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VIA E-Filing

Hon. Andrea I. Marshall, J.S.C.
Monmouth County Courthouse
71 Monument Street
Freehold, NJ 07728

Re: *Board of Education of the Borough of Red Bank v. Red Bank Charter School and Commissioner of Education of the State of New Jersey*
Docket No.: MON-L-1843-25

Your Honor:

We are counsel to defendant Red Bank Charter School, Inc. ("RBCS") in the above matter. Please accept this letter brief in lieu of a more formal brief in opposition to plaintiff Red Bank Borough Board of Education's ("District") Verified Complaint and requests for relief. This action is procedurally and substantively defective.

RBCS has served Red Bank families for 26 years. On February 1, 2022, the Commissioner of Education ("Commissioner") granted RBCS's application to continue to instruct Red Bank children for another charter term. RBCS is accomplishing precisely the goals set forth in the Charter School Program Act of 1995 ("Act"). RBCS offers an important alternative to Red Bank parents with unique education programming -- its students outperform the District's students academically.

The District for years has lodged baseless allegations against RBCS of exacerbating segregation to further the District's quest to have RBCS shut down. The District seeks to actively thwart enrollment of Hispanic students at RBCS by engaging in chilling and intimidation tactics

against Hispanic parents, and then citing relative less Hispanic student enrollment at RBCS as a reason for its closure.

The District repeatedly failed in its arguments against RBCS's continued existence. The District used a comparison of student demographics between RBCS and the District instead of the correct comparison of RBCS's enrollment with the "community's school age population." *N.J.S.A. 18A:36A-8(e)*. RBCS is fully meeting its access and equity obligations under the school laws.

The District asserts that it needs family information of those on the RBCS lottery waitlist for admission for "planning" purposes, per a consent order agreed to in 2007 ("Consent Order") which the District abrogated years ago. The Consent Order was a settlement, which did not derive at all from any findings of fact or law, in favor or against either party. It followed a remand to an earlier challenge by the District of RBCS's continued existence. The purpose of the remand had nothing to do with budget planning. Rather, it was in response to the District's baseless allegations that RBCS's operations exacerbated segregation in Red Bank – a charge the District never succeeded in proving.

In a lack of candor to this Court, the District masks the utility the waitlist afforded the District. The District used the waitlist information to chill Red Bank family interest in enrollment at RBCS by sending unwelcomed communications to families with children on the waitlist, which they reasonably perceived as threatening. While the District was arguing that RBCS's relative Hispanic enrollment warranted its closure, it was actively trying to thwart Hispanic family interest in RBCS, by targeting families it knows were disproportionately Hispanic. The District seeks the Court's entanglement in this illegitimate scheme.

This is a dispute that arises under the school laws. The action is time-barred, having been filed well after the applicable 90-days limitations period. Also, the Commissioner of Education (“Commissioner”) has primary jurisdiction. *R.* 4:67-6 has no applicability here, since no order has been entered “in favor” of one party or another and the Consent Order did not grant the District “relief.”

Beyond that, the District has abrogated the Consent Order, excusing RBCS’s compliance with it. The District breached its covenant of good faith and fair dealing that it owed to RBCS. It has used, and is attempting the Court’s help in using, the Consent Order to cause the closure of RBCS, rather than conferring the value the parties bargained for in the Consent Order.

Moreover, this action constitutes an overt act by the District to violate the civil rights of Red Bank families, by using a facially neutral practice of sending unwelcomed letters to families, with the insidious intent to chill and intimidate Hispanic families’ interest into not enrolling in Red Bank. After a family transfers a child to RBCS, the District responds with another residency verification, even though they already confirmed their residency by virtue of accepting their original enrollment in the District. They attempt this at a time of anxiety felt by immigrant families from heightened enforcement by United States Immigration and Customs Enforcement.

For the following reasons, the Court should dismiss the Verified Complaint.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

The Commissioner initially authorized RBCS to operate effective the 1998-1999 school year. After its initial term of operation, the Commissioner renewed RBCS’s charter five times. RBCS’s mission “believes that celebrating individuality, appreciating cultural diversity, mastering

¹ The procedural and factual histories are intertwined.

conflict resolution and insisting on accountability by all is a foundation of good citizenship.” (See Certification of Kristen Martello, Ed.D., hereinafter “Martello Certif.,” at ¶12.)

Effective the 2012-2013 school year, the Commissioner approved RBCS to expand to 200 students. In 2016, the Commissioner approved RBCS’s use of a weighted lottery for economically disadvantaged students effective the 2016-2017 school year. (See *id.*, ¶13.) The continuing trend of growing Hispanic enrollment at RBCS is clear:

Hispanic Enrollment %
2011-2012 School Year 30.3
2015-2016 School Year 39.2
2019-2020 School Year 53.6
2020-2021 School Year 56.41
2021-2022 School Year 56.1

RBCS’s White student population decreased from 44.22% in the 2017-2018 year to 38.8% in the 2021-2022 year. (See *id.*, ¶13.) In the 2023-2024 school year, the RBCS Hispanic population was 62.5%. See <https://rc.doe.state.nj.us/2023-2024/district/detail/80/7720/demographics?lang=EN> (Accessed June 30, 2025.)

RBCS’s enrollment, policies and practices are open to all students irrespective of gender, race, ethnicity, intellectual ability or English language learner status. (See Martello Certif., ¶14.) Unlike the District, RBCS resembles its community school age population. As of the 2021-2022 school year, 56.10% of students are Hispanic, 8% are Black, 38.80% are White, and 1% are Asian. These demographics almost mirror the United States Census Bureau’s American Community Survey results which show that Red Bank’s overall school-age population in grades K-8 is 54% Hispanic, 6% Black, and 40% White. (See *id.*)

RBCS filed with the Commissioner its fifth application to renew its charter on October 15, 2021 for a sixth term. On November 12, 2021, the District submitted opposition to that application without notice to RBCS. On December 22, 2021, RBCS submitted a response to the District's opposition (*See Martello Certif., Ex. A.*). By letter dated February 1, 2022, the Commissioner approved the renewal of RBCS's charter for the five-year period ending on June 30, 2027. (*See Certification of Thomas O. Johnston, hereinafter "Johnston Certif.," Ex. L.*)

On March 3, 2022, the District filed a Notice of Appeal of the charter renewal application approval. On July 28, 2022, the Commissioner issued a renewal summary with a date "November 15, 2021" -- the date of the Department of Education's renewal site visit at RBCS. (*See Johnston Certif., Ex. M.*)

The Commissioner filed the Statement of Items Comprising the Record ("SICR") on October 20, 2022. On February 15, 2023, the District filed its brief in support of its appeal. The District also added the Consent Order to the appeal record but did not allege its violation by RBCS. (*See Johnston Certif., Ex. G at p. 6.*)

In her February 1, 2022 approval letter, the Commissioner found that RBCS met standards for access and equity as outlined in a Performance Framework. (*See Johnston Certif., Ex. L at p. 1-2.*) In the Renewal Summary the Commissioner commends RBCS for its commitment to access and equity, "RBCS has maintained accessible and equitable application, admissions, lottery and enrollment practices." (*See Johnston Certif., Ex. M at p. 13.*)

After the Appellate Division issued a remand order, by letter dated December 2, 2024, the Commissioner issued an amplification of the February 1, 2022 renewal approval decision. (*See id., Ex. N.*) The Commissioner addressed RBCS's academic performance, operational

stability, fiscal impact on the District, demographic enrollment and any segregative impact. The Commissioner described the methodology of analyzing any segregative impact from RBCS's operations. The Commissioner stated that upon "full review of these findings, and the totality of the record, the Department has concluded that renewing Red Banks Charter would not have an impermissible segregated effect on the District." (*See id.*, Ex. N at p. 9.)

A. CONSENT ORDER

In 2002, the District appealed the Commissioner's approval of RBCS's first charter renewal application. The Appellate Division entered a decision at *In re Red Bank Charter School*, 367 N.J. Super. 462, 486 (App. Div. 2004), *cert. denied*, 180 N.J. 457 (2004). It directed a remand to:

. . . to conduct a hearing to determine whether the lottery, waiting list, sibling preference and withdrawal policy, and any other practices of the Charter School are adversely impacting the Red Bank district's racial/ethnic imbalance. After concluding the hearing, if the Commissioner finds merit in the local Board's claims, he shall develop an appropriate remedy, which properly balances our strong policy in favor of non-segregated schools with our policy of fostering the development of effective charter schools.

See id. at 486.

In the District's February 15, 2023 appeal brief, it described the outcome of the remand: ". . . a hearing was not held. Instead, the Commissioner closed the matter, without developing the record or related adverse impact analysis, upon entry of a Consent Order." (*See Johnston Certif. Ex. G. at p. 5.*)

On March 20, 2007, the parties agreed to a Consent Order.² The Consent Order made no

² Dr. Ramage falsely states that the Attorney General's Office "intervened" in the remand proceedings on behalf of the Commissioner. (*See Ramage Certif.*, at ¶11.) The remand

findings of fact or otherwise any other kind of findings. It occurred only upon agreement -- and with the consent -- of the parties. (*See* Rumage Certif., Ex. A, Comm’r Letter.) The Consent Order addressed numerous school regulations.

In Paragraph 1, the Consent Order applied *N.J.A.C. 6A: 11–7.2*, concerning the process of Red Bank residents to register in the District and then enroll in the Charter School. (*See id.*)

Paragraph 3 applied *N.J.A.C. 6aA:11-4.4(b)*, about the providing of student demographic information. (*See id.*)

Paragraph 4 of the Consent Order provided, “in accordance with the provision of *N.J.A.C. 6A:11-4.5*,” that RBCS had to maintain a waitlist. It provided that RBCS had to “provide a written copy of the waiting list to the Red Bank Superintendent, including the district of residence, no later than October 15, January 15, and May 15 of each school year.” (*See id.*)

Paragraph 5 of the Consent Order addressed RBCS’s compliance with *N.J.A.C. 6A:11-4.7*, concerning services to English language learners. Paragraph 7 applied *N.J.A.C. 6A:11-5.1*, concerning the State Department of Education certifications of RBCS staff. Paragraph 8 applied the Individuals with Disabilities Education Act, concerning out of district placements of RBCS students with disabilities. (*See id.*)

The Consent Order’s Paragraph 10 addressed student discipline and compliance with the IDEA and Section 504 of the Rehabilitation Act – another school law. Paragraph 11 concerned “Recruitment Activities,” about RBCS’s compliance with the mandate in *N.J.S.A. 18A:36A-8(e)* to recruit “a cross section of the community school age population.” (*See id.*)

proceeding necessarily involved the Commissioner, since the matter was an appeal of the Commissioner’s charter renewal decision.

The Consent Order placed obligations on the RBCS and the District. In Paragraph 1, the District agreed to process registration of Red Bank families in a timely manner, including, at the time of registration, an assessment of residency. In Paragraph 2, the Consent Order required that the District by October 30 of each school year, “submit in writing to the Charter School . . . the number of students by grade level, their gender, race/ethnicity, economic status . . . ” attending the District. RBCS had to provide the same information to the District. (*See id.*)

The Consent Order concluded in Paragraph 14: “The entry of this consent order shall only be dispositive of the issues directly relating to this matter and shall neither restrict nor prejudice in any way, the rights of the parties to pursue against each other any legal action with respect to any claim or violation of law, rule or regulation.” (*See id.*)(emphasis added.) Per the Appellate Division’s remand decision, RBCS’s charter renewal was an “issue” in the matter. *In re Red Bank Charter School*, 367 N.J. Super. at 486.

The Commissioner “reviewed” the Consent Order. On April 13, 2007, she stated: “The record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement – pursuant to N.J.A.C. 1:1-19.1(c)and (d) – is deemed to be the final decision in this matter. IT IS SO ORDERED.” The Commissioner made no findings of fact or law, in favor or adverse to the District or RBCS. (*See id.*)

Ten years after the Consent Order settlement, by letter dated October 5, 2017, counsel for the District stated to RBCS’s counsel that he has “been advised by [District Superintendent] Jared Rummage that the [RBCS] has failed to comply with the Consent Order with respect to the following number paragraphs contained in the Consent Order . . .” (*See Johnston Certif., Ex. A at*

p. 1.) Among the alleged violations, the District’s counsel stated that the District had not been receiving the waitlist information per the Consent Order. He concluded the letter by stating “this firm has been directed by the Board of Education to take all the appropriate action to enforce the terms of the Consent Order.” (*See id.*, at p. 2.) He copied Dr. Rummage on the letter.³

RBCS’ counsel responded on November 20, 2017. (*See Johnston Certif*, Ex. B.) He stated that the “Consent Order references obligations which have been superseded by laws and regulations developed since the time of the consent order. The information transmittal obligations by the Charter School are excused by virtue of the Red Bank District’s violations and bad faith attempt to thwart the underlying goal of the Consent Order. . . . Beyond that, the Red Bank District is out of time to challenge the Charter School’s performance per the Consent Order.” (*See Johnston Certif.*, Ex. B at p. 1.) RBCS’s counsel further stated:

As to providing Red Bank District student waiting list, Red Bank District has misused information about identities of parents interested in the Charter School and counsel them and/or their parents against enrolling at the Charter School – sometimes with false representations. Put another way, providing the waiting list is a tool which can thwart to Charter School’s efforts to admit a cross-section of the school-age population in the community. Beyond that, such provision of student and parent identifiable information to Red Bank district, without parental consent, violates federal and state student confidentiality laws.

* * *

The Red Bank District disinterest in the solitary policy goals contemplated in the Consent Order is illustrated by its silence about the consent order for years. It is also illustrated by Red Bank District failure to abide by its explicit obligations under the Consent Order. Contrary to paragraph 2 of the Consent Order, Red Bank

³ Dr. Rummage falsely stated in his May 14, 2025 sworn certification that “RBCS has complied with its obligation to supply the waiting lists” until “the 2021-2022 school year.” (*See Rummage Certif.*, ¶ 12.)

district has never provided to Charter School a breakdown of its students ethnic and economic status make up.

Nonetheless, the Charter School is amenable to having its representatives meet with the Redbank District representatives to formulate a memorandum of understanding which sets forth obligations on both sides to create an environment and practices to ensure that all students have meaningful public school choice in Red Bank.

(See Johnston Certif., Ex. B at p. 2-3)(emphasis in original.)

The District rejected RBCS's offer to confer on a memorandum of understanding. The District's counsel responded by letter dated December 8, 2017. (See Johnston Certif., Ex. C.) He admitted that the District has been receiving student demographic data in October and June of every school year irrespective of the Consent Order, per *N.J.A.C. 6A:23A-15.3(a)(4) and (5)*(see *id.*, at p. 3.) He also admitted that the District never provided its student demographic information to RBCS per Paragraph 2 of the Consent Order. (See *id.*) He promised that the District "[w]ill provide said information to the Charter School within a period of 30 days from December 30, 2017 and no later than December 30 of each subsequent year." (See *id.*) But he conditioned the District's compliance with the Consent Order, with RBCS providing the same information. He concluded:

Finally, as it is apparent that Charter School has this about the Consent Order and has no intention of complying with either the letter or intent of said consent order, there would seem to be little value in formulating a memorandum of understanding which will simply be again ignored by the Charter School. . . . [S]hould the Charter School continue to refuse to abide by the Consent Order, the [District] will have no other choice but to see to enforce it. Please be guided accordingly.

(See *id.*, at pp 3-4.) The District's counsel copied the Department of Education on his letter.

The District did not seek to enforce the Consent Order until 7.5 years later, upon commencing this matter, and only as to waiting lists information.

RBCS's current Head of School, Kristen Martello, Ed.D., commenced her role at RBCS in July 2019. To facilitate a re-set in the relationship with Dr. Rumage and RBCS, she supplied Dr. Rumage that school year with waitlist and other student information. But a year later, Ms. Martello found out that Dr. Rumage was advocating for support from local officials to threaten RBCS's very existence. Ms. Martello reached out to Dr. Rumage. By email, dated November 23, 2020, Dr. Rumage stated: "I have made it quite clear that I am philosophically opposed to the existence of a charter school in Red Bank for a variety of reasons. For seven years, I have engaged in conversations with NJDOE officials, borough officials, and state legislators regarding my concerns." (See Martello Certif., Ex. B.)

Still, Dr. Martello continued to provide waitlist information to the District. But in November 2021, Dr. Martello found out that the District took the waitlist family information and sent unsolicited letters to them advocating against RBCS enrollment. By email dated November 10, 2021, Dr. Rumage admitted that the District had "been sending it out for a few years." (See Martello Ex. E.) In the letter, Dr. Rumage stated to parents and guardians:

Recently, I received a copy of the current Red Bank Charter School waitlist. While reviewing the list, I noted your child's name. I am reaching out today to see if there is anything we can do to improve your child's educational experience.

(See Johnston Certif., Ex. F.) He then asked the parent to contact the District "to discuss next steps." (See *id.*)

The District sent such letters in Spanish to non-English speaking families, on official letterhead, whether or not the author had previously met the families. (See Martello Certif.,

¶18; Johnston Certif., Ex. E.) As described in a certification by a District parent K.S., a native Spanish speaker who received the Spanish-language letter, she became angry upon receiving such a letter – Dr. Ramage called her out for placing her child on the RBCS waitlist. (See Johnston Certif., Ex. E.) The Superintendent was a stranger to her, though he controlled key decisions over her child who was still enrolled in the District. She viewed the letter as an attempt at intimidation. (*Id.*)(See Martello Certif., ¶18, Johnston Certif., Ex. E.)

The District also attempts to chill and intimidate families from enrolling in RBCS through the “re-verification” of residencies which are triggered simply because a family opts for RBCS enrollment. (See Martello Certif., ¶19.) If the District cannot pressure a parent to change his or her decision to enroll a waitlisted child in RBCS, the District resorts to compelling the parents to resubmit proofs of residency, even though the District had already confirmed the student’s residency when registered and enrolled in the District.

The District’s discriminatory practices were the subject of complaint proceedings before the United States Department of Education Office for Civil Rights, Case No. 2-22-1102. RBCS filed a complaint on December 16, 2021, alleging that the District engaged in acts of intimidation in targeting Hispanic, non-native English speaking families for the purpose of suppressing Hispanic enrollment at RBCS and interfering with the right of Hispanic families to select a charter school in their community. (See Johnston Certif., Ex. D.) RBCS asserted that, even if the District sent the letters to the families in English, the District’s 84.7 percent Hispanic student population⁴ assured the District that its tactics would disproportionality impact Hispanic families, a classic case of a

⁴ See <https://rc.doe.state.nj.us/2021-2022/district/detail/25/4360/demographics?lang=EN> (Accessed June 30, 2025.)

school district adopting a facially neutral practice with an insidious intent to target student of color. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). After “evaluating” the complaint for over 15 months, the USDOE OCR declined to investigate the complaint and erroneously concluded that the complaint on its face or as clarified, “fails to state a violation of one of the laws or regulations” that their office enforces. (See Johnston Certif., Ex. K.) USDOE OCR ignored whether the facially neutral practices had an insidious intent.

RBCS therefore stopped sending the District waitlist information. On February 3, 2022, a District employee contacted RBCS to receive RBCS waitlist information. RBCS responded on February 7, 2022: “Red Bank Borough District years ago stopped abiding by its obligations under the Consent Order. Indeed, it appears that in recent years Red Bank District has used the RBCS waitlist information to engage in unlawful suppression efforts to try to drive down Hispanic student enrollment at our RBCS . . . RBCS will not participate in such improper practices.” (See Martello Certif., Ex. C at p. 1.) Dr. Ramage replied that day asserting that Dr. Martello’s statements were “false and unfounded,” but did not explain why. (See *id.*) He said “failure to provide the requested information is a direct violation of the Consent Order. Please provide the information requested or we will have no choice but to file a motion to enforce the consent order.” (See Martello Certif., Ex. C at p. 1.) He made no reference to the waitlist information being required for financial or operational planning purposes.

RBCS did not comply with Dr. Ramage’s demand. Dr. Ramage asked RBCS to “reconsider” on September 12, 2022 and on May 13, 2023. Dr. Ramage threatened “legal action” if RBCS did not provide waitlist information. (See Johnston Certif., Ex. C; Ex. D.) RBCS replied on May 22, 2023 that it “will not indulge in attempt by Red Bank Borough District to commit civil rights

violations against Red Bank Borough students and families. When you 'turn this matter over' to your attorney [you can ask] about the non-binding nature of the OCR determination, the rights to appeal that determination, the recourse to federal court, the prohibition under Title VI against adopting facially neutral policies with an insidious intent to target students of certain ethnicities . . . " (See Johnston Certif., Ex. D.)

The District filed this action on May 15, 2025 – 7.5 years after RBCS said the Consent Order had been violated, 3 years after Dr. Rumage's legal threat.

LEGAL ARGUMENT

I. THIS ACTION IS TIME-BARRED BECAUSE THE DISTRICT DID NOT COMMENCE IT WITHIN 90 DAYS OF THE DISPUTE ARISING

This matter is centered on numerous school laws issues and disputes. The limitation period for such disputes is 90 days. This action is therefore time-barred, as the present dispute arose many years ago.

N.J.A.C. 6A:3-1.3(i) states that "[t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." *Id.*

Our New Jersey Supreme Court has held that the adequate notice to trigger the 90-day statute of limitation period is from the day the petitioner learns of the existence of facts that would enable it to file a timely claim. *See Kaprow v. Bd. of Educ. of Berkeley Twp.*, 131 N.J. 572, 582 (1993). "The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days." *Id.* The Court explained that the limitation period serves two purposes: "to stimulate

litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims," and "to penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs." *Id.*

Here, the District knew of a dispute over the Consent Order no later than 2017. Indeed it threatened to seek its enforcement. (See Johnston Certif., Ex. C.) Instead, it sat on its purported rights. The District hints in its moving papers that the delay is attributable to the pendency of its appeal of RBCS's charter renewal, but does not explain why. Not wanting to put its conduct related to the Consent Order at issue in the appeal is not a legitimate reason for their delay. The pendency of the United States Department of Education Office of Civil Rights Investigation has no binding effect⁵ on the parties. The investigation concluded 2 years ago. RBCS reasonably concluded that no challenge would be forthcoming after 90 days. Even if one were to cite to the 2022 time frame, wherein Dr. Ramage threatened to file a legal action, that is still years prior to when the District filed this action.

The District cannot offer any excuse for its delay. It has regularly engaged the Commissioner is advocating against RBCS's interests. It supplemented its appeal records with the Consent Order in 2023. (See Johnston Certif., Ex. G at p. 5.) The finality and "security"

⁵ The OCR decision states "[t]his letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such . . . The Charter School may have the right to file a private suit in federal court whether or not OCR finds a violation." (See Johnston Certif., Ex. K.) RBCS administratively appealed the OCR determination to another USDOE field office, which did not result in altering the OCR determination.

required by the school laws and public policy is being denied RBCS by this action's filing. *Kaprow*, 131 N.J. at 582. Because it is time-barred, this action should be dismissed.

II. THIS ACTION SHOULD BE DISMISSED BECAUSE THE COMMISSIONER HAS PRIMARY JURISDICTION OVER THIS DISPUTE

"[T]he Commissioner of Education has primary jurisdiction to hear and determine all controversies arising under the school laws." (*See Bower v. Bd. of Educ. of E. Orange*, 149 N.J. 416, 420 (1997); *see also Board of Educ. of the Lenape Regional High School Dist., Burlington County v. New Jersey State Dep't of Educ.*, Office of Special Educ. Programs 399 N.J. Super. 595 (App. Div. 2008).

The Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner.

(*Id. quoting N.J.S.A. 18A:6-9.*)

The issues here concern compliance with school regulations about the registration and enrollment of children in a charter school, per *N.J.A.C. 6A:23A-15.3(a)*, admission practices of RBCS, per *N.J.S.A. 18A:36A-8*, waitlist compliance, pursuant to *N.J.S.A. 18A:36A-10(e)(10)*, among other school laws. The Legislature has delegated to the Commissioner the authority to adjudicate these highly specialized disputes.

The District relies on R. 4:67-6 to "enforce" the Consent Order. That rule provides,

- (a) **Applicability of Rule.** This rule is applicable to (1) all actions by a state administrative agency as defined by *N.J.S.A. 52:14B-2(a)* brought to enforce a written order or determination entered by it, whether final or interlocutory, and whether the order to be enforced requires the payment of money or imposes a non-monetary requirement or includes a combination of monetary and

non-monetary remedies; and (2) all such enforcement actions brought by a party to the administrative proceeding in whose favor a written order or determination was entered affording that party specific relief. R. 4:67-6(a).

Id. (emphasis added.)

Here, the Consent Order was not entered in the District’s “favor.” It did not afford the District “relief.” *Id.* To the contrary, it plainly noted that the content of the Consent Order were “agreed to” by RBCS and the District. (See Ramage Certif., Ex. A at p. 1.) Both the District and RBCS assumed obligations under the Consent Order. (See *id.*, Paragraph 1, District obligations about student registration; Paragraph 2, District’s Superintendent’s obligations to submit to RBCS student grade and demographic information, which were mutual.) Indeed, the Consent Order did not “restrict nor prejudice in any way, the rights of the parties to pursue against each other any legal action with respect to any claim or violation of law, rule or regulation.” (See *id.* at p. 6.) The parties “consent[ed] to the form and entry” of the Consent Order. (See *id.* at p. 6.) As the District represented to the Appellate Division on February 15, 2023, “. . . a hearing was not held. Instead, the Commissioner closed the matter, without developing the record or related adverse impact analysis, upon entry of a Consent Order.” (See Johnston Certif. Ex. G at p. 5.) Because the Consent Order was not entered “in favor” of the District, nor grant it relief, R. 4:46-6 does not apply.

The administrative regulations also supports the non-applicability of R. 4:46-6. *N.J.A.C.* 1:1-19.1 addresses a “settlement” between the parties: The “settlement” was “ordered” which is deemed the “final decision.” (See Ramage Certif., Ex. A.) In contrast, in the school regulations, *N.J.A.C.* 6A:3-3.1(b) provides: “(b) Parties to contested matters shall not submit or request the issuance of orders to show cause seeking enforcement of litigants’ rights. Parties seeking

enforcement of judgments of the Commissioner shall generally bring an action in the Superior Court as provided in New Jersey Court Rules at R.4:67-6. (emphasis added.) N.J.A.C. 6A:3-3.1(b).

A settlement, like here, is not a “judgment.”

Following transmittal of a matter to the OAL, parties shall effectuate settlement in accordance with applicable rules of the OAL. N.J.A.C. 6A:3.1.13(c). But to effectuate a “judgment” the regulations call for an enforcement action in Superior Court.

Thus, putting aside the untimeliness of this action, these issues should properly be brought before the Commissioner, wherein the Commissioner’s and Department of Education’s agency expertise can be applied. The Commissioner is granted deference in his interpretation of his agency’s regulations. Courts give “substantial deference” to an agency’s interpretation of a statute it is charged with enforcing. *In re Application of Virtua-West Jersey Hosp. Voorhees for a Certificate of Need*, 194 N.J. 413, 423 (2008)(quoting *St. Peter's Univ. Hosp. v. Lacy*, 185 N.J. 1, 15 (2005).

The principle to first exhaust administrative remedies was “designed to allow administrative bodies to properly perform their statutory functions in an orderly manner, without preliminary interference from the courts.” *Labor Ready Northeast, Inc. v. Director, Div. of Taxation* 25 N.J.Tax 607, Tax Court of New Jersey, (2011)(quoting R. 4:69-5). “[T]he doctrine of exhaustion of administrative remedies serves three primary goals: (1) the rule ensures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate resort to

the courts." *United Adver. Corp. v. Howell Twp. Planning Bd.*, 2016 N.J. Super. Unpub. LEXIS 2184, (App. Div. 2016.)

Here, the disputed issues should properly be before the Commissioner. The parties are public school systems, with each alleging school law violations by the other. This Court does not have jurisdiction.

**III. THE DISTRICT IS TARGETING HISPANIC FAMILIES TO SUPPRESS
THEIR ENROLLMENT AT RED BANK CHARTER SCHOOL**

Aside from the untimeliness of this action and the Commissioner's primary jurisdiction over the disputed issues, the actions should be dismissed based on District's unlawful use of the waitlists.

The District relies on RBCS's relative Hispanic enrollment as a basis for the Commissioner to shut down RBCS. (See Johnston Certif., Ex C., Nov. 13, 2017 Letter from Lawrence Lustberg, Esq. at p. 7; Ex. G at pp 1-2; Ex. J.) Indeed, in 2016 the District's counsel ghost-wrote a letter to the Commissioner about RBCS's Hispanic enrollment, which was sent by the Latino Coalition of New Jersey. (See Johnston Certif, Ex. J.) Although the District has abrogated the Consent Order, in good faith, RBCS has been supplying the District with the names of students on the RBCS waitlist. The District took that list and targeted those families by sending letters to them, with an explicit attempt to chill their interest in RBCS.

Families on the waitlist identify as Hispanic. All the families target for these letters still have students in the District. Indeed, 84.7% percent of the student population in the District were Hispanic in the 2021-2022 school year. The District sent such letters in Spanish to non-English speaking families, on official letterhead, whether or not Dr. Ramage had previously met the families.

The District is controlling the educational programs for such children, on matters like teacher assignments, grades, discipline, special education programming, sports activities, among other critical areas the District controls over their children's lives. The District's letter was a transparent attempt at intimidation and enrollment suppression and in gross violation of the District's obligation under Title VI of the Civil Rights Act of 1964.

The District also attempts to chill and intimidate families from enrolling in RBCS through the "re-verification" of residencies which are triggered simply because a family opts for RBCS enrollment. (See Johnston Certif., Ex. I.) Such a "re-verification" is not mandated by the school laws.⁶ To the contrary, each family expressing interest in transferring their children to RBCS had already undergone a residency review, by the District at the time of registration. *N.J.A.C. 6A:22-4.1*. Thus, if the District cannot pressure a parent to change his or her decision to enroll a waitlisted child in RBCS, the District resorts to compelling the parents to submit proofs of residency, even though the District had already confirmed the student's residency when registered and enrolled in the District. At a time of heightened anxiety by many immigrant Spanish speaking families over their documented status, the District compels families to undergo another residency audit. (see e.g. "100 Days Record Breaking Immigration Enforcement," <https://www.ice.gov/news/releases/100-days-record-breaking-immigration-enforcement-us-interior> (Accessed June 30, 2025.); *Stress and Trauma Toolkit for Treating Undocumented Immigrants In a Changing Political and Social Environment*, American Psychiatric Association,

⁶ The USDOE OCR erroneously stated that such a mandate existed under the State's school laws. A residency verification occurs at the time of "registration," which, for these students, had already occurred, resulting in their initial enrollment in the District. See *N.J.A.C. 6A:22-4.1*. Notably, the District did not institute this re-verification practice for RBCS transferees until just a few years ago.

<https://www.psychiatry.org/psychiatrists/cultural-competency/education/stress-and-trauma/undocumented-immigrants> (Accessed October 20, 2022.) For any such concerned families, the District has communicated a clear message – enroll in RBCS and have your documentation scrutinized.

The District's tactics had its intended jarring impact. As described by parent K.S., she reasonably viewed Dr. Ramage's letter as an attempt at intimidation. Even if the District sent the letters to families in English, the District's high Hispanic student population assured the District that its tactics would disproportionately impact Hispanic families. This is a classic case of a school district adopting a facially neutral practice with an insidious intent to target students of color, contrary to the civil rights laws. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

The segregation slur repeated by the District has always been disproven. The slur is particularly cynical at a time when the District is actively trying to thwart the RBCS's attempts to make it available to Spanish-speaking families. While the District cries segregation, it engages in conduct which intimidates Hispanic families from enrolling in RBCS.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., 14th Amend.

Title VI of the Civil Rights Act 42 U.S.C. § 2000d et seq., was enacted as part of the landmark Civil Rights Act of 1964. It prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.

A government practice that is ostensibly neutral but is an obvious pretext for racial discrimination or for discrimination on some other forbidden basis is subject to heightened scrutiny and invalidation. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). A law may be unconstitutional even if it does not facially discriminate on the basis of race, if it “uses the racial nature of an issue to define the governmental decision making structure, and thus imposes substantial and unique burdens on racial minorities.” *Washington v. Seattle School Dist.*, 458 U.S. 457, 470 (1982).

The District’s motive in driving down Hispanic enrollment at RBCS is clear. It is the key reason it cites to advocate for RBCS’s closure. In the 2021-2022 school year, the District had 84.7% Hispanic students. It knew full well that its unwelcomed letters to waitlisted families would disproportionately affect and chill Hispanic families from enrolling in RBCS.

Dr. Ramage displays a lack of candor with the Court. He described the purpose of using the waitlist for “ongoing planning regarding the financial and operational needs of the Board.” (See Ramage at ¶ 26.) The Consent Order makes no reference to such a purpose, which Dr. Ramage describes in his certification as “essential.” He made no reference to a planning purpose in his email exchanges with Dr. Martello.⁷ The remand decision by the Appellate Division in 2004,

⁷ Dr. Ramage references RBCS’s prior allegations of the District using the waitlists to chill Hispanic family interest in the District. Tellingly, he does not deny it in his certification. (See Ramage

which led to the Consent Order, likewise makes no reference to a District “planning” purpose behind the remand. Dr. Ramage noticeably does not disclose to the Court his prior use of the waitlist in sending unwelcomed communications to Hispanic families to chill their interest in RBCS.

Charter school actual student enrollment is reported to resident districts multiple times in the school year, stating on October 15 and concluding by June 15 of every school year. *See N.J.A.C. 6A:23A-15.3* RBCS is authorized to serve only 200 students. The waitlist names are of those families who merely submitted an application in the RBCS lottery. It is a list generated at the time of the lottery, in the Spring of every school year. It provides no assurance of actual RBCS enrollment in the event a student is taken off the waitlist, particularly if it occurs in the middle of a school year.

The District improperly solicits the Court’s assistance in its unlawful scheme to use the waitlist to thwart Hispanic enrollment at RBCS. Indulging such an attempt flatly contradicts public policy and our civil rights laws.

**IV. THE DISTRICT’S FAILURE TO ABIDE BY ITS OBLIGATIONS UNDER
THE CONSENT ORDER RELIEVES RBCS’S OBLIGATION TO BE
BOUND BY THE CONSENT ORDER**

The District has not provided its student demographic student data to RBCS. For only a few years the District traded this information upon its receiving the RBCS waitlist information, a condition not provided for in the Consent Order. Yet it seeks to enforce purported obligations

Certif., ¶15.) An attempt by him to belatedly deny it under oath in the District’s reply filing should be given little weight.

by RBCS in a consent Order the District itself disregards. The District has not, and cannot explain why the Consent Order should be enforced against RBCS and not itself.

It is well settled that when a party materially breaches a contract, the Counter-party has a right to terminate the contract and may be excused from further performance of its remaining obligations under the contract. *Nolan v. Lee Ho*, 120 N.J. 465, 472 (1990). Restatement (Second) of Contracts, § 237 (1981). Here, since the District has long disregarded its obligations under the Consent Order settlement agreement, it cannot enforce obligations by RBCS in the Consent Order.

Moreover, the Consent Order obligations have been superseded by subsequent legal and regulatory developments. School systems, including charter schools, release publicly student demographic data. *See e.g.* School Performance Reports, available at <https://rc.doe.state.nj.us/>. The District receives RBCS's student demographic data during every October 15 reporting by RBCS in the "Charter Enrollment System." (*See* Johnston Certif., Ex. H.) Private school placements of charter school students are now governed by *N.J.S.A.* 18A:36A-11 and *N.J.A.C.* 6A:23A-15.4.

V. THE DISTRICT'S BREACH OF ITS COVENANT OF GOOD FAITH AND FAIR DEALING PRECLUDES ENFORCEMENT OF THE CONSENT ORDER AGAINST RBCS

In New Jersey, a breach of the covenant of good faith and fair dealing occurs when a party 1) acted with bad motives or intentions or engaged in deception or evasion in the performance of contract; and 2) by such conduct, denied the plaintiff of the bargain initially intended by the parties. *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Assoc.*, 182 N.J. at 230-231 (2005).

Here, the District challenged RBCS's initial charter renewal. RBCS's renewal was an "issue" "directly relating" in the remand proceeding, which was "disposed" of by the Consent Order. (*See* Ramage Certif., Ex. A at ¶14.) During the remand proceedings, it agreed to settle its difference with RBCS. It entered into a settlement agreement Consent Order, which had mutual obligations. Still, the District has persistently sought the closure of RBCS. It sought to deprive the value bargained for by RBCS – its continued operations with agreed upon mutual information exchanges – which were explicitly contemplated in the Consent Order. It sought RBCS closure using the information supplied by RBCS in the Consent Order. Rather than fostering fair and equitable student admissions into RBCS, which was the purpose of the Consent Order, the District weaponized the Consent Order as a tool to aid the District in its quest to have RBCS closed.

The District's conduct is particularly jarring given its public body nature. "[I]n the exercise of statutory responsibilities, government must 'turn square corners' rather than exploit litigational or bargaining advantages that might otherwise be available to private citizens. '[The government's] primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another.'" *W.V. Pangborne & Co. v. New Jersey Dept. of Transp.*, 116 N.J. 543 (1989) quoting *F.M.C. Stores Co., v. Borough of Morris Plains*, 100 N.J. 418 (426-27 (1985)).

The District's bad faith conduct precludes enforcement of the Consent Order against RBCS.

CONCLUSION

For the foregoing reasons, RBCS respectfully requests that the Verified Complaint be dismissed with prejudice.

Respectfully submitted,

Johnston Law Firm LLC
Attorneys for Respondent
Red Bank Charter School, Inc.

A handwritten signature in black ink, appearing to read "T. O. Johnston", is written over a horizontal line.

By: _____
Thomas O. Johnston

cc: Counsel of Record (Via E-Courts Only)