PREPARED BY THE COURT

MATTHEW J. PLATKIN, ATTORNEY GENERAL OF NEW JERSEY, and SUNDEEP IYER, DIRECTOR OF THE NEW JERSEY DIVISION ON CIVIL RIGHTS, Plaintiff, v. MIDDLETOWN TOWNSHIP BOARD OF EDUCATION, and MIDDLETOWN TOWNSHIP PUBLIC SCHOOL DISTRICT, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION (CIVIL) MONMOUTH COUNTY DOCKET NO: MON-C-80-23 CIVIL ACTION ORDER

This matter having been brought before the court on an application by plaintiffs Matthew J. Platkin, and Sundeep Iyer (James R. Michael, Deputy Attorney General, appearing) to show cause why an order should not be issued preliminarily enjoining and restraining defendants Middletown Township Board of Education and Middletown Township Public School District (Bruce W. Padula, Esq., Cleary Giacobbe Alfieri Jacobs, LLC, appearing) from enforcing, implementing, or otherwise giving effect to Amended Policy 5756-Transgender Students (adopted June 20, 2023), until such time as the litigation before the New Jersey Division on Civil Rights arising from a separate administrative complaint filed on June 21, 2023 is resolved; and from amending, modifying, or superseding any portion of Policy 5756 (adopted May 1, 2019), and enjoining defendants to preserve the status quo ante prior to the adoption of Amended Policy 5756, until such time as the litigation before the New Jersey Division on Civil Rights arising from a separate administrative complaint filed on June 21, 2023 is resolved; and the court, having reviewed the papers submitted in support of and in opposition to this application, and having heard oral argument on the return date of plaintiffs'

application, and for the reasons set forth in the court's letter opinion dated August 18, 2023 accompanying this Order,

IT IS ON THIS 18th day of August 2023 hereby **ORDERED** as follows:

1. Defendants Middletown Township Board of Education and Middletown Township Public School District are hereby preliminarily enjoined and restrained from enforcing, implementing, or otherwise giving effect to Amended Policy 5756 – Transgender Students (adopted June 20, 2023) until such time as the litigation before the New Jersey Division on Civil Rights arising from a separate administrative complaint filed on June 21, 2023 is resolved.
2. Defendants Middletown Township Board of Education and Middletown Township Public School District are hereby preliminarily enjoined and restrained from amending, modifying, or superseding any portion of Policy 5756 (adopted May 1, 2019); and are further directed to preserve the status quo ante prior to the adoption of Amended Policy 5756, until such time as the litigation before the New Jersey Division on Civil Rights arising from a separate administrative complaint filed on June 21, 2023 is resolved.
3. This Order shall be deemed filed upon its uploading onto eCourts.

DAVID F. BAUMAN, J.S.C.

SUPERIOR COURT OF NEW JERSEY
MONMOUTH VICINAGE

CHAMBERS OF
David F. Bauman
SUPERIOR COURT JUDGE

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August 18, 2023

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Re: Matthew J. Platkin v. Marlboro Township Board of Ed., et al.
Docket No.: MON-C-78-23

Matthew J. Platkin v. Manalapan Englishtown Board of Ed., et al.
Docket No.: MON-C-79-23

Matthew J. Platkin v. Middletown Township Board of Ed., et al.
Docket No.: MON-C-80-23

Dear Counsel:

On August 15, 2023, the court conducted a hearing to determine whether to grant plaintiffs Matthew J. Platkin, Attorney General of the State of New Jersey and Sundeep Iyer, Director of the

New Jersey Division on Civil Rights' (hereinafter "plaintiffs" or "the State") applications for preliminary injunctive relief enjoining Marlboro Township Public Schools and Marlboro Township Board of Education (hereinafter "Marlboro"), Manalapan-Englishtown Regional Board of Education and Manalapan-Englishtown Regional Public School District (hereinafter "Manalapan"), Middletown Township Board of Education and Middletown Township Public School District (hereinafter "Middletown"), (collectively "defendants" or "the Boards") in the three referenced matters from enforcing, implementing or otherwise giving effect to Amended Policy 5756 (hereinafter "the Policy") regarding transgender students, adopted by each defendant on June 20, 2023, until such time as the litigation before the New Jersey Division on Civil Rights arising from a separate administrative complaint filed on June 21, 2023, is resolved.[1] The hearing was also to determine whether each defendant should be preliminary enjoined from amending, modifying or superseding any portion of the original Policy 5756 which remained in effect until the Policy was Amended on June 20, 2023, and should be further enjoined to preserve the status quo ante, pending final resolution of the aforementioned administrative action.

The State initially filed its applications for injunctive relief in the Superior Court, Essex County, Chancery Division, General Equity Part on June 21, 2023. On June 23, 2023, defendants filed a Motion to Transfer Venue to Monmouth County, Chancery Division, General Equity Part. On June 27, 2023, the Assignment Judge of the Essex Vicinage, the Honorable Sheila A. Venable, A.J.S.C., granted those motions. Following a conference conducted via Zoom on June 28, 2023 with all attorneys, this court set a briefing schedule and a return date of August 15, 2023. All defendants consented to temporary restraints pending the return date and, implicitly, pending the court's ruling on the State's applications.

[1] The three matters are not consolidated.

I. FACTUAL BACKGROUND

1. Original 5756 Policies.

Each of the School Districts and School Boards at issue here had adopted and promulgated Policies titled "Transgender Students," all with the designated number 5756. Marlboro adopted its Policy on January 20, 2015, and revised it on September 17, 2019. Middletown adopted its Transgender Students Policy on May 1, 2019. Manalapan adopted its Policy on November 18, 2014, and revised it on March 12, 2019. See Marl. Br. at 3; Midd. Br. at 4; Manal. Br. at 6.

Each of the original 5756 Policies contained the following identical language pertinent to the controversy giving rise to the State's application for preliminary injunctive relief and a stay of these proceedings:

> The school district shall accept a student's asserted gender identity; parental consent is not required. A student need not meet any threshold diagnosis or treatment requirements to have his or her gender identity recognized and respected by the school district, school, or school staff members. In addition, a legal or court-ordered name change is not required. There is no affirmative duty for any school district staff member to notify a student's parent of the student's gender identity or expression (emphasis added).

2. Marlboro Amended Policy.

The Marlboro Amended Policy No. 5756, titled "Transgender Students," provides that "[b]ecause Marlboro Public School District is a PreK-8 District with no high school, the Board believes that greater parental involvement is required because of the age and maturity level of its student-body." (5756 at 1). The Amended Policy repeats the earlier Policy's statement that, "[a] student need not meet any threshold diagnosis or treatment requirements to have his or her gender identity recognized and respected by the school, district, school, or school staff members." The Amended Policy provides, however, that "in the spirit of transparency and parental involvement,

the district will notify a student's parent/guardian of the student's change in gender identity or expression except where there is reason to believe that doing so would pose a danger to the health or safety of the pupil." The Marlboro Amended Policy requires that "[a] school counselor will notify and collaborate with the student first before discussing a student's gender nonconformity or transgender status with the student's parent/guardian." The Policy goes on to provide that "[t]hat discussion will address any concerns the student has about such parental notification and discuss the process by which such notification shall occur including, but not limited to whether the student wishes to be given the opportunity to notify the parent/guardian first." It further provides that "[w]here there are concerns about disclosure to a parent/guardian posing a danger to the health or safety of the pupil, the administration in consultation with the school counselor, school psychologist and other district professionals shall determine the appropriate course of action."

3. Manalapan Amended Policy.

The Manalapan-Englishtown Regional School District is a PreK-8 school district in Monmouth County serving approximately 4600 students. (Manal. Br. at 3, citing Certification of Superintendent of Schools Nicole Santora, Ed.D, ¶3).

In September 2014, the School Board adopted Policies, encapsulated in Policy 5756, concerning gender-related identity of students within the District. After amendment to the Policy in 2015 and 2019, the Board, in June 2023, adopted the current iteration of Policy 5756. The Policy as currently drafted "establishes the Board's expectations for addressing the needs of transgender students in compliance with applicable anti-discrimination laws." The Policy provides that "[f]or grades 6 through 8, the school district shall accept a student's asserted gender identity; parental consent is not required." It goes on to state "[f]or students in grades Pre-K through 5, the

responsibility for determining a student's gender identity rests with the student's parents/guardians."

Although the Policy memorializes the Board's findings that "conversations with counselors, teachers or other staff about one's gender identity and expression are entitled to confidentiality," the Policy provides an exception to such confidentiality "in the event a student requests a public social transition accommodation, such as public name/identity/pronoun change, bathroom/locker room accommodation, or club/sports accommodations, or the like...." (5756 at 1). In that event, the Amended Policy provides that "the school district shall notify a student's parents or guardian of the student's asserted gender identity and/or name change, or other requested accommodation, provided there is no credible evidence that doing so would subject the student to physical or emotional harm or abuse." (Id. at 2) The Policy also provides that "[p]rior to disclosure, the student shall be given the opportunity to personally disclose that information."

The Amended Policy further provides that "[t]here may be instances where a parent of a minor student disagrees with the student regarding the name and pronoun to be used at school and in the student's education records." In that event, the Policy provides that "the Superintendent or designee should consult the Board Attorney regarding the minor student's civil rights and protections under the NJLAD."

4. Middletown Amended Policy.

The Middletown Township School District is a PreK-12 school district serving approximately 9,122 students. (Midd. Br. at 3, citing Certification of Acting Superintendent Jessica Alfone, ¶3). In September 2014, the Middletown Board of Education first issued a Policy regarding transgender students, which underwent further revision because, in the Board's view, the former

Policy "seemingly required [District staff] to make material misrepresentations or omissions to parents concerning a student's gender identity or expression."

As with the current Policy adopted by Manalapan, the Middletown Amended Policy acknowledges that "conversations with counselors, teachers or other staff about one's gender identity and expression are entitled to confidentiality." (5756 at 1). However, here too, the Policy creates an exception "in the event a student requests a public social transition accommodation, such as public name/identity/pronoun change, bathroom/locker room accommodation, or club/sports accommodations, or the like…." In that event, the Amended Policy provides that "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."

II. ANALYSIS

A. Standard of Review.

A party seeking preliminary injunctive relief must establish 1) a well-settled right to proceed on its claims; 2) a reasonable probability of success on the merits of those claims; 3) irreparable harm if restraints are not imposed; and 4) that a balancing of the equities and hardships favors injunctive relief, and that the public interest will not be harmed. Crowe v. DeGioia, 90 N.J. 126, 132-35 (1982); Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008). Although each factor as a general rule "must weigh in favor of injunctive relief" by clear and convincing evidence, when an application is limited to preserving the status quo during the pendency of an action, such circumstance "may permit the court to place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy."

Waste Mgmt. at 520, citing General Electric Co. v. Gem Vacuum Stores, Inc., 36 N.J. Super. 234, 236-37 (App. Div. 1955).

1. The Attorney General's Right to Proceed Summarily under the Law Against Discrimination is Well-Settled.

New Jersey's Law Against Discrimination (hereinafter "LAD") prohibits places of public accommodation from discriminating against any person, directly or indirectly, on the basis of their gender identity or expression, or affectional or sexual orientation. N.J.S.A. 10:5-12(f)(1). "A place of public accommodation" includes "any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education or the Commissioner of Education of the State of New Jersey." N.J.S.A. 10:5-5(1). Because the LAD is remedial legislation, courts should and must construe the law liberally to advance its objective: to "protect society from the vestiges of discrimination." L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ., 189 N.J. 381, 399 (2007); Smith v. Millville Rescue Squad, 225 N.J. 373, 390 (2016); Andersen v. Exxon Co., U.S.A., 89 N.J. 483, 495 (1982), quoting Panettieri v. C. V. Hill Refrigeration, 159 N.J. Super. 472, 482 (App. Div. 1978) ("Since the inception of the Law Against Discrimination, our courts have repeatedly recognized its humanitarian concerns, its remedial nature and the liberal construction to be accorded it."); Poff v. Caro, 228 N.J. Super. 370, 375 (Law Div. 1987), quoting Pfaus v. Palermo, 97 N.J. Super. 4, 8 (App. Div. 1967) (statute authorizing application for injunctive relief "reflects further legislative emphasis upon adequate enforcement of a statute (the Law Against Discrimination) ranking high indeed in our public policy." When, as here, it appears to the Attorney General "that a person has engaged in, is engaging in, or is about to engage in any practice declared to be unlawful" under the LAD, the Attorney General 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." N.J.S.A. 10:5-14.1. That is what the Attorney General has done here, and his right to do so is both settled and beyond serious dispute.

Defendants' arguments that the Attorney General's claims are not settled are unavailing. Manalapan and Middletown claim, "upon information and belief" and with no citation to any legal authority, that the State has not applied the LAD "consistently." Manal. Br. at 14-15; Midd. Br. at 13-14. Moreover, they suggest that a parent's rights with respect to the "custody, care, and nurture of the child" somehow unsettle or trump the right of the Attorney General to enforce laws against discrimination. Manal. Br. at 13-14; Midd. Br. at 13-14; Malb. Br. at 15-17. For reasons discussed, infra, they do not. All three Boards point to litigation from around the country "concerning this exact issue," as further proof that the rights underlying the Attorney General's action are not settled. Manal Br. at 12-14; Midd. Br. at 11-13; see also Marl. Br. at 17-19. None undercuts, let alone addresses, the New Jersey Attorney General's well-settled right, if not obligation, to proceed in a summary manner to enforce a remedial statute protecting members of a statutorily protected class in New Jersey from discrimination. Whether the State has shown a reasonable probability of success on the merits of its LAD claims is a separate inquiry as analyzed below.

2. Reasonable Probability of Success on the Merits.

The State contends that each of the Amended Policies enacted by the Middletown, Manalapan, and Marlboro School Boards violate the NJ LAD in two respects. First, the State argues that the Amended Policies mandate disparate treatment only for transgender, gender non-conforming, and non-binary students. Second, the State contends that the Amended Policies will unlawfully subject these students to a disparate impact – that is, that the requirement of parental notification falls "more harshly on one group that another." (State Midd., Manal. Br. at 15; State

Marl. Bt. At 15, 18; quoting Peper v. Princeton University Board of Trustees, 77 N.J. 55, 81 (1978)).

At the outset, it is important to note that the State, at oral argument, confirmed that it is not seeking a blanket injunction against all parental notifications following a student's request for transgender accommodation or statement of transgender identification or expression. It seeks only to enjoin parental notification when the student, after making the request or statement, further requests that their parent or guardian not be notified.[2]

a. Disparate Treatment.

The State maintains that each of the Boards' Amended Policies expressly singles out transgender, gender non-conforming, and non-binary students for differential treatment in violation of the NJ LAD. The State claims that the Middletown and Manalapan Amended Policies require 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…." (State Midd., Manal. Br. at 12). In case of the Marlboro Amended Policy, it requires parental notification only for those students who "change [their] gender identity or expression." (State Marl. Br. at 13).

The State argues that because none of these parental notification policies requires notification about other students whose gender identity does not change, "[t]hat, by definition, subjects transgender, gender non-conforming, and non-binary students to differential treatment." (State Midd. Br. at 12; State Manal. Br. at 13; State Marl. Br. at 13). "Differential treatment" describes a situation where a "covered entity [under the LAD] 'treats some people less favorably

[2] At oral argument, counsel for the State further clarified that schools would be obligated to respond truthfully to a parent or a guardian who contacted the school to request confirmation that their child had made such a request or statement. Counsel also confirmed that the State is not seeking to enjoin parental notification where the child expresses no objection to such notification.

than others because of their [protected class].'" (State Marl. Br. at 15; State Midd. Br. at 14; State Manal. Br. at 14; quoting Peper, 77 N.J. at 81). The State further argues that for purposes of NJ LAD application, it matters not that these policies were enacted with benign intent; "[i]mposing additional conditions on some but not others based on membership in a protective class violates the [LAD], plain and simple." (State Manal. Br. at 14-15; State Midd. Br. at 14; State Marl. Br. at 16).

All three Boards deny that their respective notification requirements treat transgender students any differently than cisgender students. Manalapan claims that its Policy is "narrowly-tailored to implicate parental notification only when a student takes specific formal action," and that, were a cisgender student "to engage in any of [the same action] which triggers the parental notification contained in the transgender student policy, the cisgender student's parents would absolutely be notified." (Manal. Br. at 19) Middletown and Marlboro advance similar arguments. See Midd. Br. at 17-18; Marl. Br. at 9 ("notification is mandated whenever any student requests a change in gender identity, whether the student identifies as cisgender, transgender, gender non-conforming, or non-binary.") (emphasis in original) But the Boards' arguments beg the question: who but transgender, gender non-conforming, and non-binary students would request public and social accommodations or express a change in gender identity or expression?[3]

All three Boards argue that their respective Amended Policies apply equally to any student, including "cisgender students" who "choose [] to change their gender identity or expression." Marl. Br. at 9; Manal. Br. at 19; Midd. Br. at 18. But a cisgender student who chooses to change their gender identity or expression to transgender is not "cisgender" as defined under the Marlboro

[3] At oral argument, the State confirmed in response to a question by the court that the same analysis would apply if a transgender student requested a cisgender accommodation or chose to change their gender identity or expression to cisgender, and the parents or guardians of that student also identified as transgender.

and Manalapan Amended Policies. See Manalapan 5756 at 1; Marlboro 5756 at 1 ("'Cisgender' refers to individuals whose gender identity, expression, or behavior conforms with those typically associated with their sex assigned at birth.")[4] Moreover, that parental notification may be required for other categories of students, as Marlboro argues, is irrelevant to the court's LAD disparate treatment analysis because those provisions do not differentiate between members and non-members of a class protected from discrimination under the NJ LAD, as is the case here. See Marl. Br. at 10-12.[5] Where, as here, only students who identify as transgender are singled out for mandatory parental notification, the State has demonstrated a reasonable probability of success on the merits of its claim that the Amended Policies effect differential treatment of members of a protected class in violation of the LAD.

b. Disparate Impact.

The court also finds that the State has demonstrated a reasonable probability of success on its claim that the Amended Policies of parental notification "will unlawfully subject these students to a disparate impact in violation of the LAD," that is, "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." (State Marl. Br. at 16-17; State Midd. Br. at 15; State Manal. Br. at 15-16). In support, the State proffered a number of studies and surveys, which defendants urge the court to dismiss or discount as either irrelevant, inflammatory, inadmissible or unduly prejudicial (Marl. Br. at 9; Manal. Br. at 42; Midd. Br. at 41) or generated by "well-known LGBTQ+ advocacy and lobbying groups rather than neutral accounts of medical studies." (Midd. Br. at 23; Manal. Br.

[4] The Middletown Policy provides no glossary or definition of terms.

[5] At oral argument, counsel for Marlboro asserted that it could be argued that every scenario cited in its brief requiring parental notification discriminated against a protected group under the NJ LAD. Counsel for the State countered that the defendants' Amended Policies requiring parental notification for transgender students were distinguishable because these policies treat transgender expression or identification as an inherent issue or problem and that is just "the nature of discrimination."

at 24; see also Marl. Br. at 9). However, none of the School Board defendants refutes the State's data or presents alternate evidence sufficient to negate or call into question that data or the methodology by which the data was compiled. On this preliminary record, the court is constrained to find that the State's studies and reports constitute clear and convincing evidence of a reasonable probability of success on the State's disparate impact claims.

For example, Exhibit F to the Michael Certification, titled "Issues Impacting LGBTQ Youth," a "polling analysis" commissioned by The Trevor Project, found 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, at "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" – the precise scenario presented here, and a statistical display of disparate impact that defendants do not dispute. Exhibit G to the Michael Cert., titled "The Report of the 2015 U.S. Transgender Survey" from the National Center for Transgender Equality, notes 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."

The Middletown and Manalapan defendants argue that "[g]iven the short time frame involved at this stage of the proceedings, a full review of the accuracy -- or lack thereof -- of the claims contained in these articles is not feasible." Presumably, that admonition also applies to "opinion evidence" supporting parental involvement that these defendants supplied by way of opposition evidence. See Padula Cert., Exhibit B. In any event, at this stage of the litigation, the

State's proffered evidence is sufficiently clear and convincing to demonstrate the Amended Policies' disparate impact on a protected class under the NJ LAD. Such evidence does serve to explain, at this preliminary juncture, why some transgender students may feel more comfortable disclosing their gender identification or expression at school rather than at home, and why a policy requiring parental disclosure may subject those students not just to disparate treatment, but disparate impact, in violation of the Law Against Discrimination. Marlboro's assertion that "[s]chools should not be in the business of keeping secrets from parents about their minor children" only begs the question why a transgender child might wish to keep their gender preference or identification secret from their parents in the first place. Indeed, a Massachusetts guidance document for "Creating a Safe and Supportive School Environment" cited by the Marlboro School Board in support of its parental notification Policy, acknowledges that "[s]ome transgender and gender nonconforming students are not openly so at home for reasons such as safety concerns or lack of acceptance," precisely the claims that the State has advanced here, with statistical data, in support of its disparate impact claims. And, it should be noted, Marlboro also concedes that the Massachusetts guidance documents are "clearly not binding on this Court or on New Jersey school districts." Marl. Br. at 15.

In no way should the court's preliminary findings of disparate impact serve to minimize or discount the right of parents "to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 66 (200); Wash. v. Glucksberg, 521 U.S. 702, 720 (1997), citing Meyer v. Nebraska, 262 U.S. 390 (1923); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("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.") Parental oversight is a bedrock to a stable, nurturing home, and thus to a stable nurturing

community. However, it is also settled that the right of parental oversight is not immutable; that it should and must yield where the State can demonstrate a compelling governmental interest. At this preliminary juncture, the State has done so: to ensure that a protected class under a state law against discrimination does not suffer either disparate treatment or disparate impact because of policies requiring parental notification where a student requesting a transgender accommodation or expressing transgender identification specifically requests that their parents or guardian not be notified. See Halderman v. Pennhurst State Sch. & Hosp., 707 F.2d 702, 709 (3d Cir. 1983); C. N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 182 (3d Cir. 2005); Dempsey v. Alston, 405 N.J. Super. 499, 511 (App. Div. 2009). Indeed, Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000), a case cited by Marlboro in support of parental primacy, also recognizes that such primacy must yield "where the school's action is tied to a compelling interest." Marl. Br. at 17, citing Gruenke, 225 F.3d at 305. The State's action is not targeting parental rights per se, but rather policies promulgated by school boards that the State contends unlawfully subjects a protected class to discrimination in violation of the LAD. That is a subtle but critical distinction.

In a tacit acknowledgment that the State's concerns regarding mandatory parental notification may be valid, each of the School Boards here devised "exceptions" on a case-by-case basis: Marlboro's where "there is a reason to believe that doing so would pose a danger to the health or safety of the pupil;" Manalapan's where there is "credible evidence" that to disclose "would subject the student to physical or emotional harm or abuse;" and Middletown's where there is "documented evidence that [to disclose the student's request for accommodation or gender identification or expression] would subject the student to physical or emotional harm or abuse." The State does not and cannot deny that adequate safeguards theoretically might reduce or even eliminate any disparate impact parental notification may have on transgender students. The

difficulty is that the exceptions, as presently drafted, do not lend themselves to consistent black letter application. For example, what standard is to be employed when determining "reason to believe" under Marlboro's Policy? And what is meant by "documented evidence" under Middletown's Policy, who is to compile such documentation and how is it to be compiled? What constitutes "credible evidence" under Manalapan's Policy and who decides credibility? These and other ambiguities provide insufficient assurance that these exceptions will be applied consistently and uniformly on a case-by-case basis. And, it should be noted, Manalapan's Policy provides that "prior to disclosure [to the parents/guardians], the student shall be given the opportunity to personally disclose that information," an option which invites comparison to the circumstances in Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000) where the police were found to have violated an 18 year old's constitutional rights by informing the youth that if he did not inform his grandparent that he was gay, the police would, after which the youth committed suicide. A policy that potentially invites such an outcome creates a specter of irreparable harm militating in favor of preliminary restraints.

Although these Amended Policies are not applied uniformly over the spectrum of students in Pre-K through Grade 12[6], all age groups are encompassed within the sample group of youth polled in Exhibit G, and, as such, all are subject to disparate impact under the LAD for purposes of this application for preliminary injunctive relief. The court recognizes that the degree of parental interest or involvement with respect to a child's gender expression or identification may heighten in inverse proportion to the age of the child. Reconciling the competing interests of the State and of parents should best be left to the trier of fact in the pending administrative law action after the development of a more complete record in that forum. But here, on this record, no defendant

[6] The Marlboro and Manalapan Policies only encompass grades Pre-K through 8; Middletown's Policy extends to grades Pre-K through 12.

explains why a younger student would feel any less fear, nervousness or apprehension than an older student over a policy requiring parental notification of that student's gender expression or identification, or why a younger student would be any less exposed than an older student to physical and emotional harm at home.

3. Irreparable Harm.

"Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. The evidence supporting the State's position that parental notification has a disparate impact on transgender, gender non-conforming, and non-binary students equates to a harm imposed on these students that cannot adequately be redressed by money damages.

That harm has been recognized by the New Jersey Legislature and underscored by data compiled by surveys and studies made part of this record. As the State noted, the Legislature has determined that transgender persons "face considerable challenges in society, including discrimination, harassment, physical abuse and social isolation." State's Manal. Br. at 21; State's Midd. Br. at 20; State's Marl. Br. at 22. The Law Against Discrimination, enacted to redress such harms against this protected class, reflects a legislative finding that discrimination against a protected class causes "irreparable harm resulting from … education, family, and social disruption; and adjustment problems which particularly impact … those protected by this act." N.J.S.A. 10:5-3.

The State asserts that evidence of irreparable injury need not be shown where, as here, "a party seeks a preliminary injunction pursuant to a statute that expressly authorizes injunctive relief, as the LAD does." State Manal. Br. at 19; State Midd. Br. at 18; State Marl. Br. at 20. The State cites no binding precedent in support of that proposition, however. What cases the State did cite

show that New Jersey's Legislature has fashioned statutory injunctive remedies without the need to show irreparable harm for reducing the price of milk[7]; for failing make minutes of Board of Education meetings available to the public[8]; and for violations of environmental laws not yet shown to have caused actual harm or direct injury to the public. It will undeniably serve to underscore the remedial purpose of the LAD to extend the principle underlying these decisions that "where injunctions are creatures of statute, all that need be proven is a statutory violation,"[9] especially where the LAD expressly authorizes injunctive relief for violations under that law. It cannot be overstated that discrimination against members of protected groups is a scourge of our society; and as the State's evidence has thus far shown, there is no protected group more vulnerable, or more susceptible to physical or psychological harm, than transgender, gender non-conforming, and non-binary youth. But the court need not decide on this application the question of whether the LAD by its terms obviates the need to show evidence of irreparable harm on an application for preliminary injunctive relief. That is because the State has demonstrated a reasonable probability of success on its claim that the Amended Policies, if implemented, will have a disparate impact on transgender, gender non-conforming, and non-binary youth. There can be little dispute that some of that evidence of disparate impact, to include mental health issues, suicide, illicit drug dependency, and infliction of physical or emotional harm by immediate family members, constitutes irreparable injury which may result if restraints are not imposed preliminarily.

[7] Hoffman v. Garden State Farms, Inc., 76 N.J. Super. 189 (Ch. Div. 1962).
[8] Matawan Regional Teachers Asso. v. Matawan-Aberdeen Regional Bd. of Education, 212 N.J. Super. 328 (Law Div. 1986).
[9] Id. at 335.

4. Relative Hardship to The Parties and Harm to The Public Interest.

Balancing the relative harm to the parties if preliminary restraints are or are not imposed tips in favor of the State. The State seeks, principally, a stay on implementation of the Amended Policies until the pending administrative action that the State has filed with the Division on Civil Rights is concluded. The court was advised at oral argument that that process is already underway.[10] As a practical matter, to avoid the possibility of inconsistent rulings and needless expenditure of judicial resources, this action should be stayed pending a final determination of the administrative action, and any appellate review of that decision. Indeed, it has been held that "a court may take a less rigid view that it would of a final hearing when the interlocutory injunction is merely designed to preserve the status quo." Waste Mgmt. at 520.

Moreover, defendants' arguments that imposing restraints will compel them to violate federal and state law are not persuasive. The federal and state law cited by defendants pertain to access to information in written student records, not to affirmative requirements of parental notification of a student's transgender orientation or expression. Defendants do not explain how enjoining schools from notifying parents of a child's transgender identification or expression would prevent parents from "inspect[ing] and review[ing] the education records of their children." 20 U.S.C. § 1232g(a)(1)(A). And, while the New Jersey Pupil Records Act requires school boards to formulate regulations with respect to student records to protect the rights of parent or guardian "to be supplied with full information about the pupil," it also provides the qualifier that such information be provided "except as may be inconsistent with the reasonable protection of the person involved." Having demonstrated a reasonable probability of success on the merits of its claim that the Amended Policies will have a disparate impact on members of a protected class

[10] Counsel for the State estimated that the matter potentially could be resolved in 180 days; counsel for Marlboro countered that it could take potentially years to conclude.

under the LAD, the State will likely show that the Boards' Amended Policies of parental notification fit within that exception. Moreover, no defendant has made any compelling argument that adherence to the previous Policies governing transgender students while the administrative action is pending will result in any claim, liability or hardship. Such Policies, until June 2023, had been in place uneventfully since at least 2019.

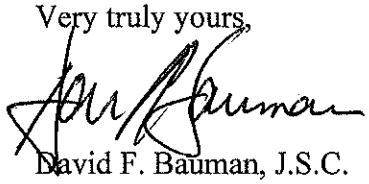
Finally, defendants have not shown that maintaining the prior Board Policies, which did not mandate parental notification, outweighs the risk of harm to any transgender, gender non-binary, and gender non-conforming student if the Amended Policies were to be implemented. The statistical possibility that even one transgender student affected by the Amended Policies should run away from home, or attempt or commit suicide, is sufficient to tip the balance of equities in favor of the State. As this action was filed in the Chancery Division, General Equity Part, equity preserves the "flexibility to devise new remedies 'to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed.'" Crowe v. De Gioia, 90 N.J. at 137, quoting 1 Pomeroy, Equity Jurisprudence, § 111 at 144.

III. CONCLUSION

In granting the State's application for preliminary injunctive relief and for a stay of both these proceedings and any modification of and/or amendments to Policies 5756 pending final resolution in the administrative action, the court is not rendering any final judgments or determinations as to the merits of either the State or the School Boards' claims. That will be left to the sound determination of the Office of Administrative Law after a full development of the factual and legal record in that matter. It is this court's hope and expectation, however, that the administrative action will proceed expeditiously, and that both the State and the School Boards

and Districts will avail themselves of the opportunity the administrative action provides to negotiate, in good faith, a consensus policy of parental disclosure that best strikes a legally appropriate and practical balance between protecting the civil rights of transgender, gender non-conforming, and gender non-binary students, and the well-settled right of parental oversight over the care and upbringing of their children. On this record, however, the court is constrained to conclude that issuing a preliminary injunction and a stay of these proceedings is the appropriate legal and equitable remedy.

Very truly yours,



David F. Bauman, J.S.C.