SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MERCER COUNTY
Docket No. MER-L-001076-18

LATINO ACTION NETWORK, et al, Plaintiffs, vs. STATE OF NEW JERSEY, STATE BOARD OF EDUCATION, AND LAMONT REPOLLET, COMMISSIONER, DEPARTMENT OF EDUCATION, Defendants.	TRANSCRIPT OF MOTION

PLACE: Mercer County Courthouse
175 South Broad Street
Trenton, New Jersey
DATE: January 10, 2019

B E F O R E:

THE HONORABLE MARY C. JACOBSON, J.S.C.

Transcript Ordered By:

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I N D E X

(The following takes place at 10:36.)
THE COURT: Good morning, you may be seated.
Is this up-to-date?
SPEAKER: Yes, Judge, I asked.
THE COURT: Okay, so they're just no other appearances.
SPEAKER: I asked.
THE COURT: Okay. I see more people than names. That's --
This is the matter of Latino Action Network, et al, versus the State of New Jersey, the New Jersey State Board of Education, and the Commissioner of Education of the State of New Jersey, and with intervenor defendants New Jersey Charter Schools Association, Beloved Community Charter School and several charter school parents. It's docket number MER-L-1076-18.
If I could have the appearances for the record, starting with counsel for the plaintiff.
MR. LUSTBERG: Good morning, Your Honor. Lawrence S. Lustberg, Gibbons P.C., on behalf of the plaintiffs.
MR. NOVECK: Good morning, Your Honor. Michael Noveck from Gibbons also on behalf of

plaintiffs.
MR. PLAWKER: Good morning, Your Honor. Roger Plawker, Pashuan, Stein, Walder and Hayden, on behalf of the plaintiffs.
THE COURT: Okay. And for the State defendants.
MS. SCHAFFER: Good morning, Your Honor. Melissa Dutton Schaffer, Assistant Attorney General, on behalf of the State defendants.
MR. JOSEPHSON: Good morning, Your Honor. Paul Josephson on behalf of defendant intervenors.
THE COURT: Okay. This matter comes before the Court on the State defendants' cross motion which has been supported by the charter school intervenors to dismiss plaintiff's amended complaint, or in the alternative, to consider the defendant's procedural objections to the Court's considering plaintiff's motion for partial summary judgment as to liability at this time.
Plaintiffs' motion for partial summary judgment as to liability was filed back in September, on September 27th of 2019, asking the Court to find that the State defendants were liable for multiple constitutional and statutory violations that have allegedly resulted in extensive de facto segregation by

race, ethnicity and socioeconomic status in New Jersey public schools and charter schools.
In a previous discussion with counsel, the Court determined to hear the procedural objections before considering the motion for judgment on liability, so it's the procedural objections that we're going to hear about this morning, and since it's the State's motion, we'll turn first to counsel for the State defendants.
MS. SCHAFFER: Thank you, Your Honor. I'd like to begin this morning by reinforcing that the State emphatically agrees that racial discrimination and segregation have no place in our public schools, and we wholeheartedly believe that a diverse student body is a critical factor in providing a high quality learning environment for all New Jersey students.
But plaintiff's theory in advancing this lawsuit and the manner in which they have pled their claims is so defective that the amended complaint should be dismissed. At the very least, their motion for summary judgment must be denied because bifurcation is not appropriate here and no discovery has yet been exchanged.
The State defendants seek relief today on three procedural grounds. First and most importantly,

because plaintiffs have pled a state-wide cause of action, the action cannot continue without the participation of each of the State's individual school districts who have a real and substantial interest in the disposition of this case. Under our court rules, joinder of the districts here is not discretionary, but mandatory.

Second, rendering partial summary judgment on the issue of liability alone is not appropriate in this case. Determining the State's liability for a constitutional violation in a vacuum without consideration of the availability and the feasibility of remedies would not only be a misuse of judicial resources, but would deprive the Court of the consideration of a robust record necessary for the disposition of a case of this magnitude.

Finally, at the very minimum, plaintiff's motion for partial summary judgment is premature, as the parties have not even commenced let alone completed discovery. Without the opportunity for discovery, the State is severely prejudiced in its defense of the claims, and the Court is left without a complete factual record.

Unless the Court prefers otherwise, I'll begin with the issues of joinder.

THE COURT: That's fine.

MS. SCHAFFER: Under Rule 4:28-1, the districts must be joined as parties here because they have an indisputable interest in the disposition of this case.

By design, plaintiff's amended complaint calls into question the entire system of public education throughout the State. For that reason, each individual school district has a direct and significant interest in how the case is adjudicated. Depriving them of the right to protect and defend that interest is contrary to the principle served by the joinder rule.

THE COURT: I know that your adversary has cited a number of cases, but including the Abbott v. Burke, Robinson v. Cahill, the school funding cases, the school districts were not required to be parties in those cases, and in many constitutional cases where the challenge is to state statutes, which is really one of the main aims of this is to invalidate certain residency requirements for public schools being bound by municipal boundaries, the courts have not required all affected districts to be, you know, to be included.

So, I mean, why here? Why is this different?

MS. SCHAFFER: So I think the distinction is in many of the cases relied on by plaintiffs, particularly Booker, Jenkins, and those lines of cases, the procedural posture of those cases by the time they got to the Court was very distinct than the procedural posture here, where those cases began before the Commissioner of Education where the districts were the parties at issue. And in addition to being parties, there was a very robust record developed before the commissioner so that before there was a determination of the constitutional violation or, you know, the issues at hand, the districts were, in fact, involved in those matters and were able to --

THE COURT: But those were single district or sending-receiving relationship situations. They weren't state-wide challenges, and so, I mean, in that sense, it is different. And certainly, Abbott, I mean, at times, I think there certainly was -- there were proceedings before the commissioner, but even going back to Robinson, it was the trial court that decided that in the first instance.

So there are many examples of constitutional challenges where millions of people can be affected, but they're not required because they have some interest to be an indispensable party. So, again,

I don't quite understand why it would be necessary here.

MS. SCHAFFER: So the distinction is that because the plaintiffs here have brought this state-wide action, and have alleged that because of what the State has done, the results of that have been a depravation of constitutional rights throughout the State. And I think Your Honor raises a very important distinction in those other cases in that we were dealing with very discreet districts where the problems were brought, you know, in a manner that was contained before the commissioner on either send-receive or consolidation, regionalization.

Here, what plaintiffs are alleging is that the entire system of public education is unconstitutionally segregated, and so the difference is that the districts here have a real and direct interest in how that case is decided. Because even if the ultimate issue of liability is a judgment against the State, in essence it becomes a judgment against the districts as well. Because any judgment finding that there's been segregation in the schools would be premised directly upon the composition of the school districts themselves.

And so they absolutely have an interest in

the initial determination of liability. More important --

THE COURT: Well, you know what? They have an interest. I guess it's whether or not they're indispensable. I mean, the particular claims here go to the State statutes that define school district by municipal boundary. And so no local district can affect, you know, affect that, you know, that circumstance. Whereas the commissioner, the argument is, the commissioner and the State board have broad powers as recognized in Booker, Jenkins, North Haledon and so forth. They have broad powers to, you know, to enforce constitutional standards on a state-wide basis.

And since the individual districts don't, there's -- they don't have to be part of the, you know, of the litigation that's not seeking relief against them. I mean, that's their argument, but there is no statutory basis for the districts themselves to go beyond the district boundaries unless they are in a sending-receiving relationship or regional, all done under state statutes.

MS. SCHAFFER: Right -- well, so initially, nor can the commissioner do that as well. I mean, the commissioner is also bound by the current statutory framework within Title 18A. But --

THE COURT: Well, that's what they're challenging, exactly what they're challenging. And so they're saying if anyone can remedy it -- I mean, they're asking the Court to expand the power of the commissioner beyond what you -- I mean, what you say are its limitations.

I mean, you haven't gotten in -- you haven't deposed their motion for partial summary judgment because we're doing this first, but you have denied the -- you know, you filed an answer in which you have denied the -- their claims.

MS. SCHAFFER: Yes, yes.

THE COURT: But anyway, that's the context of all this.

MS. SCHAFFER: Yes, and I think that the -- a couple things. So I think plaintiff's position that the State and the commissioner alone, because the commissioner has the ability to impose regulations on the district, that that suffices here, because any judgment can direct the commissioner to take care of whatever -- you know, to remedy the situation and then impose that on the district.

But I think that that position misconstrues the degree of the authority that the commissioner has over the districts. While the State agrees that the

commissioner enjoys broad powers and broad authority over the districts, the districts themselves are, are separate sue-and-be-sued entities. They have very unique and discreet interests, characteristics, demographics that the State is not in a position to articulate on their behalf.

And so the issue -- the State's joinder rule doesn't just look at whether or not the relief can be accorded among the existing parties. Our joinder rule goes further and requires that there need -- the parties must be joined if they have a substantial interest in the subject and are so situated that the disposition of the action in their absence as a practical matter can impede or impair their ability to protect their interests or leave the existing parties to the substantial risk of further litigation.

And that's really the prong that the State is relying on there, that second aspect where the districts have such an interest and are so situated that the disposition of this absence can in a practical matter impede their ability to protect their interests moving on.

So what the plaintiffs are asking the Court to do is lead the districts out of the case, not -- deny them party status on the issue of liability, have

the Court determine that there's been constitutional violations, and then impose things upon the districts without ever allowing them to have an opportunity to present as a party what they feel is important for the Court to consider --

THE COURT: Well, I mean that --

MS. SCHAFFER: -- on that ultimate issue of liability.

THE COURT: Well, I mean that, that your adversary says that's speculative at this point. I mean, what they're asking, I think, in terms of remedy generally is that if liability is found, the Court refer to the commissioner, so the commissioner has the power and obligation, if liability were to be found, to work with the districts, although the commissioner has the ultimate, you know, the ultimate, would have the ultimate responsibility.

So I don't know that they would -- it's not clear that they would not be invited to, you know, to participate.

MS. SCHAFFER: But by the time -- so there's -- so I think, number one, there's a distinction between participation and party status, because the participation in the remedy phase, you know, they're sort of left with whatever the Court has

determined the liability on, and will only then be involved in what appropriate remedies, you know, the feasibility of remedies at that point.

THE COURT: Yeah, I mean, they haven't come in though. I mean, we have the Charter School Association that has come in to participate as a defendant and to file an answer denying the claims of the plaintiffs in regard to segregation at the charter schools. We don't have any school district that's done that.

MS. SCHAFFER: That's right, and they very well may not at this juncture have determined to move to intervene. But the standard for joinder is not discretionary. Intervention, you know, leaves it to the parties and the Court and the interested entities that want to participate.

But joinder is not about whether it's up to the parties or the potential parties or those that should be named as parties. It's a mandatory rule that if there is an identification of a person or entity that must be a party to the case, then the Court is, is required to join them.

And here, if I could just loop back to my response to Your Honor's first question, which is why is it not enough for them to participate in the

remedy -- excuse me, the remedy phase is because -- and this, again, sort of gets into the second point on bifurcation, because all of these issues are so intertwined, but the idea that the districts can come in and be heard at the remedy phase ignores the fact that remedy and feasibility of remedy, availability of remedy, district resources, you know, funding issues, that all of those aspects must be considered together with the strict issues of liability under the law, and that they will inform the Court as to the degree of liability on each of the separate counts, on all of the counts, and because of the inextricability of the issues of liability and remedy, that is even more reason why the districts have such a substantial interest here.

THE COURT: Can you play it out for me? Because, I mean, it's said -- you say that over and over and over in your brief, but I'm trying to get a practical sense of what it means, because as your adversary points out, you know, Booker found de facto segregation, and even though it came up from the commissioner to the, you know, to the appellate court, causation was not considered, you know, and you know, some of the other cases, you know, Jenkins, it's -- they were focused on de facto segregation also, not on

causation, and they found liability in the absence of causation. So why wouldn't that be an appropriate framework for this case, which is also claiming de facto segregation?

MS. SCHAFFER: So setting aside the argument as to whether or not causation still must be considered with de facto segregation, what Booker and Jenkins and the rest of the line of cases did acknowledge is that even if they didn't look to the cause of the de facto segregation that they still considered the feasibility and reasonability of remedies.

Booker acknowledged that the right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps insofar as reasonably feasible to alleviate racial imbalance.

THE COURT: But that was to be done -- I mean, they had several plans they were looking at in Booker, but it didn't interfere with the finding of liability. I mean, it didn't seem to be linked in the way that you're saying it is necessarily linked in this case.

MS. SCHAFFER: But they were linked because by the time the Court made those findings, it had the

record before it. So when the Court acknowledged that, it was in the context of everything that had been presented by the districts, expert reports, you know, testimony, I mean, there was a record there.

And even if the issue of de facto segregation wasn't necessarily premised on all that, the Court heard everything holistically together, because you cannot extract the two from each other because there needs to be a consideration of the entire picture, particularly when you're dealing with a situation where it calls into question the entire system of public education throughout the State.

I mean, this case is very unique and different than all of the other cases that the plaintiffs have relied on in their briefs, and I think that's a very critical and important distinction here. And it's even more of a reason why the Court needs a full record and the context of everything that was going on in order to holistically decide liability and remedy.

THE COURT: Okay. And we sort of -- we've gotten -- I mean, it's sometimes hard to --

MS. SCHAFFER: Because they're so intertwined, yes, yes.

THE COURT: Well, I mean it's hard for

one -- some of the arguments certainly overlap. Is there anything else you want to say about indispensable parties?

MS. SCHAFFER: Yes, Your Honor. So I want to just stress that, again, you know, I think -- I think I made the point, but just to reiterate that, you know, again, the commissioner's ability to impose certain remedies on the district is a very different situation than the districts being able to participate fully as a party in the entire process here.

And the other, the other thing I just wanted to stress is circling back to the final prong of the joinder rule which talks about in the absence of the party, if it leads the existing party subject -- if it leaves the existing party subject to a substantial risk of multiple litigation down the road.

So if the districts are not able to participate fully as parties in this case, and there is ultimately remedies imposed upon them without having consideration, whatever it is that they think is important, the potential there, and the risk there for multiple lawsuits against the State in both, you know, the executive branch through the commissioner and also in the Law Division and Chancery Division of the Superior Court. I mean, there could be endless numbers

of challenges having to do with taxpayer rights, having to do with other constitutional rights that could potentially have been violated as a result of the remedy. And --

THE COURT: Well, the taxpayer rights, I mean the school district -- I mean, bringing the school districts in, I mean, they don't levy the taxes.

MS. SCHAFFER: So I misspoke.

THE COURT: I mean, the municipality --

MS. SCHAFFER: Not taxpayer rights, but the municipalities coming in or the school districts coming in and arguing because of the tax consequences or funding issues or --

THE COURT: Right, but I mean you're not saying we have to name every municipality.

MS. SCHAFFER: No, no, we are not suggesting that, Your Honor. Just the districts.

THE COURT: Okay. All right.

MS. SCHAFFER: But those types of lawsuits, you know, the State is at risk and the judicial system is at risk of having to adjudicate, you know, potentially hundreds of cases down the road. And for, you know, judicial economy and the idea of having a holistic adjudication of these matters is, you know, always in favor of having, you know, of indicating that

the mandatory joinder rule has been met here.
THE COURT: Despite how unwieldy it could be.
MS. SCHAFFER: And the State acknowledges that, you know, this is not -- calling in 585 additional parties, the State acknowledges that that is a huge undertaking and is not ignorant of what that would mean for this case. But again, that is what we're left with because of the way that the plaintiffs have pled this case.
If their complaint was pled differently and focused on the, you know, particular districts whose, you know, rights have been violated by the State in some way, then we'd be talking about something very different, and we could potentially limit. But what the complaint looks like now, there's no way around the necessity for all 585 districts.
THE COURT: Okay.
MS. SCHAFFER: Okay. So then moving on to the issue of bifurcation, so while Rule 4:46-2, which the plaintiffs rely on, permits partial summary judgments, the rule does not speak to the question which is really at issue here, and that is does it serve, does bifurcation serve the interest of justice or efficiency -- does it serve the interest of justice

or efficiency to sever the issues of liability from remedy here. And the State feels very strongly that it absolutely does not. In fact, it does the opposite.
And we suggest that the Court should look to the standards in 4:38-2. It talks about separation of liability and damages or liability and remedy in terms of how cases can be tried. And there the Court looks to issues of confusion and time efficiency. And neither one of those principles would be served if those issues were severed here.
And rather than avoiding confusion, severance of those issues would actually cause confusion here. You know, the Court -- our Supreme Court has recognized that where issues of liability and damages are so intertwined that considering them separately would taint the potential ultimate decision on liability, it should not be severed.
THE COURT: I mean, some of those cases, you know, deal with, you know, tort cases --
MS. SCHAFFER: Yes, yes.
THE COURT: -- for example. And where the causation is in question -- some of them are medical malpractice cases, you know, was it this specialist, was it another specialist, was it the negligence of the hospital, was it the ambulance being delayed or not

responding in time. I mean, it could be a whole host of people in terms of causation, and I don't know that we have that.

I mean, I understand the case law says what you say it says, but how do you -- how do you -- how do you bring those concepts into the setting, you know, that we have, you know, the context --

MS. SCHAFFER: Sure.

THE COURT: -- that we face here.

MS. SCHAFFER: I think that the same principles would apply in this case, because trying to decide the issue of liability in a vacuum, particularly based on the --

THE COURT: Now you say "vacuum." Okay. There are undisputed statistics, so in that sense, there's no vacuum. And so it's been unclear to me --

MS. SCHAFFER: Uh-hum.

THE COURT: -- and I think bifurcation spills over into the discovery, it's been unclear to me what else you say is necessary, because we have this -- we have the statistics. You know, it's not -- you know, it's somewhat unusual to have all the statistics agreed to by the parties, but frankly, the plaintiffs expert used all the Department of Education statistics.

MS. SCHAFFER: Yeah.

THE COURT: So it's not a vacuum in that sense.

MS. SCHAFFER: Uh-hum.

THE COURT: What's been put before me in the motion for liability by plaintiffs is their expert certification explaining how he got to the assertions, I think, that are the basis for the amended complaint.

So, you know, so we have that. So when you say vacuum, vacuum, vacuum, I'm not sure what you are going to produce. And even though you've seen their certifications since the end of September and the amended complaint, you know, for what, a couple of years, I don't know what it is you are going to have your expert say. I mean even general topics, I don't know.

And the brief was vague other than to say you want the opportunity for expert, expert discovery. The reply brief had a little bit more, but part of it was we want you to look at causation, so maybe you can flush it out for me.

MS. SCHAFFER: Sure. So, okay, it's hard to stand here today and say exactly what our experts would say because we have, because we were sort of provided with this motion without having notice that they have even retained this expert, without having the

expert be identified or have any idea what the expert was going to suggest.

And so, you know, at a minimum, the State has, has a right to consult with and retain experts that would be able to offer potentially -- and again, I don't know, this is sort of crossing over a little bit into the merits, which I'm really careful not to do today, but that could potentially say that the data that has been presented by itself, you know, doesn't necessarily equal constitutional violation. And it doesn't equal constitutional violation for these reasons.

And we have not been -- you know, we have not had the opportunity to do that. And again, it's the reasons that are lacking here. And when I say the bifurcation between liability and remedy, I think there's two, two concepts of remedy that kind of maybe we're interchanging, and one is that once there's been a finding that there's been a violation of the Constitution, you know, there can be a directive for the State to remedy the problem.

But in order to find liability, there also has to be consideration of the context of this raw data. And maybe at the end of the day the raw data is what it is. But the State has not had an opportunity

to present what it feels the Court should be considering in making that call.

And if there is a different way to receive the data and if there's -- you know, the plaintiffs have only given the Court what they believe the Court needs to make the determination, and the State -- you know, whether or not, again, staying away from the merits, whether or not that does satisfy an equal constitutional violation, we don't know. But the reason why it can't be decided at this stage is because the Court needs to have all of the relevant information. Even if after considering it --

THE COURT: I guess I'm just struggling as to what that might be even in categories.

MS. SCHAFFER: Yeah, okay. So categories would be --

THE COURT: That's -- I mean, that's something concrete. I know you don't have -- you have not identified an expert. You have a lot of experts at the Department of Education you could have been talking to.

MS. SCHAFFER: Right.

THE COURT: But I just was trying to get something more concrete. So you want statistics and data, I mean --

MS. SCHAFFER: So --
THE COURT: -- certainly can be interpreted differently by different parties. I mean, the certification of Mr. Coughlan goes in great detail as to how he tried to remove any discretion, and he explained how he utilized the statistics. I mean, some of them are -- I think he went back to the 2010 census, because the 2020 census hasn't been taken yet, and he wasn't comfortable with the American Community Survey, you know, I don't know if it's annual updates or whatever.
MS. SCHAFFER: Uh-hum.
THE COURT: But he then did extrapolate to address concerns about whether or not the years since he looked at the data would change -- have much of an impact on his conclusions. And he has given an opinion that no, there would not be much of an impact on his conclusions.
Is that the kind of thing that you want to --
MS. SCHAFFER: Absolutely.
THE COURT: -- have an expert take a look at?
MS. SCHAFFER: Absolutely, absolutely, Your Honor. And that's just one example.

THE COURT: Okay, give me some more.
MS. SCHAFFER: So other examples -- I mean, we -- so defendants don't have a right to even issue contention interrogatories. I mean, when you look at the amended complaint, there is still so many -- I mean, we're entitled to ask very specific questions about what they're alleging, because some aspects of their amended complaint are still so vague, it's somewhat unclear exactly what they're suggesting. So we're --
THE COURT: Well, can you give me some examples with that? I mean, as to remedy, it is definitely unclear, but not so much -- I mean, as to liability, they're focusing on the statutes that require school attendance within municipal boundaries, because the -- you know, you have quite a number of schools, and they've laid it out in their complaint that are overwhelmingly minority, 90 percent or more, some 99 percent or more.
So, I mean, that's, you know, that's what they've highlighted.
MS. SCHAFFER: So, for example, what is still unclear though is are they suggesting that that statute should be, you know, is unconstitutional as to every district in the state, that that statute results

in unconstitutional segregation in every school district? Are they arguing that that statute is only unconstitutional as to the certain districts that they have indicated are allegedly segregated? Are they suggesting that the statute should be struck down in its entirety? Are they suggesting that the statute should somehow be applied in a manner that -- that the statute can stay, but will be applied in a manner that is constitutional? All of those things are unclear.

They also reference other, you know, sort of state conditions. I can't even say state action, but conditions of the State such as housing patterns and things like that that have contributed and led to de facto segregation. But it's unclear if they're challenging the housing statutes, or if they're just saying that the condition of segregation in school constitutes, you know, the State's violation of the Constitution. So there's --

THE COURT: And is there anything -- you know, I mean, it is a broad-based challenge, and it also seeks, you know, makes claims about socioeconomic status, and I don't know what the research is on socioeconomic status.

MS. SCHAFFER: And there hasn't been any, you know, put forth by plaintiffs other than, again,

the data about how many students meet the particular standard, but --

THE COURT: And in terms of constitutional concerns, we have Booker and Jenkins, but in the school setting, is there, you know, has socioeconomic status been identified as an equivalent certain or basis for segregation in New Jersey case law?

MS. SCHAFFER: Not that I'm aware of. I mean, the Abbott line of cases certainly deals with the socioeconomic status of students and indicates that the level of socioeconomic status in certain districts can impede their ability to receive a thorough and sufficient education, which has been remedied through the Abbott remedies of resources and things of that nature.

But there's no case law in New Jersey that suggests that socioeconomic status in school districts, like, you know, a percentage of lower income -- excuse me -- students in particular districts equals a constitutional violation.

THE COURT: And is that another reason that you need to have discovery?

MS. SCHAFFER: Absolutely, because that's not something that we -- that the State would be able to respond to purely on the law. I mean, again, we

would have to have experts to opine on that to educate the Court on the issues and be able to have, you know, a full record developed on those issues. It's not just whether or not case law exists. It's what the research is. You know, we have -- we need the opportunity to have an expert present that, have an expert report, engage in full and robust, you know, depositions, I mean all of that, particularly in a case of this magnitude, Your Honor.

THE COURT: Okay. In terms of discovery, we sort of hit on it.

MS. SCHAFFER: Yeah.

THE COURT: And but, you know, the Court rules allow summary, or partial summary judgment to be brought early in the process. Often, the same objection that you've raised is raised when that happens, and that is that we need discovery. But I guess I've been pushing, pressuring -- you know, pressing you in terms of the bifurcation as to what discovery you need, because the case law, you know, says you can't just say we want discovery --

MS. SCHAFFER: Right.

THE COURT: You have to explain what that is, and it seems like, at least in terms of bifurcation, you've been telling me the kinds of

discovery that you need and that you think is warranted here. Is there anything you want to add to that?

MS. SCHAFFER: Just that, again, you know, because of the fact that we also feel strongly that the districts are mandatory parties here, there would be discovery that we would want to get from the districts regarding, you know, additional data, additional, you know, potentially test scores, you know, whatever, you know, whatever their policies are, particular individual policies within the schools. You know, we have the right to explore all of that sort of potentially relevant information with the districts as well and the charter school defendants.

So it's not just what discovery we need from plaintiffs, but there's other discovery that we need from other parties in this case so that the record can be fully developed here.

THE COURT: Okay. Anything else? I'll give you a chance to respond after we hear from plaintiff's counsel. Anything else you want to say now?

MS. SCHAFFER: Not at this time, Your Honor. Thank you.

THE COURT: Okay. We'll hear from Mr. Josephson as to the charter school issues. Are you

arguing for the --
MR. JOSEPHSON: I'd like to defer to my colleague, Miss Scruggs to speak to the charter school issues, Your Honor.
THE COURT: Okay. You know, she didn't sign the sign-in sheet.
MR. JOSEPHSON: I'm sorry, Your Honor.
THE COURT: That's okay. You were the one, I think, that filed the briefs.
MR. JOSEPHSON: Yes.
THE COURT: Okay. Has she made a notice of appearance?
MR. JOSEPHSON: We have, and we signed the pro hac order for her, Your Honor.
THE COURT: Yeah, okay. I just couldn't recall.
MS. SCRUGGS: Thank you, Your Honor. Again, my name is Lisa Scruggs. I'm with Duane Morris on behalf of the intervenors, and we submitted a letter brief with -- and a reply letter brief to lay out our procedural objections as well.
I just wanted to highlight a little bit more on the last question you were discussing with the State defendants' counsel on what kind of discovery would be needed. We believe that on the charter school

(indiscernible) particular, this whole question with regard to segregative effect is specifically brought to the fore and is required, required some additional discovery.
So in addition to wanting to depose the expert that's been identified by the plaintiff, we would also be looking to, to discover additional evidence around the existing studies and research and case law around segregative effect of charter schools in New Jersey.
We believe that we would want to present our own expert on that subject to provide the Court with additional information regarding whether the commissioner has been meeting that obligation to examine segregative effect when charter schools are established, but in addition to that, look at other studies that have been conducted around this question.
THE COURT: Yeah, I mean it's required that he look at the segregative effect. I mean, certainly, what is it, the Engelwood and Clifton Charter School cases, the Supreme Court has certainly said it, and I think the commissioner as part of the -- it's part of the process of review of charter schools.
MS. SCRUGGS: Correct. When reviewing establishment of charter schools, the maintenance or

renewal of them, that is a question that is, that the commissioner is required to examine. And there appears to be the allegation that that part of what is not happening is a significant examination of that.

THE COURT: Well, I know they're looking, too, at the fact that the statutory and regulatory scheme gives priority to students who live in the district, and that in the school district where the charter is located, so the fact that the vast majority of charter schools are located in urban areas, they have statistics that show many of those charter schools have, you know, very high percentage of minority students.

MS. SCRUGGS: And certainly, the statistics that are shown with regard to charter schools are not dissimilar from what you see in some of the districts. I think one of the things that we would want to point out and would further press as part of the discovery process is the kind of cherry picking that happened with regard to the certification presented by plaintiff's experts. Because in addition to having the districts that you talk about, the public charter schools that you talk about that are located in areas and communities that are overwhelmingly racially isolated, and so the schools that are there tend to

reflect that racial isolation, you also, though, have public charter schools who are specifically designed and utilize benefits embedded into the charter law to be diverse. They're specific designed schools that are called intentionally diverse or diverse by design charter schools that utilize some of the pieces of the charter law that provide that autonomy to pull from multiple school districts, and of course, that is additional evidence that we would want to explore as part of the discovery process and present that evidence to the Court.

THE COURT: Okay, thank you.

We'll hear from Mr. Lustberg.

MR. LUSTBERG: Thank you. Judge, I'm going to step to the podium just because I have a little cold.

THE COURT: You're always welcome. Wherever counsel is more comfortable is fine with me.

MR. LUSTBERG: Thank you, Your Honor. So, no matter how important a case is, and this is a very important case, we have to go back to the rules, and to the specific language of the rules.

And so with regard initially to indispensable parties, I'd really like to direct Your Honor's attention to the rule upon which the State

relies in moving -- and let's be clear what they're moving for, in moving to dismiss our case.

They cite and rely upon Rule 4:28-1, but Rule 4:28-1 by its terms provides that a -- specifically provides that if a person is subject to service and meets the criteria of the rule, they shall be joined as a party to the action, that a dismissal is only appropriate under the terms of that rule when that party cannot be served. That language could, literally could not be clearer.

4:28-1a, persons to be joined if feasible. A person who is subject to service of process -- and for purposes of this discussion, Your Honor, a person would refer to the districts, right? A person who is subject to service of process shall be joined as a party to the action if, in the person's absence, complete relief cannot be accorded among those already parties; or two, the person claims an interest in the subject of the action and so forth.

But let's -- and I'll come back to each of those two criteria. But let's -- just for purposes of this discussion, the relief that they seek is dismissal. The relief that the rule provides is mandatory joinder.

And so their motion as it's phrased, at

least, has to be denied unless the Court were to find under 4:28-1b that a person who should be joined pursuant to A can't be served with process, and then there's other criteria that are required, even under those circumstances, which, by the way, are not applicable either.

But so in the first instance, the motion to dismiss is, you know, not -- no insult to my friend Ms. Schaffer, but it's frivolous. There's no basis that they've set forth to dismiss the action, which is the relief that they seek, absolutely none.

So then let's go to what I guess they're really asking for, which is the mandatory joinder of 588 school districts in this matter. And there, too, I would respectfully refer the Court to the language of the rule.

So the language of the rule under 4:28-1 says this: A person who is subject to service -- so let's assume that the districts are -- shall be joined as a party to the action if: One, in the person's absence, complete relief cannot be accorded among those already parties.

Respectfully, they have not shown how the relief that we seek cannot be -- cannot be accorded among those already parties. We have sought relief

against the State.

As Your Honor has pointed out, we rely upon state constitutional provisions and state statutory provisions. We have sued state defendants. Our argument is -- and it's an argument that at least at one point, the State seemed to agree with us on, although they've changed their mind on that -- that the, that only the State can provide. It's only the commissioner who has the power and the authority and the obligation to remedy and to prevent the segregation of the sort that we have, that is the basis of our complaint.

So there's no question that at the end of this case, an order could be entered that would provide for complete relief as between those parties. But there's another alternative, and this was -- this is the alternative that the State seems to be focused on. When I say seems to be focused on, the very first sentence of Miss Schaffer's presentation was today that the districts have an indisputable interest, is what she said, in this matter. And we agree.

The districts absolutely will be affected by the remedy in this case. Most of what's in their brief with regard to the interest of the districts, the fact that they will be impacted in some way by -- at

the remedial phase of this case, we take no issue with whatsoever.

But let's look again at the language of the rule. That prong says the person claims -- the person, that is the districts claim an interest in the subject of the action. Well, the one thing this Court for sure does not have before it is any claim by any district. That does not exist.

And this case, respectfully, Judge, has been around now for a while, and at no time have a number of things happened. At no time, unlike the charter schools, has a single district moved to intervene based upon, particularly, the Court's ruling with regard to the charter schools last time, where it broadly construed what an interest has to -- should -- it is for purposes of intervention. It was sort of an open invitation for any district who wanted to intervene. In fact, Your Honor said that to us. You said, you know, you've -- you know, you have to live with the fact, plaintiffs, that you've brought a state-wide action. And so any of these districts could intervene.

Even with that clearly stated, open invitation, not one district has come forward, and in its brief, the State says, well, you know, there's

financial considerations and so forth and so on. There may be reasons why certain districts might not want to intervene. But not one to come forward? It's really a remarkable position.

And the State says it's irrelevant, but it isn't irrelevant under the rule. Because under the rule, the districts have to make that claim. So with regard to mandatory joinder, it simply hasn't happened.

There's a second thing that hasn't happened. If the State feels that they -- that it's the district's fault that any of this has occurred, then the State has had every ability to file third party complaints against the relevant districts. They haven't done that either.

And then the third thing --

THE COURT: I mean, I think in their -- I don't know, was it the reply brief where they do say that the districts share responsibility. I think I saw that.

MR. LUSTBERG: Correct, Your Honor. I mean, they -- that's sort of their position. But at the same time, if they think that, then their view would be -- and this happens in litigation, this Court knows better than anybody -- this happens in litigation all the time, that a defendant gets sued and they say

you know what, it's really not my fault. It's somebody else's fault. And what do they do? They bring them into the case. They file a third party complaint. They could have done that. The State hasn't done that either. They have not brought in a single district.

And respectfully, they haven't done that for a good reason. Because this, what has occurred here is their responsibility. It is their responsibility to prevent segregation. It is not only within the broad, general powers of the commissioner and the state board of education of the State to do it, but as we've pointed out in the cases, some of which Your Honor referenced earlier, it is specifically the power of those, of the commissioner in the Department of Education and the State, and the Board of Education, to employ those remedies. They're the ones who can do it. And so that's why no district has been brought in. This is no coincidence.

And the charter schools obviously felt that they wanted to come in. They did. The Court allowed it. A district could do that.

Here's the third thing that hasn't happened in addition to the fact there's been no third party complaint and no motion to intervene. And we pointed this out in our brief, which is when the State

answered, they were obligated by Rule 4:5-1, if it really meant it, to quote, disclose in a certification the names of any non-parties who shall be joined in the action pursuant to Rule 4:28, the very rule upon which they rely here. They filed an answer, and they did not, as they are required to do by the rules of this Court no matter how important the case is, to include that pleading.

So in the absence of a motion to intervene, in the absence of a third party complaint, in the absence of the simple -- and they could easily have listed those districts that they thought were indispensable parties under 4:28. They haven't done it. This motion should be denied. There is literally no basis for it. And there's really no basis for it because of the fundamental nature of the case we brought.

Your Honor has emphasized this to me in this and other cases, that plaintiff gets to decide who to sue. And the law is pretty clear that it -- that we don't have to sue those people who we don't want to sue unless these very, very strict requirements are met. And they haven't been met here, and so accordingly, respectfully, their -- the State's motion to dismiss, for sure, and to join parties should be denied.

Let me just add one other thing with regard to that, and I won't beat this dead horse. Which is it does matter that adding 588 districts would make this matter unwieldy. We get into this a little bit in our brief, but there's a little bit of history here. The Cogdell case, which the State really relies on tremendously, was provided for not only -- for mandatory party joinder.

In Olds v. Donnelly, the Supreme Court rolled that back. And in rolling it back, they said they were doing that because the notion of mandatory party joinder, precisely what the State is asking for here, would "complicate, prolong and increase the cost of litigation."

It has followed, and in the case law, it has followed, that those are legitimate considerations for a court like Your Honor to consider in deciding whether to mandate joinder of certain parties. That matter is something that is within your discretion.

But those factors are important ones, and in this case, respectfully, unwieldy would only begin to describe what would happen. I mean, I'm not sure there's a court -- I'm not sure this courtroom or any other courtroom in the state could accommodate a case with 588 individual districts.

But let's be clear. That's what they've asked for. Now, they say, well, that's your fault, because you did a -- you know, you brought a state-wide case.

We brought a state-wide case because it's the State that's responsible for the problem, it's the State that's empowered to address the problem, and it's the State that if and when we get to a remedial phase, should propose, along with us -- and the Court may have to order it -- an appropriate relief.

That's what this case is about. And let me again say, as we said in our brief, that at that stage, there is no doubt that districts may be impacted to such an extent that they wish to participate. And while, of course, we can't gaze into our crystal balls and say exactly how we would respond to every single application that could be made, based upon the law of the case, this Court's ruling with regard to the charter schools, I think, would be very difficult for us to oppose the participation of a district whose interests would be impacted. Because to go back to my very first sentence, and then I'll shut up on this point, the -- we do not dispute that districts will be affected, but the law is clear. The mere fact that somebody will be affected -- and we've cited those

cases to the Court -- does not mean that they must be joined.

Imagine what our legal system would be like if that was the case. Courts like Your Honor enter rulings all the time that have broad impact. Think about how our system would bog down if in every case every single person had to be identified or every single entity had to be identified that was going to be impacted, and they had to be mandatorily joined.

THE COURT: Well, we have class action provisions for plaintiffs, but there isn't -- I don't think there's an equivalent for --

MR. LUSTBERG: Well, there are defense classes that I've seen. But -- and there's no doubt that this rule exists, and it exists for a reason. But the conditions that the, you know, that exist in the rule are strict ones, and they're strict ones for a reason. Because if mandatory joinder were to be the rule rather than the exception, if it were to be -- to occur in every single case where somebody's interests were going to be affected, then the system would -- it would break down.

And so it's the rare case where mandatory joinder takes place. And I don't know statistically if it's rare, but those requirements are real, and they're

strict, and they have to be obeyed. And the State has not addressed them. They -- other than to say, and they've said it at least 150 times. If I -- I tried to do a word count on the word "interest" in their papers, that the districts have an interest. We don't disagree. They do have an interest in this matter. But the question is does that interest rise to the level where mandatory joinder is required, and respectfully, Your Honor, it does not.

So, unless the Court has other questions, I'll move on to the other two areas.

With regard to proceeding in a bifurcated manner -- and I think Your Honor is a hundred percent correct that this bleeds over, to a certain extent, to the discovery issue.

The -- it is important, once again, to look to the rules. The rule that the State relies on is a rule that has to do with trials, and bifurcated trials do have some costs to them at times that, you know, that it can be inefficient to do things separately when it would be more efficient because of the overlap of issues and witnesses and the like to try cases together.

But I've seen many cases where liability is established, and Your Honor used medical malpractice as

an example, great example, and damages on something else.

But a lot of times, by the way, bifurcation is denied in those cases because the same expert who is opining on the standard of care also is opining on damages, and so in those cases, so that it's a nuanced, careful determination that a court makes when it has all the facts before it.

Here, though, we're not -- this is -- this is not a matter of bifurcating a trial. This is a matter of moving for partial summary judgment. And as Miss Schaffer conceded, you know, summary judgment, partial summary judgment is a well accepted practice. It is not the case, truly not the case, that courts have to move for summary judgment in whole or not at all.

And so the real question comes down to the question that Your Honor asked, which is, are the liability and remedy phases, to use the State's language, inexorably intertwined. By the way, they cite a case for that, but in the case, it says inexorably indivisible.

And that's important, because this can be divided here. You asked the State over and over in what regard are these issues so intertwined in the

sense that in what regard does remedy have anything, or relief have anything whatsoever to do with liability.

Respectfully, I don't think, Judge, that you got an answer to that question. And there's a reason why you didn't get an answer to that question, because it has nothing do with it. It is not the law that the scope of relief determines whether there's liability. It would be a radical proposition.

It would also be a proposition that would fly in the face of just about every desegregation case that has come down the pike, and not just the New Jersey Turnpike, but turnpikes in other states as well.

The fact of the matter is that this means of proceeding, of determining liability first and then moving onto remedy is not the least bit unusual. It could not be more common. It could not be more appropriate. It is the way that these cases are done, and they're done because it's an orderly way to proceed.

And let me explain in part why it's such an orderly way to proceed. Because when people of goodwill get together to talk about how to fix a problem, they come up with pretty good and interesting and often attractive options. But they don't do that often until they have to. And they have to once a

judgment of liability is entered.

It's also the case, as Miss Schaffer pointed out, and I think Your Honor alluded to as well by mentioning cases like Abbott and Robinson, and of course, I should have mentioned that you're quite right, of course, that those cases were cases against the State, and individual districts were not parties, to go back to my last argument.

But in those cases, and in, likely, here, once a decision has been made with regard to liability, it may well fall upon the legislature to at least take the first crack at it. But parties will get together and come up with creative, important, attractive solutions with regard to remedy at that point. Other stakeholders, maybe districts, may want to come into be heard with regard to remedy.

The remedial phase will be complicated and important. But we don't get there until liability is determined. And it makes so much sense from an efficiency perspective to determine liability, especially here where, as the Court has pointed out, our fundamental showing is about statistics.

So that brings us to discovery. And I really don't have a lot more to say. I'll address a couple of the Court's questions and a couple of the

State's answers. But I don't have a lot more to say beyond what Your Honor's observation was, which was this happens all the time. And I've been on both sides of it. I mean, sometimes, you know, you face a motion for summary judgment from the other side before discovery, and it's not an answer to say I want to take discovery, because you have to identify what specific discovery you need.

And respectfully, I listened as hard as I could, and I did not hear any specific discovery that they need. I heard Miss Schaffer say they want to give us contention interrogatories, interrogatories that I should note typically come at the end of a case where we are required to set forth our legal theory. But she did not in any place show why that legal theory is not adequately set forth in the complaint. And frankly, I don't know that we have a lot to add to what's in the complaint.

The statistics that our expert, Mr. Coughlan, talked about are, in fact, part of the complaint as well. But so this is a complaint that was done with great care and effort really to move things along so that there wouldn't be a lot in dispute, and I should note that we went through a process with the State that before we filed our amended complaint, they

took issue with some of our numbers. We met with them, or corresponded with them. We agreed upon some of those numbers. We amended the complaint to accord with their understanding of what those numbers were in an effort to avoid just this sort of dispute, so we could get to liability, get past it, if the Court determines that those numbers amount to liability -- and that's what the summary judgment motion will be about -- and then go on to remedy a problem that should not exist one day longer than, than it does, if it's not -- if the Court finds that it's unconstitutional.

So other than the discussion that you had with counsel with regard to socioeconomic status, I don't think that there's a single question that has been raised that requires discovery.

And even with regard to socioeconomic status, I have two observations. Observation number one is one that really flows from what one of Miss Schaffer's answers to your question, which is, you know, she said, well, we want to get information from the various districts.

They can get that any time they want. The districts are instrumentalities of the State. The State collects data from them. The State has the ability to get all that information. They don't need

discovery from us or from anybody else. It's their data. There's literally no discovery that's required.

Now, if they want to take that discovery and put it in a certification in an effort to oppose our motion for summary judgment, as this Court knows, that's what happens on motions for summary judgment. And so that's what I would say with regard to socioeconomic status. If they see that -- if they want to move to partial summary judgment themselves with regard to socioeconomic status, because we haven't adduced enough information, then they can do that.

It's bewildering me as to what possible discovery they would need, because this case, the statistical part of this case, is based entirely on their numbers and numbers that are in their possession. They have not identified a single thing that they could ask us.

We have, by contrast said, look, to the extent that you want to ask questions, I'm not really sure what they would be, but if you want to ask questions of our expert, we will produce him promptly.

And Your Honor, we would produce him promptly. Although I would note that his identity has been known to them for some time now. They have not noticed a deposition. They have not taken us up on our

invitation in our papers filed now a couple of months ago to schedule a deposition. I mean, that could have all been done already.

There doesn't appear to be a great deal of urgency to the State's position in this regard, and that, candidly, is tragic. Because this is something that we should all be focused on and focused on ending as quickly as possible, as opposed to stretching it out with motions to dismiss that are completely without basis, and on efforts to stall the proceedings and to complicate them as opposed to expediting them and making them move along to a place where we can address this really pressing issue. Thank you.

THE COURT: Okay, anything else, Miss Schaffer?

MR. LUSTBERG: No, Your Honor.

THE COURT: Are you done with everything, or no?

MR. LUSTBERG: I'm -- I mean, I'm done with what I have to say. I'm more than happy, of course, to answer any questions that the Court has.

THE COURT: No, thanks.

MR. LUSTBERG: Okay.

THE COURT: I'm okay.

Anything else you want to say, Miss

Schaffer?

MS. SCHAFFER: Just a few follow-up points, Your Honor. I'll be quick.

I just have to follow-up on Mr. Lustberg's last statement, because -- and it's probably not necessary, but I feel compelled. But to suggest that we're deliberating stalling this case by filing a motion that was openly discussed and agreed to the last time we were before this Court is disingenuous.

And so while the motion was filed in September, since then, we have had a motion for, you know, the charter school's motion to intervene which had to be dealt with. We wanted to determine whether or not they would be added as a party. When we were before Your Honor on that argument is when we discussed scheduling of the State's response to the motion for partial summary judgment, where it was Your Honor's suggestion that we deal with this procedurally first, and in the meantime, we haven't continued to necessarily propound discovery because we're waiting to see where Your Honor is going, how Your Honor is going to rule on our motion. So I just feel compelled to address that last unnecessary statement by Mr. Lustberg.

So, and just to circle back on a couple

things, you know, Mr. Lustberg suggested that the State has failed to meet the standard for the joinder rule, and I just wanted to stress that we absolutely have not, and that what he is focusing on is only the interest aspect. And while he agrees that they all have interests, which, you know, I think is an important point, that that interest, what the important part is that the interest is so strong and the parties are so situated, the districts are so situated, that a judgment in this case without their ability to be a party would impede their ability to, to meaningfully defend and address those interests and rights. It's not just their interests, but they have rights at stake here. And so we did, I believe that we have met that standard.

And the second part of the rule is that -- it says, Or that it would leave the existing party subject to substantial risk of multiple litigation. And again, I think I spoke to that issue, and I won't say anything more on that.

I also want to clarify that, you know, while we have sought dismissal for failure to name indispensable parties, I don't -- I just want to make sure that the Court understands, we're not suggesting that dismissal is mandatory if the plaintiffs are

willing to name the districts as parties, or Your Honor orders that the districts be named as parties. But the failure for them -- the point is the failure for them to be, to have party status here would mandate a dismissal of the complaint, and the case cannot move forward without their participation as parties.

And I just want to address, Mr. Lustberg indicated that the parties, in order to be -- I'm sorry, the districts, in order to be joined as parties, have to affirmatively claim the interest. That's not supported by any case law. In fact, you know, there's cases that suggest that the whole point is that the right and the interest just has to be known and established, and that's why the Court has the power to mandate that they actually be pulled in as parties. They do not have to affirmatively wave a flag saying we have an interest here. And I think that's an important distinction.

As to the argument that we sort of waived our right to raise this issue because we did not file a certification identifying the parties in accordance with Rule 4:5-1, I think that's an argument that puts form over substance. That rule also allows there to be a continuing identification of the parties, or to the extent that the Court feels that we need to satisfy

that, we are certainly willing to do that. And I also note that we did identify the failure to name indispensable parties as an affirmative defense in our answer to the amended complaint.

As to the bifurcation issue, again, I think the important thing here is that plaintiffs are the one that have the burden to convince the Court why the two issues should be dealt with separately, and why it would, for the interest of -- in the interest of justice and time, why it makes sense, and I think based upon the dialogue between Your Honor and I when I was arguing earlier, sufficiently satisfied the reasons why it does not make sense here to address the two issues separately. And for that reason, you know, the motion should be -- the motion should not be considered by the Court at this time.

And then finally with the discovery issues, you know, as to the -- I disagree with Mr. Lustberg. I think we did both in our papers, and here today I added additional clarification, and I believe satisfied Your Honor's questions about what specific discovery we feel would be necessary. So I think we have met that standard.

And particularly with the socioeconomic status issues, this is not just a matter of receiving

data from the school districts. I mean, as we already discussed, you know, the State really is entitled to its own expert on those issues.

And I just want to conclude with the fact that for the Court to move forward and decide liability on summary judgment motion before there has been discovery of the parties and a robust record developed would be a substantial deviation from anything, from any type of case of this magnitude that a court has issued in this state. To find that the entire system of public education in the State of New Jersey is unconstitutionally segregated based on a record that has not, you know, based on the fact that there's been no discovery, and is only on data alone, it would be a huge deviation from the cases that have been issued in this state before that, before this time.

So I urge Your Honor to allow the discovery to continue and also urge Your Honor to order that the school districts be a party to this case and that both the issue of liability and remedy be kept together so that the Court can review all relevant information in a holistic way.

THE COURT: Okay. Thank you.

Anything from the charter schools? Anything else? No.

MR. JOSEPHSON: No, we would just reiterate, I guess, just briefly we would reiterate that we did lay out the discovery that we believe is necessary, and they involve both expert and factual discovery with regard to the claims around what the commissioner's obligations are and whether those obligations have been met with regard to looking at segregated effect when charter schools are established and reviewed.

THE COURT: Okay, thanks.

You thought it was a momentous -- just a bottle of water. Thank you, Jeff.

First, I want to thank counsel today for the argument and for their written decisions -- all the written papers that I've received, their written arguments. As usual, they're very helpful to the Court in framing the issues and assisting me in determining how to rule on the motions before the Court. This is a very significant and far reaching case, and it merits very careful consideration by the Court.

The plaintiffs are a group of non-profit corporations dedicated to civil rights advocacy and parents of racially diverse minors currently enrolled in the New Jersey public schools and represented by family members as their guardians ad litem.

And plaintiffs have named the State, the State Board of Ed and the Commissioner of Education as defendants, and they collectively oversee and govern New Jersey's public school system which consists of more than a million students in more than 2,000 public schools in excess of 500 school districts in the state.

And the complaint is very detailed in terms of the statistics regarding racial, ethnic and socioeconomic student populations, and really focuses on the significant number of schools where the students are -- fall into minority racial and ethnic categories and also have low socioeconomic backgrounds.

And the statistics, as mentioned by, you know, by plaintiff's counsel and as clear from the answer filed by the State, the statistics are all based on data that's collected by the Department of Education. And so there isn't a vacuum in that sense. We have a treasure trove of statistics, and now backed up by the certification of Ryan Coughlan. I referred to him as Mr. Coughlan, but he has a Ph.D. and has focused a lot of his professional career on de facto segregation in urban schools.

And the plaintiffs, though, have brought a very broad challenge, a state-wide challenge, not only to the alleged de facto segregation throughout the

state schools, but also in the, in the charter schools. And in the relief that they seek, they're seeking an injunction against the continued assignment of public school students, including charter school students, solely on the basis of municipal attendance boundaries and mandating that the legislature and the Commissioner of Education and the State Department of Education adopt replacement assignment methodology to address and remediate racial segregation in New Jersey's public schools, including charter schools.

And this is a case, in my view, anyway, a case of, a case of first impression in the sense that the earlier cases that we've been referred to, the Booker -- Booker dealt with a single district which was Plainfield and de facto segregation in Plainfield, which the Court ordered the commissioner to effect a remedy in cooperation with the school district. And Jenkins dealt with a sending-receiving relationship in Morristown in Morris County, where the court said -- again, the Supreme Court of New Jersey said that there was a single, a single community, and the -- so the regional aspect, I mean the state-wide aspect is something that has not been determined certainly by the state Supreme Court.

But the state Supreme Court in the context

of a series -- in the context of a case involving Engelwood, Engelwood Cliffs and Tenafly had a very strong Appellate Division decision that's been cited several times by the plaintiffs, and that's at 257 N.J. Super. 413, an Appellate Division decision going back to 1992. Because in that case, Engelwood was seeking the imposition of a regional school district, and they wanted to include Tenafly which had not been part of the sending-receiving relationship. And so in the Appellate Division decision that was issued by then Judge Long, she said that the commissioner, found that the commissioner had power to order cross-border regionalization.

But the Supreme Court of New Jersey, while it affirmed that decision, they specifically said we are not ruling on the issue of regionalization. And as far as I can tell, that's the last statement of the New Jersey Supreme Court on anything beyond the municipal borders unless you have a single community, or unless you have a sending-receiving relationship, or in North Haledon, unless you have an existing regional high school.

And you know, the Court said there in reaching the conclusion that the commissioner had his rights to do a regionalization study, we find it

unnecessary to consider whether the state Board of Education has the authority to require regionalization in this case or whether a Court may require regionalization as a judicial remedy. That's one of the judicial remedies that's sought here, not on a specific district basis, or like Sheff, which was Hartford, you know, that's one of the main cases plaintiffs rely on was one school district and the surrounding area with a very detailed record as to one district, not the Cruz case in Minneapolis and St. Paul. This is a state-wide challenge saying the entire way in which New Jersey public school and charter school education as delivered is unconstitutional.

And our Supreme Court, you know, has said, We emphasize our affirmance of the state board decision to undertake a regionalization study should not be taken to express or imply any view of the Court on the administration or judicial power to require interest-district regionalization.

So the plaintiffs here are seeking extraordinary relief, which doesn't mean they can't do it, they're seeking extraordinary relief. But I just want to emphasize that that's the context which the Court has to view this case. The Booker, the Jenkins, all the things that are relied upon by the plaintiffs

don't answer the question for relief, in my view, at least at this point, that has been put before me by the plaintiffs.

You know, when you look at the entire, entire scope of what happened in the Engelwood case, it lasted about 20 years, I think, the first -- maybe back to the 80s and then going on up to, you know, Supreme Court, subsequent Supreme Court decision.

They did a regionalization study and determined that it would not be -- there would not be an imposition of mandatory regionalization in that district upon a very, very extensive record.

The Appellate Division upheld the conclusion of the commissioner of education in that case, and the Supreme Court -- what the commissioner did in that case was to say voluntary programs are what is, what is -- is the best way to do this, because there's so much pushback when there's mandatory imposition of remedies on individual school districts.

And so after all that time, there was a voluntary program was what was adopted by the commissioner, and Engelwood really fought it. And in the Supreme -- the Appellate Division upheld the voluntary program, and the Supreme Court affirmed the Appellate Division except that the commissioner had

said it was Engelwood's ultimate responsibility, and the Supreme Court said no, sort of underscoring what plaintiffs are saying here, no, it's the commissioner's responsibility to make sure that this voluntary program addresses the, addresses the issue.

But, you know, there was a comment in the Supreme Court's decision noting that, you know, sort of after all these years, it was the Department of Education and Engelwood's joint efforts with, at that point, Bergen County Technical School, they were creating essentially a magnet program, would constitute a constructive and positive outcome for this protracted, contentious and important litigation, and at the same time, through the -- through this cooperative effort provide an enhanced educational environment at the Dwight Morrow High School, which was really the center of this, and which all students could pursue their educational goals and realize their educational potential.

So I just have to say that, you know, when I'm looking at this lawsuit, I have all of the language of Jenkins and Booker and North Haledon and Engelwood in mind. But I just felt that it was extremely important to underscore what plaintiffs are seeking here, because they are asking to do it with no

discovery, with no record other than statistics, and the statistics they present are very powerful. But I don't have much more of a context in which to view statistics.

Now it's a very different situation, but I went through about a 43-day trial hearing all sorts of statistics based upon the census data and American community service data in the affordable housing context, and there were differences about what the statistics say and how they're handled, which is why I picked up on Mr. Coughlan's opinion that even though he used 2010 statistics, he did an analysis to suggest they were still reliable.

But that's the kind of thing I think should not be relied upon by a Court without giving the other side an opportunity to comment, comment or produce some sort of expert, you know. I'm not sure what -- what might come, but I'm very concerned about proceeding to momentous liability determination with no chance for defendants state or charter school to put forth an appropriate discovery process, give them an opportunity to, to at least tell the Court what they think is important to decide the very significant liability issues in this case. But I think I'm getting ahead of myself.

First of all, I'm not going to dismiss the -- dismiss this case for failure to join indispensable parties. The school districts clearly are subject to service of process, and so dismissal is not appropriate. If I thought that the school districts had to be defendants in this case, I would order them to be mandatorily joined. But I don't -- I don't believe that every school district in the state needs to be joined or that the rule requires it.

The Court rule itself notes that the person claims an interest in the subject of the action and is so situated that disposition in his absence as a practical matter would impede that person's ability to protect that interest or leave them subject to substantial risk of incurring inconsistent obligations.

Even though the, you know, the State argues that every district is potentially affected here and plaintiffs and the Court agree with that, I don't find that it translates into requiring every school district to be joined.

Constitutional litigation deals with very significant issues and can affect millions, millions of people, and they don't all, don't all need to be joined. And even though you can, you can argue over what it means, that the person claims an interest, we

don't have any school district that's come forward, and there may be many reasons, only some of which had been suggested by the State, by the State defendants' counsel, and you know, would it impede the ability of the school districts to protect their interest?

Well, a lot of that really has to do with what are the powers and the authority of the State, the State parties versus the school districts. And it's only the State parties that if the Court were to grant, you know, were to find liability and grant partial motion for summary judgment, it's only the State entities that can effectuate a remedy, including the legislature.

And so the way the statutory scheme is set up, the plaintiffs, I think, they certainly deliberately sued only the, only the state government, and I've allowed the charter schools to come into -- a charter school and an association to represent the charter school, the charter school interests.

When you look into the party joinder rule, it's really a fact sensitive analysis. You get into issues regarding entire controversy, and the State's concern that if I don't mandate the inclusion as parties of all the districts, there could be subsequent litigation, and it would be -- it would be inefficient.

I have some concerns about that as well as the State's concern that municipality -- not municipal school systems, school districts could add to the Court's consideration of the issues in this case. They may very -- school districts may very well have information or positions that would be important for the Court to consider at the liability stage.

But I'm not going to dismiss the case for failure to name the school districts. I'm also -- even though it's not -- it's not a New Jersey case, one of the cases that's been cited by the plaintiffs comes from Minnesota, the Minneapolis-St. Paul school district. That was Cruz Guzman v. State, 916 Northwest 2d 1, Minnesota Supreme Court, 2018.

And there, even though it was just a few districts, the Court found that it was not necessary to include them when the relief -- there could be complete relief between the plaintiffs and the defendants in that case.

As I said, under the regulatory structure, the school districts are under the regulatory control of the State Board of Ed and the commissioner, and so they're not in a position to have any authority to, to accept they're -- want to pursue sending-receiving or something like that, they certainly can do that. But

they don't have any authority over the kind of relief that's sought, that's sought in, sought in this case.

But I am concerned that we don't have any school districts here, and if I -- so -- and I am concerned about the State, you know, the State's position that, you know, that not having the districts here could lead to a problem later, but, you know, the court rule regarding mandatory party joinder looks at what can happen if you don't join and the absence of an unjoined party. And one of the things that the note says, and that there's some cases to back it up, is that failure to be formally joined is not fatal when adequate notice is provided to the parties.

There are a couple of cases cited, In Re Mallon, 232 N.J. Super. 249, Appellate Division case where certification was denied at 117 N.J. 166; Toll Brothers v. West Windsor Township, 334 N.J. Super. 77, Appellate Division from 2000, with certification denied at 168 N.J. 295 from 2001.

So I don't know why we don't have any school district here. I think it would be, you know, certainly would broaden, could possibly broaden what is to be put before the Court on these important issues, but I don't know if the school districts, in fact, know about the litigation. They may very well. I don't

know if they know that a liability, summary judgment motion has been pending in which the, the Court is asked to invalidate assignment of pupils by municipal boundaries. I don't know that they know that. And I think it's important that they be notified.

So I'm going to require that the plaintiffs provide just notice, not service of a complaint, nothing like that, just a notice to every school district and every charter school in the State of New Jersey.

I've drafted a notice. I'm going to hand it out to counsel to take a look at and give me some comments next week if they're, you know, if you want to propose some revisions to it. The idea is just to let them know.

But because it would be a significant undertaking to become an intervenor, I am going to afford them, the school districts, to file motion for intervention by March 20th. They've got to -- obviously, these are public bodies. They don't -- often the school boards have to consider and, you know, vote on certain things. It's not the easiest or quickest process.

Whether or not anyone, any district will move to intervene, I don't know. But at least if

they're on notice, they can't come back, or at least there will be a very -- they will not have the same kind of argument that the State is concerned about under -- when not joining them as parties.

But I think it would be, it would be very unwieldy to have 500 something districts. I'm not -- I don't believe, as I said, for the reasons I've already given, I don't believe they are indispensable. And so -- but I do think notice is important so that we then can proceed either with the participation of some school districts or not.

You know, I think it is notable that no district, no school district has moved to intervene. Maybe none will, but I think it's important to provide the, you know, to provide the notice.

In terms of this bifurcation of liability and remedy, I -- to me it's premature to decide it, because we haven't had discovery, and I'm going to authorize discovery by the parties, but after discovery, I mean, motions for summary judgment come all the time after discovery, and at that point, there will be whatever record the State thinks is important for the Court to look at. And if at that point it's clear that liability is necessary, I don't -- you know, the plaintiffs can renew their -- I'll have their --

certainly I'll have their current papers, but at that point, summary judgment would be, you know, would be on a fuller record. And, you know, trial bifurcation to me, we're so far from that at this point, it seemed to me, to, you know, as I said to be premature.

But the one thing that I am convinced about is that given the nature of this case and the remedy and the case law, it's important to give the State and the charter schools the opportunity to engage in discovery and to provide expert reports and to take the deposition of the expert that the plaintiffs have put forward. Whether plaintiffs want to simply note or provide a notice that, of the certification of Mr. Coughlan and the attachments are his expert report, that was sort of quibbling, you know, we don't have an expert report, we just have a certification. The plaintiffs have said that's what we're relying on. If that's what they want to continue to rely on, that's fine. But I'm going to require the counsel to consult with each other and to provide the Court, if they can -- I'm not sure they'll be able to -- but if they can, to provide a proposed discovery schedule to the Court.

I understand I'm inviting these, you know, other school districts and charter schools to move to

intervene, but I don't want to hold up the case in this regard, so I'd like to have the existing counsel by January 31st, either you can give me a consent order for a discovery schedule, or competing proposals with a letter explaining why you think I should adopt your, your discovery schedule.

I mean, one of the things I was sort of struck by was the citation of, you know, by plaintiffs of, you know, a case where the Supreme Court had -- Supreme Court of New Jersey had noted that statistics may, in fact, be sufficient for liability. It was a case Mr. Lustberg was involved in, State v. Marshall, 130 N.J. 109 from 1992.

And in the plaintiff's brief, they noted that -- or they made the argument that discrimination in violation of the State constitution's equal protection guarantee, unlike it's federal counterpart, can be satisfied by statistical data alone, and they relied on State v. Marshall, 130 N.J. 109. And so that was one of the precedents they relied on to encourage the Court to authorize going right to summary, the partial summary judgment on liability.

But there wasn't a complete quote of the Marshall case, because what the -- what the Supreme Court said in Marshall is that if a Court concludes

that the statistical evidence is so deviant as to compel a conclusion of substantial significance, the Court must then look to the circumstances surrounding that statistical showing to determine its full constitutional import. That was a piece that was left out. And to me, it just says that I've got to look at the circumstances surrounding, you know, surrounding these statistics, give the defendants the chance to expand the record before the Court looks at the liability issue.

And so just for a recap, the Court will deny the motion to dismiss the case, require notice -- you know, I'll give out this proposed notice you can look at, and I just would ask you to get me any suggestions you have for changes by January 17th. And then the notices by certified mail, return receipt requested should then go out to the districts by January 27th. And we'll see if anything comes of it.

But if nothing comes of it, and no districts come forward, then, as I said, the State will have that argument of notice if anything -- any lawsuit is brought against them subsequently.

This is just for the attorneys, and it's just a draft, nothing signed. So you can take a look at it, and then let me know, as I said, by January

17th.

The motion in terms of bifurcation is denied as premature, and the, you know, the motion to defer consideration of the plaintiffs' application for partial summary judgment as to liability will be, to defer is granted pending the, you know, pending completion of discovery.

The consent order for discovery should include, certainly, periodic case management conferences by telephone at least every two months.

So we'll get that order out. Thanks again for your cooperation.

MR. LUSTBERG: Your Honor, can I just ask one clarifying question to the Court? And maybe -- and your answer may be that this is what we should talk about, and that's fine.

But so with regard to the discovery schedule, that does require us to think about whether we're just talking about liability or liability and remedy. Because if, if we're dealing with discovery with regard to remedy, that's a whole, you know, that is a much larger, and I think we've admitted, more complicated set of issues.

So are you looking for -- I guess I'm asking, is the Court looking for a schedule that we

arrive at just with regard to liability issues?

THE COURT: Well, they claim that they're indivisible, so I'm not going to decide that now.

MR. LUSTBERG: Okay.

THE COURT: They claim that causation is critical for liability, and so, you know -- so, you know, I'm not sure. I mean I'm not sure where it's going to go. At this point, I'm not going to limit it, but -- you're not going to get to remedy unless you establish liability.

MR. LUSTBERG: Obviously.

THE COURT: They've made certain arguments --

MR. LUSTBERG: Uh-hum.

THE COURT: -- that you need to look at the possibility of certain remedies as part of liability, and so I'm not going to foreclose them from that argument, but, you know, in term -- it would make no sense to spend an inordinate amount of time trying to decide remedies at this stage, but I don't want to foreclose them from addressing causation, or you know, to the extent that you're talking about regionalization, I don't want to foreclose them from that being part of what I consider.

There's one other thing that I mentioned --

I didn't mention, but I thought of when I was giving the quotation from the Supreme Court's Engelwood III, I think it's called, and that is that discovery -- I don't know how long it's going to take. You'll give me a schedule.

I would encourage you to go back to the negotiation table. That's how the 20-year dispute over Engelwood and Engelwood Cliffs was ultimately resolved.

You gave up -- I think you had good faith efforts, and I'm not going to force you to go to mediation. I just would say that the plaintiffs are very intent in moving as quickly as possible, and to not engage the State after you've heard these arguments, after you've heard some of my concerns, I think might be short-sighted.

You'll have time now to do that while the discovery process was going on. I just would encourage it, you know. I don't know where it would go, but that's ultimately what, you know, how -- at least as far as I know in terms of published cases -- was the last word on the Engelwood-Tenafly situation.

Any way, thank you all very much.

MR. LUSTBERG: Thank you.

MS. SCHAFFER: Thank you, Your Honor.

(The matter concluded at 12:23.)

CERTIFICATE

I, CATHERINE HICKS, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on January 10, 2020, Digital Index Number from 10:36:00 AM to 12:23:17 PM, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

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