FILED, Clerk of the Appellate Division, December 20, 2023, **A-000046-23**

MATTHEW J. PLATKIN, ATTORNEY GENERAL, NEW JERSEY AND SUNDEEP IYER, DIRECTOR, NEW JERSEY DIVISION OF CIVIL RIGHTS, Appellee-Petitioners, v. MANALAPAN ENGLISHTOWN REGIONAL BOARD OF EDUCATION AND MANALAPAN ENGLISHTOWN REGIONAL SCHOOL DISTRICT, Appellant-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000046-23 *Civil Action* ON APPEAL FROM: On Appeal From: Superior Court of New Jersey Chancery Division, Monmouth County Sat Below: Honorable David F. Bauman, J.S.C. Docket Number in Court Below: Docket No.: MON-C-79-23

BRIEF OF APPELLANT-RESPONDENTS,
MANALAPAN ENGLISHTOWN REGIONAL BOARD OF EDUCATION
AND MANALAPAN ENGLISHTOWN REGIONAL SCHOOL DISTRICT

On the Brief: Bruce W. Padula (030431999)

CLEARY GIACOBBE ALFIERI JACOBS, LLC
955 State Route 34, Suite 200
Matawan, New Jersey 07747
(732) 583-7474
bpadula@cgajlaw.com
Counsel for Appellant-Respondents, Manalapan Englishtown Regional Board of Education and Manalapan Englishtown Regional School District

Dated: December 20, 2023

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED iv

TABLE OF CITATIONS v

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 3

STANDARD OF REVIEW 5

STATEMENT OF FACTS 6

LEGAL ARGUMENT 12

POINT I (See Da125) 12

THE COURT ERRED BY ERRONEOUSLY APPLYING THE "WELL-SETTLED LEGAL RIGHT" PRONG OF CROWE, THE COURT ERRED BECAUSE IT FAILED TO DETERMINE THAT THE UNDERLYING APPLICATION OF THE LAW AGAINST DISCRIMINATION IN THE MANNER PLAINTIFF'S ASSERTED WAS A WELL-SETTLED LEGAL RIGHT. 12

POINT II (See Da119-138) 18

THE COURT ERRED BY FAILING TO CONSIDER THE APPLICATION OF N.J.A.C. 6A:32-7.1 TO -7.8 "STUDENT RECORDS." 18

POINT III (See Da131-133) 23

THE COURT ERRED BY NOT RECOGNIZING THAT THE INJUNCTION COMPELS the boards TO VIOLATE PARENTS' FUNDAMENTAL RIGHTS UNDER THE FOURTEENTH AMENDMENT AND Fails TO CONSIDER THE DISTRICTS' IMPLEMENTING REGULATIONS. 23

The Constitutional Violation 24

Disregard for the District's Policy and Regulation Concerning Notification 30

POINT IV (See Da129-130) 33

THE COURT ERRED BY RELYING UPON INADMISSIBLE HEARSAY, AND EVIDENCE WHICH IS IRRELEVANT, UNDULY PREJUDICIAL, AND LACKS ANY PROBATIVE VALUE PURSUANT TO N.J.R.E. 801, 802, 401 AND 403(A) 33

POINT V (See Da116, Para.2 and Da118, Para.2) 37

THE COURT ABUSED ITS DISCRETION BY ENJOINING APPELLANTS FROM AMENDING, MODIFYING, OR SUPERSEDING ANY PORTION OF POLICY 5756, UNTIL DISPOSITION OF THE ADMINISTRATIVE COMPLAINT BEFORE THE DIVISION ON CIVIL RIGHTS 37

CONCLUSION 40

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

Chancery Division Order in Manalapan-Englishtown Matter, Filed August 18, 2023 .... Da115-116

Chancery Division Order in Middletown Matter, Filed August 18, 2023 .... Da117-118

Chancery Division written decision in both matters, and including Marlboro Board of Education (MON-C-78-23/A-118-23), filed August 18, 2023 .... Da119-138

TABLE OF CITATIONS

Cases

Crowe v. De Gioia, 90 N.J. 126 (1982) 12, 13, 17

Fawzy v. Fawzy, 199 N.J. 456 (2009)..26

Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000)..26, 29

Guaman v. Velez, 421 N.J.Super. 239 (App.Div. 2011) 12

Halderman, by Halderman v. Pennhurst State Sch. & Hosp., 707 F.2d 702 (3d Cir. 1983) 25

Iliadis v. Wal–Mart Stores, Inc., 191 N.J. 88 (2007) 5

John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F.Supp. 3d 118 (D. Md. 2022)...15

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 26

Mays v. Penza, 179 N.J.Super. 175 (Law Div. 1980) 12

Moriarty v. Bradt, 177 N.J. 84 (2003) 26

Platkin and Iyer v. Hanover Twp. Board of Education and Hanover Twp. Public Schools, Docket Number MRS-C-042-23 38

Prince v. Massachusetts, 321 U.S. 158 (1944)..25

Rinaldo v. RLR Inv., LLC, 387 N.J.Super. 387 (App.Div. 2006) 5

Stanley v. Illinois, 405 U.S. 645 (1972) 25

T.F., et al., v. Kettle Moraine School District, Case No. 21-CV-1650 (Waukesha Cty. Wisconsin Cir. Ct. 2023)...16, 35

Terranova v. Gen. Elec. Pension Tr., 457 N.J.Super. 404 (App.Div. 2019)...5

Tortorice v. Vanartsdalen, 422 N.J. Super. 242 (App. Div. 2011) 27

Troxel v. Granville, 530 U.S. 57 (2000) 24, 25, 27, 29

U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449 (2012) 5

Washington v. Glucksberg, 521 U.S. 702 (1997) 27

Waste Mgmt. of New Jersey, Inc. v. Union County Utilities Auth., 399 N.J.Super. 508 (App.Div. 2008) 12

Willey v. Sweetwater Cnty. Sch. Dist., ---F.Supp.3d.---, 2023 WL 4297186 (D. Wyo. June 30, 2023) 14

Statutes and Regulations

20 U.S.C. § 1232g 21, 22

20 U.S.C. § 1232g(a)(1)(A) 21

34 CFR §99 21

34 CFR §99.1 to -99.67 21

34 CFR §99.10(a) 21

34 CFR §99.20(a) 22

34 CFR §99.3 22

N.J.A.C. 6A:32-7.1 to -7.8 .... 18, 19

N.J.A.C. 6A:32-7.1(e) 19

N.J.A.C. 6A:32-7.1(f) 19

N.J.A.C. 6A:32-7.3(a)(1) 18

N.J.A.C. 6A:32-7.3(b)(1) 20

N.J.A.C. 6A:32-7.5(e)(1) 19, 20

N.J.A.C. 6A:32-7.5(e)(3) 20

N.J.A.C. 6A:32-7.6(a)(5) 20

N.J.A.C. 6A:32-7.7(b) 20

N.J.S.A. 10:5-1 et seq ....passim

N.J.S.A. 18A:11-1(c) 37

N.J.S.A. 18A:36-19 19

N.J.S.A. 18A:36-41 6

N.J.S.A. 18A:37-13 et seq. 9, 10

N.J.S.A. 18A:37-15(b)(6)(d) 9

P.L. 2006, c. 100, § 1 14

Other Authorities

Policy 5756 ....passim

Rules

N.J.R.E. 401 ....33, 34

N.J.R.E. 403(a) 33, 34

N.J.R.E. 801 ....33, 34

N.J.R.E. 802 ....33, 34

N.J.R.E. 803(b)(1) 39

N.J.R.E. 803(b)(3) 38

R. 1:6-6 33

PRELIMINARY STATEMENT

This office represents Manalapan-Englishtown Regional Board of Education and Middletown Township Board of Education (the "Board Defendants"). Although separate orders were entered below, the issues here arise from the same decision and involve the same law and facts. As such, one brief is being submitted on behalf of the Board Defendants.

This case was brought pursuant to the Law Against Discrimination's ("LAD") prohibition on discrimination in places of public accommodation. The specific issue on appeal is the propriety of the Court's Order restraining implementation of Amended Policy 5756, "Transgender Students," adopted June 20, 2023.

Generally, the Districts' Amended Policy 5756 provides for parental notification when: (i) a student formally changes a mandatory student record, including gender, as defined by N.J.A.C. 6A:32-7.3(b)(1); (ii) a student participates in a sport for a gender other than that assigned at birth; (iii) referring a student for outside health services, and the student's sexual identify and expression is germane to the referral; and (iv) a student uses a gendered bathroom, other than that assigned at birth, except a gender-neutral bathroom.

The State alleges that the Amended policy violates LAD. It does not. The policy is narrowly-tailored and triggered by specific unilateral action taken by a

transgender student. The policy allows a student to take several steps of their public social transition without parental notification. Moreover, no steps require parental consent. For example, parental notification does not occur when a student uses a different name on a school ID, in class or on school work, nor based on a student's attire, or use of a gender-neutral bathroom.

The Chancery Division abused its discretion by misapplying the "well-settled legal claim" prong of Crowe. Rather than rely on the substantive application of LAD to the issue of parental notification, the Court ruled that it is well-settled that the Attorney General can enforce the LAD. This is a clear departure from established precedent and an impermissible basis for granting a preliminary injunction.

Additionally, the Court's decision totally ignores New Jersey Student Records Laws, which provide that gender is a mandatory student record and that parents, not students, have unfettered access to those records.

Among other reasons, the Court also erred by considering inadmissible and anecdotal hearsay evidence and ignoring evidence Board Defendants submitted. As such, the Court's August 18, 2023 Order must be reversed.

PROCEDURAL HISTORY

On June 20, 2023, Board Defendants adopted amended versions of Policy 5756. See Da152 and Da169.

On June 21, 2023, Respondents filed Verified Complaints with the Division on Civil Rights ("the DCR matter") alleging that the Policy violated the Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 et seq. See Da36 and Da74.

Simultaneously, on June 21, 2023, Respondents filed Verified Complaints and Orders to Show Cause before the Chancery Division in Essex County, Docket Numbers ESX-C-98-23 and ESX-C-99-23, seeking a preliminary injunction restraining implementation of the Policy until the DCR matter is adjudicated. See Da9 and Da48.

On June 23, 2023, Board Defendants filed motions to change venue from Essex to Monmouth County. On June 27, 2023, the Court entered Orders transferring these matters to the Chancery Division in Monmouth County. See Da147 and Da148.

On June 28, 2023, the Court entered an Order to Show Cause, returnable August 15, 2023. See Da1-2 and Da3-4. On August 15, 2023[1], the Superior

[1] 1T refers to the Transcript of the August 15, 2023, Oral Argument on the Respondent-Plaintiff's Orders to Show Cause.

Court, Chancery Division, Monmouth County, heard oral argument on the Order to Show Cause.

On August 18, 2023, the Court entered an Order preliminary enjoining the Policies pending resolution of the DCR matter and restraining Board Defendants from otherwise altering, amending, rescinding, or revising Policy 5756. See Da115-116, Da117-118, and Da119-138.

On September 6, 2023, Board Defendants filed Notices of Appeal, which were amended on September 8, 2023. See Da139-142 and Da143-146.

On October 13, 2023, Board Defendants filed Motions to Supplement the Record, which the Court decided on October 27, 2023. See Da272-279.

After issuing initial scheduling orders, and pursuant to Respondents' request, the Court issued scheduling orders on November 27, 2023, aligning the briefing schedule of these matters, along with a companion case involving Marlboro Township Board of Education (Docket Number A-118-23).

STANDARD OF REVIEW

An appellate court applies an abuse of discretion standard in reviewing a trial court's decision to grant or deny a preliminary injunction. Rinaldo v. RLR Inv., LLC, 387 N.J.Super. 387, 395 (App.Div. 2006). A court abuses its discretion when a decision "is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012) (quoting Iliadis v. Wal–Mart Stores, Inc., 191 N.J. 88, 123 (2007); see also, Terranova v. Gen. Elec. Pension Tr., 457 N.J.Super. 404, 410–11 (App.Div. 2019).

STATEMENT OF FACTS

The Board Defendants operate public school districts in Monmouth County. See Da156, Para.3 and Da234, Para.3. The Districts contract with an outside vendor known as Strauss Esmay Associations, LLP ("Strauss") to draft and advise on policies and regulations. See Da57, Para. 4 and Da234, Para.4.

Strauss has been providing policy and regulation consulting services to over 570 New Jersey school district since 1972. According to their website their "clients include more than 570 school districts..." Id.

Nearly a decade ago, Strauss began recommending that boards of education adopt transgender student policies. See Da234, Para.5 and Da238-244. In September 2014 and again in July 2015, Strauss recommended adoption of transgender student policies. Id. Both of these versions provided for parental notification in the process and consent for certain younger students. Id. Manalapan-Englishtown adopted these recommended Policies. See Da234-235, Para.6-7. Neither the Attorney General nor Director of the DCR initiated against Manalapan-Englishtown for adopting these policies. Middletown chose not to adopt those policies.

In January 2019, Strauss significantly revised its transgender student policy following the enactment of N.J.S.A. 18A:36-41 and issuance of the New Jersey Department of Education "Transgender Student Guidance for School

Districts" (hereinafter referred to as the "Guidelines"). See Da246-254. For all intents and purposes, that version of the Strauss policy was substantially identical to the Guidelines. Cf. See Da246-254 and 255-261. Significantly, Strauss advised its clients that adoption of that policy was mandatory. See Da265, Para.8-9 and Da246.

In accordance with that advice, during Winter/Spring 2019, each Board Defendant adopted Policy 5756 in the form Strauss recommended. See Da158, Para.8 and Da265, Para.9. The principles embodied in that version confronted District staff with issues that seemingly required them to make material misrepresentations or omissions to parents concerning a student's gender identity or expression.

In Manalapan-Englishtown, school administrators and staff were confronted with at least one issue where compliance with the Guidelines conflicted with the general obligation for transparency with parents. Specifically, while preparing for parent-teacher conferences, teachers of one particular student were concerned about the response to parents if asked about that student using a name about which the parents were unaware. After reviewing then-existing policy and consultation with counsel, teachers were advised to respond with: "I'm sorry, but the scope of this conference is limited to the academic progress of your child this year. Both our legal counsel and the

Department of Education advise that school districts cannot discuss specific gender identity issues with parents." While the issue did not arise, it was the subject of much concern for District staff. See Da235-263, Para.11.

In Middletown, school administrators and staff were confronted with several issues presented by compliance with the Guidelines:

- Counselors are placed in a compromised position to misrepresent or omit material facts when referring transgender students to counseling, despite gender identity and expression being germane to the referral. For example, counselors will cite a generic reason, such as anxiety and depression, rather than specifically referencing gender identity and expression. See Da158-160, Para.8-14.
- Schools are required to provide a snapshot of their student information system ("SIS") to the NJDOE each October. This snapshot is linked to standardized testing reports that are mailed home to parents. Recently, a transgender elementary student changed their name in the SIS without parental consent. When the standardized test scores, including the student's preferred name, were ready to be sent to the parents, the District was required to send a student report to a parent with a name which the State advises should be kept confidential from the parents.

In order to comply with the Guidelines, District staff was placed in the untenable position of obfuscating the test scores. Id.

- Similarly, the SIS contains a parent portal component. Parents are asked to set up an electronic account to view their child's demographic information such as emergency contacts, addresses, and other such information, in addition to report cards and grades. If a student requests a name change in the district's formal database, there is a high likelihood that a parent would be able to access that information as it would be reflected in the parent portal. The district has no way of preventing parents/guardians access to the parent portal. Id.

Additionally, in both districts, compliance with the Guidelines has conflicted with their legal obligations under the Anti-Bullying Bill of Rights Act ("ABL"), N.J.S.A. 18A:37-13 et seq. See Da158-159, Para.10. According to the ABL, districts shall inform parents/guardians of the "nature of the investigation," including if the nature of the investigation arises from a student's gender identity or expression. N.J.S.A. 18A:37-15(b)(6)(d).

When the nature of the bullying is the student's gender identity or expression, the Guidelines suggest maintaining student confidentiality, which conflicts with the statutory requirement to inform parents of the "nature of the

investigation." Thus, following the Guidelines could result in violations of the Anti-Bullying Bill of Rights Act.

Subsequent to these experiences, on June 20, 2023, the Board Defendants amended Policy 5756 to adopt the versions which are the subject of this appeal. See Da156, Para.7 and 14 and Da235, Para.10. Some minor differences exist between the Manalapan-Englishtown and Middletown Policies; however, those differences are minor and are not relevant to the issues on appeal.

In accordance with regular practice and procedure, the Superintendents prepared regulations implementing the Policy. The regulations define several aspects of the Policy and outline the procedure for student support and parental notification. See Da158, Para.14; Da235, Para.10; Da162-165; and Da262-265.

Of particular importance, the regulations define the evidence warranting an exception from the notification provisions of the Policy. See Da162 and Da262. The Court questioned the prerequisites for the exception to apply; however, as is evident from its written decision, the Court neglected to review those regulations, nor consider the manner in which the Policy would be implemented. See Da133.

Further, notwithstanding the narrowly-tailored policy, and carefully prepared regulations, Respondents sought and obtained preliminary injunctions preventing implementation of the policy and restraining Board Defendants,

without any basis in law or fact, from revising, repealing, or otherwise altering its amended Policy.

The Court's order dated August 18, 2023, constitutes an abuse of discretion and must be vacated.

LEGAL ARGUMENT

POINT I
(SEE DA125)

THE COURT ERRED BY ERRONEOUSLY APPLYING THE "WELL-SETTLED LEGAL RIGHT" PRONG OF CROWE, THE COURT ERRED BECAUSE IT FAILED TO DETERMINE THAT THE UNDERLYING APPLICATION OF THE LAW AGAINST DISCRIMINATION IN THE MANNER PLAINTIFF'S ASSERTED WAS A WELL-SETTLED LEGAL RIGHT.

The Court made plain error by misapplying Crowe's "well-settled legal right" prong. See Da125. It then compounded that error by: (i) overlooking evidence of the Attorney General's inconsistent application of the LAD in this context; and (ii) disregarding the plethora of litigation around the nation on this very issue. See Da126.

Injunctive relief represents a significant intrusion into the affairs of the parties. Waste Mgmt. of New Jersey, Inc. v. Union County Utilities Auth., 399 N.J.Super. 508, 538 (App.Div. 2008), and must only be used sparingly, in the clearest of factual circumstances and for the most compelling of equities. Mays v. Penza, 179 N.J.Super. 175, 180 (Law Div. 1980). A party seeking such relief must satisfy a "particularly heavy burden." Guaman v. Velez, 421 N.J.Super. 239, 247-248 (App.Div. 2011). Injunctive relief should not be entered simply to maintain the status quo.

Courts have consistently held that restraining one's conduct without a full hearing is extraordinary relief. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982). **In order to grant the extraordinary remedy of injunctive relief, it is imperative that the law concerning the underlying conduct must be well-settled by clear and convincing evidence.**

In other words, the "well-settled legal right" must concern the substantive application of the law, not, as the Court found here, a procedural aspect of the litigation. To the contrary here, the Court found that it is well-settled that the Attorney General can litigate to enforce the LAD. See Da125.

Indeed, the Court disregarded and overlooked evidence which demonstrates that the substantive issues concerning Policy 5756 are not well-settled, including (1) the Attorney General's lack of prosecution to prevent similar policies in place as early as 2014; and (2) the plethora of litigation around the country on this precise issue. See Da224-232; Da234-235, Para.6-7; and see infra.

Indeed, Districts, including those party to these lawsuits, had begun adopting policies in 2014 which provided for parental involvement and notification and none were sued by the Attorney General. See Da234-235, Para.6-7. Pursuant to Strauss Esmay Policy Alert 204 and 205, Districts,

including Manalapan-Englishtown, adopted transgender student policies which provided for parental notification Id. The Attorney General did not litigate against Manalapan-Englishtown over those policies. This lack of prosecution is significant because the LAD was amended in 2006 to include gender identity and expression as a protected class, significantly before those initial policies were adopted. See P.L. 2006, c. 100, § 1.

Moreover, The LAD has never been substantively applied in the manner Respondents assert. There is no caselaw, decision, opinion or other determination that parental notification violates LAD. Indeed, it cannot be disputed that this is a matter of first impression, which must reconcile the rights of transgender students with a public school district's legal obligations to parents. See Da216-222 and Da224-232.

Furthermore, establishing that this is an evolving and far-from-well-settled area of law, several lawsuits are pending or have been brought around the nation concerning this particular issue. One case challenging a similar policy is Willey v. Sweetwater Cnty. Sch. Dist., ---F.Supp.3d.---, 2023 WL 4297186 (D. Wyo. June 30, 2023), wherein the plaintiffs challenged the district's "Student Privacy Policy," barring school officials from informing parents of a child's requested name or pronoun.

Therein the District Court held:

> However, a parent's established fundamental right to direct the upbringing and education of their children would appear to be burdened if a parent was misinformed or the District or a teacher refused to respond to a parent's inquiry regarding their minor child's request to be a called a different name, absent a showing of some danger to the health or well-being of the student.
>
> **To the extent the Student Privacy Policy would preclude a teacher or school district personnel, absent a minor student's consent, from answering or responding to a parent's or guardian's inquiry as to whether their child is being called by other than their legally given name or required to lie to a parent or guardian as to the name of the minor student is being called by, likely creates a constitutional problem**.

Id. See also Da224-232. (emphasis added).

The Willey court granted the ***parents' motion*** for a Preliminary Injunction with respect to the Student Privacy Policy, on the same constitutional grounds raised herein.

Additionally evidencing this evolving area of the law are cases currently pending in Maryland, Wisconsin, Florida, and Massachusetts. See e.g., John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F.Supp. 3d 118 (D. Md. 2022)(holding that parents do not have a fundamental right under the due process clause to be promptly informed of their child's gender identity currently on appeal to the United States Court of Appeals 4th Cir.); T.F., et al., v. Kettle

Moraine School District, Case No. 21-CV-1650 (Waukesha Cty. Wisconsin Cir. Ct. 2023) (ongoing litigation involving parental challenges to a Kettle Morraine, Wisconsin School District policy concerning change of students' names and gender pronouns at school without parental consent). Thus, it is impossible to establish by clear and convincing evidence that the State's claim is a well-settled legal right.

Notwithstanding the several pending lawsuits concerning this issue, there is ongoing social discourse in the media and academia on the interplay of transgender student rights and the rights and obligations of school districts and parents. See, e.g., Da216-222 and Da224-232.

It cannot go unnoticed that a school is not a traditional public accommodation. While the District acknowledges that transgender students are protected by the LAD, the District also has other legal obligation to parents of this students. Amended Policy 5756 and its regulation carefully consider each of those rights and obligations and applies only in the narrowest of circumstances. The Court's decision is devoid of any analysis whatsoever of the specific provisions of the policies and their implementing regulations. This is an abuse of discretion and must be reversed because, as the devil is always in the details, the manner in which the policies are applied – as outlined in the regulations – pass legal muster. See Da162-165 and Da262-265.

Here, the Court latched onto any well-settled legal right in an attempt to satisfy this Crowe element because there is no well-settled jurisprudence concerning parental notification when a transgender student changes their formal legally-defined mandated student record. As such, the Court abused its discretion and the injunction must be reversed and vacated.

POINT II
(SEE DA119-138)

THE COURT ERRED BY FAILING TO CONSIDER THE APPLICATION OF N.J.A.C. 6A:32-7.1 TO -7.8 "STUDENT RECORDS."

The Court's Decision is devoid of any consideration of New Jersey and Federal Student Records law. This issue was extensively, briefed and argued below. See, e.g., T55:22-56:11. This is significant for several reasons. Primarily, a student's gender is a mandatory pupil record pursuant to New Jersey law. N.J.A.C. 6A:32-7.3(a)(1). Additionally, New Jersey Statutes and Regulations and the United States Code entitle parents the right to access their child's full and accurate student record.

As such, parents of all students are aware of the gender identified on the district's mandated student records. Accordingly, transgender students are treated the same as their cisgender counterparts as it pertains to parental knowledge of the contents of mandated student records. This point is significantly reinforced when considering the many steps a transgender student may take along their public social transition journey without parental involvement, such as selection of attire and name used in classrooms and on school identification cards, for example. See Da162-163 and Da262

N.J.S.A. 18A:36-19 provides, in pertinent part:

> The State Board of Education shall provide by regulation for the creation, maintenance and retention of pupil records and for the security thereof and access thereto, to provide general protection for the right of the pupil to be supplied with necessary information about herself or himself, **the right of the parent or guardian and the adult pupil to be supplied with full information about the pupil**, except as may be inconsistent with reasonable protection of the persons involved, the right of both pupil and parent or guardian to reasonable privacy as against other persons and the opportunity for the public schools to have the data necessary to provide a thorough and efficient educational system for all pupils.

In other words, parents have the unequivocal right to full, complete and accurate information contained in a student record. Thus, it follows that parents have the right to be notified when a student determines to change their mandated student record.

New Jersey adopted an extensive regulatory scheme governing student records. See, generally, N.J.A.C. 6A:32-7.1 to -7.8. In relevant part, those regulations provide:

- A parent shall have access to the student's records. N.J.A.C. 6A:32-7.1(f); N.J.S.A. 18A:36-19.
- The parent of a student under the age of 18 is authorized to access their child's student record, regardless of whether the child resides with the parent. N.J.A.C. 6A:32-7.5(e)(1).
- Nonadult students may assert rights of access to their records **only through their parent(s)**. N.J.A.C. 6A:32-7.1(e).

- A student is only authorized to access his/her student record if they have obtained written permission of a parent. N.J.A.C. 6A:32-7.5(e)(1).

- A record may be withheld from a parent or from an adult student **only when the district board of education obtains a court order** or is provided with evidence that there is a court order revoking the right to access. N.J.A.C. 6A:32-7.6(a)(5).

- A student's name and gender, *inter alia*, are mandated student records. N.J.A.C. 6A:32-7.3(b)(1).

- Parents of ***adult*** students may access student records **without the adult student's consent** if the adult student is financially dependent on the parent and enrolled in the public school system. N.J.A.C. 6A:32-7.5(e)(3).

- To request a change in the student record, **a parent or *adult* student** shall notify, in writing, the chief school administrator of the specific issues relating to the student record. N.J.A.C. 6A:32-7.7(b). There is no authority in student record regulations for minor children to change their student records.

Thus, it is clear that the regulatory scheme established by the State Board of Education prioritizes parental access and control of student records. Indeed, the regulations provide nearly no rights to minor students in relation to their records and, furthermore, affirmatively infringe on the rights of adult students when they are enrolled in public school and financially dependent on their parents.

Lastly, these regulations also require each district board of education to compile and maintain student records and regulate access in accordance with the

Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and 34 CFR §99. N.J.A.C. 6A:32-7.1(b).

20 U.S.C. § 1232g(a)(1)(A) specifically reads:

> No funds shall be made available under any applicable program to any educational agency[2] or institution which has **a policy of denying**, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, **the right to inspect and review the education records of their children**.

FERPA's implementing regulations similarly embody the principle of parental right to access all of their student's educational records. See, generally, 34 CFR §99.1 to -99.67.

FERPA regulations provide that "a parent or eligible student must be given the opportunity to inspect and review the student's education records." 34 CFR §99.10(a). Education records means "those records that are: (1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a

---

[2] Indeed, the State's policy, which it asserts here, also threatens its receipt of Federal funds. See, 20 U.S.C. § 1232g(a)(1)(B)("No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) **that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children** who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section."(emphasis added))

party acting for the agency or institution." 34 CFR §99.3. "Eligible student" is defined as "a student who has reached 18 years of age or is attending an institution of postsecondary education." Id. **Only parents and eligible students [those over 18] may amend a student's records**. 34 CFR §99.20(a).

Respondent's position is that transgender students are legally entitled to unilaterally alter their formal student records without parental notification and that the District conceal this information from parents. This is antithetical to FERPA and New Jersey student records law and regulations, which both prioritize parental access to student records.

Failure to acknowledge these principles is a significant oversight by the Chancery Division. Student record laws demonstrate a legislative determination that parents of ***all students*** are entitled to full, complete, and unfettered access to their child's student records. To apply the LAD in the manner the State asserts is not providing transgender students with equal rights. To the contrary, such an application treats cisgender students less favorably and establishes transgender student rights not available to the non-transgender community.

Simply, the parents of all students are aware of the gender identified and maintained in the mandatory student records. Thus, it cannot be disparate treatment to advise parents any change of gender in the mandated student record. Indeed, a change to any other mandated student record, such as address,

telephone number, or name, would trigger parental notification. Thus, parental notification of a formal mandated student record is not discriminatory.

POINT III
(SEE DA131-133)

THE COURT ERRED BY NOT RECOGNIZING THAT THE INJUNCTION COMPELS THE BOARDS TO VIOLATE PARENTS' FUNDAMENTAL RIGHTS UNDER THE FOURTEENTH AMENDMENT AND FAILS TO CONSIDER THE DISTRICTS' IMPLEMENTING REGULATIONS.

In its decision, the Court gives passing reference, but not due deference, to the Constitutional rights of parents. See Da131-133. More importantly, however, the Court's decision is devoid of any consideration that its injunction compels the District to violate those Fundamental Constitutional Rights and the concomitant liability of the District for these violations. Id. Lastly, the Court completely ignores the Districts regulations, which balance transgender students' rights with the Constitution restraints on schools as government actors. See Da133, Da162-165, and Da262-265.

In its written Decision, the Court erroneously determined that a Constitutional violation is subordinate to the State's interest to:

> ensure that a protected class under a state law against discrimination does not suffer either disparate treatment of disparate impact because of polices requiring parental notification where a student requesting a transgender accommodation or expressing

> transgender identification specifically requires that their parents or guardian not be notified.

See Da132.

The Court erred because (i) there clearly are Constitutional implications; and (ii) the Court fails to consider the Districts' process for notification, which properly balances the State's compelling interest under the LAD and parents' Fundamental Constitutional Rights. See Da163-164 and Da263-264. Indeed, to sustain this decision will result in this being the only aspect of public education where public school staff must defer 100% to the desire of the student, instead of using the staff's own education, experience and training to communicate and be transparent with parents.

The Constitutional Violation

The entire premise of the State's argument is that every other legal right – including Fundamental Rights to which parents are entitled – are trumped by the protections for gender identity and expression afforded by the LAD. This cannot be the law. The trial Court's obligation- at which it failed- was to reconcile those rights.

It is a well-settled legal presumption that fit parents act in the best interests of their children. Troxel v. Granville, 530 U.S. 57, 68 (2000). The Supreme Court of the Unites States has recognized that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary

function and freedom include preparation for obligations the state can neither supply nor hinder." Stanley v. Illinois, 405 U.S. 645, 651 (1972).

Indeed, "so long as a parent adequately cares for his or her children (*i.e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Troxel, 530 U.S. 57, 68–69 (2000).

In that regard, courts nationwide, including the Supreme Courts of the United States and New Jersey, uniformly recognize parents' Fundamental Constitutional right to direct their children's upbringing – *against* which state interference with family matters are not condoned. See Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (noting that this Court's decisions "have respected the private realm of family life which the state cannot enter"). **"[P]arents have a substantial constitutional right … to direct and control the upbringing and development of their minor children.**" Halderman, by Halderman v. Pennhurst State Sch. & Hosp., 707 F.2d 702, 709 (3d Cir. 1983)(emphasis added).

The Third Circuit also recognizes that "[t]he right of parents to raise their children without undue state interference is well established" and "[c]hoices about marriage, family life, and the upbringing of children are among associational rights th[e] [Supreme] Court has ranked as of basic importance in

our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." Gruenke v. Seip, 225 F.3d 290, 303 (3d Cir. 2000) *citing* M.L.B. v. S.L.J., 519 U.S. 102 (1996).

Similarly, the New Jersey Supreme Court recognizes parental autonomy deriving from the "**fundamental right** of parents to raise their children as they see fit." Moriarty v. Bradt, 177 N.J. 84, 103, 115 (2003)(emphasis added). Our State's highest court held that "the entitlement to autonomous family privacy includes the fundamental right of parents to make decisions regarding custody, parenting time, health, education, and other child-welfare issues between themselves, without state interference." Fawzy v. Fawzy, 199 N.J. 456, 476 (2009).

Moreover, our Appellate Division elaborated on that right:

> We begin with a review of the principles applicable to the right of a parent to make decisions, both philosophical and mundane, regarding his or her child. "Our law recognizes the family as a bastion of autonomous privacy in which parents, presumed to act in the best interests of their children, are afforded self-determination over how those children are raised." In re D.C., 203 *N.J.* 545, 551, 4 *A*.3d 1004 (2010). A parent's right to parental autonomy is recognized as "a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution" that is "rooted in the right to privacy." Moriarty, *supra,* 177 *N.J.* at 101, 827 *A*.2d 203; *see also* N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 38, 11 *A*.3d 844 (2011); Watkins

> v. Nelson, 163 N.J. 235, 245, 748 *A*.2d 558 (2000); V.C., *supra,* 163 N.J. at 218, 748 *A*.2d 539.

Tortorice v. Vanartsdalen, 422 N.J. Super. 242, 248 (App. Div. 2011).

The Fourteenth Amendment's Due Process Clause has a substantive component which "provides heightened protection against government interference with certain fundamental rights and liberty interests" including the right "to direct the education and upbringing of one's children…" Washington v. Glucksberg, 521 U.S. 702, 720 (1997). This right encompasses parents' "fundamental right to make decisions concerning the rearing of" their children including "decisions concerning the care, custody and control of" their children. Troxel, 530 U.S. at 68, 72 (upholding mother's right to decide the frequency of her child's visits with grandparents despite claims that such visits were in her child's best interests).

In Troxel, the Supreme Court explained the entrenched Constitutional parental right as follows:

> **The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children - is perhaps the oldest of the fundamental liberty interests recognized by this Court**. More than 75 years ago, in Meyer v. Nebraska, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in Pierce v. Society of Sisters, 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L.Ed. 1070

(1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in Pierce that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id., at 535, 45 S.Ct. 571. We returned to the subject in Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children...

In subsequent cases also, **we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children**. See, *e.g.,* Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); Wisconsin v. Yoder, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Quilloin v. Walcott, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J. R., 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) ("**Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course**");

> Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); Glucksberg, *supra,* at 720, 117 S.Ct. 2258 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] ... to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

Troxel, 530 U.S. at 65-66 (emphasis added).

Thus, our jurisprudence mandates "state deference to parental control over children" because "it is the parents' responsibility to inculcate 'moral standards, religious beliefs, and elements of good citizenship.'" Gruenke, 225 F.3d at 307 *citing* Yoder, 406 U.S. at 233.

The Court's decision below is contrary to this required Constitutional deference as it deprives parents, and more specifically parents of LGBTQ+ students, of information critical to the parents' ability to actively guide and foster their children's moral and psycho-social development. **Indeed, not only does the Court's decision deprive parents of their Constitutional Rights, it compels the Board Defendants to be the State actor depriving parents of those rights.**

Disregard for the District's Policy and Regulation Concerning Notification

The specific language of the Districts' policies and implementing regulations – totally ignored by the Court – find the appropriate balance between recognizing the State's compelling interest to eradicate discrimination and recognizing parent's Fundamental Constitutional Rights. See Da152-154, Da162-165, Da169-171, and Da262-265.

Significantly, the Policy is not triggered by one's status alone. Rather, it is implemented only when a student unilaterally undertakes certain steps along their public social transition accommodation spectrum. See Da152, Da162, Da169-170, and Da262. Indeed, there are many steps in the transition which can occur without parental notification. Moreover, all occur without parental consent.[3] For example, a student can change a school ID card, use a different name in class and on school work, choose whatever attire the student wants, or utilize a gender-neutral bathroom – all without parental notification. See Da163 and Da263.

Indeed, the implementing regulations are also designed in a way that recognizes several of the principles in the Guidelines and, again, balances the

[3] The Manalapan-Englishtown Policy requires parental consent for students, in grades Pre-K through 5. See Da169.

transgender students' rights with those of their parents. See Da162-165, Da262-265. The Court failed to acknowledge these regulations.

More importantly, and contrary to the State's characterization of an affirmative duty to notify parents, the Policy and the Regulation both provide for exceptions to notification when that is in the best interest of the student. See Da133, Da152, Da162, Da170, and Da262.

In fact, demonstrating that the Court failed to review all the evidence submitted, it writes, "And what is meant by 'Documented evidence' under the Middletown Policy" or "credible evidence" under the Manalapan-Englishtown Policy. See Da133. The District Regulations – submitted to the Chancery Division – include a specific definition of what this means. See Da152, Da162, Da170, Da262. Failing to review evidence submitted, particularly when that evidence addressed questions the Court included in its written decision constitutes an abuse of discretion and warrants vacating the preliminary injunction.

For example, these regulations represent a final safeguard protecting both the rights of transgender students and the rights of their parents. Indeed, while the Policy and regulations contemplate parental notification, they contain an exception when documented evidence exists that physical or emotional harm will result from parental notification. **Such evidence includes, but is not**

limited to previous reports to DCPP, student reporting of fear of physical and/or emotional harm upon disclosure, or student reporting of fear of non-acceptance upon disclosure.

Again, rather than recognize this balancing of competing interests, the Court abused its discretion and found that there exceptions supported the State's position. See Da132-133. Such a conclusion is short-sighted and totally ignores a school district's legal obligations to parents and to abide by Constitutional restraints.

Board Defendants acknowledge that transgender students are protected by the LAD. Their Policies and Regulations acknowledge those rights and afford transgender students the unilateral right without parental consent to engage in all steps along the public social transition. However, when the student chooses to take certain specific steps along their social transition journey, the school is required to recognize parents' Constitutional rights and, unless an exception applies, notify parents. The Court erred by finding that these Constitutional Rights are subordinate to the State's compelling interest to eradicate discrimination. The law can do both and Board Defendants' policies do just that.

POINT IV
(See DA129-130)

THE COURT ERRED BY RELYING UPON INADMISSIBLE HEARSAY, AND EVIDENCE WHICH IS IRRELEVANT, UNDULY PREJUDICIAL, AND LACKS ANY PROBATIVE VALUE PURSUANT TO N.J.R.E. 801, 802, 401 AND 403(A).

Under its disparate impact analysis, and notwithstanding Board Defendants' objection, the Court specifically relied upon a number of studies and surveys the State submitted and erroneously concluded that "none of the School Board defendants refute the State's data or presents alternate evidence to negate or call into that data or the methodology by which it was compiled." See Da130. This is not true as the School Board Defendants specifically provided contrary evidence and, at oral argument, specifically referenced the State's studies to support parental notification. See Da173 and Da200-207. See also T55:8-15; T57:1-13; and T56:16-19.

R. 1:6-6 provides that only facts which are admissible in evidence may be considered by the Court when hearing a motion. The studies upon which The State relied constitute inadmissible hearsay, are irrelevant and unduly prejudicial and should not be considered by this Court pursuant to N.J.R.E. 801, 802, 401 and 403(a).

N.J.R.E. 801 and 802 provide that hearsay, defined as an out of court statement offered to prove the truth of the matter asserted, is not admissible. The various studies cited are the exact definition of hearsay and, if considered by the Court, deprive Defendants of the opportunity for cross-examination. See Da86-114. See also T55:1-7 and T57:1-13. As such, these studies cannot be considered.

N.J.R.E. 401 provides that relevant evidence is generally admissible. The studies upon which Plaintiffs rely are irrelevant to the Court's disposition of the issue before it: whether Policy 5756 treats transgender students differently. See Da86-114. While those studies may provide rationale behind Plaintiffs' positions – a rationale upon which reasonable minds may differ – the reason for Plaintiffs' position does not have a tendency to prove or disprove any material fact at issue. Rather, such studies are inflammatory, unduly prejudicial, and lack any probative value as they attempt to paint a picture of a downtrodden, depressed and suicidal transgender community.

In that regard, N.J.R.E. 403(a) provides, "Except as otherwise provided by these rules or other law, the court may exclude relevant evidence if its probative value is substantially outweighed by the risk of: (a) Undue prejudice, confusing the issues, or misleading the jury…"

Indeed, there are myriad other studies which demonstrate that parental involvement with transitioning students is imperative for the health and well-being of transgender students. Most compelling, and completely ignored by the Court is the affidavit and expert opinion of Erica E. Anderson, Ph.D., dated February 3, 2023, submitted in T.F., et al., v. Kettle Moraine School District, Case No. 21-CV-1650 (Waukesha Cty. Wisconsin Cir. Ct. 2023), opining that "Parental Involvement is Essential at Every Stage of the [transition] Process," See 200-207 at Para. 58-78, concluding that "a school policy that involves school adult personnel in socially transitioning a child or adolescent without the consent of parent or over their objection violates widely accepted mental health principles and practice," See Da207 at Para. 78.

As the studies Plaintiffs provide constitute hearsay, are biased and unduly prejudicial, the Court erred by relying upon this information.

Additionally, at oral argument, and contrary to the Court's written decision, Board Defendants specifically referred to the opinion of Dr. Anderson and the study the State submitted, which specifically counseled family health care providers that parental notification was in the best interest of the child. (See T55:8-15; T56:18-19; and T57:1-13).

Thus, the Court abused its discretion, considered inadmissible evidence and ignored Board Defendants' evidence. As such, the preliminary injunction must be vacated.

POINT V
(<u>See</u> Da116, Para.2 and Da118, Para.2)

THE COURT ABUSED ITS DISCRETION BY ENJOINING APPELLANTS FROM AMENDING, MODIFYING, OR SUPERSEDING ANY PORTION OF POLICY 5756, UNTIL DISPOSITION OF THE ADMINISTRATIVE COMPLAINT BEFORE THE DIVISION ON CIVIL RIGHTS

The Court's August 18, 2023 decision imposed two restrictions on Board Defendants: (1) restraining implementation of Policy 5756 adopted on June 20, 2023; and (2) restraining Board Defendants from "amending, modifying, or superseding any portion of [pre-existing] Policy 5756." There is no legal or factual basis for this relief. None was offered and none was cited by the Court. This self-serving action allows the State to prosecute claims, which may otherwise be moot if the policies were repealed.

N.J.S.A. 18A:11-1(c) specifically provides that a Board may "[m]ake, amend and repeal rules . . . for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees. . ." Indeed, a board's direct responsibilities are to make policies, develop plans, and evaluate outcomes.

Incredibly, the State **<u>admitted that Policy 5756 is not mandatory and parental notification is legal</u>.** On September 6, 2023, in a separate matter

concerning the same issue, Platkin and Iyer v. Hanover Twp. Board of Education and Hanover Twp. Public Schools, Docket Number MRS-C-042-23, Deputy Attorney General James R. Michael admitted to the Court:

> THE COURT: True, but as I think you argued the first time, there are many districts around the State that don't have any policy whatsoever with regard to the issue to maybe the statewide guidance, but there is not necessarily specific policy on the issue; is that correct?
>
> MR. MICHAEL: I am not sure about many. **I know it is not necessarily a mandatory policy.** It's mandatory guidance that the DOE was required to put – the Legislature directed DOE to put out the guidance, and in this particular area, basically directed in large part what the guidance should say. So it is sort of an insight into –
>
> THE COURT: Guidance, yes, but –
>
> MR. MICHAEL: -- how the Legislature views the issue.
>
> THE COURT: Right, but guidance yes; policy no.
>
> MR. MICHAEL: Right. **But it is correct this is not a policy that every district is mandated to have.**

See Da269 (Lines 2-22) (emphasis added). See N.J.R.E. 803(b)(3)(admissibility of statement by person authorized to speak on behalf of party-opponent).

In a similar stunning admission from a party opponent, Attorney General Matthew J. Platkin admitted that parental notification is legal. See Da281. On August 29, 2023, Respondent General Platkin appeared on The Brian Lehrer Show on WNYC radio, and stated, "**of course, you can tell parents about**

issues going on with their student, including changes in gender identity and expression." See Da281. Such statements of a party-opponent are admissible evidence. See N.J.R.E. 803(b)(1).

Nonetheless, the State continues to prosecute this case. Moreover, unlike every other school district in this State, as a result of the Court's August 18, 2023 Order, the Board Defendants are compelled to maintain a policy subjecting them to this baseless litigation. As such, the Court must vacate that portion of the Chancery Division's decision. See Da116, para.2 and Da118, para.2.

CONCLUSION

For the foregoing reasons, the Chancery Division abused its discretion when it entered a preliminary injunction. As such, the Court's Order dated August 18, 2023 must be reversed.

Respectfully submitted,

/s/ Bruce W. Padula
Bruce W. Padula

Dated: December 20, 2023

FILED, Clerk of the Appellate Division, January 03, 2024, **A-000046-23**, AMENDED
Exhibit A

NEW JERSEY SUPERIOR COURT
APPELLATE DIVISION

MATTHEW J. PLATKIN, AG, NJ AND SUNDEEP IYER, DIRECTOR, NJ DIVISION OF CIVIL RIGHTS,

Plaintiffs-Appellees,

v.

MANALAPAN-ENGLISHTOWN REGIONAL BOARD OF EDUCATION AND MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT,

Defendants-Appellants.

Docket No. A-000046-23

Civil Action

On appeal from the Superior Court of New Jersey, Monmouth County, Chancery Division – General Equity

Sat below: Hon. David F. Bauman, J.S.C.

AMENDED BRIEF OF PROPOSED AMICUS CURIAE THE CENTER FOR AMERICAN LIBERTY IN SUPPORT OF APPELLANTS

DHILLON LAW GROUP INC.
50 Park Place, Suite 1105
Newark, NJ 07102
917-423-7221
jcontarino@dhillonlaw.com
Attorneys for Amicus Curiae
THE CENTER FOR AMERICAN LIBERTY

Of Counsel and on the Brief:
Josiah Contarino

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

BACKGROUND ON SOCIAL TRANSITIONING 3

I. Youth should receive a careful professional assessment before socially transitioning. 3

II. Social transition is a significant psychotherapeutic intervention. 4

III. Parental involvement is essential at every stage in the social transition process. 5

IV. Schools should not socially transition students in secret from their parents. 6

ARGUMENT 7

I. THE STATE IS NOT LIKELY TO SUCCEED ON THE MERITS 7

A. Parents have a fundamental right to direct the upbringing of their children. 8

1. Right to Consent to Psychological Treatment 8

2. Right to Make Important Decisions 16

B. The Parental Secrecy Policy does not satisfy strict scrutiny 21

1. Children do not have a privacy right to keep the fact their school is socially transitioning them secret from their parents. 22

2. The Parental Secrecy Policy is not narrowly tailored to prevent harm. 27

a. The Parental Secrecy Policy is not narrowly tailored to prevent parents from abusing their children. 27

b. The Parental Secrecy Policy is not narrowly tailored to prevent discrimination against transgender-identifying students at school. 28

II. THE OTHER PRELIMINARY INJUNCTION FACTORS TIP DECIDEDLY IN FAVOR OF REVERSAL 30

CONCLUSION....................33

TABLE OF AUTHORITIES

Cases

Alfonso v. Fernandez,

606 N.Y.S.2d 259 (Ct. App. 1993)....................18

B.P.J. v. West Virginia State Bd. of Educ.,

No. 2:21-CV-00316, 2023 WL 111875 (S.D. W. Va. Jan. 5, 2023)....................8

Bellotti v. Baird,

443 U.S. 622 (1979) 23, 24, 25

C.N. v. Ridgewood Bd. of Educ.,

430 F.3d 159 (3d Cir. 2005) 16, 17, 18

Campaign for S. Equal. v. Bryant,

64 F. Supp. 3d 906, 949 (S.D. Miss. 2014), *aff'd*, 791 F.3d 625 (5th Cir. 2015) .30

Croft v. Westmoreland Cnty. Child. & Youth Servs.,

103 F.3d 1123 (3d Cir. 1997) 27

D.C.M.M. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark,

No. 87207, 2023 WL 5837974 (Nev. Sept. 8, 2023) 12, 14

Dobbs v. Jackson Women's Health Org.,

142 S. Ct. 2228 (2022) 23, 25

Doe v. Dickenson,

615 F. Supp. 2d 1002 (D. Ariz. 2009)....................19

FILED, Clerk of the Appellate Division, January 03, 2024, **A-000046-23**, **AMENDED**

Doe v. Heck,

327 F.3d 492 (7th Cir. 2003) 20

Doe v. Horne,

No. CV-23-00185-TUC-JGZ, 2023 WL 4661831 (D. Ariz. July 20, 2023) 10

Edmo v. Corizon, Inc.,

935 F.3d 757 (9th Cir. 2019) 9

Fields v. Palmdale Sch. Dist. (PSD),

447 F.3d 1187 (9th Cir. 2006) 17

Fields v. Palmdale Sch. Dist.,

427 F.3d 1197 (9th Cir. 2005) 17

Fraternal Ord. of Police, Lodge No. 5 v. City of Philadelphia,

812 F.2d 105 (3d Cir. 1987) 25, 26

Fulton v. City of Philadelphia,

141 S. Ct. 1868 (2021) 29

Gade v. Nat'l Solid Wastes Mgmt. Ass'n,

505 U.S. 88 (1992) 7, 22

Garden State Equal. v. Dow,

216 N.J. 314 (2013) 30

Gruenke v. Seip,

225 F.3d 290 (3d Cir. 2000) 8, 16, 18

H.L. v. Matheson,

450 U.S. 398 (1981) 16, 25

Horizon Health Center v. Felicissimo,

135 N.J. 126 (1994) 7

Jenkins v. Jenkins,

No. 03-08-CV-037, 2008 WL 483312 (S.D. Ohio Feb. 19, 2008) 30

Kanuszewski v. Michigan Dep't of Health & Hum. Servs.,

927 F.3d 396 (6th Cir. 2019) 9

Kelson v. City of Springfield,

767 F.2d 651 (9th Cir. 1985) 18

Koe v. Noggle,

No. 1:23-CV-2904-SEG, 2023 WL 5339281 (N.D. Ga. Aug. 20, 2023) 10

Lamb v. Norwood,

899 F.3d 1159 (10th Cir. 2018) 10

Lawrence v. Texas,

539 U.S. 558 (2003) 24

Loving v. Virginia,

388 U.S. 1, (1967) 24

Mahanoy Area Sch. Dist. v. B.L,

141 S. Ct. 2038 (2021) 17, 18

Mann v. Cnty. of San Diego,

907 F.3d 1154 (9th Cir. 2018)..9

Mario V. v. Armenta, No. 18-CV-00041-BLF,

2021 WL 1907790 (N.D. Cal. May 12, 2021) 15

McDonald v. City of Chicago,

561 U.S. 742 (2010) 24

Mirabelli v. Olson,

No. 323CV00768BENWVG, 2023 WL 5976992 (S.D. Cal. Sept. 14, 2023).....17, 26, 31

Monroe v. Meeks,

584 F. Supp. 3d 643 (S.D. Ill. 2022) 10

N.A.A.C.P. v. Claiborne Hardware Co.,

458 U.S. 886 (1982) 7

New York Times Co. v. Sullivan,

376 U.S. 254 (1964) 7

Nunez by Nunez v. City of San Diego,

114 F.3d 935 (9th Cir. 1997)..24

Ovando v. City of Los Angeles,

92 F. Supp. 2d 1011 (C.D. Cal. 2000)..19

Parham v. J.R.,

442 U.S. 584 (1979) .... passim

Patel v. Searles,

305 F.3d 130 (2d Cir. 2002) 19

Pierce v. Society of Sisters,

268 U.S. 510 (1925) 18, 19

Pinson v. Hadaway,

No. 18-CV-3420-NEB-KMM, 2020 WL 6121357 (D. Minn. July 13, 2020).....10

Porter v. Allbaugh,

No. 18-CV-0472-JED-FHM, 2019 WL 2167415 (N.D. Okla. May 17, 2019) ...10

Reno v. Flores,

507 U.S. 292 (1993) 21, 22

Ricard v. USD 475 Geary Cnty., KS Sch. Bd.,

No. 522CV04015HLTGEB, 2022 WL 1471372 (D. Kan. May 9, 2022)...... 16, 28

Roper v. Simmons,

543 U.S. 551 (2005) 15

Stanley v. Illinois,

405 U.S. 645 (1972) 20

Sterling v. Borough of Minersville,

232 F.3d 190 (3d Cir. 2000) 23

T.F. v. Kettle Moraine School Dist.,

No. 2021CV1650, 2023 WL 6544917 (Wis. Cir. Oct. 03, 2023) 9, 28

Troxel v. Granville,

530 U.S. 57 (2000) 8, 20, 27

Vernonia Sch. Dist. 47J v. Acton,

515 U.S. 646 (1995) 23

Washington v. Glucksberg,

521 U.S. 702 (1997) 21, 22

Waste Mgmt. of New Jersey, Inc. v. Union Cnty. Utilities Auth.,

399 N.J. Super. 508 (App. Div. 2008)...7

Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.,

485 F. Supp. 3d 1 (D.D.C. 2020) 13

Wisconsin v. Yoder,

406 U.S. 205 (1972) 15

Statutes

N.J.S.A. 2C:14–3 24

N.J.S.A. 2C:34–3 24

N.J.S.A. 37:1–6 24

Other Authorities

Brief of Amici Curiae Medical, Nursing, Mental Health, and other Health Care Organizations in support of Plaintiff in *Adams v. The School Board of St. Johns County*, Case No. 18-13592 (11th Cir. 2019) 11

Carmichael, P., Butler, G., Masic, U., Cole, T. J., De Stavola, B. L., Davidson, S., Skageberg, E. M., Khadr, S., & Viner, R. M., *Short-term outcomes of pubertal suppression in a selected cohort of 12- to 15-year-old young people with persistent gender dysphoria in the UK*, PLOS ONE 16(2) (2021) 13

Cass, H., *Independent review of gender identity services for children and young people: Interim report* (February 2022) 12

E. Coleman, et al., *Standards of Care for the Health of Transgender and Gender Diverse People*, Version 8, Int'l J. of Transgender Health (Sept. 15, 2022) 11

Irwig, M.S., *Detransition Among Transgender and Gender-Diverse People—An Increasing and Increasingly Complex Phenomenon*, J. Clin. Endocrinology & Metab. (June 9, 2022) 14

James M. Cantor, *Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy*, J. Sex & Marital Therapy 307 (2019) 13

Kristina R. Olson, *Gender Identity 5 Years After Social Transition*, Pediatrics 150(2):e2021056082 (Aug. 2022) 13

United Kingdom National Health Service Website 5

Zucker, K.J., *The myth of persistence: Response to "A Critical Commentary on Follow-Up Studies and Desistance Theories about Transgender and Gender Non-Conforming Children" by Temple Newhook et al.*, International Journal of Transgenderism, 19 (2018)..12

PRELIMINARY STATEMENT

Parents have a fundamental right under the United States Constitution to direct the upbringing of their children. Pursuant to that right, public schools are required to notify parents and obtain their consent before socially transitioning their children at school. "Social transitioning" refers, primarily, to calling a transgender-identifying person by a new name and pronouns associated with their transgender identity. *See* ACa14, Certification of Dr. Erica E. Anderson ("Anderson Cert.") ¶ 9, attached to ACa1, Certification of Josiah Contarino, as Exhibit 1. Social transitioning is a form of psychological treatment, with dramatic and potentially life-long consequences, and the State may not perform this treatment on children without informing their parents. Minor children are not capable of determining by themselves whether social transitioning is appropriate for them, and the healthcare consensus is that schools should not socially transition students without involving their parents in the process.

Here, the Manalapan-Englishtown Regional Board of Education and Manalapan-Englishtown Regional School District (the "District") adopted a policy that at least partially acknowledges parental rights by requiring schools to notify parents when the schools socially transition their children (the "Parental Notification Policy"). Under the Parental Notification Policy, schools must accept a student's asserted gender identity as decisive and socially transition the student if the student

asks for it. Upon socially transitioning the student, the school must notify the child's parents, unless there is reason to believe that doing so would create a risk of harm to the child.

The Parental Notification Policy amended a prior policy under which schools were permitted to socially transition children in secret from their parents if the child asked that their parents not be informed (the "Parental Secrecy Policy"). The Parental Secrecy Policy was based on a guidance document issued by the New Jersey Department of Education, called *Transgender Student Guidance for School Districts*, which provided that schools may socially transition children in secret from their parents if the child asks that their parents not be informed.

The court below entered an order preliminarily enjoining the Parental Notification Policy and requiring the District to reinstate the Parental Secrecy Policy. This was erroneous. An injunction may not violate constitutional rights, and the Parental Secrecy Policy violates the rights of parents whose children attend schools in the District. What is more, the Parental Secrecy Policy harms children. It keeps children who may be experiencing psychological distress from seeing a competent mental health practitioner. It results in children receiving a "one size fits all" form of psychological treatment in a situation that demands individualized evaluation. It results in children persisting in a transgender identity when they might otherwise desist. And it cuts parents out of their children's lives, isolating children from their

main source of support and driving a wedge into the heart of the parent-child relationship just when children need it most.

This Court can remedy the violation of parents' constitutional rights and prevent this harm to children. It should reverse.

BACKGROUND ON SOCIAL TRANSITIONING[1]

I. Youth should receive a careful professional assessment before socially transitioning.

Transgender persons experience a "mismatch between [their] natal sex and [their] felt, perceived, or desired gender identity." ACa15 ¶ 10. Having a transgender identity is not, standing alone, a psychological condition. ACa15 ¶ 10. Nevertheless, transgender-identifying persons can experience gender dysphoria, which refers to "clinically significant distress . . . related to gender incongruence." ACa15 ¶ 10. Not everyone who has a transgender identity suffers from gender dysphoria, but a young person's desire to undergo a social transition is a sign that may indicate the presence of gender dysphoria or related mental-health conditions. ACa11-ACa112 ¶ 8.b.

[1] This background discussion is based on the certification of Dr. Erica Anderson. ACa6-ACa58. Dr. Anderson, a transgender woman, is an expert in the field of the treatment of youth dealing with gender-identity related issues. ACa10-ACa11, Anderson Cert. ¶¶ 3–6. Dr. Anderson's certification starts on page ACa6 of the attached appendix.

Minors who want to undergo a social transition should thus receive a "careful evaluation by an appropriately trained mental health professional" to determine whether gender dysphoria or other related conditions exist. ACa37-ACa38 ¶ 57.

II. Social transition is a significant psychotherapeutic intervention.

The primary purpose of social transitioning is to relieve the psychological distress associated with having a mismatch between one's natal sex and gender identity. ACa14 ¶ 9. Social transitioning is an "impactful psychotherapeutic intervention" in the life of a child. ACa12 ¶ 8.e. Indeed, "a social transition represents one of the most difficult psychological changes a person can experience." ACa31 ¶ 42. Like other forms of healthcare treatment, however, social transitioning is not without risks.

First, social transitioning may cause a minor's transgender identity to persist. Absent social transitioning, for the vast majority of children, "gender incongruence does not persist" into adulthood. ACa20 ¶ 20. But once a child is socially transitioned and lives as their aspired-to gender, the likelihood that the child's transgender identity will persist into adulthood "dramatic[ally]" increases. ACa25 ¶ 30. In this way, social transitioning itself can change "gender identity outcomes" in the lives of children. ACa25-ACa30 at IV.a.

Second, in most cases, social transitioning is the first step down the road to graduated "affirmative" care for the child in the form of puberty blockers and cross-

sex hormones, which can "have permanent, long-term effects," including but not limited to sterility. ACa35 ¶ 53; *see also* United Kingdom National Health Service Website (noting that "long term cross-sex hormone treatment may cause . . . permanent infertility"), ACa89. The risks associated with this graduated care must be considered when deciding whether to socially transition a minor. ACa22-ACa23 ¶¶ 24–25.

Third, the recent surge of youth reporting a transgender identity suggests that "cultural and/or social factors may contribute—even substantially—to a young person's experience of gender variance." ACa19 ¶ 19. Caution is thus warranted to ensure that a social transition is appropriate. ACa19.

Based on these concerns, social transitioning youth must be carefully undertaken with the assistance of a mental health practitioner and the minor's parents. ACa25-ACa32 ¶¶ 29–43. And in some cases, based on a weighing of the relevant considerations, "it can be appropriate for parents to say 'no' to a social transition" of their children. ACa39 ¶ 60.

III. Parental involvement is essential at every stage in the social transition process.

As a practical matter, parents must be involved for their children to even see a mental health professional. ACa40-ACa41 ¶¶ 61–64. Parental involvement is also critical in "the diagnostic process to [allow the mental health professional to] evaluate how long the [minor] has been experiencing gender incongruence, whether

there might be any external cause of those feelings, and a prediction of how likely those feelings are to persist." ACa35 ¶ 66. And given the "complicated risk-benefit calculus . . . and the limited knowledge about long-term effects and outcomes," parents "should . . . be involved to make important decisions about next steps." ACa44 ¶ 72. Moreover, excluding parents from decisions about a social transition "drive[s] a wedge between the parent and child" and "undermines [minors'] main support structure"—their families. ACa45, ACa46 ¶¶ 77, 80.

Parental involvement is also necessary to obtain informed consent. Minors generally may not be seen "without informed consent from the parent(s)/legal guardian(s), both as a matter of state laws and as a matter of medical ethics." ACa40 ¶ 61. And because minors "lack the skills for future thinking, planning, . . . and self-reflection," parents are "integral to the informed consent process." ACa40 ¶ 62.

IV. Schools should not socially transition students in secret from their parents.

Based on these considerations, schools should not socially transition minors "without consultation with parents and appropriate professionals." ACa31 ¶ 42. Indeed, no professional body "has endorsed school-facilitated social transition of minors without parental [involvement]." ACa46-ACa47 ¶ 81. School policies "excluding parental involvement [in the decision whether to socially transition their child are] contrary to widely accepted mental health principles and practice" and are "likely to lead to student harm." ACa47, ACa49 ¶¶ 82, 86.

ARGUMENT

The State has not satisfied its burden of demonstrating the preliminary injunction factors by "clear and convincing[]" evidence. *Waste Mgmt. of New Jersey, Inc. v. Union Cnty. Util. Auth.*, 399 N.J. Super. 508, 519–20 (App. Div. 2008) (setting forth preliminary injunction factors).

I. THE STATE IS NOT LIKELY TO SUCCEED ON THE MERITS

Below, the court concluded that the Parental Notification Policy violated New Jersey law, and it enjoined that Policy and required the District to reinstate the Parental Secrecy Policy. This was error. Under the Supremacy Clause of the United States Constitution, parents' federal constitutional rights trump any other state-law rights that might be at issue. *Montgomery v. Louisiana*, 577 U.S. 190, 205 (2016), *as revised* (Jan. 27, 2016). Moreover, it is black-letter law that a state-court injunction may not violate federal constitutional rights. *Horizon Health Center v. Felicissimo*, 135 N.J. 126, 148–49 (1994) (modifying injunction that "impermissibly exceeds [federal constitutional] standards"); *see also N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n.51 (1982) (noting that in a "civil lawsuit between private parties," the "application of state rules of law by . . . state courts in a manner alleged to restrict [constitutional] freedoms constitutes 'state action' under the Fourteenth Amendment" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964))).

Here, for the reasons set forth below, the lower court's injunction, which requires the District to reinstate the Parental Secrecy Policy, violates the federal constitutional rights of parents in the District. Thus, this Court should reverse.

A. Parents have a fundamental right to direct the upbringing of their children.

Parents have a fundamental right under the United States Constitution to direct the "care, custody, and control" of their minor children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.); *see also Gruenke v. Seip*, 225 F.3d 290, 304 (3d Cir. 2000) (same). This right rests on the constitutionally mandated common-law presumptions of parental fitness and affection—*i.e.*, that (1) "parents possess what a child lacks in maturity, experience, and capacity for judgment" and (2) the "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

The Parental Secrecy Policy—which the lower court ordered the District to reinstate—infringes the rights of parents in the District in four ways.

1. Right to Consent to Psychological Treatment

First, the Parental Secrecy Policy violates parents' right to consent when the State performs psychological treatment on their children. *Parham*, 442 U.S. at 602; *see also Parents United For Better Sch., Inc. v. Sch. Dist. of Phila. Bd. of Educ.,* 148 F.3d 260, 275 (3d Cir. 1998) (recognizing that "parental consent must be secured before medical treatment is obtained" by children); *Kanuszewski v. Michigan Dep't*

of Health & Hum. Servs., 927 F.3d 396, 418 (6th Cir. 2019) (noting parents have the "right to direct their children's medical care"); *Mann v. Cnty. of San Diego*, 907 F.3d 1154, 1160–61 (9th Cir. 2018) (holding state violates parental right by performing healthcare treatment on children "without notifying the parents . . . and without obtaining either the parent's consent or judicial authorization"). As Dr. Anderson explains, social transitioning is a form of psychological treatment. ACa12, ACa25-ACa31 ¶¶ 8.e, 31–45. Indeed, the very purpose of social transitioning is to alleviate the mental suffering that persons with a transgender identity can experience. ACa14 ¶ 9. Because social transitioning constitutes psychological treatment, parents have the right to consent when the State is performing that treatment on their children. *See T.F. v. Kettle Moraine School Dist.*, No. 2021CV1650, 2023 WL 6544917, at *5 (Wis. Cir. Oct. 03, 2023) (holding that socially transitioning child against parents' wishes "directly implicates an infringement against the parental . . . right to direct the care for their child").

The characterization of social transitioning as a form of psychological treatment is not controversial. Courts across the country have recognized this fact. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 770 (9th Cir. 2019) (noting that "[t]reatment options for individuals with gender dysphoria" include "changes in gender expression and role (which may involve living . . . in another gender role, consistent with one's gender identity)"); *Lamb v. Norwood*, 899 F.3d 1159, 1161 (10th Cir.

2018) (noting that "[t]reatment forms [for gender dysphoria] currently include . . . [c]hanges in gender expression and role (which may involve living . . . in another gender role, consistent with one's gender identity)"); *Koe v. Noggle*, No. 1:23-CV-2904-SEG, 2023 WL 5339281, at *6 (N.D. Ga. Aug. 20, 2023) (noting that "gender dysphoria treatment plans include therapy, support, and assistance with elements of a social transition"); *Doe v. Horne*, No. CV-23-00185-TUC-JGZ, 2023 WL 4661831, at *3 (D. Ariz. July 20, 2023) ("Undergoing treatment to alleviate gender dysphoria is commonly referred to as 'transition' and includes . . . social transition . . . ."); *Monroe v. Meeks*, 584 F. Supp. 3d 643, 678 (S.D. Ill. 2022) (holding that "[s]ocial transition . . . is a medically necessary component of treatment for some . . . with gender dysphoria"); *Pinson v. Hadaway*, No. 18-CV-3420-NEB-KMM, 2020 WL 6121357, at *1 (D. Minn. July 13, 2020) (noting that "[g]ender dysphoria treatment can involve . . . social transition"); *Porter v. Allbaugh*, No. 18-CV-0472-JED-FHM, 2019 WL 2167415, at *2 n.3 (N.D. Okla. May 17, 2019) (noting that "[c]urrent treatments for gender dysphoria include . . . social transition").

Leading medical associations also consider social transitioning to be psychological treatment. For example, the American Academy of Pediatrics, the American Association of Child & Adolescent Psychiatry, the American College of Physicians, and the American Medical Association, among others, hold the views that "[t]he recommended treatment for transgender people with gender dysphoria

includes . . . social transition" and that "[s]ocial transition . . . is often a critically important part of treatment" for gender dysphoria. Brief of Amici Curiae Medical, Nursing, Mental Health, and other Health Care Organizations in support of Plaintiff in *Adams v. The School Board of St. Johns County*, Case No. 18-13592 (11th Cir. 2019) at 12–13, ACa92–133. In addition, in its recently released *Standards of Care* Version 8, the World Professional Association of Transgender Health ("WPATH")—an advocacy organization committed to the health of transgender-identifying individuals—considers social transitioning to be psychological treatment. E. Coleman, et al., *Standards of Care for the Health of Transgender and Gender Diverse People*, Version 8, Int'l J. of Transgender Health (Sept. 15, 2022) ("WPATH SOC8") at S77 (noting that the "potential benefits" of social transitioning include "reducing gender dysphoria and enhancing psychosocial adjustment and well-being"), ACa134–38.

And other leading experts in the field—like Dr. Anderson—consider social transitioning to be psychological treatment. Ken Zucker, the former head of the Centre for Addiction and Mental Health in Toronto, has opined that social transition is a form of "psychosocial treatment that will increase the odds of long-term persistence." Zucker, K.J., *The myth of persistence: Response to "A Critical Commentary on Follow-Up Studies and Desistance Theories about Transgender and Gender Non-Conforming Children" by Temple Newhook et al.*, International Journal

of Transgenderism, 19, 231–245 (2018), ACa139–155. Hillary Cass, the former President of the Royal College of Paediatrics and Child Health in the United Kingdom, has similarly opined in her recent *Interim Report* that childhood social transition is an "active intervention [that] may have significant effects on the child." Cass, H., *Independent review of gender identity services for children and young people: Interim Report* (February 2022), ACa156–158.

The State undoubtedly has the authority to render medical treatment to children without parental consent in certain situations, *see, e.g.*, *D.C.M.M. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, No. 87207, 2023 WL 5837974, at *2 (Nev. Sept. 8, 2023) (authorizing treatment without parental consent where child needed immediate medical attention for serious medical condition and parents could not be located), but this is not one of them. Socially transitioning every child who asks for it is not recommended by any healthcare association. ACa46 ¶ 81; *see also* WPATH SOC8 at S77–78 (recommending that "health care professionals discuss the potential benefits and risks of a social transition with families who are *considering* it"), ACa137–38. Instead, a child's request to be socially transitioned should merely *begin* a "careful evaluative process" of the child. ACa21 ¶ 22; *see also* WPATH SOC8 at S77–78, ACa137–38. Socially transitioning every child who asks for it ignores the facts that (1) most children who experience a transgender identity will desist, (2) social transitioning reduces the likelihood of desistance, (3) most children

who are socially transitioned will go on to receive puberty blockers and cross-sex hormones, which can have irreversible consequences, (4) the surge in transgender identifying youth may be impacted by peer pressure, and (5) there is a growing awareness of adult "detransitioners"—*i.e.*, persons who transitioned to a transgender identity as youth who decide as adults to revert to the gender associated with their natal sex. ACa20, ACa18-ACa29, ACa34, ACa36 ¶¶ 20, 29–38, 50, 54–55; *see also* James M. Cantor, *Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy*, J. Sex & Marital Therapy 307, 313 (2019) (noting that "[o]ver puberty, the majority of [gender dysphoric] children cease to want to transition"), ACa159–67; *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 48 (D.D.C. 2020) (citing scholarship establishing that "childhood social transitions [are] important predictors of persistence"); Kristina R. Olson, *Gender Identity 5 Years After Social Transition*, Pediatrics 150(2):e2021056082 (Aug. 2022) (study in which majority of children who socially transitioned were receiving puberty blockers and / or cross-sex hormones within 5 years), ACa168–175; Carmichael, P., Butler, G., Masic, U., Cole, T. J., De Stavola, B. L., Davidson, S., Skageberg, E. M., Khadr, S., & Viner, R. M., *Short-term outcomes of pubertal suppression in a selected cohort of 12- to 15-year-old young people with persistent gender dysphoria in the UK*, PLOS ONE 16(2) (2021) (study in which 98% of children who received puberty blockers went on to receive cross-

sex hormones), ACa176–202; WPATH SOC8 at S58 (noting that the uptick in transgender-identifying adolescent girls may be driven in part by "excessive peer and social media influence"), ACa136; Irwig, M.S., *Detransition Among Transgender and Gender-Diverse People—An Increasing and Increasingly Complex Phenomenon*, J. Clin. Endocrinology & Metab., e4251–e4262 (June 9, 2022) (noting new scholarship focusing on detransitioners), ACa203–205. It is not permissible for school personnel to make such a critical healthcare decision in the life of the child without involving their parents. ACa47-ACa49 ¶¶ 82–86; *see also* WPATH SOC8 at S77–78 (recommending that "health care professionals discuss the potential benefits and risks of a social transition with *families* who are considering it" and noting that such communications "facilitate the *parents/caregivers'* success in making informed decisions about the advisability and/or parameters of a social transition for their child" (emphases added)), ACa137–38. These facts counsel for caution, not schools rushing headlong to socially transition every student who asks for it without parental involvement.

Moreover, there are no exigent circumstances in the social transitioning context that would justify schools' failure to obtain parents' consent. While it might be permissible to render life-saving emergency treatment to a child whose parents cannot be located, *see D.C.M.M.*, 2023 WL 5837974, at *2, social transitioning is a slow, deliberative process in which parental involvement is always feasible.

It does not matter that it is students—and not the school—who are initiating the request to be socially transitioned. As a matter of law, minors lack the "maturity, experience, and capacity for judgment" needed to "make sound judgments concerning many decisions, *including their [own] need for medical care*." *Parham*, 442 U.S. at 603 (emphasis added); *see also Roper v. Simmons*, 543 U.S. 551, 569 (2005) (noting that children are "vulnerable . . . to negative influences and outside pressures, including peer pressure" and often make "impetuous and ill-considered . . . decisions"). Parents—not the State, and not the child—have the "primary role" in raising their children. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). This rule, which contemplates parental participation in children's healthcare decisions, protects children from their own imprudent decisions. *See Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000). If the rule were otherwise, it would be permissible for a school to employ doctors to distribute Adderall to students before class to help them focus without obtaining parental consent, so long as the students voluntarily sought the medication. That is not the law. *See, e.g.*, *Mario V. v. Armenta*, No. 18-CV-00041-BLF, 2021 WL 1907790 (N.D. Cal. May 12, 2021) (holding parents' rights violated when school secretly conducted blood-sugar tests on willing students).[2]

[2] It is important to note that the United States Constitution protects parents' rights to *consent* to the social transitioning of their children, not just the right to parental *notice* that schools are taking this step in treating their children. While the Parental

2. Right to Make Important Decisions

Second, the Parental Secrecy Policy violates parents' right to make the "important decisions" in their children's lives. *H.L. v. Matheson*, 450 U.S. 398, 410 (1981); *see also C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005) (discussing parents' right to make those decisions in their children's lives that go to the "heart of parental decision-making"). "It is not educators, but parents who have primary rights in the upbringing of children," *Gruenke*, 225 F.3d at 307, and parents cannot play this crucial role if their children's school is actively concealing its actions from them, *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990) (noting that, under the common law, parents had the right, "not merely to be notified of their children's actions, but to speak and act on their behalf") (Kennedy, J., concurring in part and dissenting in part).

Regardless of whether social transitioning is considered psychological treatment, the decision of whether a school socially transitions a child is indisputably an "important decision" in the child's life. *See Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 522CV04015HLTGEB, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022) (observing that parents must "have a say in what [their] minor child[ren are] called" by their school); *Mirabelli v. Olson*, No. 323CV00768BENWVG, 2023 WL

Notification Policy appropriately requires parental notice before a school socially transitions students, to comply with the Constitution, it must go further and require parental consent as well.

5976992, at *9 (S.D. Cal. Sept. 14, 2023) (concluding that school district's "policy of elevating a child's gender-related choices to that of paramount importance, while excluding a parent from knowing of, or participating in, that kind of choice, is . . . foreign to federal constitutional . . . law"). Social transitioning impacts the very core of the child's self-definition as a boy or girl. And, as discussed, it substantially reduces the odds of desistence, is likely to lead to a life of medicalization, and—when done by schools behind parents' backs—results in the child suffering without parental support.

Moreover, socially transitioning students in secret from their parents does not fall within the scope of schools' implied authority under the doctrine of *in loco parentis*. Schools have "inferred parental consent" that gives them "a degree of authority . . . commensurate with the task that the parents ask the school to perform"—namely, to educate their children. *Mahanoy Area Sch. Dist. v. B.L*, 141 S. Ct. 2038, 2052 (2021) (Alito, J., concurring). Consistent with that authority, schools must have the ability "to control curriculum and the . . . educational environment," *C.N.*, 430 F.3d at 182, including things like "the hours of the school day," "the timing and content of examinations," or "the extracurricular activities offered at the school," *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) ("*Fields I*"), *opinion amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist. (PSD)*, 447 F.3d 1187 (9th Cir. 2006) ("*Fields II*"). But socially

transitioning students without parental consent is not within the scope of that inferred delegation—parents do not hand children off so schools may render psychological treatment and secretly facilitate changing their gender identity. *See Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2052; *see also Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 265–66 (N.Y. App. Div. 1993) (holding in-school condom distribution program violated parental rights because it lacked parental notification and opt-out provision).

In short, as the Third Circuit has held, parents' rights do not stop at "the threshold of the schoolhouse door." *C.N.*, 430 F.3d at 185 n.26. Schools must obtain parents' consent before socially transitioning their children.

3. Right to Family Integrity

Third, the Parental Secrecy Policy violates parents' right to maintain the integrity of their family. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (noting that "freedom of personal choice in matters of . . . family life" is constitutionally protected) (plurality op.); *see also Gruenke*, 225 F.3d at 303 (discussing right to "familial integrity"). This right protects parents' relationships with their children from "undue state interference." *Gruenke*, 225 F.3d at 303, 306 (holding school personnel's secret interference with parents' "management of [their daughter's] teenage pregnancy" violated right to family integrity). *See also Pierce*

v. Society of Sisters, 268 U.S. 510, 535 (1925) (noting that students are not "mere creatures of the State").

The Parental Secrecy Policy constitutes an "undue state interference" in parents' relationship with their children. From the clothing and toys parents give their children, to the friends parents allow their children to have, to the sports parents allow their children to play, the parent-child relationship is deeply shaped by whether the child is a boy or a girl. By requiring schools to socially transition children without informing parents, the Parental Secrecy Policy allows schools to fundamentally alter the nature of parents' "emotional bond[s]" with their children. *Ovando v. City of Los Angeles*, 92 F. Supp. 2d 1011, 1021 (C.D. Cal. 2000); *see also Doe v. Dickenson*, 615 F. Supp. 2d 1002, 1014 (D. Ariz. 2009) (holding state may not fundamentally alter the nature of the parent-child relationship). Moreover, the Parental Secrecy Policy treats parents as the enemy, impermissibly driving a wedge into the parent-child relationship that lies at the heart of the family, thus usurping the parental role. *Patel v. Searles*, 305 F.3d 130, 134, 137 (2d Cir. 2002) (holding the state violated the right to family integrity when it created "mistrust among the members of [plaintiff's] family"). In short, a school that socially transitions children behind parents' backs unduly interferes with the parents' right to family integrity.

4. Presumptions of Fitness and Affection

Fourth, the Parental Secrecy Policy impermissibly reverses the constitutionally mandated presumptions of parental fitness and affection in violation of both substantive and procedural due process. *Parham,* 442 U.S. at 602; *see also Troxel*, 530 U.S. at 68 (reversing visitation decision that failed to presume parental fitness and affection) (plurality op.); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (invalidating statute that presumed unmarried fathers were unfit parents); *Doe v. Heck*, 327 F.3d 492, 521 (7th Cir. 2003) (holding parents' rights violated where state actors "not only failed to presume that . . . parents would act in the best interest of their children, they assumed the exact opposite"); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (noting that the "fundamental requirement of [procedural] due process" is notice and an opportunity to be heard). According to the State, parental secrecy is required in *all* cases because *some* parents might harm their transgender-identifying children. ACa81–82.[3] But the "statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect [their] children is repugnant to American tradition." *Parham*, 442 U.S. at 603 (emphasis in original). Thus, the State's justification for the Parental Secrecy Policy renders it constitutionally impermissible.

[3] All citations to the State's Brief herein are citations to State's brief in the trial court.

To be sure, the State may overcome the presumptions of fitness and affection if an appropriate factfinder makes *specific findings* that *specific parents* are either unfit or will not act in the child's best interests. But the Parental Secrecy Policy does not require such findings. Instead, its secrecy requirement is predicated on the presumption that all parents are unfit and / or will not act in the best interests of the children simply because their children do not want them to know they are being socially transitioned at school. ACa81. This impermissibly reverses the presumptions of fitness and affection in violation of the parental right.

* * *

To be clear, the United States Constitution does not require schools to inform parents if they merely have a suspicion—or even direct knowledge—that their children are asserting a transgender identity (or, for that matter, any identity or orientation). Thus, this case is not, as the State argued below, about "outing" LGBTQ+ children. ACa60. Instead, this case is about whether schools must involve parents before *schools take the affirmative step* of socially transitioning their children. Under the United States Constitution, they must.

B. The Parental Secrecy Policy does not satisfy strict scrutiny.

Because parental rights are "fundamental," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), the Parental Secrecy Policy is subject to strict scrutiny, *Reno v. Flores*, 507 U.S. 292, 302 (1993). To satisfy strict scrutiny, the State must show

that the Parental Secrecy Policy is "narrowly tailored to serve a compelling state interest." *Id.* The State has not made—and cannot make—that showing.

1. Children do not have a privacy right to keep the fact their school is socially transitioning them secret from their parents.

The State argued below that children have a privacy right to keep their school's social transitioning of them secret from their parents. ACa82. The State did not specifically invoke the United States Constitution as the source of students' alleged privacy rights (presumably to avoid creating federal jurisdiction), but even if it had, children have no federal constitutional right to privacy to keep secret from their parents the fact they are being socially transitioned by their school. Thus, student privacy is not a legitimate interest, much less a compelling one.[4]

To find new extra-textual rights in the United States Constitution, the Court must conclude that the right, as "careful[ly] descri[bed]" by the litigant advancing it, is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720–21. The argument that children have a privacy right to keep secret from their parents the fact that their school is socially transitioning them does not come close to satisfying this standard. Indeed, the argument is devoid of any historical support whatsoever. *See* Blackstone,

[4] As for the State's state-law privacy arguments, as discussed, parents' federal parental rights trump any state-law privacy rights their children may have. *Montgomery*, 577 U.S. at 205.

1 *Commentaries on the Laws of England* at 440–41 (recognizing the obligation of children to parental "subjection and obedience"); Kent, 2 *Commentaries* on *American Law* at 207 (providing that children's duties to their parents include "obedience"); *Hodgson*, 497 U.S. at 483 (noting that, under the common law, parents had the right, "not merely to be notified of their children's actions, but to speak and act on their behalf") (Kennedy, J., concurring in part and dissenting in part).

Below, the State cited *Sterling v. Borough of Minersville* in support of its position, ACa75, but *Sterling* did not involve a minor. Instead, *Sterling* involved an *eighteen-year-old*. 232 F.3d 190, 192 (3d Cir. 2000).[5] Even if *adults* had a privacy right to keep the state's social transitioning of them secret (and the United States Supreme Court has never held that they do), that holding would not extend to *minors*. As the United States Supreme Court has held, "the constitutional rights of children cannot be equated with those of adults." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (noting that "unemancipated minors lack some of the most fundamental rights of self-determination"). Adults have the constitutional right to marry, *Loving v.*

[5] In its briefing below, the State attempted to obscure this fact, describing the case as involving a "teenager." ACa75. While that description is not incorrect, it also ignores the categorial distinction between minors and adults in connection with parental rights.

Virginia, 388 U.S. 1 (1967), to engage in consensual sexual relations, *Lawrence v. Texas*, 539 U.S. 558 (2003), and to and to view indecent material, *Pope v. Illinois*, 481 U.S. 497 (1987), for example, yet almost every state in the union, including New Jersey, has laws prohibiting minors from engaging in these activities, *see, e.g.*, N.J.S.A. 37:1–6 (prohibiting minors from marrying); N.J.S.A. 2C:14–3 (restricting sexual activity with minors); N.J.S.A. 2C:34–3 (prohibiting distribution of indecent material to minors).

More importantly, the proposed right at issue is not some abstract privacy right. Rather, it is a proposed privacy right in children *against their parents*. But minor children generally "lack . . . rights vis-à-vis [their] parents." *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944–45 (9th Cir. 1997). Indeed, considering "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing," the Court should be highly skeptical of arguments that seek to interpose the United States Constitution between parents and their children. *Bellotti*, 443 U.S. at 634; *see also Parham*, 442 U.S. at 603 ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions . . . ."). This conclusion is especially true considering the significant long-term "medical, emotional, and psychological consequences" associated with social transitioning, which leave

children particularly vulnerable to their own immature choices. *H.L.*, 450 U.S. at 411.

The alleged privacy right at issue also does not arise from the logic of those cases requiring a judicial bypass of a parental consent requirement in the abortion context. *See, e.g.*, *Bellotti*, 443 U.S. 622. For one thing, those cases were predicated on a federal constitutional right to an abortion, which no longer exists. *Dobbs*, 597 U.S. 215. For another thing, the Supreme Court has only ever required a judicial bypass to a parental consent requirement in the unique context of abortion, where the (former) right must be exercised within the short window of human gestation or lost forever. *Bellotti*, 443 U.S. at 642 ("A pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy."). The same is not true with social transitioning, which—like most life decisions—minor children can choose for themselves when they reach the age of majority. *Id.* (observing that no judicial bypass is required for laws prohibiting minors from marrying because "[a] minor not permitted to marry before the age of majority is required simply to postpone her decision").

Furthermore, a right to privacy exists only where the individual has a "reasonable expectation[] of confidentiality." *Fraternal Ord. of Police, Lodge No. 5 v. City of Phila.*, 812 F.2d 105, 112 (3d Cir. 1987). Children have no expectation of confidentiality in the fact that their school is socially transitioning them. Social

transitioning is open and notorious; indeed, the transition is a "social" one. By definition, students have no reasonable expectation of confidentiality in this information. *Mirabelli*, 2023 WL 5976992, at *10 ("A student who announces the desire to be publicly known in school by a new name, gender, or pronoun and is referred to by teachers and students and others by said new name, gender, or pronoun, can hardly be said to have a reasonable expectation of privacy or expect non-disclosure.").

Finally, even if minor children had a federally protected privacy right against their parents to conceal their social transitioning at school (and they do not), it is settled that privacy rights must yield where "the government interest in disclosure outweighs the individual's privacy interest." *Fraternal Ord. of Police*, 812 F.2d at 110. Here, due to the importance of parental involvement in the lives of their children, which the United States Supreme Court has recognized for over a century, parents' constitutional right to direct the upbringing of their children outweigh any putative privacy right their children might have.

In sum, children have no federal constitutional right to privacy to keep secret from their parents the fact they are being socially transitioned by their school. Thus, student privacy cannot be a compelling governmental interest sufficient to support the Parental Secrecy Policy's infringement of parental rights.

2. The Parental Secrecy Policy is not narrowly tailored to prevent harm.

a. *The Parental Secrecy Policy is not narrowly tailored to prevent parents from abusing their children.*

The State argued below that the Parental Secrecy Policy also prevents parents from harming their transgender-identifying children. ACa81–82. The prevention of harm to children is assuredly a compelling government interest in the abstract. But it violates both the substantive and procedural components of the Due Process Clause to presume that parents will harm their children without making specific factual findings in each individual case.

As discussed, the United States Constitution's protection of parental rights rests on the common-law presumptions of parental fitness and affection. *Parham*, 442 U.S. at 602. The State must adhere to these presumptions unless and until it makes specific findings that rebut them in each individual case. *Id.*; *see also Troxel*, 530 U.S. at 68 (plurality op.); *Stanley*, 405 U.S. at 652. As the Third Circuit Court of Appeals has held, "a state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Croft v. Westmoreland Cnty. Child. & Youth Servs.*, 103 F.3d 1123, 1126 (3d Cir. 1997). Because the Parental Secrecy Policy presumes that parents will harm their children if told the child is asking to be socially transitioned at school, it is not narrowly

tailored to the prevention of child abuse. *Id.*; *see also Ricard*, 2022 WL 1471372, at *8 (holding parental secrecy overbroad "because it prohibits the disclosure of preferred name and pronoun information to parents without any assessment of whether disclosure would actually post a risk" of harm to the child); *T.F.*, 2023 WL 6544917, at *8 (holding school's actions in socially transitioning child without parental consent was "not narrowly tailored because there [were] not the necessary procedural protections in place that are necessary to override a parent's choice of how to . . . treat their child").

b. The Parental Secrecy Policy is not narrowly tailored to prevent discrimination against transgender-identifying students at school.

The State also argued below that the Parental Secrecy Policy is necessary to prevent discrimination against—and create a "safe space[]" for—transgender-identifying students at school. ACa80. As with the prevention of child abuse, the prevention of discrimination is certainly a compelling governmental interest in the abstract. But the Parental Secrecy Policy is not narrowly tailored to serve that goal.

Under both the Parental Notification Policy and the Parental Secrecy Policy, schools are required to socially transition students upon their request. The only substantive difference is that under the Parental Notification Policy, schools must inform parents of their actions, while under the Parental Secrecy Policy, schools are not required to inform parents. Because social transitioning is required under both

policies, to justify the Parental Secrecy Policy, it is not enough for the State to demonstrate that *socially transitioning* students prevents discrimination. Instead, the State must demonstrate that the Parental Secrecy Policy's *non-disclosure provisions* prevent discrimination. *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1881 (2021) (holding that government does not satisfy its burden of satisfying strict scrutiny by proffering government interest at a "high level of generality" but must link the interest to the provision being challenged). Here, the State has utterly failed to demonstrate how the failure to notify parents that their children are being socially transitioned prevents discrimination against transgender-identifying students.

To the extent the State's argument is predicated on the assumption that some parents would not allow their children to be socially transitioned if given the opportunity to consent, it fails. First, this argument assumes that every child who asks to be socially transitioned should be, which is demonstrably untrue. ACa25-ACa31, ACa39 ¶¶ 29–43, 60; *see also* WPATH SOC8 at S77–78, ACa137–38. Rather, as discussed, a child's request to be socially transitioned merely *begins* the evaluation process between a mental health professional and parents regarding whether social transitioning is appropriate for that child, a process that can appropriately lead to the child not being socially transitioned. Second, the argument that bypassing parental consent prevents discrimination assumes that children play the primary role in their own upbringing. But parents have the right to play this role,

and if parents do not consent to their children's social transitioning at school, then—absent a finding of parental unfitness—that decision controls, and the District lacks any anti-discriminatory interest with respect to those children. Accordingly, like the prevention of child abuse, the State's alleged anti-discrimination purpose is not narrowly tailored.

II. THE OTHER PRELIMINARY INJUNCTION FACTORS TIP DECIDEDLY IN FAVOR OF REVERSAL

Far from *preventing* irreparable harm, the Parental Secrecy Policy *causes* harm, both to parents and to their children.

The Parental Secrecy Policy irreparably harms parents. It violates parents' fundamental rights under the United States Constitution, which cannot be remedied by money damages. *See Garden State Equal. v. Dow*, 216 N.J. 314, 328 (2013) (holding that loss of constitutional rights that cannot be remedied by money damages constitutes irreparable injury); *see also Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 949–50 (S.D. Miss. 2014) (holding that deprivation of parental rights gives rise to irreparable harm), *aff'd*, 791 F.3d 625 (5th Cir. 2015); *Jenkins v. Jenkins*, No. 03-08-CV-037, 2008 WL 483312, at *1 (S.D. Ohio Feb. 19, 2008) (same). Moreover, the harm is immediate—the Parental Secrecy Policy is in effect now, and every day it is in place parents face the substantial risk that their children might seek to be socially transitioned in secret at school.

The Parental Secrecy Policy also irreparably harms children.

First, the Parental Secrecy Policy keeps children who are experiencing a transgender identity even from being evaluated by a competent mental health practitioner. Gender dysphoria can be a serious condition, yet the Parental Secrecy Policy leaves children who are struggling with it (or sub-threshold psychological distress) to fend for themselves, without parental support and without the involvement of a mental health professional. "[K]eeping parents uninformed . . . of significant events that beg for medical and psychological experts to evaluate a child . . . is . . . likely to cause . . . harm [to the child]." *Mirabelli*, 2023 WL 5976992, at *14.

Second, the Parental Secrecy Policy's "one size fits all" approach fails to account for the unique facts in each child's situation and results in the unnecessary and ill-advised social transitioning of at least some children. This is significant because once social transitioning is introduced, the odds of desistence plummet. And the persistence of a transgender identity can result in the child experiencing psychological distress and is highly likely to lead to the introduction of puberty blockers and cross-sex hormones, which can cause irreversible changes to children's bodies. Even one child who unnecessarily suffers these life-long impacts is one too many.

Third, the Parental Secrecy Policy creates a paradigm where students are socially transitioned at school but remain the gender associated with their natal sex

at home. This facilitation of a secret "double life" cuts children off from their primary support structure and is psychologically harmful. ACa38-ACa39 ¶¶ 77–80. The State acknowledges that transgender-identifying children are uniquely susceptible to mental-health challenges, ACa81, yet—remarkably—it concludes that this is reason to *exclude* parents from their lives. The State has it exactly backwards—the fact that these children face unique challenges is a reason for parental disclosure, not secrecy.

Finally, the State has not demonstrated that transgender-identifying students will suffer harm due to the Parental Notification Policy. The State argues that notifying parents can result in parents harming their children, ACa81–82, but, again, presuming that parents will harm their children based on nothing more than the child's request to be socially transitioned in secret is constitutionally prohibited. In any event, the Parental Notification Policy has an exception for the situation where parents are likely to harm their children, so the Parental Notification Policy adequately accounts for that concern. The State also argues that the Parental Notification Policy compromises students' "safe spaces" at school, State's Br. at ACa82, but as pointed out, the District is free to continue to socially transition students under the Parental Notification Policy just as it has done in the past. The only difference is that, under the Parental Notification Policy parents will be notified, and the State has not remotely demonstrated that the notification requirement will

cause transgender-identifying students to be discriminated against at school. Unlike the Parental Secrecy Policy's "one size fits all" approach, the Parental Notification Policy's case-by-case evaluation of the risk of parental harm interposes the State between parents and their children only when such interference is truly needed.

For these reasons, the balance of the equities tips dramatically in parents' favor, and lifting the injunction is strongly in the interest of parents, their children, and the public.

CONCLUSION

For the foregoing reasons, the Court should reverse.

January 3, 2024

/s/ Josiah Contarino
Josiah Contarino
DHILLON LAW GROUP INC.
50 Park Place, Suite 1105
Newark, NJ 07102
(973)-298-1723

Attorney for Amicus Curiae
THE CENTER FOR AMERICAN LIBERTY

FILED, Clerk of the Appellate Division, February 20, 2024, **A-000046-23**

MATTHEW J. PLATKIN Attorney General of New Jersey, & SUNDEEP IYER, Director of the New Jersey Division on Civil Rights, Plaintiffs-Respondents, v. MANALAPAN-ENGLISHTOWN REGIONAL BOARD OF EDUCATION & MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION CIVIL ACTION DOCKET NO. A-00046-23 On Appeal From an Order Entered in the Superior Court, Chancery Division, Granting a Preliminary Injunction Sat Below: Hon. David F. Bauman, J.S.C. Docket No.: MON-C-79-23

BRIEF ON BEHALF OF PLAINTIFFS-RESPONDENTS

Date Submitted: February 20, 2024

Jeremy M. Feigenbaum
Solicitor General

Mayur P. Saxena
Sara M. Gregory
Assistant Attorneys General
Of Counsel and On the Brief

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
Division of Law
25 Market Street, P.O. Box 080
Trenton, New Jersey 08625-0106
(973) 877-1280
Nancy.Trasande@law.njoag.gov
Attorney for Plaintiffs-Respondents

Liza Fleming (Attorney ID No. 441912023)
Nancy M. Trasande (Attorney ID No. 297432019)
Jonathan Mangel (Attorney ID No. 281382018)
Sarah Nealon (Attorney ID No. 440472023)
Douglas R. Praschak (Attorney ID No. 335512021)
Daniel Resler (Attorney ID No. 324172020)
Deputy Attorneys General
On the Brief

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY AND STATEMENT OF FACTS 4

A. Statutory Background 4

B. The Instant Case 6

ARGUMENT 12

POINT I 13

THE COURT CORRECTLY FOUND THE STATE IS LIKELY TO SUCCEED ON THE MERITS. 13

A. The Trial Court Correctly Found That The Amended Policy Likely Violates The LAD. 14

B. Appellants' Responses Are Unavailing. 22

POINT II 41

THE TRIAL COURT CORRECTLY FOUND THE EQUITABLE FACTORS WEIGH IN FAVOR OF MAINTAINING THE STATUS QUO. 41

A. The Trial Court Did Not Abuse Its Discretion In Finding That The Equitable Factors Supported A Preliminary Injunction. 41

B. The Trial Court Did Not Abuse Its Discretion In Selecting A Careful Remedy That Temporarily Maintains The Status Quo. 45

CONCLUSION 50

TABLE OF AUTHORITIES

Cases

A.D.P. v. ExxonMobil Research & Eng'g Co.,
428 N.J. Super. 518 (App. Div. 2012) 16

Anspach v. City of Phila., Dep't of Pub. Health,
503 F.3d 256 (3d Cir. 2007) 32, 33

Blau v. Fort Thomas Pub. Sch. Dist.,
401 F.3d 381 (6th Cir. 2005) 36

C.N. v. Ridgewood Bd. of Educ.,
430 F.3d 159 (3d Cir. 2005) 36

C.V. v. Waterford Twp. Bd. of Educ.,
255 N.J. 289 (2023) 4, 16, 24

Chavez v. Martinez,
538 U.S. 760 (2003) 32

Crowe v. DeGioia,
90 N.J. 126 (1982) .... passim

Dixon v. Rutgers,
110 N.J. 432 (1988) 37

Doe v. Boyertown Area Sch. Dist.,
897 F.3d 518 (3d Cir. 2018), ... 38, 42

Doe v. Irwin,
615 F.2d 1162 (6th Cir. 1980) 33

Flagg v. Essex Cnty. Prosecutor,
171 N.J. 561 (2002) 13

Gallo v. Salesian Soc'y,
290 N.J. Super. 616 (App. Div. 1996) 38

Garden State Equality v. Dow,
216 N.J. 314 (2013) 45

Gerety v. Atl. City Hilton Casino Resort,
184 N.J. 391 (2005)....17

Gruenke v. Seip,
225 F.3d 290 (3d Cir. 2000)....34

Heffner v. Murphy,
745 F.3d 56 (3d Cir. 2014)....37

Heller v. Doe,
509 U.S. 312 (1993)....37

Holland v. Rosen,
895 F.3d 272 (3d Cir. 2018).... 31, 37

Holmes v. Jersey City Police Dep't,
449 N.J. Super. 600 (App. Div. 2017)....4

Horizon Health Ctr. v. Felicissimo,
135 N.J. 126 (1994)....13

In re City of Newark,
469 N.J. Super 366 (App. Div. 2021).... 12, 23

Interactive Brokers, LLC v. Barry,
457 N.J. Super. 357 (App. Div. 2018)....13

John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.,
622 F. Supp. 3d 118 (D. Md. 2022).... passim

L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.,
189 N.J. 38 (2007)....4, 24

Matter of T.I.C.-C.,
470 N.J. Super. 596 (App. Div. 2022).... 20, 39, 42

McKenzie v. Corzine,
396 N.J. Super. 405 (App. Div. 2007)....23

Meyer v. Nebraska,
262 U.S. 390 (1923)....33

N.J. Dep't of Env't Prot. v. Boro Auto Wrecking Co.,
No. A-4920-04T3, 2006 WL 3007394 (App. Div. Oct. 24, 2006)................41

N.J. State Policeman's Benevolent Ass'n v. Murphy,
470 N.J. Super. 568 (App. Div. 2022)..45

Peper v. Princeton Univ. Bd. of Trs.,
77 N.J. 55 (1978).. 5, 17, 38

Pfaus v. Palermo,
97 N.J. Super. 4 (App. Div. 1967) .... passim

Pierce v. Society of Sisters,
268 U.S. 510 (1925)..33

Planned Parenthood of Cent. N.J. v. Farmer,
165 N.J. 609 (2000)..20

Poff v. Caro,
228 N.J. Super. 370 (Law Div. 1987)................................. 25, 44, 48

Regino v. Staley,
No. 23-32, 2023 WL 4464845 (E.D. Cal. July 11, 2023)..............................35

Rinaldo v. RLR Inv., LLC,
387 N.J. Super. 387 (App. Div. 2006)..12

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984)..37

Rodriguez v. Raymours Furniture Co.,
225 N.J. 3 (2016)..4

Sanford v. Stiles,
No. 03-5698, 2004 WL 2579738 (E.D. Pa. Nov. 10, 2004)..........................33

Sterling v. Borough of Minersville,
232 F.3d 190 (3d Cir. 2000)..19

United Prop. Owners Ass'n of Belmar v. Borough of Belmar,
343 N.J. Super. 1 (App. Div. 2001)..17

United States v. Nutri-cology,
982 F.2d 394 (9th Cir. 1992) 41

Univ. of Texas v. Camenisch,
451 U.S. 390 (1981) 20

Vesely v. Ill. Sch. Dist. 45,
___ F. Supp. 3d ____, 2023 WL 2988833 (N.D. Ill. Apr. 18, 2023) 36

Washington v. Glucksberg,
521 U.S. 702 (1997) 31

Waste Mgmt. of N.J., Inc. v. Union Cnty. Util. Auth.,
399 N.J. Super. 508 (App. Div. 2008) 12, 23, 25, 46

Willey v. Sweetwater Cty. Sch. Dist.,
No. 23-69, 2023 WL 4297186 (D. Wyo. June 30, 2023) 27

Wisconsin v. Yoder,
406 U.S. 205 (1972) 33

Statutes

Pub. L. 1949, c. 11 5

Pub. L. 2006, ch. 100 5

20 U.S.C. § 1232 .... 30, 32

N.J. Pub. L. 2018, c.60 § 1 .... 42, 47

N.J.A.C. 6A:7-14 51

N.J.S.A. 10:5-1 to -50 .... passim

N.J.S.A. 18A:36-19 31

N.J.S.A. 18A:36-41 7

Court Rules

R. 1:36-3..27

Other Authorities

Manalapan-Englishtown Board of Education, straussesmay.com, available at: https://www.straussesmay.com/seportal/Public/pubElanOnline.aspx?id=b7fb922 4d11a4a049241102af3e02dfe (last accessed Feb. 19, 2024) 22

PRELIMINARY STATEMENT

New Jersey's Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50, is designed to eradicate discrimination in all forms. Among its protections, the LAD prohibits discrimination on the basis of "gender identity or expression" in "any place of public accommodation," N.J.S.A. 10:5-12(f)(1), including "any kindergarten, primary and secondary school, … [or] high school," N.J.S.A. 10:5-5(l). In other words, a school that adopts a policy discriminating against students based on gender identity has violated the LAD's bedrock protections. And as the New Jersey Supreme Court recognized decades ago, this prohibition extends to both disparate-treatment and disparate-impact claims.

This case arose when Appellants, the Manalapan-Englishtown Regional Board of Education and Manalapan-Englishtown Regional School District, violated the LAD's requirements. For years, Appellants maintained a policy—consistent with guidance the New Jersey Department of Education issued in 2018—to ensure a nondiscriminatory, safe, and supportive environment for all students, including all transgender students. But on June 20, 2023, they changed course and adopted a blanket policy that required schools to affirmatively inform the parents of transgender, gender non-conforming, or non-binary students about the child's gender identity. Because the policy discriminated based on gender identity or expression, the Attorney General and Director of the Division on

Civil Rights ("DCR") (together, "the State"), filed an administrative complaint before DCR the next day alleging multiple LAD violations and sought relief in the Superior Court to preliminarily enjoin enforcement of the policy—and thus maintain the status quo—pending resolution of that administrative action.

Judge Bauman did not abuse his discretion in maintaining the status quo while DCR resolves the administrative proceeding. The trial court rightly held that the State demonstrated a reasonable probability of success on the merits on its claim that this new policy subjected transgender, gender non-conforming, or non-binary students to disparate treatment and to a disparate impact under the LAD. The trial court properly found that failure to enjoin these policies would irreparably harm these students—students who already face distressingly high risks of mental health challenges and suicide. And the court accurately reasoned that Appellants would not be harmed by an order maintaining the prior policy, which had been in place for four years without identified problems, while DCR's administrative proceeding plays out. Appellants do not directly challenge these findings, which are amply sufficient to justify the preliminary injunction.

The arguments Appellants do present on appeal cannot overcome the trial court's meticulous findings on each Crowe factor. Appellants claim the State's right to relief was insufficiently settled; that their new policy is compelled by state and federal recordkeeping laws; and that the court's injunction interferes

with parents' constitutional rights. But the State's right to relief could scarcely be clearer: the court found (and Appellants' opening brief does not dispute) that the policy likely violates the LAD, and N.J.S.A. 10:5-14.1 provides the Attorney General and Director the right to seek an injunction in this situation. Second, the injunction has nothing to do with recordkeeping; this case concerns whether schools may adopt policies requiring affirmative disclosure of students' gender identities on a discriminatory basis, not when schools can withhold records from requesting parents. Third, the injunction does not intrude on parental decision-making; it does not stop parents from counseling their children, and it does not stop children from sharing information with their parents. The injunction simply restores the very policy Appellants kept in place "uneventfully" for four years, without any suggestion that Appellants were somehow violating parents' federal constitutional rights throughout that long period.

Appellants misunderstand what this case is about. The State has always embraced the central role that parents play in decisions regarding their children. And, consistent with the LAD, schools may disclose a student's gender identity in a number of circumstances, including where the school has a compelling and non-discriminatory basis to do so. But they may not enforce a policy requiring personnel to discriminate based on a protected characteristic—let alone while the State's administrative action plays out. This court should affirm.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. Statutory Background.

The New Jersey Legislature enacted the LAD in 1945, making it one of the oldest civil rights laws in the Nation. C.V. v. Waterford Twp. Bd. of Educ., 255 N.J. 289, 306 (2023). Its purpose, our Supreme Court has held, "is nothing less than the eradication of the cancer of discrimination." Id. at 306-07; see also L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ., 189 N.J. 381, 400 (2007) (agreeing that the LAD must be "liberally construed" to effectuate "the Legislature's broad remedial objectives" to eradicate discrimination); Rodriguez v. Raymours Furniture Co., 225 N.J. 343, 354 (2016) ("The LAD occupies a privileged place among statutory enactments in New Jersey."). The LAD has prohibited unlawful discrimination in all places of public accommodation since 1949, Pub. L. 1949, c. 11—a prohibition that covers unlawful discrimination in "any kindergarten, primary and secondary school ... [or] high school," N.J.S.A. 10:5-5(1); see also, e.g., C.V., 255 N.J. at 307. And since 2006, the LAD has expressly barred discrimination on the basis of "gender identity or expression." N.J.S.A. 10:5-12(f); Pub. L. 2006, ch. 100; see also, e.g., Holmes v. Jersey City Police Dep't, 449 N.J. Super. 600, 601 (App. Div. 2017). This prohibition on

[1] Because the procedural history and statement of facts are closely related, they have been combined for efficiency and the Court's convenience.

unlawful discrimination extends to disparate treatment and disparate impact alike. See N.J.S.A. 10:5-12(f) (prohibiting any place of public accommodation from engaging in discrimination "directly or indirectly"); Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 81-82 (1978).

The LAD also adopts a number of remedies to enforce these bedrock protections. Almost eight decades ago, the Legislature established what is now the Division on Civil Rights in the Department of Law and Public Safety, which today enjoys "general jurisdiction and authority" to "prevent and eliminate" all "discrimination" the LAD prohibits. N.J.S.A. 10:5-6. New Jersey law likewise vests in the Attorney General the broad authority to "[e]xercise all powers of the division." N.J.S.A. 10:5-8(a), (g). The statute allows the Attorney General and Director to proceed in an administrative forum or in the Superior Court against any party they believe is violating the LAD. N.J.S.A. 10:5-8.2, -13. And even where the Attorney General and Director proceed administratively, New Jersey law empowers them to proceed "in a summary manner in the Superior Court of New Jersey to obtain an injunction prohibiting such person from continuing such practices or engaging therein or doing any acts in furtherance thereof" while the administrative action proceeds. N.J.S.A. 10:5-14.1; see also, e.g., Pfaus v. Palermo, 97 N.J. Super. 4, 8 (App. Div. 1967).

B. The Instant Case.

On March 12, 2019, the Manalapan-Englishtown Regional Board of Education adopted Policy 5756—Transgender Students ("Original Policy"), to govern the Manalapan-Englishtown Regional Public School District. (Ra10).[2] The Original Policy broadly followed the New Jersey Department of Education's Transgender Guidance for School Districts ("State Guidance") (Da255-61), which DOE had issued in 2018 pursuant to the Legislature's direction to "assist schools in establishing policies and procedures that ensure a supportive and nondiscriminatory environment for transgender students." N.J.S.A. 18A:36-41. The Original Policy thus generally required the district to "keep confidential a current, new, or prospective student's transgender status." (Ra8). The Original Policy also stated that there was "no affirmative duty" on school personnel to notify parents regarding a student's gender identity or expression, (Ra8), and recognized that students might wish to keep this information private. But the Original Policy and State Guidance acknowledge that even when a student requests privacy, there will be times when the "school district may be obligated to disclose a student's status" because it has "a specific

[2] "Ra" refers to Respondents' appendix to this brief. "Da" refers to Appellants' appendix and "Db" refers to Appellants' brief. "1T" refers to the August 15, 2023 transcript of the Order to Show Cause hearing.

and compelling need" to do so, "such as the health and safety of a student or an incident of bias-related crime." (Ra9, Da259).

On June 20, 2023, Appellants amended the Policy 5756—Transgender Students ("Amended Policy"). (Da169-71). The Amended Policy for the first time created a new affirmative obligation on the school district to notify parents when a student "requests a public social transition accommodation[]" related to their gender, including any "public name/identity/pronoun change." (Da169). The terms of the Amended Policy provide:

> [I]n the event a student requests a public social transition accommodation, such as public name/identity/pronoun change, bathroom/locker room accommodation, or club/sports accommodations, or the like, the school district shall notify a student's parents or guardian of the student's asserted gender identity and/or name change, or other requested accommodation, provided there is no credible evidence that doing so would subject the student to physical or emotional harm or abuse. Prior to disclosure, the student shall be given the opportunity to personally disclose that information. It shall be the policy of the Board to support and facilitate healthy communication between a transgender student and their family, when disclosure is consistent with this policy.
>
> [(Da169-70).]

The Amended Policy goes on to state that if any emotional support services are provided to "transgender students, students facing other gender identity issues, or students who may be transitioning," then "[t]he full, complete, and accurate

reason for counseling and/or referrals for mental health crisis and/or concerns shall be provided to parents/guardians in relation to parental notification/consent for such services." (Da170).

On June 21, 2023, the State filed an administrative complaint with DCR alleging that the Amended Policy violates the LAD. (Da36-37). The same day, the State filed the instant suit in the Superior Court, Chancery Division, under N.J.S.A. 10:5-14.1, which authorizes the Attorney General or the Director to "proceed against any person in a summary manner in the Superior Court of New Jersey to obtain an injunction" at any time after the filing of an administrative complaint or whenever it appears that a person is engaging in any practice that violates the LAD. Proceeding by Verified Complaint and Order to Show Cause, the State sought temporary restraints and a preliminary injunction to preserve the status quo prior to Appellants' adoption of the Amended Policy only for so long as the administrative complaint is pending. (Da9-29).

The trial court heard argument on August 15, 2023, and granted the State's request on August 18, 2023. (Da115-16). The preliminary injunction directed Appellants "to preserve the status quo ante prior to the adoption of Amended Policy 5756, until such time as the litigation before [DCR] arising from a separate administrative complaint filed on June 21, 2023 is resolved." (Da116). But the trial court went no further than maintaining the status quo: the court

emphasized that it was "not rendering any final judgments or determinations as to the merits of either the State or the School Boards' claims," which would "be left to the sound determination of the Office of Administrative Law after a full development of the factual and legal record in that matter." (Da137).

The court's opinion methodically considered the prongs set forth in Crowe v. DeGioia, 90 N.J. 126, 132-35 (1982), and found that the State had carried its burden on each one. (Da124-38). Initially, the court rejected Appellants' claim that the State had no "well-settled right" to obtain relief. (Da125-126). Just the opposite: the court explained that the LAD's plain text both allows the Attorney General and the Director to "proceed in a summary manner in the Superior Court of New Jersey to obtain an injunction" prohibiting any violation of the LAD and makes clear that schools may not discriminate on the basis of gender identity or expression. Ibid. (citing N.J.S.A. 10:5-14.1). That supplied ample legal basis for the State to seek, and for the court to award, an order maintaining the status quo while the DCR administrative action proceeds. Ibid.

The trial court also found the State had a reasonable probability of success on the merits of its LAD claims. The court found the State was likely to prevail in arguing that the Amended Policy violated the LAD's prohibition on disparate treatment: the new policy, by its terms, adopted a different notification policy for transgender, gender non-conforming, and non-binary students than for their

cisgender peers. (Da126-28). Although Appellants had claimed that this policy would also apply to cisgender students who request the same change, the court noted: "who but transgender, gender non-conforming, and non-binary students would request public and social accommodations or express a change in gender identity and expression?" Ibid. For similar reasons, the court found that the Amended Policy would likely have a disparate impact: transgender, gender non-conforming, and non-binary students would experience "far greater incidence of parental disclosure of their gender identity or expression, and, with it, a far greater risk of harm from this involuntary disclosure." (Da129).

The trial court also identified the flaws in Appellants' argument that any preliminary injunction would interfere with the rights of parents. The trial court explained that its findings were not intended to "minimize or discount the right of parents" to make decisions about their children. (Da131). Although the court did not dispute the crucial role parents play, the court emphasized that the State's suit was "not targeting parental rights per se, but rather policies promulgated by school boards that the State contends unlawfully subjects a protected class to discrimination in violation of the LAD." (Da132). And in that circumstance—in which a public entity has adopted a blanket policy discriminating on the basis of gender identity or expression—Appellants' position "yield[ed]" to the State's "compelling government interest" in eradicating discrimination. Ibid. Indeed,

the court explained, the school district itself seemed to recognize that a blanket notification policy could harm students—its exception for instances in which a disclosure posed a "credible threat" constituted "tacit acknowledgement that the State's concerns regarding mandatory parental notification may be valid," but the exception's vague terms gave "insufficient assurance" that they "would be applied consistently and uniformly" to assuage that risk. (Da132-33).

Finally, the trial court found that remaining equitable factors also weighed in the State's favor. (Da134-37). The court found both that transgender youth already face a heightened risk of mental health challenges, suicide, illicit drug dependency, and infliction of physical or emotional harm by immediate family members—and that mandatory disclosure of their gender identity or expression under the Amended Policy risked exacerbating those harms. (Da135). Such harms, especially while the challenge to the Amended Policy was pending in the administrative forum, would be irreparable. (Da135). And on the other side of the ledger, the trial court found that Appellants had not made "any compelling argument that adherence to the [Original Policy] governing transgender students while the administrative action is pending will result in any claim, liability or hardship," especially where the Original Policy had been in place "uneventfully" since 2019. (Da137). This absence of hardship, when weighed against "the statistical possibility that even one transgender student affected by the

[Amended Policy] should run away from home, or attempt or commit suicide," was "sufficient to tip the balance of equities in favor of the State." (Da137).

This appeal followed.

ARGUMENT

Preliminary relief is appropriate when the moving party establishes "(1) a likelihood of success on the merits; (2) irreparable harm; (3) a showing that on balance the harm to the moving party is greater than the harm to the party to be restrained; and (4) the public interest will not be harmed." In re City of Newark, 469 N.J. Super 366, 387 (App. Div. 2021) (citing Crowe, 90 N.J. at 133); see also Waste Mgmt. of N.J., Inc. v. Union Cnty. Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008) (confirming that while "all the Crowe factors must weigh in favor of injunctive relief, a court may take a less rigid view than it would after a final hearing when the interlocutory injunction is merely designed to preserve the status quo"). This court also refuses to take "a grudging or narrow approach" to such relief if the State is seeking to maintain the status quo pending resolution of a DCR administrative action. Pfaus, 97 N.J. Super. at 8.

The trial court did not abuse its discretion in preliminarily maintaining the status quo in the Manalapan school district while DCR's administrative action proceeds. See Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 395 (App. Div. 2006) (reviewing trial court's decision to grant or deny preliminary relief only

for abuse of discretion); Horizon Health Ctr. v. Felicissimo, 135 N.J. 126, 137 (1994) ("The authority to issue injunctive relief falls well within the discretion of a court of equity."); Interactive Brokers, LLC v. Barry, 457 N.J. Super. 357, 362 (App. Div. 2018) (emphasizing a preliminary-relief order should be upheld "unless it was 'made without a rational explication, inexplicably departed from established practices, or rested on an impermissible basis" (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002))). First, the court correctly held that the State is likely to succeed on the merits. Second, the court correctly held the remaining equitable factors—irreparable harm, balance of the equities, and public interest—all squarely support maintaining the status quo.

POINT I

THE COURT CORRECTLY FOUND THE STATE IS LIKELY TO SUCCEED ON THE MERITS.

The trial court correctly found, and Appellants do not seriously dispute on appeal, that the State had demonstrated a sufficient likelihood of success on its claim that the Amended Policy violates the LAD. Appellants' responses—that the State lacks a settled right to relief; that the Amended Policy finds support in federal and state recordkeeping laws; and that the Amended Policy is necessary to protect parents' constitutional rights—all fall short.

A. The Trial Court Correctly Found That The Amended Policy Likely Violates The LAD.

The trial court correctly found that the Amended Policy likely violates the LAD because it expressly mandates disparate treatment of transgender, gender non-conforming, and non-binary students or, alternatively, because it will have a disparate impact on those same students. (Da126-27).

i. Disparate Treatment.

The trial court correctly found that the State is likely to succeed in proving that Appellants have engaged in disparate treatment barred by the LAD because, under Appellants' Amended Policy, "only students who identify as transgender are singled out for mandatory parental notification." (Da129).

The plain terms of the Amended Policy impose disparate treatment on the basis of gender identity or expression. The new policy singles out transgender, gender non-conforming, and non-binary students for differential treatment, as it requires school staff to inform parents only about those students who request a "public name/identity/pronoun change, bathroom/locker room accommodation, or club/sports accommodations, or the like." (Da169-70). In other words, the new policy categorically and facially treats transgender students (subject to blanket notification) differently than it treats cisgender students (subject to no parental notification). Although Appellants below argued that the Amended Policy could apply to cisgender students who requested a social transition, as

the court aptly noted, "who but transgender, gender non-conforming, and non-binary students would request public and social accommodations or express a change in gender identity or expression?" (Da128). Appellants no longer seriously argue that the Amended Policy applies equally to cisgender students.

Other evidence of differential treatment abounds. The Amended Policy's title—"Transgender Students"—underscores that it does not apply to cisgender students, and the remainder of its language eliminates any doubt. (Da169-70). The Amended Policy specifically refers to facilitating communication with the parents of a "transgender student." Ibid. The Amended Policy also provides that when "transgender students" require emotional support services, the school must provide a "full, complete, and accurate" explanation of that "counseling and/or referrals for mental health crisis"—without similarly requiring "parental notification/consent" for other school counseling services. (Da170). Even Appellants' brief characterizes their policy as requiring parental notification if "a transgender student" takes certain covered actions. (Db17).

Appellants' brief assertion that "the [Amended] Policy is not triggered by one's status alone" misses the mark. (Db30). Appellants say that the Amended Policy instead is triggered when a student takes "certain steps along their public social transition accommodation spectrum." Ibid. But those are actions inherent to transgender, gender non-conforming, and non-binary students, which is why

the policy mentions them specifically. (Da128; 152-53). Indeed, a school policy that disfavors Jews who observe the Sabbath would facially discriminate against Jewish people, even if not exclusively by dint of religious "status." Appellants engage in differential treatment on the basis of gender identity.

Appellants get no further by claiming that they did not violate the LAD because they were just seeking to comply with state and federal laws governing access to student records or with parents' federal substantive due process rights. (Db22-23; 30-32). As explained in detail below, Appellants misunderstand both the recordkeeping laws, see infra at 27-30, and federal substantive due process, infra at 30-40. But fundamentally, it does not matter whether Appellants were intending to comply with other laws: the LAD "is not a fault- or intent-based statute." C.V., 255 N.J. at 314 (explaining discrimination has harmful effects whether intentional or otherwise, and so "the perpetrator's intent is simply not an element of the [LAD] cause of action"). Whether conduct "involves disparate treatment through explicit facial discrimination does not depend on why the [entity] discriminates but rather on the explicit terms of the discrimination." A.D.P. v. ExxonMobil Research & Eng'g Co., 428 N.J. Super. 518, 537 (App. Div. 2012) (emphasis added). And here, the Amended Policy explicitly singles out transgender, gender non-conforming, and non-binary students and treats them differently than their cisgender peers. This disparate treatment is precisely

what the LAD is intended to prohibit, and the Amended Policy thus presents a textbook violation of the LAD. See Peper, 77 N.J. at 81; (Da129).

ii. Disparate Impact.

The trial court also rightly found that, in the alternative, the State is likely to succeed on its claim that the Amended Policy violates the LAD because it has a disparate impact on these transgender, gender non-conforming, and non-binary students. An unlawful disparate impact exists where "practices that are facially neutral in their treatment of different groups ... in fact fall more harshly on one group than another." Peper, 77 N.J. at 81; see also, e.g., Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 399 (2005) (agreeing that an otherwise "facially neutral policy" still violates the LAD when the plaintiff shows that it "'resulted in a significantly disproportionate or adverse impact on members of the affected class.'" (quoting United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 47 (App. Div. 2001))).

The Amended Policy's disparate impact is clear. Even assuming that this policy were somehow facially neutral, it is beyond dispute—and Appellant does not dispute on appeal—that the Amended Policy will disproportionately impact transgender, gender non-conforming, and non-binary students. The Amended Policy specifically requires school officials to proactively disclose to parents a student's "asserted gender identity and/or name change" when they request to

publicly change their gender identity and/or expression at school. (Da170). As the trial court correctly found, transgender, gender non-conforming, and non-binary students are the students who will make such requests, and therefore these students will necessarily be the ones that face "a far greater incidence of parental disclosure of their gender identity or expression." (Da129).

Moreover, these are the students who will also face "a far greater risk of harm from this involuntary disclosure." (Da129) (emphasis added). After all, whereas cisgender students typically consistently express their gender identity or expression at home and at school, transgender, gender non-conforming, and non-binary students are far more likely to express a different gender identity or expression at home than they do at school—often because they fear reprisal or harm. See, e.g., (Ra13) (detailing significant percentages of transgender survey respondents who report having unsupported families, families who kicked them out of the home, and/or family members who engaged in violence against them); (Ra21) (study showing that 61% of transgender individuals facing high levels of familial rejection reported having attempted suicide—making them over 300% more likely to attempt suicide than those who experienced low or no family rejection); John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F. Supp. 3d 118, 139 (D. Md. 2022) (finding transgender students "could hardly feel safe in an environment where expressing their gender identity resulted in

the automatic disclosure to their parents, regardless of their own wishes"), vacated for lack of standing, 78 F.4th 622 (4th Cir. 2023); Cf. Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000) (finding police violated teenager's rights when they threatened to tell his family he was gay, after which he died by suicide). That evidence suffices at this stage to show that the Amended Policy would likely "unlawfully subject these students to a disparate impact in violation of the LAD." (Da129). And as before, it is striking that Appellants' opening brief does not deny that the Amended Policy would have a disparate impact on transgender students.

Appellants argue that the trial court erred in its disparate impact analysis by citing "a number of studies and surveys" the State introduced into the record, (Db33-36), but that fails for two reasons. First, the court's ultimate conclusion on disparate impact did not depend on these studies and surveys. The decision below mentioned not only surveys, but undisputed facts, common sense, and a wealth of cases reaching the same conclusion. See, e.g., (Da133) (discussing Sterling, 232 F.3d 190). It hardly requires scientific evidence to conclude that, as compared to cisgender students, "some transgender students may feel more comfortable disclosing their gender identification or expression at school rather

than at home." (Da131). While the studies and surveys corroborate the court's conclusions, its holding does not depend on them. (Da131-33).[3]

Second, the court's consideration of studies and surveys at the preliminary stage was wholly appropriate. Appellants overlook the established principle that preliminary relief is "customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981). Indeed, New Jersey courts have repeatedly taken a flexible approach to consider probative information presented in a preliminary posture, especially when acting on an expedited timeline. See Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 640 n.10 (2000) (taking judicial notice of a report for the purpose of determining a preliminary injunction); Matter of T.I.C.-C., 470 N.J. Super. 596, 604 (App. Div. 2022) (citing New Jersey Transgender Equality Task Force Report to highlight "the significant amounts of violence, harassment, and discrimination experienced by transgender people in various areas of their lives"). Appellants implicitly admit as much by asking this court to give weight to unnamed "myriad other studies," and to an affidavit in an unrelated case. (Db35). And so the court appropriately

[3] In any event, the trial court's separate finding that the Amended Policy mandates disparate treatment did not reference the studies and surveys. (Da127-29). In other words, that holding—which is already sufficient to find a reasonable probability of success—is unaffected by this argument. Appellants do not argue otherwise.

exercised its discretion in the context of a preliminary injunction to take notice of the probative information the State introduced—information that, as laid out above, substantiates the Amended Policy's likely disparate impact.

The Amended Policy's exemption does not resolve these disproportionate harms. See (Db30-32). Its language requires affirmative parental notification any time a student requests a "public name/identity/pronoun change." (Da170). But see (Db30) (Appellants erroneously stating students could use a "different name in class" without notification). The sole exception to Appellants' blanket-notification rule applies where "credible evidence" reveals that notifying a student's parents "would subject the student to physical or emotional harm or abuse." (Da170). As an initial matter, the very inclusion of this exception is a "tacit acknowledgment" that disproportionate harms could manifest for these students. (Da132). And unfortunately, the exception does not ameliorate the problem: the Amended Policy provides no explanation of what "credible evidence" entails, how a school would come into possession of such evidence, or when the "credible evidence" would be sufficient to show that a particular notification "would subject" a particular student to "physical or emotional harm or abuse." Ibid. And even if such "credible evidence" could be identified, the Amended Policy still does not expressly preclude disclosure.

Nor can Appellants find refuge in a separate putative "district regulation" purportedly issued after the State filed suit. (Db30-32). There is nothing in the record to show that this purported regulation was ever enacted. The certification Appellants introduced from Manalapan Superintendent Dr. Nicole Santora, dated nearly a month after the inception of the instant suit, states only that she "intend(s) to enact the Regulations attached hereto as Exhibit E concerning the implantation (sic) of Policy 5756." (Da235). The certification does not explain why the Amended Policy did not use the more limited language of the purported district regulation, or why it was proposed after the Amended Policy. And a search of Appellants' website reveals no public or available regulation.[4] With no record evidence to show the regulation was enacted or that it could somehow supersede or even materially impact the express terms of the Amended Policy, any attempt to belatedly redefine the Amended Policy fails.

B. <u>Appellants' Responses Are Unavailing.</u>

Unable to meaningfully contest the State's proofs showing it will likely succeed in demonstrating that the Amended Policy violates the LAD, Appellants

---

[4] Appellants' website includes a page for accessing its Policies and Regulations through a service called "PUBLICACCESSOnline". Manalapan-Englishtown Board of Education, straussesmay.com, available at: https://www.straussesmay.com/seportal/Public/pubElanOnline.aspx?id=b7fb9224d11a4a049241102af3e02dfe (last accessed Feb. 19, 2024). A search of that service conducted on Feb. 19, 2024 revealed no district regulation 5756.

raise three separate arguments instead: that (i) the State has no settled right to relief; (ii) the Amended Policy finds support in federal and state recordkeeping laws; and (iii) the preliminary injunction interferes with parents' constitutional rights. These arguments misunderstand the legal questions in this case, and do not support overturning this narrow injunction.

i. Settled Right To Relief.

Appellants' first response—that even if the State is likely to prevail on the merits, it lacks a "well-settled right" (Db12-17)—fails for multiple reasons.

As an initial matter, although some early cases described the "well-settled legal right" and "reasonable probability of success" analyses as two independent prongs under Crowe, courts have long since merged the settled-right inquiry into the reasonable-probability-of-success test. See e.g., Newark, 469 N.J. Super at 387 (defining the prongs for preliminary relief as "(1) a likelihood of success on the merits; (2) irreparable harm; (3) a showing that on balance the harm to the moving party is greater than the harm to the party to be restrained; and (4) the public interest will not be harmed"); Waste Mgmt., 399 N.J. Super. at 519-20 (same); McKenzie v. Corzine, 396 N.J. Super. 405, 413 (App. Div. 2007) (same). That makes sense: if there is a reasonable probability of success, there is logically an underlying well-settled right on which that reasonable probability is based. See Waste Mgmt., 399 N.J. Super. at 528 (explaining that the "time-

honored approach in ascertaining whether a party has demonstrated a reasonable likelihood of success" includes consideration of whether "the law upon which plaintiff's claim is based is well-settled"). And as explained above, Appellants do not challenge on appeal the State's arguments regarding the LAD itself.

In any event, the trial court properly found that the State's claims do rest on well-settled rights. As to substance, "the legal right underlying" the State's action, Crowe, 90 N.J. at 133, is explicit, well-recognized, and longstanding: the LAD itself. The LAD expressly prohibits unlawful discrimination in places of public accommodation; expressly extends this prohibition to schools;[5] expressly includes discrimination based upon gender identity or expression; and expressly extends to disparate-treatment and disparate-impact theories alike. See supra at 4-5; N.J.S.A. 10:5-5(l); N.J.S.A. 10:5-12(f). The LAD also expressly grants the State authority to seek relief enjoining ongoing or future statutory violations, as it did here. See supra at 5-6; (Da125-26) (decision below confirming this well-

[5] Appellants' claim that this right is not settled because "a school is not a traditional public accommodation" under the LAD, (Db16), is expressly belied by multiple decisions from our Supreme Court and by the statute itself. See L.W., 189 N.J. at 405 (explaining the LAD "applies universally to 'places[s] of public accommodation,' a defined term that includes schools" (quoting N.J.S.A. 10:5-5(l))); C.V., 255 N.J. at 319 (decision last year applying L.W. and explaining that "a school bus is 'a place of public accommodation' under the plain language of N.J.S.A. 10:5-5(l)"). Thus, a school is indeed a "traditional" place of public accommodation under both the plain language of the LAD and settled precedent in this State.

established right to relief); N.J.S.A. 10:5-14.1 (authorizing State to "proceed in a summary manner in the Superior Court of New Jersey to obtain an injunction" against any defendant violating the LAD after filing an administrative complaint against them before DCR); Pfaus, 97 N.J. Super. at 8 (same); Poff v. Caro, 228 N.J. Super. 370, 374-75 (Law Div. 1987) (preliminarily enjoining actions while LAD administrative litigation remained pending). Settled law thus recognizes both the kind of claim alleged and the type of remedy sought.

Appellants misconstrue the "well-settled right" inquiry. Appellants seem to believe that a right is only well settled where there is binding legal authority on the precise legal issue applied to the precise set of facts. See (Db14) (arguing the State lacks a well-settled right because it did not identify a specific precedent holding "that parental notification violates [the] LAD"). But this court's cases have long made clear that the inquiry is whether the underlying body of law is settled, not whether the specific outcome of a specific lawsuit is already settled by precedent. See Crowe, 90 N.J. at 133 (noting "the underlying legal claim … was settled as a matter of law" and observing that "mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo"); Waste Mgmt., 399 N.J. Super. at 528 (same).

Indeed, were the rule otherwise, under the "well-settled right" inquiry, the movant would have already had to establish that its exact claims had already

been decided with certainty under binding precedent, rendering the "reasonable probability of success" inquiry superfluous. Moreover, if Appellants' approach were the law, no claim applying established legal rights to new facts could ever meet the preliminary injunction standard—no matter how troubling the new statutory violation, and no matter how compelling the need to maintain the status quo. And Appellants' approach would create perverse incentives: a policy that is so clearly unlawful that no other school district has previously adopted it (or an argument made in defense so clearly incorrect that no other defendant had yet raised it) could avoid preliminary relief merely because no court had previously needed to address its validity. That has never been the law.

Appellants' other responses are a red herring. It is irrelevant to the "well-settled right" test whether (or how frequently) the Attorney General has sought to enjoin other parental-notification policies, or what the alleged current state of the "ongoing social discourse" on these topics may be. (Db13; 16). Neither has any bearing on whether New Jersey's LAD provides a clear source of law that undergirds these claims. (And even were it relevant, Appellants do not identify a single similar parental-notification policy that met with Division approval.) Nor do Appellants' repeated emphasis on cases evaluating parental-notification policies in other jurisdictions, (Db14-16), bear on whether there is a settled right under the LAD to be free from discrimination in public accommodations, such

as schools, and whether there is a well-settled path for the Attorney General and Director to vindicate that right. Indeed, none of Appellants' cases involved the LAD; some did not involve any state-law anti-discrimination claims, see Willey v. Sweetwater Cty. Sch. Dist., No. 23-69, 2023 WL 4297186 (D. Wyo. June 30, 2023) (Ra26-48);[6] and others even rejected Appellants' views, see John & Jane Parents, 622 F. Supp. 3d at 130. These cited cases at most speak to Appellants' purported defense that an injunction would interfere with the parents' federal substantive due process rights—an argument that goes only to the reasonable-success prong, and which fails for the reasons below. See infra at 30-40.

ii. Recordkeeping Requirements.

Appellants contend that their Amended Policy is necessary to comply with federal and state recordkeeping laws, and that the injunction threatens to put them in noncompliance. See (Db18-23). Initially, it is undisputed that their Original Policy was in place "uneventfully" for four years before Appellants amended it. (Da137). During that time, Appellants never expressed any concern that they had been actively violating these laws. In any event, Appellants cannot show that the court's injunction, and the policy that it reinstates, are inconsistent with—or even remotely implicate—the recordkeeping laws they now cite.

[6] Pursuant to R. 1:36-3, copies of all unpublished opinions cited within this brief are submitted as part of the State's Appendix (Ra26-79).

Contrary to Appellants' misunderstanding, the federal Family Education Rights Privacy Act ("FERPA") and New Jersey Pupil Records Act ("NJPRA") have little to do with this case. Among other things, these federal and state laws govern how schools must respond to parental requests to access certain official student records. FERPA requires that no State school or educational institution shall have a policy which "den[ies], or which effectively prevents, the parents of students ... the right to inspect and review the education records of their children." 20 U.S.C. § 1232g(a)(1)(A). NJPRA, for its part, similarly requires the State Board of Education to promulgate regulations governing "the creation, maintenance and retention of pupil records … to provide general protection for … the right of the parent or guardian … to be supplied with full information about the pupil, except as may be inconsistent with reasonable protection of the persons involved[.]" N.J.S.A. 18A:36-19. However, as the trial court explained, the plain language of FERPA and NJPRA "pertain to access to information in written student records, not to affirmative requirements of parental notification of a student's transgender orientation or expression." (Da136).

That distinction is dispositive. The question this case presents is not how a school district must handle specific parental requests for officials records—or what information must go in that record. Instead, the issue before the trial court, and now on appeal, is whether the Amended Policy's decision to require blanket

affirmative notification to parents regarding their transgender children's gender identity is likely consistent with the LAD. On that score, FERPA and NJPRA are silent: neither statute requires schools to affirmatively notify parents of their children's gender identity or expression in the absence of a records request. See (Da137) (finding that enjoining schools from affirmatively "notifying parents of a child's transgender identification or expression" on a blanket basis in no way "would prevent parents from 'inspect[ing] and review[ing] the education records of their children.'" (quoting 20 U.S.C. § 1232g(a)(1)(A))). Nor do they provide a justification for promulgating a blanket rule that discriminates on the basis of gender identity or expression. As a result, the trial court correctly determined, "[Appellants'] arguments that imposing restraints will compel them to violate state and federal law are not persuasive." (Da136).

Appellants' claim that the preliminary injunction would somehow require them to violate the terms of FERPA and NJPRA is particularly weak given that it simply restores the status quo ante—the Original Policy that has been in place since 2019. (Da121). Appellants have not pointed to any instance where the Original Policy exposed them to any liability or claim under FERPA or NJPRA. (Da137). The State confirmed at oral argument that under the State's requested relief, Appellants would still be required to supply school records to a parent making a valid request under state or federal law, just as they had presumably

been doing prior to the pre-2023 amendment. (Da127; 1T12:18-14:5; 1T58:23-60:1).[7] In other words, the preliminary injunction does not preclude Appellants from complying with federal and state recordkeeping laws, but rather requires compliance with the LAD. Appellants can and must do both.

iii. Parents' Substantive Due Process Rights.

Finally, the trial court correctly held that the preliminary injunction would not interfere with parents' substantive due process rights. Appellants' argument on this score is rather surprising: the trial court's injunction simply restores the very policy Appellants kept in place "uneventfully" for four years, without any suggestion that Appellants were in fact violating parents' federal constitutional rights throughout that long period. (Da137). In any event, this argument fails: the injunction does not interfere with fundamental parental rights, and even if it did, the court's order is narrowly tailored to serve a compelling interest.

1. The initial inquiry in any substantive due process challenge is whether the claimed right is fundamental. If the constitutional "right is fundamental, its

---

[7] Contrary to Appellants' assertion, it is not, nor has it ever been, the State's position "that transgender students are legally entitled to unilaterally alter their formal student records without parental notification and that the District conceal this information from the parents." (Db22). Such conduct is not required by the court's preliminary injunction, nor was it a part of Appellants' now-reinstated Original Policy. Instead, the "public social transition accommodation" covered by the Amended Policy, such as using different pronouns or going by a different name, do not themselves require any change to the student's official records.

infringement must be narrowly tailored to serve a compelling state interest," but where "fundamental rights or interests are not implicated," courts will generally "require only a legitimate state interest that the legislature could rationally conclude was served by the statute." Holland v. Rosen, 895 F.3d 272, 292 (3d Cir. 2018); see Washington v. Glucksberg, 521 U.S. 702, 721 (1997) . Contrary to Appellants' bald assertions, the trial court's injunction does not interfere with any fundamental substantive due process rights. (Db24-32).

Courts exercise great caution before deeming any new federal substantive due process rights as fundamental. See Glucksberg, 521 U.S. at 720 (demanding "utmost care" before courts identify "new" liberty interests under due process, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of" federal judges). As a result, the "established method of substantive-due-process analysis" limits fundamental federal constitutional rights to those that "are, objectively, deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Id. at 720-21; see also Holland, 895 F.3d at 293 (adding courts may not construe either test "too broadly" and stray past the "guideposts for responsible decision-making"). It is not enough to merely assert some generalized interest; the analysis must consider "a careful description of the asserted fundamental liberty interest" at a more granular level.

Holland, 895 F.3d at 292 (quoting Chavez v. Martinez, 538 U.S. 760, 775-76 (2003)). That means the issue is whether the specific right is dictated by "[o]ur Nation's history, legal traditions, and practices." Ibid.

Although parents maintain a fundamental right "to care for and guide their children," Anspach v. City of Phila., Dep't of Pub. Health, 503 F.3d 256, 261 (3d Cir. 2007), courts have identified two bedrock limits that dispose of Appellants' arguments here. First, while courts "recognize the parental liberty interest" has been infringed when "the state actor compel[s] interference in the parent-child relationship," a failure to affirmatively provide information with parents about their child—even sensitive or important information—does not violate parents' fundamental rights. Id. at 263, 266 (emphasis added). For good reason: parents "cannot maintain a due process violation when the conduct complained of was devoid of any form of constraint or compulsion." Id. at 264. After all, failing to provide information does not actually prevent parents from guiding or raising their children as they see fit; at most, it means the State failed to "assist … the parents or affirmatively foster the parent/child relationship," to which they have no fundamental right in the first place. Id. at 266 (emphases added).

The facts of Anspach are also instructive. In that case, the complained-of conduct involved city health center personnel's failure to affirmatively advise a minor's parents that she sought reproductive care or "encourage" the minor to

do so. Id. at 261-62. The parents' claim failed because the minor was not "in any way compelled, constrained or coerced into" taking the pills, id. at 266, and "no one prevented [her] from calling her parents" first, id. at 264. The parents' "real problem" was "not that the state actors interfered with the Anspachs as parents," but that the government defendant "did not assist [them] as parents or affirmatively foster the parent/child relationship." Id. at 266; see Doe v. Irwin, 615 F.2d 1162, 1169 (6th Cir. 1980) (parents lacked a right to notice from public facility that distributed contraceptives to unemancipated minors); Sanford v. Stiles, No. 03-5698, 2004 WL 2579738, *11 (E.D. Pa. Nov. 10, 2004) (Ra49-61) (agreeing school did not violate parent's substantive due process rights when it "failed to provide information"), aff'd, 456 F.3d 298 (3d Cir. 2006).

The cases on which Appellants rely—and all of the United States Supreme Court's cases involving fundamental parental rights—fit the line between failure to inform and actual interference easily. See Meyer v. Nebraska, 262 U.S. 390 (1923) (statute barring the teaching of foreign languages to children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (law obligating parents to send children to public school); Wisconsin v. Yoder, 406 U.S. 205 (1972) (same); Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality) (ordering visitation rights for non-parents over parent's objections); Anspach, 503 F.3d at 263-64 (summarizing these precedents). Conversely, Appellants cannot cite a single decision from the

United States Supreme Court, our Supreme Court, the Third Circuit, or this court finding a fundamental substantive due process right to affirmatively provide parents with information, let alone regarding the gender identity or expression of transgender, gender non-conforming, and non-binary students—let alone on a blanket basis in violation of the LAD.[8]

That dichotomy between interference and failure to provide information is fatal to Appellants' challenge. Neither the trial court's preliminary injunction, nor the Original Policy it reinstates, in any way interferes with the parental right to direct the care, custody, and control of their own children. Contra (Db24-29). Neither the injunction nor the Original Policy prevents students from voluntarily sharing information about their gender identity or expression with their parents; neither even influences or encourages students not to share this information with their parents; and neither compels or coerces students to identify as transgender or gender nonconforming. See John & Jane Parents 1, 622 F. Supp. 3d at 130

---

[8] Appellants get no further with their reliance on Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000). Gruenke involved the opposite scenario: a government actor demanding information from a student that parents did not want to share. See id. 295-97 (coach required a student to take a pregnancy test and informed other students and their parents of the pregnancy). The compelled interference with parents' fundamental rights was clear: forcing the daughter to take a pregnancy test and disclosing her pregnancy status violated the parent's right to familial privacy and the student's individual privacy. Id. at 297. There is nothing similar here, where the trial court injunction merely precludes the school district from mandating parental notification over the student's express objections absent any compelling need to do so.

(emphasizing that parents' demand to be "informed of" a child's gender identity is constitutionally distinct from cases in which a school coerces a student not to speak with their parents). Nor do they restrict any parents from communicating with or counseling their children about gender identity and expression.

Because all this injunction does is prevent the school from discriminating via its blanket-notification policy against transgender, gender non-conforming, and non-binary students—and indeed, restores an approach Appellants had taken for years—the order infringes no fundamental rights. See Regino v. Staley, No. 23-32, 2023 WL 4464845, at *3 (E.D. Cal. July 11, 2023) (Ra62-68) (rejecting claim that schools have "an affirmative duty to inform parents of their child's transgender identity" and finding this claim reflects "an expansion of" "parental substantive due process rights that is not supported by precedent"); John & Jane Parents 1, 622 F. Supp. 3d at 130 (rejecting parents' claim that they maintain "a fundamental right to be promptly informed of" their child's gender identity). Because interference with the parent-child relationship and the court's narrow injunction are leagues apart, the decision below withstands scrutiny.

Second, Appellants' position runs headlong into the equally established rule that "in certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment." C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 182 (3d Cir.

2005); see also Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395-96 (6th Cir. 2005) (finding that "[w]hile parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child"). This principle also makes sense: a contrary rule would make it impossible for the school to be "responsive to the overall educational needs of the community and its children." John & Jane Parents 1, 622 F. Supp. 3d at 130. And it would be nearly impossible to administer, including where the parents (including divorced parents) disagree about whether to affirm their child's gender identity. See, e.g., Vesely v. Ill. Sch. Dist. 45, ___ F. Supp. 3d ____, 2023 WL 2988833, *5-6 (N.D. Ill. Apr. 18, 2023) (Ra69-74). It is therefore particularly unlikely that the failure to provide information in the school context violates fundamental rights. That is especially clear here, where the reinstated Original Policy had simply sought to ensure the school could maintain a safe and inclusive school environment by empowering students to disclose gender identity without fear of discriminatory involuntary outing, while allowing disclosures to satisfy a compelling need, like "the health and safety of a student or an incident of bias-related crime." (Ra9). Appellants have thus failed to show that the injunction violates parents' fundamental rights, let alone that the trial court abused its discretion.

2. Even if fundamental rights were implicated, the State has met its burden to justify any intrusion from the preliminary injunction. If the challenged right is not fundamental, the injunction need only bear a "rational relationship" to a "legitimate interest." Heffner v. Murphy, 745 F.3d 56, 79 (3d Cir. 2014) (noting the "strong presumption of constitutionality" and deferential nature of rational basis review); see Heller v. Doe, 509 U.S. 312, 319 (1993) (noting rational basis is "not a license for courts to judge the wisdom, fairness, or logic of legislative choices"). If the right is fundamental, the injunction must be narrowly tailored to advance a compelling state interest. See Holland, 895 F.3d at 292.

This injunction satisfies either test. As the trial court correctly found, the State has a compelling interest in ensuring "that a protected class under a state law against discrimination does not suffer either disparate treatment or disparate impact." (Da132). Indeed, the Legislature expressly recognizes that protecting individuals from discrimination is a state interest of the highest order. N.J.S.A. 10:5-3 (legislative finding that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundations of a free democratic State"). And a significant body of case law is in accord. See, e.g., Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984) (holding that "eliminating discrimination ... plainly serves compelling state interests of the highest order"); Dixon v. Rutgers, 110 N.J. 432, 451 (1988) (confirming that

"[t]he eradication of 'the cancer of discrimination' has long been one of our State's highest priorities"); Peper, 77 N.J. at 80 (adding that "New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society"); Gallo v. Salesian Soc'y, 290 N.J. Super. 616, 643 (App. Div. 1996) (agreeing that the state interest in combatting discrimination "is compelling, beyond cavil").

The compelling interest in eradicating discrimination is particularly clear in cases involving discrimination against transgender students, especially when the action involves "notification" that they "specifically request[ed]" not occur. (Da132). The State always has a "compelling interest in protecting the physical and psychological well-being of minors," Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 528 (3d Cir. 2018), which includes transgender students, who are already facing "extraordinary social, psychological, and medical risks," id. at 529-29; see also N.J. Pub. L. 2018, c.60 § 1 (a), 1(g) (noting that transgender individuals "face considerable challenges in society, including discrimination, harassment, physical abuse, and social isolation," and are at heightened risk of "mistreatment, including physical or sexual assault, between kindergarten and grade 12, due to their being out or perceived as transgender"). The State plainly has every interest in avoiding "discrimination" against transgender, gender non-

conforming, and non-binary students. See Boyertown, 897 F.3d at 528-29; John & Jane Parents 1, 622 F.Supp.3d at 139; T.I.C.-C., 470 N.J. Super. at 609.

The preliminary injunction directly advances these interests in eradicating discrimination. As explained above, the blanket notification regime at the heart of Appellants' Amended Policy discriminates against transgender, gender non-conforming, and non-binary students under a disparate-treatment or disparate-impact lens, see supra at 14-22; enjoining enforcement while the administrative proceeding unfolds ameliorates that discrimination. And the Amended Policy would likely cause some students not to disclose their gender identity at school for fear of involuntary outing, see John & Jane Parents 1, 622 F.Supp.3d at 139 (finding a transgender student "could hardly feel safe in an environment where expressing their gender identity resulted in the automatic disclosure to their parents, regardless of their own wishes"), their schools would be hindered from "creating a support system and providing counseling" for them, id. at 138. The injunction thus "ensure[s] that transgender children feel safe and well at school," ibid., while Appellants' approach does precisely the opposite.

Finally, the preliminary injunction is carefully tailored. As laid out above, the injunction is exclusively focused on communications from the school based on a protected characteristic, while leaving intact the student's ability to disclose their gender identity to their parents (and the order certainly does not counsel

students against doing so). It has no bearing on parents' ability to communicate regarding any matters of gender identity to their children. The Original Policy this injunction reinstates also allows the school to notify parents of the student's gender identity if the student does not object or if the school has a compelling (nondiscriminatory) need—e.g., to discuss "the health and safety of a student or an incident of bias-related crime." (Ra9; Da259). And, of course, the order is temporary: it lasts only until DCR resolves the administrative proceeding, again tailored to the State's interest in preventing discrimination while its action proceeds. See (Da137) (emphasizing that court is merely granting "preliminary injunctive relief"; is "not rendering any final judgments or determinations as to the merits"; and is leaving further merits analyses "to the sound determination of the [OAL] after a full development of the factual and legal record").

Appellants never identify another approach the court could have taken that would have more narrowly achieved the same compelling goals in eradicating discrimination. Their blanket notification policy—which discriminates on the basis of a protected characteristic and includes only an undetermined exception for "credible" risks—certainly does not. It is difficult to see how the court's pause, which maintains the very status quo that Appellants saw no need to alter for four years, now undermines parents' federal constitutional rights.

POINT II

THE TRIAL COURT CORRECTLY FOUND THE EQUITABLE FACTORS WEIGH IN FAVOR OF MAINTAINING THE STATUS QUO.

The trial court also correctly found that the remaining Crowe factors cut in favor of maintaining the status quo that predated the Amended Policy.

A. The Trial Court Did Not Abuse Its Discretion In Finding That The Equitable Factors Supported A Preliminary Injunction.

The trial court concluded—and Appellants do not contest on appeal—that a preliminary injunction was necessary to avoid irreparable harm.[9] There are at

[9] Although the State below argued that it did not have to establish an irreparable harm when seeking preliminary injunctive relief under N.J.S.A. 10:5-14.1, the court found no need to evaluate that question because the State had amply shown irreparable harm. See (Da134-35). Since Appellants do not directly challenge that finding of irreparable harm on appeal, that issue is not squarely before this court. That said, the State need not establish irreparable harm. The Legislature authorized the Attorney General and the Director to "obtain an injunction" after filing an administrative complaint—an indication the Legislature believes it sufficient for the State to establish a defendant "has engaged in, is engaging in, or is about to engage in" a violation of the LAD. N.J.S.A. 10:5-14.1; see also, e.g., United States v. Nutri-cology, 982 F.2d 394, 498 (9th Cir. 1992) (holding that where the government has brought a "statutory enforcement case[]" and has shown a sufficient probability on the merits, "further inquiry into irreparable injury is unnecessary"; "the passage of the statute is itself an implied finding by Congress that violations will harm the public"); N.J. Dep't of Env't Prot. v. Boro Auto Wrecking Co., No. A-4920-04T3, 2006 WL 3007394, at *5 (App. Div. Oct. 24, 2006) (Ra75-79) (same); Hoffman v. Garden State Farms, Inc., 76 N.J. Super. 189, 201 (N.J. Ch. 1962) (same). That approach is not only textual but logical: this rule would "undeniably serve to underscore the remedial purpose of the LAD," (Da135), especially in cases where the Attorney General and the Director have found an urgent need for emergency relief.

least two relevant irreparable harms here. For one, as the trial court recognized, the mandatory, involuntary disclosure of transgender, gender non-conforming, or non-binary students' gender identity or expression will cause significant and irreparable harm to students. As the court reasoned, "there is no protected group more vulnerable, or more susceptible to physical or psychological harm, than transgender, gender non-conforming, and non-binary youth." (Da135); see also, e.g., Boyertown, 897 F.3d at 528-29 (discussing these students' "extraordinary social, psychological, and medical risks"); John & Jane Parents 1, 622 F.Supp.3d at 139; T.I.C.-C., 470 N.J. Super. at 609; N.J. Pub. L. 2018, c.60 § 1(a), 1(g). Those harms are exacerbated by "[m]istreatment": if "transgender, gender non-conforming, and non-binary students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening." T.I.C.-C., 470 N.J. Super. at 609 (quoting Boyertown, 897 F.3d at 522)).

Without this injunction, Appellants' transgender, gender non-conforming, and non-binary students would suffer under an Amended Policy that specifically targets them for mandatory disclosure, and that uniquely infringes their privacy interests. See id. at 611 (emphasizing their interest in privacy to protect against "violence, harassment, and discrimination because of their gender identity"). If a student is involuntarily outed, or if a student now declines to candidly express their gender identity at school for fear of mandatory reporting, the harm will be

tremendous—and that bell can never be un-rung. See (Da135) (concluding that the Amended Policy will threaten serious injuries on transgender, gender non-conforming, and non-binary students, including "mental health issues, suicide, illicit drug dependency, and infliction of emotional harm by immediate family members," which "constitute[] irreparable injury which may result if restraints are not imposed preliminarily"); John & Jane Parents 1, 622 F.Supp.3d at 139 (explaining that a transgender student "could hardly feel safe in an environment where expressing their gender identity resulted in the automatic disclosure to their parents, regardless of their own wishes"). The trial court did not abuse its discretion in concluding that these overwhelming harms supported a preliminary injunction to temporarily protect the preexisting status quo.[10]

For another, the State would also experience an irreparable harm without this relief. See David v. Vesta Co., 45 N.J. 301, 327 (1965) (finding "prevention of unlawful discrimination" vindicates a "vital interest of the State" because the act of discrimination is "a public wrong and not merely the basis of a private grievance"); N.J.S.A. 10:5-3 (Legislature finding "the State suffers a grievous

---

[10] Appellants do not dispute any of these points; Appellants simply protest the trial court's decision to cite certain evidence. But as the State explained above, Appellants' quibble with these references to published studies and surveys fails on this posture. See supra at 20-21. Moreover, the court's mention of studies in assessing the equities was passing at best, (Da134), and simply bolstered the conclusions this court and a range of other jurists have already reached.

harm" from discrimination). Indeed, the Legislature gave the Attorney General and the Director the authority to "prevent and eliminate" all the "discrimination" the LAD prohibits. N.J.S.A. 10:5-6. And it gave them the authority to file an administrative complaint against entities that violate the LAD. N.J.S.A. 10:5-14.1. But absent preliminary relief to prevent the ongoing or future violations of the LAD, the State cannot stop this discrimination until the proceeding ends. That such discrimination could continue in the meantime, and may not be fully remediable after the fact, undermines "any adjudication [DCR] may make in this matter in vindication of [students'] rights." Pfaus, 97 N.J. Super. at 8 (adding "adequate enforcement" of the LAD ranks "high indeed in our public policy"). The court's order was further justified "to aid in the preservation of the subject matter of a proceeding pending before an administrative agency." Ibid.; see also ibid. (emphasizing that courts "cannot adopt a grudging or narrow approach" in this circumstance, because otherwise, administrative adjudication of LAD rights could become "a vain and useless act"); Poff, 228 N.J. Super. at 379 (enjoining landlord from renting apartment while an administrative proceeding under the LAD was pending concerning refusal to rent apartment to gay men).

Last, the trial court correctly found that the balance of hardships and the public interest weighed in favor of preliminary injunctive relief to maintain the status quo. As explained above, Appellants did not and have not demonstrated

any meaningful harm they would suffer from a temporary delay in implementing the Amended Policy—a delay only so long as is necessary to resolve the pending administrative action. See Pfaus, 97 N.J. Super. at 8. Strikingly, Appellants do not contest the court's factual finding that the Original Policy had been in effect "uneventfully since at least 2019," (Da137), nor do Appellants show that they were subject to liability during those four-plus years under any of the federal constitutional and statutory provisions on which they now rely. To the contrary, as a long line of cases instructs, Appellants' vague assertions of "abstract harms" and inconvenience are insufficient. See Garden State Equality v. Dow, 216 N.J. 314, 327-28 (2013); N.J. State Policeman's Benevolent Ass'n v. Murphy, 470 N.J. Super. 568, 594 (App. Div. 2022). By contrast, the State and the public have a significant and tangible interest in ensuring that school districts across the State fulfill their obligations to "[p]romote equal educational opportunity" and foster "a learning environment free from all forms of prejudice, discrimination, and harassment." N.J.A.C. 6A:7-14. The trial court's time-limited injunction promotes that public interest and causes no harm to Appellants as a result.

B. The Trial Court Did Not Abuse Its Discretion In Selecting A Careful Remedy That Temporarily Maintains The Status Quo.

Although Appellants do not challenge the trial court's fact finding on the equitable factors, they erroneously challenge the scope of preliminary relief that

Judge Bauman ordered. Appellants primarily contend that even if the trial court were correct to enjoin enforcement of Amended Policy 5756, the trial court erred in restraining Appellants from otherwise "amending, modifying, or superseding any portion of [Original] Policy 5756" as the administrative action proceeds. See (Db37-39); (Da118). That final claim is incorrect: the trial court did not abuse its discretion in crafting this careful injunction.

As an initial matter, the trial court's injunction fell comfortably within its legal authority. Courts, of course, have both the authority to preliminarily enjoin the enforcement of an unlawful policy and the authority to restore the status quo ante. See Crowe, 90 N.J. at 134; Waste Mgmt., 399 N.J. Super. at 520 (noting that "a less rigid" standard governs where "the interlocutory injunction is merely designed to preserve the status quo"). But the underlying law here goes further. N.J.S.A. 10:5-14.1 clarifies not only that the Attorney General and the Director may obtain a court order "prohibiting" the defendant from "continuing" in their unlawful "practices," but also that Attorney General and the Director may obtain relief to prohibit parties from "doing any acts in furtherance" of discrimination, to "prevent" future LAD "violations or "attempts to violate" the law, to "compel compliance" with the LAD, and to restrict "attempts to interfere with or impede the enforcement" of the LAD more generally. That broad language thus entitles

the State to seek, and the court to award, injunctive relief that not only restrains an ongoing LAD violation but prevents that actor's prospective ones.

There is a good reason for that sweeping authority: it protects the integrity and effectiveness of the administrative process the Legislature established, and the Division's ability to vindicate the rights the LAD protects. As noted above, New Jersey law vests in the Attorney General and the Director power to initiate administrative proceedings for violations of the LAD, and to seek a preliminary injunction to prevent ongoing violations before that process concludes. Pfaus, 97 N.J. Super. at 8. It thus makes eminent sense that the State would be free to seek and obtain injunctive relief that does not merely enjoin one unlawful policy, but freezes the status quo in place pending the administrative proceeding. Were the rule otherwise—if Appellants could again modify the Original Policy before the DCR proceeding concludes—then parties could repeatedly adjust policies in even minor ways to achieve the same unlawful goals. And if Appellants act on such a new policy before a court can preliminarily enjoin it, the affected students will experience significant and irreparable harm. N.J.S.A. 10:5-14.1 does not set up such a whack-a-mole system of law; rather, the law provides a regime by which DCR's administrative process will not be rendered "vain and useless" by the defendant's intervening actions. Pfaus, 97 N.J. Super. at 8.

And the trial court had every reason to include this language when crafting this particular preliminary injunction. As explained above, and as Appellants have never denied, the trial court found that the Original Policy was in effect for over four years without incident. (Da137). Appellants did not introduce record evidence substantiating any harms from that policy, or establish that it subjected them to federal or state liability. See supra at 46. Nor did they submit the terms of any new policy they wish to enact—let alone terms they would operate in a nondiscriminatory way. Said another way, Appellants have not put forward a proposal to this court, and did not put forward any proposal to the trial court, other than a blanket-notification policy. Nor is that a surprise, as they continue to wrongly claim that only blanket notification satisfies parental rights. (Db24-32). But if Appellants identify one, they can always seek a settlement with the State, or they can submit the policy to DCR for its approval in the administrative proceeding. See (Da137) (leaving all further "judgments or determinations as to the merits" to the Division and to OAL); see also Poff, 228 N.J. Super. at 379 (declining to decide propriety of requested relief because matter was pending in the DCR proceeding). All Appellants may not do—during the limited period in which DCR's administrative action is still proceeding—is unilaterally change the policy, potentially requiring another court action.

Appellants' contention thus misses the mark. Appellants claim that there is no "legal [or] factual basis" to require them to follow the Original Policy when the trial court did not find that the Original Policy is mandatory or represents the only way to comply with the LAD. (Db37). And it argues that the State has admitted the Original Policy is not mandatory. See (Da269) (counsel for State agreeing at argument in other case that the Original Policy "is not necessarily a mandatory policy"); (Da281-82) (Attorney General stating in radio interview that parents have an important role to play and that it can be important for them to maintain information about their children, but that schools could not establish a "blanket affirmative requirement based on a characteristic" protected by the LAD without running afoul of New Jersey law).[11]

But the State agrees with all of this. The State has maintained throughout this litigation that the State Guidance does not itself bind school districts, and the State has repeatedly explained that parental notice could be appropriate in a range of circumstances, including when a student does not seek confidentiality from their parents, and if there are any compelling, nondiscriminatory reasons—

[11] The transcript of the WNYC radio interview and oral argument transcript from that other case were the subject of a motion to supplement the trial record made by Appellants on October 13, 2023. This court took judicial notice of the oral argument transcript, but deferred a decision on the radio interview transcript. The State responds here to Appellants' arguments based on the radio interview transcript, but maintains the arguments it made in its Opposition to Appellants' motion to supplement the trial record.

like a student's health or safety—to disclose the information anyway. See supra at 3. Still, that has no bearing on the relief in this case, where the Amended Policy unlawfully subjects a protected class to discrimination in violation of the LAD; where N.J.S.A. 10:5-14.1 empowers courts to maintain the status quo to prevent future unlawful acts as the administrative proceeding remains pending; and where Appellants continue to claim that only blanket notification satisfies parental constitutional rights. The trial court's careful analysis in determining that the law and equities "tip[ped] in favor of" keeping the status quo, (Da137), thus did not abuse its considerable discretion in crafting a proper remedy.

CONCLUSION

This court should affirm the preliminary injunction.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Plaintiffs-Respondents

By: /s/ Nancy R. Trasande
Nancy R. Trasande
Deputy Attorney General
Attorney ID No. 297432019
Nancy.Trasande@law.njoag.gov

FILED, Clerk of the Appellate Division, March 05, 2024, **A-000046-23**

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

Bruce W. Padula, Partner
bpadula@cgajlaw.com

Reply to: Matawan Office

March 5, 2024

Via eCourts
New Jersey Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625-0970

Re: Matthew J. Platkin, Attorney General of New Jersey, and Sundeep Iyer, Director of the New Jersey Division of Civil Rights v. Manalapan-Englishtown Regional Board of Education and Manalapan-Englishtown Regional School District
Docket No.: A-000046-23

Dear Honorable Judges of the Appellate Division:

As the Court is aware, this office represents Appellant School District and Board of Education in the above-referenced matter. Kindly accept this letter brief pursuant to R. 2:6-5 and R. 2:6-2(b) in lieu of a more formal brief in further support of this appeal.

Matawan Office: 955 State Route 34, Suite 200, Matawan, NJ 07747 Tel 732 583-7474 Fax 732 290-0753
Oakland Office: 169 Ramapo Valley Road, UL 105, Oakland, NJ 07436 Tel 973 845-6700 Fax 201 644-7601
Somerville Office: 50 Division Street, Suite 501, Somerville, NJ 08876 Tel 732 583-7474 Fax 908 524-0096
Haddonfield Office: 255 Kings Highway East, Haddonfield, NJ 08033 Tel 732 583-7474 Fax 732 290-0753

www.cgajlaw.com

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS iii

TABLE OF CITATIONS OF CASES iv

PROCEDURAL HISTORY 1

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

LEGAL ARGUMENT 6

1. There is no well-settled legal right under Crowe..6
2. A school district is not a traditional public accommodation 8
3. There is no disparate impact or treatment under the Policy 10
4. The State's interpretation of LAD violates parents' Fundamental Rights 11

CONCLUSION 12

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Chancery Division Order in Manalapan-Englishtown Matter, Filed August 18, 2023 .... Da115-116

Chancery Division Order in Middletown Matter, Filed August 18, 2023 .... Da117-118

Chancery Division written decision in both matters, and including Marlboro Board of Education (MON-C-78-23/A-118-23), filed August 18, 2023 .... Da119-138

TABLE OF CITATIONS OF CASES

Cases

Anspach v. City of Phila. Dep't of Pub. Health, 503 F3d 256 (3d Cir. 2007)....................12

Crowe v. De Gioia, 90 N.J. 126 (1982)....................6

Statutes

N.J.S.A. 10:5-1 et seq. 6, 7, 8, 10

Other Authorities

District Policy 5756....................passim

Regulations

N.J.A.C. 6A:32-7.1 to -78....................10

N.J.A.C. 6A:32-7.3....................3

N.J.A.C. 6A:32-7.3(b)(1)....................8

N.J.A.C. 6A:32-7.3(b)(2)....................10

N.J.A.C. 6A:32-7.5(a)....................9

N.J.A.C. 6A:32-7.5(e)(1)-(3)....................9, 10

PROCEDURAL HISTORY

Appellants rely upon the procedural history submitted in their initial brief. Appellants object, as procedurally inappropriate, to the legal arguments contained in Respondents' Procedural History concerning the history, purpose and construction of the LAD.

PRELIMINARY STATEMENT

It is painfully clear that Respondents either have not read amended Policy 5756 and its implementing regulation, or do not understand them. Their arguments make broad sweeping and inflammatory – but factually incorrect – characterizations of the Policy.[1]

Rather than reaching any conclusions based on the State's superficial approach to this layered matter, this Court must reconcile the Law Against Discrimination's ("LAD") gender identity and expression protections with the legal obligations and practical realities of running a New Jersey public school district.

The Policy at issue effectively navigates the legal requirements owed to students and parents alike. The Policy allows transgender students tremendous latitude to engage in the safe expression of their gender identity, while also

[1] "Policy," used herein, shall refer to District Policy 5756, adopted on June 20, 2023 (Da169-171), **and** the implementing Regulation, prepared by the Superintendent, which can be found at Da262-265.

recognizing certain unilateral actions in which the student engages – not the student's status – necessitate parental notification. Such notification occurs in a school-supportive environment rather than the State's preferred haphazard, arbitrary, and random manner.

STATEMENT OF FACTS

Notwithstanding the State's mischaracterization of the Policy, the Policy and implementing Regulation provide the following:

- The District shall utilize the student's chosen name, identity and pronouns;
- Neither parental consent nor a court order/legal name change is required, except for K-5;
- Documentation, such as ID cards, shall be in student's chose name;
- Students shall be allowed to dress in accordance with their gender identity;
- Students may participate activities consistent with their gender identity; and
- Students may use rest/locker rooms in consistent with their gender identity.

See Da169-171, 262-265.

Thus, students ***are not denied*** any public accommodation the school provides, and ***are allowed unfettered access to every accommodation consistent with their gender identity***.

Additionally, the process for parental notification is well-defined, thoughtful and narrowly-tailored. Parental notification occurs **only** when a student requests a "public social transition accommodation," or a "public name/identity/pronoun change," provided there is "no documented evidence" that doing so would subject the student to harm.

Despite all of these terms being well-defined in District regulations, the State incredulously question their meaning. "Public social transition accommodation" means (a) altering mandated student records as defined by N.J.A.C. 6A:32-7.3(b)(1); (b) Utilizing the restroom/locker room of one's gender identity; or (c) engaging in an activity/sport/club associated with one's gender identity and expression rather than one's gender assigned at birth. Da262. "Public name/identity/pronoun change" means formally changing one's student records as defined by N.J.A.C. 6A:32-7.3 to utilize the name/identity/pronoun of the gender with which one identifies. Id. "Documented evidence" includes, but is not limited to previous reports to DCPP, or student reporting of fear of physical and/or emotional harm upon disclosure. Id.

Indeed, the process for parental notification is thoughtful, student-centered, and in the best interest of the student. Despite the baseless assertion of staff "outing" students, only the Superintendent or her designed Administrator shall notify the parent, **and only after the following** steps are completed:

- Staff members may not notify parents but must immediately inform a student's counselor of an accommodation which may trigger notification;
- The counselor shall notify the building administrator of a student's request;
- Superintendent shall consult with the Board Attorney, School Counselor, and appropriate administrators and teaching staff members;
- Counselor and administrator will determine the level of risk for harm and/or abuse associated with disclosure, which may preclude disclosure;
- Inform the student of the intent to disclose;
- Offer the student the opportunity to personally disclose; and
- Provide supporting measures, such as: counseling; practicing visualization and role playing of conversation with parents;

> discussing the pros/cons of disclosure; evaluating the feasibility of various disclosure conversation options; collaborating with the student on reasonable and comfortable timeline for disclosure; or offering the student options for other trusted adults to be part of the conversation.

Da163-165.

As specifically stated in the Policy, and as demonstrated above, the Board supports healthy communication between a transgender student and their family. To do otherwise, "foster[s] an unreasonable expectation that a public in-school transition will remain confidential or require district staff to affirmatively misrepresent information to parents." See, e.g, Da152. To be clear, this case is about (1) allowing transgender students to do something not allowed by their cisgender peers, but putting reasonable rules on this special permission for the sensible operation of the school and in the best interest of the student.

LEGAL ARGUMENT

Respondents' brief consistently and repeatedly misrepresents the Policy and the application of LAD to this matter. This Court must reverse the Chancery Division for the following reasons: (1) the Court failed to determine that it is well-settled that the LAD prohibits parental notification under the circumstances presented here; (2) a school district has dual legal obligations to its students under LAD and their parents pursuant to every other law; (3) the parents of transgender and cisgender students are entitled to actual knowledge of the gender of their child; and (4) interpreting LAD to prohibit parental notification is a clear violation of parents' fundamental rights.

1. There is no well-settled legal right under Crowe

The State engages in legal revisionism and urges this Court to ignore the "well-settled legal right" prong of Crowe. Respondents write, "if there is a reasonable probability of success, there is logically an underlying well-settled right on which that reasonably probability is based," and therefore, no such finding is necessary. Pb23.

In its attempt to erase the "well-settled legal right" prong, the State ignores the fact that the Court actually analyzed the "well-settled legal right" prong, albeit incorrectly. Rather than apply the substantive application of the LAD, the Chancery Court determined that the Attorney General has a well-settled legal

right to enforce the LAD. This is so because the application of the LAD's transgender protection in the context of a public school is far from well-settled.

No binding caselaw, statute, regulation, or administrative decision exists to support Respondents' interpretation of the LAD to prohibit parental notification. The closest existing "authority" are the Transgender Student Guidelines promulgated by the Department of Education. These are not law and are not how we make law in this State. If the Legislature intended these guidelines to have the force of law, it would have adopted a statute or directed the Commissioner to adopt regulations in this area. It did neither. Further, to the contrary, there is a myriad of law and litigation around the nation, previously cited, which establishes that this matter is far from well-settled.

Granting preliminary injunctive relief without the opportunity for a hearing infringes on our normal notions of due process and is an extreme remedy only granted when the law is so clear that everyone knows what the law is. Indeed, it is the substantive application of underlying law that must be well-settled. The Court made no such finding here and the application of the LAD is not clear and is not well-settled. As such, the preliminary injunction must be lifted.

2. A school district is not a traditional public accommodation

It is not disputed that a public school is a public accommodation under the LAD; however, it is equally significant for this Court to recognize that a public school is not a traditional public accommodation, such as a restaurant or bakery. Schools are built on transparency with parents and, to that end, have legal obligations to parents and students, alike.

In recognition of the LAD's protection of gender identity and expression, the Policy requires to District to recognize and honor a student's gender identity. Further, we can certainly agree that gender transition and expression of one's gender identity appear on a spectrum. The parental notification provisions of the Policy are triggered only when students take specific unilaterally chosen steps far along that spectrum. For example, the Policy is not triggered by one's transgender status alone, nor by one's use of alternate names or gender-neutral bathrooms, nor by the issuance of student ID cards, nor by one's attire.

Rather, the Policy is triggered when a student changes their "mandated student record," which specifically includes, "name, address, telephone number, date of birth, name of parent(s), [and] **<u>gender</u>**." N.J.A.C. 6A:32-7.3(b)(1). Thus, when every child registers for school, District are legally required to obtain that student's gender and **all parents** know their child's gender.

In addition to New Jersey law mandating gender as a student record, the

law authorizes access to student records. Students do not have access to their own student record. Indeed, only "authorized organizations, agencies, or persons," i.e., parents, shall have access to student records. N.J.A.C. 6A:32-7.5(a). Students need express written permission of parents to access their student record, including their gender. N.J.A.C. 6A:32-7.5(e)(1)-(3). The State makes a disingenuous difference between "accessing" one's record and "changing" that record. It is axiomatic that one cannot change a record to which one does not have access.

Finally, the State's position belies its feigned concern for the well-being of transgender students and the absurdity of its position. The State readily admits that "Appellants would still be required to supply school records to a parent," including presumably, a student record that a transgender student has changed without parental consent or notification. Pb29-30. Thus, the State's desired result is for a parent to receive a student record which identifies a child with a gender unknown to the parent, in a vacuum, and without notice to the affected student.

This is dangerous and harmful to the student and antithetical to encouraging healthy communication between a transgender student and their family. Indeed, the State's position directly implicates a concern addressed in the Policy and "foster[s] an unreasonable expectation that a public in-school

transition will remain confidential or require district staff to affirmatively misrepresent information to parents." Da152.

For these reasons, the State's arguments fail and the preliminary injunction must be lifted.

3. There is no disparate impact or treatment under the Policy

The Chancery Division and Respondents fail to recognize the legal requirements of operating a school district. The gender of every student is required at the time of registration and is maintained as a mandatory student record. N.J.A.C. 6A:32-7.3(b)(2). Only parents have access to, and therefore maintain the sole right to change a student record. N.J.A.C. 6A:32-7.5(e)(1)-(3). Thus, the general rule is parents of every student inform the District of their child's gender, and only those parents have access to their child's student record.

While the LAD protects gender identity and expression in schools, there is no statute, regulation, caselaw or administrative decision which authorizes a student to unilaterally change their student record. Allowing as much is an application of LAD not previously endorsed. Indeed, the Policy affords transgender students a special and unique right to engage is a broad spectrum of activity to express their gender – all without parental notification.

Rather, parental notification occurs when students are afforded the special right to change a mandatory student record. A right not available to their

cisgender peers. Further, parental notification occurs in limited circumstances when parental discovery of a student's gender is otherwise inevitable – when participating in a gender-specific activity or team, or utilizing an alternate restroom or bathroom.

This Policy appropriately balances a student's rights to express their gender identity in school with concomitant parental rights. More significantly, the Policy is in the student's best interest to facilitate a healthy environment to communicate with parents rather than allow for haphazard notification of parents without the support school can provide. Indeed, as the State has recognized, "Appellants would still be required to supply school records to a parent," including presumably, a student record that a transgender student has changed without parental consent or notification. Pb29-30. Thus, the State's desired result is for the parents to learn of student's expressed gender, without the support of the school, and without notice to the affected student. It is painfully obvious that this is not a good result.

4. The State's interpretation of LAD violates parents' Fundamental Rights

Respondents' primary argument in reply to the Constitutional infirmities of its current position is that the original policy has been "in place 'uneventfully' for four years without any suggestion that Appellants were in fact violating parents' federal constitutional rights throughout that long period." Pb30. First,

four years is not a "long period." Secondly, a constitutional violation cannot be permitted to continue simply because it occurred "uneventfully for four years." Surely, that is not the test for constitutionality.

The State further attempts to identify this as a "new federal substantive due process right" or a "new liberty interest." Pb31. This is not a new right. The "fundamental parental right to care for and guide their children" is one of the bedrocks of our constitutional jurisprudence.

Likewise, the State's reliance on Anspach v. City of Phila. Dep't of Pub. Health, 503 F3d 256 (3d Cir. 2007) is also misplaced. As discussed in Point 2, above, New Jersey public schools sit in a unique space with legal obligations to students and parents. As such, appellants incorporate its arguments contained in Point 2, above, herein.

For this reason, the Court must reject Respondents' arguments and reverse the Chancery Court's August 18, 2023 Order.

CONCLUSION

For the foregoing reasons, the Chancery Division erred in entering a preliminary injunction on August 18, 2023 and that decision must be reversed.

Respectfully submitted,

/s/ Bruce W. Padula

Bruce W. Padula

c: Respondents' Counsel of Record
Client

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

BRUCE W. PADULA, Partner
bpadula@cgajlaw.com

Reply to: Matawan Office

April 10, 2024

Via eCourts
New Jersey Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625-0970

**Re: Platkin et al. v. Manalapan-Englishtown Regional Board of Education, et al.
Docker Number: A-000046-23**

Dear Honorable Judges of the Appellate Division:

As the Court is aware, this office represents Appellant School District and Board of Education in the above-referenced matter. Kindly accept this letter brief in lieu of a more formal brief in response to the Amicus brief submitted by American Civil Liberties Union of New Jersey and Garden State Equality (collectively, the "Amici").

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS OF CASES ii

STATEMENT OF FACTS AND PROCEDURAL HISTORY 1

PRELIMINARY STATEMENT.. 1

LEGAL ARGUMENT 4

I. Parental Rights are Protected by the Constitution. 4

II. Deference Should not be Provided to the Agency's Interpretation of the Law Against Discrimination Because Parental Notification Regarding a Student's Gender Identity Does Not Raise Constitutional Concerns. 7

III. The Court should not consider New Arguments Proffered by the Amici Concerning the New Jersey State Constitution. 9

IV. The Studies Cited by the Amici should be disregarded as they constitute inadmissible hearsay, are irrelevant, unduly prejudicial, and lack any probative value pursuant to N.J.R.E. 801, 802, 401 and 403(a). 12

TABLE OF CITATIONS OF CASES

Cases

Deerfield Ests., Inc. v. Twp. of E. Brunswick, 60 N.J. 115 (1972)................... 9

Doe v. Del. Valley Reg'l High Sch. Bd. of Educ., 2024 WL 706797 1 (D.J. N.J. Feb. 21, 2024) 6

Lewis v. Harris, 188 N.J. 415 (2006) 10

Reilly v. AAA Mid-Atlantic Ins. Co. of New Jersey, 194 N.J. 474 (2008)....... 8

State v. Walker, 385 N.J. Super., 388 (App. Div. 2006)................................ 10

Troxel v. Granville, 530 U.S. 57 (2000)... 4, 5

Statutes

N.J.S.A. 10:5-1 et seq. 7, 8, 9, 12

N.J.S.A. 10:5-4 10

Other Authorities

Amended Policy 5756 .... passim

Rules

N.J. Ct. R. 1:6-6.. 13

N.J.R.E. 401 ....12, 13

N.J.R.E. 403(a) 12, 13

N.J.R.E. 801 ....12, 13

N.J.R.E. 802 ....12, 13

Regulations

N.J.A.C. 6A:32-7.3(b)(1) 5, 11

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellants rely upon the statement of facts and procedural history submitted in their initial brief.

PRELIMINARY STATEMENT

The Amici brief, similar to the Respondents' brief, continues to mischaracterize the carefully tailored Amended Policy 5756 and the safeguards in place. The Amici attempt to circumvent the fundamental rights of parents guaranteed in the constitution in directing the upbringing of their children and reiterate the notion that governmental actors are better equip to handle the emotional well-being of their child. In doing so, the Amici rely on the premise that parents are viewed as a negative actor that will only harm the emotional well-being of the child. This convoluted idea requires a determination by a governmental actor whether a parent is capable of handling their own child's gender identity and expression. Surely, these are not the type of policies the State should support in providing governmental actors more autonomy over the upbringing a child than the parent.

Furthermore, the overarching goal of the Laws Against Discrimination ("LAD") is to ensure that individuals are not treated differently based on certain traits or characteristics, including gender identity or expression. Notwithstanding, the Amici are advocating for a policy which results in

preferential treatment for transgender students over cisgender students. The parties fail to understand the narrow scope of the policy and the limited circumstances in which parents are notified. Namely, the Amended Policy 5756 provides for parental notification when:

i) A student formally changes a mandatory student record, including gender, as defined by N.J.A.C. 6A:32-7.3(b)(1);

ii) A student participates in a sport for a gender other than that assigned at birth;

iii) Referring a student for outside health services, and the student's sexual identity and expression is germane to the referral; and

iv) A student uses a gendered bathroom, other than that assigned at birth, except a gender-neutral bathroom.

It is important to emphasize that notice is not required for a student requesting a different pronoun, dressing differently, or getting a school ID with a different name. More specifically,

> "**The school district shall accept a student's asserted gender identity; parental consent is not required. A student need not meet any threshold diagnosis or treatment requirements to have his or her gender identity recognized and respected by the school district, school, or school staff members. In addition, a legal or court-ordered name change is not required.** The Board finds that conversations with counselors, teachers or other staff about one's gender identity and expression are entitled to confidentiality. However, in the event a student requests a public social transition accommodation, such as public

> name/identity/pronoun change, bathroom/locker room accommodation, or club/sports accommodations, or the like, the school district shall notify a student's parents or guardian of the student's asserted gender identity and/or name change, or other requested accommodation, provided there is no documented evidence that doing so would subject the student to physical or emotional harm or abuse. **It shall be the policy of the Board to support and facilitate healthy communication between a transgender student and their family, rather than foster an unreasonable expectation that a public in-school transition will remain confidential or require district staff to affirmatively misrepresent information to parents**."

As evident from above, when notice is implicated, disclosures are not made until the administrator sits down with the student and explains the process. The student is provided the opportunity to personally disclose the information prior to parental notification and provided resources to assist in the process. Moreover, disclosure is not made until consultation with the board attorney, school counsel and any other appropriate administrators and other teaching staff members. It is at this time, the level of risk of disclosure is taken into account, including the student's reporting of fear of any potential physical or emotional harm and any previous reports from the DCPP. Thus, the notification process is student-centered with a school-supportive environment. The haphazard approach suggested by the Amici is arbitrary, non-sensical and poses more of a risk for "outing" a child without providing ***any*** resources to the student.

LEGAL ARGUMENT

I. Parental Rights are Protected by the Constitution.

The Amici attempt to downplay the fundamental constitutional right of a parent under the Fourteenth Amendment to make decisions concerning the care, custody and control of their children. As noted by Justice O'Connor:

> "**The liberty interest at issue in this case-the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court.** More than 75 years ago, in *Meyer v. Nebraska*, 262 U. S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "**to control the education of their own**." Two years later, in *Pierce v. Society of Sisters*, 268 U. S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "**[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.**" Id. at 535. We returned to the subject in *Prince v. Massachusetts*, 321 U. S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "**It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder**."

Troxel v. Granville, 530 U.S. 57 (2000).

As recognized by the Amici, the constitution prohibits governmental actors from interfering with parental decision-making on matters of great-importance. The interest of parents in the care custody and control of their

children is clearly a matter of great importance and recognized as the oldest fundamental liberty interests by the Supreme Court. Id. Notwithstanding, the Amici advocate for school districts to maintain a policy of presumptive nondisclosure. However, this position fails to acknowledge that disclosure of the Amended Policy 5756 is implicated in four defined situations. Namely,

i) A student formally changes a mandatory student record, including gender, as defined by N.J.A.C. 6A:32-7.3(b)(1);

ii) A student participates in a sport for a gender other than that assigned at birth;

iii) Referring a student for outside health services, and the student's sexual identity and expression is germane to the referral; and

iv) A student uses a gendered bathroom, other than that assigned at birth, except a gender-neutral bathroom.

Even when such events implicate disclosure, there are specific procedures and resources in place for students to assist in the process. Amici advocate for the position that parents should not be informed about the emotional well-being of their child when it comes to critical sexual or gender issues, even when trained and licensed education professionals believe these issues are having a material impact on a child's physical or mental health and well-being. Again, Amended Policy 5756 permits the following:

> **"The school district shall accept a student's asserted gender identity; parental consent is not required. A student need not meet any threshold diagnosis or treatment requirements to have his or her gender identity recognized and respected by the school district, school, or school staff members. In addition, a legal or court-ordered name change is not required."**

Thus, this issue is dissimilar to that in Doe v. Del. Valley Reg'l High Sch. Bd. of Educ., a case involving school policies related to treatment of transgender students. 2024 WL 706797 1 (D.J. N.J. Feb. 21, 2024). The question in that matter pertained to whether Plaintiff has a fundamental constitutional right that requires the Board Defendants to obtain Plaintiff's consent prior to recognizing and referring to Jane as to her preferred gender. Id. at 6. As demonstrated above, this is not at issue, as Amended Policy 5756 requires a school district to accept a student's asserted gender identity without parental consent. Amended Policy 5756 requires parental notice in regard to the name change only when a request is made by the student for a mandatory student record, including gender. Thus, this case has no bearing to the matter at hand.

Moreover, the Amici reiterate the acknowledgement by the Attorney General that schools would be obligated to respond truthfully to a parent or guardian who contacted the school to request confirmation that their child had made such a request or statement regarding their chosen pronoun and gender. As such, parents are free to contact the school at any juncture to make such an

inquiry. As the teachers cannot obfuscate the records and need to respond truthfully, the information would be disclosed at this time. In addition to this approach not being in the best interest of the student, it also fails to provide any support for the student. The advocated policy would be exponentially more harmful than the narrowly tailored and thoughtful approach proposed by Amended Policy 5756. Any notification under Amended Policy 5756 would be accompanied by a plethora of resources for the student along with an evaluation by the district whether such disclosure could be harmful. Therefore, the policy advocated for by the Amici is not student-centered and in fact would place the student at a higher risk compared to Amended Policy 5756.

II. Deference Should not be Provided to the Agency's Interpretation of the Law Against Discrimination Because Parental Notification Regarding a Student's Gender Identity Does Not Raise Constitutional Concerns.

The Amici set forth that deference should be provided to the Division of Civil Rights ("DCR") for their interpretation of the Laws Against Discrimination ("LAD") as it relates to gender identity. However, the Amici fail to take into account the Attorney General's lack of prosecution to prevent similar polices of parental notification and parental involvement since 2014. See Da234-235, Para. 6-7.

Although interpretations of a statue by agencies empowered to enforce them are given substantial deference in the context of statutory interpretation,

the presumption of valid is not without limits. Reilly v. AAA Mid-Atlantic Ins. Co. of New Jersey, 194 N.J. 474, 485 (2008). The Supreme Court has cautioned that "if an agency's statutory interpretation is contrary to the statutory language, or if the agency's interpretation undermines the Legislature's intent, no deference is required." Id. It should be noted that deference does not go so far as to "permit an administrative agency under the guise of an administrative interpretation to give a statute any greater effect than is permitted by the statutory language." Id.

As previously noted in the initial moving brief, Stauss Esmay Associations, LLP ("Strauss"), is an outside vendor that contracts with districts to draft and advise on policies and regulations. See Da 57, Para. 4 and Da234, Para. 4. In September 2014 and again in July of 2015, Strauss recommended adoption of transgender polices, which included parental notification and consent for certain younger students. See Da234, Para. 5 and Da238-244. Neither the Attorney General nor the Director of the DCR initiated a lawsuit against Manalapan-Englishtown for adopting these polices. The lack of prosecution is significant insofar as the LAD was amended in 2006 to include gender identity and expression as a protected class.

Furthermore, the LAD has never been substantively applied in the manner which the Amici suggest before this Court. It is telling that the Amici

failed to cite any caselaw, decision, opinion or other determination that supports the position that parental notification violates the LAD. As the DCR and Attorney General never had an issue with parental notification in the past, despite being in place since at least 2014, deference would not be appropriate. It is of further importance that this matter stems from guidelines, which are not mandatory. Instead, the Attorney General is making allegations based upon those guidelines, which is not akin to an agency interpreting a statute or regulation. There was no formal process to adopt these guidelines, such as a public hearing, nor does the legislature require these guidelines be adopted. Therefore, deference should not even be considered in the context of this matter.

III. The Court should not consider New Arguments Proffered by the Amici Concerning the New Jersey State Constitution.

The Amici argue, for the first time by any party, that the New Jersey constitution is implicated by Amended Policy 5756. Such argument was not previously addressed.

Generally, an appellate court will not consider issues that were not raised previously, including constitutional issues. See Deerfield Ests., Inc. v. Twp. of E. Brunswick, 60 N.J. 115, 120 (1972) (providing that constitutional issues that were not raised and argued below will not

be considered unless raising a question of jurisdiction or "present[ing] a matter of real public importance"). See also State v. Walker, 385 N.J. Super., 388, 410 (App. Div. 2006).

As the Amici are setting forth arguments not previously raised by either party, the Court should not consider them. If the Court is inclined to consider the arguments, then the scope should be limited. The issue before the Court is narrow: does Amended Policy 5756 unlawfully treat students differently based on their "gender identity and expression" in violation of LAD, N.J.S.A. 10:5-4.

Instead, the Amici propose that the Court should utilize a three-factor test in determining the application of equal protections by weighing the governmental interest in the statutory classification of equal protections against the interests of the affected class. The test considers the following: 1) the nature of the right at stake; 2) the extent to which the challenged statutory scheme restricts that right; and 3) the public need for statutory restriction. Lewis v. Harris, 188 N.J. 415, 443 (2006).

The nature of the right at stake is squarely addressed and considered by Amended Policy 5756. The policy acknowledges that the LAD makes it unlawful for schools to subject individuals to differential treatment based on gender identity and expression. The narrowly tailored policy strikes a balance between the fundamental and constitutional rights of parents to control the

upbringing of their child with the free expression of a child within school. More specifically, the policy **does not require** notification when a student requests a different name in class, on non-official records, due to one's attire, or based upon any confidential conversations a student may have with a teacher or counsel. Instead, notification is triggered for one of the four following events:

i) A student formally changes a mandatory student record, including gender, as defined by N.J.A.C. 6A:32-7.3(b)(1);

ii) A student participates in a sport for a gender other than that assigned at birth;

iii) Referring a student for outside health services, and the student's sexual identity and expression is germane to the referral; and

iv) A student uses a gendered bathroom, other than that assigned at birth, except a gender-neutral bathroom.

Further, prior to any notification, a meeting is held with the student to explain the process. The student is provided with the opportunity to self-disclose to their family and additional resources to help through the process (i.e. role playing with the administrator, counseling and any other resources to facilitate the family's acceptance and support of the student's transgender status). The policy also takes into account any documented evidence that

disclosure would subject the student to physical or emotional harm or abuse. Even considering the test proposed by the Amici, it is clear that the construction of Amended Policy 5756 was created to balance the constitutional rights of parents with adequate safeguards to protect the well-being of the student.

Moreover, it important to note the paradoxical nature of the Amici's position in this matter. The Amici contend that transgender students will be targeted or treated differently under Amended Policy 5756, which the LAD intends to prevent. However, by affording transgender students the right to avoid parental notification for changing mandatory student record, participating in a sport other than the assigned at birth, and any referral of a student to outside health services when such referral is germane to the referral, they are being treated differently than cisgender students. Thus, it would be inequitable to support such a policy.

IV. The Studies Cited by the Amici should be disregarded as they constitute inadmissible hearsay, are irrelevant, unduly prejudicial, and lack any probative value pursuant to N.J.R.E. 801, 802, 401 and 403(a).

The Amici cite several surveys and studies in an attempt to support the proposition that disclosure of a student's gender identity to their parent is harmful. However, such studies are inadmissible hearsay that should not be considered by the Court.

R. 1:6-6 provides only facts which are admissible in evidence may be considered by the Court when hearing a motion. The studies upon which Amici rely constitute inadmissible hearsay, are irrelevant and unduly prejudicial and should not be considered by this Court pursuant to N.J.R.E. 801, 802, 401 and 403(a).

N.J.R.E. 801 and 802 provide that hearsay, defined as an out of court statement offered to prove the truth of the matter asserted, is not admissible. The various studies cited are the exact definition of hearsay and, if considered by the Court, deprive the Board Defendants of the opportunity for cross-examination. As such, these studies cannot be considered.

N.J.R.E. 401 provides that relevant evidence is generally admissible. The studies upon which the Amici rely are irrelevant to the Court's disposition of the issue before it. The studies cited are self-reported surveys with no scientific analysis, are subjective and fails to provide any basis that it represents the entire community at issue. Rather, these studies are inflammatory, unduly prejudicial and provide no probative value, as they attempt to portray the transgender community as depressed, fearful and suicidal. In that regard, N.J.R.E. 403(a) provides, "Except as otherwise provided by these rules or other law, the court may exclude relevant evidence

if its probative value is substantially outweighed by the risk of: (a) Undue prejudice, confusing the issues, or misleading the jury…"

Accordingly, there are a number of studies and discourse which demonstrate that parental involvement with transitioning students is imperative for the health and well-being of transgender students.[1] Despite studies being available on both sides, these studies still constitute as hearsay, are biased and unduly prejudicial, and cannot be considered by this Court.

Respectfully submitted,

s/ Bruce W. Padula

Bruce W. Padula

c: Respondents' Counsel of Record
Client

4859-9729-7846, v. 4

---

[1] For example:

1. Affidavit and Expert Opinion of Dr. Erica E. Anderson, PhD, dated February 3, 2023, submitted in B.F., et al v. Kettle Moraine School District, 21-cv-1650, Wisconsin Circuit Court ("Parental Involvement is Essential at Every Stage of the [transition] Process," ¶¶ 58-78, concluding that "a school policy that involves school adult personnel in socially transitioning a child or adolescent without the consent of parent or over their objection violates widely accepted mental health principles and practice" Id. at ¶ 78.) See Da172-215
2. New York Times, "When Students Change Gender Identity, and Parents Don't Know; Educators are facing wrenching new tensions over whether they should tell parents when students socially transition at school," January 22, 2023. See Da216-223.
3. "Are Teachers Obliged to Tell Parents Their Child Might Be Trans? Courts May Soon Decide," Sawchuck, Education Week, April 28, 2022. See Da224-232.