

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; F.D., a minor, through her guardian NOEMÍ VAZQUEZ; W.H., a minor, through his guardian FAREEAAH HARRIS; N.H., a minor, through his guardian FAREEAAH 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; and D.S., a minor, through his guardian WENDY SOTO,

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,

Respondents,

-and-

SUPREME COURT OF NEW JERSEY

DOCKET NO. 081599

SAT BELOW:

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-004546-16T4
Hon. Jose L. Fuentes, P.J.A.D.
Hon. Ellen L. Koblitz, J.A.D.
Hon. Thomas V. Manahan, J.A.D.

LAW DIVISION, MERCER COUNTRY
DOCKET NO. MER-L-2170-16
Hon. Mary C. Jacobson, A.J.S.C.

CIVIL ACTION

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, AFT NEW
JERSEY and THE NEWARK
TEACHERS UNION,

Intervenors/Respondents.

**REPLY IN SUPPORT OF PETITION FOR CERTIFICATION OF
PLAINTIFFS/PETITIONERS H.G., ET AL.**

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PRELIMINARY STATEMENT

Plaintiffs' Petition presents critical questions relating to the fundamental constitutional rights of children, and seeks certification to protect the right of students in SDA districts to seek judicial relief for the denial of educational opportunities guaranteed by this State's Thorough and Efficient Clause.¹ The opposition briefs filed by AFT, NJEA (together, with AFT, the "Unions"), and the State (collectively, with the Unions, "Respondents") attempt to distract from the significance of the rights at stake, but do not undercut the reasons articulated for granting the Petition.²

I. THE COURT SHOULD GRANT CERTIFICATION BECAUSE THERE ARE TWO OPEN AND CRITICAL QUESTIONS IMPORTANT TO PROTECTING STUDENTS' CONSTITUTIONAL RIGHTS SET FORTH IN THE PETITION

The Petition raises two issues, ripeness and standing, that are of "general public importance" and "similar to a question presented on another appeal to the Supreme Court." R. 2:12-4. The claims involve students' constitutional rights; therefore, the

¹ Abbreviations are the same as those used in the Opening Petition for Certification.

² Newark and Christopher Cerf filed a letter brief on September 4, 2018. As this Court explained in a September 6, 2018 letter, the opposition is not permitted under the New Jersey Rules of Court, and the Court will take no action with respect to the submission. Therefore, Plaintiffs will not address the rejected letter brief here, except to note that it is contrary to the District's prior Answer submitted to the lower courts and prior statements regarding LIFO.

Petition also presents questions where “the interest of justice” requires the Court’s involvement. Id.

Petitioners address Respondents’ oppositions in turn.

A. The State Respondents’ Contentions Should Not Result in Denial of the Petition

Until the underlying appeal, the State and Newark were both largely silent regarding the Unions’ motions to dismiss. Both answered the Complaint and, as noted in the Petition, Newark admitted how LIFO hampered its ability to comply with its constitutional obligations. Following a change in administration, the State belatedly submitted a motion to file a proposed petition letter to the Appellate Division two weeks before oral argument. For the first time, the State asserted that dismissal was warranted. The Appellate Division did not address the State’s application. Neither the State nor the District appeared at oral argument.

The State claims to not be “aware of any other similar question presented to this Court on appeal.” SNJb2. That is stunning. In 2016, the State filed an application in this Court to reopen the Abbott case to address, among others, issues relating to LIFO’s operation.³ The Court denied the State’s application without prejudice to its right to file an action for relief in the

³ The 2016 application was not the State’s first effort to bring LIFO issues to this Court’s attention. See, e.g., Abbott XXI, 206 N.J. 332, 367 (2011).

trial court because the issue had not previously been the subject of prior litigation in the Abbott cases. Plaintiffs used documents filed by the State in that application, including the Cerf Certification detailing the unjust effects of LIFO on Newark, to create their record in the lower courts on LIFO's unjust effects. Without addressing this evidence (presented to this Court by the State itself), the State incorrectly contends that issues arising from LIFO's operation set forth in the Petition "fail[] to raise any special reasons sufficient for this Court to grant review." SNJb2.

The State's change in position appears nakedly political, following a change in administration. The State now simply latches onto the arguments of the Unions, claiming that the Petition "should be denied as nothing in this matter rises to the level warranting certification by the Supreme Court." SNJb2. The Unions' arguments are addressed *infra*.

B. The Unions Do Not Set Forth a Reason to Deny Certification

The Unions grossly downplay the present harm befalling Newark students as a result of LIFO. Newark has avoided RIFs because of LIFO. Consequently, funds that should have been used for good purposes are being used to keep ineffective teachers on the payroll, paying them not to teach.

The Unions' position that the Petition does not address unsettled issues of general public importance simply ignores the

lifelong detrimental impact the presence of an ineffective teacher (even for just one year) can have on a student's future.

Without review from this Court, there will be uncertainty as to (i) when a constitutional claim pursuant to the Thorough and Efficient Clause is ripe, especially where the Complaint alleges ongoing harm due to the operation of a statute and the policies adopted to avoid its operation, and (ii) who has standing to bring any such constitutional claim. It is illogical that students in Newark, who cannot access individual teacher ratings, but are subject to the harms that result from LIFO, do not have standing to assert a constitutional claim when the State continually sought to bring the issue to the Court's attention before the recent change in administration.

With LIFO in effect, the substantive standard of education offered to students is in jeopardy, and policies that impact the quality of education (but do not implicate a statewide funding scheme) continue to the detriment of Newark's students.

The appellate decision raises questions about how these children, outside of challenging broad statewide funding schemes as in the Abbott cases, would be able to protect those rights. Indeed, it is impossible to reconcile (i) the lower court's approach to standing and ripeness to pursue this case and (ii) this Court's protection of that right for many years in the Abbott cases. These issues are critically important to protecting

students' rights to an education consistent with the requirements of the Thorough and Efficient Clause, especially in light of this Court's continued efforts to ensure that the education afforded to children in SDA districts is defined by comparison to their suburban counterparts.

1. Ripeness

In almost 40 pages combined, the Unions take aim at the Petition's arguments regarding ripeness on the basis that (i) a RIF has not yet occurred and (ii) the Complaint does not intimately tie the EWPS pool's diversion of the District's already limited resources to specific educational opportunities of which the students are deprived, because millions of dollars are spent paying teachers not to teach instead. See AFTb9; NJEAb12. AFT goes as far as describing Plaintiffs' request that the Court review issues critical to the constitutional rights of schoolchildren as "ask[ing] this Court to grant certification to review comparatively small expenditures by a school district," AFTb13, and to "enmesh[] itself in the minutia of school district budgets." AFTb3. That is far from what Plaintiffs seek here.

As established in the Petition, the Appellate Division's decision is contrary to the strong mandate this Court has put forth in the Abbott cases to protect educational rights of students in SDA districts, and the broad nature of the types of harm that might give rise to such claims. As this Court stated in Abbott II, "the

education provided depends to a significant extent on the money spent for it, and on what that money can buy -- in quality and quantity -- and the ability to innovate." 119 N.J. 287, 319 (1990).

Plaintiffs seek this Court's review because the question of when claims brought under the Thorough and Efficient Clause are ripe remains open based on the Appellate Division's decision. Plaintiffs seek clarity from this Court on a question of ripeness that would address a variety of educational contexts, not just the circumstances Plaintiffs face in this action.

The Appellate Division's decision here is contrary to the rationale of the Abbott decisions and the Thorough and Efficient Clause. For these reasons, review is required by this Court.

2. Standing

The Unions argue that there was no reason for the Appellate Division to address standing once it had made its decision that the case was not ripe, and this issue does not merit review by this Court. See AFTb15; NJEAb14.

In discussing standing, NJEA cites In re Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180 (App. Div. 1988). The case is inapposite. Plaintiff attorneys contested a products liability law as unconstitutional. See id. at 187. The court issued a limited holding, recognizing 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. Here, Plaintiffs are not economic bystanders in their education and their harm is not speculative. As alleged in the Complaint, Plaintiffs have suffered, and continue to suffer, concrete, ongoing injury, and have a stake in the outcome of this case sufficient to have standing.

NJEA further relies on Stubaus v. Whitman, 339 N.J. Super. 38 (App. Div. 2001) where plaintiffs were (i) taxpayers and (ii) school districts. Id. at 44. The taxpayer plaintiffs alleged that funding caused disparate tax burdens constituting constitutional violations; school district plaintiffs contended that the law being challenged resulted in different property tax burdens for each school district. Id. This Court affirmed dismissal with respect to the school district plaintiffs on grounds that they lacked standing, noting that the real party in interest was the taxpayers, not the school districts. Id. at 50. However, here, Plaintiffs are more akin to the taxpayer plaintiffs in Stubhaus. Plaintiffs alleged constitutional violations in the Complaint because they suffered, and continue to suffer, concrete, ongoing injury. They have a stake, as the party in interest, in the outcome of this case.

Additionally, NJEA relies on Warth v. Seldin, 422 U.S. 490 (1975), yet ignores that, in Warth, the Supreme Court of the United States refers to limitations, such as that requiring a plaintiff

to assert his or her own legal rights and interests in order to have standing, as opposed to resting a claim on the legal rights or interests of third parties. Id. at 498-99. Here, Plaintiffs assert their own legal rights and interests as students in Newark, which has admitted the presence of ineffective teachers in classrooms and harmful workarounds.

In the same vein, the Unions emphasize that Plaintiffs have not sought to amend to cure alleged pleading defects despite the trial court dismissing the case without prejudice. What Respondents fail to grasp, however, is that, when the Appellate Division declined to address standing, it did not address or clarify the higher pleading standard set by the trial court.

The trial court's ruling, and the Unions' arguments, imply 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 LIFO, they cannot bring a claim. HG57a. Based on the trial court's ruling, if Plaintiffs were to replead, they would face a higher standard for pleading a complaint than required by precedent. Further, under the trial court's reasoning, any student who has been taught by an ineffective teacher in the past would not have standing to bring a claim. This would undoubtedly undermine the Abbott decisions, which joined access to "effective education" and the constitutionally prescribed "thorough and efficient education."

Abbott II, 119 N.J. at 392, 394. This reasoning also fails to account for the likelihood that students will be taught by an ineffective teacher in the future. Most egregiously, the trial court's decision ignores the fact that, due to privacy laws, Plaintiffs cannot access information as to whether their classroom teachers are rated "ineffective" or were formerly part of the EWPS pool. Without reaching discovery, Plaintiffs would never have the opportunity to seek the information the trial court claims is necessary to survive a motion to dismiss.

Under this unduly restrictive standard, students, like Plaintiffs, may never have standing to bring constitutional claims pursuant to the Thorough and Efficient Clause if they are unable to show a tie between a specific harm currently suffered in the classroom and a district policy/statute solely responsible for that harm.

Constitutional rights are of such great significance that a plaintiff has standing to protect them even when they are not directly impaired. Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 392-93 (1988). Plaintiffs seek only to protect their constitutional right to a "thorough and efficient" education here. There should be no question -- especially under New Jersey's liberal standing rules, and given this Court's broad acceptance in Abbott of claims by students from Newark seeking to improve their education -- that children who attend school in a district that

has admitted to failing to meet its own constitutional obligations have standing to bring this constitutional challenge.

It is imperative that this Court grant review to clarify the requirements for a student in the classroom to have standing in these types of cases.

CONCLUSION

Respondents' arguments fail to compromise the validity and force of the Petition for Certification. Petitioners therefore respectfully request that this Court grant this Petition.

Dated: September 18, 2018

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CERTIFICATION

I hereby certify that this Petition for Certification presents a substantial question and is filed in good faith and not for purposes of delay.

Dated: September 18, 2018

Kelly Samuels Thomas