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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 EDWARD RICHARDSON

EDWARD J. RICHARDSON, of full age, certifies as follows:

1. I am Executive Director of the New Jersey Education Association ("NJEA"), the proposed Defendant-Intervenor in the above action. I have personal knowledge of the facts contained herein.

2. NJEA is a labor organization with approximately 177,188 active local and county public school employees, and public higher education employees, through its local affiliates in the State of New Jersey (collectively "active employees").

3. NJEA is affiliated with over 500 local education associations (EAs) throughout the State of New Jersey. These EAs are designated as majority representatives for collective negotiations purposes for teaching staff within local and regional school districts. (Local EAs also represent employees other than teaching staff, but the rights of such employees are not at issue in this litigation).

4. The local EAs (with varying degrees of assistance from professional staff at the NJEA) all negotiate terms and conditions of employment for active employees, which are set forth in collective negotiations agreements ("CNAs") between those majority representatives for collective negotiations ("majority representatives") and employers. The NJEA-affiliated Local EAs likewise enforce the terms of those CNAs.

5. When Local EAs and their members have a dispute or claim arising from the state statutes and regulations on seniority and tenure, like those put in issue in this case, the local EAs turn to the NJEA to perform that function, since it requires involvement with the Legislature, the Department of Education, and the commencement or defense of administrative and judicial litigation. These activities are carried out by professionals and attorneys employed or funded by the NJEA. This assistance furnished and funded by NJEA includes enforcing the rights of its members when a layoff associated with a reduction-in-force (RIF) is implemented by an employer board of education.

6. NJEA has several categories of membership. One of these categories is Minority Representative Unit Members, which any public school employee in New Jersey whose majority

representative is not affiliated with NJEA may join. In the case of Newark, where professional teaching staff is represented by the Newark Teachers Union, there are approximately 183 NJEA members who are professional teaching employees of the Newark Public Schools who are members of the NJEA. Like those teachers represented by an NJEA-affiliated Local EA, the rights of these NJEA members teaching in Newark would also be directly affected by the relief sought in this case.

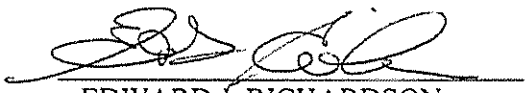
7. I understand from NJEA staff that when the 2012 reforms to teacher tenure and seniority legislation were proposed, the bill as initially introduced called for substantially reducing the importance of seniority when determining the order in which reductions-in-force were implemented. Section 23 of S1455, the initial legislation, called for the order in which reductions in force were implemented to take into account the rating of the teacher at issue (highly effective, effective partially effective, or ineffective) before their seniority was considered. During the course of lawmaking, that section, along with other proposed amendments to N.J.S.A. 18A:28-10 and -12 which were present in that initial proposal were wholly eliminated. The final law, P.L. 2012, c. 26, did not contain any of the provisions of the initial section 23, or the amendments to N.J.S.A. 18A:28-10 and -12 which were in the initial draft. That is, the Legislature rejected these provisions, despite the efforts of both the initial sponsor and the Administration to amend the rules on conducting RIFs to eviscerate the rules of seniority applicable to RIFs. The Administration's chief spokesperson at the time on these matters was Christopher Cerf, then Commissioner of Education, and now a defendant in this matter as the Superintendent of the Newark schools.

8. Attached hereto as Exhibit A are excerpts from the State's brief in Abbott v. Burke, No. 078257 (filed September 15, 2016). In that brief, the State directly and squarely

argues to the Supreme Court that the provisions of N.J.S.A. 18A:28-10 and -12, which are challenged by the parents in this litigation, should themselves be struck down. Given this litigation posture, it is highly unlikely that the State will adequately and vigorously defend against the claims made by the Plaintiffs in this case.

9. Attached hereto as Exhibit B are excerpts from the Certification of Christopher Cerf, a defendant in this case and the State District Superintendent of Newark. Mr. Cerf takes the same position as the State as described above, making it also highly unlikely that he or the defendant Newark School District will adequately and vigorously defend against the claims made by the Plaintiffs in this case.

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.



EDWARD J. RICHARDSON

Dated: November 14, 2016

EXHIBIT A

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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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

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to grant the requested relief.

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Dated: September 15, 2016

EXHIBIT B

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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

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Applicants for Intervention

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MERCER COUNTY

DOCKET NO. MER-L-2170-16

NOTICE OF MOTION ON SHORT NOTICE FOR LEAVE TO INTERVENE

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American Federation of Teachers, et al.

PLEASE TAKE NOTICE that on such date and time as the Court may direct, **which is requested to be on short notice in advance of the otherwise applicable motion date**, the undersigned attorneys for Proposed Defendant-Intervenor New Jersey Education Association ("NJEA") shall move before the Hon. Mary C. Jacobson, A.J.S.C., at the Mercer County Criminal Courthouse, for an Order permitting NJEA to be a Defendant-Intervenor in this lawsuit, pursuant to R. 4:33-1 and R. 4:33-2.

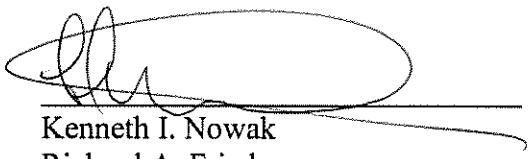
PLEASE TAKE FURTHER NOTICE that in support of this motion, NJEA relies on the Certification of Edward Richardson and the Brief in Support submitted herewith.

NJEA waives oral argument on this motion.

Respectfully submitted,

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN

Attorneys for Proposed Defendant-Intervenor New Jersey Education Association

By: 

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Dated: November 15, 2016

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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 als.,

Applicants for Intervention

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MERCER COUNTY

DOCKET NO. MER-L-2170-16

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE ON BEHALF OF PROPOSED DEFENDANT-INTERVENOR NEW JERSEY EDUCATION ASSOCIATION

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INTRODUCTION

The New Jersey Education Association (NJEA), the bargaining representative of nearly every teacher in the State,[1] moves to intervene as Defendant in the above captioned suit. For the reasons set forth below, the NJEA should be allowed to intervene as of right or as a matter of discretion. The NJEA sought the consent of the Plaintiffs to intervene, but they refused to consent. In order to adequately consider this application, we will provide the context for the interest of the NJEA to intervene, followed by the application of these reasons to the standards for intervention.

PLAINTIFFS' ALLEGATIONS

A set of parents, acting as guardians for their children who attend several schools in the Newark Public School District, have sued Kimberly Harrington, the Acting Commissioner of the New Jersey Department of Education, the State Board of Education, the Newark Public School District, and Christopher Cerf, the Superintendent of the Newark School District. The Plaintiffs seek declaratory and injunctive relief to enjoin the use of the seniority laws, N.J.S.A. 18A:28-10 and N.J.S.A. 18A:28-12. They allege that the seniority laws, insofar as they require reduction in force of tenured teachers in order of seniority rather than based upon evaluations, violate the Thorough and Efficient Clause (Art. VIII, § IV, ¶ 1), the Due Process Clause and the Equal Protection Clause.

Briefly stated, the Plaintiffs allege that the educational achievement levels in the Newark School District, and in particular at the academic performance of schools attended by the Plaintiffs' children, is substantially below standard, that this is due exclusively to the retention of

[1] The Newark Teachers' Union, an affiliate of the American Federation of Teachers, is the bargaining representative for the Newark School District teachers, but a number of teachers in the District are also members of the NJEA. See Richardson Cert., ¶¶ 2, 3, 6.

teachers rated as ineffective, that the seniority laws prevent the District from removing the ineffective teachers, and that a reduction in force (RIF) will result in the disproportionate elimination of effective teachers. Instead, they argue, the District should be allowed to RIF on the basis of the teacher's evaluation, such as effective or ineffective, rather than on the basis of seniority. Interestingly, the Plaintiffs do not mention non-tenured teachers, or that non-tenured teachers have no seniority rights under the seniority laws, and are to be let go before any tenured teachers. Plaintiffs also make no allegations about the efficacy of their own children's teachers, nor do they allege that a RIF has taken place at all. As parents, the Plaintiffs have no direct authority to themselves implement a RIF or to select which teacher their child should be assigned to.

Though this suit is directed at the Newark Public Schools, any ruling cannot be confined to that District and would apply to all school districts in the State, thereby directly affecting NJEA members and affiliate bargaining representatives.

STATUTORY FRAMEWORK

The Plaintiffs pursue this litigation in lieu of lobbying in order to have this Court declare unconstitutional the Tenure Law which has been in effect since at least 1910 and seniority laws which have been in existence since at least 1935 and revised periodically by the Legislature and Commissioner of Education to address seniority and lay off policy issues. Significantly, the Plaintiffs seek to set aside legislation, enacted in 2012, that was the result of extensive debate between the legislative and executive branches, working with all interest groups. The 2012 law adopted exhaustive changes in the Tenure Law regarding the evaluation of teachers and the procedures for eliminating underperforming teaching staff. In that process, the Legislature specifically spurned an effort by the initial sponsor of the legislation to revise the application of

seniority practices in a RIF situation as this litigation seeks; it specifically excised those provisions from the final bill presented to and signed by the Governor. Compare P.L. 2012, c. 26 with S1455 as introduced; see Richardson Cert., ¶ 7.

Oddly, what is missing from the Plaintiffs' complaint is any mention of the Tenure Laws. Yet, as the courts have observed, seniority is derivative of tenure. It is the Tenure Laws that create an absolute preference for retention of tenured teachers over non-tenured ones, and it is the Tenure Laws that are the source of the use of seniority for reduction in force amongst tenured teachers. While the Plaintiffs might have omitted a challenge to the Tenure Laws for political or pragmatic reasons, a court cannot consider setting aside the seniority laws which involve both tenured and non-tenured teaches without implicating and eviscerating the Tenure Laws.

The Plaintiffs claim the District is caught between saving money through lay-offs of teachers, and the asserted result that they will be laying off effective teachers while retaining ineffective ones, or not making any lay-offs at all. This is a false dichotomy. The ability to eliminate ineffective teachers has always been present in the Tenure Laws.

As noted, in 2012 the Legislature and Executive branches, working with the various interested parties, made significant changes to the Tenure Laws called TEACHNJ to make it more difficult to attain tenure, and much easier to eliminate ineffective teachers. TEACHNJ made substantial changes in the removal procedures for teachers ranked as ineffective, for the combined purposes of expediting removals and reducing costs. Briefly summarized, if a teacher is rated ineffective, a remedial plan is put in place. If the teacher does not adequately improve the next year, the superintendent files charges with the local board of education. The teacher gets only 3 days of notice of the charges, and then has a mere 10 days to reply. Within 30 days, or less, the board (or State Superintendent) certifies charges to the Commissioner. The teacher

has 10 days to reply, and the Commissioner has 5 days to refer the matter to arbitration. N.J.A.C. 6A:3-5.1 to -5.5.

The arbitration hearing must be held within 45 days, and a decision promptly issued, no later than 45 days from the closing of the arbitration. Discovery is limited, and parties must automatically supply to each other documents they will rely upon at the hearing. There are no depositions. While the teacher can contest procedures surrounding the evaluative process, he or she cannot challenge the evaluation itself.

If the District, or the Plaintiffs, view the seniority laws as the reason why the schools perform poorly, the proper forum for correcting this is either aggressively pursuing tenure charges against ineffective teachers or going to the Legislature that created tenure and seniority laws, and which has revised and modified them over the years to reflect new educational policies. The 2012 amendments to the Tenure Laws stand as a monument to addressing the issue of retention or elimination of ineffective teachers, not this litigation. The courts do not make policy regarding tenure or seniority; the Legislature does.

Seniority is a creature of tenure, and cannot be challenged without implicating the Tenure Law. The Teachers' Tenure Act was first enacted in 1910. See Historical & Statutory Notes to N.J.S.A. 18A:28-5; see also Downs v. Bd. of Ed. of Hoboken District, 13 N.J. Misc. 853 (Sup. Ct. 1935). The court, striking down the retention of non-tenured teachers while reducing tenured teachers, observed that the tenure law "is not a gesture but a provision in the law to protect teachers in their positions by reason of years of service." Id. at 854; see also Bd. of Ed. of Tp. of Kearny v. Horan, 11 N.J. Misc. 751 (Sup. Ct. 1934) (under Tenure Law, a tenured teacher may not be RIF-fed for reasons of economy while non-tenured teachers are retained.) The Tenure Law created the rights of tenured teachers over non-tenured teachers based upon length of

service and created a right based upon years of service. Any challenge to the use of seniority in a staff consisting of tenured and non-tenured teachers is also a challenge to tenure. The Plaintiffs cannot avoid this challenge to the Tenure Law simply by declining to address the rights of tenured teachers over non-tenured ones.

Detailed seniority laws date back at least to 1935. See Historical & Statutory Notes to N.J.S.A. 18A:28-10, -11 and -12. The modern laws governing seniority, now codified at N.J.S.A. 18A:28-10, -11 and -12, were amended numerous times since then. The seniority rules were initially to be determined by the State Board of Education and the Commissioner, and amendments in 1942, 1951, 1951, 1962, and 1967 refined those provisions. The regulations setting forth the standards for seniority (based upon N.J.S.A. 18A:28-13) were revised as recently as 2015 via 46 N.J.R. 1775(a). Substantial changes in the seniority rules were also enacted in 1983, which limited seniority to endorsements in which the teacher actually taught rather than any endorsements held. See N.J.A.C. 6:3-1.10 (1983), amended and now codified at N.J.A.C. 6A:32-5.1.

The bond between tenure and seniority was described in Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987). Addressing the substantial changes to the seniority regulations adopted in 1983, the court noted that tenure is to be liberally construed to protect the seniority of tenured teachers. It is the Tenure Law that "authorizes the creation of seniority regulations to rank the job rights of tenured teaching staff members in a RIF." Id. at 242. There are no such competing or corollary laws for non-tenured teachers. Id.

Importantly, the court in Bednar explained that the State Board's seniority rules "may or may not represent sound educational policy," but we are bound to recognize the laws and

regulations regarding seniority "which can removed only by the Legislature." Id. at 243 (citation omitted); accord, Ellicot v. Bd. of Ed. of Frankford, 251 N.J. Super. 342 (App. Div. 1991).

Thus, when the State attempted to attack the seniority laws for preventing them from selecting layoffs based upon performance rather than seniority, and to be exempt from the "last in, first out" laws, Abbott v. Burke, 206 N.J. 332, 367 (2011) ("Abbott XXI"), Justice LaVecchia rejected this effort, commenting that while there might or might not be virtue in future educational policy reforms, "the debate regarding how best to transform the educational system must be reserved for a different forum."[2]

While the Plaintiffs might dispute the policy of "last in, first out" as a poor tool for determining teacher retention, this is not the proper forum. The Plaintiffs cannot engage in lobbying by litigation.

The NJEA, with approximately 177,000 members who are school employees, has a direct and concrete interest in protecting the tenure and seniority rights of all tenured teachers and to insure that educational policy regarding tenure and seniority are made in the proper forum, where educational policy can be debated and laws enacted reflecting an agreed upon policy.

ARGUMENT

A. NJEA has demonstrated that it is entitled to intervene as of right under R. 4:33-1.

An applicant seeking leave to intervene under R. 4:33-1 must demonstrate compliance with the four-prong test in American Civil Liberties Union of New Jersey, Inc. v. County of Hudson, 352 N.J. Super. 44, 67 (App. Div. 2002). Because the Rule governing intervention as of

[2] The State, aided by Defendant Cerf, is currently challenging the seniority laws in the Supreme Court. See Richardson Cert, Exh. A, pp. 76-80. The Plaintiffs, adopting the State's renewed challenge to "last in, first out" in the pending matter before the Supreme Court, argue that the use of current seniority and tenure laws are cumbersome, expensive and inadequate.

right "is not discretionary, a court must approve an application for intervention as of right if the four criteria are satisfied." Id. (emphasis added) (citing Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 568 (App. Div. 1998).

An applicant for intervention must (1) demonstrate "an interest relating to the property or transaction which is the subject of the action; (2) show it 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. v. Planning Board, 237 N.J. Super. 118, 124 (App. Div. 1989) (citations omitted). Here, NJEA demonstrates compliance with all four factors.

As set forth in the certification of Edward Richardson submitted herewith, NJEA's field of membership includes over 177,000 active local and public school employees and higher education employees. NJEA's members include tenured and non-tenured teaching staff in over 500 school districts throughout the State of New Jersey. While NJEA itself does not directly bargain with local school districts, the NJEA is the parent organization of all of these local education associations, and the members of these local education associations are also members of the NJEA. In all but a few of these districts throughout the entire state, the local education association is the designated majority representative for collective negotiations for teaching staff. As such, the local education associations bargain with employers over the terms and conditions of employment for active employees, and enforce those bargained-for rights. In addition, where the members' rights arise from seniority and tenure rights conferred by statute (such as the tenure and seniority rights at issue here), the members rely chiefly on the NJEA for professional assistance in securing and enforcing those rights. The relief plaintiffs seek, if granted, would

impair the statutory seniority rights of hundreds of thousands of members of the NJEA, for whom the NJEA is their advocate.

The second and third prongs of intervention may be considered together. Effectively, the focus of the second and third prong of the intervention test is on whether the claims made in the action are such that the interests of the intervenor would be impaired or impeded without its participation, and whether the existing parties to the action are "adequately" representing that interest. Thus, where the existing parties are not positioned to "adequately represent" the proposed intervenor's interests, intervention is appropriate. See generally R. 4:33-1 and -2.

This inadequacy may arise from a number of factual scenarios. Perhaps the existing parties are in agreement with one another about the proper outcome of the matter, to the detriment of the proposed intervenor. Perhaps there is a doubt as to whether the parties will be sufficiently thorough with discovery and investigation of the facts. Perhaps the parties are not presenting convincing and cogent legal arguments. Perhaps they have defaulted. Or perhaps there has been a collusive or otherwise unsound plan to resolve the litigation that is not in the public interest. See generally Brody By & Through Sugzdinis v. Spang, 957 F.2d 1108, 1123 (3d Cir. 1992) (intervention appropriate where party "cannot devote proper attention to the applicant's interests" or "there is collusion between the representative party and the opposing party" or the parties are not "diligently prosecuting" or defending the case); see also Chesterbrooke Ltd., supra, 237 N.J. Super. at 124 (intervention appropriate where plaintiff and defendant reached a settlement and neither elected to appeal); Vicendese v. J-Fad, Inc., 160 N.J. Super. 373, 380 (Ch. Div. 1978) (intervention appropriate in the face of allegations of collusion and where defendant defaulted).

In this case, there is serious doubt whether there is sufficient adversity of interest between the existing litigants. On September 15, 2016, the State of New Jersey filed a motion "for modification" of the Court's prior rulings in Abbott v. Burke. See Motion for Modification of Abbott XX and Abbott XXI, Docket No. 078257 (N.J., filed Sept. 15, 2016); Richardson Cert., Exh. A. That motion squarely alleges the invalidity of the seniority and tenure statutes that the Newark parents are challenging in the instant litigation. In those papers, the State claims that the seniority and tenure laws at issue here are an "impediment to a thorough and efficient education" (Richardson Cert., Exh. A, p. 76) and a "burden" that "ensure[s] that too many ineffective teachers" will be involved in educating students, id. at 77. The State contends that "LIFO" – that is, the seniority rules applicable to a reduction in force – "is an unconstitutional impediment to a thorough and efficient education" that the Supreme Court should strike down. Id. at 80. These are hardly the words of an advocate who is going to vigorously defend the constitutional challenge to state law that the plaintiffs bring here. On the contrary, these are words of surrender.

Moreover, as a factual underpinning for that argument in the Abbott motion, the State presented a certification from Christopher Cerf, the current superintendent of Newark, and himself a defendant in this matter. Mr. Cerf argues that the "LIFO" law is "extremely limiting and harsh." Richardson Cert., Exh. B, ¶ 17. The law, in his estimation, is "damaging," id. at ¶¶ 18, 20, and he feels "hampered" by this duly-enacted law, id. at ¶ 20. Given these words, written as little as three months ago, one would be hard-pressed to imagine a less ardent advocate than Mr. Cerf, and the school district he manages, to vigorously defend the laws at issue.

The proofs here, in sum, show that the State and Local Defendants have not been and will not be sufficiently effective advocates, and are likely to leave key facts unchallenged, and key

legal theories unexplored even if warranted by applicable facts and law. Without granting the motion for intervention, the plaintiffs here are on course for a nearly-uncontested fight, which is anathema to a system of justice where competing parties vigorously advocate for their positions.

Finally, the action is timely. Plaintiffs' complaint was filed November 1, 2016, and just two weeks have passed since its inception and the instant motion, which was filed with diligence and promptness. Hanover Twp. v. Town of Morristown, 116 N.J. Super. 136, 143 (Ch. Div.), aff'd, 121 N.J. Super. 536 (App. Div. 1972). Furthermore, by requesting the motion to intervene be heard on short notice, the proposed Intervenors are demonstrating a further commitment to expediting this matter. No delay or prejudice will result from granting the NJEA's motion. On the contrary, "a valuable public purpose" will be served by having an intervenor willing and able to defend the validity of the challenged statutes. Cf. May v. Cooperman, 572 F. Supp. 1561, 1576 (D.N.J. 1983), aff'd, 780 F.2d 240 (3d Cir. 1985).

For these reasons, NJEA has demonstrated that it has met all the criteria for intervention as of right under R. 4:33-1.

B. In the alternative, the Court should grant permissive intervention under R. 4:33-2.

Where intervention of right is not allowed, an applicant may nevertheless obtain permission to intervene under R. 4:33-2:

> Upon timely application anyone may be permitted to intervene in an action if his claim or defense and the main action have a question of law and fact in common.. . . 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. (emphasis added)

This Rule should also be construed liberally by trial courts, with special attention to whether the intervention will cause undue delay or prejudice to the original parties. ACLU v.

County of Hudson, supra, 352 N.J. Super. at 70 (citation omitted). In this case, there is plainly a common question of law or fact in both the proposed intervenor's claim and the main action, that is, the validity of N.J.S.A. 18A:28-10 and -12. In addition, there is a substantial public interest in the outcome of this litigation, as it deals with the employment and educational rights of hundreds of thousands of people, making intervention under R. 4:33-2 appropriate. See Evesham Twp. Bd,. of Adj. v. Evesham Twp., 86 N.J. 295, 299 (1981). Finally, for substantially the reasons cited above, this application, made at the very infancy of this case, will not delay, compromise, or complicate the issues before the Court. See Grober v. Kahn, 88 N.J. Super. 343 (App. Div. 1965), modified, 47 N.J. 135 (1966).

For these reasons, intervention under R. 4:33-2 is also appropriate and should be allowed.

CONCLUSION

For these reasons, the motion of New Jersey Education Association for leave to intervene as a Defendant-Intervenor should be granted.

Respectfully submitted,

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