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September 13, 2023

Hon. Stuart A. Minkowitz A.J.S.C.
New Jersey Superior Court, Morris County
Chancery Division, General Equity Part
Morris County Courthouse
Washington & Court Streets
PO Box 910
Morristown, NJ 07963

Re: Matthew J. Platkin, Attorney General of New Jersey, and Sundeep Iyer, Director of the New Jersey Division on Civil Rights v. Hanover Township Board of Education and Hanover Township Public Schools

Docket No. MRS-C-0042-23

Dear Judge Minkowitz:

This office represents the Attorney General and the Director of the Division on Civil Rights with respect to the above-captioned matter. Plaintiffs respectfully submit this letter brief in support of its Motion in Aid of Litigants' Rights under Rule 1:10-3.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS

Plaintiffs rely on the prior briefing in this case, supplemented as follows.

On August 24, 2023, this Court entered an order providing that the "temporary restraints set forth in the Court's May 18, 2023 Order shall apply to Policy 5756—the LAD-compliant policy, Policy 8463, and Revised Policy 8463, to maintain the status quo." See Fifth Michael



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Cert., Ex. A (Court Order dated August 24, 2023) (emphasis added). This Court also ordered that “Defendants are temporarily enjoined and restrained from implementing or giving effect to both Policy 8463, and Revised Policy 8463, until such time as the Court renders a decision on plaintiff’s motion for preliminary restraints.” Ibid.

On September 1, 2023, this Court granted Plaintiffs’ motion to file a supplemental complaint. Oral argument took place on September 6, 2023. At the conclusion of argument, this Court made clear to both parties that the temporary restraints in its May 18, 2023 Order, and as clarified to apply to both Original Policy 8463 (“Original Policy”) and Revised Policy 8463 (“Revised Policy”), would remain in effect until this Court issued a formal written opinion on the Plaintiffs’ application for an order to show cause. See Fifth Michael Cert., Exhibit B (Excerpt from September 6, 2023 Transcript).

Despite this Court’s clear direction to both parties that the May 18, 2023 Order remained in place and thereby preserved the status quo that existed prior to the adoption of Original Policy 8463, Plaintiffs became aware that Defendants had scheduled a special meeting of the Hanover Board of Education for Monday, September 11, 2023, with one agenda item: repealing Policy 5756, which was LAD-compliant, provided protections for transgender students and had remained in place at Hanover Township schools since March 19, 2019. In an effort to prevent Defendants from taking unilateral action in contravention of this Court’s Order, Plaintiffs sent a letter to this Court and Defendants the afternoon of September 11, 2023 to put Defendants on notice that Plaintiffs would move before this Court for an order enforcing its prior August 24, 2023 Order and enjoining Defendants’ resolution repealing Policy 5756. See Fifth Michael Cert., Exhibit C. Defendants filed a letter response later that afternoon justifying the Board’s planned repeal of Policy 5756 at its September 11 meeting. See Fifth Michael Cert., Ex. D.

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Despite Plaintiffs' attempts to remind Defendants of the scope of this Court's May 18, 2023 and August 24, 2023 Orders requiring Defendants to "maintain the status quo," Defendants held a special meeting on the evening of September 11, 2023 and passed a resolution repealing Policy 5756. See Fifth Michael Cert., Ex. E. This motion follows.

ARGUMENT

THIS COURT SHOULD GRANT THE PLAINTIFFS' REQUEST FOR AN ORDER ENFORCING LITIGANT'S RIGHTS AND AWARD COUNSEL FEES IN ITS DISCRETION.

This Court should enforce its August 24, 2023 Order. Moreover, because Defendants have willfully violated that Order, this Court should award attorney's fees in its discretion for the costs Plaintiffs have incurred or will incur in the preparation of and appearances on this motion.

Rule 1:10-3 permits a litigant to seek a court's assistance to vindicate the litigant's rights. The "power of the court to enforce [its] order" is unquestionable. Bd. Of Educ. Twp. Of Middletown v. Middletown Twp. Educ. Ass'n., 352 N.J. Super. 501, 508 (Ch. Div. 2001). "The Court Rules overall evince an intent toward flexibility when the enforcement of rights is at stake. They provide various means for securing relief and allow for judicial discretion in fashioning relief to litigants when a party does not comply with a judgment or order." In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 17-18 (2015). To award sanctions or other coercive relief on a motion in aid of litigant's rights under Rule 1:10-3, a court must find "that the defendant has the ability to comply with the order which he has violated" but willfully refused to do so. Essex County Welfare Bd. v. Perkins, 133 N.J. Super. 189, 195 (App. Div. 1975); see also Schochet v. Schochet, 435 N.J. Super. 542, 548-49 (App. Div. 2014).

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Defendants' repeal of Policy 5756 violates the temporary restraints this Court put in place on its August 24, 2023 Order. The Order expressly required Defendants to maintain the status quo that existed prior to its May 2023 adoption of Original Policy 8463 and its unilateral revision of that policy in June after this litigation had already commenced. See Fifth Michael Cert., Ex. A; see also Third Michael Cert., Ex. B, Original Policy 8463; Ex. H, Revised Policy 8463. Defendants' repeal of Policy 5756, which has been in effect since March 2019, materially alters the pre-Policy status quo that this Court required be maintained by removing critical protections for transgender students. Those protections include provisions requiring the district to "keep confidential a current, new, or prospective student's transgender status" and stating 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." Third Michael, Cert. Ex. I at 1-2. The unilateral repeal of these protections alters the status quo as it existed prior to the implementation of Original Policy 8463, and thus violates this Court's temporary restraints.

Defendants' repeal of Policy 5756 also violates the provision in this Court's Order that enjoins and restrains Defendants from "implementing or giving effect to both Original and Revised Policies 8463 until such time as the Court renders a decision on plaintiff's motion for preliminary restraints." Fifth Michael Cert., Ex. A. Defendants have ignored this Court's Order by giving life to a key provision of Revised Policy 8463, which states that the policy "supersedes all other District Policies that restrict notification to parent(s)." Third Michael Cert., Ex. H. This provision of Revised Policy 8463 effectively would repeal Policy 5756, as Policy 5756 concerns, and in some cases restricts, notification to parents of a student's transgender status. Defendants' repeal of Policy 5756 at the September 11 special meeting therefore effectuates a key provision of

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Revised Policy 8463 and so violates this Court's Order enjoining Defendants from implementing or giving effect to the Revised Policy.

Defendants' repeal of Policy 5756 will place Hanover Township students at significant risk. By unilaterally repealing Policy 5756, Defendants have removed a critical backstop that protects transgender students from the very harms that the Original and Revised Policies 8463 would impose. As this Court is aware, Policy 5756 codifies crucial protections guaranteed to Hanover Township's transgender students by the Law Against Discrimination, including the right to use facilities and restrooms and to be addressed by the pronouns of the student's choice. Policy 5756 also explicitly provides 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." Third Michael Cert., Ex. I at 1-2 (Policy 5756). As the Hanover Board of Education acknowledged when it adopted Policy 5756, these protections ensure that Hanover Township public schools "provide a safe and supportive learning environment that is free from discrimination and harassment for transgender students, including students going through a gender transition." Third Michael Cert. Ex. I, at 2. Defendants' unilateral repeal of Policy 5756 eliminates the District Policy codifying these critical protections.

Plaintiffs also request their reasonable attorney's fees and costs for the preparation of this motion and related appearances and proceedings, if any. Such sanctions are warranted because Defendants have the ability to comply with the August 24, 2023 Order and have willfully refused to do so. R. 1:10-3. While sanctions are not intended to nor may they be punitive in nature, nevertheless they are a valuable "coercive measure to facilitate the enforcement of the court order." Ridley v. Dennison, 298 N.J. Super. 373, 381 (App. Div. 1997). Thus, "[o]nce the court determines the non-compliant party was able to comply with the order and unable to show the failure was

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excusable, it may impose appropriate sanctions.” Milne v. Goldberg, 428 N.J. Super. 184, 198 (App. Div. 2012).

Plaintiffs have made this showing. Throughout this litigation, Defendants have shown a willingness to take unilateral action notwithstanding this Court’s direction: Defendants first unilaterally amended Original Policy 8463 in June 2023 despite ongoing negotiations between the parties at the direction of the Court, and they have now repealed Policy 5756 despite the August 24, 2023 temporary restraints. As Defendants have pointed out throughout this case, the Board has the authority to determine whether to implement or repeal policies. Thus, they had the ability to maintain the status quo and comply with this Court’s temporary restraints by leaving Policy 5756 in place, but elected not to do so. Defendants also do not attempt to show that their conduct was excusable, instead averring only that Policy 5756 is not mandatory. This conduct merits the imposition of sanction as a coercive measure.

CONCLUSION

For all of these reasons, Plaintiffs request that the Court enter an Order enforcing litigant’s rights, requiring Defendants to abide by the pre-May 2023 status quo until such time as this Court enters a decision on Plaintiffs’ request for a preliminary injunction, and awarding counsel fees in the Court’s discretion.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

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

cc (by email): Matthew J. Giacobbe, Esq.