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LATINO ACTION NETWORK; NAACP NEW JERSEY STATE CONFERENCE; LATINO COALITION; URBAN LEAGUE OF ESSEX COUNTY; THE UNITED METHODIST CHURCH OF GREATER NEW JERSEY; MACKENZIE WICKS, a minor, by her Guardian Ad Litem, COURTNEY WICKS; MAISON ANTIONE TYREL TORRES, a minor, by his Guardian Ad Litem, JENNIFER TORRES; MALI AYALA RUEL-FEDEE, a minor, by his Guardian Ad Litem, RACHEL RUEL; RA'NAYAH ALSTON, a minor, by her Guardian Ad Litem, YVETTE ALSTON-JOHNSON; RA'YAHN ALSTON, a minor, by his Guardian Ad Litem, YVETTE ALSTON-JOHNSON; ALAYSIA POWELL, a minor, by her Guardian Ad Litem, RASHEEDA ALSTON; DASHAWN SIMMS, a minor, by his Guardian Ad Litem, ANDREA HAYES; DANIEL R. LORENZ, a minor, by his Guardian Ad Litem, MARIA LORENZ; and MICHAEL WEILL-WHITEN, a minor, by his Guardian Ad Litem, ELIZABETH WEILL-GREENBERG,

Plaintiffs,

v.

THE STATE OF NEW JERSEY; NEW JERSEY STATE BOARD OF EDUCATION; and LAMONT REPOLLET, Commissioner, State Department of Education,

Defendants,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

DOCKET NO. MER-L-001076-18

Civil Action

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' CROSS-MOTION TO DISMISS AND PROCEDURAL OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

and

NEW JERSEY CHARTER SCHOOL ASSOCIATION, INC.; BELOVED COMMUNITY CHARTER SCHOOL; ANA MARIA DE LA ROCHE ARAQUE; TAFSHIER COSBY; and DIANA GUTIERREZ,

Intervenor-Defendants.

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PRELIMINARY STATEMENT

Because undisputable, publicly available statistics, maintained by the State Department of Education, are sufficient to show as a matter of law that New Jersey's public schools are unconstitutionally segregated, Plaintiffs have filed a Motion for Partial Summary Judgment with respect to liability. But rather than defend that motion on its merits, or responsibly admit the fact of this tragic social reality and move on to the process of solving the problem, the Defendants – the Commissioner of Education (Commissioner), the New Jersey State Board of Education (State Board), and the State of New Jersey (collectively, the State Defendants), as well as Intervenor-Defendants New Jersey Charter Schools Association, Inc., BelovED Community Charter School, Tafshier Cosby, Ana Maria De La Roche Araque, and Diane Gutierrez (collectively, the Charter Defendants) – have instead filed a "cross-motion to dismiss and procedural opposition" to the motion. The motion is, as set forth below, without merit, but its result, if not its purpose, is to forestall dealing with the reality that so many of the State's public school students attend severely segregated schools, even as another generation of students fail to realize the recognized benefits of diverse, integrated educational environments.

Defendants' "procedural" arguments fail. First, the State Defendants argue that all of the State's school districts are

indispensable parties to the case. But their view of the mandatory party joinder doctrine relies on case law that has been specifically repudiated by the New Jersey Supreme Court, and in any event their arguments overlook the simple fact that the school districts are not liable for creating and perpetuating the school segregation alleged in this case – rather, it is the State Defendants who are alleged to be the responsible parties. Second, the State Defendants claim that liability cannot be adjudicated separately from remedy, ignoring that such bifurcation is explicitly permitted by court rules and is not only common but efficient in segregation cases. Third, the State Defendants, joined by the Charter Defendants, object to the filing of a summary judgment motion prior to the close of discovery – though, again, Plaintiff's motion is fully consistent with the court rules and the Defendants do not, even after all this time, set forth what facts they intend to contest in discovery that might even theoretically preclude summary judgment on liability. For example, while the Defendants particularly complain about the lack of an expert report or deposition from Plaintiffs' expert, the expert's certification submitted along with the summary judgment motion is functionally the same as both the Complaint, filed so long ago, and the type of expert report that the rules contemplate; moreover, Plaintiffs do not oppose a deposition prior to adjudication of the summary judgment motion.

If Defendants wish to argue that the current public school system is fully constitutional, even in light of the State's own statistics cited in Plaintiffs' brief on the merits, then they are free to do so. But they should not be permitted to put off for another day, year, decade, or generation reckoning with the clear, undisputable facts of this case. Certainly, they should not be permitted the delay they so clearly seek based on their flawed procedural objections. Therefore, and for the additional reasons provided herein, the Court should deny Defendants' cross-motion, reject their procedural objections, and move to briefing and argument on the merits.

ARGUMENT

I. NEW JERSEY'S INDIVIDUAL SCHOOL DISTRICTS – WHICH, UNLIKE THE COMMISSIONER AND STATE BOARD, ARE NOT LIABLE FOR STATEWIDE UNCONSTITUTIONAL SEGREGATION – ARE NOT INDISPENSABLE PARTIES TO THIS ACTION.

In Point I of their brief, the State Defendants argue that the Court should add 585 school districts (the "School Districts") as parties to this action, or otherwise dismiss the Amended Complaint for failure to name those districts as indispensable parties under *Rule* 4:28-1. The State Defendants move for dismissal under this rule, but as a general matter, the absence of an indispensable party requires joinder of the absentee, not dismissal. *See R.* 4:28-1(a). Indeed, dismissal is appropriate only when the allegedly indispensable parties cannot be served

with process – and even then, only after consideration of several additional factors. *See R.* 4:28-1(b). Because the School Districts can be served with process, dismissal would be inappropriate in any event. And, even absent joinder of the School Districts, the failure to add an indispensable party "d[oes] not deprive the trial court of jurisdiction to decide the issue between the parties who [are] joined." *Raynor v. Raynor*, 319 N.J. Super. 591, 602 (App. Div. 1999).

Regardless, neither joinder nor dismissal are appropriate in this case. First, as a threshold matter, the State Defendants' argument is based on the faulty premise that "Plaintiffs seek a declaration that all school districts in the State are segregated." State Defs.' Br. at 8. In fact, the Amended Complaint does not place blame on *any* School Districts, but instead on the State Defendants who have established and maintained a system that is broadly segregative. *See, e.g.*, Am. Compl. ¶ 27 (alleging, based on 2016-17 school year data, that 63% of Black and Latino public school students attended schools that were more than 75% non-White, and almost half (46.2%) attended schools that were more than 90% non-White). In any event, though, the State Defendants' arguments are based on a misinterpretation and misapplication of relevant legal standards, as they rely on case law that has been squarely repudiated by the State Supreme Court. Finally, because the State Defendants' arguments largely focus on how the School

Districts might be impacted by a potential remedy in this case, the motion to dismiss is premature with respect to the currently pending summary judgment motion, which addresses only the State Defendants' liability, and the request to join additional parties can be reassessed at the remedy phase of this litigation.

A. Party Joinder Is Not Mandatory Under Current Law and Court Rules.

In support of their motion to dismiss for failure to name indispensable parties, the State Defendants cite a single published New Jersey Supreme Court case – *Cogdell ex rel. Cogdell v. Hosp. Ctr. at Orange*, 116 N.J. 7 (1998) – and several other published cases from appellate and trial courts that are cited in *Cogdell*. But the State Defendants fail to address the subsequent criticism of *Cogdell's* expansive party-joinder rule, which has led to subsequent case law and rule amendments that severely restrict the circumstances under which the failure to join parties should result in dismissal.

Rule 4:28-1(a) requires joinder of a party only:

> if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest.

[*Ibid.*]

Mandatory party joinder is intended to ensure "the completeness, soundness, and finality of the ultimate determination of a legal controversy." *Cogdell*, 116 N.J. at 18. The party-joinder rule thus works in tandem with the entire controversy doctrine, which has the similar goal of assuring "that related claims and matters arising among related parties be adjudicated together rather than in separate, successive, fragmented, or piecemeal litigation." *Kent Motor Cars, Inc. v. Reynolds & Reynolds Co.*, 207 N.J. 428, 443 (2011). Accordingly, if a necessary party is not joined in an action under *Rule* 4:28-1, then a subsequent action against that party is subject to a motion to dismiss or for other appropriate sanctions. *See 700 Highway 33 LLC v. Pollio*, 421 N.J. Super. 231, 236 (App. Div. 2011). Whether a party should be joined under the mandatory party joinder rule and entire controversy doctrine "is fact sensitive and dependent upon the particular circumstances of a given case." *Ibid.*; *accord Allen B. Du Mont Labs., Inc. v. Marcalus Mfg. Co.*, 30 N.J. 290, 298 (1959).

Prior to *Cogdell*, the entire controversy doctrine applied to compulsory joinder of *claims* against other parties to the action, and was "not a basis for a concept of compulsory joinder of parties." Geoffrey C. Hazard, Jr., *An Examination Before and Behind the "Entire Controversy" Doctrine*, 28 Rutgers L.J. 7, 17

(1996). *Cogdell*, however, expanded the doctrine to "encompass[] the mandatory joinder of parties." *Ibid.* (quoting *Cogdell*, 116 N.J. at 26) (internal quotation marks omitted). The Court subsequently amended *Rule* 4:30A, which governs the entire controversy doctrine, to require the joinder of parties as well as claims. *Id.* at 21.

As the Court later noted, "[s]cholarly criticism of the doctrine's growth . . . followed swiftly." *Kent Motor Cars, Inc. v. Reynolds & Reynolds, Co.*, 207 N.J. 428, 444 (2011). Within a few years of the *Cogdell* decision, one member of the majority repudiated its holding. *See Olds v. Donnelly*, 150 N.J. 424, 451 (1997) (Stein, J., concurring in part and dissenting in part) ("I now regard as erroneous *Cogdell*'s holding that the entire controversy doctrine 'necessarily embraces . . . joinder of all persons who have a material interest in the controversy.'" (quoting *Cogdell*, 116 N.J. at 26) (alteration in original)). The Court's majority also recognized criticism of mandatory party joinder, including that it "complicates, prolongs, and increases the cost of litigation" and "requir[es] the assertion of claims against parties one otherwise would not sue." *Olds*, 150 N.J. at 444-45 (majority opinion). Accordingly, after a referral to the Committee on Civil Practice, the Court subsequently amended *Rule* 4:30A to eliminate joinder of parties from the entire controversy doctrine. *See Kent Motor Cars*, 207 N.J. at 444.

Thus, rather than mandating party joinder as described in *Cogdell*, the relevant rules currently vest the trial court with substantial discretion "to control the joinder of parties and claims." *Id.* at 446. To assist the Court in exercising its discretion, parties are required in their initial pleading to "disclose . . . the names of any non-party who should be joined in the action pursuant to *R.* 4:28." *R.* 4:5-1(b)(2); *see also Kent Motor Cars*, 207 N.J. at 445 ("*Rule* [4:5-1(b)(2)] demands only disclosure, explicitly leaving it to the court to decide whether to require that notice of the action be given to any non-party identified or to compel that party's joinder."). A party cannot "decline to reveal the existence of other parties in an effort to achieve an advantage." *Kent Motor Cars*, 207 N.J. at 446.

Requiring mandatory joinder of the School Districts in this case would run counter to the joinder principles outlined by the Supreme Court after *Cogdell*. First, it is a dramatic understatement to say that the joinder of the School Districts, which would add 585 new parties to the action, would "complicate[], prolong[], and increase[] the cost of litigation." *Olds*, 150 N.J. at 444. It would also unfairly compel Plaintiffs to "assert[] . . . claims against parties [they] otherwise would not sue." *Id.* at 445. Indeed, as described further below, Plaintiffs do not blame the School Districts for the current segregation that is pervasive in New Jersey's schools, and have no desire to bring

claims against them. This case thus presents a classic example of why *Cogdell*'s mandatory party joinder rule – which, again, is the sole basis for the State Defendants' argument on this issue – has now been rejected.

Indeed, the evidence suggests that the State Defendants' motion to dismiss is not a *bona fide* argument that the School Districts are indispensable parties, but rather a *post-hoc* rationale designed to delay adjudication of this case on its merits. While *Rule* 4:5-1(b) required the State Defendants to identify allegedly indispensable parties in their initial pleading, the State's initial Answer in this matter did not identify the School Districts as such parties. This Court should reject the State Defendants' attempt to breathe life into *Cogdell*'s corpse. The mandatory party joinder doctrine has been discarded, and should not apply here.

B. Any Mandatory Joinder Rules Apply Only to Potentially Liable Parties, and Individual School Districts Are Not Liable for Statewide Segregation.

In limited circumstances, *Rule* 4:28-1(a) requires joinder of a party who can be served with process. But the rule does not apply here, where the School Districts are not alleged to be liable for the school segregation identified in the Amended Complaint.

Rule 4:28-1(a) requires joinder only of a party with "an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without

either adjudging or necessarily affecting the absentee's interest." *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 394 N.J. Super. 71, 82 (App. Div. 2007), *aff'd*, 195 N.J. 231 (2008). The *Rule* thus requires joinder not of any party with *an* interest in the action, but instead those who are "known *responsible* parties" in the events at issue. *Cogdell*, 116 N.J. at 22 (quoting *Crispin v. Volkswagenwerk, A.G.*, 96 N.J. 336, 343 (1984)) (emphasis added). This requirement is consistent with *Rule* 4:5-1(b), which mandates that a party's first pleading identify parties with "*potential liability* to any party on the basis of the same transactional facts." *R.* 4:5-1(b) (emphasis added).

Here, Plaintiffs do not claim that any of the School Districts are liable for causing or permitting the school segregation alleged in the Amended Complaint. Instead, as the Supreme Court has repeatedly made clear, it is the State Defendants who are responsible for preventing segregation in New Jersey's schools. *See, e.g.*, *Booker v. Bd. of Educ. of Plainfield*, 45 N.J. 161, 173-74 (1965) (Commissioner has "broad power to deal with the subject" of school segregation); *Jenkins v. Morris Twp. Sch. Dist.*, 58 N.J. 483, 507 (1971) (Commissioner has "many broad supervisory powers designed to enable him, with the approval of the State Board of Education, to take necessary and appropriate steps for fulfillment of the State's educational and desegregation policies in the public

schools." (citing *Booker*, 45 N.J. at 173-81)); *In re Petition for Auth. to Conduct a Referendum on Withdrawal of N. Haledon Sch. Dist.*, 181 N.J. 161, 181 (2004) (to prevent school segregation, "[t]he Commissioner not only had the power, but also the duty, to act"). The Court has similarly held the State Defendants responsible in school funding cases. *See, e.g.*, *Abbott v. Burke* (*Abbott II*), 119 N.J. 287, 385 (1990) (requiring Legislature, State Board, and Commissioner to remedy violation of T&E Clause for funding of urban school districts); *Robinson*, 62 N.J. at 508-09 ("It is also plain that the ultimate responsibility for a thorough and efficient education was imposed upon the State. This has never been doubted.").[1] Where school segregation persists on a statewide basis, there is no authority to hold the School Districts individually liable, and thus they need not be joined as indispensable parties. *See Chasis v. Tumulty*, 8 N.J. 147, 156 (1951) (in lawsuit against city clerk seeking to compel referendum election, city government was not an indispensable party because it was clerk's sole duty to file petition for election).

Indeed, by citing various state statutes applicable to School Districts, the State Defendants prove the point: it is the State, and not individual districts, that has created and is perpetuating

[1] In the lengthy history of the *Abbott* litigation, which has impacted both statewide school funding law, applicable to all districts, and the specific funding of identified urban school districts, the Supreme Court has never suggested that any school districts were indispensable parties without whom the litigation could not proceed.

the circumstances that lead to *de facto* segregation. *See* State Defs.' Br. at 12-13. The State Defendants thus claim that "[t]he educational system's structure based on N.J.S.A. 18A:38-1 largely dictates the demographics of the district[.]" *Id.* at 13. In other words, with respect to student body composition, the School Districts are simply playing the hands that they are dealt. It is the State that dictates a district's demographics, and thus the State is liable for the demographic failure of *de facto* segregation within the schools. A School District cannot make changes necessary to eliminate the type of segregation at issue and is therefore not an indispensable party.

Indeed, the State Defendants' exact argument has been squarely rejected by the Minnesota Supreme Court in litigation similar to this one. Thus, *Cruz-Guzman v. State*, 916 N.W.2d 1 (Minn. 2018), also involves allegations against the state, and "other [s]tate entities and officials," alleging "that the [s]tate has violated the Education, Equal Protection, and Due Process Clauses of the Minnesota Constitution" by failing to prevent school segregation. *Id.* at 4. Among other defenses, the state defendants claimed that the plaintiffs had failed to join school districts and charter schools as necessary parties. *Id.* at 13. The Minnesota Supreme Court disagreed, holding instead that "school districts and charter schools are not indispensable parties when relief is sought solely from the State." *Id.* at 15. In so holding,

the Minnesota court relied on its mandatory party joinder rule, which is substantively identical to New Jersey's rule. *Compare R.* 4:28-1 *with* Minn. R. Civ. P. 19. Similarly, in this case, the School Districts are not indispensable parties because Plaintiffs seek relief from the State Defendants, not the School Districts.

Finally, the State Defendants suggest that this Court's decision to grant the Charter School Defendants' motion to intervene means that the School Districts must be regarded as indispensable parties. *See* State Defs.' Br. at 14. But intervention and joinder are separate inquiries. *See Chasis*, 8 N.J. at 156 (in denying compelled joinder of city government, noting that "[i]f the city government had wished to be heard, it could have sought entry to the suit as a party"). As this Court noted at the hearing on the motion to intervene, the Court must consider intervention applications on a case-by-case basis. *See* Tr. at 36:13-15 ("[I]f more parties apply . . . to intervene, that's something I'll have to consider."). But the fact that the school districts might intervene, or move to do so, does not require that the case be dismissed for the failure to include them in the first instance; nor would denying a motion to add the School Districts as parties (or to dismiss the case for failure to include them) preclude later requests to intervene. *See Cruz-Guzman*, 916 N.W.2d at 14 n.8 (noting that denial of mandatory joinder "has no impact on the right of school districts and charter schools to

move to intervene"). Indeed, the fact that the School Districts have *not* moved to intervene undercuts the State's argument that the School Districts "have a strong and inevitable interest in this litigation." State Defs.' Br. at 8.

C. The Commissioner and State Board Have Broad Statutory and Constitutional Powers to Desegregate Schools and Will Not Be Subject to Liability from School Districts.

The State Defendants allege that this case will "unleash a flurry of additional lawsuits by school districts" and that the districts will "undoubtedly seek to sue or join the Commissioner and the [S]tate in these suits." State Defs.' Br. at 19. This hyperbolic claim is rank speculation, unsupported by the law giving the Commissioner and State Board broad powers over school districts, and should be rejected as a reason to dismiss this case.

Not only is it clear in the law that the State Defendants exercise substantial control over School Districts, but *the State Defendants themselves* have made this exact point previously in this litigation. In initially opposing the Charter Defendants' motion to intervene, the State Defendants argued that "the Commissioner's legislatively delegated responsibility for all public schools" is "unquestioned." State's Opp'n to Mot. to Intervene, Sept. 20, 2018, at 10 (citing *Hinfey v. Matawan Reg'l Bd. of Educ.*, 77 N.J. 514, 524 (1978); *Robinson v. Cahill*, 69 N.J. 449, 461 (1976)). And, of course, this is consistent with the governing Supreme Court jurisprudence, which holds that the State

Defendants have "many broad supervisory powers . . . to take necessary and appropriate steps for fulfillment of the State's educational and desegregation policies in the public schools." *Jenkins*, 58 N.J. at 507 (citing *Booker*, 45 N.J. at 173-81).

Indeed, the State's education laws grant broad powers to the State Board and the Commissioner to set rules that public schools must follow. *See, e.g.*, N.J.S.A. 18A:4-10 (State Board has "general supervision and control of public education in this state."); N.J.S.A. 18A:4-15 ("The [S]tate [B]oard shall make and enforce, and may alter and repeal, rules for . . . implementing and carrying out the school laws of this state under which it has jurisdiction."); N.J.S.A. 18A:4-16 ("The [S]tate [B]oard shall have all powers, in addition to those specifically provided by law, requisite to the performance of its duties."); N.J.S.A. 18A:4-23 ("The [C]ommissioner shall have supervision of all schools of the state receiving support or aid from state appropriations . . . and he shall enforce all rules prescribed by the [S]tate [B]oard."). To the extent that any of their powers are unclear, there is a residual general powers clause in the statute. N.J.S.A. 18A:2-1 ("Whenever under any provision of this title the validity of the action of any person, official, board or body is . . . to be exercised pursuant to any rule to be made by, any other person, official, board or body, the latter shall have power to approve or disapprove, consent or refuse to consent, to make such

determination or promulgate any such rule, *notwithstanding that such power is not specifically conferred thereby or by any other provision of this title.*" (emphasis added)).

And, as noted, these powers specifically pertain to the authority – and obligation – to take action to desegregate the State's public schools. *See, e.g., N. Haledon*, 181 N.J. at 181 (to prevent school segregation, "[t]he Commissioner not only had the power, but also the duty, to act"); *cf. Twp. Comm. of Morris v. Bd. of Educ. of Morris*, 60 N.J. 186, 191 (1972) (rejecting township's challenge to Commissioner's allocation of costs in desegregation plan because permitting the challenge "would disable effective action towards fulfillment of the State's educational and desegregation policies").

To the extent that the Commissioner claims that lawsuits from School Districts will involve "creat[ing] or dissolv[ing] sending-receiving relationships" or will result in disputes over funding, State Defs.' Br. at 19, the Supreme Court's decision in *North Haledon* is instructive. In that case, the Court rejected a municipality's effort to end a sending-receiving relationship for purely economic reasons. 181 N.J. at 184-85. Although expressing sympathy for burdened taxpayers, the Court nonetheless held that "the constitutional imperative to address racial segregation requires the Board to compel North Haledon to remain in the Regional District despite the tax burden on its citizens." *Id.* at

186.[2] The Court thus required the Commissioner to address the financial issues by "develop[ing], in consultation with the constituent municipalities, an equitable cost apportionment scheme for the Regional District." *Ibid.*

The Court's decision in *North Haledon* thus squarely counters the State Defendants' repeated refrain that the economic concerns of school districts are a valid basis to oppose school desegregation. *See* State Defs.' Br. at 10 (referring to districts' "funding and expenditures"), 11 (alleging that Plaintiffs challenge "the public school funding scheme"), 12-13 (describing school funding), 17 (claiming that remedy could "alter districts' funding, finances, [and] resources"), 19 (claiming that districts will "compete for . . . financial and material resources"). To the contrary, *North Haledon* makes clear that the State's policy against *de facto* segregation in public schools is paramount. Of course, economic concerns will factor into any remedy crafted to cure segregation, and the Commissioner should account for them. But regardless of the solution, the Commissioner must first prevent and remedy school segregation, and then address the economic

[2] The reference to "Board" in this sentence refers to a Board of Review, consisting of the Commissioner, a member of the State Board, and two other government officials, which previously had the obligation to review a petition to withdraw from a sending-receiving relationship. A 2015 amendment to the statute abolished the Board of Review and gave its powers directly to the Commissioner. *See L.* 2015, *c.* 95 (amending N.J.S.A. 18A:13-56).

issues; he cannot disregard his constitutional obligation to eliminate *de facto* segregation for purely financial reasons.

This Court should thus reject the State Defendants' claim that the absence of the School Districts will expose the Commissioner to additional liability. Rather, the State Defendants clearly have the authority – and the duty – to undertake desegregative efforts, notwithstanding the impact that the exercise of such authority will certainly have upon School Districts as well.

D. The State Defendants Fail to Identify How Participation of School Districts Will Contribute to the Liability Stage.

The State Defendants claim in cursory fashion that the input of the School Districts is necessary in order for the Court to adjudicate liability in this case. According to the State Defendants, a school district can "paint[] a more complete and nuanced picture of its student body, its background, its diversity, and the experience of its students in this environment." State Defs.' Br. at 14. The State Defendants also posit that a school district can provide information on "how [demographics] relate to students' performances and experiences in the educational system." *Id.* at 15. But the State Defendants' arguments fail because this information is, in fact, irrelevant to liability.

As is set forth at length in Plaintiffs' summary judgment brief, the State Supreme Court has repeatedly held that *de facto*

segregation alone violates multiple State constitutional provisions. *See N. Haledon*, 181 N.J. at 178 ("We consistently have held that racial imbalance resulting from *de facto* segregation is inimical to the constitutional guarantee of a thorough and efficient education."); *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 N.J. 316, 324 (2000) ("Whether due to an official action, or simply segregation in fact, our public policy applies with equal force against the continuation of segregation in our schools."); *Jenkins*, 58 N.J. at 506 ("[T]he Commissioner ha[s] the responsibility and power of correcting *[d]e facto* segregation or imbalance which is frustrating our State constitutional goals[.]"); *Booker*, 45 N.J. at 173 ("Our own State's policy against racial discrimination and segregation in the public schools has been long standing and vigorous[.]"). To evaluate whether *de facto* segregation is taking place, the Court looks to statistical facts regarding the racial makeup of schools. *See N. Haledon*, 181 N.J. at 170-71 (evaluating the "negative impact on racial balance" by examining racial makeup of student population); *Jenkins*, 58 N.J. at 487-88 (same); *Booker*, 45 N.J. at 166 (same). Plaintiffs have accordingly moved for partial summary judgment based on the same type of statistical facts, drawn from the State's own data (and, in large part, admitted by the State in its Amended Answer). *See generally* Pls.' Stmt. of Undisputed Material Facts,

Oct. 4, 2019 (relying on "data collected and disseminated by the New Jersey Department of Education").

Importantly, the State Defendants admit that "[t]hese facts are not subject to dispute." State Defs.' Br. at 7. They therefore do not suggest that the School Districts could offer relevant evidence of statistical facts regarding the demographic makeup of their schools. Instead, the State Defendants seem to suggest that the School Districts could provide holistic evaluations of their student bodies that would provide an excuse from liability for *de facto* segregation. But the State Defendants provide no legal support for their position, which is in fact contrary to law. *See, e.g.*, *Booker*, 45 N.J. at 170 ("In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multiracial and multi-cultural communities and the earlier they do so the better."); *see also N. Haledon*, 181 N.J. at 178 ("Students attending racially imbalanced schools are denied the benefits that come from learning and associating with students from different backgrounds, races, and cultures."). That is, it is no defense to *de facto* segregation that it is somehow "outweighed by other factors."

The State Defendants' reliance on the unpublished opinion in *Graves v. State Operated School District of Newark*, A-5351-14, 2017 WL 4247539 (N.J. App. Div. Sept. 26, 2017), is puzzling, and

unpersuasive. That case involved a petition to the Commissioner alleging unconstitutional segregation in Newark's public schools. *Id.* at *1-2. The petition failed to name the Commissioner or the State Board as respondents, even though the petition alleged that those parties had failed to fulfill their obligations to desegregate the Newark public schools. *Id.* at *6. The Appellate Division affirmed dismissal of the petition on that basis. *See ibid.* Here, by contrast, Plaintiffs *have* named the Commissioner and the State Board as defendants, thus avoiding this very problem.

Graves did discuss, as an alternative grounds for dismissal, the failure to name suburban Essex County school districts as respondents to the petition. *See ibid.* But it is clear from the decision of the Administrative Law Judge below that naming suburban school districts was necessary only under the counterfactual assumption that the Commissioner and State Board did not need to be named as parties. *See Graves v. State-Operated Sch. Dist. of Newark*, OAL Dkt. No. EDU 10677-14, 2015 WL 4186022, at *13 (N.J. Adm. Apr. 28, 2015) (considering whether suburban school districts were indispensable parties only after "assuming for argument's sake that it was unnecessary to name the Commissioner or State Board of Education as parties"), *aff'd*, 2017 WL 4247539 (N.J. App. Div. Sept. 26, 2017); *see also Graves*, 2017 WL 4247539, at *6

(Appellate Division quoting same paragraph from ALJ decision).[3] But here, the Commissioner and State Board *were* named as parties, and because, as described above, the Commissioner has the authority and responsibility to prevent *de facto* school segregation, his inclusion as a defendant negates any claim that School Districts are indispensable parties.[4]

In sum, the Court should reject the argument that the School Districts must be added as parties to the liability phase of this case.

E. The Commissioner Can – And Should – Ensure That the Interests of School Districts Are Considered at the Remedy Stage.

The State Defendants' fallback argument is that any potential remedy in this case will impact School Districts, and therefore the School Districts are indispensable parties. *See, e.g.*, State Defs.' Br. at 18 (claiming that "the districts [should] have a meaningful opportunity to participate in fashioning any remedy"). This simple syllogism fails to capture the factual and legal issues involved in this case. First, as explained in the next section of this brief, the liability phase of this litigation can and should

[3] The unpublished ALJ decision is being provided to all parties along with this brief; counsel are unaware of any contrary unpublished decisions. *See R.* 1:36-3.

[4] In any event, *Graves* is unpersuasive. *See Sauter v. Colts Neck Volunteer Fire Co. No. 2*, 451 N.J. Super. 581, 600 n.9 (App. Div. 2017) (affirming that under *Rule* 1:36-3, court does not have "any obligation to . . . consider" unpublished opinions and is "free to disregard them"). Indeed, the *Graves* opinion involves only a cursory analysis of the indispensable party issue and cites no case mandating treatment of school districts as indispensable parties to a desegregation case filed against the State Defendants.

be separated from remedy; therefore, the School Districts' potential interest in remedy is premature at this stage. But more fundamentally, the mere fact that an absent party may be affected as a result of the remedy that is ultimately imposed following an adjudication of liability does not automatically make that absentee party an indispensable one.

Thus, as the Third Circuit has held, in respect of Federal Rule of Civil Procedure 19 (which is substantively identical to *Rule* 4:28-1), the inquiry is limited to whether the court "can grant complete relief to persons *already named* as parties to the action; what effect a decision may have on absent parties is immaterial." *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 313 (3d. Cir. 2007) (citing *Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 705 (3d Cir. 1996)). And as the Minnesota Supreme Court made clear in *Cruz-Guzman*, "many non-parties are bound to be affected by a judicial ruling in an action regarding the constitutionality of state statutes or state action, but they cannot all be required to be a part of the suit." 916 N.W.2d at 14 (internal quotation marks omitted); *see also Martinez v. Clark Cty.*, 846 F. Supp. 2d 1131, 1149 (D. Nev. 2012) ("[T]he Court finds it impractical and unnecessarily burdensome to require Plaintiffs to join every other person who conceivably may be affected by a declaration that the challenged law is unconstitutional . . . . Defendants clearly have the

responsibility to enact constitutional laws and to apply those laws in a constitutional fashion. They also share the responsibility and the ability to vigorously defend them from the constitutional challenges advanced by Plaintiffs.").[5] Here, even if some of the School Districts may be affected by the remedy in this case, that does not *ipso facto* render them indispensable parties.

Furthermore, while the State Defendants propose to make every single School District a defendant in this case, their claim is based on mere speculation regarding the scope of the potential remedy. Thus, the State engages in histrionics about how the remedy will be "radical," State Defs.' Br. at 8, or will "fundamentally restructure" school districts, *id.* at 10, or will have "potentially drastic ramifications," *id.* at 11, or will "necessarily impact each and every public school student in the State," *id.* at 17, or will "obliterate the entire concept of separate school districts in the State," *id.* at 18. The State Defendants offer no support for these exaggerated claims. Nor can they, because the scope of the remedy is necessarily speculative

[5] In other, similar circumstances involving unconstitutional State action carried out through municipal entities, courts have never suggested that the municipal entities acting in accordance with State law were indispensable parties. For example, although local registrars are empowered to evaluate and complete marriage certificates, *see* N.J.S.A. 26:8-25(d), (e), no party suggested, and the courts did not rule, that every local registrar was an indispensable party to litigation over marriage equality. *See Garden State Equality v. Dow*, 434 N.J. Super. 163 (Law Div.), *stay denied*, 433 N.J. Super. 347 (Law Div.), *stay denied*, 216 N.J. 314 (2013).

at this stage. Instead, Plaintiffs have suggested that the Court order the State Defendants to craft a remedy, subject to the Court's supervision. *See* Am. Compl. XI.E (requesting relief "[o]rdering that the Commissioner of Education prepare and submit a detailed remediation plan designed to achieve comprehensive desegregation and diversification of New Jersey's public schools within and among school districts"). It will therefore be up to the Commissioner, in the first instance, to determine the scope of the remedy, subject to the constitutional command to prevent school segregation.[6]

Therefore, at this point in the litigation, it is not known what School Districts may be impacted by the remedy, or how. As the State Defendants have acknowledged, they will be obligated to consider the input of School Districts, among other stakeholders, in crafting an appropriate remedy. *See* State's Opp'n to Mot. to Intervene, Sept. 20, 2018, at 12 (noting that Commissioner "has the obligation of considering and balancing the concerns and interest of hundreds of individual school districts" and other groups). The School Districts will, accordingly, by the State's own reckoning, have the opportunity to be heard. Meanwhile,

[6] Plaintiffs' requested relief provides further distinction from the unpublished opinion in *Graves*, where the petitioners specifically requested "a mandate requiring the inclusion of predominantly-white Essex County suburban school districts within a county-wide or regional plan." *Graves*, 2017 WL 4247539, at *6.

however, the Court should reject the State Defendants' request as premature.

Thus, the State Defendants' arguments regarding the impact of any potential remedy on the School Districts is inapposite, speculative, and premature. The Court should accordingly deny their motion to dismiss, or to add indispensable parties.

II. IT IS BOTH REASONABLE AND EFFICIENT TO ADJUDICATE LIABILITY BEFORE REMEDY.

In Point II of their brief, the State Defendants argue that liability and remedy are "inexorably intertwined" and therefore cannot be adjudicated in separate proceedings. State Defs.' Br. at 21. But their argument fundamentally misstates the law: while the State Defendants claim that they cannot be held liable under *Booker* as long as they have implemented a "reasonable" plan to combat segregation, the holding of *Booker* is actually that the Commissioner's *first priority* is to ensure desegregation, although his plan to do so must also be reasonable. Thus, liability (*i.e.*, whether *de facto* segregation exists such that the Commissioner must create a remediation plan) does not implicate the reasonableness of the Commissioner's actions; that issue is left to the remedy stage. Because the only issue at the liability stage is the existence (or lack thereof) of unconstitutionally segregated schools, there is no impediment to adjudicating liability before remedy. Additionally, this one-step-at-a-time

approach to the case will promote efficiency and could facilitate continued settlement discussions. The Court should not, therefore, preclude Plaintiffs' partial summary judgment, but should instead allow their motion to be heard and decided on its clear merits.

A. Courts Are Not Merely Authorized, But Also Encouraged, to Adjudicate Liability Before Remedy When, As In This Case, Doing So Would Promote Efficiency.

The Court Rules specifically permit a motion for partial summary judgment on the issue of liability, while reserving the question of remedy for trial. *See R.* 4:46-2(c) ("A summary judgment or order . . . may be rendered on any issue in the action (including the issue of liability) although there is a genuine factual dispute as to any other issue (including any issue as to the amount of damages)."). The State Defendants cite *Rule* 4:38-2(a) – which deals with trials, not summary judgment – but that rule similarly authorizes a court to address liability before remedy where "a trial of all issues . . . may be complex and confusing, or whenever the court finds that a substantial saving of time would result from the trial of the issue of liability in the first instance[.]" *Ibid.* Indeed, by administrative directive, "judges are *encouraged* to utilize [*Rule* 4:38-2(a)] and try the issue of liability first in cases where they feel it may expedite the disposition of the case." *Administrative Directive #03-77*,

"Separate Trials of Liability and Damages" (Oct. 17, 1977) (emphasis added).

In any event, partial summary judgment under *Rule* 4:46-2(c) promotes judicial efficiency by allowing the court "to determine those triable issues actually in dispute and to enter an order so limiting the trial." Pressler & Verniero, *Current N.J. Court Rules*, cmt. 1 on *R.* 4:46-3 (2019). As the United States Court of Appeals for the Seventh Circuit has explained, "[a] request for partial summary judgment can serve a useful brush-clearing function even if it does not obviate the need for a trial, and it may also facilitate the resolution of the remainder of the case through settlement." *Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund*, 778 F.3d 593, 606 (7th Cir. 2015) (internal citation omitted). Thus, partial summary judgment can "narrow the scope of the case, eliminate the need for discovery on specific issues, and focus the parties' efforts going forward." Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 Loyola U. Chi. L.J. 517, 531 (2012).

Plaintiffs' Motion for Partial Summary Judgment is in clear furtherance of just those goals. Indeed, Plaintiffs only filed their motion once it became apparent that the State Defendants would not propose a remediation plan, even in light of the undisputed facts regarding segregation in New Jersey's public schools. A decision on Plaintiffs' motion will therefore make

clear not only that such remediation is in fact necessary (as Plaintiffs' motion contends), and would accordingly help to focus not only future discovery, motion practice, and trial, but also will facilitate renewed settlement discussions based on our common understandings of how the case should proceed. *See Hotel 71 Mezz Lender LLC*, 778 F.3d at 606.

Indeed, in other cases, the New Jersey Supreme Court has, after finding the State liable for a constitutional violation, ordered the State to address the remedy in a separate context, rather than making liability contingent on remedy. *See Lewis v. Harris*, 188 N.J. 415, 463 (2006) (after ruling that same-sex couples must be granted equal rights as heterosexual marital couples, directing Legislature "[t]o bring the State into compliance" through statutory changes); *Abbott v. Burke* (*Abbott II*), 119 N.J. 287, 387 (1990) (after ruling that State school funding scheme violated the Thorough and Efficient Education Clause, noting that "[t]he Legislature may devise any remedy . . . so long as it achieves a thorough and efficient education as defined herein for poorer urban districts"); *cf. Robinson v. Cahill*, 63 N.J. 196, 198 (1973) (per curiam) (after ruling State funding scheme unconstitutional, withholding decision on remedy to give Legislature time to enact "legislation compatible with [the Court's] decision"). The Court should take the same approach here by hearing (and, as Plaintiffs argue on the merits, granting)

Plaintiffs' Motion for Partial Summary Judgment prior to considering the issue of remedy.

The State Defendants, however, argue that separating liability from remedy would be inefficient and unfair because a finding of liability at this stage would mean that "the efforts already undertaken by Defendants and districts, even if laudable, would be presumed to be ineffective." State Defs.' Br. at 23. And to be sure, Plaintiffs are arguing that even if the current public school system is not intentionally causing segregation, the current system has proven ineffective at preventing the *de facto* segregation prohibited by the State Constitution, as the statistics cited in their complaint and motion show. Of course, if the State believes that its current measures are effective, then it can argue as much in opposing the partial summary judgment motion on its merits. That said, if the Court agrees with Plaintiffs and finds that the evidence shows unconstitutional segregation under current State policies and practices, then the intended efficacy of those practices (in other words, saying "well, we tried") is not a defense to liability. *See N. Haledon*, 181 N.J. at 175 (criticizing board of education's "attitude of helplessness" in considering remedies for *de facto* segregation). In other words, *actual* efficacy, not *intended* efficacy, is the only appropriate metric where *de facto*, as opposed to only intentional, discrimination is at issue. Indeed, the Connecticut

Supreme Court, as just one example, has rejected the same argument made by the State Defendants:

> Despite the initiatives undertaken by the defendants to alleviate the severe racial and ethnic disparities among school districts, and despite the fact that the defendants did not intend to create or maintain these disparities, the disparities that continue to burden the education of the plaintiffs infringe upon their fundamental state constitutional right to a substantially equal educational opportunity.
>
> [*Sheff v. O'Neill*, 678 A.2d 1267, 1289 (Conn. 1996); *see also Booker*, 45 N.J. at 180 (noting that while board of education's preferred desegregation plan had "the highly desirable effect of integrating" one school, it "was not pointed towards the goal of greatest dispersal in the school system as a whole and did nothing helpful towards meeting the racial imbalance at" other schools).]

In sum, Plaintiffs' Motion for Partial Summary Judgment seeks to facilitate the efficient litigation and resolution of this matter by determining liability, on a record that allows a full and fair determination of liability. The Court accordingly should permit the motion to be heard on its merits, in an effort to move this litigation forward and reach the much more difficult question of remedy, which only follows if and when liability is established.

B. Whether the State Defendants Are Liable for Unconstitutional Segregation Is Unrelated to Potential Remedies.

The State Defendants claim that "liability cannot be severed from remedy because the two are inexorably intertwined." State

Defs.' Br. at 21.[7] They argue that "[t]he Commissioner cannot be held liable for the mere fact of apparent racial imbalance in schools alone," *ibid.*, but rather that the Commissioner is immune from liability if he has "create[d] a reasonable plan consistent with educational values that combats the causes of segregation," *id.* at 22. The State Defendants thus conclude – without citation to any relevant authority – that "in order to determine whether the Commissioner is liable, the court must engage in a comprehensive analysis of both the sufficiency of any current State action as well as a consideration of what other remedies may be within the State's legal authority to impose." *Ibid.* But as described above, this "we tried" defense to unconstitutional school segregation has no support in the law.

The only case that the State Defendants cite in support of their claim that liability and remedy are so intertwined as not to permit the bifurcation that Plaintiffs propose here is *Booker*, 45 N.J. 161. In *Booker*, the Court faulted the Commissioner and State Board for allowing a local board of education to implement a desegregation plan that achieved less integration than two other

[7] Plaintiffs apparently use the term "intertwined" by purportedly quoting a case for the proposition that "'if liability and [remedy] are intertwined, bifurcation should not be ordered.'" State Defs.' Br. at 21 (purporting to quote *Tobias v. Cooper Hosp. Univ. Med. Ctr.*, 136 N.J. 335, 345 (1994)). But that quotation does not appear in *Tobias*, though the case does state, as the State Defendants correctly quote it, that "[t]he court should consider 'the fairness to the litigant when the issues of [remedy] and liability may be indivisible.'" *Ibid.* (quoting *Tobias*, 136 N.J. at 345). But as set forth herein, that is not the case here, where adjudicating liability does not require considering remedies at this point.

alternative plans proposed by an outside expert. *See id.* at 163-68 (describing proposed plans and Commissioner and State Board's decisions). The Court instead held that the Commissioner and State Board were obligated to require implementation of "a reasonable plan *achieving the greatest dispersal* consistent with sound educational values and procedures." *Id.* at 180 (emphasis added). The Court observed that in failing to prioritize the minimization of school segregation over other factors, "the Commissioner was misled by unduly restrictive views." *Id.* at 181.

Thus, *Booker* makes clear that any unconstitutional segregation must be remedied by the State, even if existing practices embody "sound educational values and procedures." The Appellate Division confirmed as much just two years after *Booker* in *Elliot v. Board of Ed. of Neptune*, 94 N.J. Super. 400 (App. Div. 1967). There, the Commissioner found, and the State Board affirmed, that unconstitutional *de facto* segregation existed in Neptune Township's elementary schools, and the Commissioner ordered the school board to submit a desegregation plan. *Id.* at 401. The school board claimed that before holding it liable, the Commissioner should have permitted the board to present evidence regarding factors mentioned in *Booker* relating to the reasonableness of its existing policies and procedures. *Id.* at 402. The Appellate Division rejected this argument and affirmed the Commissioner and State Board's finding of liability, holding

that those factors are not relevant "to determining whether *[d]e facto* segregation existed," but instead applied to "whether a given integration plan is acceptable." *Ibid.* Thus, because "it [was] clear that *[d]e facto* segregation exist[ed] in Neptune's elementary schools[, t]he factors referred to in *Booker* were irrelevant to . . . a determination on liability." *Id.* at 402-03. Having affirmed a liability finding, the Appellate Division remanded for submission of a remediation plan, at which time the school board could argue that the plan it submitted was consistent with *Booker*. *Id.* at 403.

Elliot thus confirms the propriety of precisely the approach that Plaintiffs propose here. First, the Court should adjudicate liability based on the undisputed or indisputable statistics described in Plaintiffs' Motion for Partial Summary Judgment. Then, if it finds the State Defendants liable, the Court should require submission of a remediation plan, at which point the *Booker* standard would apply. After submitting a plan, the State Defendants would be free to argue that their plan "achiev[es] the greatest dispersal consistent with sound educational values and procedures." *Booker*, 45 N.J. at 180. But the State Defendants are simply incorrect in arguing and completely fail to explain how a judgment of liability depends on an analysis of "what . . . remedies may be within the State's legal authority to propose,"

State Defs.' Br. at 22; that is only an issue at the remedy stage and is irrelevant to adjudicate liability.[8]

It is for this reason that school desegregation cases from other states, in both federal and state courts, commonly proceed by way of an initial adjudication of liability, with subsequent proceedings as to remedy. *See, e.g.*, *Morgan v. Hennigan*, 379 F. Supp. 410, 484 (D. Mass.) (finding liability and stating that "defendants are further [o]rdered to begin forthwith the formulation and implementation of plans which shall eliminate every form of racial segregation in the public schools of Boston"), *aff'd*, 509 F.2d 580 (1st Cir. 1974); *Keyes v. School Dist. No. One*, 313 F. Supp. 90, 91 (D. Colo. 1970) (noting that after court adjudicated liability, "[b]oth plaintiffs and defendants were asked to submit plans to remedy the inequality found to exist"), *aff'd in part*, 445 F.2d 990 (10th Cir. 1971), *remanded on other grounds*, 413 U.S. 189 (1973); *Barksdale v. Springfield Sch. Comm.*,

[8] The State Defendants' footnote accompanying this argument cites three federal cases, all of which rely in substantial part on the federal constitutional distinction between *de jure* and *de facto* segregation. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 736 (2007) (recognizing that "The distinction between segregation by state action and racial imbalance caused by other factors has been central to [federal] jurisprudence"); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 32 (1971) (noting that federal court's ability to order future desegregative actions requires proof deliberate state action); *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 712 (2d Cir. 1979) (noting that federal courts can order remedial action only based on finding of *de jure* segregation). But New Jersey has rejected this limitation as a matter of State constitutional law. *See, e.g.*, *Jenkins*, 58 N.J. at 497 (distinguishing *Swann*). In any event, questions about how federal law affects available remedies does not prevent this Court from adjudicating liability, as the liability issue turns only on whether *de facto* segregation exists in the State's public schools.

237 F. Supp. 543, 547 (D. Mass.) (finding liability and ordering submission of a desegregation plan), *vacated on other grounds*, 348 F.2d 261 (1st Cir. 1965); *Crawford v. Bd. of Educ.*, 551 P.2d 28, 30 (Cal. 1976) (affirming trial court order finding district liable for *de facto* segregation and ordering it to then submit a desegregation plan); *cf. Sheff*, 678 A.2d at 45 (directing judgment of liability and staying decision on remedy pending legislative action). Plaintiffs simply ask the Court to take this common – and commonsense – approach to this case as well.

Accordingly, for all of the reasons described above, Plaintiffs ask the Court to reject the State Defendants' procedural opposition to the partial summary judgment motion and permit the motion to be considered on its merits.

III. DEFENDANTS DO NOT IDENTIFY ANY DISCOVERY NEEDED TO LITIGATE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, AND THE MOTION IS THUS NOT PREMATURE.

In Point III of their brief, the State Defendants argue that Plaintiffs' Motion for Partial Summary Judgment is premature because it was filed prior to the completion of discovery; the Charter Defendants join these arguments. As is described in detail below, these arguments should not preclude the Court from considering the merits of Plaintiffs' motion. Indeed, courts are permitted to grant motions for summary judgment prior to the close of discovery, and regularly do so unless the opposing party can explain what discovery is necessary, which the Defendants fail to

do here. Denial of summary judgment for want of discovery is particularly inappropriate here because the facts relied upon are the State's own, publicly available data, and not exclusively within Plaintiffs' possession. Finally, Defendants seek additional discovery from Plaintiffs' expert, and while they already have all that they need from him based on the certification that Plaintiffs filed along with their motion, Plaintiffs are nonetheless perfectly willing to make him available for the deposition that Defendants request at a time that will not delay the adjudication of this motion.

A. Defendants Fail to Meet Their Burden to Explain What Discovery Is Necessary.

As the State Defendants concede, summary judgment prior to discovery is explicitly contemplated and permitted by the New Jersey *Rules*. *See R.* 4:46-1 (permitting plaintiff to move for summary judgment "at any time after the expiration of 35 days from the service of the pleading claiming such relief"). Thus, "[a] motion for summary judgment is not premature merely because discovery has not been completed." *Badiali v. N.J. Mfrs. Ins. Grp.*, 220 N.J. 544, 555 (2015). Instead, when a party opposes summary judgment on the basis of the fact that discovery is required, it must "specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete." *Trinity Church v. Lawson-Bell*, 394 N.J. Super.

159, 166 (App. Div. 2007) (citing *Auster v. Kinoian*, 153 N.J. Super. 52, 56 (App. Div. 1977)). Pre-discovery summary judgment is thus appropriate when, as here, the matter involves the application of law to clear, undisputable facts. *See Wellington v. Estate of Wellington*, 359 N.J. Super. 484, 496 (App. Div. 2003) (affirming summary judgment before discovery where sole issue was interpretation of clear contract).

Cases rejecting pre-discovery summary judgment motions generally involve facts where "critical facts are peculiarly within the moving party's knowledge." *Velantzas v. Colgate-Palmolive Co., Inc.*, 109 N.J. 189, 193 (1988) (quoting *Martin v. Educ. Testing Serv., Inc.*, 179 N.J. Super. 317, 326 (Ch. Div. 1981)); *see also James v. Bessemer Processing Co., Inc.*, 155 N.J. 279, 311 (1998); *Mohamed v. Iglesia Evangelica Oasis De Salvacion*, 424 N.J. Super. 489, 499 (App. Div. 2012). Here, however, Plaintiffs have moved for summary judgment based not on facts peculiarly within their own knowledge, but rather based on the State's own data. While Dr. Coughlan's certification serves to explain how the data were used to create the percentage-based statistics used to support the summary judgment motion, he also made clear that creating these percentages "was a nondiscretionary and relatively simple application of statistics to the DOE's 2016-17 Enrollment Data." Coughlan Cert. ¶¶ 20, 26, 39. Indeed, the data themselves are subject to judicial notice as "capable of

immediate determination by resort to sources whose accuracy cannot reasonably be questioned." N.J.R.E. 201(b)(3); *see J.H. v. R & M Tagliareni, LLC*, 239 N.J. 198, 226 n.2 (2019) (Rabner, C.J., dissenting) (noting that "[c]ourts can take judicial notice of studies and statistics from suitable sources under N.J.R.E. 201(b)(3)" and citing cases); *Sheff*, 678 A.2d at 1287 n.42 (taking judicial notice of official school demographic statistics). To the extent that the State Defendants believe that any facts relating to that data are missing, they can provide them to the Court in opposition to Plaintiffs' motion. *See R.* 4:46-5(a) (requiring that summary judgment opponent "respond by affidavits . . . setting forth specific facts showing that there is a genuine issue for trial").[9]

Similarly, the Charter Defendants claim that they want to challenge Plaintiffs' data regarding charter schools. But they have been making this same claim since September 2018, when they first alleged that Plaintiffs' complaint relied on "erroneous data." Brief of NJCSA in Supp. of Mot. to Intervene, Sept. 6, 2018, at 1. Nonetheless, in the succeeding 15 months, the Charter

[9] In their current opposition, both the State Defendants and the Charter Defendants have failed to submit a responsive statement either admitting or disputing the facts upon which Plaintiffs rely, as required by *Rule* 4:46-2(b); of course, many of those facts were already admitted in their answer. In any event, that failure is significant, as it normally results in the plaintiff's statement of facts being "deemed admitted for the purposes of the motion." *Ibid.*; *see also Sullivan v. Port Auth. of N.Y. & N.J.*, 449 N.J. Super. 276, 279-80 (App. Div. 2017). The Defendants do not even attempt to explain why they should not be required to do that here.

Defendants have never substantiated their claim that Plaintiffs' data is false. In any event, they, too, can provide their own data in opposition to the summary judgment motion.

The State Defendants also conclusorily assert that they need the "opportunity to discover facts and data relevant to their affirmative defenses." State Defs.' Br. at 28. But they identify neither which affirmative defenses require discovery or what discovery is required, which is fatal to their claim. *See Trinity Church*, 394 N.J. Super. at 166. This claim thus does not provide a basis for denying the motion for partial summary judgment as premature.

B. Although Additional Written Expert Discovery Is Not Necessary, Plaintiffs Do Not Oppose a Deposition of Dr. Coughlan.

Both the State Defendants and the Charter Defendants argue that Plaintiffs' reliance on the certification of Dr. Ryan Coughlan constitutes expert testimony without proper discovery. But, as described below, Dr. Coughlan's certification functionally satisfies the expert discovery rules, especially given the straightforward nature of his analysis of the State's own, publicly available data. Moreover, to the extent that the Defendants seek a deposition of Dr. Coughlan prior to filing their oppositions to Plaintiffs' Motion for Partial Summary Judgment, and though they have not sought one yet (or explained why it is necessary) Plaintiffs do not oppose and will, in fact, expedite a deposition

in response to such a request so that no delay in the schedule set by the Court will result.

Disclosure of expert materials in discovery is governed by *Rules* 4:10-2(d), 4:14-7(b)(2), and 4:17-4(e). The *Rules* do not impose any affirmative obligation on a party to disclose expert materials where no discovery demands are made. Rather, in response to appropriate interrogatories, a party can demand that an adversary "disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness." *R.* 4:10-2(d). An interrogatory may also "require[] a copy of the report of an expert witness," in which case the report must be provided. *R.* 4:17-4(e). According to the rules, "[t]he report shall contain a complete statement of that person's opinions and the basis therefor; the facts and data considered in forming the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; and whether compensation has been or is to be paid for the report and testimony and, if so, the terms of the compensation." *Ibid.* Finally, a party may depose its adversary's expert witness. *R.* 4:10-2(d)(2), 4:14-7(b)(2).

In this case, along with their motion for summary judgment Plaintiffs filed (and provided to Defendants) Dr. Coughlan's certification. The certification details exactly the type of information that would appear in an expert report: Dr. Coughlan's

qualifications and prior publications, including his CV, *see* Coughlan Cert. ¶¶ 1-6 & Exh. A; the data he relied on, *see id.* ¶¶ 10, 23, 24, 36; his methodology in analyzing the data, *see id.* ¶¶ 19(a)-(t), 25, 37, 38; and the conclusions he drew from that analysis, *see id.* ¶¶ 21, 27-35, 40-45 & Exh. B, E, F, G.[10] The certification thus meets the requirements of an expert report – and indeed, neither the State Defendants nor the Charter Defendants identify any specific deficiency in the certification. *Cf. Ponden v. Ponden*, 374 N.J. Super. 1, 7 (App. Div. 2004) (noting that trial judge rejected report as a "net opinion"). Accordingly, Defendants do not need additional time for them to demand and receive an expert report, since they already have all of the information to which they would be entitled.

Again, the State Defendants and Charter Defendants both request the opportunity to depose Dr. Coughlan, as permitted by *Rule* 4:10-2(d)(2) and 4:14-7(b)(2). Of course, no party has at any time during the pendency of this action, or Plaintiffs' motion, noticed a deposition or inquired of Plaintiffs as to Dr. Coughlan's availability, but Plaintiffs do not oppose such a deposition, and will, as promised, expedite the scheduling of one so as not to disrupt the schedule set by the Court.

[10] Plaintiffs admit that the certification does not include information regarding Dr. Coughlan's terms of compensation, but counsel here represent that Dr. Coughlan is being compensated $120 per hour for his work and has thus far billed $4,050.00 at that rate.

Both sets of Defendants also claim that they want to retain their own experts to challenge Dr. Coughlan's conclusions – and they are, of course, free to do so in opposing the partial summary judgment motion. But any claim that they need more time to do so is belied by the record, and by their failure to state what some expert would say to rebut Dr. Coughlan's analysis. *See Trinity Church*, 394 N.J. Super. at 166 (a "generic assertion" that more discovery is needed is insufficient to defeat a summary judgment motion). The data described in Dr. Coughlan's certification include all the data described in Plaintiff's complaint, which was filed almost nineteen months ago. Additionally, as described in Dr. Coughlan's certification, the calculations he made involve "a nondiscretionary and relatively simple application of statistics to the DOE's 2016-2017 Enrollment Data." Coughlan Cert. ¶ 20; *see also id.* ¶¶ 26, 39. Defendants have had plenty of time to evaluate the data relevant to Plaintiffs' partial summary judgment motion, and they will have the opportunity to provide any such evaluation to the Court in their opposition to the motion on its merits. *See R.* 4:46-5(a) (requiring party opposing summary judgment motion to respond with appropriate affidavits). But the delay they seek should not be countenanced without at least some showing of what they will provide, as is necessary to justify putting off an indisputable determination that the State has failed to recognize for far too long already. *See Badiali*, 220 N.J. at 555 (party

opposing summary judgment based on lack of discovery must "demonstrate with some degree of particularity" why additional discovery is necessary (internal quotation marks omitted)).

Accordingly, the Court should not deny Plaintiffs' Motion for Partial Summary Judgment as premature. Rather, Plaintiffs have provided the information from Dr. Coughlan that Defendants would be entitled to obtain in discovery except for a deposition, which can be scheduled expeditiously in advance of any additional briefing on the motion. Otherwise, Defendants remain free to retain their own experts and provide the Court with whatever analysis and conclusions they believe are relevant to deciding the motion.

CONCLUSION

For the reasons described above, Plaintiffs ask the Court to deny Defendants' cross-motion to dismiss and procedural objections to Plaintiffs' Motion for Partial Summary Judgment and set a schedule for briefing, arguing, and deciding that motion on its merits.

2015 WL 4186022 (N.J. Adm.)

Office of Administrative Law

State of New Jersey

CAROL GRAVES ET. ALS, Petitioners,
v.
THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY AND CAMI ANDERSON, STATE SUPERINTENDENT OF SCHOOLS, Respondents.

Education
OAL DKT. NO. EDU 10677-14
AGENCY DKT. NO. 225-8/14
Record Closed: January 26, 2015
Decided: April 28, 2015

INITIAL DECISION

MOTION TO DISMISS

Robert Pickett, Esq., for petitioners (Pickett and Craig, attorneys)
Perry Lattiboudere, Esq., for respondents (Adams, Gutierrez and Lattiboudere, attorneys)

BEFORE ELLEN S. BASS, ALJ:

STATEMENT OF THE CASE

***1** The twenty-five petitioners, who include public school parents and students, taxpayers, and teachers employed in the Newark schools, assert that the State-Operated School District of the City of Newark (the District) has implemented a reorganization of its schools, the "One Newark Plan" (the Plan), that violates the constitutional right of Newark children to receive a thorough and efficient public education. Petitioners moreover contend that the District has violated statutory requirements for converting public schools to charters, as well as enrollment procedure requirements for charter schools. Finally, petitioners assert that the Newark schools are de facto segregated; as a remedy, they seek the creation of a county-wide school district.

Respondents have filed a motion to dismiss, contending that the petition was untimely filed; that petitioners lack standing to assert their claims; that petitioners have failed to proffer facts that, if true, establish that the Plan violates their constitutional rights or the provisions of the Charter School Program Act; and that the fourth count of petition, asserting that the Newark schools are unconstitutionally segregated, must be dismissed for failure to name indispensible parties.

PROCEDURAL HISTORY

Petitioners filed a petition of appeal and application for emergent relief with the Commissioner of Education (the Commissioner) on August 18, 2014. The District replied via letter memorandum on August 22, 2014. Oral argument was scheduled for September 2, 2014. I conferred with counsel via telephone on August 28, 2014, and it was agreed that the oral argument would be converted to an in-person case management conference, per my letter of the same date.

At the case management conference, it was determined that petitioners would file and serve a motion for leave to amend the petition to name the Commissioner and the Department of Education as parties to this action. They filed and served their motion on September 12, 2014. Thereafter, a telephonic status conference was conducted on October 4, 2014, in which two deputy attorneys general participated on behalf of the Department of Education. During the course of that telephone conference, the deputies urged that the Department of Education was not a necessary party to this proceeding. Notwithstanding his motion to amend, counsel for petitioners appeared to agree. Accordingly, I offered him the opportunity to reflect and determine in consultation with his clients whether he wished to pursue his amended pleading. Via letter dated October 10, 2014, counsel for petitioners advised that after careful review, he had determined that it was unnecessary to name the Commissioner or the Department of Education as respondents. Accordingly, he withdrew his motion to amend, and indicated that his clients would proceed under the originally filed petition.

Respondents filed a motion to dismiss on October 17, 2014. Petitioners filed a brief in opposition to the motion on November 12, 2014. Respondents replied to the opposition on November 24, 2014. Oral argument took place on January 26, 2015.

FINDINGS OF FACT

***2** Respondents' motion is filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. In ruling on a motion to dismiss, this forum's inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the petition. Printing Mart-Morristown v Sharp Electronics, 116 N.J. 739, 746 (1989); see also R. 4:6-2(e). While our case law provides that a reviewing forum must search "the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim ...," Printing Mart-Morristown, supra, 116 N.J. at 746 (citing DiCistofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div., 1957)), dismissal of a complaint "is mandated where the factual allegations are palpably insufficient to support a claim ..." Rieder v State of N.J. Dep't of Transp., 221 N.J. Super. 546, 552 (App. Div. 1987).

For purposes of the pending motion, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v City of Newark, 136 N.J. Super. 107, 112 (App. Div. 1975). Accordingly, I **FIND** as follows:

The District has operated under State control for about twenty years. Respondent Cami Anderson is the State Superintendent for the District, and was appointed by the Governor of the State of New Jersey. Newark is an urban school district, comprised primarily of Black and Hispanic students; the petition states that African-Americans make up 51% of the school population, and Hispanics make up 40%. According to the petition, less than 1% of the student population is white. [1] [1]

On or about November 21, 2013, Anderson publicly announced her proposal for a reorganization that would alter the manner in which students are assigned to local schools; would close failing schools; and would expand the presence of charter schools in Newark. On December 18, 2013, Anderson again publicly discussed her District-wide restructuring of the Newark schools, "calling it the One Newark Plan." A question and answer sheet describing the Plan in detail is attached to the petition as Exhibit A; the sheet describes monthly stakeholder roundtables and School Advisory Board meetings where the plan was discussed, and notes that "[w]e listened intently to the feedback we were getting and the following things become clear: we need to keep focused on solving the challenges, keep working to attain our goals, and make key adjustments based on the input [received]."

***3** Exhibit A is four pages long, was issued in February 2014, and shares details about the Plan, including guidance for families regarding school enrollment in grades K-12. The document likewise details the expansion of charter schools in Newark, noting that they will occupy existing school district buildings. At oral argument, counsel for petitioners urged that there was no finality to the Plan until June 2014; asserting it was not until then that his clients' cause of action became ripe. But he could not offer any documentary evidence that the Plan was finalized then, or even pinpoint the operative event in June 2014 that crystallized petitioners' claims. Petitioners assert that the Plan was developed without any meaningful community input, notwithstanding the fact that the petition itself describes at least three instances, well before the start of the 2014-2015 school year, that the public received information about the Plan from school district administration.

The petition challenges the underlying rationale for the Plan; claims that it is based on faulty data and methodology; and baldly asserts that "the One Newark Plan is doomed to both fail and further negatively impact the majority of African American and Hispanic students at the 'closed' and 'converted' schools." When I pressed at oral argument for an example of how the Plan would discriminate against minority students, particularly when the vast majority of students district-wide are members of minority groups, counsel referred me to Exhibit B to his petition.

Exhibit B reports on the results of a study completed in January 2014 by a Rutgers professor and a doctoral student. Its analysis is based on the information shared by Anderson on December 18, 2013, when she "announced a wide-scale restructuring of the Newark Public Schools." In a thirty-four-page document, the authors challenge the assumptions upon which the Plan is based, and opine that the Plan, including but not limited to its expansion of the presence of charter schools in Newark, will not successfully right what is wrong with the school system. But the report is based not upon hard facts, but rather upon supposition and speculation. The following excerpt is representative. In regard to the use of standardized test scores as an indicator of school success, the report states:
... there is no indication here as to whether a school's student population characteristics were used in making One Newark decisions. Yet the influence of these characteristics on test scores is very well established: if a child lives in economic disadvantage, does not speak English as a first language, or has a special education need, that child is far more likely to underperform on standardized tests.

If One Newark decisions were made without considering these student characteristics, schools that might be "beating the odds"—performing over expectations, given their student populations—could still be closed ....

***4** Thus, the report opines that "student characteristics" should have been a factor in the One Newark determination to close underperforming schools, but its authors admit they do not know if these characteristics were considered by Newark personnel, or not.

Additionally, petitioners assert that under the Charter School Program Act, an existing public school is eligible to become a charter school only if more than half the teaching staff in the school sign a petition in support of this change, as do more than half the parents of students attending the school. See N.J.S.A. 18A:36A-4(b). No such petitions were signed here. But the closed schools were not converted to charters; rather the district leased closed school buildings to charter schools. The petition does not allege otherwise, stating that "[t]he District attempts to avoid the requirements of N.J.S.A. 18A:36A-4(b) by closing public schools and then leasing the same building that housed those school to private/outside charter school entities." Petitioners term this "a stealth conversion of existing public schools," but proffer no facts that support this contention. Petitioners also assert that the "One Newark Enrolls" process through which the district will make final decisions regarding student enrollment in charter schools on the basis of a ""sophisticated mathematic equation/algorithm," likewise violates the Charter School Program Act, which provides that seats in charter school classrooms must be open to all students on a space-available basis. N.J.S.A. 18A:36-7.

Finally, in the fourth count of the petition, it is alleged that the Plan is "a feeble attempt to address and ameliorate the oppressive consequences of the segregation that exists in the Newark School District ...." This racial segregation negatively impacts the educational opportunity available to Newark students and isolates them from the rest of the public school population in New Jersey. A dual system of public schools has evolved as a result, which the petition describes as "separate and unequal." Thus, petitioners seek an order regionalizing public education in Essex County, on a county-wide basis.

ANALYSIS AND CONCLUSIONS OF LAW

This petition seeks to remedy the disparity in achievement between students in poor urban school districts such as Newark, and those in wealthier suburban districts. Petitioners urge that the Plan exacerbates those disparities, violates the Charter School Act, and disserves the students of Newark. The issues of educational inequality raised by this petition are serious and very real, and

have plagued educators for time immemorial. But the petition in its present form is so fraught with procedural and substantive deficiencies, that I **CONCLUDE** that the motion to dismiss filed by the District must be granted.

The Timeliness of the Challenge to the One Newark Plan Counts Two and Three of the Petition

***5** Petitioners have filed their petition pursuant to N.J.A.C. 6A:3-1.1 et seq., which establishes the procedures for appeals before the Commissioner of Education. See N.J.S.A. 18A:6-9. The time for filing is clearly set forth at N.J.A.C. 6A:3-1.3(i), which provides that a petition of appeal before the Commissioner must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education ... which is the subject of the requested contested case hearing." The "notice of a final order, ruling or other action" of the Board contemplated by the rule has been defined as notice "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Kaprow v. Bd. of Educ. of Berkeley, 131 N.J. 572, 587 (1993).

Here, it is uncontroverted that the District announced that it would be implementing the Plan as early as November 2013; the petition characterizes the Plan so announced with a good bit of detail, averring "that [the Plan] calls for, inter alia, the universal enrollment of all District students and reorganization that will impact over 28 of the District's 70 schools, including school consolidations, closings and the conversion of certain closed schools to charter schools." On December 18, 2013, the specifics of the Plan were announced yet again. A February 2014, pamphlet (Exhibit B) again discusses the Plan and the "charter launch" in detail. Accordingly, the petition arguably should have been filed within ninety days of the November 2013 announcement by Anderson. But giving petitioners every benefit of the doubt, at a minimum, their claims should have been formalized no later than ninety days after the release of the February 2014 pamphlet; or not later than the end of May 2014. The petition was not filed until August 18, 2014. The claims in counts two and three of the petition are thus untimely, and must be dismissed.

This conclusion is buttressed by the report that accompanies the pleading as Exhibit A, and upon which petitioners rely almost exclusively in support of their claims in count two of the petition. The report's findings are based on data reviewed and received from the District itself, and which obviously must have been available to the report's authors in advance of its release in January 2014. Accordingly, query why the petition was not filed within ninety days from the issuance of a report that counsel urges forms the basis of his clients' claims?

The ninety-day rule has been strictly applied by the Commissioner. See Kaprow, supra, 131 N.J. 572; Morris-Union Jointure Comm'n v. Bd. of Educ. of S. River, 92 N.J.A.R.2d (EDU) 453; Markulin v. Bd. of Educ. of Neptune, 92 N.J.A.R.2d (EDU) 406. The rationale for this requirement was articulated by the New Jersey Supreme Court in Kaprow, supra, 131 N.J. at 582, as follows:

> ***6** The [ninety-day] limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws .... The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days.

These considerations have particular applicability here. Petitioners had months to call into question the appropriateness of the enrollment and building changes proposed by the Plan, but instead waited until the eve of the start of the new school year, when their challenge would have created the most disruption and confusion for the school children of Newark. They utilized this strategy at their peril. I **CONCLUDE** that the challenges to the Plan articulated in counts two and three of the petition are untimely and must be dismissed.

The Commissioner has the discretion to relax the timeliness rule, N.J.A.C. 6A:3-1.16, but this extraordinary relief has been reserved only for those situations where a substantial constitutional issue is presented or where a matter of significant public

interest is involved, beyond that of concern only to the parties. Portee v. Bd. of Educ. of Newark, 94 N.J.A.R.2d (EDU) 381, 384; Wise v. Trenton Bd. of Educ., EDU 160-00, Initial Decision (July 25, 2000), adopted, Comm'r (September 11, 2000), aff'd, St. Bd. (January 3, 2001), <http://njlaw.rutgers.edu/collections/oal/>. The claims of counts two and three of the petition surely are couched in such terms, asserting that the Plan violates the guarantee that the children of New Jersey receive a thorough and efficient public education. N.J. Constitution, Art. VIII, § IV, par. 1. But to relax the rule, a viable constitutional claim must be articulated by petitioners; I **CONCLUDE** that they have failed to articulate such a claim, as set forth below.

Standing — Counts Two and Three of the Petition

The twenty-five petitioners comprise a diverse group of stakeholders, to include taxpayers, teachers, students, and parents. Standing is a "threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." In re Six-Month Extension of N.J.A.C. 5:91-1, 372 N.J. Super. 61, 85 (App. Div., 2004); Stubus v. Williams, 339 N.J. Super. 38, 47 (App. Div. 2001). To have standing, a party "must present a sufficient stake in the outcome of the litigation, adverseness with respect to the subject matter and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In re Camden Cty., 170 N.J. 439, 449 (2002). A petitioner must show a direct impairment of his own constitutional rights, and must have suffered a distinct injury or harm that was caused by the adverse party and that can be remedied by the administrative forum. See Trombetta v. Atl. City, 181 N.J. Super. 203, 221 (Law Div. 1981), aff'd o.b., 187 N.J. Super. 351 (App. Div. 1982); New Jersey Turnpike Auth. v. Parsons, 3 N.J. 235, 240 (1949); In re Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180 (App. Div. 1988); Herron v. Montclair Bd. of Educ., Initial Decision (April 16, 2014), Comm'r's Decision (June 2, 2014), <http://njlaw.rutgers.edu/collections/oal/>.

***7** Accordingly, a desire to vindicate the public interest is insufficient to confer standing; there must be a specific connection between the petitioner and the public interest he alleges to represent. D.H. on behalf of J.M.H. v. Montclair Bd. of Educ., EDU 9419-04, Initial Decision (November 22, 2004), Comm'r's Decision (December 29, 2004), <http:// njlaw.rutgers.edu/collections/oal/>. For example, in Montclair a parent challenged the imposition of a testing requirement for enrollment in Algebra, but had no children affected by the controverted test. Her claim was dismissed, with the administrative law judge noting that neither the petitioner nor her child "[would] be directly affected by the challenged policy ... or harmed by an unfavorable decision." Ibid. As the District correctly asserts, here, the taxpayer and teacher petitioners have no right to a thorough and efficient education, and accordingly, lack standing to bring claims that the Plan violates the New Jersey Constitution. Of the twenty-five petitioners, fifteen fall into this category.[2] [2] None of these petitioners claim to have children that attend either the Newark public schools, or the charter schools that now fill once vacant Newark school buildings.

Four of the petitioners are high school students.[3] [3] But as the District again correctly points out, they too make no allegations that the Plan affected their access to a through and efficient public education. Indeed, there was no change to the school placements for these petitioners in the aftermath of the implementation of the Plan, and these petitioners do not allege otherwise. I **CONCLUDE** that accordingly, the student petitioners likewise lack standing to assert that the Plan violated the constitutional rights of Newark students, as they proffer no facts that, if true, would reflect a direct impairment of their own constitutional rights. Trombetta, supra, 181 N.J. Super. at 222. For the same reason, they are without standing to assert that the leasing of District facilities to charter schools violated their rights, as this aspect of the Plan in no way affected their access to a thorough and efficient education.

The six remaining petitioners are parents of school age children. Three of these petitioners, however, likewise, do not allege that the Plan directly affected their children's education, and indeed their children attend schools that have remained open and unaltered during the 2014-2015 school year.[4] [4] (See Petition Exhibit A.) I **CONCLUDE** that accordingly, these petitioners likewise lack standing to assert that the Plan violated the constitutional rights of Newark students, as they offer no facts that would reflect a direct impairment of their own constitutional rights, or those of their children. Trombetta, supra, 181 N.J. Super. at 222. Again, they are likewise without standing to assert that the leasing of District facilities to charter schools violated their rights, as this aspect of the Plan in no way affected their access to a thorough and efficient education or otherwise directly impacted the delivery of educational services to their children, nor does the petition allege otherwise.

Justiciability — Count Two of the Petition

***8** This leaves three petitioners with children who had attended schools that were closed under the Plan, to include Tillman, Moore, and Branch. But even as to these three remaining petitioners, the petition fails to allege that their children's educational programming has been disrupted by the Plan or by their reassignment to another school. Indeed, the petition does less specify any shortfalls in their education in the aftermath of the Plan's implementation. Rather, the pleading simply speculates that the Plan ultimately will not remedy the poor academic performance of Newark students overall.

Neither the courts nor the Commissioner enter rulings that are advisory or abstract. N.J. Civil Serv. Ass'n v. State of New Jersey, 88 N.J. 605, 611 (1982); Crescent Park Tenants Assoc. v. Realty Eq. Corp. of New York, 58 N.J. 98.107; Milano v. Franklin Bd. of Educ., EDU 08606-08, Initial Decision (February 24, 2009), Comm'r's Decision (December 21, 2009), <http://njlaw.rutgers.edu/collections/oal/>. Our jurisprudence recognizes that a case must "[involve] a real and substantial controversy for which specific relief may be provided through a decree of conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical set of facts." Presbyterian Church v. Florio, 902 F. Supp. 492, 503 (D.N.J. 1995). Claims are ripe for adjudication when the "harm asserted has matured sufficiently to warrant judicial intervention. Issues must be fully developed, clearly defined and not merely speculative, conjectural or premature." Trombetta, supra, 181 N.J. Super. at 223. Petitioners' assertions that the Plan will not remedy educational disparities in Newark are speculative and are not grounded in any facts directly related to the children of these petitioning parents.

Thus, the District correctly urges that these remaining petitioners do not articulate cognizable claims. The expert report upon which petitioners rely readily confirms the correctness of this conclusion. The report ties nothing about the Plan to these specific petitioners and their children's educational programs. It offers a difference of opinion as to how to best reorganize the Newark schools, noting that "if" the reorganization failed to consider "student population characteristics" it "would be" likely to fail. The report appears to contain the conclusions of educational experts, but there must be a factual basis for an expert's opinion. Bahrele v. Exxon Corp., 279 N.J. Super. 5, 30 (App. Div. 1995). When an expert's opinion is merely a bare conclusion unsupported by factual evidence, in other words, a "net opinion," it cannot form the basis of a justiciable claim, and ultimately will be inadmissible at hearing. State v One Marlin Rifle, 319 N.J. Super. 359, 370 (App. Div. 1999).

***9** The petition, which relies almost exclusively on this report as the basis for the claims in its second count, echoes its non-specific and speculative tone. The petition's general message is simply that the Plan won't help make the public schools better, and may make matters worse. By way of example, the pleading avers that "[t]he interventions and school closings by Respondents ...are doomed to fail." Elsewhere the pleading states that "expanding charters to replace public schools will leave the neediest students to languish in other district schools that are failing or less successful." Nowhere does the petition offer concrete factual allegations that tie the Plan to some sort of disruption in the educational program for the children of petitioners Tillman, Moore, or Branch. I **CONCLUDE** that the claims of these remaining three petitioners are not ripe for adjudication relative to their claims in count two of the petition that the Plan will not deliver a thorough and efficient education to their children. [5] [5]

The Alleged Violations of the Charter School Act Count Three of the Petition

It uncontroverted that as a component of the Plan, certain Newark schools were closed, and the buildings that previously housed them were leased to charter schools. Petitioners do not contend otherwise; they nonetheless assert that the District violated the Charter School Program Act, N.J.S.A. 18A:36A-1, et seq. But the petition offers no factual support for its contention that the District's actions constituted a "stealth" conversion of the District schools to charter schools.

Indeed, the District has the clear statutory authority to lease school property that it does not presently intend to use, but that may, at some future time, be required for school purposes. N.J.S.A. 18A:20-8.2. The decision to close a particular school likewise lies within the District's sound discretion. Boult v. Passaic Bd. of Educ., 136 N.J.L. 521 (E. & A. 1947); Glynos v Bd. of Educ. of

Union Cty., EDU 9008-93, Comm'r (August 31, 1993), < http://njlaw.rutgers.edu/collections/oal/>. Here, as superintendent of a state-operated school district, Anderson has the power to take the steps needed to properly conduct and maintain the schools of Newark, including the closing of school buildings, when appropriate. See N.J.S.A. 18A:7A-38(b); N.J.S.A. 18A:7A-35.

The statute cited by petitioners addresses a very specific situation; one where teachers and parents make application to the Commissioner for conversion of their public school to a charter. N.J.S.A. 18A:36A-4(b) requires that they show support for that change through signatures on a petition. What occurred here, the closing of public school buildings and the leasing of the vacant space to an outside entity, likewise requires an approval process, just a different one. Indeed, the Commissioner's review and approval process must include evaluation of a comprehensive application; submission of addenda and supporting documents; an "in-depth" interview; and an on-site preparedness visit. N.J.A.C. 6A:11-2.1 et seq. Our courts have recognized that the Commissioner is "exceedingly careful in the approval of charter schools because of the impact that a wrong decision will have on students who attend a charter school that falters, or worse, fails to provide an educational program that satisfies the constitutional standard of a thorough and efficient education." Quest Acad. Charter Sch. of Montclair Founders Grp., supra, 216 N.J. at 388 (citing In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 164 N.J. 316, 323 (2000)).

***10** The charters that now occupy vacated District buildings assumedly complied with this rigorous process; in any event, the petition of appeal does not aver otherwise. Accordingly, the petition alleges no facts in support of its claim that District violated the Charter School Act, and I **CONCLUDE** that these claims, as articulated in count three of the petition, must be dismissed.

The Legality of the Universal Enrollment Plan

Petitioners contend that the Universal Enrollment Plan component of One Newark violates the requirements of N.J.S.A. 18A:36A-7 and N.J.S.A. 18A:36A-8. These provisions of the Charter School Act require that charter schools "be open to all students on a space available basis." N.J.S.A. 18A:36A-7. Similarly, N.J.S.A. 18A:36A-8 specifies that preference must be given to local students; charters must give priority to siblings; and must "seek the enrollment of a cross section of the community's school age population including racial and academic factors." Petitioners assert that the Universal Enrollment Plan violates these requirements.

Importantly, however, the statutes relied upon by petitioners establish obligations with which the charter schools must comply. The petition asserts that the relationship the Plan establishes between the charters and the District causes these obligations to remain unmet. But the petition does not identify the offending charter schools or join them as parties. These charter schools are indispensible parties to this action. The regulations governing the filing of controversies and disputes before the Commissioner require that a "petitioner shall name as a party any person or entity indispensible to the hearing of a contested case." N.J.A.C. 6A:3-1.3(b). Failure to do so may be grounds for dismissal. Ibid. A review of R. 4:28-1(a) is instructive, and it provides:

> A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may ... as a practical matter impair or impede the person's ability to protect that interest ....

The New Jersey Supreme Court has described an indispensable party as one having "an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between litigants without either adjudging or necessarily affecting the absentee's interest." Allen B. DuMont Labs v Marcalus Mfg. Co., 30 N.J. 290, 298 (1959). Under this standard, it is readily apparent that these unnamed charter schools have a clear stake in this litigation, and that the rights that petitioners seek to vindicate, would, in part, require an order directing that the charter schools comply with N.J.S.A. 18A:36A-7 and N.J.S.A. 18A:36A-8. Thus, complete relief cannot be granted without their participation, and for this reason, I **CONCLUDE** that the claims articulated in count three of the petition must be dismissed for failure to name indispensible parties.

***11** Finally, the District suggests that petitioners' claims might be seen as an effort to vindicate the right of these unnamed charters to be unfettered in their enrollment decisions. Viewed this way, the claims in count three nonetheless cannot survive this motion to dismiss. As set forth at length above, these petitioners have standing to assert only rights personal to themselves. They lack standing to assert the rights of the charter schools now housed in vacated District school buildings.

The Claims in Count Four — Desegregation

Count Four of the petition asserts that the District "has or will be attempting to implement its One Newark Plan as a feeble attempt to address and ameliorate the oppressive consequences of the segregation that exists in the Newark School District ...." The petition goes on to assert that "[a]s conceived by Respondents Newark School District and Superintendent Cami Anderson, the One Newark Plan falls short of eradicating the corrosive segregated environment that pervades the Newark School District, which is highly segregated by race." It is incontrovertible that while Newark and several other Essex County districts primarily educate minority students, others primarily educate White students. All of these districts, Newark included, reflect the racial and ethnic breakdown of the communities they serve.

The petition asks for the following relief:

> ... a remedial plan that will eliminate this form of racial segregation in the Newark Public Schools and that will remedy the harms caused by such segregation by the creation of appropriate county-wide or regional-wide school district which would mandate the inclusion of predominately Essex County white suburban school districts into any county-wide or regionalization plan that would effectively desegregate the Newark School District as mandated by the New Jersey Constitution.

The petition names as parties neither the "white suburban school districts" alluded to in the pleading, nor any of the other Essex County districts that are primarily home to minority students. Nor does the petition name either the Commissioner or State Board of Education, all the while averring that it is the Commissioner and State Board of Education who "have failed ... to fulfill their constitutional responsibility to eliminate racial segregation in the Newark School District ...." I **CONCLUDE** that the fourth count of the petition must be dismissed because it fails to name indispensible parties; to include, either the parties who potentially could provide petitioners the relief they seek, or the parties who would be impacted by petitioners' claims.

New Jersey law specifically provides that "[e]ach municipality shall be a separate school district." N.J.S.A. 18A:8-1. Accordingly, the Newark District is a creature of statute that exists to educate the children domiciled within its boundaries. N.J.S.A. 18A:38-1. Thus, as the District correctly asserts, it cannot, by law, send its students to neighboring suburban districts and desegregate itself. Accordingly, petitioners' argument that educational services as currently delivered in Essex County violate the rights of Newark school children to a thorough and efficient education, N.J. Const. Art. VIII, § IV, para. 1, is essentially a contention that N.J.S.A. 18A:8-1 unconstitutionally serves, in practice, to segregate students by race.

***12** A contested case is "a proceeding ... in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or statute to be determined by an agency ...." N.J.S.A. 52:14B-2. Accordingly, essential to a properly brought contested case are party respondents who are legally capable of supplying the relief sought by the petition; the petition asserts that the Commissioner has failed to meet his obligations to desegregate schools, but nonetheless fails to name him as a respondent. See Div. of State Police v. Maguire, 368 N.J. Super. 564, 573 (App. Div. 2004). As I advised counsel when we first conferred on this case, and as I continue to **CONCLUDE**, the Commissioner of Education is an indispensible party to this action. N.J.S.A. 6A:3-1.3(b).

Historical efforts to remedy educational inequality due to disparities in funding are instructive. In Abbott v. Burke, 100 N.J. 269 (1985), Raymond Abbott, and some twenty additional school children brought suit against the Commissioner of Education, State Board of Education, the State Budget Director and State Treasurer, claiming that Public School Education Act of 1975 was unconstitutional as funded. Importantly, the respondents in Abbott v. Burke were the governmental agencies actually responsible for allocating funds to local school districts; they were thus, at least in theory, capable of granting the petitioners the relief they sought.

I thus offer Abbott v. Burke as an example of the procedural course the petitioners should have taken to properly present their claim that the state-wide system of assigning school children to classrooms based on the cities and municipalities in which they reside unconstitutionally deprives them of a thorough and efficient education. Jenkins v. Morris Twp. Sch. Dist., 58 N.J. 483 (1971) offers another model for properly bringing this desegregation challenge. The deputy attorneys general representing the Department of Education successfully convinced petitioners' counsel that their client did not need to be named as a party respondent. Perhaps they had Jenkins in mind. There, petitioning parents brought suit against three districts, seeking their merger to effectuate racial balance. The court determined both that the Commissioner could serve as the forum to adjudicate that dispute, and had the authority to "cross district lines to avoid 'segregation in fact.'" Id. at 501. But it is noteworthy that in Jenkins, all the districts implicated by the desegregation order sought by the petitioners were joined as party respondents.

***13** Thus, even assuming for argument's sake that it was unnecessary to name the Commissioner or State Board of Education as parties, the claims in count four of the petition cannot survive the District's motion to dismiss because petitioners fail to join the other districts whose educational structure and programming would be impacted by the relief sought. Regionalization county-wide would implicate the delivery of educational services to each and every public school student in Essex County. A failure to join each Essex County school district would plainly impede the ability of these districts to protect their interests. See R. 4-28-1(a). Moreover, any order directing such desegregation would call upon the neighboring districts to take the steps needed to effectuate such a broad ranging and monumental change in the delivery of educational services; to include a potential consolidation of staff, school buildings, equipment, and administrative services. Without the participation of these districts, "complete relief could not be accorded among those already parties." Ibid. Accordingly, I **CONCLUDE** that count four of the petition must be dismissed for failure to name indispensible parties. N.J.A.C. 6A:3-1.3(b).

ORDER

Based on the foregoing, the petition of appeal is **DISMISSED**, as follows:

1. As to all the named petitioners, Counts Two and Three of the petition are dismissed on timeliness grounds.

2. As to all the petitioners with the exception of Tillman, Moore, and Branch, Counts Two and Three are also dismissed for lack of standing. The claim that the Universal Enrollment Plan violates the Charter School Act is also dismissed for failure to name indispensible parties.

3. As to petitioners Tillman, Moore, and Branch, Counts Two and Three of the petition are also dismissed for failure to state a justiciable claim. As to these petitioners, the claim that the Universal Enrollment Plan violates the Charter School Act is also dismissed for failure to name indispensible parties.

4. Count Four of the petition is dismissed for failure to name indispensible parties.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

ELLEN S. BASS, ALJ

Footnotes

1 [1] These figures do not add up to 100%, and the petition offers no explanation of this discrepancy. Suffice it to say however, that most students in the Newark schools are Black or Hispanic. At oral argument counsel described the District as 91% minority.

2 [2] These petitioners include: Graves, Owens, Smith-Gregory, Moncur, Gamble, Gianni, Matee, Cunningham, Jones, Gaines-Sloan, Wade, Ausby, Ikwuegbu, Osuji, and Corley.

3 [3] These petitioners include: Leonardo, Towkaniuk, Melendez, and Maldonado.

4 [4] These petitioners include: Molina, Loucious Jones, and Reedus.

5 [5] Petitioners urge that there is an inconsistency in the District's position; that is, is the District arguing that the petition is too early, or that it is too late? While these arguments superficially appear inconsistent, they are not. To the extent that the petition alleges that the proposed Plan is flawed, it is too late. To the extent that the petition speculates how the Plan will affect the education for Newark students, it is too early.

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