

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN THE MATTER OF GRANT
OF RENEWAL APPLICATION OF
THE RED BANK CHARTER SCHOOL,
MONMOUTH COUNTY

Docket No.: A-005811-01T2

Civil Action

ON APPEAL FROM THE STATE
BOARD OF EDUCATION

BRIEF OF EXCELLENT EDUCATION FOR EVERYONE AS AMICUS CURIAE

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By order dated April 4, 2003, this Court granted the motion of Excellent Education for Everyone ("E3") to submit this amicus curiae brief. E3 believes that the determination of the Commissioner and the State Board of Education regarding the renewal and expansion of the Red Bank Charter School should be affirmed.

Interests of E3

E3 is a coalition of New Jersey citizens from across the political spectrum, from all races, religions, ethnic groups and regions of the State. It was founded by its Chairman, Peter Denton, in 1998. Its Executive Director is Dan Gaby, former Vice Chairman of the New Jersey State Board of Education.

E3 seeks to encourage an on-going dialogue among parents, educators, community leaders, business people and government officials on the best ways to enable the public schools to do a more effective job of educating the children of New Jersey by subjecting their schools to the competitive pressures of parental school choice. E3 contends that competition will stimulate better public school performance, provide accountability and assure that all children will receive a quality education.

E3 works to expand to the fullest the educational options available to students and parents in New Jersey,

including traditional public schools, public charter schools, parochial schools, nonsectarian schools, home schooling and other alternatives. Its goal is to ensure that all parents, regardless of income, have the power and the resources to decide where and in what way their children are educated. These resources should include public funding of public schools and public charter schools, public vouchers for private and parochial schools, private scholarships, tax credits and tax deductions. E3 has a staff of consultants assigned to bring its message to various constituent groups via speakers, direct mail, media, tours and conferences. E3 is a 501(c)(3) organization.

In addition to Mr. Denton and Mr. Gaby, E3's board members are: Allen Barnhardt, President, City Council of Orange, N.J.; General Alfred Cade (retired), former Chairman, New Jersey Commission on Higher Education and former Chair of New Jersey Chamber of Commerce; Sondra Clark, President, Black United Fund of New Jersey; Keith DaCosta, Executive Vice President, 100 Black Men of New Jersey; George Harris, Trustee, Schmann Fund of New Jersey; Chris Jacob, Managing Director, Eagle Capital Management, LLC; Rev. Reginald Jackson, Executive Director, Black Ministers Council of New Jersey; Mary Jo Kapalko, President, New Jersey Charter Public Schools Association; Right Rev. Msgr. William J. Linder, Founder, New Community Corporation;

Martin Perez, President, Latino Leaders Alliance of New Jersey; Frederico Moran, Member, City Council of Camden, N.J.; Edward Stier, former Chairman of the Board, the Chad School; Robert C. Waggoner, President & CEO, Burrelle's Information Services; Danny Williams, President, NAACP, Newark Branch; and, Richard Z. Zimmer, Partner, Gibson, Dunn & Crutcher.

Preliminary Statement

The legal issues surrounding the continued existence of the Red Bank Charter School should not obscure the overarching purposes of New Jersey's charter school legislation. The Legislature has determined that "the establishment of a charter school program is in the best interests of the students of this State and it is therefore the public policy of the State to encourage and facilitate the development of charter schools." N.J.S.A. 18A: 36A-2.

By the fall of 2001, there was ample evidence, as found by the evaluation of the accounting firm KPMG, that the charter school experiment in New Jersey had met or exceeded expectations. New Jersey charters, which numbered fifty-four in 2001 with enrollment of 10,000 students (Da 3) were in demand. Parental/guardian satisfaction was high. Ninety three percent of those surveyed by KPMG would recommend their charter schools to other parents; teachers and administrators "expressed high levels" of customer

satisfaction (Da 10); and, "charter school parents clearly indicated they value the option of sending their child to a charter school which they believed to be the best opportunity for a successful education for their child." (Da 6). According to the KPMG evaluation, "nearly all schools report that they have wait lists.... The Office of Charter Schools continues to receive applications for new charters....with 18 being filed in 2001 alone." (Da 5)

KPMG's assessments were in line with the results of the Commissioner's evaluation based on extensive public hearings and other relevant data in 2001. The Commissioner made the following general conclusions which are particularly germane to the arguments raised on this appeal:

- "Charter school students, in the aggregate, are outperforming the districts of residence from which they draw their students in math on the ESPA and language arts on the GEPA. Student performance in other areas on these tests is comparable to the districts of residence.
- "Charter schools, on average, have lower class sizes, lower student faculty ratios, lower student mobility rates, extended school days and academic years, greater instructional time, and higher faculty attendance rates than their districts of residence.
- "Parental and student demand for, satisfaction with, and involvement in charter schools are all extremely high. Parents and students in New Jersey clearly value the choices provided by charter schools. There currently are approximately 11,300 students attending 51 charter schools in New Jersey.

- "There is little evidence that there has been either a substantial positive or negative impact on programs and budgets in districts of residence."

Charter School Evaluation Report Commissioner's Recommendations (October 1, 2001) at 2.

Charter schools have met with similar acceptance and success in other states. They have been authorized by legislation in thirty-six states and the District of Columbia.

Approximately 1,400 charters were in operation at the end of 1999, serving some 250,000 students. The number of charter schools is expanding, and currently stands at more than 2,000. Contrary to the fears of some, "overall, charter schools enrolled a larger percentage of students of color than all public schools in the states with open charter schools." The State of Charter Schools 2000 - Fourth Year Report Executive Summary and § C, Student Racial/ Ethnic Composition (Report cited in Englewood, 164 N.J. at 320).

Charter schools are held accountable for their operations and not all charter schools are successful. At the end of the 1998-1999 school year, a total of fifty-nine charter schools nationwide had closed since the first charter was opened in 1992 (nearly four percent). *Id.* at Executive Summary. The New Jersey Department of Education conducted its first renewal inspections of the twelve charter schools that opened in 1997.

Of those twelve, (which included the Red Bank Charter School) two were placed on probation, further evidencing the fact that charter schools are held accountable for their conduct and their results.

The record on this appeal demonstrates that the Red Bank Charter School, which appellant and certain amici want to shutdown, has "met with significant success both academically and as a dynamic learning community," in the words of KPMG (Da 3). This conclusion was echoed by Assistant Commissioner Osowski who wrote to the Red Bank Principal following the presentation in support of renewal and expansion:

The board was clearly impressed with your enthusiasm, with the successful instructional program you have implemented, and with the very positive student outcomes that have resulted. We selected you to be one of the three presenters because your students are achieving at a very high level and because you have implemented very innovative programs. All of that was abundantly clear in your presentation.

Your school provides an education that addresses the whole child, is focused and intense, is committed to high standards without compromise, is personal and intimate, and is obviously innovative and creative. Congratulations on not only a great presentation, but more importantly, on a great school.

(Da 16)

Because one of the Red Bank Board's central challenges on this appeal involves the enrollment of the charter school students and its impact on the racial balance in the

district school, the admissions policy employed by the charter school to recruit its students bears emphasis:

In accordance with its charter, admission to the Red Bank Charter School was free and open to all residents of the Borough of Red Bank, regardless of creed, color, gender, national origin, religion, ancestry, race, disability, or the need for special educational services.

(Da 575).

We know of no suggestion in the record before this Court that the Red Bank Charter School was less than conscientious in carrying out its stated admissions policy.

I.

THE PROCEDURE ADOPTED BY THE COMMISSIONER DID NOT DENY DUE PROCESS TO THE BOARD

The Red Bank Board was permitted to respond to the charter school's application for renewal. N.J.S.A. 18A:36A-4(c). The Board took advantage of the opportunity by filing a twenty-page testimonial to improvements in the district which included criticism of certain aspects of the operation of the charter school. This presentation was submitted with a polished legal brief. The alleged segregative effect of the charter was emphasized (Pa 23-24) and the alleged "disastrous economic impact" (Pa 35) on the schools operated by the Board were addressed (Pa 35-36). The legal analysis concluded with a request for a hearing (Pa 40).

We adopt the analysis of the Attorney General and Counsel for the Red Bank Charter School regarding the alleged requirement that the District Board is entitled to a hearing when a charter renewal application is made.

We would point out, in addition, the enormous expense and consumption of time and other resources litigated renewal applications would require. The copious briefs and appendices filed in this appeal are witness to the effort the appellant wants the Department of Education and, indeed, charter schools, to shoulder. Had the Legislature wanted district boards to have a full-fledged seat at the table, it would have done so explicitly. However, at both the initial application stage and at renewal, the legislature permitted the boards to respond to the application and nothing more. Appellant's contentions are relevant to adjudicatory proceedings.

Moreover, we submit that the Commissioner's interpretation of the statute should be accorded deference by this Court. In the Matter of the Grant of the Charter School Application of Englewood, 320 N.J. Super. 174, 197-198 (App. Div. 1999), citing Waste Management v. State DEPE, 278 N.J. Super. 56 (App. Div. 1994). One of the agencies afforded substantial deference is the State Department of Education. This Court has noted:

"Such deference has been extended to the Commissioner's regulatory decisions implicating the quality and efficiency of education in New Jersey. *Dennery v. Board of Educ.*, 131 N.J. 626, 637, 641-43 (1993). Thus, the Court has repeatedly acknowledged and approved the administrative handling of educational controversies that arise in the context of constitutional and statutory litigation, including evaluation of local educational problems, design of remedial measures, and supervision of the program implementation..." *Englewood*, supra, at 198.

II.

ENROLLMENT IN THE CHARTER SCHOOL DID NOT HAVE A SEGREGATIVE EFFECT ON THE DISTRICT SCHOOLS

The Red Bank Board would have the charter school closed because it claims that there has been a loss of white students in the middle school it operates. "The resulting segregation," the Board contends, "is due in large part to the charter school." (Ab at 30). However, while "after-this-because-of-this" logic is deceptively simple, it seems clear that the cause of the alleged racial imbalance found in Red Bank cannot be so conveniently explained.

As framed by the School Board, one might expect proof that the white children now enrolled in the charter came from the district causing the forbidden segregative effect. But this cause and effect has not been demonstrated.

Indeed, 16 or 20 percent of the total charter school enrollment came not from the district school but from other districts, private schools, parochial schools or were home schooled (Da 53).

The charter school makes a compelling point in emphasizing that the Red Bank school's racial balance was not good before the charter was first granted (Db at 19). On this point there is agreement (Pb 29, 31). The likelihood that the present balance was materially effected by the charter's enrollment is, therefore, greatly diminished.

The Red Bank Board has failed to substantiate its claim that the segregation has been caused by the charter school's enrollment but instead points to statistics purporting to show that the school population does not reflect overall population figures (Pb at 30). The more appropriate comparison, as has been pointed out by the charter school (Db at 25), is the population of school aged children. The legislature has made this clear: admission policies and "criteria for evaluating the admission of students" shall comply with section 8 of the Act. N.J.S.A. § 18A: 36A-5e. Section 8, in turn, refers to "a cross section of the community's school age population. N.J.S.A. 18A: 36A-8e. (Emphasis added.)

When the appropriate school age population is used, the charter school's enrollment is reasonably balanced: in Red

Bank as a whole, 38 percent of the school aged children are white and 59.3 percent African American or Hispanic (Db at 25); the charter school's enrollment is 47.5 percent white with 48.8 percent African American or Hispanic (Db at 26). In terms of minority-majority representation, the charter school is well integrated. The imbalance of white children in the district school can be accounted for by the decline in white children's primary enrollment (Pa 134). It is clear that the situation would not be improved if the charter school were closed with all charter students enrolling in the district's middle school (Db at 29). Once again, there has been no showing that the charter school has caused the prohibited effect.

It is noteworthy that the Charter School Program Act and the regulations adopted under it afford the Commissioner considerable flexibility in considering racial balances as a consequence of charter school enrollment. The segregative effect is to be a consideration when the charter application is first made and annually thereafter. N.J.A.C. § 6A: 11-2.1 (i) and § 6A:11-2.2 9(c)). Significantly, while requiring annual attention to the matter, the regulations do not require the Commissioner to consider the segregative effect on the district of residence as part of the renewal process.

The number of minority students in a given class at a precise moment, a point deemed persuasive by the New Jersey Education Association (Amicus Curiae Brief at 2), cannot be determinative. The statute calls for charter admissions policies that "to the maximum extent practicable, seek enrollment of a cross section of the community's school age population including racial and academic factors." N.J.S.A. 18A: 36A-8e.

It is also important to recognize that the racially blind admissions policy required of a charter school produce enrollments based on parental interest over which the school has relatively little control. Case law dealing with a school district's power to assign students to various schools are irrelevant. Similarly, reliance on Guidelines Governing School Desegregation and Integration, (which predated New Jersey's Charter School legislation), assuming that such reliance is procedurally proper, is misplaced. A charter school has no ability to move students from school-to-school to achieve racial balance other than by closing, dismissing students either to the district school or, as is likely for the Red Bank Charter's enrollment, to private, parochial, home schooling or to some other district.

III.

THE RED BANK BOARD HAS NOT SHOWN THAT THE CHARTER SCHOOL WILL PREVENT A THOROUGH AND EFFICIENT EDUCATION IN THE DISTRICT SCHOOLS

E3 takes no position regarding the possible impact of the charter's renewal and expansion on the ability of the Red Bank District to provide a thorough and efficient education. However, it does appear that the Commissioner and the State Board correctly placed the burden of persuasion on the District Board. Instead of making a showing of its inability to provide a thorough and efficient education, the District Board merely relied on threats to cut certain expenses.

E3 adopts the arguments stated on this point by the State Board of Education.

CONCLUSION

Informed by a voluminous record and energetic arguments from able advocates, the State Board of Education affirmed the Commissioner's determination to extend and expand the charter of the Red Bank Charter School. That determination deserves to be upheld by this Court.

Respectfully submitted,

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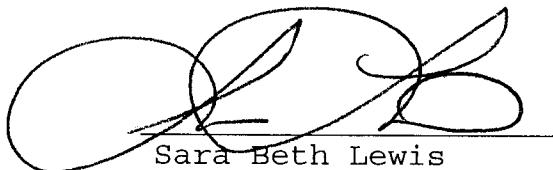
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CERTIFICATE OF SERVICE

I certify that on April __, 2003, I caused to be served a copy of Excellent Education for Everyone's ("E3") Brief as Amicus Curiae, by first class U.S. Mail, postage pre-paid, upon the parties set forth on the attached Service List.



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