

SUPREME COURT OF NEW JERSEY

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-Petitioners

V.

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

Defendants-Respondents

And (Caption continued on next page)

DOCKET NO. 081599
CIVIL ACTION

APPELLATE DIVISION
DOCKET NO. A-004546-16

SAT BELOW:

HON. JOSE L. FUENTES, P.J.A.D.
HON. ELLEN L. KOBLITZ, J.A.D.
HON. THOMAS V. MANHAN, J.A.D.

LAW DIVISION DOCKET NO.
MER-L-2170-16

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

**BRIEF OF INTERVENOR-RESPONDENT NEW JERSEY EDUCATION
ASSOCIATION IN OPPOSITION TO CERTIFICATION**

NEW JERSEY EDUCATION
ASSOCIATION a New Jersey nonprofit
Corporation, on behalf of itself and its
Members,

Intervenor-Respondent,

And

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

Intervenors-Respondents.

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PRELIMINARY STATEMENT

The New Jersey Education Association ("NJEA"), Intervenor-Respondent, submits this brief in opposition to Plaintiffs-Petitioners' ("plaintiffs") petition for certification. Plaintiffs, the parents or guardians of several Newark public school students, challenge the constitutionality of the Reduction-in-Force statutes ("RIF"), which plaintiffs refer to as the "last-in, first-out" ("LIFO") provisions, as applied in the Newark School District. ("Newark"). Those statutes require school districts, when conducting a RIF of tenured teachers, or when re-staffing following a RIF, to use seniority as the exclusive criterion rather than plaintiffs' preferred criterion of teacher performance assessments.

The Law Division dismissed the complaint without prejudice, concluding that plaintiffs' lacked standing and that their claims were not ripe for review. The Appellate Division, in a unanimous, unpublished decision, affirmed the Law Division's ripeness determination, stating that "the issue of LIFO ramifications should a RIF occur is speculative and not ripe for review." (HG17a).¹ In light of

¹ "HG" refers to plaintiffs' appendix to their petition for certification.

that determination, the Appellate Division concluded it "need not address the standing issue." (Id.).

The petition does not provide any persuasive reason to grant certification under R. 2:12-4. The Appellate Division's decision does not address unsettled issues of general public importance or present any other ground for certification. Plaintiffs claim that the lower court's decision "raises an unduly high barrier" to protect children's constitutional rights to a thorough and efficient education and imposes "impossible jurisdictional requirements" to present such a claim. (Petition 1). Those assertions are pure hyperbole. Rather, the Appellate Division's decision is a routine and legally unexceptional application of well-established ripeness principles to specific and unique factual circumstances in Newark.

Significantly, no RIF in Newark has occurred or is imminent, so the impact of any RIF on tenured teachers is purely speculative, especially when the plaintiffs did "not provide the number or percentage of non-tenured teachers in the District . . . who must be terminated first." (HG 16a). Put simply, there are no facts to show that if a RIF occurred now, it would likely exceed the number of non-tenured teachers in Newark and include tenured teachers protected by seniority under the RIF statutes.

Similarly, the impact upon plaintiffs of the pool of Educators Without Placement Sites ("EWPS"), which petitioners claim is ripe for review, is also speculative. There are no facts connecting the funds spent on the pool to the loss or reduction of any educational programs or services for plaintiffs' children. Because a RIF has not occurred or is planned, the effect of a RIF on the pool is pure conjecture. Moreover, as plaintiffs concede, the size and cost of the pool have significantly diminished since this litigation was commenced. The present cost and composition of the pool are, therefore, uncertain.

More importantly, the EWPS is a unique device created by Newark for teachers with an ineffective rating as well as for teachers who might be effective, but have been rejected by school principals for reasons other than performance. Plaintiffs do not explain how a decision on the EWPS pool would affect any school district other than Newark. The petition is based on facts that do not apply anywhere other than in Newark and, therefore, the appeal does not present issues of general public importance.

Finally, plaintiffs do not present any persuasive reason why this Court should address plaintiffs' standing, let alone to do so without a decision on this issue by the Appellate Division.

COUNTERSTATEMENT OF FACT

A. The Limited Scope of the Allegations in the Complaint

The petition relies extensively on facts relating to Newark as a whole. However, the scope of the complaint and the issues raised by plaintiffs are much more limited than suggested by the petition. First, although plaintiffs purport to seek relief for all Newark school children and, therefore, allege district-wide facts, they have not filed a class action or named parents or students at other Newark schools as individual plaintiffs. Consequently, as the Law Division recognized, the case is limited to facts pertaining to those particular students. (HG54a).

Second, while plaintiffs refer in their complaint to other "similarly situated districts" (Pa5),² the complaint is limited to allegations on behalf of the named Newark parents and students, all the named students are attending Newark schools, and, other than a brief mention of the Camden School District, there are no allegations about the effect of the RIF statutes on other School Development Authority districts in New Jersey.

² "Pa" refers to the plaintiffs' appendix to the brief in the Appellate Division.

Finally, plaintiffs do not allege any facts showing that: (i) any of their children have been, are being, or are about to be, taught by teachers rated as ineffective or partially effective; (ii) any of their children are currently assigned to, or are about to be assigned to, a teacher rated as ineffective or partially effective; (iii) any named student is failing to meet minimum proficiency standards in statewide assessments; (iv) a RIF affecting teachers is in effect in the Newark district or that a RIF is planned to occur imminently; (v) any specific program or resource affecting plaintiffs that has been cut because of the cost of maintaining the EWPS; and (vi) the alleged denial of a thorough and efficient education for any named plaintiff, let alone a constitutional deprivation caused by the RIF statutes.

B. The Law Division's Decision and Order

The Law Division recognized that the plaintiffs have not filed a class action and that the judicial assessment of the sufficiency of the complaint must focus on the facts pertaining to the twelve individual plaintiffs. (HG53a). 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 much more limited claim - once it became clear that a RIF would not occur - that plaintiffs are harmed by the mere existence of the unique EWPS pool. (HG56a).

On the ripeness issue, the Law Division 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." (HG 59a). The lower 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." (HG56a).

On the standing issue, the Law Division concluded that the specific plaintiffs are unable to show particularized harm caused by the RIF statutes. (HG58a). The court did acknowledge: (1) studies cited by plaintiffs about the importance of teacher effectiveness in the classroom, (2) the facts alleging failure of students in the Newark schools to meet Statewide minimum proficiency standards in performance assessments and Statewide graduation rates; and (3) the need to provide a thorough and efficient education to every student in the Newark district. (HG55a). However, the Law Division found that 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." (HG56a). 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." (HG57a).

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. (HG56a). The court further stated that there was no link between the then \$8 million cost of the pool and plaintiffs' children or that plaintiffs' children were being denied effective teachers because of the existence of the pool. (HG58a). The court found particularly persuasive the absence of any 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 or of any service they were being provided. (HG58a).

C. The Appellate Division's Decision

After reciting plaintiffs' allegations in the complaint (HG7a-HG15a), the Appellate Division observed that "Plaintiffs do not deny that the District has significantly reduced tenured teachers rated as ineffective or partially effective" by bringing tenure charges under the recently enacted Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHJ"), N.J.S.A. 18A:7-117 to - 129. The Appellate Division also recognized that plaintiffs "concede that the termination of non-tenured teachers in a LIFO situation is beyond their complaint" and that these non-tenured teachers must be terminated first. (Id.) However, since plaintiffs did not provide the number or percentage of non-tenured teachers in Newark, the Appellate Division opined that any RIF "might only affect non-tenured teachers, who would be terminated first." (HG16a).

The Appellate Division concluded that under the TEACHNJ procedures utilized by the District to reduce the number of ineffective and partially effective tenured teachers -- and the provisions in TEACHNJ for the "reeducation and rehabilitation of others now rated as ineffective or partially effective," -- a RIF "causing ineffective tenure teachers to teach students while

effective teachers are removed may never occur." (HG17a). Therefore, the Appellate Division stated that "the issue of LIFO ramifications should a RIF occur is speculative only and not ripe for review." (Id.). Finally, the Appellate Division rejected the argument that the District's resources could be better spent elsewhere than on the EWPS pool, stating that "the expenditure does not raise an issue of constitutional dimension." (Id.) Because the issues were not ripe for review, the Appellate Division determined that it did not need to address the issue of Plaintiffs' standing. (Id.).

LEGAL ARGUMENT

THE PETITION FOR CERTIFICATION SHOULD BE DENIED BECAUSE PLAINTIFFS FAIL TO PRESENT ANY GROUND FOR CERTIFICATION

1. Certification Should Be Denied on the Ripeness Issue Because the Appellate Division's Decision is a Proper Application of Settled Principles to the Facts of This Case

The Appellate Division concluded that the "issue of LIFO ramifications should a RIF occur is speculative and not ripe for review." (HG17a). Plaintiffs claim that the Appellate Division established "impossible jurisdictional requirements" (Pet. 1) and that this Court should grant certification to clarify the necessary showing of ripeness

in these circumstances. Contrary to plaintiffs' assertions, the Appellate Division's determination that the issues are not ripe for review represents a routine application of settled principles on ripeness to the plaintiffs' claims and the specific and unique situation in Newark. The appeal does not raise any issue of general importance and does not warrant review by this Court.

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, as here, 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. Comm. To Recall Robert Menendez from the Office of U.S. Senator v. Wells, 204 N.J. 79, 99 (2010). The need for a ripe controversy for judicial involvement is reflected in decisions holding that a "declaratory judgment is not an appropriate way to ascertain the rights or status of parties

upon a state of facts that are future, contingent, and uncertain." Garden State Equality v. Dow, 434 N.J. 163, 189 (2013). (quoting Independent Realty Company v. Township of North Bergen, 376 N.J. Super. 295, 301 (App. Div. 2005) (citations omitted)).

The Appellate Division properly applied well-established precedents to specific claims alleged by plaintiffs. Plaintiffs do not assert - nor could they assert - that a RIF affecting Newark, let alone the twelve named-student-plaintiffs is in effect or imminent. In the absence of such a showing, plaintiffs rely on a 2014 hypothetical simulation of a RIF in Newark to urge their claims are ripe for adjudication. (Pet.2-3). However, plaintiffs acknowledge that since that simulation the District has significantly reduced tenured teachers rated ineffective or partially effective under the TEACHNJ Act. (HG16a). Consequently, plaintiffs' reliance in the petition on that hypothetical simulation is misplaced because the results are out-of-date, and the present effect in Newark of a conjectured RIF are uncertain. And, as noted by the Appellate Division, the absence of any facts regarding the number of teachers who would be RIF'd, and the number of non-tenured teachers who would be terminated before any RIF of a tenured teacher, renders plaintiffs' claims pure conjecture.

Similarly, the impact of the existence of the EWPS pool on the named students is not ripe for review. There are no facts alleged to show that any of the plaintiffs' children have been or will be, deprived of an educational opportunity because of any budget cuts in programs or services that have been instituted by Newark to maintain the EWPS pool. There is also no allegation that any of the plaintiffs' children are being taught by an ineffective teacher force-placed into a classroom from the EWPS pool. While plaintiffs baldly assert constitutional harm from the mere existence of the pool, there is simply no showing that the existence of the EWPS pool has had any impact on any of the plaintiffs' children. Indeed, the EWPS pool has nothing to do with plaintiffs' claim that they are harmed by the seniority provisions applicable to tenured teachers in the RIF statutes. Therefore, the Appellate Division correctly applied ripeness principles enunciated by this Court in determining that, on the present unique set of facts in Newark, the issues raised by plaintiffs are not ripe for review.

In sum, the Appellate Division properly concluded that plaintiffs' as-applied constitutional challenges to the specific circumstances in Newark are not ripe for judicial review. Indeed, the record reflects that, from a factual

standpoint, the District has been effectively utilizing the TEACHNJ provisions to remove ineffective teachers so, as the Appellate Division recognized, a RIF with the consequences asserted by plaintiffs, may never occur. Indeed, the fact that the number of ineffective teachers has been substantially reduced undermines the validity of the outdated hypothetical results of the equivalency simulation. Further, the EWPS is a unique system created by Newark, and there is no indication that any other district has used, or is planning to utilize, such a pool. To the extent that there may be any ineffective teachers remaining in the EWFS - a matter of conjecture on this record - the proper course for plaintiffs is to encourage Newark to continue to take steps to remove those teachers under TEACHNJ, not to engage in speculative and hypothetical constitutional litigation. The ripeness decision of the Appellate Division is factually limited and legally unexceptional. Plaintiffs fail to provide any convincing reason why this Court should grant certification.

2. Certification Should Be Denied on the Standing Issue Because the Appellate Division Did Not Address Plaintiffs' Standing

Plaintiffs also seek certification of the standing issue. In light of the Appellate Division's decision on

ripeness, it did not address plaintiffs' standing to bring their constitutional challenges.

Plaintiffs do not proffer any reason why the fact-sensitive issue of plaintiffs' standing in this case presents a question of general public importance, let alone provide any showing that plaintiffs' standing should be considered even though the Appellate Division did not address that issue. There is nothing unusual or of general public importance raised by the Appellate Division's decision not to address an issue that is rendered moot because of the court's dispositive ruling on another issue on appeal. The Appellate Division's refusal to address issues not necessary for the proper resolution of the appeal does not merit review. Nor is there any reasons to forego appropriate appellate procedure and directly review the Law Division's routine application of well-settled standing principles to the facts of this case.

"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 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).

Applying these established standing principles to the facts of this case, the Law Division concluded that plaintiffs could not overcome threshold standing requirements. There is no reason for the Court to consider this issue, much less to consider this issue when the Appellate Division did not address plaintiffs' standing

because of its determination that the issues on appeal are not ripe for review.

Plaintiffs claim that the Law Division imposed a heavy burden on them to demonstrate standing. 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. If anything, a RIF, as the Appellate Division observed, is less and less likely as more ineffective teachers are removed and the EWPS pool shrinks.


Moreover, there are no specific allegations in plaintiffs' complaint showing that plaintiffs' children have been harmed by the mere existence of the EWPS pool. As mentioned above, plaintiffs are unable to show that any of their children have been or are harmed by alleged budget cuts in their programs or services because of the cost of maintaining the pool. There is a complete disconnect between the money spent on the pool and plaintiffs' bare allegations of particularized harm to an individual plaintiff because of the mere existence of the pool.

On this record, the Law Division properly applied this Court's longstanding decisions on standing to the facts of this case. Nothing in that decision -- or in the Appellate Division's decision not to address that issue -- merits this Court's review.

CONCLUSION

For the reasons stated above, the New Jersey Education Association, Intervenor-Respondent, respectfully submits that the Court should deny certification.

Respectfully submitted,
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