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**FILED  
APPELLATE DIVISION**

**AUG 24 2015**

  
CLERK

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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

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PLAINTIFFS-APPELLANTS' BRIEF

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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.

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## PRELIMINARY STATEMENT

New Jersey's Constitution guarantees children a "thorough and efficient" education. N.J. Const. art. VIII, § IV, para. 1. A state statute, however, mandates that when public school districts lay off teachers, they must do so without regard to effectiveness, retaining the most senior teachers while laying off the most junior. N.J. Rev. Stat. §§ 18A:28-10, 18A:28-12 (2013). This last-in-first-out, or "LIFO," Statute forces financially strapped public school districts like Newark to retain less-effective but more-senior teachers when a reduction in force ("RIF") is necessary. As a result, Newark must contort its budget priorities to avoid layoffs and the concomitant purge of more-effective but less-senior teachers the LIFO Statute would require.

In Newark, many of the more-senior teachers the LIFO statute protects--more than 250 of them in one recent year--are so ineffective that the District bends over backward to keep them out of the classroom, essentially paying them not to teach. This diversion of resources deprives Newark's public school students--many from low-income, minority families--of the "thorough and efficient" education the constitution guarantees.

Plaintiffs--parents suing on behalf of Newark public school students--mounted a constitutional challenge, seeking to invalidate the LIFO Statute as applied to Newark. The practical



result Plaintiffs sought was to unlock resources the LIFO statute forces Newark to expend retaining ineffective teachers and thereby allow Newark to more effectively realize the constitution's promise of "thorough and efficient" education. The trial court sidestepped the merits, however, dismissing the case based on its conclusion that Plaintiffs did not suffer sufficient injury to support standing or ripeness.

That was wrong. For years, and to this day, the children on whose behalf Plaintiffs sued have attended schools with worse classrooms, worse libraries, worse technology resources--and yes, worse teachers--than they would have absent the unconstitutional LIFO Statute. These children's injury is real, concrete, and immediate, and the results of this injury will almost certainly follow them through their lives. And over the decades-long Abbott litigation, the Supreme Court has never hesitated to address the merits of claims brought by parents of public-school children under the "thorough and efficient" education clause.

The trial court erred in holding that Plaintiffs lack standing to challenge the LIFO statute and that their claim is not ripe. This Court should reverse and remand as expeditiously as possible.

### RELEVANT FACTS

Plaintiffs attend schools that rank among New Jersey's worst. Pa 7-9 (Compl. ¶¶ 29-40); Pa 61-62 (Dist. Answer ¶¶ 29-31). As few as 10% of the students in Newark receive an education that allows them to meet the State's minimum proficiency benchmarks in language arts, and only at most 12% meet the same guidelines in math. Pa 7-9 (Compl. ¶¶ 32-40).

As teacher effectiveness is the single most influential school-based variable in a child's education, New Jersey has set standards to measure the quality of its teachers' performance. Pa 10-11 (Compl. ¶¶ 44-45); Pa 67 (Dist. Answer ¶¶ 44-45 (admitting factual allegations)). The State evaluates its teachers as "highly effective," "effective," "partially effective," or "ineffective." Pa 11 (Compl. ¶ 45); Pa 67 (Dist. Answer ¶ 45 (admitting factual allegations)).

School districts in New Jersey, however, must ignore these state-sanctioned teacher effectiveness ratings when engaging in a RIF. Pa 2 (Compl. ¶ 3); Pa 54 (Dist. Answer ¶ 3 (admitting)). Instead, the LIFO Statute mandates that such districts conduct RIFs based on seniority alone. Pa 2 (Compl. ¶ 3); Pa 54 (Dist. Answer ¶ 3 (admitting)). Further, if there is a later need to hire teachers within the District, the LIFO Statute mandates that the District prioritize re-hiring teachers who were laid off in order of their seniority, without consideration of

quality. Pa 14-15 (Compl. ¶¶ 65-67); Pa 69 (Dist. Answer ¶¶ 65-67 (admitting)).

The practical harms of the LIFO Statute are notable in Newark, a District where nearly half of all the "ineffective" teachers in New Jersey, along with 10% of the State's "partially effective" teachers, are employed. Pa 11 (Compl. ¶ 47); Pa 67 (Dist. Answer ¶ 47 (admitting)). With such a disproportionate percentage of the State's ineffective teachers, the LIFO Statute has a disproportionate impact on students in Newark in comparison to students in other, higher-income districts, such as the Summit City School District--where no ineffective or partially effective teachers are employed. Pa 11-12 (Compl. ¶¶ 47-50). Indeed, Newark admits that the LIFO Statute hampers the District from meeting its constitutional obligations. Pa 59-60 (Dist. Answer ¶ 26).

To avoid losing effective teachers in a RIF based on the LIFO Statute, the District implemented the EWPS pool. Pa 3, 17 (Compl. ¶¶ 6, 81); Pa 54, 70 (Dist. Answer ¶¶ 6, 81 (admitting)). The pool is an effort to keep ineffective teachers out of classrooms and avoid engaging in a RIF, because a RIF would not remove ineffective teachers from the District; to the contrary, a RIF would almost solely remove effective teachers. Pa 92 (Cerf Cert. ¶ 13).

Consequently, the harm caused to Plaintiffs by the LIFO Statute in Newark is twofold. First, Plaintiffs are deprived of effective teachers and other professionals when a RIF occurs. For instance, in 2016, Newark was forced to engage in a RIF of guidance counselors and librarians, which resulted in the termination of staff the District would have retained but for the mandates of the LIFO Statute. Pa 9-10 (Compl. ¶ 41). Second, Plaintiffs are harmed by the EWPS pool, because (a) Newark expends money on the EWPS pool and retains ineffective teachers to avoid the loss of primarily effective teachers through RIF; (b) Newark places ineffective teachers from the EWPS pool back into classrooms to meet budget shortfalls; and (c) Newark makes cuts to other parts of the District's budget in order to cover the cost of the EWPS pool and excess teachers. Pa 3, 17-19, 20 (Compl. ¶¶ 5-6, 79-90, 93-94, 97).

Since the LIFO Statute does not permit quality to be taken into account, the only time quality is considered by a district in making decisions regarding whether to terminate personnel is through tenure charges. A district that wants to terminate an ineffective tenured teacher must do so through an individual tenure charge, "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 costs the district more

than \$50,000 per terminated teacher. Pa 96-97 ("Cerf Cert." ¶ 23); Pa 19 (Compl. ¶ 93). This process is time intensive and expensive, and it certainly exacerbates considerations related to balancing budgets. Pa 96-97 (Cerf Cert. ¶ 23).

#### The EWPS Pool

The EWPS pool contains ineffective teachers who are paid teacher salaries without full-time classroom placements. Pa 17 (Compl. ¶ 82); Pa 70 (Dist. Answer ¶ 82). Such teachers perform various support and teacher's aide functions—the lesser of two evils undertaken to avoid engaging in a RIF that would certainly remove effective teachers. Pa 17 (Compl. ¶ 82); Pa 70 (Dist. Answer ¶ 82); Pa 92 (Cerf Cert. ¶ 13).

During the 2013-2014 school year, the EWPS pool included 271 teachers--most of whom were senior teachers with ten or more years of experience--and cost Newark approximately \$22.5 million dollars. Pa 17 (Compl. ¶¶ 83-85). In 2015, due to further exacerbation of Newark's funding issues, the District could no longer afford to keep all the teachers in the EWPS pool out of the District's classrooms, see Pa 93 (Cerf Cert. at ¶ 15), and had to force-place them into Plaintiffs' schools and other schools in the District without the consent of those schools' principals. Pa 17-18 (Compl. ¶¶ 86-87); Pa 71 (Dist. Answer ¶ 87 (admitting forced placement of teachers without consent of school principals)). These force-placed teachers' salaries cost

the District more than \$25 million, with another \$10 million in salaries remaining in the EWPS pool. Pa 18 (Compl. ¶ 87); Pa 71 (Dist. Answer ¶¶ 86, 87).

Thus, when the LIFO Statute remains in effect, no matter what course of action the District pursues, Newark's children, including Plaintiffs, are harmed. Pa 19 (Compl. ¶ 95); Pa 72 (Dist. Answer ¶ 95). Students either suffer from budgetary cuts made to offset the cost of the EWPS pool, or (when the budgetary pain of maintaining the excess and ineffective staff becomes unsustainable), a RIF that terminates effective teachers and leaves ineffective ones. Pa 19 (Compl. ¶¶ 93-95).

#### The Equivalency Request

In February 2014, Newark published information about the impact of a RIF when it sought a temporary reprieve from quality-blind layoffs in the form of an equivalency request of N.J. Admin. Code § 6A:32-5.1 (2013) ("Equivalency Request") submitted to the State Department of Education. Pa 10 (Compl. ¶ 42); Pa 67 (Dist. Answer ¶ 42 (admitting)). The District's education funding had decreased by almost \$200 million due to declining enrollment, so it had to consider whether it should engage in a RIF to address its budget shortfalls. Pa 10 (Compl. ¶ 42); Pa 67 (Dist. Answer ¶ 42 (admitting)). If Newark implemented a RIF, operation of the LIFO Statute would mandate that 75% of the laid-off teachers would be those considered

effective or highly effective, while only 4% would be rated as ineffective. Pa 16 (Compl. ¶ 74); Pa 70 (Dist. Answer ¶ 74 (admitting)); Pa 94-95 (Cerf Cert. at ¶ 18). A RIF pursuant to the LIFO Statute would cause as many as 8,000 children within the District to miss out on an effective teacher every year. Pa 16 (Compl. ¶ 75); Pa 70 (Dist. Answer ¶ 75 (admitting)). In the Equivalency Request, Newark submitted to the State Board of Education the precise harm suffered in the event of a RIF, and the Equivalency Request was incorporated into the Complaint. Pa 10 (Compl. ¶ 42 n. 11).

The State never responded to the Equivalency Request. Pa 10 (Compl. ¶¶ 42-43); Pa 37 (State Defendants' Answer ¶ 43 (admitting)); Pa 67 (Dist. Answer ¶¶ 42-43 (admitting)). Consequently, in order to retain quality teachers, Newark cut other critical programming and resources to account for the District's reduced funding and avoid a RIF. Pa 10, 17 (Compl. ¶¶ 43, 79-81); Pa 67, 70 (Dist. Answer ¶¶ 43, 79-81 (admitting)).

#### PROCEDURAL HISTORY AND THE TRIAL COURT'S RULING

After Plaintiffs filed their Complaint (Pa 1-30), the State and the District of Newark answered. Pa 31-52 (State Defendants' Answer); Pa 53-87 (Dist. Answer). Two teachers' unions intervened and moved to dismiss. At the conclusion of oral argument on that motion, the trial court judge dismissed

Plaintiffs' Complaint without prejudice from the bench, issuing a written order the next day. See 1T 63:23-81:18<sup>1</sup>; Pa 99-101 ("May 4 Order"). In that Order, the trial court found that (i) Plaintiffs lacked "standing to pursue their claims in the absence of a particularized harm to Plaintiffs" caused by the LIFO Statute, and (ii) Plaintiffs' claims lacked "ripeness in the absence of an actual, or immediate threat of harm to Plaintiffs" caused by the LIFO Statute. Pa 101. The written order also references "the reasons set forth on the record on May 3, 2017." Id.

At the May 2017 hearing, the trial court stated that Plaintiffs need to allege in their Complaint that they were in classrooms with ineffective teachers as a result of the LIFO Statute, and so the continued existence of the EWPS pool and the forced-placement of ineffective teachers back into the classroom did not constitute sufficient harm to make the claim ripe. 1T 70:5-71:8. In addition to these grounds, the trial court judge stated that she did not believe she could order the declaratory judgment remedy requested by Plaintiffs because she would not be able to set the standard to be used in place of seniority during a RIF. 1T 79:17-81:9. Further, she did not believe the Complaint justified starting "the parties down the road of lengthy discovery, burdensome on a state entity and on the

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<sup>1</sup> This brief refers to the May 3, 2017 motion transcript as "1T".



Newark Public Schools themselves . . . ." 1T 77:4-77:8. The trial court additionally opined that tenure charges and other budget workarounds would solve the issues raised by Plaintiffs. 1T 78:19-79:18.

#### ARGUMENT

The New Jersey State Constitution mandates that children in the State receive a "thorough and efficient" public education that will provide them with the opportunity to achieve, fulfill their role as citizens, and participate effectively in the work force. N.J. Const. art. VIII, § IV, para. 1. However, Plaintiffs' challenge to the LIFO Statute and its interference with their constitutional right to a "thorough and efficient" education was halted by the trial court's error in dismissing the case. The trial court primarily disposed of the case on standing grounds, holding that Plaintiffs lacked standing to challenge the LIFO Statute, but also found that Plaintiffs' claims were not ripe. None of these grounds, however, supported dismissal.

Because the trial court dismissed the case on standing, this Court must decide whether Plaintiffs suffer sufficient injury to challenge the constitutionality of an education statute--something New Jersey's courts have routinely allowed for dozens of years under the Abbott cases. Plaintiffs, children who attend school in the District, have plead

sufficient harm to support the finding of standing to challenge the LIFO Statute. Further, Plaintiffs' claims are undoubtedly ripe for adjudication because the harm perpetuated by the LIFO Statute does not materialize only in the event of a RIF. Rather, this harm is current and ongoing given the diversion of Newark's funds from the provision of a "thorough and efficient" education to the salaries of ineffective teachers who are not placed in classrooms, or even worse, were forced-placed back in classrooms after having been removed. Further, contrary to the position set forth by the trial court, Plaintiffs' harm is judicially remediable. A trial court can enjoin the enforcement of the LIFO Statute upon finding that it is unconstitutional without setting forth the new standard for evaluation. Finally, the trial court also briefly invoked several peripheral concerns that purportedly support dismissal--whether it could order an adequate remedy, whether discovery burdens would be too great, and whether Plaintiffs had adequately pled the claim. None provides grounds to deprive these Plaintiffs of their day in court.

I. STANDARD OF REVIEW

The Appellate Division reviews "a trial court's decision to dismiss a complaint under Rule 4:6-2(e)" de novo. Stop & Shop Supermarket Co., LLC v. Cty. of Bergen, 450 N.J. Super. 286, 290 (App. Div. 2017); Printing Mart-Morristown v. Sharp Elecs.

Corp., 116 N.J. 739, 746 (1989) (internal quotations and citations omitted) ("We approach our review of the judgment below mindful of the test for determining the adequacy of a pleading: whether a cause of action is suggested by the facts."); Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011) (appellate court "owe[s] no deference to the trial court's conclusions").

II. PLAINTIFFS HAVE STANDING  
(1T 71:9-75:5; Pa 100-101)

The trial court erred in holding that Plaintiffs lacked standing to bring their constitutional claims. In New Jersey, standing requires "sufficient stake and real adverseness with respect to the subject matter of the litigation [and a] substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision." Jen Elec., Inc. v. Cty. of Essex, 197 N.J. 627, 645 (2009) (quoting In re Adoption of Baby T, 160 N.J. 332, 340 (1999)). Plaintiffs readily clear that hurdle.

Plaintiffs are children who attend school in the very district that has admitted to failing to meet its own constitutional obligations. There should be no question--especially under New Jersey's liberal standing rules--that they are legally equipped to bring this case. See Jen Elec., 197 N.J. at 645 (A "core concept of New Jersey jurisprudence" is "that

[the State's] 'rules of procedure were not designed to create an injustice and added complications but, on the contrary, were devised and promulgated for the purpose of promoting reasonable uniformity in the expeditious and even administration of justice.'" (quoting Handelman v. Handelman, 17 N.J. 1, 10 (1954))).

For more than thirty years, the courts of this state have adjudicated claims of children who claimed that the State was not doing enough to remove structural impediments to their right to a "thorough and efficient" education Under Article 8, Section 4 of the State's Constitution. See, e.g., Abbott v. Burke (Abbott II), 119 N.J. 287 (1990). In "poorer urban districts" such as Newark, such plaintiffs had sufficient standing to obtain a ruling that "something more must be added to the regular education in order to achieve the command of the Constitution." Id. at 374. Another Abbott ruling held that "[t]he poor educational achievement levels evident in inner-city schools results in part from . . . the lack of qualified teachers . . . . Those special needs clearly must be confronted and overcome in order to achieve the constitutionally thorough and efficient education." Abbott v. Burke (Abbott IV), 149 N.J. 145, 177, 179 (1997) (emphasis added). In Abbott IV, the Supreme Court held that new educational standards were a reasonable definition of a constitutionally sufficient

education, but noted that improvement depends on teaching. Id. at 168 ("Real improvement still depends on the sufficiency of educational resources, successful teaching, effective supervision, efficient administration, and a variety of other academic, environmental, and societal factors needed to assure a sound education.").

Given the Supreme Court's broad acceptance of claims by students from Newark seeking to improve their education by demanding and obtaining structural reform, the trial court's decision that these Plaintiffs lack standing is reversible error, especially where:

- Plaintiffs are students in classrooms within a special needs district. Pa 5-6, 7-9 (Compl. ¶¶ 18-23, 29-40).
- Newark is a District where nearly half of all the "ineffective" teachers in New Jersey, along with 10% of the State's "partially effective" teachers, are employed. Pa 11 (Compl. ¶ 47).
- The District spends millions of dollars from its annual budget maintaining the EWPS pool, which was created in an effort to keep ineffective teachers out of classrooms and avoid engaging in a RIF. Pa 17-19 (Compl. ¶¶ 79-90); Pa 70-71 (Dist. Answer ¶¶ 79-90 (admitting factual allegations)); Pa 92 (Cerf Cert. ¶ 13).

Plaintiffs suffer from a multitude of harms as a result of the LIFO Statute. Yet, the trial court reasoned that the harms identified in the Complaint were "speculative," although the District specifically admitted that those harms existed. 1T 74:21-75:5; Pa 59, 61-67 (Dist. Answer ¶¶ 26, 29-41).

The trial court concluded that Plaintiffs lacked standing because the Complaint did not show "the children themselves being denied effective teachers." 1T 74:17-20. In essence, the trial court's ruling requires Plaintiffs to obtain information regarding all Newark teachers' individual effectiveness ratings, information about all Newark teachers' seniority, and information about each Newark teachers' classroom assignments and teaching specialty. Plaintiffs must then perform a simulated RIF using this information, to be able to affirmatively plead that the LIFO Statute has directly caused Plaintiffs to be taught by ineffective teachers. This is a much higher standard than the law requires. And as a practical matter, it would be impossible to achieve in the pleading stage, since the necessary information is not publicly available. In addition, the Newark School District already performed this analysis and found that in the case of a RIF pursuant to the LIFO Statute, 75% of the laid-off teachers would be effective or highly effective, while only 4% would be rated as ineffective. Pa 16 (Compl. ¶ 74); Pa 70 (Dist. Answer ¶ 74 (admitting)); Pa 94-95 (Cerf Cert. at ¶ 18).

Moreover, given the trial court's decision that the Complaint was not ripe because there was no RIF, Plaintiffs can never satisfactorily amend their Complaint unless and until a RIF occurs or is immediately imminent, no matter the magnitude

of the current harm to Plaintiffs and other students in Newark. These findings completely disregard the harm suffered by Plaintiffs that results from the diversion of the District's scarce funds to supporting the salaries of ineffective, superfluous teachers in the EWPS pool in order to save effective teachers. These critical indicia of harm suffered by the Plaintiffs, affirmed in the District's answer, and following in more detail below, must be considered in determining the jurisdictional issues.

First, the EWPS pool--and the continued presence of ineffective teachers in both the classroom and the pool--deprives Plaintiffs of critical educational resources, since approximately \$25 million or more of the District's budget is diverted toward the salaries of ineffective and superfluous teachers. Pa 18 (Compl. ¶ 87). The chilling effect of the LIFO Statute has, for years, taken the option of a large-scale RIF off the table and required Newark to pay ransom to ineffective teachers in order to save the effective teachers within the District. Instead, Newark cut programs or funding in other areas. Pa 3 (Compl. ¶ 5); see Abbott IV, 149 N.J. at 153 ("[W]e require that . . . measures be taken to assure the proper and efficient use of expenditures to maximize educational resources and benefits in those districts." (emphasis added)).

Second, Plaintiffs may be taught by an ineffective teacher this year or in a future school year (as this information is not public, the children have no way of knowing), and suffer the consequential harm. Pa 5-6 (Compl. ¶¶ 18-23). As set forth in detail in both the Complaint and the Equivalency Request, being taught by an ineffective teacher inflicts life-long damage on children, especially when "[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 (Abbott XXI), 206 N.J. 332, 479 (2011) (Albin, J. concurring); see also Pa at 13 (Compl. ¶¶ 57-58); Pa at 16 (Compl. ¶ 76).

In setting forth reasons for finding that Plaintiffs lacked standing, the trial court relied on In re Ass'n of Trial Lawyers of America, 228 N.J. Super. 180 (App. Div. 1988), which is inapposite. See 1T 71:20-72:13. In Ass'n of Trial Lawyers, the Appellate Division reversed the denial of a motion to dismiss, finding that the plaintiffs--trial lawyers contesting a new products liability law--did not have standing. 228 N.J. Super. at 181-82. The court found that the lawyers, as an association, did not allege that they had suffered an immediate or threatened injury as "the only possible loss to attorneys is a speculative decrease in contingent fees resulting from an amorphous and



presently unsubstantiated fear that the number and value of products liability claims may diminish." Id. at 187. Indeed, unlike in the instant case, plaintiffs in Ass'n of Trial Lawyers were not litigants the statute would directly affect. Id. at 183. Plaintiffs here, in contrast, are children who will be and are directly harmed by the LIFO statute. Thus, the causal link is far more direct in our case than in Ass'n of Trial Lawyers. Yet, in relying on Ass'n of Trial Lawyers, the trial court ignored the current harm that the EWPS pool inflicts on the Plaintiffs (despite this harm being alleged in the Complaint), and instead focused on the fact that there was no RIF during the 2016-17 school year. Compare 1T 69:4-69:7, with Pa at 3 (Compl. ¶ 6), and Pa at 17 (Compl. ¶¶ 79-80).

In contrast to the lawyers in Ass'n of Trial Lawyers, the children in this case suffer from a real, immediate, non-speculative harm: deprivations resulting from the diversion of millions of dollars of District funds to avoid laying off effective teachers; and the placement of children in classrooms with ineffective teachers. Pa at 3, 14 (Compl. ¶¶ 6-7, 64-65). These children do not suffer from a potential harm to solely economic interests; they suffer from a generations-long failure to provide them with a fundamental constitutional right. See Robinson v. Cahill, 69 N.J. 133, 147 (1975) (reaffirming that right of children to thorough and efficient education is

fundamental). Given this long-ago established and unacceptably continuing harm, Plaintiffs obviously have suffered injury and have a stake in the outcome of the case.

III. PLAINTIFFS' CLAIMS ARE RIPE  
(1T 70:5-71:8; Pa at 101)

The trial court erred in holding that Plaintiffs' claims were not ripe, purportedly because no "actual, or immediate threat of harm to Plaintiffs" existed, since no RIF had occurred. Pa at 101; 1T 70:5-71:8. Plaintiffs' claims are undoubtedly ripe for judicial review. The evaluation of ripeness requires consideration of (i) whether the issues are fit for judicial review and (ii) "the hardship to the parties if judicial review is withheld at this time." See Hogan v. Donovan, 2012 WL 1328279, at \*10 (Law Div. Apr. 17, 2012) (internal quotations and citations omitted) (Pa 115).

The decision to dismiss the Complaint is based on a fundamental misunderstanding of the function of the LIFO Statute, and the current and ongoing harm created by the EWPS pool--a direct result of the LIFO Statute, as it is one of the workarounds put in place by the District to avoid a RIF. Pa at 3 (Compl. ¶¶ 6-7). The current harm suffered by Plaintiffs is not simply whether each and every Plaintiff is in a classroom with an ineffective teacher due to the LIFO Statute. The current harm includes the continued diversion of Newark's

resources: millions of dollars are currently being diverted from Plaintiffs' schools and others in the District to pay the salaries of ineffective teachers, due to the LIFO Statute. Pa at 3, 10 (Compl. ¶¶ 5, 42-43).

In fact, since the Complaint was filed, the District engaged in another budget process for the 2017-18 school year. In order to balance the budget, instead of engaging in a RIF, the District took significant one-time steps to balance its budget without laying off effective teachers. See 1T 49:11-50:5. While these one-time steps taken by the District may have allowed them to avoid a RIF, they do not, however, resolve the larger issue of the current harm that the EWPS pool inflicts to Plaintiffs and other students in Newark.

The trial court relied solely on Indep. Realty Co. v. Twp. of N. Bergen, 376 N.J. Super. 295 (App. Div. 2005), in dismissing the Complaint on grounds of ripeness. The facts of Independent Realty are not analogous. 1T 76:3-7. In Independent Realty, the plaintiff sought an advisory opinion to uphold prior zoning approvals that potentially could be deemed invalid by subsequent zoning ordinances. Indep. Realty, 376 N.J. Super. at 298-99. However, plaintiff did not act under the protection of the prior zoning approvals, nor was plaintiff prohibited from acting. Id. Moreover, plaintiff did not exhaust its administrative remedies and there was no adverse

municipal decision affecting its rights. Id. at 303. For these reasons plaintiff failed to demonstrate the existence of an issue in controversy between the parties, and there was no actual dispute. Id. at 303.

Here, no administrative remedies are available to Plaintiffs because children do not have the ability to institute a RIF, cannot request that Newark engage in a RIF and remove ineffective teachers from the classroom, or dictate how the District spends its funds..<sup>2</sup>

The trial court further erred by disregarding the principles illustrated in Hogan (Pa 108-119). In Hogan, the plaintiff (a County Clerk) sought injunctive relief to authorize the hiring of an additional employee, which had previously been denied by defendant (the County Executive). Hogan, 2012 WL 1328279, at \*1-2 (Pa 108-109). Weighing the requirement that a claim is ripe if withholding judicial review will cause

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<sup>2</sup> Additionally, no remedies are available to the District to limit a RIF to ineffective or partially effective teachers. Pa at 2, 3-4 (Compl. ¶¶ 3, 8). In response, the teachers' unions purport that sufficient remedies exist to remove ineffective teachers from classrooms, through revisions to the TEACHNJ legislation. 1T 16:21-17:18, 30:15-24. However, this is not true. While TEACHNJ allegedly provides a "streamlined" process of laying off an ineffective teacher, TEACHNJ charges can only be brought one at a time, and take at least two years per teacher. 1T 18:5-14, 24:9-16, 49:4-7; Pa at 96-97 (Cerf Cert. ¶ 23). Even the trial court recognized TEACHNJ does not instruct the District how address budget shortfalls. 1T 48:12-48:23, 49:4-7. Moreover The circumstances that permit a district to avail itself of a dismissal under TEACHNJ are not available when a RIF may be required due to budgetary or enrollment considerations.

"hardship to the parties," the court found that a delay in hiring caused hardship since it would leave plaintiff without an employee pending the approval of the state budget. Id. at \*10 (Pa 115). The court rejected defendant's argument that the matter was not ripe until the budget was approved, because the delay would prevent bringing "pending matters to resolution as quickly as possible . . ." Hogan, 2012 WL 1328279 at \*10-11 (Pa 115). Here, Plaintiffs are being harmed by the mere existence of the EWPS pool and the forced placement of teachers from the pool back into the classroom; this harm is akin to a hardship that is taking place because judicial review was withheld. Id.; Pa 17-18 (Compl. ¶¶ 82-88).

As the Complaint alleges, and the District admitted in the Answer, through the EWPS pool and the forced-placement of ineffective teachers back into classrooms, the District continues to pay ineffective teachers' salaries while "placing [other] ineffective teachers who had not received a permanent role as the teacher of record in a classroom in order to prevent causing academic harm to students." See, e.g., Pa 92 (Cerf Cert. ¶ 13) (emphasis added); Pa 17 (Compl. ¶¶ 81-82); Pa 70 (Dist. Answer ¶¶ 81-82 (admitting factual allegations)). The District thus pays millions in salaries for teachers whom no principal in the District willingly wants in a classroom, while it fails to provide students with the basic tools for academic

success. Pa 3, 17-18 (Compl. ¶¶ 6, 85-87). Thus, Defendants also experience hardship by having to enforce a potentially unconstitutional statute which causes harm to students.

Finally, the public interest in this matter weighs against dismissal. See Hogan, 2012 WL 1328279 at \*10-11 (Pa 115) (denying motion to dismiss when sufficient hardship would accrue to both parties and "the expenditure of additional taxpayer money" if judicial review withheld and plaintiffs required to re-file after budget in question was finalized). As Superintendent Cerf stated, "[e]ven without any additional cuts to the district's funding, [the district has] been hampered by statutory restrictions that essentially protect the interests of adults over the rights of the children of Newark." Pa 97 (Cerf Cert. ¶ 25); see also, e.g., Pa 63 (Dist. Answer ¶ 34). Plaintiffs' harm is not contingent upon the institution of a RIF, and has been admitted by the District.

IV. PLAINTIFFS' HARM IS JUDICIALLY REMEDIABLE  
(1T 79:17-80:18; Pa 100-101)

The Complaint requests the trial court enter judgment declaring that the LIFO Statute violates the Education Clause, Equal Protection Clause, and Due Process principles of the State Constitution and Civil Rights Act, and "[p]ermanently enjoin[] Defendants from enforcing" the LIFO Statute in Newark. Pa 28 (Compl. ¶¶ 145-49). The trial court expressed concern that it

could not grant this requested relief. 1T 79:17-80:18.

Specifically, the trial court articulated concern that it would not be able to enjoin the LIFO Statute, as it believed the accompanying remedy would include setting the standard to replace seniority. 1T 80:7-80:18.

But a trial court can enjoin the enforcement of a statute found to be unconstitutional on these and similar grounds without setting forth the new standard for evaluation. As the Abbott II court noted, regarding remedies in the court's power, "educational sufficiency ultimately must be a responsibility of the legislature . . . [w]e can say only that as to certain students, it has failed, as they have failed, and that this failure must be remedied." Abbott II, 119 N.J. at 322; see also Robinson, 69 N.J. at 147 ("[T]he court must 'afford an appropriate remedy to redress a violation of those [Constitutional] rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing solely on paper.'" (quoting Cooper v. Nutley Sun Printing Co., 36 N.J. 189, 197 (1961))). Therefore, it is well within the power of the Court to set a floor by enjoining the LIFO statute on the basis that considering seniority alone is unconstitutional. The Court need not also set forth which specific factors--like effectiveness or quality--must be considered.

In the trial court, the teachers' unions relied on Crawford v. Davy to argue that the relief sought by Plaintiffs is beyond what the trial court can grant. No. A-1297-07T2, 2010 WL 162061 (N.J. Super. Ct App. Div. Nov. 23, 2009) (Pa 120-131). However, the Crawford court dismissed a complaint seeking a "wholesale restructuring of New Jersey's system of locally-based public schools." Id. at \*12 (Pa 130). There, plaintiffs asked the courts to require that school boards re-write school boundaries completely, and that "compulsory attendance laws" be ruled unconstitutional. Id. at \*3, \*6 ("Rather than seeking available administrative action to improve what they perceive as a 'failing' performance by the districts, plaintiffs seek instead a judicial declaration of unconstitutionality with respect to the State's longstanding structure of public education based on school districts that are largely contiguous with municipality of residence.") (Pa 122-123, 125).

Not so here. Plaintiffs are not asking to restructure the educational system. Pa 28 (Compl. ¶¶ 145-151). Instead, Plaintiffs ask for narrow relief and the court to enjoin enforcement of a statute that, whether a RIF occurs or not, harms students because it impacts the use of scarce funds and the placement of teachers within the District. Id. This does not require the court to step into the legislature's shoes. Indeed, the Crawford court acknowledges the NJ Supreme Court's



role in reviewing the constitutionality of educational statutes, both as to funding and, "under appropriate circumstances and on an appropriate record . . . beyond the issue of funding" in the Robinson then Abbott line of cases. Crawford, 2010 WL 162061 at \*5, \*6 (Pa 125). For example, Crawford noted that the Supreme Court has "on occasion required the adoption of programs and policies it deemed necessary to implement the constitutional requirement, after an extensive factfinding process involving the other branches of government." Id. at \*5 (citing Abbott v. Burke (Abbott V), 153 N.J. 480, 527-28 (1998)) (Pa 125).

The relief sought here--enjoinment of a statute--is well within the Court's power compared to the remedies required in those cases. See Robinson, 69 N.J. at 154, 155 (enjoining State from disbursing minimum support in accordance with existing laws and directing distribution of funds in accordance with incentive equalization aid formula, subject to "possible eventuation of timely and constitutionally appropriate legislative action") (citations omitted). The relief sought in this case does not require the trial court to craft a replacement standard for the District to utilize in the event of a RIF. See Abbott II, 119 N.J. at 385-91 (requiring the legislature act in accordance with the court's ruling). Rather, Plaintiffs request the Court simply to declare the LIFO Statute unconstitutional as applied to Newark, and to enjoin its enforcement.

V. THE COURT IMPROPERLY CONSIDERED DISCOVERY BURDENS  
(1T 77:4-77:8)

In reaching its ruling, the trial court improperly considered the potential discovery burden on the State and the District, which is simply irrelevant in determining whether to grant or deny a motion to dismiss. 1T 77:4-77:8. In ruling on a motion to dismiss as in the instant case, the court is "limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart, 116 N.J. at 746 (citing Rieder v. Department of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987)). Discovery plays no part in the underlying standard, has no bearing on whether a Complaint is properly pled, and is a matter to be addressed after a Complaint is deemed sufficient. Consequently, this was an improper basis for any decision to dismiss.

VI. PLAINTIFFS MET THE PLEADING REQUIREMENTS  
(1T 73:4-73:6)

New Jersey courts have consistently "applie[d] an indulgent standard," whereby plaintiffs are "entitled to a liberal interpretation of the contents of the complaint and to the benefits of all its allegations and the most favorable inferences which may be reasonably drawn therefrom." J. Fletcher Creamer & Son v. Pa. Mfrs. Ass'n Ins. Co., No, A-0470-08T3, 2009 WL 2365884, at \*3 (N.J. Super. Ct. App. Div. Aug. 4, 2009) (quotations omitted) (Pa 132-136); Burg v. State, 147 N.J.

Super. 316, 319-20 (App. Div. 1977). Therefore, a motion to dismiss a complaint should be granted "in only the rarest of instances." Printing Mart, 116 N.J.at 772.

The trial court, addressing jurisdictional and judicial remedy issues in dismissing the Complaint, did not explicitly find that Plaintiffs failed to state the causes of action set forth in the Complaint. 1T 81:10-13.

However, the trial court's ruling did touch upon issues that, if Plaintiffs were to replead, seem to set a higher standard for pleading a complaint in New Jersey than outlined in the case law. Specifically, the trial court stated that the assertions in the Complaint were "conclusory in nature" in that they supposedly failed to explicitly link the LIFO Statute to the constitutional deprivation alleged. 1T 71:4-71:19. The trial court did not see a "direct injury by the enforcement of the statute." 1T 72:17-72:19. It stated that "[t]here's no assertion that any of these 12 students is currently being taught by an ineffective teacher, is likely to be taught by an ineffective teacher." 1T 73:4-73:6.

This misstates (i) what Plaintiffs need to plead in order to survive a motion to dismiss and (ii) the specific allegations made by Plaintiffs in their Complaint. First, the trial court's ruling implies that, unless Plaintiffs allege that they are currently suffering from the ill-effects of a particular

ineffective teacher in a classroom who is there solely because of the LIFO Statute, they cannot bring a claim. However, this would bar claims by any student who has been taught by an ineffective teacher in the past; an unintended result that fights against the spirit of the Abbott decisions, which made direct connections between access to "effective education" and the constitutionally proscribed "thorough and efficient education." Abbott II, 119 N.J. at 392, 394. And it ignores the likelihood that these students will be taught by an ineffective teacher in the future, given the high number of ineffective and partially effective teachers in the District—which risk would go up exponentially in the event of a RIF such as the one modeled in the Equivalency Request. The trial court's decision also ignores the fact that, due to privacy laws, Plaintiffs cannot access information as to whether their classroom teachers for the 2016-17 school year were rated "ineffective" or were formerly part of the EWPS pool.

Consequently, given the ongoing harm to Plaintiffs and their practical inability to amend their Complaint, the Court should ensure that the merits of the case can be considered expeditiously. To do otherwise permits the harm to Plaintiffs to continue unabated until a RIF can no longer be avoided, at which point an additional--not the sole--harm would be inflicted.

Second, Plaintiffs have more than met the standard to plead their causes of action. "[T]he test for determining the adequacy of a pleading [is] whether a cause of action is 'suggested' by the facts." Printing Mart, 116 N.J. at 746 (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). Here, Plaintiffs have done far more in their Complaint than simply "suggest" a cause of action. Plaintiffs have properly and sufficiently alleged a direct, current, and ongoing injury: the presence of the EWPS pool, the expensive nature of that pool, the placement of ineffective teachers back into classrooms, and the refusal of Newark to engage in RIFs when faced with budget shortfalls in order to preserve effective teachers in the classroom. Pa 3, 17-19, 20 (Compl. ¶¶ 5-6, 79-90, 93-94, 97). Indeed, "the relevant inquiry is not whether plaintiff was a successful claimant pursuant to case law, but whether plaintiff's [] pleading, as construed by the court, 'suggested' a cognizable cause of action by its facts." J. Fletcher, 2009 WL 2365884, at \*4 (emphasis in original) (Pa 134). Here, Plaintiffs have alleged cognizable causes of action by demonstrating the continued presence of ineffective teachers in the classroom due to operation of the LIFO Statute. Pa 17-18 (Compl. ¶¶ 81, 83-88).

The New Jersey State Constitution mandates that children in the State receive a "thorough and efficient" public education

that will provide them with the opportunity to achieve, fulfill their role as citizens, and participate effectively in the work force. N.J. Const. art. VIII, § IV, para. 1; Pa 2 (Compl. ¶ 1). Under Abbott I, a successful Education Clause claim requires proof that "after comparing the education received by children in property-poor districts to that offered in property-rich districts, it appears that the disadvantaged children will not be able to compete in, and contribute to, the society entered by the relatively advantaged children." Abbott v. Burke (Abbott I), 100 N.J. 296, 296 (1985). Plaintiffs have done this. As alleged in the Complaint, Newark's neighbor Summit, which has a median household income that is more than three times higher than Newark's, has no ineffective teachers, and consequently no possibility of ineffective teachers being retained during a quality-blind RIF in place of effective teachers. Pa 12 (Compl. ¶ 49). A RIF in Newark would remove 300 effective teachers from the district and maintain a large majority of the district's ineffective teachers, which undeniably would leave students seriously worse off. Pa 16 (Compl. ¶¶ 73-75). This is especially true when the effect on Newark's students is compared to that experienced by their Summit counterparts who would continue having effective teachers after any RIF. Pa 12, 16 (Compl. ¶¶ 49, 74). The effects would be long-lasting for these Newark students, as studies have

repeatedly shown the impact of teacher effectiveness not only on scholastic achievement, but also on lifetime earning potential. Pa 12 (Compl. ¶¶ 51-52).

Moreover, beyond the comparison between Newark and a more affluent community, students in Newark are being denied their constitutional rights under the Education Clause by operation of the LIFO Statute, as alleged in the Complaint: According to the last published Staff Evaluation report, Newark has 94 ineffective and 314 partially effective teachers out of 2775. Pa 11 (Compl. ¶ 47). This means that many Newark students, the class of children represented by Plaintiffs, are undeniably being taught by ineffective and partially effective teachers. But Newark cannot do anything about this as part of addressing its budget constraints. Newark's Equivalency Request to address budget constraints by engaging in a RIF that would not result in the dismissal of effective teachers was ignored, so Newark cut other programming and diverted millions of dollars to avoid the more serious harm that would be realized by laying off its effective classroom teachers in a quality-blind LIFO Statute RIF. Pa 10, 19 (Compl. ¶¶ 43, 94). But Newark's ability to continue to cut programs is severely limited by continued budget stagnation and deficits, and the students continue to suffer the impact of ineffective teachers in the classroom and the continued cutting of educational programs. Pa 3 (Compl. ¶ 5).

CONCLUSION

Contrary to the trial court's decision, Plaintiffs' harm is not merely that some portion of them are being taught today by an ineffective teacher who is in the classroom because of the LIFO Statute. Plaintiffs' multiple harms also include the diversion of millions of dollars to pay ineffective teachers because the only other option is to engage in a disastrous RIF pursuant to the strictures of the LIFO Statute. Pa 3 (Compl. ¶ 5).

The Court should reverse the trial court's Order.

Dated: August 24, 2017

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