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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.: 091051

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.

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**ABSECON BOARD OF EDUCATION'S REPLY IN FURTHER SUPPORT  
OF PETITION FOR CERTIFICATION**

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## PRELIMINARY STATEMENT

The Commissioner of Education’s opposition to Petitioner Absecon Board of Education’s petition for certification fails to address the primary issue underlying Absecon’s arguments: that the Commissioner exceeded the statutory restrictions placed upon him by Legislature in its amendments to *N.J.S.A.* 18A:38-13. Time and again throughout his opposition, the Commissioner retreats to his power to conduct a “holistic review” of “all the circumstances” regarding whether a severance petition will result in a substantial negative impact to the affected districts. The issue here is not that the Commissioner does not have the authority to deny a severance petition, but rather that the Commissioner does not have **unbound discretion** to deny severance whenever he is uneasy with its consequences, even if those consequences are insubstantial.

The Commissioner’s opposition only lends further credence to Absecon’s concerns that he continues to exercise authority that the Legislature has revoked. Absecon’s petition explained at length that the Legislature expressly limited the Commissioner’s discretion to adjudicate severance petitions when it removed the “good cause” standard from *N.J.S.A.* 18A:38-13 and required that the Commissioner grant severance if there will be no “substantial” negative racial impact. The Commissioner’s continued insistence in his opposition that he maintains “equitable” powers to conduct a “holistic” review is a linguistic

Trojan Horse through which he will continue to apply the former good cause standard long since excised by the Legislature. In essence, the Commissioner believes he can find a “substantial negative impact” whenever he wishes and for whatever reason he wishes, no matter how insubstantial the record shows that impact to be. The Commissioner thus has granted himself the power to veto any severance application by arbitrarily casting miniscule racial or other changes as “substantial.”

Not only is this administrative scheme inconsistent with the statutory language, which gives the Commissioner no discretion to deny a severance application absent a substantial negative impact, it renders every sending school district in the state unable to leave districts that the Commissioner believes they should not leave. The Legislature envisioned no such veto power when it amended the statute. It is up to this Court to correct that understanding and to fulfill the Legislature’s intent.

The Commissioner casts his decision as consistent with the case law, and posits that his “holistic” review prerogative entitles him to base his decision of a substantial negative impact either on the percentage change to the total white student population, or the relative percentage change to the different racial student population. On the contrary, the case law only has ever looked to the change in the relative percentage in the different racial populations. More

importantly, the Commissioner does not explain when it would be appropriate to look at one methodology over the other. Apparently, he believes he can cherry pick whichever one he wishes to suit his purposes. The Commissioner's unwillingness to commit to a coherent standard is the essence of arbitrary and capricious review. Consistently throughout his brief, the Commissioner unwittingly proves Absecon's assertion that he continues to cling to discretionary powers he no longer possesses.

Unless corrected by this Court, the Commissioner's refusal to abide by the statute's express limitations will continue unchecked. Far from the Commissioner's assertion that this matter affects no interest outside that of the parties, the Panel's endorsement of this unbound discretion will affect every send-receive relationship in the state. All such districts now are beholden to an arbitrary and unprecedented scheme where the Commissioner can alternate between the student data on which he wants to rely for any reason or no reason, can dismiss un rebutted expert projections, and can deny severance applications based on miniscule changes to the total student population.

This Court therefore should grant certification to settle the issue of the limits of the Commissioner's authority under *N.J.S.A.* 18A:38-13, and enforce the Legislature's intent to limit the Commissioner's discretion.

**I. THIS COURT SHOULD GRANT CERTIFICATION BECAUSE THE COMMISSIONER'S OPPOSITION FURTHER DEMONSTRATES THAT HE CONTINUES TO EXERCISE DISCRETIONARY POWERS THAT THE LEGISLATURE HAS REVOKED.**

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Absecon explained in its petition for certification that the Commissioner's decision departs both from the statute and the applicable case law. The Commissioner counters that he did no more than exercise what he believes to be exceedingly broad powers under the statute. He argues that "[t]here is no statutorily prescribed test to determine when severance would create an impermissible racial impact." This is half true, at best. The "test" is a "**substantial**" negative impact. Nothing less will suffice, and the Commissioner has no discretion to deny severance where there is no substantial negative impact. The Commissioner has schemed his way around this legislative instruction by casting any change he does not like, no matter how minuscule, as "impermissible." The statute provides him no such subjective discretion.

In assessing a substantial racial impact, the Commissioner must look to "the racial composition of the **pupil population** of each of the districts." *N.J.S.A.* 18A:38-13. By its plain language, the statute requires the Commissioner to look to the impact on the pupil population as a whole. It follows then that if the Commissioner assesses the racial impact of a district's withdrawal in terms of percentages, he would look only to the relative percentage change in the total

white student population, not the gross white student population alone – where, as here, small numbers would lead to incredibly misleading impressions.

Both this Court and the Appellate Division have held that the analysis should center on the change to the total white student population. In *North Haledon*,<sup>1</sup> this Court looked to the “school-wide white population” to assess negative racial impact. 181 N.J. 161, 183 (2004). Similarly, in *Bd. of Educ. of Borough of Englewood Cliffs v. Bd. of Educ. of the City of Englewood*, 257 N.J. Super. 413, 448 n.4 (App. Div. 1992), *aff’d*, 132 N.J. 327 (1993), the Appellate Division noted an unacceptable 6.5% change in the total white student population of Dwight Morrow High School. The relative percentage change here to Pleasantville High Schools’s (“PHS”) school-wide white population is microscopic – 0.48%. Furthermore, this case remains distinguishable from *Englewood* because, as Absecon noted in its petition, the Appellate Division was concerned that Englewood Cliffs’ withdrawal from Dwight Morrow High School was based on “white flight.” *Id.* at 441. There are no such concerns here.

Cornered with the language of the statute and case law, the Commissioner nonetheless argues that there is no *per se* rule that limits him to reviewing the percentage change only of the total white student population. In other words, he

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<sup>1</sup> *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*”).

claims he may look either to the change to the gross white student population or the relative percentage change in total white student population. For reasons he does not explain, he chose to look here only at the gross white student population. The case law suggests no such discretion, though the Commissioner inverts the logic by arguing that nothing *prevents* him from assessing one or the other. This is untrue, given the statute's plain language that he look to the impact on the "pupil population" of each affected district. *N.J.S.A. 18A:38-13*.

More importantly, the Commissioner's suggestion that he can alternate his analysis between different student populations underscores the incoherence of the discretion he has granted to himself. Going forward, it will be impossible for districts to know the data set on which the Commissioner will rely to adjudicate any given case. This is particularly prejudicial and unfair in cases concerning districts with overwhelming minority student populations such as Pleasantville because there will be drastic differences in the projected relative percentage changes to the total white student population compared to the change only in the gross white student population. As Absecon noted in its petition, if the Panel could accept the Commissioner's determination here that the miniscule change in the total white student population of PHS is substantial, then no district ever could end a send-receive relationship if the Commissioner did not want it; any change in the affected

districts' racial composition could provide justification to deny the severance application.

In addition to exceeding the bounds of authority granted to him by the Legislature, the Commissioner's arguments violate the most basic principles of administrative review. "Although administrative agencies are entitled to discretion in making decisions, that discretion is not unbounded . . . . Administrative agencies must articulate the standards that govern their discretionary decisions in as much detail as possible." *In re Vey*, 124 N.J. 534, 543-44 (1991). It therefore is critical that agencies exercise the "utmost care, caution and clarity in exercising [their] decisional and regulatory responsibilities" by "assur[ing] the greatest possible degree of predictability in [their] own actions." *Crema v. Dep't of Env't Prot.*, 94 N.J. 286, 301 (1983). The Commissioner advances no such coherent or predictable standard here.

Instead, he suggests he can look at one form of data (relative percentage changes to total white student population, as with every prior case) or the other (gross student population, somehow announced here for the first time) in any case for apparently any reason without articulating a coherent standard to guide his decision. There are certain to be future severance cases in which the difference in the percentage drop between the total white student population and gross white student population will be dispositive, and yet districts have no way to know which one the

Commissioner will choose – only that they are subject to his “holistic” review. Beyond doubt, the Commissioner has done nothing more than repackage the former good cause standard under a new guise. This Court therefore should correct the Commissioner’s overstep, clarify the appropriate standard, and hold that the Commissioner was bound to apply the standard articulated by the Legislature to hold that Absecon’s withdrawal would have no substantial negative racial impact on PHS.

**II. THE COURT SHOULD IGNORE THE COMMISSIONER’S POST HOC EFFORT TO LEGITIMIZE HIS DECISION BECAUSE IT IS BASED ON A MISCHARACTERIZATION OF THE RECORD BELOW.**

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Absecon submitted an un rebutted record to the Commissioner showing that its withdrawal would have no impact on PHS’ racial composition because the small number of withdrawing Absecon students would be replaced each year of the phased in withdrawal by a greater number of white students coming up from Pleasantville’s middle school. Had the Panel engaged in an appropriate fulsome review of the administrative record as required, it would have been compelled to overturn the Commissioner’s decision. *See M.R. v. Dep’t of Corr.*, \_\_ N.J. \_\_ (A-53-23) (July 29, 2025) (slip op. at 28) (holding that appellate courts cannot “rubber-stamp” conclusory agency findings).

Now, in a transparent post-hoc effort to bolster his reasoning, the Commissioner attempts to undermine the un rebutted administrative record by

selectively reviewing the data. Most egregious, the Commissioner claims “Absecon admits its plan would have all but eliminated the entire white student population at PHS.” This contention is patently false. Absecon’s experts concluded that the one or two white Absecon students leaving PHS each year of the phased in withdrawal would be replaced by an equal or greater number of white students from Pleasantville’s middle school. (Pa454-455; 540-544). The record is manifestly clear on that point. Indeed, Absecon sought to supplement the record on appeal to show that its experts’ projection had been proven correct; the Commissioner opposed the motion and the Panel ultimately denied it.

Moreover, the Commissioner did not address in his decisions below the data regarding Pleasantville’s middle school. He simply ignored it. Now, he argues that the data does not reflect an increasing white population in Pleasantville’s middle school. This is both incorrect and a mischaracterization. The Commissioner elides Absecon’s experts’ conclusions by arguing that the white population in Pleasantville’s lower schools was not increasing but rather “stagnating” (*i.e.*, remaining constant). The simple truth is that there were more white students per grade in Pleasantville’s lower schools than there were per grade in its high school, even after accounting for white Absecon students. Accordingly, Absecon’s experts concluded that Absecon’s withdrawal would have no impact on PHS’ racial composition because those departing white

students would be replaced by a greater number of incoming white students each year during the phased in withdrawal. (Pa454-455; 540-544)

Relatedly, the Commissioner claims he did not dismiss the demographic trends submitted by Absecon's experts, but rather concluded that they were "speculative" because he could not assume that Pleasantville's white middle school students would attend PHS. The Commissioner's logic -- in dismissing un rebutted analysis that the law requires -- is both inconsistent and self-defeating. Though he refused to believe that PHS would receive white students from its middle school, he assumed that the same number of white middle school students from Absecon would continue to go to PHS. Such selective, inconsistent, and conclusion-driven reasoning should not warrant this Court's indulgence. *See M.R., supra*. Accordingly, the Court should grant Absecon's petition for certification.

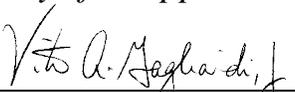
**CONCLUSION**

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

Respectfully submitted,

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DATED: October 13, 2025