

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

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**CHRISTOPHER DONOHUE, ET ALS.**

**CASE NO.: 2:21-cv-01374-JMV-JAD**

**Plaintiffs,**

**v.**

**SOUTH ORANGE/MAPLEWOOD  
SCHOOL DISTRICT, ET ALS.**

**Defendants.**

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**BRIEF ON BEHALF OF DEFENDANTS SOMEA AND LOPEZ IN OPPOSITION TO  
PLAINTIFFS' APPLICATION FOR INJUNCTIVE RELIEF**

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### **PRELIMINARY STATEMENT**

Precisely what relief the Plaintiffs seek through their instant application is unclear. Their Complaint, filed at a time the South Orange/Maplewood School District (“District”) was primarily on remote instruction has been superseded by events in the form of a return of a substantial portion of the student population to in-person instruction in March 2021, with expansion of in-person instruction slated to be phased in by the District on April 19<sup>th</sup> and May 3<sup>rd</sup>. Presumably, this is not a fast enough pace for the Plaintiffs, or in-person instruction occurring at anything less than pre-pandemic levels is not good enough in their view. The central flaw in the Plaintiffs’ position is the existence of the COVID-19 pandemic itself which has cost the lives of approximately 600,000 Americans, over 24,000 of whom resided in the State of New Jersey and approximately 2,800 in Essex County. Following a spike in cases shortly after the holidays in November and December, the spread of infections began to wane, only to more recently increase, despite vaccination efforts, in the face of more virulent strains.

It is into the headwinds of this potential fourth wave of the virus that the Plaintiffs extraordinarily ask this Court to cast aside the guidance of the federal, State and local health authorities, and fully re-open the Districts schools at pre-pandemic levels. The South Orange/Maplewood Education Association (“SOMEA”) and its President, Rocio Lopez, are sympathetic to the Plaintiffs’ legitimate frustrations, concerns and desire for their children to return to the classroom for academic, as well as social and emotional reasons. SOMEA shares in those concerns. However, neither the District, nor SOMEA, can ignore the legitimate countervailing health and safety concerns of not only students, but also the teachers and other staff, as well as their families, who are at a risk of infection.

Although Plaintiffs do not articulate in their Complaint or moving papers precisely how SOMEA is connected to its pending request for injunctive relief, it appears that the primary focus of their claim is that there is an “illegal strike” on the part of SOMEA. However, contrary to Plaintiffs’ claims, there was and is no “strike,” “work stoppage” or “work slowdown” by the SOMEA. This issue was recently heard in New Jersey Superior Court, Chancery Division in a similar motion for temporary injunctive relief, and SOMEA’s actions were specifically held by that Court not to be a strike under applicable and governing New Jersey State law.

That decision was sound considering that, notwithstanding certain disputes over the adequacy of the District’s ventilation of classrooms and offices, as well as other Covid-19 procedures, both federal and State labor law recognize the right of employees to decline to report to a workplace or perform work duties that present a substantial risk to the health and safety. Moreover, SOMEA never stopped working, and SOMEA continues to work today as hard, if not harder than ever, to educate the students in their care and charge, through both in-person and remote instruction during these challenging times. As the State Court agreed, the issue is and has always been how to do so safely for both students and staff in consideration of the continuing COVID-19 pandemic and the District’s antiquated and inadequate facilities and ventilation systems, among other issues.

In fact, the Plaintiffs’ claims in this case, and in particular, its demand for injunctive relief to resume in-person instruction, are effectively moot, as the District and SOMEA have continued to expand in-person instruction, while ensuring student and staff safety. At present, the District and SOMEA are providing the in-person instruction anticipated at this phase of the District’s re-opening plan. The District is providing new ventilation capabilities to address the legitimate concerns of the SOMEA with respect to ventilation, which are anticipated to lead to a

full return of teachers to the next phase of in-person instruction previously planned by the District for April 19<sup>th</sup> and, hopefully thereafter, on May 3<sup>rd</sup>. Thus, while Plaintiffs' request for injunctive relief may call for greater in-person instruction than what is contemplated under the District's reopening plan, that relief has no relation to any allegations made by Plaintiffs against SOMEA relating to a "strike" – which are now, effectively moot. The Plaintiffs' request for relief may also prove counterproductive since such relief will, of necessity, undermine current mitigation efforts either in place, or contemplated, resulting in the potential cessation of in-person instruction all together in the event of additional positive cases.

All SOMEA has done was briefly pause in-person instruction so that its health and safety concerns regarding the lack of adequate ventilation in District buildings could be addressed in an orderly fashion. The District acknowledged the inadequacy of its ventilation systems drove the initial decision to begin the year with remote instruction. It became abundantly clear by October 25, 2020, that additional time was needed to ensure District buildings had reasonably adequate ventilation in place to commence in-person instruction. By January 25, 2021 shortly before the School was set to reopen, the District's own architectural report effectively confirmed the inadequacy of those systems, despite District promises to upgrade them to a level that met the needs raised by the pandemic. Ultimately, the District has agreed to install new systems which are expected address the safety concerns raised by the SOMEA and hopefully allow for the in-person instruction as contemplated by the District under its own reopening plan.

The SOMEA respectfully requests that this Court reject the claim that temporary restraints are appropriate or necessary, given the fact that: (1) the standard for injunctive relief is not satisfied; and (2) it is, respectfully, inappropriate according to principles of comity for this Court to interfere with a matter currently under State Court supervision and addressing matters

arising under State law. The irreparable harm standard instructs that where uncertainty as to the facts, the law and the balance of harm exists, the *status quo ante* should be maintained. In addition, none of the federal claims raised by Plaintiffs have any merit, demonstrating not only an absence of likelihood of success on the merits, but a strong likelihood that the federal case is meritless. That standard, respectfully, requires that the District's request for temporary restraints be rejected.

## STATEMENT OF FACTS

As the District has pointed out in its submissions herein, the statistics of public record indicate that we are in the midst of an active pandemic that is not relenting, but rather increasing in case numbers. (District’s Opp. Brief at P. 8). The Covid-19 pandemic is a worldwide and constantly evolving health problem that is unfolding on a continuously shifting information landscape. In New Jersey as well as South Orange and Maplewood, this has played out in repeated attempts at school reopening, followed by closure, followed by steps towards reopening, and then closure again. Recent weeks have been no different. While the CDC and NJDOH have released guidance encouraging school reopening with 3 feet of social distancing for the lower grades given the existence of appropriately safe conditions (including appropriate ventilation and community threat levels that are manageable), more recent information suggests schools are not “out of the woods” yet. Numerous reports from media outlets of record in recent days advise that experts consider newer variants of Covid-19 to be highly infectious in children and schools to be a critical source of the spread of the new variant.<sup>1</sup> In other words, while schools have currently been in a reopening cycle, they may be on the cusp of another new wave of closures, and it is self-evident that statistics about school safety do not contain clearly established facts, but rather the latest round of provisional knowledge.

Like all school systems throughout the State of New Jersey, the District was closed for in-person education in March 2020, following the closure of schools by Executive Order of Governor Murphy. At that time, the District switched to remote instruction for the remainder of the school year. (Lopez Cert. ¶2). The District commenced this (2020-21) school year with all

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<sup>1</sup> See e.g. <https://abc7chicago.com/covid-children-variant-coronavirus-coronavirus-vaccine/10486843/> and <https://www.cnn.com/2021/04/05/health/us-coronavirus-monday/index.html>

remote instruction. The District was aware of the challenges with re-opening its schools for in-person instruction during a global pandemic. Nonetheless, it initially planned to re-open for in-person instruction of students in November 2020. (Lopez Cert. at ¶3).

With Covid-19 being an air-borne virus, the adequacy of the District's ventilation systems have been a concern with respect to in-person instruction from the outset. While case rates have varied throughout the course of the pandemic, in New Jersey they have remained stubbornly high. At present, the State's Covid Report places the Northeast Region as "high" with a Case Rate of 41.37 and a Positivity Rate of 10.81. (Lynch Cert., Exhibit "C"). The CDC, in its guidance on Ventilation in Schools and Child Care Programs, has recognized the need for adequate ventilation in school settings to combat the virus, citing the need for the introduction of "outside air," "maximizing" air ventilation and incorporating the ASHRE Standards. (Lynch Cert., Exhibit "D"). ASHRE standards likewise call for maximization of outside air ventilation and the use of filters with at least a MERV 13 rating. (Lynch Cert., Exhibit "E"). The same is true with New Jersey Department of Health Guidance on Facility Engineering and Ventilation. (Lynch Cert., Exhibit "F"). SOMEA is not seeking the "gold standard" in ventilation under these standards, merely that the District establish at least minimally acceptable levels ventilation to ensure health and safety.

The District claimed at a Board meeting on October 19, 2020, that the schools were safe for in person instruction, and that the District had upgraded its ventilation systems with HEPA filters to ensure the health and safety of students and staff. (Lopez Cert. at ¶4 and Exhibit "A"). In anticipation of the potential opening for in-person instruction, on October 21, 2020, representatives of SOMEA conducted a walk-through with administrators of District buildings. (Lopez Cert. at ¶5). However, the walk-through of the very first school (Marshall Elementary



(K-2)) made it apparent that administration, whether intentionally or not, misrepresented their preparedness to open and that few, if any, upgrades had been made to the school's antiquated and inadequate ventilation systems. (Lopez Cert. at ¶5). The inspection revealed not only that new filters were not installed, but few if any of the ventilations systems had been cleaned. There was no evidence of the installation of HEPA filters. (Lopez Cert. at ¶5).

Almost immediately, Paul Roth, the District's Business Administrator called-off the remainder of the walk-throughs when it became apparent that the buildings had "failed" the inspection. (Lopez Cert., at ¶6). Shortly thereafter, on October 27, 2020, the Superintendent, via letter to the school community, confirmed that "a facility walkthrough and review of some of our schools resulted in some concerning discoveries as it relates to our ventilation upgrades." (Lopez Cert. at ¶7). The letter went on to note:

Specifically, during our October 19, Board of Education meeting, after verification from our Facilities Department lead, we shared that univents (unit-ventilation boxes in each classroom) had been updated with filters with a Merv 16 rating. Unfortunately, our extensive inspection and investigation revealed that this was simply not true. Filters were not installed as had been reported throughout all District classrooms. In fact, the vendor was not contacted until after verification paperwork was submitted to the District. In order to prepare for students/staff to return to our buildings, every uninvent (approximately 10000) will need to be reviewed and reassessed to ensure all units have been updated; additionally, the univents are only capable of using a filter with a maximum Merv 8 rating.

(Lopez Cert., Exhibit "A").

One of SOMEA's central concerns in the midst of a pandemic occasioned by an air-borne virus was the adequacy of the District's ventilation systems. The fact that little if anything was done to prepare these systems for in-person instruction as late nearly November 2020 was deeply concerning. (Lopez Cert. at ¶8). Despite the rising cases of COVID-19 in New Jersey and in

Essex County in particular, as well as reports of new variants, the District was determined to stick with its reopening schedule, rather than await repair of its antiquated systems and the then imminent immunization of educators. In particular, the District continued to plan for a “partial reopening” on January 19, 2021. (Lopez Cert. at ¶9).

The plan was for in-person hybrid instruction on an “A” and “B” day schedule with two (2) days on and three (3) days off per week, with an all-remote Fridays for Pre-K, K through 2, and 6<sup>th</sup> and 9th Grades, as well as district-wide self-contained special education students and English Language Learning students. While students would be in-person two (2) days per week, the teachers and staff would be present for in-person instruction four (4) days a week. (Lopez Cert. at ¶10). Teachers were scheduled to attend in-person starting January 13, 2021, but SOMEA could not secure District scheduling of walk-throughs to address health and safety concerns until January 13, 14, and 15, 2021. (Lopez Cert. at ¶11). A report prepared by SOMEA and an NJEA Consultant from walkthroughs conducted on January 15th at Columbia High School, Tuscan Elementary School, and Seth Boyden Elementary School revealed numerous continuing deficiencies concerning the adequacy of the ventilation in the buildings. (Lopez Cert. at ¶12 and Exhibit “B”).

The District’s own “expert” report – performed by an architectural firm, as opposed to a properly credentialed air-quality engineer – demonstrated that the upgrades were, at best, superficial and remained inadequate. (Lopez Cert. at ¶13 and Exhibit “C”). The deficiencies contained in the Architectural Report and limitations of the District systems, even when functioning as they should, are discussed in the Certification of Allan Barkkume. (Lynch Cert., Exhibit “A”). Moreover, there existed discrepancies between the Architectural Report and SOMEA’s own walk-throughs of the schools with its trained SOMEA Healthy and Safety

Committee members. (Lopez Cert. at ¶13 and Exhibit “B”). The only solution proposed by the District to the problem, as outlined in a FAQ circulated by the Superintendent in advance of commencing hybrid in-person instruction, amounted to merely “opening the windows” in the dead of winter. (Lopez Cert. at ¶14 and Exhibit “D”).

In addition to the ventilation concerns, unmasked maintenance workers conducted repairs on the fly during in-person instruction; student cohorts were being mixed; and there were issues with quarantining students following close-contacts with COVID-19 positive individuals. Risks to the health and safety were not limited to the classroom. Bus drivers and transportation aides reported students who dropped their masks so as not to cover their noses or who took off their masks entirely, and despite requests to wear them properly, continually refused during their ride, among other concerns. Given the Covid-19 deaths of two of our bus drivers last school year, this disregard of protocols and caution on buses was deeply concerning. The forgoing is not intended to be exhaustive, but rather a summary of concerns existing beyond ventilation issues. (Lopez Cert. at ¶15).

With ventilation being inadequate, teachers, school staff, and students were asked to endure deplorable conditions, such as temperatures which averaged 35 to 60 degrees all day, as windows needed to be opened in an attempt to offset the inefficient, antiquated, and inadequate ventilation systems in District buildings. Significantly, although the Superintendent had acknowledged in his FAQs that windows would be used by the District as alternative sources of ventilation in the absence of sufficient building systems, teachers were admonished by administration for having windows open, as the temperatures were freezing or near freezing in classrooms and ordered to close windows which were their only source of fresh air ventilation. (Lopez Cert. at ¶16 and Exhibit “E”). Despite a reasonable effort in good faith to provide hybrid

instruction to our students, the membership of SOMEA had grave concerns relating to the health and safety of its members and students and on Monday, January 25, 2020, SOMEA advised the District of the necessity to return to all virtual instruction effective Wednesday, January 27, 2021, citing the unsafe conditions and ineffectiveness of the District's current operations. (Lopez Cert. at ¶17 and Exhibit "F").

That was not a decision SOMEA made lightly. Since the start of the pandemic, SOMEA has worked tirelessly to bridge the obstacles to the delivery of instruction to our students. For example, when the District sent staff home last spring without explicit guidelines on how to transition to remote instruction, teachers took it upon themselves to find creative ways to deliver curriculum. When the community asked for synchronous instruction come September and despite still having little to no professional development, teachers rose to the occasion and started the year with synchronous instruction. Indeed, despite being advised that live instruction need only be a component of each period, many teachers have delivered synchronous instruction rather than videos and asynchronous tasks from bell to bell. Further, when asked to switch to a new instructional platform with little to no training prior to the start of school, teachers trained themselves and subsequently students to be ready to deliver instruction via Canvas in September. Throughout this period, which has necessitated countless additional hours of planning, conferencing, and grading, teachers have not asked the District for anything other than regard for their physical safety and that of their families, as well as their students. (Lopez Cert. at ¶18).

When SOMEA and its members declined to return for in-person instruction, the Board belatedly negotiated with SOMEA to address at least some of their health and safety concerns, including the District's inadequate ventilation systems and remote work accommodations for individuals at high-risk of a Covid-19 infection. Ultimately the parties reached an Agreement for

SOMEA members to return to in-person instruction by defining what is considered a room “fit” for use under current conditions. (Lopez Cert. at ¶19 and Exhibit “G”). In reaching that Agreement, SOMEA acted in good faith and presumed the District had as well. (Lopez Cert. at ¶20). The Agreement provides, in pertinent part:

1. The Board and SOMEA (collectively referred to as the Parties) agree that there are a number of hearing/ventilation units, both identified by the Board during its review and others by SOMEA, that are not working as intended, such that those worksites are deemed unfit for use. **Functioning units are those with a working motor/blower which are capable of maintaining adequate ventilation and room temperature in compliance with N.J.A.C. 12:100-13:3(a)1 et seq. (68-79 degrees) with open windows, which may be opened at the discretion of the employee.**

2. Beginning on Wednesday, January 27, 2021, the Parties will meet and confer and conduct walkthroughs regarding worksites to be occupied by members prior to such occupation to determine and verify whether the rooms are fit for use or require repair. If a worksite is determined not to be unfit for use, the Board will relocate the member to a worksite that is fit for use. If such a room is not available, the member will work remotely until such time as an appropriate worksite becomes available.

(See Lopez Cert., Exhibit “G”) (emphasis added).

In addition, the District had declared in December 2020 that it would not approve home/remote work accommodation requests for teachers at high-risk of Covid-19. (See Lopez Cert., ¶20 and Exhibit “H”). When the Association challenged that position as unlawful, the District slow-walked and/or inappropriately denied such requests. As a result, the SOMEA sought and at the time believed it had secured a commitment from the District under the Agreement that members who:

provide appropriate medicated documentation from a licensed physician documenting the medical necessity of a work from home accommodation shall be granted a work from home

accommodation consistent with the requirements of Section 504 of the ADA, and the New Jersey Law Against Discrimination.

(Lopez Cert. at ¶21 and ¶3 of Exhibit “G”).

After reaching Agreement, when SOMEA representatives met with Administration pursuant to Paragraphs 1 and 2 of the Agreement to “meet and confer and conduct walkthroughs,” SOMEA was met with building administrators who purposefully shut windows after they were opened by representatives in conformance with the Agreement, to obtain accurate temperature readings. (Lopez Cert. at ¶22). When SOMEA demanded that administrators act in good faith consistent with the terms of the Agreement which provides for windows to be opened by staff for ventilation, Columbia High School’s Principal responded that would mean that the entire D wing of the building would be unfit for use. Despite the foregoing, the Principal still placed teachers and students in these rooms knowing full well the wing’s unfitness during the winter months. Indeed, temperatures in these rooms registered far below the minimum of 68 degrees. Indeed, other building administrators advised maintenance staff to close windows prior to SOMEA walkthroughs, so accurate temperature in accordance with the Agreement could not occur. (Lopez Cert. at ¶23 and Exhibit “E”).

Despite these ominous signs, SOMEA staff returned to the buildings as promised on Monday, February 8th (after a series of snow days). While grateful to see their students in person, from February 8 through 11, 2021, SOMEA had to address dozens of instances across buildings of both staff and students being placed in unfit rooms in violation of Paragraph 1 of the Agreement and failing to remedy these violations under the Agreement, either by feigning repeated ignorance to the conditions of rooms, claiming outright they were not bound by the results of SOMEA’s walkthroughs, and in even more egregious cases, again directing staff to shut windows to preclude adequate ventilation. In excess of thirty-nine (39) grievances have

been filed to date. (Lopez Cert. at ¶24). A copy SOMEA's walk-through inspection found numerous rooms (highlighted in yellow) which failed to meet the standards outlined in its Agreement with the District. (See Lopez Cert., Exhibit "H"; compare to Exhibit "G").

Moreover, the District did not comply with Paragraph 3 of their Agreement to provide remote work accommodations for high-risk members. Since entry into that Agreement, members' requests were either not processed or were denied, despite members providing the specified medical documentation. Despite seeking to continue instruction remotely, these individuals were made to take sick days under District policy while such requests were pending due to the District's delay in processing them or its outright refusal to acknowledge a medical condition which puts such members at an increased risk of severe illness. As of February 23, 2021, SOMEA has been forced to file fifteen (15) grievances related to the unfair treatment of these individuals pursuant to the Agreement. (Lopez Cert. at ¶25).

Based on the foregoing, SOMEA regrettably advised the District on Monday, February 15, 2021, that it could not continue with in-person instruction while maintaining the health, safety, and wellbeing of students and staff. (Lopez Cert. at ¶26 and Exhibit "I"). This communication indicated SOMEA's intent to return to in-person instruction on or about March 15, 2021 and makes clear that SOMEA members did not refuse to work and did not engage in a "slowdown." Rather, SOMEA emphasized its commitment to "educate passionately" by "deliver[ing] quality instruction while also addressing the emotional needs of [] students" remotely so as not to jeopardize the health, safety and welfare of themselves and their students.

Contrary to the Plaintiff's claim of a work stoppage or slowdown, SOMEA provided a limited period of remote instruction based on the anticipated winter weather predicted over the then ensuing weeks, rendering significant parts of buildings unfit for use under its Agreement

with the District, to allow the District the opportunity to conduct necessary repairs and upgrades to its buildings' systems, as well as remedy its processing of 504 requests, so that the District could be ready to operate on March 15th to provide students and staff with a safe environment conducive to in-person learning. Further, SOMEA offered to assist administration in their endeavors. (Lopez Cert. at ¶27). During that time, SOMEA has been engaged in mediation with the District through the New Jersey Public Employment Commission ("NJPERC") to address and remedy these health and safety issues. (Lopez Cert. at ¶28).

Thus, on February 25, 2021, SOMEA reached an agreement with the District to provide in-person services starting on or about March 1, 2021, to all self-contained and pull-out resource special needs students and English Language Learners, and other high-risk students, to be conducted in rooms that both parties agreed were acceptable and fit for use, as well as the presence of school nurses to ensure safety. These students have received in-person instruction since that time. (Lopez Cert. at ¶29 and Exhibit "J"). Shortly thereafter, on or about March 15, 2021, SOMEA and the District reached agreement to expand hybrid in-person instruction to include Pre-K, Kindergarten, 1st Grade, 2nd Grade, certain groups or cohorts of students in the 3rd through 5th Grade.

The 6th and 9th Grade classes were added on or about March 22<sup>nd</sup> following the State Court TRO hearing before Judge Alper wherein the District and SOMEA agreed to utilize classrooms for 6<sup>th</sup> and 9<sup>th</sup> Grade that SOMEA had concluded had minimally adequate ventilation. (T52-21 to T57-4<sup>2</sup>; see also Lynch Cert., Exhibit "H").<sup>3</sup> In person instruction is being utilized

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<sup>2</sup> The Transcript of the State Court TRO hearing are appended to the Certification of Colin M. Lynch, Esq., as Exhibit "I."

<sup>3</sup> The District characterizes this as a "win" at the hearing, it was, respectfully, a "win" for all concerned – the District, its employees and the students. As of the date of the hearing, walkthroughs of those rooms were taking place and it was fully anticipated that in-person



for those grades in classrooms in which both parties agree are “fit” for use under pandemic conditions. (See Lopez Cert., Exhibit “H”).<sup>4</sup> These students have received in person instruction since that time. (Lopez Cert. at ¶30). As a result, all students in all grades contemplated by the District’s re-opening plan as returning to in-person instruction are participating in in-person instruction at this time. (Lopez Cert. at ¶31).

While disagreements remain, SOMEA and the District are continuing to work constructively through PERC to expand in-person instruction. Through communication between SOMEA’s legal counsel and the Board’s legal counsel, it is SOMEA’s understanding that the next phase of the District’s re-opening plan contemplates the expansion of in-person instruction to Grades 5, 8 and 12, following Spring Break and a two-week period of universal virtual instruction following same, on April 19, 2021. (Lopez Cert. at ¶32).

The only issue with respect to further expansion on April 19th was the existence of rooms without any mechanical ventilation. Some classrooms/workspaces have mechanical ventilation that is non-functional or “radiant” heaters that fail to provide air circulation. SOMEA and the District have experimented with portable air filters/purifiers that provide both mechanical air circulation and air filtration that, coupled with fresh air through open windows and warming temperatures, can render the rooms fit for use by students and staff. That experimentation has proved successful. (Lopez Cert. at ¶33).

As a result, SOMEA has already advised the District of its approval of these portable air filters/purifiers in rooms otherwise without mechanical ventilation and with the ability to

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instruction would resume for 6<sup>th</sup> and 9<sup>th</sup> Grade in the then near future regardless. With Judge Alper’s cogent suggestion that instruction be limited to rooms all parties agreed were fit, SOMEA readily agreed to the concept at hearing. (T52-21 to T57-4).

<sup>4</sup> Exhibit “H” appended to the Lopez Certification is referred to in the State Court Transcript as Exhibit “G” to the District’s then moving papers.

incorporate fresh air circulation through windows or other mechanical means. Thus, SOMEA agrees that rooms that were previously unfit for use, are or will be fit for use utilizing these filters. SOMEA has notified the District of same and offered to contribute to the costs of purchasing the filters with available funds to move the process forward. (Lopez Cert. at ¶34 and Exhibit “L”).

It is the understanding of SOMEA that the District, either with or without SOMEA’s financial assistance, will procure these filters prior to the next phase of expansion of in-person instruction on April 19th. It is further SOMEA’s understanding that with the filters in place, there will be sufficient classrooms available for the District to successfully expand in-person instruction as scheduled on April 19th and to potentially add to that expansion all students in Grades 3 and 4. To be clear, SOMEA fully anticipates that the District’s next phase of expansion of in-person instruction will occur as scheduled. (Lopez Cert. at ¶35).

The next phase of the District’s re-opening plan is scheduled for May 3rd, at which point in time, the District plans to include the remaining grades to in-person instruction, which is all remaining grades, at which point, the District will be on a full in-person hybrid schedule for all grades. (Lopez Cert. at ¶36). SOMEA and the District continue to work together to address those remaining rooms which may or may not present an issue with respect to the May 3<sup>rd</sup> expansion of in-person instruction. These are rooms that lack any fresh air component to address concerns regarding adequate ventilation – i.e., rooms without windows, or a functioning ventilation system to introduce a fresh air component. (Lopez Cert. at ¶37). However, SOMEA believes that these issues can and will be resolved prior to May 3<sup>rd</sup> and will not inhibit a return to in-person instruction for all grades on May 3rd, either because: (1) the rooms will not be necessary for further in-person expansion; (2) if needed, repairs will be concluded to allow the

introduction of fresh air along with the use of air-filtration devices; and/or (3) proposed solutions, such as more powerful air-filtration devices, will allow the rooms to be safe for use.

However, a return to pre-pandemic levels of in-person instruction, would be at odds with the practical realities facing the District and present guidance issued by the State's Department of Education ("DOE"). (Lynch Cert., Exhibit "G"). School re-opening plans are rationally related to virus and case activity occurring at a given point in time. At present, the Northeast Region, inclusive of South Orange Maplewood, is classified as "high." (Lynch Cert., Exhibit "G"). Indeed, they are approaching "very high" which would require mandatory school closures. That status impacts on recommendations concerning when school should go to remote, to the level of social distancing recommended. In light of this reality, the majority of students in the State are either all remote, or partially remote (i.e., a hybrid schedule), as confirmed through a data analysis conducted by Dr. Christine Miles, Ed.D. (Lynch Cert., Exhibit "B").

While SOMEA understands the frustration of both students and their parents associated with the delay to commencing in-person instruction, and agrees that in-person instruction is superior to continued remote instruction, both academically and socially, the District's initial re-opening plans were rushed due to the District's initial failure to adequately address ventilation issues prior to the school year and into the Fall, to ensure the health and safety of the District's students and staff. While there have been and continue to be disagreements between SOMEA and the District on health and safety issues related to the pandemic, SOMEA has nonetheless worked with the District through the mediation process to achieve both in-person instruction and ensure classrooms are safe for students and staff upon their return. It is the mutual goal of SOMEA and the District to return to in-person instruction on a hybrid basis according to the existing expansion timelines of April 19<sup>th</sup> and May 3<sup>rd</sup> discussed above. (Lopez Cert., at ¶39).

It is SOMEA's understanding that the Plaintiffs in this case seek an immediate return to full in-person instruction on a full-time (i.e., non-hybrid) basis for all grades. While that is certainly the goal of SOMEA and likely the District's ultimate goal as well, that goal cannot be achieved at the present time while ensuring the health and safety of students and staff for several reasons. (Lopez Cert., at ¶40).

First, the pandemic has not gone away. While following the Winter holiday season, reports of positive cases, hospitalizations and deaths decreased, trends have begun to reverse in recent weeks. Moreover, there are reports of more virulent strains of the virus in circulation throughout the community. (Lopez Cert., at ¶41).

Second, while immunization has radically expanded, the process continues and takes time. SOMEA has encouraged its members to receive the vaccination. Some have completed the process and others have received their first dosage of the approved vaccines. Others continue to await appointments. Moreover, it is not yet particularly clear the impact and extent new variants will have on the spread of the virus. Most students are ineligible for the existing vaccines either due to age or distribution eligibility. While teachers are eligible to be vaccinated, immunization is not necessarily available to the family members of teachers and staff and it is not yet clear that a vaccinated teacher or staff member cannot carry and transmit the virus at home. Immunization will undoubtedly go a long way toward returning to full non-hybrid instruction, but now, that process is on-going. (Lopez Cert., at ¶42).

Third, elimination of hybrid instruction in favor of an immediate return to full-time instruction, five days per week, possess additional challenges. Hybrid instruction is a key to the District's ability to conduct in-person instruction while insuring recommended social distancing, which is a minimum of 3-feet for younger children (with other safeguards) and 6-feet for older

students. And, Essex County, New Jersey, remains an area deemed by the State to be at “high-risk” of transmission based upon current caseloads and trends. (See Lynch Cert., Exhibits “C” and “G”). A full return will make such social distancing and the use of student cohorts recommended by health authorities, impossible at the current “risk” levels. (Lopez Cert., ¶43).

Fourth, elimination of hybrid instruction will impact transportation of students, doubling the number of students on busses both to and from school impacting their health and safety, as well as the health and safety of their drivers, two of whom have unfortunately passed away as a result of the pandemic during the past school year. Lastly, a full return also means that students must be fed during the day under conditions with little ability to socially distance and while not wearing masks as recommended by health authorities. (Lopez Cert, at ¶¶44-45).

**LEGAL ARGUMENT**

**POINT I.**

**THE PLAINTIFFS CANNOT SATISFY THE LEGAL STANDARD  
NECESSARY FOR THE EXTRAORDINARY REMEDY OF  
TEMPORARY OR PRELIMINARY INJUNCTIVE RELIEF**

Plaintiffs fail to demonstrate that temporary restraints are necessary in this matter pursuant to the high standard for such relief as set forth under Third Circuit precedent. "A preliminary injunction 'is an extraordinary remedy, which should be granted only in limited circumstances.'" Greater Philadelphia Chamber of Commerce v. City of Phila., 949 F.3d 116, 133 (3d Cir. 2020) (quoting Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989)). To obtain a preliminary injunction, the moving party must show:

a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted . . . . [In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.

Reilly v. City of Harrisburg, 858 F.3d 173, 176 (3d Cir. 2017), as amended (June 26, 2017) (quoting Del. River Port Auth. v. Transamerican Trailer Transport, Inc., 501 F.2d 917, 919-20 (3d Cir. 1974)). "Generally, the moving party must establish the first two factors and only if these 'gateway factors' are established does the district court consider the remaining two factors." Greater Philadelphia Chamber of Commerce, 949 F.3d at 133 (quoting Reilly, 858 F.3d at 179). "The court then determines 'in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.'" Id. (quoting Reilly, 858 F.3d at 179).

Here, Plaintiffs fail on the first two “gateway” prongs. There is no cognizable federal claim against either SOMEA, Lopez or the District. Nor does there exist a clear likelihood of success on the Plaintiffs’ supplemental State law claims. Nonetheless, while the final two prongs are not applicable, a review of same serves to confirm that temporary restraints are inappropriate in light of potential irreparable harm of severe illness and potential death to third parties, including students and staff, and the public interest in maintaining health and safety of students and staff during in-person instruction, as well as ameliorating the spread of the virus throughout the wider community.

**POINT II.**

**THE DISTRICT HAS FAILED TO DEMONSTRATE A REASONABLE  
PROBABILITY OF SUCCESS ON THE MERITS OF ITS NOVEL AND  
UNSETTLED CLAIMS**

Plaintiffs have lodged a bevy of both federal and State causes of action against SOMEA and the District with no apparent regard as to whether those claims are appropriate under the circumstances at issue, or any circumstances at all, much less whether such claims are an appropriate basis for injunctive relief. In the end, however, the Plaintiffs cannot demonstrate that it has a reasonable probability of succeeding on the merits in this matter because the District's employees are simply not prohibited from engaging in the specific actions at issue. Contrary to Plaintiffs' claims, there was and is no "strike," "work stoppage" or "work slowdown." It has already been determined in State court, in fact, that there was no such strike, work stoppage, or work slowdown for purposes of temporary injunctive relief under State law.

A. **Plaintiffs' Counts V-VII are meritless, as there was no "strike," "work stoppage" or "slowdown."**

Plaintiffs' Counts V-VII seek equitable, injunctive and declaratory relief asserting State law on the inaccurate premise that there has been an "illegal strike." However, fatal to Plaintiffs' claim, there has been no such illegal strike, and Superior Court of New Jersey has already so held. (T63-17 to 22). The State Court's rationale for denying temporary injunctive relief, included disputes of fact concerning the District's ventilation systems, the lack of irreparable harm under the circumstances, among other considerations. (T62-4 to T65-5). There was good reason for this conclusion. It is well-established that a public employee may refuse an assignment where there exists a compelling threat to personal welfare. See Galloway Tp. Bd. of Educ. v. Galloway Tp. Ass'n of Educ. Sec'ys., 78 N.J. 1, 9 (1978); see also Maurice River Bd. of



Educ., P.E.R.C. No. 87-91, 13 NJPER 123 (¶ 18054 1987); Maurice River Bd. of Educ., supra, 13 NJPER 123;  Tp. of Franklin, P.E.R.C. No. 85-97, 11 NJPER 224 (¶ 16087 1985); Union Cty., P.E.R.C. No. 84-23, 9 NJPER 588 (¶14248 1983). Federal labor law recognizes that the “[t]he quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work...[shall not] be deemed a strike[.]” Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974) (quoting 29 U.S.C. § 143).

Here, there is no “strike” or “work stoppage” to enjoin or seek monetary or declaratory relief from – merely an issue concerning the situs of that work. Indeed, even that issue is now largely moot as the conditions that existed as of the Plaintiffs’ filing of its application do not exist as teachers have returned to in-person instruction in all Grade levels contemplated by the District’s re-opening plan. Critically, because the SOMEA merely temporarily refused to engage in a particular assignment – namely, conducting work in-person, based on a compelling threat to employees’ personal welfare – it is a negotiable issue. Therefore, neither the Plaintiffs, nor the Board, could unilaterally require its teaching staff members to work on site, and SOMEA’s temporary refusal to do so, while continuing to work and provide services, does not constitute a strike appropriate for temporary injunctive relief.

In addition, any legal rights underlying Plaintiffs’ claims are unsettled simply because of the unprecedented nature of the COVID-19 pandemic and its effect on education. A cause of action in a novel situation is not amenable to having a settled legal right and is incompatible with an application for temporary relief.

The legal claim brought forth by the Plaintiffs in this application for relief is inextricably linked to the conditions in which it arose – i.e., the reopening of school districts in September 2020 following a school year during which all school buildings were closed in the midst of a

global pandemic and instruction was fully remote for the final three-plus months of the school year. This unique situation – where an imminent health hazard forced schools to close, but where existing technology allowed instruction to continue on a fully remote basis – simply has not occurred before. Accordingly, there can be no settled legal right based on a completely unprecedented situation.

Significantly, not only is the legal right to require employees to report for in-person work unsettled, such a claim is also contrary to the circumstances present in the District in this matter. Here, the District failed to create conditions in its buildings that comply with either CDC guidelines or the minimum health and safety standards required by NJDOE to reopen for in-person instruction. Neither Plaintiffs, nor the Board, have demonstrated that it has a settled legal right to require employees to work in person under these circumstances. All applicable facts, guidance, and common sense dictate the opposite conclusion – in this unprecedented time in public education, there is no settled legal right to require employees to provide in-person instruction at significant risk to themselves, their families, and their students if a school district cannot meet minimum health and safety standards.

**B. Plaintiffs’ Claims for relief under the U.S. Constitution and Federal Law Also Lack Merit.**

Plaintiffs also argue, under Counts I-III of their Complaint, that they were entitled to relief under the U.S. Constitution for violations of the Due Process and Equal Protection Clauses respectively, as well as under the Individuals with Disabilities in Education Act (“IDEA”). The claims are brought pursuant to 42 U.S.C. § 1983 (“Section 1983”). The District in its submissions rightly points out that these claims are untenable, and the SOMEA joins in those arguments and incorporates them as if fully set forth. It is respectfully submitted that not only are Plaintiffs’ claims not likely to succeed on the merits and therefore not entitled to injunctive

relief, but they likely cannot survive a motion to dismiss. As a result, Plaintiffs' claims to federal question jurisdiction is itself tenuous.

In particular, the attempt to tag an additional claim against the SOMEA onto these claims based on a purported "strike" is untenable given the lack of nexus between the alleged constitutional harms and SOMEA. Claims under Section 1983 must be brought against State Actors, but the precedent is clear that a public sector union is not a "state actor" unless it is acting in close cooperation with respect to a public employer. Leahy v. Bd. of Trustees, 912 F.2d 917 (7<sup>th</sup> Cir. 1990); Storlazzi v. Bakey, 894 F. Supp. 494 (D. Ma. 1995). Here, not only was there no cooperation between SOMEA and the District in establishing the policy of hybrid instruction complained of by Plaintiffs in this litigation, but in fact the two parties have been in litigation concerning their disagreements about how to institute a return to in-person instruction, and the parties continue to negotiate from an adversarial perspective those aspects of a return to in-person instruction that are negotiable and in dispute. For this reason alone, each and every of Plaintiffs' federal claims is all but certain to fail as a matter of law, negating federal jurisdiction entirely, and thus Plaintiffs' entire case will not succeed on the merits.

In addition, Plaintiffs have attempted to assemble through numerous certifications and other evidential submission sufficient facts to "prove" that school reopening should proceed in the manner that they propose. As even a cursory review of the authorities cited by the District and the SOMEA herein demonstrate regarding the increasing severity of the pandemic and spread of variants in schools through children in recent weeks, Plaintiffs have not "proven" that the clearly established facts show that schools must be reopened 5 days a week for in person instruction as they posit. Even assuming that Plaintiffs actually had sufficient evidence to demonstrate the District would be wiser to institute different policies on school reopening (which

they have not), it would not be sufficient to entitle Plaintiffs to determine the policy on school reopening, and more importantly, *even then* it obviously would not entitle Plaintiffs to seek an order compelling the SOMEA to comply with its proposed policy. Thus, the relief that Plaintiffs are seeking is not only not supported by a clearly established right, it is difficult to imagine their ever being entitled to the relief they seek.

### **1. Plaintiffs' Due Process Claims Lack Merit**

Plaintiffs' claim for relief under the Due Process clause of the U.S. Constitution is not only not likely to succeed on the merits – it is all but certain to fail as a matter of law. A constitutional right to education *was expressly rejected* by the United States Supreme Court when it held “education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.” San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (rejecting a Constitutional challenge similar to New Jersey's Abbott line of cases brought in Texas, for disparities in educational outcome caused by school financing system). The Court went on to reject the notion of challenging the adequacy of an education under the Constitution based on social and economic disparities like those complained of here. Id. at 24. Separately, the U.S. Supreme Court has expressly noted that it has never ruled on whether there is a potential, much more limited right to a “minimally adequate education” such as protections against for students who “are not taught to read or write” and “receive no instruction on even the educational basics.” Papasan v. Allain, 478 U.S. 265, 285 (1986). Obviously, Plaintiffs have not raised anything approaching that level of deprivation in the present case, where comprehensive remote instruction is in place in the District, – and even if they had, it would not satisfy the standard for

a TRO, since the Plyer and Papasan Courts established that even the most extreme educational deprivation is not yet conferred a clearly established right under the Constitution.

Through a near-willful misreading of these precedents, Plaintiffs have foisted a selective reading of the Plyer case on this Court to argue for the extraordinary relief of forcing the District to engage in full-time all in-person instruction. However, the Plyer case concerned circumstances very different from this case: the unique exclusion of immigrant children from any education, and indeed, the penalization of those children of illegal immigrants for their parents' actions. See (Pb at p. 19-20) (citing Plyer v. DOE, 457 U.S. 202 (1982)). Not only does Plyer have nothing to do with this case, the Supreme Court has since clarified that Plyer is limited to its "unique circumstances." Kadramas v. Dickinson Pub. Sch., 487 U.S. 450, 459 (1988) (rejecting an equal protection and due process challenge to a school bussing fee).

Plaintiffs' fail to note not only this significant authority in claiming the existence of an expressly rejected Constitutional right to education, but they fail to note that Courts in the Third Circuit have already considered what types of educational deprivation could result in a Constitutional violation like that described in Plyer and set the bar very high. Thus, the Eastern District of Pennsylvania has held that in the context of failure to educate juvenile detainees between the ages of 14-20 years of age, "loss of education for up to five years, commencing no earlier than the fourteenth birthday—is not substantial enough to constitute a Plyer-like denial of education." Brian B. v. Pennsylvania Dep't of Educ., 51 F. Supp. 2d 611, 629 (E.D. Pa. 1999). In other words, it has literally been held in this Circuit that the educational deprivation would have to be worse than 5 years of internment as a juvenile delinquent to violate the Constitution. Clearly, nothing in the type of supposed deprivation alleged by Plaintiffs comes anywhere close

to even this level of deprivation from the Brian B case, given that there is a comprehensive and complete educational program in place in the District.

Therefore, Plaintiffs' Constitutional due process claim is not likely to succeed on the merits.

## **2. Plaintiffs' Equal Protection Claim Lacks Merit.**

Plaintiffs also bring a claim under the Equal Protection clause of the 14<sup>th</sup> Amendment – an argument which has even less support than their virtually unsupported Due Process claim, and which like that claim, is equally subject to dismissal. The Plaintiffs have not identified what class they fall under that is receiving disparate treatment in violation of the 14<sup>th</sup> Amendment, but as best can be gleaned, that class is held out as *the entire district* in comparison to *other districts* where learning is being conducted fully in-person. To begin with, Plaintiff's argument is flawed on its face that hybrid instruction is a form of unconstitutional discrimination, when in fact it is an instructional choice expressly permitted under State educational policy and that has been widely implemented by communities throughout New Jersey. (See Lynch Cert., Exhibit "B"). Indeed, the overwhelming majority of districts are operating on either a fully remote or partially remote (hybrid) basis.<sup>5</sup>

Regardless, the legal theory itself is foreclosed by the Supreme Court when it held "the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor...can any system assure equal quality of education except in the most relative sense." Rodriguez, *supra*, 411 U.S. at 24. The Rodriguez case similarly concerned the claim that a school district, taken as an a "class" in comparison to other school districts, had suffered an Equal Protection harm – which the Court soundly rejected. Even assuming that somehow

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<sup>5</sup> See <https://www.nj.com/education/2021/01/is-your-neighbors-school-remote-or-in-person-see-our-full-list-of-810-nj-districts.html>

Plaintiffs were able to articulate a protected class they fall under, the Rodriguez Court offered no support for the idea that mere disparities in educational outcome could support an Equal Protection Clause, which is, at best, all that Plaintiffs have alleged. Therefore, they have no likelihood of success on the merits on this claim, as indeed they have not articulated a cognizable claim in the first instance.

**3. Plaintiffs' Claims under the IDEA, ADA and Rehabilitation Act Also Lack Merit.**

Plaintiffs also argue that they are entitled to a TRO based on supposed violations of the Individuals with Disabilities in Education Act 20 U.S.C. § 1400, et seq. (“IDEA”) the Americans with Disabilities Act 42 U.S.C. § 12101 (“ADA”) and Rehabilitation Act 29 U.S.C. § 701. Looking past the voluminous submissions detailing alleged harms to disabled students, these claims all lack merit, as Plaintiffs have failed to exhaust administrative remedies before the appropriate agencies or otherwise cannot be brought as private civil actions. Of course, this leaves aside the fact that Plaintiffs are incorrect on the merits too, though we decline to discuss them at length here.

Plaintiffs have not anywhere addressed that State and federal authorities have promulgated guidance how educational services should be delivered to disabled students in this pandemic, much less argued how the District is failing to meet such guidance.<sup>6</sup> The question of how to provide services to students with disabilities under these circumstances is not uncomplicated, and for example it is understood from the guidance that pandemic conditions and school closures have provided exceptional circumstances that have, in some cases, relieved Districts of some obligations under the IDEA. The Plaintiffs do not address any of these subjects

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<sup>6</sup> See e.g., Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, March 2020. See <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>.

in all their complications, which further demonstrates why these claims must be brought before the appropriate agencies.

First, the Third Circuit has held that the IDEA does not permit a private cause of action – a plaintiff must first exhaust administrative agencies and then appeal a claim brought under the IDEA. See A.W. v. Jersey City Pub. Sch., 486 F.3d 791 (3<sup>rd</sup> Cir. 2007). As Plaintiffs have never sought to bring any of these claims at the administrative level, this Court will be unable to hear them, and therefore the IDEA claims are unlikely to succeed on the merits.

Second, although the Rehabilitation Act does permit an “implied cause of action” coextensive with the procedures available in a Title VI action, such a claim cannot be brought against private parties or other parties who do not receive federal funding. Emerson v. Thiel College, 296 F.3d 184, 190 (3<sup>rd</sup> Cir. 2002). Thus, Plaintiffs cannot maintain a claim against SOMEA or Lopez as the union is not a recipient of federal funds that can be sued pursuant to a Title VI like action.

Third, and finally, Title II of the ADA similarly does not authorize a suit against private parties and is similarly foreclosed. Emerson, supra, 296 F.3d at 190. Thus, for the same reasons Plaintiffs’ claim is foreclosed under the Rehabilitation Act, it is also foreclosed under the ADA.

In sum, Plaintiffs have not stated any cognizable claims under the disability laws, much less any claims that have a likelihood of success on the merits.

**C. Plaintiffs’ State Constitutional and Common Law Claims Lack Merit**

Plaintiffs’ arguments under the New Jersey State Constitution and the right to a thorough and efficient education are also not cognizable claims. Further, for completeness, common law claims for so-called “bad faith/fraud/deceit” brought against the SOMEA without any apparent factual allegations (and not raised in the motion seeking a TRO) are also meritless (and do not



state recognizable legal claims). It should also be noted at the outset that, given the complete lack of merit of the federal claims, this Court likely does not have jurisdiction to hear the State law claims. In addition, the State law claims seek relief that will interfere with a concurrent State court litigation, where proceedings continue and discussions are ongoing to expand in-person instruction and protect the health and safety of students and staff. For reasons of comity and pursuant to the Colorado River abstention doctrine, this Court should decline to hear the State law claims. See Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 818 (1976).

Regardless, none of Plaintiffs' State law claims are likely to succeed on the merits. First, regarding the Abbott claims, despite the selective quotation exercise by Plaintiffs from that line of cases, they have not come anywhere close to pleading a violation of the thorough and efficient clause under the New Jersey State constitution. The Abbott line of cases has found constitutional violations in certain special needs districts where circumstances demonstrated the most abject failure of education. Those cases have never been extended beyond their original context as applied to the special needs "Abbott Districts" and so Plaintiffs cannot possibly claim they are likely to succeed on the merits here, given the fundamentally novel nature of their claim.

Regardless, even a cursory examination of the Abbott cases shows that Plaintiffs' claims are all but certain to fail. The Abbott cases addressed "the education of those children who live in poverty. Their cities have deteriorated, and their lives are often bleak. They live in a culture where schools, studying, and homework are secondary. Their test scores, their dropout rate, their attendance at college, all indicate a severe failure of education." Abbott v. Burke, 119 N.J. 287, 391 (1990)("Abbott II"). Further, the paramount concern in the Abbott cases was the relative parity of educational experiences and outcomes in the very richest and very poorest school

districts, through the holding that “a thorough and efficient education requires such level of education as will enable all students to function as citizens and workers in the same society.” Id. at 374. The Abbott Court was also concerned with a bevy of evidence indicating the most dire and abject educational deprivations – close to 50% high school dropout rates, the majority of students failing high school proficiency tests, to name just one limited example. Id. at 370-71.

Plaintiffs, of course, do not plead anything remotely resembling a Constitutional deprivation under the Abbott decisions. There is no extreme disparity between Plaintiffs’ district and other districts, because a high number of New Jersey Districts have elected for hybrid instruction, and a significant number have even elected for entirely remote instruction. Indeed, invoking the Abbott decisions in this context trivializes the severe disparities that were recognized in the New Jersey’s long history of addressing disparity in New Jersey’s special needs districts. Whatever issues Plaintiffs have raised regarding the supposed inadequacy of education under hybrid conditions, these conditions unquestionably do not approach the deprivations discussed in Abbott, which described the total failure of the educational system. Therefore, it is clear that Plaintiffs’ New Jersey Constitutional claim is not likely to succeed.

Further, although it is not clear whether Plaintiffs assert the claim that SOMEA has engaged in “bad faith/fraud/deceit” with respect to the TRO, it does not state a cognizable claim. As best can be gleaned, Plaintiffs have alleged common law fraud against SOMEA and its President. The elements of fraud must be pled with specificity, including “the representation, its falsity, materiality, the speaker’s knowledge or ignorance, and reliance.” Palko v. Palko, 73 N.J. 395, 401 (1977). Plaintiffs’ Complaint does not even describe what representations were allegedly made by SOMEA that constituted fraud, but only alluded to them in conclusory

fashion. Therefore, it is clear that Plaintiffs have no likelihood of success on the merits on these claims.

In sum, Plaintiffs' State law claims, which this Court should decline to hear, also provide no basis for relief under the TRO standard.

**POINT III.**

**THE PLAINTIFFS CANNOT DEMONSTRATE THAT INJUNCTIVE RELIEF IS NECESSARY TO PREVENT IRREPERABLE HARM**

The Third Circuit has recognized that injunctive relief should not be entered except when necessary to prevent irreparable harm. Here, as discussed above – the circumstances which presumably led Plaintiffs to seek temporary restraints no longer exist. In light of the patent health and safety concerns associated with a return to in-person instruction due to the District’s inadequate ventilation systems, and other concerns, the SOMEA has complied with the District reopening plan and Sidebar agreement. True to its word at the time, the SOMEA has returned to in-person instruction and in-person instruction is taking place at this moment, though under circumstances where the adequacy of the classrooms for instruction have been properly assessed and vetted. There can be no irreparable harm when the situation underlying the Plaintiffs’ claim of harm is now effectively moot.

Nor was there ever any “irreparable harm” justifying the Plaintiffs’ application in the first instance. There was never a denial of educational programs to District students. The mere delay in the commencement of in-person instruction in favor of remote or virtual instruction – at least pending remediation of the clear public health and safety issues at issue in the Board’s facilities – did not and does not rise to the level of irreparable harm necessary for the grant of injunctive relief. Indeed, it was never the District’s plan that at this point the District would be all “in person” in February and March 2021. Presently, Grades 7 and 8, as well as Grades 10 through 12 are remote and were always going to be remote, since it was always contemplated by the District that these Grades would remain remote until after Spring-break, on or about April 19, 2020. That is the case now.

If the Plaintiffs' claim of irreparable harm is true – then they must acknowledge that the majority of school districts in the State, operating on either all remote instruction, or a hybrid schedule, are irreparably harming their students. (See n. 5, p. 28, *infra*). So too would be the parents of children voluntarily electing remote instructions due to health and safety concerns. That simply is not and cannot be the case. Moreover, remote instruction has been present throughout the New Jersey schools and contemplated by the Governor's own reopening "Road Back."<sup>7</sup> (See Lynch Cert., Exhibit "B"). All agree that in-person instruction is the goal and all things being equal it is certainly "better" for students both academically and socially. But, it does not thereby follow that a temporary delay in a return to full in-person instruction in the middle of a pandemic, consistent with federal and State guidance and pending a full assessment of the District's facilities to ensure the health and safety of students and staff, constitutes the irreparable harm necessary to justify the issuance of temporary restraints.

Accordingly, since Plaintiffs fail on the two gateway prongs, this court need not consider the final two prongs. However, in the event the Court considers the final two prongs, Plaintiffs' claims fail there as well.

The third and fourth prongs require the Court to weigh the possible harm to other interested persons from the grant or denial of the injunction and to consider the public interest. As mentioned above, the harm referred to by Plaintiffs is purely speculative, while the harm facing the District's employees and students upon premature return to full in-person instruction could be life or death. Covid-19 cases in New Jersey remain stubbornly high compared to the rest of the country. Serious health and safety concerns remain the reality. Despite this, teachers continue to teach and, in fact, are currently engaged in in-person instruction of all grades

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<sup>7</sup> See <https://www.nj.gov/education/reopening/>

contemplated by the Board at this point in time. Conversely, should temporary restraints be granted, potential severe and permanent illness and death may occur with respect to staff compelled to engage in in-person instruction in inadequately ventilated rooms and unsafe conditions. Furthermore, public interest concerns not only the academic development of students, but also the eradication of this once-in-a-century virus.

Moreover, the circumstances underlying the Plaintiffs' initial request no longer exist rendering their request effectively moot as both a practical and legal matter. Students and staff have returned to in-person instruction for all Grade levels contemplated by the District. No further expansion of in-person instruction is even contemplated by the District until April 19<sup>th</sup>. SOMEA fully anticipates that in-person instruction will expand on April 19<sup>th</sup> with the utilization of filters/air purifiers contemplated through discussions between SOMEA and the District, and is similarly hopeful that any limited remaining ventilation issues will be solved by the next phase of re-opening on May 3<sup>rd</sup>. Of course, COVID-19 has proven to be a fickle virus and future developments in the course of the pandemic could have an impact. But, the goal of returning students to as full an in person academic environment as possible, while maintaining the health and safety of students and staff, remains the goal of SOMEA, and presumably the District as well.

Accordingly, Plaintiffs fail to demonstrate that temporary restraints are necessary in this matter pursuant to the high standard for injunctive relief as set forth under Third Circuit precedent.

**CONCLUSION**

For the forgoing reasons, it is respectfully submitted that the Plaintiffs' instant application for injunctive relief should be denied.

Respectfully submitted,

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