



*State of New Jersey*  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
25 MARKET STREET  
PO Box 112  
TRENTON, NJ 08625-0112

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

CHRISTOPHER S. PORRINO  
Attorney General

MICHELLE L. MILLER  
Acting Director

January 26, 2017

(VIA HAND DELIVERY)

The Hon. Mary C. Jacobson, A.J.S.C.  
Superior Court of New Jersey  
Mercer County Courthouse  
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 on behalf of Defendants New Jersey State Board of Education and Acting Commissioner Kimberley Harrington (together "State Defendants") in support of their motion to stay this matter pending a decision from the New Jersey Supreme Court on the Commissioner's September 15, 2016 motion for relief and modification of the Court's Orders in Abbott v. Burke, 199 N.J. 140 (2009) ("Abbott XX") and Abbott v. Burke, 206 N.J. 332 (2011) ("Abbott XXI").

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

On September 15, 2016, the Commissioner filed an application with the Supreme Court for modification of the



previous Abbott v. Burke remedies to give the Commissioner the authority to effect meaningful reforms in New Jersey's struggling poor, urban schools ("School Development Authority" or "SDA" districts). See Certification of Daniel F. Dryzga, Jr. ("Dryzga Cert.") at ¶3, citing the September 15, 2016 filing. In that application, the Commissioner seeks authority from the Court to waive or suspend statutory or contractual requirements upon a showing that they impede an SDA district's ability to ensure provision of a Thorough and Efficient education. Ibid.

Two of the potentially unconstitutional impediments identified in the Commissioner's application are the same issues raised by Plaintiffs in the present Superior Court case: the "last in-first out (LIFO)" and the re-employment provisions of the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:28-10 and N.J.S.A. 18A:28-12. Under these provisions, when a district conducts a reduction-in-force (RIF), seniority is the only factor considered in determining which teachers are released from service. Seniority is also the only factor considered for the re-employment of teachers once a position for which they are qualified becomes available. N.J.S.A. 18A:28-12.

The Commissioner has observed that these last-in-first-out ("LIFO") requirements may pose impediments for SDA districts in

providing their students a Thorough and Efficient Education. See Dryzga Cert. at ¶4, citing the August 23, 2016 Certification of Former Education Commissioner David C. Hespe ("Hespe Cert.") at ¶¶15-16. As described in the State Defendants' Supreme Court application, for decades there has been a significant, persistent educational gap between New Jersey students in poor, urban public school districts and their counterparts in wealthier districts. See Dryzga Cert. at ¶4, citing the Hespe Cert. at ¶5. Both Harrington and Hespe have expressed the need for the Commissioner to have the "authority . . . to waive or suspend implementation of certain education statutes when the Commissioner determines that the statute, as applied to a particular school or SDA District, is an impediment that actually prevents the school or District from fulfilling the constitutional guarantee of a Thorough and Efficient education." See Dryzga Cert. at ¶4 citing the Hespe Cert. at ¶13 and Dryzga Cert. at ¶5, citing the September 14, 2016 Certification of Kimberley Harrington at ¶2.

On October 5, 2016, the Supreme Court sent the parties a letter requiring them to address whether the Court should consider the Commissioner's application in the first instance. See Dryzga Cert. at ¶6. The Education Law Center, on behalf of Plaintiffs, responded on November 2, 2016, and the Commissioner

responded on November 10, 2016. The Court has not yet issued a decision.

Meanwhile, on November 3, 2016, the Plaintiffs in this case, six parents of Newark Public School ("Newark") students, on behalf of their children, filed a motion to intervene in the Supreme Court application as to the LIFO requirements. That motion is still pending. At approximately the same time, on November 1, 2016, the Plaintiffs filed the present action in Superior Court against Commissioner Harrington, the New Jersey State Board of Education, Newark, and Christopher Cerf, Superintendent of Newark. The Superior Court lawsuit challenges the constitutionality of the LIFO statutes as they apply to Newark and similarly situated, yet unidentified, school districts. Plaintiffs argue that in the event of a RIF, the LIFO requirements prevent Newark and these similarly situated districts from retaining effective teachers and dismissing ineffective ones. They further claim that these statutes violate the Thorough and Efficient, Due Process and Equal Protection Clauses of the New Jersey Constitution, as well as the New Jersey Civil Rights Act. (Complaint at ¶116, ¶121, ¶135, and ¶139). Plaintiffs seek a declaration that the application of the LIFO statutes are unconstitutional and an

order permanently enjoining Defendants from enforcing N.J.S.A.  
18A:28-10 and -12.

On November 15, 2016, the New Jersey Education Association ("NJEA"), the American Federation of Teachers, AFL-CIO ("AFT"), the American Federation of Teachers - New Jersey ("AFTNJ"), and the Newark Teachers Union, Local 481, AFT, AFL-CIO ("NTU") moved to intervene in this action. Their motions were granted on December 19, 2016. The State Defendants, NJEA, and AFT's answers or motions to dismiss Plaintiffs' Complaint are currently due on January 27, 2017.

On December 16, 2016, the Commissioner filed a letter with this Court, requesting that the case be held in abeyance, pending a decision from the Supreme Court on whether to consider the Commissioner's application in the first instance. As Plaintiffs have since voiced their opposition to an abeyance, the State Defendants now file the instant motion, requesting that the court place this matter in abeyance in the interest of judicial expediency and comity.

#### ARGUMENT

**THE INTERESTS OF JUSTICE REQUIRE THAT THIS  
CASE BE HELD IN ABEYANCE PENDING A DECISION  
FROM THE SUPREME COURT.**

Under Rule 4:52-6, "[n]o injunction or restraint shall be granted in one action to stay proceedings in another pending

action in the Superior Court, but such relief may be sought on counterclaim or otherwise in the pending action." Ibid. It is well established that

the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh the competing interests and maintain an even balance.

[Procopio v. Government Employees Ins. Co., 433 N.J. Super. 377, 380 (2013) quoting Landis v. N. Am. Co., 299 U.S. 248, 254-55 (1936).]

Indeed, "[a] court has discretion to stay a case if the interests of justice require it." Walsh Securities, Inc. v. Cristo Property Management, Ltd., 7 F. Supp. 2d 523, 526 (D.N.J. 1998) (citing United States v. Kordel, 397 U.S. 1, 12 n. 27 (1970)). Although Walsh focused on parallel civil and criminal proceedings, the same principles are instructive here. In determining whether civil proceedings should be stayed, the court should weigh a number of factors including: the extent to which the issues in the two cases overlap; the plaintiff's interest in proceeding expeditiously weighed against the prejudice to plaintiff caused by a delay; the private interests of and burden on defendants; and the interests of the court. Walsh, supra, 7 F. Supp. 2d at 526.

Application of these factors demonstrates that the court should grant State Defendants' motion to hold the present action in abeyance. It cannot be disputed that the central question in this case overlaps with the issue pending before the Supreme Court: whether application of the N.J.S.A. 18A:28-10 and N.J.S.A. 18A:28-12 in SDA Districts such as Newark may impede provision of a thorough and efficient education. Considering the Supreme Court's history in the Abbott v. Burke cases and the primacy of the constitutional mandate to provide a Thorough and Efficient education, the Supreme Court, not the Superior Court, is the proper forum to address the LIFO issues that the Commissioner has already presented and Plaintiffs have reiterated here. More than thirty years of Abbott v. Burke litigation has shown the Court's deep understanding of the urgency and extreme importance of ensuring that the children in the SDA districts receive a constitutionally adequate education. Moreover, the Court did not divest itself of jurisdiction in either of the most recent Abbott v. Burke cases: Abbott v. Burke, 199 N.J. 140 (2009) ("Abbott XX") or Abbott v. Burke, 206 N.J. 332 (2011) ("Abbott XXI"), and it is therefore reasonable to conclude that the Court will address these issues affecting the provision of a Thorough and Efficient education in the SDA districts.

Plaintiffs have requested the same relief in their motion to intervene in the Supreme Court and have recapitulated essentially the same arguments before this Court. Yet whereas the Commissioner's application to the Supreme Court is on behalf of all of the SDA district public school students, the Plaintiffs' application is focused solely on Newark's students. In fact, the Commissioner's application to the Supreme Court cites Newark as just one example of an SDA district that might justify a waiver or suspension of the LIFO requirements in order to ensure provision of a Thorough and Efficient education to its students. The Commissioner has requested the Supreme Court to confirm her authority to grant this relief.

It would thus be a waste of judicial resources for this case to proceed until at least the Supreme Court decides whether to consider the Commissioner's application. Should the Court do so, it would also be unduly burdensome for the State Defendants to litigate this issue in two fora.

Plaintiffs, on the other hand, would not face any prejudice in delaying this case because their motion to intervene in the Supreme Court matter is still pending. The Supreme Court's ultimate decision on the Commissioner's application could moot the Plaintiffs' complaint entirely. If the Commissioner's application for authority to waive the LIFO requirements under



certain circumstances is granted, Newark would be able to seek its relief from the Commissioner.

Plaintiffs may argue that their case should proceed here because even if the Supreme Court proceeds to consider the case, it may require the development of a factual record. While the Commissioner believes that the Court can decide the Constitutional issue presented based on the submission already made, even were the Court to require a further record, there is no indication that it will want that process to proceed before this tribunal. In fact, as the Court ordered in Abbott v. Burke, 100 N.J. 269, 300-301 (1985) ("Abbott I"), it may determine that this issue should first be considered by the administrative agency, not the courts. Alternatively, as it did in Abbott XX and Abbott XI, the Court might appoint a Special Master for the development of any additional record. Thus, it would be premature for the Superior Court case to proceed, and, in any event, at this juncture, the State Defendants do not concede that this Court has jurisdiction.

#### CONCLUSION

For all these reasons, State Defendants respectfully request that this case be held in abeyance pending a decision from the Supreme Court on whether to consider the Commissioner's application in the first instance. State Defendants also request

that their time to respond to Plaintiffs' Complaint be extended until after this motion is decided.

Respectfully submitted,

CHRISTOPHER S. PORRINO  
ATTORNEY GENERAL OF NEW JERSEY

By: 

\_\_\_\_\_  
Daniel F. Dryzga, Jr.  
Assistant Attorney General  
Attorney ID 010771996