PREPARED BY THE COURT

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION – CIVIL PART
DOCKET NUMBER L-1076-18

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

Plaintiffs,

and

PLEASANTVILLE BOARD OF EDUCATION and WILDWOOD BOARD OF EDUCATION,

Intervenors- Plaintiffs,

v.

THE STATE OF NEW JERSEY; NEW JERSEY STATE BOARD OF EDUCATION; and ANGELICA ALLEN-MCMILLAN, Acting Commissioner, State Department of Education,

Defendants,

and

NEW JERSEY CHARTER SCHOOLS ASSOCIATION, INC.; BELOVED COMMUNITY CHARTER SCHOOL; ANA MARIA DE LA ROCHE ARAQUE; TAFSHIER COSBY; DIANE GUTIERREZ; CAMDEN PREP, INC.; KIPP COOPER NORCROSS, INC.; and MASTERY SCHOOLS OF CAMDEN, INC.,

Intervenors-Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER having come before the Court, the Hon. Robert Lougy, A.J.S.C. presiding, on the motion for partial summary judgment filed by Plaintiffs Latino Action Network, et al., represented by Lawrence S. Lustberg, Esq., Ethan J.

Kisch, Esq., and Roger Plawker, Esq., appearing; and on the motion for summary judgment filed by the State Defendants, represented by Deputy Attorney General Christopher Weber, appearing; and Intervenor-Defendants New Jersey Charter Schools Association, BelovEd Community Charter School, Tafshier Cosby, Ana De La Roche Araque, and Diane Gutierrez; represented by Paul P. Josephson, Esq., Lisa T. Scruggs, Esq., and Matthew M. Caminiti, Esq., appearing, having filed opposition to Plaintiffs' motion; and Intervenor-Defendant Renaissance Schools, Camden Prep, Inc., KIPP Cooper Norcross, Inc. and Mastery Schools of Camden, Inc., represented by Thomas O. Johnston, Esq., and Jaryda A. Gonzalez, Esq., appearing, having filed opposition to Plaintiffs' motion; and Plaintiffs having filed a reply; and the Court having conducted oral argument in this matter on March 3, 2022; and Plaintiffs and the State Defendants having submitted brief additional submissions after oral argument; and for good cause shown;

IT IS on this 6th day of October 2023 **ORDERED** that:

1. Plaintiffs' application for an order granting partial summary judgment as to Count One of the Amended Complaint and finding Defendants liable for violating Article I, paragraph 5 of the New Jersey Constitution is **DENIED**.

2. Plaintiffs' application for an order granting partial summary judgment as to Count Two of the Amended Complaint and finding Defendants liable for violating Article I, paragraph 1 of the New Jersey Constitution is **DENIED**.

3. Plaintiffs' application for an order granting partial summary judgment as to Count Three of the Amended Complaint and finding Defendants liable for violating Article VIII, Section 4, paragraph 1 of the New Jersey Constitution is **DENIED**.

4. Plaintiffs' application for an order granting partial summary judgment as to Count Four of the Amended Complaint and finding Defendants liable for violating Article I, paragraph 5 of the New Jersey Constitution, Article I, paragraph 1 of the New Jersey Constitution, and Article VIII, Section 4, paragraph 1 of the New Jersey Constitution, interpreted collectively, is **DENIED**.

5. Plaintiffs' application for an order granting partial summary judgment as to Count Five of the Amended Complaint and finding Defendants liable for violating N.J.S.A. 18A:38-5.1 is **DENIED**.

6. Plaintiffs' application for an order granting partial summary judgment as to Count Six of the Amended Complaint and finding Defendants

liable for violating the Charter School Program Act, N.J.S.A. 18A:36A-7, is **DENIED**.

7. Plaintiffs' application for an order granting partial summary judgment as to liability on Count Seven of the Amended Complaint and finding Defendants liable for violating the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2, is **DENIED**.

8. Defendants' application for an order granting summary judgment and dismissing the entirety of Plaintiffs' complaint with prejudice is **DENIED**.

9. Defendant's application for an order granting summary judgment as to Count One of the Amended Complaint is **DENIED**.

10. Defendants' application for an order granting summary judgment as to Count Two of the Amended Complaint is **GRANTED in part and DENIED in part**. The Court grants Defendants' application for summary judgment on Count Two's claim that Defendants have violated their rights to equal protection based on poverty or socioeconomic status. The Court denies Defendants' application for summary judgment on Count Two's claim that Defendants have violated their rights to equal protection based on race and ethnicity.

11. Defendant's application for an order granting summary judgment as to Count Three of the Amended Complaint is **DENIED**.

12. Defendants' application for an order granting summary judgment as to Count Four of the Amended Complaint is **GRANTED**.

13. Defendants' application for an order granting summary judgment as to Count Five of the Amended Complaint is **GRANTED**.

14. Defendants' application for an order granting summary judgment as to Count Six of the Amended Complaint is **GRANTED**.

15. Defendants' application for an order granting summary judgment as to Count Seven of the Amended Complaint is **DENIED**.

/s/ Robert Lougy
ROBERT LOUGY, A.J.S.C.

FOR THE REASONS AS STATED IN THE ATTACHED OPINION.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

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

Plaintiffs,

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PLEASANTVILLE BOARD OF EDUCATION and WILDWOOD BOARD OF EDUCATION,

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THE STATE OF NEW JERSEY; NEW JERSEY STATE BOARD OF EDUCATION; and ANGELICA ALLEN-MCMILLAN, Acting Commissioner, State Department of Education,

Defendants,

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NEW JERSEY CHARTER SCHOOLS ASSOCIATION, INC.; BELOVED COMMUNITY CHARTER SCHOOL; ANA MARIA DE LA ROCHE ARAQUE; TAFSHIER COSBY; DIANE GUTIERREZ; CAMDEN PREP, INC.; KIPP COOPER NORCROSS, INC.; and MASTERY SCHOOLS OF CAMDEN, INC.,

Intervenors-Defendants.

Decided: October 6, 2023

Lawrence S. Lustberg, Esq., Ethan J. Kisch, Esq., Michael S. Stein, Esq., and Roger Plawker, Esq. for Plaintiffs Latino Action Network, et al. (Mr. Lustberg and Mr. Kisch of Gibbons, P.C., attorneys, and Mr. Stein and Mr. Plawker of Pashman Stein Walder Hayden, P.C., attorneys).

Deputy Attorney General Christopher Weber for Defendants the State of New Jersey, New Jersey State Board of Education, and Angelica Allen-McMillan, Acting Commissioner, State Department of Education (Department of Law & Public Safety, Division of Law).

Paul P. Josephson, Esq., Lisa T. Scruggs, Esq., and Matthew M. Caminiti, Esq., for Intervenor-Defendants New Jersey Charter Schools Association, BelovEd Community Charter School, Tafshier Cosby, Ana De La Roche Araque, and Diane Gutierrez (Duane Morris, LLP, attorneys).

Thomas O. Johnston, Esq., and Jaryda A. Gonzalez, Esq., for Intervenor-Defendants Renaissance Schools, Camden Prep, Inc., KIPP Cooper Norcross, Inc. and Mastery Schools of Camden, Inc. (Johnston Law Firm LLC, attorneys).

ROBERT LOUGY, A.J.S.C.

Plaintiffs allege that Defendants have violated the New Jersey Constitution and several statutes by failing to fulfill their obligations to remedy unlawful, persistent, and pervasive statewide *de facto* segregation. They move for summary judgment as to liability, relying largely upon Defendant Department of Education's own data that shows marked concentration of Black and Latino students in some

schools and of White students in other schools.[1] They point to the residency statute, N.J.S.A. 18A:38-1, as a principal cause of that alleged segregation and ask the Court to declare that provision unconstitutional as applied.

The State Defendants move for summary judgment, as well, arguing that Plaintiffs fail to establish any constitutional violation and that any disproportionality in a small number of school districts cannot and does not establish a statewide constitutional violation. They argue that the record does not support Plaintiffs' claims, which are contrary to decades of educational law and policy in this State.

[1] Acknowledging the different language used by the parties, the Court briefly explains the terminology it uses throughout this opinion. Referring to the three most prevalent races of students statewide, Plaintiffs use the terms Black, Latino, and White. They also use the term non-White. The charter school Defendants use similar terms. The State Defendants use the terms Black, Hispanic, and White. They also use interchangeably the terms Hispanic or Latinx. The Department of Education's ("DOE") data, which figures prominently in all of the parties' arguments, uses the terms White, Black, and Hispanic. As one court has commented, "'Hispanic' and 'Latino' are usually used interchangeably as near synonyms, but the usage preferred by a person or a group may reflect nuanced differences of perspective." Latino Officers Ass'n, New York, Inc. v. City of New York, 196 F.3d 458, 460 (2d Cir. 1999). Here, with all respect to those nuances, the Court adopts Plaintiffs' descriptors, accepting the equivalence asserted by the State Defendants when discussing the underlying data. In other words, the Court will use the term "Latino" throughout, including when discussing students of color described as Hispanic by DOE. Finally, the Court did not alter the language of any quoted authorities from previous decades, even if that court would not employ such terminology in an opinion issued now.

They ask the Court to enter summary judgment on behalf of Defendants and to dismiss the complaint entirely.

Plaintiffs include several nonprofit entities that advocate for or offer services to advance the social, political, economic, and educational status of Latino, Black, and other minority communities in New Jersey. Amended Compl., ¶¶ 4-8. Plaintiffs also include Latino and Black minor students, represented by their parents or guardians, who attend various school districts at the center of Plaintiffs' complaint: Hoboken Middle School, Octavius V. Catto School in Camden, Colin Powell Elementary School in Union City, Paterson Eastside High School, PS 16 in Paterson, American History High School in Newark, Dr. Albert Einstein Academy in Elizabeth, and Irving Primary School in Highland Park. Id. at ¶¶ 9-17. The complaint named the State of New Jersey, the New Jersey State Board of Education ("the Board"), and Acting Commissioner of the New Jersey Department of Education ("DOE") Angelica Allen-McMillan as Defendants. Id. at ¶¶ 18-20; R. 4:34-4.

Two groups are participating as Intervenor-Defendants. The first group includes the New Jersey Charter Schools Association, Inc., BelovED Community Charter Schools, Ana Maria De La Roche Araque, Tafshier Cosby, and Diana Gutierrez (collectively "Charter School Defendants"). The New Jersey Charter

Schools Association advocates for various issues concerning charter schools and charter school students in New Jersey. This group of Defendants also includes charter schools and parents of charter school students whose interests are implicated by Plaintiffs' complaint. The second group of Intervenor-Defendants – Camden Prep, Inc., KIIP Cooper Norcross, Inc. (KIPP Cooper), and Mastery Schools of Camden, Inc. (collectively "Renaissance Schools Defendants") – are renaissance schools formed under the Urban Hope Act, located in the City of Camden, and implicated by the complaint.

I. INTRODUCTION

Plaintiffs seek reliefs of unprecedented scope. In the almost seventy years since the United States Supreme Court decided Brown v. Board of Education, 347 U.S. 483 (1954), no court at any level – federal, State, trial level, intermediate or highest appellate court – has concluded that an entire state's educational system is unconstitutionally segregated. Even in New Jersey, where the Supreme Court has interpreted our Constitution to provide broader protections than its federal counterpart and has forcefully declared for decades that *de facto* segregation of our public schools offends the Constitution, no decision has confronted allegations of segregation so systemic or claims for relief so broad.

But novel and broad do not mean meritless; Plaintiffs maintain that "New Jersey's schools are tragically – and embarrassingly – among the most segregated in the nation." PRb1.[2] That alleged condition, along with our Court's prohibition of *de facto* segregation, makes New Jersey a logical choice for such historic claims.

Before this Court, Plaintiffs move for summary judgment only on liability. They do not downplay the challenges of fashioning a remedy to de facto segregation but maintain that such complexities are questions for a later day. Plaintiffs argue that the scale of the alleged constitutional violation provides every impetus, not obstacle, for an order granting the relief that they seek.

State Defendants and the renaissance school Defendants, on the other hand, argue that any finding of liability is intertwined with the question of remedy. The State Defendants argue that the Plaintiffs' requested relief would "essentially obliterat[e] the State's entire public school system" based upon vague claims and a thin record. SDb 4. The Charter School Defendants argue that "as the facts in the

[2] For convenience, consistency, and clarity, the Court adopts the abbreviations provided in Rule 2:6-8. When citing to the parties' briefs or appendices, the Court will refer to the parties as follows: Plaintiffs Latino Action Network, et al., as "P"; the State Defendants as "SD"; the Charter School Intervenor-Defendants as "CSD"; and the Renaissance School Intervenor-Defendants as "RSD."

record make plain, the issues of liability and remedy are still inextricably intertwined and preclude judgment on liability." CSDb 9.

II. PROCEDURAL AND FACTUAL HISTORIES

The Court turns to the matter's procedural history. Plaintiffs filed their complaint in May 2018. In lieu of an answer, Defendants moved to transfer the matter to the Commissioner of Education. The court denied that application. By numerous consent orders, and to facilitate settlement discussions, the court extended the time for Defendants to file an answer. After those discussions broke down, the court directed Defendants to file their responsive pleading.

With Defendants' consent, Plaintiffs filed an amended complaint shortly thereafter that addressed certain statistical inaccuracies in the original complaint. Defendants filed an answer to the amended complaint.

Plaintiffs promptly moved for partial summary judgment on liability. Defendants cross-moved for summary judgment. On January 10, 2020, the court denied Defendants' cross-motion and deferred Plaintiffs' partial summary judgment motion pending discovery. The court order Plaintiffs to notice every school district, charter school, renaissance school, and county vocational school of the litigation. The court subsequently allowed several entities and individuals to participate as intervenors or amicus.

Plaintiffs raise numerous constitutional and statutory challenges that implicate how school districts enroll students and receive State funding. The Court describes several legislative frameworks relevant to this litigation.

A. Relevant legislative frameworks

Generally speaking, school districts and municipal boundaries are coterminous, and children attending public school go to the school district in which they live. "Each municipality [in New Jersey] shall be a separate local school district except as otherwise provided…." N.J.S.A. 18A:8-1. The Legislature has provided that "[p]ublic schools shall be free to … persons over five and under 20 years of age" if the person "is domiciled within the school district."[3] N.J.S.A. 18A:38-1; see also N.J.A.C. 6A:22-3.1 ("A student is eligible to attend a school district if he or she is domiciled within the school district."). As it has since 1881, see Jenkins v. Morris School Dist., 58 N.J. 483, 495-96 (1971) (citing L. 1881, c. 149), the Legislature has prohibited the exclusion of a child from any public school because of race:

> No child between the ages of four and 20 years shall be excluded from any public school on account of his race, creed, color, national origin, ancestry, or other protected

[3] This provision is at the center of this litigation, and for purposes of this opinion, the Court will refer to it as "the residency statute."

> category under subsection f. of section 11 of P.L. 1945, c. 169 (C.10:5-12), or immigration status.
>
> [N.J.S.A. 18A:38-5.1 ("the anti-exclusion statute").]

Each school district must maintain a board of education, which oversees the conduct of each school in the district. See N.J.S.A. 18A:10-1.

The School Funding Reform Act ("SFRA") outlines the process for establishing a district's education budget to include local contribution from the community and State aid. See N.J.S.A. 18A:7F to -70. The Legislature designed the SFRA as a "state-wide unitary system of education funding," Abbott v. Burke (Abbott XX), 199 N.J. 140, 147 (2009), enacted with the goal of achieving "a thorough and efficient education for every child, regardless of where he or she lives," id. at 175. See also N.J.S.A. 18A:7F-44(h) (finding that "formula accounts for the individual characteristics of school districts and the realities of their surroundings, including the need for additional resources to address the increased disadvantages created by high concentrations of children at-risk."). "At the core of the formula is the Adequacy Budget," which is "wealth equalized, [meaning] that it is based on the community's wealth and ability to provide funding through local resources." Abbott XX, 199 N.J. at 153. In other words, the formula "should provide State aid for every school district based on the characteristics of the

student population and up-to-date measures of the individual's ability to pay." N.J.S.A. 18A:7F-44(d).

The Legislature authorizes DOE to implement various school choice programs that cross district lines, including the Inter-district School Choice Program, vocational schools, Charter Schools Program Act, and the Urban Hope Act. The Inter-district School Choice Program directs that "[t]he Commissioner of Education shall establish an interdistrict public school choice program which shall provide for the creation of choice districts." N.J.S.A. 18A:36B-16. Once a choice district is established, it "may enroll students across district lines in designated schools of the choice district." Ibid. "The commissioner may take appropriate action, consistent with State and federal law, to provide [sic] that student population diversity in all districts participating in a choice district program is maintained." N.J.S.A. 18A:36B-17(b). Additionally, a school district or regional school district "may establish and maintain vocation schools." N.J.S.A. 18A:54-5. Vocation schools "shall receive pupils from other districts so far as their facilities will permit…." N.J.S.A. 18A:54-7.

Under certain circumstances, the Charter School Program Act ("CSPA"), N.J.S.A. 18A:36A-1 to -18, allow students to attend schools outside their district of domicile. Charter schools are "open to all students on a space available basis...."

N.J.S.A. 18A:36A-7. A charter school may not discriminate in its admissions policies and practices, but "may limit admission to a particular grade level or to areas of concentration of the school, such as mathematics, science, or the arts." Ibid. Preference for enrollment must be given to students who reside in the school district where the charter school is located, and the school cannot charge those resident students tuition. N.J.S.A. 18A:36A-8(a). "If there are more applications to enroll in the charter school than there are spaces available, the charter school shall select students to attend using a random selection process." Ibid. "If available space permits, a charter school may enroll non-resident students. The terms and condition of the enrollment shall be outlined in the school's charter and approved by the commissioner." N.J.S.A. 18A:36A-8(d). A charter school shall maintain a waiting list of grade-eligible students, divided into two groups: students from the district or region of residence and students from non-resident districts. N.J.A.C. 6A:11-4.6(a)(2). The Commissioner must "assess the student composition of a charter school and the segregative effect that the loss of the students may have on its district of residence." N.J.A.C. 6A:11-2.2(c).

Likewise, renaissance school projects may enroll out-of-district students if space is available. The Urban Hope Act, N.J.S.A. 18A:36C-1 to -19, allows failing school districts to partner with a nonprofit and to establish a renaissance

school project. See N.J.S.A. 18A:36C-2. The Legislature defined a renaissance school project as:

> a newly-constructed school, or group of schools in an urban campus area, that provides an educational program for students enrolled in grades pre-K through 12 or in a grade range less than pre-K through 12, that is agreed to by the school district, and is operated and managed by a nonprofit entity in a renaissance school district.
>
> [N.J.S.A. 18A:36C-3.]

A renaissance school project is a public school. N.J.S.A. 18A:36C-7. Enrollment priority is given to students who reside in the renaissance school district. N.J.S.A. 18A:36C-8(1). If spaces are still available, the school shall conduct a lottery and enter students who reside in the district but outside the attendance area. Ibid. If necessary, the school may conduct a second lottery and consider students who reside outside the established school district. Ibid.

B. The Statistics

The Court turns to the enrollment data underlying Plaintiffs' claims and Defendants' defenses. The parties agree on these statistics, which derive from statewide and county-specific data collected and disseminated by the New Jersey Department of Education for the 2016-2017 school year as well as data from the

2010 and 2020 Decennial Census.[4] The Court begins at the State level and then drills down through the county- and district-level statistics.

a. Public Schools Statewide

In the 2016-2017 school year, New Jersey had 674 school districts, 2,514 public schools, and 1,373,267 public school students. Per DOE's data, the statewide student population had the following racial composition:

RACE	**# OF STUDENTS (% of total)**
White	622,360 (45.3%)
Latino	372,657 (27.1%)
Black	213,115 (15.5%)
Asian	136,466 (9.9%)
American, Pacific Islander, or with two or more racial groups	28,670 (2.1%)

Of those students, 521,576 qualified for free or reduced-price lunch (38%).[5]

[4] Because the parties' pleadings and moving papers agree on these statistics, the Court omits citations to the record.

[5] Plaintiffs' filings equate "poverty" with free and reduced-price lunch eligibility. This corresponds to the definition of at-risk students under the SFRA. See Abbott XX, 199 N.J. at 152 (noting that SFRA defines at-risk pupil as "one eligible for a free- or reduced-price lunch").

Of the 372,657 Latino students in New Jersey, 53,354 (14.3%) Latino students attended schools that were at least 99% non-White. Thirty percent of Latino students – 112,529 (30.2%) – attended schools where the non-White enrollment was between 90% and 99%. Almost sixty percent – 218,194 (58.6%) – of Latino students attended schools that were more than 80% non-White. More than sixty percent of Latino students – 230,564 (61.9%) – attended schools that were more than 75% non-White.

Of the 213,115 Black students in New Jersey, 52,959 (24.8%) students attended public schools that were over 99% non-White. Another quarter of Black students – 51,914 (24.4%) –attended public schools in which the percentage of non-White students was between 90% and 99%. Almost two-thirds of Black students – 31,419 (61.7%) – attended schools that were more than 80% non-White. An even higher number of Black students – 140,679 (66.0%) – attended public schools that were more than 75% non-White.

Together, 585,000 public school students in New Jersey identified as Black or Latino. Of the 585,000 Black and Latino students, approximately 371,243 (63%) attended schools that were more than 75% non-White, and 270,755 (46.2%) attended schools that were more than 90% non-White.

Plaintiffs' amended complaint identifies twenty-three districts with high percentages of Latino, Black, or Latino and Black students where more than 60% of the students qualify for free or reduced-price lunch. Table 1 provides the racial breakdown for those districts in the 2016-17 school year.

Table 1. Racial Breakdown by Select Districts, 2016-17 school year

County	District	Total students	% Latino	% Black	% White	% At-risk
Essex	East Orange	8,996	7.3%	92.0%	0.4%	62.9%
	Irvington	6,785	17.7%	80.7$	0.3%	85.7%
	Newark City	35,836	46.4%	44.3%	7.9%	79.4%
	Orange City	5,167	35.0%	64.0%	0.3%	65.9%
Bergen	Guttenberg	1,016	90.9%	1.3%	6.0%	81.5%
	North Bergen	7,713	86.3%	1.0%	9.6%	66.5%
	Union City	12,216	96.0%	0.8%	1.8%	88.0%
	West New York	7,988	91.4%	1.1%	6.2%	82.8%
Union	Elizabeth	26,491	71.5%	18.7%	7.9%	83.5%
	Hillside	3,085	22.7%	64.3%	10.3%	65.8%
	Plainfield	7,822	67.3%	31.3%	0.5%	81.5%
	Roselle	2,802	39.1%	56.6%	2.7%	69.5%
Passaic	Passaic	14,276	92.5%	4.6%	0.9%	99.8%
	Patterson	25,509	68.2%	22.1%	4.7%	75.0%
	Prospect Park Boro	923	71.2%	15.7%	9.3%	62.6%
Middlesex	New Brunswick	9,100	88.8%	9.7%	0.8%	59.6%
	Perth Amboy	10,650	91.8%	5.7%	1.6%	86.9%
Camden	Camden City	8,943	51.0%	46.3%	1.3%	64.9%
	Lawnside Boro	326	11.7%	81.3%	2.8%	66.3%
	Woodlynne Boro	384	52.9%	28.4%	6.5%	89.8%
Mercer	Trenton	10,962	48.7%	49.0%	1.2%	89.1%
Monmouth	Asbury Park	2,027	40.8%	56.7%	2.0%	82.8%
	Red Bank Boro	1,289	82.3%	8.2%	7.5%	88.8%

b. Charter schools

In the 2016-2017 school year, eighty-eight charter schools operated in the State of New Jersey. Of those 88 charter schools, thirty-seven (42%) had student bodies comprised of 99% or more non-White students; sixty-four (72%) charter schools had student bodies comprised of more than 90% non-White students. Fifty-four (61%) charter schools had Black and Latino student population exceeding 90%. Sixty-one (69%) charter schools had Black and Latino student populations exceeding 80%. Forty-six (52%) of the State's charter schools had more than 70% of students at risk.

c. 2010-2011 Student-Aged Population by District

Through their expert, Plaintiffs compared the 2010 student-aged population to the number of students actually enrolled in a given school district in 2010-2011. Coughlan Certif. ¶ 36, Ex. G. Their expert, Dr. Ryan W. Coughlan, collected the demographic make-up of school-aged children (ages five to seventeen) for each of the twenty-three school districts using the 2010 Decennial Census. Ibid.

Across those school districts, the average difference between the Black student-aged population and actual Black student enrollment was 3.08 percent. Id. at ¶ 40, Ex. G. Among those School Districts, East Orange School District exhibited the largest difference between the Black student-aged population and actual Black student enrollment of 7.83 percent. Ibid.

The largest difference between the Latino student-aged population and actual Latino student enrollment was 21.69 percent for Red Bank School District. Id. at ¶ 41, Ex. G. The second largest difference was 16.6 percent for Passaic School District. Ibid. The average difference was 5.08 percent. Ibid.

For White students, the largest difference between the student-aged population and actual student enrollment was 17.92 percent in Red Bank School District. Id. at ¶ 42, Ex. G. The average difference was 3.89 percent. Ibid.

d. All school years from 2015-2020

In response to Defendant' arguments that Plaintiffs' complaint only addressed a limited number of school districts, Plaintiffs filed a supplemental certification from Dr. Coughlan collecting state yearly and five-year average data demonstrating the racial demographics of New Jersey public and charter schools for school years 2015 through 2019. The statistics derive from DOE's enrollment data for each given year and are expressed as a five-year average on a statewide basis. Defendants do not dispute these numbers.

The following table provides the distribution of the 208,470 Black students, 377,547 Latino students, 594,693 Black or Latino students, and 606,553 White students who attended public schools during this period.[6]

Table 2 Percentage of Students, by race, attending public schools, by Percentage Non-White

% non-White	Black students	Latino students	Black and Latino students	White students
Greater than 99%	26%	15.7%		
Between 90% and 99%	23.2%	29.2%		
More than 90%			46.5%	5.5%
More than 80%	62.0%	58.2%		28.9%
More than 75%	66.2%	62.0%	63.5%	40.3%

During that same time period of five consecutive school years, on average, 88.4 charter schools served 49,221 students. More than 70% of these schools had enrollment of less than 10% White students. Stated another way, more than 80% of charter school students attended schools with less than 10% White student enrollment.

[6] The table reflects the different percentage groupings identified and enrollment data by Paragraph 4 of Dr. Coughlan's supplemental certification. Any omissions from the table reflect percentages not provided by Plaintiff's expert. The Court performed no independent calculations or groupings.

In the 2019-2020 school year, 85,827 (6.2%) public school students out of 1,357,829 attended a school comprised of at least 90% of a single race or ethnic group. Defs.' Ex. B at 7.

C. Expert Testimony

The parties' respective experts opined on the significance of the DOE statistics to Plaintiffs' legal claims.

Plaintiffs offered the expert reports and testimony of Dr. Ryan W. Coughlan. Dr. Coughlan is an Assistant Professor of Education in the Educational Leadership for Diverse Learning Communities doctoral program at Molloy College, Rockville Center, New York. He was formerly on the faculty at the City University of New York and taught at Guttman Community College and at the CUNY Graduate Center. He earned a doctorate in Urban Systems/Urban Education from Rutgers University and a Master of Arts in Secondary Science Education from the City College of New York. His research and writing over the preceding several years emphasized issues of public-school segregation in New Jersey. He has authored or co-authored numerous books, journal articles, and book chapters, and has participated in numerous conference discussions concerning various issues in education reform, with a focus on school segregation.

Coughlan testified that the county-wide statistics illustrate an "extremely high degree of racial and socioeconomic segregation" because if one "move[s] from district-to-district," they will see "certain districts with very high populations of white, sometimes white and Asian students, usually very, very low levels of poverty. And very close proximity to other school districts with very high proportion of black or black and Hispanic students and typically high levels of poverty." Coughlan Dep. 51:20-21, 55:5-11. He testified that measures for segregation other than the raw data are sometimes more difficult for people to understand. Id. at 51-69. He explained that focusing the statistics on a single school district may not show segregation, but when the geographic area of focus is expanded, perhaps to several school districts, the statistics are more likely to indicate whether there is segregation. Ibid.

Coughlan admits that the statistics do not provide a technical definition of when a certain degree of segregation exists. Id. at 51-71. Coughlan acknowledged the utility in using the measures in the report of the State Defendant's expert and explained why he finds the raw data most helpful in attempting to answer the question of whether segregation exists:

> So the reality is that there are many, many different approaches for measuring this. I would also just note that although of those different ways of measuring it, it's generally accepted in my field, that if you find segregation

> based off of any single metric, that that's clear evidence of a problem of segregation. So, you don't need to sort of have every measure covered. That a single measure does that. And, you know most scholars actually believe that if we present just the most basic of demographics. If we don't use any algorithm or equation to calculate, if we just show the proportion of kids, the raw data of that, that that's the clearest of evidence. And in New Jersey, you could see from the data of these 23 districts, that there's clear, clear difference, there's clear unevenness between these districts.
>
> [Coughlan Dep. 54:9-55:3.]

Coughlan testified that he did not look at the educational outcomes for the school districts of focus in the amended complaint because educational outcomes do not answer the question of whether a school is segregated. Id. at 74-76.

He agreed that the percentage of White students enrolled in New Jersey public schools has been declining. Id. at 93-94. He explained why his report does not consider the trend of decreasing White students in New Jersey:

> My report looked at whether or not schools are segregated in this moment. And it does not, specifically, look at the trend in white student enrollment. That said, I've done an extensive amount of research in which I do look at the ways in which shifting demographic[s] shape school segregation. And, you know, it's part of the reasons why in my 2018 report that I put forth this proportionality score as a way of measuring school segregation, because it allows you to look at school segregation exactly based off of the demographic composition as it stands. So you could look at every single group as one, and present a single finding of like the proportion of students in a single school

> that would be to the exchange with students from other schools in order to ensure that school is [proportional] to the demographic of the state.
>
> [Coughlan Dep. 95:1-18.]

Coughlan also explained that he has considered changing demographics in his other work he did and concluded that "even as the demographics are changing, [school] segregation continues to persist." Id. at 96:6-7. He explained that changing demographic trends might be useful when designing a remedy. Ibid.

Coughlan disagreed with Defendants' positions that his analysis's White / non-White dichotomy is problematic because it implies schools are segregated even if they do not enroll a significant percentage of White students. Id. at 98-104. Dr. Coughlan explained:

> So, the reality is here that schools are segregated when there is a population of white students who are separated or unevenly distributed from students of different races. Right? So if we're going to simply look at the relationship between white students and students of color, there is—there's a separation between them. There's a segregation between them, because they are unevenly distributed. That does not necessarily, you know—like, there can be diversity and segregation, right? So, there is diversity as we were speaking about earlier, if you have a group of—if you have a single group of all black students, there is diversity there. You can say that there is diversity there. You can say that there is other kinds of diversity if you put black and Hispanic students together. But there is still a segregation if you have a population of white students in the space and they are separated from students of other

> races. And there's a long really terrible history that's led to that. And there's also a whole lot of inequality that's tied to that.
>
> [Id. 99:6-100:3.]

The State Defendants submitted the expert written testimony of Dr. Bari Anhalt Erlichson. Dr. Erlichson earned a doctorate from Stanford University in political science. She also has a master's degree from Stanford's School of Education in Administration and Policy Analysis. She served as an Assistant Professor at Rutgers University from 1997-2004. She then taught for two years in the Newark and Plainfield public schools. She was employed as a project director at Montclair State University, where she directed the review of fifteen urban school districts on behalf of DOE. She joined DOE in 2008 as its Director of the Office of Research and Evaluation. She served as DOE's Assistant Commissioner from 2011 through 2015 and as Special Assistant to the Commissioner from 2015 through 2016. She has served as chief performance officer in the Trenton and Asbury Park school districts. She is presently the chief performance officer for College Achieve Public Charter Schools and a lecturer at Princeton University's School of Public and International Affairs.

Erlichson "does not conclude that the Plaintiffs' submissions and certifications are incorrect in their data analyses." SDs' Ex. B at 2. She agreed

that Coughlan did not err in calculating his statistics using the methods and assumptions he did. Erlichson Dep. 9-18.

She criticized two aspects of Coughlan's analysis:

> First, the percentage of White students enrolled in New Jersey public schools has been declining for years and all indications are that such a trend will continue. Thus, Plaintiffs' filings and the certifications of Dr. Coughlan's reliance on the presence of White students in order for schools to be considered desegregated is problematic presently and will only grow more problematic as the trend continues.
>
> Second, even among Plaintiffs – as demonstrated in depositions – there is not an agreed upon definition of what school segregation is.
>
> [Defs.' Ex. B at 2-3.]

Erlichson opined that "[t]rends in public school enrollment are largely similar to the trends demonstrated by the Census for residents." Id. at 4. She explained that New Jersey's percentage of White residents has declined relative to other racial groups in recent years, noting the Census reported that New Jersey's White population declined from 59.3% in 2010 to 51.9% in 2020. Id. at 3-5; Erlichson Dep. 22:1-12, 24:16-25.

Erlichson also rejects Plaintiffs' "attempt to establish the percentage of White students enrolled in a school as deterministic to whether a school is segregated." Defs.' Ex. B at 5. She explains:

> [B]y centering the absence of White students in a definition of segregation, i.e., White v. non-White, the implication is that schools are segregated if they do not enroll a significant percentage of White students even if a school enrolls students of different races and/or ethnicities in similar proportions.
>
> . . .
>
> As the percentage of White students continues to decline in New Jersey, mirroring the residential trends documented in the Census, it is likely that fewer and fewer schools will have significant percentages of White students.
>
> [Id. at 6.]

In support of these opinions, Erlichson provides student enrollment and Census statistics from the 2019-2020 school year showing six school districts (Newark, Orange, Roselle, Camden, Trenton, and Asbury Park) are nearly equally divided in the percentages of Black and Latino/Hispanic students. Id. at 5-6. She opined that "[a]s the percentage of White students continues to decline in New Jersey, mirroring the residential trends documented in the Census, it is likely that fewer and fewer schools will have significant percentages of White students." Id. at 6. She notes that White students are only 42% of public-school enrollment. Id. at 11.

Additionally, Erlichson explored the number of "racially isolated schools" in New Jersey in the 2019-2020 school year. Id. at 7-11. Erlichson defined a "racially isolated school" as a school where a single race or ethnicity makes up

90% or more of a student body. Id. at 7. Erlichson used that definition of racially isolated schools to "flesh out" some of the numbers rather than to endorse a particular measure of segregation. Erlichson Dep. 9-18. From that basis, and with statewide total enrollment reported as 1,357,829 students, Erlichson opined:

> Across the State, 85,827 students attended a Racially/Ethnically Isolated school, or a school where a single race or ethnicity made up 90% or more of the student body. Of these students, 21,463 identified as White, 9,584 identified as Black, 53,477 identified as Hispanic/Latino, 750 identified as Asian, and 553 identified as Hawaiian/Pacific Islander, Native American or of Two or More Races.
>
> . . . .
>
> Across the State, students in these schools accounted for 6.2% of total statewide enrollment.
>
> . . . .
>
> Shifting from an analysis of student enrollment to the question of the overall composition of a school, of the 2,503 schools listed as having enrollment in SY2019-20, 148 could be considered Racially/Ethnically Isolated schools, or 5.9% of schools across the State. In other words, only 5.9% of the schools in the State were comprised of 90% or more of a single race or ethnic group.
>
> . . . .
>
> The 18 schools with more than 90% African American enrollment were located in 3 districts.
>
> . . . .

> The 69 schools with more than 90% Hispanic/Latino enrollment were located in 15 school districts.
>
> . . . .
>
> The 61 schools with more than 90% White enrollment were located in 46 school districts . . . .
>
> [SDs' Ex. B at 7-10 (emphasis in original).]

Of the schools with more than 90% Black students, nine were in East Orange, eight were in Newark, and one was in Trenton. Of the schools with more than 90% Latino students, "the highest count of schools were in districts such as New Brunswick, Passaic, Perth Amboy, Union City and West New York." Id. at 9.

The Charter School Defendants offered the written and oral testimony of expert witness Dr. Nathan Barrett. Dr. Barrett holds a doctorate in Public Policy and Administration from the Martin School of Public Policy and Administration at the University of Kentucky. He is an expert in the economics of education with a focus on school reform policy, with a focus on teacher labor markets, equity and discrimination, and finance. He has published in numerous education and economics journals and has also served as a reviewer for numerous journals. He had held numerous positions and applied his expertise in the economics of education, education administration, and issues involving education public policy. He is currently the Director of Training and Outreach at the Coleridge Initiative. Previously, he has held numerous positions in economics and education research

and helped lead research on the school reforms in New Orleans post-Hurricane Katrina, with his research focused on segregation, teacher workforce changes, teacher policy, and student discipline.

Barrett criticizes Coughlan's analysis along much the same lines as Erlichson. Barrett agrees "researchers utilize a variety of different methods" to measure segregation. Aff. of Nathan Barrett at ¶ 13 ("Barrett Aff."). He opines that "[r]eliance solely on data showing levels of racial isolation based on school-level demographic proportions [as Dr. Coughlan does] can lead to arbitrary and inaccurate conclusions about the level of segregation and whether unconstitutional segregation exists." Id. at ¶ 11. Barrett opines that using only a school's demographic proportions is problematic for several reasons: it does not account for changes in the underlying demographics of the defined community; policymakers debate which specific numerical proportion qualifies as the ideal level of integration; and it cannot trace whether changes in the demographics are in fact due to racial isolation or rather from changes in politics, policy, or governance. Id. at ¶¶ 19, 27-29. Barrett testified that school demographic proportions do not compare schools to the community as a whole, which makes their meaning more difficult to assess. Dep. of Nathan Barrett 37-42 ("Barrett Dep."). He explained

that "community" means the area from which a school is able to draw students.

Ibid.

Barrett advocates using two more common measures of segregation, "evenness" and "exposure." Barrett Aff. ¶ 15. He explains:

> Evenness considers the racial proportions in a defined community and then assess how well each school mirrors that underlying proportion. While there are many ways to measure evenness, the most common measure is the Dissimilarity Index ("DI"). The DI measures the proportion of students from one group that would have to switch schools so that every school's racial proportion reflects that of the defined community. The DI is measured from 0 to 1 with 0 being completely integrated and 1 being completely segregated.
>
> [Id. at ¶ 16.]
>
> Exposure also measures the racial proportions in a defined community and considers how likely a student of one race is likely to encounter a student of different race within their school. The most common measure used to track exposure is the Interaction Index ("II"). Notably, the II is sensitive to the relative size of the minority group. If the minority group makes up a large proportion of the underlying population, they will experience low levels of exposure. Conversely, if the minority group makes up a small proportion of the underlying population, they will experience higher levels of exposure. The interpretation of the II must consider these proportions and, standing alone, would be insufficient to generate a reliable assessment of the levels of racial isolation or determine whether there is unconstitutional segregation.
>
> [Id. at ¶ 18.]

He continues:

> Providing more comprehensive analyses that incorporate measures of evenness and exposure leads to more reliable measures of segregation levels because it allows for a better understanding of how students sort into schools, the relationship between different schools and their respective contribution to segregation in the defined community, and the tradeoffs associated with expanding the defined community to create a more diverse student population from which schools can draw.
>
> [Id. at ¶ 32.]

In support of his position, Barrett applies those methods of statistical analysis to five example public school districts in New Jersey (Camden, Jersey City, Newark, Paterson, and Trenton). Id. at ¶¶ 36-50, Tables 4-5. From that data, he concludes that "[i]f the proportions of White students available to enroll across the public schools in a district or even a county make it impracticable to pursue full integration, a system- or statewide school improvement strategy that focuses exclusively on diversifying racially isolated schools is unlikely to succeed." Id. at ¶ 51.

Barrett agreed that changing the geographic space covered by the statistics might produce different statistical results. Barrett Dep. 37-42. He testified that the dissimilarity index "should be part of the conversation" but "that you cannot look at dissimilarity alone. Even within dissimilarity, there's things you need to look at

beyond that." Id. at 48:13-17. When asked about whether there was any value at all to looking at student demographic proportions, he testified that "[i]t depends very much on the question being asked" and indicated one specific example of where such statistics might be useful is if a school wants to determine whether the racial demographics of teachers matches those of the students attending the same school. Id. at 62:7-8. When asked whether he agreed that Coughlan's numbers themselves were subjective, Barrett said "[a]ssuming all the calculations were done correctly, I mean that's what they are…. I would not go the way he went on doing everything . . . but I'm assuming that given his credentials, that he has done them correctly." Id. at 69:13-20.

The parties' respective experts disagree over whether the proportion of school-aged children living in the districts explains the variation in student enrollment proportions. Coughlan maintains that it does. He concluded that 99.7% of the variation in the proportion of Black student enrollment in the twenty-three districts is explained by the proportion of Black children living in those districts. Coughlan Certif. ¶ 43, Ex. G. He opines that the proportion of Latino children living in the districts explains 98.5% of the variation in the proportion of the Latino student enrollment in these districts. Ibid. Further, he opines that the proportion of White children living in these districts explains 76.2% of the

variation in the proportion of White student enrollment in these districts. Ibid. From this, Coughlan concludes that White children are much less constricted to attending traditional public schools within their district boundaries than Black and Latino students are. Ibid. In performing "a standard statistical test" to determine "whether the clear patterns that existed in 2010 persist," Coughlan concludes that the proportion of non-Hispanic White school-aged population in 2010 has an extremely strong and significant correlation with the proportion of the non-Hispanic White school-aged population in 2017 for these twenty-three school districts. Ibid. at ¶ 45. He found that the proportion of non-Hispanic White school-aged population in 2010 explains 88.6% of variation in the proportion of the non-Hispanic White school-aged population in 2017, demonstrating that the relationship between the school-aged population and student enrollment in 2010 persists for all racial and ethnic categories. Ibid. When asked about the "extremely high and statistically significant correlation" between the 2010 student-aged population and school enrollment data, Coughlan testified that "the point of this analysis is to show that the population living within the boundaries of a district slowly matches the population of students attending school in that district." Coughlan Dep. 70:3-7.

Defendants argue that Coughlan's supplemental calculations and conclusions are inadmissible net opinion insufficient to establish a fact for purposes of summary judgment.

Here, the moving parties agree that no material facts are in dispute and that this matter is ripe for judgment as a matter of law. The moving parties agree on the basic facts. There are several ways to calculate the level of segregation within a school district or community. The statistics presented here are accurate based on the methods and assumptions used by each party's expert. The demographics of the State change over time. For at least some areas in New Jersey, the school demographics generally track the demographics of the underlying community from which the school draws its students. Moreover, all parties agree that Defendants are constitutionally obligated to provide a through and efficient education to the students of New Jersey.

While the underlying statistics and data are not in dispute, the parties disagree about their constitutional import. Even here, however, the parties occupy some common ground. The parties agree that experts employ at least twenty different ways of measuring whether segregation exists. They generally agree that school demographics track community demographics in at least some places in New Jersey. Additionally, the parties agree that approximately 25% of New

Jersey's public-school students attend school districts in which the student body is "relatively proportional to the overall demographic of the state[]" and approximately 75% "of children are currently going to school in a place that is disproportionate or nonrepresentative of the overall demographic[s] of the state." Coughlan Dep. 155:24-157:3.

The parties acknowledge that the State's demographics continue to change. They also agree that, in recent years, New Jersey's percentage of White residents has declined relative to other racial groups: New Jersey's White population was 59.3% in 2010 and 51.9% in 2020.

III. LEGAL ANALYSIS

Based upon these facts, the parties move for summary judgment or partial summary judgment. The procedures and standards for summary judgment are well-established. Summary judgment shall be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c). Furthermore, "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid. Summary judgment is appropriate where the party opposing summary judgment points only

to disputed issues of fact that are "of an insubstantial nature." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). Where the evidence on a factual issue "is so one-sided that one party must prevail as a matter of law," the court "should not hesitate" to grant summary judgment. Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 252 (1986)). A genuine issue of material fact must be a disputed issue of fact that is of a substantial nature, having substance and real existence. Brill, 142 N.J. at 523.

The moving party must sustain the burden of showing clearly that no genuine issue of material fact is present in the case and that the moving party is entitled to judgment as a matter of law. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73 (1954) (Brennan, J.). In determining whether a dispute is genuine, the court makes all legitimate inferences in favor of the non-moving party and denies the motion if there is the slightest doubt about the existence of a material issue of fact. Saldana v. DiMedio, 275 N.J. Super. 488 (App. Div. 1998). The court must "consider whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party in consideration of applicable evidentiary standards, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party." Brill, 142 N.J. at 523. The court must engage in an analytical process essentially the same as that

necessary to rule on a motion for directed verdict, namely, "whether evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533 (quoting Anderson, 477 U.S. at 251-52).

Assertions that are unsupported by evidence "[are] insufficient to create a genuine issue of material fact." Miller v. Bank of Am. Home Loan Servicing, LP, 439 N.J. Super. 540, 551 (App. Div. 2015) (alteration in original) (quoting Heyert v. Taddese, 431 N.J. Super. 388, 414 (App. Div. 2013)). "Competent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (quoting Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005)). Furthermore, "the act of filing the cross-motion represents to the court the ripeness of the party's right to prevail as a matter of law." Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 339 N.J. Super. 158, 178 (App. Div. 2008).

A. The Court denies the parties' applications for summary judgment on Count I.

The Court denies both parties' application for summary judgment on Count I of the Amended Complaint. Plaintiffs' application is denied because they fail to prove that the State's entire educational system is unconstitutionally segregated

because of race or ethnicity. Defendant's application fails on both legal and factual grounds: their legal arguments in support of summary judgment are ultimately unpersuasive, and their own expert acknowledges that six percent of schools in the State are racially isolated, where a single race or ethnicity makes up 90% or more of a student body. Thus, while Plaintiffs have not demonstrated that the entire system is constitutionally repugnant, that shortcoming may be a question of scale, and Defendants fail to prove that they are entitled to judgment as a matter of law.

Article I, paragraph 5 of the New Jersey Constitution prohibits segregation in public schools because of race and color. It provides:

> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.
>
> [N.J. Const, art. I, ¶ 5.]

The anti-segregation clause embodies the State's strong "long standing and vigorous" public policy against racial discrimination and segregation in public schools. Booker v. Bd. of Educ., 45 N.J. 161, 173-75 (1965). As the Court observed in Jenkins, "the delegates to the Constitutional Convention took pains to provide, not only in general terms that no person shall be denied any civil right, but

also in specific terms" that segregation has no place in the public schools. 58 N.J. at 496. Such a prohibition predates the Constitution, as the Legislature and our courts have long rejected segregation in public schools. See In re Petition for Authorization to Conduct Referendum on Withdrawal of N. Haledon Sch. Dist. from the Passaic County Manchester Reg'l High Sch. Dist. (N. Haledon), 181 N.J. 161, 177 (2004) (citing L. 1881, c. 149 ("[N]o child between the age of five and eighteen years of age shall be excluded from any public school in this state on account of his or her religion, nationality or color."); Pierce v. Union Dist. Sch. Trs., 46 N.J.L. 76 (Sup. Ct. 1884); Patterson v. Bd. of Educ. of Trenton, 11 N.J. Misc. 179 (Sup. Ct. 1933)); Booker, 45 N.J. at 174 (citing L 1945, c. 169, which prohibited discrimination based on race in places of public accommodation).

The New Jersey Constitution prohibits racial discrimination in schools regardless of cause. "New Jersey's abhorrence of discrimination and segregation in the public schools is not tempered by the cause of the segregation. Whether due to an official action, or simply segregation in fact, our public policy applies with equal force against the continuation of segregation in our public schools." In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch. (Englewood), 164 N.J. 316, 324 (2000). "Segregation, however caused, must be addressed." Id. at 330. Because the harms of segregation – including the "denial

of equal educational opportunity to the Negro children who must attend them," Booker, 45 N.J. at 168 – appear "when segregation in fact, though not official policy, results from long standing housing and economic discrimination and the rigid application of neighborhood school districting," ibid., our courts "consistently have held that racial imbalance resulting from *de facto* segregation is inimical to the constitutional guarantee of a thorough and efficient education." N. Haledon, 181 N.J. at 177.

The Supreme Court has not hesitated to ensure that State officials compel compliance with the constitutional mandate to the full extent of their responsibilities and authorities. It has construed the anti-segregation clause and its implementing legislation to impose on the Commissioner the responsibility, as well as powers "comprehensive in nature," to correct de facto segregation in public schools. See Booker, 45 N.J. at 173-74, 178; Jenkins, 58 N.J. at 497. The scope of the Commissioner's powers corresponds with the high responsibility placed upon her to faithfully discharge the State's important public policy. See Jenkins, 58 N.J. at 500, 504. "[T]he State [must] ensure that no student is discriminated against or subjected to segregation in our public schools." In re Grant of the Charter Sch. In re Englewood on the Palisades Charter Sch., 164 N.J. 316, 323 (2000). "[W]here the Commissioner determines that the local officials are not taking reasonably

feasible steps towards the adoption of a suitable desegregation plan in fulfillment of the State's policies, he may either call for a further plan by the local officials or 'prescribe a plan of his own.'" Id. at 506 (quoting Booker, 45 N.J. at 178).

Neither municipal nor school district boundaries are impermeable in the fight against segregation. In meeting the constitutional obligation, and notwithstanding the residency statute, the Commissioner is vested with the authority to "cross district lines to avoid 'segregation in fact.'" Jenkins, 58 N.J. at 501 (quoting Booker, 45 N.J. at 168). "[T]he existence of a 'single community' is not a prerequisite to the power of the State Board [of Education] to bridge school district boundaries where necessary to vindicate the State's policy against segregation." Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood (Englewood Cliffs), 257 N.J. Super. 413, 476 (App. Div. 1992). And the State Board has the power "to issue such ancillary orders to school districts in this State as are required to ensure compliance with its policies."[7] Id. at 422.

Our Supreme Court has not defined either the elements or the threshold showing of an unconstitutional violation of Article I, paragraph 5. In Booker, the

[7] The Supreme Court expressly declined to address "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." Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood, 132 N.J. 327, 329(1993).

Court acknowledged that it had declined, in Morean v. Board of Education of Montclair, 42 N.J. 237, 242-43 (1964), to establish bright lines:

> While we there made no attempt to define the precise extent of racial imbalance which would require remedial action, we did refer approvingly to Jackson v. Pasadena City School District[, 382 P.2d 878, 882 (Calif. 1963)], where the court, after indicating that substantial racial imbalance would call for relief, cautioned that exact apportionment [of Black students] among the schools was not required and that consideration must be given to all relevant factors "including the practical necessities of governmental operation."
>
> [45 N.J. at 178-79.]

Considering the question of threshold further, the Court discussed ratios of Black to White students in a particular school in comparison to the ratios within the school district, generally. Id. at 179-80. The Court soundly rejected the Commissioner's standard of "entirely or almost entirely Negro":

> While [the Commissioner] has broadly recognized and acted on the principle that *de facto* segregation has an undesirable effect upon attitudes related to successful learning and denies equal educational opportunities to the racial minority, he has narrowly confined relief to situations where the schools in question were entirely or almost entirely Negro. This may be contrasted with Vetere where the Commissioner ordered the desegregation of a school with 75 per cent Negro pupil population, with Barksdale where the court ordered the desegregation of schools with Negro pupil populations appreciably more than 50 per cent but less in substantially varying amounts

> than 90 per cent, and with the general tenor of our own opinion in Morean [].
>
> [Id. at 178 (citing Vetere v. Allen, 245 N.Y.S.2d 682 (Sup. Ct. 1963), and Barksdale v. Springfield Sch. Comm., 237 F. Supp. 543 (D. Mass 1965)).]

It did not address ratios across and among school districts.

In other matters, however, the Supreme Court has compelled the Commissioner to enforce the constitutional mandate across political or school district subdivisions. Both Jenkins and North Haledon involved multiple municipalities or districts. In Jenkins, the Commissioner concluded that he had no authority to prohibit the termination of a sending-receiving relationship that would have resulted in the doubling of the percentage of Black students in the high school to 56% and would have caused "'long-range harmful effects to the two school systems' in the light of 'the growing racial imbalance between the entire student population of the Town and Township.'" 58 N.J. at 493. The Court reversed, emphasizing that, notwithstanding the Commissioner's own cramped view of his authorities, the Legislature had "fulfill[ed] the constitutional mandate in the many broad implementing enactments delegating comprehensive powers to the Commissioner," id. at 506, including the authority to direct a merger of two or more school districts if "ultimately necessary for fulfillment of the State's educational and desegregation policies in the public school," id. at 508. The Court

directed the Commissioner to deny termination of the sending-receiving relationship between two districts and to direct the respective school boards to "proceed with suitable steps towards regionalization." Id. at 508.

In North Haledon, the Court reversed an administrative decision that allowed a municipality to withdraw from a regional high school when doing so would "result in a 9% drop in the white [student] population [at the high school, and] the percentage of minorities will continue to rise and the white population will continue to decline due to population trends in the constituent towns." 181 N.J. at 184 (quoting In re Petition for Authorization to Conduct Referendum on Withdrawal of N. Haledon Sch. Dist. from Passaic County Manchester Reg'l High Sch. Dist. (N. Haledon II), 363 N.J. Super. 130, 139 (2003)). Demographic trends of decreasing enrollment of White students provided no "excuse" to approve the withdrawal and did not minimize the obligation to "anticipate imbalance and to take action to blunt perceived demographic trends which will lead to racial or ethnic imbalance." Id. at 183 (quoting N. Haledon II, 363 N.J. Super. at 139). The Court emphasized that the decision to allow the proposed withdrawal would "deny the benefits of the educational opportunity offered by a diverse student body" to all the students. Id. at 184.

Despite these constitutional mandates, judicial decrees, and legislative enactments that prohibit segregation and empower the Commissioner with the broadest authorities to combat it, the North Haledon Court acknowledged that school segregation persists, commenting that "[w]e have paid lip service to the idea of diversity in our schools, but in the real world we have not succeeded." Id. at 179. "[A]s a State, we are losing ground," the Court noted, observing that "New Jersey ranks fifth in the nation in the percentage of black students attending ninety to one hundred percent minority schools, and fourth in the nation in respect of [H]ispanic students." Ibid.

The Court has also long acknowledged that neighborhood schooling, a relative of the residency statute, might exacerbate segregation. The Booker Court observed that *de facto* segregation may arise from "the rigid application of neighborhood school districting." 45 N.J. at 168. The Court explained that "[t]his is not to imply that the neighborhood school policy per se is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact." Id. at 170 (quoting Barksdale, 237 F. Supp. at 546). The Court quoted the Commissioner's statement that, while the neighborhood school policy has advantages, "the assignment of pupils to nearby schools is a general principle and is not to be applied inflexibly when other considerations outweigh its values." Id. at 176.

While the Court sounded a note of optimism – "[i]t may well be, as has been suggested, that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem," id. at 171 – it also emphasized that "as a nation, we cannot afford standing by" until such a day, thus denying "the oncoming generation of the educational advantages which are its due," ibid.

In Jenkins, too, the Court acknowledged the "historic home rule principles and practices in our State in the field of education and elsewhere," but emphasized that, just as in enforcement of federal constitutional rights, "governmental subdivisions of the state may readily be abridged when necessary to vindicate state constitutional rights and policies." 58 N.J. at 500-01.

The Court turns first to the State Defendants' arguments. First, they argue that Plaintiffs have an inadequate factual record for the extraordinary relief they seek, and that Plaintiffs have failed to develop "a comprehensive record containing a district-by-district analysis of the State's 674 districts." SDb 41. Second, they argue that the cases interpreting Article I, paragraph 5 have confined their holdings regarding *de facto* segregation to "situations where race has already been identified as the driving force of segregation within a single school district, or in uniquely entwined communities." Ibid. They argue that the Supreme Court has

never applied the clause outside of a local, district-specific dispute in which the Court also had "a robust administrative record made below for the district sought to be declared illegally segregated." Id. at 43. They emphasize that the Supreme Court has recognized the importance of "impracticalities" and of remedies that are "reasonable, feasible and workable," while Plaintiffs here seek to ignore such constraints. Id. at 43-44, 48. They advance that the State's changing demographics would require "ongoing and continuous statewide reorganizations," id. at 45, and that Plaintiffs fail to acknowledge that racial imbalances in one school district might be driven by different factors in another, id. at 46. They argue that the a lack of a coherent definition of segregation among Plaintiffs entitles Defendants to summary judgment. Id. at 49-55. They additionally assert that Plaintiffs' broad categorization of students into Black, Hispanic, and White ignores "the diversity inherent in 'non-white' populations." Id. at 56. Finally, Defendants argue that Plaintiffs have failed to establish that State action underlies the racial imbalance. Id. at 60-62.

The Charter School Defendants support the State Defendants' application for summary judgment. They argue that Plaintiffs' statistical evidence fails to prove a violation of the Constitution or the Charter School Act. They maintain that Plaintiffs' data is outdated, incomplete, and unreliable

and that Plaintiffs "rely solely on basic, absolute measures and data comparisons to make the case for liability," CSDb 11, ignoring "the role of residential segregation, the pool of students available to enroll, Defendants' efforts to devise programs and initiatives that foster integration and progress made to date," and the positive roles of charter schools in providing a through and efficient education, ibid. They argue that Plaintiffs intentionally chose to use unsophisticated measures of segregation. Further, they maintain that issues of liability and remedy are inextricably linked and preclude the entry of judgment on liability.

The Renaissance School Defendants largely reject Plaintiffs' arguments as well but join in their application to the extent that Plaintiffs challenge the requirement that renaissance school districts charge tuition to non-Camden residents. RSDb 1 (citing N.J.A.C. 6A:31-8.3). They highlight their unique legal structure and their work in "advancing the educational best interests of Camden students through school choice and high accountability for educational outcomes," id. at 2, which necessarily entails "work[ing] every day to mitigate the effects of the obvious racial, ethnic and economic imbalance between public school students in Camden and other neighboring school districts," id. at 1-2. Renaissance school districts meet Erlichson's

definition of racial isolation: "each of them have 95 percent or more students who identify as Hispanic or Black." Id. at 5. They explain the unique enrollment criteria established for renaissance school districts, see N.J.S.A. 18A:36A-8(a)(1), and the narrow circumstances in which students who live outside of Camden may apply for enrollment. Id. at 5-6.

Turning to the merits of Plaintiffs' arguments, the RSD argue that Plaintiffs advance no proof of a constitutional violation involving renaissance school district operations. Id. at 7. To the contrary, "[s]ince the Urban Hope Act explicitly contemplates non-residents attending Renaissance Schools, such schools illustrate an important model to mitigate the effects of demographic imbalances in student enrollment throughout the State." Ibid. The RSD argue that DOE's regulation requiring them to charge tuition to non-Camden residents "arbitrarily limited opportunities for students outside Camden with diverse demographic make-ups to attend Renaissance Schools in Camden," and join in Plaintiffs' application only to the extent that it challenges that regulation. Id. at 8.

In opposition to Defendants' arguments and in support of their own, Plaintiffs lambaste the State Defendants for advancing defenses that, they argue, sound in "separate but equal" and segregationist principles. PRb 2.

They emphasize that Defendants' own data shows that "an extreme percentage of Black and Latino public school students attend schools that cannot possibly be described as diverse." Id. at 6. They point out that they rely upon the very same types of data and classifications that the Supreme Court considered in discussing *de facto* segregation. Id. at 12. More pointedly, they argue that Barrett supports the very argument that Plaintiffs seek to prove, that is, "the demographics of individual schools within a school district almost always match the demographics of the school district from which the schools draw students." Id. at 21. They argue that Defendants assert the same "excuse" of demographic trends that the Court rejected in North Haledon. Id. at 14-15. And they dispense of Defendants' arguments about diversity within a racial classification, pointing out that "neither the federal courts nor our courts ever have suggested that diversity within the Black or Latino communities can excuse the segregation of Black and Latino people in our schools or other public facilities." Id. at 15-16. As an aside, Plaintiffs observe that Defendants do not collect nor maintain intra-group data; their argument, thus, lacks any factual basis. Id. at 17.

Plaintiffs likewise reject Defendants' legal arguments. In their view, Defendants' reading of Booker and Jenkins ignores the fundaments of those

decisions. Id. at 29-30. They contrast the strictures imposed on districts' authority to combat segregation with the broad obligations and authorizations afforded the Commissioner. Id. at 31-32. They reject Defendants' defeatist argument that reduces to "the problem is too pervasive and the solution too complicated." They argue that such an attitude denies public school students of this State their constitutional due and has no role in constitutional jurisprudence. Like the Supreme Court in North Haledon, Plaintiffs urge the Court to reject Defendants' "attitude of helplessness." Id. at 43. Finally, where the data so plainly and indisputably establishes "severe and widespread" segregation, Plaintiffs ask the Court to reject Defendants' argument that Plaintiffs' claims fail for want of a consistent definition of segregation where neither the Supreme Court nor Defendants' own experts have offered a more precise definition. To that same point, Plaintiffs argue that they have presented this Court far more detailed data than the Supreme Court considered in either Booker or Jenkins.

Finally, Plaintiffs urge the Court to reject Defendants' causation arguments given this State's longstanding public policy that rejects segregation regardless of the cause and Defendants' affirmative obligation to remedy segregation, whatever its etiology. Id. at 51. Plaintiffs recount the undisputed

history of discriminatory governmental housing policy that resulted in our State's residential segregation, which the residency statute replicates in the public schools. Id. at 53-56.

The Court turns first to the State Defendants' arguments. The Court agrees that, on this record, Plaintiffs' proofs fall short of the statewide order that they seek. Plaintiffs want an order declaring that Defendants have violated Article I, paragraph 5 on a statewide, as applied basis. Plaintiffs do not shrink from the magnitude of this litigation, emphasizing throughout their written and oral arguments the statewide nature of the alleged constitutional injury; in their view, they present "extensive data documenting *statewide* school segregation," Pr 13, and lambaste Defendants' arguments as "only highlight[ing] the need for statewide liability," id. at 27, for "statewide violations of constitutional rights," id. at 40.

On this application, however, the Court remains unconvinced that the claim can be alleged, proven, and adjudicated at a statewide level based solely upon the enrollment data and Plaintiffs' expert testimony. The data does not demonstrate statewide unconstitutionality, across all districts, across all regions. Further, where no practical solution exists – where, for instance, a racially isolated district is surrounded by similarly racially isolated districts – the enrollment

data alone, without some analysis of both neighboring and regional enrollment data, demographic figures, and segregation indices, does not establish constitutional infirmity. For that reason, Plaintiffs' application for summary judgment on Count I fails.

That Plaintiffs have not established statewide infirmity does not diminish that they have demonstrated marked and persistent racial imbalance in numerous school districts across the State that Defendants' actions, policies, programs, and inaction have failed to remedy. Plaintiffs may not prevail on these proofs, on a statewide basis, but their evidence precludes the State Defendants from prevailing on their application for summary judgment.

In significant part, the State Defendants' application fails because their legal arguments are unpersuasive. First, the Court finds that the different opinions of lay witness deponents in defining segregation are irrelevant and not dispositive. The witnesses represent organizations that, by their participation in this lawsuit, challenge the constraints imposed upon public school students in this State by the residency statute, which, they argue, results in racially isolated schools for Black, Hispanic, and White students. The core of Plaintiffs' complaint sounds in the undisputed data and statistics, not a subjective, lay definition of segregation.

This State's jurisprudence is devoid of reserving constitutional relief to public school children based upon testimony offered by their representatives or guardians. Kenneth Robinson's claims did not depend upon the testimony of Ernestine Robinson, Robinson v. Cahill (Robinson I), 62 N.J. 473 (1973); Raymond Arthur Abbott's claims for relief did not depend upon the testimony of Frances Abbott, Abbott v. Burke (Abbott I), 100 N.J. 269 (1985); and, most certainly, Oliver Brown's claims for relief did not depend upon the testimony of his adult legal representatives, Brown, 347 U.S. 483. This is a data-, statistical-, and expert-driven litigation; the Court does not require nor expect representatives of Plaintiff organizations to define the constitutional injury or its parameters.

Additionally, State Defendants do not advance their own definition of segregation to discredit or refute Plaintiffs' claims. Their expert offers no definition of segregation and provides no expert testimony on its parameters. This is not intended as criticism of Dr. Erlichson; rather, it is likely that depositions of numerous DOE employees would similarly result in a range of definitions and thresholds of what constitutes a segregated school.

The Court understands the State Defendants' argument but finds it to be of little evidential or persuasive value. In Booker, Jennings, and North

Haledon, the Supreme Court spent very little energy discussing or parsing finely the definition of segregation in the context of Article I, paragraph 5, or of a thorough and efficient education. That a group of lay witnesses representing plaintiff organizations have life experiences, backgrounds, or viewpoints that result in differing definitions of a segregated school does not detract from either the evidence or the ethos of Plaintiffs' first cause of action.

Similarly unpersuasive is the State Defendants' discussion on the diversity of national origins or identifications within the Black or Latino communities. To be clear, it is one thing to acknowledge and celebrate the diversity within the broad statistical definition of Black and Latino students; that diversity is, however, no defense to claims of unlawful *de facto* segregation. Nothing in the record suggests that the causes of segregation vary among Blacks or Hispanics of different national or regional origins. Defendants cite no authority for the proposition that diversity of national origin or identification within a racial classification suffices to defeat or minimize racial segregation. Additionally, the State Defendants' own data offers no support for this argument because, as Plaintiffs observe, Defendants do not collect this data. Creative and speculative arguments devoid of

evidential support do not prevail on summary judgment. Hoffman, 404 N.J. Super. at 426.

Defendants' legal arguments fare no better. First, nothing in Booker, Jenkins, or North Haledon suggests the cramped and confined reading of Article I, paragraph 5 advanced by the State Defendants. To the contrary, the Supreme Court has, in broad and emphatic language, interpreted the legislative and constitutional history of the provision to advance this State's public policy, reaffirmed at every opportunity the broader protections provided under State rather than federal constitutional law, and held the Commissioner to the highest standards in fulfilling her constitutional obligation.

Indeed, this trilogy of cases has broadly interpreted the Executive Branch's authorities and delegations to enforce these important constitutional and legislative enactments, criticizing not the exercise of power but only, as in Jenkins, "their administrative narrowing which in effect represents not only a disavowal of power but also a disavowal of responsibility." 58 N.J. at 504. Nothing in the intervening fifty-years has diminished either Defendants' power or responsibility, and North Haledon reflects our Court's affirmation of the central tenets of Booker and Jenkins.

This Court acknowledges that the leading cases in this area have originated through an administrative process involving the Commissioner or, as in the case of North Haledon, a Board of Review that was "authorized by statute to decide whether the question of withdrawal should be put to the voters." 181 N.J. at 167-68. While Defendants may be correct that such a process would have resulted in a more detailed record, nothing requires Plaintiffs to seek vindication of their constitutional rights before an administrative agency. Defendants also acknowledge that such an administrative proceeding would be a "lengthy and complex undertaking." SDb 67.

It is of course true Plaintiffs seek unprecedented relief to address what, in their view, is pervasive and persistent racial segregation in our public schools, driven in substantial part by the residency statute. To say that Plaintiffs "fail to appreciate that our courts have never evaluated whether the statewide public school system is unconstitutionally segregated by race and socioeconomic status," SDb 63, is observation, not argument, and that the amended complaint raises constitutional claims in a new way does not render it fatally flawed. Moreover, Plaintiffs expressly acknowledge that New Jersey courts have not evaluated the challenges they are raising.

Defendants fail to establish that Plaintiffs' Article I, paragraph 5 count fail as a matter of law, particularly where, as the Court must, the Court gives the non-moving party every legitimate inference. Defendants' factual and legal criticisms of Plaintiffs' theory are neither persuasive nor robust and do not persuade this Court that Plaintiffs' claims are flawed, even if they may be more ambitious in scope than the evidence supports.

Finally, the Court finds that Defendants' discussion of demographic trends among public school children in New Jersey does not, without more, constitute a defense to Plaintiffs' constitutional claim. The Court agrees with Plaintiffs that Defendants argument rings of an "attitude of helplessness in the face of what [is] perceived to be inevitable." N. Haledon II, 363 N.J. Super. at 143. A decreasing number of White students in public schools may present challenges, but those challenges only emphasize, not diminish, "the obligation and power of education officials to remediate racial imbalance." Ibid.

B. The Court denies Plaintiffs' motion for summary judgment on Count II and partially grants Defendants' cross-motion for summary judgment on Count II.

The Court turns to Plaintiffs' second count, which alleges that "segregation on the basis of race, ethnicity and poverty" violates Article I, paragraph 1 of the New Jersey State Constitution. They argue that Defendants' failure to prevent

racial and socioeconomic segregation in the public schools violates equal protection. For similar scale- and data-driven reasons that the Court denies Plaintiffs' motion for summary judgment on Count I, the Court denies summary judgment on Count II. The Court grants Defendants' cross-motion for summary judgment based on socioeconomic status – poverty – but denies it as to race and ethnicity.

Plaintiffs argue that, under the three-factor test established in Greenberg v. Kimmelman, 99 N.J. 552 (1985), Defendants have violated Plaintiffs' equal protection rights. The first factor – with Plaintiffs defining the right as "education in a racially and socioeconomically integrated environment," PB 29 – was a core requirement of Brown, 347 U.S. at 493, and has been a central component of New Jersey's educational policy since the nineteenth century, id. at 30. Recognizing that "[n]o New Jersey court has considered the question of whether socioeconomic segregation education violates equal protection," id. at 30-31, they argue that "in other contexts, federal and state courts have ruled that different treatment based on wealth violates the norms of equal protection," id. at 31. They maintain that New Jersey schools deprive students from both impoverished and wealthy backgrounds an integrated education environment solely because of their financial means,

noting the concentrations of poverty in some districts and its relatively low prevalence in neighboring districts. Id. at 32.

Turning to the second factor, the extent of the restrictions, Plaintiffs argue that the State's current statutes severely impair the right to integrated schools, focusing their argument on the residency statute. They emphasize the close correlation between the racial and socioeconomic breakdown of the district and the underlying community and argue that, under New Jersey law, Plaintiffs can demonstrate a constitutional violation by statistical data alone.

Regarding the third factor, Plaintiffs maintain that the residency requirement serves no public need. They note the number of exceptions to the requirement and argue that a statute that is a primary cause of racial and wealth segregation must yield to the principles of equal protection.

Defendants argue Plaintiffs fail to prove New Jersey students are not receiving equal protection under the law. SDB 68. Defendants assert that count two fails as a matter of law because "disparate impact alone is insufficient to sustain an equal protection claim." Id. at 69. In addition, they assert the claim fails under the controlling balancing test. Id. at 69-82. They argue that Plaintiffs fail to demonstrate an intentional action on behalf of the State and fail to pinpoint invidious discrimination or systemic bias within the scope of Defendants' control.

Id. at 71. As to the balancing test, Defendants argue that Plaintiffs allege an established right "based on an arbitrary and reductive definition of diversity." Id. at 73-75; Barrett Aff. ¶ 11. Specifically, Defendants assert that Plaintiffs' definition minimizes the diversity within the "Black" and "Latino" communities and overlooks the increase of Asian-Americans in New Jersey. Defs.' Br. 74-78; Defs.' Ex. B at 3-6; Erlichson Dep. 22:1-12, 24:16-25. Additionally, Defendants claim that Plaintiffs do not establish that students are subject to disparate treatment because of their wealth. Therefore, Defendants argue, Plaintiffs fail to identify a "cognizable interest that is restrained by the residency statute." Defs.' Br. 79. Further, Defendants argue the narrow data presented by Plaintiffs – statistics referencing only 23 of New Jersey's 674 school districts – does not overcome the Supreme Court's demonstrated deference to home rule. Id. at 80-82. They assert that the residency requirement underlies the funding for public schools and this "important public need" outweighs the "limited data presented by [P]laintiffs." Id. at 81.

The Charter School Defendants contend that the law only allows the Court to determine an equal protection claim on statistics alone if it concludes the statistics are substantially significant, which is not the case here. CSDb 18-19.

In reply, Plaintiffs maintain Defendants' failure to prevent racial and socioeconomic segregation in New Jersey's public schools violates the State Constitution's guarantee of Equal Protection. PRb 72-77. Plaintiffs reiterate that their statistical proofs alone demonstrate a violation of the Equal Protection Guarantee and argue Defendants misconstrue precedent when they argue disparate impact alone is insufficient. Id. at 73-75. Plaintiffs emphasize that their claims allege system-wide discrimination over several years—an allegation of invidious systemic bias or discrimination. Id. at 75-76. Alternatively, Plaintiffs argue that, if intent were a required element, Defendants' "willful blindness to the *de facto* segregation" demonstrates the requisite intent. Id. at 76-77. Plaintiffs reiterate many of the equal protection arguments made in the opening brief. Id. at 77-83. Plaintiffs acknowledge socioeconomic status may raise a novel equal protection claim but that their statistics prove poverty-based discrimination as measured by free and reduced-price lunch program participation. Id. at 79. Plaintiffs dispute Defendants' contention regarding the public need for the residency statute because the school funding formula has been adjusted many times and parent engagement will not necessarily change if the schools are more integrated. Id. at 81-82. Plaintiffs also argue the home rule does not provide Defendants with any justification to abdicate their constitutional duties. Id. at 82-83.

An equal protection analysis under the New Jersey Constitution differs slightly from analysis under the United States Constitution. Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985). In Robinson, 62 N.J. at 491-92, our Supreme Court began to develop an independent analysis of state constitutional rights under Article I, Paragraph 1, that "rejected two-tiered equal protection analysis ... and employed a balancing test in analyzing claims under the state constitution." Greenberg, 99 N.J. at 567 (quoting Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 43 (1976)). That balancing test considers "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Ibid. (citing Right to Choose v. Byrne, 91 N.J. 287, 308-09 (1982)). "The test is a flexible one, measuring the importance of the right against the need for the government restriction." Lewis v. Harris, 188 N.J. 415, 443 (2006). "Under that approach, each claim is examined 'on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction.'" Ibid. (quoting Sojourner A. v. N.J. Dep't of Hum. Servs., 177 N.J. 318, 333 (2003)).

Plaintiffs advance an as-applied challenge to the constitutionality of the residency statute. The Court considers constitutional challenges to legislative enactments in light of the "seemly respect for the act of a co-equal branch of

government." N.J. Ass'n on Correction v. Lan, 80 N.J. 199, 218 (1979). "When the Legislature exercises its constitutional authority to make laws, its actions are afforded highly deferential judicial review." Commc'ns Workers of Am., AFL-CIO v. N.J. Civil Svc. Comm'n, 234 N.J. 483, 514 (2018). Courts do not second-guess the "efficacy or wisdom" of the Legislature's social policy decisions. Brown v. State, 356 N.J. Super. 71, 80 (App. Div. 2002) (internal quotation and citation omitted).

"Every possible presumption favors the validity of an act of the Legislature." New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8 (1972). To that end, and because courts exercise "extreme self restraint" in reviewing legislation, ibid., the statute's presumptive validity "can be rebutted only upon a showing that the statute's repugnancy to the Constitution is clear beyond a reasonable doubt." Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 285 (1998); see also Lewis, 188 N.J. at 459 (emphasizing that courts defer to any legislative enactment unless it is "unmistakably shown to run afoul of the Constitution."). Where a statute's constitutionality is "fairly debatable, courts will uphold" the law. Newark Superior Officers Ass'n v. City of Newark, 98 N.J. 212, 227 (1985).

The parties dispute the importance of State v. Marshall, 130 N.J. 109 (1992). In Marshall, the Court considered the defendant's argument that New Jersey's

death penalty system unconstitutionally discriminated on the basis of race. Id. at 209. The Court rejected federal law, id. at 207, and emphasized that "all of this State's] institutions reflect" a unique commitment "to the elimination of racial discrimination." Ibid. The Court explained that, if believed that the race of the defendant or of the victim significantly affected capital sentencing decisions, it would take corrective action but, under no circumstances, would it "tolerate discrimination that threatened the foundation of our system of law." Ibid. Plaintiffs argue that the Court's discussion of statistical evidence in support of a constitutional claim demonstrates that a plaintiff can prove an equal protection violation absent proof of invidious discrimination or impermissible bias. Defendants dispute that expansive reading of Marshall.

It is important to place Marshall in its context. First, Plaintiffs rely upon a discussion that constitutes several pages of the Court's 112-page decision. The Court's discussion in Marshall largely recounted the more detailed analysis in Chief Justice Wilentz's decision for the Court in State v. Ramseur, 106 N.J. 123 (1987).

Second, Plaintiffs cite no decision from the Supreme Court's subsequent equal protection jurisprudence that has relied upon the Ramseur / Marshall discussion. While the Court's significant equal protection decisions since Marshall

may not have relied upon statistical proofs, it is meaningful that neither the Court nor the Appellate Division have not imported the Ramseur / Marshall discussion into any broader, non-criminal, non-capital punishment jurisprudence. That the Court did not incorporate two cases as comprehensive and fundamental to this State's capital jurisprudence and so emblematic of the Court's commitment to vigorously policing the substantive and procedural components of capital punishment into other areas of equal protection jurisprudence reflects that death and, by extension, capital jurisprudence, is different.

Third, and finally, Plaintiffs cite to the Court's consideration of the jury selection process and "how courts may use the techniques of statistical analysis to correct inequalities in the process." Id. at 211-12. Specific to jury selection, the Marshall Court walks through Ramseur's discussion of the techniques of statistical analysis and the court's responsibility to consider the evidence and, if "the statistical evidence is so deviant as to compel a conclusion of substantial significance," id. at 212, to look at the "circumstances surrounding that statistical showing," ibid.

Of course, school segregation has little to do with capital punishment, and the mechanics of residency statute has little to do with jury selection in a capital trial. Even in Marshall, the Court noted that the Ramseur "principles are not

clearly applicable to the circumstances of this case." Ibid. That observation is even more true in a case so far removed from capital punishment where (a) Plaintiffs do not rely upon statistical deviation at all – indeed, their argument and evidence shows that schools' racial composition deviates minimally from what would be expected based upon the racial composition of the constituent municipalities, ibid., (b) does not involve a selection process, ibid., and (c) the residency statute operates very differently than jury selection in a capital case, as in Ramseur, or race-of-victim or race-of-defendant disparities in capital sentencing, as in Marshall. Plaintiffs resort to Marshall because, under their theory, it relieves them of the obligation to prove invidious discrimination or impermissible bias. In their reply, Plaintiffs continue to advance their reading of Marshall but also argue that intentional and impermissible bias and discrimination permeates their allegations, as Defendants knew of their authorities and obligations to solve the pervasive segregation and "system-wide discrimination over a period of many decades" and failed to do so. PRb 75.

The Court denies Defendants' application for summary judgment as to Count II's allegations related to race. First, Plaintiffs allege with sufficient specificity that Defendants intentionally failed to exercise their constitutional obligations and authorities to remedy segregation. The problems of racially

isolated districts persist, and Plaintiffs adequately allege that Defendants have, as a self-evident proposition, failed to take sufficient steps to remedy that segregation. The logic of their complaint is clear: segregation is abhorrent to New Jersey public policy; *de facto* segregation is prevalent and persistent across the State; Defendants are obligated and empowered to minimize segregation; Defendants have intentionally failed to fulfill their responsibilities to grant public school students the protection of these laws; segregation has not decreased; Defendants are thus liable.

Plaintiffs may yet demonstrate that Marshall and Ramseur have bearing on this matter's legal issues. But they have not done so yet. Nonetheless, the Court agrees that their amended complaint adequately alleges intention to survive Defendants' first argument in support of summary judgment.

Second, Defendants are not entitled to summary judgment as a matter of law under Greenberg. Plaintiffs satisfy the first factor in enunciating a right: the right to education in an integrated environment. As then-Judge Long wrote, "[t]he Fourteenth Amendment and its New Jersey counterpart are meant to shield our citizens against state sanctioned racial discrimination." Englewood Cliffs, 257 N.J. Super. at 473. Over the past seven decades, since Morean and Booker, our Supreme Court has championed that right and held Defendants to high standards

in its enforcement and protection. As in the first count, Defendants' discussion of national-origin and -heritage diversity within an identified racial classification is unconvincing and unsupported by the data. Had Defendant DOE collected finer grained data concerning this State's public school population and its remarkable "divers[ity of] socio-economic, cultural, and educational backgrounds," SDb 78, the Court presumes that Plaintiffs' arguments would account for that data. Absent any data whatsoever, however, Defendants advance only argument, which fails to meet the summary judgment standards. Hoffman, 404 N.J. Super. at 426.

Turning to the second factor, Plaintiffs focus on the residency statute. They argue that the statute is at the core of New Jersey's continued segregation: school segregation happens at the district level because the residency statute imports residential segregation into the public schools. "[I]t is clear that the Residency Statute determines where students attend school – and because of the statute, many students are forced to attend racially and socioeconomically segregated schools." PRb 81.

Defendants respond that Plaintiffs' data does not demonstrate that the statute is broadly unconstitutional; rather, they "rely on a narrow, unrepre-sentative set of raw data to support their theory that the residency statute

broadly restricts the right to a diverse education across the State." SDb 80. "[A]t best Plaintiffs' data makes a narrow showing regarding only 23 of the State's 674 school districts" and "in the vast majority of cases, the residency statute does not result in segregation of the sort plaintiffs allege." Ibid.

Defendants fail to prevail on summary judgment on the second Greenberg prong. Plaintiffs assert as-applied challenges and Defendants do not deny that, in some districts, the statute contributes to racial imbalance. That it does not apply in all 674 districts is not fatal to Plaintiffs' as-applied challenge.

However, Plaintiffs too fall short of the showing required for summary judgment. In this area, given the geographic interplay and the wide range of district sizes, configurations, and racial composition, Plaintiffs' broad, generalized non-geographic data set fails to establish that, if public school children were able to go to another district, and doing so was feasible and practicable, they would receive a diverse education. In some districts, that may be the case; in others, it may not be.

Turning to the third prong, Defendants argue that the statute is at the core of school finance, governance, and administration. Plaintiffs point to the paucity of evidence and arguments advanced by the State Defendants in support of the statute's public need and note the number of times that the financing system has

changed in light of constitutional demands. Additionally, notwithstanding the statutory citations offered by Defendants, Defendants cite to no evidence in the summary judgment record that supports their argument that the residency statute encourages parental involvement in governance and budgeting. The Court finds the third prong in equipoise on these proofs, short of Plaintiffs' burden of proving constitutional infirmity beyond a reasonable doubt. But the Court also finds Defendants' defenses of the statute to be tepid and likewise short of the threshold necessary to prevail on summary judgment.

Thus, Count II's claims based on race remain viable. The statute is not out of the woods; analysis and evidence at a more granular scale may establish that in some districts or regions, it establishes unconstitutional impediments on students' right to education in a diverse environment. But it is also true that Plaintiffs may be able to prove liability without a declaration of unconstitutionality. As the Supreme Court has emphasized on several occasions, home rule and neighborhood schools are not set in stone. They remain viable as long as they serve public policy; to the extent that they protect and prolong racial segregation, they are anathema to public policy. As the Court has further emphasized, home rule and neighborhood schools impose no obstacle to and do not dilute or diminish the Commissioner's exercise of her obligation to fight segregation in public schools.

Indeed, Booker and North Haledon suggest that, regardless of whether the residency statute is unconstitutional, it does not constrain the Commissioner's obligation to combat segregation. Thus, Plaintiffs may be able to prove that the State Defendants violated the equal protection clause, on an as applied basis, without a finding that the residency statute is unconstitutional.

The Court quickly disposes of Plaintiffs' argument that the evidence demonstrates an equal protection violation with respect to poverty. Plaintiffs cite no relevant authority in support of such a right and this Court declines to extend the cases they rely upon – Bearden v. Georgia, 461 U.S. 660 (1983), and State v. Joe, 228 N.J. 125 (2017) – to this context. The Court agrees with Defendants that the New Jersey Supreme Court foreclosed such a claim in Robinson I. Decades of Abbott litigation has not softened the Supreme Court's reluctance to extend equal protection rights to economic issues unconnected to the fair administration of the criminal law.

Accordingly, this Court grants Defendants' application for summary judgment on Plaintiffs' equal protection claim based on the classification of wealth. The claims related to race and ethnicity survive.

C. The Court denies the parties' applications for summary judgment as to Count III.

Count III of the amended complaint alleges that "[t]he segregation of New Jersey's public schools on the basis of race, ethnicity and poverty unconstitutionally deprives the State's public school students of the thorough and efficient education to which they are entitled under New Jersey Constitution, Art. VIII, ¶ 4." Perhaps no provision has proven more consequential for the development of educational equity and finance issues in this State; nonetheless, Plaintiffs claim takes the provision into areas that are certainly within its scope yet not precisely delineated.

The New Jersey Constitution provides that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const., art. VIII, ¶ 4. The provision imposes upon the State "the fundamental responsibility … to provide a public education for its children." Abbott XX, 199 N.J. at 143. Commonly referred to as the "thorough and efficient education clause," this obligation underlies the Robinson and Abbott lines of cases. See, e.g., Abbott v. Burke (Abbott XIX), 196 N.J. 544, 548 (2008) ("Since the early 1970s, pupils attending some of New Jersey's poorest school districts have come to the courts of this state to obtain fulfillment of their right to a thorough and efficient education guaranteed by the New Jersey Constitution.").

Fifty years of litigation regarding the "State's system of support for public education" and the State's obligation to develop a "funding formula that would provide all children, including disadvantaged children in poorer urban districts, with an educational opportunity as measured by the Constitution's thorough and efficient clause," Abbott XX, 199 N.J. at 144, has defined several dimensions of the State's obligations under the thorough and efficient clause. The State Defendants' brief recounts comprehensively the lessons learned from, and the obligations imposed by, the Abbott jurisprudence interpretation and enforcement of the provision concerning educational finance. SDb 31-33.

But the Supreme Court has identified another dimension of the thorough and efficient clause that the Abbott litigation has not touched and is neither addressed nor solved within the mechanisms of the SFRA. Funding of our public schools is one vital branch of the thorough and efficient education clause's protection, and one that the Abbott cases have defined exhaustively; "maintenance of a diverse student body," N. Haledon, id. at 175, is another. While both guarantees or obligations emanate from the same constitutional provision, nothing in this State's jurisprudence suggests that the analysis is the same or that compliance with one equates to compliance with both.

Funding mechanisms aside, racial segregation in the schools offends the thorough and efficient clause. As Judge Cuff succinctly observed in North Haledon II, "[t]he courts of this State have long recognized that racial and ethnic segregation in the schools operated by a school district contravenes and frustrates the constitutional imperative of a thorough and efficient education." 363 N.J. Super. at 139 (citing Jenkins, 58 N.J. at 494-97, Booker, 45 N.J. at 173-81, Morean, 42 N.J. at 242-44, Englewood Cliffs, 257 N.J. Super. at 452-55).

In affirming that decision for a unanimous Court, Chief Justice Poritz adopted wholly the Appellate Division's reading of the State's major desegregation cases, noting that the Court "consistently [has] held that racial imbalance resulting from *de facto* segregation is inimical to the constitutional guarantee of a thorough and efficient education." 181 N.J. at 177. The Court explained that "[s]tudents attending racially imbalanced schools are denied the benefits that come from learning and associating with students from different backgrounds, races, and cultures." Id. at 178.

The North Haledon Court emphasized that "'the children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better.'" Ibid. (quoting Booker, 45 N.J. at 170). "Racial balance and education are not 'isolated factors,' but 'different sides of the

same coin[.]'" Ibid. (quoting Englewood I, 257 N.J. Super. at 464). "'When white students are withdrawn from a diverse school environment and placed with a 'group of homogenous students,' they lose 'the educational opportunity to learn to live with and respect people from a variety of racial and ethnic backgrounds by attending school with such individuals.'" Id. at 179 (quoting Bd. of Educ. of Merchantville v. Bd. of Educ. of Pennsauken, State Board Docket No. 48-92, slip op. at 15 (State Bd. of Educ. Jan. 7, 1998), available at https://www.nj.gov/education/legal/sboe/1998/mersupre.pdf (last visited Sept. 26, 2023)). Again focusing on the thorough and efficient clause, the Court discusses, at length, the Commissioner's "constitutional imperative to prevent segregation in our public schools." As in Jenkins, the Court emphasized that "[t]he Commissioner not only had the power, but also the duty, to act[.]" Id. at 181 (citing Jenkins, 58 N.J. at 506).

Notably, neither the Appellate Division nor the Supreme Court discussed or cited to any Abbott decision in support of their respective holdings in the North Haledon litigation. The thorough and efficient education clause prohibits racial segregation not because of funding or "significant education deficiencies," SDb 35, but rather because "[s]tudents attending racially imbalanced schools are denied the

benefits that come from learning and associating with students from different backgrounds, races, and cultures," N. Haledon, 181 N.J. at 178.

The Abbott jurisprudence addresses a different component of the protections afforded by the thorough and efficient clause. It does not diminish Abbott to acknowledge, as North Haledon might suggest, that fifty years of educational financing litigation and constitutionally compliant funding mechanisms – of judicial or legislative origin – have done little to eliminate *de facto* segregation. Thus, on this record, this Court must conclude that (a) the thorough and efficient clause imposes at least two obligations upon Defendants, that is, the duty to establish and maintain a constitutionally adequate funding system and a duty to ameliorate racial imbalance in our public schools; (b) satisfaction of one such obligation does not equate to, as a matter of law, satisfaction of the other; and (c) satisfying one obligation involves different factors, even if not precisely defined, than satisfying the other.

The Court turns to the parties' arguments. The Court denies Defendants' application for summary judgment because neither their arguments nor the facts establish that they are entitled to judgment as a matter of law. Nothing in Booker, Jenkins, Englewood I, or North Haledon suggest that the Supreme Court or the Appellate Division intend that the Abbott measures of a thorough and efficient

education govern in assessing thorough and efficient claims alleging racial segregation. Such a holding would effectively erase the prohibition of segregation altogether, with no proofs on this record that funding mechanisms can and do maintain a diverse student body or ameliorate *de facto* segregation.

That the SFRA is a constitutionally adequate funding formula does not at all address the North Haledon Court's observation that New Jersey is on "the list of the most segregated states for black students." 181 N.J. at 179. With respect to any district or districts, Defendants could satisfy the provision's requirement for a constitutional funding system yet fail to "'take affirmative steps to eliminate racial imbalance, regardless of its causes.'" Jenkins, 58 N.J. at 506. Englewood I also reminds us that:

> segregat[ing] a group of homogeneous students from relatively affluent families in a school run completely by white teachers, which stresses college preparation and does not even provide a full spectrum of special education programs for the students who require them … utterly fails to account for the considerable value which we have long placed on social and educational development in an atmosphere in which children with differences learn to celebrate and not fear them.
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> [257 N.J. Super. at 461.]

See also N. Haledon, 181 N.J. at 184 (noting that permitting proposed withdrawal would deny "benefits of the educational opportunity offered by a diverse student

body" to all students: students remaining and students withdrawing from diverse high school). Adequate funding to the wealthier and homogeneous school could still deprive those children the constitutionally compelled racial balance.

Plaintiffs do not prevail, either. First, the data and proof granularity issues that preclude summary judgment on the equal protection claim are present here, as well, and do not allow the Court to enter summary judgment on these proofs.

Second, Plaintiffs' argument that racial imbalance is a *per se* violation of the thorough and efficient clause extends North Haledon beyond its holding. The North Haledon Court emphasized that racial imbalance in the public schools implicates the thorough and efficient clause and held that it was within the authority and obligation of both the Commissioner and the Board of Review to ameliorate and prevent that imbalance as part of their statutory duties, but the Court did not announce a *per se* rule. The procedural history is relevant: the matter came before the Court on certification from the Appellate Division decision reversing the Board of Review's decision. While affirming its commitment to racially balanced public schools, the Court did not define or announce a new constitutional rule, much less a *per se* rule. Rather, like in Jenkins and in Booker, it reversed Executive Branch action that failed to fulfill its obligation to maintain racial balance in the public schools. Legally, the Court concluded that (a) the

"constitutional imperative to prevent segregation in our public schools" applies to a Board of Review, as well as the Commissioner, 181 N.J. at 181-82, (b) that a 9% decrease in White students is significant, even if demographic trends also contribute to a decline, id. at 182, and (c) the Board has an obligation to consider the advantages for all children of attending school with students of different backgrounds and races, id. at 183. It did not establish a constitutional standard or minimum for a racially balanced district.

Third, absent a *per se* rule, Plaintiffs do not enunciate a workable legal standard. "Worse than North Haledon," PRb 71, does not work because, in North Haledon, the Court was concerned about an unacceptable *change* in the racial balance that the Board of Review had deemed acceptable and inevitable, not existing racial imbalances. To that point, the Court cautioned that "[n]ot every action that reduces the percentage of white students necessarily implicates the State's policy against segregation in the public schools." 181 N.J. at 183.

This discussion does not constrain North Haledon's reaffirmation of this State's policy against *de facto* segregation, its acknowledgement that New Jersey ranks high on the "list of most segregated states for black students," id. at 179, and its recognition of the collective failures to establish diversity in our schools. Finally, the Court acknowledged that neither it nor the Booker had "establish[ed] a

precise point when a thorough and efficient education is threatened by racial imbalance." Id. at 183. Thus, while North Haledon is not narrowly limited to *changes* in racial imbalance, it also does not establish a *per se* rule. It may be that the racial imbalance that offends equal protection is greater, lesser, or equal to the level that unconstitutionally threatens or impedes a thorough and efficient education. As this litigation moves forward, that is among the questions that may require an answer.

Accordingly, neither Plaintiffs nor Defendants are entitled to judgment as a matter of law on Plaintiffs' thorough and efficient claim.

D. The Court grants Defendants' application for summary judgment on Count IV.

Plaintiffs' fourth count asks the Court to construe Article I, ¶ 5, Article I, ¶ 1, and Article VIII, ¶ 4 "together and collectively in light of each other to constitute a clear and unequivocal condemnation of racial and socioeconomic segregation in New Jersey Public Schools." Am. Compl.¶ 72.

Plaintiffs contend the collective interpretation of the above three constitutional provisions provides an independent basis for holding Defendants liable for de facto school segregation. Pb 40-43. Plaintiffs advance that this Court should recognize the three provisions together create an independent basis of liability. They argue that the New Jersey Supreme Court has previously relied on

multiple constitutional provisions in rejecting segregated schools and other state and federal courts have read constitutional provisions together to create greater rights than may exist under individual constitutional provisions. Id. at 41-43. Plaintiffs argue that Defendants also violate this greater collective protection against *de facto* school segregation for the same reasons Defendants violated each individual provision. Id. at 43.

Defendants argue that count four fails because Plaintiffs do not "establish that there is such thing as a constitutional amalgamation in the education context." SDb 82. They assert that constitutional provisions may not be combined to establish a new right or "enhanced protections." Id. at 83. Rather, under New Jersey Supreme Court precedent, each constitutional claim in the education framework must be analyzed separately. Moreover, Defendants argue the New Jersey Constitution clearly defines the individual rights that Plaintiffs assert, rendering the creation of a new right needless. Id. at 83-88.

Plaintiffs reiterate the collective interpretation of the State Constitution's provisions regarding segregated schools provides an independent basis for holding Defendants liable for de facto segregation. PRb 77-86. Plaintiffs dispute that they seek to establish a new right or cause of action. Id. at 84. Rather, "Plaintiffs simply seek recognition that these three independent constitutional provisions

prohibiting segregation in public schools should also be read collectively to further fortify the broad prohibition on de facto segregation in New Jersey's public schools." Id. at 84 (emphasis in original). Plaintiffs also contend that their argument is not novel because courts have long considered "the collective import of rights" to provide further protection. Id. at 84-86.

Plaintiffs offer no binding authority for the relief they seek here. The Court declines their invitation to aggregate constitutional protections where, as here, the Supreme Court has spoken forcefully about the protections afforded by each provision, standing on its own. Additionally, they identify no gaps in constitutional protection that would compel aggregation; in other words, Plaintiffs allege constitutional injury squarely within the wheelhouses of the anti-segregation, equal protection, and thorough and efficient clauses of the New Jersey Constitution, taken individually. Each of these constitutional provisions fully guarantee their respective rights to New Jersey's public school children, without the assistance of or in combination with other clauses.

The Court grants Defendants' application for summary judgment on Count IV.

E. The Court grants Defendants' application for summary judgment on Count V.

Count V of Plaintiffs' amended complaint alleges that "New Jersey's segregation of public school by race is in violation of N.J.S.A. 18A:38-5.1, which requires that the New Jersey Commissioner of Education ensure that 'no child between the ages of four and 20 years shall be excluded from any public school on account of his race, creed, color, national origin, or ancestry.'"

As Jenkins, Booker, and North Haledon explain, this statute predates our modern Constitution and represents our "long standing and vigorous" "policy against racial discrimination and segregation in the public schools." Booker, 45 N.J. at 173; see also Jenkins, 58 N.J. at 495 (noting that provision is "explicit legislation declaring it unlawful to exclude a child from any public school because of his race"); N. Haledon, 181 N.J. at 177 (referencing statute and observing that "[l]ong before the United States Supreme Court in Brown v. Board of Education[], New Jersey had rejected segregation in the public schools of this State by statute and by case law."). It is a bedrock declaration of this State's prohibition on segregation in our public schools.

The parties generally combine their discussion of this provision and the anti-segregation clause. Plaintiffs combine the discussion and advance the same arguments; Defendants combine the discussion and advance the same defenses.

But, to state the obvious, the Constitution is not a statute, and a statute is not a constitutional provision.

What this means is that while Plaintiffs can allege and may be able to prove that Defendants violated one or more constitutional provisions while enforcing the residency statute, they cannot allege that Defendants violated N.J.S.A. 18A:38-5.1 by complying with the residency statute. If Defendants enforced the residency statute consistent with that statute's terms – which is the crux of Plaintiff's equal protection claim – to find a violation of N.J.S.A. 18A:38-5.1 would require Plaintiffs to demonstrate that Defendants excluded a student of color who lived within the district from a public school based upon that student's race or color. They do not allege, argue, or establish that.

In construing the residency statute and the anti-exclusion statute, N.J.S.A. 18A:38-5.1, the Court has an obligation to harmonize them. "Whenever statutory analysis involves the interplay of two or more statutes, we seek to harmonize them, under the assumption that the Legislature was aware of its actions and intended for related laws to work together." N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 555 (2013); see also St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 14-15 (2005) ("When reviewing two separate enactments, the Court has an affirmative duty to reconcile them, so as to give effect to both expressions of the lawmakers' will. In

other words, it is our obligation to make every effort to harmonize separate statutes, even if they are in apparent conflict, insofar as we are able to do so…."); In re Gray-Sadler, 164 N.J. 468, 485 (1999) ("When interpreting different statutory provisions, we are obligated to make every effort to harmonize them, even if they are in apparent conflict.").

Defendants do not and cannot violate one statute by enforcing another.[8] In light of the residency statute, the Court reads the anti-exclusion statute to prohibit any official or school board from excluding a student on the basis of race who is legally entitled to attend that school. The race or ethnicity of the student and the mandate of the anti-exclusion statute do not alter Defendants' obligations under the residency statute. If the student lives within the district or is otherwise entitled to

[8] To be clear, the constitutional analysis is different. As Jenkins explained fifty years ago, the Commissioner has "suitable measures of power … for fulfillment of the educational and racial policies embodied in our State Constitution and in its implementing legislation." 58 N.J. at 500-01. The Commissioner does and "must have power to cross district lines to avoid 'segregation in fact[.]'" Id. at 501. Thus, in the faithful discharge of the Commissioner's "high responsibilities in the educational field," id. at 504, the constitutional obligations may readily bridge "governmental subdivisions of the state," id. at 500, irrespective of provisions such as the residency statute. Other remedies exist, as well, of course, including "direction that [the subdivisions] proceed with suitable steps towards regionalization…, with full power to direct a merger on his own if he finds such course ultimately necessary for fulfillment of the State's educational and desegregation policies in the public schools." Id. at 508. In short, the failure of Plaintiffs' statutory claim does not reflect on the viability of their constitutional claims.

attend out-of-district, for example, under a school choice program, then it is unlawful to exclude on the basis of race. If, however, the student is not statutorily entitled or authorized to attend the district, i.e., they live in a different municipality and no other provision authorizes them to attend an out-of-district school, then the residency statute renders the student ineligible to attend the school but not "on account of" their race or color. Defendants have not violated the anti-exclusion statute.

Plaintiffs do not argue or allege that Defendants or districts are discriminating against students based on race within a district. No evidence suggests that they are. Defendants are entitled to judgment as a matter of law on this count.

F. The Court grants Defendants' application for summary judgment on Count VI.

Count VI of Plaintiffs' amended complaint alleges that Defendants have violated the CSPA, which mandates that "[a] charter school shall be open to all students on a space available basis and shall not discriminate in its admission policies or practices on … any [] basis that would be illegal if used by a school district …." N.J.S.A. 18A:36-7.

In support of summary judgment, Plaintiffs argue that Defendants have likewise violated the CSPA and its implementing regulations by permitting *de*

facto segregation to persist. Pb 45. They argue that courts have recognized the overlap between the Commissioner's constitutional and statutory authority under the act, stressing that the Commissioner's obligation to prevent segregation is a vital aspect in the review of charter school approval process. Pb 46 (citing Englewood, 164 N.J. at 329). Plaintiffs maintain that the Commissioner has allowed charter schools to be as segregated as the State's traditional schools, with 72% of charter schools having less than 10% White students, and 42% of charter schools having student bodies that are more than 99% non-White. Ibid. Plaintiffs argue that the Commissioner has failed to implement policies that could fulfill the goals of integration.

The State Defendants that Plaintiffs' legal theory is unclear and inconsistent, vacillating between alleging that the CSPA is unconstitutional and alleging that the Commissioner's action or inactions are unconstitutional. SDb 90-91. Defendants emphasize the strongest presumption of constitutionality that attaches to a legislative act and argue that Plaintiffs have failed to demonstrate that the act is illegal or leads to racial segregation. SDb 91. They point to plain language of the act that protects against discrimination and establishes safeguards to counter-balance any segregative effects that may occur because of charters. They note further that the Supreme Court has upheld the act as constitutional. Id. at 94 (citing

In re Renewal TEAM Acad. Charter Sch., 247 N.J. 46, 69 (2021)). They argue further that the Commissioner fully complies with the relevant statutory and regulatory commands to assess charter schools and the segregative effect that a charter school may have. Id. at 95-96. They note that charter school enrollment is voluntary, id. at 93, and argue that the record lacks any evidence that charter schools siphon minority or non-minority students from the traditional schools or that racial imbalances resulted either from the CSPA or Defendants' actions per that statute. Id. at 97-98.

Specific to this claim, the Charter School Defendants argue that Plaintiffs' proofs fail to establish any statutory violation. CSDb 25. They argue that Plaintiffs fail to place the charter school enrollment data in context and fail to present any data regarding White students available to diversify racially isolated schools. Id. at 26. They argue that mere statistics cannot demonstrate any constitutional violations by the Commissioner in the administration of the CSPA. Ibid. Finally, they argue that Plaintiffs' data does not establish that charter schools have exacerbated segregation throughout the State. Id. at 26-27.

In reply, Plaintiffs clarify their theory that Defendants have violated the CSPA by permitting charter schools to operate with racially imbalanced student

bodies that have exacerbated rather than relieved statewide segregation. PRb 86. They further argue that:

> The fault does not lie primarily with the State's charter schools, which are uniquely positioned to be a part of the solution to New Jersey's segregation problem. But those schools are, today, a manifestation of the State's systematically segregated schools, which because they are themselves segregated, further entrench the segregation throughout the State's schools.
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> [Id. at 86-87.]

Despite the statutory and regulatory provisions to combat segregation, Plaintiffs assert that the State Defendants have nevertheless allowed charter schools to remain segregated. Id. at 89. In any given approval, the Commissioner *may* undertake the necessary review – although Plaintiffs highlight the Commissioner's mixed success on this factor on appellate review, id. at 90 – "[b]ut the statistics show that, overall, charter schools exacerbate racial imbalances, and that the Commissioner has allowed this segregation to take place," ibid. Because "charter schools themselves are – like public school districts – simply educating the students within their district boundaries[, t]hey are part of an overall school ecosystem that maintains segregated schools." Ibid.

"The Commissioner must ensure that the operation of a charter school does not result in district segregation." In re Red Bank Charter Sch., 367 N.J. Super.

462, 472 (App. Div. 2004) (citing Charter Sch. Application of Englewood on the Palisades, 164 N.J. 316, 328 (2000)). "The Commissioner must consider 'the racial impact that a charter school applicant will have on the district of residence[.]'" In re Team Academy Charter School, 459 N.J. Super. 111, 122 (App. Div. 2019) (quoting In re Proposed Quest Academy Charter Sch. of Montclair Founders Group, 216 N.J 370, 377 (2013)).

The Court grants moving Defendants' application for summary judgment on this claim. The data upon which Plaintiffs rely does not demonstrate that Defendants have violated the CSPA or, to the extent that Plaintiffs' reply brief does not extinguish this issue, that the CSPA is unconstitutional. Plaintiffs have not demonstrated that Defendants' administration of the CSPA has exacerbated segregation or affected it in any way. The administration of the CSPA may not have cured or reduced the segregation that Plaintiffs allege but the data does not establish that it has made it worse. Additionally, as Plaintiffs own argument demonstrates, judicial review has proven held the Commissioner and the Department to the standards established by statute and rule.

Accordingly, the Court grants Defendants' application as to Count VI.

G. The Court denies the parties' applications for summary judgment on Count VII.

Finally, Plaintiffs allege that Defendants have violated the Civil Rights Act, N.J.S.A. 10:6-1 to -2 ("CRA"). The State Defendants argue that Plaintiffs' failure to establish any constitutional violation precludes relief under the CRA and, additionally, that neither the State nor its officials are amenable to suit under the CRA because they are not "persons" within the meaning of the Act.

In reply, Plaintiffs argue that (a) they prevail on their CRA claim for the same reasons they prevail on their underlying constitutional arguments, and (b) the Commissioner, individually, is liable for the constitutional violations alleged and demonstrated.

The Court denies both parties' applications for summary judgment on Plaintiffs' CRA claim. Plaintiffs' CRA claim requires success on the underlying constitutional claims, which they have not achieved. Defendants' application likewise fails because (a) their application for summary judgment on Plaintiffs' constitutional claims has failed, and (b) Plaintiffs seek injunctive and declaratory relief under the CRA, see Amended Comp. at 34-35, for which Defendants are not immune, Gormley v. Wood-El, 218 N.J. 72, 115 (2014).