

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

Appellant,

v.

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

Respondent

SUPERIOR COURT OF NEW  
JERSEY, APPELLATE DIVISION

DOCKET NO. A-003237-22

On Appeal from a decision of the  
Commissioner of Education

---

**ABSECON BOARD OF EDUCATION'S APPELLATE BRIEF**

---

**PORZIO, BROMBERG & NEWMAN, PC**

100 Southgate Parkway

Morristown, NJ 07906

P: (973) 538-4006

*Attorneys for Appellant Absecon Board of  
Education*

Of Counsel and on the Brief:

Vito A. Gagliardi, Jr., Esq. [vagagliardi@pbnlaw.com](mailto:vagagliardi@pbnlaw.com) (024821989)

Kerri A. Wright, Esq. [kawright@pbnlaw.com](mailto:kawright@pbnlaw.com) (018042005)

On the Brief:

Thomas J. Reilly, Esq. [tjreilly@pbnlaw.com](mailto:tjreilly@pbnlaw.com) (245552017)

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
TABLE OF JUDGMENTS BEING APPEALED .....	v
PRELIMINARY STATEMENT.....	1
PROCEDURAL HISTORY AND STATEMENT OF FACTS .....	4
Absecon’s Dissatisfaction With Pleasantville High School .....	4
Demographic Data And Absecon’s Feasibility Study .....	7
Absecon’s Unopposed Application To The Commissioner.....	12
The Commissioner’s Decision.....	13
LEGAL ARGUMENT .....	15
I.    THE COMMISSIONER SHOULD HAVE GRANTED ABSECON’S UNOPPOSED APPLICATION TO END THE PARTIES’ SENDING-RECEIVING RELATIONSHIP BECAUSE THE UNDISPUTED FACTS IN THE RECORD SHOW THERE WILL BE NO SUBSTANTIAL NEGATIVE IMPACT ON PLEASANTVILLE HIGH SCHOOL, OWING BOTH TO ABSECON’S PHASED-OUT WITHDRAWAL AND PLEASANTVILLE’S INCREASING WHITE STUDENT POPULATION ( <u>Pa548-53, Pa554-55</u> ) .....	18
A.    The New Jersey Supreme Court’s <i>North Haledon</i> Decision Provides The Proper Analysis For Severance Under <i>N.J.S.A. 18A:38-13</i> .....	20
B.    The Commissioner’s Decision Ignores Both <i>North Haledon</i> And The Undisputed Evidence In The Record Regarding Demographic Trends.....	23
C.    The Unrebutted Data Shows Unequivocally That There Will Be No Racial Impact on Pleasantville High School Owing To Absecon’s Gradual Withdrawal.....	25

D.	Absecon’s Unrebutted Data Is Sufficient To Allow For Severance Under Both The Statute And <i>North Haledon</i> .....	31
II.	THE COMMISSIONER’S DECISION IS ARBITRARY AND CAPRICIOUS BECAUSE THE COMMISSIONER IGNORED RELEVANT AND UNREBUTTED EVIDENCE IN THE RECORD REGARDING THE PARTIES’ STUDENT POPULATIONS AND DEMOGRAPHIC TRENDS AND SUBSTITUTED HER OWN STANDARD FOR THAT REQUIRED BY STATUTE ( <u>Pa548-53, Pa554-55</u> ) .....	34
III.	THE COMMISSIONER’S DECISION IS UNREASONABLE BECAUSE IT CREATES AN IMPOSSIBLE STANDARD FOR ANY SCHOOL DISTRICT TO MEET, BY HOLDING THAT ANY LOSS OF WHITE STUDENTS FROM A PREDOMINANTLY MINORITY DISTRICT IS INTOLERABLE ( <u>Pa548-55.</u> ).....	40
A.	The Commissioner Has Created An Arbitrary And Impossible Standard Divorced From The Case Law And Statute .....	41
B.	The Commissioner’s Decision Creates An Impermissibly Expanded Role For Herself In Granting Severance Applications That Neither Is Contemplated By The Statutory Language Nor Warranted By The Unrebutted Facts Here. ....	46
	CONCLUSION .....	50

**TABLE OF AUTHORITIES**

Page(s)

**CASES**

*Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n*, 234 N.J. 150 (2018).....16, 17, 33

*Application of Boardwalk Regency Corp. for a Casino License*, 180 N.J. Super. 324 (App. Div. 1981) .....17

*Bd. of Educ. of Maywood v. Bd. of Educ. of Hackensack*, Comm’r of Educ. Decision No. 82-20 (Mar. 2, 2020) .....44

*Bd. of Educ. of Merchantville v. Bd. of Educ. of Pennsauken*, Comm’r of Educ. Decision No. 133-15 (Apr. 10, 2015) .....45

*Board of Education of Borough of Englewood Cliffs v. Board of Education of the City of Englewood*, 257 N.J. Super. 413 (App. Div. 1992), *aff’d*, 132 N.J. 327 (1993) .....46, 47

*Board of Education of Longport v. Board of Education of Atlantic City*, Comm’r of Educ. Decision No. 238-14 (June 5, 2014).....43, 44, 45

*Dep’t of Child. & Fam. v. T.B.*, 207 N.J. 294 (2011) .....17

*DiProspero v. Penn*, 183 N.J. 477 (2005) .....33

*GE Solid State v. Dir., Div. of Taxation*, 132 N.J. 298 (1993) .....34, 46

*Greenwood v. State Police Training Ctr.*, 127 N.J. 500 (1992) .....17

*In re Herrmann*, 192 N.J. 19 (2007) .....16, 33

*In re Petition For Authorization To Conduct A Referendum On Withdrawal Of N. Haledon Sch. Dist. From Passaic Cty. Manchester Reg’l High Sch.*, 181 N.J. 161 (2004) .....*passim*

*In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp.*, 216 N.J. 370 (2013) .....16

*In re Ridgefield Park Bd. of Educ.*, 244 N.J. 1 (2020).....16, 33

*In re Stallworth*, 208 N.J. 182 (2011) .....16

*In re Vey*, 124 N.J. 534 (1991).....34, 40

*Jenkins v. Morris Twp. Sch. Dist.*, 58 N.J. 483 (1971).....19

*Melnyk v. Bd. of Educ. of the Delsea Reg’l High Sch. Dist.*, 241 N.J.  
31 (2020).....15, 17, 18, 34

*Messick v. Bd. of Rev.*, 420 N.J. Super 321 (App. Div. 2011).....17

*Russo v. Bd. of Trs., Police & Firemen’s Ret. Sys.*, 206 N.J. 14 (2011) .....15

*Saccone v. Bd. of Trs., Police & Firemen’s Ret. Sys.*, 219 N.J. 369  
(2014) .....15

*Zimmerman v. Sussex Cnty. Educ. Servs. Comm’n*, 237 N.J. 465 (2019) .....15

**STATUTES**

N.J.S.A. 18A:38-13 ..... 17, 18, 19, 20, 24, 32, 41, 46

**OTHER AUTHORITIES**

P.L. 1986, c. 156 .....19

**TABLE OF JUDGMENTS BEING APPEALED**

Decision of the Acting Commissioner of Education (#112-22), dated May 25,  
2022.....Pa545

Letter Decision of the Acting Commissioner of Education on Motion (170-  
23L), dated June 12, 2023 .....Pa554

**PRELIMINARY STATEMENT**

The Commissioner of Education’s decision denying the Absecon Board of Education’s (“Absecon”) unopposed application to sever its sending-receiving relationship with the Pleasantville Board of Education (“Pleasantville”) is an arbitrary and unreasoned administrative overstep which ignores the relevant statute, case law, and unopposed evidence in the record. Under the relevant portions of the applicable statute, the Commissioner must grant such applications so long as there is no substantial negative impact on any district educationally or financially -- neither being at issue here -- or on the racial composition of the districts’ student populations. Absecon submitted unopposed data and expert reports showing that the planned phase out withdrawal of its students, coupled with Pleasantville’s increasing white student population, results in *no* impact to either districts’ racial composition. The Commissioner in equal parts disregarded, misinterpreted, and failed properly to apply this unrebutted evidence to the appropriate legal standard. The result is a capricious decision divorced from the evidence and in contravention both to the applicable statute and case law. The decision therefore must be reversed.

Absecon and Pleasantville maintain a sending-receiving relationship whereby Absecon sends its students in grades 9-12 to Pleasantville’s high school. Pleasantville High School contains roughly 800 students; over 99% of

them come from minority backgrounds. Absecon sends just over two dozen students to Pleasantville High School -- less than 4% of the high school's student population and 85% of the students Absecon sends to Pleasantville High School are minority students. The white students which Absecon sends to Pleasantville High School account for roughly one half of 1% of the high school's student population. In the most recent school years, roughly 1 white Absecon student per year graduates from Pleasantville High School.

In 2019, Absecon filed an application with the Commissioner to sever the parties' sending-receiving relationship. Pleasantville withdrew its opposition and the petition proceeded unopposed. Absecon's primary reasons for seeking to end the relationship focused upon Pleasantville's failure to cooperate with Absecon on the districts' educational objectives and failure to provide a safe and constructive learning environment for Absecon's students. In place of Pleasantville, Absecon sought to send its students to Absegami High School, part of the Greater Egg Harbor Regional School District. Like Pleasantville, Greater Egg Harbor is a predominantly minority school district. Absecon itself also enrolls a student population which consists of over 50% minority students.

As required by statute, Absecon submitted a feasibility study, which it supplemented with several additional reports by demographers and other education experts. Those studies and supplemental reports, which remain



unrebutted before this Court, show that Absecon's phased withdrawal will have no impact on the racial composition of Pleasantville High School. In particular, the data shows that the 1 white Absecon student on average who graduates from Pleasantville High School each year likely will be replaced by an increasing number of white students from Pleasantville Middle School. In sum, the data show that Pleasantville High School's white student population likely will *increase* in the coming years, even after Absecon's withdrawal.

Despite this unrebutted data, the Commissioner denied Absecon's application, reasoning that she could not condone the removal of Absecon's white students -- even though a majority are not white -- from a predominantly minority district. Her decision is fatally flawed, legally and factually, for a number of reasons. First, she ignored the relevant statutory language and case law, which require her to grant the application absent a "substantial" negative impact on racial composition. She disposed of that standard by creating her own standard, which prohibits even the most minute change in a school's demographics. Second, her decision is arbitrary and capricious because it ignores the unrebutted evidence that there would be *no* racial impact. Finally, she ignored the commands of prior case law requiring that administrative bodies consider future demographic trends. These combined failures require reversal by this Court.

**PROCEDURAL HISTORY AND STATEMENT OF FACTS<sup>1</sup>**

On September 4, 2019, Absecon filed a petition with the Commissioner seeking to sever its sending-receiving relationship with Pleasantville. (Pa6) Absecon proposed to enter into a new sending-receiving relationship with the Greater Egg Harbor Regional School District Board of Education. (Pa8) Under this proposed arrangement, Absecon's high school students would be phased out of Pleasantville High School, and Absecon's students entering high school would attend Absegami High School -- part of the Greater Egg Harbor Regional School District -- instead of Pleasantville High School. (Pa8)

***Absecon's Dissatisfaction With Pleasantville High School.***

Absecon operates a Pre-K-8 school district. Its high school students attend Pleasantville High School through a sending-receiving agreement. (Pa6) In recent years, Absecon has become increasingly dissatisfied with the quality of education its students receive at Pleasantville High School. (Pa6-7) In fact, over 100 Absecon residents submitted public comments to the Commissioner expressing their hope that the Commissioner would end the parties' sending-receiving relationship and explaining the educational benefits their children would receive if they were able to attend Absegami High School. (Pa125-392)

---

<sup>1</sup> The procedural history and statement of facts have been combined for the Court's convenience because they are inextricably intertwined.

Many of these public comments expressed dissatisfaction with Pleasantville's engagement with Absecon's students, as well as Pleasantville's efforts in cultivating a positive learning environment for the benefit of its pupils. (Pa125-392) For example, one commentator stated that Absecon's attempts "to connect with Pleasantville High School over the years have gone unanswered and ignored." (Pa129) Another commentator noted the "lack of effort that Pleasantville High School puts into providing any information at all to our students about their school." (Pa208) Still another lamented that "not once . . . has Pleasantville made any effort to make Absecon students feel welcome in Pleasantville's community. Not once did Pleasantville's administration come to see our eighth grade students." (Pa279) Others noted that Absecon's administration attempted to open communication between the districts to facilitate collaboration and cooperation for the benefit of both districts' students, all of which went unanswered by Pleasantville. (Pa125-392) For example, Absecon's administration attempted to have Pleasantville attend a high school fair for Absecon's students; Pleasantville did not attend. Nor does Pleasantville hold an orientation program or other similar events for Absecon students, despite numerous overtures from Absecon's administration. Perhaps most troubling, Absecon has engaged in numerous efforts to work with Pleasantville's Child

Study Team to ensure an easy transition to high school for disabled students. Again, Pleasantville ignored these efforts. (Pa125-392)

Still others are concerned that Pleasantville High School does not offer their children the opportunity to thrive in a constructive learning environment. Commentators noted that the State has assigned not one, but two, fiscal monitors to oversee Pleasantville's operations. (Pa125-392) The public comments recount a bevy of educational, financial, and safety problems at Pleasantville High School. (Pa125-392) As noted by Absecon Superintendent Dr. Daniel Dooley, these issues include (1) a Pleasantville teacher arrested for having sex with students; (2) another teacher arrested for a role in a multi-million dollar health benefits fraud scheme; (3) a principal arrested for distribution of child pornography and endangering the welfare of children through the use of a school computer; (4) a fight between an administrator and support staff member during school hours; and (5) board members using a racial epithet toward school employees. (Pa128) Pleasantville's administration is subject to continuous turnover and internal disputes among board members frequently turn into extended controversies which play out before the local media. (Pa144)

Scores of public comments express Absecon residents' concerns that these continual episodes make it impossible for their children to learn in a safe and secure environment, which should be the minimum expectation for a public

school. One commentator summed up the situation by stating that Absecon's "desire to leave Pleasantville High School is not a referendum on Pleasantville, its people, municipal leaders, students, or teachers. It is a referendum on the Pleasantville Board of Education, the [L]egislature, and the [D]epartment of [E]ducation, all of whom have failed to make Pleasantville High School a place where students can thrive." (Pa247)

***Demographic Data And Absecon's Feasibility Study.***

At the time Absecon filed its petition, it sent 26 students to Pleasantville High School -- roughly 3.28% of Pleasantville High School's student population of roughly 800 students. (Pa396) Absecon's white student population represented 0.48% of Pleasantville High School's student population. (Pa396) On average, there is about 1 white Absecon student per graduating class, which usually contain roughly 200 students. (Pa541-542) Absecon itself contains a high percentage of minority students; as of the 2020-2021 school year, roughly 50% of its students are minorities. (Pa442) Absegami High School, the school to which Absecon seeks to send its students, also is part of a majority-minority district. (Pa67) At the time Absecon filed its petition, only 40% of Absegami High School's students were white. (Pa67)

Perhaps most critically, 45% of Absecon's students are economically disadvantaged. (Pa502) According to Absecon's feasibility study, which

includes the demographic information above, economically disadvantaged students perform far better at Absegami High School compared to that same demographic at Pleasantville High School. Absegami High School's economically disadvantaged students are less likely to be chronically absent, more likely to graduate from high school, and more likely to attend college. (Pa504) Absegami's achievement gap (the difference between the performance of the schoolwide population and the economically disadvantaged population) is smaller than the State average and continues to decline, benefiting and ensuring greater equality for its students who come from lower income families. (Pa504) Clearly, Absegami High School is doing something for these students and families that Pleasantville is not.

Absecon also was careful to craft a transition plan that would be as unintrusive as possible. (Pa509) Under that plan, no student would be removed from Pleasantville High School, thus ensuring no psychological impact or symbolic loss for either districts' students. Instead, Absecon's students would be phased-out over a four-year period. (Pa509) All presently-enrolled Absecon students would remain in Pleasantville High School and could graduate from Pleasantville High School. Absecon's students entering high school would attend Absegami High School. The transition plan ensures no disruption in academic progression, extra-curricular activities, or in friend groups. (Pa509)

Finally, Absecon's feasibility study showed through unassailable data that *Pleasantville High School likely was to show an increase in white students over the next several years, even after Absecon's withdrawal, based on the white population of Pleasantville's elementary and middle schools.* (Pa454-455) Removal of Absecon's exceedingly small student population would have a *de minimis* impact on Pleasantville High School's percentages of minority and white students, which would change by less than half of 1%. (Pa507) Moreover, Pleasantville's percentage of black students is declining, and its percentage of Hispanic and white students is increasing. (Pa60) The increase in Pleasantville's white population is most notable in the lower grades, where the white population has grown by 29.3% in the elementary schools and 42.86% in the middle school over the last several years. For example:

- During the 2018-2019 school year, there were 39 white students in Pleasantville's elementary schools (including pre-school); and 9 white students in Pleasantville Middle School, for an average of 4.8 white students per grade level. (Pa544)
- During the 2019-2020 school year, there were 40 white students in Pleasantville's elementary schools; and 10 white students in Pleasantville Middle School, for an average of 5 white students per grade level. (Pa544)

- During the 2020-2021 school year, there were 30 white students in Pleasantville's elementary schools, and 8 white students in Pleasantville Middle School, for an average of 3.8 white students per grade level. (Pa544)
- Across that same time period, there were 2 white students from Absecon attending Pleasantville High School during the 2018-2019 school year; 4 white students for the 2019-2020 school year; and 6 white students for the 2020-2021 school year. (Pa414)
- For those same years the white student enrollment at Pleasantville High School, excluding Absecon students, was 1 white student in 2018-2019; 1 white student in 2019-2020; and 5 white students in 2020-2021 (the first year Pleasantville High School began to see students from its larger white student population coming up through its middle school). (Pa448)

Thus, Pleasantville's increasing white student population in its lower grades will more than compensate for the loss of a handful of white students from Absecon in the high school grades. The data shows that white students from Pleasantville are beginning to meet or exceed the number of white students who attend Pleasantville High School from Absecon. (Pa454-455) Indeed, the effects of this larger white student population coming up through the lower



schools already can be seen in Pleasantville High School, where the number of total white students jumped from 5 to 11 between 2019-2020 and 2020-2021, despite the addition of just 2 white students from Absecon over that same period. (Pa541-542) Accordingly, even without Absecon's students, Pleasantville High School is projected to have an increase in white students over the coming years.

Dr. Richard S. Grip, who maintains a Doctor of Education in Educational Statistics and Measurements, who has performed demographic studies projecting student enrollment for over 17 years, and who has been qualified as an expert in this area in sending-receiving cases just like this one on multiple prior occasions, concluded in his supplemental report in support of Absecon's application that these statistics strongly indicate that "the white percentage" of Pleasantville High School moving forward "would be higher than currently exists in Pleasantville High School with Absecon students." (Pa443) Accordingly, he concluded it would be "incorrect to assume that the removal of Absecon students would remove all or nearly all of the white students at Pleasantville High School, as Pleasantville has white students in its feeder elementary and middle schools, which has been steadily increasing over the last few years." (Pa455)

All of this information was submitted in Absecon's application to the Commissioner. None of it ever was rebutted or in any way discredited. It remains the only data on which the Commissioner could rely in reaching her decision.

In sum, Absecon submitted an unrebutted and uncontested petition to the Commissioner showing that (1) it is a racially diverse district; (2) its students make up an exceedingly small percentage of Pleasantville High School's student population; (3) it sought to end its relationship with Pleasantville through a four-year phase out because of widespread frustration with the educational opportunities offered at Pleasantville High School; (4) it sought to join another racially diverse district in the Greater Egg Harbor Regional School District; (5) the loss of white students from Pleasantville High School as a result of that withdrawal would be *de minimis* at most; and (6) it was far more likely that Pleasantville High School's white student population would increase during and after the phase out withdrawal.

***Absecon's Unopposed Application To The Commissioner.***

After initially opposing Absecon's application, Pleasantville withdrew its opposition to Absecon's request to sever the sending-receiving relationship, and the matter proceeded before the Commissioner as an uncontested case. (Pa532) Pleasantville, therefore, did not oppose the severance nor allege any negative impact on its district. Indeed, Pleasantville's superintendent ultimately

recommended, and Pleasantville's board voted unanimously, not to oppose the petition. (Pa533) Not a single Pleasantville parent, student, teacher, administrator, or board member submitted his or her own public comment opposing the severance. (Pa125-392) The only individuals opposing the petition focused not on the harm to Absecon's or Pleasantville's students, but instead on the statewide issue of school segregation. None of the data submitted in Absecon's feasibility study ever was questioned, contradicted, or opposed. Before this Court, that data remains uncontroverted.

*The Commissioner's Decision.*

The Commissioner issued a written decision on May 25, 2022, denying Absecon's application. (Pa545) She found that there would be no substantial negative educational or financial impact on the districts, but determined that severance would have a substantial negative impact on the racial composition of Pleasantville High School's student body. She explained:

In the current application, reviewing the enrollment information for the 2019-2020 school year indicates that 26 Absecon students attended Pleasantville, 4 of whom were white, while Pleasantville High School had 5 total white students out of a total student body of 820 students. Given the limited total number of white students in the school compared to the entire student body, removal of the Absecon students would result in a proportional change of less than half a percent of the total student body. However, when considering the gross population of white students, it would result in a loss of 4 of 5 total white students, or an 80 percent reduction in the white population of Pleasantville. Similarly, in the 2021-2022 school year, while the loss of 25

Absecon students, including 6 white students, would result in a proportional change of less than a percent of the student body, the loss of 6 out of 11 white students would result in a 54.5 percent reduction in the gross population of white students at Pleasantville.

The Commissioner cannot find that the loss of 50 to 80 percent of Pleasantville's white population is insignificant. . . . While the proportional change of less than a percent may seem de minimis given the few Absecon students leaving Pleasantville, the Commissioner cannot ignore the substantial negative effect withdrawal would have on the gross population of white students at Pleasantville.

(Pa552)

Absecon filed a motion for reconsideration, arguing in relevant part that the Commissioner's decision ignored critical and uncontested evidence, rested on obsolete factual data, and was in critical aspects factually incorrect. (Pa554) In particular, the Commissioner never recognized the significance of the phase-out withdrawal of Absecon's students, and never accounted for the increasing white population of Pleasantville's elementary and middle schools. (Pa545-553) Far from losing 50% to 80% of its white student population, as the Commissioner concluded, the uncontested data showed that the net loss of white students, if any, from Pleasantville High School as a result of Absecon's phased withdrawal would be about 1 or 2 white students per year, which would then be supplemented by as many as 5 white students from Pleasantville Middle School (Pa454-455; 540-544)

In short, the Commissioner’s initial decision ignored uncontested data showing that the white student population was likely to increase, not decrease, **after a withdrawal by Absecon.**

The Commissioner denied the motion for reconsideration on June 12, 2023. She reasoned:

Regardless of whether students are removed at once or gradually, the gross population of white students at Pleasantville would still decrease significantly in total, causing a substantial negative impact on the racial composition of Pleasantville. Additionally, the potential increase in white students entering high school is speculative and does not negate the fact that the removal of Absecon’s white students from Pleasantville will still result in a substantial decrease in the white population of a predominantly minority district, which cannot be considered de minimis.

(Pa555)

Absecon then filed the present appeal. (Pa1)

### **LEGAL ARGUMENT**

An appellate court reviews agency decisions under an arbitrary and capricious standard. *Zimmerman v. Sussex Cnty. Educ. Servs. Comm’n*, 237 N.J. 465, 475 (2019). *See Melnyk v. Bd. of Educ. of the Delsea Reg’l High Sch. Dist.*, 241 N.J. 31, 40 (2020). “An agency’s determination on the merits ‘will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.’” *Saccone v. Bd. of Trs., Police & Firemen’s Ret. Sys.*, 219 N.J. 369, 380 (2014) (*quoting Russo v. Bd. of*

*Trs., Police & Firemen's Ret. Sys.*, 206 N.J. 14, 27 (2011)). On appeal, the judicial role in reviewing all administrative action generally is limited to three inquiries: “(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law”; (2) “whether the record contains substantial evidence to support the findings on which the agency based its action”; and (3) “whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.” *Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n*, 234 N.J. 150, 157 (2018) (quoting *In re Stallworth*, 208 N.J. 182, 194 (2011)). See *In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp.*, 216 N.J. 370, 383 (2013).

When an agency's decision “meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field.” *In re Herrmann*, 192 N.J. 19, 28 (2007). A reviewing court is not, however, bound by an agency's interpretation of a statute or its determination of a strictly legal issue. *In re Ridgefield Park Bd. of Educ.*, 244 N.J. 1, 17 (2020) (“In the absence of constitutional concerns or countervailing expressions of legislative intent, we apply a deferential standard of review to determinations made by [an agency]. Nonetheless, when an agency's decision is based on the agency's interpretation of a statute . . . we are not bound by the

agency's interpretation. Instead, we review that determination de novo.” (internal quotations and citations omitted). *See also Allstars Auto. Grp., Inc.*, 234 N.J. at 158; *Dep’t of Child. & Fam. v. T.B.*, 207 N.J. 294, 302 (2011); *Greenwood v. State Police Training Ctr.*, 127 N.J. 500, 513 (1992) (noting that agencies have no superior ability to resolve legal questions, and court is not bound by an agency's determination of a legal issue).

Appellate courts thus defer to an administrative agency’s “technical expertise, its superior knowledge of its subject matter area, and its fact-finding role,” *Messick v. Bd. of Rev.*, 420 N.J. Super 321, 325 (App. Div. 2011), but this deference “is only as compelling as is the expertise of the agency, and this generally only in technical matters which lie within its special competence.” *Application of Boardwalk Regency Corp. for a Casino License*, 180 N.J. Super. 324, 333 (App. Div. 1981). Ultimately, with regard to issues involving a “strictly legal question,” such as “proper application of” a statute, a reviewing court “stands on equal footing with the Commissioner.” *Melnyk*, 241 N.J. at 40.

Here, this Court owes no deference to the Commissioner’s interpretation of *N.J.S.A. 18A:38-13* for several reasons. First, this matter concerns the interpretation of a statute which vests the Commissioner with little or no discretion to deny a severance application so long as the applicant meets the statutory criteria. Accordingly, because this matter concerns statutory

interpretation, this Court stands on “equal footing” with the Commissioner. *Melnyk*, 241 N.J. at 40. Second, the Commissioner’s decision is based neither on a reasonable interpretation of the record, nor a reasonable application of the legislative policies underlying *N.J.S.A. 18A:38-13* to the facts at issue here. On the contrary, her decision disregards and contradicts the only evidence submitted to her, and rests on her own arbitrary and unprincipled determination that no amount of white students could be removed from Pleasantville High School without creating an intolerable racial impact. Finally, her decision creates a standard impossible for any district to meet, in direct contradiction to the statutory language and prior case law. Her decision therefore is entitled to little, if any, deference, and must be overturned.

**I. THE COMMISSIONER SHOULD HAVE GRANTED ABSECON’S UNOPPOSED APPLICATION TO END THE PARTIES’ SENDING-RECEIVING RELATIONSHIP BECAUSE THE UNDISPUTED FACTS IN THE RECORD SHOW THERE WILL BE NO SUBSTANTIAL NEGATIVE IMPACT ON PLEASANTVILLE HIGH SCHOOL, OWING BOTH TO ABSECON’S PHASED-OUT WITHDRAWAL AND PLEASANTVILLE’S INCREASING WHITE STUDENT POPULATION. (Pa548-53, Pa554-55)**

*N.J.S.A. 18A:38-13* provides the criteria for severing a sending-receiving relationship between school districts. Pursuant to the statute,

The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial 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 shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.

The issue before the Court focuses entirely on the effect of severance on the racial composition of Pleasantville's pupil population. Critically, the statute no longer contains a "good cause requirement." Its initial language required that a sending-receiving agreement could not be severed except for "good and sufficient reason upon application made to and 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*). The Legislature removed the "good and sufficient reason" language in 1986. *See P.L. 1986, c. 156*. Accordingly, the Commissioner no longer may decide not to end a sending-receiving relationship based upon considerations of good cause. Rather, 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 Commissioner's role therefore is limited to enforcing the statute, and her discretion is carefully circumscribed.

Moreover, the statute requires the Commissioner to make a determination "based upon consideration of all the circumstances." This includes not just the racial impact on the school districts, but also "the educational and financial implications for the affected districts" and "the quality of education received by

pupils.” The Commissioner here found that there would be no substantial negative impact on the educational or financial prospects of the two districts. Accordingly, under the statute, the Commissioner was required to sever the sending-receiving relationship between the parties unless she specifically found that there would be a *substantial* negative impact on the racial composition of Pleasantville High School resulting from Absecon’s withdrawal. The undisputed data here cannot, under any circumstances, support such a finding.

**A. The New Jersey Supreme Court’s *North Haledon* Decision Provides The Proper Analysis For Severance Under N.J.S.A. 18A:38-13.**

No New Jersey court has defined the precise parameters of a substantial negative impact for purposes of the racial composition of the constituent school districts. See *In re Petition For Authorization To Conduct A Referendum On Withdrawal Of N. Haledon Sch. Dist. From Passaic Cty. Manchester Reg'l High Sch.*, 181 N.J. 161, 183 (2004) (“[I]t is not really possible to establish a precise point when a thorough and efficient education is threatened by racial imbalance.”) (hereinafter, “*North Haledon*”). Nonetheless, the New Jersey Supreme Court has proclaimed that “[n]ot every action that reduces the percentage of white students necessarily implicates the State’s policy against segregation in the public schools.” *Id.* at 183.

Moreover, the *North Haledon* Court stressed that administrative agencies, including the Commissioner and the State Board of Education, must take

account of “demographic trends” to “anticipate” “perceived . . . trends” in the racial and ethnic makeup of school districts. *Id.* at 183. Applying those principles to the facts before it, the *North Haledon* Court agreed with the Appellate Division that the “**immediate** 9% diminution of the white population [as a result of North Haledon’s withdrawal from Manchester Regional High School] and a **projected racial and ethnic imbalance in the near future** cannot be characterized as insubstantial or negligible.” *Id.* at 175 (emphases added).

Several points are clear from this analysis. First, the Court was concerned with an “immediate” diminution in the white student population. Second, the Court determined that an immediate diminution of nine percentage points of the white student population, increasing to roughly thirteen percentage points once all North Haledon students had withdrawn -- changing the overall demographics of the student population at Manchester Regional High School from 51% white to 38% white -- could not be considered insubstantial in light of other evidence. Finally, the Court’s determination that an immediate diminution of nine percentage points of the white student population was not insubstantial was related inexorably to its finding of a “projected racial and ethnic imbalance in the near future.” *Id.*

The *North Haledon* Court was concerned expressly with the overall percentage drop in the **proportion** of white students at Manchester Regional

High School, not the percentage drop in the *gross number* of white students. The Court *did not* look to the percentage drop associated with the white student population alone -- as the Commissioner did here -- but rather looked to the relative change in percentages of white students in the overall student population. North Haledon students comprised roughly 28% of the student population at Manchester Regional High School. *Id.* at 166. Over 92% of the students North Haledon sent to Manchester Regional High School were white. *Id.* at 183. As a result of North Haledon's withdrawal, the student body at Manchester Regional High School would have changed from 51% white (and 49% minority) to 38% white (and 62% minority); thus, the school would have transitioned immediately from a majority white to a majority-minority school.

Applying the same mathematical principles here to the proportion of white students, rather than the gross number, Absecon students -- most of which are minority students -- account for less than 4% of Pleasantville High School's students, and 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%, far different from the 9% loss in *North Haledon*. Of course, the Commissioner does not even cite *North Haledon*. Instead, she focused only on the gross number of white students alone and the percentage loss to the gross number of white students after Absecon's withdrawal. Under *North Haledon*, her analysis should

have focused solely on the percentage drop in the proportion of white students at Pleasantville High School, not the percentage loss of the gross white student population.

An example with simple numbers explains the difference. 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, *North Haledon* requires that this be considered a roughly 9% loss of the *proportion* of white students; from 20% (2/10) to 11.1% (1/9). The Commissioner's 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. Neither *North Haledon* nor any other precedent endorses this approach, which is an extreme departure from past practice at best and a conclusion-driven sleight of hand at worst.

**B. The Commissioner's Decision Ignores Both *North Haledon* And The Undisputed Evidence In The Record Regarding Demographic Trends.**

Despite the clear guidance from New Jersey's highest court regarding interpretation of the standards for changing the designation of a school, the Commissioner neither cited nor applied any of it. Rather, in contravention to the Court's requirement that an agency must account for "projected," "perceived," and "anticipate[d]" demographic trends, the Commissioner flatly declined to rely on future demographic projections for Pleasantville High School, dismissing them as "speculative." (Pa555)

This is particularly vexing considering that the statute requires Absecon to submit a feasibility study. *N.J.S.A.* 18A:38-13. (“[P]rior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study.”). Absecon submitted a feasibility containing detailed information regarding projected demographic data for Pleasantville High School. That feasibility study never was questioned or opposed, and yet the Commissioner ignored its most important data. Presumably, the statute would not require a feasibility study if the Commissioner were free to ignore it. Ultimately, despite an uncontroverted feasibility study showcasing detailed projected demographic data, and despite authoritative case law from the Supreme Court requiring consideration of future demographic trends, the Commissioner stated in her written decision denying Absecon’s motion for reconsideration that she would ignore this data, in clear contravention of what the Supreme Court requires. (Pa555)

Similarly, the Commissioner ignored the *North Haledon* Court’s focus on an “immediate” withdrawal of white students. Instead, she dismissed the gradual withdrawal of Absecon’s students from Pleasantville High School as irrelevant, stating that “[r]egardless of whether students are removed at once or gradually, the gross population of white students at Pleasantville would still decrease significantly in total, causing a substantial negative impact on the racial

composition of Pleasantville.” (Pa555) A review of the data reveals this conclusion to be untrue.

**C. The Unrebutted Data Shows Unequivocally That There Will Be No Racial Impact on Pleasantville High School Owing To Absecon’s Gradual Withdrawal.**

Absecon sent 26 students, most of whom were minority students, to Pleasantville High School during the 2019-20 school year. Because Pleasantville had a total enrollment of 792 students, Absecon compromised only 3.28% of the total High School student population (or 0.74% of the total Pleasantville PK-12 population). (Pa396) Of this 3.28%, the percentage of white Absecon students attending Pleasantville High School makes up an even smaller percentage of the total school population. During the 2019-20 school year, the white Absecon student population at Pleasantville High School represented 0.48% of the total student population (an average of 1 white Absecon student per graduating class). (Pa541-542) The last five school years are illustrated as follows:

**Percentage of White Absecon Students Attending Pleasantville High School Compared to Total School Population**

<b>School Year</b>	<b>Absecon White Students %</b>
2015-16:	0.13%
2016-17:	0.64%
2017-18:	0.13%
2018-19:	0.24%
2019-20:	0.48%

(Pa541-542)

Due to the small number of Absecon students, including white Absecon students, attending Pleasantville High School, the data demonstrates that removal of these students would have a *de minimis* impact on the total white student population at Pleasantville High School. (Pa507) For example, as discussed above, the Absecon student population at Pleasantville during the 2019-20 school year represented only 3.28%, with white Absecon students representing 0.48% of the total student population. (Pa541-542) Had the Commissioner granted the petition, the minority student population at Pleasantville High School only would shift from 99.39% to 99.87%, or a 0.48 percentage point change. (Pa507)

As noted above, it is this change in percentage points -- not the total number of white students -- on which the Supreme Court in *North Haledon* focused. *See* 181 N.J. at 171. And there is no case which finds a 0.48 percentage point change to be substantial.

Moreover, these numbers do not account for Pleasantville's growing population of white students. In fact, the white population in Pleasantville is growing most rapidly in the elementary and middle schools, where it has increased by 29.3% and 42.86% respectively over the past 5 school years. The following chart is illustrative:

**White Students Per Grade at  
Pleasantville Elementary and Middle Schools**



School Year	Elementary (PK – 5)	Middle (6-8)	Elementary/Middle Combined	Average Per Grade
2015-16	31	7	38	<b>3.8</b>
2016-17	28	5	33	<b>3.3</b>
2017-18	35	11	46	<b>4.6</b>
2018-19	39	9	48	<b>4.8</b>
2019-20	40	10	50	<b>5.0</b>
<b>% Change (Pa544)</b>	<b>29.03%</b>	<b>42.86%</b>	<b>31.58%</b>	

The increasing number of white students in Pleasantville’s elementary and middle schools is particularly important given that Absecon planned to phase out its students. In particular, given that Absecon provides only about 1-4 white students, at most, in any particular class, the white students from Absecon who leave Pleasantville High School through graduation essentially will be replaced by a higher number of white students entering from Pleasantville Middle School. The following chart demonstrates what a four-year phase out would have looked like had it begun in 2015-2016:

**Minority Student Population At Pleasantville High School  
With Four Year Phase Out**

School Year	With Absecon Students	Without Absecon Students	Minority % With Absecon Students	Minority % Without Absecon Students	%Point Change
-------------	-----------------------------	--------------------------------	--	--	------------------

2015-16 9th grade phased out	743	740	98.80%	98.80%	0.00%
2016-17 9th & 10th phased out	768	755	98.97%	99.21%	0.24%
2017-18 9th – 11th phased out	752	730	99.34%	99.86%	0.52%
2018-19 All grades phased out	825	799	99.64%	99.88%	0.24%
2019-20 All grades phased out	815	793	99.39%	99.87%	0.48%

(Pa449)

This unrebutted data demonstrates that removal of Absecon’s students will have no impact on the minority percentage at Pleasantville High School. This is confirmed through the analysis undertaken by Dr. Richard S. Grip, who performed the racial impact analysis in Absecon’s feasibility study. Dr. Grip reasoned that

[i]f Absecon students left Pleasantville High School, it is my opinion that there would be no negative racial impact on the students at Pleasantville High School. If Absecon had completely withdrawn its students in 2019-20, corresponding to the fifth year of the phase out, the impact would have been a 0.48 percentage-point increase in the overall total minority population at

Pleasantville High School or, in other words, a 0.48 percentage-point decrease in the white student population.

(Pa454)

Dr. Grip further concluded that if “Absecon were permitted to sever its sending-receiving agreement with Pleasantville, Pleasantville High School should continue to have white students from Pleasantville’s own student population” based on the data showing that “the average number of white students per grade has been increasing over time, with the average number of white students per grade increasing from 3.3 students in 2016-17 to 5.0 students per grade in 2019-20.” (Pa454-455) To that point, he explained that in “the last three years, the average number of white students per grade level” at Pleasantville’s lower schools “has ranged from 4.6-5.0 students per grade, which is a mean of 4.8. If this value is used to predict the future number of white students at Pleasantville High School, there should be approximately 19 white students in the school annually (4.8 students x 4 grades) as they advance through the system in the upcoming years.” (Pa455)

Accordingly, he concluded that based “on the current white enrollment in Pleasantville’s elementary and middle schools . . . the white population is projected to range from 2.25%-2.38% in the next five years while the minority percentage is projected to range from 97.62%-97.75%. **Under this scenario, the white percentage would be higher than currently exists in Pleasantville**

**High School with Absecon students.” (Pa443) Thus, it would be “incorrect to assume that the removal of Absecon students would remove all or nearly all of the white students at Pleasantville High School, as Pleasantville has white students in its feeder elementary and middle schools, which has been steadily increasing over the last few years.” (Pa508)**

Absecon’s racial impact analysis was supplemented by Dr. Camille Charles, who presently serves as the Walter H. and Leonore C. Annenberg Professor in the Social Sciences, and Professor of Sociology, Africana Studies, and Education at the University of Pennsylvania, and who also has been qualified as an expert in a prior sending-receiving petitions similar to this one. Dr. Charles found that “granting Absecon’s petition to sever its sending-receiving relationship with Pleasantville will have no racial impact” on either Absecon or Pleasantville students. (Pa397) Dr. Charles explained that “as is typical in racial segregation research, changes of less than five percent in either direction for any group are characterized as stability, or no change. As such, in order for there to be a meaningful racial impact, changes to the racial composition of the school would need to exceed +/- five percent.” (Pa413) Like Dr. Grip, Dr. Charles reasoned that a “comparison of the racial composition of Pleasantville High School with and without Absecon students” revealed “there is virtually no change to the racial composition of the school, owing to the small

number of Absecon students. (Pa420) In 2019-20, the impact would have been a less than one percentage point decrease in the White student population (-0.48) and a comparable increase in the minority student population. Indeed, in the five years prior to that, the change is even smaller.” (Pa420) Therefore, Dr. Charles concluded that “given the current racial composition of Pleasantville High School, and based on prevailing literature on changes in racial composition, severing the sending-receiving agreement between Absecon and Pleasantville would have no discernable racial impact on students from either school.” (Pa420-421)

**D. Absecon’s Unrebutted Data Is Sufficient To Allow For Severance Under Both The Statute And *North Haledon*.**

Notably, both Dr. Grip’s and Dr. Charles’ analysis comports with the Supreme Court’s analysis in *North Haledon*. The *North Haledon* Court concluded that an immediate 9% diminution in a school’s white student population could not be considered insubstantial when combined with continued racial imbalances in the near future which would be exacerbated by the withdrawal. 181 N.J. at 183. Similarly, Dr. Charles reasoned that a change of 5% would be commensurate with a substantial racial impact. Both Dr. Charles and Dr. Grip explained that the racial impact of Absecon’s withdrawal would be less than 1%, spread out over a number of years through a phased withdrawal. Given the small number of Absecon students attending Pleasantville High

School, and particularly when considering the increased white student population in Pleasantville’s elementary and middle schools, Dr. Grip and Dr. Charles determined that Absecon’s withdrawal would have no racial impact on Pleasantville High School. Their conclusions comfortably comport with the *North Haledon* Court’s conclusion that “[n]ot every action that reduces the percentage of white students necessarily implicates the State’s policy against segregation in the public schools.” *Id.* at 183. Critically, Dr. Grip’s and Dr. Charles’s analyses were unrebutted. Their opinions and the data on which they were based represent the only evidence on which the Commissioner could rely.

The statute itself requires that the Commissioner grant the application unless she makes a factual determination that the severance will result in a “*substantial* negative impact” on the racial composition of the subject schools. *N.J.S.A.* 18A:38-13. Absecon showed here, through uncontroverted expert analysis based on objective data, that Absecon’s withdrawal would have *no* impact on Pleasantville High School’s racial composition. The Commissioner’s findings therefore violate both the plain language of the statute requiring a substantial negative impact, as well as the Supreme Court’s pronouncement in *North Haledon* defining a “substantial negative impact.”

On appeal, this Court’s duty is to determine “whether the agency's action violates express or implied legislative policies, that is, did the agency follow the

law,” as well as “whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.” *Allstars Auto*, 234 N.J. at 157 (2018). A reviewing court owes deference to an agency only where the agency meets those criteria. *See In re Herrmann*, 192 N.J. at 28.

The Commissioner here clearly did not. Instead, her decision effectively found that *any* removal of white students from a majority-minority district is unacceptable, and that *any* change in the racial composition of a single school within a district as a result of a sending district’s withdrawal is intolerable. Neither the statute nor the Supreme Court’s precedent interpreting that statute warrant any such interpretation. By its plain language, the statute requires a *substantial* negative impact. Rather than apply the statute as written, the Commissioner created her own standard. This Court owes no deference to any such interpretation so completely divorced from, and contradictory to, the plain statutory language. *In re Ridgefield Park Bd. of Educ.*, 244 N.J. at 17 (noting that courts are not bound by an agency’s interpretation of a statute). (internal quotations and citations omitted)). *See also DiProspero v. Penn*, 183 N.J. 477, 492 (2005) (stating that a court cannot “rewrite a plainly-written enactment of the Legislature” (alteration in original)).

The Commissioner cannot rewrite the plain statutory language to suit her own purposes. *GE Solid State v. Dir., Div. of Taxation*, 132 N.J. 298, 306 (1993) (“[A]n administrative agency may not, under the guise of interpretation, extend a statute to give it a greater effect than its language permits.”) Accordingly, the Commissioner’s decision here goes beyond what the statute permits and therefore must be reversed.

**II. THE COMMISSIONER’S DECISION IS ARBITRARY AND CAPRICIOUS BECAUSE THE COMMISSIONER IGNORED RELEVANT AND UNREBUTTED EVIDENCE IN THE RECORD REGARDING THE PARTIES’ STUDENT POPULATIONS AND DEMOGRAPHIC TRENDS AND SUBSTITUTED HER OWN STANDARD FOR THAT REQUIRED BY STATUTE. (Pa548-53, Pa554-55)**

---

In most circumstances, the Commissioner's decision is entitled to affirmance so long as the determination is not arbitrary, capricious, or unreasonable, “which includes examination into whether the decision lacks sufficient support in the record or involves an erroneous interpretation of law.” *Melnyk*, 241 N.J. at, 40. The Commissioner’s decision must contain “fair support in the record,” and must “articulate the standards and principles that govern [her] discretionary decisions in as much detail as possible.” *In re Vey*, 124 N.J. 534, 544 (1991). An appellate court must remand or overturn an agency decision where that decision does not rest on findings clear from the record, or does not apply the law properly to those findings. *Id.*



The Commissioner's decision here is unsupported both by the law, as described *supra* in Point I, as well as the undisputed factual record. Building on a number of mistaken findings and interpretations of the underlying data, the Commissioner reached the verifiably incorrect conclusion that severance of the parties' relationship will result automatically in the loss of over half, and as much as 80%, of Pleasantville High School's white student population. That conclusion is patently untrue, and contradicts the unrebutted data in Absecon's feasibility study and supplemental reports.

The Commissioner's decision rests on a number of factual assertions that are either obsolete or simply incorrect. To begin, her decision states that "Pleasantville High School had 5 total white students out of a total student body of 820 students." (Pa552) Thus, "when considering the gross population of white students, [Absecon's withdrawal] would result in a loss of 4 of 5 total white students, or an 80 percent reduction in the white population of Pleasantville" for the 2019-2020 school year. (*Id.*) This is not accurate. As of the 2020-2021 school year, as noted in the final decision and as explained in some detail in Absecon's uncontested factual proofs, there were 11 total white students at Pleasantville High School, only 6 of whom resided in Absecon. (Pa552) This boost in the white student population was based primarily on the increasing number of white students entering Pleasantville High School from Pleasantville Middle School,

which the Commissioner also ignored. The record thus demonstrates beyond dispute that Pleasantville High School would not lose “80 percent” of its white student population, even if Absecon’s students were removed completely. (Pa539-544)

Moreover, even when considering the most recent data from 2020-2021, the Commissioner found that “the loss of 25 Absecon students, including . . . 6 out of 11 white students[,] would result in a 54.5 percent reduction in the gross population of white students at Pleasantville.” (Pa552) Again, this is factually incorrect. As Absecon noted in detail in its summation brief and feasibility study, Absecon students would be phased-out over a four-year period, not removed all at once, and all presently-enrolled Absecon students would remain in Pleasantville High School. Thus, white Absecon students currently enrolled in Pleasantville High School will remain there likely until they graduate. Assuming that there are currently 6 white students from Absecon attending Pleasantville High School, this amounts to a loss on average of just over 1 white student per graduating class. Pleasantville High School would not have immediately lost “6 out of 11 white students” as the final decision contends. Rather, the undisputed facts show unequivocally that Pleasantville would lose about 1 or maybe 2 white Absecon students per year.

At the same time, and again as shown through verifiable and undisputed proofs through Absecon's feasibility study and supplemental reports, Pleasantville is likely to gain as many as 5 white students per year coming up through Pleasantville Middle School. Absecon presented undisputed data showing that there were an average of roughly 5 white students per grade in Pleasantville's elementary and middle schools for the 2019-2020 school year, and 3.8 white students per grade for the 2020-2021 school year. (Pa544) Indeed, the effects of this larger white student population coming up through the lower schools already can be seen in Pleasantville High School, where the number of total white students jumped from 5 to 11 between 2019-2020 and 2020-2021, despite the addition of just 2 white students from Absecon over that same period.

The data are clear: even if Pleasantville High School loses 1 or 2 white Absecon students to graduation each year over the next four years, it should gain at least 3 or more white students who will join the incoming freshman class. In fact, even if half of these white students in Pleasantville's elementary and middle schools attend different high schools, there still will be enough white students entering Pleasantville High School to maintain its current racial composition despite the loss of white students from Absecon. Accordingly, the racial impact of the removal of Absecon students is not just *de minimis*, it is non-existent.

Absecon repeated this point time and again both in its briefing to the Commissioner and in its feasibility study. Dr. Grip explained that, based on the current data projections, Pleasantville High School should have approximately 19 white students in its student population every year, even after excluding students from Absecon. (Pa455) Such numbers would give Pleasantville High School almost double the number of white students it had when the Commissioner issued her decision. Dr. Grip further found that Pleasantville's diversity would not be impacted by the removal of Absecon students because of the "small number of Absecon students." (Pa456) In sum, removal of Absecon's students "does not have a significant effect on the racial makeup of Pleasantville High School." (Pa456) This is unchallenged in the record.

The Commissioner capriciously failed to understand, apply, or even grasp the importance both of the phase out process and of the increasing white student population coming up from Pleasantville's lower grades. Neither concept appears in her initial written decision. Indeed, her initial decision assumes that Pleasantville will lose its entire white student population all at once, and that there is no way for that white student population to be replaced. To that extent, her decision actively *contradicts* the evidence in the record. Given these critical failures, we must assume the Commissioner either overlooked or misinterpreted essential evidence. That failure alone warrants reversal.

Even in her written decision denying Absecon's motion for reconsideration, the Commissioner dismisses the important evidence out of hand. She states that "[r]egardless of whether students are removed at once or gradually, the gross population of white students at Pleasantville would still decrease significantly in total." (Pa555) That is so, she reasons, because Absecon's evidence regarding the increasing number of white students entering Pleasantville High School is "speculative" and would not negate the "substantial decrease in the white population of a predominantly minority district." (Pa555)

There are a number of fatal problems with this analysis, legally and factually. Absecon's evidence regarding Pleasantville's increasing white population is not merely "speculative." It is based on objective data interpreted and projected by experts in the field, and unrebutted by any other party. Moreover, the Supreme Court has expressly stated that administrative agencies, including the Commissioner and the State Board of Education, must take account of "demographic trends" to "anticipate" "perceived . . . trends" in the racial and ethnic makeup of school districts. *North Haledon*, 181 N.J. at 183 (requiring "education policy makers to anticipate . . . perceived demographic trends"). Indeed, the *North Haledon* Court based its decision in part on the "***projected racial and ethnic imbalance in the near future.***" *Id.* at 175 (emphases added). Far from being "speculative," *North Haledon* clarified that

future demographic projections are a critical part of the statutory analysis. The Commissioner's total failure to account for the unrebutted demographic projections in the record showing an increase in the white student population coming up from Pleasantville's lower schools, together with her substitution of her own factual conclusion -- not found anywhere in the record -- that those facts are somehow "speculative," is an inexcusable and fatal error which renders her decision arbitrary and capricious and requires reversal. *See Vey*, 124 N.J. at 544.

Furthermore, the Commissioner drew no distinction between a gradual phase out of Absecon's students and an immediate withdrawal. Again, *North Haledon* instructs otherwise, with its focus on the "immediate" withdrawal of a certain percentage of the white student population. *Id.* at 175. Taken together, the loss of 1 or 2 white students from Absecon each year combined with the introduction of an increased number of white students from Pleasantville Middle School negates any negative impact -- let alone a substantial negative impact -- on the racial composition of Pleasantville High School. The Commissioner failed to accept or apply this unrebutted evidence, which clearly is sufficient to comply with what the statute demands. More than that, the Commissioner actively disregarded, distorted, and grossly misinterpreted the only evidence she had before her. Accordingly, the Commissioner's decision requires reversal.

**III. THE COMMISSIONER'S DECISION IS UNREASONABLE BECAUSE IT CREATES AN**

**IMPOSSIBLE STANDARD FOR ANY SCHOOL DISTRICT TO MEET, BY HOLDING THAT ANY LOSS OF WHITE STUDENTS FROM A PREDOMINANTLY MINORITY DISTRICT IS INTOLERABLE. (Pa548-55.)**

Finally, the Commissioner's decision is patently unreasonable because it creates what is, in effect, an impossible standard to meet. By the Commissioner's logic, the removal of *any* white students from Pleasantville High School results in a substantial negative impact. She expressed this point most clearly in her decision denying Absecon's motion for reconsideration, when she stated that even a potential increase in white students entering Pleasantville from its lower schools could "not negate" the substantial negative impact caused even by a gradual withdrawal of Absecon's students. (Pa555)

**A. The Commissioner Has Created An Arbitrary And Impossible Standard Divorced From The Case Law And Statute.**

The Commissioner's conclusions contradict both the statute and case law. *N.J.S.A.* 18A:38-13 requires a "*substantial* negative impact" upon the racial composition of the subject schools. Similarly, the *North Haledon* Court clarified 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. Both the statute and the case law contemplate that some loss of the white student population is permitted upon the severance of a sending-receiving relationship, even for a predominantly minority school district. Moreover, the

loss of white students here from Absecon likely will be made up by an increasing white student population in Pleasantville. The Commissioner's decision therefore is unsupported both by the evidence and case law.

Critically, and unlike so many other cases in which courts have declined to sever a sending-receiving relationship, Absecon's student population is not predominantly white. Rather, Absecon's high school student population is racially diverse, with roughly half of its students coming from minority backgrounds. Accordingly, as Dr. Grip found, removing Absecon's students will not impact the overall racial diversity of the students remaining at Pleasantville High School because "[n]early 85% of the [Absecon] students that would have been removed were minority." (Pa456) Furthermore, Absecon sends an exceedingly small number of students to Pleasantville High School. Dr. Grip thus concluded that Absecon's withdrawal "does not have a significant effect on the racial makeup of Pleasantville High School" because "Absecon students made up only 3.3% of the high school's student body (26 of 792 students) in 2019-20." (Pa456)

Pleasantville High School itself is made up almost entirely of minority students. Not all of these students are black. A substantial and increasing number of students are Hispanic. More than half of Pleasantville's students identify as 2 or more races. In general, and as noted in detail above, the white student



population in Pleasantville is increasing, and the black student population is declining. (Pa541)

At the present time, over 99% of Pleasantville High School's students are minorities; that is true with or without Absecon's students. (Pa542) Absecon accounts for less than 4% of Pleasantville High School's student population, and roughly 85% of the students Absecon sends to Pleasantville High School are minority students. (Pa456) Pleasantville High School's white student population is exceedingly small, even after accounting for Absecon's students, and it will remain exceedingly small -- though perhaps larger than it has been historically -- if Absecon were to leave. When accounting for all of the factors required both by statute and case law, Absecon's withdrawal's effect on the overall student population, both minority and white, is truly infinitesimal, if not non-existent.

The Commissioner's decision therefore creates an impossible standard at odds with the statutory language and prior case law, including prior decisions from the Commissioner. For example, in *Board of Education of Longport v. Board of Education of Atlantic City*, Comm'r of Educ. Decision No. 238-14 (June 5, 2014), the Commissioner held that Longport could sever its sending-receiving relationship with Atlantic City because there was no evidence of nefarious intent and the resulting change in the white student population would be *de minimis*. At the time of the Commissioner's decision, Atlantic City High

School enrolled 2,040 students; 442 of them -- roughly 21.7% -- were white. (Pa561) Longport sent 9 students, all of them white, to Atlantic City High School, constituting 0.4% of the student population. (Pa562)

The Commissioner understood that the removal of Longport's *entirely white* student population would have "some impact" on diversity. (Pa562) Nonetheless, the Commissioner determined that the impact would not be substantial. In reaching that conclusion, the Commissioner *rejected* the ALJ's attempt below to create a bright-line rule which would have prevented the removal of any white students from a "racially imbalanced" district. Thus, the Commissioner rejected in *Longport* the precise analysis in which she engaged here; analysis which runs counter to *North Haledon's* instruction. The Commissioner explained that if Longport's students withdrew, "the Caucasian population at the school would decrease from 442 to 433. The remaining 433 Caucasians would represent 21.3% of the total student population of [Atlantic City High School], a proportional change of .4%. . . . [A] .4% proportional change can only be characterized as *de minimis*." (Pa562) *See also Bd. of Educ. of Maywood v. Bd. of Educ. of Hackensack*, Comm'r of Educ. Decision No. 82-20 (Mar. 2, 2020) (Pa568) (finding no substantial negative educational impact where Maywood sought removal of 13% of the high school's population, the receiving district did not oppose the severance, and there would be no racial

impact owing to similar racial demographics of districts); *Bd. of Educ. of Merchantville v. Bd. of Educ. of Pennsauken*, Comm'r of Educ. Decision No. 133-15 (Apr. 10, 2015) (applying *Longport* to affirm decision finding that loss of 0.72% of white student population was not a substantial negative impact, and rejecting competing analysis which looked only at percentage loss of “white sub-population”) (Pa565-567, 572-628).

The Commissioner’s decisions in *Longport* and its progeny comply with the direction in *North Haledon* that the Commissioner assess the decline in the subject school’s **proportion** of white students, not the percentage decline in the gross white student population. *See Longport, supra* (distinguishing between “2% decrease in the gross population of” white students and “0.4% proportional change” in white student population, and relying on the latter to assess racial impact”). The Commissioner’s decision below fails not only to comply with *North Haledon*, but to explain the departure from the precedent the Department of Education established in *Longport*. Indeed, the 0.48% change here in the proportion of white students at Pleasantville High School resulting from Absecon’s withdrawal is nearly identical to the proportional change the Commissioner endorsed in *Longport*.

Essentially, the Commissioner has substituted her own judgment in place of the statutory criteria, and has created a discretionary role for herself that the

statute does not contemplate and which the Legislature purposefully removed in the 1986 statutory amendments. The role she has created for herself is not statutorily permissible. *GE Solid State*, 132 N.J. at 306. (“[A]n administrative agency may not, under the guise of interpretation, extend a statute to give it a greater effect than its language permits.”) Simply put, the Commissioner cannot go beyond the statute to create her own standard. Her authority with regard to severing sending-receiving relationships is limited to enforcing the statute, and the statute requires her to sever a sending-receiving relationship where there is an absence of a substantial negative impact upon the respective student populations. *N.J.S.A. 18A:38-13* (“The commissioner *shall* grant the requested change in designation or allocation if no substantial negative impact will result therefrom.” (emphasis added)). Given the uncontroverted evidence in the record here, the Commissioner clearly went too far, deviated from the analysis in numerous other cases, issued a decision with no basis in the law or the record, and created a standard that virtually is impossible to meet.

**B. The Commissioner’s Decision Creates An Impermissibly Expanded Role For Herself In Granting Severance Applications That Neither Is Contemplated By The Statutory Language Nor Warranted By The Unrebutted Facts Here.**

Nor is the expanded role the Commissioner envisions for herself warranted here. This is not a case of “white flight” which courts have so jealously guarded against in the past. For example, in *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 Appellate Division held that Englewood Cliffs could not sever its sending-receiving relationship with Englewood because “of the substantial negative impact on racial balance and educational quality.” The Court admitted, however, that there were other significant factors at play in that matter that motivated its holding. The Appellate Division agreed with the Administrative Law Judge’s finding that Englewood Cliffs was determined to sever its relationship with Englewood in part due to “white flight,” as well as the interference of the Tenafly Board of Education, which had for years poached white students who resided in Englewood Cliffs through a process designed to “drain upper income white and Asian college-bound students from [Englewood’s public high school], subverting that school’s efforts to promote racial balance and luring many of its most academically talented students.” *Id.* at 441.

No such scheme is in place here, nor is this a case of a majority-white school district fleeing a predominantly minority school district, in order to attend a majority-white school. Absecon itself is a majority-minority district. As Dr. Grip noted in Absecon’s feasibility study, “it is important to recognize that this is not a situation where a White school district (Absecon) is leaving a majority-minority school district (Pleasantville) only to join another White

district (Absegami in Greater Egg Harbor Regional).” Similarly, Dr. Charles found it notable

that Absecon has chosen to send its students to the diverse Absegami, as compared to the other potential options in the surrounding area -- namely Ocean City High School (which has a 12% student minority population) and Mainland Regional High School (which has a 33% student minority population). Unlike other school districts in the area, Absegami offers students a high quality and diverse educational experience.

(Pa422)

Dr. Charles concluded that this is “not a situation of what has traditionally been labeled ‘white flight.’” (*Id.*) Rather,

Absecon is not a predominately white school district (50% minority population) and it is not seeking to remove a large number of white students and send them to a predominately white school district. Instead, the Absecon students attending Pleasantville -- the ones most affected by the severance -- are on average 90% minority. Absecon has chosen to send these students to a majority-minority school district. As a result, educational quality -- not race -- appears to be the motivation for Absecon to send its students to Absegami.

(Pa422-423)

Absecon’s choice makes sense given its own diverse student population. Absegami High School is an extremely diverse majority-minority school, and the Greater Egg Harbor Regional High School District contains a steadily increasing minority population. Between 2016-2017 and 2020-2021, Absegami High School’s minority population increased from 53.06% to 59.06%. Four different racial groups (white, Black, Hispanic, and Asian) each make up more

than 15% of the student population. Such a diverse district will provide rich educational and social opportunities for Absecon's student population. *See North Haledon*, 181 N.J. at 183 (noting the importance of "multi-racial and multi-cultural" opportunities in assessing severance).

Accordingly, the Commissioner's over-zealousness has no place in this matter, particularly given the statutory parameters within which she must operate when assessing sending-receiving relationships. In sum, this matter concerns a school district with a roughly 50% minority student population planning to remove roughly two dozen students (less than 4% of the student population), most of whom are low-income minority students, from an overwhelmingly minority high school in order to place those students in another school district which also contains a majority of minority students. The undisputed evidence in the record shows that this will result in Absecon graduating roughly 1 or 2 white students per year from Pleasantville High School, who ultimately will be replaced by 3 or more white students from Pleasantville Middle School. All of this will occur through the process of a multi-year phase out, whereby Absecon will remove an exceedingly small number of students, an even smaller number of white students, resulting in an unnoticeable change to Pleasantville High School's population and little or no impact on the school's racial balance.

The statute and case law require a *substantial* negative impact, and a more than *de minimis* exodus of white students to warrant the Commissioner's interference. Otherwise, the Commissioner is bound by statute to permit severance of a sending-receiving agreement. The un rebutted evidence here shows neither a substantial negative impact nor a more than *de minimis* removal of white students. Accordingly, the Commissioner was required to step aside. She did not, and instead seems content to leave Absecon students trapped in a high school which is both disinclined to fight their departure and which remains demonstrably uninterested, for years, in even the most basic communications with Absecon educators. Her decision declining to sever the sending-receiving relationship between Absecon and Pleasantville must be reversed.

**CONCLUSION**

Based on the foregoing, Absecon respectfully requests that this Court reverse the Commissioner of Education's decision declining to sever the sending-receiving relationship between Absecon and Pleasantville.

Respectfully submitted,

**PORZIO, BROMBERG & NEWMAN  
P.C.**

Attorneys for Absecon Board of Education

By: Vito A. Gagliardi, Jr.  
Vito A. Gagliardi, Jr.

Date: November 6, 2023



---

BOARD OF EDUCATION OF	:	SUPERIOR COURT OF NEW JERSEY
THE CITY OF ABSECON,	:	APPELLATE DIVISION
ATLANTIC COUNTY,	:	DOCKET NUMBER: A-3237-22
	:	
Appellant,	:	<u>CIVIL ACTION</u>
v.	:	
	:	
BOARD OF EDUCATION OF	:	
THE CITY OF	:	ON APPEAL FROM A FINAL
PLEASANTVILLE,	:	DECISION OF THE COMMISSIONER
ATLANTIC COUNTY,	:	OF EDUCATION
	:	
Respondent.	:	

---

---

**BRIEF AND APPENDIX ON BEHALF OF RESPONDENT  
NEW JERSEY COMMISSIONER OF EDUCATION  
Date Submitted: February 12, 2024**

---

MATTHEW J. PLATKIN  
ATTORNEY GENERAL OF NEW JERSEY  
Richard J. Hughes Justice Complex  
25 Market Street, P.O. Box 112  
Trenton, New Jersey 08625-0112  
Attorney for Respondent  
Ryan.Silver@law.njoag.gov

Donna Arons  
Assistant Attorney General  
Of Counsel

Ryan J. Silver (Attorney ID: 278422018)  
Deputy Attorney General  
On the Brief

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS .....	1
A. New Jersey’s Public Education System .....	1
B. Absecon’s Petition to Sever the Send-Receive Relationship with Pleasantville .....	3
C. Absecon and Pleasantville’s Demographic Data .....	6
D. The Commissioner’s May 25, 2022 Final Decision and June 12, 2023 Decision .....	12
ARGUMENT .....	16
THE COMMISSIONER’S DECISION DENYING ABSECON’S PETITION TO SEVER THE SEND-RECEIVE RELATIONSHIP WITH PLEASANTVILLE SHOULD BE AFFIRMED BECAUSE IT WAS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE AND IS AMPLY SUPPORTED BY THE RECORD .....	16
CONCLUSION .....	28

**TABLE OF AUTHORITIES**

**CASES**

**Page**

Bd. of Educ. of Borough of Englewood Cliffs, Bergen Cnty. v. Bd. of Educ. of City of Englewood, Bergen Cnty. (“Englewood Cliffs”),  
 257 N.J. Super. 413 (App. Div. 1992), aff’d, 132 N.J. 327 (1993), cert. denied, 510 U.S. 991 (1993) .....passim

Bd. of Educ. of Mine Hill v. Bd. of Educ. of Dover,  
 2020 N.J. Super. Unpub. LEXIS 524 (App. Div. Mar. 10, 2020).....21, 25

Booker v. Bd. of Educ. of Plainfield,  
 45 N.J. 161 (1965)..... 20

Circus Liquors, Inc. v. Middletown Twp.,  
 199 N.J. 1 (2009) ..... 16-17

City of Jersey City v. Jersey City Police Officers Benev. Ass’n,  
 154 N.J. 555 (1998)..... 16

IFA Ins. Co. v. New Jersey Dep’t of Ins.,  
 195 N.J. Super. 200 (App. Div. 1984)..... 17

In re Petition for Authorization to Conduct a Referendum on Withdrawal of N. Haledon Sch. Dist. v. Passaic Cnty. Manchester Reg’l High Sch. Dist. (“North Haledon”),  
 181 N.J. 161 (2004)..... 19-20, 24-25

In re State Bd. of Educ.’s Denial of Petition to Adopt Regulations Implementing N.J. High Sch. Voter Registration Law,  
 422 N.J. Super. 521 (App. Div. 2011)..... 18

Jenkins v. Twp. of Morris Sch. Dist. and Bd. of Educ.,  
 58 N.J. 483 (1971)..... 19

Twp. Pharmacy v. Div. of Med. Assistance & Health Servs.,  
432 N.J. Super. 273 (App. Div. 2013)..... 17

Wnuck v. N.J. Div. of Motor Vehicles,  
337 N.J. Super. 52 (App. Div. 2001) ..... 18

**STATUTES**

N.J.S.A. 18A:8-1 to -51 ..... 1

N.J.S.A. 18A:9-1 to -11 ..... 1

N.J.S.A. 18A:10-1 to -34 ..... 1

N.J.S.A. 18A:13-51 to -81 ..... 24

N.J.S.A. 18A:38-8 ..... 2

N.J.S.A. 18A:38-11 ..... 1

N.J.S.A. 18A:38-13 ..... passim

**REGULATIONS**

N.J.A.C. 6A:3-6.1 ..... 2, 5

**COURT RULES**

R. 1:36-3 ..... 21

R. 2:6-1(a)(1)(H) ..... 21

**TABLE OF CONTENTS TO THE APPENDIX**

Bd. of Educ. of Mine Hill v. Bd. of Educ. of Dover, 2020 N.J.  
Super. Unpub. LEXIS 524 (App. Div. March 10, 2020) ..... Ra1

## **PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS**<sup>1</sup>

### **A. New Jersey's Public Education System.**

Generally, each municipality in New Jersey is considered to be a separate school district, N.J.S.A. 18A:8-1, although there are exceptions where districts either cease operations, splinter, consolidate, or regionalize. See generally N.J.S.A. 18A:8-1 to -51. School districts are governed by an appointed or elected board of education. See generally N.J.S.A. 18A:10-1 to -34. A district may also, through a vote by its eligible resident voters, choose to enter into regionalization or send-receive relationships with other districts. See generally N.J.S.A. 18A:9-1 to -11.

Regarding the decision to enter into send-receive relationships more specifically, N.J.S.A. 18A:38-11 provides that “[t]he board of education of every school district which lacks high school facilities within the district . . . shall designate a high school or high schools . . .” outside of the district for the education of its high school age pupils. This send-receive relationship is a “contract between the two districts for educational services to be provided in exchange for a fixed tuition payment.” Bd. of Educ. of Borough of Englewood

---

<sup>1</sup> The procedural history and counterstatement of facts are closely related in this matter and have been combined to avoid repetition and for the court's convenience.

Cliffs, Bergen Cnty. v. Bd. of Educ. of City of Englewood, Bergen Cnty. (“Englewood Cliffs”), 257 N.J. Super. 413, 457-58 (App. Div. 1992), aff’d, 132 N.J. 327 (1993), cert. denied, 510 U.S. 991 (1993); see also N.J.S.A. 18A:38-8. But, unlike an ordinary contract, termination of a send-receive relationship is subject to approval of the Commissioner. Englewood Cliffs, 257 N.J. Super. at 457-58; N.J.S.A. 18A:38-13; N.J.A.C. 6A:3-6.1.

It is within this framework that the Commissioner is required to review requests from local boards of education to alter or terminate a send-receive relationship. In evaluating requests to sever a send-receive relationship, the Commissioner considers “all the circumstances, including the educational and financial 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.” N.J.S.A. 18A:38-13. After reviewing the full record, including a complete feasibility study submitted by the petitioning district and any public comments, the Commissioner “shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.” Ibid.; see also N.J.A.C. 6A:3-6.1.

**B. Absecon’s Petition to Sever the Send-Receive Relationship with Pleasantville.**

The Absecon Board of Education (“Absecon”) operates a Pre-K through grade eight school district. (Pa6).<sup>2</sup> Absecon does not operate its own high school; rather, students in grades nine through twelve attend Pleasantville High School as part of a send-receive relationship between Absecon and the Pleasantville Board of Education (“Pleasantville”). Ibid.

On September 4, 2019, Absecon filed a petition with the Commissioner seeking to sever its send-receive relationship with Pleasantville. Ibid. According to the petition, Absecon had “become dissatisfied with aspects of its sending-receiving relationship with Pleasantville, most notably due to the cost and the quality of the education its high school students have been receiving at Pleasantville High School.” (Pa6-7). Because of its dissatisfaction, Absecon sought the Commissioner’s approval to end its send-receive relationship with Pleasantville and establish a new relationship with the Greater Egg Harbor Regional High School Board of Education (“Egg Harbor”). (Pa8). Under the proposed send-receive relationship, Absecon students would attend Absegami High School. Ibid. The petition did not specify whether, if granted, Absecon

---

<sup>2</sup> “Pa” refers to Appellant Absecon’s appendix; “Pb” refers to Absecon’s brief; and “Ra” refers to the Commissioner’s appendix.

students would be immediately withdrawn from Pleasantville High School, or if they would be gradually phased out. (See Pa6-9).

As part of its petition, Absecon included a feasibility study by Statistical Forecasting LLC, Peter E. Carter, M.A., and Steven Cea, M.B.A, as required under N.J.S.A. 18A:38-13. (Pa15). The feasibility study concluded that severing the send-receive relationship between Absecon and Pleasantville, and the establishment of a new send-receive relationship between Absecon and Egg Harbor, would not have a substantial negative educational, racial, or financial impact. (Pa93-94).

On September 20, 2019, Pleasantville filed an answer to Absecon's petition. (Pa109-110). Pleasantville opposed Absecon's request, asserting that severance of the current send-receive agreement would cause a "substantial negative impact on [Pleasantville's] quality of education, financial condition and racial composition," and would impede its ability to "provide an opportunity for a through and efficient education" for its high school students. (Pa110). Pleasantville also notified the Commissioner that it had retained the services of an expert to draft a report in opposition to Absecon's feasibility study. (Pa108). The matter was transmitted to the Office of Administrative law ("OAL") as a contested case. (Pa546).



Pleasantville did not submit any further opposition to Absecon's petition, nor did it submit a report in response to Absecon's feasibility study. Rather, on February 8, 2021, Pleasantville advised the Commissioner that at its January 27, 2021 board meeting it had voted to withdraw its opposition to the petition. (Pa115-19). Because of this withdrawal, the matter was returned to the Commissioner to proceed as an uncontested case in accordance with N.J.A.C. 6A:3-6.1. (Pa546). Members of the public were invited to submit comments regarding the proposed termination of the send-receive agreement between Absecon and Pleasantville, pursuant to N.J.A.C. 6A:3-6.1(b). (Pa118; Pa123). In response, the Department received a significant amount of public responses, both for and against severance. (Pa125-392).

Because the initial feasibility study Absecon submitted only included data up to the 2017-2018 school year, Absecon submitted supplemental studies on April 19, 2021. (Pa393-94). These included a study on the racial impact of the proposed severance by Camille Z. Charles, Ph.D., (Pa395); a racial and demographic impact analysis by Statistical Forecasting LLC, (Pa424); supplemental data on the educational impact by Peter E. Carter, M.S.Ed., and David C. Hespe, Esq., (Pa473); and a financial impact analysis by Cea, (Pa518).

Following receipt of these supplemental studies, the Department, on April 28, 2021, requested that Absecon provide updated tables for the racial and

demographic impact analysis by Statistical Forecasting. (Pa537). Absecon submitted an updated racial and demographic impact analysis per the Department's request on June 14, 2021. (Pa537-38).

On June 11, 2021, Pleasantville notified the Commissioner that at its June 8, 2021 board meeting it had voted to rescind its prior withdrawal of its opposition to Absecon's petition. (Pa532-36).

### **C. Absecon and Pleasantville's Demographic Data.**

Both Absecon and Pleasantville are located in Atlantic County. (Pa21-22). In 2010, the majority of the population in Absecon was white, representing 76.4% of the population. (Pa27). The majority of the population in Pleasantville was black, representing 57.7% of the population. (Pa28).

Absecon's high school-age students attend Pleasantville High School as part of a send-receive agreement. (Pa6). Pleasantville High School is an overwhelmingly majority-minority school — meaning a majority of its student population is comprised of minority racial groups. (Pa396). During the 2019-2020 school year, for example, there were 792 students enrolled, of whom 99.39% were minority and 0.61% were white. (Pa396). The largest racial group was Hispanic, representing 64.18% of the total student body. (Pa416). And out of those 792 students, 26, or 3.28%, were from Absecon. Ibid. The percentage of white students has never been higher than 1.20% of the total student body, a

mark achieved in the 2015-2016 school year. Ibid. During the 2019-2020 school year, white students made up only 0.61% of the total student population.

Ibid.

Absecon’s feasibility studies also included the following breakdowns of student demographic data from the 2015-2016 to 2020-2021 school years:

**Race of Absecon Students (Grades 9-12) Attending Pleasantville High School**

<b>Year</b>	<b>White</b>	<b>Black</b>	<b>Hispanic</b>	<b>Native American, Alaskan Native</b>	<b>Asian, Native Hawaiian, Pacific Islander</b>	<b>2 or more Races</b>	<b>Total</b>
2015-2016	1	14	12	0	3	0	30
2016-2017	5	17	17	0	4	0	43
2017-2018	1	16	7	0	3	0	27
2018-2019	2	9	12	0	4	0	27
2019-2020	4	8	12	0	2	0	26
2020-2021	6	6	13	0	0	0	25

[(Pa58; Pa445; Pa541).]

**Pleasantville High School (Grades 9-12) Enrollment by Race**

<b>Year</b>	<b>White</b>	<b>Black</b>	<b>Hispanic</b>	<b>Native American, Alaskan Native</b>	<b>Asian, Native Hawaiian, Pacific Islander</b>	<b>2 or more Races</b>	<b>Total</b>
2015-2016	9	298	420	1	21	3	752
2016-2017	8	290	462	0	11	5	776
2017-2018	5	268	467	0	15	2	757
2018-2019	3	286	519	0	18	2	828
2019-2020	5	284	510	0	19	2	820
2020-2021	11	278	523	0	27	2	841

[(Pa60; Pa448; Pa542).]

**Pleasantville High School (Grades 9-12) Enrollment by Race Without Absecon Students**

<b>Year</b>	<b>White</b>	<b>Black</b>	<b>Hispanic</b>	<b>Native American, Alaskan Native</b>	<b>Asian, Native Hawaiian, Pacific Islander</b>	<b>2 or more Races</b>	<b>Total</b>
2015-2016	8	284	408	1	18	3	722
2016-2017	3	273	445	0	7	0	728
2017-2018	4	252	460	0	12	0	728

2018-2019	1	277	507	0	14	1	800
2019-2020	1	276	498	0	17	2	794
2020-2021	5	272	510	0	27	2	816

[(Pa62; 448; Pa542).]

Based on the above demographic information, Absecon accounts for a significant proportion of the white student population in Pleasantville High School. In 2016-2017, Absecon students represented 62.5% of the total white population. (Pa60; Pa62; Pa448; Pa542). In 2017-2018, Absecon students represented 20% of the total white population; in 2018-2019, Absecon students represented 66.7% of the total white population; in 2019-2020, Absecon students represented 80% of the total white population; and in 2020-2021, Absecon students represented 54.5% of the total white population. (Pa60; Pa62; Pa448; Pa542).

Additionally, the feasibility study provided a demonstration of the effect of a gradual phase out of Absecon’s students would have had on the white student population in Pleasantville High School, had the phase out occurred in the four years preceding Absecon’s petition:

<b>Number of White Students in Pleasantville High</b>	<b>Number of White Students in Pleasantville High School if Absecon Students Phased Out One Grade Per Year</b>
---	--

<b>School if Status Quo Maintained</b>		<b>Year</b>	<b>Number of White Students</b>
<b>Year</b>	<b>Number of White Students</b>		
2015-2016	9	2015-2016 (9 <sup>th</sup> Grade Phased Out)	9
2016-2017	8	2016-2017 (9 <sup>th</sup> & 10 <sup>th</sup> Grades Phased Out)	6
2017-2018	5	2017-2018 (9 <sup>th</sup> – 11 <sup>th</sup> Grades Phased Out)	1
2018-2019	3	2018-2019 (All Grades Phased Out)	1
2019-2020	5	2019-2020 (All Grades Phased Out)	1

[(Pa448-49; Pa542).]<sup>3</sup>

Under the phase-out, Pleasantville High School would have seen a drastic decrease in its white student population in each year of the phase-out. In 2016-2017, Pleasantville would have lost 25% of its white student population; in 2017-2018, Pleasantville would have lost 80% of its white student population; in 2018-2019, Pleasantville would have lost 66.7% of its white student

---

<sup>3</sup> While Absecon's petition was filed on August 30, 2019, it did not provide any analysis on its proposed phase-out plan until April 2021. (Pa449). And when it did, Absecon only provided a proposed phase-out plan using data from the four years preceding its application. Ibid.

population; and in 2019-2020, Pleasantville would have lost 80% of its white student population. (Pa448-49; Pa542).

Absecon’s feasibility study also examined whether a potential increase in enrollment of white students in Pleasantville’s middle school could offset the loss of Absecon’s white students. (Pa540). The study included the following breakdown of white students in Pleasantville’s middle school during the same time period prior to the filing of the petition:

**White Students in the Elementary and Middle School  
Grades in Pleasantville Public Schools**

<b>Year</b>	<b>Elementary (PK-5)</b>	<b>Middle (6-8)</b>	<b>Combined</b>	<b>Average per Grade Level</b>
2015-2016	31	7	38	3.8
2016-2017	28	5	33	3.3
2017-2018	35	11	46	4.6
2018-2019	39	9	48	4.8
2019-2020	40	10	50	5.0
2020-2021	30	8	38	3.8

[(Pa455; Pa544).]

Based on this data, Pleasantville’s enrollment of white students in Pre-K through eighth grade has remained relatively stagnant. (Pa455; Pa544). While

Pleasantville saw a slight increase in the average number of white students per grade level in the 2019-2020 school year, the average number remained constant at just 3.8 white students per grade level from 2015-2016 to 2020-2021. (Pa455; Pa544). And, importantly, not all students who complete eighth grade automatically continue on to Pleasantville High School. Rather, students have the option of attending the public high school, a private high school, the county vocational technical school, a charter school, or an inter-district or other statutory choice program. (See Pa508). In regards to Pleasantville students specifically, Absecon’s April 2021 supplemental report by Carter and Hespe found that Pleasantville’s students “appear to be taking advantage of these programs given the drop off in students from 8<sup>th</sup> to 9<sup>th</sup> Grade.” Ibid.

Further, enrollment in Pleasantville schools “has been steadily declining . . . .” (Pa436). From 2014-2015 to 2019-2020, Pleasantville’s Pre-K to eighth grade enrollment shrunk from 3,120 students to 2,700 students. (Pa437). And this enrollment is projected to continue to decline between 2020-2021 to 2024-2025, from 2,583 students to 2,363 students. (Pa438).

**D. The Commissioner’s May 25, 2022 Final Decision and June 12, 2023 Decision.**

On May 25, 2022, the Commissioner issued a final decision denying Absecon’s request to terminate its send-receive relationship with Pleasantville.



(Pa545; Pa553). In denying the petition, the Commissioner engaged in a comprehensive review of the record, “including the public comments, the feasibility study, the parties’ submissions, and the updated enrollment information submitted by Absecon at the Commissioner’s request[.]” (Pa548).

The Commissioner found that termination of the send-receive relationship “would cause no substantial negative educational or financial impact” on Absecon or Pleasantville,” but that “removal of Absecon’s high school students from Pleasantville would have a substantial negative effect on the racial composition of Pleasantville.” (Pa549). In reaching her decision, the Commissioner noted that in 1988, a previous request by Absecon to sever a send-receive agreement with Pleasantville was denied on the basis that it would cause the “removal of one-third to one-half of the white population at Pleasantville, which had an overwhelming black to white student population ratio[.]” Ibid.

As to the present request, the Commissioner explained that in 2019-2020, there were “26 Absecon students enrolled in Pleasantville, 4 of whom were white, while Pleasantville High School had 5 total white students out of a total student body of 820 students.” (Pa552). Because of this limited number of white students, the Commissioner found that while removal of the Absecon students “would result in a proportional change of less than half a percent of the total student body,” the loss of four out of five total white students amounted to

an 80% loss in the gross population of white students. Ibid. Similarly, for the 2020-2021 school year,<sup>4</sup> the Commissioner explained that there were twenty-five Absecon students enrolled in Pleasantville, six of whom were white, while Pleasantville High School had eleven total white students. Ibid. Thus, while the loss of these 6 Absecon students “would result in a proportional change of less than a percent of the student body, the loss of 6 out of 11 white students would result in a 54.5 percent reduction in the gross population of white students at Pleasantville.” Ibid.

Based on this demographic data and relying, in part, on the court’s decision in Englewood Cliffs, the Commissioner determined that the termination of the send-receive relationship would have a “substantial negative effect” on the “gross population of white students at Pleasantville.” Ibid. Therefore, the Commissioner denied Absecon’s petition. (Pa553).

Absecon moved for reconsideration of the Commissioner’s decision under N.J.A.C. 6A:3-1.15(b)(2). (Pa554). According to Absecon, the Commissioner’s decision “rested on obsolete factual data,” failed to consider the fact that Absecon students would be withdrawn gradually from Pleasantville as part of a phase-out approach, and that any loss of white students from Absecon would be

---

<sup>4</sup> The Commissioner’s decision mistakenly references the 2021-2022 school year.

made up by an increase in the number of white students in Pleasantville's middle schools. (Pa555; Pb14). On June 12, 2023, the Commissioner denied Absecon's motion for reconsideration. (Pa554-55).

As to the claim that she relied on "obsolete factual data," the Commissioner noted that Absecon never claimed that the enrollment data she relied on, which was supplied by Absecon, was inaccurate. (Pa555). Regarding Absecon's claim that the withdrawal would be gradual, which was not part of Absecon's initial petition, (see Pa6-9), the Commissioner found that regardless of whether the students were immediately or gradually withdrawn, "the gross population of white students at Pleasantville would still decrease significantly in total, causing a substantial negative impact on the racial composition of Pleasantville." (Pa555). Lastly, the Commissioner rejected Absecon's assertion that an increase in white students in Pleasantville's middle school rendered withdrawal permissible. Ibid. As the Commissioner explained, the potential increase in white students actually entering Pleasantville's high school is "speculative" and "does not negate the fact that the removal of Absecon's white students from Pleasantville will still result in a substantial decrease in the white population of a predominantly minority district[.]" Ibid. For these reasons, and because Absecon did not provide any newly discovered evidence or misrepresentations, the Commissioner denied the motion for reconsideration.

Ibid.

This appeal followed.

**ARGUMENT**

**THE COMMISSIONER’S DECISION DENYING ABSECON’S PETITION TO SEVER THE SEND-RECEIVE RELATIONSHIP WITH PLEASANTVILLE SHOULD BE AFFIRMED BECAUSE IT WAS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE AND IS AMPLY SUPPORTED BY THE RECORD.**

The Commissioner’s decision to deny Absecon’s petition to sever the send-receive relationship with Pleasantville because doing so would have a substantial negative effect on the racial composition of Pleasantville’s student body was reasonable and fully supported by the record. Therefore, this court should affirm.

An appellate court’s review of an agency decision is limited. Circus Liquors, Inc. v. Middletown Twp., 199 N.J. 1, 9 (2009). The court’s review is focused on: “(1) whether the agency followed the law; (2) whether the agency’s decision is supported by substantial evidence in the record; and (3) whether in applying the law to the facts, the agency reached a supportable conclusion.” City of Jersey City v. Jersey City Police Officers Benev. Ass’n, 154 N.J. 555, 567 (1998). Absent a “clear showing” that the agency’s decision is “arbitrary, capricious, or unreasonable, or lacks fair support in the record,” an agency’s

final decision should be upheld, “regardless of whether a reviewing court would have reached a different conclusion in the first instance.” Circus Liquors, 199 N.J. at 9.

“If the agency decision satisfies these criteria, [the court is] bound to give substantial deference to the agency's fact- finding and legal conclusions, while acknowledging the agency’s ‘expertise and superior knowledge of a particular field.’” Twp. Pharmacy v. Div. of Med. Assistance & Health Servs., 432 N.J. Super. 273, 284 (App. Div. 2013) (quoting Circus Liquors, 199 N.J. at 10). A strong presumption of reasonableness is accorded to agency decisions, and the court should not substitute its judgment for the wisdom of agency action if that action is statutorily authorized and not arbitrary or unreasonable. Englewood Cliffs, 257 N.J. Super. at 456. As long as the agency decision is contemplated under its enabling legislation, the action must be accorded a presumption of validity and regularity. Ibid. And where, as in this case, special expertise is required, an even stronger presumption of reasonableness exists. IFA Ins. Co. v. New Jersey Dep’t of Ins., 195 N.J. Super. 200, 207-08 (App. Div. 1984); see also Englewood Cliffs, 257 N.J. Super. at 458 (explaining that in matters such as this, “it is the Commissioner who brings to bear h[er] expertise in evaluating a severance request”). Thus, while it is true that the court examines legal questions de novo, it must be “mindful of an administrative agency’s day-to-day

role in interpreting statutes ‘within its implementing and enforcing responsibility.’” In re State Bd. of Educ.’s Denial of Petition to Adopt Regulations Implementing N.J. High Sch. Voter Registration Law, 422 N.J. Super. 521, 530-31 (App. Div. 2011) (quoting Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001)).

In evaluating requests to sever a send-receive relationship, the Commissioner considers “all the circumstances, including the educational and financial 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.” N.J.S.A. 18A:38-13. The Commissioner “shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.” Ibid. But this analysis is not a traditional balancing test. Englewood Cliffs, 257 N.J. Super. at 461. While the statute lays out a number of factors to be considered, the Commissioner “is not free to weigh the overall positive and negative impacts of severance or to determine that a substantial negative impact he [or she] has found in any category is outweighed by a positive impact in another.” Id. at 462. Said another way, any finding of a substantial negative impact, regardless of the benefits or positive impacts in other areas, defeats the petition for severance of a send-receive relationship. Ibid.

The reason for this has been clearly articulated by our courts: “There is simply no place in this analysis for the weighing of positive impacts once a substantial negative impact has been found.” Ibid. Thus, under N.J.S.A. 18A:38-13, “[t]he focus of the Commissioner’s inquiry is whether a substantial negative impact exists at all; if it does, severance is to be denied.” Ibid.; see also id. at 446 (“[E]ven if legitimate educational reasons are advanced for severance or the establishment of a dual sending-receiving relationship,” these relationships will not be granted “where compelling reasons, such as substantial negative impact on racial composition and educational quality [] outweigh the educational benefits sought by the sending district in a new relationship with another district”).

As part of this calculus, the Commissioner must examine the potential racial imbalance the termination of a send-receive relationship may have on either district. N.J.S.A. 18A:38-13; see, e.g., Jenkins v. Twp. of Morris Sch. Dist. and Bd. of Educ., 58 N.J. 483 (1971) (explaining the Commissioner’s statutorily prescribed obligation to take steps to eliminate racial segregation or imbalance in public schools). Of course, “[n]ot every action that reduces the percentage of white students necessarily implicates the State’s policy against segregation in the public schools.” In re Petition for Authorization to Conduct a Referendum on Withdrawal of N. Haledon Sch. Dist. v. Passaic Cnty.

Manchester Reg'l High Sch. Dist. ("North Haledon"), 181 N.J. 161, 183 (2004).

This is because, as the Court has explained, "it is not really possible to establish a precise point when a thorough and efficient education is threatened by racial imbalance." Ibid. (citing Booker v. Bd. of Educ. of Plainfield, 45 N.J. 161, 180 (1965)).

The seminal case regarding the termination of send-receive relationships and its effect on the racial balance of public schools is Englewood Cliffs. There, the court affirmed the State Board of Education's decision denying Englewood Cliffs' petition to sever its send-receive relationship with the Board of Education of Englewood. 257 N.J. Super. at 422-23. In reaching this decision, the court recognized that although the "drop in the overall proportion of white students . . . would make a difference of 1.6%, seemingly a negligible amount," the effect on the gross population of white students was substantial. Id. at 439. Specifically, the court found that if severance was granted, 15 white students from Englewood Cliffs would no longer attend the district out of a total of 94 white students, representing a decrease in 16% of the total population of white students. Ibid. Adopting the State Board's decision, the court held that this 16% reduction in the total white population constituted a substantial negative impact on the racial balance and education of the district. Id. at 447-49.

Importantly, the court refused to rely solely on the lower proportional



decrease number; instead, the court accepted the State Board’s reasoning that N.J.S.A. 18A:38-13 “requires that any determination with respect to a requested change in designation must be based upon consideration of all the circumstances . . . and, consequently, the language of the statute precludes” such a narrow view. Id. at 447 (internal quotation marks omitted) (emphasis in original).

Nearly thirty years later, the court denied the severance of a send-receive relationship under similar circumstances in Bd. of Educ. of Mine Hill v. Bd. of Educ. of Dover, 2020 N.J. Super. Unpub. LEXIS 524 (App. Div. Mar. 10, 2020) a case the Commissioner found instructive in reaching her decision here. (Pa551).<sup>5</sup> There, the proposed withdrawal of the send-receive agreement would have resulted in the loss of approximately 3% of the overall proportion of white students. Bd. of Educ. of Mine Hill, 2020 N.J. Super. Unpub. LEXIS at \*7-8. But of the 509 students, 38 were white: 21 from Dover, the sending district; and 17 from Mine Hill, the receiving district. Id. at \*7. Thus, severance would have resulted in a 45% reduction of the total population of white students. Id. at \*8. The court, relying on Englewood Cliffs, affirmed the Commissioner’s decision that this 45% reduction in the gross population of white students constituted a

---

<sup>5</sup> Pursuant to R. 1:36-3 and R. 2:6-1(a)(1)(H), a copy of this decision has been included in the Commissioner’s appendix. The Commissioner is unaware of any other contrary unpublished court decisions regarding the issue presented in the case at hand.

substantial negative impact rendering severance impermissible. Id. at \*9.

Here, the Commissioner carefully reviewed the record, including the demographic information submitted by Absecon and reasonably determined that severance of the send-receive relationship would cause a substantial negative impact on the racial balance of Pleasantville. As set forth more fully above, Pleasantville High School enrolls a very small number of white students. (Pa476). Between 2015-2016 and 2020-2021, the highest enrollment of white students was just eleven total students. (Pa542). Of the white student population in Pleasantville High School, Absecon students accounts for a significant proportion. In 2016-2017, Absecon students represented 62.5% of the total white population. (Pa60; Pa62; Pa448; Pa542). In 2017-2018, Absecon students represented 20% of the total white population; in 2018-2019, Absecon students represented 66.7% of the total white population; in 2019-2020, Absecon students represented 80% of the total white population; and in 2020-2021, Absecon students represented 54.5% of the total white population. (Pa60; Pa62; Pa448; Pa542).

While the withdrawal of Absecon students would result in only a 0.61% reduction in the total student population, (Pa416), the reduction of up to 80% of the total white population is not trivial, especially in a majority-minority district such as Pleasantville. To be sure, a loss of 20% to 80% of the total white

population is significantly more than the 16% reduction the court in Englewood Cliffs found to cause a substantial negative impact necessitating denial of the petition. 257 N.J. Super. at 447-49.

In response to these figures, Absecon claims that the Commissioner failed to appreciate the fact that the withdrawal would occur gradually. (Pb24; Pb36; Pb40). Notwithstanding the fact that Absecon's petition did not specify that the withdrawal of students from Pleasantville High School would be done under a gradual phase out, (Pa6-9), the Commissioner did consider this information, as explained in her decision on Absecon's motion for reconsideration, and correctly determined that the outcome is the same. (Pa555). As Absecon's feasibility study and proposed phase out plan demonstrates, in 2016-2017, Pleasantville would lose 25% of its white student population; in 2017-2018, Pleasantville would lose 80% of its white student population; in 2018-2019, Pleasantville would lose 66.7% of its white student population; and in 2019-2020, Pleasantville would lose 80% of its white student population. (Pa448-49; Pa542). Thus, even accepting Absecon's argument that the withdrawal would occur gradually, the phase-out plan would result in 25% to 80% reduction in the white population, which is considerably more than the 16% reduction the court in Englewood Cliffs found to cause a substantial negative impact necessitating denial of the petition. 257 N.J. Super. at 447-49. And, more to the point,

according to Absecon’s own proposed phase out plan, which relied on outdated data from four years before the petition was filed, there would be a total of just one white student in Pleasantville High School within two years of implementation. (Pa449). Effectively, Absecon admits that its plan would all but eliminate the entire white student population. There is no clearer picture of racial imbalance than here.

Absecon does not dispute this data — nor can it; instead it claims the Commissioner utilized an improper standard in evaluating the information. (Pb20). According to Absecon, the Court’s decision in North Haledon “provides the proper analysis for severance under N.J.S.A. 18A:38-13. Specifically, Absecon asserts that in North Haledon, the Court was “concerned expressly with the overall percentage drop in the proportion of white students,” and not the “percentage drop in the gross number of white students.” (Pb21-22) (emphasis in original). Absecon’s reliance on North Haledon is inapposite.

First, that case involved the withdrawal from a regional school district which is governed by a different statute. North Haledon, 181 N.J. at 164-65; compare N.J.S.A. 18A:38-13 (severance of a send-receive agreement) with N.J.S.A. 18A:13-51 to -81 (withdrawal from a regional school district). Even ignoring this clear distinction, the Court in no way foreclosed the Commissioner from basing her decision on the affect severance would have on the gross

population of white students. While the Court found that North Haledon's withdrawal from a regional school district would have resulted in an immediate 9% reduction in the white population of the regional district, North Haledon, 181 N.J. at 164, the Court did not announce that diminution of the gross population was not an appropriate metric to evaluate severance requests. In fact, the Court cited this court's decision in Englewood Cliffs with approval, which specifically found the gross number to be an appropriate consideration of all the circumstances of a proposed severance. See id. at 141-42; Englewood Cliffs, 257 N.J. Super. at 447; N.J.S.A. 18A:38-13. Although Absecon asserts this matter is distinguishable from Englewood Cliffs because, unlike here, the petitioner there was motivated by racial prejudice in the form of "white flight" when seeking to terminate its sending-receiving relationship, (Pb47), our courts have explained that "a particularized finding of intentional discrimination is not a prerequisite for state remedies for racial imbalance." Englewood Cliffs, 257 N.J. Super. at 472; Bd. of Educ. of Mine Hill, 2020 N.J. Super. Unpub. LEXIS at \*9.

Absecon also claims that the Commissioner erred because withdrawal of Absecon's white students will be mitigated due to an increase in the population of white students in Pleasantville's elementary and middle schools. (Pb24; Pb29-30). But as the Commissioner correctly found, such a claim is entirely too

speculative to overcome the above-cited data demonstrating the dramatic effect severance would have on Pleasantville. The reasoning is simple: this assertion presupposes that all of the white students in Pleasantville’s elementary and middle schools will enroll in Pleasantville High School. (See Pa443 (explaining that the projected enrollment assumes “these children continue to matriculate into the higher grades” in Pleasantville)). But that is simply not the case. In fact, Absecon’s own experts opined that “there is an inherent problem in drawing conclusions from this data” due to the expansion of school choice options. (Pa508). This is because not all students who complete eighth grade automatically continue on to Pleasantville High School. Rather, students have the option of attending the public high school, a private high school, the county vocational technical school, a charter school, or an inter-district or other statutory choice program. (See Pa508). As to Pleasantville students specifically, Absecon’s April 2021 supplemental report by Carter and Hesper found that Pleasantville’s students “appear to be taking advantage of these programs given the drop off in students from 8<sup>th</sup> to 9<sup>th</sup> Grade.” Ibid. Thus, Absecon’s argument is nothing more than speculation and must be rejected.

Notwithstanding the speculative nature of Absecon’s claim, Absecon also misunderstands the data, which does not support a claim that Pleasantville is likely to see an increase in its white student population absent enrollment of

Absecon students. As the feasibility study demonstrates, in 2015-2016, the average number of white students per grade level in Pleasantville's elementary and middle schools was just 3.8. (Pa455; Pa544). By 2020-2021, this average remained at 3.8 students per grade level. (Pa455; Pa544). Thus, Pleasantville's enrollment of white students in Pre-K through eighth grade has not increased, but rather has remained relatively stagnant. (Pa455; Pa544). Even looking at overall district enrollment, enrollment in Pleasantville schools "has been steadily declining" from 2014-2015 to 2019-2020, with Pleasantville's Pre-K to eighth grade enrollment shrinking from 3,120 students to 2,700 students. (Pa436-37). And this enrollment is projected to continue to decline between 2020-2021 to 2024-2025, from 2,583 students to 2,363 students. (Pa438).

This data reveals two critical points. First, the average number of white students per grade level in Pleasantville's elementary and middle schools has not increased, or even significantly changed, from 2015-2016 to 2020-2021. (Pa455; Pa544). During this same time period, Absecon accounted for as much as 80% of the total white student population in Pleasantville High School. (Pa542). Second, Pleasantville's Pre-K to eighth grade enrollment has been on a steady decline since 2014-2015 with no prospect of reversing course in the near future. (Pa438). Taken together, the evidence belies any claim that

enrollment of white students in Pleasantville High School is likely to increase without continued enrollment of Absecon students.

For these reasons, the record supports the Commissioner's decision to deny Absecon's request to sever the send-receive relationship with Pleasantville.

**CONCLUSION**

For these reasons, this court should affirm the Commissioner's decision.

Respectfully submitted,

MATTHEW J. PLATKIN  
ATTORNEY GENERAL OF NEW JERSEY

By: /s/Ryan J. Silver  
Ryan J. Silver  
Deputy Attorney General

Date: February 12, 2024



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

Appellant,

v.

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

Respondent.

SUPERIOR COURT OF NEW  
JERSEY, APPELLATE DIVISION

DOCKET NO. A-003237-22

On Appeal from a decision of the  
Commissioner of Education

---

**ABSECON BOARD OF EDUCATION'S APPELLATE REPLY BRIEF**

---

**PORZIO, BROMBERG & NEWMAN, PC**

100 Southgate Parkway

Morristown, NJ 07906

P: (973) 538-4006

*Attorneys for Appellant Absecon Board of  
Education*

Of Counsel and on the Brief:

Vito A. Gagliardi, Jr., Esq. [vagagliardi@pbnlaw.com](mailto:vagagliardi@pbnlaw.com) (024821989)

Kerri A. Wright, Esq. [kawright@pbnlaw.com](mailto:kawright@pbnlaw.com) (018042005)

On the Brief:

Thomas J. Reilly, Esq. [tjreilly@pbnlaw.com](mailto:tjreilly@pbnlaw.com) (245552017)

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS AND PROCEDURAL HISTORY .....	4
LEGAL ARGUMENT .....	4
THE COMMISSIONER’S OPPOSITION IS WITHOUT MERIT BOTH LEGALLY AND FACTUALLY BECAUSE IT RELIES UPON A FLAWED READING OF THE APPLICABLE CASE LAW AND A WILLFULLY FACILE AND DISMISSIVE READING OF THE RECORD.....	4
A. The Commissioner’s Final Decision And Opposition Misunderstand And Misapply The Applicable Case Law.....	5
B. The Commissioner’s Analysis Of The Record Both In Her Final Decision And On Appeal Ignores Critical, Uncontested Data Regarding The Racial Composition Of Pleasantville’s Schools.....	11
CONCLUSION .....	15

**TABLE OF AUTHORITIES**

Page(s)

**CASES**

*Allstars Auto. Grp., Inc. v. Motor Vehicle Comm'n*, 234 N.J. 150 (2018).....5

*Bd. of Educ. of Borough of Englewood Cliffs v. Bd. of Educ. of City of Englewood*, 257 N.J. Super. 413 (App. Div. 1992), *aff'd*, 132 N.J. 327 (1993)..... 2, 3, 5, 6, 7, 9, 12, 13

*Bd. of Educ. of Twp. of Mine Hill v. Bd. of Educ. of Town of Dover*, No. A-2381-18 (Mar. 10, 2020).....10

*Greenwood v. State Police Training Ctr.*, 127 N.J. 500 (1992) .....5

*In re Herrmann*, 192 N.J. 19 (2007) .....5

*In re Pet. For Auth. To Conduct A Referendum On Withdrawal Of N. Haledon Sch. Dist. From Manchester Reg'l High Sch.*, 181 N.J. 161 (2004).....7, 8, 9, 11, 12

*In re Ridgefield Park Bd. of Educ.*, 244 N.J. 1 (2020).....4

*Melnyk v. Bd. of Educ. of the Delsea Reg'l High Sch. Dist.*, 241 N.J. 31 (2020).....4

**STATUTES**

N.J.S.A. 18A:38-13 .....13

**RULES**

N.J.R.E. 201 .....15

R. 1:36-3 .....10

## PRELIMINARY STATEMENT

The Commissioner of Education’s opposition to Petitioner Absecon Board of Education’s appeal is little more than an embellished regurgitation of the same flawed reasoning which fatally undermines the Commissioner’s final decision. Like the Commissioner’s final decision, the opposition quotes selectively from the case law, fails to engage in a demonstrative analysis of the record, and attempts to dismiss the **uncontested** evidence regarding Pleasantville’s future white high school population as “speculative.” The Court should not be swayed by such facile hand-waiving of the record below.

The Commissioner begins by noting that her decision is subject to deference and must be judged under the arbitrary and capricious standard. That is true, but it should provide her no comfort. Because this matter concerns statutory interpretation and application of appellate case law to the relevant facts, the Commissioner’s legal conclusions are reviewed *de novo*. This Court thus stands on “equal footing” with the Commissioner concerning her legal conclusions. Her legal conclusions here obviously were wrong because she did not apply the established case law properly. Moreover, the Commissioner’s decision clearly was arbitrary because it could not have been based on a reasonable interpretation of the record. Her decision contradicts, ignores, and otherwise fails to appreciate the undisputed evidence submitted to her. That

evidence showed that Pleasantville High School's white student population likely would increase, and at the very least remain constant, even after accounting for Absecon students' gradual withdrawal from Pleasantville High School. Her decision therefore could not have been based on substantial evidence contained in the record, as all administrative decisions must.

Furthermore, by straining to reach a decision at odds with the evidence in the record, the Commissioner created an impossible standard. By her logic, the removal of *any* white students from Pleasantville is sufficient to create a *substantial* negative impact under the statute. Such a conclusion obviously is in conflict with the statutory mandate and the legislative policies underlying it. Unsurprisingly, her opposition fails to consider these fatal deficiencies, and resorts instead to imploring the Court to apply the arbitrary and capricious standard and inquire no further. The Court should ignore that invitation.

The Commissioner also resorts to selective citations to case law. Most notably, she cites *Bd. of Educ. of Borough of Englewood Cliffs v. Bd. of Educ. of City of Englewood*, 257 N.J. Super. 413 (App. Div. 1992), *aff'd*, 132 N.J. 327 (1993), for the proposition that the percentage loss of the gross white student population here resulting from Absecon's withdrawal far exceeds what courts will allow. This argument is misleading, legally and factually. First, the Court in *Englewood Cliffs* did not base its holding on the percentage reduction of white

students; there were many other factors -- most notably a fear of intentional discrimination -- that influenced its decision. Second, the undisputed evidence in the record shows that Pleasantville's white student population likely will *increase*, or at least remain steady, during and after Absecon's withdrawal. There likely will be *no percentage drop in the white student population*. Finally, *Englewood Cliffs* was refined by later case law which the Commissioner ignored both in her final decision and in her opposition here. Her arguments regarding the applicable law therefore are of no merit.

Undeterred, the Commissioner dismisses Petitioner's evidence regarding Pleasantville High School's white student population as "speculative." Any such argument is disingenuous. Petitioner presented undisputed expert reports projecting student counts based on the most recent available data from Pleasantville's middle and high school. Prior case law, including the *Englewood Cliffs* decision on which the Commissioner relies, permits reliance on "projections" for assessing future student counts. The Commissioner ignored the data because it did not fit her arbitrary, pre-determined outcome. Accordingly, the Commissioner's decision must be reversed or at least remanded to require the Commissioner actually to review the undisputed evidence in the record and to account for current demographic data which confirm Petitioner's experts' future projections of white student enrollment.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Petitioner relies on the statement of facts and procedural history set forth in its appellate brief.

**LEGAL ARGUMENT**

**THE COMMISSIONER’S OPPOSITION IS WITHOUT MERIT BOTH LEGALLY AND FACTUALLY BECAUSE IT RELIES UPON A FLAWED READING OF THE APPLICABLE CASE LAW AND A WILLFULLY FACILE AND DISMISSIVE READING OF THE RECORD.**

The Commissioner’s opposition rests on two fundamental flaws: (1) a misunderstanding of the applicable case law; and (2) a dismissive reading of the administrative record. The Commissioner makes much of the fact that her decision is subject to deference and to arbitrary and capricious review. Even after considering that deference, her twin flaws of misunderstanding the law and misinterpreting, if not ignoring, the record ultimately are fatal both to her opposition here and her final decision below.

Petitioner already has addressed exhaustively in its initial brief the standard of review and need not repeat it here, except to note two critical points. First, a reviewing court is not bound by an agency’s interpretation of a statute or its determination of a strictly legal issue. *In re Ridgfield Park Bd. of Educ.*, 244 N.J. 1, 17 (2020). With regard to such matters, this Court “stands on equal footing with the Commissioner.” *Melnyk v. Bd. of Educ. of the Delsea Reg’l High Sch. Dist.*, 241

N.J. 31, 40 (2020). Accordingly, the Commissioner’s (flawed) interpretation of the law here should not be afforded deference. Second, a final agency decision must be based on “substantial credible evidence” in the record, and an agency decision is afforded deference only if the agency relies on such evidence in reaching its decision. *See Greenwood v. State Police Training Ctr.*, 127 N.J. 500, 513 (1992). If an agency’s final decision does not invoke “express or implied legislative policies,” and does not apply those policies to the facts as found through substantial credible evidence in the record, then its decision is arbitrary and capricious and must be reversed. *See Allstars Auto. Grp., Inc. v. Motor Vehicle Comm’n*, 234 N.J. 150, 157 (2018); *In re Herrmann*, 192 N.J. 19, 28 (2007). With those principles brought to bear here, the Commissioner’s decision cannot stand, and must be reversed or at least remanded for a proper consideration of the evidence.

**A. The Commissioner’s Final Decision And Opposition Misunderstand And Misapply The Applicable Case Law.**

The Commissioner cites *Englewood Cliffs* extensively, arguing that the Court in that case held that a “16% reduction in the total white student population constituted a substantial negative impact on the racial balance and education of the district.” (Rb20.<sup>1</sup>) This conclusion is misleading at best. The *Englewood Cliffs* Court did not base its holding or its decision in general on the percentage reduction in the

---

<sup>1</sup> “Rb” refers to the brief filed by Respondent Commissioner of Education.



gross white student population. Rather, the Court merely noted in its recitation of the facts that, had Englewood Cliffs removed its students from Englewood's high school, the result would have been a "16.0% loss in [Englewood's high school's] white student body but would have resulted in only a 1.6% decrease in the proportion of white students at [Englewood's high school]." 257 N.J. Super. at 434. The Court did not make a substantive legal assessment regarding the percentage drop, and noted that the 16% loss to the gross white student population would result in "only" a 1.6% loss in the total proportion of white students at Englewood's high school. At best, the Court was ambivalent on the issue and did not rely on it to reach its holding. Indeed, the Commissioner even admits in her opposition here that "the [C]ourt refused to rely solely on the proportional decrease number." (Rb20.) That conclusion is an understatement; the Court did not rely on it at all.

The Court did not need to look to the percentage drop because there were other significant factors that influenced its decision. Most critically, the Court was concerned that Englewood Cliffs was motivated to leave Englewood due to "white flight." *Id.* at 472. Indeed, the Court stated that findings by the agency below of "intentional discrimination" were "the leitmotif which runs throughout the" case. *Id.* Accordingly, the Court determined that the Commissioner and the State Board of Education properly denied severance of the sending-receiving relationship in that matter to protect against "racial prejudice and circumvention of integration." *Id.*

Furthermore, when discussing the State Board of Education’s findings of a substantial negative impact with regard to race, the Court did not mention the 16% drop in the gross white student population. Instead, it referred to the fact that there would be “no more than a 1.1% reduction in [Englewood’s high school’s] [total] white population at the time of the application.” *Id.* at 463. Thus, for purposes of its review of a substantial negative impact, the Court ignored the 16% drop in the gross white student population, referring instead to the percentage drop in the proportion of white students. The Court then explained that the 1.1% reduction was not sufficient to save the severance application because the State Board properly “reached back into the relationship between the parties in assessing [Englewood Cliffs’ application.” *Id.* Upon “reach[ing] back” into the parties’ relationship, the State Board discovered that Englewood Cliffs’ motive for severing its sending-receiving relationship was “long-term white flight,” and that it had for years engaged in practices designed to steer its white and Asian students away from Englewood’s high school, resulting in a “policy” that “accelerated [the] decline in white enrollment.” *Id.* In sum, it was Englewood Cliffs’ discriminatory motives which drove the Court’s decision, not the percentage drop in the white student population.

Petitioner here focused its appellate brief on the New Jersey Supreme Court’s decision in *In re Pet. For Auth. To Conduct A Referendum On Withdrawal Of N. Haledon Sch. Dist. From Manchester Reg’l High Sch.*, 181 N.J. 161, 183 (2004)

(hereinafter, “*North Haledon*”). In that case, and as outlined extensively in Petitioner’s appellate brief, the Court was concerned that there would be an “*immediate* 9% diminution of the white population [as a result of North Haledon’s withdrawal from Manchester Regional High School] and a *projected racial and ethnic imbalance in the near future*” which could not “be characterized as insubstantial or negligible.” *Id.* at 175 (emphases added). Petitioner explained that the Court in *North Haledon* focused on an “immediate” diminution of the white student population; that the Court focused not on the percentage loss to the gross number of white students, but rather to the relative change in the percentage of white students in the overall student population; and that the immediate loss of North Haledon’s white student population would turn Manchester Regional High School immediately from a majority white to a majority minority school.

Those principles fit comfortably to allow for the severance sought here. As Petitioner previously has noted, Absecon students -- most of whom are minority students -- account for less than 4% of Pleasantville High School’s students, and Absecon’s withdrawal would result in a reduction by 0.48% of Pleasantville High School’s white student population, from 0.61% to 0.13%, far different from the 9% reduction in *North Haledon*. The Commissioner here did not cite *North Haledon* in her final decision, and improperly focused her analysis only on the percentage loss to the gross number of white students. Had she applied *North Haledon* properly, she

would have focused solely on the percentage drop in the proportion of white students at Pleasantville High School, not the percentage loss of the gross white student population. Her failure to do so renders her decision arbitrary and capricious.

The Commissioner attempts to distinguish *North Haledon* by arguing that it “involved the withdrawal from a regional school district which is governed by a different statute.” (Rb24.) She then undermines her own argument on this point by acknowledging that the *North Haledon* Court “cited this Court’s decision in *Englewood Cliffs* with approval.” (Rb24.) If matters concerning withdrawal from a regional school district truly were distinct from cases concerning severance of sending-receiving relationships, the *North Haledon* Court would not have cited *Englewood Cliffs* at all. Contrary to the Commissioner’s argument, though the statutes are different, the analysis essentially is the same. In both *Englewood Cliffs* and *North Haledon* the Courts assessed whether the withdrawal of a particular subset of students would affect substantially and negatively the racial composition of a particular school. It is illogical and disingenuous for the Commissioner to argue that the *North Haledon* Court properly invoked *Englewood Cliffs*, but that the Court here should apply *Englewood Cliffs* to the exclusion of *North Haledon*.

Bereft of helpful published case law, the Commissioner is forced to rely on strained, incomplete analysis of an older decision from a lower court (*Englewood Cliffs*) to the exclusion of more recent case law from this state’s highest court (*North*

*Haledon*). Similarly, the Commissioner also is forced to resort to unpublished case law, which is neither binding on this Court nor of precedential value. *See R.* 1:36-3. The unpublished decision in question is *Bd. of Educ. of Twp. of Mine Hill v. Bd. of Educ. of Town of Dover*, No. A-2381-18 (Mar. 10, 2020). In that case, this Court affirmed the Commissioner’s decision that the *immediate* withdrawal of Mine Hill’s 43 students from Dover’s middle school out of a total student population of 509, including 17 of the school’s 38 white students, constituted a substantial negative impact on the racial composition of Dover’s middle school.

Several distinctions are critical. First, this Court’s decision in *Mine Hill* did not examine the record below and so we cannot know how that record relates to the record here. From the Court’s decision, it is clear the Commissioner had a number of concerns regarding Mine Hill’s withdrawal. For example, the Commissioner found that the transition plan would have a substantial negative impact “on the quality of education for Mine Hill’s seventh grade class,” and would be “impractical and would hinder the continuity of education” for Mine Hill’s middle school students, who would be forced to attend three different schools in each of the subsequent three school years. (Ra002.<sup>2</sup>) No such concerns are implicated here. Second, the withdrawal of Mine Hill’s students was to be immediate, and the Court

---

<sup>2</sup> “Ra” refers to the Commissioner’s appellate appendix.

noted public concern with the “one-year transition plan.” The same issue of immediate withdrawal also drew the Supreme Court’s attention in *North Haledon*.

No such immediate withdrawal will occur here. Rather, as Petitioner noted in its appellate brief, Absecon students’ withdrawal would be gradual, amounting to a loss of perhaps one or two white students per year, who would be replaced by an increasing number of white students from Pleasantville’s own middle school. Taken together, the loss of 1 or 2 white students from Absecon each year combined with the introduction of an increased number of white students from Pleasantville’s middle school negates any negative impact -- let alone a substantial negative impact -- on the racial composition of Pleasantville High School. The Commissioner’s arguments regarding the case law therefore are without merit.

**B. The Commissioner’s Analysis Of The Record Both In Her Final Decision And On Appeal Ignores Critical, Uncontested Data Regarding The Racial Composition Of Pleasantville’s Schools.**

The Commissioner argues incessantly that she must consider “all of the circumstances,” including the educational and financial implications of the affected districts, and that this holistic assessment empowers her essentially to rely on any data she chooses. Petitioner readily accepts her invitation to consider “all of the circumstances.” In truth, the Commissioner looked neither at the underlying circumstances nor the unrebutted evidence in the record. Were she to look at those circumstances, as she now insists she must, there are a few things that surely would

catch her attention, and that appear nowhere in her final decision. Those facts include that Absecon, a majority-minority district, seeks to withdraw its students from Pleasantville and place them in another majority-minority district in Absegami; Petitioner's experts provided unrebutted reports that Absecon's wishes stemmed not from improper racial considerations but from the desire to place its students in a better, and equally diverse, learning environment in Absegami; and that Absecon's withdrawal would have *no racial impact* on Pleasantville High School both because of the extremely small number of Absecon students attending Pleasantville High School and because of an increasing number of white students entering the high school from Pleasantville's middle school. None of this information was considered or even referenced in either of the Commissioner's two written decisions.

Faced with no way to rebut the above evidence, the Commissioner dismisses Petitioner's projections as "speculative." Of course, feasibility studies and other such reports which make predictive prognostications are, by their nature, somewhat "speculative." In fact, the law requires that these reports be "speculative." The *North Haledon* Court stated that the Commissioner should take account of "demographic trends" to "anticipate" "perceived . . . trends" in the racial and ethnic makeup of school districts. 181 N.J. at 183. In *Englewood Cliffs* -- a case on which the Commissioner relies heavily -- this Court looked to "[t]he best estimate of enrollment in the foreseeable future," which included "three years of recent data

which most accurately reflect current enrollment trends.” 257 N.J. Super. at 439. Projections not only are permitted, they are encouraged. Petitioner here did exactly what the statute requires and what the case law contemplates; it submitted feasibility studies projecting future demographic trends.

It therefore was reversible error for the Commissioner to dismiss these projections -- which were unrebutted and the only data she had before her -- on the basis that they are “speculative,” particularly given that the predictive nature of a feasibility study not only is permitted, but expected. Indeed, her decision not only is arbitrary and capricious, it is paradoxical and logically inconsistent because it allows her to dismiss the best available evidence of future demographic trends precisely because that evidence predicts future demographic trends. No feasibility study would survive such review. Given that feasibility studies are *required* by statute for facilitating the Commissioner’s review of severance applications, the Commissioner’s decision here cannot possibly have abided by the statute’s underlying legislative goals and policies. *See N.J.S.A.* 18A:38-13.

The Commissioner also contends that “Absecon admits that its plan would all but eliminate the entire white student population” of Pleasantville High School. (Pb23.) This contention is alarmingly disingenuous. Petitioner argued at length both before the Commissioner and in its appellate brief that the unrebutted evidence in Petitioner’s expert reports shows that Absecon’s phased withdrawal would have *no*



*impact* on the racial composition of Pleasantville High School, and that Pleasantville High School's white student population likely will increase or at least remain steady due to an increasing number of white students in Pleasantville's middle school.

The Commissioner argues in turn that the Court should not assume that white students from Pleasantville's middle school will attend Pleasantville High School. To begin, it is not a logical stretch to assume that at least some of the students in a district's middle school will attend its high school, particularly when those students are residents of the district. More importantly, Petitioner supported its arguments on this point through statistics, data, and expert opinion. That data shows that the white student population of Pleasantville's elementary and middle schools increased significantly from the years 2015-2016 through 2019-2020, and that these students began to make their way into Pleasantville High School in 2020-2021, when the school's white student population jumped from 5 to 11 despite the addition of just 2 white students from Absecon. (Pa541-542). Based on this data, Petitioner's expert demographer concluded that "the white percentage" of Pleasantville High School moving forward "would be higher than currently exists in Pleasantville High School with Absecon students," (Pa443), and that it would be "*incorrect to assume that the removal of Absecon students would remove all or nearly all of the white students at Pleasantville High School*" due to the increasing white population throughout

Pleasantville’s lower schools. (Pa455) (emphasis added).<sup>3</sup> Petitioner therefore showed with un rebutted evidence not just that there would be no substantial negative impact, but indeed no impact at all. Accordingly, the Commissioner’s arguments to the contrary are without merit and should not sway the Court.

**CONCLUSION**

Based on the foregoing, Absecon requests that this Court reverse the Commissioner’s decision declining to sever the sending-receiving relationship between Absecon and Pleasantville, or remand to the Commissioner for a proper consideration of the evidence, including the most recent demographic data from Pleasantville High School affirming Petitioner’s experts’ reports.

Respectfully submitted,

**PORZIO, BROMBERG & NEWMAN P.C.**  
Attorneys for Absecon Board of Education

By: Vito A. Gagliardi, Jr.  
Vito A. Gagliardi, Jr.

Date: February 26, 2024

---

<sup>3</sup> Petitioner’s experts were correct. The most recent data from the National Center for Education Statistics provides that Pleasantville’s white student population increased to 15 for the 2022-2023 school year, with just 3 white students from Absecon. See [https://nces.ed.gov/ccd/schoolsearch/school\\_detail.asp?Search=1&DistrictID=3413200&ID=341320000192](https://nces.ed.gov/ccd/schoolsearch/school_detail.asp?Search=1&DistrictID=3413200&ID=341320000192). This data accords with Petitioner’s experts projections predicting an increase in white students at Pleasantville High School based on data from Pleasantville’s lower schools. The Court can take judicial notice of this fact under *N.J.R.E.* 201. Moreover, Petitioner will move to supplement the record to include a complete set of current demographic data.