

COMMENTS TO THE COMMISSIONER OF EDUCATION
REGARDING THE ABSECON SCHOOL DISTRICT'S PETITION TO TERMINATE ITS
SENDING-RECEIVING RELATIONSHIP WITH THE PLEASANTVILLE SCHOOL
DISTRICT

Submitted by Paul Tractenberg

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The comments I am submitting were triggered by, and relate to, the Absecon school district petition to terminate the sending-receiving relationship between Absecon and the Pleasantville school district. However, they inescapably relate to the Commissioner's much broader power and duty to assure that New Jersey's school children, including the students in the Absecon and Pleasantville school districts, receive a thorough and efficient education in a racially balanced setting, their fundamental constitutional rights under the state constitution.

As the State Board of Education recognized in a similar case where the Englewood Cliffs school district sought to terminate its long-standing sending-receiving relationship with the Englewood school district, "Although presented to us as a sending-receiving case, this matter has raised questions of fundamental State policy and this agency's responsibilities thereunder." The State Board recognized, as the Commissioner did in that case and must in this case, that, in the words of the New Jersey Supreme Court, "...as established by *Booker* and *Jenkins*, our State's policy against discrimination and segregation in the public schools is of such vigor and import as to match its policy in favor of a thorough and efficient education." (Board of Education of Englewood Cliffs v. Board of Education of Englewood, 170 N.J. 323, 341-2 (2002)). Moreover, "there is no question that the Commissioner and the State Board have the responsibility to counter trends toward withdrawal from the school community by members of the white majority." (Id.) In the same vein, "...we believe that both the Commissioner and the State Board have an affirmative obligation to take such steps as are necessary to correct an imbalance brought before us where, as here, our failure to act would make us a passive participant to the perpetuation of that imbalance." (Id.)

To deal with Absecon's petition in a meaningful way, therefore, requires that the Commissioner recognizes and applies two main streams of New Jersey constitutional jurisprudence relating to public education. One is the *Abbott v. Burke* stream (, which recognizes the State's obligation to equalize school funding as a way to equalize educational opportunities on behalf of students in the State's 31 poor urban districts, one of which is Pleasantville. The second stream is represented by the pending case of *Latino Action Network, et al. v. State of New Jersey, et al.*, (Dkt. No. MER-L-001076-18), which seeks to have the State meet its equally important constitutional obligation of assuring that New Jersey schools avoid segregation and are racially balanced. This second stream traces its origin to landmark New Jersey Supreme Court decisions that even predate *Abbott's* predecessor case, *Robinson v. Cahill* (62 N.J. 473 (1973)). Perhaps the most relevant of those early decisions was *Jenkins v. Township of Morris School District* (58 N.J. 483 (1971)), which found that the Commissioner had the power and duty to prevent school

segregation even if that might require her to order the consolidation of school districts that had been in a longstanding sending-receiving relationship.

My credentials for submitting these comments

I am submitting these comments on my own behalf as a Board of Governors Public Service Professor and Alfred C. Clapp, Jr., Distinguished Public Service Professor of Law Emeritus at Rutgers Law School in Newark. Since I joined the faculty in July 1970, more than 50 years ago, I have focused my professional energies on improving the educational opportunities of low-income students of color. I have concentrated on equalizing school funding and on integrating districts, schools, and classrooms. Those activities have continued as a lawyer and educational consultant since my retirement from full-time law teaching at the beginning of 2016.

To give you a flavor of my involvement, here is a sampling of my activities:

- Starting shortly after I arrived at Rutgers Law School in 1970, I became deeply involved in New Jersey's epic school funding litigation, initially *Robinson v. Cahill* and since 1981 *Abbott v. Burke*. My involvement continues literally until today with my work on two current school funding cases, one involving Jersey City and the other Lakewood.
- In 1973, I established, and was the first executive director of, the Education Law Center, which has been representing the urban student plaintiffs in *Abbott* throughout the litigation.
- My involvement in school funding reform is rivalled only by my work on school integration, which has included various means of enhancing school integration by crossing school district lines through sending-receiving relationships, shared services, and district consolidation. In those connections, my involvement has included being co-counsel to the Englewood school district during its 17-year legal fight to maintain its sending-receiving relationship with Englewood Cliffs, to enjoin Tenafly and other NJ school districts from siphoning off white students by means of private tuition policies, and to require the consolidation of the Englewood, Englewood Cliffs and Tenafly districts at least at the high school level. Of those three objectives, only the last was not achieved through our litigation and, even as to consolidation, the NJ Supreme Court acknowledged that the Commissioner of Education had the power to order it if she determined that it was necessary to advance the State's constitutional duty to integrate its public schools.
- I am a founding member, trustee, and vice-president of the New Jersey Coalition for Diverse and Inclusive Schools, Inc., the non-profit organization promoting NJ's statewide school integration case, *LAN et al. v. State of New Jersey, et al.*
- Throughout my career, I have written and spoken extensively about these matters, including:
 - A book co-authored with three young colleagues and published in April 2020 entitled *Making School Integration Work: Lessons from Morris*, which documents the remarkable success of the Morris School District, consolidated for racial balance purposes by order of the Commissioner of Education in 1971;

- A 2019 report and action plan, entitled *A School Integration Action Plan for New Jersey*, for Chancellor Nancy Cantor of Rutgers in Newark pursuant to a seed-money grant;
- Two major reports on NJ school segregation and ways to combat it, co-authored with one young colleague--*The New Promise of School Integration and the Old Problem of Extreme Segregation: An Action Plan for New Jersey to Address Both* (2018) and *New Jersey's Apartheid and Intensely Segregated Urban Schools: Powerful Evidence of an Inefficient and Unconstitutional State Education System* (2013); and
- A course delivered at several annual NJ Judicial College programs on combatting school segregation (with my Rutgers Law colleague Elise Boddie and retired NJ Supreme Court chief justice Deborah Poritz).

My comments on the question of the proposed severance of the sending-receiving relationship between Absecon and Pleasantville

Prior commissioners and courts have dealt with the questions raised by the statutory and regulatory standards for deciding whether a petition to terminate a sending-receiving relationship should be granted or denied, often in a context reminiscent of this one where a relatively few students are involved and, in one sense, little might seem to change day-to-day based on whether they are present in the receiving district or absent from it.

That is especially true if the petitions raised issues regarding adverse impacts on racial composition of one or more of the districts. In the words of the New Jersey courts, “questions of racial balance must be a governing consideration any time the [State] Board has a withdrawal petition before it.” (In the Matter of the Petition for Authorization to Conduct a Referendum on the Withdrawal of North Haledon School District from the Passaic County Regional High School District, 181 N.J. 161, 179 (2004), quoting from App. Div. decision in that case, 363 N.J. Super. at 143).

Yet, many of those cases, like this one, have raised much larger questions of constitutional entitlement and sound educational policy than the numbers of students involved might suggest. In those prior decisions, a succession of commissioners, state boards and courts have wound up giving primacy to these larger questions and, consequently, almost always have wound up rejecting petitions for termination if they had a negative racial impact on one or more districts.

In approaching this question, the Commissioner must be mindful of several imperatives:

1. As indicated, preventing segregation and assuring racial balance in the public schools is a high constitutional priority;
2. The New Jersey Supreme Court has recognized since at least the *Booker* decision in 1965 that all students benefit educationally and socially from attending racially balanced schools;
3. If terminating a sending-receiving relationship has a substantial negative impact on any district, the Commissioner must deny the application without regard to any benefits that

other districts might claim because the governing statute does not involve a balancing test;

4. With regard to a termination's racial impact, the fact that only a small number of students is involved does not negate the possibility of there being a substantial negative impact; and
5. The fact that none of the districts which are parties to the sending-receiving relationship has formally objected does not absolve the commissioner of the duty to address the issue of negative impact, especially regarding educational quality and racial balance.

As indicated, one of the cases in which I was deeply involved for 17 years, *Board of Education of Englewood Cliffs v. Board of Education of Englewood v. Board of Education of Tenafly* (257 N.J. Super. 413 (App.Div. 1992), aff'd 132 N.J. 327 (1993), cert. denied 510 U.S. 991 (1993)), was closely analogous to the Absecon-Pleasantville situation in many respects and, therefore, can provide the Commissioner with important guidance.

A sending district—in that case Englewood Cliffs—had expressed unhappiness with its receiving district—Englewood—for years and sought to terminate its longstanding high-school-level relationship. Englewood Cliffs was a predominantly white and Asian upper-income district and Englewood was a predominantly Black and lower-income district. Relatively few of Englewood Cliffs ninth graders were attending Dwight Morrow High School in Englewood, and most were making other high school arrangements in public and private schools.

Englewood Cliffs maintained that its desire to terminate the relationship with Englewood had nothing to do with race or socioeconomic status, but only educational quality, and that Dwight Morrow was deficient in educational quality and safety. Englewood Cliffs also argued that, because only a small number of its students were attending Dwight Morrow, their departure would have little impact on that school's racial balance or educational quality. Englewood Cliffs proposed to form a new sending-receiving relationship with Tenafly, another nearby K-12 district. In fact, it turned out that many white Englewood Cliffs students, and even some white Englewood students, were already attending the overwhelmingly white and upper-income Tenafly High School on a private tuition basis.

All the decision makers in the Englewood Cliffs case--the Administrative Law Judge who conducted a 99-day-long hearing, the Commissioner, the State Board, the Appellate Division and the New Jersey Supreme Court—agreed that Englewood Cliffs should not be permitted to terminate the sending-receiving relationship, and that Tenafly (or, for that matter, any other New Jersey school district) should not be permitted to accept Englewood Cliffs or Englewood students on a private tuition basis. The only remedial issue on which they did not agree was whether regionalization should be ordered as the Commissioner did in the Morris Township-Morristown case.

As to Englewood Cliffs argument that only a small number of white students would be leaving Dwight Morrow High School in Englewood if termination were approved, the decision makers rejected the argument for two reasons that resonate for Absecon-Pleasantville: (i) that worsening the plight of an already racially imbalanced school is unacceptable; and (ii) the small number of

white students attending the receiving school at the date of decision was the result of cumulative action by the sending district over years to demean the receiving school and discourage its students from attending their designated public high school.

The main difference between the Englewood Cliffs-Englewood-Tenafly situation and the Absecon-Pleasantville-Greater Egg Harbor situation is that both Absecon and Greater Egg Harbor are significantly more racially and socioeconomically diverse than Englewood Cliffs and Tenafly were. However, Pleasantville is even more racially and socioeconomically segregated than Englewood was. According to Absecon's feasibility study, the handful of white Absecon students attending Pleasantville High School constituted **all** of the white students in attendance there in 2017-18, the last year covered by the study. That means Pleasantville High School would become a 100% non-white school, clearly the starkest example of school segregation.

The Commissioner's role in deciding whether to grant Absecon's petition to terminate its sending-receiving relationship with Pleasantville is prescribed by statute and regulation, but, as a practical matter, it also must be sensitive to the fact that the State is being charged in the *LAN* case with failing to comply with its affirmative constitutional duty to assure that New Jersey students are educated in an integrated, rather than segregated, setting.

The most relevant statutory provision as to severance of sending-receiving relationships is NJSA 18A:38-13, which is elaborated by the regulatory provision NJAC 6A:3-6.1. Under the statute, the Commissioner is charged with making "equitable determinations based upon consideration of all the circumstances, including the educational and fiscal implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts." The Commissioner is directed by the statute to "grant the requested change...if no substantial negative impact will result..." but, as indicated, court decisions reviewing that statutory provision have made clear that a relatively small numerical or percentage change in the racial composition can still dictate that the request for termination be denied.

The fact that neither of the districts, which are parties to the sending-receiving relationship, has objected to its termination is no assurance of Commissioner approval. Indeed, that should certainly be the case here where the receiving district Pleasantville initially strongly objected and then reversed itself for reasons that may not have related to the quality of the education received by its students. Also, the Pleasantville district opted to intervene in the *LAN* case in support of the plaintiffs' claim that New Jersey was failing to honor its constitutional obligation to assure students an integrated T&E education. Pleasantville's intervention was heavily influenced by Absecon's effort to terminate their sending-receiving relationship. The Commissioner also should take into consideration that Pleasantville is an Abbott/SDA district whose students the NJ Supreme Court has indicated are entitled to special solicitude because they have become tantamount to constitutional wards of the State.

The bottom line is that the Commissioner has authority to approve Absecon's petition only if there is no persuasive evidence that Pleasantville will suffer a substantial negative impact from termination of the sending-receiving relationship. In my judgment, the record currently before

the Commissioner does not support the granting of such an approval because, under longstanding New Jersey constitutional doctrine, consigning a school or district to being 100% non-white is anathema.

Although Absecon has submitted a feasibility study advancing the position that the petition for severance should be granted, in fairness, the experts who authored that study and the special counsel representing the district in this matter have a long history of assisting districts in terminating their relationships with other districts. At a videotaped public Q&A session in Absecon after the special counsel, Vito Gagliardi, and his expert team presented their feasibility study to the community, Mr. Gagliardi answered a question about his experience with such matters by stating that over a period of 20 years he had represented about a dozen districts in petitions to the commissioner and had never lost. He also answered a question about how much he would charge Absecon for shepherding its petition by estimating the cost at \$350,000 for an 18-24 month process.

The resume of Richard S. Grip of Statistical Forecasting LLC, who, according to the study (p. 5), was primarily responsible for “the demographics and the racial impacts,” states that between 2006 and 2017 he was involved in 15 feasibility studies for New Jersey school districts, most of them recently involving petitions to terminate sending-receiving relationships and most of them earlier involving efforts to leave or dissolve regional districts.

The pattern is clear—small, predominantly white and well-to-do districts are seeking to distance themselves from districts, often larger, more urban and populated by students who are lower-income Blacks and Latinx. Of relevance to the Commissioner’s decision is that those receiving districts were willing to accept the sending districts’ students when that suited both districts’ needs. Also relevant is that such a pattern is sharply at variance with the constitutional role assigned to the Commissioner and may well provide the LAN plaintiffs with current support for their claims that the State is not only tolerating, but also actively contributing to, an unconstitutional situation. Finally, this fragmentation of districts, or as Mr. Gagliardi labels it “school reconfiguration,” is directly contrary to Senator Sweeney’s effort to achieve statewide consolidation of districts. Interestingly, one of the Absecon questions to Mr. Gagliardi was what impact such legislation might have on the Absecon petition. His answer: it makes it even more urgent for Absecon to affiliate with a partner it “likes” as soon as possible,

The situation in Pleasantville is particularly problematic under all three statutory criteria the Commissioner must apply—the impact on both sending and receiving districts with regard to fiscal, educational and racial circumstances. Absecon’s feasibility study seeks to minimize the impact in all three regards for the Pleasantville district, but even it cannot suggest that there are no negative effects.

As to fiscal impacts, Absecon, Greater Egg Harbor and Mainland should be slightly better off, according to Absecon’s experts, but Pleasantville will be “slightly” worse off since it will be losing annually an estimated \$351,000 in tuition payments (p. 78). But the feasibility study sees no problem with that since Pleasantville could simply raise its local property taxes by a small amount to compensate. Alternatively, the study suggests that the departure of the estimated 38

Absecon students “should lead to staff and other reductions” in district costs, but it then seems to contradict that suggestion in the same paragraph when it states: “With about 350 certificated teachers in the district, it would be expected that this change [in enrollment] could be handled through attrition with no teachers being subject to a reduction in force” (p. 77).

As to educational impacts, the feasibility study never characterizes Pleasantville as providing an inadequate education, but the data it presents and the narrative about that data suggest that conclusion. For example, when it compares Pleasantville High School to the Greater Egg Harbor Regional and Mainland Regional alternatives, the study refers to a “stark difference” in many particulars (see Table 47 at p. 70 for High School Comparisons). In referring to PARCC results at Pleasantville High School (see Table 41 at p. 65), the study adds a note seeking to explain why no percentage could be listed regarding students who met school expectations in mathematics that concludes with the following sentence: “Whatever the explanation, it is eminently clear that the school could not (and did not) meet expectations despite such a low target, an indicator of poor pupil performance.” Finally, in expressing its Educational Conclusion (p. 71), the feasibility study has only one sentence about Pleasantville High School: “Given the fact that so few Absecon students attend (or have attended) Pleasantville High School, there will be no adverse educational effect upon Pleasantville were the Absecon School District to seek and obtain a change in its current send/receive relationship with the Pleasantville Board of Education.”

Other material available to the Commissioner provides a more explicit and detailed indication of Absecon’s view of the education provided by Pleasantville High School. For example, in a document available on the Absecon school district website, entitled “Important Information Regarding the Public Comment Period,” the district encourages members of the public to submit written comments to the Commissioner, “**strongly encouraging** members of the Absecon community to voice their opinion by submitting letters in support of our application.” (Emphasis in original) The board seeks to facilitate community responses by having an assistant to the superintendent collect and transmit them to the Commissioner. It also provides “resources” to help in the drafting of letters, including “‘sample’ letters that were submitted to the Commissioner of Education in similar cases” and some detailed “Relevant Information.” The lead-in to that information states: “The public comment period provides members of the Absecon community the opportunity **to explain why sending our students to Absegami High School is incredibly important to our community and children.**” (Emphasis added.) Throughout the 10 pages of Background Information, there are detailed comparisons of Absegami and Pleasantville High Schools. The first paragraph captures the flavor: “For quite some time, Absecon has been concerned with the cost and quality of the education its high school students have been receiving at Pleasantville High School due to **Pleasantville’s severe financial and educational mismanagement. This mismanagement also has led to Absecon having serious safety concerns at the high school.**” (Emphasis added.) The information that follows contains a litany of strong and serious charges against Pleasantville.

This is very reminiscent of the unsuccessful campaign that Englewood Cliffs waged to support its termination petition to the Commissioner. It is incumbent upon the Commissioner to

investigate Absecon's charges against Pleasantville, and, if any have substance, to take immediate steps to address them. That kind of educational oversight is at the heart of the Commissioner's responsibilities.

As to racial impact, whose treatment occupies well over a quarter of the entire feasibility study, the study documents how segregated Pleasantville High School and the rest of the district schools have been even with Absecon students in attendance. According to Table 25 at page 45, which is based on NJDOE data, during the six years between 2012-13 and 2017-18 the percentage of minority students in the district was between 98.40% and 99.04%, and the percentage of white students was between 0.96% and 1.60%. In 2017-18, the last year shown, the entire district had 51 white students (1.46%) and 3,454 minority students (98.54%). Pleasantville High School was even more segregated during that year with only five white students (0.66%) and 752 minority students (99.34%) (Table 26 at p. 46). Of the high school's enrollment, all five white students (see Table 24 at p. 44, based on Pleasantville Public School data, which shows six white students, not the five shown by NJDOE data) and 31 of the minority students were from Absecon. Based on those tables and data, if Absecon students left Pleasantville High School, it would reduce the white population of that school by 100% to zero (see Table 27 at p. 48 where the feasibility study acknowledges that) and of the district by about 10% (5 or 6 of 51).

How does the feasibility study describe those alarming statistics in its Racial Summary (p. 62)? "If Absecon students no longer attended Pleasantville High School, **it is the consultants' opinion that there would be no negative racial impact on the students at Pleasantville High School.**" (Emphasis added.) And in that paragraph's final sentence, the consultants' expert opinion is that "**Given the substantial number of Black and Hispanic students at Pleasantville High School, the diversity of the school will not change** if Absecon students no longer attend Pleasantville High School." (Emphasis added.) The study's expert opinion about what constitutes student "diversity" seems sharply at odds with the NJ Constitution and our highest court's interpretation of it.

Despite all the racial data presented by the feasibility study, it never addresses why the racial breakdown of Absecon students attending Pleasantville High School differs so dramatically from the overall racial breakdown of Absecon students. According to Table 23 at page 42, the percentage of white students in Absecon's PK-8 program between 2012-13 and 2017-18 ranged between 59.18% and 63.34% until 2017-18 when it dipped to 57.78%. Still, that is a far cry from the percentage of white students from Absecon attending Pleasantville High School (see Table 24 at p. 44). It would be interesting and instructive to know why the great bulk of Absecon students who attend Pleasantville High School (83.78% to 96.67% depending upon the year) are minority students. It also would be interesting and instructive to learn where the great majority of Absecon's white high school-age students attend school. I raise those questions having in mind the Englewood Cliffs case where it turned out that many of the white Englewood Cliffs students were quietly attending predominantly white Tenaflly High School on a private tuition basis. That led the New Jersey courts to characterize Tenaflly as a "white-flight academy" and to enjoin Tenaflly and all other NJ school districts from accepting Englewood Cliffs and Englewood students on a private tuition basis.

My comments on the broader question of what the Commissioner should do to assure the students of the Absecon and Pleasantville districts a thorough and efficient education

Unlike the question of whether you should approve the termination by one party of a sending-receiving agreement it entered with another party, this broader question is not one that a party has to bring to the Commissioner for resolution. The Commissioner has an ongoing duty to monitor whether all of New Jersey's students are receiving the thorough and efficient education, provided in a racially balanced setting, to which they are constitutionally entitled and, if some are not, the Commissioner is duty-bound to take steps necessary to rectify the failure.

In the context of Absecon and Pleasantville, though, Absecon has forced that question upon the Commissioner by seeking to justify its students' departure from Pleasantville High School by castigating Pleasantville for being ineffectively managed, unsafe, and educationally unsuccessful. If the Commissioner were to find that such charges were supportable, it is not legally or morally acceptable to simply determine that Absecon students may be better served by attending a high school other than Pleasantville High, and that the students at Pleasantville High will not be seriously enough harmed by that departure to prevent it. At the very least, the Commissioner has the constitutional responsibility to take steps necessary to correct the kind of deficiencies that the Absecon petition has set forth.

As to how the Commissioner should respond to the situation raised by Absecon's petition, I agree strongly with, and endorse, the comments submitted to the Commissioner on March 25, 2021 by David Sciarra, Executive Director of the Education Law Center. Those comments include many important and logical approaches to improving the education of the students of both the Pleasantville and Absecon districts, which are grounded in decades of elaborately developed judicial, legislative, and executive policies and standards.

The Commissioner must resist the temptation to deal with Absecon's petition in a narrow and mechanistic manner. A decision to either terminate the sending-receiving relationship between Absecon and Pleasantville or to deny the request and leave the relationship intact will not discharge the Commissioner's responsibilities to those students. To the extent that some of Absecon's complaints about the quality of education being afforded to, not only the modest number of Absecon students, but also the far more numerous students of Pleasantville, may have validity, they raise concerns the Commissioner must address. Perhaps neither of the districts is blameless for not doing more to promote a stronger educational program for all the students enrolled, but the ultimate responsibility rests with the Commissioner. Both the Abbott stream and the LAN stream of cases make crystal clear that it is the State that has ultimate responsibility for satisfaction of the fundamental constitutional right of students to a T&E education.

Such an effort will require a much different and more elaborate record than the one now before the Commissioner. The Commissioner's powers certainly provide ample means to require the creation of such a record. Even the regulations dealing with the resolution of a petition to terminate a sending-receiving relationship, referred to earlier in these comments, contemplate that the Commissioner may require "further inquiry, fact-finding or exploration of legal argument" through "such further proceedings as the Commissioner may deem necessary."

The question is not whether the Commissioner has the power to do what is required—she clearly does, but rather how urgently the Commissioner will exercise that power, as it is her duty to do.