MATTHEW J. PLATKIN Attorney General of New Jersey, and SUNDEEP IYER, Director of the New Jersey Division on Civil Rights Plaintiffs, v. MIDDLETOWN TOWNSHIP BOARD OF EDUCATION, and MIDDLETOWN TOWNSHIP PUBLIC SCHOOL DISTRICT Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION GENERAL EQUITY ESSEX COUNTY CIVIL ACTION DOCKET NO. ESX-C-_____

BRIEF IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AN ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
Division of Law
25 Market Street, P.O. Box 080
Trenton, New Jersey 08625-0106
Attorney for Plaintiffs

James R. Michael (Attorney ID No. 048741991)
Deputy Attorney General
Of Counsel and on the Brief

Jonathan Mangel (Attorney ID No. 281382018)
Loren N. Miller (Attorney ID No. 411632022)
Douglas R. Praschak (Attorney ID No. 335512021)
Daniel Resler (Attorney ID No. 324172020)
Deputy Attorneys General
On the Brief

PRELIMINARY STATEMENT

Yesterday, the Middletown Township Board of Education ("the Board") amended Policy 5756, titled "Transgender Students" ("the Amended Policy"), to impose a new requirement that the Middletown Township Public School District ("District") and its school staff "notify a student's parents or guardian of the student's asserted gender identity and/or name change, or other requested accommodation" if that student "requests a public social transition accommodation, such as public name/identity/pronoun change, bathroom/locker room accommodation, or club/sports accommodations, or the like[.]" Michael Cert., Ex. B, at 1. In a dramatic departure from the prior policy, which followed New Jersey Department of Education guidance and made clear that staff had no obligation to report such information to parents, the Amended Policy now requires the District and school staff to "out" transgender students and certain gender non-conforming, non-binary, genderqueer, and other gender-expansive students to their parents or guardians without the student's consent—even when doing so will negatively affect the student.

Immediately following the amendment of Policy 5756, the Attorney General and Director of the Division on Civil Rights brought an administrative complaint with the Division on Civil Rights, alleging that the amended policy violates the Law Against Discrimination (LAD). They now bring this summary proceeding in the

Superior Court, Chancery Division, under N.J.S.A. 10:5-14.1, N.J.A.C. 13:4-11.3, and Rule 4:52.1, seeking temporary and preliminary restraints to preserve the status quo ante prior to the adoption of Amended Policy 5756, including enjoining the effectiveness, implementation, or enforcement of Amended Policy 5756 and restraining the Board from otherwise amending, modifying, or superseding any portion of Policy 5756, whether by amendment to any existing policy or adoption of a new policy, until the litigation arising from the Administrative Complaint is resolved. Michael Cert., Ex. A.

Such restraints are appropriate when the Division on Civil Rights seeks to prevent harm while an administrative proceeding is underway. Pfaus v. Palermo, 97 N.J. Super. 4, 8 (App. Div. 1967). Here, all of the factors this Court considers in evaluating a request for a preliminary injunction strongly support awarding temporary relief. First, the State is likely to succeed on the merits. The LAD forbids unlawful discrimination on the basis of, among other things, gender identity and expression. The Amended Policy violates the LAD's straightforward prohibition against "explicit facial discrimination" by treating transgender, gender non-conforming, and non-binary students differently from their peers, and requiring parental notification without consent for such students but not for cisgender students. A.D.P. v. ExxonMobil Research & Eng'g Co., 428 N.J. Super. 518, 537 (App. Div. 2012). The Amended Policy's title—"Transgender Students"—and its plain text

make clear that the policy requires parental notification of a student's gender identity or expression only for transgender, gender non-conforming, and non-binary students. The Amended Policy therefore plainly violates the LAD.

Second, the involuntary disclosure of students' gender identity or gender expression will irreparably harm transgender, gender non-conforming, and non-binary students, who already face vastly increased and even deadly risks to their health and safety. The Amended Policy, which deprives these students of a supportive school environment that prioritizes their deeply personal choices when it comes to identity, pronouns, and even their own name will subject these students to unlawful discrimination, cause them severe mental or emotional distress, cause educational, familial, and social disruption, and violate their privacy.

Preliminary restraints will preserve the status quo while the administrative challenge to the Amended Policy plays out. Enjoining the Amended Policy would not prevent school staff from notifying parents about concerns unrelated to LAD-protected characteristics, nor would it prevent school staff from complying with Harassment, Intimidation, and Bullying (HIB) policies, or other similar reporting requirements designed to protect students' safety. Denying an injunction, by contrast, would risk visiting enormous and irremediable harm to transgender, gender non-conforming, and non-binary students who are involuntarily outed because of the Amended Policy. Because all factors favor relief, the Court should grant the State's

application and issue temporary restraints and an interlocutory injunction to preserve the status quo during the pendency of the administrative challenge to Amended Policy 5756.

STATEMENT OF FACTS

On June 20, 2023, the Board amended Policy 5756—Transgender Students, which it had previously enacted in 2019. The Amended Policy, which governs Middletown Township School District, dispenses with the prior policy's protections for the confidentiality of a student's gender identity. The prior policy mandated that the District "shall keep confidential a current, new, or prospective student's transgender status." Michael Cert., Ex. C, at 3. Consistent with New Jersey Department of Education Guidance, the prior policy also provided that there is "no affirmative duty" requiring parental notification regarding a student's gender identity or expression. Ibid.

The Amended Policy eliminates those protections. Instead, it now provides that:

> [I]n the event a student requests a public social transition accommodation, such as public name/identity/pronoun change, bathroom/locker room accommodation, or club/sports accommodations, or the like, the school district shall notify a student's parents or guardian of the student's asserted gender identity and/or name change, or other requested accommodation, provided there is no documented evidence that doing so would subject the student to physical or emotional harm or abuse. It shall be the policy of the Board to support and facilitate healthy

> communication between a transgender student and their family, rather than foster an unreasonable expectation that a public in-school transition will remain confidential or require the district staff to affirmatively misrepresent information to parents.
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> [Michael Cert., Ex. B, at 1. (emphases added).]

On its face, this Amended Policy requires the District to notify parents regarding the gender identity or expression of students. In doing so, it singles out transgender, gender non-conforming, and gender non-binary students for facially differential treatment, subjecting these students—but not their cisgender peers—to involuntary disclosure, or "outing," of their gender identity or expression to parents and guardians.

Having determined that school staff "shall" report any requests for "public social transition accommodation[s]," which include name, identity, and pronoun changes or requests to use facilities that conform to one's gender, the Amended Policy goes on to elaborate that whenever emotional support services are provided to, among others, "transgender students, students facing other gender identity issues, or students who may be transitioning" then "[t]he full, complete, and accurate reason for counseling and/or referrals for mental health crisis and/or concerns shall be provided to parents/guardians in relation to parental notification/consent for such services." Michael Cert., Ex. B, at 1–2. In so doing, the policy ensures that parental notification of a student's gender identity or expression will result not just where a

student takes steps to publicly transition, but also whenever a transgender, gender non-conforming, or non-binary student seeks or receives counseling, emotional support services, or even merely is the subject of an undefined mental health "concern." Michael Cert., Ex. B, at 1–2.

The Amended Policy also provides that school staff "may not disclose information that may reveal a student's transgender status except as provided by this policy and allowed by law." Michael Cert., Ex. B, at 2 (emphasis added). And, as to facilities, while the policy maintains the State Guidance's direction that "[a]ll students are entitled to have access to restrooms, locker rooms, and changing facilities in accordance with their gender identity to allow for involvement in various school programs and activities[,]" Michael Cert., Ex. B, at 3, this promise is qualified by the requirement of parental notification whenever a student actually requests to use these facilities as part of a "public social transition accommodation," Michael Cert., Ex. B, at 1.

All told, these changes mark a dramatic departure from the Board's prior version of Policy 5756. Unlike the Amended Policy, the 2019 policy was substantively identical to, and followed from, the New Jersey Department of Education's Transgender Guidance, which directs that school districts "shall keep confidential a current, new, or prospective student's transgender status" and prohibits school personnel from "disclos[ing] information that may reveal a

student's transgender status except as allowed by law." Michael Cert., Ex. D, at 4. This Guidance was promulgated at the Legislature's express direction to "assist schools in establishing policies and procedures that ensure a supportive and nondiscriminatory environment for transgender students." N.J.S.A. 18A:36-41.

On June 21, 2023, the Attorney General and Director filed a complaint with the Division on Civil Rights under N.J.S.A. 10:5-8.2 and -13, alleging that the District violated the LAD by enacting Amended Policy 5756, which unlawfully discriminates on the basis of gender identity and expression. That administrative litigation is currently pending. Michael Cert., Ex. A.

The LAD and the Division on Civil Rights Rules of Practice and Procedure, N.J.A.C. 13:4-1.1 to 13.2, set forth a comprehensive and established process for litigation of the administrative complaint. The Board will have the opportunity to file an answer to the administrative complaint and submit a position statement as well as any documents in support of its position. N.J.A.C. 13:4-3.1 & -3.2. The Division on Civil Rights will then investigate the complaint to determine if probable cause exists to credit the allegations in the complaint. N.J.S.A. 10:5-14. If probable cause is found, the agency will engage in conciliation efforts with the Board to eliminate any alleged discriminatory practice. Ibid. If such conciliation efforts fail, the matter will then proceed to a plenary hearing. N.J.S.A. 10:5-15; N.J.A.C. 13:4-11.1. After a full hearing, the Division will issue its final findings and determination,

N.J.S.A. 10:5-17, which are subject to an appeal filed with the Appellate Division of the Superior Court. N.J.S.A. 10:5-21.

ARGUMENT

This Court should grant Plaintiffs' application and preserve the status quo pending the resolution of Plaintiffs' administrative complaint challenging the Amended Policy because Plaintiffs can show that they will succeed on the merits, that students will be irreparably harmed absent an injunction, and that the balance of equities and public interest favor an injunction.

Under the LAD, after filing an administrative complaint, the Attorney General may proceed in a summary manner in Superior Court to prevent violations of the LAD or attempts to interfere with or impede the enforcement of the statute. N.J.S.A. 10:5-14.1. The Attorney General and Director may seek preliminary injunctive relief to maintain the status quo while the administrative complaint is being resolved. Ibid.; accord Poff v. Caro, 228 N.J. Super. 370, 375 (Law Div. 1987). Courts should consider such applications relying on traditional principles governing the issuance of preliminary injunctive relief. Ibid. But the Appellate Division has cautioned that trial courts should not adopt "a grudging or narrow approach" in considering a preliminary injunction request by the Division on Civil Rights when it is seeking to prevent harm while an administrative proceeding is underway. Pfaus v. Palermo, 97 N.J. Super. 4, 8 (App. Div. 1967).

Here, all factors support the issuance of temporary restraints and a preliminary injunction barring enforcement of the Amended Policy and thus preserving the pre–Amended Policy status quo at Middletown Township schools while administrative litigation proceeds. Preliminary injunctive relief is warranted where the moving party "establish[es] (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 v. De Gioia, 90 N.J. 126, 132–34 (1982)). "[A]lthough it is generally understood that 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." Waste Mgmt. of New Jersey, Inc. v. Union Cty. Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008) (internal citations omitted). In this case, the State is likely to succeed on the merits, and the other factors also weigh heavily in favor of preliminary relief.

POINT I

THE STATE IS LIKELY TO SUCCEED ON THE MERITS.

The LAD provides a well-settled right under which the State may seek injunctive relief. N.J.S.A. 10:5-14.1 (providing that "[a]t any time after the filing of any complaint, or whenever it shall appear to the Attorney General or the director

that a person has engaged in, is engaging in, or is about to engage in any practice declared to be unlawful" under the LAD, they may "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"). Plaintiffs are likely to succeed on the merits of their LAD claims because the Amended Policy violates the LAD by expressly singling out transgender, gender non-conforming, and non-binary students for differential treatment and results in an unjustified disparate impact on such students.

The LAD prohibits any place of public accommodation, including public schools, from discriminating against any person, directly or indirectly, on the basis of their "gender identity or expression." N.J.S.A. 10:5-12(f); see Enriquez v. West Jersey Health Sys., 342 N.J. Super. 501, 511 (App. Div. 2001); see also Nini v. Mercer Cty. Cmty. Coll., 202 N.J. 98, 111 (2010). Specifically, N.J.S.A. 10:5-12(f) provides, in relevant part, that it shall be unlawful discrimination for

> any owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof . . . on account of the . . . gender identity or expression . . . of such person . . . .
>
> [N.J.S.A. 10:5-12(f)(1). (emphasis added).]

The "LAD is the Legislature's attempt to protect society from the vestiges of discrimination." L.W. ex rel. L.G. v. Toms River Reg'l Schs. Bd. of Educ., 189 N.J. 381, 399 (2007) (quoting Cedeno v. Montclair State Univ., 163 N.J. 473, 478 (2000)). The Legislature has declared that the LAD must be "liberally construed" to further the statute's broad remedial purposes. Ibid. In applying that statutory mandate, the New Jersey Supreme Court has articulated "special rules of interpretation" that apply to the LAD:

> [Where a case] involves the LAD, special rules of interpretation apply. When confronted with any interpretive question, [the court] must recognize that the LAD is remedial legislation intended to eradicate the cancer of discrimination in society, and should therefore be liberally construed in order to advance its beneficial purposes. . . . The more broadly the LAD is applied, the greater its anti-discriminatory impact.
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> [Smith v. Millville Rescue Squad, 225 N.J. 373, 390 (2016) (internal quotation marks and citations omitted).]

The LAD plainly applies to the Board's Amended Policy. The LAD has barred discrimination against students in public schools since public accommodation protections were added to the statute in 1949. "Place of public accommodation" is expressly defined to include public primary and secondary schools. N.J.S.A. 10:5-5(l); see also L.W. ex rel. L.G., 189 N.J. at 401. The question, then, is whether the Amended Policy violates the LAD either because it mandates disparate treatment or has an unjustified disparate impact. See Carter v. AFG Indus. Inc., 344 N.J. Super.

549, 556 (App. Div. 2001); Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 81 (1978). The answer is yes: under either theory, the Amended Policy is unlawful.

To start, the Amended Policy targets students belonging to protected classes by specifically singling out transgender, gender non-conforming, and non-binary students for differential treatment. While the Amended Policy asserts that the District "adopted this Policy to ensure that its schools provide a safe and supportive learning environment that is free from discrimination and harassment for transgender students," Michael Cert., Ex. B, at 1, the remainder of its provisions create an expressly discriminatory learning environment for transgender, gender non-conforming, and non-binary students. It requires school staff to inform parents about only those students who "request[] a public social transition accommodation, such as public name/identity/pronoun change, bathroom/locker room accommodation, or club/sports accommodations, or the like," thereby expressly treating those students differently than others whose gender identity does not change. Michael Cert., Ex. B, at 1. That, by definition, subjects transgender, gender non-conforming, and non-binary students to differential treatment.

Defendants cannot plausibly contend that the policy also applies equally to cisgender students. Not only does the Amended Policy's title—"Transgender Students"—reinforce that it does not apply to cisgender students, the remainder of its language likewise supports this conclusion. The Amended Policy requires

reporting to parents on the gender identity or expression of just those students who "request a public social transition accommodation"—not, in other words, the cisgender student who seeks to be referred to as "Nick" rather than "Nicholas." And, because these accommodations that trigger parental notification expressly include requests to use the restroom or other facility corresponding with one's gender, the policy's later promise that students are entitled access to facilities "in accordance with their gender identity" rings particularly false. Likewise, while the Amended Policy recognizes the need for counselors knowledgeable in "issues and concerns relevant to transgender students, students facing other gender identity issues, or students who may be transitioning," it also requires parental disclosure of "[t]he full, complete, and accurate reason for counseling and/or referrals for mental health crisis and/or concerns . . . in relation to parental notification for such services." Michael Cert., Ex. B, at 1–2. This provision simply does not apply to cisgender students.

The Board itself has made its intent to target transgender, gender non-conforming, and non-binary students clear. The Amended Policy is titled—"Transgender Students"—making the targeted group explicit. Michael Cert., Ex. B, at 1.

This singling out of transgender, gender non-conforming, and non-binary students will subject students belonging to a protected class to differential treatment. Such facially differential treatment is anathema under our law and constitutes

discrimination under the LAD. Carter, 344 N.J. Super. at 556 ("Discrimination at the very least implies the accordance of differential treatment to persons or groups of persons that are in similar conditions or circumstances." (internal quotation marks and citation omitted)); see also Peper, 77 N.J. at 81 (describing "disparate treatment" as a situation where a covered entity "treats some people less favorably than others because of their [protected class]").

Indeed, even if the Board professes to have benign intent in targeting gender identity or expression in the Amended Policy, such purported intent would not save the Amended Policy from violating the LAD. The LAD, after all, is not a "fault- or intent-based statute." Lehmann v. Toys R Us, Inc., 132 N.J. 587, 604 (1993). Whether a policy or practice "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., 428 N.J. Super. at 537. Imposing additional conditions on some but not others based on membership in a protected class violates the law, plain and simple. Ibid.; see also Castellano v. Linden Bd. Of Educ., 79 N.J. 407, 412–13 (1979) (finding discrimination when employer singled out maternity leave for mandatory one-year leave of absence no matter whether employer's policy was well-meaning). The Amended Policy expressly discriminates on the basis of gender identity or expression. That alone is enough to violate the LAD.

But the Amended Policy also violates the LAD for a separate, independent, alternative reason as well—it will unlawfully subject these students to a disparate impact in violation of the LAD. A prima facie case for unlawful disparate impact is established where "practices that are facially neutral in their treatment of different groups . . . in fact fall more harshly on one group than another." Peper, 77 N.J. at 81. Here, the disparate impact of the Amended Policy is clear. In practice, only transgender, gender non-conforming, and non-binary students will be harmed by the provision requiring parental reports of a student's "asserted gender identity and/or name change" whenever any student requests to publicly change their gender identity or expression. Michael Cert., Ex. B, at 1. And there is no "evidence of a legitimate, non-discriminatory, reason" that would justify the Amended Policy falling more heavily on these students. Bumbaca v. Twp. of Edison, 373 N.J. Super. 239, 251 (App. Div. 2004).

Thus, even if the Amended Policy could somehow be understood (or were further amended) to require reporting of the gender identity or expression for all students, transgender, gender non-conforming, and non-binary students will face a far greater incidence of parental disclosure of their gender identity or expression, and, with it, a far greater risk of harm from this involuntary disclosure. That is because while cisgender students often consistently express their gender identity or expression at home and at school, transgender, gender non-conforming, and non-

binary students are far more likely to express a different gender identity or expression at home than they do at school—often precisely because they may fear reprisal or harm. See Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000) (finding that police violated a teenager's constitutional rights when they threatened to tell his family that he was gay, after which the teenager died by suicide). That is sufficient to show at this stage that the Amended Policy will have a disparate impact.

As detailed below, the academic research makes clear that transgender, gender non-conforming, and non-binary students report feeling disproportionately scared, stressed, and anxious about any policy that would require their schools to tell their parent or guardian if they request to use a different name or pronoun, or if they identify as LGBTQ at school. Michael Cert., Exs. F, G, H, I, J. The result of the Amended Policy, in other words, would "in fact fall more harshly on one group than another." Peper, 77 N.J. at 81.

In addition to its foundational prohibition on such unlawful discrimination, the LAD also makes it unlawful "[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so." N.J.S.A. 10:5-12(e). Here, the Board sets out an Amended Policy that not only violates the LAD, but also mandates that District staff take specific actions in furtherance of the Amended Policy that

would cause those staff members to violate the LAD. In other words, to comply with the Amended Policy, District staff must themselves engage in unlawful discrimination. By mandating that District staff engage in such practices, the Board has incited, compelled, or coerced its employees to engage in practices that violate the LAD.

For these reasons, there is a high likelihood that the Amended Policy violates the LAD. The Board has long been on notice that such a policy is unlawful. Indeed, the very first sentence of the New Jersey Department of Education's Transgender Student Guidance for School Districts—the Guidance that the Board of Education had followed until its enactment of Amended Policy 5756—states that "[t]he New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-12(11)(f), generally makes it unlawful for schools to subject individuals to differential treatment based on," among other things, "gender identity or expression." Michael Cert., Ex. D, at 1. That same Guidance states that "[t]here is no affirmative duty for any school district personnel to notify a student's parent or guardian of the student's gender identity or expression." Ibid. The Middletown Township Board of Education itself previously acknowledged and followed this guidance under its 2019 Policy. Michael Cert., Ex. C, at 2. Yet despite state law and Department of Education guidance to the contrary, the Board enacted an Amended Policy that specifically singles out

transgender, gender non-conforming, and non-binary students for differential treatment and results in a disparate impact.

At this stage, this Court need not decide the ultimate merits. But the merits are sufficiently clear to justify preserving the status quo during the pendency of Plaintiffs' challenge. Because the Amended Policy violates the LAD, Plaintiffs are highly likely to succeed on the merits.

POINT II

AMENDED POLICY 5756 WILL CAUSE IRREPERABLE HARM.

Temporary restraints and a preliminary injunction are necessary to avert the irreparable harm to students that the Amended Policy would cause if enacted.

To start, the Legislature has already made clear that a violation of the LAD may be sufficient in itself to establish irreparable harm. Where a party seeks a preliminary injunction pursuant to a statute that expressly authorizes injunctive relief, as the LAD does, "irreparable injury need not be shown. The Legislature in enacting [the statute], has determined that a violation per se of the act warrants equitable interposition." Hoffman v. Garden State Farms, Inc., 76 N.J. Super. 189, 201 (N.J. Ch. 1962) (citing State ex rel. State Bd. of Milk Control v. Newark Milk Co., 118 N.J. Eq. 504 (1935)); see also New Jersey Dep't of Env't Prot. v. Boro Auto Wrecking Co., 2006 N.J. Super. No. A-4920-04T3, 2006 WL 3007394, at *5 (App.

Div. Oct. 24, 2006), Michael Cert., Ex. E; Matawan Reg'l Teachers Ass'n v. Matawan-Aberdeen Reg'l Bd. of Educ., 212 N.J. Super. 328, 335 (Law. Div. 1986).[1]

Relevant here, the LAD provides that "the Attorney General or the director may proceed against any person in a summary manner in the Superior Court of New Jersey to obtain an injunction prohibiting [persons engaged in practices declared unlawful by the LAD] from continuing such practices or engaging therein or doing any acts in furtherance thereof, to compel compliance with any of the provisions of this act, or to prevent violations or attempts to violate any such provisions[.]" N.J.S.A. 10:5-14.1; see also Poff, 228 N.J. Super. at 375 (recognizing that N.J.S.A. 10:5-14.1 permits the Attorney General to obtain a preliminary injunction). The LAD itself also expressly states that discrimination against protected classes—including on the basis of gender identity or expression—causes "irreparable harm resulting from [inter alia] education, family and social disruption; and adjustment problems, which particularly impact . . . those protected by this act." N.J.S.A. 10:5-3. Given the Legislature's express finding that discrimination against protected classes itself causes irreparable harm, the State need not make a separate showing of irreparable harm here to justify the preliminary injunctive relief it has requested.

[1] Pursuant to R. 1:36-3, copies of all unpublished opinions cited in this brief are submitted as exhibits to the Michael Cert. Counsel is not aware of any contrary unpublished opinions.

In any event, Plaintiffs can easily show that the Amended Policy will cause "substantial, immediate, and irreparable harm." Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). "Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132–33. Here, the available evidence amply demonstrates that the involuntary disclosure of a student's gender identity or expression causes real and irreparable harm to students, and the Legislature, courts, and academic literature all agree on this point.

The New Jersey Legislature, in establishing the Transgender Equality Task Force, recognized the harms to student safety and mental health that result from involuntary disclosure of the gender identity or expression of transgender, gender non-conforming, and non-binary students. The Legislature declared that transgender individuals "face considerable challenges in society, including discrimination, harassment, physical abuse, and social isolation," and noted that transgender students in particular are at heightened risk of experiencing "mistreatment, including physical or sexual assault, between kindergarten and grade 12, due to their being out or perceived as transgender." N.J. Pub. L. 2018, c.60 § 1(a), 1(g). Involuntary disclosure of transgender, gender non-conforming, and non-binary students' gender identity or expression needlessly subjects them to a heightened risk of such harms.

A wealth of academic literature is in accord. In addition to feeling disproportionately scared, stressed, and nervous about the implementation of any policy that would require their schools to tell a student's parent or guardian if they request to use a different name or pronoun, or if they identify as LGBTQ at school, Michael Cert., Ex. F, at 12, a survey of transgender individuals found that those who reported negative experiences in grades K-12 were more likely than other respondents to face serious psychological distress, to have experienced homelessness, and to have attempted suicide. Michael Cert., Ex. G, at 132. That same survey found that 40% of "out" transgender survey respondents had families that were neutral or not supportive of their gender identity, 15% of respondents ran away from home and/or were kicked out of their home because they were transgender, and one in ten reported that they were the victim of violence at the hands of an immediate family member. Michael Cert., Ex. G, at 65. Such familial nonacceptance is emotionally damaging and dangerous, as transgender and non-binary individuals experiencing high levels of familial rejection are over 300% more likely to attempt suicide, and over 200% more likely to misuse drugs and/or alcohol. Michael Cert., Ex. H, at 195.

The Amended Policy also works an irreparable harm on transgender, gender non-conforming, and non-binary students by depriving them of a supportive, safe school environment that is "uniquely positioned to serve as a buffer to protect

students and their families." Michael Cert., Ex. I, at 17. Research has shown that these students benefit greatly from supportive school environments; they not only feel safer in school, but are also less likely to miss school because they feel unsafe or uncomfortable. Michael Cert., Ex. J, at 76. And the presence of supportive policies in school—including restroom and locker room policies that ensure transgender, gender non-conforming, and non-binary students the right to access the spaces that correlate with their gender—results in less discrimination, and greater school engagement. Michael Cert., Ex. J, at 82–83. The Amended Policy threatens to deprive the District's transgender, gender non-conforming, and non-binary students of crucial safe spaces, exposing them to immediate and needless risk that cannot be undone. This is the definition of irreparable harm.

Finally, even apart from the irreparable harm to students' mental health and physical safety, courts have repeatedly recognized that transgender individuals suffer "'clearly defined and serious injury'" where their right to privacy in being transgender is violated. Matter of T.I.C.-C., 470 N.J. Super. 596, 609 (App. Div. 2022) (quoting Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 522 (3d Cir. 2018)). "Indeed, it is difficult to imagine a more intimate, personal, and private matter than whether a person's gender identity conforms with the sex they were assigned at birth." Ibid. The violation of a student's privacy concerning their gender identity is particularly harmful given that "transgender individuals face violence, harassment,

and discrimination because of their gender identity. This is commonly recognized in case law." Matter of T.I.C.-C., 470 N.J. Super. at 611.

This serious risk of impending irreparable harm is not alleviated by the 2022-2023 academic year coming to an end. Middletown Township Public School District provides education programs throughout the calendar year, including summer school programs, that may implicate the Amended Policy's disclosure requirement. In addition, nothing in the Amended Policy limits the requirement of parental notification to the academic year, and so students may face the threat of being "outed" based on their prior change in gender identity or expression, name, or pronouns.

The Amended Policy's language purporting to consider the risk of harm to students also does not alleviate the risk of irreparable harm. Michael Cert. Ex. B, at 1. The Amended Policy's presumption is plainly that parents "shall" be notified of "the student's asserted gender identity and/or name change." Michael Cert. Ex. B, at 1. And while the requirement purports to be conditioned on there being "no documented evidence that doing so would subject the student to physical or emotional harm or abuse," Michael Cert. Ex. B, at 1, this language fails to explain what constitutes "documented evidence" that the child would be emotionally or physically harmed, and it does not explain how or why a school district would ever come into possession of this evidence. Indeed, as a practical matter, requiring the

school district to have "documented" evidence of emotional or physical harm means that this exception will rarely, if ever, apply. And, even where there is such "documented evidence," the Amended Policy does not expressly preclude notifying the student's parent/guardian of the student's change in gender identity or expression, but instead merely directs that that the Principal or designee should "discuss with the student, and any other individuals, as deemed appropriate, the risks associated with the student's transgender status being disclosed." Michael Cert., Ex. B, at 1. After all, the Amended Policy prioritizes the Board's policy "to support and facilitate healthy communication between a transgender student and their family"—even where doing so would subject the student to risk of harm. Michael Cert., Ex. B, at 1. In short, this exceedingly narrow "exception" proves to be no exception at all.

POINT III

THE REMAINING CROWE FACTORS SUPPORT GRANTING THIS APPLICATION.

In light of these irreparable harms, the balance of hardships and the public interest also weigh in favor of granting preliminary injunctive relief, which would simply maintain the status quo at Middletown Township schools as it existed prior to the implementation of Amended Policy 5756. A preliminary injunction precluding implementation of the Amended Policy would not prevent school officials from notifying parents, or others, of legitimate issues affecting a student's

well-being or progress in school that are not based on a student's protected characteristics, as was done prior to the Amended Policy. The Board will not be meaningfully harmed by a temporary delay in implementing the Amended Policy while the policy's lawfulness is adjudicated. Conversely, there is a serious risk of irreparable harm to transgender, gender non-conforming, and non-binary students at Middletown Township schools if the Amended Policy is not enjoined for the pendency of this challenge. After all, once transgender, gender non-conforming, and non-binary students have been "outed" pursuant to the Amended Policy, it will not be possible to unring that bell. That harm cannot be undone after the fact.

The strong public interest in ensuring that schools remain a safe and welcoming place of learning for all students, regardless of their gender identity or expression, also supports the issuance of a temporary injunction. The State and public have a strong interest in ensuring that each district board of education fulfills its responsibility to "[p]romote equal educational opportunity and foster through the policies, programs, and practices of the district board of education a learning environment that is free from all forms of prejudice, discrimination, and harassment." N.J.A.C. 6A:7–1.4. The public interest is therefore served by enjoining the Middletown Township Board of Education from discriminating against transgender, gender non-conforming, and non-binary students during the pendency of the adjudication of this matter.

CONCLUSION

For these reasons, this Court should grant the State's application for an order to show cause with temporary restraints to preserve the status quo ante prior to the adoption of Amended Policy 5756, including enjoining the effectiveness, implementation, or enforcement of Amended Policy 5756 and restraining the Board from otherwise amending, modifying, or superseding any portion of Policy 5756, whether by amendment to any existing policy or adoption of a new policy, until such time as the litigation arising from the Administrative Complaint is resolved.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
Attorneys for Plaintiffs

By: /s/ James R. Michael
James Michael
Deputy Attorney General

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