

JOHN J. GIBBONS FELLOWSHIP IN  
PUBLIC INTEREST & CONSTITUTIONAL LAW

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November 13, 2017

Colleen Schulz-Eskow  
Director, Office of Government Affairs  
Richard J. Hughes Justice Complex  
P.O Box 500  
Trenton, New Jersey 08625

**Re: *In re Grant of Charter Renewal of the Red Bank Charter School***

Dear Ms. Schulz-Eskow,

This Firm, along with the American Civil Liberties Union of New Jersey, represents the membership organizations Fair Schools Red Bank and the Latino Coalition. We write in response to the September 15, 2017 Remand Order of the Superior Court of New Jersey, Appellate Division, regarding the Red Bank Charter School's September 15, 2016 application for charter renewal.

The membership of Fair Schools Red Bank and the Latino Coalition includes residents of Red Bank with school-age children, some of whom attend Red Bank's Primary and Middle Schools (collectively, "the District schools" or "the District"). These members are deeply concerned that the Red Bank Charter School ("RBCS") is increasing segregation in the District schools. In nearly 20 years of operation, RBCS has never reflected the racial demographic of either the Borough or its age-equivalent public schools. Instead, RBCS has long functioned as a "safe haven" for white parents from the District schools, the populations of which are predominantly Latino. The Commissioner of Education has both the statutory and constitutional duty to remedy racial imbalance in the public schools of a school district, and to prevent the exacerbation of segregation in public schools through operation of charter schools. Accordingly, Fair Schools Red Bank and the Latino Coalition submit this letter and attached materials to assist the Commissioner in identifying the problems posed by RBCS' operation, as well as specific remedies to address them.

This letter discusses the items which should form the factual record for the Commissioner's review, as well as the issues and problems that arise therefrom, and from the record as a whole, and the legal duties of the Commissioner to address these issues and to effect

the remedies necessary to satisfy the Commissioner’s duties and best promote diversity in education in Red Bank’s public schools. In sum, the Commissioner must not allow, through the grant of a charter to RBCS, separate educational tracks along the lines of race in the Borough’s public schools. The harms to all school-age children, and the Commissioner’s legal obligations to protect against those harms, do not permit it.

**I. Fair Schools Red Bank and the Latino Coalition Submit Additional Items for the Record.<sup>1</sup>**

Fair Schools Red Bank and the Latino Coalition submit the following additional items for the Commissioner’s consideration in this matter:<sup>2</sup>

1. 2016-2017 Statewide Enrollment Data, *available at* <http://www.state.nj.us/education/data/enr/enr17/>;
2. 2017-2018 District Enrollment Data;
3. 2017-2018 RBCS Enrollment Data;
4. NJ DOE 2014-2015 Performance Report: Red Bank Boro Primary School, *available at* <http://www.nj.gov/education/pr/1415/25/254360075.pdf>;
5. NJ DOE 2014-2015 Performance Report: Red Bank Boro Middle School, *available at* <http://www.nj.gov/education/pr/1415/25/254360060.pdf>;
6. Audio Recording, Press Interview of RBCS President Meredith Pennotti and Board of Trustees President Roger Foss (February 2016), *available at* <http://www.redbankgreen.com/2016/02/red-bank-charter-officials-defend-plan/#more-102350>;
7. Meredith Pennotti, Letter to Commissioner Hesper (Feb. 19, 2016);
8. RBCS Webpage, “Red Bank Charter School Lottery Attracts More Than 100 Families,” (April 4, 2017);
9. Meredith Pennotti, “Charter School Doesn’t Contribute to Segregation in Red Bank,” Opinion, Asbury Park Press (Nov. 10, 2016);
10. Judy DeHaven, Email and Attached Memorandum to DOE Officials (Oct. 7, 2013);
11. Senator Jennifer Beck, Letter to Commissioner Cerf (undated);
12. Commissioner Cerf, Letter to Senator Jennifer Beck (May 29, 2013);
13. [Letters to the Commissioner]:
  - A. Peter Blum, Letter to Commissioner Harrington (Oct. 30, 2017);
  - B. Jill Burden, Letter to Commissioner Harrington (Nov. 9, 2017);
  - C. Judy DeHaven, Letter to Commissioner Harrington (Nov. 4, 2017);
  - D. Christina de Vries, Letter to Commissioner Harrington (Nov. 2, 2017);
  - E. Jennifer Garcia, Letter to Commissioner Harrington (Oct. 1, 2017);
  - F. Marybeth Maida, Letter to Commissioner Harrington (Nov. 3, 2017);
  - G. Lisa McLaughlin, Letter to Commissioner Harrington (Nov. 5, 2017);
  - H. Rosaleen Perry, Letter to Commissioner Harrington (Nov. 2, 2017);
  - I. Dayna Stein, Letter to Commissioner Harrington (Oct. 29, 2017);

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<sup>1</sup> These items are included in an attached Appendix, with the exception of items available online, for which internet addresses are provided, both here and in the Appendix.

<sup>2</sup> These items are cited hereinafter as “Supp. Doc. [No.] at [page no.] ([short document description]).” For example, a citation to page 2 of Peter Blum’s letter would be “Supp. Doc. 13.A at 2 (Blum Letter).”

- J. Wayne Woolley, Letter to Commissioner Harrington (Nov. 3, 2017);
- K. Maria De Los Angeles Santamaria Zacaria, Letter to Commissioner Harrington (Oct. 31, 2017);
- L. Mathew Smith and Corinda Bravo, Letter to Commissioner Harrington (Dec. 6, 2016);
- M. Lisa Keele, Letter to Commissioner Harrington (Dec. 6, 2016);<sup>3</sup>
- 14. Demonstrative Exhibit: Enrollment Demographic Graphs and Data;
- 15. Demonstrative Exhibit: U.S. Census Data;
- 16. Demonstrative Exhibit: PARCC Results 2014-2015 ELA and Math, 2015-2016 ELA and Math Graphs and Data; and
- 17. Commissioner’s August 10, 2017 Filing with the Superior Court, Appellate Division, Including Civil Case Information Statement, Statement of Items Comprising the Record, Notice of Motion to File Amplification and Certification of Kathryn Duran, DAG, in support, and Proposed Amplification of Reasons.

**II. The Commissioner Has Statutory and Constitutional Duties to Fight Even *De Facto* Segregation Wrought by Charter Schools in New Jersey.**

The Commissioner is required to address racial segregation in a district’s public schools that is caused or exacerbated by the operation of a charter school. Because of New Jersey’s “abhorrence of discrimination and segregation in the public schools,” this obligation holds without regard to the underlying cause, whether official segregation (*de jure*) or the collective result of individual decisions (*de facto*). See *Booker v. Bd. of Ed. of Plainfield, Union Cty*, 45 N.J. 161, 170 (1965) (“It is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors.”); *Morean v. Bd. of Educ. of Montclair*, 42 N.J. 237, 243 (1964) (“racial imbalance in . . . schools [] though fortuitous in origin, presents much the same disadvantages as are presented by segregated schools”).

The source of the Commissioner’s duty is twofold. First, the Commissioner’s duty is statutory, arising under the Charter School Program Act of 1995 (“the CSPA,” or “the Act”), 18 N.J.S.A. 18A:36A-1 to -18, and its implementing regulations, N.J.A.C. 6A11 *et seq.* At the time of the Act’s passage, there was “concern that loose regulation [would] allow charter schools to siphon the wealthiest and best-educated families from traditional public schools, and that the creation of charter schools [would] disproportionately burden lower classes and children of color.” *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 N.J. 316, 321 (2000) (citation and quotation marks omitted). In response, the Legislature included within the Act several provisions designed to prevent segregation in the public school system resulting from the operation of charters. *Id.* Thus, the Act mandates that, “[t]he admission policy of the charter school shall, to the maximum extent practicable, seek the enrollment of a cross section of the community’s school age population including racial and academic factors.” N.J.S.A. 18A:36A-8(e). Similarly, “[a] charter school shall be open to all

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<sup>3</sup> Both Supp. Doc. 13.L (Smith and Bravo Letter) and Supp. Doc. 13.M (Keele Letter) were included among the items comprising the record on appeal as designated by the Commissioner in her filing to the Appellate Division on August 10, 2017.

students on a space available basis and shall not discriminate in its admission policies or practices on the basis of . . . proficiency in the English language, or any other basis that would be illegal if used by a school district[.]” *N.J.S.A.* 18A:36A-7. And “[i]f there are more applications to enroll in the charter school than there are spaces available, the charter school shall select students to attend using a random selection process.” *N.J.S.A.* 18A:36A-8(a).

The Act’s implementing regulations are even more pointed in directing the Commissioner to prevent segregation through the establishment, operation and renewal of charter schools. First, “[p]rior to the granting of the charter, the Commissioner shall assess the student composition of a charter school and the segregative effect that the loss of the students may have on its district of residence.” *N.J.A.C.* 6A:11-2.1(j). Thereafter, “[o]n an annual basis, the Commissioner shall assess the student composition of a charter school and the segregative effect that the loss of the students may have on its district of residence.” *N.J.A.C.* 6A:11-2.2(c). And in reviewing applications for charter renewal, “[t]he Commissioner shall grant or deny the renewal of a charter upon the comprehensive review of the school including . . . the annual assessments of student composition of the charter school[.]” *N.J.A.C.* 6A:11-2.3(b)(8).

New Jersey Courts interpret these statutory and regulatory provisions as creating a broad duty in the Commissioner to assure that at no point will the operation of a charter school increase segregation in public schooling: “there is no question, and no party argues otherwise, that the Commissioner must ensure that the operation of a charter school does not result in district segregation. The Commissioner must vigilantly seek to protect a district’s racial/ethnic balance during the charter school’s initial application, continued operation, and charter renewal application.” *In re Grant of Renewal Application of the Red Bank Charter School*, 367 *N.J. Super.* 462, 472 (App. Div. 2004); *accord Englewood on the Palisades*, 164 *N.J.* at 328 (“The Commissioner must consider the impact that the movement of pupils to a charter school would have on the district of residence. That impact must be assessed when the Commissioner initially reviews a charter school for approval to open, and on an annual basis thereafter. . . . Continuing assessment of the charter school’s pupil population and impact on the district of residence must also occur. . . . The Commissioner’s obligation to oversee the promotion of racial balance in our public schools to ensure that public school pupils are not subjected to segregation includes any type of school within the rubric of the public school designation.”).

The Commissioner has considerable discretion to determine the “formality or structure” of the segregative effect analysis, *Englewood on the Palisades*, 164 *N.J.* at 329, but in all cases, the Commissioner must compare the racial demographics of the charter school against the school-age population of the district schools. This requirement was made manifest in *Englewood on the Palisades*, the first New Jersey Supreme Court decision to consider the Charter School Program Act and to discuss the Commissioner’s duties with respect to charters. The Court noted that, at the time of decision, the Commissioner already confronted segregation in the State’s public schools by requiring “school-to-school comparisons” within districts to “monitor racial balance,” meaning that the Commissioner oversaw comparison of the racial demographics of public schools within a district to make sure none were “out of line.” *Id.* at 325. “With charter schools,” the Court held, “the Legislature sought to achieve a comparable result.” *Id.* Accordingly, the Court interpreted the Charter School Program Act’s requirement that charter schools “seek to enroll a cross-section of the community’s school age population,” *N.J.S.A.* 18A:36A-8(e), to mean that charters must be held to “seek a pupil population similar to the pupil

population” that emerges from a school-to-school comparison with other schools in the district. *Englewood on the Palisades*, 164 N.J. at 329 (statutory language “reflect[ed] the importance that the legislators placed on the need to maintain racial balance”). In other words, in assessing segregative effect, the Commissioner must determine how the racial composition of the charter school aligns with that of other public schools in the district. *See In re Red Bank*, 367 N.J. Super. at 477 (holding that the local board compared the charter school’s demographics to the “wrong population base”—that of the borough as a whole—when it should have used the district school-age population).

Thus, if a school-to-school demographic comparison shows significant disparities, the Commissioner should determine whether charter school policies are producing or worsening segregation in the district, and if so, should mandate an appropriate remedy. *Id.* at 477, 482 (noting that, “the enrollment statistics clearly demonstrate that the Charter School has a significantly higher percentage of non-minority students than the district schools,” and remanding based on this fact among others “for the Commissioner . . . to determine whether any aspect of the Charter School’s operation of the lottery, waiting list, sibling preference, and student withdrawal practices, together with any other actions following enrollment, exacerbate the district’s racial/ethnic imbalance. Upon completion of the hearing, the Commissioner shall determine whether any remedial action is warranted, including whether to develop a remedial plan for the Charter School.”). This duty holds even where a “demographic trend” is increasing segregation on its own—the Commissioner may not claim inevitability as an excuse, and must pursue ameliorative action even if a decline in the white population of district schools was already underway as a result of demographic trends in the community. *In re Petition for Authorization to Conduct a Referendum on Withdrawal of N. Haledon Sch. Dist. from Passaic Cty. Manchest Reg. High Sch.*, 181 N.J. 161, 183 (2004).

Beyond this clear statutory obligation, imposed upon the Commission by the Legislature, the Commissioner’s duty to fight segregation in the public schools is also of constitutional magnitude. Hence, the New Jersey Constitution’s Thorough and Efficient Education Clause, N.J. Const. Art. 8, § 4, ¶ 1 (“The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of the children in the State between the ages of five and eighteen years.”), and its specific requirement 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. 1, ¶ 5, impose upon the Commissioner the “obligation to take affirmative steps to eliminate racial imbalance, regardless of its causes.” *Jenkins v. Morris Twp. Sch. Dist.*, 58 N.J. 483, 506 (1971) (citation and quotation marks omitted); *see also Booker*, 45 N.J. at 173-74 (stating that “[w]hether or not the federal constitution compels action to eliminate or reduce *de facto* segregation in the public schools, it does not preclude such action by state school authorities in furtherance of state law and state educational policies,” and holding that the Commissioner was required under New Jersey Constitution to prevent and remedy *de facto* segregation). In order so that Commission may fulfill this responsibility, the Legislature has made clear that “[t]he commissioner shall have jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws[.]” N.J.S.A. 18A:6-9; *see Jenkins*, 58 N.J. at 506-07 (citing N.J.S.A. 18A:6-9 as source of Commissioner’s “responsibility and power to correct . . . segregation or imbalance which is frustrating our State constitutional goals”).

Accordingly, the New Jersey Supreme Court has repeatedly held that the Commissioner's constitutional duty to prevent segregation entails investigating and remedying racial imbalance across public schools within a district, and even across district lines. *See, e.g., Booker*, 45 *N.J.* at 178-80 (in response to complaint that county schools were racially segregated, Commissioner was required not only to remedy particular schools that were "entirely or almost entirely" non-white, but to oversee "a reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures"); *Jenkins*, 58 *N.J.* at 506-08 (where record showed that withdrawal of one township from high school jointly shared with another would yield two racially imbalanced high schools, Commissioner was required to consider whether to enjoin withdrawal or direct merger of townships); *N. Haledon*, 181 *N.J.* at 181-84 (where record demonstrated that township's withdrawal from regional high school would worsen racial balance in regional school, Commissioner was bound by "constitutional imperative to prevent segregation in our public schools" to deny petition for a referendum on the question of withdrawal); *Bd. of Educ. of Bor. of Englewood Cliffs v. Bd. of Educ. of Englewood*, 257 *N.J. Super.* 413, 473-74 (App. Div. 1992) (where students of township were increasingly withdrawing from regional school to attend neighboring township's school on a tuition basis, resulting in "serious negative impact on the racial balance" of the regional school, "the effectuation of the State's constitutional policy in favor of racial balance as a function of the quality of education not only authorized but compelled an injunction against" neighboring township receiving students on a tuition basis). And, significantly, this constitutional duty applies equally in the charter school context. *Englewood on the Palisades*, 164 *N.J.* at 328 ("The 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.").

The Commissioner's constitutional duties also include that he mandate a proper remedy where "segregation would occur"—in such cases, "the Commissioner must use the full panoply of his powers to avoid that result." *Id.* at 329. The power to address segregation is vast: the Commissioner may, for example, design "a plan of his own" for desegregation of district schools. *Booker*, 45 *N.J.* at 178; *see also Jenkins*, 58 *N.J.* at 508 (Commissioner has "full power to direct a merger [of townships] on his own if he finds such course ultimately necessary for fulfillment of the State's educational and desegregation policies in the public schools"); *N. Haledon*, 181 *N.J.* at 182-85 (Commissioner empowered to deny township petition to hold referendum on withdrawal from regional school, and to "determine cost allocations" between townships in regional schools to account for resulting tax burden on town seeking withdrawal). In the charter school context, the Commissioner's authority includes the power to impose any "appropriate remedy, which properly balances our strong policy in favor of non-segregated schools with our policy of fostering the development of effective charter schools." *Red Bank*, 367 *N.J. Super.* at 486. For example, "if a charter school were to recruit systematically only pupils of a particular race or national origin," the Commissioner is empowered, "if necessary, to revoke the approval of a charter school." *Englewood on the Palisades*, 164 *N.J.* at 328.

Ultimately, then, whether as a matter of statute or the Constitution, the Commissioner must assess whether operation of a charter school is causing or worsening segregation within the public schools of its district. To do so, the Commissioner must compare the demographics of the charter school with those of public schools in the same district (of comparable grade level) to assess whether one or more schools is "out of line." *Englewood on the Palisades*, 164 *N.J.* at

325. If so, the Commissioner must investigate the cause of the imbalance and devise an appropriate remedy using “the full panoply of his powers.” *Id.* at 329.

**III. The Red Bank Charter School Is Contributing to Segregation in the Red Bank Public Schools.<sup>4</sup>**

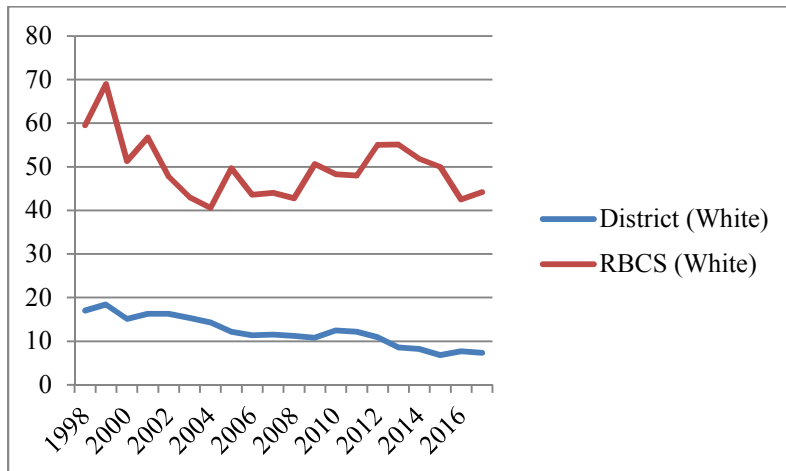
The Red Bank public schools are segregated. At present, the District’s student population is 7.3% white and 89.3% Latino, while RBCS is 44.2% white and 45.2% Latino. This disparity has existed for the life of the charter: while the white population of the District has steadily fallen from 17% in 1998 to 7.3% in 2017, RBCS’s white population has been as high as nearly 70%, and has never fallen below the mark of 40.6% in 2004. The percentage of RBCS’ white enrollment from its first years to the present is as follows:

White Enrollment at RBCS (1998-Present)

1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
59.5%	69.0%	51.3%	56.7%	47.8%	43.0%	40.6%	49.7%	43.6%	44.0%
2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
42.8%	50.6%	48.3%	48.0%	55.0%	55.1%	51.8%	50.0%	42.5%	44.2%

That the percentage of white students at RBCS has at all times been markedly higher than at the district is manifest in the following graphic:

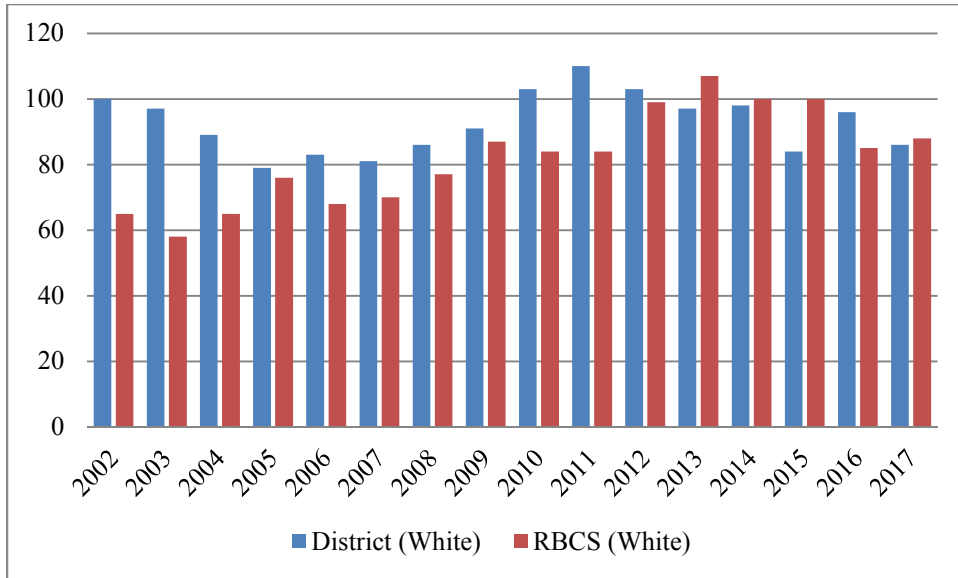
White Percent of Population by School (1998-Present)



<sup>4</sup> For all data and graphs in this section, *see* Supp. Doc. 14 (Enrollment Charts and Data), except for U.S. census data, which is listed at Supp. Doc. 15.

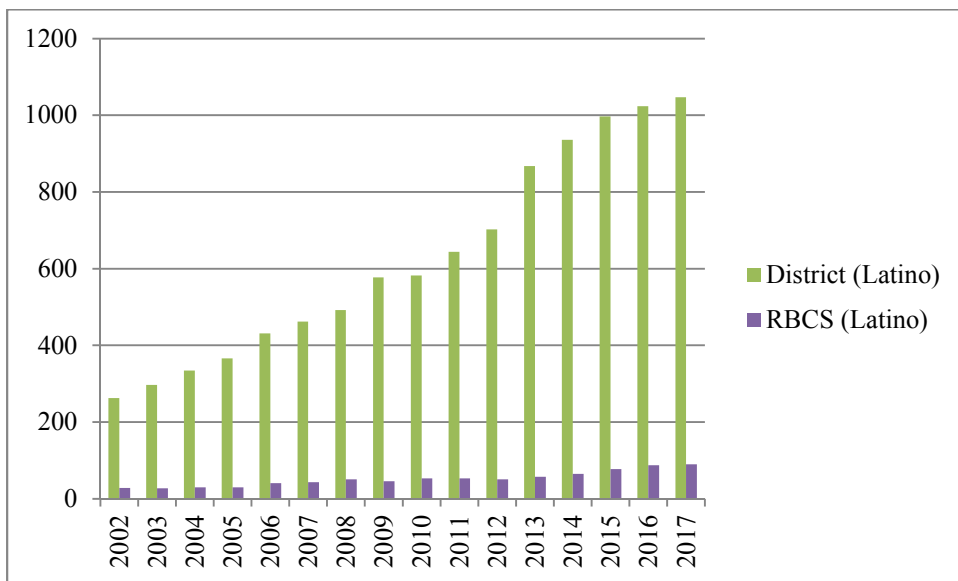
One powerful way to look at this reality is that, although the District is obviously many times the size of RBCS (in 1998, the District was over three times larger; today, its population is nearly six times as large), the two schools have consistently enrolled a comparable number of white students:

Number of White Students by School (2002-Present)



Meanwhile, as the white population in the District has declined, the Latino population has grown exponentially, with the District Latino population increasingly dwarfing that of RBCS:

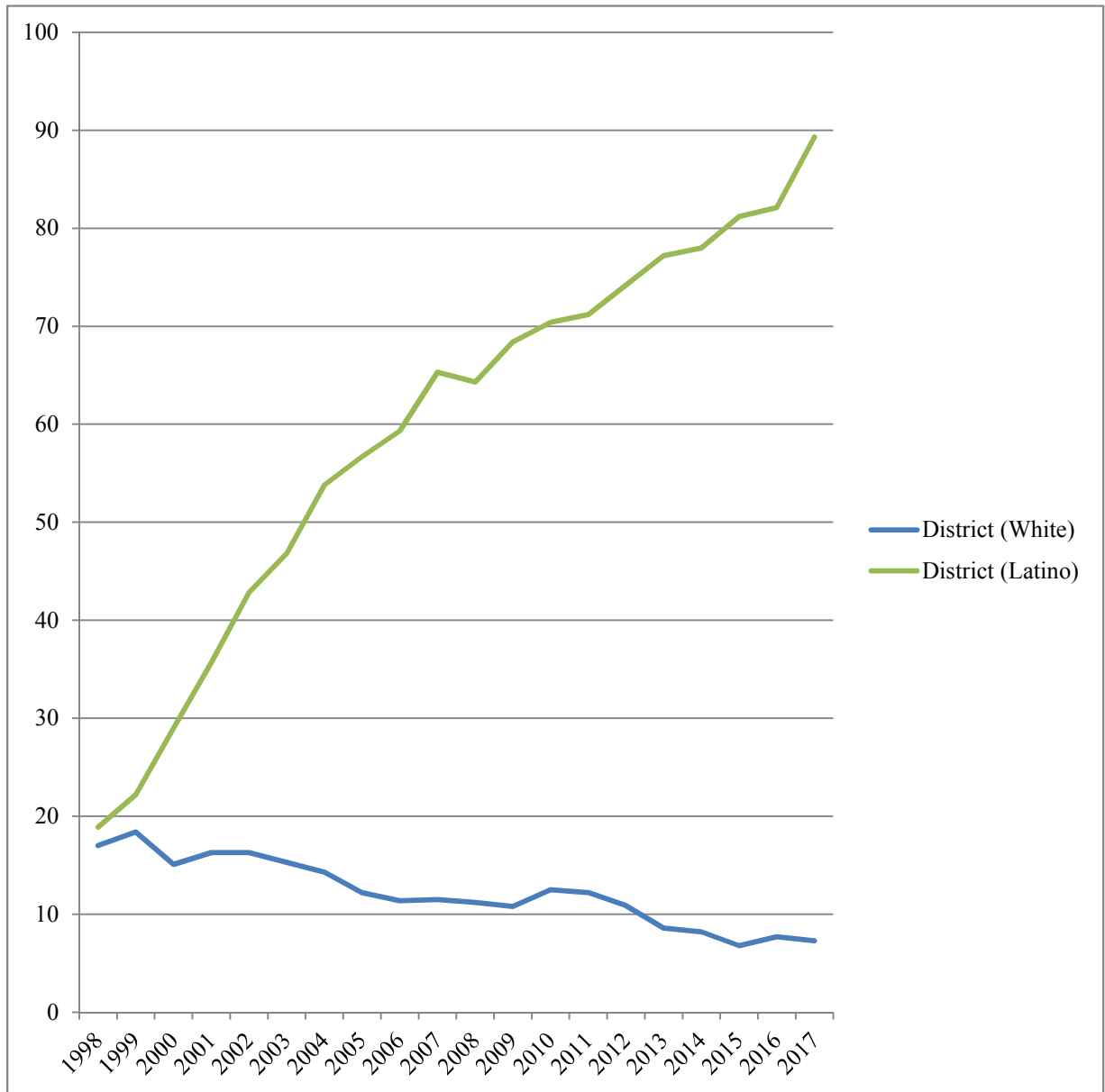
Number of Latino Students by School (2002-Present)





This increase in the Latino population has dramatically altered the District’s racial demographics. As the below graph shows, the District’s white and Latino populations were nearly equivalent at the time RBCS opened in 1998 (white population: 17.0%; Latino population 18.9%), but they have sharply diverged since, creating a highly segregated school at present (white population: 7.3%; Latino population 89.3%):

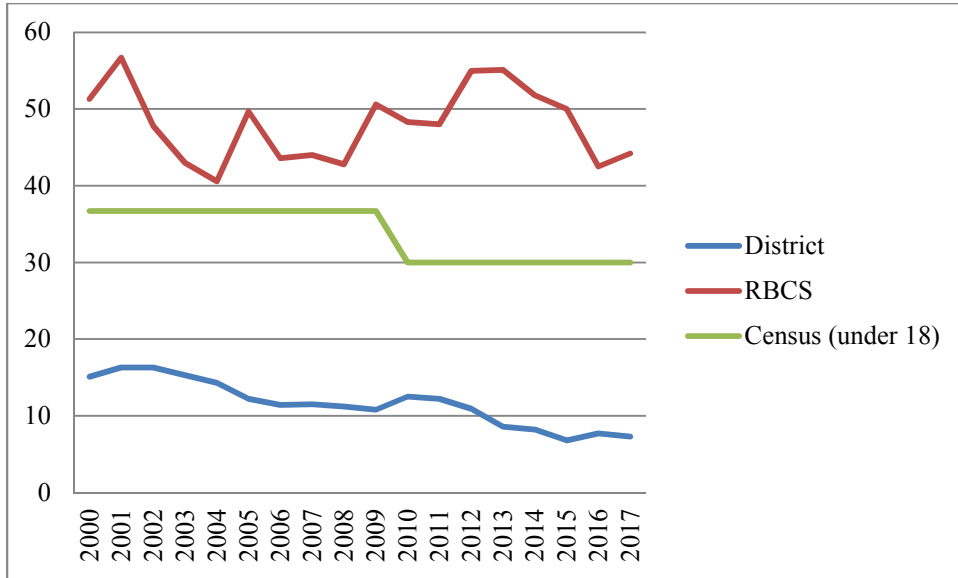
District School Percent of Population by Race (1998-Present)



Neither the District nor RBCS reflects the racial demographics of Red Bank’s under-18 population as measured by census data. White students are underrepresented in the District and over-represented in RBCS; in fact, as the below graphic shows, RBCS has always enrolled a white population that is disproportionate relative to the community’s school age population: at

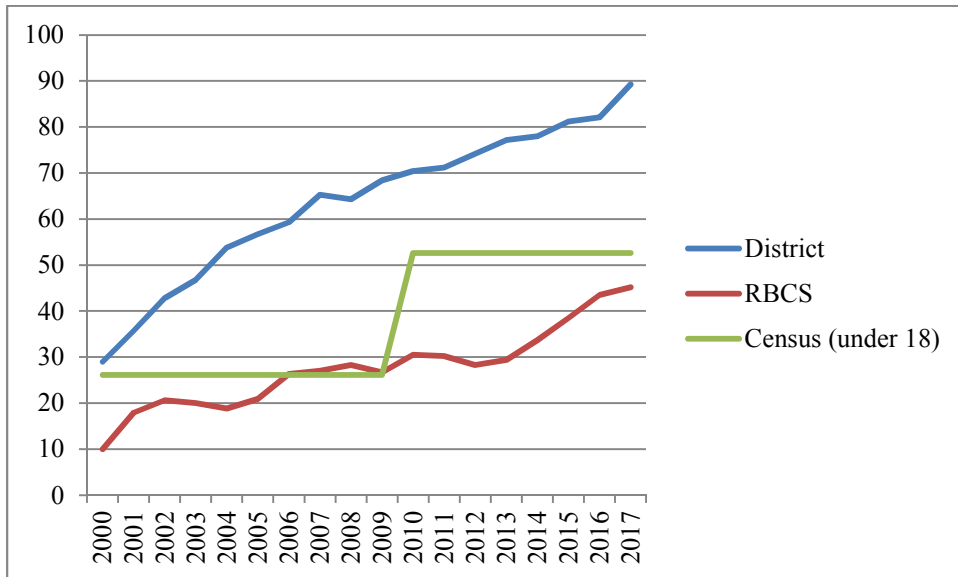
present, RBCS' proportion of white students is 14.2% higher than that of the community aged 18 and under (white percentage of under-18 population by 2010 census: 30.0%; RBCS: 44.2%).<sup>5</sup>

Percent of White Population by School (2000-Present)



By contrast, the under-18 Latino population of Red Bank is significantly overrepresented in the District and underrepresented in RBCS:

Percent of Latino Population by School (2000-Present)

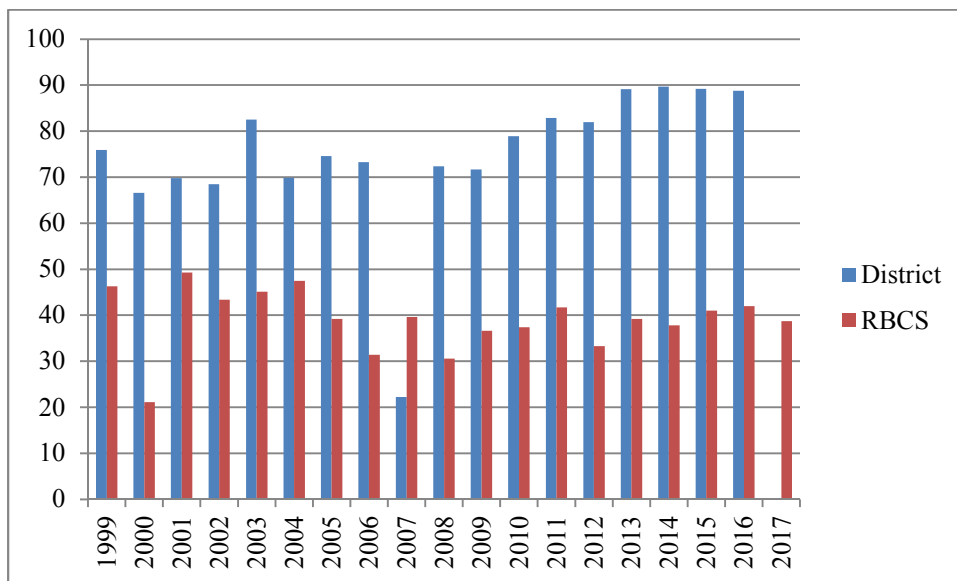


<sup>5</sup> Because the U.S. census is decennial, these graphs represent incremental change with step-like patterns.

To be sure, as the above graphic shows, the Latino population at RBCS has risen since 2015, but this change has not meaningfully reduced the racial imbalance between the District and RBCS. Thus, in 2017, the District is 7.3% white and 89.3% Latino, while RBCS is 44.2% white and 45.2% Latino. This disparity between RBCS and the District persists, and as set forth below, continues to inflict harm upon the students of the District. And, given the nearly 20 years of data evidencing racial imbalance between RBCS and the District, the most recent RBCS enrollment data is too small a sample size to permit of any conclusion that RBCS is firmly on the path to alignment of its racial demographic with that of the District and the community at large. For example, over the two-year period from 2003-2004 to 2004-2005, white enrollment at RBCS fell to 43.0% and then 40.6%, but it surged to over 55% as recently as 2012-2013 and 2013-2014. Indeed, over the four-year period from 2011-2012 to 2014-2015, RBCS enrolled 57 white students through the lottery system, but only 26 Latino students.<sup>6</sup> This evidence suggests that the problem of segregation in Red Bank’s public schools will not self-correct, and any suggestion that it will is unfounded.

Furthermore, the imbalance between the District and RBCS is not only racial, but also extends to the demographics of socio-economic status and English language proficiency. Thus, the District population contains significantly more economically disadvantaged (ED) students as measured by qualification for free or reduced-price lunch:

Percent of Population Economically Disadvantaged by School (1999-2017)<sup>7</sup>

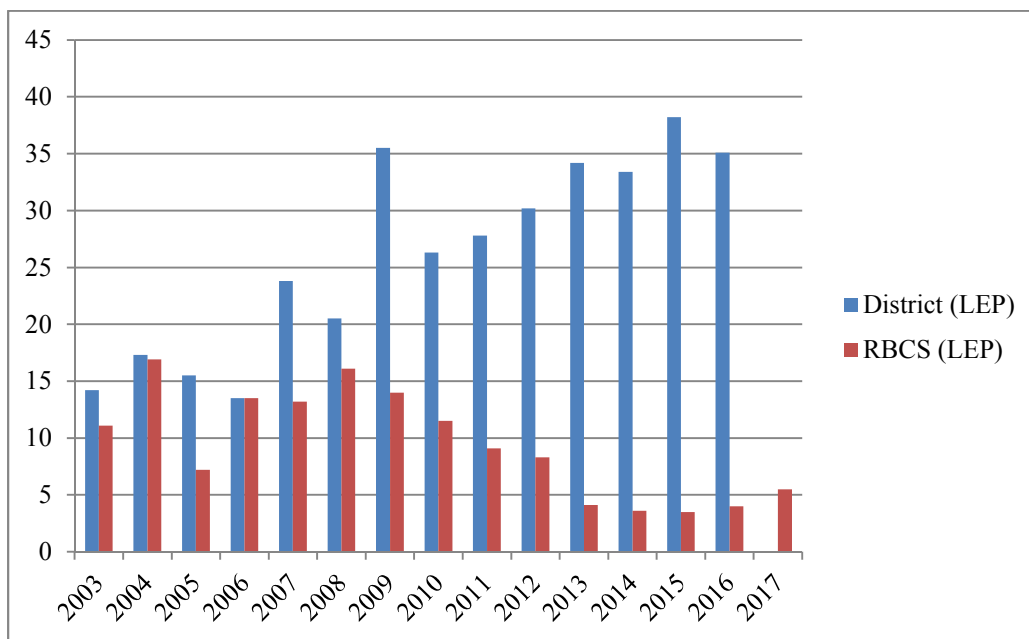


<sup>6</sup> This number represents the Kindergarten classes for 2011-2012, 2012-2013, and 2013-2014, and the Pre-K classes for 2013-2014 and 2014-2015. In 2013-2014, RBCS filled both Pre-K and Kindergarten classes by lottery, as this was the first year that Pre-K was offered. Data on this point is available among the items designated by the Commissioner as comprising the record, and at <http://www.state.nj.us/education/data/enr/>

<sup>7</sup> The first year for which this data is available is 1999. District data is not available for the 2017-2018 school year. The 2007 data point for District students is difficult to explain and appears to reflect error.

And the District’s percentage of limited English proficiency (LEP) students is also far above that of RBCS. For example, in school year 2016-2017, the most recent year for which District data is available with regard to LEP enrollment, the District’s LEP enrollment was at 35.1% compared to just 4.0% for RBCS. And while the charter’s LEP enrollment did increase slightly in 2017-2018, it only went up to 5.5%, hardly a satisfactory result:

Percent of Population Limited English Proficiency by School (2003-2017)<sup>8</sup>



In sum, there is considerable imbalance in the enrollment of white, Latino, economically disadvantaged, and LEP students at Red Bank’s public schools. As the District approaches what has been denominated “[an] intensely segregated school,” *i.e.* one with a minority population of 90% or more, Paul Tractenberg, et al., *New Jersey’s Apartheid and Intensely Segregated Urban Schools*, Institute of Education and Policy – Rutgers 13 (October 2013), RBCS maintains a white population which has never dipped below 40%.

This is not an accident. The Red Bank Charter School has expressly offered refuge to the parents of white children seeking to flee the District. That is, RBCS endeavors to mitigate against so-called “white flight.” Between 2000 and 2010, the Latino population of Red Bank grew by 107.1%, from 2,027 to 4,198, with the increase in the under-18 Latino population even more pronounced, from 542 to 1,307, or 141.1%. *See* Supp. Doc. 15 (U.S. Census Data). As the Latino population of the District has surged, *id.*; *see supra* graph at 9; white enrollment in the District has correspondingly declined, and RBCS has purposefully positioned itself as the only public school option for white parents seeking an alternative to a majority-Latino school. For

<sup>8</sup> The first year for which this data is available is 2003. District data is not available for the 2017-2018 school year.

example, consider the statement of Roger Foss, then the Vice President of the RBCS Board of Trustees (currently the Board President) from a press interview in February 2016:<sup>9</sup>

[T]he charter school is supposed to offer an alternative . . . so as to mitigate the effect of white flight. Now how do you do that? You start a small public school, which will offer an opportunity for those who otherwise would leave town or choose the parochial or other private school. It's as simple as that. What else would you do? Offer an alternative.

[Supp. Doc. 6 at time 46:00 (Foss Interview Audio)].

The RBCS Board has been equally candid about its intention to create a school with a racial composition very different from the District. In 2015, it wrote in an application to the Commissioner, “[a] common misunderstanding is that RBCS should mirror the population of the borough schools. To do that, however, would violate the very tennent [*sic*] on which the charter school was founded.” RBCS Supp. Doc. 5 at R230 (RBCS Charter Amendment App. (2015)).<sup>10</sup>

Similarly, RBCS Principal Meredith Pennotti wrote an Op Ed in a local newspaper, which asked, “why isn’t the Red Bank district more reflective of the school-age population of the borough?” Supp. Doc. 9 at 1. The answer, Pennotti said, is that, “[w]hite parents who don’t want to send their children to borough schools have numerous options,” concluding, “Red Bank residents should celebrate the fact that they have public school choice, especially those parents who want an alternative to the district schools, but may not be able to afford to send their children to private schools.” *Id.* Further, in a response to the statement of District Superintendent Jared Ramage that RBCS “does not offer any unique opportunity or instructional programming beyond what our Borough schools offer,” Pennotti wrote in a letter to the Commissioner that:

It is undeniable that Red Bank Charter School is distinctly different than Red Bank district schools. Most significantly, Red Bank Charter School offers students the opportunity to learn and grow in a racially and ethnically integrated school immersed in one another’s culture and experiences that prepares them not only for the community in which they live, but for the world they will inherit as adults.

[RBCS Supp. Doc. 9 at 1-2].

This statement makes clear that RBCS seeks to and does enroll a racial demographic different from that of the District and the community, and indeed, that such a demographic is the charter’s “[m]ost significant[.]” distinction from the District. While Principal Pennotti is correct that RBCS is a racially integrated school—a fact that certainly benefits the students of RBCS—this fact cannot be viewed in a vacuum. It remains the case that RBCS, as Principal Pennotti freely admits, sought to create a student demographic that is whiter than the District by providing safe haven to white families fleeing increasingly Latino schools, a result that harms the students of the District and requires action by the Commissioner, as discussed below.

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<sup>9</sup>[http://www.redbankcharterschool.com/rbcs/BOARD%20OF%20TRUSTEES/Board%20Members/Roger%20J.%20Foss%2C%20Esq.-%20President.html/\\_top](http://www.redbankcharterschool.com/rbcs/BOARD%20OF%20TRUSTEES/Board%20Members/Roger%20J.%20Foss%2C%20Esq.-%20President.html/_top)

<sup>10</sup> Documents submitted by RBCS to supplement the record before the Commissioner by letter of October 30, 2017, are cited “RBCS Doc. [No.] at [page no.] (short description).”

RBCS has been effective in achieving this purpose—enrolling white students whose parents reject the District by maintaining a demographic that has never fallen below 40%, in contrast with a District white population that is currently 7.3%—through a combination of its recruitment and sibling-preference policies. Thus, while RBCS technically enrolls through a lottery system, Red Bank parents of school age children describe RBCS recruitment efforts as “a whisper campaign.” Supp. Doc. 10, Att. at 5 (DeHaven Email to DOE with Attached Memo). In the words of one parent:

[W]hat happened was that mostly white, middle and upper-middle class parents recruited other mostly white, middle and upper-middle class parents they knew from their neighborhoods to enter their children into the RBCS lottery. They rarely went outside their neighborhoods or social circles. Indeed, when my children were young, there were several streets in Red Bank (John Street and South Street) where it seemed that every family sent their kids to the RBCS.

[Supp. Doc. 13.C. at 7 (DeHaven Letter)].

Several white parents recount stories of learning about the date, location, and application procedure for the RBCS lottery only through private communications from white RBCS parents. As one parent states:

[I]n early 2013, we were only vaguely aware of the Red Bank Charter School. We knew nothing about their program or admission procedures. We had not seen any advertisements about the charter, received any mailings from the charter, or heard any official word of any sort about the charter. We began hearing about the charter solely by word-of-mouth. And the word-of-mouth was solely one white parent to another white parent. That is how we learned that an admission lottery was approaching

[Supp. Doc. 13.A. at 1 (Blum Letter)].

Another parents recalls, “I was walking down the street, and one of my neighbors, a charter parent, stopped her car in the middle of the street and yelled out the window to advise me that the lottery was going to be held the next week. There was no other way I ever heard about the lottery.” Supp. Doc. 13.G at 1 (McLaughlin Letter). And still another states, “the only years I knew about the RBCS open house and lottery were the years when I actively contacted the school or neighbors actively reached out to me.” Supp. Doc. 13.C at 6 (DeHaven Letter).

More alarmingly, two white Red Bank parents recount nearly identical incidents of being assured by RBCS parents or Board members that they could be secured a spot in the charter, the lottery notwithstanding. One recalls:

[A]t a birthday party with several parents from the Red Bank Charter School (who I am still friendly with), I met [former RBCS Board President] Bruce Whitaker. He spoke positively about the Charter School and explained the lottery system. I appreciated the information, however, he made one remark that troubled me. He winked and said, “I can get you in . . .”

[Supp. Doc. 13.D at 1 (De Vries Letter)].

Another recounts:

“When you are ready, let us know and we’ll get you into the charter school[.]” These words were uttered to me by a Red Bank charter school parent, at a mutual friend’s neighborhood party sometime in 2005, while I was holding my toddler son. I replied confused, “I thought there was a lottery?” “Don’t worry about it,” was her reply. . . . At the same party, my partner at the time was also approached with the same recruiting message by Bruce Whitaker, who [was] the president of the board of trustees of the charter school at the time.

[Supp. Doc. 13.G at 1 (McLaughlin Letter)].

Of greatest concern, Latino parents in Red Bank did not receive nearly the same assurances or outreach. According to one Latina parent:

The Red Bank Charter School for years has done everything possible to make sure that few members of [] Red Bank’s Latino community know that the school even exists—especially those who Speak mostly Spanish. And for those who somehow manage to learn about the Charter School, most of those have been led to believe that it’s a private school.

[Supp. Doc. 13.K at 1 (Zacarias Letter)].

If RBCS has thus limited information about its status and application procedures to more affluent white social networks, it has enrolled a white student body disproportionate to the District and the community at large in direct contravention of New Jersey law. *N.J.S.A.* 18A:36A-8(e) (charter shall “to the maximum extent practicable, seek the enrollment of a cross section of the community’s school age population including racial and academic factors”); *N.J.S.A.* 18A:36A-7 (charter “shall not discriminate in its admission policies or practices on the basis of . . . proficiency in the English language, or any other basis that would be illegal if used by a school district”); *N.J.S.A.* 18A:36A-8(a) (where applications for enrollment exceed availability, “the charter school shall select students to attend using a random selection process”). The Commissioner accordingly has a duty, at the very least, to investigate RBCS’ recruitment methodology, discussed *infra*.

RBCS has been able to maintain its racial demographic in significant part through use of a sibling-preference policy. Sibling preference is statutorily permitted, *N.J.S.A.* 18A:36A-8(c), but, as the Appellate Division has cautioned, “[t]he statutory sibling preference is not mandatory and in particular circumstances, might not be appropriate, especially if its operation exacerbates existing racial/ethnic imbalance.” *Red Bank*, 367 *N.J. Super.* at 481-82. Because in almost all cases, siblings will be of the same race, sibling-preference reinforces the *status quo* of a charter’s racial demographics. In Red Bank, the effect is particularly pronounced. The school has only 200 seats, and there is minimal attrition through the grade levels; as RBCS states, “typically there is very little mobility from the wait list.” RBCS Supp. Doc. 5 at R228 (RBCS Charter Amendment App. (2015)). As a result, opportunity for new enrollment is primarily for the youngest incoming class through the lottery, where there are only potentially 20 seats. *See Supp.*

Doc. 17, Amplification at 4 (“In the case of RCBS, the number of incoming new students each year is small—just 20 seats in Prekindergarten and a handful in other grades due to attrition[.]”). Of this number, Principal Pennotti suggests that typically half are allotted through the sibling-preference policy, leaving 10 new seats available per year. *Id.* at 5 (reporting Principal Pennotti’s estimate). But sometimes even fewer seats are offered: for the 2013-2014 school year, RBCS provided Pre-K for the first time and held a lottery to fill both its Pre-K and Kindergarten classes—a contemporaneous memorandum from Red Bank parents notes that 13 of the 15 Pre-K spots, and 15 of the 20 Kindergarten seats, went to siblings. Supp. Doc. 10, Att. at 4 (DeHaven Email to DOE with Attached Memo). There is accordingly little opportunity for change in the demographics of RBCS. As the Commissioner has stated, even a concerted effort could produce only “a slow and incremental impact on the [charter’s] demographic makeup.” Supp. Doc. 17 at 4 (Amplification); *see, e.g., Bd. of Educ. of Bor. of Englewood Cliffs v. Bd. of Educ. of Englewood*, 257 N.J. Super. 413, 482 (App. Div. 1992) (agreeing that six years is “long enough to wait for a remedy” in action concerning segregation in public schools); *see also N.J.A.C. 6A:11-2.2(c)* (requiring Commissioner to assess a charter’s segregative effect “[o]n an annual basis”). The sibling-preference policy thus further explains how RBCS has maintained such a high concentration of white students over the course of nearly two-decades even as the Latino population of Red Bank has more than doubled. As RBCS posted on its website after the most recent lottery:

Pennotti said she hoped more low-income and minority students could attend, but the school’s enrollment is capped at 200 by its charter, leaving very few openings at the pre-school and kindergarten level for new students. State charter school law allows siblings of existing students to automatically enroll.

[Supp. Doc. 8 (RBCS Website (April 4, 2017))].

In this manner, RBCS’ recruitment and use of a sibling preference for enrollment have resulted in a student body that is very different from the District along lines of race, class, and English-proficiency.

#### **IV. Segregation in the District and Racial Imbalance between the District and RBCS Are Harming District Students.**

The resulting segregation in Red Bank is profoundly harmful to the students of the District. Attending a school that is nearly 90% single-race, District students are being deprived of the many and significant recognized benefits of diversity in education. These benefits have been recognized by the United States Supreme Court as “substantial” and include “promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] [students] to better understand persons of different races.” *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (citations and quotation marks omitted). The New Jersey Supreme Court similarly holds that “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. . . . Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations[.]” *Booker*, 45 N.J. at 170-71. Both courts also recognize the contrapositive proposition, that the opposite of



diversity—segregation—is distinctly harmful, undermining educational goals and stigmatizing segregated students. *See Brown v. Bd. of Ed. of Topeka, Kansas*, 347 U.S. 483, 494 (1954) (“[T]he policy of separating the races is usually interpreted as denoting the inferiority of [the non-white] group. . . . Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of [non-white] children and to deprive them of some of the benefits they would receive in a racially integrated school system.”) (internal citation, quotation marks, and brackets omitted); *Booker*, 45 N.J. at 170-71 (noting “the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separates generates feelings of inferiority”).

The students of the District are also exposed to the “double segregation” of separation by race and class—in 2016-2017, the District was 82.1% Latino and 88.8% economically disadvantaged, *see* Supp. Doc. 14 (Enrollment Charts and Data)—which is known to engender myriad educational obstacles. *See generally* Greg Flaxman, *et al.*, *A Status Quo of Segregation: Racial and Economic Imbalance in New Jersey Schools, 1989-2010*, UCLA Civil Rights Project 5 (October 2013) (study of segregation in New Jersey finding “very severe” double segregation and discussing associated educational problems);<sup>11</sup> *see generally* Brookings Institute, *How Within-District Spending Inequities Help Some Schools to Fail* (2011) (schools serving areas of concentrated poverty and high concentrations of minority students struggle to provide adequate teacher pay and training); Charles T. Clotfelter, *et al.*, *Teacher Mobility, School Segregation, and Pay-Based Policies to Level the Playing Field*, 6 *Education, Finance & Policy* 399 (2010) (highly qualified and experienced teachers are significantly less likely to take or remain in positions at schools segregated by both race and class).

And the evidence suggests that the harms of segregation foretold by both the United States and New Jersey Supreme Courts, including “feelings of inferiority,” have proliferated Red Bank. *Booker*, 45 N.J. 161, 170-71; *accord Brown*, 347 U.S. 483, 494 (1954) (“[T]he policy of separating the races is usually interpreted as denoting the inferiority of [the non-white] group. . . .”). Parents of District students report hearing, and RBCS parents have plainly expressed in their own letters to the Commissioner in support of charter renewal, a number of stereotypical views that pervade the community, such as the unfounded belief that District students have social or behavioral issues, or that the school is unsafe. *See* Supp. Doc. 13.C at 1 (DeHaven Letter) (woman told District parent that she rejected the District because “she didn’t want to send her kids to a school where there were ‘so many poor kids,’ because they may ‘drag’ their issues into the school”); Sup. Doc. 13.F at 1 (Maida Letter) (“I was warned that the Red Bank schools were ‘a mess[,]’ ‘a disaster[,]’ ‘full of gangs[,]’ ‘full of Mexicans[.]’”); Supp. Doc. 13.L at 1 (Smith and Bravo Letter) (RBCS parents writing in support of renewal list “behavioral issues we kept hearing about at the middle school” among reasons for “concern[] for [our] child’s future education and our reasoning as a family for staying in Red Bank.”); Supp. Doc. 13.M at 1 (Keele Letter) (RBCS parent writing in support of charter renewal states of District, “[t]he schools were unsafe, poorly managed and low-performing.”); *see generally* Supp. Doc. 13.B (Burg Letter) (listing comments posted online regarding District and its students). One District parent relates that:

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<sup>11</sup> Available at [http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-status-quo-of-segregation-racial-and-economic-imbalance-in-new-jersey-schools-1989-2010/Norflet\\_NJ\\_Final\\_101013\\_POSTb.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-status-quo-of-segregation-racial-and-economic-imbalance-in-new-jersey-schools-1989-2010/Norflet_NJ_Final_101013_POSTb.pdf).

My next door neighbor is a Real Estate Agent. She has told me that young couples with children are ‘afraid’ to buy in Red Bank because if they ‘don’t get into the Charter School,’ they’re stuck paying for private, because they don’t want their kids going to school with ‘them.’ In the past, she has asked me and another neighbor to speak with potential home buyers to reassure them about the schools, and to disabuse them of the notion that they are somehow ‘less’ because the population is majority Latino. While happy to make these calls, I find when speaking to nervous parents that the word on the street [is] that the CS is for ‘whites’ and the PS is for ‘the others’ or ‘them.’

[Supp. Doc. 13.F at 2 (Maid Letter)].

The students are alert to this reality as well. Supp. Doc. 13.C at 11 (DeHaven Letter) (“Our kids see what’s happening. As they grow older they ask, ‘How come the charter school has so many white kids?’”). In sum, the segregation in Red Bank’s school that is wrought, at least in part, by operation of the charter school has caused District students to attend a school that is doubly-segregated, depriving these students of the benefits of diversity, presenting a number of educational obstacles, and subjecting them to harmful stigma and prejudice.

#### **V. The Commissioner May Not Ignore the Charter School’s Role in Worsening Segregation in the Red Bank Public Schools.**

The Constitution and law of New Jersey make clear that the Commissioner is obligated by his oath of office to redress the segregation in Red Bank that is so powerfully indicated by the data and facts set forth above. Under the Charter School Program Act and the regulations promulgated to implement it, the Commissioner is required to determine RBCS’ application for charter renewal upon “a comprehensive review . . . including . . . student composition of the charter school[.]” *N.J.A.C.* 6A:11-2.3(b)(8). The Commissioner must therefore conduct a “school-to-school” comparison[.]” to “monitor racial balance” across Red Bank’s public schools, *Englewood on the Palisades*, 164 *N.J.* at 325, and given the disparity between the schools that we have described, must now “determine whether any aspect of the Charter School’s operation of the lottery, waiting list, [or] sibling preference . . . exacerbate the district’s racial/ethnic imbalance.” *Red Bank*, 367 *N.J. Super.* at 477. In examining RBCS’ policies, the Commissioner must hold RBCS accountable for its adherence, or apparent non-compliance, with the mandate that it, “to the maximum extent practicable, seek the enrollment of a cross section of the community’s school age population including racial and academic factors.” *N.J.S.A.* 18A:36A-8(e). It is the role of the Commissioner to assure that a charter “shall not discriminate in its admission policies or practices on the basis of . . . proficiency in the English language, or any other basis that would be illegal if used by a school district.” *N.J.S.A.* 18A:36A-7. She must also enforce the law requiring that, given that RBCS applications exceed available seats, “the charter school shall select students to attend using a random selection process.” *N.J.S.A.* 18A:36A-8(a). The Commissioner must at all times guard against the “segregative effect that the loss of the students [to a charter school] may have on its district of residence.” *N.J.A.C.* 6A:11-2.2(c). In sum, he must abide by “[t]he constitutional command to prevent segregation in our public schools[.]” *Englewood on the Palisades*, 164 *N.J.* at 328. Indeed, based upon New

Jersey’s “abhorrence of discrimination and segregation in the public schools,” it matters not whether the racial imbalance in Red Bank is a consequence of private decisions or official design. *Id.* at 324; *accord N. Haledon*, 181 *N.J.* at 177. Wherever “segregation would occur[,] the Commissioner must use the full panoply of his powers to avoid that result.” *Id.* at 329.

On the data and other facts set forth above, these provisions cry out for action by the Commissioner. Yet, in the Commissioner’s most recent assessment—the Amplification of Reasons submitted to the Appellate Division on August 10, 2017—the Commissioner instead found justification to grant a charter renewal, without doing any serious investigation, and without requiring any change to the RBCS policies that have resulted in the exacerbation of segregation in Red Bank. Most respectfully, that Amplification reached an erroneous conclusion as a result of two analytical mistakes: the Commissioner’s method of evaluating standardized test (PARCC) scores, and the Commissioner’s analysis of segregative effect.

(1) *PARCC Testing*<sup>12</sup>

In discussing its reasons for granting RBCS its charter renewal, the Amplification accords significant—even predominant—weight to RBCS’ academic performance. Supp. Doc. 17, Amplification at 1 (“I chiefly consider the charter school’s potential to improve pupil learning, and ability to increase educational options available to New Jersey families.”). In this regard, the Commissioner credits RBCS for its performance on standardized testing, noting that RBCS is designated a “Tier 1” school as a result of its testing results, and that a higher percentage of RBCS students than District students scored in the “meeting expectations” or “exceeding expectations” range on PARCC testing for both English Language Arts (ELA) and Math in years 2014-2015 and 2015-2016. *Id.* at 2. Fair Schools Red Bank and the Latino Coalition believe, however, that there are many ways to evaluate academic performance and that reliance on standardized testing is insufficient. Nonetheless, the Commissioner’s analysis of PARCC testing is flawed and in fact contributes to the racial imbalance in Red Bank’s public schools.

Specifically, the Commissioner compares the PARCC results of RBCS and District students in their totality, without differentiating between categories of students on the basis of race, socioeconomic status, or English proficiency. It is, by now, well-established that there is inherent bias in standardized testing, as a result of which recognizable groups of students over or underperform relative to the mean. *See* Stuart Biegel, “School Choice Policy and Title VI: Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment,” 46 *Hastings L.J.* 1533, 1574 (1995) (noting, “a large body of literature in the education and measurement communities confirms that many other types of standardized tests contain culturally biased test items,” and citing research). PARCC testing is not immune to this problem—one study using PARCC test results from more than 300 New Jersey schools over a three-year period found that relying only on information related to the socioeconomic status of the test-taker, researchers could predict which students would score “proficient” or above in 75% of cases; an earlier study of a three-year period showed that predictions using the same factors were 84% accurate. Christopher Tienken, “Students’ Test Scores Tell Us More About the Community They Live In Than What They Know,” (July 6, 2017), *available at* <https://phys.org/news/2017-07-students-scores.html#jCp>; *see also* James W. Loewen, “Here We Go Again: Tests for the Common Core May Be Unfair To Some And Boring To All,”

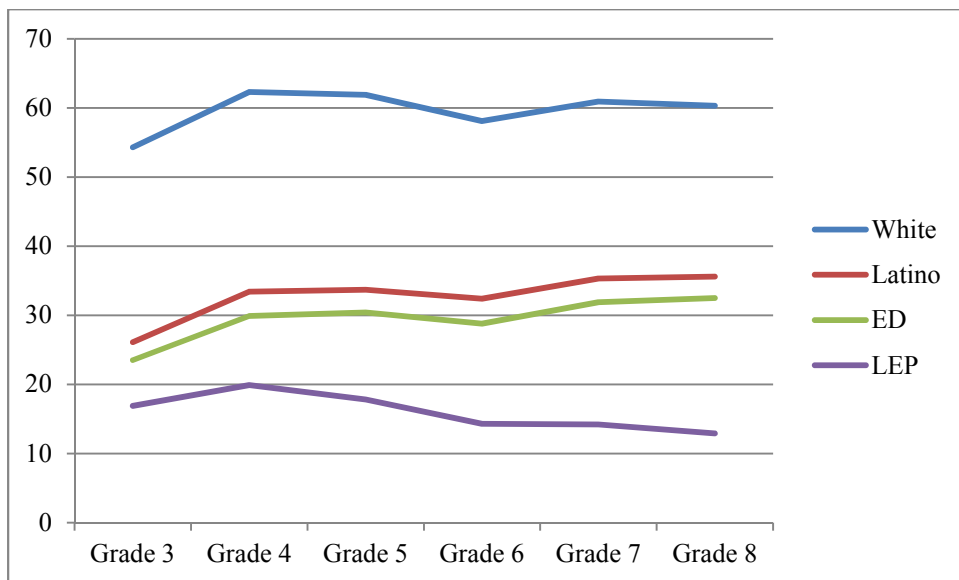
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<sup>12</sup> Charts and data in this section appear in Supp. Doc. 16 (PARCC Charts and Data).

History News Network, George Washington Univ. (Nov. 18, 2014), *available at* [http://historynewsnetwork.org/blog/153543#\\_ftn1](http://historynewsnetwork.org/blog/153543#_ftn1) (discussing causes of racial bias in standardized testing and noting these causes are apparent in the design and scoring of the PARCC and have not been addressed).

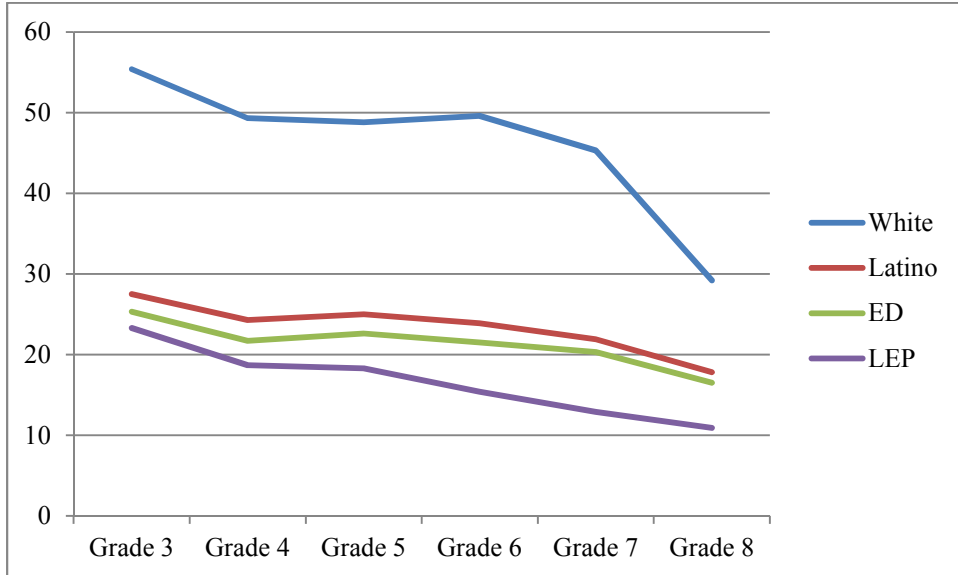
Such bias is visible in the data for the two years of PARCC testing on which the Commissioner relied in her Amplification. In both 2014-2015 and 2015-2016, New Jersey’s test results for both ELA and Math, as measured by the percentage of students scoring in either the “meeting expectations” or “exceeding expectations” range, show that statewide,<sup>13</sup> white students outperformed Latino students, who outperformed students with economic disadvantage, who outperform LEP students in turn. These test results are graphically illustrated below:

English Language Arts (ELA) 2014-2015

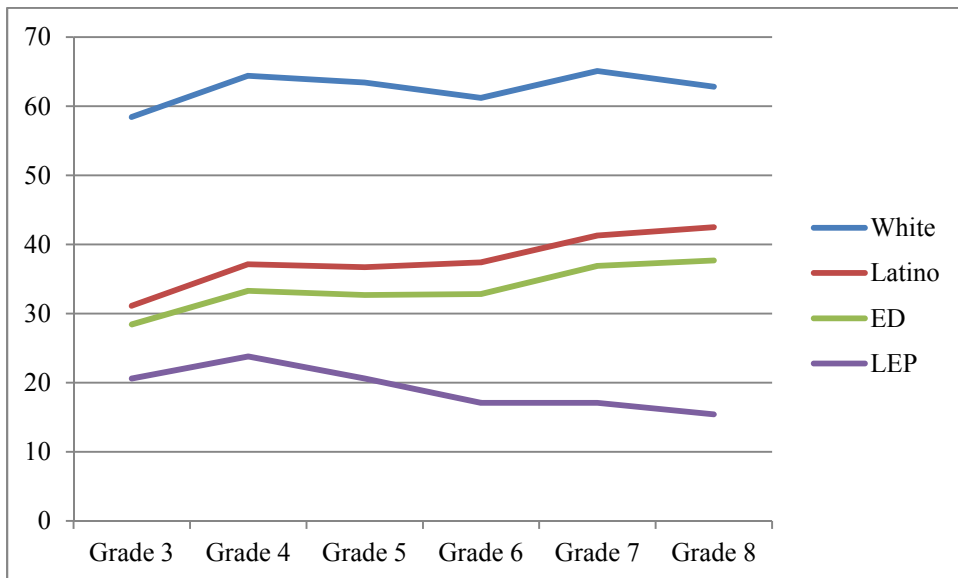


<sup>13</sup> Data available at <http://www.nj.gov/education/schools/achievement/>

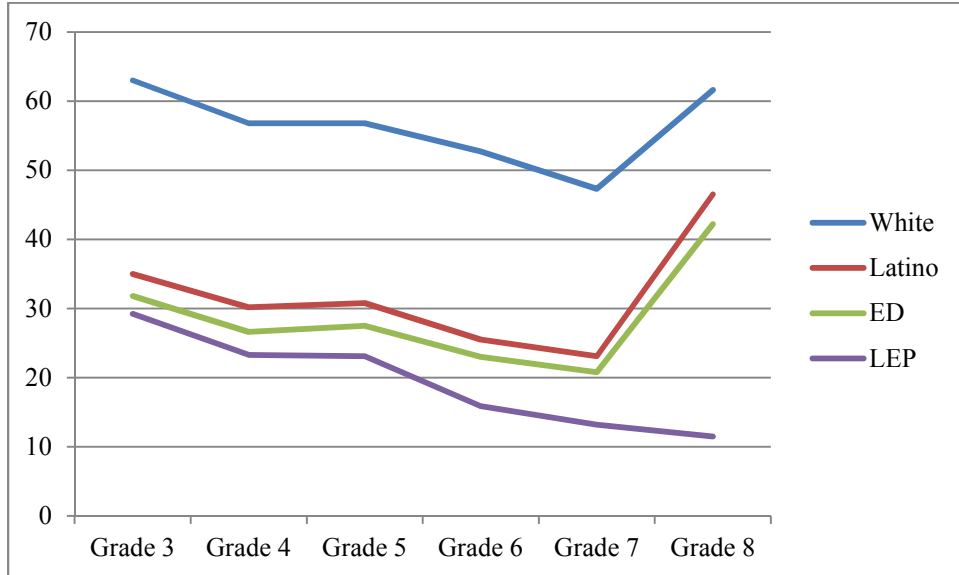
### Math 2014-2015



### English Language Arts (ELA) 2015-2016



Math 2015-2016



The consistency of this differential across years, grade levels, and subjects—bolstered by the research literature, cited *supra*—suggests a performance bias during precisely the years which the Commissioner analyzed to assess academic achievement, and the sizable gap between white and Latino students—approximately 30% in most instances—is particularly noteworthy.

This is critical because, as discussed above, the District enrolls a substantially larger percentage of Latino, economically disadvantaged, and LEP students. Indeed, during the school years examined by the Commissioner, the District enrolled over twice the percentage of Latino students, over twice the percentage of economically disadvantaged students, and over eight times the percentage of LEP students relative to the District:

	<u>White</u>		<u>Latino</u>		<u>Econ. Disadvantage</u>		<u>LEP</u>	
	<u>District</u>	<u>Charter</u>	<u>District</u>	<u>Charter</u>	<u>District</u>	<u>Charter</u>	<u>District</u>	<u>Charter</u>
2015	6.8%	50.0%	81.2%	38.5%	89.2%	41.0%	38.3%	3.5%
2014	8.2%	51.8%	78.0%	33.7%	89.7%	37.8%	33.4%	3.6%

Given these disturbing statistics suggesting bias in New Jersey’s standardized testing, as well as the supporting literature, cited *supra*, the Commissioner’s broad, undifferentiated comparison of PARCC test scores between the District and RBCS is not a fair, comparison; nor is it a reasonable way to assess academic performance for either RBCS or the District.

This error contributes to the racial segregation in Red Bank’s public schools in two specific ways. First, it effectively rewards RBCS for its enrollment of white, non-economically disadvantaged, English-proficient students.<sup>14</sup> This incentivizes the biased recruitment policies

<sup>14</sup> It also rewards RBCS insofar as the charter’s undifferentiated test scores have earned it a Tier 1 ranking. Supp. Doc. 17, Amplification at 2. This status, in turn, means that the Commissioner’s analysis of the school in charter

attributed to RBCS by Red Bank parents, described above. And second, it fosters an unwarranted perception that RBCS is a better academic school than the District, or perhaps more to the point, that the District provides a low-quality education. RBCS has promoted this view, both to the Commissioner in support of its expansion and renewal bids, *see* RBCS Supp. Doc. 5 at R223 (RBCS Charter Amendment App.) (“In doing a comparative of the RBCS data profile to that of Red Bank Borough Schools, the differential between the two is significant. These findings are the underpinnings of the petition to expand Red Bank Charter School.”); Supp. Doc. 7 at 4 (Pennotti Letter (Feb. 19, 2016)) (“Historically, urban public schools that serve low-income communities have been permitted to fail generations of children without repercussions. Red Bank’s district schools are no different.”), and to parents in recruiting, Supp. Doc. 13.B at 2 (Blum Letter) (writing of discussion with RBCS Principal Pennotti during school tour, “Pennotti could not seem to give any concrete reasons as to why the charter was better. She fell back on the statement that the charter students’ PARCC scores were better than the primary students’ scores. She made this statement repeatedly and without any qualification.”). And these views have taken hold with some parents, further depressing white enrollment in the District, *see, e.g.*, Supp. Doc. 13.M a t1 (Keele Letter) (RBCS parent writing in support of renewal, “the more we looked at the academic performance [of the District] the more we saw that this was not very encouraging either”). This judgment is unfair: properly analyzed to account for its demographics, the District’s performance in standardized testing is in fact strong. In its NJ DOE Performance Reports for 2014-2015, the Primary School ranked in the 71st percentile, and the Middle School in the 81st, when its ELA PARCC scores were measured against “peer schools,” defined as “schools that have similar grade configurations and that are educating students of similar demographic characteristics, as measured by enrollment in Free/Reduced Lunch Programs, Limited English Proficiency or Special Education Programs.”<sup>15</sup> Supp. Doc. 4 at 3, 11 (2014-2015 Primary School Performance Report); Supp. Doc. 5 at 3, 11 (2014-2015 Middle School Performance Report). By ignoring the differences in standardized test scoring across student groups in its comparison of RBCS to the District, the Commissioner thus stigmatizes the District, promoting inaccurate information that is detrimental to racial balance in the public schools and divisive of the community. *See, e.g.*, Supp. Doc. 13.G (McLaughlin Letter) (“Over the last thirteen years, I have witnessed how the charter school not only caused segregation in the schools, but how its existence caused and maintains deep schisms in all aspects of our mile square town.”).

## 2. *Segregative Effect*

The Commissioner correctly states in the Amplification that the “first step” in assessing a charter’s segregative effect is a comparison of the charter’s demographics to those of the District.

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renewal decisions is relatively circumscribed. *See* RBCS Supp. Doc. 7 at 7 (NJ DOE, Office of Charter Schools, “Renewal of Site Visit Protocol,” (2015) (as part of the renewal process, “charter school visits will be differentiated based on a school’s academic standing. For example, the Department will conduct an abbreviated site visit for charter schools that are currently in Tier 1 status”); *see* RBCS Supp. Doc. 8 at 2, 4 (NJ DOE, Office of Charter Schools, “Red bank Charter School Renewal of Site Visit Summary,” (Oct. 28, 2016)) (stating DOE site visit as part of consideration of RBCS renewal application lasted 2.5 hours, and noting, “[d]ue to the abbreviated nature of this site visit, the review team did not rate the school on all of the performance areas within the [Performance] Framework”). Thus, perversely, RBCS’ enrollment of a disproportionately white, English-proficient, and non-economically disadvantaged student body means it is subject to *less* oversight by the Commissioner. This is unconscionable.

<sup>15</sup> Peer school percentiles are not available for PARCC Math scores, and peer percentile data were not provided in performance reports for the other school year analyzed by the Commissioner, 2015-2016.

Supp. Doc. 17, Amplification at 6. The Commissioner also properly acknowledges that white enrollment in the district is steadily declining, and that RBCS's white and Latino enrollment are out of line with the community's demographics as reflected in 2010 census data. *Id.* at 3, 5. The Commissioner nonetheless finds no segregative effect and thus requires no change in RBCS policies as a condition of granting a charter renewal. This reflects both an improper reading of the evidence and a misunderstanding of the "segregative effect" legal standard.

First, the Commissioner finds that, while RBCS' population is notably whiter than that of the community's school-age children, RBCS has taken sufficient steps to address the issue with its recent advertising efforts. *Id.* at 3-4. As evidence that RBCS recruitment is proving successful, the Commissioner cites the change in Pre-K Latino enrollment from 27% to 60% from 2014-2015 to 2015-2016. *Id.* at 5. The problem with this analysis is that, especially in light of nearly 20 years of racial imbalance achieved in large part through improper recruitment methods, discussed above, it places tremendous weight on a very small sample size: the Pre-K enrollment of a small school for one year, amounting to just 20 students. Moreover, in 2017-2018, the Latino Pre-K enrollment dropped back down to 40% of the Pre-K population. Supp. Doc. 3 at 12-13 (RBCS 2017-2018 Enrollment). The Commissioner should not rely on such slight evidence in assessing RBCS' recruitment efforts. Particularly given the troubling evidence of improper, exclusionary recruitment practices discussed by Red Bank parents, above, the Commissioner should, at the very least, conduct a much more probing examination, and fully investigate the facts, to assure that RBCS is seeking "a cross section of the community's school age population including racial and academic factors" to the "maximum extent practicable." *N.J.S.A.* 18A:36A-8(e). See *Red Bank*, 367 *N.J. Super.* 482 (remanding in an earlier action brought against RBCS where charter "ha[d] a significantly higher percentage of nonminority students than the district schools" and District alleged facts suggestive of discriminatory practices by RBCS "for the Commissioner to conduct an appropriate hearing to determine whether any aspect of the Charter School's operation of the lottery, waiting list, sibling preference, and student withdrawal practices, together with any other actions following enrollment, exacerbate the district's racial/ethnic imbalance. Upon completion of the hearing, the Commissioner shall determine whether any remedial action is warranted, including whether to develop a remedial plan for the Charter School.").

The Commissioner also supports her finding that RBCS "has taken sufficient action to address the issue" of its racial imbalance by citing the charter's institution of a weighted lottery in 2016, which provides an advantage to economically disadvantaged students in selection of the incoming Pre-K class. Supp. Doc. 17, Amplification at 4. Fair Schools Red Bank and the Latino Coalition welcome the use of a weighted lottery by RBCS, but submit that it simply cannot be a sufficient remedy absent proper recruitment. Thus, even with a weighted lottery, in 2017, only 27 of 104 families applying for a seat in the incoming Pre-K class, or approximately 26%, were economically disadvantaged. Supp. Doc. 8 (RBCS Website (April 4, 2017)). By comparison, the District's student population was approximately 89% economically disadvantaged the previous year. This at least suggests—if it does not prove—that RBCS is simply not doing enough to educate the entire community about its availability to all and its admission procedures, and that the Commissioner's reliance on the weighted lottery to remedy racial imbalance at RBCS is an insufficient remedy for the problem of segregation described in this letter.

Finally, the Commissioner also concluded that RBCS was not having a segregative effect on the District because while the District's white population steadily declined from 2010 to



2016, the charter's white population fluctuated over the same period, suggesting that "increases and decreases in the proportion of RBCS were not correlated with changes in the proportion of white students in the District schools." Supp. Doc. 17 at 5 (Amplification). But a legal conclusion of "segregative effect" does not require that every decrease in the white population of the District be associated with an identical increase at the charter—no decision of any New Jersey court has construed "segregative effect" in this manner. Under the New Jersey Constitution, the Commissioner is obligated to remedy racial imbalance between schools of the same school district, and even across district lines. *Booker*, 45 N.J. at 178-80; *Jenkins*, 58 N.J. at 506-08; *N. Haledon*, 181 N.J. at 181-84. And "[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." *Englewood on the Palisades*, 164 N.J. at 328. Accordingly, the Commissioner's duty to prevent the RBCS from having a segregative effect must be understood to require remedial action any time a charter is severely racially imbalanced relative to the district schools, and any time the operation of a charter is worsening segregation in the district. This duty holds even when demographic trends were already creating segregation in the district schools—"rather than use the demographic trend as an excuse," the Commissioner should consider such trends as making intervention all the more imperative. *N. Haledon*, 181 N.J. Thus, quite simply, the charter is having a segregative effect because its student population is far whiter and wealthier than that of the District, creating a racial imbalance that causes harm to the District students; that RBCS has, at least anecdotally, selectively recruited white, middle and upper-middle class students to the exclusion of poorer Latino, LEP students exacerbates this problem. The Commissioner must account for these segregative effects under law, and may not disavow important statutory and constitutional duties by arbitrarily giving "segregative effect" an overly narrow construction. Instead, the Commissioner must take action to address the problem in Red Bank's public schools.

## **VI. The Commissioner Should Implement Several Policy Changes to Remedy Racial Imbalance in Red Bank.**

All of this said, Fair Schools Red Bank and the Latino Coalition do not urge the Commissioner to deny altogether RBCS' application for charter renewal at this time. They understand that closure of the charter school would disrupt and unfairly penalize its 200 students. But corrective action is required if the RBCS charter is to be renewed. Specifically, the Commissioner must address the central causes of RBCS' segregative effect—recruitment and sibling preference—by requiring changes to RBCS policies.

First, the Commissioner should perform a fair evaluation of the charter's academic performance by evaluating test scores in a manner that accounts for bias along lines of race, class, and English-language proficiency. This means that the charter's performance should only be compared to that of the District and other schools after differentiating between students of racial, economically disadvantaged, and LEP groups. Such a policy change would remove the incentive for RBCS to recruit predominantly white, wealthy, English-proficient students. It would also provide for more accurate assessment of the charter's academic performance. And it would remove the harmful and unfair stigma that the District is a poor academic institution with under-achieving students, a perception that both harms District students and reinforces segregation by deterring the parents of white children from enrolling them in the District schools.

Second, the Commissioner must meaningfully investigate and oversee the charter’s marketing and recruitment efforts. In light of the accounts of Red Bank parents, the charter cannot be taken at its word that it is fulfilling its obligation to seek a cross-section of the community to the maximum extent practicable; nor may the Commissioner simply tally the number of mailings or newspaper advertisements issued by the charter. Instead, the Commissioner should investigate the extent to which the full community—particularly the economically disadvantaged, Latino, LEP population—understands that RBCS is a free public school with full-day Pre-K, which admits by lottery, and which requires the disclosure of no more personal or identifying information than is required for enrollment in the District. The Commissioner must hold RBCS accountable to assure that its admission procedures and the date of its lottery are generally understood by all parents of school-age children in Red Bank, and that the lottery is truly randomized, and is the exclusive means of student enrollment.

Third and finally, the Commissioner should suspend RBCS’ sibling preference policy until the charter’s racial imbalance is corrected. In the Amplification, the Commissioner considered this possibility but ultimately rejected it because it “could be detrimental” to enrollment of a larger proportion of Latino students. Supp. Doc. 17, Amplification at 5. This conclusion is illogical. A sibling preference policy does not favor any particular racial group—it preserves the *status quo*. And since the *status quo* at RBCS is a demographic out of line with the District and the community at large, the sibling preference policy only stands to sustain racial imbalance. A moratorium on the policy would free up approximately twice as many seats to be filled through a weighted lottery, and thereby double the pace of change. The students of Red Bank have waited long enough. Accordingly, sibling preference should be temporarily suspended with the possibility that it may be re-instituted at a time when the schools of Red Bank are far less segregated than they are today, and real, palpable progress has been made toward their goal of completely desegregated schools.

## VII. Conclusion

Thank you for your consideration in reviewing this submission and your patience in awaiting it. Should you have any questions, or determine that a hearing would be appropriate for consideration of the issues here discussed, please do not hesitate to contact me. If you wish it, Fair Schools Red Bank and the Latino Coalition would welcome the opportunity to provide additional information, testimony or in-person argument, or to meet with you personally.

Respectfully yours,

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