

**TOMPKINS, McGUIRE, WACHENFELD & BARRY, LLP**  
William H. Trousdale (Attorney ID: 010921994)  
Maximilian D. Cadmus (Attorney ID: 159462015)  
3 Becker Farm Road, Fourth Floor  
Roseland, New Jersey 07068-1726  
(973) 623-7893

**ARNOLD & PORTER KAYE SCHOLER LLP**  
Kent Yalowitz, *Admitted Pro Hac Vice*  
Kathleen A. Reilly, *Admitted Pro Hac Vice*  
Colleen Lima, *Admitted Pro Hac Vice*  
250 W. 55th Street  
New York, New York 10019-9710  
(212) 836-8000

*Attorneys for Plaintiffs-Appellants*

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 NOEMÍ VAZQUEZ; M.P., a minor, through her guardian NOEMÍ VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through his 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 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

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.

CIVIL ACTION

---

**PLAINTIFFS-APPELLANTS' BRIEF  
IN REPLY TO THE OPPOSITION FILED  
BY AMERICAN FEDERATION OF  
TEACHERS, AFL-CIO, AFT NEW  
JERSEY and THE NEWARK TEACHERS  
UNION**

---

SCHOOL DISTRICT; and nominal  
defendant CHRISTOPHER CERF, in his  
official capacity as  
Superintendent of the Newark  
Public School District,

Defendants-Respondents,

And

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

Defendant-Intervenor-Respondent,

And

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

Defendants-Intervenors-  
Respondents.

Of Counsel and On the Brief:

Kathleen A. Reilly, *Admitted Pro Hac Vice*  
Colleen Lima, *Admitted Pro Hac Vice*  
Kent Yalowitz, *Admitted Pro Hac Vice*  
William H. Trousdale  
Maximilian D. Cadmus

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
PRELIMINARY STATEMENT .....	1
ARGUMENT .....	3
I. PLAINTIFFS HAVE STANDING AND THE COMPLAINT IS RIPE .....	3
A. Plaintiffs' Complaint Sets Forth Their Standing .....	3
B. Plaintiffs' Claims Are Ripe .....	10
II. THE RECENT TEACHNJ ACT DOES NOT REQUIRE DISMISSAL .....	13
A. The Complaint Does Not Render Tenure "Meaningless" .....	13
B. The Complaint Raises Legal, Not Policy, Issues and the Court Can Address These Issues .....	16
CONCLUSION .....	20

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

Appendix  
Location

ORDER GRANTING MOTIONS TO DISMISS THE COMPLAINT AND DISMISSING THE COMPLAINT WITHOUT PREJUDICE .....	Pa 99-101
TRANSCRIPT OF MOTION HEARING WITH TRIAL COURT'S ORAL OPINION, MAY 3, 2017 .....	1T 63:23-81:18



## TABLE OF AUTHORITIES

### Page(s)

#### **Cases**

<u>Abbott v. Burke ("Abbott II"),</u> 119 N.J. 287 (1990) .....	17
<u>Abbott v. Burke ("Abbott XXI"),</u> 206 N.J. 332 (2011) .....	12, 18
<u>In re Ass'n of Trial Lawyers of America,</u> 228 N.J. Super. 180 (App. Div. 1988) .....	8, 9
<u>Colombo v. Board of Edu. For the Clifton Sch. Dist.,</u> 2016 WL 6471013 (D.N.J. Oct. 31, 2016) .....	19
<u>Hogan v. Donovan,</u> 2012 WL 1328279 (Law Div. Apr. 17, 2012) .....	10, 12
<u>Independent Realty Co. v. Twp. Of N. Bergen,</u> 376 N.J. Super. 295 (App. Div. 2005) .....	11, 12
<u>Jen Elec., Inc. v. Cty. of Essex,</u> 197 N.J. 627 (2009) .....	3, 9, 10
<u>King v. South Jersey Nat. Bank,</u> 66 N.J. 161 (1974) .....	19
<u>Robinson v. Cahill,</u> 69 N.J. 133 (1975) .....	19
<u>State v. New Jersey Trade Waste Ass'n,</u> 191 N.J. Super. 144 (Law. Div. 1983) .....	16, 17
<u>Town of Secaucus v. Hudson Cty. Bd. of Taxation,</u> 133 N.J. 482 (1993) .....	19, 20
<u>Twp. of W. Milford v. Van Decker,</u> 120 N.J. 354 (1990) .....	20
<u>Valent v. N.J. State Bd. Of Educ.,</u> 114 N.J. Super. 63 (1971) .....	16, 18

### PRELIMINARY STATEMENT

In their opening brief, Plaintiffs set forth why the Court should reverse and remand the dismissal of the Complaint: the current and ongoing harm suffered by the student Plaintiffs due to operation of the LIFO Statute,<sup>1</sup> including the expensive EWPS pool workaround implemented to avoid RIFs. AFT's brief does nothing to undercut these arguments.

The LIFO Statute mandates that, in the event of a RIF, Newark lay off teachers solely based on their seniority and, should an equivalent position open later, re-hire those teachers solely based on seniority. But when the District modeled a RIF pursuant to the LIFO Statute to address its budget shortfalls and declining enrollment, it found that the teachers laid off would almost exclusively be rated as effective or highly effective. The District, therefore, spends millions of dollars on an EWPS workaround that seeks to keep unsuitable teachers out of the classroom, but recently the District had to force place some EWPS teachers back into classrooms due to budget constraints. This money used to pay teachers not to teach or to force-place teachers who might otherwise be laid off back in classrooms damages their students. It also deprives students of critical funds in a resource-limited district, which funds could

---

<sup>1</sup> Abbreviations are the same as those used in Plaintiffs' Opening Brief.

otherwise be used for academic programs or simply to manage budget shortfalls.

By virtue of this workaround, Plaintiffs are deprived of their constitutional right to a thorough and efficient education, which, in a District like Newark, is determined by comparison to the education provided in more affluent districts where there may be no ineffective teachers.

Given the allegations in the Complaint, Plaintiffs possess the requisite standing to bring this action and their claims are ripe.<sup>2</sup> On this basis, the trial court's decision should be reversed, and the Complaint should be reinstated.

In an apparent effort to distract from the constitutional rights at stake, AFT spends the majority of its brief detailing the entire statutory tenure scheme for teachers, which is not at issue. To be clear, Plaintiffs are not attacking New Jersey's entire tenure system. Plaintiffs do not dispute the methods by which teachers gain tenure, or how New Jersey evaluates teacher effectiveness. In fact, Plaintiffs agree that tenure serves valuable purposes, especially when the stated objective is to ensure that students are taught by effective teachers with job security. However, when the protections offered to adults infringe upon the rights of the children they teach, the goals

---

<sup>2</sup> AFT does not address the other arguments in the Opening Brief. Plaintiffs therefore rests on those arguments in their Opening Brief.

of tenure are not met and the challenged aspect of the tenure system should be evaluated in light of the constitutional harm suffered by the students in the classroom.

When blind adherence to seniority without consideration of teacher quality would operate to children's further detriment in one instance, a RIF, the District has taken drastic action to avoid a RIF pursuant to the LIFO Statute. In this circumstance, it is appropriate and necessary for the Court to examine the constitutional implications of the LIFO Statute on Plaintiffs.

#### ARGUMENT

##### I. PLAINTIFFS HAVE STANDING AND THE COMPLAINT IS RIPE

###### A. Plaintiffs' Complaint Sets Forth Their Standing

Plaintiffs possess the "sufficient stake," "real adverseness," and "substantial likelihood of some harm visited upon [them] in the event of an unfavorable decision" required for standing. See, e.g., Jen Elec., Inc. v. Cty. of Essex, 197 N.J. 627, 645 (2009). Plaintiffs attend class each school day in a District that (i) spends millions per year avoiding RIFs, yet routinely suffers from and must manage budget deficits, and (ii) has a glut of ineffective and highly ineffective teachers who would not be laid off if the District engaged in a RIF to manage its budget or address declining enrollment. See Pa5-6, 7-9, 11, 17-18 (Compl. ¶¶ 18-23, 29-40, 47, 79-90).



Nevertheless, AFT asserts that there is nothing "in the [C]omplaint 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." AFTb32.

In their opening brief, Plaintiffs detailed the specific harms they face - both the workarounds the District has instituted to avoid the damaging impact of a RIF and the increasingly likely necessity of a RIF. See Pb12-19.

For example, as laid out in the Complaint, as Newark is faced with declining enrollment numbers, its funding has been reduced and will continue to be reduced. Pa10 (Compl. ¶ 42); see also Pa67 (Dist. Answer ¶ 42 (admitting Newark's funding was reduced due to declining enrollment numbers)). Studies have repeatedly shown the impact of teacher effectiveness not only on scholastic achievement, but also on lifetime earning potential. Pa12 (Compl. ¶¶ 51-52); Pa68 (Dist. Answer ¶ 52 (admitting in part and noting "significant impact of low performing teachers on students of color in low-income communities"))). Yet, under the LIFO Statute, any RIF that Newark would do to address decreased funding and declining enrollment could result in the loss of 300 effective teachers from the District, while almost every ineffective teacher would remain. Pa16 (Compl. ¶ 74); Pa70 (Dist. Answer ¶ 74). In order to avoid this great harm, Newark has implemented policies, namely the EWPS pool, to keep

ineffective teachers on payroll, but out of classrooms. Pa17 (Compl. ¶ 80); see also Pa59-60, 61-67 (Dist. Answer ¶¶ 26, 29-41).

These policies, however, continue to inflict their own harm on students, including Plaintiffs, as they force the District to cut other important educational programs and resources in order to pay the salaries of ineffective teachers. Pa10, 19 (Compl. ¶¶ 43, 94). As spending on the EWPS pool spiraled out of control, Newark force-placed ineffective teachers back into the classroom, given budget shortfalls and the number of teachers in the pool. As Newark admits, "forced placement ha[s] a detrimental impact on certain students" within the District. Pa71 (Dist. Answer ¶ 86).

The District, prior to the Complaint, was so concerned about the harm of a RIF that it sought a waiver from the State seeking to consider teacher quality, not solely seniority, in a RIF. In the model RIF pursuant to the LIFO Statute in that request, 75% of the laid-off teachers would be rated effective or highly effective, and only 4% would be rated ineffective. See Pa16 (Compl. ¶ 74); Pa70 (Dist. Answer ¶ 74); Pa94-95 (Cerf Cert. ¶ 18). The District's request went unanswered,<sup>3</sup> and the

---

<sup>3</sup> The State, which has previously sought judicial intervention to waive the applicability of the LIFO Statute, does not intend to participate in the current appeal. See Letter from Deputy Attorney General Donna Arons to Joseph Orlando, Clerk, Appellate Division (Sept. 25, 2017).

District must continue either to engage in a harmful workaround that diverts millions of dollars to protect ineffective teachers and avoid laying off effective teachers or, eventually, institute a RIF that will lay off effective teachers to the detriment of their students. This is a fact pattern that mandates a determination that Plaintiffs possess the requisite standing.

In light of these allegations, it is not necessary that Plaintiffs articulate the exact programs eliminated to maintain the EWPS pool and avoid a RIF, or to identify whether they are currently in a classroom with a teacher rated as ineffective or highly ineffective.<sup>4</sup> It is harm enough, for purposes of standing, that Plaintiffs are children in a District that has admitted it takes certain actions, characterized as harmful to students, in order to avoid greater harm. This harm is current, concrete, and sufficient to convey standing.

Moreover, although a RIF appears imminent as Newark's enrollment and funding drop, it is not necessary for standing that a RIF be announced or implemented. It would simply be an

---

<sup>4</sup> In fact, Plaintiffs do not have access to information regarding an individual teacher's rating, as this information is shielded from public disclosure. Given this, it is impossible for children to allege that they are students in a classroom where the teacher is rated ineffective or highly ineffective. To hold that a plaintiff must do so in order to challenge the LIFO Statute would essentially foreclose any action.

additional harm imposed upon the Plaintiffs if a RIF is announced, for example, for the 2018-19 school year.

In opposing standing, AFT attempts to downplay the money at issue, arguing that the \$8-\$10 million spent on the EWPS pool in the past two years is a "relatively nominal portion of [the District's] overall budget." AFTb37. However, AFT focuses on the wrong comparison. The correct analysis of the money diverted to maintain the EWPS pool is not out of the District's total budget, but out of the deficit it must make up each year.

For example, subsequent to the filing of the Complaint, Newark released its budget for the 2017-18 school year. That budget was balanced due to Newark's one-time actions to mitigate a projected \$30 million deficit through aggressive budget management, the sale of buildings, and the avoidance of layoffs.<sup>5</sup> The \$10 million spent on the EWPS pool was one-third of that deficit, yet a RIF was essentially off the table as a solution if the District wished to keep effective teachers in the classroom.

In addition, the forced placement of teachers from the EWPS pool in to classrooms, in order to justify spending salary

---

<sup>5</sup> See Karen Yi, No Mass Layoffs, Taxes to Increase under \$915M Newark Schools Budget (May 8, 2017), [http://www.nj.com/essex/index.ssf/2017/04/newark\\_schools\\_approve\\_s\\_915m\\_budget\\_taxes\\_rise.html](http://www.nj.com/essex/index.ssf/2017/04/newark_schools_approve_s_915m_budget_taxes_rise.html); see also Pa18 (Compl. ¶ 90 (noting funding issues in connection with discussion of EWPS pool)).

dollars on these problematic teachers, is another cost that should be considered in evaluating the amount at issue, especially as these teachers might not be put in these positions if the District could engage in a RIF. Superintendent Cerf has stated that Newark "has sought to avoid a RIF at any cost, due to the damaging effects on schools. NPS continues to employ more teachers than are needed because the children in NPS's schools simply cannot afford to lose the outstanding teachers currently serving them." Pa95 (Cerf Cert. ¶ 20).

Individual tenure charges, as acknowledged by Superintendent Cerf, cannot solve either an oversupply of teachers or the need to protect effective teachers within the District. "Removing teachers through a tenure charge is a time-consuming and cost-intensive process that takes at least two years," and is followed by legal proceedings that can take another year or more and cost the district more than \$50,000 per terminated teacher. Pa96-97 (Cerf. Cert. ¶ 23); see also Pa71 (Dist. Answer ¶ 93 (while Newark may actively pursue tenure charges, "that process does not address the impact of quality-blind layoffs on students through the retention of low-performing teachers"))). Aggressive pursuit of tenure charges is not a solution when the situation naturally calls for a RIF.

With this background, AFT is incorrect that the trial court properly relied on In re Ass'n of Trial Lawyers of America, 228

N.J. Super. 180 (App. Div. 1988), to hold that Plaintiffs lacked standing. The case is inapposite. Plaintiffs in Ass'n of Trial Lawyers were trial attorneys seeking to contest a newly enacted products liability law as unconstitutional. See id. at 187. The court's analysis hinged on "the inescapable fact that the only possible loss to attorneys is a speculative decrease in contingent fees resulting from an amorphous fear and presently unsubstantiated fear that the number and value of new products liability claims may diminish[]" and "may have the effect of making an attorney's professional life more difficult and less attractive." Id. In reaching this conclusion, the court recognized the limited nature of its holding and that the "rights of attorneys to freely practice law [were not] so inextricably bound up and entwined with the rights of their clients as to accord them standing." Id. Put simply, the attorneys were bystanders who would, at most, suffer an indirect economic impact in the future.

In contrast, Plaintiffs are not economic bystanders to their education and their harm is not speculative. Plaintiffs obviously have suffered, and continue to suffer, concrete, ongoing injury and have a stake in the outcome of the case sufficient to have standing.

AFT also contests the applicability of Jen Elec. See AFTb42. But Jen Elec. supports Plaintiffs' standing argument.



In Jen Elec., the court noted, in addition to addressing that the pleadings demonstrated a "substantial likelihood of harm" from an unfavorable decision, that "the significant issues presented here address the very bedrock of public contract bidding requirements" such that "plaintiff has established that it has standing . . . ." 197 N.J. at 646 (citation omitted).

Here, Plaintiffs have pled the requisite facts to demonstrate their standing, especially the substantial likelihood of harm to their constitutional right to a thorough and efficient education, if their claims are denied. Given that, they have met the Jen Elec. standard and possess the requisite standing.

#### **B. Plaintiffs' Claims Are Ripe**

Plaintiffs' claims are ripe because their causes of action are fit for judicial review and there is real hardship to them if judicial review is withheld at this time. See Hogan v. Donovan, 2012 WL 1328279, at \*10 (Law Div. Apr. 17, 2012) (Pa 115). As detailed supra and in the Opening Brief, there is current and ongoing harm to Plaintiffs due to the EWPS pool, which is a direct result of the existence of the LIFO Statute.

Nevertheless, AFT ignores the present harm suffered by Plaintiffs due to the workarounds instituted by the District to avoid the impact of a RIF, and states that the only way the Plaintiffs' claims could be ripe is if "three contingent events

[occur]: (1) that a [RIF] has been implemented or is imminent; (2) that a [RIF] will eliminate junior, effective teachers while retaining senior, ineffective teachers; and (3) that as a result of a [RIF] student Plaintiffs will be assigned ineffective teachers." AFTb46. This level of action by the District is not required to maintain Plaintiffs' constitutional claims.<sup>6</sup> If it were, no child plaintiff could bring a claim based on the EWPS pool, and any such plaintiff would have to watch their harm escalate until the District dismissed a majority of effective teachers.

Given this, the trial court's sole reliance on Independent Realty Co. v. Twp. Of N. Bergen, 376 N.J. Super. 295 (App. Div. 2005), as the basis for dismissal of the Complaint is improper. At issue in that case was a parcel of undeveloped land that lay fallow for ten years, during which time the township amended the applicable zoning ordinance. As opposed to exhausting her administrative remedies or seeking clarity from the town about prior approvals, the plaintiff sought a declaratory judgment, which the court rejected due to her failure to undertake any

---

<sup>6</sup> AFT expresses its belief that an immediate or imminent RIF is required because the EWPS pool cannot make Plaintiffs' claim ripe "unless [they] can point to some educational opportunity that they have been denied that is linked to the expenditure of \$8 [sic] on the EWPS pool." AFTb46. As set forth in Section I.A supra, this analysis is not correct.

steps prior to seeking judicial intervention. There was no constitutional claim in that case.

Here, Plaintiffs have no administrative remedy. Children cannot institute a RIF, request input into a RIF, seek a waiver of the LIFO Statute from the State, bring tenure charges, or dictate how funds are spent. Children do not have access to the quality ratings of their teachers and have limited, if any, ability to influence their assignment to specific classrooms. Under the State's statutory schemes, any administrative remedies are left to the teachers or the District.

Therefore, Plaintiffs' only recourse is to the court, and their injuries are real and immediate given their current position as students in the District's schools. In fact, as one member of the State Supreme Court acknowledged, "[c]hildren go to school for a finite number of years. They have but one chance to receive a constitutionally adequate education. That right, once lost, cannot be reclaimed. The loss of that right will have irreparable consequences . . . ." Abbott v. Burke, 206 N.J. 332, 479 (2011) ("Abbott XXI") (Albin, J. concurring).

Given this, Hogan, which addresses a scenario where withholding judicial review would cause hardship to the affected party, is informative. 2012 WL 1328279, at \*10-11. Unlike the plaintiff in Independent Realty who did nothing with her land for ten years, Plaintiffs have no alternative remedy. They

cannot afford to sit and wait for the announcement of a RIF, or for the District to continue to engage in unsustainable workarounds to avoid a RIF, in order to remedy the harm they suffer. Dismissing their Complaint now essentially forecloses their ability to rectify the deprivation of their constitutional right to a thorough and efficient education.

For these reasons, the Complaint is ripe and should be reinstated.

## II. THE RECENT TEACHNJ ACT DOES NOT REQUIRE DISMISSAL

AFT spends much of its brief arguing (i) "the [C]omplaint is a thinly veiled attempt to render tenure meaningless" in Newark, AFTb26, and (ii) 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" in the TEACHNJ Act, AFTb52. Neither of these is a correct basis to dismiss the Complaint, especially as the TEACHNJ provisions and tenure generally are not at issue in this lawsuit.

### A. The Complaint Does Not Render Tenure "Meaningless"

In arguing that the Complaint is just an effort to render tenure "meaningless" in Newark, AFT asserts three false arguments about what Plaintiffs purportedly seek in relation to all teachers: "(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." AFTb27 (citation omitted).

None of this is correct, and AFT uses hyperbole about the tenure system generally to evade the reality that its effort to protect ineffective, senior teachers in the limited circumstances of a RIF damages children. AFT wants to shift the Court's attention solely to teachers in this specific circumstance, but the Education Clause protects students. Rather than discuss any specific benefits that enforcement of the LIFO Statute has for students (and there are none for Plaintiffs), AFT instead details the entire tenure scheme (not at issue here) and the supposed benefits and public policy goals of the general tenure laws to teachers in Newark. See AFTb11-21, 26-30, 50-58. This irrelevant and unpled information must be ignored in the context of considering this appeal, especially where there is no dispute about tenure generally.

Plaintiffs do not seek to upset tenure protections or how the State evaluates teacher effectiveness. The Complaint addresses only the LIFO Statute with its sole focus on seniority, and asserts that it is unconstitutional as applied in the District. Nowhere have Plaintiffs asserted that, should they prevail, non-tenured teachers will be saved at the expense of tenured teachers, non-surplus teachers will be laid off, or

the general tenure laws in New Jersey or tenure in any capacity should be changed outside the RIF fact pattern.

AFT therefore incorrectly focuses on the District's ability to bring individual tenure charges in an effort to reconcile the tenure protections with the need to ensure that children such as Plaintiffs receive their constitutionally mandated thorough and efficient education. Individual tenure charges against a single teacher do not adequately address the issue of what Newark can and cannot consider in a RIF or the expensive measures Newark takes to avoid the devastating impact of a RIF on students like Plaintiffs. Providing districts with additional procedures and leverage when filing tenure charges is not applicable when the question is what happens when Newark must cut costs to balance its budget or reduce headcount in light of declining enrollment.

All Plaintiffs seek is a declaration that the LIFO Statute, with its sole focus on seniority, violates the constitutional rights of children in the District when (i) the District diverts millions of dollars per year to preserving ineffective teachers in classrooms and the EWPS pool to avoid RIFs and (ii) any RIF would result in many more effective and highly effective teachers being laid off than ineffective teachers. This is not an attack on the tenure system as a whole - veiled or otherwise.



**B. The Complaint Raises Legal, Not Policy, Issues and the Court Can Address These Issues**

Additionally, AFT argues that the LIFO Statute should not be considered by the judicial branch because the TEACHNJ provisions regarding tenure charges have been in place for a few years, and the LIFO Statute was left unamended as a part of these reforms. See AFTb50-58. However, AFT is misguided in arguing that, because the Legislature did not amend the LIFO Statute in connection with TEACHNJ in recent years, the LIFO Statute cannot be subject to judicial review. AFT's argument that more time is needed to determine the effectiveness of the TEACHNJ provisions is a red herring.<sup>7</sup>

An unconstitutionally applied statute, such as the LIFO Statute, does not become constitutional simply because the Legislature ultimately decides not to revisit it, particularly when such statute has been law since 1968, decades before TEACHNJ was enacted. "[I]n matters of substantial constitutional dimension the Executive and the Legislature are not the determining or final arbiters of what is and what is not constitutional." Valent v. N.J. State Bd. Of Educ., 114 N.J. Super. 63, 69 (1971). That is for the courts. See, e.g., State

---

<sup>7</sup> It also ignores the cost of filing and bring tenure charges. If the District consistently faces budget deficits, more cost to the District is not the solution, but a RIF might be.

v. New Jersey Trade Waste Ass'n, 191 N.J. Super. 144, 152 (Law. Div. 1983).

The State Constitution guarantees children in Newark an education allowing them to participate fully with their more affluent peers so as "to compete in the marketplace, [and] to take their fair share of leadership and professional positions" in our society. Abbott v. Burke, 119 N.J. 287, 392 (1990) ("Abbott II").

The[se students] live in a culture where schools, studying, and homework are secondary. Their test scores, their dropout rate, their attendance at college, all indicate a severe failure of education. While education is largely absent from their lives, we get some idea of what is present from the crime rate, disease rate, drug addiction rate, teenage pregnancy rate, and the unemployment rate. . . . Without an effective education they are likely to remain enveloped in this environment. Their overall needs are not limited to education, but that need is overwhelming.

Id. In the context of these realities, any measure of the constitutional requirements of the Education Clause "must account for the needs of students" in poorer urban districts; therefore, the education required to equip these students for their future "exceeds that needed by students in more affluent districts." Id. at 319 (emphasis added).

More recently, in response to a reduction in state education funding impacting these lower income districts, the

Supreme Court again emphasized the need to protect the constitutional rights of these students: "Importantly [in Abbott II], the Court further found that 'funding alone will not achieve the constitutional mandate' for the pupils in districts having high concentrations of poor children; that 'without educational reform, . . . money may accomplish [nothing]; and that in these [poorer] districts substantial far-reaching change in education [was] absolutely essential to success.'" Abbott XXI, 206 N.J. at 348 (citing and quoting Abbott II).

Since Abbott II, there have been a number of studies demonstrating the impact that ineffective and effective teachers can have on students in low-income, minority districts. Pa13 (Compl. ¶ 55); Pa68 (Dist. Answer ¶ 55). Consequently, there is constitutional harm to Plaintiffs when the operation of the LIFO Statute results in districts like Newark either saving ineffective teachers to protect the effective or engaging in harmful RIFs without any consideration of quality.

Given this reality and the construction of the Education Clause by the New Jersey Supreme Court, the proposed, but rejected, amendment of the LIFO Statute does not prohibit a court from examining the statute and its impact on the constitutional rights of Plaintiffs, despite what AFT might suggest. See Valent, 114 N.J. Super. at 69. In fact, AFT argues that one purpose for the reforms in TEACHNJ was "[t]o

ensure that students in all districts, including Abbott districts, benefit from being taught by effective teachers . . . ." AFTb12. AFT goes so far as to assert that TEACHNJ enacted "sweeping reforms designed to address the specific issue [teacher quality] Plaintiffs brought before the court." AFTb51. However, if this was the purpose for the reform of other provisions, it has not met its constitutional obligations in relation to the LIFO Statute in Newark, where ineffective teachers are overwhelmingly protected in a RIF.

TEACHNJ certainly should not impact whether the trial court can order the requested remedy after discovery and a decision on the merits. When a specific piece of legislation is challenged as unconstitutional or repugnant to the State Constitution, it is up to the judicial branch to assess that law's constitutionality. "When there occurs such a legislative transgression of a right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts." Robinson v. Cahill, 69 N.J. 133, 147 (1975); see also, e.g., King v. South Jersey Nat. Bank, 66 N.J. 161, 177 (1974); Colombo v. Board of Edu. For the Clifton Sch. Dist., 2016 WL 6471013, at \*6 (D.N.J. Oct. 31, 2016).

Indeed, should Plaintiffs' allegations be proven, the LIFO Statute cannot be deemed constitutional and should be struck down, because "[n]o statute. . . can authorize an

unconstitutional practice." Town of Secaucus v. Hudson Cty. Bd. of Taxation, 133 N.J. 482, 493 (1993); see also Twp. of W. Milford v. Van Decker, 120 N.J. 354, 357 (1990).

For this reason, the grave constitutional harms set forth in the Complaint that are being imposed upon Plaintiffs, students in Newark, far outweigh any presumption of constitutionality or deference afforded to any statutorily created teachers' rights. As set forth in the Opening Brief, the Complaint includes many injuries flowing from the LIFO Statute that the Court could certainly find to be "repugnant" to the State Constitution.

In response, AFT has failed to articulate any social or policy benefit achieved through the LIFO Statute that counters Plaintiffs' ongoing and future constitutional harms, especially as Newark gets closer to budgeting for the 2018-19 school year. Therefore, there is no reason to dismiss the Complaint simply because it challenges the LIFO Statute, especially at the pleading stage of the litigation.

#### CONCLUSION

For the reasons set forth in Plaintiff-Appellants' Opening Brief and above, the Court should reverse the trial court's Order.

Dated: December 11, 2017

TOMPKINS, MCGUIRE, WACHENFELD &  
BARRY, LLP

By: WAT  
William H. Trousdale  
Attorney ID: 010921994  
Maximilian D. Cadmus  
Attorney ID: 159462015  
TOMPKINS MCGUIRE WACHENFELD & BARRY  
LLP  
3 Becker Farm Road, Fourth Floor  
Roseland, New Jersey 07068-1726  
(973) 623-7893

ARNOLD & PORTER KAYE SCHOLER LLP

Kent Yalowitz  
*Admitted Pro Hac Vice*  
Kathleen A. Reilly  
*Admitted Pro Hac Vice*  
Colleen Lima  
*Admitted Pro Hac Vice*  
250 W. 55th Street  
New York, New York 10019-9710  
(212) 836-8000

*Attorneys for Plaintiff-Appellants*