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November 15, 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
Motion to Intervene**

Dear Sir/Madam:

Please find enclosed an original and two copies of Notice of Motion to Intervene on Short Notice; Certificate of Donna Chiera in Support of Motion to Intervene; Movant-Intervenors' Brief in Support of Motion to Intervene; and an Order Granting Intervention.

A Certificate of Service is also enclosed. If there is a filing fee, kindly charge our Superior Court account 140552.

Sincerely,


Steven P. Weissman, Esq.

- 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, Steven P. Weissman, hereby certify that:

On November 15, 2016 an original and two copies of the following documents were hand-delivered to the Clerk, Superior Court of New Jersey, Mercer County Courthouse, 175 S. Broad Street, Trenton, New Jersey 08650:

1. Movant-Intervenors' Brief in Support of Motion to Intervene;
2. Notice of Motion to Intervene on Short Notice;
3. Certificate of Donna Chiera in Support of Motion to Intervene;
4. and an Order Granting Intervention.

On November 15, 2016 two copies of the above documents were hand-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 November 15, 2016 two copies of the above documents were sent via overnight mail and electronic copy to the following:

William H. Trousdale, Esq.
Wachenfeld & Barry LLP
3 Becker Farm Road
Suite 404
Roseland, New Jersey 07068

Christopher S. Porrino
Attorney General of New Jersey
Hughes Justice Complex
25 West Market Street
Trenton, New Jersey 08625

Charlotte Hitchcock, Chief General Counsel
Newark Public Schools
2 Cedar Street, Rm 1003
Newark, New Jersey 07102

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.


Steven P. Weissman

Dated: November 15, 2016

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 NOEMI VAZQUEZ; M.P., a minor, through her guardian NOEMI VAZQUEZ; F.D., a minor, through her guardian NOEMI VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through her guardian FAREEAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., a minor, through his guardian IRIS SMITH; M.R., a minor, through her guardian WENDY SOTO; D.S.; a minor, through his guardian WENDY SOTO;

Plaintiffs,

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 School District;

Defendants,

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

Applicants for Intervention.

SUPERIOR COURT OF THE STATE OF
NEW JERSEY
LAW DIVISION: MERCER COUNTY

Dkt. No. MER-L-2170-16

CIVIL ACTION

NOTICE OF MOTION
TO INTERVENE
ON SHORT NOTICE

TO: Clerk, Superior Court of New Jersey
Mercer County Courthouse
175 S. Broad St.
Trenton, NJ 08650

William H. Trousdale, Esq.
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Charlotte Hitchcock, Chief General Counsel
Newark Public Schools
2 Cedar Street, Rm 1003
Newark, New Jersey 07102
Attorney for Defendants Cerf and Newark Public Schools

PLEASE TAKE NOTICE that on short notice, as soon as counsel can be heard, the undersigned attorneys for movant-intervenors American Federation of Teachers, AFL-CIO, AFT New Jersey, and Newark Teachers Union (collectively the "Applicants"), will move before the Hon. Mary C. Jacobson, A.J.S.C., at the Mercer County Criminal Courthouse for an Order permitting Applicants to intervene in this lawsuit as party defendants pursuant to R. 4:33-1 and R. 4:33-2.

As is more fully set forth in the accompanying brief and certification in support of this motion, intervention should be granted based on the following:

1. This action was brought by Plaintiffs seeking a declaration that N.J.S.A. 18A:28-10 and 28-12 are unconstitutional and an injunction against the enforcement of those statutes.

2. As is more fully discussed in Applicants' Brief in Support of Intervention, Applicants are labor organizations that represent teaching staff members in the Newark, Perth Amboy and other School Districts whose members would be directly impacted by an order declaring N.J.S.A. 18A:28-10 and 28-12 unconstitutional.

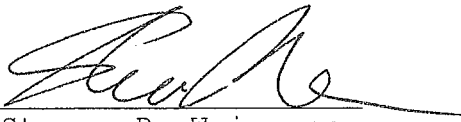
3. Applicants' interest in this matter is such that the disposition of this matter may impair their ability to protect that interest. Moreover, the named Defendants will not adequately represent Applicants' interest because they support the position of Plaintiffs in this litigation.

4. This motion is timely as it was filed within 15 days of the filing of Plaintiffs' Verified Complaint.

PLEASE TAKE FURTHER NOTICE that Applicants are not filing a pleading at this time, but will file papers as directed by the Court if intervention is granted. A form of Order is also submitted.

PLEASE TAKE FURTHER NOTICE that pursuant to R. 1:6-2(c), moving Applicants for Intervention request oral argument if opposition to this motion is filed.

WEISSMAN & MINTZ LLC
Attorneys for
Movant-Intervenors

By: 
Steven P. Weissman

Dated: November 15, 2016

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 NOEMI VAZQUEZ; M.P., a minor, through her guardian NOEMI VAZQUEZ; F.D., a minor, through her guardian NOEMI VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through her guardian FAREEAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., a minor, through his guardian IRIS SMITH; M.R., a minor, through her guardian WENDY SOTO; D.S.; a minor, through his guardian WENDY SOTO;

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Defendants,

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

Applicants for Intervention.

SUPERIOR COURT OF THE STATE OF
NEW JERSEY
LAW DIVISION: MERCER COUNTY

Dkt. No. MER-L-2170-16

CIVIL ACTION

CERTIFICATION BY DONNA CHIERA
IN SUPPORT OF MOTION TO
INTERVENE

I, Donna Chiera, hereby certify:

1. I am the President of the American Federation of Teachers New Jersey, AFL-CIO ("AFTNJ") and I chair the National Program and Policy Council of the American Federation of Teachers, AFL-CIO ("AFT"). I make this certification in support of the motion by the AFT, AFTNJ and Newark Teachers Union, Local 481, AFT, AFL-CIO ("NTU") to intervene in the above-captioned matter.

2. The AFT is a national union representing approximately 1.6 million teachers and educational employees throughout the Country.

3. AFTNJ is a statewide umbrella organization of affiliated AFT local unions. The affiliated locals of AFTNJ represent approximately 30,000 members, including pre-K to 12 teachers, faculty at Rutgers University, State Colleges and Universities, and County/Community colleges, as well as other educational employees employed by New Jersey school districts, colleges and universities.

4. The NTU is a chartered local of the AFT and an affiliated local of AFTNJ. NTU represents approximately 3,600 teachers and educational employees employed by the Newark School District.

5. The Perth Amboy Federation, Local 857, AFT, AFL-CIO (PAF) is also a chartered local of the AFT and an affiliated

local of the AFTNJ. The PAF represents approximately 1,400 teachers and educational employees employed by the Perth Amboy Board of Education.

6. Other chartered locals of AFT and affiliated locals of AFTNJ that represent K-12 teachers in New Jersey include, the North Bergen Federation of Teachers, the Garfield Federation of Teachers, the Long Branch Federation of Teachers, The Monroe Federation of Teachers and the Guttenberg Federation of Teachers. Collectively these five AFT locals represent approximately 1,500 teachers and 700 educational employees.

7. All K-12 teachers represented by affiliated locals of the AFTNJ are covered by N.J.S.A. 18A:28-10 and 28-12 - the two education statutes that Plaintiffs in the above-captioned matter ask the Court to declare unconstitutional.

8. The Newark School District is a State-operated district. The State retains control over Instruction, Program and Governance of the School District.

9. Christopher Cerf is the Superintendent of the Newark Public Schools and is named as a nominal defendant in the above matter. Attached is an article from NJ Spotlight dated November 3, 2016, in which Cerf comments on the education layoff statutes that are the subject of this litigation. (Schedule A attached). Cerf is quoted as characterizing the layoff statutes at issue as "morally unjustified."

I certify that the above statements made by me are true. I am aware that if any of the above statements made by me are willfully false I am subject to punishment.

Donna M Chiera
Donna Chiera

Dated: November 14, 2016

CERTIFICATION OF SCANNED SIGNATURE

I certify that the annexed signature page of Donna Chiera is a scanned copy of her original signature. She has acknowledged the genuineness of her signature to me. I further certify that the annexed document with an original signature affixed will be filed if requested by the Court.

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 willfully false, I am subject to punishment.


Steven P. Weissman, Esq.

Dated: November 15, 2016

SCHEDULE A



NEWARK SCHOOL CHIEF URGES END TO LIFO

MEIR RINDE | NOVEMBER 3, 2016

Lawsuit argues layoffs should be based on merit, not seniority, while union says that would leave schools vulnerable to politics



Chris Cerf is the superintendent of the Newark school system.

The chief of New Jersey's largest school district yesterday firmly offered support for the arguments behind a new lawsuit against the state, which challenges the law protecting senior teachers from layoffs.

Chris Cerf, who was Gov. Chris Christie's state education commissioner before taking the job of Newark schools superintendent, said the state's "last in, first out" or LIFO seniority rules are a "serious, serious problem for us" as the cash-strapped district struggles to cover the cost of ineffective teachers who have been rejected from teaching positions but remain on the payroll.

Calling the LIFO law "morally unjustified," Cerf listed it as one of the continuing challenges the Newark school district faces, along with an expired teacher contract, insufficient funding, and attracting and retaining talented teachers. He made the remarks while updating the state Board of Education on progress in the state-controlled district.

Cerf and Christie have criticized LIFO for years, with Christie saying he regretted it was not changed when a new tenure law passed in 2012. They say the current rule, which requires districts that are laying off tenured teachers to do so in order of seniority, is harmful to students because it forces districts to keep longer-serving but ineffective teachers while newer, better ones are let go.

"This is one where I am going to get on my soapbox, because there is no moral justification for this," Cerf said. "This is an act of political cowardice and giving in to interest groups. It's no more complicated than that."

Cerf has said he **cannot comment** on the litigation specifically. A Department of Education spokesman also declined to comment.

LIFO was targeted this week by the Partnership for Educational Justice, a New York educational reform group founded by former NBC anchorwoman Campbell Brown. Acting on behalf of several Newark parents, the group is challenging the constitutionality of LIFO, which it calls the "quality-blind layoff statute." PEJ has filed similar complaints in New York and Minnesota.

The suit contends that leaving ineffective teachers in low-income districts like Newark while laying off effective teachers deprives students of the "thorough and efficient" education required by New Jersey's constitution. It demands permanent suspension of the rule in those districts and a declaration that LIFO is unconstitutional.

The New Jersey Education Association criticized Brown's organization as an "out-of-state special interest group" that is misleading parents "to advance their harmful political agenda."

"New Jersey's seniority statute ... provides an important protection to students and communities by keeping politics, and politicians, out of the decision-making process when layoffs are imposed on our public schools," NJEA President Wendell Steinhauer said in a statement.

Steinhauer said the state's tenure law already has a process for removing ineffective teachers. That law prevents political pressure being brought to bear on administrators to fire teachers without giving a reason, particularly good veteran teachers who earn higher salaries, he said. Steinhauer also said districts should help teachers improve rather than immediately move to fire them.

He also criticized the suit for attempting to "scapegoat teachers for the state's failure to provide the resources and support needed in so many districts across the state." Brown should instead prove her concern for students by "fighting for the funding that politicians like Chris Christie have withheld from our most vulnerable districts," Steinhauer said.

The Partnership for Educational Justice in fact does argue in the suit for adequate funding of the Newark schools, which it says face "a crippling budget deficit." The suit says the district would suffer if the state Supreme Court agreed to Christie's recent request to modify its past Abbott decisions and sharply cut state funding to low-income districts.

However, rather than call for greater state funding, the suit says the district should be allowed to save money by laying off ineffective teachers, some of whom remain on the payroll even though they are not assigned to a classroom.

Cerf echoed those arguments about the cost of LIFO yesterday. When he became Newark's superintendent in July 2015, the district was spending \$25 million to \$30 million a year to pay tenured teachers who had been rejected by schools to which they had applied but could not be let go.

To avoid a budget deficit the district forced some of the schools to accept the teachers, which helped cut the spending on them to \$9 million currently, Cerf said. He said the \$9 million would be better spent on technology, books, new hires, or raises, and called on lawmakers to eliminate LIFO.

"It is nothing short of shameful that we sit here and talk about putting the interest of children first, and we can't get the Legislature to even consider addressing something that so obviously would make a difference," he said.

Cerf also discussed improvements the Newark schools have seen in recent years and barriers to further progress.

Last year's graduation rate reached 73 percent, up from about 59 percent in 2011, though many graduates are still not prepared for college or careers, he said. The number of regular public school students achieving passing scores on Partnership for Assessment of Readiness for College and Careers (PARCC) assessments rose, though the pass rates remain very low. In language arts the pass rate increased 6 percent to 28 percent, compared to 51 percent statewide. In math, the pass rate rose 2.5 percent to 20 percent, compared to 40 percent across New Jersey.

He noted that Newark's charter schools had much higher pass rates that nearly reached the state figures.

One highlight was the very good performance of students at Newark's public magnet schools on the high school PARCC exams. For example, 55 percent of the magnet students met or exceeded expectations on the language arts exam, compared to 45 percent statewide, 37 percent at Newark charters, and 27 percent at all Newark public high schools combined.

Cerf said the plan announced this year to remove Newark schools from state control continues to move forward, with another evaluation of the district scheduled for next spring. He said he

remains "absolutely committed" to restoring local autonomy after more than 20 years of state control.

"Ultimately the goal is not just to achieve transition to local control but to pass on a billion-dollar enterprise that has its head straight around its central mission of achieving educational success for all children," he said, "and is solvent and is the beneficiary of a succession strategy that continues to sustain and abet the good work of the last several years, rather than it reverting to some practices that were not in the best interests of children."

But he said the continued flat funding of aid for the state-supported district is a growing obstacle to improving the quality of education in the city.

"If the budget remains flat and our enrollment continues to increase, that means our per-pupil spending comes down," Cerf said. "And that continues to put tremendous pressure on our ability to pay teachers what they deserve and support our educational agenda."

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Defendants,

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Applicants for
Intervention.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MERCER COUNTY

DOCKET NO. MER-L-2170-16

Civil Action

**MOVANT-INTERVENORS' BRIEF
IN SUPPORT OF MOTION TO INTERVENE**

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PRELIMINARY STATEMENT

Applicants American Federation of Teachers, AFL-CIO ("AFT"), AFT New Jersey, AFT, AFL-CIO ("AFTNJ"), and the Newark Teachers Union, AFL-CIO ("NTU") (collectively, "Applicants") seek to intervene in the complaint filed by Plaintiffs in this matter. Plaintiffs ask this Court to declare that N.J.S.A. 18A:28-10 and N.J.S.A. 18A:28-12 violate the Education Clause and Article I, paragraph 1 of the New Jersey Constitution, the "fundamental rights protected by" the New Jersey Constitution, and the New Jersey Civil Rights Act, "as applied to Newark and similarly situated school districts throughout the State." Complaint, Prayer for Relief, at p. 28. Plaintiffs also ask this court to permanently enjoin Defendants from enforcing N.J.S.A. 18A:28-10 and N.J.S.A. 18A:28-12 or "any law or policy substantially similar to this statute." Id. As we explain at greater length below, the AFT, AFTNJ and NTU easily satisfy the standards to intervene as of right, as well as the standards for permissive intervention.

It is important to initially note that the named Defendants do not stand in an adversarial relationship to Plaintiffs. Indeed, each of the Defendants has proclaimed, in various forums, their support for the eradication of rights conferred on teaching staff members by the education laws at issue. On or

about September 15, 2016, the Attorney General filed a motion with the New Jersey Supreme Court seeking modification of the orders in Abbott XX and Abbott XXI (199 N.J. 140 (2009) and 206 N.J. 332 (2011) respectively) to grant Defendant Harrington, in her capacity as Commissioner of the Department of Education, the authority to waive the statutory requirements under the layoff provisions of Title 18A. (Complaint at ¶91).

Moreover, Defendant Cerf, in his current position as Superintendent of the Newark School District, has publicly supported the position of Plaintiffs in this lawsuit, calling the challenged statutes "morally unjustified." (Chiera Cert. ¶9). The instant action piggybacks on the recent motion filed by the State to modify the orders in Abbott XX and XXI, as well as on the Equivalency Application submitted in February 2014 by Cami Anderson, then the Superintendent of the Newark Public Schools to Cerf, in his capacity as Commissioner of Education. (Complaint at ¶73). The Equivalency Application seeks relief from adherence to the seniority requirements of N.J.S.A. 18A:28-10 and 28-12. Both the State's motion to the Supreme Court and the Equivalency Application are pending, and in both matters the named Defendants are aggressively advocating positions that are virtually identical to those of the Plaintiffs in this lawsuit. Under the circumstances, it is unsurprising that Plaintiffs did

not consent to the request by the New Jersey Education Association to intervene.

The adversarial system is designed to provide a tribunal with the benefit of countervailing arguments to assist the court in deciding complex issues of law and fact. Here, it is painfully obvious that the named Plaintiffs and Defendants are not adverse - they both seek to eviscerate laws that guard against layoffs based on patronage, favoritism, race, sex or other discriminatory considerations or political retribution. In fact, the current parties to this litigation agree that education layoff statutes violate the constitutional mandate of a thorough and efficient education. To assure that this Court has the benefit of the compelling arguments in support of the constitutionality of the challenged statutes the Applicant Unions should be granted the right to intervene.

STATEMENT OF FACTS

The AFT is a National Union representing approximately 1.6 million teachers and educational employees throughout the Country. (Chiara Cert. ¶2). AFTNJ is a statewide umbrella organization that advocates on behalf of teachers and educational employees in New Jersey. (Id. ¶3). AFTNJ is an affiliated body of the AFT. The NTU is a chartered local of the AFT and an affiliate of AFTNJ. (Id. at ¶4). NTU is also the collective negotiations representative for approximately 3,600

teachers and educational employees employed by the Newark Public School District. (Id.) Also chartered by the AFT and affiliated with AFTNJ is the Perth Amboy Federation, Local 857, AFT, AFL-CIO ("PAF") - the collective negotiations representative for approximately 1,400 teachers and educational employees employed by the Perth Amboy Board of Education. (Id. ¶5).

Other chartered locals of AFT and affiliated locals of AFTNJ representing K-12 teachers in New Jersey include, the North Bergen Federation of Teachers, the Garfield Federation of Teachers, the Long Branch Federation of Teachers, The Monroe Federation of Teachers and the Guttenberg Federation of Teachers. Collectively these five AFT locals represent approximately 1,500 teachers and 700 educational employees. (Id. ¶6).

The teachers represented by the NTU, PAF and other AFT locals in New Jersey will be directly impacted if N.J.S.A. 18A:28-10 and 28-12 are declared unconstitutional - statutes mandating that layoffs be conducted based on seniority and not by reason of "residence, age, sex, marriage, race, religion or political affiliation" and that laid off teachers be placed on a reemployment list and recalled in order of seniority to fill vacancies for which they are qualified.

Further, in California and New York, where similar actions were filed challenging education laws that provide for tenure and seniority-based layoffs, courts granted intervenor status to unions representing teachers. In New York, locals and affiliates of the AFT, and in California, affiliates of the National Education Association, were permitted to intervene as defendants. See, Vergara v. California, 16 Cal. Daily Op. Service 9266, ___ Cal. Rptr. 3d ___ (Ct. of Appeal, 2nd District 2016); Dauids v. New York, Index No. 101105/14, Supreme Court of New York, County of Richmond (2015).

ARGUMENT

AFT, AFTNJ and NTU satisfy the standard for intervention as of right. They also meet the less stringent standard for permissive intervention.

I. Applicants should be permitted to Intervene as of Right

Rule 4:33-1 controls intervention as of right. Where the four factors established by the rule are met by the moving party, the court is required to grant the motion to intervene.

The applicant must (1) claim "an interest relating to the property or transaction which is the subject of the transaction," (2) show he is "so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest," (3) demonstrate that the "applicant's interest" is not "adequately represented by existing parties," and (4) make a "timely" application to intervene.

[Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 568 (App. Div. 1998) (quoting Chesterbrooke Ltd. Partnership v. Planning Bd., 237 N.J. Super. 118, 124 (App. Div.), certif. denied, 118 N.J. 234 (1989)).]

This rule is generally construed liberally, and the test is "whether the granting of the motion will unduly delay or prejudice the rights of the original parties." Atlantic Employers Ins. Co. v. Tots & Toddlers Pre-School Day Care Ctr., 239 N.J. Super. 276, 280 (App. Div.), certif. denied, 122 N.J. 147 (1990). Additionally, "[a]s the rule is not discretionary, a court must approve an application for intervention as of right if the four criteria are satisfied." Meehan, 317 N.J. Super. at 568. Applicants meet this standard.

A. Applicants' Interests Relate to the Subject of the Action

New Jersey courts "take a practical approach in determining whether a moving party has a cognizable interest in litigation that it is entitled to protect by intervention." Allstate New Jersey Ins. Co. v. Neurology Pain Associates, 418 N.J. Super. 246, 254-55 (App. Div. 2011); American Civil Liberties Union of N.J. v. County of Hudson, 352 N.J. Super. 44, 67-69 (App. Div.), certif. denied, 174 N.J. 190 (2002); Warner Co. v. Sutton, 270 N.J. Super. 658 (App. Div. 1994); Southern Burlington Cty. N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983).

Our courts have also recognized that R. 4:33-1 is textually similar to Fed. R. Civ. P. 24(a), the "interest" requirement of which has been interpreted as "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." See Allstate New Jersey Ins. Co. 418 N.J. Super. at 255 (quoting Nuesse v. Camp., 385 F.2d 694, 700 (D.C. Cir. 1967)); Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1247 (6th Cir. 1997); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995). See also, Californians for Safe and Competitive Dump Truck Transportation v. Mendonca ("Mendonca"), 152 F.3d 1184 (9th Cir. 1998), where a union, the International Brotherhood of Teamsters ("IBT"), was granted the right to intervene as a defendant in a lawsuit challenging the State's enforcement of California's Prevailing Wage Law. Since the IBT's members had a significant interest in receiving the prevailing wage for their services, as opposed to a substandard wage, the union satisfied the "interest" prong of the intervention test. Id. at 1190.

Here too, the Union Applicants have a significant interest in defending the constitutionality of statutes that guard against layoffs for various invidious reasons and ensure that experienced senior teachers remain employed.

B. The Instant Action Threatens to Impair Applicants' Ability to Protect their Interests

The requirement to show that an intervenor's interest would be impaired is simply that their ability to protect their interest "may as a practical matter," rather than as a certainty, be impaired or impeded. R. 4:33-1. In interpreting the analogous provision of the federal rule, courts have held that "[t]o satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." Utah Assoc. of Counties v. Clinton, 255 F.3d 1246, 1253 (10 Cir. 2001) (permitting intervention as of right to environmental interest groups challenging use of public lands); Mendonca, 152 F.3d at 1190 (if Plaintiffs prevailed the right of IBT members to receive a prevailing wage would have been impaired).

Here, a determination that layoff provisions of Title 18A are unconstitutional will impair the rights of teaching staff who are represented by the Applicant Intervenors.

C. The Defendants' Representation of Applicants' Interests Will Not Be Adequate

Consistent with the general policy favoring intervention, courts have characterized the burden to demonstrate inadequate representation as "minimal." See Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972); Armada

Broadcasting Inc. v. Stirn, 183 Wis.2d 463, 476 (1994). In Am. Civil Liberties Union of New Jersey, Inc. v. Cnty. of Hudson, 352 N.J. Super. 44, 69 (App. Div. 2002), the court concluded that the United States had demonstrated that the defendant counties could not adequately protect the federal government's interest in litigation seeking, inter alia, INS detainee records.

Ordinarily it falls to the Attorney General to defend the constitutionality of State statutes. However, in rare cases the Attorney General is ill-equipped to carry out this critical constitutional function. This is such a case. The Attorney General cannot, on the one hand, be before the Supreme Court arguing that the layoff provisions of Title 18A violate the Education Clause of the New Jersey Constitution, and on the other hand, defend the constitutionality of those same statutes before this Court. The Attorney General's position is a matter of public record and he is incapable of defending against the complaint filed by Plaintiffs or of adequately representing the interests of the unions that seek to intervene. While the Attorney General's motion before the Supreme Court may not seek a permanent injunction against the enforcement of the Title 18A layoff provisions, as does Plaintiffs' complaint, the positions of the Plaintiffs and the State in the Abbott XX and XXI proceedings are closely aligned.

Similarly, the nominal Defendants, the Newark Public School District and Superintendent Cerf, are unable to represent the interests of the Applicant Intervenors. First, the School District and the Superintendent have an application pending before the Commissioner of Education that effectively mirrors the relief sought by Plaintiffs in the instant matter. Second, the School District remains a State-operated district with control over personnel being restored to the district based on a transition plan approved by the State Board of Education. Instruction, Program and Governance remain under State control; Operations and Fiscal Management are under local control. The School District is dependent on the State Board of Education for the restoration of complete control over the District's operation. Even if the School District and its Superintendent did not go on record in favor of gutting the layoff provisions of Title 18A, the District is beholden to the State for the restoration of its autonomy.

Third, last week, in the wake of the filing of the instant complaint, while declining to specifically comment on the litigation, Defendant Cerf unabashedly criticized the layoff provisions of Title 18A as a "serious, serious problem for us" and as "morally unjustified." (Chiera Cert. ¶9). Finally, in support of its motion to modify the Supreme Court's orders in Abbott XX and XXI, the State submitted a certification for Cerf.

(A copy of the Cerf Certification is attached to this brief). In his certification, Cerf asserts that "[t]he consequences of a RIF that only uses years of service as a determinant of who stays are counter to the core mission of providing a Thorough and Efficient education to our children." (Cerf Cert. ¶8).

In light of the fact that the positions of the Plaintiffs and the Defendants are so closely aligned with respect to the gravamen of the instant complaint, the Applicant Unions should be granted intervenor status to protect the interests of their members and to afford the Court the benefit of a true adversarial process - one in which at least one party is prepared to vigorously defend the constitutionality of the challenged statutes.

D. Applicants' Motion is Timely

In determining timeliness for intervention purposes, courts consider factors including the "amount of time that may have elapsed since the institution of the action by the moving party," whether other parties or the court would suffer prejudice, and "at what stage the motion to intervene is made." Clarke v. Brown, 101 N.J. Super. 404, 410-11 (Law Div. 1968). In Cnty. of Hudson, supra, the court noted that the United States had timely filed its application to intervene more than a month after the plaintiffs' complaint had been filed and only one day after the defendants' answers.

Here, Applicants have filed the instant motion on short notice within 15 days of the filing of Plaintiffs' complaint. Further, there is no cognizable prejudice to either party by Applicants' intervention.

In sum, Applicants satisfy each of the four factors to intervene as of right, and their motion should be granted.

II. Applicants Also Meet the Standard for Permissive Intervention

Applicants also meet the standards for permissible intervention under R. 4:33-2. "Where intervention of right is not allowed, one may obtain permissive intervention under R. 4:33-2," Atlantic Employers, supra, 239 N.J. Super., at 280, where the "claim or defense and the main action have a question of law or fact in common." R. 4:33-2. Like R. 4:33-1, the permissive intervention rule "is to be liberally construed by trial courts," in whose discretion the decision to grant intervention is reposed. Zirger v. Gen. Accident Ins. Co., 144 N.J. 327, 341 (1996).

The factors to be considered by the trial court, which should ordinarily be liberal in its grant of the motion, are the promptness of the application, whether or not the granting thereof will result in further undue delay, whether or not the granting thereof will eliminate the probability of subsequent litigation, and the extent to which the grant thereof may further complicate litigation which is already complex.


[Pressler and Verniero, Current N.J. Court Rules, comment on R. 4:33-2 (2015) (citation omitted).]

Here, every factor weighs in favor of this Court permitting Applicants' intervention. As discussed above, there can be no question that Applicants' application is prompt. There would be no delay to the nascent proceedings, let alone an undue delay. Finally, there is no apparent risk that Applicants' intervention would in any way complicate the litigation. Rather, intervention will ensure the Court has the benefit of hearing from parties that have an actual interest in defending the constitutionality of the challenged statutory provisions.

CONCLUSION

For the foregoing reasons, the AFT, AFTNJ and NTU should be permitted to intervene as parties in the instant matter.

Respectfully submitted,



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Dated: November 15, 2016

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RAYMOND ARTHUR ABBOTT, et al.,

Plaintiffs,

v.

FRED G. BURKE, et al.,

Defendants.

SUPREME COURT OF NEW JERSEY
DOCKET NO.

CIVIL ACTION

CERTIFICATION OF
SUPERINTENDENT CHRISTOPHER
CERF

I, Christopher Cerf, of full age, hereby certify that:

1. I am the State District Superintendent for the Newark Public Schools ("NPS") in the State of New Jersey, and have held this position since July 2015.

2. Prior to becoming Superintendent in Newark, I was the New Jersey Commissioner of Education, from 2011 to 2014. Prior to that, from 2004 to 2009, I served as deputy New York City schools chancellor in charge of human capital, strategy, and innovation.

3. NPS is the largest and one of the oldest school districts in New Jersey, consisting of 66 schools and serving approximately 35,000 children from pre-K through grade 12. The district's students are diverse, including 16,467 African-American, 272 Asian, 2,758 Caucasian, 15,673 Hispanic, and 158 Native American or Pacific Islander students. We serve almost 3,500 English Language Learner students, over 6100 students with disabilities, and more than 26,236 students who receive free or reduced lunch.

4. Historically, NPS students have underperformed academically compared to their peers in suburban districts. This past year, students gained 6 percentage points in English Language Arts (ELA) and almost 3 percentage points in mathematics on the state assessment. However, in absolute terms, NPS significantly lags behind the state average. The same is true with respect to graduation rates. Over the past five years, the district has increased its graduation rate from 61% to 70%. Despite this progress, the district lags behind the state average in this metric as well.

5. The financial constraints under which the district operates are severe and are projected only to get worse. The district has faced significant budget cuts in recent years, closing almost \$150 million in projected gaps over the past two years alone. The state is debating a change in our funding

formula that could result in further cuts to our funding. However, whether or not these additional cuts occur, the district is faced with another \$60 million gap for the 2017-18 school years.

6. The largest component of any district's budget is its personnel. Almost 90% of any school's budget in Newark is tied up in salaries. Since 2012, we have gradually reduced the size of our teaching force from 5200 to 2700 classroom teachers.

7. If we are forced to further reduce the size of our teaching population due to budget cuts, under the "last in first out" ("LIFO") statute, N.J.S.A. 18A:28-10, the district must reduce its teaching staff through a reduction in force (RIF) that is indifferent to the effectiveness of a teacher. Specifically, a RIF must be conducted based only on seniority, which is defined by the regulations as based on tenured status and years of service in the district. Teachers with more years of experience have rights to their job over less senior teachers, regardless of their effectiveness.

8. The consequences of a RIF that only uses years of service as a determinant of who stays are counter to the core mission of providing a Thorough and Efficient education to our children. The results of a RIF that is blind to the effectiveness of our educators would be profound.

9. The effectiveness of a teacher is the single greatest in-school determinant of a child's academic success. The students of Newark need truly the best teachers to help them on their road to success in college and career. The majority of NPS teachers are effective. In the 2015/2016 school year, 14% of NPS teachers were rated as highly effective and 75% were rated as effective. 89%

10. On its face, a law that says you must preserve the job of a less effective teacher and fire an indisputably more effective teacher simply because of their years of service flies in the face of good public policy and cannot be reconciled with the goal that we put children first.

11. The "LIFO" rule has already affected the district for years, even before our more severe budget cuts of the recent past. In 2012, NPS established a policy that all displaced teachers in the district must apply for, interview, and secure a placement at a school site that both the teacher and school leader agree is a good fit. (Typically, teachers have been displaced because their positions were eliminated as a result of budget cuts, school closures or school redesigns.)

12. A common practice in many districts is to force displaced teachers into schools' vacancies regardless of their fit for the position. But, as part of its effort to ensure that all Newark students have high-quality teachers, NPS has made it

a priority to fill vacancies by a "mutual consent" process whenever possible. Such a process assures that principals and teachers mutually agree to a placement to ensure that each school employs teachers who are the right fit for the students and culture of that school. Holding principals accountable for academic outcomes when they are prevented from selecting the teachers who deliver them is both unfair and irrational. By the same token, assigning a teacher to a school where the culture and fit is poor is equally unfair.

13. ~~Some teachers have been unable to secure a placement through this mutual consent process.~~ Because of the current seniority rules and tenure considerations, the district must retain these teachers at a cost of their full salary and benefits. (Employment rights run to the district as a whole, not the school.) NPS had a practice of not placing 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. Instead, these ineffective teachers and any teacher that could not otherwise be placed were given other assignments.

- Not necessarily a function of being ineffective

14. A consequence of this staffing policy - which was designed to afford the best education for students - was that the district was paying more than \$35 million at its peak to pay for individuals who no school in the district had chosen to hire.

many ineffective teachers

① *Many substitute teachers in full time positions and did not place ineffective teachers there*

15. Unfortunately, starting in 2015, the district could no longer afford to carry these teachers as additional support given our dire financial situation. So, to the detriment of students and to avoid the untenable financial impact of carrying the cost of these teachers, the district had no choice but to assign these teachers to schools that did not select them. Instead of allowing our principals to select and form a staff who share a common vision, the district has now had to force staff into schools. In 2016-17, while we are still carrying almost \$10million in teachers who were not able to secure a role in the district, we also had to place \$25million worth of teachers into vacancies at schools. These staff may not share the vision of the leader, may not share the vision of their colleagues in classrooms, and simply put, may not be a good fit for the school or its students.

100 teachers

Complicated speaks Not a good fit

16. In addition to hurting the schools' chances at success, a second consequence of this is that our principals cannot go out and hire the best and brightest for their schools. If they need an elementary teacher, they must take one from the district's available pool, even if the only ones available are partially effective or ineffective teachers, because we have an excess number of elementary teachers. If they need a Spanish teacher, they cannot hire the one from a neighboring district that has demonstrated tremendous gains—they must select from the

No students

many of the teachers were effective teachers willing to pay unit +60 system to access them.

W. N. M. - teachers lawsuit
to district to place the

individuals within the district who no school selected during the hiring process.

17. For the reasons outlined above, the consequences for the LIFO policy have been extremely limiting and harsh already. For that reason, the district requested regulatory relief from the LIFO policy in 2014 in the form of an equivalency application to the New Jersey Department of Education. As remains true today, the district was "in the untenable position of having to choose between balancing its budget and ensuring students have the most effective teachers possible." In fact, the looming prospect of severe additional budget cuts makes this request of relief even more urgent today.

What
guarantee

18. If NPS were to conduct a RIF, the LIFO statute would require NPS to terminate effective teachers and retain ineffective teachers who have more years of experience. The LIFO Statute requires that the RIF be conducted without any regard to teacher quality. When NPS was considering conducting a large-scale teacher RIF in 2014, it ran a model to show what the results of the RIF conducted pursuant to LIFO would have been. The model revealed that in a quality-blind RIF that followed the LIFO statute, only 4% of the teachers laid off would be rated as ineffective. Conversely, three-quarters of the teachers who were predicted to be laid off in this model were effective or highly effective. The RIF would have forced the district to cut more

than 300 of its effective or highly effective teachers while retaining 72% of the district's lowest-rated teachers. The effects would be wide-spread across the district—over half of the district's schools would have lost 20% or more of their effective or highly effective teachers. This would be especially damaging for NPS' lowest-performing schools, where NPS intentionally hired successful teachers to encourage progress in the school.

19. Under N.J.S.A. 18A:28-12, even if we were granted the ability to conduct a RIF based on quality, the exited teachers would remain on a "special re-employment" or recall list in perpetuity. Thus, even after exiting ineffective teachers in a RIF, NPS would still be prevented from filling vacancies with talented, out-of-district teachers because NPS would be required to first draw from the recall list, even if the teachers on that list had less than effective ratings.

20. For all of these reasons, the district has sought to avoid a RIF at any cost, due to the damaging effects on schools. As such, NPS continues to employ more teachers than are needed because the children in NPS's schools simply cannot afford to lose the outstanding teachers currently serving them.

21. The district has already pursued every other available avenue to close the budget gap. For instance, the district just experienced the pain of a RIF based on "LIFO" for other

instructional staff. In June 2016 the district for the first time did a RIF of nine guidance counselors and six librarians. This RIF, which saved the district almost \$1.5million, was based solely on seniority. The district was forced to lay off very talented people who we would have otherwise retained, if it were not for the seniority provisions of LIFO.

hi
 }
 schools
 close

22. The district has aggressively pursued every other available avenue to exit our lowest-performing teachers. The Tenure Act, N.J.S.A. 18A:28-1 et seq., as modified by TEACHNJ, N.J.S.A. 18A:6-117 and the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10, sets forth a procedure for exiting teachers who receive ratings below effective after two or three years. NPS has aggressively and consistently followed this process, ~~bringing more than 200 teachers up on tenure charges over the past four years,~~ orders of magnitude more than any other district in the State.

23. However, proceeding under TEACHNJ and the Tenure Employees Hearing Law does ~~not provide sufficient relief from the problems outlined above.~~ Removing teachers through a tenure charge is a ~~time-consuming and cost-intensive~~ process that takes at ~~least two years of intensive supports~~ for and documentation of the teacher, followed by legal proceedings that may take over a year and cost the district more than \$50,000. The district has and will continue to pursue this avenue. But a three- to four-

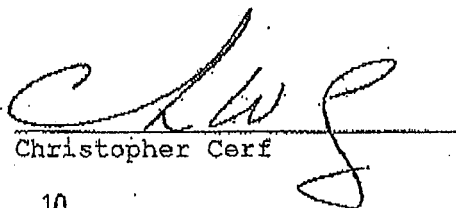
year process for a single teacher does not provide the necessary and time-sensitive relief that is called for in RIF of many teachers.

24. The "LIFO" statute, N.J.S.A. 18A:28-10, does not differentiate among teachers on any basis other than seniority. Without question, a district that is forced to keep teachers that will not improve student performance, suffers an impediment to a Thorough and Efficient education.

*Not so
a just and
the efficient
act of RIF
above*

25. NPS schools are making great strides to meet the constitutionally mandated Thorough and Efficient education requirement for all children in the District. Even without any additional cuts to the district's funding, we have been hampered by statutory restrictions that essentially protect the interests of adults over the rights of the children of Newark. As this Court has recognized, we must do everything we can to create an environment where these children can learn effectively in order to create a pathway to success in school and in life. The most important way to make that happen is to ensure we are able to retain our best teachers in the Newark Public Schools.

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


Christopher Cerf

Dated: August 23, 2016

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 NOEMI VAZQUEZ; M.P., a minor, through her guardian NOEMI VAZQUEZ; F.D., a minor, through her guardian NOEMI VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through her guardian FAREEAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., a minor, through his guardian IRIS SMITH; M.R., a minor, through her guardian WENDY SOTO; D.S.; a minor, through his guardian WENDY SOTO;

Plaintiffs,

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 School District;

Defendants,

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

Applicants for Intervention.

**SUPERIOR COURT OF THE STATE OF
NEW JERSEY**

LAW DIVISION: MERCER COUNTY

Dkt. No. MER-L-2170-16

CIVIL ACTION

ORDER GRANTING INTERVENTION

THIS MATTER having been opened to the Court by Steven P. Weissman, Weissman & Mintz LLC, attorneys for Applicant Intervenors American Federation of Teachers, AFL-CIO, AFT New Jersey and Newark Teachers Union; and

THE COURT having considered the written submissions and the oral arguments of William H. Trousdale, Esq., Wachenfeld & Barry LLP, attorneys for Plaintiffs, Christopher S. Porrino, Attorney General of New Jersey, attorneys for Defendants Kimberly Harrington and the New Jersey State Board of Education, Charlotte Hitchcock, attorney for nominal Defendants Christopher Cerf and the Newark Public School District; and

THE COURT having found that that Applicant Intervenors satisfy the standards for Intervention as of Right pursuant to R. 4:33-1 and the standards for Permissive Intervention pursuant to R. 4:33-2 and for other good cause shown;

IT IS on this ___ day of _____, 2016

ORDERED that the Motion of Applicant Intervenors American Federation of Teachers, AFL-CIO, AFTNJ and Newark Teachers Union to Intervene pursuant to R. 4:33-1 and R. 4:33-2 is GRANTED; and it is further

ORDERED that the Applicants shall be permitted to intervene in this lawsuit as party defendants; and it is further

ORDERED that the caption shall be amended to reflect the Applicants status as defendants in this action; and it is further

ORDERED that Defendant-Intervenors shall file an answer or otherwise plead in response to the Complaint on or before _____ day of _____, _____; and it is further

ORDERED that counsel for Defendant-Intervenors shall serve a copy of this order on all counsel of record, within seven (7) days from the date hereof.

Hon. Mary C. Jacobson, A.J.S.C.

[] opposed

[] unopposed