

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

Plaintiffs

v.

KIMBERLY HARRINGTON, in her official  
capacity as Acting Commissioner of the  
New Jersey Department of Education, et  
al.,

Defendants

and

NEW JERSEY EDUCATION ASSOCIATION, a  
New Jersey nonprofit corporation, on  
behalf of itself and its members,

Defendant-Intervenor

and

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

Defendant-Intervenor

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION - MERCER COUNTY

DOCKET NO. MER-L-2170-16

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

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### PRELIMINARY STATEMENT

Defendant-Intervenor, New Jersey Education Association ("NJEA"), submits this brief in reply to Plaintiffs' Memorandum of Law in Opposition to Intervenor-Defendant NJEA's Motion to Dismiss Plaintiffs' Complaint ("Memorandum" or "Pl. Mem."). The Memorandum confirms the utter failure of the complaint to present a justiciable controversy or to allege a viable constitutional cause of action. The Memorandum also makes clear that Plaintiffs' complaint is nothing more than a position statement, recast to appear as a constitutional challenge, in support of their preferred policy approach to teacher layoffs. Plaintiffs' policy preference may be appropriate grist for the political branches, which is where educational policy is formulated, but this matter is, without question, not justiciable or appropriate to proceed in this Court.

As explained in the NJEA's initial brief, glaringly absent from the Memorandum or the complaint are the specific facts necessary to show Plaintiffs' standing, the ripeness of an actual controversy before the Court, and, most importantly, the requisite elements of the claimed constitutional violations. Specifically, Plaintiffs do not proffer any facts to show that their individual children are presently being taught by a teacher rated as "ineffective" in



an annual performance evaluation or that the instruction delivered by such teachers deprives their children of a constitutional thorough and efficient education.

Beyond their failure to demonstrate standing, Plaintiffs fail to show that their claims are ripe for review since the complaint does not allege that teacher layoffs or a Reduction-In-Force ("RIF") in the State-Operated Newark Public Schools ("NPS") is in effect or scheduled in the future. Without a RIF, Plaintiffs are only able to rely on three-year old hypothetical simulations or pure speculation about the possible impact of teacher layoffs on Plaintiffs' children or other NPS students.

Of most significance, Plaintiffs fail to show that the alleged harm to NPS students - lower assessment scores and graduation rates than the State average - results from unqualified teachers whose presence in the classroom is directly attributable to the seniority-based layoff statute. Plaintiffs' constitutional claims in the complaint and Memorandum are merely legal conclusions and conclusory statements, not factual allegations supporting a claim for relief.

The Memorandum lays bare the stark and fatal deficiencies in the complaint. Plaintiffs have not satisfied the basic requirements for a justiciable controversy or a

valid constitutional claim. Even under the generous standards governing a motion to dismiss, the complaint and Memorandum vividly demonstrate that Plaintiffs' allegations fail to satisfy the high bar for a constitutional attack on the validity of a statute. To the contrary, their unfounded assertions and conclusory claims of unconstitutionality are nothing more than a request for the Court to issue an advisory opinion on their policy argument that the Legislature should require annual teacher evaluations to be considered when there are RIF layoffs. The Court should reject such a request, grant NJEA's motion to dismiss, and dismiss the complaint with prejudice.

#### ARGUMENT

NJEA must address several preliminary matters in the Memorandum before turning to the issues of standing, ripeness, and failure to state a claim. First, Plaintiffs assert they are representative of similarly situated students enrolled in NPS. (Pl. Mem. 1, 4, 6, 21). But, as noted in NJEA's initial brief, Plaintiffs have not filed a class action or named parents of students at other Newark schools as Plaintiffs. (NJEA Br. 7, n.3).

Plaintiffs also purport to make claims relating to "other similarly situated districts." (Pl. Mem. 8); however, claims relating to other former Abbott districts or other

districts are not properly before the Court. (NJEA Br.11 n.8). Moreover, in the complaint and Memorandum Plaintiffs solely rely on the singular facts in NPS; their allegations do not focus on any district other than NPS. Therefore, the Court should ignore Plaintiffs vague references to "other similarly situated districts."

Second, Plaintiffs cite and rely on facts and documents not included in the complaint such as: (1) information about NPS's funding prospects for the 2017-2018 school year (Pl. Mem. 4 n.2; 10 n.6; 25 n. 13); (2) portions of the Certification of State Superintendent Christopher Cerf (Pl. Mem. 3 n.1; 10 n.6; 13 n.7, 23 n. 11); and (3) information from newspaper articles and other documents (Pl. Mem. 10 n. 6).

Nothing in categories (1) and (3) is mentioned in the complaint so the reference to these documents is improper on a motion to dismiss. With respect to the Cerf Certification, Plaintiffs claim that the certification is "incorporated by reference into Plaintiff's complaint, as it was filed as part of the Supreme Court action." (Pl. Mem. 3 n.1). However, the complaint only mentions the Memorandum of Law filed by the Attorney General in the New Jersey Supreme Court (Complaint, ¶91); the Cerf Certification is not mentioned at all. The general reference to the Memorandum of Law is inadequate to

incorporate into the complaint all the documents in the State's Supreme Court filing. Thus, the Court should disregard any factual assertions in the Plaintiffs' Memorandum that are not actually referenced and incorporated into the complaint.

Third, Plaintiffs repeatedly cite allegations that are admitted in NPS's Answer, presumably because Plaintiffs believe that this mantra of admitted facts lends legal credibility to their claims. NPS's answer, however, is irrelevant to the present motion since the Court, even without the admitted allegations, must "assume that [Plaintiffs'] allegations are true and give that party the benefit of all reasonable inferences." NCP Litigation Trust v. KPMG LLP, 187 N.J. 353, 365 (2006).

NJEA now turns to the issues of standing, ripeness for review, and failure to state a claim. NJEA will not repeat the compelling reasons for dismissal of the complaint discussed in detail in its initial brief. Our reply to the Memorandum is limited to those arguments calling for a further response.

1. **Plaintiffs' Complaint Raises Non-Justiciable Policy Issues Consigned to the Legislature**

Plaintiffs claim that because they purport to raise constitutional challenges to the RIF statutes, their case



should be adjudicated in the courts. (Pl. Mem. 14-20). Plaintiffs fail to address the significant reasons discussed in detail in NJEA's initial brief why courts should not become involved in adjudicating such matters that are, in essence, policy proposals for changes in education laws - the same policies that were thoroughly debated and acted upon by the political branches just a few years ago. (NJEA Br. 22-35). Plaintiffs also fail to address, much less mention, the Supreme Court's admonition, in response to the State's motion seeking the judicial imprimatur on various educational reforms, including layoffs based on teacher effectiveness, that the debate about such educational reform issues belongs in the Legislature. (NJEA Br. 28-29).

Moreover, the Court is not bound by Plaintiffs' characterization of the issues in the complaint as "constitutional" when it is clear, as NJEA has explained, that Plaintiffs fail to assert facts showing constitutional harm, let alone a constitutional cause of action. Nor should the Court be distracted by Plaintiffs' invocation of the Abbott cases as precedent to support their claims when the Supreme Court has declared that "direct challenges" to, among others, the RIF statutes "have not been the subject of prior litigation in the Abbott line of cases." (NJEA Br. 33).

Furthermore, the Legislature has mandated the policy that seniority is the sole criterion that should govern layoffs in a RIF. Plaintiffs argue that seniority-based layoffs merely protect ineffective teachers in the NPS, ignoring the judicial pronouncement that "[s]eniority. . . provides a mechanism for ranking all tenured teaching staff members so that reduction in force and reemployment can be effected in an equitable fashion and in accord with sound educational policies." Lichtman v. Ridgewood Bd. of Educ., 93 N.J. 362, 368 n. 4 (1983). While Plaintiffs may have a different policy preference than seniority, their preference does not create a constitutional claim, but rather reflects a continuing debate over educational policy that belongs in the legislative forum.

Finally, Plaintiffs misconstrue NJEA's discussion of the recently-enacted revision of the tenure laws. (Pl. Mem. 19-20). NJEA discussed TEACHNJ to refute Plaintiffs' exaggerated and conclusory assertion that because of the RIF statutes, districts must now retain ineffective teachers or engage in time-consuming and expensive proceedings to terminate them. (NJEA Br. 29-31). The revisions to TEACHNJ belie this assertion because the Legislature provides a streamlined process for addressing concerns about teachers rated as ineffective in their annual performance evaluations.

Additionally, if Plaintiffs believe that TEACHNJ is not effective to address the particular situation in NPS quickly enough, that is no basis for a constitutional challenge to the RIF statute or for a declaration that the statute is unconstitutional. Rather, it is a reason to present a policy argument to the Legislature to remedy any alleged deficiencies in the statute.

The Court should conclude that Plaintiffs' claims raise non-justiciable policy issues that are not suitable for judicial resolution.

2. **Plaintiffs Lack Standing to Raise Their Constitutional Claims**

There are no facts showing that Plaintiffs' children are being taught in classrooms with ineffective teachers or that they are suffering any constitutional harm because of ineffective teachers retained under the RIF statutes. Plaintiffs seek to overcome this formidable standing hurdle by analogizing their situation to that of the tenants' association in Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98 (1971). In Crescent Park, the Supreme Court concluded that because tenants had the requisite stake and adverseness to bring individual suits, the tenants' association representing their common interests had standing. Id. at 108-09, 111.

Seeking to find comfort in this decision, Plaintiffs assert: "Similarly, here it is indisputable that Newark students - on whose behalf Plaintiffs bring this suit - are precisely the individuals being harmed by the [RIF] Statute's preservation of ineffective teachers, maintenance of the [Educator Without Placement Sites] pools, forced alternative budget cuts, and termination should a RIF be implemented." (Pl. Mem. 21). In other words, Plaintiffs claim that because other students in NPS might be harmed if a RIF is implemented, Plaintiffs represent the interests of these other students to the same extent that the association represented the interests of the tenants in Crescent Park.

Plaintiffs are wrong for several reasons. First, Plaintiffs do not assert facts to demonstrate how the challenged statutes affect them. Nowhere in the complaint are there any factual allegations that any Plaintiff's child has a teacher rated as ineffective or has been otherwise adversely affected by the operation of the seniority-based RIF statute. Instead, Plaintiffs make vague and general allegations about the allegedly unconstitutional effects of a hypothetical lay-off that might possibly result in teachers with ineffective ratings being assigned to hypothetical NPS students. Those allegations are not sufficient to demonstrate Plaintiffs' standing.



Second, the present case is readily distinguishable from Crescent Park. Plaintiffs did not bring a class or representative action on behalf of all Newark students. Therefore, their status is very different from the status of the tenants' association in Crescent Park. Plaintiffs' lawsuit was brought by six individual parents on behalf of their minor children. It is Plaintiffs own standing that must be demonstrated in the first instance, not the theoretical standing of other NPS students.

Plaintiffs' argument is actually the reverse of the standing argument in Crescent Park. There, the Court held that since the tenants had standing, the association representing their interests also had standing. Here, the Plaintiffs seek the same status as the association without first establishing the standing of other NPS students or Plaintiffs own standing.

Third, this is not one of the very limited exceptions, like the circumstances in Crescent Park, when Plaintiffs have standing to assert the rights of third parties. Stubaus v. Whitman, 339 N.J. Super. 38, 47, 51 (App Div. 2001). Here, Plaintiffs have not suffered any direct injury, other parents of children attending the NPS are capable of bringing suits on their own, and Plaintiffs are not members of any non-profit association seeking to sue on their behalf. Id. at 51.

Consequently, Plaintiffs do not have standing to bring the present lawsuit on their own behalf or on behalf of other NPS students.

3. **Plaintiffs' Claims Are Not Ripe for Review**

No RIF of tenured NPS teachers of any size - much less the 300 teacher RIF about which Plaintiffs speculate (Pl. Mem. 17, 29) - is in effect or is scheduled, and no layoff of NPS teachers has occurred under the RIF statutes. Yet, Plaintiffs assert that their constitutional challenges to the RIF statute are ripe for judicial review. (Pl. Mem. 23-27). Plaintiffs claim they are being harmed by the mere existence of the EWPS and that "there is a real and immediate threat" that NPS will be forced to implement RIFs. (Pl. Mem. 23). Plaintiffs are mistaken and rely exclusively on speculation to claim ripeness of this matter. However, it is well-established that factual allegations "must be enough to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007).

There are several reasons to reject Plaintiffs' claim that this case is ripe for review. First, the Memorandum clarifies that Plaintiffs' complaint is an "as applied" challenge to the RIF statutes: "Though the operation of the LIFO Statute is applied uniformly throughout the State, it disproportionately harms children in low-income school

districts." (Pl. Mem. 8). However, a RIF has not occurred in NPS and the consequences of the RIF statute are unknown and purely speculative. Therefore, the case is not ripe because there are no facts pertaining to the actual implementation of the RIF statute, an essential prerequisite for the proper assessment of Plaintiffs' as-applied constitutional claims.

Second, Plaintiffs provide no facts to support their conclusory statement that they "are currently being harmed" by the mere existence of the EWPS pool.

Third, at this point, whether there will be a RIF of teachers under the RIF statutes is solely a matter of conjecture and speculation. Any negative impact resulting from the retention in a seniority-based RIF of an unknown number of teachers with ineffective ratings is impossible to ascertain now since there is no information on the scope of any layoffs. Furthermore, because non-tenured employees would be laid off before any of the tenured teachers protected by the RIF statutes, the effect of a layoff on tenured teachers is purely speculative.

Fourth, Plaintiffs themselves acknowledge that the District has avoided a RIF over the past few years (Pl. Mem. 25) and that any alleged harm NPS students is totally dependent on whether a RIF is implemented. (Pl. Mem. 22 (discussing alleged harm "should a RIF be implemented"));

Pl. Mem. 26 (discussing alleged harm "if there were to be a RIF under the LIFO statute"); Pl. Mem. 26 (discussing potential harm "in the event of a RIF.")).

Finally, Plaintiffs' reliance on Hogan v. Donovan, 2012 WL 132879 (Law Div. 2012) is misplaced. That case involved a lawsuit by the County Clerk of Bergen County against the County Executive seeking to enjoin and restrain the County Executive from refusing to process an employee for the County Clerk's Office. The County Executive contended that the case was not ripe for judicial review because the annual budget had not yet been approved and, therefore, the court could not pass on the merits of the County Clerk's claim that the employee's hiring will not cause the County Clerk's office to exceed its budget.

The Law Division considered the case ripe for judicial review because, among other things, there was a budget in effect, and the issues were legal and thus appropriate for immediate judicial resolution without the need to develop additional facts. Consequently, the factual question of the budget's status had no effect on the disposition of the case, and the parties' positions would be the same if the court withheld considering the case until a finalized budget was adopted. Id. at \*10. Under these circumstances, there was no



reason or purpose for delaying judicial review until the adoption of a final budget.

The situation in Hogan bears no resemblance to the present case. The present matter is not ripe because no RIF is in effect or planned and the impact of a RIF could not be known now. Thus, the parties' positions on a RIF cannot yet be developed and are wholly dependent on events that have not yet taken place. Indeed, there would be a needless expenditure of judicial resources if the case proceeded prior to any RIF, particularly if NPS continues its past practice of avoiding teacher layoffs and no RIF of teachers is ever implemented.

Therefore, unlike the facts in Hogan, the nature and scope of the issues before the Court are unknown at this time and entirely dependent on contingent facts, i.e., the consequences of a RIF of tenured teachers, should one occur. Plaintiffs' position could only be determined after a RIF, if any, occurs or is planned. In sharp contrast to the circumstances in Hogan, there are compelling reasons to delay judicial review until a RIF is implemented or scheduled and the precise contours of the RIF are known.

4. **Plaintiffs Have Failed to Allege a Viable Claim for Relief**

In assessing Plaintiffs' complaint, the Court should disregard allegations that are merely "rote recitals of the

elements of a cause of action, legal conclusions, and mere conclusory statements." James v. City of Wilkes-Barre, 700 F.3d 675, 679 (3d Cir. 2012) (citations omitted). As we now explain, there are fundamental and fatal flaws in all of Plaintiffs' claims that the RIF statute is unconstitutional. These are not merely curable pleading omissions that could be overlooked on a motion to dismiss, but the absence of basic factual showings that go the heart of Plaintiffs' case and that are indispensable to establish the alleged constitutional causes of action.

Plaintiffs claim that 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 [RIF] Statute." (Pl. Mem. 28). That is simply not the case. The Memorandum echoes the complaint's hodge-podge of assertions on a wide range of educational matters: national research and data on the importance of a qualified teacher workforce; assessment results on standardized tests and graduation rates in the State-Operated Newark Public Schools; data on the annual performance ratings of NPS teachers under the recently enacted tenure law; a vaguely described three year old "simulation" of a hypothetical RIF of NPS teachers; and data on the cost of NPS's decision not to assign certain teachers during the school year or to conduct a RIF.

Strikingly, however, what is missing from the jumble of facts, conclusory statements, hypothetical scenarios, and speculation in the complaint and Memorandum are the requisite facts showing the alleged constitutional harms are attributable to the RIF statute. That is, there is no showing that teachers with ineffective ratings, whose presence in the classroom is directly attributable to the seniority-based RIF statutes, are responsible for, and the cause of, NPS's low test scores and graduation rates. Similarly, there is no factual showing that the alleged costs to Newark of retaining ineffective teachers have caused any educational harm to NPS students. Again, Plaintiffs rely on bare conclusory statements about unnamed and undescribed "other educational programs" (Pl. Mem. 2, 18, 22) without any facts showing what educational programs have been affected and the educational deprivation that rises to a constitutional level from the absence of these educational programs.

While Plaintiffs also purport to challenge the RIF statutes in all similarly situated urban school districts, their complaint is woefully lacking any of the facts necessary to support such a constitutional claim in these unnamed districts. Put simply, the Memorandum confirms that there is not a scintilla of fact to show that NPS students -- or students in any other district -- are being deprived of a

constitutional thorough and efficient education - or any other constitutional right - through the actual operation of the seniority-based RIF statute.

NJEA has already explained why, based on these substantial factual gaps, the complaint fails to satisfy the high bar for a viable cause of action alleging violations of the Education Clause, Equal Protection, and Substantive Due Process. (NJEA Br. 50-55). To state a claim of the denial of T&E, Plaintiffs must assert facts showing that they are being denied a thorough and efficient education because they are being taught by ineffective teachers whose presence in the classroom of Plaintiffs' children is directly attributable to the RIF statute. However, there are no facts alleged in the complaint that would allow the Court to find a causal connection between the RIF statute and the alleged constitutional harm.

As for the equal protection challenge, there must be a showing that "even if all children receive a minimally thorough and efficient education, the [RIF statute] engenders more inequality than is required by any other State interest." Abbott v. Burke, 100 N.J. 269, 296 (1985). However, the RIF statute is applied uniformly throughout the State and, in the event of layoffs, does not treat students any differently depending upon the district they are in. Layoffs under the



RIF statute are based on seniority wherever they occur. Although Plaintiffs allege that there are no ineffective teachers in the wealthier Summit school district, but there are allegedly large numbers of ineffective teachers in NPS, there are no facts showing that the RIF statute "engenders" that inequality, let alone "engenders more inequality" than is required by the State's legitimate interest in protecting seniority in layoffs of tenured teachers. See Lichtman v. Ridgewood Bd. of Educ., supra, 93 N.J. at 368 n. 4 (Seniority . . . provides a mechanism for ranking all tenured teaching staff members so that reduction in force and reemployment can be effected in an equitable fashion and in accord with sound educational policies") and case cited in NJEA's initial brief at 27-28.

Furthermore, Plaintiffs' substantive due process claim is assessed under a balancing test similar to that employed to evaluate an equal protection claim. (NJEA Br. 52-55). Plaintiffs' allege a violation of their children's "fundamental right to a thorough and efficient education" (Complaint ¶ 133), but they fail to show any alleged educational deprivation of that right attributable to the RIF statute. Plaintiffs further allege that "no rational government interest justifies this deprivation" (Complaint ¶ 134), but protecting seniority in a RIF layoff is clearly a

"rational government interest" even if Plaintiffs disagree with that protection.

In sum, Plaintiffs' conclusory claims of an educational deprivation resulting from the assignment of teachers rated "ineffective" in NPS schools is not supported by any facts in the complaint showing the connection between the implementation of a seniority-based layoff statute and the deprivation of a thorough and efficient education, equal protection or substantive due process. Plaintiffs' constitutional claims are fashioned out of whole cloth based entirely on an alleged 2014 simulation and rank speculation about the impact of RIFs in NPS that have not yet occurred and may never occur.

Significantly, even after NPS decided to return teachers from the EWPS to classrooms, which Plaintiffs characterize as a "forced-placement," Plaintiffs are unable to proffer any facts to show that NPS's decision to reassign these teachers resulted in constitutional harm to any student. Merely asserting or conjecturing about the relationship between seniority-based layoffs and a constitutional deprivation, as Plaintiffs repeatedly do in their complaint, is not sufficient to allege a viable constitutional cause of action for judicial intervention. Plaintiffs must show concrete facts -- not mere assumptions, bald assertions, and

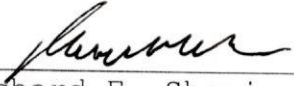
conclusory statements -- how the alleged educational deficiencies in NPS schools derive in significant part from the operational implementation of the RIF statutes. This Plaintiffs have failed to do.

Therefore, Plaintiffs mere assertion of vague, conclusory, and speculative allegations, which are replete throughout the complaint, fails to factually show the requisite connection between educational deprivations and the RIF statute. The bald conclusory claims that the RIF statutes prevent students in NPS from receiving a thorough and efficient education - or deny equal protection and substantive due process - are simply not supported by the facts alleged in the complaint. The inescapable conclusion on this motion to dismiss is that Plaintiffs' complaint fails to state viable constitutional claims and should be dismissed.

### **CONCLUSION**

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

Respectfully submitted,  
Richard E. Shapiro, LLC

By:   
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