

JOSHUA CRAWFORD, JASON CRAWFORD, and JUSTIN CRAWFORD, minors, by their guardian ad litem, Van-Ness Crawford; TYWAN DAVIS, minor, by his guardian ad litem, Floyd Tally; CATHYA VELASQUEZ and CATHYDIA RUIZ, minors, by their guardian ad litem, Enrique Ruiz; KEYINA ROYALL, minor, by her guardian ad litem, Michele Royall; SHAKUR MCNAIR and VANISHA MCNAIR, minors, by their guardians ad litem, Ericka and Sharon McNair; ALEXIS MENDEZ, minor, by his guardian ad litem, Melitza Mendez; NAJEE and J-AJANAE BEY, minors, by their guardian ad litem, Anetra Bey; DONTE RAMOS, minor, by her guardian ad litem, Maribel Ramos; JUANA ROE (pseudonym), minor, by her guardian ad litem, Mr. Roe; and JUAN DOE (pseudonym), minor, by his guardian ad litem,

Plaintiffs,

v.

LUCILLE DAVY, State Commissioner of Education; YUT'SE THOMAS, Director of the Office of School Funding; ROBERT G. KOERTZ, Director of State Budget and Accounting; BRADLEY ABELOW, New Jersey State Treasurer; STATE BOARD OF EDUCATION; and BOARDS OF EDUCATION OF: ASBURY PARK, ATLANTIC CITY, BEVERLY CITY, BOUND BROOK, BRIDGETON, CAMDEN, CLEMENTON BOROUGH, EAST ORANGE, ELIZABETH, ENGLEWOOD CITY, IRVINGTON, JERSEY CITY, LAKEWOOD TOWNSHIP, LAWNSIDE BOROUGH, MILLVILLE CITY, NEW BRUNSWICK, NEWARK, ORANGE, PATERSON, PERTH AMBOY, SALEM CITY, TRENTON, WILDWOOD, WOODBINE, AND WOODLYNNE BOROUGH, and BOARDS OF EDUCATION A through Z,

Defendants.

SUPERIOR COURT OF
NEW JERSEY
CHANCERY DIVISION
GENERAL EQUITY PART
MERCER COUNTY

DOCKET NO. C-137-06

DEFENDANTS' MOTION TO DISMISS, PURSUANT TO R. 4:6-2(e), PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY GRANTED

This matter arises from a class action complaint filed¹ on July 13, 2006 by Plaintiffs against Defendants, alleging violation of the State's constitutional guarantee to a thorough and efficient education, Art. 8, sec. 4, para. 1; violation of the State's constitutional guarantee of equal protection under the law, Art. 1, para. 1; violation of the Federal constitutional guarantee of equal protection of the law under the Fourteenth Amendment; and violation of the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c). On or about January 12, 2007, Plaintiffs filed an amended complaint for purposes of adding additional named plaintiffs. Plaintiffs are approximately 60,000 schoolchildren attending one of ninety-six schools in twenty-five municipal school districts spread across sixteen counties.² Defendants consist of various state officials and the twenty-five municipal school districts' respective boards of education.

Five substantive motions to dismiss were filed in and around October 2006. The first motion to dismiss was filed by Lucille Davy, State Commissioner of Education; Yut'se Thomas, Director of the Office of School Funding; Robert G. Koertz, Director of State Budget and Accounting; Bradley Abelow, New Jersey State Treasurer and the State Board of Education. A second was filed by the Boards of Education of Bound Brook, Englewood City, Wildwood and Woodbine. A third was filed by the Boards of

¹ Plaintiffs originally filed the Complaint in the Chancery Division of the Superior Court, Essex County. On October 27, 2006, a motion was granted to transfer venue to the Chancery Division of the Superior Court, Mercer County.

² The majority of the schools at issue in the present matter are located in disadvantaged communities. Fifteen of the twenty-five school districts are Abbott districts, which have been subject to substantial reforms and increased state funding over the past decade.

Education of Asbury Park, East Orange, Elizabeth, Jersey City, Paterson, Perth Amboy, Salem City and Trenton. A fourth was filed by the Board of Education of Atlantic City. And the fifth was filed by the Millville Board of Education. The Defendants not filing substantive motions to dismiss—Beverly City, Bridgeton, Camden Clementon Borough, Irvington, Lakewood Township, Lawnside Borough, New Brunswick, Newark, Orange, and Woodlynne Borough—have joined in these five motions.

Pursuant to the Public School Education Act, N.J.S.A. 18A:7A-14.1 (the “Act”):

- (a) It is the constitutional obligation of the Legislature to provide all children in New Jersey with a thorough and efficient system of free public schools;
- (b) The breadth and scope of such a system are defined by the Legislature through the commissioner and the State board pursuant to P.L. 1996, c. 138 (C. 18A:7F-1 et al.) so as to insure quality educational programs for all children.

Under N.J.S.A. 18A:38-25, school-aged children are required to attend public school unless certain statutory exemptions apply. Schoolchildren are assigned to the public school they must attend based on the municipality in which they are domiciled. N.J.S.A. 18A:8-1 (establishing a separate school district for each New Jersey municipality). Schoolchildren domiciled within the school district attend public school free of charge; whereas schoolchildren seeking to attend a public school outside of their respective school district must typically pay tuition. N.J.S.A. 18A:38-1.

To provide a means for delivering a “thorough and efficient education” to all students within the State, on May 1, 1996, the State Board of Education (“Defendant-State Board”) adopted the Core Curriculum Content Standards (“CCCS”).³ The CCCS

³ Defendant-State Board adopted revisions to the CCCS in July 2002, April 2004 and October 2004.

“specify expectations in nine academic content areas: the visual and performing arts, comprehensive health and physical education, language arts literacy, mathematics, science, social studies, world languages, technological literacy, and career education and consumer, family and life skills.” N.J.A.C. 6A:8-1.1(a)(1). Pursuant to N.J.A.C. 6A:8-1.3, the CCCS “describe the knowledge and skills all New Jersey students are expected to acquire by benchmark grades,” and were “established for the provision of a thorough and efficient education pursuant to N.J.S.A. 18A:7F-4[⁴] and as a basis for the evaluation of school districts in accordance with N.J.A.C. 6A:30-1.4.” The express purpose of the CCCS is to “define what all students should know and be able to do by the end of their public school education.” N.J.A.C. 6A:8-1.1(a).⁵ To assist in obtaining this requisite knowledge, the “district board[s] of education shall align their curriculum and instructional methodologies to assist all students in achieving [the CCCS].” N.J.A.C. 6A:8-1.2(c). This includes designing and delivering the curriculum and instruction in such a way that all students, including students with disabilities, limited English proficiency, and advanced students, are able to demonstrate the knowledge and skills specified by the CCCS. N.J.A.C. 6A:8-3.1(a). To measure student progress in the attainment of the CCCS, the State has enacted a Statewide assessment system (the “Assessments”) to be administered at certain grade levels.⁶ N.J.A.C. 6A:8-1.1(c).

⁴ “The [CCCS] shall ensure that all children [enrolled in public elementary, secondary, and adult high school education programs] are provided the educational opportunity needed to equip them for the role of citizen and labor market competitor in the contemporary setting.” N.J.S.A. 18A:7F-4(a).

⁵ Moreover, “[t]he [CCCS] . . . enable school district boards of education to establish curriculum and instructional methodologies for the purpose of providing students with the constitutionally mandated system of ‘thorough’ public school instruction.” N.J.A.C. 6A:8-1.1(b).

⁶ The number of grade levels taking the Assessments has increased from year to year. See N.J.A.C. 6A:8-4.1. Only the assessment scores of grades three, four, eight, and eleventh grade are before the Court on these motions.

The New Jersey Assessment of Knowledge and Skills (“NJASK”) is administered to third and fourth graders to gauge their progress in Language Arts Literacy and Mathematics. According to the New Jersey Department of Education,

NJASK is designed to give an early indication of the progress students are making in mastering the knowledge and skills described in the [CCCS]. The results are to be used by schools and districts to identify strengths and weaknesses in their educational programs. It is anticipated that this process will lead to improved instruction and better alignment with the [CCCS] in kindergarten through grade four.^[7]

The New Jersey Grade Eight Proficiency Assessment (“GEPA”) consists of three sections, Language Arts Literacy, Mathematics and Science. According to the Department of Education, the “GEPA is designed to give an indication of the progress students are making in mastering the knowledge and skills described in the [CCCS] for these areas.”⁸ The High School Proficiency Assessment (“HSPA”), administered to eleventh grade students, consists of two sections: Language Arts Literacy and Mathematics. According to the Department of Education, the HSPA is “aligned with the [CCCS] and measures whether students have acquired the knowledge and skills contained in the [CCCS] necessary to graduate from high school.”⁹

According to N.J.A.C. 6A:8-1.1(d), the results of the Assessments are for purposes of “facilitat[ing] program evaluation based on student performance and [to] enable district boards of education, the public, and government officials to evaluate the educational delivery systems of all public schools.” Where students are performing

⁷ Plaintiffs quote this statement in the complaint. While Plaintiffs’ complaint attributes the quoted statement to the New Jersey Department of Education, Plaintiffs have not provided the Court with citing references to verify this statement, or to consider the statement in the context in which it was made.

⁸ See supra note 7.

⁹ See supra note 7.

below the established levels of student proficiency in any given content area on the Assessments, “district boards of education shall provide appropriate instruction to approve skills and knowledge.” N.J.A.C. 6A:8-4.3(c). Moreover, the district boards of education “shall ensure that each school which does not achieve State standards as determined by performance on applicable Statewide assessments develops and implements a school-level improvement plan including measurable objectives to address deficiencies identified by the assessments and to comply with any correspondent Federal sanctions.” N.J.A.C. 6A:8-4.4(b)(1). Therefore, “[a]ll students shall be expected to demonstrate the knowledge and skills of the [CCCS] as measured by the Statewide assessment system.” N.J.A.C. 6A:8-4.3(d).

Plaintiffs allege that despite implementing the CCCS approximately ten years ago, Defendants have failed achievement of the CCCS for the last two years, and in some cases longer.¹⁰ According to Plaintiffs, in the schools identified in the complaint, either fifty percent or more of the children taking the Assessments are failing both of the sections tested (i.e. mathematics and language arts literacy), or seventy-five percent or more of those children are failing one of the sections tested.¹¹ Based on this data, Plaintiffs allege that they are attending schools failing to provide a “thorough and efficient education” as required by the New Jersey State Constitution, and equal protection of the law under both the United States Constitution and the New Jersey State Constitution. According to Plaintiffs, “[t]he absence of meaningful accountability in the organization of these schools perpetuates the practices within these schools[, to a degree

¹⁰ The Complaint identifies various schools within the named Defendants’ school districts, at various levels of education, achieving various test scores.

¹¹ This compilation of data is based on the March 2005 release by the Department of Education of the New Jersey School Report Cards for every public school in the State.

that] . . . spending more money cannot significantly improve the pattern of failure.”
(Complaint, ¶ 141.)

Plaintiffs, therefore, assert that a constitutionally adequate system of education cannot be maintained so long as Plaintiffs lack meaningful choice to exit their current public schools to attend a “successful” school. Succinctly stated:

The remedy [Plaintiffs] seek is public and private school choice.

In many instances there will be insufficient public schools within[, or within a reasonable distance of,] a child’s school district to accommodate all of the students who exercise the right to leave their failing schools. These children should be allowed a full-range of choices, including out of district public schools and private schools.

(Complaint, ¶¶ 141-142.) Plaintiffs seek to achieve this result by having the Court declare that a defined level of on-going partial proficiency or total failure on any of the Assessments is evidence of, or constitutes, a violation of the “thorough and efficient education” clause of the New Jersey State Constitution. Plaintiffs also seek a declaration that the overall use of district boundaries and compulsory attendance laws is unconstitutional under the “thorough and efficient education” clause in the New Jersey State Constitution, and the equal protection of law provisions under both the New Jersey State Constitution and the United States Constitution. (Complaint, ¶ 166(a).) Alternatively, Plaintiffs seek to permanently enjoin Defendants from enforcing the district boundaries and compulsory attendance laws, but only when they would consign Plaintiffs to a “failing” school.

By way of the present motion, Defendants seek to dismiss Plaintiffs’ complaint, pursuant to R. 4:6-2(e), for failure to state a claim upon which relief may be granted. Defendants’ motions are primarily premised on three arguments: (1) the relief Plaintiffs

purportedly seek—a voucher system—is purely a political issue, left to the sole province of the Legislature; (2) the allegation that Defendants have violated Plaintiffs’ right to a “thorough and efficient education” is unfounded, as it is predicated entirely on two consecutive years of assessment data¹²; and (3) Plaintiffs’ allegations of being “trapped” in the schools they are attending ignores legislatively enacted remedial measures along with recent and ongoing attempts at both the State and Federal level to increase educational proficiency in the State.

Defendants also set forth two more bases not applicable to all Defendants. Defendant-District Boards of Education (collectively “Defendant-District Boards”) of Asbury Park, East Orange, Jersey City, Paterson, Salem City, and Millville assert that the entire complaint should be dismissed, as to them, for lack of standing based on the absence of an individually named Plaintiff residing within one of these districts. Additionally, Defendant-District Boards assert that Plaintiffs’ entire complaint must be dismissed, as to them, because they lack the authority to implement the relief sought by Plaintiffs.

In determining the present motion to dismiss, Defendants maintain that the Court should consider the already existing and ongoing attempts at the State and Federal level to increase proficiency in the State because it evidences that this matter is appropriately delegated to the Legislature, and that the Legislature already has in place several remedial

¹² According to Defendants, by focusing on the assessment data in isolation, the assessment data takes on a purpose beyond that for which the Assessments were created (i.e. they only gauge performance in three of the nine academic standards that define a “thorough and efficient education”).

measures available.¹³ In fact, Defendants request that the Court take judicial notice of the State and Federal programs targeted at increasing educational proficiency in the State.

For example, in 2005, the Legislature, through its adoption of the New Jersey Quality Single Accountability Continuum (“QSAC”), strengthened the educational monitoring and evaluation provisions set forth in N.J.S.A. 18A:7A-1 et seq. According to Defendants, the Legislature promulgated QSAC as a means of “evaluating the thoroughness and efficiency of all the public schools of the State” and “ensur[ing] that all districts are operating at a high level of performance.” N.J.S.A. 18A:7A-10. Under the QSAC mandate, the Commissioner of Education (the “Commissioner”), in collaboration with school officials and community members, must review all relevant data concerning a school district, including student Assessment data. N.J.S.A. 18A:7A-14(a). Under QSAC, if a particular school district has satisfied less than fifty percent of certain quality performance indicators, the Commissioner must authorize an in-depth evaluation of the school district’s performance and effectiveness, and the school district must develop an improvement plan. N.J.S.A. 18A:7A-14(c)(1). In connection with this, the Commissioner must provide “highly skilled professionals” who will assist the school district in improving its effectiveness, “targeted assistance” to “support the teaching and learning process,” and “technical assistance” to “ensure the provision of a thorough and efficient education.” N.J.S.A. 18A:7A-3. The Commissioner also has the option to order full or partial State intervention in the school district. N.J.S.A. 18A:7A-14(c).

¹³ In addition to the attempts discussed in the body of the Court’s Statement of Reasons, Defendants also cite to the availability of charter schools, N.J.S.A. 18A:36A-2, and the 1999 enactment of the Interdistrict Public School Choice Program Act, N.J.S.A. 18A:36B-1 et seq., enabling certain interested school districts to become “choice districts” (i.e. they can designate open seats for non-resident students at the expense of the State). Moreover, Defendants cite to Governor Corzine’s State of the State Address, in which he proposed \$8 billion as direct school aid to school districts.

Also, as a recipient of Federal Title I funds, the State is required to comply with the accountability requirements of the No Child Left Behind Act (“NCLB”), 20 U.S.C. 6301 et seq.¹⁴ See, e.g., N.J.A.C. 6A:8-4 (setting forth certain disclosure and accountability requirements pertaining to Assessment scores). Pursuant to the mandate that the State comply with certain accountability requirements, the Department of Education undertakes an annual review of every school’s performance at each grade level to measure “adequate yearly progress” (“AYP”). N.J.A.C. 6A:8-4.4(a). One measure of AYP is the percentage of students performing at the proficient level on the Assessments.¹⁵ Ibid.

NCLB also authorizes the allocation of Title I funds to “local education agencies” (“LEA”) within the State. 20 U.S.C. 6303(a). Grants are allocated according to the percentage of low-income students in the LEA. Ibid. Any school that fails for two consecutive years to demonstrate adequate yearly progress towards achievement of academic standards is designated as a school “in need of improvement” and is required to give all students in the school the option of transferring to another school within the district that is not in need of improvement. 20 U.S.C. 6316(b)(1)(E). If the district cannot offer a transfer option, the school district must offer supplemental educational services. Ibid. If the school fails for four consecutive years to demonstrate adequate yearly progress towards achievement of academic standards, the LEA must, in addition to offering a transfer option and supplemental services, take corrective action such as

¹⁴ While Plaintiffs contend that the NCLB is irrelevant because it may not provide a private right of action, the Court is not certain that Defendants cite it for that purpose. Rather, it appears to the Court that Defendants cite the NCLB to evidence that the State has enacted certain requirements aimed at achieving a better education system in order to continue to receive Title I funds.

¹⁵ Further, each year an “increasing percent of the total number of students tested and of each statistically viable subgroup,” must score at the proficiency level or higher. N.J.A.C. 6A:8-4.4(a)(1).

replacing school staff, implementing a new curriculum, or extending the school day. 20 U.S.C. 6313(b)(7)(C)(iv)(I)-(IV). If the school fails to demonstrate adequate yearly progress (“AYP”) towards achievement of academic standards for five consecutive years, the LEA must undertake a “major restructuring of the school’s governance.” 20 U.S.C. 6316(b)(8)(B)(v).

By contrast, Plaintiffs contend that the Defendants’ motion to dismiss should be denied because Plaintiffs deserve their “day in court”.¹⁶ Essentially, Plaintiffs contend that Defendants’ arguments to the contrary are misguided, and under the State’s liberal pleading standard, the complaint adequately suggests a cause of action for violations of the right to a “thorough and efficient education”, equal protection—both State and Federal—and the New Jersey Civil Rights Act.

Specifically, Plaintiffs contend that they have adequately stated a cause of action for violation of the right to a “thorough and efficient education” because Plaintiffs have pled denial of the educational opportunity to acquire the knowledge and skills commensurate with the CCCS. Moreover, while Plaintiffs recognize that standardized test results are not the sole measure of adequacy, Plaintiffs contest that standardized test results should be the sole measure of inadequacy.

Plaintiffs also contend that the complaint adequately states causes of action for violation of equal protection of law, both under the New Jersey State Constitution and the United States Constitution. Plaintiffs allege that they are similarly situated to other schoolchildren in the State because the New Jersey State Constitution entitles every school aged child to the “equal educational opportunity” to have a “thorough and

¹⁶ Similarly, Plaintiffs contend that the opportunity for “full discovery” will ultimately prove the inadequacy of the education being received by Plaintiffs

efficient education”. Plaintiffs further allege that Defendants treat them differently from other schoolchildren in the State by consigning them to schools that do not impart the required skills and knowledge that constitute a “thorough and efficient education” as determined by the CCCS. Plaintiffs further allege that the municipal district boundaries and compulsory attendance laws, which are the cause of the disparity in equal protection, serve no appropriate governmental objectives.

Additionally, Plaintiffs contend that the complaint adequately states a private cause of action under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c). According to Plaintiffs, to sustain a cause of action under the New Jersey Civil Rights Act, it is sufficient to simply plead a cause of action for either a violation of the United States Constitution’s equal protection guarantee, or any substantive right—a “thorough and efficient education”—under the New Jersey State Constitution. Because Plaintiffs contend that they have stated adequate causes of action for violations of the equal protection clause of the United States Constitution, and violations of the New Jersey State Constitution’s fundamental right to a “thorough and efficient education”, Plaintiffs similarly contend that they have stated an adequate cause of action for violation of the New Jersey Civil Rights Act.

In reply, Defendants reiterate their position that the Court is prohibited from granting the ultimate relief requested, regardless of Plaintiffs’ characterization of the relief requested. Defendants also assert that any determination of district or school failure should not be heard by the Court, but rather by the agency with the necessary expertise to make such a determination—the Department of Education.

Rule 4:6-2(e) provides that a motion to dismiss may be made alleging a plaintiff's failure to state a claim upon which relief may be granted. The standard for a motion to dismiss pursuant to R. 4:6-2(e) was established in Printing Mart v. Sharp Electronics, 116 N.J. 739 (1989). According to the Court in Printing Mart, *supra*, when determining a motion to dismiss for failure to state a claim upon which relief may be granted, "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." *Id.* at 739. Moreover, courts should not be concerned with a plaintiff's ability to prove the allegations contained in the complaint. *Id.* at 746. Essentially, courts are to simply determine whether a cause of action is suggested by the facts set forth in the complaint, allowing all reasonable inferences and implications to be made in favor of the non-moving party. *Id.* at 746; City of Jersey City v. Hague, 18 N.J. 584, 587 (1955). As the Court stated in Printing Mart, *supra*, "[courts should] search the complaint in-depth and with the liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, with an opportunity being given to amend if necessary." 116 N.J. at 746 (quoting DiCristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957)).

A. Standing

Defendant-District Boards of Asbury Park, East Orange, Jersey City, Paterson, Salem City, and Millville assert that Plaintiffs' complaint should be dismissed in its entirety, as to them, because none of the named Plaintiffs reside in these particular school districts. Therefore, Defendant-District Boards assert that Plaintiffs lack individual standing to bring claims against school districts, and their respective local boards of education, in which they do not reside. According to Defendant-District Boards, none of

the named Plaintiffs have been, or are in a position to be, affected by the actions or conduct of school districts in which they do not reside. Further, because the facts and issues vary from district to district, Defendant-District Boards assert that named Plaintiffs in certain school districts cannot purport to be representative parties of the class of students in districts in which the named Plaintiffs do not reside.¹⁷ Therefore, Defendant-District Boards assert that Plaintiffs' complaint must be dismissed in its entirety at to Defendant-District Boards Asbury Park, East Orange, Jersey City, Paterson, Salem City, and Millville.

Generally, our courts take a liberal approach to standing. In the Matter of Camden County v. Board of Trustees of the Pub. Employees Retirement Sys. (PERS), 170 N.J. 439, 448-49 (2001); see also Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York, 58 N.J. 98, 107-08 (1971) (positing that “[u]nlike the federal Constitution, there is no express language in New Jersey’s Constitution [confining] our judicial power to actual cases and controversies”). To have standing, a party must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision. In re Camden County, supra, 170 N.J. at 449; see also Crescent Park Tenants Ass'n, supra, 58 N.J. at 107-08 (“Nevertheless, we will not render advisory opinions or function in the abstract nor will we entertain . . . plaintiffs who are . . . strangers to the dispute.”).

¹⁷ On this point, Defendant-District Boards assert that even assuming Plaintiffs did have standing to assert claims against certain Defendant-District Boards, although no named Plaintiffs reside within these school districts, Plaintiffs could not satisfy the “typicality” and “fair and adequate representation” requirements to act as putative class representatives.

Plaintiffs contend that under New Jersey’s liberal approach to standing, Plaintiffs can seek relief from certain Defendant-District Boards, although no named Plaintiffs reside within certain of the school districts of Defendant-District Boards. Although Plaintiffs concede that a general requirement of standing, and consequently class certification, in a class action lawsuit is that a class representative have a cause of action against each named defendant, Plaintiffs contend that there are exceptions to the general rule, particularly, the “juridical links” doctrine; a doctrine that finds its applicability primarily within the federal court system, and first espoused by the Ninth Circuit Court of Appeals in La Mar H&B Novelty & Loan Company, 489 F.2d 461 (9th Cir. 1971). Since La Mar, supra, there has been a split of authority among federal courts as to whether applicability of the “juridical links doctrine” is limited to the “typicality” requirement for class certification, or whether it applies with equal force to issues of standing. (See Plaintiffs’ Opposition Brief, at 51 n. 20.)

In stating the general principle pertaining to the “typicality” requirement for class certification, the Ninth Circuit in La Mar, supra, posited:

Under proper circumstances, the plaintiff may represent all those suffering an injury similar to his own inflicted by the defendant responsible for the plaintiff’s injury, but in our view he cannot represent those having causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands he suffered no injury.

[A] plaintiff who has no cause of action against the defendant cannot ‘fairly and adequately protect the interests’ of those who do not have such causes of action. This is true even though the plaintiff may have suffered an identical injury at the hands of a party other than the defendant.

489 F.2d at 462, 465-66. While the Ninth Circuit applied the general principle to deny class certification in La Mar, supra, it also recognized that under certain circumstances the general principle would not apply:

Obviously this position does not embrace situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury. *Nor is it intended to apply in instances in which all defendants juridically related in a manner that suggests a single resolution of the dispute would be expeditious.*

Id. at 466 (emphasis added). The Ninth Circuit rooted these exceptions in the reasoning of several federal courts, particularly Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966) and Samuel v. University of Pittsburgh, 56 F.R.D. 435 (W.D. Pa. 1972). Id. at 469-70 (observing that while Fed. R. Civ. P. 23 has no civil rights version its interpretation has been more generous in this type of case).

Here, the Court finds the facts in Washington, supra, and the reasoning applied therein, to be of particular relevance to the present matter. In Washington, supra, the plaintiffs were, or had been incarcerated in various detention facilities of the State of Alabama, its counties, cities, and towns. Their suit was against the Commissioner, the Sheriff of Jefferson County and all other sheriffs of Alabama, the Warden of the Birmingham jail and all other wardens and jailers of city and town jails in Alabama. Its purpose was to obtain a declaration of the rights of Negro citizens not to be segregated while incarcerated. In distinguishing Washington, supra, the Ninth Circuit in La Mar, supra, observed:

Obviously there were many facilities in which the plaintiffs had not been detained even though their wardens or jailors were named defendants. Nonetheless, the fact that plaintiffs had been confined in several of the facilities was

deemed sufficient to provide standing. . . . Aside from the somewhat broad and accommodating concept of standing in civil rights cases, it is also true that all the defendants were officials of a single state and its subordinate units of government[,] . . . [and therefore,] [t]heir legal relationship distinguishes them from the defendants [here].

Id. at 469 (emphasis added).

Like in Washington, supra, Plaintiffs in the present matter obviously have not attended schools in all of the school districts of Defendant-District Boards; however, all Defendant-District Boards are official units of the State, and therefore, are directly related by virtue of their legal relationship. Moreover, although the Ninth Circuit in La Mar, supra, was faced with the issue of class certification, the plain language of the Ninth Circuit’s analysis of Washington, supra, indicates that it relied on principles of standing, not class certification, to create the exceptions Plaintiffs seek to apply in the context of standing in the present matter. Therefore, conceivably the exceptions recognized in La Mar, supra, would have the same applicability on the issue of standing as it does on the issue of class certification.

Defendants rely on In re Franklin Mutual Funds Fee Litigation to rebut Plaintiffs’ reliance on the “juridical links” doctrine as an exception to the standing requirement. 388 F. Supp. 2d 451, 460 (D.N.J. 2005) (“Standing is a threshold inquiry, not a mere hurdle that can be cleared with the assistance of Rule 23.”); see also id. at 461 n.6 (“Indeed, Rule 23 cannot expand upon the Court’s jurisdiction by loosening the standing requirement.”); Id. at 461 (“The standing inquiry does not change in the context of a putative class action.”). However, In re Franklin, supra, addressed the issue of standing—and ostensibly the “juridical links” doctrine as an exception to standing—in the context of federal law, specifically Article III’s “cases and controversies”

requirement. Therefore, the Court does not find In re Franklin, supra, to be dispositive of the “juridical links” doctrine’s applicability as an exception to the general requirements of standing in New Jersey.

On this point, there is a reported New Jersey decision that, at the very least, inferentially supports the use of the “juridical links” doctrine for purposes of standing. See Kronish v. Howard Sav. Inst., 133 N.J. Super. 124 (Ch. Div. 1975), reversed and remanded on other grounds, 143 N.J. Super. 423 (App. Div. 1976) (finding lower court’s certification of class to be premature because the matter would be best tried first as a “test case”, but reserving for future consideration whether it should be certified as a class action). In Kronish, supra, while the court recognized that the New Jersey Rules of Court with respect to class actions, R. 4:32, generally coincide with the federal rules, Fed. R. Civ. P. 23, the court could not “[overlook] the distinction between the status of class actions in the New Jersey courts and under the federal jurisdiction.” Id. at 137. Specifically, the court in Kronish, supra, observed that class actions under the federal rules “have been plagued by the problem of standing arising from the federal constitutional provision restricting the Judicial power to actual cases and controversies;” a requirement not typically imposed upon litigants in New Jersey. Ibid. In recognizing this distinction, the court relied upon the reasoning in Crescent Park, supra:

Without ever becoming enmeshed in the federal complexities and technicalities, we have appropriately confined litigation to those situations where the litigant’s concern with the subject matter evidenced a sufficient stake and real adverseness. In the overall we have given due weight to the interests of individual justice, along with the public interest, always bearing in mind that throughout our law we have been sweepingly rejecting procedural frustrations in favor of just and expeditious determinations on ultimate issues.

Id. at 138 (quoting 58 N.J. at 107-08). Moreover, as already noted by the Court, the court in Kronish, supra, similarly noted that while the Ninth Circuit in La Mar, supra, denied class certification for lack of “typicality”, “its reasoning and authorities relied upon demonstrate that the result was predominately dictated by considerations of standing, and not typicality.” 133 N.J. Super. at 138. Therefore, based on the reasoning in Kronish, supra, it would appear that New Jersey courts would be receptive to the use of the “juridical links” doctrine as an exception to the requirement of standing.

Additionally, it appears that In re Franklin, supra, may even support a level of leniency to the standing requirement, despite its unyielding language on the issue of standing. Specifically, the District Court stated:

Here, plaintiffs allege they were actually injured as a result of being the shareholders in three funds. Taking those allegations as true, plaintiffs have individual standing to assert claims against defendants associated with those three funds. Plaintiffs, however, do not assert an injury traceable to any other fund. *Therefore, traditionally, they would lack standing to assert claims on behalf of other investors involving the defendants associated with the one hundred other fund defendants.*

In the class action context, however, traditional notions of standing are not completely informative of what claims may be asserted.

388 F. Supp. 2d at 461 (emphasis added). The District Court based its recognition that traditional notions of standing are not completely informative in the class action context on Haas v. Pittsburgh National Bank, a case in which the Third Circuit Court of Appeals distinguished La Mar, supra, in order to find that the plaintiffs had standing. 526 F.2d 1083, 1088-89 (3d Cir. 1975). While the Third Circuit in Haas, supra, stated the general principle that “where no nominal plaintiff has *standing* on any issue against one of multiple defendants [a] suit for damages may not be maintained as a class action against

that defendant,” Id. at 1095 (emphasis added), the Third Circuit observed that La Mar, supra, created certain limited exceptions to the general rule. Id. at 1095 n.15. Regardless, both Haas, supra, and In re Franklin, supra, addressed the issue of standing and the “juridical links” doctrine under the restrictive federal constitutional provision requiring that matters be limited to actual cases and controversies. Conversely, as already stated supra, such a requirement is not typically imposed upon litigants in New Jersey state courts. The Court, therefore, finds that the “juridical links” doctrine has its place as an exception to the general standing requirement, at least in the context of the present matter. The Court now must address whether the “juridical links” doctrine applies in the present matter.

The above cited-case law emphasizes from its plain language that for the “juridical links” doctrine to properly apply, there must be some type of “legal relationship” between defendants requiring them to “uniformly” carry out a statute, rule, or policy. See, e.g., Clark v. McDonalds Corp., 213 F.R.D. 198, 220 (D.N.J. 2003) (observing that “the amended complaint makes sufficiently clear that the individual members of the defendant class have been *non-uniform in their non-compliance with such policies*” (emphasis added)). Other federal courts have highlighted this “legal relationship” and “uniformity” requirement. For example in Mudd v. Busse, while the court declined to apply the “juridical links” doctrine, it opined:

[J]uridical links would most often be found in instances where all members of the defendant class are officials of a single state and are charged with enforcing or uniformly acting in accordance with a state statute, or common rule or practice of state-wide application, which is alleged to be unconstitutional.

68 F.R.D. 522, 527-28 (N.D. Ind. 1975). Similarly, in DcAllaume v. Perales, the court observed:

[C]ourts have also shown a willingness to find that named plaintiffs have standing to sue a class encompassing some defendants against whom they individually might not have a cause of action on the ground that the plaintiff class as a whole has been victim of a unified governmental policy carried out by the individual defendants.

110 F.R.D. 299, 304 (S.D.N.Y. 1986). Plaintiffs contend that they have just that: an action against government officials, seeking injunctive relief, against an unconstitutional statewide practice.

Here, the requisite “legal relationship” clearly exists between Defendants, in that both Defendant-State Board and Defendant-District Boards work under an overarching statutory and administrative framework to provide a “thorough and efficient education” to schoolchildren in the State of New Jersey. See In re Bd. of Educ. of Upper Freehold, 86 N.J. 265, 272-74 (1981) (describing the interrelationship of state and local authority, in the context of providing a “thorough and efficient education,” as created by the Legislature). At this stage in the litigation, however, the Court is not certain that such a “uniform” statute, rule or policy exists, in terms of its application, with respect to all of Plaintiffs’ allegations. For instance, district boundaries and residence-based school assignments clearly create the type of “uniform” application necessary for application of the “juridical links” doctrine. By contrast, while the right to a “thorough and efficient education”, the CCCS defining what constitutes a “thorough and efficient education”, and the Assessments as a measure of achieving the CCCS, are all “uniform” in their application, both the New Jersey statutes and administrative code applicable to the present matter provide school districts with a broad spectrum of measures to adopt or

implement to achieve a “thorough and efficient education,” as defined by the CCCS. Similarly, the spectrum of measures provided for vary in their severity, depending on the particular facts pertaining to a school’s achievement of the CCCS. This broad spectrum of measures and remedies could lead to different facts and defenses being considered by the Court with respect to each Defendant-District Board. The Court, however, is satisfied, at this stage in the litigation, that Plaintiffs have met the necessary standing requirement, as the overarching “legal relationship” between Defendants creates a nexus or set of rules, with no variance (i.e. provision of a “thorough and efficient education” as defined by the CCCS, achievement of which is partially measured by the Assessments). If factual differences exist between Defendant-District Boards, they would be best revisited at the class certification stage in the context of the “typicality” requirement. Therefore, the Court is satisfied, at this stage, that Plaintiffs have standing to assert claims against Defendant-District Boards Asbury Park, East Orange, Jersey City, Paterson, Salem City, and Millville.

B. Power of Local School Boards

Defendant-District Boards further assert that Plaintiffs’ complaint should be dismissed, as it pertains to them, because Defendant-District Boards lack the authority to disregard district boundaries and attendance zones—or at least to the extent Plaintiffs would like to see them disregarded. By contrast, Plaintiffs contend that Defendants do have the authority under State laws and regulations to relax district boundaries and attendance zones. Alternatively, Plaintiffs contend that even if it were true that Defendant-District Boards lacked the authority to do anything other than follow State law and regulations pertaining to district boundaries and attendance zones, Defendant-District

Boards are still properly named as defendants for failing to provide a “thorough and efficient education”.

In New Jersey, the Legislature has statutorily vested Defendant-State Board with the responsibility for the “general supervision and control of public education.” N.J.S.A. 18A:4-10. On this point, the Appellate Division has posited:

A local Board [of Education] is a creature of the State and may exercise only those powers granted to it by the Legislature either expressly or by necessity or fair implication. . . . Where there is reasonable doubt as to whether the Legislature has granted such a power, that power should not be implied. . . . Additionally, a local Board’s authority to act should not be implied if local action would adversely affect[] the legislative scheme.

Atlantic City Educ. Ass’n v. Board of Educ. of the City of Atlantic City, 299 N.J. Super. 649, 654 (App. Div.) (internal quotations and citations omitted), certif. denied sub nom., Keyport Teachers’ Ass’n v. Board of Educ. of the Borough of Keyport, 152 N.J. 192 (1997). It follows, therefore, that local Boards of Education generally only have the authority to act within the statutory framework within which they were created.

Plaintiffs contend that N.J.S.A. 18A:38-1 et seq., which regulates school attendance, including sending/receiving relationships, provides Defendant-District Boards with such authority. Plaintiffs expressly rely on N.J.S.A. 18A:38-3 and N.J.S.A. 18A:38-8 to support this contention. The Court, however, finds Plaintiffs’ reliance misplaced.

Specifically, N.J.S.A. 18A:38-3(a) states, “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.” Based on the plain language of the statute,

Defendant-District Boards (i.e. the sending districts) have no authority to make such a determination, as the decision to accept nonresident students is laid entirely within the discretion of the receiving district. See N.J.A.C. 6A:22-2.2 (placing no limits on the discretion of a local board of education to admit a nonresident student¹⁸). Similarly, the decision of whether to require the nonresident student to pay tuition is within the discretion of the receiving district.

Here, as the sending district, Defendant-District Boards have no authority to make such decisions. Moreover, it appears from the plain language of N.J.S.A. 18A:38-3 that it does not apply to sending/receiving relationships; rather it applies to instances where a student, on his own accord, seeks to attend a school in a district in which he does not reside. Therefore, the Court is not persuaded by Plaintiffs' reliance on N.J.S.A. 18A:38-3. Essentially, for N.J.S.A. 18A:38-3 to have any place in the present litigation, Plaintiffs would have to seek affirmative relief from local boards of education not a party to the present litigation (i.e. school districts consisting of what Plaintiffs have coined "successful" schools).

Additionally, N.J.S.A. 18A:38-8, states, "The board of education of any school district having the necessary accommodations may receive, or may be required to receive by order of the state board, pupils from another district not having sufficient accommodations." N.J.A.C. 6A:23-1.2 defines the "sending/receiving relationship" as

¹⁸ Presumably there are certain implied limitations, such as court orders or mandates by Defendant-State Board. See N.J.S.A. 18A:38-2 ("Public schools shall be free to any person over five and under 20 years of age nonresident in a school district who is placed . . . by order of a court of competent jurisdiction of this state. . . . [B]ut no district shall be required to take an unreasonable number of persons under this section except upon the order of the commissioner issued in accordance with rules established by the state board."). Here, because Plaintiffs' proposed class consists of approximately 60,000 schoolchildren, it would appear that such grand scale elimination—albeit consisting of only approximately 4% of the schoolchildren in the State—of district boundaries or compulsory attendance laws could only be ordered by the Commissioner, not the Court.

“an agreement between two district boards of education, one of which does not have the facilities to educate in-district an entire grade(s) or provide an entire program(s), and as an alternative sends such students to a district board of education having such accommodations and pays tuition, pursuant to N.J.S.A. 18A:38-8 et seq.” (Emphasis added.) Therefore, N.J.S.A. 18A:38-8 has two requirements: (1) either a consensual agreement between school districts or an order of the State Board¹⁹; and (2) that the sending school district have insufficient accommodations and the receiving district have sufficient accommodations.²⁰

Based on these requirements alone, it is clear that Defendant-District Boards have no authority to simply ignore district boundaries or compulsory attendance laws. Therefore, Defendant-District Boards cannot unilaterally provide the relief sought by Plaintiffs. Presumably, at best, under appropriate circumstances, the Court could order that Defendant-District Boards actively pursue entering into sending/receiving relationships. Plaintiffs’ complaint, however, seeks no such relief. Like with N.J.S.A. 18A:38-3, for Plaintiffs to obtain the relief they seek under N.J.S.A. 18A:38-8, they would also have to name as parties to the present litigation school districts with “successful schools,” in order for the Court to compel both the sending and the receiving school districts into entering into such an agreement, upon a finding of insufficient

¹⁹ “The statement is unequivocal. The statute’s requirement of a consensual agreement is manifest,” with the exception of a mandate from Defendant-State Board. See, e.g., In re Closing of Jamesburg High School, 83 N.J. 540, 547-48 (1980) (interpreting N.J.S.A. 18A:28-6.1, which consists of language similar to N.J.S.A. 18A:38-8 with the exception that it does not consist of language granting the State Board certain powers).

²⁰ While the parties disagree as the meaning of “insufficient accommodations”, the Court finds guidance in N.J.A.C. 6A:23-1.2, which defines the “sending district” as “one . . . which does not have the facilities to educate in-district an entire grade(s) or provide an entire program(s).” Presumably, if a school is overcrowded to the point that a “thorough and efficient education” is not being afforded to all students because the sheer number of students in a particular grade has diluted the school’s resources, it would constitute a school not having the necessary “facilities to educate in-district an entire grades(s).” Moreover, the term “educate” likely would be defined as the ability to achieve the CCCS.

accommodations and sufficient accommodations respectively. Absent this, Plaintiffs may only obtain the relief they seek by having Defendant-State Board—already a party to the present action—order that a receiving district accept students from Defendant-District Boards. See N.J.S.A. 18A:38-8; see also In re Closing of Jamesburg High School, 83 N.J. 540, 546 (1980) (observing that under N.J.S.A. 18A:38-8 a “school district may be compelled to become a receiving district”). Essentially, it is the Defendant-State Board, not Defendant-District Boards, who is the relevant legal entity for the issuance of relief from district boundaries or compulsory attendance laws.

As a practical matter, Plaintiffs’ reliance on N.J.S.A. 18A:38-3 and N.J.S.A. 18A:38-8 simply ignores the prayers for relief sought in the complaint, as the only prayers for relief not relating to district boundaries or compulsory attendance laws are declarations that:

- A defined level of on-going partial proficiency or total failure on any of the Assessments is evidence of, or constitutes, a violation of the “thorough and efficient education” clause of the New Jersey State Constitution.
- Defendants’ actions and omissions, including Defendant-District Boards, violate the “thorough and efficient education” provision of the New Jersey State Constitution, and the equal protections clauses of the New Jersey State Constitution and the United States Constitution.

Accepting for the moment that this declaratory relief sought presents a justiciable question, Plaintiffs could conceivably seek such declarations against Defendant-District Boards. Still, however, the Court questions whether Defendant-District Boards are appropriate defendants in the present matter, as the actual compulsory relief Plaintiffs seek—absolute or limited elimination of district boundaries and compulsory attendance laws—cannot be unilaterally provided by Defendant-District Boards. Rather, such

unilateral relief can only be provided by Defendant-State Board under N.J.S.A. 18A:38-8 or presumably by order of the Court under N.J.S.A. 18A:38-2.²¹

Therefore, Plaintiffs' complaint is dismissed, in its entirety, as to Defendant-District Boards. While the Court would generally permit Plaintiffs an opportunity to amend their complaint, as discussed *infra*, the granting of such an opportunity is not necessary.

C. Justiciability

Plaintiffs contend that under R. 4:6-2 they have clearly stated viable causes of action in their complaint, and contend that Defendants' position to the contrary is based on Defendants treating the present motion like one for summary judgment. Defendants assert that regardless of whether Plaintiffs have stated viable causes of action, Plaintiffs' complaint should be dismissed as non-justiciable. According to Defendants, Plaintiffs' complaint presents classic non-justiciable issues, determination of which is left to the sole province of the Legislature. Therefore, Defendants request that the Court dismiss Plaintiffs' complaint because the judiciary has no authority to declare district boundaries and compulsory attendance laws unconstitutional, or to enjoin their enforcement where they would confine schoolchildren to schools and school districts not providing a "thorough and efficient education". Because of this alleged lack of authority, Defendants similarly assert that the Court lacks the authority to contravene the authority of the Legislature and create what is essentially a "voucher system".

²¹ Again, however, for N.J.S.A. 18A:38-2 to have any applicability, Plaintiffs would essentially be required to name the "receiving" school districts as Defendants instead of the current Defendants. Even then, *see supra* note 18 for the Court's observation that such a grand scale elimination of district boundaries and compulsory attendance laws could likely only be ordered by the Commissioner.

By contrast, Plaintiffs contend that the complaint presents clearly justiciable issues, and therefore, Defendants’ non-justiciability arguments are unavailing. Specifically, Plaintiffs contend that the New Jersey Supreme Court’s involvement in the Robinson v. Cahill and Abbott v. Burke line of cases, discussed infra, clearly evidences the judiciary’s willingness to exert its broad equitable powers to determine when a child is not achieving a “thorough and efficient education”. Plaintiffs contend that these cases stand for the proposition that Defendants’ duty to provide a “thorough and efficient education” can be “judicially identified”; that a breach of that duty can be “judicially determined”; and that a remedy for the protection of that right can be “judicially molded”.

Generally, with respect to justiciability, “the inquiry proceeds beyond the threshold determination [of whether a court is legally authorized to decide the question presented] ‘to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.’” Gilbert v. Gladden, 87 N.J. 275, 280-81 (1981) (quoting Baker v. Carr, 369 U.S. 186, 198 (1962)). Here, clearly the “duty asserted” can be judicially identified—the fundamental right to a “thorough and efficient education”. Questions, however, arise as to whether “breach” of that duty can be judicially determined, or whether “protection” of that duty can be judicially molded. As discussed infra, the Court finds that it can do neither.

“The nonjusticiability of a political question is primarily a function of separation of powers.” Gilbert, supra, 87 N.J. at 281 (quoting Baker, supra, 369 U.S. at 210). In New Jersey, Art. III, para. 1 of the State Constitution provides for separation of powers:

The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

The doctrine of separation of powers, however, is not absolute, and in fact it assumes a cooperative effort among them. See Gilbert, supra, 87 N.J. at 281 n.3 (citing State v. Leonardis, 73 N.J. 360, 370-71 (1977)). Therefore, a determination as to the justiciability of issues presented to a court requires a “‘delicate exercise in constitutional interpretation’ for which the Court is responsible as the ultimate arbiter of the Constitution of this state.” Gilbert, supra, 87 N.J. at 282 (quoting Baker, supra, 369 U.S. at 211).

As recognized in Gilbert, supra, the United States Supreme Court has provided our courts with guidance for performing this “‘delicate exercise’”:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 282 (citing Baker, supra, 369 U.S. at 217). To justify dismissal for reasons of nonjusticiability, one of the just-cited criteria “must be inextricable from the facts and circumstances of the case in question.” Ibid.

Here, the Court finds that the claims at issue in the present matter are essentially “inextricable” from the criteria set forth in Baker, *supra*. There is clearly a “textually demonstrable commitment” of the issue to the Legislature. Specifically, Art. VIII, sec. 4, par. 1 of the State Constitution provides:

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

Moreover, it has been held that “[t]he Legislature’s role in education is fundamental and primary; th[e] [judiciary’s] function is limited strictly to constitutional review.” Abbott v. Burke, 119 N.J. 287, 304 (1990) (“Abbott II”). Essentially, the Court’s role is limited to constitutional review of such actions by the Legislature, but [i]n the absence of constitutional or statutory standards, it is not the function of this Court to substitute its judgment for that of the Legislature with respect to the rules it has adopted or the procedures followed in giving effect to the constitutionally-declared scheme.” Gilbert, *supra*, 87 N.J. at 282. Defendants concede this point, yet assert that the Court need not involve itself in such review, as the Legislature has far from defaulted on its constitutional responsibility, and that there are no constitutional or statutory standards by which the Court could determine the constitutionality of the rules it has adopted or the procedures it has followed in giving effect to the constitutionally declared scheme to provide a “thorough and efficient education.” See Robinson v. Cahill, 69 N.J. 133, 152-55 (“Robinson IV”) (providing exception for judicial intervention where the Legislature has defaulted on its constitutional duty and no alternative remains), *cert. denied sub nom.*, Klein v. Robinson, 423 U.S. 913 (1975).

As stated in Baker, *supra*, whether a claim is a political question depends on whether the court is being asked to “[d]ecid[e] whether a matter has been committed by the Constitution to another branch of government, *or whether the action of that branch exceeds whatever authority has been committed.*” 369 U.S. at 211 (emphasis added); see also id. at 217 (“The courts cannot reject . . . a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority.”). To bolster this point, “[w]hen challenges to state action respecting matters of the affairs of the State and the officers through whom they are conducted have rested on claims of constitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim.” Id. at 229. Therefore, “[t]he definition of the constitutional provision by this Court . . . must allow the fullest scope to the exercise of the Legislature’s legitimate power.” Abbott II, *supra*, 119 N.J. at 304.

Here, Plaintiffs contend that the Legislature overstepped its constitutional authority by creating and enacting district boundaries and compulsory attendance zones, thereby depriving Plaintiffs of a “thorough and efficient education.” Even accepting for the moment that the Court could entertain this constitutional challenge, Plaintiffs seek to have the Court devise and adopt a standard for determining when the fundamental right to a “thorough and efficient education” is in fact being deprived, rather than have the Court follow an already existing framework for determining this issue. Such a decision is clearly non-justiciable.

Moreover, Plaintiffs seek to have the Court order that consecutive years of failing Assessment scores constitutes “failing” to provide a “thorough and efficient education”. While the Court could conceivably entertain Plaintiffs’ request to entertain the

constitutionality of district boundaries and compulsory attendance laws in the context of Plaintiffs’ equal protection claims under both the New Jersey Constitution and the United States Constitution, as discussed infra, the Court finds that Plaintiffs have failed to state a cause of action to this effect. More important to the immediate discussion, however, is that the Court finds it lacks the ability to “judicially determine” that consecutive years of failing Assessment scores, alone, constitutes a “breach” of the “duty” to provide a “thorough and efficient education”, and that it lacks the authority to “judicially mold” a remedy to “protect” that duty. Essentially, there is a lack of judicially discoverable and manageable standards for determining the “breach”.²² Moreover, determination of such issues are “impossibl[e] . . . without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government.” Gilbert, supra, 87 N.J. at 282 (citing Baker, supra, 369 U.S. at 217).

As stated in Abbott II, “in New Jersey there is no such thing as an uneducable district . . . under our Constitution.” 119 N.J. at 375. Therefore, the Court would be remiss if it were to set the standard—by accepting Plaintiffs’ litmus test for “failing” schools or districts of consecutive years of failing Assessment scores—for whether a “thorough and efficient education” was being received. Essentially, for the Court to find that consecutive years of failing Assessment scores constitutes a failure to provide a “thorough and efficient education”, would require the Court to concede that “in New Jersey there *is* . . . such thing as an uneducable district . . . under our Constitution.” Ibid.

²² Plaintiffs’ counsel represented at oral argument that the CCCS itself constitutes judicially discoverable and manageable standards for determining whether Defendants have breached their duty to provide a “thorough and efficient education”. The CCCS, however, do not provide standards for determining that two consecutive years of failing Assessment scores constitutes a breach of the duty.

(emphasis added); see also Abbott v. Burke, 149 N.J. 145, 198 (1997) (“Abbott IV”) (“The constitutional guarantee of a thorough and efficient education attaches to every school district, and indeed, to every individual school in the State. Of course, the right to a thorough and efficient education does not ensure that every student will succeed. It must, however, ensure that every child in New Jersey has the opportunity to achieve.”).

As the New Jersey Supreme Court observed in Abbott IV, supra, 149 N.J. at 166:

[I]n interpreting the constitutional meaning of a thorough and efficient education, the Court has consistently recognized that the Legislature is charged with the primary responsibility for public education. The Court has stressed repeatedly that “[t]he Legislature’s role in education is fundamental and primary,” and, “[t]he definition of the constitutional provision by the Court, therefore, must allow the fullest scope to the exercise of the Legislature’s legitimate power.”

(quoting Abbott II, supra, 119 N.J. at 304). Essentially, for the Court to order that consecutive years of failing Assessment scores amount to a deprivation of the fundamental right to a “thorough and efficient education” would require the Court to go against the grain of the landscape of judicial involvement that the New Jersey Supreme Court has created in issues concerning the adequacy of our education system.

Moreover, the Court in Abbott IV, supra, stated, in reference to CEIFA²³:

The Legislature has now taken a major step to spell out and explain the meaning of a constitutional education. The content and performance standards prescribed by the new

²³ It should be noted that the Court in Abbott IV, supra, endorsed CEIFA, and its definition of the “substantive educational opportunity” required:

The Court recognizes that the CEIFA has provided a new, facially valid definition of the substantive educational opportunity required by the Constitution. We endorse the legislative judgment that the act’s detailed standards embody the substantive content of a thorough and efficient education. We are, however, still without any constitutional measuring stick against which to gauge the resources needed to provide that educational opportunity.

Id. at 176.

statute represent the first real effort on the part of the legislative and executive branches to define and implement the education opportunity required by the Constitution. *It is an effort that strongly warrants judicial deference.* . . . We therefore conclude that the standards are facially adequate as a reasonable legislative definition of a constitutional thorough and efficient education.

Abbott IV, supra, 149 N.J. at 167-68 (emphasis added). The Court in Abbott IV, supra, continued, however:

The standards themselves do not ensure any substantive level of achievement. Real improvement still depends on the sufficiency of educational resources, successful teaching, effective supervision, efficient administration, and a variety of other academic, environmental, and societal factors needed to assure a sound education. Content standard, therefore, cannot answer the fundamental inquiry of whether the new statute assures the level of resources needed to provide a thorough and efficient education to children in the special needs districts.

Id. at 168. The just-cited language recognizes that while the standards under CEIFA do not ensure achievement, the Court only spoke in terms of striving to improve the “resources” of a “thorough and efficient education”, not in terms of setting the standards for determining when those resources are failing. In fact, the Court in Abbott IV, supra, recognized as much. See id. at 199 (“A court alone cannot, and should not, assume the responsibility for independently making the critical educational findings and determinations that will be the basis for such relief.”).

Presumably, if Defendants are taking the necessary measures to improve achievement of the CCCS, and Defendants are being held accountable, pursuant to provisions contained in the Act, all school districts, including Defendants, can be, and should be, educated in accordance with the CCCS. Under CEIFA, there are several remedial measures available if it is found that a school is failing to achieve the CCCS.

Plaintiffs basically root their “failing” school arguments in the “[t]he absence of meaningful accountability in the organization of these schools[, thereby] perpetuat[ing] the practices within these schools[, to a degree that] . . . spending more money cannot significantly improve the pattern of failure.” (Complaint, ¶ 141.) Notably, Plaintiffs’ complaint does not seek any affirmative relief in the form of compelling such accountability, or compliance with the remedial measures in place under the Act to assist in achieving the CCCS. Instead, Plaintiffs seek a voucher system, which effectively requires the Court to determine that the remedial options already created by the Legislature are inadequate to improve the situation. While the Court does not doubt that it has the authority under certain circumstances to determine certain matters concerning the adequacy of our State’s education system, the present matter does not present such an instance.

Additionally, the Court finds there to be a lack of judicially discoverable and manageable standards for molding the relief—elimination of district boundaries and compulsory attendance laws—sought by Plaintiffs. In fact, Plaintiffs themselves suggest as much, based on their representation at oral argument that if the Court were to find that Plaintiffs were being denied a “thorough and efficient education”, the Court should remand to the Commissioner to create a remedy.²⁴ Moreover, Plaintiffs’ Surreply Brief states, “The model of Abbott IV is a near perfect fit to the determinations sought by plaintiff schoolchildren from this Court: upon a finding of constitutional violation, the Court issued an order that directs the State to develop a plan that enables plaintiff

²⁴ Plaintiffs would suggest, however, that in remanding to the Commissioner to create a remedy, the Court should provide the Commissioner with certain guidelines and/or suggestions.

schoolchildren the remedy they seek.” (Plaintiffs’ Surreply Brief, at 5.) In Abbott IV, supra, the New Jersey Supreme Court posited:

The determination of appropriate remedial relief in the critical area of the special needs of at-risk children and the programs necessary to meet those needs is both fact-sensitive and complex; it is a problem squarely within the special expertise of educators. A court alone cannot, and should not, assume the responsibility for independently making the critical educational findings and determinations that will be the basis for such relief. We can, however, provide necessary procedures and identify the parties who best may devise the educational, programmatic, and fiscal measures to be incorporated in such remedial relief. Accordingly, we remand the matter to the Superior Court to implement that aspect of the Court’s remedial order.

The Superior Court, consistent with this opinion, shall direct the Commissioner to initiate a study and to prepare a report with specific findings and recommendations covering the special needs that must be addressed to assure a thorough and efficient education to the students in the SNDs [special needs districts]. That report shall identify the additional needs of those students, specify the programs required to address those needs, determine the costs associated with each of the required programs, and set forth the Commissioner’s plan for implementation of the needed programs. In addition, the Superior Court shall direct the Commissioner to consider the educational capital and facility needs of the SNDs and to determine what actions must be initiated and undertaken by the State to identify and meet those needs.

The parties shall be given the opportunity to participate in the proceedings conducted by the Commissioner and to respond to and file exceptions to the Commissioner’s report prior to its submission to the Superior Court.

The Superior Court may, in addition, conduct hearings with the participation of the Commissioner and all parties. The Superior Court may appoint, with the approval of this Court, a Special Master to assist the court in all proceedings and in reaching its determinations and rendering its decision. The Superior Court, based on its review of the Commissioner’s report, any additional

evidence, and any findings and determinations of the Special Master, shall render a decision with its findings, conclusions, and recommendations covering the special programs that should be implemented in the special needs districts and the costs of their implementation. That decision will be made available to all parties, and shall be reviewed by this Court.

149 N.J. at 199-201 (emphasis added). Notably, Plaintiffs' reliance on Abbott IV, supra, is unavailing. Nowhere in the just-cited language of Abbott IV, supra, did the New Jersey Supreme Court order, or even suggest, a particular remedy to the Commissioner. Therefore, even if the Court were to retain jurisdiction, and were to find constitutional deprivation, in ultimately remanding to the Commissioner to study, craft, and suggest an appropriate remedy, there is no guarantee that the Commissioner would suggest the remedy—a voucher system—suggested by Plaintiffs.

If the Court, hypothetically, was to permanently enjoin the application of district boundaries and compulsory attendance laws, solely in instances where a particular school or school district is failing to provide a “thorough and efficient education”, this would create a peculiar result, as students would be required to attend schools in various districts at different stages in their education. For example, in Clementon, Plaintiffs only cite poor assessment scores for Clementon Elementary School. Therefore, conceivably, children in the Clementon school district may be permitted to attend school out of district, yet when they reach the middle school or high school level, be required to attend school back in the Clementon school district. The same holds true for the Woodlynne school district. The Court has concerns over the effect such a result would have on the child's self and social development. In fact, the Court finds that these are exactly the type of policy considerations and concerns that are best considered by the Legislature. Additionally, the Court presumes that whether a school is considered “failing” can

change from year-to-year, and consequently, students could potentially be in-and-out of a particular school district from year-to-year. In connection with this, the Court questions how it could adequately safeguard what Plaintiffs would suggest are “successful” schools from becoming “failing” schools, if the Court were to permit a mass exodus of approximately 60,000 schoolchildren.

In other words, the Court does not believe that it could craft this remedy to be “at once effective and judicially enforceable.” See Aaron Saiger, Note, Disestablishing Local School Districts as a Remedy for Educational Inadequacy, 99 COLUM. L. REV. 1830, 1836 (1999) (noting that the “elusiveness of ‘judicially discoverable and manageable standards’ is the best argument for state courts’ reluctance to engage in the redesign of educational policies”); see also id. at 1841 (observing that the “pitfalls of implementation in schools are especially dramatic, particularly because the party ordered to reform is the state, while the party that must carry out reforms is the local school district. Intergovernmental implementation lends itself well to delay, confusion, conflict, and ‘token compliance’”). This is also consistent with the reasoning in Jenkins v. Leininger, 659 N.E.2d 1366 (Ill. Ct. App. 1995) (alleging violation of equal protection and right to a thorough and efficient education, as relying on statistical information concerning a variety of things, including inadequate test scores, to prove such).²⁵ In Jenkins, supra, the plaintiffs sought injunctive relief diverting control over state education funds from the school districts to the plaintiffs. Id. at 1376. Essentially, the plaintiffs sought the creation of a voucher system. Ibid. In dismissing the complaint, the court in

²⁵ The Court recognizes Plaintiffs’ attempt to distinguish Jenkins, supra, on the grounds that the State of Illinois does not treat a “thorough and efficient education” as a fundamental right under its Constitution. In the present matter, the Court cites to Jenkins, supra, for purposes of illustrating the difficulties in having the judiciary exact the remedies sought by Plaintiffs.

Jenkins, supra, observed, “This issue of funding is extremely complex. Plaintiffs seek to oversimplify their remedy by limiting the relief to them alone. In so doing they fail to adequately confront the ramifications of their remedy.” Ibid.

The Court is similarly not persuaded by Plaintiffs’ argument that N.J.S.A. 18A:7F-6(b) clearly evidences the justiciability of the present matter. Plaintiffs contend that Defendants’ arguments to the contrary defy logic. To the Court, however, it is Plaintiffs’ reliance on N.J.S.A. 18A:7F-6(b) which is misplaced. In fact, it supports a finding that crafting an appropriate remedy is for the province of the Legislature and not the Judiciary. N.J.S.A. 18A:7F-6(b) provides:

[W]henever the commissioner determines, through the results of Statewide assessments . . . that a district, or one or more schools within the district, is failing to achieve the core curriculum content standards, *the commissioner may summarily take such action as he deems necessary and appropriate*, including but not limited to:

- (1) directing the restructuring of curriculum or programs;
- (2) directing staff retraining or reassignment;
- (3) conducting a comprehensive budget evaluation;
- (4) redirecting expenditures;
- (5) enforcing spending at the full per pupil T&E amount;

. . . .

For purposes of evaluating a district’s results on Statewide assessments pursuant to this subsection, the commissioner shall limit the use of these actions to those instances in which a school in a district has experienced at least three consecutive years of failing test scores.

(emphasis added.) Plaintiffs would argue that the plain language permits, and provides, the Commissioner with the authority to address failing test scores. First, the court notes that at oral argument, Plaintiffs submitted their intent to amend their complaint, if it

survives the present motion, to claim that three years, not two, of failing Assessment scores should be considered a constitutional deprivation of a “thorough and efficient education”. Second, while the Court does not necessarily disagree with Plaintiffs that the Commissioner has broad authority, as evidenced by N.J.S.A. 18A:7F-6(b), to remedy consecutive years of failing Assessment scores, the Court does not find it justiciable to compel the Commissioner to exercise her broad authority to remedy consecutive years of failing Assessment scores by eliminating district boundaries and compulsory attendance laws. The non-justiciability of such a remedy is evidenced by the plain language of the statute itself, which provides, “[T]he commissioner may summarily take such action *as [s]he deems necessary and appropriate.*” N.J.S.A. 18A: 7F-6(b) (emphasis added).

In connection with this, and illustrative of the Court’s inability under N.J.S.A. 18A:7F-6(b) to order that the Commissioner eliminate district boundaries and compulsory attendance laws upon three consecutive years of failing Assessment scores, the Court is not persuaded by Plaintiffs’ reliance on the pre-school initiative program promulgated by the New Jersey Supreme Court in Abbott v. Burke, 153 N.J. 480, 508 (1998) (“Abbott V”). According to Plaintiffs, the Court ordered that the Commissioner, pursuant to its broad remedial authority under N.J.S.A. 18A:7F-6(b), and in carrying out the New Jersey Supreme Court’s order that “all Abbott districts . . . provide half-day pre-school for three- and four-year olds,” adopted a voucher system that “[t]he Commissioner may authorize cooperation with or the use of existing early childhood day-care programs in the community.” Ibid. Notably, contrary to Plaintiffs’ position, the New Jersey Supreme Court only stated that the Commissioner “may” utilize such programs, not that it “must” utilize such programs. More importantly, the New Jersey Supreme Court only

granted the authority based on the Commissioner’s finding that pre-school programs were necessary, and that “‘cooperation with or the use of existing early childhood and day-care programs in the community’ would likely be both necessary and appropriate.”²⁶ Abbott v. Burke, 163 N.J. 95, 110 (2000) (“Abbott VI”) (quoting Abbott V, supra, 153 N.J. at 508). In connection with this, the New Jersey Supreme Court only authorized such a remedy because “[d]uring the Abbott IV remand proceedings . . . the State recommended collaboration between the districts and existing community daycare programs.” 163 N.J. at 114. From this, it is clear that Plaintiffs’ reliance on the pre-school initiative program to suggest that the Court can order the elimination of district boundaries and compulsory attendance laws, or even suggest that the Commissioner exercise its authority to do so, is misplaced.

School problems are essentially practical ones, what is best for achieving success cannot be easily answered. Jenkins, supra, 659 N.E.2d at 1370. “The fact that improvement is needed at the plaintiffs’ schools does not establish a constitutional deprivation by the defendants of plaintiffs’ right to an education.” Id. at 1372. Plaintiffs would suggest that the Court has the authority to order the implementation of a voucher system. Notably, however, our Supreme Court has recognized and attempted to remedy the ills of our disadvantaged communities, but has presumably stopped short of suggesting or ordering a voucher system due to the concerns affecting schoolchildren outside of the classroom. Abbott IV, supra, 149 N.J. at 178-79 (quoting Abbott II, supra, 119 N.J. at 369 (““Those needs go beyond educational needs, they include food, clothing and shelter, and extend to lack of close family and community ties and support, and lack

²⁶ The Court observed, “[a]s a practical matter, given the time constraints within which the districts were required to develop half-day programs . . . , use of operating daycare centers has obvious benefits.” 163 N.J. at 110.

of helpful role models.’ . . . Those special needs clearly must be confronted and overcome in order to achieve a constitutionally thorough and efficient education.”). These practical problems are precisely why the Court is ill-equipped to suggest a remedy to the administrative body or the Legislature, much less “judicially mold” its own remedy.²⁷ Therefore, the Court finds Plaintiffs’ claim seeking a declaration that consecutive years of failing Assessment scores constitutes a failure to provide a “thorough and efficient education”, and the relief sought—elimination of district boundaries and compulsory attendance laws—to be non-justiciable.

Even if Plaintiffs’ claims were justiciable, the Court finds that Plaintiffs have failed to state a cause of action under both the New Jersey State Constitution and the United States Constitution. Plaintiffs allege that they are similarly situated to other schoolchildren in the State because the New Jersey State Constitution entitles every school aged child to the “equal educational opportunity” to have a “thorough and efficient education”. Plaintiffs further allege that Defendants treat them differently from other schoolchildren in the State by consigning them to schools that do not impart the required skills and knowledge that constitute a “thorough and efficient education” as determined by the CCCS. Plaintiffs further allege that the municipal district boundaries and compulsory attendance laws, which are the cause of the disparity in equal protection, serve no appropriate governmental objectives.

Like the Fourteenth Amendment of the United States Constitution, Article I, paragraph 1 of the State Constitution protects “against the unequal treatment of those who should be treated alike.” Rutgers Council of AAUP Chapters v. Rutgers, The State

²⁷ Notably, these practical problems are so prevalent that the Court questions whether the elimination of district boundaries and compulsory attendance laws would in fact improve the situation or drag what Plaintiffs deem “successful” schools into the realm of what Plaintiffs deem “failing” schools.

University, 298 N.J. Super. 442, 452 (App. Div. 1997) (quoting Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985), certif. denied, 153 N.J. 48 (1998)). Unlike the federal courts, our courts have rejected the rigid, multi-tiered approach, and instead have opted for a flexible balancing test when analyzing equal protection challenges. Id. at 452 (citing Barone v. Department of Human Services, 107 N.J. 355, 368 (1987)). “The crucial issue under New Jersey case law is ‘whether there is an appropriate government interest suitably furthered by the differential treatment’ involved.” Id. at 452 (quoting Borough of Collingswood v. Ringold, 66 N.J. 350, 370 (1975), appeal dismissed, 426 U.S. 901 (1976)). Essentially, three factors are to be considered under this balancing test: “the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.” Id. at 452 (quoting Greenberg, supra, 99 N.J. at 567). While “[o]ur equal protection analysis requires a real and substantial relationship between the classification and the governmental purpose which it purportedly serves[,] . . . when a statute is facially neutral, . . . even if it has a disparate impact on a class of individuals, an equal protection challenge based on the New Jersey Constitution will succeed only if the Legislature intended to discriminate against the class.” Id. at 452 (citing Greenberg, supra, 99 N.J. at 580).

Here, the Court finds that Plaintiffs have failed to state a cause of action for violation of the equal protection clause of both the United States and the New Jersey Constitution. The Court is confronted with a statute that is “facially neutral”. In fact, Plaintiffs would not seem to dispute this finding, as evidenced by their stating, “Plaintiffs further allege that district boundaries and residence-based school assignments do not serve any appropriate governmental objective *when they* serve to deny plaintiff

schoolchildren to the loss of a fundamental right guaranteed by the State Constitution.” (Plaintiffs’ Opposition Brief, at 16 (emphasis added).) Therefore, Plaintiffs’ complaint must set forth allegations sufficient to suggest that the Legislature intended to discriminate against the class of individuals purportedly being discriminated against.

The Court finds that Plaintiffs have failed to set forth such allegations.²⁸ When actually looking at what it is Plaintiffs are claiming, it becomes clear that Plaintiffs’ equal protection claim is founded solely on disparate impact, not intent to discriminate. It is well-settled that such claims are not an appropriate basis for an equal protection clause challenge under either the United States Constitution or the New Jersey Constitution. See, e.g., Rutgers Council of AAUP Chapters, supra, 298 N.J. Super. at 452 (“[E]ven if it has a disparate impact on a class of individuals, an equal protection challenge based on the New Jersey Constitution will succeed only if the Legislature intended to discriminate against the class.”); San Antonio Independent School v. Rodriguez, 411 U.S. 1, 24, rehearing denied, 411 U.S. 959 (1973) (“[T]he Equal Protection Clause does not require absolute equality or precisely equal advantages.”); see also Jenkins v. Leininger, 659 N.E.2d 1366, 1375 (Ill. App. Ct. 1995) (“The equal protection clause guards against unequal treatment, not unequal results.”). In other words, Plaintiffs’ claim “rests not on a statute or policy that was discriminatory on its face, or as applied but, rather, on the creation of an educational system where conditions, results, and effects were unequal.” Jenkins, supra, 659 N.E.2d at 1375.

The Court is also not persuaded by Plaintiffs’ attempt to distinguish Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), aff’d, 404 U.S. 1027 (1972) from the present matter. According to Plaintiffs, the cases are distinguishable because the unequal

²⁸ Nor does the Court believe Plaintiffs could ever plead facts suggesting such an intention.

treatment (i.e. alleged racial segregation) in Spencer, supra, “was caused by residential housing patterns,” as opposed to the unequal treatment (i.e. alleged consignment to “failing” schools) in the present matter being caused “by defendants’ failure to meet the constitutional mandate in those schools.” (See Plaintiffs’ Opposition Brief, at 18.) Such a distinction is without a difference, as Plaintiffs’ claim is still only cognizable when looking at the result of the alleged discrimination, not that there was in fact intent to discriminate. Moreover, the basis for the unequal treatment in both Spencer, supra, and the present matter is likely identical (i.e. residential housing patterns). As evidenced by their allegation “that district boundaries and residence-based school assignments classify [plaintiff schoolchildren] on the basis of residence,” it would appear that Plaintiffs could not disagree with such a finding by the Court.²⁹ (See Plaintiffs’ Opposition Brief, at 16.)

The Court is likewise not persuaded by Plaintiffs’ attempt to distinguish Spencer, supra, on the basis that the District Court dismissed Spencer, supra, for a failure to plead the allegations at issue with the necessary specificity, not based on the reasonableness of school district boundaries coinciding with municipal boundaries. Plaintiffs would suggest that the District Court’s discussion of such constitutes mere dicta, not binding authority.³⁰ In Spencer, supra, the Court found that Plaintiffs failed to provide “specific disclosure of the particulars of the violations charged, other than the contention that in

²⁹ Therefore, while the right to a “thorough and efficient education” is a fundamental right under the New Jersey Constitution, the Court need not engage in a more searching review.

³⁰ The Court notes, although Plaintiffs’ Opposition Brief does not, that Spencer, supra, was affirmed by the United States Supreme Court, 404 U.S. 1027 (1972), and even prompted Justice Douglas to write a dissenting opinion, which focused not on the procedural deficiencies in the plaintiffs’ pleadings, but on the issue of district boundaries creating segregated school districts. See ibid. More importantly, the District Court in Spencer, supra, stated, “If the drawing of district lines is reasonable and not intended to foster segregation then that action satisfies the mandate. . . . [and] [i]t cannot be said that district lines based on municipal boundaries are unreasonable.” Spencer, supra, 326 F. Supp. at 1241. Therefore, the Court attaches greater relevance to Spencer, supra, than Plaintiffs would suggest.

public schools in which black pupils predominate less than the same educational and social advantages prevail. . . . The pleadings are silent respecting the legislative implementation of the constitutional directive.” 326 F. Supp. at 1240. The District Court then went on to say:

It is clear that these legislative enactments prescribe school district boundaries in conformity with municipal boundaries. This designation of school district zones is therefore based on the geographic limitations of the various municipalities throughout the State. *Nowhere in the drawing of the school district lines are considerations of race, creed, color or national origin made.* The setting of municipalities as local school districts is a reasonable standard especially in light of the municipal taxing authority. The system as provided by the various legislative enactments is unitary in nature and intent and any purported racial imbalance within a local school district results from an imbalance in the population of that municipality-school district. Racially balanced municipalities are beyond the pale of either judicial or legislative intervention.

Id. at 1240 (emphasis added). Here, it cannot be said that district boundaries and compulsory attendance laws were designed with considerations of consigning students to “failing” schools. While the Court does not believe that assuring a “thorough and efficient education” is necessarily “beyond the pale” of the judicial intervention, as is clearly evidenced by the Robinson, supra, and Abbott, supra, line of cases, the Court does find that elimination of district boundaries and compulsory attendance laws to achieve this result are beyond its scope.

The difficulty of Plaintiffs’ equal protection claim is also suggested by the practicalities of the claim itself. In essence, Plaintiffs’ equal protection claim assumes—in fact it must assume to be successful—that what is a “failing” school now, was also a “failing” school at the time the Legislature enacted district boundaries and compulsory

attendance laws, and will continue to always be a “failing” school absent elimination of district boundaries and compulsory attendance laws. Such is most likely not the case.³¹ Therefore, the Court finds that Plaintiffs’ have failed to state a cause of action under the New Jersey Constitution. For the same reasons, the Court finds that Plaintiffs have failed to state a cause of action under the United States Constitution.

The Court will briefly address Plaintiffs’ private cause of action under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c). According to Plaintiffs, to sustain a cause of action under the New Jersey Civil Rights Act, it is sufficient to simply plead a cause of action for either a violation of the United States Constitution’s equal protection guarantee, or any substantive right—a “thorough and efficient education”—under the New Jersey State Constitution. Because Plaintiffs argue that they have stated adequate causes of action for violations of the equal protection clause of the United States Constitution, and violations of the New Jersey State Constitution’s fundamental right to a “thorough and efficient education”, Plaintiffs contend that they have stated an adequate cause of action against Defendants for violation of the New Jersey Civil Rights Act.

Here, as already stated supra, the Plaintiffs’ private cause of action under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c) is not viable in the context of the present matter. While the Court recognizes that the right to a “thorough and efficient education”

³¹ Spencer, supra, essentially rejects such an argument in the context of alleged racial segregation. Specifically, the District Court stated:

Assuming further that efforts to achieve the ideal interracial proportion necessarily include the alteration of the population factor determinative of the redistricting, there can be no assurance that the population factor will remain static. If so, it would be necessary to successively reassign pupils to another district as the rate of births and graduations alters the racial proportions creating the demand for the educational facilities as its changes from term to term. In sum, the difficulty complained of does not amount to unconstitutional segregation.

326 F. Supp. at 1239-40. Similarly, the difficulty complained of by Plaintiffs does not amount to equal protection violation, at least as a result of district boundaries and/or compulsory attendance laws.

is a fundamental one, as stated supra, Plaintiffs' claims concerning the deprivation of such are non-justiciable. Likewise, as stated supra, Plaintiffs' equal protection claim under the United States Constitution fails to state a cause of action.³² Therefore, Plaintiffs' private cause of action under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c) must be dismissed.

In closing, "[n]o court should decide constitutional issues in a vacuum, in the absence of a well-developed record isolating the essential factual question at their basis and including findings of fact." Jones v. Department of Comm. Affairs, A-0701-05T3 2007 N.J. Super. LEXIS 296, at *5 (App. Div. Aug. 24, 2007) (Approved for Publication Aug. 24, 2007) (citing American Trucking Ass'n v. State of New Jersey, 164 N.J. 183 (2000); State Farm Mutual Aut. Ins. Co. v. State of New Jersey, 124 N.J. 32, 63 (1991); Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 140 (1962)). In Jones, supra, the Appellate Division posited:

Whether the constitutional issues are framed as facial challenges to statutes or regulations, or asserted deprivations of the claimant's rights in the manner in which such provisions have been applied, or arguments that due process violations have occurred in the enforcement of those provisions, the factual background of the matter must be developed either through stipulated facts or in a litigation process. No such development has occurred in this case to date. If any issues of facial unconstitutionality exist that turn out to be independent of the facts in the case and survive the contested case process, they can be addressed on judicial review. Consideration of any such issues at this time would be premature.

* * * * *

³² "Even if the legislative intent might be thought crude or unwise and the law unjust or oppressive, errors of legislation are not subject to judicial review unless they exceed some limitation imposed by the constitution. Within those limitations the legislative power is supreme and judicial power cannot interfere with it." Jenkins, supra, 659 N.E.2d at 1370 (quoting People v. Deatherage, 81 N.E.2d 581, 586 (1948)).

Neither the Chancery Division, nor we, could decide the constitutional issues raised by plaintiffs in the absence of a “complete and informed record,” [Abbott v. Burke, 100 N.J. 269, 303 (1985)]; moreover, this case ought to be fully developed in an administrative proceeding, rather than via a trial in a court, because it is so heavily impacted by the special expertise and insights that administrative agencies bring to such matters. See id. at 301-02. The eventual result of the process should be a decision in the case that “reflect[s] determinations of appropriate administrative issues as well as the resolution of factual matters material to the ultimate constitutional issues.” Id. at 303. Of course, in order to discharge this responsibility in a way that makes sense, the first-instance decision makers, the ALJ and the agency head, must fully address such constitutional issues raised as are necessary to the decision, and resolve them in principled fashion by their best lights, subject, of course, to judicial review.

Jones, supra, 2007 N.J. Super. LEXIS 296, at *5-7 (emphasis added).

Here, Plaintiffs essentially seek to have the Court determine, “in a vacuum”, the constitutional issues raised in the complaint, as Plaintiffs seek to have the Court issue a judicial decree that two years of failing Assessment scores constitute a deprivation of a “thorough and efficient education”. Moreover, Plaintiffs seek to have the Court consider “in a vacuum” the judicial remedy of eliminating district boundaries and compulsory attendance laws, as Plaintiffs argue that “district boundaries and residence-based school assignments do not serve any appropriate governmental objective *when they* serve to deny plaintiff schoolchildren to the loss of a fundamental right guaranteed by the State Constitution.” (See Plaintiffs’ Opposition Brief, at 16 (emphasis added).)

As already observed supra, problems with our education system are inherently practical and societal ones, and therefore, it is not easily determined what constitutes the best remedy for resolving such problems. Plaintiffs would have the Court ignore these practical problems, but ignoring such problems effectively ignores what may be the most

vital piece to the puzzle.³³ Moreover, “[t]he determination of appropriate remedial relief . . . necessary to [achieve a ‘thorough and efficient education’] is both fact-sensitive and complex; it is a problem squarely within the special expertise of educators.” Abbott IV, supra, 149 N.J. at 199. Similarly, this Court cannot, “alone[,] . . . and should not, assume the responsibility for independently making the critical educational findings and determinations that will be the basis for such relief.” Ibid. Consequently, even if Plaintiffs’ constitutional claims were justiciable, the Court would find such claims to be premature in the absence of a well-developed factual record before the “special expertise” of Defendants’ agency heads, and if appropriate, the Legislature. It would simply not be prudent of the Court to entertain such claims, much less rule in favor of Plaintiffs simply by considering, in isolation, consecutive years of Assessments score data.

Therefore, for the abovementioned reasons, Defendants’ motion to dismiss Plaintiffs’ complaint, in its entirety, is GRANTED.

³³ Abbott IV, supra, even recognized that “‘needs go beyond educational needs’, [and are in fact practical and societal problems which] . . . must be confronted and overcome in order to achieve constitutionally thorough and efficient education.” 149 N.J. at 178-79 (quoting Abbott II, supra, 119 N.J. at 369).

