SB #86-98

IN THE MATTER OF THE FINAL GRANT OF A CHARTER FOR THE UNITY CHARTER SCHOOL, MORRIS COUNTY. : STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, September 3, 1998

Remanded by the State Board of Education, November 4, 1998

Decision on remand by the Commissioner of Education, December 4, 1998

Remanded by the State Board of Education, February 3, 1999

Response by the Commissioner of Education, February 16, 1999

Decision by the State Board of Education, April 7, 1999

For the Appellant, Wiley, Malehorn & Sirota (John G. Geppert, Jr., Esq., of Counsel)

For the Respondent, Collier, Jacob & Mills (David H. Ganz, Esq., of Counsel)

For the Participant Commissioner of Education, Terri A. Cutrera, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

This is our fourth determination in this matter. As described in the first section of this opinion, the matter involves a challenge by the Morris School District (hereinafter "District") to the grant of a charter to Unity Charter School (hereinafter "Unity" or "Charter School") under the Charter School Act of 1995. The District's challenge was based on several grounds, some of which related specifically to the circumstances of Unity's operation. These included claims that the Commissioner's approval of Unity's charter application was improper because: 1) the approval improperly permitted the operation of a segregated school in circumvention of the New Jersey Supreme Court's decision in Jenkins v. Tp. of Morris School District and Bd. of Educ., 58 N.J. 483 (1971)

and the Commissioner's subsequent order establishing the Morris School District, 2) Unity's facility was not suitable for educational purposes, and 3) Unity's application had not shown how the school would comply with the core curriculum standards and statewide assessment program. In addition, the District challenged the statutory and regulatory framework that currently governs the funding of charter schools.

As detailed below, our review thus far has focused on whether the Charter School's facility was suitable for educational purposes. Hence, our efforts have largely been directed toward establishing a record that would be sufficient to permit us to properly decide the facility issues. As described below, such a record has been developed, and we now decide those issues. At the same time, we have turned our attention to the District's remaining claims and, as embodied in this opinion, we also decide the issues related to those claims.

I

This appeal, which was initiated by the Morris School District, challenges a grant of final approval given on September 3, 1998 by the Commissioner of Education to the Unity Charter School to operate a charter school pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. (hereinafter "Act") for the period from July 1, 1998 through June 30, 2002.[1] As set forth in its application, the Charter School

[1] The Morris School District did not file an appeal from the Commissioner's contingent approval of Unity Charter School given on February 5, 1997. As set forth in our decision of November 4, 1998, the deputy attorney general representing the Commissioner argued that all issues relating to the Commissioner's initial approval should be dismissed as time-barred. The State Board concluded that the appeal was not time-barred, stressing both that the initial approval had been given before the State Board had adopted the regulations upon which the Deputy relied and that it would "hesitate to interpret our regulations to bar any appeal where the appellant had not had notice of the factual circumstances...." State Board's Decision, slip op. at 3.

planned to open with 60 students in grades K-8, and to expand by the fourth year to include 195 students in grades K-12.[2]

One of the central issues of the District's appeal was the suitability of the Charter School's facility for educational purposes.[3] In this regard, the District focused on the fact that the building was owned by a social club which would continue to operate and which served and stored alcoholic beverages at the site for its members. The District was also concerned about whether the bathroom facilities for the students were appropriate in view of the rules pertaining to such facilities in schools and given the possibility that members of the social club might be present during school hours.

On November 4, 1998, we issued our first decision in this matter. We found that there was nothing in the record before the Commissioner at the time he granted final approval to the Charter School to indicate that the facility it was planning to utilize was a social club in which alcoholic beverages were served and stored.[4] This circumstance

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[2] Under the terms of the Charter School's three-year lease for its current facility, the school would expand to a maximum of 140 students by the last year of the term of that lease.

[3] In addition, the District raised questions relating to the constitutionality of the Act and implementing regulations under the New Jersey constitution and claimed that approval of the Charter School was in violation of other requirements of New Jersey law. More specifically, the District contended that final approval permitted the operation of a segregated public school in violation of New Jersey's constitution and judicial decisions relating to racial balance, including Jenkins, supra, which was the foundation for the formation of the Morris School District. The District also contended that New Jersey's guidelines governing the desegregation of the public schools require that all public schools, including charter schools, be racially balanced. The District further claimed that payment of funds to the Charter School was unconstitutional and that the regulations were unconstitutional because they required district boards to allocate public funds for the use of private individuals. Given the constraints on our jurisdiction and the statutory time limit within which we were required to act, N.J.S.A. 18A:36A-4(d), we noted the presence of these issues in our decision of November 4, 1998, but presumed at that time the validity of the statute and implementing regulations for purposes of determining whether the Charter School should be permitted to continue to operate.

[4] The Commissioner subsequently indicated in his decision on remand issued on December 4, 1998 that he "was advised [by Department staff] of the fact that the United Charter School is located in a building that also houses a social club" prior to his grant of a final charter to the school. Commissioner's Decision on Remand of December 4, 1998, slip op. at 1. The deputy attorney general representing the Commissioner, a participant in this appeal, also alleged in her brief to us dated October 19, 1998 that "[w]hen the Commissioner rendered his decision on September 3, 1998 to grant a charter to the Unity

raised both policy and legal concerns relating to the presence of alcoholic beverages in a facility housing a school. In light of the information contained in materials submitted by the parties in supplementation of the record, we concluded that further review and determination by the Commissioner of the suitability of this site for educational purposes was required pursuant to N.J.S.A. 18A:36A-10.[5] We therefore retained jurisdiction while remanding this matter to the Commissioner for determination within thirty days of the suitability of the site for educational purposes.

On December 4, 1998, the Commissioner issued his first decision on remand. Based on the Charter School's submission and a report to him describing the facility following a site visit by Department of Education staff, the Commissioner concluded that students did not have access to the social club or to the alcoholic beverages stored in the building and that the facility was suitable for a charter school.

Our Legal Committee's initial review of the Commissioner's December 4, 1998 decision indicated that some items which had been referenced by the Commissioner in his decision had not been included in the record transmitted to us by the Attorney General's office on December 15, 1998. Consequently, on December 29, 1998, we sent a letter to the Commissioner requesting those items, which included documentation as to the exact location of the alcoholic beverages that the Commissioner had

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Charter School, he was fully informed about the nature and location of the proposed facility….The Commissioner was informed that even though the first floor of the Columbian Club houses a bar, no drinks are served on the premises during school hours." Commissioner's Brief, at 23-24. However, there is no documentation in any of the materials transmitted to us on appeal by the Commissioner that indicates that such information was communicated to him or considered by him in determining to grant final approval to the Charter School.

[5] N.J.S.A. 18A:36A-10 provides that: "A charter school may be located in part of an existing public school building, in space provided on a public work site, in a public building, or any other suitable location. The facility shall be exempt from public school facility regulations except those pertaining to the health or safety of the pupils…."

concluded were not accessible to the Charter School's students. We also requested clarification of the bathroom facilities that were assigned for use by students and those which were used by staff and other adults who had access to the building. See N.J.A.C. 6:22-5.4(h).[6]

On January 5, 1999, a deputy attorney general representing the Commissioner responded to our request on his behalf. While providing most of the documents we had requested, the deputy did not furnish documentation relating to the site visit conducted by Department staff which had been relied upon by the Commissioner, indicating that such report had been "communicated orally to the Commissioner." Letter dated 1/5/99 from Deputy Attorney General Cutrera, at 2. Nor did the deputy's submission provide clarification regarding the bathroom facilities or specify the location of the alcoholic beverages stored at the site, stating that "all other information and documentation requested in the [December 29, 1998] letter was not before the Commissioner when he rendered his December 4, 1998 decision." Id.

On February 3, 1999, we remanded this matter to the Commissioner for a second time. Given the issues that had been raised by the District's appeal, we found that we were unable to resolve this matter without specification of the exact location of

[6] N.J.A.C. 6:22-5.4(h) provides, in part:

> 2. General pupil toilet rooms are those which are designed and labeled for pupil use, contain at least two of each required fixture and are directly accessible from a corridor or an open plan instructional space. Pupils housed within an instructional space which is in excess of 300 square feet shall not be required to travel through any other space except a corridor to reach a general pupil toilet room.
> 3. There shall be at least one general toilet room for each sex on each floor occupied by pupils or all instructional rooms shall have individual toilet rooms. Where classrooms, shops or physical education rooms are provided with self-contained individual facilities (water closet, lavatory and drinking fountains), the pupil capacity of these rooms shall not be counted in computing the number of fixtures required in the general pupil toilet rooms.

See also N.J.A.C. 6:22-5.4(h)4, infra, n.7.

the alcoholic beverages in the facility and assurance that the bathroom facilities complied with the requirements of N.J.A.C. 6:22-5.4(h). We directed the Commissioner to direct the County Superintendent to revisit the Charter School's facility and to submit a written report to him which:

> 1) specifically identifies the exact location within the building where the alcoholic beverages are stored, including identification of such location on a site plan and 2) provides clarification of the bathroom facilities which are assigned for use by students and those which are used by staff and other adults who have access to the building, including the specific type and location of bathroom facilities provided for the school's kindergarten students, so as to assure that the facilities are in compliance with the requirements of N.J.A.C. 6:22-5.4(h).

State Board's Decision, slip op. at 4.

We also directed that the County Superintendent assure that the Charter School had complied with the requirements of N.J.A.C. 6:22-5.4(h)4i or submitted an alternative bathroom plan for its kindergarten students in accordance with the requirements of N.J.A.C. 6:22-5.4(h)4ii and iii.[7] We directed the Commissioner to transmit the County

[7] N.J.A.C. 6:22-5.4(h)4 provides:

> Toilet facilities for early intervention, pre-kindergarten and kindergarten classrooms shall be provided as follows:
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> i. An individual toilet room shall be provided in each classroom and shall meet the following criteria:
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> (1) Be located and equipped in such a way as to ensure privacy for the pupils;
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> (2) Be accessible to physically handicapped students and barrier free in design as per N.J.A.C. 5:23-7;
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> (3) Meet all other provisions of N.J.A.C. 6:22-2.4(b) which pertain to toilet room design;
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> (4) Pre-kindergarten and kindergarten classrooms shall contain a junior-juvenile size water closet suitable for children's use, equipped with an open front seat with a flood rim height no greater than 14 inches from the floor, and a lavatory (sink) with a flood rim height no greater than 26 inches from the floor; and
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> (5) Facilities for early intervention programs shall provide a diaper/clothes changing area.
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> ii. In lieu of providing an individual toilet room in each classroom as required in (h)4i above, toilet rooms may be provided adjacent to or outside the classroom if the following criteria are satisfactorily addressed:

Superintendent's report to us by February 16, 1999. Once again, we retained jurisdiction.

On February 16, 1999, the Commissioner transmitted a report to us prepared by the County Superintendent regarding her visit to the school on February 8, 1999. In her report, the County Superintendent provided a floor plan marked to show where alcoholic beverages were stored in the building, noting that the three cabinets used for such storage had been secured with a padlock requiring a key. She also indicated that a small amount of alcohol was locked in a small storage closet next to the bar.

With regard to the bathroom facilities, the County Superintendent reported that: "Bathroom facilities are located on both the upper and lower levels. There is one handicapped accessible toilet and sink for girls and one for boys located on the upper (school) level. On the lower level are larger restroom facilities. The girls' room consists of three stalls and three sinks. The boys' room consists of three stalls, three urinals and three sinks." Report of County Superintendent, at 2. The County Superintendent attached a copy of a memo from the Charter School's director to staff which directed "all

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(1) No child or group of children shall be left unsupervised at any time when traveling to or from the facilities. Provisions shall be made for adult supervision in a manner that will not infringe upon instructional time.

(2) Toilet facilities shall be readily accessible and the toilet room and signage shall be visible to a child from the classroom door.

(3) Toilet facilities for early intervention, pre-kindergarten pupils shall be designated for their exclusive use and shall be so identified.

(4) Toilet facilities shall be provided for both boys and girls and shall meet the requirements of (h)4i(4) above.

iii. If a school district chooses to provide toilet rooms adjacent to or outside the classroom in conformance with (h)4ii above, the chief school administrator shall certify to the county superintendent how the alternate method of compliance shall be addressed, on forms prescribed by the Commissioner. The completed form and a copy of a resolution by the local district board of education approving the alternate method of compliance shall be submitted to the county superintendent for approval. Annually, thereafter, the chief school administrator shall resubmit the form certifying how the alternate method of compliance shall be addressed. Any changes to the approved alternate method of compliance shall be submitted to the county superintendent for approval.

students to use the upstairs bathroom at all times. If the upstairs bathroom is not available, students are required to be accompanied by a staff member to the lower level rest room." Id. The County Superintendent indicated that the social club's maintenance man was the only other adult present in the building on a regular basis.

The County Superintendent also reported that a request was received from the Charter School on December 23, 1998 for approval of an alternative method of compliance with the requirements for in-class toilet facilities for kindergarten students. N.J.A.C. 6:22-5.4(h)4. That request stated that kindergarten students would be "escorted to and from the bathrooms by a designated staff person at or around 9:00 a.m. and again at or around 11:00 a.m. daily. Unless otherwise in use, the children will use the bathrooms on the main floor of the school. After lunch and before nap time, at or around 12:30 p.m., the children will use the lower level bathrooms adjacent to the nap area. At any additional time that there is a need for one of our youngest children to use a bathroom, he/she will be escorted to and from the bathroom by a staff member." The County Superintendent related that she had approved the school's alternative plan on January 5, 1999.

The County Superintendent did not, however, respond to our request to clarify which of the bathroom facilities at the site were designated for use by staff members and other adults who have access to the building.[8] Nor did the County Superintendent describe the specific type of toilet facilities provided for the school's kindergarten

[8] The State Board requested this specific information in its letter to the Commissioner dated December 29, 1998 and again in its decision of February 3, 1999.

students, so as to ensure compliance with the requirements of N.J.A.C. 6:22-5.4(h)4i(4). See N.J.A.C. 6:22-5.4(h)ii(4). See also N.J.A.C. 6:22-6.1(g)2vi(1).[9]

On April 7, 1999, finding that we were still unable to determine whether the facility in which the Charter School is housed is suitable for educational purposes as required by N.J.S.A. 18A:36A-10,[10] we directed the parties to submit additional briefs on the question of whether the bathroom facilities offered at the school met health and safety concerns, including but not necessarily limited to the regulatory provisions listed above. In view of the fact that the school anticipated significant expansion, we also directed the parties to address whether the Charter School could provide bathroom facilities at this site that met health and safety concerns as the school expanded. In this respect, we stressed that the parties should pay particular attention to the health and safety needs of the school's kindergarten and elementary age children in relation to the middle school age children currently enrolled at the school and the high school students who will be attending school at this facility during the three-year term of the lease, in addition to the fact that the school has been approved by the Commissioner to expand to 140 students at this site by the 2000-2001 school year.[11]

In addition, we could not ignore the fact that the Appellate Division had issued a decision on March 29, 1999 disposing of three appeals from contingent approvals of charter applications given by the Commissioner. In the Matter of the Grant of the

[9] N.J.A.C. 6:22-6.1(g)2vi(1), regarding emergency provisions for accommodation of pupils in substandard school facilities, provides that toilet facilities for pupils in off-site, rented or leased buildings "shall be provided for students in early intervention, pre-kindergarten and kindergarten programs as per N.J.A.C. 6:22-5.4(h)4."

[10] See, supra, n.5.

[11] The Charter School has indicated in briefs and certifications that the number of students it is permitted to enroll at this site was limited to 105 by the Morristown Zoning Board when the school was granted a zoning variance in June 1998. However, there is no documentation in the record to verify that assertion.

Charter School Application of Englewood on the Palisades Charter School, et al., 320 N.J. Super. 174 (App. Div. 1999) ("Englewood on the Palisades"). The Morris School District appeared as amicus curiae in that case. However, the Court "decline[d] to address specifically the issues raised" by the District because it "has an appeal pending before the State Board at present." Id. at 243.[12] Given this circumstance, we directed the parties to brief the issues raised by the District that should most appropriately be considered in the first instance by this agency, see Abbott v. Burke, 100 N.J. 269, 301-303 (1985), as well as to address the impact of the Appellate Division's recent decision in Englewood on the Palisades on the instant appeal.

Finally, we recognized that under the circumstances as they had been presented to him at that point, the Commissioner had stated in his decision of December 4, 1998 that he could find no legal prohibition to the Charter School's location in a building that also housed a social club. He further indicated in a footnote that "it does not appear" that either N.J.S.A. 33:1-76 or N.J.S.A. 2C:33-16 are implicated by the fact that the Charter School is located in such a facility. However, the Commissioner did not expressly decide the legal issues raised and did not address the practical and policy implications of allowing a public school to operate in a facility where alcoholic beverages were present. In that the jurisdiction to decide these issues now lay with the State Board, we directed the parties to address these questions in more depth.

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[12] We note that, in contrast to the approvals challenged by the parties in that case, the Morris School District's appeal to the State Board in the instant matter is from the Commissioner's grant of final approval rather than from a grant of contingent approval. See, supra, n.1 and accompanying text.

II

The Morris School District responded to the directives in our April 7, 1999 decision by filing a supplemental brief. That brief, dated April 30, both addressed the issues we had identified in our decision and reasserted the claims that were the original focus of its appeal to the State Board. Accordingly, the District not only pursued its challenge to the suitability of the facility, but also renewed its claim that because charter schools are public schools, this agency is obligated to ensure that the student population attending Unity Charter School is racially balanced as measured under the Department of Education's desegregation guidelines. The District also reasserted its claim that financial obligations imposed on it by the Charter School's operation would result in violation of the rights of the District's students. The District argued in this respect that N.J.A.C. 6A:11-7.1(c) improperly required it to divert more of its funds to support the Charter School on a per pupil basis than the regulation required from the other school districts from which Unity would draw its students.

In a brief dated April 28, a deputy attorney general representing the Commissioner of Education argued that Unity's bathroom facilities were in compliance with applicable health and safety regulations and that the presence of alcohol did not under the circumstances violate state statutes or regulations. The deputy also argued that, within the limits established by various judicial decisions, the State Board had the jurisdiction to consider all of the issues raised in this appeal by the District, including the constitutional dimensions of those issues relating to funding and racial segregation. However, the deputy contended that the District lacks the standing to pursue an equal protection argument.

In its brief dated May 14, Unity addressed the facilities questions and responded to the District's other claims. The Charter School adopted the factual and legal arguments advanced on behalf of the Commissioner with the exception of the statement in the Commissioner's brief that the State Board had the jurisdiction to consider the District's equal protection argument. The Charter School denied the assertion that it was a segregated school and argued that the District's prior claim that the makeup of the school had a potentially negative effect on the District's racial balance should be rejected as insignificant and speculative. The Charter School contended that the Appellate Division's decision in Englewood on the Palisades, supra, had settled that the funding provisions of the Charter School Act were not unconstitutional. Along with its brief, the Charter School filed a motion to supplement the record with certifications relating to the racial balance of its student population and the efforts through which it had achieved such balance, as well as certifications relating to the facilities issues.

On May 18, the District filed a letter brief to bring to our attention the Appellate Division's decision in In the Matter of Charter School Appeal of the Greater Brunswick Charter School, Docket #A-4557-97T1F (App. Div. 1999), which had been rendered on May 17. On May 21, the deputy attorney general representing the Commissioner filed a letter brief in response and brought to our attention the Appellate Division's May 17 decision in In the Matter of the Grant of the Charter School Application of the Patrick Douglas Charter School, Docket #A-4713-97T1 (App. Div. 1999).

On May 26, the Charter School filed a response to the District's May 19 filing and also commented on the five charter school decisions rendered by the Appellate Division on May 17. In response to the Charter School's filing, the District filed a motion to supplement the record with data relating to its minority enrollment.

III

Initially, we grant the motions of both the Charter School and the District to supplement the record. After carefully reviewing the District's claims of racial imbalance on the basis of the record as supplemented, we find that it has failed to establish the validity of these claims.

There are two distinct aspects to the District's claims of racial imbalance. Its central claim is that the Commissioner could not properly approve the charter because such approval permitted the operation of a segregated school. The focus of this claim is the racial composition of the pupil population of Unity Charter School. However, the District is also contending that the Commissioner's approval was improper because the availability of the option of enrolling in the Charter School may result in a negative impact on the racial composition of the student population that continues to attend the District's schools.

We recognize that the parties are not in agreement as to the proportion of Unity's students that are minority. Nor is there agreement as to the racial composition of the Morris School District and the proper unit within the District by which to measure its racial balance in relation to Unity's. Nonetheless, even accepting the District's view on these questions,[13] it has not provided minimal substantiation for its claims. Given the

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[13] The District contends that only 14% of Unity's student population is minority as compared to the District's overall enrollment of 40% minority. In its last submission, the District urges the State Board to use its K-2 minority enrollment of 46% as the basis for measuring the adequacy of the diversity achieved by Unity. However, we cannot discern any basis for evaluating the racial composition of the District's student population and any impact thereon solely by reference to its K-2 enrollment.

Moreover, a 46% minority enrollment, in and of itself, does not represent a concentration of minority students in the District such that remedial measures would be required and, as set forth above, the District has not shown that the small number of students from the District who are attending Unity have had any impact on the racial composition of the District's student population.

opportunity that we have afforded the District in these proceedings to pursue its claims and to provide adequate support for them, as well as the sweeping implications of granting the relief sought by the District,[14] we deny its claims of improper racial imbalance.

In doing so, we reject the District's argument that the question of whether Unity Charter School is segregated should be resolved by application of the Department's desegregation guidelines. Those guidelines were designed to ensure that the student populations attending school within a district were not segregated as a result of their assignment by the district to specific schools. This is not the situation confronting a charter school, which may recruit students from more than one district and which does not distribute its students by assigning them to different schools.

In point of fact, in the case of a charter school, the student makes the "assignment" by choosing to enroll in the charter school. Moreover, the conceptual foundation of the charter school program rests on the policy determination to provide students and their parents with the opportunity to make this choice.

This does not mean that, from an educational policy perspective, having a diverse student population is not important in the context of a charter school. In addition to prohibiting discrimination, N.J.S.A. 18A:36A-7; N.J.S.A. 18A:36A-11, the Legislature recognized the significance of achieving such diversity by requiring charter schools to have an admission policy that "…to the maximum extent practicable, seek[s] the enrollment of a cross section of the community's school age population, including race and academic factors." N.J.S.A. 18A:36A-8(e). In this respect, we stress that the

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[14] The District is seeking race-based remedies applicable to all charter schools.

District has not questioned the efforts that Unity has made to attract such a student population. Nor has the District alleged that Unity has in fact discriminated in either its recruitment efforts or its admissions.

Similarly, there is no indication that the option of attending Unity has had any impact on the racial composition of the District's student population. Given the number of students from the Morris School District who are enrolled in the Charter School, and based on the District's statistics, we cannot discern even a minimal impact on the racial composition of the District.

In this respect, we emphasize that, as the Appellate Division stated in Patrick Douglas Charter School, supra, slip op. at 12:

> [I]f and when the charter school in any particular district results in a skewed or undesirable racial mix in the existing district, the Commissioner has the power – independently of the powers granted by the Charter School Program Act – to take remedial action.

However, as described above, there is no indication from the District's submissions that Unity has had such an impact on the racial composition of the District's student population. Compare with Board of Educ. of Englewood Cliffs v. Board of Educ. of Englewood, decided by the State Board of Education, April 4, 1990, aff'd, 257 N.J. Super. 413 (App. Div. 1992), aff'd, 132 N.J. 327 (1993), cert. denied, 510 U.S. 991, 114 S.Ct. 547, 126 L.Ed.2d 449 (1993) (loss of 6% of the white student population from Dwight Morrow High School in Englewood to Tenafly High School pursuant to tuition policy constituted significant negative impact on the racial composition of Englewood's student population).

IV

We reject the District's contention that approval of Unity's charter should be reversed because Unity's application did not show how it would comply with the Core Curriculum Content Standards and the Statewide Assessment Program. In this respect, we stress that the Core Curriculum Content Standards define the results expected from the education provided, but they do not specify the strategies that a school district or a charter school must follow to achieve such results. Introduction to Core Curriculum Content Standards. Our review of Unity's application indicates that the curriculum planned by this Charter School was comprehensive and well thought out. In fact, the over-all application clearly demonstrates the school's commitment to achieving the standards and to going beyond them. Nor has the District specified any deficiency in Unity's curriculum, either as set forth in the application or as implemented. Hence, the District has not established any basis that would justify setting aside the approval granted by the Commissioner in this case to Unity's educational program.

V

We now turn to the issues relating to the Charter School's current facility. As set forth above, the District claimed that Unity's facility was not suitable for educational purposes as required by N.J.S.A. 18A:36A-10 because the school was housed in a facility that: 1) also served as a social club for adults and in which alcohol was present, and 2} did not have adequate bathroom facilities.

The District's concerns are twofold. First, it was concerned that the presence of alcoholic beverages at the site meant that there was a potential for children attending the Charter School to gain access to those beverages even if they were not served

during school hours. The District argued that this endangered the welfare of the students and also created a legal liability for the school and its founders.

Second, the District contended that permitting alcohol on the premises of a public school is contrary to the public policy of this State. In this regard, the District points to N.J.S.A. 33:1-76 (no liquor license shall be issued for the sale of alcoholic beverages within 200 feet of a church or public schoolhouse) and N.J.S.A. 2C:33-16 (any person bringing or disposing of alcoholic beverages on school property without express written permission is guilty of a disorderly persons offense). The District argues that these statutes both reflect this policy and the fact that the Legislature did not intend to allow the presence of alcohol on school premises under normal circumstances. The District also asserts that the concerns about the pervasiveness of alcohol problems in our nation's schools, which were highlighted by the "Safe and Drug Free School and Communities Act of 1994," 20 U.S.C.A. §7101 et seq., should be determinative in evaluating the suitability of Unity's facility.

After careful review of the legal and policy concerns that have been expressed, we reject the District's contention that the presence of alcoholic beverages on this site under the particular circumstances that have been presented here renders the site unsuitable for educational purposes. In this respect, we stress that, as found by the Commissioner, the statutes cited by the District do not create any legal prohibition that would have excluded the facility in question from use as a school. At the same time, we emphasize that the fact that there is no legal prohibition applicable to this situation does not mean that this facility is necessarily suitable for use for educational purposes.

Given the strength of our State's policies with respect to alcohol in our schools and this agency's objectives with respect to drug and alcohol education, we would not

permit Unity to continue to operate at this site unless we were satisfied that the circumstances were such that any possibility had been eliminated that the alcohol might be made available to the students. The record at this point satisfies us that this is in fact the case. Unity has provided detailed descriptions of how the alcohol is stored and how issues related thereto are handled. This has convinced us that the presence of the alcohol in this case is being treated by both Unity and its landlord with appropriate sensitivity to the welfare of the students in both the physical and social sense.

However, we continue to be concerned that access to alcoholic beverages might occur as a result of the presence of club members or other adults when the school is in operation, and we find that it is critical to avoid the potential that any such incident might occur in this setting. Accordingly, although Unity has indicated that such adults are not present during school hours, we find it necessary to formalize this practice by directing that adults who are not associated with the school shall not be permitted to be in the building when children are present during school hours or for school-sponsored events except with specific authorization from the appropriate school personnel and under proper supervision therefrom.

We have also examined with extreme care the issues related to Unity's bathroom facilities. After reviewing all of the submissions, we find that Unity has developed an alternate bathroom plan that appears to provide for adequate supervision of the children when they use the bathrooms. However, in addition to meeting those concerns, alternate bathroom plans authorized under N.J.A.C. 6:22-5.4(ii) must also "meet the requirements of [N.J.A.C. 6:22-5.4(h)4i(4)]." That regulation mandates without exception that kindergarten bathroom facilities which are outside or adjacent to the classroom must still contain a junior-juvenile size toilet and sink suitable for children's

use which meet the specifications set forth in the regulation. See, supra, n.7. There is no indication in the Charter School's alternate plan that either bathroom used by its kindergarten students complies with this requirement. Nothing in the information that has been provided to us gives us any indication that Unity's bathroom facilities conform with the requirements of N.J.A.C. 6:22-5.4(h)4i(4). Accordingly, notwithstanding the County Superintendent's approval, we cannot permit Unity to operate without a plan that reflects compliance with the requirements of N.J.A.C. 6:22-5.4(h)(4)ii. We therefore direct Unity to submit a revised plan that is in full compliance with the requirements of N.J.A.C. 6:22-5.4(h)(4)ii and 6:22-5.4(h)4i(4) to the County Superintendent for review and approval. We further direct that such plan be implemented by the start of the 1999-2000 school year, and we instruct the County Superintendent to verify such implementation on the basis of an inspection of the facility.

VI

We have carefully considered the District's argument that N.J.A.C. 6A:11-7.1(c) discriminates between resident and non-resident school districts by allowing non-resident districts to pay a charter school on a per pupil basis the lower of either the amount of its local levy or the local levy of the district of residence. We reject the District's contention that any resulting disparity between the amount it must pay as a resident district and that which a non-resident district will pay when one of its students attends Unity is impermissible. We are aware that such result will occur in cases where the non-resident district spends less on a per pupil basis to educate its students than does the resident district in which the charter school is located. However, we find that it is inequitable to require a school district to spend more on a per pupil basis to support

those students attending a charter school than it spends to educate the students attending school in the district. Nor would it be appropriate to permit a district to spend less for the education of students who attend a charter school located within the district than it does to educate those students who attend the district's schools. Hence, given the fact that the current statutory scheme for funding public education, the Comprehensive Education Improvement and Financing Act of 1996, permits variations in the amount of per pupil expenditures, we find that, in basing the obligations of resident and non-resident districts to support the educational costs of students attending charter schools on each district's expenditures for students in the district's schools, N.J.A.C. 6A:711-7.2(c) provides a proper and fair method for establishing the amount to be charged to each district to support those students attending a charter school.

VII

In summary, we find that the District has failed to establish the validity of its claims of racial imbalance on the basis of the record as supplemented. Even accepting the District's view on this issue, we find that it has not provided minimal substantiation for its claims. Nor is there any indication in the record that the option of attending Unity has had any impact on the racial composition of the District's student population. We therefore deny the District's claims of improper racial imbalance.

We also reject the District's contention that approval of Unity's charter should be reversed because Unity's application did not show how it would comply with the Core Curriculum Content Standards and the Statewide Assessment Program. The over-all application clearly demonstrates the school's commitment to achieving the standards and to going beyond them. The District has not specified any deficiency in Unity's

curriculum, either as set forth in the application or as implemented. Hence, the District has not established any basis that would justify setting aside the approval granted by the Commissioner in this case to Unity's educational program.

We also reject the District's contention that the presence of alcoholic beverages on this site under the particular circumstances that have been presented here renders the site unsuitable for educational purposes. However, given the presence of a social club on the premises in which alcoholic beverages are stored and served, we direct that adults who are not associated with the school be permitted to be in the building in which the Charter School is housed only with specific authorization from the appropriate school personnel and under proper supervision therefrom.

We find, in addition, that there is no indication in the record that Unity's bathroom facilities conform with the requirements of N.J.A.C. 6:22-5.4(h)4i(4). Accordingly, we direct Unity to submit a revised alternate bathroom plan that is in full compliance with the requirements of N.J.A.C. 6:22-5.4(h)(4)ii and 6:22-5.4(h)4i(4) to the County Superintendent for review and approval. We further direct that such plan be implemented by the start of the 1999-2000 school year, and we instruct the County Superintendent to verify such implementation on the basis of an inspection of the facility.

In addition, we reject the District's argument that N.J.A.C. 6A:11-7.1(c) discriminates between resident and non-resident school districts by allowing non-resident districts to pay a charter school on a per pupil basis the lower of either the amount of its local levy or the local levy of the district of residence. We reject the District's contention that any resulting disparity between the amount it must pay as a resident district and that which a non-resident district will pay when one of its students

attends Unity is impermissible. We find that, in basing the obligations of resident and non-resident districts to support the educational costs of students attending charter schools on each district's expenditures for students in the district's schools, N.J.A.C. 6A:711-7.2(c) provides a proper and fair method for establishing the amount to be charged to each district to support those students attending a charter school.

By our decision today, after a careful review of the record as supplemented, we have resolved all of the issues raised by this appeal. On this basis, as set forth in this decision, we have determined that the approval granted by the Commissioner to Unity Charter School should not be set aside. However, in so doing, we stress that the Charter School must comply with our directives as set forth above.

We do not retain jurisdiction.

Donald C. Addison, Jr. opposed.

Jean D. Alexander opposed.

July 7, 1999

Date of mailing ______________________