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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,

Defendant-Intervenor

and

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

Defendant-Intervenor

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MERCER COUNTY

DOCKET NO. MER-L-2170-16

NOTICE OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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PLEASE TAKE NOTICE that on such date and time as the Court may direct, the undersigned attorneys for Defendant-Intervenor, New Jersey Education Association ("NJEA"), shall move before the Honorable Mary C. Jacobson, A.J.S.C., at the Mercer County Criminal Courthouse, for an Order granting the NJEA's motion to dismiss the Plaintiffs' complaint and dismissing the complaint with prejudice.

PLEASE TAKE FURTHER NOTICE that in support of this motion, NJEA relies on the Certification of Richard E. Shapiro, Esq. and the Brief of Defendant-Intervenor, New Jersey Education Association, in Support of the Motion To Dismiss Plaintiffs' Complaint submitted with the motion.

NJEA requests oral argument on this motion.

Respectfully submitted,

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN

By: _____
Kenneth I. Nowak
Richard A. Friedman
Flavio L. Komuves

RICHARD E. SHAPIRO, LLC

By: _____
Richard E. Shapiro

Dated: March 13, 2017

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

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY

DOCKET NO. MER-L-2170-16

BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINT ON BEHALF OF DEFENDANT-INTERVENOR NEW JERSEY EDUCATION ASSOCIATION

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PRELIMINARY STATEMENT

Defendant-Intervenor, New Jersey Education Association ("NJEA"), submits this brief in support of its motion to dismiss plaintiffs' complaint. Plaintiffs, the parents or guardians of several Newark public school students, ask the Court to declare the Reduction-in-Force ("RIF") statutes, which are based on the seniority of tenured teachers in a lay-off -- rather than on teacher performance evaluations under the recently amended tenure laws -- unconstitutional and to enjoin their application. Plaintiffs further claim that, as presently implemented, the RIF statutes put low income and minority students at risk of having teachers rated as "ineffective" on annual performance evaluation and, therefore, are unconstitutional. The relief sought by plaintiffs is based on the legally unsupportable and fundamentally flawed proposition that because there might be some teachers rated as "ineffective" in Newark, all of Newark's tenured teachers should lose the longstanding employment safeguard of seniority.

The RIF statutes plaintiffs seek to invalidate, which they refer to as the LIFO statutes ("LIFO"), have been in force for over eighty years and are designed to protect tenured teachers from arbitrary dismissals in the event of a RIF. These statutes have been continually refined by the Legislature over the years, but the seniority protections have been retained. Most recently

in 2012, the Legislature rejected any change to the seniority provisions in the RIF statutes during a sweeping overhaul of the Tenure Act in New Jersey -- the first extensive reform of New Jersey's tenure law in close to 50 years. That legislative action retained and preserved seniority rights in a RIF, but substantially revised the tenure laws to make the acquisition of tenure more difficult and to streamline the process for the dismissal of ineffective teachers. Unhappy with the Legislature's decision to retain seniority in a RIF, plaintiffs, in the guise of a claim of unconstitutionality, are now asking this Court to review and override that legislative judgment.

Plaintiffs may disagree with the Legislature's recent policy decisions and seek to have this Court second-guess those decisions. However, that is insufficient to warrant judicial intervention in this matter and encroachment on legislative prerogatives in violation of the Separation of Powers doctrine. Reduced to its essentials, the plaintiffs purported "constitutional attack" is nothing more than a policy disagreement over the wisdom of the longstanding legislative decision to retain seniority as the sole criterion in a RIF instead of plaintiffs' preferred approach of reliance on annual performance ratings. The Legislature, not the courts, have the fundamental and primary responsibility for establishing policy regarding seniority and for resolving such policy disputes. It

is well-settled that New Jersey courts "display faithful judicial deference to the will of the lawmakers whenever reasonable [people] might differ as to whether the means devised by the Legislature to serve a public purpose conform to the Constitution." Burton v. Sills, 61 N.J. 1, 8 (1972).

Plaintiffs' complaint also cannot overcome other justiciability hurdles. First, plaintiffs lack standing to bring their claims because they have not alleged -- and cannot allege -- that any of plaintiffs' children is presently being, or will imminently be, taught by a teacher with an ineffective rating. Second, plaintiffs' claims are not ripe for judicial consideration. Plaintiffs do not allege - and cannot allege -- that a RIF is presently underway, or will soon be implemented. Thus, there is no real, present, or imminent harm to plaintiffs that would justify judicial intervention.

Third, plaintiffs' entire complaint is premised on speculation about the effects of a hypothetical RIF that might occur at some indeterminate date in the future. Even when viewed indulgently on a motion to dismiss, plaintiffs' allegations are a transparent effort to seek an advisory opinion rather than the resolution of a concrete controversy.

Finally, plaintiffs' complaint must be rejected because of the failure to state a claim upon which relief can be granted. Plaintiffs' complaint is replete with selective statistics, and

general, conclusory, and hypothetical allegations. What is missing, however, are facts that are essential to demonstrate a cognizable cause of action of denial of a thorough and efficient education, equal protection or substantive due process. Most strikingly, the complaint is devoid of any allegations that show that the RIF statutes, on their face or as applied, are linked to, and the cause of, Newark school children's educational deficits or the education of any child by a teacher rated as ineffective.

In brief, there is a fundamental disconnect between plaintiffs' assertions about the RIF statutes and the alleged constitutional violations. Conjecture and speculation, which are at the heart of plaintiffs' claims, are no substitute for well pled facts of a constitutional violation warranting judicial intervention.

For the reasons set forth in this brief, this Court should grant NJEA's motion to dismiss and dismiss plaintiffs' complaint with prejudice.

PROCEDURAL HISTORY

On November 1, 2016, plaintiffs, the parents or guardians of several Newark public school students, filed a five-count complaint seeking a declaratory judgment and injunctive relief, claiming that the reduction in force statutes in New Jersey governing teacher layoffs, N.J.S.A. 18A:28-10 and N.J.S.A.

18A:28-12 ("RIF" or "LIFO"), are unconstitutional. These statutes require that reductions in force of tenured teachers -- and their reemployment after a RIF - must be based exclusively on seniority. Plaintiffs allege that basing such decisions on seniority, rather than upon evaluations of teacher effectiveness, violates various provisions of the New Jersey Constitution: the Education Clause, Art. VII, Sect. IV, ¶ 1; the right to equal protection of the law under Art. I, ¶ 1; and the right to due process under Art. I, ¶ 1. Plaintiffs also allege a violation of the New Jersey Civil Rights Act, N.J.S.A. 10:6-2 et seq. and, in their fifth cause of action, seek a declaratory judgment under the New Jersey Declaratory Judgment Act, N.J.S.A. 2A:16-50 et seq.

The State defendants are Kimberly Harrington, the Acting Commissioner of Education, and the New Jersey State Board of Education. Plaintiffs have also sued, as nominal Newark defendants, the Newark Public School District and Christopher Cerf, Superintendent of the Newark School District. Newark has been a State-Operated school district since 1995.

On December 22, 2016, the Court granted the New Jersey Education Association's ("NJEA")[1] and the American Federation of

[1] NJEA is a labor organization with approximately 177,000 local and county public school employees and public higher education employees. "NJEA is affiliated with over 500 local education associations (EAs)" in New Jersey, and these education

Teachers' ("AFT")[2] separate motions for leave to intervene and designated the NJEA and AFT as Defendants-Intervenors. On February 1, 2017, the Court established a schedule for answers and motions to dismiss, requiring the defendants and defendants-intervenors to file answers to the complaint, or a motion to dismiss in lieu of an answer, by February 27, 2017. The filing date was subsequently extended to March 13, 2017.

Pursuant to that order, NJEA filed its motion to dismiss on March 13, 2017, and, simultaneously, submits this brief in support of the motion to dismiss.

STATEMENT OF THE FACTS

A. Plaintiffs' Allegations in the Complaint

For purposes of this motion to dismiss, the factual allegations in plaintiffs' complaint must be accepted as true. Plaintiffs allege that their children attend several schools in the Newark School District ("Newark") where the academic achievement levels of large numbers of students, as measured by test scores, are deficient and substantially below State minimum

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associations "are designated as majority representatives for collective negotiation purposes for staff within local and regional school districts." In Newark, whose teaching staff is represented by the Newark Teachers Union, there are 183 NJEA members who are professional teaching employees of the Newark Public Schools who are members of NJEA. (Certification of Edward J. Richardson, dated August 23, 2016, in support of NJEA's motion to intervene), at ¶¶2, 3, and 6.

[2] The Newark Teachers Union, an affiliate of the American Federation of Teachers, is the bargaining representative for the Newark School District teachers.

proficiency standards.(Complaint, ¶¶30-40).[3] Plaintiffs also claim that Newark's graduation rates are much lower than statewide figures. (Complaint, ¶¶59-60).

According to plaintiffs, effective teachers are the "single most influential school-based variable in determining the adequacy of a child's education and a critical determinant of educational success" (Complaint ¶ 44), and Newark has a disproportionately high number of teachers rated as less than effective. (Complaint, ¶50). They assert that the educational shortcomings in their children's schools are solely the result of the district's inability to consider teacher effectiveness when there is a RIF because: (1) the RIF statutes require that school districts, in implementing a RIF, lay off tenured teachers based solely on seniority, without considering any other factor, including evaluations of a teacher's effectiveness or ineffectiveness, N.J.S.A. 18A:28-10 (Complaint, ¶¶ 3,64) and (2) the reemployment statute mandates that any teaching staff member dismissed as the result of a RIF shall be placed on a preferred eligible list in order of seniority, not teacher

[3] Plaintiffs' children attend the following Newark schools: Hawkins Street Elementary School; Fourteenth Avenue Elementary School; Luis Munoz Marin Elementary School; First Avenue Elementary School; East Side High School; Eagle Academy for Young Men; and Speedway Academies. Although plaintiffs purport to seek relief for all Newark public school students, they have not filed a class action or named parents or students at other Newark schools as plaintiffs.

quality or any other factor, for reemployment in the event there is a subsequent need to re-hire teachers. N.J.S.A. 18A:28-12. (Complaint, ¶ 3, 65). Seniority, according to plaintiffs, is based on "tenure" in the district where the RIF occurs (Complaint, ¶66) and "is weakly correlated with effective teaching." (Complaint, ¶68).

Plaintiffs claim that in light of "declining student enrollment in Newark and the corresponding decrease in state funding," Newark is faced with two "untenable options": "(i) layoff effective teachers pursuant to the mandates of the LIFO statute, while leaving ineffective teachers clustered in an already under-performing school district, or (ii) refuse to institute reductions-in-force (even when faced with decreased funding), retain effective teachers to save the effective and highly-effective teachers, decline to hire new teachers, and cut spending elsewhere in the district's budget." (Complaint, ¶¶ 5, 63-67).

As alleged in the complaint, Newark has chosen the latter alternative and has created a pool of teachers, known as the Educators Without Placement Sites ("EWPS") that Newark will not place in full-time teaching positions in order to avoid reducing the number of effective teachers instructing students.

(Complaint, ¶ 6).[4] This pool of teachers, according to the complaint, "drains millions of dollars per year from Newark's budget" and the impact on Newark's funding is exacerbated by the "State's misguided efforts to cut education funding to the Schools Development Authority ("SDA") districts," which are the former Abbott districts. (Complaint, ¶ 6).[5] Plaintiffs assert that starting in 2015, despite Newark's efforts to only place ineffective teachers with the school's consent, Newark had to "force place" these teachers within district schools as permanent teachers without the consent of the schools. (Complaint, ¶¶86-87).

Plaintiffs further claim that, in February 2014, Newark sought from the Commissioner of Education a "temporary reprieve" from the RIF statutes, but that the district's request has not been answered by the State. (Complaint, ¶¶ 42-43). As part of this request, Newark presented data from a simulation that

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[4] Plaintiffs make inconsistent allegations in the Complaint about the composition of the EWPS. In one allegation, plaintiffs assert that the EWPS consists of a "pool of ineffective teachers" (Complaint, ¶ 6), while at another point in the Complaint the EWPS is described as a "pool for those teachers whom principals did not want to hire because of performance concerns." (Complaint, ¶ 81). Plaintiffs do not explain this discrepancy in the complaint.

[5] Plaintiffs allege that other unnamed school districts are faced with the same dilemma, but "have implemented workarounds to avoid the harms associated with implementing reductions-in-force pursuant to LIFO." (Complaint, ¶ 7). Presumably, plaintiffs refer to the Camden School District, which is only mentioned in passing in the complaint. (Complaint, ¶¶78, 108).

allegedly showed that if the RIF statutes were implemented in Newark, "75% of the teachers it would lay off were considered effective or highly effective, and *only 4% of the teachers laid off would be rated ineffective.*" (Complaint, ¶74)(emphasis in original). Plaintiffs also claim that the RIF statutes interfere with Newark's ability to recruit, hire, and retain highly qualified teachers. (Complaint, ¶¶96-103).

They assert that the RIF statutes are unconstitutional for the following reasons: (1) they have the "perverse effect" of requiring that Newark fire junior effective teachers and retain senior ineffective teachers in violation of the Education Clause of the New Jersey Constitution (Complaint, ¶ 11); (2) school children in Newark are inequitably harmed in comparison to children from affluent districts, in violation of the Equal Protection Clause of the New Jersey Constitution, since adequate funding allows affluent districts to retain effective teachers in the event of a RIF (Complaint, ¶ 12); and (3) Newark's school children are being denied their fundamental right to a thorough and efficient education as a result of the RIF statute, in violation of the Due Process Clause of the New Jersey Constitution (Complaint, ¶ 13).[6]

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[6] As mentioned above, plaintiffs also allege violation of the New Jersey Civil Rights Act and seek a declaratory judgment regarding their constitutional claims.

Plaintiffs seek a judgment declaring that the RIF statute, as applied,[7] to Newark "and other similarly situated districts" is unconstitutional (Complaint, ¶ 16);[8] and an injunction "to prevent enforcement of the LIFO statute, or any law or policy substantially similar to the LIFO statute, which would prevent Newark and other similarly situated districts from considering teacher effectiveness - regardless of seniority - when making decisions in relation to reductions-in-force." (Complaint, ¶ 17).[9]

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[7] Notwithstanding plaintiffs' assertion that they are bringing an "as applied challenge, they appear to be pursuing a facial challenge to the statutes because the RIF statute is not being implemented in Newark, and there are no facts regarding the actual effects of implementation that are necessary to assess an "as applied" challenge.

[8] Claims relating to "other similarly situated districts" are not before the Court. Plaintiffs have not filed a class action on behalf of parents or students in "other similarly situated districts," all the named plaintiffs are attending Newark schools, and no specific allegations, other than a brief mention of the Camden School District, have been asserted about the effect of the RIF statute on other school districts. However, as NJEA asserted in its motion for intervention, a ruling on plaintiffs' claims would likely not be confined to Newark and would apply to all SDA districts in the State, including those with NJEA members and affiliate bargaining representatives.

[9] Beyond seeking an injunction to prevent enforcement of the RIF statute in operation, plaintiffs also seek to enjoin enforcement of any "law or policy" that would prevent Newark from considering teacher effectiveness regardless of seniority. Id. Plaintiffs do not cite to any specific "law or policy" presently in effect - other than the RIF statutes -- that would be vulnerable to an injunction.

Significantly, plaintiffs do not challenge the tenure statutes or regulations that are the basis for seniority among tenured teachers for the purposes of the RIF statutes. Nor do plaintiffs mention non-tenured teachers or that non-tenured teachers, regardless of their ratings, have no seniority rights under the RIF statutes and will be laid off, regardless of their rating, before any tenured teachers. Of more importance to their present claims, plaintiffs do not allege that any of their children is being, or is about to be, taught by an ineffective or partially effective teacher. Moreover, plaintiffs do not allege that any of their children are currently assigned to, or are about to be assigned to, an ineffective teacher. Finally, plaintiffs do not allege that a RIF affecting teachers is in effect in the Newark Public School District or that a RIF is planned to occur imminently.

B. The Statutory Scheme

Since tenure and seniority are inextricably intertwined in the RIF provisions, the tenure laws provide the broader context for consideration of the plaintiffs' claims, which do not involve any direct challenge to the tenure statutes. The Tenure Act was originally enacted in 1909, L. 1909, c. 243, and seniority laws have been in effect since 1935. L.935, c. 126. These statutes have been amended several times over the years,

but the RIF provisions challenged by plaintiffs have remained intact.

Most recently, in 2012 the Tenure Act provisions relating to the evaluation of teachers and the process for removing ineffective teachers were substantially modified by the TEACHNJ Act;[10] however, the RIF statutes were not changed. As is apparent from the legislative history, the original version of the bill (S. 1455) -- introduced and sponsored by Senator Ruiz -- contained proposed provisions (Section 23) that would have amended the RIF dismissal statute, beginning in the 2014-2015 school year, to take into account teacher evaluation rating levels of highly effective, effective, partially ineffective, and ineffective as well as seniority within each of those rating categories. That proposal was ultimately rejected by the Legislature during the course of the legislative process and did not make it into the final bill presented to and signed by the Governor. L. 2012, c. 26. The legislative history does not explain why this provision was rejected although it is likely the Legislature concluded that the retention of seniority was consistent with, or advanced the goals of, TEACHNJ.

The linkage between tenure and seniority is reflected in the existing RIF provisions. "The tenure statute authorizes the

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[10] The acronym stands for "Teacher Effectiveness and Accountability for the Children of New Jersey."

creation of seniority regulations to rank the job rights of tenured teaching staff in a RIF. . . .The statute does not create or authorize the commissioner to create competing rights for non-tenured teachers." Bednar v. Westwood Board of Education, 221 N.J. Super. 239, 242 (App. Div. 1987). (citations omitted). Thus, the RIF provisions are contained in Chapter 28 (Tenure) of the Education Code and the RIF provisions are entitled "Effect of Reduction of Force Upon Persons Under Tenure."

N.J.S.A. 18A:28-10 states in pertinent part that dismissals resulting from a RIF "shall be made on the basis of seniority according to standards to be established by the commissioner with approval of the state board."[11] N.J.S.A. 18A:28-12 provides that staff dismissed in a RIF will be given preference in reemployment. In other words, under the tenure statutes, a non-tenured teacher whose contract is not renewed because of a RIF is not entitled to the seniority or reemployment rights in the RIF provisions. Union Cty. Bd. of Ed., v. Union Cty, Teach Assn., 145 N.J. Super. 435, 437 (App. Div. 1976), certif. den. 74 N.J. 248 (1977).

[11] Under the regulations, seniority is determined according to the number or fraction of academic or calendar years of employment in the school district in the specific categories set forth in the regulations. N.J.A.C. 6A:32-5.1(b).

Plaintiffs claim that because of the RIF statutes, the district must now retain ineffective teachers "or engage in the time-consuming and expensive proceedings to terminate ineffective, tenured teachers on a case by case basis," (Complaint, ¶ 93). However, they fail to address, much less mention, the sweeping overhaul of tenure laws in 2012. These substantial changes not only make it more difficult to obtain tenure in the first place, but also they significantly streamline the process for eliminating ineffective tenured teachers. At the time of signing TEACHNJ, Governor Christie described the new law "as an important step towards ensuring we have a great teacher in every classroom." (Governor's Press Release, dated August 6, 2012) (Exhibit A to Certification of Richard E. Shapiro, Esq. ("Shapiro Certification," which is being submitted with the motion to dismiss).

The TEACHNJ Act is a complex law with many interlocking parts that includes numerous changes designed to improve the quality of K-12 teaching and to speed up the removal process for dismissal of ineffective teachers. First, under TEACHNJ, the period for acquiring tenure by a teacher was extended from three to four years; the teacher must complete a district mentorship program during the initial year of employment and must also achieve a rating of effective or highly effective in two annual evaluations in the following three years. N.J.S.A. 18A:28-5(b).

Under the former law, a teacher with an appropriate certification who taught within the scope of his/her certification acquired tenure by the mere passage of time. N.J.S.A. 18A:28-5(a).

Second, TEACHNJ requires performance standards and defined rating categories for teachers of "effective," "highly effective," "ineffective," and "partially ineffective." These are established by an evaluation rubric adopted by the board of education and approved by the Commissioner. N.J.S.A. 18A:6-123(b). A pilot program to test and refine the evaluation rubric was required by January 31, 2013, and the board of education had to ensure implementation of the rubric for the evaluation of teachers in the 2013-14 school year. Id. at (d),(e). Nothing equivalent to this rating system was included in the former tenure law.

Third, there are new standards for dismissing tenured teachers for inefficiency. Under the former system, prior to making any determination to certify an inefficiency charge to the commissioner for a hearing, the board of education was required to provide the employee with written notice of the inefficiency and allow the employee at least 90 days to correct the inefficiency. N.J.S.A. 18A:6-11.

Under TEACHNJ, the process for filing inefficiency charges has been substantially changed. Revocation of tenure on the

ground of inefficiency will be based on the effectiveness ratings for performance standards in the evaluation rubric. Tenure charges must automatically be brought against a teacher whenever the teacher is rated: (1) ineffective or partially effective in an annual evaluation and ineffective in the following year's evaluation; or (2) partially effective in two consecutive years or ineffective in one year and partially effective in the following year. N.J.S.A. 18A:6-(1)and (2). However, in the latter circumstances, the superintendent, "upon a written finding of exceptional circumstances" may grant the employee another year to achieve a rating of effective or highly effective. If the employee does not, the superintendent must promptly file the inefficiency charge with the Commissioner. Id. at (2).

Fourth, the procedures for dismissing allegedly inefficient tenured teachers have been totally revised in order to expedite dismissals and reduce the costs for removing teachers who are repeatedly ineffective. For example, the time periods for various actions by the school district, affected employee, and the commissioner have been adjusted to accelerate the referral of the matter for a hearing before an arbitrator. N.J.S.A. 18A:6-17.3; N.J.A.C. 6A:3-5.1(c); and the arbitrator must conduct the hearing within 45 days of the assignment under strict timelines, N.J.S.A. 18A:6-17.1(b) and (f).

Furthermore, the arbitrator must issue a decision within 45 days of the commencement of the hearing. N.J.S.A. 18A:6-17.1(d). The arbitrator's decision is final and binding and is not appealable to the commissioner or State Board of Education, N.J.S.A. 18A:6-17.1(e). Judicial review of the arbitrator's decision is very limited. Bound Brook Board of Education v. Ciripompa, Dkt. No. A-57-15, ___ N.J. ___, 2017 WL 677015 at *5 (Feb. 21, 2017).[12]

The operative provisions of TEACHNJ have only been fully in effect since the 2013-2014 school year. Consequently, tenure charges based upon the new inefficiency procedures requiring two years of ineffective ratings could not be brought before July 1, 2015.

C. **Decisions From Other States**

Plaintiffs' complaint is the latest in a recent series of similar legal actions over the past few years challenging tenure and RIF statutes in different states. Public school students or their parents have been the named plaintiffs raising virtually identical claims against states and state officials, as well as school districts, in California, Vergara v. State of California, 209 Cal. Rptr. 3d 532 (Ct. App. 2016)(court of appeal reverses trial court's decision invalidating tenure and RIF laws);

[12] A copy of the Westlaw opinion is attached as Exhibit B to the Shapiro Certification.

Minnesota, Forslund v. State of Minnesota, et al, Second Judicial District, County of Ramsey (October 26, 2016)(trial court dismisses complaint on various grounds; appeal pending)[13]; and New York, Davids v. State and Wright v. State (Consolidated), New York Supreme Court, County of Richmond (March 26, 2015)(trial court denies motion to dismiss; appeal pending under New York law that allows the appeal of the denial of a motion to dismiss).[14]

LEGAL ARGUMENT

The gravamen of Plaintiffs' complaint is that the reduction in force statutes are unconstitutional because they require Newark in a RIF to dismiss teachers -- and to reemploy them in the event of a vacancy after a RIF -- based on seniority rather than on the rating of their teaching performance.

Plaintiffs have opted to seek judicial intervention instead of legislative action to address their concerns after the Legislature retained the seniority provisions in 2012 as part of a complete overhaul of the tenure laws. They ask this Court to conclude that the RIF statutes are unconstitutional in violation of the Education Clause, Equal Protection, and Due Process, and to order declaratory and injunctive relief. Plaintiffs do not

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[13] The Decision and Order in Forslund is attached to the Shapiro Certification as Exhibit C.

[14] The Decision and Order denying the defendants' motion to dismiss in Wright and Davids is attached to the Shapiro Certification as Exhibit D.

directly attack the tenure laws in New Jersey even though "[s]eniority is a statutory concept created by Chapter 28 of Title 18A, a chapter which deals only with the various aspects of tenure." Bednar, supra, 221 N.J. Super. 242.

As this Court recently stated: "This court must tread lightly when deciding whether to invalidate a statutory scheme involving far-reaching consequences and policy considerations. . . .[T]his court's role is necessarily limited to constitutional adjudication, rather than entering the 'swift and treacherous current of social policy'" Garden State Equality v. Dow, 434 N.J. Super. 163, 186 (Law Div. 2013).

Preliminarily, several basic principles should guide this Court's review of the motion to dismiss plaintiffs' complaint seeking invalidation of reliance on seniority in the RIF statutes. Statutes are presumed to be constitutional. DePascale v. State, 211 N.J. 40, 63 (2012). Therefore, as this court recently recognized: "courts shall not 'declare void legislation unless its repugnancy to the Constitution is clear beyond a reasonable doubt' . . . . The burden falls on the party challenging the legislation 'to demonstrate clearly that it violated a constitutional provision.'" Garden State Equality v. Dow, supra, 434 N.J. Super. at 187(citations omitted).

Furthermore, "[t]he judicial branch of government does not and cannot concern itself with the wisdom or policy of a

statute. Such matters are the exclusive concern of the legislative branch, and the doctrine is firmly settled that its enactment may not be stricken because a court thinks it unwise." N.J. Sports & Exposition Authority v. McCrane, 61 N.J. 1, 8 (1972). In other words, it has been long settled that "the reach of a statute is one of legislative responsibility, essentially outside the judicial realm." Ind. Elec. Assoc. of N.J. v. N.J. Bd. of Exam., 51 N.J. 466, 481 (1969). See also, Caviglia v. Royal Tours of America, 178 N.J. 460, 476 (2004)(Courts "do not pass judgment on the wisdom of a law or render an opinion on whether it represents sound social policy. . .That is the prerogative of our elected representatives.")(citation omitted). Simply put, courts do not sit "as a superlegislature and [they] accept the legislative judgment as to the wisdom of the statute." Burton v. Sills, 53 N.J. 86, 95 (1968).

Even under the "generous and hospitable approach" typically accorded review of the legal sufficiency of a complaint on a motion to dismiss, NCP Litigation Trust v. KPMG LLP., 187 N.J. 353, 365 (2006); Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989), plaintiffs' complaint must be dismissed with prejudice for three substantial reasons: (1) plaintiffs' claims raise non-justiciable educational policy issues that are within the purview of the Legislature, and not the courts; (2) plaintiffs' specific claims fail to overcome the threshold

requirements for justiciability of a case seeking judicial intervention and resolution; and (3) plaintiffs have failed to state claims upon which relief can be granted. NJEA will discuss each of these issues in turn.

POINT ONE

THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFFS SEEK JUDICIAL RESOLUTION OF NON-JUSTICIABLE EDUCATIONAL POLICY ISSUES CONSIGNED TO THE LEGISLATURE

Plaintiffs' complaint seeks to invalidate the RIF provisions based on seniority while ignoring that those provisions are an integral part of the tenure statutes and that their invalidation could have an indeterminate, but far reaching, effect on the protections afforded tenured teachers under the Tenure Act. While disingenuously dressed in the guise of a discrete action within the purview of the judiciary -- a challenge to the constitutionality of the RIF statutes -- the complaint implicates a host of educational policy issues relating to tenure, seniority, the advantages or disadvantages of using teacher performance evaluations as a substitute for seniority, and the preservation of employee protections in RIFs. As explained below, these types of policy considerations have historically and traditionally been addressed by the Legislature, not by the judiciary. The complaint must, therefore, be dismissed.

In essence, plaintiffs are asking the judiciary to evaluate the policy choices in the laws governing teacher tenure and RIF protections, and to substitute its judgment for the legislative policy considerations reflected in those statutes. Not only are plaintiffs seeking to have the Court weigh in on standards for a RIF, but they are also making this request in the aftermath of the Legislature's recent refusal to modify the RIF statutes to base RIF layoffs on the ratings in annual teacher evaluations - their proposed approach.

This Court should reject plaintiffs' invitation to encroach on matters consigned to the Legislature. The issues raised by plaintiffs are clearly outside the judicial domain and are, as we now explain, non-justiciable.

The justiciability of a case -- particularly a case raising the types of issues and seeking the forms of relief set forth in plaintiffs' complaint -- is a threshold issue before any court. De Vesa v. Dorsey, 134 N.J. 420, 429-430 (1993)(Pollock, J., concurring); Gilbert v. Gladden, 87 N.J. 275, 280-281 (1981). "It is ingrained in our case law that courts of this state will not determine constitutional questions unless absolutely imperative to resolve the issues in litigation. That imperative level is never reached when the issues are non-justiciable." City of Camden v. Whitman, 325 N.J. Super. 236, 243 (App. Div. 1999).

Furthermore, the Appellate Division has recognized that "an exercise of legislative judgment" constitutes a "purely political decision" and, therefore, presents a non-justiciable controversy. Borough of Glassboro v. Byrne, 141 N.J. Super. 19, 24 (App. Div. 1976). This principle of non-justiciability flows from the separation of powers doctrine whose purpose is to "safeguard the 'essential integrity' of each branch of government." Gilbert, 87 N.J. at 281(citation omitted). Thus, justiciability is a judicial doctrine designed to preserve the separation of powers mandated by the New Jersey Constitution, N.J. Const. Art. III, ¶1, and to prevent the unwarranted intrusion of one branch of government into the rightful domain of the others. Knight v. Margate, 86 N.J. 374, 388 (1981)("The constitutional spirit inherent in the separation of governmental powers contemplates that each branch of government will exercise fully its own power without transgressing upon powers rightfully belonging to a cognate branch.").

To determine the justiciability of a specific controversy, the Court must evaluate "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." Gilbert, 87 N.J. at 281(quoting Baker v. Carr, 369 U.S. 186, 198, 82 S. Ct. 691, 699 (1962)). This in turn requires consideration of the following criteria: whether there is "a

textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Gilbert, 87 N.J. at 282(quoting Baker v. Carr, supra, 369 U.S. at 417, 82 S. Ct. at 710. See also, DeVesa v. Dorsey, supra, 134 N.J. at 430. "To justify dismissal based on non-justiciability, one of these criteria must be inextricable from the facts and circumstances of the case in question." Gilbert, 87 N.J. at 282(citation omitted); Loigman v. Trombadore, 228 N.J. Super. 437, 442 (App. Div. 1988).

Plaintiffs' complaint does not merely implicate one criterion that, standing alone, would be sufficient for dismissal of the complaint as non-justiciable. The complaint implicates several of these factors that, in combination, overwhelmingly demonstrate that the present matter constitutes a non-justiciable controversy that is wholly unsuitable for

judicial resolution. As the Minnesota court concluded when faced with a similar challenge to that State's tenure and RIF laws: "[p]laintiffs' concerns . . .relate to the wisdom of legislative policy. . . .and the appropriate avenue to address that policy is through the legislative process rather than the courts." Forslund v. State of Minnesota, supra, Exhibit C to Shapiro Certification, opinion at 27.

The same conclusion is compelled in this case. First, there is a "textually demonstrable constitutional commitment" of the Legislature's fundamental role in educational matters. N.J. Const. art. 8, sec. 4, para. 1 of the New Jersey Constitution provides the following: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years." "That mandate of the New Jersey Constitution places the basic responsibility for education on the Legislature." In re Upper Freehold Reg'l School Dist., 86 N.J. 265, 272 (1981). Furthermore, "the Legislature's role in education is fundamental and primary; this Court's function is limited strictly to constitutional review." Abbott v. Burke, 119 N.J. 287, 304 (1990).

No case in New Jersey has ever questioned the Legislature's "fundamental and primary role" in making educational policy

decisions relating to the tenure laws or has opined that seniority protections in the RIF statutes are inappropriate, let alone unconstitutional. That judicial silence strongly indicates that the courts in this State are not the proper forum for resolving policy debates about tenure or seniority, especially since "[t]he right to tenure is created and governed entirely by statute," Merlino v. Borough of Midland Park, 172 N.J. 1, 8 (2002)(quoting Breitwieser v. State-Operated Sch. District, 286 N.J. Super. 633, 637 (App. Div. 1996)).

After all, the tenure laws "represent important expressions of legislative policy" that "were designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service." Viemeister v. Bd. of Education of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). See also, Bednar, supra, 221 N.J. Super. at 241 (Tenure law "should be liberally construed to further its beneficial purpose of affording security to teaching staff who meet its standard of length of service.").

The seniority provisions in the RIF statutes are a vital aspect of the legislative policy underlying the tenure laws. Id. at 242. In short, these seniority provisions reflect the legislative judgment that, above all, school districts must use seniority as the proper standard to protect the rights of

tenured employees in a RIF. Any challenge to that legislative judgment belongs in the Legislature, not the courts.

This "fundamental and primary" role of the Legislature was recently underscored by the Supreme Court in Abbott XXI. Abbott v. Burke, 206 N.J. 332 (2011). In that case, the State defended its "conscious and calculated decision" to substantially reduce State school aid by asserting that school districts could have mitigated the impact of the reduced cuts by the implementation of certain reforms, including allowing districts to execute RIFs of teachers based on merit instead of seniority. Id. at 366. The Court rejected the State's defense outright, recognizing that such a debate over policy reforms belongs in the Legislature. As the Court stated:

> "While there may or may 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. . . .In one respect, the State cannot transform its defense to this motion in aid of litigants' rights into a vehicle to obtain an indication of some judicial approval for collateral labor law and educational policy that are, as yet, unadopted by the Legislature." Id. at 367. Nor can the State assert that districts should have mitigated the impact of budget reductions somehow before those initiatives were legislatively obtained. Unless and until the State achieves the legislative reforms it prefers, and puts those tools in the hands of the districts, arguments attacking collective bargaining agreements . . .do not advance the State's interest in this matter." Id. at 367.

The issue raised in plaintiffs' complaint -- whether Newark, if it must conduct a RIF, should do so on the basis of teacher evaluations instead of seniority - is similarly a policy debate reserved for the Legislature. Equally important is the critical policy question raised by plaintiffs of whether the longstanding legislative decision to provide teachers with a "measure of security" through seniority should now be abandoned for a new approach based on teacher evaluations. This is not a judicial function: "Weighing the relative merits of different educational systems is the province of policymakers, not judges." Forslund, supra, Exhibit C, opinion at 33.

Despite plaintiffs' efforts to portray this case as a constitutional challenge to the RIF statutes capable of judicial adjudication, there is no doubt that plaintiffs are actually contesting the wisdom of the recent legislative policy decision to retain seniority, and not use teacher evaluations, in RIFs. However, "the wisdom, prudence and good sense of the Legislature in the enactment of law are not questions for the judiciary to resolve." Wnuck v. NJ Div. of Motor Vehicles, 337 N.J. Super. 52, 57 (App. Div. 2001).

Central to plaintiffs' complaint is the claim that, because of seniority, the school district must now retain ineffective teachers "or engage in the time-consuming and expensive proceedings to terminate ineffective, tenured teachers on a case

by case basis." (Complaint, ¶ 93). Yet plaintiffs never mention the significant 2012 educational reforms in TEACHNJ. With these reforms, the Legislature lengthened the time for obtaining tenure and streamlined the process for removing teachers with successive annual ineffective ratings. In so doing, the Legislature retained seniority in a RIF. The balance struck by the Legislature should not be upset by the judiciary, particularly when the Legislature has recently taken steps to address the allegations of "time-consuming and expensive" proceedings for terminating ineffective teachers.

Plaintiffs offer no reason why this Court should short circuit that legislative process when the reforms were only fully implemented in the 2013-2014 school year and inefficiency charges under TEACHNJ could only be brought for the first time after ineffective ratings in two subsequent years, i.e., after July 1, 2015. A period of nineteen months is hardly enough time for an earnest assessment of the implementation of these complex statutory reforms and for a precipitous intervention by the courts. Without affording time to assess the results of this recent implementation of substantial educational reforms, plaintiffs ask the Court to step in now and invalidate the seniority protections that remained in the statute because teacher performance evaluations would, in their view, be a better method of determining who should be dismissed in a RIF.

However, the issue in this case is whether the reliance on seniority in the RIF statutes is constitutional, not whether an alternate method of selecting teachers for a RIF should be adopted. That policy decision was made by the Legislature in 2012 when it retained the seniority provisions. That is a classic policy choice that belongs in the legislative arena because "[j]udging whether a statute is effective is a matter for policymakers." Caviglia, supra, 178 N.J. at 486.

Consequently, although plaintiffs attempt to shoehorn this case into the judiciary's power to assess the constitutionality of statutes, consideration of the issues raised by plaintiffs' complaint requires the Court to go far beyond that proper and limited judicial role. In effect, plaintiffs are asking this Court to assume the role of a "superlegislature," second-guess legislative decisions, and entertain policy debates about the proper touchstone for dismissing tenured employees in a RIF. Since there is a "textually demonstrable constitutional commitment" of such educational policy issues to the Legislature, the Court should, on this basis alone, conclude that the case is non-justiciable. Gilbert v. Gladden, supra, 87 N.J. at 282-83 (holding that "textually demonstrable commitment' of the question to the Legislature was sufficient for determination that complaint was not justiciable).

But there are additional reasons for the Court to conclude that plaintiffs' complaint raises non-justiciable issues that are in the Legislature's domain. **First**, there are no "judicially discoverable and manageable standards for resolving," id. at 282, the different policy implications and consequences inherent in deciding whether ranking by seniority or by teacher performance is preferable when there is a RIF. To consider this debate, the Court would have to engage in a far reaching inquiry of competing educational philosophies and policy disputes. The Court would also have to make the standard-less inquiry into whether reliance on seniority results in lower test scores, as plaintiffs claim, or whether other factors -- such as the lack of parental involvement, the socio-economic conditions of students, the out-of-school effects on those students, or the concededly inadequate funding under the School Funding Reform Act of 2008 -- are responsible for the student performance results in Newark cited in plaintiffs' complaint. Courts are "simply not equipped for such a role, nor capable of it." Abbott v. Burke, 136 N.J. at 455.

Nor does the judiciary have any standards or authority to determine the policy factors that should be assessed if seniority is not used or how a change in the RIF criterion from seniority to teacher performance would impact on various teacher tenure protections. Plaintiffs' preferred substitute for

seniority -- reliance on teacher performance evaluations or annual teacher ratings -- is by no means self-evident as an appropriate or better solution than seniority for increasing student performance. The assessment of this issue would require an inquiry into whether and to what extent teacher performance evaluations, which are legislatively and administratively designed for tenure removal purposes, should be factored into a RIF determination.

The Abbott decisions, which primarily address funding mechanisms adopted by the State, do not provide any useful standards for assessing the constitutionality of the reliance on seniority in the RIF states because "direct challenges to [those] provisions in question have not been the subject of prior litigation in the Abbott line of cases." Abbott v. Burke, M-379, Order filed on January 31, 2017,[15] and, as mentioned above, the Supreme Court has already declared in Abbott XXI that such policy discussions are more properly addressed in the legislative forum.

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[15] The Order is attached as Exhibit E to the Shapiro Certification. The order denied the State's motion for relief and modification, which was filed in September 2016, of certain orders in the Abbott cases. The State's motion sought to have the Court authorize the Commissioner of Education to override certain statutory provisions that the State claimed are unconstitutional, including the RIF statutes based on seniority, when they impede "the delivery of a through and efficient education in certain" SDA districts. See Exhibit A to Certification of Edward Richardson in support of NJEA's motion to intervene at 76-80.

Second, plaintiffs do not merely seek to have the Court undertake an inquiry that expresses the "lack of respect due coordinate branches of government," Gilbert, 87 N.J. at 282. Plaintiffs' claims are more radical. They seek to have the Court demonstrate the maximum amount of judicial disrespect for the Legislature by independently reviewing and resolving policy issues in the face of recent explicit legislative determinations.

The enactment of TEACHNJ, which left the RIF statutes unchanged, represents a legislative decision to retain seniority rights while making wholesale changes in other tenure provisions. Plaintiffs now seek to have the judiciary intervene and invalidate seniority rights that were preserved as part of that extensive legislative debate.

More than that, plaintiffs seek to have the Court judicially override this apparent legislative policy judgment by invalidating a critical aspect of the Legislature's policy determination -- the maintenance of seniority rights in the RIF statutes. Plaintiffs' requested relief would result in judicial nullification of the Legislature's policy decision to maintain seniority rights in a RIF and to reject the teacher performance standards included in the bill when it was originally introduced. More importantly, such relief would place the judiciary in direct conflict with a recent legislative

determination of the underlying policy question raised by plaintiffs. However, "[i]t is not for the judiciary to override legislative decisions because their policy may be unappealing." A&B Auto Stores of Jones St., Inc. v. Newark, 59 N.J. 5, 19(1971). .

Plaintiffs' complaint does not merely implicate a single criterion that, by itself, warrants dismissal of the complaint on non-justiciability grounds. Rather, plaintiffs' claims implicate a multiplicity of the factors demonstrating that the issues are clearly unsuitable for judicial resolution. The social, economic, and practical issues surrounding tenure and seniority rights are complex and multi-faceted. It is evident that consideration of whether seniority or some other factor should trump other considerations in a RIF involves educational policy judgments for the Legislature. Legislative efforts to achieve a delicate balance among competing interests should not be jettisoned by the judiciary -- absent a clear case of unconstitutionality that, for reasons discussed below, is not present here -- merely because plaintiffs do not like the result of the legislative process. Plaintiffs' complaint should, therefore, be dismissed as non-justiciable.

POINT TWO

PLAINTIFFS' COMPLAINT MUST BE DISMISSED BECAUSE PLAINTIFFS LACK STANDING, THE MATTER IS NOT RIPE FOR CONSIDERATION, AND PLAINTIFFS ESSENTIALLY SEEK AN ADVISORY OPINION

Plaintiffs' complaint suffers from another fatal flaw. They fail to show their specific claims are justiciable under longstanding precedent. Specifically, plaintiffs do not, and cannot, claim that any of their children is being, or is about to be, taught by an ineffective or partially effective teacher. While alleging numerous facts about test scores, plaintiffs do not allege that their test scores in reading, writing or math - or in any test at all - are attributable to an ineffective teacher.

Furthermore, plaintiffs do not, and cannot, assert that a RIF affecting teachers is in effect in the Newark Public School District or that a RIF is planned to occur imminently. Nor do they, or can they, allege that even if there is a RIF, they will be taught by an ineffective teacher. Significantly, as we explain in Point Three, infra, the causal relationship between the RIF statute, and the assignment of ineffective teachers to plaintiffs or the educational harm they claim, which is the essence of their case, is wholly absent from the complaint.

In short, plaintiffs allege no harm, imminent or otherwise, and no damaging event that has occurred, or is soon to occur.

These are not curable defects in pleading, but fatal flaws in plaintiffs' case. These fundamental shortcomings reveal that plaintiffs' real agenda is to mount an abstract attack upon the seniority of tenured teachers in the hope of enlisting judicial intervention, even though their allegations demonstrate that their own claims are non-justiciable.

Because of the lack of any facts to support critical matters that are indispensable to judicial consideration of plaintiffs' claims, plaintiffs are unable to overcome a motion to dismiss. Specifically, plaintiffs cannot satisfy the threshold requirements for judicial involvement: the named plaintiffs lack standing; the case is not ripe for adjudication; and the Court is being asked to issue an advisory opinion on a hypothetical controversy. The Court should dismiss the complaint and refrain from participation in the political and policy debate mounted by plaintiffs in their complaint.

A. Plaintiffs Lack Standing

The named plaintiffs lack standing to bring this action. "'Standing is a threshold requirement for justiciability' of a cause of action seeking a court's intervention and judgment." In the Matter of the Grant of a Charter to the Merit Preparatory Charter School of Newark, 435 N.J. Super. 273, 279 (App. Div. 2014). "Standing refers to the plaintiff's ability or entitlement to maintain an action before the court. Courts will

not entertain matters in which plaintiffs do not have sufficient legal standing." Stubaus v. Whitman, 339 N.J. Super. 38, 47 (2001)(citation omitted). The doctrine of standing, as well as ripeness and mootness, "'are incidents of the primary conception that . . . judicial power is to be exercised to strike down legislation . . . at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action.'" Matter of Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180, 185 (App. Div. 1988)(citation omitted).

While New Jersey courts have taken a liberal approach to standing, Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York, 58 N.J. 98, 107-08 (1971), a party must still demonstrate "a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In re Camden County, 170 N.J. 439, 449 (2002). In other words, "[t]he party who seeks to 'annul legislation on grounds of its unconstitutionality must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement.'" Id. (citation omitted). Without these requirements, "courts would be called upon to decide abstract questions of wide public significance even though other

governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." Warth v. Seldin, 95 S. Ct. 2197, 2205 (1975).

Even applying the New Jersey judiciary's generous view of standing, plaintiffs cannot overcome this threshold hurdle. The Court need not consider the first two criteria for standing because plaintiffs cannot demonstrate a substantial likelihood that they are being harmed by the RIF statute. None of the plaintiffs' children is being, or will imminently be, taught by ineffective teachers. Nor can they assert that a RIF has occurred, or is about to occur or, that even if one does, it will result in the assignment of an ineffective teacher to their children. Consequently, there is no clear and present harm affecting plaintiffs that would warrant judicial intervention.

Moreover, litigants generally do not have standing to assert the rights of third parties, Stubaus, 339 N.J. Super. at 47 -- in this case, the rights of other students in Newark. This is especially true when a litigant attempts to seek standing "'to vindicate the constitutional rights of some third party'" Matter of Ass'n of Trial Lawyers of Am., supra, 228 N.J. Super. 188. See also, Abbott v. Burke, supra, 206 N.J. at 371. Since "the judiciary does not have a roving commission to seek and destroy unconstitutionality," Matter of Ass'n of Trial Lawyers of Am.,

228 N.J. Super. at 185, plaintiffs' lack of standing to challenge the RIF provisions is fatal to their case.

B. Plaintiffs' Claims Are Not Ripe For Adjudication

The constitutional issues raised by plaintiffs are also not ripe for adjudication. The gist of the complaint is that reliance on seniority in the RIF statutes rather than on teacher performance will subject their children to instruction by teachers with a rating of ineffective on their annual evaluations, thereby violating several provisions of the New Jersey Constitution. However plaintiffs are seeking premature resolution of claims that are presently not ripe for judicial consideration.

"Ripeness is a justiciability doctrine designed to avoid premature adjudication of abstract disagreements." Garden State Equality v. Dow, 434 N.J. Super. 163, 188 (Law Div. 2013). Ripeness for judicial review is essential when constitutional issues are at stake because "[d]eeply embedded in our jurisprudence is the settled principle against resolving disputes "in advance of constitutional necessity.'" State v. Jones, 196 N.J. Super. 553, 559-60 (App. Div. 1985).

As this Court explained in Garden State Equality: "To determine if a case is ripe for judicial review, the court must evaluate: 1) the fitness of the issues for a judicial decision, and 2) the hardship to the parties by withholding court

consideration." 434 N.J. Super. at 189. The Court further stated: "As to whether an issue is fit for judicial review, courts must first determine 'whether review would require additional factual development.'" Id. "With respect to the 'hardship' prong of the ripeness analysis, courts can assume jurisdiction over a claim only if there if there is a 'real and immediate' threat of enforcement or harm that would affect the plaintiff." Id. at 189. The need for a ripe controversy for judicial involvement is reflected in decisions holding that a "declaratory judgment is not an appropriate way to discern the rights or status of parties upon a state of facts that are future, contingent, and uncertain." Independent Realty Company v. Township of North Bergen, 376 N.J. Super. 295, 301 (App. Div. 2005)(citations omitted).

While plaintiffs challenge the use of seniority in RIFs, they do not allege that an actual RIF is in effect. Nor do they allege that a RIF is planned and will occur immediately or in the near future. The complaint is utterly devoid of any facts of an actual or imminent RIF or of facts showing a "real and immediate" threat of harm that would adversely impact the education of plaintiffs' children. Absent a RIF, there is no factual basis for such assertions. Plaintiffs substitute mere speculation, conjecture and simulations about the hypothetical impact on their children of a hypothetical RIF that has not yet occurred, or is

imminently scheduled, for the requisite facts demonstrating harm to plaintiffs' children caused by the implementation of a RIF.

Furthermore, plaintiffs assert that they are seeking relief for injuries caused by Defendants' "unconstitutional enforcement" of the RIF statutes. (Complaint at pp. 1-2). Yet, they do not allege any facts showing that the defendants are enforcing, or are threatening to enforce, the seniority provisions in the RIF statutes. To the contrary, both Newark and other similarly situated districts have, according to plaintiffs, implemented "workarounds to avoid the harms associated with implementing reductions in force pursuant to" seniority. (Complaint, ¶ 7).

The Court should not undertake the extraordinary act of assessing the constitutionality of the legislative determinations in the RIF statutes until there are facts to show that a RIF decision "has been implemented and its effects felt in a concrete way by the challenging parties." Garden State Equality, supra, 434 N.J. Super. at 188. Before then, plaintiffs' claims about a non-existent RIF are not ripe for adjudication, and the present case is not justiciable.

C. The Court Should Dismiss The Case Since Plaintiffs Essentially Seek An Advisory Opinion

Upon close scrutiny, plaintiffs' allegations present nothing more than an abstract, hypothetical situation that is strikingly different from the actual factual circumstances set forth in

their complaint. Stripped to its essentials, plaintiffs are challenging the RIF statutes on the basis of a hypothetical set of circumstances of a hypothetical RIF since no RIF has been implemented or scheduled and since none of plaintiffs' children is being taught, or will imminently be taught, by an ineffective teacher. Yet, plaintiffs seek to have this Court opine on the validity of a statute that they concede is not being implemented in Newark.

The Supreme Court forcefully stated over forty years ago that courts should "not render advisory opinions or function in the abstract.. . ." Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York, supra, 58 N.J. at 107. Independent Realty Company v. Township of North Bergen, supra, 376 N.J. Super. at 301("Although here is no express language in the New Jersey Constitution which confines the exercise of . . .judicial power to actual cases and controversies , , ,nevertheless, it is well settled that [courts] will not render advisory opinions or function in the abstract."); Rybeck v. Rybeck, 150 N.J. Super. 151, 156 (App Div. 1977)("A determination such as that sought in this case should not be made where the litigant's concern with the subject matter does not evidence 'a sufficient stake and a real adverseness' and the opinion will be merely advisory in nature.").

Moreover, as the Appellate Division has held: "courts should not decide cases where a judgment cannot grant relief" nor render decisions that "can have no practical effect." City of Plainfield v. N.J. Dep't of Health & Senior Servs., 412 N.J. Super. 466, 483-84 (App. Div.)(citations and internal quotation marks omitted), certif. den. 203 N.J. 93 (2010).

In its present posture, this case is not appropriate for a judicial determination of the issues raised by plaintiffs' constitutional attack on the RIF statutes. It is possible that the hypothetical consequences of a hypothetical use of the RIF statute in the future may, because of the use of seniority, lead to a higher number of ineffective teachers in Newark than would the hypothetical statutory scheme envisioned by plaintiffs. But there is nothing other than sheer speculation that the result of an as yet unanticipated RIF would be the assignment of ineffective teachers to plaintiffs' children. The judiciary should not consider such abstractions, especially when their resolution would have no practical impact because they are "strictly hypothetical in nature," Rybeck, supra, 150 N.J. Super. at 156. The Court should refrain from exercising jurisdiction over this case when the plaintiffs are, in actuality, seeking to have the Court render an advisory opinion.

Consequently, the complaint should be dismissed with prejudice because plaintiffs are not able to satisfy the basic requirements for a justiciable controversy.

POINT THREE

PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE THEY FAIL TO ALLEGE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiffs allege that the seniority provisions in the RIF statutes violate the Education Clause and the Equal Protection and Substantive Due Process provisions of the New Jersey Constitution. N.J. Const. Art. 1, ¶ 1. Plaintiffs also claim violations of the New Jersey Civil Rights Act ("NJCRA") and the New Jersey Declaratory Judgment Act ("DJ Act"). Plaintiffs characterize their constitutional claims as an "as applied" challenge, which, as mentioned above, is a misnomer given the absence of any allegation in the complaint that the RIF statutes have been actually applied in Newark. Regardless of how their claims are characterized, plaintiffs' complaint fails to state any claim upon which relief can be granted.

First, a facial challenge to the statute must fail because nothing on the face of the statute distinguishes among teachers on the basis of their rating under TEACHNJ. The statutes do not speak to the issue of whether effective teachers will be laid off first and ineffective teachers will be retained, or vice

versa. The statutes don't mention teacher merit, or ineffective or effective teachers, at all. There is nothing in the language of the statutes that assigns teachers to specific schools or students.

The statute only mandates that seniority be the sole criterion in a RIF. Indeed, plaintiffs' claim of facial invalidity is ironic given that their entire case is predicated on the assertion that teacher merit is not mentioned in the RIF statute. Furthermore, plaintiffs cannot muster a facial challenge when the allegations in the complaint solely recite the hypothetical effect of the RIF statutes if they were applied in Newark.

Second, if viewed as an "as applied" challenge to the seniority provisions, plaintiffs' complaint still fails to state a colorable claim. Put simply, plaintiffs do not, as required by an "as applied" challenge, plead facts to demonstrate how the seniority provisions have been applied and how this application affects their children. Instead, plaintiffs make general and speculative allegations, citing irrelevant statistics or simulations, about the allegedly unconstitutional effects on hypothetical students in a hypothetical RIF situation. Nowhere in the complaint are there any factual allegations that any plaintiff's child has an ineffective teacher or has otherwise been adversely affected by the operation of the seniority

provision in the RIF statute. Thus, there is no factual basis for an "as applied" challenge since "[o]nly in the factual context then presented and in the light of circumstances as they may then appear could such an [as applied] determination be made." Robinson v. Cahill, 69 N.J. 449, 455 (1976).

Furthermore, even if plaintiffs' allegations are construed by the Court as a proper "as applied" challenge, the claims against State officials must be dismissed. Any decision to implement a RIF, as well as any decision on who will be dismissed in a RIF, are made by local Newark officials, not State officials, based on "reasons of economy" or other "good cause." N.J.S.A. 18A:28-9. And no "as applied" claim against local officials can be maintained because there are no allegations that the RIF statute has been implemented by Newark or will be implemented in the imminent future.

Additionally, a successful "as applied" challenge only results in the invalidation of those applications, and not of the entire statute. Ayotte v. Planned Parenthood of N. New England, 126 S.Ct. 961, 967-69 (2006). But there are no actual applications of the statute alleged in the complaint that are subject to a determination of invalidity if plaintiffs were to prevail. Given these circumstances, the Court is really being asked to issue an advisory opinion on an "as applied" challenge.

Third, plaintiffs have not alleged facts showing that the statutes affecting seniority in a RIF are causally connected to: (1) the presence of ineffective or partially ineffective teachers in any classroom in Newark; or (2) a deprivation of education that violates the constitutional rights of students in Newark. It is not enough for plaintiffs to allege that Newark students have test scores and graduation rates below the Statewide average. Nor can they rely on conclusory and hypothetical allegations of constitutional deprivations that they claim are caused by a RIF based on seniority. Plaintiffs must allege facts showing a causal connection between the implementation of the RIF and the alleged deprivations. Scheidt v. DRS Technologies, Inc. 424 N.J. Super. 188, 193 (App. Div. 2012)(for claim to survive motion to dismiss, plaintiff must allege sufficient facts, and not only conclusory allegations, to support a cause of action).

This plaintiffs have not done, and cannot do. There is a fundamental disconnect between the RIF statute and the educational deficiencies in Newark alleged by plaintiffs. In Vergara v. State, supra, 209 Cal. Rptr. 538, the California Court of Appeal was faced with similar severe flaws in plaintiffs' challenges to California's tenure statutes. The court concluded that plaintiffs' claims must fail because

"they did not show that the statutes

> inevitably cause a certain group of students to receive an education inferior to the education received by other students. Although the statutes may lead to the hiring and retention of more ineffective teachers than a hypothetical alternative system would, the statutes do not address the assignment of teachers; instead, administrators - not the statutes - ultimately determine where teachers within a district are assigned to teach. Critically, plaintiffs failed to show that the statutes themselves make any certain group of students more likely to be taught by ineffective teachers than any other group of students."

The same defect - the lack of a causal connection between the RIF statute and ineffective or partially effective teachers -- is fatal flaw in all of plaintiffs' claims.

There are troubling deficiencies in student outcomes in Newark even though the district has been under State control for over 20 years, but those educational deficits cannot be causally linked by facts to the seniority provisions in the REF statutes. As in Vergara, plaintiffs cannot show that the RIF statutes "inevitably cause a certain group of students to receive an education inferior to the education received by other students." Nor can they show that, in the event of a RIF, any of plaintiffs' children will be taught by a teacher with an ineffective rating or that "the statutes themselves make any certain group of students more likely to be taught by ineffective teachers than any other group of students."

Plaintiffs simply do not offer facts to causally link the RIF statute to the alleged constitutional deprivation. Low student outcomes in Newark, anecdotal facts, aggregate statewide statistics, simulations, or general research studies do not provide the specific fact-based causal linkage necessary to support the plaintiffs' claims. Plaintiffs ask the Court to make a speculative leap from an as yet unimplemented RIF to a finding of a constitutionally deficient education for plaintiffs' children because theoretically they might be assigned an ineffective teacher. Piling speculation upon conjecture in the complaint and threadbare allegations are inadequate to allege a constitutional claim, for "a conclusion of constitutional deficiency cannot hang on a thread, it must rest on granite." Abbott v. Burke, 119 N.J. 287, 320 (1990).

Fourth, plaintiffs' Education Clause claim must be dismissed as well. The Supreme Court has defined the substantive right to an education "one that will enable their students to function effectively in the same society with their richer peers both as citizens and as competitors in the labor market - [as] an education that is the substantial equivalent of that afforded in the richer districts." Abbott v. Burke, 136 N.J. 444, 454 (1994).

None of this applies to plaintiffs' complaint. Under the Abbott decisions, the fundamental requirement for showing the denial of a thorough and efficient education is a sufficient showing of significant educational harm caused by the alleged constitutional deficiency. Abbott v. Burke, supra, 119 N.J. at 368. See also, Abbott v. Burke, 199 N.J. 140, 147 (2009)(Upholding the constitutionality of SFRA because record "convincingly demonstrates that SFRA is designed to provide school districts in this state, including the Abbott school districts, with adequate resources to provide the necessary educational programs consistent with state standards); Abbott v. Burke, 206 N.J. 332, 341 (2011)(State ordered to provide full funding under SFRA to Abbott districts because record shows that "the cuts to school aid funding, in districts of varying needs, have been instructionally consequential and significant"; Id. at 360 (Record before Special Master demonstrated that reductions of funding under SFRA "have had a significant impact on the beneficiaries of our prior remedial orders, namely the plaintiff pupils of the Abbott districts.")

Plaintiffs do not allege that any of their children's right to a thorough and efficient education has been denied as result of instruction by teachers with ineffective ratings. Nor do plaintiffs allege that there has been specific educational harm to particular students causally connected to such a teacher's

employment seniority, let alone the severe and significant harm required to support an Education Clause violation. Plaintiffs' claim of the denial of a thorough and efficient education is not supported by any facts to show that the claimed violation is attributable to the RIF statute or that the statute operates in a manner that has and will cause the denial of a thorough and efficient education for any of their children. There is simply no factual foundation for the bald claims that ineffective teachers have deprived any of plaintiffs' children - or any other student in Newark - of a thorough and efficient education.

Fifth, plaintiffs' substantive due process and equal protection claims must similarly fail. Both the equal protection and due process rights under the New Jersey Constitution derive from the broad constitutional language in art. 1, ¶1 of the New Jersey Constitution. Sojourner A. v. Dept. of Human Serv., 177 N.J. 318, 332 (2003). "When evaluating substantive due process and equal protection challenges under the New Jersey Constitution, [the] Court applies a balancing test." Caviglia, supra, 178 N.J. at 472. Therefore, the Court must weigh "the nature of the affected right, the extent to which governmental restriction intrudes upon it, and the public need for the restriction." Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985).

Initially, comparisons between Newark and the Summit City School District (Complaint, ¶¶ 47-48) or any other non-Abbott

district have no legal relevance and do not advance plaintiffs' equal protection or substantive due process claim. The RIF statutes are applied uniformly throughout New Jersey and do not draw any distinctions between or among districts or students. For the purposes of equal protection and substantive due process, the school districts are treated similarly under the RIF statutes because all layoff and re-employment decisions governed by the statute are based on seniority regardless of the district in which the layoff occurs.

Furthermore, plaintiffs' factual allegations do not support an equal protection or substantive due process claim. According to plaintiffs, the nature of the right at stake is their children's "fundamental" right to a thorough and efficient education. However, this case is not about the right to a thorough and efficient education, but rather, about whether the Legislature has the constitutional authority to use seniority as the criterion for layoffs rather than teacher ratings from an annual evaluation. In other words, the RIF statutes regulate teacher employment decisions, not students. Neither plaintiffs nor their children have any right, let alone a fundamental right, to participate in teacher employment decisions precipitated by a RIF.

With regard to the second factor in the balancing test -- the extent to which the government intrudes upon that right - it

is evident that the RIF statutes and seniority rights do not by themselves restrict any right to an education, result in the assignment of an ineffective teacher for plaintiff's children, or cause any educational harm to students. Nor is there any showing that the number of ineffective teachers in Newark is caused by the RIF statutes.

Additionally, there are numerous and substantial intervening factors, such as State funding, budgetary decisions, socio-economic conditions of students, Newark's implementation of TEACHNJ, and local educational determinations, that have a direct impact upon whether plaintiffs' children's right to a thorough and efficient education will be infringed or restricted in any way regardless of the RIF statutes. There are no plausible facts to support the conclusory and speculative assertions that to the extent there may be the denial of a thorough and efficient education for plaintiffs' children or other students in Newark, it solely and exclusively results from the RIF statutes and not from these other factors.

Finally, the public need for the protection of teacher seniority is compelling. "The tenure provisions are designed to aid in the establishment of a competent and efficient school system by providing teachers, principals and superintendents with a measure of security in the rank they hold after years of service." Bd. of Ed. Of Manchester Tp. v. Raubinger, 78 N.J.

Super. 90, 101 (1963). Seniority promotes continuity of service, and protects tenured teachers from arbitrary dismissals that may be based on age, cronyism, rate of pay or other improper motivations. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 73 (1982). (Tenure Act "protects teachers from dismissal 'for 'unfounded, flimsy or political reasons.'"(internal citations omitted). The Legislature could have reasonably determined that for these reasons seniority also advances the right to a thorough and efficient education. That is sufficient to satisfy the constitutional mandates of due process and equal protection. "Legislatures are entitled to experiment and explore means through which to advance public policy, provided there is a reasonable basis to support the legislation." Caviglia, supra, 178 N.J. at 477.

Plaintiffs' claims under the NJCRA and the DJ Act also cannot survive the motion to dismiss. The NJCRA was adopted in 2004 "for the broad purpose of assuring a state law cause of action for violations of state and federal constitutional rights . . . ." Owens v. Feigin, 194 N.J. 607, 611 (2008), Plaintiffs have not alleged the violation of any federal constitutional right and, as explained above, their state constitutional claims must be dismissed for failure to state a claim. Therefore, plaintiffs have no basis for a cause of action under the NJCRA.

Plaintiffs' request for a declaratory judgment must be dismissed for comparable reasons. The DJ Act empowers courts to declare rights, status and other legal relations in order "to afford litigants relief from uncertainty and insecurity." Chamber of Commerce of the U.S.A. v. State of N.J., 89 N.J. 131, 140 (1982). The Act "cannot be used to decide or declare rights of status of parties upon a state of facts which are future, contingent and uncertain." Id.(citation omitted). "It is the threshold findings of both justiciability and standing which form the basis for relief under the Declaratory Judgment Act." In re Ass'n of Trial Lawyers of Am., supra, 228 N.J. Super. at 184.

In Point Two, supra, NJEA explains that this case is not justiciable because plaintiffs lack standing and the case is not ripe for consideration. Therefore, there is no justiciable basis upon which plaintiffs could obtain declaratory relief. The Court "should not decide cases where a judgment cannot grant relief" nor render decisions that "can have no practical impact." City of Plainfield, supra, 412 N.J. Super. at 483-84. Count V of the plaintiffs' complaint should be dismissed.

Plaintiffs' allegations fail to state any claim upon which relief can be granted, and the complaint must be dismissed with prejudice.

CONCLUSION

For the reasons stated above, Intervenor-Defendant, New Jersey Education Association, respectfully requests that the Court enter an Order granting the motion to dismiss and dismissing Plaintiffs' complaint with prejudice.

Respectfully submitted,
Richard E. Shapiro, LLC

By: Richard E. Shapiro, Esq.

Dated: March 13, 2017

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Attorneys for Defendant-Intervenor
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,

Defendant-Intervenor

and

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

Defendant-Intervenor

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MERCER COUNTY

DOCKET NO. MER-L-2170-16

CERTIFICATION OF RICHARD E. SHAPIRO, ESQ.

Richard E. Shapiro, Esq. of full age, hereby certifies as follows:

1. I am an attorney at law of the State of New Jersey and am the

sole proprietor of Richard E. Shapiro, LLC. I am one of the attorneys representing the New Jersey Education Association, Defendant-Intervenor in the above-captioned action and make this Certification in support of the New Jersey Education Association's motion to dismiss Plaintiffs' complaint.

2. A true and correct copy of the Governor's Press Release on the signing of tenure reform legislation, dated August 6, 2012, is appended to this Certification as Exhibit A.

3. A true and correct copy of the Supreme Court opinion in Bound Brook Board of Education v. Ciripompa, ____N.J. ____, 2017 WL 677015 (2017) is appended to this Certification as Exhibit B.

4. A true and correct copy of the Findings of Fact, Conclusions of Law, and Order for Judgment in Forslund v. State of Minnesota, Second Judicial District, County of Ramsey (2016) is appended to this Certification as Exhibit C.

5. A true and correct copy of the Decision and Order in Davids v. State of New York and Wright v. State of New York (Consolidated), Supreme Court of New York, County of Richmond, entered on March 20, 2015, is appended to this Certification as Exhibit D.

6. A true and correct copy of the Order of the Supreme Court of New Jersey in Abbott v. Burke, filed on January 31, 2017, is appended to this Certification as Exhibit E.

I hereby certify that the foregoing statements are true. I am aware that if any of the foregoing statements is knowingly false, I am subject to punishment.

RICHARD E. SHAPIRO, ESQ.

Dated: March 10, 2017

Exhibit A

Ch 26

Governor Chris Christie Signs Revolutionary Bipartisan Tenure Reform Legislation Into Law

August 06, 2012 Tags: Education

Trenton, NJ – Marking the first extensive reform of New Jersey's tenure law in over 100 years, Governor Christie today signed the Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act, a sweeping, bipartisan overhaul of the oldest tenure law in the nation. The legislation transforms the existing tenure system to now provide powerful tools to identify effective and ineffective teachers, strengthen the supports available to help all teachers improve their craft, and, for the first time, tie the acquisition, maintenance, and loss of tenure to a teacher's effectiveness in the classroom. The new law, S-1455, is the result of nearly two years of consistent and vocal advocacy for real education reform by Governor Christie and good faith, bipartisan cooperation with members of the legislature, education reform advocates, and stakeholder groups. Governor Christie called on the legislature to take the next step in ensuring New Jersey has the best educators in the country by reforming the antiquated practice of Last In, First Out (LIFO), supporting differentiated pay for teachers, and banning forced placement so principals and teachers agree to all teacher assignments.

"This is a historic day for New Jersey and this new tenure law is an important step towards ensuring we have a great teacher in every classroom. After more than 100 years in existence, this Administration, Legislature and key reformers have done together what many considered to be impossible. For their leadership in this effort and for their partnership, I thank Senator Ruiz, Assemblyman Diegnan, the sponsors in each chamber, and the Legislature as a whole in this long, difficult, but bipartisan, effort to bring real and meaningful change to our education system," said Governor Christie. "We are taking a huge leap forward in providing a quality education and real opportunity to every student in New Jersey. But our work to develop laws that put students first is not done. Now is the time to build on this record of cooperation and results to put in place further reforms focused on our students by ending the flawed practice of Last In, First Out and supporting both differentiated pay and banning forced placements of teachers."

The signing of TEACHNJ represents the completion of another item in the bold education reform agenda Governor Christie outlined in September 2010 and has pursued aggressively over the last two years. The Governor's reforms are aimed at ensuring that all students in New Jersey, regardless of zip code, graduate from high school ready for college and career.

"With this historic signing we are revamping a century-old tenure law and creating fundamental changes that will help to ensure our students have the best leaders in the classroom," said Senator Teresa Ruiz. "This law represents nearly two years of work. It demonstrates that no matter what side of an issue you are on, when people are truly willing to work together - and to continue to work regardless of the disagreements that may take place - extraordinary things can happen."

"Tenure reform represents one of the most significant and landmark pieces of legislation this Legislature has acted upon," said Senate President Steve Sweeney. "Working in a bipartisan fashion and thanks largely to the guidance, dedication, and leadership of Senator Ruiz, we are overhauling an outdated law that brings reform to our educational system and protects the educational future of our students."

The TEACHNJ bill enacts three measures essential to improving the quality of educators in front of New Jersey classrooms.

The law for the first time in New Jersey history ties the acquisition of tenure to effectiveness rather than simply on how long an educator has been in the profession. Tenure will now be awarded only after two years of effective or highly-effective ratings, and will take four years instead of three years to attain, while providing a year of mentoring for all new teachers. Similarly, revocation of tenure will be predicated on effectiveness and tenure charges will automatically be brought against teachers and principals after two consecutive years without a rating of effective or highly-effective, except in circumstances where an educator has demonstrated modest improvement during that span and may be granted an additional year to achieve an effective rating. These provisions will help ensure that only those teachers who are consistently demonstrating success in serving our students remain in the classroom.

The law also dramatically reduces the time and cost it takes to remove educators who are repeatedly ineffective in improving student outcomes. Formerly, the process to remove a teacher could take several years and cost more than $100,000, providing a disincentive for districts to bring tenure charges against ineffective teachers. Over the past ten years, less than 20 teachers have lost tenure after charges of "inefficiency," which was most closely aligned with the definition of "ineffective." Under the new system, the time would be limited to 105 days from the time the written tenure

charges are received by the Commissioner and is capped at $7,500 per case – which will be paid by the state.

Additionally, the law outlines requirements for providing support to help all educators improve by developing more meaningful evaluation systems and tying the results of those evaluations directly to professional development. In addition to mandating mentoring in a teacher's first year, the new evaluation systems will provide more meaningful feedback on teacher practice and will incorporate measures of what matters most – how well students are actually performing. Professional development will be tied to those evaluations, and corrective action plans will be mandatory when a teacher is rated ineffective or partially ineffective – providing the opportunity for improvement before tenure charges are brought for ineffectiveness.

"The passage of this bill, which was unheard of only a year ago, demonstrates that education reform is not a partisan issue. If we really put children first, the right thing to do is in reality quite simple," said Education Commissioner Chris Cerf. "Now, let's continue to move forward and take on the hard work to make sure that every child in our state graduates from high school truly ready for college and career."

Over the past two years, the Department of Education has worked with principals and teachers across the state to improve evaluation systems in order to help all educators continuously improve their practice. There are currently 30 districts scheduled to pilot new teacher and principal evaluation systems this coming school year in preparation for statewide rollout in 2013-14, as outlined in the TEACHNJ law.

"This is meaningful tenure reform that does what's best for our children while balancing the protection of due process for our principals and teachers," said Assemblymen Patrick J. Diegnan Jr. "This is real change that will ensure new teachers are properly trained and evaluated and that tenure charges are handled in a timely and professional manner. Our focus will be where it should be - making sure that our students have the best teachers in the classroom."

Since taking office, Governor Christie has worked to secure critical education reforms to better serve all New Jerseyans. These reforms include an expansion of charter school application approvals paired with more aggressive management and oversight for charter performance, the implementation of the Interdistrict School Choice program, making common sense changes to the school funding formula to increase fairness and attack fraud and abuse, raising state support to education to the highest level in history, and moving forward with bold reforms in the No Child Left Behind waiver to put in place a better accountability system and more effectively turn around failing schools. Earlier this year, the Governor signed the Urban Hope Act, establishing a pathway for the creation of high-quality alternatives for students in three low-performing districts.

Primary sponsors of the bill are Senators M. Teresa Ruiz (D-Essex), Kevin J. O'Toole (R-Bergen, Essex, Morris and Passaic) and Assemblymembers Patrick J. Diegnan, Jr. (D- Middlesex) Ralph R. Caputo (D-Essex) Jay Webber (R-Essex, Morris and Passaic), Albert Coutinho (D-Essex), Mila M. Jasey (D-Essex, Morris), Bonnie Watson Coleman (D-Hunterdon, Mercer), and Craig J. Coughlin (D-Middlesex).

###

Press Contact:
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Exhibit B

2017 WL 677015
Only the Westlaw citation is currently available.
Supreme Court of New Jersey.

Bound Brook Board of Education, Plaintiff-Appellant,

v.

Glenn **Ciripompa**, Defendant--Respondent.

Argued November 9, 2016
Decided February 21, 2017

Synopsis

Synopsis

Background: Board of education sought judicial review of an arbitration order, which found board had proven that tenured teacher engaged in unbecoming conduct, but had not proven sexual harassment. The Superior Court, Chancery Division, Somerset County, reversed the arbitrator's decision and remanded for a review before a new arbitrator. Teacher appealed. The Superior Court, Appellate Division, 442 N.J.Super. 515, 124 A.3d 1205, reversed and reinstated the award. Board's petition for certification was granted.

Holding: The Supreme Court, Timpone, J., held that arbitrator exceeded his authority by tasking board with substantiating charge of sexual harassment.

Judgment of the Appellate Division reversed and remanded.

West Headnotes (9)

Change View

1 **Alternative Dispute Resolution** Scope and Standards of Review
Judicial review of an arbitration award is very limited.

2 **Alternative Dispute Resolution** Limitation to statutory grounds
Alternative Dispute Resolution Scope and Standards of Review
An arbitrator's award is not to be cast aside lightly; it is subject to being vacated only when it has been shown that a statutory basis justifies that action.

3 **Alternative Dispute Resolution** Nature and Extent of Authority
Alternative Dispute Resolution Agreement or submission as determinative
Limits to an arbitrator's authority are defined by statute, as well as by the questions framed by the parties in a particular dispute. N.J. Stat. Ann. § 2A:24-8.

4 **Alternative Dispute Resolution** Conformity to Submission
An arbitrator's award should be consonant with the matter submitted; otherwise, the determination is contrary to the authority vested in him. N.J. Stat. Ann. § 2A:24-8.

5 **Alternative Dispute Resolution** Conformity to Submission
Alternative Dispute Resolution Actions exceeding arbitrator's authority
A claim that an arbitrator decided a legal question not placed before him or her by the parties is tantamount to a claim that the arbitrator imperfectly executed his or

her powers, as well as a claim that the arbitrator exceeded his or her authority within the meaning of the arbitration statute. N.J. Stat. Ann. § 2A:24-8(d).

6 **Education** Conduct unbecoming a teacher in general
Public Employment Conduct or Misconduct in General
Public Employment Sexual conduct
Proving hostile work environment is not necessary to satisfy the burden of showing unbecoming conduct that may serve as a basis for dismissing or reducing the compensation of a tenured employee of a public school system. N.J. Stat. Ann. § 18A:6-10.

7 **Education** Conduct unbecoming a teacher in general
Public Employment Conduct or Misconduct in General
A charge of unbecoming conduct by tenured public school teachers requires only evidence of inappropriate conduct by teaching professionals; it focuses on the morale, efficiency, and public perception of an entity, and how those concerns are harmed by allowing teachers to behave inappropriately while holding public employment. N.J. Stat. Ann. § 18A:6-10.

8 **Labor and Employment** Discharge
Arbitrator imperfectly executed his power and exceeded his authority by tasking board of education with substantiating charge of sexual harassment against tenured public school teacher, despite fact that board only brought charges of unbecoming conduct; board's complaint claimed that teacher engaged in unprofessional, inappropriate, and "potentially" harassing behavior, and basis for discipline was broader misconduct of undermining morale of co-workers and behaving inappropriately when students were present. N.J. Stat. Ann. §§ 2A:24-8 (d), 18A:6-10.

9 **Education** Conduct unbecoming a teacher in general
A school board is not required to prove a severe and pervasive effect for every harassment-based offense that buttresses a charge of unbecoming conduct by a tenured public school teacher; a school district will not be hamstrung by failing to establish a claim beyond unbecoming conduct. N.J. Stat. Ann. § 18A:6-10.

On certification to the Superior Court, Appellate Division, whose opinion is reported at 442 *N.J.Super.* 515, 124 *A.*3d 1205 (App. Div. 2015)

Attorneys and Law Firms

Robert J. Merryman argued the cause for appellant (Apruzzese, McDermott, Mastro & Murphy, attorneys).

Arnold M. Mellk argued the cause for respondent (Mellk O'Neill, attorneys; Edward A. Cridge, on the brief).

Robert A. Greitz argued the cause for amicus curiae New Jersey School Boards Association (Cynthia J. Jahn, General Counsel, attorney).

Opinion

JUSTICE TIMPONE delivered the opinion of the Court.

In this case we determine whether an arbitrator exceeded his authority by applying the standard for proving a hostile-work-environment, sexual-harassment claim in a law against discrimination (LAD) case to a claim of unbecoming conduct in a tenured teacher disciplinary hearing. We find that he did.

Defendant Glenn **Ciripompa** is a tenured high school math teacher, in the **Bound Brook** School District (District). The **Bound Brook** Board of Education (Board) charged defendant with two counts of unbecoming conduct. Reviewing under the Tenure Employees Hearing Law (TEHL), *N.J.S.A.* 18A:6–10 to -18.1, the arbitrator determined that the Board failed to prove that the conduct charged in the second count met the four-prong hostile work

environment test set forth in *Lehmann v. Toys 'R' Us, Inc.*, 132 *N.J.* 587, 603–04, 626 *A.*2d 445 (1993).

The arbitrator impermissibly converted the second charge into one of sexual harassment. Accordingly, we reverse the judgment of the Appellate Division and remand for arbitration with a new arbitrator to determine whether defendant committed unbecoming conduct, and any appropriate penalty.

I.

We distill the following pertinent facts from the record. Defendant's behavior came under Board scrutiny after the Board received copies of student Twitter posts alleging "Mr. C" was electronically transmitting nude photographs. An investigation uncovered defendant's pervasive misuse of his District-issued laptop and iPad, as well as evidence of inappropriate behavior toward female colleagues, often in the presence of students. The results of the investigation spurred the Board to seek defendant's termination from his tenured position and served as the substantive allegations of the two-count tenure complaint against defendant.

**4* Count I of the complaint, unambiguously labelled "Conduct Unbecoming," centered on defendant's improper use of the District-issued laptop and iPad. The District's policy prohibits "all employees and students using District computers, iPads and District networks" from accessing content for "illegal, inappropriate or obscene purposes, or in support of such activities." The complaint alleged that defendant had "received and signed for a copy of the District's acceptable use policy." Evidence adduced at the arbitration hearing established that defendant used the devices, sometimes during work hours, on the District computer network to send explicit pictures of himself and to seek similar pictures in return from various women on the internet. On the District-issued devices, defendant saved nude pictures and sexually explicit emails, sent and received by defendant, including negotiations for paid sexual services.

Count II, without a specific label, set forth the following allegations:

> 1. Teaching Staff members in the **Bound Brook** School District, including Mr. **Ciripompa**, receive training with respect to appropriate conduct towards staff members and workplace harassment on an annual basis.
>
> 2. During the 2013–14 School Year complaints were received about Mr. **Ciripompa's** inappropriate conduct towards female staff members.
>
> 3. Interviews of female staff members revealed that Mr. **Ciripompa** has repeatedly engaged in unprofessional, inappropriate and potentially harassing behavior towards female staff members.
>
> 4. On two occasions Mr. **Ciripompa** asked female staff members out on dates in front of students, thereby making the staff members very uncomfortable.
>
> 5. Mr. **Ciripompa** has repeatedly commented about the physical appearance and dress of female staff members, making them very uncomfortable.
>
> 6. Mr. **Ciripompa** sent flowers to a female staff member, using students to deliver the flowers, along with messages that the female staff member found to be inappropriate.

The concluding prayer for relief applied to both counts of the complaint. It stated that "the foregoing unbecoming conduct warrants [defendant's] dismissal from the **Bound Brook** Borough School District in accordance with *N.J.S.A.* 18A:6–10."

In support of the charges, the Board produced physical evidence taken from defendant's Board-issued computer and iPad, as well as testimonial evidence that defendant, in the presence of students, propositioned staff members to date him and commented on the physical appearance of female staff. Notably, defendant's remark about the tight fit of a female teacher's pants prompted a follow-up question by a student who was present when defendant uttered the remark. Defendant also used a student as his personal courier to deliver flowers and "inappropriate" messages to a colleague he was pursuing.

In accordance with the TEHL, the Board determined by a majority vote that the evidence supported the charges and warranted dismissal. The Commissioner of Education (Commissioner) reviewed the charges and agreed they warranted termination. The charges were then submitted for review by an arbitrator, pursuant to *N.J.S.A.* 18A:6–16. The arbitrator found that the Board had proven the allegations underlying Count I but dismissed

Count II with prejudice, reducing the penalty from dismissal to a 120–day suspension without pay.

The arbitrator began his analysis of Count II by noting that, "[w]hile the charges contained in Count II do not specifically state sexual harassment, it is clear from the nature of the allegations and the cited policy that this is in fact the case, as [defendant] has likewise recognized." The arbitrator then announced that, under this Court's decision in *Lehmann*, *supra*, 132 *N.J.* at 610, 626 *A.*2d 445, a successful claim for sexual harassment requires a showing that "working conditions were affected by the harassment to the point at which a reasonable woman would consider the working environment hostile." The arbitrator emphasized that the subjective feelings of the female staff members were insufficient to establish a hostile work environment claim. He found that defendant's conduct was not severe or pervasive enough to "modify the [female staff members'] behavior or routine in any material way." While announcing that defendant's "conduct cumulatively amounted to a shocking abdication of his professional responsibility" and "rais[ed] bad judgment to an art form," the arbitrator found, contrary to evidence presented, that defendant "had no prior warnings" concerning misuse of the computer system. The arbitrator concluded that misuse of the District-issued electronics did not justify defendant's removal from his tenured teaching position.

***5** Pursuant to *N.J.S.A.* 18A:6–17.1(e), the District sought review in the Superior Court, Chancery Division. The court reversed the arbitrator's decision, remanding it for a review before a new arbitrator. The court held that the arbitrator "erroneously changed the nature of Count II and imposed an inappropriate standard."

On appeal, the Appellate Division reversed the Chancery Division's decision vacating the arbitral award and reinstated the suspension. ***Bound Brook*** *Bd. of Educ. v.* ***Ciripompa***, 442 *N.J.Super.* 515, 518, 124 *A.*3d 1205 (App. Div. 2015). The panel found no error in the arbitrator's application of the *Lehmann* standard to the charges proffered against defendant. *Id.* at 526, 124 *A.*3d 1205.

We granted the Board's petition for certification, limited to the issue of whether the arbitrator's reliance on *Lehmann* in dismissing the Board's second charge of inappropriate and unprofessional conduct supported vacating the arbitrator's award. ***Bound Brook*** *Bd. of Educ. v.* ***Ciripompa***, 224 *N.J.* 280, 132 *A.*3d 422 (2016). We granted leave to the New Jersey School Board Association (Association) to appear as amicus curiae.

II.

The Board urges this Court to reverse the judgment of the Appellate Division, contending that the arbitrator's hostile work environment analysis was improper. The Board argues that there is a fundamental difference between charges of "unbecoming conduct" and "sexual harassment" and that the arbitrator improperly conflated the two to require the Board to prove a hostile work environment under *Lehmann*.

In support of the Board's position, the amicus Association maintains that the arbitrator lacked the authority to alter or rewrite the charges. The Association contends that the arbitrator should have limited his analysis to a determination of unbecoming conduct. The Association underscores the practical impossibility of trying to prepare and present appropriate evidence if "arbitrators [have] the ability to unilaterally change the charges presented." Further, the Association asserts that requiring the Board to prove hostile work environment "would be anathema in a school setting." It argues that schools would have no recourse against isolated but abhorrent incidents that would not rise to the level of a hostile work environment, yet would satisfy the standard of unbecoming conduct.

Defendant urges this Court to read the underlying facts of the count as predicated on allegations of sexual harassment sufficient to trigger a *Lehmann* analysis. Defendant highlights the Board's own reliance on *Lehmann* during questioning of witnesses and on its references to the sexual harassment policies as indicative of the true nature of Count II—sexual harassment.

III.

1 2 "Judicial review of an arbitration award is very limited." *Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko*, 202 *N.J.* 268, 276, 997 *A.*2d 185 (2010). "An arbitrator's award is not to be cast aside lightly. It is subject to being vacated only when it has been shown that a statutory basis justifies that action." *Kearny PBA Local # 21 v. Town of Kearny*, 81 *N.J.* 208, 221, 405 *A.*2d 393 (1979). We therefore begin with a review of the

circumstances under which a court may vacate an arbitral award and then consider whether this case merits such action.

A.

New Jersey's TEHL provides tenured public school teachers with certain procedural and substantive protections from termination. *N.J.S.A.* 18A:6–10 provides that no tenured employee of the public school system "shall be dismissed or reduced in compensation ... except for inefficiency, incapacity, unbecoming conduct, or other just cause." If the charges are substantiated, they are submitted for review by the Commissioner. *N.J.S.A.* 18A:6–11. If the Commissioner determines the tenure charges merit termination, the case is referred to an arbitrator. *N.J.S.A.* 18A:6–16. "The arbitrator's determination shall be final and binding," but "shall be subject to judicial review and enforcement as provided pursuant to *N.J.S.[A.]* 2A:24–7 through *N.J.S.[A.]* 2A:24–10." *N.J.S.A.* 18A:6–17.1. Pursuant to the cross-referenced statutes, there are four bases upon which a court may vacate an arbitral award:

> ***6** a. Where the award was procured by corruption, fraud or undue means;
>
> b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
>
> c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;
>
> d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.
>
> [*N.J.S.A.* 2A:24–8.]

Here, the issue is whether the arbitrator impermissibly transmuted Count II's allegation of unbecoming conduct into a charge of hostile work environment sexual harassment and thus measured the Board's claim against an improper legal standard, namely the standard articulated by this Court in *Lehmann*, *supra*, 132 *N.J.* at 603–04, 626 *A.*2d 445. This particular claim of error implicates subsection (d) of *N.J.S.A.* 2A:24–8.

3 4 "[L]imits to the arbitrator's authority ... are defined by statute, *N.J.S.A.* 2A:24–8," as well as "by the questions framed by the parties in a particular dispute." *Local No. 153, Office & Prof'l Emps. Int'l Union v. Tr. Co. of N.J.*, 105 *N.J.* 442, 449, 522 *A.*2d 992 (1987). Indeed, an arbitrator's award "should be consonant with the matter submitted. Otherwise, the determination is contrary to the authority vested in him." *Grover v. Universal Underwriters Ins. Co.*, 80 *N.J.* 221, 231, 403 *A.*2d 448 (1979); *cf. Tretina v. Fitzpatrick & Assocs.*, 135 *N.J.* 349, 359, 640 *A.*2d 788 (1994)("If the arbitrators decide a matter not even submitted to them, that matter can be excluded from the award." (quoting *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 129 *N.J.* 479, 548, 610 *A.*2d 364 (1992))).

The Third Circuit addressed "allegation[s] that the arbitrators exceeded their authority by resolving an issue the parties did not intend to submit" under 9 *U.S.C.A.* § 10(a)(4), which is virtually identical to *N.J.S.A.* 2A:24–8(d), by considering "whether the arbitrators manifestly exceeded their authority in interpreting the scope of the parties' submissions." *Metromedia Energy, Inc. v. Enserch Energy Servs.*, 409 *F.*3d 574, 579 (3d Cir. 2005), *cert. denied*, 546 *U.S.* 1089, 126 *S.Ct.* 1021, 163 *L.Ed.*2d 852 (2006).

The Third Circuit described how courts review claims that arbitrators have exceeded their authority:

> [A]rbitrators have the authority in the first instance to interpret the scope of the parties' submissions in order to identify the issues that the parties intended to arbitrate. When confronted with an allegation that the arbitrators exceeded their authority by resolving an issue the parties did not intend to submit, we will review the arbitrator's interpretation of the parties' intentions under a "highly deferential" standard. Nonetheless, this deference is not a rubber stamp, and our review must focus upon the record as a whole in determining whether the arbitrators manifestly exceeded their authority in interpreting the scope of the parties' submissions.
>
> [*Metromedia Energy, Inc.*, *supra*, 409 *F.*3d at 579 (discussing *Matteson v. Ryder Sys. Inc.*, 99 *F.*3d 108, 112–14 (3d Cir. 1996), *cert. denied*, 546 *U.S.* 1089, 126 *S.Ct.* 1021, 163 *L.Ed.* 2d 852 (2006)).]

5 *7 We agree that a claim that an arbitrator decided a legal question not placed before him or her by the parties is tantamount to a claim that the arbitrator "imperfectly executed [his or her] powers" as well as a claim that the arbitrator exceeded his or her authority within the meaning of *N.J.S.A.* 2A:24–8(d).

Having concluded that subsection (d) frames our review of this matter, we turn to the substance of the Board's claim.

IV.

We first review the standard applied to a claim of unbecoming conduct.

This Court has defined unbecoming conduct as conduct "which adversely affects the morale or efficiency of the [department]" or "has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." *In re Young*, 202 *N.J.* 50, 66, 995 *A.*2d 826 (2010) (alterations in original) (quoting *Karins v. Atl. City*, 152 *N.J.* 532, 554, 706 *A.*2d 706 (1998)). We have also held that a finding of unbecoming conduct "need not 'be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.' " *Karins*, *supra*, 152 *N.J.* at 555, 706 *A.*2d 706 (quoting *Hartmann v. Police Dep't of Ridgewood*, 258 *N.J.Super.* 32, 40, 609 *A.*2d 61 (App. Div. 1992)).

Even when the unbecoming conduct alleged has elements similar to those that might comprise a hostile work environment claim, this Court has explained that "[t]he absence of [harassment] evidence in this type of case is not critical.... [i]t is not necessary 'for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.' " *Karins*, *supra*, 152 *N.J.* at 561–62, 706 *A.*2d 706 (quoting *Connick v. Myers*, 461 *U.S.* 138, 152, 103 *S.Ct.* 1684, 1692, 75 *L.Ed.*2d 708, 723 (1983)).

6 7 Stated otherwise, proving hostile work environment is not necessary to satisfy the burden of showing unbecoming conduct. A charge of unbecoming conduct requires only evidence of inappropriate conduct by teaching professionals. It focuses on the morale, efficiency, and public perception of an entity, and how those concerns are harmed by allowing teachers to behave inappropriately while holding public employment. The Court has made it clear that the failure of a school board to prove a different offense does not preclude a finding of unbecoming conduct. In *Young*, *supra*, for example, this Court permitted tenure charges of unbecoming conduct based on a student's allegations of sexual abuse that were deemed unfounded by the Department of Children and Families (DCF). 202 *N.J.* at 68–69, 995 *A.*2d 826. We explained that although the "DCF might conclude that sexual contact between a student and his former teacher does not constitute abuse or neglect under *N.J.S.A.* 9:6–8.21(c)," that determination "is a far cry from suggesting that it is not conduct unbecoming a school employee." *Id.* at 69–70, 995 *A.*2d 826.

Because claims of hostile work environment, sexual harassment and unbecoming conduct are governed by separate, distinct legal standards and in separate, distinct legal contexts, we next turn to the specifics of this case to consider whether the arbitrator correctly determined that Count II of the Board's complaint was properly subjected to the *Lehmann* standard.

V.

8 *8 Count II of the Board's complaint claimed that defendant "engaged in unprofessional, inappropriate and potentially harassing behavior towards female staff members," and the coda to the complaint characterized the ground for termination, developed through both counts of the charges, as defendant's "unbecoming conduct." The Board framed the issue before the arbitrator as follows: "Has the Board of Education established the Tenure Charges of conduct unbecoming by a preponderance of the evidence?" This language clearly demonstrates that the basis for the complaint was a violation of the District's code of conduct by "engag[ing] in inappropriate language or expression in the presence of pupils." The Board's proofs in Count II focused on defendant's repeated propositions of his coworkers in the presence of students, his inappropriate use of students as couriers to deliver flowers and inappropriate messages to colleagues he was pursuing, and his lascivious comments, made in the presence of students, about a colleague's clothing.

While there is passing reference to defendant's "potentially harassing behavior" in the charge, even a cursory reading of the complaint, and the underlying facts and evidence,

demonstrate that the basis for discipline was broader misconduct of undermining the morale of his co-workers and behaving inappropriately when students were present.

This count was premised on the Board's assertion that defendant's actions violated Board Policy Number 4281, which addresses "Inappropriate Staff Conduct":

> School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils.
>
> The Commissioner of Education has determined inappropriate staff conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a public employee.

The arbitrator clearly recognized that the Board had proven inappropriate conduct when he found defendant's conduct to be a fundamental renunciation of his duties and obligations as a teacher that "raise[d] bad judgment to an art form."

Despite that conclusion, the arbitrator found that the Board failed to prove Count II. The arbitrator quoted Board Policy Number 3362—"Sexual Harassment"—and made only fleeting reference to the "Inappropriate Staff Conduct" policy in his discussion of Count II. The arbitrator then applied the *Lehmann* standard and found Count II to be unproven because the "complained of actions [did] not meet the generally recognized definition of hostile work environment sexual harassment and [did] not rise to that level."

There are settings in which sexual harassment claims may provide the underpinnings of an unbecoming conduct charge. This is not one of them. Count II of the complaint charges "unprofessional, inappropriate and potentially harassing behavior." The arbitrator disproportionately focused on the "potentially harassing" allegation in his analysis, ostensibly disregarding the word "potentially" and the remaining charges in the sentence. The coupling of "unprofessional, inappropriate and potentially harassing" should have forewarned the arbitrator that this was not a harassment charge. Indeed, the inclusion of the word "potentially" reveals that the Board was not claiming harassment per se.

9 The explanation we espoused in *Karins* is instructive: it is not necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Karins*, *supra*, 152 *N.J.* at 561–62, 706 *A.*2d 706 (quoting *Connick*, *supra*, 461 *U.S.* at 152, 103 *S.Ct.* at 1692, 75 *L.Ed.*2d at 723). Surely, a school board must not be required to prove a "severe and pervasive" effect for every harassment-based offense that buttresses a charge of unbecoming conduct. As this Court explained in *Young*, a school district will not be hamstrung by failing to establish a claim beyond unbecoming conduct.

*9 Here, the arbitrator erroneously faulted the Board for failing to prove a charge that it did not bring. The arbitrator erred in his reliance on *Lehmann* because he imposed a different and inappropriate standard of proof on the Board to sustain its unbecoming conduct in the presence of students claim. The arbitrator "imperfectly executed" his power by misinterpreting the intentions of the Board so significantly as to impose a sexual harassment analysis, when such an analysis was wholly ill-suited in this context. The *Lehmann* standards for hostile-work-environment, sexual-harassment claims arise in an entirely different context—under the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10:5–1 to -42.

"The LAD was enacted to protect not only the civil rights of individual aggrieved employees but also to protect the public's strong interest in a discrimination-free workplace." *Lehmann*, *supra*, 132 *N.J.* at 600, 626 *A.*2d 445. In *Lehmann*, we established the standard for a cause of action for hostile work environment sexual harassment claims under the LAD. *Lehmann*, *supra*, 132 *N.J.* at 592, 626 *A.*2d 445. This Court promulgated a four-prong test, under which the plaintiff must show that "the complained-of conduct: (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive." *Id.* at 603–04, 626 *A.*2d 445 (emphasis in original). That standard, however, is not implicated in a termination hearing under the TEHL. None of the female employees affected by defendant's actions are suing the District-employer for turning a blind eye to sexual harassment in the workplace. The instant matter is not an employee-versus-employer dispute that requires application of the *Lehman* standard. Indeed, that standard distorts the evaluatory method pertinent to this matter, making it inappropriate for consideration here.

The re-characterization of Count II erroneously tasked the Board with substantiating charges it did not file with evidence it did not proffer. The arbitrator's review was not "consonant with the matter submitted," *Grover, supra*, 80 *N.J.* at 231, 403 *A.*2d 448; rather, he "imperfectly executed his powers" as well as exceeded his authority by failing to decide whether Count II stated a successful claim of unbecoming conduct in support of termination. We find the arbitrator's award invalid under *N.J.S.A.* 2A:41–8(d).

VI.

The judgment of the Appellate Division reinstating the arbitrator's award is reversed, and the matter is remanded for arbitration with a new arbitrator to determine whether defendant committed unbecoming conduct, and any appropriate penalty.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ–VINA, and SOLOMON join in JUSTICE TIMPONE's opinion.

All Citations

--- A.3d ----, 2017 WL 677015

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Exhibit C

STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Tiffini Flynn Forslund; Justina Person; Bonnie Dominguez; and Roxanne Draughn,

Plaintiffs,

vs.

State of Minnesota; Mark Dayton, in his official capacity as the Governor of the State of Minnesota; the Minnesota Department of Education; and Brenda Cassellius, in her official capacity as the Commissioner of Education; St. Paul Public Schools, Independent School District 625; Anoka-Hennepin School District 11; Duluth Public Schools, Independent School District 709; West St. Paul-Mendota Heights Eagan Area Schools, Independent School District 197,

Defendants.

Court File No. 62-CV-16-2161
Case Type: Other Civil

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT

This matter came on for hearing on Defendants' motion to dismiss pursuant to Minn. R. Civ. P. 12.02 (a) and (e) on July 14, 2016. James R. Swanson, Esq., Jesse Stewart, Esq., Frederick Finch, Esq. and Nekima Levy-Pounds, Esq. appeared on behalf of plaintiffs. Alethea Huyser, Esq. appeared on behalf of Defendants State of Minnesota, Minnesota Department of Education, Governor Mark Dayton and Minnesota Commissioner of Education Brenda Cassellius. Elizabeth Veira, Esq. appeared on behalf ISD No. 709, Duluth Public Schools. Peter Mikhail, Esq. appeared on behalf of ISD No. 625, St. Paul Public Schools. John Baker, Esq. and

Jeanette Bazis, Esq. appeared on behalf of ISD No. 11, Anoka-Hennepin School District. James K. Martin Esq. appeared on behalf of Defendant, Independent School District No. 197, West St. Paul, Mendota Heights, Eagan Public Schools ("ISD 197"). The parties filed their final submissions August 19, 2016 and the Court took the matter under advisement at that time.

The Court having considered the submissions and arguments of counsel, and upon all the files, records and proceedings herein, issues the following:

ORDER

1. The Defendants' Motions to Dismiss Plaintiffs' Amended Complaint are granted in their entirety.

2. Plaintiffs' Amended Complaint is dismissed with prejudice.

2. The attached Memorandum is made a part hereof and incorporated by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY.

26 October 2016

BY THE COURT:

Margaret M. Marrinan
Judge of District Court

MEMORANDUM

A. BACKGROUND

Plaintiffs are the parents and guardians of five children who currently attend or have attended the Defendant school districts. Their Amended Complaint asks the Court to find M.S. §§ 122A.40 (the "Continuing Contract Law") and 122A.41 (the "Tenure Act") unconstitutional in all applications and to wholly enjoin their application. Specifically, Plaintiffs allege that these statutes are unconstitutional under the following provisions of the Minnesota Constitution: Education Clause (Art. XIII, § 1), Due Process Clause (Art. I, § 7) and the Equal Protection Clause (Art. I, § 2). (AC. ¶ 25.) Regarding the Education and Due Process Clauses, Plaintiff allege that the statutes violate these provisions both facially and as-applied. Regarding the Equal Protection Clause, they challenge the statutes' constitutionality as-applied. In addition to asking that the Court declare these statutes unconstitutional, Plaintiffs seek a permanent injunction enjoining the enforcement, application or implementation of the statutes, or substantially similar statutes, in the future. (AC. p.74 ¶¶ 4-5).

Since their inception in 1927, laws governing teacher tenure have been revised several times.[1] No Minnesota court has previously held that the state's tenure and continuing contract laws violate the Minnesota Constitution. Plaintiffs claim that as implemented today, however,

[1] Christine Ver Ploeg, *Terminating Public School Teachers for Cause under Minnesota Law*, 31 Wm. Mitchell L. Rev. 303, 306 (2004).

these tenure and contract laws put low income students and students of color at risk of having ineffective teachers and, as such, are unconstitutional.

For the reasons set forth below, the Court finds that it lacks subject matter jurisdiction to adjudicate the allegations in Plaintiffs' Amended Complaint, and that the Plaintiffs have also failed to state a claim upon which relief can be granted as a matter of law. As a consequence, the Amended Complaint is dismissed with prejudice.

B. PLAINTIFFS' ALLEGATIONS

For purposes of this motion to dismiss, the Court accepts the factual allegations pled by Plaintiffs as true.

More than 92% of Minnesota children attend the state's more than 2000 public schools, which serve a diverse population of more than 840,000 students. (AC.¶ 2) In the aggregate, Minnesota children continue to outpace their peers from other states on the National Assessment of Educational Progress ("NAEP"), considered "the Nation's Report Card"). (AC. ¶ 4). Despite this, the majority graduate high school unprepared to succeed in college. (AC. ¶ 6).

Dramatic opportunity gaps among the students exist across socioeconomic status, race and ethnicity. These persist throughout the course of the children's education. (AC.¶ 7). Minnesota's disparities in academic outcomes are among the worst in the nation and are reflected in its high school graduation rates. (¶ 11). Despite legislative mandates to close this achievement gap, most Minnesota public schools have failed to make significant progress in narrowing it. (AC. ¶ ¶ 12-15).

Minnesota has adopted statutes relating to the manner in which school districts employ teachers, specifically M.S. § 122A. 40 ("Continuing Contract Law") and M.S. § 122A.41 ("Teacher Tenure Act"). The first applies to most school districts throughout the state, the second

to school districts serving cities of the first class, including Defendants ISD 625 (St. Paul) and ISD 709 (Duluth). For purposes of this litigation, the provisions of these statutes are identical, and the Court will refer to the statutes collectively as the "Challenged Statutes".

Plaintiffs allege that the provisions regarding hiring and retention of teachers found in these statutes perpetuate the achievement gap and affect students statewide. (AC. ¶¶ 16-18). Specifically, the Challenged Statutes force school leaders to: 1) grant new teachers virtually permanent employment after three years on the job; 2) keep ineffective teachers long after they have shown themselves to be ineffective; and 3) terminate less-senior teachers when budget constraints require staff reductions, regardless of whether these teachers achieve better results for their students than more senior teachers. (AC. ¶ 17). Nonetheless, teachers laid off under these statutes are both effective and ineffective teachers. (AC. ¶ 112.)

As the Amended Complaint applies to the specific Plaintiffs, the following are accepted as facts for purposes of this motion:

1. Anoka-Hennepin School District 11

The allegations pertaining to Plaintiff Forslund appear at AC. p.8, ¶27; pp. 38-40, ¶¶139-144; pp. 52-53, ¶¶184-187, and p. 62, ¶218.

Plaintiff Forslund's daughter K.F., age 17, is an African American student in an unidentified AHSD school. (AC ¶27). K.F. qualifies for free or reduced-price lunch.

The Amended Complaint alleges that K.F. has been assigned to an ineffective teacher, or is at substantial risk of being assigned to an ineffective teacher, or both (AC ¶27.) However, it does *not* allege that K.F. is:

1) Being taught by an ineffective teacher, or is about to be taught by one;

2) Currently assigned to, or about to be assigned to, and ineffective teacher;

3) Attending, or about to attend, a school that serves predominantly low-income students and students of color, or a school serving the highest percentages of low-income students and students of color.

Although the Amended Complaint alludes to differences in the quality of teachers at two elementary schools (Evergreen Park Elementary and Andover Elementary) (AC ¶¶ 139-44), it does not allege that 17-year old K.F. is attending any elementary school. In fact, Plaintiffs acknowledge that K.F. attends neither of these schools. How this information relates to Plaintiff Forslund's child is not explained.

Plaintiff makes no reference to her child's grades or other indicia of academic performance, or that s/he has suffered as a result of being enrolled in this school district.

Plaintiffs also allege that, "[u]pon information and belief, the Anoka-Hennepin Public Schools grant tenure to, and continue to employ ineffective teachers, including teachers directly responsible for K.F.'s education" and "engage in quality-blind layoffs which have the effect of depriving K.F. of the opportunity to learn from effective teachers." (AC. ¶ 218.) However, K.F. does not identify what about her teachers at Anoka–Hennepin School District 11 she believes makes them ineffective or any adverse consequences she claims to have suffered as a result.

In sum, Plaintiff Forslund fails to 1) allege any action or inaction by this defendant in relation to these schools; 2) identify what it is about the teachers that she believes make them ineffective; and 3) establish any nexus between the elementary schools and her 17-year old child (and thus what adverse consequences her child has suffered).

2. West St. Paul-Mendota Heights-Eagan Area Schools, ISD

The allegations pertaining to Plaintiff Justina Person's Complaint against this Defendant appear at AC. p.8, ¶28, pp.40-43, ¶¶145-150, pp. 54-55, ¶¶188-191; and p. 61, ¶ 217.

Plaintiff Person is the mother of J.C., age 14, and D.C., age 8, both of whom are presently students in the West St. Paul–Mendota Heights–Eagan Area Schools, Independent School District 197. They are Caucasian, and qualify for free or reduced-price lunch.

Dissatisfied with the teachers to whom her children were assigned in their previous school district (St. Paul Public Schools, ISD 625), Plaintiff Person transferred them to ISD 197 (AC. ¶ 217), and alleges that "as a direct result of the Challenged Statutes, J.C. and D.C. have been assigned to an ineffective teacher" and remain at substantial risk of being assigned to ineffective teachers. (AC. ¶28.)

As with Ms. Forslund, Plaintiff Person alludes to a comparison between two schools (Moreland Arts & Health Magnet and Mendota Elementary School) within the district. She alleges that Moreland has a greater number of low-income students and ineffective teachers than Mendota. Plaintiffs acknowledge that J.C. and D.C. do not currently attend either of these schools.

Plaintiff does not allege that either child has been assigned to an ineffective teacher while enrolled in ISD 197. Rather, as do the other Plaintiffs, she speculates that the children are at a "substantial risk" of being assigned to an "ineffective teacher". Similarly, she makes no reference to her children's grades or other indicia of academic performance, or that they have suffered as a result of being enrolled in this school district.

Thus, Plaintiff Person fails to 1) allege any action or inaction by this defendant in relation to these schools; 2) identify what it is about the teachers that she believes make them ineffective;

3) establish any nexus between the elementary schools and her 17-year old child (and thus what adverse consequences her child has suffered).

The Amended Complaint fails to define the term "ineffective teacher" or the standard or method by which an "effective teacher" is distinguished from an "ineffective teacher".

3. St. Paul Schools, ISD 625

The allegations pertaining to ISD 625 are found at AC. pp. 8-.9, ¶ 28 and¶ 30; pp.32-34, ¶¶125-131; pp. 49-52, ¶¶ 176-179; p. 59, ¶ 209 and p. 61, ¶217. Two Plaintiffs make allegations against this Defendant.

The first, Justina Person, described immediately above, moved her children to ISD 197 from ISD 625 following experiences with ineffective teachers in the St. Paul Public Schools. (AC.¶ 28). Ms. Persons does not identify the St. Paul schools her children attended, but alleges that they "have been assigned an ineffective teacher who impedes their equal access to the opportunity to receive a uniform and thorough education" and that "they transferred from the St. Paul Public Schools" as a result. She alleges "upon information and belief" that ISD 625 granted tenure to, and continues to employ the ineffective teachers directly responsible for her children's education.

The second, Roxanne Draughn, is the mother of A.D., age 7. A.D. is African American, qualifies for FRL, and attended an unidentified school in St. Paul, where a substantial majority of the students qualified for FRL and identify as students of color. Ms. Draughn alleges that A.D.'s school's performance on the MCAs lags behind statewide averages, and that "on information and belief, he attends (and has previously attended) a public school that has more than its proportionate share of ineffective teachers." (AC. ¶ 209.)

Ms. Draughn draws a comparison between two elementary schools in the St. Paul Public Schools (Obama Elementary and Horace Mann Elementary) and alleges disparities in student performance based upon a disparities between the effectiveness of teachers at each of these schools. Nowhere does Plaintiff allege that her son attends either school. Nor does she make any reference to her child's grades, or other indicia of academic performance, or that he has suffered as a result of being enrolled in this school district.

As do the other Plaintiffs, she alleges "on information and belief" that her son "has been assigned to, and/or is at substantial risk of being assigned to, an ineffective teacher"....and is "disproportionately more likely to be assigned to ineffective teachers....than students who attend schools that serve more affluent populations...."(AC.¶ 209).

By letter dated August 11, 2016, counsel for Plaintiff Draughn advised the Court that she has withdrawn A.D. from the St. Paul Public Schools for the 2016-17 school year and has enrolled him in a public charter school.

A.D., J.C., and D.C. do not identify the basis upon which they allege that their teachers in St. Paul are ineffective or what adverse consequences they claim to have suffered as a result.

4. ISD 709 (Duluth Public Schools)

The allegations pertaining to Plaintiff Dominguez are found at the following paragraphs of the Amended Complaint: p. 9, ¶29; p. 35, ¶¶132-134; p. 51, ¶¶ 180-182; and p.60, ¶210.

This Plaintiff alleges that a) her 13-year old child is Native American and qualifies for free or reduced-priced lunch; b) because of the Challenged Statutes she "has been assigned to, and/or is at substantial risk of being assigned to an ineffective teacher who impedes [her] equal access to the opportunity to receive a uniform and thorough education, and that [she] lacks notice of and opportunity to challenge the same". ¶29.

At pages 35 and 51 of the Amended Complaint, a comparison of two schools within the district is made. At p. 60, Plaintiff alleges that her daughter "currently attends (and has previously attended) a school where a significant majority of students qualify for FRL", that a substantial share of her classmates are students of color, and that her schools lag well-behind district and state performance averages on the Minnesota Comprehensive Assessments ("MCAs"). E.Q. does not identify the school she attends. Nor does she allege that ISD 709 has another school that serves the same grade levels as E.Q.'s school and that serves a more affluent student body with fewer students of color.

She goes on to allege that "[o]n information and belief, [her daughter] has been assigned to, and/or is at substantial risk of being assigned to, an ineffective teacher, at the same time that students in other classrooms in the same school are assigned to effective teachers, and is likely to be assigned to more ineffective teachers than students who attend schools that serve more affluent populations where fewer children identify as students of color..."

Plaintiff makes no reference to her child's grades, or other indicia of academic performance, or that she has suffered as a result of being enrolled in this school district.

Plaintiff Dominguez fails to 1) allege any action or inaction by this defendant in relation to these schools; 2) identify what is it about her teachers that she believes make them ineffective; and 3) identify what adverse consequences her daughter has suffered as a result.

5. State Defendants

Plaintiffs also assert claims against the State of Minnesota, Governor Mark Dayton, the Minnesota Department of Education, and Commissioner of the Minnesota Department of Education, Dr. Brenda Cassellius.

Plaintiffs sue the State of Minnesota based on its "plenary responsibility for educating all Minnesota public school students" and allege that the remaining State Defendants have some general oversight over education. Plaintiffs neither allege that any of Plaintiffs' children attend a school run by a State entity, nor assert that any named State Defendant has legal authority to hire, fire, supervise, or assign individual teachers.

6. General Allegations

Plaintiffs' Amended Complaint also contains a number general allegations that are not specific to either the Plaintiffs or Defendants in this case. Among them:

a. The key, in-school determinant of student success is teacher quality, and high-quality instruction from effective teachers helps students overcome disadvantages associated with socioeconomic status. (AC. ¶¶45-50).

b. Students are harmed by the hiring and retention of "ineffective teachers". (AC ¶¶57-58, 64, 70).

c. Low-income students and students of color are more likely to be taught by "ineffective teachers" than students attending schools serving more affluent and/or majority-white populations. (AC.¶19).

d. There is a connection between tenure laws, "ineffective teachers" and achievement disparities among students based on socioeconomic status, race and ethnicity (AC.¶¶7-11).

e. Each of the defendant districts are less proficient on standardized tests due to a concentration of 'low-performing", "ineffective" teachers in schools serving the highest percentages of low-income students and students of color. (AC. ¶¶125-150).

f. Similarly, these teachers have less classroom experience than teachers at schools serving more affluent or more majority-white student populations. (AC.¶¶176-191).

g. In aggregate, Minnesota public school children outperform students in nearly every other state, and outpace peers from other states on the National Assessment of Educational Progress ("NAEP"), "the Nation's Report Card." (AC.¶¶ 1, 3).

Plaintiffs draw no direct connection between the statistics they cite regarding teachers' years of classroom experience and student performance or teacher effectiveness. (AC.¶¶176-191). Defendants, also citing NAEP, have presented public data showing that despite the existence of achievement gap disparities, Minnesota students of all backgrounds perform at or near national averages. Defendants also point to data on Minnesota charter schools, which are not subject to state tenure laws, yet which are disproportionately among the poorest performing schools in Minnesota. Plaintiffs have not addressed this public data, which is available on the Minnesota Department of Education website.

C. ANALYSIS

1. Minnesota's Statewide Education System

The Education Clause of the Minnesota Constitution emphasizes the importance this state places on universal education:

> "The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public

> schools.....[and to] make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state....[2]

Historically Minnesota has placed education at the pinnacle of the state's priorities. There is no statewide school board: control over employment decisions at the schools rests with the local school districts. These districts have the discretion to determine the protocol for hiring teachers, evaluating their performance, and implementing statutory requirements for mentoring, educating and improving teaching practices. With this discretion comes the ability to address and remove non-performing teachers. None of the State Defendants have legal authority over the hiring, evaluation or discharge of the teachers.

With more than 840,000 students, over 2,000 public schools and 55,277 public school teachers, state education policy is complex and expansive. The importance of education is reflected in comprehensive and continually evolving legislation that addresses academic standards, curriculum and assessment and accountability.[3]

Although public school students in the state tend to outperform students in other states, Minnesota has an achievement gap in public education that stretches across socioeconomic, racial and ethnic lines. (AC.¶¶ 7-11). Concerned about the gap, the legislature has prioritized closing it by adopting statutes that require school boards to adopt comprehensive, long-range strategic plans designed to achieve that goal. In 2016, it required each district's strategic plan to

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[2] Minn. Const. Art. XIII § 1.The Amended Complaint makes no claim regarding the State's funding duties.

[3] M.S. §§120B.018-.09; §§ 120B.10-.236; and§§ 120B.299-.365, respectively.

include a process to examine "the equitable distribution of diverse, effective, experienced and in-field teachers and strategies to ensure low-income and minority children are not taught at higher rates than other children by inexperienced, ineffective, or out-of-field teachers..."[4]

Although the epicenter of Amended Complaint is the premise that Plaintiffs' children have the potential to be exposed to "ineffective" teachers, nowhere is this term defined. For purposes of the claims alleged here, the Court must assume that it refers to teachers whose ineffectiveness merits discharge. Plaintiffs do allude to a 2012 survey of Minnesota public school teachers (the "MinnCAN Survey") in which those teachers polled[5] believed that 82.5 % of teachers are effective, and 17.4 % ineffective. ("Ineffectiveness" was defined as being unable "to advance student learning such that, on average, students demonstrate at least one year of academic learning during a school year") AC. ¶ 59. More than 90% of the responses attributed the main reason for "ineffectiveness" to factors *other than* teacher experience or ability.

2. **Background of Teacher Tenure in Minnesota**

Minnesota's first tenure law was adopted in 1927,[6] in order to ensure that teacher employment was driven by job performance.[7] The Challenged Statutes provide a legal

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[4] 2016 Minn. Session Laws, art. 25, §§ 9-12.

[5] The Amended Complaint neither reveals the number of teachers responding to this survey nor what percentage of "ineffective" teachers are tenured or non-tenured.

[6] Act of March 14, 1927, Ch. 36, 1927 Minn. Laws 42–44. Minnesota's first tenure law applied only to teachers in so-called "cities of the first class"—i.e., Minneapolis, St. Paul, and Duluth. Minn. Stat. § 2935-1 *et seq.* (Mason 1927). Approximately ten years later, continuing contracts were extended to teachers in other districts. Minn. Stat. § 2903 (Mason 1938). Although Minnesota law continues to maintain two separate statutory provisions for tenure and continuing contracts, the provisions at issue in this case are now largely similar. As such, the Court refers to both as "tenure" laws, differentiating only where necessary.

[7] *McSherry v. City of St. Paul*, 277 N.W. 541, (Minn. 1938).

framework for teacher employment decisions made by local school districts, while guaranteeing certain procedural due process protections for teachers.[8] Minnesota law expressly allows districts to terminate or remove any teacher for cause, including for poor teaching.[9]

In *McSherry v. St. Paul,* the Supreme Court reasoned that the purpose of these laws was to protect students and improve the quality of their education through development of a professional teaching staff. It described tenure as having as its basis "the public interest, in that most advantages go to the youth of the land and to the schools themselves rather than the interest of teachers as such" and that it had been adopted so that "better talent would be attracted to the profession." [10] Addressing the genesis of tenure laws, the Court referenced the spoils system that had come into prominence during the presidency of Andrew Jackson, and had flourished for years afterward. To combat these abuses, the principles of the first national civil service act (1883) were later adopted for the teaching profession because "it was thought that for the good of the schools and general public the profession should be made independent of personal or political influence, and made free from the malignant power of spoils and patronage"[11].

The Court went on to elaborate on the legislative intent underlying teacher tenure:

> Plainly, the legislative purposes sought were stability, certainty, and permanency of employment on the part of those who had shown by educational attainment and by probationary trial their fitness for the teaching profession. By statutory direction and limitation there is

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[8] For example, see M.S. §§ 122A.40-.41 (Employment Contracts and Teacher Tenure Act).
[9] M.S. §§ 122A.40, subds. 9, 13; 122A.41, subd. 6.
[10] *Supra,* at 544.
[11] *Id.* at 543.

> provided means of prevention of arbitrary demotion or discharges by school authorities. [The act].....was enacted for the benefit and advantage of the school system by providing such machinery as would tend to minimize the part that malice, political, or partisan trends, or caprice might play. It established merit as the essential basis for the right of permanent employment. On the other hand, it is equally clear the act does not impair discretionary power of school authorities to make the best selections consonant with the public good. . . . The right to demote or discharge provides remedies for safeguarding the future against incompetence, insubordination, and other grounds stated in the act.[12]

More recently, in 1992, the Minnesota Supreme Court explained that "[t]eachers, whose primary task is to impart knowledge to students through personal interaction, are given the security of tenure to assure their academic freedom and to protect them from arbitrary demotions and discharges unrelated to their ability to perform their prescribed duties."[13] Still other Minnesota courts have described the tenure laws as "wise legislation, promotive of the best interests, not only of teachers affected, but of the schools as well." [14]

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[12] *Id.* at 544.
[13] *Frye v. Indep. Sch. Dist. No.* 625, 494 N.W.2d 466, 467 (Minn. 1992).
[14] *Oxman v. Indep. Sch. Dist. Of Duluth,* 227 NW 351 (Minn. 1929).

3. Teacher Tenure and Continuing Contract Laws

Statutes governing the manner in which school districts employ teachers are broken into two categories:

1) The "Teacher Tenure Act" (M.S. §122A.41), applicable to cities of the first class (here, ISD 625 and ISD 709); and

2) The "Continuing Contract Law" (M.S. § 122A.40), applicable to the remaining defendants and all other school districts in the state.

The statutory framework for teacher tenure in all Minnesota school districts is straight-forward, and all school districts in the state are subject to it. Where a district fails to follow the provisions of either M.S. §§ 122A.40 or 122A.41, as applicable, its employment action against a teacher is deemed ineffective. [15] New teachers are considered probationary employees for at least three years. During that time, they must receive at least three evaluations in each school year by a peer review committee. Probationary teachers can be discharged, demoted, or have their contracts non-renewed, and they have no rights of appeal should that occur.[16]

Many effective teachers complete probation successfully and achieve tenure (AC. ¶¶ 53, 65).[17] For those who do so, they "shall continue in service and hold [the] respective position during good behavior and efficient and competent service and must not be discharged or demoted except for cause after a hearing".[18]

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[15] *Perry v. ISD No. 696,* 210 NW2d 283, 287 (Minn. 1973).
[16] M.S. §§ 122A.40, subd. 5; 122A.41, subd. 2.
[17] The Court will use the word "tenure" to apply to both M.S. §§122A.40 and 122A.41.
[18] M.S. §§ 122A.40, subd. 7.

Tenured teachers can be terminated for cause, including: (1) inefficiency or gross inefficiency in teaching; (2) neglect or willful neglect of duty or persistent violation of school laws, rules, regulations, or directives; (3) conduct unbecoming a teacher, insubordination, immoral conduct, conviction of a felony; (4) failure without justifiable cause to teach; (5) other good and sufficient grounds that render the teacher unfit to perform the teachers' duties.[19]

Individual employment decisions on teacher probation, tenure, and dismissal are made at the local school district level, and the details about the implementation of the statutory requirements are negotiated as part of collecting bargaining agreements. M.S. §§ 122A.40, 122A.41.

Once a teacher obtains tenure, school districts provide development opportunities and evaluation once a teacher obtains tenure. They must implement teacher evaluation and peer review processes in order to "develop, improve, and support qualified teachers and effective teaching practices." [20] In addition to defining affirmative goals to improve teaching quality, districts must address any teacher not meeting professional standards through a teacher improvement plan with established goals and timelines. If the teacher fails to make adequate progress while on an improvement plan, discipline is required including possible termination, discharge, or nonrenewal.[21]

Tenure laws include reduction-in-force provisions that govern default procedures to be followed if conditions, such as budget or lower student enrollment, require a decrease in teacher staffing. Although Minnesota law provides that "[i]n the event it becomes necessary to

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[19] M.S. §§ 122A.40, subds. 9, 13; 122A.41, subd. 6.
[20] M.S. §§ 122A.40, subd. 8(b); 122A.41, subd. (5)(b).
[21] M.S. §§ 122A.40, subd. 8 (12), (13); 122A.41, subd. 5 (13).

discontinue one or more positions . . . teachers must be discontinued in any department in the inverse order in which they were employed", *it does not mandate the use of this system.* Instead, it expressly allows school boards and teacher representatives in the district to negotiate "a plan providing otherwise".[22]

Plaintiffs' concerns in this case relate to areas currently subject to active policymaking by the Minnesota Legislature. As mentioned above, in the 2015-2016 legislative session, the Minnesota Legislature passed several laws germane to the allegations in Plaintiffs' Amended Complaint:

1) A statutory commitment to teacher assessment, development, and improvement specifically intended to provide for "improved and equitable access to more effective and diverse teachers." [23]

2) A body of laws specifically enacted "to pursue racial and economic integration and increase student achievement, create equitable educational opportunities, and reduce academic disparities. . . ." [24]

3) A requirement that Districts are to publish long-term plans which address "equitable distribution of diverse, effective, experienced and in-field teachers and strategies to ensure low-income and minority children are not taught at higher rates than other children by inexperienced, ineffective, or out-of-field teachers".[25]

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[22] M.S. §§ 122A.41, subd. 14; 122A.40, subd.10-11.
[23] Act of June 1, 2016, ch. 189, 2016 Minn. Laws 1, art. 24, §§ 6-7 (to be codified at M.S. §§122A.40, subd. 8; 122A.41, subd. 5).
[24] *Id.*, and M.S. § 124D.861, subd. 1 (a).
[25] *Id.* at art. 25, §§9-12.

4) Unless unavoidable, a student must not be taught in two consecutive years by a teacher who is on an improvement plan.

D. CONCLUSIONS OF LAW

Defendants argue that Plaintiffs' Amended Complaint fails for lack of subject matter of jurisdiction and for the failure to state a cognizable claim. The Court addresses each in turn.

Minn. R. Civ. P. 12.02 provides several bases upon which a complaint may be dismissed. Those pertinent here are 1) the lack of subject matter jurisdiction (Minn. R. Civ. P. 12.02 (a)) and 2) the failure to state a claim upon which relief can be granted. (Minn. R. Civ. P. 12.02 (e)).

1. Lack of Subject Matter Jurisdiction

A complaint must be dismissed if the court lacks jurisdiction over the subject matter of the complaint. Minn. R. Civ. P. 12.08 (c).

Standing, a threshold issue to jurisdiction, relates to the Court's authority to redress an injury through coercive relief. It falls under the broader umbrella of justiciability, which "forms a threshold for judicial action and requires, in addition to adverse interests and concrete assertions of rights, a controversy that allows for specific relief by a decree or judgment of a specific character as distinguished from an advisory opinion predicated on hypothetical facts...When a lawsuit presents no injury that a court can redress, the case must be dismissed for lack of justiciability"[26].

To establish a justiciable controversy in a declaratory judgment action that challenges the constitutionality of a law, a plaintiff must show "a direct and imminent injury which results from

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[26] *State ex rel. Sviggum v. Hanson,* 732 NW2d 312, 321 (Minn. App. 2007).

the alleged unconstitutional provision and that "the law is, or is about to be, applied to his disadvantage".[27] The mere possibility of injury is not enough to establish justiciability (*Id.)* and an action is justiciable only if it "(a) involves definite and concrete assertions of right that emanate from a legal source, (b) involves a genuine conflict in tangible interests between parties with adverse interests, and (c) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion". [28] Where the complaint "does not state a cognizable claim or cause of action under the substantive law", dismissal is proper.[29] Finally, where claims present nonjusticiable political questions, the court lacks subject matter jurisdiction.[30]

A. Standing

Standing is essential to the existence of a justiciable controversy, and lack of it bars consideration of the claim by the court"[31]. Put succinctly, the question of standing is whether the litigant is entitled to have the court decide the merits of a particular issue. It requires that a party have a sufficient stake in a justiciable controversy to seek relief from the court[32] and that s/he "articulate a legally cognizable interest …suffered because of the State's action and that differs

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[27] *McCaughtry v. City of Red Wing,* 808 NW2d 331, 337 (Minn. 2011).
[28] *Cincinnati Ins. Co. v. Franck,* 621 NW2d 270, 273 (Minn. App. 2001).
[29] 1 David F. Herr& Roger S. Hadock, *Minnesota Practice* § 12.9, at 366 (5th ed. 2009)
[30] "What is generally meant, when it is said that a question is political, and not judicial, is that it is a matter which is to be exercised by the people in their primary political capacity, or that it has been specifically delegated to some other department or particular officer of the government, with the discretionary power to act…" *In re McConaughy*, 119 N.W. 408, 417 (Minn. 1909).
[31] *In re Custody of D.T.R.,* 796 NW2d 509, 512 (Minn. 2011).
[32] *Lorix v. Crompton Corp.,* 736 NW2d 619, 624 (Minn. 2007).

from injury to the interests of other citizens generally"[33]. Without these requirements, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights". [34] The "standing inquiry [is] especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by another branch of government is constitutional"[35], and the court must be careful to "abstain from encroaching on the power of a coequal branch" of government [36].

To establish standing, a plaintiff bears the burden of showing 1) an injury-in-fact; 2) traceability; and 3) redressability.[37]

(1) Injury-in-fact

For an injury-in-fact, the plaintiff must show a "concrete and particularized invasion of a legally protected interest"[38], and that the harm claimed is "personal, actual or imminent.[39] Where an issue has "no existence other than in the realm of future possibility [it is] purely hypothetical and...not justiciable".[40]

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[33] *Webb Golden Valley, LLC v. State,* 865 NW2d 689, 693 (Minn. 2015).
[34] *Warth v. Seldin,* 95 S.Ct. 2197, 2205 (1975).
[35] *Clapper v. Amnesty Intern.,* 133 S.Ct. 1138, 1147 (2013).
[36] *State ex rel Sviggum, supra.*
[37] *Riehm v. Comm'r of Public Safety,* 745 NW2d 869, 873 (Minn. Ct. App. 2008). See also *All. For Metro. Stability v. Metro Council,* 671 NW2d 905,913 (Minn. App. 2003).
[38] *Lorix v. Crompton Corp.,* 736 NW2d 619, 624 (Minn. 2007). *See also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992).
[39] *Riehm, supra,* at 873.
[40] *Lee v. Delmont,* 36 NW2d 530, 537 (1949).

As it relates to the State Defendants, the Amended Complaint does not allege that any of them make any decision regarding the hiring, retention or assignment of Plaintiffs' teachers. Consequently it also fails to allege any specific harm allegedly caused by these parties.

As to each of the named school districts, Plaintiffs have failed to establish an injury-in-fact. There is no claim that an action (or inaction) of the defendant districts has resulted in personal, actual or imminent harm to them. Rather than being pled with the concrete, particularized information required by case law, the Amended Complaint is couched in generalized, conclusory terms. Plaintiffs allege that they have "been assigned to, and/or [are] at substantial risk of being assigned to, an ineffective teacher who impedes [their] equal access to the opportunity to receive a uniform and thorough education". It is only in the complaint against ISD 625 (the St. Paul School District) that a Plaintiff alleges her children actually have been assigned to an "ineffective" teacher. Yet even in that case, there is no definition of what an "ineffective" teacher might be.

(2) Traceability

Nor do *any* of the Plaintiffs identify any negative consequences that have resulted *to them* from the assignment of their teachers. Standing requires that Plaintiffs allege that they themselves have been injured: the harm alleged "must affect [them] in a personal and individual way"[41] , and they must plead "concrete facts showing that the Defendants' *actual actions* have caused the substantial risk of harm" (emphasis supplied)[42]. Nowhere do Defendants allege that

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[41] *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 n. 1(1992).
[42] *Clapper v. Amnesty Int'l USA,* 133 S.Ct. 1138, 1150 (2013).

the actual actions of any of the Defendant school districts have caused a substantial risk of harm to Plaintiffs' children. Rather, they place the onus on the Challenged Statutes.

Being creatures of statute, school districts and their boards have only such powers as are conferred on them by the legislature.[43] Plaintiffs acknowledge that the Defendant school districts are required to follow these statutes (AC.¶ 74). This being the case, there is no genuine conflict in adverse interests between these parties. As discussed above, where there is no genuine conflict of adverse interests, there is no justiciability.[44]

(3) Redressability

Finally, the Court must be able to redress the harm alleged by Plaintiffs.

"Justiciability doctrines—including mootness and standing—all relate, in some manner, to the court's ability to redress an injury through coercive relief."[45] Because Plaintiffs' alleged harms are not fairly traceable to the teacher tenure and the continuing contract provisions they challenge, a decision by the Court to strike those laws would not redress the harms. In *Warth v. Seldin*, after finding that plaintiffs lacked standing on a number of grounds (including the failure to allege facts showing that there was a substantial probability that the challenged government action caused their harm), the Court also found that plaintiffs had failed to allege facts from which it could be inferred that "if the court afford[ed] the relief requested, the asserted [harm] will be removed".[46]

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[43] *Perry v. ISD 696,* 210 NW2d 283, 286 (1973).
[44] *State ex rel Sviggum, supra.*
[45] *Id. at 321.*
[46] 95 S.Ct. 2197, 2208 (1975).

Plaintiffs acknowledge that eliminating teacher tenure will not ensure that their children never again receive a teacher they consider "ineffective",[47] and the Amended Complaint itself acknowledges that removing the laws would only provide school districts "greater flexibility." (AC. ¶ 200.) When taken as true, these allegations, still fail to 1) present a substantial probability that "but for" the tenure laws Plaintiffs' alleged harms would not occur; and 2) demonstrate that the harm complained of would be removed were the Court to strike down these laws.

B. Political Question

The political question doctrine exists to preserve the constitutional separation of powers between the executive, legislative, and judicial branches of government. No branch of government "can legally exercise the powers which in the constitutional distribution are granted to any of the others. A grant to one is a denial to the others." [48]

A question is political, and not judicial, when "it has been specifically delegated to some other department or particular officer of the government with discretionary power to act" and although the courts may decide whether the legislature has acted within its Constitutional bounds, they but cannot go further and exercise powers delegated by the constitution to the legislature.[49]

When it comes to education, the Minnesota courts have long recognized that cases challenging educational policies and methods by which they are achieved are legislative

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[48] *McConaughy, supra*, 119 N.W. at 416–17.
[49] *Id.* See also *Smith v. Holm*, 19 N.W.2d 914, 916 (Minn. 1945).

questions that are not justiciable by the Courts. Among the cases reflecting this is *Assoc. Schools of Ind. Dist. No 63 v. Sch. Dist. No. 83,* in which a plaintiff challenged a legislative requirement that local school districts maintain departments for certain subjects. The Court noted that "the maintenance of public schools is a matter, not of local, but of state, concern" and that the case presented "a legislative and not a judicial question, a question of legislative policy and not of legislative power"[50] In *Skeen v. State,* rejecting a challenge to education funding laws, the Court reiterated the importance of the separation of powers when interpreting the Education Clause: "[We] do not mean to suggest that it would be impossible to devise a fairer or more efficient system of educational funding. Instead, we believe that any attempt to devise such a system is a matter best left to the legislative determination." [51]

Minnesota courts have also recognized in other contexts that claims related to educational quality are not, as a matter of policy, proper for court adjudication. In Alsides *v. Brown Inst., Ltd.*, [52] the Court of Appeals "rejected, on public policy grounds, claims for educational malpractice [which] would require the court to engage in a 'comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies.'" At issue in *Alsides* were claims that a private school failed to provide adequate instruction and education. Explaining the public policy grounds for rejecting such claims, the Court of Appeals noted:

1) the lack of a satisfactory standard of care by which to evaluate an educator;

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[50] 142 N.W. 325, 327-328 (Minn. 1913).
[51] 505 N.W.2d 299, 308–19 (Minn. 1993).
[52] 592 N.W.2d 468, 473 (Minn. App. 1999) (citation omitted).

(2) the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student's attitude, motivation, temperament, past experience, and home environment;

(3) the potential for a flood of litigation against schools; and

(4) the possibility that such claims will "embroil the courts into overseeing the day-to-day operations of schools."[53]

The Minnesota Constitution commits matters of education policy, including details regarding the type and quality of educators, to the legislative branch. Plaintiffs' quest for a better or more-perfect education is parallel to that pursued by the legislature, but there is nothing in the Amended Complaint that forms a cognizable constitutional claim that can be remedied by a court.

Plaintiffs' concerns in this case relate to the wisdom of the legislative policy. Almost 140 years of state case law stands for the proposition that the appropriate avenue to address that policy is through the legislative process rather than the courts. "The public policy of a state is for the legislature to determine and not the courts." [54]

The Amended Complaint presents no injury that the Court can redress. The final prong required for justiciability and standing is lacking and the suit must be dismissed on that basis.[55]

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[53] *Id.* at 472

[54] *Mattson v. Flynn*, 13 N.W.2d 11, 16 (Minn. 1944).

[55] *McSherry, supra.*

2. Failure to State a Claim

A claim is sufficient against such a motion "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded"[56]. Put another way, the only question for the court is "whether the complaint sets forth a legally sufficient claim for relief".[57] Addressing such a motion, the district court must consider "only the facts alleged in the complaint, accepting [them] as true and must construe all reasonable inferences in favor of the nonmoving party". [58] A legal conclusion in a complaint is not binding, however, and a plaintiff must provide more than mere labels and conclusions to survive the motion to dismiss.[59] Generally the court must ignore materials outside the pleadings, but it may consider some materials that are part of the public record as well as those necessarily embraced by the pleadings.[60]

In accord with this standard, the Court has taken as true those facts properly alleged in Plaintiffs' Amended Complaint ("AC").

Here, Plaintiffs must establish standing as to *each claim* against *each named Defendant.* The U.S. Supreme Court has explained this concept by stating that "[t]he actual-injury requirement would hardly serve the purpose of . . . preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular

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[56] *Walsh v. U.S. Bank, N.A.,* 851 NW2d 598, 603 (Minn. 2014).
[57] *Elize v. Comm'r of Pub. Safety,* 298 NW2d 29, 32 (Minn. 1980).

[58] *Hebert, supra* at 229.
[59] *Bahr v. Capella University,* 788 NW2d 76, 80 (Minn. 2010).
[60] *Porous Media Corp. v. Pall Corp.,* 186 F 3d. 1077, 1079 (1999).

inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration." [61]

Seen in the light of the fundamental requirements of pleading, the Amended Complaint fails to state a claim upon which relief may be granted as against each of the defendant districts. While Plaintiffs argue that the districts are proper parties because they supervise and control staffing decisions in the schools serving their children, the Amended Complaint does not allege that any of them have (or are about to take) any action, or fail to take any action, that has caused or will cause harm to any of the Plaintiffs.

The Amended Complaint asserts both facial and as-applied claims, but the requested relief asks that the challenged provisions of the Minnesota teacher tenure and continuing contract laws be found invalid and be wholly enjoined. Regardless of how pled, Plaintiffs' claims are defined by the relief they seek.[62] When the relief sought is an invalidation of the statute in all applications, Plaintiffs are asserting facial claims. *Id.* Because that is the case here, Plaintiffs' claims are all facial claims and Plaintiffs must prove that the statutory provisions they challenge are unconstitutional in all their applications. [63]

A. The Education Clause

> "The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature

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[61] *DaimerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006).
[62] *John Doe No. 1 v. Reed,* 561 U.S. 186 (2010).
[63] *McCaughtry v. City of Red Wing,* 831 NW2d 518, 522 (Minn. 2013).

shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state."

Minn. Const. art. XIII, § 1.

The object of this clause is "to ensure a regular method throughout the state, whereby all may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic"[64] This language is unambiguously directed at the legislature, *not* to the school districts. As a consequence, it does not create individually enforceable constitutional rights against the individual school district defendants.

The clause addresses two distinct concepts: one addressing the establishment of a "general and uniform system of schools"; the other addressing the financing of the system. At issue here is the first of these concepts.

In *Skeen v. State,*[65] the Minnesota Supreme Court analyzed the term "general and uniform system". Turning back to the days of the Minnesota Constitutional Convention of 1857, the court discussed the wording proposed by various constitutional delegates, and then the language finally adopted. It analyzed at length the phrase "general and uniform", rejected the attempt of the plaintiffs to construe it narrowly, and instead highlighted early state cases that found that the provision should be broadly interpreted. It reaffirmed the concept that "uniform" does not mean "identical" or even "nearly identical", and "merely applies to the general system, not to specific ...disparities." [66]

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[64] *Board of Educ. Of Town of Sauk Centre v. Moore,* 17 Minn. 412, 416 (1871).
[65] 505 NW2d 299 (1993).
[66] *Id.*, at 310–11.

Among the cases the *Skeen* Court followed was *Curryer v. Merrill*. There, arguing that the Education Clause compelled uniformity, the plaintiff challenged a statute that provided books for public schools, but that did not apply to certain school districts. Stating that "[t]he rule of uniformity....has reference to the *system* which [the legislature] may provide, and not to the district organizations that may be established under it", the Court declined to strike down the statute because the objections raised pertained to "legislative discretion and policy only, and not one of power".[67] The Court's continuous emphasis on a "uniform system" has continued from *Curryer* on down through other cases, among them *State ex rel. Klimek v. Otter Tail County*[68], (rejecting the argument that the clause required uniformity in free school busing).

Whether the subject complained of is text books (*Curryer)*, school busing (*Klimek)*, or school funding (*Skeen)*, there simply is no recognized right under the Education Clause to identical or "uniform" education or teachers.

Plaintiffs contend that they are not seeking identical education, but that under *Skeen* they have a constitutional right to an "adequate education," which they generally allege is not being met. *Skeen* is the first and only time Minnesota's appellate courts have used the word "adequacy" in connection with the Education Clause. The plain language of the Education Clause does not contain the word adequacy. As Defendants point out, *Skeen* was a funding case and the adequacy of the basic funding provided was not in dispute. [69] Plaintiffs have cited no case law that supports the proposition that the language of the Education Clause allows a

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[67] 25 Minn. 1, 7 (1878).
[68] 283 NW 397, 398 (Minn.1939).
[69] *Skeen*, 505 N.W.2d at 315 ("In this case, the plaintiffs concede that they continue to receive an adequate education . . .)

Minnesota court to weigh into debates of educational policy or to become an arbiter of which educational systems and frameworks best serve Minnesota's interest.

Assuming, *arguendo,* that *Skeen* had implied a basic concept of "adequate education" into the plain language of the Education Clause, Plaintiffs' Amended Complaint fails to allege harms that would fall below that measure. Among the cases from other jurisdictions discussed by the *Skeen* Court was one from Wisconsin that defined "uniform" as referring to minimum standards for teacher certification and number of school days as well as standard school curriculum.[70] Another, from West Virginia, suggested basics such as reading, writing, arithmetic and civics.[71]

Nowhere does Plaintiffs' Amended Complaint allege that Minnesota's system of education fails to meet these basic requirements, much less that teacher tenure laws are causing the system to fall short. To the contrary, Plaintiffs acknowledge that Minnesota's system of education generally ranks as one of the best in the country, and that Minnesota schools do have effective teachers. Nowhere do Plaintiffs identify any concrete past or imminent harm, any factual allegations, of how their individual educations failed to meet these concepts of adequacy.

In challenging these statutes on their face, Plaintiffs bear a heavy burden of proving that the legislation is unconstitutional in *all* applications,[72] that is, that the harms they allege occur inevitably as a result of the statutes.[73]. This is a standard Plaintiffs cannot meet.

The plain language of the challenged provisions does not obligate school districts to provide a constitutionally "adequate" education. Rather, these provisions plainly give school

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[70] *Kukor v. Grover*, 436 N.W.2d 568, 577-78 (Wis. 1989).
[71] *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W.Va. 1979).
[72] *Minn. Voters Alliance v. City of Minneapolis,* 766 NW2d 683, 688 (Minn. 2009).
[73] *McCaughtry v. City of Red Wing*, 831 N.W.2d 518, 522 (2013).

districts the discretion not to hire and retain ineffective teachers. Minn. Stat. §§ 122A.40, 122A.41. School districts can determine whom to hire,[74] and can dismiss teachers who are not performing effectively.[75] They have the authority to restructure reduction-in-force provisions in negotiation with the teacher unions.[76] The Minnesota Supreme Court has recognized explicitly the authority of local administrators to implement the state's tenure laws and has instructed that the laws "must not be construed . . . to impair the right of a school board to determine policy in the administration of school affairs, or to transfer from a school to . . . courts the management of, supervision, and control of school systems." [77]

Regardless of the best efforts of school officials, it is inevitable that there will be variations in school and teacher performance, both in terms of style and quality. There is nothing in the plain language of the Education Clause, or in the state appellate cases interpreting it, that intimates that all such variations should carry constitutional significance. The essence of Plaintiffs' claims is not that Minnesota lacks a "general and uniform" system of education, but rather, a disagreement with the *type* of general and uniform system chosen by the legislature. As such these facial challenges "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution"[78]. Weighing the relative merits of different educational systems is the province of policymakers, not judges.

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[74] Minn. Stat. §§ 122A.40, subd. 5; 122A.41, subd. 2.
[75] Minn. Stat. §§ 122A.40, subds. 9, 13; 122A.41, subd. 6.
[76] Minn. Stat. §§ 122A.40, subd. 10, 122A.41, subd. 14.
[77] *Frye v. ISD. No. 625*, *supra*, 494 N.W.2d at 467-78.
[78] *McCaughtry, supra*, 831 NW2d at 522.

B. Equal Protection Clause

In addition to claiming that the Challenged Statutes violate the Education Clause, Plaintiffs also assert that they violate the Equal Protection Clause because they result in ineffective teachers being disproportionately assigned to schools serving the largest concentrations of low-income students and students of color. As a consequence they "create an arbitrary distinction between students" who are taught by "effective" as opposed to "ineffective" teachers". (AC. ¶¶ 205–07.)

The Equal Protection Clause states that:

> "No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgement of his peers..." Minn. Const. art. I, § 2.

Statutes are presumed to be constitutional and will not be declared unconstitutional unless it is shown beyond a reasonable doubt that it violates the constitution,[79] and where constitutionally challenged, the duty is on the challenging party to prove its invalidity.[80] The courts should not substitute their judgment for that of the legislature, and as long as a statute is rationally related to a legitimate government purpose, it should be upheld. *Id.* Strict scrutiny applies only if a challenged statute operates to disadvantage a suspect class or impinge upon a

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[79] *Dimke v. Finke,* 295 NW 75, 78 (Minn. 1940).
[80] *Essling v. Markman,* 335 NW2d 237, 239 (Minn. 1983).

fundamental right. In that case, the state generally must prove that the statute is necessary to a compelling state interest.[81]

Plaintiffs frame their equal protection claims only as as-applied claims. As discussed above, these claims must be considered facial claims because the only relief they seek is to have the challenged provisions of the teacher tenure and continuing contract laws invalidated in all applications and wholly enjoined. As stated by Chief Justice Roberts in *John Doe No. 1*,[82]

> "The label is not what matters. The important point is that plaintiffs' claim and the relief that would follow...reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach.

By definition, a facial challenge to a statute on equal protection grounds asserts that at least two classes are created by the statute, that the classes are treated differently under the statute, and that the difference in treatment cannot be justified." [83] Nothing on the face of the Challenged Statutes either infringes a student's right to education or treats a student differently on the basis of race or socioeconomic status. Plaintiffs acknowledge that the teacher tenure and continuing contract laws do not facially violate the equal protection clause. For this reason alone, all of Plaintiffs' equal protection claims fail as a matter of law.

But even if Plaintiffs had asserted a proper as-applied claim, those claims would fail as a matter of law. As mentioned above, strict scrutiny applies only if a challenged statute operates to

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[81] *Skeen, supra,* 502 NW2d at 312.
[82] 561 U.S. 186, 194.
[83] *In re McCannel*, 301 N.W.2d 910, 916 (Minn. 1980).

disadvantage a suspect class or impinge upon a fundamental right (here, the fundamental right to education). In that case, the state generally must prove that the statute is necessary to a compelling state interest.

(1) Fundamental Right to Education

The Minnesota Supreme Court has recognized the right to a "general and uniform system of education" as one of those fundamental rights "which have their origin in the express terms of the Constitution or which are necessarily to be implied from those terms." [84] Plaintiffs fail to cite any case that suggests that this fundamental right to education calls for a strict scrutiny analysis of any and every statute related to any aspect of education in Minnesota. That is not surprising: such an interpretation would be inconsistent with the Minnesota Supreme Court's recognition that the policy decisions made by the legislature in determining *how* to create a general and uniform system are political questions not appropriate for judicial review. For the same reasons discussed in the context of their Education Clause claims, Plaintiffs' allegations do not fall within the scope of legal protections afforded by the fundamental right to education.

In addition, because the Challenged Statutes directly regulate teacher employment decisions, not students, the connection between the laws and Plaintiffs' educational experience is affected by a variety of intervening factors. As our Supreme Court has recognized in a different context, laws that do not "directly or substantially interfere" with a cognizable fundamental right are "too attenuated to trigger the heightened scrutiny that [Plaintiffs] seek". [85]

For these reasons, strict scrutiny does not apply.

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[84] *Skeen*, 505 N.W.2d at 313
[85] *Gluba ex rel Gluba*, 735 N.W.2d 713, 720 (Minn. 2007).

(2) Suspect Class

Plaintiffs assert that application of the Challenged Statutes either disparately treats or disparately impacts students of color and low-income students. (AC. ¶ 205.) There are two types of equal protection claims: 'disparate treatment' and 'disparate impact.[86]

First, in order to state a disparate treatment claim, "the threshold question is whether the claimant is treated differently from others who are similarly situated, because the equal protection clause does not require the state to treat differently situated people the same", and Minnesota courts "routinely reject equal protection claims when a party cannot establish that he or she is similarly situated to those whom they contend are being treated differently."[87].

Here, Plaintiffs' allegations against Defendants fail to state a "disparate treatment" claim because they do not allege that the Challenged Statutes themselves result in differential treatment of Plaintiffs. Instead, Plaintiffs allege that application of the statutes exacerbates existing discrepancies in low-income and minority schools. (AC. ¶¶ 19–20.) According to Plaintiffs' own allegations, the Challenged Statutes are applied similarly across school districts, but allegedly negatively impact low-income and minority school districts because they have higher numbers of "ineffective teachers." (*Id.*)

Minnesota courts have held that such allegations do not state a claim for disparate treatment under the Equal Protection Clause. For example, in *Odunlade* , the Minnesota Supreme Court rejected plaintiff-taxpayers' argument that they were treated differently in

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[86] *Odunlade v. City of Minneapolis,* 823 NW2d 638, 647 (Minn. 2012).

[87] *Id.*

violation of the Equal Protection Clause where their residential properties were assessed at higher ratios than other communities due to "bank sales" being excluded from calculation of market value. The court noted that there were simply "more bank sales in relators' neighborhoods" than in other neighborhoods, but that this does not give rise to an equal protection claim, because the statute was applied similarly across all neighborhoods. [88]

The same reasoning applied in *Dean v. City of Winona,* in which the court stated that "[a]ppellants' real complaint is about the effect of an otherwise neutral ordinance on their particular circumstances, which does not give rise to an equal protection claim."[89] Because "discriminatory effects in the absence of disparate treatment" does not give rise to an equal protection claim,[90] Plaintiffs' allegations do not state a claim for disparate treatment under the Equal Protection Clause.

Second, "[t]o make out a claim for an equal protection violation based on disparate impact, a plaintiff must show (1) that a state action impacts his suspect class more than others, and (2) that the state actor intended to discriminate against the suspect class." [91] It is well established that where a statute is facially neutral and may have a disparate impact, "only invidious discrimination is deemed constitutionally offensive".[92]

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[88] 823 N.W.2d at 647–48.
[89] 843 N.W.2d 249, 259 (Mn. Ct. Ap. 2014)
[90] *Odunlade*, 823 N.W.2d at 648.
[91] *Id.*
[92] *Dean v. City of Winona*, 843 N.W.2d 249, 260 (Minn. App. 2014).

Plaintiffs' First Amended Complaint does not state a disparate impact claim: there is no claim that Defendants have intentionally discriminated against them on the basis of their race.[93] Nor does the financial status of the Plaintiffs play a part in the outcome of this case. Plaintiffs incorrectly argue that it remains an "open question" whether socio-economic status is a suspect class under Minnesota equal protection law. In 2012, the Minnesota Supreme Court held that "wealth or socioeconomic status does not constitute a suspect class." [94]Although Plaintiffs attempt to argue that *Odunlade* applies only to adults, and not children, the Minnesota Supreme Court drew no such distinction.

Finally, when there are legitimate reasons for the state legislature to adopt and maintain a particular statute, the courts "will not infer a discriminatory purpose on the part of the [State]." [95]

As discussed above in the section addressing the background of teacher tenure laws, the Minnesota Supreme Court has repeatedly recognized the legitimate purposes supporting them, observing that the Legislature's rationale was not only legitimate but "wise legislation, promotive of the best interests, not only of teachers affected, but of the schools as well"[96]

Because there is a rational, neutral explanation for the discriminatory impact alleged,

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[93] See *Odunlade*, *supra* at 648, in which the court affirmed dismissal of plaintiffs' disparate impact claim because "relators fail to allege that respondents intentionally discriminated against them on the basis of any suspect class status".

[94] *Id.*, (citing *Rodriguez*, 411 U.S. at 23-24, 28); *Skeen*, 505 N.W.2d at 314–15 ("The alleged 'class' of low-income persons constitutes an incredibly amorphous group, a group which changes over time and by context, and which is unable to show the historical pattern of discrimination that traditional 'suspect' classes can.") (quoting *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d at 1021).

[95] *McClesky v. Kemp*, 481 U.S. 279, 297-99 (1987).

[96] *Oxman v. Indep. Sch. Dist. Of Duluth*, 227 N.W. 351, 352 (Minn. 1929).

there can be no inference of discriminatory purpose. Accordingly, Plaintiffs have failed to state an Equal Protection Clause claim against Defendants based on the alleged disparate impact of the teacher tenure laws.

C. Teacher Tenure Laws Satisfy Rational Basis Review

Since strict scrutiny does not apply here, the Challenged Statutes (which must be presumed valid) need only satisfy a rational basis review to withstand a constitutional challenge. If the statute is "rationally related to the achievement of a legitimate government purpose, it will be upheld," and a reviewing court must not substitute its judgment for that of the legislature.[97]

For as long as the teacher tenure laws have been on the books, Minnesota courts have recognized their purpose as the promotion of "stability, certainty, and permanency of employment on the part of those who had shown by educational attainment and by probationary trial their fitness for the teaching profession." [98] These laws accomplish this purpose by (1) allowing teacher dismissal only for cause and after a hearing, following a three-year probationary period, (2) giving teachers due process rights in the event of a discharge or demotion, and (3) laying off teachers in the order of least to most seniority, unless the school district and teachers' representative reach some other agreement. These enhanced teacher protections are rationally related to the purpose of promoting stability, certainty, and permanency of teacher employment, and promote the interests of the schools as well as those of the teachers.

The teacher tenure laws must be upheld under a rational basis analysis.

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[97] *Skeen*, 505 N.W.2d at 312.

[98] *Strand v. Special Sch. Dist. No. 1*, 361 N.W.2d 69, 72 (Minn. App. 1984), *rev'd on other grounds*, 392 N.W.2d 881 (Minn. 1986).

D. Procedural Due Process Claim

In addressing this claim, the court must determine first whether the government has deprived the individual of a protected life, liberty, or property interest, and, if so, whether the procedures it followed were constitutionally sufficient.[99]

Plaintiffs allege a property interest relating to a right to have notice and hearings regarding tenure, dismissal and LIFO (layoff) provisions, and assert they have been deprived of these. (AC. ¶¶ 270- 287). To prevail on these claims, they must prove that the interest allegedly interfered with is a constitutionally protected property interest, and that it has been interfered with to an extent that violates the Due Process Clause.[100] A protected property interest "is a right that is created and defined by 'existing rules or understandings that stem from an independent source, such as state law, rules or understanding that support claims of entitlement to certain benefits' ".[101] While a property interest in public education has been recognized in the context of student expulsion cases,[102] that section guarantees only the right to *attend* a school and has been limited solely to circumstances of "total exclusion from the educational process." [103] Plaintiffs acknowledge that they currently attend school, and do not allege they have suffered "total exclusion" from their public education (AC. ¶¶ 27–30).

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[99] *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012).

[100] Minn. Const. art. 1, § 7 provides that no person shall "be deprived of life, liberty, or property without due process of law". This due process protection is identical to that guaranteed under the U.S. Constitution. *Sartori v. Harnischfeger Corp.*, 432 NW2d 448, 453 (Minn. 1988).

[101] *In re Individual 35W Bridge Litigation*, 806 N.W.2d 820, 830 (Minn. 2011).

[102] *J.K. ex rel. Kaplan v. Minneapolis Public Schools (Special School District No. 1)*, 849 F. Supp.2d 865, 871 (Minn. 2011). *See also, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 573–74 (1975).

[103] *Zellman ex rel MZ v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. App. 1999) (adding that "[j]udicial intervention in public school systems requires restraint."

While students may have a property right to attend schools, no court has recognized a property right in having an effective teacher. Nor has any court recognized a right to notice and an opportunity to be heard regarding hiring, firing and lay-off issues, or the assignment of effective or ineffective teachers. That is because the number of students affected by a school district's employment decision would be significant: "[w]here a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption". [104]

Plaintiffs identify no other statutory law or rule which forms the basis for the property interest they seek to assert. Because Plaintiffs' have not been denied a protected interest, they fail to state a claim against any of the defendants under the Procedural Due Process clause[105] .

Dated: 26 October 2016

BY THE COURT:

The Honorable Margaret M. Marrinan
Judge of District Court

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[104] *Hylen v. Owens,* 251 NW2d 858, 861 (Minn. 1977). [104] *Sawh, supra,* 823 N.W.2d at 632 ("If the government's action does not deprive an individual of [a protected] interest, then no process is due.").

[105] *Sawh, supra,* 823 N.W.2d at 632 ("If the government's action does not deprive an individual of [a protected] interest, then no process is due.").

Exhibit D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART 6

MYMOENA DAVIDS, by her parent and natural guardian MIAMONA DAVIDS, *et al.*, and JOHN KEONI WRIGHT, *et al.*,

Plaintiffs,

-against-

THE STATE OF NEW YORK, *et al.*,

Defendants,

-and-

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER, KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD OGNIBENE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE, Individually and as President of the New York State United Teachers; PHILIP A. CAMMARATA, MARK MAMBRETTI, and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Intervenor-Defendants.

HON. PHILIP G. MINARDO

DECISION & ORDER

Index No. 101105/14

Motion Nos.[1] 3580 - 008
3581 - 009
3593 - 010
3595 - 011
3598 - 012

[1]The motions have been consolidated for purposes of disposition.

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

The following papers numbered 1 to 12 were fully submitted on the 14th day of January, 2015.

Papers Numbered

Notice of Motion to Dismiss by Defendant THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF EDUCATION, with Exhibits and Memorandum of Law, (dated October 28, 2014) 1

Notice of Motion to Dismiss by Intervenor-Defendant MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, with Exhibits and Memorandum of Law, (dated October 28, 2014) 2

Notice of Motion to Dismiss by Intervenor-Defendants PHILIP CAMMARATA and MARK MAMBRETTI, with Exhibits and Memorandum of Law, (dated October 23, 2014) 3

Notice of Motion to Dismiss by Intervenor-Defendants SETH COHEN, *et al.*, with Exhibits and Memorandum of Law, (dated October 27, 2014) 4

Notice of Motion to Dismiss by Defendants STATE OF NEW YORK, *et al.*, with Affirmation and Supplemental Affirmation of Assistant Attorney General Steven L. Banks, Exhibits and Memorandum of Law, (dated October 28, 2014) 5

Affirmation in Opposition of Plaintiffs MYOMENA DAVIDS, *et al.* to Defendants and Intervenor-Defendants' Motions to Dismiss, with Exhibits and Memorandum of Law, (dated December 5, 2014) 6

Affirmation in Opposition by Plaintiffs JOHN KEONI WRIGHT, *et al.*, to Defendants and Intervenors-Defendants' Motions to Dismiss, with Exhibits and Memorandum of Law, (dated December 5, 2014) 7

MYMOENA DAVIDS, et al. v. THE STATE OF NEW YORK, et al.

Upon the foregoing papers, the above-enumerated motions to dismiss the complaint pursuant to CPLR 3211(a)(2), (3), (7), and (10), by the defendants and intervenor-defendants in each action are denied, as hereinafter provided.

This consolidated action, brought on the behalf of certain representative public school children in the State and City of New York, seeks, *inter alia*, a declaration that various sections of the Education Law with regard to teacher tenure, teacher discipline, teacher layoffs and teacher evaluations are violative of the Education Article (Article XI, §1) of the New York State Constitution. The foregoing provides, in relevant part, that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." (NY Const. Art. XI, §1). As construed by plaintiffs, the Education Article guarantees to all students in New York State a "sound basic education", which is alleged to be the

key to a promising future, insofar as it adequately prepares students with the ability to realize their potential, become productive citizens, and contribute to society. More specifically, plaintiffs argue that the State is constitutionally obligated to, *e.g.* systemically provide its pupils with the opportunity to obtain "the basic literacy, calculating, and verbal skills necessary to enable [them] to eventually function productively as civic participants capable of voting and serving on a jury" (Campaign for Fiscal Equity, Inc. v. State of New York (86 NY2d 307, 316), *i.e.*, "to speak, listen, read and write clearly and effectively in English, perform basic mathematical calculations, be knowledgeable about political, economic and social institutions and procedures in this country and abroad, or to acquire the skills, knowledge, understanding and attitudes necessary to participate in democratic self-government" (*id.* at 319). More recently, the Court of Appeals has refined the constitutionally-mandated minimum to require the teaching of skills that enable students to undertake civic responsibilities meaningfully; to function productively as civic participants (Campaign for Fiscal Equity, Inc. v. State of New York, 8 NY3d 14, 20-21). Plaintiffs further argue that the Court of Appeals has recognized that the Education Article requires adequate teaching by effective personnel as the "most important" factor in the effort to provide children with a "sound basic education" (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d 893, 909). With this as background, plaintiffs maintain that certain identifiable sections of the Education Law foster the continued, permanent employment of ineffective teachers, thereby falling out of compliance with the constitutional mandate that students in New York be provided with a "sound basic education". Finally, it is claimed that the judiciary has been vested with the legal and moral authority to ensure that this constitutional mandate is honored (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d 902).

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At bar, the statutes challenged by plaintiffs as impairing compliance with the Education Article include Education Law §§1102(3), 2509, 2510, 2573, 2588, 2590-j, 3012, 3013(2), 3014, and 3020. To the extent relevant, these statutes provide, *inter alia*, for (1) the award of, *e.g.*, tenure of public school teachers after a probationary period of only three years; (2) the procedures required to discipline and/or remove tenured teachers for ineffectiveness; and (3) the statutory procedure governing teacher lay-offs and the elimination of a teaching positions.[2] In short, it is claimed that these statutes, both individually and collectively, have been proven to have a negative impact on the quality of education in New York, thereby violating the students' constitutional right to a "sound basic education" (*see* NY Const, Art. XI, §1).

As alleged in the respective complaints, sections §§2509, 2573, 3012 and 3012(c) of the Education Law, referred to by plaintiffs as the "permanent employment statutes", formally provide, *inter alia*, for the appointment to tenure of those probationary teachers who have been found to be competent, efficient and satisfactory, under the applicable rules of the board of regents adopted pursuant to Education Law §3012(b) of this article. However, since these teachers are typically granted tenure after only three years on probation, plaintiffs argue that when viewed in conjunction with the statutory provisions for their removal, tenured teachers are virtually guaranteed lifetime employment regardless of their in-class performance or effectiveness. In this regard, it is alleged by plaintiffs that three years is an inadequate period of time to assess whether a teacher has demonstrated or earned the right to avail him or herself of the lifelong benefits of tenure. Also

2. The present statutes require that probationary teachers be furloughed first, and the remaining positions be filled on a seniority basis, *i.e.*, the teachers with the greatest tenure being the last to be terminated. For ease of reference, this manner of proceeding is known as "last-in, first-out" or "LIFO".

drawn into question are the methods employed for evaluating teachers during their probationary period.

In support of these allegations, plaintiffs rely on studies which have shown that it is unusual for a teacher to be denied tenure at the end of the probationary period, and that the granting of tenure in most school districts is more of a formality rather than the result of any meaningful appraisal of their performance or ability. For statistical support, plaintiffs argue, *e.g.*, that in 2007, 97% of tenure-eligible teachers in the New York City school districts were awarded tenure, and that recent legislation intended to implement reforms in the evaluation process have had a minimal impact on this state of affairs. In addition, they note that in 2011 and 2012, only 3% of tenure-eligible teachers were denied tenure.

With regard to the methods for evaluating teacher effectiveness prior to an award of tenure, plaintiffs maintain that the recently-implemented Annual Professional Performance Review ("APPR"), now used to evaluate teachers and principals is an unreliable and indirect measure of teacher effectiveness, since it is based on students' performance on standardized tests, other locally selected (*i.e.*, non-standardized) measures of student achievement, and classroom observations by administrative staff, which are clearly subjective in nature. On this issue, plaintiffs note that 60% of the scored review on an APPR is based on this final criterion, making for a non-uniform, superficial and deficient review of effective teaching that generally fails to identify ineffective teachers. As support of this postulate, plaintiffs refer to studies that have shown that in 2012, only 1% of teachers were rated "ineffective" in New York (as compared to the 91.5% who were rated as "highly effective" or "effective"), while only 31% of students taking the standardized tests in English Language Arts and Math met the minimum standard for proficiency. As a further example,

plaintiffs allege that only 2.3% of teachers eligible for tenure between 2010 and 2013 received a final rating of "ineffective", even though 8% of teachers had low attendance, and 12% received low "value added" ratings. Notably, these allegations are merely representative of the purported facts pleaded in support of plaintiffs' challenge to the tenure laws, and are intended simply to illustrate the statutes' reliance on some of the more superficial and artificial means of assessing teacher effectiveness, leading to an award of tenure without a sufficient demonstration of merit. Each of the above are alleged to operate to the detriment of New York students.[1]

With regard to plaintiffs' challenge to those sections of the Education Laws which address the matter of disciplining or obtaining the dismissal of a tenured teacher, it is alleged that they, too, operate to deny children their constitutional right to a "sound basic education". As pleaded, these statutes are claimed to prevent school administrators in New York from dismissing teachers for poor performance, thereby forcing the retention of ineffective teachers to the detriment of their students. Among other impediments, these statutes are claimed to afford New York teachers "super" due process rights before they may be terminated for unsatisfactory performance by requiring an inordinate number of procedural steps before any action can be taken. Among the barriers cited are the lengthy investigation periods, protracted hearings, and antiquated grievance procedures and appeals, all of which are claimed to be costly and time-consuming, with no guaranty that an underperforming teacher will actually be dismissed. As a result, dismissal proceedings are alleged to be rare when based on unsatisfactory performance alone, with scant chance of success. According to plaintiffs, the cumbersome nature of dismissal proceedings operates as a strong disincentive for

[1] Also worthy of note in this regard is plaintiffs' allegation that most of the teachers unable to satisfactorily complete probation are asked to extend their probation term.

administrators attempting to obtain the dismissal of ineffective teachers, the result of which is that their retention is virtually assured.

Pertinent to this cause of action, plaintiffs rely upon the results of a survey indicating that 48% of districts which had considered bringing disciplinary charges at least once, declined to do so. In addition, it was reported that between 2004 and 2008, each disciplinary proceeding took an average of 502 days to complete, and between 1995 and 2006, dismissal proceedings based on allegations of incompetence took an average of 830 days to complete, at a cost of $313,000 per teacher. It is further alleged that more often than not these proceedings allow the ineffective teachers to return to the classroom, which deprives students of their constitutional right to a "sound basic education".

Finally, plaintiffs allege that the so-called "LIFO" statutes (Education Law §§2585, 2510, 2588 and 3013) violate the Education Article of the New York State Constitution in that they have failed, and will continue to fail to provide children throughout the State with a "sound basic education". In particular, plaintiffs maintain that the foregoing sections of the Education Laws create a seniority-based layoff system which operates without regard to a teacher's performance, effectiveness or quality, and prohibits administrators from taking teacher quality into account when implementing layoffs and budget cuts. In combination, these statutes are alleged to permit ineffective teachers with greater seniority to be retained without any consideration of the needs of the students, who are collectively disadvantaged. It is also claimed that the LIFO statutes hinder the recruitment and retention of new teachers, a failure which was cited by the Court of Appeals (albeit on other grounds) as having a negative impact on the constitutional imperative (Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d at 909-911).

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In moving to dismiss the complaints, defendants and intervenor-defendants (hereinafter collectively referred to as the "movants") singly and jointly, seek dismissal of the complaints on the grounds (1) that the courts are not the proper forum in which to bring these claims, *i.e.*, that they are nonjusticiable; (2) that the stated grievances should be brought before the state legislature; and (3) that the courts are not permitted to substitute their judgment for that of a legislative body as to the wisdom and expediency of legislation (*see e.g.* Matter of Retired Pub Empl Assoc, Inc. v. Cuomo, – Misc3d –, 2012 NY Slip Op 32979 [U][Sup Ct Albany Co]). In brief, it is argued that teacher tenure and the other statutes represent a "legislative expression of a firm public policy determination that the interest of the public in the education of our youth can best be served by [the present] system [which is] designed to foster academic freedom in our schools and to protect competent teachers from the abuses they might be subjected to if they could be dismissed at the whim of their supervisors" (Ricca v Board of Edu, 47 NY2d 385, 391). Thus, it is claimed that the policy decisions made by the Legislature are beyond the scope of the Judicial Branch of government.

It is further claimed that if these statutes violated the Education Article of the Constitution, the Legislature would have redressed the issue long ago. To the contrary, tenure laws have been expanded throughout the years, and have been amended on several occasions in order to impose new comprehensive standards for measuring a teacher's performance, by, *e.g.*, measuring student achievement, while fulfilling the principal purpose of these statutes, *i.e.*, to protect tenured teachers from official and bureaucratic caprice. In brief, it is movants' position that "lobbying by litigation" for changes in educational policy represents an incursion on the province of the Legislative and Executive branches of the government, and is an improper vehicle through which to obtain changes in education policy. Accordingly, while conceding that there may be some room for judicial

encroachment, educational policy is said to rest with the Legislature.

Movants also argue that the complaints fail to state a cause of action. In this regard, it is claimed that in order to state a valid cause of action under Article XI, a plaintiff must allege two elements: (1) the deprivation of a sound basic education, and (2) causes attributable to the State (*see* New York Civ Liberties Union v. State of New York, 4 NY3d 177, 178-179). Moreover, the crux of a claim under the Education Article is said to be the failure of the state to "provide for the maintenance and support" of the public school system (Paynter v. State of New York, 100 NY2d 434, 439 [internal quotation marks omitted]; New York State Assn of Small City School Dists Inc. v. State of New York, 42 AD3d 648, 652). Here, it is claimed that the respective complaints are devoid of any facts tending to show that the failure to offer a "sound basic education" is causally connected to the State, rather than, as claimed, administered locally.

The movants also argue that the State's responsibility under the Education Article is to provide minimally adequate funding, resources, and educational supports to make basic learning possible, *i.e.*, the requisite funding and resources to make possible "a sound basic education consist[ing] of the basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury" (Paynter v. State of New York, 100 NY2d at 439-440). On this analysis, it is alleged to be the ultimate responsibility of the local school districts to regulate their curriculae in order to effect compliance with the Education Article while respecting "constitutional principle that districts make the basic decision on ... operating their own schools" (New York Civ Liberties Union v. State of New York, 4 NY3d at 182). Thus, it is the local districts rather than the State which is responsible for recruiting, hiring, disciplining and otherwise managing its teachers. For example, the APPR,

implemented to measure the effectiveness of teachers and principals, reserves 80% of the evaluation criteria for negotiation between the local school district and its relevant administrator and unions. Movants argue that these determinations do not constitute state action.

In addition, movants argue that both complaints fail to state a cause of action because they are riddled with vague and conclusory allegations regarding their claim that the tenure and other laws combine to violate the Education Article, basing their causes of action on (1) alleged "specious statistics" regarding the number of teachers receiving tenure, (2) the alleged cost of terminating teachers for ineffectiveness, (3) inconclusive surveys of school administrators on the reasons why charges often are not pursued, and (4) a showing that the challenged statutes result in a denial of a "sound basic education". According to the movants, none of these allegations are sufficient to establish the unconstitutionality of the subject statutes, *i.e.*, that there exists no rational and compelling bases for the challenged probationary, tenure and seniority statutes.

Also said to be problematic are plaintiffs' conclusory statements that students in New York are somehow receiving an inadequate education due to the retention of ineffective educators because of the challenged statutes. Moreover, while plaintiffs argue that public education is plagued by an indeterminate number of "ineffective teachers", they fail to identify any such teachers; the actual percentage of ineffective educators; or the relationship between the presence of these allegedly ineffective teachers and the failure to provide school children with a minimally adequate education. Accordingly, movants claim that merely because some of the 250,000 teachers licensed to teach in New York may be ineffective, is not a viable basis for eliminating these basic safeguards for the remaining teachers. In brief, movants maintain that aside from vague references to ineffective teachers and "cherry-picked" statistics without wider significance, the plaintiffs have done little to

demonstrate that the alleged problem is one of constitutional dimension.

Movants also argue that the action should be dismissed for the failure to join necessary parties as required by CPLR 1001 and 1003. In this regard, it is claimed that since the relief which plaintiffs seek would affect all school districts across the state, this Court should either order the joinder of every school district statewide, or dismiss the action. In addition, the movants argue that plaintiffs have failed to allege injury-in-fact, and that the claims which they do make are either not ripe or fail to plead any imminent or specific harm. More importantly, the complaints fail to take into account the recent amendments to these statutes, which are claimed to render all of their claims moot (*see generally* Hussein v. State of New York, 81 AD3d 132). In the alternative, it is alleged that the subject statutes are meant, *inter alia*, to protect school district employees from arbitrary termination rather than the general public or its students (*but see* Chiara v. Town of New Castle, – AD3d –, 2015 NY Slip Op 00326, *21-22 [2d Dept])

Finally, defendants the STATE of NEW YORK, the BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New York; and JOHN B. KING, in his official capacity as the Commissioner of Education of the State of New York and President of the University of the State of New York, argue that complaints as against them should be dismissed since they were not involved in the enactment of the challenged statutes and cannot grant the relief requested by plaintiff.

The motions to dismiss are granted to the extent that the causes of action against MERRYL H. TISCH and JOHN B. KING, in their official capacities as Chancellor and Commissioner are

severed and dismissed, the balance of the motions are denied.[1]

The law is well settled that when reviewing a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, a court "must accept as true the facts as alleged in the complaint and any submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and [without expressing any opinion as to whether the truth of the allegations can be established at trial], determine only whether the facts as alleged fit within any cognizable legal theory" (Sokoloff v. Harriman Estates Dev. Corp., 96 NY2d 409, 414; *see* Sanders v. Winship, 57 NY2d 391, 394). Accordingly, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations [can be] discerned which taken together manifest any cause of action cognizable at law the motion ... will fail" (Guggenheimer v. Ginzburg, 43 NY2d 268, 275). However, where evidentiary material is considered on the motion, "the criterion [becomes] whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and, unless it can be said that no significant dispute exists regarding it", the motion must be denied (*id.*). Here, it is the opinion of this Court that the complaints are sufficiently pleaded to avoid dismissal.

The core of plaintiffs' argument at bar is that school children in New York State are being denied the opportunity for a "sound basic education" as a result of teacher tenure, discipline and seniority laws (*see* Education Laws §§2573, 3012, 1103(3), 3014, 3012, 3020, 2510, 2585, 2588,

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[1] Claims against municipal officials in their official capacities are really claims against the municipality and are therefore, redundant when the municipality is also named as a defendant (*see* Frank v. State of NY Off. of Mental Retardation & Dev. Disabilities, 86 AD3d 183, 188).

3013). While the papers submitted on the motions to dismiss undoubtedly explain that the primary purpose of these statutes is to provide employment security, protect teachers from arbitrary dismissal, and attract and keep younger teachers, when afforded a liberal construction, the facts alleged in the respective complaints are sufficient to state a cause of action for a judgment declaring that the challenged sections of the Education Law operate to deprive students of a "sound basic education" in violation of Article XI of the New York State Constitution, *i.e.*, that the subject tenure laws permit ineffective teachers to remain in the classroom; that such ineffective teachers continue to teach in New York due to statutory impediments to their discharge; and that the problem is exacerbated by the statutorily-established "LIFO" system dismissing teachers in response to mandated lay-offs and budgetary shortfalls. In opposition, none of the defendants or intervenor-defendants have demonstrated that any of the material facts alleged in the complaints are untrue.

It is undisputed that the Education Article requires "[t]he legislature [to] provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." (NY Const. Art. XI, §1). Moreover, this Article has been held to guarantee all students within the state a "sound basic education", which is recognized by all to be the key to a promising future, preparing children to realize their potential, become productive citizens, and contribute to society. In this regard, it is the state's responsibility to provide minimally adequate funding, resources, and educational supports to make basic learning possible, *i.e.*," the basic literacy, calculating and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury" (Paynter v. State of New York, 100 NY2d at 440), which has been judicially recognized to entitle children to "minimally adequate teaching of reasonably up-to-date basic curricula ... by sufficient personnel adequately trained to teach those

subject areas" (Campaign for Fiscal Equity, Inc. v. State of NewYork, 86 NY2d at 317). Further, it has been held that the state may be called to account when it fails in its obligation to meet minimum constitutional standards of educational quality (*see* New York Civ Liberties Union v. State of New York, 4 NY3d at 178), which is capable of measurement, as alleged, by, *inter alia*, sub-standard test results and falling graduation rates (*id.*) that plaintiffs have attributed to the impact of certain legislation.

More to the point, accepting as true plaintiffs' allegations of serious deficiencies in teacher quality; its negative impact on the performance of students; the role played by subject statutes in enabling ineffective teachers to be granted tenure and in allowing them to continue teaching despite ineffective ratings and poor job performance; a legislatively prescribed rating system that is inadequate to identify the truly ineffective teachers; the direct effect that these deficiencies have on a student's right to receive a "sound basic education"; plus the statistical studies and surveys cited in support thereof are sufficient to make out a prima facie case of constitutional dimension connecting the retention of ineffective teachers to the low performance levels exhibited by New York students, *e.g.*, a lack of proficiency in math and english (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY2d at 910). Once it is determined that plaintiffs may be entitled to relief under any reasonable view of the facts stated, the court's inquiry is complete and the complaint must be declared legally sufficient (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 86 NY2d at 318).

The Court also finds the matter before it to be justiciable since a declaratory judgment action is well suited to, *e.g.*, interpret and safeguard constitutional rights and review the acts of the other branches of government, not for the purpose of making policy decisions, but to preserve the constitutional rights of its citizenry (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 100

NY2d at 931).

With regard to the issue of standing, in the opinion of this Court, the individually-named plaintiffs clearly have standing to assert their claims as students attending various public schools within the State of New York who have been or are being injured by the deprivation of their constitutional right to receive a "sound basic education", which injury, it is claimed will continue into the future so long as the subject statutes continue to operate in the manner stated. Further details regarding the individual plaintiffs' purported injuries can certainly be ascertained during discovery. Moreover, since these children are the intended beneficiaries of the Education Article, in the opinion of this Court, they are clearly within the zone of protected interest.

Only recently have the courts recognized the right of plaintiffs to seek redress and not have the courthouse doors closed at the very inception of an action where the pleading meets the minimal standard to avoid dismissal (*see* Campaign for Fiscal Equity, Inc. v. State of New York, 86 NY2d at 318). This Court is in complete agreement with this sentiment and will not close the courthouse door to parents and children with viable constitutional claims (*see* Hussein v. State of New York, 19 NY3d 899). Manifestly, movants' attempted challenge to the merits of plaintiffs' lawsuit, including any constitutional challenges to the sections of the Education Law that are the subject of this lawsuit, is a matter for another day, following a further development of the record.

The balance of the arguments tendered in support of dismissal, including the joinder of other parties, have been considered and rejected.

Accordingly, it is

ORDERED that the motion (No. 3598 - 012) of defendant-intervenors MERRYL H. TISCH, in her official capacity as Chancellor of the Board of Regents of the University of the State of New

York, and JOHN B. KING, in his official capacity as the Commissioner of Education of the State of New York and President of the University of the State of New York is granted; and it is further

ORDERED that the causes of action against said individuals are hereby severed and dismissed; and it is further

ORDERED that the balance of the motions are denied; and it is further

ORDERED that the clerk shall enter judgment accordingly.

ENTER,

J.S.C.

Dated: MAR. 17, 2015

GRANTED

MAR 17 2015

STEPHEN J. FIALA

Exhibit E

SUPREME COURT OF NEW JERSEY
M-378 September Term 2016
078257

RAYMOND A. ABBOTT, ET AL.,

Plaintiffs-Respondents,

v.

FRED G. BURKE, ET AL.,

Defendants-Movants.

O R D E R

FILED

JAN 31 2017

CLERK

This matter was opened to the Court by defendants' motion "for relief and modification of this 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)."

In defendants' extensive written submissions to the Court, they primarily focus on certain aspects of collectively negotiated agreements and provisions of state law, including teacher tenure statutes. Defendants ask the Court to authorize the Commissioner of Education to override those statutory and contractual provisions when the Commissioner determines that they impede the delivery of a thorough and efficient education in certain School Development Authority (SDA) districts. Defendants use this Court's prior Abbott rulings as the basis for relief, but direct challenges to the provisions in question have not been the subject of prior litigation in the Abbott line of cases.

Defendants' application also briefly references the existing funding formula for SDA districts. Defendants ask the Court to vacate its prior orders to fund the School Funding Reform Act (SFRA) according to the Act's terms and instead authorize funding for SDA districts at current levels.

Plaintiffs sought an extension of time to file their answer. Rather than schedule an answer on the merits of defendants' motion, the Court ordered the parties to submit legal argument as to whether it is appropriate for defendants' application to be filed with this Court in the first instance. The Court received and reviewed the parties' briefs in response.

It is, therefore, for good cause shown, ORDERED as follows:

1) Defendants' application for relief is denied. The Court declines to exercise original jurisdiction to hear this matter in the first instance; and

2) Defendants' request for relief from certain aspects of collectively negotiated agreements and provisions of state law is denied without prejudice to defendants' right to file an action for relief in the trial court. The Court does not opine on the merits of the issues or arguments.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 30th day of January, 2017.

CLERK OF THE SUPREME COURT

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Attorneys for Defendant-Intervenor
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,

Defendant-Intervenor

and

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

Defendant-Intervenor

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MERCER COUNTY

DOCKET NO. MER-L-2170-16

ORDER

THIS MATTER, having come before the Court on the motion of Defendant-Intervenor, New Jersey Education Association, for an Order granting the New Jersey Education Association's motion to dismiss Plaintiffs' complaint and dismissing the complaint with prejudice, and the Court having considered the papers submitted in support of, and in opposition to, the motion, and the Court having considered the arguments of counsel, and good cause appearing,

IT IS on this _____ day of _____, 2017,

ORDERED that:

1. The motion of Defendant-Intervenor, New Jersey Education Association, to dismiss the Plaintiffs' complaint is GRANTED;

AND IT IS FURTHER ORDERED that::

2. The Plaintiffs' complaint shall be dismissed with prejudice.

_____
MARY C. JACOBSON, A.J.S.C.

___ Opposed

___ Unopposed

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and

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Defendant-Intervenor

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MERCER COUNTY

DOCKET NO. MER-L-2170-16

NOTICE OF ENTRY OF APPEARANCE

Please enter the appearance of the undersigned as counsel for Defendant-Intervenor, New Jersey Education Association, in the above-captioned matter.

Respectfully submitted,
RICHARD E. SHAPIRO, LLC

By: 
Richard E. Shapiro

DATED: March 13, 2017

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and

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Defendant-Intervenor

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MERCER COUNTY

DOCKET NO. MER-L-2170-16

CERTIFICATE OF SERVICE

RICHARD E. SHAPIRO, Esq. hereby certifies as follows:

1. On March 13, 2017, I caused to be hand-delivered an original and two copies of a Notice of Entry of Appearance of Richard E. Shapiro, Esq.; Notice of Motion To Dismiss Plaintiffs' Complaint; Brief of Defendant-Intervenor, New Jersey Education Association, in Support of Motion To Dismiss Plaintiffs' Complaint; Certification of Richard E. Shapiro, Esq.; Proposed Order; and this Certificate of Service, in the above-captioned matter to the Clerk, Civil Part, Mercer County Civil Courthouse, 175 S. Broad Street – 3d Floor, Trenton, NJ 08650 for filing, and a copy of the documents forwarded via hand-delivery to the Honorable Mary C. Jacobson, Assignment Judge, Superior Court, Criminal Courthouse, 400 South Warren Street, Trenton, NJ 08650.

2. On March 13, 2017, I caused to be forwarded via UPS Overnight Service, a copy of the documents referenced in Paragraph 1 to the following:

William H. Trousdale, Esq.
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Christopher Cerf
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Local Defendants (no attorney listed)

Steven P. Weissman
Weissman & Mintz LLC
One Executive Drive, Suite 200
Somerset, New Jersey 08873
Attorneys for Defendant-Intervenor
American Federation of Teachers, et al.

3. On March 13, 2017, I caused to be mailed, via Certified Mail, Return Receipt Requested, a copy of the documents referenced in Paragraph 1 to:

Christopher S. Porrino
Attorney General of New Jersey
Hughes Justice Complex
25 West Market Street
Trenton, New Jersey 08625-0112
Attorneys for State Defendants

I HEREBY CERTIFY that all of the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me is willfully false, I am subject to punishment.

Dated: March 13, 2017

Richard E. Shapiro