

H.G., a minor, through her guardian TANISHA GARNER; F.G., a minor, through her guardian TANISHA GARNER; E.P., a minor, through his guardian NOEMI VAZQUEZ; M.P., a minor, through her guardian NOEMI VAZQUEZ; F.D., a minor, through her guardian NOEMI VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through her guardian FAREEAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., a minor, through his guardian IRIS SMITH; M.R., a minor, through her guardian WENDY SOTO; D.S.; a minor, through his guardian WENDY SOTO;

Plaintiffs-Appellants,

v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education; NEW JERSEY STATE BOARD OF EDUCATION; nominal defendant NEWARK PUBLIC SCHOOL DISTRICT; and nominal defendant CHRISTOPHER CERF, in his official capacity as Superintendent of the Newark School District;

Defendants-Respondents,

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-004546-16

ON APPEAL FROM THE LAW
DIVISION, MERCER COUNTY

DOCKET NO. MER-L-2170-16

SAT BELOW:

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

BRIEF ON BEHALF OF AFT RESPONDENTS

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

Defendant-Intervenors-
Respondents.

BRIEF ON BEHALF OF AFT RESPONDENTS

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PRELIMINARY STATEMENT

Plaintiffs appeal from the dismissal of their complaint, which seeks a declaration that two education statutes that require the layoff off and recall of tenured teachers based on seniority - N.J.S.A. 18A:28-10 and 28-12 - are unconstitutional as applied "in Newark and all similarly situated districts." Plaintiffs are twelve students who attend schools in the Newark Public School District (the "District" or "Newark") and their guardians. The gravamen of their complaint is that the operation of these two statutes in Newark - statutes they reference as the LIFO (last in, first out) statutes - result in the layoff of effective teachers and the retention of ineffective teachers. Although there have been no layoffs in the District and although no layoffs are planned, Plaintiffs maintain that statutes requiring seniority-based layoffs deprive them of a thorough and efficient education. Alternatively, Plaintiffs claim that even though there have been no layoffs, their constitutional rights are violated by the District's decision to maintain a pool of teachers who have no permanent classroom assignment - the educators without placement ("EWPS") pool - at an annual cost of between \$8 and \$10 million.

Plaintiffs assert that there is an irreconcilable conflict between statutory provisions that afford teachers job security, such as the LIFO statutes, and a thorough and efficient education. However, our Supreme Court has never said, or even hinted, that educational outcomes and opportunities improve when job protections are stripped away from teachers. On the contrary, the Court has expressly recognized the important public policy advanced by insulating teachers from hiring and retention decisions driven by patronage, favoritism or discriminatory motives. Indeed, the "overriding purpose" of tenure and other job security provisions is to further the goal of a thorough and efficient education. Matter of Closing of Jamesburg High School, School District of the Borough of Jamesburg, Middlesex County, 83 N.J. 540, 553 (1980) (CJ Wilentz dissenting).

The LIFO provisions challenged by Plaintiffs are part of a newly enacted comprehensive statutory scheme - The Teacher and Effectiveness Accountability Act for the Children of New Jersey ("TEACHNJ" or the "Act"), N.J.S.A. 18A:6-117 et seq. - that advances the constitutional mandate of a thorough and efficient education by providing effective teachers with job security, assisting ineffective teachers in improving their performance, and removing those

teachers who receive ineffective or partially effective performance ratings in two consecutive years.

The trial court dismissed the complaint concluding that the Plaintiffs lacked standing and that the dispute was not ripe for judicial review. The lower court based its determination on the plaintiffs' failure to plead facts that linked the operation of the LIFO statutes to the deprivation of any constitutional right. Specifically, the court observed that:

1. Plaintiffs' complaint does not allege that there have been any layoffs of tenured teachers in the District or that any layoffs are planned;
2. Plaintiffs' complaint does not allege that any student plaintiff has been assigned an ineffective teacher; and
3. Plaintiffs' complaint does not allege that any student Plaintiff has been denied any specific educational opportunity as a result of the District spending \$8 million to maintain the EWPS pool.

Accordingly, the trial court recognized that the harm to which Plaintiffs point is purely speculative and contingent on a reduction in force ("RIF") of tenured teachers being conducted at some future date.

Even under New Jersey's relatively liberal standing doctrine, a complaint must allege facts that establish "real adverseness." Without any layoffs having been conducted pursuant to the LIFO statutes, and without any

allegation that the expenditure of \$8 million on the EWPS pool deprived any student Plaintiff of a specific educational opportunity, the trial court properly found that Plaintiffs lacked standing and that the matter was not ripe for review.

PROCEDURAL HISTORY and COUNTERSTATEMENT OF FACTS¹

A. Procedural History before the Trial Court

On or about November 1, 2016, Plaintiffs filed a complaint in Superior Court, Law Division seeking declaratory and injunctive relief based on the claim that the LIFO statutes violated Plaintiffs' constitutional right to a thorough and efficient education. (Pa1).² The American Federation of Teachers, AFL-CIO, the Newark Teachers Union and the AFT New Jersey (collectively the "AFT") and the New Jersey Education Association (the "NJEA") moved to intervene and on December 22, 2016, over the opposition of Plaintiffs, the trial court granted their motions. (AFTa83, 85). The court ordered the parties to answer or otherwise plead by January 27, 2017. (Id.).

¹The Procedural History and the Statement of Facts have been combined for purposes of clarity.

²"Pa_" denotes appendix to appellants' brief; "Pb_" denotes appellants' brief to the Appellate Division; "AFTa_" denotes appendix to respondent AFT's brief to the Appellate Division.

By order dated January 27, 2017, the court stayed all due dates pending consideration by the trial court of the State's motion to hold the case in abeyance pending a decision by the New Jersey Supreme Court on the State's motion for relief and modification of the Court's orders in Abbott v. Burke, 199 N.J. 140 (2009) and Abbott v. Burke, 206 N.J. 332 (2011). (AFTa87). By order dated February 1, 2017, the trial court dismissed the State's motion to hold the case in abeyance as moot and ordered the Defendants and the Defendant-Intervenors to file answers or motions to dismiss by February 27, 2017.³ (AFTa90, 93). On March 3, 2017, the trial court entered an order, inter alia, staying discovery until the motions to dismiss were argued. (AFTa96). The court also ordered counsel for the Newark School District and for the State defendants to attend the oral argument, whether or not they responded to the motions to dismiss. (AFTa100). On March 13, 2017, the State filed an Answer to the complaint and on or about March 22, 2017, the Newark School District defendants filed an Answer. (Pa 31, 53).

By order dated May 4, 2017, the lower court granted the motions of the Defendant-Intervenors to dismiss the

³The trial court held the State's motion to be moot based on the Supreme Court's order denying the State's motion in the Abbott matters for relief and modification

complaint. (Pa99). The court found that the Plaintiffs lacked "standing to pursue their claims in the absence of a particularized harm to Plaintiffs caused by the N.J.S.A. 18A:28-10 and N.J.S.A. 18A:28-12 and further found that the Plaintiffs' claims lack ripeness in the absence of an actual, or immediate threat of harm to Plaintiffs caused by the LIFO statutes." (Pa101).

On or about May 24, 2017, Plaintiffs filed a motion for leave to appeal, which Defendant-Intervenors opposed, arguing that the decision of the trial court dismissing the complaint was a final judgment. This Court denied plaintiffs' motion and directed Plaintiffs to file a notice of appeal.

B. The Challenged Statutes

N.J.S.A. 18A:28-10 provides that "dismissals resulting from any such reduction [a reduction in the number of teaching staff members] shall not be made by reason of residence, age, sex, marriage, race, religion, or political affiliation, but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board."

N.J.S.A. 18A:28-12 provides, in relevant part: "If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a

preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs"

C. Plaintiffs' Complaint

1. Allegations as to the number of ineffective teachers in the District

Plaintiffs allege that during the 2013-14 school year, out of 2,775 teachers in the District, 94 were rated "ineffective" and 314 were rated "partially effective." (Pa11, complaint ¶47). The complaint cites the <http://www.state.nj.us/education/data/staff/> as the source for its factual allegations regarding the number ineffective and partially effective teachers in the District. That same website indicates that during the 2015-2016 school year 183 teachers were rated partially effective - a 42% reduction from 2013-14 - while the number of ineffective teachers dropped to 65 - a 31% reduction.

2. Allegations as to the EWPS pool

Plaintiffs further allege that the District created "what is known as the EWPS pool for those teachers whom principals did not want to hire because of performance concerns." (Pa17, complaint ¶81). Plaintiffs acknowledge

that not all the teachers in the EWPS pool are rated "ineffective." Teachers are placed in the pool if "principals in the district decline to employ them." (Pa17, complaint ¶82).

It is alleged that during the 2013-2014 school year there were 271 teachers in the EWPS pool, costing the District \$22.5 million. (Pa17, complaint ¶83). Therefore, the average cost of the salary and benefits for a teacher in the pool was \$83,000. (\$22.55 million divided by 271 teachers). Plaintiffs further allege that in the current 2016-2017 school year the District is spending \$10 million to retain teachers in the EWPS pool - \$12.5 million less than it spent in 2013-2014. (Pa18, Complaint ¶87). Based on an average salary and benefit package of \$83,000, the number of teachers in the EWPS pool was reduced from 271 in 2013-2014 to approximately 120 in 2016-2017. Although Plaintiffs brief repeats the allegation in their complaint that \$10 million is being spent to maintain the EWPS pool, in their brief to the trial court in opposition to the motions to dismiss, Plaintiffs cited an article by Karen Yi quoting Superintendent Cerf stating that the District is

currently spending \$8 million on the pool.⁴ (AFTa103, 108-112).

3. Allegations as to teachers "force-placed" in classrooms from the EWPS pool

The complaint also alleges that during the 2016-2017 school year the District spent \$25 million on the salaries of teachers who were "force placed" in the District's schools. (Pa18, complaint ¶87). Using a salary and benefit package of \$83,000, approximately 300 teachers were allegedly placed in classrooms without the consent of a school's principal. Plaintiffs allege that teachers, who had been in the EWPS pool and who are now in classrooms, could be laid off if the LIFO provisions were struck down. (Pa18, complaint ¶88). If in 2016-2017 there were 120 teachers in the EWPS pool and there was a total of 248 District teachers with ratings of ineffective or partially effective (65 ineffective and 183 partially effective based on the most recent data available on NJ DOE's website), the number of forced placed teachers with ratings of ineffective or partially effective was closer to 128 than 300.

⁴

http://www.nj.com/essex/index.ssf/2017/03/parents_fight_teacher_layoff_rules_as_newark_school.html)

4. Allegations as to the layoff of non-surplus teachers

Plaintiffs allege that if the LIFO statutes were struck down, non-surplus teachers rated ineffective or partially effective could be removed from the payroll through a reduction in force and replaced by effective teachers. Thus, Plaintiffs state that to fulfill the District's need for additional Spanish teachers, rather than "hiring new, highly-qualified teachers from outside the district," Newark had to place teachers from the EWPS pool in those positions. (Pa20, complaint ¶97). In other words, Plaintiffs allege that but for LIFO, the District could layoff ineffective or partially effective Spanish teachers and replace them with teachers hired from the outside.

Although Plaintiffs do not seek judicial review of the TEACHNJ removal procedures, underlying their complaint is the claim that the teacher evaluation and removal procedures are "time-consuming," "expensive" and "ineffective" and therefore the District should be permitted to layoff non-surplus ineffective teachers without regard to seniority and then replace them. (Pa19, complaint ¶94). In effect, Plaintiffs seek judicial approval to circumvent the TEACHNJ procedures and instead

summarily remove and then replace tenured teachers without according teachers the procedural protections mandated by statute and by the due process provisions of the New Jersey and federal Constitutions.

The TEACHNJ reforms are designed to ensure that only effective teachers are in classrooms and to that end the 2012 legislation instituted rigorous evaluation procedures and streamlined removal procedures. Further, the Legislature considered and rejected proposed changes to the LIFO statutes challenged by Plaintiffs.

D. The 2012 TEACHNJ Reforms

TEACHNJ, which was signed into law by Governor Christie on August 6, 2012, was the first successful overhaul of New Jersey's tenure system since 1909. It was touted by the Governor as "transform[ing] the existing tenure system to now provide powerful tools to identify effective and ineffective teachers, strengthen supports available to help all teachers improve their craft, and, for the first time, tie the acquisition, maintenance, and loss of tenure to a teacher's effectiveness in the classroom." Governor Chris Christie Signs Revolutionary

Bipartisan Tenure Reform Legislation Into Law, Aug. 6, 2012.⁵

Thus, the 2012 legislation tied tenure protections directly to teacher evaluations. Commenting on the passage of TEACHNJ, Senator M. Teresa Ruiz, a sponsor of the legislation, stated, "By strengthening our professionals, we will ensure that our students have the best teachers in the classroom so that all children - regardless of their background, their ZIP code, or their socio-economic status - will have the opportunities they deserve for educational excellence."⁶ In TEACHNJ, the Legislature declared that:

The goal of this legislation is to raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform personnel decisions.

[N.J.S.A. 18A:6-118].

To ensure that students in all districts, including Abbott districts, benefit from being taught by effective teachers, TEACHNJ implemented a number of major reforms to the system of awarding tenure and evaluating teachers, including: (1) increasing from three to four years the

⁵<http://www.state.nj.us/governor/news/news/552012/approved/20120806c.html> (last visited February 15, 2017).

⁶http://www.nj.com/news/index.ssf/2012/06/weeping_nj_teachers_tenure_bi.html

probationary period preceding the granting of tenure; (2) requiring the development of evaluation rubrics by boards of education for approval by the Commissioner of Education; (3) requiring the on-going professional development of teaching staff; (4) developing corrective action plans for under-performing teaching staff who are rated ineffective or partially effective; and (5) establishing procedures for the expeditious removal of ineffective teachers.

1. The Development of Evaluation Rubrics

TEACHNJ requires that a school district submit to the Commissioner of Education, for review and approval, the evaluation rubrics that the district will use to assess the effectiveness of its teachers, principals, assistant principals and vice-principals. N.J.S.A. 18A:6-122(a). Minimum evaluation standards established by the State Board of Education through the promulgation of regulations must include:

1. four defined rating categories: ineffective, partially effective, effective and highly effective;
2. a rubric that is at least partially based on multiple objective measures of student learning that use student growth from one year's measure to the next year's measure;
3. standardized assessments to be used as a measure of student progress, but shall not be the predominant factor in the overall evaluation of a teacher;

4. performance measures that are linked to student achievement;
5. multiple employee observations during the school year; and
6. a process for ongoing monitoring and calibration of the observations to ensure that the observation protocols are being implemented correctly and consistently.

[N.J.S.A. 18A:6-123(b)].

Beginning with the 2013-2014 school year a board of education was required to implement the approved and adopted evaluation rubric for all educators in all schools in the district. N.J.S.A. 18A:6-123(e).

2. The Establishment of School Improvement Panels

The Act mandates that each school convene a school improvement panel, consisting of the principal or his/her designee, an assistant principal or vice-principal and a teacher. The panel is tasked with overseeing the mentoring of teachers, conducting evaluations of teachers, including an annual summative evaluation, and identifying professional development opportunities for all instructional staff, "tailored to meet the unique needs of the students and staff of the school." N.J.S.A. 18A:6-120(b). TEACHNJ further requires on-going professional development of teaching staff by developing individualized plans to support student achievement and to be "responsive

to the unique needs of different instructional staff members in different instructional settings." N.J.S.A. 18A:6-128(a).

School improvement panels are required to conduct a mid-year evaluation of any teacher who is evaluated as ineffective or partially effective in his/her most recent annual summative evaluation. N.J.S.A. 18A:6-120(c). Any teaching staff member who "fails or is struggling to meet the performance standards established by the board of education" is provided with additional professional development designed to correct the needs identified in the annual summative evaluation. For each teacher rated ineffective or partially effective, a corrective action plan must be developed that includes "timelines for corrective action and responsibilities of the teaching staff member and the school district for implementation of the plan." N.J.S.A. 18A:6-128(b).

3. A Four-year Probationary Period and Researched-Based Mentoring Programs

TEACHNJ expanded the probationary period for attaining tenure from three to four years for all teaching staff members employed on or after the effective date of the Act. N.J.S.A. 18A:28-6(b). To achieve tenure a teacher must complete a direct mentorship program during the initial

year of employment and receive a rating of effective or highly effective in two annual summative evaluations within the first three years of employment after the initial year of employment in which the teacher completes the direct mentorship program. Id. To further enhance the effectiveness of teachers, boards of education are required to implement a "research-based mentoring program that pairs effective, experienced teachers with first-year teachers to provide observation and feedback, opportunities for modeling, and confidential support and guidance in accordance with the Professional Standards for Teachers and the evaluation rubric." N.J.S.A. 18A:6-127(a).

4. Mandated Filing of Charges of Inefficiency against Ineffective or Partially Effective Teachers

Although TEACHNJ affords teachers who do not satisfy evaluation standards the opportunity to improve performance, a superintendent is required to file with the secretary of the board of education a charge of inefficiency whenever an employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation. N.J.S.A. 18A:6-17.3(a). If an employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an

annual summative evaluation and the following year is rated partially effective, the superintendent must also file with the secretary of the board a charge of inefficiency, except that the superintendent, upon a written finding of exceptional circumstances, may defer the filing of tenure charges until after the next annual summative evaluation. N.J.S.A. 18A:6-17.3(a).

5. A Streamlined and Less Burdensome Removal Procedure

In addition to mandating the filing of charges of inefficiency against ineffective teachers, the Act accelerates and streamlines the tenure removal process. The removal process - from the filing of a charge of inefficiency with a school board to the issuance of a final arbitrator's decision - is designed to be completed within 135 days.

Within 30 days following the filing of charges of inefficiency, a school board must forward the written charge to the Commissioner of Education, unless the board determines that the evaluation process has not been followed. N.J.S.A. 18A:6-17.3(b). The teacher against whom the charges are filed has 10 days to submit a written response to the charges to the Commissioner. N.J.S.A. 18A:6-17.3(c). The Commissioner has five days immediately

following the 10-day period provided for a response to refer the case to an arbitrator. N.J.S.A. 18A:6-17.3(c).

Arbitration hearings must commence within 45 days of the assignment of the case to an arbitrator. N.J.S.A. 18:6-17.1(b)(1). A decision must be rendered within 45 days from the start of the hearing. N.J.S.A. 18:6-17.1(d). Timelines must be strictly adhered to and may not be extended without the approval of the Commissioner. N.J.S.A. 18:6-17.1(f)-(g). Arbitrators are randomly assigned by the Commissioner from a panel of 25 arbitrators. N.J.S.A. 18:6-17.1.

In addition to this expedited procedure, the authority of the arbitrator is limited to deciding whether: (1) the employee's evaluation failed to substantially adhere to the evaluation process; (2) there was a mistake of fact in the evaluation; (3) the charges would not have been brought but for an unlawful or discriminatory reason; and (4) the district's actions were arbitrary and capricious. N.J.S.A. 18:6-17.2.

E. The Legislative Decision Not to Modify the LIFO Provisions of the Tenure Statute

During the legislative process that resulted in the enactment of TEACHNJ, various iterations of the legislation contained amendments to the LIFO provisions that are the

subject of the instant appeal. The Legislature's rejection of proposed amendments to the LIFO provisions limiting the use of seniority as a factor in layoff decisions was coupled with major reforms to other aspects of the statutory tenure scheme. The Legislature recognized the value of a layoff procedure that uses an objective criterion - seniority - when selecting between tenured teachers to be laid off, rather than a more subjective system prone to manipulation based on favoritism, patronage or other reasons unrelated to merit.

When sweeping reforms to the tenure and evaluation provisions of Title 18A were being debated in 2012, the Legislature also considered whether the system for implementing layoffs in times of budgetary crisis or programmatic need should be seniority-based. When it rejected revisions to the proposed LIFO provisions, the Legislature made a policy choice - it decided that seniority provides an objective and transparent standard for making difficult layoff decisions.

As initially proposed, TEACHNJ included provisions that would have eliminated seniority protections for teachers acquiring tenure after the effective date of the bill. Senate Bill 2925, sponsored by Senator Ruiz, and introduced on June 6, 2011, amended N.J.S.A. 18A:28-10 and

28-12 to exclude from the seniority provisions of the layoff and recall statutes teaching staff members employed in the position of teacher, principal, assistant principal or vice-principal, who acquire tenure after the effective date of the bill. (AFTa14). On February 6, 2012, Senator Ruiz sponsored another version of TEACHNJ, introduced on February 6, 2012 as Senate Bill No. 1455. (AFTa26). Section 23 of that bill linked seniority to evaluation ratings for teachers who acquired tenure before the bill's effective date. Teachers acquiring tenure after the bill's effective date would be designated as a "member of a priority hiring pool," affording a teacher the opportunity to interview for vacant in-district positions "before a principal may consider outside applicants." To qualify as a member of the priority hiring pool, a teacher would need to have an evaluation rating of effective or highly effective. There would be no obligation to consider seniority as a factor in layoffs for teachers obtaining tenure after the bill's effective date.

Not until the TEACHNJ bill was reported out of the Senate Committee on June 18, 2012, as a substitute bill for Senate Bill No. 1455, were the provisions amending N.J.S.A. 18A-28-10 and 12 dropped. (AFTa44). On the one hand, the Legislature rejected a system that would have given

districts far greater discretion to lay off teachers in favor of an objective process based on seniority. On the other hand, it enacted an expedited system for removing ineffective tenured teachers.

ARGUMENT

The LIFO statutes are part of TEACHNJ - the recently overhauled, comprehensive statutory scheme designed to address issues of teacher performance and ensure that only effective teachers are retained in school districts. Plaintiffs seek to sever the LIFO provisions from this integrated and holistic statutory approach and enjoin their operation so that the Newark School District can remove its non-surplus and surplus ineffective and partially ineffective teachers through layoffs, without regard to seniority.

The trial court dismissed the complaint on standing and ripeness grounds because Plaintiffs do not allege that they have suffered or are suffering any harm attributable to the application of the LIFO statutes. Indeed, Plaintiffs acknowledge that there have not been any layoffs in the District. Rather, they speculate that they might suffer harm if the District were to conduct a layoff of tenured teachers at some future date. But harm contingent on uncertain future circumstances does not suffice to meet

even New Jersey's liberal standing requirements. Moreover, Plaintiffs do not allege that they have been or are about to be assigned ineffective teachers. The entirely speculative assertion that if there are layoffs student Plaintiffs may be harmed by being taught by an ineffective teacher does not establish the adversity that is the hallmark of a dispute that is ripe for adjudication.

Similarly, the recitation that the District maintains an EWPS pool for which it expends approximately \$8 million, without tying the existence of that pool to any specific deprivation of educational opportunities for the student Plaintiffs, does not suffice to establish the immediate or threatened harm, or the adverseness, to overcome the threshold pleading requirements necessary to avoid dismissal.

Although Plaintiffs root their Complaint in the assertion that the obstacle to the removal of ineffective or partially effective teachers is seniority-based layoffs mandated by LIFO, they do not explain how the relief they seek would address the allegedly ineffective or partially effective teachers who are not in the EWPS pool because they are needed to perform instructional duties in the classroom. The layoff provisions of TEACHNJ can only be used to reduce staffing levels. N.J.S.A. 18A:28-9. As the

trial court recognized, layoffs are not a substitute for filing charges of inefficiency under TEACHNJ's procedures and cannot be used to remove ineffective teachers the District would then have to replace. (AFTa153, T80:1-81:9). Removing teachers and then replacing them is not a reduction in force. It is simply the removal of tenured teachers, who are alleged to be ineffective, without due process. The teachers rated ineffective or partially effective, who are not in the EWPS pool because they are needed to perform instructional duties, cannot be purged from the District through a layoff. Rather, the District must utilize the evaluation and expedited removal procedures mandated by TEACHNJ. Although Plaintiffs depict those procedures as ineffective, time-consuming and burdensome, they did not ask the trial court to declare them unconstitutional or to enjoin their operation. (Pa19, complaint ¶93).

As we discuss below, the trial court properly dismissed the complaint based on standing and ripeness grounds because Plaintiffs failed to plead any facts that would permit a finding that the LIFO provisions caused: (1) the layoff of effective tenured teachers and the retention of ineffective tenured teachers; (2) any student Plaintiff to be taught by an ineffective teacher; or (3) any student

Plaintiff to be denied an educational opportunity to which the Plaintiff was constitutionally entitled.

I. THE STANDARD OF APPELLATE REVIEW

The New Jersey Appellate Division reviews a motion to dismiss for failure to state a claim pursuant to R. 4:6-2(e) using a plenary standard of review. See, Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002); J-M Mfg. Co., Inc. v. Phillips & Cohen, LLP, 443 N.J. Super. 447 (App. Div. 2015). The Appellate Division therefore "employ[s] the same standard as that applied by the trial court," and its "review is limited to the 'legal sufficiency of the facts alleged in the complaint.'" J-M Mfg. Co., 443 N.J. Super. at 447 (citing Donato v. Moldow, 374 N.J. Super. 475 (App. Div. 2005); Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005)); Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 355, 378 (1995); K. Hovnanian Cos. of North Cent. Jersey, Inc. v. New Jersey Dept. of Env't'l. Prot., 379 N.J. Super. 1, 7 (App. Div. 2005).

II. THE TRIAL COURT PROPERLY APPLIED THE STANDARD OF REVIEW FOR A MOTION TO DISMISS

Pursuant to R. 4:6-2(e), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." "The inquiry is confined to a

consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (affirming dismissal of complaint that alleged unconstitutional taking by the State's implementation of an alignment preservation map) (quoting P. & J. Auto Body v. Miller, 72 N.J. Super. 207, 211 (App. Div. 1962)). A reviewing court may only consider "whether the complaint states a cognizable cause of action." Ibid. Thus, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v. City of Newark, 136 N.J. Super. 107, 112 (App. Div. 1975).

Where "no matter how 'generously' or 'indulgentlly' pleadings are scrutinized," the complaint fails to articulate a legal basis for relief, the complaint must be dismissed. Energy Rec. v. Dept. of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999) aff'd, 170 N.J. 246 (2001). "Dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Rieder, 221 N.J. Super. at 552 (quoting Muniz v. United Hsps. Med. Ctr. Pres. Hsp., 153 N.J. Super. 79, 82-83, (App. Div. 1977)).

"Pleadings reciting mere conclusions without facts and reliance on subsequent discovery do not justify a lawsuit."

Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998). Therefore, a pleading must set forth the facts on which a claim is based, "showing that the pleader is entitled to relief[.]" Spring Motors Distributors, Inc. v. Ford Motor Co., 191 N.J. Super. 22, 29 (App. Div. 1983) (citing R. 4:5-2), aff'd in part and rev'd in part on other grounds, 98 N.J. 55 (1985); see also Jardine Estates, Inc. v. Koppel, 24 N.J. 536, 542 (1957). When a complaint fails to set forth the necessary factual allegations in support of its claim for relief, the pleading must be deemed inadequate. See Miltz v. Borroughs-Shelving, a Division of Lear Siegler, Inc., 203 N.J. Super. 451, 458-59 (App. Div. 1985).

III. THE TEACHNJ JOB SECURITY PROVISIONS PLAINTIFFS SEEK TO INVALIDATE SERVE AN IMPORTANT PUBLIC PURPOSE AND ARE PART OF A COMPREHENSIVE STATUTORY SCHEME TO ENSURE THAT STUDENTS ARE TAUGHT BY EFFECTIVE TEACHERS

Although Plaintiffs do not directly attack the tenure provisions of TEACHNJ, the complaint is a thinly veiled attempt to render tenure meaningless in the Newark School District. The LIFO provisions are part of a comprehensive statutory scheme that provides teachers with job security by providing protections from dismissal based on patronage, favoritism or other invidious motives. Those protections take the form of tenure and the requirement of seniority-

based layoffs - the LIFO statutes. Plaintiffs seek to dismantle these job security guarantees in the Newark District in three ways: (1) they seek to layoff non-surplus tenured teachers; (2) they seek to layoff tenured teachers without regard to seniority; and (3) they seek to layoff tenured teachers before separating non-tenured teachers, who are effectively at-will employees.⁷

As the appellate court recognized in Viemeister v. Bd. of Educ. of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949), "the tenure provisions in our school laws were designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service. They represent important expressions of legislative policy which should be given liberal support, consistent, however, with legitimate demands for governmental economy."

"[T]he protection of teachers' tenure rights is part of the legislative effort to ensure a thorough and efficient education, a constitutionally based aspect of a clear and compelling State policy of furthering the interests of school children." Matter of Closing of

⁷ Non-tenured teachers must be separated from employment before tenured teachers are laid off. Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987).

Jamesburg High School, 83 N.J. at 553 (1980) (CJ Wilentz dissenting). The Chief Justice went on to observe that "tenure laws were designed to protect teachers in their positions, and by virtue of the security they engender to promote a 'competent and efficient' school system. The fundamental and overriding purpose of tenure is to benefit children by furthering the constitutional and legislative goal of a thorough and efficient education." Id. at 557 (internal citations omitted).⁸

In Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63 (1982), the New Jersey Supreme Court again addressed tenure provisions. "[T]he Tenure Act was originally enacted in 1909. Since then, it has undergone numerous amendments. However, its purpose has not changed. The tenure statute prevents school boards from abusing their superior bargaining power over teachers in contract negotiations. It protects teachers from dismissal for 'unfounded, flimsy or political reasons.'" Id. at 73 (internal citations omitted). See also, Lammers v. Bd. of Educ. of Borough of

⁸ The Chief Justice's disagreement with the majority was limited to the interpretation of N.J.S.A. 18A:26-6.1, which provides that when a school is closed and the students are transferred to another district the sending and receiving districts may enter into an agreement to transfer the tenured teachers from the school to be closed to the receiving district, with their tenure rights intact.

Point Pleasant, 134 N.J. 264 (1993); Carpenito v. Bd. of Educ. of Borough of Rumson, Monmouth County, 322 N.J. Super. 522 (App. Div. 1999); Platia v. Bd. of Educ. of Tp. of Hamilton, Mercer County, 434 N.J. Super. 382, 388 (App. Div. 2014) (Tenure Act's remedial purpose to prevent school boards from abusing superior bargaining power therefore mandates that it be liberally construed to achieve "beneficent ends").

Thus, the courts have recognized that job security 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 decisions on patronage or other invidious motives, rather than merit. Recognizing the salutary purposes served by such safeguards, in 2012 the Legislature left intact the protections afforded by tenure laws and seniority-based layoff provisions, while revamping the process by which probationary teachers earn tenure, the teacher evaluation system and the procedures for the removal of ineffective teachers.

Although Plaintiffs do not seek judicial review of the TEACHNJ removal procedures, underlying their complaint is the claim that Newark should be permitted to circumvent TEACHNJ evaluation and removal procedures because they are

"time-consuming," "expensive" and "ineffective" by removing and replacing ineffective teachers through a RIF. (Pa19, complaint ¶94). In other words, Plaintiffs seek to eliminate tenure for ineffective teachers in Newark, stripping them of the procedural protections mandated by statute and of due process protections mandated by the New Jersey and federal Constitutions.

However, TEACHNJ's expedited procedures are in place to remove ineffective teachers and they must be utilized by the District. The job protections that have been an integral part of the statutory tenure scheme for over 100 years based on a legislative policy judgment that such protections facilitate the recruitment and retention of excellent teachers should not be disturbed.⁹

IV. THE TRIAL COURT PROPERLY DISMISSED THE COMPLAINT BECAUSE PLAINTIFFS DO NOT HAVE STANDING TO RAISE ANY CONSTITUTIONAL CLAIMS

Pursuant to R. 4:26-1, "[e]very action may be prosecuted in the name of the real party in interest. . .

⁹ If a court were to grant the relief Plaintiffs seek - invalidating the LIFO statutes as to Newark teachers - teachers in every school district, but Newark, would enjoy the protections of N.J.S.A. 18A:28-10 and -12, raising equal protection and due process issues. Moreover, removing these protections from Newark's tenured teachers - including those teachers rated highly effective and effective - would invariably create serious obstacles to the recruitment and retention of teachers, further exacerbating the challenges of providing Newark's students with a thorough and efficient education.

." Standing is essential to the existence of a justiciable controversy and determines whether a plaintiff is entitled to initiate and maintain an action in court. In re Adoption of Baby T., 160 N.J. 332, 340 (1999). Standing requires that the party have a sufficient stake in a justiciable controversy to seek relief from the court.

"Standing refers to the plaintiff's ability or entitlement to maintain an action before the court. Courts will not entertain matters in which Plaintiffs do not have sufficient legal standing." New Jersey Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 409 (App. Div.), appeal dismissed, 152 N.J. 361 (1998). To determine whether a party has standing a court must decide "whether the party has a sufficient stake in and real adverseness with respect to the subject matter, and whether the party will be harmed by an unfavorable decision." In re Charter School Application of Englewood, 320 N.J. Super. 174, 222 (App. Div. 1999), aff'd, 164 N.J. 316 (2000).

While New Jersey courts typically interpret standing more broadly than the federal "case or controversy" requirement under the United States Constitution, a court "will not render advisory opinions or function in the abstract nor will [it] entertain proceedings by plaintiffs who are 'mere intermeddlers' . . . to the dispute."

Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107 (1971)(citations omitted). In this regard, a litigant must show "a substantial likelihood of some harm" for purposes of standing. New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n, 82 N.J. 57 (1980). Where harm is purely hypothetical it is not justiciable.

Here, the trial court properly concluded that neither the student Plaintiffs nor their guardians have standing to assert claims under any of the causes of action for alleged constitutional violations. There is no allegation in the complaint to suggest that any student Plaintiff is currently suffering harm or is about to suffer harm attributable to the operation of the LIFO statutory provisions. Plaintiffs allege that they will be deprived of a "thorough and efficient education" should there be a layoff because the District will be required to remove teachers based on seniority, possibly resulting in the retention of more senior ineffective teachers and the removal of less senior effective teachers. However, there has not been a layoff of teachers in the Newark District. There is no allegation by Plaintiffs that a layoff is imminent, or even planned. 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 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 student Plaintiffs, 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.

A. No facts are plead that establish any causal link between the LIFO statutes and any actual harm suffered by Plaintiffs

1. Standing is not conferred based on allegations that ineffective teachers are assigned instructional duties, absent allegations that link such assignments to LIFO statutes or to Plaintiffs

The thoroughly speculative nature of the alleged harm is underscored by the factual allegations that are

noticeably missing from the complaint. There is no allegation that any student Plaintiff is currently, ever has been, or is about to be assigned an ineffective teacher. For that matter, student Plaintiffs do not allege that their test scores are below the State's minimum proficiency benchmarks in language arts or math or fall below the State's grade level expectations. Nor do Plaintiffs allege that if Newark conducts a layoff in accordance with the LIFO statute, they will be assigned ineffective teachers. They do not even speculate that this will happen. Indeed, the harm alleged here is conjectural precisely because there have not been layoffs and Plaintiffs do not allege that layoffs are planned.

Furthermore, to have standing, the student Plaintiffs must not only have been assigned an ineffective teacher, but the assignment must be the result of the LIFO provisions. The complaint does not contain such an allegation - nor could it since there have been no teacher layoffs in the District. Accordingly, Plaintiffs do not allege any concrete past, present or imminent future harm that would have permitted the trial court to adjudicate the merits of the complaint.

2. Standing is not conferred based on the allegation that the District spends \$8 million to maintain an EWPS pool absent allegations that student Plaintiffs have been denied educational opportunities to which they are constitutionally entitled

Recognizing they do not have standing to challenge the constitutionality of the LIFO statutes based on a claim that layoffs in Newark resulted in the retention of senior ineffective teachers, it is alleged that the student Plaintiffs are harmed because the District spends \$8 million to maintain the EWPS pool. However, absent any allegation that the use of funds for the EWPS pool caused student Plaintiffs to be deprived of a specific educational opportunity, Plaintiffs do not satisfy the requirement that of showing immediate, concrete or imminent harm causally linked to the operation of the LIFO statutes. Although Plaintiffs assert that the "EWPS pool . . . deprives them of critical resources," the complaint contains no allegation that the use of funds for the EWPS pool caused student Plaintiffs to be deprived of a specific educational opportunity. (Pb16).

In support of their claim that the expenditure of \$8 million to maintain the EWPS pool confers standing, Plaintiffs cite to the New Jersey Supreme Court's Abbott/Robinson jurisprudence. (Pb16-17). However, the

Abbott v. Burke line of cases 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. 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.

Plaintiffs cite paragraphs 17-19, 43 and 79-90 of their complaint in support of their claim that "Plaintiffs suffer from a multitude of harms as a result of the LIFO statutes." (Pb14). But none of the cited paragraphs identify programs that were cut or identify the impact of programmatic 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 79-90 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 v. Burke 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 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' attenuated theory of causation cannot salvage the claim that they suffer a constitutional deprivation because Newark spends \$8 million to maintain the EWPS pool.

3. Standing is not conferred by Plaintiffs' generalized allegations that students in Newark continue to fall below minimum proficiency standards

The generalized harm alleged in the complaint - namely, that Newark students continue to fall below minimum State proficiency standards - without allegations that link such generalized harm to seniority based layoffs, does not confer standing to challenge the constitutionality of the LIFO statutes. Indeed, there is not even an allegation that the student Plaintiffs do not test on grade level.

Plaintiffs present a parade of horrors with respect to the educational deficiencies in the Newark District 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.¹⁰ No

¹⁰ A case in point is the allegation that the mother of Z.S. has not been able to obtain an appropriate educational plan for addressing Z.S.'s dyslexia. (Pa9, complaint ¶38). Even assuming the allegation to be true, as a court is obligated to do for purposes of deciding 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 was attributable to the operation of the LIFO statutes or to the District's decision to spend \$8 million on the EWPS pool. Indeed,

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

The recitation of the many deficiencies in the Newark School District - deficiencies the New Jersey Supreme Court has sought to address over the course of four decades of Abbott litigation - is not a substitute for pleading facts that link those deficiencies to LIFO statutes. The pleading deficiencies that led the trial court to dismiss the complaint on standing and ripeness grounds are not cured by the axiom that students should be taught by

there are no allegations in the complaint that explain why Z.S. does not have an appropriate educational plan.

effective teachers. (Pb17). No one disputes that persons charged with the grave responsibility for teaching our children should be effective. The recent overhaul of the Education Law provides all school districts, including Newark, with the tools to either improve the performance of ineffective teachers or remove them. The solution to ineffective teachers in classrooms is not striking down LIFO statutes, but adhering to the evaluation and expedited removal procedures of TEACHNJ.

B. The trial court properly relied on In re Ass'n of Trial Lawyers of America (Trial Lawyers), 228 N.J. Super. 180 (App. Div. 1988)

Plaintiffs allege that the trial court's reliance on Trial Lawyers was misplaced. There, the Appellate Division reversed the denial of a motion to dismiss, concluding that trial lawyers, contesting a new products liability statute, did not have standing because they did not allege that they had suffered an immediate or threatened injury and the only conceivable loss to the attorneys was a possible decrease in contingency fees resulting from the speculative claim that the number of products liability cases might decrease. 228 N.J. Super. at 187.

Plaintiffs attempt to distinguish Trial Lawyers by claiming that the causal link is "far more direct" in the instant case because the student Plaintiffs "suffer from a

real, immediate, non-speculative harm: deprivations resulting from the diversion of millions of dollars of District funds to avoid laying off effective teachers; and the placement of children in classrooms with ineffective teachers." (Pb18). Plaintiffs again ignore their failure to plead any facts that connect the use of \$8 million for the EWPS pool to the deprivation of any educational opportunity to the student Plaintiffs or to any other student.

Trial Lawyers was properly relied on by the court below in concluding that where harm is speculative and where there are no factual allegations in a complaint that establish concrete, actual harm to plaintiffs, there is no standing to assert a claim that a statute results in the deprivation of a constitutionally-protected right. Plaintiffs incorrectly assume that they can simply rely on allegations that test scores of students in the Newark School District are below minimum proficiency levels without pleading facts to establish a causal connection between low test scores and LIFO provisions.

The trial court correctly concluded that more is required to satisfy New Jersey's standing requirements. Plaintiffs have not pled any facts that establish that they have a "sufficient stake" in the outcome of a

constitutional challenge to the LIFO provisions or that they have real adverseness with respect to the subject matter of this lawsuit. (AFTa75, T75:6-75:16).

C. Jen Electric, Inc. v. Cty. Of Essex, 197 N.J. 627 (2009) does not support Plaintiffs' standing

Plaintiffs cite Jen Elec. Inc., 197 N.J. at 645, in support of their contention that they have standing to challenge the constitutionality of the LIFO statutes. In Jen Electric plaintiff challenged a bid specification issued by Essex County for the purchase and installation of a new traffic signal system. Jen Electric, a registered public works contractor that supplied, installed and maintained signal systems, objected to the County's narrowly drawn specifications that excluded from consideration traffic control systems that the plaintiff supplied and installed. As the Jen Electric Court observed, plaintiff was "an active, indeed pro-active, participant in the bidding process . . . Its interest in this controversy is undeniable, and its participation in this contest speaks for itself." 197 N.J. at 646-7. Accordingly, Jen Electric satisfied the standing requirement by pleading facts that demonstrated "a substantial likelihood" that it would suffer some harm "in the event of an unfavorable decision." By contrast, in

this matter Plaintiffs have pled no facts that meet this threshold requirement. They do not allege that they have ever been taught by an ineffective teacher. Nor do they allege that they have been deprived of any educational opportunity causally linked to the expenditure of \$8 million on the EWPS pool.

Plaintiffs also urge reversal of the trial court's decision to dismiss on standing grounds because in order to satisfy the standing requirement they would have to "perform a simulated RIF using this information [information about teacher ratings], to be able to affirmatively plead that the LIFO statute has directly caused Plaintiffs to be taught by ineffective teachers." (Pb15). They claim that this is a "much higher standard than the law requires." (Id.). They further claim that they can "never satisfactorily amend their complaint unless and until a RIF occurs or is immediately imminent, no matter what the magnitude of the current harm to Plaintiffs and other students in Newark." (Pb15-16).

Plaintiffs miss the point. The issue is not whether they can demonstrate that if a RIF was to occur at some unknown future date senior ineffective teachers would be retained and junior effective teachers would be laid off. The issue is that unless a RIF is imminent, or at least

planned, there is no cognizable harm that gives rise to a justiciable controversy. Indeed, if a RIF occurs two years from now, there may be no partially effective or ineffective teachers in the District, eliminating any chance that a student Plaintiff would be assigned an ineffective teacher as a result of the operation of the LIFO statutes.

Plaintiffs lose sight of the essential principle that they must plead facts that establish that they have been harmed by the operation of the LIFO statutes. That either requires the pleading of facts to establish that they are being taught by ineffective teachers as a result of the operation of the LIFO statutes, or that they are being denied educational opportunities to which they are constitutionally entitled because the district is spending \$8 million on the EWPS pool. As the trial court recognized, the facts pled in the complaint must establish a causal link between the operation of the LIFO statutes and a constitutional deprivation. No allegations in the complaint establish that essential connection.

V. THE TRIAL COURT PROPERLY DISMISSED THE COMPLAINT BASED ON THE RIPENESS DOCTRINE

The doctrine of ripeness requires an evaluation of "(1) the fitness of the issues for judicial decision, and

(2) the hardship to the parties caused by withholding court consideration." Committee to Recall Robert Menendez from the Office of U.S. Senator v. Wells, 204 N.J. 79, 99 (2010) (internal citations omitted); Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967). Plaintiffs' claims fail both parts of this test.

"A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1996) (internal citations omitted). Echoing the United States Supreme Court, the New Jersey Supreme Court observed that "[a] declaratory judgment claim is not ripe for adjudication if the facts illustrate that the rights or status of the parties are 'future, contingent, and uncertain.'" Garden State Equality v. Dow, 434 N.J. 163, 189 (L. Div. 2013) (citing Indep. Realty Co. v. Twp. of N. Bergen, 376 N.J. 295, 302 (App. Div. 2005)). "Courts can assume jurisdiction over a claim only if there is a 'real and immediate' threat of enforcement or harm that would affect the plaintiff." Garden State, 434 N.J. at 189 (citing K. Hovnanian Co. of N. Central Jersey, Inc. v. N.J. Dep't of Env'tl. Prot., 379 N.J. at 10).

Plaintiffs' challenge to N.J.S.A. 18A:28-10 is not ripe because it is dependent on the occurrence of three

contingent events: (1) that a reduction in force (RIF) has been implemented or is imminent; (2) that a reduction in force will eliminate junior, effective teachers while retaining senior, ineffective teachers; and (3) that as a result of a reduction in force student Plaintiffs will be assigned ineffective teachers. Their challenge to N.J.S.A. 18A:28-12 requires two additional conditions precedent: (1) that ineffective senior teachers are laid off in a RIF; and (2) that the District re-hires them. Because a RIF has not been implemented and is not imminent, the conditions precedent for challenging the constitutionality of either N.J.S.A. 18A:28-10 or 18A:28-12 cannot be satisfied. As Plaintiffs have not and cannot identify a concrete, immediate harm, this Court should affirm the dismissal of their claims as not ripe for judicial consideration.

Recognizing that their complaint is not ripe as to layoffs, Plaintiffs alternatively claim that the \$8 million the District spends on the EWPS pool is ripe for review. For reasons already discussed, unless Plaintiffs can point to some educational opportunity that they have been denied that is linked to the expenditure of \$8 on the EWPS pool, their effort to depict this claim as ripe also fails.

Plaintiffs assert that the trial court's reliance on Independent Realty Co. v. Twp. of N. Bergen, 376 N.J.

Super. 295 (App. Div. 2005), in dismissing the complaint on ripeness grounds was misplaced. (Pb20). However, the lower court correctly found that Independent Realty offers guidance when claims are based on speculation and when there is no real or immediate threat of injury. In Independent Realty, the plaintiff, the owner of undeveloped property in the Township of North Bergen, obtained site plan approval to build a 27-story residential building. After the Township amended its zoning ordinance - more than ten years after plaintiff's site plan had been approved, but prior to the plaintiff applying for a construction permit - the plaintiff filed a declaratory judgment action seeking a determination that its prior approvals remained in effect. When plaintiff filed its complaint, there had been no adverse ruling by the Township relating to plaintiff's property and the Township did not claim that its amended zoning ordinance rendered the prior approvals invalid. Further, the plaintiff never sought to develop its site. Concluding that the issue did not raise a justiciable controversy ripe for judicial determination the court observed that a "declaratory judgment is not an appropriate way to discern the rights or status of parties upon a state of facts that are future, contingent and uncertain." 376 N.J. Super. at 302 (citing Civil Service

Comm'n v. Senate, 165 N.J. Super. 144, 148 (App. Div.),
certif. denied, 81 N.J. 266 (1979)).

Here, as in Independent Realty, Plaintiffs ask a court to adjudicate facts that are contingent on future events that may never occur. There is no harm Plaintiffs allege they have suffered or are suffering linked to the operation of the LIFO statutes.

Plaintiffs further assert that the trial court disregarded the principles in Hogan v. Donovan, 2012 WL 1328279, at *10 (Law Div. 2012). To the contrary, the court's decision in Hogan underscores the deficiencies in Plaintiffs' pleading. In Hogan, the County Clerk brought an action to compel the County Executive to process the employment application of an individual fluent in English and Korean to assist the Clerk in complying with the requirement that ballots and voter information be printed in the Korean language. The County Executive moved to dismiss the complaint, arguing, inter alia, that the dispute was not ripe for adjudication as no budget had been approved for the current fiscal year. The court refused to dismiss the complaint, finding that the plaintiff alleged a current need for an additional employee and that to delay the adjudication of the underlying issue until after the County passed a budget would prejudice the plaintiff. It

would also leave open the issue of whether the County Executive has the statutory authority not to process an employment application when there are adequate funds in the Clerk's budget to support the requested position.

Thus, in Hogan, unlike in the instant matter, the County Clerk alleged facts establishing a present and continuing harm to the operation of his office. As such, Hogan offers no support for Plaintiffs' position that their claim is ripe for judicial review. Nor does Plaintiffs' claim with respect to the funding of the EWPS pool overcome the ripeness hurdle. Plaintiffs ignore the fact that they do not link any education deprivation to the expenditure of \$8 million out of a budget of almost \$1 billion. Nor does the classroom placement in of teachers, who had been assigned to the EWPS pool, cure the complaint's deficiencies. As previously discussed, layoff statutes cannot be used in place of TEACHNJ evaluation and removal procedures to terminate the employment of tenured teachers. Thus, the claim that ineffective teachers have been removed from the EWPS pool and placed in classrooms fails to establish the necessary causal link between the operation of the LIFO statutes and harm to any student. Again, it bears noting that Plaintiffs do not allege that any

plaintiff student is being or has ever been taught by an ineffective teacher.

**VI. THE TRIAL COURT PROPERLY EXPRESSED CONCERN OVER THE
ROLE OF THE COURT IN THE POLITICAL PROCESS IN LIGHT OF
THE RECENT ENACTMENT OF THE TEACHNJ REFORMS AND OVER
THE STANDARDS TO BE USED FOR LAYOFFS IF LIFO STATUTES
WERE STRUCK DOWN**

Plaintiffs further argue that the lower court's dismissal of the complaint should be reversed because the court expressed concern that it could not grant the requested relief. (Pb23-26).

First, the trial court did not dismiss the complaint on the basis that it did not have the power to enjoin the operation of the LIFO statutes upon finding the statutes to be unconstitutional as applied.¹¹ Only after finding that the Plaintiffs lacked standing and that the dispute was not ripe for judicial review did the court comment on the arguments advanced by the AFT and the NJEA that the non-justiciability of political questions doctrine militates in favor of allowing the TEACHNJ reforms in the areas of teacher tenure, evaluations and removal, time to work. (AFTa154, T78:21-79-10). Second, the lower court was properly concerned about the role of the courts in an area

¹¹ The trial court specifically noted that there "were matters raised in the brief[s] [of the AFT and NJEA] that the Court doesn't need to reach based upon the finding of lack [of] standing and lack of ripeness" (AFTa151, T77:16-20).

where the Legislature has so recently acted to transform the education law to address the gravamen of Plaintiffs' complaint - namely, that students are taught by effective teachers.

Pursuant to the 2012 TEACHNJ legislation, if a district adheres to statutorily mandated teacher evaluation procedures, ineffective teachers will be removed from the district. It is this procedure - not the LIFO provisions - that are designed to accomplish the relief that Plaintiffs seek. The trial court was understandably reluctant to enmesh itself in this matter so soon after the Legislature and Governor enacted sweeping reforms designed to address the specific issue Plaintiffs brought before the court.

It is also noteworthy that in the context of enacting groundbreaking reforms to a tenure system that had been in place for over a century, the Legislature decided to leave untouched the part of this cohesive statutory scheme that requires layoffs based on seniority. The trial court recognized that the judgment that a seniority-based layoff system is more likely to increase the overall quality of a district's teaching pool than other alternative systems - two of which were proposed in the TEACHNJ bills sponsored Assemblywoman Ruiz - is uniquely the type of policy assessment our State Constitution entrusts to the

Legislature. The delicate balance between providing job security as an inducement to the recruitment and retention of teachers and fashioning procedures and safeguards to remove ineffective teachers is most appropriately struck, not by the courts in this particular instance, but by the Legislature.

While the Supreme Court has aggressively enforced the Education Clause by requiring the equalization of per pupil spending between the Abbott and other school districts, the Court has generally proceeded with respect for separation of powers principles, affording the two political branches ample time to enact legislation to correct the inequities between the educational opportunities afforded children in Abbott districts and children in wealthier suburban districts.

The trial court was reluctant to wade into educational policy waters involving teacher evaluations and removal proceedings so soon after the two other branches acted to install statutory safeguards to ensure that ineffective teachers are identified and removed based on objective evaluation rubrics developed by local school boards and approved by the Commissioner of Education. (AFTa152-153, T78:24-81:9).

The caution with which the Supreme Court has proceeded in the Abbott v. Burke litigation is instructive and supports the trial court's reticence to upend LIFO provisions that the Legislature recently endorsed as part of an omnibus statutory reform to ensure students are taught by effective teachers. Illustrative is the Supreme Court's decision in Abbott v. Burke, 206 N.J. 332, 366-7 (2011) (Abbott XXI) rejecting the State's challenge to "the efficacy of existing tenure laws, teacher evaluation methods, and collective bargaining agreements." The Court observed that to achieve radical changes to educational policy in the area teacher job security, the State should initially seek those changes through the legislative process.

While there may or may not be virtue in future educational policy reforms, the debate regarding how best to transform the educational system must be reserved for a different forum. The State's presentation of such arguments in connection with the instant matter is simultaneously premature and laggard. In one respect, the State cannot transform its defense to this motion in aid of litigants' rights into a vehicle to obtain an indication of some judicial approval for collateral labor law and education policy reforms that are, as-yet, unadopted by the Legislature. Nor can the State assert that districts should have mitigated the impact of budget reductions somehow before those initiatives were legislatively obtained. Unless and until the State achieves the legislative reforms

it prefers, and puts those tools in the hands of districts, arguments attacking collective bargaining agreements or targeting interest groups in the education community, do not advance the State's position in this matter.

[Id. at 367]

Thus, the Court in Abbott XXI did not accept the invitation to venture into the realm of educational policy in areas that do not implicate State funding. The trial court was properly hesitant to make policy with respect to statutory job protections for teachers, especially so soon after the Legislature enacted comprehensive reform measures to accomplish precisely what Plaintiffs here ostensibly seek by way of relief - the removal of ineffective teachers.

A similar approach was endorsed by Chief Justice Wilentz in Abbott II where he observed:

The constitutional command [of a thorough and efficient education] does not require relief every time the slightest deviation from a thorough and efficient education is found, or any time that deviation, though proven, is likely to be corrected soon. 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.

[119 N.J. at 321].

However, the Chief Justice went on to find that there is no "likelihood of achieving a decent education tomorrow, in the reasonable future, or ever," and on that basis the

Court held the Public School Education Act of 1975 to be unconstitutional as applied to poorer urban districts. Ibid. Unlike the plaintiffs in Abbott II, the Plaintiffs here offer no facts to even suggest that TEACHNJ, if permitted to work as intended, will not dramatically reduce, if not eliminate, the number of teachers shown to be ineffective in the Newark District.

Abbott v. Burke, 199 N.J. 140 (2009) (Abbott XX) also provides guidance. There, the State sought a declaration that the funding formula of SFRA satisfied the requirements of the thorough and efficient education clause and therefore the State should be released from the Court's prior remedial orders concerning education funding for students in Abbott districts. The Court considered the State's motion based on a record developed before a Special Master pursuant to an order of remand by the Court in Abbott v. Burke, 196 N.J. 544, 565 (2008) (Abbott XIX). Of particular concern to the Court was "how [the SFRA funding formula] supports accommodation of the special needs of disadvantaged students." 199 N.J. at 151. Over the objections of plaintiffs and various amici curiae, the Court granted the State's application. The Court explained that until the school funding formula expressed in SFRA "has had time to function as intended, it will be

impossible to know precisely what its effect will be." Id. at 169. "We see no reason, or basis, for us to second guess the extraordinarily complex education funding determinations that went into the formulation of the many moving parts to this funding formula." Id. at 170. Recognizing that the experts who testified before the Special Master disagreed on many aspects of the funding formula, the Court commented that "the important point is that resolution of those conflicts is, in the first instance, a judgment for the Executive and Legislature to make." Id. at 171. "The judicial remedy is necessarily incomplete . . . and cannot substitute for the comprehensive remedy that can be effectuated only through legislative and executive efforts." Ibid. (quoting Abbott v. Burke, 149 N.J. 145, 189 (1997) (Abbott IV)).

Apropos of the issue that was before the trial court, the Supreme Court in Abbott XX observed that "[u]nlike in prior moments in the history of school funding litigation in this state, we do not now confront legislative inaction or failure to identify and provide realistic education funding support to at-risk children whose severe educational challenges cause their programs to be the most costly." Id. at 171. Concluding that the legislative effort deserves deference, the Court noted that the

political branches of government are "entitled to take reasoned steps, even if the outcome cannot be assured, to address the pressing social, economic and educational challenges confronting our state. They should not be locked in a constitutional straightjacket. SFRA deserves the chance to prove in practice that, as designed, it satisfies the requirements of our constitution." Id. at 175.

Notwithstanding the Abbott Court's repeated forays into the legislative realm when faced with inaction, and at times outright defiance of its orders by the Legislative and Executive branches in the area of school funding and related programmatic issues, the Supreme Court has consistently proceeded with restraint in dealing with matters of educational policy, ever sensitive to the separation of powers issues that hover over any judicial incursion into the legislative arena. Courts will insert themselves into the legislative process "only so far as demonstrably required to meet the constitutional exigency." Robinson v. Cahill, 69 N.J. 133, 144 (1975). The "Court does not purport to 'sit as a super-legislature' a role firmly disavowed by this and other courts. Our Court has previously and repeatedly shown respect for the doctrine of separation of powers of government. A court must always

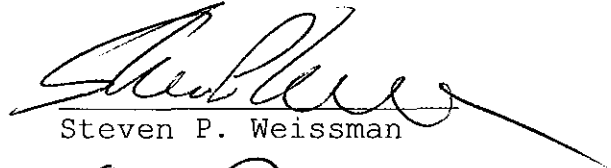
adhere to that concept, bending only so far as clearly required to fulfill the constitutional duty its members swore to perform" to support the Constitution. Robinson v. Cahill, 69 N.J. 449, 472 (1976) (citations omitted).


This is not a case where the Legislature or the Executive branch has turned a blind eye toward serious flaws in the State's educational system. In the areas of teacher tenure and performance the other two branches of government have recently been proactive, radically reforming the tenure and evaluation systems to ensure that only effective teachers are granted tenure and are retained. The evaluation and rating rubrics developed in conformance with the TEACHNJ standards were first used during the 2013-2014 school year. Pursuant to TEACHNJ, charges of inefficiency based on two consecutive annual summative ratings of ineffective or partially effective were filed for the first time in June or July of 2015, resulting in the processing of an initial round of charges during the 2015-2016 school year. The TEACHNJ process for removing ineffective teachers is still in its infancy and deserves the opportunity to function as the Legislature and Governor intended.

CONCLUSION

For the reasons set forth in this brief, the trial court's decision dismissing the complaint based on lack of standing and lack of ripeness should be affirmed.

Respectfully,


Steven P. Weissman


Annmarie Pinarski

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