

H.G., a minor , through her guardian TANISHA GARNER;
F.G., a minor, through her guardian TANISHA GARNER;
E.P., a minor through her guardian NOEMI VAZQUEZ; M.P., a minor, through her guardian NOEMI VAZQUEZ; W.H., a minor, through his guardian FARREAH HARRIS; N.H., a minor, through his guardian FARREAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., a minor, through his guardian IRIS SMITH; Z.S., 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 a Superintendent of the Newark Public School District,

Defendants-Respondents

And

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.:A-004546-16

Civil Action

ON APPEAL FROM THE LAW
DIVISION

DOCKET NO. MER-L-2170-16

SAT BELOW:

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

BRIEF AND APPENDIX ON BEHALF
OF DEFENDANT-INTERVENOR NEW
JERSEY EDUCATION ASSOCIATION

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

Defendant- Intervenor-
Respondent,

And

AMERICAN FEDERTION OF
TEACHERS, AFL-CIO, AFT NEW
JERSEY and THE NEWARK
TEACHERS UNION,

Defendants-Intervenors-
Respondents.

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PRELIMINARY STATEMENT

Defendant-Intervenor, New Jersey Education Association, submits this brief in support of affirmance of the May 4, 2017, order dismissing the plaintiffs' complaint without prejudice. Plaintiffs, the parents or guardians of twelve Newark public school students, challenge the constitutionality of statutes governing the lay-off of tenured teachers when there is a reduction-in-force ("RIF"). Plaintiffs claim that those statutes are unconstitutional as applied to the Newark Public Schools ("Newark") because they require RIFs to be based on seniority rather than on teacher effectiveness.

The lower court dismissed the complaint, finding that plaintiffs lack standing and that their challenges are not ripe for review. The court below did not address other justiciability issues or the merits of plaintiffs' claims.

The order below should be affirmed. Plaintiffs allege in their complaint that they are harmed by the RIF statutes because those statutes put them at risk of having classroom teachers rated as ineffective on performance evaluations. Plaintiffs also allege they are harmed by the mere existence of a pool of teachers -- referred to as the Educators Without Placement Sites ("EWPS") -- which was created by the Newark district for teachers with an

ineffective rating as well as for teachers who have been rejected by principals for reasons other than performance. The pool was designed to keep ineffective teachers out of classrooms and to avoid the possible RIF of effective classroom teachers with less seniority. Plaintiffs contend the costly pool exposes Newark students to teachers with an ineffective rating and requires Newark to make budget cuts in other parts of the district's budget.

The court below correctly found that plaintiffs' complaint cannot overcome the fundamental justiciability hurdles of standing and ripeness. **First**, plaintiffs lack standing because they have not alleged that any of plaintiffs' children is presently being, or will imminently be, taught by a teacher rated as ineffective or partially ineffective. Plaintiffs also fail to show that any of their children are affected by the mere existence of the EWPS pool or by budget cuts allegedly necessitated for the retention of ineffective teachers in that pool.

On appeal, plaintiffs ignore the critical omission of necessary allegations in the complaint to show particularized harm to the individual plaintiffs caused by the RIF statutes. This is not a class or representative action, like the Abbott v. Burke litigation, so the failure to show harm to the individual plaintiffs is fatal to

plaintiffs' claims. In an effort to divert attention from these omissions, plaintiffs make sweeping, factually unsupported allegations about the RIF statutes and the EWPS, relying on selective statistics, the impact upon other Newark students, conclusory allegations, and hypothetical simulations. What is glaringly missing from the complaint are the requisite facts to show standing based on the particularized harm to these individual plaintiffs caused by the RIF statutes in the absence of a RIF or by the existence of the EWPS pool.

Second, plaintiffs' claims are also not ripe for judicial consideration. Plaintiffs do not allege that a RIF is in effect in Newark, or will soon be implemented. Thus, the lower court properly concluded that there is no real and immediate harm to plaintiffs caused by the RIF statutes or the EWPS pool. Plaintiffs' complaint is premised on speculation about the effects of the hypothetical RIF that might hypothetically occur at some indeterminate time in the future. Such conjecture and speculation are no substitute for well pled facts showing real and immediate harm to support their standing and the ripeness of their claims.

For the reasons set forth in this brief, the Court should affirm the order dismissing the complaint.

PROCEDURAL HISTORY

On November 1, 2016, Plaintiffs-Appellants ("plaintiffs"), the parents or guardians of several Newark public school students, filed a five-count complaint in Mercer County Superior Court (Law Division) seeking a declaratory judgment and injunctive relief. The complaint alleges that the reduction-in-force statutes (the "RIF statutes") in New Jersey governing teacher layoffs, N.J.S.A. 18A:28-10 and N.J.S.A. 18A:28-12,¹ are unconstitutional. These statutes require that reductions in force of tenured teachers -- and their reemployment after a RIF -- be based exclusively on seniority.

Plaintiffs claim that basing such decisions on seniority, rather than upon evaluations of teacher effectiveness, violates various provisions of the New Jersey Constitution: the Education Clause, Art. VII, Sect. IV, ¶ 1; the right to equal protection of the law under Art. I, ¶ 1; and the right to due process under Art. I, ¶ 1. Plaintiffs also allege a violation of the New Jersey Civil Rights Act, N.J.S.A. 10:6-2 et seq. and, in their fifth cause of action, seek a declaratory judgment under

¹ These statutes are referred to by the parties as "the RIF statutes" or "the LIFO statutes."

the New Jersey Declaratory Judgment Act, N.J.S.A. 2A:16-50 et seq.

The State defendants are Kimberly Harrington, the Acting Commissioner of Education and the New Jersey State Board of Education. Plaintiffs also sued, as nominal defendants, the Newark Public School District ("Newark") and Christopher Cerf, Superintendent of the State-Operated Newark School District. Newark has been a State-Operated school district from 1995 until September 2017, when the State Board of Education voted to start the process of returning full local control to Newark.²

On December 22, 2016, the lower court granted the New Jersey Education Association's ("NJEA")³ and the American

² See "Resolution To Return Newark Public Schools to Full Local Control," Minutes of the September 13, 2017, meeting of the New Jersey State Board of Education at 5 (Intervenor-Defendant NJEA's Appendix at 1-3) (hereinafter referred to as "IDNJEA").

³ NJEA is a labor organization with approximately 177,000 local and county public school employees and public higher education employees. "NJEA is affiliated with over 500 local education associations (EAs)" in New Jersey, and these education associations "are designated as majority representatives for collective negotiation purposes for staff within local and regional school districts." In Newark, whose teaching staff is represented by the Newark Teachers Union, there are 183 NJEA members who are professional teaching employees of the Newark Public Schools. Certification of Edward J. Richardson, dated August 23, 2016, in support of NJEA's motion to intervene, at ¶¶2, 3, and 6. (IDNJEA 4-5).

Federation of Teachers' ("AFT")⁴ separate motions for leave to intervene and designated the NJEA and AFT as Defendants-Intervenors. On March 13, 2017, NJEA filed its motion to dismiss the complaint, contending that: (1) plaintiffs seek judicial resolution of non-justiciable educational policy issues consigned to the Legislature; (2) plaintiffs' claims are not justiciable because they lack standing and the issues are not ripe for judicial consideration; (3) plaintiffs fail to allege a claim upon which relief may be granted because they fail to show the alleged constitutional violations are caused by the RIF statutes or the EWPS pool. AFT raised similar claims in its separate motion to dismiss the complaint.

On May 3, 2017, the Assignment Judge (Honorable Mary C. Jacobson, A.J.S.C.) heard oral argument on the motions to dismiss and, on May 4, 2017, the court below entered an Order granting the NJEA's and AFT's motions to dismiss and dismissing plaintiffs' complaint without prejudice. (Pa 99-101). The court found that "Plaintiffs lack standing to pursue their claims in the absence of a particularized harm to Plaintiffs caused by" the LIFO statutes. (Pa 101). The lower court also found that "Plaintiffs' claims lack

⁴ The Newark Teachers Union, an affiliate of the American Federation of Teachers, is the bargaining representative for the Newark School District teachers.

ripeness in the absence of an actual or immediate threat of harm to Plaintiffs caused (sic) the LIFO statutes.” (Id.). The court further stated in the Order that, in light of its rulings on standing and ripeness, there was no need to reach plaintiffs’ other claims. (Id.)

On May 24, 2017, plaintiffs filed a motion in this Court for leave to appeal the Law Division’s decision and order, asserting that the dismissal without prejudice was not a final order. On June 15, 2017, a panel of this Court denied the plaintiffs’ motion and ordered that plaintiffs’ motion be “accepted as a timely notice of appeal” and that “plaintiffs file an appropriate notice and case information statement within fourteen days.” (IDNJEA 9). Plaintiffs timely filed their notice and case information statement, and the appeal proceeded on a regular track.

COUNTERSTATEMENT OF THE FACTS

A. Plaintiffs Allegations in the Complaint

For purposes of this appeal, NJEA accepts the factual allegations in plaintiffs’ complaint as true. Plaintiffs allege that their children attend several schools in the Newark School District (“Newark”) where the academic achievement levels of large numbers of students, as measured by test scores, are deficient and substantially below State minimum proficiency standards. (Complaint, ¶¶30-

40) (Pa7-9).⁵ Plaintiffs also claim that Newark's graduation rates are much lower than statewide figures. (Complaint, ¶¶59-60) (Pa13-14).

According to plaintiffs, effective teachers are the "single most influential school-based variable in determining the adequacy of a child's education and a critical determinant of educational success" (Complaint ¶ 44) (Pa10), and Newark has a disproportionately high number of teachers rated as less than effective. (Complaint, ¶50) (Pa12). They assert that the educational shortcomings in their children's schools are solely the result of the district's inability to consider teacher effectiveness when there is a RIF because: (1) the RIF statutes require that school districts, in implementing a RIF, lay off tenured teachers based solely on seniority, without considering any other factor, including evaluations of a teacher's effectiveness or ineffectiveness, N.J.S.A. 18A:28-10 (Complaint, ¶¶ 3,64) (Pa 2,14); and (2) the reemployment statute mandates that any teaching staff member dismissed

⁵ Plaintiffs' children attend the following Newark schools: Hawkins Street Elementary School; Fourteenth Avenue Elementary School; Luis Munoz Marin Elementary School; First Avenue Elementary School; East Side High School; Eagle Academy for Young Men; and Speedway Academies. Although plaintiffs purport to seek relief for all Newark public school students and, therefore, allege district-wide facts, they have not filed a class action or named parents or students at other Newark schools as plaintiffs.

as the result of a RIF shall be placed on a preferred eligibility list in order of seniority, not teacher quality or any other factor, for reemployment in the event there is a subsequent need to re-hire teachers. N.J.S.A. 18A:28-12. (Complaint, ¶ 3, 65) (Pa2,14). Seniority, according to plaintiffs, is based on "tenure" in the district where the RIF occurs (Complaint, ¶66) (Pa14-15) and "is weakly correlated with effective teaching." (Complaint, ¶68) (Pa15).

Plaintiffs claim that in light of "declining student enrollment in Newark and the corresponding decrease in state funding," Newark is faced with two "untenable options": "(i) layoff effective teachers pursuant to the mandates of the LIFO statute, while leaving ineffective teachers clustered in an already under-performing school district, or (ii) refuse to institute reductions-in-force (even when faced with decreased funding), retain ineffective teachers to save the effective and highly-effective teachers, decline to hire new teachers, and cut spending elsewhere in the district's budget." (Complaint, ¶¶ 5, 63-67) (Pa3,14-15).

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

in order to avoid reducing the number of effective teachers instructing students. (Complaint, ¶ 6)(Pa3).⁶ This pool of teachers, according to the complaint, “drains millions of dollars per year from Newark’s budget” and the impact on Newark’s funding is exacerbated by the “State’s misguided efforts to cut education funding to the Schools Development Authority (“SDA”) districts,” which are the former Abbott districts. (Complaint, ¶ 6)(Pa3).⁷ Plaintiffs assert that starting in 2015, despite Newark’s efforts to only place ineffective teachers with the school’s consent, Newark had to “force place” these teachers within district schools as permanent teachers without the consent of the schools. (Complaint, ¶¶86-87)(Pa17-18).

⁶ Plaintiffs make inconsistent allegations about the composition of the EWPS. In the complaint, plaintiffs assert that the EWPS consists of a “pool of ineffective teachers” (Complaint, ¶ 6)(Pa3). On the other hand, the State Superintendent, Christopher Cerf, asserts in his certification, upon which plaintiffs rely, that teachers could also be placed in the pool because their positions were eliminated as a result of budget cuts, school closures or school redesign. Certification of Christopher Cerf at ¶¶11,13(Pa 91-92).

⁷ Plaintiffs allege that other unnamed school districts are faced with the same dilemma, but “have implemented workarounds to avoid the harms associated with implementing reductions-in-force pursuant to LIFO.” (Complaint, ¶ 7)(Pa 3. Presumably, plaintiffs refer to the Camden School District, which is only mentioned in passing in the complaint. (Complaint, ¶¶78, 108)(Pa16, 22).

Plaintiffs further claim that, in February 2014, Newark sought from the Commissioner of Education a "temporary reprieve" from the RIF statutes, but that the district's request has not been answered by the State. (Complaint, ¶¶ 42-43) (Pa10). As part of this request, Newark presented data from a simulation that allegedly showed that if the RIF statutes were implemented in Newark at that time, "75% of the teachers it would lay off were considered effective or highly effective, and *only 4% of the teachers laid off would be rated ineffective.*" (Complaint, ¶74) (Pa16) (emphasis in original). Plaintiffs also claim that the RIF statutes interfere with Newark's ability to recruit, hire, and retain highly qualified teachers. (Complaint, ¶¶96-103) (Pa19-21).

They assert that the RIF statutes are unconstitutional for the following reasons: (1) they have the "perverse effect" of requiring the RIF of junior effective teachers and retaining senior ineffective teachers in violation of the Education Clause of the New Jersey Constitution (Complaint, ¶ 11) (Pa4); (2) school children in Newark are inequitably harmed in comparison to children from affluent districts, in violation of the Equal Protection Clause of the New Jersey Constitution, since adequate funding allows affluent districts to retain effective teachers in the

event of a RIF (Complaint, ¶ 12)(Pa4-5); and (3) Newark's school children are being denied their fundamental right to a thorough and efficient education as a result of the RIF statutes, in violation of the Due Process Clause of the New Jersey Constitution (Complaint, ¶ 13)(Pa5).⁸

Plaintiffs seek a judgment declaring that the RIF statutes, as applied, to Newark "and other similarly situated" districts" is unconstitutional (Complaint, ¶ 16)(Pa5)⁹ and an injunction "to prevent enforcement of the LIFO statute, or any law or policy substantially similar to the LIFO statute, which would prevent Newark and other similarly situated districts from considering teacher effectiveness - regardless of seniority - when making decisions in relation to reductions-in-force." (Complaint, ¶ 17)(Pa5).¹⁰

⁸ As mentioned above, plaintiffs also allege violations of the New Jersey Civil Rights Act (Pa 26) and seek a declaratory judgment regarding their constitutional claims (Pa26-27).

⁹ Claims relating to "other similarly situated districts" are not before the Court. Plaintiffs have not filed a class action on behalf of parents or students in "other similarly situated districts"; all the named plaintiffs are attending Newark schools; and no specific allegation, other than a brief mention of the Camden School District, has been asserted about the effect of the RIF statutes on other school districts.

¹⁰ Beyond seeking an injunction to prevent enforcement of the RIF statute in operation, plaintiffs also seek to

Significantly, plaintiffs do not allege any facts showing that: (1) any of their children are being, or are about to be, taught by teachers rated as ineffective or partially effective; (2) any of their children are currently assigned to, or are about to be assigned to, a teacher rated as ineffective or partially effective; (3) a RIF affecting teachers is in effect in the Newark district or that a RIF is planned to occur imminently; (4) any specific program or resource affecting or harming plaintiffs that has been cut because of the cost of maintaining the EWPS; and (5) the alleged denial of a thorough and efficient education for any named plaintiff, let alone a constitutional deprivation caused by the RIF statutes.¹¹

enjoin enforcement of any "law or policy" that would prevent Newark from considering teacher effectiveness regardless of seniority. (Pa5). Plaintiffs do not cite to any specific "law or policy" presently in effect in Newark so the relief would be superfluous.

¹¹ Plaintiffs cite Newark's assertion in its answer that "the LIFO statute hampers the District from meeting its constitutional obligations." (Pb4). Newark, like plaintiffs, provides no facts to support this conclusory assertion. Merely parroting that the RIF statutes hamper the fulfillment of a constitutional obligation does not make it true; there must be some underlying factual support, which neither Newark nor Plaintiffs provide. Moreover, even if Newark's assertions might have some relevance for the merits of plaintiffs' claims, an issue that does not have to be addressed on this appeal, Newark's assertions are not relevant to whether plaintiffs have

B. The Trial Court's Decision and Order

The court below recognized that the plaintiffs have not filed a class action and that the focus of judicial assessment of the sufficiency of the complaint must be based on the facts pertaining to the twelve individual defendants. (1T:66:7-21). The court also observed that the focus of plaintiffs' allegations of unconstitutionality shifted from the claim that a RIF was imminent that would result in the loss of effective teachers and the retention of ineffective teachers to the claim - once it became clear that a RIF would not occur - that plaintiffs are harmed by the existence of the EWPS pool. (1T:70:11-71:9).

On the standing issue, the lower court found that plaintiffs were unable to show particularized harm caused by the RIF statutes. (1T74:1-3). With respect to plaintiffs' standing to challenge the impact of a RIF on plaintiffs, the court acknowledged the studies cited by plaintiffs about the importance of teacher effectiveness in the classroom, the facts alleging failure of the Newark schools, and the importance of providing a thorough and efficient education to every student in the Newark district. (1T69:19-70:47). However, the court found that

standing or whether the issues raised by plaintiffs are ripe for judicial review.

plaintiffs failed to show particularized harm because "the complaint is completely devoid of facts of how any of these individual students are harmed by the LIFO statute. There's been no reduction in force so there's been no firing on the basis of this complaint of any teacher in Newark who is an effective teacher." (1T70:5-9). Additionally, "[t]here's no assertion that any of these 12 students is currently being taught by an ineffective teacher [or] is likely to be taught by an ineffective teacher." (1T:73:4-6)

With respect to plaintiffs' standing to challenge the RIF statute on the basis of the existence of the EWPS pool, the court explained that the causation standard is not met because "[t]he assertions are conclusory in nature" and there was no linkage "other than speculation and conjecture" between the RIF statutes and harm to the twelve plaintiffs. (1T:71:4-19). The court further stated that there was no link between the \$8 million and plaintiffs' children or that plaintiffs' children were being denied effective teachers because of the existence of the pool. (1T74:12-20). The court found particularly persuasive the absence of an assertion that the lack of the \$8 million required to maintain the pool led to the reduction or elimination of any program that plaintiffs' children were involved in. (1T74:12-75:16).

As for ripeness, the court below explained that the judiciary can assume jurisdiction over a claim “only if there’s a real and immediate threat of enforcement or harm that would affect the plaintiff.” (1T76:8-11). The court found that the plaintiffs’ claims were not ripe because “there’s been no reduction in force and no strong likelihood that there’s going to be one in the foreseeable future.” (Id. at 11-17).

LEGAL ARGUMENT

Plaintiffs raises five issues on appeal: (1) they have standing to challenge the RIF statutes and the impact of the EWPS pool on plaintiffs; (2) their claims are ripe for judicial review; (3) the harm to plaintiffs from the RIF statutes is judicially remediable; (4) the court improperly considered discovery burdens in deciding the motion to dismiss; and (5) plaintiffs meet pleading requirements for their claims.

As NJEA discusses below, issues (3) and (5) were not adjudicated by the lower court’s order and are not properly before this Court on appeal, and plaintiffs misconstrue the judge’s discussion of (4), the alleged consideration of “discovery burdens.” The sole issues properly on appeal of the lower court’s order are the findings that that

plaintiffs have no standing and that the issues are not ripe for review.

NJEA will discuss those claims in turn and will then address the reasons why the other issues should not be considered on appeal.¹² Even under the "generous and hospitable approach" typically accorded review of the legal sufficiency of a complaint on a motion to dismiss, NCP Litigation Trust v. KPMG LLP., 187 N.J. 353, 365 (2006); Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989), the Law Division's order should be affirmed because plaintiffs' lack standing to raise their specific claims and their claims are not ripe for review.¹³

¹² NJEA agrees that the trial court's decision to dismiss the plaintiffs' complaint must be reviewed de novo. (Pb11-12).

¹³ NJEA joins in the AFT's contention that the trial court properly expressed concern over the role of the court in the political process and the proper scope of relief in this case. (AFTb50-57). While not specifically mentioned in the Order, the lower court also recognized that plaintiffs' claims are not well pled because there is the "fundamental absence of the link... [the] causation link in the context of a constitutional claim." (1T73:17-19]. Because this Court review judgments, not decisions, it may affirm on these grounds and for different reasons than those articulated below. Serrano v. Serrano, 367 N.J. Super. 450, 461 (App. Div. 2004) (citing Isko v. Planning Bd. of Livingston Twp., 51 N.J. 162, 175 (1968) ("Although we affirm for different reasons, a judgment will be affirmed on appeal if it is correct, even though 'it was predicated upon an incorrect basis.'"), rev'd on other grounds, 183 N.J. 508, (2005). Consequently, this Court can affirm the decision below for these reasons even if they are different

POINT ONE

**THE LAW DIVISION'S ORDER SHOULD BE
AFFIRMED BECAUSE PLAINTIFFS LACK
STANDING TO RAISE THEIR CONSTITUTIONAL
CHALLENGES TO THE RIF STATUTES**

The Law Division found that plaintiffs "lack standing to pursue their claims in the absence of a particularized harm to Plaintiffs caused by" the RIF statutes. (Pa 101). This determination should be affirmed.

"'Standing is a threshold requirement for justiciability' of a cause of action seeking a court's intervention and judgment." In the Matter of the Grant of a Charter to the Merit Preparatory Charter School of Newark, 435 N.J. Super. 273, 279 (App. Div. 2014). "Standing refers to the plaintiff's ability or entitlement to maintain an action before the court. Courts will not entertain matters in which plaintiffs do not have sufficient legal standing." Stubaus v. Whitman, 339 N.J. Super. 38, 47 (App. Div. 2001) (citation omitted). The doctrine of standing, as well as ripeness and mootness, "'are incidents of the primary conception that . . . judicial power is to be exercised to strike down legislation . . . at the instance of one who is himself immediately harmed, or immediately threatened with

that those stated or relied upon by the trial court. State v. Heisler, 422 N.J. Super. 399, 416 (App. Div. 2011). See Point III, infra, at pp. 33-36.

harm, by the challenged action.'" Matter of Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180, 185 (App. Div. 1988) (citation omitted).

While New Jersey courts have taken a liberal approach to standing, Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York, 58 N.J. 98, 107-08 (1971), a party must still demonstrate "a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In re Camden County, 170 N.J. 439, 449 (2002).

A showing of harm is essential because courts "will not render advisory opinions or function in the abstract nor will [they] entertain proceedings by plaintiffs who are mere 'intermeddlers' or who are merely interlopers or strangers to the dispute." Crescent Park Tenants Ass'n, supra, 58 N.J. at 107. See also, Slutsky v. Slutsky, 451 N.J. Super. 332, 370 (App. Div. 2017) (same); Rybeck v. Rybeck, 150 N.J. Super. 151, 156 (App. Div. 1977) ("A determination such as that sought in this case should not be made where the litigant's concern with the subject matter does not evidence 'a sufficient stake and a real

adverseness' and the opinion will be merely advisory in nature.").

In other words, "[t]he party who seeks to 'annul legislation on grounds of its unconstitutionality must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement.'" In re Camden County, supra, 170 N.J. at 449(citation omitted). Without these requirements, "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." Warth v. Seldin, 95 S. Ct. 2197, 2205 (1975). As this Court has stated: "courts should not decide cases where a judgment cannot grant relief" nor render decisions that "can have no practical effect." City of Plainfield v. N.J. Dep't of Health & Senior Servs., 412 N.J. Super. 466, 483-84 (App. Div.) (citations and internal quotation marks omitted), certif. den. 203 N.J. 93 (2010).

Plaintiffs cannot overcome this threshold standing hurdle. The Court need not consider the first two criteria for standing because plaintiffs cannot demonstrate a substantial likelihood that they are being harmed by the

RIF statute. Plaintiffs allege two "practical harms" of the RIF statutes. First, plaintiffs allege that they are deprived of effective teachers when a RIF occurs (Pb5). Second, plaintiffs claim they are harmed by the mere existence of the EWPS pool because Newark expends money on the EWPS pool to retain ineffective teachers, force-places ineffective teachers in the classroom to meet budget shortfalls, and cuts other parts of the budget to cover the cost of the EWPS pool. (Pa5).

Plaintiffs do not, and cannot, claim that any of their children is being, or is about to be, taught by an ineffective or partially effective teacher, much less an ineffective teacher as a result of, or caused by, the operation of the RIF statutes. Moreover, while plaintiffs highlight low test scores in the district, plaintiffs do not allege that their test scores in reading, writing or math - or in any test at all - are low, much less attributable to an ineffective teacher in their classrooms or to the RIF statutes.

Furthermore, the EWPS was created by Newark instead of pursuing tenure charges under TEACHNJ¹⁴ against ineffective

¹⁴ The acronym stands for "Teacher Effectiveness and Accountability for the Children of New Jersey."

teachers in the district;¹⁵ therefore, any alleged harm from the existence of the EWPS is caused by Newark's own independent decisions, not by the actual existence of the unimplemented RIF statutes. The district cannot reasonably claim under these circumstances that the self-generated EWPS pool can serve as the basis for the particularized harm required for standing to challenge the RIF statutes. The fact that Newark decided to spend money on maintaining the pool rather than to spend money on pursuing tenure charges does not result from the RIF statutes or confer standing to challenge those statutes. Put bluntly. Newark cannot create a constitutional issue out of whole cloth by establishing the EWPS pool and refusing or delaying tenure proceedings under TEACHNJ.

¹⁵ Plaintiffs assert, relying on a certification from the State Superintendent of Newark, Christopher Cerf, that tenure proceedings brought by the district to remove ineffective teachers are costly and time-consuming proceedings that take at least two years. (Pb 5-6). Neither plaintiffs nor Cerf asserts that the procedures in the recently-enacted 2012 TEACHNJ Act, L. 2012, c. 26, are not working in Newark to expedite tenure proceedings and reduce their cost. The TEACHNJ Act is a sweeping overhaul of the tenure laws. Under TEACHNJ, the tenure process has been significantly streamlined to expedite tenure proceedings and to reduce the costs of such proceedings. The operative provisions of TEACHNJ have been fully in effect since the 2013-14 school year. Consequently, tenure charges under the Act could have been brought after July 1, 2015. Newark does not claim in its brief on appeal that the tenure charges currently filed by Newark under TEACHNJ have been costly and time-consuming.

More importantly, there are no specific allegations in plaintiffs' complaint showing that plaintiffs or their children have been harmed by the forced placement of ineffective teachers in their classroom because of the EWPS pool. Nor do plaintiffs show that any of their children have been or are harmed by alleged budget cuts in other parts of Newark's budget because of the cost of the EWPS pool. Furthermore, Plaintiffs do not allege facts to show that any plaintiff has been deprived of a thorough and efficient education because of those budget cuts. There is a complete disconnect between the money spent on the pool and any specific harm suffered by an individual plaintiff.

Consequently, there is no clear, present or imminent particularized harm to any individual plaintiff caused by the RIF statutes, much less the showing required to confer standing on them to pursue their constitutional claims.

Moreover, with limited exceptions, litigants generally do not have standing to assert the rights of third parties, Stubaus, 339 N.J. Super. at 47, 49 -- in this case, the rights of other students in Newark. This is especially true when a litigant attempts to seek standing "'to vindicate the constitutional rights of some third party'" Matter of Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180, 188 (App. Div. 1988). See also, Abbott v. Burke, 206 N.J. 332,

371 (2011). Here, none of the limited exceptions to third party standing applies: plaintiffs have not suffered a direct impairment of constitutional rights or any direct injury; other parents and students are capable of bringing their own suits, and the plaintiffs are not members of any association. Stubaus, supra, 339 N.J. Super. at 51.

Plaintiffs cite the Abbott v. Burke litigation in an effort to bolster their alleged standing to raise certain claims of educational deficiencies. (Pb2,10,13 15-16). That reliance is misplaced. First, unlike the individual plaintiffs in this case, the Abbott plaintiffs were certified as a representative class and there was agreement by the parties to include statewide proofs. Abbott v. Burke, 100 N.J. 268, 277 n. 1 (1985).

As the lower court properly determined, the plaintiffs here must establish their own standing and cannot rely on assertions that other Newark students, not named as plaintiffs, are allegedly harmed or suffer a "disproportionate impact" because of the RIF statutes. (Pb3-4).

Second, the willingness of the Supreme Court to entertain and elucidate certain rights for disadvantaged students in the Abbott litigation, where standing was not an issue, does not eliminate the requirement that

plaintiffs must have standing to pursue their constitutional claims in this litigation. Since "the judiciary does not have a roving commission to seek and destroy unconstitutionality," Matter of Ass'n of Trial Lawyers of Am., 228 N.J. Super. at 185, the individual plaintiffs' lack of standing to challenge the RIF provisions is fatal to their case.

Plaintiffs also claim that the lower court imposed a heavy burden to show particularized harm. (Pb15). The lower court required no more than is required of every other litigant who claims standing - a showing of harm to the plaintiffs to justify judicial consideration of their constitutional claims. The hypothetical simulation from 2014 cited by plaintiffs begs the critical standing question of whether plaintiffs can show that they are currently sustaining or are in imminent danger of sustaining harm from the RIF statutes or the EWPS pool.

Finally, plaintiffs' claim that Matter of Ass'n of Trial Lawyers, supra, 228 N.J. Super. 180, cited by the court below (1T71:21-72:22), is inapposite. Plaintiffs' efforts to distinguish that case are not persuasive. The lower court relied on Matter of Ass'n of Trial Lawyers for the appropriate analytical framework to assess the standing of a party who, like plaintiffs, seek to invalidate a

statute. Plaintiffs fail to demonstrate that the court below misstated those principles. Plaintiffs' disagreement is with the application of those principles to their case, a claim that NJEA has shown above is without merit.¹⁶

In sum, plaintiffs' conclusory and speculative assertions fail to show they possess standing to challenge the constitutionality of the RIF statutes.

POINT TWO

THE LAW DIVISION'S ORDER SHOULD BE AFFIRMED BECAUSE PLAINTIFFS' CONSTITUTIONAL CLAIMS ARE NOT RIPE FOR ADJUDICATION

The Law Division found that "Plaintiffs' claims lack ripeness in the absence of an actual, or immediate threat of harm to Plaintiffs caused by" the LIFO statutes. (Pa 101). Since plaintiffs do not, and cannot, assert that a RIF affecting tenured teachers is in effect or planned to occur imminently, plaintiffs' primary claims are, therefore, not ripe. Plaintiffs' alternative claim -- that there is "current and ongoing harm" from the EWPS pool, created as a direct result of the RIF statutes - is also not ripe for review. The lower court's order should be affirmed. .

¹⁶ Plaintiffs cite Jen Elec., Inc. v. County of Essex, 197 N.J. 627 (2009) to support their standing. (Pb12). In that case, the Supreme Court found standing because there was a demonstration of "a substantial likelihood of harm." Id. at 646. In contrast, plaintiffs have been unable to show any harm, much less a substantial likelihood of harm.

Ripeness is a justiciability doctrine designed to avoid premature adjudication of abstract disagreements. Abbott Lab v. Gardner, 387 U.S. 136, 148, 87 S. Ct. 1507, 1515 (1967). Ripeness for judicial review is essential when constitutional issues are at stake because “[d]eeply embedded in our jurisprudence is the settled principle against resolving disputes “in advance of constitutional necessity.”” State v. Jones, 196 N.J. Super. 553, 559-60 (App. Div. 1985).

To determine if a case is ripe for judicial review, courts must evaluate: (1) the fitness of issues for judicial review, and (2) the hardship to the parties caused by withholding of judicial consideration. K. Hovnanian Co. of N. Central Jersey, Inc. v. N.J. Dep’t of Env’tl. Prot., 379 N.J. Super. 1, 9 (App. Div.), certif. denied, 185 N.J. 390 (2005). “In determining whether an issue is fit for judicial review, [the court] consider[s] whether review would require additional factual development.” Id. at 516.

In the present case, the resolution of the issues raised by plaintiffs requires the further development of facts showing that a RIF was in effect or planned. Similarly, the EWPS issue is not fit for review until there are facts, which have not been pled yet, showing that any of the plaintiffs’ children have been deprived of an

educational opportunity because of the budget cuts or are being taught by an ineffective teacher force-placed in the child's classroom.

With respect to the hardship prong, courts can assume jurisdiction over a claim only if there is a "real and immediate" threat of harm that would affect the plaintiff. Id. at 516-17. The need for a ripe controversy for judicial involvement is reflected in decisions holding that a "declaratory judgment is not an appropriate way to discern the rights or status of parties upon a state of facts that are future, contingent, and uncertain." Independent Realty Company v. Township of North Bergen, 376 N.J. Super. 295, 301 (App. Div. 2005) (citations omitted).¹⁷

While plaintiffs challenge the use of seniority in RIFs, they do not allege that an actual RIF is in effect. Nor do they allege that a RIF is planned and will occur immediately or in the near future. The complaint is utterly devoid of any facts of an actual or imminent RIF or of facts showing a "real and immediate" threat of harm that would adversely impact the education of plaintiffs' children.

¹⁷ Plaintiffs contend that the lower court's reference to this case was erroneous because the "facts are not analogous." (Pb20). This assertion misses the point. The lower court cited the case for the unassailable proposition that ripeness is necessary for judicial consideration of a declaratory judgment. (1T76:3-7). The similarity of the facts to the present case was and is irrelevant.

Plaintiffs substitute mere speculation, conjecture and simulations about the hypothetical impact on their children of a hypothetical RIF that has not yet occurred, or is imminently scheduled, for the requisite facts showing the real and immediate threat of harm.

Nor do plaintiffs allege any real and immediate threat to their children from the mere existence of the EWPS. Plaintiffs claim that the EWPS pool causes harm -- even if there is no RIF -- in the following ways: (1) Newark spends money on the pool and retains ineffective teachers to avoid the loss of primarily effective teachers; (2) Newark force-places ineffective teachers from the pool back into the classroom to meet budget shortfalls; and (3) Newark makes cuts to other parts of the district's budget in order to cover the cost of the EWPS pool. (Pb 5, 19-20 Yet, there is no allegation that any of the plaintiffs' children are being taught by an ineffective teacher force-placed from the EWPS pool or that any of the plaintiffs' children have been affected by the budget cuts required to maintain the pool. There is simply no showing that the existence of the EWPS pool has had a real and immediate impact on any of the plaintiffs.

Indeed, 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. Therefore, the case is not ripe because there are no facts pertaining to the actual implementation of the RIF statutes, an essential prerequisite for the judicial consideration of Plaintiffs' as-applied constitutional claims.

The lower court correctly decided not to undertake the extraordinary act of assessing the constitutionality of the RIF statutes in the absence of a current or planned RIF or of facts to show that the effects of the EWPS pool are felt in a concrete way by the plaintiffs. See Abbott v. Gardner, supra, 387 U.S. at 148-149, 87 S.Ct. 1515. Plaintiffs rely exclusively on speculation and conclusory assertions to claim ripeness of their claims. 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). Conclusory assertions of harm or hypothetical simulations of a RIF in 2014 are insufficient to allege a showing of the real and immediate harm needed to show ripeness of constitutional challenges to a RIF now.

In short, the impact upon plaintiffs is not direct and immediate, which renders the issues inappropriate for judicial review at this stage.

Further, the lower court was not convinced that delay will harm the plaintiffs. The court stated that "there are 200 tenure charges being brought which is a very significant percentage of the ineffective teachers that were cited by plaintiffs." (1T79:6-10). This finding is undisputed.

Finally, Plaintiffs' reliance on Hogan v. Donovan, 2012 WL 132879 (Law Div. 2012) is misplaced. That unpublished decision 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 those 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 Newark continues its past practice of avoiding teacher layoffs and not implementing any RIF of tenured teachers.

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 and speculative facts, i.e., the consequences of a RIF of tenured teachers, should one occur and the real and immediate effects of the EWPS pool on plaintiffs' children. In sharp contrast to the circumstances in Hogan, there are compelling reasons to

delay judicial review until either: (1) a RIF is implemented or scheduled and the precise contours of the RIF are known; or (2) there is a showing of a real and immediate threat of harm to plaintiffs' children from the EWPS pool.

The court below correctly determined that plaintiffs' claims are not ripe, and this Court should affirm the lower court's order dismissing the complaint without prejudice.

POINT THREE

THE REMAINING ISSUES RAISED BY PLAINTIFFS ON APPEAL ARE WITHOUT MERIT

Plaintiffs raise three other issues on appeal: (1) the court below erred in expressing concern that plaintiffs' harm is not judicially remediable (Pb23-26); (2) the court improperly considered discovery burdens on a motion to dismiss (Pb27); and (3) plaintiffs met the pleading requirements (Pb27-33). There are several reasons why these issues need not be addressed on appeal.

First, while the trial court expressed concerns in her oral decision about these matters, they were not addressed as, or considered to be, the rationale for the court's opinion or order on standing and ripeness. The lower court made this clear in both the oral decision and the order. In the oral decision, the court below stated: "There were

matters raised in the brief that the Court doesn't need to reach based upon the finding of lack of standing and lack of ripeness. . . ." (1T77:16-18). In its order, the court reiterated this point, stating that because of its rulings on standing and ripeness, it did "not need[] to reach Plaintiffs' other claims." (Pa101). Therefore, this Court should decline in the first instance to address these issues as grounds for reversal. Duddy v. Gov't Emp. Ins. Co., 421 N.J. Super. 214, 221 (App. Div. 2011).

Second, plaintiffs' claim that the trial judge erroneously decided the above issues in its opinion must also be rejected. That claim must fail because "it is well-settled that appeals are taken from orders and judgments and not from opinions, oral opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion." Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001). See also, Heffner v. Jacobson, 100 N.J. 550, 553 (1985) (same); Macfadden v. Macfadden, 49 N.J. Super. 356, 358-359 (1958). "It must be remembered that it is from the judgment, and not the opinion, that appeal is taken.").

"The written conclusions or opinion of a court do not have the effect of a judgment. From them no appeal will lie." Id. at 359. "It is only what a court adjudicates, not

what it says in an opinion, that has any direct legal effect.” Suburban Department Stores v. City of East Orange, 47 N.J. Super. 472, 479 (App. Div. 1957). Since the lower court only adjudicated the standing and ripeness issues, the appeal is limited to those two issues and not the other issues raised by plaintiffs in their brief.

Third, even if the lower court’s order was predicated on an incorrect basis, which it was not, that does not preclude affirmance if the order below is valid. “It is a commonplace of appellate review that if the order of the lower tribunal is valid, the fact that it was predicated upon an incorrect basis will not stand in the way of affirmance.” State v. MacLaughlin, 205 N.J. 185, 195 (2011) (quoting Irving Isko et als. v. Planning Board of Tp. of Livingston et als. 51 N.J. 162, 175 (1968)). NJEA has explained above that, even if the court finds the lower court’s decision on ripeness and standing is incorrect, that does “not stand in the way of affirmance.” This Court could affirm the judgment below for reasons other than those articulated by the lower court. See note 13, supra.

Finally, plaintiffs’ claim that the lower court erred by considering the discovery burden on the State and Newark, which plaintiffs claim “is simply irrelevant in determining whether to grant or deny a motion to dismiss.”


(Pb 27). Plaintiffs misunderstand the lower court's comments on discovery.

"A pleading should be dismissed if it states no basis for relief and discovery would not provide one." Rezem Family Assoc., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div.), certif. denied and appeal dismissed, 208 N.J. 366 (2011) (emphasis added). It is evident from the record that the lower court was merely opining that costly and burdensome discovery "is not justified" when there is nothing presented by plaintiffs, other than speculation, to overcome the patent lack of ripeness on the face of the complaint. (1T77:2-8). In other words, plaintiffs did not assert below, and do not assert on appeal, that discovery would uncover facts to show that plaintiffs have standing and that the case is ripe for adjudication. That is certainly an appropriate factor for the court to consider on a motion to dismiss, and plaintiffs claim that those concerns were irrelevant should be rejected.

CONCLUSION

For the reasons stated above, Defendant-Intervenor, New Jersey Education Association, respectfully requests that the Court affirm the May 4, 2017, Order granting the motion to dismiss and dismissing Plaintiffs' complaint without prejudice.

Respectfully submitted,
Richard E. Shapiro, LLC


By: Richard E. Shapiro, Esq.
Attorney ID. #005281983

Dated: November 15, 2017

APPENDIX

**New Jersey State Board of Education
Minutes of the Meeting of the New Jersey State Board of Education
In the Conference Room on the First Floor
100 River View Executive Plaza
Trenton, NJ**

September 13, 2017

Presiding: Arcelio Aponte, President

Secretary: Kimberley Harrington, Commissioner

PRESENT CONSTITUTING A QUORUM

Dr. Ronald Butcher-- via teleconference
Mrs. Mary Beth Berry
Ms. Edythe Fulton
Mrs. Mary Elizabeth Gazi
Dr. Nedd J. Johnson
Mrs. Kathy Goldenberg
Mr. Andrew Mulvihill
Dr. Joseph L. Ricca
Mrs. Sylvia Sylvia

ABSENT

Dr. Ernest Lepore
Mr. Jack Fornaro

CONVENING

State Board of Education President Arcelio Aponte convened the public meeting at 9:00 a.m. with the reading of the statement pertaining to the public session of the State Board meeting as it complies with the New Jersey Open Public Meetings Act.

The Open Public Meetings Act was enacted to insure the right of the public to have advance notice of and to attend the meeting of public bodies at which any business affecting their interest is discussed or acted upon.

In accordance with the provisions of this Act, the State Board of Education has caused notice of this meeting to be published by having the date, time and place thereof posted in the Department of Education, Secretary of State's Office and notice also having been given to the State House Press Corps, the Governor's Office and the State Board agenda subscribers.

And seeing there was a quorum, the meeting of September 13, 2017, was called to order.

ADJOURN TO EXECUTIVE SESSION

President Aponte then read the resolution pertaining to the executive session of the State Board meeting as it complies with the Open Public Meetings Act.

WHEREAS, in order to protect the personal privacy and to avoid situations wherein the public interest might be disserved, the Open Public Meetings Act permits public bodies to exclude the public from that portion of a meeting at which certain matters are discussed, now therefore be it

RESOLVED, that consistent with the provision of N.J.S.A. 10:4-12.b, the State Board Education will now adjourn to executive session to discuss personnel and legal issues. The State Board immediately adjourned to executive session on September 13, 2017.

RESOLVED, that all NJQSAC assessment areas are now returned to local control or in the process of being returned to local control pursuant to N.J.A.C. 6A:30-7.2. The Department of Education, in collaboration with Newark Public Schools, shall develop a full transition plan pursuant to N.J.A.C. 6A:30-7.2 and 7.3, which will incorporate a transition plan for the return of the function of Governance and the function of Instruction and Program to local control. The full transition plan will establish the framework for the return to local control of the district.

***E. State Operation of the Newark Public Schools**

- On a motion duly seconded and carried, the State Board unanimously adopted the following resolution pertaining to the status of state operation of the Newark Public Schools.

**RESOLUTION TO RETURN NEWARK PUBLIC SCHOOLS
TO FULL LOCAL CONTROL**

WHEREAS, by administrative order issued by the State Board of Education on July 5, 1995, the State Board of Education removed the Newark School District Board of Education and created a State-operated school district in Newark pursuant to N.J.S.A. 18A:7A-34; and

WHEREAS, pursuant to N.J.S.A. 18A:7A-10 et seq., effective on January 24, 2007, the New Jersey Legislature, in review and consultation with the Joint Committee on the Public Schools, directed the Commissioner of the Department of Education to develop and implement a system for monitoring and evaluating the thoroughness and efficiency of public school districts in the State of New Jersey to be called the New Jersey Quality Single Accountability Continuum (NJQSAC); and

WHEREAS, NJQSAC involves an assessment of each school district's performance in the five key components of school district effectiveness: Instruction and Program, Personnel, Fiscal Management, Operations, and Governance; and

WHEREAS, the State Board of Education passed resolutions on October 17, 2007; June 4, 2014; and August 3, 2016 to return the areas of Operations, Fiscal Management, and Personnel to local control, respectively, while the remaining key components of school district performance continued under partial State intervention; and

WHEREAS, the State Board of Education passed a Resolution on September 13, 2017 to initiate the return to local control of the function of Governance and the function of Instruction and Program; and

WHEREAS, in accordance with N.J.A.C. 6A:30-7.1 the Commissioner has determined that Newark has met the factors for initiating withdrawal from partial intervention and a return to full local control; now therefore, be it

RESOLVED, that all NJQSAC assessment areas are now returned to local control or in the process of being returned to local control and the process for withdrawal from partial intervention shall be initiated forthwith in Newark Public Schools pursuant to N.J.A.C. 6A:30-7.2; and be it further

RESOLVED, the Department of Education, in collaboration with Newark Public Schools, shall develop a full transition plan pursuant to N.J.A.C. 6A:30-7.2 and 7.3, and hereby initiating the process of withdrawal of the Newark Public Schools from partial State intervention. The full transition plan will establish the framework for the return to local control of the district. The effective date of the return to local control shall be established in the full transition plan.

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WORK SESSION

There was no work session.

NEW BUSINESS

ADJOURNMENT

On a motion duly seconded and carried, the State Board of Education adjourned its September 13, 2017, public meeting at 12:51 p.m.

Kimberley Harrington, Commissioner
Secretary, N.J. State Board of Education

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New Jersey Education Association

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

Plaintiffs

v.

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

Defendants

and

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

Proposed Defendant-Intervenor

and

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

Applicants for Intervention

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MERCER COUNTY

DOCKET NO. MER-L-2170-16

CERTIFICATION OF
EDWARD RICHARDSON

EDWARD J. RICHARDSON, of full age, certifies as follows:

1. I am Executive Director of the New Jersey Education Association ("NJEA"), the proposed Defendant-Intervenor in the above action. I have personal knowledge of the facts contained herein.

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2. NJEA is a labor organization with approximately 177,188 active local and county public school employees, and public higher education employees, through its local affiliates in the State of New Jersey (collectively "active employees").

3. NJEA is affiliated with over 500 local education associations (EAs) throughout the State of New Jersey. These EAs are designated as majority representatives for collective negotiations purposes for teaching staff within local and regional school districts. (Local EAs also represent employees other than teaching staff, but the rights of such employees are not at issue in this litigation).

4. The local EAs (with varying degrees of assistance from professional staff at the NJEA) all negotiate terms and conditions of employment for active employees, which are set forth in collective negotiations agreements ("CNAs") between those majority representatives for collective negotiations ("majority representatives") and employers. The NJEA-affiliated Local EAs likewise enforce the terms of those CNAs.

5. When Local EAs and their members have a dispute or claim arising from the state statutes and regulations on seniority and tenure, like those put in issue in this case, the local EAs turn to the NJEA to perform that function, since it requires involvement with the Legislature, the Department of Education, and the commencement or defense of administrative and judicial litigation. These activities are carried out by professionals and attorneys employed or funded by the NJEA. This assistance furnished and funded by NJEA includes enforcing the rights of its members when a layoff associated with a reduction-in-force (RIF) is implemented by an employer board of education.

6. NJEA has several categories of membership. One of these categories is Minority Representative Unit Members, which any public school employee in New Jersey whose majority

representative is not affiliated with NJEA may join. In the case of Newark, where professional teaching staff is represented by the Newark Teachers Union, there are approximately 183 NJEA members who are professional teaching employees of the Newark Public Schools who are members of the NJEA. Like those teachers represented by an NJEA-affiliated Local EA, the rights of these NJEA members teaching in Newark would also be directly affected by the relief sought in this case.


7. I understand from NJEA staff that when the 2012 reforms to teacher tenure and seniority legislation were proposed, the bill as initially introduced called for substantially reducing the importance of seniority when determining the order in which reductions-in-force were implemented. Section 23 of S1455, the initial legislation, called for the order in which reductions in force were implemented to take into account the rating of the teacher at issue (highly effective, effective partially effective, or ineffective) before their seniority was considered. During the course of lawmaking, that section, along with other proposed amendments to N.J.S.A. 18A:28-10 and -12 which were present in that initial proposal were wholly eliminated. The final law, P.L. 2012, c. 26, did not contain any of the provisions of the initial section 23, or the amendments to N.J.S.A. 18A:28-10 and -12 which were in the initial draft. That is, the Legislature rejected these provisions, despite the efforts of both the initial sponsor and the Administration to amend the rules on conducting RIFs to eviscerate the rules of seniority applicable to RIFs. The Administration's chief spokesperson at the time on these matters was Christopher Cerf, then Commissioner of Education, and now a defendant in this matter as the Superintendent of the Newark schools.

8. Attached hereto as Exhibit A are excerpts from the State's brief in *Abbott v. Burke*, No. 078257 (filed September 15, 2016). In that brief, the State directly and squarely

argues to the Supreme Court that the provisions of N.J.S.A. 18A:28-10 and -12, which are challenged by the parents in this litigation, should themselves be struck down. Given this litigation posture, it is highly unlikely that the State will adequately and vigorously defend against the claims made by the Plaintiffs in this case.

9. Attached hereto as Exhibit B are excerpts from the Certification of Christopher Cerf, a defendant in this case and the State District Superintendent of Newark. Mr. Cerf takes the same position as the State as described above, making it also highly unlikely that he or the defendant Newark School District will adequately and vigorously defend against the claims made by the Plaintiffs in this case.

I certify that the foregoing statements made by me are true to the best of my knowledge and belief. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.


EDWARD J. RICHARDSON

Dated: November 14, 2016

ORDER ON MOTION

H.G.
V.
KIMBERLY HARRINGTON

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-000595-16T3
MOTION NO. M-006912-16
BEFORE PART F
JUDGE(S): MITCHEL E. OSTRER
FRANCIS J VERNIOIA

MOTION FILED: 05/24/2017
ANSWER(S) 06/05/2017
FILED: 06/09/2017
06/12/2017

BY: H.G.
BY: COMMISSIONER OF THE NEW JERSEY
BOARD OF EDUCATION
AMERICAN FEDERATION OF TEACHERS
NEW JERSEY EDUCATION ASSOCIATION

SUBMITTED TO COURT: June 15, 2017

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS
15th day of June, 2017, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT

MOTION FOR LEAVE TO APPEAL **DENIED AND OTHER**
MOTION FOR ORAL ARGUMENT ON MOTION **DENIED**

SUPPLEMENTAL: Plaintiff's motion shall be accepted as a timely notice of
appeal. Plaintiff shall file an appropriate notice and case information
statement within fourteen days.

FOR THE COURT:

Mitchel E. Ostrer

MITCHEL E. OSTRER, J.A.D.

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