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December 12, 2016

**Via Hand Delivery**

Clerk, Superior Court of New Jersey  
Mercer County Courthouse  
175 S. Broad Street  
Trenton, New Jersey, 08650

**Re: H.G., et als. v. Harrington, et als.  
Dkt. No. MER-L-2170-16  
Reply to Opposition to Motion to Intervene**

Dear Sir/Madam:

Enclosed please find the original and one copy of the Reply of Applicants for Intervention American Federation of Teacher, AFL-CIO; AFT New Jersey, AFL-CIO; Newark Teachers Union, AFT, AFL-CIO to Plaintiffs' Opposition to Applicants' Motion to Intervene on Short Notice. Please also note that Applicants are requesting oral argument on this matter on December 19, 2016.

A Certificate of Service is also enclosed. If there is a filing fee, kindly charge our Superior Court account 1405+52.

Very truly yours,

Ira W. Mintz

- c. Honorable Mary C. Jacobson, A.J.S.C.  
William H. Trousdale, Esq.  
Christopher S. Porrino, Attorney General  
Charlotte Hitchcock, Esq.

Certification of Service

I, Ira W. Mintz, hereby certify that:

On December 12, 2016, an original and one copy of the Reply of Applicants for Intervention American Federation of Teachers, AFL-CIO; AFT New Jersey, AFL-CIO; Newark Teachers Union, AFT, AFL-CIO to Plaintiffs' Brief in Opposition to Applicants' Motion to Intervene on Short Notice were hand-delivered to the Clerk, Superior Court of New Jersey, Mercer County Courthouse, 175 S. Broad Street, Trenton, New Jersey, 08650.

On December 12, 2016, two copies of the same document were delivered to the Honorable Mary C. Jacobson, A.J.S.C., at the Mercer County Criminal Courthouse, 400 S. Warren Street, Trenton, New Jersey, 08650.

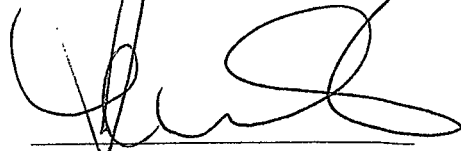
On December 12, 2016, two copies of the same document were sent via overnight mail and electronic copy to the following:

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I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are knowingly false, I am subject to punishment.



Ira W. Mintz

Dated: December 12, 2016

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**Re: H.G., et als. v. Harrington, et als.  
Dkt. No. MER-L-2170-16  
Reply to Opposition to Motion to Intervene**

Dear Judge Jacobson:

Please accept this letter brief as the Reply of Applicants for Intervention American Federation of Teachers, AFL-CIO; AFT New Jersey, AFL-CIO; and Newark Teachers Union, AFT, AFL-CIO to Plaintiffs' Opposition to Applicants' Motion to Intervene. At the outset, it is important to note that the named Defendants do not oppose the intervention of Applicants. The only opposition comes from Plaintiffs.

Every teacher in every school district in New Jersey has an interest in the protections of the challenged statutes. Without the protections of these statutes, any teacher, regardless of

their effectiveness rating, faces an unreviewable Reduction in Force (RIF). No current party to the litigation represents the interests of the teachers who will face the consequences of an adverse decision. Because of this, and the other factors set forth in R. 4:33-1 and 2, Applicants' Motion for Intervention should be granted.

### **I. Standing is not a Separate Requirement for Intervention**

Plaintiffs argue that before intervention can be granted, Applicants must first meet the separate requirements of standing, as it is a "necessary threshold issue." Pl. Opp. at 1. The body of published Superior Court decisions makes clear that R. 4:33-1 and 2 establish the standards for determining whether to grant a motion for intervention. The Rule does not require a court to conduct a threshold standing analysis.<sup>1</sup> Indeed, the first two prongs of the test for intervention as of right incorporate a standing-type analysis. Moreover, as discussed below, Applicants meet the requirements for both standing and intervention, so this disagreement need not be resolved here.

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<sup>1</sup>See, e.g., In re Adoption of Monroe Twp. Housing Element, 442 N.J. Super. 565, 575-5 (Law Div. 2015); American Civil Liberties Union of New Jersey, Inc v. Cnty. of Hudson, 352 N.J. Super. 44 (App. Div. 2002); Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563 (App. Div. 1998); Atlantic Employers Ins. Co. v. Tots & Toddlers Pre-School Day Care Center, Inc., 239 N.J. Super. 276 (App. Div. 1990); Chesterbrooke Ltd. Partnership v. Planning Bd. of Twp. of Chester, 237 N.J. Super. 118 (App. Div. 1989).

## II. Applicants Meet the Requirements for Standing

Plaintiffs argue that Applicants lack standing both representationally and individually. Plaintiffs first assert that Applicants lack representative standing because they cannot demonstrate a common economic interest among their members related to this litigation. Plaintiffs base this assertion on the erroneous claim that "[t]o establish standing as the representative of its members, the association's members must have a 'common economic interest in the challenged action.'" Pl. Opp. at 8 (citing New Jersey Hospice and Palliative Care Org. v. Guhl, 414 N.J. Super. 42, 48-49 (App. Div. 2010)) (emphasis added).

As a preliminary matter, New Jersey courts have never found that a common economic interest is required to find that an association has standing. Indeed, imposing this severe restriction on standing contravenes the guiding principle that "New Jersey courts take a broad and liberal approach to standing." New Jersey Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 415 (App. Div. 1997). Instead, the courts have found that for an association to have standing on behalf of its members, "the association must allege that its members, or any of them, 'are suffering immediate or threatened injury as a result of the challenged action . . . .'" Id. at 416 (quoting

In re Ass'n of Trial Lawyers of America, 228 N.J. Super. 180, 186 (App. Div. 1988)) (emphasis added). Demonstrating a common economic interest is only one of the ways that associations can demonstrate standing.

Moreover, Applicants satisfy the standing requirements either under a common economic interest test or under the theory that its members will be injured if the challenged statutes are declared unconstitutional. Those statutes require that when a RIF is conducted, seniority is the only factor that can be considered. This requirement protects all teachers from arbitrary or vengeful actions by local administrations. All teachers benefit if a RIF cannot be used as a vehicle to target and selectively terminate teachers disliked by local administrations. The invalidation of these statutes will cause real injury to teachers in New Jersey; through loss of income for some and loss of job security and protection for all. The Applicant unions have an interest in ensuring their members' economic and non-economic interests are adequately defended.

Plaintiffs' second theory is that Applicants lack standing because they "are not impacted, as organizations, by the LIFO Statute's constitutionality or unconstitutionality." Pl. Opp. at 9. Plaintiffs claim that in the event that the teacher tenure statutes are found unconstitutional, Applicants would still be able to engage in negotiations to protect their

teachers. However, in the event that the teacher tenure statutes are found to be unconstitutional, any similar agreement that results from negotiations would also be unconstitutional. Hunterdon Cent. H.S. Bd. of Ed. v. Hunterdon Central H.S. Teachers' Ass'n, 86 N.J. 43 (1981) (paid leave of absence for religious purposes which would otherwise be negotiable was abridgement of the establishment clause of the First Amendment and therefore outside the scope of collective negotiations).

Applicants would not "continue to have the opportunity to engage in negotiations with Newark to ensure protections for members . . . if and when RIFs occur," as Plaintiffs claim. Pl. Opp. at 10. Instead, Applicants would be severely hampered in their efforts to ensure that if a RIF takes place, senior teachers are protected against layoffs for arbitrary, invidious or unlawful reasons. The Legislature has chosen to implement this laudable policy objective - an objective that benefits all teachers and for that matter their students, as well - by enacting N.J.S.A. 18A:28-10 and 28-12.

Applicants therefore have both representational and individual standing to intervene.

### **III. Applicants Meet the Requirements for Intervention as of Right**

Plaintiffs next argue that Applicants are not entitled to intervention as of right because they do not have an interest in

the outcome of the case, will not be harmed by the outcome of the case, real adversity exists, and there is an internal conflict of interest among Applicants' members.

First, Applicants do have an interest in the outcome of the case. The challenged statutes protect teachers from being laid off for reasons other than seniority, and provide protection to the members that Applicants represent.

Second, Applicants are not required to show "direct harm" by the resolution of this litigation, as Plaintiffs claim. Pl. Opp. at 12. Instead, Applicants are required to show that the "disposition of the action may as a practical matter impair or impede [their] ability to protect" the stated interest. Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 568 (App. Div. 1998) (internal citations omitted). The ability of Applicants to protect their members would be impaired if these statutory provisions are found unconstitutional because the security provided by these statutes would be eliminated.<sup>2</sup>

Third, real adversity between Plaintiffs and named Defendants does not exist. A mere "conflict among the parties

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<sup>2</sup> It is important to note that Plaintiffs devote a considerable amount of time to arguing the merits of this case. However, Applicants have not advanced the argument that the protections codified at N.J.S.A. 18A:28-10 and 12 "trump the constitutional rights of the schoolchildren they teach," as Plaintiffs appear to believe. Pl. Br. at 12. The only argument that Applicants have thus far advanced is that they meet the criteria for intervention as of right and for permissive intervention.



regarding the remedies sought in this case" does not create the presence of adversity, as Plaintiffs' claim. Pl. Opp. at 14. As Applicants set forth more fully in their Motion to Intervene, the Attorney General is currently before the New Jersey Supreme Court arguing that the same statutory provisions violate the Education Clause of the New Jersey Constitution. App. Br. at 9. Further, Christopher Cerf, nominal defendant, is publicly opposed to these laws. Id. at 10. An alleged disagreement about remedies is insufficient to create real adversity when both parties are actively seeking to have the same laws declared unconstitutional. Plaintiffs seek to prevent a party standing in real adversity to be joined in this action to prevent these statutes from being vigorously defended. By arguing that Applicants do not meet the requirements for intervention, Plaintiffs seek to deprive the teachers, who will be affected by the outcome of this litigation, of a voice before this Court. Of note is that Plaintiffs maintain that even senior teachers in Newark, who have an "ineffective" rating, "would not have a cause of action until they know whether they would actually be impacted by a quality-based RIF." Pl. Opp. at 10.

Plaintiffs would have this Court conclude that no union or other organization representing teachers who are protected by the challenged statutes, and no individual teacher, should be granted the right to intervene in this proceeding. In other

words, the litigation brought by Plaintiffs attacking the constitutionality of N.J.S.A. 18A:28-10 and 28-12 should proceed without any party to the litigation vigorously defending the constitutionality of these statutes. While not having a true adversary may be of benefit to the Plaintiffs, it is not beneficial to this Court, to the ends of justice, or to the hundreds of thousands of teachers who stand to be injured if the challenged statutes are declared unconstitutional.

Finally, Plaintiffs argue that intervention should not be granted because there is an internal conflict among Applicants' members. This asserted conflict is apparently between junior teachers rated effective and senior teachers rated ineffective, ostensibly because the junior teachers would benefit from having these laws invalidated while the senior teachers would not. In support of this claim, Plaintiffs cite Sullivan v. DB Investments, Inc., 2006 WL 892707 (D. N.J. 2006). However, intervention in Sullivan was denied because the motion to intervene was untimely, the parties that the proposed intervenors sought to represent were adequately represented, and the court was not convinced that the proposed intervenors could adequately advance the interests of either "subclass" of defendants. Sullivan does not, as Plaintiffs claim, stand for the proposition that any potential internal conflict disqualifies an organization from intervening.

Although a potential conflict among some members of an association is not a disqualifier for purposes of intervention, no such conflict exists here. All members of the NTU and all members of the NJAFT and the AFT who are employed in K-12 school districts in New Jersey share an interest in being protected against layoffs motivated by arbitrary, invidious or unlawful reasons. All members of the Applicant unions will lose the protections of the challenged laws and will be negatively affected if these laws are invalidated.<sup>3</sup> Applicants meet all four criteria set forth in R. 4:33-1 required for intervention as of right, and this Court should grant their motion.

#### **IV. Applicants Meet the Requirements for Permissive Intervention**

Plaintiffs claim that Applicants should also be denied intervention under R. 4:33-2 because to do so would "result in undue delay, fail to eliminate the probability of subsequent litigation, and further complicate this litigation." Pl. Opp. at 15. In making this argument, Plaintiffs ignore the overarching principle that "our Court Rule on permissive

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<sup>3</sup> There is no internal conflict among the members represented by Applicants that differs from the typical differences found among the diverse members of public sector unions across New Jersey. State v. Prof'l Ass'n of N.J. Dept. of Ed., 64 N.J. 231 (1974) (state-wide negotiations unit of all professional State employees is appropriate despite different characteristics within the group).

intervention . . . is to be liberally construed by trial courts." Zirger v. General Acc. Ins. Co., 144 N.J. 327, 341 (1996) (citing State v. Lanza, 29 N.J. 595, 600 (1963)); Pl. Opp. at 15.

As a preliminary matter, Plaintiffs' contention regarding undue delay stands in contradiction to their earlier argument that standing must be established before intervention can be granted. Plaintiffs cobble together an argument that if intervention is granted they will be forced to engage in extensive discovery to prove that Applicants do not have standing. Pl. Opp. at 15. ("[D]epositions would need to be taken of various union members to determine if the organizations adequately represent their views, and additional motions will be filed on the question of standing.) Once intervention is granted, any discovery on this issue would be inappropriate. Even if discovery was permitted, the delay occasioned by Plaintiffs' decision to proceed down such a path is not a basis for denying permissive intervention.

Moreover, Plaintiffs' contention that subsequent litigation is probable because "individual teachers may bring actions tailored to their specific circumstances challenging the basis for their termination" does not support the denial of Applicants' motion. Pl. Opp. at 15. As Plaintiffs point out, if these statutes are declared unconstitutional, whether or not

the unions are parties to this litigation, there may be subsequent litigation. Pl. Opp. at 15. On the other hand, if the constitutionality of the challenged statutes is upheld, subsequent litigation will be unnecessary. For reasons previously discussed, granting the motions to intervene ensures that there will be parties who have an interest in defending the constitutionality of the statutes at issue.

Finally, Plaintiffs have not advanced any real argument that permitting Applicants' intervention will further complicate proceedings.<sup>4</sup> Instead, permitting intervention of Applicants will merely ensure that there is a party involved with a real interest in defending the challenged laws.

#### V. Conclusion

For the reasons set forth here as well as in their Motion to Intervene, Applicants request that the Court grant the Motion to Intervene.

Respectfully submitted,



Ira W. Mintz

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<sup>4</sup> Plaintiffs refer to Applicants' lack of involvement in Abbott v. Burke, Dkt. No. 078257 (N.J. Supreme Court) as further reason to deny their motion for intervention. However, Applicants' decision not to intervene in the Abbott litigation has no bearing on their right to intervene in this case.