

OAL DKT. NO. EDU 1797-02 (EDU 7310-01 ON REMAND)
AGENCY DKT. NO. 157-6/01

BOARD OF EDUCATION OF THE MORRIS :	
SCHOOL DISTRICT, MORRIS COUNTY,	
	:
PETITIONER,	
	:
V.	COMMISSIONER OF EDUCATION
	:
UNITY CHARTER SCHOOL, MORRIS	DECISION ON REMAND
COUNTY,	
	:
RESPONDENT.	
_____	:
	:

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL), recommending that the Commissioner approve a previously rejected Consent Order in light of the briefs and stipulation of facts submitted by the parties on remand, have been reviewed.¹

Upon such review, the Commissioner is once again compelled to reject the proposed Order, and, further, to dismiss the Petition of Appeal.

In his prior decision, the Commissioner had commended the parties' cooperative efforts toward seeking increased student diversity in the charter school's student population, but was unable to accept the parties' proposed Order because it established a system employing race as a paramount factor in student admissions notwithstanding an absence of proofs that the school did not reflect a racial cross-section of the community's school-age population, *N.J.S.A.* 18A:36A-8(e), or that the school's existence created a negative impact on the racial

¹ The record also includes a supplemental Certification of William Feldman, brought to the record by the parties' mutual request subsequent to issuance of the Initial Decision. The certification describes both the actual results of the lottery conducted on January 16, 2003, and the results as they would have been had the proposed Consent Order been in effect at the time of the drawing.

composition of District public schools. The Commissioner further observed that the parties had failed to identify the cause(s) of the school's enrollment disparity, leaving him unable to determine whether the proposed remedy was narrowly tailored to address such cause(s).² Consequently, the Commissioner remanded the matter to the OAL for development of a factual record, with legal analysis as necessary, so as to permit him to make an informed determination on the appropriateness of any proposed agreement, or, alternatively, for proceedings on the merits if a conforming settlement could not be reached.³

In response to the Commissioner's directive, the parties submitted to the record on remand before the Administrative Law Judge (ALJ) a Stipulation of Facts setting forth the respective enrollments, broken down by percentage into "white" and "minority" groupings, of the Morris School District (District), and of the Unity Charter School (Unity), as well as the number of District students at Unity for 1997-98 through 2002-03. Additionally, the District submitted a letter brief in support of the Consent Order together with a Certification of Dr. Dennis Clancy with exhibits, while Unity submitted a letter brief and Certification of Susan Lausell, to which the District replied with additional statistics further breaking down the previously stipulated "minority" numbers into "Black" and "National Origin" categories.

In his Initial Decision on Remand, the ALJ recommended approval of the original Consent Order for reasons reproduced in their entirety below:

During the penancy [*sic*] of the remand the parties settled their differences in accordance with the instructions contained in the Commissioner's decision of January 11, 2002.

²The Commissioner noted by way of example that disparities caused by insufficient outreach would likely be addressed through remedies quite different from those addressing inability to retain minority students once admitted.

³ The Commissioner additionally clarified that an approvable Consent Order could not include a provision for indefinite extension by the parties without assessment of the agreement's effectiveness, and that any proposed Order concerning recruitment, enrollment or wait-listing of students was tantamount to an application for charter amendment, *N.J.A.C.* 6A:11-2.6, so that any Order ultimately approved by the Commissioner would be deemed to have amended Unity's charter. On this point, see Note 5 below.

Having reviewed the stipulated facts, certifications submitted, and exhibits attached to both I FIND (a) that they are consistent with law, (b) that they fully disclose [*sic*] of all of the issues in controversy and (c) that they were voluntarily entered into by the parties.

I note further that the stipulations [*sic*] of facts was accompanied by a verbal representation from both sides at the time of a concluding conference that no further factual findings were necessary from the Office of Administrative Law and that in the opinion of the petitioner and respondent the proposed stipulation of facts completely support [*sic*] the original consent order submitted.

(Initial Decision at 2)

Thus, notwithstanding the Commissioner's prior directive, the Initial Decision offers neither analysis nor explication as to why the parties' proposed order is acceptable under the facts pled. This is particularly troublesome because the arguments and statistical analyses presented by the parties on remand reiterate or, at best, slightly elaborate, facts and positions already set forth in the pleadings and accompanying documents filed at the initiation of this matter in 2001, and because the Consent Order provides for precisely the relief requested by the District in its petition alleging violations of law, a request to which Unity is clearly acquiescing solely because it views increased student diversity as a desirable goal, not because it in any way credits the District's allegations against it or the District's interpretation of controlling law. Thus, there has been not even a facial showing, in satisfaction of the Commissioner's specific directive, that a remedy is warranted because Unity does not reflect a racial cross-section of "the community's school age population," *N.J.S.A.* 18A:36A-8(e), or its existence creates a negative impact on the racial composition of the student body in the District. Indeed, the Initial Decision does nothing more than memorialize the parties' own agreement that their originally-submitted Consent Order was adequately supported for purposes of acceptance by the Commissioner.

It is, therefore, necessary for the Commissioner here to review both the provisions of the proposed settlement and the positions of the parties with respect to it.

The proposed Order establishes an admissions system providing for Unity students to be selected by lottery from separate White, Black and National Origin tiers, with new students to be selected, according to the number of seats available, from the tier(s) needed to bring the proportionate number of Unity students in each category to the same level as exists in the Morris School District; separate waiting lists are to be maintained for the purpose of filling, with an applicant from the proportionally lacking tier, any vacancy later created by a departing student.⁴ The Order would remain in effect for two years from the date of its approval by the Commissioner, but the parties may extend it “for an additional period of time by providing written notice of their mutual consent to the office of the New Jersey Commissioner of Education prior to the expiration of the original two years.” (Consent Order at 4)⁵

In support of the Order, the District alleges that Unity is not “racially balanced with its district of residence, the Morris School District***, in violation of the Charter School Program Act (CSPA) and the *State Guidelines on the Desegregation and Integration of Public Schools (Guidelines)*.” (Petition of Appeal at 2) It contends that *Jenkins v. the Township of Morris Sch. Dist. and the Bd. of Educ.*, 58 N.J. 483 (1971) and *In the Matter of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 N.J. 316 (2000), act to require Unity to achieve racial balance with the District pursuant to the *Guidelines*. (*Id.* at 5) The

⁴ In the submission referenced at Note 1 above, the parties represented that, had this system been in effect when Unity conducted its January 2003 lottery, all five minority applicants (of 13 total) would have been selected for Unity’s seven kindergarten vacancies instead of only one; both minority applicants (of 29 total) would have been selected for Unity’s five first-grade vacancies instead of none; and half the minority applicants (4 of 21 total) would have been selected for Unity’s two second-grade vacancies instead of none. Thus, under the current “blind” lottery, with 14 slots available, only one minority student was selected; whereas, if the proposed tiered system had been in effect, that number would have risen to nine.

⁵ The District objects to the Commissioner’s prior characterization of this language (see Note 3 above) as creating an agreement of potentially indefinite duration, claiming that it “actually provides for an initial two-year duration after which the parties must agree in writing to continue the terms of the Order and again obtain approval from the Commissioner of Education.” (District Brief at 4, 12) The Commissioner observes that the clause at issue provides solely for *notice* to the Commissioner of the *parties’* intention to continue the Order.

District further contends that Unity adversely impacts the District by accepting a large number of white students from the District while the percentage of Unity minority students is “much lower” than the minority population of the District, and that Unity’s sibling preference policy materially exacerbates the situation. (*Id.* at 6-7) As relief, the District seeks an order implementing a three-tiered lottery system, selection of minority students from a tiered waiting list, “possibly abolishing the sibling selection process” and any other relief the Commissioner deems “equitable and just to effectuate racial balancing under the *Guidelines*.” (*Id.* at 7) In support of its allegations of *de facto* segregation and its prayer for relief, the District offers the Certification of Dr. Dennis Clancy, describing the respective racial compositions of various grade levels in Unity as compared to those in the District, together with a proposed calculation of the appropriate balance for Unity under the *Guidelines* and a memorandum of law more fully setting out the District’s position. In its brief on remand, the District essentially reiterates these same arguments, additionally stressing its unique status as the only district in New Jersey expressly created to address racial imbalance (District’s Brief on Remand at 2, 5), and noting the Department’s response to the District’s comment on rules proposed in August 2002 by the State Board of Education to address racial balance in charter schools: “*To achieve the requisite racial balancing between the charter school and the district of residence, the Department will implement procedures consistent with the existing Guidelines.*” (emphasis in text) (*Id.* at 3, quoting 34 *N.J.R.* 3806(a))

In addition to denying the conclusions of law imbedded in the District’s petition, Unity counters that the charter school law does not require it to be in racial balance with the actual student enrollment of the District, and that the District has not made an adequate showing of adverse impact on the racial balancing of the District’s student population. (Answer to

Petition at 5 and *passim*) Unity's answer also incorporates a letter from the Vice President of the Board of Trustees, setting out Unity's position with regard to the allegations made by the District. In that letter, Unity contends that it has, as already demonstrated through prior litigation and required annual reports, "aggressively" attempted to recruit students from all segments of the Morristown and Morris Township communities; however, it also concedes that "its student body unfortunately does not adequately mirror the community in which it is located." Therefore, Unity does not oppose – indeed, it endorses – the District's request for a multi-tiered or weighted lottery to select students to fill charter school openings with the aim of attaining greater diversity. (Letter of David A. Bolson at 1) Unity further states:

Two additional points need to be clarified. First, MSD [Morris School District] has alleged in its Petition, on more than one occasion, that Unity has had an adverse impact upon racial balancing at MSD. However, the evidence provided by MSD proves the contrary. MSD cannot show how a school of 90 children, only 52 of whom are drawn from MSD, can adversely impact a school population of more than 4,000. According to Dr. Clancy's own certification, the racial composition of the K-8th grade student body at MSD is 58.91% white and 41.09% minority. Also, according to the statistics contained in the same certification, if Unity were to cease operations and all its MSD students returned to the various schools within MSD, the K-8th grade racial makeup at MSD would only go to 59.24% white and 40.76% minority – less than a 0.4% change. Clearly, Unity has virtually no impact on MSD's racial balance.

Secondly, since, as Dr. Clancy describes, MSD has the means and mechanism to balance its schools, it will never be "out of balance" with itself. MSD rues, however, that MSD is out of balance with Unity. It is the position of Unity that it has no legal or moral obligation to be in racial balance with MSD. We believe that it is the legal and moral obligation of Unity to be in racial balance with the community in which we reside. This is an important distinction. First of all, although MSD applicants get preference in admission, Unity receives numerous applicants from out-of-district students and is required to accept them if space is available. Currently, approximately 45% of Unity students are from out-of-district. Additionally, Unity is attracting students who were not even part of the public school system. Currently, approximately 10% of Unity students were home-schooled prior to attending Unity and an additional 10% came to Unity from private schools. There is no rational argument to be made, nor reasonable formula to be concocted, that would attain "balance" with MSD under these circumstances. (Letter of David A. Bolson at 2)

Unity reiterates and elaborates these arguments in its brief on remand, additionally contesting the District's interpretation of *Englewood* and the accuracy of its calculations based on the *Guidelines*, since those calculations, even presuming for purposes of settlement proceedings that the *Guidelines* apply to Unity, do not fully address all the categories of students and grade-level organizations required in their application.⁶ (Unity Brief on Remand at 3-5) Unity concludes by noting that although it and the District “may disagree on the law, the two sides do agree on one thing: that the representation of minorities at Unity should increase” and that “entry of the Consent Order will help make that goal a reality.” (*Id.* at 5)

Thus, in the District's case because it seeks a remedy for alleged violations of law and in Unity's case because it would like to have more minority enrollees than the existing “blind” lottery has thus far generated, the parties have agreed to an admissions mechanism based on predetermined ratios, with the assignment of specified numbers of seats to students of corresponding racial categories.

However, notwithstanding the motivation of the parties and their commendable cooperation in attempting to achieve their goal, the Commissioner cannot issue an Order granting absolute preference to certain charter school applicants solely on the basis of race or national origin merely because the parties agree he should do so. Although it is beyond dispute that the State has a compelling interest in preventing segregation, and that maintenance of diverse student populations is critical to provision of a thorough and efficient system of public education, it is also true that, as a general proposition, conditioning student admission *exclusively* on membership in a particular racial or ethnic group, as the proposed lottery does, is unlikely to withstand legal scrutiny except, possibly, under the narrowest and most compelling of

⁶ It was in response to this objection that the District subsequently submitted the more refined breakdown of student enrollments referenced at page 5 above.

circumstances; certainly, such conditioning cannot be adopted simply as a means of increasing student diversity, particularly when it takes the form of a “quota” system of a type already found impermissible in various jurisdictions based upon federal law.⁷ Accordingly, the Commissioner must look to the arguments and proofs presented in support of the District’s claim that Unity is in violation of law prohibiting segregation.

The District’s claim rests on two prongs, one pertaining to the composition of Unity itself and the other to its impact on the District. As expressed by the State Board in a prior proceeding challenging the Commissioner’s initial approval of Unity’s charter:

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. (*In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County*, State Board decision of July 7, 1999, Slip Opinion at 13)

On the composition of Unity’s student population, the District relies on two contentions, the first relating to the role of the *Guidelines*, and the second to the population on which the calculations therein are to be based. Specifically, the District contends that the New Jersey Supreme Court, in its decision in *Englewood, supra*, held the CSPA “[to require] that a charter school’s admission policy ‘seek a pupil population similar to the pupil population that the *Guidelines* seek for New Jersey school districts,’” so that, when the *Guidelines* are applied to Unity, Unity’s percentages of white/minority/national origin students must be comparable to

⁷ Black, Watt Lesley, Jr., Ph.D. and Frank R. Kemerer, Ph.D., “Legally Defensible Approaches to Racial Diversity in Charter School Enrollments,” *West’s Education Law Reporter*, Vol. 172, No.2, February 27, 2003, 575-609. In light of the State Board’s decision in *IMO Final Grant, infra*, the Commissioner is unpersuaded by the District’s contention that existence of a desegregation order for the District renders inapposite any ruling where such an order was not in place. (District’s Brief at 3-5)

those of the public schools of the District (District’s Brief at 6); in other words, if Unity’s student percentages do not “match” the *Guidelines*, the school is, by definition, segregated. (District’s Brief on Remand at 11) A reading of the cited passage in context, however, yields an altogether different result. At the conclusion of a discussion reviewing New Jersey’s long and vigorous State policy against discrimination and segregation, the Court pointed to the *Guidelines* as the State’s model for ensuring consistency between the percentages for various racial groups within a district's overall pupil population and the percentages for the same pupil groups in a district’s various schools, so as to promote learning environments in which students are educated among a mix of children reflective of the overall district composition for that organizational level. Turning to charter schools, the Court opined that:

With charter schools, the Legislature *sought to achieve a comparable result*. Balancing the desire to prevent discrimination on the basis of race in admission policies with a concomitant desire to prevent racial segregation in the charter school, the Act provides:

The 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-8e.]

As a result of the comments elicited from the joint hearing,***[the language cited quoted above] was added, reflecting the importance that the legislators placed on the need to maintain racial balance in the charter schools. *In using, as the pertinent reference, “a cross section of the community's school age population including racial and academic factors,” the Act requires that a charter school's admission policy seek a pupil population similar to the pupil population that the Guidelines seek for New Jersey's school districts.* We see nothing in the Act or its history that is discordant with the State's policy of maintaining nonsegregated public schools in our communities.*** (emphasis supplied) (*Englewood, supra*, at 325-27)

Thus, the Court found *not* that the percentage calculations set out in the *Guidelines* control charter school enrollments based on comparison to enrollments at the school’s district of residence, as claimed by the District, but that the CSPA and the *Guidelines* are analogous in

purpose, both seeking for each individual school a broad representation of students from the larger community; in other words, that the CSPA was specifically and successfully structured to accomplish for charter schools what the *Guidelines* accomplish for public school districts.

On this point, the Court's holding in *Englewood* is entirely consistent with the prior holding of the State Board of Education, affirmed by the Appellate Division of Superior Court, in a related matter involving the very parties and issues appearing herein. In its July 7, 1999 decision entitled *In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County*, the State Board of Education held:

In [finding that the District failed to establish the validity of its claims of racial imbalance], *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 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. (emphasis supplied) (Slip Opinion at 14-15)

That the Appellate Division shared the understanding of *Englewood* set forth by the Commissioner above is indicated by its affirmance, in a ruling purposely delayed until the Supreme Court had ruled in *Englewood, supra*, of the State Board expressly “for the reasons stated in *Englewood* decided on June 28, 2000 and the State Board’s 22-page opinion of July 7, 1999.” *In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County*, Superior Court, Appellate Division, A-6212-98T1, Slip Opinion at 3. Therefore, at this juncture, there can be no question the District’s interpretation of *Englewood*, on which its claim of racial imbalance within Unity rests, is unsustainable. The specific formulas of the *Guidelines* do not apply in the present circumstance,⁸ and even to the extent that the *Guidelines* may be viewed as a general gauge of desirable mixes of children for particular types of communities, the student population for purposes of comparison with a charter school is not the public school enrollment of the district of residence, but “the community’s school age population,” a group for which no comparison can here be made, since the present record is virtually devoid of information about it.

Nor is the tenuousness of the District’s position altered by its claim that, in recently adopting amendments to the regulations governing charter schools, the State Board of Education endorsed the District’s view by stating, in response to comments submitted by the District, that it would “*implement procedures consistent with the existing Guidelines*” in order to “*achieve the requisite racial balancing between the charter school and the district of residence.*” (emphasis in text) (District’s Brief on Remand at 3, Certification of Dr. Dennis Clancy at 5-6)

⁸ Also worth noting in this context is that the Guidelines (at 14) prohibit creating or sustaining other discrimination in efforts to correct imbalanced enrollments, and that, had the parties’ proposed lottery been carried out, as set forth in their own submission (see Note 4 above), no non-minority student would even have been *eligible* to enter the *drawing* for a second-grade seat, in clear contravention of *N.J.S.A.* 18A:38-5.1 (no child to be excluded from any school on basis of race).

The referenced exchange reads in its entirety as follows:

3. COMMENT: At proposed N.J.A.C. 6A:11-4.4, the commenter recommends that the rule be amended to provide a procedure whereby racial balancing between the charter school and the district of residence is to be considered and achieved under the existing New Jersey State Guidelines on the Desegregation and Integration of Public Schools (Guidelines). (3) [Identifying commenter as Mr. John G. Geppert, Jr., Attorney, Wiley, Malehorn and Sirota]

RESPONSE: The Department acknowledges the commenter's concern. In accordance with N.J.A.C. 6A:11-2.2(c), the Commissioner will assess the composition of a charter school and the segregative effect that the loss of the students may have on its district of residence. To achieve the requisite racial balancing between the charter school and the district of residence, the Department will implement procedures consistent with the existing Guidelines. (34 N.J. Reg. 3806(a))

Contrary to the District's representation, in this response, the State Board is not agreeing that the *Guidelines* will be specifically applied to conform a charter school's student enrollment to the racial balance of its district of residence. Rather, the State Board "acknowledges the commenter's concern" by reiterating the principles of *Englewood* with respect to the Commissioner's obligation to ensure that a charter school is not itself segregated and that it does not have a segregative effect on its district of residence,⁹ and, in that context, assuring that racial balance assessments will be undertaken "consistent with" the *Guidelines*, that is, with a recognition of the common purpose of the CSPA and the *Guidelines* as held by the *Englewood* Court.

The first prong of the District's attack on Unity, therefore, must fail. The CSPA addresses, in a way that has withstood scrutiny by New Jersey's highest Court, the equally important but potentially competing interests of racial balance and neutrality in admissions by requiring that a charter school solicit an applicant pool reflective of a cross-section of the larger community, but then finally select its students from that pool on a random basis; that is, by

⁹ See discussion at 16-17 below.

creating, to the fullest extent possible, a diverse applicant pool from which each applicant then has an equal opportunity to compete for the limited number of seats available:

A charter school shall be open to all students on a space available basis and shall not discriminate in its admission policies or practices on the basis of intellectual or athletic ability, measures of achievement or aptitude, status as a handicapped person, 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)

If 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.The 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-8a and 36A-8e)

Just as the law distinguishes the applicant pool from the results of the selection process, with diversity attained through the former and not the latter, so it is by the former, evidenced by the charter school's recruiting methods, that compliance with the law must in the first instance be gauged. As stated by the *Englewood* Court:

The Department's Guidelines require continuing assessment of a school district's efforts to maintain racial balance among its schools. Continuing assessment of the charter school's pupil population and impact on the district of residence must also occur. Obviously, *if a charter school were to recruit systematically only pupils of a particular race or national origin, the Commissioner would be obliged to stop that activity* and, if necessary, to revoke the approval of a charter school engaging in such tactics. (emphasis supplied) (*Englewood, supra*, at 328)

In the present matter, there is neither evidence nor allegation that Unity is *not* seeking a diverse, representative applicant pool (indeed, quite the contrary); nor is there evidence or allegation that Unity is not retaining minority students once admitted.

Additionally, reported experience has shown that the method of combining a “blind” lottery with a diverse applicant pool may not necessarily produce the mix of students desired in a particular charter school, but neither is it likely to result in a segregated school.

(Black and Kemerer at 600, Note 7 *supra*) That experience appears to have been borne out by Unity. Since the first year of its operation in 1998-99, Unity has maintained a white/minority balance of about 82-85% white to about 15-18% minority:

<u>Year</u>	<u>White</u>	<u>Minority</u>
1998-1999	86.11% - 88.5%	11.5% - 13.89%
1999-2000	79%	21%
2000-2001	81% - 83.3%	16.67% - 19%
2001-2002	84.4%	15.6%
2002-2003	82.3%	17.7%

(Stipulation of Facts at 4)

This balance, while it may not reflect the level of diversity ideally sought by the parties, is clearly sufficient to ensure that Unity students are not attending an unlawfully segregated school, and that they are in a position to enjoy the benefits of a diverse student body.

Turning to the second prong of the District's claim, the question of negative impact on the racial composition of the student population of the District, the Court has clearly stated:

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 Department's Guidelines require continuing assessment of a school district's efforts to maintain racial balance among its schools. Continuing assessment of the charter school's***impact on the district of residence must also occur. Obviously, ***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 pupils are not subjected to segregation includes any type of school within the rubric of the public school designation. (emphasis supplied) (*Englewood, supra*, at 328)

Similarly, the State Board has held:

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.

(In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County, supra, Slip Opinion at 15, citations omitted)

Thus, there is no question here of whether the Commissioner has the obligation or authority to act in the face of demonstrated segregation, only the question of whether the present record supports the District's claim.

In this regard, as it did with its challenge based on application of the *Guidelines*, the District previously made its claim to the State Board in the context of challenging the Commissioner's initial approval of Unity's charter. On that occasion, the State Board held:

***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.

We recognize that the parties are not in agreement as to the proportion of Unity 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 opportunity that we have afforded the District in these proceedings to pursue its claims and to provide adequate support for them,***we deny its claims of improper racial imbalance.

[T]here 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.

¹³The 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.

(In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County, supra, Slip Opinion at 13-15, citations omitted)

The Appellate Division, in the decision referenced at pages 13-14 above, upheld the State Board's opinion without prejudice to the District's ability to make a "new presentation within the Guidelines of *Englewood*" so as to provide a "more suitable vehicle for effective consideration of [its] claims." *In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County, supra*, Slip Opinion at 3. For the District to prevail herein, then, it must demonstrate that the *de facto* effect of Unity is to affect a racial balance precariously maintained in the District. (*Englewood, supra*, at 328)

The evidence submitted by the District in support of its claim is fully incorporated into the Petition of Appeal, the pertinent portions of which read as follows:

5. In order to demonstrate a continuing *de facto* segregation effect, the District herein provides information on the racial composition of Unity and the MSD [the District] from the time Unity opened in 1998 to the present.

6. Attached as Exhibit B to the Certification of Dr. Dennis Clancy is a true copy of the enrollment data for Unity and the MSD in the 1998-1999 school year. In the 1998-99 school year, Unity conducted its registration for the first time. Many of the 35 students that left the MSD to attend Unity came from the Hillcrest-Hamilton school attendance area as set forth below. Seven of the eight kindergarten students were white. As a result, the kindergarten class at Hillcrest School, from which a large amount of MSD students were removed to enroll in Unity, was nearly a fifty-fifty split of white and minority students. *See Exhibit B, charts #2 and #3.* Five of the seven first grade students who went to Unity were white. Of the four second graders, three students were white and one was minority. The only third grade student that went to Unity was white. Three fourth grade students attended Unity and all were white. Of the two fifth grade students attending Unity, one was white and one was minority. All ten middle school students were white.

7. District-wide for the 1998-99 school year, the Unity Charter School enrolled 35 MSD students of which 32 or 91% were white. The minority population of District students at Unity was 9%, with only 3% African-American and 6% National Origin. *See Exhibit B to Certification of Dr. Dennis Clancy, chart #1.* These percentages are in stark contrast to those within the District for

grades K-8, which was approximately 59% White, 20% African-American, and 21% National Origin. See Exhibit B to Certification of Dr. Dennis Clancy, chart #2.

8. Recognizing shifts in residential demographics over the past three decades, the District established and opened a seventh school, a Multiage Magnet School, and implemented intra-district choice for the 1999-2000 school year. This program initiative was designed to create additional space in each of the six neighborhood schools for a growing student population and increase flexibility for the assignment of students to balance enrollment composition.

9. For kindergarten through second grade in the 1999-2000 school year, the District was comprised of 55% white students, 17% African-American students and 28% National Origin students. See Exhibit B to Certification of Dr. Dennis Clancy. Unity's enrollment consisted of 79% white students, and 21% minority students, which was in sharp contrast to the District's percentages. See Exhibit B to Certification of Dr. Dennis Clancy, chart #4. Of the eight kindergarten students who were enrolled in Unity from the District in the 1999-2000 school year, all eight were white and six came from Hillcrest. Unity enrolled seven first grade MSD students, 86% of whom were white. Unity enrolled four second grade students from the District, three of whom were white. There was one MSD third grader enrolled in Unity who was white. All three fourth grade students that went to Unity were white. Two fifth graders from MSD went to Unity, one was white and one minority. For the sixth grade, nine MSD students were enrolled in Unity and all of them were white. Only one MSD seventh grader enrolled in Unity and was white.

10. In the 2000-2001 school year, the ethnic composition of the students Districtwide in the grades K-2 was 55% white and 45% minority. In addition, the District-wide composition in grades 3-5 the racial composition is 56% white and 44% minority. See Exhibit C to Certification of Dr. Dennis Clancy. Overall, the racial composition of the District is approximately 60% white and 40% minority. During the same year, Unity enrolled 90 students, 52 of whom were from the District. Only 12 of the 52 students are minority. Overall, Unity had only 15 minority students, making its population comprised of just over 83% white students. See Exhibit E to Certification of Dr. Dennis Clancy. This is under the lower deviation limits, which requires that Unity have a minimum minority population of 30.8%. See Exhibit D to Certification of Dr. Dennis Clancy.

11. Under the *New Jersey State Guidelines on the Desegregation and Integration of Public Schools* ("Guidelines") the districtwide student percentages for MSD of 56% White, 17% African-American and 27% National Origin. See Exhibits D and E to Certification of Dr. Dennis Clancy. Under the *Guidelines* for racial balancing the upper limit of white students is to be 62.6%, which Unity exceeds by over 20%. The lower deviation limit for African-American students is 11.9%, which Unity is under by over seven percent (7%). Likewise, Unity is over six percent (6%) short of the lower deviation percentage for National Origin students. See Exhibit D to Certification of Dr. Dennis Clancy.

(Petition of Appeal at 3-5)

As is apparent from the above-quoted excerpt, and as is additionally borne out by the District's initial brief at 7-9, its brief on remand, and both certifications of Dr. Clancy, the District's claim of "adverse impact" is, in actuality, nothing more than a variation of its complaint regarding the disparity between the District's proportional levels of minority enrollment and those of the charter school, in other words, a veiled version of its now-discounted claim that Unity is compelled to achieve racial balance with District schools in accordance with the *Guidelines*. Although the District notes the fact that more white students than minority have left the District to attend Unity and the fact that some schools and grades in District have been affected more than others, it has made no demonstration whatsoever that the loss of these students has affected the District's overall racial balance. On the contrary, the record¹⁰ instead supports Unity's contention that

[the District] cannot show how a school of 90 children, only 52 of whom are drawn from [the District], can adversely impact a [K-12] school population of more than 4,000. According to Dr. Clancy's own certification, the racial composition of the K-8th grade student body at [the District] is 58.91% white and 41.09% minority. Also, according to the statistics contained in the same certification, if Unity were to cease operations and all its [District] students returned to the various schools within [the District], the K-8th grade racial makeup at [the District] would only go to 59.24% white and 40.76% minority – less than a 0.4% change. Clearly, Unity has virtually no impact on [the District's] racial balance. (Letter of David A. Bolson at 2)

Unity reiterates and updates this point in its brief on remand:

The fact remains that Unity simply does not adversely impact [the District's] student population. It cannot. Unity presently enrolls 96 students, only 43 of whom come from the District. These 43 students represent **less than 1.5%** of the more than 2,900 children in grades K through 8 attending public schools in the District. To suggest that Unity has any impact on [the District's] racial balancing, let alone an adverse impact, is simply disingenuous. (emphasis in text) (Unity Brief on Remand at 4)

¹⁰ It is noted that the parties incorporated into the record by reference the District's fall enrollment reports for grades K-8 and the fall enrollment statistics on the New Jersey Department of Education website for the years 1998-2002. (Stipulation of Facts at 4)

The Commissioner agrees, and, indeed, he finds the State Board's assessment of the District's earlier claim of "adverse impact" to be equally applicable here:

[T]here 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 the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County, supra, Slip Opinion at 15)

The District, therefore, has failed to show that Unity has had a *de facto* effect on the racial balance of its district of residence, just as it failed to show that the school was itself segregated. *Englewood, supra*, at 328.¹¹

In conclusion, then, even assuming, *arguendo*, that the arrangement sought by the Morris School District and the Unity Charter School might be found lawful under circumstances sufficiently narrow and compelling, the Commissioner cannot find any such circumstance on the present record. To the contrary, the record submitted by the parties shows that Unity is in full compliance with applicable provisions of the CSPA as to recruitment and selection of students, that the school is not segregated, and that the school's existence has not negatively affected the racial balance of its district of residence. Thus, despite Unity's sincere desire to increase the level of student diversity produced by operation of the CSPA, and its acquiescence on that basis to the Morris School District's requested relief, the Commissioner cannot sanction, or, indeed,

¹¹ In its Petition, the District additionally alleged that Unity's sibling preference policy exacerbated the situation with respect to the school's racial balance. However, no evidence whatsoever was brought to the record as to effect of this policy; rather, the District relies solely on the general assertion that "the impact of the current enrollment on future registrants will further compound the adverse effect on racial balancing in the district." (Petition of Appeal at 7) This bare assertion alone cannot suffice as a basis for the Commissioner to direct that Unity's policy, which is expressly permitted by the CSPA at *N.J.S.A.* 18A:36A-8c, must be revised or repealed.

even permit, establishment of an admissions mechanism that relies upon race as the sole determinant of a student's opportunity to attend the school.

Accordingly, for the reasons set forth above, the Initial Decision recommending approval of the proposed Consent Order of the parties is rejected, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.¹²

COMMISSIONER OF EDUCATION

Date of Decision: May 22, 2003

Date of Mailing: May 22, 2003

¹² This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*