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**Please Reply to Trenton**

December 12, 2016

### Via Hand Delivery

Clerk, Civil Part

Mercer County Civil Courthouse

175 S. Broad Street

P.O. Box 8068

Trenton, NJ 08650-0068

**Re: H.G., et al. v. Harrington, et al. and  
New Jersey Education Association and  
American Federation of Teachers, AFL-CIO, et als.  
Docket No.: MER-L-2170-16**

Dear Sir/Madam:

Enclosed please find an original and two copies of the following documents:

1. Letter Brief in Support of Motion to Intervene;
2. Supplemental Certification of Flavio Komuves; and
3. Certification of Service.

Kindly file and return a copy of each document stamped "filed" in the self-addressed stamped envelope provided.

Please charge any filing fees to our Superior Court Account No. 140110.

Thank you for your attention to this matter.

Very truly yours,



Kenneth I. Nowak

KIN/cjrh  
Enclosures

cc: Hon. Mary C. Jacobson, A.J.S.C., w/encl.  
(via Hand Delivery)  
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Please Reply to Newark

December 12, 2016

## Via Hand Delivery

Clerk, Civil Part  
Mercer County Civil Courthouse  
175 S. Broad Street  
P.O. Box 8068  
Trenton, NJ 08650-0068

Re: **H.G., et al. v. Harrington, et al.**  
**Docket No.: MER-L-2170-16**

Dear Judge Jacobson:

Please accept this letter-brief, in lieu of a more formal brief, in further support of the Motion to Intervene filed by the New Jersey Education Association ("NJEA").

As an initial matter, NJEA observes that the Plaintiffs' arguments about purported flaws in the school personnel laws established by the Legislature are fundamental policy arguments, not appropriate to litigation. Therefore, they are being made in the wrong forum. But now that the Plaintiffs have elected

this forum, the NJEA has the right to speak for and protect the interests of its members in this suit, particularly where the Defendants, none of which has opposed the motion to intervene, lack the adversarial inclination to defend the constitutionality of the challenged statutes. The interests of the teachers, both those currently protected by seniority and those who will be soon, are best represented by organizations whose purposes include advocacy for the professional and economic interests of teachers, including their security in employment.

**A. Unlike Plaintiffs, whose own standing is questionable, a teachers' union is a proper intervenor in a lawsuit whose resolution will affect its members' economic rights.**

As demonstrated in the NJEA's moving papers, if any party has questionable standing in this action, it is the Plaintiffs, not the NJEA. Plaintiffs make no allegations about the effectiveness of their own children's teachers. Nor do they allege that Newark has actually conducted or sought to conduct a Reduction in Force (RIF). Nor do the Plaintiffs bring an action against the Local Defendants for allegedly failing to use the available statutory remedies for ridding a district of ineffective teachers, even though that is the Plaintiffs' supposed goal.

The test for whether the NJEA as a proposed intervenor has a legally sufficient concern warranting intervention is whether it has "an interest relating" to the continued enforcement of

the seniority laws.<sup>1</sup> Whether or not NJEA as an entity would be harmed is simply not relevant to the determination; NJEA as an association may move to intervene if the individual members who make up the NJEA's membership and/or the local bargaining units in NJEA's federation that represent teachers at the local level, would suffer harm in the event of an adverse decision.<sup>2</sup> And as demonstrated in the opening papers, Plaintiff's proposal is to place NJEA members at risk of layoffs on the basis of some

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<sup>1</sup> Under Am. Civil Liberties Union of N.J., Inc. v. Cty. of Hudson, 352 N.J. Super. 44, 67 (App. Div.), certif. denied, 174 N.J. 190 (2002), an applicant for intervention must simply claim "an interest relating to the property or transaction" at issue in the litigation. This is a less rigorous test than the one applied to determine whether a plaintiff has standing to commence litigation. That requires "a sufficient stake and real adverseness with respect to the subject matter of the litigation [and a] substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision." N.J. State Chamber of Commerce v. N.J. Election Law Enf't Com., 82 N.J. 57, 67 (1980). Even assuming arguendo that the test of State Chamber of Commerce is what applies, the harm that would be visited upon NJEA's members in the event of an unfavorable decision in this case - the possible loss of their livelihood in a RIF done without established, or any, standards - is more than adequate to show the adverseness and harm necessary to confer standing on a plaintiff.

<sup>2</sup> See N.J. Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 416 (App. Div. 1997), appeal dismissed, 152 N.J. 361 (1998). Nor does it matter whether the "interest" at issue is constitutional or merely economic. Under applicable precedent, an organization may bring suit where "its members, or any of them, are suffering" an injury that the individual member could sue over. Id. The injury that can be vindicated in an association's suit could be statutory, as it was in N.J. Citizen Action; economic, as it was in Crescent Pk. Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98 (1971); or constitutional, as it was in State Chamber of Commerce, supra.

indeterminate criteria chosen by the school districts, rather than the objective criteria the Legislature has deemed appropriate for selecting who will be targeted in layoffs.<sup>3</sup>

For this reason, teachers' unions are routinely granted intervenor status in litigation that touches on the terms and conditions of their employment. For example, in Vergara v. California, 246 Cal. App. 4<sup>th</sup> 619 (Cal. 2d Dist. 2016), review denied, 2016 Cal. LEXIS 8387 (Cal. Aug. 22, 2016), a group of California parents brought a lawsuit very similar to this one, challenging California's school district reduction-in-force statutes. Id. at 629. The California appeals court dismissed the complaint, holding that these statutes did not violate the constitutional rights of California students. Id. at 651-52. The Court noted that the California Teacher Association and the California Federation of Teachers had both been granted intervenor status by the trial court. Id. at 629 n.2. This was despite the fact that, unlike the governmental Defendants here, the governmental defendants in that case were vigorously pursuing the defense of the case and had "essentially identical"

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<sup>3</sup> The Plaintiffs appear to suggest that if the seniority laws are struck down, the NJEA local associations would be able to negotiate some method of job protection (assuming that they would have the right to bargain in this area after eradication of seniority laws a century old). This presents the interesting notion that these same NJEA locals would allegedly have the right to negotiate some sort of criteria to replace seniority, but lack the right to defend seniority.

legal positions to that of the intervenors. Id. Similarly, in Patterson Park Pub. Charter Sch., Inc. v. Baltimore Teachers Union, AFT Local 340, AFL-CIO, 923 A.2d 60 (Md. App. 2006), the Maryland intermediate appeals court held that the teachers' union had the right to intervene in proceedings relating to applications by charter schools for regulatory waivers. The unions contended that the waivers, if granted, would violate statutory, regulatory, and contractual rights of their teacher members. Accordingly, the Court found it appropriate for the teachers' union to be granted the right to be heard as intervenors to defend the interests of their members.

Consistent with other courts that have granted teachers' unions the right to be heard in litigation affecting the statutory and contractual employment rights of their members, this Court should allow NJEA to be heard as an intervenor defendant in this party.

**B. Without allowing NJEA and the other intervenor applicants to participate in this litigation, there is insufficient adversity of interest between the existing parties for it to proceed.**

As described in NJEA's opening papers (see NJEA Opening Brf. at 9), the Plaintiffs in this case have filed a motion to intervene in the Supreme Court's Abbott v. Burke proceedings on issues similar to those raised in this case. They told the Supreme Court that regarding their challenge to the

LIFO/Seniority rules, "it would be most appropriate for the LIFO issue to be heard at the trial level" because of the absence of "a record as it pertains to the LIFO [s]tatute." Trousdale Cert., Exh. C, p. 18. Yet, the Plaintiffs here, while suggesting that making "a record" is their goal, apparently prefer that the record be created only with an adversary (i.e., the State) who openly proclaims that it "agrees with [the Plaintiffs] that the current LIFO [s]tatute may impede the ability of children in Newark to receive the constitutionally mandated thorough and efficient education." (Komuves Suppl. Cert., Exh. A., p. 1).

Leaving aside whether the creation of a record is even appropriate (as this case is amenable to disposition on motion), Plaintiffs apparently prefer that the record they seek be created without meaningful opposition. That is not how an adversary system of justice works. Sente v. Mayor & Mun. Council of Clifton, 66 N.J. 204, 210 (1974) ("the absence of the vigorous adversary advocacy necessary to focus questions of fact and of law and to bring to the court's attention all the ramifications of the issues" is harmful to the administration of justice).

The Plaintiffs cheerily assure this Court that because they have some differences of opinion with the State Defendants about the question of remedies (see Plaintiffs' Brf. at 12-13), that



creates sufficient adversity of interests to warrant denial of the intervention motion. But that difference is a manufactured illusion; as noted above and in Plaintiffs' moving papers, the State Defendants, relying on sworn testimony of the chief school administrator in Newark, are in lockstep with the Plaintiffs that the LIFO statutes are a damaging burden, and an obstacle to quality education. (See NJEA Opening Brf. at 9). That they may disagree over what should be done upon a declaration of the unconstitutionality of these statutes in no way negates their fundamental agreement that the statutes must be voided. Thus, they are fundamentally inadequate as litigants without the participation of the intervention applicants.

**C. There is no conflict between NJEA members that can properly preclude the organization from participating as an intervenor defendant.**

The Plaintiffs urge alternatively that intervention should be denied because the NJEA lacks a "common interest" within the meaning of the case law on intervention and there may be possible internal disagreement on the NJEA's policy position. (See Plaintiffs Brf. at 7-8, 14). Plaintiffs are wrong.

Like any private organization, including a labor organization, the NJEA is free to take positions on matters of public import. It is not the role of Plaintiffs here, or the courts, to second-guess NJEA's policy positions or opinions as inappropriate. As the Appellate Division recently reminded

litigants in Davidovich v. Isr. Ice Skating Fed'n, 446 N.J. Super. 127, 153-54 (App. Div. 2016), "[i]n New Jersey, '[d]eference has always been afforded to the internal decision making process of [a] private association.'" (quoting Danese v. Ginesi, 280 N.J. Super. 17, 23 (App. Div. 1995) (other citations omitted)). "[A] voluntary association . . . without direction or interference by the courts" has the absolute right to establish "doctrine" or "policy." Id. at 154 (citations omitted).<sup>4</sup>

The NJEA President, with regard to this litigation, has found and determined on behalf of NJEA that it was commenced by "an out-of-state special interest group" and was intended to "undermine the laws that protect educators, students and New Jersey's public schools from political interference." Komuves Supp. Cert., Exh. B. The NJEA, from its student members who do not yet have teaching jobs,<sup>5</sup> to employees at an early stage of their career, to those approaching and in retirement, has

---

<sup>4</sup> Plaintiffs' vague threats to take the depositions of individual NJEA members regarding their agreement or disagreement with the challenged laws (see Plaintiffs' Brf. at 14) is foreclosed by, among other principles, this rule of judicial noninterference in the rights of private organizations. In any event, there is simply no legal basis to suggest a right to depose members of a professional organization in connection with an application for intervention.

<sup>5</sup> The Plaintiffs purport to paternalistically defend the rights of NJEA student members. However, students are under no compulsion to join NJEA; they have associated with the organization entirely of their free will. As people who are not employees in a bargaining unit, they are not even under any obligation to pay agency shop fees to the NJEA.

determined that the attack on the seniority and tenure laws mounted by Plaintiffs here is a threat to all educators, both present and future ones, who will earn seniority rights as their career progresses. Indeed, if Plaintiffs were right that NJEA's student and early-career members disagreed that seniority and tenure protections are important and crucial, there would, simply put, not be student and early-career members of the organization. And yet, there are thousands.

The Plaintiffs' attempt to create a conflict between those teachers without tenure (and hence no seniority rights) and those with tenure (and concomitant seniority rights) is fabricated. Tenure and seniority rights are goals of all teachers. That one does not yet have tenure and seniority rights does not mean one is against them, it just means that the goal is not yet achieved. But make no mistake, teachers who have not yet earned seniority rights look forward to the day they have those protections. They know that without them they are subject to being terminated based upon the whim and will of their supervisors and administrators, who can act based upon favoritism or conformity, vengeance or reward for acquiescence, and can stifle innovation and experimentation. For junior teachers, seniority rights are not anathema but aspirational. There is simply no basis to believe that there is a divide in the interests of the membership which would preclude standing.

While the Plaintiffs might argue that the test for layoffs would be an ineffective rating, they admit in their complaint that many districts have no ineffective teachers, so there would be no guidelines to protect teachers in layoffs.

Even if the Plaintiffs were right that there was disagreement among NJEA members, however, that would still not negate the "common interest" necessary to justify a motion for intervention. A "common interest" does not mean an interest that is uniform and identical in all respects among multiple individuals; a "common interest" refers simply to a dispute among a broad group of an organization's members and an opposing party that is not "more appropriately in a proceeding between the individual [member] and the [defendant]." N.J. Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 416 (App. Div. 1997), appeal dismissed, 152 N.J. 361 (1998) (citation omitted). A labor organization could not function if it could only act when all rights of all its members were in complete lockstep with one another; for this reason, it is not required to. It must act "in the general interest of its membership, and it may have to compromise on positions" that will favor some members at the expense of others. Addington v. US Airline Pilots Ass'n, 791 F.3d 967, 983 (9th Cir. 2015) (collecting cases). A labor organization, when advocating for its members, must necessarily take positions for the benefit of the whole

even if there is some "[c]onflict between employees" or "winners and losers" in the end. Id. (citations omitted). Our courts have recognized the same principles apply to public sector unions in New Jersey, observing that it is "inevitabl[e]" and that there will be "differences . . . in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees." Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super. 486, 491 (App. Div.), certif. denied, 72 N.J. 458 (1976) (quoting Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)). Thus, a Union may legitimately account for these differences in how it advocates on behalf of its members. Id. It is appropriate and expected for a Union like NJEA to act on behalf of its membership as a whole, which it is doing here by defending the constitutionality of the LIFO statutes.

CONCLUSION

For these reasons, and those stated in NJEA's moving brief, its motion to intervene should be granted.

Respectfully submitted,

*Kenneth I. Nowak*  
*Richard A. Friedman*  
*Flavio L. Komuves*

Kenneth I. Nowak

Richard A. Friedman

Flavio L. Komuves

cc: Hon. Mary C. Jacobson, A.J.S.C. (via Hand Delivery)  
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New Jersey Education Association

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 als.,

Applicants for Intervention

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION – MERCER COUNTY

DOCKET NO. MER-L-2170-16

**SUPPLEMENTAL CERTIFICATION**  
**OF FLAVIO KOMUVES**

**FLAVIO L. KOMUVES**, of full age, certifies as follows:

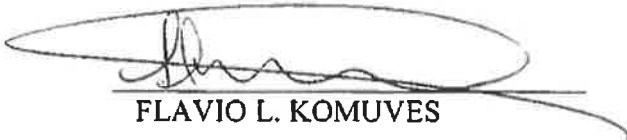
1. I am an attorney at law of the State of New Jersey, admitted to practice in all federal and state courts in New Jersey, and am associated with Zazzali, Fagella, Nowak, Kleinbaum & Friedman, counsel to the New Jersey Education Association (“NJEA”), the

proposed Defendant-Intervenor in the above action. I have personal knowledge of the facts contained herein.

2. Attached hereto as Exhibit A are excerpts of a filing made by the Commissioner of Education on November 14, 2016 in Abbott v. Burke, No. 078257, in opposition to the motion to intervene filed in that matter by the Plaintiffs in this case.

3. Attached hereto as Exhibit B is a printout of the statement of NJEA President Wendell Steinhauer on November 15, 2016, regarding the instant litigation.

I certify that the foregoing statements made by me are true to the best of my knowledge and belief. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

  
FLAVIO L. KOMUVES

Dated: December 12, 2016



# EXHIBIT A



EDWARD J. DAUBER

November 14, 2016

VIA HAND DELIVERY

Supreme Court of New Jersey  
Office of the Clerk  
Richard Hughes Justice Complex  
25 West Market Street  
Trenton, New Jersey 08625-0970

Re: Raymond Arthur Abbott, et al. v. Fred G. Burke, et al.  
Docket No. 078257

Dear Sir/Madam:


Please be advised this firm, together with the Attorney General of New Jersey, Christopher S. Porrino, represents defendants. Enclosed please find an original and nine (9) copies of the following:

1. The Commissioner's Brief in Opposition to Movants-Intervenors' Motion to Intervene;
2. Certification of Service; and
3. Copies of unreported decisions cited by defendants: City of Jersey City v. Liberty Storage, LLC, 211 N.J. Super. Unpub. LEXIS 134 (App. Div. Jan. 20, 2011) and Conn. Coalition for Justice in Educ., Inc. v. Rell, 2016 Conn. Super. LEXIS 2183 (Sup. Ct. Sept. 7, 2016).

Kindly file the same, and forward a filed copy to the undersigned in the enclosed envelope. As this office represents the defendants in their capacity as a State agency, there is no filing fee charged to us.

Thank you for your courtesies.

Very truly yours,

  
Edward J. Dauber

FJD:mn  
Encls.

RAYMOND ARTHUR ABBOTT, et al.,

Plaintiffs,

v.

FRED G. BURKE, et al.,

Defendants.

SUPREME COURT OF NEW JERSEY

Docket No. 078257

Civil Action

---

THE COMMISSIONER'S BRIEF IN OPPOSITION TO MOTION TO INTERVENE

---

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Sheryl L. Reba, Esq.  
Kathryn B. Hein, Esq.

### PRELIMINARY STATEMENT

The Commissioner of the Department of Education ("Commissioner") submits this brief in opposition to the motion to intervene by six parents on behalf of 11 Newark public school children. While the Commissioner agrees with the Movants that the current LIFO Statute may impede the ability of children in Newark to receive the constitutionally mandated thorough and efficient education, intervention in Abbott v. Burke is neither procedurally nor substantively appropriate.

Pending before this Court is the Commissioner's motion to modify this Court's Orders in Abbott XX and Abbott XX1 based on the overwhelming evidence presented which demonstrates that the tens of thousands of children in the 31 School Development Authority Districts ("SDA Districts," formerly known as "Abbott Districts") are not receiving a thorough and efficient public education as guaranteed by the State Constitution. The Court addressed the past constitutional deficiencies with orders focused primarily on substantially increasing the state levels of funding so that nearly \$100 billion of state aid has been spent in the SDA Districts over the last 30 years. Nonetheless, the constitutional deficiencies remain, demonstrating that the solution requires more than increased funding. Rather, the abundant evidence presented in the Commissioner's motion (including Certifications from two nationally recognized

CONCLUSION

For the foregoing reasons, the motion to intervene should be denied.

Edward J. Dauber, Esq. (Bar No. 008881973)  
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By: Edward J. Dauber  
Edward J. Dauber *(signature)*

-and-

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*Attorneys for Defendants*

Dated: November 14, 2016

# EXHIBIT B

# New Jersey Education Association

JOIN FOR MEMBERS

Sign in for member information and resources.

[Member Sign In](#)

Related

- [Notice of Motion on Short Notice for Leave to Intervene](#)
- [Brief in Support of Motion for Leave to Intervene on Behalf of Proposed Defendant-Intervener New Jersey Education Association](#)
- [Certification of Edward Richardson](#)

## NJEA seeks standing in seniority challenge

Will defend members, schools against political attack

Published on Tuesday, November 15, 2016



Today, NJEA filed a motion to intervene in the lawsuit challenging New Jersey's seniority law. That suit, filed earlier this month with the support of an out-of-state advocacy group, names Newark Superintendent Christopher Cerf and Acting Commissioner of the New Jersey Department of Education Kimberley Harrington as defendants. NJEA seeks to become a named defendant in the suit in order to protect the interests of its members.

NJEA President Wendell Steinhauer issued this statement:

"This ideological lawsuit is a blatant political attack on the women and men who have dedicated their lives to educating New Jersey's students. It has nothing to do with education and everything to do with the anti-public education agenda of its funders.

"We refuse to let an out-of-state special interest group undermine the laws that protect educators, students and New Jersey's public schools from political interference. We also refuse to leave our members' rights to be defended by either the Newark School district or the Christie administration, both of which are hostile to our members and very unlikely to offer any real defense.

"It is telling that the Plaintiffs refused our earlier request to intervene without a court order. They have tried to stack the deck in their favor by selecting defendants who are unlikely to defend the law in question. It shows that they do not believe their case is strong enough to stand on its merits. Their transparent effort to avoid real scrutiny is an affront to both our legal system and our democratic ideals.

"As interveners in the case, we will mount a vigorous legal defense of our members' rights and of the integrity of our public schools. We also value the opportunity to work with AFTNJ, which is intervening on behalf of its members in Newark and elsewhere."

## RELATED

- [Notice of Motion on Short Notice for Leave to Intervene](#)
- [Brief in Support of Motion for Leave to Intervene on Behalf of Proposed Defendant-Intervener New Jersey Education Association](#)
- [Certification of Edward Richardson](#)



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- [Contact NJEA](#)



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New Jersey Education Association

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 als.,

Applicants for Intervention

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION – MERCER COUNTY

DOCKET NO. MER-L-2170-16

**CERTIFICATION OF SERVICE**

Carrie Jo Herbert, of full age, hereby certifies as follows:

1. I am a legal secretary with the law firm of Zazzali, Fagella, Nowak, Kleinbaum & Friedman.

2. On December 12, 2016, I caused to be hand delivered an original and two copies of a Letter Brief in further support of the Motion to Intervene, Supplemental Certification of Flavio Komuves, and Certification of Service, in the within matter to the Clerk, Civil Part, Mercer County Civil Courthouse, 175 S. Broad Street, Trenton, NJ 08650-0068 for filing and a copy of said documents were hand delivered to The Honorable Mary C. Jacobson, Assignment Judge – Superior Court, Criminal Courthouse, 400 South Warren Street, Trenton, NJ 08650-0068.

3. On December 12, 2016, I forwarded via email and regular mail, a copy of the documents referred to in Paragraph 2 to the following:

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

  
\_\_\_\_\_  
Carrie Jo Herbert

Dated: December 12, 2016