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Christopher Cerf
Commissioner of Education

TO: Christopher Cerf, Commissioner, New Jersey Department of Education
FROM: Cami Anderson, Superintendent, Newark Public Schools
DATE: February 21, 2014
RE: Memorandum in Support of Equivalency Application

I. Introduction

In the next three years, Newark Public Schools (NPS) expects to see its student enrollment fall by nearly 25 percent.¹ In fact, by 2016 the district will serve only 60 percent of the city's students, down from 95 percent in 2009.² There are two related consequences of declining student enrollment. First, NPS has more teachers than it needs to serve the number of students it has in its classrooms. Second, since student enrollment impacts the district's funding, NPS will also see its revenue shrink by as much as 200 million dollars.³ Because teacher salaries and benefits make up more than 40 percent of the district's operating budget, NPS cannot afford to employ hundreds more teachers than it needs.

In order to properly right-size the district's teaching force, over the next three years NPS will need to reduce the number of teaching positions by almost 30 percent. However, a reduction in force (RIF)⁴ under the current New Jersey regulation will severely compromise the district's efforts to ensure every student has a great teacher. The regulation requires teacher layoffs to be conducted strictly on the basis of length of service and without regard for teacher quality. A quality-blind layoff of this sort would force the district to lose hundreds of Effective and Highly Effective⁵ teachers simply because they have not taught as long as some lower-performing teachers. The loss of so many great teachers would cause thousands of Newark students to fall behind their peers and would derail their progress toward college and career.

To prevent the loss of its best teachers, NPS is seeking temporary relief from the regulation that requires a RIF to be conducted based solely on length of service. NPS respectfully requests that the Commissioner of Education (the Commissioner) exercise his authority under N.J. ADMIN. CODE § 6A:5-1.1 (2013) *et seq.* to grant NPS' application for an equivalency of N.J. ADMIN. CODE § 6A:32-5.1 (2013) for three years, effective immediately. As outlined below, the requested equivalency would refine the definition of seniority, as it applies to NPS, to consider both performance and length of service when a reduction of teachers is necessary.

Without the equivalency, NPS is in the untenable position of having to choose between balancing its budget and ensuring students have the most effective teachers possible. NPS requests the proposed equivalency so that it can consider teacher quality when making RIF decisions, which would enable NPS to balance its budget and retain the great educators it already has, ensuring more students have access to effective teachers.

¹ See Appendix A at slide 6.

² *Id.*

³ *Id.* at Slide 7.

⁴ The singular and plural, *i.e.*, reduction in force and reductions in force, are both hereinafter referred to as RIF.

⁵ See *infra* text accompanying notes 63-71 for discussion of NPS' evaluation system.

II. Legal Standards & Supporting Arguments

NPS has completed the New Jersey Department of Education’s Equivalency Application Form and is submitting this Memorandum in Support of its application to address the more nuanced components of its request. The following sections of this Memorandum demonstrate how NPS’ application for an equivalency of N.J. ADMIN. CODE § 6A:32-5.1 satisfies the requirements for granting its request. The sections below will:

- State the requirements for granting the equivalency
- Provide background on the current regulation
- State the proposed equivalent language
- Identify and explain the circumstances necessitating the equivalency
- Demonstrate how the proposed equivalency meets legal standards
- State the projected measurable results NPS expects should the equivalency be granted
- Describe the opportunity for public comment

A. The District’s Equivalency Application Satisfies the Requirements set forth in N.J.A.C. § 6A:5-1.1 *et seq.*

Under N.J. ADMIN. CODE § 6A:5-1.1 *et seq.*, the Commissioner has the power to grant certain requests for flexibility. One type of flexibility is an equivalency, in which the Commissioner allows a district to modify regulatory language with language that “achieve[s] the intent of a specific rule through an alternate means that is different from, yet judged to be comparable to or as effective as those prescribed within the rule.”⁶

The equivalency is required to meet three legal standards. It must:

1. Satisfy the “spirit and intent” of the New Jersey education statutes and regulations,
2. Fulfill the obligation to provide a “thorough and efficient education” to all students, and
3. Not present a “risk to student health, safety or civil rights.”⁷

In addition to meeting these legal requirements, an application for an equivalency must:

1. Describe how the equivalency satisfies the spirit and intent of the existing rule,
2. Outline the conditions or reason for the requested equivalency,
3. State the projected measurable results that will provide programs or services that are at least equal to the current rule, and
4. Demonstrate that the district’s community has been made aware of the proposal, and had the opportunity to comment.⁸

Together with this Memorandum in Support, NPS’ Equivalency Application Form meets the above requirements.

B. Background on Current Regulation

New Jersey law requires a RIF of teachers to be conducted on the basis of seniority.⁹ However, New Jersey statute authorizes the Commissioner to define seniority. Specifically, the statute states that a RIF “shall be made on the basis of seniority

⁶ N.J. ADMIN. CODE § 6A:5-1.2 (2013).

⁷ N.J. ADMIN. CODE § 6A:5-1.3.

⁸ N.J. ADMIN. CODE § 6A:5-1.4.

⁹ N.J. STAT. ANN. § 18A:28-9, *et seq.* (2013).

according to standards to be established by the commissioner.”¹⁰ Seniority is not defined elsewhere in the statutes of the Education Code.

The seniority standards currently applied by the Commissioner are included in N.J. ADMIN. CODE § 6A:32-5.1, which is the section of code for which NPS seeks an equivalency. This regulation outlines how seniority is calculated and enumerates the categories of positions for which seniority applies. Seniority is defined as “the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided.”¹¹ The remainder of the regulation provides details on calculating length of service, the use of seniority for reversion and re-employment, and categorizes titles in which an educator can earn seniority.

C. The District’s Proposed Equivalent Language

To ensure it is able to retain its best teachers while appropriately right-sizing to match the declining student enrollment, NPS requests that the Commissioner approve the below equivalent language in place of the current definition of seniority in N.J. ADMIN. CODE § 6A:32-5.1:

In the circumstances outlined in N.J. STAT. ANN. § 18A:28-9 et seq., seniority shall be calculated by placing teachers into performance categories from lowest to highest performance and then ranking all teachers within a given performance category first by tenure status and then by length of service. Accordingly, non-tenured teachers in the lowest performance category shall be prioritized for reduction first. Once all non-tenured teachers are eliminated from the lowest performance category, tenured teachers with the least years of service in the lowest performance category shall be prioritized for reduction in force in reverse order of length of service. This process will repeat through the performance categories until the district reaches its target number of reductions.

When identifying performance categories, the district shall consider the following criteria: the most recent annual summative evaluation rating, formal observation ratings, attendance and disciplinary records.

Length of service will be calculated pursuant to the current requirements outlined in N.J. ADMIN. CODE § 6A:32-5.1.

For purposes of this equivalency request, the term teacher is used as it is defined in N.J. ADMIN. CODE § 6A:10-1.2 (2013).

Teachers who have been dismissed as a result of a reduction in force shall be placed on a preferred eligible list pursuant to N.J. STAT. ANN. § 18A:28-12 and in order of seniority as defined in this equivalent language. Teachers may remain on the preferred eligible list until employed or for up to one academic year, whichever is shorter.

The next section will demonstrate why this equivalent language is necessary for NPS to address financial conditions resulting from a decline in enrollment without losing its highest performing teachers.

D. The District’s Current Teacher Quality and Fiscal Demands Necessitate the Approval of the Requested Equivalent Language

An equivalency for N.J. ADMIN. CODE § 6A:32-5.1 is necessary for NPS to attain fiscal stability in the face of declining student enrollment and to ensure all Newark students have access to effective teachers. Achieving both goals is necessary for NPS to meet its mission of graduating all students ready for college and career. However, these goals are impossible to achieve simultaneously under the State’s current definition of seniority.

¹⁰ N.J. STAT. ANN. § 18A:28-10 (emphasis added).

¹¹ N.J. ADMIN. CODE § 6A:32-5.1(b).

1. Declining Student Enrollment is the Driving Force behind NPS' Challenges to Fiscal Stability

As previously stated, NPS has been experiencing a dramatic decline in student enrollment over the last several years. Because district funding depends in large part on the number of students enrolled in its schools, the drop in student enrollment will cause a proportionate reduction in the district's budget. Since 2010-11, NPS has seen a seven percent decline in student enrollment. In the same time frame, the annual net revenue has declined by 90 million dollars. The projected outlook is much worse. **NPS could see its net revenue fall by as much as 200 million dollars by 2016-17, driven primarily by an almost 25 percent decline in student enrollment expected over that time.**¹²

A second consequence of falling student enrollment is the decreased need for teachers. In other words, because NPS will have fewer students than it has had in the past, the district will need fewer teachers. Additionally, since teacher salaries and benefits make up 42 percent of the district's operating budget, NPS cannot afford to employ hundreds more teachers than it needs. Case in point: this year NPS expects a budget gap of 57 million dollars, caused in part because it employs more teachers than it needs.¹³ Next year, the district could see a deficit of up to 85 million dollars.

Ordinarily, a district in this situation would conduct a RIF of its teaching force to reduce its deficit and right-size itself. NPS has been reluctant to conduct a teacher layoff because under the current regulations NPS would be forced to conduct a quality-blind RIF and lose some of its most effective teachers. Instead, NPS has attempted to reduce its deficit by making reductions to departments, programs and personnel with the least impact on student learning. In the last year, NPS has cut nearly 30 million dollars from the central budget, which included a RIF of central office personnel and dramatic reductions to department expenditures.¹⁴ However, the projected decline in student enrollment – and accompanying decline in net revenue – is too steep to avoid making cuts to the teaching force.

Until now, NPS has not considered laying off teachers because a quality-blind RIF would severely compromise the district's commitment to improving the quality of teaching. Unfortunately, the district can no longer afford to retain more teachers than it needs, so a RIF is necessary.

2. NPS is Committed to Teacher Quality

For decades, a distressing number of Newark students have endured poverty and low academic achievement.¹⁵ These historical patterns are particularly troubling because children who are born into low-income families tend to remain in poverty unless something dramatic enables them to break that cycle – like the chance at a great education.¹⁶ NPS is committed to graduating all students ready for college and career so that all Newark students have the opportunity to break the cycle of poverty.

Consequently, NPS has taken extraordinary steps to improve teacher quality across the district because decades of research and experience prove how great teachers can put their students' lives on an entirely different path. In fact, current research

¹² See Appendix A at slides 6 and 7.

¹³ Newark Public Schools, Budget Presentation, <http://c2.newarkpublicschools.schoolwires.net/cms/lib7/NJ01001467/Centricity/Domain/23/SABBudgetFinal1314ReadOnly.pdf> (last visited February 18, 2014).

¹⁴ *Id.*

¹⁵ Kids Count Data Center, <http://datacenter.kidscount.org/data/tables/2149-children-living-below-the-federal-poverty-level?loc=32&loct=5#detailed/5/4705/true/17,16,15,14,13/any/4502,12997> (last visited February 18, 2014) (demonstrating that year after year vastly more children in Essex County live below the federal poverty line than most other children in New Jersey); New Jersey Department of Education, New Jersey Statewide Assessment Reports, <http://www.state.nj.us/education/schools/achievement/> (February 18, 2014) (demonstrating that only about 30 percent of Newark high school students passed the High School Proficiency Assessment for many years in the late 1990s and early 2000s).

¹⁶ Miles Corak, *Do Poor Children Become Poor Adults?*, DYNAMICS OF INEQUALITY AND POVERTY 143, 148-150 (Elsevier Ltd. 2006).

shows that teacher quality is the most powerful school-based factor in student academic success or failure.¹⁷ The difference in results for students between having an Effective versus an Ineffective teacher is enormous and profound, in some studies equivalent to a year's worth of learning.¹⁸ **A recent study established that students who have even one Highly Effective teacher are more likely to attend college, have higher earnings, and are less likely to become teenage parents than their peers.**¹⁹ Another study showed that having an Effective teacher four years in a row would be enough to close the black-white achievement gap.²⁰ Because NPS' mission is to prepare all its students for a successful future in college and career, every opportunity to put a high-quality teacher in front of students is critical.

As part of its commitment to improve teacher quality, NPS has reformed its policies and practices for hiring, developing, and retaining outstanding teachers. Most notably, the Framework for Effective Teaching has created clearer, higher expectations for NPS teachers and has helped school and district leaders to give teachers the feedback they need to do their best work. Additionally, the groundbreaking contract NPS negotiated with the Newark Teachers Union has allowed the district to give its best teachers the recognition and higher compensation they deserve – as well as a compelling reason to stay in Newark's classrooms longer.²¹ **According to the district's records, in the first year of the new contract, NPS was able to retain 96 percent of its Highly Effective teachers and 95 percent of its Effective teachers.**

Unfortunately, the current state regulation prevents NPS from ensuring its best teachers are protected in a RIF. Instead, teachers are retained based on years of experience, which is an unreliable indicator of teacher effectiveness. In fact, most research suggests that teacher effectiveness does not improve much after a teacher's first three years in the classroom.²² When RIF decisions are based on years of service, districts are often forced to retain their low-performing teachers over their high-performing teachers. Recently, two separate studies examined the relative impact of RIF based solely on length of service as compared to RIF based on teacher performance.²³ They found that **only 13 to 16 percent of teachers laid off in a**

¹⁷ Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *Teachers, Schools, and Academic Achievement*, 73(2) *ECONOMETRICA* 417, 443-51 (2005) (identifying teacher quality as having a greater impact on student learning than other in school factors, including teacher experience and class size).

¹⁸ ERIC HANUSHEK, NATIONAL CENTER FOR ANALYSIS OF LONGITUDINAL DATA IN EDUCATION RESEARCH (CALDER), *THE ECONOMIC VALUE OF HIGHER TEACHER QUALITY* 3-4 (2010) (working paper) (explaining that high-performing teachers can produce a year and half's worth of achievement gains while a low-performing teacher may produce just a half year's worth of gains); ROBERT J. MARZANO, *CLASSROOM MANAGEMENT THAT WORKS* 1-3 (ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT) (2003) (demonstrating the comparative impact of ineffective and effective teachers on the same student) (citing SANDRA P. HORN, WILLIAM L. SANDERS & S. PAUL WRIGHT, *Teacher and Classroom Context Effects on Student Achievement: Implications for Teacher Evaluation*, 11 *JOURNAL OF PERSONNEL EVALUATION IN EDUCATION* 57, 63-64 (1997) (concluding that one year with an ineffective teacher can derail student achievement so dramatically that even a subsequent year with a highly effective teacher cannot correct the damage done)).

¹⁹ RAJ CHETTY, JOHN N. FRIEDMAN & JONAH E. ROCKOFF, NATIONAL BUREAU OF ECONOMIC RESEARCH, *THE LONG-TERM IMPACTS OF TEACHERS: TEACHER VALUE-ADDED AND STUDENT OUTCOMES IN ADULTHOOD* 38-42 (2012) (working paper) (Demonstrating how teacher quality impacts life-long student outcomes and summarizing 20 years of data on 2.5 million students in grades 3-8, including 18 million tests, and tax records on parent characteristics and adult outcomes).

²⁰ ROBERT GORDON, THOMAS KANE & DOUGLAS STAIGER, THE BROOKINGS INSTITUTION, *IDENTIFYING EFFECTIVE TEACHERS USING PERFORMANCE ON THE JOB* 8 (2006) (Stating that "[h]aving a top-quartile teacher rather than a bottom-quartile teacher four years in a row could be enough to close the black-white test score gap").

²¹ See Appendix B at § II.

²² Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *Teachers, Schools, and Academic Achievement*, 73(2) *ECONOMETRICA* 417, 447-49 (2005) (Explaining that marginal improvement in teacher quality occurs after a teacher's third year of teaching); LINDA DARLING-HAMMOND, *TEACHER QUALITY AND STUDENT ACHIEVEMENT: A REVIEW OF STATE POLICY EVIDENCE* 8 (Education Policy Analysis Archives 2000).

²³ Donald Boyd, Hamilton Lankford, Susanna Loeb & James Wyckoff, *Teacher Layoffs: An Empirical Illustration of Seniority v. Measures of Effectiveness*, 6 *EDUC. FIN. AND POLICY* 439, 444-447 (2011); Dan Goldhaber and Roddy Theobald, THE URBAN INSTITUTE AND NATIONAL CENTER FOR THE ANALYSIS OF LONGITUDINAL DATA IN EDUCATION RESEARCH, *ASSESSING THE DETERMINANTS AND IMPLICATIONS OF TEACHER LAYOFFS* 29 (2010) (working paper).

quality-blind RIF would also have been cut under a performance-based system.²⁴ This further demonstrates not only that experience is a poor proxy for effectiveness, but that a quality-blind RIF would cut too many of the wrong people.

Because experience is not a reliable proxy for teacher quality, NPS has been unwilling to conduct a RIF based solely on years of experience. The reality of losing less-experienced but high-performing teachers is a risk that NPS has not been willing to take for fear of the impact it would have on the lives of its students.

3. The Educators Without Placement Sites are No Longer Financially Sustainable

Because the loss of high-performing teachers has such harsh consequences for students, three years ago NPS established a policy that all displaced teachers 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. A common practice in many districts is to force displaced teachers into 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 mutual consent whenever possible.²⁵

Unfortunately, some teachers have been unable to secure a placement through this process, and because of the current seniority rules and tenure considerations the district must retain them and pay full salary and benefits. The cost of retaining teachers in the EWPS pool is high and increasing every year. At the end of the 2012-13 school year, there were 159 EWPS teachers that the district could not place into full-time budgeted positions, which amounted to nearly 16 million dollars in salaries and benefits. This year, NPS has 248 EWPS teachers that cannot find or are not eligible for permanent placements. **The estimated cost to carry the current pool of EWPS teachers is over 25 million dollars, which is nearly half of the projected deficit of 57 million dollars for 2013-14 fiscal year budget.**

While not all teachers in the EWPS pool are low-performing, they are **almost six times as likely receive an Ineffective rating** than teachers with full-time placements in schools. NPS has a practice of never placing an Ineffective EWPS teacher as the teacher of record in a classroom to prevent causing academic harm to students. Instead, Ineffective EWPS teachers and any teacher that cannot otherwise be placed are given additional support assignments, which are either co-teaching or other instructional roles. These teachers may remain on the EWPS roster for multiple years. In fact, **nearly 80 percent of the teachers in the EWPS pool at the end of the 2012-2013 school year had been in the pool for multiple years.** Since these teachers are entitled to full pay and benefits, the district has been forced to pay these teachers year after year even though they have not been able to secure a teaching position.

Because over **70 percent of EWPS teachers have ten or more years of service** in the district, nearly all EWPS teachers would be protected based on their years of service in a quality-blind RIF. In that scenario, the district would be forced to retain teachers in the EWPS pool who have been rated Ineffective and have not been able to find a placement in more than a year instead of higher-performing teachers who happen to have less years in the district. In contrast, a performance-based RIF would remove those EWPS teachers who have been rated Ineffective, preventing them from further contributing to the district's ballooning deficit. While a performance-based RIF would not remove all of the teachers from the EWPS list, it would remove some of the least effective and simultaneously enable the district to place high-performing EWPS teachers in classrooms positions to replace lower-performing teachers that currently occupy those positions.

NPS modeled both a quality-blind and a performance-based RIF to demonstrate how each type of RIF would impact the district, including the effect on the EWPS pool. The next section will explain the models and their results in detail.

²⁴ *Id.*

²⁵ For those EWPS teachers who are not low-performing, NPS's staffing team works closely with them and principals who have vacancies to identify mutually agreeable positions. For the 2013-2014 school year, 95 percent of EWPS teachers who found new positions, did so by mutual consent. When placed by mutual consent, these teachers are officially placed into a budgeted position and do not contribute to the overall cost of maintaining the EWPS list. These teachers are typically higher-performers and are able to secure positions easily.

4. *The District Analyzed the Comparative Impact of Quality-Blind and Performance-Based RIFs in Support of its Application*

To show how a quality-blind RIF and a performance-based RIF would affect NPS differently, NPS modeled each type of RIF and analyzed their comparative impacts on the district. The next sections explain the methodology for how each RIF was modeled and then compare the results.

a. Methodology

Because the district projects it will need nearly 30 percent fewer teaching positions by 2016-17, NPS modeled quality-blind and performance-based RIFs based on that projection.²⁶ While the district does not expect to reduce this many teachers all at once, modeling the two types of RIF in this way demonstrates the different impacts on the district once it reaches its target reduction of teaching positions.

Additionally, the district modeled both RIF scenarios as though they had been conducted at the end of the 2012-13 school year. This point in time analysis made it possible to use a near-complete data set, minimizing assumptions, particularly with evaluation ratings, rather than model a RIF with incomplete data for the upcoming 2013-14 school year. In other words, NPS modeled both a performance-based and quality-blind RIF as though it had laid off about 30 percent of its teaching positions at the end of the 2012-13 school year. These models do not necessarily identify the teachers who would be laid off in a RIF at the end of the 2013-14 school year; rather, they demonstrate the likely impact the two types of RIF would have on the district.

To conduct the quality-blind RIF model, NPS followed the current rules in N.J. ADMIN. CODE § 6A:32-5.1.²⁷ Under these rules, NPS calculated the years of service of every teacher employed in the district as of June 28, 2013. Non-tenured teachers with the least years of service in their category of service were cut first.²⁸ Then, if additional cuts were necessary, tenured teachers with the least years of service were cut. If a teacher who is laid off has an employment history that afforded her reversion rights to other positions, she would bump a less senior teacher.²⁹ In the case in which two or more teachers had

²⁶ NPS modeled the RIF as though it cut 30 percent of teaching positions in each teaching job title in the district. In a real RIF scenario, NPS would cut positions based on the needs of the schools; therefore, the cuts may not be evenly distributed by job title.

²⁷ NPS calculated length of service in the job titles a teacher held and assumed the teacher held proper certification in those titles because NPS lacked reliable historical certification data. In advance of conducting an actual RIF, NPS will request an advisory opinion pursuant to N.J. STAT. ANN. § 18A:28-11 to confirm the certification history on record with the State of all its teachers.

²⁸ Categories are broadly defined as elementary and secondary with content-specific endorsements.

²⁹ NPS assumed a teacher had the right to revert to a position if the teacher had previously held that position, had more years of service in that position than at least one other teacher, and possessed the proper certification for the position. An alternative approach would be to assume reversion rights if a teacher possessed a certification that applied to any position the teacher had previously held and the teacher had more years of service in than at least one other teacher. It is possible that NPS's approach in this model may have not have captured some teachers who would have had reversion rights under the alternate approach. However, the number of teachers who could be impacted by this difference is marginal.

In some cases, teachers have held instructional titles in the central office in addition to either elementary or secondary titles. In calculating length of service, NPS tacked on the years served in the central office title to the time served in an elementary or a secondary position. Alternatively, NPS could have calculated length of service in the central office title separately from the titles held in schools. NPS opted for the former option because it tended to benefit teachers by granting them more years of service.

For both of the above methodology questions, if granted its requested equivalency, NPS will request an advisory opinion pursuant to N.J. STAT. ANN. § 18A:28-11 to confirm the proper approach before finalizing any RIF decisions.

identical lengths of service in a position, NPS randomly selected the teacher(s) for the RIF.³⁰

To conduct the performance-based RIF, NPS placed teachers in performance categories that corresponded to their most recent evaluation rating.³¹ Within each performance category, teachers were also ranked by their disciplinary and attendance history so that teachers with disciplinary records and poor attendance were prioritized for layoff before others in that performance category.³² For example a teacher rated Ineffective who has an unacceptable disciplinary and attendance history would be prioritized for a RIF before a teacher rated Ineffective who has no attendance or discipline issues.

 Higher RIF Priority

| Annual Evaluation Rating | Disciplinary Record | Attendance History |
|--------------------------|-----------------------------------|------------------------------------|
| Ineffective | Does not meet expectations | Slightly Below Expectations |

 Lower RIF Priority

| Annual Evaluation Rating | Disciplinary Record | Attendance History |
|--------------------------|---------------------------|---------------------------|
| Ineffective | Meets Expectations | Meets Expectations |

Once teachers were ranked by performance category, they were then ranked by length of service within their performance category.³³ Then, teachers with the fewest years of service were prioritized for layoff first within their performance category, until all the teachers in that performance category were cut. So, among all teachers rated Ineffective who have both attendance and discipline issues, non-tenured teachers with the least years of service would be cut first. Under the equivalent language, teachers do not have reversion rights, therefore the performance-based model does not revert teachers to positions previously held.³⁴

The next section will demonstrate the different results of the two types of RIF.

b. Results of RIF Models

Using NPS’ projected needs over the next three years, both RIF result in cutting 30 percent of positions within each job title or between 26 and 27 percent of all teachers in the district.³⁵ Although roughly the same number of teachers would lose their

³⁰ Ordinarily, NPS would have consulted the board policy on what to do in the case of a tie. However, NPS was not able to obtain the board policy on this point for the RIF model. Random selection is an acceptable method of breaking a tie in a length of service RIF. *Mann v. Cherry Hill Bd. of Educ.*, 1987 S.L.D. 1506 (*aff’d* St. Bd. 1987 S.L.D. 1522) (*aff’d* App. Div. Dkt. #A-2695-87T1, June 7, 1990).

³¹ There were five performance categories because NPS treated Partially Effective teachers who received a step increase as a higher performance category than Partially Effective Teacher who did not receive a step increase. Pursuant to § II.A.4 of the MEMORANDUM OF AGREEMENT BETWEEN THE NEWARK STATE OPERATED SCHOOL DISTRICT AND NEWARK TEACHERS UNION, teachers rated Partially Effective are not entitled to a step increase. However, the Superintendent has the discretion to award step increases to Partially Effective teachers. See Appendix B.

³² The district considers “high-performing teachers” to be all Highly Effective teachers, Effective teachers without any disciplinary or attendance issues, and Partially Effective teachers who received a step increase and do not have any attendance or disciplinary issues.

³³ For purposes of the performance-based RIF model, years of service was used as a proxy for tenure status because the two are so closely linked.

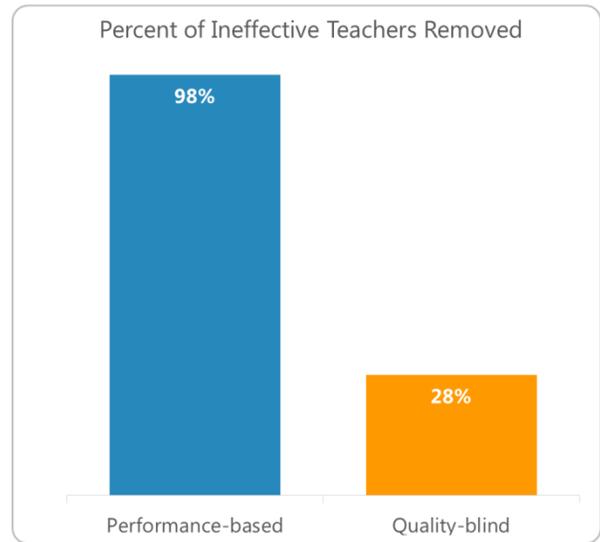
³⁴ Neither scenario modeled the impact of rehiring teachers who had been laid-off because it was not possible to predict which positions might have vacancies after the RIF.

³⁵ Some of the cut positions were already vacant, so no teacher in that position would lose his or her job. As a result, less than 30 percent of teachers would lose their jobs.

Additionally, the number of teachers cut in each type of RIF is slightly different because the equivalency language does not allow for reversion. So, in a quality-blind RIF, a few teachers revert to positions instead of being laid-off. In a quality-blind RIF, 809 (26 percent) teachers would have lost their jobs. Under a performance-based RIF, 816 (27 percent) teachers would lose their jobs. While 7 more teachers would have lost their jobs in the quality-blind RIF, this is because they were placed in positions that they may not have worked in

jobs, the quality of those teachers is what makes the difference to students. As demonstrated by the modeling results, the criteria for a RIF have a very meaningful impact on the quality of NPS’ teaching force. Outlined below are some of the more salient comparison points from the two models.

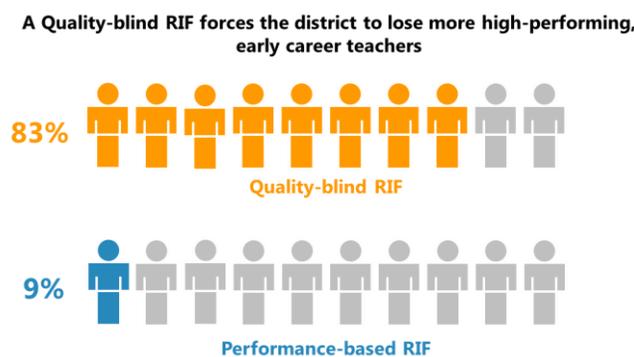
Performance of Teachers: The number of Ineffective teachers removed through a quality-blind RIF is drastically less than under a performance-based RIF. Under a quality-blind RIF, only four percent of teachers who would be laid off are rated Ineffective, and only 28 percent of all Ineffective teachers in the district would be removed. In contrast, **in a performance-based RIF 14 percent of cut teachers are rated Ineffective, and 98 percent of all Ineffective teachers in the district would be removed.**



The loss of high-performing teachers is also remarkably different under the two types of RIF. **Under a quality-blind RIF, 75 percent of teachers who would be laid off are rated either Effective or Highly Effective.** In contrast, under a performance-based RIF only 35 percent of laid off teachers are rated Effective; no Highly Effective teachers would be lost.

The difference in the quality of teachers that are retained under each RIF is striking. In fact, **only 30 percent of the teachers laid off in a quality-blind RIF would also be removed in a performance-based RIF.** And, the number of high-performing teachers that would be retained under each type of RIF has serious, life-long implications for Newark students. Under a quality-blind RIF, NPS would be **forced to cut more than 300 Effective and Highly Effective teachers** that it could otherwise retain under a performance-based RIF. This translates to **as many as 8,000 Newark students missing out on a high-performing teacher in just one year.** For many of these students, this one year could mean the loss of up to a year’s worth of learning and could take them off the path to college, stable careers and higher incomes.³⁶

Length of Service and Tenure of Teachers: Because the current regulations would, in general, require non-tenured teachers to be laid off first, **more than 80 percent of teachers who would lose their jobs under a quality-blind RIF are non-tenured,** many of whom have less than five years of service. Of these non-tenured teachers who would lose their jobs, **70 percent are rated Effective or Highly Effective.** This means that the vast majority of the teachers NPS would lose are new teachers who are already demonstrating success in the classroom and out-performing some of their more experienced peers.



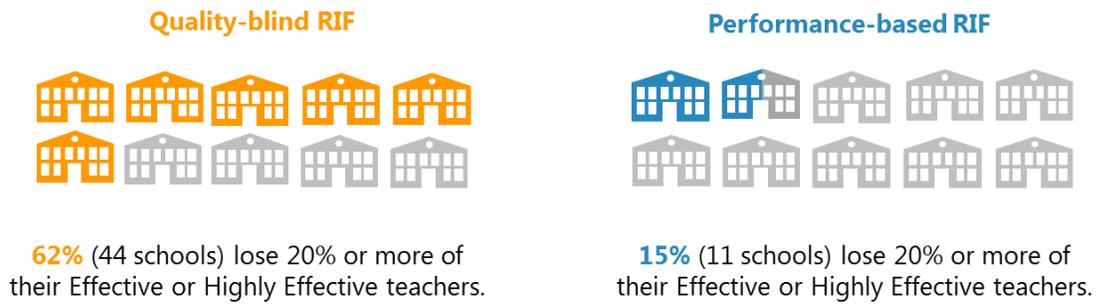
for several years and may not be the most qualified candidate for the position. They simply have more years of experience in that role than at least one other teacher.

³⁶ See *supra* notes 18 and 19 and accompanying text.

Without the equivalency, NPS would be forced to retain low-performing teachers of all experience levels and watch high-performing teachers leave the district, many of whom are at the beginning of their careers. However, under a performance-based RIF, the district could keep these early-career, high performing teachers in addition to their more-experienced, high-performing counterparts.

Impact on Schools: No NPS school is immune from the impact of a RIF. However, a quality-blind RIF causes deeper cuts to certain schools than a performance-based RIF would. **Forty-four schools (or 62 percent) would lose 20 percent or more of their Effective and Highly Effective teachers in a quality-blind RIF**, while under a performance-based RIF only 11 schools (or 15 percent) would lose that many Effective and Highly Effective teachers. And, the district’s highest poverty schools would lose almost twice as many Effective and Highly Effective teachers under a quality-blind RIF as under a performance-based RIF.

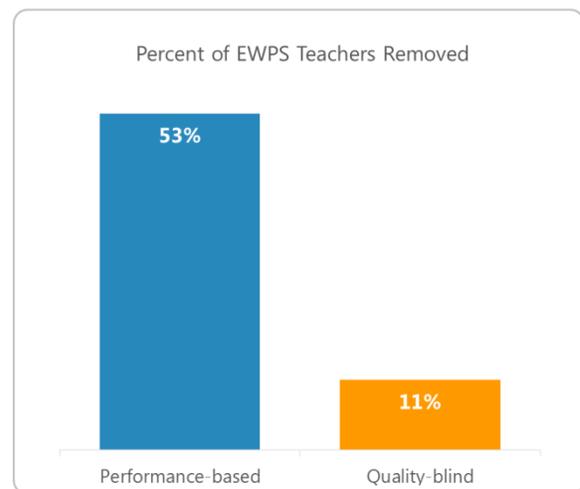
A performance-based RIF protects more schools from losing disproportionate numbers of effective and highly effective teachers.



High turnover in one year can be challenging, but to remove high-performing teachers and potentially replace them with low-performing teachers can cause irreparable damage to student learning. In a performance-based RIF, however, these schools would be able to retain their high-performing teachers and lose only the low-performing teachers they have. The equivalency, if granted, would protect the progress being made in schools by high-performing teachers.

EWPS Status: As discussed above, a RIF would not necessarily eliminate the EWPS list, but it should at least make a significant reduction in the number of teachers who have been unable to find appropriate placements. Under a quality-blind RIF, only 11 percent of the EWPS teachers would be laid off. The remaining 89 percent would have to be placed in schools.

In a performance-based RIF, however, five times as many EWPS teachers would be laid-off and removed from the EWPS list. While not all teachers on the EWPS list would be removed, the performance-based RIF would allow the district to eliminate the lowest-performing half of the EWPS pool.



5. Summary of Circumstances Necessitating Equivalency

NPS is facing a dramatic decline in student enrollment over the next three years. Because district funding is dependent on the number of students it serves, declining enrollment creates two related fiscal issues. First, the district will have more teachers than it needs to serve its student population. Second, the district’s net revenue will shrink at the same rate student

enrollment declines, which means the district will have less money to spend on teacher salaries and benefits. As a result, NPS cannot avoid teacher layoffs any longer.

NPS may need to cut as many as 30 percent of its teaching positions over the next three years. However, if NPS conducted this RIF in accordance with the current state regulation, NPS would lose hundreds of high-performing teachers. The loss of so many high-performing teachers would cause thousands of Newark students to lose up to a year's worth of learning and could derail their progress toward college and career.

Because of its commitment to improving teacher quality across the district, for the past three years NPS has avoided these losses by retaining more teachers than it needs. However, NPS can no longer afford the ballooning costs of carrying teachers it does not need year after year – particularly those who are Ineffective or unable to secure a placement through mutual consent.

NPS requests the proposed equivalency so that it can make the necessary cuts to its teaching staff while ensuring all of its students have the best possible teachers.

E. Proposed Equivalent Language Meets Legal Standards

1. The Proposed Equivalent Language Aligns with Spirit & Intent of Applicable Education Laws and Regulations

The equivalent language is consistent with the “spirit and intent” of applicable New Jersey statutes and regulations, including the purpose of N.J. ADMIN. CODE § 6A:32-5.1.

There are no federal statutes or regulations impacted by the proposed equivalency. This section will focus on the alignment of the proposed equivalency and New Jersey statutes and regulations.

a. The Proposed Equivalent Language is Consistent with the Spirit and Intent of N.J. ADMIN. CODE § 6A:32-5.1

The stated purpose of N.J. ADMIN. CODE § 6A:32 is “to provide assistance to district boards of education and school district administrators regarding the daily operation of their schools.”³⁷ There is no further statement of intent or insight into the specific definition of seniority contained in subchapter 5. Courts have inferred that the purpose of the definition of seniority is to rank teachers “so reductions in that staff ‘can be effected in an equitable fashion and in accord with sound educational policies.’”³⁸

If the accepted purpose of seniority is to create a system of making RIF decisions that prioritizes the best interests of students and that is fair to teachers, then a system that considers performance better satisfies these requirements than one based solely on length of service. Over the last several years, New Jersey and Newark Public Schools, in particular, have emphasized the importance of setting and maintaining high expectations for its teachers through the new teacher evaluation system.³⁹ For those teachers who meet or exceed those expectations, the only equitable decision-making system is the one that honors their work and results. Additionally, because the proposed equivalent language requires teachers with the least years of experience to be cut before more experienced teachers in the same performance category, NPS’ definition gives appropriate consideration to length of service. Thus, in cases where students would benefit equally from the teachers in question, the district honors the teacher’s longevity with the district.

Performance is not only a fair decision-making criterion; it is also an educationally sound one. In 1983, when this statement of purpose for §6A:32-5.1 was first established, it may have been sound educational practice to base layoff decisions on length

³⁷ N.J. ADMIN. CODE § 6A:32-1.1.

³⁸ *Nicholson v. Bd. of Educ. of Asbury Park*, 2013 WL 4647752, at *7 (N.J. Adm. Aug. 1, 2013) (quoting *Capodilupo v. West Orange Bd. of Educ.*, 218 N.J. Super. 510, 514 (App. Div. 1987) (citing *Lichtman v. Bd. of Educ. of Ridgewood*, 93 N.J. 362, 368 n. 4 (1983))).

³⁹ See *infra* text accompanying notes 63-71 for discussion of NPS’ evaluation system.

of service.⁴⁰ At that time, the research into the variation in teacher effectiveness was not yet established nor were there reliable evaluation systems to measure teacher performance.⁴¹ As discussed above, today's research clearly shows that there is little connection between teacher quality and years of experience.⁴² Additionally, the research shows that the loss of even one high-performing teacher in a student's academic career could cost them more than a year's worth of learning and a lifetime of challenges.⁴³ Under a quality-blind RIF, the district can expect to lose hundreds more Effective or Highly Effective teachers who would otherwise be retained under a performance-based RIF, which would deprive thousands of Newark students of the district's best teachers.

Based on the most current research and how we know a quality-blind RIF would affect Newark students and teachers, the only equitable and educationally sound way to make RIF decisions is to redefine seniority to be based primarily on performance.

b. The Proposed Equivalent Language Meets the Spirit and Intent of N.J. STAT. ANN. § 18A:28-9 et seq. (the "RIF Statutes")

The Commissioner has broad powers to define seniority: The plain language of N.J. STAT. ANN. § 18A:28-10 confers on the Commissioner the responsibility to define seniority. Seniority is not defined elsewhere in Title 18A, and very minimal guidance is provided as to how the Commissioner must define seniority. Section 18A:28-13 of the New Jersey statutes states that "The commissioner in establishing such standards...*may, in his discretion,* determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both."⁴⁴ Therefore, the Commissioner is granted broad latitude by statute to establish the definition of seniority for purposes of conducting a RIF, and the definition he establishes is determinative. By extension, the Commissioner has equally broad discretion to redefine seniority through an equivalency, so long as the proposed equivalent language also meets the intent of the original rule, which was addressed above.

The equivalent language complies with preferred eligible privileges for teachers who are laid off: New Jersey statute requires teachers who are laid off to be placed on "a preferred eligible list in the order of seniority for reemployment...and in computing length of service for reemployment, full recognition shall be given to previous years of service."⁴⁵ This law offers the teacher the right of first refusal to any employment opportunities within the district for which the teacher is qualified. The proposed equivalent language is consistent with this statute because teachers who are laid off are entitled to reemployment in order of seniority as defined by the equivalent language. Additionally, because the definition of seniority includes consideration for length of service when all other performance indicators are equal, the equivalent language complies with the requirement that "full recognition" is given to prior service for purposes of rehiring.

The equivalent language limits teachers to one year on the preferred eligible list. However, this limitation does not contradict the statutory language. Although "[t]here is nothing in N.J.S.A. 18A:28-12 which references a term of years after which the

⁴⁰ See *supra* note 38.

⁴¹ DAVID KEELING, JENNIFER MULHERN, SUSAN SEXTON & DANIEL WEISBERG, TNTP, THE WIDGET EFFECT 10-18 (2009) (demonstrating that most evaluation systems fail to assess variations in teacher effectiveness); MEASURES OF EFFECTIVE TEACHING (MET) PROJECT, ENSURING FAIR AND RELIABLE MEASURES OF EFFECTIVE TEACHING 20 (2013).

⁴² See *supra* note 22 and accompanying text.

⁴³ See *supra* notes 18 and 19 and accompanying text.

⁴⁴ N.J. STAT. ANN. § 18A:28-13 (emphasis added).

⁴⁵ N.J. STAT. ANN. § 18A:28-12.

priority status for recall is limited,”⁴⁶ neither is there anything in the statute that prohibits a limitation on the right for a teacher to expect to be recalled.

NPS’ proposed limitation of one academic year is a reasonable limitation for recall, and one to which many other states, districts and collective bargaining units adhere.⁴⁷ After a year of not working in the district, the teacher should reasonably be expected to seek employment elsewhere. Moreover, if a position becomes available in future years, nothing would prevent the teacher from applying for a position in the district, or the district from rehiring that teacher. If the teacher is truly high-quality, it is unlikely he would have been laid off in a performance-based RIF in the first place. And, in the rare instance that this were to occur, he would have little trouble being hired back.

Retaining high-performing teachers is one strategy for improving the overall teaching quality in the district. A complementary strategy is the ability to hire high-quality teachers when the district has the need for additional teachers. If NPS is forced to hire from the same pool of teachers in perpetuity, until they are all rehired, retired or withdraw themselves from consideration, the quality of education NPS is able to offer will not improve at an acceptable rate.

The equivalent language strikes the right balance between deference to tenure rights and sound educational policy: While tenure and seniority are closely related, there are “conceptual differences between ‘tenure’ and ‘seniority.’”⁴⁸ One of the primary differences being that tenure is a statutorily defined right, while seniority rights are defined through regulation.⁴⁹ In particular, the Commissioner has broad authority to establish seniority categories through regulation, including as in this instance, replacing regulatory language through an equivalency.⁵⁰ Consistent with the scope of the Commissioner’s powers, the proposed equivalent language modifies seniority categories so that they consider performance, tenure and length of service instead of only the latter two criteria. In practice, the proposed language will prioritize a non-tenured teacher for reduction before a tenured teacher within the same performance category. Therefore, all else being equal, tenure rights determine the level of job protection under the proposed equivalent language just as under the current regulation.

To the extent that a non-tenured teacher in a higher performance category may be retained over a tenured teacher in a lower performance category, courts have found that it may be necessary to balance a teacher’s tenure rights against “sound educationally based reasons...to retain a non-tenured teacher” in a RIF.⁵¹ Under the current regulation, for example, it is

⁴⁶ Cahn v. Bd. of Educ. of Deal, 1994 WL 389804, at * 6 (N.J. Adm. May 19, 1994).

⁴⁷ BIRMINGHAM BD. OF EDUC., POLICY MANUAL, § 5.16.3 (2012) (limiting recall rights to one year), http://www.nctq.org/docs/Birmingham_Policy_Manual_12-11-12.pdf (last visited February 18, 2014); MOBILE COUNTY PUB. SCH., BD. POLICY § 6.44 (2007) (limiting recall rights to one year), <http://www.mcps.com/?L=3&DivisionID=4358&DepartmentID=4177&SubDepartmentID=2004&TabNo=2> (last visited February 18, 2014); POLK COUNTY SCH. DIST., THE SCH. BD. OF POLK COUNTY AND POLK EDUC. ASSOC., INC. TEACHER COLLECTIVE BARGAINING AGREEMENT, § 19.7 (2012) (limiting recall rights to one year), http://www.nctq.org/docs/Polk_11-14TeacherCBA4-10-12.pdf (last visited February 18, 2014); ATLANTA PUB. SCH. BD. POLICY (2010) (limiting recall rights to six months) <http://eboard.eboardsolutions.com/ePolicy/policy.aspx?PC=GBKA&Sch=4004&S=4004&RevNo=1.52&C=G&Z=P> (last visited February 18, 2014); Elgin Sch. Dist. U-46; AGREEMENT BETWEEN THE BD. OF EDUC. AND THE ELGIN TEACHERS ASSOC., § 13.13 (2011) (limiting recall rights to one year), <http://www.nctq.org/docs/ETA-Agreement-2011-14.pdf> (last visited February 18, 2014); DES MOINES PUB. SCH., COMPREHENSIVE AGREEMENT BETWEEN THE DES MOINES INDEP. COMMUNITY SCH. DIST. AND THE DES MOINES EDUC. ASSOC., § XI.C (2012) (limiting recall rights to one year), <http://www.nctq.org/docs/12-13-DMEA-Teachers-Comp-Agreement-1213-080612.pdf> (last visited February 18, 2014); EAST BATON ROUGE PARISH SCH. SYS., EAST BATON ROUGE PARISH SCH. BD. POLICY, http://www.nctq.org/docs/policy_manual_g_912.pdf (last visited February 18, 2014); ALBUQUERQUE PUB. SCH., NEGOTIATED AGREEMENT BETWEEN THE ALBUQUERQUE MUN. SCH. DIST. AND THE ALBUQUERQUE TEACHERS FED’N, Art. 14, § B.2 (2013) (limiting recall rights to one year), http://www.nctq.org/docs/Albuquerque_2013-2014.pdf (last visited February 18, 2014).

⁴⁸ Lichtman, 93 N.J.at 368 n. 4.

⁴⁹ *Id.*

⁵⁰ See *supra* text accompanying note 44.

⁵¹ Capodilupo, 218 N.J. Super. at 514.

permissible for a tenured art teacher to be laid off before a non-tenured science teacher because, in part, it is considered educationally sound to account for the teacher's credentials in addition to the teachers' length of service and tenure status. Similarly, there are sound educational policy reasons to allow for consideration of performance along with tenure and length of service even if there are instances where a tenured teacher is prioritized for reduction over a non-tenured teacher within the same performance category. In a quality-blind RIF where length of service and tenure are the only RIF criteria, nearly half of the laid-off teachers would be Effective or Highly Effective, non-tenured teachers.⁵² Losing these high-performing teachers at the beginning of their careers means that Newark students year after year miss out on being taught by these great teachers. However, in a performance-based RIF, the majority of these teachers would be retained, which could mean an additional year's worth of learning for some students. The ability to improve student learning is the essence of an educationally sound reason to retain a non-tenured teacher over a tenured teacher. Thus, the proposed equivalent language properly balances tenure rights against sound educational policy considerations.

Constitutionality of N.J. Stat. Ann. § 18A:28-9 et seq.: If it is determined that seniority standards must be defined as length of service, that laid-off teachers have an indefinite right to reemployment and that only tenured teachers receive seniority protections, then NPS would be left to question the constitutionality of N.J. STAT. ANN. § 18A:28-9 et seq. The effect of the RIF Statutes under such limited interpretations would compromise the constitutional requirement that every New Jersey student receive a thorough and efficient education.⁵³

Our legislature defined thoroughness and efficiency through the Core Curriculum Content Standards (CCCS), and our Supreme Court has affirmed these standards to be "a reasonable legislative definition of thorough and efficient education."⁵⁴ However, the Court has also clearly stated that "the standards themselves do not ensure any substantive level of achievement."⁵⁵ To ensure that all students are able to meet the CCCS, and in turn are given a thorough and efficient education, a variety of other resources must also be provided. The Court specifically named "successful teaching" among these resources.⁵⁶

In the years since *Abbott IV* was authored, research has confirmed the Court's assertion that student achievement depends largely on teacher effectiveness.⁵⁷ As previously established, basing lay-off and re-employment decisions on length of service and tenure status alone inevitably leads to cutting Effective and Highly Effective teachers while Partially Effective and Ineffective teachers are retained simply because they have tenure and more years of experience.⁵⁸ Because teacher quality is the most powerful school-controlled influence on student achievement,⁵⁹ systematically depriving students of high-quality teachers compromises the quality of education students receive, hinders their ability to meet the CCCS and therefore violates the constitutional guarantee that all students receive a thorough and efficient education.⁶⁰

⁵² See *supra* section D.4.b pages 8-11 for discussion of the RIF modeling results.

⁵³ N.J. Const. art. VIII, § 4, ¶ 1; see *infra* text accompanying notes 77-81 for a discussion of the thoroughness and efficiency standards.

⁵⁴ *Abbott ex rel. Abbott v. Burke*, 149 N.J. 145, 168 (1997).

⁵⁵ *Id.*

⁵⁶ *Id.*; see also *Abbott ex rel. Abbott v. Burke*, 206 N.J. 332, 359 (2011) (finding that qualified teachers are essential to districts' ability to meet the CCCS); *Abbott ex rel. Abbott v. Burke*, 119 N.J. 287, 295 (1990) (explaining that "funding alone will not achieve the constitutional mandate of an equal education in these poorer urban districts; that without educational reform, the money may accomplish nothing; and that in these districts, substantial, far-reaching change in education is absolutely essential to success.").

⁵⁷ See *supra* text accompanying notes 17-22 for discussion of the importance of teacher quality on student achievement.

⁵⁸ See *supra* pages 9-10 for discussion of NPS projected loss of high-performing, non-tenured teachers under a quality-blind RIF.

⁵⁹ See *supra* text accompanying notes 17-22 for discussion of the importance of teacher quality on student achievement.

⁶⁰ A California Superior Court is currently considering a very similar argument in *Vergara v. California*. See Plaintiffs' First Amended Complaint at 17-18, *Vergara v. California*, No. BC 484642 (2012), http://studentsmatter.org/wp-content/uploads/2012/05/SM_First-

c. **The Proposed Equivalent Language Reinforces both the Evaluation and Tenure Revocation Components of the TEACHNJ Act**

Passed in 2012, the TEACHNJ Act is landmark legislation that takes an important step toward improving teacher quality across our State by reforming both the minimum teacher evaluation requirements as well as the requirements for teachers to attain and maintain tenure.⁶¹ The equivalent language is consistent with the policy and intent of the TEACHNJ Act, which is “to raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform personnel decisions.”⁶²

NPS’ evaluation system complies with the requirements of the TEACHNJ Act: First, the equivalency relies on NPS having a teacher evaluation system that meets the requirements of the TEACH NJ Act law and is implemented with fidelity so that the district can confidently base personnel decisions on the evaluation ratings. NPS has been an early adopter of the TEACHNJ policies and is already in its second year of implementing its teacher evaluation rubric, called the Framework for Effective Teaching.⁶³ The Framework for Effective Teaching includes a teacher practice instrument that is tailored to NPS’ unique needs and was approved by the New Jersey Department of Education.⁶⁴ Beginning with the 2013-14 school year, NPS is incorporating the required Student Growth Objectives into the evaluation cycle.⁶⁵ And, once the results are available, the Student Growth Percentile component will be included in the annual evaluation ratings for applicable teachers.

NPS has updated its goal-setting, observation, and evaluation practices to comply with the TEACHNJ regulations. These updated policies can be found in *The Framework for Effective Teaching: A Guidebook for Teachers and Administrators*, which has been distributed to all NPS teachers and evaluators.⁶⁶ In addition to the Guidebook, NPS has provided detailed training to all evaluators, and school leaders have, in turn, trained their staff on the evaluation system.⁶⁷

Because NPS has designed and implemented a teacher evaluation system that meets the State’s requirements and is otherwise robust and reliable, NPS is appropriately positioned to make RIF decisions based on teacher performance.

Amended-Complaint_08.15.12.pdf (last visited February 3, 2014); See also <http://studentsmatter.org/our-case/vergara-v-california-case-summary/> for a summary of the case and related materials.

⁶¹ Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act, Pub. L. 2012, C. 26 (codified as amended in scattered sections of Title 18A, Chapters 6 and 28).

⁶² *Id.*; see also N.J. STAT. ANN. § 18A:6-118 (2013).

⁶³ Newark Public Schools, The Framework for Effective Teaching, <http://www.nps.k12.nj.us/domain/6> (last visited February 18, 2014).

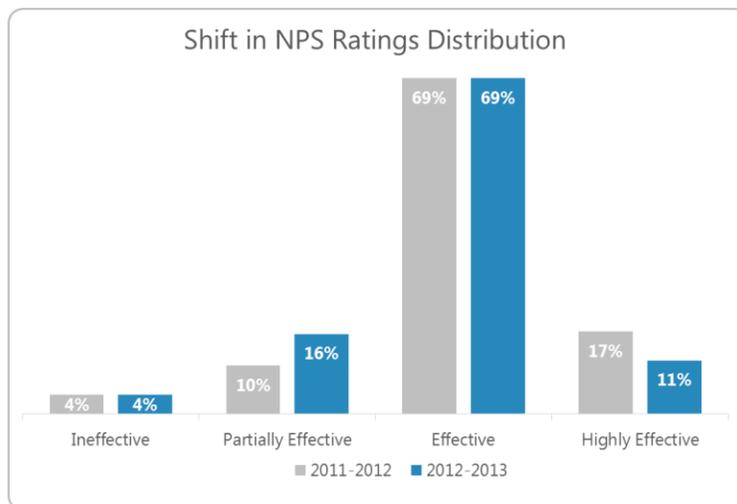
⁶⁴ New Jersey Department of Education, Approved Teaching Practice Evaluation Instruments, <http://www.state.nj.us/education/AchieveNJ/teacher/approvedlist.pdf> (last visited February 18, 2014).

⁶⁵ See Appendices C and D.

⁶⁶ Newark Public Schools, Framework for Effective Teaching: A Guidebook for Teachers and Administrators, <http://www.nps.k12.nj.us/domain/6> (last visited February 18, 2014).

⁶⁷ See Appendix E.

NPS evaluation ratings are more reliable as a result of NPS' new evaluation framework: Not only is NPS in compliance with the requirements of the TEACHNJ statute and regulations, but the district has already started to see a difference in its evaluators' practices. As evaluators have become more comfortable with the system through training and practice, the ratings distributions demonstrate a more realistic reflection of the teacher quality in Newark. Between the 2011-12 and 2012-13 school years, NPS has seen an increase in the number of teachers rated Partially Effective that mirrors the decrease in number of teachers rated Highly Effective.⁶⁸ This shift in ratings distribution indicates that evaluators are providing a more rigorous assessment of observable teacher practice.



Additionally, last year NPS designed and implemented a Peer Validation program where highly-trained, independent evaluators observe teachers to ensure the district's teacher evaluation system is fair, transparent, and consistent.⁶⁹ The program was developed in consultation with the NTU and is overseen by the Peer Oversight Committee, which is comprised of an equal number of NTU and NPS representatives.⁷⁰ The assessment of the peer validators did not replace the regular evaluators' ratings; instead they served as an additional data point in the discussion about what appropriate annual evaluation ratings should be. Last year, the peer validators conducted over 200 validation observations at schools across the district, with a focus on teachers who have been rated Ineffective or Highly Effective in past observations or mid-year reviews.⁷¹ This approach allowed NPS to assess its evaluators' ability to gauge teacher quality at the far ends of the ratings spectrum. As a result, NPS has independent confirmation that the majority of its evaluators can accurately assess teacher quality.

The shift in ratings distributions and confirmation by independent observers gives NPS confidence in its evaluators' ability to assess teacher effectiveness using the new Framework for Effective Teaching. Thus, NPS can reliably make personnel decisions based on teachers' evaluation ratings.

The equivalent language aligns with the TEACHNJ Act's objective for districts to base personnel decisions on teacher effectiveness: An important and ground-breaking purpose of the TEACHNJ Act is that it empowers districts to consider teacher quality when making personnel decisions.⁷² This policy is an important first step toward ensuring all New Jersey

⁶⁸ *Id* at Slide 22.

⁶⁹ See Appendices F and G at 3-5.

⁷⁰ See Appendices H and B at § I.B.

⁷¹ See Appendix G at 10-12 and 15.

⁷² See *supra* notes 61-62 and accompanying text.

students have high-performing teachers, but thus far has been limited to personnel decisions related to the granting and revocation of tenure.⁷³ The new law will allow NPS to revoke tenure for its low-performing teachers after two years of demonstrated poor performance.⁷⁴ This is an important strategy to increasing the overall quality of the district's teachers and one that NPS expects to take full advantage of when the time comes. However, leveraging the tenure charge process will not solve the district's immediate budget crisis.

First, even if NPS brought and won every tenure charge case it could, it would still fall considerably short of its target reduction. As previously explained, NPS will need to cut nearly 30 percent of its teaching positions in the next three years to accommodate the district's declining student enrollment and rapidly shrinking revenue. Based on trends from the last two years, only about six percent of the district's teachers will have two years of Ineffective or Partially Effective ratings at the end of this year. Therefore, even in the best case scenario, NPS would only be able to cut a fraction of the teaching positions necessary to balance its budget. Thus, the district would need to conduct a quality-blind RIF to achieve its target reduction, which is counter to the intent of the TEACHNJ Act.

Additionally, the tenure charge process is lengthy and expensive. At a minimum, tenure revocation is a two year process because the district must gather two years of evaluation ratings and then prepare a case against the teacher.⁷⁵ Therefore, achieving its targeted reductions through the tenure charge process would take the district at least twice as long as a performance-based RIF. Additionally, despite the procedural changes to the tenure charge process,⁷⁶ it is likely that the district will still need to invest significant amounts of time and money defending against challenges to tenure charges. Typically, defending a single tenure charge case costs between 25,000 and 50,000 dollars. And, even with the new streamlined process, tenure charge proceedings could take up to five months to complete. Although NPS expects to pursue tenure charges as appropriate, it is untenable for NPS to rely solely on a single process that will not achieve NPS' target reduction and balance its budget. The current budget crisis requires a mechanism better suited to the district's urgent need to right-size by quality.

The equivalency is aligned with the intent of TEACHNJ because both the statute and equivalency base personnel decisions on teacher quality. The difference is that they address two different types of personnel decisions. TEACHNJ is limited to personnel decisions related to tenure; whereas the equivalency addresses personnel decisions related to RIF. The proposed equivalent language appropriately supplements the the type of personnel decisions in which NPS can consider teacher quality. The tremendous benefits of its landmark policies notwithstanding, the TEACHNJ Act was not designed to address massive fiscal issues of the sort NPS is facing. The proposed equivalent language, on the other hand, is perfectly tailored to allow NPS to right-size in a manner that is more efficient than the TEACHNJ Act while remaining consistent with the spirit of the law.

2. Equivalent Language Promotes a Thorough and Efficient Education

As discussed above, the proposed equivalency would better meet the district's obligation to provide a thorough and efficient education than the current regulation. Because "successful teaching"⁷⁷ is a key component of providing students with a thorough and efficient education, depriving students of high-performing teachers – as a quality-blind RIF is sure to do – would seriously impair the ability of the district to meet its constitutional obligations.⁷⁸

⁷³ N.J. STAT. ANN. §§ 18A:6-11-18.1; 28-5 (2013); *see also* New Jersey Department of Education, A Guide to the TEACHNJ Act, <http://www.state.nj.us/education/AchieveNJ/intro/TeachNJGuide.pdf> (last visited February 18, 2014).

⁷⁴ N.J. STAT. ANN. § 18A:6-17.3; *see also* New Jersey Department of Education, A Guide to the TEACHNJ Act, <http://www.state.nj.us/education/AchieveNJ/intro/TeachNJGuide.pdf> (last visited February 18, 2014).

⁷⁵ N.J. STAT. ANN. § 18A:6-17.3.

⁷⁶ N.J. STAT. ANN. §§ 18A:6-11-18.1.

⁷⁷ Abbott, 149 N.J. at 168.

⁷⁸ *See supra* notes 17-22 and accompanying text.

Even the more conservative interpretations of the constitutional requirement note that “thoroughness” indicates a standard quality of education to which all New Jersey students are entitled.⁷⁹ Likewise, “efficiency” implies that all educational resources – financial and non-financial – are maximized to achieve a thorough education.⁸⁰ To that end, “[w]aste is inefficient and therefore unconstitutional.”⁸¹

Under the current system, NPS can either choose to reduce financial waste by conducting a RIF or to protect its high-performing teachers; it cannot do both. If the district chooses to conduct a RIF to accommodate its shrinking student enrollment and revenue, it would lose hundreds more Effective and Highly Effective teachers simply because they are less senior under the current regulations. The result would be a waste of the district’s most valuable educational resource – high-quality teachers. Alternatively, NPS can choose to retain its high-performing, but less-experienced teachers by not conducting a RIF. In this scenario, NPS must also keep the low-performing teachers with more years of experience. In the past, NPS has chosen the latter option because, despite being financially wasteful, this option conserves the most valuable resources of quality teachers and most benefits student learning.

If the equivalency is granted, NPS will be able to accomplish both goals by right-sizing to meet its financial demands while protecting its highest-performing teachers. Thus, the proposed equivalent language not only satisfies the district’s obligation to provide a thorough and efficient education to all Newark students, but it does so exceedingly better than the current regulation.

3. Equivalent Language does not Pose a Risk to Student Health, Safety or Civil Rights

The proposed equivalency poses no risk to student health, safety or civil rights. In fact, the equivalent language would better serve students than the current regulation. Under the equivalency, the district would have the ability to consider relevant criteria, such as attendance history and disciplinary records when making RIF decisions. In the performance-based RIF, 70 percent of the cut teachers have either poor attendance or an unacceptable disciplinary record. A quality-blind RIF, however, does not capture many of the teachers who have attendance or disciplinary issues. **Seventy-six percent of the teachers with attendance or disciplinary issues who would lose their jobs in a performance-based RIF would not be laid off in a quality-blind RIF.** Using these factors in a performance-based RIF, NPS would be able to prioritize retention of teachers who are not only more effective educators, but also provide a consistent and professional adult presence for Newark’s students.

4. Request for Severability

As explained above, NPS is confident that its requested equivalency meets the legal standards for the Commissioner to grant its application. However, NPS requests that the proposed equivalency be construed as severable and if any part fails to meet the legal standards set out in N.J. ADMIN. CODE § 6A:5-1.1, or for any other reason is deemed invalid, the remaining parts shall not be affected by the deficient portion.

F. Projected Measurable Results

If its requested equivalency is granted, NPS expects to see the following results:

1. When given the option between a higher- and lower-performing teacher in a RIF, NPS will have a greater ability to retain the higher performing teacher.
2. NPS will achieve the targeted reduction while retaining more high-performing teachers than it would under a strict years-of-service RIF.

⁷⁹ Abbott, 149 N.J. at 209 (Garibaldi, J., dissenting).

⁸⁰ *Id.* at 209-210.

⁸¹ *Id.* at 210.

3. As a result of a RIF, the district will increase the proportion of high-performing teachers by identifying the low-performing teachers for reduction.
4. If NPS exceeds its targeted budget reduction and there is no need to rehire teachers, NPS will repurpose any funds originally earmarked for base salaries and benefits to support programs that may have been reduced or eliminated in prior years due to budgetary constraints.

These projected results capture both the financial and the human capital benefits NPS expects if it is able to conduct a RIF based, in part, on performance. The district will be able to report on these results as needed to ensure compliance with N.J. ADMIN. CODE § 6A:5-1.6.

G. NPS has provided opportunity for public comment

For over a year, NPS has frequently and consistently engaged with a variety of community stakeholders to discuss a broad set of goals including its portfolio strategy and the One Newark plan. Since January 2013, NPS has hosted or participated in nearly 90 events with the specific intent of discussing these issues with NPS families, faculty, staff, School Advisory Board (SAB) members, elected officials, clergy, funders and civic leaders.⁸²

As the need to right-size the NPS teaching force became evident, NPS incorporated this topic into its discussions with community members about NPS' portfolio strategy and the One Newark plan. In mid-November, NPS began in earnest to engage with the NPS community about the need to reduce its teaching force while retaining its highest performing teachers. Since that time, NPS has discussed this topic with various stakeholders no less than 50 times.⁸³ Each time, NPS specifically referenced its intention to request relief from existing state laws that force quality-blind layoffs.⁸⁴ Additionally, NPS has publicized on the One Newark website its intent to submit an equivalency that will allow the district "to consider seniority alongside quality as [it] right size[s]."⁸⁵

In addition to these outreach efforts, NPS planned and provided notice for an event specially convened to discuss its intention to submit this equivalency request as part of the One Newark plan. Initially, the event was to occur on the evening of February 13, 2014. On February 7, 2014, NPS posted on its website the agenda for the event and included an item that explicitly named the district's intent to submit an equivalency for N.J. Admin. Code § 6A:32-5.1.⁸⁶ On February 11 and 12, 2014, the district also published notices of the event and intent to submit an equivalency for N.J. Admin. Code § 6A:32-5.1 in two locally circulating newspapers – *The Star-Ledger* and *Luso Americano*.⁸⁷

Due to a weather related state of emergency, NPS was forced to reschedule the February 13th event. To provide the community with the earliest possible opportunity to comment on the equivalency, NPS chose to utilize the next public meeting – the SAB business meeting scheduled for February 18, 2014, which is a standard, long standing and previously advertised open public meeting. NPS took extra precautions to ensure the community was aware of the opportunity. As soon as the district realized the need to reschedule the public comment opportunity for February 18th, NPS updated the event and

⁸² See Appendix I.

⁸³ *Id.*

⁸⁴ See Appendix A at slide 10. Several versions of this presentation were used with various stakeholders. However, all contained the content on slide 10 referencing the need to seek an equivalency.

⁸⁵ Newark Public Schools, One Newark FAQs, <http://onewark.org/faqs/how-will-the-one-newark-plan-be-evaluated/>, (last visited February 19, 2014).

⁸⁶ See Appendix J.

⁸⁷ See Appendices K and L.

agenda information on the NPS website⁸⁸ and republished the notice of the opportunity for public comment in *The Star-Ledger* on February 15, 2014.⁸⁹

On February 18, 2014, at the regularly scheduled SAB business meeting, Vanessa Rodriguez, Chief Talent Officer, and Peter Turnamian, Assistant Superintendent, shared in detail the district’s intention to submit an equivalency for N.J. Admin. Code § 6A:32-5.1 as part of its One Newark plan.⁹⁰

Following Ms. Rodriguez and Dr. Turnamian’s presentation, SAB members took the opportunity to pose questions about the details of the presentation to the presenters as well as to Superintendent Cami Anderson. Immediately following the SAB members’ questions, the meeting was open for public comment according to established SAB procedure. Speakers were able to sign up at the event and were called to speak by Antoinette Baskerville-Richardson, SAB Chairperson. Each speaker was allotted up to three minutes for their comments.⁹¹

The questions and initial NPS responses fell into three topic areas, summarized in the table below. It is important to note that the majority of the comments expressed a concern to reduce the EWPS pool and the financial burden of carrying teachers in the district who do not have a full-time teaching placement. The district shares this concern and echoed that it is similarly concerned about the ability to reduce the number of teachers in the district while maintaining a keen focus on teacher quality. No explicit opposition to the proposed equivalency was voiced at the meeting.

| Summary of Questions | Summary of NPS Responses |
|---|--|
| What is the current state of the EWPS pool? In particular, what is the projected cost of the pool to the district next year? And, what is the district currently doing to reduce the number of teachers who remain in the pool? | While the district has already taken steps taken to maximize the number of teachers who can be placed by mutual consent, many teachers remain in the EWPS pool for multiple years. The cost of this pool to the district to date has been approximately \$30 million. The projected cost of the EWPS pool for next year will depend in part on whether the requested equivalency is granted. |
| Can the district provide details on the number of teachers who will be laid off this year and the demographic breakdown of those teachers? | The district will not know exactly how many or which teachers will be laid off until student enrollment is complete and the FY15 budget is finalized. The district will provide projections to the SAB once the district has more concrete information to share about staffing needs for the 2014-15 school year. |
| Will the requested equivalency affect teachers’ tenure rights? | No, the requested equivalency would consider tenure and length of service alongside teacher performance. Therefore, tenure rights are not abridged. |

⁸⁸ See Appendix J.

⁸⁹ See Appendix M. NPS was not able to republish the notice for public comment in *Luso Americano* because that publication only runs on Wednesdays and Fridays. There was insufficient time to submit an updated notice for publication on Friday, February 14, 2014, and a notice on Wednesday, February 19, 2014 would have been useless.

⁹⁰ See Appendix N.

⁹¹ The notice and meeting protocols followed for both the originally scheduled event on February 13, 2014 and for the SAB business meeting on February 18, 2014 meet the requirements for an open meeting as defined by the Open Public Meetings Act (OPMA). N.J.S.A. § 10:4-12.

NPS has taken into consideration all comments shared at the event when preparing this equivalency request and is committed to maintaining a dialogue with both internal and external stakeholders throughout the equivalency application process and – if granted – the implementation process.

III. Conclusion

Because of its declining student enrollment, NPS can no longer avoid a reduction of its teaching force. To make the necessary financial reductions, NPS will need to lay off more than 800 teachers over the next three years. Under the current State regulations, NPS would risk losing hundreds of high-performing teachers, which would have negative consequences for thousands of Newark students. However, if the proposed equivalency is granted, NPS could reduce its costs in anticipation of its declining revenue, while simultaneously retaining the vast majority of these high-performing teachers.

The proposed equivalent language meets the legal standards for an equivalency request. First, the proposed language is consistent with spirit and intent of all applicable laws and regulations, including N.J. ADMIN. CODE § 6A:32-5.1.

- The equivalency is consistent with the purpose of N.J. ADMIN. CODE § 6A:32-5.1 because basing seniority on performance, tenure and length of service is equitable and consistent with sound educational practices.
- The Commissioner has broad powers to define seniority through regulation and by extension through an equivalency. Thus, the proposed equivalent language is within the scope of the Commissioner’s authority.
- The proposed equivalent language also meets the spirit and intent of N.J. STAT. ANN. § 18A:28-12, which allows laid-off teachers to be rehired. The proposed language includes reemployment rights by order of seniority as defined by the equivalent language.
- The proposed language meets the requirements of N.J. STAT. ANN. § 18A:28-9 *et seq.* because it strikes an appropriate balance between teachers’ tenure rights and sound educational practices.
- Finally, the proposed equivalency relies on an evaluation system that complies with the TEACHNJ Act, and NPS’ Framework for Effective Teaching meets the requirements for an evaluation rubric under the law. Additionally, the equivalency is consistent with the intent of the law because it would allow NPS to base personnel decisions on teacher quality, one of the stated objectives of the landmark legislation.

Second, the proposed equivalent language also promotes a thorough and efficient education for all Newark students. Under the equivalent language, NPS would be able to right-size while retaining over 300 more high-performing teachers than it would under the current quality-blind RIF requirements. In other words, NPS could eliminate “financial waste” while preventing the loss of its high-performing teachers. Because teacher effectiveness is the most powerful school-based factor in student academic success, protecting high-performing teachers also ensures NPS is able to provide a quality – i.e., thorough – education. Thus, not only would the equivalency foster a thorough and efficient education, but it would do so exceedingly better than the current regulation which would force the district to remove hundreds of high-performing teachers.

Finally, the equivalency poses no harm to student health, safety or civil rights. In fact, the equivalent language would better serve students than the current regulation because the district would have the ability to consider attendance history and disciplinary records in addition to teacher evaluation ratings. Using these factors, NPS can protect its effective instructors who have also demonstrated their ability to be a consistent and wholesome adult presence for Newark’s students.

Through its Equivalency Application Form and this Memorandum in Support, NPS has demonstrated the need for the requested equivalency and has met the requirements for its application. Therefore, NPS respectfully requests that the Commissioner grant its application for an equivalency for N.J. ADMIN. CODE § 6A:32-5.1.