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BOARD OF EDUCATION OF THE
CITY OF ABSECON, ATLANTIC
COUNTY,

Appellant,

v.

BOARD OF EDUCATION OF THE
CITY OF PLEASANTVILLE,
ATLANTIC COUNTY,

Appellee.

SUPREME COURT OF NEW JERSEY
DOCKET NO.:

ON APPEAL FROM A SUPERIOR
COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-3237-22

Sat Below:

HON. LORRAINE M. AUGOSTINI,
J.A.D.

HON. LISA A. FIRKO, J.A.D.

HON. AVIS BISHOP-THOMPSON,
J.A.D.

**ABSECON BOARD OF EDUCATION'S PETITION FOR
CERTIFICATION**

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Appellate Division Decision, filed July 18, 20252a

STATEMENT OF THE MATTER INVOLVED

Certification by this Court is needed urgently to review and correct a decision concerning a matter of general public importance. *R.* 2:12-4. The Appellate Division decision in this matter affirmed a decision by the Commissioner of Education that had ignored the clear statutory direction in *N.J.S.A.* 18A:38-13 and had seized for herself an unbounded discretion contrary to the legislative constraints imposed on her authority. Only by turning a blind eye to the plain statutory language and essentially rubberstamping an agency decision under the banner of a general deference toward administrative agencies could the Appellate Division claim to rationalize affirming this Commissioner determination to block a school district from withdrawing -- unopposed -- from a sending-receiving relationship when the withdrawal effected no harm, let alone “substantial harm,” to the racial balance within either district.

This matter specifically concerns the Absecon Board of Education’s application to sever its sending-receiving relationship for its high school students with the Pleasantville Board of Education. Absecon’s application to the Commissioner was unopposed and supported by the significant amount and quality of data that Absecon submitted, which showed: Absecon would gradually withdraw a small number of students from Pleasantville High School over a four-year period; few of those students would be white – amounting to

about one or two each year over the four years; and those one or two white students would be replaced by an increasing number of white students entering Pleasantville High School from its own middle school population. Absecon's un rebutted feasibility studies predicted that there would be **no** racial impact resulting from Absecon's withdrawal. Nevertheless, ignoring both the significance of the phased-withdrawal and Pleasantville's increasing white population, the Commissioner determined in her initial decision, as well as when denying Absecon's motion for reconsideration, that the "gross population of white students at Pleasantville would decrease significantly," calling Absecon's data regarding the expected increase in the white student population at Pleasantville High School "speculative."

The Commissioner's failure to base her findings on the evidence in the record is itself arbitrary and capricious. Her determination that use of statistics by Absecon was "speculative" ignored the Department of Education's established process for severance applications, which requires predictive feasibility studies, and contravened established case law from this Court that the Commissioner **must** rely on "projected" and "anticipate[d]" "demographic trends."

More importantly, the Commissioner's decision is an end run around statutory language that was implemented to limit her discretion. When amended

in 1986, the Legislature removed from the statute the former “good cause” standard and replaced it with language requiring that the Commissioner “shall” grant a severance application if there will be no “substantial” negative racial impact. The Commissioner’s decision here impermissibly elides that statutory command, substituting it with a standard the Commissioner created for herself that permits her effectively to deny any severance application in her discretion, even if the racial impact is infinitesimal or non-existent. Indeed, the standard she fashioned, and that was approved by the Appellate Division’s affirmance in this matter, permits her to deny a severance application whenever there will be **any** impact on the racial composition of a receiving school district, in blatant contravention of the statutory language which **requires** her to grant a severance application absent a **substantial** racial impact.

It was error for the Appellate Division to affirm the Commissioner’s decision that authorized her to exercise discretionary power she no longer has, and place a district like Absecon in an administrative straightjacket from which it and others like it can never remove themselves. If Absecon cannot meet the standard to show a non-substantial negative impact on the record before the Commissioner here, then no district can. If that is the case, then the Commissioner has rendered the Legislature’s imposed restraints meaningless.

The Appellate Division erred in affirming the Commissioner’s decision without engaging in a proper review. The Court misapplied prior case law, failed to examine the record meaningfully, and its opinion contains several significant errors and oversights, such as noting that arguments were not raised when the record reflects otherwise. More fundamentally, the panel failed to recognize that the Commissioner’s decision is a rogue departure from the Legislature’s expressed intent. The correction needed here can come only from this Court. Unless this Court intervenes by certifying and reviewing this matter, the Commissioner’s Office will continue to believe that it is authorized to exercise discretion and power in sending-receiving school district severance cases to a degree untethered to the express restraints imposed by the Legislature nearly 40 years ago.

QUESTIONS PRESENTED

1. Does the Appellate Division’s decision endorse an impermissible expansion of the Commissioner’s authority to adjudicate severance applications under *N.J.S.A.* 18A:38-13, in contravention to the Legislature’s constraint of the Commissioner’s authority through its 1986 amendments to the statute?

2. Did the Appellate Division misapply existing school severance case law (a) by permitting the Commissioner to dismiss as “speculative” the required demographic projections contained in the submitted feasibility studies, and (b)

by allowing the Commissioner's analysis to focus on the projected changes to Pleasantville's gross white student population alone, rather than the entire student population as a whole?

3. Did the Appellate Division err by affirming an arbitrary, capricious, and unreasonable Commissioner's decision that applies a new, impossible-to-meet standard and prohibits even infinitesimal deviations in the racial composition of a receiving school district following severance?

ERRORS COMPLAINED OF

1. The Appellate Division ignored constraints on the Commissioner's discretion when reviewing sending-receiving severance applications effected by the Legislature's 1986 amendment of *N.J.S.A.* 18A:38-13. The amended statute requires her to grant such petitions absent a **substantial** negative racial impact and, further, requires her to assess the racial impact of withdrawal on the district's student population as a whole, not merely based on the gross white student population alone.

2. The Appellate Division's decision is inconsistent with prior case law concerning assessment for an impermissible substantial negative racial impact resulting from severance of a sending-receiving relationship, which requires courts and the Commissioner to account for projected future demographic trends

and to assess the racial impact on the affected district's student population as a whole.

3. The Appellate Division failed to conduct a careful, rigorous, and comprehensive review of the appellate record that this Court requires, overlooking various errors inherent in the Commissioner's decision that render the decision arbitrary and capricious, and endorsing a standard of the Commissioner's own making that is at odds with the statutory language and impossible for almost any district to meet.

REASONS WHY CERTIFICATION SHOULD BE ALLOWED

This Court should grant certification under *Rule* 2:12-4 because this case presents an unresolved question of general public importance regarding the limits of the Commissioner's statutory authority under the school laws. In 1986, the Legislature amended *N.J.S.A.* 18A:38-13 to restrict the Commissioner's authority to deny petitions to sever sending-receiving relationships between school districts. *See* P.L. 1986, c. 156. Prior to that amendment, *N.J.S.A.* 18A:38-13 provided that a sending-receiving agreement could not be severed except for "good and sufficient reason" "approved by the commissioner." *See Jenkins v. Morris Twp. Sch. Dist.*, 58 N.J. 483, 501 (1971) (interpreting prior version of *N.J.S.A.* 18A:38-13). Now, the statute demands that the Commissioner "**shall** grant the requested change in designation if no substantial

negative impact will result therefrom.” *N.J.S.A.* 18A:38-13. The Legislature excised the “good and sufficient reason” language. The Commissioner nonetheless continues to exercise authority vested in her under the old statutory language, and the Appellate Division now has endorsed that approach.

Absecon demonstrated with unrebutted evidence that its withdrawal would have minimal, and perhaps no, impact on Pleasantville High School’s racial composition. Given the exceedingly small number of students at issue here, the Commissioner effectively determined that she was not comfortable with, and therefore could not endorse, any change in Pleasantville High School’s racial composition. The statute no longer permits the Commissioner to wield such discretionary authority. With the Appellate Division’s approval, the Commissioner will continue to wield that *ultra vires* authority absent this Court’s intervention.

This Court may grant certification under three circumstances: (1) where the matter “presents a question of general public importance which has not been but should be settled by the Supreme Court;” (2) where the decision below conflicts with the precedent of a same or higher court “or calls for the exercise of the Supreme Court’s supervision;” or (3) in other matters “if the interest of justice requires.” *Rule* 2:12-4. All three circumstances exist here.

First, this case concerns a matter of plain public importance because it will inform the Commissioner's review of every subsequent severance case she adjudicates. *See Mahony v. Davis*, 95 N.J. 50, 51 (1983) (Handler, J., concurring) (noting that certification is warranted where the matter transcends the interests of the litigants). This Court therefore should decide whether the Appellate Division has endorsed authority for the Commissioner beyond what the Legislature intended.

Second, the Appellate Division permitted the Commissioner to dismiss un rebutted evidence that the school laws require her to assess, and to evaluate the evidence she did consider in a fashion contrary to established case law. Though it garners no mention in the panel's decision, the Commissioner dismissed Absecon's demographic projections as "speculative." But, the applicable statute and case law **require** predictive feasibility studies. Indeed, this Court's *North Haledon*¹ decision requires the Commissioner to "anticipate" "demographic trends" in the racial and ethnic makeup of school districts. 181 N.J. 161, 183 (2004).

Third, and last, by failing to abide by the clear statutory language concerning the Commissioner's limited discretion, the Department's own regulations, and case law of this Court, the Commissioner rendered an arbitrary,

¹ *In re Petition For Authorization To Conduct A Referendum On Withdrawal Of N. Haledon Sch. Dist. From Passaic Cty. Manchester Reg'l High Sch.* (hereinafter, "*North Haledon*").

capricious, and unreasonable decision in failing to account for the unrebutted demographic trends that should have compelled severance. By endorsing the Commissioner's selective review of an unrebutted administrative record that defies the statute and case law, the Appellate Division reached a "palpably wrong" holding that requires reversal in the interests of justice. *See Bandel v. Friedrich*, 122 N.J. 235, 237 (1991). The Court therefore should grant certification pursuant to *Rule 2:12-4*.

COMMENTS ON THE APPELLATE DIVISION'S OPINION

I. THE APPELLATE DIVISION'S DECISION SHOULD BE REVERSED BECAUSE IT PERMITS THE COMMISSIONER TO EXERCISE AUTHORITY IN CONTRAVENTION OF THE LEGISLATURE'S LIMITING 1986 AMENDMENT TO N.J.S.A. 18A:38-13.

As amended in 1986, *N.J.S.A. 18A:38-13* instructs that the Commissioner "shall grant" a severance petition "if no substantial negative impact will result therefrom" to the educational and financial prospects of the involved districts, and to the racial composition of the affected districts. The Commissioner no longer may decide not to end a sending-receiving relationship based upon considerations of good cause. The Legislature has commanded that the Commissioner **must** grant a severance application absent a **significant** negative impact on one or more of the affected districts, and retains no discretion to determine not to do so absent a substantial negative impact.

The Appellate Division did not devote attention to the statutory language, the Legislature's amendments to the statute, or the limits of the Commissioner's authority under the statute. Rather, the Appellate Division implicitly treated the Commissioner's authority under the statute as broad and accepted her conclusion that a "54.5 percent reduction in the gross population of White students at" Pleasantville High School could not be considered insubstantial. (20a) Putting aside the fact that this finding is factually incorrect (discussed in greater detail in point III, *infra*), the analysis used by the Commissioner and affirmed by the Appellate Division defies the statutory language.

The statute requires the Commissioner to assess whether there is a "substantial negative impact" "on the racial composition **of the pupil population of each of the districts.**" By looking only at the change in the gross number of white students, the Commissioner separated and insulated her analysis from the pupil population of Pleasantville High School as a whole, contrary to what the statute requires. Indeed, an assessment of the change to Pleasantville High School as a whole using the same statistics results in astoundingly different numbers. When calculating the change to the percentage of white students in Pleasantville High School as a whole, rather than the percentage change to the gross number of white students alone, Absecon's withdrawal would result in a loss of 0.48% of Pleasantville High School's white

student population, from 0.61% to 0.13%. (Pa541-42, Pb25-26) Thus, the change to the “pupil population . . . of the district” -- the precise statutory language the Commissioner is commanded to apply -- shows an infinitesimally small change to the total white student population that could not be considered substantial under any standard.

An example with simple numbers highlights the difference between assessing only the change to the gross white student population -- the incorrect analysis used by the Commissioner and endorsed by the Appellate Division -- and the overall change to the “pupil population of the district” -- the appropriate standard as commanded by the statute’s plain language. If a high school has 10 students, and 2 of them are white, and 1 white student will be lost from the withdrawal of a sending district, the change to the “pupil population . . . of the district” (required by statute) is a roughly 9% loss of the proportion of white students; from 20% (2/10) to 11.1% (1/9). The Commissioner’s incorrect analysis here looks only to the isolated number of white students; by her logic, the drop from 2 white students to 1 in this example is a 50% loss.

The Commissioner’s analysis departs from what the statute plainly commands. More than that, it creates an impossible standard that places districts such as Absecon in an administrative straightjacket by preventing them from leaving a district if there will be any potential racial impact on the district from

which they seek to withdraw, even if there will be no substantial racial or educational or financial impact. The Legislature could not have envisioned such a restrictive standard when it amended the statute in 1986, limited the Commissioner's discretion, and prohibited severance only in cases where there would be a significant impact on the affected district's "pupil population" as a whole. By departing from the statutory command, the Commissioner has created her own standard and retained the discretionary authority the Legislature removed in its 1986 amendment. She no longer possesses such broad discretion, and the Appellate Division's affirmance of that bygone authority requires reversal.

II. THE APPELLATE DIVISION'S DECISION SHOULD BE REVERSED BECAUSE IT DEVIATED FROM APPLICABLE CASE LAW.

In addition to defying the Legislature's expressed intent, the Appellate Division and the Commissioner also ran afoul of prior case law. In particular, the Appellate Division's affirmance of a standard that prohibits any change in the racial composition of a school district resulting from severance expressly contravenes this Court's instruction in *North Haledon* that "[n]ot every action that reduces the percentage of white students necessarily implicates the State's policy against segregation in the public schools." 181 N.J. at 183. The Appellate

Division here provided a facile overview of *North Haledon* without applying its principles or import.

In accordance with *N.J.S.A.* 18A:38-13, as amended and in its present form, the *North Haledon* Court assessed the expected change to the white student population of Manchester Regional High School as a whole, **not** the change to the percentage of the gross number of white students. The Court specifically noted that the sending district's withdrawal likely would result "in a decrease in the **school-wide white population** by 9%." *Id.* at 171 (emphasis added). Again, Absecon's withdrawal here would result in a change of 0.48% in Pleasantville High School's white student population, decreasing from 0.61% to 0.13%.

The Appellate Division also ignored *North Haledon*'s instruction that the Commissioner assess demographic projections when adjudicating severance petitions. The *North Haledon* Court referenced numerous times the Commissioner's duty to account for "demographic trends." For example, the Court noted: "What we do know is that in this case, **demographic trends** are contributing to a steady decrease in the number of white students attending Manchester Regional, and that North Haledon's withdrawal will accelerate this trend." *Id.* at 183 (noting also that "the Board [of Review] should have

considered the ameliorative effect” of demographic trends, and that “education policy makers” must “anticipate . . . perceived demographic trends”).

The Appellate Division here did not discuss the Commissioner’s failure even to review the predictive assessments contained in Absecon’s unrebutted feasibility studies. The Commissioner did not discuss in her initial decision those predictive assessments in Absecon’s feasibility studies, even though feasibility studies are required by *N.J.S.A. 18A:38-13* (“[T]he district seeking to sever the relationship shall prepare and submit a feasibility study . . .”). Then, in her decision denying Absecon’s motion for reconsideration, the Commissioner dismissed the studies as “speculative,” despite the fact that feasibility studies are, by their nature, predictive, and despite the *North Haledon* Court’s instruction that the Commissioner account for “demographic trends.” Absecon later moved before the Appellate Division to supplement the record with updated student demographic data, evidencing that its feasibility studies were correct. Rather than being informed with the best and most up-to-date information, the Appellate Division denied the motion. (13a, n.3)

Ignoring the Commissioner’s flawed reasoning set forth in her order denying Absecon’s motion for reconsideration, as well as her failure to abide by *North Haledon*’s holding, the Appellate Division concluded that Absecon had somehow “waived” any arguments regarding the motion for reconsideration by

not addressing them in its initial brief. That conclusion is verifiably incorrect. Absecon appealed the denial of its motion for reconsideration (2a), included the order in its appendix (Pa555), and described in various ways in its appellate brief the reasons why the Commissioner erred in denying the motion (*See, e.g.*, Pb24, Pb39). It was palpable and gross error for the Appellate Division to conclude otherwise. Though the panel went on to provide a cursory discussion and summary affirmance of the Commissioner's decision denying reconsideration, it did not discuss the Commissioner's failure to consider on the merits, as the statute and case law require, the predictive value of Absecon's un rebutted feasibility studies.

The Appellate Division also relied heavily, and incorrectly, on the case of *Board of Education of Borough of Englewood Cliffs v. Board of Education of the City of Englewood*, 257 N.J. Super. 413, 446 (App. Div. 1992), *aff'd*, 132 N.J. 327 (1993). The panel's discussion of *Englewood*, which resorts to cherrypicked quotes and an incomplete analysis that does not explain the many varying factors on which the *Englewood* Court relied, is both conclusion-driven and fails to appreciate *Englewood's* true import. In particular, the *Englewood* Court reached its holding through its concern that "white flight" had motivated Englewood Cliffs' desire to withdraw from Dwight Morrow High School. The case did not come down to a single issue discussion of numbers and percentages.

Rather, the Appellate Division found that Englewood Cliffs had conspired to remove its “upper income white and Asian college-bound students from” Dwight Morrow High School. *Id.* at 441.

The Commissioner made no such findings here, nor could one be sustained. Absecon is a diverse school district, with over 50% of its students coming from diverse backgrounds, and it sought to send its high school students to the equally diverse Absegami High School. (Pb2-8) “White flight” is not and could not be a concern here.

Moreover, as the statute requires and in accordance with *North Haledon*, the *Englewood* Court assessed the potential decrease in the total white student population at Dwight Morrow High School as a whole, **not** the gross white student population. In a footnote, the Court explained that the withdrawal of 100 white students from Englewood Cliffs from a total white student population of 355 would result in a 6.5% net change to Dwight Morrow High School’s white student population; from 31.5% to 25.0%. *Id.* at 448, n.4. Again, applying the same formula here results in a 0.48% change to Pleasantville High School’s white student population – insubstantial under any standard.

Had the *Englewood* Court used the Commissioner’s formula endorsed here, it would have concluded that the loss of 100 white students from a total white student population of 355 would result in a 28.17% change to the gross

white student population, and could have denied severance on that basis alone. Though it cited *Englewood* extensively, the panel below failed to explain or even note that the *Englewood* Court’s analysis differed significantly from the Commissioner’s here. The Commissioner’s departure from the statute and case law, and the Appellate Division’s affirmance of it, require this Court’s intervention and correction.

III. THE APPELLATE DIVISION’S DECISION SHOULD BE REVERSED BECAUSE IT ENDORSES AN ARBITRARY, CAPRICIOUS, AND UNREASONABLE AGENCY DECISION THAT IS DIVORCED FROM THE ADMINISTRATIVE RECORD AND RESULTS IN THE CREATION OF AN IMPOSSIBLE STANDARD.

This Court recently held that it “cannot rubber-stamp agency decisions that rely upon conclusory findings” and “that fail to comport with the” applicable statutory language. *M.R. v. Dep’t of Corr.*, __ N.J. __ (A-53-23) (July 29, 2025) (slip op. at 28). The Court further stressed that appellate review of an administrative record “is not ‘perfunctory,’” and that it “must engage in a ‘careful and principled consideration of the agency record and findings.’” *Id.* (Slip op. at 13-14) (quoting *In re Young*, 202 N.J. 50, 70 (2010)). Accordingly, “the obligation that there be substantial evidence in the record requires a sifting of the record, and the ability to find support for the conclusions reached by the agency under the requisite statutory framework.” *Id.* (slip op. at 14) (internal quotations omitted). *See also In re Quest Acad. Charter Sch.*, 216 N.J. 370, 387

(2013) (applying same standard to review of decisions of the Commissioner of Education).

The Appellate Division here did not undertake the careful and considered review this Court requires. Absecon submitted robust and unrebutted feasibility studies evidencing that there would be no substantial racial impact on Pleasantville High School -- and perhaps no discernible impact at all -- because Absecon's phased-in withdrawal would occur over a period of four years, and because the one or two white Absecon students leaving each year would be replaced by an equal or greater number of white students from Pleasantville's middle school. (Pa454-455; 540-544). More specifically, this would mean that the high school, even with Absecon's withdrawal, was projected to have even more white students than it does now. The Commissioner ignored those projections, incorrectly analyzed the withdrawal as though it would occur immediately and all at once, and applied the wrong analysis (reviewing only the change to the gross number of white students, not the total white student population as the statute requires and the case law instructs). Then, in her decision denying Absecon's motion for reconsideration, she improperly dismissed Absecon's feasibility studies -- required by statute and integral to the analysis -- as "speculative."

Far from sifting through the record and addressing these obvious and clear errors raised by Absecon, the Appellate Division's decision does not discuss them. The panel did what this Court in *M.R.* instructed against: perform a perfunctory review of a final agency decision and then give that decision a rubber stamp of approval. The Appellate Division was not at liberty to ignore the clear errors of fact and law inherent in the Commissioner's decision.

This Court's intervention therefore is required because the unreasonableness inherent in the Commissioner's decision, affirmed as it was by the Appellate Division, results in the creation of an impossible standard, antagonistic to the statute, and divined from no source of authority other than the Commissioner's own will. School districts such as Absecon have been placed in an administrative straightjacket, unable to pursue educational opportunities of their choice if there will be any racial change to the school district from which they seek to withdraw. This extreme interpretation finds no support in the Legislature's adjustment to the statute in 1986 and results in thwarting the legislative will. In reality, this new standard is simply a derivative of the former "good cause" standard the Legislature abandoned. If allowed to stand, the Commissioner will apply this new and improper standard in every severance petition, and any public school district seeking to end a sending-receiving relationship will be forced to navigate an unreasonable review process

at odds with the Legislature’s expressed intent. *See M.R., supra* (slip op. at 14) (noting, in context of appeals from agency decisions, that the Court must “give effect to the Legislature’s intent”). *See also State v. A.M.*, 252 N.J. 432, 450 (2023) (noting same).

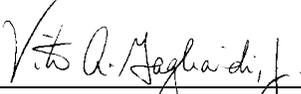
CONCLUSION AND CERTIFICATION

For the foregoing reasons, Appellant Absecon Board of Education respectfully requests that the Court grant its petition for certification.

I hereby certify that the foregoing Petition presents substantial questions meriting Certification and that it is filed in good faith and not for purposes of delay.

Respectfully submitted,

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By: 
Vito A. Gagliardi, Jr.

DATED: August 18, 2025