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

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-005811-01T2

**BRIEF ON BEHALF OF AMICUS CURIAE AMERICAN CIVIL
LIBERTIES UNION OF NEW JERSEY IN SUPPORT OF BOARD
OF EDUCATION OF THE BOROUGH OF RED BANK**

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PRELIMINARY STATEMENT

Segregation in New Jersey's public schools is a difficult and persistent problem. Although the state's public schools became more integrated during the 1960's and early 1970's, segregation has increased in recent years, and today New Jersey's public schools are among the most segregated in the nation.

The Borough of Red Bank ("Red Bank") is an integrated community, with significant numbers of African-American, white, and Hispanic children. Nonetheless, the Middle School operated by the Red Bank Board of Education (the "Board") has become an overwhelmingly minority school. In contrast, the Red Bank Charter School ("RBCS") has a student body that is made up of about half white students. Thus, the Red Bank Board of Education must fund one predominantly minority school and another that acts as a "safe haven" for white students.

In renewing and expanding the charter of RBCS, however, the Commissioner of Education (the "Commissioner") did not consider the segregative effect of RBCS. Despite the Supreme Court's instruction to the Commissioner that he "assess [the racial impact when he] initially reviews a charter school for approval to open, and on an annual basis thereafter," In the Matter of the Grant of the Charter School Application of Englewood, 164 N.J. 316, 328 (2000) (hereinafter, "Englewood"), his decision fails even to mention the issue of race.

Likewise, the New Jersey State Board of Education (the "State Board") did not remedy this problem. Indeed, the State Board mentioned the issue of race only in passing: "Nor has [the Board] demonstrated that [RBCS] has had a segregative effect on the district's schools or that expansion of [RBCS] will have an impermissible impact on the racial composition of the [Board]'s schools." (Pa 180.)¹ Nowhere does the State Board set forth its reasons for rejecting the overwhelming evidence that RBCS has had a segregative effect on the Middle School. And without such reasoning or analysis, the decision of the State Board fails to provide a basis for judicial review.

New Jersey law requires that the Commissioner take action to combat segregation in the State's public schools. As the Commissioner shirked this responsibility when he renewed and expanded the charter of RBCS, the Court must remand this matter to the Commissioner so that he may consider this segregative effect and develop an appropriate remedy.

STATEMENT OF INTEREST

The American Civil Liberties Union of New Jersey ("ACLU-NJ") submits this brief amicus curiae because this matter raises important questions of state law pertaining to charter schools, racial segregation, and public school funding. Specifically,

¹ Amicus uses the abbreviation "Pa" to designate pages in the appendix filed with this Court by Appellant Board of Education and the abbreviation "Da" to designate pages in the appendix of Appellee RBCS.

ACLU-NJ seeks reversal of the decision of the Commissioner of Education to renew and expand the charter of the Red Bank Charter School on the grounds that he failed to analyze the racial impact and population of that school as required by the laws and Constitution of New Jersey and as explained by the Supreme Court in Englewood and other cases. Additionally, amicus curiae submits this brief to emphasize the Commissioner's obligation and authority to undertake appropriate remedial action to combat segregation in public schools.

ACLU-NJ is a private non-profit, non-partisan organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, ACLU-NJ has approximately 8,000 members in the State of New Jersey. ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes and is composed of over 300,000 members nationwide. An important part of the work of the ACLU-NJ is to appear as amicus curiae before this Court in matters that implicate individual liberties. See, e.g., Wilde v. Wilde, 341 N.J. Super. 381 (App. Div. 2001); State v. Ravatto, 333 N.J. Super. 247 (App. Div. 2000), rev'd on other grounds, 169 N.J. 227 (2001); J.B. v. M.B., 331 N.J. Super. 223 (App. Div. 2000); V.C. v. M.J.B., 319 N.J. Super. 103 (App. Div. 1999); J.A. v. Board of Educ. for Dist. Of South Orange & Maplewood, 318 N.J. Super. 512 (App. Div. 1999); State v. Kane, 303 N.J. Super. 167 (App. Div. 1997); Gallo v. Salesian Soc., Inc., 290 N.J. Super. 616 (App. Div. 1996); State in Interest of J.G., 289 N.J. Super. 575 (App. Div. 1996);

Matter of Adoption of Two Children by H.N.R., 285 N.J. Super. 1 (App. Div. 1995); State v. Kadelak, 280 N.J. Super. 349 (App. Div. 1995).

A proper resolution of the issues raised in this case is of vital concern to ACLU-NJ, which strongly supports protections against racial discrimination and segregation. ACLU-NJ is currently participating in numerous cases involving these issues. See, e.g., Russo v. Le Terrace Swim Club, Civ. Action No. L-8182-02 (Law Div. filed Aug. 23, 2002) (LAD claim against swimming pool that refused to allow minority members or guests); Dasrath v. Continental Airlines, Inc., Civ. Action No. 02-2683 (D.N.J. filed June 4, 2002) (discrimination claim against airline for removal of plaintiff and others from a flight after another passenger complained of "brown-skinned men"); Cureg v. Continental Airlines, Inc., Civil Action No. 02-2684 (D.N.J. filed June 4, 2002) (same); Morka v. State of New Jersey, Civ. Action No. L-8429-97 (Law Div. filed Aug. 29, 1997) (suit on behalf of numerous minority motorists stopped and/or searched by New Jersey State Troopers); South Camden Citizens in Action v. New Jersey Dep't of Env'tl. Protection, 274 F.3d 771, cert. denied 122 S. Ct. 2621, 153 L. Ed. 2d 804 (June 24, 2002) (seeking application of Section 1983 as an avenue for redress of violations of Title VII of the Civil Rights Act of 1964 committed under color of state law).

ACLU-NJ is also committed to protecting the right to public education and the rights of public school students. See, e.g., Estate of Jeffreys v. State of New Jersey, Civ. Action No. 95-

6155, 1996 U.S. Dist. LEXIS 21360 (D.N.J. Jan. 29, 1996) (resolving under IDEA question whether local or state educational agency would pay for educational services provided to disabled child); Abbott v. Burke, 163 N.J. 95 (2000); see also Joye v. Hunterdon, 353 N.J. Super. 600 (App. Div. Aug. 12, 2002) (raising students' state constitutional rights against suspicionless drug testing).

This case presents a question at the junction of these two sets of issues: de facto segregation in the public schools. The Supreme Court has made clear that the Commissioner and the State Board have vital roles to play in protecting against segregation in state-funded schools. Because they have neglected their obligations in this matter, amicus curiae respectfully urges this Court to reverse this matter and remand it to the Commissioner for further consideration.

SEGREGATION IN NEW JERSEY'S PUBLIC SCHOOLS REMAINS AN ONGOING PROBLEM.

In recent years, segregation in New Jersey's public schools has been increasing to that point that New Jersey now operates one of the most segregated public school systems in the nation. That this is so is established by the January 2003 report of the Civil Rights Project at Harvard University which analyzes segregation in public schools throughout the United States: A Multiracial Society with Segregated Schools: Are we Losing the Dream? (Erica Frankenberg, Chungmei Lee, and Gary Orfield,

<http://www.civilrightsproject.harvard.edu/research/reseg03/reseg03_full.php> (Jan. 2003)).

This report shows that since the 1970's, segregation in New Jersey's public schools has become a greater and greater problem. In 1970, for example, the average black student in New Jersey attended a school at which about one-third of the students were white. (A Multiracial Society, Table 15 at 49.) In 2000, by contrast, the average black student in New Jersey attended a school that was only about one-quarter, or 25.7%, white. Likewise Hispanic students attend increasingly segregated schools -- in 1970, the average Hispanic student attended a school that was 38.2% white. Today, the average Hispanic student attends a school with only 28.8% white students. (A Multiracial Society, Table 17 at 51.)

The report also shows that black and Hispanic students in New Jersey also attend schools that are among the most segregated in the nation. For example, in only five states does the average black student attend school with fewer white students than does the average New Jersey black student. Similarly, in only seven states do a smaller percentage of black students attend majority white schools. Most troubling, in only three states do a higher percentage of black students attend schools with over 90% minority students. Indeed, in New Jersey, half of all black public school students attend schools with greater than 90% minority students. (A Multiracial Society, Table 16 at 50.)

Further, Hispanic students are no more integrated into New Jersey's public schools than are black students. As noted above, the typical Hispanic student in New Jersey attends a school that has 28.8% white students; Hispanic students in only five other states attend schools with fewer white students. About one quarter of Hispanic students attend majority white schools; in only six states do smaller percentages of Hispanic students attend majority white public schools. And 40.7% of Hispanic students in New Jersey attend public schools with over 90% minority students; Hispanic students in only three other states are more likely to attend such thoroughly segregated schools. (A Multiracial Society, Table 18 at 52.)

As this Court has recently emphasized, "sound educational and legal principles do not allow for segregation 'with its inherent inequalities of educational opportunities and its withholding of the democratic and educational advantages of heterogeneous student populations.'" Board of Educ. of Borough of Englewood Cliffs v. Board of Educ. of City of Englewood, 257 N.J. Super. 413, 453 (1992) (quoting Morean v. Board of Educ. of Montclair, 42 N.J. 237, 242-43 (1964)). See also Booker v. Board of Educ. of City of Plainfield, 45 N.J. 161, 170-71 (1965) ("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."). In order to combat the problem of segregation, the Commissioner of Education enjoys broad authority to undertake measures to combat segregation, whether

de facto or de jure. Board of Educ. of Borough of Englewood Cliffs, 257 N.J. Super. at 454 (citing Jenkins v. Township of Morris Sch. Dist., 58 N.J. 483, 504 (1971)); Booker, 45 N.J. at 178.

As explained more fully in Section IV of this brief, the current situation in Red Bank is a perfect example of the de facto segregation against which the Supreme Court has warned. The Middle School has about 85% minority students and only about 15% white students while public funds also support RBCS, which serves as a "safe haven" for white students otherwise unwilling to attend the predominantly minority Middle School. As noted, the Commissioner and State Board failed to address this problem or how the funding for the Middle School is affected by the operation of RBCS.

Certainly the Commissioner has not only the power, but indeed the obligation, to consider this segregative impact of reauthorizing and expanding RBCS. In light of the increasing segregation of New Jersey's public schools and the state's historic commitment to fight segregation in its schools, the failure of the Commissioner to have done so is particularly troubling.

**CONTRARY TO THE INSTRUCTION OF THE SUPREME COURT, THE
COMMISSIONER AND THE STATE BOARD FAILED TO CONSIDER
THE RACIAL IMPACT OF RBCS UPON THE MIDDLE SCHOOL.**

The Supreme Court has clearly instructed the Commissioner with respect to his obligations in reviewing an application for a charter renewal. He "must consider the impact that the movement of pupils to a charter school would have on the district of residence" both at the time of the grant of a charter, "and on an annual basis thereafter." Englewood, 164 N.J. at 328. See also id. ("Continuing assessment of the charter school's pupil population and impact on the district of residence must also occur.") The Court also made clear that, while the Commissioner has the obligation to remedy intentional segregation, he "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." Id. Because Red Bank is a district with just such a precarious balance, the Commissioner's failure to address the racial impact of RBCS's charter renewal and expansion, as well as his failure to take remedial action in light of that impact, require that this matter be reversed and remanded to the Commissioner.

The Supreme Court and the New Jersey Department of Education have also provided guidance to the Commissioner and to school districts regarding the point at which racial disparity among a community's schools becomes impermissible racial segregation. In particular, the New Jersey State Guidelines on the Desegregation and Integration of Public Schools

(hereinafter, the "Guidelines") "establish a set of uniform criteria for school desegregation in New Jersey public schools." Guidelines at 2. In its Englewood decision, the Supreme Court recognized that school districts must adhere to the Guidelines in order to comply with New Jersey law requiring desegregation. Englewood, 164 N.J. at 324-330.

The Guidelines prescribe a formula to determine the point at which racial disparity among a community's public schools violates the state's obligation to integrate its schools. Because of the vast racial disparity between RBCS and the Middle School, the schools of Red Bank violate the Guidelines's integration requirement.

In order to determine whether a community's schools have become segregated, the Guidelines mandate the following calculations. First, the total number of minority and majority students in a district attending a particular school level (e.g., grades Kindergarten through third grade) should be calculated. (Guidelines at 15.) Then, the percentage of each minority group of students should be multiplied by .3. This result is the permissible deviation among public schools for that minority group. For example, if 10% of students attending grades K-3 in a school district were black, the permissible range of black students at any particular school is from 7% to 13%. Id. The permissible deviation for a majority group, on the other hand, is the average of the permissible deviation for the two largest minority groups. For example, if a majority

white school district had 10% black students (3% permissible deviation) and 20% Hispanic students (6% permissible deviation), then the permissible deviation for white students is 4.5%. Id.

In 2000-2001, RBCS had 38 white students, 27 black students, 12 Hispanic students, and 3 Asian/Pacific Island students.² That same year, in the Middle School's grades 4-8, there were 41 white students, 149 black students, 79 Hispanic students, and 3 Asian/ Pacific Island students. (New Jersey Dep't of Educ., 2000-2001 Enrollment of Borough of Red Bank Schools, <<http://www.state.nj.us/njded/data/>>.) Accordingly, of the 352 students attending public schools in Red Bank in 2000-2001, there were 79 white students, 176 black students, 91 Hispanic students, and 6 Asian/ Pacific Island students.

According to the Guidelines, then, the permissible deviation percentages for the three largest racial groups in the public schools of Red Bank are: white -- $\pm 7\%$ ($22\% * .3$); Hispanic -- $\pm 8\%$ ($26\% * .3$); and black -- $\pm 8\%$ ($(7\% + 8\%)/2$). As the table below demonstrates, the racial composition of RBCS does not come close to falling within the permissible ranges established by the Guidelines.

² These numbers were arrived at by multiplying the percentages for the 2000-2001 school year provided by RBCS in its Brief submitted to the State Board of Education (Pa 189) by the 80 students authorized to attend RBCS by its charter.

	White	Hispanic	Black
<u>Guidelines</u> High Limit	29%	34%	58%
Both middle schools in Red Bank	22%	26%	50%
<u>Guidelines</u> Low Limit	15%	18%	42%
RBCS	47.5%	15%	33.8%
Middle School	15%	29%	55%

The state's interest in preventing de facto segregation remains even though these schools are operated separately. Both the Supreme Court and this Court have emphasized the authority and indeed the responsibility of the Commissioner to combat segregation among schools in a community, even if multiple towns or school boards are involved. In Jenkins v. Township of Morris School District, 58 N.J. 483, 506-07 (1971), for example, the Supreme Court held that the Commissioner possessed the authority to prevent the students of Morris Township from withdrawing from Morristown High School when such withdrawal would lead to the segregation of each town's schools. More recently, the Supreme Court held that the Commissioner had the responsibility to remedy the segregation that would result from the withdrawal of one town's students from the public schools of another. Board of Educ. of the Borough of Englewood Cliffs v. Board of Educ. of City of Englewood, 170 N.J. 323, 343-44 (2002).

The situation in Red Bank is at least analogous. Here, separately operated schools in a single community have become

segregated. The Middle School has become overwhelmingly minority (85%), while RBCS is significantly more balanced (52% minority). As a result, the Commissioner has the obligation to address this situation and to act to end the segregation that has developed in the schools of Red Bank.

RBCS counters that white students have left the District's schools for reasons other than the creation of RBCS. (RBCS Br. at 14-21.) This argument misses the point. While some students of all ethnic groups who now attend RBCS might not attend the Middle School were RBCS not in operation, others would do so. If even half of the white students currently enrolled in RBCS were to attend the Middle School instead of RBCS, the percentage of white students in the school would rise from 15% to 20%, significantly alleviating the segregation of that school. In fact, the number of RBCS students who would enroll in the Middle School were RBCS not an option is likely much higher than this figure: the record shows that 80% or more of the students attending RBCS attended schools operated by the Board before they enrolled in RBCS. (Da 53; Da 77, ¶47.)

The courts have made clear that even when private choices lead to segregation in public schools, the Commissioner has the obligation to remedy that segregation. For example, even when local school boards act without discriminatory intent in opening their schools to tuition-paying students, the Commissioner has the duty to prevent the exacerbation of segregation resulting from the school boards' actions. Board of Educ. of Borough of

Englewood Cliffs v. Board of Educ. of City of Englewood, 170 N.J. 323, 342-43 (2002). Nor, as this Court has noted, should the Commissioner permit the state to become a "passive participant" in private discrimination." Board of Educ. of Borough of Englewood Cliffs v. Board of Educ. of City of Englewood, 257 N.J. Super. 413, 472 (1992), aff'd, 132 N.J. 327 (1993). When the Commissioner permits the continued operation of schools in a single community with racial compositions as starkly divergent as those of RBCS and the Middle School, the Commissioner risks permitting the state to become just such a "passive participant" in the discriminatory decisions of private actors.

Further, even if RBCS were drawing white students only from private schools instead of from the Middle School, the situation would be no better because it would be inappropriate for public funding that would otherwise go to the Middle School to support the operation of a "safe haven" for white students who are unwilling to attend public school. Despite their obligation to assess the financial, as well as the segregative, impact of the operation of RBCS, the Commissioner and State Board failed to decision. Accordingly, this matter must be reversed and remanded to the Commissioner for further proceedings.

**THE DECISIONS OF THE COMMISSIONER AND THE STATE BOARD DO NOT
SATISFY MINIMUM STANDARDS OF AGENCY DECISION MAKING.**

The text of the decisions of the Commissioner and State Board both demonstrate a failure to consider the segregative impact of RBCS on the other public schools in Red Bank. As noted previously, the word "race" does not appear anywhere in the decision of the Commissioner, and the decision provides no hint that the Commissioner ever noted the impact of RBCS upon the Middle School. (Pa 73.)

The decision of the State Board of Education is similarly flawed. It states only that the papers of the District did not "demonstrate[] that [RBCS] has had a segregative effect on the district's schools or that expansion of [RBCS] will have an impermissible impact on the racial composition on the district's schools." (Pa 180.) The decision, however, completely fails to set forth the facts which led the State Board to reject the District's compelling demonstration of a vast racial gap between RBCS and the District's school.

These decisions do not meet the standards for agency action demanded by the New Jersey courts. In an administrative decision on an application for a school charter, the reasons underlying the decisions of the Commissioner and State Board must be "discernable," even if they "need not be as detailed or formalized as an agency adjudication of disputed facts." In re Grant of the Charter Sch. Application of Englewood, 320 N.J. Super. 174, 217 (1999). See also In re Charter Sch. Appeal of

Greater Brunswick Charter Sch., 332 N.J. Super. 409, 415 (1999). Because the reasons for the decisions of the Commissioner and State Board do not meet even this low standard of discernability, this matter must be remanded to the Commissioner for further consideration.

For example, there is evidence in the record that, even though RBCS is one-fourth the size of the Middle School, it had more white children enrolled in the 2001-2002 school year than did the Middle School. (Pa 7.) Likewise, the record indicates that RBCS had more white students in a single fourth grade class in 2001-2002 than did the Middle School in all three of its fourth grade classes. (Pa 13.)

RBCS does not dispute these stark disparities, but argues only that other factors have contributed to the racial composition of the Middle School. (RBCS Br. at 17-21.) Of course, as the Supreme Court has made clear, it is not relevant that other factors in addition to a charter school's existence may contribute to segregation in a community. If a charter school "affect[s] a racial balance precariously maintained in a charter school's district of residence," then the Commissioner "must . . . be prepared to act." Englewood, 164 N.J. 316, 328 (emphasis added). Even if other factors also affect the racial balance of a charter school's district of residence, the Commissioner must still act if a charter school exacerbates the problem.

The attempts of RBCS and the State Board to demonstrate that the Commissioner and State Board considered the racial impact of RBCS only highlight the lack of record evidence that they did so. In its brief, the State Board states: "The Commissioner reviewed all of this available data regarding the racial composition of [RBCS] and the District." (State Board Br. at 10.) However, the Board points to no evidence, in the record or otherwise, in support of its broad statement.

Likewise, in its brief to this Court, RBCS states: "It is [RBCS]'s understanding that the Commissioner did conduct a review of the racial composition of [RBCS] based upon the data provided; and continued to do so in each succeeding year. (Da 74, ¶36.)." (RBCS Br. at 11.) RBCS attempts to support this assertion by reference to the January 13, 2002 Certification of Michael Stasi, the President of RBCS's Board of Trustees. However, this Certification contains precisely the same statement as the RBCS brief and provides no basis for Mr. Stasi's "understanding" of the nature of the Commissioner's review of RBCS's charter and renewal application. (Da 74, ¶36.)

In sum, the decisions of the Commissioner and State Board failed to consider the segregative impact of RBCS on the Middle School and indicate no basis for rejecting the significant evidence that RBCS has exacerbated segregation at the Middle School. Accordingly, this Court should reverse the decisions of the Commissioner and State Board and remand this matter for further consideration.

CONCLUSION

Because the Constitution and laws of New Jersey require the Commissioner and State Board to combat de facto segregation in the state's communities, and because the Commissioner and State Board have failed to address the segregative effects of RBCS on the Middle School, those decisions should be reversed and this matter remanded to the Commissioner for further consideration.

Respectfully submitted,

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