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| <p>LATINO ACTION NETWORK, <i>et al.</i></p> <p>Plaintiffs/Appellants,</p> <p>and</p> <p>PLEASANTVILLE BOARD OF EDUCATION and WILDWOOD BOARD OF EDUCATION,</p> <p>Intervenor-Plaintiffs,</p> <p>v.</p> <p>THE STATE OF NEW JERSEY, <i>et al.</i>,</p> <p>Defendants-Appellees,</p> <p>and</p> <p>NEW JERSEY CHARTER SCHOOLS ASSOCIATION, INC., <i>et al.</i>,</p> <p>Intervenor-Defendants.</p> | <p>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: AM-000088-23T1</p> <p><u>CIVIL ACTION</u></p> <p>On Motion for Leave to Appeal from an Interlocutory Order of the Superior Court of New Jersey, Law Division, Mercer County</p> <p>Trial Court Docket No.: MER-L-1076-18</p> <p>Sat Below: Honorable Robert T. Lougy, A.J.S.C.</p> |
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BRIEF OF *AMICUS CURIAE* NEW JERSEY POLICY INSTITUTE

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PRELIMINARY STATEMENT

The New Jersey Policy Institute (“NJPI”) is a non-profit organization dedicated to working with New Jersey’s public and private sector leaders to find practical and effective solutions to the largest issues affecting the State and its residents. Though it has not yet made a formal appearance in this matter, NJPI has supported the position of *amicus curiae* New Jersey Interdistrict Public School Choice Association through additional research and policy analysis. NJPI now wishes to make its own appearance in this matter as *amicus curiae* to provide policy solutions to the parties supported by relevant data and studies. It is NJPI’s hope that the information it provides to the Court and the parties will permit them to continue exploring an expansion of New Jersey’s Interdistrict School Choice Program as a vehicle for creating greater diversity in New Jersey schools.

Both the Plaintiffs and various *amici* proposed expanding the Program as a potential remedy. In furtherance of that potential solution, NJPI’s amicus brief will provide the parties and the Court with (1) information concerning the Program’s history; (2) surveys and other information related to the potential effect of expanded school choice on student diversity; and (3) fiscal data showing how expanded school choice can be a revenue-neutral solution that

creates greater diversity in New Jersey's public schools without significant taxpayer expense.

NJPI takes no position regarding the parties' motions for summary judgment or the underlying merits of this matter, generally. Rather, its *amicus* submission is limited only to explaining why expanded voluntary interdistrict school choice presents an effective and economical solution to the issues Plaintiffs have raised. Interdistrict School Choice is an existing, successful program currently subject to a State freeze. The infrastructure already is in place, and there is significant interest among parents and students to expand the Program, evidenced by a waiting list containing over 2,000 students. The Program therefore presents a ready-made solution that can be implemented almost immediately. It is cost-effective, voluntary, and will produce no significant additional administrative burden for the State.

STATEMENT OF FACTS

A. New Jersey's Interdistrict School Choice Program History.

New Jersey established a pilot program authorizing interdistrict public school choice in 1999. *See L. 1999, c. 413*. In 2010, the State made the program permanent by passing the Interdistrict Public School Choice Program Act. *L. 2010, c. 65*. The Program was instantly successful. Program enrollment expanded rapidly from 15 choice districts serving 964 students in School Year

(SY) 2010-11 to 130 choice districts serving 5,158 students at the height of the program in SY 2014-15. Consequently, the Program's cost also grew exponentially from approximately \$10 million in SY 2010-11 to \$49 million in SY 2014-15. We also understand that these cost considerations were a contributing factor in Governor Christie's decision to cap student participation in SY 2012-13 and to stop accepting applications from school districts to become choice districts.

Despite the Program's continued popularity, the State has not permitted a new choice district since 2015, and there has been a decline in the number of districts hosting choice students. Student enrollment has held steady since 2015, with the number of choice seats virtually frozen. The Program's cost has increased only moderately due to the prohibition on new schools and the freeze on the number of choice seats at choice districts.

B. The Program's Operation.

1. Becoming a Choice School

Local boards of education can request that their schools participate in the Program through an application to the New Jersey Department of Education. Choice districts are permitted to limit their programs to a particular grade level or to specialized programs such as mathematics, science, or the arts. School boards may also establish reasonable, non-discriminatory selection criteria. A

choice district cannot discriminate in admissions policies, and if there are more applicants than there are seats available, the choice district must hold a lottery to select choice students. *See N.J.A.C. 6A:12-3; -4; -5.* Choice districts may give preference to siblings of enrolled students.

2. Student Application to a Choice School & Student Lotteries.

Students select a choice district by visiting the “Find a Choice District” section of the Department of Education Website. Then they must submit the choice application found on the choice district’s website directly to the choice district. Each district has its own choice application. Where choice options are available, any student who resides in New Jersey is eligible to apply.¹ Generally, students must apply by the November or December before the school year in which they hope to enroll in the school district. In limited circumstances, and upon a showing of “good cause,” the Commissioner may allow a student immediately to transfer to a choice district.²

When there are not enough seats for all choice applicants in a district, the district must conduct a lottery. There are exceptions where the district may give

¹ *See* N.J. Department of Education, *Interdistrict Public School Choice Program*, available at <https://www.nj.gov/education/choice/>.

² *See* N.J. Department of Education, *Interdistrict Public School Choice Program FAQs For Parents*, available at <https://www.nj.gov/education/choice/parents/faq/#g2l6>.

applicants preference in the lottery: (1) sibling preference; (2) where a choice student has attended a district where the terminal year is prior to 12th grade (*i.e.*, completing eighth grade at a K-8 district; the student may receive preference at the next choice school); or (3) “resident students of the choice district who move out of the district during the school year but before the application deadline and want to remain in the choice district the following year, provided the student will enroll in a choice-approved grade/program and . . . the district has choice seats available.” *See* note 2, *supra*.

3. Program Data And Popularity.

Critically, the number of choice students has increased at a steady and rapid pace over the last 20 years. In 2001-2002, there were 96 total choice students.³ By 2005-2006, there were just over 1,000. *See* Rutgers Study, *supra*, at 1-4. By the 2023-2024 school year, there were 5,174 choice students (approx. 0.4% of the public-school students in the state) – a roughly 500% increase in less than 20 years.⁴ During the 2022-2023 school year, a total of 3,595 students applied for the Choice Program, more than three times as many students as were

³ Rutgers Institute On Education Law And Policy, New Jersey’s Interdistrict Public School Choice Program, at 1-2 (2006) (hereinafter, “Rutgers Study”).

⁴ See N.J. Department of Education, N.J.A.C. 6A:13, Interdistrict Public School Choice Presentation, Jan. 17, 2024, *available at* https://www.nj.gov/education/sboe/meetings/agenda/2024/January/public/5e2_Interdistrict_School_Choice_presentation.pdf.

in the entire program in 2005-2006.⁵ Of the students who applied, just 41% were accepted into the program. Though there is no restriction on the number of students who can apply, the funding freeze has resulted in a sharp drop in the percentage of students the Program accepts. Students who are not accepted are placed on a waitlist. For the 2022-2023 school year, over 2,000 students remained on the waitlist. *See* note 5, *supra*.

4. Why Families Use the Choice Program.

Families use the Choice Program for a variety of reasons. The relatively low bar for an application likely contributes to the popularity of the program. Certainly, there are families who use the Program to gain access to greater academic programming. Similarly, there are students who want access to a particular course of study or program, such as a ROTC program, STEM courses, bio medical courses, fine and performing Arts, and university partnerships. In addition, a choice school may provide an opportunity for a student to have a new start if the student is being bullied or needs a different social environment. Parents have also noted that they apply for the Program so that their children can attend school in districts near where they work or where they have a family

⁵ *See* N.J. Department of Education, N.J.A.C. 6A:12, Interdistrict Public School Choice, Mar. 6, 2024, *available at* www.nj.gov/education/sboe/meetings/agenda/2024/March/public/5c2_Interdistrict_Public_School_Choice_presentation.pdf.

network (*i.e.*, where a family member can care for a child after school). Regardless of the reasoning, it is clear from the Program’s popularity and the waitlists that there are parents looking for options for their students.

LEGAL ARGUMENT

I. EXPANDED SCHOOL CHOICE PROVIDES A READY-MADE INFRASTRUCTURE TO SOLVE THE ISSUE OF INTENSELY-SEGREGATED SCHOOL DISTRICTS.

When this matter was filed in 2018, Plaintiffs advanced that there were 23 “intensely segregated” school districts in eight counties across the State. These are school districts where over 90% of the students were non-white and a majority were in poverty.⁶ A review of those intensely segregated districts and the Choice Schools available in these counties reveals that seven of the eight counties have no or few schools participating in the Choice Program. The following chart is illustrative:

⁶ While the data presented by Plaintiffs in their complaint focused on “intensely segregated” districts where the student population was 90% or more non-white, the parties undoubtedly are aware that there remain more than 130 public schools in New Jersey that are “highly segregated,” with 41 of those districts containing more than 90% students of one race, including districts that are more than 90% all white. *See* Nicole Rosenthal, How Segregated Is Your NJ School?, <https://patch.com/new-jersey/across-nj/how-segregated-your-nj-school-see-district-breakdown>. Notably, 33 of the 130 schools already are Choice Districts, but the seats in these segregated districts remain frozen.

| County | Number of “Intensely Segregated” Districts | Number of Choice Districts |
|---------------|---|---------------------------------------|
| Camden | 3 | 16 |
| Essex | 4 | 0 |
| Hudson | 4 | 1 |
| Mercer | 1 | 1 |
| Middlesex | 2 | 0 |
| Monmouth | 2 | 3 |
| Passaic | 3 | 2 |
| Union | 4 | 3 |

Critically, many of the State’s choice districts, most notably in Camden County as well as a few in Union and Monmouth Counties, are located in close *proximity* to the intensely segregated districts. For example, the following districts are considered to be intensely segregated districts:

- Essex (4 Districts): East Orange, Irvington Twp, Newark City, Orange City
- Hudson (4 Districts): Guttenberg Town, North Bergen, Union City, West New York
- Union (4 Districts): Elizabeth, Hillside, Plainfield, Roselle
- Passaic (3 Districts): Passaic, Paterson, Prospect Park Boro
- Middlesex (2 Districts): New Brunswick and Perth Amboy
- Camden (3 Districts): Camden City, Lawnside Boro, and Woodlyne Boro

- Mercer (1 District): Trenton
- Monmouth (2 Districts): Asbury Park and Red Bank Boro⁷

The vehicle for creating greater school diversity in those areas thus is largely in place -- assuming the State ends the freeze on choice district enrollment -- because there are existing Choice Program schools that students in those highly segregated districts could access. In other areas of the State, most notably Middlesex and Essex Counties, there are no choice districts, despite there being several intensely segregated schools in both counties. There are also relatively few choice options in Mercer and Monmouth Counties. Through the expansion of both the number of choice districts throughout the State, as well as increasing choice enrollment where it already exists, we are confident that the State can create greater diversity in all 130 of New Jersey's highly segregated school districts.

A rudimentary rendering of the current location of the nearly 120 Choice Districts and the 23 "intensely segregated" districts contained in NJPI's appendix visually illustrates the opportunity in using the current Choice Program across the state by unfreezing seats at current choice districts. It also is illustrative in showing where the State should look to approve new choice

⁷ The information contained in the chart is included in NJPI's appendix and was created using data available in the record or public information that is judicially noticeable.

districts to adequately provide options for students in intensely segregated schools. For example, the map provided in NJPI's appendix shows the 23 "intensely segregated" schools referenced in the complaint represented by black dots, and the location of the Choice Districts is in Blue. The counties in red are those with no schools in the Interdistrict School Choice Program. (PIa12)⁸

Based upon the data in the record and the judicially-noticeable information submitted in NJPI's appendix, NJPI would propose that the eight counties named in the lawsuit should serve as the starting point for developing an Interdistrict Desegregation Transfer Plan. First, the State should lift the restriction on new choice districts and allow school districts, as well as the counties surrounding them, to apply to the Program. Second, existing choice districts in those eight counties should be granted more seats if space permits. Third, the State should prioritize and provide incentives for schools in Essex, Middlesex, Mercer, and Monmouth Counties to become choice districts due to the nonexistence or virtual nonexistence of choice options in those counties. The State also could expand choice seats in counties contiguous to these counties and to other counties with a large number of segregated districts. Finally, any choice district that is "highly segregated" should be permitted to expand the

⁸ "PIa" refers to NJPI's appellate appendix.

number of Choice Seats available. Taken together, we believe these initial steps could serve as a catalyst to end school desegregation in New Jersey.

Most importantly, the steps outlined above are operationally, politically, and financially practical. An expanded Program would be completely voluntary for schools and parents. In addition, an expanded school choice program requires no new funding for facilities and will have only a minimal impact on school staff. Finally, an expanded Choice Program will permit the State to create greater school diversity without resorting to race-based remedies which may be politically sensitive and subject to judicial challenge.

II. SURVEY SUBMISSIONS TO THE NEW JERSEY DEPARTMENT OF EDUCATION DEMONSTRATE CHOICE DISTRICTS ARE USING THE PROGRAM TO DIVERSIFY AND WANT TO EXPAND THEIR SEATS.

Public school districts readily understand that expanded school choice is an efficient way to increase the diversity of their student populations. For the 2022-23 and 2023-24 school years, the Department of Education sent surveys to public school districts regarding the Program. (PIa13-22) In response to a question concerning the reasons why the district was participating in the Program, roughly 60% stated that they were “interested in diversifying [the district’s] student population.” (PIa16-17) This was true for both the 2022-23 and 2023-24 school years. (PIa16-17)

Most choice districts also want to increase the number of choice students in their schools. For both of the surveyed school years, there were roughly 5,000 choice seats funded by the Department of Education. (PIa13-15) Choice districts indicated that they wanted to fill roughly 7,000 choice seats for each surveyed school year – a roughly 40% increase. Moreover, the Department included in the survey a question regarding how it could improve the Program. Many districts responded that the Department should add more choice seats, and the districts had the space, interest, and available programming. (PIa21-22) Finally, the Department asked choice districts if they were satisfied with the Program. Roughly 60% of districts responded that they were “very satisfied.” (PIa19-20) Less than 5% responded that they were not satisfied.⁹ (PIa19-20)

The Program is popular with parents and school districts alike. Should the parties or the Court contemplate expanded school choice as a potential remedy, they will not be foisting a program on public school districts that the districts do not want. On the contrary, public school districts have indicated for years that school choice is a way to increase diversity, and that they are ready and willing to accept more choice students.

⁹ The Court is permitted to take judicial notice of the Department’s surveys because they are records of an administrative agency. *See Sanders v. Div. of Motor Vehicles*, 131 N.J. Super. 95, 98-99 (App. Div. 1974).

III. NJPI'S STUDY SUGGESTS THAT THE COSTS FOR EXPANDED SCHOOL CHOICE WILL BE SLIGHT, IF NOT REVENUE NEUTRAL.

In addition to its administrative efficiency, expanded school choice promises to provide a cost-effective vehicle for creating greater school diversity. Because the State pays choice aid to the choice district in place of the choice district's school tax levy, an expanded school choice program will have only a slight financial impact, if any, on the district of residence, and should not require significant additional costs. Indeed, expansion of the choice program could actually serve as a cost savings to the State for students who leave a school district with significant state aid to attend a choice district receiving less state aid.

In fiscal year 2024, which funded the 5,174 students in the Program for the 2023-2024 school year, the State appropriated \$59,905,000, which amounts to nearly \$12,000 a student. Importantly, the State appropriation for the Choice Program does not require significant additional state resources. When a student leaves the district of residence (*i.e.*, "choices out") and goes to the choice district, the choice district is awarded the state aid and the choice district's local levy from the State for that choice student. Accordingly, while the State is paying not only the state aid for the choice student but also the local levy of the choice district, the State may actually *save* money when a student attends a

choice district which receives less state aid. In addition, the resident district *keeps its local levy* for the resident choice student, so the financial impact to the resident district is minimized. Further, the Program utilizes existing school districts with existing human capital and school facilities, thereby minimizing the financial investment from the State to implement the Program as a remedy.

In its recent fiscal analysis of the Program, NJPI commissioned an independent examination of the Program’s anticipated costs to New Jersey’s taxpayers. The study¹⁰ evaluated the Program’s current cost, and modeled potential expansions under New Jersey’s School Funding Reform Act (“SFRA”). The study’s primary objective was to “evaluate how shifts in student enrollment from resident districts to choice districts affect state aid allocations under the SFRA formula.” (PIa4) The study, which is among the first of its kind to examine the issue, concluded that a “significant portion” of the Program’s costs will be “offset by Equalization Aid savings.” (PIa2)

In reaching its conclusions, the study reviewed the current net cost of operating the Program, the net cost to fund all waitlisted students for fiscal year 2025, and a scenario for expanding the Program in Essex and Middlesex Counties (the only counties without choice districts) alone. According to the

¹⁰ In addition to its inclusion in NJPI’s appendix, the study is available publicly at the following link: <https://newjerseypolicyinstitute.org/idpsc/>.

study's findings, the net cost of operating the Program for fiscal year 2025 is roughly \$44 million; and roughly \$51 million for fiscal year 2026. (PIa5) The net cost to fund all waitlisted students for fiscal year 2026 -- including both School Choice Aid and Equalization Aid adjustments -- is approximately \$11.9 million. (PIa6)

After examining the Program's current cost and costs for funding waitlisted students, the study reviewed the financial implications associated with relocating roughly 5% (approximately 4,230) of students from highly segregated districts (East Orange, Irvington, Newark City, Orange City, New Brunswick, and Perth Amboy) into new choice districts within Middlesex and Essex counties. (PIa3) The study examined the distribution under two different models: (1) an even distribution of students across counties (Scenario A), and (2) a distribution of students only to geographically adjacent districts (Scenario B). Scenario A (even distribution) resulted in a net state aid cost of approximately \$9.7 million in fiscal year 2025, and 11.2 million in fiscal year 2026. Scenario B (geographically adjacent distribution) resulted in a higher net state aid cost of approximately \$25.4 million in fiscal year 2025, and \$31.2 million in Fiscal year 2026. (PIa3-5).

Based on these findings, the study concluded that "strategic geographic placement of choice students into districts not receiving equalization aid can

substantially reduce overall state costs associated with the program.” (PIa10) For example, “Scenario A demonstrated lower net costs compared to Scenario B due to a higher proportion of students attending districts without equalization aid eligibility.” (PIa10) Thus, although “New Jersey’s interdistrict school choice program incurs significant upfront costs through School Choice Aid funding, these expenses are partially mitigated by corresponding reductions in Equalization Aid allocations to sending districts.” (PIa10) These “offsetting savings currently cover approximately 30-31% of total school choice aid expenditures on average.” (PIa10)

Accordingly, “[t]he precise net financial impact depends heavily upon both student distribution patterns across districts and the method employed to calculate equalization aid adjustments.” (PIa10) By “relocating students to districts that do not qualify for Equalization Aid,” the State can “substantially reduce[] overall state costs.” (PIa10) Most strikingly, “[u]nder optimal conditions -- where approximately 63% or more of relocated students enroll in districts without Equalization Aid eligibility -- the program could potentially approach a net-neutral or even generate savings.” (PIa3)

CONCLUSION

An expansion of New Jersey's School Choice Program thus provides both the State and the Commissioner with a ready-made remedy that will create greater school diversity in New Jersey efficiently, economically, and immediately. The data and study contained herein establish that school choice is both popular and economically feasible in New Jersey. NJPI therefore urges the parties and the Court to consider an expansion of New Jersey's School Choice Program as a potential remedy in this matter.

NJPI believes that its *amicus* submission will provide valuable information to the Court and the parties indicating the potential of expanded school choice to provide greater diversity in New Jersey schools. NJPI is willing to provide additional information as may be required by the Court or requested by the parties to further illuminate this potential.

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