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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

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION:

MOTION FOR LEAVE TO APPEAL FROM
AN INTERLOCUTORY ORDER OF THE
SUPERIOR COURT OF NEW JERSEY,
LAW DIVISION, CIVIL PART, MERCER
COUNTY

DOCKET NO. MER-L-2170-16

Sat Below:
Hon. Mary C. Jacobson, A.J.S.C.

CIVIL ACTION

SCHOOL DISTRICT; and nominal
defendant CHRISTOPHER CERF, in his
official capacity as
Superintendent of the Newark
Public School District,

Defendants,

And

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

Defendant-Intervenor,

And

AMERICAN FEDERATION OF TEACHERS,
AFL-CIO, AFT NEW JERSEY and THE
NEWARK TEACHERS UNION,

Defendants-Intervenors.

**PLAINTIFFS' BRIEF AND APPENDIX IN SUPPORT OF PLAINTIFFS'
MOTION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY ORDER OF THE
SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CIVIL PART, MERCER
COUNTY, DOCKET NO. MER-L-2170-16**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
RELEVANT FACTS	3
PROCEDURAL HISTORY AND THE TRIAL COURT’S RULING	8
ARGUMENT	10
I. LEAVE TO APPEAL IS WARRANTED	10
A. LEGAL STANDARD FOR LEAVE TO APPEAL	10
B. LEAVE TO APPEAL IS IN THE INTEREST OF JUSTICE BECAUSE THE JUDGMENT IS FINAL IN EFFECT	11
II. THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT	13
A. PLAINTIFFS HAVE STANDING	13
B. PLAINTIFFS’ CLAIMS ARE RIPE	17
C. PLAINTIFFS’ HARM IS JUDICIALLY REMEDIABLE	20
D. THE COURT IMPROPERLY CONSIDERED DISCOVERY BURDENS	22
E. PLAINTIFFS MET THE PLEADING REQUIREMENTS	22
CONCLUSION	25
APPENDIX	
A. COMPLAINT, FILED NOVEMBER 1, 2016	Pa1
B. ANSWER OF DEFENDANTS KIMBERLY HARRINGTON AND NEW JERSEY DEPARTMENT OF EDUCATION	Pa31
C. ANSWER OF DEFENDANTS NEWARK PUBLIC SCHOOL DISTRICT AND CHRISTOPHER CERF	Pa53

D. CERTIFICATION OF SUPERINTENDENT CHRISTOPHER CERF, DATED
AUGUST 23, 2016 Pa88

E. TRANSCRIPT OF MAY 3, 2017 MOTION HEARING Pa99

F. ORDER GRANTING MOTIONS TO DISMISS THE COMPLAINT AND
DISMISSING THE COMPLAINT WITHOUT PREJUDICE,
FILED MAY 4, 2017 Pa141

G. SAADEH V. ALKHALIL, A-5549-14T1, 2016 WL 6900742 (N.J.
SUPER. CT. APP. DIV. NOV. 23, 2016) Pa144

H. HOGAN V. DONOVAN, 2012 WL 1328279 (LAW DIV. APR. 17, 2012)
..... Pa147

I. CRAWFORD V. DAVY, 2010 WL 162061 (N.J. SUPER. CT APP. DIV.
NOV. 23, 2009) Pa159

J. J. FLETCHER CREAMER & SON V. PA. MFRS. ASS'N INS. CO.,
2009 WL 2365884 (N.J. SUPER. CT. APP. DIV. AUG. 4, 2009) . Pa171

TABLE OF AUTHORITIES

Page (s)

Cases:

Abbott v. Burke,
119 N.J. 287 (1990) 14, 22

Abbott v. Burke,
149 N.J. 145 (1997) 14, 15

Abbott v. Burke,
206 N.J. 332 (2011) 15

Brundage v. Estate of Carambio,
195 N.J. 575 (2008) 11, 13

Burg v. State,
147 N.J. Super. 316 (App. Div. 1977) 23

Cooper v. Nutley Sun Printing Co.,
36 N.J. 189 (1961) 21

Crawford v. Davy,
2010 WL 162061
(N.J. Super. Ct App. Div. Nov. 23, 2009) 20, 21

Crescent Park Tenants Ass'n v. Realty Equities Corp.,
58 N.J. 98 (1971) 13, 14

Grow Co. v. Chokshi,
403 N.J. Super. 443 (2008) 10, 13

Handelman v. Handelman,
17 N.J. 1 (1954) 13

Hogan v. Donovan,
2012 WL 1328279 (Law Div. Apr. 17, 2012) 17, 18, 19, 20

Independent Realty Co. v. Twp. of N. Bergen,
376 N.J. Super. 295 (App. Div. 2005) 17, 18

In re Ass'n of Trial Lawyers of Am.,
228 N.J. Super. 180 (App. Div. 1988) 16

J. Fletcher Creamer & Son v. Pa. Mfrs. Ass'n Ins. Co.,
2009 WL 2365884
(N.J. Super. Ct. App. Div. Aug. 4, 2009) 22, 23

<u>Jen Elec., Inc. v. Cty. Of Essex,</u> 197 N.J. 627 (2009)	13
<u>Printing Mart-Morristown v. Sharp Elec. Corp.,</u> 116 N.J. 739 (1989)	23
<u>Robinson v. Cahill,</u> 69 N.J. 133 (1975)	17, 20, 21, 22
<u>Saadeh v. Alkhalil,</u> A-5549-14T1, 2016 WL 6900742 (N.J. Super. Ct. App. Div. Nov. 23, 2016)	10

Constitution, Statutes And Rules:

N.J. Const., Art. VIII, Sect. IV	1, 14, 18
N.J.S.A. 18A:28-10	<u>passim</u>
N.J.S.A. 18A:28-12	<u>passim</u>
N.J.A.C. § 6A:32-5.1	7
R. 2:2-4	11
R. 2:2-2 (b)	11

PRELIMINARY STATEMENT

The State Constitution guarantees children "a thorough and efficient" education. ART. VIII, SECT. IV, ¶ 1. A state statute, N.J.S.A. 18A:28-10 and 18A:28-12 (the "LIFO Statute"), nevertheless requires that public school districts follow a quality-blind teacher layoff and reemployment mandate when executing a reduction-in-force ("RIF"): teachers must be laid off based solely on seniority, not their effectiveness in the classroom, and if a district later decides to rehire teachers, it must prioritize re-hirings based on seniority, not quality.

The LIFO statute is particularly burdensome and damaging to financially constrained public school districts that protect their few effective teachers by avoiding RIFs -- including the Newark Public School District ("Newark" or the "District"), where Plaintiffs attend school. Because of the LIFO Statute, the District must, despite its severe financial constraints, maintain on its payroll teachers whose classroom performance is so deficient that, incredibly, they are paid not to teach.

Paying ineffective teachers to stay out of the classroom consumes critical district resources that are necessary for the students of Newark, and deprives those students of the thorough and efficient education they would receive but for the statute. Indeed, the District has admitted that the LIFO Statute impairs its ability to meet its constitutional obligations:

[T]he District's schools are making great strides to meet the constitutionally-mandated Thorough and Efficient education requirements for all children in the District. Through no fault of its own, however, and even without any additional cuts to the District's funding, the District has been hampered by statutory restrictions that essentially protect the interests of adults over the rights of the children of Newark. As New Jersey's Courts have recognized, we must do everything we can to create an environment where these children can learn effectively to create a pathway to success in school and in life. The most important way to make that happen is to ensure that we are able to retain our best teachers in [Newark].

Plaintiffs' Appendix ("Pa") at 59 (Dist. Answer ¶ 26).

Plaintiffs -- twelve children in Newark, who bear the ultimate burden of the waste of the LIFO Statute and whose basic educational needs are consequently not being met -- sued, asking the trial court to void the statute as unconstitutional as applied to the Newark. The trial court sidestepped the merits of their challenge, however, incorrectly holding that they had not alleged any injury sufficient to establish standing. Plaintiffs were deprived of an immediate right to appeal as the trial court dismissed the Complaint without prejudice, apparently on the theory that Plaintiffs' current harm is not cognizable so they should endure their privations silently, coming back to the court only if and when circumstances change in a way that would cause even more severe injury.

Thus, Plaintiffs respectfully petition this Court for leave to appeal. The Court should grant the petition, and, upon its review of the merits, promptly rule that Plaintiffs have standing to litigate whether the LIFO Statute comports with the constitutional mandate of a "thorough and efficient" education.

RELEVANT FACTS

Plaintiffs attend schools that, regrettably, rank among New Jersey's worst. Pa at 7-9 (Compl. ¶¶ 29-40); Pa at 61-62 (Dist. Answer ¶¶ 29-31). These schools serve predominantly economically disadvantaged children, and very few of the students receive an education that allows them to meet or exceed the State's minimum proficiency benchmarks in language arts and math. Pa at 7-9 (Compl. ¶¶ 32-40).

As teacher effectiveness is the single most influential school-based variable in a child's education, New Jersey has set standards to measure the quality of its teachers' performance. Pa at 10-11 (Compl. ¶¶ 44-45); Pa at 67 (Dist. Answer ¶¶ 44-45 (admitting factual allegations)). The State evaluates its teachers as "highly effective," "effective," "partially effective," or "ineffective." Pa at 11 (Compl. ¶ 45); Pa at 67 (Dist. Answer ¶ 45 (admitting factual allegations)).

Despite the State's emphasis on evaluating teacher effectiveness, Newark, when engaging in a RIF, is forbidden from considering teacher effectiveness. Pa at 2 (Compl. ¶ 3); Pa at

54 (Dist. Answer ¶ 3 (admitting)). Instead, the LIFO Statute mandates that Newark conduct RIFs based upon seniority alone. Pa at 2 (Compl. ¶ 3); Pa at 54 (Dist. Answer ¶ 3 (admitting)). Further, if there is a later need to hire teachers within the District, the LIFO Statute mandates that the District prioritize re-hiring teachers who were laid off in order of their seniority, without consideration of quality. Pa at 14-15 (Compl. ¶ 66); Pa at 69 (Dist. Answer ¶ 66 (admitting)).

This is especially troubling in Newark as the District employs nearly half of all the "ineffective" teachers in New Jersey, along with 10% of the State's "partially effective" teachers. Pa at 11 (Compl. ¶ 47). 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 students." Pa at 13 (Compl. ¶ 54). This is true in Newark, and operation of the LIFO Statute has a disproportionate impact upon students in Newark in comparison to students in other, higher-income districts, such as the Summit City School District ("Summit"), because Newark has the highest concentration of the State's ineffective and partially effective teachers. Pa at 11-12 (Compl. ¶¶ 47, 48, 49, 50).¹ Newark admits that the LIFO Statute hampers the

¹ Summit had zero ineffective or partially ineffective teachers out of 337 evaluations. Pa at 12 (Compl. ¶¶ 49-50). Consequently, in Summit, RIFs under the LIFO Statute would not

District from meeting its constitutional obligations. Ma. at 59 (Dist. Answer ¶ 26).²

Consequently, the LIFO Statute in Newark harms Plaintiffs in two ways: (i) by depriving them of effective teachers and other professionals when a RIF occurs³ and (ii) by the (a) money that Newark spends on both the EWPS pool and retaining ineffective teachers to avoid the loss of primarily effective teachers through RIF; (b) placement of ineffective teachers from the EWPS pool back into classrooms to meet budget shortfalls, and (c) cuts made to other parts of the District's budget in order to cover the cost of the EWPS pool and excess teachers. Pa at 3, 17-19, 20 (Compl. ¶¶ 5-6, 79-90, 93-94, 97).

The EWPS Pools

In an effort to avoid losing primarily effective teachers in a RIF, the District implemented the Educators Without Placement Sites ("EWPS") pool. Pa at 17 (Compl. ¶ 81); Pa at 70

result in ineffective or partially ineffective teachers being retained over effective teachers. Pa at 12 (Compl. ¶ 49).

² Outside of RIFs, a district that wants to terminate an ineffective tenured teacher must do so through a tenure charge, which is "a time-consuming and cost-intensive process that takes at least two years," and is followed by legal proceedings that can take another year or more and cost the district more than \$50,000 per terminated teacher. Pa at 96-97 ("Cerf Cert." ¶ 23); Pa at 19 (Compl. ¶ 93). This time and money intensive process has no bearing on the issue presented in this case and is inadequate to address how the District should handle a budget shortfall. Pa at 96-97 (Cerf Cert. ¶ 23).

³ In 2016, Newark was forced to engage in a RIF of guidance counselors and librarians, which resulted in the termination of staff the District would have retained but for the mandates of the LIFO Statute. Pa at 9-10 (Compl. ¶ 41).

(Dist. Answer ¶ 81 (admitting)). The pool is an effort to keep ineffective teachers out of classrooms and avoid engaging in a RIF that would not remove these teachers from the District, but would remove almost solely effective teachers. Pa at 92 (Cerf Cert. ¶ 13). The EWPS pool contains ineffective teachers who are paid teacher salaries without full-time classroom placements. Pa at 17 (Compl. ¶ 82); Pa at 70 (Dist. Answer ¶ 82). Such teachers perform various support and teacher's aide functions -- the lesser of two evils undertaken to avoid engaging in a RIF that would not remove these ineffective teachers from the District, but would certainly remove effective teachers. Pa at 17 (Compl. ¶ 82); Pa at 70 (Dist. Answer ¶ 82); Pa at 92 (Cerf Cert. ¶ 13).

During the 2013-2014 school year, the EWPS pool included 271 teachers -- most of whom were senior teachers with ten or more years of experience -- and cost Newark approximately \$22.5 million dollars. Pa at 17 (Compl. ¶¶ 83-85). In 2015, due to further exacerbation of Newark's funding issues, the District could no longer afford to keep all the teachers in the EWPS pool out of the District's classrooms, see Pa at 93 (Cerf Cert. at ¶ 15), and had to force-place them into Plaintiffs' schools and other schools in the District without the consent of those schools' principals. Pa at 17-18 (Compl. ¶¶ 86-87); Pa at 71 (Dist. Answer ¶ 87 (admitting forced placement of teachers

without consent of school principals)). These force-placed teachers' salaries cost the District more than \$25 million, with another \$10 million in salaries remaining in the EWPS pool. Pa at 18 (Compl. ¶ 87); Pa at 71 (Dist. Answer ¶¶ 86, 87).

Thus, when the LIFO Statute remains in effect, no matter what course of action the District pursues, Newark's children, including Plaintiffs, are harmed. Pa at 19 (Compl. ¶ 95); Pa at 72 (Dist. Answer ¶ 95 (admitting that due to tension between engaging in RIF or keeping ineffective teachers in EWPS pool, "Newark continues to struggle with growing challenges negatively impacting certain district students.")). Students either suffer from budgetary cuts made to offset the cost of the EWPS pool, or, when the budget can no longer maintain the superfluous staff, a RIF that terminates effective teachers and leaves ineffective ones. Pa at 19 (Compl. ¶¶ 93-95).

The Equivalency Request

In February 2014, Newark published information about the impact of a RIF when it sought a temporary reprieve from quality-blind layoffs in the form of an equivalency request under N.J.A.C. § 6A:32-5.1 ("Equivalency Request") submitted to the State Department of Education. Pa at 10 (Compl. ¶ 42); Pa at 67 (Dist. Answer ¶ 42). The District's education funding had decreased by almost \$200 million due to declining enrollment, so it had to consider whether it should engage in a RIF to address

the budget shortfalls. Pa at 10 (Compl. ¶ 42); Pa at 67 (Dist. Answer ¶ 42 (admitting)). If Newark implemented a RIF, operation of the LIFO Statute would mandate that 75% of the laid-off teachers would be those considered effective or highly effective, while only 4% would be rated as ineffective. Pa at 16 (Compl. ¶ 74); Pa at 70 (Dist. Answer ¶ 74 (admitting)). A RIF pursuant to the LIFO Statute would cause as many as 8,000 children within the District to miss out on a high-performing teacher every year. Pa at 16 (Compl. ¶ 75); Pa at 70 (Dist. Answer ¶ 75). In the Equivalency Request, Newark submitted to the State Board of Education the precise harm suffered in the event of a RIF, and the Equivalency Request was incorporated into the Complaint. Pa at 10 (Compl. ¶ 42 n. 11).

The State never responded to the Equivalency Request. Pa at 10 (Compl. ¶¶ 42-43); Pa at 67 (Dist. Answer ¶¶ 42-43 (admitting)). Consequently, Newark cut other critical programming and resources in order to account for the District's reduced funding and to retain quality teachers. Pa at 10, 17 (Compl. ¶¶ 43, 79-81); Pa at 67, 70 (Dist. Answer ¶¶ 43, 79-81 (admitting)).

PROCEDURAL HISTORY AND THE TRIAL COURT'S RULING

Plaintiffs filed the Complaint on November 1, 2016. Pa at 1-30. Shortly thereafter, the Union-Intervenors intervened and moved to dismiss; the original Defendants answered, with Newark

admitting most of the allegations in the Complaint. See Pa at 31-52 (State Defendants' Answer); Pa at 53-87 (Dist. Answer). At the conclusion of oral argument on a May 3, 2017, the trial court judge orally dismissed Plaintiffs' Complaint without prejudice, issuing a written order the next day. See Pa at 99-140 ("May 3 Tr."); Pa at 141-143 ("May 4 Order"). In that Order, the trial court found that (i) Plaintiffs lacked "standing to pursue their claims in the absence of a particularized harm to Plaintiffs" caused by the LIFO Statute and (ii) Plaintiffs' claims lacked "ripeness in the absence of an actual, or immediate threat of harm to Plaintiffs" caused by the LIFO Statute. Pa at 143. The written order also refers the parties back to "the reasons set forth on the record on May 3, 2017." Id.

The trial court stated that Plaintiffs need to allege in their Complaint that they were in classrooms with ineffective teachers as a result of the LIFO Statute, and so the continued existence of the EWPS pool and the forced-placement of ineffective teachers back into the classroom did not constitute sufficient harm to make the claim ripe. Pa at 134 (May 3 Tr. at 70:5-71:8). In addition to these grounds, Judge Jacobson stated that she did not believe she could order the declaratory judgment remedy requested by Plaintiffs because she would not be able to set the standard to be used in place of seniority during

a RIF. Pa at 138-139 (May 3 Tr. at 79:17-81:9). Further, she did not believe the Complaint justified starting “the parties down the road of lengthy discovery, burdensome on a state entity and on the Newark Public Schools themselves” Pa at 137 (May 3 Tr. at 77:4-77:8). The trial court additionally opined that tenure charges and other budget workarounds would solve the issues raised by Plaintiffs. Pa at 138 (May 3 Tr. at 78:19-79:18).

ARGUMENT

I. LEAVE TO APPEAL IS WARRANTED

A. LEGAL STANDARD FOR LEAVE TO APPEAL

The trial court did not find that Plaintiffs failed to state a claim -- it never reached the merits -- but rather dismissed the Complaint upon jurisdictional grounds and without prejudice. See Pa at 137 (May 3 Tr. at 77:16-20); Pa at 143 (May 4 Order). Consequently, the decision is not formally final. See Grow Co. v. Chokshi, 403 N.J. Super. 443, 457-58 (2008); see also Saadeh v. Alkhalil, A-5549-14T1, 2016 WL 6900742, at *2 (N.J. Super. Ct. App. Div. Nov. 23, 2016) (“When a complaint’s dismissal is without prejudice it ‘adjudicates nothing’ and may be reinstated.”) (internal citation omitted). Therefore, Plaintiffs cannot appeal the dismissal without this Court’s leave.

Leave to file an interlocutory appeal of a trial court's order is permitted "in the interest of justice." R. 2:2-4. It should be granted when the "interlocutory order[] actually or effectively dismiss[es] a party's claims or defenses." Brundage v. Estate of Carambio, 195 N.J. 575, 600 (2008). It can also be granted when an action, such as this, concerns an issue of "constitutional magnitude." Id. Finally, the Court may take appeals from interlocutory orders to "prevent irreparable injury." R. 2:2-2(b).

B. LEAVE TO APPEAL IS IN THE INTEREST OF JUSTICE BECAUSE THE JUDGMENT IS FINAL IN EFFECT

Here, Plaintiffs' ability to replead is meaningless in practice, mainly because the trial court's ruling precludes the requested relief. In substance and effect, the ruling is final.

The trial court's decision reflects an inaccurate understanding of the operation of the LIFO Statute in Newark and the current harm suffered by Plaintiffs, as well as the court's ability to order the requested remedy. The trial court incorrectly concluded that the Complaint was "completely speculative," despite the District specifically admitting the harms identified. Pa at 59, 61-67 (Dist. Answer ¶¶ 26, 29-41).

The trial court found that Plaintiffs lacked standing because the Complaint did not show "the children themselves being denied effective teachers." Pa at 136 (May 3 Tr. at

74:17-20). This is a higher standard than the law requires and is unrealistic as the information is not publically available. Moreover, given the trial court's decision that the Complaint was not ripe because there was no RIF, Plaintiffs can never satisfactorily amend their Complaint unless and until a RIF occurs or is immediately imminent, no matter the magnitude of the current harm to Plaintiffs and other students in Newark. These findings completely disregard the harm suffered by Plaintiffs that results from the diversion of the District's scarce funds to supporting the salaries of ineffective, superfluous teachers in the EWPS pool in order to save effective teachers. These critical indicia of harm suffered by the Plaintiffs, affirmed in the District's answer, must be considered in determining jurisdictional issues.

Further demonstrating that the dismissal truly is made with prejudice is the trial court's expressed concern that it cannot grant Plaintiffs' requested remedy enjoining the enforcement of the statute. Pa at 138-139 (May 3 Tr. at 79:17-80:18). The trial court articulated its concern that it would not be able to enjoin the LIFO Statute, as it believed accompanying remedy would include setting the standard to replace seniority. Pa at 139 (May 3 Tr. at 80:7-80:18). Not only is this concern misplaced, but these concerns will continue to exist even if

Plaintiffs can sufficiently amend their Complaint to satisfy the trial judge.

Consequently, given the ongoing harm to Plaintiffs and their practical inability to amend their Complaint, the Court should grant leave to appeal so that the merits of the case can be considered and the ongoing harm addressed. Brundage, 195 N.J. at 599 (leave granted when "there is the possibility of some grave damage or injustice resulting from the trial court's order." (internal quotations omitted)); see also Grow Co., 403 N.J. Super. at 461. To do otherwise permits the harm to Plaintiffs to continue unabated until a RIF can no longer be avoided, at which point an additional -- not the sole -- harm would be inflicted.

II. THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT

A. PLAINTIFFS HAVE STANDING

New Jersey courts apply "liberal rules of standing," as a "core concept of New Jersey jurisprudence" is "that [the state's] 'rules of procedure were not designed to create an injustice and added complications but, on the contrary, were devised and promulgated for the purpose of promoting reasonable uniformity in the expeditious and even administration of justice.'" Jen Elec., Inc. v. Cty. of Essex, 197 N.J. 627, 645 (2009) (quoting Handelman v. Handelman, 17 N.J. 1, 10 (1954)). Standing exists where a plaintiff has a "sufficient stake and

real adverseness.” Crescent Park Tenants Ass’n v. Realty Equities Corp., 58 N.J. 98, 107 (1971).

Here, Plaintiffs are children who possess a right to a “thorough and efficient” education, see N.J. CONST. ART. VIII, SECT. IV, ¶ 1, which requires that children be given an education that “will equip all of the students of this state to perform their roles as citizens and competitors in the same society.” Abbott v. Burke, 119 N.J. 287, 389 (1990) (Abbott II). In “poorer urban districts” such as Newark, this means that “something more must be added to the regular education in order to achieve the command of the Constitution.” Id. at 374. “The poor educational achievement levels evident in inner-city schools results in part from . . . the lack of qualified teachers Those special needs clearly must be confronted and overcome in order to achieve the constitutionally thorough and efficient education.” Abbott v. Burke, 149 N.J. 145, 177, 179 (1997) (Abbott IV) (emphasis added) (new educational standards were reasonable definition of constitutionally sufficient education, but also noting improvement depends on teaching).

Given this, Plaintiffs clearly have the requisite standing and adverseness to bring their claims. They are students in classrooms within a special needs district (Newark) who suffer from a multitude of harms as a result of the LIFO Statute.

First, the EWPS pool, and the continued presence of ineffective teachers in both the classroom and the pool, deprives Plaintiffs of critical educational resources, since approximately \$25 million or more of the District's budget is instead diverted toward the salaries of ineffective teachers. Effectively, for the past few years, Newark has taken the option of a large-scale RIF off the table when balancing its budget in order to save the effective teachers within the District (even with declining enrollment) and, instead, cut programs or funding in other areas. See Abbott IV, 149 N.J. at 153 (“[W]e require that . . . measures be taken to assure the proper and efficient use of expenditures to maximize educational resources and benefits in those districts.” (emphasis added)). Second, Plaintiffs are children who could be taught by an ineffective teacher this year or in a future school year, and suffer the consequential harm. As set forth in detail in both the Complaint and the Equivalency Request, being taught by an ineffective teacher inflicts lasting life-long damage on children, especially when “[c]hildren go to school for a finite number of years. They have but one chance to receive a constitutionally adequate education. That right, once lost, cannot be reclaimed. The loss of that right will have irreparable consequences” Abbott v. Burke, 206 N.J. 332, 479 (2011) (Abbott XXI) (Albin, J. concurring).

In setting forth reasons for her finding that Plaintiffs lacked standing, the judge relied upon In re Ass'n of Trial Lawyers of America, 228 N.J. Super. 180 (App. Div. 1988), which is inapposite. See Pa at 134-135 (May 3 Tr. 71:20-72:13). In Ass'n of Trial Lawyers, the Appellate Division reversed the denial of a motion to dismiss, finding that the plaintiffs -- trial lawyers contesting a new products liability law -- did not have standing. 228 N.J. Super. at 181-82. The court found that the lawyers did not allege that, as an association, they had suffered an immediate or threatened injury as "the only possible loss to attorneys is a speculative decrease in contingent fees resulting from an amorphous and presently unsubstantiated fear that the number and value of products liability claims may diminish." Id. at 187. Here, the trial court improperly ignored the current harm that the EWPS pool inflicts on the Plaintiffs (which was alleged in the Complaint), and instead exclusively focused on the fact that there was no RIF during the 2016-17 school year. Pa at 133 (May 3 Tr. at 69:4-69:7).

But unlike the attorney plaintiffs in Ass'n of Trial Lawyers, the child Plaintiffs here suffer from a real, immediate, non-speculative harm: deprivations resulting from the workarounds put in place to avoid a RIF laying off effective teachers and are in or will likely be in classrooms with ineffective teachers. This is not a harm to their economic

interests (as was alleged to the attorneys), but a constitutional harm arising out of a deprivation impacting their fundamental right. See Robinson v. Cahill, 69 N.J. 133, 147 (1975) (reaffirming that right of children to thorough and efficient education is fundamental). Given this, Plaintiffs have standing, and the trial court decision should be reversed.

B. PLAINTIFFS' CLAIMS ARE RIPE

Plaintiffs' claims are undoubtedly ripe for judicial review. The evaluation of ripeness requires consideration of (i) whether the issues are fit for judicial review and (ii) "the hardship to the parties if judicial review is withheld at this time." See Hogan v. Donovan, 2012 WL 1328279, at *10 (Law Div. Apr. 17, 2012) (internal quotations and citations omitted).

The decision to dismiss the Complaint is based on a fundamental misunderstanding of the function of the LIFO Statute, and the current and ongoing harm created by the EWPS pool (a direct result of the LIFO Statute, as it is a workaround to avoid a RIF). The current harm suffered by Plaintiffs is not simply whether each Plaintiff is in a classroom with an ineffective teacher due to the LIFO Statute. Rather, the current harm is Newark's continued diversion of its resources.

The trial court relied solely on Independent Realty Co. v. Township of North Bergen, 376 N.J. Super. 295 (App. Div. 2005), in dismissing the Complaint on grounds of ripeness. The facts

of Independent Realty are not analogous, however. In Independent Realty, the plaintiff did not exhaust its administrative remedies and there was no adverse municipal decision affecting its rights; therefore, it failed to demonstrate the existence of an issue in controversy between the parties, and there was no actual dispute. Id. at 303.

Here, no administrative remedies are available to Plaintiffs, because children do not have the ability to institute a RIF, cannot request that Newark engage in a RIF and remove ineffective teachers from the classroom, or dictate how the District spends its funds. Further, if the TEACHNJ removal processes is viewed as an analogous administrative remedy -- a view not articulated by the trial court -- any such remedy would not be available to the Plaintiffs because only the District can bring tenure charges. In any event, the circumstances that permit a district to avail itself of a dismissal under TEACHNJ are not available when a RIF may be required due to a need to reduce superfluous teachers.

Further, there is no question that the named Plaintiffs, along with all Newark students, have a real stake in the outcome of this litigation, suffer real harm, and present real adverseness. They possess a fundamental right to a "thorough and efficient" education, see N.J. CONST. ART. VIII, SECT. IV, ¶ 1. The trial court erred in dismissing the Complaint without

properly considering Hogan, which sets forth the standard for evaluating ripeness under New Jersey law. 2012 WL 1328279. Plaintiffs are harmed by the mere existence of the EWPS pool and the forced placement of teachers from the pool back into the classroom, which is the kind of repetitive harm contemplated in Hogan.

As the Complaint alleges, and the District admitted in the Answer, through the EWPS pool and the forced-placement of those ineffective teachers back into classrooms, the District continues to pay ineffective teachers' salaries while "placing [other] 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." See, e.g., Pa at 92 (Cerf Cert. ¶ 13) (emphasis added). Through these workarounds, the District pays millions in salaries for teachers whom no principal in the District willingly wants in a classroom, while it fails to provide students with the basic tools for academic success.

Finally, the public interest in this matter weighs against dismissal as Plaintiffs face hardship if judicial review is withheld. See Hogan, 2012 WL 1328279 at *10-11 (denying motion to dismiss when sufficient hardship would accrue to both parties if judicial review withheld and plaintiffs required to re-file after budget in question was finalized). As Superintendent Cerf

stated, “[e]ven without any additional cuts to the district’s funding, [the district has] been hampered by statutory restrictions that essentially protect the interests of adults over the rights of the children of Newark.” Pa at 97 (Cerf Cert. ¶ 25); see also, e.g., Pa at 63 (Dist. Answer ¶ 34). As in Hogan, “little [is] gained, therefore, by [dismissing and] adjudicating this matter in the factual context of a finalized [or next year] budget” as Plaintiffs’ position would be the same either way. 2012 WL 1328279 at *10. Plaintiffs’ harm is not contingent upon the institution of a RIF, and has been admitted by the District. Judge Jacobson erred when determining that the case was not ripe and dismissing the Complaint.

C. PLAINTIFFS’ HARM IS JUDICIALLY REMEDIABLE

The Complaint requests the trial court enter judgment declaring that the LIFO Statute violates the Education Clause, Equal Protection Clause, and Due Process principles of the State Constitution and Civil Rights Act, and “[p]ermanently enjoin[] Defendants from enforcing” the LIFO Statute in Newark. Pa at 28 (Compl. ¶¶ 145-49). The judge expressed concern that she cannot grant this requested relief. Pa at 138-139 (May 3 Tr. at 79:17-80:18). But a trial court can enjoin the enforcement of a statute found to be unconstitutional on these and similar grounds. See, e.g., Robinson, 69 N.J. at 147 (“[T]he court must ‘afford an appropriate remedy to redress a violation of those

[Constitutional] rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing solely on paper.'") (quoting Cooper v. Nutley Sun Printing Co., 36 N.J. 189, 197 (1961)).

Here, the Complaint focuses on the specific harm caused by the LIFO Statute, which forbids the District from considering anything other than seniority when engaging in a RIF and the measures undertaken by the District to preserve effective teachers by avoiding the statutorily mandated method of conducting a RIF. Pa at 17, 22-23 (Compl. ¶¶ 79-81, 112-13). In opposition, the Union Intervenors relied upon Crawford v. Davy to argue that the relief sought by Plaintiffs is beyond what the trial court can grant. 2010 WL 162061 (N.J. Super. Ct App. Div. Nov. 23, 2009). However, the Crawford court dismissed a complaint seeking a "wholesale restructuring of New Jersey's system of locally-based public schools." Id. at *12. By comparison, Plaintiffs are not asking to restructure the educational system. Instead, Plaintiffs ask the court to enjoin enforcement of a statute that, whether a RIF occurs or not, harms students because it impacts the use of scarce funds and the placement of teachers within the District.

Such relief -- enjoinder of a statute -- is squarely within the Court's power. See Robinson, 69 N.J. at 154, 155 (order enjoining State from disbursing minimum support in

accordance with existing laws and directing distribution of funds in accordance with incentive equalization aid formula, subject to "possible eventuation of timely and constitutionally appropriate legislative action," was "constitutionally minimal, necessary and proper") (citations omitted). The relief requested in this case does not require the trial court to craft a replacement standard for the District to utilize in the event of a RIF. See Abbott II, 119 N.J. at 385-91. Rather, Plaintiffs request the Court to declare the LIFO Statute unconstitutional as applied to Newark, and to enjoin its enforcement.

D. THE COURT IMPROPERLY CONSIDERED DISCOVERY BURDENS

In reaching her ruling, the judge improperly considered the potential discovery burden on the State and the District, which is simply irrelevant in determining whether to grant or deny a motion to dismiss. Discovery plays no part in the underlying standard, has no bearing on whether a Complaint is properly pled, and is a matter to be addressed after a Complaint is deemed sufficient. Consequently, this was a completely improper basis for any decision to dismiss.

E. PLAINTIFFS MET THE PLEADING REQUIREMENTS

New Jersey courts have consistently "applie[d] an indulgent standard," whereby plaintiffs are "entitled to a liberal interpretation of the contents of the complaint and to the benefits of all its allegations and the most favorable

inferences which may be reasonably drawn therefrom." J. Fletcher Creamer & Son v. Pa. Mfrs. Ass'n Ins. Co., 2009 WL 2365884, at *3 (N.J. Super. Ct. App. Div. Aug. 4, 2009) (quotations omitted); Burg v. State, 147 N.J. Super. 316, 319-20 (App. Div. 1977) ("[P]laintiff is entitled to a liberal interpretation of its contents and to the benefits of all its allegations and the most favorable inferences which may be reasonably drawn from them." (quotations and citations omitted)). Therefore, a motion to dismiss a complaint should be granted "in only the rarest of instances." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 772 (1989).

Judge Jacobson, because she addressed jurisdictional and remedy issues in dismissing the Complaint, did not explicitly state that Plaintiffs failed to state the causes of action set forth in the Complaint.

However, her ruling did touch upon issues that, if Plaintiffs were to replead, seem to set a higher standard for pleading a complaint in New Jersey than outlined in the case law. Specifically, the trial court stated that she believed the assertions in the Complaint were "conclusory in nature" and failed to explicitly link the LIFO Statute to the constitutional deprivation alleged. Pa at 134 (May 3 Tr. at 71:4-71:19). She did not believe there was a "direct injury by the enforcement of the statute." Pa at 135 (May 3 Tr. at 72:17-72:19).

Specifically, Judge Jacobson stated that “[t]here’s no assertion that any of these 12 students is currently being taught by an ineffective teacher, is likely to be taught by an ineffective teacher.” Pa at 135 (May 3 Tr. at 73:4-73:6).

This, however, is a mischaracterization (i) of what Plaintiffs need to plead in order to survive a motion to dismiss and (ii) of the specific allegations made by Plaintiffs in their Complaint. First, Judge Jacobson is essentially stating that, unless Plaintiffs allege that they are currently suffering from the ill-effects of an ineffective teacher in a classroom who is there solely because of the LIFO Statute, they cannot bring a claim. However, this would bar claims by any student who has been taught by an ineffective teacher in the past. And it ignores the likelihood that these students will be taught by an ineffective teacher in the future, given the high number of ineffective and partially effective teachers in the District -- which risk would go up exponentially in the event of a RIF such as the one modeled in the Equivalency Request.⁴

⁴ It ignores that, due to privacy laws, Plaintiffs cannot access information as to whether their classroom teachers for the 2016-17 school year were rated “ineffective” or were formerly part of the EWPS pool. Presumptively, if Plaintiffs had alleged that their current teachers were not meeting their needs, the Union-Intervenors would have pointed to the lack of allegations that these teachers actually were rated ineffective or in the EWPS pool, and Judge Jacobson’s statements would (improperly) support that as a reason to dismiss.

Second, Plaintiffs have more than met the standard to plead their causes of action, including alleging a direct, current, and ongoing injury: the presence of the EWPS pool, the expensive nature of that pool, the placement of ineffective teachers back into classrooms, and the refusal of Newark to engage in RIFs when faced with budget shortfalls in order to preserve effective teachers in the classroom. Pa at 3, 17-19, 20 (Compl. ¶¶ 5-6, 79-90, 93-94, 97). Plaintiffs' harm is not simply whether they are being taught today by an ineffective teacher who is in the classroom because of the LIFO Statute; it is the totality of the harms stemming from the mechanisms through which the District seeks to preserve effective classroom teachers when faced with a budget shortfall because the only other option is to engage in a RIF pursuant to the strictures of the LIFO Statute.

Given this, Plaintiffs have more than adequately pled the connection between the LIFO Statute and their harm, and their Complaint, as currently pled, should result in the denial of a motion to dismiss.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for leave to appeal and, upon review of the merits, reverse the trial court's Order.

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