

SB # 3-03

IN THE MATTER OF THE GRANT OF :
THE CHARTER SCHOOL APPLICATION : STATE BOARD OF EDUCATION
OF THE JERSEY SHORE CHARTER : DECISION
SCHOOL, MONMOUTH COUNTY. :

Decided by the Commissioner of Education, January 15, 2003

Decision on motion by the State Board of Education, May 7, 2003

Decision on motion by the State Board of Education, June 4, 2003

Decision on motion by the State Board of Education, July 2, 2003

Decision on motion by the State Board of Education, November 5, 2003

For the Appellants, Wilentz, Goldman & Spitzer (Viola S. Lordi, Esq., of
Counsel)

For the Respondent, McCarter & English, LLP (David C. Apy, Esq., of
Counsel)

For the Intervenor, McOmber & McOmber (R. Armen McOmber, Esq., of
Counsel)

For the Participant Commissioner of Education, Kathleen Asher, Deputy
Attorney General (Peter C. Harvey, Attorney General of New
Jersey)

By letter dated January 15, 2003, the Commissioner of Education granted contingent approval to the application submitted by the Jersey Shore 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. The Charter School's application indicated that during its first year,

the school would include fifth, sixth, and seventh grades and that it would add an eighth grade in its second year of operation.

On February 14, 2003, the Boards of Education of West Long Branch, Eatontown and Oceanport filed an appeal to the State Board of Education challenging the Commissioner's decision.

On May 7, 2003, the State Board granted a motion to participate filed on behalf of the Commissioner, and, on July 2, 2003, it granted intervenor status to the Board of Education of the City of Long Branch.

On June 4, 2003, the State Board granted a motion filed by the Boards of Education of West Long Branch, Eatontown and Oceanport to supplement the record with materials relating to the Charter School's ability to accommodate students with special needs.

On July 22, 2003, the Oceanport Board withdrew its appeal.

On July 30, 2003, the Board of Education of the City of Long Branch filed a motion seeking to supplement the record with the affidavits of Joseph M. Ferraina, Superintendent of Schools for Long Branch, and Carmina Rodriguez-Villa, the Whole School Reform Facilitator for Long Branch. The Long Branch Board argued that the motion should be granted because the affidavits contained information that was material to the issues on appeal but which were not in the record because Long Branch had not been afforded the opportunity to respond to the Charter School's application submitted in 2002 since it was not part of the Charter School's "region of residence." The Long Branch Board argued that the affidavits should be included because they demonstrated that the Charter School would have a negative and unlawful impact on the racial

balance of Long Branch's public schools and would hinder the ability of the Long Branch Board to provide a thorough and efficient education by diverting funding from the district.

On August 4, 2003, the Charter School filed a motion to dismiss the appeal in the matter or to place it in abeyance, contending that the issues being raised were hypothetical, moot, and/or not justiciable at that time because the Charter School had resolved on June 13, 2003 to take a planning year and, consequently, would not begin operating until 2004. The Charter School argued that as a result of the planning year, the record was unsettled and the enrollment figures would change in terms of the districts from which its students would be drawn.

On August 25, 2003, a Deputy Attorney General representing the Commissioner filed an answer to the Long Branch Board's motion to supplement the record. The Deputy Attorney General argued that the motion should be denied because the affidavits and accompanying documents were outside the scope of what was before the Commissioner when he approved the Charter School's application and that no evidence had been provided to indicate that the Commissioner had failed to properly consider the entire record when he determined to grant the charter.

On August 28, 2003, a letter brief was filed on behalf of the appellants West Long Branch Board and Eatontown Board. The appellants opposed the Charter School's motion to dismiss the appeal or place it in abeyance, arguing that the Charter School had demonstrated its inability to meet the needs of special education students and that this alone warranted further review before it was given final approval by the Commissioner.

On August 28, 2003, the Deputy Attorney General representing the Commissioner filed a letter stating that the Commissioner did not oppose the Charter School's motion to dismiss.

On September 4, 2003, the Long Branch Board filed its answer to the Charter School's motion. The Long Branch Board alleged that the Charter School had intentionally not included Long Branch in its "region of residence" so as to prevent the Long Branch Board from responding to the School's 2002 application, but that it was actively recruiting students from Long Branch. The Long Branch Board contended that not only would funding be diverted from the district, but, because a majority of the students from Long Branch who were enrolling in the Charter School were white, the racial balance in the district's schools would be negatively affected. The Long Branch Board maintained that the Charter School had demonstrated its intention to continue recruiting heavily from Long Branch and that there was nothing to suggest that the Charter School would alter its recruitment practices or that the enrollment figures would change as a result of the planning year. Under these circumstances, the Long Branch Board urged the State Board to consider the critical issues raised by the appellants and the Long Branch Board before the Charter School opened.

On November 5, 2003, the State Board of Education denied the Charter School's motion to dismiss or to place this matter in abeyance, finding that the appeal clearly raised concerns of such character that they had to be addressed before the proposed school could become operational. In its decision of November 5, the State Board also granted the Long Branch Board's motion to supplement the record with affidavits and documents pertaining to its claims that the Charter School would have an unlawful

negative impact on the racial balance of the district's schools and would severely hinder the Long Branch Board's ability to provide a thorough and efficient education by diverting funding from the district.

Following the State Board's November 5 decision, all of the parties filed briefs addressing the merits of the matter.

In its brief, the West Long Branch and Eatontown Boards challenge the adequacy of the Charter School's application. They argue that the Commissioner should not have approved the application because the Charter School had not remediated educational items that had been judged to be poor by the Department of Education's reviewers. The appellant Boards further argue that the Charter School's application shows an over-reliance on laptop computers which raises serious educational concerns and that there is a striking similarity between this application and that of the Great Falls Charter Schools which renders the grant of a charter improper. The appellant Boards also contend that the special education program being offered by the Charter School is inadequate.

The major thrust of the Intervenor Long Branch Board's challenge is that the Charter School will have an impact on the racial balance of the student population of the Long Branch School District that is impermissible under New Jersey law. It points to the enrollment data submitted in May and June of 2003, before the Charter School decided to take a planning year, to demonstrate the impact that the Charter School will have on the racial composition of its student population. The Board asserts that the need to maintain its current racial balance is heightened because it enrolls one of the most diverse student bodies in New Jersey and is under a federal desegregation mandate.

The Long Branch Board argues that the Commissioner has an affirmative obligation to consider the segregative effect that the Charter School will have and that he is required to take all action necessary to remedy any segregation it causes. It contends that the Commissioner has not fulfilled his obligation in this instance because he granted the charter despite the fact that, if the Charter School had designated its “region of residence” on its application as including only West Long Branch, Eatontown, and Oceanport, the spring enrollment data showed that more students from Long Branch would be attending the Charter School than from any of these districts. Long Branch maintains that this fact, combined with the facts that Long Branch had been included in the Charter School’s district of residence in its previous applications and that the facility originally proposed by the Charter School on its current application was in Long Branch, should have alerted the Commissioner that the Charter School was misrepresenting its “region of residence.”

The Long Branch Board also asserts that it will lose approximately \$380,000 per year that will go to the Charter School to support the enrollment of 38 of its students and another \$28,000 for their transportation. The Long Branch Board argues that since it is an Abbott district with a large percentage of minority and special needs students, this loss will seriously undermine its ability to provide a thorough and efficient education.

In response to the West Long Branch and Eatontown Boards, the Charter School argues that the Department of Education’s review process was thorough and comprehensive and included not only review of the application but also the revisions made by the Charter School based on comments by Department of Education staff and the final in-depth structured interview. It contends that given this review and the record

in the matter, the Commissioner's decision was not arbitrary or capricious and that there is no legal basis for the State Board to reverse the Commissioner's determination to issue the charter. It further argues that none of the appellant Boards' other arguments have any merit and that the Charter School recognizes that it has a moral and legal obligation to provide for the special education needs of any student enrolled.

In response to the Long Branch Board's arguments, the Charter School argues that the record before the State Board is devoid of facts that would permit any analysis of the racial impact of the Charter School on Long Branch's middle schools. In this respect, the Charter School points to N.J.A.C. 6A:11-2.2(c), which, because the School had taken a planning year, changed the date by which it was required to provide the Commissioner with its enrollment data from May 15, 2003 to January 15, 2004. Since the Commissioner did not have this data when he granted the charter, he had not been provided the opportunity to conduct an assessment of any potential segregative effect. The Charter School also contends that, even if there is a material impact on one or more of Long Branch's middle schools, denial of final approval of its charter is not the proper remedy. Rather, it argues, Long Branch should transfer children from one school to another to alleviate any imbalance or that the Commissioner might establish limits on the number of children from Long Branch who could be enrolled in the Charter School.

The Charter School also argues that the grant of its charter should be sustained because Long Branch had not made any showing that it would not be able to provide a thorough and efficient education due to the fiscal loss it would suffer as a result of the enrollment of students from Long Branch in the Charter School. Finally, the Charter

School contests Long Branch's contention that the Charter School intentionally misrepresented its "region of residence" in its 2002 application by not including Long Branch in that region. In this respect, the Charter School argues that it could not have done so because the founder from Long Branch who had been involved when the Charter School applied for a charter in 2000 withdrew after the Commissioner rejected that application. Therefore, because N.J.A.C. 6A:11-1.2 limits a "region of residence" to those districts from which there is a founder who is a teaching staff member or parent, it could not have included Long Branch in its "region of residence" on its 2002 application.

The Deputy Attorney General representing the Commissioner argues that the Commissioner's determination approving the Charter School's application should be sustained. She maintains that the review process was appropriate and that the Commissioner was not required to defer to the findings of the reviewers. She further argues that Long Branch has failed to demonstrate that the Charter School will have a negative racial impact on the district, contending that any data regarding the students enrolled in the Charter School for the 2003-04 school year is no longer accurate since the Charter School subsequently decided to take a planning year. Because of that decision, the data pertaining to the Charter School's enrollment is not available until January 15, 2004. Moreover, she contends, the Commissioner is not obligated to assess the racial impact on each individual school building, but rather is required only to assess whether or not the Charter School is seeking a cross section of the community's school age population. Commissioner's brief, at 19. The Deputy Attorney General further contends that since the Commissioner will do so once the data is received after January 15, 2004, and because Long Branch has failed to prove that the Charter School

will have a negative racial impact on the district, its appeal should be dismissed. She also argues that the Commissioner was under no obligation to consider the fiscal impact on Long Branch absent a showing that Long Branch would not be able to provide a thorough and efficient education and that the Charter School's decision not to include Long Branch in its "region of residence" was within its discretion. She asserts that there was nothing to require the Charter School to include Long Branch in its "region of residence" and no legal prohibition against having more students enrolled from a school district outside that region so long as it gives preference to students from the districts that are included.

Initially, we reject the arguments of the West Long Branch and Eatontown Boards that we should reverse the Commissioner's determination to grant contingent approval to the Charter School because of deficiencies reflected in its application. Although some of the Department's reviewers judged certain aspects of the application to be "poor," others judged the application to be adequate, strong or exemplary in the same areas. The reviewers did not uniformly judge the application to be poor, and the addendum and in-depth interview process apparently addressed any concerns. Under these circumstances, we conclude that the Commissioner's determination to grant contingent approval to the Charter School was not arbitrary or capricious.

Nor do we find Long Branch's arguments relating to the Charter School's fiscal impact to be convincing. While Long Branch's status as an Abbott district requires careful attention to the adequacy of its budget, Long Branch has not provided any concrete examples of how the Charter School will impact its budget programmatically. Thus, it has not made an initial showing that the Charter School "would impede, or

prevent, the delivery of a thorough and efficient education in the district.” In re Grant of Charter School Appl., 164 N.J. 316, 334 (2000).

Similarly, West Long Branch and Eatontown have provided no evidence to counter the Commissioner’s approval of the Charter School’s program with respect to special education students. While there were some concerns raised in this area by some of the reviewers, these concerns were addressed during the Department’s addendum and in-depth interview process. However, the comments reported in the affidavits are troublesome, and, in view of the importance we place on insuring that special needs children are afforded equal educational opportunities throughout the public school system, we direct the Commissioner to carefully monitor the Charter School in the event that it becomes operational for compliance with that mandate both with respect to its student recruitment and the programs and services it provides to the students it enrolls.

Even more troublesome are the questions Long Branch has raised as to whether granting final approval to the Jersey Shore Charter School is consistent with New Jersey’s constitutionally-derived policy and the decisional law developed thereunder with respect to racial balance in our public schools. The New Jersey Supreme Court has made it clear that 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.” In re Grant of Charter School Appl., supra at 328. While the Court declined to find the Charter School Act facially unconstitutional because it did not “expressly state in detail how the Commissioner is to fill that constitutional obligation,” id. at 329, it left no doubt that the Commissioner’s

responsibilities in this context extend beyond determining whether a charter school is seeking a cross section of the community's school age population. See Commissioner's brief, at 19.

As expressed by the New Jersey Supreme Court:

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....the Commissioner [must] be prepared to act if the de facto effect of a charter school were to affect a racial balance precariously maintained in a charter school's district of residence. The Commissioner's obligation to oversee the promotion of racial balance in our public schools to ensure that public school students are not subjected to segregation includes any type of school within the rubric of the public school designation.

In re Grant of Charter School Appl., supra at 328.

The Court made it equally clear that the Commissioner's obligation to assess the racial impact that a charter school applicant would have is not limited to the impact on the district of residence. As stated by the Court:

...the Commissioner's obligation to prevent segregation in the public schools must inform his review of an application to approve a charter school, and if segregation would occur the Commissioner must use the full panoply of his powers to avoid that result. The statutory authority to approve a charter school does not affect the Commissioner's constitutional obligation to prevent segregation in the public schools. Similarly, there is a need to consider the impact a charter school has on other school districts if school districts outside the district of residence provide pupils to fill charter school openings not filled by pupils from within the charter school's district of residence.

Id. at 329-330 (emphasis added).

The Court also stressed that to be timely addressed, assessment of the racial impact on the district of residence cannot wait until the charter school has been approved and is already taking students from the public schools of the district. Id. at 330. The Court further found that the Commissioner must assess whether there is a segregative effect on any other district sending pupils to an approved charter school once the school is operating. Id. The Court acknowledged that the State Board's rule proposal to ensure racial balance under the Charter School Act was then at the preliminary stage, but it expressly stated that it trusted that the final version would provide the Commissioner with the pertinent pupil information early enough in the charter school approval process to facilitate the review that he was required to perform. Id.

We find that the circumstances that have been presented here require that the Commissioner fulfill his mandated responsibility to assess the racial impact of the Jersey Shore Charter School on the Long Branch School District before he can grant it final approval and permit it to become operational. His constitutional obligation to insure racial balance in New Jersey's public school demands no less. In this respect, we stress that although the significance of enrollment data submitted by the Charter School in May 2003 was diminished by the School's decision in August 2003 to take a planning year, the data raises serious concerns. In this context, there is no need to examine the process by which the Charter School determined its "region of residence." The fact of the matter is that whether or not Long Branch is within that designated region, the Charter School is anticipating that a significant number of students from Long Branch will be enrolling and that, if the school had opened in September 2003 as proposed in

its application, most of those students would have been white. Given the racial composition of the student population of Long Branch and the Long Branch Board's representation that it is under a federal desegregation order, we cannot ignore that fact. Since the Charter School has presumably provided the updated enrollment data which was due on January 15, 2004, we would be abrogating our responsibility if we did not insure that final approval of the Charter School did not result in a significant racial impact on Long Branch's student population.

We therefore remand this matter to the Commissioner with the direction that he supplement the record with the enrollment data submitted on January 15, 2004, and the federal desegregation order referred to by the Long Branch Board. We further direct that he determine whether, under all of the circumstances, the racial composition of the student population that will be attending the Charter School, if it becomes operational in September 2004, will be such as to cause a significant negative impact on the student population of Long Branch. See Board of Educ. of Borough of Englewood Cliffs v. Board of Educ. of Englewood, 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). We recognize that in the event of such an impact, there are various measures that could reasonably be taken, including denying final approval to the Charter School, to avoid any segregative effect. However, it would not be reasonable to expect the Long Branch Board to redistrict its middle school population solely for the purpose of being able to grant final approval to the Charter School.

Under the circumstances, we direct that any further proceedings, including any hearings necessary to resolve contested issues of material facts, be conducted as expeditiously as possible. We do not retain jurisdiction.

March 3, 2004

Date of mailing _____