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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,

Defendants,

And

NEW JERSEY CHARTER SCHOOLS ASSOCIATION, INC., BELOVED COMMUNITY

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

CIVIL ACTION

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

CHARTER SCHOOL, ANA MARIA DE LA ROCHE ARAQUE, TAFSHIR COSBY, DIANE GUTIERREZ

Intervenor-Defendants

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PRELIMINARY STATEMENT

Plaintiffs continue to propose that liability on state-wide public school segregation can be determined in a vacuum, without consideration of the cause or the viability of a remedy. This suggestion is not only inconsistent with precedential case law, but is inefficient and highly prejudicial to Defendants.

And because the liability and remedy aspects of the case are inexorably linked, the school districts must be afforded the opportunity to defend their undisputed interests in this matter. Indeed, any determination of State liability would amount to a declaration that the districts are unconstitutionally segregated. Likewise, any remedy imposed on the State, would unquestionably impact the structure and operations of the individual school districts. Plaintiffs' attempt to skew the legal standard for joinder to avoid the creation of a full record is obvious and easily disputed.

Finally, Plaintiffs' concession that Defendants are at least entitled to depose their purported expert witness, alone, mandates denial of their motion. And beyond that, Defendants must be afforded the opportunity to explore the causes of the statistical data upon which Plaintiffs rely, along with the remedies that have been or can be implemented. As in Defendants' moving brief, the complexity of this matter requires a careful and comprehensive analysis of a fully developed record. Liability cannot be decided

without the exchange of discovery, especially given the drastic state-wide relief sought by Plaintiffs.

For these reasons, and the reasons argued in Defendants' moving brief and herein, Plaintiffs' Amended Complaint should be dismissed for failure to join indispensable parties or, alternatively, their motion for partial summary judgment should be denied.

ARGUMENT

POINT I

BECAUSE LIABILITY AND REMEDY ARE INEXORABLY INTERTWINED, THIS COURT SHOULD REJECT PLAINTIFFS' ATTEMPT TO BIFURCATE LIABILITY FROM REMEDY.

Through their motion for partial summary judgment, Plaintiffs ask this court to decide liability in a vacuum with no consideration of legally viable remedies. Their bid to bifurcate this litigation is flawed in two fundamental ways. First, Plaintiffs' theory demands that liability may lie in the absence of any identifiable State action or viable legal remedy. Second, Plaintiffs' contention that efficient resolution requires bifurcation is mistaken. Bifurcating the proceedings in the way Plaintiffs suggest risks creating extensive litigation in the remedy phase without having considered whether a permissible remedy even exists. Such an approach is not only unprecedented, but inimical to a fair and efficient process. The court should

deny Plaintiff's motion for partial summary judgment and recognize that liability for de facto segregation is inexorably linked to the ability to remedy the condition.

A. The State's Liability for an Unconstitutionally Segregated School System Cannot be Determined Without Consideration of the Causes of the Alleged Racial Imbalance and the Viability of Remedies.

Plaintiffs argue that the selective raw demographic data they provide[1] necessarily shows that the State's schools are unconstitutionally segregated. But Plaintiffs fail to consider that the State's ability to remedy any alleged unconstitutional segregation is constrained by both State and federal law. They define "liability" so broadly that it suggests responsibility of the Commissioner of Education beyond what he is statutorily authorized to do. (Pltfs. Br. at 26). That definition also ignores the restraints imposed by the Fourteenth Amendment's guarantee of equal protection. See U.S. Const. Amend. XIV; Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746-48(2007) (holding that classifying students based upon race and assigning them to schools based upon that classification - even for the purpose of ameliorating racial imbalance - offends principles of

[1] As noted in Defendants' moving brief, Plaintiffs rely on data from just over 2% of the State's total school districts in support of their motion for partial summary judgment seeking State-wide liability. (Defendants Br. p. 7; citing Pltfs. Statement of Undisputed Facts).

Equal Protection under the Fourteenth Amendment); Milliken v. Bradley, 418 U.S. 717 (1974) ("Milliken I")(invalidating a multi-district bussing requirement as a means of correcting segregation that existed in only one of the districts covered by the plan). Surely, whether a particular school's demographic data reflects unconstitutional segregation must be considered against broader demographic data for the relevant community. See, e.g. In re Petition for Authorization to Conduct a Referendum on Withdrawal of N. Haledon Sch. Dist. From Passaic Cty. Manchester Reg'l High Sch., 181 N.J. 161, 183 (2004)(considering demographic data in light of demographic trends and noting that "it is not really possible to establish a precise point when a thorough and efficient education is threatened by racial imbalance."). Still, Plaintiffs seek an Order finding that liability rests with the State without any consideration of the causes or potential remedies for the data at issue.

Plaintiffs contend that Jenkins v. Morris School District, 58 N.J. 483 (1971), says otherwise and denies the distinction between de facto and de jure segregation. (Pltfs. Br. at 35 n.8 (citing Jenkins, 58 N.J. at 497)). Because the issues of liability and remedy are intertwined, nothing in Jenkins forecloses consideration of the causes of racial imbalance when determining de facto segregation, and it certainly does not grant the State broad authority to violate the Fourteenth Amendment.

In support of their contention that liability and remedy should be considered separately, Plaintiffs rely on Elliot v. Board of Education of Neptune, 94 N.J. Super. 400 (App. Div. 1967). In Elliot, the Commissioner considered demographic evidence regarding elementary schools within the Neptune school district and ordered the district to submit a desegregation plan, finding that there was no material dispute over the existence of de facto segregation within those discrete schools. Id. at 401. The Appellate Division affirmed the Commissioner's narrow finding that, "where the decisional law is lined up against the mentioned percentages of pupil concentration, it is clear that de facto segregation exists in Neptune's elementary schools. The factors referred to in Booker were irrelevant to such a determination." Id. at 402-03(citing Booker v. Bd. Of Educ. 45 N.J. 161 (1965)).

But Elliot is easily distinguishable from this case. Elliot considered allegations pertaining to particular schools in the Neptune school district, not the global state-wide allegations Plaintiffs raise here. Plaintiffs have chosen a small subset of the State's districts, presented them to the court without context, and asked the court to rule on the Commissioner's liability for the entire state. The expansive scope of Plaintiffs' claims demands additional factual development before summary judgment could possibly be warranted so that the Court has the benefit of

considering the viable remedies.[2]

For these reasons, the court must be able to consider liability together with the causes of any racial imbalance and the viability of remedies.

B. Bifurcating Liability from Remedy Would Not Promote Efficiency, But Would Result in Time-Consuming Protracted Litigation on an Issue That May Not Be Legally Viable.

Not only is liability inherently tied to remedy in the context of de facto segregation, but bifurcating the litigation would likely result in a morass of complicated and competing piecemeal litigation without knowing whether a clear viable remedy even exist.

Plaintiffs argue that courts are encouraged to resolve the issue of liability prior to remedy "in cases where they feel it may expedite the disposition of the case." (Pltfs. Br. at 27-28) (citing Administrative Directive #03-77, "Separate Trials of Liability and Damages" (October 17, 1977)). However, nothing in this mandate, or in the Court Rules, requires the bifurcation of

[2] Elliot was also decided against an entirely different legal landscape. Since Elliot was decided, federal courts have substantially limited the State's authority to remedy alleged segregation. See e.g., Parents Involved, 551 U.S. 701 (recognizing in 2007 that the Equal Protection Clause prohibits the government from classifying students based upon race and assigning them to schools based upon that classification); Milliken I, 418 U.S. 717 (invalidating a multi-district bussing requirement as a means of correcting segregation that existed in only one of the districts covered by the plan).

a pending matter where doing so is inefficient, or where the issues to be bifurcated are inexorably linked as they are here.

Contrary to Plaintiffs' claims, bifurcation of liability and remedy would not result in a more efficient resolution of this matter. Without considering liability and remedy together, this court risks extended litigation resulting in potentially inconsistent decisions with no clear determination of whether a viable remedy even exists.

Even the case law that Plaintiffs rely on to support their motion for partial summary judgment - Lewis v. Harris, 188 N.J. 415 (2006), Abbott v. Burke, 119 N.J. 287 (1990) (Abbott II), and Robinson v. Cahill, 63 N.J. 196 (1973) - shows why bifurcation in this case is untenable. While it is true that, in these cases, the New Jersey Supreme Court declared the State's marriage and educational funding statutes unconstitutional and separately ordered the Legislature to correct the violations, those cases are procedurally and substantively distinct from this one. Those cases considered specific, discrete applications of State statutes. This case, unlike those cited, does not turn on a single cause that can be identified and remediated. In other words, each of Abbott, Lewis, and Robinson involved a clear allegation of a State act or omission; no such allegation exists here.

As set forth above, and in Defendants' prior submission, whether the State is liable in this matter for the de facto

segregation Plaintiffs allege cannot be separated from whether there exists a remedy for the alleged segregation. Plaintiffs' motion for partial summary judgment should be denied.

POINT II

THE SCHOOL DISTRICTS ARE INDISPENSABLE BECAUSE THEY HAVE INTERESTS IN THE LIABILITY AND REMEDY STAGES OF THIS LITIGATION AS WELL AS ADDITIONAL INTERESTS NOT STRICTLY LIMITED TO LIABILITY.

Plaintiffs offer no persuasive explanation as to why the 585 school districts in this State are not indispensable parties. They concede that Rule 4:28-1 requires joinder where a judgment necessarily affects absent parties' interests (Pltfs. Br. at 9-10), and they do not dispute that the districts have a significant interest in the question of whether they are unconstitutionally segregated. But in making these concessions, Plaintiffs attempt to reframe the standard by suggesting that school districts' interests are only implicated if they are to "blame" for the constitutional violation. (Pltfs. Br. at 4, 8). Plaintiffs' argument fails for two reasons: first, it is premised on the mistaken assumption that liability and remedy can be bifurcated; and second, it is beyond dispute that the districts necessarily have an interest in this litigation due to its potential to result in substantial changes to the State's education system, and a

failure to join the districts would deprive them of the opportunity to present those interests for the court's consideration.

Despite Plaintiffs' best efforts to convince this court otherwise, liability and remedy cannot be compartmentalized and decided apart from one another. And since it is undisputed that all of New Jersey's school districts are indispensable as to remedy, they are indispensable as to all aspects of this litigation. Furthermore, as to liability, declaring the State liable for unconstitutional segregation necessarily establishes liability on behalf of the school districts - who implement the State's policies and decisions within the educational system established by the allegedly unconstitutional laws.

But the school districts have other interests in this matter beyond liability and remedy. This litigation would inevitably determine whether school districts caused, exacerbated, contributed to, or failed to prevent unconstitutional segregation in the education system they are supposed to foster. Because joinder is not limited to liable parties, these interests also make them indispensable.

A. All 585 School Districts Are Indispensable Parties Because They Have an Interest in Liability and Remedy in this Matter, Which Are Inexorably Intertwined.

As argued above, liability and remedy are inexorably intertwined in this matter. Whether the State or school districts

are liable for unconstitutional segregation will be unavoidably influenced by the available remedies and by those remedies that are currently being implemented or have been tried before to little or no success. If existing or potential remedies can be shown to combat segregation or can be shown to be ineffective in doing so, that will have an effect on whether the State's current laws are unconstitutional or cause de facto segregation.

The school districts' interest in a remedy in this matter is unquestioned, making them indispensable parties to all aspects of litigation. Plaintiffs do not even attempt to argue that the school districts do not have an interest in the remedy. See Pltfs. Br. 22-26. Any remedy that affects the fundamental structure of the educational system in New Jersey is unavoidably going to affect the interests of the school districts that provide educational services under that system. It is not speculative to say that Plaintiffs' requested remedy would fundamentally alter the composition and functioning of all of this State's school districts. That is, after all, Plaintiffs' stated goal. While the specific remedy may be undecided as yet, there is no doubt that it will alter districts' demographics and their pool of admissible students.

The present matter therefore differs from Toll Bros., Inc. v. Twp. of West Windsor, 334 N.J. Super. 77 (App. Div. 2000), in which the nature of the remedy meant that intervenors were not

indispensable parties. In that case, owners of tracts of land that had been removed from the township master plan's affordable housing component alleged that they were indispensable parties to an ongoing builder's remedy suit. There, the court found that the owners of the deleted tracts were not indispensable parties at the outset of the builder's remedy suit because "neither the parties nor the court had any reason to believe that the outcome of the Toll Bros. suit would affect in any way the Maneely or Akselrad tracts" and that the builder "never suggested that granting it complete relief would in any way impact the sites." Toll Bros., 334 N.J. Super. at 91 (original emphasis).

It is inescapable that the relief requested by Plaintiffs - will drastically impact the school districts. At a minimum, it will alter the geographic scope of their admissible students and their demographics. This will necessarily impact their funding, their expenses, their administrative and material capacities, their staffing needs, and much more. This is not to say, as Plaintiffs misconstrue, that financial concerns of the school districts trump concerns about unconstitutional segregation. To the contrary, these operational impacts underscore the complicated factual background of this litigation and also implicate school districts' abilities to provide a thorough and efficient education to their students, all of which this court must consider in assessing both liability and remedy. Given the nature of the

remedy at issue here and the potential impact, the school districts have a sufficient interest that will be impaired or impeded in their absence. R. 4:28-1; Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 394 N.J. Super. 71, 82 (App. Div. 2007).

Also, those districts that are demonstrably not segregated according to Plaintiffs have an interest in vindicating themselves. Plaintiffs did not identify all individual districts that are allegedly segregated. Instead, they sought a declaration as to statewide segregation in New Jersey's school districts. This encompasses districts that could demonstrably show they are not segregated. Those districts have an interest in being able to present evidence refuting these allegations at the liability stage.

Plaintiffs bemoan that joinder of the school districts would complicate this litigation, (Pltfs. Br. 8-9), but they, not Defendants, dictated the scope of this case by seeking state-wide liability and remedy. Because the school districts have interests in determining liability and remedy, they are indispensable parties.

B. Plaintiffs Manipulate the Standard for Joinder under R. 4:28-1 So as to Impermissibly Restrict It to Liable or Responsible Parties.

Plaintiffs attempt to rewrite the Court Rules on joinder so as to effectively limit it to those parties who are liable or "responsible." See, e.g., Pltfs. Br. 9-10. But neither R. 4:28-

1 nor pertinent case law limits joinder to liable parties. Instead, the determining factor is whether the person or entity "claims an interest in the subject of the action" and proceeding in their absence would "impair or impede the person's ability to protect that interest." R. 4:28-1. See also Chubb Custom, 394 N.J. Super. at 82 (finding that a party is indispensable if it "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.") As argued thoroughly in Defendants' moving brief, all school districts in the State have an inevitable interest in this matter.

Plaintiffs' attempts to limit joinder to liable parties are based on a deliberate misreading of the court rules and the case law. (Pltfs. Br. 9-10). While Cogdell ex rel. Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 22 (1998) references joining "known responsible parties," nowhere does it restrict joinder to such parties. Even less persuasive is Plaintiffs' attempt to find support in R. 4:5-1(b). (Pltfs. Br. 10). That rule's language quoted by Plaintiffs- "potential liability to any party on the basis of the same transactional facts" - in turn quotes R. 4:29-1(b) (permissive joinder) and not R. 4:28-1, which does not reference liability.

This court has declared parties indispensable due to interests in the subject matter unrelated to their liability. See, e.g., Fox v. Twp. of West Milford, 357 N.J. Super. 123, 130-31 (App. Div. 2003) (finding State to be an indispensable party in a matter in which plaintiff alleged inverse condemnation on the part of the township where the township vacated a street granting access to plaintiff's property and township raised as a defense that plaintiff had access owing to an easement it held on adjoining land owned by the State); Raynor v. Raynor, 319 N.J. Super. 591, 602-03 (App. Div. 1999) (determining that a named beneficiary of a life insurance policy - the second wife of the decedent - was an indispensable party in dispute about the proceeds between the estate of the decedent and decedent's first wife).

Therefore, there is no requirement that joinder pursuant to R. 4:28-1 is dependent upon liability. In fact, such a reading would be at odds with the plain language of the rule that does not reference liability and speaks primarily as to "interest." R. 4:28-1.

Similarly, Plaintiffs' reliance on Cruz-Guzman v. State, 916 N.W.2d 1 (Minn. 2018) is unpersuasive because it would restrict joinder to those from whom relief is sought, which, again, is not the standard articulated in R. 4:28-1. Even though this court is not bound by any decision of a court in another jurisdiction or state, U.S. Cas. Co. v. Hercules Powder Co., 4 N.J. 157, 168

(1950), In re Summit and Elizabeth Trust Co., 111 N.J. Super. 154, 166 (App. Div. 1970), Cruz-Guzman is nevertheless unpersuasive.

The Minnesota court rejected joinder on the sole basis that plaintiffs pleaded for relief from the state rather than the school districts. Cruz-Guzman, 916 N.W.2d at 14. The court's analysis of Minnesota's joinder rule consists of a single paragraph and does not even address the school districts' interest in the matter. Id. at 14-15. Instead, like Plaintiffs in this case, the court considered only from whom relief was requested by the plaintiffs. But R. 4:28-1 is clear that joinder is mandatory where there is an interest that will be impaired or impeded in the party's absence. And parties may be indispensable even if no relief is requested from them. See, e.g., Fox, 357 N.J. Super. at 130-31; Raynor, 319 N.J. Super. at 602-03.

The school districts' have important interests in this matter that go beyond liability and remedy and that warrant their joinder. As mentioned, some districts have an interest in presenting this court with evidence that they do not have segregated schools. Others have an interest in contesting any assertion that they contribute to or promote unconstitutional segregation.

Furthermore, school districts have their own influence on the demographics of their schools and would offer evidence that they utilize existing laws and resources to prevent or combat segregation. For instance, districts could present this court

with evidence that they utilize sending/receiving relationships, N.J.S.A. 18A:38-8 to -24; acceptance of non-resident students with or without tuition, N.J.S.A. 18A:38-3; regional school districts, N.J.S.A. 18A:13-1 to -81; or the Interdistrict Public School Choice Program, N.J.S.A. 18A:36B-14 to -24. These experiences could shed light on the districts' ability to implement any potential remedies in this case.

Lastly, as argued in Defendants' moving brief, the school districts have an interest in any matter that would drastically affect the legality and structure of the educational system that they actually implement on a day-to-day basis. To determine the legality and constitutionality without the school districts would inevitably impair or impede their ability to protect their interest in implementing and administering educational services in our State's schools, whether or not Plaintiffs are interested in blaming the districts for the problems they allege. Whether the school districts should be permitted to defend their interests cannot be determined by Plaintiffs' strategic legal decisions.

That no school district has as yet moved to intervene has no persuasive effect. There are myriad reasons why districts may have not, to date, intervened in this matter. For instance, districts may not have the financial resources to devote their legal budget to a potentially expensive and protracted litigation.

There is nothing to be gleaned either way from their lack of intervention thus far.

All 585 school districts in New Jersey have an interest in any determination that they play a role in unconstitutional segregation of their students. But liability is not the only factor considered for joinder under R. 4:28-1. The school districts can show other interests that would be impaired or impeded by failing to join them. Hence, the school districts are indispensable parties.

POINT III

PLAINTIFFS CONCEDE THAT DEFEDANTS ARE ENTITLED TO SOME DISCOVERY, THUS PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY IS PREMATURE.

Plaintiffs' motion for summary judgment on liability prior to the exchange of discovery must be denied. Defendants are entitled to discovery on all triable issues, including ultimate questions of liability. R. 4:10 et seq. Without a citation to any legal authority, the Plaintiffs attempt to argue that Mr. Coughlan's certification - provided to Defendants for the first time as an exhibit to the motion – somehow qualifies as an expert report under the New Jersey Court Rules. But at the same time, Plaintiffs concede that Defendants are entitled to depose their purported expert. This concession alone warrants a denial of summary judgment since Plaintiffs admit that an expert deposition has yet to occur,

and Defendants are entitled to question the why and wherefore of any expert's opinion.

Further, contrary to Plaintiffs' suggestion, Defendants have identified numerous issues requiring additional discovery throughout its initial brief. (Defendants' Br. p.26-27). Specifically, Defendants are entitled to discovery on issues including the causes of the alleged segregation; the nature of remedies sought by Plaintiffs; feasibility of those remedies; and the effectiveness of any remedies currently in place. Plaintiffs complain that Defendants cannot specify these needs in more granular detail, but that is precisely why Defendants must be afforded an opportunity to conduct initial discovery requests. And, at the bare minimum, Defendants are entitled to explore the factual predicate and opinions of the Plaintiffs purported expert, consult with their own expert(s), and submit a responsive expert report. Again, deciding liability in this case – which would require comprehensive and calls for an overwhelming State-wide remedy – without allowing Defendants an opportunity to engage in any discovery is unwarranted.

CONCLUSION

For all the above reasons, Plaintiffs' Amended Complaint should be dismissed without prejudice or, alternatively, their motion for partial summary judgment should be denied as procedurally deficient.

Respectfully submitted,

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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 DUTTON 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 December 23, 2019, a copy of Defendants' Reply Brief in further support of Defendants' cross-motion to dismiss Plaintiffs' Amended Complaint and opposition to Plaintiffs' motion for summary judgment along with a certification of service were served via the court's electronic filing system on the following:

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3. On Tuesday, December 24, 2019, one courtesy copy was sent to the Clerk of the Superior Court, the chambers of the Honorable Mary C. Jacobson, and all counsel of record via overnight mail at the addresses 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: December 23, 2019