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December 7, 2016

Via Hand Delivery
Deputy Clerk of the Superior Court
Mercer Vicinage
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Re: H.G., et al. v. Harrington, et al., MER-L-2170-16

Dear Sir or Madam:

This firm represents Plaintiffs in the above-captioned matter. Enclosed for filing, please find an original and one copy of Plaintiffs' Memorandum of Law in Opposition to Proposed Defendant-Intervenors AFT, AFTNJ and NTU's Motion for Leave to Intervene, a Certification of Counsel with Exhibits, and a Certification of Service. Kindly return a copy marked "filed" to this office in the enclosed self-addressed, stamped envelope.

Should you have any questions, please do not hesitate to contact me. Thank you for your attention in this matter.

Respectfully submitted,

WT

William H. Trousdale
For Tompkins, McGuire, Wachenfeld & Barry LLP

Enclosures

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H.G., a minor, through her guardian TANISHA GARNER, et al.,

Plaintiffs,

v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education, et al.,

Defendants

and

NEW JERSEY EDUCATION ASSOCIATION, a New Jersey nonprofit corporation, on behalf of itself and its members,

Proposed Defendant-Intervenor

and

AMERICAN FEDERATION OF TEACHERS, AFL-CIO, et al.,

Applicants for Intervention

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY

Docket No.: MER-L-2170-16

Civil Action

MEMORANDUM OF LAW IN OPPOSITION TO MOVANT-INTERVENORS AFT, AFTNJ AND NTU'S MOTION TO INTERVENE

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Plaintiffs, a group of minor children within the Newark Public School District ("Newark") represented by their parents, respectfully submit this brief in opposition to the Motion for Leave to Intervene filed by the American Federation of Teachers, AFL-CIO ("AFT"), AFT New Jersey, AFT, AFL-CIO ("AFTNJ") and the Newark Teachers Union ("NTU") (collectively with AFT and AFTNJ, "Proposed Movants-Intervenors").

PRELIMINARY STATEMENT

The issue presented in this litigation is simple: do New Jersey's Last In, First Out ("LIFO") statutes unconstitutionally deprive students of their fundamental right to a thorough and efficient education? The parties necessary to adjudicate that issue are already parties to this lawsuit: the students harmed by these two statutes and those tasked with enforcing the LIFO statutes. Proposed Movants-Intervenors, organizations representing a vast array of individuals in the educational space throughout the country and within New Jersey, are not necessary parties to this constitutional challenge, as there are no constitutional rights of the organizations at stake. Consequently, Proposed Movants-Intervenors both lack standing and cannot meet the requirements for mandatory or permissive intervention. Their motion to intervene should be denied.

As an initial matter, Proposed Movants-Intervenors cannot establish standing, a necessary threshold issue to intervention about which they are completely silent. First, Proposed Movants-Intervenors have nothing at stake in this litigation--as organizations, they are not impacted by the constitutionality or unconstitutionality of the LIFO statutes. Second, all of the Proposed Movants-Intervenors are membership organizations that include teachers and educational employees, many of whom either are not impacted by the LIFO statutes at all or would benefit if the LIFO statutes were deemed unconstitutional as applied. As such, the organizations have no

common interest among their members in advocating that the quality-blind LIFO statutes are constitutional. Rather, in seeking to intervene in order to defend the statutes, Proposed Movants-Intervenors prioritize their ineffective senior teacher members over their effective junior teacher members, creating an irreconcilable conflict of interest among their members. Moreover, AFT primarily consists of members who do not work in New Jersey, let alone Newark, and simply cannot demonstrate an interest in this action.

And even if the Proposed Movants-Intervenors could establish standing, they should not be allowed to intervene. Proposed Movants-Intervenors, as organizations, have nothing at stake in this lawsuit sufficient to make them necessary parties to this action. Moreover, their involvement would do nothing to stem potential future litigation by individual teachers impacted by quality-based reductions-in-force (if the LIFO statutes are found unconstitutional) or quality-blind reductions-in-force based on seniority alone (if the Court deems the statutes constitutional).

For the reasons detailed infra, Proposed Movants-Intervenors lack standing to intervene in these proceedings and are not entitled to intervention under either R. 4:33-1 (Intervention as of Right) or R. 4:33-2 (Permissive Intervention).

FACTUAL BACKGROUND

N.J.S.A. 18A:28-10 and 18A:28-12 (the "LIFO Statute") mandates that, when school districts execute a reduction-in-force ("RIF"), those districts must lay off teachers based on seniority alone, ignoring any other factor, including the teacher's effectiveness. Affirmation of William H. Trousdale (December 7, 2016) ("Trousdale Aff."), Ex. A ("Compl.") ¶ 3. Subsequently, if there is a need to hire teachers within the district, the district must prioritize the re-hiring of the previously laid-off teachers in order of their seniority, not their assessed quality. Id. These statutes do not impact the ability of districts to terminate problematic, tenured teachers

on a one-off basis through a tenure charge, but such efforts to terminate these teachers one-by-one results in significant expense to the district each time such proceedings occur. Trousdale Aff., Ex. B ("Cerf Cert.") ¶ 23 ("Removing teachers through a tenure charge is a time-consuming and cost-intensive process that takes at least two years . . . , followed by legal proceedings that may take over a year and cost the district more than $50,000."). For districts faced with shrinking budgets and lowered student enrollment, engaging in expensive one-time proceedings to remove ineffective teachers, which often take place over at least two years, does not permit the district to effectively address quality issues as part of addressing budget issues. Id.

The children in Newark are especially harmed by the LIFO Statute. The effectiveness of teachers has been found to be the single most influential school-based variable in determining the adequacy of a child's education and a critical determinant of educational success. Compl. ¶ 44; see also Amy M. Hightower et al., Improving Student Learning by Supporting Quality Teaching: Key Issues, Effective Strategies, Editorial Projects in Educ. Research Center, 2 (2011), http://www.edweek.org/media/eperc_qualityteaching_12.11.pdf. Yet Newark is suffering from an excess of ineffective and partially effective teachers. Compl. ¶ 47. More than half of the ineffective teachers in New Jersey have been reported as working in Newark. Id. Meanwhile, Plaintiff students attend schools where the majority of students are unable to meet the State's minimum proficiency expectations in literature and math. Compl. ¶¶ 31-40.

Given the present circumstances in Newark, the LIFO Statute, as applied, has a disproportionate and negative impact on Newark and similarly situated districts by forcing the termination of effective teachers, as opposed to more senior but less than effective educators, when a RIF is necessary. In February 2014, as part of an unanswered request by Newark to the New Jersey Commissioner of Education ("Commissioner") seeking a temporary reprieve from

quality-blind layoffs in the form of an equivalency request ("Equivalency Request"), the district reported the results from a simulation modeling what would likely occur if the district were forced to engage in a RIF. Compl. ¶¶ 42, 73. In this simulation, Newark showed that, under the LIFO Statute, 75% of the teachers it would lay off pursuant to a RIF would be considered effective or highly effective, and only 4% of the teachers laid off would be rated ineffective. Compl. ¶ 74. This means that as many as 8,000 children in Newark would miss out on being taught by an effective teacher each year if layoffs are implemented pursuant to the LIFO Statute. Compl. ¶ 75.

Faced with the real harm imposed by a RIF, Newark has historically opted to engage in a costly program to keep ineffective, problematic teachers out of the classroom: the Educators Without Placement Sites ("EWPS") pool. Compl. ¶ 81. By definition, teachers in this pool have been rated as ineffective or have other performance-related issues that caused principals throughout the district to decline to employ them. Compl. ¶ 82; see also Cerf Cert. ¶ 13. Teachers in the EWPS pool do not have full-time classroom placements, but perform various support and teacher's aide functions. Compl. ¶ 82. During the 2013-2014 school year, Newark placed 271 teachers in the EWPS pool, which cost the district approximately $22.5 million dollars in payroll and consisted primarily of senior teachers with ten or more years of experience. Compl. ¶¶ 84-85.

However, starting in 2015, Newark's budget could not support keeping these EWPS teachers out of the districts' schools. Compl. ¶ 86. In 2016-2017, Newark had to place teachers from the EWPS pool, representing more than $25 million in teacher salaries, within the district schools, without the consent of the principals. Compl. ¶ 87. Nevertheless, more than $10 million in teachers' salaries remains in the EWPS pool. Id.

This cost is a significant portion of Newark's budget, and is tied to the salaries of teachers deemed to be so ineffective or problematic that Newark seeks to keep them out of the classroom (and cannot). Yet there is no educationally beneficial option left to the district. For example, if Newark sought to terminate each one of the 271 teachers who were in the pool during the 2013-2014 school year on an individual basis by use of the provisions of the TEACHNJ tenure laws, the district could spend more than $1.36 million and countless man-hours on these proceedings. Cerf Cert. at ¶ 23 (estimating approximately $50,000 per proceeding). The estimated length of time for each individual proceeding is about two years. Id. at ¶ 21. Therefore, even if Newark implemented tenure charges, such proceedings could not be completed in time for annual budgetary decisions, and so would still require Newark to implement layoffs. On the other hand, if the LIFO Statute were deemed unconstitutional as applied, Newark would be able to remove ineffective teachers from the schools through a RIF triggered by the decreased enrollment and budget challenges within the district.

Consequently, Newark is left with an impossible choice while the LIFO Statute is in effect: continue with the EWPS pool to retain effective teachers or engage in a RIF wherein effective teachers would be terminated and ineffective teachers--simply due to their seniority--would be retained. Compl. at ¶ 93.

Proposed Movants-Intervenors

AFT is a national labor organization that "represents 1.6 million pre-K through 12th-grade teachers; paraprofessionals and other school-related personnel; higher education faculty and professional staff; federal, state and local government employees; nurses and healthcare

workers; and early childhood educators."[1] AFTNJ is a "statewide umbrella organization of affiliated AFT local unions," which consists of approximately 30,000 members, including "pre-K to 12 teachers, faculty at Rutgers University, State Colleges and Universities, and County/community colleges, as well as other educational employees employed by New Jersey school districts, colleges and universities."[2] A part of AFTNJ's mission is to "[p]romote the welfare of children by providing progressively better education opportunities for all, regardless of race, color, creed, gender and social, political, economic status, handicap or disability" and "[f]ight all forms of bias in education due to race, gender, creed, and social, political, or economic status, or national origin."[3] NTU is the local union affiliated with AFTNJ, and consists of approximately 3,600 teachers and educational employees employed by Newark.[4]

Procedural History

Plaintiffs filed this action on November 1, 2016 seeking declaratory and injunctive relief to enjoin the LIFO statute as applied in Newark and similarly situated districts. On November 3, 2016, Plaintiffs filed a motion to intervene in Abbott v. Burke, Docket No. 078257 (N.J. Supreme Court), after the New Jersey Attorney General, on behalf of the State, filed a Memorandum of Law seeking to modify the Supreme Court's prior Abbott decisions. Trousdale Aff., Ex. C. In that filing, Plaintiffs sought to intervene to be heard on the issue of the constitutionality of the LIFO Statute as the Commissioner sought the ability to "waive or suspend these provisions" at her discretion in the State's filing. Trousdale Aff., Ex. D at 64.

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1 See, e.g., AFT Press Release, Americans Voted for Public Schools Over Privatization (Nov. 9, 2016), http://www.aft.org/press-release/americans-voted-public-schools-over-privatization; see also generally http://www.aft.org/.

2 See Certification by Donna Chiera in Support of Motion to Intervene (Nov. 14, 2016) ("Chiera Cert."), ¶ 3.

3 See Mission, http://aftnj.org/mission/.

4 See Chiera Cert. at ¶ 4.

Proposed Movants-Intervenors, which have not sought to intervene in Abbott, now seek leave to intervene in this action to defend the constitutionality of the LIFO Statute because they fear that the Defendants in this action will not adequately defend their interests in advocating for senior teachers.

ARGUMENT

I. PROPOSED MOVANTS-INTERVENORS LACK STANDING TO INTERVENE IN THIS ACTION

Separate and apart from the criteria Proposed Movants-Intervenors must satisfy before being permitted to intervene under R. 4:33-1 or R. 4:33-2, they must first establish their standing. See e.g., Spring Creek Holding Co., Inc. v. Shinnihon U.S.A. Co., Ltd., 2005 WL 3357492, at *3 (N.J. App. Div. Dec. 12, 2005); Farmland Dairies, Inc. v. Borough of Wallington, 29 N.J. Tax 310, 312 (Tax Ct. 2016) (citing Mobil Admin. Serv. Co. v. Twp. of Mansfield, 15 N.J. Tax 583, 587 (Tax Ct. 1996), aff'd, 17 N.J. Tax 509 (App. Div. 1997).

An association can establish standing only where "it has a real stake in the outcome of the litigation, there is a real adverseness in the proceeding, and the complaint is confined strictly to matters of common interest and does not include any individual grievance which might perhaps be dealt with more appropriately in a proceeding between the individual member and the defendant." New Jersey Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 416 (App. Div. 1997) (emphasis added) (quoting Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 109 (1971)). The above criteria can be satisfied where (i) the association itself is affected by the alleged conduct at issue or (ii) the association is acting as the representative of its members. See LDM, Inc. v. Princeton Reg'l Health Comm'n, 336 N.J. Super. 277, 288-89 (Sup. Ct. 2000) (quoting Warth v. Seldin, 422 U.S. 490, 511 (1975) (internal citations omitted)). To establish standing as the representative of its members, the association's members must have a

"common economic interest in the challenged action." New Jersey Hospice and Palliative Care Org. v. Guhl, 414 N.J. Super. 42, 48-49 (App. Div. 2010) (citing Crescent Park Tenants Ass'n, 58 N.J. at 107-12).

There is not a single mention of standing in Proposed Movants-Intervenors' brief in support of their motion. See generally Movant-Intervenors' Brief in Support of Motion to Intervene (Nov. 15, 2016) ("Ints. Br."). And it is no surprise why: none of Proposed Movants-Intervenors can serve as a representative of their members because there is no common economic interest in the challenged action among them, and the organizations themselves are not impacted by the LIFO Statute.

First, none of Proposed Movants-Intervenors can show that the Complaint is "confined strictly to matters of common interest" to its members, Riviera Motel Corp., 296 N.J. Super. at 416, such that its members have a "common economic interest in the challenged action." New Jersey Hospice and Palliative Care Org., 414 N.J. Super. at 48-49. The union members do not have a common economic interest in this action. First, both AFT and AFTNJ include members who have zero economic or other interest in this action -- teachers outside of New Jersey, in the case of AFT, and teachers outside of impacted districts, in the case of AFTNJ. In regards to the AFT members outside of New Jersey, only ten states have layoff provision in effect that are solely quality-blind, and each state has a different scheme for how those quality-blind layoff programs work. Teachers and educational employees outside of New Jersey have zero economic interest in the constitutionality or unconstitutionality of the LIFO Statute. Moreover, it is irrelevant that, in other cases in other states, teachers' unions have intervened, especially when there are different statutory schemes and constitutional language at issue in those cases. See Ints. Br. at 5 (citing to Vergara v. California, 16 Cal. Daily Op. Service 9266, __ Cal. Rptr. 3d __ (Ct.

of Appeal, 2d Dist. 2016); Davids v. New York, Index No. 101105/14, Supreme Court of New York, County of Richmond (2015)). Moreover, in Davids and in Vergara, Plaintiffs did not oppose the unions' motion to intervene. See Trousdale Aff., Ex. E (Davids v. New York, Index No. 101105/204 (N.Y. Sup. Ct., Richmond Cty. Sept. 30, 2014) (granting intervention by teachers' unions, but noting no opposition received to motion to intervene); Vergara v. California, No. BC484642, 2013 WL 6912923, *2 (Cal. Super. Ct., Dept. 58, Los Angeles Cty. May 2, 2013) (citing to California's intervention statute, Cal. Civ. Code § 387). Additionally, in both Vergara and Davids, it is not simply the LIFO policies in California and New York, respectively, that are being challenged; plaintiffs in both cases challenged other aspects of California's and New York's tenure laws. But here, Plaintiffs challenge only the LIFO Statute--not the other aspects of the tenure laws--making the interests at stake very different. For this reason, whether unions have been deemed to have an interest in other actions should have no impact on a decision here, especially when none of the Proposed Movants-Intervenors meet the requisite standard for standing.

All of the Proposed Movants-Intervenors represent the interests of some of their members (e.g., senior, ineffective teachers within Newark and other similarly situated districts) at the expense of and detriment to their other members (e.g., more junior, non-tenured and/or effective teachers). A ruling finding the LIFO Statute unconstitutional as applied would be an economic boon to effective but more junior teachers who currently are at greater risk of termination. By contrast, there is an economic risk to more senior, ineffective teachers who presently face little risk of termination despite their effectiveness (or lack thereof) in the classroom.

Second, Proposed Movants-Intervenors do not have standing because they are not impacted, as organizations, by the LIFO Statute's constitutionality or unconstitutionality.

These organizations advocate and bargain on behalf of their individual members. For example, NTU collectively bargains with Newark. See Ints. Br. at 3-4. Presumably, if the LIFO Statute were deemed unconstitutional as applied, NTU, by virtue of its collective negotiation activities, would continue to have the opportunity to engage in negotiations with Newark to ensure protections for members (effective or ineffective) if and when RIFs occur. This role would not change based on the outcome of the instant litigation. Likewise, AFTNJ apparently consists of certain organizations that collectively negotiate in other districts similar to Newark (see Ints. Br. at 4). The impact of a decision regarding the constitutionality of the LIFO Statute would not impair that ability. Rather, if this case is successful, it would change only the statutory, unconstitutional protections offered to senior, ineffective teachers in the event a district like Newark decides it needs to engage in a RIF.

Consequently, this litigation is clearly a challenge that, if relief is granted to Plaintiffs, could result in individual grievances filed by teachers protesting RIFs, not a collective grievance filed by any of the Proposed Movants-Intervenors. Given this, during the pendency of this action, the only teachers who might have standing are those who could potentially have an individual grievance if the LIFO Statute were deemed unconstitutional as applied: an ineffective teacher placed in an EWPS pool who is subsequently terminated due to a RIF, another ineffective (or less than effective) teacher who is removed due to a subsequent RIF, or an ineffective teacher who is not re-hired by the district following a RIF. And those teachers would not have a cause of action until they knew whether they would actually be impacted by a quality-based RIF.

Given these considerations, it is impossible for Proposed Movants-Intervenors to establish standing due to their inability to serve as representatives of all the members of the

organizations and their lack of an organizational interest in this action. As a result, their Motion for Leave to Intervene should be denied.

II. EVEN IF PROPOSED MOVANTS-INTERVENORS COULD ESTABLISH STANDING, THEY ARE NOT ENTITLED TO INTERVENTION AS OF RIGHT

Assuming arguendo that one or all of Proposed Movants-Intervenors could establish standing to intervene (and they cannot), they are still not entitled to intervention as of right. To be entitled to intervention as of right under R. 4:33-1, they must: (i) claim "an interest relating to the property or transaction which is the subject of the transaction"; (ii) show they are "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest"; (iii) demonstrate that their interest is not "adequately represented by existing parties"; and (iv) "make a timely application to intervene." Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 568 (App. Div. 1998) (citation omitted). Additionally, an internal conflict of interest between members of a proposed intervenor counsels against granting leave to intervene. See, e.g., Sullivan v. DB Investments, Inc., No. Civ. A. 04-2819, 2006 WL 892707, at *5 (D.N.J. Apr. 6, 2006).

First, Proposed Movants-Intervenors present an unpersuasive claim that they have an interest in the outcome of this case. Ints. Br. at 8. They rely on the fact that, if the LIFO Statute is deemed unconstitutional, there will be an impairment of "the rights of teaching staff who are represented by [Proposed Movants-Intervenors]." Id. According to the Proposed Movants-Intervenors, these rights appear to be protection against being laid off on the basis of "residence, age, sex, marriage, race, religion or political affiliation" when a RIF occurs within a district. Id. at 4. But those rights--inappropriate terminations based on factors other than quality--are not at issue in this case. It is a complete red herring even to imply that is the case. The only issue in this case is whether the constitutional rights of students within a district are violated when a

district such as Newark is forced to institute quality-blind RIFs and reemployments based solely on seniority. None of Proposed Movants-Intervenors would suffer direct harm by any resolution in favor of Plaintiffs here. The relief sought by Plaintiffs is narrow and tied solely to the question of whether seniority-based layoffs and reemployment without any consideration of quality violates their constitutional rights. If granted, it will remove the obligation to consider seniority only when conducting a RIF and permit Newark and similarly situated districts to consider teacher quality. Meanwhile, Proposed Movants-Intervenors just want to ensure that "experienced senior teachers remain employed," regardless of their quality. Id. at 7.

More importantly, the statutory rights shielding senior teachers during a RIF within New Jersey districts do not trump the constitutional rights of the schoolchildren they teach. The relief sought by Plaintiffs is premised on the constitutional right granted to children within New Jersey to receive a thorough and efficient education. N.J. CONST. ART. VIII, SECT. IV, ¶ 1. The students in Newark and similarly situated districts face severe constitutional deprivations as a result of the protections offered by the LIFO Statute to ineffective teachers within their districts. Newark employs approximately half of the ineffective teachers in New Jersey, yet only 4% of ineffective teachers would be removed from the district if a RIF were to occur pursuant to the LIFO Statute. See Compl. ¶¶ 47 & 74. The data reveal how a RIF pursuant to LIFO directly impairs Plaintiffs' ability to receive the "thorough and efficient" public education to which they are constitutionally entitled. One study found that replacing an ineffective teacher with a simply average teacher would increase the present value of students' lifetime income by over $250,000 per classroom--an amount that can reach staggering proportions when aggregated over

successive years of effective teaching.[5] Another study found that the achievement gap narrows each year a child of color is taught by an effective teacher and, if this positive effect were to accumulate, four consecutive years with a highly effective teacher rather than a highly ineffective teacher would be sufficient alone to close the racial achievement gap between white students and their black counterparts.[6]

Proposed Movants-Intervenors' interests in protecting and enforcing statutory seniority rights have no relevance to the central question in this litigation: are students' constitutional rights being violated by the LIFO Statute? If the LIFO Statute is unconstitutional, the repeal of non-constitutional statutory rights does not impact the analysis, no matter long they have existed. In other words, the constitutionality of a statute does not rise and fall on the statutory benefits it creates for other parties.[7]

Second, there is adversity of interest in this action. The State Board of Education and the Commissioner ("State Defendants"), as well as nominal defendants Newark and Superintendent Cerf, are charged with implementing any RIF pursuant to the LIFO Statute as it currently stands. Plaintiffs sought to intervene in the Abbott action precisely because they did not believe the State Defendants adequately represented their interests on the LIFO issue. In that action, the State seeks to have the New Jersey Supreme Court award the Commissioner discretion to opt in or out of the LIFO Statute as she sees fit. Trousdale Aff., Ex. D at 64. But the State has a long history

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[5] Raj Chetty, John N. Friedman & Jonah E. Rockoff, The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood, 5 (Nat'l Bureau of Econ. Research, Working Paper No. 17699, 2011), http://www.nber.org/papers/w17699.pdf.

[6] Bryan C. Hassel & Emily Ayscue Hassel, Opportunity at the Top: How America's Best Teachers Could Close the Gaps, Raise the Bar, and Keep Our Nation Great, Opportunity Culture 2-4 (2010), http://www.opportunityculture.org/images/stories/opportunity_at_the_top-public_impact.pdf.

[7] Additionally, the only statutes at issue in this case prevent districts from considering teacher quality when engaging in a RIF; the statutory tenure protections and the additional safeguards offered to teachers through collectively bargained agreements are not challenged in this suit.

of failing to use the discretion granted to it by the Supreme Court to benefit students like Plaintiffs. See, e.g., Abbott v. Burke, 206 N.J. 332, 369 (2011) (after granting State discretion to change school funding formula, holding that State cannot deprive full School Funding Reform Act funding); Abbott v. Burke, 149 N.J. 145 (1997) (finding Comprehensive Education Improvement and Financing Act unconstitutional); Abbott v. Burke, 136 N.J. 444 (1994) (finding Quality Education Act unconstitutional); Abbott v. Burke, 119 N.J. 287 (1990) (finding clause 212 of Public School Education Act of 1975 unconstitutional). Given the State's September 2016 filing in the Abbott action, it is apparent that there is a conflict among the parties regarding the remedies sought in this case, regardless of any statements that may have been made regarding the damaging impact of the LIFO Statute on Newark by Superintendent Cerf. Moreover, the Commissioner's failure to respond to Newark's 2014 Equivalency Request indicates that there may also be adversity of interests among the Defendants.

Finally, as explained in detail in Section I supra, there is clearly an internal conflict of interest among the members of the Proposed Movants-Intervenors as their members have divergent interests in the outcome of this action. As a result, even if Proposed Movants-Intervenors were able to establish standing, the divergent interests of their membership counsels against granting them leave to intervene.

III. ADDITIONALLY, EVEN IF PROPOSED MOVANTS-INTERVENORS COULD ESTABLISH STANDING, PERMISSION TO INTERVENE SHOULD NOT BE GRANTED

Assuming arguendo that Proposed Movants-Intervenors could establish standing to intervene (which they cannot), they still should not be granted permission to intervene under R. 4:33-2. The following four factors are considered in determining whether a motion for permissive intervention should be granted: (i) the promptness of the application; (ii) whether granting the motion would result in further undue delay; (iii) whether granting the motion would

eliminate the probability of subsequent litigation; and (iv) the extent to which granting the motion may further complicate litigation that is already complex. See ACLU of N.J., Inc. v. Cty. of Hudson, 352 N.J. Super. 44, 70 (App. Div. 2002).

Plaintiffs agree that Proposed Movants-Intervenors did file their motion to intervene promptly; however, granting the motion would result in undue delay, fail to eliminate the probability of subsequent litigation, and further complicate this litigation. First, if this Court grants their motion to intervene, Plaintiffs anticipate that a substantive amount of effort would be spent delving further into the question of whether each of Proposed Movants-Intervenors does indeed have standing to be involved in this action. Additional depositions would need to be taken of various union members to determine if the organizations adequately represent their views, and additional motions will be filed on the question of standing. Second, as set forth supra, if the Court grants Plaintiffs' requested relief and finds the LIFO Statute unconstitutional as applied, there is a likelihood of substantial subsequent litigation by individual teachers (likely members of NTU, but potentially also members of AFT and/or AFTNJ) if RIFs are instituted within districts. Those individual teachers may bring actions tailored to their specific circumstances challenging the basis of their termination. Allowing Proposed Movants-Intervenors to intervene now would have no impact on those potential future actions. Finally, this litigation is complex, given the simultaneous proceedings at the Supreme Court and trial level. There is no need to interject another party into this action (when that party has not sought involvement before the Supreme Court), especially when that party has no constitutional right to be adjudicated. Moreover, as noted above, the question of whether Proposed Movants-Intervenors truly do possess the requisite standing (if they are permitted to intervene) would also

add unnecessarily to the complexity of this case. Put simply, AFT, AFTNJ and NTU simply are not necessary parties to this action, even if they did have standing.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Proposed Movants-Intervenors' Motion for Leave to Intervene.

Dated: December 7, 2016

By: WT

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H.G., a minor, through her guardian TANISHA GARNER, et al.,

Plaintiffs,

v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education, et al.,

Defendants

and

NEW JERSEY EDUCATION ASSOCIATION, a New Jersey nonprofit corporation, on behalf of itself and its members,

Proposed Defendant-Intervenor

and

AMERICAN FEDERATION OF TEACHERS, AFL-CIO, et al.,

Applicants for Intervention

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY

Docket No.: MER-L-2170-16

Civil Action

CERTIFICATION OF COUNSEL WITH EXHIBITS IN SUPPORT OF PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO PROPOSED DEFENDANT-INTERVENORS AFT, AFTNJ AND NTU'S MOTION FOR LEAVE TO INTERVENE

I, William H. Trousdale, Esq., of full age, hereby certify:

1. Annexed hereto as **Exhibit A** is a true and correct copy of Plaintiffs H.G., a minor, through her guardian Tanisha Garner, et al. (hereinafter, "Plaintiffs")'s Complaint, filed November 1, 2016.

2. Annexed hereto as **Exhibit B** is a true and correct copy of the Certification of Christopher Cerf, dated August 23, 2016.

3. Annexed hereto as **Exhibit C** is a true and correct copy of Plaintiffs' Memorandum of Law in Support of their Motion to Intervene in Abbott v. Burke (078257), filed November 3, 2016.

4. Annexed hereto as **Exhibit D** is a true and correct copy of the State's Memorandum of Law on Behalf of Defendants' Motion for Modification of Abbott XX and Abbott XXI in Abbott v. Burke (078257), signed September 15, 2016.

5. Annexed hereto as **Exhibit E** is a true and correct copy of the September 30, 2014 Order of Justice Philip G. Minardo of the New York Supreme Court in Davids v. New York, Index No. 101105/14.

I certify that the foregoing statements made by me are true. If any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date: December 7, 2016

WT

William H. Trousdale

EXHIBIT

A

SUPERIOR COURT OF THE STATE OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

H. G., a minor, through her guardian TANISHA GARNER; F. G., a minor, through her guardian TANISHA GARNER; E.P., a minor, through his guardian NOEMÍ VAZQUEZ; M.P., a minor, through her guardian NOEMÍ VAZQUEZ; F.D., a minor, through her guardian NOEMÍ VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through her guardian FAREEAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., a minor, through his guardian IRIS SMITH; M.R., a minor, through his guardian IRIS SMITH; Z.S., a minor, through her guardian WENDY SOTO; D.S., a minor, through his guardian WENDY SOTO;

Plaintiffs,

v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education; NEW JERSEY STATE BOARD OF EDUCATION; nominal defendant NEWARK PUBLIC SCHOOL DISTRICT; and nominal defendant CHRISTOPHER CERF, in his official capacity as Superintendent of the Newark School District;

Defendants.

Case No.: _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, by their undersigned counsel, bring this civil action for declaratory judgment and injunctive relief against Defendants Kimberly Harrington, in her official capacity as Acting Commissioner of the New Jersey Department of Education; New Jersey State Board of Education; Newark Public School District; and Christopher Cerf, in his official capacity as Superintendent of the Newark Public School District, (collectively "Defendants") for injuries

caused by Defendants' unconstitutional enforcement of the State statute prohibiting school districts from considering teacher quality when they have to resort to teacher layoffs due to a budgetary deficit. N.J.S.A. 18A:28-10 and 18A:28-12. Plaintiffs hereby allege as follows:

INTRODUCTION

1. The Education Clause of the New Jersey Constitution requires the Legislature to 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." Art. VIII, Sect. IV, ¶ 1.

2. Teacher effectiveness is the most important in-school factor affecting the quality of students' education. Students with high-quality, effective teachers do not just learn better than those without effective teachers in the short run—in the long run, they are more likely to graduate from high school, more likely to attend college, more likely to have good jobs and higher lifetime earnings, and less likely to become teenage parents.

3. Yet, the Legislature has passed a law that forces school districts faced with the possibility or reality of a reduction-in-force to follow quality-blind teacher layoff and reemployment statutes, N.J.S.A. 18A:28-10 and 18A:28-12 (the "quality-blind layoff statute" or "LIFO statute"), which mandate that school districts, when executing a reduction-in-force, lay off teachers based on seniority alone, ignoring any other factor, including the teacher's effectiveness. If there is a later need to hire teachers, the district must prioritize the re-hiring of these laid off teachers in order of their seniority, not their assessed quality.

4. The children affected by the LIFO statute are primarily located in low-income districts such as the Newark Public School District ("Newark"). Parents in those districts continuously need to fight to ensure that their children receive the high-quality education and opportunities they deserve.

5. Given declining student enrollment in Newark and the corresponding decrease in state funding, the reality of LIFO in Newark forces Newark and similar districts to wrestle with two untenable options that damage every child in the district: either (i) lay off effective teachers pursuant to the mandates of the LIFO statute, while leaving ineffective teachers clustered in an already under-performing school district, or (ii) refuse to institute reductions-in-force (even when faced with decreased funding), retain ineffective teachers to save the effective and highly-effective teachers, decline to hire new teachers, and cut spending elsewhere in the district's budget.

6. Thus far, Newark has opted not to fire effective classroom teachers; instead, it has created a pool of ineffective teachers that it will not place in full-time teaching positions in order to avoid reducing the number of effective teachers instructing students within the district. This pool of ineffective teachers, which is known as the Educators Without Placement Sites ("EWPS") pool, is unsustainable. It drains millions of dollars per year from Newark's budget that could be used to hire new, effective teachers and provide other beneficial programs. This detrimental budgetary impact is especially harmful in light of the State's misguided efforts to cut education funding to the Schools Development Authority ("SDA") districts, including Newark, which would further inhibit the district's ability to provide a thorough and efficient education to these students.

7. Other school districts similarly situated to Newark are faced with this same dilemma and have implemented workarounds to avoid the harms associated with implementing reductions-in-force pursuant to LIFO.

8. Because of its harmful effects on the students in struggling school districts, the LIFO statute violates the rights of Plaintiffs guaranteed by the New Jersey Constitution,

including those guaranteed by the Education Clause, as applied to Newark and similarly situated districts because that statute operates, when a reduction-in-force is necessitated, to strip schools in these districts of effective teachers, and prevents these districts from instead laying off ineffective teachers that have greater seniority.

9. New Jersey courts have a long and admirable history of protecting the fundamental right to education in the state and ensuring that lower-income and struggling districts—known as *Abbott* or SDA districts—receive the additional funding needed to assist in meeting their constitutional mandate.

10. Ensuring adequate funding to these districts is essential, but funding alone is not sufficient to provide a thorough and efficient education to these students. They need effective teachers.

11. In these districts, of which Newark is one, this fundamental right to a thorough and efficient education requires the State to provide an education that "exceeds that needed by students in more affluent districts," according to the New Jersey Supreme Court. Yet, the LIFO statute has the perverse effect of mandating that these less affluent school districts fire junior (but effective) teachers and instead retain senior (but ineffective) teachers during reductions-in-force, violating the rights guaranteed by the Education Clause.

12. Additionally, these children are inequitably harmed in comparison to children attending other districts, given the impact of the LIFO statute in less affluent districts like Newark where recent data shows that there are higher concentrations of ineffective teachers than other districts within the state. Children in Newark and other similarly situated districts suffer greater harms from the LIFO statute than students in other districts, given that a reduction-in-force pursuant to the LIFO statute would result in the dismissal of effective teachers and the

retention of ineffective teachers. On this basis, the LIFO statute, as applied to these children, also violates their rights pursuant to the New Jersey Constitution's Equal Protection Clause.

13. Moreover, these children are being deprived of their fundamental right to a thorough and efficient education by virtue of the operation of the LIFO statute, thereby violating their rights pursuant to the Due Process Clause of the New Jersey Constitution.

14. For these reasons, Newark and other similarly situated districts need to be rid of the LIFO statute's requirements and permitted to keep effective teachers in the classroom. Laying off teachers without any consideration of their quality prohibits children from being educated in the constitutionally mandated manner.

15. By enforcing the quality-blind layoff statute, Defendants violate the constitutional and statutory rights of Plaintiffs and other students in Newark and similarly situated districts throughout the State.

16. Therefore, Plaintiffs seek a judgment declaring that the State's quality-blind layoff statute, as applied to Newark and other similarly situated districts, is unconstitutional.

17. Plaintiffs further seek injunctive relief to prevent enforcement of the LIFO statute, or any law or policy substantially similar to the LIFO statute, which would prevent Newark and other similarly situated districts from considering teacher effectiveness—regardless of seniority—when making decisions in relation to reductions-in-force.

PARTIES

18. Plaintiff Tanisha Garner is the mother of two daughters, H.G. and F.G., who currently attend Hawkins Street Elementary School ("Hawkins") in Newark. Ms. Garner sues on behalf of each of her children.

19. Plaintiff Noemí Vazquez is the mother of E.P., M.P., and F.D. E.P. currently attends East Side High School; M.P. currently attends the Fourteenth Avenue School; and F.D. currently attends Hawkins. All three schools are located in Newark. Ms. Vazquez sues on behalf of each of her children.

20. Plaintiff Fareeah Harris is the mother of W.H. and N.H., both current students at Luis Muñoz Marín Elementary School ("Marín") in Newark. Ms. Harris sues on behalf of each of her children.

21. Plaintiff Shonda Allen is the mother of J.H., a current student at the Eagle Academy for Young Men of Newark ("Eagle Academy"). Ms. Allen sues on behalf of her child.

22. Plaintiff Iris Smith is the mother of O.J. and M.R., both current students at Speedway Academies ("Speedway") in Newark. Ms. Smith sues on behalf of each of her children.

23. Plaintiff Wendy Soto is the mother of Z.S. and D.S., both current students at the First Avenue School in Newark. Ms. Soto sues on behalf of each of her children.

24. Defendant Kimberly Harrington is the Acting Commissioner of the New Jersey Department of Education ("Commissioner") and charged with enforcing the quality-blind layoff statute by creating the standards by which teachers may be laid off and ensuring that all children in New Jersey receive a constitutionally effective education.

25. Defendant New Jersey State Board of Education is charged with enforcing the quality-blind layoff statute by approving the standards set by the Commissioner, which dictate how teachers may be laid off.

26. Defendant Newark Public School District is charged with enforcing the quality-blind layoff statute when executing a reduction-in-force within the district.

27. Defendant Christopher Cerf is the Superintendent of Newark and charged with enforcing the quality-blind layoff statute when executing a reduction-in-force within the district and ensuring that all children within Newark receive a constitutionally effective education.

VENUE

28. Venue is proper in Mercer County because the cause of action arises here, where Defendants enforce the quality-blind layoff statute. R. 4:3-2(a)(2).

FACTS

THE NEWARK SCHOOL DISTRICT

29. Newark is a struggling school district, with almost one-third of Newark students failing to graduate from high school. Of those who do graduate, only approximately 10% will be ready for college and careers. The long-term harm suffered by these students as a result of their deficient in-school educational experiences is devastating.

30. Approximately 50% of Newark's eighth-graders have received an education that allows them to meet the state's minimum proficiency for literacy. Only 40% of these same eighth graders have received an education that allows them to meet the minimum proficiency standards for mathematics.

31. Newark's students are in the state's bottom 25% for literacy and bottom 10% for math.

32. For example, Plaintiffs H.G., F.G., and F.D. currently attend Hawkins.

33. In the 2014-2015 school year, 94.3% of the children attending Hawkins were considered economically disadvantaged students.[1] Only 18% of the children at Hawkins received an education that allowed them to meet or exceed the State's minimum proficiency

[1] *See* New Jersey Department of Education, *New Jersey School Performance Report: Hawkins Street School: 2014-2015 School Year*, 29, *available at* http://www.nj.gov/education/pr/1415/13/133570460.pdf.

benchmarks in language arts, and only 10% received such an education in math.[2] These results place Hawkins in the bottom 11% of elementary schools in the State.

34. Plaintiffs W.H. and N.H. currently attend Marín.

35. Similar to Hawkins, students at Marín are struggling. For the 2014-2015 school year, 12% and 10% of children at Marín received an education in language arts and math, respectively, that met or exceeded the State's grade level expectations.[3] These results place Marín in the bottom 5% of elementary schools in the State. Like Hawkins, Marín educates a large percentage of children considered to be economically disadvantaged.

36. Plaintiffs M.P., O.J., and M.R. also attend elementary schools in Newark.

37. For the 2014-2015 school year at the Fourteenth Avenue School, which M.P. attends, only 18% of students met or exceeded the grade level expectations in language arts and only 12% of students met or exceeded grade level expectations in math.[4] At Speedway, which O.J. and M.R. attend, only 11% of students met or exceeded the State's grade-level expectations in language arts, and only 8% of those students met or exceeded the State's grade-level expectations in math.[5] The majority of students at both schools are considered economically disadvantaged.

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[2] *Id.* at 3.

[3] *See* New Jersey Department of Education, *New Jersey School Performance Report: Luis Muñoz Marín Elementary School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570301.pdf.

[4] *See* New Jersey Department of Education, *New Jersey School Performance Report: Fourteenth Avenue School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570420.pdf.

[5] *See* New Jersey Department of Education, *New Jersey School Performance Report: Speedway Avenue School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570690.pdf.

38. Z.S. and D.S. both attend the First Avenue School in Newark, at which less than half of the students met or exceeded the State's grade-level expectations.[6] However, Z.S. has been diagnosed with dyslexia, and her mother continues to struggle to have the school institute the appropriate educational plan to address this disability. At the First Avenue School, only 17.6% of children with a disability met the State standards.[7]

39. The issue is not limited to Newark's elementary schools, however. Plaintiff E.P. attends East Side High School. At this high school, only 13% of students met or exceeded the State's grade-level expectations in language arts during the last school year, and only 6% of them met or exceeded expectations in math.[8] This puts East Side High School in the bottom 10% of schools in the State. About one in three students failed to graduate from East Side High School on time.[9]

40. Likewise, Plaintiff J.H. attends the Eagle Academy. Ten percent of the students at Eagle Academy met or exceeded the State's expectations in language arts, and only 8% of the students met or exceeded the State's expectations in math.[10]

41. Despite these performance issues within Newark's schools, in 2016, Newark was forced to engage in a reduction-in-force of guidance counselors and librarians. This saved the

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6 *See* New Jersey Department of Education, *New Jersey Performance Report for First Avenue School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570410.pdf (indicating 41% of students met or exceeded grade-level expectations in language arts, and 44% met or exceeded grade-level expectations in math).

7 *Id.* at 4.

8 *See* New Jersey Department of Education, *New Jersey School Performance Report: East Side High School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570040.pdf.

9 *Id.* at 17 (70% of the students graduated in four years, which is below the State's target graduation rate of 78%).

10 *See* New Jersey Department of Education, *New Jersey School Performance Report: Eagle Academy for Young Men of Newark*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570307.pdf.

district $1.5 million, but, as it was based solely on seniority, the district was forced to terminate staff it would have retained but for the mandates of the LIFO statute. Although not the primary classroom teachers, this reduction-in-force deprived Newark students of professionals who could have positively impacted their educational experience.

NEWARK'S 2014 UNANSWERED EFFORT TO WAIVE THE REQUIREMENT FOR QUALITY-BLIND LAYOFFS

42. In February 2014, Newark submitted a request to the Commissioner seeking a temporary reprieve from quality-blind layoffs in the form of an equivalency request under N.J.A.C. 6A:32-5.1 (the "Equivalency Request").[11] The request was driven by the declining enrollment in Newark, which resulted in the loss of almost $200 million in education funding.[12] This forced a difficult choice upon the district about what to do with its limited resources.

43. The request has gone unanswered by the State, and Newark is left to either engage in quality-blind layoffs or create alternatives to instituting reductions-in-force. Either option results in harm to students within the district. They will either suffer the lifelong harms that can result from instruction by ineffective teachers or, alternatively, suffer from budget cuts in other areas that result in losses in important educational programming and resources. All of this stems from the impact of the LIFO statute.

EFFECTIVE TEACHERS ARE ESSENTIAL FOR CHILDREN TO RECEIVE THE RIGHTS CONFERRED BY THE EDUCATION CLAUSE

44. The effectiveness or ineffectiveness of teachers has been found to be the single most influential school-based variable in determining the adequacy of a child's education and a critical determinant of educational success.

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[11] *See* Newark Public Schools, *Overview of Equivalency Request: Protecting Our Best Teachers During a Fiscal Crisis* (2014), *available at* http://content.nps.k12.nj.us/wp-content/uploads/2014/08/Overview_of_Equivalency_February_2014_FINAL.pdf.

[12] *See id.* at 1.

45. Recognizing this, New Jersey evaluates its teachers as "highly effective," "effective," "partially effective" or "ineffective." The final rating of a teacher is based on multiple factors generally evaluated based on student learning and teacher practice.[13] These considerations are designed to measure the quality of the teacher in the classroom, and are updated from time to time.

46. Ineffective or partially effective teachers are required to create a Corrective Action Plan with targeted professional development goals for the following year after the evaluation, and their progress is monitored.

47. In the last published Staff Evaluation report, the New Jersey Department of Education provided state- and district-level educator evaluation data.[14] In Newark, out of the 2775 teachers evaluated, 94 were rated "ineffective" and 314 were rated "partially effective." Statewide, there were only 205 teachers reported as being rated "ineffective," meaning that almost *half* of the ineffective teachers reported in the State worked in Newark at the time the evaluations were completed. Moreover, approximately 10% of the State's partially effective teachers were located in the district.

48. In comparison, of the 337 teachers evaluated in the Summit City School District ("Summit"), only a few miles from Newark, *not a single teacher* was reported as receiving a rating of ineffective or partially effective.

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[13] *See* http://www.nj.gov/education/AchieveNJ/teacher/ (setting forth explanations as to how teachers are evaluated in New Jersey).

[14] *See* N.J. Department of Education, *Staff Evaluation 2013-14, available at* www.state.nj.us/education/data/staff.

49. Therefore, even if Summit, a district with a median household income more than three times higher than Newark,[15] were forced to engage in a reduction-in-force, the students within the district would likely not be harmed in the same way as there were no teachers reported with ineffective or partially effective ratings that could be retained in place of effective teachers.

50. In essence, the effect of the LIFO statute in districts like Summit would not result in students being assigned to teachers reported as ineffective, given the nature of the district and the quality of the teaching staff. On the other hand, Newark has a disproportionately high concentration of teachers rated as less than effective. Therefore, when layoffs under the LIFO statute are based on an arbitrary standard of teacher seniority, not teacher effectiveness, while both districts can be injured, the data shows that Newark would retain less than effective teachers in place of effective teachers, while Summit, which reportedly has no ineffective teachers, would not suffer the same type of harm.

51. The importance to students of having effective teachers cannot be overstated. Study after study demonstrates that teacher quality is the most important in-school factor affecting student achievement.

52. One recent study found that replacing an ineffective teacher with simply an average teacher would increase the present value of students' lifetime income by over $250,000 per classroom—an amount reaching staggering proportions when aggregated over successive years of effective teaching.

53. Effective teachers can have an especially large effect on closing the achievement gap across class and racial lines.

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[15] Reported household median income for 2013 was $115,239 in Summit and $32,973 in Newark. *See* City-Data.com, *available at* www.city-data.com.

54. According to a recent national study, "[b]y every measure of qualifications . . . less-qualified teachers [are] to be found in schools serving greater numbers of low-income and minority students."

55. Studies show that, consistently, students of color in low-income communities are between three and ten times more likely to have unqualified teachers than students in predominantly white communities.

56. The New Jersey Department of Education found that using a measure of effectiveness premised upon a teacher's paper qualifications (i.e. degrees, certifications, demonstrated content knowledge in the subject taught), students in districts like Newark were five times more likely to be taught by teachers that did not possess even the minimum paper qualifications required by the federal No Child Left Behind Act.

57. Consequently, it is no surprise that one study found that the achievement gap narrows with each year a child of color is taught by an effective teacher.

58. Another study shows that, if this positive effect were to accumulate four consecutive years with a top-quartile teacher (a highly-effective teacher) rather than a bottom-quartile teacher (a highly-ineffective teacher), this would be sufficient alone to close the racial achievement gap between white students and their black counterparts.

59. Graduation rates in Newark are also low compared to other districts in New Jersey. According to 2015 graduation data published by the New Jersey Department of Education, the districtwide graduation rate from a four-year public high school in Newark was 69.59%. In comparison, the statewide graduation rate was 89.67%.[16]

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[16] *See* N.J. Department of Education, *2015 Adjusted Cohort 4 Year Graduation Rates, available at* www.state.nj.us/education/data/grate/2015/.

60. Moreover, within Newark, only 69.39% and 69.61% of Black and Hispanic students, respectively, graduate from a four-year high school. On a statewide basis, however, 81.51% of Black students and 82.81% of Hispanic students graduate high school, which indicates that students in other districts, who learn from effective teachers, achieve greater educational success.

61. The studies and metrics confirm what common sense and experience tell us—quality teaching is essential for quality education.

62. If, as the New Jersey Supreme Court has emphasized repeatedly, a thorough and efficient education is one that provides children the opportunity to achieve, enables them to perform their roles as citizens, and equips them with the skills needed to compete effectively in the contemporary labor market, then such an education is impossible without quality teachers.

TO THE DETRIMENT OF STUDENTS, QUALITY-BLIND LAYOFFS REQUIRE NEWARK TO EITHER (I) CONSISTENTLY LAY OFF EFFECTIVE TEACHERS AND RETAIN INEFFECTIVE TEACHERS OR (II) TAKE OTHER HARMFUL MEASURES TO AVOID LAYING OFF EFFECTIVE TEACHERS

63. The LIFO statute has two detrimental mandates dictating how districts must make certain personnel decisions.

64. First, when there is a reduction-in-force within a district, the district must dismiss teachers on the basis of seniority. Quality may not be considered. N.J.S.A. 18A:28-10.

65. Second, if a teacher is laid off due to such a reduction-in-force, the teacher must remain on a preferred eligibility list, which again is established on the basis of seniority alone. Quality may not be considered. N.J.S.A. 18A:28-12.

66. Seniority under the statute is not actually based on the individual's years of experience teaching, but, for the vast majority of teachers, on years teaching within the district where the reduction-in-force occurred. It is not truly teaching experience or teacher quality, but

tenure in the district that determines who gets preferential treatment in the event a district has the opportunity to fill vacancies following a reduction-in-force. This means that the ability of students to learn in an economically challenged district is dependent not on quality, and not even on actual years of experience, but on the arbitrary happenstance of teachers' years of service in a specific district.

67. Therefore, given the constraints of the reemployment provision of the LIFO statute, a district is (a) forced to ignore the quality of a teacher when able to re-hire previously laid off teachers and (b) prevented from bringing in new, effective teachers when a vacancy opens if there are qualified teachers on the eligibility list.

68. The primary persons who benefit from this mandate to consider *only* intra-district seniority are ineffective teachers who have held their jobs for many years despite their ineffectiveness. There is no empirical support for preferring this group of teachers. To the contrary, empirical studies show that seniority is weakly correlated with effective teaching. As a result, the length of employment is simply not a proxy for teacher effectiveness.

69. While layoffs based on effectiveness would cut the lowest performing and least effective teachers, LIFO undoubtedly cuts a number of higher performing teachers.

70. One study showed that 80% of those laid off on the basis of seniority alone are more effective than the lowest performing teachers. Put differently, the vast majority of teachers laid off during quality-blind layoffs are *not* ineffective teachers.

71. In response to a 2012 New Jersey Department of Education survey inquiring about the effects of quality-blind layoffs on student performance, school superintendents and administrators reported that such layoffs are a "tremendous handicap" because "the teacher with the most seniority is not always the best teacher."

72. The tremendous handicap suffered by superintendents and administrators that is inherent pursuant to the LIFO statute is especially felt in Newark, the state's largest school district.

73. In the Equivalency Request, Newark presented data from a simulation that used actual data from its teaching staff, and it showed the devastating impact of quality-blind layoffs on student achievement and the prospective benefits of performance-based layoffs.

74. Newark's data showed that, under the current quality-blind layoff system, if layoffs were implemented, 75% of the teachers it would lay off were considered effective or highly effective, and *only 4% of the teachers laid off would be rated ineffective.* Pursuant to the LIFO statute, three hundred of Newark's effective or highly effective teachers would be laid off while *72% of Newark's lowest-rated teachers would remain.*

75. Given the number of students each of these effective or highly effective teachers would otherwise instruct, this means that as many as 8,000 children in Newark would miss out on a high-performing teacher each year.

76. As previously described above, being taught by an ineffective teacher impacts these children not simply during that school year, but for the rest of their lives.

77. Unfortunately, Newark's experience is not unique. The same is true in other urban districts throughout the State that face layoffs this year and in the years ahead.

78. For example, the superintendent of the Camden School District ("Camden") has reported that quality-blind layoffs force Camden to lose some of the district's most-effective teachers, at a time when the district already struggles to educate its students competitively, and thus has no effective teachers to spare.

79. In an effort to avoid the necessity of quality-blind layoffs, these less affluent, urban districts take steps to avoid instituting reductions-in-force.

80. Consequently, Newark has resorted to the harmful and unsustainable tactic of keeping ineffective teachers on the district payroll.

81. When certain teaching positions become superfluous because of declining enrollment, Newark has refrained from imposing layoffs. Instead, it has created what is known as the EWPS pool for those teachers whom principals did not want to hire because of performance concerns.

82. Teachers in the EWPS pool do not have full-time classroom placements, but instead perform various support and teacher's aide functions. By definition, the teachers in this pool have been rated as ineffective or have other performance-related issues that made principals throughout the district decline to employ them.

83. During the 2013-2014 school year, there were 271 teachers in the EWPS pool, meaning there were 271 teachers that Newark had found to be so ineffective that they were not placed in a classroom, but still compensated as if these teachers were contributing full-time to student achievement.

84. This pool is largely composed of senior teachers. Approximately 70% of the teachers in this pool have ten or more years of experience.

85. Newark spent approximately $22.5 million dollars in the 2013-2014 school year keeping these ineffective teachers on its payroll and away from a permanent teaching placement within its district schools.

86. However, starting in 2015, Newark could not keep most of these EWPS teachers out of the districts' school.

87. Instead, the district had to force place these teachers as permanent teachers within district schools without the consent of the schools. For the 2016-2017 school year, this forced-teacher-placement represented more than $25 million in teacher salaries. Yet, $10 million in teachers' salaries remains in the EWPS pool.

88. In the event of any future quality-blind layoffs, teachers in this EWPS pool, rated partially effective or ineffective, and now serving as the principal teacher in classrooms in district schools, would largely avoid layoffs at the expense of less-senior, more-effective *and non-EWPS* teachers.

89. The largest component of any school district's budget is its personnel—almost 90% of any individual school's budget in Newark is tied to salaries. Spending the valuable resources of a district on ineffective teachers is not only nonsensical, but also inefficient and in direct contradiction with the mandate of the New Jersey Constitution. The EWPS pool would be wholly unnecessary were it not for the quality-blind layoff statute.

90. The EWPS pool is unsustainable, especially given the funding issues currently faced by Newark in light of continued declining enrollment and ongoing efforts by the State to cut the district's funding.

91. On September 15, 2016, the New Jersey Attorney General filed a Memorandum of Law in the State Supreme Court seeking to modify the Court's prior *Abbott* decisions and permit the State to institute a new funding scheme. Reports have stated that, if this funding scheme were to be enacted, Newark would lose almost 69% of its state aid, which is equivalent to a loss of $14,502.99 per pupil in the district.[17]

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[17] *See* Stephen Stirling, *How Christie's Controversial School Aid Plan Could Impact You*, NJ.COM (Jun. 22, 2016), *available at* http://www.nj.com/education/2016/06/how_christies_school_aid_proposal_could_impact_your_district.html.

92. However, the issues of funding and the LIFO statute should not be conflated. Newark, and other *Abbott* districts, need the money provided by the *Abbott* line of cases. Even with the court-mandated *Abbott* funding, Newark faces a crippling budget deficit, prompting the need to either conduct damaging reductions-in-force or place teachers from the EWPS pool within classrooms while the LIFO statute is in effect.

93. Put simply, between the quality-blind layoff statute and the EWPS program, Newark faces an impossible dilemma: the district must either lay off effective teachers and retain ineffective teachers, or it must bear the heavy burden of keeping ineffective teachers on staff (or engage in the time-consuming and expensive proceedings to terminate ineffective, tenured teachers on a case by case basis) rather than lose the effective teachers they have.

94. The loss of effective teachers from the classroom due to a reduction-in-force, or the insertion of ineffective teachers from the EWPS pool in order to avoid a reduction-in-force, impacts the education offered to the Plaintiff children, who already attend schools that are unable to educate the majority of their students in order to meet the State's base-level expectations for each grade-level.

95. As a result of the impossible dilemma, in connection with other factors facing the district, Newark continues to struggle with poor student performance, growing achievement gaps, and ever-more difficult challenges in recruiting and retaining high-quality teachers. And the Plaintiff children suffer as a result.

QUALITY-BLIND LAYOFFS ALSO UNDERMINE THE ABILITY OF SCHOOL DISTRICTS, LIKE NEWARK, TO ATTRACT AND RETAIN EFFECTIVE TEACHERS

96. High-poverty districts, like Newark, also face extraordinary difficulties in recruiting, hiring, and retaining highly-qualified teachers.

97. Elementary schools in Newark have difficulty hiring new, highly-qualified teachers from outside the district. Instead, they are forced to first hire qualified teachers from the EWPS pool to fill any staffing needs, even if the pool is made up of teachers rated as less than effective. The devastating result for children within the district is that the district is limited in its ability to find and place qualified and effective teachers in open positions. Even if a school were successful in removing an ineffective teacher from the classroom during layoffs, if a vacancy for which the teacher is deemed to fall within the job parameters exists elsewhere in the district, the principal is forbidden from hiring the most qualified and effective applicant, and instead must settle for that teacher who was previously deemed to be so ineffective that they had been removed from full-time teaching positions. For example, Newark recently needed to hire Spanish teachers, but was forced to require its schools to take Spanish teachers from the EWPS pool instead.

98. Therefore, schools in Newark, already stripped of effective teachers due to the prior periods of engaging in quality-blind layoffs, must add to their concentration of ineffective classroom teachers every time they look to fill a vacancy, as high-quality teachers who may otherwise have been available to fill the position will find alternative employment opportunities.

99. Although other districts have been less transparent than Newark about their dealings with the quality-blind layoff statute, it is clear that, if the statute must be enforced, it will continue to rob districts of effective teachers that they cannot afford to lose.

100. Moreover, outside of the impact of the EWPS pool and the LIFO statute, published studies and reports indicate that qualified teachers are reluctant to work in poorer, urban districts like Newark, which further reduces Newark's pool of potential candidates when it can hire new teachers.

101. Nevertheless, the specter of quality-blind layoffs at the end of every school year serves to exacerbate qualified teachers' reluctance to apply to work in districts like Newark, where the likelihood of layoffs is higher for teachers new to the district—even teachers with many years of experience. Consequently, qualified candidates seek employment opportunities in other districts where funding and declining enrollment are not concerns and greater employment stability exists.

102. Likewise, effective teachers voluntarily may decide to take their talents elsewhere.

103. Because of the quality-blind layoff statutes and the other factors that make teachers reluctant to come to less affluent districts, Newark is prevented from replenishing its supply of effective teachers with new hires from outside the district.

QUALITY-BLIND LAYOFFS UNDERMINE NEWARK'S ABILITY TO EFFECTIVELY EDUCATE ITS STUDENTS AND VIOLATE THE CONSTITUTIONAL RIGHTS OF PLAINTIFFS

104. Defendants' enforcement of the quality-blind layoff statute in Newark will remove quality teachers, which leads to lower test scores, lower high school graduation rates, lower college attendance rates, and sharply reduced lifetime earnings for students in Newark like the Plaintiff children.

105. Almost half of the students in Newark failed the State's high school proficiency assessment in math, and over 20% failed the assessment for language arts. This means those students did not possess the basic skills needed for obtaining a high school diploma.

106. Only 19% of Newark's students are on track to be ready for college and post-secondary careers. Of those who do graduate and go on to post-secondary education, virtually all require remedial work before they can obtain credits that count toward a college degree.

107. Plaintiffs' struggles in obtaining an effective education at their schools in Newark mirror the struggles facing other students in districts like Newark throughout the State.

108. In particular, information about Camden is worrisome. Less than 1% of Camden graduates are ready for college and careers. This means more than 99% of the students who graduate from Camden high schools, which has a 63.57% graduation rate, are not ready for college or careers.

109. This reality cannot be reconciled with the mandate under the State Constitution that children in New Jersey, and especially Plaintiff children who attend schools in an *Abbott* district, receive a thorough and efficient education giving them the opportunity to achieve, fulfill their role as citizens, and compete effectively in the contemporary labor market.

110. Draining districts like Newark of quality teachers, an inevitable result of the LIFO statute's quality-blindness, removes those within the schools who are in the best position to help these students achieve their constitutionally mandated thorough and efficient education and thereby violates the New Jersey Constitution on numerous fronts.

111. In sum, the quality-blind layoff statute violates the rights of Plaintiffs and similarly situated children in Newark and similar districts throughout the State.

112. The LIFO statute necessarily leads to the devastating result of laying off effective teachers in school districts that cannot afford to lose any effective teachers, and the retention of ineffective teachers to the detriment of the students in those districts. Moreover, the statute undermines the ability of districts like Newark to attract and retain desperately needed qualified and effective teachers.

113. The LIFO statute's overall effect is to prevent school districts from effectively educating their students by removing the necessary in-school ingredient for a constitutional education -- quality teachers.

FIRST CAUSE OF ACTION
Education Clause Violation

114. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

115. The Education Clause requires that the State provide a "thorough and efficient" system of education to New Jersey's primary and secondary school students. In doing so, the Education Clause confers an individual right in those students to an effective education.

116. The quality-blind layoff statute, however, requires school districts conducting reductions-in-force to disregard teacher quality when deciding which teachers to lay off and, instead, requires districts to lay off teachers based upon seniority alone. Additionally, it mandates that subsequent vacancies in the district be filled in accordance with quality-blind, seniority-based eligibility. This policy has required, and will continue to require, Newark and other similarly situated districts to retain ineffective teachers while laying off effective teachers, with the effect of depriving students in those districts of a constitutionally guaranteed effective education.

117. Therefore, Defendants, by enforcing the quality-blind layoff statute in Newark and similarly situated districts, have violated the Education Clause and are not providing the mandated thorough and efficient public education to Plaintiffs and children similarly situated to them.

118. Enforcement of this statute must be enjoined in Newark and all similarly situated districts.

SECOND CAUSE OF ACTION

Equal Protection Violation

119. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

120. Article I, Paragraph 1 of the New Jersey Constitution grants individuals the right to the equal protection of the law.

121. The quality-blind layoff statute disproportionately affects students attending school districts like Newark, which primarily serves children of color who live in areas of concentrated poverty, like Plaintiffs, who have a fundamental right guaranteeing them to a thorough and efficient education set forth by the Constitution and the rulings of the New Jersey Supreme Court.

122. The LIFO statute impinges on the children's constitutional right to a thorough and efficient education as this constitutional right is inextricably linked to the retention of effective teachers.

123. It is arbitrary to deny these children their fundamental right to a thorough and efficient education by requiring districts to retain, terminate, and hire teachers based solely on intra-district seniority, and not their effectiveness or quality or even their actual years of teaching experience.

124. These layoffs will occur and continue to occur in poor, urban areas with high populations of children of color, such as Newark, and will be comparatively rare in wealthier, whiter, suburban districts, such as Summit.

125. Accordingly, Plaintiffs and similarly situated children attending districts such as Newark are disproportionately and adversely harmed by the quality-blind layoff mandate of N.J.S.A. 18A:28-10 and 18A:28-12.

126. The harm to Plaintiffs and children attending schools in districts like Newark results from the denial of an equal opportunity to receive a thorough and efficient education, which is a fundamental right, is profound, and outweighs any governmental interest that may support the quality-blind layoff statute.

127. Because the quality-blind layoff statute as applied disproportionately impacts Plaintiffs and similarly situated students, the statute violates the equal protection principles embodied in Article I, Paragraph 1 of the New Jersey Constitution.

128. The statute must therefore be declared unconstitutional and its enforcement enjoined as applied to Newark and all similarly situated school districts.

THIRD CAUSE OF ACTION
Due Process Violation

129. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

130. Article I, Paragraph 1 of the New Jersey Constitution grants individuals protection against government deprivation of their interests in life, liberty, or property.

131. The Education Clause grants every New Jersey child a right to and an interest in a thorough and efficient education. Art. VIII, Sect. IV. Moreover, New Jersey statutory law grants to all children the right to attend primary and secondary school. *See* N.J.S.A. 18A:38-25.

132. Accordingly, under the State Constitution, State statutes, and case law interpreting the New Jersey Constitution and State statutes, a thorough and efficient education is guaranteed to be provided by public school districts to such primary and secondary school students as Plaintiffs, and it is deemed to be a fundamental right.

133. By requiring school districts to reduce their teacher workforces on the basis of intra-district seniority alone, and without any regard to teacher performance, the quality-blind

layoff statute deprives Plaintiffs and similarly situated schoolchildren of their fundamental right to a thorough and efficient education.

134. No rational governmental interest justifies this deprivation.

135. Therefore, Defendants' enforcement of the quality-blind layoff statute is unconstitutional, as it violates the due process principles of Article I, Paragraph 1 of the New Jersey Constitution and must be enjoined in Newark and all similarly situated school districts throughout the State.

FOURTH CAUSE OF ACTION
Civil Rights Act Violation

136. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

137. The New Jersey Civil Rights Act grants individuals the right to be free of deprivations by public officials of substantive rights secured by the laws or Constitution of New Jersey. *See* N.J.S.A. 10:6-2, *et seq.*

138. The New Jersey Constitution grants Plaintiffs and similarly situated students the substantive rights to a thorough and efficient education, equal protection under the law, and substantive due process.

139. By enforcing the quality-blind layoff statute, Defendants, acting under color of law, have violated the New Jersey Civil Rights Act. Therefore, Defendants' enforcement of the quality-blind layoff statute in Newark and similarly situated districts must be enjoined.

FIFTH CAUSE OF ACTION
Declaratory Judgment

140. Plaintiffs re-allege and incorporate by reference the preceding allegations in the foregoing paragraphs as if fully set forth here.

141. Plaintiffs seek relief under the New Jersey Declaratory Judgment Act, N.J.S.A. 2A:16-50 *et seq*. This act allows parties to sue for a judicial declaration in order to declare and settle the rights and obligations of the parties.

142. As alleged in the preceding counts and the general allegations above, the Education Clause of the New Jersey Constitution requires that the State provide a "thorough and efficient" education; Article I, Paragraph 1 of the New Jersey Constitution grants individuals the right to the equal protection of the law; and Article I, Paragraph 1 of the New Jersey Constitution protects individuals from the unwarranted deprivation of certain fundamental rights, including the right to an effective education.

143. Each of these constitutional rights is being and will in the future again be violated by the application of the LIFO statute in Newark and other similarly situated districts. The quality-blind layoff statute requires school districts conducting reductions-in-force to disregard quality in laying off teachers, instead mandating that these districts implement reductions-in-force based upon seniority alone. This policy has required and will require Newark and other similarly situated districts to retain ineffective and less-effective teachers, to the profound detriment of the Plaintiffs and other schoolchildren in those districts.

144. The quality-blind layoff statute deprives Plaintiffs and other similarly situated children in Newark and other similarly situated districts of their fundamental right to a thorough and efficient education, equal protection of the law, and the fundamental right to an education. Plaintiffs therefore seek a declaratory judgment that the application of the LIFO statute is unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against Defendants, as follows:

145. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, violates the Education Clause of the New Jersey Constitution as applied to Newark and similarly situated school districts throughout the State;

146. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, violates the Equal Protection principles of Article I, Paragraph 1 of the New Jersey Constitution as applied to Newark and similarly situated school districts throughout the State;

147. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, violates fundamental rights protected by the New Jersey Constitution as applied to Newark and similarly situated school districts throughout the State, and deprives children within those districts of their due process rights;

148. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, as applied to Newark and similarly situated school districts throughout the State, violates the New Jersey Civil Rights Act;

149. Permanently enjoining Defendants from enforcing the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, or any law or policy substantially similar to this statute in Newark and any similarly situated school district throughout the State;

150. Awarding Plaintiffs legal fees and costs of suit, under the New Jersey Civil Rights Act and otherwise; and

151. Awarding any and all such other relief as deemed just and warranted.

Dated: November 1, 2016

By: _____

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RULE 4:5-1 CERTIFICATION

I. William H. Trousdale, Esq., certify pursuant to Rule 4:5-1 that, to the best of my knowledge, information, and belief, the matter in controversy is not the subject of any other action or arbitration proceeding, now or contemplated, other than the Abbott v. Burke litigation (078257), and that no other parties should be joined in this action pursuant to Rule 4:28.

Dated: November 1, 2016

By: _____

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RAYMOND ARTHUR ABBOTT, et al., Plaintiffs, v. FRED G. BURKE, et al., Defendants.	SUPREME COURT OF NEW JERSEY DOCKET NO. CIVIL ACTION **CERTIFICATION OF SUPERINTENDENT CHRISTOPHER CERF**

I, Christopher Cerf, of full age, hereby certify that:

1. I am the State District Superintendent for the Newark Public Schools ("NPS") in the State of New Jersey, and have held this position since July 2015.

2. Prior to becoming Superintendent in Newark, I was the New Jersey Commissioner of Education, from 2011 to 2014. Prior to that, from 2004 to 2009, I served as deputy New York City schools chancellor in charge of human capital, strategy, and innovation.

3. NPS is the largest and one of the oldest school districts in New Jersey, consisting of 66 schools and serving approximately 35,000 children from pre-K through grade 12. The district's students are diverse, including 16,467 African-American, 272 Asian, 2,758 Caucasian, 15,673 Hispanic, and 158 Native American or Pacific Islander students. We serve almost 3,500 English Language Learner students, over 6100 students with disabilities, and more than 26,236 students who receive free or reduced lunch.

4. Historically, NPS students have underperformed academically compared to their peers in suburban districts. This past year, students gained 6 percentage points in English Language Arts (ELA) and almost 3 percentage points in mathematics on the state assessment. However, in absolute terms, NPS significantly lags behind the state average. The same is true with respect to graduation rates. Over the past five years, the district has increased its graduation rate from 61% to 70%. Despite this progress, the district lags behind the state average in this metric as well.

5. The financial constraints under which the district operates are severe and are projected only to get worse. The district has faced significant budget cuts in recent years, closing almost $150 million in projected gaps over the past two years alone. The state is debating a change in our funding

formula that could result in further cuts to our funding. However, whether or not these additional cuts occur, the district is faced with another $60 million gap for the 2017-18 school years.

6. The largest component of any district's budget is its personnel. Almost 90% of any school's budget in Newark is tied up in salaries. Since 2012, we have gradually reduced the size of our teaching force from 3200 to 2700 classroom teachers.

7. If we are forced to further reduce the size of our teaching population due to budget cuts, under the "last in first out" ("LIFO") statute, N.J.S.A. 18A:28-10, the district must reduce its teaching staff through a reduction in force (RIF) that is indifferent to the effectiveness of a teacher. Specifically, a RIF must be conducted based only on seniority, which is defined by the regulations as based on tenured status and years of service in the district. Teachers with more years of experience have rights to their job over less senior teachers, regardless of their effectiveness.

8. The consequences of a RIF that only uses years of service as a determinant of who stays are counter to the core mission of providing a Thorough and Efficient education to our children. The results of a RIF that is blind to the effectiveness of our educators would be profound.

9. The effectiveness of a teacher is the single greatest in-school determinant of a child's academic success. The students of Newark need truly the best teachers to help them on their road to success in college and career. The majority of NPS teachers are effective. In the 2015/2016 school year, 14% of NPS teachers were rated as highly effective and 75% were rated as effective.

10. On its face, a law that says you must preserve the job of a less effective teacher and fire an indisputably more effective teacher simply because of their years of service flies in the face of good public policy and cannot be reconciled with the goal that we put children first.

11. The "LIFO" rule has already affected the district for years, even before our more severe budget cuts of the recent past. In 2012, NPS established a policy that all displaced teachers in the district must apply for, interview, and secure a placement at a school site that both the teacher and school leader agree is a good fit. (Typically, teachers have been displaced because their positions were eliminated as a result of budget cuts, school closures or school redesigns.)

12. A common practice in many districts is to force displaced teachers into schools' vacancies regardless of their fit for the position. But, as part of its effort to ensure that all Newark students have high-quality teachers, NPS has made it

a priority to fill vacancies by a "mutual consent" process whenever possible. Such a process assures that principals and teachers mutually agree to a placement to ensure that each school employs teachers who are the right fit for the students and culture of that school. Holding principals accountable for academic outcomes when they are prevented from selecting the teachers who deliver them is both unfair and irrational. By the same token, assigning a teacher to a school where the culture and fit is poor is equally unfair.

13. Some teachers have been unable to secure a placement through this mutual consent process. Because of the current seniority rules and tenure considerations, the district must retain these teachers at a cost of their full salary and benefits. (Employment rights run to the district as a whole, not the school.) NPS had a practice of not placing ineffective teachers who had not received a permanent role as the teacher of record in a classroom in order to prevent causing academic harm to students. Instead, these ineffective teachers and any teacher that could not otherwise be placed were given other assignments.

14. A consequence of this staffing policy - which was designed to afford the best education for students - was that the district was paying more than $35 million at its peak to pay for individuals who no school in the district had chosen to hire.

15. Unfortunately, starting in 2015, the district could no longer afford to carry these teachers as additional support given our dire financial situation. So, to the detriment of students and to avoid the untenable financial impact of carrying the cost of these teachers, the district had no choice but to assign these teachers to schools that did not select them. Instead of allowing our principals to select and form a staff who share a common vision, the district has now had to force staff into schools. In 2016-17, while we are still carrying almost $10million in teachers who were not able to secure a role in the district, we also had to place $25million worth of teachers into vacancies at schools. These staff may not share the vision of the leader, may not share the vision of their colleagues in classrooms, and simply put, may not be a good fit for the school or its students.

16. In addition to hurting the schools' chances at success, a second consequence of this is that our principals cannot go out and hire the best and brightest for their schools. If they need an elementary teacher, they must take one from the district's available pool, even if the only ones available are partially effective or ineffective teachers, because we have an excess number of elementary teachers. If they need a Spanish teacher, they cannot hire the one from a neighboring district that has demonstrated tremendous gains—they must select from the

individuals within the district who no school selected during the hiring process.

17. For the reasons outlined above, the consequences for the LIFO policy have been extremely limiting and harsh already. For that reason, the district requested regulatory relief from the LIFO policy in 2014 in the form of an equivalency application to the New Jersey Department of Education. As remains true today, the district was "in the untenable position of having to choose between balancing its budget and ensuring students have the most effective teachers possible." In fact, the looming prospect of severe additional budget cuts makes this request of relief even more urgent today.

18. If NPS were to conduct a RIF, the LIFO statute would require NPS to terminate effective teachers and retain ineffective teachers who have more years of experience. The LIFO Statute requires that the RIF be conducted without any regard to teacher quality. When NPS was considering conducting a large-scale teacher RIF in 2014, it ran a model to show what the results of the RIF conducted pursuant to LIFO would have been. The model revealed that in a quality-blind RIF that followed the LIFO statute, only 4% of the teachers laid off would be rated as ineffective. Conversely, three-quarters of the teachers who were predicted to be laid off in this model were effective or highly effective. The RIF would have forced the district to cut more

than 300 of its effective or highly effective teachers while retaining 72% of the district's lowest-rated teachers. The effects would be wide-spread across the district—over half of the district's schools would have lost 20% or more of their effective or highly effective teachers. This would be especially damaging for NPS' lowest-performing schools, where NPS intentionally hired successful teachers to encourage progress in the school.

19. Under N.J.S.A. 18A:28-12, even if we were granted the ability to conduct a RIF based on quality, the exited teachers would remain on a "special re-employment" or recall list in perpetuity. Thus, even after exiting ineffective teachers in a RIF, NPS would still be prevented from filling vacancies with talented, out-of-district teachers because NPS would be required to first draw from the recall list, even if the teachers on that list had less than effective ratings.

20. For all of these reasons, the district has sought to avoid a RIF at any cost, due to the damaging effects on schools. As such, NPS continues to employ more teachers than are needed because the children in NPS's schools simply cannot afford to lose the outstanding teachers currently serving them.

21. The district has already pursued every other available avenue to close the budget gap. For instance, the district just experienced the pain of a RIF based on "LIFO" for other

instructional staff. In June 2016 the district for the first time did a RIF of nine guidance counselors and six librarians. This RIF, which saved the district almost $1.5million, was based solely on seniority. The district was forced to lay off very talented people who we would have otherwise retained, if it were not for the seniority provisions of LIFO.

22. The district has aggressively pursued every other available avenue to exit our lowest-performing teachers. The Tenure Act, N.J.S.A. 18A:28-1 et seq., as modified by TEACHNJ, N.J.S.A. 18A:6-117 and the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10, sets forth a procedure for exiting teachers who receive ratings below effective after two or three years. NPS has aggressively and consistently followed this process, bringing more than 200 teachers up on tenure charges over the past four years,orders of magnitude more than any other district in the State.

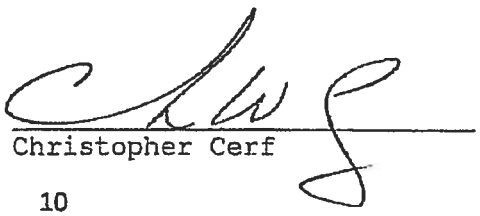
23. However, proceeding under TEACHNJ and the Tenure Employees Hearing Law does not provide sufficient relief from the problems outlined above. Removing teachers through a tenure charge is a time-consuming and cost-intensive process that takes at least two years of intensive supports for and documentation of the teacher, followed by legal proceedings that may take over a year and cost the district more than $50,000. The district has and will continue to pursue this avenue. But a three- to four-

year process for a single teacher does not provide the necessary and time-sensitive relief that is called for in RIF of many teachers.

24. The "LIFO" statute, N.J.S.A. 18A:28-10, does not differentiate among teachers on any basis other than seniority. Without question, a district that is forced to keep teachers that will not improve student performance, suffers an impediment to a Thorough and Efficient education.

25. NPS schools are making great strides to meet the constitutionally mandated Thorough and Efficient education requirement for all children in the District. Even without any additional cuts to the district's funding, we have been hampered by statutory restrictions that essentially protect the interests of adults over the rights of the children of Newark. As this Court has recognized, we must do everything we can to create an environment where these children can learn effectively in order to create a pathway to success in school and in life. The most important way to make that happen is to ensure we are able to retain our best teachers in the Newark Public Schools.

I hereby certify that the statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.



Christopher Cerf

Dated: August 23, 2016

EXHIBIT

C

RAYMOND ARTHUR ABBOTT, et al., Plaintiffs, v. FRED G. BURKE, et al., Defendants.	SUPREME COURT OF NEW JERSEY Docket No.: 078257 Civil Action

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

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TABLE OF AUTHORITIES

Page(s)

Cases:

Abbott v. Burke,
119 N.J. 287 (1990) 21

Abbott v. Burke,
136 N.J. 444 (1994) 21

Abbott v. Burke,
149 N.J. 145 (1997) 21

Abbott v. Burke,
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Abbott v. Burke,
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ACLU of N.J., Inc. v. Cnty. Of Hudson,
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Asbury Park v. Asbury Park Towers,
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Meehan v. K.D. Partners, L.P.,
317 N.J. Super. 563 (App. Div. 1998) 16

N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp,
2015 WL 10015127
(N.J. Sup. Ct. Law Div. July 13, 2005) 20

State v. Costello,
59 N.J. 334 (1971) 19

Constitution, Statutes And Rules:

N.J. Const. Art. VIII, Sect. IV 1

N.J.S.A. 18A:28-10 ..... 3, 8

N.J.S.A. 18A:28-12 ..... 3, 8

N.J.A.C. 6A:32-5.1 ..... 9, 10

Other Authorities:

Frank Adamson & Linda Darling-Hammond, Speaking of Salaries: What It Will Take To Get Qualified, Effective Teachers in All Communities, Center for Am. Progress, https://cdn.americanprogress.org/wp-content/uploads/issues/2011/05/pdf/teacher_salary.pdf. 12, 13

Camden City Schools, Annual Report (Jan. 8, 2014), http://www.state.nj.us/education/sboe/meetings/2014/January/public/Powerpoint_Camden.ppt 6

Christopher D. Cerf, N.J. Dep't of Educ., Division of Educational Programs and Assessment, New Jersey's Plan for Meeting the Highly Qualified Teacher Goal (rev'd 2011), http://www.state.nj.us/education/archive/data/hqt/06/plan.pdf 13

Raj Chetty, John N. Friedman & Jonah E. Rockoff, The Long-Term Impacts of Teachers: Teacher Value Added and Student Outcomes in Adulthood(Nat'l Bureau of Econ. Research, Working Paper No. 17699, 2011), http://www.nber.org/papers/w17699.pdf 12, 17

Bryan C. Hassel & Emily Ayscue Hassel, Opportunity at the Top: How America's Best Teachers Could Close the Gaps, Raise the Bar, and Keep Our Nation Great, Opportunity Culture (2010), http://www.opportunityculture.org/images/stories/opportunity_at_the_top-public_impact.pdf.....13, 14

Amy M. Hightower, et al., Improving Student Learning By Supporting Quality Teaching: Key Issues, Effective Strategies, Editorial Projects in Educ. Research Center,(2011), http://www.edweek.org/media/eperc_qualityteaching_12.11.pdf 12

N.J. Department of Education, 2012, 2013, 2014 and 2015, http://www.nj.gov/education/data/grate/2015/ 5

N.J. Department of Education, 2015 Adjusted Cohort 4 Year Graduation Rates, www.state.nj.us/education/data/grate/2015/ 14

N.J. Department of Education, N.J. Performance Report for First Avenue School: 2014-2015 School Year, 3, http://www.nj.gov/education/pr/1415/13/133570410.pdf 7

N.J. Department of Education, N.J. School Performance Report: Eagle Academy for Young Men of Newark, 3, http://www.nj.gov/education/pr/1415/13/133570307.pdf 8

N.J. Department of Education, N.J. School Performance Report: East Side High School: 2014-2015 School Year, 3, http://www.nj.gov/education/pr/1415/13/133570040.pdf 8

N.J. Department of Education, N.J. School Performance Report: Fourteenth Avenue School: 2014-2015 School Year, http://www.nj.gov/education/pr/1415/13/133570420.pdf 7

N.J. Department of Education, N.J. School Performance Report: Hawkins Street School: 2014-2015 School Year, 29, http://www.nj.gov/education/pr/1415/13/133570460.pdf 6

N.J. Department of Education, N.J. School Performance Report: Speedway Avenue School: 2014-2015 School Year, http://www.nj.gov/education/pr/1415/13/133570690.pdf 7

N.J. Department of Education, Staff Evaluation 2013-14, www.state.nj.us/education/data/staff 9

N.J. Department of Education, New Jersey Statewide Assessment Reports - Grade 8 - English Language Arts, http://www.nj.gov/education/schools/achievement/15/parcc/excel.htm 5

N.J. Department of Education, New Jersey Statewide Assessment Reports - Grade 8 - Mathematics, http://www.nj.gov/education/schools/achievement/15/parcc/excel.htm 5

Newark Public Schools, Assessment of District Progress (2015), http://content.nps.k12.nj.us/wp-content/uploads/2015/03/Newark-Board-of-Education-District-Assessment-2015.pdf 11

Newark Public Schools, Memorandum in Support of Equivalency Application (Feb. 21, 2014), http://www.edweek.org/media/waiver_request.pdf 11

Newark Public Schools, Overview of Equivalency Request: Protecting Our Best Teachers During a Fiscal Crisis (2014), http://content.nps.k12.nj.us/wp-content/uploads/2014/08/Overview_of_Equivalency_February_2014_FINAL.pdf 10

Stephen Stirling, How Christie's Controversial School Aid Plan Could Impact You (Jun. 22, 2016), http://www.nj.com/education/2016/06/how_christies_school_aid_proposal_could_impact_your_district.html 15

PRELIMINARY STATEMENT

This Court has long protected the opportunity for New Jersey children to achieve pursuant to the constitutional requirement for a "thorough and efficient system of free public schools for the instruction of all the children in the State." N.J. Const. Art. VIII, Sect. IV, ¶ 1 (the "Education Clause"). To date, the Court has focused on the essential need to ensure adequate funding for 31 at-risk School Development Authority ("SDA") districts, and has not yet addressed the important role that high-quality teachers play in the lives of these students. The State has now placed this issue before the Court, creating a false dichotomy between current funding structures and the need to eliminate an unconstitutional obstacle to the hiring and retention of high-quality teachers.

In order to provide this Court with the perspective of New Jersey parents who earnestly want their children to learn, the parents identified herein seek to intervene to request the elimination of New Jersey's last-in, first-out ("LIFO") statutes in the Newark Public Schools District ("Newark"), and other similarly situated districts, while preserving the essential gains that have flowed from the Abbott decisions.[1] The LIFO

[1] The Movants-Intervenors are Tanisha Garner, on behalf of her children H.G. and F.G.; Noemí Vazquez, on behalf of her children M.P., E.P. and F.D.; Fareeah Harris, on behalf of her children N.H. and J.H.; Shonda Allen, on behalf of her child J.H.; Iris Smith, on behalf of her children O.J. and M.R.; and Wendy Soto,

statutes require that districts facing a reduction-in-force ("RIF") must lay off and re-hire teachers in order of seniority, ignoring quality. These statutes have a substantial, unconstitutional impact on the students in Newark and similarly situated districts. Numerous studies have shown that teacher quality is the most important in-school factor affecting the quality of students' education. Students with low-quality, ineffective teachers, in the long run, are less likely to graduate from high school, attend college, have good jobs and strong earnings, and avoid becoming teenage parents.

The remedy is simple: declare the statutes unconstitutional and allow the SDA districts to factor in teacher quality when making retention and termination decisions. There is no need to eliminate the progress that the Abbott cases have achieved by defunding the SDA districts as well.

Yet the State attempts to do just that. Movants-Intervenors have a unique perspective essential to the just adjudication of this phase of the Abbott case. These Newark parents are raising children who would be directly impacted by a ruling from this Court on the LIFO issue. In order to protect their interests-the elimination of the LIFO statutes without defunding their school district-these parents seek to intervene

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on behalf of her children Z.S. and D.S. All of the children attend schools in Newark.

in connection with the State's motion to modify the mandates of prior Abbott decisions.

PROCEDURAL HISTORY

Since 1985, the Abbott line of cases have established this Court's expectations of a constitutional educational scheme for children in the SDA districts. However, no record has been presented regarding the effect of the LIFO statutes, N.J.S.A. 18A:28-10 and 18A:28-12 (together, the "LIFO Statute"), on students within the SDA districts. Nor has the Court been asked to consider the constitutionality of the LIFO Statute.

In September, the State filed a motion ("2016 Abbott Filing") seeking to modify this Court's prior decisions in Abbott v. Burke, 199 N.J. 140 (2009) (Abbott XX) and Abbott v. Burke, 206 N.J. 332 (2011) (Abbott XXI), which mandated specific funding formulas for the SDA districts. In seeking relief, the State also requested that the Court grant, among other things, the Education Commissioner the authority to waive the LIFO Statute in the SDA districts. The State did not seek a ruling permanently enjoining enforcement of the LIFO Statute in the SDA districts on the basis that it is unconstitutional, but instead sought a flexible remedy exercised at the Commissioner's discretion. See Memorandum of Law on Behalf of Defendants' Motion for Modification of Abbott XX and Abbott XXI (Sept. 25, 2016) at 64, 80 ("Therefore, as applied in certain

circumstances, the Commissioner should be permitted to waive or suspend these provisions in those cases, but otherwise preserve the Act" and requesting ability for Commissioner to decide, in exercising her discretion, as to what statutory or contractual provisions would be waived) (emphasis added).

On November 1, 2016, Movants-Intervenors, on behalf of their children, filed a Complaint in the Superior Court of the State of New Jersey, Law Division: Mercer County, seeking a ruling that the LIFO Statute is unconstitutional and permanently enjoining its enforcement in Newark and other similarly situated districts. See Complaint (attached hereto as Exhibit A). In the trial court, Movants-Intervenors will make a record evidencing the multiple ways in which the LIFO Statute violates the constitutional right to a thorough and efficient education. Given the overlap in issues, Movants-Intervenors seek to intervene to ensure that their voices are heard on the LIFO Statute if this Court considers the issue and to make clear that the harm from the LIFO Statute can only be stopped if it is permanently enjoined, and not left to the State's discretion.

FACTUAL BACKGROUND

Movants-Intervenors

Movants-Intervenors are parents appearing on behalf of their children, all Newark students. They represent the interests of parents of the children affected by the LIFO

Statute, who are primarily located in SDA districts such as Newark. Movants-Intervenors must be vigilant to ensure their children receive the high-quality education and opportunities that all N.J. children are guaranteed under the Constitution.

The Newark School District

Newark is a struggling school district. The long-term harm suffered by students in Newark as a result of their deficient in-school educational experiences is devastating. Only approximately 50% of Newark's eighth-graders meet the State's minimum proficiency for literacy, and approximately 60% of eighth graders in Newark do not meet the minimum proficiency for mathematics.[2] At the high school level, almost one-third of Newark students fail to graduate.[3] Almost half of the high school students in Newark failed the State's high school proficiency assessment in math, and over 20% failed the assessment for language arts.

Only 19% of Newark's students are on track to be ready for college and post-secondary careers. Of those who do graduate

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[2] See N.J. Department of Education, New Jersey Statewide Assessment Reports - Grade 8 - English Language Arts, row 5157, http://www.nj.gov/education/schools/achievement/15/parcc/excel.htm (last visited Oct. 27, 2016); N.J. Department of Education, New Jersey Statewide Assessment Reports - Grade 8 - Mathematics, row 4957, http://www.nj.gov/education/schools/achievement/15/parcc/excel.htm.

[3] See N.J. Department of Education, 2012, 2013, 2014 and 2015 Adjusted Cohort 4 Year Graduation Rates, row 244, http://www.nj.gov/education/data/grate/2015/.

and go on to post-secondary education, virtually all require remedial work before they can obtain credits that count toward a college degree. Movants-Intervenors' struggles in obtaining an effective education at their schools mirror the struggles facing other parents in districts like Newark throughout the State.[4]

H.G., F.G., and F.D. currently attend the Hawkins Street Elementary School ("Hawkins"). In the 2014-2015 school year, 94.3% of the students attending Hawkins were considered to be economically disadvantaged.[5] 82% of Hawkins students did not meet the State's grade-level expectations in language arts, and 90% did not meet the State's grade-level expectations in math.[6]

Similarly shocking statistics exist for the schools that the children of other Movants-Intervenors attend, all of which educate a majority of economically disadvantaged students. W.H. and N.H. attend Luis Muñoz Marín Elementary School ("Marín") in Newark. For the 2014-2015 school year, 12% and 10% of children at Marín received an education in language arts and math, respectively, that met or exceeded the State's grade level expectations. These results place Marín in the bottom 5% of

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[4] For example, less than 1% of Camden School District ("Camden") graduates are ready for college and careers. Camden City Schools, Annual Report, 23 (Jan. 8, 2014), http://www.state.nj.us/education/sboe/meetings/2014/January/public/Powerpoint_Camden.ppt.

[5] See N.J. Department of Education, N.J. School Performance Report: Hawkins Street School: 2014-2015 School Year, 29, http://www.nj.gov/education/pr/1415/13/133570460.pdf.

[6] Id. at 3.

elementary schools in the State. M.P., O.J., and M.R. attend either the Fourteenth Avenue School or Speedway Avenue School in Newark. At both schools, the vast majority of students fail to meet the minimum grade-level expectations set by the State in either math or language arts.[7] Z.S. and D.S. attend the First Avenue School in Newark, at which less than half of the students met or exceeded the State's grade-level expectations.[8] Further, Z.S. has been diagnosed with dyslexia, and it is a struggle to have the school institute the appropriate educational plan to address this disability. At the First Avenue School, only 17.6% of children with a disability met the State standards.[9]

High school students E.P. and J.H. attend East Side High School and Eagle Academy for Young Men of Newark, respectively.

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[7] See N.J. Department of Education, N.J. School Performance Report: Fourteenth Avenue School: 2014-2015 School Year, 3, http://www.nj.gov/education/pr/1415/13/133570420.pdf (18% and 12% of students at Fourteenth Avenue School meet or exceed grade level expectations in language arts and math, respectively); see N.J. Department of Education, N.J. School Performance Report: Speedway Avenue School: 2014-2015 School Year, 3, http://www.nj.gov/education/pr/1415/13/133570690.pdf (11% and 8% of students at Speedway Avenue meet or exceed grade level expectations in language arts and math, respectively).

[8] See N.J. Department of Education, N.J. Performance Report for First Avenue School: 2014-2015 School Year, 3, http://www.nj.gov/education/pr/1415/13/133570410.pdf (41% and 44% of students met or exceeded grade-level expectations in language arts and math, respectively).

[9] Id. at 4.

Almost 90% of students at each high school do not meet the State's grade level expectations in language arts or math.[10]

In light of the struggles facing the district, Newark cannot afford to lose even one effective teacher. Yet this is precisely what will occur under the LIFO Statute if the judiciary does not step in.

The LIFO Statute

The LIFO Statute requires that, when there is a RIF within a district, the district must dismiss teachers solely on the basis of seniority. N.J.S.A. 18A:28-10. Quality must not be considered.

If a teacher is laid off due to a RIF, the teacher is placed on a preferred eligibility list set solely on the basis of seniority. N.J.S.A. 18A:28-12. Again, quality must not be considered. With the exception of veterans, seniority is set by the number of years the teacher has spent working within the district where the RIF is occurring. In the event that the district seeks to hire more teachers, teachers on the preferred eligibility list must be offered positions in the order they

[10] See N.J. Department of Education, N.J. School Performance Report: East Side High School: 2014-2015 School Year, 3, http://www.nj.gov/education/pr/1415/13/133570040.pdf (13% and 6% of students at East Side High School met or exceeded grade-level expectations in language arts and math, respectively); N.J. Department of Education, N.J. School Performance Report: Eagle Academy for Young Men of Newark, 3, http://www.nj.gov/education/pr/1415/13/133570307.pdf (10% and 8% of students at Eagle Academy met or exceeded grade-level expectations in language arts and math, respectively).

appear on the list for a particular job. Quality is not considered, and teachers who are not included on the list cannot be offered the job before those on the list.

New Jersey requires that public school teachers be evaluated based on multiple factors (including student learning and teacher practice) and rated as "ineffective," "partially effective," "effective," and "highly effective." Recently, the N.J. Department of Education provided state- and district-level educator evaluation data, which showed that almost half of the ineffective teachers and 10% of the partially effective teachers in the State worked in Newark at the time the evaluations were completed.[11] Poor teacher quality, without reference to seniority, adversely impacts students in Newark.

Consequently, Newark is faced with a difficult choice, impacting every student in the district: (i) lay off less senior, effective teachers while retaining ineffective, more senior teachers or (ii) avoid RIFs through other measures.

Newark's 2014 Unanswered Effort to Waive the Requirement for Quality-Blind Layoffs

In February 2014, Newark submitted an application to the Commissioner requesting a temporary reprieve from quality-blind layoffs in the form of an equivalency request under N.J.A.C.

[11] See N.J. Department of Education, Staff Evaluation 2013-14, row 1288, www.state.nj.us/education/data/staff (94 of 205 teachers reported as ineffective within New Jersey were working in Newark).

6A:32-5.1 (the "Equivalency Request").[12] The request was driven by declining enrollment in Newark, which resulted in the loss of almost $200 million in education funding.[13] This forced a difficult choice upon the district about what to do with its limited resources, especially given that almost 90% of an individual school's budget is salaries.

In the Equivalency Request, Newark set forth data from a simulation utilizing data from its teaching staff to demonstrate the devastating impact of quality-blind layoffs on the district. Specifically, Newark showed that, under the LIFO Statute, if it were to implement layoffs, 75% of the teachers it would lay off would be considered effective or highly effective, and only 4% of the teachers laid off would be rated ineffective.[14]

The request has gone unanswered by the State, and Newark is left to either engage in quality-blind layoffs or create alternatives to instituting RIFs. Specifically, Newark, in an effort to avoid the automatic operation of the LIFO Statute, has created a pool of teachers that school principals do not want in their classrooms because of performance concerns. This pool of ineffective teachers, which is known as the Educators Without

[12] See Newark Public Schools, Overview of Equivalency Request: Protecting Our Best Teachers During a Fiscal Crisis (2014), http://content.nps.k12.nj.us/wp-content/uploads/2014/08/Overview_of_Equivalency_February_2014_FINAL.pdf.

[13] See id. at 1.

[14] See id. at 2.

Placement Sites ("EWPS") pool, is unsustainable. During the 2013-2014 school year, there were 271 teachers in the pool, costing the district approximately $22.5 million dollars to keep those teachers on the district's payroll.[15] 70% of the individuals within the pool were teachers with ten or more years of experience.[16] In 2015, due to budget constraints, Newark could not keep these teachers out of the districts' schools. For the 2016-2017 school year, Newark was forced to place teachers from the pool into classrooms, representing $25 million in teacher salaries, while $10 million in teacher salaries still remained in the pool.[17] Shockingly, these ineffective teachers-if there were to be a RIF-would be protected from layoffs due to their seniority. Less senior, more effective teachers would be pulled from classrooms and laid off instead.

Therefore, either enforcing the LIFO Statute or trying to work around the statute in an effort to retain effective teachers results in severe, irreparable harm to Newark students. Thousands will directly suffer the lifelong impact of ineffective teachers, and all will suffer from budget cuts in

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[15] Newark Public Schools, Assessment of District Progress (2015), 19, http://content.nps.k12.nj.us/wp-content/uploads/2015/03/Newark-Board-of-Education-District-Assessment-2015.pdf.

[16] See Newark Public Schools, Memorandum in Support of Equivalency Application, at 6 (Feb. 21, 2014), http://www.edweek.org/media/waiver_request.pdf.

[17] Cerf Certification, ¶ 15.

other areas that result in the loss of important educational programming and resources.

Denying these children the opportunity to learn from effective teachers has an impact on them not simply during the school year, but for the rest of their lives.

Effective Teachers are Essential for Children to Receive the Rights Conferred by the Education Clause

The effectiveness of teachers has been found to be the single most influential school-based variable in determining the adequacy of a child's education and a critical determinant of educational success.[18] One study found that replacing an ineffective teacher with a simply average teacher would increase the present value of students' lifetime income by over $250,000 per classroom-an amount reaching staggering proportions when aggregated over successive years of effective teaching.[19]

Effective teachers can have an especially large effect on closing the achievement gap across class and racial lines. According to a national study, "[b]y every measure of qualifications . . . less-qualified teachers [are] to be found in schools serving greater numbers of low-income and minority

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[18] Amy M. Hightower et al., Improving Student Learning By Supporting Quality Teaching: Key Issues, Effective Strategies, Editorial Projects in Educ. Research Center, 2 (2011), http://www.edweek.org/media/eperc_qualityteaching_12.11.pdf.

[19] Raj Chetty, John N. Friedman & Jonah E. Rockoff, The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood, 5(Nat'l Bureau of Econ. Research, Working Paper No. 17699, 2011), http://www.nber.org/papers/w17699.pdf.

students."[20] Studies show that, consistently, students of color in low-income communities are between three and ten times more likely to have unqualified teachers than students in predominantly white communities.[21]

The N.J. Department of Education found that, using a measure of effectiveness premised upon a teacher's paper qualifications (i.e. degrees, certifications, demonstrated knowledge in the subject taught), students in districts like Newark were five times more likely to be taught by teachers who did not possess even the minimum paper qualifications required by the No Child Left Behind Act.[22]

Consequently, it is no surprise that one study found that the achievement gap narrows each year a child of color is taught by an effective teacher.[23] This same study shows that, if this positive effect were to accumulate, four consecutive years with a highly effective teacher rather than a highly ineffective

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[20] Frank Adamson & Linda Darling-Hammond, Speaking of Salaries: What It Will Take To Get Qualified, Effective Teachers in All Communities, Center for Am. Progress 1, https://cdn.americanprogress.org/wp-content/uploads/issues/2011/05/pdf/teacher_salary.pdf.

[21] Id.

[22] Christopher D. Cerf, N.J. Department of Education, Division of Educational Programs and Assessment, New Jersey's Plan for Meeting the Highly Qualified Teacher Goal 2 (rev'd 2011), http://www.state.nj.us/education/archive/data/hqt/06/plan.pdf.

[23] Bryan C. Hassel & Emily Ayscue Hassel, Opportunity at the Top: How America's Best Teachers Could Close the Gaps, Raise the Bar, and Keep Our Nation Great, Opportunity Culture 2-4 (2010), http://www.opportunityculture.org/images/stories/opportunity_at_the_top-public_impact.pdf.

teacher would be sufficient alone to close the racial achievement gap between white students and their black counterparts.[24]

Graduation rates in Newark are also low compared to other districts. According to 2015 graduation data published by the N.J. Department of Education, the districtwide graduation rate from a four-year public high school in Newark was 69.59%. In comparison, the statewide graduation rate was 89.67%.[25] Moreover, within Newark, 69.39% and 69.61% of Black and Hispanic students, respectively, graduate from a four-year high school.[26] On a statewide basis, 81.51% of Black students and 82.81% of Hispanic students graduate high school,[27] which indicates that students in other districts, who learn from effective teachers, achieve greater educational success.

This sample of studies and metrics confirms what common sense suggests-quality teaching is essential for quality education.

The Interaction of The LIFO Statute and Funding

Even with the court-mandated Abbott funding, Newark faces a crippling budget deficit, prompting the need to either conduct

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[24] Id. at 3-4.

[25] See N.J. Department of Education, 2015 Adjusted Cohort 4 Year Graduation Rates, row 7707, www.state.nj.us/education/data/grate/2015/.

[26] Id. at rows 2655-56.

[27] Id. at rows 7698-99.

damaging RIFs or staff teachers from the EWPS pool of unassigned, poorly performing teachers back into classrooms while the LIFO Statute is in effect.

Moreover, reports have stated that, if the proposed funding scheme of the State referenced in 2016 Abbott Filing were to be enacted, Newark would lose almost 69% of its state aid-equivalent to a $14,502.99 loss per pupil.[28]

The continued effort by the State to cut funding to SDA districts makes it increasingly difficult for Newark to find the balance between ensuring its programs are funded and preventing effective teachers from being laid off pursuant to the LIFO Statute. On this basis, regardless of the outcome of any funding decision by the Court, Movants-Intervenors seek a decision that the LIFO Statute is unconstitutional and that the affected districts are permanently enjoined from enforcing it.

ARGUMENT

POINT ONE

MOVANTS-INTERVENORS SHOULD BE GRANTED LEAVE TO INTERVENE

Movants-Intervenors seek leave to intervene in these proceedings under R. 4:33-1 (Intervention as of Right) or R. 4:33-2 (Permissive Intervention).

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[28] See Stephen Stirling, How Christie's Controversial School Aid Plan Could Impact You, NJ.COM (Jun. 22, 2016), http://www.nj.com/education/2016/06/how_christies_school_aid_proposal_could_impact_your_district.html.

I. MOVANTS-INTERVENORS SHOULD BE ALLOWED TO INTERVENE AS OF RIGHT

There are four criteria permitting a party to intervene as of right: the movant must (i) claim "an interest relating to the property or transaction which is the subject of the transaction"; (ii) show it is "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest"; (iii) demonstrate that the movant's interest is not "adequately represented by existing parties"; and (iv) make a "timely" application to intervene. Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 568 (App. Div. 1998) (citation omitted). The rule is construed liberally and the question is whether granting the motion "unduly delay[s] or prejudice[s] the right of the original parties." Id. (citation omitted). Movants-Intervenors meet every criterion with ease.

A. Movants-Intervenors Have a Clear Interest in the Outcome of the Abbott Cases

The Abbott line of cases primarily address the constitutionality of New Jersey's method of funding education, with a focus on the SDA districts, and the ability of those districts to adequately meet the educational needs of their students as required by the State Constitution. Given that the 2016 Abbott Filing raises concerns as to the LIFO Statute, Movants-Intervenors, as plaintiffs in a trial court proceeding,

seek to protect their interests by intervening in this action. They have a clear interest in the LIFO issue now before this Court, as it has a drastic effect on the quality of their children's education and the lower court proceeding.

With the LIFO Statute still on the books, the children of Movants-Intervenors, who attend Newark Public Schools, are being deprived of their constitutional right to a "thorough and efficient" education. The dire situation in Newark led Movants-Intervenors to file a lawsuit two days ago challenging the constitutionality of the LIFO Statute, which will allow Movants-Intervenors to set forth a full evidentiary record on the unconstitutional impact of the LIFO Statute on students in Newark and similarly situated districts.[29]

As long as the LIFO Statute remains the governing law, enforcement of the statute in Newark will lower the number of quality teachers in classrooms, leading to lower test scores, lower graduation rates, lower college attendance rates, and sharply reduced lifetime earnings for Newark students.[30] Thus, as parents of Newark students, Movants-Intervenors have an evident interest in the outcome of the motion to reopen the Abbott case.

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[29] See Exhibit A.

[30] See Raj Chetty, John N. Friedman & Jonah E. Rockoff, supra note 19.

B. Movants-Intervenors' Ability to Challenge the LIFO Statute Will Be Impaired or Impeded if They Are Not Permitted to Intervene

As noted above, Movants-Intervenors have already filed a Complaint at the trial court level seeking a broader ruling than the State seeks in this Court-namely, that the LIFO Statute as applied is unconstitutional. Simultaneously pending cases in this Court and at the trial level may prevent Movants-Intervenors from being heard at either level, particularly if Movants-Intervenors' Motion to Intervene is denied and the lower court action is stayed pending a decision from this Court.

Final disposition of the LIFO issue by this Court could also foreclose all other litigation challenging the LIFO Statute, without consideration of the position of the parents of the children most directly and negatively affected by the LIFO Statute as applied in Newark. Moreover, Movants-Intervenors want the LIFO Statute permanently enjoined and declared unconstitutional as-applied in Newark, not simply waived at the Commissioner's discretion as the State has requested. If the State's request related to the LIFO Statute is granted, Movants-Intervenors face a shifting landscape where-at its sole discretion-the State may decide to let the LIFO Statute apply to some or all SDA districts in the future. This scenario is just as unconstitutional as the current application of the LIFO Statute.

For this reason, Movants-Intervenors believe it would be most appropriate for the LIFO issue to be heard at the trial level, as this Court has not yet had the opportunity to develop a record as it pertains to the LIFO Statute in the Abbott cases. See, e.g., State v. Costello, 59 N.J. 334, 344-45 (1971) (declining to address issue not previously asserted in lower courts).

Given the severity of the negative effects the LIFO Statute has on the quality of the education of their children, Movants-Intervenors want to ensure that their voices will be heard on the LIFO issue if this Court decides to entertain the State's motion. Additionally, Movants-Intervenors would like an opportunity to submit evidence on the unconstitutional impact of the LIFO Statute on students' right to a thorough and efficient education if the Court decides to hear the motion. See Abbott v. Burke, 196 N.J. 544, 565-66 (2008) (Abbott XIX) (remanding matter to Special Master as State's assertions "supported only by affidavits that are challenged by opposing affidavits" left Court "unable to resolve the matter on the present record.").

C. Movants-Intervenors' Interests Are Not Adequately Represented by the Existing Abbott Parties

Notably, the 2016 Abbott Filing was the first instance in which the constitutionality of the LIFO Statute was raised in the Abbott cases. Unlike the original Abbott plaintiffs,

Movants-Intervenors are uniquely situated because their children are directly and disproportionately affected by the application of the LIFO Statute in Newark, given the staggering statistics coupled with the number of ineffective teachers who remain on Newark's payroll by way of the EWPS pool.

Moreover, the Movants-Intervenors are not adequately represented on the LIFO issue by the State. New Jersey public officials and government agencies are generally presumed to exercise their power and discretion appropriately and therefore may adequately represent individual parties in a litigation,[31] but such a presumption should be lost here, when the State has previously exercised its discretion in ways that disadvantage districts like Newark. See Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1, 11-12 (App. Div. 2006) (showing of conduct by public entity that "evinces a derogation of its fiduciary responsibilities" may lead Court to conclude that movant-intervenor not properly represented). In the Abbott cases, the Court has consistently found that the State violated the constitutional right of children within SDA districts to a thorough and efficient education when adjusting funding formulas. See Abbott XXI, 206 N.J. at 369 (after granting State

[31] See, e.g., N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp, 2015 WL 10015127, at *9 (N.J. Sup. Ct. Law Div. July 13, 2015). Pursuant to Rule 1:36-3, a copy of the decision is provided as Exhibit B.

discretion to change funding formula, holding that State cannot deprive full School Funding Reform Act funding); Abbott v. Burke, 149 N.J. 145 (1997) (Abbott IV) (finding Comprehensive Education Improvement and Financing Act unconstitutional) Abbott v. Burke, 136 N.J. 444 (1994) (Abbott III)(finding Quality Education Act unconstitutional); Abbott v. Burke, 119 N.J. 287 (1990) (Abbott II)(finding clause 212 of Public School Education Act of 1975 unconstitutional). There is no reason to believe, on this track record, that the State could adequately represent the interests of Movants-Intervenors on the LIFO Statute.

Moreover, the relief sought by the State is too narrow on the LIFO Statute and too radical on funding. The State wants the discretion to waive, not enjoin, the LIFO Statute in the SDA Districts, including Newark. But to give power to the Commissioner to decide whether to waive on a discretionary basis does not adequately protect those who may be adversely affected by the statute, should the Commissioner decide for whatever reason not to waive. Moreover, the State also intends to cut funding further for the SDA Districts. These districts not only need effective teachers, they also need adequate funding to provide a thorough and efficient education to these students. Cutting funding to the SDA Districts would have a devastating effect on the students of Newark.

D. Movants-Intervenors' Application Is Timely

Movants-Intervenors' instant Motion for Leave to Intervene is timely. The constitutionality of the LIFO Statute has not been before the Court in the Abbott cases previously, and Movants-Intervenors' motion comes before this Court has made any ruling with respect to the State's request as to whether the State's request is appropriate or on the merits. Further, this application was filed two days after Movants-Intervenors filed their Complaint at the trial level.

For the foregoing reasons, no undue delay would occur as a result of granting the application.

II. ALTERNATIVELY, PERMISSION TO INTERVENE SHOULD BE GRANTED

Movants-Intervenors meet the standard under for permissive intervention, which is liberally construed. See ACLU of N.J., Inc. v. Cnty. Of Hudson, 352 N.J. Super. 44, 70 (App. Div. 2002) (four factors for motions to intervene under R. 4:33-2: (i) promptness of application; (ii) whether granting motion would result in further undue delay; (iii) whether granting motion would eliminate probability of subsequent litigation; and (iv) extent to which grant may further complicate litigation that is already complex).

As set forth supra in Section I.D, this application is timely and prompt. Given the timeliness of Movants-Intervenors' application, especially since the Court has not yet made any

ruling on the State's request to modify prior rulings, no undue delay would occur if the application was granted. Movants-Intervenors have already filed a Complaint at the trial court level, seeking a broader ruling than the State does here. A decision in this Court will impact that litigation. Finally, although the Abbott series of cases is complex, adding Movants-Intervenors as parties would not unduly complicate this litigation.

POINT TWO

THE COURT SHOULD NOT EVALUATE THE LIFO STATUTE WITHOUT AN EVIDENTIARY RECORD

There is no evidentiary record before the Court on the unconstitutional impact of the LIFO Statute on the children in Newark and similarly situated districts. On that basis, it would be premature for this Court to consider the State's request regarding the LIFO Statute without such a record. See, e.g., Abbott XIX, 196 N.J. at 565-66 (remanding issue of constitutionality of State's revised school funding scheme for further development of evidentiary record). One appropriate place for the State and Movants-Intervenors to set forth the record on this issue is in the trial court, where a proceeding has just been instituted by the Movants-Intervenors.

In the alternative, there could be an evidentiary hearing on the matter before this Court to establish the

unconstitutional impact of the LIFO Statute upon students in Newark. See id. at 565-66.

Draining districts like Newark of quality teachers, an inevitable result of the quality-blind nature of the LIFO Statute, removes those who are in the best position to help these students achieve their constitutionally mandated thorough and efficient education and thereby violates the N.J. Constitution on numerous fronts.

It is essential for the Court to understand that the quality of teachers in the classroom matters. As set forth in detail above, numerous studies have shown the impact a quality teacher can have on a child's life, stretching beyond that particular school year. Moreover, school superintendents and administrators view the LIFO Statute as a tremendous handicap.

This inherent handicap is especially felt in Newark, the state's largest school district. In the Equivalency Request, Newark showed the devastating impact of quality-blind layoffs: 300 of Newark's effective or highly effective teachers would be laid off, while 72% of Newark's lowest-rated teachers would remain.

As described above, being denied the opportunity to learn from an effective teacher can impact these children not simply during the school year, but for the rest of their lives. Given the number of students each of these effective or highly

effective teachers would otherwise instruct, as many as 8,000 children in Newark would miss out on a high-performing teacher each year.

The alternative to a RIF-the EWPS pool- is just as damaging to the district's children as the LIFO Statute. Almost 90% of any individual school's budget in Newark is tied to salaries, and the EWPS pool drains valuable resources from Newark and saddles the district with ineffective teachers in direct contradiction with the language of the New Jersey Constitution. Eliminating the need for the pool by enjoining the LIFO Statute would free up to $25 million from the Newark budget that could go towards educational programs, the hiring and training of teachers, and other efforts to assist Newark students achieve the opportunities promised in the Constitution.

For this reason, Movants-Intervenors seek to establish the unconstitutional impact of the LIFO Statute through an evidentiary record developed either at the trial court level or in this Court.

CONCLUSION

For the foregoing reasons, Movants respectfully request that the Court grant Movants' Motion to Intervene.

Dated: November 3, 2016

By: WT

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Of Counsel to Movants-Intervenors;
Moving for Pro Hac Vice Admission

SUPERIOR COURT OF THE STATE OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

H. G., a minor, through her guardian TANISHA GARNER; F. G., a minor, through her guardian TANISHA GARNER; E.P., a minor, through his guardian NOEMÍ VAZQUEZ; M.P., a minor, through her guardian NOEMÍ VAZQUEZ; F.D., a minor, through her guardian NOEMÍ VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through her guardian FAREEAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., a minor, through his guardian IRIS SMITH; M.R., a minor, through his guardian IRIS SMITH; Z.S., a minor, through her guardian WENDY SOTO; D.S., a minor, through his guardian WENDY SOTO;

Plaintiffs,

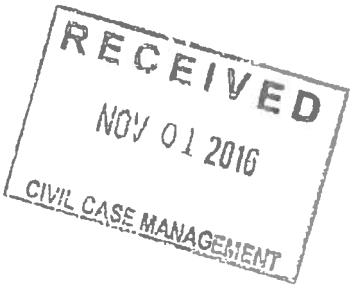
v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education; NEW JERSEY STATE BOARD OF EDUCATION; nominal defendant NEWARK PUBLIC SCHOOL DISTRICT; and nominal defendant CHRISTOPHER CERF, in his official capacity as Superintendent of the Newark School District;

Defendants.

Case No.: _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF



Plaintiffs, by their undersigned counsel, bring this civil action for declaratory judgment and injunctive relief against Defendants Kimberly Harrington, in her official capacity as Acting Commissioner of the New Jersey Department of Education; New Jersey State Board of Education; Newark Public School District; and Christopher Cerf, in his official capacity as Superintendent of the Newark Public School District, (collectively "Defendants") for injuries

caused by Defendants' unconstitutional enforcement of the State statute prohibiting school districts from considering teacher quality when they have to resort to teacher layoffs due to a budgetary deficit. N.J.S.A. 18A:28-10 and 18A:28-12. Plaintiffs hereby allege as follows:

INTRODUCTION

1. The Education Clause of the New Jersey Constitution requires the Legislature to 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." Art. VIII, Sect. IV, ¶ 1.

2. Teacher effectiveness is the most important in-school factor affecting the quality of students' education. Students with high-quality, effective teachers do not just learn better than those without effective teachers in the short run—in the long run, they are more likely to graduate from high school, more likely to attend college, more likely to have good jobs and higher lifetime earnings, and less likely to become teenage parents.

3. Yet, the Legislature has passed a law that forces school districts faced with the possibility or reality of a reduction-in-force to follow quality-blind teacher layoff and reemployment statutes, N.J.S.A. 18A:28-10 and 18A:28-12 (the "quality-blind layoff statute" or "LIFO statute"), which mandate that school districts, when executing a reduction-in-force, lay off teachers based on seniority alone, ignoring any other factor, including the teacher's effectiveness. If there is a later need to hire teachers, the district must prioritize the re-hiring of these laid off teachers in order of their seniority, not their assessed quality.

4. The children affected by the LIFO statute are primarily located in low-income districts such as the Newark Public School District ("Newark"). Parents in those districts continuously need to fight to ensure that their children receive the high-quality education and opportunities they deserve.

5. Given declining student enrollment in Newark and the corresponding decrease in state funding, the reality of LIFO in Newark forces Newark and similar districts to wrestle with two untenable options that damage every child in the district: either (i) lay off effective teachers pursuant to the mandates of the LIFO statute, while leaving ineffective teachers clustered in an already under-performing school district, or (ii) refuse to institute reductions-in-force (even when faced with decreased funding), retain ineffective teachers to save the effective and highly-effective teachers, decline to hire new teachers, and cut spending elsewhere in the district's budget.

6. Thus far, Newark has opted not to fire effective classroom teachers; instead, it has created a pool of ineffective teachers that it will not place in full-time teaching positions in order to avoid reducing the number of effective teachers instructing students within the district. This pool of ineffective teachers, which is known as the Educators Without Placement Sites ("EWPS") pool, is unsustainable. It drains millions of dollars per year from Newark's budget that could be used to hire new, effective teachers and provide other beneficial programs. This detrimental budgetary impact is especially harmful in light of the State's misguided efforts to cut education funding to the Schools Development Authority ("SDA") districts, including Newark, which would further inhibit the district's ability to provide a thorough and efficient education to these students.

7. Other school districts similarly situated to Newark are faced with this same dilemma and have implemented workarounds to avoid the harms associated with implementing reductions-in-force pursuant to LIFO.

8. Because of its harmful effects on the students in struggling school districts, the LIFO statute violates the rights of Plaintiffs guaranteed by the New Jersey Constitution,

including those guaranteed by the Education Clause, as applied to Newark and similarly situated districts because that statute operates, when a reduction-in-force is necessitated, to strip schools in these districts of effective teachers, and prevents these districts from instead laying off ineffective teachers that have greater seniority.

9. New Jersey courts have a long and admirable history of protecting the fundamental right to education in the state and ensuring that lower-income and struggling districts—known as *Abbott* or SDA districts—receive the additional funding needed to assist in meeting their constitutional mandate.

10. Ensuring adequate funding to these districts is essential, but funding alone is not sufficient to provide a thorough and efficient education to these students. They need effective teachers.

11. In these districts, of which Newark is one, this fundamental right to a thorough and efficient education requires the State to provide an education that "exceeds that needed by students in more affluent districts," according to the New Jersey Supreme Court. Yet, the LIFO statute has the perverse effect of mandating that these less affluent school districts fire junior (but effective) teachers and instead retain senior (but ineffective) teachers during reductions-in-force, violating the rights guaranteed by the Education Clause.

12. Additionally, these children are inequitably harmed in comparison to children attending other districts, given the impact of the LIFO statute in less affluent districts like Newark where recent data shows that there are higher concentrations of ineffective teachers than other districts within the state. Children in Newark and other similarly situated districts suffer greater harms from the LIFO statute than students in other districts, given that a reduction-in-force pursuant to the LIFO statute would result in the dismissal of effective teachers and the

retention of ineffective teachers. On this basis, the LIFO statute, as applied to these children, also violates their rights pursuant to the New Jersey Constitution's Equal Protection Clause.

13. Moreover, these children are being deprived of their fundamental right to a thorough and efficient education by virtue of the operation of the LIFO statute, thereby violating their rights pursuant to the Due Process Clause of the New Jersey Constitution.

14. For these reasons, Newark and other similarly situated districts need to be rid of the LIFO statute's requirements and permitted to keep effective teachers in the classroom. Laying off teachers without any consideration of their quality prohibits children from being educated in the constitutionally mandated manner.

15. By enforcing the quality-blind layoff statute, Defendants violate the constitutional and statutory rights of Plaintiffs and other students in Newark and similarly situated districts throughout the State.

16. Therefore, Plaintiffs seek a judgment declaring that the State's quality-blind layoff statute, as applied to Newark and other similarly situated districts, is unconstitutional.

17. Plaintiffs further seek injunctive relief to prevent enforcement of the LIFO statute, or any law or policy substantially similar to the LIFO statute, which would prevent Newark and other similarly situated districts from considering teacher effectiveness—regardless of seniority—when making decisions in relation to reductions-in-force.

PARTIES

18. Plaintiff Tanisha Garner is the mother of two daughters, H.G. and F.G., who currently attend Hawkins Street Elementary School ("Hawkins") in Newark. Ms. Garner sues on behalf of each of her children.

19. Plaintiff Noemí Vazquez is the mother of E.P., M.P., and F.D. E.P. currently attends East Side High School; M.P. currently attends the Fourteenth Avenue School; and F.D. currently attends Hawkins. All three schools are located in Newark. Ms. Vazquez sues on behalf of each of her children.

20. Plaintiff Fareeah Harris is the mother of W.H. and N.H., both current students at Luis Muñoz Marín Elementary School ("Marín") in Newark. Ms. Harris sues on behalf of each of her children.

21. Plaintiff Shonda Allen is the mother of J.H., a current student at the Eagle Academy for Young Men of Newark ("Eagle Academy"). Ms. Allen sues on behalf of her child.

22. Plaintiff Iris Smith is the mother of O.J. and M.R., both current students at Speedway Academies ("Speedway") in Newark. Ms. Smith sues on behalf of each of her children.

23. Plaintiff Wendy Soto is the mother of Z.S. and D.S., both current students at the First Avenue School in Newark. Ms. Soto sues on behalf of each of her children.

24. Defendant Kimberly Harrington is the Acting Commissioner of the New Jersey Department of Education ("Commissioner") and charged with enforcing the quality-blind layoff statute by creating the standards by which teachers may be laid off and ensuring that all children in New Jersey receive a constitutionally effective education.

25. Defendant New Jersey State Board of Education is charged with enforcing the quality-blind layoff statute by approving the standards set by the Commissioner, which dictate how teachers may be laid off.

26. Defendant Newark Public School District is charged with enforcing the quality-blind layoff statute when executing a reduction-in-force within the district.

27. Defendant Christopher Cerf is the Superintendent of Newark and charged with enforcing the quality-blind layoff statute when executing a reduction-in-force within the district and ensuring that all children within Newark receive a constitutionally effective education.

VENUE

28. Venue is proper in Mercer County because the cause of action arises here, where Defendants enforce the quality-blind layoff statute. R. 4:3-2(a)(2).

FACTS

THE NEWARK SCHOOL DISTRICT

29. Newark is a struggling school district, with almost one-third of Newark students failing to graduate from high school. Of those who do graduate, only approximately 10% will be ready for college and careers. The long-term harm suffered by these students as a result of their deficient in-school educational experiences is devastating.

30. Approximately 50% of Newark's eighth-graders have received an education that allows them to meet the state's minimum proficiency for literacy. Only 40% of these same eighth graders have received an education that allows them to meet the minimum proficiency standards for mathematics.

31. Newark's students are in the state's bottom 25% for literacy and bottom 10% for math.

32. For example, Plaintiffs H.G., F.G., and F.D. currently attend Hawkins.

33. In the 2014-2015 school year, 94.3% of the children attending Hawkins were considered economically disadvantaged students.[1] Only 18% of the children at Hawkins received an education that allowed them to meet or exceed the State's minimum proficiency

[1] *See* New Jersey Department of Education, *New Jersey School Performance Report: Hawkins Street School: 2014-2015 School Year*, 29, *available at* http://www.nj.gov/education/pr/1415/13/133570460.pdf.

benchmarks in language arts, and only 10% received such an education in math.[2] These results place Hawkins in the bottom 11% of elementary schools in the State.

34. Plaintiffs W.H. and N.H. currently attend Marín.

35. Similar to Hawkins, students at Marín are struggling. For the 2014-2015 school year, 12% and 10% of children at Marín received an education in language arts and math, respectively, that met or exceeded the State's grade level expectations.[3] These results place Marín in the bottom 5% of elementary schools in the State. Like Hawkins, Marín educates a large percentage of children considered to be economically disadvantaged.

36. Plaintiffs M.P., O.J., and M.R. also attend elementary schools in Newark.

37. For the 2014-2015 school year at the Fourteenth Avenue School, which M.P. attends, only 18% of students met or exceeded the grade level expectations in language arts and only 12% of students met or exceeded grade level expectations in math.[4] At Speedway, which O.J. and M.R. attend, only 11% of students met or exceeded the State's grade-level expectations in language arts, and only 8% of those students met or exceeded the State's grade-level expectations in math.[5] The majority of students at both schools are considered economically disadvantaged.

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2 *Id.* at 3.

3 *See* New Jersey Department of Education, *New Jersey School Performance Report: Luis Muñoz Marín Elementary School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570301.pdf.

4 *See* New Jersey Department of Education, *New Jersey School Performance Report: Fourteenth Avenue School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570420.pdf.

5 *See* New Jersey Department of Education, *New Jersey School Performance Report: Speedway Avenue School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570690.pdf.

38. Z.S. and D.S. both attend the First Avenue School in Newark, at which less than half of the students met or exceeded the State's grade-level expectations.[6] However, Z.S. has been diagnosed with dyslexia, and her mother continues to struggle to have the school institute the appropriate educational plan to address this disability. At the First Avenue School, only 17.6% of children with a disability met the State standards.[7]

39. The issue is not limited to Newark's elementary schools, however. Plaintiff E.P. attends East Side High School. At this high school, only 13% of students met or exceeded the State's grade-level expectations in language arts during the last school year, and only 6% of them met or exceeded expectations in math.[8] This puts East Side High School in the bottom 10% of schools in the State. About one in three students failed to graduate from East Side High School on time.[9]

40. Likewise, Plaintiff J.H. attends the Eagle Academy. Ten percent of the students at Eagle Academy met or exceeded the State's expectations in language arts, and only 8% of the students met or exceeded the State's expectations in math.[10]

41. Despite these performance issues within Newark's schools, in 2016, Newark was forced to engage in a reduction-in-force of guidance counselors and librarians. This saved the

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[6] *See* New Jersey Department of Education, *New Jersey Performance Report for First Avenue School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570410.pdf (indicating 41% of students met or exceeded grade-level expectations in language arts, and 44% met or exceeded grade-level expectations in math).

[7] *Id.* at 4.

[8] *See* New Jersey Department of Education, *New Jersey School Performance Report: East Side High School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570040.pdf.

[9] *Id.* at 17 (70% of the students graduated in four years, which is below the State's target graduation rate of 78%).

[10] *See* New Jersey Department of Education, *New Jersey School Performance Report: Eagle Academy for Young Men of Newark*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570307.pdf.

district $1.5 million, but, as it was based solely on seniority, the district was forced to terminate staff it would have retained but for the mandates of the LIFO statute. Although not the primary classroom teachers, this reduction-in-force deprived Newark students of professionals who could have positively impacted their educational experience.

NEWARK'S 2014 UNANSWERED EFFORT TO WAIVE THE REQUIREMENT FOR QUALITY-BLIND LAYOFFS

42. In February 2014, Newark submitted a request to the Commissioner seeking a temporary reprieve from quality-blind layoffs in the form of an equivalency request under N.J.A.C. 6A:32-5.1 (the "Equivalency Request").[11] The request was driven by the declining enrollment in Newark, which resulted in the loss of almost $200 million in education funding.[12] This forced a difficult choice upon the district about what to do with its limited resources.

43. The request has gone unanswered by the State, and Newark is left to either engage in quality-blind layoffs or create alternatives to instituting reductions-in-force. Either option results in harm to students within the district. They will either suffer the lifelong harms that can result from instruction by ineffective teachers or, alternatively, suffer from budget cuts in other areas that result in losses in important educational programming and resources. All of this stems from the impact of the LIFO statute.

EFFECTIVE TEACHERS ARE ESSENTIAL FOR CHILDREN TO RECEIVE THE RIGHTS CONFERRED BY THE EDUCATION CLAUSE

44. The effectiveness or ineffectiveness of teachers has been found to be the single most influential school-based variable in determining the adequacy of a child's education and a critical determinant of educational success.

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[11] *See* Newark Public Schools, *Overview of Equivalency Request: Protecting Our Best Teachers During a Fiscal Crisis* (2014), *available at* http://content.nps.k12.nj.us/wp-content/uploads/2014/08/Overview_of_Equivalency_February_2014_FINAL.pdf.

[12] *See id.* at 1.

45. Recognizing this, New Jersey evaluates its teachers as "highly effective," "effective," "partially effective" or "ineffective." The final rating of a teacher is based on multiple factors generally evaluated based on student learning and teacher practice.[13] These considerations are designed to measure the quality of the teacher in the classroom, and are updated from time to time.

46. Ineffective or partially effective teachers are required to create a Corrective Action Plan with targeted professional development goals for the following year after the evaluation, and their progress is monitored.

47. In the last published Staff Evaluation report, the New Jersey Department of Education provided state- and district-level educator evaluation data.[14] In Newark, out of the 2775 teachers evaluated, 94 were rated "ineffective" and 314 were rated "partially effective." Statewide, there were only 205 teachers reported as being rated "ineffective," meaning that almost *half* of the ineffective teachers reported in the State worked in Newark at the time the evaluations were completed. Moreover, approximately 10% of the State's partially effective teachers were located in the district.

48. In comparison, of the 337 teachers evaluated in the Summit City School District ("Summit"), only a few miles from Newark, *not a single teacher* was reported as receiving a rating of ineffective or partially effective.

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[13] *See* http://www.nj.gov/education/AchieveNJ/teacher/ (setting forth explanations as to how teachers are evaluated in New Jersey).

[14] *See* N.J. Department of Education, *Staff Evaluation 2013-14, available at* www.state.nj.us/education/data/staff.

49. Therefore, even if Summit, a district with a median household income more than three times higher than Newark.[15] were forced to engage in a reduction-in-force, the students within the district would likely not be harmed in the same way as there were no teachers reported with ineffective or partially effective ratings that could be retained in place of effective teachers.

50. In essence, the effect of the LIFO statute in districts like Summit would not result in students being assigned to teachers reported as ineffective, given the nature of the district and the quality of the teaching staff. On the other hand, Newark has a disproportionately high concentration of teachers rated as less than effective. Therefore, when layoffs under the LIFO statute are based on an arbitrary standard of teacher seniority, not teacher effectiveness, while both districts can be injured, the data shows that Newark would retain less than effective teachers in place of effective teachers, while Summit, which reportedly has no ineffective teachers, would not suffer the same type of harm.

51. The importance to students of having effective teachers cannot be overstated. Study after study demonstrates that teacher quality is the most important in-school factor affecting student achievement.

52. One recent study found that replacing an ineffective teacher with simply an average teacher would increase the present value of students' lifetime income by over $250,000 per classroom—an amount reaching staggering proportions when aggregated over successive years of effective teaching.

53. Effective teachers can have an especially large effect on closing the achievement gap across class and racial lines.

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[15] Reported household median income for 2013 was $115,239 in Summit and $32,973 in Newark. *See* City-Data.com, *available at* www.city-data.com.

54. According to a recent national study, "[b]y every measure of qualifications . . . less-qualified teachers [are] to be found in schools serving greater numbers of low-income and minority students."

55. Studies show that, consistently, students of color in low-income communities are between three and ten times more likely to have unqualified teachers than students in predominantly white communities.

56. The New Jersey Department of Education found that using a measure of effectiveness premised upon a teacher's paper qualifications (i.e. degrees, certifications, demonstrated content knowledge in the subject taught), students in districts like Newark were five times more likely to be taught by teachers that did not possess even the minimum paper qualifications required by the federal No Child Left Behind Act.

57. Consequently, it is no surprise that one study found that the achievement gap narrows with each year a child of color is taught by an effective teacher.

58. Another study shows that, if this positive effect were to accumulate four consecutive years with a top-quartile teacher (a highly-effective teacher) rather than a bottom-quartile teacher (a highly-ineffective teacher), this would be sufficient alone to close the racial achievement gap between white students and their black counterparts.

59. Graduation rates in Newark are also low compared to other districts in New Jersey. According to 2015 graduation data published by the New Jersey Department of Education, the districtwide graduation rate from a four-year public high school in Newark was 69.59%. In comparison, the statewide graduation rate was 89.67%.[16]

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[16] *See* N.J. Department of Education, *2015 Adjusted Cohort 4 Year Graduation Rates, available at* www.state.nj.us/education/data/grate/2015/.

60. Moreover, within Newark, only 69.39% and 69.61% of Black and Hispanic students, respectively, graduate from a four-year high school. On a statewide basis, however, 81.51% of Black students and 82.81% of Hispanic students graduate high school, which indicates that students in other districts, who learn from effective teachers, achieve greater educational success.

61. The studies and metrics confirm what common sense and experience tell us—quality teaching is essential for quality education.

62. If, as the New Jersey Supreme Court has emphasized repeatedly, a thorough and efficient education is one that provides children the opportunity to achieve, enables them to perform their roles as citizens, and equips them with the skills needed to compete effectively in the contemporary labor market, then such an education is impossible without quality teachers.

TO THE DETRIMENT OF STUDENTS, QUALITY-BLIND LAYOFFS REQUIRE NEWARK TO EITHER (I) CONSISTENTLY LAY OFF EFFECTIVE TEACHERS AND RETAIN INEFFECTIVE TEACHERS OR (II) TAKE OTHER HARMFUL MEASURES TO AVOID LAYING OFF EFFECTIVE TEACHERS

63. The LIFO statute has two detrimental mandates dictating how districts must make certain personnel decisions.

64. First, when there is a reduction-in-force within a district, the district must dismiss teachers on the basis of seniority. Quality may not be considered. N.J.S.A. 18A:28-10.

65. Second, if a teacher is laid off due to such a reduction-in-force, the teacher must remain on a preferred eligibility list, which again is established on the basis of seniority alone. Quality may not be considered. N.J.S.A. 18A:28-12.

66. Seniority under the statute is not actually based on the individual's years of experience teaching, but, for the vast majority of teachers, on years teaching within the district where the reduction-in-force occurred. It is not truly teaching experience or teacher quality, but

tenure in the district that determines who gets preferential treatment in the event a district has the opportunity to fill vacancies following a reduction-in-force. This means that the ability of students to learn in an economically challenged district is dependent not on quality, and not even on actual years of experience, but on the arbitrary happenstance of teachers' years of service in a specific district.

67. Therefore, given the constraints of the reemployment provision of the LIFO statute, a district is (a) forced to ignore the quality of a teacher when able to re-hire previously laid off teachers and (b) prevented from bringing in new, effective teachers when a vacancy opens if there are qualified teachers on the eligibility list.

68. The primary persons who benefit from this mandate to consider *only* intra-district seniority are ineffective teachers who have held their jobs for many years despite their ineffectiveness. There is no empirical support for preferring this group of teachers. To the contrary, empirical studies show that seniority is weakly correlated with effective teaching. As a result, the length of employment is simply not a proxy for teacher effectiveness.

69. While layoffs based on effectiveness would cut the lowest performing and least effective teachers, LIFO undoubtedly cuts a number of higher performing teachers.

70. One study showed that 80% of those laid off on the basis of seniority alone are more effective than the lowest performing teachers. Put differently, the vast majority of teachers laid off during quality-blind layoffs are *not* ineffective teachers.

71. In response to a 2012 New Jersey Department of Education survey inquiring about the effects of quality-blind layoffs on student performance, school superintendents and administrators reported that such layoffs are a "tremendous handicap" because "the teacher with the most seniority is not always the best teacher."

72. The tremendous handicap suffered by superintendents and administrators that is inherent pursuant to the LIFO statute is especially felt in Newark, the state's largest school district.

73. In the Equivalency Request, Newark presented data from a simulation that used actual data from its teaching staff, and it showed the devastating impact of quality-blind layoffs on student achievement and the prospective benefits of performance-based layoffs.

74. Newark's data showed that, under the current quality-blind layoff system, if layoffs were implemented, 75% of the teachers it would lay off were considered effective or highly effective, and *only 4% of the teachers laid off would be rated ineffective.* Pursuant to the LIFO statute, three hundred of Newark's effective or highly effective teachers would be laid off while *72% of Newark's lowest-rated teachers would remain.*

75. Given the number of students each of these effective or highly effective teachers would otherwise instruct, this means that as many as 8,000 children in Newark would miss out on a high-performing teacher each year.

76. As previously described above, being taught by an ineffective teacher impacts these children not simply during that school year, but for the rest of their lives.

77. Unfortunately, Newark's experience is not unique. The same is true in other urban districts throughout the State that face layoffs this year and in the years ahead.

78. For example, the superintendent of the Camden School District ("Camden") has reported that quality-blind layoffs force Camden to lose some of the district's most-effective teachers, at a time when the district already struggles to educate its students competitively, and thus has no effective teachers to spare.

79. In an effort to avoid the necessity of quality-blind layoffs. these less affluent, urban districts take steps to avoid instituting reductions-in-force.

80. Consequently, Newark has resorted to the harmful and unsustainable tactic of keeping ineffective teachers on the district payroll.

81. When certain teaching positions become superfluous because of declining enrollment, Newark has refrained from imposing layoffs. Instead, it has created what is known as the EWPS pool for those teachers whom principals did not want to hire because of performance concerns.

82. Teachers in the EWPS pool do not have full-time classroom placements, but instead perform various support and teacher's aide functions. By definition, the teachers in this pool have been rated as ineffective or have other performance-related issues that made principals throughout the district decline to employ them.

83. During the 2013-2014 school year, there were 271 teachers in the EWPS pool, meaning there were 271 teachers that Newark had found to be so ineffective that they were not placed in a classroom, but still compensated as if these teachers were contributing full-time to student achievement.

84. This pool is largely composed of senior teachers. Approximately 70% of the teachers in this pool have ten or more years of experience.

85. Newark spent approximately $22.5 million dollars in the 2013-2014 school year keeping these ineffective teachers on its payroll and away from a permanent teaching placement within its district schools.

86. However, starting in 2015, Newark could not keep most of these EWPS teachers out of the districts' school.

87. Instead, the district had to force place these teachers as permanent teachers within district schools without the consent of the schools. For the 2016-2017 school year, this forced-teacher-placement represented more than $25 million in teacher salaries. Yet, $10 million in teachers' salaries remains in the EWPS pool.

88. In the event of any future quality-blind layoffs, teachers in this EWPS pool, rated partially effective or ineffective, and now serving as the principal teacher in classrooms in district schools, would largely avoid layoffs at the expense of less-senior, more-effective *and non-EWPS* teachers.

89. The largest component of any school district's budget is its personnel—almost 90% of any individual school's budget in Newark is tied to salaries. Spending the valuable resources of a district on ineffective teachers is not only nonsensical, but also inefficient and in direct contradiction with the mandate of the New Jersey Constitution. The EWPS pool would be wholly unnecessary were it not for the quality-blind layoff statute.

90. The EWPS pool is unsustainable, especially given the funding issues currently faced by Newark in light of continued declining enrollment and ongoing efforts by the State to cut the district's funding.

91. On September 15, 2016, the New Jersey Attorney General filed a Memorandum of Law in the State Supreme Court seeking to modify the Court's prior *Abbott* decisions and permit the State to institute a new funding scheme. Reports have stated that, if this funding scheme were to be enacted, Newark would lose almost 69% of its state aid, which is equivalent to a loss of $14,502.99 per pupil in the district.[17]

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[17] *See* Stephen Stirling, *How Christie's Controversial School Aid Plan Could Impact You*, NJ.COM (Jun. 22, 2016), *available at* http://www.nj.com/education/2016/06/how_christies_school_aid_proposal_could_impact_your_district.html.

92. However, the issues of funding and the LIFO statute should not be conflated. Newark, and other *Abbott* districts, need the money provided by the *Abbott* line of cases. Even with the court-mandated *Abbott* funding, Newark faces a crippling budget deficit, prompting the need to either conduct damaging reductions-in-force or place teachers from the EWPS pool within classrooms while the LIFO statute is in effect.

93. Put simply, between the quality-blind layoff statute and the EWPS program, Newark faces an impossible dilemma: the district must either lay off effective teachers and retain ineffective teachers, or it must bear the heavy burden of keeping ineffective teachers on staff (or engage in the time-consuming and expensive proceedings to terminate ineffective, tenured teachers on a case by case basis) rather than lose the effective teachers they have.

94. The loss of effective teachers from the classroom due to a reduction-in-force, or the insertion of ineffective teachers from the EWPS pool in order to avoid a reduction-in-force, impacts the education offered to the Plaintiff children, who already attend schools that are unable to educate the majority of their students in order to meet the State's base-level expectations for each grade-level.

95. As a result of the impossible dilemma, in connection with other factors facing the district, Newark continues to struggle with poor student performance, growing achievement gaps, and ever-more difficult challenges in recruiting and retaining high-quality teachers. And the Plaintiff children suffer as a result.

QUALITY-BLIND LAYOFFS ALSO UNDERMINE THE ABILITY OF SCHOOL DISTRICTS, LIKE NEWARK, TO ATTRACT AND RETAIN EFFECTIVE TEACHERS

96. High-poverty districts, like Newark, also face extraordinary difficulties in recruiting, hiring, and retaining highly-qualified teachers.

97. Elementary schools in Newark have difficulty hiring new, highly-qualified teachers from outside the district. Instead, they are forced to first hire qualified teachers from the EWPS pool to fill any staffing needs, even if the pool is made up of teachers rated as less than effective. The devastating result for children within the district is that the district is limited in its ability to find and place qualified and effective teachers in open positions. Even if a school were successful in removing an ineffective teacher from the classroom during layoffs, if a vacancy for which the teacher is deemed to fall within the job parameters exists elsewhere in the district, the principal is forbidden from hiring the most qualified and effective applicant, and instead must settle for that teacher who was previously deemed to be so ineffective that they had been removed from full-time teaching positions. For example, Newark recently needed to hire Spanish teachers, but was forced to require its schools to take Spanish teachers from the EWPS pool instead.

98. Therefore, schools in Newark, already stripped of effective teachers due to the prior periods of engaging in quality-blind layoffs, must add to their concentration of ineffective classroom teachers every time they look to fill a vacancy, as high-quality teachers who may otherwise have been available to fill the position will find alternative employment opportunities.

99. Although other districts have been less transparent than Newark about their dealings with the quality-blind layoff statute, it is clear that, if the statute must be enforced, it will continue to rob districts of effective teachers that they cannot afford to lose.

100. Moreover, outside of the impact of the EWPS pool and the LIFO statute, published studies and reports indicate that qualified teachers are reluctant to work in poorer, urban districts like Newark, which further reduces Newark's pool of potential candidates when it can hire new teachers.

101. Nevertheless, the specter of quality-blind layoffs at the end of every school year serves to exacerbate qualified teachers' reluctance to apply to work in districts like Newark, where the likelihood of layoffs is higher for teachers new to the district—even teachers with many years of experience. Consequently, qualified candidates seek employment opportunities in other districts where funding and declining enrollment are not concerns and greater employment stability exists.

102. Likewise, effective teachers voluntarily may decide to take their talents elsewhere.

103. Because of the quality-blind layoff statutes and the other factors that make teachers reluctant to come to less affluent districts, Newark is prevented from replenishing its supply of effective teachers with new hires from outside the district.

QUALITY-BLIND LAYOFFS UNDERMINE NEWARK'S ABILITY TO EFFECTIVELY EDUCATE ITS STUDENTS AND VIOLATE THE CONSTITUTIONAL RIGHTS OF PLAINTIFFS

104. Defendants' enforcement of the quality-blind layoff statute in Newark will remove quality teachers, which leads to lower test scores, lower high school graduation rates, lower college attendance rates, and sharply reduced lifetime earnings for students in Newark like the Plaintiff children.

105. Almost half of the students in Newark failed the State's high school proficiency assessment in math, and over 20% failed the assessment for language arts. This means those students did not possess the basic skills needed for obtaining a high school diploma.

106. Only 19% of Newark's students are on track to be ready for college and post-secondary careers. Of those who do graduate and go on to post-secondary education, virtually all require remedial work before they can obtain credits that count toward a college degree.

107. Plaintiffs' struggles in obtaining an effective education at their schools in Newark mirror the struggles facing other students in districts like Newark throughout the State.

108. In particular, information about Camden is worrisome. Less than 1% of Camden graduates are ready for college and careers. This means more than 99% of the students who graduate from Camden high schools, which has a 63.57% graduation rate, are not ready for college or careers.

109. This reality cannot be reconciled with the mandate under the State Constitution that children in New Jersey, and especially Plaintiff children who attend schools in an *Abbott* district, receive a thorough and efficient education giving them the opportunity to achieve, fulfill their role as citizens, and compete effectively in the contemporary labor market.

110. Draining districts like Newark of quality teachers, an inevitable result of the LIFO statute's quality-blindness, removes those within the schools who are in the best position to help these students achieve their constitutionally mandated thorough and efficient education and thereby violates the New Jersey Constitution on numerous fronts.

111. In sum, the quality-blind layoff statute violates the rights of Plaintiffs and similarly situated children in Newark and similar districts throughout the State.

112. The LIFO statute necessarily leads to the devastating result of laying off effective teachers in school districts that cannot afford to lose any effective teachers, and the retention of ineffective teachers to the detriment of the students in those districts. Moreover, the statute undermines the ability of districts like Newark to attract and retain desperately needed qualified and effective teachers.

113. The LIFO statute's overall effect is to prevent school districts from effectively educating their students by removing the necessary in-school ingredient for a constitutional education -- quality teachers.

FIRST CAUSE OF ACTION
Education Clause Violation

114. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

115. The Education Clause requires that the State provide a "thorough and efficient" system of education to New Jersey's primary and secondary school students. In doing so, the Education Clause confers an individual right in those students to an effective education.

116. The quality-blind layoff statute, however, requires school districts conducting reductions-in-force to disregard teacher quality when deciding which teachers to lay off and, instead, requires districts to lay off teachers based upon seniority alone. Additionally, it mandates that subsequent vacancies in the district be filled in accordance with quality-blind, seniority-based eligibility. This policy has required, and will continue to require, Newark and other similarly situated districts to retain ineffective teachers while laying off effective teachers, with the effect of depriving students in those districts of a constitutionally guaranteed effective education.

117. Therefore, Defendants, by enforcing the quality-blind layoff statute in Newark and similarly situated districts, have violated the Education Clause and are not providing the mandated thorough and efficient public education to Plaintiffs and children similarly situated to them.

118. Enforcement of this statute must be enjoined in Newark and all similarly situated districts.

SECOND CAUSE OF ACTION
Equal Protection Violation

119. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

120. Article I, Paragraph 1 of the New Jersey Constitution grants individuals the right to the equal protection of the law.

121. The quality-blind layoff statute disproportionately affects students attending school districts like Newark, which primarily serves children of color who live in areas of concentrated poverty, like Plaintiffs, who have a fundamental right guaranteeing them to a thorough and efficient education set forth by the Constitution and the rulings of the New Jersey Supreme Court.

122. The LIFO statute impinges on the children's constitutional right to a thorough and efficient education as this constitutional right is inextricably linked to the retention of effective teachers.

123. It is arbitrary to deny these children their fundamental right to a thorough and efficient education by requiring districts to retain, terminate, and hire teachers based solely on intra-district seniority, and not their effectiveness or quality or even their actual years of teaching experience.

124. These layoffs will occur and continue to occur in poor, urban areas with high populations of children of color, such as Newark, and will be comparatively rare in wealthier, whiter, suburban districts, such as Summit.

125. Accordingly, Plaintiffs and similarly situated children attending districts such as Newark are disproportionately and adversely harmed by the quality-blind layoff mandate of N.J.S.A. 18A:28-10 and 18A:28-12.

126. The harm to Plaintiffs and children attending schools in districts like Newark results from the denial of an equal opportunity to receive a thorough and efficient education, which is a fundamental right, is profound, and outweighs any governmental interest that may support the quality-blind layoff statute.

127. Because the quality-blind layoff statute as applied disproportionately impacts Plaintiffs and similarly situated students, the statute violates the equal protection principles embodied in Article I, Paragraph 1 of the New Jersey Constitution.

128. The statute must therefore be declared unconstitutional and its enforcement enjoined as applied to Newark and all similarly situated school districts.

THIRD CAUSE OF ACTION
Due Process Violation

129. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

130. Article I, Paragraph 1 of the New Jersey Constitution grants individuals protection against government deprivation of their interests in life, liberty, or property.

131. The Education Clause grants every New Jersey child a right to and an interest in a thorough and efficient education. Art. VIII, Sect. IV. Moreover, New Jersey statutory law grants to all children the right to attend primary and secondary school. *See* N.J.S.A. 18A:38-25.

132. Accordingly, under the State Constitution, State statutes, and case law interpreting the New Jersey Constitution and State statutes, a thorough and efficient education is guaranteed to be provided by public school districts to such primary and secondary school students as Plaintiffs, and it is deemed to be a fundamental right.

133. By requiring school districts to reduce their teacher workforces on the basis of intra-district seniority alone, and without any regard to teacher performance, the quality-blind

layoff statute deprives Plaintiffs and similarly situated schoolchildren of their fundamental right to a thorough and efficient education.

134. No rational governmental interest justifies this deprivation.

135. Therefore, Defendants' enforcement of the quality-blind layoff statute is unconstitutional, as it violates the due process principles of Article I, Paragraph 1 of the New Jersey Constitution and must be enjoined in Newark and all similarly situated school districts throughout the State.

FOURTH CAUSE OF ACTION
Civil Rights Act Violation

136. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

137. The New Jersey Civil Rights Act grants individuals the right to be free of deprivations by public officials of substantive rights secured by the laws or Constitution of New Jersey. *See* N.J.S.A. 10:6-2, *et seq.*

138. The New Jersey Constitution grants Plaintiffs and similarly situated students the substantive rights to a thorough and efficient education, equal protection under the law, and substantive due process.

139. By enforcing the quality-blind layoff statute, Defendants, acting under color of law, have violated the New Jersey Civil Rights Act. Therefore, Defendants' enforcement of the quality-blind layoff statute in Newark and similarly situated districts must be enjoined.

FIFTH CAUSE OF ACTION
Declaratory Judgment

140. Plaintiffs re-allege and incorporate by reference the preceding allegations in the foregoing paragraphs as if fully set forth here.

141. Plaintiffs seek relief under the New Jersey Declaratory Judgment Act. N.J.S.A. 2A:16-50 *et seq*. This act allows parties to sue for a judicial declaration in order to declare and settle the rights and obligations of the parties.

142. As alleged in the preceding counts and the general allegations above, the Education Clause of the New Jersey Constitution requires that the State provide a "thorough and efficient" education; Article I, Paragraph 1 of the New Jersey Constitution grants individuals the right to the equal protection of the law; and Article I, Paragraph 1 of the New Jersey Constitution protects individuals from the unwarranted deprivation of certain fundamental rights. including the right to an effective education.

143. Each of these constitutional rights is being and will in the future again be violated by the application of the LIFO statute in Newark and other similarly situated districts. The quality-blind layoff statute requires school districts conducting reductions-in-force to disregard quality in laying off teachers, instead mandating that these districts implement reductions-in-force based upon seniority alone. This policy has required and will require Newark and other similarly situated districts to retain ineffective and less-effective teachers, to the profound detriment of the Plaintiffs and other schoolchildren in those districts.

144. The quality-blind layoff statute deprives Plaintiffs and other similarly situated children in Newark and other similarly situated districts of their fundamental right to a thorough and efficient education, equal protection of the law, and the fundamental right to an education. Plaintiffs therefore seek a declaratory judgment that the application of the LIFO statute is unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against Defendants, as follows:

145. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, violates the Education Clause of the New Jersey Constitution as applied to Newark and similarly situated school districts throughout the State;

146. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12. violates the Equal Protection principles of Article I, Paragraph 1 of the New Jersey Constitution as applied to Newark and similarly situated school districts throughout the State;

147. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, violates fundamental rights protected by the New Jersey Constitution as applied to Newark and similarly situated school districts throughout the State, and deprives children within those districts of their due process rights;

148. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, as applied to Newark and similarly situated school districts throughout the State, violates the New Jersey Civil Rights Act;

149. Permanently enjoining Defendants from enforcing the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, or any law or policy substantially similar to this statute in Newark and any similarly situated school district throughout the State;

150. Awarding Plaintiffs legal fees and costs of suit, under the New Jersey Civil Rights Act and otherwise; and

151. Awarding any and all such other relief as deemed just and warranted.

Dated: November 1, 2016

By: _____

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Of Counsel; Moving for Pro Hac Vice Admission

RULE 4:5-1 CERTIFICATION

I. William H. Trousdale. Esq., certify pursuant to Rule 4:5-1 that, to the best of my knowledge, information, and belief, the matter in controversy is not the subject of any other action or arbitration proceeding. now or contemplated. other than the Abbott v. Burke litigation (078257). and that no other parties should be joined in this action pursuant to Rule 4:28.

Dated: November 1, 2016

By: _____

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Of Counsel; Moving for Pro Hac Vice Admission

2015 WL 10015127 (N.J.Super.L.) (Trial Order)
Superior Court of New Jersey, Law Division.
Union County

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiff,
v.
EXXON MOBIL CORPORATION, Defendant.

Nos. UNN-L-3026-04, UNN - L-1650-05.
July 13, 2015.

Decision

John J. Hoffman, Acting Attorney General, Richard F. Engel, Esq., Deputy Attorney General, Allan Kanner, Esq. and Elizabeth B. Petersen, Esq., Special Counsel to the Attorney General, Kanner & Whiteley, L.L.C., For the Plaintiff.

Marc A. Rollo, Esq., Archer & Greiner P.C., Theodore V. Wells, Jr., Esq., Paul, Weiss, Rifkind, Wharton & Garrison LLP, Alice A. Brown, Esq., For the Defendant.

Susan J. Kraham & Selena Kyle, for New York/New Jersey Baykeeper, New Jersey, Sierra Club, Clean Water Action, Delaware Riverkeeper, Delaware Riverkeeper Network, Environmental New Jersey, Natural Resources Defense Council, and New Jersey Audubon.

Richard L. Rudin, for Senator Lesniak.

Michael J. Hogan, Judge.

I. STATEMENT OF FACTS

*1 This decision concerns eight environmental interest groups' and a New Jersey State Senator's attempted intervention to oppose the settlement of a complex, eleven-year-old natural resources damages ("NRD") case. On August 19, 2004, the New Jersey Department of Environmental Protection ("DEP," "State," or "Department"), as the public's statutorily entrusted trustee of natural resources, filed two complaints against ExxonMobil Corporation ("Exxon"). [1] The complaints alleged injuries to the soils, sediments, groundwater, and surface water [2] at Exxon sites known as the Bayway refinery in Linden, New Jersey ("Bayway") and the Bayonne former refinery in Bayonne, New Jersey ("Bayonne"). The DEP alleged that these injuries began when Standard Oil Company, Exxon's predecessor in interest, commenced industrial operations in 1877 at Bayonne and 1909 at Bayway. The DEP sought $8.9 billion in damages for these injuries pursuant to *N.J.S.A.* 58:10-23.11 to -23.24, the Spill Compensation and Control Act ("Spill Act"), and common law theories of public nuisance, trespass, and strict liability. The State also sought to recover its natural resource damage assessment costs and counsel fees. The site remediation cleanup of Bayway and Bayonne was not a part of the State's claims because two 1991 Administrative Consent Orders ("ACOs") govern that issue. [3] The underlying litigation experienced numerous pre-trial motions and two interlocutory appeals before it was assigned to the present judge for trial, which began January 2014 and concluded September 2014. A brief recap of these events is helpful to understanding the current motions.

On October 7, 2004, Exxon attempted to remove the case to the United States District Court for the District of New Jersey. This attempt was unsuccessful, and the matter was remanded back to the Superior Court by order dated March

24, 2005. On January 11, 2006, the DEP moved for partial summary judgment, seeking a determination that Exxon was strictly liable as a matter of law for all cleanup and removal costs under the Spill Act. *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, 393 *N.J. Super.* 388, 397 (App. Div. 2007). Exxon cross-moved for summary judgment on the ground that the Spill Act does not provide liability for loss of use of natural resources. *Ibid.* Judge Ross Anzaldi, sitting as motion judge, granted both motions in part, holding that Exxon was strictly liable and dismissing the DEP's claims for loss of use damages. *Id.* at 397-98. On appeal, Exxon did not contest Judge Anzaldi's strict liability ruling. *Id.* at 398. The Appellate Division, however, reversed Judge Anzaldi's loss of use ruling and held that loss of use damages "are a component of costs of mitigating damage to public natural resources." *Id.* at 402.

***2** After the first interlocutory appeal, the DEP amended its complaint to include strict liability counts. *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, 420 *N.J. Super.* 395, 398 (App. Div. 2011). Exxon moved for partial summary judgment on the strict liability count, claiming that it was barred by the statute of limitations. *Ibid.* The trial court agreed with Exxon and granted their motion for summary judgment. On appeal, the Appellate Division reversed and held that the statute of limitations did not bar the common law strict liability count because the common law could be considered part of the State's environmental laws, which have been legislatively granted an extension on their statute of limitations. *Id.* at 411.

After sixty-six days of a complex, contested bench trial, this court began work on its decision. [4] In February 2015, before it rendered a decision, the parties informed the court that they had reached a proposed settlement. Under the terms of the settlement, Exxon agrees to pay the State $225 million. [5] In return, the State (1) releases with prejudice and covenants not to sue Exxon for all claims based on the discharge of contaminants onto the soil and sediments of Bayway and Bayonne; (2) dismisses the surface water claims without prejudice and agrees that the water claims can only be brought in the future in a multi-defendant action if a formal natural resource damage assessment is completed by the applicable trustee through a procedure that allows for Exxon's participation; (3) releases with prejudice and covenants not to sue Exxon for all NRD relating to Exxon Retail Stations located within the state (this excludes any claims involving any Exxon Retail Station where methyl tertiary butyl ether ("MTBE") has been discharged); (4) releases and covenants not to sue Exxon for all NRD relating to sixteen statewide facilities, including the Former Paulsboro Terminal #3045 that has been the subject of litigation in Gloucester County since 2007 ("Gloucester litigation") (Docket No. L-1063-07 consolidated with L-0563-03); and (5) agrees to defer the final remedy determination and remediation of Morses Creek until the cessation of refining operations. [6]

Further, the parties agreed that each party shall bear its own costs and expenses and that the agreement, with the exception of the remediation of Morses Creek, will not alter Exxon's obligations under the ACOs. [7] Finally, the settlement states that [n]othing contained in this Consent Judgment shall be considered an admission by [Exxon]," [8] and it grants Exxon contribution protection "to the fullest extent possible pursuant to Section 113(f)(2) of [the Comprehensive Environmental Response, Compensation, and Liability Act] CERCLA, 42 *U.S.C.A.* §§ 9613(f)(2), the Spill Act, *N.J.S.A.* 58:10-23.11fa. (2)(b) and any other statute, regulation, or common law principle that provides contribution rights against ExxonMobil ...." [9]

In accordance with *N.J.S.A.* 58:10-23.11e2, the State published a copy of the proposed settlement on the DEP's website, published notice of the settlement in the New Jersey Registrar, and arranged for notice in twelve newspapers. [10] Details of the settlement were made public April 6, 2015. The settlement immediately received extensive public backlash and has since been the topic of a number of media sources. [11] Although the DEP usually gives the public thirty days to comment on any proposed settlement, due to the heightened public interest, it extended the time period prescribed in *N.J.S.A.* 58:10-23.11e2 to sixty days. This "Public Comment Period" ended June 5, 2015, by which time the DEP had received around 16,000 public comments, the vast majority of which were opposed to the settlement. The purpose of these comments is twofold. First, in any settlement under the Spill Act, the DEP reviews them before it decides to make

a formal application for approval of a settlement. Second, the court ultimately charged with approving a settlement can review them for assistance in determining if the settlement is fair, reasonable, and in the public interest.

*3 On June 9, 2015, the New York/New Jersey Baykeeper, New Jersey Sierra Club, Clean Water Action, Delaware Riverkeeper, Delaware Riverkeeper Network, Environment New Jersey, Natural Resources Defense Council, and New Jersey Audubon collectively filed a motion to intervene as of right under *N.J. Ct. R.* 4:33-1 or, alternatively, for permissive intervention under *N.J. Ct. R.* 4:33-2. On June 19, 2015, New Jersey State Senator Raymond Lesniak, individually and as a member of the New Jersey State Senate for the 20th Legislative District (Union), filed a motion seeking intervention under the same court rules. The environmental groups allege that "the Department inexplicably abandoned its duty as trustee of the State's natural and financial resources" by settling with Exxon for "less than three cents on the dollar," an amount they consider "suspiciously low." [12] By doing so, they believe "the Department has failed to protect the public." [13] Further, they claim "the Department abruptly changed course" and that the "Settlement amount is woefully short of what the Department is legally entitled to receive and obligated to recover." [14]

For these reasons, they "wish to be heard in opposition, to urge the Court to reject the sweetheart deal the Department and Exxon are poised to receive." [15] Their desired intervention would be limited to "seek[ing] to intervene to participate as plaintiffs in any proceedings relating to the Court's consideration of the Settlement. In addition, should the Court enter a judgment approving the Settlement, Environmental Intervenors seek the right to appeal as a party." [16] They "seek only to challenge the legality and sufficiency of the Settlement, not to reopen trial proceedings or otherwise relitigate the case" [17] and, if permitted to intervene, "will address solely the salient question the Court must decide: Should the Settlement be approved or disapproved." [18] If they are permitted to "simply brief and argue orally that, under prevailing law, the Court should refuse to approve the Settlement," they believe "they will present a legally driven perspective that neither primary party will offer." [19]

Senator Lesniak alleges "the NJDEP is eviscerating the intent and purpose of the [Spill Act]." [20] He believes the DEP is not adequately representing New Jersey citizens and faults the DEP for "not publicly disclosing] any site-specific assessments as to the environmental damages caused by Exxon Mobil's operations at" the non-Bayway/Bayonne facilities. [21] He is also opposed to the settlement because he claims it allows Exxon "to deduct 35% and 9% from its federal and state corporate business taxes" and because it does not specify how the DEP will spend the money on remediation and restoration projects. [22]

On July 9, 2015, the State formally moved for approval of the proposed settlement. The State and Exxon oppose the environmental groups' and Senator Lesniak's (collectively "Intervenors") motions. The court held oral argument on the motions July 10, 2015.

II. INTERVENTION AS OF RIGHT

New Jersey Court Rule 4:33-1 states:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Our courts have interpreted this rule as a four prong test:

*4 The applicant must (1) claim "an interest relating to the property or transaction which is the subject of the action," (2) show he is "so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest," (3) demonstrate that the "applicant's interest" is not "adequately represented by existing parties," and (4) make a "timely" application to intervene.

Chesterbrooke Ltd. P'ship v. Planning Bd. of Twp. of Chester, 237 *N.J. Super.* 118, 124 (App. Div. 1989). "The substance of the rule permitting intervention as of right is also ordinarily construed quite liberally." *ACLU of N.J., Inc. v. Cnty. of Hudson*, 352 *N.J. Super.* 44, 67 (App. Div. 2002) (citing *Meehan v. K.D. Partners, L.P.*, 317 *N.J. Super.* 563, 568 (App. Div. 1998)). "As the rule is not discretionary, a court must approve an application for intervention as of right if the four criteria are satisfied." *Meehan*, 317 *N.J. Super.* at 568 (citing *Chesterbrooke*, 237 *N.J. Super.* at 124).

The court has reviewed not only the binding New Jersey caselaw but also the persuasive authorities from the federal circuit courts of appeals. Because *Rule* 4:33-1 "is taken substantially from *Fed. R. Civ. P.* 24," *Twp. of Hanover v. Town of Morristown*, 118 *N.J. Super.* 136, 140 (Ch. Div. 1972),[23] New Jersey courts "may look to the federal decisions for guidance in construing the rule." *Testut v. Testut*, 32 *N.J. Super.* 95, 99 (App. Div. 1954) (citing *Lang v. Morgan's Home Equip. Corp.*, 6 *N.J.* 333, 338 (1951)); *see also Chesterbrooke*, 237 *N.J. Super.* at 125 (citing cases from the Court of Appeals for the District of Columbia Circuit and United States Supreme Court to aid in its interpretation of *N.J. Ct. R.* 4:33-1). Based on this review, the court finds that the environmental groups satisfy the "interest" and "impair or impede his ability to protect that interest" prongs. Because the environmental groups do not meet the "adequate representation" and "timeliness" prongs, however, the court denies their motion for intervention as of right. The court finds that Senator Lesniak fails all four *Rule* 4:33-1 prongs.

II.A. The Intervenors' Interest Relating to the Property That is the Subject of This Action

The environmental groups have an "interest *relating to* the property or transaction which is the subject of the action." *N.J. Ct. R.* 4:33-1 (emphasis added). Our courts do not require potential intervenors to have an interest "in" a plaintiff's or defendant's property.[24] Rather, it is sufficient that intervenors own property adjacent to the property at issue. *Chesterbrooke*, 237 *N.J. Super.* at 124 (finding that such an interest "relates to" the property which is the subject of the action). Furthermore, the Appellate Division has found that "nonprofit corporations having the declared purpose of protecting open spaces and the environment ... and the preservation of wildlife" meet the interest prong, especially when many members of the intervening groups reside in the township and live adjacent to the site. *Warner Co. v. Sutton*, 270 *N.J. Super.* 658, 660 (App. Div. 1994) (finding that intervenors had an interest because, "Many members of the movant groups reside in Maurice River Township. Some live adjacent to the Warner site.") The environmental groups meet these requirements.

*5 "New York/New Jersey Baykeeper is a nonprofit, membership-based environmental organization that advocates for the preservation, protection, and restoration and the Hudson-Raritan Estuary."[25] "Baykeeper members and supporters, including more than 2,400 members in Northern New Jersey, use New Jersey waters, meadows, and wetlands for swimming, wading, fishing, birding, boating, kayaking, and a variety of other recreational, professional, and aesthetic purposes."[26] The New Jersey Sierra Club is a nonprofit organization dedicated to protecting and restoring the environment."[27] "At the Bayway site, the Club has been involved in worker safety, toxic chemical cleanup, and reporting of air and water pollution violations for over twenty-five years."[28] Clean Water Action "is a 1.2 million-member organization that works to protect the environment, health, economic well-being, and community quality of life."[29] "The Delaware Riverkeeper is a full-time, privately funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed."[30] "The Delaware Riverkeeper Network is a nonprofit environmental organization that champions the rights of communities to a Delaware River and tributary streams that are clean and

healthy."[31] The organization "has members who live and recreate in areas directly influenced by Exxon sites included in the Settlement.[32]

"Environment New Jersey is one of the state's largest citizen-based advocacy organizations, and is committed to protecting New Jersey's environment for future generations by protecting the state's land, air, and water, and by promoting a clean energy future."[33] "The organization has over 20,000 dues-paying citizen members, including more than 1,700 members in Union County, 300 members in Hudson County, and 300 members in Gloucester County.[34] Natural Resources Defense Council "is a public interest environmental advocacy organization with approximately 300,000 members in the United States, including more than 8,000 in New Jersey."[35] "Over the last decade, NRDC has litigated cases to prevent air pollution and soil contamination in Bayonne, New Jersey, and Staten Island, New York; remediate dioxin contamination of Newark Bay, New Jersey; and remediate chromium contamination of soil in Jersey City, New Jersey."[36] New Jersey Audubon "is a privately supported, not-for-profit, statewide membership organization incorporated in New Jersey."[37] "NJA fosters environmental awareness and conservation ethic; protects New Jersey's birds, mammals, other animals, and plants, especially endangered and threatened species; and promotes preservation of New Jersey's valuable natural habitats."[38]

The Bayway/Bayonne litigation, Gloucester litigation, and claims at Exxon Retail Stations all involve the State's attempts to recover money for alleged damages to its natural resources. The eight environmental interest groups are interested in the protection, restoration, and recreational use of the State's natural resources. Moreover, many of their members live at or near the sites in question. This is sufficient to satisfy the "interest" prong.

Senator Lesniak alleges that he has "been at the forefront on sponsoring environmental laws in New Jersey since [he has] been in the Legislature" and "was also a proponent of the Spill Act amendments in the early 1990s ...."[39] His "Senate District includes the Bayway neighborhoods of the Cities of Linden and Elizabeth ...."[40] According to his brief and certification, the local public officials of these cities and numerous residents have been nearly uniform in expressing their opposition to the proposed settlement.[41] Indeed, 22,000 New Jersey residents have signed his online petition urging rejection of the settlement.[42]

Despite these facts and allegations, for two reasons, the court finds that Senator Lesniak does not have an interest relating to the property or transaction which is the subject of this action. First, although Senator Lesniak's district includes the Exxon sites and surrounding areas, this cannot serve as an "interest" under *Rule* 4:33-1. There is no limiting principle to his assertion that he has an interest in this litigation because his district is affected. To allow a state legislator to intervene in a matter because it impacts his/her district would set a precedent by which *any* legislator could claim an interest *any time* litigation concerns property or transactions that affect his district.

***6** Second, the court can find no case holding that a legislator has an interest due to the fact that an action impacts his district. The court does not doubt that he cares about natural resources and wants to see them restored. His political and public policy concerns, however, are distinguishable from the environmental groups' concerns because *Warner* specifically stated that "nonprofit corporations having the declared purpose of protecting open spaces and the environment ... and the preservation of wildlife" can have an interest in an action. *Ibid.* There is no binding New Jersey caselaw that holds state legislators who want to preserve open spaces and wildlife have a *Rule* 4:33-1 interest.

II.B. The Disposition of This Action May Impair or Impede the Environmental Groups' Ability to Protect Their Interest

The environmental groups meet the second *Rule* 4:33-1 prong because they are "so situated that the disposition of the action *may* as a practical matter impair or impede [their] ability to protect" their interest in the protection and restoration

of natural resources located in New Jersey. *N.J. Ct. R.* 4:33-1 (emphasis added). The second prong does not present a high hurdle for potential intervenors because of its use of the word "may." An intervenor does not have to show that the disposition of a case "will" impair or impeded his ability to protect his interest. In both the Bayway/Bayonne and Gloucester litigation, the DEP, as the public's trustee of natural resources, seeks money from Exxon that it intends to use to restore injured natural resources. The disposition of these cases "may" impair or impede the environmental groups' interest in these resources because should this court dismiss the State's claims for lack of sufficient evidence, the State will not recover any amount of money for the restoration of natural resources. If this occurs, the environmental groups and their members will not be able to use the resources for aesthetic or recreational purposes. *See Meehan*, 317 *N.J. Super.* at 571 (finding that concerns of diminished "quality and enjoyment of light, air, and quiet" relate to the subject property). The environmental groups, therefore, meet the second prong.

II.C. The DEP Adequately Represents the Intervenors' Interests [43]

A potential intervenor's motion must fail if at least one of the existing parties adequately represents the intervenor's interests. The third *Rule* 4:33-1 prong is a separate inquiry from the interest prong, and "courts must be careful not to blur the interest and representation factors together." *Kleissler v. U.S. Forest Serv.*, 157 *F.*3d 964, 972 (3d Cir. 1998) (citing *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 101 *F.*3d 503, 508 (7th Cir. 1996)). For ten years, the Intervenors considered the DEP to adequately represent their interests. The Intervenors, however, believe that the DEP's settlement for "pennies on the dollar" constitutes an abdication of their fiduciary duty. Due to the difference in opinion on the proper NRD recovery amount, the Intervenors believe the DEP no longer adequately represents their interests and seek to intervene to brief and orally argue against the proposed settlement.

*7 For the reasons elaborated on in the rest of Section II.C, the court finds that the DEP still adequately represents the Intervenors' interest in the protection and restoration of natural resources located in New Jersey. The DEP and Intervenors share the same ultimate goal, and their quarrel is only over the means employed to achieve that goal. Further, the public comment period provided an adequate forum for the Intervenors to provide the court with arguments against the settlement. Because the environmental groups' intervention as of right motion hinges on the "adequate representation" prong, the court will devote a substantial portion of Section II to this issue.

This Section proceeds by first exploring the cases Intervenors cited in their briefs and explaining why these cases are distinguishable from the current matter. [44] The court will then discuss the federal courts of appeals' "ultimate goal" test and how this test works against the Intervenors. Finally, the court will discuss New Jersey courts' preference for finding adequate representation when statutes entrust agencies with certain duties and the deference given to these executive agencies. This deference closely mirrors the federal presumption of adequate representation that arises when parties share the same ultimate goal.

II.C.1. New Jersey Caselaw and the Intervenors' Authorities

The Intervenors rely on a number of cases that granted post-judgment applications for intervention for the sole purpose of appealing the judgment. The Appellate Division has consistently held that "[i]ntervention after final judgment is allowed, if necessary, to preserve some right which cannot otherwise be protected." *Chesterbrooke*, 237 *N.J. Super.* at 123 (citing *Hanover*, 118 *N.J. Super.* at 142). In *Chesterbrooke*, the plaintiff filed a subdivision approval for certain variances with the defendant planning board. *Id.* at 120. The board initially denied the application and the plaintiff filed suit. *Id.* at 121-22. After the matter was argued, the judge granted automatic approval of the subdivision application, a decision that the planning board decided not to appeal. *Id* at 122. The day after the board announced its decision not to appeal, two landowners filed an intervention motion for the sole purpose of appealing the trial court's ruling. *Ibid.* The trial court denied the motion, but the Appellate Division reversed, finding that once the board decided not to appeal, it no longer

adequately represented the objectors' interest because "there was no one available to protect their interest through an appeal." *Id.* at 124-25.

Likewise, in *Warner Co. v. Sutton*, the Appellate Division allowed post-judgment intervention because it was necessary to preserve some right which otherwise could not have been protected. *Warner*, 270 *N.J. Super.* at 667. There, a plaintiff mining company's land was rezoned a "conservation zone," in which mining was prohibited. *Id.* at 660. The company filed an action against the planning board, alleging an unconstitutional taking. *Ibid.* The company and board reached a settlement, under which the company would receive a perpetual nonconforming-use status. *Id.* at 661. Citing environmental concerns, a number of nonprofit corporations filed a post-judgment intervention motion to appeal the settlement. *Id.* at 662. The Appellate Division reversed the trial court and allowed intervention, finding that after the consent order was entered, the board did not represent the intervenors' environmental interests. *Id.* at 665.

***8** Finally, in *Meehan v. K.D. Partners, L.P.*, the Appellate Division also allowed post-judgment intervention because it was necessary to preserve some right which otherwise could not have been protected. *Meehan*, 317 *N.J. Super.* at 571. There, a developer sought use of a variance from a planning board "to allow the conversion of an existing hotel to an eight-unit hotel with kitchen facilities." *Id.* at 564. "The application was successful, but a neighboring property owner, plaintiff James P. Meehan, filed an action in lieu of prerogative writs in the Law Division challenging the settlement." *Id.* at 565. The Law Division voided the approval, but while the appeal was pending, Meehan and the developer entered a settlement that would allow the variance to go through. *Ibid.* Thirty days after the consent order was signed, Thaddeus Barkowski, another adjacent property owner, filed a motion to intervene, claiming that the variance would diminish his property value and lessen the quality of enjoyment of light, air, and quiet. *Id.* at 565, 571. The Appellate Division found that although Meehan adequately represented Barkowski's environmental and property value concerns prior to the settlement, once Meehan agreed to allow the variance to proceed, their "interests were no longer parallel." *Id.* at 571.

The Intervenors believe these three cases aid their cause because they all granted intervention motions concerning environmental matters. A closer inspection of these cases' reasoning and fact patterns compels this court to reach a different result. In three respects, these cases are distinguishable from the present matter. First, these three cases all dealt with intervention motions filed *post-judgment* for the purpose of appealing a judgment that neither original party wanted to appeal. "There is a significant difference between intervening at an appellate level to advance arguments on behalf of uniquely interested parties ... and intervening at the trial level as an interested party." *City of Asbury Park v. Asbury Park Towers*, 388 *N.J. Super.* 1, 12 (App. Div. 2006) (citations omitted). These cases, therefore, are not directly on point because this court has neither approved nor rejected the settlement.

Second, these three cases found lack of adequate representation because intervention was necessary to preserve some right *which could not otherwise be protected.* Here, the environmental groups seek to intervene to "simply brief and argue orally that, under prevailing law, the Court should refuse to approve the Settlement," and they believe "they will present a legally driven perspective that neither primary party will offer."[45] Likewise, Senator Lesniak seeks to intervene "for the purpose of arguing that the proposed Consent Judgment ... should be disapproved by the court."[46] They are correct that at the Settlement Hearing to occur July 21, 2015, neither original party is likely to offer arguments against the settlement. However, the Intervenors, along with *thousands* of other individuals, have already voiced their objections to the settlement through the statutorily mandated public comment process.[47] On June 12, 2015, the DEP provided the court with these comments, and the court has been extensively reviewing the comments for arguments both for and against the settlement. This case, therefore, is unlike *Chesterbrooke* where the intervenors had no avenue to voice their objections. *See Chesterbrooke*, 237 *N.J. Super.* at 124-25.

In essence, the Intervenors have already done that which they seek to do through intervention: argue to the court against the settlement. *Cf. United States v. Metro. Dist. Comm'n*, 865 *F.*2d 2, 5 (1st Cir. 1989) (finding adequate representation where potential intervenors "had other avenues for influencing the decisions"). Furthermore, at all times since the DEP

filed its complaint, the DEP has, on behalf of the public, been the entity that has prosecuted this case, conducted a natural resource damage assessment, retained outside counsel, and hired numerous expert witnesses to further its cause. This is not a case where Intervenors possess "intimate knowledge asto what is going on." *ACLU*, 352 *N.J. Super.* at 65 (agreeing with the trial court that because "the real party in interest here is the United States of America and presumably it has intimate knowledge asto what is going on with regard to the continuing investigation" the County of Hudson did not adequately represent its interests (internal quotation marks omitted)).

*9 The court does not find the Intervenors' contention that neither original party is likely to make arguments against the settlement at the July 21, 2015 hearing to be a reason warranting intervention. Any time the DEP brings a NRD case against an individual defendant and the case settles, it is unlikely either the DEP or the defendant will argue against the settlement if a hearing occurs. Therefore, there is no limiting principle to the Intervenors' contention. If they were allowed to intervene here because neither the DEP nor Exxon will argue against the settlement, then it would set a precedent that allows movants to intervene in *any* NRD case. The court sees the Legislature's adoption of the public comment period as evidence that they did not intend for this result to occur. *Rule* 4:33-1 is to be construed liberally, not limitlessly.

Third, *Chesterbrooke*, *Warner*, and *Meehan* are distinguishable from this case because in those cases, the original party and the potential intervenor started out with the same ultimate goal, but their goals later diverged. In those cases, original parties adequately represented the potential intervenors' aesthetic, environmental, and property value goals, but ceased to further those goals when they settled. The DEP has settled this case, but it still shares the same ultimate goal with the Intervenors: the protection and restoration of natural resources located in New Jersey. As the following Section explains, when parties still share the same ultimate goal and only disagree on the means or strategy employed to achieve that goal, the federal courts have found adequate representation.

II.C.2. The Intervenors and DEP Share the Same Ultimate Goal

In 1977, the year the Spill Act came into effect, the Legislature found and declared "that the State is the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction ...." *N.J.S.A.* 58:10-23.11a. With the passage of the Spill Act, the Legislature intended "to exercise the powers of this State to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances ...." *Ibid.* Specifically, the Legislature charged the DEP with the duty of "facilitat[ing] and coordinat[ing] activities and functions designed to clean up contaminated sites in this State." *Ibid.*

In 1991, the DEP began to perform its fiduciary duty with regard to the Bayway and Bayonne sites when it convinced Exxon to enter into two ACOs for the remediation of the sites. With the filing of the 2004 complaints, the DEP began its attempt to recover damages from Exxon for Bayway and Bayonne that it intends to use to restore and replace damaged natural resources in New Jersey. Likewise, the DEP began a similar pursuit in 2007 by bringing a NRD claim against Exxon for contamination at its former Paulsboro site. The Intervenors do not want anything that the DEP does not want. Both parties seek the remediation of contaminated sites and the restoration/replacement of injured natural resources. Because these ultimate goals are the same, the court believes a presumption of adequate representation should arise, a presumption the Intervenors have done nothing to rebut.

The First, Second, Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits, along with the United States District Courts for the District of Utah, Eastern District of Missouri, and Southern District of Ohio have all held that where the party seeking to intervene has the same ultimate goal as a party already in the suit, a presumption of adequate representation arises. *Prete v. Bradbury*, 438 *F.*3d 949, 956 (9th Cir. 2006); *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 *F.*2d 211, 215 (11th Cir. 1993); *Wade v. Goldschmidt*, 673 *F.*2d 182, 186 n.7 (7th Cir. 1982); *Moosehead Sanitary Dist. v. S. G. Phillips Corp.*, 610 *F.*2d 49, 54 (1st Cir. 1979); *U.S. Postal Serv. v. Brennan*, 579 *F.*2d 188, 191 (2d Cir. 1978); *Virginia v. Westinghouse Electric Corp.*, 542 *F.*2d 214, 216 (4th Cir. 1976); *Ordnance Container Corp. v. Sperry Rand Corp.*, 478 *F.*2d 844, 845 (5th Cir. 1973); *Phila. Electric Co. v. Westinghouse Electric Corp.*, 308 *F.*3d

856, 859-60 (3d Cir. 1962); *SEC v. Am. Pension Servs.*, No. 2:14-cv-00309-RJS-DBP, 2015 U.S. Dist. LEXIS 6782, at *14 (D. Utah Jan. 20, 2015); *United States v. Bliss*, 132 *F.R.D.* 58, 61 (E.D. Mo. 1990); *Piedmont Paper Prods., Inc. v. Am. Fin. Corp.*, 89 *F.R.D.* 41, 44 (S.D. Ohio 1980). To overcome this presumption, intervenors "must produce something more than speculation as to the purported inadequacy," and "ordinarily must demonstrate adversity of interest, collusion, or nonfeasance." *Moosehead*, 610 *F.*2d at 54. The inadequacy of representation element "is not met when the applicants present only a difference in strategy." *SEC v. TLC Invs. & Trade Co.*, 147 *F. Supp.* 2d 1031, 1042 (C.D. Cal. 2001) (citing *Nw. Forest Res. Council v. Glickman*, 82 *F.*3d 825, 838 (9th Cir. 1996)). Furthermore, a potential intervenor's concern that the plaintiff recover the full amount to which they are entitled is not a sufficient reason to find inadequacy of representation. *See Moosehead*, 610 *F.*2d at 54 (finding adequate representation even when potential intervenor "Maine wants [plaintiff] Moosehead to collect as much as possible"); *Phila. Electric Co.*, 308 *F.*2d at 859 ("To the extent that the concern of the Commission is that the plaintiff recover the full amount to which it is entitled, the Commission's interest and that of the plaintiff are identical.... We conclude, therefore, that any interest the Commission may have in the adequacy of the plaintiff's prospective recovery cannot be a basis for intervention as of right.").

***10** Here, Intervenors have the same ultimate goal as the DEP: the recovery of money from Exxon to use to replace and restore natural resources in New Jersey. The Intervenors seek to intervene because they take issue with the amount the DEP would receive under the proposed settlement. This case has been ongoing for eleven years, and Exxon has fiercely contested the DEP's claims. All parties have always known that it could conclude in one of three ways: (1) this court could dismiss the DEP's claims and the DEP could recover $0; (2) the DEP could recover the full amount of $8.9 billion; or (3) the amount the DEP recovers, either through litigation or settlement, could be somewhere in between. After last year's lengthy trial, for any number of reasons the DEP could have realized their hand was not as strong as they originally believed. As the public's trustee, they could have believed that the best strategy was to settle the case and take a certain amount of money over the prospect of no money.

At this stage, the court does not pass judgment on the fairness and reasonableness of the proposed settlement. This will be done after the July 21, 2015 hearing. All the court is saying is that the Intervenors' preference for a different strategy, *SEC*, 147 *F. Supp.* 2d at 1042, and concern over the amount recovered, *Phila. Electric Co.*, 308 *F.*2d at 859, is not enough to meet the adequate representation prong. The Intervenors have not demonstrated adversity of interest, collusion, or nonfeasance. *Moosehead*, 610 *F.*2d at 54. They have not even alleged misfeasance, let alone nonfeasance. *Cf. Prete*, 438 *F.*3d at 957 & n.9 (noting that courts find adequate representation when the original party "vigorously defends" that action); *Asbury Park*, 388 *N.J. Super.* at 8-9 (finding that the city "more than adequately represented" the potential intervenors when it "zealously and successfully opposed" a condemnation proceeding). Nor have the Intervenors claimed they did not receive notice of the public comment period so as to allow them to submit feedback on the settlement.

In an attempt to overcome the "ultimate goal" test, the Intervenors rely on *In re Acushnet River & New Bedford Harbor*, 712 *F. Supp.* 1019 (D. Mass 1989). At first blush, this case appears to support the Intervenors' position. There, the United States District Court for the District of Massachusetts granted environmental interest groups' petition for intervention who were challenging the adequacy of a $2 million settlement recovery. *Acushnet River*, 712 *F. Supp.* 2d at 1022.[48] A closer review of the case, however, reveals that it is easily distinguishable from the present matter. Under CERCLA, the trustees argued that "the proper measure of natural resource damages is the *lesser* of the costs of restoring or replacing the injured resources and the resources' lost use value." *Id.* at 1024 (internal quotation marks omitted). The *Acushnet River* intervenors believed the measure of damages should be "the cost of restoration or replacement of the natural resources, or failing that, of the acquisition of equivalent resources, *plus* the lost use value." *Ibid.* Thus, the court found that the ultimate goal divergence did not concern the *recovery amount*, but rather "the *proper measure of damages*." *Ibid.* (emphasis added).

In the present case, because the dispute is only over the recovery amount and not the proper measure of damages, the Intervenors do not satisfy the adequate representation prong. At all relevant times, the DEP has sought to have Exxon pay for the sites' remediation through the ACOs and attempted to recover lost use damages to use to restore and replace

injured natural resources. *Exxon*, 393 *N.J. Super.* at 401-02. This is exactly what the Intervenors want, and this court will not allow intervention when the Intervenors seek no relief other than that which the DEP seeks. *Virginia*, 542 *F.*2d at 216 ("Nonetheless, we find that Virginia has not met its burden. Virginia seeks no relief other than that which VEPCO seeks for itself.").

*11 The environmental groups also do not meet the adequate representation prong because they are public interest groups whose concerns closely parallel those of a public agency. The Third Circuit has held that a "government entity charged by law with representing a national policy is presumed adequate for the task, particularly when the concerns of the proposed intervenor, *e.g.*, a 'public interest' group, closely parallel those of the public agency." *Kleissler*, 157 *F.*3d at 972 (citations omitted). To overcome this presumption, intervenors must make a "strong showing of inadequate representation." *Ibid.* (citing *Mausolf v. Babbitt*, 85 *F.*3d 1295, 1303 (8th Cir. 1996)); *see also Prete*, 438 *F.*3d at 957 (requiring a "very compelling showing to the contrary"). "[I]ntervenors should have an interest that is specific to them." *Kleissler*, 157 *F.*3d at 972. Intervenors have not overcome this presumption of adequate representation because their interests are general, rather than specific, and they have not pled any facts to show why the DEP cannot adequately represent them.

Moreover, during oral argument, the Intervenors admitted that because they are only challenging the settlement, if the underlying litigation had been allowed to proceed to its natural end, they would not have filed these motions before the court rendered a decision.[49] This concession at oral argument that they are "primarily concerned with the outcome of the settlement negotiations, and that [their] interests at trial would be adequately represented by [the DEP], is significant. [This court fails] to see how a party which admittedly is adequately represented at trial by parties to the action, is somehow entitled *as of right* to participate in settlement proceedings." *Virginia*, 542 *F.*2d at 216.

The "ultimate goal" test's reasoning is equally applicable to *Rule* 4:33-1. In New Jersey, when parties share the same ultimate goal, one "who is interested in pending litigation should not be permitted to stand on the sidelines, watch the proceedings and express his disagreement only when the results of the battle are in and he is dissatisfied." *Hanover*, 118 *N.J. Super.* at 143. The Intervenors' quarrel is with the means and strategy employed by the DEP against Exxon. The Intervenors have done nothing to overcome the presumption of adequate representation. Although this presumption comes from federal law, New Jersey courts apply a similar presumption when the case involves an administrative agency that has been statutorily entrusted with certain duties.

II.C.3. New Jersey Presumption Favoring Statutorily Entrusted Agencies

"There is a *prima facie* presumption that the power and discretion of governmental action has been properly exercised." *Miller v. Passaic Valley Water Comm'n*, 259 *N.J. Super.* 1, 14 (App. Div. 1992) (citing *Grundlehner v. Dangler*, 51 *N.J. Super.* 53, 61 (App. Div. 1958)). "The good faith of public officials is to be presumed, their determinations are not to be approached with a general feeling of suspicion." *Ibid.* (citing *Ward v. Scott*, 16 *N.J.* 16, 23 (1954); *N.J. Highway Auth. v. Curry*, 35 *N.J. Super.* 525, 532 (App. Div. 1955)). To overcome this presumption, challengers must "establish[ ] clearly that the [government's] action was unreasonable." *Grundlehner*, 51 *N.J. Super.* at 61. For example, in the field of taxation, it is presumed that the "government will act scrupulously, correctly, efficiently, and honestly." *F.M.C. Stores Co. v. Borough of Morris Plains*, 100 *N.J.* 418, 427 (1985). Applying these principles, the Appellate Division has consistently found adequate representation when the Legislature has entrusted municipalities and agencies with certain duties.

For instance, the Appellate Division has found that a municipality adequately represents a private developer in condemnation proceedings when that private entity is contractually obligated to pay a condemnation amount and seeks to intervene to challenge the valuation. *Asbury Park*, 388 *N.J. Super.* at 3, 8. The Appellate Division, referencing *Miller*, *Grundlehner*, and *F.M.C. Stores*, placed great weight on the fact that the Legislature made the municipality "the sole entity entrusted with the authority to acquire land by condemnation to carry out a redevelopment plan," *id.* at 11-13,

and noted that the potential intervenor had not made "a clear showing, by specifically articulated facts, of conduct by the public entity that palpably evinces a derogation of its fiduciary responsibilities." *Id.* at 12.

*12 Similarly, in *New Jersey Division of Youth & Family Services v. D.P.*, 422 *N.J. Super.* 583 (App. Div. 2011), the Appellate Division denied resource parents' motion to intervene in a child's best interest hearing because the "process, as designed by the Legislature ... precludes their participation as a party in the litigation." *D.P.*, 422 *N.J. Super.* at 586. Because the resource parents had an opportunity to "impart information to the Family Part," just as Intervenors have the same opportunity by way of their public comments, the court found adequate representation. *Ibid.* The Legislature has made the DEP the public's trustee for natural resources, *N.J.S.A.* 58:10-23.11a, just as it has entrusted law guardians with the "object of ensuring [foster children's] well-being." *D.P.*, 422 *N.J. Super.* at 593. Although it is admirable that Intervenors seek to replace and restore the state's natural resources, absent specifically articulated facts as to why the DEP cannot achieve its ultimate goal, the court sees no reason to allow them to intervene as of right.

The resource parents' ability to impart information to the Family Part was key to the court's *D.P.* determination. Likewise, the Appellate Division has also placed importance on the use of "fairness hearings" to approve settlements and has found adequate representation when this occurs. In *Builders League of South Jersey, Inc. v. Gloucester County Utilities Authority*, 386 *N.J. Super.* 462 (App. Div. 2006), when a developer objected "with the amount of the proposed settlement," the court found adequate representation because the trial judge employed a fairness hearing. *Builders League*, 386 *N.J. Super.* at 467-68. At the fairness hearing, which was used to determine if the settlement was reasonable, the developer was allowed to file written comments and objections. *Id.* at 468. Finding adequate representation, the court noted that the "hearing protected the public's interest while balancing the rights and concerns of the parties." *Id.* at 472.

Here, the court affords the DEP's decision to settle the case the same presumption that the municipality and administrative agency were afforded in the above mentioned cases. The Intervenors have done nothing to rebut this presumption. At best, they have stated that the settlement amount is "suspiciously low," [50] and chided the DEP for not explaining why the settlement is fair, reasonable, and in the public interest and how they are to spend the settlement funds. [51] The DEP's decision, however, is "not to be approached with a general feeling of suspicion." *Miller*, 559 *N.J. Super.* at 14. Further, fairness, reasonableness, and public interest are not factors at this stage. The court is currently considering the wealth of public comments, especially Intervenors', and is holding a hearing in less than two weeks to make that determination. Although the court finds that the DEP adequately represents the Intervenors' interests, neither Exxon, the State, nor Intervenors should read this decision as to impact the determination the court will make in the coming weeks.

In conclusion, even under a liberal reading of *Rule* 4:33-1, Intervenors fail the third prong because the DEP adequately represents their interests in the protection and restoration of New Jersey's natural resources. Through their public comments, the Intervenors have a mechanism to protect their interest. They share the same ultimate goal with the DEP and have not rebutted the presumption of adequacy that therefore arises. As the public's statutorily entrusted trustee for public resources, it is the DEP that has been charged with prosecuting the underlying action, and Intervenors have made no showing as to why the DEP cannot properly perform this function.

II.D. The Intervenors' Motions are Not Timely

Intervenors' motions for intervention as of right would fail under *Rule* 4:33-1 even if they were timely because the DEP adequately represents their interest. For this reason, the court need not discuss at length timeliness under *Rule* 4:33-1. Timeliness is a permissive intervention factor under *Rule* 4:33-2, and the court will elaborate on it in that section. The court notes, however, that when discussing intervention as of right, the Appellate Division has stated that "the controlling date" for a timeliness inquiry is when the interests of the original party and intervenor diverge. *See Meehan*, 317 *N.J. Super.* at 570. As discussed above in Section II.C., the DEP and Intervenors' interests have never diverged. For this

reason, "the controlling date" for the timeliness inquiry should be 2004, the date the DEP filed the complaints. As such, the court cannot consider the Intervenors' motions to be timely under *Rule* 4:33-1.

III. PERMISSIVE INTERVENTION

*13 "Where intervention of right is not allowed, one may obtain permissive intervention under *R. 4:33-2*." *Atl. Employers Ins. Co. v. Tots & Toddlers Pre-School Day Care Ctr.*, 239 *N.J. Super.* 276, 280 (App. Div. 1990). New Jersey Court Rule 4:33-2 states:

> Upon *timely application* anyone may be permitted to intervene in an action if the claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a state or federal governmental agency or officer, or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the agency or officer upon timely application may be permitted to intervene in the action. *In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.*

Rule 4:33-2 (emphasis added). Like *Rule* 4:33-1, it is to be liberally construed, but unlike *Rule* 4:33-1, it permits intervention at the trial court's discretion. *ACLU*, 352 *N.J. Super.* at 70.[52] Trial courts are to consider four factors when determining whether to grant permissive intervention: (1) the *promptness* of the application; (2) whether the granting thereof will result in *further undue delay*; (3) whether the granting thereof will *eliminate the probability of subsequent litigation*; and (4) the extent to which the grant thereof *may further complicate litigation which is already complex*. *Ibid.* (quoting Pressler, *Current N.J. Court Rules*, comment on *R.* 4:33-2 (2002)). Based on these factors, the binding New Jersey caselaw, and the relevant persuasive federal authorities, the court denies the Intervenors' motions for permissive intervention.

The Intervenors argue that the motions for permissive intervention are prompt, or timely, because they were filed less than two months after the DEP publically released the details of the proposed settlement. As discussed in the intervention as of right timeliness section, however, the court views the timeliness of their motion in relation to when the DEP filed the suit in 2004. This case is very much like *Sutter v. Horizon Blue Cross Blue Shield of New Jersey*, in which the Appellate Division denied a permissive intervention motion as untimely. 406 *N.J. Super.* 86, 107-08 (App. Div. 2009). There, the intervenors filed a motion to intervene only months after the proposed settlement of a class action lawsuit was announced. *Id.* at 95-96. The trial court denied the motion and the Appellate Division affirmed, noting that "the [intervenors] have moved at a very late date," and that "litigation began over four years ago and has received much attention." *Id.* at 107. Based on this analysis, the Intervenors' motions are even less timely than that in *Sutter* because this litigation began eleven years ago and has likewise received much attention.

*14 As to the second factor, the court finds that granting the Intervenors' motions will result in further undue delay. It is true that the granting of any permissive intervention motion will necessarily delay proceedings somewhat. This second factor, however, works against the Intervenors because the delay they will cause is *undue*. Both the environmental groups and Senator Lesniak initially stated in their briefs that they only seek to intervene to argue against the proposed settlement. Even if this is all the Intervenors seek to do, the delay would be undue because both parties, as well as the public, have submitted numerous public comments opposing the settlement. The delay caused by their intervention, therefore, would be undue because it would give these parties two bites at the apple: they would be able to argue against the proposed settlement in the public comment forum and again at the settlement hearing. *See id.* at 107 (denying permissive intervention motion because, *inter alia*, the potential intervenors were allowed to voice their concerns at the statutorily mandated "fairness hearing"). To give these groups time to write briefs and prepare oral arguments for the hearing, proceedings would unnecessarily have to be further delayed.

The court highlights the Intervenors' original statement of intent because, after reading the environmental groups' reply brief and conducting oral argument, it seems they have changed their intent. In their reply brief, the environmental groups stated, "Once Applicants receive and review [the State's substantive explanation and argument on the terms of the settlement], they will be able *to present a more fully formulated position on the role they wish to play in the settlement-review proceedings.*[53] This position was reiterated at oral argument.[54] This inconsistency and expansion of intent not only weakens their argument as to the undue delay factor, but also as to the third and fourth factors.

The third factor also works against the Intervenors because their intervention would not eliminate the probability of subsequent litigation, it would increase that probability. Finally, the granting of their motions would add to the complexity of an already complicated case that has seen both original parties spend millions of dollars in assessment costs and attorneys fees. "'The courts have recognized that once parties have invested time and effort in settling the case, it would be prejudicial to allow intervention.'" *Ibid.* (quoting trial court). To do so "'would render worthless all of the parties' painstaking negotiations.'" *Ibid.* (quoting trial court).

The factors employed by the Court of Appeals for the First Circuit also work against the Intervenors. That court looks to (1) the length of time the applicants knew, or reasonably should have known, of their interest before they petitioned to intervene; (2) the prejudice to the existing parties due to the applicants' failure to petition for intervention promptly; (3) the prejudice that applicants would suffer if they were not allowed to intervene; and (4) unusual circumstances militating for or against intervention. *Garrity v. Gallen*, 697 *F.*2d 452, 455 (1st Cir. 1983). Here, the Intervenors were aware of the lawsuit's inception in 2004 and have known of their interests in its outcome for eleven years. As *Sutter* instructs, intervention after a settlement has been reached prejudices the original parties because it would render worthless their "painstaking negotiations." *Sutter*, 406 *N.J. Super.* at 107. Furthermore, allowing intervention would prejudice the State because it would be forced to spend scarce public resources opposing the Intervenors. *See Garrity*, 697 *F.*2d at 457 (finding prejudice to the state when allowing intervention would compel them to expend additional public resources). The Intervenors, their members, and the general public have already submitted thousands of comments in opposition to the settlement. The DEP has spent considerable time and money reviewing these comments and still decided to go through with the settlement. To add to that time and money would be unduly prejudicial.

***15** Third, the Intervenors will not suffer any prejudice if they are not allowed to intervene. As repeatedly stated in this opinion, the Intervenors have already extensively argued against the settlement through their public comments. The court has reviewed, and is still reviewing, their comments and nothing will be gained by permitting the Intervenors to submit additional briefs and make additional oral arguments on the subject. Finally, to the extent there are unusual circumstances, the length of this case works against the Intervenors.

To support their motion, Intervenors rely on the previously discussed *In re Acushnet River & New Bedford Harbor*. In that case, applying the *Garrity* factors, the court found that allowing intervention would not cause undue prejudice or delay. *Acushnet River*, 712 *F. Supp.* at 1025. *Acushnet River*, however, is easily distinguishable from the present case. There, the court specifically highlighted the fact that "this one settlement constitutes a relatively small part of this entire litigation," and that viewing "the matter in the context of this entire massive litigation, the possible undue prejudice that may result to the existing parties discounted by the probability that such prejudice will ever occur is insufficient" to defeat the motion. *Id.* at 1025. Far from being "a relatively small part of this entire litigation," the proposed settlement seeks to dispose of *all* aspects of the State's soil and sediment claims. The State and Exxon have fought over these claims for eleven years, and intervention at this stage, unlike that in *Acushnet River*, would be highly prejudicial.

Finally, Senator Lesniak raises one argument that is distinct from the environmental groups' arguments. Citing *Evesham Township Zoning Board of Adjustment v. Evesham Township Council*, 86 *N.J.* 295 (1981), he argues "the courts have generally been solicitous of applications by public officials and agencies who represent a constituency with an interest in the matter."[55] Far from announcing such a general principle, however, the New Jersey Supreme Court in *Evesham*

specifically pointed out that the vice-chairman of the zoning board's intervention motion was filed "to intervene *individually* as a party plaintiff asserting *his status as a taxpayer and resident* of the municipality." *Evesham*, 86 *N.J.* at 298 (emphasis added). Because, contrary to Senator Lesniak's assertion, there is no general principle concerning officials and agencies who represent constituencies, the court gives no weight to his assertion. Because Lesniak is a Senator of the same Legislature that has delegated to the DEP the responsibility of pursuing NRD claims, *N.J.S.A.* 58:10-23.11a, the court is less inclined to allow him to intervene in this matter. Such an intervention would implicate separation of powers issues. Furthermore, as a legislator, he not only has the ability to use his position as a State Senator to urge his colleagues to prospectively change any flaws he currently finds in the NRD settlement process, but to also air concerns about the settlement in the many recognized public forums as part of the political process.

In conclusion, the court denies the Intervenors' motions for permissive intervention. Even under a liberal reading of *Rule* 4:33-2, the motions were not prompt and would unduly prejudice the original parties. To allow intervention at this stage would work against the very purpose of the rule's timeliness requirement, which is "to prevent last minute disruption of painstaking work by the parties and the court." *Metro. Dist.*, 865 *F.*2d at 6.

SUMMARY

***16** The court denies both the environmental groups' and Senator Lesniak's motions for intervention as of right and permissive intervention. The court denies the *Rule* 4:33-1 motion as to the environmental groups because the DEP adequately represents their interests. The court denies the *Rule* 4:33-1 motion as to Senator Lesniak because he lacks an interest or, alternatively, assuming he has an interest, because the DEP adequately represents that interest. The court denies the *Rule* 4:33-2 motions because they are not timely and granting them would unduly delay proceedings and prejudice the original parties.

The court is not saying that potential intervenors can never intervene to oppose a Spill Act settlement. However, the Intervenors here have done nothing to overcome the presumption of adequate representation that arises when they share the same ultimate goal with an original party. They have not demonstrated collusion, nonfeasance, or lack of notice of the opportunity for public comments. Everything they seek to do through their intervention motion has already been accomplished through their public comments. Furthermore, neither Exxon nor the State are opposed to allowing the Intervenors to serve as amici curiae. Intervenors can apply to brief and orally argue as amici so that they can address their concerns without unduly disrupting proceedings. To allow intervention, however, would unduly delay proceedings and prejudice the State and Exxon. For these reasons, the motions are DENIED WITHOUT PREJUDICE.

ORDER

THIS MATTER having come before the Court on the Motion to Intervene filed by New York/New Jersey Baykeeper, the New Jersey Sierra Club, Clean Water Action, Delaware Riverkeeper, Delaware Riverkeeper Network, Environment New Jersey, Natural Resources Defense Council, and New Jersey Audubon (collectively, the "Putative Intervenors"), the Court having considered the papers presented and having heard the oral arguments of counsel, and good cause having been shown;

It is on this *13th* day of *July*, 2015 ORDERED that the Putative Intervenors' motion to intervene is hereby DENIED. for the reason set forth in the attached on & filed written decision

Counsel for Plaintiff shall serve a copy of this Order upon all counsel within five (5) days of receipt of this Order.

IT IS SO ORDERED:

<<signature>>

MICHEL J. HOGAN, J.S.C. Ret. on Recall

ORDER

THIS MATTER having come before the Court on the Motion for Leave to Intervene filed by Raymond J. Lesniak, individually and as a New Jersey State Senator, 20th Legislative District (Union), the Court having considered the papers presented and having heard the oral arguments of counsel, and good cause having been shown;

It is on this *13 th* day of *July*, 2015 ORDERED that Raymond J. Lesniak's motion to intervene is hereby DENIED. for the reasons set forth in the attached & filed written decision

Counsel for Plaintiff shall serve a copy of this Order upon all counsel within five (5) days of receipt of this Order.

IT IS SO ORDERED:

<<signature>>

MICHEL J. HOGAN, J.S.C., Ret. on Recall

Footnotes

1 The complaints have since been amended and consolidated under the current docket number: UNN-L-3026-04 (consolidated with UNN-L-1650-05).

2 Pursuant to a January 11, 2006 case management order, the case was bifurcated between the soil and sediment claims and the groundwater and surface water claims.

3 Exxon and the State voluntarily entered into these ACOs, and their provisions are not at issue in both the underlying litigation and these intervention motions.

4 Both parties filed six pre-trial Rule 104 Motions to bar the testimony of the other sides' expert witnesses. Because this was a bench trial, the parties agreed to allow the experts to testify at trial. After trial, the court was to decide these 104 motions and include them in its opinion. In the interests of judicial economy, the parties agreed to this format because this was a bench trial, and thus, there was less chance of prejudice if the judge heard testimony he ultimately decided not to admit.

5 Proposed Settlement, Pg. 13.

6 *Id.* at 14-20.

7 *Id.* at 20-21.

8 *Id.* at 23.

9 *Id.* at 25.

10 *Id.* at 25-26.

11 Both local newspapers and national outlets such as the Philadelphia Inquirer, the New York Times, and Comedy Central's "The Daily Show" have run stories on the proposed settlement.

12 Brief Supporting Environmental Groups Motion to Intervene [hereinafter Environmental Groups Brief"], Pg. 1.

13 *Ibid.*

14 *Id.* at 7.

15 *Id.* at 9.

16 *Ibid.*

17 *Id.* at 11.

18 *Id.* at 14.

19 *Id.* at 14-15. Although this was their original stated intent, the environmental groups appear to have changed and expanded the reasons they seek to intervene. *See infra* Section III (discussing expansion of purpose in their reply brief and at oral argument).

20 Brief Supporting Senator Lesniak's Motion to Intervene [hereinafter Senator Lesniak's Brief"], Pg. 2.

21 *Id.* at 3.

22 *Id.* at 4.

23 Federal Rule of Civil Procedure 24(a)(2) states, "On timely motion, the court must permit anyone to intervene who claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

24 Exxon argues that the Intervenors cannot have an interest in this litigation because they lack standing to have brought the suit in the first place. This argument, however, ignores that fact that the Environmental Rights Act gives "access to the courts by *all* persons interested in abating or preventing environmental damage." *Twp. of Howell v. Waste Disposal, Inc.*, 207 *N.J. Super.* 80, 93 (App. Div. 1986). Private persons may also bring common law claims, such as the common law trespass and strict liability claims in this case.

25 Environmental Groups Brief at 2.

26 *Ibid.*

27 *Ibid.*

28 *Id.* at 2-3.

29 *Id.* at 3.

30 *Ibid.*

31 *Id.* at 4.

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

35 *Id.* at 5.

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 Senator Lesniak's Brief at 2.

40 *Ibid.*

41 *Id.* at 3.

42 *Ibid.*

43 Although the court finds that Senator Lesniak does not have a *Rule* 4:33-1 interest, *see supra* Part II.A., this Section was written with his intervention as of right motion in mind. The legal principles stated in this Section apply to both his and the environmental groups' motions. Even if Senator Lesniak had "an interest relating to the property or transaction which is the subject of the action and [was] so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest." *N.J. Ct. R.* 4:33-1, his intervention as of right motion would still fail because the DEP adequately represents his interests.

44 These cases were all cited by the environmental groups. The section of Senator Lesniak's brief on intervention as of right only cited two cases for general *Rule* 4:33-1 propositions.

45 Environmental Groups' Brief at 14-15.

46 Senator Lesniak's Brief at 1.

47 Environmental Groups' Brief at 2-3, 5, 8-9, 11.

48 Although it was a permissive intervention motion, the court still discussed the adequate representation prong. *Acushnet River*, 712 *F. Supp.* at 1022-23, 1024.

49 Oral Argument Transcript, Lesniak, Pg. 7, Ln. 2-8; Oral Argument Transcript, Kyle, Pg. 44, Ln. 2-5; Oral Argument Transcript, Kyle, Pg. 47, Ln. 23 – Pg. 48, Ln. 15.

50 Environmental Groups' Brief at 1.

51 *Id.* at 7-8; Senator Lesniak's Brief at 3.

52 The federal counterpart to *Rule* 4:33-2 states, "On timely motion, the court may permit anyone to intervene who has a claim or defense that shares with the main action a common question of law or fact." *Fed. R. Civ. P.* 24(b)(1).

53 Environmental Groups' Reply Brief at 9-10.

54 Oral Argument Transcript, Kyle, Pg. 47, Ln. 17-19; *Id.* at Pg. 55, Ln. 10-11; *Id.* at Pg. 82, Ln. 1-12.

55 Senator Lesniak's Brief at 8.

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EXHIBIT

D

RAYMOND ARTHUR ABBOTT, et al., Plaintiffs, v. FRED G. BURKE, et al., Defendants.	SUPREME COURT OF NEW JERSEY Docket No. Civil Action

MEMORANDUM OF LAW ON BEHALF OF DEFENDANTS' MOTION FOR MODIFICATION OF ABBOTT XX AND ABBOTT XXI

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PRELIMINARY STATEMENT

After thirty years of litigation focused largely on school funding, New Jersey still struggles to meet its mandate to provide a "thorough and efficient system of free public schools" for the thirty-one School Development Authority districts ("SDA Districts"). The unmistakable lesson learned from these past thirty years is that more money does not equal more achievement for the students in the SDA Districts. The approach to funding those school districts, which yielded ever-increasing sums of money without sufficient correlation to educational outcomes, and which is plagued by a host of statutory and contractual impediments to improvement of underperforming districts, has worked to condemn over a generation of students in our most at-risk districts to an inadequate education.

The Court has long acknowledged that money alone could not drive success in the SDA districts and predicted that a funding remedy would be "approaching inutility." The time has come for the Court to find that the point of "inutility" has been reached and accordingly to shift the Court-ordered remedies to ensure that the Commissioner of Education can effectuate the necessary changes to achieve better results for the students.

To ensure significantly improved outcomes, the current approach to funding the SDA Districts must be reconsidered and

the Commissioner of Education must be given the tools to affect meaningful reforms. It is universally accepted that having effective teachers is the most important in-school factor to closing the achievement gap for K-12 children. The best hope for achieving performance gains among the urban poor districts, therefore, is not additional funding but the elimination of impediments to attracting and maintaining the most effective teaching staff in those districts and of restrictions on the districts' abilities to utilize a full complement of tools to provide a thorough and efficient education.

The deficiency of an education system that provides more money every year to failing districts without sufficient correlation to results is compounded by state statutes and labor agreements that prevent the Commissioner and superintendents in low-achieving districts from providing students with the best teachers available and with innovative teaching and learning programs. For example, under the Tenure Act, districts implementing a reduction-in-force must consider tenure above all other factors, even if it means the most effective teachers in the district will be laid off. In Camden, the collective negotiation agreement provides that teachers need only teach for four hours and forty-five minutes out of the seven hour and five minute school day. Moreover, under the current statutory

construct, it takes years and tens of thousands of dollars to terminate an ineffective tenured teacher.

These practices elevate - in a manner unique to teachers and enjoyed by no other profession or industry - collective negotiation agreements and seniority rules over the education of children. These laws and labor agreements unconstitutionally stand in the way of providing a "thorough and efficient system of free public schools" to students in the SDA Districts.

New Jersey spends the third most amount of money in the nation on K-12 education - $13.3 billion or 38% percent of the FY2017 State budget. Although the thirty-one SDA Districts represent only 22.8% of the State's total student population, they will receive more than 56% of the direct state education aid distributed for FY2017, and over 14% of the entire State budget. Under this funding-focused construct, SDA Districts have received $97 billion in school funding over the last three decades. Despite this, there has been no appreciable improvement in the substantive education of New Jersey's disadvantaged students.

The statutory system that has evolved around the School Funding Reform Act ("SFRA") is neither thorough nor efficient. It is doubtful that this Court ever contemplated that in seeking to comply with the Constitution, the State would be required to spend more per pupil at a failing public school than is spent on

tuition at the most prestigious private schools in the State - and yet still get poor results, such as in Asbury Park where nearly $31,000 is spent per pupil annually.

As is now evident, providing more funding to failing districts does nothing to fix the fundamental need for a quality teacher in every classroom, with the fiscal burden fairly supported by all contributors. A critical eye must be focused on the inequities of a system that permit a district like Asbury Park to generate State and other aid sufficient to spend $31,000 per student, that permit districts to shirk their Local Fair Share obligations and not be an active partner in the fiscal support of their schools and allow communities to manipulate their local income and property wealth downward in order to unfairly to receive State support.

It is not only morally repugnant to continue to put failed statutory schemes ahead of students, it is constitutionally invalid. Accordingly, the State seeks to amend the Court's prior orders in this matter. Critically, the Abbott v. Burke remedies must include authority for the Commissioner to override, when necessary, statutory and contractual impediments to hiring and retaining the best teachers and maximizing their effectiveness. The unacceptable disparity in outcomes in SDA districts will not be eliminated while these structural

impediments to providing a thorough and efficient system of education remain in place.

Further, the funding of New Jersey's public schools cannot be viewed through the SFRA alone. While the SFRA is a cornerstone of the system, myriad other laws impact a student's education and the efficiency of the State's fiscal support of schools - many detrimentally so. Viewed holistically, the State is not maintaining a thorough and efficient system of public schools as applied to the SDA Districts. Respectfully, the Court should specifically authorize the Commissioner to remedy the statutory and contractual obstacles in those districts.

Finally, given the many inextricably intertwined statutes with State-wide impact on education, and the constitutional obligations of the Legislature and Executive Branch to support and administer a system of free public schools, it is imperative that those branches devise a system that continues to financially support our public schools, while eliminating the impediments and correcting the deficiencies noted herein. This must be done on an urgent basis and in sufficient time so that school districts can plan and implement the necessary changes for the 2017/2018 school year lest the students in the SDA Districts be relegated to falling even further behind their peers. If such action is not taken expeditiously, the Court

should accept an application for further relief in the next few months.

PROCEDURAL HISTORY

Since the 1970's, this Court has repeatedly addressed the constitutional requirement that the State provide each child with a thorough and efficient education and the means for implementing that constitutional mandate. Robinson v. Cahill, 62 N.J. 473, 481 (1973) ("Robinson I"). In a series of decisions in Abbott v. Burke, this Court has overseen the implementation of measures to ensure a thorough and efficient education in poor urban school districts, frequently referred to as the Abbott Districts. In Abbott v. Burke, 100 N.J. 269 (1985) ("Abbott I"), the first of the Abbott cases, the Court addressed the Public School Education Act of 1975 and found that the 1975 Act was unconstitutional as applied to certain property-poor districts. This Court held that the 1975 Act "must be amended, or new legislation passed, to assure that poorer urban districts' educational funding is substantially equal to that of property-rich districts." Abbott v. Burke, 119 N.J. 287, 385 (1990) ("Abbott II").

The Legislature responded by enacting the Quality Education Act of 1990 ("QEA") and the Comprehensive Education Improvement and Financing Act of 1996 ("CEIFA"); both were found unconstitutional as applied to the poor, urban districts.

Abbott v. Burke, 136 N.J. 444, 446-47 (1994) ("Abbott III"); Abbott v. Burke, 149 N.J. 145, 201 (1997) ("Abbott IV"). The Court directed the Commissioner of Education to devise a plan for the State to assist in implementing solutions or programs to meet the needs of the Abbott Districts, and in the interim, this Court imposed what has become known as the "parity remedy," requiring the State to increase funding to the Abbott Districts to a level "equivalent to the average per-pupil expenditure" in certain non-Abbott districts. Id. at 224. In 1998, this Court accepted the Commissioner's findings and recommendations for "whole school reform." Abbott v. Burke, 153 N.J. 480, 527 (1997) ("Abbott V").

Over the next decade, lawsuits continued concerning implementation of the Abbott V Order. See Abbott VI - XIX. In 2008, the Legislature passed the School Funding Reform Act of 2008 ("SFRA"). Under this rather complex formula, property and income poor districts generally are to receive substantially more State aid per pupil than property and income rich districts.

This Court held in 2009 that "the SFRA is a constitutionally adequate scheme" and relieved the State from prior remedial orders, including the parity payments ordered in Abbott IV. Abbott v. Burke, 199 N.J. 140, 175 (2009) ("Abbott XX"). In 2011, this Court Ordered the State to calculate and

provide funding to the SDA Districts in accordance with the SFRA formula. Abbott v. Burke, 206 N.J. 332, 376 (2011) ("Abbott XXI").

FACTUAL BACKGROUND

Schools in New Jersey's poor, urban districts (previously known as "Abbott Districts," now known as "SDA Districts"[1]) have been underperforming for decades. Abbott II, supra, 119 N.J. at 369-70; Certification of Jeffrey Hauger ("Hauger Cert.") at ¶ 9 (Exhibits A and B). There is a persistent and significant educational achievement gap between the SDA District students and their non-SDA counterparts. Ibid. This Court has held numerous times that the Commissioner of Education is charged with resolving the problem of constitutional deprivation and, as

[1] In 1975, all of the public school districts in the State were categorized into District Factor Groups ("DFG"), which represent an approximate measure of a community's relative socioeconomic status. Abbott II, supra, 119 N.J. at 338-39. The DFGs ranged from A to J, with the most privileged districts receiving I and J ratings and the most underprivileged districts receiving A and B ratings. Ibid. The Abbott II Court identified the 28 districts which received A and B ratings as having special needs. Id. at 343-44. In Abbott III, this Court called these 28 districts the "Special Needs Districts." Abbott III, supra, 136 N.J. at 446. Under CEIFA, these schools were renamed "Abbott Districts" and after districts were added based on updated census data, there were 31 in this category. N.J.S.A. 18A:7F-3. In 2008, the SFRA abolished this distinction, but recognized that these 31 districts had special needs and placed them under the authority of the School Development Authority ("SDA"). N.J.S.A. 18A:7G-3. These 31 districts are now known as "SDA Districts" and will be referred to as such herein.

a remedy, has on multiple occasions ordered the State to increase funding to these underperforming SDA Districts for the purpose of improving student performance and reducing disparity. Abbott II, supra, 119 N.J. at 296-97, 299-300, 309-10; Abbott IV, supra, 149 N.J. at 167, 180, 198, 224; Abbott V, supra, 153 N.J. at 492-93, 614; Abbott XX, supra, 199 N.J. at 144, 245; Abbott XXI, supra, 206 N.J. at 341, 369-70, 391-92; 462-64.

Unfortunately, while tens of billions of dollars were provided to the SDA Districts over 30 years, Certification of Kevin Dehmer ("Dehmer Cert.") at ¶ 7 (Exhibit C), statutory and contractual impediments have thwarted the State's efforts to implement real, substantive reform. The achievement gap that began the Abbott v. Burke litigation in 1984 remains just as wide today. Abbott II, supra, 119 N.J. at 369-70; Hauger Cert. at ¶ 9 (Exhibits A and B). By this motion, the State seeks modification of this Court's Orders in Abbott XX and Abbott XXI to allow the State to remove these impediments and reduce the disparities in achievement.

I. SDA Districts Are Still Performing Poorly as Compared to non-SDA Districts

The SDA Districts have continued their comparatively poor performance since the Abbott v. Burke litigation began in 1984. Abbott II, supra, 119 N.J. at 369-70; Hauger Cert. at ¶ 9 (Exhibits A and B). In the 1985/1986 school year, all but two

of New Jersey's lowest performing schools failed to meet the then applicable basic State school certification requirement that at least 75% of a school's students pass the existing High School Proficiency Test ("HSPT"). Id. at 369. Of the 14,000 students from poor, urban districts who took the test, only 54% passed the reading portion, 42% passed the math, and 43% passed writing. Id. at 369-70. Certain of those urban districts did even worse, with only 41% of Newark students passing the reading portion, 31% passing math, and 39% passing writing. Id. at 370. In Camden, only 39% passed reading, 28% passed math, and 44% passed writing. Ibid. By comparison, statewide, 83% of students passed reading, 72% passed math, and 77% passed writing. Ibid. In the State's highest-performing districts, 97% passed reading, 93% passed math, and 95% passed writing. Ibid. In the 1984/1985 school year, the dropout rate in poor, urban high schools was as high as 47%, significantly higher than the statewide figure. Ibid.

The difference in performance levels between the SDA Districts and non-SDA Districts has not changed much since the Abbott litigation began in 1984. Exhibit A to the Certification of Jeffrey Hauger demonstrates that, for the 2001/2002[2] through

[2] Where no data is shown on the chart for a specific assessment for a specific school year, this means the assessment was not operational that year (i.e., 2001-2008 NJ ASK 3-8) or no state-

the 2014/2015 school years, third grade, eighth grade, and high school[3], standardized test scores for math and English/language arts ("ELA") in the SDA Districts have remained low and relatively stagnant. Hauger Cert. at ¶ 9(a) (Exhibit A). Exhibit B to the Hauger Certification demonstrates that the performance gap between the SDA District schools' standardized test scores and the scores in the other State districts' schools has also remained relatively large and that it has not closed over this time period. Id. at ¶ 9(b) (Exhibit B).

For instance, in school year 1985/1986, the disparity between the SDA Districts and Statewide average scores was 29 percentage points for high school reading, 30 percentage points for math, and 34 percentage points for writing. Abbott II, supra, 119 N.J. at 369-70. From the 2001/2002 school year through the 2014/2015 school year, the disparity between the SDA Districts and non-SDA Districts remained in the 13-30 percentage point range for high school ELA and in the 14-33 percentage point range for high school math. Hauger Cert. at ¶ 9(b)

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wide data associated with the assessment was released that year (i.e., 2007-2008 NJ ASK grade 3). Hauger Cert. at ¶ 9(c).

[3] In analyzing the student proficiency levels, grades 3, 8 and 11 were used as benchmarks. Certification of Katherine Czehut ("Czehut Cert.") at ¶ 13. Grade 3 was used because third grade literacy is commonly used as an indicator of future educational success. Ibid. Grade 8 was included because it is commonly used in educational research. Ibid. Grade 11 was used because, in New Jersey, the eleventh grade assessment is the final assessment of a high school student's knowledge. Ibid.

(Exhibit B). Since the 2001/2002 school year, a consistent and significant disparity between standardized testing scores for SDA Districts and non-SDA Districts has continued at all grade levels. Ibid.

This persistent disparity is also true for graduation rates. Exhibit A to the Certification of Peter Shulman demonstrates that, from the 2010/2011 school year through the 2014/2015 school year, graduation rates in the SDA Districts ranged from 68.6% to 76.7%, while graduation rates in the non-SDA Districts ranged from 86% to 92.9% over the same years. Certification of Peter Shulman ("Shulman Cert.") at ¶ 4 (Exhibit A). Just like the standardized test scores, graduation rates in the SDA Districts remain consistently lower than the non-SDA District averages. Ibid.

Reinforcing these disappointing outcomes, the school district rating site, SchoolDigger.com, which evaluates and ranks districts according to test scores released by state education departments, ranks only 2 of 29 ranked SDA districts in the top 400 of the 610 New Jersey districts[4] that it ranked on

[4] SchoolDigger.com recognized 673 separate school districts in the State of New Jersey, including the traditional public school districts, charter schools, and specialized schools such as vocational schools. See School Digger Rankings. Only 610 of these districts were ranked because SchoolDigger.com did not have sufficient information to rank the 63 unranked districts. Ibid. Ranking Frequently Asked Questions, <<https://www.

the site based on test scores from 2014/2015. New Jersey School Districts, Updated Tuesday, February 2, 2016, based on the 2014/2015 school year test score, <<https://www.schooldigger.com/go/NJ/districtrank.aspx>> (last visited Sept. 9, 2016) ("School Digger Rankings"). Only 6 SDA districts ranked in the top 500, while 23 of 29 SDA districts ranked were among the bottom 110, including 3 of the bottom 4 (Trenton #607, Camden #608, Asbury Park #609). Ibid.

Looking at the disparity between spending and outcomes yet another way, consider the Asbury Park and Haddonfield school districts. In FY2015, Asbury Park spent an astounding $30,977 per pupil, Dehmer Cert. at ¶ 9 (Exhibit E), and had a graduation rate of only 66%, see NJDOE, 2015 Graduation Rates, 2015 Adjusted Cohort 4 Year Graduation Rates, <<http://www.state.nj.us/education/data/grate/2015/>> (last visited September 14, 2016), while Haddonfield spent less than half that amount per pupil - $15,292, <http://www.state.nj.us/cgi-bin/education/csg/16/csg.pl>, - and has a 98.9% graduation rate. See NJDOE, Taxpayer's Guide to Education Spending 2016, District: Haddonfield Boro,

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schooldigger.com/aboutranking.aspx>> (last visited Sept. 9, 2016) ("School Digger FAQs"). Two of the unranked districts are SDA Districts - Burlington City and Long Branch City. School Digger Rankings. Thus, only 29 of the 31 SDA Districts were ranked by SchoolDigger.com. Ibid.

<http://www.state.nj.us/education/guide/2016/district.shtml> (last visited September 14, 2016). From this, it is clear that more spending, alone, does not equate to improved educational outcomes.

II. SDA District Funding Has Increased Dramatically

State funding to SDA Districts has increased substantially since the Abbott litigation began, to its current disproportionately high level. Dehmer Cert. at ¶ 7 (Exhibit C). State funding has enabled the SDA Districts to spend significantly more per pupil than the non-SDA District average, and more than the national average. Dehmer Cert. at ¶ 9 (Exhibit D); see also Digest of Education Statistics, Table 236.55, Total and current expenditures per pupil in public elementary schools: Selected years, 1919-20 through 2012-13 <https://nces.ed.gov/programs/digest/d15/tables/dt15_236.55.asp?current=yes>> (last visited Sept. 14, 2016) ("NCES Table 236.55").

In the early 1970's, per pupil spending in New Jersey ranged from $700-$1,500. Abbott II, supra, 119 N.J. at 334. In 1975, spending ranged from $1,076-$1,974 per student. Ibid. In the 1984/1985 school year, the New Jersey State average was $3,329 per pupil. Id. at 344. In that year, the average expenditure in the A and B districts (which now comprise most of the the SDA Districts) was $2,861, whereas the average spending

in schools in the State's most affluent districts (the I and J districts at that time) was $4,029 per student. Ibid. In 1984, the national spending average was $3,216 per student. NCES Table 236.55, supra. Thus, at the very beginning of the Abbott litigation, the SDA Districts were spending $400 per student less than the national average but as much as $2,253 less per pupil than the New Jersey State average. This changed significantly after this Court first granted financial relief in Abbott II, which required increased State funding to the Abbott Districts.

As a result of additional State funding for education over the next decade, the average per pupil expenditure in the SDA Districts rose to $10,938 per pupil in the 2001/2002 school year, exceeding the non-SDA District average of $9,007 per pupil, Dehmer Cert. at ¶ 9 (Exhibit D), and the national average of $8,572 per pupil. NCES Table 236.55, supra. In the 2012/2013 school year, the average per pupil spending in the SDA Districts increased further to $16,723 as compared to the non-SDA District average of $13,522, Dehmer Cert. at ¶ 9 (Exhibit D), and the national average of $12,020. NCES Table 236.55, supra. The most recent data from the 2014/2015 school year demonstrates that the SDA District spending remains high at $16,605 per pupil as compared to the non-SDA District average of $14,261. Dehmer Cert. at ¶ 9 (Exhibit D). While those are the

averages, the amounts spent in many SDA districts are significantly higher. For instance, in 2014/2015, education spending in Asbury Park was $30,977 per pupil, Keansburg was $21,306 per pupil, Camden was $19,156 per pupil, Hoboken was $21,505 per pupil, Newark was $17,041 per pupil, Jersey City was $18,154 per pupil and East Orange was $18,980 per pupil. Dehmer Cert. at Exhibit E.

This increased spending in the SDA Districts is possible largely because of significant increases in State education funding. Dehmer Cert. at ¶ 7 (Exhibit C). In FY1985, total State aid to the 31 SDA Districts was $684,903,725, representing 39.5% of the total preschool-12 State aid distributed that year. Dehmer Cert. at ¶ 7(a) (Exhibit C). In the year immediately following Abbott IV, in FY1998, that percentage jumped to 48.5%. Id. at ¶ 7(b) (Exhibit C). At that time, the number of students in the SDA Districts was about 22% of all students in the State. Ibid. In FY2017, the SDA Districts will be receiving nearly 59% of all preschool-12 State aid distributed, while their proportionate student enrollment is virtually unchanged - projected at 22.8% of the State's students for FY2017. Id. at ¶ 7(c) (Exhibit C).

As this data demonstrates, since the Abbott v. Burke litigation began, the SDA Districts have continuously received a significant and expanding portion not only of the State's

education budget, but of the State's overall budget. For example, the entire FY2017 State budget is $34.8 Billion. FY2017 Appropriations Act. Of this, $8.7 Billion is devoted to education spending, nearly $5.1 Billion[5] of which will go to the 31 SDA Districts, alone. Dehmer Cert. at ¶ 7 (Exhibit C). Thus, 14.6% of the State's entire budget will go towards funding just the 31 SDA Districts in FY2017. Ibid.; FY2017 Appropriations Act.

III. Paradoxically, While Court-Ordered State Education Funding Has Increased to the SDA Districts, at the Same Time, their "Local Fair Share" Percentage Contributions Have Decreased, Thus Impacting Other State Budgetary Needs

In addition to receiving State aid, each district is required to raise a portion of its budget through local property taxes. Dehmer Cert. at ¶ 10. A calculation of each district's estimated ability to raise local taxes to support local schools is required as part of the SFRA formula and this calculation is

[5] This number, while staggering, actually does not take into account hundreds of millions of dollars in additional funding that SDA Districts receive from other sources, including approximately $300 Million per year in Federal funds. Dehmer Cert. at ¶ 5 (Exhibit A). While the federal funding figures for FY2017 have not yet been determined, federal funding for FY2017 is best estimated by using the amount of federal aid included in each district's latest audit. Dehmer Cert. at ¶ 5(a) (Exhibit B). The most recent audit is from FY2015. Ibid. Thus, the best estimate of federal funding for FY2017 is $305,375,444 for all SDA Districts, the combined federal aid amount from each district's FY2015 audit. Ibid.

referred to as the district's "local fair share" ("LFS"). Ibid. While the Court-ordered funding for the SDA districts has increased, at the same time, SDA Districts' LFS percentage contributions have decreased, and other distorted financial effects have become evident as well. Despite the high level of State funding for the SDA Districts, many of them pay less than their LFS amounts for education, thus impacting other State budgetary needs.

A district's LFS is based on the district's relative property and income wealth and is calculated pursuant to the formula set forth at N.J.S.A. 18A:7F-52. Dehmer Cert. at ¶ 10. See also Dehmer Cert. at Exhibit F. Most of the SDA Districts pay less than their LFS amount and, through tax abatements, have actually increased the State's burden to fund schools in their districts.

First, SDA Districts are able to use tax abatements to avoid funding their school districts from the local tax base while relying on State aid to fill this gap. See A. Matthew Boxer, New Jersey Office of the State Comptroller, A programmatic Examination of Municipal Tax Abatements, August 18, 2010 <<http://www.nj.gov/comptroller/news/docs/tax_abatement_report.pdf>> (last visited Sept. 9, 2016) ("2010 Comptroller Report"). Through tax abatements, see N.J.S.A. 40A:21-1, 40A:20-1, municipalities may exempt certain property owners,

usually businesses, from paying property taxes. See 2010 Comptroller Report, supra, at 4; Certification of John J. Ficara ("Ficara Cert.") at ¶ 4. In exchange, the businesses are typically required to make payments in lieu of taxes ("PILOT") to the municipality. 2010 Comptroller Report, supra, at 4; Ficara Cert. at ¶ 5. For long term abatements, the municipality retains 95% of the PILOT (the other 5% goes to the county), 2010 Comptroller Report, supra, at 5; Ficara Cert. at ¶ 10, and "[i]n many cases, the negotiated PILOT provides more funds to the municipality than it would have otherwise received." 2010 Comptroller Report, supra, at 5. However, the school districts, which typically receive "a large portion of traditional property tax collections - sometimes more than half," Id. at 12, do not receive any portion of the PILOT payment. Id. at 5-6, 12; see also Ficara Cert. at ¶ 10, 13-14 (the cost of long term tax abatements is "borne by school districts, county residents, and State taxpayers"). In addition, for long-term abatements, the PILOT payment is not reflected in the municipality's "ratable base, meaning formula state aid continues to provide enhanced funding based on artificially low community wealth." Id. at 12. In 2010, the State Comptroller noted that "[t]his system allows the municipality, in essence, to hide its true wealth from the school district and the state, resulting in the school

district's continued reliance on the state for funding." Id. at 13.

In his 2010 Report, the State Comptroller identified twenty municipalities (from the 75 municipalities in New Jersey that granted exceptions exceeding 5% of the total taxable value) that made "significant use of development abatements." Id. at 10. Fifteen of these twenty were SDA Districts (Asbury Park, Bridgeton, Camden, Harrison, Hoboken, Gloucester Township, Jersey City, Long Branch, Millville, Newark, New Brunswick, Paterson, Vineland, Union City, and Trenton). Ibid. The report also focused on three additional municipalities that granted exemptions exceeding 5% of the total taxable value, but which did not provide information in a manner sufficient to determine whether the abatements were development-related. Ibid. Two of these three were SDA Districts (Elizabeth and West New York). Ibid.; see also Ficara Cert. at ¶¶ 11-12 (Exhibit A).

The significance of these abatements is exemplified by Jersey City. For example, as of August 2010, Jersey City had exempted approximately $2 billion in property from taxation. 2010 Comptroller Report, supra, at 12. Based on Jersey City's tax rates, this meant that Jersey City did not collect approximately $120 million in property taxes. Ibid.

Second, despite the high levels of State funding that the SDA Districts receive, local funding for education in the SDA

Districts remains low as compared to their LFS amounts. Thirty of the thirty-one SDA Districts paid less than the amount of their LFS towards education almost every year from FY2010 through FY2017[6]. Dehmer Cert. at ¶ 10 (Exhibit F). In 2017, only six of the 31 SDA Districts contributed at least 80% compared to their LFS amount. Dehmer Cert. at ¶ 10-11 (Exhibit F). Most failed to contribute even 60% compared to their LFS amount. Ibid.

In FY2010, Jersey City paid only 40.3% compared to its LFS amount, Dehmer Cert. at ¶ 10 (Exhibit F), while receiving $417,733,738 in State aid for education. See NJDOE, 2009-10 State Aid Summaries, Jersey City <http://www.state.nj.us/education/stateaid/0910/aidsearch.shtml> (last visited September 14, 2016). In FY2010, Hoboken did not provide $3.5 million to its schools due to tax abatements provided to $298 million worth of property. 2010 Comptroller Report, supra, at 13. In FY2010, Hoboken provided only 35.2%

[6] There are a few instances in which SDA Districts paid their LFS amount or higher. In FY2016, Garfield City paid 101.1% as compared to its LFS amount and in FY2013, it paid 102.7% as compared to its LFS amount. Dehmer Cert. at ¶ 10 (Exhibit F). In FY2010, New Brunswick City paid 101% as compared to its LFS amount. Ibid. In FY2014, Salem City paid 102.4% as compared to its LFS amount. Ibid. Burlington City is the only SDA District that has consistently paid greater than its LFS amount from FY2010 through FY2017. Ibid. In all other instances, the SDA Districts paid less than their LFS amounts each year from FY2010 through FY2017.

compared to its LFS amount. Dehmer Cert. at ¶ 10 (Exhibit F). That year, the State provided $6.99 million in education aid to Hoboken. 2010 Comptroller Report, supra, at 13.[7]

The SDA Districts' inequitable reliance on State funds for education is illustrated by comparing tax rates in SDA Districts to those in the rest of the State. Despite having municipal tax rates well above the State average, from FY2010 through FY2015, the SDA Districts consistently collected less than the State average in school taxes[8]. Certification of Timothy Cunningham ("Cunningham Cert.") at ¶ 4 (Exhibit A).

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[7] Notably, in recent years, the SDA Districts are increasingly paying less and less towards education as compared to their LFS amounts. For instance, Hoboken contributed only 35.2% as compared to its LFS amount for FY2010 and this contribution declined to only 23.5% compared to its LFS amount for FY2017. Dehmer Cert. at ¶ 12 (Exhibit F). Similarly, Jersey City contributed only 40.3% compared to its LFS amount towards education funding, which has since decreased to only 35.3% as compared to its LFS amount in FY2017. Ibid. Asbury Park contributed only 51.6% as compared to its LFS amount in FY2010, which rate declined to 42.6% as compared to its LFS amount in FY2017. Ibid.

[8] For example in FY2015, twenty-four of the thirty-one SDA Districts imposed school tax rates that were 80% or less of the State average while all thirty-one SDA Districts imposed municipal tax rates greater than the State average. Cunningham Cert. at ¶ 4 (Exhibit A). For instance, in FY2015, Camden's school tax rate was only 36% of the State average while its municipal tax rate was 220% of the State average. Ibid. Paterson's school tax rate was only 51% of the State average while its municipal tax rate was 351% of the State average. Ibid.

Quite clearly, the current system has disincentivized SDA Districts from investing in their public school systems, and has resulted in their engagement of practices that shift to the State an undue share of their education costs.

Unfortunately, the disproportionate funding burden that many SDA District municipalities have shifted to the State has come to the detriment of other important State functions, including the State's obligation to schools in the 560 non-SDA Districts, and has diverted money from other important State priorities. See Abbott XXI, supra, 206 N.J. at 502 (Hoens, J., dissenting) (fully funding the SFRA with respect to the SDA Districts in light of a budget crisis ignores "the effect that acceding to [plaintiffs'] demand will have on the rights of the unrepresented school districts and of any other person, program, or interest, including those of potentially equivalent constitutional dimension") see also Connecticut Coalition for Justice in Education Funding, Inc. v. M. Jodi Rell, No. CV-145037565-S (Conn. Super. Ct. Sept. 7, 2016) (slip op. at 7-8) ("any constitutional standard the courts set for overall spending levels must be modest … the costs and benefits of education spending must be weighed against other spending priorities before they can be imposed … only the General Assembly does this … It is nonsense under such a system for a court to set expansive goals for the schools and direct whatever

spending it takes to achieve them when it hasn't thought about how its orders might undercut spending on other important rights, including those protected by the Constitution"). As Justice Hoens noted in her dissenting opinion in Abbott XXI, "our Constitution, [also includes] the requirement that the budget be balanced, see N.J. Const., art. VIII, § 2, ¶ 3, and the provision assigning to the Legislature the exclusive authority to appropriate funds, N.J. Const., art. VIII, § 2, ¶ 2." Abbott XXI, supra, 206 N.J. at 502 (Hoens, J., dissenting). Thus, when a budget is based on "greatly reduced revenues that require[] considerable belt-tightening and shared sacrifice[,]...our co-equal branches of government [are forced] to make hard choices requiring reduction of funding affecting numerous and diverse interests, including those of constitutional dimension." Id. at 495 (Hoens, J., dissenting).

IV. Great Teachers Are the Real Key to Improved Student Performance in the SDA Districts

It is almost universally accepted that putting students in contact with great teachers is the single most important aspect of improving student performance. Certification of Eric Hanushek, Ph.D. ("Hanushek Cert.") at ¶¶ 22-33; Certification of Katharine Strunk, Ph.D. ("Strunk Cert.") at ¶ 33; Certification of Christopher Cerf ("Cerf Cert.") at ¶¶ 8-9; Certification of

David Hespe ("Hespe Cert.") at ¶ 14; Certification of Kimberley Harrington at ¶ 13.

Dr. Eric Hanushek, a nationally recognized expert on school finance policy and a Senior Research Fellow at Stanford University's Hoover Institute, explained that "[l]iterally hundreds of research studies have focused on the importance of teachers for student achievement." Hanushek Cert. at ¶ 25. These studies demonstrate that "teachers are very important; no other measured aspect of schools is nearly as important in determining student achievement." Ibid. Katharine Strunk, Ph.D., another national expert on school finance policy and Associate Professor of Education and Policy at the University of Southern California, Rossier School of Education, agrees that "there is extensive research that shows that individual teachers are the most important school-based factor in predicting student achievement on standardized tests as well as longer-term outcomes." Strunk Cert. at ¶ 25.

Dr. Hanushek explained that his research "shows that some teachers produce 1.5 years of gain in student achievement in an academic year while others . . . produce only 0.5 years of gain in student achievement. Stated differently, two students starting at the same level of achievement can know vastly different amounts of information at the end of a single academic year due solely to the teacher to [whom] they are assigned. If

a bad year is compounded by other bad years, it may not be possible for the student to recover." Hanushek Cert. at ¶ 26. Dr. Hanushek's research shows that "[a] teacher [whose teacher quality level] is one standard deviation above average increases student achievement by 0.2 standard deviations (or approximately 6-8 months of learning) when compared to the average teacher. On the other hand, a teacher who is one standard deviation below average decreases student achievement by 0.2 standard deviations (or approximately 6-8 months of learning)." Id. at ¶ 30.

Moreover, Dr. Hanushek has studied the deep impacts that teacher quality can have not just on the students' lives, but also the State of New Jersey and the Nation as a whole. Id. at ¶ 31. For example, a teacher at the sixtieth percentile of the distribution of teacher effectiveness will on average increase a student's lifetime earnings. Ibid. A teacher at the ninetieth percentile will increase the average student's lifetime income by over $25,000 above that expected for an average teacher. Id. at ¶ 31(b). Thus, "a ninetieth percentile teacher with a class of 25 students will add in total more than $680,000 in future income to the class. This is obtained each year the teacher is in the classroom." Id. at ¶ 31(c). However, "a tenth percentile teacher will each year subtract an equivalent amount from a class of 25 students as compared to an average teacher." Id. at ¶ 31(d).

Dr. Hanushek has also found that if New Jersey could improve student performance, "past economic history suggests that the state GDP could be 3.5 percent higher on average over the next 80 years." Hanushek Cert. at ¶ 33. If the nation, as a whole, could improve just its students performing at a "below basic" level to a basic level, the level of GDP in the United States would, according to historical relationships, be lifted by 3.3 percent - almost as much as the total national spending. Id. at ¶ 32.

Other researchers have reached similar results. A 2005 study performed by Marzano et al. concluded that teacher and principal quality account for nearly 60% of a school's total impact on student achievement. Another study performed in 2009 by Goldhaber found that teacher quality had a much greater impact than other factors such as reductions in class size. Having a highly effective teacher for three to five years can erase the deficits that the typical disadvantaged student brings to school. Dick Startz (2010), Profit of Education (Santa Barbara, CA: Praeger). Another study found that a student earns 3.5 percent more each year, if the student had an above-average teacher (75th percentile) teacher in kindergarten than if the student had a below-average (25th percentile) teacher. Dobbie, Will and Roland G. Fryer (2011). "Are High-Quality Schools Enough to Increase Achievement among the Poor? Evidence

from the Harlem Children's Zone," American Economic Journal: Applied Economics 3, no. 3 (July): 158-87.

Despite the compelling conclusions of this research and the fact that New Jersey school districts typically allocate more than 80% of their budgets to salaries and benefits, Cerf Cert. at ¶ 6, there are a disproportionate number of ineffective teachers in the SDA Districts.

Pursuant to the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-117 et seq., which was enacted in 2012, teachers now are rated annually into one of four categories: highly effective, effective, partially effective, and ineffective. N.J.S.A. 18A:6-123(b)(1).

In the entire State of New Jersey in the 2013/2014 school year, which had 105,759 teachers statewide, 205 (0.1%) teachers were rated as ineffective and 2,558 (2.4%) were rated as partially effective. Hespe Cert. at ¶ 17. Statewide, 24,897 (23.7%) of teachers were rated as highly effective. Ibid. The remaining teachers were rated as effective. Ibid. Thus, under the TEACHNJ ratings, the vast majority (97.5%) of New Jersey teachers in the State's 591 school districts in the 2013/2014 school year were rated as effective or highly effective. Ibid. Most schools had no or very few ineffective or partially effective teachers. Ibid.

By contrast, in the 2013/2014 school year, Newark employed 2,775 teachers in its district schools. Hespe Cert. at ¶ 18. Of those, 94 were rated ineffective and 314 were rated partially effective. Ibid. Only 309 of its 2775 teachers were rated highly effective. Ibid. Like Newark, Camden had a very high concentration of the State's lower rated teachers. Ibid. In the 2013/2014 school year, it employed 11 ineffective teachers and 149 partially effective teachers. Ibid. Conversely, only 33 of its 1,014 teachers were rated highly effective. Ibid. In Paterson, 20 of its 1,989 teachers were rated ineffective, and 298 were rated partially effective in the 2013/2014 school year. Ibid.

Thus in 2013/2014, Camden, Newark, and Paterson, just three of the State's 591 school districts, employed 125 (60%) of the State's 205 ineffective teachers. Hespe Cert. at ¶ 19. These three districts also employed 758 (29%) of the State's 2,558 partially effective teachers. Conversely, only 526 (9%) of the 5,778 teachers employed in these three districts were rated "highly effective", as compared to 23% of teachers statewide who received this top rating. Ibid.

V. Funding Is Not the Answer

This Court has held that a "thorough and efficient education requires a certain level of educational opportunity, a minimum level, that will equip the student to become 'a citizen

and . . . a competitor in the labor market.'" Abbott II, supra, 119 N.J. at 306 (1990) (quoting Robinson I, supra, 62 N.J. at 515). Although the Court's efforts to meet this Constitutional mandate traditionally focused on a gap in funding for poorer school districts, the Court has repeatedly confirmed that increased funding is not a constitutional panacea:

- "Hence while funding is an undeniable pragmatic consideration, it is not the overriding answer to the educational problem, whatever the constitutional solution ultimately required." Robinson v. Cahill, 69 N.J. 133, 141 n.3 (1975) ("Robinson IV").

- "We note the convincing proofs in this record that funding alone will not achieve the constitutional mandate of an equal education in these poorer urban districts; that without educational reform, the money may accomplish nothing; and that in these districts, substantial, far-reaching change in education is absolutely essential to success." Abbott II, supra, 119 N.J. at 287.

- "[T]he Court never has believed that equality of expenditures alone will translate into an educational opportunity in Irvington that is comparable to the one provided in Millburn. The judicial funding remedy, indeed, is likely to be approaching inutility. Only comprehensive and systemic relief will bring about enduring reform." Abbott IV, supra, 149 N.J. at 201.

With respect to funding, several different approaches have been tried over the past three decades, but little has been done to effect "substantial, far-reaching change in education [that]

is absolutely essential to success." Abbott II, supra, 119 N.J. at 295. Three significant conclusions are apparent from a careful review of both state funding and school performance data that bear out these statements by the Court that funding in itself is not the solution to meeting the constitutional mandate.

First, there continues to be a significant achievement gap between the State's best and worst performing schools, and the SDA Districts continue to suffer the negative impact of that disparity. Hauger Cert. at ¶ 9 (Exhibits A and B). Second, the disparity in pupil outcomes in the SDA Districts has not been significantly reduced despite substantially increased funding over the past three decades.[9] Ibid.; Dehmer Cert. at ¶ 7 (Exhibit C). Third, studies nationally demonstrate that, assuming infrastructure, equipment and supplies are maintained at a reasonable level, the most important factor in providing a quality education is the quality of the teaching staff. Hanushek Cert. at ¶¶ 22-31; Strunk Cert. at ¶ 33.

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[9] While the SFRA, enacted by the Legislature in 2008 and addressed by this Court in Abbott XX and Abbott XXI, has not been fully funded by the Legislature since FY2009, see FY2009 Appropriations Act through FY2017 Appropriations Act, the absolute amount of funding for the SDA districts since FY2009 increased from $4.636 Billion in FY2009 to $5.074 Billion for FY2016 and is projected at $5.095 Billion for FY2017. Dehmer Cert. at ¶ 7 (Exhibit C). Based upon the entire Abbott funding and performance history, there is no basis for concluding that full funding under the SFRA would affect the disparity.

The Department of Education has identified specific impediments, as discussed at length below, to attracting and maintaining the highest quality teaching staff in the SDA Districts and concluded that while removing those impediments cannot guarantee the desired results in a short period of time, it will be virtually impossible to eliminate the disparity in performance in the SDA Districts while those impediments remain in place. A considerable change in the current system of education is required for the State to satisfy its constitutional obligation.

VI. The LIFO Provision of the Tenure Act Has Created an Impediment to a Thorough and Efficient Education Because It Discourages New Talent From Applying for Teaching Positions and Leads to Retention of Less Efficient over More Efficient Teachers

The Tenure Act provides, inter alia, that upon rehiring by a district for a fifth year, a teacher shall have tenure in the position "during good behavior and efficiency." N.J.S.A. 18A:28-5. Yet that part of the Tenure Act that concerns reductions in force ("RIFs"), states: "Dismissals resulting from any such reduction . . . shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board." N.J.S.A. 18A:28-10. Traditionally, upon any RIF, seniority is the only basis upon which teachers are released. Non-tenured teachers are subject to release first, irrespective of their

effectiveness, and tenured teachers are released in reverse order of seniority, irrespective of their effectiveness. Indeed, a teacher's evaluated effectiveness plays no role in a RIF. This so-called last-in, first-out ("LIFO") requirement in the event of a RIF is an impediment to a thorough and efficient education because: (1) districts (like many of the SDA Districts) with a declining student population and commensurate likelihood of potential RIFs are unable to attract talented new teachers who know that they will be the first let go in the event of the potential RIF; and (2) more effective but less senior tenured teachers will be released upon a RIF, in favor of retaining less effective teachers with more seniority. The cumulative effect of both factors, as a result of LIFO, is that SDA Districts are disproportionately populated by less effective teachers.

A. Newark Public Schools

For example, in Newark, in the 2015/2016 school year, 10% of the tenured teachers were still rated as ineffective or partially effective. Cerf Cert. at ¶ 9. Christopher Cerf, Superintendent of Newark Public Schools ("Newark"), explained that the district has been unable to exit most of these teachers because they have tenure. Id. at ¶¶ 14-24. As a result, Newark has had to continue to employ ineffective teachers for years. Id. at ¶ 13-15. Recognizing the paramount importance of great

teachers to Newark's students, the district has employed various policies in an attempt to limit the impact that less-than-effective teachers have on students. Id. at ¶ 11-14.

For instance, Newark created a policy requiring mutual consent - of both the principal and teacher - before any teacher is placed in a school. Ibid. Naturally, most principals do not consent to employing less than effective teachers in their schools. Thus, each year there is a pool of hundreds of teachers who have not been placed. In prior years, instead of forcing a placement, the Newark district has borne the continuing financial burden of paying these teachers' salaries and benefits while placing them in supportive but less than full teaching roles, such as in substitute teacher positions or as a co-teacher. Id. at ¶ 11-16. However, although this approach benefitted the education of Newark's students, it was very inefficient and costly because Newark paid full salaries and benefits for positions that could more economically be filled by less senior (and less credentialed personnel), at a cost of tens of millions of dollars each year. Newark is no longer able to fund this approach while also maintaining a balanced budget. Ibid. Thus, schools in the Newark district now must fill nearly all vacancies from within the district - even if this means taking a less than effective teacher from the pool over a more effective teacher from outside the district. Ibid.

This problem would only be exacerbated in the event of a RIF. Cerf Cert. at ¶ 18. Due to declining student population, the Newark school district currently has more teachers than it needs for certain subjects. Id. at ¶ 20. If the district were to conduct a RIF to reduce the number of teachers, because of the LIFO Statute, it would be forced to terminate many of its great teachers while replacing them with less effective teachers. Id. at ¶ 18. For example, the Newark school district performed a hypothetical RIF in 2014 which showed that, under the LIFO Statute, only 4% of the teachers laid off would be rated as ineffective while 75% of the layoff would consist of teachers with effective or highly effective ratings. Id. at ¶ 18. The hypothetical 2014 RIF would have forced the district to cut more than 300 of its effective or highly effective teachers while retaining 72% of its lowest-rated teachers. Ibid. Shockingly, the RIF would have resulted in the layoff of only 11% of the pool of teachers who had not been placed by mutual consent. Ibid. Moreover, 44 of the Newark district's schools would have lost 20% or more of their effective or highly effective teachers. Ibid. The Newark school district recognized that removing this many great teachers from its classrooms and replacing them with less than effective teachers would have been disastrous for its students. Id. at ¶ 18. Consequently, the Newark school district continues to employ

more teachers than needed for its students and takes on a significant financial burden to do this: a financial burden which is becoming increasingly difficult, even impossible, to continue. Id. at ¶ 20.

B. Paterson Public Schools

Paterson has been unable to avoid conducting RIFs and has conducted two major RIFs in recent years. Certification of Donnie Evans ("Evans Cert.") at ¶ 15-16. Most recently, in the 2014/2015 school year, Paterson laid off 376 staff members, 188 of whom were teachers. Ibid. Because of LIFO, all of the teachers laid off were non-tenured and a significant number of those laid off had received effective or highly effective ratings, while many teachers with ineffective or partially effective ratings remained in the district. Id. at ¶ 16. Paterson's Superintendent noted that this result had a negative impact not only upon the current teacher quality in the Paterson district, but also on its ability to attract new recruits in subject areas different from the subject areas of teachers who were laid off in the RIF. Id. at ¶ 17. As Superintendent Evans explained "[b]ecause new teachers anticipate being the target of a future RIF, they are not applying for these positions." Ibid.

C. Recall Lists

Even if some ineffective teachers are exited in a RIF, N.J.S.A. 18A:28-12 provides that any teacher terminated in a RIF

"shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified … full recognition shall be given to previous years of service." Thus, as Newark Superintendent Cerf explained, even after exiting ineffective teachers in a RIF, Newark would still be prevented from filling vacancies with talented, out-of-district teachers because NPS would be required to first draw from the recall list, even if the teachers on that list had less than effective ratings. Cerf Cert. at ¶ 19. Paterson Superintendent Evans also noted this provision, commenting that "it is counter-intuitive for Paterson to be forced to rehire a less than effective teacher once he or she has been laid off." Evans Cert. at ¶ 20.

Research supports that the LIFO provisions have a negative effect on schools. Dr. Hanushek has noted that LIFO "leads to significant costs in terms of achievement of students." Hanushek Cert. at ¶ 45. Dr. Strunk's research suggests that LIFO-based layoffs adversely impact both schools and students. Strunk Cert. at ¶ 36. LIFO has a direct impact on students by removing more effective teachers from schools than would be the case under a layoff process based on teacher quality. Id. at ¶ 37. In addition, research shows that layoffs conducted pursuant to LIFO, as opposed to those based on quality, result in the

layoff of a substantially greater number, and higher quality teachers to reach equivalent budget savings. Id. at ¶ 38. Conversely, where a layoff was conducted based on teacher quality, the layoff actually increased student achievement while also decreasing the number of teachers that the district had to lay off. Id. at ¶ 39.

In addition to these direct impacts, research shows that layoffs conducted pursuant to LIFO cause massive turnover in the district as teachers are shuffled around to fill spaces created by the seniority-based layoff. Id. at ¶ 42. This churn may also impact school culture and student achievement. Id. at ¶ 42. Furthermore, research shows that teachers who receive a RIF notice, but who are not ultimately laid off, are less effective upon their return to teaching. Id. at ¶ 43.

School districts have attempted to use provisions of the Tenure Act, N.J.S.A. 18A:25-1 et seq., as modified by TEACHNJ, N.J.S.A. 18A:6-117, and the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to rid themselves of the less than effective teachers before any potential RIF, so that fewer inefficient teachers will gain seniority, thereby reducing the retention of less efficient teachers in the event of a RIF. Cerf Cert. at ¶¶ 11, 22-23. Unfortunately, as applied in these SDA districts, this statutory framework has fallen short of its goal.

D. TEACHNJ

In 2012, the Legislature enacted TEACHNJ with "[t]he goal . . . to raise student achievement by improving instruction through the adoption of [teacher] evaluations." N.J.S.A. 18A:6-118. However, despite the new evaluation system, and the theoretically expedited removal system for inefficient teachers, once a teacher receives tenure, continued employment is essentially guaranteed, except if the superintendent navigates a convoluted array of lengthy procedural steps.

Pursuant to the Tenure Employee Hearing Law, prior to dismissing a tenured public employee for inefficiency, a hearing must be held before an arbitrator. N.J.S.A. 18A:6-10. Before commencing the removal hearing based on inefficiency charges, however, the teacher must have received at least two annual summative evaluations as "inefficient" or "partially efficient." See N.J.S.A. 18A:6-123 (evaluation rubrics must be adopted for all teaching staff members, which set forth a basis for the ratings of ineffective, partially effective, effective, and highly effective). "[I]f the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of

inefficiency," and the process to remove the teacher from employment commences. N.J.S.A. 18A:6-17.3.

However, once a teacher is rated "ineffective or partially effective on the annual summative evaluation, as measured by the evaluation rubrics, a corrective action plan shall be developed by the teaching staff member and the chief school administrator or the teaching staff member's designated supervisor." N.J.A.C. 6A:10-2.5. At least two years must pass - with the teacher remaining active in the classroom - before an ineffective tenured teacher can be brought up on tenure charges. Until the teacher is actually removed from tenure, the teacher will continue to have seniority rights under the Tenure Act, resulting in the likely termination of more effective, non-tenured teachers while a tenure charge is pending.

Newark has been aggressively proceeding under TEACHNJ and the Tenure Employees Hearing Law to exit its ineffective teachers prior to conducting a RIF, but has found that, as applied in its district, these statutes are an insufficient means of exiting Newark district's low performing teachers. Cerf Cert. at ¶ 23. Newark has filed tenure charges against 200 teachers in the past four years, but numerous ineffective teachers remain. Id. at ¶ 22-23.

Superintendent Cerf explained why these statutory provisions are an insufficient solution to exiting NPS' low

quality teachers. First, it is very expensive to bring tenure charges; it costs the district an average of $50,000 for each teacher against whom charges are filed. Cerf Cert. at ¶ 22-23. Second, it takes a very long time to exit a teacher under the statutory procedure. Id. at ¶ 18. In addition, full salary and benefits can only be withheld for 120 days while charges are pending. Ibid. Under TEACHNJ, a teacher cannot be subject to a tenure charge unless he or she receives less than effective evaluations for two years; some teachers have extended this to three years by avoiding evaluation in the second year. Ibid. Even after charges are brought, the arbitration proceeding can take several months and, in some cases, more than a year, before a decision is rendered. Ibid. Third, arbitrations do not always result in the termination of the ineffective teacher. Id. at ¶ 19. Fourth, the statutory provisions only provide a path for exiting the district's lowest rated teachers and provide no way to exit teachers who receive effective ratings, but who are not a good fit. Ibid.

VII. Certain Provisions of the Collectively Negotiated Agreements in Certain SDA Districts, Including Length of School Days, Length of School Year, and Teacher Assignments Have Created an Impediment to a Thorough and Efficient Education

Teachers in every district in the State of New Jersey are unionized, including in each of the 31 SDA Districts. Hespe Cert. at ¶ 20. Therefore, all of the SDA Districts are bound by

a collective negotiation agreement ("CNA") between the school district and the teachers' union that addresses virtually every aspect of the teachers' positions in those districts. Hespe Cert. at ¶ 20.

The New Jersey Education Association ("NJEA") maintains that, in forming the CNAs, "[s]chool boards are required to negotiate with an employee representative over" at least 70 topics, including but not limited to the following:

- Extracurricular assignments - certain aspects
- Hours of work
- Merit pay - including evaluation criteria
- Physical facilities and working conditions
- Preparation periods - length and number of
- Reduction in Force (RIF) - notice provisions and compensation for remaining staff if there is a significant increase in workload
- RIF procedures if NOT covered in statutes, such as:
    - Seniority
    - Recall
    - Bumping rights
- Release time
- Shifting unit work from unit employees to employees outside the unit
- Teacher-pupil contact time
- Teaching periods - number of
- Transfer and assignment procedures
- Workload
- Workday - length of
- Work schedule including creation of new shift(s)

NJEA, Collective Bargaining Manual at pg. 6-7, <<http://wlbea.org/files/2015/03/NJEA-Collective-Bargaining-Manual.pdf>> (last

visited Sept. 13, 2016); Certification of Kimberley ("Harrington Cert.") at ¶ 15. Thus, CNAs between teachers' unions and school boards in New Jersey are typically lengthy, restrictive, and address virtually every aspect of the teacher's position. Hespe Cert. at ¶ 23; Harrington Cert. at ¶ 17.

National researchers recognize that highly restrictive CNAs are associated with lower student achievement and lower graduation rates. Strunk Cert. at ¶ 15. The Department of Education has deemed that certain items in CNAs, as applied in certain SDA Districts, are impediments to providing a thorough and efficient education to the students in those districts. These impediments include CNA provisions that (A) limit, restrict and reduce teaching time on a daily, weekly and annual basis and (B) restrict the district's ability to control teacher assignments.

A. Restrictions on Teaching and Training Time

It is common for CNAs to contain explicit restrictions on the length of the school year, the length of the school day, when the school day must start, the number of hours of classroom time, when teachers must have breaks, when the school day must end, and when teachers can be scheduled for professional training or development. Hespe Cert. at ¶ 23. For example, the Camden CNA provides that teachers shall only teach for four hours and forty-five minutes of the seven hour and five minute

school day. Hanushek Cert. at ¶ 18; see also Shulman Cert. at Exhibit B. This is because the CNA requires that each teacher's day include a forty-five minute lunch breach, a forty-five minute unassigned preparation period, and forty-five minutes of unassigned time. Ibid. Additionally, the Camden CNA limits the school year to only 185 days. Restrictions such as these prevent the implementation of innovative and proven learning programs. Strunk Cert. at ¶¶ 20-25.

It is axiomatic that essential job training for teachers with respect to district/school/state education initiatives is critical. Harrington Cert. at ¶ 19. To stay current on research-supported best practices for classroom instruction, teachers must be offered on-going essential job training (including professional development opportunities) to support their capacity for sustainable implementation in the classroom. Ibid. Research shows that one-dose professional development does not transfer to instructional gains for children. Ibid. For sustainable change to take place and student gains to increase, the professional development doses must be job embedded and repeated. Ibid.

Many school administrators are frustrated with the inability to implement these training opportunities with their staff knowing how important they are for student growth. Harrington Cert. at ¶ 19. To help effectively train the

teachers, administrators require meaningful (i) grade level planning time; (ii) professional learning communities; (iii) additional professional development opportunities; and/or (iv) student contact time. Id. at ¶ 20. More often than not, these opportunities are thwarted by the CNAs because of the rigidity imposed by contractual mandates for individual preparatory periods and duty periods. Ibid.

For instance, the DOE has recommended administrators use their faculty meeting times to provide instructional trainings for their staff only to be told they are unable to do this because the contract specifically states they may only use that time for agenda items and may not use it for teacher training. Harrington Cert. at ¶ 20. These meetings range from weekly to biweekly and in time increments of 30-45 minutes. Ibid. This means a minimum of 60 minutes a month that could be used for support and training to shift classroom instruction is being used to check off agenda items which are not impactful on student learning. Ibid.

Another example involves the implementation of the Common Core State Standards throughout the State. Harrington Cert. at ¶ 21. District administrators recognized the critical importance of supporting their teachers through training to fully understand the shifts in instruction necessary to move from the New Jersey Core Curriculum Content Standards to the

Common Core State Standards. Ibid. Numerous administrators wanted to use faculty meeting time for such trainings as well as offer afterschool and summer trainings to ensure the instruction in the classroom matched the rigor and expectations of the standards in preparing students for college and careers. Ibid. The administrators were restricted by the contract allowance for the pre-set number of days/hours that could be used for professional development and knew they needed to offer their staff more support in order to make certain the standards were being fully implemented. Ibid.

Another example involves the integration of technology into the classroom, which can be daunting for educators, many of whom do not have the confidence to use and infuse the technology across their curriculum. Harrington Cert. at ¶ 22. Professional development is needed to support educators in this area and to help them increase their own capacity as well as their ability to comfortably use technology to enhance student learning experiences and ready students with the skills business and industry are seeking. Ibid. Once more, school districts are being limited in training their teachers to be more effective. Id. at ¶ 20.

A final example involves Camden, where because the CNA limits the teachers' school day to four hours and forty-five minutes, and the school year to 185 days, there is nothing that

the district can reasonably do to extend its students' learning time. Camden has determined that it would be beneficial to students if in-district teachers proctored in-school suspensions because this would provide educational continuity and stability for the children. Hespe Cert. at ¶ 29. However, because of the four hour and forty-five minute school day, there is limited teacher availability to proctor in-school suspensions. Ibid. Obviously, a suspension from class can be educationally more useful under the supervision of a trained teacher than under an untrained individual.

Camden would also like to implement a literacy program for grades K-5. Such a literacy program has been successful in other school districts, however, it cannot be fully implemented in Camden because it requires block scheduling precluded by the CNA and the CNA effectively prevents the district from being able to properly train its teachers to teach the program. Hespe Cert. at ¶ 29.

Paterson has faced similar restrictions. The Paterson CNA places significant restrictions on the length and layout of the school day. Evans Cert. at ¶¶ 7-8. Pursuant to the Paterson CNA, the school day is seven hours, of which only five hours and forty minutes is permitted to be student contact time because of required unassigned, lunch, and preparation periods. Id. at ¶ 10. To increase this teaching time by even one period, teachers

must individually volunteer for the increase in student contact time and Paterson must pay them extra for the time. Ibid. In addition, pursuant to the Paterson CNA, the school day must begin at all of Paterson's schools at 8:15 a.m. Id. at ¶ 9. This requirement prohibits a staggered bus schedule, thereby costing the district more money than necessary for the transportation program. Ibid.

B. Restrictions on Teacher Assignments

Research shows that seniority transfer provisions in CNAs are, in the words of Dr. Strunk, "likely [to] exacerbate the inequitable distribution of teachers across schools within districts..." Strunk Cert. at ¶ 26. Recently, research has confirmed that "the more restrictive involuntary seniority transfer provisions in CBAs contribute to teacher quality gaps between advantaged and disadvantaged schools." Id. at ¶ 26. Conversely, research shows that when the school districts have the ability to make involuntary teacher transfers, this "appears to improve equity along the dimensions we examine, with some gains to efficiency as well." Ibid.

Many CNAs applicable in SDA Districts contain restrictive transfer provisions requiring that seniority dictates how teachers are transferred, assigned, hired, fired, laid off and recalled. For example, internal applicants must be given preference over new hires for vacant positions. A junior

teacher must be involuntarily transferred before a more senior teacher is impacted. The end result is that the CNA dictates a result contrary to the principal's judgment as to the needs of the particular classroom and the fit of the teacher to be assigned. Hespe Cert. at ¶ 27.

Some CNAs expressly exclude principals from weighing in on teacher transfers to their schools: "A teacher being involuntarily transferred or reassigned shall not suffer a reduction in rank or in total compensation. A list of open positions in the school districts . . . teachers may request positions, in order of preference…" See Camden CNA at Article XXIX. As a result, principals can be saddled with forced placements of teachers in their buildings. Hespe Cert. at ¶ 27. Too often it seems, these teachers are either not a great "fit" or were not found to be effective educators in their prior environment. Ibid. This can contribute to additional teachers in schools and/or situations where such teachers are being paid not to teach.

In addition, restrictive seniority provisions will lead to great inequity in the distribution of experienced and high performing teachers across classrooms in the school and district. Hespe Cert. at ¶ 28. For example, regardless of any statutory provision regarding RIFs, such as LIFO, see point V supra, unions negotiate seniority provisions in their CNAs. Id.

at ¶ 28. In Camden, for example, and as is typical in CNA's, and consistent with the LIFO statute, the district is expressly prevented from retaining one educator over another based upon performance unless all seniority, certification and length of service factors are equal. Id. at ¶ 28. See also Camden CNA, attached to the Shulman Cert., at Article XXIV. "No tenured teachers will be laid off before non-tenured teachers. Length of service in the district shall dictate the order of layoff . . . . In the case of all factors equal, teachers will be considered on the basis of their evaluation ratings…" Ibid. The Newark CNA prevents 'site-based decision-making' for "transfer provisions and seniority provisions." Id. at ¶ 28. See also Newark CNA, attached to the Shulman Cert., at Article IV.

In Paterson, while the CNA does not expressly require teacher consent for a transfer, in Superintendent Evans' experience, teachers will typically grieve reassignments they do not like. Evans Cert. at ¶ 11. After arbitration, 100% of the reassignments have been upheld, but the district had to incur the expense and time associated with the grievance process. Ibid. In addition, the grievance has a chilling effect on the principal of that school, discouraging him or her from making future transfers absent teacher consent, thus shifting the focus

away from benefit to children's education and creating a negative environment in the school. Id. at ¶ 12.

It is evident that student success and the closing of the achievement gap is inhibited by CNAs on time for professional development; collaborative curriculum and lesson planning; extended teaching periods, extended school days, and afterschool enrichment programs. Harrington Cert. at ¶ 13. New Jersey's college and career ready practices of today are not the same as those of yesterday. Id. at ¶ 14. Today's career ready practices incorporate the communication, critical thinking, collaboration, and decision making skills employers are looking for in filling their workforce needs. Ibid. These attributes coupled with the academic skills and knowledge are a tall yet critical order for educators to fill. Ibid.

Our State's students cannot be properly prepared for the world that awaits them working under the confines of a traditional education system. Harrington Cert. at ¶ 14. Rather, the approach must be nimble and flexible to readily adjust and adapt to meet the needs of each and every student to ensure future success. Ibid. Moreover, it cannot be overlooked that the students in the SDA Districts often come to school with achievement gaps of their own - no early intervention, parents unavailable due to needing to work multiple jobs to provide for their family, communication barriers and the like. Id. at ¶ 7.

These gaps coupled with a lack of quality instruction widens the gap, making it difficult for a child to bridge the ever-widening expanse created as school years with ineffective teachers mount. Ibid.

C. CNAs Are Virtually Impossible for Districts to Change

In the past, school districts have been met with significant resistance to changing the above provisions in their collective negotiations agreement. Hespe Cert. at ¶ 29. Such items are locked into CNAs and the school representatives refuse to negotiate any significant change. Ibid. As a group, the teachers are not willing to explore more innovative methods to teaching or structuring the school day. Evans Cert. at ¶ 7.

As set forth in the Certification of Matthew J. Giacobbe, Esq., an experienced labor attorney who frequently negotiates public school contracts, the teachers, represented by their union, often seek reductions in the length of the workday, work year and student contact time during the work day. Certification of Matthew J. Giacobbe, Esq. ("Giacobbe Cert.") at ¶ 8. The teacher's unions also often seek increases in their individual preparation periods, which would reduce student instructional time. Id. at ¶ 9. School districts often encounter tremendous difficulty in increasing student instructional time due to the teacher unions' intransigence to agree to any contractual proposal that results in an increase to the length of the work

day, work year or increase in teacher/student contact time during the work day. Id. at ¶ 11.

Currently, the CNAs are negotiated utilizing the prior agreement as a minimum. Hespe Cert. at ¶ 31; Evans Cert. at ¶ 6. Districts have little leverage to negotiate required changes to the collective negotiations agreement because all of the surrounding districts have similar provisions and negotiation practices, and the State NJEA has a representative on most District's union negotiation teams and who participates actively. Evans Cert. at ¶ 6. The education unions' interest is to ensure that contracts are negotiated so that the pro-union provisions of neighboring districts' contracts are used as leverage to ensure many common provisions across districts. Hespe Cert. at ¶ 31. There is resistance to provisions that would make sense in SDA districts, given their struggles and demographics. Hespe Cert. at ¶ 31; Evans Cert. at ¶ 6. Thus the same type of provisions, school day and school year structures that have been around for many years repeatedly end up in the new agreements, preventing innovation and flexibility in the SDA Districts' schools. Evans Cert. at ¶ 6.

For example, in Paterson, the CNA requires negotiation before the district implements "any aspect of an experimental program which would affect the terms and conditions of employment." Evans Cert. at ¶ 7. Because of the union's

unwillingness to change such terms of the CNA, Paterson has been effectively prevented from implementing research-based, best practices to improve learning for its students, such as the University of Pittsburgh's Institute for Learning's "Principles of Learning." Ibid.

D. School Districts No Longer Have the Benefit of "Last Best Offer" in Negotiating CNAs

Collective negotiations are a lengthy process. It can take years for the parties to agree upon the terms of a new CNA. Meanwhile, the students of SDA Districts suffer unduly for lack of research-proven "improved educational opportunities." See Horne v. Flores, 557 U.S. 433, 466-67, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (2009).

Under the New Jersey Employer-Employee Relations Act ("NJEERA"), N.J.S.A 34:13A-1, when the parties reach an impasse after good faith negotiations, the public employer can institute its last best offer. See In re NJ Transit Bus Ops, 125 N.J. 41, 54 (1999) ("it is the employer's last offer, its unilateral last offer, that prevails and, by law, the employees must abide by it"). In 2003, however, the Legislature enacted School Employees Contract Resolution and Equity Act ("SECREA"), N.J.S.A. 34:13A-33, which eliminated the "last best offer" provisions of the NJEERA for public school employers only. As applied, SECREA eliminated the ability of school boards to

implement their "last best offer," to their public employees under an expiring CNA when a new agreement cannot be reached. Giaccobe Cert. at ¶¶13-14. Those provisions remain in place in the collective negotiation process between other public employers and their employees. It thus prevents school districts from implementing changes to an expiring CNA, such as an increase in the number of school days or the length of the school day, over the objection of the teachers' representatives. No other public employer is so bound. Giaccobe Cert. at ¶¶ 15-22.

As of July 7, 2016, there are 49 districts in New Jersey (SDA and otherwise) which have not yet reached an agreement for CNAs which expired on June 30, 2015 or earlier. New Jersey School Boards Ass'n, Settlement Rates in Perspective, <<http://www.njsba.org/services/laborrelations/settlement-rates-in-perspective/>> (last visited August 24, 2016). Mr. Giacobbe explained that the enactment of SECREA and the inability to use "last best offer" in teacher negotiations has resulted in more protracted negotiations without a terminal proceeding and has made it more difficult for school districts to make meaningful changes to their respective CNA's, including changes to increase student instructional time. Giacobbe Cert. at ¶¶ 12-16.

SECREA has left SDA Districts with no ability and no leverage to implement proven educational policy reforms, if good

faith negotiations fail to convince the teachers' representatives that changes that are in the best interest of the children are a pressing need. Id. at ¶¶ 20-22. Without last best offer, the SDA Districts are especially limited in negotiating to institute educational reforms that will provide a thorough and efficient education to the students in such Districts.

VIII. Many SDA District Schools That do not Operate Under These Impediments Perform Significantly Better

Schools in SDA Districts that do not face the impediments discussed above, namely charter schools, are able to implement other public education techniques and policies that cannot be implemented in district schools, and in general, these schools perform much better than other public schools in the SDA Districts. Czehut Cert. at ¶ 12 (Exhibit B). This comparison provides concrete evidence that eliminating the cited impediments in certain SDA Districts is likely to promote better student performance in those District schools. Ibid.; see also Connecticut Coalition v. Rell, supra, No. CV-145037565-S at *89 ("[t]he court knows what its ruling means for many deeply ingrained practices, but it also has a marrow-deep understanding that if they are to succeed where they are most strained schools have to be about teaching children and nothing else").

A. Background on Charter Schools

A charter school is "a public school operated under a charter granted by the Commissioner that is independent of the district board of education and managed by a board of trustees." N.J.A.C. 6A:11-1.2. When enacting the Charter School Program Act in 1995, the Legislature declared that one purpose was to "assist in promoting comprehensive educational reform by providing a mechanism for the implementation of a variety of educational approaches which may not be available in the traditional public classroom. … [Including by] encourage[ing] the use of different and innovative learning methods." N.J.S.A. 18A:36A-2; see also J.D. ex rel. Scipio-Derrick v. Davy, 415 N.J. Super. 375, 392 (App. Div. 2010) ("the charter school program was a reform measure by the Legislature to ensure that every child receives a thorough and efficient education by providing an innovative alternative to traditional public schools").

Generally speaking, charter schools are funded by the districts where the students reside, to the extent of 90% of the budget allocated to each student that chooses to attend the charter school. N.J.S.A. 18A:36A-12(a); Czehut Cert. at ¶ 15. In exchange for this funding, charter schools must submit regular performance reports to the Commissioner, who has the authority to revoke a charter or place a school on probation if it is not performing properly. N.J.S.A. 18A:36A-17; N.J.A.C.

6A:11-2.4; see also In re 1999-2000 Abbott v. Burke Implementing Regulations, 348 N.J. Super. 382, 441 (App. Div. 2002) ("a charter school will simply cease operating if the Commissioner vacates the charter"); Czehut Cert. at ¶ 11. A charter will only be renewed if the charter school meets certain requirements, including academic requirements that are given the most weight in the renewal decision. Id. at ¶¶ 9-11.

When the charter school is performing well, the charter school board of trustees enjoys a great deal of freedom and flexibility in its operational methods. N.J.S.A. 18A:36-14(a); see also J.D. ex. rel. Scipio-Derrick v. Davy, supra, 415 N.J. Super. at 392 ("having enrolled in charter schools, plaintiffs, unlike traditional public school students, receive an education exempt from regulation").

For example, charter schools have the ability to make personnel decisions, such as which employees to hire, promote, and let go. N.J.S.A. 18A:36-14(a). The Tenure Act, including the LIFO Statute, does not apply to charter schools. Rather, charter schools have the freedom to determine their own definition of "tenure" and set forth the terms of their individualized, streamlined tenure policies. N.J.A.C. 6A:11-6.2. Charter schools also have the option of deciding whether to offer the terms of a collective bargaining agreement to its certified staff. N.J.S.A. 18A:36A-14(b). While some charter

schools in New Jersey have teachers' unions, most do not, including some of the most successful charter schools, such as North Star Academy in Newark. Hespe Cert. at ¶ 35.

Because they are public schools, charter schools are free of charge and are generally open to all students in the district. N.J.S.A. 18A:36A-7. If more students enroll than there are spaces available, then the school must use a random selection process and waiting lists. N.J.S.A. 18A:36A-8; N.J.A.C. 6A:11-4.5. Under the Statute, the school shall "to the extent practicable, seek the enrollment of a cross section of the community's school age population including racial and academic factors." N.J.S.A. 18A:36A-8(e).

Significantly, charter schools in SDA Districts have roughly the same percentage of at-risk students as schools in the same SDA Districts. For example, charter schools in the SDA Districts and other SDA District schools have, respectively, 76.6% and 75.6% of students living in poverty. Czehut Cert. at ¶ 17 (Exhibit E).

B. Most Charter Schools Are Highly Successful

Charter schools in New Jersey's SDA Districts generally outperform schools in SDA Districts. Czehut Cert. at ¶ 12. In 2012, the Center for Research on Education Outcomes ("CREDO") analyzed New Jersey charter schools and found that "[a]t the school level, 30 percent of the charter schools have

significantly more positive learning gains than their [traditional public school] counterparts in reading, while 11 percent of charter schools have significantly lower learning gains. In math, 40 percent of the charter schools studied outperformed their [traditional public school] peers and 13 percent perform worse." CREDO, Charter School Performance in New Jersey (November 1, 2012) at 6. "On average, students in New Jersey charter schools learned significantly more than their virtual counterparts in reading and mathematics." Id. at 15; see also CREDO, Urban Charter School Study: Report on 41 Regions, 2015 at 2 (finding that, nationally, "urban charter schools in the aggregate provide significantly higher levels of annual growth in both math and reading compared to their [district school] peers"); Hanushek Cert. at ¶ 50.

The data shows that, in New Jersey's SDA Districts, the average standardized test scores for charter schools located within SDA Districts exceed the SDA District scores and, in some cases, even the State average. Hauger Cert. at ¶ 9(a) (Exhibit A); Czehut Cert. at ¶ 12-13 (Exhibits B and C). For the 2014/2015 school year, 40 of 45 charter schools serving middle school grades in SDA Districts outperformed the average middle school scores in the SDA District schools in ELA (English Language Arts) and 35 of 45 did so in math. Czehut Cert. at ¶ 12 (Exhibit B). For elementary school, 51 of 57 charter schools

in SDA Districts outperformed the average SDA District school scores in ELA and 46 of 57 did so in math. Ibid. In addition, the magnitude of the difference in the percent of students achieving proficiency in standardized tests at charter schools located in SDA Districts compared to their SDA District counterparts has been increasing since 2009. Id. at ¶ 13 (Exhibit C).

C. Charter Schools Provide a Blueprint for Success in District Schools

Because most charter schools are free from the statutory and contractual impediments, discussed supra, they are able to implement various techniques and policies that district schools are unable to implement. For example, North Star Academy in Newark is one of the most successful charter schools in New Jersey. Czehut Cert. at ¶ 14 (Exhibit D). North Star's 2014/2015 proficiency rates on the PARCC tests were number one in its similar school group[10] on both Math and ELA. Ibid. Its proficiency rate on the 2014/2015 ELA PARCC tests exceeded 84.4% of all schools in the State for ELA and 84.9% of all schools in the State for Math. Ibid. Its 2014/2015 proficiency rate

[10] A "similar school group" is compiled by looking at mean standardized testing scores, number of students with disabilities, and number of English language learners. Czehut Cert. at ¶ 14 (Exhibit D).

exceeded 94.2% of all schools in the district (Newark) for ELA and 96.2% of all schools in the district for math. Ibid.

North Star recognizes that great teaching makes effective education. Bambrick-Santoyo, Paul, Leverage Leadership: A Practical Guide to Building Exceptional Schools at 4. Thus, for example, North Star employs various techniques to encourage great teachers at its schools.

First, North Star is free from the Tenure Act, including the LIFO Statute, and presumably can attract and retain only the best teachers while more freely exiting underperforming teachers. Because it is not constrained by this complicated statutory framework, North Star can quickly exit ineffective teachers once they are identified to ensure that only the best teachers are impacting their students.

Second, because North Star is not constrained by a CNA, it is able to implement reforms to school day length and school year length in ways to best suit their students' needs. Hespe Cert. at ¶ 26. For example, North Star has implemented an extended 10-month school year and an extended academic day when compared to Newark's other schools. Ibid. see also CREDO, Charter School Performance in New Jersey (November 1, 2012) at 17 (on average, New Jersey charter schools provide students with "an additional two months in learning in reading over their [traditional public school] counterparts").

Clearly, charter schools are also able to use the flexibility granted by their freedom from CNAs to quickly and efficiently implement academic programs in the best interest of their students. For example, if a charter school determines that its students are performing poorly in math during the Fall semester, it can change the format of the school day for the Spring semester to implement block scheduling. Such a school can also quickly reassign teachers so that they are in a position that is the best fit for their skills. Without having to be concerned with whether a proposed technique or policy comports with provisions of a CNA, that school can focus on the more important question: "what is in the best interest of the students?"

The high performance of many of the charter schools, such as North Star, is evidence that if SDA Districts had the opportunity to implement reforms similar to those implemented in many charter schools, they would also see academic improvement for their students and reduced disparity from student performance in the rest of the state's districts. This Court should allow the Commissioner discretion, upon relevant findings, to remove the impediments discussed herein to allow SDA Districts to achieve this success.

ARGUMENT

POINT I

The Commissioner Needs the Flexibility To Suspend Portions of Collectively Negotiated Agreements and Statutory Restrictions In Order to Provide a Thorough and Efficient System of Education to the Children of the SDA Districts

Confirming that there is "a growing consensus in education research that increased funding alone does not improve student achievement," the United States Supreme Court stated that the "ultimate focus is on the quality of educational programming and services provided to students, not the amount of money spent on them... The weight of research suggests that these types of local reforms, much more than court-imposed funding mandates, lead to improved educational opportunities." Horne, supra, 557 U.S. at 466-67. Indeed, as this Court has stated:

> Again, the clear import is not of a constitutional mandate governing expenditures per pupil, equal or otherwise, but a requirement of a specific substantive level of education... a thorough and efficient education requires a certain level of educational opportunity, a minimum level, that will equip the student to become 'a citizen and . . . a competitor in the labor market.'

Abbott II, supra, 119 N.J. at 306, citing Robinson I, supra, 62 N.J. at 515-16; see also Connecticut Coalition v. Rell, supra, No. CV-145037565-S at *28-29, 37 ("[t]he state's latitude to decide how much overall money to spend on schools doesn't mean

the state can have a constitutionally adequate school program while spending its money whimsically … [the Court must] require the state's spending plan to be rationally, substantially, and verifiably connected to creating educational opportunities for children…there is no direct correlation between merely adding more money to failing districts and getting better results. This is hard to argue with, and the plaintiffs concede that only well-spent extra money could help").

By this motion to amend the Abbott remedies, the Commissioner seeks authority to remove contractual and statutory restrictions that he finds to be standing in the way of particular SDA Districts' ability to provide a substantive level of education to meet the constitutional mandate of a thorough and efficient education for its students.

The relief requested herein is entirely consistent with this Court's prior jurisprudence. For example, in Abbott II this Court observed that:

> 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.
>
> * * *
>
> Clearly the delivery of an adequate education requires efficiency in spending. The need to eliminate waste, to increase efficiency, and to maximize the education

> dollar--a need that is believed to be more acute in the special needs districts--does not lessen the need for resources. Both additional money and reformation of the way in which that money is spent are required to improve the conditions in failing school districts.
>
> * * *
>
> Thus, we have always insisted that increased funding to the SNDs be allocated for specific purposes realistically designed to improve education. The Commissioner has an essential and affirmative role to assure that all education funding is spent effectively and efficiently, especially in the special needs districts, in order to achieve a constitutional education.

149 N.J. at 168, 171, 193 (emphasis added); see also Connecticut Coalition v. Rell, supra, No. CV-145037565-S at *87-88 ("the fundamental right to an adequate educational opportunity won't mean much unless the state's major policies have good links to teaching … children"). Indeed, this Court struck down the Comprehensive Educational Improvement and Financing Act of 1996 in part because it did not comply with the constitutional obligation to effectuate change by attracting qualified teachers and improving teaching in the SDAs. Id. at 201 ("Our Constitution demands that every child be given an equal opportunity to meet his or her promise. CEIFA is deficient in that it does not provide adequate resources to help the most educationally deprived children to achieve that promise or to effect change in our most needy schools. . . . Nothing will be

done under the act to attract the most qualified teachers to those environments or to improve teaching") (emphasis added). Similarly, the statutory and contractual limitations described herein prevent the provision of a thorough and efficient education in SDA Districts and, as such, the Commissioner must be provided with the authority to ameliorate this unconstitutional deprivation.

It is axiomatic that the more time students have with teachers, the better their education. However, current collective bargaining practices have led to contractually-mandated decreases in student-teacher time. Such provisions directly prevent a thorough and efficient system of education and the Commissioner should be permitted to set them aside when appropriate.

A. Portions of Collectively Negotiated Agreements Restrict the SDA Districts' Ability to Provide a Thorough and Efficient Education

While "[p]ublic employees have a right to engage in collective negotiations," In re County of Atl., 445 N.J. Super. 1, 21 (App. Div. 2016), citing Council of N.J. State Coll. Locals v. State Bd. of Higher Educ., 91 N.J. 18, 25-26 (1982) (citing N.J. Const., art. I, ¶ 19 and N.J.S.A. 34:13A-5.3), such rights are limited. Public employees "'do not have the right to bargain collectively' like their counterparts in the private sector, public employees may instead engage in 'collective

negotiations.'" Mount Holly Tp. Bd. of Educ. v. Mount Holly Tp. Educ. Ass'n, 199 N.J. 319 (2009); see Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409, 428 (1970) (discussing distinction between "collective bargaining" and "collective negotiations"). "'[T]he scope of negotiations in the public sector is more limited than in the private sector' due to the government's 'special responsibilities to the public" to "make and implement public policy.'" In re County of Atl., supra, 445 N.J. Super. at 21, quoting In re IFPTE Local 195 v. State, 88 N.J. 393, 401-02 (1982) (citations omitted).

As recently reiterated by the New Jersey Supreme Court:

> public employment negotiation has been divided into two categories: mandatorily negotiable terms and conditions of employment and non-negotiable matters of governmental policy.
>
> In light of the competing interests of a public employer and public employees, the Court stated in Local 195 that [t]he role of the courts in a scope of negotiations case is to determine . . . whether an issue is appropriately decided by the political process or by collective negotiations. Thus, the Court articulated a three-part test for weighing those interests, establishing that a subject is negotiable when: (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy.

Borough of Keyport v. International Union of Op. Engineers, 222 N.J. 314, 333-34 (2015) (internal citations omitted), citing, inter alia, Local 195, IFPTE v. State, 88 N.J. 393, 404-05 (1982).

Items falling under the first prong, those items that "intimately and directly affect[] the work and welfare of public employees," Id., are deemed to be mandatorily negotiable, unless the second or third prong applies. Such mandatorily negotiable terms and conditions of employment include items such as salary, In re County of Atl., supra, 445 N.J. Super. at 21, citing In re Hunterdon Cnty. Bd. of Chosen Freeholders, 116 N.J. 322, 331-32 (1989), and vacation time, "unless the term is set by a statute or regulation." Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012), citing State Troopers Fraternal Ass'n of N.J. v. State, 149 N.J. 38, 51 (1997). The third prong of the Local 195 test also precludes negotiation of an item where it may significantly interfere with the determination of governmental policy. Here, the Commissioner seeks confirmation of his authority to effectuate governmental education policy, despite restrictions in the CNA attempting to preclude him from doing so. Moreover, the second prong addressing preemption by "statute or regulations", a fortiori, must recognize the priority of the thorough and efficient constitutional guarantee.

1. Adjustments to the Length of School Day and School Year, as well as Teacher Utilization During the School Day, Must be Available to All SDA Districts When Determined by the Commissioner to be Necessary for a Thorough and Efficient Education

It has long been held that "[a]lthough the establishment of a school calendar is a managerial prerogative, a decision that directly impacts the days worked and compensation for those days implicates a term and condition of employment." Troy v. Rutgers, 168 N.J. 354, 384 (2001). However, "[q]uestions concerning whether subjects are mandatorily negotiable should be made on a case-by-case basis." In re Alleged Improper Practice Under Section XI, Paragraph A(d) of the Port Auth. Labor Relations Instruction, 194 N.J. 314, 343 (2008), citing Troy v. Rutgers, 168 N.J. at 383. Indeed, as this Court has stated:

> It follows that fixing the number of school days and the hours of instruction per school day fall within a fundamental management prerogative. It is also obvious that establishing the number of those days and the hours of instruction per school day impacts upon the teachers' terms and conditions of employment. It is only when the result of bargaining may significantly or substantially encroach upon the management prerogative that the duty to bargain must give way to the more pervasive need of educational policy decisions.

Bd. of Ed. of Woodstown-Pilsegrove Reg'l School Dist. v. Woodstown-Pilesgrove Reg'l Ed. Ass'n, 81 N.J. 582, 591 (1980), citing State v. State Supervisory Ass'n, 78 N.J. 54, 67 (1978).

Studies have confirmed that longer instructional time

improves student performance and has a lasting effect on the students' overall economic well-being over a lifetime. Hanushek Cert. at ¶ 31. The restrictions in the SDA Districts' CNAs significantly or substantially encroach upon the districts' prerogatives to increase the number of school days or school hours and attempts to achieve these reforms through negotiation have been unavailing. Giacobbe Cert. at ¶¶ 7-11. The Commissioner should be able to impose such policy, where it is determined in a particular SDA District, that a longer school day or year is necessary to improve student performance. "When the dominant issue is an educational goal, there is no obligation to negotiate and subject the matter . . . to binding arbitration." Bd. of Ed. of Woodstown-Pilsegrove Reg'l School, 81 N.J. at 591; see Ramapo-Indian Hills Ed. Ass'n Inc. v. Ramapo Indian Hills Reg'l High Sch. Dist. Bd. of Ed., 176 N.J. Super. 35, 43 (App. Div. 1980) (the only inquiry is whether the "dominant concern" involves an educational goal or the work and welfare of the teachers).

Moreover, restrictions in certain SDA Districts' CNAs prohibit those Districts from utilizing their teachers in the manner they determine will best improve student outcomes. For example, due to the restrictiveness of its CNA, Camden has been unable to utilize teachers in a meaningful way to proctor an in-school suspension program. Hespe Cert. at ¶ 29. Moreover,

Camden cannot fully institute its Literacy Program as have its Renaissance Schools, because the CNA does not permit flexibility in scheduling; nor does it allow for the professional development time to teach the Literacy Program. Hespe Cert. at ¶ 29. Without question, students in the SDA Districts would benefit from increased literacy, yet due to restrictive CNAs, the schools are prevented from instituting programs with fidelity to improve student performance. An SDA District should be able to override the restrictions in the CNAs when the Commissioner determines a need in that SDA District, to utilize teachers as necessary to effectuate public policy in the field of education that is essential to providing the thorough and efficient system of education guaranteed by our Constitution. That constitutional guarantee preempts provisions that otherwise fall within the category of negotiable terms and conditions of teachers' employments.

2. The Constitutional Mandate of a Thorough and Efficient Education Overrides Other Constitutional Provisions, Including the Right of Contract

Where there are competing constitutional provisions - as may be argued here - the courts must weigh the conflicting constitutional rights. See, e.g, State v. Lashinsky, 81 N.J. 1, 13 (1979) ("[T]he constitutional prerogatives of the press must yield, under appropriate circumstances, to other important and legitimate government interests."); see Burgos v. State, 222

N.J. 175, 183-84 (2015) (analyzing the "apparent clash of constitutional provisions" between funding pensions of public employees with the constitutional "budgetary and debt limiting clauses" to find that the "Legislature and Governor were without authority" to grant contract rights that override the Debt Limitation Clause of the Constitution).

Here, the DOE is required to effectuate the constitutional mandate to provide a thorough and efficient education to all children. The right of parties to collectively negotiate is clearly of lesser constitutional dimension, given the explicit governmental policy exception. See, e.g., Borough of Keyport, supra, 222 N.J. at 333-34, citing Local 195, supra, 88 N.J. at 404-05. Relying on Borough of Keyport, the Appellate Division of the Superior Court has recently upheld a Public Employment Relations Commission's ("PERC") decision which recognized that, in certain circumstances, the government policy doctrine overrides the employees' rights to negotiate the terms and conditions of their employment. See Robbinsville Twp. Bd. of Educ. v. Wash. Twp. Educ. Ass'n, No. A-2122-13T2 (App. Div. Aug. 7, 2015) (slip op. at 11), certif. granted 223 N.J. 557 (2015). Therein the court conceded that "[t]here is no dispute that the furloughs resulted in reduced hours of work with resultant reductions in pay, and that these actions necessarily implicate the terms and conditions of employment," but held that the

school board's decision to implement three unpaid furlough days was an exercise of its non-negotiable policy determination. Robbinsville Twp. Bd. of Educ., supra, No. A-2122-13T2 at *7-8. "When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions." Id. at *8, quoting City of Jersey City v. Jersey City Police Officers Ben. Ass'n, 154 N.J. 555, 568 (1998). There can be no more significant government policy than fulfillment of the constitutionally mandated thorough and efficient education requirement.

Moreover, there can be no question that those portions of the CNAs that interfere with a thorough and efficient education are overridden by the New Jersey Constitution. While the Constitution protects against government impairment of contractual obligations, N.J. Const., art. IV, § 7, ¶ 3, "[n]ot even a substantial impairment of contract violates the Constitution if the governmental action has a "significant and legitimate public purpose," is based upon reasonable conditions, and is related to "appropriate governmental objectives." Borough of Seaside Park v. Commissioner of New Jersey Dept. of Ed., 432 N.J. Super. 167, 216 (2012), certif. denied 216 N.J. 367 (Dec. 3, 2013), quoting State Farm Mut. Auto Ins. Co. v. State, 124 N.J. 32, 64 (1991); see Burgos v. State, supra, 222

N.J. at 183 (holding that the Debt Limitation Clause of the State Constitution precludes an enforceable contract created via statute).

As a result, the Court should confirm the Commissioner's authority to effectuate educational policy, by conferring managerial prerogative upon specific SDA District Superintendents to reform the school day and school year, and to utilize teachers in the most educationally effective manner throughout the work day.

B. The LIFO Portion of the Tenure Act Impedes the SDA Districts' Ability to Provide a Thorough and Efficient Education and is Therefore Unconstitutional As Applied to Those Districts

CNAs are not the only impediment to a thorough and efficient system of education. The Legislature has passed unconstitutional laws that improperly protect teachers to the detriment of students.

Consider the perverse decisions that the inflexible statutes and labor agreements with teachers foist upon superintendents and principals in our most hard-pressed school districts. Newark has resorted to paying teachers not to teach, at a cost of tens of millions of dollars each year. In Newark and Paterson, keeping and marginalizing poorly-performing teachers is preferred to the burden, expense and disruption of exiting them. During a RIF, the Tenure Act not only requires

districts to retain ineffective teachers and let go less-tenured, effective teachers, it also impedes them from matching teachers with the subject matter needs of classrooms. Even when these superintendents do manage to lay-off ineffective teachers, these same poor-performing teachers remain on a preferred recall list, preventing the superintendents from hiring talented, often less-expensive teachers to replace them. And perhaps most glaring, Camden's CNA limits actual teaching time to four hours, forty-five minutes of a seven-hour, five-minute school day. We cannot allow our most vulnerable students to be so readily short-changed by these statutory and collectively negotiated obstacles to a thorough and efficient education.

To effectuate the thorough and efficient guarantee of the New Jersey Constitution, the Commissioner needs to allow certain SDA districts to align staffing reductions with student learning and teacher effectiveness metrics. New Jersey's LIFO tenure provisions, as applied, ensure that too many ineffective teachers, who are unable to prepare students for the PARCC[11] or for life, will remain employed during a reduction in force, thus violating the students' rights to a thorough and efficient education.

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[11] The Partnership for Assessment of Readiness for College and Careers ("PARCC") is a standardized test that is given to New Jersey students to measure achievement. The PARCC has been used to measure achievement since the 2014/2015 school year.

Pursuant to the Tenure Act, teachers are "under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by" the Tenure Employee Hearing Law. N.J.S.A. 18A:28-5-9. However, despite the Tenure Act expressly permitting teachers to lose tenure due to inefficiency, the LIFO section of the Tenure Act further provides that teacher dismissals resulting from a reduction in force must be "made on the basis of seniority," N.J.S.A. 18A:28-10, and not by releasing the inefficient teachers first. Thus, when the SDA districts determine the need to layoff large numbers of teachers, they are forced to first remove their last-hired teachers, regardless of the quality of the teachers released or the quality of those who remain. See Connecticut Coalition v. Rell, supra, No. CV-145037565-S at *68 ("teachers make significant gains in the early years of teaching but plateau after about five years. No one defended the idea that having a master's degree makes a better teacher … no one said long years on the job and advanced degrees always meant good teaching"); The Mirage: Confronting the Hard Truth About Our Quest for Teacher Development, The New Teacher Project, 2015, at 15 <<http://tntp.org/publications/view/the-mirage-

confronting-the-truth-about-our-quest-for-teacher-development>> (last visited Sept. 12, 2016).

Because teacher salaries generally increase according to the number of years a teacher has been employed in a district, the seniority layoff provisions impede SDA Districts in at least three ways. First, untenured teachers, irrespective of how highly they are evaluated, are let go before tenured teachers, and less senior tenured teachers are let go before those more senior. Second, LIFO creates the probability that districts must lay off a greater number of less senior but highly effective or effective teachers than by laying off a smaller number of more senior, yet less effective teachers for the same financial benefit. Finally, the remaining more senior but potentially less effective teachers will likely be teaching more students, due to necessarily larger class sizes, conflicting with the goal of a thorough and efficient education. Cerf Cert. at ¶ 24. This situation, as discussed above, has disproportionately affected SDA districts, resulting in their school children being deprived of a thorough and efficient education.

Statutes are "presumed to be constitutional – 'a presumption that may be rebutted only on a showing that a provision of the Constitution is clearly violated by the statute.'" Moriarty v. Bradt, 177 N.J. 84 (2003) (upholding

grandparent visitation rights) quoting In re Adoption of a Child by W.P., 163 N.J. 158, 165-66 (2000) (Poritz, C.J., dissenting). See also NYT Cable TV v. Homestead at Mansfield, 111 N.J. 21, 28 (1987). "[W]hen the constitutionality of a statute is threatened, we have excised constitutional defects or engrafted new meanings to assure its survival." NYT Cable TV, supra, 111 N.J. at 28, citing Town Tobacconist v. Kimmelman, 94 N.J. 85, 104 (1983). This is done, however, only where it is determined that the Legislature would have wanted the statute to survive as modified rather than to succumb to constitutional infirmities. NYT Cable TV, supra, 111 N.J. at 28, citing Jordan v. Horsemen's Benevolent and Protective Ass'n, 90 N.J. 422, 431-32, 435 (1982). Here, it is clear that the Legislature wants to protect teacher employment. In SDA Districts, however, LIFO is an unconstitutional impediment to a thorough and efficient education. Therefore, as applied in certain circumstances, the Commissioner should be permitted to waive or suspend these provisions in those cases, but otherwise preserve the Act. Indeed, "under New Jersey law, 'a challenged statute will be construed to avoid constitutional defects if the statute is 'reasonably susceptible' of such construction.'" Gallenthin Realty Devel., Inc. v. Borough of Paulsboro, 191 N.J. 344, 365 (2007), citing Bd. of Higher Educ. v. Bd. of Dirs. of Shelton Coll., 90 N.J. 470, 478 (1982).

C. The Court May Override Employment Terms for Public Employees in the Public Interest

The Court would not be treading new ground to permit the Commissioner to override certain restrictive provisions from CNAs: there is support in prior caselaw where the public interest is at stake. In New Jersey and elsewhere, courts have even permitted states in such circumstances to freeze wages and cost of living increases, reduce wages, and require unpaid furlough days for public employees.

For example, in Robbinsville Twp. Bd. of Educ., supra, No. A-2122-13T2 at *7-8, the court held that the school board's decision to implement unpaid furlough days was an exercise of its non-negotiable policy determination and therefore permissible notwithstanding provisions in the teachers' CNA. See also N.J.A.C. 4A:6-1.23 (voluntary furlough program). As noted above, in that case, the Court permitted the school board to unilaterally override a provision in the teachers' CNA - which provided that they would be paid for 185 (veteran teachers) or 188 (new teachers) days of work - by removing three professional development days (and the corresponding pay for those days) from the teachers' school year. Robbinsville Twp. Bd. of Educ., supra, No. A-2122-13T2 at *3-4. The furlough was required because the school's budget was cut and the only other option would have been to lay off teachers, which the board of

education noted "would simply add to the District's budget crisis, not resolve it." Id. at *3. The court noted that the board of education's decision was justified because it "sought to achieve a balance between the interests of public employees and the need to maintain and provide reasonable services." Id. at *9.

In another instance, this Court held that public employee pensioners do not have a right to continued annual cost of living adjustments ("COLAs"). Berg v. Christie, 225 N.J. 245, 278 (2016). After providing COLAs for many years, in 2011, the State suspended COLAs and essentially froze pension payments at the 2011 levels. Id. at 252-53. Despite a statutory provision that plaintiffs argued created a contractual right to COLAs, this Court held that it was permissible for the State to suspend COLAs because "[f]or the Legislature to have given up so much control over a future Legislature's ability to react to the present needs of the State, the expression of a statutory contract and the individual terms of such a contract must be unmistakably clear. That clarity is absent here…" Id. at 278.

Other state courts have also permitted state and city governments to override employment terms for public employees in the public interest. See Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 376 (2d Cir. 2006) (holding that the City of Buffalo's wage freeze for public employees "constitutes neither a

Contracts Clause nor Takings Clause violation"); Professional Engineers in Cal. Gov't v. Schwarzenegger, 50 Cal. 4th 989 (Cal. 2010) (upholding state imposed furloughs that amounted to a 5% pay cut to public employees).

Furthermore, in the bankruptcy field, it is long settled that "a bankruptcy court may permit a debtor to unilaterally reject or modify an existing collective bargaining agreement," under certain circumstances. In re Kaiser Aluminum Corp., 456 F.3d 328, 340 (3d Cir. 2006) (citing 11 U.S.C. 1113(b)(1)(A)). Moreover, the debtor may unilaterally reject or modify either an existing collective bargaining agreement or the continuing terms and conditions of an expired collective bargaining agreement. In re Trump Entm't Resorts Unite Here Local 54, 810 F.3d 161, 165 (3d Cir. 2016).

Here, the Commissioner seeks the authority, not to freeze or reduce teachers' wages, but to exercise flexibility in regard to managing teachers when necessary to remedy an important and long-standing gap in SDA District students' performance. Recognizing and granting the Commissioner the discretion to eliminate impediments will help achieve the constitutionally required thorough and efficient education for this State's students.

Exercise of such discretion is in the public interest. "A legitimate public purpose is one 'aimed at remedying an

important general social or economic problem rather than providing a benefit to special interests.'" Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 368 (2d Cir. 2006), quoting Sanitation & Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 993 (2d Cir. 1997). Here, there is no greater legitimate public purpose than the constitutional requirement on thorough and efficient education for New Jersey's children.

POINT II

DEFERENCE TO THE COMMISSIONER IS APPROPRIATE

There is strong precedent requiring this Court to defer to the expertise of administrative agencies, especially "when the issue under review is directed to the agency's special 'expertise and superior knowledge of a particular field.'" In re Stallworth, 208 N.J. 182, 195 (2011) (quoting In re Herrmann, 192 N.J. 19, 28 (2007)).

Under the doctrine of separation of powers, as mandated by our Constitution, "[n]o 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." N.J. Const., art. III, § 1, ¶ 1. As such, this Court has recognized many times that it must defer to agency expertise on technical matters, "where such expertise is a pertinent factor." Campbell v. N.J. Racing Comm'n, 169 N.J. 579, 588 (2001) (citing Close v. Kordulak

Bros., 44 N.J. 589, 599 (1965)); Gloucester City Welfare Bd. v. State Civil Serv. Comm'n, 93 N.J. 384, 390 (1983) (strong presumption of reasonableness accompanies administrative agency's exercise of statutorily delegated responsibility). The court "may not second-guess those judgments of an administrative agency which fall squarely within the agency's expertise." In re Stream Encroachment Permit, Permit No. 0200-04-0002.1 FHA, 402 N.J. Super. 587, 597 (App. Div. 2008). This Court has stated that "[i]n making predictive or judgmental determinations, … case law has recognized the value that administrative expertise can play in the rendering of a sound administrative determination." In re Proposed Quest Academy Charter School of Montclair Founders Group, 216 N.J. 370, 389 (2013). Moreover, "[j]udicial deference is at a high when reviewing such findings." Ibid. (citing Golden Nugget Atl. City Corp. v. Atl. City Elec. Co., 229 N.J. Super. 118, 122-23 (App. Div. 1988)). See also N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535 (2012) (deferring to Commissioner in adoption of regulations limiting certain benefits in new a school administrator contracts); In re the Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch., 164 N.J. 316 (2000) (recognizing discretion allotted to the Commissioner in implementation of the Charter School Program Act).

For example, courts have routinely deferred to the Commissioner of Education in charter school matters based on his unique expertise. See, e.g., Quest Academy, supra, 216 N.J. at 389 (noting "the value that administrative expertise can play in the rendering of a sound administrative determination" and that "judicial deference is at a high when reviewing such findings."); In re Grant of Charter School Application of Englewood on Palisades Charter School, 320 N.J. Super. 174, 213 (App. Div. 1999), aff'd with modifications, 164 N.J. 316 (2000) (deferring to the Commissioner's expertise in assessing charter applications).

In the course of the Abbott litigation, this Court has similarly recognized that deference must be paid to the Commissioner of Education. In Abbott II, this Court declined to apply its remedy to any districts other than what are now known as the SDA Districts, explaining that "[i]n the absence of proof, we believe that the separation of powers requires us to defer to the Board's, the Commissioner's, and the legislative judgment concerning such districts." Abbott II, supra, 119 N.J. at 320. In Abbott IV, this Court held that "[t]he content and performance standards prescribed by [CEIFA] represent the first real effort on the part of the legislative and executive branches to define and to implement the educational opportunity required by the Constitution. It is an effort that strongly

warrants judicial deference." Abbott IV, supra, 149 N.J. at 168. In Abbott XX, this Court recognized the "effort and the good faith" exercised by the Legislature in developing the SFRA and concluded that "the legislative effort deserves deference." Abbott XX, supra, 199 N.J. at 172; see also Abbott v. Burke, 206 N.J. 332, 355 (2011) ("Abbott XXI") (commenting that the holding in Abbott XX "was a good-faith demonstration of deference to the political branches' authority").

Thus, the Court has often deferred to the expertise and judgment of the Commissioner. See, e.g., Abbott I, supra, 100 N.J. at 393 (recognizing Commissioner's "plenary authority"); Abbott IV, supra, 149 N.J. at 224 (Commissioner to "manage, control, and supervise the implementation of … funding to assure it will be expended and applied effectively and efficiently to further the students' ability to achieve"); Abbott V, supra, 153 N.J. at 527 (accepting the Commissioner's "whole school reform" proposals based on the testimony of the Commissioner and other educational experts). In Abbott XX, supra, 199 N.J. at 175, the Court noted that the thorough and efficient clause should not operate as a "constitutional straitjacket," and emphasized that "[t]he political branches of government, however, are entitled to take reasoned steps, even if the outcome cannot be assured, to address the social, economic, and educational challenges confronting our state."

Here, the State is asking this Court to allow the Commissioner to use his knowledge and expertise in education matters: first, to identify those circumstances where students in specific SDA Districts are not being afforded a thorough and efficient system of education; second, to determine whether specific statutory or contractual provisions are impeding those districts' progress toward providing a thorough and efficient system; and finally, to suspend such impediments to allow the SDA District, and thus the State, to fulfill the constitutional obligation to these underserved schoolchildren.

There is no single solution to the educational challenges experienced by thousands of children in the various SDA Districts in this State. This is illustrated by the fact that schools with the flexibility to adapt their educational techniques to meet their students' changing needs tend to be more successful. The Commissioner must be allowed to use his expertise and judgment to determine and implement solutions, especially where the problems are of a constitutional magnitude. Therefore, this Court should recognize and defer to the Commissioner's judgment and expertise just as it has done many times in the past.

POINT III

THE COURT SHOULD VACATE ITS PRIOR ORDER REQUIRING THE FUNDING OF THE SFRA IN ACCORDANCE WITH ITS TERMS AND ACKNOWLEDGE THE DEFICIENCIES OF NEW JERSEY'S EDUCATION SYSTEM THAT DEMAND THE ATTENTION OF THE EXECUTIVE AND LEGISLATURE

The United States Supreme Court has led a national movement towards school reform that is not based on increased funding, but on structural and management reforms that ameliorate many glaring inadequacies towards education. In 1992, students and parents of Arizona's Nogales Unified School District ("Nogales") commenced a class action complaining that Arizona's approach to funding programs for English language-learner ("ELL") students was insufficient as applied in Nogales. The class action alleged that Arizona was violating the Equal Educational Opportunities Act of 1974 ("EEOA"), § 204(f), 88 Stat. 515, 20 U.S.C. § 1703(f), "which requires a State 'to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.'" Horne v. Flores, supra, 557 U.S. at 438-39.

In response, "[i]n 2000, the District Court entered a declaratory judgment with respect to [funding programs for ELL students at] Nogales, and in 2001, the court extended the order to apply to the entire State." Id. at 439. Thereafter the court found Arizona in contempt for its funding failures. In March

2006, the state legislature passed a bill "designed to implement a permanent funding solution to the problems identified by the District Court in 2000." Id. at 442. The Legislators and Superintendent together moved to purge the District Court's contempt order in light of that bill, and alternatively, moved for relief from the court's ELL funding requirements based on changed circumstances. Id. at 443. The Governor, State Board of Education and the original plaintiffs were respondents before the U.S. Supreme Court. Ibid.

The Supreme Court noted that "[f]or nearly a decade, the orders of a Federal District Court have substantially restricted the ability of the State of Arizona to make basic decisions regarding educational policy, appropriations, and budget priorities. The record strongly suggests that some state officials have welcomed the involvement of the federal court as a means of achieving appropriations objectives that could not be achieved through the ordinary democratic process." Horne, supra, 557 U.S. at 447 n.3. Remanding "for a proper examination of at least four important factual and legal changes that may warrant the granting of relief from the judgment: the State's adoption of a new ELL instructional methodology, Congress' enactment of NCLB, structural and management reforms in Nogales, and increased overall education funding," Id. at 459, the Supreme Court stated:

> Both of the lower courts focused excessively on the narrow question of the adequacy of the State's incremental funding for ELL instruction instead of fairly considering the broader question whether, as a result of important changes during the intervening years, the State was fulfilling its obligation under the EEOA by other means. The question at issue in these cases is not whether Arizona must take "appropriate action" to overcome the language barriers that impede ELL students. Of course it must. But petitioners argue that Arizona is now fulfilling its statutory obligation by new means that reflect new policy insights and other changed circumstances. Rule 60(b)(5) provides the vehicle for petitioners to bring such an argument.

Id. at 439. The Court remanded the action "for a proper examination of … factual and legal changes that may warrant the granting of relief from the judgment," including but not limited to reforms in Nogales. Id. at 459. The Nogales superintendent instituted structural and management reforms that "ameliorated or eliminated many of the most glaring inadequacies discussed by the district court." Id. at 465-66. The Court noted that "[a]mong other things, [Superintendent] Cooper reduced class sizes, significantly improved student/teacher ratios, improved teacher quality, pioneered a uniform system of textbook and curriculum planning, and largely eliminated what had been a severe shortage of instructional materials." Id. at 466 (internal citations omitted). The Court found that:

> these reforms might have brought Nogales' ELL programming into compliance with the EEOA even without sufficient ELL incremental funding to satisfy the District Court's original order. … The District Court similarly discounted Cooper's achievements, acknowledging that Nogales was ''doing substantially better than it was in 2000, but concluding that because the progress resulted from management efforts rather than increased funding, its progress was fleeting at best.
>
> Entrenched in the framework of incremental funding, both courts refused to consider that Nogales could be taking appropriate action to address language barriers even without having satisfied the original order. This was error. The EEOA seeks to provide equal educational opportunity to all children enrolled in public schools. Its ultimate focus is on the quality of educational programming and services provided to students, not the amount of money spent on them. Accordingly, there is no statutory basis for precluding petitioners from showing that Nogales has achieved EEOA-compliant programming by means other than increased funding--for example, through Cooper's structural, curricular, and accountability-based reforms. The weight of research suggests that these types of local reforms, much more than court-imposed funding mandates, lead to improved educational opportunities.

Id. at 466-67 (internal citations omitted). In other words, "[f]unding is merely one tool that may be employed to achieve the statutory objective." Id. at 459; see also Connecticut Coalition v. Rell, supra, No. CV-145037565-S at *30-31 ("If there is a meaningful role for the courts in enforcing the constitutional promise of an adequate education, it has to be at

a very high level: the courts can set a minimum base for overall resources and then ensure that the major policies carrying them into action are rationally, substantially, and verifiably calculated to achieve educational opportunities").

Similarly, here, the SFRA alone does not comprise New Jersey's thorough and efficient system of education. Numerous other laws impact the education of our State's children. Many of these laws, as applied to the SDA Districts, impede the State's fiscal support of schools and prevent the State from creating a thorough and efficient system of education in the SDA Districts. Justice Hoens observed that by demanding full funding of the SFRA for the SDA Districts notwithstanding a budget crisis, the Abbott XXI plaintiffs sought "to elevate their interpretation of their funding needs above and ahead of all others" and "effectively lock[] our co-equal branches in a 'constitutional straitjacket.'" Id. at 503 (Hoens, J., dissenting). The SDA Districts' manipulation of their local tax schemes to avoid paying their LFS towards education, knowing that the State will fill the gap, has only worsened the detrimental impact on the State's other obligations.

As set forth supra, the Court should empower the Commissioner to override, when necessary, these impediments in the SDA Districts. In addition, respectfully, the Court should vacate its prior order to fund the SFRA according to its terms,

thereby allowing the Commissioner to remedy the education obstacles in those districts at the current funding levels.

Finally, given that (1) the system has so many inextricably intertwined statutes with State-wide impact, (2) the now evident proposition that more money for SDA Districts is not a panacea, (3) the need to remove statutory and contractual impediments that exist and to assess the impact of those changes, and (4) the constitutional mandate of separation of powers which delegates to the Executive and Legislative branches the tasks of weighing and meeting all of the priorities and needs of the State and its citizens, it is imperative that those branches devise a system within that context that continues to financially support the school districts appropriately and adequately, while eliminating the impediments and correcting the deficiencies. This must be done on an urgent basis and in sufficient time so that school districts can plan and implement the necessary changes no later than for the 2017-18 school year lest the students in the SDA Districts be relegated to falling even further behind their peers with all the detrimental effects to them and to the State as a whole discussed above. If such action is not taken expeditiously, the Court should be prepared to entertain an application from the State in the next few months for further relief.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to grant the requested relief.

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Dated: September 15, 2016

EXHIBIT

E

STATE OF NEW YORK
SUPREME COURT COUNTY OF RICHMOND

MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, ERIC DAVIDS, by his parent and natural guardian MIAMONA DAVIDS, ALEXIS PERALTA, by her parent and natural guardian ANGELA PERALTA, STACY PERALTA, by her parent and natural guardian ANGELA PERALTA, LENORA PERALTA, by her parent and natural guardian ANGELA PERALTA, ANDREW HENSON, by his parent and natural guardian CHRISTINE HENSON, ADRIAN COLSON, by his parent and natural guardian JACQUELINE COLSON, DARIUS COLSON, by his parent and natural guardian JACQUELINE COLSON, SAMANTHA PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, FRANKLIN PIROZZOLO, by her parent and natural guardian SAM PIROZZOLO, IZAIYAH EWERS, by his parent and natural guardian KENDRA OKE,

Plaintiffs,

-against-

THE STATE OF NEW YORK, THE NEW YORK STATE BOARD OF REGENTS, THE NEW YORK STATE EDUCATION DEPARTMENT, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, JOHN AND JANE DOES 1-100, XYZ ENTITIES 1-100,

Defendants,

-and-

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO,

Intervenor-Defendant.

ORDER

Index No. 101105-2014

Hon. Philip G. Minardo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

JOHN KEONI WRIGHT, GINET BORRERO, TAUANA GOINS, NINA DOSTER, CARLA WILLIAMS, MONA PRADIA, ANGELES BARRAGAN,

Plaintiffs,

-against-

THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New York, JOHN B. KING, in his official capacity as the Commissioner of Education of the State of New York and President of the University of the State of New York,

Defendants,

-and-

SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE, Individually and as President of the New York State United Teachers,

Intervenors-Defendants.

Proposed Intervenors-Defendants Seth Cohen, Daniel Delehanty, Ashli Skura Dreher, Kathleen Ferguson, Israel Martinez, Richard Ognibene, Jr., Lonnette R. Tuck, and Karen E. Magee, Individually and as President of the New York State United Teachers, by their attorney, Richard E. Casagrande, having moved in the action with the caption *John Keoni Wright, et al., v. State of New York, et al.* and bearing the Albany County Index Number A00641/2014 (hereinafter the "*Wright* action"), pursuant to sections 1012 and 1013 of the

Civil Practice Law and Rules for an order permitting them to intervene in the *Wright* action, and

The *Wright* action by order of this court dated September 18, 2014, having been consolidated with the action with the caption *Mymoena Davids, et al., v. State of New York, et al.,* and bearing the Richmond County Index Number 101105/2014 (hereinafter the "*Davids* action") and the pleadings in the actions being consolidated and standing as pleadings in the consolidated action,

NOW, upon reading and filing the affirmation of Richard E. Casagrande, dated August 28, 2014, and the exhibit annexed thereto, the affidavit of Seth Cohen, sworn to on August 28, 2014, the affidavit of Daniel Delehanty, sworn to on August 27, 2014, the affidavit of Ashli Skura Dreher, sworn to on August 27, 2014, the affidavit of Kathleen Ferguson, sworn to on August 27, 2014, the affidavit of Israel Martinez, sworn to on August 27, 2014, the affidavit of Richard Ognibene, Jr., sworn to on August 26, 2014, the affidavit of Lonnette R. Tuck, sworn to on August 27, 2014, and the affidavit of Karen Magee, sworn to on August 28, 2014, with proof of service thereof, and no opposition thereto having been filed, and after due deliberation, it is

ORDERED that the Proposed Intervenors-Defendants' motion to intervene is granted, and it is

FURTHER ORDERED, that Seth Cohen, Daniel Delehanty, Ashli Skura Dreher, Kathleen Ferguson, Israel Martinez, Richard Ognibene, Jr., Lonnette R. Tuck, and Karen E. Magee, Individually and as President of the New York State United Teachers be and are

hereby deemed to be Intervenors-Defendants in this consolidated action.

Dated: September 30, 2014

ENTERED:

HONORABLE PHILIP G. MINARDO
Justice of the Supreme Court

116496/CWA1141

Hon. Philip G. Minardo

William H. Trousdale (N.J. Attorney ID No. 010921994)
TOMPKINS MCGUIRE, WACHENFELD & BARRY, LLP
3 Becker Farm Road
Suite 402
Roseland, New Jersey 07068
(973) 623-7893
Attorneys for Plaintiffs

H.G., a minor, through her guardian TANISHA GARNER, et al.,

Plaintiffs,

v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education, et al.,

Defendants

and

NEW JERSEY EDUCATION ASSOCIATION, a New Jersey nonprofit corporation, on behalf of itself and its members,

Proposed Defendant-Intervenor

and

AMERICAN FEDERATION OF TEACHERS, AFL-CIO, et al.,

Applicants for Intervention

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY

Docket No.: MER-L-2170-16

Civil Action

CERTIFICATION OF SERVICE

I, William H. Trousdale, Esq., of full age, hereby certify:

1. I am an attorney-at-law licensed to practice before this Court and a partner at the law firm of Tompkins, McGuire, Wachenfeld & Barry, LLP, 3 Becker Farm Road, Suite 402, Roseland, NJ 07068, attorneys for Plaintiffs Tanisha Garner, on behalf of her children H.G. and F.G., et al.

2. Today, December 7, 2016, I caused to be submitted, by hand delivery, the original and one (1) copy of Plaintiffs' Memorandum of Law in Opposition to Proposed Defendant-Intervenors AFT, AFTNJ and NTU's Motion for Leave to Intervene, a Certification of Counsel with Exhibits, and this Certification of Service to the Deputy Clerk of the Superior Court, Mercer Vicinage, 175 South Broad Street – 1st Floor, Trenton, NJ 08650 for filing purposes.

3. Today, December 7, 2016, I caused to be forwarded, via New Jersey Lawyers' Service, one copy of the above-noted documents to the Hon. Mary C. Jacobson, A.J.S.C., New Criminal Courthouse, 400 South Warren Street, 4th Floor, Trenton NJ, 08650.

4. Today, December 7, 2016, I caused to be forwarded, via New Jersey Lawyers' Service, one copy of the above-noted documents to the following parties in the above-captioned case:

Beth N. Shore
Deputy Attorney General
Education/Higher Education Section
Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

Charlotte Hitchcock
Chief General Counsel
Newark Public School District
2 Cedar Street, Room 1003
Newark, NJ 07102

Flavio L. Komuves
Zazzali, Fagella, Novak, Kleinbaum & Friedman, PC
One Riverfront Plaza, Suite 320
Newark, NJ 07102

Steven P. Weissman
Weissman & Mintz LLC
One Executive Drive, Suite 200
Somerset, NJ 08873

I certify that the foregoing statements made by me are true. If any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date: December 7, 2016

WT

William H. Trousdale