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Attorney General

MICHELLE L. MILLER
Director

November 22, 2019

VIA ELECTRONIC FILING (ECourts)
Hon. Mary C. Jacobson, A.J.S.C.
Mercer County Superior Court
Criminal Courthouse
400 S. Warren Street, 4th Fl.
Trenton, New Jersey 08650

Re: Latino Action Network, et. al. v. State of New Jersey, et. al.; Docket No.: MER-L-001076-18

Dear Judge Jacobson:

In connection with the above-captioned matter, enclosed for filing on behalf of Defendants, State of New Jersey, New Jersey State Board of Education, and Lamont Repollet, Commissioner, New Jersey Department of Education, please find Defendants':

- Notice of cross-motion to dismiss Plaintiffs' Amended Complaint;
- Brief in support of cross-motion and in opposition to Plaintiffs' motion for summary judgment;
- Proposed Form of Order; and
- Proof of Service

Thank you for your attention in this matter.

Respectfully submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: /s Melissa Dutton Schaffer
Melissa Dutton Schaffer
Assistant Attorney General

cc: All Counsel of Record (via ECourts)

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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; RANAYA ALSTON, a minor, by her Guardian Ad Litem, YVETTE ALSTON-JOHNSON; RAYAHN ALSTON, a minor, by his Guardian Ad Litem, YVETTE ALSTON-JOHNSON; ALAYSA 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; 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, Acting Commissioner, State Department of Education,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY
DOCKET NO. MER-L-001076-18

CIVIL ACTION

ORDER GRANTING DEFENDANTS' CROSS-MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants,

And

NEW JERSEY CHARTER SCHOOLS ASSOCIATION, INC., BELOVED COMMUNITY CHARTER SCHOOL, ANA MARIA DE LA ROCHE ARAQUE, TAFSHIR COSBY, DIANE GUTIERREZ

Intervenor-Defendants

THIS MATTER, having been opened to the Court on the return date of January 10, 2019 by GURBIR S. GREWAL, Attorney General of the State of New Jersey (Melissa Dutton Schaffer, Assistant Attorney General appearing), attorney for Defendants State of New Jersey, New Jersey State Board of Education, and Lamont Repollet, Commissioner, New Jersey Department of Education, by way of Cross-Motion to Dismiss Plaintiffs' Amended Complaint; and upon notice to all parties; and the Court having read and considered the papers submitted and any opposition thereto, as well as oral argument; and for good cause shown;

IT IS on this ____ day of _____, 2020; hereby **ORDERED** that Plaintiffs' Motion for Partial Summary Judgment is **DENIED** and Defendants' Cross-Motion for Dismissal of Plaintiffs' Amended Complaint is **GRANTED**; it is

FURTHER ORDERED that a copy of this Order shall be served upon all parties within seven (7) days of receipt.

_____
Hon. Mary C. Jacobson, A.J.S.C.

___ Opposed

___ Unopposed

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Plaintiffs,

v.

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

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY
DOCKET NO. MER-L-001076-18

CIVIL ACTION

NOTICE OF CROSS-MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendants,

And

NEW JERSEY CHARTER SCHOOLS ASSOCIATION, INC., BELOVED COMMUNITY CHARTER SCHOOL, ANA MARIA DE LA ROCHE ARAQUE, TAFSHIR COSBY, DIANE GUTIERREZ

Intervenor-Defendants

To: Hon. Mary C. Jacobson, A.J.S.C.
Mercer County Superior Court
Criminal Courthouse
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PLEASE TAKE NOTICE that on Friday, January 10, 2020 at 10:30 a.m., or as soon thereafter as counsel may be heard, Defendants in the above-captioned matter, the State of New Jersey, New Jersey State Board of Education, and Lamont Repollet, Commissioner, New Jersey Department of Education, will move before the Honorable

Marcy C. Jacobson, A.J.S.C., of the Superior Court of New Jersey, Mercer County Vicinage, Law Division – Civil Part, for an Order granting Defendants' Cross-Motion to dismiss Plaintiffs' Amended Complaint.

PLEASE TAKE FURTHER NOTICE that in support of Defendants' motion, Defendants rely on its brief annexed hereto; and

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: /s Melissa Dutton Schaffer
Melissa Dutton Schaffer
Assistant Attorney General

Dated: November 22, 2019

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; RANAYA ALSTON, a minor, by her Guardian Ad Litem, YVETTE ALSTON-JOHNSON; RAYAHN ALSTON, a minor, by his Guardian Ad Litem, YVETTE ALSTON-JOHNSON; ALAYSA 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; 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, Acting Commissioner, State Department of Education,

Defendants.

And

NEW JERSEY CHARTER SCHOOLS ASSOCIATION, INC., BELOVED COMMUNITY CHARTER SCHOOL, ANA MARIA DE LA ROCHE ARAQUE, TAFSHIR COSBY, DIANE GUTIERREZ

Intervenor-Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY
DOCKET NO. MER-L-001076-18

CIVIL ACTION

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

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PRELIMINARY STATEMENT

Without question, seminal decisions such as Brown v. Board of Education and Booker v. Board of Education emphasize a fundamental precept: racial discrimination and segregation have no place in our public schools. And we wholeheartedly believe that in New Jersey, as one of the most diverse states in the country, a diverse student body is a critical factor in forming a high-quality learning environment for all students. But here, Plaintiffs' theory in advancing this lawsuit, and the way they chose to do so, is so defective that the Amended Complaint should be dismissed, or at the very least, their motion for partial summary judgment must be denied. This is so for three primary reasons.

First, Plaintiffs seek a state-wide remedy impacting each of the State's 673 operating school districts by uprooting the complex and interconnected system of public education across this entire State without notice to those districts. Granting summary judgment without notice to each of the State's school districts – that are not currently parties to this case - would substantially prejudice their interests without giving them an opportunity to voice any objection. For this reason alone, partial summary judgment should be denied and the Amended Complaint should be dismissed in its entirety.

Second, granting summary judgment on liability without consideration of possible remedies teeters on a fundamentally

flawed theory of liability. Liability and remedy are inexorably intertwined in this case, especially considering the drastic equitable remedy requested by the Plaintiffs. Plaintiffs essentially ask this court to hold Defendants liable for alleged state-wide segregation on the sole basis of census data from a limited subset of the State's schools. Implicit in Plaintiffs' argument is that any apparent racial imbalance in public schools – even that caused by voluntary migration – would be sufficient on its own to find the State liable for a constitutional violation. Rather, the proper question here is whether Defendants have met their duty to create a reasonable plan consistent with sound educational principles and processes. Partial summary judgment should be denied as there has been no consideration of whether Defendants have failed to act appropriately or whether a legally permissible remedy even exists.

Third, Plaintiffs motion is premature. By filing for summary judgment prior to the exchange of discovery, Plaintiffs ask the court to avoid discovery and disregard the complex issues relating to the causes underlying the data and how those issues might be addressed to advance sound educational values. Plaintiffs ask this court to move quickly, when the complexity of the issues demands careful, comprehensive consideration. Without the exchange of discovery, deciding the issue of liability in a case suggesting a drastic state-wide remedy is simply premature.

For each of these reasons, Plaintiffs' motion of partial summary judgment must be denied.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS

Through its Constitution, New Jersey guarantees "the maintenance and support of a thorough and efficient system of free public schools for the instruction of children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, §4, ¶1 ("T&E Clause"). It also guarantees equal protection of the laws, N.J. Const. art. I, §11 ("Equal Protection Clause"), and prohibits discrimination in the exercise of any civil right or segregation in the public schools "because of any religious principles, race, color, ancestry or national origin." N.J. Const. art. I, 5 ("Non-Discrimination Clause"). In addition to these Constitutional provisions, New Jersey school laws prohibit discrimination. See N.J.S.A. 18A:38-5.1 ("No child between the ages of four and 20 years old shall be excluded from any public school on account of his race, creed, color, national origin, or ancestry.")

In New Jersey, "[e]ach municipality shall be a separate local school district." N.J.S.A. 18A:8-1. New Jersey currently has 565 municipalities, 585 operating school districts,[1] and 88 charter

[1] This figure includes single-municipality districts pursuant to N.J.S.A. 18A:8-1, consolidated districts pursuant to N.J.S.A. 18A:8-25 to -41, and regional school districts pursuant to 18A:8-42. It does not include the State's 16 non-operating districts. See N.J.S.A. 18A:8-43 to -51.

schools. New Jersey State League of Municipalities, https://www.njlm.org/644/Forms-of-Municipal-Government---New-Jers (last visited November 21, 2019); State Department of Education, New Jersey Public Schools Fact Sheet, https://www.state.nj.us/education/data/fact.htm (last visited November 21, 2019). New Jersey funds its public schools through a combination of local property taxes and state appropriations. See generally Robinson v. Cahill, 67 N.J. 333, 342 (1975)(citing Robinson v. Cahill, 62 N.J. 473 (1973)(State must provide "an equal education opportunity," however, the burden of doing so is distributed)).

On May 17, 2018, Plaintiffs filed a complaint against the State of New Jersey, the New Jersey Department of Education, and Lamont Repollet, Commissioner of the Department, alleging that New Jersey's statewide system of public education, including its charter school program, is unconstitutionally segregated by race, ethnicity, and poverty. (Compl. at ¶¶1-3). In support of this state-wide claim, Plaintiffs selectively chose 23 school districts in eight different counties and provided undisputed statistical data relating to race and socioeconomic status in those districts. Plaintiffs also selectively provided comparative data for certain surrounding districts. (Compl. at ¶40A-H).

Within in its prayer for relief, Plaintiffs seek a declaration that N.J.S.A. 18A:38-1 violates the State Constitution "insofar as

it compels New Jersey school children to attend public schools in the municipality in which they reside;" that those laws "mandat[ing] that charter schools prioritize enrollment of students from the district in which they reside" are unlawful and unconstitutional. (Compl. at ¶79C) Plaintiffs also seek to enjoin "the continued assignment of public school students, including those attending charter schools, solely on the basis of municipal attendance boundaries." (Compl. at ¶79D). Additionally, Plaintiffs ask that this court "mandate[e] that the Legislature, the Commissioner of Education and the State Department of Education adopt a replacement assignment methodology" and order that the Commissioner "prepare and submit to the Court within three months a detailed remediation plan designed to achieve comprehensive desegregation and diversification of New Jersey's public schools within and among school districts." (Compl. at ¶79D-E).

On June 29, 2018, Defendants filed a motion in lieu of an answer seeking to transfer the case to the Commissioner of Education. (Defs.' Mot. Transfer Jun. 29, 2018). However, on August 9, 2018, the court denied the order without prejudice, and the following day instructed Defendants to file an answer by August 31, 2018. (Order Den. Mot. Transfer Aug. 9, 2018).

In an effort to facilitate a potential settlement, the court suspended Defendants' deadline indefinitely, unless consent was withdrawn with 14 days' written notice. (Case Management Order

Sept. 20, 2018). The parties' settlement discussions continued through January 4, 2019, at which time they filed a joint status update with the court acknowledging that settlement discussions were ongoing and requesting another adjournment until April 8, 2019. (Status Update Jan. 4, 2019).

On April 3, 2019, Plaintiffs indicated to the court that they were no longer interested in pursuing a mutual resolution. (Plfs' Letter Apr. 3, 2019). The court held a case management conference on April 17, 2019, after which the court ordered Defendants to file an answer by May 17, 2019. (Case Management Order Apr. 17, 2019). The initial discovery end date was set for November 12, 2019. (Disc. End Date Reminder Aug. 31, 2019). Subsequently, the discovery end date was extended to January 11, 2020.[2]

On July 17, 2019, Plaintiffs filed an unopposed Motion for Leave to File an Amended Complaint, which was granted and accepted for filing on August 2, 2019. (Order Granting Mot. Am. Compl. Aug. 2, 2019). On August 22, 2019, the Defendants filed an amended answer. (Defs' Amended Answ.).

On September 17, 2019, New Jersey Charter Schools Association, Inc., BelovED Community Charter School, Ana Maria De La Roche Araque, Tafshier Cosby and Diane Gutierrez filed a Motion

[2] The Discovery End Date was automatically extended by sixty days upon the filing of Intervenor-Defendants' Answer pursuant to Rule 4:24-1(b).

to Intervene in the matter. (Mot. Intervene Sept. 17, 2019). Then, on September 27, 2019, before either party initiated discovery, Plaintiffs filed a Motion for Partial Summary Judgment seeking a determination on the issue of liability.[3] (Pls' Mot. Summ. J. Sept. 27, 2019). In support of their motion, Plaintiffs rely on statistics relating to the racial make-up of New Jersey schools, and specific census data from fifteen school districts – representing just over 2% of the State's 674 total districts. (Pls'. Statement of Undisputed Facts). These facts are not subject to dispute. In addition, Plaintiffs rely on the certification of a putative expert, Ryan W. Coughlan, offering his analysis of and opinion regarding the significance of the data. (Cert. Ryan Coughlan; Ex. A to Pls' Mot. Summ. J.).

On October 17, 2019, this court granted the Charter School Association's motion to intervene and entered an order outlining a briefing schedule on Plaintiffs' Motion for Partial Summary Judgment. (Order Granting Intervention Oct. 17, 2019). Determining that there were threshold procedural issues that must be addressed prior to considering the merits of the motion, the order indicated that Defendants shall file procedural objections to the motion by November 22, 2019. Ibid. This brief follows.

[3] On October 4, 2019, Plaintiffs submitted a second copy of its Motion for Partial Summary Judgment, which corrected the caption.

ARGUMENT

POINT I

THE AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO INCLUDE NEW JERSEY'S PUBLIC SCHOOL DISTRICTS, ALL OF WHICH HAVE A STRONG INTEREST IN THE OUTCOME OF THIS MATTER.

The school districts in New Jersey have a strong and inevitable interest in this litigation. Plaintiffs seek a declaration that all school districts in the State are unconstitutionally segregated and that the entire educational structure in the State must change. All school districts therefore have an interest in defending claims that they are liable for or contribute to unconstitutional segregation and, if those claims are substantiated, in fashioning a remedy. Any remedy would radically alter districts' funding and expenses, and the districts must be permitted to participate in that process. Because Plaintiffs chose to allege statewide liability and a statewide remedy, each and every school district in the state must be joined in this matter.

When a court must settle a legal question or dispute, it strives to do so "effectively and permanently by bringing before it all parties necessary for that purpose." Cogdell by Cogdell v. Hosp. Center at Orange, 116 N.J. 7, 19 (1989) (quoting Garnick v. Serewitch, 39 N.J. Super. 486, 497 (Ch. Div. 1956)). To that end, the Court Rules require joinder of certain parties 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.
>
> [R. 4:28-1(a).]

While the principal purpose of the Rule is to "protect an absent person from an adjudication of his or her interests," it also "protects all of society from repetitious, abortive, and wasteful litigation." Cogdell, 116 N.J. at 17-18. The party-joinder Rule therefore promotes the dual policy of fairness to the parties and judicial efficiency and economy. Ibid.

Historically, mandatory joinder of a party hinged on whether that party was "indispensable" to a just adjudication. Jennings v. M & M Trans. Co., 104 N.J. Super. 265, 272 (Ch. Div. 1969); Allen B. DuMont Labs., Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298 (1959). An individual is considered indispensable where he or she "has 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." Ibid. A further indication of an individual's indispensability will be whether the interest is "of

such a nature that a final decree cannot be made without...leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Cogdell, 116 N.J. at 19 (quoting Shields v. Barrow, 58 U.S. 130, 139 (1854)).

A. All School Districts In New Jersey Have An Interest In Determining Whether They Are Unconstitutionally Segregated And Non-Joinder Would Impair Or Impede Their Ability To Protect That Interest.

Each school district in the state is an indispensable party because each has an interest in the adjudication of this matter, which seeks to not only ascribe liability for racial segregation and its deleterious effects, but to also fundamentally restructure the boundaries of the districts, their admissible students, their funding and expenditures, and even in some cases their very existence. It is imperative that all districts have a "seat at the table" to this important and influential adjudication. See Transcript of Second Motion to Intervene (Oct. 16, 2019), 25:25-26:1.[4]

The participation of each school district is essential to a fair and thorough adjudication of the issues presented. Allowing the matter to move forward without the districts' involvement, particularly in the context of the consideration of a summary

[4] Hereinafter referred to as "T."

judgment motion, would deny them an opportunity to adequately present their interests. It would likewise leave the court with an incomplete presentation of the issues.

i. The Interests Of All School Districts In New Jersey Are Implicated Because Plaintiffs Pleaded Statewide School Segregation.

Unlike other cases involving de facto segregation in New Jersey that have implicated particular districts or regions, Plaintiffs here have pled a statewide system of segregation. Because Plaintiffs challenge the very statutes that mandate attendance, and consequently the public school funding scheme, it is incumbent upon them to include all districts, not just those that are illustrative of the alleged. Plaintiffs cannot choose to select only the districts or regions that support their claims and use them to extrapolate to every other district, while ignoring or downplaying those districts that do not fit their narrative. Unlike other cases where the courts had to contend with only one or two districts in close propinquity to one another, this court must consider all relevant factors that occur statewide in order to rule on liability – a daunting undertaking with potentially drastic ramifications. The districts' participation is necessary both to adjudicate liability and to evaluate and craft a proper remedy, if necessary. It would be impracticable and potentially chaotic to attempt to devise a statewide remedy in this matter

without the information obtained from the districts when determining liability.

Indeed, this court appropriately cautioned Plaintiffs that their decision to plead statewide, by its expansive nature, may warrant joining other parties. See T36:3-15 (wherein the court states "You determined to plead the case the way you did on a statewide basis [. . . .] So [. . .] if more parties apply [. . .] to intervene, that's something I'll have to consider."). Plaintiffs cannot reap the benefits of pleading this case statewide without also accepting the procedural and substantive consequences that naturally attend such an undertaking.

ii. Each School District In New Jersey Has An Interest In The Current Educational Structure In The State And Its Impact On The Districts And Their Students.

Under New Jersey's current educational system, municipalities collect property pay taxes, which include local school levies for the public education system. See N.J.S.A. 18A:7F-5. Those levies, in part, fund the school district(s) located in that municipality. N.J.S.A. 18A:7F-5; 18A:7F-43 to -70. School districts are geographically defined by their location within a municipality. N.J.S.A. 18A:8-1. They are overseen by either elected or appointed local boards of education, N.J.S.A. 18A:10-1, whose members must reside within the boundaries of the district. N.J.S.A. 18A:12-1.

The local boards are not only responsible for provide educational services for students residing within the geographic scope of the school district, but also for determining educational policy. N.J.S.A. 18A:38-1. The educational system's structure based upon N.J.S.A. 18A:38-1 largely dictates the demographics of the district, and assists both districts and the State in determining how much funding a district will receive in a given year. It also provides districts a degree of year-to-year certainty regarding its anticipated budget. See generally 18A:7A-3 to -60; 18A:7F-43 to -70. Based on this anticipated budget, districts undertake both short- and long-term facilities planning and secure necessary funding. The structure also provides the district with notice of the number of students to whom it will need to provide educational services, allowing each district to ensure availability of necessary resources, such as hiring staff, negotiating union contracts, purchasing adequate school supplies, securing bussing, and more, in order to sufficiently serve its student body.

The school districts, more so than almost every party to this action, bear witness every day to their student populations and their successes and struggles. The districts would offer unparalleled insight on the question of liability, painting a more complete and nuanced picture of its student body, its background,

its diversity, and the experience of its students in this environment.

iii. Determining Whether New Jersey's School Districts Are Unconstitutionally Segregated Without The Participation Of The Districts Would Impair Or Impede Their Ability To Protect Their Interests.

Similar to the issue of joinder, in the context of intervention, this court has recognized that a determination on liability in this case would be benefited by the participation of the Charter Schools' Association, the BeLoved Charter School and the named parents of charter school students. See T33:21-34:12; T42:19-24 (acknowledging that consideration of liability without the charter school intervenors "could as a practical matter impede their ability to protect their interests."). Likewise, the school districts would similarly be able to confirm, challenge, or refute the pleadings and statements of experts offered by Plaintiffs. See also T40:2-9 (court noting that the charter school intervenors may defend the allegations differently than the State Defendants). The districts would be unable to offer this information in their defense or to the court so that it may make an informed and fair decision in this case. To determine liability without their participation, would leave the districts unable to adequately protect their interests.

The districts would be in a better position to provide this information than the Commissioner and the State. Defendants might

not necessarily have the best information on the demographics of the districts, which would vary widely based on whether they are in urban, suburban, or rural environments, and how they relate to students' performances and experiences in the educational system. The districts would be better equipped to provide a greater understanding of how each district is unique and how its environment affects its students.

Furthermore, there is no guarantee that Defendants in this matter can adequately represent the interests of the school districts. Make no mistake, Defendants intend to vigorously defend all aspects of this case, but the interests of the Commissioner and State may not necessarily always align with those of the districts, and questions and consequences of liability may weigh more heavily on the districts than they do on the State Defendants. This court correctly recognized this in deciding on the charter schools' association's motion to intervene. T42:25-43:7 (court acknowledgement that the State "may not adequately represent the interest of the charter schools."). See also T44:20-45:1.

The Appellate Division has had occasion to decide on this very issue in a nearly identical case and found that when de facto segregation is alleged and the requested relief is regionalization, then all other affected school districts are indispensable parties. Graves v. State Operated School District

of the City of Newark, A-5351-14, 2017 WL 4247539 (Sept. 26, 2017).[5]

In Graves, plaintiffs, including several students of Newark public schools, sued the Newark school district arguing in part that the district suffered from de facto segregation in violation of N.J. Const., art. VIII, § 4, ¶ 1 and N.J. Const., art. I, § 5. Graves, 2017 WL 4247539 at *2. Part of the relief sought by plaintiffs was a declaration of de facto segregation and a plan to implement a countywide or regional school district. Ibid. An administrative law judge granted the district's motion to dismiss, and the Commissioner affirmed. Ibid.

In affirming the dismissal, the Appellate Division noted that "the potentially-affected Essex County suburban school districts also are indispensable parties to the claim of de facto segregation of the Newark schools." Id. at *6. The court cited to the opinion of the ALJ who found the requested relief of a countywide or regional school district would affect "each and every public school student" in Essex County. Ibid. Therefore, "[a] failure to join

[5] While the opinion in Graves is unpublished, such opinions may be treated as secondary research and consulted for their persuasive authority, especially in analogous situations. Nat. Union Fire Ins. Co. of Pittsburgh v. Jeffers, 381 N.J. Super. 13, 18 (App. Div. 2005); Sauter v. Colts Neck Volunteer Fire Company No. 2, 451 N.J. Super. 581, 600 (App. Div. 2017). In accordance with Rule 1:36-3, Defendants are not aware of any inconsistent unpublished opinions and a copy has been provided to all parties.

each Essex County school district would plainly impede the ability of these districts to protect their interests." Ibid.

Here, the potential impact of this matter goes further: the issues involved would necessarily impact each and every public school student in the State.

B. All School Districts Have An Interest In Fashioning A Remedy If The Districts Are Found To Be Unconstitutionally Segregated And Non-Joinder Would Impair Or Impede Their Ability To Protect Their Interest.

A determination on liability would ultimately necessitate a statewide remedy, potentially throwing the State's school districts into confusion, uncertainty, financial distress, and possibly even dissolution. It will radically alter districts' funding, finances, resources, and the number of students they must service. Given the dramatic effect Plaintiffs' requested relief would have on all of the school districts in the State, adjudicating this matter without the participation of those districts would be "wholly inconsistent with equity and good conscience." Cogdell, 116 N.J. at 19.

This court, in deciding to grant the Charter Schools' Association's motion to intervene, recognized the importance of having a "seat at the table," not just for determining liability but also especially for when this court considers what remedy, if any, might be appropriate. T25:16-26:4. Just as the districts must participate as to any determination of liability because of

their intimate knowledge of daily operations in our schools and the profound effect a finding of liability would have on their interests, so should the districts have a meaningful opportunity to participate in fashioning any remedy in a manner that would benefit the students, the districts, and ensure their continued viability.

In the Graves case, the ALJ identified some of the same issues discussed herein, namely that a regionalization order 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." 2017 WL 4247539 at *6. Without these other districts participating as parties, complete relief could not be accorded among those that were parties. Ibid. (citing R. 4:28-1(a)).

Plaintiffs here seek relief even more monumental than that at issue in Graves. Plaintiffs seek not merely a regional school district or even a countywide district for just a single county. Instead, Plaintiffs seek to obliterate the entire concept of separate school districts in the State and to effectively leave behind one all-encompassing state-wide school district with no regard for the local issues affecting each districts' students. This court cannot determine liability in a vacuum without

considering the profound transformation of the delivery of the State's educational services that would result. To issue such a decision without the participation of the districts would necessarily lead to an outcome that "may be wholly inconsistent with equity and good conscience." Cogdell, 116 N.J. at 19.

Indeed, this court acknowledged the drastic consequences this litigation could have on charter schools in the context of intervention; those consequences are equally applicable to New Jersey's public school districts. See T47:8-13 (noting the consequences the charter schools may face in the wake of a decision on liability, including the closing of some schools). For these same reasons, it is imperative that the districts participate in the litigation.

C. Failure to Join School Districts Would Subject Defendants To A Substantial Risk Of Additional Litigation.

In addition, the relief sought by Plaintiffs here would unleash a flurry of additional lawsuits by school districts as they move to create or dissolve sending-receiving relationships, seek reimbursement or equal funding from one another, compete for students and financial and material resources, and so on. This would inevitably create the kind of "repetitious, abortive, and wasteful litigation" that joinder seeks to prevent. Cogdell, 116 N.J. at 17-18. Also, these districts would undoubtedly seek to sue or join the Commissioner and the state in these suits, which

would open them to a substantial risk of double, multiple, or inconsistent obligations toward the entire state's school districts. R. 4:28-1(a). As this court astutely pointed out in the context of intervention, "one of the [important] things [...] is to prevent additional lawsuits." T42:11-12.

Each school district in this State has an inevitable and undeniable interest in a determination on questions of unconstitutional segregation. Failure to add the districts would impede their ability to protect this interest because it would leave them without recourse to challenge liability, provide a complete picture of each district and the educational services their students receive, or tailor a remedy to each district and its students. For these reasons, Plaintiffs' Amended Complaint should be dismissed.

POINT II

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT MUST BE DENIED BECAUSE LIABILITY AND REMEDY ARE INEXORABLY INTERTWINED AND CANNOT BE SEVERED.

Under Rule 4:38-2(a), a court may in its discretion permit bifurcation:

> [w]henever multiple parties, issues, or claims are presented . . . and the nature of the action . . . is such that a trial of all issues as to liability and damages 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, the court may on a party's or

> its own motion, direct that the issues of liability and damages be separately tried.

However, "if liability and [remedy] are intertwined, bifurcation should not be ordered." Tobia v. Cooper Hosp. Univ. Medical Ctr., 136 N.J. 335, 345 (1994). The court should consider "the fairness to the litigant when the issues of [remedy] and liability may be indivisible." Ibid. And bifurcation should not be ordered where doing so would prejudice a party. See Diodato v. Rogers, 321 N.J. Super. 326, 335 (Law Div. 1998).

Here, contrary to Plaintiffs' suggestion, liability cannot be severed from remedy because the two are inexorably intertwined. The Commissioner cannot be held liable for the mere fact of apparent racial imbalance in schools alone. Rather there must be a showing that the Commissioner failed to fulfill some duty under the law. In Booker v. Board of Education, 45 N.J. 161, 180 (1965), our Supreme Court held that the State's duty to address segregation in education requires the creation of a "reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures." The Court held that an appropriate plan should factor in "[c]onsiderations of safety, convenience, time economy and other acknowledged virtues of the neighborhood policy . . . . Costs and other practicalities must be considered and satisfied." Ibid.

By arguing that the Commissioner is liable solely on the basis

of limited census data for a subset of New Jersey's public schools, (Pls' Br.6), Plaintiffs mischaracterize the Commissioner's duties under the law. Stated plainly, the Commissioner's duty is not to strike a purely statistical racial balance across all New Jersey public schools, but rather to create a reasonable plan consistent with educational values that combats the causes of segregation. Plaintiffs essentially seek to hold the State liable based on isolated statistics devoid of any context, and without a robust evaluation of the reasonableness, practicality or even "sound educational values and procedures." Id. at 180. This argument lacks merit. Instead, 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.[6] But that sort of analysis is

[6] There is a substantial body of Federal case law prohibiting the creation of remedies that might themselves offend principles of equal protection. See, e.g., Parents Involved in Cmty. Schs. V. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797-98 (2007) (noting that, absent a showing of constitutional necessity, the Equal Protection Clause prohibits the government from classifying students based upon race and assigning them to schools based upon that classification); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16-17 (1971) (noting that the State's ability to remedy school segregation under Title VI, 42 U.S.C. § 2000c, is no broader than the contours of the Equal Protection Clause, which requires a finding of liability prior to the crafting of a remedy); Parent Assoc. of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705, 715-16 (2d Cir. 1979) (finding that, consistent with the Equal Protection Clause, the federal courts lacked the ability to intervene and remedy segregation in public schools absent a finding

exactly what Plaintiffs contend should be reserved until a later proceeding. Stated plainly, Plaintiffs seek to hold Defendants liable for failure to act without first considering whether any legally or constitutionally permissible remedy even exists.

Furthermore, bifurcating remedy from liability in the manner Plaintiffs suggest would substantially prejudice Defendants' ability to present its defense. For example, the consideration of liability in a vacuum would be detrimentally skewed if Defendants and school districts were denied the opportunity to offer evidence relating to their efforts to combat segregation. Conversely, consideration of appropriate remedies would similarly be skewed because the efforts already undertaken by Defendants and districts, even if laudable, would be presumed to be ineffective in the wake of a determination of liability, thereby limiting the universe of potential solutions. Thus, bifurcating the litigation and deciding liability alone at the summary judgment stage is inappropriate because liability is necessarily premised upon the State’s ability to implement a viable remedy.

Accordingly, the nature of Plaintiffs' claims necessitates a joint analysis of both liability and remedy, any potential remedy for alleged school segregation will be indelibly tethered to a finding of the State's liability for the condition. Severing the

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that the condition was caused by State action).

two would prejudice Defendants by limiting the evidence and arguments it can present in mounting a defense against Plaintiffs' claims of unconstitutionality. For these reasons, Plaintiffs' motion for partial summary judgment must be denied.

POINT III

PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE SUMMARY JUDGMENT IS INNAPROPRIATE AND PREMATURE PRIOR TO THE EXCHANGE OF DISCOVERY.

A party may file a motion for summary judgment as early as twenty days from the service of the complaint. R. 4:46–1. Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). However, summary judgment is generally "inappropriate prior to the completion of discovery." Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003). The courts should provide "every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case." Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498–99 (App. Div. 2012) (citations omitted).

When continued discovery would shed light on unresolved factual issues, summary judgment should not be granted. See Crippen

v. Cent. N.J. Concrete Pipe Co., 176 N.J. 397, 399–404 (2003) (finding summary judgment premature where further discovery would reveal evidence relevant to claims and defenses). There is no question that summary judgment normally is inappropriate before the party resisting such a motion has had an opportunity to complete the discovery relevant and material to defense of the motion. Velantzas v. Colgate–Palmolive Co., Inc., 109 N.J. 189, 193 (1988). It is well established that where discovery on material issues is not complete, the court must afford the non-movant the opportunity to take discovery before disposition of the motion. See Wilson v. Amerada Hess Corp., 168 N.J. 236, 253–54 (2001). However, in order to defeat summary judgment, the non-movant who resists the motion on the grounds of incomplete discovery is required to specify the discovery that is still necessary. Trinity Church v. Lawson–Bell, 394 N.J. Super. 159, 166 (App. Div. 2007).

Here, Plaintiffs' application for summary judgment is premature. Plaintiffs seek to hold Defendants liable for an alleged constitutional violation, seeking a state-wide remedy that would change the entire landscape of New Jersey's public education system. But, instead of hitting pause and allowing the case to go through its normal course, the Plaintiffs have decided to hit fast forward asking this court to award summary judgment without any exchange of discovery. This is clearly improper for multiple reasons.

First, as addressed above, necessary and indispensable parties must be added before summary judgment may be entered. Again, the Plaintiffs are seeking a state-wide remedy without affording all affected school districts the opportunity to be heard on the allegations raised in their Complaint. So essentially, the Plaintiffs are seeking to hold school districts liable for an undisclosed state-wide remedy, while also seeking to foreclose the districts opportunity to be heard on liability. The addition of new parties will likely change the entire landscape of this case. Plaintiffs are essentially asking this court to hold the affected school districts liable without engaging in any discovery and without allowing the districts to participate in the case. This alone renders Plaintiffs' application for summary judgment premature.

Second, additional discovery may reveal that the underlying data used to formulate the allegations in Plaintiffs' Complaint is insufficient to set forth a viable constitutional claim. Without exchanging any discovery, Defendants are unable to bolster and explore affirmative defenses to the claims asserted. This basic right must be afforded to Defendants prior to the entry of summary judgment.

Third, Plaintiffs' improperly rely on a self-proclaimed expert, Ryan W. Coughlan, in support of summary judgment without affording the Defendants any opportunity to explore his

credentials and/or his support for his alleged expert opinion through deposition or otherwise. New Jersey Court Rules require experts to be named in discovery. Under Rule 4:10-2(d)(1) a party can require its opponent to disclose the names and addresses of the experts it expects to call at trial through interrogatories. These interrogatories may also require such experts to furnish a copy of their reports, which, under Rule 4:17-4(e), must contain a complete statement of the expert's opinions and the rationale for those opinions; the facts and data considered in forming the opinions; the qualifications of the expert, 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. See also Ponden v. Ponden, 374 N.J. Super. 1, 6 (App. Div. 2004) (describing an inadequate expert report).

Here, no discovery has been exchanged and Defendants are therefore unable to assess the facts and data relied on by Mr. Coughlan in formulating his alleged expert opinion, which they are entitled to do under the court rules. Defendants are also entitled to consult and retain their own expert to review Mr. Coughlan's report and offer rebuttal expert opinion. Without this opportunity for expert discovery, the Defendants, and this court, are deprived of the necessary guidance that is needed to interpret complex factual and scientific data.

Finally, without the exchange of any discovery, Defendants would suffer substantial prejudice as they would be deprived of their opportunity to discover facts and data relevant to their affirmative defenses. Therefore, the inescapable conclusion here is that summary judgment is premature and should be denied.

CONCLUSION

For these reasons, Defendants' cross-motion to dismiss Plaintiffs' Amended Complaint should be granted and Plaintiffs' motion for partial summary judgment denied.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Carol GRAVES, Leah Zalanna Owens, Deborah Smith–Gregory, Jose Leonardo, Kristin Towkaniuk, Ramon Melendez, Jr., Hector Maldonado, Chantell Moncur, Linda Kelly Gamble, Nancy J. Gianni, Penny Matee, Christine Cunningham, Judy Jones, Cynthia Wade, Judy Gaines–Sloan, Gail Ausby, Christina Ikwuegbu, Francisca Osuji, Deidre Corley, George Tillman, Jr., Tamara Moore, Omayra Molina, Loucious Jones, Jenise Reedus, and Veronica Branch [1], Petitioners–Appellants,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK and Cami Anderson, State Superintendent of Schools, Respondents–Respondents.

DOCKET NO. A–5351–14T3
|
Argued September 12, 2017
|
Decided September 26, 2017

On appeal from the Commissioner of Education, Docket No. 225–8/14.

Attorneys and Law Firms

Robert T. Pickett argued the cause for appellants (Pickett & Craig, attorneys; Mr. Pickett, of counsel and on the briefs; Lauren M. Craig, on the briefs).

Daniel Schlein argued the cause for respondents (Adams Gutierrez & Lattiboudere, LLC, attorneys; Perry L. Lattiboudere, of counsel and on the brief; Mr. Schlein, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent Commissioner of Education (Jennifer Hoff, Deputy Attorney General, on the statement in lieu of brief).

Before Judges Yannotti, Carroll and Mawla.

Opinion

PER CURIAM

***1** On August 18, 2014, petitioners filed an administrative complaint challenging the implementation of the "One Newark Plan" by the State Operated School District for the City of Newark (SOSD). [2] They also alleged that the Newark public schools are unconstitutionally segregated on the basis of race, color, ancestry, and national origin. Petitioners appeal from a final decision of the New Jersey Commissioner of Education (Commissioner) dismissing the petition. We affirm.

I.

Petitioners include three individuals who are residents and taxpayers of Newark; four students who were attending Newark public high schools when the petition was filed; twelve individuals who were employed as teachers in Newark's school district at that time; and six parents with children who were then attending the Newark public schools. Petitioners named the SOSD and Cami Anderson, who was then superintendent of the SOSD, as respondents.

In their administrative action, petitioners challenged the implementation of the "One Newark Plan," which petitioners claimed had been developed behind closed doors and involved the district-wide restructuring of Newark's public schools. Among other things, the plan provided for the closure of certain neighborhood schools and the leasing of the vacant school facilities to organizations for the operation of charter schools.

In count two, petitioners allege that the plan violates the rights of Newark students to a thorough and efficient education, as guaranteed by the New Jersey Constitution. *N.J. Const.* art. VIII, § IV, ¶ 1. Petitioners allege that the plan would have a disproportionate impact upon the district's African–American and Hispanic students, as well as severely disadvantaged children in Newark. Petitioners claim that replacing public schools with charter schools would leave Newark's "neediest" students to languish in schools that are failing or less successful.

In count three, petitioners claim that the "One Newark Plan" violates the Charter School Program Act of 1995 (CSPA),

N.J.S.A. 18A:36A–1 to –18. Petitioners allege that under the plan, public schools would be converted to charter schools without compliance with *N.J.S.A.* 18A:36A–4(b). The statute permits a currently existing public school to become a charter school if at least fifty-one percent of the teaching staff and fifty-one percent of parents or guardians of pupils attending the school sign a petition supporting the conversion. *Ibid.* Petitioners allege that the SOSD was engaging in the "stealth conversion" of existing public schools by closing the schools and thereafter leasing the closed school buildings to organizations for the operation of charter schools.

***2** In count three, petitioners further allege that the plan violates the CSPA because it allows the SOSD to make final decisions as to the students who will be permitted to enroll in charter schools on the basis of a "sophisticated mathematic equation/algorithm." According to petitioners, such a student-selection process violates *N.J.S.A.* 18A:36–7 and *N.J.S.A.* 18A:36–8, which govern the charter-school enrollment process.

In addition, in count four, petitioners allege the plan "falls short of eradicating the corrosive segregated environment that pervades" the district. Petitioners assert that fifty-one percent of the students enrolled in the Newark public schools are African–American; forty percent are of Hispanic origin; and about eight percent are non-Hispanic whites. Petitioners claim that children who attend racially-segregated schools receive an education that is inferior to the education of children enrolled in predominantly-white suburban school districts in Essex County.

Petitioners assert that the alleged de facto racial segregation of the Newark schools violates the thorough and efficient clause of the State's Constitution, *N.J. Const.* art. VIII, § 4, ¶ 1, and the provision of the State Constitution that bars segregation of schools on the basis of race, color, ancestry, and national origin, *N.J. Const.* art. I, § 5.

In their request for relief, petitioners sought: an injunction enjoining the SOSD from further implementation of the "One Newark Plan"; to terminate all contracts with charter-school organizations that assume control of closed public school facilities; a declaration that the concentration of African–American and Hispanic children in the Newark school district is the result of de facto segregation, in violation of the New Jersey Constitution; establishment of a plan to eliminate the alleged unconstitutional de facto segregation of the Newark schools by creating a county-wide or region-wide school district, which would include the predominantly white Essex County suburban school districts; and other relief.

When they filed their petition, petitioners also filed an application for emergent relief. The Commissioner referred the matter to the Office of Administrative Law for proceedings before an Administrative Law Judge (ALJ). Petitioners later withdrew their request for emergent relief. In September 2014, the ALJ conducted a case management conference and expressed her concern that petitioners had not named certain indispensable parties, including the Commissioner and the State Board.

Thereafter, petitioners filed a motion to amend the petition to add the Commissioner and the State Board as respondents. However, in October 2014, petitioners withdrew that motion and elected to proceed only against the respondents named in the petition. Thereafter, respondents filed a motion to dismiss the petition on various grounds, and petitioners opposed the motion. In January 2015, the ALJ heard oral argument on the motion.

On April 28, 2015, the ALJ filed an initial decision granting the motion and dismissing the petition in its entirety. On June 15, 2015, the Commissioner issued a final decision dismissing the petition for the reasons stated by the ALJ. This appeal followed.

On appeal, petitioners argue: (1) the ALJ and the Commissioner failed to review the motion to dismiss in accordance with the established standard of review; (2) the ALJ erroneously found that the claims in counts two and three of the petition had not been timely filed; (3) they have standing to assert the claims in the petition; (4) the "One Newark Plan" violates the constitutional right of Newark students to a "thorough and efficient" education; (5) the "One Newark Plan" violates the CSPA; and (6) they were not required to join the Commissioner, State Board, or the predominantly-white Essex County suburban school districts as indispensable parties with regard to the claim of de facto segregation of the Newark public schools.

II.

***3** We first consider petitioners' contention that the ALJ and Commissioner failed to consider respondents' motion to dismiss under the appropriate standard of review. Petitioners

argue that the applicable standard is either the standard for a motion for involuntary dismissal of civil actions under *Rule* 4:37–2(b), or a motion for summary decision in administrative actions under *N.J.A.C.* 1:1–12.5(b). We disagree.

Here, respondents filed a motion to dismiss under *N.J.A.C.* 6A:3–1.5(g), which allows a party to file a motion to dismiss a petition in a dispute arising under the school laws in lieu of filing an answer. The motion is comparable to a motion under *Rule* 4:6–2(e) to dismiss a complaint in a civil action for failure to state a claim upon which relief can be granted.

When reviewing a *Rule* 4:6–2(e) motion, a court must determine the adequacy of the pleading and decide whether a cause of action is "suggested" by the facts. *Printing Mart–Morristown v. Sharp Elecs. Corp.*, 116 *N.J.* 739, 746 (1989) (quoting *Velantzas v. Colgate–Palmolive Co.*, 109 *N.J.* 189, 192 (1988)). The court 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, opportunity being given to amend if necessary." *Ibid.* (quoting *Di Cristofaro v. Laurel Grove Mem'l Park*, 43 *N.J. Super.* 244, 252 (App. Div. 1957)).

In ruling on the motion, the ALJ correctly applied the standard for dismissal based on the failure to state a claim in determining: (1) whether petitioners had standing to assert the claims in the complaint; (2) whether petitioners filed the claims in counts two and three within the time required; (3) whether petitioners stated a valid claim that the "One Newark Plan" violates *N.J.S.A.* 18A:36A–4(b); and (4) whether petitioners failed to name indispensable parties with regard to their claim that the plan violated the enrollment mandates for charter schools in the CSPA and the claim of de facto segregation of the Newark schools on the basis of race, color, ancestry, or national origin.

We reject petitioners' contention that the ALJ should have applied the standards set forth in *Rule* 4:37–2(b) when ruling on respondents' motion to dismiss. The court rule applies at trial in civil actions after the plaintiff has presented its evidence. *Ibid.* The rule allows the court to dismiss the complaint if, based upon a review of the facts and the law, "the plaintiff has shown no right to relief." *Ibid.* The standard for granting such a motion does not apply to a motion to dismiss a petition filed with the Commissioner under *N.J.A.C.* 6A:3–1.5(g).

We also reject petitioners' contention that respondents' motion to dismiss was essentially a motion for summary decision of an administrative action under *N.J.A.C.* 1:1–12.5(b). Petitioners argue that under that rule, summary decision may not be granted if there are genuine issues of material fact.

The summary decision rule does not, however, apply here. Respondents did not seek summary decision. They sought dismissal of the petition under *N.J.A.C.* 6A:3–1.5(g). As we have explained, the motion was the administrative equivalent to a motion to dismiss a civil action under *Rule* 4:6–2(e) for failure to state a claim upon which relief can be granted.

We therefore conclude that the ALJ and Commissioner applied the correct standard in ruling on respondents' motion to dismiss.

III.

***4** We next consider petitioners' argument that the ALJ erred by finding that the claims regarding the "One Newark Plan" in counts two and three of the petition were not filed within the time required by *N.J.A.C.* 6A:3–1.3(i). The rule provides that a petition of appeal to the Commissioner in a dispute arising under the school laws 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[.]" *Ibid.*

In her decision, the ALJ noted that counts two and three of the petition challenged the SOSD's implementation of the "One Newark Plan." The ALJ observed that the SOSD had announced on November 21, 2013, that it would be implementing the plan and the SOSD described the plan in detail. Moreover, on December 18, 2013, the SOSD publicly announced specifics of the plan. In addition, in February 2014, the SOSD issued a pamphlet, which again discussed details of the plan that would be implemented.

The ALJ and the Commissioner determined that at a minimum, petitioners should have filed the claims in counts two and three within ninety days after the SOSD issued the pamphlet about the plan in February 2014. The record supports that determination.

It is well established that the ninety-day-limitation period "provides a measure of repose" and it is "an essential element in the proper and efficient administration of the school laws."

Kaprow v. Bd. of Educ. of Berkeley Twp., 131 *N.J.* 572, 582 (1993). "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." *Ibid.*

We conclude that the ALJ and Commissioner correctly found that petitioners failed to assert their claims regarding implementation of the "One Newark Plan" within the time required by *N.J.A.C.* 6A:3–1.3(i). Therefore, the dismissal of the claims in counts two and three of the petition was proper.

IV.

Petitioners argue that the ALJ and Commissioner erred by dismissing the claims that the plan violated the CSPA. We disagree.

A. Closing of Schools/Leasing of Space for Charter Schools

Here, petitioners allege that the plan allowed for the "stealth conversion" of public schools without complying with *N.J.S.A.* 18A:36A–4(b). The statute provides in pertinent part that a district may convert a "currently existing public school" to a charter school if fifty-one percent of the school's teachers and fifty-one percent of the parents or guardians of students attending the school sign petitions approving the change. *Ibid.*

Petitioners allege that under the "One Newark Plan," the SOSD was closing certain public schools and then leasing the vacant space in those schools to organizations that would use the space to operate charter schools. Petitioners maintain that this provision of the plan represents an impermissible end-run around the process in the CSPA for converting existing public schools to charter schools.

However, as the ALJ and Commissioner recognized, a school district has the discretion to close a school that the district no longer requires for the education of students. Furthermore, the SOSD also has statutory authority to lease vacant space in school buildings to other persons or organizations. *N.J.S.A.* 18A:20–8.2. The ALJ and the Commissioner correctly found that because the SOSD was not converting a "currently existing public school" to a charter school, *N.J.S.A.* 18A:36A–4(b) did not apply.

***5** We will not set aside an administrative decision if it is consistent with the applicable law, supported by sufficient credible evidence in the record, and not arbitrary, capricious, or unreasonable. *Saccone v. Bd. of Trs. of Police & Firemen's Ret. Sys.*, 219 *N.J.* 369, 380 (2014). The ALJ and the Commissioner's determination that the SOSD was not engaged in the conversion of currently existing public schools to charter schools is consistent with the plain language of the statute and supported by sufficient credible evidence in the record. The decision is not arbitrary, capricious, or unreasonable.

B. Enrollment Plan for Charter Schools

Petitioners also claim that the "One Newark Plan" violated the CSPA because it includes an enrollment process for charter schools that violates the requirements of the CSPA. In support of this argument, petitioners cite *N.J.S.A.* 18A:36A–7, which states that charter schools shall "be open to all students on a space available basis." They also cite *N.J.S.A.* 18A:36A–8, which provides that charters must give preference to local students, priority to siblings, and enroll a cross section of the community's school-age population, "including racial and academic factors."

Petitioners argue that they alleged sufficient facts to show that the plan's enrollment process violates the enrollment mandates in the CSPA. The ALJ did not, however, address the merits of this claim. Instead, the ALJ decided that the claim could not be considered because petitioners failed to name indispensable parties.

An indispensable party is one who has "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., Inc. v. Marcalus Mfg. Co.*, 30 *N.J.* 290, 298 (1959). The ALJ stated that, "Under this standard, it is readily apparent that these affected 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."

The ALJ determined that without the participation of the unnamed charter schools, complete relief could not be granted. The Commissioner adopted the ALJ's findings and

conclusion on this issue. We conclude that the ALJ and the Commissioner correctly found that the unnamed charter schools whose enrollment processes were at issue were indispensable parties to the dispute.

These organizations clearly have a stake in the resolution of the claims regarding their enrollment plans. Because petitioners had not joined these organizations in the administrative action, the ALJ and the Commissioner correctly found that petitioners' claim regarding the charter school enrollment process in the "One Newark Plan" could not be considered.

We therefore conclude that in addition to correctly dismissing the claims in count three as untimely, the ALJ and the Commissioner correctly determined that the claim regarding the alleged violation of *N.J.S.A.* 18A:36A–4(b) failed as a matter of law, and the claim regarding the alleged unlawful enrollment plan for charter schools could not be considered because petitioners failed to name indispensable parties.

V.

Petitioners also claim that the "One Newark Plan" was a "feeble attempt to address and ameliorate" what petitioners allege is the de facto segregation of the Newark public schools on the basis of race, color, ancestry, and national origin. Petitioners allege that such de facto segregation violates the New Jersey Constitution.

***6** Among the other relief requested in this action, petitioners sought a remedial plan to address the alleged unconstitutional de facto segregation of the Newark public schools. They sought a mandate requiring the inclusion of predominantly-white Essex County suburban school districts within a county-wide or regional plan "that would effectively desegregate" the Newark public school system.

The ALJ dismissed this claim because petitioners failed to name indispensable parties, specifically, the Commissioner, the State Board, and the Essex County suburban school districts that would be affected by such a remedial order. The Commissioner adopted the ALJ's decision on this issue.

On appeal, petitioners argue that the Commissioner, State Board, and potentially-affected suburban school districts would not be indispensable parties until there has been a finding of unconstitutional de facto segregation of the Newark schools. We cannot agree. We affirm the dismissal of this claim substantially for the reasons stated by the ALJ in her initial decision, which was adopted by the Commissioner.

As the ALJ noted, the petition does not merely treat the Commissioner as a decision-maker. It asserts a claim against the Commissioner, alleging that the Commissioner has not met his statutory and constitutional obligation to desegregate the Newark public schools. Furthermore, it is well established that only the Commissioner has the power to "cross district lines to avoid 'segregation in fact.' " *Jenkins v. Morris Twp. Sch. Dist.*, 58 *N.J.* 483, 501 (1971) (quoting *Booker v. Bd. of Educ.*, 45 *N.J.* 161, 168 (1965)). Thus, the Commissioner is an indispensable party to any claim in which a party seeks a multi-district, remedial order addressing alleged de facto segregation of a district's schools.

We reject as entirely without merit any suggestion that the Commissioner's interest would only involve the remedy for the alleged de facto segregation of the Newark schools. Clearly, the Commissioner would have an interest in any findings of the relevant facts, as well as determining whether a remedy is required.

Moreover, the potentially-affected Essex County suburban school districts also are indispensable parties to the claim of de facto segregation of the Newark schools. As we have explained, petitioners are seeking to create a regional, county-wide school system that would include the suburban school districts in Essex County. As the ALJ stated in her decision:

> 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.*

We therefore conclude that the ALJ and the Commissioner correctly decided to dismiss the claim of de facto segregation because petitioners failed to name the Commissioner and the affected suburban school districts as indispensable parties.

For essentially the same reasons, the State Board should also have been named as a party.

***7** We note that in her decision, the ALJ found that only three petitioners had standing to raise claims that the "One Newark Plan" violated the right to a thorough and efficient education under the New Jersey Constitution. These petitioners were the parents of three students who had attended public schools that were closed under the "One Newark Plan."

The ALJ nevertheless found that these petitioners had not alleged specific facts to show that the education of the three students had been disrupted or otherwise impaired by their assignments to other schools. The ALJ therefore concluded that the claims relating to these three students were not justiciable because they would essentially require the Commissioner to render an advisory ruling.

In view of our decision affirming the dismissal of petitioners' claims on other grounds, we need not determine whether the other petitioners had standing to assert claims that the "One Newark Plan" violates the students' rights to a thorough and efficient education, or whether the claims of the three parents found to have standing are justiciable.

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2017 WL 4247539

Footnotes

1 We note that Veronica Branch was not listed in the caption, but she was identified as a party in the petition. Therefore, we have added her to the list of petitioners.

2 In 1995, the State Board of Education (State Board) authorized the removal of the Newark Board of Education and the creation of the SOSD. *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 113–14 (App. Div. 1995), *certif. denied*, 145 N.J. 372 (1996). On September 13, 2017, the State Board voted to begin the process for returning the Newark schools to local control.

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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; RANAYA ALSTON, a minor, by her Guardian Ad Litem, YVETTE ALSTON-JOHNSON; RAYAHN ALSTON, a minor, by his Guardian Ad Litem, YVETTE ALSTON-JOHNSON; ALAYSA 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; 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, Acting Commissioner, State Department of Education,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY
DOCKET NO. MER-L-001076-18

CIVIL ACTION

CERTIFICATION OF SERVICE

Defendants,

And

NEW JERSEY CHARTER SCHOOLS ASSOCIATION, INC., BELOVED COMMUNITY CHARTER SCHOOL, ANA MARIA DE LA ROCHE ARAQUE, TAFSHIR COSBY, DIANE GUTIERREZ

Intervenor-Defendants

MELISSA SCHAFFER, pursuant to Rule 1:4-4(b) and Rule 1:5-3, hereby certifies:

1. I am an Assistant Attorney General in the Division of Law, Department of Law and Public Safety, State of New Jersey. I represent the Defendants in the above-captioned matter.

2. On November 22, 2019, a copy of Defendants' notice of cross-motion to dismiss Plaintiffs' Amended Complaint, Brief in support of cross-motion and in opposition to Plaintiffs' motion for summary judgment, Proposed Form of Order, and, certification of service were served on the following via the court's electronic filing system:

Clerk of the Court
Superior Court of New Jersey
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Trenton, New Jersey 08650

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3. On the same date, one courtesy copy was sent to the chambers of the Honorable Marcy C. Jacobson, at the court's address listed above, and one copy was sent to all counsel of record via overnight mail at the address listed above.

4. I certify that the foregoing statements made by me are true to the best of my knowledge and belief. I am aware that if any of the foregoing statements made by me are willfully false I am subject to punishment.

By: /s Melissa Dutton Schaffer
Melissa Dutton Schaffer
Deputy Attorney General

Dated: November 22, 2019