segregation and underscore the full range of tools available to the Commissioner to effectuate integration. In 1976, California’s Supreme Court observed desegregation efforts “throughout the country have produced virtually scores of administrative techniques for facilitating the

desegregation of school systems.” Crawford, 17 Cal. 3d at 305. More than four decades later, the Commissioner has access to even more techniques and more research evidencing their effectiveness, including in the charter context. For example, Connecticut’s post-Sheff experience demonstrates how interdistrict transfer and magnet programs are powerful tools for integration. See Sheff Movement, Measuring Progress. Research on effective interventions also abound. A 2019 Report enumerates various policies supporting integration across charters, including a recommendation that charter schools enroll students from multiple school districts or across a region.<sup>12</sup>

**II. The Commissioner of Education has an affirmative duty to meaningfully evaluate fiscal impacts on a resident district’s ability to provide a thorough and efficient education that may result from proposed charter school expansion applications.**

This Court has previously affirmed the constitutional right of all public school children to a “thorough and efficient” education and that the Commissioner’s approval of charter schools should not interfere with a resident district’s “continuing

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<sup>12</sup> See Halley Potter & Miriam Nunberg, Scoring States on Charter School Integration, The Century Found., Apr. 4, 2019, <https://tcf.org/content/report/scoring-states-charter-school-integration/>. The report notes: “all states have ways in which they can strengthen existing charter school laws and policies to support integration and prevent segregation in charter schools.” The Report’s state-by-state comparison rated New Jersey 27th out of 42 states in state support for integration in charter schools, including tying for last in measuring actual enrollment in racially integrated charter schools.

ability to provide a thorough and efficient education to its remaining pupils.” Englewood, 164 N.J. at 334. Although the Commissioner may require some PSDs to first demonstrate at the charter school renewal stage that their ability to meet the requirements of a “thorough and efficient” education could not be met, it left open the question of whether that burden should shift for an Abbott district, or a former Abbott district that serves Abbott school children, like NPS. See Abbott v. Burke, 206 N.J. 332 (2011) (Abbott XXI).

In light of the systemic unconstitutional treatment of the Abbott students and school districts, *Amici* respectfully urge the Court to reverse and remand the Appellate Division’s ruling. When a charter school’s application or renewal and expansion application concerns an Abbott district or a resident district serving Abbott school children, the Commissioner has an affirmative duty to meaningfully ensure that the transfer of resources to the charter schools will not jeopardize the resident district’s provision of a thorough and efficient education to its school children.<sup>13</sup>

As further shown below, such a ruling is grounded in this Court’s historic precedent of both ensuring the state fulfills its

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<sup>13</sup> For purposes of this brief, and unless otherwise stated, “high-need” or “underserved” students refers to ELLs students, students with disabilities, low-income students and students in at-risk circumstances.

constitutional duty of providing a "thorough and efficient" system of free public schools, as well as its role in protecting the right to a thorough and efficient education for the state's most marginalized districts and school children. This argument is further buttressed by the Court's recognition that charter schools are created statutorily and may pose a threat to PSDs' ability to meet the requirements of providing a thorough and efficient education. Like the evidence presented by ELC in this case, research shows this threat is real, and compounded when a higher percentage of underserved students remain in the PSDs.

**A. The text and history of the education clause in New Jersey reflect a deep commitment to providing access to a quality education for New Jersey's most vulnerable children.**

New Jersey has a long-established and strong constitutional tradition of recognizing the important role of public education in society. New Jersey's Constitution guarantees every student between the ages of five and eighteen a right to a "thorough and efficient" public education. See N.J. Const. art. VIII, § 4, ¶ 1. Added to the constitution in 1875,<sup>14</sup> this Court has repeatedly been called upon to interpret and give meaning to this Education Clause. This Court's rich jurisprudence has been unequivocal: a constitutionally adequate education must provide every child a level of "educational opportunity which is needed in the

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<sup>14</sup> Robinson v. Cahill, 62 N.J. 473, 501, on reargument, 63 N.J. 196 (1973), and on reh'g, 69 N.J. 133 (1975).



contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." Abbott v. Burke, 149 N.J. 145, 167 (1997) ("Abbott IV").

This Court has explained that the state bears the primary responsibility of designing an educational system that attains constitutional adequacy. It is the role of the courts, however, to ensure the state's chosen system passes constitutional muster. Abbott v. Burke, 119 N.J. 287, 311 (1990) ("Abbott II"). This Court has articulated several principles for assessing whether that constitutional standard is met. First, "a thorough and efficient education requires a certain level of educational opportunity. . . [which] can—and should—be defined in terms of substantive educational content." Abbott II, 119 N.J. 287 at 306-07. To meet this threshold, the school system must prepare all students, including those most disadvantaged, with the educational training and support to "participate fully as citizens and workers in our society." Id. at 384-85.

This qualitative standard incorporates flexibility in two important ways. First, the substantive contours of a thorough and efficient education are "a growing and evolving concept," which "depend upon the economic, historical, social and cultural context in which that education is delivered." Id. 303-04. Second, the qualitative standard does not require absolute fiscal equality, but rather adequate funding for equal educational opportunity.

This Court has observed that “for disadvantaged students to receive a thorough and efficient education, the students will require above-average access to education resources.” Id. at 373-74.

While flexible in some respects, this Court has been unequivocal that the state is obligated to fund schools at a level that allows “disadvantaged children to compete in, and contribute to, the society entered by the relatively advantaged children.” Id. Funding must be “certain every year” and “adequate to provide for the special educational needs of these poorer urban districts in order to redress their extreme disadvantages.” Id. at 385, 294-95.

The Court further identified a variety of educational inputs and outputs that bear directly on whether the state is providing the constitutionally required level of educational opportunity, such as course offerings, student-teacher ratios, teacher experience, and various measures of student achievement. Id. at 364-66. The Court held that, as applied, the state’s statutory and administrative framework provided students living in poorer, urban districts with inferior educational opportunities that did not prepare them upon graduation “to compete in the marketplace [or] to take their fair share of leadership and professional positions.” Id. at 391-94.

As described in the subsequent sections, the record before the Commissioner in this case reflected the same type of “inverse

disparity of need” and funding that was struck down as unconstitutional in Abbott II. Id. at 314. The evidence further demonstrates how charter expansion is worsening NPS students’ access to a thorough and efficient education. In failing to evaluate the fiscal and other tangible educational impacts of charter expansion, the Commissioner abdicated his duty to provide all New Jersey’s children, including those enrolled in NPS schools, with a constitutionally adequate education that prepares them to “compete effectively in the economy and to contribute and to participate as citizens and members of their communities.” Abbott IV, 149 N.J. at 166.

**B. Threats of intensifying segregation and diminishing a thorough and efficient education in school districts as a result of charter school expansion requires the Commissioner to affirmatively act and prevent such impacts.**

While this Court has acknowledged the Legislature’s authority to create charter schools, that authority is constrained by the State’s obligation to ensure that a “thorough and efficient” education is neither impeded nor prevented in the PSDs. Englewood, 164 N.J. at 334. When the creation or expansion of charter schools intensifies segregation and reduces public funding, thereby stratifying educational opportunity so as to deny an adequate or equitable education to all students in the PSDs, each of these effects amounts to a constitutional violation. Black, Preferencing Educational Choice at 1364. The need for the

Commissioner to affirmatively and meaningfully determine the charter expansion effect on a PSD's ability to provide a "thorough and efficient" education is exponentiated in high-need districts like Newark and the Abbott districts.

In determining whether a "thorough and efficient" education is impeded, the Court should examine the threats created by charter schools at the local level. Id. at 1425. High-need districts like Newark are particularly impacted and deserve greater scrutiny of charter applications because of their poverty intensity and the severity of their constitutional injuries. In Abbott XXI, this Court recognized the heightened need to protect the Abbott plaintiff students, noting they "have been denominated victims of a violation of constitutional magnitude for more than twenty years. Because of the severity of their constitutional deprivation, that class of pupils was determined to be deserving of special treatment from the State." 206 N.J. at 340.

**1. Charter school expansion is causing districts like NPS to experience significant losses of resources, while also educating greater concentrations of higher-cost underserved students, thereby, impacting the PSDs' ability to deliver a thorough and efficient education.**

High-need districts like NPS warrant greater scrutiny of charter school expansions by the Commissioner and the courts due to a confluence of two factors: the proliferation of charter school growth in their district; and the obligation to serve higher concentrations of underserved students who are costlier to

educate. As the Appellate Division noted, charter schools have grown rapidly in Newark, nearly tripling since 2008, from 4,559 students to 12,885. Team Academy, 459 N.J. Super. at 139. Following the phase-in enrollment approved in the seven charter schools, charter schools are expected to educate about 50% of all students in NPS. Id.

The potential harm resulting from the loss of students is even greater for districts like NPS because they are educating a higher percentage of underserved students of color who require more resources. As noted previously, charter schools are enrolling and educating more NPS students but far fewer higher cost students, including ELL students and students with disabilities, leaving those students in NPS.

Students like those in NPS often face double- and triple-segregation threats to opportunity, based on challenges implicated by race, national origin, poverty, language and disability. As the U.S. Commission on Civil Rights found, schools "tend to face more challenges to achievement, such as instability of enrollment, high teacher turnover, and/or combining groups of students such as students with limited English proficiency (LEP) and special education students together in the same classroom with insufficient supports for their learning." U.S. Comm'n on Civil Rights, Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation 14 (2018). The U.S.

Commission went on to note that “[t]he effects of concentrated poverty exacerbate existing racial and ethnic inequalities, and ‘[t]he differential racial exposure to concentrated school poverty is a fundamental reason why segregation is so strongly related to educational inequality.’” Id. at 14 (quoting Gary Orfield, et al., El Pluribus . . . Separation: Deepening Double Segregation for More Students, The Civil Rights Project, (September 2012)).

Research shows that districts serving higher numbers of underserved students, including ELLs and students with disabilities, require higher levels of funding to help those students meet their educational needs. Bruce D. Baker, America’s Most Fiscally Disadvantaged School Districts and How They Got that Way, Center for American Progress, July 2014.<sup>15</sup> This type of “inverse disparity of need”—reduced resources paired with greater need—is precisely what caused this Court in Abbott II to invalidate the state’s system of education as applied to poor, urban districts. 119 N.J. at 314, 384-94. It is not to suggest that there is anything inherently inferior in these student groups that creates greater barriers to academic success. Research shows when sufficient resources are provided and well spent, it can help students overcome systemic barriers and lead to greater educational opportunities, which, in turn, can lead to improved

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<sup>15</sup> Available at <https://cdn.americanprogress.org/wp-content/uploads/2014/07/BakerSchoolDistricts.pdf>.

student performance and lifetime outcomes for underserved students.<sup>16</sup>

New Jersey, in part, recognizes these challenges and provides additional funding for ELLs and students with disabilities. See Team Academy 495 N.J. Super. 111. However, the Appellate Division perfunctorily concluded that since NPS educated more underserved students, it would “be entitled to additional funding.” Id. In reaching this conclusion, the court, and the Commissioner, failed to account for evidence in the record on the ultimate question: whether the additional and overall funding was sufficient to overcome the loss of funding to charter schools and enable NPS to provide a “thorough and efficient” education for all of its remaining students.

**2. Substantial evidence in the record shows how the financial impacts of educating increasing concentrations of underserved students, while experiencing decreasing revenues, negatively impacts NPS’s ability to deliver a thorough and efficient education.**

On this question, ELC presented undisputed evidence that the state’s failure to fully fund the School Funding Reform Act (“SFRA”) resulted in a shortfall of \$192 million, or \$3,799 per

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<sup>16</sup> See, e.g., C.K. Jackson, et al., The effects of school spending on educational and economic outcomes: Evidence from school finance reforms, 1 Q. J. of Econ., 131, 157- 218 (2016); J. Lafortune, et al., School finance reform and the distribution of student achievement (No. w22011), Nat’l Bureau of Econ. Res.(2016).

pupil—even with local aid at the maximum tax levy in 2015-16.<sup>17</sup> App. of Appellant Education Law Center Vol. I 1a - 392a, at 40a, Dkt No. A-003416-15T1, (LEAD). NPS was also sending over a quarter of its budget to charter schools (\$225 million). Id. at 41a. In addition, other changes to NPS's weighted enrollment, directed by the New Jersey Department of Education, and extra payments directed to charters of \$63 million, resulted in charter schools receiving nearly \$1,200 more per pupil than was legally required. Id.

Consequently, NPS was faced with several budget cuts and losses of educational opportunity impeding and preventing its ability to provide a "thorough and efficient" education to its students. Over a three-year period, cuts included a 20% reduction in ELL programs, 28% for special education students and a loss of 390 staff members. Id. at 47a-48a.

These facts were clear from the record. However, aside from a conclusory statement in the Commissioner's approval letters that it evaluated the "fiscal impact on sending districts," the record fails to reflect that the Commissioner affirmatively and meaningfully determined how these troubling enrollment patterns,

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<sup>17</sup> Other recent studies in Newark and Trenton similarly demonstrate the significant toll on public school districts caused by the proliferation of charter schools in those two cities. See Danielle Farrie & Monete Johnson, Newark Public Schools: Budget Impacts of Underfunding and Rapid Charter Growth, Education Law Center, Aug. 2017; Danielle Farrie, Trenton Public Schools: Budget Impacts of Underfunding and Rapid Charter Growth, Education Law Center, Jul. 2018.



coupled with the financial budgetary issues discussed further below, may be impacting NPS's ability to provide a thorough and efficient education, much less patterns of segregation. See, e.g., id. at 18a-19a.

**C. Research shows that charter school expansion has depleted resources and in turn, educational opportunity, for underserved students in public school districts.**

The fiscal impacts experienced in NPS are not isolated and mirror a troubling nationwide trend. Charter school expansion can have a negative fiscal impact on local school districts, depleting their schools of adequate funding, thereby decreasing educational opportunities for underserved students. Research from PSDs nationwide demonstrates this negative fiscal impact and how that affects educational quality in public school districts. Funding reductions can cause lower teacher pay, teacher and support staff layoffs, critical program cuts, and other consequences that negatively affect instruction quality.<sup>18</sup> Those most impacted are the most vulnerable students in local districts, including low-income students of color, students with disabilities, and ELLs. Danielle Farrie & Monete Johnson, Newark Public Schools; Danielle Farrie, Trenton Public Schools.

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<sup>18</sup> J Lafortune et al., School Finance Reform; Robert Bifulco & Randall Reback, Fiscal Impacts of Charter Schools: Lessons from New York, 9 Educ. Fin. and Pol'y 86 (2013).

While state and local district funding structures for charter schools vary, the overall trend points to reducing educational opportunity for students in PSDs across many states. Deborah A. Verstegen & Teresa S. Jordan, A Fifty-State Survey of School Finance Policies And Programs: An Overview, 34 *Journal of Education Finance* 213 (2009). As charter school enrollment increases and PSD enrollment in the same district decreases, the PSDs lose important resources. Generally, this is because the net enrollment losses at PSDs deprive them of the per-pupil allotment funding that they otherwise would have had, but for the charter expansion. Bifulco & Reback, Fiscal Impacts of Charter Schools. This is problematic because, despite a technical decrease in the number of students enrolled at PSDs, PSDs must still cover fixed costs that remain constant in the short-, medium-, and long-term. Helen F. Ladd & John D. Singleton, The Fiscal Externalities of Charter Schools: Evidence from North Carolina, SSRN Scholarly Paper ID 3082968, Social Science Research Network (Apr. 9, 2018). These costs include building maintenance, administrative capacity, and other services that may be required by law. Id. at 3. In effect, without sufficient policy mechanisms to protect the resources of PSDs, charter schools with increasing enrollment that cause decreased enrollment at PSDs will “generate negative fiscal externalities on public school districts,” forcing PSDs to make

cuts that will affect the quality of education provided at public schools. Id.

These costs typically require either increased revenues, *i.e.*, tax increases, or budget cuts in other areas. How the revenues or cuts are distributed ultimately affects the resources available to a particular school, and, too often, resources are typically diverted away from PSDs and funneled to charter schools.<sup>19</sup>

The experiences of several states have confirmed that the growth of charters and decreases in PSD enrollment can drain districts of the resources available for public schools. In New York state, for example, revenues lost due to charter schools in Albany City School District and Buffalo Public Schools ranged from \$7 million to \$8.5 million, and \$20.6 million to \$24.2 million, respectively. Helen F. Ladd & John D. Singleton, The Fiscal Externalities of Charter Schools: Evidence from North Carolina, SSRN Scholarly Paper ID 3082968, Social Science Research Network (Apr. 9, 2018). In Pennsylvania, one study found that “[t]he fiscal impact of charter expansion is consistently negative” and “[t]he total annual fiscal impact grows each year as more students

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<sup>19</sup> Ladd & Singleton, The Fiscal Externalities of Charter Schools; David Lapp et al., The Fiscal Impact of Charter School Expansion: Calculations in Six Pennsylvania School Districts, Research for Action (Sept. 2017); Farrie, Trenton Public Schools; Farrie & Johnson, Newark Public Schools.

depart for charters.” Lapp et al., The Fiscal Impact of Charter School Expansion. A 2018 North Carolina study that analyzed the negative fiscal externalities of charter schools in six districts revealed similar findings. Id. In Durham, North Carolina, the authors estimated that the fiscal burden on PSDs due to charter schools was \$16 million, or \$500 per student. Id. at 2.

Experiences in California provide another instructive example. During the 2016-17 period, the Oakland Unified School District had a \$15 million budget deficit. Ultimately, the district instituted \$9 million in cuts due to charter school expansion, “slashing funds for academic counselors, school supplies, and even toilet paper.” Gordon Lafer, Breaking Point: The Cost of Charter Schools for Public School Districts, In the Public Interest, May 2018, at 4.<sup>20</sup> Overall, the presence of charter schools cost Oakland \$1,500 per student due to lost funding. Id. at 5. That same year, the San Diego Unified School District was forced to cut \$124 million due to charter school growth, causing hundreds of teacher, clerical and custodial professionals to lose their positions, which ultimately hurt students. Id. at 4. In 2018, over 250 districts across the state prepared for budget cuts that would affect every aspect of the educational quality for students. Id. at 5. The results proved devastating for PSDs,

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<sup>20</sup> Available at [https://www.inthepublicinterest.org/wp-content/uploads/ITPI\\_Breaking\\_Point\\_May2018FINAL.pdf](https://www.inthepublicinterest.org/wp-content/uploads/ITPI_Breaking_Point_May2018FINAL.pdf).

depriving them of the resources they need to educate students effectively.

**Conclusion**

For the above-stated reasons, *Amici* respectfully urge the Court to reverse the Appellate Division's ruling and remand to the Commissioner for reconsideration of the segregative and fiscal impacts consistent with the Court's ruling.

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