HANOVER TOWNSHIP BOARD OF EDUCATION AND HANOVER TOWNSHIP PUBLIC SCHOOLS, Defendants-Appellants, v. MATTHEW J. PLATKIN, ATTORNEY GENERAL OF NEW JERSEY, AND SUNDEEP IYER, DIRECTOR, NEW JERSEY DIVISION ON CIVIL RIGHTS Plaintiffs-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000371-23 T5 Civil Action On Appeal From: Morris County Chancery Division Docket No.: MRS-C-00042-23 Date of Submission to Court: January 18, 2024

BRIEF OF DEFENDANTS-APPELLANTS HANOVER TOWNSHIP BOARD OF EDUCATION AND HANOVER TOWNSHIP PUBLIC SCHOOLS

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PRELIMINARY STATEMENT

This brief is submitted on behalf of the defendants-appellants, Hanover Township Board of Education and Hanover Township Public Schools (collectively, the "Board"), in support of their appeal from the trial court's September 29, 2023 order granting the application for preliminary restraints filed by the State Attorney General and Division on Civil Rights (collectively, "Plaintiffs") and restraining the Board's Original and Revised Policy 8463 providing for notification to parents of matters adversely impacting their children's health, safety and/or social/emotional well-being.

As more fully delineated below, the trial court failed to properly apply the criteria for injunctive relief and dispensed with the clear and convincing standard which governs injunctive relief. The court failed to consider: (i) whether Plaintiffs established a settled legal right; and (ii) the public interest. The court found a likelihood of success based on distortion of the policy language, baseless inference and in derogation of the Constitutional right of parental autonomy. The court found irreparable harm based on generalized studies, its presumption of parental malevolence and further distortion of the policy language -- as opposed to facts. The court's analysis of relative hardships disregarded harm to fundamental Constitutional rights. In addition, the court decided a non-justiciable, moot issue in restraining a repealed policy.

PROCEDURAL HISTORY and STATEMENT OF FACTS[1]

The Board operates a kindergarten to eighth grade school district. On May 16, 2023, the Board adopted Policy 8463 entitled "Parental Notice of Material Circumstances" which provided for parental notification of facts and/or circumstances materially impacting students' physical and/or mental health, safety and/or social/emotional well-being (the "Original Policy") (**Da1-2**). The next day, Plaintiffs filed: (1) a Complaint alleging that the Original Policy discriminated against students on the basis of gender identity, gender expression and affectional or sexual orientation in violation of the New Jersey Law against Discrimination ("LAD"), N.J.S.A. 10:5-1 *et seq*. (**Da3-23**); and (2) an Order to Show Cause ("OTSC") application seeking temporary and preliminary restraints against the Original Policy pending disposition of Plaintiffs' administrative complaint with the Division on Civil Rights ("DCR") challenging the policy's legality.

On May 18, 2023, the trial court entered an OTSC with temporary restraints (**Da119-122**). The Board filed an opposition on May 23, 2023. The court heard oral argument on May 30, 2023. At the court's instance, the parties engaged in discussions to resolve the matter via a revised policy but

[1] The Procedural History and Statement of Facts are addressed in tandem as they are intertwined.

were unsuccessful. Letter from Matthew Giacobbe, Esq. to the court dated July 24, 2023 (**Da199-200**).

As a result of the Board's discussions with Plaintiffs, on June 6, 2023, the Board repealed the Original Policy and passed Revised Policy 8463 which provides for parental notification "by the appropriate administrator and/or staff member" "whenever a student discloses an issue and/or exhibits behaviors that may have an adverse impact on the student's physical and/or mental health, safety and or social/emotional well-being." (**Da110**). The policy provides that it "does not create a duty, implicit or otherwise, for any staff member or administrator to investigate, substantiate or validate the issue and/or behaviors giving rise to a duty to inform…." It further provides that "notification cannot be based solely on a student's actual and/or perceived protected characteristics under" the LAD. The policy imposes a duty of confidentiality and candor regarding parental notifications. The policy dispenses with parental notification whenever there is a reasonable belief that notification would place a student at risk of abuse or neglect as defined under N.J.S.A. 9:6-1. In those circumstances, the policy instead provides for notification to the: (1) Department of Children and Families, Institutional Abuse, Division of Child Protection and Permanency; and (2) Hanover Police Department.

On June 23, 2023, the Board filed its Answer to the Complaint (**Da24-25**). On July 14, 2023, the Board issued Regulation 8463 delineating the protocol for parental notification under Revised Policy 8463 **Da112**). The regulation provides that:

> [P]arental notification shall be made by the appropriate administrator and/or the observing certificated staff member, and an appropriate certificated staff member (e.g., school nurse, school psychologist, school guidance counselor) if deemed necessary by the appropriate administrator. For non-certificated personnel, parental notification shall be made by the appropriate school administrator or her/his designee.

In addition, the regulation reiterates the policy's prohibition against parental notification "based solely on a student's actual and/or perceived protected characteristics under" the LAD. The regulation also lists protected classes under the LAD.

On August 10, 2023, Plaintiffs filed a Supplemental Complaint (**Da36-72**) along with a supporting certification. Third Certification of Attorney General (**Da74-78**). The Supplemental Complaint sought preliminary restraints against the repealed Original Policy as well as Revised Policy 8463 based on the same allegations of discrimination. On August 24, 2023, the Board filed its opposition including a certification of counsel (**Da221-223**) as well as a supplemental certification of counsel (**D321-327**) filed on August 27, 2023.

By order entered August 24, 2023 (**Da418-419**), the court made the temporary restraints applicable to both the Original Policy and Revised Policy 8463 and extended the temporary restraints until such time as it rendered a decision on Plaintiffs' supplemental application for preliminary restraints.

On September 6, 2023 the court heard argument on Plaintiffs' supplemental application for preliminary restraints. On September 11, 2023, the Board repealed its voluntary Policy 5756 on transgender students (**Da141-144**). On September 13, 2023, Plaintiffs filed a motion in aid of litigants rights seeking an order compelling the Board to reinstate its voluntary Policy 5756. On September 14, 2023, the Board filed its Answer to the Supplemental Complaint (**Da363-392**). On September 28, 2023, the Board filed its opposition to Plaintiffs' motion in aid of litigants rights.

On September 29, 2023, the court entered an order preliminarily enjoining and restraining the Board "from enforcing, implementing, or otherwise giving effect to … [the Original] Policy … or Revised Policy 8463, until resolution of the litigation arising from a separate administrative complaint filed with the DCR on May 17, 2023 and amended on August 10, 2023." (**Da393-417**). The order denied Plaintiffs' motion in aid of litigants rights.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO ANALYZE WHETHER PLAINTIFFS ASSERTED A SETTLED LEGAL RIGHT (Da393-417)

A. The Applicable Standard is *De Novo*

"Although decisions relating to injunctive relief are normally reviewed for abuse of discretion, … review is *de novo* where the disputed issue is a question of law." Stoney v. Maple Shade Twp., 426 N.J. Super. 297, 307 (App. Div. 2012). The disputed issue on this appeal is a question of law, to wit, the trial court's application of the legal criteria for injunctive relief.

Our Courts recognize that injunctive relief, even when only to preserve the *status quo*, represents a significant intrusion into the affairs of the parties and the interests of the public. Waste Mgmt. of New Jersey, Inc. v. Union County Utilities Auth., 399 N.J. Super. 508, 538 (App. Div. 2008). Thus, they have held that injunctive relief is an extraordinary remedy to be used sparingly and to be granted only 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). Accordingly, a party seeking such relief must satisfy a "particularly heavy burden." Guaman v. Velez, 421 N.J. Super. 239, 247-248 (App. Div. 2011).

In order to obtain the extraordinary remedy of injunctive relief Plaintiffs must establish, by clear and convincing evidence, all of the following factors prescribed by Crowe v. De Gioia, 90 N.J. 126 (1982) and its progeny: (1) Plaintiffs' claim is based on a well-settled legal right; (2) Plaintiffs have a reasonable probability of success on the merits; (3) Plaintiffs will suffer irreparable harm if the relief is denied; and (4) the harm to Plaintiffs, if the injunction is denied, will be greater than the harm to the opposing party if the injunction is granted. Crowe, 90 N.J. at 132-134. *See also* Guaman, *supra*, 421 N.J. Super. at 247-248 (a successful applicant must demonstrate all Crowe factors by clear and convincing evidence); Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012) (same); Dolan v. De Capua, 16 N.J. 599, 614 (1955) (injunctive relief is not granted absent clear and convincing proof).

Plaintiffs must also show "that the public interest will not be harmed." Waste Mgmt., *supra*, 399 N.J. Super. at 520 *citing* Crowe, 90 N.J. at 132–134; Brown, *supra*, 424 N.J. Super. at 183; J.H. Renarde, Inc. v. Sims, 312 N.J. Super. 195, 203 (Ch. Div. 1998). Injunctive relief "may be issued only through the careful application of these principles." Waste Mgmt., 399 N.J. Super. at 538.

B. The Court Failed to Consider whether the LAD Creates a Well-Settled Legal Right to Exclude Parents from Information about their Children

It is well-established that "temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, 90 N.J. at 133.

Thus, "an interlocutory injunction should not issue when a legal question upon which the case turns is not free from doubt." J.H. Renarde, 312 N.J. Super. at 201 *citing* Accident Index Bureau, Inc. v. Male, 95 N.J. Super. 39, 50 (App. Div. 1967) ("An interlocutory injunction should not issue if plaintiff's asserted rights are not clear as a matter of law").

The trial court did not analyze the first factor, *i.e.*, whether Plaintiffs advanced a well-settled legal right under the LAD notwithstanding that Plaintiffs' claim is one of first impression -- as evinced by the lack of LAD precedent on the issue of parental notification policies. "In determining whether to grant a preliminary injunction, a trial court must consider … **whether the legal right underlying [the applicant's] claim is unsettled** …." Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 395 (App. Div. 2006) (emphasis added) *citing* Crowe v. De Gioia, 90 N.J. 126, 132–134 1982).

Notably, the trial court adduced no LAD precedent or statutory provision on the issue of parental notification policies versus the rights of LGBTQ+ students under the LAD -- as there is none. The court invoked the LAD, but the LAD neither: (i) directs that parents be kept ignorant of matters adversely affecting their children because the matters incidentally implicate a protected characteristic such as LGBTQ+ status; nor (ii) equates parents' knowledge of their child's LGBTQ+ status with discrimination. The court cited no

case law or statutory provision barring notification to parents of matters bearing a potentially adverse impact upon their children whenever a protected characteristic is incidentally involved. There is no such law and there can be no such law given the fundamental Constitutional parental right to autonomy in childrearing -- which is further addressed below.

The claims herein entail the tension between this Constitutional parental right and a purported blanket right of minors to withhold information from their parents whenever such information involves a protected characteristic -- a right which has not been established in the LAD nor its case law. Rather, the purported right is unsettled and is part of an uncertain, evolving area of the law. *See* Stephen Sawchuk, *Are Teachers Obliged to Tell Parents their Child Might be Trans?,* Education Week, April 28, 2022, p. 5-6. (**Da287-295**). Nor is there any authority according minors a well-settled blanket right of privacy to the exclusion of their parents except where parents are adjudged unfit. Moriarty v. Bradt, 177 N.J. 84, 112 (2003) (the law should not disturb the parent/child relationship except upon a clear showing of a parent's gross misconduct or unfitness). Therefore, the trial court erred in ignoring this fundamental prong of the Crowe test.

POINT II

THE TRIAL COURT ERRED IN ENTERING RESTRAINTS DESPITE A LACK OF CLEAR AND CONVINCING EVIDENCE OF A LIKELIHOOD OF SUCCESS ON THE MERITS (Da393-417)

A. Lack of Clear and Convincing Evidence of Likelihood of Success on Claim of LAD Violation.

(i) Neither the Law nor the Policy Language support a LAD Violation

In analyzing the factors for injunctive relief, the trial court dispensed with the requisite clear and convincing standard. According to the court, because "we are asking for status quo", Waste Mgmt. "minimizes the Crowe factors" so "we don't have to go into great detail with regard to hardship or likelihood of success on the merits or otherwise." T27:8-15. On the contrary, Waste Mgmt. cautioned that its decision "does not permit the issuance of an injunction, which preserves the status quo … in all cases." Waste Mgmt., 399 N.J. Super. at 534. Rather, the factors for injunctive relief "must be clearly and convincingly demonstrated" and, even when the relief sought is the preservation of the *status quo*, an "injunction must be squarely based on sound judicial discretion … which **may** permit the court to place less emphasis on a particular Crowe factor **if** another greatly requires the issuance of the remedy." Waste Mgmt., 399 N.J. Super. at 520 (emphasis added). Waste Mgmt. neither minimized the Crowe factors nor dispensed with the clear and convincing standard but instructed that the Crowe factors "must be weighed" pursuant to

"the exercise of an exacting judicial discretion…." Waste Mgmt., 399 N.J. Super. at 534-535.

The trial court erroneously held that Plaintiffs established a likelihood of success on the merits based on its conclusion that "enforcement of the Revised Policy **may** constitute unlawful discrimination in violation of the LAD." (p. 14) (emphasis added) (**Da406**). Despite this ruling, the court adduced no precedent or statutory authority in support of its conclusion. Significantly, parental notification of a potentially adverse impact, even if it implicates LGBTQ+ status, is not a practice declared to be unlawful under the LAD. While the court cited the LAD's public accommodation provision (N.J.S.A. 10:5-12(f)), (p. 13) (**Da405**), it did not reference clear and convincing evidence that the Revised Policy involves the following conduct proscribed under N.J.S.A. 10:5-12(f)**:** "to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges" of a public place of accommodation (*i.e.*, school) "or to discriminate against any person in the furnishing" of such accommodations, advantages, facilities or privileges. There is no claim that LGBTQ+ students are not afforded educational services and access to scholastic and/or extracurricular activities on par with all other students. Rather, Plaintiffs' contention was that LGBTQ+ students should be exempted from the Revised Policy whenever parental notification incidentally

involves their LGBTQ+ status. Neither the LAD nor pertinent precedent provide that parents must be deprived of such information.

The trial court relied on its interpolation of language found nowhere in the plain language of the Revised Policy or its accompanying Regulation in concluding that the policy "creat[es] a condition where staff and administrators may engage in activities violative of the LAD." (p. 14) (**Da406**). Even though there is no language in the policy authorizing consideration of protected characteristics, the court concluded that the policy's language prohibiting notification based solely on protected characteristics "infers" consideration of protected class membership "as a result of subjective perception that a student suffered an adverse impact" by mere virtue of a protected characteristic (p. 13-14) (**Da405-406**). The court's conclusion presumed that school personnel equate protected characteristics with adverse impact triggering parental notification thereby ascribing discriminatory motives to school personnel without any factual basis. The court further presumed that the Revised Policy contemplates that LAD protected characteristics constitute an adverse impact upon student health, safety and well-being and thereby "invites violation of the LAD." (p. 14) (**Da406**).

The court's conclusions are detached from - both - reality and the policy's plain language. First, the trial court concedes that "parental autonomy

is … a fundamental liberty interest protected by the … Constitution" (p. 19, **Da411**), but then completely ignores the reality that protected characteristics may be incidentally implicated in matters involving adverse impacts of which parents should be apprised pursuant to their Constitutional autonomy. It is beyond serious dispute that a protected characteristic could be an incidental fact in a situation involving an adverse impact. Indeed, even the State's non-binding Transgender Guidance contemplates disclosure of a student's transgender status "as allowed by law" and for "health and safety" reasons (**Da228-234**). The court's position, taken to its logical extreme, would prohibit notifying a parent that their child is pregnant because pregnancy is a protected characteristic under the LAD. N.J.S.A. 10:5-12(f). *But see* Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000) (finding a constitutional violation where swim coach did not advise parents of his suspicion that their daughter was pregnant). Likewise, parents could not be notified of their child's anorexia, body dysmorphia, cutting -- all protected characteristics (*e.g.*, disabilities) under the LAD. The court essentially ignores that effective parenting necessarily presupposes parental awareness of matters affecting one's child irrespective of whether such matters implicate LGBTQ+ status. A parent cannot guide a child through the child's gender identification journey when school personnel actively exclude the parent therefrom.

Second, a plain reading of Revised Policy 8463 and its regulation confirms that it is a neutral policy which premises parental notification upon any issue involving an adverse impact on student health, safety or well-being, irrespective of protected classification. The Revised Policy's actual disclosure provisions contain no language either authorizing notification because of protected characteristics or defining protected characteristics as an adverse impact:

> **Duty to Inform**
> All staff members (certificated and non-certificated personnel) and administrators shall take necessary steps -- after first notifying and consulting with an appropriate school administrator (e.g., the Principal and/or his/her designee) -- to promptly inform a student's parent(s) whenever a student discloses an issue and/or exhibits behaviors that may have an adverse impact on the student's physical and/or mental health, safety and or social/emotional well-being. **Such notification cannot be based solely on a student's actual and/or perceived protected characteristics under the New Jersey Law Against Discrimination**, N.J.S.A. 10:5-12(f). **Parental notification is required** under this policy **when there is** an observation and/or indicia of **an adverse impact on the student's physical and/or mental health, safety and or social/emotional well-being**. **The notification shall be made by the appropriate administrator and/or staff member**.
>
> **Duty of Candor and Confidentiality**
> In addition to the foregoing, all staff members and administrators shall have a duty of candor with respect to all communications with parents required under this Policy. Further, staff members and administrators shall maintain the confidentiality of such communications in accordance with applicable Federal and State law, including without limitation Policy 8335.

Revised Policy 8463 (**Da110**) (emphasis added).

> 1. Duty to Inform Protocol
> The following protocol shall be utilized when parental notification is required pursuant to Policy 8463. Specifically, **parental notification shall be made by the appropriate administrator and/or observing certificated staff member and an appropriate certificated staff member** (e.g., school nurse, school psychologist, school guidance counselor) if deemed necessary by the appropriate administrator. **For non-certificated personnel, parental notification shall be made by the appropriate school administrator** or his/her designee.
> ….
> 4. Discrimination Prohibited
> Policy 8463 requires parental notification whenever a student discloses an issue and/or exhibits behaviors that may have an adverse impact on the student's physical and/or mental health, safety and/or social/emotional well-being. **Such notification cannot be based solely on a student's actual and/or perceived protected characteristics under the New Jersey Law Against Discrimination**, N.J.S.A. 10:5-12(f). Protected classes for schools under the New Jersey Law Against Discrimination N.J.S.A. 10:5-12(f) include race, creed (religion), color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality.

Revised Policy 8463 Regulation (**Da112**) (emphasis added).

(ii) No Clear and Convincing Evidence of Disparate Treatment

Although Plaintiffs claimed disparate treatment under the LAD, there was no clear and convincing showing thereof under the Revised Policy. "Disparate treatment [under the LAD] is demonstrated when a member of a protected group is shown to have been singled out and treated less favorably

than others similarly situated on the basis of an impermissible criterion under the anti-discrimination laws." Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super. 55, 74 (App. Div. 2004). Plaintiffs must demonstrate that the Board was "motivated by discriminatory intent." Mandel, 373 N.J. Super. at 76. "Proof of discriminatory motive is critical" for a disparate treatment claims. Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 398 (2005); Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 81 (1978) (same). *See also* Jason v. Showboat Hotel & Casino, 329 N.J. Super. 295, 304 (App. Div. 2000) (claim of disparate treatment requires plaintiff to prove a discriminatory motive); Maietta v. United Parcel Service, Inc., 749 F. Supp. 1344, 1370 (D.N.J. 1990) (plaintiff bears the ultimate burden of persuasion in a disparate treatment case to show treatment was caused by purposeful or intentional discrimination).

The plain language of the Policy refutes the trial court's above-described attempts to interpret Revised Policy 8463 as discriminatory. The plain, unambiguous language of the policy controls. *See* Paff v. Byrnes, 385 N.J. Super. 574, 579 (App. Div. 2006). The court cannot presume that the Board intended something other than that expressed by the policy's plain language. Soto v. Scaringelli, 189 N.J. 558, 569–570 (2007). The court cannot engage in conjecture or surmise which will circumvent the plain language. Id. *See also*

In re Civil Commitment of J.G., 322 N.J. Super. 309, 322 (App. Div. 1999) (statutory language should be construed as written and not according to some unexpressed intention because a "court is not at liberty to indulge in a presumption that the Legislature intended something more than what it actually wrote in the law").

The Revised Policy's plain terms do not provide for disparate treatment based on protected class status. Contrary to the trial court's distorted gloss, the Policy neither authorizes notification because of students' LGBTQ+ status nor defines LGBTQ+ status as an adverse impact (p. 13-14) (**Da405-406**). It does not exempt non-LGBTQ+ students from parental notification of issues with potentially adverse impact. Rather, the Revised Policy applies equally and uniformly to all students regardless of their protected class status. Parental notification under the Revised Policy is not triggered by protected class status, but rather by neutral criteria, *i.e.*, when "a student discloses an issue and/or exhibits behaviors that may have an adverse impact on the student's physical and/or mental health, safety and or social/emotional well-being." Revised Policy and Regulation (**Da110**; **Da112**). Significantly, the mere fact of a student's membership in a protected class does not trigger notification under the Revised Policy 8463 as the policy expressly prohibits "notification … based solely on a student's actual and/or perceived protected

characteristics under the" LAD (**Da110**; **Da112**). As set forth above, this provision recognizes the reality that a protected characteristic can be an incidental circumstance in a situation involving an adverse impact.

Thus, the Policy treats LGBTQ+ students in the exact same manner as any other student who discloses an issue and/or exhibits behavior that may have an adverse impact on the student's physical and/or mental health, safety and or social/emotional well-being. *See* Doe v. Princeton Univ., 790 Fed. Appx. 379, 383 (3d Cir. Oct. 25, 2019) (to show disparate treatment on the basis of sex, a plaintiff may show that similarly situated individuals of the other sex experienced different treatment).

(iii) No Clear and Convincing Evidence of Disparate Impact

Although Plaintiffs claimed disparate impact under the LAD, there was no clear and convincing showing thereof under the Revised Policy. Plaintiffs "must show that a facially neutral policy resulted in a significantly disproportionate or adverse impact on members of the affected class." Schiavo v. Marina Dist. Development Co., LLC, 442 N.J. Super. 346, 369 (App. Div. 2015); Gerety, 184 N.J. at 399. Moreover, an adverse effect on a single person, or even a few persons "is not sufficient to establish disparate impact." Schiavo, 442 N.J. Super. at 370.

The court cited no clear and convincing evidence that the facially neutral parental notification policy resulted in any disproportionate adverse impact on

LGBTQ+ students but simply concluded that the policy "opened the door to" "[m]andatory differential treatment based on LAD-protected characteristics" (p. 14, **Da406**) based on nothing more than unwarranted inference and its distortion of the policy's plain language. Significantly, the Revised Policy expressly applies to any student experiencing issues with a potentially adverse impact. LGBTQ+ students are not the only students who experience such issues and the Policy does not exempt non-LGBTQ+ students from parental notification. Rather, non-LGBTQ+ students are equally subject to parental notification of matters bearing a potentially adverse impact on student physical/mental health, safety and/or social/emotional well-being. The court adduced no evidence otherwise.

B. Lack of Clear and Convincing Evidence of Likelihood of Success on Overcoming Constitutional Parental Rights.

The court concluded that the Revised Policy invites state interference with parents' rights to raise their children "because the Revised Policy actually implies an obligation on school staff to investigate and verify information before disclosure" (p. 19) (**Da411**). The court's conclusion is contrary to the Policy's express language that it "does not create a duty … for any staff member to investigate, substantiate or validate the issue and/or behaviors giving rise to" the parental notification (**Da110**).

The court also concluded that "enjoining the Revised Policy would not infringe upon parental rights" because Plaintiffs are "not targeting parental rights

per se…." (p. 19) (**Da411**). This conclusion ignores that excluding parents from matters affecting their children hinders parents' exercise of their Constitutional autonomy. Parents cannot provide input on matters impacting their children's lives -- whatever they may be -- when these matters are actively concealed from them by school personnel. Parents' involvement in their child's development and overall well-being requires knowledge of potentially adverse situations. The trial court adduced no case law overcoming the paramount right of Federal Constitutional parental autonomy in favor of an unsettled LAD claim of parental exclusion, because no such case law exists. Moreover, pursuant to the Supremacy Clause of the Federal Constitution (U.S. Const. Art. VI, cl. 2), "state laws and constitutional provisions that conflict with the Federal Constitution are without effect." Comm. to Recall Robert Menendez From the Office of U.S. Senator v. Wells, 204 N.J. 79, 103 (2010).

Courts nationwide, including the United States Supreme Court and the New Jersey Supreme Court, 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). *See also* Smith v. Org. of Foster Families, 431 U.S. 816, 845 (1977) ("The liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition").

The United States Supreme Court has consistently 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 v. Granville, 530 U.S. 57, 68–69 (2000).

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). 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.

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 … 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, 225 F.3d at 303 *citing* M.L.B.

v. S.L.J., 519 U.S. 102 (1996). "Federal jurisprudence, reaffirmed over nearly a century, recognizes that the Due Process Clause of the Fourteenth Amendment protects the 'right [] ... to direct the education and upbringing of one's children.'" Major v. Maguire, 224 N.J. 1, 14 (2016).

The right of parents to raise their children without undue state interference is also well established in our state courts. Dempsey v. Alston, 405 N.J. Super. 499, 511 (App. Div. 2009). The New Jersey Supreme Court recognizes parental autonomy deriving from the "fundamental right of parents to raise their children as they see fit." Moriarty, 177 N.J. at 103, 115. Our State's highest court holds 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). Our Appellate Division elaborated on that right as follows:

> 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).

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. "Deference to parental autonomy means that the State does not second-guess parental decision making or interfere with the shared opinion of parents regarding how a child should be raised. Nor does it impose its own notion of a child's best interests on a family. Rather, the State permits to stand unchallenged parental judgments that it might not have made or that could be characterized as unwise. That is because parental autonomy includes the freedom to decide wrongly." Fawzy, 199 N.J. at 473–474.

The court's conclusion -- that parental rights are not compromised because they are not "target[ed] … per se" (p. 19) (**Da411**) -- is contrary to this required Constitutional deference as it would deprive parents of fundamental information critical to their ability to actively guide and foster their children's moral and psycho-social development. In Gruenke, 225 F.3d at 307, the Third Circuit determined that the "parents … sufficiently alleged a

constitutional violation" where a swim coach who suspected their daughter/student was pregnant did not advise the parents thereof but instead asked the student to take a pregnancy test and discussed the matter with the school counselor. The Court expressed "considerable doubt about the[] right" of school counselors "to withhold information of this nature from the parents." Id.[2]

More recently, in Mirabelli v. Olson, 2023 WL 5976992, __ F.3d __ (S.D. Cal., Sept. 14, 2023) the United States District Court for the Southern District of California entered preliminary restraints in favor of teachers challenging a school district policy which prohibited them from apprising parents of their child's transgender status absent the child's consent. The teachers did not seek to telephone parents to specifically report a child's gender identification but they did not want to conceal pertinent information that could impact student health and well-being or affirmatively mislead parents. Id. at *4. The court observed that, as result of the policy, "[p]arents are left outside" (Id.) because teachers who are in the "position to observe the student and form[] the opinion that the intellectual or social health and well-

[2] The Court dismissed the parents' familial privacy claim on immunity grounds because, at the time of the incidents in question (*i.e.*, 1997), the parents' claim "in the unique circumstances of this case cannot be said to have been clearly established."

being of the student may be at risk related to gender non-conformance or dysphoria … [are] not permitted to inform the parents…." Id. at *5.

Although relief was granted based on First Amendment free speech and free exercise grounds, the court reasoned that the district's policy was "in direct tension with the federal constitutional rights of parents to direct the upbringing and education of their children" and that the "policy of elevating a child's gender-related choices to that of paramount importance, while excluding a parent from knowing or, or participating in, that kind of choice, is as foreign to federal constitutional and statutory law as it is medically unwise." Id. at *8, *9. The court observed that the Family Educational Rights and Privacy Act (20 U.S.C. §1232g), which grants parents access to their children's school records, subordinates the privacy rights of the child to the parents' right to know and in favor of parental involvement which "includes more than academics and extends to matters of health." Id. at *9.

The court held that the teachers demonstrated a likelihood of success on their free speech claim because the policy would require them to violate the law by acting in derogation of parents' constitutional rights. Id. at * 12. As for the free exercise claim, the court reasoned that the school district was "mistaken" in "plac[ing] a child's right to privacy above, and in derogation of, the rights of a child's parents. The Constitution neither mandates nor tolerates

that kind of discrimination." Id. at *15. In its conclusion, the court further reasoned:

> A request to change one's own name and pronouns may be the first visible sign that a child or adolescent may be dealing with issues that could lead to gender dysphoria or related coexisting mental-health issues. Communicating to a parent the social transition of a school student to a new gender … is called discrimination/harassment by the defendants, despite having little medical or factual connection to actual discrimination or harassment.
> ….
> Parental involvement is essential to the healthy maturation of schoolchildren. The … School District has adopted a policy without parent input that places a communication barrier between parents and teachers.
> ….
> [The] policy appears to undermine [parents'] constitutional rights while it conflicts with knowledgeable medical opinion.

Id. at *18.

The same concerns arise in this case where the trial court's decision empowers the State to decide what is appropriate for parents to know about their minor children and when it is appropriate for them to know it – in derogation of parents' Constitutional right to be actively involved in their children's development and to decide what is best for their children. As the Supreme Court explained, "Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state…. Most children, even in adolescence, simply are not able to make

sound judgments concerning many decisions…. Parents can and must make those judgments." Parham v. J.R., 442 U.S. 584, 603 (1979). The Supreme Court affirmed parental "authority to decide what is best for the child" and that "Neither state officials nor federal courts are equipped to review such parental decisions." Id. at 604.

POINT III

THE TRIAL COURT ERRED IN ENTERING RESTRAINTS DESPITE A LACK OF CLEAR AND CONVINCING EVIDENCE OF SUBSTANTIAL AND IMMINENT IRREPARABLE HARM (Da393-417)

The burden is on the party seeking injunctive relief to show "irreparable injury … [that is] is substantial and imminent…." Brown, 424 N.J. Super. at 183. The trial court did not find substantial and imminent irreparable harm but only concluded that "irreparable injury **may** result" (p. 16) (**Da408**) and "Students **may** be subject to irreparable harm" if the Revised Policy were enforced because they "**may** find themselves concerned that personal information regarding sexuality, sexual orientation, transitioning, gender identity or expression … may be disclosed to their parents." (p. 15) (emphasis added) (**Da407**).

The court based its conclusory finding on general studies indicating that: (1) 40% of transgender respondents had neutral or unsupportive families, 10% reported that an immediate family member had been violent towards them and 15% ran away from home or were kicked out of the house; and (2) LGBTQ

youth are more likely to be apprehensive about a policy requiring parental disclosure of LGBTQ identification or use of a different name or pronoun (p. 15-16) (**Da407-408**). In analyzing irreparable injury, the court concluded that these generalized studies "provided unrefuted evidence of disparate impact" (p. 16) (**Da408**) -- as opposed to imminent, irreparable harm from the policy.

Moreover, the court's finding presumes, without proof, that parents who are notified will inflict irreparable harm upon their children thereby prejudging all parents as unfit -- diametrically opposed to the law's presumption that fit parents act in the best interests of their children. Troxel, 530 U.S. at 68. "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." Parham, 442 U.S. at 603. "That some parents may at times be acting against the interests of their children … creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests." Id., at 602–603. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents…." Santosky v. Kramer, 455 U.S. 745, 753 (1982). Furthermore, the court's unwarranted presumption ignores that the policy dispenses with parental notification whenever there is a

reasonable belief that notification would place a student at risk of abuse or neglect (**Da110**).

The court also ignored that "keeping parents uninformed and unaware of significant events that beg for medical and psychological experts to evaluate a child … is likely to cause greater harm…." Mirabelli, 2023 WL 5976992, at *14. The trial court's approach of excluding parents "is dramatically inconsistent with respected medical opinions." Mirabelli, 2023 WL 5976992 at *5. In Mirabelli, the court quoted from the declaration of Dr. Erica E. Anderson, PhD, a transgender woman and expert in the field of children and adolescents navigating gender identity issues, as follows:

> "A child or adolescent who exhibits a desire to change name and pronouns should receive a careful professional assessment prior to transitioning;" "A request to change name and pronouns may be the first visible sign that the child or adolescent may be dealing with gender dysphoria or related coexisting mental-health issues;" "Parental involvement is necessary to obtain professional assistance for a child or adolescent experiencing gender incongruence, to provide accurate diagnosis, and to treat any gender dysphoria or other coexisting conditions;" "A school-facilitated transition without parental consent interferes with parents' ability to pursue a careful assessment and/or therapeutic approach prior to transitioning, prevents parents from making the decision about whether a transition will be best for their child, and creates unnecessary tension in the parent-child relationship. Nor is facilitating a double life for some children, in which they present as transgender in some contexts but cisgender in other contexts, in their best interests."

Id. at *6.

> "[c]ircumventing, bypassing, or excluding parents from decisions about a social transition undermines the main support structure for a child or adolescent who desperately needs support."

Id. at *7.

Indeed, there are myriad studies and discourse which demonstrate that parental involvement with transitioning students is imperative for the health and well-being of transgender students. For example, see:

- 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) (**Da236-277**);

- New York Times, "When Students Change Gender Identity, and Parents Don't Know", January 22, 2023 (**Da279-285**); and

- "Are Teachers Obliged to Tell Parents Their Child Might Be Trans? Courts May Soon Decide," Sawchuck, Education Week, April 28, 2022 (**Da287-295**).

In addition, the court's finding of irreparable harm is premised upon distortion of the Revised Policy's language. For instance, the policy contains no mention of discipline yet the court speculated that the policy "has the **potential** to cause irreparable harm to school staff" (p. 17, 18) (**Da409-410**) because: (1) the policy "will subject staff to discipline if they fail to correctly interpret" "the terms 'behaviors,' 'adverse impact,' and 'emotional well-being….'" (p. 17) (**Da409**); and (2) "failure to report would subject staff

members to discipline, and incentivize reporting even when unnecessary" (p. 18) (**Da410**).

Similarly, contrary to the Revised Policy's plain language, the court concluded that the policy requires "untrained non-instructional staff" -- such as janitors (T17:17) -- to "report behaviors that they believe may cause an adverse impact" (p. 18) (**Da410**). On the contrary, the Revised Policy's Regulation provides as follows:

> [P]arental notification shall be made by the appropriate administrator and/or the observing certificated staff member, and an appropriate certificated staff member (e.g., school nurse, school psychologist, school guidance counselor) if deemed necessary by the appropriate administrator. For non-certificated personnel, parental notification shall be made by the appropriate school administrator or her/his designee. (**Da112**).

Finally, the trial court speculated that the policy "might create a presumption" of "investigation or verification" which "would have the potential to disclose personal and confidential information about a student to others, simply by asking questions necessary to provide verification." (p. 17) (**Da409**). The court's speculation is contrary to the policy's express language that it "does not create a duty … for any staff member to investigate, substantiate or validate the issue or behaviors giving rise to" the parental notification (**Da110**).

POINT IV

THE TRIAL COURT ERRED IN ENTERING RESTRAINTS DESPITE A LACK OF CLEAR AND CONVINCING EVIDENCE THAT PLAINTIFFS' HARM GREATLY OUTWEIGHED COUNTERVAILING HARMS (Da393-417)

Injunctive relief should not issue unless the hardship to Plaintiffs, if the relief does not issue, greatly outweighs countervailing harm if it does. J.H. Renarde, 312 N.J. Super. at 204-205. The trial court concluded that "the relative hardship to plaintiffs if relief is denied is greater than the harm to defendants if the relief is granted" because enforcement of the Revised Policy "may" subject students and school staff to irreparable harm while defendants "would not be harmed" by the imposition of preliminary restraints; therefore, "more harm would result by denying preliminary restraints…." (p. 20-21) (**Da412-413**).

In doing so, the court dismissed the irreparable harm to parental Constitutional rights (p. 19) (**Da411**). Mirabelli, 2023 WL 5976992, at *15 ("It is black letter law that the deprivation of constitutional rights unquestionably constitutes irreparable injury"). Indeed, the rationale of Mirabelli applies here:

> The school's policy [against parental notification] is a trifecta of harm: it harms the child who needs parental guidance and possibly mental health intervention to determine if the [gender] incongruence is organic or whether it is the result of bullying, peer pressure, or a fleeting impulse. It harms the parents by depriving them of the long recognized Fourteenth Amendment right to care,

> guide, and make health care decisions for their children. And finally, it harms [teachers] who are compelled to violate the parent's rights by forcing [them] to conceal information they feel is critical for the welfare of their students ….

Mirabelli, 2023 WL 5976992, at *18.

The preliminary restraints disrupted the Board's ability to implement policies to address potential adverse impacts on students, secure parental involvement, maintain an open, cooperative relationship with parents and acknowledge fundamental Constitutional parental rights. In addition, the court's entry of restraints penalizes parents of LGBTQ+ students inasmuch as it would exclude them from information regarding issues or behaviors that may have an adverse impact on their child's physical and/or mental health, safety and or social/emotional well-being whenever LBGTQ+ status may be implicated. Similarly, the court's order: (1) strips parents of LGBTQ+ students of their right to provide guidance and support to their children such as by securing potentially necessary services (*e.g.*, therapy and counseling) to fulfill needs that schools are not equipped to address on a plenary basis; and (2) deprives LGBTQ+ students of parental guidance and support.

Moreover, as set forth at Point III, *supra*, the court did not adduce clear and convincing evidence of substantial, immediate and irreparable harm from the Revised Policy. Therefore, the record lacked clear and convincing evidence that the harm, if any, from denial of the restraints substantially

outweighed countervailing harms to the Board, students and parents from the imposition of the restraints.

POINT V

THE TRIAL COURT ERRED IN ENTERING RESTRAINTS WITHOUT CONSIDERING HARM TO THE PUBLIC INTEREST (Da393-417)

The "propriety of an … injunction has to be viewed … from the vantage point of the public" and "the public interest … should play a significant role in the judge's determination." Waste Mgmt., 399 N.J. Super. at 536. Indeed, a court can withhold injunctive relief despite a substantial showing of irreparable injury when the public interest is affected. Waste Mgmt., 399 N.J. Super. at 520. The burden is on the party seeking temporary injunctive relief to show that "the public interest will not be harmed." Brown, 424 N.J. Super. at 183.

The trial court did not consider the harm to the public interest in entering restraints. Specifically, as set forth above, the court did not consider how its decision would impact parent-child relationships and bar parents from providing necessary guidance and support to children grappling with gender identity issues. Again, the decision in Mirabelli set forth an expert's analysis which bears consideration here:

> By facilitating a social transition at school over the parents' objection, a school would drive a wedge between the parent and child. Similarly, facilitating a double life for some children, in which they present as transgender in some contexts but cisgender

> in other contexts, is not in their best interest. After all, "[c]ircumventing, bypassing, or excluding parents from decisions about a social transition undermines the main support structure for a child or adolescent who desperately needs support. ….
> [P]olicies [against parental notification] are contrary to best practices regarding maintaining the relationship between parents and their children. Best mental health practices abhor activity that drives a wedge between parents and children, creating distrust and tension. In all cases, parental consent is required to provide medical and psychological treatment to minors. In part, this is because the science of mental health recognizes that the best evidence regarding a minor's mental and emotional well-being comes from first-hand accounts by parents, rather than biased accounts from immature children.

Mirabelli, 2023 WL 5976992, at *7.

The trial court failed to consider that its order empowers the State to insert itself between parent and child by excluding parents from critical matters affecting their children -- contrary to the public interest in the preservation of the parental-child relationship. *See* Cafaro v. Cafaro, 118 N.J.L. 123, 127 (E. & A. 1937) ("natural and politic law, morality … demand the preservation of this relation in its full strength and purity" and sound public policy "cherishes it in the public interest").

POINT VI

THE TRIAL COURT ERRED IN ADJUDICATING A MOOT ISSUE BY ENTERING RESTRAINTS AGAINST A REPEALED POLICY (Da393-417)

The trial court's September 29, 2023 order (**Da393-417**) also enjoined the Original Policy even though it was repealed and replaced in June 2023. *See* correspondence from Matthew Marotta, Esq. dated June 7, 2023, June 13, 2023 Board minutes and correspondence from Matthew J. Giacobbe, Esq. dated June 15, 2023 (**Da134-135**; **Da171**; **Da178-180**). Therefore, at the time of the court's decision, the Original Policy was a nullity and did not exist. The court offered no rationale for its departure from the tenet that the courts "of this state do not resolve issues that have become moot due to the passage of time or intervening events." State v. Davila, 443 N.J. Super. 577, 584 (App. Div. 2016).

"To avoid resolving abstract legal issues and to preserve judicial resources, courts ordinarily do not address legal questions that have been rendered moot." Malanga v. Twp. of West Orange, 253 N.J. 291, 307 (2023). *See also* Davila, 443 N.J. Super. at 584 (judicial economy dictates that courts abstain from rendering advisory opinions on moot issues). "The function of the court is to apply legal principles to the facts as they exist and are before it, and not to anticipate facts which may or may not come into being, for if this

were otherwise a court would constitute itself, virtually, as advisory counsel in the cause before it, and in consequence destroy the value and stability of its decisions." Grausman v. Porto Rican Am. Tobacco Co., 95 N.J. Eq. 223, 227 (E. & A. 1923). Therefore, the perceived need to test the validity of a claim of right in anticipation of future situations is, by itself, no reason to continue the process. *See* Wisniewski v. Murphy, 454 N.J. Super. 508, 518 (App. Div. 2018).

An issue is moot when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy. Malanga, 253 N.J. at 307; Betancourt v. Trinitas Hosp., 415 N.J. Super. 301, 311 (App. Div. 2010). The court's entry of restraints against the Original Policy could not and did not afford Plaintiffs any effective relief and had no practical effect on the controversy as the Original Policy ceased to exist in June 2023. *See* Twp. of Berkeley v. Cent. Reg'l Bd. of Educ., 2017 WL 3427254, at *1 (App. Div. Aug. 10, 2017) (free tuition policy rendered moot by subsequent policy requiring tuition); Am. Humanist Ass'n v. Matawan-Aberdeen Reg'l Sch. Dist., 440 N.J. Super. 582, 597 (Law Div. 2015) ("defendants informed the court that the … School Board was revising policy 8820 to delete the aforementioned paragraphs from that policy… given the board's deletion of those requirements, any issue raised by plaintiffs with respect to board policy 8820

is now moot"); In re the Application of Madin/Lord Land Dev. Int'l for Pinelands Dev. Approval 103 N.J. 689, 691, 695 (1986) (repeal and revision of regulation mooted appeal of order granting reconsideration under regulation); Gayder v. Spiotta, 206 N.J. Super. 556, 560 (App. Div. 1985) (superseding ordinance rendered challenge to memorandum moot); Casser v. Twp. of Knowlton, 441 N.J. Super. 353, 365 (App. Div. 2015) (challenge to ordinance which is no longer in effect is moot). *See also* Jai Sai Ram LLC v. Planning Bd. of So. Toms River, 446 N.J. Super. 338, 345 (App. Div. 2016) (appeal of a board's grant of a use variance is mooted by an intervening ordinance expressly permitting the use); Mazza v. Bd. of Adjustment of Bridgeton, 47 N.J. 161, 162 (1966) (same).

Thus, the court entered restraints on a matter -- *i.e.*, the Original Policy -- that was moot and non-justiciable as a matter of law. *See* Stop & Shop Supermarket Co., LLC v. County of Bergen, 450 N.J. Super. 286, 291 (App. Div. 2017) ("Mootness is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm").

CONCLUSION

For the foregoing reasons, Hanover Township Board of Education and Hanover Township Public Schools respectfully submit that the trial court's September 29, 2023 order should be reversed.

Respectfully submitted,
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January 18, 2024

MATTHEW J. PLATKIN, ATTORNEY GENERAL OF NEW JERSEY, AND SUNDEEP IYER, DIRECTOR, NEW JERSEY DIVISION ON CIVIL RIGHTS Plaintiffs-Respondents, v. HANOVER TOWNSHIP BOARD OF EDUCATION, AND HANOVER TOWNSHIP PUBLIC SCHOOLS, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION CIVIL ACTION DOCKET NO. A-0371-23T5 On Appeal From an Order Entered in the Superior Court, Chancery Division, Granting a Preliminary Injunction Sat Below: Hon. Stuart A. Minkowitz, J.S.C. Docket No.: MRS-C-0042-23

BRIEF ON BEHALF OF PLAINTIFFS-RESPONDENTS

Date Submitted: May 30, 2024

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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, [or] affectional or sexual orientation" 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 their sexual orientation or gender identity has violated the LAD's bedrock protections.

This dispute arose when the Hanover Township Board of Education and Hanover Township Public Schools (Appellants or the District) violated the LAD by adopting a blanket policy that required school personnel to affirmatively inform the parents of LGBTQ+ students about their child's sexual orientation, gender identity, or gender expression. Because Appellants' policy discriminated on the basis of protected characteristics, the Attorney General and the Director of the Division on Civil Rights (DCR) filed an administrative complaint alleging LAD violations. The Attorney General and the Director also sought relief from the Superior Court to preliminarily enjoin enforcement of the policy, and thus maintain the status quo, pending resolution of that action. And while Appellants revised their policy, purportedly to cure the underlying LAD violations, the issue

persisted: Appellants never denied that their students' gender identity or sexual orientation would remain a key factor that could still require affirmative parental notification, and they continued to argue that such notifications are necessary to vindicate fundamental parental rights. Because Appellants' Revised Policy thus functioned as the Original Policy did, the State filed an amended complaint and an amended request to preliminarily enjoin both policies.

Judge Minkowitz did not abuse his discretion in enjoining these policies while DCR resolves the pending administrative proceeding. The trial court recognized the clear case law empowering DCR to preserve the status quo while it pursues final relief in an administrative forum, and the court rightly held that the State had a sufficient probability of success on the merits of its claim that the policies' treatment of LGBTQ+ students violates the LAD. The trial court also properly found the injunction appropriate to prevent any irreparable harm to LGBTQ+ students, who already face a distressingly high risk of mental health challenges and violence. And the trial court accurately reasoned that Appellants would not be harmed by a preliminary order enjoining enactment of these two policies while DCR's pending administrative proceeding plays out.

Appellants' arguments on appeal cannot overcome the court's reasoned findings. Appellants claim the State's right to relief was insufficiently settled; that the injunction interferes with parents' constitutional rights; that there was

insufficient evidence of irreparable harm; and that the court incorrectly balanced the equities. But the State's right to relief could hardly be clearer: these policies violate the LAD, and N.J.S.A. 10:5-14.1 provides the Attorney General and the Director the express right to seek preliminary relief that preserves the status quo while their administrative action is pending. The court's narrow injunction also does not intrude on parental decision-making, as it neither stops parents from counseling their children or their children from sharing information with their parents. And the harm from failing to enjoin these policies is obvious: LGBTQ+ children who are involuntarily outed face tremendous and irreversible harms, including that they would be less willing to come out at school in the first place, in turn preventing them from accessing the support they may need.

Appellants' arguments are based on a flawed understanding of the State's position and the trial court's narrow injunction. 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 LGBTQ+ status in a number of circumstances, including any time there is a compelling and non-discriminatory justification. But as the trial court properly held, schools may not adopt or enforce policies that discriminate against any student based on their LAD-protected characteristics, let alone while the State's administrative action proceeds. That is dispositive, and 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 "the first state anti-discrimination statute in the nation." L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ., 189 N.J. 381, 399 (2007). Its purpose, our Supreme Court has explained, "is nothing less than the eradication of the cancer of discrimination." C.V. v. Waterford Twp. Bd. of Educ., 255 N.J. 289, 306-07 (2023) (citation omitted); see also L.W., 189 N.J. at 400 (agreeing that the LAD must be "liberally construed" to effectuate "the Legislature's broad remedial objectives" in eradicating discrimination).

The LAD has therefore prohibited unlawful discrimination in all places of public accommodation since 1949, Pub. L. 1949, ch. 11—a prohibition that covers unlawful discrimination in "any kindergarten, primary and secondary school, ... [or] high school," N.J.S.A. 10:5-5(*l*); see also, e.g., C.V., 255 N.J. at 307. Since 1991, the LAD has expressly barred discrimination on the basis of "sexual orientation," Pub. L. 1991, ch. 519, and since 2006, it 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

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

Dep't, 449 N.J. Super. 600, 601, 605-06 (App. Div. 2017). This prohibition on 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"); see also Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 398 (2005) (noting "disparate treatment and disparate impact" are both "cognizable under the LAD"); Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 81-82 (1978).

The LAD empowers the Attorney General and Division on Civil Rights 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 where the Attorney General and Director proceed administratively, state 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 Original Policy and Order to Show Cause.

On May 16, 2023, Appellants adopted new Policy 8463—Parental Notice of Material Circumstances (Original Policy). (Da1-2).[2] The Original Policy imposed a new obligation on all staff members in the school district to affirmatively notify all parents when the staff member is made aware of "any facts or circumstances that may have a material impact on the student's physical and/or mental health, safety and/or social/emotional well-being, including ... sexuality; sexual orientation; transitioning; [or] gender identity or expression …." (Da1). The Original Policy provided:

> All school staff members (certificated and non-certificated personnel) and administrators shall take all necessary steps—including notifying appropriate school administrators (e.g., the Principal and/or his/her designee)—to immediately, fully and accurately inform a student's parent(s) whenever such staff member is made aware of, directly or indirectly, any facts or circumstances that may have a material impact on the student's physical and/or mental health, safety and/or social/emotional well-being, including, without limitation, the following: substance use;

[2] "Ra" refers to the State's appendix to this brief. "Da" refers to Appellants' appendix and "Db" refers to Appellants' brief. "1T" refers to the May 30, 2023 transcript of the Order to Show Cause Hearing on the State's original complaint; "2T" refers to the September 6, 2023 transcript of the Order to Show Cause hearing on the State's amended complaint.

> tobacco/vaping use; alcohol use; firearms; peer/academic/athletic pressures; school performance; eating disorders; suicide; self-harm; anxiety; depression; fatigue; isolationism / anti-social behaviors / social withdraw; truancy; theft; vandalism; unlawful activity; violent or aggressive behavior; preoccupation with anti-social music; pornography; sexual activity; sexuality; sexual orientation; transitioning; gender identity or expression; gang affiliation; obsessive behaviors; familial/cultural challenges; harassment; intimidation; or bullying.
>
> Where a staff member reasonably believes that such notification to a student's parent(s) will place the student at risk of abuse or neglect as defined by N.J.S.A. § 9:6-1, the staff member and appropriate administrators shall immediately notify the Department of Children and Families, Institutional Abuse (DCF), Division of Child Protection and Permanency (DCPP), and/or the Hanover Township Police Department (HTPD) in accordance with the annual Memorandum of Agreement and/or as directed by the Superintendent, his/her designee and/or the Board's legal counsel.
>
> [Ibid.]

The Original Policy broadly defined reportable information to include any information that "may" affect a "student's physical and/or mental health, safety and/or social/emotional well-being." Ibid. It established a long list of factors, placing "sexual orientation; transitioning; [and] gender identity or expression" in a list that includes problematic behaviors such as substance abuse, vandalism, and gang affiliation. Ibid. In response to inquiries, the Board's leadership and

counsel confirmed that if a student disclosed to a staff member that they might be gay, it was to be immediately reported to the parent. (Ra11-12).

The following day, the State filed an administrative complaint with DCR alleging that the Original Policy violates the LAD. (Ra6). The same day, the State filed this 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. (Da3). Proceeding by Verified Complaint and Order to Show Cause, the State sought temporary restraints and a preliminary injunction to restrain the policy and preserve the status quo while the administrative action was pending. (Da3; Da119). That same day, on May 17, 2023, Appellants confirmed that the Original Policy "requires that staff members 'say something to the parents and appropriate school administrators,' if they 'see something that could adversely affect the social/emotional well-being of a child,'" including a student's "sexual orientation; transitioning; [or] gender identity or expression." (Da117).

On May 18, 2023, the trial court temporarily enjoined and restrained Appellants from implementing the Original Policy and from otherwise giving effect to the aspects of the Original Policy that violated the LAD—including its specifications based on sexual orientation, gender identity, or gender expression.

(Da119-22). After full briefing, a hearing on the application took place on May 30, 2023, during which Appellants maintained that the Original Policy did not offend the LAD. (Da38; 1T18:12-19). At the end of the hearing, the court noted that "some of the language [of the Original Policy] is undefined and vague" and "imposes … a subjective obligation with no discretion whatsoever on school officials," and the court urged the parties to work toward an amicable resolution while it prepared its written opinion. (1T58:19-59:21). Appellants represented that they would be "glad" to negotiate with the State. (1T59:22-60:4).

C. The Revised Policy and Amended Order to Show Cause.

Three days after the May 30, 2023 hearing, Appellants unilaterally filed a letter advising the court that they believed all the issues would soon be resolved with the repeal of the Original Policy and the adoption of a revised version of Policy 8463 (Revised Policy) at an upcoming special board meeting. (Da124-27). In response, the State advised the court that Appellants had failed to give the State the requested assurances that students would not have their sexual orientation or gender identity disclosed in contravention of the LAD. (Da129). Despite the State's concerns regarding continued violations of the LAD, on June 6, 2023, Appellants adopted the new policy by resolution at a special, emergency meeting of the Board. (Da134; Da138-39). Appellants permanently adopted the Revised Policy on June 13, 2023. (Da110; Da146-49; Da151; Da171).

While the Revised Policy removed the Original Policy's references to the specific "matters" requiring parental notification—including sexual orientation, transitioning, and gender identity or expression—it continued to make clear that notification "shall" be effectuated "whenever a student discloses an issue and/or exhibits behaviors that may have an adverse impact on the student's physical and/or mental health, safety and or social/emotional well-being." (Da110). It also still mandated reports by both "certificated and non-certificated" staff alike; indeed, while it added the requirement that the staff member provide notice to an administrator, it still required the staff member to make the report regardless of any directive from an administrator. Ibid. And the Revised Policy prohibited notification only when it is "based solely on a student's actual and/or perceived protected characteristics under the [LAD]." Ibid. (emphasis added).

The Revised Policy also added a new section entitled "Duty of Candor and Confidentiality," explaining "all staff members and administrators shall have a duty of candor with respect to all communications with parents required under this Policy," and permitting only a narrow carve-out for circumstances involving a "risk of abuse or neglect as defined by N.J.S.A. § 9:6-1." Ibid. Even in these circumstances, the Revised Policy required school staff to "immediately notify[] the Department of Children and Families, Institutional Abuse, (DCF), Division of Child Protection and Permanency (DCPP), and/or the Hanover Township

Police Department." Ibid. The Revised Policy added that it "does not create a duty, implicit or otherwise, for any staff member or administrator to investigate, substantiate or validate the issue and/or behaviors giving rise to a duty to inform a student's parent(s) under this Policy." Ibid.

Finally, the Revised Policy also provided: "Except as otherwise required under Policy 8463, this Policy supersedes all other District Policies that restrict notification to parent(s) about matters affecting their children." Ibid. That text meant that the Revised Policy was replacing not only the Original Policy, but also the pre-May 2023 policy, known as "Policy 5756—Transgender Students," which had been in effect since 2019. (Da141-44). For the four years in which it was in effect, the 2019 Policy clarified that school "staff members may not disclose information that may reveal a student's transgender status except as allowed by law," (Da142), and that "[t]here is no affirmative duty for any school district staff member to notify a student's parent of the student's gender identity or expression," (Da141), although notification was appropriate where there was a "specific and compelling need, such as the health and safety of the student," (Da142). The 2019 Policy was consistent with the LAD and followed the New Jersey Department of Education's Transgender Student Guidance for School Districts (State Guidance). (Da228-34). Appellants' Revised Policy, however, specifically superseded its terms. (Da110).

On July 14, 2023, Appellants issued new "regulations" to implement the Revised Policy, which Appellants titled "District Regulation 8463—Parental Notification Required" (Regulation 8463). (Da112). Regulation 8463 listed a series of district policies that would "require parental notification about matters affecting the health and/or safety of their children," and it expressly included the Revised Policy in that list. Ibid. Regulation 8463 also purported to set a protocol for notification by certificated staff members or administrators only, directly contradicting the terms of the Revised Policy. Ibid.

On August 10, 2023, after attempts to negotiate a resolution failed, the State filed an amended administrative complaint at DCR (Da80), a supplemental complaint to the Superior Court (Da36), and amended request for a Preliminary Injunction enjoining the Original and Revised Policies. (Ra74). On August 24, 2023, the court granted the State's request for temporary restraints against both policies to "maintain the status quo." (Da418-19). On September 1, 2023, the court granted the State's motion to file a supplemental complaint. (Ra76-77).

D. The Trial Court's Decision.

On September 29, 2023, the trial court granted the State's request for preliminary restraints and enjoined Appellants from "enforcing, implementing, or otherwise giving effect" to either the Original or Revised Policies until the resolution of the pending DCR administrative action. (Da394).

The court's opinion considered the factors set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and found that the State had carried its burden on each one. (Da403-13). As to the State's reasonable probability of success, the trial court noted that the Revised Policy requires staff to make a "subjective" decision as to whether a student is suffering an "adverse impact" that requires notification to parents, and recognized that there was "a strong argument" that the Revised Policy is "flawed by a fundamental and impermissible presumption—that LAD-protected characteristics may have an adverse impact on the student's physical and/or mental health, safety and/or social/emotional well-being." (Da406). The court determined that such "[m]andatory differential treatment based on LAD-protected characteristics ... invites a violation of the LAD." Ibid.

The court rejected Appellants' argument that an injunction would infringe parents' fundamental constitutional rights. The court found to the contrary that "one could reasonably argue that investigation and reporting in accordance with the Revised Policy invites … school staff[] to invade the privacy of students and parents simply to determine whether a student's protected characteristic or behavior, coupled with other incident, has caused an 'adverse impact' to their 'physical and/or mental health, safety and/or social/emotional well-being.'" (Da411). It found that the stigma associated with such an unnecessary invasion of the family sphere "may be irrevocable." (Da412).

The trial court also found that the State established a threat of immediate and irreparable harm. (Da407-08). Citing "unrefuted evidence of disparate impact, including mental health issues, and infliction of physical or emotional harm by immediate family members," the court found that irreparable injury to students may occur absent preliminary restraints. (Da408). And the Revised Policy may cause irreparable harm to school staff, who are subject to discipline "if they misinterpret or fail to report" the so-called "behaviors that may have an adverse impact" on any student's physical or mental wellbeing. (Da409). This fear of discipline would also incentivize over-reporting and exacerbate the potential of harm to students. (Da410). And the trial court found that the relative hardship to the parties weighed in favor of the State. (Da412).

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 when the State is merely 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 enjoining enforcement of the Original and Revised Policies while DCR's administrative action proceeds. See Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 395 (App. Div. 2006) (holding grant of preliminary relief is reviewed 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) (adding 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'" (citation omitted)). The court correctly held the State is likely to succeed and that the equitable factors all squarely support enjoining the Policies.

POINT I

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

The trial court correctly found that the State had shown that the Original and Revised Policies likely violate the LAD. Appellants' responses—that the

State lacks a settled right to relief, that the Revised Policy is necessary to protect parents' constitutional rights, and that some claims are moot—fall short.

A. The Trial Court Correctly Found That Both Policies Likely Violate The LAD.

The State established that the Original and Revised Policies likely violate the LAD because they mandate disparate treatment of, and will have a disparate impact on, LGBTQ+ students. (Da404-06; Da409). The trial court thus did not abuse its discretion in preliminarily enjoining enforcement of these two policies while DCR's administrative action remains pending.

i. Disparate Treatment.

The trial court correctly found the State was sufficiently likely to succeed in showing that the Original and Revised Policies subjected students to disparate treatment, because LGBTQ+ students were singled out for parental notification on the basis of protected characteristics. Unlawful disparate treatment exists when there is "differential treatment to persons or groups of persons that are in similar conditions or circumstances." Carter v. AFG Indus. Inc., 344 N.J. Super. 549, 556 (App. Div. 2001) (citation omitted); see also Peper, 77 N.J. at 81 (describing "disparate treatment" as when an entity "treats some people less favorably than others because of their [protected class]"). The Original Policy imposes disparate treatment on the basis of LGBTQ+ status because it expressly singled out "sexual orientation; transitioning; gender identity or expression" for

mandatory parental notice. (Da1). And although Appellants revised the express references to protected characteristics in the Revised Policy, the language and history of that policy demonstrate that the violation of the LAD persists.

Begin with the Original Policy, which even Appellants no longer defend. The Original Policy plainly subjected LGBTQ+ students to disparate treatment by mandating that all school staff affirmatively notify parents of "any facts or circumstances that may have a material impact on the student's physical and/or mental health, safety and/or social/emotional well-being, including ... sexuality; sexual orientation; transitioning; [or] gender identity or expression." (Da1). By its own terms, the Original Policy expressly singled out protected characteristics for mandatory parental notice, (Da1), facially treating LGBTQ+ students (who are subject to blanket parental notification) differently than their non-LGBTQ+ peers (who are not subject to parental notification). See L.W., 189 N.J. at 401-02 (discussing sexual-orientation discrimination under the LAD).

The structure of the Original Policy confirmed its discriminatory nature. Not only did the policy treat "sexuality; sexual orientation; transitioning; gender identity or expression" as always constituting "material circumstances" that may harm a student's "health, safety and/or social/emotional well-being," but the list of other such characteristics only underscored the problem. (Da1). In addition to LGBTQ+ students, the Original Policy included such behaviors as substance

use, alcohol use, school performance, gang affiliation, and violent or aggressive behavior. Ibid. Treating a LAD-protected characteristic in the same manner as these concerning behaviors only stigmatizes LGBTQ+ students, setting them apart from their heterosexual and cisgender peers. That the Original Policy did so categorically—with no evidence that LGBTQ+ status results in harm to a student's health or well-being—further highlights the violation.

Unfortunately, the Revised Policy—especially understood in the context of Appellants' own representations—continues to subject LGBTQ+ students to disparate treatment in violation of the LAD. Although the Revised Policy removes the Original Policy's list of examples of specific "matters" that require parental notification—including sexual orientation, transitioning, and gender identity or expression—the Revised Policy still provides that all school staff (regardless of their certifications, expertise or experience) "shall" make notifications to parents "whenever a student discloses an issue and/or exhibits behaviors that may have an adverse impact on the student's physical and/or mental health, safety and or social/emotional well-being." (Da110). This policy also establishes an undefined "duty of candor with respect to all communications with parents" that again applies to "[a]ll staff members." Ibid. And because the Revised Policy does not even require a staff member "to investigate, substantiate or validate the issue and/or behaviors" before making the notification, ibid., the

Revised Policy thus mandates immediate and unverified notifications to parents based on the mere suspicion of an adverse impact, among which the Board previously explicitly included LGBTQ+ or transitioning status.

Appellants' own course of conduct and public representations make clear that the Revised Policy's uninhibited demand for notifications based on "adverse impact" will require notifications based at least in part on a student's LGBTQ+ status. See Twp. of Pennsauken v. Schad, 160 N.J. 156, 170 (1999) (instructing that when a text "is susceptible to different interpretations, the court considers extrinsic factors, such as its purpose, legislative history, and statutory context to ascertain" the meaning of a policy). The Original and Revised Policies were enacted just weeks apart, and the former plainly stated the Board's view that "sexual orientation; transitioning; [and] gender identity or expression" are all specific "facts or circumstances" that could harm the "student's physical and/or mental health, safety and/or social/emotional well-being." (Da1). That bears heavily on the meaning of the Revised Policy's text.

Appellants' public statements and statements in litigation confirm that the notifications relating to "adverse impact" would still turn heavily on a student's "sexual orientation; transitioning; [and] gender identity or expression," despite the removal of the illustrative list from the policy. After the State initially filed its lawsuit challenging the Original Policy, the Board doubled down on its

position, confirming the Original Policy required all staff to "notify appropriate school administrators and a student's parents whenever the staff member is made aware of any facts or circumstances that may have a material impact on a student's physical and/or mental health and/or social emotional well-being, including but not limited to … sexual orientation; transitioning; [and] gender identity or expression." (Da117). That official Board statement confirms the clear link between the "adverse impact" language in the Revised Policy and the explicitly discriminatory provisions in the Original Policy. Indeed, in briefing to this court, Appellants continue to confirm the existence of a link between the "adverse impact" language in the Revised Policy and LGBTQ+ status, arguing that notifications of LGBTQ+ status are required in order to satisfy parents' constitutional rights. See (Db13) (arguing that the school cannot withhold such information since parents must be able to oversee a "child's gender identification journey"); (Db19-29) (substantive due process argument).

Regulation 8463, issued by Appellants to interpret and to implement the Revised Policy, makes this connection even clearer. Regulation 8463 includes a list of policies that it specifically understands to "require parental notification about matters affecting the health and/or safety of their children," and identifies the Revised Policy in that list—a list that again includes policies concerning substance abuse, firearms offenses, and suspected gang activity. (Da112). The

District's decision to include Policy 5756 as part of Regulation 8463's regime provides further evidence of the discriminatory nature of the Revised Policy, carried forward from the Original Policy. Ibid.

Appellants' primary counterargument confirms the Revised Policy still violates the LAD. Appellants argue that the Revised Policy cannot violate the LAD because it does not allow parental notification where the notification is "based solely on a student's actual and/or perceived protected characteristics under the [LAD]." (Da110). But that is not the test; instead, if consideration of a LAD-protected characteristic "ma[kes] a difference" in the determination, that action violates the LAD. Bergen Com. Bank v. Sisler, 157 N.J. 188, 211 (1999); see also Donofy v. Autotote Sys., Inc., 350 N.J. Super. 276, 296 (App. Div. 2001) (noting plaintiff must show the impermissible factor was a "determinative or substantial, motivating factor in defendant's decision" and not the "only factor"). And here, Appellants do not and cannot deny that LGBTQ+ status has an important role to play in requiring parental notifications under the Revised Policy. The trial court thus correctly reasoned that because "a student's protected status under the LAD may still be unlawfully used" pursuant to the Revised Policy "to determine whether parental reporting is to occur," the LAD claim is likely to succeed. (Da406). In other words, as the court noted, "even though protected status may only be part of the consideration, the Board has,

nevertheless, opened the door to differential treatment based upon students' protected status." Ibid.[3]

Appellants' argument that ruling for the State "would prohibit notifying a parent that their child is pregnant because pregnancy is a protected characteristic under the LAD," (Db13), only highlights their misunderstanding. The State has repeatedly agreed that "a school district may be obligated to disclose a student's status" whenever it has "a specific and compelling need, such as the health and safety of a student or an incident of bias-related crime." (Da232). Thus, there may be a circumstance in which parents of LGBTQ+ and non-LGBTQ+ students must be notified about an issue that requires the disclosure even of any relevant LAD-protected characteristics. But Appellants may not adopt a blanket policy that singles out LGBTQ+ students for parental notification based on those very characteristics. That remains differential treatment.

Appellants' remaining counterarguments fare no better. Appellants claim the Revised Policy does not "discriminate against any person in the furnishing" of accommodations or privileges. (Db11). But a policy that permits differential

[3] Appellants repeatedly argue that the trial court said there "may" be violations of the LAD and the challenged policies "opened the door" to illegality. (Db11-19). But the court's findings were far stronger, recognizing the State had made "a strong argument" that these policies treated "LAD-protected characteristics" impermissibly and "invite[d] a violation of the LAD" through "[m]andatory differential treatment." (Da406).

treatment of a student based in part on a protected characteristic discriminates against that student in the furnishing of an accommodation—a public education. See N.J.S.A. 10:5-5(*l*); N.J.S.A. 10:5-12(f). Appellants are also wrong when they claim the State "must demonstrate that the Board was 'motivated by discriminatory intent.'" (Db16). Appellants' intent is not the question; the LAD "is not a fault- or intent-based statute." C.V., 255 N.J. at 314. 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). The Revised Policy's text, together with Appellants' representations and Regulation 8463, make clear it subjects LGBTQ+ students to differential treatment based on their LAD-protected characteristics.

ii. Disparate Impact.

Even if these policies did not so flagrantly subject LGBTQ+ students to disparate treatment, the trial court correctly found that the State also "provided unrefuted evidence of disparate impact." (Da408). Under the LAD, an unlawful disparate impact exists if "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, 184 N.J. at 399 (agreeing an otherwise "facially neutral policy" still violates the LAD if it "'resulted in a significantly

disproportionate or adverse impact on members of the affected class'" (citation omitted)). The State offered powerful evidence that even assuming Appellants' Original and Revised Policies could somehow be understood as facially neutral, they disproportionately impact LGBTQ+ students.

In the decision below, the trial court cited considerable record evidence underscoring that a policy mandating parental notification of a student's sexual orientation or gender identity or expression would have a disparate impact on LGBTQ+ students. Contra (Db18-19) (Appellants claiming trial court "cited no clear and convincing evidence that the [Revised Policy] resulted in any disparate impact on LGBTQ+ students"). Among other evidence, the court cited surveys showing that "47% of the transgender and/or non-binary youth reported feeling 'nervous' and 'scared,' compared to 24% and 18%, respectively, of cisgender youth, and 45% feeling 'stressed,' compared with 22% of their cisgender counterparts, as a result of 'a policy that would require schools to tell a student's parent or guardian if they request to use a different name/pronoun, or if they identify as LGBTQ at school.'" (Da407-08) (quoting Da205). The court also noted the research "that 40% of respondents 'who were out to the immediate family they grew up with,' had families 'that were neutral or not supportive;' that '[o]ne in ten (10%) reported that an immediate family member had been violent towards them because they were transgender,' and that '[f]ifteen percent

(15%) ran away from home and/or were kicked out of the house because they were transgender." (Da408) (quoting Da208). Such evidence underscores the disparate effects on LGBTQ+ students from mandatory parental notification.

Relatedly, parental notification of a student's sexual orientation or gender identity or expression would also impact LGBTQ+ students differently because they are more likely than their non-LGBTQ+ peers not to share that information at home. See 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"), vacated for lack of standing, 78 F.4th 622 (4th Cir. 2023). The harm to students from such involuntary outing is thus felt disparately as well. See Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000) (police violated teenager's rights when they threatened to tell his family he was gay, after which he died by suicide). Said another way, parental notification disparately impacts those students who have not already shared this information with their parents—overwhelmingly LGBTQ+ students. The court did not abuse its discretion in finding this evidence sufficed to show the Revised Policy would subject students to a disparate impact under the LAD.

The Revised Policy's carve-out for situations where "a staff member or administrator reasonably believes that notification … will place the student at

risk of abuse or neglect as defined by N.J.S.A. § 9:6-1" does not cure these fatal flaws. (Da110). Most obviously, N.J.S.A. 9:6-1 sets a high bar for finding "abuse" or "neglect," but the forced outing of all students' sexual orientation or gender identity or expression still disproportionately impacts LGBTQ+ students even in cases where it does not lead to physical abuse or neglect. Furthermore, even where the school staff believes parental notification creates a risk of abuse or neglect, the Revised Policy still instructs staff to "immediately notify[] the Department of Children and Families, Institutional Abuse, (DCF), Division of Child Protection and Permanency (DCPP), and/or the Hanover Township Police Department," rather than simply calling on staff not to make any notifications at all. (Da110). But the blanket demand for notifications to DCF, DCPP, and the police (even where no incident has arisen, because the parents are not in fact informed of this information) will subject LGBTQ+ students to greater privacy intrusions than their otherwise similarly situated peers.

Finally, Appellants' response that "non-LGBTQ+ students are equally subject to parental notification" under the Revised Policy, (Db19), misconstrues the disparate impact framework. The State need not show that a policy applies only to a protected class, (Db18-19), but rather that it "fall[s] more harshly on one group than another." Peper, 77 N.J. at 81. That the parents of non-LGBTQ+ students may at times receive notifications under the Revised Policy simply does

not change the disproportionate impacts that notification will have on LGBTQ+ students, where that notification would out a student to their parents over the student's explicit objections. Thus, the Original and Revised Policies will have a predictable and disparate impact on LGBTQ+ students relative to their peers—a direct violation of the LAD.

B. Appellants' Responses Are Unavailing.

Unable to meaningfully rebut the State's showing on the merits of its LAD claim, Appellants argue instead that (i) the State has no settled right to relief, (ii) the preliminary injunction interferes with parents' constitutional rights, and (iii) the challenge to the Original Policy is moot. These arguments are incorrect, and they do not support overturning this narrow injunction.

i. Settled Right to Relief.

Appellants' first response—that the State lacks a "well-settled legal right" to the relief sought (Db7-9)—fails for multiple reasons.

As an initial matter, although some early cases described the "well-settled legal right" and "reasonable probability of success" as two separate prongs under Crowe, courts have long since merged these inquiries into one. 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"); 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 right on which that probability is based. See Waste Mgmt., 399 N.J. Super. at 528 (agreeing the "time-honored approach in ascertaining whether a party has demonstrated a reasonable likelihood of success" logically incorporates whether "the law upon which plaintiff's claim is based is well-settled").

In any event, the State's claims plainly rest on well-settled legal rights. As to substance, the State's "underlying legal claim," Crowe, 90 N.J. at 133, is explicit, well-recognized, and longstanding: the LAD. This venerable state statute expressly prohibits unlawful discrimination in places of public accommodation; extends this prohibition to schools; includes discrimination based on sexual orientation and gender identity or expression; and extends to both 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, 15-16; (Da119-22a) (trial court confirming this well-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 a defendant violating the LAD after it files an administrative complaint

against that entity); 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 claim remained pending). Settled law thus recognizes both the kind of claim alleged and the type of remedy sought.

Appellants misconstrue the "well-settled right" test. Appellants treat this prong as requiring that there be precedent already resolving all the issues in the case—meaning, as relevant here, "LAD precedent or statutory provision on the issue of parental notification policies versus the rights of LGBTQ+ students under the LAD." (Db8). But this court's cases have long made clear that the inquiry is whether the underlying body of law is settled, not whether the outcome of a specific lawsuit is already settled. See Crowe, 90 N.J. at 133 (noting "the underlying legal claim … was settled as a matter of law" and 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).

The rule could hardly be otherwise. Were Appellants correct in their interpretation of the "well-settled right" prong, a movant would have to establish its exact claims had been decided with certainty—rendering the "reasonable probability of success" inquiry superfluous. Moreover, under Appellants' approach, no case of first impression would ever meet the preliminary injunction standard—no matter how troubling the statutory violation or how compelling

the need to protect the status quo. There would never be a well-settled right to apply established legal rights to new facts. Applying Appellants' interpretation would create perverse incentives: a policy so clearly unlawful that no other school district has adopted it could avoid preliminary relief merely because no court had previously addressed its validity. That has never been the law.

ii. Parents' Substantive Due Process Rights.

The trial court also correctly found that the preliminary injunction would not violate substantive due process. Its order does not infringe any fundamental rights and, regardless, 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 infringement must be narrowly tailored to serve a compelling state interest," Holland v. Rosen, 895 F.3d 272, 293 (3d Cir. 2018), 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,'" ibid. (quoting Nicholas v. Pa. State Univ., 227 F.3d 133, 139 (3d Cir. 2000); see Washington v. Glucksberg, 521 U.S. 702, 721 (1997). The trial court's injunction does not interfere with any fundamental rights.

Courts exercise great caution before deeming any new federal substantive due process rights 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" judges). 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 that are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Id. at 720-21. It is not enough to assert a generalized interest; the analysis must consider the "careful description of the asserted fundamental liberty interest" at a granular level. Holland, 895 F.3d at 292 (citation omitted). The issue is therefore whether a specific right is dictated by "[o]ur Nation's history, legal traditions, and practices." Id. at 293.

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), Appellants misconstrue the scope of this substantive due process right. Appellants claim that parents' fundamental rights are infringed when the school "actively concealed" certain information from them, (Db20), but that runs into two bedrock limits. First, while courts "recognized the parental liberty interest" has been infringed when "the state actor compelled interference in the parent-child relationship," a failure to affirmatively provide information about their child does not violate a fundamental right. Anspach, 504 F.3d at 262, 266.

After all, not providing information does not prevent parents from guiding or raising their children as they see fit; at most, the State failed to "assist … the parents or affirmatively foster the parent/child relationship," assistance to which the parent has no fundamental right in the first place. Id. at 266.

Federal courts have disposed of similar challenges on this basis. In Anspach, the Third Circuit rejected substantive due process claims brought by parents against a city health center for failing to inform them that their minor child sought reproductive care. See id. at 261-62. It concluded that, because the government had not "compelled, constrained or coerced [the minor] into a course of action she objected to," namely, receiving reproductive care, there had been no substantive due process violations. Id. at 266. From there, the court cut to the heart of the underlying issue: "the real problem alleged by Plaintiffs is not that the state actors interfered with the Anspachs as parents; rather it is that the state actors did not assist the Anspachs as parents or affirmatively foster the parent/child relationship." Id. at 266 (emphasis in original); see also Doe v. Irwin, 615 F.2d 1162, 1169 (6th Cir. 1980) (parents lacked right to any notice from public facility that distributed contraceptives to minors); Sanford v. Stiles, No. 03-5698, 2004 WL 2579738, *11-12 (E.D. Pa. Nov. 10, 2004) (Ra88-89)[4]

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

(school did not violate any fundamental parental rights when it "failed to provide information"), aff'd, 456 F.3d 298 (3d Cir. 2006).

Multiple courts, including the District of New Jersey, have relied on this principle in rejecting the argument that parents have a fundamental right to information about a child's LGBTQ+ status. See Doe v. Del. Valley Reg'l High Sch. Bd. of Ed., No. 24-107, 2024 WL 706797, *6-8 (D.N.J. Feb. 21, 2024) (Ra99-100) (rejecting parent's claim that schools must provide notification and seek parental consent before using a child's preferred name and pronouns, and concluding that a parent's demand for affirmative information about LGBTQ+ status lies outside "the scope of the familial liberty interest protected under the Constitution[,]" and was neither "deeply rooted in this Nation's history and tradition "or "implicit in the concept of ordered liberty" (citing Anspach)); see also Regino v. Staley, No. 23-32, 2023 WL 4464845, at *3 (E.D. Cal. July 11, 2023) (rejecting argument that schools have "affirmative duty to inform parents of their child's transgender identity" and finding claim reflects "an expansion of" "parental substantive due process rights that is not supported by precedent"); John & Jane Parents, 622 F.Supp.3d at 130 (rejecting claim that parents have "a fundamental right to be promptly informed of" child's gender identity).

This dichotomy between interference and failure to provide information is fatal to Appellants' challenge. The trial court's preliminary injunction does

not interfere with parents' right to direct the care, custody, and control of their own children. Contra (Db19-29). By its own terms, the order does not prevent students from voluntarily sharing information about their sexual orientation or gender identity or expression with their parents; does not influence or encourage students to withhold this information from their parents; and does not compel or coerce students to identify as transgender or gender nonconforming. See John & Jane Parents, 622 F.Supp.3d at 130-134 (emphasizing 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 does it restrict any parents from communicating with or counseling their children about this topic. All this injunction does is prevent Appellants from discriminating against LGBTQ+ students via a blanket affirmative notification policy, and even then only for so long as DCR's administrative action remains pending.

The cases on which Appellants rely—and all of the United States Supreme Court's cases involving fundamental parental rights—fit the distinction 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. Soc'y 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 right to affirmatively provide parents such information, let alone to adopt a blanket policy in violation of the LAD.[5]

Appellants' reliance on Mirabelli v. Olson, No., 23-768, __ F.Supp.3d __, 2023 WL 5976992 (S.D. Cal., Sept. 14, 2023), is likewise misplaced. (Db27). As Appellants concede, (Db26-27), Mirabelli resolved First Amendment claims by teachers that a policy prohibiting the disclosure of a student's gender identity violates the teacher's right to free exercise of religion. The language concerning parental rights on which Appellants rely is dicta, as the court expressly stated that "no parents ha[d] joined as plaintiffs," and that "issue is not resolved here." Mirabelli, 2023 WL 5976992, at *11. In any event, Mirabelli remains an outlier among the overwhelming array of cases acknowledging that parents do not have an affirmative right to the disclosure of information about their children.

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[5] Appellants get no further by relying on Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000). Gruenke involved the opposite scenario: a government actor investigating the private health information of a student and demanding such information from the student in private meetings. See id. at 295-97 (coach demanding student take pregnancy test). The interference with parental rights was clear: forcing the child to take a pregnancy test and disclosing her pregnancy violated the parent's right to familial privacy and student's right to privacy. Id. at 297. Here, by contrast, the trial court's injunction merely precludes the district from mandating blanket parental notification over a student's objections.

Appellants' view of substantive due process runs into a second problem: even though "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." Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395 (6th Cir. 2005); see also C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 182 (3d Cir. 2005) (holding "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"); Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1207 (9th Cir. 2005) (concluding even more broadly that parents' fundamental rights "do[] not extend beyond the threshold of the school door"). 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, 622 F.Supp.3d at 130. And as a practical matter, it would be difficult to administer, especially when the parents (such as divorced parents) disagree about whether to affirm their child's gender identity. See, e.g., Vesely v. Ill. Sch. Dist. 45, 669 F.Supp.3d 706, 712 (N.D. Ill. 2023). Appellants have thus failed to show that the injunction violates parents' fundamental rights.

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 state 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). If a right is fundamental, the injunction must be narrowly tailored to advance a compelling interest. See Holland, 895 F.3d at 292.

This injunction satisfies either test. The State has a compelling interest in ensuring an LAD-protected class does not suffer discrimination. See, e.g., Doe, 2024 WL 706797, at *23-24 (finding that a school policy "recogniz[ing] transgender students by their preferred gender identity without affirmatively notifying" their parents advances "legitimate objectives"); Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984) (agreeing "eliminating discrimination ... plainly serves compelling state interests of the highest order"); Dixon v. Rutgers, 110 N.J. 432, 451 (1988) (confirming "[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 "New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types"); Gallo v. Salesian Soc'y, 290 N.J. Super. 616, 643 (App. Div. 1996) (underscoring state interest in combatting discrimination "is compelling, beyond cavil").

The compelling interest in eradicating discrimination is particularly clear in cases involving LGBTQ+ students, especially when the governmental action involves notification that they requested not occur. The State 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), including transgender youth, who face "extraordinary social, psychological, and medical risks" in connection with discriminatory policies in school, id. at 529; see also N.J. Pub. L. 2018, ch. 60 § 1(a), 1(g) (state legislative finding that transgender individuals "face considerable challenges in society, including discrimination, harassment, physical abuse, and social isolation," and "[m]ore than 75 percent of survey respondents experienced some form of mistreatment, including physical or sexual assault, between kindergarten and grade 12, due to their being out or perceived as transgender"). The State has a clear interest in avoiding such discrimination against LGBTQ+ students. See Boyertown, 897 F.3d at 528-29; Matter of T.I.C.-C., 470 N.J. Super. 596, 609-10 (App. Div. 2022).

The preliminary injunction advances these interests. As explained above, Appellants' Policies discriminate against LGBTQ+ students under a disparate-treatment or disparate-impact lens. Enjoining enforcement merely while DCR's administrative proceeding unfolds ameliorates that discrimination. Moreover, because the Policies would likely cause some to forego disclosing their sexual orientation or gender identity for fear of being outed, the Policies would hinder schools from "creating a support system and providing counseling" for these students. See John & Jane Parents, 622 F.Supp.3d at 138-39. The injunction

thus "ensure[s] that [LGBTQ+] children feel safe and well at school," id. at 138, while Appellants' approach would unfortunately do 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 LGBTQ+ status 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 sexual orientation or gender identity to their children. Nor does it prevent the school from notifying parents of the student's LGBTQ+ status if the student does not object, or the school has a compelling and nondiscriminatory justification for the disclosure, such as the health and safety of a student or the school's obligation to report an incident of bias-related crime. And, of course, the court order is temporary: it lasts only until DCR resolves the administrative proceeding, perfectly tailored to the State's interest in preventing discrimination and protecting the status quo while its action proceeds.

iii. Mootness.

The trial court did not abuse its discretion in preliminarily enjoining the Original Policy, even though it had been superseded by the Revised Policy.

First, this challenge to the Original Policy was not moot, because the trial court had to enjoin the Original Policy—not just the Revised Policy—to restore

the pre-litigation status quo. See Pfaus, 97 N.J. Super. at 9. As the record below revealed, the Board repealed the Original Policy and implemented the Revised Policy in one resolution. See (Da138-39) (June 6, 2023 emergency resolution); (Da171) (June 13, 2023 meeting making Revised Policy permanent). Had the trial court only enjoined the Revised Policy, it was thus entirely possible that the Original Policy would have automatically gone back into effect. Moreover, the pre-litigation 2019 Policy that had complied with the State Guidance would not likely have been automatically reinstituted, because it was rescinded through a separate resolution. (Da380). To ensure effective relief protecting the status quo, the court had to enjoin the Original Policy. On this basis alone, the State's challenge to the Original Policy was not moot.

Second, Appellants ignore the voluntary-cessation doctrine. This doctrine makes clear that where the government claims mootness based on the repeal of its policy, it must show "the allegedly wrongful behavior could not reasonably be expected to recur." West Virginia v. EPA, 597 U.S. 697, 720 (2021); see Delanoy v. Twp. of Ocean, 245 N.J. 384, 402 n.5 (2021) (agreeing "voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant…free to return to his old ways" (citation omitted)). Moreover, "the defendant's reason for changing its behavior is often probative of whether it is likely to change its behavior again." Hartnett

v. Pa. State Educ. Ass'n, 963 F.3d 301, 306 (3d Cir. 2020). That Appellants rescinded the Original Policy "as a response to the litigation," is thus significant, Cnty. of Butler v. Gov. of Pa., 8 F.4th 226, 230 (3d Cir. 2021), as it underscores the risk that they would re-impose the policy when the lawsuit ends.

Appellants make no effort to meet their heavy burden under the voluntary-cessation doctrine, and indeed they cannot. Appellants rescinded the Original Policy only after the State filed an administrative action and suit in the Superior Court, and obtained temporary restraints. (Da124). Appellants do not deny that this decision happened in the context of litigation. They also do not foreswear re-imposing the Original Policy. Nor do they point to changed circumstances that make re-imposition unlikely. Just the opposite: Appellants continue to say in briefing that parental rights require notifications. (Db19-29). As such, even if the Original Policy is no longer in effect, this narrow injunction was necessary to prevent the reinstatement of a policy that so flagrantly violated the LAD.

Finally, the trial court properly declined to dismiss the State's challenge to the Original Policy because the case involves "an important matter of public interest." Nini v. Mercer Cnty. Cmty. Coll., 202 N.J. 98, 105 n.4 (2010) (noting New Jersey courts "often decline[] … to dismiss a matter on grounds of mootness, if the issue in the appeal is an important matter of public interest" (citation omitted)). Indeed, "[t]he question[] presented in this case center[s] on

the interpretation of our Law Against Discrimination," ibid., and its resolution has tremendous importance to the students in this District—and across the State, given that Appellants' policy inspired similar policies by other school boards. Moreover, "the public interest in the finality and efficiency of litigation warrants a resolution on the merits," State v. Davila, 443 N.J. Super. 577, 589 (App. Div. 2016): the challenge to the Revised Policy remained active before the Superior Court, and it was proper and efficient to make clear that the Original Policy's flagrant illegality was impermissible too. The court did not abuse its discretion in holding that the Original Policy violated LGBTQ+ students' rights.

POINT II

THE TRIAL COURT CORRECTLY FOUND THE EQUITABLE FACTORS WEIGH IN FAVOR OF ENJOINING THE POLICIES.

The trial court also correctly determined that the remaining Crowe factors favored a narrow injunction preventing enforcement of the Original and Revised Policies while DCR's administrative proceeding is pending.

A. The Trial Court Did Not Abuse Its Discretion In Finding Irreparable Harm.

The trial court reasonably found this preliminary injunction was necessary to avoid irreparable harm to students and staff members in the District.[6]

[6] 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

There are at least four irreparable harms. First, the mandatory disclosure of LGBTQ+ students' sexual orientation, gender identity, or gender expression over a student's objection will cause them significant and immediate irreparable harm. (Da407-08). Once a student has been involuntarily outed to their parents, that bell can never be unrung. And the harms that follow can include "mental health issues, and infliction of physical or emotional harm by immediate family members," as well as homelessness and loss of privacy. (Da407-08; Da411). As another court recently put it, "there is no protected group more vulnerable, or more susceptible to physical or psychological harm, than transgender, gender non-conforming, and non-binary youth." (Ra124); see Boyertown, 897 F.3d at

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court found no need to resolve that question because the State had amply shown irreparable harm. See (Da407-13). Because the State has shown irreparable harm will result, this court can simply affirm on that basis. That said, as a matter of law, 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, 398 (9th Cir. 1992) (holding that where the government beings a "statutory enforcement case[]" and shows a sufficient probability of success 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) (Ra128, 131) (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.

528-29; John & Jane Parents, 622 F.Supp.3d at 139; T.I.C.-C., 470 N.J. Super. at 609; N.J. Pub. L. 2018, ch. 60 § 1(a), 1(g). When "transgender, gender non-conforming, and non-binary students face discrimination in schools, the risk to their wellbeing cannot be overstated[.]" Boyertown, 897 F.3d at 529. The trial court's narrow injunction was necessary to ameliorate that discrimination.

Although Appellants accuse the court of "prejudging all parents unfit," (Db30), the opinion does nothing of the sort. The State did not claim—and its evidence does not suggest—that all parents would harm their LGBTQ+ child. Nor has the State ever denied the importance of parental involvement in a child's life, including for transgender students. Contra (Db30-32). Rather, the State's position has always been that a blanket policy involuntarily outing all LGBTQ+ minors notwithstanding the students' express opposition to that notification will threaten both immediate and irreparable harm, including higher rates of suicide and suicide attempts, increased drug and alcohol misuse, and a risk of violence or homelessness. (Ra26-40). Appellants refuse to acknowledge the realities of harm to students, but the record evidence makes these risks clear.

Second, were Appellants' policies to remain in effect, students would be less willing to express their LGBTQ+ status at school, making it difficult if not impossible for the school to provide them necessary support. See (Da407-08) (finding that students could no longer trust that their privacy interests would be

protected even if they shared their LGBTQ+ status with "a school staff member in confidence"). That, too would work a grave harm, as a "transgender child 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." John & Jane Parents, 622 F.Supp.3d at 139. Students who no longer feel that they can express their LGBTQ+ status at school may be unable to access the support they need, and would be unable to access facilities (or even names and pronouns) in line with their gender identity. Simply put, as the trial court recognized, this lawsuit is not aimed at undermining parents' rights but rather at addressing the inevitable effects of school "policies … that purportedly subject a protected class to discrimination in violation of the LAD." (Da411).

Third, the State would experience irreparable harm without the injunction. Indeed, the State "suffers a grievous harm" when unlawful discrimination occurs within its borders. N.J.S.A. 10:5-3; see also, e.g., Jackson v. Concord Co., 54 N.J. 113, 123 (1969) ("[P]revention of unlawful discrimination vindicates not only the rights of individuals but also the vital interests of the State."). The Legislature thus gave the Attorney General and the Director express authority to "prevent and eliminate discrimination" the LAD prohibits, N.J.S.A. 10:5-6, and to file an administrative complaint against entities that violate the LAD, N.J.S.A. 10:5-14.1. Absent preliminary relief, the State could not prevent this

discrimination until the DCR proceeding ends. That discrimination could continue in the meantime undermines "any adjudication [DCR] may make in this matter." Pfaus, 97 N.J. Super. at 8. Said another way, this order was needed "to aid in the preservation of the subject matter of a proceeding pending before an administrative agency," and to prevent DCR's administrative action from serving as "a vain and useless act" after the harm is done. Ibid.[7]

Fourth, the court below did not err in finding enforcement of the Revised Policy posed a risk of harm to District staff. The Revised Policy requires all staff members "take necessary steps ... to promptly inform a student's parent(s) whenever a student discloses an issue and/or exhibits behaviors that may have an adverse impact on the student's physical and/or mental health, safety and or [sic] social/emotional well-being." (Da110). The court reasoned that, because the terms "necessary steps" and "adverse impact" are undefined, and because the Revised Policy is unclear on what "necessary steps" means, staff could be

[7] Appellants' claims that the trial court erred by finding that "irreparable injury may result," rather than that it will, (Db29), and by failing to consider "harm to the public interest," (Db36), amount to quarreling over semantics. Appellants do not argue that the State's evidence actually fails to establish irreparable injury to students and staff. And for good reason: the trial court based its finding of irreparable harm on the extensive evidence the State submitted establishing that irreparable harm to LGBTQ+ students would result absent an injunction. See (Da407-08). And as noted above, the State's inability to vindicate the rights of New Jerseyans through enforcement of the LAD itself harms the public interest. See Jackson, 54 N.J. at 123.

subject to discipline for misreporting or misinterpreting the ill-defined policy. (Da408-10). And while Appellants argue the Revised Policy does not create a duty to investigate, (Db33), that is irrelevant to whether staff may be subject to discipline for misreporting or misinterpreting the Revised Policy. Notably, at the September 6, 2023 hearing, when asked whether there is an "implication that any staff member who does not report would be subject to discipline," counsel for the State responded "Yes. I think that's the case." (2T13:19-14:6). The Court observed and asked about the bounds of teacher discipline under the Revised Policy multiple times at that hearing, to which Appellants did not directly respond. (2T24:9-25:16; 2T31:3-33:17; 2T35:7-35:8)

But staff who discriminate based on sexual orientation or gender identity could also find themselves liable for violating the LAD. See N.J.S.A. 10:5-12(f) (establishing it is unlawful for any "owner … manager, superintendent, agent or employee of any place of public accommodation" to engage in discriminatory practices); N.J.S.A.10:5-12(e) (making it unlawful for "any person, whether an employer or an employee or not" to aid or abet any violation of the LAD). Absent an injunction, staff would be between a rock and a hard place—face either a prospect of discipline if they do not comply, or possible liability under the LAD and harm to their relationships with students if they do. By awarding time-limited relief, the trial court avoided this fourth irreparable harm.

B. The Trial Court Did Not Abuse Its Discretion In Considering The Other Equitable Factors.

The balance of equities and the public interest likewise supported granting this narrow preliminary injunction. Initially, the trial court properly held that Appellants "will not be harmed" by a narrow injunction staying implementation of the Original and Revised Policies. (Da412). This is particularly true where, as here, the delay is only for so long as the administrative action is pending. See Pfaus, 97 N.J. Super. at 8. That lack of harms Appellants themselves will suffer stands in sharp contract to the harms experience by the State and students.

While Appellants focus instead on the purported harms to parents, all of their assertions fail. For one, Appellants assert that the trial court's decision "penalizes parents of LGBTQ+ students" and "deprives LGBTQ+ students of parental guidance and support," (Db35), but that misconstrues the injunction. The injunction does not prevent students from sharing information with parents; does not influence or encourage students to withhold this information; and does not limit a parent's right to communicate with or counsel their children about these issues. The preliminary injunction and the LAD merely prohibit singling out students on the basis of their LAD-protected characteristics, a restriction that applies to LGBTQ+ and non-LGBTQ+ students alike. As explained above, the State has always embraced and continues to embrace the critical role of parents in decisions regarding their children. And, consistent with the LAD, schools

may disclose a student's LGBTQ+ status in multiple circumstances, including if they have a compelling and non-discriminatory basis to do so. (2T8:18-9:2). All schools may not do is discriminate based on an LAD-protected characteristic.

Appellants' argument that the trial court's narrow injunction "empowers the State to insert itself between parent and child" fares no better. (Db37). As explained above, there is a significant difference between a judicial order that inserts itself into the parent-child relationship, and one that prevents Appellants from affirmatively disclosing information in a discriminatory way. See supra at 31-35. In reality, as the trial court found, "the Revised Policy" is the one that "invites agents of the government (school staff) to invade the privacy of students and parents simply to determine whether a student's protected characteristic or behavior, coupled with [an]other incident, has caused an 'adverse impact.'" (Da411). Appellants' arguments thus merely circle back to the same substantive arguments they made in pressing their case on the merits. (Db19).

Finally, Appellants' vague assertions of "abstract harms" 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). The State and the public maintain a significant and tangible interest in ensuring that schools fulfill their obligations to "[p]romote equitable educational opportunity and foster … a learning environment that is free from all forms of

prejudice, discrimination, and harassment based on the protected categories listed at N.J.A.C. 6A:7-1.1(a)." N.J.A.C. 6A:7-1.4; see N.J.A.C. 6A:7-1.1(a) (listing protected characteristics under the LAD). The narrow injunction below promotes that public interest for such time DCR's administrative action remains pending, and appropriately balances the harms to the parties and the public by preserving the pre-litigation status quo.

CONCLUSION

This court should affirm the preliminary injunction.

Respectfully submitted,

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HANOVER TOWNSHIP BOARD OF EDUCATION AND HANOVER TOWNSHIP PUBLIC SCHOOLS, Defendants-Appellants, v. MATTHEW J. PLATKIN, ATTORNEY GENERAL OF NEW JERSEY, AND SUNDEEP IYER, DIRECTOR, NEW JERSEY DIVISION ON CIVIL RIGHTS Plaintiffs-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000371-23 T5 Civil Action On Appeal From: Morris County Chancery Division Docket No.: MRS-C-00042-23 Date of Submission to Court: July 15, 2024

REPLY BRIEF OF DEFENDANTS-APPELLANTS HANOVER TOWNSHIP BOARD OF EDUCATION AND HANOVER TOWNSHIP PUBLIC SCHOOLS

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PRELIMINARY STATEMENT

The Board submits this reply brief in further support of its appeal from the trial court's September 29, 2023 order restraining Revised Policy 8463 providing for notification to parents of matters adversely impacting their children's health, safety and/or social/emotional well-being. Plaintiffs seek to exclude parents from situations adversely impacting their children whenever LGBTQ+ status is incidentally involved thus advocating a double standard whereby non-LGBTQ+ children enjoy the school's coordination with parents in situations presenting adverse impacts while LGBTQ+ children do not because the State would bar their parents from knowledge of such situations. Instead of facilitating a transparent, cooperative relationship between schools and parents, Plaintiffs distort the LAD to endorse State-enabled secrecy, mistrust and parental exclusion from matters adversely impacting their children. Plaintiffs' position is not clearly and convincingly based upon a settled legal right to exclude parents from knowledge of matters adversely impacting their LGBTQ+ children and lacks a clear and convincing likelihood of success under the law. Plaintiffs do not, and cannot, adduce any precedent barring schools from alerting parents of matters adversely impacting their LGBTQ+ children. Any such precedent would uproot an entrenched tradition and constitutional right of parental autonomy.

STATEMENT OF FACTS

The Board relies upon its initial brief's Procedural History and Statement of Facts but briefly notes the following misrepresentations in Plaintiffs' brief regarding the Revised Policy: (1) it "out[s] all LGBTQ+ minors" (Pb44); (2) "students' gender identity or sexual orientation … [is] a key factor" in the Revised Policy (Pb2); (3) "LGBTQ+ students were singled out for parental notification" (Pb16); and (4) the Policy mandates notification by non-certificated staff (Pb10, 18). Each misrepresentation is refuted by the plain text of the Policy (Da110, 112). Plaintiffs further represent that the Board's "policy inspired similar policies by other school boards" (Pb42) with absolutely no supporting reference in the record. Finally, Plaintiffs mischaracterize the trial judge's order as "narrow" and as "exclusively focused on communications from the school based on a protected characteristic" (Pb39, 41, 42, 48-50) when -- in fact -- it enjoins a neutral policy wholesale (Da394).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO ANALYZE WHETHER PLAINTIFFS ASSERTED A SETTLED LEGAL RIGHT (Da393-417)

Plaintiffs err in asserting that the courts merged "the well-settled legal right and reasonable probability of success…prongs" (Pb27). Under Crowe, these are discrete prongs. Crowe v. De Gioia, 90 N.J. 126, 133 (1982). *See*

also Garden State Equality v. Dow, 216 N.J. 314, 325 (2013) ("Crowe … requires the State to show that its legal right is settled"). Plaintiffs cannot point to any well-settled right, but only a generalized reference to the LAD (Pb28-29) which cannot override constitutional parental authority over one's children. Bellotti v. Baird, 443 U.S. 622, 638 (1979); H.L. v. Matheson, 450 U.S. 398, 410 (1981). Plaintiffs adduce no case law for the proposition that it is a LAD violation to notify parents of situations adversely impacting their children whenever LGBTQ+ status is incidentally involved. Rather, "this is a difficult and complex area of the law that continues to develop." Ricard v. USD 475 Geary County, KS Sch. Bd., 2022 WL 1471372, at *10 (D. Kansas May 9, 2022). Plaintiffs' inability to adduce supporting LAD precedent bars injunctive relief under Crowe which held that the legal right therein was settled given pertinent precedent. Crowe, 90 N.J. at 133 ("the underlying legal claim … was settled as a matter of law in Kozlowski v. Kozlowski").

POINT II

THE TRIAL COURT ERRED IN ENTERING RESTRAINTS DESPITE A LACK OF CLEAR AND CONVINCING EVIDENCE OF A LIKELIHOOD OF SUCCESS ON THE MERITS (Da393-417)

Plaintiffs' arguments regarding disparate treatment fail because they are entirely based upon the Original Policy which no longer exists and was abolished (Pb17-21). Indeed, Plaintiffs repeatedly invoke the defunct Original Policy to attribute a discriminatory objective to the Revised Policy but assert that the

Board's "intent is not the question" (Pb23). *Contra* Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 398 (2005) ("Proof of discriminatory motive is critical" for a disparate treatment claims). Since the Revised Policy is neutral on its face, Plaintiffs interpolate language absent from the plain text of the Policy. Plaintiffs concede that there are circumstances "in which parents of LGBTQ+ and non-LGBTQ+ students must be notified about an issue that requires the disclosure even of any relevant LAD-protected characteristics." (Pb22, 3, 48-49). Similarly, the Revised Policy recognizes that a protected characteristic can be incidental to a situation involving adverse impact hence its prohibition on notification based solely on a protected characteristic. Plaintiffs choose to ignore the plain text of the Revised Policy which triggers parental notification upon an adverse impact on health, safety or well-being and specifically bars the so-called "outing" of students (Da110).

Plaintiffs' arguments regarding disparate impact also fail as plaintiffs have not clearly and convincingly shown that the Revised Policy "resulted in a significantly disproportionate or adverse impact on" more than "a few" LGBTQ+ students. Schiavo v. Marina Dist. Dev. Co. LLC, 442 N.J. Super. 346, 369 (App. Div. 2015). Plaintiffs assume that the Revised Policy would disparately impact LGBTQ+ students based on: (1) a survey concluding that a percentage of LGBTQ+ students would be stressed by the prospect of parental notification of

their LGBTQ+ status; and (2) an article on the percentage of LGBTQ+ individuals lacking a supportive home environment (Pb24-25). Stress over parental notifications and unsupportive home environments are not exclusive to LGBTQ+ students. Plaintiffs further assume that the Revised Policy disparately impacts "LGBTQ+ students … because they are more likely than their non-LGBTQ+ peers to not share that information at home." (Pb25). Again, this assumes that non-LGBTQ+ students invariably apprise their parents of all issues bearing a potentially adverse impact on their health, safety and well-being.

Plaintiffs' contention that the Revised Policy's exception in cases presenting a risk of abuse or neglect is insufficient (Pb25-26) ignores that "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. Children and Youth Services, 103 F.3d 1123, 1126 (3d Cir. 1997). *See also* Ricard, 2022 WL 1471372, at *8 (there would be an interest in withholding notification to parents "where there is a particularized and substantiated concern that disclosure … could lead to child abuse, neglect, or some other illegal conduct").

Significantly, our constitutional law presumes "broad parental authority over children" and that parents, not the State, "possess what a child lacks in

maturity, experience and capacity for judgment required for making life's difficult decisions" so "[p]arents can and must make those judgments." Parham v. J.R., 442 U.S. 584, 602, 603 (1979). "[P]arents have an important guiding role to play in the upbringing of their children which presumptively includes counseling them on important decisions." H.L., 450 U.S. at 410. Thus, "parental notice and consent are qualifications that typically may be imposed … on a minor's right to make important decisions." Bellotti, 443 U.S. at 640. The notion that the State "should supersede parental authority … because some parents abuse and neglect children is repugnant to American tradition." Parham, 442 U.S. at 603. Similarly, the fact that parents' decisions may be disagreeable to their children "does not diminish the parents' authority to decide what is best for the[ir] child." Id. at 604. *See also* Schall v. Martin, 467 U.S. 253, 265 (1984) (children are subject to parents' control).

Parental rights are constitutionally protected from "actions that strike at the heart of parental decision-making authority on matters of greatest importance…." C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 184 (3d Cir. 2005); J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 934 (3d Cir. 2011). Parents would be hampered in making such decisions by the secrecy and exclusion endorsed by Plaintiffs even though parents are "entitled to the support of laws designed to aid [them in the] discharge" of their parental

role. Bellotti, 443 U.S. at 639. Indeed, one District Court determined that "it is illegitimate to conceal information from parents for the purpose of frustrating their ability to exercise a fundamental right" and "difficult to envision" "a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns." Ricard, 2022 WL 1471372, at *8. In enjoining a school policy barring parental notification, the court explained that the school's concern that some parents may be unsupportive of their children's chosen names/pronouns "merely proves" that the school's interest "is intended to interfere with the parents' exercise of a constitutional right to raise their children as they see fit. And … that constitutional right includes the right of a parent to have an opinion and … a say in what a minor child is called and by what pronouns they are referred." Id.

Tatel v. Mt. Lebanon Sch. Dist., 675 F. Supp.3d 551 (W.D. Pa. 2023) held that gender dysphoria/transitioning instruction without parental notification interfered with parents' rights and "implicates the heart of parental decision-making on matters of the greatest …, i.e., … constitutional importance" because "[w]ithout notice to parents … that information could not be placed by parents in the family's moral or religious context." Id. at 564,

572. *See also* C.N., 430 F.3d at 185 (introducing child to sensitive topics before parent has done so "can … undermine parental authority").

Therefore, parents are constitutionally entitled to notification of adverse impacts on their children even if LGBTQ+ status may be incidentally involved. The case law cited by Plaintiffs fails to establish otherwise. Plaintiffs rely on John & Jane Parents 1 v. Montgomery County Bd. of Educ., 622 F. Supp.3d 118 (D. Md. 2022) (Pb33) *vacated* 78 F4th 622 (4th Cir. 2023) which was vacated on jurisdictional grounds by the Fourth Circuit. John & Jane Parents 1 involved parents' challenge to a policy authorizing schools to develop gender support plans for students and conceal the plans from their parents. The Fourth Circuit found a lack of jurisdiction over the parents' challenge but emphasized, "[t]hat does not mean that their objections are invalid. In fact, they may be quite persuasive." Id. at 626. Indeed, the Fourth Circuit described the challenged policy of concealment as "staggering" and "repugnant as a matter of policy…." Id. at 631. Plaintiffs also rely on C.N., which did not involve parental notification but rather involved a student survey of which "parents were provided ample notice …." 430 F.3d at 171, n. 15. Notably, C.N. rejected the notion that parents' rights do not extend beyond the threshold of the school door. Id. at 185, n. 26. Plaintiffs also rely on Sanford v. Stiles, 2004 WL 2579738 (E.D. Pa. Nov. 10, 2004) which is inapposite. In

Sanford, a mother sued a school over her son's suicide alleging negligence and state created danger. The court found that a guidance counselor's failure to advise the mother that her son wrote a letter to a former girlfriend stating that stories about her "almost made me want to kill myself" did not create or increase the danger that he would commit suicide nor interfere with her relationship with her son where the letter contained "the same information to which she [the mother] already had access in the form of instant messages." Id. at *4-7, *11-12. Plaintiffs rely on another inapposite case, Anspach v. City of Phila. Dep't of Pub. Health, 503 F.3d 256 (3d Cir. 2007). Anspach held that a public clinic was not required to notify parents that their 16-year old daughter exercised her privacy right to reproductive care by obtaining emergency contraception from the clinic -- "a facility that, unlike a public school, does not require attendance or exercise authority over its visitors." Id. at 269, 271. In contrast, no reproductive care rights are at issue in this matter and the relevant setting herein is not a public clinic but rather a public school which "require[s] attendance or exercise[s] authority over its visitors." Id. Anspach imposed a coercion requirement for recognition of parental rights (Id. at 262, 266) which is not articulated in the Supreme Court case law since interference with parental autonomy can take many forms short of coercion. *See* Troxel v. Granville, 530 U.S. 57 (2000) (no discussion of coercion).

Rather, Anspach relied on another case which held that a public clinic's provision of contraception to minors without parental notice was not a constitutional violation given the minors' privacy right to contraception. Id. at 262-264 *citing* Doe v. Irwin, 615 F.2d 1162, 1166 (6th Cir. 1980) *citing* Roe v. Wade, 410 U.S. 113 (1973) *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022). Plaintiffs also erroneously rely on Doe v. Del. Valley Reg'l High Sch. Bd. of Educ., 2024 WL 706797 (D.N.J., Feb. 21, 2024). Doe applied Anspach's coercion requirement to deny a temporary restraining order against a school's policy which enabled students to socially transition at school unbeknownst to their parents. Doe reasoned that the plaintiff/parent had not established that parental consent was constitutionally mandated before a school may honor a students' preferred pronouns.[1] In contrast, the Revised Policy seeks to apprise parents of adverse impacts on their children's health and safety.

Significantly, Plaintiffs fail in their effort to distinguish Gruenke v. Seip, 225 F.3d 290 (3rd Cir. 2000). In Gruenke, the Third Circuit found a violation of constitutional parental rights, repeatedly faulted the school for failing to notify parents of their daughter's suspected pregnancy and expressed "considerable doubt about" the school's decision "to withhold information of

[1] Plaintiffs also rely on Regino v. Staley, 2023 WL 4464845 (E.D. Cal. July 11, 2023) which is to the same effect.

this nature from the parents." Id. at 307. Plaintiffs also fail in their attempt to dismiss Mirabelli v. Olson, 691 F.Supp.3d 1197 (S.D. Cal. 2023) as an "outlier" and dicta (Pb35). First, our Supreme Court holds that "parental notice and consent are qualifications that typically may be imposed … on a minor's right to make important decisions" and parents are "entitled to the support of laws designed to aid [them in the] discharge" of their "guiding role" which "justifies limitations on the freedoms of minors" and "State deference to parental control over children…." Bellotti, 443 U.S. at 640, 639, 637. Second, Mirabelli's analysis of parental rights was not dicta. The court held that the plaintiff/teachers showed a likelihood of success on the merits precisely because the school's policy of parental exclusion would require them to act "in derogation of the constitutional rights of parents." Id. at 1215.

POINT III

THE TRIAL COURT ERRED IN ENTERING RESTRAINTS DESPITE A LACK OF CLEAR AND CONVINCING EVIDENCE OF SUBSTANTIAL AND IMMINENT IRREPARABLE HARM (Da393-417)

Plaintiffs failed to adduce clear and convincing evidence of substantial and imminent irreparable harm, as they are required to do. Poff v. Caro, 228 N.J. Super. 370, 375 (Law Div. 1987). Instead, Plaintiffs rely on generalized surveys and an article (Da204-220) -- none of which address the actual effects of a parental notification policy -- and unsupported assumptions that, as a result of the Revised Policy: (1) parents will subject their children to "mental

health issues, … physical or emotional harm," "suicide," "drug and alcohol misuse" and "homelessness"; (2) it would be difficult for the school to provide LGBTQ+ students with support;[2] (3) "discrimination occurs"; and (4) "staff could be subject to discipline … for misreporting or misinterpreting the Revised Policy." (Pb43-47). Plaintiffs failed to introduce any clear and convincing evidence to support any of the aforementioned assumptions.

POINT IV

THE TRIAL COURT ERRED IN ENTERING RESTRAINTS GIVEN A LACK OF CLEAR AND CONVINCING EVIDENCE THAT PLAINTIFFS' HARM GREATLY OUTWEIGHED COUNTERVAILING HARMS AND ITS FAILURE TO CONSIDER THE PUBLIC INTEREST (Da393-417)

Plaintiffs adduced no clear and convincing evidence that the public interest warranted the order and that Plaintiffs' harm greatly outweighed countervailing harms. Plaintiffs dismiss the order's impact on constitutional parental rights and ignore that the deprivation of such rights "for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). The order disserves children whose parents are kept ignorant of adverse impacts necessitating parental involvement and teachers who are required to be complicit to parental exclusion. The order also counters transparency, trust and cooperation between schools and parents. Plaintiffs' contention that "assertions of abstract harms are insufficient"

[2]Plaintiffs ignore that the order's parental exclusion makes it difficult for parents to provide support and guidance.

(Pb49) actually applies to the plaintiffs who did not meet their legal burden of establishing all the Crowe factors by clear and convincing evidence. Dow, 216 N.J. at 320, 327.

POINT V

THE TRIAL COURT ERRED IN ADJUDICATING A MOOT ISSUE (Da393-417)

Plaintiffs' maintain that the "challenge to the Original Policy was not moot, because … the trial court had to enjoin the Original Policy … to restore the pre-litigation status quo" (Pb39-40) based on their erroneous speculation that the Original Policy "would have automatically gone into effect" had the "trial court only enjoined the Revised Policy." (Pb40) Plaintiffs' ignore that policies require formal Board action. *See* N.J.S.A. 18A:11-1; Bylaw 0131 (Da225). Plaintiffs also ignore that the Board repealed the Original Policy.

Plaintiffs' reliance on cases applying the voluntary cessation doctrine is misplaced. In W. Va. v. EPA, 597 U.S. 697 (2022), the EPA did not rescind the challenged regulation but only represented that it had no intention of enforcing it. Id. at 720. In contrast, the Original Policy was specifically repealed. *See* Schultz v. Kott, 131 N.J. Super. 216, 219 (App. Div. 1974) (since federal program of aid to the disabled and New Jersey "homemaker" regulations enacted pursuant thereto were no longer in existence, request by plaintiff to have court enjoin enforcement of regulations was moot). In

Delanoy v. Twp. Ocean, 245 N.J. 384 (2021), a pregnancy discrimination case, the replaced policy was actually applied to the plaintiff causing her damages. In contrast, the Original Policy was never applied. Hartnett v. Pa. State Educ. Ass'n, 963 F.3d 301, 309 (3d Cir. 2020) affirmed denial of injunctive relief as moot as there was no "real threat of enforcement" of the challenged statute. County of Butler v. Governor of Pa., 8 F.4th 226, 230 (3d Cir. 2021) remanded for a dismissal as moot where the challenged executive orders were no longer in effect. Plaintiffs' reliance on Nini v. Mercer Cmty. Coll., 202 N.J. 98, 105, n. 4 (2010) for language acknowledging an exception to mootness for important matters of public interest is unavailing as the Court will be addressing this matter via the Revised Policy. In contrast, Nini involved a settlement which would have mooted any consideration of the issue raised therein. Similarly, State v. Davila, 443 N.J. Super. 577 (App. Div. 2016) is inapposite because the court addressed a moot issue in order "to prevent a collateral attack on defendant's conviction grounded on any claims impugning defense counsel's performance, and to afford defendant the benefit of all … promises made to him when he entered his guilty plea" where he "entered into a negotiated plea, reserving the right to appeal a pre-trial motion relating only to a dismissed count of the indictment." Id. at 581, 588, 589.

Plaintiffs have not demonstrated "that relief is needed" against the Original Policy and "that there exists some cognizable danger of" its recurrence that is "something more than mere possibility…." U.S. v. Grant, 345 U.S. 629, 633 (1953) (affirming denial of injunctive relief as moot where the defendant ceased conduct violative of the Clayton Act). Plaintiffs' attempt to enjoin the Original Policy -- which was repealed -- is unquestionably moot and not supported by any legal precedent.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Board's initial brief, it is respectfully requested that the Appellate Division reverse the trial court's order and decision.

Respectfully submitted,
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Dated: July 15, 2024