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**THE CONTINUED PURSUIT OF *BROWN V. BOARD OF EDUCATION*:
WE NEED TO FURTHER DESEGREGATE NEW JERSEY'S PUBLIC
SCHOOLS, BUT HOW?**

Miranda Stafford

INTRODUCTION

The 1954 Supreme Court decision *Brown v. Board of Education* dramatically altered the American public education system and, subsequently, the overall status of race relations in the United States.¹ *Brown*, analyzing instances of educational segregation across the country, found that the segregation of students in the public school system on the basis of race violated the Constitution.² More specifically, the Court determined that segregation in education improperly denied students their right to equal protection of the law under the Fourteenth Amendment.³ Segregation, they said, had “no place” in public education, as schooling presented “perhaps the most important function of state and local governments.”⁴

Despite the clear unconstitutionality of segregation, many states, namely those which operated under the racial caste system of Jim Crow, failed to comply with the *Brown* decision in a timely matter.⁵ In the interest of enforcing desegregation, the Court handed down a judicial mandate a year later in *Brown II*, outlining the general mechanisms to be used to bring states into compliance and requiring that the desegregation of American public schools be conducted with “all deliberate speed”.⁶ In the aftermath of *Brown* and *Brown II*, a slew of other cases tackling specific instances of segregation in educational settings helped to further shape the legal apparatus of desegregation.⁷ *Brown*, *Brown II*, and their legal progeny onerously⁸ made some practical progress towards their goal and led to better outcomes for students⁹. Ideologically, *Brown* became encoded in the broader understanding of what America, and ultimately individual states, should strive for in a democratic society.¹⁰

¹ *Case: Brown V. Board of Education*, LEGAL DEF. FUND, <https://www.naacpldf.org/case-issue/landmark-brown-v-board-education/> (last visited May 16, 2024).

² *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954).

³ *Id.*

⁴ *Id.* at 493.

⁵ *Timeline of Events Leading to the Brown v. Board of Education Decision of 1954*, NAT'L ARCHIVES (June 7, 2021), <https://www.archives.gov/education/lessons/brown-v-board/timeline.html>.

⁶ *Brown v. Bd. Of Ed. (Brown II)*, 349 U.S. 294, 301 (1955).

⁷ NAT'L ARCHIVES, *supra* note 5.

⁸ See Steve Rose, *Ruby Bridges: the six-year-old who defied a mob and desegregated her school*, THE GUARDIAN (May 6, 2021, 5:00 AM), <https://www.theguardian.com/society/2021/may/06/ruby-bridges-the-six-year-old-who-defied-a-mob-and-desegregated-her-school>.

⁹ See Sean F. Reardon et al., *Is Separate Still Unequal? New Evidence on School Segregation 2* (2022).

¹⁰ See *Legal Highlight: The Civil Rights Act of 1964*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964#:~:text=The%20Act%20prohibited%20discrimination%20in,continues%20to%20resonate%20in%20America.>

The state of New Jersey has had a long, complicated journey towards meeting the promise of *Brown*.¹¹ Before the *Brown* decisions, New Jersey passed a statute in 1881 which outlawed segregation, though the practice did not actually end in the state at that time.¹² Instead, segregation persisted into the mid-twentieth century, mostly in the portion of the state resting south of the Mason-Dixon line relative to Pennsylvania/Maryland.¹³ In response to continued defiance of the 1881 law and subsequent judicial decisions upholding the state's commitment to desegregation, New Jersey ratified a new state constitution in 1947 which contained specific language banning segregation in public schools.¹⁴ In doing so, New Jersey became the first state to incorporate desegregation into its state constitution¹⁵, and it remains the only state to specifically dub segregation in public schools unconstitutional.¹⁶ However, this *commitment* to desegregation did not ultimately *deter* segregation: at least 60 New Jersey school districts blatantly violated the new state constitution by continuing discriminatory practices through at least 1948.¹⁷ In fact, Camden County dragged its feet on desegregating for over a decade, with the city of Pennsauken, New Jersey not closing its last "Negro school" until 1962.¹⁸

Despite this problematic past, the 1947 New Jersey state constitution solidified the apparent intention to end, or at least seriously combat, segregation and discrimination on the basis of race in public schools.¹⁹ The sincerity of the state's conviction in this mission, however, has long been called into question.²⁰ While New Jersey has taken substantial steps legislatively and judicially to address racial inequity in education under the law, the separation of New Jersey students by race continues to persist across the state.²¹

¹¹ GREG FLAXMAN ET AL., A STATUS QUO OF SEGREGATION: RACIAL AND ECONOMIC IMBALANCE IN NEW JERSEY SCHOOLS, 1989-2010 (2013), <https://theinclusionproject.rutgers.edu/wp-content/uploads/2020/06/ucla-civil-rights-project-report-on-nj-segregation.pdf>.

¹² Kathleen O'Brien, *Black History Month: Integrating Jersey's Schools*, NJ.COM (Feb. 1, 2008, 4:00 AM),

https://www.nj.com/ledgerarchives/2008/02/black_history_month_integratin.html; see N.J. STAT. ANN. § 18A: 38-5.1 (West 2023).

¹³ O'Brien, *supra* note 12.

¹⁴ *Id.*; N.J. CONST., art. I, ¶ 5; see *Hedgepeth v. Bd. of Educ.*, 35 A.2d 622 (N.J. 1994).

¹⁵ ALBERT BLAUSTEIN, CIVIL RIGHTS U.S.A.: PUBLIC SCHOOLS: CITIES IN THE NORTH AND WEST, 1963: CAMDEN AND ENVIRONS 7 (1963).

¹⁶ FLAXMAN ET AL., *supra* note 11, at 7.

¹⁷ *Id.* at 10.

¹⁸ BLAUSTEIN, *supra* note 15, at 8.

¹⁹ See N.J. CONST., art. I, ¶ 5.

²⁰ See O'Brien, *supra* note 12.

²¹ See GARY ORFIELD ET AL., NEW JERSEY'S SEGREGATED SCHOOLS: TRENDS AND PATHS FORWARD 6-11 (2017), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/new-jerseys-segregated-schools-trends-and-paths-forward/New-Jersey-report-final-110917.pdf>.

This lingering educational segregation can largely be attributed to the state's geographic, physical segregation.²² Despite ranking seventh in racial and ethnic diversity across the United States, New Jersey is twenty-third in nationwide measures of residential segregation, not including Hispanic/Latino populations.²³ The problem is best explained by the numbers: in 2016, 20% of New Jersey's 564 municipalities were 90% white and 60% were 75% white, despite whites making up only 56% of the state's population at the time.²⁴ Generally, this uneven demographic distribution can be traced back to historically racist housing policies and real estate practices utilized in New Jersey like exclusionary zoning, redlining, and blockbusting.²⁵ Though no longer legal, the result of these policies and practices was the layout of New Jersey and the broader exclusion of non-whites from the generational wealth building available to their white peers.²⁶ Ultimately then, the initial efforts undertaken by New Jersey to end segregation in public education came into conflict with these larger, racist structures built into the physical fabric of the state.

Regrettably, these issues have not disappeared with time.²⁷ New Jersey's primary method of assigning students to school districts relies upon zip code or municipality, meaning that students in New Jersey's public school system are attending schools comprised of students from residentially segregated communities.²⁸ While national trends indicate that residential

²² See TIM EVANS, *SCHOOL DISTRICT FRAGMENTATION AND RESIDENTIAL SEGREGATION* (2020), <https://www.njfuture.org/research-reports/school-district-fragmentation-and-residential-segregation/>.

²³ U.S. CENSUS BUREAU, *Racial and Ethnic Diversity in the United States: 2010 Census and 2020 Census* (2023), <https://www.census.gov/library/visualizations/interactive/racial-and-ethnic-diversity-in-the-united-states-2010-and-2020-census.html>; NAT'L INST. ON MINORITY HEALTH AND HEALTH DISPARITIES, *HDPulse: An Ecosystem of Minority Health and Health Disparities Resources* (2024).

²⁴ Colleen O'Dea, *Interactive Map: Segregation Continues to Be NJ's State of the State*, N.J. SPOTLIGHT NEWS (Dec. 2, 2016), <https://www.njspotlightnews.org/2016/12/16-12-01-interactive-map-segregation-continues-to-be-nj-s-state-of-the-state/>.

²⁵ BRUCE D. BAKER & MARK WEBER, *SEPARATE AND UNEQUAL: RACIAL AND ETHNIC SEGREGATION AND THE CASE FOR SCHOOL FUNDING REPARATIONS IN NEW JERSEY* (2021), <https://www.njpp.org/wp-content/uploads/2021/09/NJPP-Report-Separate-and-Unequal-September-2021-1.pdf>.

²⁶ MATTHEW GERKEN ET AL., *ASSESSING THE LEGACIES OF HISTORICAL REDLINING: CORRELATIONS WITH MEASURES OF MODERN HOUSING INSTABILITY* 1, 2, 5 (2023), <https://www.urban.org/sites/default/files/2023-01/Addressing%20the%20Legacies%20of%20Historical%20Redlining.pdf>.

²⁷ ORFIELD ET AL., *supra* note 21, at 15.

²⁸ Catherine Carrera, *New Jersey school segregation case: A look at key points, what's next in Latino Action Network vs. NJ*, Chalkbeat Newark (Oct. 13, 2023, 1:08 PM), <https://www.chalkbeat.org/newark/2023/10/13/23915907/new-jersey-school-segregation-lawsuit-latino-action-network-naacp/#:~:text=In%20study%20after%20study%2C%20New,school%20systems%20in%20the%20country.>

segregation may be lessening, that has apparently done little to alleviate New Jersey's segregated schools.²⁹ In fact, the available data suggests that segregation may be increasing in New Jersey school districts: between 2017 and 2024, New Jersey moved from the sixth-most segregated state for African American students to the fifth and from the seventh-most for Hispanic students to the fourth.³⁰

In the legal challenge *Latino Action Network, et al. v. New Jersey*, plaintiffs have alleged that the state knowingly segregates students by race through the assignment of students to schools based on residency.³¹ More specifically, the plaintiffs have contended that this constitutes *de facto* segregation which violates, not only the decisions laid out in *Brown* and *Brown II*, but also a state Supreme Court decision declaring *de facto* segregation in schools to be unlawful.³² Attorneys for the state have argued that such claims are too broad and suggest that any remedies for the plaintiffs might “essentially obliterate the State's entire public school system”.³³ A recent interim order on summary judgment for the parties indicates that the court is open to limited findings of *de facto* segregation, and that segregation was adequately demonstrated by the plaintiff in certain New Jersey schools.³⁴ While the opinion hesitated to find a systemic pattern of segregation based on the summary judgement motion, the court held that, in any case, the state of New Jersey has an obligation to remediate racial imbalance in its public schools under the state constitution.³⁵

The outcome of *Latino Action Network*, however, is not the focus of this Note. The most recent reporting on the case has indicated that the parties have been working towards negotiations: however, whether or not the use of residency to assign students to public school districts constitutes *de facto* segregation in the eyes of the law or is categorically impermissible is of little consequence in comparison to the strong evidence that the use of residency assignment has done little to assuage or prevent segregation in New Jersey schools.³⁶ In other words, regardless of whether the state chooses to

²⁹ Brady Meixel et al., *Residential Segregation Is Declining. How Can We Continue to Increase Inclusion?*, URBAN INST. (Sep. 30, 2020), <https://www.urban.org/urban-wire/residential-segregation-declining-how-can-we-continue-increase-inclusion>.

³⁰ ORFIELD ET AL., *supra* note 21, at 6.

³¹ *Latino Action Network v. State*, No. L-1076-18, 2023 N.J. Super. LEXIS 1721, at *6 (N.J. Super. Ct. Law Div. Oct. 6, 2023) (order denying plaintiffs' motion for partial summary judgment and granting in part defendants' motion for summary judgment); *see also* N.J. STAT. ANN. § 18A:8-1 (West 2023) (ADD PARENTHETICAL HERE); *see also* N.J. STAT. ANN. § 18A:38-1 (West 2023) (ADD PARENTHETICAL HERE).

³² *Latino Action Network*, 2023 N.J. Super. LEXIS 1721, at *9-10; *see also* *Booker v. Bd. of Educ.*, 212 A.2d 1 (N.J. 1965) (ADD PARENTHETICAL HERE).

³³ *Latino Action Network*, 2023 N.J. Super. LEXIS 1721, at *10 (quotation marks omitted).

³⁴ *Id.*

³⁵ *Id.* at *64-65.

³⁶ *See* FLAXMAN ET AL., *supra* note 11, at 8.

recognize the culmination of historic elements and their link to present educational segregation, there should still be little love for the residency assignment method. Operating under that policy, New Jersey has maintained a surprisingly poor integration rate.³⁷ As of 2013, white students still made up the majority of students enrolled in suburban schools across the state.³⁸ In contrast, urban schools in New Jersey in 2013 were majority non-white and had been for 20 years prior, with African Americans making up the majority of the student body in North and Central Jersey schools.³⁹ North, Central, and South Jersey have all seen significant increases in the Latino student populations of urban schools as well.⁴⁰ With the residency assignment method producing, at best, stagnant rates of desegregation and, at worst, increasing rates of segregation amongst non-white students, another method of student assignment is worth consideration. The plaintiffs in *Latino Action Network*, while not advocating for any specific method, suggest several in their amended complaint:

[V]oluntary consolidation by individual districts, N.J.S.A. 18A:13-34; district consolidation within counties by order of the Commissioner of Education, on the recommendation of executive county superintendents, N.J.S.A. 18A:7-8; expanded school district authority to accept non-resident students, N.J.S.A. 18A:38-3 (a); authority of districts to send students to or receive students from other districts pursuant to agreements between the districts, N.J.S.A. 18A:38-8 et seq.; Interdistrict Public School Choice program, N.J.S.A. 18A:36B-14 et seq; county vocational district schools, N.J.S.A. 18A:54 et seq.; and. . . multi-district charter schools, N.J.S.A. 18A:36A-8, N.J.A.C. 6A:22- 2.2.⁴¹

This Note, rather than discuss the merits of the arguments presented in *Latino Action Network*, is instead preoccupied with the above list of replacement policies. Moving forward, I will analyze each of these proposed policy solutions and their potential to supplant the current residency assignment method. The evaluation of each proposal will include a cursory look at relevant legislation, barriers to implementation (should they exist),

³⁷ See *id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Amended Complaint for Declaratory Judgment and Other Relief at 23, *Latino Action Network*, 2023 N.J. Super. LEXIS 1721 [hereinafter Complaint].

what a practical application might look like, and desegregative potential. In the conclusion of this Note, based upon the analysis of each solution under this four-part test, I will provide an indication as to whether any of these policies might successfully push New Jersey further along its long-travelled path towards desegregation.

I. CONSOLIDATION

To begin, I will examine policies proposed by the plaintiffs in *Latino Action Network* which focus on consolidating school districts. Namely, “voluntary consolidation by individual districts, N.J.S.A. 18A:13-34”, and then, “district consolidation within counties by order of the Commissioner of Education, on the recommendation of executive county superintendents, N.J.S.A. 18A:7-8”.⁴² As per the goals of this Note, both potential avenues to desegregation in New Jersey schools will be examined through the lens of the four-part test iterated above. Consequently, this section will review the legislation underpinning both consolidation-related proposals, address any existing hurdles, forecast the practical application of each, and discuss their ability to diminish segregation in education.

A. Voluntary Consolidation

New Jersey statute 18A:13-34 provides the state’s school districts the ability to combine into a single, regional public school district under specific conditions:

The districts seeking consolidation must either be individually local, previously combined, or already composed of two or more municipalities; The boards of education for each respective district, along with the education commissioner (or suitable representative), must agree regarding the consolidation; and, Consultation, study and investigation finding that the joining of the districts is “advisable” must conclude prior to the consolidation.⁴³

Per the relevant legislation, consolidation must result in the creation of either an all-purpose regional school for those districts involved in the consolidation, or a limited regional public school district for at least one of a number of other educational facilities, including elementary, junior high, or high schools.⁴⁴ The statute allows school districts to utilize this method to

⁴² *Id.*

⁴³ N.J. STAT. ANN. § 18A:13-34 (West 2023).

⁴⁴ *Id.*

create a relatively expansive variety of shared schools.⁴⁵ More specifically, under N.J. statute 18A:13-34 districts may share resources to create vocational schools, special schools, health facilities, and other educational facilities or services.⁴⁶ In the event that public school districts consolidate in the limited latter method, they must additionally take care to satisfy requirements to determine the allocation of funding for these schools.⁴⁷

For the purposes of understanding this statutory requirement addressing funding, along with the broader motivations for consolidation that public school districts may have, a brief overview of New Jersey's educational funding scheme is required. Public schools in the state are financed through three primary sources: local property taxes, state aid, and federal aid.⁴⁸ Across New Jersey few districts are eligible to receive federal aid,⁴⁹ excluding the unusual funding that came about in response to the recent COVID-19 crisis and afforded school districts with emergency funds.⁵⁰ Under more typical circumstances, New Jersey public school districts receive most of their funds through either local property taxes or aid allocated by the state.⁵¹

Property taxes raised by municipalities are the first source for public school funding in New Jersey.⁵² Public school districts individually calculate the budget required for them to effectuate a "thorough and efficient education" for their student body, the standard mandated by the state constitution.⁵³ This is referred to as a district's "adequacy budget" and reflects the base rate required per student as adjusted for each student's age, school setting, and applicable additional needs, like free or reduced-cost lunch programs.⁵⁴ Local property taxes come into play where the adequacy budget is measured against the "local cost share", which is the state-determined financial contribution assigned to each municipality for its respective school district.⁵⁵ Informed by a municipality's property values and residential incomes, mathematical formulas determine the ultimate local cost share a municipality is responsible

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *School Finance 101*, N.J. SCH. BDS. ASS'N, <https://www.njsba.org/news-information/parent-connections/school-finance-101/> (last visited May 16, 2024).

⁴⁹ *Id.*

⁵⁰ Phyllis W. Jordan, *What Congressional Funding Means for K-12 Schools*, FUTUREED (May 11, 2023), <https://www.future-ed.org/what-congressional-covid-funding-means-for-k-12-schools/>.

⁵¹ N.J. SCH. BDS. ASS'N, *supra* note 48.

⁵² *Id.*

⁵³ New Jersey School Boards Association Staff, *Thorough and Efficient: The Evolution of Public Education*, 45 SCH. LEADER 2 (2014), <https://www.njsba.org/news-publications/school-leader/septemboctober-2014-volume-45-2/thorough-and-efficient-the-evolution-of-public-education/>.

⁵⁴ N.J. SCH. BDS. ASS'N, *supra* note 48.

⁵⁵ *Id.*

for.⁵⁶ Ultimately, local property taxes pay the local cost share, and state aid, called “equalization aid”, fills in the difference.⁵⁷ In the interest of understanding the financial burdens placed upon municipalities, however, it may be more productive to think of the equalization aid as what the state is willing to contribute to schools and the local cost share as the financial gap that municipalities must put together to fill in the gap.⁵⁸ School districts also receive categorical aid from the state, which provides funding for special education, transportation, and other essential features of public education.⁵⁹ In practice, the funding scheme employed by New Jersey places a higher funding burden on districts with higher property values and incomes, while the state supplements more of the funding for districts with indicators pointing towards financial instability.⁶⁰

Educational funding in New Jersey is further complicated by a number of decisions under *Abbott v. Burke*, which require the state to ensure that students in financially struggling districts receive funding which is substantially equivalent to that of students in more affluent ones.⁶¹ These decisions have been heralded as some of the most important in working towards educational desegregation since the *Brown* decisions.⁶² Though *Abbott* has presented a boon to underfunded and struggling schools, challenges to the funding scheme throughout the 2000s and 2010s limited the ability of the judicial decision to play out as wholly intended.⁶³ Instead, the funding scheme was hamstrung and underfunded by the 2008 School Funding Reform Act (SFRA) until the Supreme Court of New Jersey determined that these actions were unconstitutional.⁶⁴ The effects of the SFRA are still felt a decade later: to date, the financial scheme implemented by *Abbott* has only ever been fully funded for one year.⁶⁵

The most recent iteration of school funding reform in New Jersey has sought to lessen some of the financial inequities amongst public school districts furthered by the SFRA.⁶⁶ Enacted in 2018, these reforms changed the

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ @stateaidguy, *New Jersey's School Funding Formula Unfairly Privileges Some Not-So-Poor "Abbott" Districts*, N.J. EDUC. REP. (Feb. 26, 2020), <https://njedreport.com/new-jerseys-school-funding-formula-unfairly-privileges-some-not-so-poor-abbott-districts/>.

⁶¹ See, e.g., *Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011).

⁶² *The History of Abbott v. Burke*, EDUC. L. CTR., <https://edlawcenter.org/litigation/abbott-v-burke/abbott-history.html> (last visited May 16, 2024).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Carly Sitrin, *Explainer: Everything You Need to Know About School Funding in NJ*, N.J. SPOTLIGHT NEWS (July 25, 2018), <https://www.njspotlightnews.org/2018/07/18-07-25-explainer-everything-you-need-to-know-about-school-funding-in-nj/>.

⁶⁶ *Id.*

formula used to determine equalization aid in an effort to more closely match individual district funding to their actual needs, but largely continued to operate under the scheme put into place by SFRA.⁶⁷ Still, some 300 school districts in New Jersey lack proper funding— as of the implementation of the new reforms, the school district of Atlantic City was owed roughly \$110 million in state aid.⁶⁸

The complicated discussion of New Jersey's educational funding scheme provided above goes to show that the voluntary combination of public school districts throughout the state is not as simple as its underlying legislation might suggest. For both all-purpose regional schools and limited consolidations, funding plays an outsized role. Per N.J. statute 18A:13-34, limited consolidations must determine funding through joint resolution by involved school boards upon the consideration of the portion of each municipalities' equalized state aid prescribed to the limited consolidation, the residential makeup of students attending the limited consolidation, and approved through a formal vote by the community.⁶⁹ All-purpose consolidations, on the other hand, subject relevant communities to the funding structures described earlier in this Note.⁷⁰

Extrapolating on the above, then, it appears unlikely that New Jersey public school districts would be inclined to consolidate where there might be substantial property value or residential income differences between respective municipalities. Combining districts, however, is apparently something that the state seeks to encourage.⁷¹ Recent legislation, dubbed the School Regionalization Efficiency Act, provides funding for school districts to complete one of the three requirements to consolidate under N.J. statute 18A:13-34: consultation, study and investigation to determine whether combination is "advisable".⁷² In fact, there are several factors which may override funding considerations and sway New Jersey public school districts towards voluntary consolidation.⁷³ Chief amongst these are the cost alleviating outcomes of combined administrative staff, which routinely drive up operating costs across the state's 600 districts.⁷⁴ For some, these savings have the potential to make up for any differences in educational funding which might arise from consolidation. Public school districts in Salem and Ocean counties have seen benefits of this kind and found through studies that

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ N.J. STAT. ANN. § 18A:13-34 (West 2023).

⁷⁰ *Id.*

⁷¹ See Kelly Heyboer, *Should some N.J. school districts merge? The state is offering money to find out.*, NJ.COM (Jan. 23, 2022, 7:43 PM), <https://www.nj.com/education/2022/01/should-some-nj-school-districts-merge-the-state-is-offering-money-to-find-out.html>.

⁷² *Id.*; N.J. STAT. ANN. § 18A:13-34 (West 2023).

⁷³ See Heyboer, *supra* note 73.

⁷⁴ *Id.*

additional benefits may be expected due to consolidation.⁷⁵ Ultimately, the economic outcomes of consolidation are likely to depend upon the financial makeup of school districts and municipalities themselves.

Beyond the monetary impacts of consolidation, another consideration for public school districts discussing this option might be the relinquishment of local control.⁷⁶ When districts merge, the pool of individuals with a say over student education, curriculum, and content inherently expands. In today's polarized climate, exemplified by growing movements calling for book bans and other controversial education reforms,⁷⁷ consolidating public school districts may open them up to face further contention, breed conflict over such policies between those areas merging, or simply create further headaches for school staff and administrators trying to navigate such a complicated moment in educational spaces.

Regardless of these practical considerations, consolidating public school districts does present an obvious opportunity to address and alleviate at least some of the issues spurring segregation in New Jersey schools.⁷⁸ On its face, combining public school districts, particularly those with different economic and racial makeups, appears as an effective method to ensure that students receive comparative educations across the board. Because the method being discussed here is *voluntary* consolidation, however, there should be some caution concerning the actual likelihood that racial segregation would legitimately be diminished. As previously mentioned, public school districts throughout the state are unlikely to have a serious interest in consolidating with districts and municipalities which have income and property value rates substantially different than their own, particularly where more affluent districts and poorer districts might be concerned.⁷⁹ This is especially evident when thinking about a hypothetical scenario addressing the consolidation of *Abbott* school districts with those suburban ones around them that may be better off financially. *Abbott* districts receive a significant portion of their educational funding through state aid as they typically lack the tax base to generate sufficient funds to cover their adequacy budget.⁸⁰ In contrast, wealthy districts receive significantly reduced state aid for education and instead fund public schools primarily through residential property taxes.⁸¹ Though currently there is no criteria for exiting *Abbott*, assuming

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ *See* Vashti Harris, *Some N.J. schools under siege from those trying to get books on race, LGBTQ+ pulled from shelves*, NJ.COM (Feb. 16, 2023), <https://www.nj.com/news/2022/04/some-nj-schools-under-siege-from-those-trying-to-get-books-on-race-lgbt-pulled-from-shelves.html>.

⁷⁸ *See* Heyboer, *supra* note 73.

⁷⁹ *See id.*

⁸⁰ *See* N.J. EDUC. REP., *supra* note 60.

⁸¹ *See* N.J. SCH. BDS. ASS'N, *supra* note 48.

merged districts would leave the program (as they would no longer be wholly urban as the decision specified they ought to be) then wealthy districts would be left to make up whatever the financial burden shakes out to be.⁸² While perhaps it isn't a terrible outcome for wealthy districts to help support students living in impoverished communities, it certainly contradicts the residency-based system of school assignment and funding that the state has historically operated under and seems unlikely to be a choice that well-off districts would willingly make.⁸³

Overall, though voluntary consolidation of public school districts as per New Jersey statute 18A:13-34 is a theoretically feasible path towards desegregation, it seems unlikely. To be sure, this can be attributed to the fact that this method employs voluntary consolidation: wealthy districts have little incentive to combine with others and poor districts are unlikely to attract partners with whom they might merge. While that then leaves open consolidation as a viable route for those districts falling in the middle of the economic spectrum, it is important to note that geographic segregation still plays a role here. Districts looking to merge are probably most likely to do so with the communities that surround them. Considering the high rates of segregation across New Jersey as a whole, voluntary consolidation amongst individual municipalities may still reinforce existing segregative patterns.⁸⁴ In sum, this option for desegregating New Jersey's schools appears relatively undesirable.

B. District Consolidation Within Counties

In contrast to voluntary consolidation, district consolidation within counties presents a more measured implementation of public school district mergers under the supervision of the state. Per New Jersey statute 18A:7-8, executive county superintendents maintain the following duties, in addition to numerous others:

To "promote administrative and operational efficiencies and cost savings within the school districts in the county while ensuring that the districts provide a thorough and efficient system of education"; and

"Based on standards adopted by the commissioner, recommend to the commissioner, who is hereby granted the authority to effectuate those recommendations, that certain school

⁸² See N.J. EDUC. REP., *supra* note 60.

⁸³ See New Jersey School Boards Association Staff, *supra* note 53.

⁸⁴ See FLAXMAN ET AL., *supra* note 11, at 13, 21, 59.

districts be required to enter arrangements with one or more other school districts or educational services commissions for the consolidation of the district's administrative services".⁸⁵

Further, executive county superintendents are required to create and maintain School District Regionalization and Consolidation of Services Advisory Committees for their respective counties.⁸⁶ These committees require representation on behalf of all school districts within a given county and meet monthly to discuss various educational topics of relevance in that county.⁸⁷ In conjunction with their associated Advisory Committees, executive county superintendents are instructed to explore consolidation amongst districts, with particular regard towards the creation of regional school districts.⁸⁸

The plaintiffs in *Latino Action Network* contend that a viable option for restructuring public school assignment might be "district consolidation within counties by order of the Commissioner of Education, on the recommendation of executive county superintendents".⁸⁹ While certainly possible under the relevant statutory provision mentioned above, the real hurdle to utilizing this method to restructure student assignment in public school districts arises from a legal failure to provide clear guidance to county superintendents in making their recommendations for consolidation. More specifically, New Jersey statute 18A:7-8 provides no clear indication as to what might justify a regional consolidation under the Commissioner's standards, nor what those standards might be.⁹⁰

Regulations adopted by the Commissioner of the New Jersey Department of Education may provide some clarity.⁹¹ As directed by New Jersey Commissioner of Education through the Fiscal Accountability, Efficiency and Budgeting Procedures currently issued, executive county superintendents were required to provide plans for regional consolidation where applicable by March 15, 2010.⁹² While at the time of this Note these provisions are more than a decade old, this 2010 mandate asked for the development of studies and subsequent plans focused "to the greatest extent practicable, on the consolidation of school districts that receive students on a tuition basis with the sending school districts, and the consolidation of limited-purpose regional school districts that receive students from constituent

⁸⁵ N.J. STAT. ANN. § 18A:7-8 (West 2023).

⁸⁶ N.J. ADMIN. CODE § 6A:23A-2.2 (2024).

⁸⁷ *Id.*

⁸⁸ N.J. ADMIN. CODE § 6A:23A-2.5 (2024).

⁸⁹ Complaint, *supra* note 41, at 23.

⁹⁰ See N.J. STAT. ANN. § 18A:7-8 (West 2023).

⁹¹ See N.J. ADMIN. CODE § 6A:23A-2.5 (2024).

⁹² *Id.*

municipalities to create enlarged all-purpose regional school districts”.⁹³ Under this planning initiative, executive county superintendents were required to analyze a number of metrics, including effectiveness and efficiency, socioeconomic representation and demographics, and general advantages and disadvantages for involved school districts.⁹⁴

Though they have not been updated in some time, one might hypothesize that these regulatory guidelines might inform present standards required by the Commissioner for district consolidation within counties under statute 18A: 7-8.⁹⁵ Should they be applicable and serve to inform the broader recommendations for consolidation made by executive county superintendents, they might provide a suitable basis for combating segregation in New Jersey public school districts. On their face, these standards potentially allow at least some consolidation intended to balance the racial demographics within public school districts, which inherently addresses the problem of segregation at least as well (if not better) than the current system of residential assignment, which, due to geographic limitations, cannot alter such demographics beyond the makeup of a zip code itself.⁹⁶

Another complicating element is the requirement under New Jersey statute 18A: 7-8 that executive county superintendents ensure “districts provide a thorough and efficient system of education”.⁹⁷ Included to mandate compliance with the state’s constitution,⁹⁸ the legal definition of a “thorough and efficient system of education” in New Jersey has often been tied to economic funding, rather than the existence of segregation in schools.⁹⁹ Indeed, while supporting the proposition that all students must receive equal educational opportunities, the “thorough and efficient system of education” clause of the state constitution has been chalked up to monetary need, resulting in the creation of the *Abbott* districts throughout the state.¹⁰⁰ Of course, preventing segregation in school districts such as the *Abbotts* is the chief aim of the plaintiffs in the ongoing *Latino Action Network* litigation.¹⁰¹

⁹³ N.J. ADMIN. CODE § 6A:23A-2.5(a) (2024).

⁹⁴ *Id.*

⁹⁵ See N.J. STAT. ANN. § 18A:7-8 (West 2023).

⁹⁶ See *id.*

⁹⁷ N.J. STAT. ANN., .

⁹⁸ N.J. CONST. art. 8, § 4, ¶1.

⁹⁹ See *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011).

¹⁰⁰ *Litigation Overview*, EDUC. L. CTR., <https://edlawcenter.org/litigation/states/newjersey.html#:~:text=In%20decisions%20in%20Robinson%20v,educational%20opportunity%20for%20school%20children> (last visited May 16, 2024).

¹⁰¹ *Latino Action Network v. State*, No. L-1076-18, 2023 N.J. Super. LEXIS 1721 (N.J. Super. Ct. Law Div. Oct. 6, 2023).

Considering the doubly economic interests of both the statute underpinning recommended consolidation and the likely applicable regulatory standards relegating racial demographics to merely a factor, it appears that this method of desegregation may ultimately prove lackluster. Arguably then, for district consolidation within counties to work, there must be some greater push towards desegregation. While *Latino Action Network* may ultimately result in a revision of the legal understanding of the “thorough and efficient system of education” clause¹⁰², an update in regulations promulgated by the Department of Education may suffice temporarily. Should the Commissioner of the New Jersey Department of Education adopt new regulatory standards informing executive county superintendent recommendations for consolidation with a greater focus on desegregation in the evaluation process, this method has a high desegregative potential, barring any administrative law follies.

II. INTERDISTRICT ATTENDANCE

Following the assessment of avenues to desegregation based upon theories of school district consolidation, this subsection will address proposals made by *Latino Action Network* plaintiffs which provide for interdistrict attendance. Namely, this subsection will look at “expanded school district authority to accept non-resident students, N.J.S.A. 18A:38-3 (a); authority of districts to send students to or receive students from other districts pursuant to agreements between the districts, N.J.S.A. 18A:38-8 et seq.; Interdistrict Public School Choice program, N.J.S.A. 18A:36B-14 et seq.”¹⁰³

As was done previously, the proposed methods discussed here will be evaluated through a four-part test: the underlying legislation, any existing hurdles, the forecasted practical application, and the ability to diminish segregation.

A. Authority to Accept Non-Residents

Under N.J.S.A. 18A:38-3(a), New Jersey public school districts may allow non-resident children to attend under the following proscription: “any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe.”¹⁰⁴ While some additional statutes exist governing the

¹⁰² See ORFIELD ET AL., *supra* note 21.

¹⁰³ *Latino Action Network*, 2023 N.J. Super. LEXIS 1721.

¹⁰⁴ N.J. STAT. ANN. § 18A:38-3 (West 2013).

admission of students experiencing family emergency,¹⁰⁵ students placed by court order within the district but not residing,¹⁰⁶ and students with parents deployed in active military conflicting with residency,¹⁰⁷ for the purposes of the suggestion by plaintiffs in *Latino Action Network* the examination of solely N.J.S.A. 18A:38-3(a) is sufficient.¹⁰⁸

Plainly, N.J.S.A. 18A:38-3(a) allows school districts to skirt the residency-based attendance mandates employed in public education.¹⁰⁹ The statute provides districts the autonomy to designate associated costs, such as tuition, transportation, and other details relevant to a student's attendance.¹¹⁰ The drawback as it pertains to desegregation, however, is that admission is at the will of the school district's Board of Education.¹¹¹

It is important to note that New Jersey does provide protection against blatant racial discrimination in the decision-making process of school boards for admission of non-resident students.¹¹² Per N.J.S.A. 18A:38-5.1:

“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 category under subsection f. of section 11 of P.L.1945, c. 169 (C.10:5-12), or immigration status. A member of any board of education who shall vote to exclude from any public school any child, on account of his race, creed, color, national origin, ancestry, or other protected category under subsection f. of section 11 of P.L.1945, c. 169 (C.10:5-12), or immigration status shall be guilty of a disorderly persons offense.”¹¹³

While, of course, the existence of a statute does not eliminate its violation, nor does it prevent ‘disguised’ violation, wherein illegal discrimination is masked as some legitimate concern, the concern as it pertains to desegregation is less about outwardly racist rejections of students and more about the limited capacity of such a method to effectively desegregate New Jersey public schools.

In its current form and use, N.J.S.A. 18A:38-3(a) authorizes school boards to evaluate non-resident students for admission on what basically

¹⁰⁵ N.J. STAT. ANN. §§ 18A:38-1.1–1.2 (West 2013).

¹⁰⁶ N.J. STAT. ANN. § 18A:38-2 (West 2013).

¹⁰⁷ N.J. STAT. ANN. §§ 18A:38-3.1–3.2 (West 2013).

¹⁰⁸ *Latino Action Network*, 2023 N.J. Super. LEXIS 1721.

¹⁰⁹ N.J. STAT. ANN. 18A:38-3(a) (West 2013).

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² N.J. STAT. ANN. § 18A:38-5.1 (West 2020).

¹¹³ *Id.*

amounts to a case-by-case basis, and often results from non-resident removal proceedings from the school district.¹¹⁴ Clearly, such a limited scope is incompatible with the overwhelming problem posed by continuing segregation in New Jersey. At face value, however, N.J.S.A. 18A:38-3(a) contains no language seeming to bar the implementation of admission policies which might streamline the acceptance of non-resident students.¹¹⁵ Once again, however, that ability is left wholly to the discretion of individual school districts and their relevant school boards.¹¹⁶

Unfortunately, the likelihood of convincing many school districts to voluntarily admit non-resident students through the implementation of such policies appears low. Other than goodwill, there appears to be little motivating school boards admit students. Further, even where students are admitted, the public school district can set relevant terms of admission, like tuition and transportation.¹¹⁷ Under the statute, tuition can be charged to families and families may also bear the responsibility of getting their students to school.¹¹⁸

Given the historical disparity in wealth between non-white and white residents in New Jersey,¹¹⁹ it appears that any avenue wherein persons might be personally charged to ensure their child receives a desegregated education is categorically a bad one. Relying on school districts and school boards to voluntarily accept non-residents for the purposes of desegregating New Jersey schools is far too trepidatious when based solely upon the authority conferred under N.J.S.A. 18A:38-3(a). Realistically, it appears no better a method than the current system of residency-based admission, and perhaps would appear as an even worse one given that it might place a financial burden directly upon those disadvantaged most by the policies currently in place.

B. Transfer Agreements

As with the authority to accept non-resident students, N.J.S.A. 18A:38-3 also lays the groundwork for school districts to create transfer agreements with one another, providing for the “authority of districts to send students to or receive students from other districts pursuant to agreements between the

¹¹⁴ See generally EDUC. LAW CTR., UNDERSTANDING PUBLIC SCHOOL RESIDENCY REQUIREMENTS: A GUIDE FOR ADVOCATES 2-3 (2005), https://edlawcenter.org/assets/files/pdfs/publications/Residency_Publication_Update_Mar.pdf.

¹¹⁵ See N.J. STAT. ANN. § 18A:38-3.

¹¹⁶ See *id.*

¹¹⁷ See *id.*; see also EDUC. LAW CTR., *supra* note 114, at 2.

¹¹⁸ See § 18A:38-3; see also N.J. STAT. ANN. § 18A:38-1(b)(2) (West 2019); see EDUC. LAW CTR., *supra* note 114, at 2.

¹¹⁹ See O'Brien, *supra* note 12.

districts.”¹²⁰ Clarified by caselaw, *Edmondson v. Board of Education* held that school districts are within the authority granted to them by N.J.S.A. 18A:38-3 to create such agreements.¹²¹

Subsequently, additional statutes have been created to regulate the relationship between districts engaging in transfer agreements or in any such agreement where students are sent en masse from one district to another.¹²² In nearly all cases, some agreement of tuition and transportation is required between the districts engaged in transfer.¹²³ Relatedly, sending districts must be given a representative seat on the receiving district’s school board under N.J.S.A. 18A:38-8.1 unless the student population from that sending district comprises less than 10% of the student body.¹²⁴

Essentially like the authority to grant individual non-resident students admission, New Jersey public school districts generally have autonomy regarding which districts they make transfer agreements with. Likewise, the protections of N.J.S.A. 18A:38-5.1 also apply in this context and bar the rejection of transfer agreements based on enumerated protected class statuses, including race.¹²⁵

In this context then, transfer agreements appear a similar choice to school board discretionary admission, though certainly better suited to tackling the problems of segregation throughout the state. There is, however, the caveat that desegregation would require transfers between schools with differing demographics, which may be challenging considering New Jersey’s continued geographic segregation.¹²⁶ Because of the physical distance separating different racial populations across the state, it appears impractical to expect transfer agreements to resolve issues of segregation. Outside of those school districts which lie just next to districts primarily comprised of non-white students, it seems unlikely that transfer agreements would lead to desegregation across the entirety of the state and instead in just those districts.

Aside from this somewhat limited potential, because these are voluntary agreements, they would again be left to the discretion of public school districts and school boards rather than being effectuated by the state itself.¹²⁷ Though transfer agreements are more favorable to families, as they avoid the possibility of direct financial burden in the pursuit of desegregated

¹²⁰ *Latino Action Network et al. v. State*, No. L-1076-18, 2023 N.J. Super. Unpub. LEXIS 1721 (N.J. Super. Ct. Law Div., Mercer County Ct. Oct. 6, 2023).

¹²¹ *Edmondson v. Bd. Educ. Borough Elmer*, 37 A.3d 536, 539 (N.J. Super. Ct. App. Div. 2012).

¹²² See generally N.J. STAT. ANN. § 18A:38 (West 2013).

¹²³ See N.J. STAT. ANN. § 18A:38-8.1 (West 2017).

¹²⁴ *Id.*; N.J. STAT. ANN. § 18A:38-8.2 (West 1995).

¹²⁵ See N.J. STAT. ANN. § 18A:38-5.1 (West 2020).

¹²⁶ See ORFIELD ET AL., *supra* note 21, at 32-34.

¹²⁷ See N.J. STAT. ANN. § 18A:38-3 (West 2023).

education,¹²⁸ they are hardly a reliable tool as they rely ultimately on geographic proximity and goodwill to combat segregation in New Jersey public schools.

C. Interdistrict School Choice

As compared to the other options described in this subsection, the Interdistrict Public School Choice Act serves as the best avenue for combatting segregation in the interdistrict attendance vein of proposals made by plaintiffs in *Latino Action Network*. Though voluntary and requiring districts to apply, the Act presents a viable framework as to what might be implemented in place of the current residency-based attendance scheme.¹²⁹

Under current New Jersey law, the Interdistrict Public School Choice Act allows school districts to opt in for the creation of “choice” districts, which students from outside of traditional district lines may apply to.¹³⁰ Districts applying for the program are assessed under several guidelines, namely:

- a. the fiscal impact on the district;
- b. the quality and variety of academic programs offered within the district;
- c. the potential effectiveness of the student application process and of the admissions criteria utilized;
- d. the impact on student population diversity in the district; and
- e. the degree to which the program will promote or reduce educational quality in the choice district and the sending districts.¹³¹

As of the 2023-24 school year, 122 districts in New Jersey have applied and satisfied these requirements.¹³²

“Choice” districts, once enrolled in the program, have significant autonomy in shaping the admission of students from outside districts.¹³³ Under the statute, enrolled recipient districts designate specific schools and grades for applicant students.¹³⁴ In practice, this allows “choice” districts to have significant control over how they might incorporate students into their

¹²⁸ *Cf. id.*

¹²⁹ See generally Interdistrict Public School Choice Program Act, N.J. STAT. ANN. § 18A:36B-14 (West 2010).

¹³⁰ N.J. STAT. ANN. § 18A:36B-16 (West 2010); see also N.J. STAT. ANN. § 18A:36B-20 (West 2017).

¹³¹ N.J. STAT. ANN. § 18A:36B-18 (West 2010).

¹³² N.J. Dep't of Educ., *Interdistrict Public School Choice Program*, <https://www.nj.gov/education/choice/> (last visited May 16, 2024).

¹³³ See § 18A:36B-16.

¹³⁴ N.J. Dep't of Educ., *supra* note 132.

educational systems, preventing any overwhelming side effects like overcrowding in one grade or school. Ultimately, though, the number of students that a “choice” district can take is determined by the State.¹³⁵

Students seeking to apply to “choice” districts must follow certain procedures and meet statutory requirements.¹³⁶ Procedurally, students and their families must first notify their “sending” district, or the school district they ought to attend as dictated by their zip code.¹³⁷ After such notification, the student must then apply to the choice program and specify the school district they wish to enroll in.¹³⁸ The ability to apply is subject to deadlines issued by the Commissioner of Education in New Jersey.¹³⁹ For example, students were required to apply by November 30, 2022 for the 2023-24 academic year, though schools also had the discretion to accept late applications until October 14, 2023 provided they had yet to fill their maximum allowance of students.¹⁴⁰

Requirements for attendance are well defined, though often attached to other circumstances.¹⁴¹ Generally, two main statutory requirements determine eligibility for the Interdistrict Public School Choice Program in New Jersey.¹⁴² The first is that a student is actively enrolled in their “sending” district.¹⁴³ Second, the student applicant is required to have attended school for at least one year in their “sending” district immediately prior to submitting an application.¹⁴⁴ However, this second requirement is suspended where an applicant is entering either preschool or kindergarten and has a sibling already enrolled in the “choice” district.¹⁴⁵

Despite the presence of these statutory requirements, schools still have some say over which students can transfer in.¹⁴⁶ Under the statute, school districts have the right to evaluate students regarding their “fit” into the “choice” district.¹⁴⁷ This interview, however, does not give the “choice” district carte blanche to specifically select students for attendance.¹⁴⁸ For example, in the event that there are more eligible student applicants than spots available,

¹³⁵ See N.J. DEP'T OF EDUC., STUDENT APPLICATION TIMELINE FOR CHOICE AND SENDING/RESIDENT DISTRICTS FOR ENROLLMENT IN THE 2024-2025 SCHOOL YEAR 2 (2023), <https://www.nj.gov/education/choice/cdistricts/docs/DistrictApplicationTimeline.pdf>.

¹³⁶ See generally N.J. STAT. ANN. § 18A:36B-20 (West 2017).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ N.J. DEP'T OF EDUC., *supra* note 132, at 1.

¹⁴¹ See generally § 18A:36B-20.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See *id.*

¹⁴⁷ See § 18A:36B-20.

¹⁴⁸ See *id.*

school districts must utilize a lottery system to determine which students might be allowed to attend.¹⁴⁹ Regardless of the lottery, however, schools may prioritize the acceptance of students who already have siblings within the district, should they choose to do so.¹⁵⁰

While school districts participating in the Interdistrict School Choice Program must follow federal legislation including the Civil Rights Act of 1964, the Equal Educational Opportunities Act of 1974 (EEOA), the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973, and the Individuals with Disabilities in Education Act (IDEA), under the statute schools have the authority to reject otherwise eligible individuals where they have individualized education plans (IEPs).¹⁵¹ Again, though, schools do not have unbridled discretion in these rejections of otherwise eligible students.¹⁵² Instead, “choice” schools may only deny attendance to students with IEPs under the following three circumstances: “. . . [the] student's individualized education program could not be implemented in the district, or if the enrollment of that student would require the district to fundamentally alter the nature of its educational program, or would create an undue financial or administrative burden on the district.”¹⁵³

Beyond the federally codified requirements for accessibility of the Interdistrict School Choice Program to eligible students, “choice” schools are also forbidden by statute to alter either admission or admission practices, or to otherwise discriminate against a candidate, with regard to “athletic ability, intellectual aptitude, English language proficiency, status as a person with a disability, or any basis prohibited by [the] State.”¹⁵⁴ In essence then, the Interdistrict School Choice Program effectively provides “choice” schools the ability to take on additional students in the places and spaces that the district desires (with state approval), but provides less autonomy in the selection of the students that actually attend.

Considering this, the Interdistrict School Choice Program does appear to provide a decent opportunity to balance the needs of desegregation with the interests of individual school districts. However, the human element involved in the selection of a “choice” district in the first place does appear to present barriers to alleviating racial disparities statewide.¹⁵⁵ Because the

¹⁴⁹ N.J. DEP'T OF EDUC., *supra* note 132, at 1 n.2.

¹⁵⁰ *See id.*

¹⁵¹ *See* § 18A:36B-20(b)-(c); *see also* U.S. Dep't of Just., Civ. Rts. Div., *Types of Educational Opportunities Discrimination*, <https://www.justice.gov/crt/types-educational-opportunities-discrimination> (last updated Mar. 25, 2021).

¹⁵² *See generally* § 18A:36B-20(b)-(c).

¹⁵³ *Id.* § 18A:36B-20(c).

¹⁵⁴ *Id.* § 18A:36B-20(b).

¹⁵⁵ *See* Kalinda Ukanwa, Aziza C. Jones & Broderick L. Turner Jr., *School Choice Increases Racial Segregation Even When Parents Do Not Care About Race*, 119 PNAS 35 (2022); *see also*

Interdistrict School Choice Program allows a child and family to select any participating institution, there is a lingering possibility that New Jerseyans may either intentionally or unintentionally self-segregate even within different school districts rather than assignment by residency.¹⁵⁶ Research conducted in 2017 across the top 100-most populous school districts in the United States found that expanded access to school choice, including private and charter schools, often equated to further racial segregation and racially homogenous schools.¹⁵⁷ One suggested theory was that this self-segregation was the product of either an unconscious or conscious intent to stay within educational systems serving familiar racial communities, potentially enhanced by the relative success of charter schools.¹⁵⁸

Alternatively, more recent research actually suggests that increased segregation corresponding with expanded school choice is a by-product of differing priorities and considerations amongst students and families of different races.¹⁵⁹ A 2022 study proposes that Black families are more likely to send students to highly ranked schools, forgoing other considerations like commute or class size in the interest of social mobility.¹⁶⁰ On the other hand, White families appear more concerned with simply avoiding schools with low rankings while preserving short commutes and other attributes.¹⁶¹ The study suggests that this dichotomy, born out of differing priorities related to social hierarchies intertwined with race, contributes to self-segregation where school choice is expanded.¹⁶²

Regardless of the actual underlying sociological phenomenon explaining the segregative effect happening with expanded school choice, expansion of the Interdistrict Public School Choice Program to tackle issues of segregation may ultimately prove to be problematic. It is worth noting, however, that these studies do not primarily examine public school district choice and rather school choice generally, meaning that they also include charter schools and private schools. Charter schools can be a controversial issue in the field of education, which will not be fully discussed within the scope of this Note, but an argument can be made that school choice programs enabling access to charters and private schools do weaken public school districts and increase overall levels of educational segregation.¹⁶³

Grover J. Whitehurst, *New Evidence on School Choice and Racially Segregated Schools*, 2 EVIDENCE SPEAKS REPS. 33 (2017).

¹⁵⁶ See Ukanwa et al., *supra* note 155; see also Whitehurst, *supra* note 155.

¹⁵⁷ See Whitehurst, *supra* note 155.

¹⁵⁸ *Id.*

¹⁵⁹ Ukanwa et al., *supra* note 155, at 1-2.

¹⁶⁰ *Id.* at 1.

¹⁶¹ *Id.*

¹⁶² See generally *id.*

¹⁶³ See Letters to the Editor, *Murphy's Charter School Fail a Sign of Weakness: Letters*, NJ.COM (Feb. 7, 2022, 5:46 PM), <https://www.nj.com/opinion/2022/02/murphys-charter-school->

However, at least one prior study has indicated that the Program does have a desegregative effect in New Jersey.¹⁶⁴ Assuming that an expanded version would continue this trend, the practicality of this solution faces economic viability as a final hurdle.¹⁶⁵ When the Interdistrict Public School Choice Program was initially implemented in New Jersey, many districts took advantage of the financial incentives and enrolled.¹⁶⁶ Since then, however, the cost of the program grew excessive, as some financial support is also granted to “sending” districts to cushion the economic strain of losing a student.¹⁶⁷ To combat the ballooning balance, the program was capped at the 120 schools currently designated as “choice” and as of 2022 has not been reopened for enrollment.¹⁶⁸ In its current form, the Interdistrict Public School Choice Program would likely continue to be economically burdensome, but relatively recent changes in New Jersey’s financial situation may make its expansion more feasible.¹⁶⁹ Given all of these potential conflicts, the Interdistrict Public School Choice Program, while providing a solid framework, appears a risky choice to diminish segregation in New Jersey public schools overall.

III. SCHOOL CREATION

In contrast to the other subsections above, the following will discuss proposals by the plaintiffs in *Latino Action Network* which involve the creation of wholly new schools which students from a variety of municipalities might be able to attend. This Note will explore “county vocational district schools, N.J.S.A. 18A:54 *et seq.*; and . . . multi-district charter schools, N.J.S.A. 18A:36A-8, N.J.A.C. 6A:22- 2.2.”¹⁷⁰

Again, as utilized in the analyses performed above, these subsections will generally follow a four-part examination looking at the underlying

fail-a-sign-of-weakness-letters.html (including a letter from Carl Della Peruti that discusses how charter schools remove the best from public schools); Brendan Chen, *Has the Increase in Charter Schools Decreased School Segregation or Made it Worse?*, HOUS. MATTERS: URB. INST. (Sept. 28, 2022), <https://housingmatters.urban.org/articles/has-increase-charter-schools-decreased-school-segregation-or-made-it-worse>.

¹⁶⁴ INST. ON EDUC. L. & POL'Y, RUTGERS UNIV. – NEWARK, NEW JERSEY’S INTERDISTRICT PUBLIC SCHOOL CHOICE PROGRAM: PROGRAM EVALUATION AND POLICY ANALYSIS 30-31 (2006).

¹⁶⁵ See Patrick Wall, *N.J. Lawsuit Says District Choice Could Help Desegregate Schools. Would It Work?*, CHALKBEAT: NEWARK (Mar. 10, 2022, 3:38 PM), <https://newark.chalkbeat.org/2022/3/10/22971263/new-jersey-school-district-choice-lawsuit-racial-segregation>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *Fitch Upgrades New Jersey's IDR to 'A'; Outlook Positive*, FITCHRATINGS (Sept. 12, 2022, 3:46 PM), <https://www.fitchratings.com/research/us-public-finance/fitch-upgrades-new-jersey-idr-to-a-outlook-positive-12-09-2022>.

¹⁷⁰ Amended Complaint for Declaratory Judgment & Other Relief at 23, *Latino Action Network, et al. v. State*, No. MER-L-001076-18 (N.J. Super. Ct. Law Div. Aug. 2, 2019).

legislation, any existing hurdles, the forecasted practical application, and the ability to diminish segregation.

A. County Vocational District Schools

New Jersey law defines a vocational school as one which provides an education either “(a) to fit for profitable employment; (b) to provide training which is supplemental to the daily employment; or (c) to fit for homemaking, according to the state plan for vocational education adopted by the state board.”¹⁷¹ At the discretion of the New Jersey Education Commissioner and with the subsequent approval of the state education board, the establishment and maintenance of countywide vocational schools may be initiated.¹⁷² Per the underlying statute, the only requirement to instigate this process is an investigation by the Commissioner into the “necessity” of a countywide vocational school.¹⁷³ As of March 2022, there were 21 county vocational schools across the state, one for each county.¹⁷⁴

Countywide vocational schools provide a wide variety of specialized classes to students, ranging in focus from hairdressing to robotics.¹⁷⁵ Frequently, these schools also offer students opportunities to obtain college credits prior to graduation, along with hands-on training in a variety of subjects.¹⁷⁶ Overall, vocational schools in New Jersey have an extremely high graduation rate which sits 8% above the average in traditional public schools.¹⁷⁷

However, with all of the exciting specializations offered and the high graduation rate, vocational schools in the state are hard-pressed to meet the demand of New Jersey students and families.¹⁷⁸ Roughly 30,000 students apply each year, with just 13,000 accepted.¹⁷⁹ Students throughout each respective county may apply to their corresponding vocational school or to another school.¹⁸⁰ Students from said county are prioritized for admission, but where possible vocational schools must also admit students from out of

¹⁷¹ N.J. STAT. ANN. § 18A:54-1 (West 2023).

¹⁷² N.J. STAT. ANN. § 18A:54-2 (West 2023).

¹⁷³ *Id.*

¹⁷⁴ Melanie Burney, *From Medicine to Mechanics, N.J.'s Vocational Schools Are Offering More Job Paths to More Students*, PHILA. INQUIRER (Mar. 16, 2022, 10:42 AM), <https://www.inquirer.com/news/vocational-schools-new-jersey-gloucester-institute-20220316.html>.

¹⁷⁵ *See id.*

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See* N.J. ADMIN. CODE § 6A:19-2.3(a) (2013).

county.¹⁸¹ Students living within the corresponding county have their tuitions paid by the board of education of their vocational school and if any student attends a vocational school out of county, their educational fees are negotiated and paid for by the respective boards.¹⁸²

While countywide vocational schools may appear idyllic in costs to students and families and successful outcomes, the fact that they are highly sought-after comes with steep drawbacks in the context of desegregation.¹⁸³ Many countywide vocational schools across the state employ strict standards for admission to narrow the pool of potential students.¹⁸⁴ For example, at Camden County Technical Schools, students are assessed by:

. . . standardized test scores; results of the CCTS Placement Test; attendance records; 7th and 8th grade report cards; 9th grade report card if applying to 10th grade; essays and letters of recommendation if applicable; audition results if applying for the Music Academy or the Performing Arts Academy; portfolio review if applying to Graphic Arts and Design, and other documents/information provided by the applicant's current school district and/or parents or guardians.¹⁸⁵

Some contend that these kinds of high standards serve to create barriers to admission for students of color, creating countywide school districts that do not reflect countywide demographics.¹⁸⁶

In a few cases across the state, this can be observed by comparing the racial makeup of vocational schools to the broader county. For example, in 2019 just 1% of the student body at Bergen County Academies was Black and 6% was Hispanic, compared with countywide populations of 7% and 20% respectively.¹⁸⁷ Bergen County Academies requires students to apply online, submit letters of recommendation from three teachers, submit a transcript, take a multi-part specialized admissions test, and then, should they reach parameters in that first phase, proceed to a second phase including an

¹⁸¹ See N.J. ADMIN. CODE § 6A:19-2.3(b) (2013).

¹⁸² See N.J. ADMIN. CODE § 6A:19-2.3 (2013).

¹⁸³ See Sarah Gonser, *How New Jersey Turned Vocational Schools into Sought-after Academies*, NBC NEWS (Apr. 2, 2019, 4:08 AM), <https://www.nbcnews.com/news/education/how-new-jersey-turned-vocational-schools-sought-after-academies-n989781>.

¹⁸⁴ See *id.*

¹⁸⁵ *High School Admissions Overview for Camden County Technical Schools*, CAMDEN CNTY. TECH. SCHS., https://cts.org/apps/pages/index.jsp?uREC_ID=262052&type=d&termREC_ID=&pREC_ID=502629 (last visited May 16, 2024).

¹⁸⁶ Gonser, *supra* note 183.

¹⁸⁷ *Id.*

interview and/or an audition or portfolio review depending upon the school the student wishes to attend.¹⁸⁸ Comparatively, Passaic County Technical Institute determines admission based upon grades, standardized test scores and behavioral records.¹⁸⁹ In 2019, the school was 53% Hispanic, 19% white, and 10% Black, compared with countywide populations of 42%, 41%, and 15% respectively.¹⁹⁰

Without a major investment in the expansion of countywide vocational school districts and a retooling of admissions standards for many institutions, this method presents little hope of effectively addressing segregation in New Jersey public schools. Until programs are expanded to catch up with demand, vocational schools across the state are unlikely to make genuine progress towards desegregation. However, even if more schools opted to adopt Passaic County Technical Institute's admissions policies, this would do little to rectify the issue on a larger scale considering that just 35,000 New Jersey students attend vocational schools.¹⁹¹

Further, countywide vocational school districts have been accused of weakening public school districts by attracting strong students to their highly successful programs.¹⁹² Any solution to addressing segregation in public schools would require a relatively robust public school system, so a countywide vocational school program that undercuts the efficacy of public schools cannot be the answer to New Jersey's educational segregation problem. While the academic successes of these institutions are certainly admirable and worthy of emulation, countywide vocational schools in their current form are unlikely to serve the purpose of desegregation as described in this Note.

B. Multi-District Charter Schools

As in the above subsection, the implementation of multi-district charter schools as a method of diminishing segregation seems inappropriate to resolve segregation in New Jersey schools, though much better suited than vocational schools. Largely, charter schools in the state have been promoted as an alternative to traditional public schools, as well as a sort of stop-gap measure to support students in failing schools.¹⁹³ While they operate independently and under license, regulations addressing charter schools in

¹⁸⁸ BERGEN CNTY. ACADS., ADMISSIONS FOR THE CLASS OF 2028: GUIDE TO APPLYING 4-5 (2023), https://bca-admissions.bergen.org/pdfs/BCA_GuideToApply.pdf.

¹⁸⁹ Gonser, *supra* note 183.

¹⁹⁰ *Id.*

¹⁹¹ See Burney, *supra* note 174.

¹⁹² See Gonser, *supra* note 183.

¹⁹³ See Latino Action Network, et al. v. State, No. L-1076-18, 2023 N.J. Super. Unpub. LEXIS 1721, at *14-15 (N.J. Super. Ct. Law Div., Mercer County Ct. Oct. 6, 2023).

New Jersey are fairly strict and unfavorable to charters when compared to other states.¹⁹⁴ Charter schools are authorized to operate within their designated Local Education Agency.¹⁹⁵ While there is no cap on the number of charters allowed to operate across the state, each must be approved by the New Jersey Department of Education.¹⁹⁶ The schools must operate as public schools and charge no tuition fees to students, instead receiving funding from traditional public schools in accordance with the number of students attending the charter from said district.¹⁹⁷

Unlike vocational schools in New Jersey, charter schools do not utilize specialized testing or any other admissions requirements beyond standard details.¹⁹⁸ Instead, admissions are determined mostly by lottery, although preferences may be provided to siblings.¹⁹⁹ This, therefore, makes them a more inclusive option for students seeking alternatives to traditional schools who might be excluded from the highly desirable vocational schools. New Jersey law provides that “preference for enrollment in a charter school shall be given to students who reside in the school district in which the charter school is located,” but specifies that out-of-municipality students may also attend where space is available.²⁰⁰ Charters are required to “seek the enrollment of a cross section of the community’s school age population including racial and academic factors” at “the maximum extent practicable.”²⁰¹

Although these are perfectly reasonable requirements for schools seeking to provide support to the students of particular municipalities, like traditional public schools, charter schools can end up becoming highly segregated.²⁰² Though New Jersey does not currently publicly share data on the issue, one study found that upwards of 86% of New Jersey students attending charter schools across the state were Black or Hispanic.²⁰³

¹⁹⁴ See Jeanette Rundquist, *National Education Group Gives N.J. Charter School Laws a 'C' Grade*, NJ.COM (Dec. 7, 2009, 10:42 PM), https://www.nj.com/news/2009/12/national_education_group_gives.html.

¹⁹⁵ *Charter Schools*, N.J. DEP'T EDUC., <https://www.nj.gov/education/chartsch/> (last visited May 16, 2024).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ N.J. DEP'T OF EDUC., *GUIDELINES FOR ACCESS AND EQUITY IN NEW JERSEY CHARTER SCHOOLS 2-3* (2015), <https://www.nj.gov/education/chartsch/about/equity/docs/guidelines.pdf>.

¹⁹⁹ *Id.*

²⁰⁰ N.J. STAT. ANN. § 18A:36A-8(a), (d) (West 2023).

²⁰¹ *Id.* § 18A:36A-8(e).

²⁰² See Patrick Wall, *New Jersey Says It Studies Charter School Segregation, but Won't Share the Findings*, CHALKBEAT: NEWARK (Mar. 21, 2022, 4:11 PM), <https://www.chalkbeat.org/newark/2022/3/21/22989702/charter-school-segregation-new-jersey-studies-refuse-share-findings/>.

²⁰³ *Id.*

Comparatively, 15.4% of the state's population is Black.²⁰⁴ The logical origin of this segregation stems from the same place as traditional public schools: New Jersey's geographic segregation.²⁰⁵ Because charter schools often open to provide alternative educational options for students, they tend to be found in places where students and families want alternative options to traditional public schools (i.e. where traditional public schools are struggling). Thus, their student population may be pulled from the same pool as the already segregated traditional public schools within the municipality. However, charter schools in New Jersey are also unlimited in their discretion to admit out-of-residence students.²⁰⁶ With that added population source, there is then a question as to whether and why the inclusion of nonresident students are not improving the overall levels of diversity at charter schools. Regardless of the cause, though, the extremely high concentration of black students in charter schools across the state suggests that they do little to effectively address segregation in New Jersey schools on their own.

The idea of a multi-district charter school would potentially allow for some alleviation to the segregation issue, provided that the applicable municipalities for student attendance created a diverse pool and that those students wanted to attend a charter school. Under that conception, multi-district charters then present nearly all the same positives as the regionalized public school districts discussed in this Note's subsection on consolidation. Unlike the regional districts though, multi-district charter schools would face the unique problem of being wholly optional. In other words, because attending a charter school is optional, there is potential for self-segregation as discussed in the subsection of this Note on the Interdistrict Public School Choice Program. While multi-district charters could also pull in non-district students, there is also a possibility that those students would also be self-segregating in their choice of school.²⁰⁷ While charters are required to try and create a student body reflecting the community by law, their freedom of choice also provides them with little ability to shape a student population that might make self-segregating choices. Ultimately then, multi-district charter schools have the potential to be just as poor at desegregation as current residency-based schools.

Further, charter schools are relatively controversial.²⁰⁸ The most damaging critique against them has been accusations of siphoning away valuable resources from traditional public schools.²⁰⁹ Charter schools receive

²⁰⁴ *QuickFacts: New Jersey*, U.S. CENSUS BUREAU (July 1, 2022), <https://www.census.gov/quickfacts/NJ>.

²⁰⁵ See FLAXMAN ET AL., *supra* note 11, at 8.

²⁰⁶ N.J. ADMIN. CODE § 6A:22-2.2 (West 2023).

²⁰⁷ *Id.*

²⁰⁸ See Letters to the Editor, *supra* note 163.

²⁰⁹ Wall, *supra* note 202.

state and federal funds in accordance with their attendance, so they obtain roughly 90% of that funding for students compared with traditional public schools which are supported by local taxes.²¹⁰ Low operating costs allow charters to function on such limited funding, but the drain on public schools can be crippling if their student population opts to attend charter schools. As such, the implementation of multi-district charter schools as the sole method to address segregation across the public school system seems a poor choice.

CONCLUSION

While the plaintiffs in *Latino Action Network* cite several potential frameworks to replace residency assignment, none appear wholly poised to handle the task of desegregating New Jersey's public schools.²¹¹ Cursory analysis of existing consolidation, interdistrict attendance, and school creation schemes all demonstrate some flaw in their current forms. Voluntary consolidation relies too heavily on the cooperation of school districts to reliably create an outcome that remedies segregation, while district consolidation within counties appears promising but lacks meaningful administrative guidance. The authority of school boards to accept non-residents is too narrow to alleviate segregation, transfer agreements may not defeat New Jersey's geographic segregation, and Interdistrict School Choice has been too limited to make any substantive impact. Finally, vocational schools are too exclusive and multi-district charter schools may simply provide new avenues for segregation.

Instead, any sort of solution relying upon existing state legislation will need at least some tweaks to effectively reduce segregation in public schools. In large part, this is due to the underlying reliance on the residency-based system of assignment that New Jersey's school system currently employs. All suggestions raised by the plaintiffs in *Latino Action Network* were designed within the existing framework of residency-assignment. Regardless of the options presented in this Note, the creation of consolidated school districts within counties and an expansion of the Interdistrict Public School Choice Program seem best positioned to decrease segregation in New Jersey public schools.

Consolidating school districts within counties provides an opportunity to expand districts beyond their current geographic restrictions and include more racial diversity into a single school district.²¹² Beyond the desegregative

²¹⁰ See Rundquist, *supra* note 194.

²¹¹ See generally Order Denying Plaintiff's Motion for Partial Summary Judgment and Granting In Part Defendant's Motion for Summary Judgment, *Latino Action Network et al. v. State*, No. L-1076-18 (N.J. Super. Ct. Law Div., Mercer County Ct. 2023).

²¹² N.J. STAT. ANN. § 18A:7-8 (West 2019).

potential of such districts, this solution also provides financial savings through the combination of administrative positions, which can then be reinvested into schools and utilized to further address the effects of segregation.

While perhaps not as promising as the development of countywide districts, the Interdistrict Public School Choice Program also appears as a viable framework to combat segregation in New Jersey schools. Though the current version of the program is limited to just 120 schools, its expansion could provide students the ability to access better public schools.²¹³ Further, the Interdistrict Public School Choice Program would allow districts to maintain their autonomy while also addressing issues of segregation. This option, however, does present some risk in the form of self-segregation.²¹⁴ Another potential drawback might be the financial cost of expanding the program, as its provisions are relatively expensive.²¹⁵

No matter the outcome of *Latino Action Network*, the case sheds a light on enduring segregation in New Jersey and encourages significant changes to the public education system and the legal frameworks underpinning it. Through the assessments provided in this Note, it appears that no current legislation will easily replace residency, nor easily ensure that segregation in the state will finally cease. While the above proposals may provide some guidance, in practice it will be unlikely to see any applied in their current forms. In any case, the state of New Jersey has an apparent need for change in its public school system to fulfill the promise of desegregation laid out in *Brown* and enshrined in its own constitution.

²¹³ See Wall, *supra* note 165.

²¹⁴ See Ukanwa, *supra* note 155; see also Whitehurst, *supra* note 155.

²¹⁵ See Wall, *supra* note 165.