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H. G., et al.,

Plaintiffs,

v.

KIMBERLY HARRINGTON, et al.,

Defendants,

AMERICAN FEDERATION OF TEACHERS,
AFL-CIO, AFT NEW JERSEY, NEWARK
TEACHERS UNION; NEW JERSEY
EDUCATION ASSOCIATION,

Defendants/Intervenors.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MERCER COUNTY

Docket No.: MER-L-2170-16

Civil Action

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO INTERVENOR
DEFENDANT AFT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

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MERCER VICINAGE
CIVIL DIVISION

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Plaintiffs, a group of minor children within the Newark Public School District (“Newark” or the “District”) represented by their parents and representative of students enrolled in the District, respectfully submit this brief in opposition to the Motion to Dismiss filed by Intervenor-Defendants the American Federation of Teachers, AFL-CIO (“AFT”), AFT New Jersey, AFT, AFL-CIO (“AFTNJ”) and the Newark Teachers Union (“NTU” and, together with the AFT and AFTNJ, the “Union Intervenors”).

PRELIMINARY STATEMENT

This action does not involve a battle over educational policies; it is a constitutional challenge to two statutes that prevent students in Newark from receiving the thorough and efficient education to which they are entitled under the State Constitution. This is a case in which both original defendants—the District and State—have answered the Complaint and where the District has admitted to nearly every allegation made by Plaintiffs. By contrast, the Union Intervenors seek to deny these parents and students their day in court by positioning the dispute as one about tenure more generally. The Union Intervenors are wrong. This lawsuit addresses the constitutional harm to children arising from a statutory scheme that requires, when a district engages in a reduction-in-force (“RIF”), only the seniority of teachers, *and never their quality*, to be considered.

As sufficiently pled in Plaintiffs’ Complaint, N.J.S.A. 18A:28-10 and 18A:28-12 (the “LIFO Statute”) mandate the termination and re-hiring of already-tenured teachers in the event of a RIF based *solely* on seniority with no regard to quality, which causes significant harm to students in Newark. In order to evade the negative consequences of these statutory requirements, and based on statistical models run by the district, Newark has engaged in an alternative, but still damaging, practice of placing ineffective teachers in a “pool” in order to avoid RIFs and

preserving the quality teachers from being removed from their positions during a RIF. This policy requires the District to continue to pay ineffective teachers, to the detriment of students. However, this practice is unsustainable and does not provide a long-term solution, especially in light of the budget constraints faced by the District. And worse, it has resulted in force-placements, which have returned ineffective teachers to classrooms, to manage costs. This practice harms the students in Newark both due to the drain of resources that could be used for other educational programs and the negative educational impact that results when students are taught by ineffective teachers.

As *admitted* by Newark in its Answer to the Complaint, this practice is damaging to the District and its students, cannot be remedied solely through one-off tenure charges, results in the retention of low-performing teachers, and undermines the District's ability to attract and retain effective teachers. The practice violates the constitutional rights of children such as Plaintiffs within the District, and the remedy sought—permitting quality to be considered during a RIF and any subsequent re-hiring of staff—will allow these students to receive a thorough and efficient education. Plaintiffs have the standing, jurisdiction and concrete damage, and pled sufficient claims in the Complaint, to permit them to move forward to the merits of this action. Union Intervenors' motion should be denied.

BACKGROUND

I. THE CONSTITUTIONAL AND STATUTORY FRAMEWORK

The New Jersey State Constitution mandates that children in the State receive a “thorough and efficient” public education that will provide them with the opportunity to achieve, fulfill their role as citizens, and participate effectively in the work force. Certification of William H. Trousdale (March 29, 2017) (“Counsel Cert.”), Ex. A (“Compl.”) ¶ 1; Counsel Cert., Ex. B (“Dist. Answer”) ¶ 1 (admitting). As a teacher's effectiveness or ineffectiveness is the

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

Despite the existence of a State evaluation system and the emphasis on evaluating teacher effectiveness, school districts in New Jersey, when forced to engage in a RIF, are forbidden from considering the effectiveness of those teachers being laid off. Compl. ¶ 3; Dist. Answer ¶ 3 (admitting). Instead, the LIFO Statute mandates that such RIFs be conducted based upon seniority alone. Compl. ¶ 3; Dist. Answer ¶ 3 (admitting). The statute considers seniority based upon a teacher's length of time teaching within the district where a RIF occurs, as opposed to length of time teaching overall. Compl. ¶ 66; Dist. Answer ¶ 66 (admitting). Further, if there is a later need to hire teachers within the district, the LIFO Statute mandates that the district prioritize re-hiring teachers who were laid off, without consideration of their assessed quality. Compl. ¶ 66; Dist. Answer ¶ 66 (admitting).

Outside the context of RIFs, districts may consider a teacher's effectiveness in making a termination decision. A district that wants to terminate an ineffective tenured teacher must do so through a tenure charge, which is "a time-consuming and cost-intensive process that takes at least two years," and is followed by legal proceedings that can take another year or more and cost the district more than \$50,000 per terminated teacher. *Trousdale Aff., Ex. C* ("Cerf. Cert.") ¶ 23¹; *see also* Compl. ¶ 93. This time and money intensive process is inadequate for districts—

¹ The Certification of Superintendent Cerf was incorporated by reference into Plaintiffs' complaint, as it was filed as part of the Supreme Court action. *See Greenberg v. Pro Shares Trust*, No. A-0759-10T3, 2011 WL 2636990, at *3 (App. Div. July 7, 2011) ("[W]here the complaint references and ... incorporates a document, that document is deemed part of the

especially those with shrinking budgets—to effectively and efficiently address teacher quality issues while addressing ongoing budget issues. *See* Cerf Cert. ¶ 23.²

II. THE PARTIES IN THIS ACTION

A. *The Plaintiffs*

Plaintiffs in this case are twelve children enrolled in Newark schools, represented by their guardians, and are representative of similarly situated Newark students. Compl. ¶¶ 32-40. The schools that these students attend are in the bottom percentiles for performance among New Jersey schools, and are emblematic of the majority of schools within the District. Compl. ¶¶ 29-31; Dist. Answer ¶¶ 29-31 (in each paragraph, admitting that “District has been hampered by statutory restrictions that essentially protect the interests of adults over the rights of the children of Newark” when trying to “meet the constitutionally-mandated Thorough and Efficient education requirements for all children in [Newark]”). .

Plaintiffs H.G., F.G., and F.D. currently attend Hawkins Street Elementary School (“Hawkins”) in Newark. *Id.* ¶ 32. Hawkins is in the bottom 11% of elementary schools in New Jersey; only 18% of its students received an education that allowed them to meet or exceed the State’s minimum proficiency benchmarks in language arts, and only 10% received such an education in math. *Id.* ¶ 33; Dist. Answer ¶ 33 (admitting that “District has been hampered by statutory restrictions that essentially protect the interests of adults over the rights of the children of Newark” when trying to “meet the constitutionally-mandated Thorough and Efficient education requirements for all children in [Newark]”). W.H. and N.H. attend Luis Munoz Marin Elementary School (“Marin”) in Newark. Compl. ¶ 20. Marin is in the bottom 5% of

complaint, and the [c]ourt may consider that evidence in the context of a motion to dismiss.”) (citation omitted).

² As set forth *supra*, Newark will shortly be facing the question of how to allocate its limited resources for the 2017-2018 school year in the face of an anticipated budget deficit.

elementary schools in New Jersey, with only 12% and 10% of its children receiving educations in language arts and math, respectively, that met or exceeded the State's grade-level expectations. *Id.* ¶ 35; *see also* Dist. Answer ¶ 35. M.P. attends Fourteenth Avenue School in Newark, where 18% and 10% of the students have received educations sufficient to perform at or above grade level in language arts and math, respectively. Compl. ¶¶ 19, 37; *see also* Dist. Answer ¶ 37. O.J. and M.R. attend Speedway Academies ("Speedway") in Newark. Compl. ¶ 22. Only 11% of Speedway's students have received an education allowing them to meet or exceed grade-level expectations in language arts, and only 8% have in math. *Id.* ¶ 37; *see also* Dist. Answer ¶ 37. Z.S. and D.S. are both current students at the First Avenue School ("First Ave.") in Newark. Compl. ¶ 23. Fewer than half of First Ave.'s students meet or exceed the State's grade-level expectations, and only 17.6% of children with disabilities do so. *Id.* ¶ 38; Dist. Answer ¶ 38 (admitting that "District has been hampered by statutory restrictions that essentially protect the interests of adults over the rights of the children of Newark" when trying to "meet the constitutionally-mandated Thorough and Efficient education requirements for all children in [Newark]"). Z.S. is one such student, and her mother has had ongoing struggles in obtaining an appropriate educational plan for addressing her dyslexia. Compl. ¶ 38. E.P. attends East Side High School ("East Side") in Newark. *Id.* ¶ 19. East Side is in the bottom 10% of schools in New Jersey, and only 13% of East Side students have received an educational allowing them to meet or exceed grade level expectations for language arts, and only 6% for mathematics. *Id.* ¶ 39; *see also* Dist. Answer ¶ 39. Finally, J.H. is a current student at Eagle Academy for Young Men of Newark ("Eagle Academy"). Compl. ¶ 21. Only 10% and 8% of students at Eagle Academy met or exceeded State minimum expectations for language arts and math, respectively. *Id.* ¶ 40; *see also* Dist. Answer ¶ 40.

Throughout the District, only 50% of eighth-grade students in Newark schools meet the State's minimum proficiency in literacy. Compl. ¶ 30; Dist. Answer ¶ 30 (admitting that "District has been hampered by statutory restrictions that essentially protect the interests of adults over the rights of the children of Newark" when trying to "meet the constitutionally-mandated Thorough and Efficient education requirements for all children in [Newark]"). Even fewer, just 40%, meet the State's minimum standards for mathematics. Compl. ¶ 30. Given the challenges faced in the schools these twelve students attend and the inability of the majority of students within the District to meet the State's minimum proficiency expectations, Plaintiffs represent and typify the thousands of students enrolled in Newark schools.

B. *The Defendants and Defendant-Intervenors*

Newark is charged with enforcing the LIFO Statute when executing a RIF within the district, but is hampered in meeting its obligations under the New Jersey State Constitution's thorough and efficient education clause due to the restrictions placed upon it by operation of the LIFO Statute. Compl. ¶ 26. In fact, Newark has admitted that

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

Dist. Answer ¶ 26. Superintendent Cerf, as the superintendent of Newark, is charged with enforcing the LIFO Statute in the event of a RIF. Compl. ¶ 27; Dist. Answer ¶ 27. In addition, the State Board of Education and Acting Commissioner Kimberly Harrington (together with the

State Board of Education, the “State Defendants”) are charged with enforcing the LIFO Statute through the creation of standards. Compl. ¶¶ 24-25; Dist. Answer ¶¶ 24-25.

On December 19, 2016, the Court permitted the Union Intervenors, as well as the New Jersey Education Association (“NJEA”), to intervene as defendants in this action. Trousdale Aff., Ex. E. AFT is a national labor organization that “represents 1.6 million pre-K through 12th-grade teachers; paraprofessionals and other school-related personnel; higher education faculty and professional staff; federal, state and local government employees; nurses and healthcare workers; and early childhood educators.”³ AFTNJ is a statewide umbrella organization of affiliated AFT local unions, which consists of approximately 30,000 members, including public school teachers for students from pre-K through twelfth grade. NTU is the local union affiliated with AFTNJ, and consists of approximately 3,600 teachers and educational employees employed by Newark. The group of individual teachers represented by the Union Intervenors includes both senior and junior teachers, which means that individual members of the Union Intervenors are impacted by the LIFO Statute in different ways.

NJEA is a labor organization with a membership of approximately 200,000 members, which does not consist of senior teachers only or just teachers within Newark.⁴ NJEA has recently touted on its website that seniority “is a positive, not a problem” in response to challenges to the LIFO Statute, and characterizes any attacks on seniority rights as an effort to create division among colleagues. *See* NJEA, Seniority: A Positive, Not A Problem (Dec. 14, 2016), <http://earlycareer.njeasites.org/2016/12/14/seniority-a-positive-not-a-problem/>. The organization’s membership includes both individuals who benefit from the protections of the

³ *See, e.g.*, AFT Press Release, *Americans Voted for Public Schools Over Privatization* (Nov. 9, 2016), <http://www.aft.org/press-release/americans-voted-public-schools-over-privatization>; *see also generally* <http://www.aft.org/>.

⁴ NJEA, *Fact Sheet*, <https://sd15.njea.org/about/who-we-are/fact-sheet>.

LIFO Statute (e.g., senior, ineffective teachers) and individuals who are harmed by the statute (e.g., less senior, effective teachers).⁵

III. BACKGROUND REGARDING THE APPLICATION OF THE LIFO STATUTE IN THE DISTRICT

Though the operation of the LIFO Statute is applied uniformly throughout the State, it disproportionately harms children in low-income school districts. Newark is one such school district. As the Complaint sets forth, in the 2014-2015 school year 94.3% of the students at Hawkins, where three of the named Plaintiffs are students, were considered economically disadvantaged. Compl. ¶ 33. According to a national study, “[b]y every measure of qualifications . . . less-qualified teachers [are] to be found in schools serving greater numbers of low-income and minority students.” Compl. ¶ 54; Frank Adamson & Linda Darling-Hammond, *Speaking of Salaries: What It Will Take To Get Qualified, Effective Teachers in All Communities*, Center for Am. Progress 1, https://cdn.americanprogress.org/wp-content/uploads/issues/2011/05/pdf/teacher_salary.pdf; Dist. Answer ¶ 54 (admitting). Consistently, students of color in low-income communities are between three and ten times more likely to have unqualified teachers than students in predominantly white communities. Compl. ¶ 55; Adamson & Darling-Hammond, at 1; Dist. Answer ¶ 55 (admitting in part and noting “there are studies concerning the significant impact of low performing teachers on students of color in low-income communities”). Another study found that, by replacing an ineffective teacher with simply an average teacher, the present value of students’ lifetime income would increase by over \$250,000 per classroom—an amount that reaches staggering proportions when aggregated over successive years of effective teaching. Compl. ¶ 52; Raj Chetty, John N. Friedman & Jonah E. Rockoff, *The Long-Term Impacts of Teachers: Teacher Value-Added and*

⁵ See, e.g., *Early Career NJEA*, <http://earlycareer.njeasites.org/>.

Student Outcomes in Adulthood, 5 (Nat'l Bureau of Econ. Research, Working Paper No. 17699, 2011), <http://www.nber.org/papers/w17699.pdf>; Dist. Answer ¶ 52 (admitting in part and noting “there are studies concerning the significant impact of low performing teachers on students of color in low-income communities”).

Newark fits these criteria. The District serves primarily low-income and minority students, and is suffering a glut of ineffective teachers. *See, e.g.*, Compl. ¶¶ 4, 12; *see also* N.J. Department of Education, *2015-2016 Enrollment District Reported Data: Newark City District*, <http://www.state.nj.us/cgi-bin/education/data/enr11plus.pl>. Nearly half of all the “ineffective” teachers in New Jersey work in Newark, along with 10% of the State’s “partially effective” teachers. Compl. ¶ 47; Dist. Answer ¶ 47 (admitting). And the District has admitted that it “has been hampered by statutory restrictions that essentially protect the interests of adults over the rights of the children of Newark” when trying to “meet the constitutionally-mandated Thorough and Efficient education requirements for all children in” the District. Dist. Answer ¶ 33.

In comparison to Newark, the affluent Summit City School District (“Summit”) a few miles away had *zero* ineffective or partially ineffective teachers out of 337 evaluations. Compl. ¶¶ 49-50; Dist. Answer ¶¶ 49-50 (admitting). Consequently, in Summit, RIFs under the LIFO Statute would not result in ineffective or partially ineffective teachers being retained over effective teachers. Compl. ¶ 49; Dist. Answer ¶ 49 (admitting). The same cannot be said for Newark and other similarly situated districts, where application of the LIFO Statute forces the termination of effective teachers over more senior but less effective educators whenever a RIF is required for budgetary reasons.

In February 2014, Newark published information about the impact of a RIF on the District when it sought a temporary reprieve from quality-blind layoffs in the form of an

equivalency request under N.J.A.C. § 6A:32-5.1 (“Equivalency Request”) from the State Department of Education. Compl. ¶ 42; Dist. Answer ¶ 42. The District sought this relief because its education funding had decreased by almost \$200 million in recent years due to declining enrollment within the District’s schools, so Newark needed to consider whether it should engage in a reduction in its teaching force to address the budget shortfalls.⁶ Compl. ¶ 42; Dist. Answer ¶ 42 (admitting). The Equivalency Request included data showing that, if Newark were to implement a RIF, operation of the LIFO Statute would *mandate* that 75% of the laid-off teachers would be those considered effective or highly effective, while only 4% would be rated as ineffective. Compl. ¶ 42; Dist. Answer ¶ 42 (admitting). The data presented in the Equivalency Request showed that a RIF under the LIFO Statute would result in as many as 8,000 children from the class of Newark students represented by Plaintiffs missing out on a high-performing teacher every year. Compl. ¶ 75; Dist. Answer ¶ 75. Newark submitted to the State Board of Education the *precise* harm that would be suffered by the District in the event of a RIF.

The State Defendants have never responded to the Equivalency Request. Compl. ¶¶ 42-43; Dist. Answer ¶¶ 42-43 (admitting); Trousdale Aff., Ex. D (“State Answer”) ¶¶ 42-43 (admitting that Newark submitted Equivalency Request and State never answered it).

⁶ Newark has faced significant budget cuts for the 2014-2015, 2015-2016, and 2016-2017 school years. See Cerf Cert., ¶ 5; see also Education Law Center, *Newark Public Schools: Budget Impacts of Underfunding and Rapid Charter Growth* (Nov. 2015), http://www.edlawcenter.org/assets/files/pdfs/Newsblasts/NPS%20Budget%20Impacts%20of%20Underfunding%20and%20Rapid%20Charter%20Growth_hires.pdf. Newark is currently in the process of setting its 2017-2018 school year budget, but the current budget allocation from the State of New Jersey for Newark is essentially stagnant. Adam Clark & Carla Astudillo, *See How Much State Aid Christie is Proposing for Each N.J. School District*, NJ.COM (Mar. 3, 2017), http://www.nj.com/education/2017/03/how_much_state_aid_christie_proposed_for_every_nj.html#incart_river_home_pop (including in database that Newark will only receive a 0.2% increase in state aid). Consequently, the District anticipates that it will likely face a \$30 million deficit for the 2017-2018 school year, but the District’s budget has not yet been released. See Karen Yi, *Parents Fight Teacher Layoff Rules As Newark Schools Face \$30M Deficit*, NJ.COM (Mar. 9, 2017), http://www.nj.com/essex/index.ssf/2017/03/parents_fight_teacher_layoff_rules_as_newark_schoo.html.

Consequently, the District had to make decisions harmful to its students in order to operate within its diminished resources. Compl. ¶ 42; Dist. Answer. ¶ 42 (admitting). Newark has been forced to cut other important programming and resources in order to account for the District's reduced funding and to retain quality teachers. Compl. ¶¶ 43, 79-81; Dist. Answer ¶¶ 43, 79-81 (admitting). Additionally, since the Complaint was filed, the State's budget numbers for the 2016-2017 school year have been released and Newark's state aid remains essentially stagnant. *See Clark & Astudillo* (including in database that Newark will only receive a 0.2% increase in state aid).

The effects of the decreased funding have been further exacerbated by a costly program that Newark implemented prior to 2014 in order to protect quality teachers within the District: the Educators Without Placement Sites ("EWPS") pools. Compl. ¶ 81; Dist. Answer ¶ 81 (admitting). Newark created the program in an effort to keep ineffective teachers out of classrooms and avoid engaging in a RIF *that would not remove these teachers from the District*. *See Cerf Cert.* ¶ 13. Teachers in these EWPS pools have all been rated as ineffective or have other performance-related issues that caused principals throughout the District to decline to employ them. Compl. ¶ 82; Dist. Answer ¶ 82 (noting that Newark is "unable to separate from employment low performing teachers, meaning that [Newark] carr[ies] the cost of that burden centrally."). These teachers do not have full-time classroom placements, but perform various support and teacher's aide functions. Compl. ¶ 82. During the 2014-2015 school year, the EWPS pool included 271 teachers—most of whom are senior teachers with ten or more years of experience—and cost Newark approximately \$22.5 million dollars in payroll. *Id.* ¶¶ 83-85.

In 2015, Newark could no longer afford to keep these EWPS teachers out of the District's schools due to funding issues, *see Cerf Cert.* at ¶ 15, and had to force-place them in schools

without the consent of those schools' principals. Compl. ¶ 86-87; Dist. Answer ¶ 87 (admitting force placement of teachers without consent of school principals). These force-placed teachers' salaries cost the District more than \$25 million, with another \$10 million in salaries for those teachers remaining in the EWPS pool. Compl. ¶ 87; Dist. Answer ¶ 87; *see also id.* ¶ 86 (noting that, when Newark was "unable to carry the cost of the burden centrally, the financial burden of such placement fell to the school budgets directly" and "forced placement had a detrimental impact on certain students"). Despite the Union Intervenors' implication that \$10 million is an inconsequential amount of Newark's budget,⁷ the cost of the EWPS teacher salaries, both for those teachers in the pool and those teachers force-placed back into classrooms, was significant given Newark's staggering \$65 million deficit for the 2015-2016 school year given flat funding (which was primarily addressed through placing the EWPS teachers back in the classroom). *See* Dan Ivers, *How Newark Schools Closed a \$65 Million Deficit in 6 Steps*, NJ.COM (Feb. 2, 2016), http://www.nj.com/essex/index.ssf/2016/02/how_newark_schools_closed_a_65m_deficit_in_6_steps.html. The \$10 million currently spent keeping teachers *out of the classroom* is a significant portion of the budget deficit that Newark anticipates facing for the 2017-2018 school year (almost a third of the deficit), yet, Newark would prefer to retain those teachers than engage in a RIF. *See* Karen Yi, *Parents Fight Teacher Layoff Rules As Newark Schools Face \$30M Deficit*, NJ.COM (Mar. 9, 2017, http://www.nj.com/essex/index.ssf/2017/03/parents_fight_teacher_layoff_rules_as_newark_schoo.html) (quoting Superintendent Cerf: "We've got to find at least \$30 million one way or another in additional revenue or expense reductions.").

⁷ *See* AFT Brief at 50. AFT also ignores the expense of salaries being paid to ineffective or problematic teachers who had previously been removed from classrooms and placed in the EWPS pool, who were force-placed back into classrooms in 2016.

The Union Intervenors assert that Newark could address this issue of ineffective teachers by engaging in individual tenure proceedings. *See* AFT’s Brief in Support of Motion to Dismiss (Mar. 13, 2017) (“AFT Br.”) at 15-17. But this is not a true solution to the larger issue.⁸ *See* Dist. Answer ¶ 93 (noting that, while Newark may actively pursue tenure charges, “that process does not address the impact of quality-blind layoffs on students through the retention of low-performing teachers”). In fact, the process would take so long that the annual budget considerations would still require Newark to address the question of whether it should implement a RIF or continue to maintain the EWPS pool while individual terminations were being adjudicated. It also prevents Newark, when engaging in a RIF, from considering whether it should spend its limited resources retaining ineffective teachers—even if the District aggressively brought tenure charges against ineffective and problematic teachers, there may be teachers with lower ratings in the District that may be more suitable for dismissal under a RIF than those with higher ratings.

Thus, no matter what course of action the District pursues while the LIFO Statute remains in effect, Newark’s children are harmed. Compl. ¶ 95; Dist. Answer ¶ 95 (admitting that because of tension between either engaging in RIF or keeping ineffective teachers in EWPS pool, “Newark continues to struggle with growing challenges negatively impacting certain district students.”). Students either suffer from the other budgetary cuts made to compensate for funding the EWPS pool in the District’s effort to keep effective teachers, or the students are injured by a RIF (such as the one modeled in the Equivalency Request) that terminates effective teachers over ineffective ones. Compl. ¶¶ 93-95.

⁸ Proceedings for terminating teachers under the TEACHNJ tenure laws are estimated to cost \$50,000 per teacher, and would each take about two years. *See* Cerf Cert. at ¶¶ 21, 23.

ARGUMENT

Under the New Jersey State Constitution, the children of New Jersey are entitled to a “thorough and efficient system of free public schools.” N.J. CONST. ART. VIII, SECT. IV, ¶ 1. As the New Jersey Supreme Court has stated in defining the contours of this constitutional requirement, every child in New Jersey must be given “the opportunity to achieve. . . . [And i]f the claim is that these students simply cannot make it, the constitutional answer is, *give them a chance.*” *Abbott v. Burke*, 149 N.J. 145, 198 (1997) (*Abbott IV*) (quotations omitted, citing to *Abbott v. Burke*, 119 N.J. 287 (1990) (*Abbott II*)) (emphasis added). Plaintiffs stand before the Court asking only for a system under which the District can retain teachers who provide students the constitutionally mandated “opportunity to achieve.” The Union Intervenors essentially ask the Court not to “give them [that] chance,” asserting numerous arguments, none of which have any merit. The Court should therefore deny the motion to dismiss and proceed as expeditiously as possible toward a judgment on the merits.

I. THE UNION INTERVENORS’ JURISDICTIONAL CHALLENGES ARE WITHOUT MERIT

There is no jurisdictional basis for dismissing Plaintiffs’ Complaint.

A. Plaintiffs Have the Appropriate Standing For Asserting Constitutional Claims

New Jersey courts employ “liberal rules of standing.” *Jen Elec., Inc. v. Cty. of Essex*, 197 N.J. 627, 645, 964 A.2d 790, 801 (2009); *Crescent Park Tenants Ass’n v. Realty Equities Corp.*, 58 N.J. 98, 107, 275 A.2d 433, 437 (1971); *N.J. Builders Ass’n v. Bernards Twp.*, 219 N.J. Super. 539, 530 A.2d 1254 (App.Div.1986), *aff’d*, 108 N.J. 223, 528 A.2d 555 (1987). This is in keeping with “a core concept of New Jersey jurisprudence, that is, that [the state’s] ‘rules of procedure were not designed to create an injustice and added complications but, on the contrary, were devised and promulgated for the purpose of promoting reasonable uniformity in the

expeditious and even administration of justice.” *Jen Elec.*, 197 N.J. at 801-02 (quoting *Handelman v. Handelman*, 17 N.J. 1, 10, 109 A.2d 797 (1954)) (applying these principles in finding that a plaintiff who would be responsive to a general, not sole-source, public contract bid did have standing to challenge bid specifications). Though New Jersey courts will not proceed with cases brought by “mere intermeddlers” or “strangers to the dispute,” standing exists wherever a plaintiff has “a sufficient stake and real adverseness.” *Crescent Park Tenants*, 58 N.J. at 107-08. Plaintiffs have standing here.

In *Crescent Park Tenants*, the New Jersey Supreme Court found standing for a tenant association where it was undisputed that the tenants themselves had the requisite stake and adverseness to bring individualized suits. *Id.* at 108. Similarly here, it is indisputable that Newark students—on whose behalf Plaintiffs bring this suit—are precisely the individuals being harmed by the LIFO Statute’s preservation of ineffective teachers, maintenance of the EWPS pools, forced alternative budget cuts, and termination of effective teachers should a RIF be implemented. Plaintiffs have alleged that Newark’s decreased enrollment numbers have led to funding cuts, which would ordinarily necessitate a RIF. Compl. ¶ 42. The District admits this as well. Dist. Answer ¶ 42. However, in order to avoid the grave harm to students that such a RIF would cause by terminating large numbers of effective teachers, Newark has instituted the EWPS pool, which diverts the District’s limited funds to cover the salaries of ineffective teachers whom principals have deemed not fit to be in the classroom. *Id.* ¶¶ 51, 74, 80. These sums will be, based on present estimates, a third of the District’s budget deficit for the 2017-2018 school year. See Karen Yi, *Parents Fight Teacher Layoff Rules As Newark Schools Face \$30M Deficit* (Mar. 9, 2017), http://www.nj.com/essex/index.ssf/2017/03/parents_fight_teacher_layoff_rules_as_

newark_schoo.html (quoting Superintendent Cerf: “We’ve got to find at least \$30 million one way or another in additional revenue or expense reductions.”). This in turn prevents Newark from funding various educational programs and recruiting new, effective teachers, which in turn injures the District’s students. Compl. ¶¶ 43, 94.⁹ These are real, non-speculative harms pled in the Complaint and suffered by the Plaintiffs.

There can be no question that the named plaintiffs, along with all Newark students, have a real stake in the outcome of this litigation, and that real adverseness is present. *See, e.g., Crescent Park Tenants*, 58 N.J. at 109 (“[N]o one may question that the Association has a real stake in the outcome of the litigation nor many [sic] anyone question that there is real adverseness in the proceeding” where the Association’s members all had common, indisputable grievances with the landlord). Further, regardless of whether the named Plaintiffs are currently in a classroom with an ineffective teacher, they could be next year, and some of their classmates necessarily are at present. Plaintiffs also suffer the significant harm of the district’s decreased educational resources, representing more than a third of the anticipated budget deficit in the District for the upcoming school year, going toward the retention of ineffective teachers in order to keep effective teachers in their classrooms. Therefore, like the plaintiffs in *Crescent Park Tenants*, Plaintiffs here have clearly demonstrated their standing.

⁹ Plaintiffs have pending discovery requests geared toward providing further details about the harms of the LIFO Statute, which should further confirm the information publicly available about those harms evidenced in the Equivalency Request, the District’s Answer, and the Cerf Certification.

B. *Plaintiffs' Claims Are Ripe for Judicial Review*

Plaintiffs' claims, as alleged in the Complaint, are undoubtedly ripe for judicial review. Under New Jersey law, the evaluation of ripeness requires consideration of (i) whether the issues are fit for judicial review and (ii) the hardship to the parties if judicial review is withheld at this time. *See Hogan v. Donovan*, 2012 WL 1328279, at *10 (Law Div. Apr. 17, 2012) (citing *Comm. to Recall Robert Menendez From the Office of U.S. Senator v. Wells*, 2014 N.J. 79, 99 (2010) (internal citations and quotations omitted)). Given the escalating harm faced by students in Newark in the face of stagnant funding and decreased enrollment, there is no doubt that the issue regarding retention of ineffective teachers in Newark has reached a point where this constitutional challenge is necessary.¹⁰

1. Plaintiff's Claims Are Ripe for Judicial Review

This court assumes jurisdiction over a claim if there is a "real and immediate" threat of enforcement or harm that would affect the plaintiff. *Garden State Equality v. Dow*, 434 N.J. Super. 163, 189 (Law Div. 2013). Plaintiffs are currently being harmed by the mere existence of the EWPS pool, and there is a real and immediate threat that Newark will be forced to implement RIFs, given the stagnant budget, pursuant to the mandates of the LIFO Statute. Notably, in 2016, Newark was forced to engage in a RIF of guidance counselors and librarians, given budget constraints. Compl. ¶ 28. This RIF saved the district \$1.5 million, but, as it was based solely on

¹⁰ Moreover, in September 2016, the State Defendants sought relief from the New Jersey Supreme Court from, among other things, the operation of the LIFO Statute in districts including Newark. *See* Compl. ¶ 91; Trousdale Aff., Ex. F (Memorandum of Law in Support of State Defendants' Application to Modify *Abbott* Decisions). Attached to this application was the Cert. Cert., *see* Trousdale Aff., Ex. C, which discussed the significant harms faced by Newark, in part, due to the operation of the LIFO Statute. Although the New Jersey State Supreme Court ultimately dismissed the State Defendants' application without a decision on the merits, the State Defendants' memorandum made it clear that the issues presented by the LIFO Statute are dire. *See generally* Trousdale Aff., Ex. E. Plaintiffs do not agree with the portions of the State Defendants' application seeking to change the funding formulas for districts like Newark, but, as evidenced by the State's submission, the constitutional issues presented by the LIFO Statute are ripe and require judicial intervention.

seniority, the district was forced to include in the population of individuals laid off those it would have preferred to retain. *Id.* Although not the primary classroom teachers, this RIF deprived students in Newark of those teachers who otherwise could have had a positive impact on their future. *Id.* Given the stagnant budget the District faces for the 2017-2018 academic year, the next RIF is likely to affect primary in-classroom teachers and, as modeled in the Equivalency Request, to remove almost none of the ineffective teachers in the District.¹¹

During the 2014-2015 academic year, 53 percent of New Jersey's ineffective teachers were in Newark, whereas only 0.89 percent of the State's highly effective teachers were in Newark. Meanwhile, students in Newark, including students in the schools that Plaintiffs attend, continue to fail to meet basic educational requirements because quality teachers are foregone. *See, e.g.,* Compl. ¶¶ 31, 33, 35, 37, 47-48, 105, 106.

As Plaintiffs allege in the Complaint, through the EWPS pool—and in an effort to avoid implementing the LIFO Statute—the District has paid and continues to pay the salaries of certain ineffective teachers while simultaneously avoiding “placing [other] ineffective teachers who had not received a permanent role as the teacher of record in a classroom *in order to prevent causing academic harm to students.*” *See, e.g.,* Cerf Cert. at ¶ 13 (emphasis added). Most recently, in 2016-2017, the District is still carrying almost \$10 million in costs of teachers who were still unable to secure a teaching role in the District. Compl. ¶87; Cerf Cert. ¶ 16. Through the EWPS pool, the District ends up paying millions of dollars in salaries for teachers whom no school in the District wants to place in a classroom, while the District struggles to provide students with the basic tools for academic success.

¹¹ *See* Newark Public Schools, *Overview of Equivalency Request: Protecting Our Best Teachers During a Fiscal Crisis* (2014), http://content.nps.k12.nj.us/wp-content/uploads/2014/08/Overview_of_Equivalency_February_2014_FINAL.pdf.

For over three years, the District has resorted to alternatives to instituting a RIF as required by the LIFO Statute, in an attempt to manage the harm to Plaintiffs. However, as the Cerf Certification and the District's Answer make clear, these alternatives to a RIF are not sustainable given the continued budgetary issues faced by the District. *See, e.g.*, Dist. Answer ¶¶ 82, 86; Cerf Cert. ¶ 5. As Superintendent Cerf affirmed: “[t]he financial constraints under which the district operates are severe and are projected only to get worse . . . [as it] has faced significant budget cuts in recent years.” Cerf Cert. at ¶ 5. At first, the District was paying more than \$35 million at its peak to pay for individual teachers whom no school in the District had chosen to hire, by way of the EWPS pool. *See id.* at ¶ 14.

Plaintiffs have been and continue to be negatively impacted by the dire situation in the District. The infringement upon Plaintiffs' constitutional right to a thorough and efficient education is current, is ongoing, and would only be further exacerbated if the District is forced to institute a RIF. This harm is real, affects the everyday academic lives of Plaintiffs, and will only worsen as the District is left with effectively flat funding from the State, as evidenced in the Governor's school aid budget numbers, revealed earlier this month.¹² The District's static state aid for the 2017-2018 academic year—coupled with the estimated \$30 million deficit—is likely to put the District in a position where it has no option but to institute a RIF. That point would *not* be when Plaintiffs' harm is materialized, but rather, that would be the point at which Plaintiffs' ongoing harm will be detrimentally intensified.

¹² *See* State of New Jersey, Department of Education, 2017-18 State Aid Summaries, 2017-2018 Projected SFRA K-12 State School Aid and PreK State Aid (2017), <http://www.state.nj.us/education/stateaid/1718/>.

2. There Is Significant Hardship to Both Plaintiffs and Newark if Judicial Review Is Denied at This Time

The public interest in this matter weighs against dismissal on ripeness grounds because the hardship faced by Newark's students, including Plaintiffs, and, indeed, the District if judicial review is withheld at this time will unduly prejudice the parties. *See Hogan*, 2012 WL 132879 at *10-11 (denying defendant's motion to dismiss where sufficient hardship would accrue to both parties if judicial review was withheld at the time and plaintiffs were required to re-file after the budget in question was finalized). In 2014, Newark submitted the Equivalency Request to the State Defendants, which set forth the specific harms faced by the district and the students (like Plaintiffs) within the district if there were to be a RIF under the LIFO Statute. That request has gone unanswered. Compl. ¶¶ 42-43; Dist. Answer ¶¶ 42-43 (admitting); State Answer ¶¶ 42-43 (admitting that Newark submitted Equivalency Request and State never answered it).

As Superintendent Cerf set forth, “[e]ven without any additional cuts to the district’s funding, [the district has] been hampered by statutory restrictions that essentially protect the interests of adults over the rights of children of Newark.” Cerf Cert. at ¶ 25; *see also, e.g.*, Dist. Answer ¶ 34 (“Defendants admit that even though the District’s schools are making great strides to meet the constitutionally-mandated Thorough and Efficient education requirements for all children in the District, the District has been hampered by statutory restrictions that essentially protect the interests of adults over the rights of the children of Newark.”). Dismissal of this case would result in the District (i) committing its limited resources to the retention of ineffective teachers to the detriment of students to avoid a RIF or (ii) result in the District executing drastic teacher layoffs—without being able to consider a teacher’s effectiveness—in the event of a RIF. Both options would not only cause further harm to the Plaintiffs and students in other similarly

situated circumstances, it would also prolong the negative impact that the LIFO Statute has on students in Newark for at least another full academic year.

Further, as in *Hogan*, “little would be gained, therefore, by [dismissing on grounds of ripeness and] adjudicating this matter in the factual context of a finalized [2017-2018] budget” in which a RIF is in place, as Plaintiffs’ position would be the same either way. 2012 WL 132879 at *10. The harm is real, ongoing, not contingent upon the institution of a RIF, and has been *admitted* by the District.

Consequently, the issues are ripe for judicial review now, as obtaining a dismissal on ripeness grounds now would just require re-filing the suit as soon as the 2017-2018 budget is approved. *See id.* at *11. The Union Intervenors’ motion to dismiss should accordingly be denied, as was done by the Court in *Hogan*.

C. *Plaintiffs’ Constitutional Challenge to the LIFO Statute Is Properly Before This Court, Not the Legislature*

The Union Intervenors spend much of their brief arguing that this action really involves just a policy question, best left to the Legislature, and not a legal question to be addressed by the Court. The Union Intervenors base this meritless contention primarily on an argument that the LIFO Statute should be granted deference because statutes (especially when, as they argue, a statute was recently considered by the Legislature) are presumed constitutional. But they are incorrect. One of the judiciary’s primary roles is to determine the contours of the State’s constitution and whether any given statute falls outside those constitutional boundaries. When a specific piece of legislation is challenged as unconstitutional, it is up to the judicial branch to assess that law’s constitutionality, and whether a statute has been recently considered by the Legislature is of no moment. *See, e.g., State v. New Jersey Trade Waste Ass’n*, 191 N.J. Super. 144, 152, 465 A.2d 596, 600 (Law. Div. 1983) (“The function of the courts is to review

legislative enactments to determine their constitutionality.”); *King v. South Jersey Nat. Bank*, 66 N.J. 161, 177 (1974) (“The power of the Court to enforce rights recognized by the New Jersey Constitution, even in the complete absence of implementing legislation, is clear.”); *Robinson v. Cahill*, 69 N.J. 133, 147 (1975) (“When there occurs such a legislative transgression of a right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts.”); *Valent v. N.J. State Bd. Of Educ.*, 114 N.J. Super. 63, 69 (Ch. Div. 1971) (“Since *Marbury v. Madison*, this obligation is imposed upon the judiciary, not the executive or legislative branches.”); *Colombo v. Board of Edu. For the Clifton Sch. Dist.*, 2016 WL 6471013, at *6 (D.N.J. Oct. 31, 2016) (finding that the wrong alleged by plaintiff, which related to sexual harassment charges, under the “thorough and efficient” clause “raises a State Constitutional claim over which the courts have clear jurisdiction”). The Union Intervenors’ argument that the LIFO Statute should be granted deference because legislation is presumed constitutional is a red herring. Even if a presumption exists, any such presumption can be overcome—and should be here. See *Valent*, 114 N.J. Super. at 69 (“[I]n matters of substantial constitutional dimension the Executive and the Legislature are not the determining or final arbiters of what is and what is not constitutional.”).

Here, the State Constitution guarantees children with socio-economic disadvantages, such as those in Newark, not merely an education enabling them to function competently, but an education enabling them to participate fully with their more affluent peers so as “to compete in the marketplace, [and] to take their fair share of leadership and professional positions” in our society. *Abbott II*, 119 N.J. at 392.

The[se students] live in a culture where schools, studying, and homework are secondary. Their test scores, their dropout rate, their attendance at college, all indicate a severe failure of education. While education is largely absent from their lives, we

get some idea of what is present from the crime rate, disease rate, drug addiction rate, teenage pregnancy rate, and the unemployment rate. . . . Without an effective education they are likely to remain enveloped in this environment. Their overall needs are not limited to education, but that need is overwhelming.

Id. at 391-2. In the context of these realities, the New Jersey Supreme Court stated that the measure of the constitutional requirements of the Education Clause “*must* account for the needs of students” in poorer urban districts; therefore, the education required to equip these students for their future “*exceeds* that needed by students in more affluent districts.” *Id.* at 319 (emphases added).

More recently, in response to a reduction in State education funding impacting these lower income districts, the Supreme Court *again* emphasized the need to protect the constitutional rights of these students: “Importantly [in *Abbott II*], the Court further found that ‘funding alone will not achieve the constitutional mandate’ for the pupils in districts having high concentrations of poor children; that ‘without educational reform, . . . money may accomplish [nothing]; and that in these [poorer] districts substantial far-reaching change in education [was] absolutely essential to success.’” *Abbott v. Burke*, 206 N.J. 332, 348 (2011) (“*Abbott XXI*”) (citing and quoting *Abbott II*). Since *Abbott II*, there have been a number of studies demonstrating the impact that ineffective and effective teachers can have on students in low-income, minority districts. Compl. ¶ 55; Adamson & Darling-Hammond, at 1; Dist. Answer ¶ 55 (admitting in part and noting “there are studies concerning the significant impact of low performing teachers on students of color in low-income communities”). Consequently, there is constitutional harm present when the operation of a statute like the LIFO Statute results in districts like Newark either saving ineffective teachers to protect the effective or engaging in harmful RIFs without *any* consideration of quality.

There are numerous examples throughout the Complaint—and in the District’s Answer—identifying the ways in which the LIFO Statutes violate the New Jersey Constitution. *See* AFT Br. at 30; Dist. Answer ¶¶ 12-13, 15-16 (admitting that the LIFO Statute essentially protects the interests of adults over the rights of the children of Newark). These grave, constitutional harms being imposed upon Newark’s students far outweigh any presumption of constitutionality afforded to any statutorily created teachers’ employment rights. *See* Cerf Cert. at ¶ 25 (“Even without any additional cuts to the [D]istrict’s funding, [the District has] been hampered by statutory restrictions that essentially protect the interests of adults over the rights of children of Newark.”); *see* Dist. Answer ¶¶ 12-13, 15-16 (admitting that the LIFO Statute essentially protects the interests of adults over the rights of the children of Newark). As Plaintiffs laid out in their Complaint, faced with declining enrollment numbers, Newark’s funding has been reduced. Compl. ¶ 42; Dist. Answer ¶ 42 (admitting that Newark’s funding was reduced as a result of declining enrollment numbers). Under the LIFO Statute, any RIF that Newark might consider in response to its decreased funding would result in the loss of 300 effective teachers from the district, and almost every ineffective teacher in the district would remain. Compl. ¶ 74. The harm of ineffective teachers instructing Newark’s students would be long-lasting, as studies have repeatedly shown the impact of teacher effectiveness not only on scholastic achievement, but also on lifetime earning potential. *Id.* ¶¶ 51-52; Chetty, Friedman & Rockoff, at 5; Dist. Answer ¶ 52 (admitting in part and noting “there are studies concerning the significant impact of low performing teachers on students of color in low-income communities”). In order to reduce this great harm, Newark has thus far opted to implement policies, namely the EWPS Pool, that keep as many ineffective teachers as possible on the district payroll but out of classrooms. Compl. ¶ 80. These policies, however, inflict their own harm on Newark’s students, as they force the

district to cut other important educational programming and resources in order to pay the salaries of ineffective teachers. *Id.* ¶¶ 43, 94. They also clearly involve placing *ineffective* teachers *back into the classroom* given the funding issues faced by Newark. As Newark admits in response to Plaintiffs' Complaint, "forced placement ha[s] a detrimental impact on certain students" within the district. *See, e.g.*, Dist. Answer ¶ 86. Moreover, a RIF appears to be imminent as Newark's budget yet again remains stagnant.

In the face of Plaintiffs' proper constitutional challenge, the Union Intervenors spend significant time addressing cases that provide no guidance to this inquiry. *See* AFT Br. at 30. Each case had the benefit of a more fully developed record in determining whether the respective legislation was constitutional. *See Lewis v. Harris*, 188 N.J. 415 (2006) (refusing to affirm summary judgment where the Court found that denial of benefits to same-sex couples violated their equal protection rights); *Robinson v. Cahill*, 69 N.J. 449, 470-71 (1976) (considering certain issues in light of "the long record" of "the whole case"); *N.J. Sports & Exposition Auth. v. McCrane*, 61 N.J. 1 (1972) (holding statute constitutional at summary judgment, not motion to dismiss); *Benke v. N.J. Highway Auth.*, 13 N.J. 14, 23, 97 A.2d 647, 651 (1953) (citing *amicus curiae* regarding the constitutional distinction between a donation or appropriation versus the loan of credit, which was at issue in that case); *Hamilton Amusement Ctr. v. Verniero*, 156 N.J. 254, 266, 716 A.2d 1137, 1142 (1998) (referencing revelations from the record that prior to the legislation plaintiffs had only included political speech in their signage as influential to the Court's determination that the only commercial speech was being regulated and a lower constitutional scrutiny was therefore required).

The Court in this case should similarly make its constitutionality decisions based upon all available facts, making dismissal at this early stage inappropriate. Indeed, should Plaintiffs'

allegations be proven, the LIFO Statute cannot be deemed constitutional and should be struck down, because “[n]o statute . . . can authorize an unconstitutional practice.” *Town of Secaucus v. Hudson Cty. Bd. of Taxation*, 133 N.J. 482, 493, 628 A.2d 288, 293 (1993) (“Wherever a statute and the constitution come into conflict, the statute must give way.”); *see also Twp. of W. Milford v. Van Decker*, 120 N.J. 354, 357, 576 A.2d 881, 882 (1990) (holding that “it is axiomatic that no statute can sanction an unconstitutional practice” and refusing to consider issues attempting to permit unconstitutional practice).

Finally, ignoring the harms posed to Plaintiffs and similarly situated children within Newark, the Union Intervenors attempt to shift the Court’s attention to the teachers in an effort to argue that the Court should not consider this challenge, *but the Education Clause protects students, not teachers*. *See* AFT Br. at 30 (recognizing that “job protections afforded teachers, including LIFO” are not constitutional, but statutory); *see also* AFT Br. at 30-33. The Education Clause protects the rights of children to a thorough and efficient education, not the rights of ineffective teachers to their jobs in the face of a RIF. Therefore, rather than discuss any specific benefits and public policy goals that enforcement of the LIFO Statute has for students, the Union Intervenors instead assert the supposed benefits of the general tenure laws to teachers in Newark. *Id.* at 30-33. In particular, the Union Intervenors argue that the basic premise of tenure laws is to promote job security for “effective teachers.” *See* AFT Br. at 30-31. But the LIFO Statute does *not* promote job security for effective teachers when they are more junior; it actually mandates their dismissal. Therefore, the Union Intervenors’ efforts to place the job security provided to teachers under the general tenure laws as a “public good,” since it purportedly “functions as a recruitment and retention inducement by acting as a check on school officials and administrators who might otherwise be tempted to base hiring and retention decision on patronage or other

invidious motives, rather than merit” in fact highlights exactly why the LIFO Statute, which prohibits merit considerations when a RIF is necessary. AFT Br. at 32.

In response to this argument, it is essential to note that Plaintiffs have not challenged that the tenure laws taken as a whole are unconstitutional. Their claims are limited *just* to the impact of the LIFO Statute on children within districts like Newark. Nevertheless, the Union Intervenors spend the majority of their “Statement of the Case” discussing aspects of the tenure laws *not* implicated by Plaintiffs’ Complaint and therefore not included as part of Plaintiffs’ pleading. *See* AFT Br., at 9-20. But Plaintiffs are not challenging the milestones teachers must meet in order to gain tenure or any of the other protections offered to tenured teachers in New Jersey (including the various protections associated with being brought up, individually, on tenure charges). Therefore, the only harm alleged to children within Newark such as Plaintiffs is that arising by operation of the LIFO Statute: the impact of a future RIF under the LIFO Statute as demonstrated through Newark’s modeling in the Equivalency Request and the current impact on students of the loss of resources and the forced placement of ineffective teachers back into the classroom due to the operation of the EWPS pool. Consequently, the irrelevant and unpled information present in the Union Intervenors’ memorandum of law should be ignored.¹³

The Union Intervenors have failed to articulate any compelling social or policy benefit achieved through the LIFO Statute that counters Plaintiffs’ ongoing and future constitutional harms, which have been caused specifically by the LIFO Statute’s enforcement. Therefore, there is no reason to dismiss Plaintiff’s complaint simply because it challenges a statute, especially at the pleading stage of the litigation.

¹³ On a motion to dismiss the Court should not be presented with information outside of the complaint and what is incorporated by reference thereto. *Greenberg*, No. A-0759-10T3, 2011 WL 2636990, at *3 (App. Div. July 7, 2011).

II. PLAINTIFFS HAVE SUFFICIENTLY PLED THEIR CLAIMS

A. *Applicable Pleading Standards*

Given that the Plaintiffs have cleared all jurisdictional hurdles, the facts alleged in Plaintiffs' Complaint more than surpass the requirements to survive a motion to dismiss for failure to state a claim. New Jersey courts have consistently "applied an indulgent standard," whereby plaintiffs are "entitled to a liberal interpretation of the contents of the complaint and to the benefits of all its allegations and the most favorable inferences which may be reasonably drawn therefrom." *J. Fletcher Creamer & Son, Inc. v. Penn. Manufacturers Ass'n*, 2009 WL 2365884, at *3 (N.J. App. Div. Aug. 4, 2009) (quotations omitted); *Burg v. State*, 147 N.J. Super. 316, 319–20, 371 A.2d 308, 310 (App. Div. 1977) ("It is thoroughly settled that on a motion challenging the legal sufficiency of a complaint, R. 4:6-2(e), 'the plaintiff is entitled to a liberal interpretation of its contents and to the benefits of all its allegations and the most favorable inferences which may be reasonably drawn from them.'"). Therefore, the New Jersey Supreme Court has articulated that motions to dismiss a complaint should be granted "in only the rarest of instances." *Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 N.J. 739, 772 (1989); *see also NCP Litig. Trust v. KPMG LLP*, 187 N.J. 353, 365 (2006) ("If the fundament of a cause of action may be gleaned even from an obscure statement of claim[s], then the complaint should survive this preliminary stage.") (internal quotations omitted); *Meisels v. Fox Rothschild, LLP*, 2014 WL 7891590, at *4 (N.J. App. Div. Feb 19, 2015) (stating that "[b]ecause of this liberal and searching inquiry, a Rule 4:6-2(e) motion should be granted only in the rarest of instances"). For a complaint to survive a motion to dismiss, a plaintiff must simply allege facts that "suggest" a cause of action. *See Craig v. Suburban Cablevision, Inc.*, 140 N.J. 623, 626, 660 A.2d 505, 506 (1995); *Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189, 192, 536 A.2d 237 (1988).

Plaintiffs have done far more in their Complaint than simply “suggest” a cause of action. They have set forth a myriad of facts demonstrating the significant harm faced by students within the District, including Plaintiffs, due to operation of the LIFO Statute. These allegations, even without discovery, are substantiated by submissions by the District to the State Board of Education (e.g., the Equivalency Request), the Cerf Certification, and the District’s Answer.

Knowing this, the Union Intervenors have argued that, when considered in totality, the Complaint does not allege facts that *prove* the LIFO Statute is unconstitutional. Unfortunately for the Union Intervenors, “the relevant inquiry is not whether plaintiff was a successful claimant under case law, but whether plaintiff’s [] pleading, as construed by the court, ‘suggested’ a cognizable cause of action by its facts.” *J. Fletcher Creamer & Sons, Inc. v. Penn. Manufacturers Ass.*, 2009 WL 2365884, at *4 (N.J. App. Div. Aug. 4, 2009). Therefore, this is simply not one of those rare instances in which the complaint should be dismissed.¹⁴

B. *Plaintiffs Have Properly Stated a Claim Under the Education Clause*

The New Jersey State Constitution mandates that children in the State receive a “thorough and efficient” public education that will provide them with the opportunity to achieve, fulfill their role as citizens, and participate effectively in the work force. N.J. Const. art. VIII, § 4, ¶1; Compl. ¶ 1. The Union Intervenors argue that “Plaintiffs must allege facts that establish that they are being deprived of a thorough and efficient education by virtue of being taught by

¹⁴ The Union Intervenors provide certain examples of actions wherein motions to dismiss were granted. *See, e.g.*, AFT Brief at 20-21. However, these cases are inapposite. For example, in *Rieder v. State Dept. of Transp.*, the statute in question did not itself restrict a landowner’s use of his or her land prior to the commencement of condemnation proceedings, thus it could not, on its face, constitute government regulation qualifying as a taking. 221 N.J. Super. 547, 555-57 (App. Div. 1987). In *Glass v. Suburban Restoration Co.*, the plaintiff merely stated that an attorney did not perform everything the attorney had said that she would, without alleging any specific unperformed tasks or the harm that the lack of performance had caused. 317 N.J. Super. 574, 581-82 n.5 (App. Div. 1998). Neither of those cases presented actionable wrongs laid out or identified specific harms as Plaintiffs have done here.

ineffective teachers and that the presence of those ineffective teachers in the classroom of the Plaintiff children is attributable to the LIFO provision of TEACHNJ.” AFT. Br. at 49. As a preliminary matter, this summation ignores the harm that Newark students are facing, which Plaintiffs have thoroughly pled, due to the budget constraints that have been exacerbated in an attempt to avoid the direct harms of implementing a RIF under the LIFO Statute. Compl. ¶¶ 43, 94. Plaintiffs have not failed to state a claim simply because their harm currently flows from Newark’s attempts to mitigate the injurious effects of the LIFO Statute on its students.

Nevertheless, Plaintiffs have satisfied the pleading requirements to maintain their claim under the Education Clause. Under *Abbott I*, a successful Education Clause claim requires proof that “after comparing the education received by children in property-poor districts to that offered in property-rich districts, it appears that the disadvantaged children will not be able to compete in, and contribute to, the society entered by the relatively advantaged children.” *Abbott v. Burke*, 100 N.J. 269, 296 (1985). Plaintiffs have done this.

As alleged in the Complaint, Newark’s neighbor Summit, which has a median household income that is more than three times higher than Newark’s, has no ineffective teachers, and consequently no possibility of ineffective teachers being retained during a quality-blind RIF in place of effective teachers. Compl. ¶ 49. Yet a RIF in Newark, which would remove 300 effective teachers from the district and maintain a large majority of the district’s ineffective teachers, would leave students seriously worse off. This is especially true when the effect on Newark’s students is compared to that experienced by their Summit counterparts who would continue having effective teachers after any RIF. *Id.* ¶ 74. The effects would be long-lasting for these Newark students, as studies have repeatedly shown the impact of teacher effectiveness not only on scholastic achievement, but also on lifetime earning potential. *Id.* ¶¶ 51-52.

Moreover, beyond the comparison between Newark and a more affluent community, students in Newark are being denied their constitutional rights under the Education Clause by operation of the LIFO Statute, as alleged in the Complaint. According to the last published Staff Evaluation report, Newark has 94 ineffective and 314 partially effective teachers out of 2775. *Id.* ¶ 47.¹⁵ This means that many Newark students, the class of children represented by Plaintiffs, are undeniably being taught by ineffective and partially effective teachers. Second, due to decreased funding, Newark requested a reprieve from the LIFO Statute so that it could conduct a RIF, which indicates the harm suffered within the District. *Id.* ¶ 42. This request was ignored, so Newark cut other programming in order to avoid the most serious harm that would be realized by laying off its effective classroom teachers in a quality-blind LIFO Statute RIF.¹⁶ *Id.* ¶¶43, 94. Further, Newark has admitted the harm that force placing ineffective teachers (*e.g.*, the teachers in the EWPS pools) in the classroom has on students. *See* Dist. Answer ¶ 86; *see also* Dist. Answer ¶ 55 (admitting that there are studies concerning significant impact of low performing teachers on students of color in low-income communities). Nothing in the Complaint indicated that Plaintiffs seek layoffs of non-surplus teachers in a RIF, as insinuated by Union Intervenors. Third, removing ineffective teachers via the TEACHNJ provisions is “a time-consuming and cost-intensive process that takes at least two years,” and is followed by legal proceedings that can take another year or more and cost the district more than \$50,000 per terminated teacher. *Cerf. Cert.* ¶ 23. This is consequently not a viable option for efficiently removing ineffective teachers when the district is faced with decreased funding. Moreover, if tenure charges typically

¹⁵ Since the Complaint was filed, additional information about staff evaluations for the 2014-2015 school year in Newark was released. While the number of ineffective teachers in Newark decreased by four since the prior year, the *percent* of the state’s ineffective teachers that are concentrated in Newark has increased to 53%. *See* <http://www.state.nj.us/education/data/staff/>.

¹⁶ In fact, one of Newark’s budget cuts was to engage in a RIF of guidance counselors and librarians which was based solely on seniority, per the LIFO Statute requirements. *Id.* ¶ 41.

take two years to complete, there is no guarantee that those charges will be completed at the time a RIF becomes necessary. Even if the TEACHNJ provisions have streamlined the tenure charge process, it still does not address the significant disadvantages faced by the District when it is required to take immediate action and implement a quality-blind RIF. Fourth, Newark's attempt to keep ineffective teachers out of classrooms through the EWPS pool cost the district approximately \$22.5 million during the 2013-2014 school year. *Id.* ¶ 85. When growing budget constraints forced Newark to place some of those ineffective teachers back into classrooms the salaries of those ineffective teachers continued to cost the district \$25 million, plus another \$10 million spent on the teachers still in the EWPS pool. *Id.* ¶ 87. The costs of keeping these ineffective teachers are substantial for a district with a \$30 million deficit.

Given these facts set forth in the Complaint, Plaintiffs have adequately pled a violation of their right to a thorough and efficient education pursuant to the Education Clause.

C. *Plaintiffs Have Properly Stated Equal Protection and Due Process Claims*

Though the New Jersey Constitution does not “expressly state[] that [New Jersey] citizens are entitled to the equal protection and due process of the laws, [New Jersey courts] have construed the expansive language of Article I, Paragraph 1 to embrace those fundamental guarantees.” *Oberhand v. Dir., Div. of Taxation*, 193 N.J. 558, 577-78 (2008); *Garden State Equality v. Dow*, 434 N.J. Super. 163, 207 (Law Div. 2013); *Greenberg v. Kimmelman*, 99 N.J. 552, 568 (1985).

New Jersey courts have recognized that in its essence, “the first paragraph of [the] State Constitution ‘protect[s] against injustice and against the unequal treatment of those who should be treated alike.’” *Oberhand*, 193 N.J. at 578 (quoting *Greenberg v. Kimmelman*, 99 N.J. 552, 568, 494 A.2d 294 (1985)). Implementation of the LIFO Statute does not treat New Jersey students, situated in differing districts, similarly. Its mandate of quality-blind layoffs assumes an

equal quality of teachers in each district. This is clearly not the case when almost half of all New Jersey's ineffective teachers are employed within Newark. Compl. ¶ 47. Thus, in reality, layoffs in school districts with a plethora of ineffective or partially effective teachers and lower concentrations of effective and highly effective teachers, such as Newark, carry additional burdens that require additional considerations. To ignore this reality, as required by the LIFO Statute, is to inflict harm on students in these districts of a kind that students in districts like Summit are not at risk of facing. *Id.* ¶ 55; Adamson & Darling-Hammond, at 1 (finding that students of color in low-income communities are between three and ten times more likely to have unqualified teachers than students in predominantly white communities); Dist. Answer ¶ 55 (admitting in part and noting "there are studies concerning the significant impact of low performing teachers on students of color in low-income communities").

The Union Intervenors attempt to brush these unequal effects of the LIFO Statute under the rug by asserting that the restriction¹⁷ at issue is justified because there is a "public interest to provide teachers with job protections that insulate them for retention decisions based on patronage, politics or other invidious considerations antithetical to providing students with a thorough and efficient education." AFT. Br. at 57. Yet the Union Intervenors provide no explanation as to how the LIFO Statute itself furthers this supposed public interest, especially when the LIFO Statute prohibits the consideration of teacher quality when considering which individuals to lay off in a RIF. Nothing in AFT's brief provides information sufficient for the

¹⁷ AFT identifies the relevant "restriction" at issue in this case as being the districts' restricted ability to lay off teachers without regard to seniority. *See* AFT. Br. at 57. This is not an honest characterization of the restriction that Plaintiffs are challenging. Plaintiffs do not assert that they should be able to disregard seniority, rather Plaintiffs are challenging the LIFO Statute's restrictions which prohibit districts from considering *any factor other than seniority, including effectiveness and quality*, when a RIF is required. Compl. ¶¶ 3, 123.

Court to conduct the necessary balancing test and determine whether the LIFO Statute's purported public interest outweighs the inequality it engenders. *See Abbott I*, 100 N.J. at 296.

Further, as discussed in Section IV.A, *supra*, Plaintiffs have sufficiently asserted that their right to a "thorough and efficient" education is seriously impeded by the LIFO Statute's restrictions. This constitutes a due process violation which cannot be outweighed by the purported, though not explained, public benefit of the LIFO Statute asserted by AFT. *See Murphy v. Pub. Serv. Elec. & Gas Co.*, No. A-1418-07T3, 2009 WL 276540, at *6 (N.J. Super. Ct. App. Div. Feb. 6, 2009) ("When evaluating a due process claim under the New Jersey Constitution, the courts apply a balancing test weighing the "nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for restriction.")

D. *Plaintiffs Have Properly Stated a Claim Under the Civil Rights Act*

As demonstrated in depth in Sections I.A and I.B *supra*, Plaintiffs have clearly articulated the harms that they have suffered due to the enactment of the LIFO Statute. These harms constitute violations of Plaintiffs' constitutional right to a "thorough and efficient" education, as well as their equal protection and due process rights. The New Jersey Civil Rights Act was enacted to provide "a remedy for the violation of substantive rights found in our State Constitution and laws." *Tumpson v. Farina*, 218 N.J. 450, 474 (2014); *Owens v. Feigin*, 194 N.J. 607, 611 (2008). Thus, having alleged harms to their constitutional rights, Plaintiffs have properly stated a Civil Rights Act claim.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Intervenor-Defendants AFT's Motion to Dismiss Plaintiffs' Complaint.

Dated: March 29, 2017

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v.

KIMBERLY HARRINGTON, et al.,

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AMERICAN FEDERATION OF TEACHERS,
AFL-CIO, AFT NEW JERSEY, NEWARK
TEACHERS UNION; NEW JERSEY
EDUCATION ASSOCIATION,

Defendants/Intervenors.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY

Docket No.: MER-L-2170-16

Civil Action

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SUPERIOR COURT OF NJ
MERCER VICINAGE
CIVIL DIVISION

CERTIFICATION OF SERVICE

I, William H. Trousdale, Esq., of full age, hereby certify:

1. I am an attorney-at-law licensed to practice before this Court and a partner at the law firm of Tompkins, McGuire, Wachenfeld & Barry, LLP, 3 Becker Farm Road, Suite 402, Roseland, NJ 07068, attorneys for Plaintiffs Tanisha Garner, on behalf of her children H.G. and F.G., et al.

2. Today, March 29, 2017, I caused to be forwarded, by hand delivery, the original and two (2) copies of Plaintiffs' Memorandum of Law in Opposition to Defendant-Intervenor AFT's Motion to Dismiss the Complaint, the original and two (2)

copies of Plaintiffs' Memorandum of Law in Opposition to Defendant-Intervenor NJEA's Motion to Dismiss the Complaint, a Certification of Counsel with Exhibits, and this Certification of Service to the Deputy Clerk of the Superior Court, Mercer Vicinage, 175 South Broad Street – 1st Floor, Trenton, NJ 08650 for filing purposes.

3. Today, March 29, 2017, I caused to be forwarded, via hand delivery, one copy of the above-noted documents to the Hon. Mary C. Jacobson, A.J.S.C., New Criminal Courthouse, 400 South Warren Street, 4th Floor, Trenton NJ, 08650.

4. Today, March 29, 2017, I caused to be forwarded, via email and US Postal Service, one copy of the above-noted documents to the following parties in the above-captioned case:

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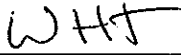
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I certify that the foregoing statements made by me are true. If any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date: March 29, 2017



William H. Trousdale, Esq.