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April 12, 2017

Via Messenger

Hon. Mary C. Jacobson, A.J.S.C.
Criminal Courthouse
S. Warren Street
P.O. Box 8068
Trenton, NJ 08650-0068

**Re: H.G. et al. v. Harrington et al. and the AFT and the
NJEA; Docket No. MER-L-2170-16**

Dear Judge Jacobson:

Please accept this letter in lieu of a more formal brief in reply to Plaintiffs' brief in opposition to AFT's motion to dismiss. Plaintiffs fail to address the following critical deficiencies in their Complaint:

1. How Plaintiffs have standing to challenge the constitutionality of LIFO statutes, which they claim are responsible for the presence of ineffective and partially effective teachers in District classrooms, when the Complaint fails to allege that they have ever been taught by ineffective or partially effective teachers and when there have been no teacher layoffs in the District.

2. How Plaintiffs have standing to challenge the use of \$8 million to maintain the EWPS (Educators without Placements) pool¹ when their Complaint does not contain a single allegation that the District's use of funds for that purpose is causally connected to the presence of ineffective teachers in classrooms or results in the Plaintiffs not receiving educational opportunities to which they are constitutionally entitled.
3. How LIFO statutes are ripe for adjudication when there have been no layoffs of teachers in the Newark School District and when none are planned.
4. How Plaintiffs state a cognizable claim that LIFO statutes violate the Education, Due Process or Equal Protection clauses of the New Jersey Constitution when Plaintiffs fail to allege, with any specificity, harm that they or any other Newark students have suffered

¹Although Plaintiffs' brief ("Rb_") repeats the allegation in their Complaint that \$10 million is being spent to maintain the EWPS pool, the Karen Yi article cited in their brief quotes Superintendent Cerf as stating that the District is currently spending \$8 million on the pool. (Rb12; http://www.nj.com/essex/index.ssf/2017/03/parents_fight_teacher_layoff_rules_as_newark_schoo.html). As discussed in AFT's initial brief ("AFTbr_") in support of dismissal (AFTbr7, n.4), based upon an average teacher salary of \$83,000 and a pool costing \$8 million, there are approximately 96 teachers in the pool, not all of whom are rated ineffective or partially effective. That means there are approximately 200 teachers assigned to instructional duties in classrooms who are alleged to be rated ineffective or partially effective.

either as a result of the operation of the LIFO statutes or the use of \$8 million for the EWPS pool.

5. How Plaintiffs state a cognizable claim that the LIFO statutes violate the Education, Due Process or Equal Protection clauses of the New Jersey Constitution based on the presence of ineffective teachers who are assigned instructional duties and who cannot be laid off because they are not surplus.²

Rather than address the above deficiencies, Plaintiffs' opposition brief repeats the allegations in their Complaint that students in Newark schools continue to perform below the State's minimum proficiency benchmarks and below the State's grade-level expectations. Plaintiffs also recite the references in their Complaint to studies emphasizing the importance of effective teachers. But Plaintiffs allege no facts that causally connect the low performance of students in certain Newark public schools with the operation of LIFO statutes or to the use of \$8 million to maintain the EWPS pool. Nor do Plaintiffs allege facts that

² It is important to note that a rating of ineffective or partially effective is a component of the TEACHNJ evaluation process to provide teachers with feedback to improve performance. Only after two consecutive years of ineffective or partially effective ratings are removal proceedings initiated. Accordingly, teachers identified as rated ineffective or partially effective may improve the following year and receive an effective, or even a highly effective, rating. (For a full discussion of the TEACHNJ evaluation process see AFTbr12-17).

tie the alleged presence of ineffective or partially effective teachers in classrooms to the LIFO statutes.

Plaintiffs present a parade of horrors with respect to the educational deficiencies in the Newark Public Schools without pleading facts that establish a causal link between the alleged failures of Newark's public school system and Plaintiffs' constitutional attack on LIFO statutes.³ No facts are pled that support the conclusion that there is any relationship between the alleged inadequacies of the District's schools and LIFO statutes. In effect, Plaintiffs ask this Court to assume the existence of such a link. But this type of sophistic logic cannot defeat a motion to dismiss. To establish the unconstitutionality of LIFO statutes, Plaintiffs must do more than allege that Newark's schools continue to be among the State's lowest performing schools and that Newark has a relatively high number of ineffective and partially effective teachers. Yet that is the essence of Plaintiffs' Complaint and

³A case in point is Plaintiffs' reference to the allegation that the mother of Z.S. has not been able to obtain an appropriate educational plan for addressing Z.S.'s dyslexia. (Rb5; Compl. ¶38). Even assuming that allegation to be true, as the Court is obligated to do for purposes of a motion to dismiss, there are no facts alleged that demonstrate that the inability of Z.S.'s mother to obtain an appropriate educational plan for her daughter is attributable to the operation of the LIFO statutes or to the District's decision to spend \$8 million on the EWPS pool. Indeed, there are no allegations in the Complaint that explain why Z.S. does not have an appropriate educational plan.

the gist of Plaintiffs' opposition brief. The factual allegations necessary to establish causal links between underperforming schools and LIFO statutes are simply missing.

Additionally, Plaintiffs' opposition brief does not meaningfully address AFT's argument that the constitutionality of the Legislature's policy decision to retain the protections of the LIFO statutes as part of its 2012 comprehensive TEACHNJ reform is a non-justiciable political question or that separation of powers principles militate in favor of the Judiciary affording this legislative initiative time to work. Plaintiffs' rejoinder to the claim that this case raises a non-justiciable political question is their bald-faced assertion that "[t]his action does not involve a battle over educational policies." (Rb1). They make no effort to distinguish the cases cited by AFT or to explain why this Court should prematurely wade into areas of educational policy. See Crawford v. Davey, 2010 WL 162061 at *13 (App. Div. 2009) (AFTa71) (newly enacted educational reform legislation should be given "the opportunity to work"); Abbott v. Burke (Abbott II), 119 N.J. 287, 321 (1990) ("Were we confident that a thorough and efficient education were likely to be achieved in the near future under the present system, we would not dream of intervening."); Abbott v. Burke (Abbott XX), 199 N.J. 140, 170-171 (2009) (Agreeing to release the State from prior remedial orders and to give the newly

enacted SFRA funding formula an opportunity to work, the Court commented, "[t]he judicial remedy is necessarily incomplete . . . and cannot substitute for the comprehensive remedy that can be effectuated only through legislative and executive efforts." (AFTbr43-48).

As discussed in AFT's initial brief in support of its motion to dismiss, and as further discussed below, Plaintiffs fail to allege facts sufficient to support either of their two claims: (1) that students in Newark are being taught by ineffective or partially effective teachers due to the operation of LIFO statutes, or (2) that students in Newark suffer a constitutional deprivation because the District spends \$8 million to maintain the EWPS pool.

A. Plaintiffs' claims that the LIFO statutes are responsible for ineffective or partially effective teachers being placed in classrooms in the Newark School District in violation of the Education, Due Process and Equal Protection provisions of the New Jersey Constitution must be dismissed.

Plaintiffs characterize their claim as a "constitutional challenge to two statutes [the LIFO statutes] that prevent students in Newark from receiving a thorough and efficient education to which they are entitled under the State Constitution." (Rbr1). However, the Complaint fails to allege facts that demonstrate Plaintiffs have suffered or are suffering a constitutional deprivation attributable to the operation of

the LIFO statutes. Nor do Plaintiffs allege facts sufficient to establish a causal connection between the operation of LIFO statutes and the presence of ineffective or partially effective teachers in any classroom in the Newark School District. Nevertheless, the gravamen of Plaintiffs' Complaint is that students suffer a constitutional harm when they are taught by ineffective teachers. Leaving aside whether being taught by an ineffective teacher violates the constitutional rights of Plaintiffs or any other students, as a threshold requirement, to state a cause of action under the Education, Due Process or Equal Protection provisions of the New Jersey Constitution, Plaintiffs must plead facts establishing that the presence of ineffective teachers in Newark classrooms is causally connected to the LIFO statutes. However, the Complaint is devoid of any allegations that would permit this essential connection to be drawn. Indisputably, there have been no layoffs of teachers in Newark - a necessary prerequisite to linking LIFO statutes to ineffective classroom teachers.

In response to AFT's argument that teachers who are in classrooms performing instructional duties are not "surplus" and therefore cannot be laid off, Plaintiffs state, "[n]othing in the Complaint indicated that Plaintiffs seek layoffs of non-surplus teachers in a RIF, as insinuated by Union Intervenors." (Rb31)). However, Plaintiffs' brief in opposition to dismissal

makes clear that they are in fact seeking relief from this Court that would permit Newark to use layoffs as a vehicle to remove tenured teachers who are assigned classroom instructional duties and who are not surplus. Plaintiffs assuredly recognize that while laying off EWPS pool teachers without regard to seniority may save the District \$8 million, it will have no impact upon teachers assigned to classroom instructional duties. For the relief sought by Plaintiffs to result in the removal of ineffective and partially effective teachers from classrooms, the Court would have to countenance the use of layoffs to circumvent TEACHNJ removal proceedings. Plaintiffs can protest that this is not the relief they seek, but even a casual reading of their Complaint and opposition brief reveals that this action is premised on the notion that if the seniority provisions of LIFO are invalidated, the District will be able to lay off teachers assigned to classrooms.

Although Plaintiffs do not outright challenge the constitutionality of the TEACHNJ removal procedures, they allege that the TEACHNJ process is a "time and money intensive process [that] is inadequate for districts—especially districts with shrinking budgets—to effectively and efficiently address teacher

quality issues while addressing ongoing budget issues.”⁴ (Rb3-4). Thus, Plaintiffs seek to lay off ineffective and partially effective teachers, including approximately 200 teachers assigned to classroom instructional duties, rather than use the streamlined TEACHNJ procedures which they and Cerf view as time-consuming and expensive.

Plaintiffs (and Cerf) pull no punches - they seek to vest school principals with the authority to “go out and hire the best and the brightest” to replace laid-off teachers. (Cerf Cert. ¶16). Notably, Plaintiffs allege that a RIF under the LIFO provisions would result in the loss of 300 effective teachers (Rb24; Complaint ¶74).⁵ For purposes of layoff, Plaintiffs draw no distinction between the approximately 96 teachers in the EWPS pool and the approximately 200 teachers in classrooms allegedly rated ineffective or partially effective. Moreover, Plaintiffs acknowledge that the District has filed charges of inefficiency against over 200 teachers since the enactment of TEACHNJ reforms in 2012, but provide no additional

⁴Plaintiffs rely on the Certification of Newark School District Superintendent Cerf, which they incorporate by reference into their Complaint. (Rb3, n.1).

⁵Plaintiffs’ allegation that 300 effective teachers would be eliminated in a RIF is based on information from the DOE website that in the 2014-15 school year there were 90 teachers rated ineffective and 221 teachers rated partially ineffective. In 2013-14 there 96 teachers rated ineffective and 314 rated partially effective. Data is not available on the DOE website for either the 2015-16 or 2016-17 school years.

information as to the processing or outcome of those cases. (Cerf Cert. ¶22).

Thus, Plaintiffs (and Cerf) seek relief allowing the District to circumvent TEACHNJ removal procedures and instead to utilize layoff statutes, denuded of seniority protections, to terminate the employment of some 200 teachers performing instructional duties in classrooms. Plaintiffs are of the view that LIFO statutes, stripped of seniority protections, would permit the District to accomplish through layoffs what the District has been unable to accomplish through the TEACHNJ removal procedures. Put simply, there is no set of facts that would entitle Plaintiffs to such relief.

RIF procedures are not available to remove non-surplus tenured teachers - whether or not those teachers were force-placed in schools to perform essential instructional duties. The purpose of layoffs is to "reduce the number of teaching staff members employed by the district whenever, in the judgment of the [school] board it is advisable to abolish any such positions" N.J.S.A. 18A:28-9 (emphasis added). The purpose of a RIF is to reduce the number of teachers; not to remove allegedly ineffective or partially effective teachers. For this reason, a school district is not permitted to conduct a RIF and then hire replacements. Yet that is the essence of the relief Plaintiffs request. In effect, Plaintiffs ask this Court

to rewrite the LIFO statutes, not only to permit layoffs without regard to seniority, but to permit the use of layoffs to remove non-surplus teachers assigned to classrooms. Only in that way can Cerf and the Plaintiffs accomplish their shared objective of permitting principals to layoff classroom teachers and replace them with "the best and the brightest." (Cerf Cert. ¶16). While Plaintiffs may deny that they seek to lay off non-surplus teachers, no other relief sought by the instant Complaint will result in the removal of the approximately 200 teachers rated ineffective or partially effective who are performing instructional classroom functions.

Although Plaintiffs bemoan the time and expense required to remove ineffective teachers through TEACHNJ procedures, those procedures, unchallenged, but much maligned, by Plaintiffs, are the only procedures available to remove non-surplus teachers. Whether or not the harm of having 200 teachers rated ineffective or partially effective in Newark classrooms violates the Education Clause, the presence of those teachers in classrooms is not attributable to LIFO and cannot be addressed through a RIF.

Nor does the speculative assertion that at some point in the future there may be a need for a reduction in force, and when that time comes, if at all, there may still be ineffective or partially effective teachers on the District's payroll, save

the Complaint from being dismissed. ("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." (Rb19)). For reasons discussed in AFT's initial brief, such speculative harm does not confer standing and claims based on "contingent future events that may or may not occur as anticipated, or indeed may not occur at all," are not ripe for adjudication. Texas v. United States, 523 U.S. 296, 300 (1996) (internal citations omitted).

Accordingly, Plaintiffs do not assert a viable claim that the LIFO statutes deprive them of a thorough and efficient education based on the presence of ineffective teachers in the classroom. There are no allegations pled that permit the Court to find that the operation of the LIFO statutes has any connection to ineffective teachers assigned to classrooms. And notwithstanding Plaintiffs' dissatisfaction with TEACHNJ removal procedures - procedures that are not directly attacked in the instant Complaint, non-surplus tenured teachers in classrooms cannot be removed through layoffs. Accordingly, Plaintiffs' claims that LIFO provisions are responsible for students being taught by ineffective or partially must be dismissed, leaving Plaintiffs with the claim that the District's use of \$8 million to maintain the EWPS pool is a constitutional violation.

B. Plaintiffs' claim that the District's use of \$8 million to maintain the EWPS pool violates the Education, Due Process and Equal Protection provisions of the New Jersey Constitution must be dismissed.

In apparent recognition of the pleading deficiencies described in Point A above, Plaintiffs assert an alternative legal theory. They maintain the even if LIFO statutes are not responsible for the presence of ineffective teachers in Newark classrooms, they are able 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." (Rb30). Plaintiffs also assert that they "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." (Rb16). Plaintiffs further claim that they are "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 mandate of the LIFO Statute." (Rb17, emphasis added).⁶

In this regard, Plaintiffs effectively acknowledge that the only harm that could form a basis for their constitutional claims is Newark's expenditure of \$8 million on the EWPS pool.

⁶As previously noted such speculative claims are not ripe for adjudication.

However, there are no facts alleged by Plaintiffs to establish that the decision of the District to spend \$8 million for the EWPS pool out of a budget of over \$900 million rises to the level of a constitutional deprivation.

The New Jersey Supreme Court's Abbott/Robinson jurisprudence addresses broad systemic problems in providing educational opportunities to students in Abbott school districts - violations that are severe in degree and pervasive in scope - such as the failure of the State to provide adequate funding for dozens of Abbott districts or the failure to equalize educational opportunities by implementing full day kindergarten and pre-school. Plaintiffs claim that the "grave constitutional harms being imposed upon Newark's students far outweigh any presumption of constitutionality afforded any statutorily created teachers' employment rights." (Rb24). However, the Complaint contains no allegations of particularized harms suffered by Plaintiffs or other students as a result of the use of \$8 million for the EWPS pool. In their opposition brief, Plaintiffs, citing paragraphs 43 and 79-81 of their Complaint, state that "Newark has been forced to cut other important programming and resources in order to account for the District's reduced funding and retain quality teachers." (Rb11). Plaintiffs also cite paragraph 94 of their Complaint to support the claim that when Newark's request for a "reprieve from the

LIFO statute" was ignored by DOE, the District "cut other programming" (Rb31). None of the cited paragraphs identify programs that were cut or the impact of such cuts on Plaintiffs or other students. For example, paragraph 43 merely alleges that Plaintiffs will "suffer from budget cuts in other areas that result in losses in important programming and resources." Paragraph 43 does not specify programmatic or resource losses and paragraphs 79-81 and 94 reference only the creation of the EWPS pool.

Asserting a "grave constitutional harm" is not the same as pleading facts that support a finding that Plaintiffs or other students have suffered a severe and pervasive constitutional deprivation. No matter how Plaintiffs attempt to characterize the harm they have suffered, they are simply unable to point to any facts in the Complaint that causally link the existence of the LIFO statutes or the funding of the EWPS pool to their allegation that District schools continue to fall below proficiency benchmarks and grade level expectations.

The constitutional deprivations that animated our Supreme Court in the Abbott cases did not involve how an Abbott district decides to spend some relatively nominal portion of its overall budget. Even if this granular level of scrutiny of a school district's spending decisions comports with the Supreme Court's analytical framework as set forth in its Abbott line of cases,

Plaintiffs' Complaint does not allege facts demonstrating that the expenditure of \$8 million to maintain an EWPS pool causes Plaintiffs or any other students to be denied a thorough and efficient education. No facts are alleged that if the District did not spend \$8 million on the EWPS pool, those funds would be used in a manner that would meaningfully impact the quality of education in the District or alter educational outcomes. Plaintiffs' vague and attenuated theory of causation cannot save their claim that Plaintiffs suffer a constitutional deprivation because Newark spends \$8 million to maintain the EWPS pool.

Conclusion

The LIFO statutes are a straw man. The Complaint contains no allegations that establish the necessary causal link between the presence of ineffective or partially effective teachers in Newark classrooms and the operation of the LIFO provisions. Nor does the Complaint contain allegations that link the use of \$8 million to maintain the EWPS pool with the loss of any specific program or other educational opportunity. For the reasons set forth in this letter brief and in AFT's initial brief in support of its motion to dismiss, the Complaint should be dismissed in its entirety.

Respectfully submitted,



Steven P. Weissman

c. All counsel of record (via email and regular mail)