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**IN THE COURT OF COMMON PLEAS
OF YORK COUNTY, PENNSYLVANIA**

IN RE: APPOINTMENT OF RECEIVER : CASE NO. 2014-SU-004190-49
FOR THE SCHOOL DISTRICT OF THE :
CITY OF YORK :

**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF YORK NAACP AND
ARC OF PENNSYLVANIA**

Movants, York NAACP and Arc of Pennsylvania, through their counsel, Education Law Center and Public Interest Law Center of Philadelphia (PILCOP) hereby move the Court for leave to file a brief as Amici Curiae and in support thereof aver as follows:

1. Movant Arc of Pennsylvania (Arc of PA) is an affiliate branch of the national Arc (The Arc). The Arc is the largest advocacy organization for people with intellectual and developmental disabilities in the United States. Arc of PA is made up of 34 local chapters which serve 56 counties throughout the Commonwealth of Pennsylvania. The Arc of PA has 8,000 members within the Commonwealth of Pennsylvania, including a chapter in York, Pennsylvania. Arc of PA provides consultation and technical assistance to students, parent groups, schools and pre-schools in order to improve the provision of education for students with significant disabilities in general education classes. The Arc of PA or its predecessors has been a plaintiff in special education cases including *PARCC v. Commonwealth*, 343 F. Supp. 279 (E.D. PA 1972) and *Gaskin v. Commonwealth*, No. 94-CV-4048 (ED. Pa).
2. Movant York-National Association for the Advancement of Colored People of Pennsylvania (“York-NAACP”) is a member organization of the NAACP of Pennsylvania, which is the state affiliate of the NAACP. Founded in 1909, the mission of

the National Association for the Advancement of Colored People is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination. The Commonwealth of Pennsylvania NAACP has over 10,000 members in 30 chapters across The Commonwealth. Members of the York-NAACP include parents of students attending York City School District schools, including parents of children with disabilities. York NAACP is dedicated to advocating for civil rights issues affecting people throughout the commonwealth, including ensuring that all students have equal access to high quality public education. To that end, NAACP-PA successfully intervened to protect the needs of students with disabilities in a school district made up of predominately students of color, *Chester Upland School District v. Commonwealth of Pennsylvania*, 2012 U.S. Dist. LEXIS 115607, (E.D. Pa., August 15, 2012) (approval of class action settlement).

3. The purpose of this amici curiae brief is to aid the Court in ruling on the issues raised by the Petition relating to the appointment of a receiver for the School District of York City.
4. Specifically, Movants seek to file this brief in order to bring to the Court's attention how the proposed contract sought by the Chief Recovery Officer (CRO) would violate the rights of students with disabilities under federal and state law.
5. As set forth in the accompanying brief, the CRO's demand to approve a contract whose implementation would violate the law is unenforceable and movants therefore urge the Court to deny the Petition to appoint this receiver on the ground that such an appointment is arbitrary and capricious.

6. Movants assert that they provide valuable knowledge and expertise relating to the impact of the proposed plan on students with special education needs and the requirements of federal and state special education laws.

WHEREFORE, Movants respectfully request to be permitted to file and serve the attached amici brief to provide advocacy and information to the Court on the aforementioned issues.

Respectfully submitted,

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Dated: December 22, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Motion upon the parties, listed below, in accordance with the requirements of § 1.54.

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**IN THE COURT OF COMMON PLEAS
OF YORK COUNTY, PENNSYLVANIA**

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BRIEF OF AMICUS CURIAE
ARC OF PENNSYLVANIA AND YORK NAACP

I. INTRODUCTION

Amici organizations file this brief to represent the interests of public school students with disabilities and their parents residing in the School District of the City of York, PA. Amici file this brief in order to bring to the Court’s attention how the requested receivership, district-wide charter system and implementation of the proposed Charter Agreement sought by the Chief Recovery Officer (“CRO”) would violate the rights of students with disabilities under federal and state law. Specifically, under the contract and proposed plan as outlined by the CRO, students with disabilities would either be assigned to district-wide charter schools, or if parents rejected this option, assigned to cyber programs whether or not such placements were based on parent input, afforded a student a free, appropriate public education and ensured the student would be educated in the least restrictive environment.

Such a predetermined placement violates the core individualization and parental participation mandates of the IDEA. Moreover, such placements violate federal and state law because they are in the least integrated, most restrictive environment, rather than

ensuring placement in the least restrictive environment (LRE) as required under the IDEA and contravene other protections mandated by federal and state law. In addition, the plan does not address how or whether such placements would include necessary and appropriate related services. For these reasons, and others set forth herein, we ask the Court to deny the Petition for receivership as arbitrary and capricious inasmuch as the proposed plan would violate special education law and is unenforceable.

II. STATEMENT OF INTEREST

The Arc of PA is an organization of 8,000 members in Pennsylvania organized in 34 chapters, including a chapter in York, PA. The Arc of PA is dedicated to ensuring that students with disabilities receive a free appropriate public education as required by the Individuals with Disabilities Education Act, that they are educated in compliance with that law, which requires that the parents of students with disabilities be a part of the educational decision-making process and that they are educated in the least restrictive environment. The Arc of PA or its predecessors has been a plaintiff in special education cases including *PARCC v. Commonwealth*, 343 F. Supp. 279 (E.D. PA 1972), and *Gaskin v. Commonwealth*. 389 F.Supp.2d 628 (E.D.Pa. 2005).

York NAACP is a member organization of the NAACP -PA State Conference which has over 10,000 members in 30 chapters across the state. The members of York NAACP include parents of students with and without disabilities attending the York City School District. York NAACP, like NAACP-PA is dedicated to ensuring that all students have equal access to high quality public education. York NAACP has a direct interest in ensuring that all students, including those with the most severe educational needs, receive

a high quality public education in accordance with their rights under federal and state law. NAACP-PA was a successful intervenor-plaintiff in the case of *Chester Upland School District v. Commonwealth of Pennsylvania*, 2012 U.S. Dist. LEXIS 115607, (E.D. Pa., August 15, 2012) (approval of class action settlement) wherein another Pennsylvania school district with a majority of non-white students contested plans to close that district's schools because of the impact of the proposed plan on students with special education needs. The York NAACP has previously tried to intervene in this proceeding in order to represent the interests of its members who are parents of students with and without disabilities that attend York City schools and will be directly affected by the proposed receivership and contract which the Chief Recovery Officer and Pennsylvania Department of Education are attempting to impose on the York City School District.

III. FACTUAL STATEMENT

The Secretary of the Pennsylvania Department of Education has petitioned this Court for the appointment of a receiver for School District of the City of York ("District), in part, on the ground that the Board failed to comply with specific directives issued by the CRO. Specifically, the York School Board was asked by the CRO to adopt a contract with a charter school providing funding for all District students to attend that school. The contract did not explicitly address how students with disabilities would receive required notices and be served by the charter school and did not state how students with disabilities who did not wish to attend the charter would be provided for. During the hearing, the CRO testified that his plan for these students who wanted to be served by a

traditional public school instead of a charter school was to provide them with a cyber-program. When asked how this would work for students who were unable to read, the CRO indicated that he did not know. According to PDE statistics, in 2013, approximately 1350 of the students in the District not attending charter schools were students with disabilities (22% of 6300 students). Each of these 1,350 students is entitled to notice of the proposed placement, an IEP Team meeting to determine the student's placement, an individualized decision-making process which includes parent participation and the opportunity to challenge a proposed placement through a due process hearing. However, the proposed plan failed to address how any of this would occur – how notice would be provided, meetings held etc. or how the needs of students with disabilities would be addressed as required by federal and state law.

IV. LEGAL ANALYSIS

A. OVERVIEW OF FEDERAL AND STATE SPECIAL EDUCATION LAW

Under the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. 1400, *et seq.* and state law incorporating the IDEA, 22 Pa. Code 14.1, *et seq.*, both the state and school districts have a legal duty to provide students with disabilities with a Free and Appropriate Educational Program (“FAPE”) in the Least Restrictive Environment (“LRE”). 34 C.F.R. 300.101 and 300.114; *Chester Upland School Dist. v. Pennsylvania*, 861 F.Supp.2d 492 (E.D.Pa. 2012); *Gaskin v. Pennsylvania*, 389 F.Supp.2d 628 (E.D.Pa.,2005); *Oberti v. Board of Education*, 995 F.2d 1204 (3d Cir.1993). The primary purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and

related services designed to meet their unique needs.” 20 U.S.C. § 1400(d)(1)(A). The Supreme Court has defined FAPE to include “educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89 (1982); *see* 20 U.S.C. § 1401(9). In addition, the state and school districts have a duty under these statutes to comply with a set of detailed procedural safeguards which ensure that parents are intricately involved in every aspect of the planning and placement process. 20 U.S.C. §§ 1414–1415; *Beth V. by Yvonne V. v. Carroll*, 87 F.3d 80 (3rd Cir. 1996). Failure to follow these procedures is a fundamental violation of the IDEA. *Board of Education v. Rowley*, 458 U.S. 176, 192 (1982)

At the core of the IDEA’s objective of ensuring a FAPE through an individualized educational program designed to meet a student’s particular needs is the requirement that a collaborative process exist between parents and schools. *Schaffer v. Weast*, 546 U.S. 49, 53 (2005). “The central vehicle for this collaboration is the [Individualized Education Program (“IEP”)] process.” *Id.* “Each IEP must include an assessment of the child’s current educational performance, must articulate measurable goals and benchmarks and must specify the nature of the special services that the school will provide.” *Id.* (citing 20 U.S.C. § 1414(d)(1)(A)). The IEP must be “reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential.” *D.S.*, 602 F.3d at 557; *see Burlington Sch. Comm. v. Mass. Dep’t of Educ.*, 471 U.S. 359, 368 (1985) (describing IEP as “modus operandi” of

the IDEA). Parents, along with the other members of the IEP team, play a critical role in formulating the IEP, which includes determining the child's educational placement. 20 U.S.C. § 1414(d)(1)(B); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524 (2007) (ruling that the IDEA grants parents independent, enforceable rights, both procedural and substantive, to ensure that their child receives FAPE).

Parents are legally entitled to participate in the IEP meeting and must be given Prior Written Notice by the school of any changes to their child's intended educational program and related services so they have the opportunity to discuss and potentially to challenge any proposed change. *Honig v. Doe*, 484 U.S. 305 (1988). See 20 U.S.C. § 1415(b). In Pennsylvania, a Notice of Recommended Educational Placement ("NOREP") is the usual vehicle through which schools comply with the IDEA's Prior Written Notice requirement. See 34 C.F.R. § 300.503(a); Pa. Office for Dispute Resolutions, *Procedural Safeguards Notice* (Jan. 6, 2011), <http://odr-pa.org/wordpress/wp-content/uploads/Procedural-Safeguards-Notice.pdf> ("In Pennsylvania, prior written notice is provided by means of a [local education agency] Prior Written Notice Form/Notice of Recommended Educational Placement."). If parents do not agree with the proposed change, they have the right to challenge the action through due process proceedings and ultimately in court. 34 C.F.R. 300.503-504 and 507. When a parent challenges a proposed change of placement, the student has the right to remain in his/her current placement until the placement dispute has been finally resolved. *M.R. and J.R. ex rel. E.R. v. Ridley Sch. Dist.*, 744 F.3d 112(3rd. Cir. 2014) *petition for cert. filed* (U.S. 06/20/14); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 861-63 (3d Cir.1996).

Accordingly, the IDEA empowers parents to assert substantive and procedural violations concerning the provision of FAPE. 20 U.S.C. §§ 1415(b)(6), (f). Courts generally conduct a two-step inquiry to assess whether a school district has complied with the IDEA. *See Rowley*, 458 U.S. at 206. First, courts look to whether the state or school district complied with the procedures set forth by the IDEA and state law. Second, the court evaluates whether the IEP is reasonably calculated to enable the child to receive educational benefit. *Id.* But, under governing caselaw, it can be unnecessary to even address the second prong if the court can identify inadequacies that seriously infringe the parents' *opportunity* to participate in the IEP formulation process, determine a child's placement or causes a deprivation of educational benefits or loss of educational opportunity. *See* 20 U.S.C. § 1415(f)(3)(E); *Winkelman*, 550 U.S. at 525. Consequently, there can be no more serious and clear infringement than a one-size-fits-all placement or program. Accordingly, predetermining an educational programs or placement for children with disabilities without the involvement of their parents is strictly prohibited by the IDEA. *See, e.g., D.B. v. Gloucester Twp. Sch. Dist.*, 751 F. Supp. 2d 764, 771 (D.N.J. 2010), *aff'd*, 2012 WL 2930226 (3d Cir. July 19, 2012); *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir.2004).

Chapter 14 reflects Pennsylvania's compliance with IDEA requirements, and incorporates federal IDEA regulations. 22 Pa. Code § 14.102. Aside from affording commensurate state protection of federally-guaranteed IDEA rights, Chapter 14 separately requires the provision of quality special services and programs for students with disabilities along with other specific protections. *See* 22 Pa. Code § 14.102(a). This includes the

facilities that must be made available for educating students with disabilities. *See* 22 Pa. Code § 14.144.

B. THE CRO'S PROPOSED PLAN FOR STUDENTS WITH DISABILITIES TO ATTEND A CYBER PROGRAM AS THE ONE-SIZE-FITS-ALL OPTION VIOLATES THE RIGHTS OF STUDENTS UNDER THE IDEA AND CHAPTER 14.

a. The Proposed Plan Violates A Student's Right to An Individualized Educational Placement Decision Based on Parent Participation.

As discussed above, students who are eligible for special education services under the IDEA and Chapter 14, are entitled to a written Individualized Education Plan (IEP) regarding services and school placement that is developed, reviewed and revised for each individual student. 34 C.F.R. § 300.320; 22 Pa. Code § 14.102(a)(2)(xxvii). Each school placement decision must be individualized and based on the child's IEP. 34 C.F.R. § 300.116(a)(2), (b); 22 Pa. Code § 14.102(a)(2)(xiii).

Courts have concluded that "the placement decision must be based on the IEP produced by the IEP team and cannot be made before the IEP is produced." *Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Michael R.*, No. 02 C 6098, 2005 U.S. Dist. LEXIS 17450 at *42 (N.D. Ill. Aug. 15, 2005) (citing *Spielberg v. Henrico County Public Schs.*, 853 F.2d 256, 258-59 (4th Cir. 1988)). "Consequently, a school district's unilateral decision to change a student's placement before the IEP meeting with the student's parents, referred to as 'predetermination,' can constitute a violation of the IDEA." *James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102*, 642 F. Supp. 2d 804, 821 (N.D. Ill. July 22, 2009) (quoting *Michael R.*, 2005 WL 2008919 at *14). This is because parents have a right to be involved in all decisions regarding placement and services for their

children and it is illegal for the state or the District to predetermine placements for students with disabilities. See *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir.2004). Instead, placement decisions must be made by each child's Individual Education Program (IEP) Team which includes the student's parents. 20 U.S.C. §§ 1414–1415.

Pursuant to these requirements, courts have firmly and consistently rejected educational placements that are predetermined in any manner. In *D.B.*, the court found that the student's IEP was predetermined based on conclusions about the student's placement even though parents were present at IEP meetings because there was “no evidence that the comments of the parents were entertained by the members of the IEP team and there was no evidence that the parents' concerns were incorporated into the final version of the IEP.” 751 F. Supp. 2d at 772 & n.11. As noted by the appellate court in *Anchorage Sch. Dist. v. M.P.*, No. 10-36065, 2012 WL 2927758, at*5 (9th Cir. July 19, 2012), the IDEA, its implementing regulations, and case law all emphasize the importance of parental involvement and advocacy. This general rule is also reflected in a recent decision by a federal district court in Pennsylvania, *P.V. v. School District of Philadelphia*, 2013 U.S. Dist. LEXIS 21913 (E.D. Pa., February 19, 2013). There, the District sought to unilaterally assign students with autism to various schools based on their need for services and to do so without first notifying their parents, having IEP meetings and listening to parental concerns about such changes. The court found that this process violated the Prior Written Notice mandate.

Significantly, under the IDEA, the Commonwealth has an independent statutory duty to ensure that all children with disabilities receive a free appropriate public education in the least restrictive environment and to do so in accordance with promises made to the U.S. Department of Education. *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 697 (3d Cir. 1981). These obligations also require the Commonwealth to ensure that students with disabilities receive an individualized placement decision. In fact, the Commonwealth already should know, as a result of the *Chester Upland School District v. Commonwealth*, 2012 U.S. Dist. LEXIS 115607, *20 (E.D. Pa., August 15, 2012) that assigning all students with disabilities to a single provider without non-disabled peers as proposed in Chester for a temporary plan is an inappropriate “one size fits all” provision.

For these reasons, the proposed plan of the CRO to place all students, including those with disabilities, in cyber programs as the only option to a district-wide charter school clearly violates the IDEA and Chapter 14 by denying students with disabilities their right to an individualized placement decision predicated on parent participation.

b. The Proposed Plan Violates A Student’s Right to Be Educated in the Least Restrictive Environment.

A vital element of a FAPE is the right of a student with a disability to receive an education alongside a student without a disability. The “least restrictive environment” for a student is one in which a student with a disability is educated with his non-disabled peers. To provide “LRE” the state and the District have a duty ensure that they provide students with disabilities with a full continuum of placement options. 34 C.F.R. 300.115. The continuum of placements starts at instruction in regular classes, as the

least restrictive, and ends with instruction in institutions as the most restrictive. *See* 34 C.F.R. § 300.115(b)(1); *D.B. v. Ocean Twp. Bd. of Educ.*, 985 F. Supp. 457, 490 (D.N.J. 1997).

In this case, by referring all students to a cyber school or cyber program as the only possible school placement, the proposed plan denies these students access to a full continuum of placements as required by the IDEA and 22 PA. CODE Chapter 14. *See* 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.115; 22 PA. CODE §§ 14.102(a)(1)(iv), 14.145(5). As the Pennsylvania Department of Education has explained, the failure to offer students with disabilities a range of placement options violates the LRE requirement as well as the requirement that placements decisions be individualized. *See* Basic Education Circular, *Placement Options for Special Education* (Date of Review October 2009) (“Placement BEC”). This guidance also states that students cannot be placed in a particular school merely because it is the most convenient. Placement BEC at 2 (“[R]egardless of the type of placement being considered,” there remains “an obligation to place a student in the least restrictive environment (LRE) in which the student's IEP can be implemented; and . . . a corresponding prohibition against placing children based solely on factors of administrative convenience.”). *Id.* The Department in fact has cautioned districts that utilizing “nontraditional sites, particularly if they are segregated and are not based on an individual placement decision, [would] result in the disapproval of the school district’s special education plan by the Bureau of Special Education.” *Id.* at 2-3.

All children with disabilities, including those with IEPs, those awaiting IEPs, and those entitled to protection under the ADA and Section 504 are entitled to services in the least restrictive environment. *Chester Upland School Dist. v. Pennsylvania*, 861 F.Supp.2d 492, 508 (E.D.Pa. 2012); *Gaskin v. Pennsylvania*, 389 F.Supp.2d 628 (E.D.Pa.,2005); *Oberti v. Bd. of Edu. of the Borough of Clementon School Dist.*, 995 F.2d 1204, 1216-17 (3d Cir. 1993) (“Congress understood that a fundamental value of the right to public education for children with disabilities is the right to associate with their non-disabled peers.”). 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.550. The IDEA requires that students be provided services in the least restrictive environment (LRE) appropriate to their disabilities. 20 U.S.C. § 1412(a)(5)(A). This requires mainstreaming, which is incorporating special education students into traditional classrooms enabling them to be educated side by side with non-disabled students. Students receiving special education services should be, to the greatest extent possible, educated “together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled.” *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 535 (3d Cir. 1995).

“This provision sets forth a ‘strong congressional preference’ for integrating children with disabilities in regular classrooms.” *Oberti*, 995 F.2d at 1213-14. Following Congress’s goals, the Third Circuit in *Oberti* held that “even if placement in the regular education classroom cannot be achieved satisfactorily, the school is still required to include the child in school programs with nondisabled children (specifically academic classes, other classes such as music and art, lunch, recess, etc.) whenever

possible.” *Oberti*, 995 F.2d at 1215. Indeed, provision of an integrated setting can be required even where a district would not typically have such a setting. *Delaware County Intermediate Unit No. 25 v. Martin K.*, 831 F. Supp. 1206, 1219 (E.D. Pa. 1993).

If, as proposed in this case, students are relegated to cyber schooling, they will be participating in their education from home. While instruction in the home is one of the placement options included in the IDEA, it is the most restrictive option. *K.S. v. Strongsville City School Dist.*, 2014 WL 2442193 (N.D. Ohio 2014); *Haverford Township School District*, 112 LRP 24677 (SEA Pa. (20120). As the United States Department of Education has explained:

“Home instruction is, for school-aged children, the most restrictive type of placement because it does not permit education to take place with other children. For that reason, home instruction should be relied on as the means of providing FAPE to a school-aged child with a disability only in those limited circumstances when they cannot be educated with other children even with the use of appropriate related services and supplementary aids and services, such as when a child is recovering from surgery.”

Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12,405, 12,638 (Dep’t of Educ. Mar. 12, 1999). Thus, under the LRE mandate, the state and the District are prohibited from providing students with instruction in the home unless the student at issue is unable to be receive educational benefit in a less restrictive environment. *See also*, “Placement BEC”, *supra*.

There is simply no justification for suggesting that children with disabilities should automatically be educated at home as proposed under the receivership plan now at issue in this case because this is clearly the most restrictive, rather than the least restrictive setting. Even if some students with disabilities who opt out of the district-wide

charter school are educated in “one building” and even if this were an otherwise appropriate setting, if there are a disproportionate number of students with disabilities in that setting this will again be contrary to ensuring that students are educated in the LRE. However, at this juncture, the legality of this issue and whether there is a potential revenue source for such a separate building for a cyber program has not been explored or considered. Rather, the proposed contract fails to address whether a revenue source exists to fund operation of such a building, although the CRO plans to utilize a cyber-placement option. The Court’s conclusion in *Chester Upland School Dist. v. Pennsylvania*, 2012 U.S. Dist. LEXIS 115607, *20 (E.D. Pa., August 15, 2012) is instructive on this point. There, the court found that “the lack of any final plan from the Department for providing special education services in the least restrictive environment in the event of such a closure” would constitute “imminent violations of ... rights under the IDEA and Section 504.” Similarly, the lack of a plan to serve the needs of students with disabilities in York City also threatens imminent violations of federal and state laws.

The financial cost of failing to comply with the IDEA is significant. When the state and/or districts violate the IDEA, these entities may be liable for the parents’ attorney’s fees; the cost of compensatory education and tuition reimbursement, and withdrawal of federal funds. 34 C.F.R. 300.101. These costs can be extremely high for the District and for the state. For example, in the case contesting Chester Upland’s proposed school closures and the state depriving students of FAPE and LRE in the course of proposing to close the schools in that district, the Court directed the state to pay attorneys’ fees as follows: “the Commonwealth will pay class counsel \$260,000 in fees

and expenses, which counsel represents constitutes a "substantial discount" from the lodestar." *Chester Upland, supra*, at *18.

Notwithstanding the well-established, strict legal requirements discussed above, and the potential for incurring substantial liability and possible withdrawal of millions of dollars in federal funds, the state through the CRO has ignored these requirements in crafting the Financial Recovery Plan, the proposed charter agreement, and in devising a plan for students with disabilities who choose to continue attending a regular public school.

Instead, neither the Financial Recovery Plan nor the proposed Charter Agreement provide for a program which ensures that students will receive FAPE in the LRE when students with disabilities do not utilize the charter school option. Instead, during the hearing, the CRO testified that his plan for these students was to provide them with a cyber-program. When asked how this would work for students who were unable to read, for example, the CRO indicated that he did not know. The fact that the CRO's proposed plan violates -- rather than ensures compliance with -- the IDEA and Chapter 14 and fails to ensure that the District effectively meets the educational needs of *all* students in the District renders the proposed contract unenforceable. Moreover, as the representative of the state, the CRO has an affirmative duty to ensure that the District will meet the special education needs of its students, not just those who choose to attend the district-wide charter school.

c. The Proposed Plan Fails to Ensure That Students With Disabilities Will Receive a FAPE, including Related Services.

A cyber program may be a fundamentally inappropriate setting that cannot meet the particular needs of a student with disabilities and therefore denies a student a FAPE.

However, there does not appear to be any specific plan to ensure the provision of a FAPE, including the provision of related services to students with disabilities, particularly for those who are engaged in cyber school programs from their homes.

Under the IDEA, related services include:

...transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

34 C.F.R. 300.34.

The CRO did not even attempt to explain or address how the District would be able to provide FAPE in a cyber-program to students in the above categories who need intensive programs and extensive related services; or may not be physically, cognitively, and/or emotionally able to use a computer or access instruction via a cyber-program, or who may not have a parent or caregiver at home to assist them when they need help. It is difficult to imagine how the CRO could have addressed these issues, even if he had taken the time to consider them.

The foregoing described violations of the IDEA -- the failure to ensure individualized placement decisions and parent participation in those decisions, the failure to provide a FAPE in the least restrictive environment, etc. are all implicated by the CRO's proposed plan. Accordingly, Amici respectfully submit that Petitioner's requested receivership action is arbitrary and capricious and warrants denial of the Petition in this case.

d. The Proposed Plan Violates The Rights Of Students With Disabilities Under Section 504 Of The Rehabilitation Act Of 1973

Section 504 of the Rehabilitation Act (“Section 504”) provides that, “No otherwise qualified individual with a disability . . . shall, solely, by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance”

29 U.S.C. §794(a) (2002). Discrimination can be established through a showing that the state or district have excluded or treated students with disabilities in an inferior manner or treated them differently for a reason which is not a justified response to an individual with disabilities' needs or abilities. Specifically, the Act prohibits:

- Affording a qualified individual with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others. 34 CFR 104.4 (b)(1)(ii).
- Providing a qualified individual with a disability an aid, benefit, or service that is not as effective as that provided to others. 34 CFR 104.4 (b)(1)(iii).
- Providing different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities unless such action is necessary to provide a qualified individual with disabilities with aids, benefits, or services that are as effective as those provided to others. 34 CFR 104.4 (b)(1).
- Otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service. 34 CFR 104.4 (b)(1)(vii).
- Directly, or through contractual or other arrangements, utilizing criteria or methods of administration that: a) have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; b) have the purpose of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to individuals with disabilities; or c) perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state. 34 CFR 104.4 (b)(4).

The United States Department of Education, Office of Civil Rights (“OCR”), has repeatedly held that a *blanket policy* affecting disabled students violates section 504. *Christopher S. ex rel. Rita S. v. Stanislaus County Office of Educ.*, 384 F.3d 1205, 1212 (9th Cir.2004) In the present case, the state through the CRO’s action is significantly restricting educational options for students with disabilities to attending a district-wide charter or participating in a cyber-program. This blanket policy violates Section 504 and would force the District to violate the statute because these students, by virtue of living in York City School District, are the only students in Pennsylvania who would not be afforded all the rights guaranteed them under IDEA, including but not limited to, the right to receive a free, appropriate public education in regular school and a regular class with their non-disabled peers. Moreover, if students with disabilities became more likely to be placed in cyber programs with more limited educational options this would also violate Section 504.

As is the case with IDEA violations, the state and District may be liable for attorneys’ fees, the costs of compensatory education and tuition reimbursement, and withholding of federal funds for violating Section 504. *SmartStart: Scope of Available Relief Under Section 504*, LRP, updated July 23, 2014. Notwithstanding, the potential for incurring substantial liability for violating the requirements of Section 504, however, the state through the CRO has adopted a course of action which will subject students with disabilities to highly discriminatory treatment. In addition, the state through the CRO is forcing the District to similarly engage in such discriminatory treatment.

In light of the potential violations of Section 504 discussed above, Amici once again respectfully submit that this action is arbitrary and capricious and warrants denial of the Petition in this case.

C. THE CRO's PROPOSED PLAN WILL FAIL TO SERVE THE NEEDS OF STUDENTS WITH DISABILITIES, RENDERING THE PROPOSED RECEIVOERSHIP ACTION ARBITRARY AND CAPRICIOUS.

Under Pennsylvania's Charter School Law, school districts are to approve new charter schools only if it "conforms to the legislative intent" of the charter school law. *See* 24 P.S. § 1717-A(e)(2). That legislative intent requires that there be a robust "existing school district." 24 P.S. § 17-1702-A.¹ The existence of a school district is inherent to the very notion of "school choice" and, by law, students must have, as part of that choice, the option to choose a school district school. The conversion of an entire district to a charter school with no track record of success decreases the number of

¹ It is the intent of the General Assembly, in enacting this article, to provide opportunities for teachers, parents, pupils and community members to establish and maintain schools that operate independently from *the existing school district* structure as a method to accomplish all of the following:

- (1) *Improve* pupil learning.
- (2) *Increase* learning opportunities for all pupils.
- (3) Encourage the use of different and innovative teaching methods.
- (4) Create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the school site.
- (5) Provide parents and pupils with *expanded choices* in the types of educational opportunities that are available *within the public school system*.
- (6) Hold the schools established under this act *accountable* for meeting measurable academic standards and provide the school with a method to establish *accountability* systems. (emphasis added).

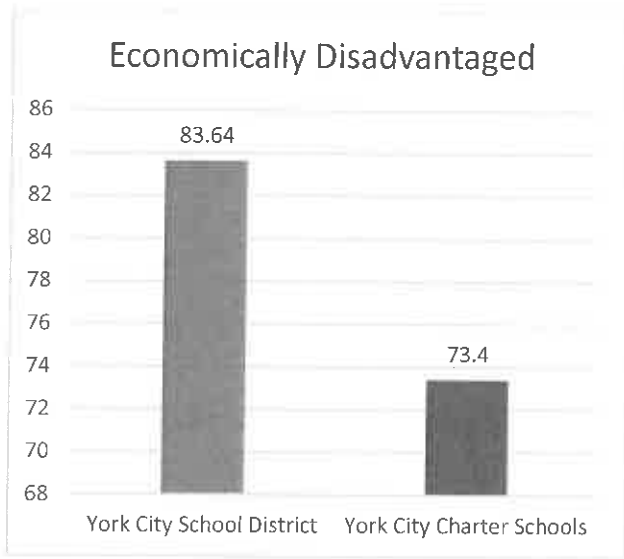
“choices” for students and is antithetical to “increasing opportunities” and “expanding” choices.

This proposition is particularly concerning because there is no evidence that charter schools have improved our system of public education, as also required under the statutory intent of the charter school law. See 24 P.S. § 17-1702-A(1-6) (requiring that charter schools “improve pupil learning” and are held “accountable” for academic standards). In fact, the charter schools operating in Pennsylvania have underperformed in comparison to their authorizing school districts of residence. See National Charter School Study 2013, Center for Research on Education Outcomes (CREDO), Stanford University (finding that in Pennsylvania, charter students on average are covering 29 days less material in reading and 50 days less in math) (available at <http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf>). In particular, Pennsylvania’s Cyber Charter Schools are performing even more poorly than brick and mortar charter schools. See Policy Brief: Revisiting Cyber Charter School Performance, 2014, Research for Action (finding that Pennsylvania’s “cyber charter schools come up short even in comparison to the highest-poverty traditional public and charter schools”) (available at <http://www.researchforaction.org/wp-content/uploads/2014/11/RFA-Revisiting-Cyber-Charter-Performance-November-2014.pdf>).

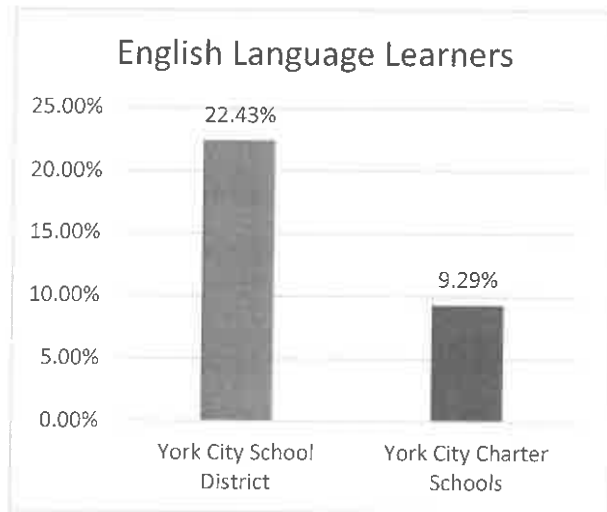
Students with disabilities are entitled to the same core rights and protections and education at charter schools as they receive at traditional public schools. 20 U.S.C. 1415 20 U.S.C. § 1413(a)(5) and 1412. Under Pa law, a charter school is the equivalent of a

public school district for purposes of compliance with the IDEA. Charter schools must evaluate students, identify them with disabilities, provide them with IEPs, work in concert with their parents, and place them in the least restrictive environment. However, the data across Pennsylvania and in York in particular is that charter schools are not serving children with significant disabilities. The same charter school trends we see in Pennsylvania hold true for charter schools that have operated in York City. While the charter sector, taken as a whole, scores slightly higher on the state’s “school performance profile,” their scores reflect a significantly less-challenging-to-serve student body.² York City is a community with high numbers of vulnerable students, including students who are economically disadvantaged, English language learning students, and students with disabilities. Both district and charter schools serve high numbers of students with significant needs. However, in comparison to the district schools, the charter sector, serves disproportionately far fewer. For example, while the York City school district serves 83% students considered economically disadvantaged, the charter sector as a whole serves only 73%.

² York City charter schools average a 57.8 SPP and district schools average a 52.6 SPP. However, this data includes the scores of all the charter schools enrolling students from York City School district – Lincoln Charter School, the Helen Thackston Charter School, and New Hope Academy Charter School. It also includes the scores of the York Academy Regional Charter School, a regional charter school which enrolls approximately one-third of its students from other, more high-achieving, school districts. When York Academy Regional is not included, the York City charter schools only average a 51.5 SPP. This average also does not include the Crispus Attucks Youth Build Charter School, whose scores were not reported by the state.

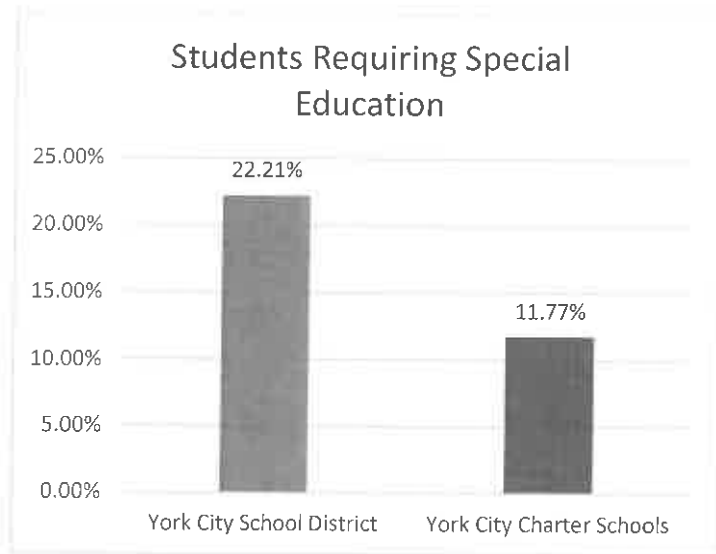


While the district’s student body is comprised of 22% English language learners, the charter sector only serves nine percent.



Charter schools in York City also underserve students with disabilities and in particular students with severe, more challenging-to-serve, disabilities. For example, while York City School District serves over 22% students with disabilities, the charter sector as a whole only serves less than 12% students with disabilities.³

³ All performance and demographic data is from the state’s Pennsylvania School Performance Profile website, available at <http://paschoolperformance.org/>. Note, for the Lincoln Charter School the percent of



The students with disabilities that are served by the York City charter school sector, are disproportionately students with relatively mild disabilities. For example, the most common and typically mild disabilities diagnosis for students receiving special education is a “specific learning disability.” Statewide, students diagnosed with a specific learning disability comprise 45% of all students receiving special education. In the 2012-2013 school year, the most recently available data for the kinds of disabilities served by each district, the York City School District’s special education population was 52.2% specific learning disability. However, the York City charter school sector’s special education population was comprised of 68.5% students with specific learning disabilities.⁴ Therefore, the district sector disproportionately serves the students with more severe disabilities than the charter sector. This same trend has been documented in other more heavily chartered school districts in Pennsylvania. *See* Testimony to the

economically disadvantaged students appears to have been erroneously reported as only 2.9%. Thus, the calculation above uses 45%, the school’s economically disadvantaged data reported for the previous 2012-2013 school year.

⁴ All data for the kind of disability served by each sector is from the “Statistical Summary” on the website for the Pennsylvania Department of Education’s Bureau of Special Education, available at http://penndata.hbg.psu.edu/documents/PennDataBooks/Statistical_Summary_2012-2013_Final.pdf.

Auditor General by David Lapp (available at http://www.elc-pa.org/wpcontent/uploads/2014/03/ELC_Testimony_AuditorGeneral_CharterSchools_3_7_14-.pdf).

This trend – that charter schools fail to serve children with significant needs -- has been described as having a discriminatory impact on special education funding among charter schools in Pennsylvania. *See* State Needs a Rational Fix for its Method of Funding Charter Students with Disabilities, December 10, 2014, David Lapp (available at <http://thenotebook.org/december-2014/147977/state-needs-rational-fix-its-method-funding-charter-students-disabilities>); *See also* Bruce Baker, The Commonwealth Triple-Screw: Special Education Funding & Charter School Payments in Pennsylvania, School Finance 101 (June 5, 2012) (available at <http://schoolfinance101.wordpress.com/2012/06/05/the-commonwealth-triple-screw-special-educationfunding-charter-school-payments-in-pennsylvania>). Public schools in York City are in dire need of improvement and funding. However, the combination of all this demographic data, suggests that the York City School District has been overburdened with York City’s most needy students. This combined with robust studies finding the PA charter sector under-performing district schools, demonstrates the dearth of evidence that the charter sector has the ability to properly serve students with disabilities—particularly those with the greatest needs.

Moreover, it is well documented that Pennsylvania’s Cyber Charter Schools perform far below brick and mortar schools, both district and charter operated. *See* Policy Brief: Revisiting Cyber Charter School Performance, 2014, Research for Action (find

that Pennsylvania's "cyber charter schools come up short even in comparison to the highest-poverty traditional public and charter schools") (available at <http://www.researchforaction.org/wp-content/uploads/2014/11/RFA-Revisiting-Cyber-Charter-Performance-November-2014.pdf>); *see also*, Molnar, A. (Ed.); Rice, J.K., Huerta, L., Shafer, S. R., Barbour, M.K., Miron, G., Gulosino, C, Horvitz, B. (2014) *Virtual Schools in the U.S. 2014: Politics, Performance, Policy, and Research Evidence*. National Education Policy Center, (concluding that, despite growth in online education nationally, "there is little high-quality research to support the practice or call for expanding virtual schools") (available at <http://nepc.colorado.edu/publication/virtual-schools-annual-2014>). In fact, the state's School Performance Profiles (SPPs) show that cyber charters remain among the very lowest-scoring public schools in the Commonwealth, even when accounting for student demographics. Incredibly, all 14 current cyber charters had scores that fell in the lowest 21 percent of nearly 3,000 Pennsylvania public schools. In fact, more than half of the state's cyber charters fell in the bottom three percent of all schools statewide. Not one cyber charter school had a School Performance Index score of 70 or above, the state's basic threshold for satisfactory school performance. *Id.*; See also Testimony of David Lapp, November 15, 2013 available at http://www.elc-pa.org/wp-content/uploads/2013/12/ELC_Cyber_Charter_Testimony_11_15_13.pdf

In light of the foregoing, and in the absence of any plan developed to address the needs of students with disabilities and ensure the provision of FAPE in the LRE, it appears unlikely that either a district-wide charter school or cyber program will

effectively meet the needs of the 1,350 students with disabilities in the District as required under federal and state law.

V. CONCLUSION

For the reasons set forth herein, the CRO's proposed plan of placing students with disabilities in cyber programs as the one-size-fits-all sole option to placement in a district-wide charter school would violate the rights of students with disabilities under federal and state law. Moreover, a district-wide charter school system or cyber program alternative will not serve the needs of students with disabilities. Accordingly, Amici organizations urge the Court to deny the Petition for receivership as arbitrary and capricious inasmuch as the proposed plan would violate special education laws, is unenforceable and contrary to public policy.

Respectfully Submitted,

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